Construction Horizon Scanner 2018
What should consultants and contractors be aware of?

Consultation of the Construction Act – A Government consultation on the implementation of the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the Act) concluded in January 2018. The consultation looked in particular at the 2011 changes to the Act, including the payment framework and misuse of adjudication. Depending on the outcome, further amendments to the Act could follow which will need to be reflected by contractors and consultants in their contractual arrangements. This could mean new measures to increase transparency in the exchange of information relating to payments and new ways of encouraging dispute resolution by adjudication as well as, strengthening the right to suspend performance.

Retention Consultation – In January 2018, a Government consultation on the use of cash retentions in the construction industry was also concluded. The consultation considered alternatives to cash retentions being held by employers and contractors, such as project bank accounts (PBAs), escrow accounts and bonds, with the intention of reducing cash-flow issues. The extent of further legislation will become clearer following the outcome of the consultation, which could lead to new law such as, a statutory retention deposit scheme.

New Standard Form Contracts – A new suite of standard form professional services and building contracts have been issued and are expected to be used more frequently in 2018. The FIDIC, JCT and NEC4 new suite of building contracts are already being tendered by contractors. The NEC4, ACE have published new editions of their professional services contracts and it is expected RIBA may follow. This could lead to changes in potential risk on a project for the parties involved. Importantly, these standard forms are more onerous than their predecessors suggesting a hardening market.

New Procurement Routes – A fresh line-up of contractors are expected to replace Highways England’s present Collaborative Delivery Framework, with the new Regional Development Partnership. Under the new arrangement, contractors will become delivery integration partners designing and constructing highway projects across England under the new NEC4 standard terms with suitable amendments. The new approach will focus on greater collaboration and a stronger regional procurement footprint for medium size projects. Further, in the procurement of routine maintenance and delivery of capital renewal and improvement schemes for Area 10, Highways England intend play a lead role in managing the projects, whilst appointing a principal maintenance and response contractor. Both procurement routes are a positive step and are likely to result in greater collaboration.

BIM – The Government is to start engaging with the construction industry to enable the use of BIM Level 3 on government projects. This could mean a new digital standard for the construction sector.

Data Protection – In May 2018, a tough new regime for data collection and usage will come into effect under the General Data Protection Regulation (GDPR), strengthening individuals’ rights and introducing new obligations on data controllers and data processors. The new regime is deliberately tough with penalties for non compliance significantly increased. Businesses will need to familiarise themselves with the changes and the reputational risks of not taking GDPR seriously. This means businesses in the construction industry will have to review their practices and procedures on data management in order to comply with the new regulations.

Dispute Procedure and Practice – Reviews on various dispute processes are expected during 2018 including a review of the current Pre-Action Protocol for Construction and Engineering Disputes, which came into force in November 2016, in order to streamline the pre-action process. A further revision of the Technology and Construction Court Guide is also expected during 2018 to reflect a number of changes in dispute practices and procedure including, a significant increase in the threshold for claims to be started in the TCC and wider costs and case management powers for the courts.

Technology - Technology in the sector, including the use of technology in mega projects, is impacting how projects are procured and how they are structured contractually. There is understandably a greater concern over intellectual property rights, data exchange, insurance, cyber risk, amongst other things. We expect to see the approach to contracts change with a move away from typical construction and engineering contracts to those with a much more technology focus. The new standard forms, as mentioned above, are arguably not fit for purpose where there is a significant technology element.

Brexit – Article 50 negotiations between the UK and EU are expected to be complete by October 2018 to allow time for the EU Council, European Parliament and UK to approve any Brexit agreement by March 2019. The degree of legislative and regulatory changes will impact on contractors and consultants when considering their contractual provisions. The scope of such changes will be determined by the extent of any deal between the UK and the EU. Contractors and consultants should negotiate into their contracts remedies for change in law and price escalation.

Carillion Group Liquidation – The liquidation of a number of companies within the Carillion Group, the UK’s second biggest construction company, is expected to have a significant impact on the UK construction sector as a whole. This could mean significant losses in official payments and retentions by the Carillion supply chain as well as, increased potential risk on projects that were previously undertaken as joint ventures with Carillion.

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