

Issue No : 9
Published : Summer 92
Article No : 1
Author : Roger Trett
Title : Introduction

Introduction

We have been told that the U.K. recession is over, so will the demise of Lelliot be the last of the major construction receiverships? There certainly appears to be a renewed confidence in certain areas of industry, with retail sales increasing and houses starting to sell again, no doubt thanks to the lower interest rates. What happens, however, if Europe moves into recession? In all probability, we will have a lot of competition from European construction companies. Can we cope with the competition and, to return to Lelliot, will we see further receiverships? I think we may well do so.

The fact that companies have survived the recession (if it is actually over) does not mean that they will be strong enough to go forward in a rising market, particularly with strong competition.

The finance agencies will certainly be cautious over the next few years and will be unwilling to lend funds at the rate they were before. Another part of the equation is that the returns achieved in the 1980's will not be seen again for some years, making the figures less palatable for the Banks.

Perhaps the immediate hope for companies who have not yet considered the future problem of working capital is for a rise in the Stock Market to be reflected in their share price, to increase their worth and effective borrowing power.

On a lighter note, did you realise that although the Conservatives came to power in 1979, with a vision of making administration easier for companies, i.e. less red tape, Butterworth Company Law has increased from 400 pages to 1,300 pages! This fact was revealed to me by Neil Hamilton MP and Minister at the Department of Trade and Industry. Neil was speaking to a gathering of prominent construction personnel at a recent Trett House of Commons dinner, hosted by Michael Cartiss MP.

One of Neil's roles is to reduce the bureaucracy imposed upon companies and he goes about his job with vigour. Some of the rules set by Government are plainly stupid. For example, did you know that it is a criminal offence for a betting shop to transmit pictures on screens larger than 30 inches? It is not, however, illegal for a number of television screens, each one not exceeding 30", to be joined together to make up one large picture!

On a final note, Trett bade farewell to Len Ashworth CBE on 15 April when he formally retired, after serving the Board of Trett for 10 years. Len joined Trett following his retirement as Managing Director of Davy McKee, where he had spent most of his working life. Len was a familiar face in the heavy engineering industry and brought to Trett a wealth of construction and business experience. Len has been a fatherly figure, a superb help and has guided Trett through a period of significant growth. We wish him well in "God's waiting room", as he affectionately refers to Poole in Dorset where he lives, and we hope that it is only British Rail that will be picking him up!

Issue No : 9
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Article No : 2
Author : M Kenyon
Title : Appointing an Expert

Appointing an Expert

Trett Contract Services were recently registered as Corporate Members of the British Academy of Experts, as 'Providers of Expert Services'. Mike Kenyon of our Manchester office explains their role.

The Academy is a multi disciplinary body that was established in 1987, its object being to ensure high professional standards amongst Experts and to promote their use in litigation and dispute resolution. At the Academy's foundation is a strict Code of Practice to which all members must adhere. As a consequence, Clients can be assured that members of the Academy have both the integrity and qualifications to act as Experts.

The Benefit of Independence

An engineering or construction dispute destined for arbitration or a full hearing before an Official Referee is likely to be technically complex. The successful resolution of such a dispute can be dependent upon how well the parties to the dispute convey these technically complex matters to the Arbitrator or Official Referee. In some instances, a consideration of the technical matters may be prepared in-house by the parties to the dispute. In other instances, an independent Expert Witness may be appointed by a party to the dispute to prepare an Expert's Report and give expert evidence on one or many of the Issues in dispute.

So why appoint an independent Expert and what benefits can be gained from making an appointment? It is often the case that the party or parties to the dispute have the expertise within their own organisations, and that their members of staff are more than capable of giving a valid opinion on the matters in dispute. However, it is vital that such an opinion is given with independence and impartiality. An opinion or report that can be shown to be biased will be given little weight by either the Arbitrator or Official Referee.

It is normal for the Expert, prior to giving evidence at the hearing, to prepare a Report. This Report should be fair and balanced, the Issues examined should be viewed with a consideration for the standpoint of both parties to the dispute. The opinion should without question be impartial. If necessary, the Expert should and must be critical of his Client's case. No Client will thank an Expert who has enthused about the strength of a weak case only to incur avoidable costs when the court rejects a one-sided Expert's Report.

The courts will expect the person acting as Expert to give his honest opinion. It is important to note that the Expert is not another witness for his Client but an unbiased assessor of the facts and matters that fall within his expertise. This is a role that should be carried out by the Expert without pressure or influence from the party that made his appointment.

