

CBE Question 2 Response – June 2022 CMP Exam

INFORMATION REPORT

In relation to

LETTER OF INTENT & CAPPED EXPENDITURE

on

ENGLEMERE REHABILITATION CENTRE PROJECT

for

A.N.Other Ltd, Board of Directors

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1. Executive Summary

Our company is currently undertaking site remediation works on the Englemere Rehabilitation Centre (ERC) project. We are approaching the authorised level of expenditure as noted within our Letter of Intent (LoI). This report is intended to be forwarded to the Main Contractor (MC) following a review by our Board of Directors, with the expectation that it will assist in the review of all available options (CIOB, Exam Questions, 2022, p2).

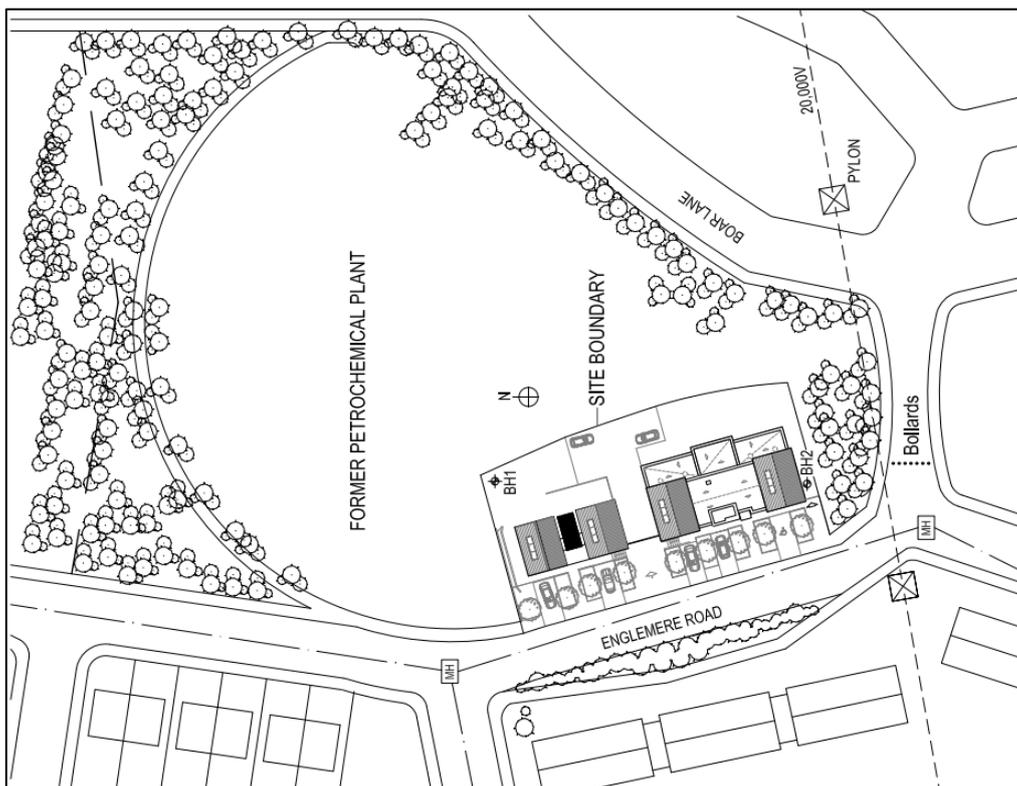
Four main options for discussion are reviewed later within this report:

- a. Increase in the LoI expenditure cap
- b. Demobilise our site team and withdraw from site
- c. Continue works at risk
- d. Enter into a formal Contract.

All of these options will require further dialogue with the MC and Client team to ensure an agreeable solution for all parties, therefore, a selection of pros and cons for each option are also considered to assist the reader.

2. Introduction

The following report aims to identify the predicted hazards that we may encounter due to the issues being experienced, along with the likely programme outcomes. In addition, the report will consider our available options to promote further discussion with the MC and ultimately the Client. A site plan has been included below to assist in your familiarisation of the project area:



(CIOB, Exam Drawings, 2022)

3. Predicted Hazards

3.1. Main Contractor, Client & Local Residents Relationships

A good relationship is currently shared between our company, the MC and the Client, which must be a major consideration in the resolution of the current issue, not just for this project but also for future work-winning opportunities. As argued by Designing Buildings, *“It is important to effectively manage relations between project parties as time delays, cost overruns and quality defects can be the result of relationship deterioration”* (Relationship management in construction, 2022). The project was initially opposed by the residents, so this situation will need to be carefully managed to ensure that the impact on local residents is kept to a minimum, particularly regarding health and safety.

