

# The subcontractors' battle to be heard when the doors shut

Most headaches for subcontractors are caused by the fact that they do not actually work for the people that pay their bills. So they often worry whether the main contractor will champion their cause in circumstances where the employer may be reluctant to effect payment for their work. This concern is exacerbated by what are generally known as paid-when/if-paid clauses, where the main contractor undertakes to pass on to the subcontractor the relevant portion of such payments it receives from the employer.

To make matters worse, the subcontractor hardly ever does, or indeed can, argue directly with the employer on any payment issues: the main contractor acts as a buffer for the subcontractor. UAE law specifically precludes subcontractors from filing their submissions directly with the employer for any amounts claimed against the main contractor unless what is known as, assignment of rights, has taken place. In addition, contractual references often stress that no aspect of the contract should be interpreted to mean that a privity of contract exists between the subcontractor and the employer.

However, this set up, coupled with pay-if/when-paid clauses, can act as a wall of isolation and seclusion for the subcontractor: it has waived the chances of pressing upon the main contractor for its dues as any contractual party in its position normally could. At the same time it has no other target to



fire at when the ultimate paymaster, the employer, is shielded both legally and contractually from any formal approaches by the subcontractor.

Worse still, some subcontractors include complex arbitration clauses that force the subcontractor to participate in arbitration proceedings that are, in essence, between the employer and the main contractor. This is meant to offer indirect access to a claim shouldered by the main contractor but, in real terms, is filed on behalf of the subcontractor.

Where the arbitration option as a dispute resolution method has been discarded in subcontractors, the litigation option is either set out expressly or left to be triggered by default when nothing else is mentioned. This is usually – but not always – when the value of the subcontracted works was, at the time of signing, considered to be unworthy of sophisticated dispute resolution mechanisms.

In the few instances where subcontractors' claims have been brought before UAE justice, local courts have been supportive to subcontractors that were not paid by the

With few negotiating tools, subcontractors often overlook the leverage that their critical role in projects may afford them, and sign off on terms that can force them out of the UAE's competitive arena. **Antonios Dimitracopoulos**, partner and head of construction, Bin Shabib & Associates, identifies a few of the common dead-end scenarios that subcontractors are confronted with.

**“UAE law specifically precludes subcontractors from filing their submissions directly with the employer for any amounts claimed against the main contractor unless what is known as, assignment of rights, has taken place.”**

main contractor but more often in circumstances where pay-if/when-paid clauses were absent.

One way, allowed by local law, for the main contractor to slip out of the loop and let the subcontractor argue its differences directly with the employer is the assignment of rights option. In essence, this

is a tripartite agreement where in employer, main contractor and subcontractor make a departure from the default position set out above: they open a direct line of communication between the subcontractor and the employer, with the main contractor slipping out of the picture.

The consent of all three parties would of course be required for this option to materialise – a consent that the employer may not readily provide if he wishes to hide behind the main contractor through a shield afforded to him by law.

So the subcontractor may be left with no choice but to rest all its hopes that its corner will be fought by the main contractor, in the anticipation that his payments will not be overlooked in the scheme of the much larger figures placed on the negotiating table with the employer.

But difficulties over payments negotiated through intermediaries are not the only headache that is in store for the subcontractor. Issues of liability may also arise halfway through the subcontract works and the subcontractor may find

himself caught between the devil and the deep blue sea.

One example would be that of a subcontractor on site having reservations as to the safety of a specific structure, designed by the employer, and relating to the subcontracted works. The subcontractor can draw this to the attention of the main contractor.

However, in many instances, the employer remains defiant as to the sufficiency and safety of its own design and the subcontractor could be caught in a very serious dilemma: it could continue with the subcontracted works in the hope that nothing of substance will arise.

Alternatively, it can proceed by using its own version of what it considers a safer design – almost certainly in breach of its contractual obligations. Finally, and most unlikely, it can object to proceeding with works that it considers unsafe and risk being requested to evacuate the site, as well as being blacklisted from future projects.

Under local law, the last and commercially most prejudicial option for the subcontractor would in fact be the most legal-

ly watertight. In the event of any incident occurring giving rise to issues of stability or safety, the employer will, in all likelihood, hold the main contractor responsible for accepting the employer's design and this will have a snowball effect on the subcontractor. This is because it too may be held responsible by the main contractor for designs that it accepted as sound, just as if it had generated those designs itself.

It is fair to say that subcontractors get a raw deal in terms of the law, as they are elbowed out of any negotiations directly with the employer. Given this, it may not be too wise for subcontractors to make their position even harder to defend, by unconditionally accepting pay-if/when-paid clauses in the hope that all will be well in the end. In practice, the chances of any complications backfiring their way to the subcontractors are actually much higher than the initially optimistic air of securing a subcontract may suggest. The subcontractors stand to lose more, as they are often perceived as the weakest, and therefore the most replaceable, link.