

Introduction

It is quite common for the employers of scaffolding companies to attempt to deduct alleged cross claims from the invoices submitted by the scaffolding contractor. The process is often referred to as setting-off. Setting-off is used as a defence to the scaffolding contractor's claim for payment, rather than the pursuit of the claim by the employer, and therefore the set-off can only reduce or extinguish the scaffolding contractor's invoice. If the set-off is greater than the invoice the employer will have to pursue the set-off as a counterclaim.

The three main types of set-off encountered by scaffolding contractors are:

1. Reduction of the scaffolding contractor's invoice on the ground that the value of the work has been over claimed or has not been carried out correctly. Such a set-off is more correctly called an abatement.
2. Employer's cross-claims for a wide variety of issues involving costs incurred by the employer such as costs arising from delay or disruption, cost of providing facilities chargeable to the scaffolding contractor (electricity, lighting, craneage etc.), additional cost of performing work on behalf of the scaffolding contractor. These cross-claims are often referred to as equitable set-offs.
3. Sums agreed by the parties to be owing to the employer (liquidated sums).

Right to Set-off

The right of an employer to set-off is a common law right and therefore does not need to be referred to in the contract conditions.

However, the written terms of a contract may amend the common law right as follows:

- exclusion of the right in part or in total (if the clause is drafted too widely it may be unenforceable by virtue of the Unfair Contract Terms Act 1977 on the ground of being unreasonable)
- limit the types of claim which may be set-off
- apply conditions to the set-off procedure
- include the right to set-off cross claims incurred on other contracts (unless such a right is specified in the contract cross claims incurred on other contracts cannot be set-off)

The right to set-off may also be amended by statute. For example section 143 sub section 110a Part 8 Local Democracy, Economic Development & Construction Act excludes the right of set-off if the requisite 'withholding notice' has not been served.

Standard Forms

All of the standard forms of sub-contract deal with the deduction of contractor's claims from payments due or to become due to the scaffolding contractor. In effect these clauses modify the common law right of set-off by imposing conditions to be observed when making deductions. Generally they allow for the setting-off of loss and expense arising from the scaffolding contractor's failure to maintain progress of the sub-contract works. They require notice of the intention to make such deductions and when such notice is required to be given. They specify what information must be given to the sub-contractor including the reasons and the calculation of the sums to be deducted.

Contractor's claims, including those referred to in the preceding paragraph, must be notified to the scaffolding contractor within the prescribed terms of the contract for the issuing of withholding notices. Those terms must specify the amounts to be withheld, the reasons for withholding, and notification must be given within the timescale provided otherwise the contractor loses his entitlement to withhold from the current payment and must wait until the next payment to exercise the right to withhold.

Remedies

Provided that the sub-contract is a construction contract within the meaning of the Part 8 LDEDCA the scaffolding contractor has the right to refer any dispute, including a dispute in connection with a set-off, to an adjudicator for a decision. The dispute may be whether or not a 'withholding notice' has been issued.

Whilst every effort has been made to provide reliable and accurate information, we would welcome any corrections to information provided by the Writer which may not be entirely accurate, therefore and for this reason, the NASC or indeed the Writer, cannot accept responsibility for any misinformation posted.



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