



**RICS COBRA 2013**



**COBRA 2013**

**10<sup>th</sup> – 12<sup>th</sup> September**

**New Delhi India**

# **RICS COBRA 2013**

**The Construction, Building and Real Estate Research Conference of the  
Royal Institution of Chartered Surveyors**

**Held in New Delhi, India in association with the University of Ulster and IIT  
Delhi**

**10<sup>th</sup>-12<sup>th</sup> September 2013**

Royal Institution of Chartered Surveyors  
Parliament Square  
London SW1P 3AD United  
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All papers submitted to COBRA were subjected to a peer review refereeing process.

Referees were drawn from an expert panel, representing respected academics from the construction and building research community. The conference organisers wish to extend their appreciation to the following members of the panel for their work, which is invaluable to the success of COBRA.

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# IMPROVING THE PRACTICE OF SUBCONTRACT NOMINATION IN THE UAE CONSTRUCTION INDUSTRY

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## ABSTRACT

Subcontracting is a common aspect of procurement strategy in construction. The practice of subcontract nomination has produced many problems to the construction industry in the UAE. Examining the nature of associated challenges and investigating new approaches to improve the nomination practice become more critical and demanding. An initial research on the relevant literature was conducted to establish a better understanding of the problems and possible solutions. Then, a series of semi structured interviews were carried out with senior construction professionals in the UAE to examine how the findings of the initial research apply and relate to the UAE construction industry. The analysis and findings of the interviews formed the basis of a closed questions questionnaire. The respondents of the questionnaire were mainly asked to rate the nomination challenges and the approaches to improve the nomination practice. The research concluded that despite the significant reasons and benefits of nomination, the associated risks and challenges don't encourage adopting it. The full involvement of the MC in the nomination process from the outset and the better detailed provisions of the contract nomination clauses were found the best possible approaches to improve the practice of subcontract nomination in the UAE.

Key words: Construction Management, Contract Administration, Nominated Subcontractors, Procurement, FIDIC.

## INTRODUCTION

Subcontracting arrangement is a common practice in the construction industry. All procurement routes recognize such arrangement as part of the overall procurement strategy. Projects are rarely completed without the involvement of subcontractors. Mbachu (2008) found that 85% of construction projects are subcontracted out. This statement indicates the significant impact of subcontractors on construction projects and explains the availability of many researches on subcontracting approach in general.

Though, it is surprising that there is a lack of research on the practice of subcontract nomination, despite of its associated problems. Many researchers such as Burnison (1970), Shoosmith (1996) and Sinjakli (2003) realized the existence of such problems but did not adequately examine the

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nature of associated difficulties and the possible ways of overcoming them. Molloy (1998) discovered that introducing NSCs in projects has led to many court cases where it was not possible to resolve the disputes away from courts. Sinjakli (2003) referred the reasons of such disputes to the inadequacy of contract provisions relating to nomination procedures and liabilities of parties. Those reasons could be the same which forced Wallace (2004) to emphasize that nomination should never be used referring to it as a conspiracy against employers.

Nevertheless, there are some reasons and benefits behind introducing NSCs in projects. Shoesmith (1996) found that NSCs can provide better integrity to project performance. Fong (2004) said that the main benefit of nomination is to proceed with construction works despite of incomplete design. However, there is a real need to investigate whether such reasons and benefits are really of the importance to make the project parties accepting potential problems and risks of nomination.

This paper aims to find out the reasons, risks and problems of introducing the subcontract nomination in construction contracts. It will examine the contractual and legal framework of nomination and study the factors affecting the nomination practice. Finally, it will recommend professional guidelines for construction practitioners that will help improve the practice of subcontract nomination.

## **RESEARCH METHODOLOGY**

Initially, an intensive literature review was conducted to provide a summary of contemporary issues and an analysis of knowledge gaps in the field which would reinforce the relevance of the research topic. It is important to mention that there was a real challenge finding sufficient academic resources about the research topic. Therefore, the researcher referred also to professional resources from the industry such as law firms' newsletters and construction updates. Based on the literature review, the field work was conducted using the survey method which is cost effective and reliable. Firstly, qualitative semi-structured interviews were conducted with carefully selected senior professionals in the UAE and the outcome was utilized to further assist in the development of a closed-question questionnaire. The questionnaire was distributed out electronically and results were obtained from 150 construction practitioners in the UAE. Different aspects of conducting the questionnaire survey were considered to obtain best results in terms of statistical significance, validity and reliability.

