

CAP Clauses

Sample clauses – RICS Conflict Avoidance Process (CAP)

Minimising construction disputes using the
RICS Conflict Avoidance Process



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Introduction

Below are sample clauses for parties wishing to incorporate a Conflict Avoidance Process (CAP) into their contract.

The RICS CAP clauses can be adopted as drafted or adapted to meet the specific needs of the contracting parties.

Two anonymised examples are also provided of where the RICS CAP clause has been adapted and incorporated into the NEC3 and FIDIC contracts.

A RICS CAP process clauses, can be used:

- A. to resolve disagreements which arise during a project where express provision for CAP has been incorporated into the project contract at the outset, **or**
- B. to resolve ad hoc disagreements which arise during a project where express provisions for CAP have not been incorporated into the contracts initially, **or**
- C. to deal with differences between parties which have existed for any length of time and remain unresolved, and which may not be tied immediately to the terms of the contract between them.

RICS

RICS developed the Conflict Avoidance Process (CAP) in 2017. The following short- and long-form CAP clauses have been carefully refined over years of practical use and modification by CAP users and practitioners.

RICS Short Form CAP Clause

The Royal Institution of Chartered Surveyors (RICS) Conflict Avoidance Process (CAP)

The Parties agree

- a. to co-operate with each other in the early identification, notification and resolution of any disagreement between them arising from the contract and works which could give rise to a formal dispute capable of being referred to adjudication, arbitration, other alternate dispute resolution process or litigation (qualifying disagreement)
 - b. to refer any qualifying disagreement to the RICS CAP before referring it to adjudication, arbitration, other alternate dispute resolution process or litigation.
 - c. to adhere to the RICS CAP Rules.
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RICS Long Form CAP Clause

1. The Royal Institution of Chartered Surveyors (RICS) Conflict Avoidance Process (CAP)

The Parties agree:

- a) to cooperate with each other in the early identification, notification and resolution of any disagreement between them arising from the contract and works, which could give rise to a formal dispute capable of being referred to adjudication, arbitration, other alternate dispute resolution process or litigation (qualifying disagreement)
- b) to refer any qualifying disagreement to the RICS CAP before referring it to adjudication, arbitration, other alternate dispute resolution process or litigation.
- c) to adhere to the RICS CAP Rules.

2. Creating a Project Panel

The parties will collaborate with RICS to establish a curated register of professionals ("the Project Panel"), jointly created for the project. This panel will consist of experts selected for their specialist knowledge in areas where disputes are most likely to arise. When a specific issue emerges, members of the Dispute Panel, whose role it is to conduct the CAP process, will be selected from the Project Panel based on the nature of the dispute and the expertise required to assist in its resolution.

3. Prior to referral of a dispute/issue to RICS

Prior to referring an issue for resolution by CAP, the Parties should endeavour to agree upon:

- a) a clear definition of the question(s) or issue(s) on which they want the Dispute Panel to provide a CAP Report with recommendations for resolution.
- b) whether the Dispute Panel should consist of one or three persons, and
- c) any person(s) whom the Parties jointly consider suitable to be on the Dispute Panel.

4. Referral to RICS

The Applicant, or both parties jointly, shall complete and submit a 'CAP Dispute Panel Request form' by email to RICS (copied as appropriate to the other Party).

5. Appointment of Dispute Panel

Where the Parties have agreed the number and identity of a suitable person(s) who they would like to appoint as the Dispute Panel, RICS will, in consultation with

the Parties, undertake due diligence checks to ensure each of the proposed Dispute Panel members:

- a) is willing to take on the appointment
- b) has subject matter knowledge
- c) has the expertise and qualifications required by the parties
- d) can undertake the reference within timescales required by the parties
- e) will adhere to any pre-agreed fee arrangements
- f) will act impartially, and
- g) is free from conflicts of interest.

If satisfied, RICS will appoint them.

In the event of the Parties failing to reach agreement on the identity of a person or person to act as the Dispute Panel, or the Dispute Panel proposed by the Parties being unavailable, unwilling or otherwise unsuitable to act, RICS will, in consultation with the Parties, select and appoint an appropriately qualified and impartial Dispute Panel.

6. Initial Joint Meeting

As soon as possible after appointment, the Dispute Panel will meet (or otherwise correspond) with both Parties and/or their representatives to:

- a) Ensure the question(s) or issue(s) on which they want the Dispute Panel to provide Recommendations are clearly defined
- b) Agree on the timescales, and
- c) Ensure the Parties and Dispute Panel are aligned on how to proceed.

Where agreement between the Parties cannot be obtained, the Dispute Panel will decide the procedure to be followed, and the Parties shall cooperate with the Dispute Panel in following its directions.

7. CAP Procedure

The Dispute Panel will undertake an investigative role. The Panel will normally invite the Parties to make oral and/or written submissions but may also make its own enquiries and rely on its own expertise.

8. Dispute Panel's Recommendations

The recommendations of the Dispute Panel will be provided in a written CAP Report which will include details of the Dispute Panel's findings and the reasons for its recommendations.

Where the Parties and Dispute Panel agree, the Dispute Panel may meet with the Parties or a Party to discuss the recommendations and the practical implementation of them. Where the Dispute Panel is comprised of three persons, this meeting may, with the agreement of the Parties, involve only one member of the Dispute Panel.

9. Acceptance and Implementation

The Parties can choose to implement, reject, or use the CAP Report for further negotiation or resolution.

Parties may choose to be bound by the recommendations or agree on a process by which, if neither party makes formal objection within an agreed period of time, the recommendations become binding.

The Parties alone, or with the assistance of the Dispute Panel, if they so request, may then take such further steps as they agree are necessary to settle any ongoing disagreement.

10. Costs

Each Party shall:

- a. bear its own costs and expenses in relation to any reference of a qualifying matter to the Dispute Panel,
- b. bear in equal shares the remuneration and expenses of the Dispute Panel,
- c. bear as agreed or directed by the Dispute Panel such additional expenses as are required for the conduct of the CAP process.

The responsibility for the costs involved in securing additional information from an expert will be agreed by the Parties, or in the absence of agreement, determined by the Dispute Panel.

11. Confidentiality

Save as required by law, the Parties and the Dispute Panel shall keep confidential all information of whatever nature provided by or on behalf of the Parties.

12. RICS CAP Rules

The Parties agree the RICS CAP Rules will apply.

Incorporation of RICS CAP clause into NEC 3 contract

A leading publicly funded body adopted CAP through an additional clause inserted into the NEC 3 standard form, and that its purpose was to provide for CAP as an option specifically for a large infrastructure upgrade project.

Dispute Resolution Option X2

Re-number clause X2.A as clause X2.A.1.

Insert a new clause X2.A.2 as follows:

"X2.A.2 Notwithstanding clause X2.1 any dispute (including any difference between the parties) may in the first instance be referred to a Conflict Avoidance Panel, in accordance with the procedural Rules set out in Appendix XX hereto, by notice in writing from the referring party to the other party.

Insert a new clause X2.A.3 as follows:

"X2.A.3 If a party to the dispute is dissatisfied with the recommendation(s) notified by the Conflict Avoidance Panel pursuant to clause X2.A.6, it notifies the other party to the dispute in writing, within 7 days of notification by the Conflict Avoidance Panel pursuant to clause X2.A.6, of the reasons why it is dissatisfied with the recommendation(s)."

Insert a new clause X2.A.4 as follows:

"X2.A.4 Each party to the dispute (a) bears its own costs and expenses in relation to any reference of a dispute to the Conflict Avoidance Panel and (b) bears in equal shares the remuneration and expenses of the member(s) of the Conflict Avoidance Panel and the fees of the Royal Institution of Chartered Surveyors."

Insert a new clause X2.A.5 as follows:

"X2.A.5 Save as required by law, the Parties and the member(s) of the Conflict Avoidance Panel keep confidential all information of whatever nature provided by or on behalf of the parties to the dispute pursuant to clause X2.A and the Conflict Avoidance Panel's recommendation(s) (including its findings and its reasons for the recommendation(s)). The Parties do not make use of or rely upon any such information or the Conflict Avoidance Panel's recommendation(s) (including its findings and its reasons for the recommendation(s)), which are without prejudice."

Delete "in the first instance" from clause X2.B.1.

Incorporation of RICS CAP clause into FIDIC contract

A leading publicly funded body has amended its FIDIC contract to include CAP in place of a Dispute Avoidance Adjudication Board (DAAB). The amendment is based on the RICS long-form CAP clause.

21. Conflict Avoidance Process

21.1 Conflict Avoidance

The Employer and the Contractor agree to co-operate with each other in the early identification, notification and avoidance or resolution of any disagreement that may lead to a Dispute. Where necessary this may be achieved by using the CAP under this Clause 21.

21.2 Dispute Resolution

The CAP is an addition to other dispute resolution processes under Sub-Clause 20.2 [Amicable Settlement] and Clause 22 [Arbitration] of this Contract. The Parties agree to use the CAP prior to escalating any Dispute between the Parties under Clause 22 [Arbitration] of this Contract.

21.3 Conflict Avoidance Process

Any disagreement likely to lead to a Dispute, shall, in the first instance, be referred to a CAP for a non-binding recommendation on how to resolve the Dispute.

