The increase in construction costs is a hot topic, following Arcadis's comment about appropriate risk allocation I have been looking into Fluctuation provisions this week.

Several Lawyers have been posting about fluctuation clauses/rise and fall clauses, both in Australia and the UK. Fluctuation clauses can allow for a contract sum to be adjusted for changes in taxation, cost of labour transport and materials also for increase in head office overheads. With the increases in fuel costs and transport costs it is not surprising that this topic is now being discussed.

I feel that following the comment about risk allocation it is important that we open the dialogue on all aspects to properly managing these risks, Andersen Strathearn have comments that in the current market if contractor's can't obtain agreement from suppliers to fix a price for materials and or labour then there may be a reluctance to sign fixed lump sum contracts. If employer's want to ensure they maintain value for money avoiding inflated prices they may need to consider these clauses.

I'd be interested to hear from others, have fluctuation clause made a comeback?

I have explored how these clauses operate in JCT, SBCC, NEC and AS forms of contract on the link below.

https://jamesbeckwith121713271.wordpress.com/2022/08/28/fluctuations-rise-and-fall/

Fluctuations/Rise and Fall.

My recent posts have considered the rising construction costs. With the current market pressures with increasing costs has led to the topic of fluctuation provisions (called rise and fall in Australia). Fixed priced contracts are common in the UK but as Anderson Strathearn point out in the current market if contractor's can't obtain agreement from suppliers to fix a price for materials and or labour then there may be a reluctance to sign such agreements.[1] Fluctuation provisions can assist by including clause in contract that allow for:

- Changes in taxation.
- Changes in the cost of labour, transport and materials (sometimes referred to as 'escalation').
- Increases in head office or administrative costs.[2]

When I discussed behaviours I commented on appropriate risk allocation, Employers need to be open about such provisions which can ensure appropriate mechanisms for fluctuations and sensible risk allocation.

There are several ways in which Fluctuation provisions can be applied , here I will examine standard forms in England & Wales, Scotland and Australia.

Fluctuation Provision in SBCC and JCT Contracts:

SBCC and JCT Contract contain provisions for Fluctuations. These relate to three options:

[1] Duff Leona, Fluctuations provisions in contract – the basics, Anderson Strathearn, https://www.andersonstrathern.co.uk/insights/fluctuations-provisions-in-construction-contracts-the-basics/, Accessed August 2012

[2] Design Buildings Wiki, Fluctuations in Construction Contracts, https://www.designingbuildings.co.uk/wiki/Fluctuations_in_construction_contracts, Accessed August 2022.

Option A: Relates to contribution, levy and tax fluctuations, therefore it allows that any rates change, or new tax being introduced there will be an adjustment made.

Option B: Labour and materials cost and tax fluctuations. Here the contract states that the contract sum is based on "the rules and decisions of the contract industry joint council, include scheme under the working rule agreement of the CIJC and the Building and Civil engineer annual public holiday agreements"[3]. Therefore if rate of pay for workers under the National Working Rule Agreement are amended then the contractor will be entitled to an adjustment to the contract sum to suit. The Contractor will need to collaborate with the QS in calculating this adjustment and provide details or at least approximations for the tender sum split against relevant headings, materials, labour and so on.

Option C: Formula Adjustment. This option allows for an adjustment in the contract sum by applying a formula based on the indices published by the National economic Development Office. Under this option he contract sum is divided into "work categories" and each category is adjusted by refence to the relevant index The RICS detail this formula in their guide note on Fluctuations as follows:

The formula

The formula for adjustment of the Value of Work allocated to Work Categories under Part I of these Rules for Valuation Periods up to and including the Valuation Period in which occurs the date of practical completion is as follows:

$$C = \frac{V(I_v - I_o)}{I_o}$$

where

C = the amount of the adjustment for the Work Category to be paid to, or recovered from, the Contractor.

V = the Value of Work in the Work Category for the Valuation Period.

I_v = the Index Number for the Work Category for the month during which the Mid-point of the Valuation Period occurred.

I_o = the Index Number for the Work Category for the Base Month.

Note: Any sum included in the valuation in respect of the Balance of Adjustable Work will also be subject to adjustment (see rule 26).

4

AS4300 (1995) & AS2124 (1992):

With many Australian Construction Contract either being bespoke contracts or heavily amended the current Australian Standard Contracts do not reference Rise and Fall. AS4300 (1995) and AS2124 (1992) included rise and fall clause that can be annexed to the Contract.[5]

Vincent Young have set out a useful commentary on the application of Rise and Fall in their recent blog and I recommend that you visit their site as they explain this in some detail. Here they discuss the Rise and Fall Formulae similar to the JCT/SBCC example discussed above, comment that there are four essential elements.[6]

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[3] RICS, Fluctuations, August 2016, https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/fluctuations-1st-edition-rics.pdf, Accessed August 2022.

[4] ICS, Fluctuations, August 2016, https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/fluctuations-1st-edition-rics.pdf, Accessed August 2022.

[5] Vincent, Brett, Rise and Fall Clause in Construction Contracts, https://vincentyoung.com.au/rise-and-fall-clauses-in-construction-contracts/, Accessed August 2022, May 2022

[6] Vincent, Brett, Rise and Fall Clause in Construction Contracts, https://vincentyoung.com.au/rise-and-fall-clauses-in-construction-contracts/, Accessed August 2022, May 2022

1: Affected Price: This is about identifying the affected price, be it labour or materials. Th e split of the contract sum against labour and materials can be rough if agreed by the parties or against a schedule of rates. If a schedule of rates is use then there is no need for an apportionment.

2: Applicable Price Index: The price index details how the affected price either rises or falls. The Australian Bureau of Statistics publish these lists.

3: Risk Buffer: The Employer may accept only apportion of the risk. Vincent Young comment here that an Employer might only accept 40% of a rise in price, therefore if the rise if 5% the employer will bear 40%of this 5% rise.[7]

4 Reference Date: It is important there is a reference date often termed the base date in a contract.

NEC 4 Contract:

The NEC is drafted as a contract using plain English and does not reference Fluctuations and handles this topic under the Optional Clause X1 for price adjustment for inflation. The NEC states:

'...The Price Adjustment Factor (PAF) at each date of the assessment of an amount due is the total of the products of each of the proportions state in the Contract Data multiplied by (L-B)/B of the index linked to it.[8]

Here then the NEC Contract references "B" this is the index available prior to the base date. L is the latest index. The variance between the two indices is calculated by Variance = (L-B)/B. This can apply if selected under the fixed lump sum contract options A and B or Target Contracts Options C and D however Options E and F have clauses that ensure the contractor is paid for inflation.

[7] Vincent, Brett, Rise and Fall Clause in Construction Contracts, https://vincentyoung.com.au/rise-and-fall-clauses-in-construction-contracts/, Accessed August 2022, May 2022

[8] NEC 4, Engineering and Construction Contract, June 2017, p63