

“THE HONEY IS SWEET, BUT THE BEE HAS A STING” (BENJAMIN FRANKLIN) - APPRECIATING RISK

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The West Midlands is awash with good news and positive economic overtones following the announcement that Birmingham is to host the Commonwealth Games in 2022, with neighbouring Coventry also confirmed as the City of Culture 2021; potentially boosting the regional construction economy by over £500 million. Alongside this, the region continues to prepare itself for Phase 1 of the HS2 rail project with an estimated £900 million of Enabling Works already awarded.

As a result, the region is rubbing its hands together for the “good times” and the wealth of opportunity that lies ahead. For some, the journey will doubtless prove to be hugely rewarding but for others, the outcome may be diametrically opposed to this positive outlook.

All sections of the industry will jostle and manoeuvre for a piece of the action, which can lead to “Price” becoming the dominant driving force for opportunity. This scramble for work could be to the detriment of indepth risk allocation and understanding. It is not suggested that there will necessarily be an epidemic of “under bidding”, rather that “commercial risk” will outweigh the equally important concept of “contractual risk”.

A recent decision at the Technology & Construction Court (TCC) in the case of *North Midland Building Limited -v- Cyden Homes [2017] EWCH 2414 (TCC)* serves as a timely reminder of the need to identify, and equally understand, the concept of “contractual risk”.

Parties to a construction contract do not enter into agreement with the intent of creating dispute or conflict. It is however, the Contract that binds them in all aspects whether disputes arise or not. A lack of understanding as to the content of any form of contract is certainly a high-risk strategy, particularly for Contracting organisations, and one that should be avoided at all times.

Recently published opinion by the RICS and BCIS (Building Cost Information Service) on its behalf, predicts a downturn in tender prices during this year. This is also marked by an expected increase in material and labour costs, due to on-going Brexit negotiations and a continuing shortage of skilled labour.

Contractors therefore, look set to come under increased pressure commercially and find themselves in “troubled waters” when facing a competitive tender situation.

As Sir Michael Latham pointed out in his then ground-breaking Report in 1994 entitled “Constructing the Team”;

“If the economy is weak, the industry will suffer, and its participants will try to alleviate that suffering at the expense of others (including clients). If the economy is going wrong, little will go right in the construction industry.”

These comments reflect well founded and longstanding economic principles. Whilst some in the industry already appear willing to take a conscious approach toward “contractual risk”, others seem to take a more cavalier approach.

Addressing the issue of “Risk” within the Construction Industry Sir Michael Latham said;

“No construction project is without risk; the risk may be managed, minimised, shared, transferred or accepted, but it can never be ignored.”

Our concern with the imminent expansion of the West Midlands workload, and the predictable mad dash for work, is that contract risks could be ignored, or misunderstood; which could turn round and bite the unsuspecting contractor, or sub contractor, long after the contract is awarded.

DGA frequently advises clients on contractual risk as part of their live project commercial support services. This allows misunderstandings to be highlighted at an early stage and addressed before a dispute arises. A Project Health Check Audit service has just been launched by DGA,

which allows Contractors to understand the status of their project in regards to processes and procedures on a live scheme



MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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