

# Binding construction programme? the risks with making the programme a contract document

By Kate Muldrew

A programme is an important tool in any construction project. A comprehensive and monitored construction programme helps ensure the timely delivery of the project. The converse is also true and, to use a well-known proverb, to fail to plan is to plan to fail.

For this reason, a principal may be tempted to incorporate the programme as a contract document. However, parties need to be mindful of the risks of doing so. This article will examine some of the unintended consequences that can arise, including imposing additional obligations on both parties, increased claims, and inflexibility.

## A key project management tool

A construction programme is typically intended to be a living document that is updated through the course of the project. It provides a roadmap to completion, showing the sequence and manner in which the contractor plans to carry out the works.

It also allows the principal to monitor the contractor's actual progress of works and assess delay claims.

## Ordinary contractual status

A construction programme is usually not incorporated as a contract document and is therefore not binding on the parties.

Certain forms of contract oblige the contractor to prepare and submit a programme. For example, under clause 5.10 of NZS 3910:2013, the contractor

is obliged to submit a programme demonstrating how it proposes to meet the due date for completion. But these programmes do not have the status of a binding document.

The contractor's paramount time-related obligation is to complete the works by the stipulated due date for completion (either the whole of the works or separable portions). It generally then has the freedom to programme the works as it sees fit, and the principal has little influence over the sequencing and timing of activities.

This can be seen as an unsatisfactory outcome for a principal. If a contractor fails to complete within time, the principal is entitled to damages. But this traditional model does not have scope for proactive intervention by the principal to avoid delays to completion in the first place. Delay damages may also be an inadequate remedy, particularly if there is a liability cap or concern about the contractor's ability to pay.

## Programme as a contract document

Faced with the above issue, a principal may be tempted to bind the contractor to a programme of works. The apparent advantages to a principal are the opportunity to exercise control, prioritise certain works, and set clear expectations for the contractor. However, there are significant trade-offs.

Programmes are intended to be flexible and subject to revision as works progress. That flexibility is lost if a programme is contractually binding. Any departure from the programme (even if it is not critical) will likely constitute a breach of contract and/or give rise to a variation.

A contractually binding programme imposes obligations on both parties. It not only binds the contractor to follow it, but the principal must also facilitate the progress of works in accordance with the programme. This is an extension of the principal's ordinary duty to not obstruct the works. Even slight deviations would potentially give rise to claims.

In *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd*,<sup>1</sup> the contractor's method statement was incorporated into the contract. The court held that this imposed an obligation on the contractor to follow it unless it was legally or

<sup>1</sup> *Yorkshire Water Authority v Sir Alfred McAlpine & Son Northern Ltd* (1985) 32 BLR 114.



physically impossible to do so. The contractor was therefore entitled to a variation if it was impossible to follow the method statement.

The court in *Martifer UK Ltd v Lend Lease Construction (EMEA) Ltd*<sup>2</sup> remarked that it would be unusual for contracting parties to bind themselves into an arrangement where any departure from the programme would be a breach of contract by one or both. In the particular circumstances of that case, the court decided that the programme was not legally binding on the parties.

Additionally, the programme is often submitted by the contractor after the contract is signed. Incorporating a programme as part of the contract has the potential to extend the contract negotiations and delay the commencement of works.

## Way forward

There are other mechanisms to ensure that certain works are prioritised and/or the contractor progresses works in a timely manner, without the need to incorporate the whole programme into the contract.

A well-drafted contract can impose an obligation on the contractor to progress the works diligently and without delay. This provides the principal with a proactive means of redress (usually termination), rather than waiting until the completion date has expired. The programme will be of assistance here – i.e., a failure to meet key dates in the construction programme may be evidence that a contractor is in breach of that obligation.

## ABOUT THE AUTHOR

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Kate is an infrastructure and construction lawyer, who specialises in project delivery and construction disputes.

A skilled advocate, Kate has represented clients in a wide range of dispute resolution forums, including arbitration, mediation, adjudication, and court proceedings. She is experienced in managing large scale, multi-party proceedings.

Click [here](#) to read her full biography.



<sup>2</sup> *Martifer UK Ltd v Lend Lease Construction (EMEA) Ltd* [2015] CSOH 81.

