CITY UNIVERSITY OF HONG KONG

CONTRACT DOCUMENTATION &
STANDARD FORM OF BUILDING CONTRACT (SFBC)

Documents for construction contracts usually comprise the following:-

(i) Conditions of Contract SFBC.
(ii) Form of Tender.
(iii) Bills of Quantities.
(iv) Correspondence passing between the tenderer and the employer in the period between the receipt of tenders and the signing of contract.
(v) Contract drawings.
(vi) Specification.

In common law all the documents comprised in the contract are taken together to obtain a true construction, but some standard forms stipulate that one or other (usually the Conditions of Contract) shall take precedence.

Conditions of Contract SFBC

Contractually the conditions of contract constitute the heart of the documentation.

It contains the terms of the contract made between the Employer and the contractor, and in which their rights and duties arising under the contract are defined.

To be accepted by both contracting parties, the Conditions of Contract should allocate risks sensibly fairly between the parties, and similarly the duties to be performed and actions to be taken by both should be set out in reasonable terms.

There are many Standard Forms used in the construction industry and the one most commonly used in U.K. for building contract is the JCT (Joint Contract Tribunal) Standard Form of Building Contract, Private, with Quantities. In H.K., the Standard Form of Building Contract Private Edition – With Quantities published by the HKIA, HKIS and HKICM is commonly used in the private sector, and the General Conditions of Contract for Building works is used for all government building contracts (HKIS = the Hong Kong Institute of Surveyors).

The greatest advantage of the Standard Forms of Contract is that those persons using it become familiar with its contents with the passage of time. They are thus aware of its suitability for their own purposes and of its particular strengths and weaknesses.

The use of the standard form also avoids the problems arising from the diversity of forms of contract drafted by individual surveyors.

The Conditions of Contract comprise the following:-
a. Recitals - statements of (usually the background) facts which often appear at the commencement of a formal document

. date on which the agreement was made
. parties of the agreement
. details of the intended works

b. Articles

. Consideration given by the Contractor
. Consideration given by the Employer
. Architect
. Quantity Surveyor
. Arbitration agreement (Arbitration agreement is subject of Article 5 in JCT Standard Forms, while in HKIS Standard Forms, it is placed in Clause 41).

c. Terms

This is the main body of the conditions of contract in which the rights and obligations of the contractual parties are stipulated. Here are some important conditions:

Clause 32 Certificate and Payments

1) Value of work done – including provisional quantities, provisional sums and prime cost sums;
2) Value of preliminaries done;
3) Value of variations;
4) Value of other matters claimed by the contractor and agreed by the architect.

Clause 13 Variations, Provisional Quantities, Provisional Items and Provisional Sums

Variation is divided into the quantity and the rate component. Quantities may be arrived at in accordance with the HKSMM Rules but the rate is based on the rules set out in Clause 13.4 (1) of the SFBC.
Depending on the character and conditions of the variation work, the rate can be evaluated based on the THREE-S Rule (Same, Similar and Star).
Omission and Addition works are measured separately to allow the positive and negative effects to be combined at the end of the variation account.

Clause 24 Damages for non-completion

If the contractor fails to complete the works by the Date for Completion stated in the Appendix to these Conditions or within any extended time fixed under Clause 25 or
Clause 35 of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow the employer a sum calculated at the rate stated in the said Appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this contract.

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**Definition:** Substantial Completion Certificate (substantially completed = may not be entirely free from defects, can be taken over and used by the Employer for the intended purpose, SFBC p.14 refers)

**Clause 25 Extension of Time**

It is recognised that time is very precious in construction. Time is of essence, work not according to the time table is considered to be a breach of contract. But the SFBC allows the following to be reasons to delay the schedule without penalties, these reasons are:

**Listed Events**

a) force majeure  
b) inclement weather > 20mm rainfall  
c) cyclone signal no. 8  
d) the excepted risks occurred like strike, civil commotion  
e) delay and loss caused by specified peril, or insured peril  
f) *architect's instruction to resolve documents discrepancies*  
g) *architect’s instruction to open up for inspection of work covered up and the consequential making good*  
h) *architect’s instruction requiring a variation*  
i) *architect’s instruction to increase work magnitude*  
j) *architect’s instruction to postpone or suspend work*  
k) *architect’s instruction to exhume antiquities found on site*  
l) *late instructions, late drawings, late details*
m) delay by Nominated Sub-Contractor & Nominated Supplier already got extension of time
n) *delay by Nominated Sub-Contractor & Nominated Supplier despite objection by main con
o) delay caused by replacing Nominated Sub-Contractor & Nominated Supplier
p) *delay caused by specialist contractor
q) delay caused by utilities company
r) *employer fails to supply materials on time
s) *employer fails to give site
t) delay caused by government departments
u) a special circumstance entitling contractor an extension of time
v) *employer’s breach of contract

NOTE * Those are the same as in Clause 27

**Clause 27 Claim for Additional Payment, Loss and/or Expense**

The above 22 listed events will not have any monetary effect unless they also belong to the following list of qualifying events.

