

Cracks in the Foundations: Common Issues Facing the Construction Industry

Omission of Works and Termination

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Speakers



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Agenda

Today we will cover:

- Omission and the common law.
- Construction contracts and omission.
- Termination of construction contracts.
- Common pitfalls and best practice.

The webinar will conclude with a Q&A session.



Omission and the common law

- The right to omit works must be exercised with caution
- No explicit common law right to omit works from the scope of a contract
- Contracts cannot be rescinded due to a bad bargain between the parties
- Contractor is obligated to complete the agreed works but also has a corresponding right to complete the works



Construction contracts and omission

- The standard position regarding the omission of works will be considered in relation to the following contracts:
 - JCT
 - SBCC
 - NEC
- The law implies limitations on the omission of works which are as follows:
 - The omission must be legitimate
Sweatfield Limited v Hathaway Roofing Limited [1997] 1 WLUK 475
 - The omission must not undermine the original contract
Stratfield Saye Estate Trustees v AHL Construction Ltd [2004] Adj.L.R. 12/06



Omission and JCT

- The ability to omit works must be considered in relation to the Variation and Change procedures (Clause 5.1).
- The Employer can issue an instruction without the Contractor's consent, subject to the right of reasonable rejection.
- Contractor has the right to apply for an extension of time or additional payment.

Instructions requiring Variations

- 3·14
- 1 The Architect/Contract Administrator may issue instructions requiring a Variation.
 - 2 Any instruction of the type referred to in clause 5·1·2 shall be subject to the Contractor's right of reasonable objection set out in clause 3·10·1.
 - 3 Not applicable
 - 4 The Architect/Contract Administrator may sanction in writing any Variation made by the Contractor otherwise than pursuant to an instruction.
 - 5 No Variation required or sanctioned by the Architect/Contract Administrator shall vitiate this Contract.

Definition of Variations

- 5·1 The term 'Variation' means:
- 1 the alteration or modification of the design, quality or quantity of the Works including:
 - 1 the addition, omission or substitution of any work;
 - 2 the alteration of the kind or standard of any of the materials or goods to be used in the Works;
 - 3 the removal from the site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;

Omission and SBCC

- SBCC and JCT contracts are similar in relation to the omission of work provisions.
- Variations are permitted if they represent a necessary change to the Employer's Requirements.
- Contractor's right of reasonable rejection.

Instructions requiring Variations

- 3.14**
- .1 The Architect/Contract Administrator may issue instructions requiring a Variation.
 - .2 Any instruction of the type referred to in clause 5.1.2 shall be subject to the Contractor's right of reasonable objection set out in clause 3.10.1.
 - .3 In respect of the Contractor's Designed Portion, any instruction requiring a Variation shall be an alteration to or modification of the Employer's Requirements.
 - .4 The Architect/Contract Administrator may sanction in writing any Variation made by the Contractor otherwise than pursuant to an instruction.
 - .5 No Variation required or sanctioned by the Architect/Contract Administrator shall vitiate this Contract.
- 5.1** The term 'Variation' means:
- .1 the alteration or modification of the design, quality or quantity of the Works including:
 - .1 the addition, omission or substitution of any work;
 - .2 the alteration of the kind or standard of any of the materials or goods to be used in the Works;
 - .3 the removal from the site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;

Omission and NEC

- Standard NEC contracts are silent as to the extent of work that may be omitted and the ability to redistribute the works.
- An instruction may be given to the contractor to alter the scope of work (Clause 14.3).
- Clause 14.3 has been subject to litigation in *Van Oord UK v Dragados* concerning the omission of work from an NEC3.

The Project Manager and the Supervisor	14	
	14.1	The <i>Project Manager's</i> or the <i>Supervisor's</i> acceptance of a communication from the <i>Contractor</i> or of his work does not change the <i>Contractor's</i> responsibility to Provide the Works or his liability for his design.
	14.2	The <i>Project Manager</i> and the <i>Supervisor</i> , after notifying the <i>Contractor</i> , may delegate any of their actions and may cancel any delegation. A reference to an action of the <i>Project Manager</i> or the <i>Supervisor</i> in this contract includes an action by his delegate.
	14.3	The <i>Project Manager</i> may give an instruction to the <i>Contractor</i> which changes the Works Information or a Key Date.
	14.4	The <i>Employer</i> may replace the <i>Project Manager</i> or the <i>Supervisor</i> after he has notified the <i>Contractor</i> of the name of the replacement.

Termination and construction contracts

- JCT and SBCC:
 - Employer entitled to terminate if the Contractor defaults.
 - Either party has the right to terminate due to the insolvency of the other party.
 - Contractor entitled to terminate if the Employer defaults.

- NEC:
 - Either party can terminate the contract for any reason set out in the termination table (Clause 90.2).
 - Common reasons for termination include:
 - Insolvency of the other party.
 - ‘A substantial failure to comply with obligations’.

Default by Contractor

- 8-4 ·1 If, before practical completion of the Works, the Contractor:
- 1 without reasonable cause wholly or substantially suspends the carrying out of the Works; or
 - 2 fails to proceed regularly and diligently with the Works; or
 - 3 refuses or neglects to comply with a notice or instruction from the Architect/Contract Administrator requiring him to remove any work, materials or goods not in accordance with this Contract and by such refusal or neglect the Works are materially affected; or
 - 4 fails to comply with clause 3·7 or 7·1; or
 - 5 fails to comply with clause 3·23,
- the Architect/Contract Administrator may give to the Contractor a notice specifying the default or defaults (a ‘specified’ default or defaults).

TERMINATION TABLE			
TERMINATING PARTY	REASON	PROCEDURE	AMOUNT DUE
The Contractor	R1–R15, R18 or R22	P1, P2 and P3	A1 and A3
	R17 or R20	P1 and P3	A1 and A2
	R21	P1 and P4	A1 and A2
	R23	P4	A1, A2 and A4
The Subcontractor	R1–R10, R16 or R19	P1 and P4	A1, A2 and A4
	R17 or R20	P1 and P4	A1 and A2

Common pitfalls and best practice



Common pitfalls

- Omission amounting to a breach of contract.
- Scope of the contract is reduced illegitimately and unnecessarily.

Best practice

- Review contracts carefully.
- Seek legal advice.

Questions?

Speakers



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