



# GUIDANCE Note

## Onerous Terms & Conditions 01.10.21

This guidance note is a summary of the trending risks and considerations businesses should look out for if they are looking for onerous terms when engaging with clients and main contractors to perform Works.

### Key information

Failure to comply with contractual provisions may have far-reaching negative financial and legal consequences. To assist companies in the engineering services sector of the industry negotiate a more equitable alternative to an onerous clause, the following has been produced. Members receiving a contract are reminded that this is a contractual offer to work, using their terms and conditions. The offer does not have to be accepted, in the form offered and members are advised to consider negotiating alternative wording based on the following advice. Members are strongly advised to review their agreements, for the presence of such clauses and where possible, use the advice to negotiate a compromise.

Onerous Terms & Conditions				
	Title	Example	Risk	Compromise/Action
1.	Main Contract discount	<i>The Sub-Contract Price will be subject to 2.5% Main Contractor's discount</i>	This discount is applicable no matter what the circumstances.	Any discount should be expressed to be "subject to the Sub-Contractor having received full payment of any amount due under the Sub-Contract"

				<p><i>by the relevant final date for payment”.</i></p> <p>This ensures that, if the Main Contractor decides to pay late, the discount will not apply.</p> <p>The other party should not argue against this, as to do so would be to endorse an intention to pay late before the contract has even started.</p>
2.	<p>Reduced scope for extensions of time/loss and/or expense</p>	<p>1) The Sub-Contractor will only be entitled to an extension to the time for completion if, the completion of the Sub-Contract Works is likely to be or has been delayed beyond the Date for Completion by reason of the occurrence of any of the matters entitling the Main Contractor or the Contractor to an extension of time as set out in the relevant provisions of the Main Contract or the Contract, as the case may be, the Sub-Contractor shall give to the Contractor written notice to that effect in a manner which enables the Contractor to fully comply with its obligations under the terms of the Contract.</p> <p>2) The Sub-Contractor’s full compliance with this obligation is a condition precedent to the Sub-Contractor being entitled to any extension of time under the</p>	<p>The effect of this clause, whether in relation to extensions of time or any entitlement to loss and/or expense, is that the Sub-Contractor cannot make a claim unless:</p> <p>(a) the Main Contractor has a similar right under the Main Contract; and</p> <p>(b) the Sub-Contractor has complied with any procedure for making such a claim as laid out in the Main Contract.</p> <p>There are a number of events which may well fall outside a Main Contractor’s entitlement to an extension/ reimbursement under the Main Contract, for which the Sub-Contractor is not responsible (but the Main Contractor is) and so the Sub-Contractor should not take the risk of the Main Contractor being in default due to no reason of default by the Sub-Contractor.</p>	<p>Replace this type of clause with a generic right that the Sub-Contractor can claim an extension of time or loss and/or expense to the extent the Sub-Contractor has incurred delay/costs due to reasons beyond the Sub-Contractor’s reasonable control.</p>

		<p>provisions of the Sub-Contract.</p> <p>3) If the Main Contract contains any conditions precedent (or terms of equivalent effect) or other restrictions to claiming extensions of time then the same shall apply to this Sub-Contract mutatis mutandis save that in relation to requirements to provide notices, information, documents or similar the same shall be provided to the Contractor in sufficient time to allow the Contractor a reasonable time to consider the same and forward the same (or similar) to the Employer in compliance with such requirements.</p> <p>4) Without prejudice to the provisions of clause 15(5) below, failure by the Sub-Contractor to make an application for any extension of time (which for the avoidance of doubt shall include all relevant supporting information, grounds for its request and other explanations and documentation necessary to enable the Contractor to ascertain the Sub-Contractor's entitlement) within 7 days of the date when the Sub-Contractor became aware or ought reasonably to have become aware of the circumstances giving rise to or likely to give rise to a delay shall in any event amount to a waiver by the Sub-Contractor of</p>	<p>Remember also that the Sub-Contractor is not party to the main contract, may not have sight of it and has not had an opportunity to negotiate it.</p> <p>One way of dealing with this is to list the events including those which may occur for which the Sub-Contractor should be entitled to an extension of time and/or a reimbursement. Another way would be to insert a provision allowing the Sub-Contractor to claim an extension of time due to <i>'circumstances beyond its reasonable control'</i>.</p>	
--	--	--	--	--