**The Qualifying Events:**

a) architect’s instruction to resolve documents discrepancies
b) architect’s instruction to open up for inspection of work covered up and the consequential making good
c) architect’s instruction requiring a variation
d) architect’s instruction to increase work magnitude
e) architect’s instruction to postpone or suspend work
f) architect’s instruction to exhume antiquities found on site
g) late instructions, late drawings and late details
h) delay by Nominated Sub-Contractor & Nominated Supplier despite objection by main contractor
i) delay caused by specialist contractor  
j) employer fails to supply materials on time  
k) employer fails to give site  
l) employer’s breach of contract  

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d. Appendix  
The Appendix to the Conditions of contract is at the end of the Conditions. The purpose of which is to set out in one place a schedule of the details peculiar to an individual contract which would otherwise be inserted in a series of gaps throughout the various clauses. Such gaps are liable to be overlooked and this can be avoided by listing these details in the appendix. It is also easier for reference purposes. The Appendix must be completed before the attestation clause is signed so that each party is fully aware of the terms relating to the individual contract.  

There are a few important points:-  

(i) Amendment to Standard Forms  
As a principle of good practice, alterations to the standard forms of contract should not be made unless absolutely essential. If it is considered that alterations have to be made, they should only be executed by a person competent to appreciate all the implication or consequences of the amendments.  

(ii) Standard Form of Contract and the General Law  
Standard Form of Contract cannot be read in isolation. Behind it stands the general law of contract and around that, is the whole of the rest of the common and statute law. Perhaps the most recent significant legislation affecting contract conditions is the Unfair Contract Terms Act 1977 or CAP 71 Control of Exemption Clauses Ordinance in Hong Kong.  

(iii) Standard Form of Contract and the other Contract documents  
It is a general principle of legal interpretation that the specially written document will override the standard document in any case of conflict, since the special document presumably reflects the intentions of the parties better. It is however common practice, in standard forms, to provide that the contract conditions shall override the other documents where there is a discrepancy. JCT Cl.2.2.1 or SFBC 14.3: "Nothing contained in the Contract Bills shall override or modify the application or interpretation
of that which is contained in the Articles of Agreement, the Conditions or the Appendix".

This would be explained later.

2.2.2 Form of Tender

The Form of Tender is the contractor's offer in response to the invitation of tender. It is usually a standard pro-forma attached and forms part of the tender documents.

After the tender is accepted, the Form of Tender would be incorporated and forms part of the contract documents.

2.2.3 Bills of Quantities

The Bills of Quantities (B. of Q.) will serve as a tendering document. It is used to give uniform information to all competing tenderers.

After being priced and accepted it also serves as a contract document which contains the description and the quantities of the intended work. It is also used as a basis for interim certificates and for valuing variations.

Of all the functions required to be performed by the B. of Q., undoubtedly the most important are its contractual functions (i.e. determining contract price and evaluating interim payments and variations). Most of the functions (e.g. assisting financial control by the Employer, assisting the contractor in organising work, feedback of cost information to contractor, extraction of price data for estimating by consultants) can be met by reprocessing the basis data from which the bill of quantities is derived.

In most cases the nature and extent of the work to be executed under a building or civil engineering contract is shown on drawings and described in the specification. But however much one may try to make these documents complete it is, nevertheless, impossible to do so exhaustively in the absolute sense. It is therefore necessary to construe them as including matters "reasonably to be inferred".

Where a B. of Q. is prepared and incorporated in the contract it purports to translate the requirements depicted on the drawings and described in the specification into the form of quantified items, in which connection there arises the same difficulty of describing the work exhaustively in the absolute sense both as regards the bill as a whole and regards individual items comprising it.

The general requirement is that the definition of that work which is the subject of the item to be such that all ancillary items or processes, difficulty, risks, etc. required to be included in such items shall be expressly stated, unless they are contingently and indispensably necessary to that work.
All items in the bill shall be deemed to have been prepared in accordance with the principles of the SMM (if the measurement diversifies from the SMM, this clause should be amended).

If there are discrepancies between the Drawings/Specification and the Bill, the Bill shall be corrected provided the information on the Drawings or Specification is correct.

