

NO. 49

Quigg
Golden

SPRING EDITION
2022

INSIGHT

FUTURE FOUNDATIONS

ADJUDICATION

HOW TO PROTECT YOUR
CASH-FLOW

PROCUREMENT

THE FUTURE OF PUBLIC
PROCUREMENT

OUR PEOPLE

HOW WE ARE
CONTINUOUSLY STRIVING
TO BE THE BEST

WELCOME TO THE QUIGG GOLDEN INSIGHT

Much like 2020, 2021 can be described as 'challenging' at best. Events around the world are already shaping what looks to be another interesting year with delay and disruption to supply chains likely to remain with us. Whilst we hope that the threats posed by the Covid-19 pandemic are waning, nevertheless, the seemingly increasing frequency of devastating storms, forest fires and state-on-state conflict on Europe's borders is unlikely to make for a compelling argument towards a positive outlook to 2022. Fortunately, at Quigg Golden, we help our clients thrive in challenging times. This issue of Insight aims to demonstrate that.

One certainty in these challenging times must be your contracts. Knowing where your exposure lies contractually – before it becomes an issue – can keep you ahead of the curve in terms of subsequent disputes. Highlighting areas for potential risks, and also opportunities, is something our experienced team can help with, page 8 provides some details on our Contract Review service.

A construction dispute, however, isn't something you can, or necessarily should, avoid and thus from time to time, you may find yourself venturing down this path. We have an incredible amount of experience in dispute resolution, particularly Adjudication. Associate Director and practising adjudicator Claire McCarry provides a really useful insight into this aspect of our service. If you want to learn more about the process, consider some of the training seminars/webinars and courses we run.

This edition of Insight also highlights the increasing importance of sustainability in procurement. What's more, the UK withdrawal from the EU has led to a proposed overhaul of UK procurement laws and we are watching this space with great interest - Senior Associate Claire Graydon sets out the proposed changes for our readers. How new sustainability criteria and Brexit might affect you in respect of running a tender or submitting a bid is something we can help you with.

What makes Quigg Golden unique is that many of our staff are 'dual-qualified' having come from a construction or engineering background and then becoming qualified in the law. This means they understand our clients, their needs, their fears and their challenges – through being able to view the matter more objectively. Our clients' overall commercial success and satisfaction are at the top of our agenda; indeed, this is one of our four core values alongside, Integrity, Teamwork and Excellence. Our staff are a highly motivated, well-educated and commercially savvy bunch and they will fight hard in pursuit of a positive outcome for you. I recommend the article on page 14 if you want to find out more about who we really are as a firm.

We hope you enjoy this edition of Insight magazine. We'd love to hear your own thoughts on it, either in part or as a whole. If you've enjoyed a particular article feel free to share it on LinkedIn and tag us. We think there is much opportunity to be gained by those well prepared for the challenge that lies in the year ahead. With a deep level of expertise in our highly motivated team, we at Quigg Golden very much look forward to helping you meet that challenge and have a successful and prosperous 2022.



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PRODUCT AVAILABILITY : AN
INSIGHT INTO 2022

This edition of Insight was edited
and designed by

Emma Payne
Josh Bates

in 2022...

The construction industry, like most sectors in the United Kingdom and Ireland, faced much adversity in 2021 thanks to the ongoing impacts of COVID-19 and Brexit. Whilst the past year has not been all bad, 2021 will forever be synonymous with material shortages, inflated prices and delayed or failed construction projects, coupled with the impacts of the pandemic on labour. These issues are still ongoing in 2022 and many fear that a recession will be the result of inflation and rising interest rates. Whilst the government deny any imminent threat of a recession, it is not wholly unlikely. With the conclusion of 2021, this article looks forward to what 2022 may bring for the industry.

The Supply Chain in 2022

Whilst the government are working to fix the supply chain issues in the UK, disruptions continue to spread and many have noted that these issues existed before COVID-19 and Brexit – these events have only served to exacerbate the problem in 2020 and 2021. There is now new uncertainty surrounding questions of wider post-Brexit trade as Brexit Minister Lord Frost resigned from the UK government in December 2021. Furthermore, the new Omicron COVID-19 variant threatens to extend the saga of lockdowns and restrictions once again. Hopefully 2022 will see less misplaced cargo vessels in strategic bottlenecks, but the continued threat to timber supplies from large scale forest fires cannot be ruled out. The limits of labour availability in the construction sector will only continue to be tested as opportunities for remote employment have rocketed during the pandemic, and those with technological skills will have their choice of employment due to the demands of modern online working. These changes to the trading environment will most likely mean that prices will continue to go up as the supply of materials and labour continues to be outstripped by the demands of the market.

Procurement Hotspots

With the above concerns in mind, those in the construction and procurement industry need to look ahead to 2022 with strategic plans in place. In October 2021 the government announced the Budget and Spending Review. The Review points to what are bound to be procurement hotspots in 2022 as it reveals what projects the government will be pumping money into in the coming years.

