

GUIDANCE NOTE GN 2.3.5

Liability Caps

Application in the Public Works Contract

Office of Government Procurement

Liability Caps
Application in the Public Works Contract

Document Reference GN 2.3.5 v1.0

20 July 2023

© 2023 Office of Government Procurement

Published by: Office of Government Procurement
Department of Public Expenditure, NDP Delivery and Reform
Government Buildings
Upper Merrion Street
Dublin 2

The document is not to be taken as a legal interpretation of the provisions governing public procurement. All parties must rely exclusively on their own skills and judgment or upon those of their advisors when making use of this document. The Government Construction Contracts Committee (GCCC), the Office of Government Procurement (OGP) and the Department of Public Expenditure, National Development Plan Delivery and Reform and any other contributor to this guidance note do not assume any liability to anyone for any loss or damage caused by any error or omission, whether such error or omission is the result of negligence or any other cause. Any and all such liability is disclaimed.

Section 1 Introduction

1.1 Purpose of Guidance Note

The forms of public works contracts PW-CF1 to PW-CF5, published on 17 July 2023 and PW-CF6 to PW-CF8, published on 19th July 2023 (and their corresponding Form of Tender and Schedule) contain a new clause entitled “Limit on Liability” (“the Limit on Liability Clause”).

The Limit on Liability Clause provides that the liability of a Contractor to the Employer is limited to a monetary amount stated in the Form of Tender and Schedule. The Liability Cap does not apply in all circumstances and is subject to certain exclusions specified in the Clause.

This Guidance Note describes the operation of the Limit on Liability Clause and provides guidance on how to arrive at an appropriate amount for the Liability Cap.

Terms used in this Guidance Note have the same meaning as in the Public Works Contract, unless otherwise stated.

1.2 Background

For entities engaged to perform a contract, there will be a risk of incurring liability, both to the party who engaged them and to third parties. Liability may arise under various situations such as, a breach of contract (including a breach of the contractual standard of care), or in tort by negligence (i.e. breaching a duty of care), or a breach of a statutory duty. For an entity contemplating performing a contract, it can therefore be difficult to estimate the extent of potential liabilities, which in turn may lead to an unquantified level of financial exposure.

Where contracts do not have a Liability Cap, it may result in reduced competition for the award of the contract. Entities may be reluctant, or unable (either by virtue of their size, financial capacity to carry high levels of insurance or by their corporate policies) to take on the commercial risk, particularly where the profit margin relative to the level of risk is perceived as disproportionate (“the risk/reward relationship”).

Alternatively, in return for taking on the risk, where entities do participate for the award of a contract, it may do so only on the basis that it includes risk premia (and/or increased levels of insurance, where available) in the tendered price, in return for taking on the risk of unquantified financial exposure. Either or both situations may lead to reduced competition and increased tender prices that may not deliver value for money outcomes for the party commissioning the contract.

Continued on next page

Section 1 Introduction

1.2 Background (continued)

Capping liability in a contract may offer entities a degree of assurance in performing the contract. It can enable entities to assess, with a greater degree of confidence, the level of risk of financial exposure associated with taking on the contract and make provision for taking it on. It may also increase competition and deliver better value for money outcomes for the party commissioning the contract.

The introduction of Liability Caps into the public works contract PW-CF1 to PW-CF8 falls out of an ongoing review of the Capital Works Management Framework, and seeks to improve the overall risk/reward balance under the public works contract. It also seeks to encourage greater participation for the award of public works contracts and, in particular, facilitate the participation of small to medium enterprises in tendering opportunities.

The introduction of Liability Caps in the public works contract suite follows the introduction of Liability Caps in the Standard Conditions of Engagement for Consultancy Services, both Technical and Archaeological on 31st March 2023. Both sets of contractual amendments complement one another and form part of a combined effort to review the risk/reward balance in conducting a public sector capital project.

Note: It should be noted that the Liability Cap *does not* limit the liability of a Contractor to third parties.

1.3 The Limit of Liability Clause in PW-CF1 to PW-CF8

The table below summarises the relevant sub-clause or clause numbers for the Limitation on Liability Clause in the various contracts. For PW-CF1 to PW-CF5, the wording of the Clause is the same. For PW-CF6 to PW-CF8, due to either differing sub-clause references within the particular form of contract, or, where certain items do not apply (e.g. sub-clause 3.8 Existing Facilities or Use and Occupation or Occupation by Employer does not apply in PW-CF6 to PW-CF8, or liquidated damages), there are some differences in the Liability Cap Exclusions.

