

Default of Nominated Sub-Contractors

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It is a sad indication of the current economic climate in Hong Kong that defaults of contractors and sub-contractors are becoming increasingly more common. The effect of a contractors' default on an employer, or a sub-contractor's default on a contractor can be devastating. Employers can find themselves with half completed buildings earning no rental income, and contractors find themselves suffering delays which may not entitle them to extensions of time and thus make them liable for liquidated damages.

An area of traditional difficulty is that of the default of nominated sub-contractors, and, in particular, the rights and obligations of the contractor and the employer where the nominated sub-contractor defaults.

These matters have been examined by the courts on a number of occasions, and this seems an opportune time to re-visit the area, and to summarise the current position.

Initially it has to be said that the intervention of the courts into the area of nominated sub-contractors' default has been controversial, and some authors such as Mr I Duncan Wallace in Hudson's Building and Engineering Contracts have been extremely critical of decisions such as that in the House of Lords case of *Bickerton v. Northwest Metropolitan Hospital Board* (1970).

Notwithstanding such criticism, the rights and obligations of the contractor and the employer in the event that the employment of a nominated sub-contractor is determined under either the Hong Kong Government or Hong Kong RICS forms of contract can be currently summarised as follows:

1. The Architect must re-nominate another sub-contractor

This stems from the leading and much criticised case of *Bickerton v. Northwest Metropolitan Hospital Board* (1970), where the court, considered that the wording of the JCT 1963 form of contract "Such [PC] sums shall be expended in favour of such persons as the architect shall instruct" led to the conclusion that works covered by PC Sums could not be carried out by the contractor and that in the event of the determination of the employment of the nominated sub-contractor there was a duty on the architect to nominate a replacement sub-contractor. The Hong Kong Government forms contain similar wording.

2. The Employer must pay for the works carried out by the replacement sub-contractor on the basis of the accepted tender of that sub-contractor.

In the absence of an express provision, even if there is a requirement to nominate a replacement sub-contractor, the employer is only bound to pay for the works as though they had been carried out by the original sub-contractor. Therefore if the replacement sub-contractor's rates are higher (which they generally will be) the contractor has to bear the difference.

However, both the RICS form and HK Government forms of contract do provide to the contrary. For example in the Hong Kong Government form of contract, GCC Clause 67(1) provides:

"Prime Cost Sums shall be deducted from the Contract Sum and in lieu thereof shall be added the total sum to be paid by the Contractor to any

Nominated Sub-contractor on the certificate of the Surveyor."

- 3. The Contractor is not entitled to an extension of time for delays caused by the defaulting sub-contractor or caused by the determination and re-nomination of a replacement sub-contractor, unless the Employer has taken an unreasonable time to re-nominate.**

The case of Percy Bilton v. Greater London Council (1982) confirmed that where a nominated sub-contractor defaults and has its employment under the sub-contract determined, the contractor is not entitled to an extension of time for either delays caused by the nominated sub-contractor prior to the date of determination, or delays caused by the determination itself, i.e. by the need to appoint a new sub-contractor.

However the contractor will be entitled to an extension of time if the Architect takes an unreasonable time to nominate a replacement sub-contractor.

- 4. The Contractor can object to the re-nomination.**

In the case of Fairclough v. Rhuddlan Borough Council (1985) a delay occurred in the re-nomination process because the contractor objected to the re-nomination of a replacement sub-contractor because the replacement sub-contract (upon which the replacement sub-contractor's tender was based)

indicated a completion date later than the currently set date for completion.

The court held that the contractor was entitled to object on this ground. The significance of this point is that this decision effectively negates the practical effects of the decision in Bilton, because although that case established that a contractor is not entitled to an extension of time for the delays caused by the original nominated sub-contractor (either prior to determination or due to the determination), the Fairclough case confirmed that a contractor can either object to the nomination of a replacement sub-contractor if the date for completion of that replacement sub-contract is later than the contract date for completion, or insist upon an extension of time for that extended period.

Accordingly it would appear prudent for a contractor to either refuse to accept the nomination of any replacement sub-contractor if the sub-contract does not provide for completion on the currently set date for completion, or in consideration for not objecting to the re-nomination, to insist on an extension of time. In such a way a contractor can avoid the effects of taking responsibility for delays caused by the default of a nominated sub-contractor whose employment is determined.

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