
POINTS TO CONSIDER WHEN A CONTRACTING PARTY BECOMES INSOLVENT

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INTRODUCTION

Insolvency on construction projects can be hugely damaging to employers and contractors. However, the risks can be reduced with the correct strategic approach and having a careful and thorough review of contract conditions, warranties and bonds.

We recommend a number of points that employers, contractors and subcontractors should consider if you find yourself in a situation where a contracting party becomes insolvent.

FOR EMPLOYERS:

- 1) Secure the site.
- 2) Check and ensure that the works are properly insured.
- 3) Record the physical state of the site making a full inventory of all unfixed materials and plant. Obtain video and photographic evidence.
- 4) Review the contract to determine the respective rights and obligations of the parties in respect of such matters as payment, ownership of unfixed materials (on and off site) and rights of termination.
- 5) Review any performance and/or security bonds to determine entitlement to make calls on any such bonds.

- 6) Review any collateral warranties provided by subcontractors and/or suppliers particularly in relation to any step-in rights.
- 7) Reconcile the progress and value of the works up to the appointment of the insolvency practitioner.
- 8) Develop a procurement strategy for completion of the Works and/or any defects.

FOR CONTRACTORS AND SUBCONTRACTORS:

- 1) Review your contractual rights and obligations in relation to suspension or termination of the contract on grounds of insolvency. Note that an incorrect termination could put you in breach of contract.
- 2) Prepare detailed records of your progress and value of works up to the appointment of the insolvency practitioner. This should include measures, marked-up drawings, photographs and video evidence.
- 3) Find out the employer's intentions – how will the employer complete the project?
- 4) Decide whether it is in your interest to terminate the contract.
- 5) Serve any suspension and/or termination notices as required under the contract.

- 6) Check the provisions of any collateral warranties, including whether there are step-in rights.
- 7) Serve any notices as required by your collateral warranties.
- 8) Review the status of any performance bonds, on-demand bonds or parent company guarantees provided (if any).
- 9) Review any ongoing insurance requirements with your insurance broker.
- 10) Review and comply with ongoing payment obligations to subcontractors and suppliers.
- 11) Serve any suspension and/or termination notices to subcontractors and suppliers as required under their contracts.
- 12) Review what lawful steps can be taken to recover your plant, equipment and unpaid materials from the site. Find out if you have retention of title clause in place for unpaid materials under the contract.
- 13) Review the contract and your plant hires agreements to understand your rights and obligations for plant and equipment that is on-hire and retained on site. Effective communication with the plant hire companies is essential.
- 14) For consortia: check your contractual position; who are you under contract with? Are the parties to the JV jointly and severally liable?
- 15) Discuss any financial difficulties with your bank at an early stage.

HKA has significant experience in dealing with insolvency issues, from reviewing and advising on contracts, subcontracts and supply contracts, as well as bonds and collateral warranties. We can also advise on the correct notices to be issued, and produce the required reports on progress and value of works.

ABOUT THE AUTHOR



Mike Blaylock is a Chartered Quantity Surveyor with over thirty years' experience within the construction and engineering industries. He has worked on a wide range of projects for employers, contractors, subcontractors and suppliers. In this time Mike has held roles as managing quantity surveyor, estimating manager, claims manager, commercial manager and employer's representative.

His experience within the construction industry includes working with both private and public sector clients providing a full range of quantity surveying duties and also acting as contract administrator/employer's agent. He has been involved in contracts ranging from commercial offices, retail, distribution, education, leisure, residential, local government and central government projects.

Mike has recently been involved in defending a multi-million-dollar dispute on the reconstruction of a port development under an amended FIDIC contract. Duties included involvement in the drafting of defence papers and quantum reports for a FIDIC Dispute Adjudication Board (DAB) hearing and also a report on the status of the contractor's final account.

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