

Acting as EMPLOYER'S REPRESENTATIVE [ER] Construction projects

Gerard O Sullivan FRICS FSCSI FCIArb
O Sullivan Conciliation Ltd
22nd October 2025

Content

1. Capital Works Management Framework
2. Employer's Representative' Role
3. Contract Personnel Roles
4. Contract Documents
5. Employer engagement
6. Contractor engagement
7. Site Facilities
8. Resident engineer/clerk of works
9. Monthly site meetings
10. Monthly cost and progress reports
11. Contract programme
12. Delay and disruption
13. Design/procurement submissions

Content



- 15.Completion, Commissioning , hand over
- 16.Payment applications -payment certificates
- 17.Outstanding works -defects
- 18.Managing change
- 19.Managing risk
- 20.Final account
- 21.Dispute resolution process
- 22.ER's duty of care/case law
- 23.Authority of ER as an Employer's construction professional



Capital works management framework GN 3.1 v 1.1 07/21

OBJECTIVES

PROJECTS DELIVERED

- a) On cost –tender price same as final outturn cost
- b) On time – project delivered on or before Substantial Completion Date
- c) Project delivered to the required quality standard in the construction meets the contract specification
- d) To allocate risk so there is optimal transfer of risk to the Contractor

Stages

- i) Appraisal –Feasibility Employer identifies needs and decision to proceed
- ii)/iii) Planning- Needs quantified, assumptions verified , desired outputs specified and the solution designed – Design – Tender
- iv) Implementation – the solution is constructed and handed over
- v) Review –assessment of how successful the delivered solution meets the needs



Capital works management framework GN 3.1 v 1.1 07/21

Achievement of objectives dependent on Employer providing complete and detailed information in the tender documentation

For design and build PW CF 2 and 4 Employer must provide output specifications

For Traditional projects PW CF1, 3 ,5 and 6 Employer must provide comprehensive input designs and specifications



2. EMPLOYER'S REPRESENTATIVE'S ROLE

Person appointed to administer the contract on behalf of the Employer and to represent the Employer's Interest

Usually will also act as design team leader and responsible for delivery of design documentation and or design brief and to manage and co-ordinate delivery of information via the various design consultants

Will include co-ordination of statutory appointees – assigned certifier/ PSDS

May be independent consultant or an in-house appointment from the Employer's organization

The person primarily responsible for liaison with the Contractor



Employer's Representative

Role cl 4 management

- Issue of instructions to the Contractor
-which are either directions or change orders 4.4.1 in writing 4.5.5.
-on any matter connected with the Works (whether or not mentioned elsewhere in the Contract) at any time up to the date of issue of the Defects Certificate 4.5.1
-that are necessary in his/her opinion for the completion of the Works 4.5.4

Employer's Representative

Role cl 4 management

- Change orders issued are deemed to be within the ER's authority 4.3.2
- May delegate in writing any ER functions or powers 4.3.3
- Co-ordinate and manage the issue responses from design team members/ Employer in relation to all responses required under the contract and ensure responses issued in good time where requests received in good time

Employer's Representative

cl.4 management

- May give opinions, assessments, determinations and certificates in accordance with the contract to the parties in time and give other communications (clarifications) in accordance with the contract or as ER considers appropriate 4.4.2
- Request on time any clarifications, consultations, workshops, exchange of information and expertise or investigations 4.1.3
- May seek removal of Contractor's representative etc 4.2.3

Employer's Representative Design construction stage

- Where further design development is required by the Contractor after contract award check the preferred design to see whether it meets the defined output requirements, performance specifications and planning and building regulation/ fire regulation requirements set out in the works requirements

Employer's Representative

cl4 management

- Deal with Contractor's submissions 4.7
- Consider Value engineering proposals proposed by the Contractor and advise whether the Employer either agrees or reject same 4.8
- Receive the Contractor's detailed programme 4.9.1 and direct when appropriate revisions to the current programmes 4.9.3



Employer's Representative

cl 4 management

- Receive and direct format of Progress Reports 4.10
- Respond to reasonable requests for instruction/information from the Contractor / by the latest date required 4.11
- Entitled to receive all information, documents and records required to perform their functions and powers under the Contract 4.13
- Meetings scheduled and arranged including issue of minutes 4.15

Limit on Employer's Representative's Authority

- Schedule Part 1 A states max values for any one change order/ max cumulative value over 3 month period
- Not to instruct any change that reduces the safety, usefulness, quality or scope to the Work Requirements
- Consult with Employer in advance of any change to the Contract sum before deciding on the adjustment
- Take instruction from Employer on Contractor value engineering proposal
- Consult re valuations / estimates of extras/savings with cost consultant

Employer's Representative Certification / Determinations

- Certify payments under clause 11-interim , penultimate and final
- Certify substantial completion under clause 9
- Certify completion of defects within 4 weeks of completion of defects period
- Determine claims for extension of time under clause 9 and 10
- Determine claims for compensation under clause 10
- Act impartially between the parties on these roles

Employer's Representative

cl 12 termination

- Direct the Contractor to put matters right in respect to failure of the Contractor to comply with its obligations under the Contract 12.1.1 (1)
- Where terminated determine the termination value and the termination amount 12.2

3. CONTRACT PERSONNEL ROLES

Employer's personnel

Design team – consultants to assist ER in their role– architect-engineer- services engineer (sub specialist designers)–structural engineer- landscape- etc –all to assist in completion of work requirements , tender assessment and construction stage supervision and necessary design development and advise ER on interpretation of work requirements, quality of work and progress/ programming –all under direction of ER

Attend regular site meetings, carrying out inspections and dealing with contractor submittals and overseeing commissioning and directing on remedials- prep relevant part of reports to Employer and respond to Employer – address specific areas of concern in respect to contractor's quality of work and progress

Cost consultant – part of DT and advise on cash flow projections , payment applications and valuation of change orders /compensation events, PVC

3. CONTRACT PERSONNEL ROLES

Employer's personnel

Statutory appointments – PSDP PSCS – responsible under construction health and safety regulations

Assigned certifier to certify project for the purpose of fulfilling the Employer's obligations under Building Regulations

Employers agent –usually in Employer's organisation as the point of contact with the ER for responding to reports – and liaising with other critical personnel within the Employer organisation –may also act as liaison with third parties including statutory/ public utilities such as ESB, Uisce Ireland , Building Control , neighbours etc

Site engineer/clerk of works –see later

4. CONTRACT DOCUMENTS



TENDER DOCUMENTS

Instructions to Tenderers

Procurement Competition Rules

Open/ selected/ negotiated

Suitability Criteria to Enter Competition

Requirements for Contractor's Proposals

Tender

Tender form/ schedules 1 and 2

Contract Conditions PWC 1 to 11

Works Requirements including novated/ named specialist documentation

Pricing Document

Background Information



Contract Documents

- Art 5. - Per 1.3.1 Order of precedence where inconsistencies occur between documents
 - Agreement-
 - Letter of Acceptance including post tender clarification identified in it and Schedules (1, 2 and 3) completed
 - Contractor's Tender
 - Conditions
 - Work Requirements –defines the project scope
- Pricing document-as priced by successful contractor
- Works Proposals (identified in the schedule)
- Any other documents referred to in the Contract – e.g. PSDP health and safety plan, planning conditions local authority fire certification, surveys, dilapidation reports, etc All may be deemed background information



Pricing Document

- **NO PROVISIONAL SUMS/ITEMS/QUANTITIES –**
- These are not measurement contracts –
- **FOR EMPLOYER DESIGN CONTRACTS PWC1, 3 AND 5**
- But any inconsistency above a value of €500 per item between the Works Requirements and the description and measurement of the Works Requirements in the Pricing Document in accordance with the relevant method of measure (Schedule 1 K17) shall be resolved by the instruction of the ER under sub-clause 1.3.4
- Risks for Employer – shortcomings in design information leading to omission of items required to be measured and described – likewise risk that BQ might not have measured or described work requirements as required by ARM , CESSM or TII Rules
- Contract Sum is established by way of the Tender Offer
- Errors in rates/arithmetical etc are at the Contractor's risk - under public procurement there should be a checking process of the Priced document before tender is recommended and any errors corrected without changing the Tender Offer



Model Forms

- Bid Bonds
- Letter notifying Candidates/ten derers
- Letter accepting tender offer
- Letter to tenderer notifying award
- Performance bond
- Parent company Guarantee
- Novation and Guarantee Agreement
- Novation Agreement
- Appointment of Project Supervisor (safety)
- Professional Indemnity Insurance cert
- Collateral Warranty
- Rate of pay certificate
- Bond –unfixed materials
- Retention Bond
- Appointment of Conciliator
- Bond for Conciliator's Recommendation
- Appointment of Standing Conciliator
- Reserved Specialist Forms
- Letter re Temporary PI insurance arrangements
- Reliance warranty
- Declaration re reg 57
- Declaration re Oath

Background Information

1.10 In this sub-clause 1.10
Background Information
means any information
made available on, before
or after the Contract Date
to the Contractor or to
anyone on the
Contractor's behalf by the
Employer or anyone
acting on the Employer's

behalf in connection with
the Contractor's tender
for the Contract, which
information is not
included in this Contract.
Background Information
also includes any
information stated to be
'Background
Information'.

