

# The Ten Commandments of Pre Contract

## What You Must Do Before Signing a Contract.....



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## Who Should Read This...

This White Paper should be read by all UK and Internationally based Funders, Developers, Clients, Design Teams, Contractors and Specialist Sub-Contractors who want to minimise risk, have better commercial relationships and have a real desire to conduct their business **without** unnecessary conflict and the waste it produces.

It is also useful for parties interested in advising or supplying certain services to construction and those studying in the field of construction or building.

## About the Author

Yosof Ewing<sup>1</sup> is the author of the internationally acclaimed White Paper series **The 10 Commandments**<sup>2</sup>. He is the Managing Director of CPMK, a private practice of Professional Alternative Dispute Practitioners, Dispute Resolvers, Expert Witnesses, Quantity Surveyors and Project Managers based in the UK with global reach. He is a qualified Mediator, Licensed NLP Practitioner and acts as Expert Witness, as well as advising on disputes, contracts and procurement in construction, property and energy.

Yosof is a Fellow of the Institute of Commercial Management, Fellow of the Chartered Management Institute, Member of the Association of Project Management, Member of the Chartered Institute of Civil Engineering Surveyors, Member of the Chartered Institute of Arbitration, Practising Associate of the Academy of Experts, Member of the Association of Project Safety, Member of the Institute of Engineering and Technology, Member of the Society of Construction Law and is a listed Party Representative by the Association of Independent Construction Adjudicators.

**I believe that  
prevention is better  
than the cure.**

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## Introduction

This White Paper is the first of a trilogy written in plain English to help the industry overcome unnecessary conflict and the waste it involves.

The following list are 10 things you must do before you agree to sign up to a contract or indeed start work on site.

Now that the Construction Act 1996 has been amended<sup>3</sup>, I have revisited this series of papers and updated them to incorporate any changes. I have taken the opportunity to rewrite other sections of the paper to give a more rounded read for other sections of the industry and thank all of the people who gave me such welcome feedback. I hope you like the changes and look forward to hearing your opinion.

I believe that prevention is better than the cure. Not to mention a darn sight cheaper!! I have a desire to rid our industry of unnecessary disputes and create better working relationships. Please spread the word and let's build teams not barriers.

Disputes cost money, however in virtually all cases they are avoidable. If you lay the foundations correctly in any contract you will be in a much better position post contract or in the event you get into a dispute.

## The 10 Commandments of Pre-Contract

### 1. Check out who you will be working with...

Why spend time and money on tendering with or for somebody who may not pay you, who has a history of poor payment, who might run off with your money or who cannot sustain the cash flow necessary for the project?

Credit is not an automatic right. If I ever meet the person who invented the "rule" of 30 days I would shoot them!! Credit is for credit worthy businesses.

Likewise if you're the Employer you need to know that the contractor has the necessary resources in place to be able to follow your cash flow plan through to completion. Of course it is incumbent on you to make payment timeously, in order that this can happen too.

Find out the company name, registered number and address. Be wary of companies who setup "project specific" companies, these are very easy to shut down, insist on a Parent Company guarantee.

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<sup>3</sup> [www.constructpro.com/ConstructionAct2009](http://www.constructpro.com/ConstructionAct2009)

Ask for trade or banking references, ask to see copies of audited accounts, credit agreements with suppliers / sub-contractors.

Even if you have been working with a company before you should continually manage their credit / financial probity. Ratings as well as circumstances change, make sure you don't get caught out!!

Use a reputable credit checking company or ensure your due diligence is up to scratch.

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## 2. Ensure there is sufficient information available for pricing the works...

Many reading this I am sure have come across this paragraph, or something very similar before - **"The Main Contract documents are available to inspect at our office by appointment. The Contractor will be deemed to have taken cognisance of the content of these documents in his tender and no claims for any omission will be entertained"**.

My opinion on this practice, by you Clients and Main Contractors that are guilty of this, is that it is a very unfair and short sighted way to spread risk down the supply chain. I believe 3 words that should always be at the front of everybody's minds in the commercial world are - **Fair and Reasonable**.

In other words if a company expects another to abide by this clause, but they only have a minimal period for return, I would suggest the Employing company does not have the others best interests at heart. They are being unfair and unreasonable.

From a Main Contractor or Employer point of view, think of it this way. If your contractor feels they have no choice but to accept this clause and have therefore (and with your knowledge) not fully appraised your requirements and expectations, it is reasonable to expect they will make mistakes, or omissions in respect of time, cost and quality. In other words your short sightedness at pre contract stage will ultimately come back and haunt you further down the line.

