

CONSTRUCTION | JUNE 2023

# USE IT OR LOSE IT! – THE IMPORTANCE OF CONTRACT ADMINISTRATION AS A RISK MANAGEMENT TOOL IN CONSTRUCTION CONTRACTS

**It is common for construction clients to inform their legal team that notices were not issued or contractual procedures were not complied with deliberately, in order to avoid triggering any conflict or acrimony with the other party or to avoid misinterpretation by the other party. But does it pay to be nice?**

## Introduction

Contracts provide specific procedures which, when followed, provide parties with a high degree of certainty that they will receive the relief or remedies provided for under the contract.

When parties to construction disputes meet with their lawyer to discuss their claim or defence to a claim that has been received, the lawyer's hope is that the client has issued the notices and correspondence required under the contract, in the format and within the timescales required by the contract, and fully supported by substantiating documents. If that is not the case, the client's chances of success are lowered from the outset.

However, in real life, it is often the case that a client will not be able to provide all the required notices, or that the notices that have been issued may not be in the prescribed format or may not be adequately substantiated, or that the parties to the contract have diverged from the procedures set out in the contract altogether.

Some of the reasons for these issues are as a result of the dynamics of a live construction project i.e., changes in personnel, resourcing issues, time pressures.

However, it is common for construction clients to inform their legal team that notices were not issued, or contractual procedures were not complied with deliberately, in order to avoid triggering conflict or acrimony with the other party or to avoid misinterpretation by the other party.

## Key message

Unfortunately, such an approach usually leads to conflicts or misunderstandings of a much greater magnitude at a later stage, as it "*muddies the waters*", so parties are unsure of where they stand, contractually.

This can limit the parties' ability to agree a solution and often leave them having to resort to the more costly, time consuming and stressful option – formal dispute resolution.

This is a shame as, in many instances, compliance with the contractual procedures and notices, at the right time and in the right manner, (essentially, good contract management) avoids conflict by heading off incipient issues at an early stage, before they have the chance to grow and become entrenched disputes.

One of the most common instances of divergence from contract procedure is in respect of engineer's instructions.

Using standard conditions of FIDIC 1999 (Red and Yellow Books) as an example, under sub clause 3.3 the Engineer may issue to the Contractor, at any time, instructions which may be necessary for the execution of the Works and the remedying of Defects, and the Contractor is obliged to comply with the instructions given by the Engineer.

However, there is often a reluctance on the part of the Engineer to issue instructions for Contract Works to be commenced or progressed, due to concern that the Contractor will treat such instruction as a Variation Instruction.

Sub-clause 3.3 expressly states that if an instruction constitutes a Variation, the contractual procedure for dealing with Variations will apply. Accordingly, it is clear from the drafting of sub-clause 3.3 that if an instruction does not constitute a Variation, then the contractual procedure for dealing with Variations will not apply.

Notwithstanding such confirmation in sub-clause 3.3, if the Engineer wishes to have a greater level of comfort in issuing instructions, as and when they are required, the Engineer can:

1. Expressly state on the instruction that it is not a Variation, and
2. Paste into the instruction an extract of the Contract scope of works which refers to the works which are the subject of the instruction, to demonstrate that such works are already within the Contract scope.

In this way, the Engineer puts on record and evidences that the instruction is not a Variation from the outset.

If the Contractor disagrees, and does consider that the instruction is a Variation, then the issue can be discussed between the parties at an early stage.

However, if the Engineer has provided clear evidence that the instructed works are in scope, the Contractor will have no basis for asserting that the instruction is a Variation and the matter can be closed out swiftly, without distracting the parties from performance of their contractual obligations.

Also, as the issue has been raised expressly in the instruction, if the Contractor does not raise any objection on receipt of the instruction or does not pursue any objection raised at that time, then any later assertion that the instruction is a Variation, (as part of a sub-clause 20.1 claim) may be time-barred.

In any event, such claim may lack credibility for not having been raised in the material period, immediately after the issue of the instruction.

## HFW perspective

Good contract management takes organisation - ensuring clear processes are in place and that the personnel responsible for those processes are fully aware of what needs to be done and when.

HFW's Construction and Engineering Team can provide regular contract administration surgeries for commercial teams, to review issues arising on projects that may require service of a notice or other intervention under the contract and to ensure that such issues are proactively and contemporaneously managed rather than being left to escalate into bigger problems.

Also, HFW's Construction and Engineering Team can review construction contracts and provide bespoke contract handbooks summarising the key procedures under each contract with notice and instruction templates attached.

Such handbooks are a useful and accessible reference guide for busy commercial teams to keep at their desks and may also be supported by HFW's bespoke contract administration workshops.

For more information, please contact the author of this alert



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