Contractor's documents

- Contractual
- Works proposals (D & B)
- Prices Pricing Document
- Schedule 2
- Programmes
- Collateral Warranties –
designers, specialists –
Schedule 1
- Warranties – required under
works requirements
- Certifications under Building
Regulations
- Submittals re specialists/
materials to meet work
requirements - competency
- Value engineering proposal
- Statutory approvals /licences
- Progress reports
- Site Records including labour
/plant records
- Health and safety documents
- Evidence of insurance – EL,PL
All Risks , PI



Contractor's documents

- Contractual
- Works proposals (D & B)
- Prices Pricing Document
- Schedule 2
- Programmes
- Collateral Warranties –
designers, specialists –
Schedule 1
- Warranties – required under
works requirements
- Certifications under Building
Regulations
- Submittals re specialists/
materials to meet work
requirements - competency
- Value engineering proposal
- Statutory approvals /licences
- Progress reports
- Site Records including labour
/plant records
- Health and safety documents
- Evidence of insurance – EL,PL
All Risks , PI



Standard Conditions of Engagement for Consultancy Services (Technical)

COE-1 v 2g 30 June 2016

- Measure of performance
- 2..3 skill , care , diligence, efficiency , and professional conduct reasonably to be expected from a consultant with the qualifications and experience suitable for the services
- 2.4 No guarantee of suitability for purpose of the design or other services
- 2.17 Joint and several liability
- Financial basis of appointment -payment clause 9
 - fees paid either on a percentage or converted to fixed lump sum price basis- feasibility to tender stages usually on percentage of the budget/main contract sum – over an agreed fixed period for each stage and normally due at end of certified completion of each stage

5 Employer Engagement



EMPLOYER'S RESPONSIBILITY

- **Appoint**
- Employer's Representative ...and notify contractor if replacing –and if no ER Employer responsible for the function
- Project design team [employer design] or project overseers for design [contractor design]and cost consultant either through ER or under control of ER –**(whether directly or through ER)**
- Appoint resident engineer/clerk of works where relevant
- Appoint statutory appointees under Health and Safety Construction Regulations – PSDP and PSCS – and assigned certifier under Building Regulations 2014
- Appoint Employer's representative to Project Board
- Appoint standing conciliator/conciliators as required with agreement of Contractor
- Respond and engage with ER and their team in respect to their report on progress, significant changes, budget /cash flow and confirm asap consent to the ER to confirm contract changes over the project limits where appropriate and essential to the project
- Access to and use of site for duration of project and in respect to access for post completion works and remedying defects

Employer Engagement

EMPLOYER'S RESPONSIBILITY

- Ensure funds available and approved based on budget and advised and agreed changes
- Pay the Contractor , design team and relevant third party bodies as and when appropriate and in time
- Make prompt decisions in relation to the facility to enable it to be delivered on time
- Establish clear and effective communication procedures
- Evaluate and respond to project reports
- Take over projects on completion
- Engage legal advice where required and risk assess disputes as and when appropriate
- Engage where required with neighbouring landowners/occupiers re boundary issues etc. (May be delegated to design team)

Contractor's documents

- Contractual
- Works proposals (D & B)
- Prices Pricing Document
- Schedule 2
- Programmes
- Collateral Warranties –
designers, specialists –
Schedule 1
- Warranties – required under
works requirements
- Certifications under Building
Regulations
- Submittals re specialists/
materials to meet work
requirements - competency
- Value engineering proposal
- Statutory approvals /licences
- Progress reports
- Site Records including labour
/plant records
- Health and safety documents
- Evidence of insurance – EL,PL
All Risks , PI



6 Contractor engagement

Contractor's obligations

8.1 (1) that the works are executed and completed i) in accordance with all the requirements in , and reasonably inferred from, the Contractand ii) in a proper and workmanlike manner and using good practice

8.1.(2) that all Works Items.....

i) comply with the Contract and Legal Requirements and ii) are of good quality and unless the Contract provides otherwise, new

8.1.3) that all materials and goods that are Works Items...are fit for the purpose for which they are normally used

8.1.4) that all Works Items selected or design by the Contractorare for for their intended purpose in the Works

9.6 .1 The Contractor shall achieve Substantial Completion of the Works and each Section by its Date for Substantial Completion

6 Contractor engagement

Contractor's personnel role

Contractor's representative –full authority to act on behalf of the contractor on all matters concerning the contract –will be subject to the approval of the ER if not named in the works proposals or agreed and approved prior to acceptance of tender

Contractor's Supervisor –full time on site with full authority to receive instructions and other communications on behalf of the contractor on all matters concerning the contract

Other staff QS, site engineer, temporary works designers, various trade supervisors, service co-ordinators, programmers, purchasers etc

Make required submittals –specialists, suppliers, material

Contractor design –contractor works proposals

Value engineering proposals

Programmes

Progress reports

Provide site facilities for administration and health and safety welfare and security

Insurance



7 Site Facilities for Employer Personnel

- Safe Work Place – Re Employer Legal Responsibility
- Sanitary & Messing Facilities
- Wet Room
- Office Facilities
- Facilities for on site staff –eg resident engineer
- Meeting Facilities
- Broadband-telecommunications
- Site Record Instruments – Camera, Surveying Equipment, Measures

Attendance on Employer Personnel by Contractor

- Access to Carry out Duties
- Maintenance of Site Facilities

8 RESIDENT ENGINEERS/CLERK OF WORKS

- On-site supervision of construction activities
- Ideally full-time supervision
- Appropriate mix of skills to suit proposed works
- Delegation of Powers –usually only specific to resident engineers on civils projects – clerk of works never advisable
- Delegate in Writing
- Clearly identify what authority of the ER is being delegated and the limitations imposed thereon
- Identify Clause Entitling Delegation of Powers
- Name Personnel
- Update Letter as Personnel Change

DELEGATION OF POWERS

1. Observe and record the Contractor's activities, and those of his specialists and suppliers;
2. Inspect the Contractor's site records and any other documentation, which is required to be maintained to comply with the Contract, the Contractor's own procedures or any Legal Requirement;
3. Agree records with the Contractor in respect of site activities, including materials used, plant and staff engaged in works and as-constructed details;
4. The functions and powers set out under Clauses 4.3.3. to be defined by the ER (delegation) ;
5. Provide written objections
6. Comment or offer an opinion on the Contractor's working methodologies, materials being used, or any other aspects concerning the Contractor provision of the Works.
7. Keep ER fully informed of actions and obtain appropriate directions from same as appropriate



9 Submissions

- Design & Materials
- Risk Assessments & Method Statements
- Requests for Further Information
- 3rd Party Documentation
 - Local Authority Licences
 - Utility Engagement
- Payment Applications
- Notices
- Correspondence
- Minutes / Records / Reports

Specialist –Definition

CI 5

- Subcontractor or supplier of a Works item named in the Contract
- Contractor's Personnel who design
- Contractor's Personnel stated in the Works Requirements to be specialists –Named Specialists –Schedule 3B
- CI. 5.4.1 Other than those named in the Contract the Contractor is to submit details to the ER of proposed subcontractor/specialists and their scope of their work –usually reported in Contractor's fortnightly reports



Employer's Representative cl5 specialists

ER'S approval of Specialists

- Subcontractor/specialist to be suitably qualified and experienced and competent to carry out their respective tasks cl. 5.2
- Contractor may not terminate subcontract without first submitting details to the ER except
 - for reasons of insolvency
 - or serious breach of Law concerning safety
 - or failed to effect/maintain insurance cl. 5.4.5
- On termination the Specialist/subcontractor shall be replaced after the details of the proposed replacement has been submitted to the ER. Cl.5.4.5
- Employer's Representative may object to the replacement of the Subcontractor/specialist if the proposed replacement does not have at least the level of experience, qualifications ,competence , technical capacity and financial standing of those being replaced. Cl 5.6 – Critical to that decision will be objective information to confirm that minimum level



