Construction

September 2014

CONTRACT VARIATIONS, TRAPS FOR THE UNWARY

This Article first appeared on 22 July 2014 in Construction News and is reproduced with permission. www.cnplus.co.uk

At the end of practically every construction project the parties will be faced with a schedule of unresolved variations that will need to be agreed. Disagreements will often relate to valuation.

For example, the quantity surveyors may choose different rates from the bill of quantities to value the variation.

Such differences on quantum will often lead to a horse trade and are normally resolved through sensible negotiation. After all, the sums in question will normally be comparatively small.

The disputed variation items will be more difficult to resolve where there is a disagreement as to whether anything at all is owing for the 'extra'.

Such disagreements on matters of principle typically boil down to one of two arguments.

Firstly, the question of whether the item of work is within the contract scope; secondly, whether the work has been approved and instructed by the employer.

These issues can be difficult to resolve – not least because the sum in dispute will often be considerable because of the employer's zero valuation.

Work within scope?

The description of the scope of works will normally be contained within a large number of documents appended to the contract, including a specification, drawings and pricing documents.

There will almost always be gaps and contradictions within the technical documents, so disagreements as to whether work is within or outside the defined scope are commonplace.

The law concerning the interpretation of contracts will govern how an adjudicator or court tries to resolve the inconsistencies.

construction news

holman fenwick willan hfw

The description of the scope of works will normally be contained within a large number of documents appended to the contract, including a specification, drawings and pricing documents... ... The law concerning the interpretation of contracts will govern how an adjudicator or court tries to resolve the inconsistencies.

MICHAEL SERGEANT, PARTNER

The contract may contain a 'priorities clause', which sets out an order as to which contract documents have priority over others.

For example, the wording in the specification may be said to take priority over what is shown on the drawings.

The position may be more complex still where the contractor is required to undertake work that is not specifically shown on the contract documents.

For example, a design and build contractor's obligation to ensure its design functions properly may mean it is required to undertake extra or changed work if that design proves to be defective.

No approval

A contractor will normally only be entitled to be paid for extras if the employer has requested them. This is the case even though the change is an improvement to the works.

After all, if a contractor could unilaterally increase its scope (and be paid for that work) the employer would lose all control over its budget.

Difficult situations will, however, arise where the contractor had to undertake the disputed extra work simply in order to proceed with the works.

Or, it may be the case that the extra work was necessary in order to comply with CDM regulations such that it is impractical for the contractor to stop work while waiting for an instruction.

The law has found a variety of ways of bending the strict rules relating to the need to have a formal instruction where this creates unfair outcomes – such as when the contractor cannot otherwise proceed.

For example, exceptions have been made where the employer has indicated to the contractor there is no need for an instruction – in which case the employer is said to have waived this requirement.

In certain limited situations the courts have even indicated there may be a positive duty on the employer to issue an instruction.

However, contractors need to be careful – these are very much exceptions to the rule.

For more information please contact Michael Sergeant, Partner, on +44 (0)20 7264 8034 or michael.sergeant@hfw.com, or your usual contact at HFW.

Lawyers for international commerce hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth