

Enhancing Fairness in Construction Contracts: Key Considerations for Equitable Tender Negotiations and Risk Allocation for Tier 2 Contractors

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Abstract: This study investigates fairness in construction contracts, with a focus on equitable tender negotiations and risk allocation practices impacting Tier 2 contractors. Drawing from international legal frameworks, contract standards, and industry best practices, the paper identifies systemic risks faced by Tier 2 contractors and proposes key contractual measures to mitigate them. Findings emphasize the importance of balanced liability, defined delay entitlements, reasonable payment terms, and protective legal clauses. The research contributes practical strategies for improving contract equity and sustainability in construction supply chains.

Keywords: Construction contracts, tier 2 contractors, fairness in contracting, equitable tender negotiations, risk allocation, liquidated damages, extension of time, contract variations, defects liability period, unfair contract terms, payment terms, dispute resolution, security and retention, force majeure, contractual risk management, small business protection, contract negotiation challenges, construction supply chain equity.

1. Introduction

A. Background of the Study

Tier 2 contractors play a vital role in delivering complex construction projects, yet they often face inequitable contract terms, risk imbalances, and delayed payments. Fairness in construction contracting is increasingly critical, particularly in the wake of global events such as the COVID-19 pandemic and geopolitical conflicts which have highlighted the vulnerabilities of subcontractors. Literature indicates that traditional contract models often shift disproportionate risk onto Tier 2 contractors, affecting project outcomes and industry stability. This study aims to explore mechanisms for enhancing fairness in construction contracts by focusing on equitable tender processes and balanced risk allocation.

2. Methodology

This qualitative research employs a document analysis methodology, reviewing a curated collection of legal texts, construction law handbooks, and contract templates including NEC3, FIDIC, and Australian construction law resources. Documents were analyzed to extract content related to contract

fairness, risk allocation, and negotiation practices. Themes were coded and synthesized to identify patterns and actionable insights relevant to Tier 2 contractor protection.

3. Results

Key findings from the document analysis include:

- **Limit of Liability:** Contracts should include a clause limiting the total liability of the Tier 2 contractor to no more than 100% of the contract value. This protects contractors from financially ruinous claims and aligns with risk-sharing principles found in NEC3.
- **Liquidated Damages (LDs):** LDs clauses should cap daily penalties at 1% of the contract value and total penalties at 10%. Furthermore, the contract must state that LDs are the exclusive remedy for delay, preventing multiple claims for the same breach.
- **Extension of Time (EOT) Causes:** Contracts must explicitly list valid EOT causes, including pandemics, epidemics, quarantine restrictions, wars, and other uncontrollable events. This provides clarity and fairness when such disruptions occur.
- **Delay Costs:** While Force Majeure events typically exclude entitlement to delay costs, contracts should allow Tier 2 contractors to claim compensation for delays directly caused by the main contractor's actions or omissions.
- **Variation Agreements:** To prevent disputes, all contract variations must be agreed in writing prior to implementation, including detailed scope changes, costs, and revised timelines.
- **Exclusion of Consequential Loss:** Contracts should include a clause stating that neither party is liable for consequential or indirect loss, and legal costs should only be borne after a final judgment is rendered.
- **Defects Liability Period (DLP):** The DLP should be capped, with 12 months being ideal, 18–24 months common, and 30 months the maximum acceptable. This limits indefinite warranty obligations on the contractor.
- **Warranty Period Review:** Warranty periods in the contract

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should be aligned with manufacturer warranties to avoid undue responsibility on the contractor.

- *Security and Retention*: Security should preferably take the form of retention—10% per payment until a total of 5% is held. This is more manageable for contractor cash flow than other forms like bank guarantees.
- *Security Release Conditions*: Retention should be released upon completion of subcontract works and expiry of the DLP, rather than tying release to head contract practical completion, which delays contractor cash flow.
- *Time Bars*: Short notice periods can disadvantage Tier 2 contractors. A minimum of 7 days for notices (e.g., EOT, variation claims) is recommended, along with a set timeframe for the main contractor to assess the claim.
- *Set-Off Clause*: The main contractor's right to set off should be limited to the current contract only. This prevents deductions based on unrelated projects or claims.
- *Payment Terms*: Contracts should avoid 'pay-when-paid' clauses and instead mandate clear payment schedules—ideally 30 days or 30 days end-of-month (EOM)—to support subcontractor cash flow.
- *Dispute Resolution Mechanism*: A multi-step resolution process should be outlined, beginning with negotiation between authorized parties, followed by adjudication, mediation, or legal proceedings as needed.
- *Insurance Compliance*: Tier 2 contractors must ensure that all required insurances are valid and adequate, with verification through accepted certificates from insurers.
- *Unfixed Materials*: Payment for unfixed materials is crucial for supply contracts. Ownership should pass upon payment, and the risk should pass upon delivery, helping to maintain contractor cash flow.

4. Discussion

Real-world contract negotiations for Tier 2 contractors often involve significant challenges including limited bargaining power, asymmetric information, and aggressive risk transfer from Tier 1 contractors or principals. Tier 2 contractors commonly face compressed timelines for bid preparation, restricted access to project information, and pressure to accept onerous contract terms to secure work. These factors can lead to disputes, cash flow difficulties, and compromised project performance.

Unfair contract terms are a prevalent issue for Tier 2 contractors, especially in standard form contracts where clauses may impose excessive liabilities, stringent time bars, and broad indemnities. Such terms create significant imbalance and financial risk, often leaving Tier 2 contractors with little recourse. Legislative reforms aim to address these inequities by

voiding unfair clauses and protecting smaller contractors from exploitative provisions. However, enforcement challenges remain, and proactive contract negotiation and legal review are critical.

These real-world dynamics underscore the necessity of the contractual safeguards detailed in this study. Without these protections, Tier 2 contractors remain vulnerable to practices that threaten their financial viability and industry sustainability. The results affirm that current industry practices inadequately protect Tier 2 contractors unless explicit clauses are included. Compared with prior research, these findings reinforce the shift toward collaborative contracting models like NEC3 and incentivised target cost agreements. Adopting these measures can reduce disputes, improve contractor performance, and promote equitable project delivery. However, implementation depends on the willingness of Tier 1 contractors and principals to embrace transparency and shared responsibility. Legal reforms also signal a regulatory push toward fairness. Future research may explore enforcement challenges and the role of digital contracting in safeguarding subcontractor rights.

5. Conclusion

Fairness in construction contracts is critical to the resilience of Tier 2 contractors and overall project success. This study recommends contract clauses that promote balance, clarity, and legal protection. By integrating equitable negotiation practices and precise risk allocation, stakeholders can create a more sustainable and just construction ecosystem.

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