9 Submissions -registers

- BIM / Quality Management
- Registers
 - Site Based
 - Office Based
 - Physical / Local Computer / Local Server / Cloud Based
- Design & Materials Register
- Risk Assessments & Method Statements
- Contract Changes
 - Change Orders
 - Value Engineering Proposals
 - Claims
- Correspondence

9 Submissions –register record

- Register Records
 - Numbering Sequence
 - Category
 - Date Received
 - Status
 - Description / Title
 - Contractor Reference
 - Date for Response
 - Use tools within software
 - Document Links
 - Conditional Formatting

9 Submissions –possible responses

- Proposal Agreed
- No objection to proposal
- No objection to detail provided, but further information required in respect of
- Insufficient detail provided to make an assessment
- Proposal does not appear to be compliant, due to Please provide further information in respect of
- Proposal is rejected, it does not comply with and if implemented it will cause difficulties due to



10 Record Keeping - Site

- Record Types
 - Pre-Construction Surveys
 - Site Diaries – detailed note taking
 - Daily Sheets – daily summary, not for a casual audience
 - Resource focused
- Weekly Report – photographic record, for a casual audience
- Task Focused
- Monthly Report – summary report to be read alongside Contractor's report
- Status Focused

10 Record Keeping - Site

- Record Types
 - Additional Records – greater detail if more precise details needed
 - Claim Notifications
 - External Influences
 - Videos
- Record Characteristics
 - Regular, Consistent,

Contemporaneous

- Records should match available capacity
- Record keeper needs to understand the purpose of the record



10 Record Keeping - Site

- Pre-Construction Surveys
 - Minimum Requirement
 - Walk-Over in Advance of Works Commencing
 - Photographs & Notes
 - Ideally in Company with Contractor
 - Sensitive Structures or Environments
 - Independent Specialist
 - Written Report
 - Archaeologically or Ecologically Sensitive
 - Homes and Occupied Buildings
 - Vulnerability to Works
 - Liaise with Stakeholders

10 Record Keeping - Site

- Daily Records
 - Based on Site Diaries
 - Division of Day to match inspections –
e.g. AM, Mid, PM
 - Weather
 - Operating Hours
 - Active Work Areas
 - Management & Office Staff
 - Construction & Supervisory Staff –
including sub-contractors
 - Large Plant – hours operating /
standby / parked
 - Small Plant
 - Deliveries
 - Notes

10 Record Keeping - Site

- Weekly Report
 - Focus on Tasks not Resources
 - Site mobilisation / facilities
 - Single location task
 - Moving tasks
 - Photographic Record
 - Summary descriptions
 - Interaction with Third Parties
 - Attach Daily Record Sheets

11 Monthly/Bi-monthly site meetings

Text

Purpose

- Review Status
- Identify issues of concern
 - Design
 - Construction
 - Stakeholders
- Agree approach to problems
- Monthly reports
 - Contractor
 - Employer's Representative

11 Monthly / Bi monthly site meetings

Text

AGENDA

Previous Minutes

Matters Arising

Health & Safety

- HAS / PSDP / PSCS / Contractor / Client / Designer / Incidents

Contract Formalities & Other Contract Issues

- Bonds / Insurances / Communication Protocols / Site Boundaries / RE Facilities

Consents

- Planning Permission / Regulatory Bodies

Third Parties

- Landowners / General Public / Adjacent Construction Activity

Construction Documents & Information

- Quality Management / Design Submissions / Method Statements
- Instructed Variations / Value Engineering Proposals / Construction Plans

Construction Activities

- Environmental Management / Site Facilities / Issues & Progress on Site
- Individual Work Areas / Look-Ahead Programme / Testing

Program

- Current Program / Extension of Time

Payment

- Cash Flow / Applications / Variations / Claims

AOB / Next Meeting

12 Monthly / Bi monthly Reports

- Status Based Report
- Progress of Main Structures – Photographs
- Working Areas
- Sub-Contractors Present
- Programme Status

Ideally try and complement the Contractor's Monthly Report, rather than duplicate it

Report Topics

- Health & Safety Incidents
- Environmental Incidents
- Structure –Structure B - etc
- Programme
- Structure – X % complete, with Y weeks remaining on programme
- Significant Construction Issues
 - e.g. changes to working drawings being made on site, without any procedure in place
 - Cost –issue- cash flow versus progress – cost reports compensation events – costs claimed – costs determined and agreed – costs disputed

Coffee Break





13 PROGRAMMES

- Programme non binding on contractor – has the right to alter
- Float -ownership -intention – an allowance for errors /contingency -nature of a programme -estimate -not entitled to extension until the float exhausted
- Purpose of the programme – to enable the Contract Administrator to plan their own arrangements , for possession information supply of drawings and coordination
- PWC cl 4.9.1*The programme shall be of a quality that will permit effective monitoring of the Works*
- PWC cl 4.9.2 ...*allow reasonable periods of time for the Employer and the Employer's Personnel to comply with their obligations under the Contract.*



Cl. 4.9. 1 programme

- Submit before starting date
- Of quality to permit effective monitoring of the Works
- Includes times when Contractor requires instructions or any other actions from ER/Employer
- Order and times Contractor Proposes to execute the Works
- When Contractor's submissions/docs to be made
- Work to be carried out by Employer's Personnel
- **Critical paths ,critical floats, critical resources and other flexibility**
- Estimate of resources for each period
- Details of last review and purposes of changes



4.9.1 programme

- **Critical paths ,critical floats, critical resources and other flexibility**
- **The floats refer to the Critical paths –both plural – so it is envisaged that floats will be monitored to inform the ER whether there is final effect on the date for Substantial Completion**



4.9.3 Programme

- If so directed by the ER the Contractor to submit a revised Programme should it not correspond with actual or reasonably projected progress and that programme should show actual versus projected progress
- If Contractor asserts *it is not possible to reach Substantial Completion of the Works..*by its *Date for Substantial Completion* –the earliest date for same will be shown

4.9. Programme v Programme Contingency

- Programme is what it is – a monitoring document of the contractors' intent and progress
- If he intends to finish early he is fully entitled to do so
- But the Employer is not bound to assist?
- However, it is arguable that the float lost by Employer's default should be taken into account by the ER in assessing extension of time
 - It is arguable that the float could be considered part of the Contractors risk of the programme contingency and that the programme reflects his use of same

14 Delay and Disruption



Text

Dates –contract period

- Definitions Cl 1.1
 - Contract date – date of issue of Letter of Acceptance
 - Date for Substantial completion of the Works- inserted in Schedule Part 1G or 2 C –if Schedule states a period last day of that period starting on Contract date
- 9.1 Starting date – contractor sets date giving ER at least 15 working days notice and no more than 20 working days after Contract date-insurance commence –cl 3.2

Delay

- PWC cl 9.3.1 Contractor becomes aware that work under the contract is being or is likely to be delayed for any reason notify ER as soon as practicable of delay and cause. At most 40 working days after he became aware of delay shall give ER full details of the delay and its effect on progress of the Works. Notice under 10.3.1 will suffice
- Where event is both a delay and compensation event it must be compliant with 10.3 notice procedures otherwise it could be time barred

Delay event

- PWC 9.3.2. events causing delay to date for substantial completion identified in Schedule Part 1 K1 to 21 as delay events and which are confirmed by the Employer as delay events by the insertion of Yes in the appropriate columns
- Extension of time or use of programme contingency provided delay does not arise as a
 - 1) Result of the Contractor's or Contractor's Personnel's act or omission or the Contractor's own breach of Contract
 - 2) the Contractor cannot avoid the delay and makes all reasonable efforts to minimise the delay
 - 3) the Contract does not provide otherwise (eg failure to give notice)

Extension of time

- PWC 9.3.2. subject to 9.3 , 9.4 (programme contingency) and 10 (notice requirements) there shall be an extension to the Date of Substantial Completion caused by the delay event taking into account only Site Working Days – Procedure under cl 10 applies to both delay only and delay/compensation events in that an ER determination required
- ER may at any time revise determination of an extension 9.3.3

Delay event

- Compensation/delay cl 10.3.1 Claim
- If contractor considers that under the contract there should be an extension of time – same process as with cost adjustment – same notice requirement
- 10.3.1.3 contractor to provide information required under 9.3 and a proposal – either for use of the programme contingency (Cl 9.4) or an extension of time
- Must give full details of the delay event and its effect on the progress of the works cl 9.3 –

