

69. Managing Development Property V

Building Contract Duties

The Royal Institute of the Architects of Ireland (RIAI) is the representative professional body and now the registration authority for architects. It produces a number of standard form construction contracts. Their contracts deal principally with traditional "general contracting" methods of procurement and construction.

There is no equivalent of the UK Joint Contract Tribunal which has produced standard for contracts in the UK for general contracting, and also for the more modern forms of procurement. Irish law firms have adopted UK forms for use in more modern methods of procurement.

These following deals with certain common form terms and conditions found in construction contracts. The types of clause and division of responsibilities is most consistent with general contracting. Other forms of contracting would involve broadly similar principles, modified or added to in order to reflect the particular procurement method.

Contractor's Obligations

Under the standard RIAI documents, the Building Contractor is obliged to construct

the Works in accordance with the plans, drawings, bills and specifications which define the work in written and graphic form. The building documents will be annexed to or referred to in the building contract. The make up of the building documents will depend on the nature of the work.

The workmanship is as described in the building documents. Where there is no specified standard, the standard is to be appropriate to the works and materials. The contractor must comply with statutory obligations, including in particular the planning permission (which will be reflected in the building documents) and the Building Regulations which set out minimum building standards. The contractor controls the site and all persons on it.

Employer's Obligations

The employer's principal obligation is to pay for work done and under certain circumstances to compensate for loss and expense. The employer must not hinder the contractor and must co-operate with it. The employer must make any necessary nominations within a reasonable time. The contractor will generally have a right to object to employer's nominations on reasonable grounds.

The employer appoints the contractor administrator who will generally be an

architect. Some architect's obligations under the contract are carried out by the architect on behalf of the employer and must be carried out with due care and skill. This means the architect's negligence could render the employer liable. Other obligations under the contract, must be carried out by the architect or contractor administrator independently. The employer must not obstruct or interfere with such functions. An example is the issue of certificates for payment.

The site conditions will generally be the contractor's risk under the contract documentation. There may be situations where the employer takes the risk because there is a warranty that the tender documentation is fully accurate in all respects. There would need to be clear wording to shift this risk to the employer.

Design

Traditionally, responsibility for the design of the works rested with the employer's design team. This would normally consist of an Architect and Civil Engineer backed up with other necessary consultants such as a Services Engineer. Construction was the responsibility of the contractor whose obligation was to undertake the work in accordance with the contract documentation. However in practice, in all but the simplest project, the design process demands continuing interaction

between design and construction teams until the project is completed.

Generally, a designer is obliged to take due care to achieve the result required by the design process. The designer does not generally guarantee the result, but undertakes to exercise due care appropriate to his profession.

In a "design and build" project, there is more likely to be a stricter unconditional obligation on the single contractor and designer to achieve the required purpose. The responsibility may include superintending the design and construction process.

It is increasingly common for nominated sub-contractors to design their own work or bring some kind of proprietary system. Where the main contract is a conventional building contract, it is unlikely that the main contractor will be held responsible for the nominated sub-contractor's design. In these circumstances, the employer should enter a direct collateral agreement with the sub-contractor.

In practice, contractors nearly always take on a measure of design responsibility. The contract documents cannot give sufficiently fine detail in every respect and a contractor must exercise discretion in certain areas. Sub-contractors are often asked for their opinions on particular problems, as the process proceeds.

Contractors, sub-contractors and suppliers may provide documents for particular purposes for approval by the architect.

Completion

Practical completion is usually specified as completion to an extent that the building or project can be taken over for its intended purpose without inconvenience. It does not necessarily mean that all aspects of the work have been fully completed. Generally, contracts will specify a specific completion date with provision for liquidated damages (being a fixed sum for every late day or week) until the works achieve practical completion. If an extension of time is given (and the contract administrator/architect may be obliged to grant an extension for a variety of reasons), the due completion date is moved forward in time.

The contract administrator's (usually the architect's) certificate that the works are complete has a number of consequences. The site is handed back to the employer. A Health and Safety Plan for the building must be delivered. Depending on the contract, insuring responsibility may also pass back. The contractor is usually entitled to one half of the accumulated retention monies. The rectification or "defects liability" period begins.

The defects liability rectification period usually lasts six months. During this period

any defects, shrinkages or faults must be put right by contractor at its own expense. The administering architect must issue a final list of defects not later than 20 days after the end of the defects liability period and the contractor then has a reasonable time to put them right.

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 may still be able to recover damages, but the fixed liquidated damages would no longer be available.

The RIAI contracts allow for extension and adjustment of the completion date by the administering architect under certain circumstances. These circumstances or events include where there are variations or where the extra works have been ordered. The standard contracts allow for extension of time where the administering architect certifies that certain situations apply.

Variations in the works can include changes in design, materials, specifications and removal of work. A variation is certified by the administering architect. It must be in accordance with the broad terms of the contract. A contractor has a right to object on

reasonable grounds to a variation. The contractor generally has no authority to vary anything except under certain limited emergency circumstances. The standard RIAI contract contains a procedure to value a variation. The variation is valued in accordance with the same principles as set out in the contract documents.

Extensions of time may be granted to contractors, where certain events which are likely to delay completion and which are outside their control, arise. There are procedures by which the contractor may claim an extension of time. The application must be independently determined by the administering architect.

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 architect 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.

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, loss of 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.

Payment

Construction contracts deal with the employer's obligation to pay in different ways. Under the RIAI contract 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.

The contractor is generally entitled to payment certificates as the work progresses for the value of work done. Payment certificates, once issued by the administering architect, are due and owing. The amount of money due is recorded by an interim certificate issued by the administering architect. The RIAI standard contract requires payments to be made within 7 working days of the certificate.

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 is inserted in the contract and is commonly about 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 for costs and expenses which are allowed by the contract. The fact that an unexpected difficulties have been encountered or that the work proved more expensive, does not generally entitle the Contractor to be compensated. The RIAI contract requires the contractor to prove that direct loss and expense has been incurred because of 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 will be set out in the contract. The application must be made to the Administering architect who decides if the claim is founded and ascertains the amount so incurred.

Insurance

Insurance must cover liability to employees for injury or death provided that it is not due to any negligence or default of the employers. The contractor also agrees to indemnify the employer in respect of damage to physical property 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 two alternative clauses. One option places responsibility on the contractor while the other option 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 institution is required. The standard RIAI contract 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.

This extract is from our "Legal Guide to the Management and Enforcement of Security in Ireland" (2009). The 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. It 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 it. The reader should rely only on specific legal or taxation advice. It is based on the law as of 1st October 2009.

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