Drafting for a greener future

Tim Kittow and **Harry Coates** of **Beale & Company Solicitors LLP** welcome the benefits that the increasing amount of 'green drafting' of construction contracts will deliver, but caution that there are potential risks associated that must be appreciated from the outset.

KEY POINTS

- **Government and industry bodies are publishing reports on achieving green targets in construction contracts.**
- **NEC have released a new Secondary Option that allows parties to incorporate green KPIs into the NEC4 suite.**
- **Since 2009 JCT have had a Supplemental Provision incentivising practices that reduce the impact on the environment.**
- **In 2021 the FIDIC Climate Change Charter set out how construction can mitigate its environmental impact.**
- **It is important that the risks associated with 'green drafting' are understood at the outset.**

The environmental challenge facing construction companies is daunting. The built environment currently contributes 39% of the UK's greenhouse gas emissions, the country's biggest single contributor. An estimated 70% of global carbon emissions come from the building and operation of infrastructure with a staggering 7% of global carbon emissions coming from concrete alone. As such, efforts are needed to reduce the impact that construction and the built environment has upon the climate.

However, the construction industry is taking note and is transitioning from the 'why' we need to address this challenge to the question of 'how' we change practices. For some commentators the obvious step to take is to transition from a linear economy to a circular one.

The circular economy principles are based on three key tenets: (i) eliminate waste and pollution, (ii) keep products and materials in use and reuse where possible and (iii) regenerate natural systems. In a construction context this can be done by retrofitting existing structures and using new standardised materials for example.

Another way the construction industry is looking to reduce its impact on the environment is through the use of 'green drafting'. Green drafting is the use of contractual measures with the environment at its core, and the goal of reducing the carbon impact of a construction project/service (both during construction and for the whole lifecycle of a project). We are increasingly seeing the use of bespoke and standard form contract clauses in construction contracts to introduce requirements relating to climate change.

This article will look at some examples of 'green drafting' and provide an overview.

The Chancery Lane Project Drafting

The Chancery Lane Project ('TCLP') is a lawyer led organization aiming to change the way in which the world contracts. They have prepared a number of contractual clauses to facilitate climate solutions, that can be incorporated into contracts across a number of sectors.

Some of the relevant clauses for the construction industry include:

- Estelle's clause, Climate Standard of Care (Construction): revises the standard of care under a contract, to require contractors and/or service providers to comply with a new definition of "Best Industry Practice" in mitigating climate risk and to ensure that the project has and meets its "Net Zero Objectives".
- Luna's clause, Net Zero Aligned Construction Modifications: is an incentivisation for building contractors to propose modifications that can be classed as "Net Zero Modifications" to project works, which will benefit the Employer, the overall project and the environment.
- Madhavi's clause, Modern methods of Construction ('MMC') and Net Zero Provisions for

Construction or Development Agreements: adapts other TCLP clauses for use in MMC contracts and allows contracting parties to embed sustainable practices into their contract.
- Mary's clause, JCT Energy Efficiency and Environmental Obligations: which can be used to amend the JCT Design and Build contract to make energy efficiency a requirement of practical completion.
- Tristan's clause, Construction Materials: Procurement: that can be used to set a carbon budget for construction projects under a JCT Design & Build Contract 2016. This can help to reduce greenhouse gases and incentivise participants to use more sustainable materials.

These clauses are suggested frameworks that industry participants can seek to include. However, parties should consider and adapt them as necessary to ensure that they align with the practical considerations highlighted below. By way of illustration, Estelle's clause could be interpreted to include fitness for purpose obligations that may be inconsistent with professional indemnity policies.

NEC4 new Secondary Option X29

NEC have recently published a new secondary Option, X29, which has been drafted for use with the full NEC4 contractual suite. This is a positive step in helping the industry to tackle climate change.

X29 introduces several key elements that will help the construction industry address climate change in their contracts:

- Climate Change Requirements: The scope of the works/services will specify the Climate Change Requirements that must be complied with. A failure to comply with the requirements will be a defect if it is considered to relate to the works/services and consequently will require rectification at the contractor's/consultant's expense.
- Climate Change Plan: The Climate Change Plan is devised by the contractor/consultant and needs to identify the key stakeholders and the expected timescales. The plan is meant to be updated as and when instructed and required. The form and content of the Climate Change Plan will be for the parties to agree.
- Performance Targets: The clause includes the provision of a table for setting out any targets and rewards. This provides a regime for measuring compliance with specified performance targets, for which the client may set out financial incentives and penalties.
- Contractor's/Consultant's Proposals: If the contractor/consultant believes that it can reduce the environmental impact of the lifecycle of the asset, it can propose changes to the scope.

Employers, contractors and consultants can now take advantage of X29 to incorporate climate change requirements into their NEC contracts.

