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The art of negotiation in a difficult market[1]

by David Bebb

Times remain tough for contractors. In David Bebb's view it's definitely a buyer's market out there and given some of the amendments to standard contracts that land on his desk, it is clear that employers know it. The days when the parties used an unamended standard form and the playing field was less lopsided are long gone. Of course, tenders have always asked for the contractor's acceptance to the terms "without qualification" but there was usually some scope for manoeuvre. Nowadays, "qualifications to the contract terms will not be accepted" can frequently mean exactly what it says. So faced with such fierce competition, what should contractors do? His advice is always twofold. First, don't give up on the negotiation; it is surprising what can be achieved if you go about it the right way. Second, even if this approach is unsuccessful at least understand what you are signing up to so you can go into the job with your eyes open.

In this article, David looks at some of the most common amendments to standard contracts designed to shift risk firmly to the contractor's doorstep and offers some tips on negotiating your way into a position where you can sleep a little easier at night.

Design responsibility

The JCT Design and Build Contract is a misnomer. Whilst the "building" bit of the work is down to the contractor, the extent to which he is responsible for the "design" bit depends on the Employer's Requirements ("ERs"). And the ERs, of course, vary enormously from job to job. At one end of the scale, they may comprise no more than half a dozen sides of A4 setting out briefly what the employer is looking for. These are then developed with the contractor – which includes, importantly, his input in the design – and finally agreement is reached as to what's to be done and the price to be paid for it. At the other extreme, the ERs comprise 15+ lever arch volumes of detailed designs and specifications which, obviously, limit the contractor's scope for design input. But under the JCT Design and Build Contract, the contractor does not take responsibility for all that design[2]. No prizes then for guessing the most common form of amendment required by employers.

I cannot recall the last time that I saw this part of the standard contract remain intact. Instead, the amendments clearly place the responsibility for all design contained in the ERs firmly at the contractor's doorstep. From a practical point of view, where the ERs comprise a few sides of A4, contractors are generally willing to accept the risk. The issue becomes far more problematical where a substantial element of the design is already comprised in the ERs and the contractor is being required to take responsibility for it. Traditionally, this is where the employer's design team are novated across to the contractor. Depending on the wording of any novation agreement this can offer some comfort for contractors, but ultimately this is a bitter pill that contractors are frequently being asked to swallow.

Time-bars

Construction contracts have always required the contractor to serve a variety of notices on the employer. These notices usually, but not always, relate to circumstances in which the contractor considers himself to be entitled to additional time and/or money. The JCT is no different. In clause 2.24 of the Design and Build form the contractor is supposed to give a notice of delay "*forthwith*". Similarly, his claim for loss and expense must be made as soon as it becomes apparent to him that progress is being affected.[3] But then enter the time-

[1] The large print giveth, the small print taketh away.

[2] See clause 2.11 which provides "the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the inadequacy of any design contained in them". But note that the contractor does still retain responsibility for ensuring that the ERs comply with all Statutory Requirements (see clause 2.15).

[3] Just so that none of you fall at this hurdle please note that the precise wording of clause 4.20 is to make your application "as soon as it has become, or should reasonably have become, apparent to [you] that the regular progress has been or is likely to be affected".

[4] See for example the articles by my colleagues in the previous two Annual Reviews - www.fenwickelliott.com.

bar. Drafted properly, these are not difficult to spot in a set of amendments and will usually specify a precise time for service of the notice (e.g. 5 days) and state clearly the effects of non-compliance. But it never ceases to amaze me how contractors think that the law will somehow come to their rescue if they miss the date. Generally speaking, it won't.[4] The words "*you will not be entitled to any [time/money] if you do not serve the notice within 5 days*" do exactly what they say on the tin.

Omission of work

By this, I mean a variation clause that allows the omission of work which expressly allows the employer not only to omit it but to award the same work to another contractor (and without compensation by way of loss of profit to the current contractor). The theory, of course, is that the employer may somehow be able to secure a better price than the one he's been given by his current contractor and that this re-tendered work can be carried out seamlessly alongside the existing contractor's work. I have no doubt in some cases this may be the case. But in the majority of cases it is not a viable option for the client. Like time-bars this requires some very clear wording to achieve the desired effect.

