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Loss and Expense and LAD's in JCT Contracts

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The Situation:

I'm a Main Contractor working on an unamended JCT Design and Build Contract (2016). The project has achieved Practical Completion 8-weeks late owing to a variety of delays by various Subcontractors and I have extra costs and risks to deal with.

The Questions:

1. The Contract has £20,000 LAD's per week and the client has issued a Payment Notice holding £160,000 (£20,000 x 8 weeks) from our Application with no further detail.
 - a. Can they do this? Do they have to provide a detailed submission and programme justifying the deduction?
 - b. What's the best way to respond to this?
 - c. Even though the contract stipulates £20k LAD's, does the client need to justify the amount/LAD calculation or can they just apply the penalty?
2. The primary cause of the delay is two Subcontractors, can I withhold the same values from their monthly Applications?
3. In addition to LAD's, we've paid other Subcontractors to accelerate to prevent further delays.
 - a. How can I recover this from the two Subcontractors that failed?
 - b. What level of detail do I need to provide?
 - c. Can I deduct sums from their Applications for Payment of the Subcontractors who caused delays and if so, what do I need to write in the Payment Notification?

This is an interesting scenario blending a number of different facets of the contract mechanisms.

1.

a)

Can they do this? Do they have to provide a detailed submission and programme justifying the deduction?



The scenario says that the Employer has issued a payment notice calculating the amount which is being deducted (i.e. the number of weeks of delay multiplied by the rate of LAD's in the Contract). From a payment mechanism perspective this is correct.

However, in order for the Employer to deduct damages the Contract Administrator must first have issued a Notice of Non-Completion – this is a condition precedent to the Employer's right to deduct damages. If no notice has been issued then the right to deduct / withhold damages does not arise.

The contract says that the Contractor will carry out and complete the works for a sum of money by the Date for Completion. If the Contractor fails to complete by the contract date then the Employer is eligible to take damages for compensation for that breach.

If the Contractor has grounds for being late which justify the delay and it has served the requisite notices then there may be an entitlement to more time to carry out the works (an extension of time) which will postpone the Employer's rights to claim damages until the new completion date is passed.

1.

b)

What's the best way to respond to this?

That depends...



If the Contract Administrator (CA) has failed to issue a non-completion notice then advise the Employer immediately of this failing and that it would be in breach of contract if it were to continue to make the deduction. Depending on what then happens will dictate what the Contractor needs to do to protect its position.

It should be remembered however, that if the CA has failed to issue a notice this can be easily rectified and the Employer could then make its deductions, subject to a payment / payless notice in the next available payment cycle.

Where the Contractor believes that it has an entitlement to an extension of time which would give relief from damages, if it has not already done so, it should notify the Employer and make a request for an extension of time setting out the basis of the entitlement.

1.

c)

Even though the contract stipulates £20k LAD's, does the client need to justify the amount/LAD calculation or can they just apply the penalty?

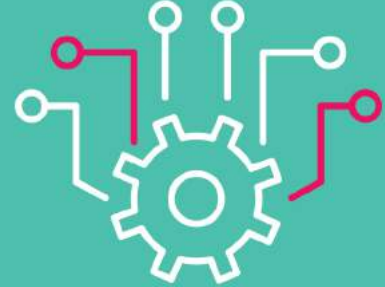


In short, yes. The rate of LAD's is a term of the Contract and the Employer does not need to justify it – the Parties to a Contract are free to contract on whatever terms they like.

The time to argue about whether the level of damages is appropriate or justifiable is before entering into Contract during tender negotiations. There is more than one way of dealing with this, however, such as ensuring the time for performance is adequate.

2.

The primary cause of the delay is two Subcontractors, can I withhold the same values from their monthly Applications?



There is no blanket answer to this.

Are the sub-contractors' obligations fully and properly set out in the sub-contract agreements, including the programme durations, key dates and any constraints? Have notices been issued recording failures against the Sub-Contract obligation? Have notices of non-completion been issued? Are there adequate records and correspondence to demonstrate failures?

If the answer is yes, then there is no reason why deductions cannot be made against these sub-contractors in accordance with the payment mechanism under the particular sub-contract agreements. Ensuring that timely payment or pay less notices are issued in sufficient detail to enable the sub-contractors in question to understand both the amount of and the reasons for the deductions and that repeated or updated notices are issued in subsequent payment cycles to

avoid any question of there being technical payment defaults. I would also caution that where sub-contract obligations are not back to back with the main contract obligations care is taken to ensure that the amount of any deduction is appropriate to the particular sub-contract agreement (for instance; it is usual for sub-contracts to be silent on the question of damages so that a contractor is able to pass on LADs deducted by the Employer and its own costs and other sub-contractor's costs to a sub-contractor that is responsible for delay; however I have also seen instances where a liquidated sum has been agreed and entered into the sub-contract which is different from the main contract rate of LADs).

3.

In addition to LAD's, we've paid other Subcontractors to accelerate to prevent further delays.

a) How can I recover this from the two Subcontractors that failed?



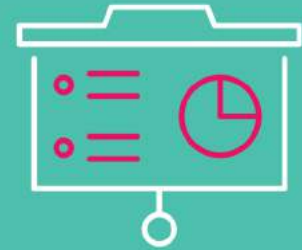
"Acceleration" could cover a number of things.

Say instructions have been issued to a sub-contractor to vary the timing or method of how it contracted to do its works as a consequence of a failure by another sub-contractor then this could legitimately be described as loss and expense, which subject to the correct notices, would bring the additional cost incurred into costs which are recoverable from the responsible sub-contractor (e.g. if an instruction was issued to reduce a three week duration to one week through having three round the clock shifts then the additional costs incurred, such a NPO, would be recoverable).

If you've made the necessary notices to the subcontractor who failed then the additional costs could be recovered.

3.

b) What level of detail do I need to provide?



There is no set answer to this – you would need to demonstrate a failure (or breach), and a cost incurred (an effect) and you would need to show that the cost has been incurred as a direct consequence of this breach (e.g. following the example above, there was, originally a three week period for the following trade, the Sub-contractor has delayed the project by two weeks and in order to avoid the Contract running over time the 24 hour working had to be instructed and these are the costs directly incurred as a result of that instruction).

3.

c)

Can I deduct sums from their Applications for Payment of the Subcontractors who caused delays and if so, what do I need to write in the Payment Notification?



The short answer is 'yes you can'; but this is caveated by everything that I have said earlier. There has to be an obligation, which is then breached; and costs must be incurred as a direct consequence of that breach to bring them within consideration. And, all the while this is subject to ensuring that the requisite notices have been issued and records maintained (e.g. non-completion; payment; payless etc.).

The Contract contains all of the mechanisms that have been discussed and it is a matter of ensuring that these are administered properly and effectively.