There was a particular focus on strong and innovative public services and levelling up on existing infrastructure. £2.3 billion is being allocated to help transform diagnostic health services over the next three years with a view to at least 100 such community centres being set up and a further £1.5 billion is being allocated for new surgical hubs. Beyond public healthcare services, £2.6 billion has been allocated to build new school places for children with special educational needs and disabilities. The government will also invest £11.5 billion in the Affordable Homes Programme in England to help construct 180,000 affordable homes (65% of which will be outside London).

A further £205 million has been allocated to build or transform up to 8,000 state-of-the-art community football pitches across the UK. In Northern Ireland, £49 million from the Levelling Up Fund will be invested into 11 projects including the redevelopment of former Ministry of Defence site into a community farm in the North-West; a nation-wide Electric Vehicle charging network and improved sports facilities on the North Coast.

The above is not an exhaustive list of the potential fruitful opportunities for procurement in 2022 and beyond. Contractors should be looking to these hotspots in order to plan ahead for tendering and job opportunities. In the event that the industry is faced with a recession, this will mean increased competition for procurement opportunities such as those above, and so more competitive, keener prices – something to bear in mind when preparing tenders.

in 2022...

Procurement Point-Scoring: ESG Criteria

Competitive pricing is not the only criteria for winning procurement bids in the current climate. Contractors must take account of social value in the award of central government contracts as the PPN 06/20 was published to launch a new model to deliver social value through the government's commercial activities.

The Environmental, Social and Governance (ESG) criteria in the PPN 06/20 is particularly important given the booming green agenda in the UK and EU, as well as the mental and physical well-being of employees being an especially pertinent issue during the COVID-19 crisis in the past couple of years. Contractors must pay more attention than ever to ESG criteria and think about how to include these meaningfully in projects.

The PPN 06/20 model is mandatory but commercial teams have flexibility in deciding which outcomes are applied. Social value must carry a minimum score of 10% of the total score in order to ensure that it carries a heavy enough weighting in the bid evaluation; a higher percentage weighting can be applied where justified.

The PPN 06/20 provides a model of focal areas of social value for commercial teams to consider when planning their delivery of central government projects, these include:

- COVID-19 recovery: the policy outcome being to help local communities manage and recover from the impact of the pandemic. Creating employment and training opportunities, supporting communities and improving workplace conditions are some ways to achieve this.
- Tackling economic inequality by creating new business, jobs and skills: this might look like helping new and small businesses, creating a diverse supply chain and promoting collaboration in the supply chain.
- Fighting climate change through effective stewardship of the environment: this might look like working towards net zero greenhouse gas emissions and influencing staff, suppliers and communities to protect the environment.
- Promoting equal opportunities by reducing the disability employment gap and tackling workforce inequality.
- Supporting the physical and mental health and wellbeing of the contract workforce.
- Improving community integration by demonstrating collaboration with stakeholders.

At Quigg Golden, we are already seeing many leading companies embracing these requirements and we can offer help and assistance to kickstart your own understanding of the requirements.

Quigg Golden Comment

If one thing is abundantly clear, it is that the issues the industry faced in 2021 will be carried over into 2022 without any clear path for change as the political landscape coupled with the on-going pandemic means that the commercial environment remains in limbo. Contractors must plan ahead for 2022 with the knowledge they have gained in 2020 and 2021, all with a view to exercising ESG considerations in public procurement spaces.

Should you need any further advice on the issues touched on in this article, do not hesitate to contact Quigg Golden – the market leaders in construction and procurement law.



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BREXIT

THE FUTURE OF PUBLIC PROCUREMENT



THE GREEN PAPER & THE UK GOVERNMENT RESPONSE TO CONSULTATION

At £300 billion per year, public procurement accounts for a third of all annual public expenditure. In 2020, the UK Government published a Green Paper on 'Transforming Public Procurement' (*the Green Paper*) which sets out proposals for future procurement legislation. Overhauling the "outdated public procurement regime" was the Government's stated objective. The main goals of the proposed reforms included speeding up and simplifying the procurement process, placing value for money as a key mandate and generating social value. Up until the UK Withdrawal from the EU, any procurement reform had to work within the framework of EU regulations. However, in a post Brexit world, the UK Government want to seize the:

"opportunity to develop and implement a new procurement regime, moving away from the complex EU rules-based approach that was designed first and foremost to facilitate the single market and instead adopt a new simplified approach that prioritises boosting growth and productivity in the UK, maximising value for money and social value, promoting efficiency, innovation and transparency".

