

Conditions Precedent

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Since the introduction of the forms of contract for the airport core projects, contracts have increasingly included conditions precedent.

A condition precedent is a provision, which stipulates that a contractor (or a sub-contractor under a sub-contract) must comply with certain specified procedures if he is to avail himself of other contractual provisions. If a contractor (or sub-contractor) does not comply with the certain specified procedures then he is deemed to have waived his rights under the contract, or at law, to the remedies, which would otherwise have been available to him.

The remedies which are usually made the subject of conditions precedent are:-

- extensions of time;
- financial claims for additional payment.

Conditions precedent is a legal term and it is established law (there may be a few exceptions) that if the conditions precedent are not fulfilled then a contractor has no recourse to the remedies which were the subject of the conditions precedent.

Common Requirements

A contractual provision for conditions precedent usually provides for the following:-

- a notice to be given by the contractor to the consultants, often specified to be within a certain number of days (often 28 days) after the start of an event for which the contractual remedy is being sought;
- the provisions of particulars in sufficient detail so that the consultants can understand the claim, (i.e. the contractual remedy being sought), and to form his own opinions on the matter. The provision of such particulars is often specified to be within a certain

number of days after the effects of an event have ceased (often 28 days);

- if the effects of an event are prolonged (as is often the case in construction) then interim particulars are often required at intervals not exceeding a specified period (often 28 days).

Provisions relating to conditions precedent will be interpreted *contra proferentem*, hence, they should be carefully drafted. However, the law will not protect a party who has made a bad bargain and if, for instance, the notice period is 7 days, then a contractor must comply with that provision if he is to avail himself of the contractual remedy.

Extensions of Time

As a remedy for excusable delays, i.e. delays caused by an employer or delays for which an employer has agreed to accept the risk as regards to time, e.g. insurable risks (the neutral causes of delay), a contractor is entitled to an extension of time and such provisions keep alive an employer's right to recover damages for delay, often stated to be liquidated and ascertained damages.

If the provisions are made the subject of conditions precedent (e.g. notice, interim particulars and final particulars), and the contractor does not comply with the conditions precedent, then the consultant cannot, contractually, award an extension of time.

However, an employer's reflections at the contractor's misfortune in failing to comply with the conditions precedent (BERA have had experience of a claim being rejected where the notice was issued one day after the expiry of the specified period) may be short-lived as the contractor may have a legal remedy.

That legal remedy is the doctrine that a wrongdoer cannot benefit by his own misdeeds. Therefore, based upon the legal doctrine that a person cannot benefit by his own misdeeds, if the cause of delay is employer's default (or his agent's default) and such default prevents the contractor from completing by the specified date for completion, then the employer cannot recover liquidated damages as he would be benefitting by his own misdeeds. The contractor would still be bound by the need to complete within the time which would have been extended had he complied with the conditions precedent so there is no benefit to the contractor caused by his failure to comply with the conditions precedent.

There is another problem and that is what happens where, after the event which caused delay, and for which the contractor failed to comply with the conditions precedent, the employer causes further delay. Most contractual provisions which are drafted do not cater for this situation.

Therefore, for an employer, the only benefit of conditions precedent relating to extensions of time is that the extensions of time for neutral causes of delay may be avoided if the contractor does not comply with the conditions precedent.

When a consultant relies on a failure to comply with the conditions precedent, as he or she must do, and rejects an otherwise meritorious claim for an extension of time for an event of employer's default, and such event causes delay to completion, then the administration of the time aspects of a contract become in disarray.

Therefore, employers should think twice about such provisions before drafting their extension of time provisions.

Claims for Additional Payment

This is where conditions precedent can be more fully enforced but again the legal doctrine that a person cannot benefit by his own default still applies. Therefore, conditions precedent related to payment for additional work cannot be enforced as an employer cannot benefit from an instruction to carry out additional work and get that work free of charge if the contractor fails to comply with the conditions precedent.

