



GROUP POLICY FOR DEALING WITH CONTRACTORS' INSOLVENCY

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Policy for Dealing with Contractors' Insolvency

Policy

It is Group policy to minimise the loss and expense incurred as a result of a Contractor, employed by the Group, going into liquidation.

It should be noted that it is also Group policy to minimise the risk of such an event occurring, and our procedures for ensuring this are set out in our Procurement Policy.

SBCC Building Contract

Under the SBCC Standard Form of Building Contract, the crucial point is that, in the event of the Contractor's employment being terminated, the Contract remains in force and the Contract terms dealing with termination come into play. Therefore Group companies owe specific obligations to the Contractor. It is these specific obligations that the Group must be able to deal with quickly and competently in order to minimise overall costs for the project.

Procedures

The procedures listed below detail the actions which require to be taken by the group upon notification that a Contractor is Insolvent.

1. The following must be done immediately:
 - Secure the works, and post notices regarding the ownership of the site and its contents.
 - Advise the Finance Department to make no further payments to the Contractor until final reconciliations have been carried out on all affected projects.
 - Insure the site, and any works, materials, etc. thereon.

2. The following should be done with all reasonable speed:
 - Check what the Contract terms are and assess what further action (such as formal termination of the Contract) is required.
 - Advise all Consultants who are employed by the group on affected Contracts.
 - Instruct the Quantity Surveyor to value the project as it stands, including an assessment of ownership of materials, equipment, etc. located on or adjacent to the site.
 - Carry out an internal cost reconciliation for all affected projects as at the date of Liquidation/Receivership, and ascertain the possibility of "set-off", i.e. deducting money owed by the Contractor from money owed to the Contractor.
 - Assess the options open to the group in order to complete the works. Usually this will involve instructing the Consultants to prepare the necessary documentation to seek competitive quotations from other Contractors for carrying on and completing the project.
 - Obtain legal advice if necessary.

APPENDIX

SUMMARY DESCRIPTION OF INSOLVENCY AND HOW IT AFFECTS THE BUILDING CONTRACT

1.1 Introduction

It should be noted that the SBCC Conditions of Contract, which are used by the Group for all Maintenance and Development Contracts, deal with the various forms of Insolvency as one and the same.

1.2 Insolvency

This term is solely a financial term meaning that a Contractor is unable to pay their debts when they fall due. The Contractor may have a healthy workload, and may even be operating profitably, however if their cash flow is sufficiently poor they may become insolvent.

Such Insolvency can be evidenced by various happenings and the SBCC specifies most of them, namely if the Contractor:

- enters into an arrangement with its creditors (other than for the purpose of amalgamation or reconstruction)
- seeks to wind itself up without a declaration of solvency;
- has a winding up order or bankruptcy order made against it;
- has an administrator or administrative receiver appointed;
- is the subject of any analogous arrangement in another jurisdiction; or
- where it is a partnership, any of the above applies to one of the partners.

1.3 Building Contracts

Under the Scottish Building Contract, the employment of a Contractor is not automatically terminated if it becomes insolvent. The Contract terms which apply upon Insolvency automatically are:

- The Contractor's right to carry out the work is suspended, pending reinstatement or formal termination by the Group.
- The Group must secure the site (and consequently should insure it).
- The final accounting provisions apply (see below).

If the Group wants to have someone else carry out the remaining works, it must decide to terminate the Contract and issue a notice to that effect.

1.4 Payment of Contractors

With or without such termination of the Contract, the Group is no longer under obligation to make any further payments to the Contractor until completion of the works when a Final Cost Reconciliation can be carried out. If it formally terminates the Contract, the Group may employ and pay another Contractor to carry out and complete the works (or indeed the original Contractor if so agreed with the relevant insolvency practitioner – although this is very unlikely). Alternatively, the Group may decide not to proceed with the works (and this is deemed to be the case if works do not commence within 6 months of formal termination by the Group), in which case there is still a Final Cost Reconciliation to be carried out (albeit on a slightly different basis).

Either way, the Group has a duty under common law to mitigate any losses arising from the termination of the Contractors' employment, and this will include minimising the cost of completing the works.

In carrying on and completing the works, the Group can use equipment and materials intended for, delivered to and placed on or adjacent to the site, which belong to the Contractor, but the value of materials not covered by a prior interim certificate must be included in the final accounting (usually as part of the contract price). Non-consumable equipment must be returned to the Contractor in due course. It cannot be sold by the Group without the consent of the insolvency practitioner.

If any equipment, e.g. scaffold, plant hire, etc., does not belong to the Contractor, it may be used, but only with the express permission of the owner.

Any materials intended for, delivered to and placed on or adjacent to the site, which do not belong to the Contractor, because under the contract with the sub-contractor or supplier ownership has not passed to the Contractor, cannot be used by the Group without the agreement of and payment to the sub-contractor or supplier. The exception is those materials already covered by an interim certificate, provided the Group has not been advised (prior to the Insolvency) that the sub-contractor or supplier still had ownership.

One final, but extremely important point is that, upon insolvency of the Contractor, the Group is entitled to set-off a claim against the Contractor under one Contract against amounts due to the Contractor under another Contract.