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British Institute of Facilities Management



Investors in FM Excellence

FACILITIES MANAGEMENT CONTRACTS 2008

Compiled by **Marc Hanson**

Revised and updated by **Sarah Clark** and **Marc Hanson**





Using the book

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Foreword



Facilities management continues to grow both as a profession and as a discipline, leading to its recognition as a key industry. With this growing popularity, professionals are having to deal with a broad range of complex buildings and built environment issues. An understanding of contract law and how it applies to facilities management must be an essential tool for every facilities manager.

Whether meeting with other professionals or engaging with the supply chain, facilities managers are entering formal agreements on a regular basis or dealing with intricate issues on behalf of their employer or client. It is essential that contract law is understood and applied correctly. The new BIFM competences recognise that a firm knowledge of the law is critical in delivering FM excellence, whether it is risk management, procurement or legislation.

As the scope of facilities management expands and FM professionals are driven to demonstrate compliance to legislation as a matter of course, knowledge of all elements of contract law will prove to be fundamental.

Lord Scarman, former Lord of Appeals, expressed the view that “if studied in abstraction, contract law is no more than generalised theory about the nature and consequences of agreement coupled with rules as to the meaning of words and phrases of language”.

This book explores the lexicon of general and facilities management contract law and provides a simple-to-follow guide for the student and for the seasoned professional.

Features such as considering both client and contractor issues and reinforcing the points with case law help guide the reader in a simple and friendly format. It presents the essential cases and materials in contract law, putting the cases in context and linking the materials

together. Whether you are grappling with the complex issues of TUPE or puzzling over standard forms of contract, Facilities Management Contracts 2008 sets out the basic principles of the subject, and references a relevant piece of case law that will help you have a better understanding of the key points of case law.

I believe it is the ideal contract text for students of facilities management, and for professionals too, as it explains the concepts clearly and is carefully structured, enabling professionals and students with no prior legal knowledge to understand the law. It will soon become a favourite as a quick reference or revision guide.

Ian R Fielder,
CEO, British Institute of Facilities Management



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1. Introduction

The intention of this publication is twofold – to provide an introduction to basic contract law as it relates to facilities management contracts and to provide a guide to common contractual provisions one would expect to see in such contracts. By 'facilities management contracts' it is meant contracts for the provision of 'hard' services such as maintenance of plant and buildings, 'soft' services, such as the provision of cleaning services, or a combination of both hard and soft services. This publication largely concentrates on the legal aspects of facilities management contracts and does not attempt to deal in detail with the drafting of services or specifications.

Facilities management is a diverse industry and, given the brevity of this publication, it has not been possible to cover in detail the specific requirements of every industry sector.

For example, this publication does not consider in great detail the specific requirements of facilities management contracts entered into in connection with private finance initiative / public private partnership transactions. Nor does it cover the specific contractual requirements of public sector clients, for example in relation to inspection by the National Audit Office or requirements in relation to the Official Secrets Acts 1911 to 1989.

It is nevertheless hoped that this publication does cover the key areas of relevance to all facilities management contracts, whether relating to the public or private sector or whether for the provision of hard or soft services.

There is little consistency in facilities management contracts as to how the parties to such contracts are described. Some contracts refer to 'service provider' and 'client', others 'contractor' and 'employer'. Throughout this publication, for clarity and consistency, the supplier of facilities management services has been referred to as the 'facilities management contractor' and the receiver of the services as the 'client'. These terms are not used prescriptively; the parties to a facilities management contract should choose definitions that are appropriate to their own circumstances.



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2. Contract formation and tendering

Formation of a contract

A facilities management contract, like any other contract, is essentially a legally binding and enforceable bargain between two or more parties. Each party contributes something to the bargain – the facilities management contractor the provision of certain services, the client payment for those services.

For a bilateral contract (such as a facilities management contract) to be legally binding, there must be:

- an offer from one party;
- unconditional acceptance of that offer by the other party; and
- 'consideration' provided by each party for the promise made by the other party.

In a facilities management contract, the price paid by the client and the services carried out by a facilities management contractor would form their respective consideration.

Tendering

When a client sends out an invitation to tender to a facilities management contractor, this is not usually an 'offer'. Invitations to tender are usually no more than an offer to negotiate. It is the facilities management contractor's tender to carry out the services contemplated by the client's invitation to tender that will usually amount to the 'offer'. When the client accepts the facilities management contractor's tender and each party gives consideration, then, provided both parties have an intention to be legally bound, a legally enforceable contract will come into place.

It is important to note that offer and acceptance can be in writing, orally or by conduct. However, if a tender states that it is only capable of acceptance by the client in writing, then any acceptance from the client must be in writing for a contract to come into place. It is not unusual for unsuccessful tendering facilities management contractors

to demand payment of their costs of tendering from the client. However, costs of tendering are not recoverable although a facilities management contractor may, in certain circumstances, be able to claim payment for specific work done during tendering at the request of the client (see box below).

Recovery of tender costs – *William Lacey (Hounslow) Ltd v. Davis (1957) WLR 932*

A builder tendered for certain construction work to the client's building. Later he was asked to do further work including preparing and revising further detailed cost estimates. No contract was ever entered into and eventually the client decided not to do the work and sold the building. The builder claimed remuneration for the work he had done in preparing the revised cost estimates.

The court held that where a builder undertakes work as preparation for a tender, his costs incurred cannot ordinarily be claimed from the client. However in this case the revised cost estimates were used by the client not to ascertain the cost of a genuinely contemplated project but for a collateral purpose.

It was held that such detailed estimates did not, as a result, relate to work that a builder would expect to do without charge when tendering. Furthermore, there was an implied promise to pay for that work as the work was done under the mutual belief that the builder would be awarded the contract.

It is of course unusual for a facilities management contractor's tender offer to be accepted without qualification by a client. The facilities management contractor may have queried the terms of the proposed facilities management contract, reserved his position pending receipt of further technical information, or suggested alterations to the scope of the services to be provided. The client and the facilities



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management contractor may then enter into negotiations not only in relation to the tendered price but also in relation to revisions to the facilities management contract and to the scope of services. Any revised proposals from the client will effectively negate the original offer from the facilities management contractor and form a fresh 'counter offer' from the client to the facilities management contractor.

As negotiations progress, each party may make to the other numerous offers and counter offers until eventually the parties reach agreement on the price, contract terms and services and one of them 'accepts' the other's final 'offer'. It is usually at this point that formal contract documentation is prepared and signed by the parties.

Is there a binding contract?

The process of negotiating a facilities management contract can be protracted. In many cases, facilities management contractors may start providing services and the client may start paying for them without any formal contract having been signed. Where the relationship between the client and the facilities management contractor subsequently breaks down, it can be difficult to establish whether there was actually a binding contract between the parties and if there was, on what terms it was made.

Whether a binding contract exists between a facilities management contractor and a client in such circumstances will depend on a number of factors:

- Did the parties intend to create legal relations between them?
- At the time that the contract was allegedly made, had the parties agreed upon the terms that they regarded as being a prerequisite to a contract being formed?
- Did the terms of the alleged contract include all the essential terms of contract which need to be agreed for any contract to be legally binding; for example were the price, the services and the timing of the delivery of the services agreed?

- Had there been an acceptance of the alleged 'offer' or evidence showing that the 'offer' had been accepted?

Unless the above criteria can be satisfied, it is unlikely that any enforceable contract will be in place. The case of *Hescorp Italia SpA v. Morrison Construction Ltd* (2000) All ER (D) 371 ([see box](#)) highlights the dangers inherent in proceeding with works without a formal contract. In the absence of a contract or a formal contract, as it would be unjust for the client to obtain the benefit of work done by the facilities management contractor without being obliged to pay for that work, the facilities management contractor will usually be allowed to recover his reasonable costs and expenses incurred on a '*quantum meruit*' basis ([see box](#)).

There are no clear legal rules as to how such 'reasonable costs' will be assessed. The courts may, however, be guided by any abortive negotiations as to price or from calculations based on net labour and material costs with an allowance for overheads and profit.

Letters of intent

A [letter of intent](#) is a communication from a client expressing an intention to enter into a contract in the future. The effect of the letter of intent depends upon the objective meaning of the words used.

It is common for clients to issue letters of intent to facilities management contractors authorising the facilities management contractor to start providing the services notwithstanding the fact that final agreement has not been reached on price or contract terms. Usually a letter of intent is merely a statement by the client of his intention to enter into a contract at a future date. Such letters will not ordinarily be binding on the parties and the client will usually have no obligation to compensate the facilities management contractor for the loss of the contract should it not be awarded to him.

However, where a facilities management contractor executes work at the request of a client pursuant to a letter of intent, if the letter of



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intent is not a legally binding contract, then to prevent the 'unjust enrichment' of the client who has obtained services without having a contractual obligation to pay for them, the courts will usually allow the facilities management contractor to recover his reasonable costs and expenses incurred on a *quantum meruit* basis.

In certain circumstances, letters of intent may be binding 'mini contracts' allowing each party to enforce the terms of the letter should the other be in breach. For a letter of intent to be a binding contract it must fulfil all the criteria of a binding contract [referred to previously](#).

Whilst letters of intent may in certain circumstances be necessary they should generally be avoided. They act as a disincentive on the parties to agree the formal contract and rarely set out in any detail exactly what is expected of each party. Uncertainty as to each parties' duties and rights under a letter of intent often leads to disputes.

Whilst a letter of intent drafted as a 'mini contract' may at least clarify key issues such as payment and rights on termination it will still act as a disincentive on the parties to agree the main contract and will never be sufficiently detailed to cover in full the various obligations that it is envisaged each party will bear.

Lack of formal contract – *Hescorp Italia SpA v. Morrison Construction Ltd (2000) All ER (D) 371*

Hescorp Italia SpA (Hescorp), a steelwork subcontractor, responded to Morrison Construction Limited's (Morrison's) invitation to tender and entered into an exchange of correspondence. During negotiations of the formal terms of contract Hescorp commenced works on site, but due to disagreements over the completion date and the level of delay damages there was still no formal contract in place when Hescorp's work reached practical completion.

As there was no formal contract, Hescorp claimed £397,000, on a *quantum meruit* basis, for the value of the work done in accordance with Morrison's instructions. Morrison claimed that although it was not formal, a contract had been entered into for a lower amount as representatives of both parties had signed a document that stated an agreed lump sum of £362,500 for the work. Hescorp stated that they had proposed the lump sum price but that it was supposed to relate to a total package of agreed contractual terms and that position had not been achieved.

The court considered the correspondence between the parties and summarised the law on establishing the existence of a contract. They made it clear that the parties could agree all the contract terms subject to one pre-condition before a contract became binding, and that also parties could be bound even though some terms were not agreed or certain formalities were outstanding, provided that the missing terms do not make the contract unworkable or uncertain.

The court held that Morrison's had no real prospect of proving that a contract existed because although the court considered that a level for delay damages had probably been agreed the essential term which set down the completion date had never been agreed. As such Hescorp was entitled to payment on a *quantum meruit* basis.



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Quantum Meruit

Quantum Meruit (literally meaning 'how much he has deserved') aims to provide a practical solution to the question of how much should be paid out in a case where no contract or no formal contract exists and requires the court to look at the facts of the individual case against what is a very uncertain legal background.

The level of payment awarded could range from nothing to cost price plus profit, and there are two conflicting trains of legal thought on the issue; that the court should provide for:

- 1) the "reasonable remuneration of the claimant"; or, in contrast,
- 2) the "value of the benefit in the hands of the defendant".

These two methods of calculation can produce vastly different award sums.

If the facilities management contractor has spent time and money in providing a valuable service to the client, in accordance with the client's instructions, then the facilities management contractor should be recompensed. However, the confusion comes in balancing the arguments that the facilities management contractor should not recover more than he has spent and that the client should not have to pay for more than he has gained.

But what has the client gained and what is the margin for profit which would be incorporated into the contract price? In *Laserbore Ltd v. Morrison Biggs Wall Ltd* (1993) CILL 896, the *quantum meruit* issue was considered on the basis of what would be a fair commercial rate for the services provided. It would certainly be more than the simple expenditure of the facilities management contractor.

In the event that the principle of *quantum meruit* is more liberally interpreted and the courts take the approach as set out in *Costain Engineering Ltd and Tarmac Construction Ltd v. Zanen Dredging and Contracting Company Ltd* (1996) 85 BLR 77, where it was held that the contractor was entitled to claim not only the value of the work done but also to a share in the profit generated by the work then this may provide a disincentive for the facilities management contractor to agree to enter into the formal contract.

When assessing *quantum meruit* claims each case will be assessed on its particular merits. Case law has held that where an informal contract exists the reasonable remuneration approach should be taken (*Serck Controls Ltd v. Drake and Scull Engineering Ltd* (2000) All ER (D) 725). Where there is no contract the position remains unclear.



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Letters of intent – *ERDC Group Ltd v. Brunel University (2006)* EWHC 687 (TCC)

The claimant company in this case was ERDC Group, which claimed payment for the construction of a new sports facility for the defendant, Brunel University.

The university counterclaimed on the grounds that the work was unfinished and not of satisfactory quality. ERDC had tendered for the works to be carried out on the basis of a JCT Standard Form of Contract. The university appointed ERDC under letters of intent, deferring an official contract until after full planning permission had been granted. After the last letter of intent had expired, ERDC carried on with the construction.

Once the main elements of the work were done, ERDC was sent the official contract documents. It refused to sign them, arguing that it would continue on the basis that all the work done so far would be valued on the basis of *quantum meruit* and not in accordance with the rules for valuation laid out in the JCT contract.

The university did not accept that all of the work should be valued on a *quantum meruit*, and ERDC left the site, by agreement, without finishing the work.

It was ruled that the initial letter of intent, as well as the ones that followed, demonstrated the parties' clear intention to create a binding legal relationship between themselves. The acceptance of the letters of intent by ERDC led to the formation of binding contracts. The court said:

“Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have not been used. The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case.”



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3. Contracts (Rights of Third Parties) Act 1999

The Contracts (Rights of Third Parties) Act 1999 ([see Appendix 1](#)) received Royal Assent on 11 November 1999 and came into full force and effect on 11 May 2000. It aims to circumvent the old English law doctrine of privity of contract and provide relevant third parties with a right to enforce a term of a contract in specific circumstances.

Privity of contract

Traditionally, only the parties to a contract could actually enforce the terms of that contract even though the contract in question may be made with the purpose of conferring a benefit on a third party. This doctrine could cause difficulties as a third party that intended to benefit from a contract had to rely on one of the contracting parties to take action and obtain redress on his behalf. The doctrine of privity led third parties to obtain their own contractual link (usually in the form of a collateral warranty) to the parties to the contract to enable them to take action in relation to their own loss.

How does the Act work?

The Act confers upon a third party a right to enforce a term of a contract, if:

- the contract expressly provides that a third party may so act (section 1(1)(a)); or
- the term in question purports to confer a benefit on the third party, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party (Sections 1(1)(b) and 1(2)).

If a third party wishes to enforce a right under a contract, he will first have to prove that the term he is relying on actually purports to confer a benefit upon him, or the category of persons to which he belongs, for example, tenants.

If this is disputed, it will be for the parties to the contract to prove that on the proper interpretation of the contract, it was not their intention that the third party be able to enforce the terms of the contract in its own right.

The provisions of the Act are broadly drafted and prevent the parties to the contract from varying contract terms without the third party's consent.

Section 6 of the Act exempts several categories of contract from its provisions, and certain fundamental provisions of the Unfair Contract Terms Act 1977 will have no effect in a third party claim. In addition, the Act is silent as to whether third party rights can be assigned and it will be a matter for the parties to agree and provide for in the contract.

Effect

The emergence of third party rights and the consequent changes to the traditional doctrine of privity have not impacted on the formalities required to create a contract but do reduce the requirement for collateral warranties that have been used in the past to evade the rule. However, parties need to be cautious as to the extent of the third party rights granted in order to ensure that they do not inadvertently grant more rights than they actually intended. Alternatively, parties may wish to exclude the Act to prevent any inadvertent grant of rights.



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Conferring a benefit on a third party – *Laemthong International Lines Company Limited v. Abdullah Mohammed Fahem & Co* (2005) 2 All ER (Comm) 167

The owners of a shipping vessel (the owners) entered into a contract with a charterer (the charterers) to deliver a consignment of sugar.

The party due to receive the sugar (the receivers) also entered into an agreement with the charterers to purchase the sugar that was to be delivered by the owners. In order for the sugar to be released at port the receivers had to give the charterers a letter of indemnity (LOI).

The charterers then entered into their own LOI with the owners. The owners delivered the sugar as promised to the receivers but then the ship was arrested on the order of a bank that asserted a claim for the value of the cargo.

The owners claimed that the receivers were legally obliged to indemnify them against their losses resulting from the arrest and also to provide security for the release of the vessel. However, the owners were not party to the LOI between the receivers and

the charterers, and so in order to make any claim against them, the owners needed to show that they were 'agents', and that as such they were granted rights under the Contracts (Rights of Third Parties) Act 1999.

In order for the Act to apply, the court considered that firstly the owners had to show the terms of the LOI between charterers and receivers purported to 'confer a benefit on the owners'.

Secondly, that if this were proved, the owners could enforce the claim on the receivers provided that the receivers could not show that the parties did not intend the terms to be enforced by the owners.

The judge decided that the owners were conferred benefits as 'agents'. The owners claimed that the only way in which the charterers could deliver the sugar was through the owners and as such the owners had to be the charterer's agents.

The Judge rejected the argument that the LOI was worded in such a way as to only apply directly to the charterers, and decided that the owners were third party beneficiaries of the LOI between the charterers and the receivers.



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4. Services and specifications

Scope of services

Facilities management contracts are contracts for the provision of services or goods and services. As such, it is essential that the contract sets out in detail the services to be provided. The facilities management contractor will have no responsibility to perform any services not set out in the contract and the client should therefore take great care to ensure that everything he expects the facilities management contractor to do is documented in detail in the services. Whilst in certain circumstances a facilities management contractor may have an obligation to provide non-specified services that are indispensably necessary to his performance of the specified services, it should not always be assumed that the facilities management contractor will be obliged to provide the more routine or general services that a client may expect any facilities management contractor to provide.

For example, whilst occasional meetings with the client may be indispensably necessary for the performance of the services, if the services specified do not require the facilities management contractor to meet on a weekly basis or submit written reports, the facilities management contractor will not be obliged to attend such meetings or give such reports.

All facilities management contracts contain lists of services and operational tasks and requirements to be carried out by the facilities management contractor. These may be included in one document, often referred to as a 'specification', or alternatively, general services can be listed in one part of the contract with more detailed operational tasks and requirements set out in another.

General services can include a requirement on the facilities management contractor to report to the client in writing in a certain format and to procure and supervise the work of subcontractors. More specific services may be tied in with the specification. For example, in relation to services connected with the maintenance of

plant, the facilities management contractor may be obliged to inspect and grease certain items of plant on a daily basis, or in relation to cleaning services, to clean a certain area to a certain standard on a weekly basis.

Given the difficulty of specifying every conceivable service the client may wish the facilities management contractor to perform, and also given the likely need to vary at least some of the services during the often lengthy term of any facilities management contract, contracts should include a provision allowing the client to instruct additional, or vary existing, services in return for additional payment (see [Additional payment for additional services](#)).

Whilst carefully-drafted provisions in a facilities management contract can allow the client to instruct additional or varied work, the client must take care not to instruct additional services that are radically different from, or greatly outside the scope of, those envisaged by the original contract. If additional or varied services are instructed that are outside the original scope of the contract, the facilities management contractor may have no obligation to perform those services. If he nevertheless performs such services the client may find that the facilities management contractor is entitled to be paid not on the rates set out in the contract but on the basis of his reasonably incurred costs. ([See box](#)).

'Input' and 'Output' specifications

The specification is an extremely important document in any facilities management contract. It will usually set out the client's requirements in relation to services to be performed, quality standards to be met and all pertinent information that the facilities management contractor will require in order to perform the services in accordance with the contract.



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Variation of contract beyond original scope – *Sydenhams (Timber Engineering) Ltd v. CHG Holdings Ltd (2007) EWHC 1129 (TCC)*

Sydenhams claimed for unpaid work carried out for the defendant developer company CHG. At CHG's request, Sydenhams had provided a quote for the design, supply and erection of the timber frames for a commercial property CHG was developing. Sydenhams disputed that it knew of CHG's main contractor before it started work on the site, and that it understood Sydenhams to be a subcontractor.

At a later date, Sydenhams provided a final revision of its quotation and CHG signed an order for manufacture document. There was no main contract in place between the main contractor and CHG until after this had happened. Payment dates for the works were discussed and a letter detailing the agreement, which established that some of the works would be paid for by CHG in instalments through the main contractor, was signed by all three parties.

Later, Sydenhams suspended all works due to problems with payment from the main contractor. CHG agreed to make direct payments and also agreed a new payment structure. Sydenhams finished the work and then, on CHG's request, carried out more work on some windows, for which it was not paid. The main contractor then went into administration.

As it is the specification that the contractor will look at when calculating his tender for supplying the facilities management services, the client should take great care in drafting the specification to ensure that it contains all information necessary for the facilities management contractor to adequately price the provision of the services. It should, for example, set out in some detail the services to be performed.

CHG argued that the original order was a letter of intent, and that the payment letter indicated that Sydenhams was merely a subcontractor of the main contractor. It agreed that the final payment agreement only gave CHG the right to pay Sydenhams directly and had left the main agreement, being the subcontract between Sydenhams and the main contractor, largely unaffected.

