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Thread:
Late Thread - JCT Contract Conditions
Post:
Late Thread - JCT Contract Conditions
Author: Anonymous

Posted Date: 11 October 2015 12:27
Status: Published

As this is an open discussion, I wanted to just touch on some of the JCT Contract conditions.

I looked at the JCT Standard form of Domestic Sub Contract Agreement 2002 (only version I had access to) and found some interesting conditions which may prove useful moving forward. (I have paraphrased to reduce read time best I can but the jist is there)

The following apply to the Sub Contract Documentation provided to the Subcontractor:

1.9.1 "The Sub Contractor shall carry out and complete the Sub-Contract works in Sections in Compliance with the Sub-Contract Documents and in Conformity with all reasonable directions and requirements of the Contractor ..."

1.9.2 "All Materials and goods shall, so far as procurable, be the kinds and standards described in the Sub Contract Documents..."

1.9.3 "All workmanship shall be as of the standards described in the Sub Contract Documents..."

1.12 "Nothing Contained in the Subcontract Documents shall be construed so as to impose any liability on the Sub Contractor in Respect of any act, omission or default on the part of the Employer, the Contractor, his other Sub Contractors or their respective servants or agents nor create any privity of contract between the Sub-Contractor and the Employer or any other Subcontractor."

Based on the above, IF it is determined that the specifications/ design of the Water pressure from the Borehole is insufficient, BUT the specs were still included in the Subcontract Documentation, then the Subcontractor has complied with his duties and designed the heating system as per the parameters provided to him in his Subcontract Documentation and is not liable.

If the other Subcontractor (bore hole) provided incorrect details, then refer to the following;

3.8.1 (Effect of non-complying work by others upon work, etc which is in accordance with the Subcotnractor) "Where compliance by the Contractor or by any other Sub-Contractor... necessarily results in work properly executed or

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materials or goods properly fixed or supplied under this subcontract having to be re-fix or re-supply, the Contractor shall in accordance with directions so take down and/or re execute or re-fix or re-supply …"

Further 3.8.1 – "The Sub Contractor shall be paid by the Contractor on the basis of Fair evaluation of any taking down and or re execute or re-fix or re-supply under sub clause 3.8.1"

In which case the Contractor would need to make a claim against the Other Subcontractor (Bore Hole). Possibly under negligence due to their providing incorrect design (depends on their Sub Contract Conditions relating to due diligence, liability etc).

However if the Water design/ specification is sufficient and the fault is with the Sub Contractor who designed/ installed the heating system then the following may be applicable.

7.1 "if or before the date of practical completion of the last section in which there are subcontract works, the subcontractor shall make default in any one or more of the following

…2. without reasonable cause….failed to proceed regularly and diligently with the Sub Contract Works …"

The Contractor may make a claim"

Section 8 also deals with Performance specified works and will identify if the Subcontractor has not met their duty of care under their agreed performance standards or breached their obligation by providing faulty design.

I would suggest the following course of action

- New MD negotiates with Contractor to enter into Joint Expert Determination with the key objective to identify if the specs of the water system as provided (by the Contractor, from the other Subcontractor (borehole)) in the Subcontract docs was sufficient and if the SubContractor in their exercising of due care and due diligence could of ascertained otherwise.
    - Contractor will seek opinion of independent expert.
    - As the Current Expert report does not appear to address the technical aspects fully, the Sub Contractor will also seek a second opinion form an expert
- Expert determination will be conducted over 28 days
- Result will be forwarded to Adjudication

Even if both parties agree to adhere to expert determination result. One party may refuse thereby leaving the dispute open. 28 day expert determination followed by 28 day adjudication is within the 3 month time frame but is a double layer of review to further reduce the likelihood of any party disputing the decision at practical completion (by arbitration or litigation). Relatively easy and cheap compared to other methods and it is likely matter will be closed fairly.

RE: PI, if it is proven that the water/ bore design is sufficient and the fault lies with the heating Subcontractor than I believe their improper design may be negligent and would be liable to a claim of their PI.

Some other notes already covered...

- Sub-contract provides for disputes to be resolved by High Court Action. Contravenes the HGCRA that provides for adjudication thus "the Scheme for Construction Contracts" applies.
- Sub Contract allocates costs of disputes in contravention of section 108 3(A) of HGCRA, as amended by LDEDC.