## **LITERATURE REVIEW**

### **Subcontracting Approach**

Subcontractors are the backbone of the procurement strategy for any construction project. Brook (2008) stated that Main Contractors (MCs) usually have limited skills and capabilities for which they are driven to procure part of the project works to specialist subcontractors. Mbachu (2008) emphasized on other benefits of subcontracting such as obtaining higher quality, improving the cash flow, transferring the risks and decreasing the overheads. Involvement of subcontractors in projects requires the Engineer's prior consent who is usually concerned with the performance of subcontractors. However, the MC has no right to sublet the whole work unless the contract allows.

There are many risks involved in subcontracting. Karim *et al.* (2006) argued that the quality is still a critical factor in subcontracting. Other researchers found that 12% of construction projects costs are generally wasted for quality rectification (Burati *et al.*, 1992). This statement contradicts one of the reasons of which the MC may decide to sublet. It is also noted that involving a large

volume of subcontractors on the job requires outstanding managerial skills to ensure appropriate performance. Cooke and Williams (1998) asserted that more risk will be borne by the MC who may physically act as a construction manager in case of subletting more works. Cooke and Williams advised MCs to make sure that they have the managerial capabilities that can lead the show, coordinate and control the performance of subcontractors.

There are three different types of subcontracting: domestic, named and nominated subcontracting. Laryea (2009) said that such distinction is usually based on the selection mode of subcontractors. According to Shoesmith (1996), the two most familiar subcontracting procurement methods are the domestic form (a subcontract between the MC and a subcontractor of his choice) and the nominated form (a subcontract between the MC and a subcontractor nominated by the Employer/Engineer). Sometimes, the MCs are given list of specialist subcontractors in the contract known as named subcontractors to give the employers some control on the selection. Greenhalgh and Squires (2011) stated that named subcontractors are usually treated as domestic ones. Selecting the appropriate method is part of the Engineer's duties at an early design stage depending on the nature of project and design requirements.

During the project life cycle, the Employer may select a subcontractor to provide particular services in the project by issuing a letter of nomination through the Engineer to the MC instructing him to enter into a subcontract agreement with the selected subcontractor. Such subcontractor is contractually known as a Nominated Subcontractor (NSC). Hackett and Robinson (2003) said that nominated subcontracts may include conveying system, electromechanical systems, external wall cladding and structural steelwork. Wilkie and Walker (2002) stated that many forms of contract give the Employer the right to nominate under certain procedures for such nomination such as FIDIC and ICE conditions of contract.

#### **Reasons and Benefits of Nomination**

According to Fong (2004), the main advantage of nomination mechanism is to allow the Employer to release the tender for MCs when part of the works is not completely developed. However, the furnished details should not be too preliminary for the tenderers to proceed with estimation and planning. Murdoch and Hughes (1996) said that the Employer uses nomination to have a better control over cost, quality and time. The opportunity to get the lowest competitive prices in the market is much higher. The Employer may have plenty of time to achieve value for money by searching for offers that satisfy his balancing requirements between price and quality. The Employer also draws on the advantage of nomination to negotiate the shortest duration of executing the works with the potential subcontractor. Shoesmith (1996) gave consideration to the previous experience with the NSC and the past good contractual relations.

Employers go for nomination to have the freedom to select the companies they wish without basing such selection on the lowest price. This opens the door for the Employer to employ his own companies or sister companies in the project to improve his overall business. Shoesmith also found that nomination may provide better integrity to project performance and referred this to the tendency of NSCs to align themselves with the Engineer and be able to resolve design and technical problems efficiently. The NSC may be involved in the project much earlier than the MC where the NSC commonly assists the Engineer in the design stage by providing a special design or details for particular elements.

On the other hand, nomination helps the MC accelerate the tendering submission by pricing for attendance and profit only against nomination packages. It also helps the MC improve the efficiency of construction programme by eliminating the lead time required for procuring special packages if left in the MC's custody. With regards to quality, the Employer may adopt

nomination if certain fundamental items of design require special construction techniques or if a particular quality of products is required for maintenance or operation costs. Leaving it to the MC to propose a subcontractor may end up with dissatisfaction of the Employer and/or the Engineer regarding the delivered quality from the proposed specialist.

### **Contractual Framework of Subcontract Nomination**

Some standard forms of contract include provisions that give an employer the right of selecting subcontractors. The 4<sup>th</sup> edition of FIDIC 1987 allows for nomination provision under clause 59 but does not elaborate on procedures and liabilities of parties. The new FIDIC red book 1999 was released with substantial changes to its old form and the nomination provision under clause 5 was modified without any tangible improvement. The standard form of FIDIC subcontract agreement 1994 is usually used by MCs with certain amendments to suit NSCs as long as the main contract is based on FIDIC for compatibility purposes. The amendments may cover indemnification against NSC default, design liabilities and direct payment by the Employer.