Transforming Public Procurement – the Government response to consultation on the Green Paper

Following the public consultation on the Green Paper, on 06 December 2021 the Government published the Government response to the consultation (*the Government Response*). This Response outlines the proposals it intends to implement, drop or amend when actioning the future Procurement Bill (*the Bill*). The main proposals expected to be implemented are set out below:



i. Transparency, non-discrimination and fair treatment of suppliers

Six principles of procurement were proposed in the Green Paper: transparency, fair treatment of suppliers, non-discrimination, the public good, value for money and integrity. However, the UK Government Response proposes that only transparency, non-discrimination and fair treatment of suppliers should remain as the main principles of procurement – meaning they will be legally binding principles throughout the public procurement process. The remaining principles from the Green Paper will instead be reframed as "objectives" which should influence decisions, but it is doubtful that these will be legally binding obligations in contrast to the principles.

ii. A simpler regulatory framework

The Green Paper proposes to streamline the current public procurement laws into one single regulatory framework. This would mean integrating the current procurement regulations (the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and Defence and Security Public Contracts Regulations 2011) into a single, uniform framework. The UK Government intends to combine these regulations into a simpler legislative framework as described in the Green Paper but suggested some amendments to the proposed framework. The proposed amendments include powers to make secondary legislation where needed: for example, provisions may need to be updated to reflect changing technology. Other amendments proposed by the Government include specific provisions covering concession contracts, as well as the inclusion of a full suite of national security exemptions

iii. Using the right procurement procedures

There are currently seven procurement procedures available to award public contracts. The Green Paper proposed overhauling these existing procedures (of which there are seven) which have been described as "*often complex and inflexible*". Three simplified procedures have been proposed to replace the existing seven:

- A "*flexible competitive procedure*" which would allow buyers to negotiate 'to get the best from the private, charity and social enterprise sectors';
- An "*open procedure*": designed for simpler, "off the shelf" competitions; and
- A "*limited tendering procedure*" for specific circumstances where urgency is required.

These proposals were met with mixed responses by the public consultation, the main concern being that the new flexible competitive procedure could introduce more complexity in procurement as it requires tailored processes. Among other concerns was the fear that there may be a consequential increase in legal challenges due to the huge overhaul in the existing procedures – over 350 regulations governing these procedures are being made redundant. However, the UK Government Response suggested that whilst the flexible competitive procedure may require more work at the beginning of the process such as the design and tailoring to the procurement to be undertaken, it is thought that this increased effort at the beginning of the process may allow more complex procurements to be better designed by contracting authorities. The Government also plans to issue detailed and comprehensive guidance to ensure consistency and compliance with legal obligations.

iv. Awarding the right contract to the right supplier

The Green Paper proposed introducing exclusion measures to the current award criteria for public procurement. These exclusion measures would address tackling unacceptable behaviour in procurement such as fraud by ensuring that Directors who are found guilty of the exclusionary offences cannot wind up their companies and set up another in order to bid for public contracts. A central debarment list was proposed, as well as reforms to ensure that the weighted evaluation of past performance is increased by introducing a range of mandatory and discretionary exclusion grounds. To reflect this newfound importance being placed on good practices and social value, the Green Paper proposed a change in terminology, where contracts should be awarded on the basis of MAT ("*Most Advantageous Tender*") rather than MEAT ("*Most Economically Advantageous Tender*").

The UK Government intends to introduce the proposals in this section into the new legislation. The UK Government intends to introduce mandatory exclusion grounds for criminal convictions such as for offences of bribery and blackmail, fraud, money laundering and modern slavery offences. Discretionary grounds for exclusion will include instances of serious labour misconduct, bankruptcy and insolvency, professional misconduct and poor performance relating to breaches of contract. The Government response supports the change in terminology from MEAT to MAT as it provides further clarity for contracting authorities that a broader view on evaluation criteria is needed. Furthermore, to address any concerns about the potential burden on SMEs, the Government intends to introduce proportionality requirements on the award criteria being used.

v. Using the best commercial purchasing tools

The UK Government intends to legislate on the proposals to introduce a new Dynamic Purchasing System ("*DPS*") which is suitable for all types of procurement. This will be called the Dynamic Market. It will be available for use with all types of works, services and goods procurements within the scope of the new legislation. An Open Contracting Data Standard ("*OCDS*") will also be implemented so that data across the public sector can be shared at all stages of the contracting process to promote open and transparent contracting, whilst also enabling quick completion of award notices where necessary. The UK Government have said that the adoption of the OCDS will improve data quality and the Government intends to work closely with e-tendering system providers in order to effectively implement this standard. The whole process of awarding public sector contracts will be visible to the public for the first time.



vi. Effective contract management

The UK Government intends to legislate on the following proposals as described in the Green Paper. The Green paper proposed legislating further to tackle payment delays in public sector supply chains. Prompt payment is a significant problem, especially for small businesses. The current regulations do not provide enforcement mechanisms or require contracting authorities to monitor cash-flow. Proposals to provide greater visibility on payment in public sector supply chains and ensuring all suppliers are paid within 30 days include:

- Legislating to provide clear access for any business to take up payment delays directly with the contracting authorities;
- Legislating to provide a specific right to the contracting authority to investigate the payment performance of a supplier of any tier in its supply chain; and
- Aligning public and private sector reporting requirements and publishing payment performance all in one place on GOV.UK to allow greater scrutiny.

