Construction and Engineering

BPE Construction & Engineering Newsletter – March 2015

Gazing through my car window as I drove into the office this morning, I spotted what I can only describe as some 'extremely cute' lambs playing in the usually dark fields. This can mean only one thing - Spring is finally here!

March is a very busy month in Cheltenham's social calendar, with the Cheltenham Gold Cup amongst other events. In the Construction & Engineering team we have been very busy too! Since we last wrote:

- We were delighted with how many attended our Construction & Engineering Friday Lunchtime Seminar, where Anna Wood & Kerrie Jones discussed CDM Regulations changes & liability limitation. Thank you to everyone that attended the session and for your positive feedback. We are now looking forward to our next session on 17 April 2015, where Neil Mason & Kerrie Jones will be discussing tendering and other procurement issues.

- We have been out and about meeting clients and hearing about exciting new opportunities in the Gloucestershire and South West region, in particular renewable energy projects.

- Anna Wood from the team is soon to be expecting her own little lamb as she is now on maternity leave. We wish her well and look forward to her return later in the year.

Back in the office we've been dealing with:

- Advising on the roll out of owner operated AD plants with an average value of £4m each across the UK.

- A particularly thorny lift enhancement contract in Wiltshire.

- A £500,000 final account dispute for a chain of boutique hotels in the West Country.

- A £800,000 delay and disruption claim to do with an education facility.

- Advising on defence of a potential design liability claim by an employer under a design and build contract.

- Advising on a potential claim for an extension of time and loss and expense arising out of failures by statutory bodies and statutory undertakers

- Drafting sub-contract terms for boiler installation and maintenance nationwide contracts

- Drafting operation and services agreement for anaerobic digestion facilities

- Reviewing building contract terms for a new school

- Advising the contractor in connection with a template EPC contract for the generation of rooftop solar energy to be rolled out across various sites in the UK.

- Providing legal support to a contractor in relation to a potential dispute with a subcontractor concerning valuation of works under a fixed price contract.

- Negotiating an amended ICC contract on behalf of a civils contractor in relation to a farm based wind turbine installation to be entered into with a major energy supplier.

The Public Contracts Regulations 2015

By Kerrie Jones

I was simultaneously flattered and disconcerted at our Construction & Engineering lunchtime seminar last month when a client told me "your eyes lit up when we discussed Public Procurement and the support we needed". Okay, I admit it, I do get quite excited by Public Procurement, especially because I know that when done properly it can be stress-free and lucrative.

This is a gentle introduction to some of the changes introduced by the Public Contracts Regulations 2015 (PCR 2015.2). More detailed pieces will follow over the coming months as I plan to dive deeper into the Regulation changes and explain what this will mean for our clients.

On 26 February the PCR 2015.2 introduced substantial changes and clarifications to the Public Procurement rules in England, Wales and Northern Ireland (separate regulations were introduced in Scotland). The aim is greater flexibility, transparency and clarity to the Public Procurement regime that affects all public bodies and their suppliers.

Amongst the wide reaching changes, the distinction between Part A and Part B service contracts has been abolished. Previously, the Regulations divided the services into Part A (priority) services and Part B (residual) services. Prior to the changes only Part A services were fully caught by the Regulations, however this is no longer the case. Now Part B services will be fully regulated under PCR 2015.2 (unless they are considered to fall under the new 'lighter touch' regime or are excluded under sub-section 3 of the Regulation).

PCR 2015.2 introduces two new award procedures, namely competitive procedure and innovation partnership. Replacing the old negotiated procedure (which was only available on limited grounds) with the new competitive procedure with negotiation allows for negotiation between the parties throughout the tender process until the point of tender submission.

Competitive procedure with negotiation will be available on the same grounds as the existing competitive dialogue procedure (which remains). Where negotiations are necessary due to the nature, complexity or risk-profile of the contract, this type of procedure is suitable when the cost of the contract is yet to be determined. Innovation partnership allows a public authority and a private sector partner to develop an innovative product that is not yet available on the market.