On the other hand, the seventh edition of ICE conditions of contract 1999 includes well written and detailed provisions about nomination comparing to FIDIC and JCT. Eggleston (2001) considers ICE contracts the simplest standard forms of contract to be used by civil engineers. NEC3 contracts which replaced ICE forms in 2009 have omitted the nomination clause in all its forms to achieve the collaborative and integrated working approach. Moreover, JCT 2005 which is widely used in the UK has also omitted the nomination clause and replaced NSCs with a specified list of subcontractors in the contract. Ndekugri and Rycroft (2009) explained that the omission was made following the feedbacks on the bad experience and the inherent pitfalls of nomination procedures. McGuinness (2007) referred the reason to the unfair balance of contractual arrangement which was in favor of MCs only.

Murdoch and Hughes (1996) clarified that the triangular relationship among the Employer, the MC and the NSC is extremely complex; therefore, it is very unpopular in the construction industry. In principle, the Employer has an obligation to appoint a NSC through an instruction from the Engineer. However, once the subcontract agreement is signed by the MC and the NSC, the Employer's contractual obligation is supposed to be refrained. Jordi (1999) and Sinjakli (2003) emphasized that there is no doctrine of privity of contract, therefore, an employer can't sue a NSC, for the lack of direct agreement between them. Though, employers may be left without remedies when a NSC becomes in default.

McGuinness (2007) found that there may be a valid contractual relationship between the Employer and the NSC referring to the case of *Hong Kong Housing Authority v Rotegear Corporation Ltd [2009]*. In his case, an offer from the NSC was accepted by the Employer. Accordingly, the NSC commenced the design and coordination works during the tender stage prior to entering into a subcontract agreement with the MC. The ruling explained that the tender documents of a nomination package signify a contractual relationship through the principle of offer and acceptance between the Employer and the NSC.

Under common law, there is a variety of considerations with regards to the NSC and liabilities of parties towards his default. The contract agreement between parties is one of these considerations. The case of *Percy Bilton v. Greater London Council [1982]* is always referred to when it comes to liabilities of parties upon a default of NSCs. In this case, a NSC went into liquidation during the course of the works. The MC requested an extension of time because the replacement NSC could not complete the work within the original timeframe. The Judgment concluded that the MC is not entitled to claim anything from the Employer against the delays caused by the defaulting subcontractor.

In addition, Common law rule of privity of contract prevents a third party to sue for damages on a contract in which he is not a party. However, this law was criticized many times for cases where the contract is for the benefit of a third party. That is why, the approach of the collateral warranty materialized in the nomination practice. By the use of the collateral warranty, an employer can create a direct contractual relationship with a NSC who is acting as a third party to the main contract. Such warranty usually states a nominal amount of money that will be due to the Employer in case of the default of the NSC. Nevertheless, the collateral warranty may not necessarily relieve the MC from his liability towards the default of NSCs.

### **The legal framework of nomination in the UAE**

FIDIC suites of contract are widely adopted in the UAE construction. That's why; the nomination practice is very common. All construction contracts are governed by the local civil law jurisdiction which is the legal system used in the UAE, heavily influenced by French, Roman, Egyptian and Islamic laws. The UAE Civil Code recognizes the use of subcontracting in construction contracts as stated in Article 890, however, there are no clear provisions in the code that distinguish between domestic and NSCs.

Bin Shabib & Associates (2008) explained that there is a common misconception that MCs do not share the same legal relationship with the NSCs as they would with their own selected subcontractors. Article 890 states that: “1) *A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person* 2) *The first contractor shall remain liable as towards the employer*”. Sinjakli (2003) stated that this article is deemed to include NSCs as affirmed by previous Supreme Court judgments.

Sinjakli referred to article 891 to assert that NSCs can't claim due payments directly from the Employer unless there is a proper assignment of right by the MC with the Employer. Bin Shabib & Associates (2008) asserted that such assignment shall be agreed by all involved parties. Article 891 states that: “*A subcontractor shall have no claims against the employer for anything one to him from the main contractor unless if assigned to the employer*”. Teo (2011) explained that a subcontractor has no right against an employer and all rights and liabilities in relation to the subcontract works will be a matter between the contractor and his subcontractor. However, Teo added that it is common for an employer to request NSCs to provide a direct warranty to the employer with regard to the quality and fitness of the subcontract work. This, however, does not in itself give any right to a subcontractor to have direct recourse against an employer, since it is the terms of the contract which crucially govern the legal relationship between parties.