Proposals included allowing more flexibility to amend contracts in times of crisis in order to improve the ability of contracting authorities to adapt quickly in these situations. It was also proposed that a requirement should be introduced to publish contract amendment notices – this would increase transparency and offer commercial teams more certainty over the risk of legal challenges. The Government intends to legislate on these proposals as described in the Green Paper. The Government Response further proposed that evidence may be required from subcontractors that reasonable efforts have been made to resolve payment delays before escalating to the contracting authority – this will help to mitigate the number of disputes arising between suppliers and contracting authorities.

Quigg Golden Comment

The UK Government Response was issued nearly a full year after the Green Paper was published in 2020. It is unsurprising that the Response took this long as the consultation received over 600 responses, which is in major contrast to the average of 250 responses for previous consultations on procurement law. The Government Response appears to have taken on board the respondents' concerns and criticisms; the detailed Government Response stipulates that there will be a significant overhaul of the current public procurement regime as per the proposals, but there will also be amendments made to the Green Paper proposals in order to deliver procurement that better meets the UK's needs.

The Bill will be expected in 2022, but the secondary legislation and Guidance will follow, at the earliest, in 2023. A six month "go live" period will be granted after the conclusion of the Bill to allow contracting authorities to reorganise their procurement resources, undertake development programmes and ensure they familiarise themselves with the new rules for when the Bill becomes binding. During this period the Government intends to produce a detailed package of published resources, including statutory and non-statutory guidance on the key elements of the regulatory framework, case studies and model procedures. Further to these resources, subject to funding availability, the Government intends to offer a programme of learning and development to meeting the varying needs of stakeholders in public procurement supply chains.

WHY WE DO CONTRACT REVIEWS

Analysis of contract documents, programmes, tenders and warranties can increase your chances of successfully completing a project. Contract Reviews clarify the terms of the contract draft and identify any red flags you should be aware of.

Quigg Golden has a wealth of experience gained from drafting contracts for a wide range of multi-million pound projects across the UK, Ireland and internationally. Our experience in dispute resolution leaves us perfectly positioned to help you identify and avoid unnecessary risks.

Our Contract Review Service ensures that terms and conditions in the contract draft are understood and that risks are managed correctly in order to avoid legal problems down the line.



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ADJUDICATION

THE INSIGHT

If you need your money and the other side are not paying you for some reason, adjudication is the place to go. But there are some key points to consider.

What is adjudication?

It's a dispute resolution process for construction contracts. An independent gets appointed to act as the adjudicator – often adjudicators are professionals such as engineers and quantity surveyors. The aim is that the adjudicator will decide the dispute in 28 days. But there are key steps:

- You need a dispute – so you must have claimed something that the other side has rejected. A classic would be you have claimed payment and the payer has not paid it.
- The aggrieved party serves a “notice of intention” to refer the dispute to adjudication – you need to get this right! If it is not done correctly, you can run into all sorts of problems.
- Then you need to get the adjudicator appointed. The contract might stipulate who to use, if not, then there are adjudicator nominating bodies. The leading ones would be the RICS or ICE.
- Then it's over to the adjudicator. The adjudicator will set the procedure and aims to reach a decision on the dispute within 28 days of its referral. The adjudication roller coaster has several twists and dives, but you end up with something enforceable in short order.

Pay now, argue later

The adjudicator's decision is *interim* binding – meaning that it is not absolutely final and conclusive, it is open to be superseded by a subsequent decision in arbitration or court proceedings. However, 90% of the time, the adjudication decision settles the matter.

But the main point is that the winner is entitled to enforce the adjudicator's decision. The loser must pay, even if it is likely to be overturned later. So, the principle is “pay now, argue later”. If the payer does not pay, the courts are very reluctant to prevent enforcement.

The “pay now, argue later” mechanism means that adjudication is effective in protecting cash-flow. Adjudication was designed this way to provide a quick process which is cheaper and more accessible than litigation or arbitration – this helps to keep the contract period running and makes sure the parties are paid.

When can you adjudicate?

Under both the UK and Irish legislation, parties have a statutory right to refer a dispute arising from a construction contract to adjudication “at any time” – even if your construction contract does not include any provisions for dispute resolution procedures you can still refer your dispute to adjudication. The right to refer “at any time” has been interpreted plainly and literally by the courts. For example, contractual agreements such as escalation clauses, which provide for a pre-adjudication procedure, cannot postpone or limit adjudication time frames. Even where the contract has been discharged, adjudication will be allowed to proceed.

When should you adjudicate?

It is important to know what disputes are worth pursuing. So do speak to us about when it is appropriate (or less so). The amount you are claiming matters. So does the complexity of the issues and how good your evidence is. You should always think it through before starting into an adjudication process. The adjudication process differs from that of conciliation and mediation as each of these require a consensual approach. Instead, adjudication requires only the



unilateral choice of one party to the construction contract. The other party must comply as adjudication is a statutory right in both the UK and Ireland.

It is usually better to avoid any form of formal dispute resolution. So, have you attempted to negotiate on the dispute? You might be able to mediate or conciliate. These might be better options. Check that adjudication is the most suitable procedure to resolve the dispute. If adjudication is looking likely then counter-claims, costs and commercial relationships should all be considered.

