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CONSTRUCTION law

NEWS AND ADVICE FROM BIRKETT LONG

It seems that competition in the construction world is not just between contractors, but also between organisations providing standard form contracts.

Not to be outdone by JCT, a new version of the NEC contract has been launched. A brief introduction to this form of contract, and the changes it will bring, is included in this edition of this newsletter. Another area full of options is that of resolving disputes, with adjudication, court proceedings and arbitration leading the way. The courts have recently reminded us of the risks of ignoring mediation; a sobering experience for the defendant in the case outlined on page two of this newsletter. Also, Martin Hopkins looks at how developments in employment law may affect the construction industry. This has long been a difficult area for the contractor and more clarification may be welcome. We hope you find the articles of interest.

New NEC contracts

Peter Allen offers a summary of the key changes in the newly published suite of NEC contracts.

Mediate or else!

The courts are keen to promote mediation and are not afraid to penalise parties who refuse it.

All change for sub-contractors

The Taylor Review highlights the need for change, particularly in the status of sub-contractors, as Martin Hopkins explains.

Keeping up with the JCTs

a new version of NEC contracts introduces major changes

Hot on the heels of the updated JCT contracts comes publication of the new version of the NEC suite of contracts, NEC 4. This replaces the NEC 3 contract, which was published 12 years ago. The new suite includes new forms of contract, such as the professional service sub-contract, the design, build, operate contract and the term service sub-contract. Peter Allen explains further:

New options in the contracts include provisions for building information modelling (BIM), early contractor involvement, collateral warranties, retention bonds, value engineering proposals and dispute resolution boards. It is an evolution of the NEC 3 contract and is designed to expand its appeal to different types of projects, as well as international projects. Many Government departments endorse the use of the NEC form of contract.

It should be remembered that the NEC contract is not viewed, by its creators, simply as a document to be signed at the start of the project and put away until the end, or used if a problem arises. It is designed to be a project management tool to assist its smooth running. The contract has a clause confirming that the parties will act in the spirit of mutual trust and co-operation and this is fundamental to the contract working successfully. If used properly, this leads to proactive risk management, open communication and the willingness to work together to solve problems, whatever their cause. The new form of contract tries to build on this, providing greater opportunities for good management of projects and supporting new approaches to procurement. New features include:

Contractor's proposals

- These are clauses allowing a contractor to propose a change to the scope of works to reduce the cost, or a way to accelerate the programme to achieve an early completion. The project manager and client have the choice whether or not to accept such proposals.

Design and build

- There is a new option for full design and build responsibility being passed to the contractor. The new clauses deal with the duty of care to be provided, insurance, intellectual property ownership and retention of documents.

Consensual dispute resolution

- A new process of negotiation has been incorporated into the dispute resolution process. Whilst this cannot override the absolute right to refer a dispute to adjudication where the Construction Act applies, it may lead to disputes being resolved earlier.

Mediation is an alternative method of resolving disputes and involves an independent third party helping to negotiate a settlement. It's a process that the courts are eager to encourage, as Peter Allen explains.

Think twice...

...if you don't want to go to mediation!

In the past the courts have, on occasions, held that parties who refuse to go to mediation may be punished in costs. In a recent case a party made an offer to settle the claim against it; that offer was not accepted by the claimant, who sought to arrange mediation instead. The defendant delayed so long that the claimant lost confidence in the process and decided not to pursue the mediation after all.

The matter went to trial and the claimant was awarded less than the sum that had originally been offered by the defendant in settlement. Normally, this would have led to the claimant having to pay the costs that the defendant had incurred after the offer was made. However, the judge said that had mediation occurred there would have been a real chance of settlement and the vast majority of the parties' costs would have been saved. The judge

- **Dispute avoidance board**
  Where the Construction Act does not apply, this is also an option. A board, made up of individuals nominated by the parties, is set up and becomes familiar with the project. If a dispute does arise it is referred to the dispute avoidance board for them to review. They can provide a recommendation to resolve the dispute and hopefully that recommendation will be accepted by the parties: a method that has the potential to reduce the number of disputes.
- **Finality of assessments**
  Procedures have been introduced to allow the cost of works to be finalised as the project proceeds. This includes default provisions so that if the project manager does not respond, then the sums claimed are treated as accepted. The accepted figures cannot be reviewed after the works have been completed.
- **Payment provisions**
  It is now a requirement for the contractor to make an application for payment. If no application is made then the contractor will not receive a payment.
- **Collateral warranties**
  A secondary option has been added, requiring collateral warranties (known as 'undertakings' in the NEC contract) to be required from other parties.
- **Early contractor Involvement**
  There is an option for the contractor to become involved in the project at an early stage and participate in the development of the design and proposals. It means that a contractor can put forward proposals for improvements and innovations that may save costs, reduce time and improve profit. It also means that potential problems can be identified and either eliminated or the risk reduced.
- **Additional compensation events**
  This optional clause allows additional compensation events to be added. Risk can be allocated in different ways, depending on the particular situation of the construction works.

