
How to Deal with a Delay or Default by Nominated Sub Contractor, in a Contract under JCT 98 under JCT 98



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A Case Study

Preamble

A contract for the construction of a new leisure centre included a PC sum for the design, fabrication and installation of a very large sectional climbing wall, and the architect subsequently invited specialist tenders for the work. The tender prices were closely grouped, and the architect subsequently issued an instruction to the contractor to place an order for the work with the lowest tenderer. A nominated sub contract was subsequently signed between the main contractor and the specialist, and a collateral warranty was put into place between the specialist and the employer under which the specialist undertook:

- to use all due skill and care in the design of the wall
- to carry out the works in such a way that the main contractor would not become entitled to an extension of time.

Installation of the wall is shown on the contractor's program as lying on the critical path and the main contractor is entitled to an extension of time for any delays by the nominated sub contractors.

The specialist company fails to commence installation on the agreed date despite a number of telephone calls from the contractor and despite the fact that the architect has reason to believe that at least some of the wall sections have already been fabricated. The specialist subsequently contacts the architect to say that they have discovered a serious error in their price. They state that they are not prepared to fulfill the contract unless the contract price is increased by some 75%.

The case study is to analyze the legal position from the point of view of all of the parties involved, citing relevant case law as appropriate and advise the architect how he should proceed.

Introduction

In nominating a sub contractor for the project, the contract administrator has followed the formal steps in accordance with the main contract which has been signed between the employer and the main contractor. Main contractor has been instructed by the contract

administrator to enter in to an agreement with the nominated sub contractor after selecting the sub contractor. By entering to this sub contract agreement, the parties; the main Contractor and the nominated sub Contractor have agreed to the terms and conditions fully, as related in the contract. Conditions of the main contract will be included in the sub contract.

Under JCT 98 form, this nomination has been considered as a 'nominated sub contract' because in various ways it fulfills the requirements of nominated sub contract, such as bill of quantities showing the relevant scope as 'PC sum', contract administrator issuing an instruction on the expenditure of such PC sum, etc.

After the completion of forming of sub contract agreement, the employer has entered into a collateral warranty with the nominated sub contractor, in which the main terms to read as, the nominated sub contractor should 'use all due skill and care in the design of the scope specified' and 'carry out the works in such a way that the main contractor would not become entitled to an extension of time due to any delay of nominated sub contractor'. Accordingly, as per clause 35 of JCT 98 form this nominated sub contract has been formed and the terms and conditions are accepted in the following order:

1. Sub contractor has tendered on form NSC/T
2. Collateral warranty has been formed as NSC/W and is incorporated to the sub contract agreement
3. Contract administrator has formally nominated the sub contractor on NSC / N
4. Completing the above (1) , (2) & (3), the main contractor and the nominated sub contractor are bound by the terms of sub contract NSC / C

The Contract administrator, in this case, the 'architect' is responsible for administration of various financial and commercial provisions such as payments, variations and completion of the relevant sub contract.

With all above it is clear that the steps which have been taken by the contract administrator and the employer are according to the form of contract adopted for the project.

The estimated cost of the relevant sectional climbing wall has been included in the bills of quantity as a PC sum. The main contractor is entitled for the percentage or any fixed amount set out in the bills of quantity against the value of actual work done by the nominated sub contractor for attendance, coordination and supervision. The existing general facilities such as site facilities, scaffolding, temporary roads, power supply etc., will be covered by the said percentage of fixed fee.

Dispute

The specialist nominated sub contractor was not able to meet the contractual obligations due to the following:

1. Failing to commence the works on an agreed date
2. The contractor's notification of his inability to perform the contract due to erroneous contract price.

Failing to commence on an agreed date, nominated sub contractor has created a back ground of a claim for extension of time from the main contractor, as the particular works are on the critical path of the main contractor's program.

Contractual and Legal Background

According to JCT 98 form of contract, the main contractor has no liability for any delays or any other damages by the nominated sub contractor. This allows the main contractor to claim an extension of time for the delays occurred by the nominated sub contractor. On the other hand, the main contractor is not liable to pay liquidated damages to the employer during the relevant period which was delayed by the nominated sub contractor. Similarly any damages due to the breach of contract terms by the nominated sub contractor can not be claimed from the main contractor.

As the nominated sub contractor has entered into a sub contract agreement with the main contractor, the nominated sub contractor is liable to complete the works at the agreed price. The price which has been offered by the nominated sub contractor is valid if that it is not subject to a variation or omission. The main contractor is entitled to recoup any losses due to the delay of any nominated sub contractor under the clause 4.40 of NSC/ C. The employer is not authorized to involve such claims as this aspect does not fall under the category of 'relevant matters' described.

Also, if the sub contract works lies on the project critical path, the nominated sub contractor gets an extension of time for works, and such extension of time will not be applicable to the main contractor's time for the completion of the whole project. The main contractor is unprotected in cases where the cause of delay is due to his/her own fault.

By demanding an increased price for the works under the sub contract, the nominated sub contractor has expressed repudiation from the project. The justification which he has provided is not accepted as per the law of contract. As he entered into a legally binding contract, it is not possible to withdraw the offer stating that there was a mistake in pricing. The sub contractor is bound to complete the scope set out in the contract at the agreed contract price within the contract period.

Responsibility of the losses and damages due to repudiation of a nominated sub contractor, additional costs due to inflation, and disruption to the main contractor's program etc. shall be borne by the employer, mainly according to the court decisions made as follows:

House of Lords in *North West Regional Hospital Board v TA Bickerton & Sons Ltd (1970)* held that any increased cost arisen due to the repudiation of nominated sub contractor should be borne by the employer as the nomination is a responsibility of employer, at the event of a withdrawal of a nominated sub contractor from the project.

