

Specialist Sub-contractors – Use Fluctuation Clauses!

Noble Francis (Economics Director of the CPA) noted that the construction Industry is having to deal with rapid price inflation, increasing labour costs and cash flow issues. UK construction has lost 3,611 firms in the past year despite strong construction demand. Unsurprisingly, it is the specialist sub-contractor that is suffering more than most. Out of the 3,611 construction firms that have ceased trading in the past year, 58% of them were specialist sub-contractors. Specialist sub-contractors are highly reliant on cash flow and as a consequence have suffered from sharp rises in materials and labour cost inflation, whilst on fixed-price contracts signed up to 12 plus months ago. Although, according to the CLC's Product Availability Working Group, general product availability has improved, and product inflation has stabilised, it is not enough to save many specialised contractors. Indeed, with the cost of energy soaring upwards, labour costs increasing and with container costs remaining high due to capacity issues it is a certainty that the suffering will continue for some time.

It is true that until recently, due to construction materials and labour costs being relatively stable, fluctuation clauses in contracts have not been used as they were not deemed necessary and have been deleted without any consideration of their potential impact. In fact, many contractors just forgot about them altogether. A costly mistake in the current climate.

In most construction contracts where fluctuation clauses have not been used, the risk of price rises are borne mostly by the contractor. This, of course, can be potentially ruinous for the contractor in a volatile climate and has proved to be so. However, if a fluctuation clause provision is in place, the cost of price increases can be transferred from the contractor to the employer on the final account adjustments. However, this can be potentially ruinous for the employer too, if unchecked.

It has certainly been the case that employers and contractors have benefitted over the years from prices being stable. Employers have enjoyed competitive pricing from contractors (ridiculously low pricing in many cases, but that is for another article), and contractors have been willing to take the risk on low price increases when tendering for contracts. However, that stable environment is now well and truly in the past. It is time to take fluctuation clauses seriously and use them.

Different contracts tend to deal with fluctuation provisions differently. For example, JCT includes the provisions in the Contract Particulars, while NEC has a Secondary Option X1 that would need to be selected when the contract documents are assembled. Understanding the options available for fluctuations in the contracts is important as, for example, fluctuation is dealt

with under three options A, B and C in JCT's Standard Building Contract, and Design & Build Contract 2016.

Fluctuation clauses can have considerable implications for the employer and the contractor so time should be spent negotiating their use and all sides concerned should fully understand how to administer them. Unfortunately, as poor administration of contracts is a major cause of contractual disputes, it seems likely that administering fluctuation clauses will turn out to be messy.

The Confederation of Construction Specialists takes the administration of contracts extremely seriously and has developed a suite of contractual courses and programmes for all staff that deal with contracts. Low levels of spend on contractual training is an issue for the construction industry, which predictably results in the continued inadequate administration of contracts.

The Confederation of Construction Specialists delivers contractual training to its members, construction companies, and other construction trade associations.

Contact geraldkelly@constructionspecialists.org for information about courses or to become a member.

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