The judge found that the signed order for manufacture and the final quotation had constituted a binding contract between Sydenhams and CHG. CHG and Sydenhams had been expressly referred to in both the order and the quotation as a party to the contract, and the type, scope and price of work to be undertaken were all defined. Sydenhams' standard terms and conditions had also been incorporated. This was held as clear evidence that there had been no contract between the main contractor and Sydenhams.

The payments letter had varied the contract terms only in respect of instalment payments, but there was no fundamental shift in the parties' agreed rights and obligations, and CHG was liable to pay any outstanding sums that arose under that agreement. The order for extra work had confirmed the new payments agreement and reinforced a direct contractual relationship between Sydenhams and CHG in respect of the work.

Whilst the specification will set out the services to be performed there are two different approaches to describing in the specification how any performance standards in relation to such services are to be met. A traditional 'input' specification will set out in detail the exact services to be performed by the facilities management contractor in a prescriptive fashion. For example, in relation to cleaning services, not only would the standards the contractor is to achieve be set out in the



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specification but also the exact means by which those standards are to be met. If a facilities management contractor fails to perform the services in accordance with the prescribed methodology then this will be a breach of contract, which may allow the client certain remedies under the contract; for example the accrual of service credits, abatements from sums due to the facilities management contractor, or even the termination of the facilities management contractor's employment.

In recent years, clients have increasingly moved away from the use of 'input' specifications in favour of 'output' specifications. An 'output' specification would not prescribe how the facilities management contractor is to achieve performance standards set out in the specification. The facilities management contractor would be expected to come up with his own proposals for how to achieve those standards. The logic behind the use of 'output' specifications is that the client's main concern is not the means by which performance standards are met but the fact that those performance standards are met.

A facilities management contractor should be entitled to use his own expertise to offer solutions that achieve and exceed the client's performance requirements. It is argued that an 'input' specification will not allow the facilities management contractor sufficient freedom to use his expertise and to offer innovative solutions to the client's performance requirements. It is also argued that allowing the facilities management contractor to define how he will achieve the client's performance requirements will result in lower tenders being received by the client as facilities management contractors may be able to suggest more cost-effective ways of achieving the client's requirements than those that may be specified by a client using an 'input' specification.

'Output' specifications offer further advantages. As the facilities management contractor is to define how performance requirements

are to be met, this removes the need for the client to spend the considerable time and expense necessary in preparing detailed 'input' specifications. This in turn should reduce the cost to the client of tendering the outsourcing of services. It will, however, correspondingly result in an increase in the tender costs of the facilities management contractor and it can be expected that the facilities management contractor will endeavour to recover such costs in his tender.

Whilst 'output' specifications do not require the detailed text necessary for an 'input' specification, they do require very careful drafting. The client should be aware that if an 'output' specification is used, unless they make specific references in the specification to how particular services are to be performed, they will lose control over the detail of how the services are to be performed. For example, if the client has very specific requirements in relation to security arrangements for the site, if these are not set out in a prescriptive fashion, the facilities management contractor will be free to provide a level of service he feels meets the client's performance requirements.

In certain circumstances, it may therefore be necessary to utilise a hybrid specification incorporating both 'input' and 'output' elements. It is also important for the client to be precise in the output specification on what exactly is required. If a service in an output specification is too vague, the facilities management contractor may not price for performing a service that the client expected to be included in the contract price, and this will invariably lead to disputes. In addition if a specific service is not referred to, and if it cannot be argued that such a service was obviously required, then the contractor may demand additional payment for performing the service.

The client will need to adopt different approaches in assessing the performance of the facilities management contractor depending whether an input or output specification is used. Whilst it is relatively easy using an input specification to judge whether the contractor has



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complied with the same (has the relevant task been carried out?), with an output specification, the client must look instead at whether the performance requirements, often drafted in a relatively subjective way, have been met. The subjective nature of many performance requirements means that output specifications are most likely to be successful when used in a contract where the relationship between the facilities management contractor and the client is not adversarial but is proceeding on a 'partnering' basis.



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5. Contract duration

It is important for all facilities management contracts to set out clearly the dates on which the obligations of each party begin and end. The start date and end dates can be expressed as certain specific days or alternatively each party's contractual obligations can be expressed to last for a particular duration calculated by reference to a period of days, weeks, months or years. There are no typical contract durations for facilities management contracts. Contract durations will vary depending on the value and type of the services to be provided. Whilst it may be common in lower value contracts for the provision of simple services to be renewed on an annual basis, higher value contracts or those for the provision of more complex services may last for a number of years.

Indeed, for higher value contracts, where the costs of tendering may be high, many facilities management contractors will be unhappy even to tender for a contract that will be renewable on an annual basis as if unsuccessful at the first retender they may find that their revenue for their first and only year of employment will be less than their tender and set up costs. This will particularly be the case in relation to public private partnership facilities management contracts where the contractor may be assuming greater risks than would usually be the case and where he will want assurances that the contract will not be retendered within a short period of time.

It is common for a clause to be included in facilities management contracts stating that the employment of the facilities management contractor is to terminate automatically at the end of the contract term. If such a term is included and the client allows the facilities management contractor to continue to work after such termination then any further work undertaken will be outside the previously agreed contractual framework and the facilities management contractor will be entitled to be paid for that work not on any of the previously agreed contract rates but on a *quantum meruit* basis.

The client would also be unable to rely on the previously agreed contractual provisions relating to quality and performance that would not apply to work done after the automatic termination. Provisions can also be included in the contract that allow the contract term to be extended on agreement of the parties to any adjustments to price, scope of services or contractual obligations that either may require.



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6. Facilities management contractors' obligations

Absolute or reasonable skill and care obligations?

All facilities management contracts should contain an obligation on the facilities management contractor to provide the facilities management services in accordance with the facilities management contract (including any specification annexed to it). In many cases, this obligation will be qualified so that the facilities management contractor is obliged to use reasonable skill and care to perform the services in accordance with the contract.

The insertion of this qualification is of some importance. A straightforward statement that the facilities management contractor is to provide the services in accordance with the contract imposes an absolute obligation on the facilities management contractor to perform the services in accordance with the contract. Therefore, if some of the services he provides fail to comply with the contract, he will be in breach of contract, even if he could show he had used reasonable skill and care in performing the services.

If, however, the facilities management contractor was obliged to use reasonable skill and care in the performance of the services, he may not be in breach of contract if he can show that, although the services provided were not in accordance with the contract, he used reasonable skill and care in performing them. Where a facilities management contractor's obligation is to provide the services using 'reasonable skill and care', the parties may agree to amplify that obligation by requiring the facilities management contractor to use the reasonable skill and care to be expected of a competent facilities management contractor, experienced in providing services of the same scope, nature and value to the services to be provided under the relevant contract.

This would be a relatively high standard of skill and care. In the absence of such wording, the standard of skill and care to be

used would be the standard the courts would expect an ordinarily competent and skilled facilities management contractor to use in the circumstances relevant to the particular contract.

Whether or not the facilities management contractor's obligation to perform the services should be an absolute or reasonable skill and care obligation will depend on the nature of the facilities management services to be provided under the particular contract. Where a party to a contract is to provide professional services (for example a contract for the provision of architectural or engineering services), the common law will imply a term that the provider of the services will use reasonable skill and care in the provision of those services.

If the facilities management contractor is acting essentially as the manager of a number of other service providers for whom he will have no direct responsibility, then arguably he is providing a professional managerial service and his obligation should be to use reasonable skill and care in the performance of his services. Alternatively, if the facilities management contractor is providing goods and services himself, or taking full responsibility for goods and services provided by others, then arguably, he is acting in a way similar to a traditional building contractor (whose performance obligations are usually absolute) and therefore the facilities management contractor should have a absolute obligation to perform the services in accordance with the contract.

As it is generally easier to show a breach of contract where a facilities management contractor has an absolute obligation to provide services in accordance with a contract, most clients prefer to see their facilities management contractors under absolute obligations. For the same reason, most facilities management contractors prefer their obligations to be limited to reasonable skill and care obligations.

Even where a facilities management contractor's general obligation to perform the services is expressed to be a reasonable skill and care obligation, his clients will often insist on the obligations



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to comply with statutory requirements and health and safety provisions being absolute obligations. The client's responsibilities to third parties in relation to statutory requirements and health and safety will be absolute and he will want to ensure that, should the facilities management contractor put the client in breach of those requirements, then the facilities management contractor will not be able to escape liability by arguing that he was not negligent.

Compliance with a client's instructions

As no facilities management contract can cover all eventualities, clients will want to include a provision requiring the facilities management contractor to comply with instructions issued by the client. Such instructions may relate to varying the services or requiring the performance of additional work. The obligation to comply with such instructions is usually expressed to be absolute.

As the client will want to have firm control over the provision of the services he will usually resist any attempt by the facilities management contractor to qualify the obligation to comply with the client's instructions. For example, a facilities management contractor may seek to water down the obligation so that he need only comply with 'reasonable' instructions. This is an unattractive amendment from the point of view of the client as it will be open to debate whether or not any instruction given is 'reasonable' in the circumstances.

Whilst the parties are having that debate the facilities management contractor need not comply with the instruction and the client's control over the provision of the services will be weakened. Facilities management contractors may seek to relieve themselves of liability if they are instructed to do something which they believe will put them in breach of contract.

This is not unreasonable, provided that they have a clear obligation to notify the client of how they believe his instruction will cause a breach of the contract. It is also reasonable for the facilities management

contractor to be able to refuse to comply with an instruction issued by the client where such instruction would put either the facilities management contractor or the client in breach of any relevant statutory or health and safety requirement.

If the facilities management contractor refuses to comply with an instruction, the client will require the right to employ someone else to undertake the work required by the instruction. In such circumstances, as one of his contractual remedies the client should be entitled to recover the cost of instructing another party to comply with the instruction from sums due to the facilities management contractor or, if no such sums are due, from the facilities management contractor as a debt.

Supply of goods and materials

If the facilities management contractor is to supply as part of the services any goods or materials, it is usual for the contract to require these to be in accordance with any standards referred to in the specification. In addition, wording is often included to cater for the situation where quality standards of any particular item are not defined in the specification. In such circumstances, the goods and materials are often required to be of the 'highest quality' or to the 'best available standard'. Such definitions are obviously very wide and facilities management contractors may rightly object to such imprecise definitions. As an alternative it may be agreed that, where the quality of an item is not defined in the specification, it will be of a quality equivalent to the standards and requirements set out in the specification for other similar items.

If wording such as 'highest quality' is used, it should be tied back to the relevant best standards or highest quality at the time that the items are specified, otherwise a facilities management contractor could find himself in breach of contract if an item used one year is, unbeknownst to him, superseded two or three years later by an item of superior quality due to technical innovation.



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Where the quality of an item is not defined in the specification, it is common for clients to require the facilities management contractor to provide items that are 'fit for the purpose for which they are to be used'. This is an onerous requirement, usually resisted by facilities management contractors. If such fitness for purpose wording is retained, it would allow the client to sue the facilities management contractor if the item specified was not suitable for its purpose, even if the item supplied by the facilities management contractor was that specified. For this reason, insurers providing professional indemnity insurance will not cover the giving of fitness for purpose obligations by the facilities management contractor.

Compliance with statutory requirements

A facilities management contractor will be obliged at common law to comply with all relevant statutory requirements in the performance of his services even if the contract contains no express clause to that effect. To the extent that the facilities management contractor is in breach of those statutory requirements, he may find himself liable to third parties, particularly if his breach relates to a breach of any health and safety requirements. Notwithstanding this, as a breach of statutory requirements by the facilities management contractor may well lead to a breach of those requirements by the client, the client will usually want (in addition to any tortious rights he may have) to include a provision in the facilities management contract requiring the facilities management contractor to comply with all relevant statutory requirements, whether these are Acts of Parliament, statutory instruments or regulations and byelaws produced by local authorities.

As a result, if the client suffers a loss due to the facilities management contractor's breach (for example if he is fined for a breach of a health and safety requirement) he may be able to recover this fine from the facilities management contractor due to the latter's breach of contract.

Given the often broad definition of statutory requirements contained in many facilities management contracts, it is unfortunately common for those drafting the specification and services inadvertently to require the facilities management contractor to provide services that would put both the client and facilities management contractor in breach of at least some statutory requirements. For this reason, the facilities management contractor should be obliged on appointment to check the services and specification to establish whether or not any of the client's requirements breach any statutory requirement or regulation. If the facilities management contractor does find a requirement in the services or specification that would cause a breach of a statutory requirement, he should be obliged to notify the client of that potential breach and the client should be required to decide how best to deal with it.

He could, for example, remove the requirement on the facilities management contractor to provide the relevant service or alternatively he could amend the service in such a way as to ensure no breach occurs.

Given that facilities management contracts can last for a number of years, it is likely that new statutory requirements will be introduced and existing statutory requirements will be altered during the term of many longer-term contracts. If a change in statutory requirements does affect the services to be reformed, who is to bear any cost resulting from that change? The introduction of the minimum wage in April 1999 resulted in increased labour costs for many facilities management contractors, especially those specialising in the provision of soft, labour-intensive services such as cleaning.

Whilst facilities management contractors were able to factor increased costs into future tenders they were not able to do so in relation to ongoing facilities management contracts. If a facilities management contractor's tender did not contain any contingency in relation to risk in changes in statutory requirements, then unless



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the contract allowed the facilities management contractor some compensation due to such changes, he would have found himself out of pocket.

Risk of changes in statutory requirements can be dealt with in a number of ways:

- The risk of changes in any statutory requirements after the date of tender can be placed on the client;
- The risk of changes in statutory requirements after the date of tender can be placed on the client provided that such changes could not have been reasonably foreseen by a competent facilities management contractor at the date of tender;
- Fluctuation provisions can be included in the contract allowing any fixed prices or rates to fluctuate in accordance with the cost of complying with changes in statutory requirements.

The facilities management contractor and the client should carefully consider which of them is best able to bear the risk in any change in statutory requirements. The client may feel that this is a risk best borne by the facilities management contractor who may have a greater knowledge of the likelihood of relevant and pending changes in the law and the impact that they will have on the provision of the services.

The facilities management contractor would obviously be free to price the risk of changes in the law when he prepares his initial tender. Alternatively, the client may feel that, rather than pay a premium for the transfer of that risk, he would rather bear it himself.

Health and safety

In addition to any requirement on the facilities management contractor to comply with any relevant statute relating to health and safety, such as the Construction (Design and Management) Regulations 2007, a client will also require compliance with any of his

own health and safety regulations which may be in force at the site where the facilities management contractor is to provide the services. Given that the provision of facilities management services is often labour intensive and that those services are often provided at sites where others are working, this is an important requirement.

Construction (Design and Management) Regulations 2007

After a major industry-wide consultative exercise in 2002, the Health and Safety Executive (HSE) embarked on a revision of the Construction (Design and Management) Regulations 1994. [The Construction \(Design and Management\) Regulations 2007](#) facilitate a shift in responsibility for health and safety responsibilities onto clients and away from facilities management contractors.

The Regulations apply to all 'construction works' including fitting out, maintenance, redecoration and cleaning works, amongst others.

A client is defined as "anyone having construction or building work carried out as part of their business". This could be an individual, partnership or company and includes property developers or management companies for domestic properties.

A 'CDM coordinator' has to be appointed to advise the client on projects that last more than 30 days or involve 500 person days of construction work. The CDM coordinator's role is to advise the client on health and safety issues during the design and planning phases of construction work.

A 'principal contractor' has to be appointed for projects expected to last more than 30 days or which will involve 500 person days of construction work. Their role is to plan, manage and coordinate health and safety.



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Responsibilities

Clients must not appoint or engage a CDM coordinator, principal contractor, designer or facilities management contractor unless they know that they are competent to undertake the work. To be competent, a facilities management contractor needs to have:

- sufficient knowledge of the tasks to be undertaken and the risks which the work will entail; and
- sufficient experience and ability to carry out duties in relation to the project, to recognise any limitations and to be able to take action to prevent harm to those carrying out construction work.

Facilities management contractors themselves are expected to seek cooperation from any other person concerned in any construction work on site to enable them to perform any duty or function under the Regulations and are expected to cooperate with others.

Facilities management contractors must also coordinate their activities with one another to ensure the health and safety of people carrying out or affected by the construction work.

Every facilities management contractor must adhere to the general provisions of prevention, which are as set out in Schedule 1 of the Management of Health and Safety at Work Regulations 1999, namely:

- avoiding risks;
- evaluating risks which cannot be avoided;
- combating risks at source;
- adapting work to the individual;
- adapting to technical progress;
- replacing the dangerous with the less dangerous;
- developing prevention policy to cover technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
- giving collective protective measures priority over individual

protective measures; and

- giving appropriate instructions to employees.

Part 2 of the Regulations also identifies specific duties of certain duty holders.

Client

- Check competence and resources of all appointees.
- Ensure there are suitable management arrangements for the project welfare facilities.
- Allow sufficient time and resources for all stages.
- Provide pre-construction information to designers and contractors.

Facilities management contractors

- Plan, manage and monitor own work and that of workers.
- Check the competence of all workers and appointees.
- Train their own employees.
- Provide information to their workers.
- Comply with all specific requirements in Part 4 of the Regulations.
- Ensure there are adequate welfare facilities for workers.

Documentation

The client must provide the designers and facilities management contractors with all information in its possession ('pre-construction information').

In respect of notifiable projects, a health and safety file is required, which must contain information in respect of the project which is needed for future construction work to be carried out safely.

Consequences of breach of the Regulations

The position under the Health & Safety Work Act etc. 1974 (HSWA) is that any breach of health and safety regulations may give rise to civil liability.



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Moreover, the Regulations remove the civil liability exemption which existed under CDM 1994 in respect of civil actions brought by employees against employers.

Breach of the Regulations is a criminal offence. Most prosecutions for breaches of health and safety legislation are brought under the HSWA and a successful prosecution can lead to an unlimited fine and/or two years' imprisonment. There are also powers for directors to be struck off for up to 15 years.

Another legal development, in the form of the [Corporate Manslaughter and Corporate Homicide Act 2007](#), could mean that an organisation may be guilty of corporate manslaughter if a gross management or organisational failing causes a person's death. A convicted company will be liable to an unlimited fine and individuals can be charged personally with manslaughter.

Clients' requirements relating to the site

As most facilities management services will be provided in relation to sites that are currently occupied by the client's staff and/or other contractors, the client will want to ensure that the facilities management contractor complies with any regulations that the client may have dealing with the conduct of the facilities management contractor's staff or their activities on site. A specific clause will usually be included in the contract obliging the facilities management contractor to comply with those requirements.

Typical site requirements would include obligations to ensure the facilities management contractor's staff comply with any no-smoking policy, dress code and security arrangements.

On site health and safety

Two construction companies were fined over £180,000 for serious health and safety offences, following an incident that left a worker paralysed. The prosecutions were brought by the HSE following an investigation into an incident where a labourer was severely injured whilst working on a site at Sir John Moore Barracks, Winchester.

The worker, Feeley, was working for Robert Blackmore, trading as RB Contractors, which was subcontracted by Rokbuild Ltd to build an office extension and a new respirator testing chamber.

On 16 March 2004 Feeley was driving a dumper on the site when the front wheels slipped into a trench. Another worker used the bucket of a mini excavator to try to pull the dumper out. The bucket slipped down and hit Feeley in the back, causing damage to his spinal cord and leaving him paralysed from the waist down.

The facilities managers on the site were found to be inexperienced and untrained and because of this they had appointed a subcontractor without checking their competence. In addition, they failed to properly supervise the work, allowing a contractor without a driving licence to be put in the driving seat of the dumper. Compounding the issue, an untrained fellow worker then tried to pull it from the trench using the bucket of a mini-digger.

The Judge felt that Rokbuild's failings were the principle causes of this incident, and that if Rokbuild had properly assessed the competence of the subcontractor and then arranged for competent supervision, it would have prevented the incident.



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Implied contractual terms

Whilst most well-advised clients and facilities management contractors will endeavour to ensure that their contract is in writing and covers in full the agreement reached between them, it is not unusual for parties to a facilities management contract to find that their contract fails to address certain key issues.

Where a contract is effectively an oral contract or where it has been entered into on a mere exchange of letters there may well be very few clear indications as to what contractual obligations each party has to the other in relation to payment and performance of services. In such circumstances certain terms may be implied by law into the contract. Such implied terms will be as binding on each party as if they were express terms.

Terms will be implied into a contract either by statute or where one party seeks to imply a term into the contract on the basis that such a term is necessary in order to make the contract work or that it is usual for such term to be included in contracts relating to the facilities management industry. The parties are free expressly to exclude any implied terms or to vary them and an express term of a contract which is inconsistent with an implied term will override the implied term.

For example, if a facilities management contract contained a provision requiring the facilities management contractor to exercise a higher standard of reasonable care and skill than that which may be implied to be paid to the facilities management contractor then such express provisions relating to payment will override any implied payment terms.

Statutory implication of terms

Facilities management contracts will almost certainly be contracts for the supply of services pursuant to section 12 of the Supply of Goods and Services Act 1982. The Act sets out basic contract terms

which will be implied into contracts for services. Section 13 of the Act implies a term that the supplier of the services will carry out those services with reasonable care and skill.

The Courts would decide what the appropriate level of skill and care was for the facilities management contractor depending upon the level of skill that the contractor may have expressed himself as having. Section 14 of the Act implies a term that the supplier will carry out the services within a reasonable time. Section 15 of the Act implies a term that the person receiving the service will pay the supplier a 'reasonable charge'.

