

Construction issues and reflective assignment



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Introduction

This report evaluates and analyses 4 issues which arose from a construction project and solutions have been recommended.

A reflective essay is included to provide an amicable solution to the issue.

Background Information

Smart Developments are a commercial development company based in Leeds with goals to provide new sustainable buildings in Leeds. The first development is a £10, 000, 000. 00 project to build new accommodation, retail, sports and leisure facilities.

Modern Contractors are a respected and hard-working medium sized contracting organisation operating in Leeds and throughout the region.

Modern Contractors had signed an 18month contract with *Smart Developments* to complete the building works, based on JCT Standard Building Contract with Quantities 2011.

The following issues have arisen:

1. On the date that *Modern Contractors* were due to start the project the main entrance to the site (as stated in the Bills of Quantities) is blocked by materials left by the Client. These materials are not removed from site for 1 week.
2. During the removal of the cellar a gas main was found and British Gas was called to relocate the main which took 16 working days. Some works could

continue but the repositioning of the gas main caused a delay to the progress of the main groundworks.

3. Then, during the excavation of the substructure works ancient roman coins are found. This leads to a further delay of 1 month to allow for archaeological investigation work.

4. Monthly payments are agreed in the contract particulars and these should be in *Modern Contractors* account by the 15th of each month. In August and six months into the contract period payment was not paid until 5th September. When *Modern Contractors* complained to the employer they said “ that’s the trouble with banks these days – you just can’t rely on them” and *Modern Contractors* “ should know better than to complain about the situation as this is standard industry practice”. As *Modern Contractors* have some issues with cash flow they are proposing an additional clause in their contracts with their sub-contractors that will provide for them to pay the sub-contractors only when they have been paid.

Issue 1

On the date that Modern Contractors were due to start the project the main entrance to the site (as stated in the Bills of Quantities) is blocked by materials left by the Client. These materials are not removed from site for 1 week.

Before going deep into the roots of the contract, it is important to note that all site works are under responsibility of Smart Developments.

What does the contract say?

In the case of *Freeman v Hensler (1900)* where it was held that it is an employer's duty (of co-operation) to give the contractor possession of the site within reasonable time to enable him to carry out and complete the work on the completion date.

According to JCT 11 SBC/Q, the employer has to co-operate fully with the contractor so that the site is handed over within reasonable time, and the contractor will be able to perform the works as per schedule.

If the employer fails to do so, it is possible for the employer to defer giving possession of the site for a period not exceeding six weeks calculated from the relevant 'Date of Possession' stated in the contract. (Clause 2. 5)

Such clause prevent the employer from being in breach of contract and liable to damages, but the contractor will have alternative remedies which are listed in clause 2. 29. 3 (extensions of time) and clause 4. 24 (loss and expense).

The fact that materials were blocking the main entrance can be taken positively. The contractors could have notified Smart Development who would have organized for an alternative entrance or simply moved the materials somewhere else.

It can be argued that one week's time loss is not substantial and will not hinder the project or cause the project to continue beyond completion date.

Assuming buffers/float were added for activities, Smart Developments can argue that the whole project duration can accommodate the loss of time (1

week) and they negotiate with the contractors to start the project after one week and still finish the project on time.

Recommendation

In the event that the contractors do not agree and decide to go forward with a claim of extension of time or loss and expense, it is advisable for Smart Developments to allow for reasonable extension of time.

Though the process isn't simple, the contractors need to notify the employer that they will be delayed in starting their work. The Contract Administrator need to do the follow up and find out if this event is a Relevant Event or not. This process may take another week. (Note: Deferment of Possession is a relevant event under clause 2. 29. 3 / 2. 5)

Concerning loss and expense claim, it is advisable for Smart Developments to verify the claim amount to know if there has been any mobilisation cost or machinery transferred to site or any valid claim, before proceeding to any payments.

Issue 2:

During the removal of the cellar a gas main was found and British Gas was called to relocate the main which took 16 working days. Some works could continue but the repositioning of the gas main caused a delay to the progress of the main ground works.

What does the contract say?

There is a mechanism in the contracts to deal with delays. Usually foreseen or unforeseen events which appear during progress of work have to be dealt with by a protocol.

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JCT 11 dictates that the Contractor has to inform the Contract Administrator or the Architect in writing when cases arise where they deem to have been delayed significantly. And to stipulate the number of days they think the delay will cause them prejudice/prevent the contractors to continue their job.

It can be noted that an extension of time granted for a cause of delay which may seem to have financial implications does not necessarily mean that there will be additional payments.

The design team of Smart Developments should have carried out proper site surveys prior any designing and notify the Contract Administrator of possible works concerning gas pipes.

It is inevitable for British Gas to be present and complete the repositioning of gas' main.

JCT 11 SBC/Q defines that statutory undertaker such as British Gas (being responsible for gas supply and regulated by law) should carry out their work diligently.

Recommendation

At this point, it is advisable for Smart Developments to fix the completion date and allow for extension of time for the contractors to complete the work in progress, based on clause 2. 27, 2. 28 and 2. 29

To prevent any further problems concerning loss & expenses, Smart Developments can review the rate at which Liquidated Damages are governed and reduce at its free will.

