

Implicit employer approval of progress reports

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Introduction

Many construction contracts provide that the contractor must submit daily, weekly or monthly progress reports, which then serve as a basis for invoices or applications for payment certificates (eg, see Clauses 4.21 and 14.3 of the International Federation of Consulting Engineers (FIDIC) Red Book 1999). In some cases, the contract provides that these progress reports must first be approved by the employer. A recent case before the Supreme Court demonstrates that, in certain circumstances, such approval may be implied through the employer's silence.

Decision

In the case before the Supreme Court (4A_368/2016, September 5 2016), the main contractor had hired a subcontractor for erection and installation works. The sub-contract stipulated that the subcontractor's personnel had to issue daily progress reports, which had to be signed by a designated representative of the main contractor (J). In a subsequent payment dispute, the main contractor challenged invoices from the subcontractor, arguing that the progress reports underlying the invoices had not been signed at all, or had not been signed by J.

The court analysed the main contractor's argument that J's signature was a formal prerequisite for the validity of any progress report.

The court first found that all but one of the reports had actually been signed, although by other individuals within the main contractor's organisation, namely X and Y. The court noted that the sub-contract did not specify that J had the exclusive power to countersign progress reports to the exclusion of any other representatives of the main contractor. Rather, the purpose of the relevant provision in the contract was merely to ensure that the main contractor made available a dedicated person to approve the progress reports. The court also found that Y was J's replacement in his absence, whereas X had general power to conclude contracts on behalf of the main contractor, which was deemed to cover *a fortiori* progress reports. On this basis, the court found all of the signatures to be valid countersignatures of the progress reports.

As to the one progress report that had not been signed by any representative of the main contractor, the court found that it had nevertheless been approved. Witness evidence established that the relevant progress reports, including the unsigned report, had been attached to the invoices submitted to the main contractor. The main contractor was contractually bound to flag any issues on any invoice within seven days. However, it never raised any such issues, hence the underlying unsigned progress report was deemed to be accepted. The main contractor went on to argue that the notice requirement for contesting invoices did not prevail over the form requirement for progress reports, and that the main contractor's failure to object to the relevant invoice could not compensate for the absence of an authorised signature, but the court rejected the arguments.

Comment

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Contractors often have a contractual obligation to prepare progress reports (eg, see Clause 14.21 of the FIDIC Red Book 1999) and must sometimes obtain signatures and approvals from the employer or engineer (although there is no such requirement under the FIDIC Conditions, parties may modify the conditions to include it). Whether the lack of an approval prevents the contractor from invoicing or receiving payment for the works covered by a progress report will depend on the wording of the contract. However, even if such an approval is required for invoicing or payment, an employer may not be able to hide behind its absence to deny payment if it does not object to the invoice or progress report in a timely manner.

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