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If a requirement to issue a notice on time or budget extension is not properly met, the contractor may end up out of pocket

Issue the notice or pay the price

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The case

Education 4 Ayrshire Limited v South Ayrshire Council [2009]

Most will agree that in the construction industry, the Terms of the Agreement between the parties are often left in the bottom draw and not followed until something goes wrong. The various standard forms of contract all contain different provisions dealing with matters such as payment, variations, extension of time and damages, to name but a few.

So, given that most parties don't even consider the Terms, which, if any, of them do you need to strictly adhere to? Well, in our opinion at Hill International we would say that all of the provisions need to be followed, but then we would say that wouldn't we!! However, a recent decision of the Court of Session may well have placed a greater importance on both reading and complying with the provisions of the contract.

Most quantity surveyors and commercial managers will be aware of Terms which are said to be 'condition precedent' to any entitlement, but how accurate do you really need to be when drafting that delay notice? Well, according to the Court of Session the answer is simple, you need to be very accurate, or you face losing your entitlement to either time, money or both.

The above decision came from a case which involved a PPP Agreement, which one can imagine contained numerous provisions held in what was most probably a number of lever arch files. The court in this case, however, was asked to only consider those Terms contained at Clause 17 of the Agreement. Clause 17 dealt with Extensions of Time and of course those all important costs, which were associated with that extension. Clause 17 stated, amongst other things, that the contractor should notify the employer under Clause 17.1 of any likely delay as soon as this was practicable, which, as I am sure you will agree, seems reasonable. Nevertheless, the Clause went on to state that the Notice should in any event be given within 20 business days of the contractor becoming aware of the event: now that's getting a bit more onerous.

Clause 17.5 stated that subject to Clause 17.6 where the delay event was considered under the agreement as a 'Works Compensation Event', the contractor could claim relief from either its obligations and/or claim compensation. Clause 17.6 states that as soon as practicable and in any event within 20 business days, the contractor should give notice of its claim to the employer for both time and money.

So on 2 May 2007 the contractor sent a letter to the employer which stated that pursuant to Clause 17.1 it was notifying the employer of the delay. The letter also stated that "we will submit our full claim in accordance with Clause 17.6 of the project agreement" and the contractor also attached a copy of correspondence from its subcontractor which set out details of the estimated delays and costs. This included a proposed programme and the subcontractor's claim for 19 weeks extension of time.

The outcome

Well, by now you are probably saying: "So the contractor got its extension of time and associated costs". Well if that's what you thought, you were no different than most of us in construction. The answer though is somewhat more convoluted. The court said that the contractor had failed to give notice as required by Clause 17.6 of the contract.

No, you did read it correctly: the contractor had failed to give Notice pursuant to the contract. The court said that as a condition precedent the only question for the court was whether the notice of 2 May complied with the requirements as set out within the agreement at 17.6.1. The Clause required that the contractor "give notice of its claim". The letter stated: "We will submit our claim in accordance with Clause 17.6".

By now you can probably see what's coming, that is the letter did not set out the claim it merely stated that it would submit a claim and as such it had not met the requirements of Clause 17.6.1. The pursuer's (claimant) representation stated that an allowance should be made for the fact that Notices are drafted by businessmen and not lawyers - this seems like a fair argument I hear you cry!

Nevertheless, the court stated "It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions". Now I don't know about your experiences of construction, but that's certainly not my understanding.

What can we learn from this decision?

Well, the first thing to learn is that a lot of people believe that being contractual has a negative impact on their relationship with the other party. So if this decision teaches us anything it's that if there is a requirement to issue a Notice then that Notice must be issued, otherwise it's likely that your company will be faced with the costs and no possible prospect of recovering them.

Secondly, if a notice requires a specific format, served on a specific address to a specific person then the Notice should comply with these requirements, otherwise any notice which has been issued may be deemed by the courts, arbitrator or adjudicator to be non-compliant and of nil effect.

It should be noted that this decision has come from the Scottish courts and as such it is only persuasive authority to the English courts, but nevertheless if the English courts are persuaded by this decision contractors and subcontractors alike need to be aware of its implications.

Source: Steve J Oakes is a senior consultant at Hill International in Birmingham.