Liquidated damage

- PWC 9.8.1 Contractor shall pay the Employer [and the Employer may deduct from payments to the Contractor – if the Works do not reach Substantial Completion by the Date of Substantial Completion of the Works (certified by the ER)
- The fact that precise pre-estimation of the is difficult or impossible to determine does not render the

assessment of Liquidated damages penal, **“on the contrary, that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties Dunlop Pneumatic Tyre Co Ltd v New garage and Motor Co Ltd [1915] AC 79**

Extension of time

- Purpose – to protect the Employer's rights to liquidated and ascertained damages
- Allocate use of programme contingency
- Calculate Contract Sum adjustment under clause 10.7 by application of daily delay costs
- Delay events – responsibility
- Schedule Part 1 k – allocation of delay risk
- Allocation of compensation risk

Compensation/delay event

- PWC Schedule part 1 K –
 - 1) Change order
 - 2) The ER directs a search for defects and none found
 - 3) The ER directs suspension the works under cl 9.2
 - 4) The Contractor suspends work in accordance with cl 12.3
 - 5) Factual error in information about the Site or setting out in the Works Requirements
 - 6) The Employer takes over part of the Works before Substantial

Completion

- 7) Contractor has not received in due time necessary instructions from the ER applied for in writing
- 8) Employer prevents occupation and use of the site
- 9) The Employer does not give the Contractor a Works item or other thing as required by the Contract when asked

Compensation/delay event

- PWC Schedule part 1 K –
10) interference with the
execution of the works on the
part of Employer's personnel on
site and the interference is
unforeseeable and not in
accordance with the contract
11) The Employer instructs a
rectification of loss or damage
to Risk Items for which the
Contractor is not responsible
clauses 3.2.3

- 16) A breach by the Employer
of the Contract delay the
Works not listed elsewhere in
this table

Delay only events

- PWC Schedule part 1 K –
12) loss or damage to works
which is the Contractor's risk
under cl 3.2
13) a weather event as described
14) strike or lockout affecting the
Construction industry generally
or a significant part of it and is
not confined to the employees of
the contractor or any
Contractor's personnel
- 15) Order or other act of a court
or other public authority
exercising authority under the
law, that did not arise as a result
of or in connection with an act ,
omission or breach of legal
requirements of the Contractor
or the Contractor's personnel or
a breach of Contract by the
Contractor



Delay events + - Compensation option

- PWC Schedule part 1 K –
 - 18) An item of archaeological interest or human remains is found on the Site and it was unforeseeable
 - 19) The contractor encounters on the Site unforeseeable ground conditions or unforeseeable human-made obstructions in the ground , other than Utilities
 - 20) The Contractor encounters unforeseeable Utilities in the ground on the Site
 - 21) Owners of Utilities on the Site do not relocate or disconnect Utilities as stated in the Works Requirements, when the Contractor has complied with their procedures and the procedures in the Contract and the failure is unforeseeable

Unforeseeable

- Condition, circumstance or occurrence is **unforeseeable**
- *If an experienced contractor tendering for the works could not have reasonably foreseen it on the designated date , having inspected the site and surroundings, having satisfied itself (in so far as practicable and taking into account any*

information in connection with the site provided by the Employer) as to all matters concerning the Site, including its form and nature and its geotechnical, hydrological and climatic conditions

ASSESSMENT OF DELAY

- *The critical path of a construction contract is a sequence of activities through the project from start to finish the sum of whose durations determines the overall duration of the project **L Drummond Young City Inn Ltd v Shepherd Construction Ltd [2007] ScotCS CSOH 190***
- There may be more than one critical path depending on the workflow logic of delay to the progress of any activity in the critical path
- NEC requires a real time adjustment to the programme which governs the execution of the work whereas RIAI require an assessment as soon as they are able to do so

ASSESSMENT OF DELAY

- **Entitlement v actual based methods**
- Theoretical impact -as planned but for -as planned impacted – as built but for
- Baseline planned programme updated to the point the event occurs (but planned programme rarely followed)
- Actual -as planned v as built
 - impact/update methods - how works progressed -seek to ascertain what delay events actually caused delay
 - Choice depends on nature and extent of relevant records –

ASSESSMENT

- All assessments rely on a subjective assessment and theoretical projection
- accuracy depends on the base information –
- and reasonableness of the analysis -
- was logic appropriate-
- analysis of expert cannot be a substitute for an understanding of how any of

the events on site actually impacted on the other events -of assistance but not determinative ***Ramsey J***
London Underground Ltd v Citylink Telecommunications Ltd [2007] BLR 391

9.4 Programme Contingency

Use of the programme contingency provided for in this sub-clause shall be claimed and determined in accordance with this clause 9 and clause

10. Programme contingency may be drawn- down when Substantial Completion has been, is being or will be delayed beyond the date for Substantial Completion minus the unused part of the first and second thresholds In making a determination under sub-

clauses 9.3 and 10.5 in respect of a delay to Substantial Completion of the Works, the Employer's Representative shall notify the Contractor and the Employer of how much of the first threshold and the second threshold have been used-up by delays to Substantial Completions of the Works caused by Compensation Events.

15 Completion, Commissioning Handover

Text



Substantial Completion

- The Works or part of the Works are complete so that they can be taken over and used by the Employer for their intended purpose and there are no Defects other than
 - Defects accepted by Employer 8.5.4
 - Minor defects
- All tests required by contract before SC passed
- ER has received all documents required before SC
- Collateral warranties required delivered to ER
- Details in the Cert of Compliance on Completion of Works included on the Register maintained under Part IV Building Regulations

Minor defects

- They do not prevent the Works or part of the Works from being used for their intended purpose
- The ER had grounds for believing the contractor has reasonable grounds for not promptly rectifying them
- Rectification will not prejudice the safe and convenient use of the Works or part

Certificates on completion

- PWC 9.6.2 within 20 working days of receiving the request from the Contractor to certify Substantial Completion the ER shall give to the Employer and Contractor either a cert stating the date of SC or the reasons for not issuing the certificate-
- Schedule 1 h may prohibit issue of cert in advance of Date for Substantial Completion
- Insurance for works now responsibility of Employer – Value of works to be advised
- Defects period commences
- Moiety of retention released

Substantial completion

Testing

- Factory Tests
- Tests during Construction
- Tests Prior to Completion
 - Visual Inspection
 - Demonstration
 - Commissioning
 - Operational Tests
- Tests After Completion
 - Operational Tests
- Reports on each Test

Defects & Outstanding Works

- Classification
- Prevents Works being put into use
- Doesn't Stop Operation but has future implications
- Minor or aesthetic
- List Everything?

As-Builts / Safety File

Handover of Works and Training

16 Payment claims – payment certificates



INTERIM PAYMENT



- **PWC 11.1 Interim payments –**
- 1 Monthly up to and including Substantial completion
- 2 Contractor – submits a statement – payment claim notice - showing progress, the sum he considers is due, a detailed breakdown and any supporting evidence the ER requires
- 3 Employer's Representative within 14 days gives certificate of the amount in his opinion is due from Employer – response to the payment claim notice
- 4 Shall be paid on presentation of invoice within 21 days of presentation to Employer by Contractor
- 5 Employer's Representative shall give calculations and give reasons for opinion
- 6. Employer fails to pay Contractor can charge interest under EC (Late Payment in Commercial Transactions) Regs 2012 – Contractor makes a written demand for payment –not made within 7 days (sec 5.CCA) –(12.3) –suspend the works on notice and then terminate 12.4 within 15 working days of suspension

Payment WHATS DUE?



- **PWC 11.1 Interim payments – what is due ?**
- 1 the Contract value of the Works properly executed
- 2 Any amount the ER considers proper under unfixed Works items subject to notified limits
- 3 Amounts for adjustments to the Contract Sum for Compensation Events determined under the contract
- 4 Any amounts to be paid under the PV clause
- **5) 11.1.2 (5) amounts included in the Pricing Document for Contractor's Documents properly completed and supplied as required by the Contract.**
- **Less** Retention shall be deducted from each interim payment 11.3

11.4 Full Payment –



Contractor fails to comply in full obligations –the Employer is not required to make payment in full

- 1 Not given collateral warranty by due date in schedule 1 F (i)–amount stated therein
- 2 Not submitted programme or progress report when required entitled to deduct 15% of each payment until submitted or given
- 3 non compliance with 5.3 – deduction under 5.3.6 –estimate amount should have been paid to work persons

/contributions

- 4 failure to give certificate required under 5.3.7 that Contractor is fully compliant with cl 5.3 – There shall be no payment until cert is given
- 5 Where the Contractor has still not complied with by the date the Defects Certificate was issued shall be deducted from the Contract Sum. The Contractor shall give the Employer any information the Employer requires for this determination.