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Thread:
Scenario 1 - Suggested Actions
Post:
Scenario 1 - Suggested Actions
Author: Anonymous

Posted Date: 07 October 2015 15:55
Status: Published

Dear all,

It seems to me that whichever course of dispute resolution is chosen an expert opinion on the technical matters associated with the heating and hot water system will be required. For example, an adjudicator is unlikely to be able to apportion fault to each party without the input of such a technical expert. To that end my suggestion would be for the parties to commence/recommence negotiations with the new MD re-establishing contact with the contractor's management and suggest that, as part of the negotiation process, a technical expert is jointly appointed. Once this expert report is published it may be possible for the parties to assess each other's monetary liability. A joint expert has obvious cost savings and no chance of a difference of opinion as there would be between competing experts.

If this is not possible then adjudication is the next step due to the limited time constraint, litigation would not be possible in the time as the complexity of the issue and the value would mean that it would be heard in the High Court. Slots for hearings in the High Court are booked some months in advance in addition to which complying with the CPR pre-action protocol, appointing solicitors, counsel, disclosure of documents all takes time. For example the CPR requires that the parties have complied with or at least considered some form of ADR such as mediation and cost sanctions may apply if a party has refused without justification. If mediation was to be used then the mediator would need to be armed with the technical expert report to understand each party's position.

As part of the new MD's approach it would be sensible to identify the deficiencies within the contract adjudication process and that the adjudication provisions in the amended HGCRA Act would apply in their entirety as the use of 'Tolent' type clauses are now prohibited.

In terms of a target outcome for the MD to aim at, as long as the agreement reached either by negotiation, mediation or adjudication is less than £1m then the PI cover could be relied on to cover this debt. Or am I wrong in stating that PI could be used in this way? I would have thought that as long as the subcontractor that they were not negligent in the design of the heating system and acted with reasonable skill and care when performing this function then the PI cover could be called on.

All feedback welcome!

Kind regards

Nigel

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Thread:	Scenario 1 - ADR options?	**Posted Date:**	07 October 2015 12:26
Post:	Scenario 1 - ADR options?	**Status:**	Published
Author:	Anonymous		

A few observations on the scenario:

1. The dispute appears to be about a technical issue, rather than about interpretation of the contract. Presumably therefore if an expert is able to clearly determine the cause of the problem (water pressure or the design of the system), the owner of the risk can be determined.
2. The sub-contract provides for disputes to be resolved by High Court Action. This would contravene the HGCRA that provides for adjudication and therefore "the Scheme for Construction Contracts" applies. If this were ignored and litigation was chosen to resolve the dispute, apart from contravening HGCRA, pressing on with court action would be dimly viewed, especially in light of Pre-Action Protocol. One of the objectives of Pre-Action Protocol is to "enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings."
3. Additionally, the fact that the contract allocates the costs for disputes entirely to the sub-contractor, is in contravention of section 108 3(A) of HGCRA, as amended by LDEDC.

Regarding a specific approach to the Scenario:

1. Negotiation might be the first step. Although relationships between the main contractor and the sub-contractor have not been good up until now, the appointment of a new MD might be an opportunity to improve things and a basis for collaboratively resolving the dispute. The sub-contractor already has an expert view on the matter and although it is not clear cut, on balance the expert believes that the sub-contractor should succeed. The experts' advice could be used as a basis of negotiation.
2. Expert Determination – if the parties cannot agree by negotiation, the expert, or another appointed by the parties could be employed to look at the technical cause of the problem and reach a conclusion on the cause or causes. This approach would need to be acceptable to both parties with agreement that the outcome of the expert advice will be accepted. If the expert finds that the problem lies both in design and water pressure, then negotiation could recommence based on that basis.

3. If no agreement is reached then Adjudication may be the next step. The Adjudicator will reach a decision in 28 days (meeting the aspirations of the sub-contractor to resolve the problem quickly). The Adjudicator will base his decision based on the information presented, included the Experts report. The Adjudicators decision will be binding until practical completion

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Thread:	Scenario 1	**Posted Date:**	27 September 2015 12:46
Post:	Scenario 1	**Status:**	Published
Author:	Anonymous		

The dispute in hand is not procedural nor does it hang on a point of law. It is a technical issue that depends on the contribution towards the problem caused by a potentially inadequate design on the one hand and inadequate water pressure on the other. The indeterminate nature of the initial expert advice suggests that the actual cause may be some balance of the two.