Sinjakli (2003) referred to Federal Supreme Court of by Abu Dhabi judgment in case no. 273/229/19 issued on 30.05.1999 whereby the Court emphasized that the subcontractor is not allowed to ask the Employer to pay his entitlement from the MC's entitlement since the responsibility of the MC continues operative *vis-à-vis* the Employer under Articles 890 and 891 of the Civil Code. However, the conditions of main contract may have certain provision that allow an employer to pay NSC's dues directly under certain conditions as discussed later in this paper.

### **Nomination Procedures**

Hackett and Robinson (2003) stated that nomination procedures have been much refined over the years to overcome many shortcomings and they gave JCT 1998 as an example. However, Powell-Smith *et al.* (2000) found the procedures under JCT 1998 are extremely complex. In brief, the procedures commence when the Employer with due consultation with the Engineer identifies all

subcontract packages that the Employer seeks to have control over their selection well in advance. The Engineer establishes the necessary milestones on which stage the NSC should be involved in the project depending on its nature and the extent of the required design details. The Engineer is responsible to prepare the tender documents of each nomination package and leads the tender process.

Once the Employer and the Engineer are satisfied with an offer in terms of cost, quality and time, the Engineer issues a letter of nomination to the MC instructing him to enter into a subcontract agreement with the NSC by the expenditure of the relevant provisional sum in the bill of Quantities. Wilkie and Walker (2002) advised MCs to give consideration to the timing of this instruction as it may entitle MCs to an extension of time if it is critically delayed. Some standard forms of contract state a specific period for the MC and the NSC to enter into a subcontract or to give notice to the Engineer of objection or further extension. JCT 1998 states ten working days for the parties to sign the agreement while FIDIC 1999 is silent about this.

FIDIC includes a provision that gives the MC the room to object the nomination on a reasonable ground. Eggleston (2001) discussed some reasons of objection by the MC which include a) Rejection of the NSC to sign a subcontract on full back to back basis b) Previous difficulties c) Poor safety records d) Financial instability e) Inadequate insurances f) Lack of confidence. Murdoch and Hughes (1996) found that the Employer/Engineer will have some options should the MC objects nomination on a reasonable ground. The Engineer may a) re-nominate another subcontractor, b) direct the MC to carry out the work as a variation, c) instruct the MC to find a potential domestic subcontractor and submit quotation. Other options may include omitting the relevant scope of work from the main contract or instructing the MC to deploy the NSC with a relief of responsibilities by the Employer. However, both options should be the least options for employers due to inherent risks.

### **Risks and Problems of Subcontract Nomination**

Wilkie & Walker (2002) stated that nomination practice is never easy as it leads to many risks and challenges which may kill the project. NSCs prefer to have direct agreements with employers to avoid the risks of 'back to back' basis and the MC's capability of paying on time. Murdoch and Hughes (1996) advised that nomination should be used with extreme care since it fundamentally alters the balance of risks among employers, MCs and NSCs. Allocation of risks depends on the form of contract being used. Lo *et al.* (2006) identified thirty causes of delays in Hong Kong construction projects including nomination. Chan and Yeong (1995) advised that one of the strategies to avoid variations is to minimize the use of NSCs. Repetition of nomination problems sheds lights on the main risks that surround the whole process. Other common risks of subcontract nomination include objection of MC, scope conflict, late nomination and NSC default.

### **Default of NSCs and Relevant Consequences**

Default of NSCs may be the most significant risk and challenge facing employers and MCs. There are many complications pertaining dealing with such default regardless of the used form of contract. According to (Molloy, 1998), the default of the NSC may cause devastating impact on both MCs and employers, where the liability of such default is not easily determined. Murdoch and Hughes (1996) stated that the MC's responsibility of a NSC default is strictly limited to particular cases but they did not elaborate on the nature of such cases. On the contrary, Sinjakli (2003) and Teo (2011) emphasized that FIDIC forms of contracts hold the MC liable for all breaches of NSCs. This contradiction indicates that the determination of liabilities depends on the form of contract being used.

The MC is responsible for performing works in terms of design, materials and workmanship in accordance with project specifications. Such works upon completion should be fit for the intended purpose. NSC is supposed to perform works in the same manner to help the MC discharge his obligations to the Employer. The NSC shall commit to remove any defective material and remedy any defects in work. The MC usually accepts liability for the workmanship of NSCs but not design (Shepherd and Koh, 2006). However, if the NSC shows reluctance to remedy any defects, the MC has the right to deduct the value of the defective works from the due amounts payable to the NSC.