		<p>its entitlement to do so.</p> <p>The Sub-Contractor shall not be entitled to an extension of the period(s) for completion in respect of such delay, which is greater than the extension, which the Contractor is able to secure under the Main Contract. The Contractor may in its absolute discretion and without future obligation waive the provisions of this clause 15(6) in respect of any given delay or delays to the Sub-Contract Works.</p>		
3.	Compliance with the Main Contract	<p>3.1 <i>The Sub-Contractor <b>shall be deemed to have full knowledge of the provisions of the Main Contract</b> (other than the details of the Main Contractor's prices thereunder as stated in the bills of quantities or schedules of rates and prices as the case may be). To the extent that the Main Contractor has a copy of the Main Contract, <b>the Main Contractor shall, if so requested by the Sub-Contractor, provide the Sub-Contractor with a copy of the Main Contract, at the Sub-Contractor's expense.</b></i></p> <p>3.2 <i>The Sub-Contractor shall:</i></p> <p><i>i. <b>assume and perform hereunder all the obligations and liabilities of the Main Contractor under</b></i></p>	<p>This imposes an obligation on the Sub-Contractor to comply with the Main Contract. This is a very onerous provision because:</p> <p>(a) it is unlikely that the Sub-Contractor has had sight of the Main Contract and an opportunity to take part in the Main Contract negotiations</p> <p>(b) the terms of the Main Contract may either completely override the Sub-Contractor's rights and obligations under the Sub-Contract, be incompatible with the Sub-Contract terms or require the Sub-Contractor to comply with additional onerous obligations that may result in the Sub-Contractor incurring extra cost</p> <p>(c) it is often the case that the Sub-Contractor has to request a copy</p>	<p>The Sub-Contractor should always seek to delete such contractual provisions.</p> <p>Where such deletion is not possible, we would recommend the following amendments:</p> <p>3.1 <i>The Sub-Contractor shall have regard to the provisions of the Main Contract (other than the details of the Main Contractor's prices thereunder as stated in the bills of quantities or schedules of rates and prices as the case may be) provided the Main Contractor has supplied the Sub-Contractor with a copy of the Main Contract by the date of this Agreement.</i></p> <p>3.2 <i>The Sub-Contractor shall using its reasonable</i></p>

		<p><b>the Main Contract in relation to the Sub-Contract Works as if the provisions of the Main Contract were set out and repeated herein, and</b></p> <p>ii. <b>so execute and complete the Sub-Contract Works so that no act or omission of his in relation thereto shall constitute, cause or contribute to any breach by the Main Contractor of any of his obligations under the Main Contract and shall ensure that the Main Contractor's, Employer's and Supervising Officer's requirements are fully met, including, without limitation, in relation to the satisfaction of their or any third parties' requirements.</b></p>	<p>of the Main Contract in order to see what obligations it contains.</p> <p>For the above reasons, the Sub-Contractor should not be required to go back-to-back with the Main Contractor and the Sub-Contract should standalone and if necessary incorporate express risks which need to be stepped-down.</p>	<p><i>endeavours execute and complete the Sub-Contract Works so that no negligent act or omission of his in relation thereto shall constitute, cause or contribute to any breach by the Main Contractor of any of his obligations under the Main Contract and shall ensure that the Main Contractor's, Employer's and Supervising Officer's reasonable requirements are fully met, including, without limitation, in relation to the reasonable satisfaction of their reasonable requirements.</i></p>
4.	<p>Compliance with ancillary documents not previously seen</p>	<p><i>The following Documents are not attached to the Sub-Contract, but form part of the Sub-Contract:</i></p> <ul style="list-style-type: none"> <li>• <i>third party contracts</i></li> <li>• <i>enquiry letters</i></li> <li>• <i>construction phase plan</i></li> <li>• <i>specification</i></li> <li>• <i>drawings, etc.</i></li> </ul> <p><i>Where there is any conflict, discrepancy or similar within or between any document or condition included or referred to under this Sub-</i></p>	<p>The purpose of such a provision is to make the specified documents part of the Sub-Contract. Once they are part of the Sub-Contract, the Sub-Contractor will be required to comply with them regardless of whether or not they have seen them. Such obligations may be stricter than those the Sub-Contractor has agreed to and may require it to incur further costs and/or employ additional personnel in order not to be in breach of the Sub-</p>	<p>The Sub-Contractor should always either seek to delete provisions requiring it to comply with documentation it has not seen or make compliance with such documentation conditional upon having been provided with the same.</p> <p>Any list of documents forming part of the Sub-Contract should always be listed in order of priority so that should a conflict or discrepancy</p>