Under clause 2. 30, once a certificate has been issued, deductions can start after the first payment but Smart Development can bargain with the Contractors for a review of the rate and withhold deductions until practical completion has been reached.

If both parties agree, only extension of time will be granted because of the delay caused by British Gas.

Issue 3:

Then, during the excavation of the substructure works ancient roman coins are found. This leads to a further delay of 1 month to allow for archaeological investigation work.

What does the contract say?

According to JCT 11 SBC/Q, the clause 2. 29. 4 acknowledge that compliance with clause 3. 22. 1 (Antiquities) or Architect's/Contract Administrator instruction under clause 3. 22. 2 is a valid Relevant Event.

Recommendation

Valid Relevant Events are entitled to Extension of Time; Therefore Smart Developments should fix the completion time and allow an extension of time.

The contractor can claim for Loss & Expenses since excavation was being carried out and it had to stop to allow for investigation.

Since 1 month of delay is fairly considerable lapse of time, Smart Developments should allow the contractor to claim for its Loss & Expenses, Smart Developments can only compute a reasonable amount of loss incurred.

The other side of the coin is that if there is part performance only, then Smart Developments can only pay for the work that has been carried out. Since the contract has not been fully honored, both parties can wait and accept the delay in project. And resume work after the coins' investigation has been completed.

Smart Developments will forfeit the right to claim for Liquidated Damages if the contract completion date is fixed again.

Issue 4:

Monthly payments are agreed in the contract particulars and these should be in Modern Contractors account by the 15th of each month. In August and six months into the contract period payment was not paid until 5th September. When Modern Contractors complained to the employer they said " that's the trouble with banks these days – you just can't rely on them" and Modern Contractors " should know better than to complain about the situation as this is standard industry practice". As Modern Contractors have some issues with cash flow they are proposing an additional clause in their contracts with their sub-contractors that will provide for them to pay the sub-contractors only when they have been paid.

What does the contract say?

The dates provided in the contract particulars are to be used to distinguish if there has been a breach of contract for delayed payment or not.

According to JCT 11 SBC/Q clause 4. 12. 1 the final date of an interim payment is 14 days from the due date.

Therefore money due in August should have been lodged in the contractors account by latest 29th of August. Since payment was received on 5th of September this amounts to a breach of the contract.

The contractor has the right to suspend any work as a result of the breach of contract or to terminate his employment under clause 4.16.7 / 4.14.1

Recommendation

It is advisable for Smart Developments to pay the contractor simple interest on the amount due from 29th August till 5th of September as per clause 4.12.6 and to make sure that all payments are done within the time frame.

The fact that Modern Contractors are altering their contract with the sub-contractors doesn't not affect Smart Developments because of privity of contract, though Modern Contractors have to notify the employer of the sub-contractors they will be employing as per CDM Regulations stated in clause 3.23.3

Reflective Essay

Modern Contractors could have moved the materials on site themselves or notify Smart Developments of the problem that the main entrance is blocked by materials, and expect the Employer to clear the entrance.

Concerning the 1st issue: Though the delay is only one week, the employer cannot use any available float to absorb this type of delay. Modern Contractors should apply for extension of time for this delay and make sure that extra time is allowed for the float as well.

Concerning the 2nd issue, British Gas has to complete their work as per law, Modern contractors being hindered in doing their job can claim for extension of time.

Though Modern Contractors have been trying to complete other works in sections, this delay can be reflected in the overall project hand-over time. Therefore Modern Contractors have to apply for extension of time and moreover claim for Loss & Expense as it is accrued for 16 days of not performing actual work towards achievement of project.

Concerning the 3rd issue, since the event could not be foreseen by any parties, Modern Contractors are entitled to extension of time and have the right to claim for Loss & Expense. The cost would include plant provided on site for excavation, labour, lorries waiting for excavation etc.

Concerning the 4th issue: Modern Contractors have the right to suspend any performance until payment has been effected. It is possible to terminate the contract as well because of the breach caused by Smart Developments in delaying payment.

By adding extra clauses to the contract, Modern Contractors cannot forego their duties to pay their Sub-Contractors. The payment has to be processed by Modern Contractors no matter what is the outcome with Smart Developments.

An amicable solution for problems is direct negotiations between Modern Contractors and Smart Developments.

For Issue 1: Either parties could have cleared the materials and go forward with the project. As 1 week is not considerable time and both parties can absorb this delay within float

For Issue 2: The design team should have known that there are live gas lines within the cellar, therefore British Gas would have been called during the first week to relocate the pipes. Modern Contractors would have been given possession of site 2 weeks after British Gas had fix the lines.

For Issue 3: The best option would be to pay Modern Contractors a minimum rate for the delay caused. That rate would cover for plant hire and labour for example, there would not be any profit for Modern Contractors. Or allow Modern Contractors to carry alternative works on other site until Smart Developments are ready to accommodate them again.

For Issue 4: Smart Developments can negotiate to allow for some extra time before payment can be released to Modern Contractors and waive retention money for part of works carried out.