



# STA MEMBER WEBINAR TIMBER PRICES AND AVAILABILITY

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# Your Speakers - Morwenna Crichton and Susan Threlfall

- ❖ Morwenna is a founding Director of Yelland Savage and has many years experience in all aspects of dispute resolution.
- ❖ Susan is a Senior Contracts Consultant and has significant experience in all aspects of dispute resolution.
- ❖ Both Morwenna and Susan have prepared and delivered many training sessions on contract construction and interpretation and have assisted numerous clients in the past 15 years with advice in connection with drafting of contracts and disputes arising therefrom.

# The Background

- ❖ YS have been asked to give a short presentation on the current problems faced by the industry in relation to shortages of materials and materials price increases.
- ❖ This is particularly affecting the timber industry. There are a variety of reasons for this including:
  - ❖ UK and global demand outstripping supply. A surge in the popularity of timber frames in Europe and the USA is putting more strain on supply.
  - ❖ Problems with shipping container availability arising from Suez and COVID-19 have contributed to this
  - ❖ Sawmills shut from time to time due to COVID-19. Shutdowns due to COVID are in particular affecting Sweden which is a significant timber-supplying partner.
  - ❖ Brexit – haulage issues.
  - ❖ Stockpiles which are normally in place to smooth out humps in supply have been exhausted over the past year and the combination of reduced manufacturing capabilities and high demand means they have not been replenished.
- ❖ This is also affecting OSB, chipboard, and structural plywood as there are limited manufacturing capabilities to increase supplies.

# The issues

- ❖ There are three issues arising from the shortages in the timber market:
  - ❖ Procurability of materials – can you get them at all and if not, what are your options?
  - ❖ Procurability of materials – late delivery – what are your options?
  - ❖ Increased price of materials.
- ❖ This session considers these 3 issues in the context of the JCT Standard Building Sub-Contract Conditions 2016 and the STA Terms and Conditions
- ❖ The exact position will depend on whether a contract is in place, what terms or amendments have been made to that contract, and the specific facts, so if in doubt – seek advice

# Can you get the materials at all?

## Procurability under JCT

- ❖ The SBCSub/C 2016 as unamended assumes that the materials and goods are procurable:

### Materials, goods and workmanship

2.4.1 All materials and goods for the Sub-Contract Works shall, so far as procurable, be of the kinds and standards described in the Sub-Contract Documents. The Sub-Contractor shall not substitute any materials or goods so described without the Contractor's consent, which, if given, shall not relieve the Sub-Contractor of his other obligations. **(bold emphasis added)**

- ❖ If materials are not procurable therefore, the Sub-Contractor is not at fault.
- ❖ There are 2 main options:
  - ❖ Substituting the materials with a material that is procurable; or
  - ❖ Delaying the works until the relevant material becomes available
- ❖ The Sub Contractor cannot substitute the goods without the Contractor's consent, or unilaterally alter any mandated construction sequence and so needs to seek instructions either way.
  - ❖ An instruction to alter the kind or standard of the materials or goods will be a Variation under Clause 5.1.1.2.
  - ❖ An instruction to change the order of execution of the work will be a Variation under 5.1.2.4

# Can you get the materials at all? Procurability under JCT (Cont.)

- ❖ What if no instruction is given?
  - ❖ Sub-Contractor cannot do anything without consent/instruction
  - ❖ There is an obligation on the Contractor not to unreasonably withhold or delay consent
  - ❖ Is the failure to give an instruction a breach of contract by the Contractor?
  - ❖ What if there are no suitable alternatives that the materials can be substituted with? The position under JCT is unclear/unsatisfactory
- ❖ In practice the Sub-Contractor is always obliged to proceed regularly and diligently and so should investigate all available options before consulting with the Contractor.

# Can you get the materials at all?

## Procurability under STA Terms

- ❖ Under the STA terms, a change to the materials used will be a variation pursuant to clause 3.3.

*“A variation includes any change to the Contract, howsoever arising, whether it is driven by the Buyer, or arises as a result of something outside of the Seller’s control. A variation may be instructed by the Buyer, or notified by the Seller to the Buyer, if the seller becomes aware of a variation which has not been instructed by the Buyer.”*

- ❖ If the parties choose to delay the works until the relevant material becomes available, this may entitle the Sub-Contractor to an extension of time and money if the delay is caused by a reason outside of the control of the Sub-Contractor
- ❖ If it is not appropriate to substitute materials, or it is impossible to know when materials will be available, the STA terms offer an additional remedy in the form of the frustration clause:

*“Prevention or frustration*

*13.1 If the Contract becomes impossible to perform or is otherwise frustrated the Buyer shall be liable to pay the Seller all reasonable costs, expenses, overheads and all loss of profit which the Seller, his suppliers or sub-contractors incur as a result of such frustration or impossibility of performance.”*

# Procurability of materials

## Late delivery - what are your options?

- ❖ As set out above, if the Contractor chooses to instruct alternative materials and this causes delay, or if it chooses to defer the works until materials are available, these will both be grounds for an extension of time.
- ❖ There are also alternative routes to an extension of time.
- ❖ Under the STA terms where there is a set completion date, the Sub-Contractor will be entitled to time and money for any matters outside of his control.
- ❖ Under the JCT terms, there are a number of Relevant Events which could be relied upon (depending on the specific facts) as to *why* the materials in question were not available – including the exercise of a statutory power (which may relate to Brexit or Covid) and force majeure (which may relate to Covid) or even have a more general application.



