Hawkswell | Kilvington

CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Can Works be Omitted from a Construction Contract?

There is no common law right for an employer to omit work from a contractor's scope of works, yet an "omissions clause" is a common feature of many construction contracts. In this bulletin, we consider the key principles underlying such clauses in order to provide clarity as to whether an employer's instruction to omit works is a legitimate exercise of their contractual rights.

The common law position

The reasoning behind the common law position in relation to the omission of works is twofold. Firstly, an employer should not be entitled to escape the consequences of a bad bargain. Secondly, a contractor should have the right to carry out and earn profit on the full scope of works that have been agreed. If the scope of works was significantly reduced, a contractor could be left out of pocket if it had invested money into providing specialist equipment for the project or diverted resources from elsewhere.

Express power to omit works

Notwithstanding the above, parties can agree to override the common law position by expressly agreeing to include an omission of works clause in their construction contract. However, it is important to note that any such clause will be subject to implied limitations concerning:

I. the extent of the work that can be omitted; and

II. the employer's ability to redistribute any omitted work.

Understanding these limitations is critical as, if the power to omit works is exercised incorrectly, it may constitute a repudiation of contract by the employer.

How much work can be omitted?

Even where a contract contains an express omission of works clause, an employer cannot remove all of the works from a contractor's scope or omit such a large proportion of the works so as to effectively terminate the contract. The reasoning for this, again, is that an employer should not be able to avoid a bad bargain.

Can the omitted work be redistributed?

The effect of the second implied limitation is that, unless there is clear wording to the contrary, an omission must be a genuine omission and there must be no intention to carry out the omitted work at a later date. In other words, an employer cannot omit work simply to give it to another contractor. This is for any reason, including the poor performance of the original contractor or the fact that an alternative contractor may be able to complete the work at a reduced cost.

Omission of works clauses in standard form contracts

Standard form contracts such as the JCT Design and Build 2016 and the FIDIC Red Book 2017 contain clauses that permit the omission of works in situations where the employer does not wish to have the work carried out at all, as opposed to where the employer wants to take work away from the contractor and engage another contractor to carry it out. Should an employer wish to widen the power to omit works provided for in such standard form contracts, express amendments would be required.

Analysis

Before an employer issues an instruction to omit an element of work from their contractor's scope, they will need to carefully review the terms of any omissions clause in light of the implied limitations. In particular, express wording will be required if the reason behind the proposed omission is to allow the employer to contract with others, or if the extent of the omission is such so as to effectively terminate the contract. In cases where there is no such express wording then omitting works from a contractor's scope on this basis will be a breach of contract and may also amount to a repudiation of the contract. The same will also be true, regardless of the reason, if there is no omissions clause at all.

HAWKSWELL KILVINGTON LIMITED
CONSTRUCTION & ENGINEERING SOLICITORS

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01954 285719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk