

Who Pays for Delay?

Everyone complains that construction contracts are never completed on time or on budget, of which there are always high profile examples, such as the new Wembley Stadium and the Scottish Parliament. Everybody is of course worried about over-spend on the construction works for London 2012 and no doubt as we draw nearer to those Olympic Games, people will worry about the works being completed on time.

Delay Claims

Delay does not have to be confined to such major projects. Many small projects will also be delayed and then disputes will arise as to who pays. The employer in a contract can often make an easy calculation. If the project is not completed by the date set for practical completion, liquidated and ascertained damages can be claimed from the contractor.

However, the contractor may believe the delay was not its fault and therefore that such damages should not be recovered.

There are two parts to any delay claim. The first is obtaining extra time to carry out the contractual works. The second is claiming for the extra costs of being on-site for a longer period of time than originally envisaged.

Adjusting the Completion Date

In the Joint Contracts Tribunal (JCT) Suite of Contracts there is a section dealing with adjustment of the completion date. In the contract there will be a list of relevant events that will entitle the contractor to have more time to carry out the works. If there are suggested amendments to a standard form of contract, this section should be considered to see whether



or not the employer is reducing the scope for extensions of time.

Extensions of Time

- A contractor should put in the claim for extensions of time as soon as possible. Contractors should not wait until after the works have been completed and then hope to retrospectively negotiate extensions.
- One major reason for extensions of time is extra works. Often the contractor only costs the actual cost of carrying out those works. The contractor does not take into account the fact that it will be on-site for longer and therefore incur, amongst other things, extra preliminaries. Those should be included in the claim.

Payment of Loss and Expense

Under the standard forms of contract the relevant events for obtaining payment of loss and expense are not always the same as those that would entitle an extension of time. One of the reasons for this is that some events will have caused delays on-site,

but have been the fault of neither the employer nor the contractor, such as adverse weather conditions. It would not be fair for the employer to have to pay for the extra time the contractor has to be on-site as a result of this, and in the same way the employer should not be able to recover liquidated and ascertained damages because the contractor has taken longer to complete the works. Amendments to the relevant events for claiming loss and expense should be considered carefully.

In conclusion, it is vital to record causes of delay and when they started. Those records can then be used to justify extensions of time and claims for loss and expense as appropriate.

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Time to Review Your Contracts

Many businesses continue using the terms and conditions that they have always used for many years. This can be quite dangerous when there are changes in the law. These changes can come about both as a result of cases decided by the courts and also changes in legislation. Legislative changes could be both as a result of British Acts of Parliament and European regulation.

It is important therefore to keep your contracts under review. If you do not do so, they may become obsolete or not have the effect that you intended.

In recent years the JCT released a 2005 version of their contracts, which has already been amended. The third edition of the NEC contract has been issued as well. However, on many occasions people rely on their favourite old versions. This often means that it is necessary to produce a large amount of amendments to take into account changes in the law. This makes contracts confusing to read and

difficult to follow. The amendments may also have impacts on other parts of the contract that they were not intended to do.

Changes in the law include The Construction (Design and Management) Regulations 2007, which deals with, amongst other things, health and safety on sites. There have also been changes to the CIS Scheme as a result of the Income Tax (Construction Industry Scheme) Regulations 2005 and the Income Tax (Construction Industry Scheme) (Amendment) Regulations 2007.

Most people will know about these changes; however it is quite common to come across contracts that have not been amended to take them into account. They are significant and contracts should be altered to cover the changes. The amendments are made either to make the contracts easier to understand or to comply with changes in the law.

Birkett Long LLP can advise you on your terms and conditions and review them if necessary.

Construction Act Changes

In our last newsletter we identified possible changes to the Construction Act. There has been a process of consultation and views taken on possible changes to the Act, which would increase the scope for things such as adjudication.

At present though, these changes have not yet moved forward, which may be due to a lack of Parliamentary time. However, it is likely that changes will be made to the Act which may well be significant. Look out for further reports when the changes are made.

Redundancy on the Cards?

Redundancy talk seems to be everywhere at present in the construction industry and you too may be thinking about taking that path in your business. If so, you might find the following questions and answers helpful:

- Q** If I make someone redundant, presumably I am not dismissing them and therefore they can't bring a claim of unfair dismissal against me?
- A** Wrong on both counts. A redundancy is a dismissal in law. However it is a potentially fair reason for dismissal, as long as it is carried out fairly.
- Q** I have four admin staff, but I reckon I only need three, to save costs. Is that a redundancy?
- A** Yes – a redundancy situation exists where you need fewer people to do work of a particular kind, perhaps just at one particular location.
- Q** What if I actually have as much admin work to do, or more, but just want to save costs?
- A** Still a redundancy, provided you genuinely require fewer admin staff to do the work.

You may well have lots of other questions - if so our employment specialists would be pleased to help you.



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