		<p><i>Contract, the Sub-Contractor shall forthwith inform the Contractor in writing of the discrepancy and its proposed amendment to remove the relevant discrepancy and (subject always to compliance with applicable laws) the Contractor shall decide between the discrepant items or otherwise may accept the Sub-Contractor's proposed amendment and the Sub-Contractor shall be obliged to comply with and implement the decision or acceptance by the Contractor at the cost of the Sub-Contractor and without cost to the Contractor, provided that where the resolution of such discrepancy results in a saving to the Sub-Contractor, the Sub-Contract Sum shall be reduced by the amount of such saving.</i></p>	<p>Contract.</p> <p>The Sub-Contractor should obtain copies of all documents that it is bound by where they are incorporated into the Sub-Contract by reference so that it can assess the risk and cost the risk accordingly within its price.</p>	<p>arise, it is clear as to how that conflict or discrepancy should be resolved, i.e. which document overrules the other.</p> <p>The Sub-Contractor may also wish to reverse the risk so that the time and monetary consequences of resolving any conflict or discrepancy lays with the Main Contractor.</p>
5.	Loss of profit on termination	<p><i>If for any reason the Contractor's employment under the Contract is determined, then the employment of the Sub-Contractor under this Sub-Contract shall thereupon also determine, and the Sub-Contractor shall exclusively be entitled to be paid:</i></p> <p>(a) <i>the value of the Sub-Contract Works completed or partially completed at the date of such determination, such value to be calculated according to the provisions of the Sub-Contract</i></p> <p>(b) <i>the value of any unfixed materials</i></p>	<p>This clause means that the Sub-Contract will terminate if the Main Contract terminates, even where the Sub-Contractor may be wholly innocent. In which case, why should the Sub-Contractor not be able to claim loss of profit or other consequential losses incurred due to suffering a termination that was not caused by a fault of the Sub-Contractor?</p>	<p>Add the right to get paid for; loss of profit on the remaining contract works, payment for materials ordered and not yet delivered but which cannot be cancelled and for removal of temporary plant, materials, machinery and buildings.</p>

		<p><i>and goods delivered (not prematurely) upon the Site for use in the Sub-Contract Works the property in which has passed to the Contractor under the terms of the Sub-Contract</i></p> <p>(c) <i>so far as not already paid, any amount due under Clause X and Clause Y.</i></p> <p><i>Subject to the above, for the avoidance of doubt the Sub-Contractor shall not be entitled to any other payment whatsoever, including payment for loss of profit, loss of contracts, loss of opportunity or other indirect or consequential losses arising out of the termination of the Sub-Contractor's employment.</i></p>		
6.	Cross contract set-off	<p>The Main Contractor shall have the right to deduct from or set off against any sums due to the Sub-Contractor under this Sub-Contract <b>and/or any other agreement between the Main Contractor and the Sub-Contractor</b> all damages, costs, losses and expenses incurred by the Main Contractor as a result of the Sub-Contractor's breach hereof.</p>	<p>The effect of this clause is to allow the Main Contractor to deduct any money due from the Sub-Contractor either under this project or any other project. So, if the Sub-Contractor has a number of on-going projects with the Main Contractor and one of them has issues, whilst others are performing well, the Main Contractor will be entitled to deduct money from <b>any</b> of the projects that are going well <b>provided</b> this cross set-off provision is contained in all of the sub-contracts.</p>	<p>The clause could be amended as follows: <i>"The Main Contractor shall have the right to deduct from or set off against any sums due to the Sub-Contractor, under this Sub-Contract, all such damage, costs, losses and expenses."</i></p>
7.	Late payment of	<i>In the event of the Main Contractor</i>	Whilst the parties to a contract are	The clause could be amended as



	interest	<p><i>failing to pay any sum due to the Sub-Contractor by the final date for payment, the Main Contractor shall pay to the Sub-Contractor interest on such overdue sum from the final date for payment until payment is made <b>at the rate of 2% per annum</b> above the official dealing rate of the Bank of England current at the final date for payment.</i></p>	<p>free to agree any rate of interest, the industry-standard rate of interest is 5%. It could well be argued that as the industry norm is 5%, nothing lower is a 'substantial remedy' as required by the legislation, but the Sub-Contractor would not want to leave this issue to chance. It is better to agree the rate of 5% in the Sub-Contract.</p> <p>Note that if there is no late payment of interest provision in the Sub-Contract, the law implies such a provision and allows the payee to charge a 'statutory interest', that is currently 8% plus the Bank of England's base rate.</p>	<p>follows:</p> <p><i>"In the event of the Main Contractor failing to pay any sum due to the Sub-Contractor by the final date for payment, the Main Contractor shall pay to the Sub-Contractor interest on such overdue sum from the final date for payment until payment is made <b>at the rate of 5% per annum</b> above the official dealing rate of the Bank of England current at the final date for payment."</i></p>
8.	Conditions precedent	<p><i>The Sub-Contractor shall deliver to the Main Contractor within 14 days of request signed collateral warranties in the form attached. Delivery to the Main Contractor of such collateral warranties within the said period <b>shall be a condition precedent</b> to the Sub-Contractor's entitlement to payment under the Sub-Contract.</i></p>	<p>This provision makes payment conditional upon the happening of an event (e.g., receipt by the Main Contractor of collateral warranties.)</p> <p>If, for whatever reason, the Sub-Contractor is unable to deliver the warranties within the time given, it receives <b>NO PAYMENT</b> until it delivers them - the punishment could be vastly disproportionate to the default in question.</p> <p>By making the payment a set amount, which could be held back by the Main Contractor, it brings the punishment in line with the issue for which the Sub-Contractor is responsible.</p>	<p>As a compromise, this clause could be amended as follows:</p> <p><i>"The Sub-Contractor shall deliver to the Main Contractor within 14 days of request signed collateral warranties in the form attached. The Main Contractor may withhold [e.g., £100] due to the Sub-Contractor under the Sub-Contract until such collateral warranties have been executed and delivered to the Main Contractor"</i>.</p>



9.	Extended payment period	<p><i>Interim applications for payment shall be submitted at the end of the month following the month in which the work is carried out.</i></p> <p><i>The payment due date in respect of interim applications for payment shall be the date occurring <b>forty-five (45)</b> days after submission of the interim application for payment.</i></p> <p><i>The final date for payment in respect of the interim application for payment shall be the date occurring forty-five (45) days after the payment due date.</i></p>	<p>The effect of this provision is to cash-starve the payee as the payment period is 90 days after the period in which the goods are delivered and the works done.</p>	<p>To ensure positive manageable cash-flow, payees (means persons to whom payment is due) are advised to follow the industry 'norm' payment period, where:</p> <ul style="list-style-type: none"> <li>• application for payment is to be submitted a week prior to the end of the month</li> <li>• the due date is the end of the month, and</li> <li>• the final date for payment is <b>17 (or 30) days</b> after the due date.</li> </ul>
10.	Variations (1)	<p><i>"In the event such alteration or modification constitutes a variation or change under the terms of the Main Contract, then such a variation or change shall be valued and paid for by the Main Contractor at the prices contained in the Sub-Contractor's tender. Otherwise, the Sub-Contractor shall not be entitled to any additional sums in relation thereto."</i></p>	<p>In the above clause, payment is conditional on the type of variation having been agreed under the Main Contract. If, however, the Main Contractor instructs the Sub-Contractor to carry out a type of variation that has not been agreed under the Main Contract, the Sub-Contractor will have to carry it out at its own cost. If the Sub-Contractor fails to carry out the instruction the Sub-Contractor is at risk of being in breach of the Sub-Contract, and the Sub-Contract may be terminated.</p> <p>As it is unlikely that the Sub-Contractor has had a chance to comment on/negotiate the terms of the Main Contract, it is unfair to impose these terms on the Sub-Contractor.</p>	<p>This type of provision should be deleted and replaced with a fair system. A fair system would allow:</p> <ul style="list-style-type: none"> <li>• The Sub-Contractor not to be obliged to carry out any variation not issued in writing</li> <li>• The Sub-Contractor to confirm any oral instruction to the Main Contractor within 14 days and if not dissented from within 7 days of receipt, that instruction will be deemed a variation by the parties</li> <li>• The Sub-Contractor a reasonable right of objection to any variation</li> </ul>

11.	Variations (2)	<p><i>“The Main Contractor shall be entitled to vary, modify and/or omit the nature or scope of the Sub-Contract Works.”</i></p>	<p>This provision allows the Main Contractor, amongst other things, to omit certain services from the scope of the Sub-Contract Works. If the Sub-Contract price has been worked based on the volume of work, by losing certain parts of the Sub-Contract Works the Sub-Contractor may be losing a substantial proportion of its Sub-Contract price/profit.</p>	<p>Where the price/profit is calculated on the volume of work, the provision allowing the Main Contractor to omit parts of scope should either be deleted or the Main Contractor should be required to reimburse the Sub-Contractor for any loss of profit thus caused.</p>
12.	Indemnity	<p><i>The Sub-Contractor shall be liable for <b>and shall save harmless and indemnify</b> the Main Contractor from and against any claim demand proceeding damage cost charge or expense due to or resulting from any:</i></p> <p>(a) <i>breach non-observance or non-performance by the Sub-Contractor its servants or agents of the provisions of the Main Contract or this Sub-Contract or any of them</i></p> <p>(b) <i>act or omission of the Sub-Contractor his servants or agents which involves the Main Contractor in any liability either to the Employer or the Main Contractor under the Main Contract or to any other party under any other agreement made by the Main Contractor in connection with the Main Contract Works, and</i></p>	<p>Normally, if a Sub-Contractor breaches a contract the other party suffering loss can claim: a) loss naturally arising from the breach (direct loss), and b) loss within the contemplation of the parties at the time of entering the contract (very limited consequential loss).</p> <p>Agreeing to indemnify someone is equivalent to agreeing to write him or her a blank cheque (any and all loss) if a particular event specified in the contract (eg, failure to comply with the Main Contract) occurs.</p> <p>Unlike under the ordinary rules of contract law, the party benefiting from the indemnity will not be required to prove their loss falls within (a) and (b).</p> <p>Additionally, the statutory limitation period which defines the period after completion within which the Sub-Contractor could be sued (6 years for</p>	<p>The Sub-Contractor should always seek to delete indemnity provisions. If this is not possible to achieve, the Sub-Contractor could propose amending the indemnity provision as follows:</p> <p><i>The Sub-Contractor shall be liable to the Main Contractor in respect of any <b>reasonably and directly incurred and fully substantiated claim demand proceeding damage cost charge or expense due to or resulting from any:</b></i></p> <p>(a) <i>breach non-observance or non-performance by the Sub-Contractor its servants or agents of the provisions of the Main Contract or this Sub-Contract or any of them</i></p> <p>(b) <i>act or omission of the Sub-Contractor his servants or agents which involves the Main Contractor in any liability</i></p>