Things to note

- Make sure you have a clear dispute. You must be clear what you are after and the other side needs to have considered it and rejected it (or left it so long that it is clearly not accepted).
- Follow the right procedure to appoint an adjudicator and adhere to the correct timings.
- Bear in mind the adjudicator's job is to decide on the rights of the parties under the contract. They will decide the case (usually) on what is put forward by the parties. An adjudicator will not make a case for the parties. So you need to be able to explain your case clearly.
- If you are the payer, be ready! A claimant can come at you at any time. Do not allow matters to fester.

So, what really matters in an adjudication? - Records, records, records!

The side with the best evidence wins. Preparation is key and should begin as soon as possible. Far too often parties fail to understand the importance of records – this includes payment records, labour allocation sheets, meeting minutes, site diaries and photographs, emails, programmes and more. A general rule of thumb is to record EVERYTHING.

Quigg Golden comment

All in all, adjudication is a very powerful tool, when used correctly. The processes of (a) commencing an adjudication; (b) responding to a notice of adjudication; and (c) challenging the enforcement of an adjudication decision are all actions which require strict adherence to the statutory provisions provided for in the HGCRA 1996 and the Construction Contracts Act 2013 in the UK and Ireland respectively.

Knowing when and how to use adjudication is fundamental to the process.

Quigg Golden is one on the market leaders in adjudication. We have been doing adjudication since the process arrived in the UK over 25 years ago. We can assist you in understanding and maximising the benefits of this and many other procedures that help you sort out your problems efficiently and as painlessly as possible. Should you need any advice on adjudication do not hesitate to contact us.



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QUIGG GOLDEN JOINS FORCES WITH Edwards & Co



We are delighted to announce that Edward Quigg and James Golden have become partners in Edwards and Co while retaining their position as directors with Quigg Golden.

Our clients now have seamless access to the courts in Northern Ireland, as well as access to legal expertise across a wide range of practice areas including Company Conveyancing, Corporate and Employment Law, and a full range of private services. These are important ways that we can further support our clients in these challenging times.

The team in Edwards and Co have been providing high-quality legal support to clients across Northern Ireland for more than fifty years and cover a full spectrum of legal services; providing individuals, small businesses and charities with practical advice to all legal matters and helping them resolve disputes.

Quigg Golden's NI office and Edwards and Co have been in neighbouring office buildings on Hill Street in Belfast for the last decade and it has been through this close proximity that we recognised synergies and a shared vision for the future.

Both businesses will continue to trade separately and retain their own names and identity. Senior partner Dorcas Crawford will retire from Edwards & Co following an illustrious career to focus on providing education, facilitation and mediation to commercial and third sector organisations. All the other current partners are remaining and being joined by Philip Gordon as the litigation partner.

The Changing Role of a Quantity Surveyor: A Legal Perspective

MICHEÁL O'SHEA

Micheál is studying for a Bachelor's of Science (BSc) degree in Quantity Surveying and Commercial Management at Ulster University, which is accredited by the RICS. Micheál is currently on his year-out placement with Quigg Golden.

WHAT MADE YOU CHOOSE QG?

What attracted me was the very clear opportunity to work alongside some of the most qualified and experienced personnel in the Construction Law Industry. Quigg Golden is well-known for employing a variety of people, ranging from adjudicator panel members to arbitrators and even tri-qualified Solicitors. I cannot imagine better people to work alongside and learn from when commencing your career.

WHAT HAS BEEN THE BEST PART SO FAR?

The ability to gain knowledge in a wide scope of work. To date I have had the opportunity to work with over forty different clients, ranging across all of the predominant construction contract families in both contentious and non-contentious disciplines. Subsequently this has led to me being involved in many aspects of alternative dispute resolution, ranging from litigation to arbitration and most recently adjudication.

WHAT IS THE BEST THING ABOUT QUIGG GOLDEN?

The ability to help our clients through the difficult and often frustrating problems that arise on a daily basis and the satisfaction that follows when a commercially focused outcome is achieved in the clients favour. We seem to be good at what we do here, so it feels like that happens more often than not! Furthermore, the benefit gained from closeness of the whole team within Quigg Golden that promotes an environment for enjoyment as well as a constant drive for improvement. Quigg Golden never seems to rest on its laurels and I like that development is a universal expectation.

HOW DO YOU APPLY FOR THE INTERNSHIP?

It will be advertised across LinkedIn and both Queens University and Ulster University's respective career networks in Spring. This requires only a CV and covering letter and certainly no experience in either the law or construction.

My advice to candidates however would be that whilst the process is not overly challenging, it is very competitive. An ability to demonstrate a willingness to learn and potentially one day become an expert in construction and procurement law and what that means in reality will help set their applications apart from those who can't.

This is an opportunity you should grasp with both hands. Quigg Golden is a growing and versatile company with a range of longer-term opportunities, which makes it an exciting place to work.

Micheál O'Shea
Intern
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Contract Administration: Termination, Insolvency & Dispute Resolution

 18 MAY 2022

Quigg
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The termination of construction contracts often gives rise to disputes and there are a number of potential traps around which businesses must navigate.