3.2. Potential Planning Implications

Due to the findings contained within the Site Investigation and the Local Authority’s knowledge of the site’s previous use, it is likely that the planning process will have called for an Environmental Impact Assessment (EIA) and site remediation plan (SRP) to be undertaken. Primary legislation for dealing with contaminated land is dealt with under Part 2A Environmental Protection Act 1990, (Department for Environment Food & Rural Affairs, 2012). The Client could be in contravention of the planning approval notice if the remediation works are not completed in line with the recommendations of the EIA and SRP, both will need to be reviewed and an assessment of risk undertaken.

3.3. Ecological & Biohazard Issues

Not completing the remediation strategy may well present both ecological and biohazards to the site and surrounding area, potentially impacting the local residents. Following our appointment to undertake the site remediation, along with the MC and Client, we now have a legal and moral responsibility to leave the site in a safe condition to prevent the spread of contamination to adjacent land. It is likely that we will need to demonstrate (to enforcing agencies) that we have remediated the site as best we can with the commercial resources available.

Subject to a review of the options, it may be necessary for us to stop works to prevent exceeding the financial cap. If this is thought to be the realistic next step, we should agree with the MC that the remaining available funds associated with the Lol should be used to leave the site in as clean a condition as funds allow. We would also need to forward letters to the MC and Employer relating to the risks of demobilisation and the potential for impact on the environmental conditions, as without the further resources there would be no alternative.

3.4. Financial Implications

Depending on the option taken to resolve the situation, it is likely that there will be financial implications to one or more of the involved parties. There will most certainly be implications for the Client, either by committing more funds to unlock the situation or at the very least, due to the programme delay and prelim costs associated with the early orders and time taken to resolve the current situation. Whilst for the MC and our company, we would be at risk financially if we progress without an uplift to the Lol cap.

If there are financial concerns for the Client, there may be a potential avenue for them to reclaim remediation costs from the 'polluter'. This is an option that should be explored by the Client team (CIRD60130 - Land Remediation Relief: Exclusions: Polluter Pays: Deliberate or accidental polluter - HMRC internal manual - GOV.UK, 2016). Whilst an option, it will depend upon them being able to identify the 'polluter', as well as reviewing any prior acceptance of the land condition on purchase.

It is worth noting that the same contractual conditions applied to the MC will be stepped down to the sub-contractor. Therefore, if the financial cap is exceeded, the risk is that neither the MC nor sub-contractor would be paid by the Client.

3.5. Early Orders

The lead-in period for the pre-cast piles required us to place an order a week ago to avoid a programme delay (CIOB, Exam Questions, 2022, p2). However, by placing this order we would exceed the expenditure cap and, therefore, this order has not been placed. Without a formal contract in place for the works, there is no official mechanism for formal early warning within a Letter of Intent, however, we should notify the MC immediately in the interests of being open, honest, and maintaining our relationship. It would be worthwhile engaging our project QS to populate a schedule of upcoming early orders and then to review this with the MC and Client so that, if possible, we can prevent a re-occurrence of the current situation.

3.6. Legal Consequences

It is paramount that we keep good relations between all parties at the forefront of our minds, however, to provide a concise list of implications, we must consider the legal issues surrounding the current situation. To predict a worst-case scenario, should any claims be recommended to the courts, firstly we should consider if the Lol is a binding contract, for it to be binding, the following needs to be included within the letter (Mason, 2016, p212):

- 1. "Records the agreement between both parties and is signed & dated.*
- 2. The letter provides for consideration, which is payment for the works, to be carried out.*
- 3. The intention to create legal relations is expressed in the terms of the letter".*

Also, we will need to confirm if a works scope or description were included within the Lol, confirming details such as the clear definition of what, where, when & how the works are to be delivered. This would help to reinforce the contract being binding, as the courts will find it easier to confirm a ruling if the Lol can be viewed as binding. Please also refer to the case law example mentioned in Section 5.3, relating to exceedance of financial caps.

4. Potential Programme Outcomes

It is sensible to assume that regardless of the selected option to resolve the remediation expenditure, a delay to the current programme is almost certain due to the ongoing programme issue associated with the piling early orders. To minimise the delay associated with this, our advice would be that the Client increases the Lol value immediately and the pre-cast piling order placed. From a programme perspective, the withdrawal from site will certainly have the biggest impact on delays, whilst our progression at risk would have the least impact. All delays will be dependent upon all parties and how quickly they can collaboratively resolve the situation.

