

## Commercial risk management

### Overview

A highly practical programme, with a strong emphasis on practical exercises, to help participants pro-actively manage commercial risk.

### Training objectives

This course will help staff to:

- Minimise risk at the pre-contract stage
- Anticipate and manage risk issues during contract performance
- Maximise contract profitability

### Audience

This is an ideal programme for all staff whose roles call for a practical understanding of commercial risk and how to manage it, including:

- Commercial and contracts specialists
- Project managers and engineers
- Purchasing and procurement specialists

### Format

An inter-active two-day course with a strong emphasis on practical exercises. If required, a one-day version of this programme can be provided instead, although the learning would be significantly diminished without the exercises.

### Special features

For maximum benefit from the course, we recommend that the trainer be given access to sample contracts and live projects on which to base the case studies and practical exercises.

### The expert trainer

Catherine is an independent consultant and trainer in contract and commercial risk management. She was formerly a Commercial Manager at BAe Systems, following previous contract and commercial roles with GEC and Siemens, and has extensive practical experience of commercial risk management, contract management, contract negotiation and bid management. She is a highly experienced and a very popular trainer, as the following comments from course participants show:

'Excellent – you made contracts sound interesting!'

*Co-op Group*

'Good speaker, passionate about subject and good two-way discussions were held throughout the presentation.'

*Silvertown UK Ltd*

'Very enjoyable with a lot of interaction.'

*Hitachi Data Systems*

'Well prepared and well paced.'

*Honeywell*

'Catherine obviously knows and relishes her subject and this enthusiasm came over at all times. Delivery was excellent and kept it from being very dry as it could have been.'

*Jungheinrich*

'This was an excellent training course. Totally relevant to what I do and future of the company.'

*ABB Ltd*

## Course outline

### 1 The commercial environment

- The company's objectives – profit / turnover; growth / survival
- Maximise profits / minimise risks – getting the right balance
- Benefits of having a good contract – identifying and understanding the obligations, liabilities and risks that form the legally binding contract

### 2 Basic principles of English contract law

- Default position – implied terms in statute and tort
- Implied terms
  - Risk for suppliers: 'unlimited consequential damages' liability
  - Risk for buyers: 'burden of proof' and reasonableness rule
- Litigation risks
  - Subjective nature
  - Soured relationships
  - Alternative: mutually, pre-agreed recourse stated in express terms of contract
- *Silence exercise – understanding the default position*
- Express terms – revising, capping and excluding liability in tort and statute
- English contract law – compensation not a penalty
- Understanding the requirements to create a legally binding contract (LILAC)
  - Legality
  - Intent
  - Legal capacity
  - Agreement
  - Consideration (LILAC)
- Offer and acceptance
- Battle of the forms.
- Letter of Intent
- Authority
- *Entering a legally binding contract – LILAC exercise and battle of the forms facilitation session*

### 3 Process of evaluating obligations, liability and risk in a contract

- Storyboarding
  - Issues log and Dependency log
  - Identifying what is required of parties to satisfy legal obligations of contract
- Risk register
  - Identifying what could potentially go wrong
  - Consequences of failure / breach
  - Understanding liability, and therefore risk, of each clause
- Identifying if a clause has been drafted to sway in one party's favour
  - Determining whether this reflects bargaining position of parties, and / or, if acceptable level of risk
  - Appreciating liability / risks entering into
  - 'Going in with eyes open'
- Ensuring there are no 'loopholes'
- Being proactive – targeting the best case, planning for the worst
- *Contract review exercise and Traffic light risk analysis exercise*

### 4 Express terms – supplier's liability

- 'What and when' obligation clauses on the supplier
- Excluding, capping and limiting liability clauses
- 'Cake and eat it' clauses – implied, unlimited liability taking precedence over expressed, capped liability
- Limitation of Unfair Contracts Terms Act
- Bank and parent company guarantees

- Set-off clauses

## **5 Express terms – buyer’s liability**

- Late / non-payment by buyer
- Letters of credit
- Dependency clause – free issue obligations on buyer
- *Settlement zone exercise*

## **6 Other core express terms**

- Complete agreement
- Order of precedence
- Contract amendments
- Termination for breach
- Termination for convenience
- Law of contract and jurisdiction
- Litigation v arbitration
- Type of price and inflation risk
- Make-up of price – what’s included / excluded
- Currency / exchange rate risk
- *Price negotiation facilitation exercise*

## **7 Intellectual property**

- Key issues, including
  - Confidentiality
  - Licences
  - Escrow

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