It should also be borne in mind that from the main contractor's perspective (whatever the contractual niceties) he is the innocent party in that he engaged one company to design and install a heating system and another company to provide a bore hole and pumping station. Whatever the technical complexity of the actual combined cause of failure he will see himself as innocent. In this respect it seems to me that the dispute actually lies between us and the bore hole subcontractor, albeit via the intermediary of the main contractor. It is likely that the main contractor, in covering his bases, is also in dispute with the bore hole subcontractor or at least put him on notice. If he has not done so he needs to be encouraged to do so immediately.

Litigation and arbitration are dismissed as potential mechanisms for resolution as they will simply take too long. Whilst adjudication could be used to obtain an award within an acceptable time frame there are three considerations that argue against this approach.

1. Because it is a contractual mechanism it will only allow the main contractor and us to engage in the dispute resolution process and be party to any award. This is avoiding a potential significant contributer to the underlying problem and from the main contractor's perspective leaves him hanging out for any element of the liability that is held not to lie with us
2. Because the dispute is highly technical any award has the potential to be challenged subsequently if one or other party is dissatisfied
3. It may be hard to find a suitablly qualified adjudicator who can understand and find upon the technical issues

It is therefore recommended to use expert determination in the following way

- Contact the main contractor and propose expert determination as the method of apportioning liability
- Suggest that the bore hole subcontractor is brought into the process so that there are three parties involved - us, the main contractor and the bore hole subcontractor
- This means the appointed expert can apportion liability across three parties and his award will resolve the problem for the main contractor and not leave him with a residual risk

- From the facts as presented it is likely that the smallest share of liability (if any) will fall to the main contractor, thus further incentivising him to participate
- The expert advice we have received to date would suggest that we can avoid the majority of liability and therefore any costs apportioned to us will hopefully be less than our level of PI insurance cover

This approach requires the consent of both the main contractor and the bore hole subcontractor but it is hard to see why they wouldn't wish to participate. The main contractor is likely to be the least responsible for the problem and the award will be comprehensive from his perspective. The bore hole subcontractor is in the same quandary as us and will therefore wish to engage in the true technical dispute with the appropriate party currently separated by respective subcontracts through the main contractor. It is suggested that the expert determination is made binding on all three parties to avoid future resurrection of the dispute at some future time.

If the bore hole subcontractor refuses to participate then we should still seek to proceed with the main contractor although this is less satisfactory.

If the main contractor refuses to participate then it may be necessary to initiate adjudication to bring matters to a head. It should be noted that the requirement under our subcontract terms and conditions to fund the full cost of determination is not in compliance with the Housing Grants Construction and Regeneration Act 1996 (as amended) and as such is unenforceable. The adjudicator must be given the freedom to apportion his costs as he sees fit. However, even if adjudication results in a satisfactory outcome from our perspective it may still be subject to future challenge if the main contractor remains dissatisfied and any such legal action may be initiated on or around the time of the prospective flotation. Indeed, the requirement for a bond to cover any payout against an adjudication award suggests he may be minded to do so.

(Post is Unread)

Thread:	Resolving Dispute	**Posted Date:**	26 September 2015 16:30
Post:	Resolving Dispute	**Status:**	Published
Author:	Anonymous		

Although this claim has financial compensation written all over it, there is more to it in the form of reputation, business continuity and good relationship. It will suffice to say therefore that no effort to find a resolution to dispute in a time and cost effective manner is wasted.

The cause of the dispute appears to be design related which is not unusual in construction disputes. What we also know is that the design and build contract arrangement between the main contractor and the client was flowed down to the subcontractor in a design, procure and install arrangement albeit using the main contractors standard terms. Design and install contract would put the obligation on the subcontractor to meet all the specification and take on the associated risks having had the time to review and validate the design for buildability before going into contract. The exact rights and obligations of the contracting

parties will need to be verified.

Notwithstanding the report produced by the expert engaged by the subcontractor, which in itself is inconclusive, it will be advantageous to start the resolution of the dispute by opening up a negotiation channel. It is evident that some form of discussions would have taken place to at least agree on the cause of the inadequacy of the heating system, but with a new MD appointed by the subcontracting organisation who is keen to "sort things out", there is a possibility that this cost and time effective dispute resolution method will just work including an opportunity to address other minor dispute "lurking in behind the scene" and release of withheld payment and retention to improve cash flow. There is a chance that due to the technical nature of the dispute, that negotiation will result in agreeing to appoint a joint expert to give his opinion on the dispute through Expert Determination. The negotiation will also help set expectations as to the likely outcome and the way the expert verdict will be received or rejected in lieu of another method.