Limit on Liability Clause in PW-CF1 to PW-CF8

Contract	Clause	Liability Cap	Liability Cap Exclusion	Schedule
PW-CF 1	3.10	3.10.1	3.10.2	FTS-1, Part 1M
PW-CF 2	3.10	3.10.1	3.10.2	FTS-2, Part 1M
PW-CF 3	3.10	3.10.1	3.10.2	FTS-3, Part 1M
PW-CF 4	3.10	3.10.1	3.10.2	FTS-4, Part 1M
PW-CF 5	3.10	3.10.1	3.10.2	FTS-5, Part 1M
PW-CF 6	17	17.1	17.2	FTS-6, 17.1
PW-CF 7	18	18.1	18.2	FTS-7, 18.1
PW-CF 8	17	17.1	17.2	FTS-8, 17.1

Continued on next page

Section 2 Liability Caps in the Public Works Contract

2.1 General

A new clause “Limit on Liability” is included in the public works contract forms PW-CF1 – PW-CF8 (and their respective forms of Tender and Schedule¹).

The Limit on Liability Clause provides that the Contractor’s liability to the Employer arising out of or under the Contract is limited to the monetary amount stated in the Schedule (“the Liability Cap”). Exclusions to the Liability Cap are also set out in the Clause (see Section 2.2). (“the Liability Cap Exclusions”)

The amount of the Liability Cap to apply to the contract is stated in the Schedule. The Employer enters the monetary amount of the Liability Cap applicable to the contract when issuing the invitation to tender documentation. Where an amount is not entered in the Schedule, the clause specifies that the amount of the Liability Cap shall be no greater than the Contract Sum applies, so that in all cases, the liability of the Contractor to the Employer (subject to Liability Cap Exclusions) is limited.

2.2 Liability Cap Exclusions

The Liability Cap does not apply to all circumstances in which the Contractor may incur liability to the Employer. Where an Employer’s claim against the Contractor relates to any Liability Cap Exclusion, the liability of the Contractor to the Employer is uncapped, and the Contractor is liable in full to the Employer (the breadth of which would be calculated in accordance with well-settled legal principles). Any claim relating to a Liability Cap Exclusion does not reduce or exhaust the amount of the Liability Cap.

The Liability Cap does not apply to liability of the Contractor to the Employer that relate to the following:

- a) fraud or fraudulent misrepresentation, wilful default, gross negligence;
- b) death, personal injury or illness;
- c) loss of, or damage to, tangible or intangible property (except for the Works);
- d) where applicable, liquidated damages pursuant to the relevant sub-clause in the contract (where applicable)²;
- e) any liability to which insurance for the Works pursuant to the relevant clause in the Contract, whether before or after Substantial Completion, is intended to respond (where applicable to the particular contract)
- f) for PW-CF1 to PW-CF5 only, and where applicable in the contract, the Contractor’s liability under sub-clause 3.8 Existing Facilities and Use or Occupation by the Employer; or
- g) any liability which the Contractor cannot lawfully exclude or limit.

And are described following:

a) Fraud or fraudulent misrepresentation, wilful default, gross negligence

¹ i.e. FTS-1 to FTS-8

² Sub-clause 2.6 of PW-CF6; Sub-clause 7.3 of PW-CF7; Not applicable in PW-CF8

The Liability Cap Exclusions under a) above are behavioural and prevent the Contractor being released from any liability in circumstances where the Employer's claim (be it for its own losses or a liability it might incur to a third party) arises from acts/behaviour that are not mere negligence or breach of the contractual standard of care.

b) Death, personal injury or illness

The Liability Cap Exclusion in b) above relates to circumstances where an Employer incurs a liability to any party for death, personal injury or illness arising from a breach of contract or negligence by the Contractor. Where these circumstances apply, the Contractor's liability to the Employer is uncapped, on the basis that the Employer should not be held liable for any difference between the extent of its liability to any person, and that of the Contractor's Liability Cap.

c) Loss of, or damage to, tangible or intangible property (except for the Works)

The cap exclusions in c) are for loss of, or damage to a third party's property, and property of the Employer that is not the Works. The intention of these cap exclusions is to cover loss or damage to any physical property and any other property (including intellectual property rights and other non-physical property rights). Other than claims relating to the Employer's property that is not the Works, these cap exclusions are included on the basis of the same principle as those under b) i.e. the Contractor is not permitted to cap its liability where it has caused the Employer a liability to a third party.

d) Liquidated Damages

Under d) liquidated damages are excluded and do not reduce or exhaust the Contractor's Liability Cap (liquidated damages act as a cap on the Contractor's liability for late completion of the Works).

e) Insurance of the Works

Under e), the full reinstatement cost of the property insured under the relevant clause in the contract (so this in all instances should include the Works), including the cost of demolition, removal of debris, delivery, professional fees, inflation occurring during the construction and reinstatement periods, and profit is excluded. The reason for this cap exclusion is that any such liability of the Contractor should be covered by the insurance required under the relevant sub-clause in the contract. Whilst the Contractor should have the benefit of insurance covering its liability for loss or damage to the Works, without such an exclusion, a pay-out by the insurer of the Works (where loss or damage to the Works arose as a result of a breach by the Contractor) would reduce or exhaust the Contractor's Liability Cap.

f) Existing Facilities and Use or Occupation by the Employer (PW-CF1 to PW-CF5 only)

This cap exclusion applies to forms of contract PW-CF1 to PW-CF5 only, where sub-clause 3.8 applies in the contract. The exclusion provides that any liability of the Contractor to the Employer under sub-clause 3.8 *Existing facilities and Use or Occupation by the Employer* is excluded from the Liability Cap. The reason for such a cap exclusion is that sub-clause 3.8 provides a cap on the Contractor's liability for loss and damage caused by

Section 2 Liability Caps in the Public Works Contract

negligence of the Contractor to the extent (and up to the limit) required to be insured under sub-clause 3.6.1.

g) Any liability which the Consultant cannot lawfully exclude or limit –

The final category of excluded liabilities relates to any liability, which, under law, cannot be excluded.

