



**Note: In this document “we” refers to the Big Lottery Fund, and “you” to the grant holder.**

The construction industry entered 2009 with the sharpest falls in output and new orders since 1980 and 1983 respectively; expectations for the year ahead remain bleak.

With tenders being priced very competitively there is a potential amongst building firms for insolvency. All contractors are actively seeking work and are very keen to be included on tender lists.

Insolvency happens when a company cannot pay its debts. The latest insolvency statistics published on 1 May 2009 show that 4,941 compulsory liquidations and creditors’ voluntary liquidations occurred in England and Wales in during the first quarter of 2009. This was an increase of 7.1 per cent on the previous quarter and an increase of 56 per cent on the same period a year ago.

If a building company becomes insolvent, it can severely disrupt construction projects. Where insolvency happens after completion, it can be expensive to remedy any defects in the work.

## What are the early indications of contractor insolvency?

Although contractor insolvency is often unavoidable, there are usually signs of financial problems before a receiver or liquidator is appointed.

Identifying financial difficulties early is your chance to minimise disruption. We recommend that you and your professional advisers closely monitor your projects for signs that a contractor may be in financial difficulties. These include:

- a slow down in the progress of the work and a cut in the number of people working on site
- less supervision and management on site and changes in the people managing the project
- a reduction in the value of materials on site and delays in delivery of materials
- non-scheduled movement of machinery from the site

- non-payment of sub-contractors or requests for payments by sub-contractors to you
- requests from your builder for payments to be made quicker than agreed
- unusual visitors to the site, such as senior management from head office.

If you believe that your contractor is at risk of becoming insolvent, seek advice from your professional team and speak with your grants officer as soon as possible.

Your professional team, architect, contract administrator or project manager will advise you about your options and your legal rights.

## Completing the contract

If your contractor becomes insolvent, your first aim must be to make sure that the contract is completed as quickly as possible. The longer the delay in completing, the greater the cost will be. There are four main ways for completing the contract works.

1. **Reinstatement** – The contractor may be reinstated. This is normally the quickest way of finishing the work. However, you must get written assurance from the liquidator that the contractor will not disclaim.
2. **Assignment** – A receiver or liquidator may arrange for the work to be completed by assignment if you agree. This can be a good way of making sure the work gets finished, as long as the financial standing of the assignee is satisfactory, as the assignee accepts all rights and liabilities under the original contract.
3. **Novation** – If assigning the contract is not possible, a receiver may commission another suitable contractor to finish the work.
4. **Completion by the grant holder** – In this case, you may obtain tenders from suppliers to complete the work or use direct labour.

## Provision of standard building contracts

Generally, standard building contracts provide that, if a contractor becomes insolvent, either the contractor's employment is automatically terminated or you can decide whether to carry on employing the contractor.

In common law, however, insolvency does not necessarily constitute a breach of contract. What happens when a contractor becomes insolvent is usually set out in a standard construction contract.

Joint Contracts Tribunal (JCT) standard form building contracts cover standard insolvency practice. If you enter into an agreement with a contractor, you should follow as closely as possible the wording of the JCT contracts. You should include clauses entitling you to:

- terminate the contractor's employment under the contract
- stop paying the contractor
- take reasonable measures to ensure that the works and materials are protected and kept on site
- instruct others to complete the works, and recover the costs from the original contractor, as well as the costs of any losses or damages caused by the insolvency.

Once a contract is terminated, if you had to recover any money already paid to the contractor, you would be considered as an unsecured creditor and be entitled only to the same amount as all the other unsecured creditors.

## Employing contractors

If you are yet to employ contractors to work on your capital project, we strongly recommend that you consider the following matters:

- ▶ Employ suitably qualified, experienced and competent professional advisers and consultants, for example, chartered surveyors, architects, engineers.
- ▶ Make sure that when you appoint a professional team, they are able to manage an insolvency in your interests.
- ▶ If there is insolvency, ask your consultants to send you their insolvency procedure.
- ▶ Get independent professional advice in choosing the right standard building contracts that include suitable and recognised provisions for contractor insolvency.
- ▶ Check the financial status of potential contractors before tendering.
- ▶ Choose qualified contractors for tendering. (Local authorities often have approved contractor lists. or use online contractor databases such as the Government-run Constructionline.)
- ▶ Make sure any changes to the contract are made at the invitation to tender stage to avoid contractors putting prices up later.
- ▶ Make sure that the contract is drawn up and signed before any work on site starts.

## Further sources of advice and guidance\*

### **Association for Project Management**

08454 581944

[www.apm.org.uk](http://www.apm.org.uk)

### **Association of Building Engineers**

0845 1261058

[www.abe.org.uk](http://www.abe.org.uk)

### **Chartered Building Company/Consultancy Scheme**

01344 630743

[www.cbcscheme.org.uk](http://www.cbcscheme.org.uk)

### **Chartered Institute of Building**

01344 630700

[www.ciob.org.uk](http://www.ciob.org.uk)

### **Companies House**

0303 1234500

[www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

### **Construction Best Practice Program**

0845 6055556

[www.constructingexcellence.org.uk](http://www.constructingexcellence.org.uk)

### **Construction Line**

0870 2400152

[www.constructionline.co.uk](http://www.constructionline.co.uk)

### **Office of Government Commerce (OGC)**

0845 000 4999

[www.ogc.gov.uk](http://www.ogc.gov.uk)

### **Royal Institute of British Architects**

020 75805533

[www.architecture.com](http://www.architecture.com)

### **Royal Institute of Chartered Surveyors**

0870 3331600

[www.rics.org](http://www.rics.org)

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