Release retention



- **PWC CONTRACT**
- PWC 11.3.4 – For Substantial completion of a Work Section reduce retention by relevant portion set out in Schedule 1 G for that section
 - Contractor entitled to invoice the Employer for half the amount of retention so retained
- 11.3.2. Substantial completion

17 Outstanding Defects



Text

Employer's Representative

cl 8 defects

- Agree with contractor time and place for tests required by the Contract—if test fails may require test be repeated 8.4.
- May direct search for defect or its cause.
- Re any defect may direct removal, demolition where incorporated into the Works, reconstruction, replacement or correction and non delivery
- With Employer's consent agree with contractor to accept defect C.8.5.4 ER's refusal to accept a defect is conclusive cl 8.5.4.
- May make appropriate extension to defects period 8.6.2 and issue Defects certificate within 20 working days end of Defects Period

18 Managing Change



Text

CHANGE ORDERS cl 1



- Definitions
- Change order – an instruction of the Employer's Representative (ER) to change the Works or to change constraints in the Contract on how the Works are to be executed.
- ***limitation of ER's ostensible authority in respect of individual and cumulative value of change orders is notified in Schedule 1 part A –***
- ***note 4.3 2 says any act or instruction of ER shall have effect as if within the ER's authority and the Contractor need not inquire into whether he has or has not got authority***

ER directions



- Direction – contractor considers it a Change Order
-4.5.2 -Must give notice under 10.3 and have it determined under cl 10
- Contractor commences to implement instruction in advance of referring for a determination under 10.3 it will be confirmed as a direction

Compensation/delay

- 10.1 Compensation events occur the contract sum shall be adjusted by the amount provided in cl 10.6
- The event must not be as a result of the contractor's act, omission or breach of contract
- And he must demonstrate he has done all to avoid adverse affects of event
- Comply fully with cl 10
- Schedule Part 1 K 1 Change order determines whether same is or is not a compensation event

Claim Notice requirements



- Compensation event cl 10.3.1
Claim
- If contractor considers that under the contract there should be an adjustment to the contract sum-upwards or downwards
- Contractor shall , as soon as practicable and in any event within 20 working days after it become aware, or should have become aware, of something that could result in such an entitlement, give notice to the ER
- Within 20 working days after giving notice the Contractor shall give the ER details of all of the following
 - All relevant facts
 - A detailed calculation –a proposal for the adjustment of the contract sum based on said calculation

Claim Notice requirements

- Notice of claim compliant with 4.14
- 10.3.1 must prominently state that they are given under clause 10.3 of the contract
- 10.3.2. Failure to give notice or details in accordance with and within time provided in 10.3 the contractor shall not be entitled to an increase in the contract sum
- **The Employer shall be released from all liability to the Contractor in connection with the matter**

Claim Notice requirements



- 10.3.3. IF THE CAUSE OF THE CLAIM HAS A CONTINUING EFFECT
- UPDATE ON ESTIMATED DELAY/COSTS ON MONTHLY BASIS
- MAY SUBMIT AT FORTNIGHTLY PROGRESS MEETINGS OR WITH PAYMENT APPLICATIONS TO ER
- ER NO DISCRETION TO RELAX CONDITIONS PRECEDENT-FORMALITIES OR TIME

Cl. 10.4 Proposed changes



- 10.4 Valuing proposed instructions
- Within 20 working days of request contractor to provide
 - Detailed calculations – costs
 - Delay information if it arises
 - Time saving if proposal an omission
 - Documents required in relation to the proposal

ER'S DETERMINATION-

- Claims and Proposed Change Orders
- 10.5 ER within 20 working days of receipt of information or proposal will do either
- Direct additional information or revised proposals –contractor to respond in 10 working days and ER shall reply in a further 10 working days (may not seek further information) or
- Notify parties proposal agreed or
- Will not be given
- **Make a determination** for adjustments or not to contract sum/programme contingency and notify parties

10.5 ER's Determination in time

10.5.3 If the Employer's Representative fails to take any of the actions in sub-clause 10.5.1 within the time stated, the Employer's Representative will be taken to have made a determination under sub-clause 10.5.1 (3) that there be no adjustment to the Contract Sum, no use of programme contingency referred to in sub-clause 9.4 , and no extension to

any Date for Substantial Completion. The Determination will be taken to have been made on the last day of the time provided for in sub clause 10.5.1

10.5 ER's Determination

10.5.4 A determination of the Employer's Representative notified to the Contractor and the Employer under sub-clause 10.5.1 (3) or 10.5.2 (*ER's extension of time on own initiative*) shall be final and binding on the parties unless, after 28 days after receiving notice of the determination (or, if sub-clause 10.5.3 applies, within 28 days after the determination is taken to have been made), the Contractor or the Employer gives notice to the other

under sub-clause 13.1.1 disputing the determination and referring to the dispute process

10.5.5 Notice of a determination under sub-clause 10.5.1.(2) shall be conclusive (final and binding) on the parties 28 days after the date of termination unless the determination has been referred to the dispute process cl 13.



CL 10.6 Contract sum adjustments

According to 10.6 adjustments to the Contract Sum for a Compensation event are in respect to additional, substituted or omitted work required as a result. It is important that the word “substituted” is interpreted clearly to include the change of the nature of works originally specified

arising out of such Compensation Events. Works as intended and planned under the contract on the basis of full design information provided and contractor's risk identified can be radically changed by the nature and timing of compensation events.

Adjust contract sum 10.7



- With reference to sub-clause 10.7.1. the delay cost is that sum which will be added to the contract sum arising out of a Delay Event giving rise to a change in the date for substantial completion.
- This delay cost has been either defined as a rate tendered by the contractor which is applied to the number of site working days the contract is extended for Delay Events which are also

Compensation Events (10.7.1. (1)) which is the case under this contract or

- “the expenses unavoidably incurred by the Contractor as a result of the delay to the Date for Substantial Completion of the Works..(10.7.1.(2)).*

Delay cost tendered

- 10.7.4
- Except as provided in 10.7 losses or expense arising from or in connection with delay,
- disruption,
- Acceleration,
- loss of productivity or
- knock on effect
- shall not be taken into account or included in any increase to the contract

GERARD O SULLIVAN O SULLIVAN CONCILIATION LTD

sum and the Employer shall have no liability for such losses and expenses

10.9 Employer's Claims

- ER or Employer will give notice and details of events or circumstances where they consider there should be a reduction in the Contract Sum or there is an amount due to the Employer under the Contract
 - The details, relevant facts, the calculations and the basis for same and the proposed adjustment to the contract sum
- Contractor has 20 working days to respond
- Within 20 working days of receiving the response the ER will determine the matter
- Procedures shall apply until defects cert is issued or certs issued after termination

19 RISK MANAGEMENT

Text

INTENT IS THAT APPROPRIATE RISK IS ASSESSED AND ALLOCATED AT TENDER BETWEEN EMPLOYER AND CONTRACTOR

- unforeseen underground issues
- employer caused delay events – time/cost risk per thresholds
- contractor design issues
- daily delay costs below real cost
- acceptance of abnormally low tenders
- During project – failure of performance of contractor due to various unforeseen risk factor including hyper inflation , labour and material shortages, pandemics etc

19 RISK MANAGEMENT

Text

ER's role is by way of reports to Employer /funding agency to advise as to significant issues with performance of contractor – which are likely to lead to serious disputes either on cost/ or time or both – these are matters for which the Employer may need to engage further advise and either direct a resolution via the dispute avoidance process

ER's role is by way of clause 4.1 to engage , where necessary and for the good of the project , with the contractor on a without prejudice basis to address risk where it becomes clear that the contractor is not managing the risk for whatever reason –

To advise both parties , where they have formed the opinion that progress of the works is seriously being delayed due to the fault of the contractor and give notice of same to both parties under clause 12

Employer on formal dispute processes will engage directly with Contractor nominees to resolve
ER's role is to advise and assist the Employer and the dispute process