5. Available Options

To enable an effective discussion with the MC and Client to take place, four options for ‘next steps’ have been identified below. Each of these options has its own associated pros and cons, which have also been listed to provide further clarity and assistance to the MC and Client:

5.1. Increase the Letter of Intent Expenditure Cap

This will depend on the Client’s current financial circumstance; the most straightforward approach is for us to engage with the MC to assist them with the information that they require to uplift the Lol, thereby allowing works to progress with minimal delay to the programme.

<p>Pros:</p> <ol style="list-style-type: none"> 1. Minimise programme impacts. 2. Allows for works to be completed, mitigating H&S issues. 3. Potential to include other early orders to mitigate further risk to programme. 4. Would not expose MC to additional financial risk. 5. Would remove risk of re-mobilisation costs. 	<p>Cons:</p> <ol style="list-style-type: none"> 1. Will still incur some delay. 2. Requires further financial commitment.
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5.2. De-mobilise & Withdraw from Site

The most radical option available to us is to stop works, de-mobilise and withdraw from site. Whilst this may be the safest option for our company to reduce our exposure commercially, it will undoubtedly have a negative impact on our relationship with the MC and in turn, their relationship with the Client. It would be advisable that we discuss the condition that we are to leave the site in, particularly in relation to the contamination issues that will still exist. As mentioned elsewhere in this report, we should recommend that the remaining Lol funds are used to leave the site in a safe condition, to avoid further issues for the MC, Client and local community.

Pros: <ol style="list-style-type: none">1. Removes Subcontractor & MC exposure to unauthorised costs.2. Allows time to conclude main Contract agreement.	Cons: <ol style="list-style-type: none">1. Negative impact on relationships.2. Greatest impact to the programme.3. Potential for ecological and biohazard prosecution.4. Client would be liable for remobilisation costs.
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5.3. Continue Works at Risk

With only an Lol in place and with capped expenditure agreed, it would not be sensible to proceed with the works without at least agreeing for the financial cap to be uplifted. There is evidence within previous case law, e.g. Mowlem plc v Stena Line Ports Ltd, where the well-meaning act of proceeding beyond an agreed financial cap was met with disagreement from the courts, their view being that the financial cap that had been agreed should apply regardless of whether or not the claimant (Mowlem plc), continued to work beyond the limits set (Mason, 2016, p212). In any event, our ability to continue the works with a view to maintain our relationship cannot influence the situation regarding the early orders as mentioned in Section 3.5 & 4 above.

Pros: <ol style="list-style-type: none">1. Minimise programme impacts.2. Helps to maintain relationship.3. Avoids ecology & biohazard issues arising.	Cons: <ol style="list-style-type: none">1. Financial implications to both us and the MC.2. No influence on early order situation.3. No ongoing recourse as no formal contract exists.
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5.4. Enter into a Formal Contract

To prevent a reoccurrence of the current situation, it would be sensible to enter into a formal contract as soon as possible. If this could be done now, then it would negate the need for further uplifts of the financial cap. In addition, all parties will be clear in their contractual position with clear and effective mechanisms to ensure that early notification of issues can be communicated quickly, with either Early Warnings under the NEC form of contract or by Relevant Event or Relevant Matter under the JCT form of contract.

Pros:	Cons:
<ol style="list-style-type: none">1. Negates the need for further uplifts to the Lol.2. Formalises the position for all parties.3. Ensures correct mechanisms for administering the contract are in place.	<ol style="list-style-type: none">1. Requires commitment from all parties to conclude quickly.2. Dependent on the above, may incur programme delays.3. May not be quick as there may be other items still to be resolved between Client and MC, i.e. LAD contract sum programme, etc.

6. Conclusion

It is critical that we meet with the MC (and if possible, the Client) at the earliest opportunity to discuss the available options and minimise any unnecessary delays to the project moving forwards. It is also worthwhile reviewing a strategy to minimise programme delays, by including the increase in Lol cap to allow early orders to be placed and the remediation to be completed. Dependent on the selected option, we should engage legal support to best advise on leaving the site in a safe condition, so as not to leach contamination on to neighbouring areas. Failing further action from the Client, our four options are reduced to two:

1. Demobilise and withdraw from site.
2. Continue at risk.

As discussed above, Option 2 should be discounted due to the risks noted in Section 5.3. If Option 1 is considered the only viable option, careful consideration should be given to agreeing that the remaining available funds be used to make the site safe from ecology, biohazards and leaching issues.

7. Bibliography

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