



## Do we need to keep subcontractors in the dark?

In most of the standard forms of sub-contracts used in the Hong Kong construction industry there is an obligation for subcontractors to carry out their works to suit the Main Contractor's programme. Contrary to this obligation, it seems that Main Contractors like to keep their subcontractors in the dark by not providing the full version of the Master Programme or any updated revisions, most likely this is so that the subcontractors are prevented from claiming for extension of time because of delays by other subcontractors or even the Main Contractor. The reasonableness of this practice is questionable.

### The Case:

The Australian case *Alstom v Yokogawa Australia Pty Ltd & Anor* (No.7) [2012] SASC 49 may be able to answer this question.

Alstom was the Main Contractor and Yokogawa Australia Pty Ltd & Anor (also known as YDRML) was its subcontractor responsible for the electrical, control and instrumentation Works of the refurbishment and automation of the Playford B Power Station. YDRML's sub-contract amount was AUD33.8M which was roughly a quarter of the Main Contract amount.

Similar to the situation described in my previous article on back-to-back contracts ('Formation of Construction Contract - Handle with Care (Part I)'), Alstom used the Main Contract as a template for the subcontract. Instead of drafting a bespoke agreement, they modified the Main Contract with special conditions to alter certain definitions and terms. The project was in significant delay and the client withheld AUD 13M in liquidated damages from Alstom.

In the apportionment of the delay liabilities, the question was whether Alstom was required to provide its updated and accurate works programme showing all relevant logic links to YDRML, notwithstanding that there was no express contractual provision to that effect. If it is the case here, YDRML would not be liable for the delays.

There were many thousands of activities to be scheduled, therefore a Master Programme was produced to assist in determining the order and timing of the activities, and to enable forward planning. In a project, most activities have "predecessors" – these are simply other tasks that must be completed or started before the current task can begin. For example, if activity "X" is excavation, one of the predecessor activities may be the lateral support.

In this project, the software specified in the Main Contract was Primavera P3. Like other programming software, P3 has the ability to dynamically recalculate the critical path and work out the effect on a Milestone date of any delay that occurred during the course of the Works. It is not unusual no matter whether in Hong Kong or Australia, that the Main Contractors rarely shares all of their planning information with its subcontractors. Even if it is being shared, it is usually and deliberately in the form of PDF printouts, rather than Primavera or Microsoft Project file form so that the subcontractors cannot know about the logic lying behind whatever the Main Contractors are demanding by way of performance. Worse still, many Main Contractors only provide their subcontractors with extracts from the Master Programme showing only the activities and corresponding start and finish dates relevant to that particular subcontractor.

Returning to the case, in many instances, Alstom refused to provide to YDRML the electronic form of its Primavera programme. It was always the case that Alstom gave YDRML extracts from its Master Programme, showing only selected portions Alstom thought were relevant to YDRML's activities. In the main part, the extracts omitted the time relationship links between activities and their predecessors. In the court, it was found that Alstom's Master Programme was inadequate, the Milestone dates had been entered as fixed dates and consequently, could not move forward when delays were incorporated into the Master Programme.



### **The Court's Findings:**

The Court found that there were “thousands” of activities that YDRML was unable to properly schedule without knowing the predecessors to them or when Alstom would give access. There were three legal principles that resulted in an obligation on Alstom as the Main Contractor to provide sufficient information to YDRML to enable it to plan and work according to the plan:

1. Unless the contract expressly says otherwise, there is an implied duty to co-operate resting on both parties;
2. Every commercial contract includes an implied obligation to act in good faith;
3. Unless the contract expressly says otherwise, if any act by one party prevents the other from proceeding as planned, the innocent party will be deemed to have performed the contract.

### **Duty to Act in Good Faith:**

The Court went on to discuss whether there is an implied duty to act in good faith. It held that the obligation to cooperate and the obligation to act in good faith extended to a requirement to provide to YDRML the full electronic version of Alstom's Primavera program, including any updated versions during the Works. Alstom's failure to do so had prevented YDRML from performing its obligations under the sub-contract – an act of prevention, therefore, YDRML was not liable for any of the delays and therefore not liable for any portion of liquidated damages.

## Some Thoughts:

Some of the reasons for Main Contractors not providing comprehensive delay information as well as the full Primavera programme to their subcontractors is as follows:

- Prevent pacing delays – the subcontractors may slow down as well;
- Avoid the subcontractors claiming for EOTs when the Main Contractor is not yet confident to get the same from the client;
- Maximise their returns and generate more float for the project;
- Any subsequent acceleration of the works by the subcontractors can be masked and remain unrewarded.

Despite the fact that keeping the subcontractors in the dark enjoys a lot of benefits for the Main Contractor, Main Contractors should now be aware that following this case, more subcontractors may be willing to go to the court to challenge the Main Contractor, especially when issues related to LD's/prolongation costs arise.

Under the NEC Contract, although the NEC Contract does not use the term good faith, the court in the case of *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50 concerning an NEC sub-contract, the court commented that *“Clause 10.1 is not merely an avowal of aspiration, instead, it reflects and reinforces the general principle of good faith in contract.”*

In short, providing the updated Master Programmes in Primavera or MS project formats to the subcontractors is easy, as it can prevent the argument of prevention and later disputes. However, one wonders whether that will make any difference to Main Contractor's in the future, old habits still prevail.