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Scope Creep – How to Keep the Client Happy without Catching a Cold

Scope Creep could be defined as continuous or uncontrolled growth in, or changes to, a project's scope, at any point after the project begins. We have all seen, and experienced, scope creep on our projects. At times 'Scope Sprint' may feel like a more apt turn of phrase.

For those unfamiliar, HKA's annual CRUX Insight report[i] reveals the leading causes of disputes on projects across the globe. Upon a review of this data, it is seen that 'Variations', 'Late availability of information', 'Change of scope' and 'Different interpretations of the contract provisions' rank within the top 10 causes of disputes across all sectors. A considerable proportion of these disputes relate to disagreements between parties as to whether something an employer (or its agent) requests or requires should be considered as 'design development' or a 'change'. The former typically being the risk of the contractor, with the latter being at the expense of the employer. This article will explore the topic of the various forms of scope creep and available case law to shed some light on this heavily disputed issue.

What is Design and Build?

Firstly, a recap on the typical design and build process. A contractor would typically be provided with 'Employer's Requirements'. This can range from a straightforward description of the required end product, through to series of documents that stretch to multiple lever arch files (or a large hard drive!), specifying every aspect of the project in great detail. The 'Employer's Requirements' define the parameters of the client's needs. They may include documents such as performance specifications, material specifications, conceptual designs and general arrangement drawings, which must be used by the selected contractor to develop the detailed design. This refined design is typically known as the 'Contractor's Proposals', or similar. These proposals set out the contractor's solution to the 'Employer's Requirements' and will usually include more detailed construction drawings. Depending on the contract and the procurement method, the 'Contractor's Proposals' may be included as contract documents. Alternatively, the agreement may be entered into solely with the 'Employer's Requirements' incorporated, requiring the contractor to progress the detailed design following the execution of the contract.

Design Reviews

In the latter of the above situations, the contract will typically require the contractor to submit the proposed design at various stages of development to the employer, or his agent, for review. The contract may, in some circumstances, even call for approval. It is, however, essential to note that the contractor's overarching obligation is to design and construct the project to meet the 'Employer's Requirements' alone. This means that, despite the approval of the employer or his agent, if the design is later found not to adhere to the 'Employer's Requirements', the contractor shall maintain liability for this failure.

Upon submission of the contractor's design, the employer or his agent may, as part of the review process, identify items that do not adhere to its expectations. This would usually lead to a request, by way of a comment contained within a document review sheet, that changes be made to the contractor's design. At this point, a discussion may arise as

to whether the request is a case of design development, as the original submission did not adhere to the 'Employer's Requirements'. Alternatively, if the change falls outside of the remit of the 'Employers Requirements' and amounts to a change in scope, this may give rise to an entitlement to additional time and cost.

This could happen for a multitude of reasons. There could have been some misunderstanding of the 'Employers Requirements' by one of the parties, or they may lack clarity and be open to interpretation. It may even be the case that the employer's needs have not been captured correctly in the 'Employer's Requirements'.

This then poses the question: how do we draw a line between what constitutes a 'change' which leads to entitlement by the contractor and what is 'design development' which does not?
It is important to note that amendments to standard form contracts to allow 'design development' or 'detailing' are frequently seen, but rarely is the terminology defined. Perhaps this is an accidental omission by both parties. Alternatively, it may be considered, by those drafting the contract, beneficial to leave this term open to interpretation. That is, it may be perceived that creating such ambiguity will allow a broad range of afterthoughts to be incorporated as 'design development' and therefore deemed included within the contractor's original price.

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Case Law Examples
There is not a great deal of case law available around this particular subject. One case that dealt with the matter in quite some detail was the 2002 Technology and Construction Court ('TCC') case of Skanska v Egger[ii]. This case was followed by a Court of Appeal ('CoA') hearing[iii] on a smaller number of matters, also in 2002. These cases identified liability for the topics in dispute between the parties before a further judgement relating to quantum in 2004.

By way of background, Skanska entered into a contract to develop the design of, and subsequently construct, a wood chipboard factory for Egger. Several disputes arose which Skanska claimed resulted from 'changes' to the 'Employer's Requirements'. Egger, however, contended that they were simply cases of 'design development' or 'detailing' which was expressly provided for under the agreement.

