DON’T LET HS2 SEND YOU OFF THE RAILS

Sheena Sood With HS2 up in the air, it’s wise for those in the supply chain to review their contract position ahead of possible cancellation

News of the government’s review of HS2 has been somewhat overshadowed from public gaze by the ongoing Brexit turmoil. Nevertheless, it has sent shockwaves through the construction industry. With the project’s total cost having risen from £62bn to between £81bn and £88bn, transport secretary Grant Shapps recently announced that the first phase of the project will be delayed by up to five years, shifting the projected completion date to between 2028 and 2031. Refusing to rule out a complete cancellation, he said the review would put the government in a better position to make a “go or no go” decision by the end of this year.

While the government has said work on HS2 will continue in the meantime, suppliers should be considering the potential ramifications of a delay or, worse, cancellation of the project. So, what are the key contractual considerations?

Termination and its consequences

Consider the termination rights under your contract. These will not necessarily be back-to-back if you are a subcontractor or secondary-level consultant on the project. In addition, look at the required notice periods for termination. Costs will be sustained in terms of demobilisation, reallocation of staff, and so on. Loss of profit may not be recoverable but it is a key aspect to check carefully, given the potential impact on your business. As all losses will need to be properly evidenced, you will need to ensure you maintain an accurate record of all costs and consequences that arise from termination. It may also be prudent to appoint (at an early stage) a quantum expert to provide you with a steer on costs.

Notice requirements

While the government is carrying out its review, in the meantime you are likely to be contractually obliged to continue to deliver on the obligations in your contract, as will your client. During the uncertainty, if your client asks you to slow down, change your deliverables or even suspend services, ensure this is carried out in parallel with your own actions. Consider the steps you need to take to protect your position, including seeking advice from a specialist in the field.

CONSIDER THE COSTS YOU WILL INCUR IN BRINGING YOUR SUBCONTRACTS TO AN END, AND WHETHER YOU ARE REQUIRED TO MAKE PAYMENT UNDER YOUR SUBCONTRACTS BEFORE YOU RECEIVE PAYMENT UNDER YOUR HEAD CONTRACT

TALL TOWER PROCUREMENT

In the second of our series on the legal considerations of constructing tall buildings, Jill Hamilton considers what procurement approach is best in the light of the Hackitt report

We anticipate that control and flexibility may start to become more of a consideration for developers, given the additional obligations that are likely to be imposed on them and the uncertainty about those obligations that may exist at the time of procurement. For example, the regulations may impose “gateway” sign-offs (where compliance with safety regulations needs to be checked at certain intervals during the build process), which could lead to delays or a requirement for changes to the design partway through the build. Additional record keeping may be required to document the “golden thread” of information recommended by Hackitt.

Design and build

Because of the value and complexity of high-rise building projects, design and build is the most common method of procuring such schemes, sometimes as part of a two-stage procurement process. The contractor, by and large, takes responsibility for the overall design and construction of the project following initial design by the developer’s design team. While developers benefit from the contractor taking single-point responsibility, the counterpoint to this is that the developer loses an element of control. This is because the design and build contractor can (within certain parameters) vary the design and select the materials used and methods of construction to be used. A further
out in accordance with your contract, with notices provided in the prescribed form and time periods pursuant to your contract. Consider the remedies available to you if your client does not comply with its obligations, such as damages for breach of contract, and make sure all issues are documented in correspondence with your client.

Subcontracts What are your suppliers’ rights

The uncertainty may mean payment is delayed or withheld, so it is prudent to ensure Construction Act notices are served in accordance with the act and the contract, including dealing with failures to issue payment notices, default payment notices or pay less notices. Should delay or cancellation of the project lead to non-payment, consider your recovery options, such as preparing a letter before action and/or commencing “smash and grab” adjudication.

Intellectual property rights In the event of termination, you will need to consider your position in respect of your intellectual property rights and ongoing confidentiality obligations. Are you entitled to use the documents and materials produced in connection with the project? You will need to consider too how your contracts deal with jointly developed intellectual property and what is your suppliers’ entitlement to these rights. You will also need to manage confidential information, including return and destruction as required under the contract.

It is understood the government’s review should be completed and a report issued this autumn. Given the tight timetable, it would be wise for those affected to be thinking through now the likely commercial and legal implications of termination or a change in direction. Contingency planning is difficult when you don’t quite know what you are planning for – deal or no deal? However, evaluating the legal ramifications of cancellation of HS2 and protecting your position under your contract would seem sensible whatever the outcome of the review.

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Design and build will probably continue to be the predominant procurement route for most developers of high-rise buildings. However, we are likely to see additional monitoring, through the use of a monitoring team retained by the developer or an enhanced clerk of works role, to ensure the works are constructed in accordance with the regulations and that appropriate records are being kept. Developers will need to be aware of their obligations and take them into account at the outset of the project and may need to bear the consequences of any changes in the regulations. Ultimately, developers are responsible for ensuring that safety is never compromised.

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**SHOULD DELAY OR CANCELLATION OF THE PROJECT LEAD TO NON-PAYMENT, CONSIDER YOUR RECOVERY OPTIONS**

against you, or your rights as a subcontractor? As contracts may not be back-to-back, you will need to factor in any contractual rights against you, as well as your contractual rights against the government. Do your subcontracts allow for suspension or termination if the head contract is suspended or terminated? You will need to consider the costs you will incur in bringing your subcontracts to an end and whether you are required to make payment under your subcontracts before you receive payment under your head contract.

Monitor late or non-payment The uncertainty may mean payment is delayed or withheld, so it is prudent to ensure Construction Act notices are served in accordance with the act and the contract, including dealing with failures to issue payment notices, default payment notices or pay less notices. Should delay or cancellation of the project lead to non-payment, consider your recovery options, such as preparing a letter before action and/or commencing “smash and grab” adjudication.

The developer therefore retains more control over how the design of the building evolves during the construction phase, but the method of carrying out the works is still up to the contractor, and the developer bears the cost of changes being required during the construction phase, as with design and build.

Construction management gives the developer more control over the project. Under construction management, a developer appoints the design team and then separately appoints a number of trade contractors to carry out each of the works packages needed to deliver the project. There is more flexibility for the developer in relation to changes in legislation that occur during the construction phase as the full extent of the works is not set at the start of the project and the trade contractors are appointed as and when required. For example, the foundations contractor will be appointed in the early stages of the project, but a cladding contractor may be appointed months later, so the cladding contractor’s trade contract can reflect the current legislation in place at the time that it is appointed.

Management contracting follows similar principles to construction management. However, the risk of disaggregating each element of design and works leaves risk with the developer for any gaps in the scope of works, as there is no contractor with a full overview of the project to ensure that all risks are covered. In addition, it may not always be clear whether any failures are due to defective design or defective workmanship, so it can be more difficult to identify culpability for any failures to achieve regulations.