Quigg Golden
insight
No. 43 Summer 2016

Edward Quigg
Edward.Quigg@QuiggGolden.com

Welcome

WELCOME ONCE AGAIN to Quigg Golden insight, keeping you abreast of developments in construction law.

Our Summer edition leads with David McNeice's analysis of a case that highlights the importance of diligence and clarity in agreeing to scheduled stage payments. John Dunlop carries this theme forward, asking "when is an instruction for change not an instruction for change?" with particular reference to payments for variations to contract where no written instruction has been issued.

Emma Jane McSteen outlines two new pilot schemes being trialled by the TCC as a mid-point between adjudication and a full blown TCC litigation. From January of this year, contracting authorities must accept the European Single Procurement Document (ESPD) from bidders as part of the selection process and William Brown assesses the impact of this change.

At Quigg Golden we work hard and we play hard, witness Jonathan Parker's cycle race against a plane and my own efforts in the London Marathon.

Enjoy!

No entitlement to payment after agreed payment schedule has expired?

David McNeice
David.McNeice@QuiggGolden.com

THE TECHNOLOGY AND Construction Court ("TCC") in the recent case of Grove Developments Limited v Balfour Beatty Regional Construction Limited [2016] EWHC 168 (TCC) looked at whether or not a contractor was entitled to interim payments for works carried out after an agreed payment schedule between the parties had expired.

The parties entered into a JCT D&B Contract 2011 (DB11), with amendments from the Employer. The works were for the design and construction of hotel and serviced accommodation beside the O2 Complex in London. The contract value was in the region of £121m. Works began in July 2013 and were to be completed by July 2015.

The parties had agreed there would be stage payments in accordance with Alternative A of the JCT DB11. These stage payments stated that there would be 23 no. payments throughout the duration of the contract, between July 2013 and July 2015 when the works were to be completed. On 21 August 2015, one month after the works were to have been completed, the Contractor issued an interim application, for Payment No. 24. This application was valued by the Contractor in the region of £23 million and made pursuant to the payment regime under the Housing Grants, Construction Regeneration Act 1996 ("the Act"). Grove Developments ("Grove") responded to Balfour Beatty stating that they had no contractual right to issue Interim Application 24, and that the payment regime under the Act was irrelevant as the Contract has established a mechanism and dates for payments. In any event, Grove also argued that a valid payless notice had been issued.

Balfour Beatty commenced adjudication proceedings and in January 2016 the Adjudicator issued his decision stating that Grove should pay Balfour Beatty a further £2 million, in addition to the sums already paid, thus approving payment Application No. 24.

However, in December 2015, whilst the adjudication was still on-going, Grove started Part 8 Proceedings in the High Court. Part 8 proceedings are for declaratory relief, and in this instance Grove sought the Court's determination that Balfour Beatty had no right to be paid for Application No. 24 as the parties had already agreed under contract that there would be only 23 staged payments throughout the duration of the Contract.

In making his decision Stuart-Smith J referred to the Act, which provides the statutory payment regime that applies to construction contracts. This is read in conjunction with Part 2 of the Scheme for Construction Contracts (England and Wales) Regulations 1998.

Sections 109 – 110 of the Act state that 1) there is an entitlement to stage payments and 2) that there must be an adequate mechanism for determining when these stage payments would apply. Stuart-Smith J considered recent case law, including his own judgment in Yuanda, stating that if there are existing contractual arrangements that are capable of coexisting with the Scheme, being that there are adequate provisions for interim stage payments, then it is unnecessary to import the Scheme's payment provision as a whole. This is what Balfour Beatty was attempting to do for payment application No. 24.

Ultimately, Stuart-Smith J concluded that as the parties had agreed to the interim staged payments, as well as the amounts of each interim payment, the fact that the agreement did not provide for interim payments covering work taking place after the stage payments, was not enough to import the Scheme's payment provisions to supplement the agreement already in place. Essentially this would have created a contract with two payment regimes, a contractual and a statutory one existing in parallel with each other.