So how do you get around this?

Employers - make sure your commercial teams provide the necessary information at tender stage, so that bidders understand the scope of works, are able to provide you with a realistic estimate of the cost of your project, along with a realistic appraisal of the time necessary to deliver it to the quality standards you require. You are creating something that didn't exist before, the value of that asset is linked to the quality.

Contractors - You need to make it clear in your tender submission that your tender is based only on the information you have had sight of. Simple. Do not be bullied into providing unrealistic bids - it will only end in disputes. Okay but the Main Contractor says that this is not acceptable and demands that you accept the risk.

Well in reality this could and sadly does happen. The answer? Refer to paragraph 3 above. Alternatively and probably more realistically, is to insist on the fact that your tender is based on information you have actually physically received and viewed, with a note that should the offer be of interest then you will commit further resources to fine tuning your offer. This is **Fair and Reasonable**.

A simple idea to remember here is, if you are feeling uncomfortable or burying your head in the sand at pre-contract stage, think how uncomfortable and demoralised you will feel when you are sitting without payment and facing an Adjudication or you or your supply chain member is facing Liquidation?

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### 3. Ask questions if you are not sure...

Clients and Employers need to be aware that questions will arise during tendering and it is important that they are answered quickly and accurately. How can you get an accurate bid if the expectations have not been clarified?

Contracting is a risky business, for all parties. It is the intelligent identification and management of those risks that determines the success or failure of a project. Get them right and the rewards are there. Underestimate or ignore them and you'll end up paying for it.

I believe that risk and reward should be balanced. The higher the risks a company undertakes, then they should receive greater rewards. The issue I see commonplace in our industry is parties accepting risks they haven't fully understood or taken the necessary precautions to manage them. Worse still the Employer has assumed they have.

**I believe that risk and  
reward should be  
balanced**

Whilst the Employer may consider that its not their lookout, in reality it soon becomes so, as a dispute unfolds. What happens next is simply stupid, the rewards evaporate in legal costs while the project suffers as attention is diverted, further affecting the rewards for the project parties.

Employers should work with Contractors and ensure all project risks have been identified and the necessary controls allowed for.

Contractors need to remember that you are the Specialist Contractors. If there is something in the Invitation to Tender that concerns you, is amiss or you are unsure of, no matter how trivial, then ask the company you are tendering for to clarify so that you understand. Never Assume!! To assume makes an Ass of U and Me!!

If the answer you receive doesn't clarify your query or you still have concerns, then you will need to make clear that you have not allowed for the item. If you do need to insert a cost

against it, then at the very least insert it as a provisional sum, i.e. for the **Purposes of Costing** and again make this clear.

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## 4. Put everything in writing...

Everything and I do mean everything that you say or do must be recorded in writing. Every discussion, query, letter, email, drawing, specification, reference and so on must be documented.

As a resolver of Disputes I can honestly say that one of the biggest issues we have is proving what happened and when. Keeping records at this stage is vital.

**How can you resolve a Dispute if you cannot prove it?**

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## 5. Use a Standard Method of Measurement...

There are Standard Methods of Measurement for every trade and yet in my experience the majority of construction disputes I see coming over my desk, very few employers / contractors have employed one.

To me this is crazy.

Employers / Main Contractors - these systems have been implemented to ensure that bids reflect your needs, why not use them? It only opens the door for error and potential disputes further down the line.

Sub-contractors - Ask yourself this question. Why do so many employers / contractors not use a system? Some of them may use a loose version of an SMM, others a completely bespoke version, only they fully understand. Let me be clear, there is no reason for you to be tied to this, if you wish to employ an SMM then do so.

Okay but the Main Contractor will only accept a tender in their format. Notwithstanding the obvious (Why? Risk?) There is nothing stopping you doing so, but issuing a supplementary breakdown, in SMM format to clarify what is allowed for and **what is not** in each item.

Some employers / contractors have stated they find them too labourious. My answer - **nonsense**. Every trade has a defined structure, set it up once and up date every year, hey presto your own rate book in a structure that has defined measurement and coverage rules.

What is more labourious, a wee bit more effort at pre contract stage or a contract that has more holes than swiss cheese and is open to interpretation or misinterpretation (aka abuse). Clarify expectations pre contract, post contract is just **too late**.

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## 6. Check the contract before you sign it...

