SOMEWHERE IN TIME – SECURING AND PROTECTING YOUR CONTRACTUAL RIGHTS

Introduction

It is in both main contractors and sub-contractors interests that sub-contracts are completed by contracted completion dates otherwise at least one organisation, if not both, can incur additional costs on the project, if not losses to their respective companies.

Most sub-contracts contain clauses which enable the main contractor to deduct monies from a sub-contractor when late completion of a sub-contract occurs, which may be a pre-estimated sum of its likely additional cost (liquidated and ascertained damages) or the actual additional costs incurred (unliquidated damages).

However, there are usually clauses which protect the sub-contractor from incurring these costs, subject to contracted criteria having to be complied with, by allowing the sub-contractor additional time to complete the project because of delays which the employer and/or main contractor is culpable for.

An extension of time postpones the completion date, allowing the sub-contractor additional time to complete the sub-contract without incurring any of the main contractor's additional costs. This not only protects the sub-contractor from incurring the main contractor's costs for delays but, in certain circumstances, such as a variation of additional works, it also entitles the sub-contractor to recover additional costs for remaining on the contract for the extended period to undertake these additional works.

The main contractor is required to give advance notice to the sub-contractor of its intention to deduct damages for late completion and the sub-contractor is required to give notice of the delays which it considers the employer and/or main contractor is responsible for, the effect that those delays may have on the sub-contract completion date and possibly an estimate of the additional cost of the delay, before the sub-contractor can gain the extension of time and recover its costs for the additional time required.

When the sub-contractor and employer/main contractor have caused delays at the same time, which are termed concurrent delays, these are always a cause of potential dispute. Who then recovers what monies from whom? Does the sub-contractor have an entitlement to an extension of time?

The Main Contractors Position

When a main contractor engages a sub-contractor to construct an element of a project, it normally requires completion by a given date to provide certainty as to when it can commence succeeding work and protects itself by incorporating clauses in the sub-contract that enables it to reduce the monies to be paid to the sub-contractor for completing the project later than contracted. This is by either liquidated and ascertained damages or by ascertaining the actual additional cost incurred.

Should an employer issue instructions hindering the sub-contractor from completing the sub-contract by the completion date, it is probable that it would be stopped from recovering these costs, unless there is a mechanism incorporated in the sub-contract for the completion date to be postponed to take into account the main contractor's instructions. It is for this reason that extension of time clauses are incorporated into sub-contracts.

However, this is usually insufficient to meet the main contractor's requirements, because if an instruction of variation is issued, causing delay, it does not want to have to wait to near the time of sub-contract completion to find out about it. Furthermore, if an instruction is issued that has more serious consequences than previously perceived, it wants to be notified by the sub-contractor of those consequences promptly so that it can reconsider whether the instruction is fulfilled, whether to rescind it because it is commercially more viable to do so, or to advise the employer's team of the potential effects of it.

Therefore, in many sub-contracts a main contractor incorporates clauses that require prompt notification of delays to the sub-contract by the sub-contractor, with a possible assessment of any extension of time requirement to the sub-contract completion date because of the delays for which it is culpable.

No main contractor wants surprises concerning the completion of a sub-contract. It is as important for the main contractor to be able to plan with certainty as to when it will be completed, as it is to the sub-contractor to complete it.

Main contractors secure their contractual rights concerning the completion of the sub-contract by the contracted date, by incorporating provisions into sub-contracts whereby any revised contracted completion date is determined at the earliest opportunity by the sub-contractor being required to provide notices of delays within a stated period of events taking place. The main contractor can then calculate whether any sum of money can be deducted from the sub-contractor for late completion if it fails to achieve completion by the revised date.

If the main contractor is not going to be able to commence succeeding work by a certain date, it has to consider the effects of this upon its cash flow and make provision for it. It therefore needs certainty in assessing what sums it is due to pay the sub-contractor, what it can deduct from the sub-contractor's payment because of late completion and the cost of any delays in being unable to complete the project. As a result, it is becoming common to have sub-contracts that state that if no notice of delay is provided or extension of time requested within a stated period of events taking place, then the sub-contractor does not receive an extension of time.

