This One Won't Fly
Rachel Barnes, March 2006

The latest edition of the Professional Services Contract came out last June. Although endorsed by the Office of Government Commerce, it does not appear to have been widely adopted. This could be because the contract has become almost indigestible, and also because the liability of consultants has been extended.

As with the NEC contract for contractors, key dates have been introduced, with which the consultant has to comply unless the reason for failure to do so qualifies as a compensation event. They have to be included in the consultant's programme and any revised programmes. One wonders if this is necessary as the consultant's programme already had to include significant detail about the order and timing of the operations and the dates by which the consultant is to complete work. The employer decides if there has been failure to meet a key date and assesses any additional cost which it or others incur in 'carrying out work'. This is its only right in these circumstances. There is no right to challenge this assessment.

A risk register has to be compiled at the beginning of the contract detailing any relevant risk and who is to do what to avoid or reduce that risk. All matters that are subject to the early warning procedure - which have been expanded - are now to go on to the risk register and there are to be risk reduction meetings. Further decisions are then to be made as to the actions that will be taken and by whom. It is not clear whether these actions become a matter of contractual obligation, so that a party could be liable in damages if that action is not taken. It is difficult to see at present whether the risk register will in fact contain anything more than the events that are the subject of the early warning procedure.

The main changes to the procedures are those relating to compensation events. These have been divided between those that the employer notifies and those that the consultant notifies. There is a tight eight week limit for a consultant-notified event which, if missed, deprives it of any entitlement to extra time or money unless the event is one that should have been notified by the employer (that is, an employer instruction or changed decision).

After the consultant has notified a compensation event, the employer notifies the consultant that the event is or is not eligible (depending on what it has decided). If this is not done, the consultant may notify the employer that it has not been notified, and if the employer does not notify the consultant in a further two weeks the event is treated as a compensation event.

The same flurry of notifications applies to quotations for compensation events, whether the employer accepts the quotation, or does not reply, or asks for a revised quotation, or decides to assess the compensation event himself.

For a project which is fast-moving or subject to many changes or problems, it could prove impossible for the parties to keep up with all these formal requirements, and the timetable required for them.

A compensation event can only give rise to changes to the price, completion date and key dates. An assessment of a compensation event is not to be revised if the forecast on which it was based is shown later to have been wrong.

Since any breach of contract by the employer is to be treated as a compensation event, this effectively restricts what can be recovered by the consultant in the event of any such breach.

PSC3 does recognise that the requirement under the earlier edition for the consultant to remedy defects could go beyond what was required by law and also that the consultant could be obliged to do this even when he has not been negligent. However, the way this has been dealt with is to require the consultant to notify the correction of any defect for which it believes it is not liable as a compensation event. This is tantamount to reversing the burden of proof.
Limits of liability are more restricted. Certain matters are excluded altogether from the limit of liability. The net contribution clause is simplified to the point of being meaningless.

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