It is now no longer necessary for a construction contract to be in writing in order for the payment provisions of the Act to apply. This means that oral contracts now come under the Act, albeit they must be evidenced in writing. However, any provisions as to adjudication must be in writing to be effective. If not, then as with the 1996 Act, the adjudication provisions of the Scheme for Construction Contracts<sup>4</sup> apply. Many standard form contracts already go for adjudication under the Scheme as it is widely acknowledged as being fair to both parties.

There is a school of thought out there that our industry is too complex due to the myriad of "standard" contracts in existence. Whilst I am inclined to agree with this statement to an extent, I must also state that this complexity can be demystified by finding what mathematicians call, the lowest common denominator.

In UK construction contracts, for me, it has to be the Housing Grants, Construction and Regeneration Act 1996, now amended by the **The Local Democracy, Economic Development and Construction Act 2009**<sup>5</sup>.

Sometimes referred to as the Cashflow Act, the legislation was originally created to underpin our industry with simple contractual rights for all parties. In essence it was to underpin all of the contracts in our industry.

Sadly, or some might say, predictably, loopholes were identified and exploited. The late 20th and early 21st Century saw the reverse of Latham and Egan's vision in that the Act was effectively circumvented. **Clever companies with deep pockets sought to remove and undermine the rights of the contractors the industry relies upon for the physical delivery of projects.**

The Act has underwent an upgrade that is supposed to put paid to the many concerns and loopholes. Sir Michael Latham has, rightly so, again been at the forefront of this process. This led to the Local Democracy, Economic Development and Construction Act 2009 receiving Royal Assent on 12 November 2009. Part 8 of the Act amends the Housing Grants,

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<sup>4</sup> [Scheme for Scotland and Scheme for England & Wales](#)

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2009/20/part/8>



Construction and Regeneration Act 1996 to improve payment practices and dispute resolution in the construction industry.

The aim of Part II of the original 1996 Act was to secure the flow of monies down the supply chain. Part 8 of the new Construction Act's aims are:

**“to intervene where the legislation has shown to not have delivered its original objective”; and to adopt “proportionate amendments to the existing framework”.**

So we have a myriad of so called “standard contracts”. However the reality is that they are never standard. The practice of amending contracts to favour one party and disadvantage the other is as old as time.

The trick is, as the title states “Check the contract **before** you sign it”. Does it cover all your risks adequately and fairly? A good check of this is to use my saying - “A contract is an equitable division of risk for reward between two parties, who understand those risks and accept them.” If you feel the contract doesn't fit this description, then say so at this point and amend accordingly.

If you do not understand it, don't just sign it or feel pressured into signing it, take some time and get expert advice, the cost of that advice will be a fraction of the pain you will feel facing adjudication or worse administration.

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## **7. Make sure you have allowed for a cost base plus a profit...**

A very, very clever person once said that “Turnover is Vanity, PROFIT is sanity”.

Never has a phrase been said that still rings as true today, throughout all commercial transactions.

A £100 million job and a £500 job have one unalienable thing in common, each of them must derive a profit for you. In other words for every pound you spend you must return that pound plus whatever uplift you reasonably can to ensure you can continue to grow your business and invest for the future.

This goes not only for Clients, but for every member of the supply chain. Clients and Main Contractors must appreciate that in order to achieve project completion on time, to specification and within the budget agreed, then all parties must be able to derive profit. If not then I guarantee you that your project will fail.

So what must you allow for?

I like to break it down into two simple headings.

### Preliminaries

These as the name suggests are things that happen before the contract can actually take place, e.g. welfare facilities, insurance, plant, transport and so on.

I, in my quest for simplification, tend to refer to them as "Site Overheads". I do this because even after the project kicks off virtually all of these costs remain and continue to go on right until the Final whistle.

I often say to contractor clients this. Imagine carrying out your trade in your depot / yard. Say its located in Glasgow, now take that trade and do it in London. Anything required to move the trade - its a preliminary.

Besides these Preliminary costs you will add an uplift for company overheads and profit.

### Contract Sum

This is the actual physical works. it is made up of the labour and material required to actually build or construct the works. Along with these labour and material costs you will add an uplift for company overheads and profit.

NB: if you work in Civil Engineering chances are this section will include for your plant as well. It will depend on the SMM you employ.

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## **8. Negotiate out any unrealistic or unfair risk...**

Never be afraid to refuse to accept any or all of the terms of a contract if they are unrealistic or unfair.