Non-statutory implication of terms

Lord Pearson, in the building case of *Trollope & Colls Limited v. North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 ([see box](#)), neatly summarised the circumstances in which the courts would imply non-statutory terms into a contract:

"The Court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.

"An unexpressed term can be applied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."



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When time is of the essence of the contract

The expression 'time is of the essence' means that a breach of the condition as to time for performance will entitle the innocent party to treat the breach as a repudiation of the contract, without regard to the magnitude of the breach, and normally with the intention of claiming damages for loss. Exceptionally, however, the completion of the work by a specified date may be a condition precedent to the facilities management contractor's right to be paid.

Ordinarily, time is not of the essence in building contracts, although it may be expressly agreed to be so by the parties, or by necessary implication. Such an implication may be excluded by construction of other provisions of the contract – time is normally not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed for completion, nor when the parties contemplate a postponement of completion. Time cannot be of the essence if a date is not specified or capable of precise determination by the parties.

Implication of terms – *Trollope & Colls Limited v. North West Metropolitan Regional Hospital Board (1973) 1 WLR 601*

A building contractor entered into a contract for the execution of building work to be carried out in various phases. Phase three was to commence six months after the issue of the completion certificate for phase one and was to be completed by a certain date. There was a delay in completing phase one but there was no provision in the building contract allowing an extension of time for the completion of phase three should phase one be delayed.

The House of Lords refused to imply a term extending the time for completion of phase three by a period equal to the extension of time granted for the completion of phase one. The House of Lords held that the expressed terms of the contract were clear and that as such no term could be implied into the contract. The parties to the contract were deemed to have accepted the risks involved in signing the contract as it was drafted.



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7. Recovery of loss at common law

It is a common law principle, expressed in the 1854 case of *Hadley v. Baxendale* 9 EX 341, that where a party to a contract suffers a loss due to a breach of contract, he can recover from the party in breach:

- all his losses flowing directly and naturally from the breach; and also
- such losses that were within the reasonable contemplation of both parties at the time the contract was made as would be likely to arise due to the breach.

If, for example, a facilities management contractor undertaking plant maintenance services was in breach of contract, and this resulted in damage to the plant, ordinarily the client would be entitled to recover not only the cost of repairing the plant but also other losses incurred such as loss of profit or the cost of additional rented accommodation, provided that such losses flowed directly and naturally from the breach or were within the reasonable contemplation of the parties at the time the contract was signed.

Whilst in many contracts the facilities management contractor will be able to estimate and therefore price the risk of certain potential losses, such as the cost of repair, other potential losses, such as loss of profit, are far more difficult to estimate and quantify. If tendering facilities management contractors are required to have unlimited exposure to such potential losses, the client may find that the tenders he receives are far higher than would be the case if the facilities management contractors' liability in relation to such losses was limited.

Indeed, some facilities management contractors may refuse to enter into any contract that does not contain some form of cap on their liability. This will often be the case in relation to facilities management contracts for the supply of information technology, computing or telephone services to financial institutions or to other information-reliant businesses where the client could incur potentially huge losses from, for example, the non-availability of a computer network or telephone system.

Common methods of limiting liability

Liability for loss can be limited in a number of ways:

- It can be capped to a specific agreed amount;
- It can be capped to the level of the facilities management contractor's insurance protection as at the date of the contract, or to the level of the insurance as the same may fluctuate over the duration of the contract;
- It can be capped to the amount of the facilities management contractor's fee; and
- It can be limited to sums payable under a performance point system.

Limits on liability can take the form of an overall cap on all liability, contractual or otherwise, or can limit only certain types of loss.

For example, in some contracts, the facilities management contractor's liability for all non-repair losses is expressly excluded.

Other provisions can be included limiting the liability of the facilities management contractor for any breach of the contract, or for claims outside the contract (for example, in relation to claims in tort or for breach of statutory duty) to an amount to be agreed between the parties. All losses, not just repair losses, would therefore be capped.

It is common for facilities management contractors to seek to exclude all liability for all non-repair costs (often called consequential losses). These are losses that are the most difficult to estimate and price for when submitting a tender. If a facilities management contractor is seeking to exclude the recovery of losses such as loss of profit or loss of production, great care should be taken in the drafting of the relevant exclusion clause ([see box](#)).

Poor drafting can lead to the effectiveness of any exclusion clause being severely limited especially as such clauses will be read by the courts '*contra proferentum*'; that is against the facilities management



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Exclusion clause drafting – *British Sugar plc v. NEI Power Projects Limited* (1997) 87 BLR 42

A contractor was engaged to design, supply, deliver, test and commission generating equipment. The client alleged that the equipment was poorly designed and badly installed and this resulted in breakdowns in the power supply. The client claimed damages in excess of the contract sum. The main part of the client's claim was in respect of increased production costs and loss of profit.

In pre-contract discussions, the parties discussed at some length limiting the contractor's liability. The following was agreed and included in the contract:

"The (contractor's) liability for consequential loss is limited to the value of the contract".

No attempt was made to define what 'consequential loss' was, although the contractor believed it meant all non-repair losses, including loss of profit and increased production costs. The contractor sought to rely on the agreed limitation to defeat that part of the client's claim in excess of the value of the contract.

Each party offered a different interpretation of what 'consequential loss' meant. The Court of Appeal found in favour of the client and concluded that both parties had agreed to limit the contractor's liability to loss and damage not directly and naturally resulting from the contractor's breach. They found that the client's loss of production costs and loss of profit were directly and naturally arising from the breach and that therefore the limitation wording in the contract was ineffective against the client's claim.

contractor seeking to rely on such a clause, in the case of any ambiguity in such a clause. If a client is prepared to accept that the liability of the facilities management contractor will be limited, the client should carefully consider the likely extent of his potential losses that could arise from a breach of contract by the facilities management contractor and should ensure that he has adequate insurance cover in place to protect him against such losses in the absence of any contractual remedy against the facilities management contractor.

Unfair Contract Terms Act 1977 (UCTA)

UCTA relates to clauses that exclude or restrict liability rather than 'unfair terms' and was introduced because at common law the courts had no powers to target such clauses that might have been considered unreasonable or objectionable. UCTA imposes limits on the extent to which liability can be restricted in the spheres of negligence and breach of contract.

Contra Proferentum

The courts have controlled the use of exclusion clauses by holding that an exclusion clause may only be relied upon if it has been incorporated into the contract and if on the construction of the contract, the clause covers the loss in question. In relation to the construction of the contract the '*contra proferentum*' rule ensures that any ambiguity in the wording of an exclusion clause will be construed as narrowly as possible against the person who wishes to rely on the clause, although it will not be applied strictly if to do so would defeat the intentions of the parties to the contract.

Contracts within the scope of UCTA

UCTA deals with 'Business Liability' and more specifically with the liability for breach of obligations or duties arising from:



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- things done or to be done by a person in the course of business; or
- the occupation of premises which are used by the occupier for business purposes.

Although the term 'business' is not defined in UCTA the term is known to extend beyond the activities of companies to include "a profession and the activities of any government department or local or public authority" (section 14) and as such will apply to facilities management contracts let in relation to PFI projects.

What is reasonable?

Section 11(1) of the Unfair Contract Terms Act 1977 (UCTA) states that a clause will be unreasonable unless it is considered "that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".

The courts have considered a number of factors when deciding whether an exclusion clause is reasonable:

- the respective bargaining power of the parties;
- the extent to which the clause was freely negotiated;
- the parties' access to and use of legal advice;
- the availability of insurance;
- the availability of alternative contractors or suppliers; and
- the extent to which the effect of the exclusion clause had been explained to the parties.

Recent case law on 'reasonableness' and standard terms (*Regus (UK) Limited v. Epcot Solutions Limited* (2007) All ER (D) 93 Mercantile Court) suggests that in a business to business contract, where standard terms of business are so draconian that they

When contracting with a consumer or on standard terms of business the contract may not exclude or restrict any liability for a breach of contract except where it is reasonable (see box).

Standard terms of contract

UCTA's main sphere of operation is in relation to standard terms which one party may try to impose on the other. There has been some argument as to what will constitute standard terms of contract and it is generally thought that to be standard terms they should be considered by the party proffering them to be their standard terms

let the service provider off the hook for that business' failure to provide basic or fundamental services (in this instance relating to the proposed exclusion of any remedy for malfunctioning air-conditioning by a supplier of serviced office accommodation) there is a high probability that the clause will be held by the courts to be unreasonable.

The current situation is covered by two pieces of legislation – UCTA and the Unfair Terms in Consumer Contracts Regulations 1999, the latter applying only to business to consumer dealing. The two laws contain inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects.

In 2005, the Law Commission and the Scottish Law Commission published a final report, together with the draft Unfair Terms in Contracts Bill. The Bill aims to clarify and unify the legislation into a single, clearly written and accessible statute.

Although the Government has accepted the recommendations, these are currently subject to a regulatory impact assessment before the Bill is enacted. It is not clear at this stage when (or if) the Bill will be enacted.



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and used habitually by that party when contracting. It is thought that whether the contract terms were drafted by or on behalf of the contractor is indicative of whether they are standard terms and until recently it was thought that industry standard form contracts would not constitute standard terms under UCTA even if they were frequently used by contractors.

However, in the case of *British Fermentation Products v. Compair Reavell* (1999) BLR 352, the judge cast doubt on this theory, stating that if the party relying upon the provisions of UCTA could prove that the industry standard form contract was invariably or usually used by the other party as its standard terms then they could be considered to be standard terms within the meaning of UCTA.

If this approach is further applied by the courts then this could impact upon the use of standard form facilities management contracts such as the GC/Works/10 standard form of facilities management contract (see Chapter 17 – [Standard forms of facilities management contracts](#)).

Negligence and UCTA

'Negligence' is defined under UCTA as a "breach of contractual obligation to take reasonable care or to exercise reasonable skill or to breach an equivalent common law duty" (section 1(1)). UCTA provides that the contract may not exclude or restrict liability for death or personal injury as a result of negligence and that in relation to any other loss or damage the contract may not exclude or restrict liability for negligence except where it is reasonable.

Section 13(1) of UCTA may also prevent the parties from:

- making a liability or its enforcement subject to any restrictive or onerous conditions;
- excluding or restricting any right or remedy in relation to the

liability;

- subjecting a person to prejudice as a result of pursuing a right or remedy; and
- excluding or restricting any rules of evidence or procedure.



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Insurance

A facilities management contractor is obliged by law to maintain certain types of insurance. For example in Great Britain the Employer's Liability (Compulsory Insurance) Act 1969 requires all employers to provide insurance against the injury, disease or death of any of their own staff arising out of their employment.

Given that the facilities management industry can be extremely labour intensive and requires the performance of work within occupied buildings, employer's liability and public liability insurance (to protect the facilities management contractor from third party claims resulting from physical injury or damage to property) are essential.

However, whilst some clients will only seek confirmation from tendering facilities management contractors that they maintain such insurance with a level of indemnity that the client feels is appropriate given the complexity of the services to be provided and the site where those services are to be provided, others may make it a contract term that such insurance is maintained.

The purpose of making the maintenance of such insurance a contract term when facilities management contractors are at any rate obliged by the law to maintain such insurance is to underline the importance of such insurance to the facilities management contractors.

Where the facilities management contractor is providing what amounts to professional services, he may be required to maintain professional indemnity insurance. This insurance will provide cover against losses caused by his negligent breach of his agreed contractual obligations to provide the services. Many facilities management contractors will not maintain such insurance or if they do, will maintain it with an aggregate limit of indemnity rather than a limit in respect of each and every claim.

Where insurance is held with an aggregate indemnity limit, the facilities management contractor will have insurance protection only for a specified sum in any one year. If claims are received in one year that total more than the amount of the insurance held, the insurance protection will be exhausted. If further claims are made in that year the facilities management contractor will have no insurance protection in relation to those claims.

If insurance is held on an each and every claim basis, the insurance indemnity limit will apply in relation to each claim received in that year. As such, whilst a professional indemnity insurance with an indemnity limit of £5m on an each and every claim basis may be acceptable to the client, a similar level of indemnity on an aggregate basis may not.

If the facilities management contractor is providing goods as well as services he may maintain product liability insurance instead of or in addition to professional indemnity insurance. The purpose of such insurance is to provide protection to the facilities management contractor in relation to claims by the client and third parties for damage or loss caused by faulty goods supplied. A product liability policy will not protect the facilities management contractor in relation to the cost of rectifying any defect in the product itself.

Occasionally, clauses are seen in facilities management contracts allowing the client to take out professional indemnity insurance should the facilities management contractor fail to do so. It is, however, unlikely that any insurer would be prepared to allow the client to insure the facilities management contractor's risk. As it is also unlikely that the courts would grant an injunction to the client requiring a facilities management contractor to comply with an obligation to maintain insurance, the most effective remedy that the client has if insurance is not maintained is either abatement from amounts due under the contract or by termination or the threat of termination of the contract.



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Reference to insurance requirements should therefore be made in any performance point system and in the termination provisions.

Facilities management contracts often require the client to take out and maintain insurance in relation to the premises where the services are to be provided. Such insurances would cover damage caused to the premises by typical insured risks such as fire and flood. This cover should be obtained in and in respect of the separate rights and interests of both the client and the facilities management contractor or should at least contain a requirement that the insurer waive its subrogation rights against the facilities management contractor in relation to any negligence causing the fire or other risks insured.

The intention of these provisions is to protect the facilities management contractor as well as the client in relation to any insured risks, whether or not they have been caused by the facilities management contractor's negligence.

The law changed with effect from 28 February 2005 to exempt very small companies that employ only their owner from the requirement to have employers' liability compulsory insurance.

Indemnities

It is common for each party to a facilities management contract to indemnify the other in relation to claims for personal injury, death or damage to third party property arising from the other's breach of contract or negligence. These indemnities may tie in with the insurance that each party is required to maintain to protect that party against claims in relation to such risks. In addition, clients may seek to include indemnities in facilities management contracts whereby the facilities management contractor indemnifies the client against any losses the client may incur due to any breach of contract on the part of the facilities management contractor.

Such indemnity clauses are invariably resisted by facilities management contractors and their advisers and many insurers providing professional indemnity insurance will not allow their insured to agree to provide such indemnities to a client. Indemnities offer two main advantages to parties seeking to recover loss. Firstly, the time a party will have to make a claim in relation to any breach of contract will be substantially extended. Usually, a party can sue for breach of a simple contract for up to six years from the date of that breach occurring. If the contract is executed as a deed, then each party will be entitled to sue for breach of contract for up to 12 years from the date of breach.

Where an indemnity is included in a contract, a party that suffers loss will be able to sue the other party for recovery of that loss for either six or 12 years (depending on whether the contract is executed as a deed or simple contract) from the date of that loss being incurred. Therefore, if under a simple contract a breach occurs that does not cause a loss until ten years later, then the parties suffering loss can still claim, notwithstanding the fact that its loss was incurred more than six years after the date of breach.

The other advantage of an indemnity clause is that the usual rules relating to recoverability of loss do not apply. Ordinarily a party endeavouring to recover its losses from another party that is in breach of contract would have to show that the losses incurred flowed directly and naturally from the breach or were within the contemplation of the parties at the time the contract was made (see Chapter Six – [Facilities management contractors' obligations](#)). In addition, they would have to show that they had endeavoured to mitigate their loss. If the party suffering the loss is suing under an indemnity, it need not show that the losses it is endeavouring to recover flowed directly and naturally from the breach or were within the contemplations of the parties or that they have mitigated their loss.



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How the parties to a facilities management contract structure the client's payment obligation under the contract will vary depending on the nature of the particular contract and on the attitude of each party in relation to pricing risk. Common payment options include payment on a lump sum basis, payment on a 'cost plus' basis (where the facilities management contractor is paid a fee and reimbursed all costs he incurs providing facilities and employing direct labour and any subcontractors) or payment on agreed rates and prices.

Lump sum payment options

Where the scope of the services to be provided by a facilities management contractor is clearly defined, clients may, when tendering the services, seek lump sum bids for the provision of those services for a certain fixed duration. Lump sum payment options are attractive to clients as the price to be paid to the facilities management contractor in any one year will be fixed, allowing the client greater certainty in the fixing of budgets and assisting in financial control of expenditure. If during the supply of the services it transpires that the provision of the services is more expensive than the facilities management contractor originally envisaged then this risk will lie with the facilities management contractor who will be obliged to absorb the increased cost and will not be able to pass it on to the client.

For this reason lump sum payment options are not generally favoured by facilities management contractors. In order to offset the potential pricing risk referred to above, facilities management contractors will usually include in their lump sum bid a contingency sum reflecting that increased risk.

If price risk contingencies are set at a high level, the increased cost to the client may outweigh the benefits of having a lump sum price and the client might instead prefer to pay on a 'cost plus' basis. As facilities management contracts may last for a number of years, if

a lump sum payment option is used provisions should be included allowing the lump sum to adjust; for example, annually by either an agreed percentage or in accordance with the retail price index or an industry standard measure such as the building maintenance index published by the Royal Institution of Chartered Surveyors.

Cost plus payment option

Where a facilities management contractor is acting as a main contractor, and employing subcontractors to perform the services, the facilities management contractor may prefer to be paid on a 'cost plus' or prime cost basis. This would usually involve the payment to the facilities management contractor of:

- a fee to reflect his profit on the contract, his overheads and his risk contingency; together with
- all amounts that he is required to pay to his subcontractors in relation to the performance of the services and any other costs that may be agreed as reimbursable.

Payment on a cost plus basis therefore largely removes the risk to the facilities management contractor of the cost of providing the services exceeding what had originally been estimated. If the provision of services costs more in terms of payments to be made to the subcontractors it is the client who will bear the increase in cost.

Unless the contract is clearly drafted, it would be arguable that the facilities management contractor has no incentive to control the subcontractor's costs as, come what may, he will be paid those costs. Indeed, if the overhead element of his fee is an amount to be calculated as a percentage of the subcontractor costs, subcontractor cost overruns will actually benefit him. For these reasons payment on a cost plus basis is not usually favoured by clients.

Where a cost plus payment system is used, the client will want to ensure that the tendering of the subcontract packages is undertaken



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on an open book basis so that he can attempt to satisfy himself that the subcontractors offering the most competitive price are engaged and that, as far as possible, no hidden discounts are being given to the main contractor by the subcontractors in relation to their appointment.

The client will also want to ensure that the terms of subcontract being used by the facilities management contractor do not dump risk on the subcontractors (for example by including 'pay when paid' clauses) in such a way as to increase subcontractor tenders or limit the pool of tendering subcontractors. The facilities management contractor's fee can be paid as a lump sum or, as noted above, as a percentage figure to be applied to the total costs to be paid to the subcontractors.

If a lump sum fee is used then on longer contracts this should adjust, as discussed earlier, on an annual basis.

Payment by rates and prices

Where the full extent of the services to be provided by the facilities management contractor are not known it is common to agree payment for the provision of services on the basis of agreed rates and prices. For example, a client may know that he requires the provision of hot meals at his workplace but he may not know the number of meals that will be required over any given period of time.

As such it would be very difficult to agree payment for the provision of such meals on a lump sum basis although it would be possible to agree the unit cost of each meal. Payments due in any one month could therefore be calculated depending on the number of meals required multiplied by the unit price.

As with an agreement to pay on a lump sum basis, the parties will usually want to agree some form of mechanism allowing any unit prices or rates to adjust annually to reflect increased cost.

Additional payment for additional services

As discussed in Chapter Four – [Services and specifications](#), a client may need the facilities management contractor to undertake additional or varied services to those set out in the contract. As such, payment provisions ought to include mechanisms for calculating the additional payments to be made to the facilities management contractor in relation to such additional or varied services.

Where payment is being made on a cost plus basis, increased costs to subcontractors stemming from additional or varied services will be passed via the facilities management contractor to the client. The client will also be obliged to pay the facilities management contractor's own costs in relation to any such additional or varied services if the facilities management contractor's fee is based on a percentage figure to be applied to the subcontractors' costs.

If the fee is expressed as a lump sum, mechanisms need to be included allowing payment due to the facilities management contractor's additional costs. A simple provision might state that the client will be obliged to pay the facilities management contractor's reasonable additional costs arising from the performance of the additional or varied services. However, such a broad provision could well lead to argument as to how the facilities management contractor's 'reasonable' additional costs are to be calculated.

More complex provisions would limit the scope for argument by requiring the facilities management contractor to only proceed with varied or additional services on agreement by the client of a binding additional lump sum. Alternatively, provisions could be included whereby additional or varied services were to be paid for on a basis of agreed rates or unit prices as set out in the contract or any attached specification.



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Price adjustment dependent on performance

At common law, a client has the right to make an abatement against sums due to a facilities management contractor if the facilities management contractor's breach of contract has resulted in the services received by the client being worth less than contracted for.

Alternatively, a client would have the right to bring a claim for damages for any losses suffered by him due to the breach of contract by the facilities management contractor. If, for example, a facilities management contractor failed to provide certain services obliging the client to employ others to undertake those services, the client would be entitled to either make an abatement against sums due to the original facilities management contractor to reflect the reduced value of the services received or alternatively claiming the cost of employing an alternative contractor from the original facilities management contractor.

The client's common law rights in relation to breaches of contract by a facilities management contractor will not, however, provide adequate remedy where breaches of contract by the facilities management contractor do not lead to any loss or do not lead to a loss that is easily quantifiable. For example, if a facilities management contractor is obliged to provide uniformed security staff, if the staff forget to wear their uniforms, what financial loss will the client actually suffer? Similarly, if a facilities management contractor agrees to answer all calls to an emergency help desk within ten rings, but in fact only answers such calls within 20 rings, will the client suffer any loss? If so, how will that loss be calculated?

Performance point systems

As common law rights cannot adequately deal with linking poor performance to payment many facilities management contracts now contain performance point systems or service level agreements to allow deduction from sums due to a facilities management contractor

where loss resulting from breach can either not be quantified or is non-existent.

The main objective of performance points systems is to ensure that the client receives the standard of service he pays for under the facilities management contract. It is imperative that a performance points system be simple to understand and operate, be jointly agreed by the parties and be based on an assessment of the facilities management contractor's performance against specified service levels or key performance indicators (KPIs) ([see box](#)).

The successful delivery of a service will be assessed by reference to the facilities management contractor's success in meeting agreed service levels and KPIs. The service levels and KPIs should cover a range of criteria relating to operation and delivery of the service; finance; organisation including health and safety and administration; and customer satisfaction. Under a performance points system, a facilities management contractor will accrue points or service credits should his provision of the services fail to meet the agreed service levels or KPIs.

To be effective, performance points systems should be balanced and incorporate elements of both risk and reward for the facilities management contractor. They should not be seen as a method of penalising the facilities management contractor, but rather a mechanism to incentivise him to deliver a better service, by offering positive incentives and rewarding exceptional performance.

Points accrued would be weighted depending on the significance of the failure to achieve the relevant service levels or KPIs. For example, whilst failure to answer the telephone at a help desk within ten rings may cause the accrual of one performance point, failure to answer an emergency call-out in relation to defective plant within one hour may cause the accrual of 20 points. Most performance point systems will allow for points accrued in any month to be aggregated.



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Setting key performance indicators

Key performance indicators (KPIs, also known as KSIs – key success indicators) are a quantifiable measurement of the improvement in performing an activity that is critical to a facilities management contract. KPIs should complement the overall targets of a business and relate to its core activities.

KPIs can be used by clients to measure progress against agreed objectives for an organisation. They demonstrate how an organisation is performing against its stated goals. KPIs are particularly useful for facilities management contractors and can be used to form an important element of a service level agreement (SLA).

KPIs can be used as a performance management tool to monitor good or bad performance, but also as a means of encouragement and reward. KPIs give facilities management contractors a clear picture of what is important to clients. However, they can be

discredited if they are seen to be artificial or unrealistic. KPIs must be quantifiable measurements, agreed beforehand with facilities management contractors, which reflect the critical success factors of an organisation or the services to be delivered.

There are many and varied KPIs, composed by individual clients to suit their particular circumstances. It can be a challenge to identify objective measures that can be selected for more precise application. A significant step forward in the facilities management industry is the creation of a register of metrics in the form of the BIFM / ARK KPI Register, which is openly accessible to everyone via the BIFM website – www.bifm.org.uk

The register sets out in logical terms (reviewed and determined by the BIFM Research, Innovation and Knowledge Committee) a hierarchy of Service Lines which so far represent the broad spectrum of services and activities that make up facilities management.

The aggregate points accrued would then be included in a formula, which would dictate the amount, if any, to be deducted from sums due to the facilities management contractor in that particular month. The more points accrued, the greater the deduction made. Therefore, it is important in establishing a performance points system to see that the service standards set out in the service levels and KPIs are clear, achievable and capable of objective measurement.

To minimise the cost to the client, the facilities management contractor will often be primarily responsible for assessing their own service standards with the client carrying out periodic spot checks. Whilst performance point systems are attractive to many clients, it is legally unclear whether or not such systems are enforceable. At common law, a contractual provision that allows one party to deduct monies from the other, which does not reflect genuine loss

suffered, will be considered to be a penalty provision and therefore unenforceable. It would be arguable that many performance point systems could, as a result, be interpreted as penalty provisions. As yet, there has been no case law on the point although it would seem to be only a matter of time before the issue is considered by the courts.

However, performance point systems need not be solely designed to punish poor performance. They can also be used to reward outstanding performance. If performance points accrued within a month are below a certain level, then the contract could be drafted so that the facilities management contractor would be entitled to an additional payment that month in relation to his exceptional performance. If a performance point system is designed to both punish poor performance and reward exceptional performance,



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it may well be less liable to challenge in the courts as a penalty provision.

If a performance point system is used, consideration needs to be given as to how this links in with any limitations on liability contained within the contract. Many facilities management contractors will seek to limit their liability for breaches of the contract to the deductions from the fee that the client will be entitled to make under any performance point system. If the performance point system only allows deductions to be made from amounts due, as opposed to requiring the contractor to make the payments to the client if deductions would exceed amounts due, then if the client's only recourse in relation to breach of contract is under a performance point system, such a system would effectively cap the facilities management contractor's liability at the level of the amounts to be paid to him under the contract.

Many clients may find such a cap too low and may therefore want the ability not only to make deductions from payments due to the facilities management contractor under any performance point system but also to be able to bring claims, if necessary, for breach of contract. Clear wording is required in a contract to prevent a party being able to both make deductions under a performance point or abatement clause or a claim for breach of contract (see box, right).

A common compromise adopted by parties to facilities management contracts allows the client to only make deductions from sums due to the facilities management contractor under a performance point system in relation to certain failures by the facilities management contractor but also allows the client to bring claims for breach of contract in relation to breaches not covered by the performance point system.

Right to claim damages and/or an abatement – *Ellis Tylin Limited v. Co-Operative Retail Services Limited* (8 March 1999; T&C Court; unreported)

A facilities management contractor was obliged to provide maintenance services to a client at multiple sites. An agreement was reached between the contractor and the client agreeing a formula for calculating the entitlement of the client to make abatements from sums due to the contractor if the contractor in breach of contract failed to provide the services in accordance with the contract. The facilities management contractor argued that the agreement of the formula amounted to an agreement of a variation to the contract to the effect that the client waived his contractual rights in relation to the contractor's non-performance and that his rights in relation to such non-performance were limited to those set out in the abatement provisions.

The court held that there is a presumption that each party to a contract is entitled to rely on all remedies available to it arising by operation of the law in the event of breach of the contract by the other party. To rebut that presumption, clear and unequivocal wording must be used in the contract that certain remedies would not be available in respect of breaches of that contract. In the circumstances, the court found that no such clear wording had been used and as such, the client was free to either make abatements under the abatement provisions of the contract or, if he wished, bring a claim against the facilities management contractor for breach of contract.



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Mechanics of payment

Whilst it is common for most facilities management contractors to be paid on a monthly basis, whether this is appropriate or not will depend very much upon the terms of the specific contract. In certain circumstances, it may be appropriate to pay the facilities management contractor on a weekly or quarterly basis.

Contracts should make provision for the submission of invoices by the facilities management contractor at certain specific intervals. Each invoice should be supported by all information, receipts and documentation that the client may wish to see to enable him to consider the validity of the amount claimed in the invoice. The client will want to include in the contract a period of time to allow him to consider the contractor's invoice and to calculate the amount that he believes is due, taking into account any adjustments to the price necessary by virtue of any performance point system or any abatement he may wish to make.

Once the client has calculated what he believes is due he should be obliged to pay the due amount to the facilities management contractor within a certain number of days.

The relevant payment period will vary depending on the cash flow requirements of the facilities management contractor and the ability of the client to turn around invoices within the relevant time period. The client should be aware that if he insists on time periods for payment that are unduly long, then tendering facilities management contractors and their subcontractors may price such longer periods to reflect the impact such longer periods may have on their cash flow.

Facilities management contractors may insist that if the client fails to make payment within the time period specified in the contract interest will accrue on the outstanding amount. Indeed, in certain contracts, the Late Payment of Commercial Debts (Interest) Act 1998 may imply such an obligation to pay interest in relation to late payments.

From 7 August 2002, the Late Payment of Commercial Debts (Interest) Act 1998 was amended and supplemented to incorporate the features of European Directive 2000/35/EC on combating late payment in commercial transactions.

Under the revised legislation, clients are now able to claim reasonable debt recovery costs and can benefit from the simplification of the calculation of Statutory Interest. Additionally, small and medium-sized enterprises can ask a representative body to challenge grossly unfair contract terms used by their clients which do not provide a substantial remedy for late payment of commercial debts.

The revisions to the legislation also include the simplification of the calculation of statutory interest. A reference rate is now used to determine the late payment interest rate, which is fixed for a six-month period. The late payment interest rate that applies in the UK is the reference rate plus 8%.

Many facilities management contracts will be subject to the Housing Grants, Construction and Regeneration Act 1996. This requires contracts which are caught by the provisions of this Act to contain certain 'fair payment' provisions. These are discussed in more detail in Chapter 14 – [The Housing Grants, Construction and Regeneration Act 1996](#).



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By the facilities management contractor

At common law, if a contract is silent on assignment, either party may freely assign the benefit (i.e. their rights) under the contract to another without the consent of the other party being required. However, a party is not entitled to assign its obligations under a contract without the consent of the other party.

Subcontracting of services by a facilities management contractor would amount to the assignment of its obligations under the contract and as such this cannot be done without the consent of the client.

Where work is to be subcontracted, the client will want to ensure that the facilities management contractor remains fully responsible for that work. In addition, the client will want to ensure that only those services that they expect to be subcontracted will be subcontracted.

Notwithstanding the position at common law it is usual to include a provision in facilities management contracts preventing the facilities management contractor from subcontracting any of the services without the consent of the client. If the client is paying the facilities management contractor on a cost plus basis then he will have an added incentive to ensure that the facilities management contractor only subcontracts with subcontractors who are first approved by the client. In such circumstances the client may also wish to take a significant role in the tendering of the subcontract works and in the selection of the subcontractors.

For example, the client may wish to review any subcontract tenders jointly with the facilities management contractor and to approve the terms of any subcontract. In certain circumstances the client may wish the facilities management contractor to employ a certain specified subcontractor for the performance of particular services.

For example a client who has not previously outsourced the majority of his facilities management services may require the facilities management contractor to continue the employment of

those providing services which had previously been outsourced, for example security or catering subcontractors. As the common law is silent on the issue careful consideration needs to be given by the parties in such circumstances as to who is to bear the risk of failure of these 'nominated' or 'named' subcontractors.

Facilities management contractors may be of the opinion that, as they have been required to employ the particular subcontractor, perhaps against their own better judgement, the risk of that subcontractor becoming insolvent and disrupting the performance of other subcontractors should lie with the client. The client, however, will prefer all the risk in relation to nominated or named subcontractors to lie with the facilities management contractor as would be the case with any other subcontractor. Careful negotiation will be required to satisfy the conflicting demands of each party.

By the client

Clients often wish to retain the right to assign their rights under their facilities management contracts to another party without the consent of the facilities management contractor being required. This may be necessary in case the client needs to transfer the ownership of the site where the services are to be provided.

In such circumstances the facilities management contractor may not object to an unfettered right of assignment if such assignment can only be made to companies within the same group as the client. They may well object if the client wishes to retain a right to assign the benefits of the contract to another company not connected with the original client.

The facilities management contractor could rightly point out that it based its tender price on contracting with a particular named party and that if it had known that it would be contracting with another party it may well have agreed a different price. In addition the insurers of facilities management contractors are likely to point out the increased



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risk of being sued by a party taking the benefit of the contract who is not the client who originally entered into the contract.

As such, facilities management contractors are likely to strongly resist clauses allowing the free assignment of the benefits of a contract by the client to third parties not part of the client's group of companies.

In certain circumstances the client may wish to assign to another party both his rights and his obligations, the latter including his obligation to pay. Clauses can be included in the contract allowing the free assignment by the client of its rights and obligations under the contract without the consent of the facilities management contractor being required.

Such clauses would need to recite the facilities management contractor's consent to any such assignment. The facilities management contractor, however, would almost certainly want to be able to refuse to agree to such an assignment of the obligation to pay in case they were unhappy with the financial covenant of the new client.



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11. TUPE and transfer activities

The original Transfer of Undertakings (Protection of Employment) Regulations (TUPE) have been part of the landscape of UK employment law since the early 1980s when they were introduced to implement the EC Acquired Rights Directive 77/187/EEC). TUPE has now been updated dramatically. The reason for the majority of the latest changes is European legislation, a revised Acquired Rights Directive (2001/23/EC), as well as attempts by the Government to codify judicial decisions and add some much needed clarity. The new TUPE regulations, [TUPE 2006](#), were long overdue but finally became law on 6 April 2006.

The main principles of the Regulations have not changed. The basic aim of the legislation is to protect employees when their employer changes from underneath them. The 'automatic transfer principle' means that their contracts of employment, rights and liabilities, transfer to the new employer. TUPE is triggered when there is a relevant transfer of a business entity from one employer to another. This might be the sale of a business as a going concern, or it might arise when service contract is awarded or re-allocated. TUPE does not apply in the context of share sales as the employer (the company) does not change. This is still the case under the new Regulations.

When does TUPE apply – service provision changes

Former position

One of the main difficulties with the 1981 TUPE Regulations was determining whether they applied in any given situation (that is, whether there was a 'relevant transfer'). If a business was bought and sold as a going concern it was usually clear enough that there was a relevant transfer. However, much litigation centred around whether a change of service provider (i.e. outsourcing arrangements) would trigger a TUPE transfer, particularly when there was a changeover of contractors. New TUPE attempts to resolve this uncertainty.

New TUPE

Under the new Regulations there are two separate definitions of a relevant transfer. These overlap and are not mutually exclusive. The first largely reflects the previous definition and is referred to as a 'classic' or 'business' transfer. This means that new TUPE applies where there is:

"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".

The second, new, definition means that contracting-out, re-tendering, second generation contracting-out and contracting-in of services (known as 'service provision changes') will now almost always be relevant transfers and the incoming service provider will inherit the employees of the outgoing service provider. This definition of TUPE is most likely to affect facilities managers. TUPE 2006 states that a service provision change will occur where:

- activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor') – contracting out;
- activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ('a subsequent contractor') on the client's behalf – re-tendering or second generation contracting out; or
- activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf – contracting-in.



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Where TUPE applies to a service provision change, the transferor will be the person who provided the service or carried out the activities prior to the change, and the transferee is the person who carries out the service or activities after the service provision change.

In order for new TUPE to apply to a service provision change certain conditions must be satisfied.

There must be an organised grouping of employees situated in Great Britain immediately before the transfer

DTI guidance on TUPE 2006 uses the example of a courier company where collections and deliveries are carried out each day by different couriers on an ad hoc basis, rather than by one team on a permanent basis. There would be no transfer if the client appointed another company to do the couriership because there was no organised group of employees providing the service in the first place.

The principal purpose of the organised group must be carrying out the relevant activities for the client

This 'principal purpose' test may prevent a service provision transfer occurring where employees work for a number of different clients for a material amount of their time. DTI guidance suggests that this means 'essentially dedicated', but consider what the principal purpose is of a group of employees who spend 70% of their time doing ten different functions, but 30% of their time on one particular contract. It is clear that there is no requirement that a group of employees should work exclusively for one employer. However, the key, and unresolved question, is exactly how much time the organised group (or individual) should spend dedicated to a particular client in order for that client to be its 'principal purpose'.

The client must intend that the activities will continue to be carried out after the transfer other than in connection with a single specific event or task of short-term duration

The DTI guidance gives the example of a client engaging a contractor to organise a single conference. Even though the contractor has

established an organised grouping of staff – e.g. a 'project team' – to carry out activities involved in fulfilling that task, there will be no service provision change under TUPE if the client used a different contractor for a subsequent conference and the members of the first project team would not be required to transfer to the second contractor.

The activities must not be mainly, or wholly, the supply of goods. The DTI guidance gives the example of a company that decides, rather than ordering food for the canteen itself, to appoint a contractor to do so. This alone would not amount to relevant transfer. In contrast, changing the contractor that runs the staff canteen would be a relevant service provision change.

To whom does TUPE apply?

TUPE applies to employees of the relevant undertaking, but not to self-employed contractors or partners of a firm:

- the employees must be employed by the transferor of the business (although using devices to get round TUPE such as employing all staff through service companies will fail); and
- they must be employed immediately before the transfer takes place (although the category of transferring employees will also include any employees who are dismissed before the transfer takes place for a reason connected to the transfer); and
- they must be employed to work wholly or mainly in the business or activity being transferred (this is a question of fact for the Employment Tribunal to decide).

Employees who formally 'object' under TUPE will not transfer.

This gives the transferor limited scope to control the identity of employees to whom TUPE applies, for example by redeploying them elsewhere within its organisation before the transfer takes place, or by asking them to object to the transfer at the same time as offering them another job.



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Effect of TUPE – what transfers?

In brief, when TUPE applies the transferring employees will automatically transfer to the incoming contractor on the same terms and conditions of employment (except for pension rights). Their continuity of employment will be preserved.

When TUPE applies, the following transfer with the employee:

- The entirety of the contract of employment and any employment rights / liabilities which arise in connection with it (save for most pension rights).
- Collective agreements in respect of such employees are also transferred.
- Statutory employment rights (sex, race, disability, age, sexual orientation and religious discrimination, redundancy rights, unfair dismissal etc.).
- Personal injury liability.

Criminal liability does not transfer.

Dismissal (before or after transfer) for a reason connected with the transfer is automatically unfair unless it is for an 'economic, technical or organisational reason entailing changes in the workforce' (ETO reason). Employees with one year's continuous service will be able to claim unfair dismissal and seek reinstatement, re-engagement and/or compensation.

Generally speaking, changes to terms and conditions that are detrimental to the employee cannot be made (and are void) where the reason for the change is connected with a transfer. A transferring employee is entitled to resign and claim that they have been dismissed if the transfer involves or would involve a substantial change in working conditions to the employee's detriment.

However, changes to terms and conditions unconnected with the transfer or made for a reason which, although connected with the transfer nevertheless amounts to an ETO reason, can be made.

Information and consultation under TUPE

TUPE 1981 required the transferor to provide information and, where measures were envisaged in relation to affected employees, consult with appropriate representatives about a proposed transfer. However, there was conflicting case law on the question of who should bear the liability where the duty to inform and consult is breached.

TUPE 2006 aims to resolve this conflict by giving both the transferor and the transferee information and consultation obligations. Furthermore, where the transferor is found to be at fault, the transferor and transferee will be jointly and severally liable for any compensation payable. Liability for failure to inform and consult is up to 13 weeks' pay for each affected employee.

Affected employees

Not only transferring employees are affected by a transfer. Remaining employees of the transferor, and the existing employees of the transferee might also be affected, in which case they too are owed the duty of information and consultation.

The obligation to inform

The requirement to provide information will always apply whenever there is a TUPE transfer. An employer of employees affected by the transfer of an undertaking, whether it is the transferor or the transferee, must inform all appropriate representatives of any affected employees of the following:

- that a relevant transfer is to take place, when it is to take place and why;
- the legal, economic and social implications of the transfer for affected employees. This means that the employer should give information about the impact of the transfer upon the employees' contractual and statutory rights and other matters such as pay and prospects, pensions and any change in their place of work;
- whether or not the employer envisages taking any 'measures'



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or actions (for example re-organisation) which will affect those employees and if so what action is planned. If no measures are to be taken, then the employees must be informed of this;

- if the employer is the transferor, he must state whether or not the transferee envisages that it will take any action in relation to those employees who are to be transferred and if so what action or measures are planned. Again if no such measures are to be taken, the employees must be informed of this fact.

Interestingly the duty is only said to apply to an 'employer' of 'affected employees'. The transferee does not become the employer of the transferring employees until the transfer has taken effect. Therefore, at first blush it would seem that the transferee has no information obligations until the date of the transfer.

When and how must the information be given?

The above information must be provided long enough before the transfer to enable consultation to take place between the employer and the employee's representatives. No more detail is given in the Regulations and, as yet, no case law has emerged to assist.

The relevant information must be delivered to the employee representatives or posted to an address notified by the employee representatives to the employer. In the case of representatives of a trade union the information must be sent to its head or main office. The information should be in documentary form.

The obligation to consult

If the employer of affected employees (whether or not they are transferring employees) envisages that it will take measures in relation to any of the affected employees, not only must it inform the representatives of the proposed measures, but it must also enter into consultation with the employee representatives with a view to seeking their agreement to the measures to be taken, although there is no requirement that agreement must actually be reached. It follows that if no measures are envisaged then the obligation to consult does not arise.

Employee liability information

The 1981 TUPE Regulations did not require a transferor to provide a transferee with any details whatsoever about the transferring workforce. However in standard business sales details of the transferring employees were, and still are, generally provided as part of the due diligence process, backed up by warranties and indemnities in the sale agreement which enable the transferee to sue on those contractual provisions if undisclosed liabilities materialise post-transfer.

New obligation to provide information

Regulation 11 of TUPE 2006 places a new requirement on the transferor to provide 'employee liability information' to the transferee in advance of a transfer. In relation to each employee assigned to the transferring undertaking employee liability information means:

- the identity and age of the employee;
- the information that would be contained in a section 1 statement of particulars of employment under the Employment Rights Act 1996;
- disciplinary and grievance proceedings taken by or against an employee within the previous two years in circumstances where the statutory dispute resolution procedures apply;
- legal action which has been brought by an employee within the past two years or which the transferor has reasonable grounds to believe that the employee might bring; and
- details of collective agreements which will have effect in relation to the employee after the transfer.

This is wider than simply providing information about employees who will actually transfer. Transferees will also need to know about employees whose claims they may be liable for; for example, employees dismissed before the transfer, because of the transfer or for a reason connected to the transfer.



