Centra Consult LLP
Dispute resolution, claim preparation and delay analysis

Risk allocation and unforeseen ground conditions

Introduction

Construction contracts will set out the respective rights and obligations of the parties to the contract and will also allocate risk between the parties.

It is a commonly used phrase that any type or category of risk should be allocated to the party best able to manage or control it.

This article briefly considers one of the important risks in many construction contracts; the risk that ground conditions actually encountered will be less favourable than was expected at the time the contract was entered into.

Common law position

The case law in respect of unforeseen ground conditions and the common law position goes back to the 19th Century. The case of *Bottoms v York Corporation* (1892) considered a project where no boreholes were sunk prior to contract, for sewerage works near the River Ouse, but a price was agreed. The Contractor found that the ground it was excavating in was such as to require unforeseen measures in order to construct the sewers. It was held that there was no representation or guarantee as to the nature of the soil and that the contractor was not entitled to additional payment.

More recently, a century on, this underlying common law position was restated in the case of *Workshop Tarmacadam Co Ltd v Hannaby (1995) 66 Con LR 105, CA*. Here, whilst the works were subject to measurement on completion, the contract terms were held to be insufficiently wide as to give entitlement for additional payment to the Contractor in respect of unforeseen hard rock which it encountered:

> "*Had the plaintiffs wished to make such a provision in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for them so to have provided in specific terms. They did not do so*"

Put simply, the common law position is that the risk of unforeseen ground conditions rests with the contractor. Unless a contract makes specific provision for additional time and/or money in the event of unforeseen ground conditions then the risk remains with the Contractor.

Standard Forms

The JCT contracts adopt an approach akin to the common law position. Unforeseen ground conditions are not a Relevant Event / Matter giving rise to entitlement to an extension of time or additional payment. The only route for relief might be where the unforeseen ground is such that the design of the works requires to be changed and the Contractor is entitled to additional payment or time as a consequence of a variation.

Other standard form contracts adopt a different position than the common law one.

For example the NEC3 Engineering and Construction Contract provides for a compensation event in certain circumstances where the Contractor encounters physical conditions that had "*such a small chance of occurring that it would have been unreasonable for him to have allowed for them*" (clause 60.1(12)). However, in judging physical conditions for the purposes of a compensation event certain factors need to be taken into account, including site information provided to the Contractor (clause 60.2).

Site Information

Site information available at time of tender and included in a contract is another important factor in considering the risk of unforeseen ground conditions.

An employer has no general duty to provide site information (the employer does not warrant the site).

Where information is provided to a Contractor and it is clear he may rely on it then the Employer may be taken, expressly or by implication, to have warranted the accuracy of that information. If the information turns out to be wrong the Contractor may have a claim for damages. Such a proposition is supported by the Court of Appeal case *Bacal Construction (Midlands) Ltd v Northampton Development Corporation (1975) 8 BLR 88, CA*. In that case the Contractor was directed to design foundations based on the information provided.

However, an Employer may provide site information and not cut across the underlying position that a Contractor is obliged to undertake works for the stated price even if the ground conditions turn out to be worse than expected.

It is also the case that site information can be provided but with disclaimers included in the contract to the effect that any inaccuracies or errors will not give rise to liability for the Employer. In effect "here is some information which I possess, but you are still liable for accurately assessing the ground on which the works are to be constructed".

Contractors must be aware that the onus is on them to obtain and understand site information necessary for construction of the works.

Risk Allocation

The above is a very brief summary of some aspects of the common law position as regards unforeseen ground conditions. There is much more that could be said on the topic, way beyond the scope of this article.

What is interesting to consider here is the issue of risk allocation. The modern best practice is to place the risk with those best able to manage or control it. However, it is common to see unforeseen ground conditions clauses either deleted from contracts or heavily amended to place the risk more clearly on the Contractor (or Subcontractor).

In particular as regards Subcontractors (e.g. earthworks or drilling subcontractors) are attempts to pass on this risk to them in line with industry best practice on allocation of risk?

Some such as piling Subcontractors will seek to include in contracts their standard terms and conditions excluding liability for the effect of unforeseen ground conditions. Others may not appreciate, until it is too late, that they are being passed the risk of unforeseen ground conditions by the deletion (or lack) of clauses providing entitlement to recompense in such circumstances.

There are arguments for and against passing such risk down the contractual supply chain. However, often clauses passing this risk down that supply chain are doing no more than that, without true consideration as to the appropriateness of that risk allocation. This can lead to subsequent disputes and expense.

Perhaps a better way would be to have an open and honest discussion on respective obligations and risk allocation at time of entering into contract and to be as precise as possible about what risk is allocated where.

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