

# Underground services

28 October 2016

**Charles Blamire-Brown looks at the question of contractors claiming extra costs for additional works**

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**On a JCT Design and Build project, the contractor is claiming extra costs for additional work because the existing underground gas pipe is in a different location to the one that is shown on the drawings supplied with the employer's requirements. Is the contractor entitled to claim these extra costs?**

All too often there are discrepancies between the drawings forming the employer's requirements and actual physical structures, particularly when it comes to detailing existing underground services.

The key questions are as follows.

- Who is responsible for these discrepancies and their impact?
- If it is not the contractor, what additional cost is that contractor legitimately entitled to recover?

## Who is responsible?

In the current scenario, the discrepancy originates from the employer's requirements, so it is necessary to understand the contractor's responsibility for these. Clause 2.11 of the [JCT Design and Build contract](#) makes clear that the contractor is not responsible for the contents of the requirements or for verifying the adequacy of any design they contain.

The contractor's responsibility is instead to develop its own proposals. However, to the extent that any discrepancy originates from the employer's requirements ? which are not dealt with in the contractor's proposals ? then these requirements must be corrected, in this instance to show the correct location of the gas pipe. This and any other corresponding amendments that may need to be made to the contractor's design to accommodate the corrections will be termed a "change".

*In terms of any disruption costs, the later the discrepancy is spotted the more disruptive the effect of redesigning the works to accommodate it will likely be on the contractor's works*

As a change, it is to be valued in accordance with clause 5. In practice, however, is the change likely to require a redesign? Will additional work need to be undertaken as a result of any revised design? It will depend on the nature and extent of the redesign, but this could

well be relatively limited.

The real battleground is instead likely to be the contractor's claim for any loss and/or expense that arises from the delay and disruption to the works as a result of making the change ? for instance, in stopping or reprogramming the work while the redesign is completed.

This will likely include a number of components, such as:

- prolongation costs associated with any critical delay to completion caused by the change
- disruption costs caused by having to carry out works in an inefficient manner as a result of the change.

Any claim for the former will be subject to analysis and challenge, in relation to whether the costs were caused by the change to accommodate the discrepancy and associated delays or by other delays for which the contractor is culpable.

There is also the issue of mitigation. If the discrepancy is spotted at an early stage, then it may well be that the contractor can mitigate the effect of any delay by reprogramming its works. In such cases, there may be no overall critical programme delay or associated cost. In terms of any disruption costs, the later the discrepancy is spotted the more disruptive the effect of redesigning the works to accommodate it will likely be on the contractor's works.

## **Delayed notification**

It is also worth bearing in mind that the contractor is obliged under clause 2.13 to notify any discrepancy as soon as it becomes aware of it. If there is a delay in notifying, then the contractor may be responsible for any additional costs arising, which might include the expense of redoing work it would not have needed to repeat had the discrepancy been notified before the original work was carried out.

It is very common to see clause 2.11 amended, effectively making the contractor responsible for any errors or divergences in the employer's requirements by deeming the former to have verified their accuracy. In such circumstances, any discrepancy in the employer's requirements would not require a change, neither would it constitute a relevant matter, and the contractor would be unable to recover its additional costs.

Overall, a scenario such as this comes down to the scope of the contractor's responsibility for the employer's requirements, and so it will be important to see whether clause 2.11 has been amended. If it has not, then an employer will likely struggle to prevent the contractor from claiming additional costs arising from changes to the requirements. However, the contractor will need to demonstrate that these were in fact caused by changes to accommodate the discrepancy and associated delays to the works, rather than by other factors for which it is responsible.

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## **Further information**

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