		<p>(c) <i>negligence act omission or breach of duty on the part of the Sub-Contractor its servants or agents caused by or arising out of or in connection with the execution of the Sub-Contract Works.</i></p>	<p>a simple contract; 12 years for a deed) that would usually apply can be extended under an indemnity.</p> <p>For example, if the Sub-Contractor is required to indemnify the Main Contractor for a breach of the Sub-Contract, the rights of the party to be indemnified will continue for as long as the indemnity remains in force. If the party in breach refuses to honour its obligations under the indemnity, there will be a cause of action for breach of the obligation to indemnify. The limitation period will begin to run from the time of the refusal to indemnify, which may occur long after the original breach of contract.</p> <p>Indemnities are highly onerous and unnecessary</p>	<p><i>either to the Employer or the Main Contractor under the Contract or to any other party under any other agreement made by the Contractor in connection with the Main Contract Works, and</i></p> <p>(c) <i>negligence act omission or breach of duty on the part of the Sub-Contractor its servants or agents caused by or arising out of or in connection with the execution of the Sub-Contract Works.</i></p>
13.	Retention	<p><i>Retention of 5% of the Sub-Contract Sum or at such other percentage as may be stated in the Purchase Order will be held by the Main Contractor from interim payments.</i></p>	<p>With low margins generally in the SME sector, the retention element can represent the total profit margin on a project and affect cash flow.</p>	<p>In the interests of maintaining positive cash flow, the Sub-Contractor should either seek to delete the retention provision or, where it is not possible, agree that the retention will be release in two tranches - the first tranche to be released on completion of the Sub-Contract Works; the second tranche to be released on expiry of the rectification period as stated in the Sub-Contract (the rectification period should, where possible, be twelve months from practical completion of the Sub-Contract</p>

				Works). Release of retentions should <b>never</b> be linked to PC of the main contract works or expiry of the defects liability period of the Main Contract Works.
14.	Exclusive remedy provision	<i>The Sub-Contractor's entitlement to recover any loss and/ or expense pursuant to clause [x] shall be its sole remedy in respect of loss and/ or expense and/or damages arising as a result of a breach of the Sub-Contract by the Main Contractor. For the avoidance of doubt, the Sub-Contractor shall have no other entitlement to recover loss and/or expense and/or damages at common law.</i>	<p>This is an exclusive remedy clause. This means that only the specified remedy, i.e., reimbursement of <i>loss and expense</i>, will be available to the Sub-Contractor if the Main Contractor <i>breaches the Sub-Contract</i>. One issue with this is that all other remedies that may have been available to the Sub-Contractor at common law, regardless of whether or not the Sub-Contractor knew about them, will not be available.</p> <p>The other issue is that the Sub-Contractor will only be able to recover direct loss and expense; however, its losses may go further than that and the breach may impact on the Sub-Contractor's employee/labour costs, insurance premiums, ability to take on other projects and hence earn money, etc.</p>	It is difficult to amend such a clause because it is often impossible to foresee all the circumstances and potential appropriate remedies. Additionally, it is not an industry-standard provision. Therefore, we would advise deleting this provision altogether.
15.	Audit	<i>The Sub-Contractor shall ensure at no extra cost to the Main Contractor for the purposes of carrying out any audit that the Employer's, Main Contractor's and the Main Contractor's internal and nominated auditors and where relevant</i>	<p>These provisions entitle the named parties to audit the Sub-Contractor and examine all documents the Sub-Contractor holds no matter how commercially sensitive.</p> <p>They also require the Sub-Contractor</p>	It could be difficult to narrow down the extent of these provisions, so it is best to delete them altogether.

		<p><i>the Controller and Auditor General, are given access to inspect and examine such documents as may reasonably be required which are owned, held or otherwise within the control of the Sub-Contractor.</i></p> <p><i>The Sub-Contractor shall, for carrying out the audit, provide, at no additional cost to the Main Contractor, such accommodation and facilities for representatives of the Employer, the Main Contractor and the Main Contractor as the Employer, the Main Contractor or the Main Contractor may reasonably require.</i></p>	<p>to bear all the costs associated with carrying out the audit.</p> <p>The type of information that the Sub-Contractor will have in its possession is likely to be commercially sensitive and confidential (e.g., it may contain rates charged on other jobs, agreements with suppliers, employee's personal data, etc). Therefore, by disclosing such information, the Sub-Contractor may be undermining its ability to negotiate good rates, and potentially be breaching confidentiality agreements and/or data protection legislation, etc.</p>	
16.	Insolvency under a third-party contract - pay-when-paid	<p><i>Notwithstanding anything to the contrary in this Sub-Contract, the Sub-Contractor shall not be entitled to receive any payments under this Sub-Contract in the event that any third party with an obligation to pay the Main Contractor or the Main Contractor becomes insolvent.</i></p>	<p>This clause means that if the Employer or any other party responsible for paying the Main Contractor becomes insolvent and fails to pay it, the Main Contractor will not be responsible for paying to the Sub-Contractor for the Sub-Contract Works.</p> <p>The Main Contractor is trying to pass on the risk of the Employer's default to the Sub-Contractor without the Sub-Contractor having a contract with the Employer or the opportunity to do due diligence on the Employer to manage this risk in contrast with the Main Contractor who does.</p>	<p>For the reasons explained, we would advise such clauses are removed, as there is no commercially justifiable reason why the Sub-Contractor should bear the insolvency risk of parties that the Sub-Contractor is not in contract with.</p>
17.	Ownership of the Sub-Contractor's	<p><i>Where the Main Contract provides that title in equipment, temporary works or</i></p>	<p>This states that if the Main Contract so requires, the title in the Sub-</p>	<p>We would advise deleting such provisions and replacing it with a</p>

	equipment	<i>consumables owned or brought onto Site by the Main Contractor shall in certain events vest in the Employer or re-vest in the Main Contractor, then insofar as Sub-Contractor's Equipment, temporary works or consumables are to be provided by the Sub-Contractor for the purposes of the execution of the Sub-Contract Works the title therein shall pass from the Sub-Contractor to the Main Contractor immediately before it is due to vest in the Employer in accordance with the Main Contract and shall revert to the Sub-Contractor immediately after it has re-vested in the Main Contractor in accordance with the Main Contract.</i>	<p>Contractor's equipment will pass to the Main Contractor and it will revert to the Sub-Contractor, as per the terms of the Main Contract.</p> <p>Depending on the terms of the Main Contract, the title in such equipment may never revert to the Sub-Contractor. What is more, it is unreasonable to require the Sub-Contractor to comply with the terms of an agreement it may not have seen and/or had an opportunity to negotiate. Although the law in this area is complicated, the Sub-Contractor will want the Sub-Contract to stipulate that ownership will not pass until payment is made in full. In any event, why would the Sub-Contractor ever surrender title to their plant (which may be on hire from another business) and their tools?</p>	retention-of-title clause, which specifically identifies that title in any goods, materials, equipment, plant or tools does not pass until payment in full for the same has been received by the Sub-Contractor.
18.	Adjudication	<i>The referring party shall choose the Adjudicator from the Main Contractor's Panel of Adjudicators (a copy of which is available on request).</i>	An adjudicator nominated by the Main Contractor may be biased and, due to the pre-existing relationship, and more minded to adjudicate in the Main Contractor's favour.	It is better to have an independent adjudicator nominated by a nominating body (e.g. RICS). Therefore, a provision requiring use of a named adjudicator should be deleted.
19.	Payment of adjudication costs by referring party	<i>The Sub-Contractor shall indemnify the Main Contractor against any costs and expenses incurred by the Main Contractor in adjudication.</i>	<p>This is a very "heavy" form of a "Tolent" clause, ie a type of clause that allocates the responsibility for paying adjudication costs on a particular party.</p> <p>This clause does not just require the</p>	This clause should be deleted as the Leander Construction v Mulalley case, and 2010 amendments to the Construction Act has cast doubt on whether such clauses are lawful under s.108A of the Construction Act as amended.



			<p>Sub-Contractor to pay the Main Contractor's adjudication costs in all circumstances (even where the Main Contractor is genuinely at fault eg, failure to comply with the payment procedure); it requires it to <b>indemnify</b> the Main Contractor. Such a clause may prevent the Sub-Contractor from seeking justice through adjudication because the Sub-Contractor may be concerned about the potential costs it may incur in addition to, say, loss of payments.</p>	
20.	Termination at will	<p><i>The Main Contractor may terminate the Sub-Contractor's engagement under the Sub-Contract at any time and for any reason by giving to the Sub-Contractor not less than seven (7) days' prior written notice. On expiry of such notice period, the Sub-Contractor's engagement under the Sub-Contract will terminate automatically.</i></p>	<p>This provision gives the Main Contractor the right to terminate the Sub-Contract for no reason at all (i.e. at will) and does not require the Main Contractor to compensate the Sub-Contractor for any loss of profit incurred as a result of such termination.</p> <p>This is an onerous clause because the Sub-Contractor may have tendered for the Sub-Contract works based on reduced rates due to the length and size of the project. If the Main Contractor then decides to terminate the Sub-Contract at will, not only will the Sub-Contractor lose the remainder of the Sub-Contract sum, but the Sub-Contractor will also lose money on the under-priced rates.</p>	<p>Generally, we would advise deleting such clauses. If it absolutely has to stay in the Sub-Contract, it could be amended as follows:</p> <p><i>"Either party may terminate the Sub-Contractor's engagement under the Sub-Contract at any time and for any reason by giving to the other party not less than twenty-one (21) days' prior written notice. On expiry of such notice period, the Sub-Contractor's engagement under the Sub-Contract will terminate automatically.</i></p> <p><i>Upon such determination and after taking into account amounts previously paid under this Sub-Contract the Sub-Contractor shall be paid by the Main Contractor:</i></p> <p>(a) <i>the total value of all work</i></p>



