Quigg Golden

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INSIGHT

CONSTRUCTION & PROCUREMENT LAW

FACING CHANGE HEAD-ON.

WHAT TO EXPECT FROM THE INDUSTRY IN 2023

PROCUREMENT DEVELOPMENTS IN THE UK & NORTHERN IRELAND

REVIEWING YOUR HR, GOVERNANCE & WORKFLOWS

WELCOME TO THE QUIGG GOLDEN INSIGHT

At the time of writing, the UK is on its third Prime Minister in the space of a year. That's two people who were not in charge of a country when we last published an edition of this magazine (a mere 9 months ago). If that isn't symbolic of the volatility and uncertainty of our current times, I don't know what is!

With that in mind, this edition of Insight magazine seeks to focus on those volatile, uncertain, complex and ambiguous times ahead. We hope some of the articles will provoke thought and would be very keen to hear your own views via our social media platforms or if you want to get in touch with the authors directly.

Another issue of Insight magazine and another that sees us all operating in what can best be described as 'challenging' circumstances. It is not lost on us that we used the same word in the foreword of our last issue too, so perhaps we need to re-frame the problem in order to see the opportunities that lie ahead. Business leaders today are expected to face head-on a complex and evolving set of overlapping challenges that seem to be coming along in quick and unrelenting succession. In this edition of Insight, our team discusses some of those issues and how they can be turned into opportunities for success by breathing some positive energy into what could otherwise be a gloomy outlook if we allow it to be.

In this edition, Claire Graydon gives us an update on the new UK Procurement legislation and what opportunities it might present to those tendering for work under the new legislation. In addition to that, Edward Quigg gives us a view of recent changes to public procurement in, with particular interest paid to the requirement to apply a social value score to any bid.

Further articles on the importance of having contracts reviewed by a trained eye and in understanding price variations should help aid your understanding of where you may be exposed to risk and how we can help mitigate against that.

James Golden discusses the benefits of Adjudication and why it should be seen as the 'go to' means of resolving construction disputes in Ireland in a commercially pragmatic manner. Josh Bates comments on the expertise Quigg Golden has to offer in delivering bespoke and market leading training to your teams to help them avoid disputes arising altogether – arguably the most commercially pragmatic outcome of all.

Finally, Gavin Hendrie goes somewhat off-piste for us by discussing the challenges of dispute resolution in the workplace and how the expertise to resolve such a dispute for existing clients can be found here at Quigg Golden.

Once again, we hope you enjoy this edition of Insight. We would be thrilled to hear some of your feedback, so please do give us your thoughts; good, bad, or indifferent with regards to this edition. We very much look forward to working with you in 2023 and giving you the benefit of our expertise to turn challenge into opportunity.

Quigg Golden

CONTENTS

INSIGHT NO. 50

WHAT TO EXPECT FROM THE INDUSTRY IN 2023

AN INSIGHT INTO WHAT'S TO COME

Much has been written over recent years about *"VUCA"* as a means of describing our contemporary operating environment: one that is Volatile, Uncertain, Complex and Ambiguous. Here, in mid-October 2022, trying to think what might impact upon the Construction sector in the UK and Ireland throughout 2023, it's somewhat difficult to ignore the Volatile and Uncertain bits of that or indeed take a generally positive view. Current UK political instability and an increasingly challenging economic outlook, ongoing tensions in the Far East between China and Taiwan compounding the already devastating effects of war in eastern Europe and its impact upon energy, food and other material supplies do not make for a happy horoscope.

So, if we are to look towards 2023 as a year of renewed opportunity, perhaps paraphrasing a scene from the film Apollo 13 – a mission that NASA declared a *"successful failure"* – is in order, by considering the question *"what do we have that's good?"*.

Well, first and foremost, construction law is in good health. The current legislative landscape affords those in dispute an outlet to resolve the matter quickly, effectively and in a commercially pragmatic manner and without need for recourse to a lengthy court process (itself exposed to further delays as another symptom of the Covid-19 pandemic). At Quigg Golden we have a first-class team of experts, many dual qualified in both construction or engineering disciplines and the law who can guide you through the process in a quick, efficient and helpful manner. We don't see that changing at all in 2023, if anything, we'll get even better at it. Director, James Golden and Associate Director, Claire McCarry, are both qualified Adjudicators and undisputed experts in their fields. If you have any queries regarding Adjudication and how you might undertake it to resolve a construction dispute in the UK or Ireland, do reach out to them.

The UK's withdrawal from the EU affords it the opportunity to rewrite many laws, some of which will affect readers of this magazine in different ways. Those changes could be considered an opportunity for some and a threat for others. One change of note relates to UK Procurement legislation and the reforms to it that are likely to be brought into effect in 2023 (the Bill is currently sat at the Second Reading Stage in the House of Lords). This new legislation will be a departure from the previous EU regulations on the subject and enable the UK to create a system that removes some of the existing complexity, yielding a simpler, more transparent and competitive system, particularly for small and medium sized enterprises. This is good news, but it will mean that what we know of Procurement law in the UK will change. Keeping with the VUCA theme, that means uncertainty and maybe a little ambiguity in the early stages, particularly where we may need to look to the courts and precedent being set at the contentious end of the spectrum. Nevertheless, our team of Procurement law experts, led by Director, Edward Quigg and Senior Associate, Claire Graydon are already well ahead in their understanding of what this new legislation might mean for clients and can help you avoid many of the pitfalls that await those who are unprepared. If you have any doubts on the matter, please do not hesitate to contact Edward or Claire.

Similarly, the Law Commission of England & Wales is considering what changes might be made to UK Arbitration law in order to bring the Arbitration Act, passed in 1996, up to date with the demands of the modern era. Many commercial contracts will have a clause requiring disputes to be referred to Arbitration, so modernisation is another thing we can view optimistically. With Ireland and England already recognised global centres for Arbitration, Quigg Golden – with offices across both the UK and Ireland – are well placed to understand how such change might affect clients and how we can act accordingly on your behalf. Many of our staff are members of the Chartered Institute of Arbitrators and will be on hand to help.