These are some of the major changes to the NEC contract. This form of contract is becoming more and more popular and all contracts under Phase 1 of the High Speed 2 (HS2) Project use the NEC suite of contracts. As well as its many advantages, this is a significant alternative to other forms of standard contract. For further information or advice please contact Peter Allen.

therefore ordered that the defendant pay 75% of the claimant's costs.

The Court of Appeal upheld this order.

Although it was tough on the defendant, the court said that parties should not unreasonably refuse to refer a dispute to mediation, and should not drag their heels in setting up a mediation. If they do, then costs sanctions may be merited.

This is a further warning to parties to seriously consider mediation to resolve a dispute. If you won't go to mediation you may not receive your costs, even if you are successful!

For further advice on how mediation works and how it can, in many cases, successfully resolve disputes, please contact Peter Allen. Peter is an Alternative Dispute Resolution Group accredited mediator with many years' experience of litigation in the construction sector.

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Welcome back Marc

trainee returns as partner

Commercial litigation expert Marc Thurlow has returned to his roots; re-joining our firm as a partner after having completed his training as a solicitor with us back in 2011.

Marc was one of the team which established our Basildon office six years ago and, after broadening his commercial experience with a city law firm, he has returned to our expanding office in the town.

> We are delighted to welcome Marc back to Birkett Long. His experience will provide a significant boost to our South Essex presence.
>
> *David Wisbey, Chairman at Birkett Long*

Marc has expertise in business disputes including ownership and financial disputes, professional negligence and intellectual property. He was involved in a significant High Court case which established a new point of law relating to the terms of LLP agreements. Another High Court case enabled a law firm to receive more than £400,000 from compensation recovered under a contingency fee agreement.

A former pupil at King Edward VI Grammar School in Chelmsford, Marc grew up in Billericay. After completing his legal studies at Leicester and Sheffield universities, he returned to Essex to complete his training contract with Birkett Long. You can contact him on 01268 824933 or marc.thurlow@birkettlong.co.uk

With the publication of the Taylor Review "Good Work" Report at the beginning of July, we see a number of proposals for reform of employment law. Of particular interest are the proposed changes to the classification of employment status and what this means to sub-contractors.

employment rights

all change for sub-contractors

The construction industry has for many years been at the forefront of the development of the law in this area. Sub-contractors have been used in the industry for many years. As a result, the industry has been heavily involved in litigation arising from the introduction of the "worker" classification and the additional benefits offered by such a classification under the Working Time Regulations.

This has led to the development of, as just one example, the rolled-up holiday pay concept. Unfortunately, the classifications have become less certain over the years, leading to difficulties for employers in understanding what their obligations are to those who work for them.

Matthew Taylor has sought, in his report, to clear up some of the confusion around status. The report is lengthy but includes proposals to:

- Create a new classification of "dependent contractor" to define a worker who is not an employee
- Retain the classifications of worker and employee but define them more clearly by amending legislation
- Remove the requirement for dependent contractors to perform work personally
- Allow individuals to bring a claim to tribunal to determine their status without having to pay a fee, and place the burden of proof on the employer when it comes to establishing that an individual is not an employee/dependent contractor
- Allow holiday pay to, once again, be paid as part of salary

This is, of course, merely a report at this stage. There will need to be a great deal of work to clarify exactly what the changes will look like, and to translate those changes into legislation. But the fact that the Prime Minister decided to accompany Mr Taylor at the publication of his report demonstrates a commitment to it. She said "I am clear that the Government will act to ensure that the interests of employees on traditional contracts, the self-employed and those people working in the 'gig' economy are all properly protected. This report will provide the stimulus for that work across the range of employment types." Mrs May's comments closed by encouraging the other parties in the House of Commons to read the report and "engage with the difficult issues it raises, come forward with your own views and ideas".

I would encourage all employers to do the same as this may be the best opportunity to resolve the confusion over status that causes such uncertainty for employers at the moment.

For more advice, please contact Martin Hopins on 01268 244145 or email martin.hopkins@birkettlong.co.uk

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