

Loss and expense where delay is made up Question

Suppose a situation where a construction project is delayed and the Contractor informs the Architect in writing (as required by RIBA Contract Clause 23) stating the cause of the delay as late instructions, details etc., under 23(f). When the Architect issues his Extension of Time award (e.g. 2 weeks), the Contractor will obviously claim for loss and/or expense under Clause 24(a) which claim will include preliminary items for the period of the delay.

Upon the Architect (or the Quantity Surveyor) ascertaining the amount of such loss or expense, this sum, according to Clause 24, shall be added to the Contract Sum.

But suppose the Contractor subsequently makes up the 2 week delay so that Practical Completion occurs on the original completion date.

- (a) Would the Contractor be entitled to receive the amount of claim under Clause 24(a)? : the argument being, that if there had been no delay and the Contractor finished 2 weeks early he would not have been required to reduce his preliminaries, so he should not have to reduce his new extended preliminaries because he finished 2 weeks early on the new extended Contract Completion date.
- (b) Similarly, would the Contractor be entitled to receive bonus payments at the rates contained in the Bills (if such exist) because he made up the delay?
Your help would be appreciated.
- (c) Also, could you please recommend any literature on the subject of Claims under Standard Forms of Contract?

Reply

- (a) In the opinion of the panel, the contractor would be entitled to claim direct loss and expense as a result of late instructions etc. He is under no obligation to make up this time although he has the right to finish on or before the date for completion (or extended completion). It should be borne in mind that loss and expense do not accrue automatically by reason of late instructions – the contractor must always establish to the satisfaction of the architect that he has actually incurred loss and expense.

In the case cited, the delay has occurred, an extension been granted and loss and expense established and included in valuations. There is therefore no case for depriving the contractor of this money should be subsequently catch up the lost time.

- (b) The question on bonus is not specific enough to give a definite answer. Hudson on Contracts states that whether a bonus accrues or fails to accrue for achieving an *extended* contract completion date, depends on the terms of the particular "bonus" condition made by particular parties in respect of a particular contract.
- (c) John Sims wrote a series of articles on Claims in "Building" from 21st March, 1975 to 19th September, 1975.

The Institute of Building published (1) in 1973, Site Management Information Service series "Contractors Claims" by J. Franks and (2) also in 1973, Occasional Paper No. 3 "Establishing the Validity of Contractual Claims" by T. H. Robinson.

These contain references to further reading on the subject.

Loss and expense due to variations Question

I would be obliged if you would give me an opinion on differences which have arisen in respect of Clause 11 of the Contract.

On the Nominated Sub-Contract works, variations were made which prolonged the contract period and these were taken into consideration when granting an extension under Clause 23. Subsequently, the Contractor has made a claim for Direct loss and/or Expense, under Clause 11(6) and has included in his claim a sum for loss and/or expense in respect of the delay caused by the Sub-Contract varied works.

The General Contractor and his Legal Adviser maintain that Variations referred to in Clause 11 include Variations on the whole of the works and not just work executed by the General Contractor.

The relevant paragraph in the Contractor's Legal Adviser's letter is as follows:- "We also wish to point out that although there is no express provision for Variations in prime cost works in the Contract, the very fact that prime cost works are part of the whole works, enables these works to be classified under the general term of Variation."

I am not in agreement with their interpretation and would appreciate your opinion in this matter.

Reply

Clause 11 of the conditions of contract applies to variations to any part of the works including that to be carried out by nominated sub-contractors.

If, as stated, variations were made to nominated sub-contract work which prolonged the contract period, an extension of time should be granted under clause 23(e) and a claim for direct loss and expense would be applicable under clause 11(6).

The situation would differ if the extended period of contract was caused by the nominated sub-contractor's own delays. In this case an extension of time would be granted under 23(g). Any claim for loss and expense by the Main Contractor, including liquidated damages, would have to be made against the sub-contractor.

JCT Clause 11(4) (c) – Dayworks Question

I write to you for your guidance in the interpretation of Clause 11 (4) (c) (i) of the JCT Private Form of Contract with Quantities, July 1976 revision which reads: "the prime cost of such work calculated in accordance with the 'Definition of Prime Cost of Dayworks carried out under the Building Contract' and current at the date of tender as defined" etc.