Therefore, the more closely the person giving the opinion is linked with the party in dispute, then less independence and impartiality will be attached to his views. It is this independence and impartiality that an independent Expert can provide. However independence and impartiality should not be considered only in terms of a benefit gained from making the appointment of an independent Expert, as any person acting as Expert is under a duty to so act; see *Whitehouse V Jordan* ([1981] 1 WLR 246, 256) per Lord Wilderface.

"The Courts will expect the person acting as Expert to give his honest opinion."

Duties and Responsibilities of the Expert

In addition to acting with independence, Mr Justice Cresswell, in the case *National Justice Compania navlera SA v Prudential Assurance Company Limited (Ikarian Reefer)* (Times Law Report 5th March 1993) identified the following duties and responsibilities of the Expert acting in civil cases.

1. The opinion given by the Expert is to be objective and unbiased, and should cover only those matters within his expertise - see *Polivitte Limited v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379, 386) per Mr Justice Garland, and *Re J* ([1990] FCR 193) per Mr Justice Cazalet.
2. The Expert is not to assume the role of advocate.
3. The Expert is to disclose those facts or assumptions upon which his opinion is based together with any material facts which could detract from the concluded opinion.
4. The Expert is to make clear when an issue or question falls outside his expertise.
5. The Expert should indicate that his opinion is provisional if it is considered that insufficient data was available when the facts were being researched: see *Re J* ([1990] FCR 193) per Mr Justice Cazalet.
6. If the Expert is unable to assert that his report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report: (See *Derby & Co Ltd and Other v Wheldon and Others (No. 9)*) (The Times Law Report 9th November 1990) per Lord Justice Staughton.
7. If, following an exchange of reports, the Expert changes his opinion on a material matter, then this change of opinion should be communicated to the party to the dispute without delay.
8. All documentation that is referred to in the Expert's report should be provided to the other party at the time Experts exchange reports.

Further Benefits

In addition to this independence and impartiality, the Academy cite the following further benefits to be gained from appointing an independent Expert.

- Specialist technical knowledge within a given discipline.
- Highly developed investigative and analytical skills.
- A broad perspective of the issues affecting disputes.
- Experience in handling disputes and contentious problems.
- An understanding of the related legal processes.
- Ability to present findings and opinions with clarity and authority.
- Experience in presenting evidence in a court or other tribunal.

Selecting an Expert

Should the decision be made to appoint an independent Expert then the selection and criteria used for the selection is critical; a poor appointment could have a significant impact on the outcome of the dispute and it is for this reason that the BAE offer a Matching Service. The aim of the Matching Service being to ensure that only appropriate and properly qualified Experts that have been properly vetted and who subscribe to the Code of Practice are recommended for appointment.

Issue No : 9
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Article No : 3
Author : J Whitfield
Title : Netting an Extension

Netting An Extension

Forty years ago, Lord Denning, explained obiter dicta in the case of *Amalgamated Building Contractors Ltd v Waitham Holy Cross UDC (1952)* that the power of extending contractual completion dates should also apply retrospectively and that common sense required that the method of assessment of such an extension would be what he termed the "**net**" method.

At this point it would perhaps be of use to explain that where an extension of time is granted during a period of culpable delay, that is a delay wholly the responsibility of the Contractor, there are two schools of thought on how the extension of time should be calculated. The first method, described as the 'gross' method has been preferred by many academics and some commentators and propounds that if an extension of time is granted because of an event arising during a period of culpable delay, then the extension of time must begin to run from the date the instruction, for example, was given. This means that the Architect must establish a new completion date for the contract which adds the extension of time from the date of the instruction, thus denying the Employer liquidated damages up to the new completion date. Naturally, many Employers found this to be unfair.

The second method, known as the 'net' method of calculation, was preferred by Lord Denning in the above case. In these situations, it is argued that the Contractor is only entitled to an extension of time equal to the time required to, say, carry out the additional work. Effectively, this means that if the Contractor is six months in delay and is delayed by one further month due to a relevant event, the completion date would be extended from the original completion date to a month later, still leaving the Contractor with five months of culpable delay and the threat of liquidated damages. Some Contractors would consider this to be unfair as the Employer may be directly responsible for the late relevant events, e.g. issuing instructions for extra work.