20 Final Account



Text

Final and other Payments



- **PWC CONTRACTS**

- PWC 11.5.1 and 2 – Penultimate Payment
- Within 2 months of Substantial Completion Contractor shall give ER a Final Statement
- Final statement shall include all monies the Contractor considers is due from the Employer under or in connection with the Contract. Employer has no liability for any matter not detailed in the Final

Statement except indemnities and compensation events which occurred after Substantial completion

- Within 3 months of receipt of Final Statement ER shall issue the penultimate payment certificate in the amount in his opinion is due less any final retention to be paid after the defects period

Final and other Payments



- **PWC CONTRACTS**
- **Final Payment certificate-11.5.3**
- No more than 3 months from the issue of the Defects Certificate
- ER shall issue a Final Payment Certificate certifying the amount in his opinion is finally due
- It shall be the amount in the penultimate payment certificate
- Except
 - The final payment of retention
 - Adjustment for compensation events arising after substantial completion
- Amounts owed by the Contractor not included in penultimate certificate – eg value for defects agreed not to be remedied
- Deductions under Full Payment clause 11.4
- Other amounts to be paid after substantial completion eg testing after same

Final and other Payments



- **Final Payment certificate-**

11.5.3

The Final statement of all sums the Contractor considers is due from the Employer

Employer shall have no liability under or on connection with the Contract not detailed in the Final Statement

No payments or certificates

a) will relieve the contractor of

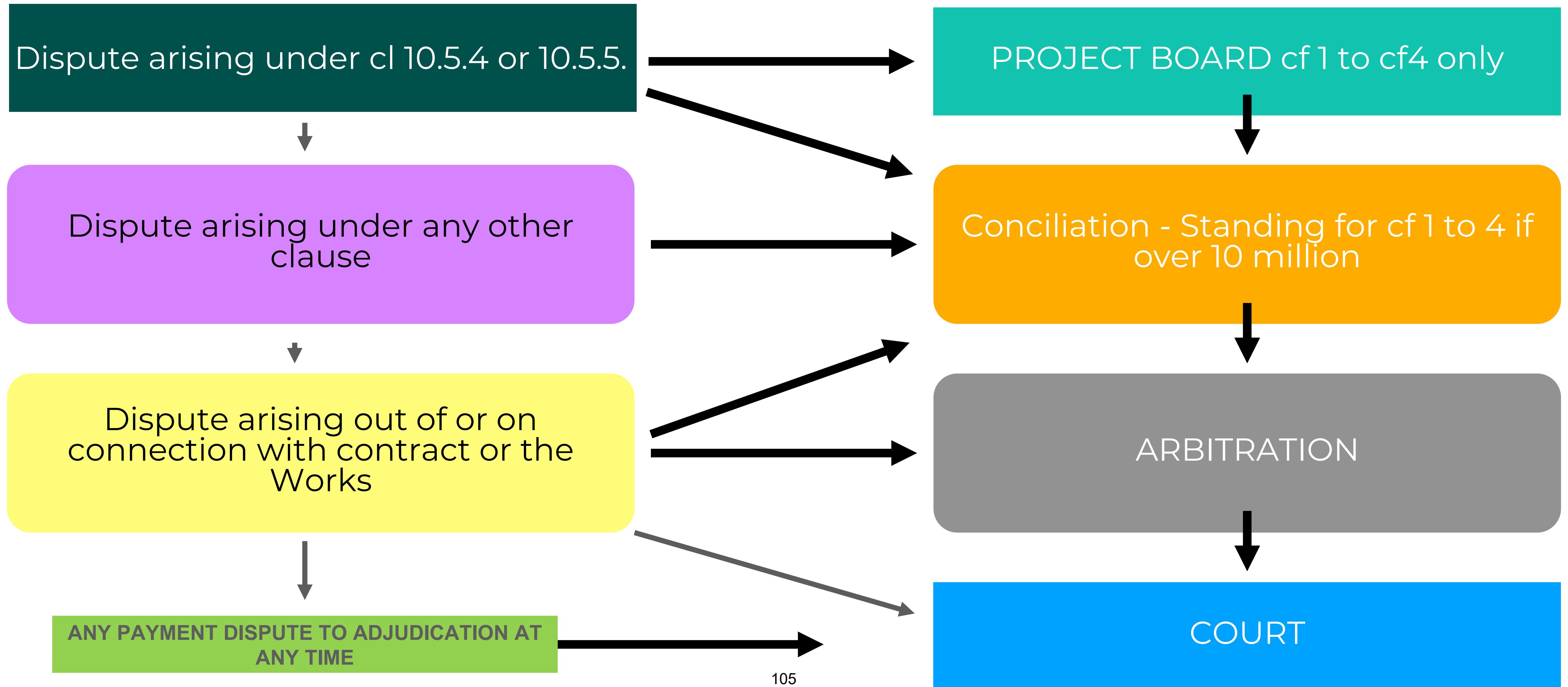
any obligations or
b) be evidence of the value of work or
c) that the works has been completed satisfactorily

21 Dispute Resolution Process

Text



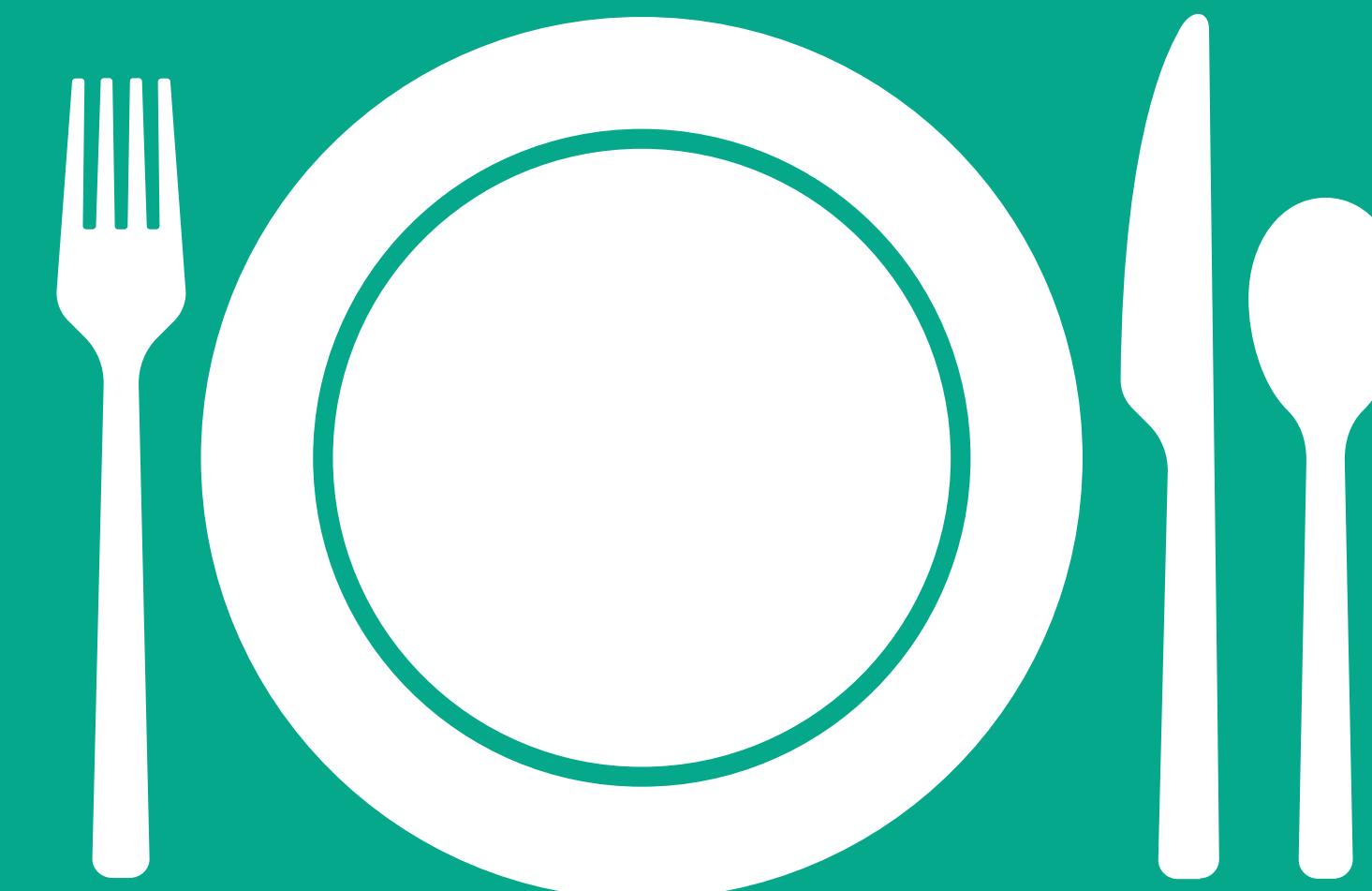
New dispute procedures



PB decisions/ Conciliator's recommendation

- ER 's role
- To co-operate with the process as agent for Employer and source of disputed decision
- Implement the PB's decision which will either affirm the ER's determination or direct alteration of Contract Sum and or extension of time/use of programme contingency
- Implement the conciliators recommendation if accepted including alterations of Contract Sum, extension of time/use of programme contingency and any other recommendation affecting the contract agreement –eg altered payment processes for payment of additional sums