Data Protection legislation has been around in the UK and Ireland for some time, but for many, the lack of any form of 'punishment' for wrongdoing meant it wasn't taken seriously. That all changed in May 2018 when the EU General Data Protection Regulations (GDPR) were brought into effect becoming the Data Protection Act 2018 (similarly named in both the UK and Ireland). Again, this is an area that the UK is seeking to reconsider with its own law which, at first glance, has potential to deviate from the EU legislation applied in other countries. This could present challenges, for example the ease with which personal information can be passed between organisations resident in different states. There is no doubt that for many, existing data protection legislation is complex and with a new, divergent system in place in the UK, the likelihood of increased uncertainty is significant. Further refinements in 2023 to Employment Law, Company Law, Taxation Law and Corporate Governance may impact on your business in as yet unforeseen ways too. Practice Director, Gavin Hendrie (a qualified Mediator and tri-chartered Manager, HR and Governance professional) – working in association with our sister firm in Belfast, Edwards & Company – will keep a firm weather eye on these changes as they occur and can assist clients as required.

The New Year in the UK and Ireland is typically a celebration of renewed hope and opportunity. Whilst there is much to be uncertain of in 2023 and many may see the year ahead as a 'glass half-empty', there is nonetheless as much, if not more, reason to see the 'glass half-full'. One thing of which we are not uncertain, is that Quigg Golden have many years of experience helping clients through a crisis and we will continue to do the same throughout 2023 and beyond.

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THE PEOPLE OF QUIGG GOLDEN

Our practice comprises of engineers, quantity surveyors, lawyers and non-practising barristers. Most of our team are dual qualified, with hands on experience in construction. Our holistic approach gives us the experience and expertise required to provide advice in a practical and commercially focused manner that consistently delivers excellence for our clients.

Our purpose is to serve our clients and achieve their commercial objectives.

The
UK PROCUREMENT BILL

EXCLUDING SUPPLIERS UNDER THE NEW REGIME

May 2022
BILL INTRODUCED

May 2022
FIRST READING

May 2022
SECOND READING

July 2022 -Currently
COMMITTEE STAGE

LORDS & COMMONS

AMENDMENTS & ROYAL ASSENT

BILL PASSED

6 month transition period

LAW IN FORCE

In the last instalment of Insight, we provided a detailed run-down of the UK Government's proposed reforms to public procurement as published in the 2020 Green Paper on *"Transforming Public Procurement"* and the Government's response to the consultation in 2021.

The main proposals expected to be implemented included six main principles of public procurement (transparency, fair treatment of suppliers, value for money, the public good, integrity and non-discrimination); a simpler regulatory framework; awards based on Most Advantageous Tender *("MAT")*; the introduction of a new Dynamic Purchasing System *("DPS")*; and, legislating to tackle payment delays in public sector supply chains. It is expected to become law in 2023, our prediction being that the 6 month transition period for when the law comes into force will end in late 2023 as the Bill is yet to progress to the House of Commons.

The Procurement Bill *("the Bill")* was officially introduced to Parliament in May 2022 and continues to progress through the legislative stages. The Bill has already undergone the first two readings in the House of Lords and is currently at the Committee Stage. The Committee Stage oversees a detailed line-by-line review of the Bill from start to end. Every clause of the Bill must be agreed to, and the House of Lords will vote on any amendments. The Committee Stage has been ongoing since July and there is no time limit to how long the House of Lords can discuss the Bill. Whilst the current version of the Bill has remained largely true to the principles in the Green Paper, its passage through Parliament will undoubtedly result in changes to the wording and details. One key debate is discussed below.

The debate at Committee Stage has addressed the process for excluding suppliers. The Green Paper and consultation identified mandatory and discretionary exclusion grounds as areas of uncertainty in the current regime. Whilst these concepts will be carried forward into the new regime, the new Bill intends to implement changes that make exclusion grounds clearer. The Bill purports to categorise suppliers into *"excluded"* or *"excludable"* groups.

Excluded suppliers are those that mandatory exclusion grounds apply to. Excludable suppliers are those to which discretionary exclusion grounds apply. When categorising into these groups, contracting authorities must consider the likelihood of reoccurrence of the exclusion grounds.

This is a new matter for contracting authorities to consider under the regime. Rather than marking suppliers on how past errors have been remedied, contracting authorities must shift their focus to suppliers' future behaviour and the likelihood of any recurring risk to public contracts.

To implement a clear regime for determining the likelihood of re-occurrence, specific factors must be considered by the contracting authority:

- If the supplier has taken the past misconduct seriously and that there is supporting evidence of this;
- Evidence of steps taken to prevent any re-occurrence;
- How recent the relevant misconduct was;
- If the supplier is committed to taking preventative steps; and
- Any other evidence considered relevant.

The Bill has also extended the scope of exclusion grounds to sub-contractors and any other associated suppliers. This is clearly a step towards increasing supply-chain transparency as per the principles of procurement set out in the Green Paper. This portion of the Bill is requiring increased due diligence from both contracting authorities and suppliers, encouraging pro-active approaches to remedying poor practice in the supply chain.

These are just some of the details being reviewed at Committee Stage regarding exclusion grounds under the Bill. A debarment list has also been introduced, with the possibility *"excluded"* status for suppliers becoming binding across all procurements. Little detail is available on this matter, it is expected that it will be dealt with in the secondary legislation – but it is something to note. The overarching approach of the Lords seems to be that a more consistent and forward-looking approach to exclusion must be implemented.

There is still much to unpack at the Committee Stage and it is unclear how long this process will take. It is not expected that this stage will conclude soon, after all reimagining the full UK procurement regime and refining the Green Paper into a functional and effective body of law is no minor task. It is exciting to watch this new chapter unfold and we hope to continue to provide regular updates on its progress.

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Quigg Golden provides the latest on all construction and procurement law related matters on a regular basis. Visit our website for more articles, our LinkedIn for Talking Point Tuesdays, or sign up to our MailChimp for new, events and special discounts on training courses.

Website LinkedIn MailChimp

SOCIAL VALUE IN PUBLIC PROCUREMENT

THE CHALLENGES AHEAD

The aim of social value is to drive social, economic, and environmental growth through government spending. Thereby, achieving value for money and beneficial community impact beyond the asset's main purpose. The achievement of these goals is now becoming a prevalent factor in public procurement. With social value policies being introduced in both the United Kingdom and Northern Ireland, we are now seeing an increased focus on social value across a number of jurisdictions and progressive guidance continuing to be published in Ireland.

Northern Ireland and the UK's Procurement Policy

On 31 January 2013, the Public Services (Social Value) Act *("the Act")* came into force in the United Kingdom. This is an Act which places a requirement on public bodies to have regard for economic, social and environmental well-being in connection with public service contracts.

The Act on its own, did not achieve its intended outcome with public bodies continuing to concentrate on obtaining the most economically advantageous tender and not formally scoring or selecting tenders who provided added social value. To combat this, a dedicated social value policy was introduced in September 2020 through PPN 06/20.

The situation in Northern Ireland is similar, the Buy Social Model was approved by the Procurement Board in 2015 but faced similar market apathy as the Act. Consequently, the Executive determined that to achieve greater value on its £3bn annual public spending, change was needed and through PPN 01/21, issued a new social value policy which came into effect on 01 June 2022.

These policies place obligations on public bodies to allocate a minimum of 10% of the total award criteria to social value during any public tender process with a value above the Public Contract Regulation thresholds. The thresholds, which are currently £5,336,987 for works contracts and £213,477 for services contracts, are inclusive of VAT.

As seen in the case of *Amey Highways Ltd v West Sussex County Council* (2019), where Amey lost out on the contract award by the "wafer thin" margin of 0.03%, public tenders are fiercely competitive, and with 10% of the total award criteria being allocated to social value, it has the capability to be a defining factor in determining the successful tenderer.

It is not yet clear, how following Brexit, the soon to be introduced Procurement Bill and the reformation of the UK Public Procurement Process will affect the above-mentioned scoring requirements in both the UK and Northern Ireland. Given that the Procurement Contract Regulations had previously provided the existing legal framework for incorporating and evaluating social value criterion, it is expected that change will occur.

Ireland's Procurement Policy

In 2018, Rialtas na hÉireann introduced an Information Note, *"Incorporating Social Considerations into Public Procurement"* in relation to its €12bn annual expenditure. Whilst the Information Note itself provides a useful practical guide for the achievement of social value and formed part of the National Public Procurement Policy in Ireland, it is explicitly stated to not be an interpretation of Irish Procurement Law and placed no express obligations on public bodies to score social value within its procurement processes.

More recently in October 2019, the Department of Public Expenditure and Reform published Circular 20/2019 titled *"Promoting the use of Environmental and Social Considerations in Public Procurement"*. This took a stronger stance on encouraging public bodies to consider the implementation of social value into its contracts with the Social Consideration Advisory Group being established as a cross-departmental organisation to promote and facilitate the incorporation of social value by assisting public bodies across Ireland to achieve social value.

However, unlike the above-mentioned jurisdictions, Ireland has yet to implement a dedicated social value policy, which places a formal obligation on its public bodies to explicitly evaluate social value within its tender award criteria. Accordingly, the achievement of social value through public procurement within Ireland has not been as successful in comparison to the United Kingdom and Northern Ireland.

Ireland, through its continued publication of social value guidance, is following a similar strategy that resulted in the introduction of dedicated social value policies in the United Kingdom and Northern Ireland. Therefore, public bodies in Ireland will be best placed to be well acquainted with the achievement, measurement and monitoring of social value.

In any case, Irish contractors bidding for an above threshold contract in the United Kingdom and/or Northern Ireland will be required to compete for contracts on social value scoring criteria.

Challenges ahead

Regardless of the differing policies and/or strategies introduced across different jurisdictions, the challenges faced with the implementation of social value into public sector contracts remain interchangeable.

The evaluation of tenders is intended to be an objective as much as possible. Notwithstanding this, the inclusion of any social value scoring requirement will result in a principally, but not wholly, subjective approach being undertaken as many long-term social impacts will not be readily identifiable nor measurable at tender stage. Thereby, social value commitments will be difficult to compare and the evaluation thereof requires elements of subjectivity which may make subsequent awards open to challenge, this is an added layer of complexity to the tender evaluation process.

Comparatively, it is straightforward to assess purely financial impacts from other changes in law and policy, for example the recent removal of the red diesel rebate scheme will result in increased preliminaries costs for contractors, to a predictable degree in line with the relative cost of white and red diesel. It is much less clear, however, when having to consider the potential benefit of a graduate development programme suggested by one tenderer, let alone compare that to a lower environmental impact solution suggested by other. Further, there are lessons to be learnt in terms of proportionality and monitoring. For example, how can a larger contractor offering 10 apprenticeships be compared to a smaller contractor offering just 2 with both commitments making up 20% of their respective workforce on any given project. To what extent can the contractor use the same 10 apprenticeships commitment in different procurement processes? Can it claim this social value improvement multiple times?

The process may result in a distinction between primary benefits, such as the financial and qualitive aspects of the product being procured, and secondary benefits related to social value. These secondary benefits may not directly benefit the public body in question but could result in increases to tender prices. There is a potential that public bodies may pay more for less.

From a principles-based perspective, a divergence will likely be encouraged for the Most Advantageous Tender being selected in favour of the Most Economically Advantageous Tender, in hopes of negating the purely monetary assessment of tenders which, in many cases, has led to the lowest priced tender being accepted with such approach, if adopted, often leading to an array of legal complications throughout the contractual chain of construction projects.

If social value is to be achieved, there may need to be an adjustment to the traditional, purely financial understanding of value to incorporate a broader range of social benefits. The successful implementation of social value in public procurement is not without challenges. There is a need to ensure that:

- The processes are not discriminatory;
- Value for money is still achieved;
- The burdens and costs are proportional to the works and tenderers; and
- Are contractually enforced.

We suggest that this can only be achieved through measurement and monitoring within the awarded contract, which will place an additional financial burden on public bodies, with the alignment of tender commitments with contractual provisions already being a known weak point in public procurement, often resulting in the need for expert advice.

Effectiveness of Social Value a foreshadowing?

The effectiveness of the recently introduced Social Value Policy in Northern Ireland can only be determined *ex post facto*, however with it now being over two years since the introduction of the Social Value Policy in the United Kingdom, concerns have already been identified.

Mr Rees-Mogg, within a recent Telegraph article, announced his intent to reduce the weighting given to social value when evaluating tender bids to return *"to a greater focus of achieving taxpayer value for money"* [1]. Additionally, Andy Burnham (Mayor of Greater Manchester) has been quoted describing the current Social Value requirements within PPN 06/20 as *"too general and too box-ticking"* and reiterated the need for *"tangible commitments"* [2].

Many have argued that the 10% award criteria allocation to score social value may become redundant if each and every tenderer is achieving the maximum scoring allocation through template style answers which do little, if anything, to further the achievement of social value in relation to the subject matter of the contract. If the 10% award allocation is to be effective, a robust scoring mechanisms must be developed. If all tenders are achieving 10%, or close thereto, the 10% award criteria may be rendered ineffective in determining the most advantageous tender.

It is not disputed that an underlying policy is imperative for the continued achievement of social value, however, there is a question over if a scoring requirement alone will be sufficient to achieving policy goals. It has become readily apparent, that larger contractors, often with their own dedicated social value departments and having previously made their own independent social value commitments, have an inherent advantage over many smaller contractors. This perhaps, is the reasoning behind Mr Ress-Mogg's comments on social value. With the smaller contractor(s) not being in a position to compete, and larger contractors independently taking measures, what is the benefit for the public at large if value is not achieved? Contractor's will need to embrace policy change and adopt a pragmatic approach to maintain competitiveness within future competitions, with public bodies having to develop social value scoring criteria in compliance with its respective policy.

CONCLUSION

As with the introduction of any new policies, and the absence of judicial decisions to provide clarification, public bodies and contractors alike will be presented with contrasting interpretations which, in effect, may lead to a rise in procurement related disputes.

Notwithstanding the challenges throughout this article, the rise in social value related policies is welcomed and as experience allows for the development of clearer standards of practice, we look forward to being a part of this and shaping how it develops to progress the achievement of value for money within public procurement.

Quigg Golden, with its expertise in the procurement process and contract drafting, is ideally placed to provide practical advice in a changing procurement market. For further advice, contact Edward.Quigg@QuiggGolden.com.

[1] https://www.telegraph.co.uk/business/2022/03/19/jacob-rees-mogg-reduce-government-focus-ethical-contracts/
[2] https://www.pioneerspost.com/news-views/20210302/make-social-value-metrics-more-tangible-greater-manchester-mayor-andy-burnham
[3] [2019] EWHC 1291 (TCC)


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NEW TO THE NEC?

What construction professionals need to know.

JCT v NEC

The JCT suite have been the go-to contracts for many decades. Today though, the NEC is making gains on the JCT's popularity and due to the NEC often being preferred for use in public procurements and its increasing use universally, it is increasingly likely that the construction professionals unfamiliar with the NEC will be required to use it at some point in the future.

The NEC Philosophy

The NEC suite was designed with an entirely different philosophy in mind to that of the JCT, and our clients, as construction professionals need to understand the differences between these two forms of contract.

The NEC, now in its fourth evolutionary iteration (NEC4), was intended to work around the realities of the construction industry through the implementation of some basic principles, including:

- Stimulating good management and collaboration between parties for mutual benefit;
- Clarity and simplicity - the contract is written in plain, easy to understand English and should be logical to follow and easy to explain, for example in a flow chart; and
- A one size fits all approach, with the NEC being modular and useable in wide variety of projects (including internationally) and across disciplines.

Simply put, the NEC form of contract is designed to be a real time project management tool, used continually throughout the course of a project. It avoids the use of legal jargon often seen in the JCT.

The NEC *"family"* includes several different forms of contract, with the most common being the Engineering and Construction Contract (ECC). To cover additional arrangements, there are also the following forms:

- The Engineering and Construction Subcontract (ECS).
- The Professional Services Contract (PSC).
- The Design, Build and Operate Contract (DBO – introduced with the NEC4 suite of contracts).
- The Alliance Contract (ALC – also introduced with NEC4).

As a result of the philosophy behind the NEC, the suite holds certain characteristics that tend to set it apart from the JCT. We cover some key differences here.

Structure, Options and Flexibility

Whereas the structure of a JCT Contract is split across the following sections:

- Conditions;
- Carrying out the works;
- Control of the works;
- Payment;
- Variations;
- Injury, Damage and Insurance;
- Assignment, Third Party Rights and Collateral Warranties;
- Termination;
- Settlement of Disputes; and
- Schedules.

The NEC is set out as follows:

<u>Core Clauses</u>

1 – General;
2 – Contractor's Main Responsibilities;
3 – Time;
4 – Testing and Defects;
5 – Payment;
6 – Compensation Events;
7 – Title;
8 – Risks and Insurance; and
9 – Termination.

The NEC also utilizes a choice of **Main Options** which determine contract structure and pricing, of which one must be chosen:

A: Priced Contract with Activity Schedule;
B: Priced Contract with Bill of Quantities;
C: Target Contract with Activity Schedule;
D: Target Contract with Bill of Quantities;
E: Cost Reimbursable Contract; and
F: Management Contract.

The NEC also provides a bespoke set of ***"Secondary Options"***, by way of a further 22 specific clauses depending upon which of the main option (A-F) is used.

Under the NEC, the section titled ***"Contract Data"*** contains the Works Information and Site Information.

Programming and Project Management

Whereas the JCT does not necessarily have a programme as a built-in contractual document, the NEC emphasizes that maintaining an accurate and up to date project programme will encourage active management, planning and record keeping. This programme focused approach is intended to reduce the likelihood, complexity and impact of delay and disputes. The NEC drafters refer to the programme as the *"beating heart"* of the NEC. Under the NEC the programme is critical for day-to-day management and for the assessment of compensation events. A contractor's programme may be rejected for the following reasons:

- Being shown to be impractical;
- Not showing the required information;
- Not realistically representing the Contractor's plans; and
- Not complying with the Scope of the Works.

Once the Contractor has prepared a programme for the works and this is approved by the Project Manager, it becomes the *"Accepted Programme"*. The Accepted Programme is a toll against which progress (or lack of) can be measured and easily permits a quickly accessible out turn of any delay. Revised programmes are submitted to the Project Manager for acceptance, and may also be subject to rejection for the reasons set out above.

Extensions of Time and Loss and Expense

Whereas, the JCT deals with EOTs and Loss and Expense as separate matters (as relevant matters or relevant events), the NEC manages both time and monetary change concurrently through the use of a single mechanism known as *"Compensation Events"*. The NEC4 lists 21 separate events as compensation events, giving rise to potential further entitlement to time and/or money for the Contractor, ranging from physical conditions, instructed changes to archaeological finds (i.e., the standard stuff).

Under the NEC, the *"early warning mechanism"* allows either party to warn of potential compensation events (although not all will be). This early warning mechanism deals with the matter in real time to reduce impact, and more importantly, to provide the parties with an opportunity to mitigate the effects of changes.

Failure to notify of a compensation event will likely remove entitlement to additional time and/or money, which further encourages cooperation and active management of issues.

Pricing and Payment

Different NEC Options allow for varied approaches to pricing. Generally, Options A and C use an activity schedule for pricing (i.e., payment for completed activities) whereas B and D use bills of quantities for pricing and assessing payments. In the NEC, rather than making interim payments on a cost basis, payments are usually made on a forecast basis.

The NEC may also use an *"Activity Schedule"* which holds pricing information for the Works from the Accepted Programme which is then used to manage payment per the prices allocated to each activity.

Defined Cost

Defined cost is a specialist mechanism to see what costs the Contractor may be allowed (or disallowed) to claim. They are separated into *"Schedules of Cost Components"* (i.e., lists of approved headings or otherwise), creating a far more open book approach than the JCT.

Dispute Resolution

The intention of the NEC's dispute resolution mechanism is to encourage the parties to take greater steps in solidifying a dispute resolution process into the contract, that is to be rigidly followed before either party commences litigation

The dispute resolution procedure in the majority of the NEC3 suite of contracts is based on one of two options:

- Option W1 (for use on projects that are not subject to the Housing Grants, Construction and Regeneration Act 1996).
- Option W2 (for use on UK projects where the agreement between the parties is a construction contract and is subject to the Housing Grants, Construction and Regeneration Act 1996).

The change from NEC3 to NEC4 saw a change to the dispute resolution process by introducing Option W3, which establishes the use of a *"Dispute Avoidance Board"* for use with the NEC4 ECC on projects that are not subject to the Construction Act 1996, meaning Option W3 may be used as a substitute for adjudication.

Quigg Golden Comment

The NEC is a very fair and proactive contract. The key stipulations involved in having a programme accepted, both encourage and mean the contract is a working tool, not one that can be left in a drawer until issues arise. This (while slightly more contract administratively cumbersome) makes it a more reactive form of contract, and dynamic tool designed to be used constantly throughout a project to ensure efficiency and reduce risk.

What can Quigg Golden do for you?

To learn more about the specific clauses and mechanisms and ensure you are equipped to work with NEC contracts, contact Quigg Golden to enquire about the various different courses we offer. Not only is Quigg Golden an accredited provider of the ICE Law and Contracts Management Course, but we also provide bespoke contract training, covering a broad range of contracts - not just the NEC. If you are having a specific issue with an NEC contract, please do not hesitate to contact us as our team of experts can provide advice and assistance.

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TRAINING WITH QUIGG GOLDEN

OVER 25 YEARS OF EXPERIENCE

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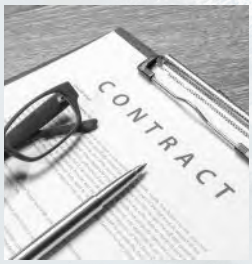

Practical examples and exercises.

Our experience working with contractors and contracting authorities across the private and public sector, has enabled our expert team to develop a range of training programmes for construction and procurement professionals.

Call 028 9032 1022
or email
Josh.Bates@QuiggGolden.com

THE IMPORTANCE OF CONTRACT REVIEWS

The contract is at the heart of every construction project.

Prior to entering into the contract, the parties can spend weeks, or even months, negotiating the terms of the contract. When instructed to carry out a contract review, Quigg Golden check the terms to identify potential risks which are then highlighted and explained. This could include any unenforceable and/or unfair terms that seek to transfer an unreasonable amount of risk to the contractor.

What is the purpose of a contract review?

- To enable clients to make informed decisions when they are negotiating and entering into agreements; and
- To ensure the relevant persons know their obligations under the contract such as the timeframes within which notices must be served.

Why are contract reviews important?

Construction is inherently risky. How that risk is allocated between the parties can often be a deciding factor in whether a project goes well or is a failure.

These risks arise not just from the wording/form of the contract, but also any omissions, and in the minutia of law. Seemingly unassuming wording or omissions can have significant cost implications further down the line.

Grey areas and uncertainty within contracts are a breeding ground for disputes. High risk and onerous clauses that were not identified prior to contract execution could have significant consequences affecting payment and/or claims for additional time and/or money under the contract.

Legal professionals who specialise in construction contracts and disputes have the experience to identify the risk(s) posed by clauses that might otherwise seem innocuous or inconsequential. By seeking professional contract review advice, and spending a relatively modest amount, contractors can manage the risk they are exposed to, and hopefully avoid expensive, drawn-out legal proceedings. Below are some of the key areas of risk allocation that should be considered by a party prior to entering into a contract:

Payment

Payment is important for all businesses. Heightened risks could include unusually long payment terms or impediments to receiving payment, including any condition precedents and/or time bars which could completely remove entitlement to payment unless certain terms are first complied with by the payee within a specified timeframe.

Change Management

Change management, and how change is dealt with by the parties is one of the most common causes of disputes. Change management includes claims for any extensions of time and additional payment (delay/disruption claims and/or variations).

Again, any condition precedents and timebars should be identified and, if necessary, negotiated out of the contract. Failure to comply with condition precedents and/or timebars can significantly limit a contractor's entitlement to claim additional time and/or money.

Liquidated and Ascertained Damages

It is important to understand how a LAD clause functions, what the purpose of these clauses is and how they can be negotiated to limit the risk to your company such as negotiating caps on liability.

Design Liability

Different forms of contract have their own way of allocating design risk between the parties. Typical examples of the transfer of additional design risk include:

- The Contractor assuming responsibility for any designs produced by the Employer / others;
- The Contractor being responsible for ensuring that all designs conform with statutory requirements, and any subsequent changes to those statutory requirements (clauses such as this can have serious cost consequences, for example, cladding requirements post Grenfell); and
- *"Ground conditions".*

Termination and Dispute Resolution

At contract negotiation stage, there is a tendency for little attention to be paid to termination and dispute resolution provisions. However, these provisions are extremely important, and can pose significant risk. For example, the contract could include a *"termination for convenience"* clause, which allows one of the parties (usually the Employer) to terminate the contract, without the need for the Contractor to have committed a breach and without there being any cost consequences i.e, the Contractor is prevented from bringing a claim for loss of profit on the remaining works.

What can Quigg Golden do for you?

When reviewing standard form and bespoke contracts, it takes a trained and experienced eye to identify all the above risks (and many more we have not mentioned for the sake of brevity). Quigg Golden have a dedicated contract review team (led by James Sargeant), with years of experience, who would be happy to discuss whether your contract could benefit from these services that we offer.

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Price Variation Clauses

In the last edition of Insight magazine we addressed the *"material shortage crisis"* and the unexpectedly high costs of construction materials. These issues are effectively symptoms of major events such as COVID-19, Brexit and, more recently, war in Ukraine.

Whilst the outlook on the above has been absent of positivity for the duration of 2021 and nearly all of 2022, the Construction Availability Statement from the Construction Leadership Council *("CLC")* on 17 October 2022 finally shared some welcome news as *"all regions are reporting the best product availability in two-years"* and the December Statement revealed that availability continues to improve. Whilst overall price inflation is starting to decrease, however concern persists especially in relation to energy costs.

Whilst things may be starting to improve, improvements are slow and the lasting effects of inflated prices continue to be felt throughout the industry, especially by contractors and sub-contractors. Electrical contractors remain acutely affected by material availability and inflation issues. Even if prices dropped back to pre-2020 levels tomorrow, contractors would still be trying to mitigate their losses due to price increases on past and on-going contracts that have created cash-flow issues and ignited claims for price uplifts. It is a problem that is not going anywhere in the short-term.

With all that being said, the remainder of this article aims to provide some guidance on contractual remedies that may be available to deal with price increases - specifically Price Variation *("PV")* clauses.

What is a Price Variation Clause?

Like most contractual clauses they allocate risk. In this instance, that of increases (or decreases) in material costs. Most standard forms include some form of optional PV Clause, but historically these have not been utilised, which meant that the risk/reward lay entirely with the Contractor (or Sub-Contractor). That trend is now changing, and often executing parties will refuse to contract without some kind of PV Clause being included in the Contract.

The risk can be allocated in a number of ways, for example, the Contract may state that there is to be no variation for the first year of the Contract, in which case the Contractor will have that risk from when the Contract was priced until that date and will only be entitled to claim increases when that deadline is past.

Additionally, or alternatively, a limit of change may be set, for example, there is no adjustment payment until the price has changed by more than 10%. This means that the Contractor has the risk/reward for 10% of price movement. So simply, the risk may be shared by some kind of split.

Determining the Figures

All this begs the question, how to determine how much is paid. There are two common methods of determining the extent of the change, index-based price adjustment and evidence-based price adjustment.

Index-Based Adjustment

Index-based adjustment clauses will refer to a specific index in the contract, for example the Consumer Price Index (*"CPI"*) for small general project. Larger projects, will have the contract sum subdivided into proportions per a material and allocated to a suitable index. So a major roading project may differ in proportions allocated to a bitumen index for the binder, and an aggregate index for the stone. The following general formula is then applied, usually per payment application according to the proportions (no matter what work was actually carried during that time period).

$$Pn = (In / Io)$$

Pn = adjustment factor
Ln = current value of the index
Lo = original value of the index in question

As a worked example, let's say that you are applying this formula to calculate price uplifts for steel. The steel price index was 2.0 at the start of the contract. The current value of the steel index is 2.2. That means the adjustment factor is 2.2/2.0, so the adjustment factor is 1.1.

So, if the payment application is valued at £100k, and the contract proportioned 10% of the contract sum to adjustment according to the steel index, then £10k of the £100k application is adjusted.

The adjustment factor, 1.1, is multiplied by £10k to arrive at £11k. This is a price increase of £1k. So, £1k is added to the £100k to arrive at a payment of £101k - assuming no other adjustments are made.

Things to Note

Any number proportion of the contract sum can be adjusted to any index. However, the proportion and the index will be defined in the contract and those factors do not change. Usually, the price variation clause will operate on a per-application basis rather than the parties revisiting the calculations at the end of the job. Both Clients and Contractors must ensure there is ongoing input in the assessment of the Contractor's applications to ensure that the adjustments are made in accordance with the contract.

Contracts that use index-based adjustment

This type of calculation is used the following contractual clauses:

- NEC4 Secondary Option X1 Price Adjustment for Inflation;
- JCT Option C - formula adjustment;
- Public Works Contracts PW-C1 - PW-C5 - referred to as *"the Formula Fluctuations Method"* in PV2;
- RIAI e.g. Clause 13.7; and
- FIDIC - *"Schedule of Cost Indexation"* is used.

