

Desirable or Not?

Focus on Legal by **Laurette Gallagher**

All construction contracts have a provision whereby the Architect or Engineer may issue an instruction to vary the work the Contractor has contracted to undertake.

The standard forms of contract contain differing provisions conferring varying degrees of authority under which the Architect/Engineer is to issue a variation. One such authority is the Architect's/Engineer's power to issue a variation which is "desirable".

The Government form states:

"The Architect/Engineer shall order any variation to any part of the Works that is necessary for the completion of the Works and shall have the power to order any variation that for any other reason shall in his opinion be desirable for or to achieve the satisfactory completion and functioning of the Works."

The KCRC form states:

"The Engineer may instruct any variation to the Works that is in his opinion desirable in connection with the Works or the Project."

The Disney Conditions (draft form available only) state:

"The Project Manager may at any time prior to the issue of the Completion Certificate for the Works instruct any variation to the Works that is in his opinion desirable in connection with the Works or the Project."

The Private form has no such provision within its variation clause.

As you can see from the above the authority to issue a variation appears to be quite extensive and provides a broad topic for discussion. However what I wish to consider in this article is the interpretation and hence authority for variations that are "...in his opinion desirable...".

The Government form has restrictive authority in so far as "desirable" is limited by the premise that the variation is given on the basis of a specified objective, i.e. to achieve satisfactory completion and functioning of the Works. Consequently the authority conferred by "desirable" is limited to this caveat.

The KCRC and Disney forms do not contain such a caveat and therefore are less restrictive. Also under these forms there is express provision is only for "desirable" although it would be implied that such a provision would also include

for that "necessary". The Government forms expressly provides for both. Further aside, under both the KCRC and Disney forms the Architect/Engineer/Project Manager can order a variation with reference to the entire Project as opposed only to the Works the Contractor has contracted to do.

So now having looked at the various clauses the question remains as to what is the interpretation of "desirable".

"Desirable" is a pretty emotive word and hardly seems appropriate in the context of a construction contract. It does also rather suggest, a take it or leave attitude, such that to issue a variation would be nice however not imperative.

The Shorter Oxford English Dictionary in giving the meaning of desire states:

"that emotion which is directed to the attainment or possession of some object from which pleasure or satisfaction is expected"

Unfortunately there is no definition given in my legal dictionary.

Therefore when it comes to defining what is meant by desirable we need to refer to relevant authorities.

Max W. Abrahamson's Engineering Law and the I.C.E. Contracts, Fourth Edition states on page 169:

"...it is the engineer's decision whether a variation is "necessary (or) desirable" which the contractor binds himself and is entitled to obey. If that is so, the engineer may become disqualified by following his employer's orders to vary or not vary the works against his own judgement."

Abrahamson then goes on to say with particular reference to "necessary (or) desirable" that:

"This provision seems to be intended to deal particularly with the case where the employer objects unreasonably to a variation which is necessary for the safety of the works, or which is a more economical method to meet unexpected problems."

From Abrahamson's statement it would appear that one definition of "desirable" is a more economical method to meet unexpected problems. This definition would appear to potentially leave the door open for abuse and I come back to this point later on in this article.

Abrahamson then goes on to explain why the

Engineer should have "desirable" authority:

"The contractor may safely carry out such a variation order within the engineer's powers under this clause even though he knows that the employer has not authorised or has forbidden the engineer to make it, and if the engineer bows to the employer's orders his decision may be reversed in arbitration."

I cannot envisage too many scenarios where the employer would object to a more economical method for work for which he is to pay for. However then Abrahamson goes on to say:

"But the employer too, is entitled to arbitration, so that even if the engineer is prepared to take an independent line it may be preferable to try to reach a compromise direct with the employer."

I must say I find it a little disconcerting that Abrahamson is advocating that the engineer compromise his authority with the employer. This is contrary to the implied term that the Architect/Engineer is impartial and should remain so throughout the duration of the Contract. I do accept however that Abrahamson's view does sadly reflect reality.

Abrahamson's interpretation of "desirable" is supported in the case **Davis & Co (shopfitters) Ltd v William Old (1969) 67 L.G.R.** In this case it was held that the architect may require a variation whether or not the contractor or the employer likes it. In the case of **Benjamin Foster Co. v Commonwealth 61 N.E. (2d) 147** the definition of "desirable" was extended to include for the speed and quality of the work. The court assumed that the engineer was bound to act independently in exercising a power to *"modify the plan of operation or of construction if, in his judgment, such modification is necessary or desirable on account of the quality, safety or speed of the work."*

For convenience I have assumed that a variation to the quality or speed of the work would not comprise an omission of work where the contractor would incur a loss. However should a loss be incurred the variation may be deemed to comprise a more economical method and in most circumstances the following comments would be applicable.

To return to an earlier point I made, I can imagine that there are a few contractors concerned with Abrahamson's comment that variations can be issued to achieve more economical methods. However Abrahamson does clarify that:

"FOR THE COMPLETION... FOR THE SATISFACTORY COMPLETION AND FUNCTIONING OF THE WORKS. These are the

Laurette Gallagher

MSc in Construction Project Management, MCI Arb, Diploma in International Commercial Arbitration, Academy of Experts — Quality Dispute Resolver, HKIAC Accredited Mediator, MHKICM.

Laurette has some 19 years experience in the construction industry gained in leading international contracting and consulting organisations as well as experience working for smaller companies. Most of her experience has been gained in civil engineering projects including underground works.

She advises on problematic contractual/legal issues and is involved in mediation and arbitration matters.

E-mail: laurette.gallagher@jrknowles.com



only purposes for which the engineer has the right under this clause to vary the works. He is not entitled, for example, to substitute one piece of work for another or order an omission merely because the employer finds that he is exceeding his budget, or has changed his mind."

The KCRC and Disney forms of contract do not contain the words *"FOR THE COMPLETION... FOR THE SATISFACTORY COMPLETION AND FUNCTIONING OF THE WORKS"* instead they refer to *"...in connection with..."* which provides a far wider application of the Engineer's/Project Manager's authority.

Nonetheless generally it would seem that "desirable" does not give the Architect/Engineer unlimited powers to order variations of any nature but rather the intention is to confer authority to the Architect/Engineer in order to maintain the Architect's/Engineer's impartiality.

So where does this all lead? Well unfortunately disputes as to when a variation was "desirable" will continue and each case will have to be judged on its own merit given the contractual provisions and circumstances of the case.

But should the Contractor be asked to undertake a variation, which he considers to be outside the scope of the variation clause he may ignore the variation and assuming that he has all the necessary information he may continue with the works as originally stated in the contract. However we all know that this approach is not practical. Therefore alternatively the contractor may obey but must convey his protests to obeying such a variation and recover damages (including loss of profit) for breach of contract as a result of the wrongful issue of the variation. 