Contract killers 2

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In the May/June 2004 Edition of Architectural Technology, Paul Greenwood MCIAT turned the spotlight on one of those shadowy areas, namely, the meaning and interpretation of contract clauses and their implications.
In this article **Andrew Macleod** of Robin Simons LLP expands on the theme.

The uncomfortable prospect for those not quite up to speed on contracts is finding themselves overtaken by events in the late and desperate scramble to unravel and explain the implications of contract clauses to their client.

In his article, Paul Greenwood invited us to put together our respective 'top six' areas most likely to give rise to problems in building contracts. Paul gave us his own top six to mull over and I think it is worth reminding ourselves what they were:

1. Definition of the Scope of Work
   (with this the likelihood of disputes arising under items 2, 3 and 4 are drastically reduced).

2. Claims for extra money
   (variations/loss and expense).

3. Claims for extra time
   (extension of time, loss and expense/minimise damages).

4. Wrongful withholding of payment
   (notice of withholding payment).

5. Practical completion
   (issuing of certificate of non-completion/minimise damages).

6. Adjudication
   (payment provisions/disputes in respect of points 2-5 referred to adjudication for speedy resolution).

I do not disagree with any of them. In fact, I shall return to the subject of adjudication in a few moments.

All of them have arisen in my recent experience in connection with the CIAT Professional Indemnity Insurance Scheme Advice and Helpline (where potential problems can be addressed and headed off before they ever become a problem), but also at a more salutary level, when they give rise to claims by clients against CIAT members.

I do not intend to drill down into Paul's top six issues although as I have said, I will stray into the area of adjudication in a moment. However, to Paul's top six, I wish to add a 'highest mover' outside of the top six and that relates to contractors' non-performance and how you, as a contract administrator address that issue.

The last thing you want is for your client to turn the guns on you

Many members will say they do not venture along the contract administration road. Well so be it. I leave you simply to check that you make this clear in your Letters of Engagement/Conditions of Engagement.

To those who are journeying with me along this road, I can tell you that experience has shown me that clients expect their Architectural Technologist to be nimble of foot and issue the requisite instructions to the contractor to put right what is wrong or complete what is incomplete.

Some standard form contracts contain provision allowing the contract administrator, on behalf of the employer, to issue notices warning a recalcitrant contractor of the consequences of poor performance.

The decision to issue such a notice should be the result of careful consideration. If a notice is negligently issued, the contractor may well incur costs and expense which he will seek to recover from the employer.

The employer may, in turn, seek to recover such costs from the contract administrator. On the other hand, a failure to act decisively to deal with a contractor's incompetence can also result in liability on the part of a contract administrator.

Clients become very frustrated when contractors fail to perform and without adequate counselling and explanation, they will soon look to you to make amends for a problem, which is not of your making.

Explaining what happens at practical completion and the reason why there may be minor snags, which do not affect that completion is a mystery that clients are only too pleased to have explained to them.

Equally, it is invaluable to be able to advise your clients of their contractual and/or common law rights to terminate the contractor's employment and/or employ another contractor to remedy defective outstanding works, pay them and recover the balance from the original contractor (whether by an adjustment to the contract sum or otherwise).

Oh yes, I said the client will have to pay someone else to do the work. Your client will be looking to you to have protected his interests in that regard through the certification and retention procedure such that there remains sufficient money in the kitty to employ another, probably more expensive, contractor to tidy up the mess.

Unfortunately, there often is insufficient money and that does give rise to claims against contract administrators. By the time defective and/or incomplete work has become a major issue, such that the contractor is no longer frequenting the site, client/contractor relations will normally have nosedived to the extent that your client is no longer paying the contractor sums that you have certified as due under the contract.

How familiar are you with the contractual machinery for certifying and making payment and the procedures for withholding of payments pursuant to the Housing Grants, Construction and Regeneration Act 1996 (otherwise known as the 'Construction Act')?

Generally speaking, once the contract administrator has certified sums due for payment, the employer has a contractual obligation to pay the amount certified to the contractor within a set number of days. If he intends to withhold payment, then he must follow the procedures set out in the Construction Act.

Here, timescales are tight and whilst it is the employer's responsibility to issue notices of withholding, contract administrators frequently find themselves criticised by employers for failing to draw their attention to the need to serve notices of withholding payment and the timescales involved.

By the time the realisation has dawned, the switched on contractor is already preparing to commence proceedings to recover certified sums through adjudication – a dispute resolution procedure that will take 28 to 42 days to reach a conclusion, but no longer.

I can tell you that clients who are upset because they missed the boat when it came to serving notices of withholding payment are an even hairier prospect when they find themselves embroiled in a summary procedure where their prospects of success may not be good and where, in all likelihood, they will be paying a sum of money (which they do not wish to pay) to a contractor who no longer feels inclined to attend site.

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Combined with a possible lack of direction from the contract administrator as to what the adjudication procedure is all about, one can envisage clients getting very steamed up and believe me, they will do. The last thing you want is for your client to turn the guns on you by commencing adjudication proceedings against you to make good the shortcomings of the contract administration.

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