It is in the interest of the disputing parties to adopt a non-adversarial, time and cost effective method for resolving this dispute as no method guarantees success. Arbitration and litigation is expensive and time consuming, and in this case, are not preferred options due to the need for the subcontractor to have this dispute resolved just in time before floating their shares. Moreover, the pre-action protocol expects parties to attempt alternative dispute resolutions methods before going to Litigation or Arbitration. It will therefore be beneficial for the subcontractor to start with negotiation, and then jointly progress to expert determination to resolve this dispute due to the technical nature. If these two method fails to achieve an acceptable result, the subcontract can refer it to adjudication which although not specified in the contract is covered by HGCRA.

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Thread: Technical Cause Agreed by Expert Determination
Posted Date: 21 September 2015 08:39
Status: Published
Post: Technical Cause Agreed by Expert Determination
Author: Anonymous

At first glance the reasons for the failure of the heating system should be technical and fairly simple to prove. Since we were subcontracted to design the heating system we should be aware of the parameters at Contractor's Termination Point (pipe size, water pressure, temperature etc.). I assume, as with most projects, the Contractor is obliged to give the parameters at the existing TP point and our obligation was simply to connect. This data must have then been used in our calculations for the heating system and in parallel with the requirements of the heaters themselves (as given from our vendor). I assume these drawings/calculations were then handed to main Contractor or a third party for approval?

The given parameters can easily be tested and witnessed by all parties through a field test. In the event the parameters at the TP point differ from the actual situation, these documents/calculations etc. could be useful evidence in our defense.

If however the data points to a design flaw then it should be clarified if this lies with the heating system designer or heater vendor.

Even if the TP parameters were in error with the actual situation it may be levied by the Contractor that we have not worked in good engineering practice by failure to verify the information given -depending on the wording of the contract. However, in most cases we are entitled to assume the information regarding outside utilities is correct.

As stated I believe the technical explanation can be pinpointed and the resulting settlement should be agreed between all parties (main contractor, subcontractor and vendor). Expert determination is the better option since the cause seems to be technically explainable. This settlement should be agreed without the need for arbitration or litigation. I also think claiming professional indemnity insurance should be avoided since it will be an admission of "negligence" which would hurt the value of our company beyond any claim amount we could receive.

In the event any party disagrees with the settlement amount, a consultation with a lawyer (mini trail) to determine the value (if any) for future litigation should be looked at. However I don't believe this would be required if the evidence is sound.

(Post is Unread)

Thread:	Expert Determination	**Posted Date:**	20 September 2015 17:52
Post:	Expert Determination	**Status:**	Published
Author:	Anonymous		

Evidently, at the current stage of the dispute development litigation doesn't represent an appropriate option for the subcontractor due to the associated financial costs and time. The potential public offering sets very tight time constraints and any ongoing dispute will affect negatively the subcontractor's plans. "Arbitration" option has the same deficiencies even though it is not clear if arbitration procedure is laid down in the agreement at all.

Taking into account the technical nature of the dispute the expert determination seems to be the most appropriate way to settle the dispute. The initial report of the technical professional indicates that there is a room for negotiations even though it is not "clear-cut". Based on the findings of the engaged independent professionals the parties can start negotiations and reach a settlement agreement. The new managing director will play a pivotal role in the negotiation

process. Although both conciliation and mediation are viable options they may limit the opportunity to discuss the matter openly and the subcontractor will not benefit from the appointment of the new managing director.

The suggested action path is as follows:

- To contact the contractor and to introduce the new managing director;
- To create the expert determination procedure and appoint the technical professionals;
- To negotiate the settlement agreement based on the technical reports;
- In case if the agreement isn't reached to suggest the cociliation/mediation path.

20/09/2015 Dmitry Cherepanov

(Post is Unread)

Thread:	Pre action protocol	**Posted Date:**	11 September 2015 20:54
Post:	Pre action protocol	**Status:**	Published
Author:	Anonymous		

According to pre-action protocol parties are now expected to attempt alternative dispute resolutions methods before going to litigation. It also seems that we have a strong case as we have already engaged an expert who advised that we have a strong case however not clear-cut. We can realistically expect some cost to the business even if we are successful at litigation so we might as well try to negotiate a good deal outside of court and maybe save money, even if that means we will have to concede on some aspects of the case. Due to us hoping to float on the stock market soon, we need a quick result and therefore litigation should be our last resort. If we can achieve a successful negotiation , we could even retain the client and win future work with them. There are also some additional minor disputes to consider which could be helpful in the negotiation process as there will have to be some give and take on negotiable item. Through effective negotiation, we can save cost, time and preserve relationships before we escalate to more formal methods of dispute resolution

I suggest negotiation should be our first choice, if the parties are not able to come to a satisfactory solution then we can bring in a third party to mediate until an agreement can be met.