Lunch





22 Duty of Care

A Professional person owes common law duty of care in negligence as well as contract - concurrent

Henderson v Merrett Syndicates Ltd[1995]2 AC 145HL

Reasonable Skill and Care

....a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of the new advances, discoveries and developments in his field. He should have such awareness as an ordinary competent practitioner would have of the deficiencies in his (her) knowledge and the limitations of his skill. He should be alert to the hazards and risks inherent in any profession or task he undertakes to the extent that other ordinary competent members.....would be alert.....The standard is that of the reasonable average .

Bingham LJ Eckersley v Binnie & Partners [1988] 18Con LR 1

The responsible body test

Bolam v Friern hospital Management Committee[1957] 1 WLR 582

Duty of Care

Reasonable Skill and Care



Exceptions to *Bolam*

Negligence in these circumstances depends essentially upon what advise was in fact given , not upon the processes whereby it came to be given

Camerata Property Inc v Crédit Suisse Securities (Europe) Ltd [2011] EWHC 479

If in the rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis , the judge is entitled to hold that the body of opinion is not reasonable or responsible

Bolitho v City and Hackney Health Authority [1998] ac232

Duty of Care

Reasonable Skill and Care



The express terms of the conditions of appointment may impose more onerous duties



Duties in detail

Design

Examination of site/ Surveys

Delivery of Drawings, Information and Instructions in time

Instructions as to methods of working and temporary works/

Supervision and Inspection

Administration of contract

Specialist duties re Specialist subcontractor/supplier

Knowledge of legislation, Building regulations and Rights of Adjoining owners



Duties in detail

Excess of cost over estimates

Negligent procurement /prep of Bills of Quantities

Recommending Builders

Comprehensive design

Buildable design

Quasi –judicial decisions

Negligence in Certifying

Degree of care

Employer's suggestions /wishes likely to lead to an unsatisfactory result , duty will be discharged by a sufficient warning -but note issues of compliance with planning, Building Regulations, Byelaw, DAC and fire certification , safe design , public procurement rules etc are not bendable to Employer's suggestions/wishes and instructions to breach same could ultimately lead to no option but to resign

Turner v Garland and Christopher [1853] Hudson 4th Ed

Engineer engaged by design and build contractor to design floor of factory to withstand weight of trucks found liable to contractor . In evidence engineer admitted he was aware of the specific purpose of the floor ***Greaves v Beynham Meikle [1975]***

Contrary judgement in ***George Hawkins v Chrysler (UK) Ltd (1986)***

DESIGN



Continuing duty

During supervision stage

....if he subsequently discovered that what he may initially have been justified in assuming was an adequate design was in fact a defective design, his responsibility remains

London Borough of Merton v Lowe [1981] 18 BLR

Continuing duty

Activated in circumstances that would reasonably require a review –after practical completion prior to final certification developer received complaints re the sound insulation of the apartments –Architect gave a factually current answer but did not review their design – obligation to review ended at practical completion as they were only empowered to instruct variations up to practical completion – entitled to refuse to investigate or entitled to request extra fees

New Islington Health Authority v Pollard Thomas & Edwards [2001] BLR 74

Continuing duty

No specific duty to review unless something occurred to make it necessary or prudent for a reasonably competent designer to undertake a review Hudson 2-042 at 275

However if original design failure results in inevitable rebuild costs any subsequent review is too late

Limitations of liability – 6/12 years contractually

Tort – 6 years or 2 years for personal injury from date of knowledge

Reliance on other specialists

- 1) undertake responsibility for design work already carried out**
- 2) Designers may directly engage a specialist consultant to perform part of the services for which they are responsible**
- 3) Client may engage another consultant alongside the Designer**
- 4) Client may delegate design work to a specialist Contractor or supplier – directly or under main contract**
- 5) Scope of Designers engagement may include coordination of the design work of others**

Reliance on other specialists

Project managers often use a design responsibility matrix and incorporate into the engagement of each consultant designer and the tender packages of each specialist contractor/main contractor

Advisable where no single organisation is undertaking a comprehensive design

Dividing line needs to be clear as the lead designers responsibility for design in this particular area will cease apart from obvious duties of coordination

Designer cannot unilaterally reduce the scope of its obligations to the client

Moresk v Hicks [1985] 1 all ER 346 CA



Examination of site/Surveys

Defendant engineers were not themselves obliged to carry out the necessary verifications on site but rather they were obliged to see that work to verify the design assumption was undertaken by someone. If his knowledge of the ground conditions was insufficient to enable him to determine a safe bearing capacity he could work initially on assumptions but he had an obligation to see to it that the requisite additional information was acquired to verify those assumptions and that the client knew that the additional information had to be obtained' absent of an explicit warning and disclaimer it was not sufficient to leave it to the client alone to obtain and evaluate the additional information

Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd (No 2) [2004] EWHC 1750 TCC



Surveys

If a surveyor misses a defect because it signs are hidden , that is a risk his client must accept. But if there is a specific ground for suspicion and the trail of suspicion leads behind furniture or under carpets , the surveyor must take reasonable steps to follow the trail until he has all the information which it is reasonable for him to have before making his valuation.

L Templeman Smith v Bush [1990] 1 AC 831



Delivery of drawings , information and instructions in time

In circumstances where it is obvious that the Contractor requires the details at a particular time , the Employer will be bound to ensure that they are supplied at that time without any request , but otherwise the Contractor cannot claim compensation unless it has requested details which have not thereafter been duly provided

Hudson 2-051

Duty assessed in the light of

- i) Contractor's actual progress
- ii) the stipulated contract period or intermediate dates
- iii) the need of a Contractor for reasonable advanced knowledge of the work for pre-planning purposes
- iv) Whether or not the information relates to a variation
- v) Any agreed/indicated programmes showing intended order of work or dates of completion of part of the work
- vi) RFIs schedule indicating its need for the information in question



Delivery of drawings , information and instructions in time

No breach if the dates in the programme were not in fact achievable

Consarc Design Ltd v Hutch Investments Ltd [2001] 84 Con LR

Account needs to be taken of sufficient time to consider contractor submittals/ work shop drawings

Serious delay to the progress whether the contract culpable or not can as a matter of common sense justify a corresponding postponement of performance by the Employer or the consultants of their time related obligations

Hudson 2-053

Instructions as to methods of working /temporary works

Unless a contract stipulates to the contrary the Contractor is entitled to choose its own working methods of working or temporary works – the corollary is that he is not entitled ,when faced with difficulties to demand or require instructions as to how to overcome them

Clayton v Woodman & Son (Builders) [1062] 2QB 533

Where Employer's approval is required for method statements in respect to technically demanding temporary works there should be an express term that the Employer's approval does not relieve the Contractor of any of its obligations under the Contract

Kingston –upon-Hull Corp. V Harding [1892] 2 QB 494

Instructions as to methods of working /temporary works

Intervention of the consultant with methods of working /temporary works may in the Employer's interest

- A) where methods of working are contrary to what is specified –which usually related to the quality of the finished permanent work – this is a breach of an express term
- B) The working methods used are likely to imperil the quality of the permanent work ***Hart Investments v Terence Fidler [2007] BLR 526***
- C) Contractor's methods are unsafe and an accident would seriously prejudice the Employer or damage adjoining property ***City of Prince Albert v Underwood McLellan [1969] 3 DLR***
- D) to assist the contractor at the behest of the Employer to relax a specification or vary permanent work where it is sufficiently important for the Employer's interest for a speedy completion



Supervision and inspection

The prevention ,detection and correction of defective work by the Contractor

Dangers of reliance on clerk of works

Leicester Board of Guardians v Trollope {1911} 75JP 197

Inappropriate non complaint fixings not seen ***Ministry of Defence v Scott Wilson Kirkpatrick [1997]***

