

## Peter D Aeberli



**Barrister - Arbitrator - Mediator –  
Adjudicator**



**To What Extent Are a Subcontractor's  
Obligations Under B.E.C. Sub-contract  
DOM/2 Back to Back With Those of the  
Main Contractor Under J.C.T. With  
Contractors Design 1981**

### **Introduction**

A developer invites tenders for the design and construction of a new retail complex on the terms of JCT with contractor's design 1981 (WCD). The successful tenderer includes in its contractor's proposals an outline scheme for the mechanical and electrical installation.

After contract formation the design and construction of the mechanical and electrical installation is let to a sub-contractor on the terms of DOM/2. The employer's requirements and the contractor's proposals are incorporated into the sub-contract as numbered documents.

Later it is discovered that the outline mechanical and electrical scheme does not comply with the fire officer's requirements. Amending the scheme at this late stage is complex and costly. Both the contractor and the subcontractor incur additional expense. The project is delayed.

This article considers how the provisions of WCD and DOM/2 allocate responsibility for events such as these between the employer, the contractor and the sub-contractor. Somewhat surprisingly, case law provides little guidance in this area and the issues must be approached from first principles.

### **The employer's responsibility**

It is reasonably clear that, under the provisions of WCD, the employer need not reimburse the main contractor for the costs incurred in amending the mechanical and electrical design, nor are there grounds for extending the contract period.

Under WCD clause 6.1.2, the contractor is required to comply with statutory requirements such as regulations relied upon by the fire officer in this case.

Under WCD clause 6.1.2, the contractor must, subject to the clause 6.3 exceptions, bear the cost of amendments that are necessary to remove divergencies between the statutory requirements and either the employer's requirements or the contractor's proposals.

None of the WCD clause 6.3 exceptions apply to the circumstances of this case. Clause 6.3.1 only applies where the statutory requirements have

changed after the base date inserted in the Appendix. In this case, the regulations being applied by the fire officer have not changed. It is the contractor's knowledge of them which has changed.

For clause 6.3.3 to apply, the employer must have stated in its requirements that they comply with the fire officer's regulations. This would be unusual, and is not the case here. As for clause 6.3.2, it covers the situation where an amendment of the contractor's proposals is required to bring them into line with the terms of permissions or approvals made, after the base date, for the purposes of development control requirements.

"Development control requirements" is defined under WCD, clause 1.3 as "any statutory provisions and any decision of a relevant authority thereunder which control the right to develop the site." Arguably, the fire officer's refusal to approve the outline mechanical and electrical scheme does control the right to develop the site as originally intended. Nevertheless, the better view is that "development control requirements" refers to matters such as planning legislation which curtail rights to exploit land, as opposed to other regulations, such as those applied by the fire officer, which determine the manner in which works on that land are constructed.

The contractor must, therefore, bear the cost of the necessary amendments. Neither is it entitled to an extension to the contract period under WCD clause 25.3 and clause 25.4.7. The latter clause defines as a relevant event "Delay in receipt of any necessary permission or approval of any statutory body which the Contractor has taken all practical steps to avoid or reduce."

Under WCD clause 2.5.1, the contractor (as designer), is required to have exercised reasonable skill and care in the preparation of the contractor's proposals. It should have been aware of the fire officer's requirements. In consequence it cannot be said to have taken all practical steps to avoid or reduce the delay in approval that resulted from the fire officer's rejection of the outline mechanical and electrical scheme.

### **The sub-contractor's responsibility**

Having failed to establish a case against the employer, the contractor must look to the sub-contractor for recovery of its loss, and for an indemnity covering its liability to the employer for liquidated damages.

#### *The sub-contractor's responsibility under the terms of DOM/2*

The sub-contractor's principal obligations under DOM/2 are: Under clause 4.1 (see also Article 1.2), to "carry out and complete the Sub-Contract Works in compliance with the Sub-Contract Documents";

Under clause 5.3.1,

"To the extent that the Sub-Contractor has designed the Sub-Contract Works... the Sub-Contractor shall have in respect of any defect or insufficiency in such design the like liability to the contractor as would an ...appropriate professional designer..."

These obligations must be interpreted in the light of the relevant definitions in WCD clause 1.3. In particular:

"Sub-Contract" is defined as "the contractual rights and obligations of the Contractor and the Sub-Contractor as set out in the Sub-Contract Documents";

"Sub-Contract Documents" is defined as "Sub-Contract DOM/2 and the Numbered Documents...";

"Sub-Contract Works" is defined as "the works... described in the Numbered Documents and which are to be carried out as part of the works."

