

THE AMENDMENT OF STANDARD FORM CONSTRUCTION CONTRACTS

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Use of Standard Forms

The use of standard form construction contracts has a number of advantages for the various parties that participate in the construction process, including the speed at which tender documents can be produced, familiarity for contract administrators and tendering contractors and, in relation to the more popular and long standing forms in use, an established body of case law which can assist in the construction and interpretation of contracts.

It is often the case, however, that substantial amendments are made to General Conditions of Contract, either by employers to re-allocate risks away from themselves to the Contractor, or by contractors to avoid or limit liabilities which arise under the Conditions. Such amendments are usually introduced either by means of Special Conditions of Contract (often contained in the Preliminaries section of the Bills of Quantities) or by correspondence exchanged between the parties at the time of tender or negotiation of the contract.

Drafting Amendments

It is in these amendments to standard General Conditions of Contract, however, that extra care needs to be taken by employers and contractors alike both in drafting the amendments and in considering their full contractual implications. The amendments made often have effects which were not originally intended by the draftsman, or do not achieve the original objectives of the party making the amendment.

Examples

These points have been illustrated by a number of recent decisions in the courts.

The first example is the decision of the Court of Appeal in the case of *Balfour Beatty v Docklands Light Railway Limited*. In that case, Balfour Beatty was engaged by Docklands Light Railway to carry out extensive civil engineering works for a sum in excess of £20,000,000. The contract incorporated the standard 5th Edition of the Institution of Civil Engineers' General Conditions of Contract, but two substantial amendments had been made. First, the "independent" Engineer, as the certifier of payments and extensions of time for completion, was replaced by an Employer's Representative, and secondly, Clause 66 of the Contract conditions, dealing with the resolution of disputes (and in particular providing for matters to be referred to arbitration) was omitted in its entirety.

Needless to say, disputes arose and the Contractor had claims for around £3,000,000 over and above the sums certified by the Employer's Representative.

The deletion of Clause 66 of the General Conditions removed the standard power given to the arbitrator to "open up, review and revise" the decisions of the contract administrator and certifier. The question then arose as to whether the court had a similar power to "open up, review and revise" the decisions and certificates of the Employer's Representative.

Simply put, the court held that the Contract should be construed strictly and that the Contractor's entitlement to receive payment and extensions of time for completion was dependent on the judgment of the Employer's Representative. While, it was held, the Employer's Representative as certifier had a duty to act honestly, fairly and reasonably (even though there was no such obligation expressed in the Contract), there was no agreed means in the Contract of challenging the decisions of the Employer's Representative. Even though the Contract did not provide that the decisions of the Employer's Representative were final and binding, it was held that unless the Contractor was able to establish that there had been a breach of contract by the Employer, it would not be entitled to any remedy in the review of expressions of judgement by the Employer's Representative.

The effect of the amendments (which was probably unintended by both the Employer and the Contractor) was that the decision of the Employer's Representative, as expressed in certificates for additional payment and extensions of time, became final and binding on both parties and that the courts had no general power to "open up, review and revise" the decisions of the Employer's Representative.

The second example of difficulties caused by amendments made to a standard form Conditions of Contract is provided by the decision of the House of Lords in the case of *Bovis Construction (Scotland) Limited v Whatlings Construction Limited*.

In that case, Bovis, as management contractor, engaged Whatlings as a trade contractor to carry out the construction of certain parts of a new concert hall. Bovis' standard printed General Conditions of Contract were incorporated into the Contract but certain amendments had been made by the parties in correspondence which were included in the Contract.

The standard General Conditions of Contract provided that if the trade contractor was in breach of his obligations to carry out the Works diligently, the trade contractor was to be liable (without limitation) for the loss or damage suffered by Bovis in consequence of the breach.

However, in correspondence exchanged between the parties during negotiations (which was incorporated into the Contract) Bovis agreed to accept a limitation on the liability of the trade contractor in respect of "time related costs", of £100,000.

The trade contractor reduced their resources on Site and failed to proceed diligently with the Works. Following the service of appropriate notices, Bovis determined the engagement of the trade contractor and claimed damages of £2.7 million in respect of breach of the trade contractor's obligations to carry out the Works diligently.

The trade contractor, of course, asserted that its liability to Bovis was limited to £100,000 as set out in the correspondence exchanged prior to the creation of the Contract.

The court held that while the correspondence between the parties was effective in limiting the trade contractor's liability to pay damages in respect of delays in completion of the Works, where the Contract

was terminated, time ceased to have relevance and the damages claimed by Bovis flowed from non performance and not late performance. Accordingly, the limitation of liability set out in the correspondence (which was no doubt intended by the trade contractor to apply to any liability arising under the Contract for failure to complete the Works) was held not to be effective in limiting Bovis' claim.

The final example of an amendment being made to a standard form set of Conditions of Contract, and which failed to achieve at least one of the parties' objectives, is the case of *Mitsui Babcock Energy Limited v John Brown Engineering Limited ("J.B.E.")*. In this case, it was alleged that the effect of the amendment made was that no contract existed between the parties at all.

JBE was appointed as main contractor for the construction of a combined cycle power station in the U.K. and engaged Mutsui to design, manufacture and install two heat recovery steam generators.

A substantial amount of time was spent during the negotiation of the Contract on the question of the tolerances which were to be applicable in measuring whether the generators to be supplied by Mitsui met the performance requirements of the Contract. This matter was dealt with in Clause 35.5 of the standard General Conditions of Contract, but prior to the parties signing the Agreement, Clause 35 had been substantially deleted and the words "*Clause 35.5 to be discussed and agreed*" inserted.

Mitsui sought a declaration from the court that the effect of this amendment was that no binding contract had been concluded between the parties as they had no intention of entering into a contract when the Agreement was signed.

The High Court, however, held that notwithstanding that some of the proposed terms of the Contract had not been agreed, it was the intention of the parties to enter into a binding agreement and that the Contract as a whole was not unworkable or void for uncertainty. It was held to be relevant, however, that the parties had conducted their relations after signing the Agreement on the basis that there was in fact in existence a binding Contract between them.

Conclusion

These three very brief examples illustrate the care which must be exercised by both employers and contractors (and indeed main contractors and sub contractors) in amending standard form Conditions of Contract. It is often the case that the amendment of one provision has ramifications throughout the Contract Conditions or that the amendment made does not adequately achieve the objective which originally prompted the amendment. Careful consideration must be given to whether consequential amendments arising from the principal amendment are required to maintain the integrity of the Conditions of Contract as a whole, and whether the proposed amendment is effective in reflecting the intention of the parties.

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