

Construction Contractors Association of Western Australia Inc

This Position Paper provides a summary of the CCAWA's Member endorsed approach proposed for the nominated Topic and is intended to be used as a guideline for all CCAWA member interactions, communications and other activities related to the nominated Topic.

Topic: Contract Terms and Conditions

Objectives

To standardise the approach across the industry with respect to contract terms and conditions in WA, to ensure a fair allocation of risk and a contractual position that is equitable for all parties.

Current Approach

Each of the key clients in WA adopt a slightly different approach to contract terms and conditions. Then further departments / projects within a client adopt different approaches. This results in significant work undertaken during the pre-contract stage of each project to review nonstandard conditions or highly amended standard forms of contract.

Typically, less than 50% of contracts in WA adopt standard forms of contract

Industry also note that 'lessons learnt' from previous contracts are not consistently adopted by Clients, which means contract negotiations can become protracted to agree positions which the industry knows to have been accepted on other projects (in some cases between the same parties to the contract).

Risks are not currently being apportioned to the party best able to manage the risk.

Key Issues and Factors

The level of risk that the Contractors are expected to take on is a significant issue for the industry. If Contractors actually priced all risks passed to them by the Client, they would be uncompetitive, and not pricing these risks is an unsustainable approach for contractors to take in the long term.

The key contract terms causing concerns for the industry relate to:

- The lack of a reasonable Limits of Liability;
- Consequential Loss;
- Liquidated Damages;
- Defects Liability with excessive duration; and
- Payment Terms that do not allow positive cash flow for contractors.

These issues are not applied consistently across the different agencies and contracts and are typically significantly weighted in favour of the client.

The CCA notes that these issues are a key decision point for many of our industry in obtaining internal approvals to tender for projects. Current conditions result in considerably fewer tender proposals being submitted than would otherwise occur if a more reasonable and consistent position was taken by Clients.

CCAWA Proposed Approach

The CCA understand that not all projects are the same, but the following principles form the approach that we propose industry to adopt;

- Liability – limits of liability to be capped at <100% of the contract value

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- Consequential Loss –
 - limited to what the contractor can actually manage / impact
 - Client to demonstrate and clearly quantify the consequential loss
- Liquidated Damages
 - should be non-punitive
 - demonstrable as compensation for loss or damage
 - capped at 10% of contract value
- Defects Liability Period
 - Limited to 12 months for Construct Only
 - Limited to 24 months for Design and Construct
- Payment Terms
 - As a minimum to be in line with Section 10 of the Construction Contracts Act 2004 – which mandates payment within 42 days
 - Industry's preferred approach is 30 days payment terms

Outcomes

The CCAWA advocates for a standardised approach to contract terms and adopting the principles set out above will reduce protracted contract negotiations resulting in:

- More tender submissions from Industry which will ensure competitiveness;
- Faster conversion of tenders to award and delivery;
- Reduction in contractual issues during the life of the project through the administration of more equitable contract terms; and
- A more sustainable construction industry for Western Australia.

This benefits our clients in mitigating any risk to timelines for the delivery of the works and minimising potential for disputes during the delivery of the works. With risk managed by the parties best able to manage them this will deliver best for project outcomes.