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The lessons to learn from this decision are two-fold. First, contractors must ensure they understand the payment terms and schedule for payments they sign up to. Second, if there is a specific schedule of interim payments agreed at the outset of the contract, contractors will need to ensure that where work is carried out after the stage payments expire, there exist provisions to apply for additional payments. From a strict interpretation of the Court's decision, which some may consider harsh, the contractor shall have no contractual right to apply for further payments for work carried out after agreed interim stage payments have expired until the final payment mechanism kicks in after practical completion. Even though Grove failed to include such a provision, this was not enough to allow the Contractor to import the Scheme's payment provisions to supplement what had been fairly and adequately agreed.

This decision ultimately highlights the importance and need for contractors to be diligent and clear in their understanding when agreeing to scheduled stage payments, as well as the requirement for them to have an agreed mechanism for additional payments whenever work is carried out beyond the agreed Schedule.

Main contractors must be aware when agreeing to staged payment schedules, as if these payment terms are not imposed downstream to subcontractors and supply chains, main contractors will stand to be exposed and at extreme risk of cash flow irregularity.

TCC Litigation: The Shorter and Flexible Trials Pilot Schemes

TWO NEW PILOT schemes have been introduced for claims issued in the Rolls Building Courts in London from 1 October 2015 to 30 September 2017. The Technology and Construction Court ("TCC") is taking part in this pilot and it is hoped it will bring about quicker and cheaper construction dispute resolution. It is intended to be a mid-point between adjudication and a full blown TCC litigation.

The Schemes are potentially significant changes to litigation, as they could become an important stage on the road to quicker, cheaper and more flexible construction dispute resolution. It is hoped that they will be a success.

The new rules for the Shorter Trials Pilot Scheme ("STS") and the Flexible Trials Pilot Scheme ("FTS") are contained in Civil Procedure Rules, Practice Direction 51N. The structure of each will be discussed in turn.

THE SHORTER TRIALS SCHEME

STS is the main focus of the new rules and contains the most radical proposals which would see judgment within a year of the issue of proceedings. It seems STS will be most suitable for cases which do not require extensive factual witness evidence and where expert evidence is not going to be too contentious. It is quite common in construction disputes that expert evidence can be focused on a limited area and they could therefore radically change how we currently run construction disputes. It should however be noted that STS does not allow for multiple parties. STS cases will be structured on the Scheme as follows:

- **Pre-Action Procedure** – any other relevant pre-action protocols do not apply. A letter of claim should be sent to the defendant notifying the claim and the intention to adopt the STS. The defendant will have 14 days to respond.
- **Claim Form and Particulars of Claim** – both will be served promptly following the defendant's response, they must be served together. The Particulars of Claim is limited to 20 pages and accompanied by the bundle of core documents.
- **Acknowledgment of Service** - must be served within the current 14 days.
- **Defence and Counterclaim** – to be served 28 days after the Acknowledgement of Service. The defence is limited to 20 pages in length and is to be accompanied by a bundle of core documents.
- **CMC** – takes place within 12 weeks of the acknowledgement of service. The Claimant's legal representatives will arrange, produce and file a list of issues which will be updated throughout the matter.
- **Disclosure** - takes place within 4 weeks of the CMC and will be significantly limited.
- **Witness statements** – limited and not more than 25 pages in length.
- **Expert evidence** - issued by written report and limited to identified issues.
- **Trial** - will be within 10 months of the issue of proceedings. The trial length is restricted to 4 days.

All proceedings will be heard by the designated judge and applications will be dealt with on paper. Interestingly, cost budgeting and management does not apply unless agreed by the parties. The parties are to exchange schedules of costs within 21 days of the conclusion of the trial. The court will hand down judgment within 6 weeks.