Measures aimed at opening up more opportunities for SMEs and start-ups will no doubt be warmly welcomed. Public bodies are now encouraged to divide a contract into multiple 'lots'. Although this is not a new idea, the PCR 2015.2 will force public bodies to provide an explanation if the recommended 'lot' approach is not followed.

Despite the new procedure applying from last month, it doesn't mean that we can kiss goodbye to the old PCR 2006 procedure. PCR 2006 will still apply to procurement that commenced prior to the changes - so make sure that you keep on top of which procedure applies to which contract!

The changes mean that your tender documents and processes must be compliant. So some considerations for your tender documents:

- Have you included all the information which the new Regulations require?
- Timescales, terminology and references to the Regulations will require amendment e.g. Regulation 32 (standstill notices) and Regulation 32A (standstill period) are now Regulations 86 and 87.
- Check revised and expanded grounds for excluding bidders (mandatory and discretionary).
- Check if selection criterion is still compliant e.g. turnover requirements not exceeding twice contract value.
- Include Regulation 73 termination provisions. This Regulation implies certain terms in to the contract if they have not been included, therefore it is advisable that you include your own provisions rather than expose yourself to a Judge's discretion.
- Stay up to date with record keeping and reporting to meet the audit trail requirements of Regulation 84.

These are just a few considerations for you to ponder over until next month's article but in the meantime, if you have any questions or requirements that you would like to discuss with me contact me at kerrie.jones@bpe.co.uk.

You can contact Kerrie Jones on mailto:kerrie.jones@bpe.co.uk or 01242 248297.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice.

What if it doesn't do what it says on the tin?

By Neil Mason

The law gives primacy to the terms of a written contract, and the court will only look at pre-contract correspondence in certain circumstances. This is because when a court tries to construe a contract, it seeks to give effect to the objective meaning of contractual terms rather than the parties' subjective intentions.

When can the court go beyond the confines of the contract and consider any pre-contract correspondence? The leading authorities are *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28 and, in the construction and engineering context, *Chartbrook v Persimmon Homes Ltd and others* [2009] UKHL 38. In each case the leading judgment was given by Lord Hoffman, and these essentially provide that a court can look at pre-contract correspondence, when it has to:

1. construe a contract term, and in order to do so needs to establish that a fact, which may be relevant as background, was known to the parties; or
2. adjudicate on a claim for such remedies as Rectification or Estoppel.

Rectification is a type of claim for a court order to re-write a contract to conform to the parties' intention. Estoppel is a bar to a party taking certain steps because to do so would be inequitable i.e. unfair to the other party. Both remedies are subject to separate legal tests, and can be defeated by such devices as 'entire agreement clauses', which exclude consideration of pre-contract statements, and 'non-waiver clauses', which seek to preserve a party's contractual rights when they fail to exercise them in a timely fashion.

Each of these deserves an article in its own right, so watch this space. In the meantime, be thankful that most construction and engineering standard forms do not include such clauses. Ensure that you keep a written chronological record of pre-contract correspondence and statements arising from your negotiations in case you need to rely on Rectification if you're bringing a claim, or Estoppel to defend one.

As ever, timely and incisive pre-contract legal advice can help avoid such disputes by ensuring that your contract is drafted with precision and corresponds to what you've actually agreed.

You can contact Neil on mailto:neil.mason@bpe.co.uk or 01242 248432.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice.

The time of your life

By Emilie Sclater

Like life in Green Day's popular track, many a construction project will come across "a turning point, a fork stuck in the road" where "time grabs you by the wrist, directs you where to go". Delays are sometimes inevitable and crop up in unforeseen ways (or ways which perhaps should have been foreseen – like rock of Gibraltar – see Anna Wood's piece on this case in July 2014, "FIDIC rocks my world".

In this case, the parties used the FIDIC Yellow Book form of contract. The contract included clauses to the effect that the Contractor must give notice if he considers himself entitled to any extension of time for completion, describing the event or circumstance giving rise to the claim. This notice, which was a condition precedent (i.e. a pre-requisite) to an extension of time, had to be given "as soon as practicable" and "not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance".