Read together, these clauses require the sub-contractor to carry out and complete the works described in the numbered documents and, when providing design work, to exercise reasonable skill and care. They do not, in themselves, make the sub-contractor responsible for the quality of the information contained in the numbered documents. This information is, in effect, the brief to which the sub-contractor must work.

Where the brief is defective, as in this case, the sub-contractor should, as a reasonably competent designer, draw this to the contractor's attention; but, without the contractor's authorisation, it cannot depart from the brief. It is for the contractor to amend its brief. Under the provisions of DOM/2 this can only be done by directing a variation.

*The sub-contractor's responsibility under the incorporated provisions of the main contract*

DOM/2 does, however, purport to impose on the sub-contractor additional obligations by incorporation into the sub-contract of provisions taken from the contract between the contractor and the employer. In particular, under DOM/2 clause 5.1.1, the sub-contractor is to:

"observe, perform and comply with all the provisions of the Main Contract... on the part of the Contractor to be observed, performed and complied with so far as they relate and apply to the Sub-Contract... Without prejudice to the generality of the foregoing... clauses 6,..."

The indemnities given by the sub-contractor in DOM/2 clause 5.1.2 adopt a similar wording.

Interpreted in the light of the definitions referred to above, the intention of this clause appears to be that the sub-contractor is only to perform and

comply with those provisions of the main contract that both impose obligations on the contractor and relate and apply to the sub-contractor's obligations under DOM/2 and the numbered documents.

The contractor's obligations under WCD, in so far as relevant to the case being considered here, are those set out in WCD clause 6. The extent of the sub-contractor's responsibility for amendments caused by the fire officer's requirements will depend on the extent to which the contractor's obligations under this clause have been incorporated into the sub-contract by DOM/2 clause 5.1.1. This, in turn, depends on identifying relevant provisions of the sub-contract to which those obligations can relate and apply. Obligations on which DOM/2 clause 5.1.1 can bite.

These clauses must be construed together to establish the intention of the parties as regards the incorporation of obligations from the main contract into the sub-contract. In so doing it is acceptable to alter the wording of the incorporated terms, here WCD clause 6, as necessary to give effect to that intention.<sup>1</sup>

WCD clause 6.1.1.2 sets out the contractor's responsibility for compliance with the statutory requirements. Construing this clause together with DOM/2 clause 5.1.1 gives the following reading:

"the sub-contractor must comply with the Statutory Requirements in so far as the contractor's obligation to do so under WCD can be shown to relate and apply to one or more of the sub-contractor's obligations under DOM/2 and the Numbered Documents."

Assuming that the numbered documents do not purport to impose more onerous obligations on the sub-contractor than those contained in the DOM/2 conditions, the relevant obligations of DOM/2 are the subcontractor's obligation, under clause 4.1, to carry out and complete the sub-contract works described in the numbered documents and, under clause 5.3.1, to carry out with reasonable skill and care any design that it provides.

The effect of this method of incorporation appears to be that, when carrying out and completing the works in accordance with the brief contained in the numbered documents and completing any outstanding design work, the sub-contractor must, in so far as possible, observe the fire officer's requirements. But DOM/2 does not give the sub-contractor the power to ignore this brief, even where it is defective or in conflict with the statutory requirements.

Furthermore, the sub-contractor has, in general, no responsibility to the contractor for the quality of the information contained in the numbered documents. It has, therefore, no relevant obligation on which DOM/2 clause 5.1.1 can bite so as to impose on the sub-contractor, through the incorporation of WCD clause 6.1.2, the obligation to ensure, at its own expense, that this information complies with the statutory requirements.

---

<sup>1</sup> *Aughton Limited v. Kent Services Limited* (1991) 57 Build.L.R. 1, [1992] A.D.R.L.J.

Nevertheless, under WCD clause 6.1.2, the contractor is obliged to correct, at its own cost, any discrepancies between the employer's requirements or the contractor's proposals and the statutory requirements. This clause also comes within the ambit of DOM/2 clause 5.1.1. If the subcontractor is to be made responsible to the contractor for amending the works described in the numbered documents to remove discrepancies between it and the statutory requirements it must be through incorporation of this clause into the sub-contract.

Construing WCD clause 6.1.2 together with DOM/2 clause 5.1.1 gives, in so far as relevant, the following reading:

"the sub-contractor must amend, at its own expense, divergencies between the Statutory Requirements and the Employers Requirements or the Contractor's Proposals and must, but only where the contractor's obligation to do so under WCD can be shown to relate and apply to one or more of the sub-contractor's obligations under DOM/2 and the Numbered Documents."