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How and when to notify

The transferor must supply the information in writing or make it available in a readily accessible form. For example, it could be contained on information disks or copies of contracts and/or other documents (or even a summary of them) could be provided. Arguably the information could be provided verbally, if this can be said to be a readily accessible form, but in any event the transferor would be wise to follow up any verbal disclosures in writing so that there is a record of when and what has been disclosed.

The information must be accurate as of a date specified by the transferor, but that date can be no more than 14 days before the information is supplied to the transferee. It is unlikely, however, that the obligation to provide this information will be triggered by a bidding process, unless there is any obligation to do so in the contract with the client (in which case the information should be anonymous in order to comply with the Data Protection Act 1998). The obligation probably arises once the transferee is identified.

The information must be provided no later than 14 days before the transfer unless special circumstances arise that make it not reasonably practicable to comply with this deadline. As is often the case, the Employment Tribunals have interpreted 'special circumstances' very narrowly. There is then a further duty to keep the transferee updated of any changes to the employee liability information and such updates are to be provided in writing.

Contractors are not always in control of whether they continue to provide services or not, or whether there will be a TUPE transfer, but they will still be required to provide the employee liability information, sometimes at short notice. It is therefore advisable to keep up-to-date records, both by maintaining employees' personal files, and also by maintaining records of claims and potential claims, which of course will require thought as to whether one could reasonably consider whether particular circumstances could give rise to a claim.

Failure to notify

If the transferor fails to provide the necessary information, the transferee can bring a claim in the Employment Tribunal within three months from the date of the transfer. In assessing the compensation the Tribunal will have regard to:

- the loss sustained by the transferee; and
- any relevant contract between the parties relating to the transfer.

TUPE 2006 provides for what it calls a 'minimum' award of £500 per employee "in respect of whom the transferor has failed to comply" but also allows the Tribunal a discretion to award a lower (or higher) amount if it considers it just and equitable to do so.

Unresolved issues

The requirement to provide Employee Liability Information applies even where one contractor loses a contract to another provider. The downside for transferors is that they may be unhappy about having to provide this information to a competitor. They will not be able to hide behind the Data Protection Act to avoid disclosure because one of the exceptions in that Act is where there is a legal duty to disclose, which TUPE clearly imposes. Disclosure of additional information, however, could be a breach of the DPA.

The downside for transferees, particularly in the context of a service provision change transfer, is that having this information just two weeks before the transfer may be too late for the transferee. Usually the tendering exercise will have been completed significantly in advance of two weeks before the transfer. This potential problem could perhaps be resolved by an agreement between the outgoing contractor and the client requiring early disclosure of this information (subject to compliance with the Data Protection Act).



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Regardless of any benefits that the new obligation to provide Employee Liability Information will bring to a transferee, in general it is unlikely to replace the old due diligence process.

Negotiating TUPE

Thought needs to be given as to what will happen on termination of the contract, and also as to whether any warranties or indemnities should be given by either side. Some common matters for negotiation are as follows (although it may not always be possible to secure agreement of the other side):

- The incoming contractor will want disclosure of employee information together with warranties that the information disclosed and the list of employees transferring is correct and that employment-related payments are up to date;
- The incoming contractor should seek indemnities in relation to:
 - (i) liabilities arising from the acts or omissions of the client or the previous facilities management contractor prior to the start of the new contract; and
 - (ii) any liabilities that arise in respect of employees not listed as transferring (e.g. if employees claim they should have transferred).
- The incoming contractor may seek warranties or indemnities in relation to any non-compliance by the client or the previous contractor in relation to TUPE consultation obligations;
- The client may seek an indemnity from the incoming contractor in relation to liabilities arising during the contract period;
- The client may seek to prohibit the incoming contractor from increasing total employment costs beyond a certain level, making material changes to employment terms and conditions, increasing the number of people working on the contract, or moving the best employees out of the business in the period just before the end of their contract;

- the client may seek to impose an obligation on the incoming contractor to provide certain information to the client and/or to the next contractor (subject to obligations of confidence and under the Data Protection Act 1998) about employees working on the contract at its expiry.



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At common law

It is important for the parties to include provisions in the contract allowing termination of the facilities management contractor's employment prior to the end of the term, should either or both parties require.

Without any termination provisions, each party would be bound to perform their obligations under the contract until the end of the term unless the other was in repudiatory breach of contract (that is was in breach of a fundamental term of the contract) and the innocent party elected to accept the repudiation and terminate the contract.

For insolvency or *force majeure*

Each party is likely to require the right to be able to terminate, should the other party become insolvent or unable to perform its obligations under the contract. In addition, each party is likely to require the right to terminate, should performance of their obligations under the contract be prevented by the occurrence of a *force majeure* event.

As there is no clear doctrine in English law of what constitutes *force majeure*, care should be taken in drafting *force majeure* contractual provisions to ensure that such provisions reflect the requirements of the parties. The parties may wish to limit the ambit of the *force majeure* clause so that it only excuses non-performance in instances of physical or legal impossibility. Alternatively, they may wish to include a wider clause which would excuse non-performance in instances of practical impossibility; for example, events that occur which are beyond the control of the party seeking to be excused performance, where such events could not have been prevented by the taking of reasonable steps to avoid or mitigate such events.

For breach

Each party is also likely to agree that the other may terminate should they be in breach of contract and should that breach either not be capable of remedy or not be remedied within a certain period. Such a provision would apply in relation to any non-performance of the services on the part of a facilities management contractor or in relation to any non-payment on the part of the client. The client may also want to tie the termination provisions in with any performance point system included in the contract.

For example, a mechanism could be written into the contract allowing the client to terminate, should the facilities management contractor accrue more than a certain number of performance points in any one month.

For convenience

Parties to facilities management contracts often recognise that, in certain circumstances, the relationship between the parties can break down and as such, provisions are often included allowing each party to terminate on notice even where there has been no breach of contract by the other party.

Clients will also want this right if there is the possibility that the site where the services are to be provided is to be sold or closed. Careful consideration needs to be given to the length of the notice period to ensure that it is long enough to allow the facilities management contractor to reassign staff to other contracts and to give plenty of time for the client to find an alternative facilities management contractor.

Consequences of termination

Clear provisions must be included in the contract dealing with payments to be made on termination. The facilities management



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contractor should be entitled to payment of all sums accrued due at the date of termination and the parties may also agree that he be entitled to payment of additional amounts to reflect the cost of reassigning staff and to reflect any lost profit if the termination has been made prior to the end of the term and without the facilities management contractor being in breach of contract.

The client will want to include clear provisions in the contract requiring the contractor to cooperate with a replacement facilities management contractor and to hand over to such facilities management contractor all relevant information. Provisions will also need to be included to deal with the effect of TUPE on termination (see Chapter 11 – [TUPE and transfer activities](#)).



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Strictly speaking, there is no need to include either a clause stating the governing law of a contract or how disputes are to be resolved. To establish which country had legal jurisdiction in relation to any particular contract the courts would consider the nationalities of the client and the facilities management contractor and look at where the services were to be performed. If at least one of the parties to the contract was English and the services were to be provided in England, English law would usually apply.

If the contract is silent on dispute resolution procedures, subject to whether or not the parties have a right to adjudication under the Housing, Grants, Construction and Regeneration Act 1996, any disputes would be referred to the courts.

Informal dispute resolution procedures

Interest in alternative dispute resolution has been growing steadily over the last decade. A significant push came from Lord Woolf's 1986 report, *Access to Justice*, which identified a need for fair, speedy and proportionate resolution of disputes. If a dispute arises, it is in the interest of both the facilities management contractor and client to ensure that the issues are managed positively and at the right level in order to encourage early and effective settlement. Unnecessary delays and inefficiency can lead to escalation of costs and further damage the relationship between the parties.

These principles lie at the heart of the Civil Procedure Rules, which came into force in April 1999. The Civil Procedure Rules emphasise and encourage settlement of disputes before any court proceedings are issued. Since their introduction there has been pressure to make full use of Alternative Dispute Resolution (ADR) procedures to encourage the settlement of dispute before they reach the courts. A new High Court practice direction now means that courts must also take into account (when considering the issue of costs) whether the parties have given proper consideration to the use of ADR.

The courts now take the view that litigation should be a last resort – and may require parties to a dispute to provide evidence that alternative means of resolution were considered before court action commenced.

Penalties for failing to use ADR – *P4 Ltd v. Unite Integrated Solutions plc* (2007) EWHC (TCC) 2924

This case has been described as the strongest signal yet from the courts that refusing to mediate will be penalised. The claimant was awarded costs prior to the date of the defendant's offer to settle the dispute on the ground that the defendant had unreasonably declined an invitation to mediate or have a meeting in accordance with the Construction and Engineering Pre-action Protocol.

If a dispute between parties cannot be resolved amicably at the level within each organisation where the dispute arises, provisions may be included in the contract requiring (subject to any right to refer the dispute to adjudication under the Housing, Grants, Construction and Regeneration Act 1996) the dispute to be referred to senior members of each organisation in the hope that those unconnected with the detail of the dispute may be able to reach agreement.

If the dispute is still not resolved, provisions can be included to refer the dispute to mediation or some other form of alternative dispute resolution.

Mediation

The aim of mediation is to enable both the facilities management contractor and its client to reach a mutually acceptable agreement in relation to the dispute.



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Mediation is simply negotiation assisted by a completely neutral third party. It is sometimes also known as 'structured negotiation'. This form of dispute resolution has all the advantages of conventional negotiation but the involvement of the third party can help to improve the effectiveness of any negotiations. It can be instigated by the parties themselves, or sometimes it is entered into by order of a court.

Mediation is considered the preferred dispute resolution route in disputes where conventional negotiation has failed for some reason or is not making good progress. It is used extensively in commercial disputes – over 75% of commercial mediations result in a settlement either at the time of the mediation or within a short time thereafter.

The role of a mediator is to facilitate negotiations. He will not express views on any party's position, although he may question the parties on their positions. The mediator will try to get the parties to focus on looking to the future rather than analysing past events and trying to establish their legal rights. Mediation is a flexible process but the format tends to be reasonably similar in most cases.

The parties to the disputes are free to settle or not as they choose. Any party may leave the mediation if they so wish. Mediation can happen at any stage of a dispute and take anything from one hour to several days, although usually it is completed after one day.

A mediation held over the course of a day will typically be structured as follows:

1. Initially, there will be a joint meeting for the facilities management contractor and client where both set out their position;
2. A series of private confidential meetings between the mediator and each party will be held;
3. Joint meetings are held between some or all members of each of the teams;
4. Settlement is reached, the terms recorded and signed.

There are a number of organisations, such as the Centre for Effective Dispute Resolution (CEDR) and the ADR Group, which can nominate a mediator from their panels of trained mediators. Whilst Mediators can be trained solicitors or barristers they are often from a non-legal background with experience of the facilities management industry.

Facilities management contractors and clients can also approach a potential mediator directly. Who conducts the mediation is a decision for the parties involved, and a facilities management contractor or client may wish to consider the use of a mediator with a background in an appropriate area of business, or simply choose someone who has a good reputation for helping parties reach a settlement.

After the mediator has been appointed the parties will enter into a contract with the mediator and each other, which defines the rights, responsibilities and obligations of each to the other, including the procedure to be followed, confidentiality and fees.

Possible limitations of mediation

Unless recorded in a binding document, agreements made at mediation are non-binding. Whilst this can often discourage facilities management contractors and clients from taking advantage of the mediation process the fact that any agreement can be binding if the parties expressly agree that it should be, can facilitate commencement of discussions between the parties, especially in circumstances where communication between them has completely broken down.

Mediation may not be suitable in all circumstances. In *Halsey v. Milton Keynes General NHS Trust* (2004) 1 WLR 3002, for example, allegations of fraud, cases where a legal precedent should be set, and cases where injunctions are appropriate, were identified as being possibly unsuitable for mediation.

Cases where a public hearing is felt to be necessary are also, by their nature, unlikely to be suitable for mediation.



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Arbitration

Arbitration is governed by statute, principally the Arbitration Act 1996, and is a process for resolving disputes in which both sides agree to be bound by the decision of a third party, the arbitrator.

Facilities management contracts may include a clause where the parties involved agree to refer any disputes to arbitration, or they can make this decision later in the lifetime of the contract. Any agreement to arbitrate should be in writing.

It is advisable for facilities management contractors to ensure that arbitration clauses are as simple as possible. For example, it is best to avoid specifying exactly how any future arbitration is to be conducted. An exception to this rule is if multiple contracts are involved, or multiple parties. It is advisable to provide for a single arbitration for disputes arising from all contracts rather than be forced to conduct multiple arbitrations all dealing with a single dispute.

It is possible, as long as all parties agree, to amend an arbitration agreement at any stage so that it serves the needs of both client and facilities management contractor better. The Arbitration Act gives the parties the discretion to decide between themselves how their dispute is best to be resolved, but provides a fallback position if agreement cannot be reached. Like litigation and adjudication, arbitration is an adversarial process, and the grounds for appeal are limited.

Arbitration has the advantage (when compared to litigation in the courts) of being a private dispute resolution procedure and as such the decision of an arbitrator will not be made public. In addition, as the parties are free to select their arbitrator they can select someone to arbitrate the dispute who they believe has extensive specialist industry knowledge and who may have a greater understanding of the facilities management industry than a judge.

Where disputes are to be referred to arbitration and no arbitrator can be agreed, contracts often provide for the arbitrator to be

selected by any arbitrator nominating body such as the Chartered Institute of Arbitrators. In such circumstances the parties will have no control over the selection of the arbitrator and they may find that the arbitrator selected is of poor quality and that this is reflected in the decision made. In addition, as many arbitrators are not legally qualified, disputes may subsequently arise as to whether or not the arbitrator has erred in law in reaching this decision.

Where such allegations are made, the courts may become involved to determine whether or not that is the case and disputes can then become very protracted. Problems such as these have led many commentators to take the view that arbitration can be a more time-consuming and, due to increased length of proceedings, expensive process than litigation in the courts. In addition, an arbitrator will not have the same powers as a High Court judge to join third parties into any proceedings and as such arbitration will not be suitable where there is the possibility of multi-party actions.

Adjudication

Adjudication is another form of ADR. It is a specialised dispute resolution process that originates from the Housing Grants, Construction and Regeneration Act 1996, where it provides a speedy and flexible process, providing a final decision on disputes that usually arise in the context of an ongoing contractual relationship, often involving a particular project.

Litigation

The Woolf reforms have given new powers to judges to encourage the quicker resolution of disputes by litigation through the courts. This in turn should have a bearing on legal costs. The general rule is that the losing party pays the costs of the successful party although not all of the successful party's costs will be recoverable.



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Without Prejudice

The Court of Appeal has recently confirmed that early negotiations prior to the commencement of litigation can be protected by 'without prejudice' privilege.

In *Framlington Group Ltd and Axa Framlington Group Ltd v. Ian Barnetson* (2007) EWCA Civ 502 negotiations took place between the parties in relation to share options due to an employee, Barnetson, under an employment contract five months before litigation commenced.

Framlington attempted to rely on the previous negotiations. The court initially held that the negotiations were not without prejudice because they took place before there was any threat of litigation.

There was no reliable evidence suggesting there was any reference to the term "without prejudice" at the meeting. Even if there had been, the wider issues between the parties meant it could not have been determinative either way as to the discussions that took place.

The judge dismissed Framlington's application, holding that the relevant passages were not 'without prejudice', because the exchanges to which they referred occurred before the commencement of litigation or any basis for potential litigation, and, therefore, at a time when there was no dispute. In his view the exchanges were simply an attempt to agree a variation of Mr Barnetson's employment contract in order to reach a final settlement.

The Court of Appeal overturned this decision and held that they were 'without prejudice' communications and were privileged.

The appeal judge confirmed that any negotiations genuinely intended to resolve a dispute and avoid litigation should not be stifled simply because a party is concerned they could be used against him at a later stage. This case confirms that the 'without prejudice' rule can apply at an early stage in a dispute, and demonstrates the Court's general approach to encouraging parties to resolve the disputes rather than to litigate.

The successful party is still likely to have considerable legal costs if a dispute does not settle before trial.

If a dispute between a facilities management contractor and a client is referred to the courts, the decision of the court will be available to the public. This may be significant if the dispute touches on any issues that are commercially sensitive to either party.

Before court proceedings start, it may be necessary to follow a 'pre-action protocol', outlining the steps that the parties must take.

This is to encourage active management of cases by the courts and the early exchange of information and documents in order to bring about a settlement of the dispute before the case reaches court. It is vitally important that each of the issues are identified and

a viable case is established before considering commencing legal proceedings.

One of the advantages of litigation as opposed to arbitration is the power that the courts have to join related disputes which are pursued by or against third parties and which may have a significant bearing on the issues in dispute between the client and the facilities management contractor.



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Online dispute resolution?

It is predicted that eventually the internet will become a popular medium for dispute resolution. In the United States, virtual courtroom initiatives have already been launched.

Bodies such as the European Union and the International Chamber of Commerce are also looking at the potential of online services with a view to more efficient dispute resolution.



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14. Housing Grants, Construction and Regeneration Act 1996

Part Two of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act) ([see Appendix 2](#)) was introduced to address two of the key ills of the construction industry – payment abuse and frequent and costly disputes. Whilst the Construction Act was drafted with the construction industry in mind, its ambit is so wide that it will have a significant impact on certain facilities management contracts.

Although the Construction Act appeared on the statute books in July 1996, it could not come into force until the supporting legislation, most importantly the Scheme for Construction Contracts ([see Appendix 3](#)), was in place. The Scheme sets out payment and adjudication provisions that will be applied to 'construction contracts' that fail to meet the requirements of the Construction Act.

The Scheme came into force on 1 May 1998 and all 'construction contracts' entered into after that date are subject to the Construction Act.

What is a 'construction contract' under the Construction Act?

The Construction Act and its supporting legislation is 'ring fenced' to apply specifically to 'construction contracts'. The definition of a 'construction contract' is, however, very wide and covers any agreement for the carrying out of 'construction operations', or the arranging for the carrying out of 'construction operations' by others, or the provision of own labour or labour of others for the carrying out of 'construction operations'.

'Construction operations' is also widely defined to include not only construction but also repair, maintenance and installation work. It also includes external and internal cleaning of building and structures insofar as the same are carried out during the course of construction, alteration, repair, extension or restoration and painting and decorating.

'Structures' includes roads, power lines, runways, docks, railways and sewers. Certain specific operations are not 'construction operations' and these include certain works connected with nuclear processing, power generation, water, chemicals, pharmaceuticals, oil, gas, steel, food and drink. In addition, supply-only contracts for material, plant and machinery are also excluded although supply and install contracts are not.

Following extensive lobbying, the Department of the Environment acknowledged that the ambit of the Construction Act was too wide. The result was the Construction Contracts Exclusion Order ([see Appendix 4](#)) which also came into force on 1 May 1998. This places certain property, finance and highways agreements outside the Construction Act, even if such agreements relate to 'construction operations'.

Significantly, from a facilities management perspective, Private Finance Initiative (PFI) / Public Private Partnership (PPP) agreements entered into by NHS trusts pursuant to Section 1 of the National Health Service (Private Finance) Act 1997 are excluded, together with contracts entered into pursuant to a PPP or the Private Finance Initiative.

Broadly, for a PPP / PFI contract to escape the Construction Act, the contract must contain a statement that it has been entered into under a PPP or the PFI and the payment due under the contract needs to be determined at least in part by reference to usual PFI / PPP criteria. In addition, one of the parties to the contract must be a public authority, nationalised industry or a voluntary school.

Application of the Construction Act to facilities management contracts

In many circumstances, it will not be clear whether a facilities management contract will be subject to the Construction Act. For example, in relation to PPP / PFI projects, while the concession



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agreement between the public authority and the concessionaire may, due to the Exclusion Order, be outside the Construction Act, any facilities management contracts entered into by the concessionaire could still be subject to it.

More specifically, a simple facilities management contract dealing with the provision of cleaning and catering services would not be subject to the Construction Act whereas a contract that covered the provision of cleaning services provided in conjunction with building maintenance services would be covered by the Construction Act.

Where a facilities management contract covers a number of services, only some of which are subject to the Construction Act, then it will only apply to those services that fall under it. Unless specific drafting is included in the contract to deal with the provisions of the Construction Act, to the extent that the provisions required by the Construction Act are not included, the provisions of the Scheme for Construction Contracts will apply.

This may lead to problems (see box, right). For example, if a facilities management contract covers the provision of maintenance services and catering services, and a dispute arose between the parties, insofar as the dispute related to the provision of the maintenance services, this would need to be referred to adjudication under the Scheme, whereas insofar as it related to the provision of the catering services, the dispute would need to be dealt with in accordance with the dispute resolution procedure set out in the contract.

This could obviously lead to inconsistent decisions being made. Under the same contract, if the client wished to make a deduction for poor performance from an amount due to the facilities manager, they would need to comply with the provisions of the Construction Act dealing with set-off in relation to deductions to be made against sums due in respect of the maintenance services but would be free to make a set-off under the contract or in accordance with common law or equity in relation to deductions to be made against sums due in respect of the catering services.

Does the Construction Act apply?

In *Nottingham Community Housing Association Limited v. Powerminster Limited* (2000) BLR 309, a number of interesting questions regarding hybrid facilities management contracts (where some of the services fall within the confines of the Construction Act and some do not) were addressed.

Nottingham Community Housing Association Limited (Nottingham) contracted with Powerminster Limited (Powerminster) for the carrying out of annual services and safety checks on gas appliances, including responsive repair and breakdown services, in Nottingham's properties.