Performance

The Swire Properties Limited Standard Form of Building Contract contains conditions precedent which are linked to real performance and aim to benefit both the contractor and employer if they are observed.

With regard to extensions of time the conditions precedent in clause 23 sub-clause (3) of the Swire Form are:-

".. the Main Contractor shall:-

- (a) constantly use all practicable measures to anticipate, prevent or mitigate any delay to the Works; and
- (b) submit the notice referred to in sub-clause (1), and shall include therein such details of the cause, or causes, of delay and the anticipated effects of the said cause or causes, as are then reasonably foreseeable (including without limitation any paragraph of sub-clause (1) relied upon);
- (c) thereafter keep such records and submit such further information in connection with the said cause and effects as the Architect shall reasonably require.
- (d) prepare and submit to the Architect, for each event which the Main Contractor contends has caused delay, full and detailed particulars of the effects thereof and the practicable measures implemented by the Main Contractor pursuant to sub-clause (3)(a); and
- (e) prepare and submit to the Architect, with the aforementioned full and detailed particulars, a delay

demonstration programme based upon the Construction Programme referred to in clause 6 of Schedule 3 hereto, or if more than one month has elapsed since the Construction Programme was prepared, the latest monthly update thereof referred to in clause 7 of Schedule 3 hereto,

- (i) the delay demonstration programme shall show the Main Contractor's intentions immediately before the start of the event which caused delay, the effects of the event, the Main Contractor's revised intentions after assimilating the effects of the event and the as-built record of the affected activities;
- (ii) the delay demonstration programme shall take into account the practicable measures referred to in sub-clause (3)(a) and any measures taken by the Employer to mitigate delay;
- (iii) the full and detailed particulars and the delay demonstration programme shall jointly establish the nexus between the event, or events, causing delay and the effects thereof and, if, in the opinion of the Architect, this nexus has not been established, then the Main Contractor shall provide further particulars to prove his contentions or withdraw the claim. This clause clearly sets out the procedures required and a contractor can be left in no doubt how it has to proceed once an event occurs and what it has to do to establish its claim".

This clause clearly sets out the procedures required and a contractor can be left in no doubt how it has to proceed once an event occurs and what it has to do to establish its claim.

With regard to claims for additional payment, the conditions precedent in clause 24 sub-clause (3) of the Swire Form are:-

".. the Main Contractor shall, for each event which has materially affected the regular

progress of the Works, or of any part thereof:-

- (a) constantly use all reasonable means to anticipate, prevent and/or mitigate the incurring of any such Direct Loss and/or Expense; and
- (b) make the written application referred to in sub-clause (1) within twenty-eight (28) days after it has become, or should reasonably have become, apparent to him that the regular progress of the Works, or of any part thereof, has been or is likely to be affected as aforesaid; and
- (c) thereafter keep such records and submit such further information in connection with the said circumstances and Direct Loss and/or Expense as the Architect shall reasonably require; and
- (d) in support of his application, and within ninety (90) days of the end of the effects caused by the event which materially affected the regular progress of the Works, or of any part thereof, submit to the Architect such information as should reasonably enable the Architect to form an opinion as aforesaid together with such details of such Direct Loss and/or Expense as is reasonably necessary for such ascertainment.

Again this clause clearly sets out what is required for a contractor to succeed with a financial claim. The Swire contractual provisions incorporating conditions precedent strive to achieve improved performance (i.e. constantly use all practicable measures etc.) and not just place obstacles in a contractor's path when seeking his rights under the contract. Such improved performance is intended to benefit both the contractor and employer. A contractor who constantly uses all practicable measures to reduce delay and to mitigate cost will benefit an employer by earlier completion and less additional expense than can occur on a contract where there are no such obligations (e.g. where the obligations refer to best endeavours).

Employers and consultants should be aware of the pitfalls as well as the benefits of

conditions precedent when drafting their contracts.

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