We hope you can join our "*Termination, Insolvency and Dispute Resolution*" webinar to get some practical guidance on how to avoid the pitfalls and maximise your strategic position.

100% ONLINE

Introduction to PWC

 26 APRIL 2022

The Public Works Contracts are used throughout the Irish public sector. This webinar is designed to bring delegates "*up to speed*" with the nuances of contracting under Public Works Contract, with specific emphasis on the CFI form (works designed by the Employer).

- Overview of the PWC suite of contracts, and the differences between each
- Structure of the PWC-CFI contract
- Review of the Contractor's main responsibilities
- Review of the Employer's main responsibilities
- Understanding Delay Events and Compensation Events; and
- Claiming additional time and money – Review of the payment mechanism.

Introduction to NEC

 27 APRIL 2022

This half-day webinar is designed to introduce delegates to the key contractual mechanisms within NEC suite, with emphasis on the NEC "*Engineering and Construction Contract*".

This course will cover:

Overview of the NEC philosophy; Structure of the ECC contract; Review of the early warning mechanism; Understanding the compensation events; and Review of the payment mechanism

JCT Contracts Management Course

A six week course in effective administration and successful delivery of projects under the JCT suite of contracts.

 14 APRIL - 19 MAY 2022

JOIN OUR

Lunchtime Sessions

Check out our website for updates on when we run our free lunchtime sessions

Giving Reasons and Debriefing – Tips and Pitfalls

08 April 2022

Scoring Social Value in Public Procurement – A New Era

11 May 2022

OUR PEOPLE

2021 continued the 2020 theme of 'difficult' (which may be understating it somewhat) for many, but at Quigg Golden we have a team of people who see 'difficult' differently – they see challenge and they are not a bunch that's slow to grasp the opportunity. Quigg Golden have always taken professional and personal development seriously and we continued to invest heavily in this development in 2021.

Construction and Procurement Solicitors that really understand the construction industry are a rare breed and our approach has been to historically 'grow our own', either from newly qualified law graduates or from seasoned professionals within the built environment who want to change direction in their careers. Our unique selling point therefore very much lies in having people who understand that we do not merely practice construction and procurement law, but that we instead use the law to solve construction and procurement problems. To that end, we were pleased to have Andrew McKinley join us, and Cara Roughan re-join us in the summer, both bringing a wealth of civil engineering and contracts management experience. We are always on the lookout for experienced construction professionals who want to develop their career in Construction law.



In addition to the great work they've been doing to help our clients secure successful outcomes, very few of our team have not benefited from that investment on the CPD front this year.

Senior Associate James Sargeant put the finishing touches to his Legal Practising Certificate to upgrade it to an LLM. More importantly, he was added to the Roll of Solicitors and issued with a practicing certificate by the SRA, becoming our latest 'home grown' Solicitor. As if that wasn't enough, he also qualified as an Accredited Contracts Manager with the ICE and as a Chartered Construction Manager with the CIOB. In recognition of his expertise, the CIOB elected James as their Tomorrow's Leaders Representative on the Maidstone Hub Committee.

Senior Associate Claire Graydon will do precisely the same this year when she too completes her LPC and period of recognised training and adds to her skillset as an organic product of the QG talent pipeline.

Others are following in their footsteps, with Junior Associate Michelle Travers, who started life at Quigg Golden as a Secretary in the Administrative team, successfully completing the Graduate Diploma in Law and is now working towards being added to the Roll of Solicitors in England & Wales.

Hot on her heels will be Diana Pinzaru, a law graduate from Romania. Having previously worked as a trainee in-house lawyer in Romania, Diana has used her understanding of contract law to quickly grasp the complexities of construction law. She too will commence the LPC and a period of recognised training as she undertakes the final steps in the process of qualifying as a Solicitor in England & Wales.

Quigg Golden is not all about qualifying Solicitors though. Many of our existing staff come from engineering and surveying backgrounds and are adding legal qualifications to augment their already well-developed expertise. Associate Stephen McKenna and Associate Director Claire McCarry have both been undertaking an LLB. In her time with Quigg Golden, Claire has additionally become qualified and recognised as a leading construction law Adjudicator in her own right, with Associate John Doherty now following down a similar path.



Whilst seasoned construction professionals are adding to their broader knowledge of the law, Dublin-based Junior Associate Anisha Vedullapalli has been adding to her construction knowledge by preparing to sit the ICE Law and Contracts Management course. Anisha already holds both a Bachelors and Masters degree in the Law and the LCM course will further enhance her understanding of the law as it pertains to Construction.

We also created two new job opportunities for Belfast-based students. Emma Payne joined us for some summer holiday work experience and liked us enough to want to hang around on a part-time basis whilst she completes her LLB at Queen's University Belfast. Of more significance, we additionally created a new Quigg Golden Internship, offering a 12-month fully paid placement for a QUB or Ulster University student to join us full-time for a year. The first successful candidate was Micheál O'Shea, taking a placement year with us before returning to his final year at UJJ studying Quantity Surveying.