A dispute arose over unpaid invoices and Powerminster gave notice of adjudication

under the Construction Act. Nottingham argued that there was not a construction contract within the meaning defined in the Construction Act because the repair and maintenance of gas appliances did not amount to 'construction operations', and as such the dispute was not within the adjudicator's jurisdiction.

The court thought otherwise. It would appear, however, that some of the disputed invoices related to work carried out in connection with annual services and safety checks, activities that were clearly not 'construction operations' and which were therefore outside the Act. Nottingham did not argue that such services were outside the Act. If they had, it is possible that the adjudicator would have agreed that he had no jurisdiction in relation to amounts due in respect of such services and as such Powerminster could not have brought adjudication proceedings against Nottingham in respect of the same.



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The Scheme for Construction Contracts Adjudication

The Act and the adjudication provisions set out in the Scheme are intended to allow the parties to a 'construction contract' to have access to a cheap and speedy dispute resolution procedure. If the contract itself does not specify the name of an adjudicator or a body who can nominate an adjudicator, the party referring the dispute must select an adjudicator nominating body that will select an adjudicator.

Once a written notice of adjudication is given, an adjudicator must be appointed within seven days. The adjudicator will be required to give his decision within 28 days, although this time period may be extended by agreement. To avoid inconsistent decisions an adjudicator may, with the consent of all relevant parties, adjudicate related disputes under different contracts. Adjudicators must act in accordance with the law and in accordance with the terms of the relevant contract.

The adjudicator is entitled to determine his own procedure for the adjudication and parties to an adjudication are entitled to be represented by their lawyers.

An adjudicator is required to decide the matters in dispute. His powers include the ability to open up any certificates issued under the contract unless wording is included in the contract stating that the decision or certificate was 'final and conclusive'. If requested, an adjudicator is obliged to provide reasons for his decision. The adjudicator's decision will be binding until finally determined by legal proceedings or by arbitration or agreement. Adjudicators' decisions are enforceable in the courts by summary judgement.

The provisions excluding both PFI contracts and residential occupiers are currently under review.

Payment

Where a contract does not provide for periodic payments then the Scheme will provide for a payment every 28 days. Where the contract does not contain an adequate mechanism for calculating payments, the Scheme will impose a mechanism.

Interim payments under the Scheme become 'due' on the expiry of seven days following the end of the relevant period. The 'final date for payment' of amounts due is 17 days from the date when a payment becomes due. The party making a payment must give notice within five days of the 'due' date of the amount that he proposes to pay.

The Act itself prevents any set-off or withholding of payment due unless a notice of intention to withhold the payment is given not later than a date not later than the final date for payment to be set out in the contract. If no date is set out in the contract, the Scheme specifies a date of not later than seven days before the final date for payment.

The set-off provisions are of great importance in relation to facilities management contracts where payment is often linked to performance. Provisions in a facilities management contract that allow the employer to deduct payment from the facilities management contractor by abatement will need to be modified to reflect the provisions of the Act.

The Act gives a party who is not paid any amount due to him on the 'final date for payment' the right to suspend work on seven days' notice. If similar suspension provisions are not included in the facilities management contract, the Scheme will imply such a provision.



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Continuing the example, if a client failed to follow procedures set out in the Construction Act in relation to set-off in respect of the maintenance services, then the facilities manager could suspend their performance of those services but, unless the underlying contract gave them such a right in general, he could not suspend the provision of the catering services.

Performance deductions and the Construction Act

There has also been some confusion as to whether statutory requirements for set-off notices as set out in the Construction Act apply to abatements as might be made as performance deductions under facilities management contracts. However, in *Rupert Morgan Building Services (LLC) v. David Jarvis* (2004) BLR 18 CA, the Court of Appeal confirmed that defences for non-payment, whether characterised as set-offs or abatements, could not succeed without a withholding notice.



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15. Private Finance Initiative / Public Private Partnership facilities management contracts

Private Finance Initiative (PFI) / Public Private Partnership (PPP) schemes are alternatives to traditional approaches to procurement and aim to involve the private sector in undertaking public sector projects through the provision of asset-backed services. The role of the public sector is changing to a provider of services and not a procurer of assets or infrastructure.

Focus

The theory behind this change in policy promulgation is that it allows the public sector to concentrate on what are considered to be its core functions – regulation and overseeing – by allowing the private sector to perform the asset-backed service elements.

Typically the public sector authority will put out to tender a project (see Chapter 18 – [EU public procurement regime](#)) to purchase a service rather than a capital asset from a private sector consortium. The successful consortium will then set up a 'special purpose vehicle' (SPV) to construct the infrastructure necessary to provide a public sector service – for example schools, hospitals, fire stations – in line with a detailed output specification (see '[Input](#)' and '[Output](#)' [specifications](#)).

The project contract may be to design, build, finance and operate the facility (DBFO Contract) and this is where the facilities management element becomes apparent. The scheme is intended to enable the public sector authority to utilise the more innovative business and management skills and financial resources of the private sector whilst transferring the risk and responsibility involved in the provision of asset and infrastructure and related services provision.

The facilities management contract that the facilities management contractor enters into with the SPV is invariably a complex document. It will contain a wide range of obligations that will typically mirror the wording in the project contract. It will be drafted to ensure that the relevant parts of the output specification have been incorporated into

the facilities management contract and will seek to impose upon the facilities management contractor the obligations that are imposed upon the SPV in the concession contract.

These obligations may be very extensive indeed and the facilities management contractor may be expected to bear liabilities far in excess of those he would normally contemplate. For example, facilities management contractors may be expected to accept responsibility, by way of deductions from their payment, for non-performance of services, measured against precise outcomes. Similarly, where the client under project contract has only limited scope for non-performance being excused, it is likely that the SPV will seek to ensure that more stringent provisions will be included in the facilities management contract.

Characteristics of a PFI / PPP project

- SPV
- Output specification
- Long-term contract (25–30 years)
- Defined phases (design and construction phase followed by operational phase)
- Unitary payments regime
- Availability and performance regime
- Optimal risk transfer

The project contract will be a very highly negotiated and detailed document and the obligations imposed upon the facilities management contractor may include both hard services, such as repair or maintenance of the infrastructure, and soft services, such as catering and cleaning. It could also include obligations to take responsibility for lifecycle maintenance or asset replacement. Typically the SPV will take the risk in lifecycle maintenance and asset replacement and pass on such risks to its hard FM services contractor.



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The SPV will also establish a reserve for funding lifecycle maintenance or asset replacement while expecting the hard FM services contractor to take the risk out of its adequacy. Such an arrangement can lead to additional rewards for the facilities management contractor if greater than the planned levels of efficiency are achieved.

Risk transfer

The emphasis in any PFI / PPP is optimal risk transfer. The pure theory of optimal risk transfer is to achieve the most sensible and efficient allocation of the risks to the party best able to manage and control the risk. However, it is generally in the interests of the public sector authority to hand over as much risk as possible to the private sector.

A project company will increase its bid prices if inappropriate risks are dumped on it and it will seek to step down such risks to the facilities management contractor. In particular, risks associated with the post-construction elements of the project will be transferred to the facilities management contractor.

Availability and performance regime

The public sector authority's main control mechanism to ensure that the specification is adhered to and the general public's expectations are met is in the availability and performance regime. This will take the form of a mechanism allowing payment deductions in the event that the services are not performed in accordance with the output specification.

The intention is to provide a constant incentive for the SPV and (due to the step down of such provisions into the facilities management contract) the facilities management contractor to deliver an efficient and effective service. The facilities management contract terms will ensure that payment deductions will be abated from payments due to

the facilities management contractor or otherwise recoverable from the facilities management contractor even where the reason for a particular deduction may not be clear and the facilities management contractor contends that he should not have to bear the cost of the deduction as it was not due to his default.

Interface agreements

During the course of a PFI / PPP project it is inevitable that tensions between construction contractors and facilities management contractors will arise over various issues, such as disputes about liability for defects occurring during the operational phase, delay of availability and the presence of facilities management contractors on site prior to the availability period.

The situation is often compounded by the constant burden of payment deductions incurred by the facilities management contractor for a lack of availability of the facility, non-payment if services are not performed and ultimately the threat of replacement of the contractors.

These tensions are generally unavoidable but may be eased by entering into an interface agreement. This is a direct contract between the SPV, the construction contractor and the facilities management contractor, which establishes an agreed framework for cooperation between the parties and, amongst other provisions, will regulate access and interaction between construction and facilities management works on site, include mutual warranties in respect of compliance issues, provide mechanisms for dealing with disputes amongst the parties and deal with the consequences of termination of the project agreement or replacement of either the facilities management contractor or construction contractor.

Standard terms

In July 1999 the Private Finance Treasury Taskforce (now Partnership UK) produced a volume of standard terms for use in PFI



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contracts – Standardisation of PFI Contracts (SoPC). The intention was to encourage the standardisation of contractual terms for PFI transactions to save parties needing to draft bespoke contracts every time a PFI transaction is undertaken.

Second and third editions have followed in September 2002 and April 2004, and the [fourth edition](#) takes into account new legislation and developments in the PFI market, incorporates the changes and derogations contained in the 2005 Addendum and provides new guidance.

The three main objectives of the guidance remain unchanged. Firstly, to promote a common understanding of the main risks encountered in a standard PFI project; secondly, to allow consistency of approach and pricing across a range of similar projects; and thirdly to reduce the time and cost of negotiation by enabling all parties concerned to agree a range of areas that can follow a standard approach without extended negotiations.

Whilst, generally speaking, the standard terms are intended to be a guide and are not, at present, compulsory, it is considered that when analysing a PFI transaction the National Audit Office will take note of whether or not the parties have followed the standard terms.

Standard clauses and commentary are provided that deal with many issues pertinent to PFI facilities management contracts, including service requirements and the issue of unavailability, and the use of the performance points systems to assess performance and adjust payments accordingly.

Management of the public sector's front line PFI operational capability is set to improve as a result of the introduction of more focused training for public sector clients and contract management teams.

With over 500 PFI projects in operation in 2007, the Government is keen to build on the contract management skills of the public sector by providing formalised training. The training programme is endorsed

by HM Treasury and follows on from a review of operational PFI / PPP projects in 2006.

Sector-specific standard form documents have also been developed in some sectors including:

- NHS hospital PFI standard form project agreement, developed and overseen by the private finance unit of the Department of Health;
- Local Improvement Finance Trust (LIFT) standard form documents, developed and overseen by Partnerships for Health (PfH); and
- Building Schools for the Future (BSF) standard form documents, developed and overseen by Partnerships for Schools (Pfs).

Disputes arising from PFI / PPP facilities management contracts

There is less room for a dispute to occur in a PFI project than during the course of a traditional facilities management contract. For example, disputes over the level of facilities management contractor final accounts are uncommon. This may be partly a result of provisions in construction contracts which restrict contractor delay compensation and time relief to what is obtained by its direct employer, the SPV.

Disputes can and do arise at the construction stage of a PFI project. Any discrepancy between the specification presented to the facilities management contractor and the SPV's project remit may create problems for an SPV.

After the construction stage, wear and tear will start to affect the buildings, facilities and equipment. The lack of availability of a particular facility can have financial consequences for the SPV responsible for its management.



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The SPV will in turn look to the facilities management contractor to resolve such issues, and again, this can lead to dispute.

There are different approaches to mitigating the effect of disputes. A number of mechanisms have been employed to deal with interface-type issues, from interface agreements to more informal approaches.

Other key areas for disagreement are benchmarking and market testing. The scope for large pricing impacts from these areas makes them a likely source of conflict. The availability of adjudication under building and facilities management subcontracts may also make negotiated settlement of disputes less likely. A decision can be obtained from an adjudicator within, generally, four to six weeks of the process commencing, a tempting option for subcontractors of the SPV.

PFI / PPP Disputes

The Dudley Hospitals PFI project led to a £34m dispute between the main contractor and mechanical and electrical subcontractor in *Emcor Drake & Scull v. Sir Robert McAlpine* (2005) 98 Con LR 1. The case reached the Court of Appeal on the issue of the scope of a letter of intent.

Another leading case, *Midland Expressway Ltd v. Carillion Construction* (No. 2) (2006) CILL 2317, was heard in the Technology and Construction Court and has created widespread interest and, indeed, concern, amongst those engaged in PFI projects.

The case concerned the construction of the tie-ins between the M6 and the new M6 toll road and related to a construction subcontract under a PFI project. The relevant subcontract contained a typical 'equivalent project relief' provision, which sought to match claims of the subcontractor against the project company with equivalent claims of the project company against the public authority.

It was held that pursuant to the provisions of the Housing Grants Act 1996 a construction subcontractor could not be prevented from referring disputes immediately to adjudication and that certain of the particular 'equivalent project relief' provisions in that construction subcontract were therefore ineffective.



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16. Partnering

The increasing popularity of partnering reflects a move away from traditional and typically adversarial concepts of contracting that are often detrimental to working relations between the parties. Partnering provides a practical and cooperative approach to contractual relationships by seeking to optimise the skills and resources at the disposal of each party and providing a positive incentive for all the parties involved to work together to obtain the maximum benefit from the contract.

However, much more than a long-term or repeat business relationship is required to provide some comfort and shared understanding to the parties; instead, it requires mutual commitment and effort. The partnering concept has an obvious affinity with facilities management contracting as the very nature of the customer and service provider relationship depends on a continuing and mutually beneficial relationship.

Non-binding partnering agreements

It is quite common for a partnering agreement to be expressed to be non-binding. A non-binding partnering agreement will document a change in the approach or attitude of the parties to their working relations by identifying their various aims and objectives in an attempt to build a mutually beneficial relationship but it will not affect the nature of their legal or contracting relationship.

This is usually achieved by drawing up a form of charter. It is unlikely that the parties would ever wish to go so far as to imply that the partnering arrangements should have the status of a full partnership in the legal sense and in particular the partnership assumption of a share in profits should be expressly excluded.

Even if the agreement is intended to be non-binding it could have an impact on any related facilities management contract as it may be used to interpret the standards of conduct required from the parties under the substantive contract. This was noted in the case of *Birse*

Construction Ltd v. St David Ltd (1999) BLR 19, and approved by the Court of Appeal in *Al-Naimi (t/a Buildmaster Construction Services) v. Islamic Press Services Inc* (2000) 70 ConLR 21. To enter into a non-binding partnering agreement may be seen by some as a first step, but whether such a relationship develops further will depend on the willingness of the parties to make the partnering arrangement work for them.

Binding partnering agreements

Framework agreements are used to put a binding partnering agreement in place. It will provide all the essential terms necessary to regulate a long term relationship, including dispute resolution procedures, and will require that the parties act in good faith.

The framework agreement will be used as an interface for various project contracts and will enable the parties to enter into the project contracts using 'back to back' provisions. Entering into these arrangements can prove quite complex, particularly if one party is a public authority or utility, as issues such as competition and EU public procurement rules will arise (see Chapter 18 – [EU Public Procurement Regime](#)).

Benefits of partnering

Traditional methods of contracting are invariably adversarial in their nature and tend to involve independent entities in the supply chain becoming embroiled in a power struggle which is driven solely by the issue of price and the threat of replacement.

Partnering aims to add value to contracts that goes beyond pricing and aims to increase customer satisfaction and loyalty in a number of ways:

- replaces a blame culture with mutual objectives;
- cuts down on wasted costs by building a rapport and developing



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- an understanding of each other's operations; and
- promotes the wider use of each party's services and knowledge.

How do you make partnering work?

Partnering is not simply a form of contract but a philosophy for working together. To make it work requires collaboration, which involves a mixture of skills, attitude and technique.

Skill

- Reliability
- Respect in the market place
- Stability
- Open communication
- Experience
- Capability to deliver
- Sufficient access to resources
- Good health and safety record

Attitude

- Mutual commitment to partnering
- Genuine willingness to make the partnering arrangement work at All levels of the organisation
- Transparency
- Trust
- Fairness
- Compatibility
- Flexibility
- Clear vision of the long term benefits of partnering which are often difficult to identify at the beginning

Technique

- Good working relationship already in place
- Make partnering a working ethos rather than a variable contract arrangement

- Allocate roles and responsibilities from the outset
- Training
- Measure performance and provide feedback
- Scaling down supplier base



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17. Standard forms of facilities management contract

There are few standard form facilities management contracts available on the market although various organisations connected to the facilities management sector have made attempts in recent years to standardise facilities management contracts and their conditions for use, with a view to providing a general framework for contracts which can be used as a template or as an industry-wide acceptable basis for individually tailored arrangements.

The lack of standardisation has led to a proliferation of client-drafted bespoke contracts and to the production by many facilities management contractors of their own preferred terms. The advantage of using standard form facilities management contracts instead of bespoke forms is that the use of standard terms eases negotiation of contract terms, thereby saving both parties time and money.

As such, the use of standard contracts, albeit with specific amendments where appropriate, should be encouraged.

The main current standard form facilities management contracts are as follows.

The Joint Contracts Tribunal (JCT) Standard Form Measured Term Contract

The JCT Measured Term Contract was first published in 1989 and is one of the most commonly used. A major overhaul in 2005 included revisions to existing contracts and the introduction of new forms.

Whilst it is intended primarily for building work, the contract, which allows for payment against schedules of prices and rates for specific tasks instructed within a certain term, can be used with modification and adaptation for the provision of facilities management services.

The contract is appropriate for use:

- by employers who have a regular flow of maintenance, minor works and improvements to be carried out by a single contractor

- over a specified period of time and under a single contract;
- where the work is to be instructed from time to time and measured and valued on the basis of an agreed schedule of rates; and
- where a Contract Administrator is to administer the conditions.

The contract was updated in 2007 to comply with the CDM Regulations (April 2007). In response to the emphasis the Regulations placed on planning, communications and the provision of information and welfare, the contract has brought in changes to references and terminology and the approach to health and safety responsibilities on construction sites.

PACE – GC/Works/10

The contract was first published in Spring 2000 and was designed to be used primarily by government and public sector organisations to procure facilities management services. The contract has been widely used in the public sector and is suitable for the provision of both stand alone services, where the contractor supplies only one type of service, and the provision of total facilities management services, where the contractor provides all services to a property. The contract is suitable for use in respect of both hard or soft services and has also been used by the private sector for the outsourcing of facilities management services.

The PACE contract was drafted to follow the other GC/Works contracts in the PACE suite of standard form contracts as closely as possible and follows the precedent set by the other GC/Works contracts by including a specific provision to encourage fair dealing by both parties and stressing the need for a cooperative and open relationship founded on team work.



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NEC ECC Contract

The New Engineering Contract (NEC) is an alternative form of main contract produced by the Institution of Civil Engineers (ICE). In 2005 ICE published a third edition, the Engineering and Construction Contract (ECC), also referred to as the NEC 3. The ECC was designed to incorporate all the essential provisions of commonly used standard conditions, whilst omitting those which are peculiar to specific sectors.

It is designed to be flexible, and can be used for a wide range of traditional engineering and construction works such as civil, electrical, mechanical and building work. It can also be used as the basis for a Facilities Management contract.

The ECC focuses on how it is possible through good management to reduce the risks involved in construction and engineering work, such as poor performance and cost and time overruns. The ECC suggests that this objective is achieved by collaborative foresight and the clear division of function and responsibility. However, the contract has been criticised by some for its unclear language and lack of legal certainty.



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18. EU Public Procurement Regime

General public sector procurement rules have been in place since the 1970s. A different form of these rules applies to the water, energy, transport and telecommunications sectors (the 'utilities' sectors). All procurement rules share common themes of non-discrimination and transparency and are designed to open up the public procurement market and to ensure the free movement of goods and services within the EU.

EC procurement rules were revised in 2006, and the revisions apply to both general and utilities sectors. The new Regulations consolidate and update the previous rules, and implement two corresponding EU Directives, which were finalised in March 2004.

At EU level the detailed rules for public sector procurement are contained in Directive 2004/18/EC (the Directive).

The Directive consolidated and updated three earlier directives for works, supplies and services.

The rules on remedies for breach of the Directive are currently contained in Directive 89/665/EEC (the Remedies Directive). The Directive has now been implemented into UK law by the Public Contracts Regulations 2006 (the Regulations). The Regulations therefore consolidate and update the three separate Regulations for works, supplies and services, which were put in place to implement the old Directives.

The Regulations also incorporate the rules in the Remedies Directive.

The European Commission has begun a discussion on the potential revision of the Remedies Directive. This may lead to amendments to the Regulations in future.

The Public Contracts Regulations 2006

The new rules came into effect on 31 January 2006, and the main changes are:

- the previously separate Regulations governing supply, works and services are now consolidated;
- the Regulations provide for framework agreements and electronic auctions;
- a new competitive dialogue procedure in the Regulations is available for complex procurements;
- the introduction of rules for Dynamic Purchasing Systems, a wholly electronic system for commonly used purchases;
- contracts may be reserved to supported factories and businesses (where more than 50% of the workforce is disabled);
- specific provisions are included for central purchasing bodies;
- a ten-day standstill period at the award stage has been introduced to permit unsuccessful tenderers to seek information about an award decision.

Other changes include clarification on the use of social and environmental issues when deciding on a facilities management contractor, and mandatory exclusion of candidates convicted of certain offences.

To whom do the Regulations apply?