On the 11th May 1992, Mr Christopher J Willis, an arbitrator, made an interim award which allowed a retrospective Architect's Instruction and applied the 'net' method of calculation. The Contractor and the Employer felt that this was such an important point that it should be tried in the commercial court. Thus, the case of *Balfour Beatty Building Limited v Chestermount Properties Ltd (1993)* came to be heard before Mr Justice Colman.

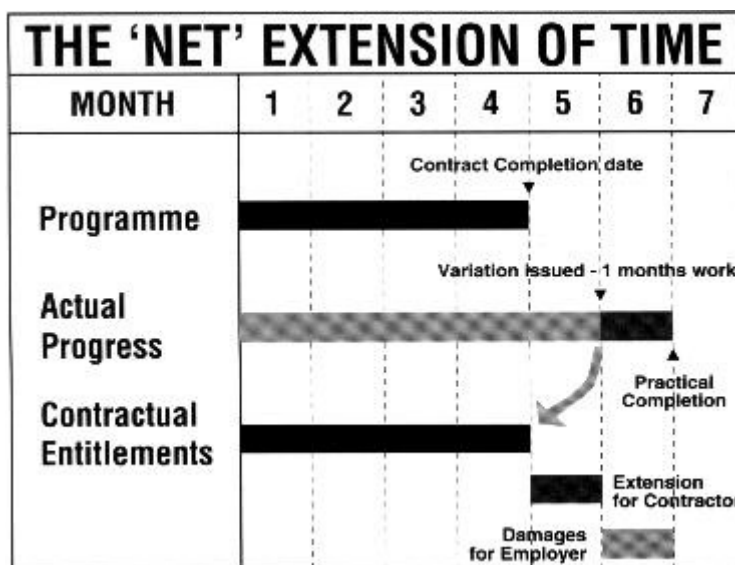
The case required the answer to two questions; firstly "**Does Clause 25 confer upon the Architect jurisdiction to grant an extension of time for the completion of the works in respect of the relevant event occurring during a period of culpable delay?**" The second question arises from it and is "**In granting an extension of time in respect of the relevant event occurring during a period of culpable delay, ought the Architect to award a gross extension or ought it to be a net extension?**"

Jurisdiction

In finding for the Employer, that the Architect does have the power to issue retrospective instructions during a period of culpable delay, Mr Justice Colman thoroughly examined clause 25 of the Contract. Rather than paraphrase the learned Judge I allow his words to speak for themselves "... **the function of the completion date is to identify the end of the period of time commencing with the date of possession within which the Contractor must complete the works, including variations, failing which he must pay liquidated**

damages. The means by which that period is adjusted is by advancing or postponing the completion date which can be done prospectively or retrospectively." To remove any doubt as to his meaning, he continued later in the judgement by saying "....in the case of a variation which increases the works, the fair and reasonable adjustment to be made to the period for completion may involve movement of the completion date to a point of time which may fall before the issue of the variation instruction". The Judge went on "Against this background, the contention that the gross method is fair to both parties cannot stand up."

It seems very clear from the judge's remarks that in his view, and this case is not being appealed, the Architect does have the power to issue retrospective extensions of time which extend the completion date to a date before the instruction was given.



Gross or Net Extensions

Mr Fernyhough QC on behalf of the Contractor, argued that the gross method was to be preferred on the proper construction of the Contract. At the time he put forward this proposition he was not alone. Many academics and commentators have preferred this method of assessing extensions explaining that an extension of time is not an extension of time at all but in fact a deferment of the completion date. Their reasoning being that it is nonsensical to change the completion date for the Contract to a new date which has already passed and is a date predating the instruction. However, Mr Justice Colman preferred the common sense approach taken by Lord Denning in the earlier case. Denning U used an example to explain his views. **"Take a simple case where the Contractors, near the end of the work, have overrun the contract time for six months without legitimate excuse. They cannot get an extension for that period. Now suppose the works are still uncompleted and a strike occurs and lasts a month. The Contractors get an extension of time that month. The Architect can clearly issue a certificate which will operate retrospectively. He extends the time for one month from the original completion date, and the extended time would obviously be a date which has already passed."** Whilst the wording of the Contract upon which Denning LJ was commenting was slightly different from the wording of JCT, the Judge in this case felt that it was a sensible and commercial interpretation of what the JCT had intended to say.

With regard to the Contractor's argument on fairness, the Judge said that his judgement was fair inasmuch as the Contractor will still only pay liquidated damages for his breaches or delays. The judge also felt that it would be unfair for the Employer to be deprived of the liquidated damages for the Contractor's breach, which would be the result under the 'gross' method of calculation.

