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Kevin Stewart MSP  
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Dear Minister

## **LOCAL AUTHORITY AMENDMENTS TO THE STANDARD BUILDING CONTRACTS USED IN SCOTLAND**

The Forum wishes to draw your attention to a number of issues relating to the above.

### **A) Amendments to the Standard Conditions of Contract**

It is generally accepted in the industry that amendments to Building Contracts should be discouraged as they inevitably result in risk transfer to Tier 1 contractors, and as a consequence, the whole of the supply chain. However, we have seen recent trends, in both the public and private sectors, to amend such Contracts.

The Scottish Futures Trust Publication, "Guidance on Selecting a Procurement Strategy and a Form of Contract", published on 27 September 2017 [which was the Implementation of Recommendations 16, 17 and 18 of the Review of Scottish Public Sector Procurement] specifically refers to this issue on pages 43-44. The Guidance recommends that any proposed amendments be shown by way of tracked changes, with the procurer explaining the proposed changes, and the reasons for these.

Recent experiences reported to us by a number of different contractors across Scotland demonstrates that this is not happening, and, in one particular case an authority has issued a contract with a total of 67 pages of amendments.

### **B) Recent Issues of Contract Documents issued by Local Authorities**

The Forum has had access to extracts from tender documents issued by three Local Authorities in Scotland and these all include what for present purposes we would describe as, "Covid 19" provisions. We have outlined the issues as follows:

1. The documents are inconsistent in wording and on the extent of amendments. For example, one Authority has removed four Relevant Events relating to a Contractors entitlement to apply for an extension of time to the Completion Date of the Building Contract. No explanation is provided as to why this is considered necessary, and the result is a significant transfer of risk to the Contractor, and the supply chain.
2. All three of the authorities, have added a clause to deal with a potential situation where the Employer [the Authority] and the Contract Administrator cannot fulfil their responsibilities due to Covid 19. In such an event, they are proposing that the Contractor takes the risk of all of the financial impact of such an event. An extract from tender documents, is attached for ease of reference, and Clause 10 is the relevant provision.

### C) Consequences for T1 Contractors and the Supply chain

Each of these actions brings their own problems, but item B2 is a particularly punitive provision, which at the very least requires a re-consideration of the potential financial consequences.

A further and very significant issue is that it appears that the Contractor would have to bear the cost of site operations being suspended. It also means that the Contractor would not be entitled to terminate the Contract, until the expiry of a period of 6 months of suspension.

It may assist to give you a hypothesis:

*“Due to a Public Health Emergency, the Employer and the Contract Administrator cannot fulfil their obligations under the Contract; the Contractor cannot proceed due to lack of design information; the construction works cannot progress, or worst case are fully suspended; the Contractor will have to bear all other costs of securing the site, maintaining secure and health and safety provisions etc. All of these risks will apply right down the supply chain”.*

### D) Suggested actions

- 1) In the case of the issue highlighted in A, we would ask that you consider the issue of a CPN to all public sector procuring authorities in Scotland, to remind them of their obligations under the “Guidance on Selecting a Procurement Strategy and a Form of Contract” document.

2) In the case of the issues raised in item B (1 and 2) it appears to the Forum that the consequences have not been properly considered, and neither are we aware of any engagement with the Industry to discuss the implications of such amendments.

In order to try and find a resolution, the Forum would be keen to see if the Scottish government could facilitate a meeting with appropriate representatives from all sides to discuss these and other implications of a further outbreak of Covid 19.

We fully appreciate the tensions here between the Industry, on the one hand, not being willing to bear any additional costs and/or risks, and the public sector, on the other hand, who state that they are not willing to underwrite any costs, due the severe financial pressures they are presently under.

I look forward to hearing from you.

Best wishes



**Alan Wilson**  
Chair



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