21.4 Pre-Agreement

Prior to the referral of any Dispute, the Parties will endeavour to agree upon:

- (a) which Party assumes the role of referring Party and which the responding Party;
- (b) a clear definition of the Dispute and the outcome sought from the CAP; and
- (c) the person(s) whom the Parties would consider suitable to act as the member(s) of the CAP Panel.

21.5 Obtaining Recommendation

21.5.1 Request for Nomination

Once agreement has been reached on the roles of the Parties under Sub-Clause 21.4. (a), the CAP Panel member(s) and the definition of the Dispute, then the referring Party shall complete and submit a Request for Nomination of CAP to RICS. This request should include a brief description of the Dispute to enable RICS to determine if the proposed CAP member is suitable.

21.5.2 Panel Selection

In the event of the Parties failing to reach an agreement on suitable member(s) of the CAP Panel, then the Parties may request RICS to nominate the member(s) of the CAP Panel. Any person selected to act as a member of the CAP Panel by the Parties and RICS must:

- (a) be a natural person acting in his personal capacity;
- (b) declare any interest, in any matter relating to the Dispute or this Contract; and
- (c) be qualified and experienced in the subject matter on which a recommendation is sought.

21.5.3 Appointment of the CAP

Having received the Request for Nomination of CAP Panel, RICS will assess the proposed member(s) and appoint to the CAP Panel if suitable. RICS will endeavour to appoint a CAP Panel within 7 days of receipt of request.

21.5.4 Scoping Meeting

Once appointed, the CAP Panel shall meet (or otherwise correspond) with representatives of both Parties to establish and agree on a process that suits both Parties and the issue at hand. The objectives of this scoping meeting are agreed beforehand and may include:

- (a) ensuring the Dispute and recommendation sought are clearly defined;
- (b) agreeing on the timings and particulars of the referral process; and
- (c) ensuring the Parties are aligned on how to proceed.

21.5.5 Referral Process

The baseline referral process can be adjusted by agreement of the Parties and with advice from the CAP Panel, to suit the issue at hand but the chosen referral process will not be deviated from once the CAP is underway.

The baseline process is as follows:

- (a) within 5 working days of the scoping meeting, the referring Party shall submit a referral to both the CAP Panel and the responding Party giving brief written particulars of the Dispute, the relief sought and the basis for claiming the relief sought, including the provisions of this Contract that are relevant to the Dispute. The referral may include copies of, or relevant extracts from this Contract, and any other documents on which he relies.

(b) within 5 working days of receiving the referral, the responding Party shall issue a response to the referral. The response may include copies of, or relevant extracts from, this Contract, and any other documents on which he relies.

(c) within 7 working days of receiving the response, the CAP Panel shall notify the Parties of its recommendation for resolving the issue. The CAP Panel may request additional submissions or clarifications from either Party as required within such 7 working days.

21.5.6 Recommendation

The recommendation provided by the CAP Panel will always:

(a) be in writing and include a summary of the CAP Panel's findings as well as a statement of its reasons for the recommendation(s); and

(b) be non-binding on the Parties unless and until (i) implemented under Sub-Clause 21.5.7; or (ii) no notice of dissatisfaction has been given by either Party in accordance with Sub-Clause 21.6.

21.5.7 Implementation

If both Parties are satisfied with the recommendation of the CAP Panel, then this recommendation shall be formally implemented as soon as reasonably practicable in a manner chosen by the CAP Panel. Once implemented, the recommendation shall be final and binding on the Parties.

21.6 Notice of Dissatisfaction

If a Party is dissatisfied with the recommendation of the CAP Panel, it must notify the other Party in writing of its dissatisfaction, within 5 working days of receiving the recommendation, and should detail the reasons why it does not accept the recommendation and is dissatisfied with the recommendation of the CAP Panel.

Except as stated in Sub-Clause 21.9 [Failure to Comply with CAP Panel's Recommendation], neither Party shall be entitled to commence arbitration of a Dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the CAP Panel has given its recommendation as to a matter in Dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 5 working days of receiving the recommendation, then the recommendation shall become final and binding upon both Parties.

21.7 Costs

Each Party bears its own costs and expenses in relation to any reference of a Dispute to the CAP Panel, and bears in equal shares the remuneration and expenses of the member(s) of the CAP Panel and the fees of RICS.

21.8 Confidential

Save as required by law, the Parties and the member(s) of the CAP Panel must keep confidential all information of whatever nature provided by or on behalf of the Parties.

21.9 Failure to Comply with CAP Panel's Recommendation

In the event that a Party fails to comply with any final and binding recommendation of the CAP Panel, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Clause 22 [Arbitration] in which case Sub-Clause 21.5 [Obtaining Recommendation] and Sub-Clause 20.2 [Amicable Settlement] shall not apply to this reference. The Parties agree that the arbitral tribunal shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.