

Nominated or Named?

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Nominated subcontractors are often closely aligned with the consultants assisting in design and overcoming co-ordination and technical problems arriving at an end product which is aesthetically and functionally what a consultant requires. Nominated subcontractors are often involved in a project before the main contractor is appointed and the project is often designed around a nominated subcontractors' features, e.g. lift shaft sizes, curtain walling features and the like.

Clause 27 of the HKIA Standard Form of Building Contract deals with nominated subcontractors. This form of contract was based upon the UK JCT 63, which itself was based upon earlier RIBA standard forms of contract. Nominated subcontracting, therefore, has a long history.

Reasonable Objection

In traditional main contract tenders, nominated subcontract works will form the subject of a description of a prime cost sum and some preliminary drawings may be provided. Main contract tenderers, therefore, have little information concerning the nominated subcontract works and yet, increasingly, main contract tenderers are being required to take on liabilities such as design, fitness for purpose and even the risks of performance by the unknown, yet to be nominated, subcontractor. Once a main contractor has accepted the architect's nomination proposal he becomes responsible for that subcontractor, just as he would his own domestic subcontractors (excepting an obligation to re-nominate in certain circumstances). Therefore, a fair contract should provide protection for the main contractor and allow him to insist upon certain conditions and requirements when the architect issues his nomination proposal. Clause 27(a) of the HKIA

Standard Form of Building Contract provides:-

"Provided that the Architect shall not nominate any person as a subcontractor against whom the Main Contractor shall make reasonable objection".

Therefore, a main contractor's objection to an architect's nomination proposal only has to be "reasonable" for him to succeed with an objection.

Vetting a Nomination Proposal

A prudent main contractor will carefully inspect an architect's nomination proposal and investigate the proposed nominated subcontractor. Programme and performance obligations are obvious aspects to check but also the proposed nominated subcontractor's financial standing is an important aspect to be investigated.

BERA have recently had to advise main contractor clients to also investigate the financial viability of the proposed subcontract price to determine if the proposed nominated subcontractor can actually carry out the tendered work profitably as an unprofitable subcontractor is far more difficult to deal with (and can go into bankruptcy) than a profitable subcontractor.

There are many justifiable reasons that a main contractor can put forward to reject an architect's nomination proposal. Take for example, a nomination proposal for a curtain walling subcontract which the main contractor has investigated and found the proposed nominated subcontractor to be financially insecure and, in addition, the proposed nominated subcontractor reduced his initial tender price by 20% with no reduction in work content or specification. A main contractor would be fully justified

in objecting to a nomination proposal if such circumstances occurred (and they do occur frequently) or if he felt that the proposed tender sum was too low.

Then what happens if, for instance, an architect has used the curtain walling subcontractor's preliminary design for structural design, aesthetic appearance, interface arrangements or any number of other arrangements?

In such circumstances, the contractor has a strong bargaining position. A skillful main contractor can obtain indemnities and waivers from the employer on the basis that if he refuses the nomination proposal on valid grounds then the project could grind to a halt. Where a main contractor has valid grounds for objection, and insists upon his rights, then an employer will have to provide whatever indemnities and waivers are negotiable otherwise he will incur even more expense if he elects for determination of the main contractor's employment under the contract.

No Right to Object

Incidentally, if clause 27(a) of the HKIA Standard Form of Building Contract has been amended to delete the main contractor's right to raise reasonable objection, then the architect's nomination proposal will almost certainly be construed as a warranty at law that the proposed nominated subcontractor is capable of performing the subcontract works as provided in clause 27. If the nominated subcontractor then fails, the main contractor could claim against the employer for misrepresentation by his agent, the architect. Therefore, any loss incurred by the main contractor could be recoverable from the employer.

Failure to Perform

In another scenario of potential risk to an employer, after the nomination proposal has

been accepted, the subcontract awarded and work commenced, the main contractor complains that the nominated subcontractor is failing to perform. He issues notices under clause 20 of the RICS standard form of nominated sub-contract, the subcontractor's performance does not improve, so the main contractor determines the subcontractor's employment. When this occurs, the employer has to procure that his architect re-nominates another subcontractor to complete the outstanding works by a date which will enable the main contractor to complete the main contract works by the original date for completion. Delays will occur in the re-nomination process and time could be rendered at large if there is an unavoidable delay to completion of the main contract works. Whatever else happens, the employer will incur additional expense.

Named SubContracting

It was due to such risks that in the late 1980's, Swire Properties Limited introduced into its contracts the concept of named subcontracting, to replace traditional nominated subcontracting with its potential risks to an employer.

The named subcontracting concept requires names of would-be subcontractors to be furnished at the main contract tender stage by the consultants, for the main contractor to issue tender enquiries and for him to select the proposed named subcontractor. Further, after the award of the subcontract, the named subcontractor is treated like any other domestic subcontractor and the employer/architect have no obligation to re-nominate.

Main Features

The main features of named subcontracting are:

- The tender documents include lists of the names of potential named subcontract tenderers. Main contract

tenderers have the opportunity to object to any named subcontractor on the list of proposed named subcontract tenderers, but that objection must be made at tender stage.

- Main contractors lead the named subcontract tender process, for each named subcontract package the main contractor assembles the tender documents (including programme requirements and their own conditions), issues tender documents, receives the tenders, reviews tenders, holds post tender meetings and makes a proposal to the architect if any tenderer, other than the tenderer who submitted the lowest price, is to be appointed.
- The Architect has a right to veto any proposed appointment and can issue an instruction to the main contractor to accept any of the tenderers.
- After the nominated subcontract is awarded, the named subcontractor is, for all intents and purposes, a domestic subcontractor.

- The main contractor is only paid the rates in the accepted subcontract or lowest tender even if he has to find a replacement subcontractor.
- There is no obligation on an employer or an architect to re-nominate.

Since its introduction in the late 1980's, Swire Properties Limited have successfully used the named subcontracting policy on all of its traditional contracts, although some fine-tuning of the provisions for named subcontracting were made to allow an architect to select a tenderer, rather than allow a main contractor to make proposals.

However, whichever concept is adopted, nominated or named, both an employer's and a main contractor's profitability are compromised by a subcontract tenderer who makes promises he cannot possibly achieve. The time for careful diagnosis is prior to acceptance.

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