Consequently, if the sub-contractor fails to comply with the requirements of the sub-contract regarding providing notices of delay and/or in requesting extensions of time, it might not be able to belatedly seek the additional time and cost upon completion of the sub-contract.

The Sub-Contractors Position

Sub-contractors know that if they are on a sub-contract for longer than intended, or allowed for within their pricing, then it will cost more and possibly cause a loss on the sub-contract.

Notwithstanding this stark realism, sub-contractors all too often assume that because the employer and/or main contractor causes delay to the project, either by failing to release information at the appropriate time or by instructing variations, that they will automatically receive an extension of time.

Despite sub-contractors ensuring that there are clauses in the sub-contract entitling them to receive extensions of time for stated events, all too often they ignore the notice provisions and just consider that this can be dealt with at the end of the sub-contract. They are then surprised at the main contractor's reaction and "unreasonableness" when it points out that the sub-contractor has failed to comply with the notice provisions and/or extension of time request requirements in the sub-contract and therefore it is not entitled to one.

Under English Law a party to a contract is not allowed to profit from its own breach of the contract. This is known as the Prevention Principle and is usually the sub-contractor's first defence on being informed that the main contractor is not prepared to grant an extension of time due to the lack of notices of delay and/or a request for an extension of time. After all, it is the main contractor's instructions or failure to provide information that has caused the delay, so why should the main contractor not grant an extension of time when it is considered in hindsight at the end of the contract?

The Courts are looking closely at the notice provisions in construction contracts and the precise wording, to determine whether the words indicate with certainty that failure to issue a notice of delay and/or a request for an extension of time at the appropriate time means that the sub-contractor is not entitled to one at all. Increasingly, the Courts are supporting employers/main contractors where the words of the contract can be interpreted with certainty that if its provisions have not been complied with, then the sub-contractor is not entitled to an extension of time, irrespective of the main contractor's culpability in causing delay. Some modern standard forms reinforce this by their wording (See NEC Sub-Contract 3rd Edition).

Having determined that sub-contractors are not due extensions of time because of their failure to notify delays and request extensions of time in accordance with the requirements of the sub-contract, this not only prevents the sub-contractor from being awarded the appropriate extension of time, which in itself causes injury to the sub-contractor, but the main contractor is still entitled to recover its damages for late completion of the contract. As the sub-contractor has chosen not to notify delays in accordance with the contract, this is not a breach of the Prevention Principle. (See Steria Ltd v Sigma Wireless Communications Ltd.)

Therefore, the sub-contractor not only fails to secure an extension of time that might entitle it to additional financial reimbursement, but it also has to pay the main contractor damages because an extension of time has not been granted. The sub-contractor's failure to issue notices and/or request extensions of time as required by the contract will mean that the sub-contractor is penalised for its lack of attention to the administration of the contract.

What is a Notice of Delay

I have yet to read a sub-contract which requires a notice of delay or a request for an extension of time being drawn up as a formal legal document.

A sub-contract will state what has to be stated within a notice of delay, and this is the minimum content that should be included. However, the more information that can be included for the main contractor to consider, then so much the better. It usually has to be written, therefore telephone calls between the sub-contractor and the main contractor confirming delays are irrelevant; but with the advent of e-mails this has been easily overcome as e-mails are written documents that result in notices being issued in day to day communication between sub-contractors and main contractors.

Where a sub-contractor has been delayed by the main contractor, the Courts have proved to be very helpful to the sub-contractor in accepting contemporaneous documents as evidence of notice. This has extended to e-mails which have been purportedly issued regarding other subject matter, but contain a concluding paragraph stating that another item or element of work is in delay because of outstanding information from the main contractor, daywork sheets detailing labour and equipment being used on additional work, or unable to work, and a Court has even held an Information Required Schedule to be a notice of delay where the sub-contractor stated against one item that it was on the "Critical Path" and then the main contractor failed to provide the information by the required date stated on the Schedule.

For clarity, the sub-contractor is usually better off if he sends a letter stating clearly the areas of delay, an assessment of their affect upon the sub-contract completion date and then concludes with a request for an extension of time to the sub-contract completion period. However, whilst elements of work are in delay, it is sometimes difficult to predict the effect that these will have on the completion date of a project because sequencing of works can be altered to mitigate the elements that are in delay.

There is also a benefit to the sub-contractor by including a Cause and Effect Schedule to the progress reports detailing all elements of work that are in delay with reasons, so that the main contractor is aware of the information requirements of the sub-contractor, to complete the sub-contract within the contracted period. Whilst this is usually seen initially as an adversarial tactic by the sub-contractor, after a few progress meetings it is often seen as a beneficial management tool in assisting all parties in completing the sub-contract on time. This is because the main contractor becomes fully aware of the most important items of outstanding information or preceding works that are required by the sub-contractor to enable its work to take place with a minimal of delay.

A Cause and Effect Schedule should contain a unique item number for each item of work that is in delay, the reason it is in delay and the immediate consequence of that delay on the subsequent operation. If there are further consequences to the delay, then the immediate consequence should be considered a further cause of delay so that each can be dealt with individually on the Schedule.

Where there is an element of a sub-contract in delay for which the sub-contractor is culpable, then the sub-contractor is usually better off if he is up front and states this on the Cause and Effect Schedule, as well as stating what it is doing to mitigate the delay. Whilst the sub-contractor usually has no contractual requirement to accelerate the works to overcome delays for which the main contractor is culpable, it does have the duty and ability to accelerate works that are in delay for which it is culpable. By recording these on the Cause and Effect Schedule it can clearly demonstrate the affects that they did, or did not, have on the completion date of the sub-contract. My experience is that if the sub-contractor has caused the delay and agreed a period of delay that it is responsible for, it is usually dealt with far more amicably with the main contractor and usually has a better result, than having an argument concerning it at the end of the contract.

Very often elements of work are in delay because of the sub-contractor's alterations to its method of working and, when analysed at the end of the day, have no effect whatsoever upon the completion of the sub-contract. But because of the sub-contractor's lack of disclosure concerning them, considerable argument and cost is devoted to proving and evidencing that they had no effect upon the completion date and that the items that did cause delay arose from events for which the main contractor is culpable.

What is required for an Extension of Time Request

The precise detail that is required for an extension of time request alters from sub-contract to sub-contract. It is therefore important that the sub-contractor reads the sub-contract and complies with it.

However, rarely does it mean that the sub-contractor has to submit a full, detailed, critical path analysis of the progress of the sub-contract to support its request for an extension of time and recently the Courts have supported this view.

The majority of sub-contracts require the sub-contractor to detail the items in delay that will affect the completion of the sub-contract, the reasons they are in delay and an estimate of the extension of time requested. The wording of the majority of sub-contracts indicate that the assessment is subjective and that the main contractor should also consider it in a subjective manner, although he is likely to bring to the sub-contractor's attention delays for which the contractor is culpable.

If a sub-contractor submits a request for an extension of time (I have yet to read a sub-contract that refers to a sub-contractor "claiming" an extension of time) and meets the requirements of the sub-contract, then this is what the main contractor has to consider. Too often a sub-contractor submits an extension of time request only to receive a letter from the main contractor stating that he cannot consider the request as no critical path analysis has been submitted to establish that it has been correctly assessed.

My view, recently concurred with by the Courts, is that if the main contractor refuses to deal with an extension of time request until an expensive analysis is compiled in support of the request, then this is a variation to the sub-contract and the sub-contractor should be reimbursed for providing the analysis requested.

Furthermore, there are different methods of analysing delay and which method is used can affect the result. Because of this, it is rare that a sub-contract requires such analysis to be submitted with a request for an extension of time. In recent reported cases, Courts have been reticent at accepting such analysis, and look at extension time disputes with a more pragmatic and common sense approach, due to the vagaries of results that are solely dependent upon the method of analysis adopted.

