

Sanctions for deliberate non-compliance with contract terms by a party

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Full topic title

“Sanctions

Tactically, when there is deliberate non-compliance with contract terms by a party, what sanctions are available, realistic and practical, with reference to JCT, D+B and NEC3 Priced Contracts?”

The scenario

- Non-compliance may take many forms, e.g.:
 - not doing work properly
 - Ignoring instructions and directions
 - Not progressing
- Most likely scenario – contractor is going slow, threatening achievement of completion by due date
- Client/employer wants job finished

Management escalation

- Does the problem lie with the contractor's staff on site?
- Is their head office aware of and supportive of the course being taken?
- Way to find out is to high level contact (e.g. CEO to CEO)
- Variations on this, e.g.:
 - Summon meeting of all concerned, to include decision-takers
 - Appoint neutral independent (outside contract) to investigate, report, and if possible find solution (like a mediator)

First steps for the adviser

- What exactly does the non-compliance consist of?
- What is the problem? (“jaw jaw is better than war war”)
- What documentary record complaining about it already exists?
- In all cases where record is wanting, create it – contractor may be brought to senses just by seeing well-drafted contractual notices (with hint that lawyers are involved)

Structural/technical/engineering non-compliance

- This could simply be dangerous and so may have very serious implications for all parties
- Engage experts in relevant disciplines to analyse and report quickly
- Consider stopping the work (financial/commercial risks)
- Consider bringing in externals e.g. HSE, local authority building control
- Not wise to cover up and hope it goes away

Financial issues

- This type of behaviour is often symptomatic of underlying financial problems
- If this is so, contractor's problem may quickly become owner's problem
- Ask frank questions of contractor; ask around the industry
- If money is the problem, that's how it needs to be treated
- Not much point in hard contractual stance if it will just push contractor over the edge

If the contractor is simply being difficult..

- He needs to know what could hit him
- This requires careful preparation and creation of good documentary record

Contractual steps - NEC3

- NEC contracts pre-suppose more cooperation than non-cooperation
- Nevertheless, the types of record which should be in place include:
 - Early warning notices by Project Manager under clause 16.1
 - Holding of a risk reduction meeting under clause 16.2 & .3
 - Instruction to submit revised programme under 32.2
 - Notice to correct defects cl.43
- Note: Cl. 36 does not give power to instruct acceleration to recover delay

Contractual steps - JCT

- The types of record which should be in place include:
- Instructions from the Architect/CA under clauses 3.18/3.19
- Notices of non-compliance with e.g. clause 2.1 (carry out Works in proper and workmanlike manner) and clause 2.4 (regularly and diligently proceed)

Contractual steps – ECC/FIDIC

- The types of record which should be in place include:
- Instruction to submit revised programme under FIDIC clause 8.6
- Instruction to carry out remedial work under FIDIC clause 7.6

De-scoping

- How about removing some or all of remaining scope of work from the contractor?
- Attractive idea, but with practical issues and legal risks – see Abbey Developments v PP Brickwork (2003) – can't take work away in order to give it to another contractor (but see JCT clause 3.11)
- Is the risk of a claim by the contractor one worth running? His claim would be for the profit he would have made on the work removed – maybe there was no profit
- Might contractor go to court for injunction?

Media/PR

- Consider (in conjunction with other measures) use of media/PR to apply pressure
- Adverse publicity may cause future problems for contractor e.g. getting on tender lists
- Take professional advice both on PR and defamation
- Talk to others in the industry

Concession

- One course is simply to pay contractor more money
- Remember Danegeld!
- Don't expect to later argue payment was "made under duress"
- More likely, settlement of outstanding claims can be wrapped up with undertaking to add resource and speed up progress
- This needs faith in the personnel involved (not very likely to have been earned)

Incentives

- Payment of additional money, or relief from LDs can be made contingent on achieving completion by specific date.
- Additional money can be secured by putting it in escrow till target achieved
- Slow drip feed of money (week by week) if cashflow is the contractor's problem

Threats

- Liquidated damages
- Termination and/or
- Bond call
- Formal dispute resolution
- Probably all have to be considered, but in conjunction with incentives

Liquidated damages

- Is contractor aware that he will pay LDs if he does not complete on time?
- Some may have ideas about arguing penalty etc – but where will money be in meantime? No last certificate payment, no retention release, no final account
- Beware of situation where maximum LDs is reached – then it gets no worse for the contractor

Termination

- A nuclear weapon; last resort
- Not even to be threatened unless you are prepared to go through with it
- Not to be threatened unless you have a replacement – often difficult/ impossible to find
- Not to be used without extremely careful compliance with contract pre-cursors, and beware of counter-attack
- Don't muddle contractual termination and termination under common law

Bond call

- Another nuclear weapon, not to be used except as last resort
- But one which will certainly get contractor's attention
- Another instance where extremely careful attention is required to ensure compliance with every requirement of the bond

Adjudication

- How about going to adjudication?
- What are you going to ask adjudicator to decide?
- Adjudicators probably can make declaratory order e.g. as to contractor's non-compliance with contract
- Will the contractor pay any attention? Maybe not, but it will certainly lead to him getting independent advice and (hopefully) being alerted to risks of his conduct

Arbitration/litigation

- Is it worth considering arbitration or litigation (depending on what the dispute resolution provision in contract says)?
- If arbitration, frankly nothing would be achieved in necessary time frame
- If litigation, consider Part 8 declaratory relief – can be done pretty quickly, and certain to get contractor's undivided attention

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