A nominated sub contractor has liabilities in contract and in tort. This is covered by the nomination procedure of sub contractor, by adding a direct agreement between the employer and the nominated sub contractor. The collateral warranty plays the role of such agreement between them, to enable the employer to cover any damages of delays or any other due to breach of contract. With the collateral agreement, a collateral contract forms and it will cover the employer's rights with some established assurances made by the nominated sub contractor. Such assurances are legally binding and can be presented at courts. *The case of Shanklin Pier Co Ltd v Detel Products Ltd (1951)* which held that the sub contractor was liable for damages due to the breach of collateral contract is an example.

Even if any direct contractual link is not available between the nominated sub contractor and the employer, a potential claim will be possible to exist in the tort of the negligence. Such claim shall be based on physical damages. However, in the event of an employer appointing the nominated sub contractor, it will provide an additional value of a relationship of 'proximity' that the nominated sub contractor has a duty of care in tort not to create 'pure economic losses' through negligence performance of the sub contract. *Junior Books Ltd. v Veitchi Co. Ltd (1983)*.

The main contractor also has responsibilities in a nominated sub Contract, mainly on the quality and the standards of workmanship and the fitness for purpose of Work. Also the quality and the fitness for the purpose of materials supplied also should be taken into consideration under the responsibilities of the main contractor.

As a practice the following facts are to be considered before commenting on the responsibilities of the main contractor.

1. Terms of the main contract and the sub contract governs the project
2. Type of the dispute or default
3. Who is to suffer
4. Following up actions by the parties involved.

When considering the provisions for the recovery of damages due to the delays of the nominated sub contractors, it is worthy to study the case *Westminster CC v Jarvis & Sons (1970)*. The house of Lords held that the sub contractors delays (piling contractor who has completed the job on time, but found defects at the later stages which remedies have taken time causing an extension of time to the main contractor) shall not be considered for extension of time to main contractor, because the delays are considered only on the completion of the works. In other words, House of Lords expressed their vision about the claim, i.e. if it is on the subject of 'completion of the works', the main contractor shall be granted the extension of time, for the delays by the nominated sub contractor.

Also, the above has provided that the main contractor shall be liable for the quality of the works and the required standards.

The current position which is in force is 'where a nominated sub contractor is in delay of practical completion, and if it is applying to a delay in the main contract, the main contractor is entitled for an extension of time. Then the employer can recover the liquidated damages that have been caused due to the delay, directly from the nominated sub contractor, under the NSC / W clause of collateral warranty.

Main Contractor's responsibility towards mitigation of delays and subsequent losses

Main contractor shall take the necessary actions for mitigation of delays in the contract. In this particular case, the main contractor has placed telephone calls to nominated sub contractor to remind him about his delays of the commencement of works. It is necessary to check what contractual terms are available to measure the validity of such action in order to mitigate the additional cost from any delays. As telephone calls are not accepted as recorded evidence in contracts, such action towards mitigation will be challenged against a possible claim from the main contractor. If the methods of notices are limited to letters, fax or other in writing systems in the contract, the main contractor will be liable for the damages for not taking 'reasonable steps for mitigation of losses'. These measures of mitigation action by the main contractor are to be valued by the contract administrator.

Following losses and damages to the employer could occur due to the above dispute:

1. Re-nomination and re-tendering cost , in the event of termination of sub contract
2. Cost of extension of time , if , to be granted to the main contractor due to the delay by the nominated sub contractor
3. Liquidated damages due to the overall delay of the project due to the delays by the nominated sub contractor.

In the event of the main contractor being liable for the delays (under lack of necessary actions for mitigation), the following additional costs will be generated , which are to be recovered from the nominated sub contractor.

1. Extra costs for the required acceleration to the progress of the work to cover the delays in order to avoid possible liquidated damages
2. Any other costs related to the breach of sub contract.

Conclusion

The Contract administrator, in this case the architect shall proceed as follows towards the mitigation of any losses to the employer due to delays by the nominated sub contractor;

1. Advise the employer regarding the procedures of claims against the nominated sub contractor for his repudiation and the subsequent delays, under the terms and conditions of the collateral warranty. The employer may send notice to the nominated sub contractor regarding the breach of agreement of the package construction by demanding an increased contract price under the collateral warranty. Also, the failure of the nominated sub contractor to avoid 'extension of time claims' from the main contractor as agreed under the collateral warranty shall be highlighted in the notice. It is to be advised, under the sub clause 3.3 of NSC/W, the employer is entitled to recover the losses including liquidated damages that happened due to the delay of the nominated sub contractor.
2. Send a notice to the main contractor to submit evidence of proof of the actions he has taken to mitigate the delays by the nominated sub contractor under the conditions of the sub contract and as well as the main contract with the employer. Such proof is analyzed by the contract administrator to determine the level of effort taken by the main contractor towards the mitigation of losses and the same determination shall be submitted to the employer in the view of possibilities to avoid claims of extension of time from the main contractor.
3. Take necessary steps towards re-nomination of a new sub contractor for the package, according to the conditions set out in the contract, within the specified period if the current nominated sub contractor does not agree with the employer and the main contractor to continue.
4. The contract administrator has to organize negotiations between the nominated sub contractor, the main contractor, and the employer and instruct the nominated sub contractor to resume the works as per the collateral warranty agreement and the sub contract agreement to establish the original contract conditions, (price and the time for completion).