

# Subcontractors



## **1.0 Introduction**

Wikipedia (2009) defined subcontractor as “ an individual or in many cases a business that signs a contract to perform part or all of the obligations of another’s contract”. Other authors, Gerald N. Hill & Kathleen T. Hill (2005) defined subcontractor as “ a person or business which has a contract with a contractor to provide some portion of the work or services on a project which the contractor has agreed to perform”.

Generally, a subcontractor performs his work under a contract with a main contractor who is hired by the employer. In building construction, a main contractor usually hires a subcontractor to perform a specific task such as roofing, plumbing, electrical, cement work and plastering, as part of the overall project. Hence, if the main contractor does not pay for the subcontractor, then the subcontractor has the right to enforce a “ mechanic’s lien” on the real property upon which the work was done to collect.

### **There are three types of subcontractor that is:**

Nominated subcontractor (Specialist subcontractor)

Domestic subcontractor

Named subcontractor

Nominated subcontractor is essentially selected or appointed by the employer for some specific works. If the employer wants to nominate a subcontractor for an element of work, then he will instruct the main contractor to use the nominated subcontractor through the architect. The

element of work usually is the engineering package such as piling, structural frame or some M&E services works. In this kind of subcontract, there is a direct contractual relationship between the employer and the subcontractor.

On the other hand, domestic subcontractor is selected and appointed by the main contractor who is hired by the employer. The domestic subcontractor doesn't have the direct contractual relationship with the employer but he contract with the main contractor. Domestic subcontractors usually execute the part of work from the main contract and supply or fix the materials and goods. The employer will not involve in the election of this kind of subcontractor and the main contractor take the responsibility of the subcontractor.

The Named subcontractor is contractually same as the domestic subcontractor. However, the different between them is the employer states that which contractor is acceptable without take responsibility for their final selection and appointment.

## **Chapter 2: Forms of Contract**

### 2. 0 Forms of Contract

#### 2. 1 Review the method of appointing specialist subcontractor JCT 98

The JCT 1998 is the pre JCT Form which was used when selecting and choosing the subcontractor. There are two types of subcontractor in this form of Building Contract which are Nominated subcontractor and Domestic subcontractor. In the JCT Form, except the Employer, the Architect has the highest authority in making decision. Nominated subcontractor is essentially

appointed by the Architect or the Employer when they need the subcontractor in some specific works. Daniel Atkinson (1999) defined nomination as “ sub-letting sections of the work allowing the Employer full involvement in choosing the company early and using the subcontractor’s expertise for design or coordination”.

There are some reasons that the Employer nominated a subcontractor (Daniel Atkinson, 1999):

The Employer can select any company that he likes to be his subcontractor without based on the price.

The subcontractor’s design expertise and his knowledge can be utilized due to he can be involved early.

Since the specialist subcontractor involves, the Contractor will not waste his time on some particular work which the Contractor does not expert in it.

The Employer can understand his responsibilities clearly since the clear contractual liability is established.

Delay in time can be prevented by the direct links and involvements are established.

According to the Jennie Price (1994), the procedure of nominating a subcontractor under the Standard Form of JCT 1998, Clause 35. 4:

The Architect sends the both of invitation to tender in part 1 of the standard form of tender, NSC/T, and the relevant section of the employer/ nominated subcontractor agreement, NSC/W, together with the

<https://assignbuster.com/subcontractors/>

drawings/specification/bill of quantities which describe the work, to those companies the employer wishes to invite to tender.

Then the tenderers complete the standard form of tender (part 2 of NSC/T) and the relevant sections of the warranty, NSC/W, and return both documents to the Architect.

The Architect chooses the subcontractor, and arranges for the Employer to sign the selected subcontractor's tender to confirm his approval of it, and to execute the warranty, NSC/W.

The Architect nominates the subcontractor to the main contractor using the standard nomination instruction, NSC/N. He also sends the main contractor a copy of the invitation to tender and the successful subcontractor's tender, the drawings/specification/bills of quantities on which the tender was based, and the executed warranty.

After received those documents, the main contractor has the right of reasonable objection to the selected tenderer within 7 days. If he does not object, he must reach agreement with the selected tenderer on the 'Particular Conditions' set out in Part 3 of NSC/T. These include the subcontract period, insurance details and the identity of the adjudicator and trustee stakeholder.

When agreement on the Particular Conditions has been reached, the main contractor and subcontractor sign Part 3 of NSC/T, and execute the subcontract articles of agreement, NSC/A, which incorporate by reference the subcontract conditions NSC/C.

The main contractor sends a copy of the signed NSC/T Part 3 and the executed NSC/A to the Architect for his records.

