

Managing the contract: Setting up a contract for success and avoiding common pitfalls

Seminar for ACostE, 17 May 2017

Joseph Hale and John Rossiter

Managing the contract: Avoiding common pitfalls

- Procurement
- Negotiating the contract
- Contract award
- During the works
- Final account/completion
- If it all goes wrong.....

Procurement issues

- Doing something new or innovative:
 - New procurement model (e.g. UU NEC3 & CDP, Sellafeld PPP)
 - New regulatory backdrop (e.g BREEAM, Building Regs, Planning)
 - New professional team/consultants
 - New funding model
 - New tenants/end users
 - New market (e.g. Waste to Energy and the inherent risks)
- Using the wrong contract for the job:
- Trying to save money by doing work in-house that you're not set up to do.

Negotiating the contract: Understand what you're buying/signing up to

- Fitness for purpose or reasonable care and skill
- Design life
- Building to a spec or to achieve an output?
- Responsibility for existing assets?
- Who's taking the risk that the design/spec does not achieve the desired outcome?
- Are there performance guarantees? If so, how do they interface with existing assets?

Negotiating the contract: Understand what you're buying/signing up to

- Are you relying on information provided by the Employer/others?
- Are you taking the risk that information is accurate?
- Who's designing what?
- Ground conditions:
 - Who has done the investigation?
 - Can you rely on it?
 - What if it is not accurate?

Negotiating the contract: Understand what you're buying/signing up to

- Delay risk:
 - Workable liquidated damages mechanism?
 - Clear Completion Date?
 - Are there also Key Dates (NEC)?
- Passing risk on to the supply chain
- Solvency risk.
- Conditions precedent e.g. Bonds.

Negotiating the contract: Amendments

- Many problems arise from not amending the contract correctly.
- Inadvertently tinkering with the contract mechanisms e.g.
 - notification processes;
 - what constitutes a variation;
 - adding schedules;
 - Output requirements/spec.
- Not being ‘joined up’: Engineers focusing on the spec/schedules and commercial/legal teams focusing on the core terms.
- Assuming an amendment discussed in email or a meeting:
 - Is actually clear
 - Will be included in the final contract.

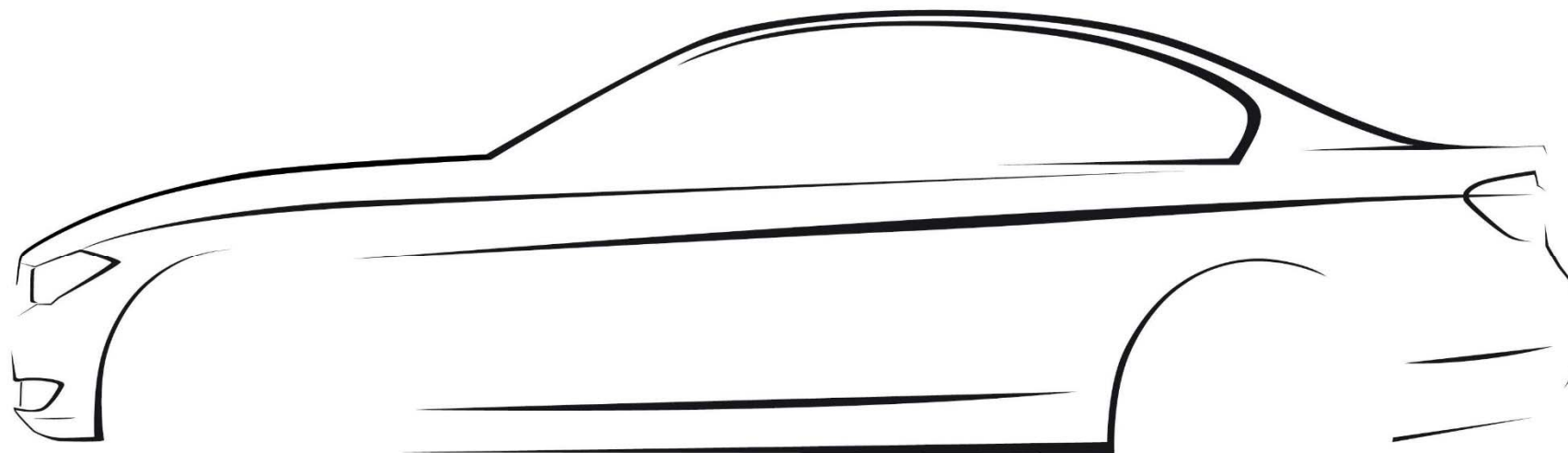
Negotiating the contract: Pricing issues to consider



Negotiating the contract: Pricing issues to consider



Negotiating the contract: Pricing issues to consider



Negotiating the contract: Pricing issues to consider

- Have you used rates and prices for that project not just standard rates? Considered site location, working rule agreements etc?
- Is the price deemed to include all incidental works and services?
- Do all variations/compensation events allow you to claim additional costs? Is there a 'de-minimis' on Variations?
- How will you price variations?
- Can you recover overheads and profit on variations/claims?
- In what circumstances is the Target Cost adjusted?
- Are their audit rights/obligations?
- If you have audit obligations:
 - Are your systems/records adequate to meet the requirements?
 - Are your subcontracts 'back-to-back'?

Negotiating the contract: Pricing issues to consider

- How does payment under the contract relate to how you have estimated or priced the works?
 - Reimbursement – will all costs be paid as costs? Or in Fee or a Working Area Overhead %?
 - Payment – how does payment profile work? Completed activities?
- Will you actually get paid? Have you done due diligence?
- Have you populated the schedules in the contract properly so that you will be reimbursed costs in the way you expect? E.g. completing Schedule of Cost Components under NEC3.
- Have you priced for all bonds, warranties etc required? Have you check you can actually get them?

Contract Award: Just before you sign

- Entire agreement clause:
 - Is everything relevant included in the Contract?
 - Has anything been included that you didn't agree to?
- Check all the component parts of the contract are in place, properly completed and in one place.
- Common problems include:
 - Not completing schedules and appendices correctly:
 - Failing to fill in all the parts of the contract or get it signed (including warranties and subcontracts);
 - Important details are left blank or unclear but not nailing them down later.
 - Assuming you can refer to a discussion or document that is not included as part of the contract.

Contract award: Approach/behaviour

- Is there a definitive final set of contract documents?
- Not reading the contract:
 - Don't assume the contract is the same as the one used on the 'last job';
 - Amendments to standard forms (e.g. NEC3) may not be highlighted. Not every amendment will be a z clause;
 - Focusing on the core contract conditions but not paying attention to appendices/schedules;
 - Don't put the contract 'in the drawer'.

Mobilisation: Getting Work Started

- Read the contract and all the appendices/schedules (again)
- Who needs to know what about the contract?
- Processes: payment; notices; claims
- Communications
- Records
- Consider a work-shop internally, or with all parties, at the outset to discuss and agree how the contract works, particularly in the case of changes to a standard form.

During the works: Behaviours

- Not using the contract:
 - A fear of being “contractual” - Thinking that using the contract is a bad thing.
 - The contract set out the agreed process for doing certain things. It is right to use it, but using it doesn't have to be aggressive or negative.
- Not having clear lines of communications agreed/in place
- Not saying what you mean:
 - If the contract is in delay then say it, don't say everything is OK or it will come back to haunt you later.
 - The ‘Court test’
- Failing to agree things early, before they get out of hand

During the works: Notices

- Might include: Payment; early warnings; delay; additional costs; force majeure; defects.
- Notices that are not served properly and/or on time: Check the provisions of the contract as to:
 - Format and content;
 - Addressee;
 - Method of sending.
- Notices that don't refer to the contract (e.g. don't say it is a "notice" or that it is issued under clause x).
- Poor drafting generally.
- Who deals with Notices?

During the works: Notices

- What was written:

“Following the delayed access to Y, we are hopeful we can mitigate any effect on the programme...”

- What was meant:

“The delayed access to Y may cause critical delay to the works. We will do the best we can to mitigate any effect on the programme, however, the event may cause some delay and give rise to additional costs. We cannot estimate the precise extent of any delay or additional costs at present but will provide you with further details do so in due course.”

During the works: Departing from the contract

- Not being clear as to what is or isn't a variation:
 - Are you or the contractor departing from the contract?
 - Is the contract silent on this point?
 - Does the issue potentially affect a lot of money?
- Failing to record any agreements regarding variations properly:
 - Would you do a deal affecting £millions on the back of a meeting or an email?
 - Deed of variation would be ideal;
 - Peer review;
 - External legal.
- 'Getting on' with the works and leaving difficult issues until later.
- Assuming the other party will 'do the right thing'.

During the works: Records

- Record what the contract requires you to record.
- Record what you think might be useful based on experience.
- Electronic record systems: Complete? Searchable? Reliable?
- What happens when staff leave? Emails? Documents stored on laptops? Text messages?
- Meeting Minutes:
 - Often inaccurate;
 - Not updated;
 - Often mis-used/mis-quoted.

Final account/completion

- Have an eye on the final account process when you start.
- Do you have audit rights under your Contract?
- Records, records, records.
- Negotiate from a position of strength.
- Beware the agenda of others.
- Traded value!

Warning signs

- Contractor/Consultant takes a more contractual approach.
- Contractor reduces resources.
- Lack of communication.
- Change in personnel.
- Works are underway without contract documentation in place.
- Consultant acts as post-box, stops advising.

If it all goes wrong.....

- If you think the other party has breached the contract:
 - Record the fact (consider how/tone);
 - Be careful not to just brush over the issue (waiver? affirmation?);
 - Ensure your own house is in order: records, knowledge, third parties.
- Contract comes to a premature end:
 - Termination?
 - Do you need to reserve your rights?
 - Are the consequences clear under the contract?
- Consider the priorities:
 - maintain the bottom line?
 - protect reputation?
 - preserve relationship?

If it all goes wrong

- Need to know the positives **and the negatives.**
- Rare that the position is clear cut.
- Rare that one party is entirely faultless.
- Legal privilege.
- Claims consultants/expert reports.
- Consider the bigger picture but be aware of the detail:
 - Do you need an all encompassing (= expensive and time consuming) claim submission?
 - Could there be one or two key issues that unlock a large part of the deadlock?
- ADR: Carrot and stick?
- Communications: Who's talking to who?
- Don't assume Consultants' PI will 'plug the hole'

FREETHS

Any questions?

solomons | europe

Joe Hale



Email: joseph.hale@freeths.co.uk

Phone: 0845 030 5759 / 07775 586391

John Rossiter



Email: john.rossiter@solomonseurope.co.uk

Phone: 07867 397 293