Judge Wilcox set out, at paragraph 52 of the quantum judgement, that the proper approach for differentiation between 'detailing', as it was in this case described, and 'changes' was that which was put forward by one of the parties' experts. In brief:

"The general arrangements are those which show the overall layout, plans, elevations and sections… Because there is insufficient space on these drawings to show the full extent of what is required to construct the project, they are supplemented and complemented by detailed drawings."

"my view on what constitutes detail are detailed elements which do not go outside the scope of the general arrangement."

He concludes: "… detail refines the general arrangements, but it does not change or expand any of the information shown on the general arrangements." [iv]

Later in the same judgement, at paragraph 119, Judge Wilcox goes on to further define that the relevant clause "is not a 'long stop' enabling new requirements. It empowers the employer to give information as the final detailing of those requirements already within the 'Employer's Requirements'."

This approach was applied by the CoA across various disputed topics, including a requirement for an additional firefighting water main and the inclusion of process steelwork in particular parts of the plant.

Firstly, relating to the water main, the CoA judged that Skanska's original design would have been sufficient for the initial firefighting system foreseen by all the parties at the time of entering into the contract. Only, as a result of an additional requirement for a second firefighting system, had a second main been required. As a result, the TCC's finding was upheld, and Egger was held liable for this change.

Concerning the second topic in this case - process steelwork - the CoA found that although at the tender stage, the available information surrounding the requirement for this process steelwork was poorly defined, it was indicated. The contract allowed Egger to provide further information concerning these aspects after the execution of the contract. As such, the CoA upheld the TCC's finding that Skanska was liable for these changes and could not recover any additional costs in respect of the development of the steelwork design.

Each project will have its nuances, and the answer to the question of design development will hinge on the facts of the case. However, the Skanska case does illustrate that the courts will not allow an employer to effectively widen the scope of the contractor's work whilst disguising this as 'design development'. The courts will look strictly into the 'Employer's Requirements' to establish if, in each case, the employer's instructions can reasonably be considered as 'design development'.

The Skanska dispute continued for several years following the completion of the works, and the costs of resolving the disputes amounted to around £9 million[v]. To put this in context, the total amount claimed by Skanska was around £12 million, and the counterclaim submitted by Egger was approximately £4 million. Despite these relatively high-value claims, the net recovery by Skanska of £2.8 million was far less than half of the costs. It would seem in this case that the parties were so profoundly in dispute that the costs of the conflict became insignificant in comparison to 'winning' the dispute. Ultimately, Egger was found liable for 55% of the expenses. Therefore, despite being somewhat successful in defending the claims of Skanska, the time and cost invested in this dispute were perhaps not spent wisely, as neither party achieved any financial gain.

How can you Avoid this Conflict on your Projects?

This risk of conflict resulting from 'design development' and scope creep will never be diminished entirely. Notwithstanding this, the risk can be significantly reduced by the parties. Firstly, the employer should ensure that time is invested in making the 'Employer's Requirements' as clear, unambiguous and accurate as possible. A clearly defined scope at this stage will, in addition to reducing the risk of disputes, likely

lead to contractors bidding more competitively due to a perceived reduction in the risk of unknowns occurring.

From the contractor's perspective, it is essential to conduct a detailed review of the 'Employers Requirements' at tender stage. In undertaking this process, the contractor should ensure that it captures any concerns and submits these as assumptions or qualifications in the tender submission. This will enable the employer to close out these ambiguities before the execution of the contract and give both parties greater certainty.

Finally, if a design development clause is included in the contract, this must be defined clearly and unambiguously, so both parties understand the scope and application of the clause. If differences do subsequently arise, this will assist the parties in dealing with the matter quickly through negotiation, helping to avoid lengthy and expensive litigation proceedings such as those seen in the Skanska case.

If you require any further information, please contact Oliver Spence at oliverspence@hka.com.

[i] https://www.hka.com/crux-insight/
[ii] [2002] All ER (D) 15 (Jun)
[iii] [2002] EWCA Civ 1914
[iv] [2004] EWHC 1748 (TCC)
[v] [2005] EWHC 284 (TCC)