It seems likely that the arguments which have raged over a number of years about retrospective issue of variations and gross and net methods of calculation will come to an end with this definitive decision by the court.

NB At the time of writing this case was unreported but the judgement can now be examined in the J993 Construction Industry Law Letter pages 821-828.

Issue No : 9
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Article No : 4
Author : T Fletcher
Title : Construction Management in the 1990

Construction Management In The 1990s

Tony Fletcher considers the role of Construction Management.

Construction Management has been heralded as an American idea imported to the UK in the late 1980's to help deal with the commercial property boom, though of course it has been around in one form or another for much longer than that. The attraction of Construction Management was the speed with which projects could move from concept to drawing board and onto completion. British Construction Management projects set tremendously fast build records in the late 1980's and early 1990's, surpassing the records set in the United States. But speed is not the only benefit to the Client. If carried out correctly, a Construction Management project should benefit from superior management, better control and reduced conflict.

A Better Way to Manage

The Construction Manager (CM) is recruited by and paid by the Client. He does not have a financial stake in the contracting process and this enables him to exercise a degree of impartiality that is not evident in Management Contracting. The CM receives no benefit from keeping specialist Sub Contractors out of their money and so is less likely to do so. This should result in management led by the needs of the project rather than by the needs of the Main Contractor's cash flow, surely a better way to manage complex construction projects.

Increased Control

In recent years, the construction industry has come to recognise the importance of Specialist Contractors and the valuable contribution they can make to the design and management of a project. In some methods of procuring projects, this expertise is either ignored or unused. In Construction Management, the Trade Contractors are the very life blood of the project and the catalyst for its successful completion. Contracting directly to the Client, the Trade Contractors are managed by the CM who ensures that the design team and Trade Contractors work in harmony, giving greater control over the whole construction process.

Reducing Conflict

Much of the conflict in construction will arise from contentions between those higher in the hierarchy and those lower in the hierarchy, as portrayed by the traditional construction organigram. In Construction Management, Trade Contractors share equal billing with the CM and the designers. This flattening of the project organisational chart reflects the value of each member to the team and their equality within it. If any encouragement can be given to a participant as an incentive to avoid conflict then there must be such an incentive.

Benefits

Construction Management should benefit all contributors to the new project but the clear winner will be the Client. To ensure that the Client gets his building completed on time, to a set quality and within budget, the Construction Manager will usually assist by:

- Interviewing and helping select the design consultants
- Establishing the design and construction programmes
- Monitoring and reporting on design and construction activities

- Advising on buildability, value engineering and life cycle costing
- Managing the Trade Contractor procurement process
- Advising and representing the Client in all matters.

Certainly this has been the experience at Trett Construction Management and other Construction Management companies, and now many Clients have reaped the benefits of using Construction Management for their projects.

Of course, no system of procurement and management is a panacea for all of construction's ills and Construction Management does have its critics. Some of the main complaints are:

- The CM is just a postbox for recirculating paper.
- The Trade Contractors have to manage themselves by coordinating at site level.
- Some Construction Managers are still unable to forget their old contracting habits and will abuse Trade Contractors, treating them as if they were Sub-Contractors.

These complaints do have substance but the trend is for Clients to employ specialist Construction Managers who are established solely for this role. The modern CM knows that cooperation and teamwork will produce better results than contention and subjugation.

The outlook for Construction Management Consultancy and full Construction Management is bright as long as the benefits of CM can be harnessed without importing the negative elements of old style contracting.

Issue No : 9
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Article No : 5
Author : Misc
Title : Letters

Sirs,

We have been working on a contract now for some months and all went well until I applied for an extension of time for the cladding. We are working on JCT 80, Private, with quants, and so I cited as a relevant event clause 25.4.2, exceptionally adverse weather conditions. The cladders had refused to work due to unusually high winds, for this area, in March.

The request was refused because the contract we accepted was amended to delete this clause. There is no way I can catch up at this late stage. Will I have to pay liquidated damages for the two weeks when I should have got an extension?

Ian Robinson

Address Supplied.

Ian,

I wonder if the person who amended the standard form really knew what he was doing. The extension of time clauses in the contract are for the benefit of both parties and not just the contractor. By deleting this clause he has removed the remedy that the contract provides for time lost due to exceptionally adverse weather. Now the Architect is prevented from giving such an extension. If you really cannot complete on time and the only reason is this delay, then the end date becomes impossible. In effect the contract is frustrated and an extreme remedy available to you is to leave site, allowing the losses to lay where they fall. The person most likely to lose by this is the client. The more practical step, however is for you to complete the works in normal fashion. I suggest you approach the client direct, as the Architect has no power to agree an extension now, and agree on an achievable new end date, and perhaps some extra money.

