

Contracting for Surveyors

Current Trends

Presentation by Jarleth Heneghan of William Fry to
Society of Chartered Surveyor Ireland
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Overview



Environmental,
Social and
Governance
(ESG)



Private Sector
Contracts



Adjudication in
Construction
Contracts Act 2013



Performance
Security



Health and Safety
& COVID-19

Environmental, Social & Governance

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Environmental, Social & Governance

- What is your ESG Strategy?
- Is your Project at risk!
- Increasing reliance on ESG as performance marker of Sustainability & Resilience
 - Insurers / Investors / Lenders continued growing emphasis on ESG
 - Integration into due diligence practices, portfolio analysis
 - Reduce risks to Projects from climate change /energy price volatility / environmental legislation
- Practical effects of ESG framework on supply chain deliveries / asset life-cycles
 - Opportunities for Surveyors – Tendering and construction / operational processes
 - Impact on procurement processes and works specifications
 - Construction documentation & reporting

Environmental, Social & Governance

- Client demand driven
 - Tender/Construct/Operate projects in a lower carbon way
 - Competitive advantage
 - Quality ESG Data – Key measurement benchmark of the future
- Global Real Estate Sustainability Benchmark (GRESB)
 - The Global Standard for benchmarking
 - The 7 sustainability criteria and 50 indicators – 5 Star rating/ annual renewal
 - The time for engagement is now!
- Advise for surveyors
 - Engage and implement Environment Management System accredited to ISO 14001
 - Adopt Green procurement and life cycle costing strategies
 - Specialise in the provision of LEED / BREEAM / WELL / WIRED
 - Act on the ESG accelerants

Private Sector Contract

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Meeting Construction Targets May Mean Amending Building Contracts

- Balance of risk perceived to be with the employer under RIAI Standard Forms of Building Contract. The effects of employer schedule of contract amendments to RIAI forms
- Balance of risk perceived to be with the contractor under PWC (employer design). Significantly impacting both existing contracts and contractors tendering
- Post pandemic issues include the rapid increases in costs/availability of materials and labour and impacts on site productivity – Employer risk under RIAI forms unless excluded
- Delay due to the late delivery of key components /materials resulting from the pandemic recovery and BREXIT – Do RIAI /PWC standard form of contract adequately address these issues?
- The private sector form of contract claims to achieve a fairer allocation of risk, promoting sustainability and efficiency in the industry

The Private Sector Contract (PSC)

- Advantages of the PSC contract
 - Sub-contractors
 - Insurances
 - “Force Majeure”
 - Changes In The Law
- The PSC Launched by CIF, Engineers Ireland and SCSl on 15 September 2020. Based on PWC (employer-designed)
- Suitable for medium to large scale building or civil engineering works. where design has been provided by the employer
- Objective of achieving a fair and balanced allocation of risk between parties to promote long-term sustainable efficiency in the industry
- In summary PSC uses the overall structure of the public works contracts but re-balancing the risk allocation between the employer and contractor
- Includes similar additions to those used to supplement and amend the RIAI form

The Private Sector Contract (PSC)

Areas where the PSC deviates from PWC contracts and RIAI standard form:

- Specialists
 - Contractor responsibility varies depending on whether they are novated, named or nominated specialists
- Design
 - PSC makes client responsible for the ‘integration and co-ordination of the design’
- Fit for purpose
 - Contractor to be responsible for ensuring the suitability of items designed or selected by the client’s design team
- Law and government action
 - PSC makes change of law after the designated date a delay and compensation event
- Liability
 - PSC limits contractor’s liability to 100% of the initial contract sum
- Insurance
 - Contractor Professional Indemnity requirement is optional
- Claim and dispute mechanics
 - PSC requires *each* party to notify claims within 28 days after it becomes (or should have become) aware of something resulting in an entitlement

The Private Sector Contract (PSC)

- PSC & Force Majeure
 - Unlike PWC, PSC effectively makes provision for force majeure. The responsibility of the Contractor is much narrower and not responsible for all risks, whether foreseen or unforeseen
 - Absence of provision for Force Majeure means the contractor may argue that the contract has been frustrated, however, multiple problems with this doctrine and can be difficult to confirm whether contracts have in fact been frustrated or not
- Three approaches to drafting a Force Majeure Clause
 - a) 'Extreme' Approach
 - b) 'Woolly' Approach
 - c) 'Formula' Approach
- Use of PSC
 - Why are we not seeing it adopted on projects at this time?
 - Is it familiarly with other standard forms; the unique circumstances of the times e.g. pandemic / BREXIT or is it something else?

Performance Securities in Construction

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Performance Securities

- Form of security which is appropriate to a project will depend on the risk, scope, effect and duration sought to be protected against
- Bonds
 - Advance Payment
 - Performance: Impact of *Clarington* decision
 - Retention
- Parent Company Guarantee
 - Typically utilised where the counterparty is a Joint Venture or a special purpose vehicle incorporated for delivery of the particular project
- Collateral Warranties
 - Will offer an added layer of protection to the employer and third parties against non-performance of the key counterparties – consultant / sub-consultant, contractors /sub-contractors
 - Third parties will include funders, purchaser, tenants and management companies