(Post is Unread)

Thread:	Choice of ADR	**Posted Date:**	06 October 2014 20:21
Post:	Choice of ADR	**Status:**	Published
Author:	Anonymous		

It seems to be more of a technical matter that could be solved by negotiation or mediation coupled with expert opinion. While the old management did not go along very well, the new manager might bring a fresh breeze into the discussion and might be able to get the relationship back on track out of pure necessity. Also the potential ongoing business relationship and the private resolution of the case seems to be favourable. In addition, time is of the essence. Having this risk of 1.5M (minus P.I.) hanging over the potential IPO could mean hampering its success.

- Rather technical problem, not legal
- Quick and private resolution favourable
- Expert opinion on our side
- Future business relationship wanted

The contract as such does not provide for ADR but companies are required to commit to some form of ADR (the Scheme). It seems like the main contractor already had adjudication in mind when making the contract because why would he only put HC litigation in his T&Cs while referring to a bond that the sub-contractor needs to provide in case of an adjudication award? The situation regarding the "Tolent Clause" is not clear. In *Bridgeway Construction v Tolent Construction* [2000] CILL 1662 HHJ McKay confirmed the clause while in *Yuanda (UK) v WW Gear* [2010] EWHC 720 (TCC) Judge Edwards-Stuart dismissed the clause as being contrary to the Act because it might put the referrer into a less favourable situation.

The way I see it is that either mediation coupled with expert opinion or adjudication is the preferred route to proceed.

(Post is Unread)

Thread:	The Board meeting	**Posted Date:**	06 October 2014 20:06
Post:	The Board meeting	**Edited Date:**	06 October 2014 20:06
Author:	Anonymous	**Status:**	Published

It's a tech dispute. Whichever form of resolution is adopted it is inevitable that Expert technical assessment will be required. (Meaning independent expert assessment which can stand up under robust x examination).

Additionally legal opinion should be sought on the enforceability of the terms of contract related to dispute resolution / litigation. Do we have to go via ADR to Litigation?

What are the risks and costs?

Have we moved from disagreement to dispute? Conflict?

Elevated to firm positons, entrenchment?

Any possibility of good faith negotiation? Pre-action protocol ADR? ADR outcome?

Any other parties to the disagreement? SC1's system supplier – defective components?

Does C know we want to list? If yes then he knows the risk / cost to SC1 of having an unresolved dispute at the time of listing and the window for resolution.

What requirements for the system were provided by C to SC1 and SC2? Realistic / achieveable?

Does innovative = un tried / tested? Any proven past performance of the systems?

Any provisions in the contract related to the use of "innovative" systems?

Did SC 1and SC2 work together on the system design?

Are the outputs of the SC1's system achievable using SC2's inputs?

Has the work of each SC been checked for design compliance and workmanship?

Is there any possibility of SC1 becoming a Claimant against the supplier?

Did SC1 design the system or sub contract the design out?

(Post is Unread)

Thread:	Method of resolving dispute	**Posted Date:**	06 October 2014 19:34
Post:	Method of resolving dispute	**Edited Date:**	06 October 2014 19:33
Author:	Anonymous	**Status:**	Published

I agree with the views put forward by Simon, Patrick and others, that Mediation and Expert Determination are the best forms of ADR in this situation. Litigation and Arbitration having a record for taking much longer than the 3 months that are available.

This should also assist our new MD in his relationship with the client. Our expert has positive views on our case.

Furthermore, they are relatively quick and non-adversarial. Given the proposed flotation and the need to avoid adverse publicity, they would look to be a good way to progress.

(Post is Unread)

Thread:	Non Adversarial first?	**Posted Date:**	05 October 2014 08:43
Post:	Non Adversarial first?	**Edited Date:**	05 October 2014 08:43

Author: Anonymous **Status:** Published

I am a little late to the discussion, apologies for that.

In the first instance, we should perhaps look at what we have constructed and ensure that we feel we have complied with the Sub-Contract. We have been given 'advice' by an expert but it is unclear as to what field of expertise. I assume that we have purchased the innovative heat pumps outright, and we have no back-to-back contract in place where we can offset some or all of our liability onto the supplier. It's essential that we establish that the heat pumps are fit for purpose. If not, we can bring an action against the supplier under section 14 of the Sale and Supply of Goods Act 1994.