As the old saying goes, "*there's no rest for the wicked*" and even the Directors did their bit for self-development. Managing Partners Eddie Quigg and James Golden became 'tri-qualified' solicitors as they added practicing certificates in Northern Ireland to their existing ability to practice in both England & Wales and also the Republic of Ireland. I myself wasn't immune to all this development either, adding Chartered status in both the CIPD and the Chartered Governance Institute to my Chartered Manager designation and also becoming both a qualified Mental Health First Aider and a Civil Mediation Council accredited Mediator.

Embarking on a career at Quigg Golden is not just a job and certainly not one merely for those from a legal background. If you are interested in learning more, please do get in touch with Gavin Hendrie for an informal and confidential chat.

Gavin Hendrie, Practice Director



PRODUCT AVAILABILITY AN INSIGHT INTO 2022

2021 was characterised by severe material shortages across the board and subsequently inflated prices, but the latest Construction Product Availability Statement from the Construction Leadership Council gave some hope that 2022 might be better for supply chains as "sales remain strong" and there has been a 'gradual improvement in supply' as well as 'relatively good stocks and availability of most products'.

However, this must be taken with a pinch of salt as the statement was issued in January after an expected seasonal reduction in demand over the Christmas period. We will still feel the effects of delayed and disrupted supply chains in 2022, there is still limited availability of materials such as bricks, roof tiles, plastic drainage products and some coatings and paints. Semi-conductors are also in short supply, these are needed for the likes of fire protection systems, boilers kitchen white goods and several other advanced construction products.

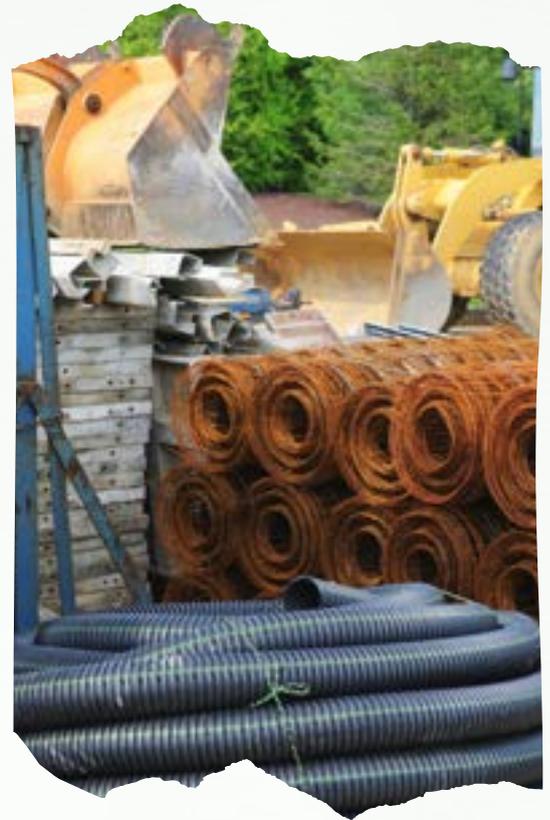
So, what can contracting parties do about material shortages and price increases?

With cost-increases practically unavoidable, the question arises of who pays the extra cost of materials where the cost has been factored into the price agreed in the contract? The general rule is that where the contract does not provide a mechanism for contractors/subcontractors to share the effects of price increases with other involved parties, then it is the contractors/subcontractors who will shoulder the effects of the price difference. The risk lies where it falls.

The Procurement Advisory Note (PAN01/21) in Northern Ireland has recommended that parties work together in "a spirit of mutual trust and cooperation" where the crisis has affected existing contracts. The good news is that parties can plan ahead effectively for future contracts. Contractors and subcontractors must be careful to include clauses in their contracts to prevent future financial disaster. We consider some of the contractual options available to contracting parties.

Price Variation Clauses

You can include a price variation clause within a contract. Most standard form contracts have the option for including such provisions. These clauses can be used when



Think ahead.
Be careful
what you sign.



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there is a set price contracted for the Works, and when a cost-plus contract has been used by the parties. JCT contracts provide an option for contract particulars to allow the adjustment of rates to deal with unforeseen additional costs due to inflation. These take the form of Price Variation Clauses. Price Variation Clauses exist to provide a safeguard against unforeseen changes to the price of materials which are needed to fulfil the contracted Works.

However, parties should note that the threshold to trigger a Price Variation Clause is high – the price increase must go beyond the regular fluctuation in market prices, which is what we have seen in 2021. These clauses can be used when there is a set price contracted for the Works, and when a cost-plus contract has been used by the parties.

Employers may not initially see the benefit of a Price Variation Clause where there is an increase in costs. However, these clauses can help to maintain progress on a project as they aim to prevent delay and disruption caused by unforeseen market circumstances. Such provisions are likely to protect cash-flow, reduce the risk of disputes and prevent contractors from becoming insolvent, which is bad for all parties connected to the project.