2.3 Setting the Amount of the Liability Cap

There is no standard approach in relation to setting a limit on liability for contracts. The approach recommended in this Guidance Note is that the monetary amount of the Liability Cap should reflect a combination of the level of risk to the Employer associated with the provision of the required deliverables, balanced, where relevant, with value for money considerations, in relation to the value of the contract.

The risk-based amount may be arrived at by firstly conducting an assessment of potential loss to the Employer, and the likelihood of loss arising, resulting from a breach or negligence by the Contractor in performing the Contract. Depending on the project circumstances, it may also be appropriate to take into consideration commercial factors that may influence value for money outcomes.

At an early stage in preparing the contract for tender, the Employer should arrange that an assessment of the risks associated with the occurrence of a breach or breaches of the contract, or negligence, is performed. Expert risk advice should be sought if necessary to inform the risk assessment.

During the tender document preparation stage, the outcome of the risk assessment should be kept under review, both to factor in new information as it becomes available, and to identify risk treatment measures and inform the preparation of the tender documentation. For instance appropriate risk measures may be incorporated into the Works Requirements, or inform the use of selection or award criteria.

Risk/Reward Relationship and Value for Money

Where appropriate, consideration may also be given as to whether the estimated risk based amount (as described above) represents a commercially acceptable risk for those entities likely to tender for the contract and, in turn, deliver a value for money outcome. Technical merit criteria, and the weightings applied to them, signal to tenderers where the Contracting Authority's priorities lie and give confidence to tenderers to price the true cost of their services.

In the round, Employers should judge as to whether the initial estimate for the Liability Cap is proportional to the risks associated to the project from the Employer's perspective, and refine the estimates as may be appropriate to respond to commercial factors to arrive at an appropriate amount, relative to the value of the Contract.

For instance, it may be assessed that using some risks in the assessment rated as high impact with a low probability of occurrence may not lead to value for money outcomes and consideration may be given to excluding them from the risk assessment in order to reduce the level of commercial risk.

In practice, high value Liability Caps, unless justifiable by the particular circumstances, may not result in value for money outcomes. Employers

Section 2 Liability Caps in the Public Works Contract

should strive to arrive at an amount that is derived from a reasoned risk assessment of losses in the event of a breach/negligence that, for an entity taking on the contract, represents a commercially reasonable level of risk in return for the profit margin earned in delivering the asset.

The risk assessment *does not* need to include liabilities that arise in relation to the Liability Cap Exclusions, as liability for these liabilities remains uncapped.

Section 3 Other Considerations

3.1 The Default Amount for the Liability Cap

The Limit on Liability Clause provides that where an amount is not stated in the Schedule, a default amount that is not greater than the amount of the Contract Sum applies. The purpose of providing a default amount is to ensure that where an amount is not stated, a Liability Cap applies to the contract (as opposed to unlimited liability).

However, in every instance, Employers should take care to carry out the risk assessment described previously to arrive at the appropriate amount of the Liability Cap, and should not rely on the default amount, **unless** it represents an appropriate amount for the Liability Cap given the circumstances of the project.

Note The default amount equal to the Contract Sum is **not** a recommended, or a standard norm, for a Liability Cap. Employers should not rely upon it as an alternative to carrying out an assessment of risk (as described Section 2.3 of this Guidance Note). In the absence of a considered assessment, the use of the default amount may not result in an appropriate amount of the Liability Cap to apply for a contract.

3.2 Design and Build Projects

In the context of Design and Build Capital projects, Contracting Authorities should be conscious of the provision of Professional Indemnity Insurance (PII) required for the design of the Works. This is an additional source of remuneration where negligence/breach of the contractual standard of care has occurred. The level of PII sought should be factored into the risk assessment for the project in order for the full benefit of the insurance to be obtained.

Appendix I Example of a Risk Matrix

Risk Matrix		<----- IMPACT ----->				
		A	B	C	D	E
		Minor	Moderate	Major	Critical	Catastrophic
100%	5 - Almost certain	Low	Medium	High	High	High
80%	4 - Likely	Low	Medium	Medium	High	High
50%	3 - Possible	Low	Medium	Medium	High	High
10%	2 - Unlikely	Low	Low	Medium	Medium	High
2%	1 - rare	Low	Low	Low	Medium	Medium