Contracting authorities

The Regulations apply to contracts let by 'contracting authorities'. Bodies are considered to be contracting authorities if they fall within one of the following categories:

- Public bodies – mostly public authorities comprising part of the State, regional or local government.
- Bodies governed by public law:



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These are bodies that:

- (a) are established to meet 'needs in the general interest' (for example, providing services directly to the public);
- (b) do not have a commercial or industrial character; and
- (c) are controlled by another public body,

by either:

- (i) being financed wholly or mainly by another contracting authority;
- (ii) being subject to management supervision by another contracting authority; or
- (iii) having more than half of the board of directors, members or participating individuals appointed by another contracting authority.

As such the definition of 'contracting authority' can cover organisations such as museums and universities.

- Joint associations formed by one or more contracting authorities.
- Any other bodies listed in Schedule 1 of the Regulations (Subsidised Contracts).

If a private company awards a facilities management contract for work which will be subsidised by a contracting authority by more than half the value, Regulations will apply. The contracting authority must ensure that a condition of its contribution is that the subsidised body will follow all the Regulations.

- Central Purchasing Bodies.
There is now a provision in the Regulations allowing contracting authorities to purchase through 'central purchasing bodies'. This provision clarifies that a group of potential client authorities can purchase on a collective basis through one of their number. Central purchasing bodies are contracting authorities for the purposes of the new Regulations. If a client purchases through a central purchasing body it will be deemed to have complied with the Regulations – provided that the central purchasing body has

complied.

The central purchasing body must indicate at the start of the process that it is buying for others, and, in the case of a framework, the identity of any other bodies who are expected to make use of the procedure.

Framework agreements

Framework agreements are set up by public sector bodies with suppliers to provide goods, works or services according to certain requirements. These can be arranged centrally by one public body for itself or for a larger group of public bodies.

The previous Public Contracts Regulations did not explicitly provide for the use of framework agreements (in contrast with the rules on utilities procurement).

Many public sector clients have been using framework agreements regularly and this approach was supported by Office of Government Commerce (OGC) guidance. The Regulations now explicitly provide for the use of framework agreements in the public sector.

The following rules apply to the award of a framework agreement:

- The duration of a framework agreement is limited to a maximum of four years, except in exceptional circumstances. OGC and European Commission guidance suggests that a longer duration may be justified in cases where four years are insufficient to allow an adequate return on an investment.
- All of the potential clients participating in the framework agreement should be identified in advance.
- Where a framework agreement involves more than one facilities management contractor, there must be at least three (provided that there is a sufficient number of interested bidders).
- When calculating the procurement thresholds (see below), the aggregated value of all contracts to be awarded under the framework agreement should be taken into account.



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- When awarding call-off contracts, the contracting authority can choose between two types of procedure. The call-offs can either be awarded based on the terms of the offers received when the framework was originally established (where these offers are sufficiently detailed) or the contracting authority may decide to conduct a mini-competition between the members of the framework agreement.

The rules on utilities procurement have always contained provisions on framework agreements. These provisions have mostly been retained.

e-procurement

One of the key objectives of the new EU procurement directives was to adapt the procurement regime to certain forms of electronic procurement.

Consequently, the new Regulations contain detailed rules for conducting reverse electronic auctions (e-auctions). The new Regulations give more emphasis to e-procurement, which will benefit client authorities if they send contract notices electronically.

Client authorities can now also detail procurement activities on a website known as a 'buyer profile' which provides information on purchase plans, contact details, future, current and past contracts.

Two new electronic purchasing tools are now regulated – Dynamic Purchasing Systems (open electronic catalogues where prices can be updated without introducing a new tender) and electronic auctions.

Although UK public authorities and utilities used e-auctions before the new Regulations came into force, the new Regulations will change some aspects of current practice. The key aspects of the new rules on e-auctions are listed below:

- The prospective client has to advertise the intention to use an e-auction to award the contract.

- The prospective client must also provide bidders with detailed information on how the auction will be conducted.
- Before conducting an e-auction, the prospective client must ask bidders to submit initial tenders. The authority evaluates these tenders to establish a preliminary ranking of bidders. Bidders must be provided with a formula by which the preliminary ranking is recalculated during the auction.
- During the auction, bidders must be kept aware of their current ranking.
- Bidders must also be informed about the conditions for closing the e-auction. The prospective client can either specify a certain closing date and time or may decide that the auction will close after a certain period of time has elapsed since the submission of the last bid.

Value thresholds

The Regulations require competitive processes to be run for contracts that exceed the value thresholds and are not covered by any of the relevant exclusions or exceptions.

The key value thresholds from 31 January 2006 are as shown in the table below.

	Services	Supplies	Works
Central Government Bodies	£93,738 €137,000	£93,738 €137,000	£3,611,319 €5,278,000
Other Public Bodies	£144,371 €211,00	£144,371 €211,00	£3,611,319 €5,278,000



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Classifying a contract as being either for works or for services can be critical in determining if the rules apply. This can be difficult when a contract contains elements of both works and services.

As a general rule (although it is advisable to check as the guidance is detailed):

- where the services are necessary for the execution of the works, the contract will be a works contract (even if the services element is worth more than the works);
- where the works are incidental to the services, the contract will be a services contract;
- where the services are incidental to the works, the contract will be a works contract but the rules will still apply if the value of the services involved exceeds the relevant value threshold;
- if a contract provides for supplying equipment and an operator, it should be regarded as a services contract;
- contracts for supplying software are considered to be for supplies unless they have to be tailored to the exact specification of the client authority, in which case they are services.

Procedures

There are four types of procurement procedure:

1. Open Procedure: where an individual contract notice is placed in the Official Journal of the European Union (*OJEU*) inviting applications which meet minimum criteria, and all of those who meet these criteria must be sent an invitation to tender.
2. Restricted Procedure: where a call for competition must be made in the *OJEU* and the contracting authority may reduce the number of applicants selected to tender according to the procedures set out in the Regulations.
3. Negotiated Procedure: where a call for competition must be made in the *OJEU* and the contracting authority may then seek tenders or negotiate directly. In certain instances, the negotiated

procedure is available without publishing a call for competition.

4. Competitive Dialogue: when a contracting authority enters into dialogue with bidders.

Competitive dialogue

The competitive dialogue procedure is intended for use in complex projects. Although it can be used in PFI / PPP contracts, it is also useful in complex IT contracts.

In PPP / PFI contracts, it is often the case that a client cannot define the financial or legal make up of a facilities management contract in advance, because issues such as risk allocation, finance, or who will be responsible for which services, is still under discussion with the potential facilities management contractors. In situations such as this, the competitive dialogue procedure is justified.

Technical specifications

Technical specifications used in any procurement process must be defined by reference to any European specifications that are relevant; European standards (where they exist) must still shape the requirement, although facilities management contractors are not obliged to show conformity with the standard, provided they can show that their products are 'equivalent'.

Technical standards may be defined:

- by reference to European standards 'or equivalent'; or
- in terms of performance or functional requirements (which can include environmental characteristics); or
- by a combination of the above.

Specifications must not be written so as to discriminate or inhibit competition. They should not generally refer to trade names or patents. The specification must refer to European Standards or to a performance or functional specification. Essentially, the contracting authority must describe what it wants and allow suppliers to prove that they can supply it.



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Stages in the process

In most cases, a contract notice must be published in the *OJEU*. Having published the contract notice, a client is then obliged to follow one of the four types of award procedure.

Under the restricted, negotiated and competitive dialogue procedures there must be a sufficient number of participants to ensure genuine competition. For the restricted procedure the minimum is five and for the negotiated and competitive dialogue procedures the minimum is three.

The Regulations also set out minimum time periods, which must be observed by contracting authorities. The minimum periods can be reduced if the *OJEU* notice is sent electronically and/or the contracting authority gives online access to the contract documents.

Stage	Open	Restriction	Negotiated	Competitive Dialogue
Advertisement	<i>OJEU</i> Contract Notice	<i>OJEU</i> Contract Notice	<i>OJEU</i> Contract Notice	<i>OJEU</i> Contract Notice
Prequalification		Requests to tender submitted	Requests to tender submitted	Requests to tender submitted
		Prequalification of tenderers	Prequalification of tenderers	Prequalification of tenderers
Tendering		Invitation to tender issued	Invitation to negotiate issued	Invitation to participate issued
		Negotiation phase	Dialogue phase	
	Submission of tenders	Submission of tenders	Submission of tenders	Submission of tenders
Evaluation	Evaluation	Evaluation	Evaluation	Evaluation
Award	Clarification with preferred bidder	Clarification with preferred bidder	Clarification with preferred bidder	Clarification with preferred bidder
	Notification of award/ <i>OJEU</i> award notice	Notification of award/ <i>OJEU</i> award notice	Notification of award/ <i>OJEU</i> award notice	Notification of award/ <i>OJEU</i> award notice
	Entry into contract	Entry into contract	Entry into contract	Entry into contract



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Evaluation / award

Contracting authorities can choose to award contracts covered by the rules either on the basis of the lowest price offered or on the

basis of the 'most economically advantageous tender'. Contracting authorities awarding a contract on the basis of the most economically advantageous tender also have to indicate the relative weighting given to each of the evaluation criteria. Award criteria must appear in

Procedure		Normal limit (days)	Electronic notification to OJEU	Electronic access to contract documents
Open	Minimum time from sending notification until tender return date	52	-7	-5
	With PIN (usual)	36		
	With PIN (minimum)	22		
Restricted	Minimum time from dispatch of notice to receipt of requests to be selected for tender	37	30	
	If urgent	15	10	
	Minimum time from dispatch of information to tender until tender return date	40	35	
	If urgent	10		
	With PIN (usual)	36	31	
	With PIN (minimum)	22		
Negotiated Procedure	Minimum time from dispatch of notice until receipt of requests to be invited to negotiate	37	30	
	If urgent	15	10	
Competitive Dialogue	Minimum time from dispatch of notice until receipt of requests to be selected to participate	37	30	



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the *OJEU* notice or the contract documentation.

The economically most advantageous offer criteria must:

- be objective; and
- set out, if possible in descending order of importance, criteria such as period for completion, cost and running costs, quality, aesthetic and functional issues.

The Regulations set out new 'standstill' obligations for contracting authorities. This is to allow an aggrieved bidder a reasonable chance to consider its situation, and where it believes the contracting authority has breached the Regulations to bring an action against the contracting authority before it concludes the contract.

Records must be kept of all procurement decisions in case of challenge in the courts or for reporting to the European Commission.

These records must be kept for at least four years and include:

- reasons for the use of the negotiated procedure without a call for competition;
- decisions relating to the choice of tenderers;
- assessment of tenders; and
- dates and copies of notices sent to the *OJEU*.

Standstill period

The Regulations give facilities management contractors an opportunity to challenge what they perceive to be wrongful award decisions. This arises from a landmark ruling of the European Court of Justice in 1998, *C-81/98 Alcatel Austria v. Bundesministerium fuer Wissenschaft Und Verkehr*.

The *Alcatel* case held that national courts in EU Member States must be able to review and set aside award decisions on procurement contracts that are subject to EU procurement directives. As the UK does not permit contracts to be set aside once entered into, Alcatel effectively obliged the UK to introduce a mandatory standstill period between the award decision being announced and the contract being concluded.

Following that decision, client authorities are now obliged to allow a standstill period of at least ten calendar days between the date of notifying tenderers of their contract award decision in writing and the date they propose to enter into the contract.

If a tenderer requests a debriefing by the end of the second working day of the ten-day period, client authorities must debrief the tenderer during the standstill period. In any event, there must be three working days between the debriefing and the end of the standstill period.

The purpose of this change is to allow aggrieved bidders a reasonable chance to consider their situation, and to bring an action before the contract is concluded if they think they have a case.



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A claim from an unsuccessful tenderer can only be made if all of the below are satisfied:

- the Regulations have been breached;
- the tenderer has suffered loss or damage as a result of the breach;
- the tenderer has notified the detail of its claim and intention to bring proceedings in writing before any court proceedings are issued; and
- court proceedings are brought by the tenderer within three months from the date when grounds for bringing proceedings first arose.

Before any claim can be brought it will be necessary for the tenderer and its advisers to review the procurement process to date, and in appropriate cases make requests for information from the contracting authority. The contracting authority needs to ensure that it complies with the Regulations, and does not provide a tenderer with grounds for bringing a claim.

The very short time limits that apply both to making requests for information and to bringing court proceedings mean that tenderers and contracting authorities need to understand their legal positions at an early stage in any potentially contentious procurement.

Remedies for breach of the Regulations and the 'standstill period'

The Regulations provide for two main types of remedy:

1. An injunction (a court order restraining the award of the contract, and ultimately requiring the contracting authority to amend or restart the procurement process); and/or
2. Damages.

The Regulations prevent the contracting authority from entering into any contract for the standstill period which must be a minimum of ten days.

This is to enable further information to be requested / supplied and any application for an injunction to be brought.

The Utilities Contracts Regulations 2006

The old rules brought within their scope purely private companies that should not be within the scope of the public sector procurement rules in the first place. This was a problem in view of the liberalisation of the energy markets – and it added an extra burden to companies that wanted to enter the market with a view to supplying electricity or gas to fixed networks.

The new laws have rectified this, and they have removed qualification for those utilities whose regulatory approvals are objective, transparent and subject to effective competition.

For example, if a company applies for a gas transporter licence, which it receives provided that it complies with objective, proportional and non-discriminatory conditions, this would lead it to not be regarded as a utility within the meaning of the Regulations when it supplies gas to a fixed network. In effect, private utilities operating in completely liberalised markets may no longer be covered by the rules.

A further opportunity now exists for utilities to eradicate any doubt by applying to the European Commission for a specific exemption. This will confirm that they are cleared of having to comply with the procurement rules by operation of the new tests for special or exclusive rights, as described above.

The UK (via OFGEM) has already successfully taken this opportunity and the Commission has declared that the public procurement rules no longer apply to utilities in terms of their activities in England, Scotland and Wales for the generation of electricity.

The EC Utilities Contracts Directive applies to all procurement by water, energy and transport companies and is implemented through UK Regulations.



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The utilities regime has always allowed for more flexibility than the public sector regime. The new rules simply clarify their use under the legal framework. Many of the changes to the utilities procurement rules also apply to public sector contracts, for example:

- Central Purchasing Bodies;
- Framework Agreements;
- e-procurement;
- technical specifications; and
- award criteria.

Identical rules apply to all of these provisions.

To whom do the Utilities Contracts Regulations apply?

The new rules on utilities procurement are based on the concept that purchasers in sectors that are completely liberalised should not be covered.

- Due to effective competition in the telecommunications sector, the Utilities Regulations do not apply.
- Postal services are now covered by the Utilities Regulations, as they have moved away from the Public Sector Regulations in order to reflect increased competition.
- Regulation 9 also allows any utility that is exposed to competition in markets where there is free access exemption from the Regulations – for example, electricity generators.

The question of whether a sector is exposed to effective competition depends on criteria such as the characteristics of the goods or services concerned, whether there are alternative goods or services available, the prices and the actual or potential presence of more than one supplier of the goods or services concerned.

Thresholds

Utilities contracts are only covered by the Regulations if they exceed certain financial thresholds. As with the Public Contracts Regulations, valuation is not always straightforward.

The legislation requires the aggregation of contracts having similar characteristics, which are awarded to meet recurrent needs over the same period, which means that in effect, a higher proportion of contracts will be covered than first appears to be the case. The legislation specifically forbids splitting up contracts or using special evaluation methods to keep the values beneath the thresholds.

Services	Supplies	Works
£288,741 €414,278.	£288,741 €414,278.	£3,611,474 €5,278,000

Procedures

As with the Public Contracts Regulations, utilities must choose enough tenderers to ensure adequate competition. The number to be invited may be reduced to a number appropriate to the contract and the resources available to manage it.

The methods by which tenderers are selected must be objective and non-discriminatory. Companies that are not selected have the right to know the reasons for non-selection. These reasons must be carefully recorded.

Under the Directives, there are three permitted award procedures:

1. Open Procedure: where an individual contract notice is placed in the *OJEU* inviting applications which meet minimum criteria, all of those who meet these criteria must be sent an invitation to tender.
2. Restricted Procedure: where a call for competition must be made in the *OJEU* and the utility may reduce the number of applicants selected to tender according to the procedures set out in the Directives.
3. Negotiated Procedure: where a call for competition must be made in the *OJEU* and the utility may then seek tenders or



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negotiate directly. In certain instances, the negotiated procedure is available without publishing a call for competition.

Utilities have a free choice of these procedures. Most choose to use the most flexible of these procedures, the negotiated procedure.

Specifications must not be written so as to discriminate or inhibit competition. They should not generally refer to trade names or patents. The specification must refer to European Standards or to a performance or functional specification. Essentially, the utility must describe what it wants and allow suppliers to prove that they can supply it.

The process for a utility to become exempt from the Regulations can be started by:

- the Utility;
- the Office of Government Commerce (OGC); and
- the Commission.

The Commission will consider all the relevant facts, take a view from a competent national authority where relevant, and publish its decision in the *OJEU*.



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The British Standards Institute (BSI) and its sister national standards bodies in European countries are working towards making facilities management a more integrated profession.

Standards are developed to help facilities managers develop a better understanding of their responsibilities. This is hoped to be achieved through better communication and understanding between stakeholders; improved quality measurement and output delivery; and the development of facilities management and customer service tools and systems.

The legal association responsible for the planning, development and adoption of European standards is the Centre Europeenne du Normalisation (CEN). The CEN develops standards relating to most products and services, with the exception of electro technology and telecommunications. Standards, and their contents, are evolved from the voluntary work of participants representing all interests concerned.

Initially, only four European countries had national standards for facilities management. The Dutch facilities management industry then approached the Dutch Standardisation Institute (NEN) and initiated two European projects through the CEN, creating a Technical Committee.

The CEN members agreed to develop two European Standards which would encompass the classification of facility costs and definitions of facility-related terms, with the aim of improving transparency within the market.

The CEN initiative commenced in 2002 and has worked to establish the basis upon which the national standards bodies across Europe (BSI in the UK) that form the membership of CEN would participate in the establishment of standards that could be used and referenced across Europe in a consistent manner.

In the UK the BSI has just published the British Standard on Facilities Management. The first part (BSEN15221-1:2006) provides terms and definitions, and the second part (BSEN15221-2:2006) gives guidance on how to prepare Facility Management agreements.

BS EN 15221-1:2006: Part 1 – terms and definitions

Part 1 aims to bring uniformity across Europe to terms and definitions relating to facility management. After considering five varying definitions of 'Facility Management', the standard concludes that the term means:

"the integration of processes within an organisation to maintain and develop the agreed services which support and improve the effectiveness of its primary activities."

Besides providing general terms and conditions, Part 1 also:

- provides insight into the scope of Facility Management;
- encompasses Facility Management-related terms and definitions; and
- presents a Facility Management model and scope of services.

It is structured as follows:

- Introduction
- Scope
- Terms and definitions
- Scope of Facility Management
- Annex A (informative) Facility Management Model
- Annex B (informative) Scope of Facility Management

Annex B divides facilities management services into two groups – 'space and infrastructure' and 'people and organisation'. These two groups are clarified with a detailed classification of services, making it possible for the EU to collect data in a structured way. For facilities



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managers across Europe, this action will make it possible to start benchmarking all of their locations in a uniform way.

BS EN 15221-2:2006: Part 2 – Guidance on how to prepare facility management agreements

Part 2 has been produced in order to enable and encourage consistency in the development of contract agreements between parties regarding the delivery of facilities management services.

It primarily applies to organisations that adopt integrated facility services and/or a functional approach. This is due to the fact that the standard anticipates that demand for this type of facility services will increase in the UK and abroad as a result of growing economic maturity and technical developments.

The standard applies to:

- public and private client / Facility Management service provider relationships;
- European cross-border and domestic client / Facility Management service provider relationships;
- internal and external Facility Management service providers; and
- in-house teams of organisations.

The standard is applicable to services that are predominantly:

- business to business services;
- managed by a facilities management contractor;
- recurrent type of operations;
- performance oriented; and/or
- using prices or mechanisms to determine prices for services which are closely linked to performance.

It aims to:

- promote cross-border relationships and interface between the client and Facility Management service provider within the European Union;
- reduce the risk of disputes and adjustments occurring, and specify arrangements in the event of a dispute;
- aid the selection and scope of facility services and to identify options for their provision;
- aid and advise on the drafting and negotiation of Facility Management agreements;
- compare and distinguish between types of Facility Management agreements; and
- advise on the attribution of rights and obligations between the parties to the agreement.

The standard is structured as follows:

- Scope
- Normative References
- Terms and Definitions
- Primary Activities
- Different Types of Facility Management agreements
- Main Characteristics of Facility Management agreements
- Preparation and Implementation of Facility Management
- Facility Management Agreement Structure
- Annex A: (informative) Public Procurement Legislation

The standard does not:

- replace any specialised standards related to services within the scope of the facilities management contract;
- go into detail concerning the management of environmental issues;
- provide standard forms for facilities management contracts;
- determine rights and obligations between clients and facilities management contractor; or



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- detail employment conditions in regard to facilities management contracts.

Many educational networks for facilities management already exist. The UK, Germany, Italy, The Netherlands, Austria, and Spain all have facilities management-related Masters Degree programmes. However, a European Facilities Management Masters program that reflects more than just one region does not exist.

Future standards

Now that the work on the two initial standards has been completed, the focus has shifted to future requirements. It has been decided that new work items will be considered when the European Committee for Standardisation (CEN) next meets, including the following.

Facilities management processes

- A generic standard for processes to underpin future standards. Will support the explanation of the facilities management model and clarify the distinction between process and service.
- Process identification; process mapping and generic process protocols.