NEC4 X Clause for Inflation

The NEC provides various contract pricing options (Options A through to E). Under Main Options A and B, the Contractor will assume the risk of inflation, but under Main Options C and D, the risk is shared between the parties. However, the risk allocation can be altered by Secondary Option X1.

NEC4 Secondary Option X1: Price adjustment for inflation

This is a Secondary Option Clause provided by the NEC – this is a bolt-on clause which the parties can add to their contract, should they wish. Option X1 allows for price adjustments to the Works by considering the price set against the latest price index.

JCT

The JCT suite of contracts provide a list of Relevant Events which may entitle a Contractor to claim for an extension of time. With regards to material price increases, Relevant Events upon which a Contractor might be able to rely include:

- **Changes:** For example, if the design is changed from one material to another due to material shortages (the applicability of this Relevant Event is likely to be very dependent on the facts); and
- **Force majeure:** This is an undefined term in the JCT suite of contracts, but it could be argued to apply to global material price increases.

Contractors should however be aware that although “*force majeure*” is a Relevant Event, it is not a Relevant Matter. This means that although the contractor may be entitled to additional time (thereby offering protection against LADs), the contractor will not usually be entitled to additional money. Most JCT contracts also provide an option for the parties to include “*Fluctuation Provisions*” which deals with changes in respect of the cost of labour, materials and tax. These provisions can be included in the contract via the contract particulars. However, in our experience they are usually excluded from the contract. This perhaps indicates that either (1) parties are not aware of these provisions or (2) choose not to include them. Either way, this can have significant detrimental consequences.

Other considerations

Parties would be advised to set a budget for price increases as well as including Price Variation Clauses such as the JCT Fluctuation Provisions and NEC4 Secondary Option X1. Design teams should review raw material availability and estimated delivery times to determine a realistic estimation of the Completion Date. Alternative material options should be identified or where there is no alternative, then this should be made very clear in the tendering process. Parties would be advised to operate on an open-book basis and contractors need to be ready to provide compelling evidence with regards to the effects of inflation on both existing and future contracts.

Quigg Golden Comment

The construction industry continues to be faced with the reality of a landscape shaped by both COVID-19 and Brexit in recent years. Supply chains remain acutely affected in an ever-more expensive and delayed market. When it comes to drafting contractual clauses that concern delay and/or suspension of the Works due to material shortages and/or rising costs, you should identify the potential risks and clearly set out how that risk is to be split between the parties to the contract. In particular, you should set out any entitlement that the contractor may have for additional time and/or money if the project is affected by material shortages/price increases. The actual form of words you should use in the contract can be tricky. It needs to be precise and work with all the other terms of the contract.

So, think ahead, and be careful what you sign.

If you are currently facing any of the problems set out above, then Quigg Golden can provide you with further advice. Do not hesitate to contact us.



OUR SERVICES

ADJUDICATION
ARBITRATION
CONCILIATION
CONTRACT ADVICE
& DRAFTING
LITIGATION
MEDIATION
TRAINING
PROCUREMENT

STAFF TRAINING

Lisa Keenan, Office Manager

At Quigg Golden we take staff training and development seriously. However, it isn't just external education we focus on. Twice yearly, we get all staff together from across the QG landscape for some team bonding, typically in the form of technical in-house training and a planned social activity. Normally, this is conducted in Belfast, but in recent years, we've managed to get as far afield as Malaga and Budapest, although the pandemic has impinged upon our ability to travel in the last couple of years.

Nevertheless, in the summer of 2021 we did manage to get together as a whole group and spend two wonderful nights on Lusty Beg Island in Co Fermanagh, Northern Ireland. Alongside training on how to plan and delegate, conduct an effective contract review, the importance of good, clear and concise communications and other aspects of our business that require regular reinforcement, we also managed to do some clay pigeon shooting (the Practice Director reminded us all he was once in the Army by winning that one); Archery (they clearly don't teach that in the Army) and a powerboat 'safari' around a very rough Lough Erne (someone was holding on so tight it was clear he was never in the Navy...). The lull in Covid restrictions at the time also allowed us to enjoy each other's company without the need for phrases like "you're breaking up" or "you're still on mute". Although after a few drinks, some people sounded like they were breaking up; and others probably should have been on mute!

Our recent Christmas training was limited by Covid restrictions; however, we got everyone together on St Patricks Day for some more refresher training and even more refreshing pints of Guinness. Training at Quigg Golden lies very much at the heart of our culture here and we will continue to strive for excellence in what we do through our teamwork and by producing high quality work to the very best of our individual and collective ability.



Quigg Golden

Quigg Golden provides over two decades of specialist experience guiding our clients through complex situations in the construction industry.

Find out how we can help your business with a free one hour consultation.

OUR LOCATIONS

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"Very professional subject matter experts."

"We found the NEC training provided by Quigg Golden so well explained and thoroughly enjoyable, providing working examples which was easy to relate to."

"A very experienced team that gives a very professional service and has a vast experience in construction contracts and disputes. They give the very best advice to restrict costs."

4.9 / 5 average rating on
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