Remember my definition above? All parties to the contract must understand the risks involved and have been given a fair opportunity to provide for that risk within their estimate and terms. If not you are heading for a problem.

In my view, parties to a project should be completely open and transparent. How else can you put all "hazards" in plain sight and manage them? If the Client holds back thinking the contractor is at risk and the contractor doesn't know about the issue, then uh-oh problem!!

Risk by definition is "a situation involving exposure to danger" or more poetically "the possibility that something unpleasant or unwelcome will happen".

When you consider risk in that context you realise that you must do something to minimise, reduce or remove the risk altogether.

Lets think about what is important in business - Profit, its sanity, remember?

Imagine if you will that your profit is not just something on your balance sheet but a living, breathing person who works for your organisation, just like an operative.

In this age of hyper awareness of Health & Safety, all reputable contracting companies know what is expected for Risk Assessment and Method Statements for safe systems of work. What is the purpose of these safe systems of work? To protect your employees from danger or unpleasantness.

**Imagine if you will that your profit is not just something on your balance sheet but a living, breathing person who works for your organisation, just like an operative.**

If your profit is an employee then what would you do to protect them? Do you have a safe system of work? If so is it as effective as you think it is? If not, why not?

Have a clear process that you follow for every estimate you undertake and don't deviate from it. If you need help with contract review then get it before you sign (see above).

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## 9. Qualify or condition as necessary.

When drafting or completing a tender it is almost certain that you will need to clarify your meaning or limit the scope of an item.

Employers and Main Contractors do this (or should do) as a matter of course. However I see on a regular basis when representing a subbie in a dispute major contractors (some very well known) who have corporate governance coming out of their ears, yet they still fail to choose and draft contracts that are relevant and to add to the embarrassment, they fail to suitably qualify critical elements of the time / costs / quality formula.

Qualifying is critical to a specialist contractor. They will know their trade better than any employer or main contractor and therefore know the various areas of risk from their own experience. Clients and Main Contractors who ride rough shod over specialist subbies terms, do so at their own peril. See section above about risks.

You may also need to limit an item due to a lack of information being available at the time of tender.

There could be any number of reasons, the point is though **you are allowed to**. Contracting must always be **fair and reasonable**. You may think that by forcing a term or removing a qualification, you have removed the problem, far from it. You have only added to the future and usually much bigger problem.

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## 10. Never discount or price below cost.

When I initially wrote this paper, the audience was primarily specialist sub-contractors. When it became apparent that clients, banks and many main contractors were also reading the papers, I took the opportunity of the new legislation to rewrite and update. This section is still aimed at those specialist subbies - I would however add a cautionary note to all you clients and main contractors out there.

Do not accept prices just because they are lowest. Pay for professional advice to check the rates are achievable. If you do not, multiply the cost of that advice tenfold because that is most likely what that shortsightedness will cost you.

I understand that the key to appraising any project, either before, during or, after, is the application of the "Barnes Triangle". In layman's terms, can the project be completed on **time**, to the right **quality** and for the **budget**? Time > Cost > Quality - if any of these are compromised in any way then like any formula the others will be affected.

If you're a specialist subbie reading the headline above and thinking, duh of course, then well done you. However sadly contracting businesses are performing commercial Hari-Kari on a regular basis.

As work becomes increasingly harder to obtain due to the number of businesses chasing the contracts, there are contractors who are going in **less than cost**, or to use the technical term, "sub-economic".

A desperate contractor may do this with the idea in their minds that they can make it back on Variations or Extra Works. NEWSFLASH, no they will not. If the rate is lower than cost, regardless of the quantum, chances are it will be valued at the bill rates or equivalent. So they will not recoup anything. Simply put it's a bad idea, based on poor understanding of the QS function.

This is simply ludicrous. Not to mention unsustainable.

If you are losing money your business will fail. Simple. Do not do it, if you feel compelled to then call it a day and go and work for somebody else. Either that or you could open a charity because that's exactly what you are doing.

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## So to Summarise...

**Disputes are avoidable or can be easily resolved with the right preparation and attitude.** When you consider their cost and then add it to the costs involved in obtaining work, building relationships, PQQ's, procurement, legal costs, losing staff, the **stress** and losing clients,.....the list goes on. Surely it is common sense to seek to avoid any discord that will affect you, your business,

your profits, your project, your asset and leave you right back where you started. Ready to do it all again. Don't you think that enough is enough?

Definition of Insanity: doing the same thing over and over again and expecting different results.  
(Albert Einstein)

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