Adding to the work of TCLP and others, NEC should be lauded for introducing new green drafting to aid with the move towards decarbonisation.

However, we are already seeing an increase in new provisions imposing additional risks in respect of climate change etc. in NEC contracts (through z-clauses) and there are some key risks associated with X29 (including unlimited liability). X29 will therefore need to be considered very carefully when it is used.

FIDIC Climate Change Charter

On 11 November 2021 FIDIC published its Climate Change Charter. This is a call to arms for the global engineering community to take steps to decarbonise and is aligned with the UN Sustainable Development Goals.

Whilst it does not provide contractual drafting, the Charter sets out how the construction industry should address climate mitigation and engineer resilience into the built environment.

> "FIDIC wants to align the global FIDIC community around a number of concise, ambitious aspirations and commitments to mitigate climate change and put consulting engineering at the forefront of global innovation in technical and behaviour solutions."

It provides guidance on commitment to sustainable development goals and reducing the impact of the construction industry on the environment. It has taken a novel approach and recognises that each stakeholder (such as a FIDIC member association, project team, consulting engineer) has a key role to play in mitigating the environmental impact of a construction project. As such, it has developed specific actions and objectives for each stakeholder group, including developing policies and best practice to reduce the carbon footprint of the industry. Companies, individuals and other organisations can sign up to the Charter to demonstrate their commitment to the Charter

and its aims. This can be done free of charge on FIDIC's Climate Change Charter website: *https://climatechangecharter.world/charter/*.

It is yet to be seen what effect this Charter will have practically. It may mean that FIDIC users may have access to new guidance documents, briefings or even additional clauses to the contractual suit, but it is clear that FIDIC are tackling this environmental challenge head on, and lobbying the industry to work together to meet the target of net zero by 2050.

JCT Sustainable and Environmental Option

First introduced in 2009 this Supplemental Provision that has been carried through to the current 2016 editions is a welcome step in the right direction.

The Supplemental Provision enables a contractor to suggest what it feels are economically sensible additions that will actually reduce the environmental impact of the works (which can then be instructed as a change/variation). The contractor is also obliged to provide information on the environmental impact of these changes in the hope that it can foster circular economy principles.

Although in practice this provision is not frequently used, as the focus on net-zero continues to intensify, we may see it being rolled out more widely (although in our view bespoke provisions introduced through a schedule of amendments are more likely).

Practicalities and Considerations

In addition to the obvious and welcome advantages of green drafting, it is important that certain practicalities and risks are considered before it is adopted in contracts. We have highlighted some of the key risks to note from the perspective of a contractor or consultant.

- Scope Creep: With green drafting there is a risk of scope creep. Scope creep is where the scope of services or works includes additional requirements that could result in services beyond what has been priced for. This can cause pricing issues and may reduce profit margins.
- Insurance issues: There may be a conflict between the push towards net zero and the hardening of the insurance market. For any construction professional it is vital that they understand the need to balance the requirements of professional indemnity insurance policies with any obligations being accepted through the introduction of green drafting.
- Strict obligations/fitness for purpose: From many of the examples we have seen, green drafting can contain fitness for purpose obligations. This is a concern that has been recognised by many commentators, as fitness for purpose obligations (essentially a guarantee that a service will meet certain requirements) go beyond the scope of cover under most professional indemnity insurance policies.
- Materials: There may be a conflict between circular economy principles and industry standard clauses such as deleterious materials clauses. For example, deleterious materials clauses generally prohibit the use/specification of materials that do not meet current standards (which re-used materials may not). Similarly, contracts often require that materials are "new" which is clearly in conflict with the principle of reuse.

Conclusion

The introduction of green drafting as above is a very positive step which is to be lauded. Further, the very high level of carbon emissions contributed by the built environment means that there are significant opportunities for progress and incorporating elements of green drafting into contracts is a key instrument to bring about change in the sector. With this in mind, it is possible that a minimum level of green drafting could become compulsory in the foreseeable future, as the government has already introduced the Task Force on Climate-Related Financial Disclosures.

However, practicalities and risks of integrating green drafting into contracts do need to be considered. Legal advice should always be sought to ensure that the clauses incorporated reflect professional indemnity insurance arrangements and avoid assuming unacceptable levels of risk.

It is important to remember that whilst they are a helpful starting point, the green drafting clauses discussed here require a great deal of thought and discussion between the parties as to how they will be used and the targets that will be set. These targets need to be both attainable and measurable for the clause to be used effectively.

Green drafting in general needs to be considered carefully as it could lead to additional risks and liabilities being imposed on the contractor/consultant in the guise of tackling climate change. This is something we are already seeing. The potential benefits that green drafting can bring may make the effort worthwhile, but it is important that the risks associated with it are understood at the outset. **CL**