

Nominated Sub-contractors— Cash Discount, etc.

(Standard Form of Building Contract)

Extract from "A Tale of Woe" by F. E. Miller FIArb (Fellow)

Characters and Scene

The Firm: The Senior, Lesser Partnership. Quantity Surveyors.

The Partners: Sam Senior and Jim Lesser.

The Place: Somewhere.

The Time: Sometime.

The story is purely fictional and the characters imaginary.

The Scene: Sam Senior's Office (Sam is standing by the window of his office reading *The Times*.) Enter Jim Lesser.

Jim: Hallo Sam; still reading the newspaper?

Sam: Afternoon Jim, I'm just reading *The Times* report on that Sindell Case¹. Most interesting. Good job we took that consultant's advice and didn't pay it on our jobs. Saved us a lot of trouble. . . .

Jim: I wish someone would take this question of discount on increase cost for nominated sub-contractors to court and save me a lot of trouble.

Sam: Not that old problem again! I thought we had agreed not to allow it and let the builder and sub-contractors sort it out between themselves.

Jim: Yes! I know that's what we agreed; but I can't seem to convince the builders that we are right.

Sam: Why? Who's causing the trouble?

Jim: You remember that builder, Green's Construction, who did the school project². . . .

Sam: Not him again!!

Jim: He, that is Green, insists that we include the nominated sub-contractor's final account in full and then add 1/39th to the increased cost for Main Contractor's

discount. In the meantime he keeps paying the sub-contractor the total sum certified less the 2½% . . . and, of course, the total sum certified includes the fluctuations.

Sam: This bloke Green is a pain in the neck! If his name comes up again on a Tender list, I'll make some strong protest. He's just a blessed time waster.

Jim: Well that's the problem really. The sum of money involved is so small. It's just the principle of the thing. It seems to crop up on nearly every job and wastes hours of time. . . .

Sam: As you say . . . someone, someone else I hope, ought to take it to court to resolve the problem. Perhaps the NFBTE should offer to finance a case. . . .

Jim: I'd send them £50 donation if they did. . . .

Sam: Agreed!!

Jim: But what are we going to do about Green; he's got quite a good argument which I cannot defeat.

Sam: I must admit I am taking this chap Green fairly seriously after the last problem he raised on the Bills of Quantities. What does he say now?

Jim: Green says the situation is quite simple and he quotes these parts of the Contract³ in his letter to us.

SFBC

Clause 27 "The following provisions of this Condition shall apply where the prime cost sums are included in the Contract Bills. . . ."

Sub Clause 27(a) "Such sums shall be deemed to include 2½ per cent cash discount. . . ."

Sub Clause 27(e) "If the Architect desires to secure final payment to any nominated sub-contractor . . . then the Architect may in an Interim Certificate

include an amount to cover the said final payment, and thereupon the Contractor shall pay . . . the amount so certified less only a discount for cash of 2½ per cent."

Sub Clause 30(5)(c) "In the settlement of accounts the amounts paid or payable under the appropriate contracts by the Contractor to nominated sub-contractors . . . (including the discounts for cash mentioned in clauses 27 and 28 of these Conditions), . . . shall be set against the relevant prime cost . . . sum . . . and the balance, after allowing in all cases pro rata for the Contractor's profit at the rates shown in the Contract Bills, shall be added to or deducted from the Contract Sum."

Green Form

Sub Clause (10a) "The price of the Sub-Contract Works (hereinafter referred to as the 'Sub-Contract Sum') shall be the sum named in or determined by the provisions of Part III of the Appendix to this Sub-Contract or such other sum as shall become payable by reason of any authorised variations, fluctuations or amounts ascertained under Clause 8(c) hereof."

This, he says, means that all sums properly payable under the sub-contract between the nominated Sub-Contractor and the builder are to be set against the Prime Cost sum. And as all sums set against the Prime Cost are to include the 2½% for cash discount then any sums in respect of increase cost must also be subject to the 2½%.

Sam: That's all very well but under Clause 23A of the Green Form of sub-contract all increase cost are to be paid "net".

Jim: Yes! Old Green agrees with that but he counters with the fact that the "net" referred to does not have anything to do with discount. The "net" is used in the context – "net" of profit, overheads, etc. . . .

Sam: Net of profit, overheads, etc.?

Jim: Yes! Green says the wording of the fluctuations clause in the Sub-Contract is, in effect, exactly the same as in the Main Contract and it could not be argued that the "net" in the Main Contract had anything to do with discount. Could it?

Sam: Of course the "net" referred to in the Main Contract does not refer to discount. It means *net* of overheads and profit etc.

Jim: That's exactly Green's point.

Sam: Hmm!!

Jim: Green says that nominated suppliers are in a similar situation regarding the relationship with Prime Cost and discount.

Sam: How?

Jim: If an order is placed with a nominated supplier on a basis of prices ruling at the date of dispatch we would include in the final account whatever sum the supplier actually charged.

Sam: Ah yes! but the increase cost of prices over the original quotation on which the order was placed would include the 5% discount for the builder.

Jim: Exactly! that is what Green says, the nominated supplier would add the discount to his increase cost. . . .

Sam: Yes! but what. . . .

Jim: But what's more Green makes the special point that if the nominated supplier's original quotation was "net" of discount we would adjust for this in the final account by adding 1/19th. Furthermore, if the nominated supplier's price had increased (prices ruling at date of dispatch), presumably owing to increased cost, we would in effect add 1/19th to that element also. We would only be considering the total sum to be set against the Prime Cost Sum . . . we would not concern ourselves as to the constituent parts of the supplier's price.

Sam: I . . . well . . . yes, I suppose so. Hold on a minute . . . let me think! Where are those Clauses referred to?

Sam carefully reads the relevant Clauses of the Standard Form of Building Contract and the Green Form of Sub-Contract with particular emphasis on Clause 30(5)(c) of the Main Form.

Sam: Good Lord!! . . . Jim! . . . Do you realise what this means? If old Green is right then . . . well . . . Clause 30(5)(c) reads . . .

"In the settlement of accounts the amounts paid or payable . . . to nominated sub-contractors . . . (including the discounts for cash . . .) . . . shall be set against the relevant prime cost . . . sum . . . and the balance, after allowing in all cases pro rata for the Contractor's profit . . . shall be added to or deducted from the Contract Sum."

. . . This means that if the sums paid by way of increased costs under Clause 23 and claims under Sub Clauses 8(c) (i) and 10(d) of the Green Form are part of the *amounts paid or payable* . . . which they must be . . . then not only is the Builder entitled to his cash discount he is also entitled to profit on these sums.

Jim: WHAT!! Profit on nominated sub-contractor's increased costs and claims?

Sam: That's what it says.

Jim: Do you realise what this could mean?

Sam: Yes! In simple terms any Builder who has 7½% profit on the Prime Cost sum may be entitled to 7½% on any increased costs and claims paid to nominated sub-contractors under the sub-contract as provided for under Sub Clause 30(5)(c) of the Main Form.

Jim: PHEW!! We'd better check some other views before taking any action.

Sam: Yes! Have a quick check round . . . It's left me all flustered. I shan't be able to concentrate on much else this afternoon.

Exit Jim.

References:

1. William Sindell Ltd. v North West Thames Regional Health Authority. *The Times* 1st February 1977.
2. Bills of Quantities. *The Quantity Surveyor* October 1975.
3. Standard Form of Building Contract 1963 Edition (July 1976 Revision).
Green Form of Sub-Contract Revised July 1975.