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STA Seminar

Payment Practices, Collateral Warranties & Retention

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YELLAND SAVAGE
CONSTRUCTION
LAW EXPERTS

Payment Practices post-COVID

- ▶ Supply chains are being expected to fund Covid issues.
- ▶ This is being done in a number of ways. Clients/ Contractors are:
 1. Not granting time and/or money for Covid delays
 2. Not granting time and/or money for **ALL** Covid delays
 3. Using Covid to disguise culpable upstream delay and granting EOT for Covid delays where the Contract provides for time only **EVEN IF** the project was already in delay for a reason that would have entitled the claiming party to time and money (e.g. design delays).
 4. Making spurious claims
 5. Deleting Covid recovery provisions in new contracts

1. Not granting time and/or money for Covid delays

▶ STA T&C's:

- 1.5 “Date for Completion” means the date or dates specified in the Quotation or otherwise agreed in writing between the Buyer and the Seller on which the Goods are to be delivered and/or services completed at the Place of Delivery, including for the avoidance of doubt, any extension to the Date for Completion arising from any delay, or determined in accordance with the Contract.
- 6.3 Any Date for Completion is to be treated as an estimate only unless otherwise agreed in writing by the Seller and shall not involve any obligation on the Seller to complete the Goods and Services by a specified date.
- 7.2 The Seller shall not be liable for any delay or for any consequences of any delay in the production or delivery of any of the Goods or in the completion of the Services where the Date for Completion is an estimate as defined in 6.3. It will, however be entitled to compensation if it is delayed and/or disrupted by matters outside of its control.
- 7.3 If and whenever it becomes reasonably apparent that the commencement, progress or completion of the Goods and Services is being or is likely to be delayed due to circumstances outside the control of the Seller, the Seller shall give notice to the Buyer. If any such delay occurs then (unless the cause of the delay frustrates or renders impossible or illegal the performance of the Contract or shall otherwise discharge the parties from their obligations under the Contract) the Date for Completion shall be extended by such period (not limited to the length of such delay) as the Seller may reasonably require to complete the performance of its obligations. The Seller will advise the Buyer of the revised Date for Completion in writing as soon as possible. The Buyer will be deemed to have accepted the revised Date for Completion unless he has objected in writing within 14 days of the Seller's notice, stating valid reasons for that objection.
- 7.4 In circumstances where the Seller has agreed a Date for Completion which is not an estimated date, and the Goods and/or Services are not so delivered or completed for reasons other than those set out in clause 7.3, the Seller shall be liable to pay to the Buyer liquidated and ascertained damages in an amount equal to 0.5% of the sum in the Quotation per week of delay up to an aggregate maximum amount of 5% of the Price, or 10 weeks, whichever is the lesser amount. It is incumbent on the Buyer to mitigate costs generated as a result of any delay. The Seller shall have no other or further liability of whatsoever nature to the Buyer whether in contract or in delict/tort in respect of a failure to deliver the Goods or to complete the Services in the circumstances outlined in this clause.

1. Not granting time and/or money for Covid delays (cont.)

▶ STA T&C's:

- 3.1 The rates and prices stated in the Quotation or any price subsequently submitted by the Seller are based on materials and wage rates applicable at the date of the Quotation or variation quotation on the understanding that the supply of the Goods and Services will be completed within the Validity Period. Should completion be delayed beyond the Validity Period as a result of any fault of the Buyer or any other reason outwith the control of the Seller, the Seller reserves the right to adjust the rates and prices stated in the Quotation or variation quotation in line with the increased costs of materials, labour or plant incurred by the Seller. Any such adjustment will be notified to the Buyer as soon as practicable in writing after the expiry of the Validity Period.
- 3.2 The Seller reserves the right to increase the rates and prices stated in the Quotation or any variation quotation by an amount equivalent to any additional costs, taxation or levies imposed on or affecting the cost to the Seller of providing the Goods and Services after the date of the Quotation or any variation quotation by virtue of any statute, regulations or orders issued by Government Department or any other duly constituted authority, including (without limiting the generality of the foregoing) any statutory changes in taxation of fuel required to deliver Goods.
- 3.3 A variation includes any change to the Contract, howsoever arising, whether it is driven by the Buyer, or arises as a result of something outside of the Seller's control. A variation may be instructed by the Buyer, or notified by the Seller to the Buyer, if the seller becomes aware of a variation which has not been instructed by the Buyer.
- 7.1 If, due to circumstances outside the control of the Seller, the Buyer cannot accept delivery of any of the Goods and Services on the Date for Completion, or is otherwise unable to grant access to the Seller to the Place for Delivery for the purpose of delivery of the Goods or the commencement of the Services, the Seller reserves the right to recover any costs incurred by the delay and/or to continue to manufacture Goods and deliver them to storage in accordance with Clause 8. The value of Goods not delivered as a result of delays by the Buyer or reasons outside the control of the Seller will be included in a subsequent Application for Payment.

