

The *Construction Playbook* and effective contracting: moving the dial from vision to reality

Andrew Croft of **Beale & Co**, and **Anna Kettle** and **Helen Field** of **Atkins** warn that contracts are becoming more onerous and being used increasingly to shift risk, which does not deliver best value or best solutions. A new approach to contracting is demanded, which the government's *Construction Playbook* points towards.

KEY POINTS

- The UK Government's *Construction Playbook* is a fantastic opportunity to embrace a new approach to contracting.
- Contracting authorities are required to comply with the *Playbook* unless they have good justification.
- However, contracts are becoming more onerous and are being used more and more to shift risk.
- This is impacting contract awards and does not deliver best value or the best solutions.
- It is in the best interests of the industry to take a longer term view in relation to contracting which reflects the *Playbook*.

The vision set out in the UK Government's *Construction Playbook* published in 2020 and updated in September 2022 (*Playbook*) includes, amongst other things, an intention to create "sustainable, win-win contracting arrangements that incentivise better social, economic and environmental outcomes, improve risk management and promote the general financial health of the sector". The *Playbook* outlines 14 key policies to achieve this, including effective contracting and risk allocation alongside the use of standardised contract terms, with amendments limited to boilerplate clauses as appropriate. It also highlights the risk of contracts becoming onerous and makes clear that

contracting authorities should not ask suppliers to take unlimited liability other than in respect of very few exceptions.

This vision was reinforced when the UK government published the *Constructing the Gold Standard* review of frameworks in 2021 in which the review states that "there is rarely justification" for changing the delicate balance of risk allocation achieved in standard form contracts.

The *Playbook* has created a fantastic opportunity for the industry to embrace a new approach to contracting and ensure that contracts are structured to "support an exchange of data, drive collaboration, improve value and manage risk" However, there appears to be significant challenges in moving the dial from vision to reality when it comes to effective contracting with contracts getting more onerous, longer and complex. The October 2021 *New Foundations* report by the Confederation of British Industry (CBI) highlighted the slow adoption of the *Playbook* and called for the Government to speed up its implementation. Disappointingly, almost two years later, the position remains much the same. This article examines common inconsistencies with the *Playbook* and why shifting from a vision to a reality benefits all parties to the conversation.

The reality

The contractual market in the construction industry has been hardening for some time now, with contracts getting more onerous, longer and complex. This is resulting in risk being passed

down the supply chain at levels which consultants and contractors are either unable to accept, or which they are forced to price in. This does not deliver the best value or the best solutions for clients as intended by the *Playbook*.

Further, as a result of a hardening insurance market, suppliers are finding it harder and harder to take on excessive risks. The continued shifting of risk down to suppliers is not therefore in the best interests of the Government or the construction industry.

It is important that contracting authorities and those advising familiarise themselves with the *Playbook* and think carefully about whether the contractual terms reflect the policies and intent behind it. As an industry we should have an open dialogue on how we can encourage compliance with the *Playbook* going forward and help transform the way that public works projects and programmes are procured.

Typical examples of inconsistencies with the *Playbook* are considered below.

Caps on liability

Contracts are still regularly being issued without any cap on liability. This is a clear example of non-compliance with the *Playbook's* policies. Those that do have caps will often contain wide exclusions from those caps, such as sums covered by insurance or indemnities, which render the cap on liability ineffective. Alternatively, the cap when included is often disproportionately high when compared to the contract price and level of risk. Without an effective cap on liability the supplier's liability will be unlimited and could be in excess of their insurance or other resources. The approach means that risk is not being shared as fairly as the *Playbook* encourages.

Many consultants and contractors will refuse to enter contracts with unlimited liability, so this is making it difficult for tenderers to continue to take part. Those who do remain involved may increase their tender price to reflect the risk.

In accordance with the *Playbook*, clients should not be asking suppliers to take unlimited liabilities and should take into account the financial capacity of suppliers in establishing limits of liabilities. Exceptions should be limited to a small number of instances where this would not be lawful or a commercial cross-government policy has been agreed. Suppliers can assist clients by articulating the impact that such terms have on their ability to

bid and/or on the value for money that they can offer in their bids.

Strict obligations and increasing complexity

While the *Playbook* calls for a "focus on outcomes, rather than scope, in their specifications", public sector contracts are increasingly including onerous terms which result in an inequitable allocation of risk.

