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Source: Planning and Building Control Today
Country: UK
Date: 10th January 2019

Keyword: Shulmans

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Planning & Construction News

Risks developers face in engaging professionals without agreeing terms

January 10, 2019

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Sarah Wilson, head of construction at Shulmans LLP, discusses the genuine risks that developers face in engaging professionals without agreeing the terms of their retainer

It is fairly common in the construction industry for the construction professionals to start work without a formal contract having been agreed. Sometimes even worse, for the consultant's standard terms and conditions to have been agreed, by default.

By consultants, we are talking about planners, architects, engineers and contract administrators. These are the people who typically will be involved from the very early stages of a project, sometimes often before funders have been involved, and it is therefore easy to see how they sometimes do start work without the formal contract having been agreed.

This has been highlighted by the recent case Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd) [2018] EWCA Civ 2222. The designer commenced work without a contract having been agreed and finalised and ended up in the High Court, and then the Court of Appeal, to determine what the contract terms were and particularly, whether the designer's liability was limited, in circumstances where it was alleged that there were £40m worth of defects.

The Court of Appeal eventually found in favour of the designer – the limitation of liability had been included in the contract; clearly not good news for the developer. This could have all been avoided had the contract been agreed at the outset.

So, what sort of things can go wrong if a developer allows consultants to do work without contract terms being in place?

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Without any specific contract terms in place, it is likely that there is still a basic contract. This means that the Court will imply the scope, price to be paid, duration of the contract, unless these terms have specifically been agreed. The contract will operate without any other terms, unless any particular terms have specifically been agreed between the parties.

Why might that be a problem to a developer?

8 Reasons for developers to sign your construction consultants up to contracts before they start work

Scope

Without anything in writing, there is a huge risk that the scope of works will be unclear. This may mean that the consultant will not be liable for items that the developer thought the consultant was dealing with. It may also mean that items are not addressed by a particular consultant, when the developer thought they were and there are effectively gaps in the design and development of the project. Inevitably these will be discovered at some point but could prove expensive to remedy.

Funders' requirements

Funders, as you would expect, have specific requirements to protect their investments. If a consultant starts work without a detailed contract, there will be very little protection for the funder and this may impact upon the funder's willingness to fund or the terms upon which it is prepared to provide funding.

Collateral warranties

These documents are a common requirement in construction projects. Without a specific requirement in its contract, a consultant has no obligation to provide any collateral warranties. For example, a collateral warranty provided to a funder would give a direct contractual means of redress against a member of the construction team where the funder would not otherwise have it.

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These warranties are typically given to funders, developers, purchasers and future purchasers and tenants and future tenants. Without such warranties, these parties are not getting what the commercial market requires as being reasonable and are also placing themselves at risk. This has the potential to reduce the value of the developer's investment.

Novation

In some instances the developers intention may be that the consultants are novated to the contractor, so that the contractor can take full risk for the design. Without an express requirement, the developer would have no means of requiring the consultants to agree to any novation. This could limit the method of procurement or could mean that the developer has to make an additional payment to the consultants in return for a novation.

Consultants own T&Cs may apply

Another potential problem where a formal contract has not been agreed is that the consultants own terms and conditions may, in default, become agreed between the parties. This will cause the problems listed above because such requirements are unlikely to be included in the consultants' standard terms and conditions. However, in addition, the consultants' terms and conditions will inevitably be more favourable to the consultant.

Consultants own T&Cs may include a limitation of liability

So for example, I would expect a consultant's terms and conditions to contain a financial cap on its liability. This may be wholly inappropriate for the size of the project. In addition, it may be wholly unacceptable to funders and also the developer itself (who may not have read the terms of conditions in detail).

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Establishing a business relationship from the outset

In addition, agreeing the contract with consultants at the outset puts the business relationship on a correct footing. Both parties then understand what the consultant's scope of work is and particularly who is responsible for the interface with other consultants, contractors and the developer. This will avoid any administrative or construction lacuna.

Properly structured contract from the outset

Finally, it can be beneficial in helping to focus on how the work and contracts with all members of the construction team are to be structured for the project.

In summary, we find that finalising consultants' appointments very early in the process is a relatively small investment which usually pays dividends in the smooth running of the project. If you wish to discuss any of these issues please feel free to contact anyone in our construction team.

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