# Increased price of materials

## JCT

- ❖ Situation will depend on whether there has been any change to scope / programme.
- ❖ If scope / programme has not changed there is only one possible mechanism: fluctuations clauses.
  - ❖ The Fluctuations Provision will only take effect if it has been identified as applicable within the Sub-Contract Particulars (item 8)).
  - ❖ Different Fluctuations provisions:
    - ❖ Option A – only covers taxes and levies etc
    - ❖ Option B – changes in market prices – but in practice may be difficult to operate/prove
    - ❖ Option C – Index linked – normally the best option but currently there are problems with indices
- ❖ For contracts going forward: consider a bespoke mechanism?

# Increased price of materials

## JCT (Cont.)

- ❖ There may be more arguments for claiming increased prices if the scope has changed or in the event of Contractor culpable delay.
- ❖ If for example more work has been instructed and this leads to the procurement of more materials than initially planned, the Sub-Contractor might argue that the additional work is no longer being carried out under similar conditions to the original work (“conditions” in this context could include market conditions) and that it is entitled to a different price for the additional materials.
- ❖ In the event of delay which has arisen from a Relevant Matter, the Sub-Contractor is entitled to his loss and expense. Loss and expense is based upon actual expenditure and so if the additional materials cost has arisen purely because of the delay and the effect this has had on when the materials are procured, this may be a route to additional money.
- ❖ If the scope and programme stays the same, and there are no bespoke provisions to cater for changes to the base cost of the materials, the risk is likely to sit with the Sub-Contractor under the SBCSub/C 2016.
- ❖ Fixed price clause “add ons”: do these really change anything to the basic JCT mechanisms?

# Increased price of materials

## STA Terms

- ❖ The STA terms provide that rates can be adjusted:
  - ❖ If completion is delayed beyond the Validity Period for a reason outside of the Seller's control. The Validity Period is the period in the Quotation and does not have to match the project duration
  - ❖ In the event that the rates of exchange tax or duty at the date of the Quotation change
  - ❖ As a result of a Variation – rates can be “adjusted to take account of the changes to the basis of the rates”
- ❖ Clause 3.4: STA terms state that if the Buyer instructs a Variation, the Seller does not have to accept that Variation.

# Increased price of materials

## STA Terms (Cont.)

### Price of the Goods

- 3.1 The rates and prices stated in the Quotation or any price subsequently submitted by the Seller are based on materials and wage rates applicable at the date of the Quotation or variation quotation on the understanding that the supply of the Goods and Services will be completed within the Validity Period. Should completion be delayed beyond the Validity Period as a result of any fault of the Buyer or any other reason outwith the control of the Seller, the Seller reserves the right to adjust the rates and prices stated in the Quotation or variation quotation in line with the increased costs of materials, labour or plant incurred by the Seller. Any such adjustment will be notified to the Buyer as soon as practicable in writing after the expiry of the Validity Period.
- 3.3 A variation includes any change to the Contract, howsoever arising, whether it is driven by the Buyer, or arises as a result of something outside of the Seller's control. A variation may be instructed by the Buyer, or notified by the Seller to the Buyer, if the seller becomes aware of a variation which has not been instructed by the Buyer.
- 3.4 The Seller is not obliged to accept from the Buyer a variation to the Contract. If the Seller is prepared to accept any such variation as soon as practical after receiving full details of any such proposed variation, or if the Seller becomes aware of a variation not notified/proposed by the Buyer, the Seller, will issue a variation quotation, which may include such later time for the Date for Completion as the Seller considers reasonable. Variations will be valued by using the rates and prices detailed in the Quotation, where these are applicable; the rates and prices detailed in the quotation adjusted to take account of changes to the basis of the rates and prices where applicable and fair and reasonable rates where applicable. The Seller will not be required to implement any such variation unless the Buyer accepts the variation quotation in writing. Where not rejected in writing within 7 days, the variation quotation will be deemed accepted For the avoidance of doubt (and without prejudice to clause 4.2) where the variation consists of the omission of an element of the works, or reduction in the quantities of any Goods, the Seller will be entitled to take account of all losses and expenses that are incurred by the Seller in returning excess Goods, and/or terminating and/or renegotiating any contractual arrangements with suppliers to the Seller of any goods, materials, plant and equipment or other services that are no longer required in connection with the Goods and Services. The Seller will be entitled to payment of overheads and profit on the omitted/reduced work/Goods.

### Imported Materials

- 11.1 The Price, where appropriate, allows for the cost of importing materials based upon the rates of exchange, tax or duty prevailing at the date of the Quotation or variation quotation as applicable. In the event of any adjustment in such rates of exchange etc, after the date of the Quotation or variation quotation as applicable, the Seller reserves the right to make an appropriate adjustment to the Price to compensate the Seller for any increased cost.

Questions?



# MEMBER'S QUESTIONS

- ❖ We priced a job 12 months ago and there is no provisions to increase costs. We still have 50% of the site to complete which will span approx. over the next 12 months
- ❖ We priced a job 2 months ago and whilst we are ok with prices, the scenario arises whereby we cannot secure the materials due to shortages ?