This is the opposite of what the *Playbook* is trying to achieve. In a worst-case scenario, obligations which are inconsistent with insurance arrangements being imposed on the supply chain, in a market whereby insolvencies are on the rise, could result in a successful tenderer being put out of business and unable to fulfil its obligations. Despite the fact that the *Playbook* calls for a "focus on outcomes, rather than scope, in their specifications", prescribed outcomes should be limited to matters within the supplier's control, clearly defined and quantifiable. Having a more considered approach to risk in line with the *Playbook* will help boost innovation and minimise costs for both parties.

Another area of concern is that public sector contracts are becoming longer and more complex. This is particularly the case with framework agreements, which can involve significant input as part of the tender process to try to understand the contractual documents, in circumstances when the successful tenderer has no guarantee of work. This increases the cost and risk to the suppliers and can result in opportunities being refused. Clients and their advisers should consider carefully whether contracts can be simplified and if it is necessary to deviate from the delicate balance of risk in standard form contracts.

Responsibility for third party work

The *Playbook* states "The fundamental principle is that contracts should be profitable. Fair returns and expectations need to be reasonable for suppliers to remain interested and for the market to be sustainable". This is not always achieved where contracting authorities issue contracts making suppliers responsible for works and services far beyond their scope, some of which is being provided by other direct suppliers of the client. This further illustrates the unbalanced transfer of risk during a period of financial instability and rising labour costs. The risk of errors should sit with the party that prepared the

data or information, or the party that is paid to check or review it. To give effect to the intent of the *Playbook*, risk should be allocated to the party that is best placed to deal with it and this should be explained to suppliers.

Indemnities

The industry is also seeing an increasing trend towards the inclusion of onerous indemnities in public sector contracts, such as wide performance indemnities, when a breach of contract claim will usually suffice. As mentioned above, sometimes these indemnities are also excluded from the limit of liability. Indemnities are also inconstant with typical insurance arrangements; increase the loss the supplier is exposed to and may extend the liability period. To improve matters, further consideration should be given to the real purpose of any such indemnities, if they are necessary and whether suppliers can absorb the risk.

Intellectual Property

The *Playbook* states that “Developing a clear strategy for intellectual property (IP) rights will drive better value for money, support a competitive market and encourage innovative solutions”. However, the continuing theme in public sector contracts is intellectual property (IP) provisions that restrict a consultant seeking to commercialise their IP on other projects. For example, all IP is often transferred to the client without justification. Understandably, the client will want to ensure that they have sufficient IP rights to successfully manage, operate, and maintain the project, however this can be achieved with granting the client a market standard licence, whilst the supplier retains their IP. This facilitates innovation, whereas a transfer of IP will likely increase the contract price.

Options to suppliers

These inconsistencies between public sector contracts and UK government policies are having a real impact on the construction industry.

Whilst it is possible to report an “onerous contract”/non-compliance through the Public Procurement Review Service, there is limited awareness of this process (only 94 cases were received in the 20/21 period). It is also unclear how effective any such report would be to address the problems being encountered as the ultimate outcome is unclear.

One of the main issues for suppliers is that often these onerous public sector contracts are issued during a tender process which allows very limited scope for negotiation or contract amendment. This is often a result of the way the procurement processes under the Public Contract Regulations 2015 operate. In other circumstances, the contract may be a call-off contract under a framework agreement which does not allow for any negotiation either (see comments above regarding frameworks). Whilst suppliers could raise tender queries in relation to the non-compliance with the *Playbook*, this will be unlikely to result in the contract being made more reasonable.

The *Playbook* operates on a “comply or explain” basis, with contracting authorities required to comply unless they have good justification. Furthermore, when a contract is publicly designated by a supplier as onerous, it should prompt a root cause analysis and a conversation with the supplier about the reasons the contract has become onerous and the options available to address this. This feedback loop needs to be improved so that all parties can understand the impact of onerous terms on the supply chain and how, with a shift in mindset, this trend could be reversed.

Concluding Thoughts

The *Playbook* encourages all parties to think about projects and programmes in new ways. The same is true for the way in which these projects and programmes are being contracted. The *Playbook* states that transformational change will only be achieved by systematically approaching risk, sustainability and innovation across portfolios of projects.

It is therefore incumbent on clients, suppliers and their advisers to familiarise themselves with the *Playbook*, while adopting a more collaborative approach which focuses on the best outcomes for the project. Contracts which simply pass all risk onto the supplier will rarely be in the best interests of the client. The government recognises that a more equitable allocation of risk will make the public sector a more attractive client, deliver better value for money and incentivise suppliers to focus on delivering agreed sustainability, social value and contractual outcomes. The industry needs to leverage the *Playbook* and work together to make this vision a reality. **CL**