In 1904, the case of *Patman and Fotheringham Ltd. v. Pilditch [1904]* decided the matter when it was held that if the bill were deficient by comparison with the drawings and there was some doubt as to the purpose it was supposed to serve then the contractor was entitled to be paid an appropriate addition to the contract sum. Since then the courts have been inclined to hold that where the documents are not entirely clear, the presumptive purpose of the bill of quantities is for the recalculation of the contract price. Currently all the major forms of contract in use provide for the correction of errors in the bill of quantities. In JCT, it provides that:-

"Any departure from the method of preparation referred to in Clause. 2.2.2.1 or SFBC Clause 14.3 or any error in description or quantity or omission of items from the Contract Bills shall not vitiate this Contract but shall be corrected and deemed to be a variation".

2.2.4 Pre-contract Correspondence

These are correspondence passing between the tenderer and the employer in the period between the receipt of tenders and the signing of the contract. Examples are the enquiries and the replies regarding the tender documents, the qualifications made by the tender (if the employer does not reject his tender) and the subsequent negotiations and agreements on these qualifications, the amendment sheets which contain revision, addition or omission of works made subsequent to the issue of tender document and the terms or conditions added, modified or deleted after the issue of the tender documents.

These may contain terms of contract and should be incorporated into and expressly stipulate that they form part of the contract documents.

2.2.5 Contract drawings

Drawings should depict (show in the form of a picture) what is to be done - as distinct from describing the quality of materials or constructional requirements (these being appropriate to the Specification), or quantitative information (which is better presented in the B. of Q.).

There are four types of drawings:-
(i) **Detail design drawings** (taking-off drawings)

These are the set intended primarily for the QS to use for the production of the B. of Q. At this stage, some details of the design are still being worked out and solutions to problems arising from the specialist areas of work are being sought. As a result, numerous minor revisions are necessary.

It is almost inevitable that some errors will be found and queries will arise in these drawings. It is important that these be resolved with the Architect before the bill is completed, and equally important that the drawings are amended or corrected so as to accord with the bill before tenders are invited.

(ii) **Tender drawings**

These drawings are incorporated into and form part of the tender documents. They should be sufficient to show clearly the extent and scope of the work to be performed, and with sufficient working detail to enable the contractor's estimator price for the works.

(iii) **Contract drawings**

These are the set on which the B. of Q. is finally based and there should be no discrepancy between the work shown on this set of drawings and that described in the B. of Q. The QS will generally schedule in an appendix to the B. of Q. the final list of the drawings that are to become the contract set.

Ideally, the contract set should usually be possible to depict the entity with reasonably precision and to elaborate this with sufficient working detail to enable the project to be completed with a minimum of supplementary drawings.

(iv) **Production drawings**

These are the set for use on site by the Contractor. They show not only WHAT, and HOW and HOW MANY but also WHERE - the precise setting out instructions for positioning on the site. They also give some other information the QS did not need (and would not affect the pricing), e.g. the colour of the paint work.

This set may differ in detail from the contract set as improvements and amendments are made as work progresses and each such change must be covered by a written Architect's Instruction so that the QS can identify and negotiate the financial effect of the variations.

The production drawings are not issued to the Contractor in a complete set but are given to the Contractor as and when from time to time may be necessary.

There arises the problem of when the contractor is entitled to receive these drawings and this is always the main cause drawings and this is always the main cause of
disputes and claims. It is therefore a good practice to keep these supplementary drawings to a minimum.

2.2.6 Specification

The specification is a document used to describe or specify the quality of materials and workmanship required, to state any constraints as to the methods to be adopted or (only very rarely) to stipulate such methods. It is a contract document where contracts using drawings and a specification only.

The specification is not recognised as a separate contract document by the JCT Form of Contract (with quantities) and its meat is usually included in the Contract Bill itself as 'Preambles'. The reason of this is to avoid duplication of information between any of the documents as identical repetition is unnecessary and repetition which is not identical is dangerous.

2.3 Order of Precedence of Contract Documents

The Contract Conditions may state that the documents are 'mutually explanatory' but this may be considered to be unwise as, in the case of large and complex contracts, it is likely that there will be some conflicts. It is better to state in the conditions the order of precedence but if none is stated and the 'mutually explanatory' proviso is not used then the order of precedence would be as follows:-

. Special conditions take precedence over General Conditions
. Operation Clauses take precedence over Recitals
. Handwritten alterations take precedence over those typewritten
. Typewritten words take precedence over printed words
. in regard to drawings:-
+ more detailed drawings take precedence over general arrangement drawings
+ large-scale drawings take precedence over small scale drawings
+ where drawings are produced principally for a particular trade take precedence over drawings produced for other trades

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