## **2. 2 Review the method of appointing specialist subcontractor JCT 05**

JCT 2005 Form of Building Contract (with quantities) has been updated, amended, merged and retired most of its important contracts. This form was set out in clear, understandable, and well-ordered for the user and it had simplified on wording such as change the word “ Determination” to “ Termination”. There is a little deviation between JCT 1998 and JCT 2005 regarding to the subcontracting. In this form of Building Contract, the nomination of subcontractor has been omitted.

According to the Chappell D. (2007), there are a lot of problems arise between the main and subcontractor since a project is not ready for the subcontractor to start his work on the anticipated date. Due to the delay of the commence work, the subcontractor may argue and claims for more money. On the other hand, Ndekugri I. and Rycroft M. (2009) stated that JCT 1998 had extensive provisions on nominated subcontracting but due to the bad experience from the inherent pitfall of nomination of subcontracting and its complexity, the provision has been omitted in JCT 2005.

There are three principles of appointing a subcontractor under the JCT 2005 Form of Building Contract:

### **Consent to sub-contracting (Clause 3. 7)**

According to this clause, main contractor cannot appoint or subcontract whole or any part of works to anybody without the Architect’s or the Contract Administrator’s consent. However, the Architect also cannot withhold or

delay his consent unreasonably. If the Contractor insists to sub-letting his works to anyone without consent, then the employer entitles to terminate the Contractor's contract under clause 8. 4. 1. 4. Besides that, under the clause 3. 7. 2, the contractor cannot subcontract the design portion to anyone without the Employer's consent.

### **Lists in Contract Bills (Clause 3. 8)**

Under this clause, annexations of lists of subcontractor to work packages which are defined in the Contract Bills are required. Clause 3. 8. 2 has stated that the list of subcontractor must not less than three persons. Then the Architect has to choose among the three persons to be the subcontractor. It is similar as pervious clause that the Architect cannot withhold or delay his consent unreasonably. If the Contractor submitted the list which less than three persons, then either:

The Employer and the Contractor shall by agreement add the names of other persons to make sure the list comprises not less than three persons; or

The Contractor carries out the works by himself.

### **Conditions of sub-contracting (Clause 3. 9)**

The subcontract shall state the condition that upon the termination of the Contractor with any reason, then the employment of the subcontractor will be automatically terminated too under the Clause 3. 9. 1. Besides that, the subcontract shall provide that subcontractor cannot remove the site materials which have been delivered to the works without the Contractor's written consent except for use on the works. If the materials or goods have been paid by the Contractor, then they will become the Employer's property

and the subcontractor cannot deny it. On the other hand, if the Contractor has paid the subcontractor for any site materials before their value is included in the Interim Certificate, then the materials will become the Contractor's property. Under the Clause 3.9.4, if the Contractor fails to make the payment to the subcontractor, then the Contractor shall pay simple interest to the subcontractor until the payment is made. Then according to the Clause 3.9.5, the Contractor could get the warranty from the subcontractor for his execution of works within 14 days of receipt of a written request by the Contractor.

If the subcontract complies with the three principles above, then the Architect could select and choose among the three persons in the list to be the domestic subcontractor.

### **2.3 Review the method of appointing specialist subcontractor NEC 3 ECC 05**

The NEC 3 ECC 2005 is essentially used by Government for public works such as road, bridge etc. In JCT Form, the Architect has the highest authority while the Project Manager has the highest authority in this NEC 3. He plays an important role in this Form of Building Contract especially in subcontracting. The Project Manager is the person who approves the appointment of the subcontractor by the Contractor. In other words, the Project Manager dominates in the selection of subcontractor.

Under the Clause 26.1, the Contractor still takes the responsibility to the works even though he had subcontracted the works to the Domestic subcontractor. Therefore, the Contractor must select the subcontractor carefully in case of the omission of the subcontractor. However under the



Clause 26. 2, the subcontractor who has been proposed by the Contractor must be accepted by the Project Manager. If the Project Manager does not accept the subcontractor, then the Contractor cannot appoint such subcontractor.

Under the Clause 26. 3, the Contractor has to submit the proposed conditions of contract for every subcontract to the Project Manager for his acceptance and approval unless an NEC Contract is proposed. Besides that, if the Project Manager agreed that no submission is required then the Contractor is not need to submit it. This clause also stated that the reasons that the Project Manager does not accept the subcontractor who is proposed by the Contractor are:

The subcontractor will not allow the Contractor to provide the works.

The subcontractor does not include a statement that the parties to the subcontract shall act in a spirit of mutual trust and cooperation.

### **Chapter 3: Reasons of why Nomination has been stopped**

#### **3. 0 Reasons of why Nomination has been stopped**

In the opinion of Jennie Price (1999), the disadvantages toward the main contractor are some of the reasons that the nomination has been stopped.

