

# Carbon, Construction Contracts and (Life) Cycle



Housing and infrastructure plans for the rest of the decade will result in a significant increase in embodied emissions if current government policy dictates their delivery, write Rhona Henry, Partner and Aisling Cassidy, Senior Associate, Construction and Engineering, at Matheson.

## Background

It is no secret that the construction process contributes to approximately 37 per cent of carbon emissions in Ireland, and 39 per cent globally. Since 2021, strict government climate policies are in place to reduce emissions, including a legally binding target of a 51 per cent reduction in national CO<sub>2</sub>eq emissions by 2030 and an overall target of a climate neutral economy by 2050 under the Climate Action and Low Carbon Development (Amendment) Act (2021).

Such statistics, however, quantify the buildings-related emissions in terms of the "use phase" of the building and do not accurately portray the impact of the embodied carbon emissions that the

construction activities have on the whole life cycle of a building.

A UCD report commissioned by the Irish Green Building Council (IGBC)<sup>1</sup> has set out that these embodied emissions will increase significantly if housing and infrastructure plans for the rest of the decade are carried out according to current government policy, effectively cancelling out the emissions savings being made by the gradual increase in the use of renewable energy.

In response to these findings, the IGBC has, in cooperation with key stakeholders, launched a draft roadmap, laying out the necessary steps for the construction industry and government to halve the built environment emissions by 2030.

## Lifecycle of a building

In terms of analysing the whole lifecycle of a building, it follows that the legal frameworks for procuring the construction and operation (and potential repurposing, retrofitting and/or demolition) of a project should also be examined and tailored for greater use, rather than being restricted to the "use" phase of the building.

Traditionally, a construction contract is drafted on the premise that the terms and conditions set the legal framework and that the technical aspects of the scheme are scheduled to the contract as associated documents.

As practical measures, such as provisions aimed at improving the industry's use of materials and energy use of a building after completion, are likely to have a big impact on the reduction of a scheme's carbon emissions, why not build on the requirements of the technical specifications or bill of quantities and include drafting to combat climate change in the terms and conditions of construction contracts?

Green public procurement (GPP) is already mandated in Ireland for public bodies and GPP commitments given at tender stage need to be carefully incorporated into the final contract and periodically reviewed. Climate-aligned construction contract drafting can help public bodies and businesses to ensure they are playing their part in the collective effort to address climate change and meet the Government's net-zero targets. They can also help public bodies and businesses achieve their own sustainability goals, and might even be necessary to secure project funding from certain debt or equity funders as a condition of a loan or investment.

Parties to a construction contract may wish to consider whether their existing contract drafting requires amendment or deletion in order to comply with their sustainability goals and climate change objectives.

For example, a contractor may be required to use only new materials on a project. Is this strictly required, or can the drafting be amended so that the use of new materials is only required in certain scenarios?



Ambitious sustainability targets can be met by repurposing many of the contractual mechanisms commonly used in the construction industry today to ensure the right pricing, specifications, and standards. Examples of climate-aligned construction contract drafting may be found in the supplemental provisions of the JCT 2016 Edition contracts<sup>2</sup> and NEC Secondary Option X29.

These clauses are not solutions in themselves; however, they serve to focus the attention of the construction contract parties at the outset to create a framework that can be used to give contractual effect to reduce the climate impact through the lifecycle of the asset.

## The Chancery Lane Project (TCLP)

TCLP is a rapidly expanding initiative of lawyers, construction industry experts, and sustainability professionals working to adapt contracts to combat the climate crisis. A suite of precedent clauses for construction-specific drafting (drafted for use in accordance with the laws of England and Wales) was released by TCLP and is available freely for download on the TCLP website.

While TCLP clauses are a useful resource, they cannot be inserted into a construction contract without further thought. Careful consideration needs to be given at the outset of a project to the steps that the parties to a construction contract can take to reduce carbon emissions throughout the project lifecycle and equally careful consideration needs to be given to the contract drafting to ensure that those steps are measurable and achievable.

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## How can Matheson help?

At Matheson, we provide ESG and climate-related drafting expertise in the areas of sustainable construction; sustainable commercial real estate; natural resources and utilities; waste and the circular economy; sustainable finance; governance; climate action; energy, employment practices; supply chain management; investment funds; environmental and planning; and data privacy. Aisling Cassidy is a Senior Associate in Matheson's Construction and Engineering team and is a member of the TCLP Construction Law Working Group tasked with adapting the TCLP

built environment clauses for use in the Irish market. Matheson's Construction and Engineering team is led by partner, Rhona Henry.

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[www.matheson.com/services/construction-and-engineering](http://www.matheson.com/services/construction-and-engineering)

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1. *Whole Life Carbon in Construction and the Built Environment in Ireland | Today & 2030* v4, October 2022, produced by the Building in a Climate Emergency (BIACE) Research Lab, UCD School of Architecture, Planning and Environmental Policy, for the Irish Green Building Council.

2. *"Sustainable Development and Environmental Considerations"*: supplemental provision 8 Part 2 of Schedule 2, JCT Design and Build Contract, 2016 Edition and supplemental provision 4 in Schedule 8, JCT Standard Building Contract, 2016 Edition.