Avoid Making Contractual Mistakes – Invest in Training!

Gerald Kelly – General Manager
Confederation of Construction Specialists

The ARCADIS Global Construction Disputes Reports are always an interesting read. The 2018 report was no exception, and rather depressingly, it finds that the UK's top three causes of disputes are as follows:

1st – *A failure to properly administer the contract*
2nd – *Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations*
3rd - *Failure to serve the appropriate notice under contract*

The three causes blatantly highlight the failure of companies to administer contracts correctly. It is reasonable to recognise that, understandably, vast amounts of time and resource are thrown at tendering and winning work; however, scant resources are given to the staff that have to administer the contracts. If you do not believe this to be true, ask this question to your staff – have you ever been on a contractual training course? The answer will, in all likelihood, be – I have not, however, I have picked up what I need to know from a colleague. And where did that colleague acquire the information? In all probability it will be from another colleague. You can see where I am going with this, and how this sequence of events can easily lead to disaster from the small builder through to the largest of organisations. Indeed, Carillion accepted clauses in their contracts such as point 4 and point 5 (in the following list) which cost them, and all the subcontractors that went down with them, dearly. Why did they except clauses that could potentially be so harmful? One reason would definitely be poor staff understanding of contractual consequences due to inadequate training. Incidentally, according to an article in the Guardian Newspaper, the collapse of Carillion triggered a 20% spike in the number of UK building firms becoming insolvent. Had these insolvent companies trained their contractual staff sufficiently to understand the contracts that their companies were signing up to, the outcomes may have been different, and these companies may well be still operating.

The construction industry seriously needs to re-evaluate how it trains its contractual staff. Contract staff should be highly trained and have the knowledge and the sureness to challenge the necessity of clauses in contracts. Companies will only then, following sound advice from their trained contract staff, have the confidence to refuse contracts that are deemed over onerous. It is a truism that No Contractor or Sub-Contractor has ever gone broke because it refused to accept an over onerous Contract/Sub-Contract.

Obvious Contractual Mistakes

1. Failing to check that the Employer is not a "Special Purpose Vehicle" (SPV) without any assets
2. Accepting a Sub-Contract with a clause allowing Main Contractors to terminate it for convenience
3. Issuing Collateral Warranties at the commencement of Sub-Contracts to the Employer (Especially when there is a termination for convenience clause in the Sub-Contract)
4. Accepting Fitness for Purpose clauses in the Contract/Sub-Contract (Especially when designed by third parties).

5. Agreeing to accept obligations and risks that are beyond their control
6. Agreeing to cash retentions, issuing Collateral Warranties, Performance Bonds, etc., which all protect the Employer/Main Contractor for the same risks/failures
7. Accepting ridiculously short notification periods notifying delay, extension of time requirements, prolongation costs, etc.
8. When working to a Letter of Intent with a maximum value – carrying out work in excess of that maximum value
9. Failing to keep detailed contemporary records of delays to working faces, etc., caused by others
10. Accepting the obligation to protect the Sub-Contract Work until the Main Contract is handed over
11. Accepting Sub-Contracts where variations of additional work will only be granted if they are also a variation under the Main Contract, or when there is a clause in the Sub-Contract that there will be no additional recompense for them
12. Failing to confirm verbal instructions issued by the Main Contractors' staff. Or even worse, accepting a Sub-Contract stating that the Sub-Contractor cannot rely upon instructions issued by the Main Contractor's staff

On a positive note, there is absolutely no reason not to train as there are many courses available to attend. The Confederation has variety of successful courses available that are delivered by Contract Industry Professionals. Example of courses are:

Introduction to Contracts
Contractually Supervising and Managing Specialist Construction Work
Obtaining Payment
Handling Claims and Disputes
An Alternative Form of Contract
Specialist Subcontract Management
Contractual Awareness for Salespeople
JCT 2011 and the 2016 Changes
Understanding NEC Subcontracts and the Introduction of NEC4
Introduction to Irish Construction Contracts and Law
In-house bespoke courses
Arden University backed Construction Contractual Disputes Avoidance Programme

So, go and ask the question to your staff and then book them on a course.

Contact Katy Barker to book onto a course - katy.barker@constructionspecialists.org
T: 01252 624763

For over 30 years the Confederation of Construction Specialists has been supporting construction specialist companies. By providing up-to date relevant contract training courses, professional advice and contractual guidance, the Confederation of Construction Specialists enables specialist companies to optimise the ways in which they operate contractual arrangements when dealing with Main Contractors or clients.

www.constructionspecialists.org
https://twitter.com/ccs_org