Editor

Issue No : 9
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Article No : 6
Author : HardHat
Title : On The Lighter Side : Lies, Damned Lies and Statistics

On The Lighter Side

Lies, damned lies and statistics

Our Columnist Hardhat discovers that Disraeli's belief that there were only three types of lie was unfounded. Hardhat leads us through some of the popular

WHAT THE CLIENT SAYS:

Yours weren't the lowest fees we received but we like the scheme you suggested.

We want you to build quality into this project.

Price is a secondary consideration on this particular scheme.

We don't really want a warranty from you, we trust you. It's just that our insurers insist you see.

You have got a free hand on the external appearance.

WHAT THE ARCHITECT SAYS:

The scheme is fully designed, any changes will be minor/superficial. The latest drawing issue just clarifies a few points.

Any changes will be shown on the drawings... in good time/before you start the work/sometime.

Our scheme is within the budget you gave us.

WHAT THE CONSULTANT SAYS:

We are here to represent the Client's best interests with the Sub Contractor.

We are here to represent the Sub Contractor's best interests with the Client.

If we make a mistake we admit it and then put it right.

Your warranting / checking our design doesn't make you responsible for any mistakes.

This design provides an economical solution to the Client's needs.

WHAT THE QUANTITY SURVEYOR SAYS:

Value for money does not necessarily mean the cheapest price.

We will not necessarily accept the lowest tender.

I am afraid your tender/final account is just over our budget.

This bill is prepared in accordance with SMM7.

We are not just Quantity Surveyors, we are Project Managers too.

WHAT THE CONTRACTOR SAYS: (To THE ARCHITECT)

We like to be a part of the design team.

By working together I think we can save the Client money.

I honestly cannot remember the last time we submitted a claim for loss and expense.

This site is very deceptive.

We are actually . . . ahead of/on/only a week behind programme.

It just isn't possible to incorporate those extras into the existing programme.

WHAT THE CONTRACTOR SAYS: (To THE QUANTITY SURVEYOR)

As you will see, this schedule of rates reflects our tendered figures.

We make no money out of dayworks, as you know, but they are the fairest way to measure this work.

We would make more money on daywork but for the Client's benefit, we have given him a price.

It may be a percent or two out but overall the remeasure is about right.

You're right. It must be a typographical error.

WHAT THE CONTRACTOR SAYS (To THE SUB CONTRACTOR)

You are not the lowest tenderer but we would like to talk to you anyway.

Our company terms and conditions are always open for discussion. Pay when paid isn't as bad as people make out.

We use our own terms because we find the JCT forms too complex for Sub Contractors.

It isn't our fault, it is the Client/Architect/QS/anyone else.

WHAT THE SUB CONTRACTOR SAYS:

We will be there Monday.

We have done bigger jobs than this before.

We only use our own directly employed labour.

We will be finished at the end of the week.

If you do not pay us we will issue a writ.

WHAT THE SUPPLIER SAYS:

They are coming Monday! Tuesday! Wednesday etc. etc.

We have just sent the last one out but we are getting some more in.

We keep much larger stocks at our other warehouse; I'll get one for you.

The driver is on his way/has broken down/left hours ago.

You are on our highest discount band now.

WHAT THE LAWYER SAYS:

You have a strong case.

We deal with this type of problem all of the time.

One strong letter from us should do the trick.

When they get the writ and see that you are serious they will concede.

Now that we have gone this far it won't cost much more to go to court.

WHAT TRETT SAY:

Hope you can take a joke!

Issue No : 9
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Article No : 7
Author : S Harold
Title : Record Keeping 2 : Preventing Disk Discontent

PREVENTING DISK DISCONTENT

Computers are an everyday part of our lives in construction. The data produced by the computer can represent many hours of work, hence the importance of good housekeeping. Stuart Harold of our Great Yarmouth office gives us some welcome advice on how to stop our records disappearing.

Storage

The most common storage media used by computers is the magnetic disk. Whether this is in the form of a removable floppy disk, or an integral hard disk, you are relying on a magnetic field to store your data. It is a very reliable means of storage but it is all too easy to convince yourself that something you put on to the computer today will still be there tomorrow. Things do go wrong, hard disks fail and coffee does get spilt onto floppy disks. The most important thing is to minimise the amount of damage done and the best way of doing this is have a well implemented backup routine.

