

## **Programming to Complete Early - the Ramifications**

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In the ever more competitive construction industry in Hong Kong contractors are continually looking for that edge when pricing their tenders that will win them the contract.

Sometimes, if it is considered that the contract period is generous a contractor may seek this edge by tendering on the basis that it will complete the works in a shorter period thus saving site and head office overheads. Contractors who tender on such a basis are generally reluctant to let this be known at tender stage, and it will generally only become apparent to the client that the contractor intends to finish early when the initial works programme is produced after the contract has been awarded.

The ramifications of such actions have been considered by the courts in a number of cases and need to be understood by contractors, clients and their advisors. I will attempt to summarise the position below:

### **Is a contractor entitled to programme the works to finish early, and work in accordance with that programme to complete on the programmed earlier date?**

This is of course the fundamental question considering whether such action is permitted in the first place. This point was considered in the leading case on this subject, that of *Glenlion Construction Ltd - v- The Guinness Trust* (1987) 39 BLR 89 where it was held that the contractor (*Glenlion*) was entitled to complete before the date of completion because of the wording of JCT 1963 Edition

Clause 21 which provides that the contractor shall ".....complete the same on or before the Date for Completion...", and that he was entitled to carry out the works in such a way as to enable him to achieve the earlier

completion date whether or not the works were programmed in such a manner.

The JCT 1963 Edition is identical in this respect to the local RICS/HKIA Private Form of Contract so this principle is directly relevant to private works in Hong Kong, and also it is suggested Government projects due to the similar wording of GCC Clause 49 i.e. "The Works .. shall be completed within the time or times stated....".

### **If the contractor programmes to finish the works early must the Architect or the Engineer issue drawings and details in time to enable such early completion?**

This point was again considered in the *Glenlion* case where the contractor argued that there should be a term implied into the contract that if the programme showed a completion date before the date for completion the employer by himself, his servants or agents (i.e. the Architect or the Engineer) should so perform the said agreement as to enable the contractor to carry out the works in accordance with the programme and to complete the works on the said completion date.

However the court disagreed. It was held that since it was not suggested by the contractor that he was both entitled and obliged to finish by the earlier completion date, if there was such an implied term as set out above it would impose an obligation on the employer (*Guinness*) but not on the contractor (*Glenlion*).

It follows therefore that a contractor is entitled to complete the works earlier than the contract completion date and has a right to do so. However there is no corresponding duty on the part of the Employer to permit him to do so, and in particular to furnish him with information or otherwise

positively co-operate so as to enable him to do so. The contractor is merely free from any contractual restraint and may complete earlier. The employer must not prevent him from doing so but this does not mean that the employer is bound to facilitate in a positive way the implementation of the contractor's privilege or liberty.

**If the contractor programmes to finish the works early and a delay occurs which prevents such early completion (but not completion by the original date) can the contractor claim its prolongation costs?**

This is a difficult question. In such a situation the contractor is not entitled to an extension of time because despite the delay he will still complete by the Date of Completion or within the Time for Completion. But what of his prolongation costs?

The point appears to be open to doubt. In Keating on Building Contracts (6<sup>th</sup> Edition) Keating states:

*"Where the programme date is earlier than the Date for Completion stated in the Contract, it may be that some direct loss and/or expense may be recoverable on the grounds of disruption. However, provided that the contractor can still complete within the Contract Period, he cannot recover prolongation costs".*

Keating's position has been followed in the South Africa case of Ovcon (Pty) Ltd -v- Administrator of Natal (1991) a case where the contractor showed completion in eleven months with a contract period of fifteen months. Three months delay to the programme period was caused by the Employer. The Court refused to award additional preliminary costs saying:

*"if the contractor had taken its contemplated fifteen months these expenses would have been incurred in any event."*

However courts in the USA have taken a different line. In Sun Shipbuilding and Dry Dock Co -v- United State Lines Inc (1977) the courts view was that:

*"cost are no less damaging merely because they occur fortuitously before a contract dead line rather than after."*

*"the Government may not hinder or prevent earlier completion without incurring liability"*

*"Whilst it is true that there is not an "obligation" or "duty" of defendant [owner] to aid a contractor to complete prior to the completion date, from this it does not follow that the defendant may hinder and prevent a contractor's early completion without incurring liability. It would seem to make little difference whether the parties contemplated early completion, or even whether the contractor contemplated an early completion. Where the defendant [owner] is guilty of "deliberate harassment and dilatory tactics" and a contractor suffers loss as a result of such action, we think that the defendant is liable".*

All cases therefore appear clear that (at least under the local Private Form of Contract and the Government General Conditions) a contractor is entitled to programme to, and complete early, but that in such circumstances the Architect or the Engineer is not obliged to issue drawings and details to facilitate such early completion. However whether a contractor would be entitled to prolongation costs when a delay occurs to prevent that early completion is viewed differently in different jurisdictions.

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