However, this does not deal with the situation where there is concurrent delay in which the sub-contractor is culpable for delay in one portion of the works at the same time that the main contractor is culpable for another. Needless to say both the main contractor's and the sub-contractor's first desire is concerning money. The main contractor does not want to pay the sub-contractor for delay where the sub-contractor is culpable for it and the sub-contractor requires payment for the additional costs it incurred where the main contractor is culpable for the delay.

Courts have resolved this by awarding the sub-contractor the period of delay for which the main contractor is culpable, but not any cost applicable to the delay, as the sub-contractor would have been on site in any event undertaking works because of the delay for which it was culpable.

Using Computer Programs to Analyse Delay

There is not a software planning program on the market that has been designed and written to consider delay retrospectively. Software planning programs are written for the construction team to plan and programme the construction of the project in advance, after consideration of the sequencing and method of working necessary to deliver the contract by the contracted completion date.

Software planning programs cannot satisfactorily be used retrospectively because timelines usually show one line from commencement of an operation through to its completion and they do not show the level of production. For example, the sub-contractor may have had ten tradesmen undertake 70% of an item of work and then reduces it to two men to complete the remaining 30%. This does not show up on any software generated planning program, nor the sub-contractor's reasoning for doing it.

Other examples are;

1. If 95% of an item of work had been undertaken and the remaining 5% left until the week before the sub-contract was completed, when the sub-contractor could have undertaken the work previously, for example the external door used for access into the building being left off so that it is not damaged, it does not show that 95% of the work was completed in accordance with the programme, with only a small 5% of the work left until the week before the sub-contract completion. It shows a time line running through to the week before the sub-contract was completed, which is incorrect.

2. If the suspended ceilings had been completed only for suspended ceiling tiles to be removed by the mechanical installations sub-contractor so that it could commission its works, does the computer generated programme show the suspended ceilings as being completed prior to the removal of the tiles to commission the mechanical installation, or after they are re-installed?

Software planning programs do not take into account the actual undertaking of the works; they merely deal hypothetically with delays for which an extension of time could be granted. They ignore when instructions to vary works are given. For example, an instruction to vary works not due to be commenced for another six weeks is going to have less impact, if any at all, than if an instruction was issued when those works were about to, or had, commenced. No software planning program will pick this up and allow for it. Software planning programs are designed to assume that there is only one way of undertaking a project, in accordance with the construction teams preferred method and sequencing of works and furthermore require detailed, precise and regular updating to be correct. They are therefore of little use in assessing an extension of time retrospectively.

It is for this reason that Courts have become reticent at accepting computer generated planning programs as evidence of delay and more willing to accept extensions of time to be arrived at from contemporaneous records and facts as to what happened on site, when considered with dates of instructions being issued affecting the progress of the works, logic as to what happened and experience as to proficiency in dealing with and mitigating the delays.

Therefore, extensions of time should be considered with an as-built programme that shows when precise elements of work were undertaken, the production resources used to undertake them and dates when instructions are issued by the main contractor. Then by using pragmatism and common sense, determination of the extension of time due to the sub-contractor can usually be agreed.

As long as the sub-contractor takes into account delays that it is culpable for and any failings in decisions it made as to construction of the project, then a fair and reasonable extension of time can usually be ascertained with minimal cost and more often than not, amicable agreement.

Conclusion

1. If Courts can interpret that the words of the contract state that if the sub-contractor fails to provide a notice of delay, or to request an extension of time, at the appropriate time as stated in the sub-contract, then no extension of time is due to be granted, then they shall not award one. (City Inn Ltd v Shepherd Construction Ltd BLR (2003) 468 and Steria Ltd v Sigma Wireless Communications Ltd (2007))

2. Courts will be liberal in deciding what constitutes a notice of delay or request for an extension of time, as long as it complies with the requirements of the sub-contract. (Steria Ltd v Sigma Wireless Communications Ltd (2007))

3. Courts are reticent at accepting software generated critical path analyses in determining entitlement of delay, due to the susceptibility of error occurring in their compilation. (Skanska Construction UK Ltd v Egger (Barony) Ltd (2004) EWHC 1748 and City Inn Ltd v Shepherd Construction Ltd CILL (2008)2537)