As with the incorporation of obligations under WCD clause 6.1.1.2 into the sub-contract, the difficulty is that the sub-contractor has, in general, no responsibility under the terms of DOM/2 for the quality of the information contained in the numbered documents. There is, in consequence, no relevant obligation on which DOM/2 clause 5.1.1 can bite so as to incorporate the obligation on the sub-contractor to amend defects in that information at its own cost. This is the case whether or not the contractor's proposals or the employer's requirements are expressly included in the sub-contract numbered documents.

There is, however, an exception where the sub-contractor supplies the contractor with those sections of the contractor's proposals relating to the subcontract works. In that case, it is responsible as a designer, under DOM/2 clause 5.3.1, for exercising reasonable skill and care in preparing that material. A responsibility which could, arguably, extend to advising the contractor of defects in the employer's requirements that ought reasonably to have been discovered.

Assuming that the material is subsequently included in the numbered documents, then the sub-contractor's responsibility for it under DOM/2 clause 5.3.1, is an obligation on which DOM/2 clause 5.1.1 can bite, thus imposing on the sub-contractor the additional obligations to have complied with the statutory requirements in preparing that material, and to correct any divergence between it and the statutory requirements at its own cost. Only in these circumstances are the sub-contractor's obligations to the contractor back to back with those of the contractor to the employer.

This interpretation of DOM/2 clause 5.1.1 accords with justice and commercial sense. Where the sub-contractor has not been involved in, or had a right to comment on, the preparation of the employer's requirements or the contractor's proposals, in particular those sections which are later to form the brief for the sub-contract works, there is little justification for making it responsible for the quality of that material.

Where, however, the sub-contractor provided that information then there is no reason why its responsibility for that material should not be back to back with those of the contractor to the employer.

Nevertheless it might be felt that this suggested construction of DOM/2 clause 5.1.1 is too narrow and technical. If possible, should not a wider reading be preferred so that the sub-contractor's obligations are, in all cases, back to back with those of the contractor.

It might, for instance, be argued that the intention behind this clause was that the sub-contractor should comply with all of the contractor's obligations under WCD in so far as they relate and apply to the sub-contract works. This, after all, is the wording used in similar provisions of, for instance, JCT sub-contract NSC/4 clause 5.1.1.

Such a construction would be unacceptable. Not only because it is not supported by the wording of DOM/2 clause 5.1.1, but because it would impose on the sub-contractor responsibility for all of the material contained in the sub-contract numbered documents, whether or not it had any control over the quality of that material.

The sub-contractor's responsibility would extend, not just to correcting divergencies between the statutory requirements and relevant sections of the employer's requirements or contractor's proposals at its own cost but, through the incorporation of WCD clause 2.5.1 into the sub-contract, to responsibility for any design defects in that information, irrespective of whether these were defects in the employer's requirements or contractor's proposals, or in material produced subsequently, at the contractor's request, for inclusion into the numbered documents of the sub-contract. Once the sub-contractor became aware of such defects it would have to correct them at its own expense to avoid subsequent litigation, and would have to reimburse the contractor for the latter's loss and expense under DOM/2 clause 13.4.

The result would be that, through incorporation of terms from the main contract, the sub-contractor's design warranty would be extended well beyond that provided for in DOM/2 clause 5.3.1. Furthermore, the contractor would have a complete indemnity from the sub-contractor against any failure by it to exercise reasonable skill and care in developing the design of the future sub-contract works prior to the inclusion of that material into the numbered documents of the sub-contract.

Even if this interpretation was arguable on the wording of DOM/2 clause 5.1.1, it would be unlikely to find favour in a court of law. Express words must be used before a contractual provision will be accepted as indemnifying another for the consequences of its own negligence.<sup>2</sup> The somewhat opaque language of clause 5.1.1 or, for that matter, of clause 5.2 contains no such express words.

---

<sup>2</sup> *Smith v. South Wales Switchgear* [1978] 1 W.L.R. 165 (H. L).

## **Conclusion**

It is now possible to answer the question posed in the title of this article.

The sub-contractor's obligations to the contractor under DOM/2 are not, in general, back to back with those of the contractor to the employer under WCD. In general, the sub-contractor is not responsible for deficiencies in the material included in the sub-contract numbered documents, whether or not these include the employer's requirements or the contractor's proposals. The contractor must direct a variation to correct such deficiencies and must, in consequence, recompense the sub-contractor through appropriate adjustments to the sub-contract sum and sub-contract programme. Where, however, the sub-contractor has provided the contractor with those sections of the contractor's proposals relating to the sub-contract works and they have later been incorporated as numbered documents into the sub-contract then, under DOM/2, the sub-contractor is responsible for the quality of that material. If, for instance, amendments become necessary to remove divergencies between it and the statutory requirements, then these must be carried out at the sub-contractor's expense. Furthermore, it must recompense the contractor for the latter's loss and expense under DOM/2 clause 13.4.