A further clause stated that the Contractor would be entitled, subject to provision of the notice, to an extension of time if and to the extent that completion "is or will be delayed". The delays in this case were caused by poor weather, rock and hydrocarbon and lead contamination on site. The Contractor served notice but arguments arose over the timing of the Contractor's notice (among other things).

Perhaps somewhat surprisingly, the TCC decided that where it was known that an event might have an impact on completion in the future, but that impact was not immediate and not yet measureable, notice was not required at that time. This interpretation will give some contractors greater flexibility as to the timing of delay notices avoids the situation where contractors must give numerous "protective" notices in case an event becomes a delay event. The TCC indicated that notice could be given either at the time when it became clear that there would be a delay in future OR when the delay itself had started.

It is likely that some other forms of contract (such as some of the JCT suite) could be interpreted similarly however not all will be and as always, it is key to check the wording of your contract terms and comply with any notice requirements.

Many employers may already be taking this decision into account and amending standard forms of contract to ensure that there is a clear date by which notices must be served and that they must be served at the earliest possible date. A note of caution to contractors therefore – don't let this be "a lesson learned in time"! Check the wording of your contract terms and ensure that you give notice of delays as early as possible to avoid their invalidity.

You can contact Emilie on emilie.sclater@bpe.co.uk or 01242 248296.

Cutting through the legalese: CDM Regulations 2015 – Contractual Changes

By Katie Pickering

Following on from my article in the October newsletter, Changes to the CDM Regulations, it has been confirmed that there will now be a transition period running from 6 April 2015 until 6 October 2015. Full details are set out in Schedule 4 to the CDM Regs 2015. Some of the key points are listed below:

- On projects where a CDM Co-ordinator has already been appointed, the client has until 6 October 2015 to replace its CDM Co-ordinator with a principal designer (unless the construction phase will complete before that date)

- During the transition phase, CDM Co-ordinators will have revised duties in order to comply with CDM 2015.

- For projects where a CDM Co-ordinator has not yet been appointed and where there will be more than one contractor, a principal designer must be appointed instead.

- On projects with no principal contractor appointed, a principal contractor must be appointed as soon as practicable if the project involves more than one contractor.

- A principal contractor already appointed under CDM Regs 2007 will remain principal contractor for the purposes of CDM Regs 2015.

Due to the transitional arrangements, there is no real need to amend existing contracts to refer to the CDM Regs 2015 once it comes into force, but any new contracts which have not been entered into yet and work will start after 6 April 2015, should be amended to refer to the CDM Regs 2015.

CDM Co-ordinator appointment documents will no longer be required and standard design consultant appointments will need to be amended to make way for the possibility of a designer being appointed as a principal designer. The JCT will publish a supplementary amendment which will need to be incorporated into all contracts where work will start after 6 April 2015.

The RIBA Standard Conditions of Appointment do not refer expressly to CDM Regs 2007 but the schedule of services that accompany them do, so they are likely to require amendment. Where a contract is not yet entered into but work will start before 6 April 2015, the parties may wish to add wording to the contract acknowledging that the new Regulations will come into force during the course of the project.

Katie can be contacted on katie.pickering@bpe.co.uk or 01242 248271.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice. "Cutting through the legalese" in particular is intended to be a short and introductory feature which does not provide comprehensive guidance on the topic in question. Legal advice should always be sought.

Guest Article: That's It!

By Paul Newman, Cotswold Barristers

The Final Certificate is key to JCT contracts. The employer / contractor has 28 days in which to challenge the Certificate. If not, the Certificate conclusively decides certain matters – defects, delays and how much the contractor will be paid. In ***Marc Gilbard 2009 Settlement Trust (Trustees of) v OD Developments and Projects Ltd*** [2015] EWHC 70 Coulson J considered how clause 1.9 (Final Certificate) of the JCT Standard Form of Building Contract works.

The Trust argued that clause 1.9 prevented any proceedings outside the 28-day period, including any future adjudication. No, said the contractor. He had issued Court proceedings within the 28-day period. That made the Final Certificate inconclusive in all other proceedings. The contractor could now take the valuation in the Final Certificate to adjudication. If not, the right to refer a dispute to adjudication "at any time" under the 'Construction Act' would be fettered.