Defective roof design and failure to inspect

George Fischer Holding Ltd v Multi Design Consultants Ltd [1998] 63 Con LRI



Specialist contractors with design responsibilities

If passing on design liability to subcontract specialist is the scope of that design responsibility clear

If the Employer remains responsible for the principle design elements and his consultant remains the lead he remains responsible for the design of the interface unless that is clearly defined into the specialist's contract or their work as defined in the main contract

Actual contracts provided by specialist should be viewed to confirm there are no restrictions that affect the warranties provided



Knowledge of

Legislation

A reasonable working knowledge of relevant law and to the extent needed to discharge his duties or seek legal advise

Building Regulations and Bye Law – thorough knowledge as part of his skill set

BL Holdings Ltd v Robert J Wood & Partners [1979] 12 BLR 1 CA

Rights of Adjoining Owners -to construct or design without proper reference to adjoining Owners may render the consultant negligent

Take legal advise if its not within your ken

Krestow v Wooster [1978] 360So USA



Excess of cost over estimates

Express or implied term that the project should be capable of being completed within a stipulated or reasonable cost – liable in negligence if the excess cost is sufficient to show want of care and skill on their part

Moneypenny v Hartland [1826] 2 C & P

Failure to advise no allowance for future inflation in an estimate advised in February at £238,000. In July advised costs would be within the estimate but in August advised value of extras ordered were £65,000.00 Client replied figure of £300,000 not to be exceeded – September indicated cost would be £440,000 (35% inflation) .Held architect not entitled to fees

Nye Saunders & Partners (a firm) v Bristow [1987] 37 BLR



Negligent procurement /recommending contractors

It is possible to let contracts when a design is incomplete but the procurement methods adopted must be closely controlled with a view to protecting the client's interests - a consultant who advises on a method of procurement holds a duty of care in respect of such advise

Hudson -2-063

Under public procurement rules the consultant must follow both the relevant public procurement legislation to the letter and where necessary obtain legal advise on the matter including in respect to the selection of tenderers and the successful tender

CWMP gives massive details on how to do it –but it is a complex and difficult matter



Comprehensive design/Buildable design

Designers will be seen to fail in their duty if without warning the Employer they fail to provide for work which is necessary for a satisfactory final result and which will have to be added by way of a variation to the contract *Hudson 2-066*

Designer may be liable if the design they produce is not one that is “buildable” having regard to the ordinary competent standards of workmanship and /or if it could only be built with a high degree of supervision to ensure compliance by the contractor ***George Fischer Holding Ltd v Multi Design Consultants Ltd [1998] 63 Con LRI***



Administration of contract

It is submitted that there is a duty to consult the Employer beforehand in all but trivial or emergency matters , so as to obtain prior approval of the variation and its probable costs ***Gordon v Miller [1838] 1 D ct of Sess 832***

Contract administrator determines matters of contractual entitlement or liability and consults with cost consultant on quantum

Will not be liable if in the course of administering the contract they honestly adopt one of two possible constructions in interpreting the contractual obligations of the parties Hudson 2-074

Duty to advise contractor has obtained adequate insurance –and either obtain external advise or advise the client to do so ***Pozzolanic Lytag Ltd v Bryan Hobson Associates [2000] BLR 233***

Co-ordinate design,manage other consultants and other direct specialists ***Royal Brompton NHS Trust v Hammond (no7) [2000] 78 Con Lr and (No 8) [2002] 88 Con L R***



Quasi-judicial decisions

In the great majority of cases a Certifier is not ,when certifying , ruling upon any dispute formulated between the Employer and Contractor and referred to them for settlement and decision, but is merely concerned , without consciously resolving any dispute as such, to decide matters such as value, quality of work or extension of time as part of an administrative function evidenced by the certificate. 2-80 Hudson

In discharging their duties they will not be obliged to obey their client's instructions in regard there to

Liable to client for over certification

Similar applies to the determination role under cl 10.5 of the PWC

Failure to issue termination notice when plainly required

West Faulkner Associates v London Borough of Newham [1994] 71BLR



Negligence in certifying

Negligent certifier who causes loss to his Employer will be liable under terms of their contract and in tort under ***Hedley Byrne*** principles for economic loss

Sutcliffe v Thackrah [1974] AC 727

No direct duty to the contractor =certifier employed to protect the Employer's interests and the Employer does not warrant his competence only **his fairness or honesty** acting administratively not **quasi –judicial**

Pacific Associates Ltd v Baxter [1990] QB 993

John Holland Construction Limited v Majorca Products [1996] Victoria SC

Extras not ordered in writing ***Donovan v South Dublin Guardians 1905 5NIJR 106*** had to be paid because they were certified-



23 Authority of ER

Generally

Waiver of Contractual Requirements

Contracts or variations

Employment of other consultants

Express powers under construction contracts



General authority

Expressed in contract

Implied as matter of necessity –what is necessary for or ordinarily incidental to the execution of their express authority

Courts do not readily accept custom/usage

Acting in excess of authority given in dealing with third parties may lead to liability to that third party for breach of warranty of authority



Waiver of Contractual Requirements

ER no authority to waive strict compliance with contract or bind Employer

..that where a person by asserting that he has authority of the principal induces another person to enter into any transaction which he would not have entered into but for the assertion if untrue – person asserting he has authority will be personally liable for the damage incurred

Firbank Executors v Humphreys [1887] 18 QBD 54 at 60



Waiver of Contractual Requirements

No implication that consultant's design is practicable or possible – not permissible to instruct an extra that would bind Employer to pay for work necessary to comply with the contractor's obligations

Acceptance of work by ER does not bind the Employer see Sec 8.7 no relief for Contractor except by agreement under 8.5.4

Claims approved in interim certs do not bind

Work explicitly instructed as change order doe not bind if on true view the work is included in the original contract obligations



Waiver of Contractual Requirements

Granting of extensions of time does not bind the Employer

Approvals by ER if given will not bind the Employer if the work is in fact a breach of contract -subject to possible issue of detriment and estoppel

QS agreed amount of claim disregarding or waiving absence of notice –no authority

John Laing Construction Ltd v County & District Properties Ltd [1982] BLR 1

Conclusive actions are binding 8.5.4 rejection of a defect – ER's not contested determination 10.5.4.and 10.5.5



Contracts or variations

No power to contract or vary the contract

Only Employer and Contractor can agree to vary terms *Kinlen v Ennis UDC (1916) 2 IR 299*

May be varied by the parties or Employer may delegate authority

Variation /change order clause permitting variation of the contract works



Contracts or variations

Hurst Stores and Interiors Ltd. V ML Europe Property Ltd [2003] BLR391

PM acting for the contractor signed a statement prepared by the Employer's agent not realising it purported to be a compromise agreement settling the final account outside the valuation terms of the contract. No effect as PM had no authority to enter into it- no authority to act generally in the management of the contractor's business



Contracts or variations

Employer who by conduct or statement has misled a contractor into thinking the CA/ER has full authority may well be held either actually to have authorised or given ostensible authority to contract

Employer knows and stands by and allows the work ordered to be carried out

CA/ER's engaged full time by public bodies do have ostensible authority

Carlton Contractors v Bexley Corp [1962] 60 LGR

Borough surveyor orally agreed to correct errors



Contracts or variations

Carlton Contractors v Bexley Corp [1962] 60 LGR

Borough surveyor orally agreed to correct errors varying the Contractor's obligations and confirmed in writing by the Contractor. Signed contract did not include changes. Held the surveyor has ostensible authority and contract was directed to be rectified



Employment of other consultants

In respect to design ...no implied authority to employ other consultants
....liable unless other ..*consultant's employment has been expressly authorised*

Hudson -2-090

Moresk v Hicks [1966] 2 Lloyds Rep 338

Architect had nominated subcontractor design the structural concrete –had 3 choices

- Refuse the appointment
- Request the Employer to engage a structural engineer
- Engage a structural engineer with latter owing him the duty of care



Express powers under construction contracts

*Restrictions ...may well exist as between the Construction Professional (CP) and the Employer as to the occasions upon which the powers expressly conferred upon the CP in the construction contract may be exercised.....These will not affect the Contractor or any other third party, provided , in the case of the Contractor , that the CP acts strictly within the terms of the express authority conferred by the construction contract.to the extent that there is power to bind the Employer, the CP should consult the Employer and obtain consent.... **Hudson 2-091***

note version of Hudson referred to
14th Edition 2020



Thank you
CMG
Questions??