Understanding variations – a contractor's perspective
Jonathan Brooks, Tim Tapper, Andrew Ash & Stuart McGee
21 March 2011 & 23 March 2011
Introduction – Jonathan Brooks
Variations - introduction

- Obligations to comply
- Timing of notice – before or after variation agreed?
- Notice – condition precedent?
- Timing of assessment
What is a variation?

- What is a variation?
- The circumstances in which variations might arise:
  - Instructions from the CA or Engineer
  - Changes to drawings
  - Changes in site/work management, methods and procedures e.g. changes in access or changes to site accommodation
  - Employer requests
  - Instructions to expend provisional sums
  - Changes in Statutory Requirements and Regulations –post formation of contract
  - Contractor requests
  - Discrepancies in and/or between contract documents
  - Agreed tender assumptions proven to be incorrect
  - Unforeseen ground conditions
Variation clauses

- Why do contracts need variation clauses?
- What happens if the additional work requested is outside the scope of the variation clause?
  - *Blue Circle Industries v Holland Dredging Co* (1987)
  - Contractor can refuse to carry out the work;
    or
  - If the Contractor carries out the work – separate contract - entitled to be paid reasonable remuneration not at contract rates
Conditions precedent – instructions to carry out additional work to be "in writing"

What if varied work has been carried out solely on the basis of an oral instruction but the contract stipulates that only orders in writing will be paid for?

- Any evidence of an instruction in writing?
- If not, who gave the oral instruction?
- Was the Employer aware the varied work was being carried out but said nothing at the time?
- Has there been any signal from the Employer or its authorised representative that strict compliance will not be required?
Time bar provisions – Contactor's Notices (1)

• To encourage contemporaneous claim evaluation rather than post mortems

• Examples:
  – FIDIC Clause 20.1 – Contractor gives notice of claim within 28 days of becoming aware (or from when he/she should have been aware) of event or circumstances giving rise to claim
  – NEC 3rd Clause 61.3 – Contractor notifies PM within 8 weeks of becoming aware of an event which has happened or which he expects to happen
Time bar provisions – Contactor's Notices (2)

Implications of failure to give notice on time:

• FIDIC – extension of time or additional payment adjusted to take account of prejudice caused

• NEC 3rd – Contractor not entitled to a change in the Price, the Completion date or a Key Date (unless the Compensation event is one which the PM should have notified but did not)
The impact of notice provisions on the Contractor

- Need for close and urgent scrutiny of drawings for changes and discrepancies at the outset
- Observant and experienced site staff looking out for change plus more site visits
- Programmers now an essential and ongoing part of the team
- Need to increase size of dedicated project claims team
- Need to step notice provisions down into sub-contracts
Tim Tapper
Practical Issues

• **Tim**
  • Basic Principles
  • Provisional Sums
  • Preliminaries
  • Errors
  • The Contractor’s QS and the PQS
• **Stuart**
  • Fair Rates
  • Omissions
  • Dayworks
  • Presentation
  • Variations after PC
Basic Principles

- JCT
- 5.1 – ‘alteration or modification of the design, quality or quantity of the Works’
- 5.2 – ‘the imposition by the Employer of any obligation or restriction’
- Valuation principles
- 5.9 – impact on other work
- NEC
- List of 19 CEs – wider than JCT
Provisional Sums

- JCT concept
- Two types
- Defined – due allowance for programming, planning and pricing prelims.
- Undefined – no allowance required
- What happens when it says its defined and it isn’t?
- What happens when the BQ says all provisional sums are deemed to be defined?
Preliminaries in Variations

• Try to include as much as you can
• NEC – all included anyway (no procedure for separate claims)
• JCT – 5.6.3.3 ‘allowance, where appropriate shall be made for any additions to or reduction of preliminary items of the type referred to in the SMM …’
Errors in BQ

1. Contractor has underpriced a rate and then receives a variation for more.
2. Extension of rate x quantity is incorrect.
3. Error in quantity in lump sum BQ.
The Contractor’s QS and the PQS
Stuart McGee
Valuation at Fair Rates

- JCT 2005 Without Quantities
  - Clause 5.6.1.2 “where the work is not of similar character to work set out in the Contract Documents, it shall be valued at fair rates and prices.”

- GC Works 1
  - Clause 42.5(c) “if it is not possible to value as sub paragraph (b)
    - then by measurement and valuation at fair rates and prices, having regard to current market prices”

- NEC does not have an equivalent clause as adjustments are based on Defined Cost
Valuation at Fair Rates

- *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [1999] ABC.L.R. 01/22*
  - HHJ Humphrey Lloyd QC decided
  - “generally means a valuation which *will not give the contractor more than his actual costs reasonably and necessarily incurred plus similar allowances for overheads and profit*”

  - “a fair valuation must, in the absence of special circumstances include an element on account of profit”.
Valuation of Omissions

- **JCT 2005 without Quantities**
  - Clause 5.6.2
  - “To the extent that a Valuation relates to the omission of work set out in the Contract Documents and subject to clause 5.8 in the case of CDP works, the valuation of the work omitted shall be in accordance with the rates, prices or amounts in the Priced Documents.”

- **NEC 3**
  - Core clause 63.2
  - “If the effect of a compensation event is to reduce the total Defined Cost, the prices are not reduced except as stated in this contract.”

- **Omissions - JCT**
  - Valued at contract rates or prices
  - Loss of profit is not recoverable – Unless omitted work given to another
  - Will also include adjustment of Preliminary type items

- **NEC**  Omission based upon Defined Cost unless otherwise agreed
Dayworks - When should they be used?

- **JCT 2005 Without Quantities**
  - Clause 5.7
  - “Where the execution of additional or substituted work cannot be valued in accordance with clause 5.6 or 5.8 [CDP works] as applicable the Valuation shall comprise:
    - The prime cost of such work… together with Percentage Additions to each section of the prime cost at the rates stated…”

- **When**
  - Works are not of similar character to work included in the contract documents
  - Works are not executed in similar conditions to work included in the contract documents
  - There is a significant change in quantities
  - A variation quotation has not been issued
  - Varied work cannot be properly valued by measurement such as disruption, relocation of operatives, changed access provisions or unique works.
Presentation of variation account

• **Timing**
  - JCT Asap after instruction issued or works completed
  - NEC Within three weeks of being instructed to do so

• **Methodology**
  - Comply with Contract procedures
  - Common system with client QS
  - Update on a regular basis not less than monthly
  - Clearly schedule and reference all amendments
  - Ensure QS has acknowledged receipt
  - Be consistent in format and content
Presentation of variation account

• **Evidence**
  • Prepare the variation assuming it will be disputed and will be referred to Adjudication.

• **Minimum Requirements**
  • Narrative
  • Instruction to vary the works
  • Quantities (inc dimensions)
  • Rates – extracts of BoQ’s, build up to star rates, invoices or quotations
  • Drawings and specifications
  • Preliminary costs
  • Photographs
  • Notices and correspondence
**Variations after Practical Completion**

- Architect/EA unable to instruct as contract is at an end
- Unless agreement between Employer/Contractor
- Preferable for Contractor for works to be a separate order/contract
- Should be Quoted by Contractor or Based on schedule of rates
- Consider implications on design liability, warranty’s, insurances
- Generally increased risk for Contractor with very little reward
Questions

www.cyrilsweett.com