A technical expert should be appointed and this could be jointly with the Main Contractor's agreement, with the sole intention to discover the root cause of the problem. If the Main Contractor is not keen, we could ask them to provide their own expert and let them work together to pinpoint the root cause. This process could be carried out under a strict timescale, leaving sufficient time for further negotiation or other action before our stock market floatation date.

The cost of this process should be reasonably insignificant compared to the sums withheld currently or any possible future recourse. There is a high risk here that a satisfactory agreement will not be reached, particularly if the Main Contractor engages a Consultant as well, who will be naturally biased towards the fee payer. However, in a short space of time, we will have a greater depth of knowledge regarding the issue at the very least, and we could take a more informed decision in due course which may revert back to mediation / negotiation - the non-adversarial approach.

On completion of the above process, and on further review of the information provided, if we feel that we have complied with the contract, we should consider the adjudication route. We should not be disuaded by the cost of adjudcation term. I agree with a number of my colleagues here in that this term will be ignored. Tom Owen (2014) writes on Westlaw "a term which purports to oblige the Referring Party to pay the fees of all parties to the adjudication and/or the adjudicator's fees and expenses is not effective" following the Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2011] 1 All E.R. (Comm) 550.

The adjudication should be considered two fold. Initially, we should consider the sums withheld so far. Has an adequate, correct and timely notice of withholding been issued in accordance with the recent LDEDC Act 2009? If not, we should persue this through the Statutory process for a reasonably quick and simple decision. If correct and timely notices have been issued, then our final option is to crystalize the dispute based on the findings of the experts engaged and refer the matter to adjudication.

If successful, any decision will be binding until the end of the Contract, that being at least a year away. Arbitration does not appear to be an option, as we have agreed on litigation in the event of a dispute. The Courts will insist that we have followed the Pre-Action Protocol in any event. Uff (2013) describes one of the requirements being to consider the possible appointment of a joint expert. Hence my suggestion above.

(Post is Unread)

Thread: Expert Determination - Technical Issue
Post: Expert Determination - Technical Issue
Author: Anonymous
Posted Date: 04 October 2014 14:04
Status: Published

Although there are obvious financial implications here the dispute we have is technical. We need to establish if it is our problem, the design of the heating system is deficient or is it the design of the water pressure supply, completed by the Main Contractors subcontractor.

The Main Contractor will also want this issue resolving quickly so the problem can be rectified.

Due to time restrictions (the impending float) and our obligation under 'pre-action protocol' I see we have two options, Adjudication or Expert Determination. My reluctance with adjudication is the current uncertainty of the requirement for us to pay all costs for an adjudication and provide a bond (how do we get this bond back?) We need to establish if the Contract falls under the Construction Act 2009. Although I believe it unlikely this clause will be upheld I'm not sure we will necessarily get the result we are looking for with adjudication, this is primarily a technical dispute, not financial, or a dispute that requires a quick fix interim decision.

Therefore my proposal would be to go down the route of Expert Determination purely on the design issue and establish responsibility. If it is found the design of the water pressure supply is inadequate the financial issue will automatically be resolved and if it is our design, so be it, we claim under our PI policy resolve the mater and move on. The sticking point here is if both designs are lacking, as our original expert determined the case is 'not clear-cut'.

(Post is Unread)

Thread: ADR - Is this an option?
Post: ADR - Is this an option?
Author: Anonymous
Posted Date: 02 October 2014 18:21
Status: Published

In another thread, I have stated that adjudication may be the most suitable path of action. However, would any other ADR provide us with a suitable chance of resolve? Is this an option?

It would appear that the two parties are likely to be entrenched within their position over this larger dispute, but could the fresh face of the appointed MD open new discussions allow a round of ADR to proceed?

We have set ourselves a 3-month target for the resolution of this case, so would it not be advisable to undertake a round of ADR, providing that there is a true desire for a fair outcome?

Expert determination could be an option, with both parties looking for common ground, but if common ground can be found we will of course have to commit ourselves with the final decision.

Failing the ADR, adjudication could be an option.

Your thoughts?

(Post is Unread)

Thread:
Some queries on the contract and disputes
Post:
Some queries on the contract and disputes
Author: Anonymous

Posted Date: 02 October 2014 08:58
Status: Published

I would like to raise several queries.

Can the terms of the contract between the contractor and the sub-contractor be relied upon?

We know the main contractor is appointed under an amended JCT contract. However, it would appear the sub-contractors contract is a bespoke contract under the main contractor's terms, which are likely to be beneficial to him, but less so to the sub-contractor.