Evidence-Based Adjustment

The alternative is evidence-based adjustment. This requires the Contractor to provide evidence of a price increase between when the work was priced and when it is performed. Generally, this should be based on the *"Market Price"* as in the price available to the market rather than the price available to the specific contractor. So that means showing the prices of varying suppliers. This avoids issues such as discounts for quantity purchases, or special deals between contractor's suppliers advantaging or disadvantaging a particular party. If that information can be provided, then it is a simple matter of comparing the two *"Market Prices"* to calculate the change.

Things to Note

In order to deploy this method effectively, the Contractor must ensure that it has kept robust records, which may include having to obtain quotations from suppliers it never intends to use. Clients are able to analyse the validity of evidence-based claims as they are able to obtain prices from numerous suppliers for the same materials. However, there is clearly a greater administrative burden in collecting and reviewing this information compared to simply applying an index-based calculation.

Contracts that use evidence-based adjustment

- JCT Option A - contribution, levy and tax fluctuations;
- JCT Option B - labour and material cost and tax fluctuations;
- Public Works Contracts - refers to this as the *"Proven Cost Method"* in PV1; and
- RIAI e.g. Clause 36 Wage and Price Variations.

Quigg Golden Comment

We are aware that rising prices is an issue that continues to affect the whole industry, should you need advice on this please do not hesitate to contact us. We regularly provide advice and assistance on how to claim price uplifts using price variation clauses. We also provide a full range of services from contract reviews or contract drafting before the execution of the contract, right up to claims support for contentious matters that involve dispute resolution processes.

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an insight into

ADJUDICATION IN THE REPUBLIC OF IRELAND

Adjudication has become a staple of dispute resolution in the British and Northern Irish construction industry since its introduction into law in 1996. A large body of case-law has been developed in these jurisdictions and construction professionals have become very familiar with the adjudication process and have learnt to trust it.

The Irish response to these developments in the United Kingdom came nearly eighteen years later via the Construction Contracts Act 2013 *("the Act")* which came into force in July 2016. The later introduction of adjudication in Ireland has meant that the first enforcement decision in Ireland was only in 2021 and thus, the Irish courts have significant ground to cover in terms of questions of interpretation of the Act. In the real world, what this means is that the adjudication process is perhaps less ingrained into the industry's culture in Ireland, and, in our experience, construction professionals are oftentimes slightly more sceptical about exercising their statutory right to adjudicate. Although, its popularity is increasing. This article aims to provide a quick look at how adjudication operates in Ireland and what the benefits are of this process in the commercial world.

How does it work?

Adjudication is a 28-day dispute resolution procedure which can be used to resolve dispute relating to payment under construction contracts. The process can be summarised as follows:

- A payment dispute crystallises. What this means is that the parties are in a clear disagreement as to the sums owed. It might mean that negotiation has failed but really it only requires one party to have asked for something and the other to have denied it.

- The aggrieved party will then serve a *"Notice of Intention"* to refer the dispute to adjudication. The aggrieved party is thereby referred to as the *"Referring Party"* and the party to whom the notice was served is the *"Responding Party".*

- Once the notice has been served, the parties can agree on an adjudicator, failing which the Referring Party writes to the Construction Contracts Adjudication Service to seek the appointment of an adjudicator. One key difference between UK adjudication and Irish adjudication is at this stage of the dispute. In the UK an adjudicator must be appointed within 7 days, however in Ireland there is no time limit and appointment will depend on availability. However, it usually takes less than two weeks.

- Within seven days of the adjudicator's appointment, the Referring Party must submit its *"Referral Notice"*. This is essentially a document which sets out the detail of the Referring Party's case.

- Thereafter, there is a series of submissions from both parties to the adjudicator.

- The adjudicator will review the submissions and evidence given to them by the parties and they must reach a decision within 28 days, subject to any extensions that might be granted.

- Once the decision is given, it is immediately enforceable, but can always be changed by negotiation or final dispute resolution through litigation or arbitration. However, most adjudication decisions end up resolving the dispute finally for the parties.

Enforcing a Decision under the Construction Contracts Act 2013

Under sections 6 (10) and 6 (11) of the Construction Contracts Act 2013, the decision of an adjudicator is not final and conclusive. Rather, the decision is open to be overturned by arbitral or court proceedings. The legal effect of an adjudicator's decision is to impose an obligation to make a payment in the interim – the *"pay now, argue later"* mechanism. However, a party may be able resist the enforcement of an adjudicator's award where they can demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the decision, even on a temporary basis. However, courts impose a high threshold for any such resistance, so parties must assume the immediate payment obligation will apply.

What are the benefits of Adjudication?

The ultimate goal of adjudication is to provide the quick resolution of disputes to protect cash flow in the supply chain – because cash is king. Each year the Ministerial Panel of Adjudicators in Ireland must produce an annual report, this report demonstrates just how effective adjudication has been in achieving this goal. The most recent report reveals that in between 2018 and 2021 well over 100 disputes were referred to adjudication, and in 2021 63% of the disputes were valued between €50,000 and €1 million, and 25% of the disputes were valued at over €1 million. The increasing uptake of adjudication paired with the value of the disputes being referred is a clear indicator that confidence in the process is being won. Further, most of these adjudications were decided in 28 – 42 days, demonstrating that the process is remaining true to its essence. This timeframe is extremely expedited compared to litigation or arbitration which can take years and eat up huge amounts of fees for the parties. Although because it is compressed, there can be a very intense period dealing with issues. Making it happen smoothly is often something that benefits from professional help.

Conclusion

Adjudication is an extremely effective process, when used properly. It should only be undertaken subject to a full risk assessment of the individual case and the application of expert advice. Quigg Golden has the advantage of over twenty years of adjudication experience as we have been partaking in adjudications for our clients since its inception in the UK, and we even have two practicing adjudicators in our expert cohort. Furthermore, as many of our team our dual qualified, we can provide both the construction and legal expertise required for a successful adjudication. Our experience is spread across smaller matters to multi-million euro disputes.

James is a practising adjudicator: a member of a number of appointing body panels including the Institution of Civil Engineers, TeCSA and the ministerial panel in Ireland, as well as the Chair of the ICE Dispute Resolution Panel.

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HR GOVERNANCE & DISPUTE RESOLUTION

CONTRACT REVIEWS, TRAINING AND MEDIATION, BUT NOT AS YOU KNOW IT

At Quigg Golden, we specialise in reviewing the various standard forms of construction contract in use across the industry and, ultimately, aid you through the process of dispute resolution. But did you know we can also review your employment contracts and aid you through the process of managing employment disputes too? This article aims to outline why a good employment contract can be an important factor in avoiding disputes and why you should talk to one of our team if you find yourself involved in or managing employee disputes.

Preventing Disputes from Arising

Perhaps the easiest way to avoid disputes arising in the first instance is to be very clear about the what is expected in terms of such things as performance, behaviour, outputs etc and the easiest way to articulate that is via an employment contract. A contract can be formed orally or in writing, but if you choose the latter option, it becomes much easier, should the need arise, to prove what was agreed, when it was agreed and between whom it was agreed. Employment Contracts should therefore be in writing and there are certain things it ought to contain, known as a 'written statement of particulars'. This could be simple things such as: who is the contract between, when does it start (and if temporary, when does it end), how much should the salary or bonus be, what is the annual leave entitlement, where is the proper place of work and other such important terms and conditions of employment. These are known as 'express terms', some of which will have to conform with statutory requirements, for example health and safety, equality and diversity requirements, maternity policies, annual leave allowances or even just the hours of work to name but a few. In addition, 'Implied Terms', for example that employees won't be expected to act unlawfully in the course of their duties, that the employer will provide a safe place of work and that both employer and employee owe each other a duty of trust and confidence will also need to be considered.

Another valuable aspect of a written employment contract relates to the process to be followed should a dispute arise. Existing Quigg Golden clients shouldn't find this last part surprising – the statutory right to use Adjudication as a means of quickly and efficiently resolving disputes is after all, a provision within both the Housing Grants, Construction and Regeneration Act 1996 (in the UK) and the Construction Contracts Act 2013 (in Ireland). Whether it be a dispute with another party to a construction project or with an employee over a work matter, ensuring that your employment contracts say the right things in the right manner is of significant importance. Either way, Quigg Golden has the expertise to guide you through the process and ensure you minimise risk and exposure to problems down the line.

Having a well set out contract of employment is just one part of your HR governance that will help prevent disputes from arising though. Good leadership and management, where employees are sure of their role, their responsibilities and their part in the overall organisational plan is vital too. This means being able to identify areas of friction or weakness in your setup and having the wherewithal to address it early on. This sometimes requires 'difficult conversations' and it is often the reluctance to do so that leads to issues escalating to a point where a dispute forms. If you think this is an area you or your team need to develop, again, we can help with bespoke training or technical assistance to approach such issues with confidence and head off any potential disputes at the pass.

Dispute Resolution Options

Like any disagreement, the options for resolving the matter can be loosely defined as 'informal' or 'formal'. We would always encourage parties to resolve their differences as informally (and early) as possible, but often this just isn't achievable. In such circumstances, recourse to a formal process of dispute resolution should be sought. In respect of employment matters, at the extreme end, this may be via an Industrial or Employment Tribunal or perhaps, in very extreme cases, by taking the matter to the Courts. Those are both drawn out and potentially expensive processes, leading to the increasing likelihood that some form of Alternative Dispute Resolution (ADR) will be required in the first instance. Indeed, ADR is becoming so commonplace that there are some who suggest the 'Alternative' be dropped, such is the increasingly mainstream appeal. Of the various options open, a particularly suitable form of ADR in resolving employment disputes is Mediation.

What is Mediation?

Mediation is an entirely voluntary and confidential process that seeks, through an impartial interlocutor – the mediator – to facilitate agreement between two parties to a dispute. It is ultimately about finding a compromise through common ground.

Benefits of Mediation

Mediation is becoming increasingly recognised as a means of settling disputes of various natures but within a business setting and for a wide variety of reasons. Firstly, it is quick, minimising disruption and avoiding the lengthy process of waiting on dates for IT/ETs or appearances in court. Comparatively, it costs significantly less than a Litigation matter too, with 75% of disputes referred to Mediation settling within just one day. That means a Mediator will likely charge a fee far less than a firms of Solicitors might charge on an hourly basis for work carried out over several weeks or even months. Mediation is a confidential process, meaning the outcome won't be aired for public viewing. As it also seeks to establish an outcome which is mutually agreeable, it can help save business relationships that might otherwise be ruined via a more combative process. That's what makes it especially useful in settling workplace disputes, particularly in the early phases and where no obvious 'right or wrong' answer can be applied (where a disciplinary process may be more pertinent).

About the author

Gavin Hendrie is the Practice Director at Quigg Golden and responsible for overseeing all operational aspects of the firm, including: HR, Finance, Governance, Compliance, IT, Business Development and Infrastructure matters. He is a Chartered Manager, Chartered HR practitioner and Chartered Governance Professional and Company Secretary and also a CMC accredited Mediator in his own right. His depth and breadth of experience is available to all Quigg Golden clients by arrangement.

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4.9 / 5 average rating on ReviewSolicitors

"QUIGG GOLDEN ARE OUR GO TO LEGAL EXPERTS FOR ALL CONSTRUCTION RELATED ISSUES. THEIR DEPTH OF KNOWLEDGE, CONTRACTUAL AWARENESS AND ABILITY TO REMAIN WELL INFORMED OF CURRENT LEGAL PRECEDENCE ALLOWS THEM TO PROVIDE US WITH REALISTIC AND UNAMBIGUOUS ADVICE WITHOUT DELAY. ONCE AGAIN WITH THIS JCT CONTRACTUAL ISSUE THEY ALLOWED US TO APPLY PRESSURE IN A WELL INFORMED BUT CONGENIAL WAY WHICH HAS ACHIEVED THE DESIRED RESULT WHILST MAINTAINING OUR RELATIONSHIP WITH THE CLIENT. A WIN WIN SITUATION FOR US THANKS TO QUIGG GOLDEN."

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