Backups

Basically, all a backup consists of is a copy of the data stored on your machine, or network, which is made on some form of portable media. Many ways to backup your data are available, such as tape streamers, removable hard disks or optical disk drives. The most important thing is that the backups are done regularly, and the backup media is stored somewhere safe, preferably in a totally different building. If the worst does happen the backup can be 'restored' and the system is up and working again with the minimum loss of time and money.

Housekeeping

Good housekeeping relies on the operator keeping track of all the files stored on his machine. Old files which might get mixed up with, or possibly overwrite newer versions and so they should be removed. Backups should be done regularly, and files for projects which have been completed, or scrapped, should be archived in the same way as a backup. These archived files are useful for reference and may be required if a job should ever resurrect itself. A routine for scrapping these archived files after, for instance, five years could be implemented. But it is not only after the data has been entered into the machine that care should be taken. It is also during the data entry itself.

Human Error

We all make mistakes, some people make more than others and some people deny it more than others, but we do all make mistakes. If allowed to, the computer will quite happily accept erroneous data and process it along with any other correct data it possesses. If junk goes in, junk will come out, even if it has been rearranged and processed. Luckily, there are many ways in which to limit the possibility of entering incorrect data. The program itself can have routines built in which check the data against values which it knows are correct, such as a spell checker in a Word Processing package. If the package has been designed to recognise the data it receives as a specific type, such as currency or a date, it can then check it against a set or range of values defined by the operator at an earlier time. An example of this could be a database which is a listing of correspondence received by one company from another. If it was known that all correspondence was sent between two specific dates the field containing

this information could have a 'Validity Check' set up which would only allow dates falling into this range to be entered. Also, if another field was created to store a key word which was used to index the correspondence, and it contained only a limited number of different values such as 'Electrical' or 'Mechanical', a list of valid key words could be created against which the computer could compare the data as it was entered. The ability to do this can allow the use of relatively inexpensive staff who have no expert knowledge about the information they input to do the data entry. The consultant can then process this information and extract useful results safe in the knowledge that the data stored in the computer matches the criteria he specified.

Conclusion

Computers should be seen as a tool. They are there solely to assist the operator in performing their job with greater efficiency. It is all too easy for companies to rush headlong into computerisation without considering the amount of thought which has to be given to areas such as those mentioned in this article. But with the correct training and a well thought out Information Technology Plan it can help supply a company with the competitive edge it needs to succeed within its chosen industry.

Issue No : 9
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Article No : 8
Author : M Thomas
Title : Sub-Contracting - Look Before You Leap

SUB-CONTRACTING - LOOK BEFORE YOU LEAP!

Many disputes at Final Account stage are a direct result of misunderstandings over the various documents which form part of the Sub-Contract. Once the Sub-Contract is signed, it is too late to amend the list of documents.

ALWAYS CARRY OUT AN EXTENSIVE COMPARISON AND CHECK AGAINST ALL THE TENDER DOCUMENTS PRIOR TO SIGNING THE SUB-CONTRACT.

Some typical points to watch for are:

- It is possible for documents to be listed in the Sub-Contract, even though the Sub-Contractor has never seen them before.
- Do the Minutes of the 'Order Placement Meeting' record everything which was discussed and agreed, do they record items which were not agreed!
- Does the Specification and Bills of Quantities set out in the Sub-Contract correspond exactly with the Tender Enquiry documents? It is not unknown for the Tender to be based upon Specification and Bills of Quantities extracts only, but for the whole of the Specification/Bills of Quantities to form part of the Sub-Contract. This can introduce new conditions, such as restricted working hours and access, special conditions of contract, special working sequences or interfaces with other trades.
- Are the Drawings listed in the Sub-Contract the same as those upon which the Tender was based? It is possible that the Tender Drawings were Rev A, whereas the Sub-Contract Drawings are listed as Rev B. In signing the Sub-Contract, the Sub-Contractor is deemed to have allowed for everything shown on Rev B. Drawings even if only Rev. A has been seen.

BE CAUTIOUS

You have inspected all the Main Contract documents, haven't you?

Under most forms of Sub-Contract, the Sub-Contractor is bound to comply with the Main Contract, whether inspected in detail or otherwise.

The time to spot and correct any anomalies is **BEFORE SIGNING.**

ONCE SIGNED THE SUB-CONTRACT IS BINDING.