This is evident in their inclusion of a tolent clause. Tolent clauses are clauses in construction contracts that determines who will pay the cost of an adjudication – sometimes only applicable if they are the referring party, and sometimes the costs regardless of who refers the dispute for adjudication.

The Act, following in the footsteps of the decision in Yuanda (UK) Co Ltd –v- WW Gear Construction Ltd, finds that tolent clauses are contrary to Section 108-2A of the Act

> " The contract shall…enable a party to give notice at any time of his intention to refer a dispute to adjudication"

It is felt that tolent clauses hampers a party's right to bring a dispute to adjudication. Therefore the clause written into the contract requiring the subcontractor to meet both sides cost of any adjudication is in violation of the Act, and likely to then be unenforceable.

Therefore this clause should not necessarily be an impediment to taking a dispute to adjudication

The contract provides for High Court Litigation in the event of any dispute, and as the claims are for over £1.5million this is outside of the County Courts jurisdiction. Litigation in the High Courts is likely to be costly and will require the appointment of solicitors and barristers. There is also likely to be a long period of delay before it reaches the courts, almost certainly beyond the 3 month period before the sub-contractor is hoping to float the company on the stock market. Therefore to proceed immediately to litigation will not get a decision on the problem in question until long after it is really needed.

Further, to proceed with litigation, it is usually a requirement that parties

attempt a form of ADR. This is an expectation of the Pre-Action Protocol for Construction and Engineering disputes, and is also a pre-requisite before arbitration.

Therefore it appears that regardless of the contracts provisions it would be wise for the parties to attempt alternative dispute resolution prior to considering legal proceedings.

Alternative dispute resolutions such a mediation and conciliation tend to be less adversarial – this may be important if the job is still on going and relationships are to be maintained. However this relies on the willingness of the parties to sort the dispute out.

Another query -

Is it possible that the client and the contractor are about to enter into a dispute? The Sub-contractors have had substantial sums withheld, and whilst pay when pay clauses where abolished under Section 113 of the LDEDC Act, it Is still not an unusual scenario. If the client is withholding money from the contractor, they may be entering a dispute. If this dispute is framed around the same problems of the low cost communal heating and hot water system, will this turn into a multi-party dispute, particularly if the second sub-contractor is also involved with the problem?

Therefore would any form of dispute resolution be better for multi-party disputes? It is unlikely that litigation would have the mechanisms to allow this? Multi-party disputes are possible with arbitration, but this would require joinder provisions in all the parties' contracts.

(Post is Unread)

Thread:	Dispute resolution	**Posted Date:**	01 October 2014 07:42
Post:	Dispute resolution	**Edited Date:**	01 October 2014 07:42
Author:	Anonymous	**Status:**	Published

There are a number of options that can be considered in order to resolve the current dispute.

- Negotiation
- Mediation
- Expert determination
- Adjudication
- Litigation

Negotiation

This is always the preferred method in resolving a dispute. It involves no legal cost, it is strictly between the parties and relationships are maintained. It is always preferable to negotiate from a position of strength. If the sub-contractor can demonstrate to the main contractor that they are not liable under their sub-contract for the faulty design then they may persuade the main contractor to withdraw their claim in respect of a faulty design as to pursue or defend such a claim in a more formal arena would be futile and would incur the main contractor in additional legal cost

Mediation

This is a stated method of dispute resolution in the JCT contract and is also a requirement of a pre action protocol which encourages the parties in dispute to consider mediation before adjudication or litigation. Even if it is considered that mediation would be unproductive I would advise that we offer mediation or if offered to the subcontractor they should accept it. The reason for this is that if a party refuses to take part in mediation then even if they win a subsequent litigation the cost may go against them.

Expert determination

Given that that there are only two possible reasons for the inadequacy of the heating system a possible option would be for the parties to jointly engage an expert to determine where the liability for the inadequacy lay. Both parties would share in the costs of the expert and once he delivers his findings and one of the parties is deemed to be liable then there is a good chance that the dispute will be resolved

Adjudication

The housing Grants Act allows any construction contract to be referred at any time. The fact that the sub-contract contains a clause which states that the subcontractor will have to meet the cost of both sides in any adjudication would prevent the subcontractor from referring the disputes as since 1st October 2011 when the Housing Grants act was amended by part 8 of the Local Democracy, Economic Development and Construction Act these type of clauses known as “Tolent Clauses” where outlawed. Each party therefore would stand their own costs and the losing party would pay the Adjudicators cost. A decision would be binding until the end of the contract when it could be challenged in the courts.