How to make the process slicker

In the current market I am frequently asked by contractor clients to keep my comments, when reviewing the contract to a minimum. My instructions consist usually of "*the absolute showstoppers only please Dave*" or words to that effect. (For the clients reading this you know who you are). Understandably, in a competitive market, the contractor who raises the most points on the contract may well find himself falling at the first hurdle. But that said, my experience is that this is more of an idle threat by employers. It would, of course, be a sorry state of affairs, if the contractor who offers the best price, product and project team, fails to deliver simply on the basis that a reasonably balanced contract cannot be agreed. This would be an unfortunate case of the legal tail wagging the project dog. Don't get me wrong, the contract is important but so is ensuring the right contractor to deliver a quality project on time and at the right price. In my experience, provided the process of negotiating the contract is gone about the right way, contractors can, and do, persuade employers either to drop amendments or at least to meet them halfway. So how should contractors approach the thorny issue of onerous amendments? Before answering this, we need to take a step back and see how the contract amendments came about in the first place. The conversation between the employer and his lawyer a few weeks before the tender went something like this:

> Employer: "I've got a project. Please send me your standard amendments."
>
> Lawyer: "Certainly. Ideally, though, we need to go through some of the changes just to make sure I am covering the sort of risks that may crop up on your new project and that I have got the balance right. I need to tailor your contract to your job."
>
> Employer: "Hmm. How long will that take [i.e. cost]? Not really got the time. Just make them tough. Must dash."

The lawyer then sets to work and 60 or so pages later produces the goods to slot into the tender. The next time the amendments see the light of day (note they will rarely be read by the employer's agent/project manager[5]) is when they land on the contractor's desk. So what now? Three options spring to mind. First, the head-in-the-sand approach: accept them and hope for the best. (It is this approach, by the way, that keeps my litigator colleagues in gainful employment). Second, the "this could really wind up my client before

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[5] He will have had his fee pared to the bone so there's no money in the pot for this. There's certainly no money in the pot for extensive negotiations over the contract so consider whether the message "*qualifications to the tender will not be accepted*" is really being driven by the employer or his agent/project manager?

we even start" approach: say you will accept them and try to wriggle out of them once you have a foot in the door such that the employer will risk a serious delay to his project if he goes elsewhere. It is this approach that ensures my contractor clients are no longer kept in gainful employment through a lack of repeat business and referrals. Here's the third (and best) approach:

Can you manage the risk?

Distinguish those risks which simply cannot be taken from those which can be managed. Sounds obvious doesn't it? The inclusion of time-bars referred to above is a good example. From a contractor's point of view it is difficult to argue against the inclusion of such time-bars other than obvious doesn't it? The inclusion of time-bars referred to above is a good example. From a contractor's point of view it is difficult to argue against the inclusion of such time-bars other than that they are "*extremely unfair if we miss the date*". But life's tough guys. Live with it. This is not a credible argument to run with an employer and one I advise contractors to avoid.

Much better is to ensure that the notice periods are achievable and manage the risk internally by ensuring project teams and commercial managers are well aware of what is required of them (if needs be by tattooing the timescales and consequences on their arms).

Be proactive and take control of the negotiations

Simply saying the amendment is not agreed will get you nowhere. You need to explain in the context of this particular project *why* it is not acceptable. But if you really want to move things forward suggest a compromise position and justify it early on. This gives the employer something to chew on. The worst that can happen is that your suggestion is rejected - but your response of "not agreed" was going to be met in the same way anyway, wasn't it?

Make sure your lawyer earns his fee. You don't just want to be told the risks of the amendment, you want the solution. Your lawyer should know where compromises can be found, understand the employer's concerns, know what's generally acceptable in the market and be able to sell the whole shebang to the employer with charisma and ideally by way of a meeting lasting no more than a couple of hours. And this brings me on to my next point.

Avoid the email merry-go-round

You just can't beat a face-to-face meeting. Contract negotiations can quickly become nothing more than a merry-go-round of emails upon which every member of the project team and his brother are copied, with views becoming increasingly entrenched with each email. This is a wholly counter productive, time-consuming and expensive way of going about things. Much more effective is a meeting with the contractor, the employer and their respective lawyers. Once the first few amendments have been raised by the contractor and his lawyer – and the real effect of that amendment explained to all present (ideally by way of a practical example) - another conversation between the employer and his lawyer quickly sparks up. This (rather hush-hush) conversation goes something like this:

> Employer: "Is this really the effect of the amendment?"
>
> Lawyer: "Yes."
>
> Employer: "Hmm. That was never my intention. Why did you draft that?"

Lawyer: "You asked me to."

Employer: "Well, on reflection it does seem a bit harsh so let's drop it and move on because this is becoming tiresome [i.e. expensive]"

Lawyer (to all in the meeting): "We'll concede it."

And so the amendment that started life all those weeks ago in the lawyer's office bites the dust, never to see the light of day again (well at least until the next project). Joking aside, the point is this. A full and frank face-to-face discussion about the effect of the amendment can be extremely productive in moving the negotiations forward.

Conclusion

So there you have it. A few pointers to securing a balanced contract in a world where balanced contracts are few and far between.

It is still possible to secure a balanced contract in the current market if you go about the negotiations in the right way. As can be seen from the above, the onerous amendment is not always what the employer intended so the time to shout out is before the contract is signed.

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