Coulson J decided – '*… the purpose of clause 1.9.3 is to limit those matters in respect of which the Final Certificate is not conclusive to those matters raised in the proceedings issued within 28 days*.' In other words, if the contractor did not specifically challenge an item in the valuation then that item should be taken as agreed even if the parties had previously argued about it. Clause 1.9.3 envisaged one set of proceedings – '*There are certainly no words in clause 1.9.3 which permit a series of subsequent proceedings …*' In this case the contractor initially chose just to litigate. After 28 days, he could still go to adjudication but in that adjudication the Final Certificate would be conclusive – '*The Act does not provide an unfettered right to adjudicate regardless of other contractual terms*.'

The warning for clients and lawyers is clear – quick decisions are needed on tactics after a Final Certificate is issued.

Paul Newman is a barrister specialising in construction law at Cotswold Barristers. Visit www.cotswoldbarristers.co.uk to find out more.

Guest Article: Consultation to speed up Section 106 Agreements

By Harriet Willmore, Trainee Solicitor, BPE Solicitors

Housing Minister Brandon Lewis has recently released a consultation on plans to speed up the negotiation and completion of Section 106 Agreements. The consultation on these proposals opened on 20 February and closes on 19 March 2015, so a rapid response is required.

Since their introduction, Section 106 Agreements have been the subject of much scrutiny due to developers often incurring significant delays in obtaining planning permission. Whilst there are many reasons why Section 106 agreements take so long to complete, feedback from the sector suggests this comes down to the drawn-out negotiations and the contentious nature of agreeing the terms. There is a strong argument that if the terms were negotiated much earlier on, with more engagement with the council at the pre-application stage, the agreements would be much simpler and quicker to negotiate.
Determined to take steps to tackle the delays associated with Section 106 Agreements, and mitigate the block on economic development, the Government has made several proposals including:

- setting statutory timescales for agreement so the existing 8 to 13 week target is met;
- encouraging the use of standardised clauses to avoid the need for each clause to be drafted from scratch;
- setting expectations for pre-application negotiations and encouraging front-loaded discussions; and
- introducing a dispute resolution process for when negotiations have stalled or statutory or agreed time frames have elapsed.

So what does this mean for developers? Any guidance or legislation implemented following the consultation is likely to result in developers considering their Section 106 Agreements much earlier on in the planning application process.

The proposals also seek views on whether the requirement to provide affordable housing contributions acts as a barrier to development providing dedicated student accommodation. If you would like to respond to the proposals to speed up Section 106 negotiations and on student accommodation please visit www.gov.uk/government/consultations/section-106-planning-obligations-speeding-up-negotiations and complete a response form.

You can contact Harriet on harriet.willmore@bpe.co.uk or 01242 248409.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice.

My Perfect Sunday

This month we interviewed John Brückel from Construction Logistics Services

- **I've been involved with the construction sector since:** I've been involved with the construction sector since 1994. My first job was for a developer in Cheltenham employed as a buyer/surveyor. After few years I moved into main contracting working for various sized companies for a period of 10 years. Since 2005 I have worked in a commercial consultant role with the UK's leading food retailers, housing associations and commercial developers.

- **The best thing about my job is:** Being able to streamline process, ensuring that risks and opportunities on projects are tabled, understood and successfully designed and managed out to completion.

- **The worst thing about my job is:** Sometimes having to search for that penny to balance being distracted from finding the more important pounds.

- **The first album I ever bought was:** Shakin Stevens- Let's Boogie.

- **My favourite holiday was:** This year in Alpe d'huez teaching my son to parallel ski followed by a successful last day down all of the red runs. Looking forward more so to next year's black runs.

- **My favourite bar/restaurant in Gloucestershire is:** Green Dragon - Cowley

- **Make mine a (e.g., pint of real ale/rum and coke):** Guinness or Gin and Tonic Super Sonic

- **My perfect Sunday would be:** Up and out early taking my son Joseff to tag Rugby for Stroud U8's then back home to warm up with a Sunday lunch. Walk the dogs in the woods with the family followed with a few bottles of red with my partner, Kate, and friends.