Performance Securities

Insurance

- Current Issues in the Professional Indemnity insurance Market
- “Any on claim” or “In the aggregate”
 - Difficulty may arise with aggregate cover as the PI policy effectively covers all projects on which the consultant, contractor or sub-contractor is engaged
 - Aggregate limitation for sub-limbs – environmental, asbestos, cladding fire resistance etc.
 - If claims reach the policy threshold within the period of insurance, an employer could be in a position where there is no further cover available to meet their claim
- Impacts on construction industry – design related latent defects.
- Latent Defects Insurance (LDI)
 - No Fault Insurance
 - Usually arranged for a 12 (twelve) year period and will protect against defects that occur in the post construction phase of a building
 - Not dependent whether the contractor/sub-contractor is still in business

Adjudication under Construction Contracts Act 2013

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Aakon Construction Services Ltd v Pure Fitout Associated Limited [2021] IEHC 562

- The dispute between the two parties was referred to adjudication after the applicant (sub-contractor) issued a payment claim notice to the respondent (main contractor), which the respondent subsequently did not reply to
- Adjudicator found that the failure to respond to the payment claim notice had the consequence of triggering a default requirement to pay the amount claimed
- In addition, the adjudicator indicated that there was no need to evaluate the sums ‘properly’ payable by evaluating the measured work and variations
- The High Court enforcement proceedings which took the form of an application for leave to enforce the adjudicator's decision, found in favour of the applicant and upheld the adjudicator's decision
- The respondent's grounds for resisting the application in relation to (1) Jurisdictions of the Adjudicator; and (2) Failure to consider part of the respondent's defence were unsuccessful
- Effect of *Grove Developments Ltd v S&T (UK) Ltd (2018) EWCA Civ 2448*

Judgment of Simons J –Key Differences between the Construction Contracts Act 2013 and equivalent UK legislation

- In Ireland, adjudicator's decision is enforced as if it were an order of court. Under UK legislation, an application for a summary judgment is made to enforce an adjudicator's decision.
- Adjudication process under the 2013 Act is statutory. By contrast, UK legislation implies terms into construction contracts giving rights to adjudication. As such, adjudicator's decision in Ireland going forward may be amenable to judicial review.
- Dissimilar to UK legislation, no express provision under the 2013 Act which stipulates the consequences of a failure to respond to a payment claim notice.
- In the UK an adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. However, 2013 Act refers to court proceedings initiated 'in relation to' the adjudicator's decision, suggesting it is necessary to challenge an adjudicator's decision head on - and that some weight may have to be given to the adjudicator's decision.

Health & Safety & COVID-19 in Contracts

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**Employer/
Contractor
Responsibilities**

Cost / Time Implications

Change in Law

Health & Safety & COVID-19 on Contracts

Responsibilities

- Employer
 - Section 8 (1) of the Safety, Health and Welfare at Work Act 2005: *"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees"*
- Project Supervisor for the Design Project (PSDP)
- Employer is expected to co-operate with the Contractor
- Contractor
 - Covid-19 Plan
 - Compliance Officer
 - Enforcement in construction activities and on site

Health & Safety & COVID-19

Cost Implications

- RIAI Construction Contract Clause 4 – variations due to legislative enactments shall be added/subtracted from Contract Sum, as certified by the Architect
- Parties have amended Clause 4 to reflect both (1) the extent of the recoverable sum which will accommodate the (2) the scale of the change envisaged as a result of the Covid-19 pandemic legislation
- Clause 36 where not excluded from the Contract by the parties may give the Contractor the bases of a claim in respect of an increase in the contract price
- PW-CF1 optional clause – optional clause which allows for adjustment to Contract Sum. For that to occur some type of action is required from the employer
- Effect of the absence of a force majeure clause
- ‘Ex gratia payment’ to relieve financial pressure on Contractor’s due to site closureOffice of Government Procurement
 - Model terms of Supplemental Agreement

Health & Safety & COVID-19

Time & Cost Entitlements

- Clause 9 of the PWC Contract and Clause 30 of the RIAI standard form: contractual entitlement to additional time.
- What constitute “Delay Events” and “Compensation Events” are defined in part 1K of the Schedule to PW- CF1
- A delay event includes “delays to the works caused by the order or other act of a court or other public authority exercising authority under Law”
- Definition of “law” is narrower than RIAI standard form
- Contractor to establish the Delay Event (as set out in Schedule 1K) is also a Compensation Event.
- Clause 30 RIAI standard form: EOT will be granted where the Architect forms the view that the event has caused delay and is not due to a default of the Contractor.
- Need for a collaborative approach

Health & Safety & COVID-19

Change in Law

- **Clause 18 FIDIC (Yellow Book) provides for Exceptional Events, defined as an event or circumstance which**
 - a) is beyond a party's control;
 - b) could not have been reasonably provided against before entering the contract
 - c) having arisen could not reasonably have been avoided or overcome; and
 - d) is not substantially attributable to the other party
- **Clauses 19.1 NEC provides for prevention, Clause 60.1(9) details compensation events and Clause 91.7 covers Reasons for Termination. Each of these clauses provide for an event which**
 - a) stops the Contractor completing the whole of the works or from completing them by the date for planned Completion; and
 - b) neither party could prevent, and an experienced Contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to allow for it

Force Majeure & Frustration

- *Tennants (Lanschire) Ltd v G.S. Wilson & Co. Ltd [1917]AC 495* – Demonstrate able and willingness to perform contractual obligations BUT FOR the force majeure event
- FIDIC general catch-all clause "*exceptional events that:*
 - *is beyond a Party's control; or*
 - *having arisen, could not reasonably have been avoided or overcome*".
- JCT Contracts: "relevant events"
- RIAI: Dependant on specific contract and whether or not specific clause amendments has being inserted in the Employer's Schedule of Amendments to the Contract form

Questions?

Contact us



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Thank you