1. Not granting time and/or money for Covid delays (cont.)

▶ NEC ECC 2013

- ▶ NEC 60.1 The following are compensation events.
 - ▶ (1) The Project Manager gives an instruction changing the Works Information except
 - a change made in order to accept a Defect or
 - a change to the Works Information provided by the Contractor for his design which is made either at his request or to comply with other Works Information provided by the Employer.
 - ▶ (2) The Employer does not allow access to and use of a part of the Site by the later of its access date and the date shown on the Accepted Programme.
 - ▶ (4) The Project Manager gives an instruction to stop or not to start any work or to change a Key Date.
 - ▶ (5) The Employer or Others
 - do not work within the times shown on the Accepted Programme,
 - do not work within the conditions stated in the Works Information or
 - carry out work on the Site that is not stated in the Works Information.
 - ▶ (19) An event which
 - stops the Contractor completing the works or
 - stops the Contractor completing the works by the date shown on the Accepted Programme.and which
 - neither Party could prevent,
 - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
 - is not one of the other compensation events stated in this contract.

1. Not granting time and/or money for Covid delays (cont.)

▶ JCT

▶ JCT D&B 2016

▶ 2.26 The following are Relevant Events

- (1) Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change;
- (12) the exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Works;
- (14) force majeure.

▶ 4.21 The following are Relevant Matters

- .1 Changes and any other matters or instructions which under these Conditions are to be treated as a Change;

2. Not granting time and/or money for ALL Covid delays

- ▶ Is time being awarded for the site shutdown period only?
- ▶ Does time awarded include slower working practices due to change in site operating procedures, loss of factory slots, slower production?

3. Using Covid to disguise culpable upstream delay and granting EOT for Covid delays where the Contract provides for time only EVEN IF the project was already in delay for a reason that would have entitled the claiming party to time and money (e.g. design delays).

4. Making spurious claims

- ▶ We are seeing an increase in old claims coming out the woodwork, particularly delays and defects claims.

5. Deleting Covid recovery provisions in new contracts

- ▶ Be aware of amendments to Standard Terms (STA Terms, NEC, JCT)
- ▶ Typical deletions include:
 - ▶ NEC3 ECC 60.1(19) An event which
 - stops the Contractor completing the works or
 - stops the Contractor completing the works by the date shown on the Accepted Programme.and which
 - neither Party could prevent,
 - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
 - is not one of the other compensation events stated in this contract.
 - ▶ JCT D&B 2016
 - 2.26 (12) the exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Works;
 - 2.26 (14) force majeure.
- ▶ These clauses are being deleted altogether or amended so as to exclude anything foreseeable at the Base Date.

Collateral Warranties & Retention

- ▶ We have not yet seen any changes to the treatment of retentions and collateral warranties post-Covid.
- ▶ This may become more of an issue over the next 12 months as a result of insolvencies.

Collateral Warranties

- ▶ Have you contracted to provide a collateral warranty?
- ▶ Have you contracted to provide a collateral warranty in the proffered form?

Negotiating collateral warranties:

- ▶ The collateral warranty should not give the beneficiary any greater rights than the original party you have contracted with. The collateral warranty should not impose on you any greater duties than under the contract.

Standard Terms & Conditions for the Design, Manufacture, Supply and Erection of Timber Frame Products

20.1.5 The provision of a Collateral Warranty Agreement, unless otherwise agreed in the Quotation. In the event that a Collateral Warranty is to be provided as per the Quotation, it is on the basis that

20.1.5.1 The wording is in a form that is agreeable to the Seller.

20.1.5.2 It will not be valid unless and until the agreed final application has been paid in full.

Retention

- ▶ The use of retention bonds can limit issues of retention recovery
- ▶ Other alternatives to retention should also be considered (e.g. project bank accounts, performance bonds).