Litigation

This is the stated method of dispute resolution stated within the sub-contract and therefore Arbitration is not an option in this dispute. Given that litigation is the stated method of dispute resolution there are a number of reasons for trying to avoid this. The main reasons are generally litigation is slow and lengthy and therefore very costly. Also as the dispute is being heard in the courts it is open to be reported on and given that the sub-contractor have plans to float the company any bad publicity could have an adverse effect on share prices.

(Post is Unread)

Thread: Methodology for resolving the dispute
Posted Date: 01 October 2014 07:33
Status: Published
Post: Methodology for resolving the dispute
Author: Anonymous

The given scenario would appear to indicate some form of ADR should be proposed because of the nature of the dispute.

Firstly, the dispute itself is largely technical concerning as it does the design, supply and installation of a low cost communal heating and hot water system using innovative heat pumps and /or the adequacy of the water pressure supplying the system fom the bore hole. There doesn't appear to be any obvious complex legal issue to be resolved to settle the dispute.

Secondly, time is an important factor given the imminent float on the stock market and also the restrictions that will be imposed on our ability to carry out design work on future projects whilst there is an unresolved potential claim against out PI Insurances.

Thirdly and also because of the imminent stock market float, whatever method chosen needs to be carried out in private to avoid any adverse pubilicity having an impact thereon.

Another factor to consider is whether we wish to maintain on ongoing business relationship with the main contractor once the dispute is resolved. Notwithstanding the break down in the relationship, it seems unlikely that our new Managing Director would want to start his tenure by losing potential clients.

All of this seems to preclude the use of litigation and to a lesser extent arbitration which whilst meeting some of the criteria about is not likely to lead to a sufficiently speedy resolution.

The pre action protocols to be followed prior to litigation/arbitration are also

encouraging us towards some form of ADR before we pursue either of these options.

Adjudication is an option in that it would meet the speed and privacy criteria and in any event, is already part of the contractual framework for the settlement of disputes available to us by virtue of the JCT agreement we have with the Main Contractor. It would also deal with the technical aspects as long as we could find an appropriately qualified adjudicator to deal with the dispute and assuming we could get the Main Contractor to agree to the appointment. However, I would be not inclined to follow this route given the largely adversarial nature that adjudication tends to follow and the adverse effect this could have on our future business relationship with the Main Contractor.

Negotiation doesn't seem to a likely option given that this has probably alreay taken place to get to the current position and is unlikely to succeed given the deterioating relationship with the Main Contractor's management.

This leaves mediation, conciliation, expert determination and mini-trial all as viable options but I would suggest that expert determination seems to be the favourite route to follow, focusing as it does on the technical aspects of the dispute. The expert we have already employed has already advised that on balance our arguments should succeed. We should be reasonably confident and have nothing to lose by following this route and if necessary, we could walkaway at any time should we so choose.

(Post is Unread)

Thread:
Query regarding the specifics of the contract..."setting the scene"

Posted Date: 30 September 2014 21:20
Status: Published

Post:
Query regarding the specifics of the contract..."setting the scene"

Author: Anonymous

Before submitting further opinion, there are two issues that I would like to gain clarity on.
Firstly, can we please determine, by reference to the contract documents or otherwise, the specific design liability i.e. Is the liability "fit for purpose" or are we merely required to exercise "reasonable skill and care"?
If it is the former, it may well be the case that not only are we not potentially under insured but could possibly not be insured at all in the vent that PI does not cover the more onerous fit for purpose provision.
Despite the dialogue that has been opened with the Insurer, there is no record of the design being labelled negligent. It is my understanding that in order to activate PI cover, it is normal to establish negligence, has this been alleged by the Contractor? In order for PI cover to apply, negligence may need to be proven. The case Wimpey v Poole (1984) 2 Ll LR 499 provides an example of a party attempting to prove negligence (against themselves)

The second query relates to the date that the contract was executed and also, the specific clause(s) that relate to the provisions for costs in respect of adjudication proceedings. Prior to the enactment of The Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) on 1 October 201, such that payment clauses were not uncommon in construction contracts and their validity had been upheld in the courts following the decision in the widely

reported Tolent case, Bridgeway Construction Ltd v Tolent Construction Ltd (1999) TC14100. However, LDEDCA now outlaws contractual clauses which impose adjudication costs on one of the parties, ie the referring party unless there is express agreement. I would argue that the implementation of standard terms without recorded dialogue would not constitute such negotiation and therefore agreement of this specific term.

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