				<p><i>executed at the date of determination, and</i></p> <p>(b) <i>the cost of materials and goods properly ordered for the Sub-Contract Works for which the Sub-Contractor shall have paid or for which the Sub-Contractor is legally bound to pay, and on such payment by the Main Contractor any materials or goods so paid for shall become the property of the Contractor, and</i></p> <p>(c) <i>the reasonable cost of removal from the site of all temporary buildings, plant, tools, equipment, materials and goods, and</i></p> <p>(d) <i>any loss of profit and/or damage caused to the Sub-Contractor by the determination.”</i></p>
21.	Sub-Contractor's equipment on termination	<i>The Main Contractor may by written notice to the Sub-Contractor determine the Sub-Contractor's employment under the Sub-Contract with immediate effect. Thereupon the Main Contractor may take possession of all materials, Sub-Contractor's equipment and other things whatsoever brought on the Site by the Sub-Contractor and may use them for the purpose of executing, completing and maintaining the Sub-</i>	<p>This clause entitles the Main Contractor to take possession of all of the Sub-Contractor's equipment brought on site together with any materials, paid or unpaid for by the Main Contractor, use and, potentially, sell it if it thinks necessary.</p> <p>Not only will the Sub-Contractor's employment end, it may also lose its equipment and hence not be able to work on other projects. It may also</p>	<p>In the first instance, this clause should be deleted. If it is not possible, the clause should be amended as follows:</p> <p><i>The Main Contractor may by written notice to the Sub-Contractor determine the Sub-Contractor's employment under the Sub-Contract with immediate effect. Thereupon the Main Contractor may, subject to prior payment for</i></p>

		<p><i>Contract Works and may, if the Main Contractor thinks fit, sell all or any of them and apply the proceeds in or towards the satisfaction of monies otherwise due to the Main Contractor from the Sub-Contractor.</i></p>	<p>have to allow the Main Contractor to utilise materials for which it has not paid; thereby losing any money it paid for such materials.</p> <p>In any event, why would the Sub-Contractor ever surrender title to the Sub-Contractor's plant (which may be on hire from another business) and their tools?</p>	<p><i>the same. take possession of all materials, brought on the Site by the Sub-Contractor and paid for by the Main Contractor and may use them for the purpose of executing, completing and maintaining the Sub-Contract Works.</i></p>
22.	Fitness for purpose	<p><i>The Sub-Contractor warrants to the Contractor that the Sub-Contract Works will be fit for their purposes as made known to the Sub-Contractor.</i></p>	<p>The industry standard of care that should be owed is one of "reasonable skill and care".</p> <p>However, if the Sub-Contractor agrees to the 'fitness for purpose' wording this imposes a far higher standard. The Sub-Contractor could be agreeing to a purpose or purposes that the Sub-Contractor may not be aware of.</p> <p>The Sub-Contractor will need to check with their insurer as to whether or not their insurance will cover this higher standard - insurance products rarely do cover 'fitness for purpose' which would leave the Sub-Contractor to cover the shortfall between the insurance cover and the Sub-Contractor's liability.</p>	<p>The clauses should be amended as follows:</p> <p><i>The Sub-Contractor shall carry out and complete the Sub-Contract Works with the reasonable skill, care and diligence, which may reasonably be expected of a professional person acting in the capacity of the Sub-Contractor, carried out within the scope of the Sub-Contract.</i></p> <p><i>The Sub-Contractor shall supply goods and materials to the standard stated in the Sub-Contract or where no standard is stated, of satisfactory quality.</i></p> <p><i>No warranty, condition, undertaking or term expressed or implied, statutory or otherwise, as to the condition, quality, performance, durability, fitness for purpose of the Sub-Contract Works under the Sub-Contract is given by the Sub-Contractor.</i></p>