The wording of this clause seems ambiguous in so far as it may be interpreted in either of the following ways.

- i.e. 1. That dayworks are to be priced in accordance with the RICS definition current at the time of tender.
or 2. That dayworks are to be priced at rates (labour plant and materials) current at the time of tender.

If the second interpretation is correct, then a great problem arises when recovering increased costs on a fluctuations contract. Assuming the NEDO formula and Clause 31(f) is used which expressly omits dayworks from the increase cost recovery calculation, how does one recover or allow for increased costs when work is undertaken on a daywork basis?

Reply

The notes on amendments issued by the JCT in July 1976 state "... the edition of the relevant Definition of Prime Cost which is to operate is that which is current at the date of tender ..."

Section 3.1 of the "Definition" provides that "The standard wage rates ... are those laid down for the time

being in the rules ... of the NJCBI ... as may be applicable ... at the time when ... the daywork is executed."

Daywork is therefore priced at rates current when the work is done (and the appropriate percentage applied as notified in the tender). This takes care of increased costs and is why the NEDO formula excludes daywork.

Insolvency in the Construction Industry

The following is the text of three papers delivered to a meeting of the South Africa Branch at the Wanderers Club, Johannesburg on 6th July 1977.

The speakers were Mr. P. J. Goodson, CA(SA), FCIS, Mr. R. H. Hislop, CA (SA), and Mr. D. O. Norman, MAQS, DipQS (Pretoria), FRICS.

It should be noted that the legal procedures and remedies referred to are subject to South African law.

Insolvency in the Construction Industry

by P. J. Goodson, CA(SA), F.C.I.S.

In order to discuss Insolvency in this Industry, one must first endeavour to obtain a clear picture of the Engineer or the Contractor on whose base the Industry is founded.

Two American authors are of the opinion that mythically a construction contractor is an "illiterate character with muddy boots" blessed by legend with high profits and an affinity for hard drink, but on the other hand cursed by Dunn Bradstreet with low profits and a high failure rate. This sentiment might have in the past been partly correct. Today, however, it must be granted that he is generally an astute entrepreneur, a competent technical man, also a supreme optimist and justly proud of what he achieves.

However, his overriding quality – if that is the word to use – is that at heart he is still a gambler. Because, for every contract he wins by competitive tender there are half a dozen other fellows who are betting that he is wrong and in order to win his bets he must follow the course of all gamblers in that he must take chances to pull off the sought after coup.

Anyone who has read the autobiography of George Pauling, a legendary contractor on this Continent, will agree that the picture I am trying to paint of a somewhat devil-may-care, flamboyant body of business men is not an exaggeration.

We now couple this man to an industry fraught with the vagaries of nature, impossible deadlines, architects and engineers with fixed ideas and hard heads and one is bound to create a fairly explosive corporate structure.

One that is either destined to break the bank or doomed to abysmal failure.

It does not matter that today's Construction companies are assisted by all the modern sophisticated management tools and technology available to them, for the ultimate and always telling decisions are generally made on the spot by the man wearing the muddy boots relying sometimes entirely on his "infallible" sixth sense to which he learnedly attached the word "experience".

If decisions of this nature are proved not to be the best ones in the interest of the company they are improved by the sheer dogged hard work not only of the contractor himself but that which he invariably manages to obtain from his men. We have, therefore an Industry that is in no way like any other. In addition to its different activities, it is volatile, erratic and extremely sensitive to other outside influences – political, economic, weather, upsets in other industries. This is true to such an extent that it has often been referred to as a "yardstick" or "barometer" to the whole country's situation in which it operates.

Now the subject in hand – insolvency. The activity of a construction company centres round the contracts it has been able to win or negotiate. It is easy to follow the progression of these contracts through a company. The functions can be listed:

- (a) Estimating.
- (b) Financing.
- (c) Planning.
- (d) Execution.

It matters not whether the company is the proud owner of one or fifty contracts, the co-ordinating effort to ensure the dove-tailing of these functions is Management, and here for "management" one must also read "Contractor".

If taken in isolation each one of these functions, if