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DELAYS, EXTENSIONS AND VARIATIONS

At common law, where the employer delays or is responsible for delay, the fixed completion date and liquidated damages provision no longer apply. The employer still may be able to recover damages, but the fixed liquidated damages would no longer be available.

The JCT contracts allow for extension and adjustment of the completion date by the contract administrator under certain circumstances. These circumstances or events include where the extra works have been ordered. The JCT standard Contract 05 allows for extension of time where the contract administrator gives instructions relating to provisional sums, action regarding fossils, antiquities and testing the work. Where there are approximate quantities only, specified further time may be allowed if the approximation is not a reasonable forecast of the works required.

Variations in the works can include changes in design, material specifications and removal of work. A variation is certified and issued by the contract administrator. It must be in accordance with the terms of the contract. A contractor has a right to object on reasonable grounds to a variation. A variation may emanate from an employer. The administrator may approve a variation has been made by the contractor. The contractor generally has no authority to vary anything except under certain limited emergency circumstances.

The standard JCT contract contains a procedure to value a variation in a schematic way. The measure of work can be carried out in the same principles as set out in the contract builds. This contract allows for optional incorporation of a fluctuation clause. Fluctuations provide a mechanism for reimbursing contractors for change in input prices over which they have no control. They are three options in relation to the operation of the fluctuation clause.

Extensions of time will only be granted where the events are likely to delay completion. There are procedures by which the contractor may claim an extension of time. The application must be independently determined by the contract administrator. The contractor who wishes to claim an extension of time must have used his best endeavours to prevent delay in the progress of the works. The contract administrator must fix a new date giving such extension as is fair and reasonable as a result of the relevant event that has caused the legitimate delay.

Payment

The contractor is entitled to suspend works if it has not been fully paid. This will affect the completion date. Any delay caused by the employer or its agents or by exceptionally bad weather during loss damage by certain insured risks, civil commotion, strikes, exercise of government power, force majeure, delay on the part of the nominated sub-contractors and suppliers will also entitle a contractor to an extension.

Construction contracts deal with the employer's obligation to pay in different ways. Under the JCT contracts with Bills of Quantities, the bid by the contractor is based on the work described and specified in the contract Bills. These will have been set out in detail in the Bill by the employer's Quantity Surveyor. If any quantities are altered because of changes in the client's requirements the contract price will be altered.

In the JCT contract , JCT 05 "with approximate quantities", the Bills of Quantities are provided purely for the tender process. A price will not be fully established until the works are completed and the quantities actually carried out or ascertained ("measured").

It has always been common practice for construction contract sums to be paid by instalments. Legislation was introduced in England and Wales 1996 which makes instalment payments mandatory. Payments by instalments are obligatory except in the case of contracts of less than 45 days duration. The parties are free to negotiate the amount and the timing of the extra payments. Payments are due within seven days.

Payment certificates once issued by the contract administrator are due and owing. The amount of money due is recorded by an interim certificate issued by the contract administrator. The JCT SBC 05 requires payments to be made within 14 days of the interim certificates. There is a right to claim interest, on late payments, under the Late Payment of Commercial Debts Act.

It is common practice to withhold a proportion of the payments due to a contractor until work has been completed. The "retention fund" is intended to be available to the employer for the purpose of underpinning contractual performance and in particular rectifying the defective works during the defect liability period. The retention applies in respect of each interim certificate. The retention rate in the JCT SBC 05 is 3%.

The retention money is generally held in trust for the contractor so that it cannot be accessed by his general creditors. Generally one half of the retention is paid to the contractor upon practical completion and the other half is paid after the defect liability period.

Contractor's Claims

A Contractor can only claim loss and expense based on site conditions if there is a particular provision of the Contract that provides this. The fact that an unexpected difficulties have been encountered or work is proving more expensive does not generally entitle the Contractor to be compensated.

The JCT SBC 05 requires the contractor to prove that direct loss and expense has been incurred. The loss may arise from one of the following:

- variations;
- instructions in relation to postponement of work;
- expenditure of provisional sums specified in the contract document
- discrepancy or diversions between contract drawings;
- suspension of works due to default in payment;
- diversions where the quantity is different to an approximate quantity.

There are certain procedural aspects in relation to claims. The procedure for making the claim is set out in JCT SBC 05. The application must made to the Contract Administrator who decides if the claim is founded and ascertains the amount so incurred.

The nature of the loss or expense can cover out of pocket expenses for loss or loss of profit. There may be immediate costs and head office overheads and profits.

Insurance

Insurance must cover liability to employees for injury or death provided that it is not due to any negligent or default of the Employers. The Contractors duty to indemnify the employer also covers damage to property and damage due to negligence, breach of statutory duty or omission by the Contractor or someone for whom the Contractor is responsible.

The Contractor is obliged to take out and maintain certain Insurance Policies which cover most forms of insurable liability.

The Insurance Provisions in relation to damage to the actual works are complicated. There are 2 alternative clauses. Option A places responsibility on the Contractor while Option B places insurance responsibility on the employer.

Guarantee

The Guarantee is an arrangement by which the contractor's performance is backed up by a third party. Guarantees are frequently given by the parent company of the contractor.

Commonly a performance bond by an insurer or financial institute is required. JCT SBC 05 does not require a bond. The standard provisions are frequently amended to require a bond with a minimum level of 10% of the contact sum. The purpose of a bond is to cover where the counter party is insolvent.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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