Emma Jane McSteen
Emma-Jane.McSteen@QuiggGolden.com

THE FLEXIBLE TRIALS SCHEME

FTS is far less prominent than the STS, it has been specifically drafted to keep disclosure and evidence to a minimum. This should lead to an expedited case management procedure and trial date, thereby reducing costs for the parties. The FTS procedure can be summarised as follows:

- **Proceedings** - issued as normal, if the parties wish to adopt the FTS it should be agreed in advance of the first CMC and the court informed accordingly.
- **Disclosure** - restricted to the documents on which the parties rely unless specific disclosure is requested.
- **Witness evidence** - limited to identified issues or identified witnesses.
- **Submissions at trial** - in writing with oral submissions and cross examinations subject to a time limit as directed at the CMC or agreed between the parties.

Normal cost budgeting and management appear to apply to the STS.

If implemented as drafted, STS and FTS will offer a relatively quick dispute resolution process which is far less arbitrary and more structured and controlled than adjudication. Obviously, the expedited trial dates will be dependent on the court having capacity to hear the trial within the one year period. Construction cases will see the advantages of running on the STS or FTS, if suitable, and both should always be considered when deciding the correct forum for the dispute.

Jonathan races the plane

A MASSIVE WELL done from all at Quigg Golden to Jonathan Parker, QG Director who was part of the HSS Hire team that helped raise over £100k for Oxfam in the Heathrow Race the Plane event on 21 January in T5, Heathrow. Jonathan cycled an impressive 13.88 miles in his half hour slot at an average speed of 27.75mph. Congrats to all involved in this worthy event.

When is an instruction for change not an instruction for change?

John Dunlop
John.Dunlop@QuiggGolden.com

ONE OF THE most frequently discussed points on construction projects is whether or not a contractor is entitled to get paid for a variation/change if no written instruction has been issued.

Under most standard forms, if a contractor does extra work following an oral request from the employer or his agent, there is a very real risk that the correct contractual procedure has not been properly followed and that the payment mechanism for the variation/change has not been triggered. Inevitably, what this leads to is the contractor not being compensated for carrying out the variation/change works.

A construction contract will typically have a specific mechanism to allow an order to be issued that changes the scope of the works. If such an order is issued validly under the contract then the contractor will be entitled to claim extra time and money for carrying out the order. The right to payment in respect of that order under the contract is therefore only triggered if an instruction, in accordance with the contract mechanism, has been issued.

What constitutes a valid instruction is key in determining if the contractor is granted time and/or money for carrying out the change. Many standard forms require that any instruction must be in writing in order to comply with the contract and must be issued before the extra work has been carried out.

WHAT IS ONE TO DO?

Therefore, what can a contractor do to ensure that they are paid for such work? Below we look at both the JCT and NEC standard form contracts and attempt to offer some practical guidance.

NEC3 CHANGE MECHANISM

Under the NEC3 standard form:
Clause 13.1 states: *"Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the language of the contract"*
Clause 14.3 states: *"The Project Manager may give an instruction to the Contractor which changes the Works Information or a Key Date."*
Clause 27.3 states: *"The Contractor obeys an instruction which is in accordance with this contract and is given to him by the Project Manager or the Supervisor."*

Clause 14.3 allows the project manager to issue an instruction to change the Works Information. Clause 27.3 requires the contractor to comply with such as long as it is in accordance with the contract. Clause 13.1 defines what a valid communication is under the contract (which includes instructions).

Reading these clauses together means that verbal instructions have no status under an NEC3 contract, as they are not in a form that can be read, copied and recorded. Under Clause 27.3, the contractor is under no obligation to act on a verbal instruction, as it has not been issued in accordance with Clause 13.1.

JCT CHANGE MECHANISM

Unlike the JCT main standard forms, the NEC3 contract is silent on what the contractor should do if the project manager does issue a verbal instruction. Clause 3.12.1 of the JCT SBC's allows the contractor to issue a "Confirmation of Verbal Instruction" (CVI) if the architect/contract administrator issues an instruction that is not in writing. Looking at the change mechanism under the JCT SBC 2011:
Clause 3.14.1 states: *"The Architect/Contract Administrator may issue instructions requiring a Variation."*
Clause 3.10 states: *"The Contractor shall forthwith comply with all instructions issued to him by the Architect/Contract Administrator in regard to any matter in respect of which the Architect/Contract Administrator is expressly empowered by these Conditions to issue instructions…"*
Clause 3.12.1 states: *"Where the Architect/Contract Administrator issues an instruction otherwise than in writing, it shall be of no immediate effect but the Contractor shall confirm it in writing to the Architect/Contract Administrator within 7 days, and, if he does not dissent by notice to the Contractor within 7 days from receipt of the Contractor's confirmation, it shall take effect as from the expiry of the latter 7 day period."*

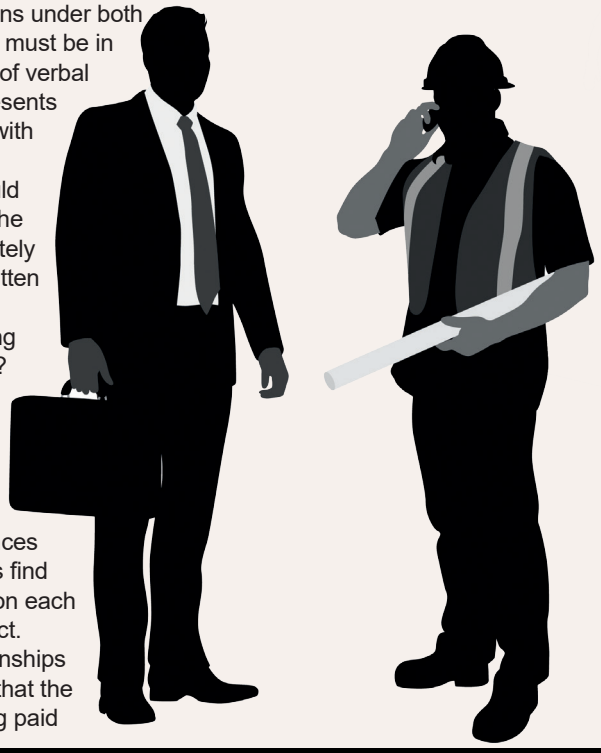
From the above clauses, it can be seen, that the JCT standard form anticipates there being verbal instructions during the course of the project. Clause 3.12.1 allows the contractor to confirm in writing what the architect/contract administrator verbally issued.

WHAT SHOULD A CONTRACTOR DO?

As all instructions under both standard forms must be in writing, receipt of verbal instructions presents the contractor with a commercial problem. Should they carry out the works immediately or wait for a written instruction with all of its resulting consequences?

At the end of the day, a lot may come down to the facts and circumstances that contractors find themselves in on each particular project. Working relationships might be such that the risk of not being paid for acting on a verbal instruction is low. However, in the event that circumstances change or indeed working relationships are not so good, acting on a verbal instruction could result in a dispute if non-payment results.

Commercially, it may be better to wait for a written instruction before executing the works but in practice, this may not be the most desirable action to take. However, it is essential for contractors to bear in mind what the main aim for being on the project is i.e. to carry out the works under any circumstances and keep the client on side without a written instruction to do so, which may result in a guarantee for payment becoming reduced, or to comply with the terms of the contract by not carrying out the works until a written instruction has been issued, at the risk of upsetting the client.



The European Single Procurement Document

William Brown
William.Brown@QuiggGolden.com

FROM 26 JANUARY 2016, contracting authorities must accept the European Single Procurement Document (ESPD) from bidders as part of the selection process.

WHAT IS IT?

The ESPD is a standard issue document used by a bidder to declare that none of the regulatory grounds for exclusion apply to them. It acts as 'preliminary evidence', replacing certificates issued by public authorities to allow a bidder to declare that it:
1. is not in one of the situations referred to in Regulation 57 (i.e. has not been convicted of corruption, fraud etc.);
2. meets the selection criteria set out in Regulation 58 (i.e. possesses the financial, human and technical resources to perform the contract; and
3. where applicable, fulfils the objective rules and criteria set out pursuant to Regulation 65.

The system aims to remove part of the administrative burden placed on companies when presenting their eligibility to bid for contracts.

WHAT DOES IT LOOK LIKE?

After April 2017 the ESPD will only be available in an online format. Until then, paper copies may be used. The European Commission has recently published an Implementing Regulation which sets out the standard form for the ESPD. A link to this Regulation has been provided.

Each contracting authority should cater this standard form ESPD depending on the nature and requirements of the competition taking place. Bidders then complete these forms and return. Bidders may reuse a previously submitted ESPD provided they confirm that the information contained in it continues to be correct.

HOW WILL IT WORK IN PRACTICE?

We don't know yet. The UK government is yet to release guidance on how the document should be used. How the document will link together with standard issue PQQ documents from the UK Crown Commercial Service etc. remains a prominent issue. Both documents will cover a lot of the same ground, and provide more opportunity for ambiguities to arise if bidders must now submit two documents instead of one.

In the meantime, contracting authorities must abide by Regulation 59 and accept ESPDs from 26 January 2016. A failure to do so would amount to a technical breach of the Public Contract Regulations. Contracting authorities should take care to ensure that the wording of their procurement documents does not prohibit a bidder from submitting an ESPD.

Link to Regulation (EU) 2016/7
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.003.01.0016.01.ENG&toc=OJ:L:2016:003:TOC

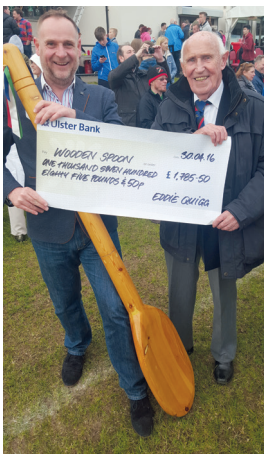
WORLD RECORD ATTEMPT

QUIGG GOLDEN IS proud to be supporting Jonathan Parker, one of our Directors, in attempting to ride from London to Paris in world record to try and raise £10,000 for cyclists fighting cancer. Having lost four family members to the disease he feels passionate about trying to help others who have suffered directly or indirectly.

The attempt will involve riding 170 miles at an average speed of around 26mph. Jonathan is being coached for the event by multiple national time-trial champion, Matt Bottrill of Matt Bottrill Performance Coaching, who said "two of the biggest challenges are taking on board enough nutrition since Jonathan will be burning around 1100 calories an hour for nearly seven hours, and maintaining the aggressive aerodynamic position required for the same amount of time".

More details about the event and the charity can be found at www.cyclistsfc.org.uk/news/world-record-attempt-for-cfc. Updates will also be tweeted via @CfCWorldRecord.

We and the charity would be grateful for any donations or assistance in bringing the charity and event to people's attention.



Eddie's Wooden Spoon Marathon

ON SUNDAY 24 April 2016 Eddie Quigg ran the London Marathon and managed to raise £1,785.50 for Wooden Spoon. Wooden Spoon is a rugby orientated charity that aims to help children who are disadvantaged socially, physically or mentally. It is a charity Quigg Golden have been involved with for many years and Eddie really appreciates all the support he received and wishes to thank all that were able to make a donation.

DIARY DATES

For further information email *seminars@QuiggGolden.com*

ICE Law and Management Course

25 week training programme starting October 2016 in BELFAST, MAIDSTONE and DUBLIN.

MAIDSTONE

21 JULY 2016 - Anatomy of a Procurement Challenge

4 AUGUST 2016 - Understanding a Claim for Delay: Prolongation, Disruption, Accelerations

22 SEPTEMBER 2016 - Getting to Grips with Payment Terms for Construction Contracts

DUBLIN

14 SEPTEMBER 2016 - Construction Contracts Act

28 SEPTEMBER 2016 - Choosing your Procurement Procedure Under New Regulations

QG insight

Editor - Clare Urquhart

Design - Summerisland

Feedback / Contributions
Quigg Golden, 18-22 Hill Street, Cathedral Quarter, Belfast, BT1 2LA. T: 028 9032 1022
E: *Belfast@QuiggGolden.com*

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