

CONSTRUCTION INSIGHT

The Latest News in Construction Contracts

Death By Insurance

An increase in insurance premiums has forced many firms out of business. Construction Insight looks at this and considers actions to alleviate the problems.

Tendermanship A Skill to be Proud of or a Crime?

Construction Insight takes a look at skills used when tendering to get maximum recovery in accordance with the Contract Conditions.

Mediation is on the Rise

What is involved in mediation and what are the advantages that are encouraging so many people to use it.

EDITORIAL

Welcome to Construction Insight the new name for the Irish Construction Arbitration Newsletter. We hope you find it as informative as ever.

We would be pleased to receive any comments that you have. We can be contacted at dublin@contract-consultants.com.

We are hearing that more and more construction companies are facing problems with rising insurance premiums.

In this issue we take a closer look at the problems and suggest some solutions.

We then look at the issue of Tendermanship. There are some in the Industry who suggest that this is little more than an attempt by contractors to rob employers of their money.

Finally, ADR is becoming a more and more popular form of dispute resolution. We take a look at the processes of mediation and conciliation and consider the advantages that are making them so popular.

DEATH BY INSURANCE

Construction firms have seen their insurance premiums rocket in the past number of years, particularly since September 11. It has been reported that some specialist contractors are facing premium rises of up to 300%.

The fact is that this sharp increase in premiums has forced, and will continue to force, many firms out of business.

Insurance can be categorised into two main categories. These are:

1. Insurance that covers the risk of damage to the works during construction. This is sometimes known as property or works insurance; and

Insurance that covers the risk of claims by third parties for personal injuries or damage to property resulting from the carrying out of the work by the contractor. This is otherwise known as liability insurance.

Under most types of construction contracts a contractor is required to have insurance to cover events that a contractor would be liable for under either an implied or an expressed term of the contract.

The purpose of insurance is to safeguard an employer against heavy losses that he would be likely to incur in a situation where a claim is made against a contractor or where the works have been damaged and the financial resources of the contractor are inadequate to meet his contractual liabilities.

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Another form of insurance is Contractor's All Risk. The type of risk that this covers tends to differ from policy to policy. Generally CAR will be renewed annually and will be contractor specific, not contract specific, with a number of contracts listed. The importance of a CAR policy is that claims made long after project completion may be covered. More often than not, this is the only cover that a contractor has against latent defects.

"The Cost of Works and Third Party Liability cover could be greatly reduced ..."

There is a tendency for "over insurance". For example, a large number of the risks that are included in the insurance cover, in particular the "property" cover would be unlikely to produce a large claim the costs of which a normal contractor would not be able to absorb. Therefore, there is no need for this risk to be covered.

The cost of works and third party liability cover could be greatly reduced by making use of reasonable excesses and reducing the list of the insured risks.

This would be an inducement to good site management and give a tendering advantage to those contractors that practice good site management and have met Health & Safety Standards.

Insurance has become such an issue for many contractors and sub-contractors that a number of trade organisations have negotiated with insurers to get better deals for their members.

In the UK, organisations have lobbied for change. They have encouraged the insurance industry to strengthen the "General Insurance Standards Council Code of Practice" and have warned their members not to use brokers acting outside of this Code. Changes to the Code include requiring insurers to give at least 21 days notice of renewal terms. Very often renewal notices come in at the last minute with exorbitantly high premiums. Contractors do not have time to "shop" around for a better deal and if they cannot afford to pay the premium they can be forced to operate illegally. They have also lobbied the insurance industry to undertake to discriminate positively against those people who set better Health & Safety Standards on sites.

Also in the UK, Specialist Trade Organisations have lobbied the Government and, in fact, the Department of Work and Pensions produced a report on the spiralling insurance premiums. This report did not receive a good response by those in the industry and many said that this study offered no immediate solutions to the crisis caused by rising premiums.

It would appear that the pressure on construction businesses is likely to continue unless those within the construction and insurance industries are willing to change present practices.



TENDERMANSHIP

A Skill to be Proud of or a Crime?

Max Abrahamson in his seminal book on the ICE Conditions of Contract devotes an entire chapter to what he describes as "Tendermanship". For Mr Abrahamson this is something to be guarded against at all costs

So what is Tendermanship? I have not been able to find any satisfactory definition. However, I would suggest that it is the ability of a contractor to secure selection in the competitive tendering process in a way that allows him to maximise his ultimate recovery in accordance with the contract.

"Is it a bad thing? ... Problems occur if either party fails to follow the rules ..."

Is it a bad thing? Tender selection is run by rules and rules mean games. Both sides want to win. The client will seek

to ensure that the contract he entered into is well drafted and leans as much in his favour as possible. The contractor quite naturally wishes to secure the work and will do everything allowed by the rules to ensure that he wins the contract but also maximises his recovery. Problems occur when either party fails to follow the rules or fails to appreciate what the rules entail. The Law expects tenders to be let on a competitive basis. This is the foundation of the Contra Proferentum rule which states that if there is an ambiguity in a contract term, it is resolved against the party who inserted it and is seeking to rely on it. The rationale is that as the tenderer you must view a contract in the way most economically suitable to yourself because that is what everyone else will do and it is the only way that proper comparisons can be made between different bids.

"... if the contract documents are imprecise then the law allows contractors to maximise errors in their own favour"

Clients often regard this process as a blatant attempt to be unjustly robbed of their money by some unscrupulous contractor. However, if the contract documents are imprecise then the Law allows contractors to maximise errors in their own favour.

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The common forms of Tendermanship are

- Identify risks and price for them. For example, a contractor may know that the amount of rock has been underestimated in a Bill of Quantities and will, therefore, price this at a high rate knowing that it is likely to dramatically increase profits;
- Identify flaws in the contract documents and price for those. For example, a contractor may see that drawings show that a particular type of brick detail is very common but that the bill of quantities (which is the document they must price) only allows for very few and, accordingly, a high price may be put against them;

- Adopt an efficient but fragile method of work. A contractor may be allowed flexibility in the time to construct a building and may decide to complete it much faster than anticipated by the client or his team. Subject to the reasonableness per *Glenlion Construction Ltd - v - The Guinness Trust (1987)* the contractor is perfectly entitled to do this. However, this makes the programme susceptible to being derailed by even minor changes and, consequently, they can claim significant additional costs for disruption and prolongation.

The only real way to overcome difficulties with tendering is to abandon "lowest price procurement" and fully embrace partnering. Since this is almost certainly the road to corruption, it will not be accepted, especially by the Public sector. So we will be forced to continue playing our games of tendermanship.

MEDIATION

Mediation and Conciliation are becoming more and more popular as a way to resolve disputes but what exactly is involved and what are the advantages?

Mediation is a form of Alternative Dispute Resolution (ADR). It is a consensual non-binding process that allows parties in a dispute to find an inexpensive solution to their problem.

Conciliation is a very similar process to mediation. Many forms of conciliation/mediation procedures will provide that the mediator's/conciliator's opinion or recommendation is binding if one of the parties does not dissent within a certain period of time.

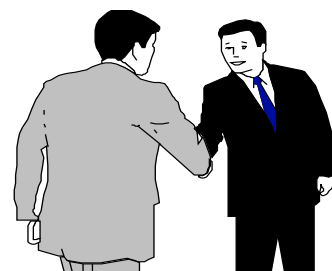
In the past ten years mediation has developed throughout the world. This is mainly as a result of the slowness and cost (actual or perceived) of other forms of dispute resolution.

Most recently, mediation has become much more widely used in England, particularly following the post Woolf Civil Justice Reforms.

Parties who are in dispute will either agree on a mediator or they will apply to have a mediator appointed. Once the mediator is on board he may require the parties to give him a statement of their respective cases.

The mediator may arrange a meeting between himself and the parties. After this there may be further meetings between the mediator and the parties either jointly or individually.

There will then be what is known as the mediation hearing (if required). It is during this time that the mediator will strive to have the parties reach agreement.



If this is not possible, the mediator may be required to make a decision or recommendation.

A mediator can have various roles in a mediation. He acts as an impartial chairman, but he can also be a sounding board for the parties to bounce ideas off. He can choose to play the role of devils advocate.

Probably the most important skill of a mediator is his ability to help each party to see the merits and weaknesses of its case. He will help them identify their priorities and needs. This is very useful as it helps to narrow the issues in dispute and makes the parties view their respective cases more realistically.

It must be remembered that, although mediation is a less formal method of dispute resolution than litigation or arbitration, it is still properly structured and highly professional.

The benefits of mediation are:

1. A QUICK, COST EFFECTIVE way to resolve disputes. Very often the mediation itself will only take one day.
2. The parties are assured that the process is completely CONFIDENTIAL and entirely WITHIN THEIR CONTROL.

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