The Main Contractor will lose his right to choose his favorite subcontractor to carry out the part of works. He would hard to communicate with the subcontractor who is nominated by the Employer thus cannot cooperate well. Since the Main Contractor is forced to employ the subcontractor so he is unable to impose his own terms and conditions which are more commercially advantageous to him. Other than that, the Nominated Contractor is normally

difficult to be managed and controlled since their direct link with the professional team and the Employer. They will not easily listen to the Main Contractor on the design works due to the works are their expertise.

Since some of employer will repeat the business with the nominated subcontractor, then the said nominated subcontractor will monopoly in this industry. Other subcontractors will not have chance to receive the job and make them suffer in their incomes. On the other hand, quality of the works might be dropped due to some nominated subcontractors handle few projects in the same period. They cannot concentrate on a single project and make the quality of every works will be dropped.

### **3. 1 Advantages and Disadvantages toward the Employer**

Jennie Price (1999) agreed that Nomination provides some advantages and disadvantages toward the Employer which are shown as below:

#### **Advantages to the Employer:**

The Employer is able to select the person whom he wishes to carry out the subcontract works.

Through the warranty NSC/W, the Employer has the direct contractual link with the subcontractor. It can covers matters such as design or materials selection by the subcontractor.

#### **Disadvantages to the Employer:**

The Employer has to take the risks and bear the responsibilities on the Nominated subcontractor due to his omission of works. If any defaults have been found, then the Employer should bear the extra costs.

There are no rights against the main contractor in the event of defective design by the Nominated subcontractor.

The Main Contractor entitles to claim Extension of Time if the progress of the main contract works is delayed by the Nominated subcontractor. Besides that, he could also claim for the Loss and Expenses due to the delay of works which is caused by the subcontractor.

Since the Main Contractor does not take any responsibility on the Nominated subcontractor, there may be lack of management of the progress of the works on site of the subcontractor.

### **3. 2 Opinion for the new appointment procedure of subcontractor**

In my opinion, the new specialist subcontractor/supplier appointment procedures are more complex to render the duties of the Architect / Project Manager / Quantity Surveyor. This is because the design teams have not direct contact with the subcontractor. All the instructions which are given by the design teams are passed through the Main Contractor. That might be appeared some mistake in the communication. By the way, the design team also cannot directly manage the subcontractor since the subcontractor only contract with the Main contractor.

## **Chapter 4: Conclusion**

### **4. 0 Conclusion**

After the research, we will know that the procedure of nomination in JCT Form 98 and the reasons for nomination under this Form. Then we know that no more nomination under JCT Form 05. We also get the three methods that appoint a specialist subcontractor in JCT Form 05. NEC 3 ECC 2005 is only for

the government works and the Project Manager has the highest authority in this Form.

As a conclusion, nomination provides some disadvantages to the Main contractor such as difficult to cooperate between them and the main contractor cannot impose his own terms and conditions to the subcontract. Besides that, the main contractor is usually hard to manage the nominated subcontractor because he has the direct link with the professional design team. Other than that, nomination will make the monopolies arise in the construction industry due to the repeat business between the nominated subcontractor and the Employer. Quality of the works is low since the subcontractor cannot concentrate on single project. The Employer needs to bear the risks and take the responsibilities on the nominated subcontractor. Hence, nomination has been stopped.

Finally, in my opinion, there are a lot of benefits that nomination has been stopped since there were a lot of disadvantages.

### **Chapter 5: References**

Atkinson D. (2009), Sub-Contracting. [Online]. Last accessed on 24th July 2009 available at <http://www.atkinsonlaw.com/cases/CasesArticles/Articles/SubContracting.htm>

CHAPPELL, David (2007). Understanding JCT Standard Building Contracts Eight Edition, Abingdon, Taylor & Francis.

Gerald N. Hill & Kathleen T. Hill (2005), Subcontractor [Online]. Last accessed on 24th July 2009 available at <http://legal-dictionary.thefreedictionary.com/Subcontractor>

NDEKUGRI I. and RYCROFT M. (2009). The JCT 05 Standard Building Contract Law and Administration Second Edition, Oxford, Butterworth-Heinemann.

PRICE, Jennie (1999). Sub-contracting under the JCT Standard Forms of Building Contract, London, Macmillan Press LTD

Wikipedia (2009), Types of Subcontractor [Online]. Last accessed on 24th July 2009 available at [http://en.wikipedia.org/wiki/Subcontractor#Types\\_of\\_subcontractor](http://en.wikipedia.org/wiki/Subcontractor#Types_of_subcontractor)

#### Bibliography

Barnes P. and Davies M (2008). Sub-contracting under The JCT 2005 Forms First Edition, Oxford, Blackwell.

GERRARD, Robert (2005). NEC2 and NEC3 Compared. Great Britain, Bell & Bain.

M&E Contractor Magazine (2005), what sort of subbie are you. [Online]. Available at <http://www.eca.co.uk/IndustryGuidance/CCandL/Download/WhatSortOfSubbieRU.pdf>