Classification / cost categories / life cycle costing of building and taxonomy benefits

- Introducing a common language for facilities management professionals.
- Faster, transparent and comparable specifications.
- Different structures linked together, compatible with each other.
- A basis for development of tools and systems, necessary for creating interfaces between systems.
- A basis for performance indicators and benchmarking.

Quality / service levels / KPIs

- Guidance on how to prepare SLAs and KPIs.
- Explanations of how the SLA and KPI contribute to reach quality objectives and how the quality management methods contribute to the interaction between primary activities processes and facilities management processes.
- Methodologies applicable to all services.

Measurement of space

- Develop a European standard in terms of accuracy, protocol and usage of space to facilitate benchmarking of facility efficiencies.
- Space m² (and m³) and its use; process and its use; inventory of existing space measurement standards in 28 European countries.



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Appendix 1 – Contracts (Rights of Third Parties) Act 1999

An Act to make provision for the enforcement of contractual terms by third parties.

[11th November 1999]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. Right of third party to enforce contractual term

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if:

- (a) the contract expressly provides that he may, or
- (b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract

if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party-

"the promisor" means the party to the contract against whom the term is enforceable by the third party, and "the promisee" means the party to the contract by whom the term is enforceable against the promisor.

2. Variation and rescission of contract

(1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if:

- (a) the third party has communicated his assent to the term to the promisor,
- (b) the promisor is aware that the third party has relied on the term, or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

(2) The assent referred to in subsection (1)(a):

- (a) may be by words or conduct, and
- (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.



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(3) Subsection (1) is subject to any express term of the contract under which:

- (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or
- (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied:

- (a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or
- (b) that he is mentally incapable of giving his consent.

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

(6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by both the High Court and a county court.

3. Defences etc. available to promisor

(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.

(2) The promisor shall have available to him by way of defence or set-off any matter that:

- (a) arises from or in connection with the contract and is relevant to the term, and

(b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(3) The promisor shall also have available to him by way of defence or set-off any matter if:

- (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and
- (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(4) The promisor shall also have available to him:

- (a) by way of defence or set-off any matter, and
- (b) by way of counterclaim any matter not arising from the contract, that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

4. Enforcement of contract by promisee

Section 1 does not affect any right of the promisee to enforce any term of the contract.



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5. Protection of promisor from double liability

Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of:

- (a) the third party's loss in respect of the term, or
- (b) the expense to the promisee of making good to the third party the default of the promisor, then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

6. Exceptions

- (1) Section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.
- (2) Section 1 confers no rights on a third party in the case of any contract binding on a company and its members under section 14 of the Companies Act 1985.
- (3) Section 1 confers no right on a third party to enforce:
 - (a) any term of a contract of employment against an employee,
 - (b) any term of a worker's contract against a worker (including a home worker), or
 - (c) any term of a relevant contract against an agency worker.
- (4) In subsection (3):
 - (a) "contract of employment", "employee", "worker's contract", and "worker" have the meaning given by section 54 of the National Minimum Wage Act 1998,
 - (b) "home worker" has the meaning given by section 35(2) of that Act,

(c) "agency worker" has the same meaning as in section 34(1) of that Act, and

(d) "relevant contract" means a contract entered into, in a case where section 34 of that Act applies, by the agency worker as respects work falling within subsection (1)(a) of that section.

(5) Section 1 confers no rights on a third party in the case of:

- (a) a contract for the carriage of goods by sea, or
- (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

(6) In subsection (5) "contract for the carriage of goods by sea" means a contract of carriage:

- (a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or
- (b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction.

(7) For the purposes of subsection (6):

- (a) "bill of lading", "sea waybill" and "ship's delivery order" have the same meaning as in the Carriage of Goods by Sea Act 1992, and
- (b) a corresponding electronic transaction is a transaction within section 1(5) of that Act which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order.

(8) In subsection (5) "the appropriate international transport convention" means:



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(a) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under section 1 of the International Transport Conventions Act 1983,

(b) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under section 1 of the Carriage of Goods by Road Act 1965, and

(c) in relation to a contract for the carriage of cargo by air:

(i) the Convention which has the force of law in the United Kingdom under section 1 of the Carriage by Air Act 1961, or

(ii) the Convention which has the force of law under section 1 of the Carriage by Air (Supplementary Provisions) Act 1962, or

(iii) either of the amended Conventions set out in Part B of Schedule 2 or 3 to the Carriage by Air Acts (Application of Provisions) Order 1967.

7. Supplementary provisions relating to third party

(1) Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

(2) Section 2(2) of the Unfair Contract Terms Act 1977 (restriction on exclusion etc. of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on section 1.

(3) In sections 5 and 8 of the Limitation Act 1980 the references to an action founded on a simple contract and an action upon a specialty shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a specialty.

(4) A third party shall not, by virtue of section 1(5) or 3(4) or (6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act).

8. Arbitration provisions

(1) Where:

(a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and

(b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

(2) Where:

(a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement"),

(b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and

(c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.



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9. Northern Ireland

(1) In its application to Northern Ireland, this Act has effect with the modifications specified in subsections (2) and (3).

(2) In section 6(2), for "section 14 of the Companies Act 1985" there is substituted "Article 25 of the Companies (Northern Ireland) Order 1986".

(3) In section 7, for subsection (3) there is substituted- "(3) In Articles 4(a) and 15 of the Limitation (Northern Ireland) Order 1989, the references to an action founded on a simple contract and an action upon an instrument under seal shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a contract under seal".

(4) In the Law Reform (Husband and Wife) (Northern Ireland) Act 1964, the following provisions are hereby repealed:

- (a) section 5, and
- (b) in section 6, in subsection (1)(a), the words "in the case of section 4" and "and in the case of section 5 the contracting party" and, in subsection (3), the words "or section 5".

10. Short title, commencement and extent

(1) This Act may be cited as the Contracts (Rights of Third Parties) Act 1999.

(2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day.

(3) The restriction in subsection (2) does not apply in relation to a contract which-

- (a) is entered into on or after the day on which this Act is passed, and

(b) expressly provides for the application of this Act.

(4) This Act extends as follows:

- (a) section 9 extends to Northern Ireland only;
- (b) the remaining provisions extend to England and Wales and Northern Ireland only.

The full text of this Act may be read [here](#).

Appendix 2 – Housing Grants, Construction and Regeneration Act 1996

Part II

Construction contracts

Introductory provisions

104. Construction Contracts

(1) In this Part a "construction contract" means an agreement with a person for any of the following:

- (a) the carrying out of construction operations;
- (b) arranging for the carrying out of construction operations by others, whether under subcontract to him or otherwise;
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement:

- (a) to do architectural, design, or surveying work, or
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.



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(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

(6) This Part applies only to construction contracts which:

- (a) are entered into after the commencement of this Part, and
- (b) relate to the carrying out of construction operations in England, Wales or Scotland.

(7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

105. Meaning of "construction operations"

(1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions:

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the

foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
- (f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Part:

- (a) drilling for, or extraction of, oil or natural gas;
- (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is:



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(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of:

(i) building or engineering components or equipment,

(ii) materials, plant or machinery, or

(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106. Provisions not applicable to contract with residential occupier

(1) This Part does not apply:

(a) to a construction contract with a residential occupier (see below), or

(b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose-

"dwelling-house" does not include a building containing a flat; and "flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

(3) The Secretary of State may by order amend subsection (2).

(4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

107. Provisions applicable only to agreements in writing

(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing:

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.



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(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

Adjudication

108. Right to refer disputes to adjudication

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose “dispute” includes any difference.

(2) The contract shall:

- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute

was referred;

- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales, the Scheme may apply the provisions of the [1996 c. 23.] Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

Payment

109. Entitlement to stage payments

(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless:



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- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
- (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

(4) References in the following sections to a payment under the contract include a payment by virtue of this section.

110. Dates for payment

(1) Every construction contract shall:

provide an adequate mechanism for determining what payments become due under the contract, and when, and provide for a final date for payment in relation to any sum which becomes due. The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if:

- (a) the other party had carried out his obligations under the contract, and
- (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the

Scheme for Construction Contracts apply.

111. Notice of intention to withhold payment

(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify:

- (a) the amount proposed to be withheld and the ground for withholding payment, or
- (b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be. In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than:

- (a) seven days from the date of the decision, or
- (b) the date which apart from the notice would have been the final date for payment, whichever is the later.

112. Right to suspend performance for non-payment

(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by



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whom payment ought to have been made (“the party in default”).

(2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.

(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113. Prohibition of conditional payment provisions

(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

(2) For the purposes of this section a company becomes insolvent:

(a) on the making of an administration order against it under Part II of the [1986 c. 45.] Insolvency Act 1986,

(b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,

(c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or

(d) on the making of a winding-up order under Part IV or V of that Act.

3) For the purposes of this section a partnership becomes insolvent:

(a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or

(b) when sequestration is awarded on the estate of the partnership under section 12 of the [1985 c. 66.] Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.

(4) For the purposes of this section an individual becomes insolvent:

(a) on the making of a bankruptcy order against him under Part IX of the [1986 c. 45.] Insolvency Act 1986, or

(b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.

(5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

Supplementary provisions

114. The Scheme for Construction Contracts

(1) The Minister shall by regulations make a scheme (“the Scheme for Construction Contracts”) containing provision about the matters referred to in the preceding provisions of this Part.

(2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.



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(3) In this section “the Minister” means:

- (a) for England and Wales, the Secretary of State, and
- (b) for Scotland, the Lord Advocate.

(4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

(5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

115. Service of notices, &c

(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post:

- (a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
- (b) where the addressee is a body corporate, to the body’s registered or principal office, it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

116. Reckoning periods of time

(1) For the purposes of this Part periods of time shall be reckoned as follows.

(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where the period would include Christmas Day, Good Friday or a day which under the [1971 c. 80.] Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded.

117. Crown application

(1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity.

(2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.

(3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.

(4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.

The full text of this Act may be read [here](#).



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Appendix 3 – The Scheme for Construction Contracts (England and Wales) Regulations 1998

Citation, commencement, extent and interpretation

1. - (1) These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 and shall come into force at the end of the period of 8 weeks beginning with the day on which they are made (the "commencement date").

(2) These Regulations shall extend only to England and Wales.

(3) In these Regulations, "the Act" means the Housing Grants, Construction and Regeneration Act 1996.

The Scheme for Construction Contracts

2. Where a construction contract does not comply with the requirements of section 108(1) to (4) of the Act, the adjudication provisions in Part I of the Schedule to these Regulations shall apply.

3. Where:

(a) the parties to a construction contract are unable to reach agreement for the purposes mentioned respectively in sections 109, 111 and 113 of the Act, or

(b) a construction contract does not make provision as required by section 110 of the Act, the relevant provisions in Part II of the Schedule to these Regulations shall apply.

4. The provisions in the Schedule to these Regulations shall be the Scheme for Construction Contracts for the purposes of section 114 of the Act.

Signed by authority of the Secretary of State Nick Raynsford

Parliamentary Under-Secretary of State, Department of the Environment, Transport and the Regions 6th March 1998.

SCHEDULE

Regulations 2, 3 and 4

THE SCHEME FOR CONSTRUCTION CONTRACTS

PART I ADJUDICATION

Notice of Intention to seek Adjudication

1. - (1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract, to adjudication.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly -

- (a) the nature and a brief description of the dispute and of the parties involved,
- (b) details of where and when the dispute has arisen,
- (c) the nature of the redress which is sought, and
- (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

2. - (1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator:

- (a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or
- (b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or



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(c) where neither paragraph (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

(3) In this paragraph, and in paragraphs 5 and 6 below, an "adjudicator nominating body" shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.

3 The request referred to in paragraphs 2, 5 and 6 shall be accompanied by a copy of the notice of adjudication.

4. Any person requested or selected to act as adjudicator in accordance with paragraphs 2, 5 or 6 shall be a natural person acting in his personal capacity. A person requested or selected to act as an adjudicator shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.

5. - (1) The nominating body referred to in paragraphs 2(1)(b) and 6(1)(b) or the adjudicator nominating body referred to in paragraphs 2(1)(c), 5(2)(b) and 6(1)(c) must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so.

(2) Where the nominating body or the adjudicator nominating body fails to comply with paragraph (1), the referring party may:

- (a) agree with the other party to the dispute to request a specified person to act as adjudicator, or
- (b) request any other adjudicator nominating body to select a

person to act as adjudicator.

(3) The person requested to act as adjudicator in accordance with the provisions of paragraphs (1) or (2) shall indicate whether or not he is willing to act within two days of receiving the request.

6. - (1) Where an adjudicator who is named in the contract indicates to the parties that he is unable or unwilling to act, or where he fails to respond in accordance with paragraph 2(2), the referring party may:

- (a) request another person (if any) specified in the contract to act as adjudicator, or
- (b) request the nominating body (if any) referred to in the contract to select a person to act as adjudicator, or
- (c) request any other adjudicator nominating body to select a person to act as adjudicator.

(2) The person requested to act in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

7. - (1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the "referral notice") to the adjudicator.

(2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

(3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents to every other party to the dispute.

8. - (1) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.



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(2) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes.

(3) All the parties in paragraphs (1) and (2) respectively may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes.

(4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, that adjudicator's fees and expenses shall be determined in accordance with paragraph 25.

9. - (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

(3) Where an adjudicator ceases to act under paragraph 9(1) -

(a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding

following the making of any determination on how the payment shall be apportioned.

10. Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the adjudicator's appointment nor any decision he may reach in accordance with paragraph 20.

11. - (1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

(2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses.

Powers of the adjudicator

12. The adjudicator shall -

(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

(b) avoid incurring unnecessary expense.

13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may-

(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other



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documents given under paragraph 7(2),

- (b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
- (c) meet and question any of the parties to the contract and their representatives,
- (d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,
- (e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,
- (f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,
- (g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and
- (h) issue other directions relating to the conduct of the adjudication.

14. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.

15. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may:

- (a) continue the adjudication in the absence of that party or of the document or written statement requested,
- (b) draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified,

and

- (c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.

16. - (1) Subject to any agreement between the parties to the contrary, and to the terms of paragraph (2) below, any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.

(2) Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.

17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.

18. The adjudicator and any party to the dispute shall not disclose to any other person any information or document provided to him in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.

19. - (1) The adjudicator shall reach his decision not later than:

- (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
- (b) forty two days after the date of the referral notice if the referring party so consents, or
- (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.



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(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)

- (a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
- (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

Adjudicator's decision

20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may -

- (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
- (b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,
- (c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

21. In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with this paragraph.

22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

Effects of the decision

23. - (1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

24. Section 42 of the Arbitration Act 1996 shall apply to this Scheme subject to the following modifications:

- (a) in subsection (2) for the word "tribunal" wherever it appears there shall be substituted the word "adjudicator",
- (b) in subparagraph (b) of subsection (2) for the words "arbitral proceedings" there shall be substituted the word "adjudication",
- (c) subparagraph (c) of subsection (2) shall be deleted, and
- (d) subsection (3) shall be deleted.

25. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.



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26. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability

PART II PAYMENT

Entitlement to and amount of stage payments

1. Where the parties to a relevant construction contract fail to agree:

- (a) the amount of any instalment or stage or periodic payment for any work under the contract, or
- (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
- (c) both of the matters mentioned in sub-paragraphs (a) and (b) above, the relevant provisions of paragraphs 2 to 4 below shall apply.

2. - (1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).

(2) The aggregate of the following amounts:

- (a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with sub-paragraph (b)),
- (b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and

(c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.

(3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.

(4) An amount calculated in accordance with this paragraph shall not exceed the difference between:

- (a) the contract price, and
- (b) the aggregate of the instalments or stage or periodic payments which have become due.

Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.

4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later:

- (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or
- (b) the making of a claim by the payee.

5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between:

- (a) the contract price, and
- (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,



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shall become due on the expiry of:

- (a) 30 days following completion of the work, or
- (b) the making of a claim by the payee, whichever is the later.

6. Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on:

- (a) the expiry of 30 days following the completion of the work, or
- (b) the making of a claim by the payee, whichever is the later.

7. Any other payment under a construction contract shall become due:

- (a) on the expiry of 7 days following the completion of the work to which the payment relates, or
- (b) the making of a claim by the payee, whichever is the later.

Final date for payment

8. - (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.

(2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.

Notice specifying amount of payment

9. A party to a construction contract shall, not later than 5 days after the date on which any payment:

- (a) becomes due from him, or
- (b) would have become due, if -
 - (i) the other party had carried out his obligations under the contract, and
 - (ii) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

Notice of intention to withhold payment

10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

Prohibition of conditional payment provisions

11. Where a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective as mentioned in section 113 of the Act, and the parties have not agreed other terms for payment, the relevant provisions of:

- (a) paragraphs 2, 4, 5, 7, 8, 9 and 10 shall apply in the case of a relevant construction contract, and
- (b) paragraphs 6, 7, 8, 9 and 10 shall apply in the case of any other construction contract.

Interpretation

12. In this Part of the Scheme for Construction Contracts:

"claim by the payee" means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

"contract price" means the entire sum payable under the construction contract in respect of the work;

"relevant construction contract" means any construction contract



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other than one -

(a) which specifies that the duration of the work is to be less than 45 days, or

(b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

"relevant period" means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

"value of work" means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

"work" means any of the work or services mentioned in section 104 of the Act.

The full text of this Act may be read [here](#).

Appendix 4 – The Construction Contracts (England and Wales) Exclusion Order 1998

CONSTRUCTION, ENGLAND AND WALES

The Construction Contracts (England and Wales) Exclusion Order 1998

Made 6th March 1998 Coming into force in accordance with article 1(1)

The Secretary of State, in exercise of the powers conferred on him by sections 106(1)(b) and 146(1) of the Housing Grants, Construction and Regeneration Act 1996[1] and of all other powers enabling him in that behalf, hereby makes the following Order, a draft of which has been laid before and approved by resolution of, each House of Parliament:

Citation, commencement and extent

1. - (1) This Order may be cited as the Construction Contracts (England and Wales) Exclusion Order 1998 and shall come into force at the end of the period of 8 weeks beginning with the day on which it is made ("the commencement date").

(2) This Order shall extend to England and Wales only.

Interpretation

2. In this Order, "Part II" means Part II of the Housing Grants, Construction and Regeneration Act 1996.

Agreements under statute

3. A construction contract is excluded from the operation of Part II if it is:

- (a) an agreement under section 38 (power of highway authorities to adopt by agreement) or section 278 (agreements as to execution of works) of the Highways Act 1980[2];
- (b) an agreement under section 106 (planning obligations), 106A (modification or discharge of planning obligations) or 299A (Crown planning obligations) of the Town and Country Planning Act 1990[3];
- (c) an agreement under section 104 of the Water Industry Act 1991[4] (agreements to adopt sewer, drain or sewage disposal works); or
- (d) an externally financed development agreement within the meaning of section 1 of the National Health Service (Private Finance) Act 1997[5] (powers of NHS Trusts to enter into agreements).

Private finance initiative

4. - (1) A construction contract is excluded from the operation of Part II if it is a contract entered into under the private finance initiative, within the meaning given below.



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(2) A contract is entered into under the private finance initiative if all the following conditions are fulfilled:

- (a) it contains a statement that it is entered into under that initiative or, as the case may be, under a project applying similar principles;
- (b) the consideration due under the contract is determined at least in part by reference to one or more of the following -
 - (i) the standards attained in the performance of a service, the provision of which is the principal purpose or one of the principal purposes for which the building or structure is constructed;
 - (ii) the extent, rate or intensity of use of all or any part of the building or structure in question; or
 - (iii) the right to operate any facility in connection with the building or structure in question; and
- (c) one of the parties to the contract is:
 - (i) a Minister of the Crown;
 - (ii) a department in respect of which appropriation accounts are required to be prepared under the Exchequer and Audit Departments Act 1866[6];
 - (iii) any other authority or body whose accounts are required to be examined and certified by or are open to the inspection of the Comptroller and Auditor General by virtue of an agreement entered into before the commencement date or by virtue of any enactment;
 - (iv) any authority or body listed in Schedule 4 to the National Audit Act 1983[7] (nationalised industries and other public authorities);
 - (v) a body whose accounts are subject to audit by auditors appointed by the Audit Commission;
 - (vi) the governing body or trustees of a voluntary school within the meaning of section 31 of the Education Act 1996[8] (county schools and voluntary schools), or
 - (vii) a company wholly owned by any of the bodies described

in paragraphs (i) to (v).

Finance agreements

5. - (1) A construction contract is excluded from the operation of Part II if it is a finance agreement, within the meaning given below.

(2) A contract is a finance agreement if it is any one of the following:

- (a) any contract of insurance;
- (b) any contract under which the principal obligations include the formation or dissolution of a company, unincorporated association or partnership;
- (c) any contract under which the principal obligations include the creation or transfer of securities or any right or interest in securities;
- (d) any contract under which the principal obligations include the lending of money;
- (e) any contract under which the principal obligations include an undertaking by a person to be responsible as surety for the debt or default of another person, including a fidelity bond, advance payment bond, retention bond or performance bond.

Development agreements

6. - (1) A construction contract is excluded from the operation of Part II if it is a development agreement, within the meaning given below.

(2) A contract is a development agreement if it includes provision for the grant or disposal of a relevant interest in the land on which take place the principal construction operations to which the contract relates.

(3) In paragraph (2) above, a relevant interest in land means:

- (a) a freehold; or
- (b) a leasehold for a period which is to expire no earlier than 12 months after the completion of the construction operations under the contract.

The full text of this Act may be read [here](#).