23.	Variations in writing	<i>No payment for an alleged variation will be made by the Contractor unless the Subcontractor has obtained a written instruction from the Contractor.</i>	<p>The above clause means that if you accept an oral instruction on site that amounts to a variation, you may not be entitled to claim payment for the variation.</p> <p>This is clearly impractical as it is common for instructions to be given verbally for example during a meeting, a site visit or in an emergency. By allowing a procedure where an oral instruction can be confirmed in writing, disputes are less likely to arise.</p>	<p>As a compromise, the following drafting can be added:</p> <p><i>Any oral instruction which might, if in writing, form the basis of a variation shall be confirmed in writing to the Contractor within 14 days of the date of the oral variation being made. If not dissented from by the Contractor within 7 days of the date of the aforementioned confirmation is sent, that oral instruction shall duly be deemed agreed by the parties as a written variation.</i></p>
24.	Termination at will	<i>The Main Contractor may at its sole discretion terminate the Sub-Contract on notice.</i>	<p>This type of clause enables the Contractor to terminate the contract regardless of whether there has been an act of breach or not by the Sub-Contractor. There is no requirement for the Contractor to act reasonably when exercising such a provision. Further, this right is not reciprocal and a Sub-Contractor cannot terminate the contract without proving a breach of contract by the Contractor.</p>	<p>This type of clause should be deleted.</p>
25.	Termination Restrictions Imposed by a Collateral Warranty	<p>The Sub-Contractor will not in any circumstances exercise any right it may have to terminate its employment under the Sub-Contract or to treat its employment under the Sub-Contract as having been terminated by the Contractor or to discontinue the performance of its duties and</p>	<p>A collateral warranty is subordinate to the works contract and should properly impose no more onerous terms than those already set by the sub-contract itself. Parties to a construction contract have been entitled, from 1998, to partially or totally discontinue the performance of</p>	<p><i>Although intended to subvert the Beneficiary's attempt to constrict the sub-contractor's rights to (partially) suspend in the event of non-payment the argument can be made:</i></p> <ol style="list-style-type: none"> <li><i>1. A collateral Warranty is an ancillary document, sub-</i></li> </ol>

		<p>responsibilities thereunder until it shall first have given to the Beneficiary not less than 21 days' written notice of such matters ("the Sub-Contractor's Notice") PROVIDED THAT compliance by the Sub-Contractor with the provisions of this clause xx shall not be treated as a breach of the Sub-Contract by the Sub-Contractor nor as a waiver of any breach on the part of the Contractor giving rise to the right of determination nor otherwise prevent the Sub-contractor from exercising his rights after expiration of the notice unless the right of determination shall have ceased under the provisions of clause xx (payment or a step-in).</p>	<p>their contractual obligations; if the other party fails to make a contractually correct payment and provided certain pre-conditions have been met. The above term seeks to extend the 7-day notice period (as provided by the Scheme and usually embraced by subcontracts) by 14 days to 21 days. 7 days is the period the JCT employ and although this is a long time most warranties attempt to extend this by either a further 7 or 14 days. The Beneficiary pays little to obtain this right and delays expose the sub-contractor to increasing risk of significant loss; if the Beneficiary decides not to step-in at the end of this period of procrastination. Step-in terms usually restate the earlier completion date, negating any benefit the Scheme provides for relief from exposure to delay damages following time lost through the suspended time by the statutory right to an extension of time.</p>	<p><i>ordinate to the sub-contract and it should not therefore be amending the sub-contract statutory right to suspend for non-payment to the party's detriment.</i></p> <p>2. <i>This is simply an amendment to the number of days to bring it in line with the Construction Act and the overarching sub-contract and is in line with good i.e., JCT contractual practice.</i></p> <p><i>Amended clauses may read:</i>  <i>The Sub-Contractor will not exercise any right it may have to terminate its employment under the Sub-Contract or to treat its employment under the Sub-Contract as having been terminated by the Contractor or to discontinue the performance of its duties and responsibilities thereunder until it shall first have given to the Beneficiary not less than 7 days' written notice of such matters ("the Sub-Contractor's Notice") PROVIDED THAT compliance by the Sub-Contractor with the provisions of this clause xx shall not be treated as a breach of the Sub-</i></p>
--	--	--	---	---

				<p><i>Contract by the Sub-Contractor nor as a waiver of any breach on the part of the Contractor giving rise to the right of determination nor otherwise prevent the Sub-contractor from exercising his rights after expiration of the notice unless the right of determination shall have ceased under the provisions of clause xx (payment or a step-in).</i></p> <p><i>Notwithstanding the provisions of clause 1.1 nothing in this Agreement will preclude, stop or restrain the Sub-Contractor from exercising any right provided to him under Section 112 of the Housing Grants, Construction and Regeneration Act, 1996 as amended, and any partial or full suspension shall not constitute a discontinuance as envisaged by clause 1.1 provided the Sub-Contractor notifies the Beneficiary and/or any Interested Party of such suspension within 7 Days of the Sub-Contractor exercising his statutory rights.</i></p>
--	--	--	--	---



ECA, Rotherwick House, 3 Thomas More Street, St. Katharine's & Wapping, London E1W 1YZ  
Tel: 020 7313 4800 Email: [info@eca.co.uk](mailto:info@eca.co.uk) [www.eca.co.uk](http://www.eca.co.uk)