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Can an employer descope at its convenience?

by Marc Wilkins

Every now and then we are asked to advise clients who have had their contracts terminated or the remainder of their work under a contract removed part way through a job, not because of any actual or alleged wrongdoing on their part or because the project has been abandoned or unavoidably put on hold, but simply because the work is being given to an alternative contractor who is able to offer a more competitive price. Are employers entitled to "descope" or terminate at their convenience in order to secure a better bargain elsewhere? As is so often the case, it depends on what the contract says.

Generally speaking, a contractor who is engaged to carry out works not only has an obligation to complete those works but also a corresponding "right" to complete them. There are of course circumstances where that right may be lost; for example where the contract includes express provisions entitling an employer to omit work from the scope (e.g. where the employer's requirements in respect of certain elements of the work have changed or where the works are simply no longer required) or to terminate the contractor's employment such as where there has been a material breach or in the event of contractor insolvency. Such provisions serve an important purpose. However, whilst such contractual rights to omit works or terminate provide some flexibility over the scope of works and the opportunity to exit contracts where necessary, they may also provide employers with opportunities to swap contractors part way through a project simply to take advantage of a more competitive price being offered by another contractor for the remaining works.

Omission of work

As a starting point, there is no general right to omit work from the scope contained within a construction contract. Generally speaking therefore, an employer would not simply be able to omit some or all of the remaining scope of work in order to give it to an alternative contractor – if he has entered into a bad bargain, then that is the bargain he should be stuck with.

That position is, generally speaking, supported by the courts. Whilst contracts will often include express provisions entitling the employer to vary the scope of the contractor's work in order to adapt to changes in the requirements of the particular project, for an employer to be entitled to omit work, the contract must expressly say so. Even then, the law imposes limitations on such entitlement. There are two principal bases on which even an express right to omit work may be limited. They are: (i) the amount of work which can be omitted, and (ii) the ability to redistribute omitted work to others.

The amount of work that can be omitted

As a general principle, an employer cannot remove all the remaining work from a contractor's scope or omit such a large element of it that the omission would change the fundamental characteristic of the works. This goes back to the fundamental principal that the "basic bargain" struck between the employer and the contractor must be honoured, and that the employer cannot use the omissions clause to escape from what he considers to be a "bad bargain" so as to get a better bargain with another contractor. Therefore, where a significant amount of work remains to be carried out and all of the remaining work is omitted, a court is likely to find that such a large omission violates the parties' basic bargain.

The ability to redistribute omitted work to others

The question of whether a contract entitles an employer to omit work for the purpose of giving it to another contractor has been the subject of recent cases before the English and Scottish courts, and the current guidance from the courts can be summarised as follows:

- A contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.
- Clear words are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else.
- There are circumstances where work may be omitted and given to others provided the contractual provisions relied upon are wide enough to permit the omission. The employer's motive or reason for instructing the omission of the work is irrelevant.

Termination

Where the variation provisions of a contract do not provide an employer with the right to omit the remainder of the work in circumstances where it wants to exit what it might see as a bad bargain, contractors may find employers look to operate the termination provisions of the contract as an alternative means of removing the contractor instead. There is no general right to terminate "at will" or "for convenience". To be able to do so, the contract must provide (in clear terms) an unqualified right to terminate without any cause or reason, on giving notice. In such circumstances, termination will be at the sole discretion of the employer.

The courts will normally uphold well-drawn termination at will clauses – they will generally be seen as part of the commercial bargain reached between the parties which the court will be reluctant to interfere with. However, there are limited circumstances in which the courts may not give effect to a termination for convenience provision, such as where the contract does not provide for the original contractor to be compensated for loss of profit and overhead contributions it would have received on the balance of the work. Although where both parties are commercial entities and have freely negotiated and concluded a contract, the courts would be unlikely to interfere in the bargain reached unless the

complainant suffered from bargaining weakness which put it at a serious disadvantage, and where the contract in question is oppressive. That would be a high threshold to get over.

Comment

Whilst there are reasons why an employer may reasonably require the flexibility to descope work, whether by omission or termination for convenience, from a contractor's perspective it is important to understand (i) the scope and implications of the variation or termination provisions in contracts they are signing up to and, in particular, whether the bargain being entered into is capable of being changed significantly at the employer's sole discretion and at potentially very short notice, and (ii) whether there is any protection afforded to the contractor by way of clear provisions for the valuation of omissions, or in the event of termination at will, which provide for the contractor to be compensated for losses such as loss of profit and overhead contributions that would have been earned on the balance of the work.