The NSC may delay the commencement of works resulting in significant delays. He may not commit to the working programme without a reasonable excuse which affects the critical path. Delays of NSCs have different natures and types as discussed thoroughly in the dissertation of Masrom (2007). Such delays of NSCs are controversial areas of risk allocation. Some standard forms of contract such as JCT 80 allocate the delay risk of the NSC to the Employer (Marsh, 2000). Based on this, the MC will be granted an extension of time and will be eligible for prolongation cost as well. Murdoch and Hughes (1996) argued that employers will be deprived from his right to claim liquidated damages from both of MCs and NSCs. Accordingly, the NSC may have no incentive to finish on time unless there is a collateral warranty agreement with the Employer.

On the other hand, some other forms of contract such as FIDIC allocate the delay risk to the MC but there is no express provision for this allocation. If the NSC delays the project, the MC shall be liable to pay liquidated damages to the Employer and such liquidated damages shall be passed to the NSC as per the subcontract. The question here is the extent of compensation the NSC is liable for. In some cases, liquidated damages that the MC is liable for may go beyond the nominated subcontract price itself. This makes it impossible for the MC to recover such damages from the NSC's account. To avoid this unpleasant scenario, many MCs tend to reject nomination unless employers limit their liability towards NSCs default.

Murdoch and Hughes (1996) asserted that repudiation is the most difficult default to face with NSCs. The default arises when the NSC suddenly repudiates the subcontract. This introduces a question of the responsibility for completing the works, the cost of rectifying defective items, disruption to the master programme and subsequently disturbance to other subcontractors on board resulting in project delays. Wallace (2004) found that the cases which hold the Employer liable for the repudiation consequences have been heavily criticized. That criticism was on the grounds that the NSC will be encouraged to repudiate a contract if there is no collateral warranty with the Employer. Also, there will be no incentive to the MC to help the NSC stand till project completion. Molloy (1998) supports this argument claiming that the default is controversial.

### **Termination and Re-nomination of NSCs**

When a NSC is in default, the termination may be a wise action to correct the situation. Some standard forms of contract pay attention to the importance of having an appropriate provision of the NSC termination in the main contract. The seventh edition of ICE conditions of contract has been improved to better address the liabilities and consequences of termination of NSCs (Eggleston, 2010). FIDIC forms of main contract such as FIDIC 1999 don't cover liabilities, termination and re-nomination issues but clause 18 of FIDIC subcontract 1994 allows the MC to terminate the subcontract in case of default. However, the termination of NSCs by the MC under FIDIC suites of contract is never easy. The Employer is responsible to make nomination and has inherent benefits of going with a specific subcontractor. Hence, he is deemed to be involved in the any decision for termination that is sought by the MC.

Due to the absence of clear provisions in the main contract addressing these issues, many questions are left without answers. Is the Employer's consent required before termination? Who will be liable for damages resulting from termination? Is the Employer obliged to re-nominate and who will be liable for damages resulting from re-nomination process? Eggleston (2001) referred to the seventh edition of ICE conditions of contract to confirm that the MC has an obligation to serve a notice about NSC default and the Engineer consent on termination is required. Eggleston (2001) added that the Employer is liable to re-nominate and pay the actual incurred price due to re-nomination. Otherwise, he may not be interested to re-nominate a subcontractor with the lowest offer.

The case of *Percy Bilton v. Greater London Council [1982]* concluded that the MC is not entitled to claim against the delay of re-nominating another subcontractor unless the Employer has unreasonably delays the re-nomination. Another point is the liability of the extra potential cost resulting from the replacement. Molloy (2008) argued that the Employer is obliged to pay for the works carried out by the replacement subcontractor based on the accepted tender of the original subcontractor. McMullen (2009) contradicted this argument by asserting that the MC should be compensated regarding the additional cost resulting from the replacement subcontractor's price. Under English law, the Employer shall be liable when the NSC dropped out on the basis that the Employer is responsible to re-nominate and accordingly he will pay the extra cost (Murdoch and Hughes, 1996). The Employer may recover such cost in case he obtained a collateral warranty from the NSC.

Re-nomination process may result in more issues. According to the case of *Fairclough Building Ltd v. Rhuddlan Borough Council (1985)*, the MC can object re-nomination on the ground that the replacement subcontractor refuses to complete the project as originally planned. The MC may negotiate with the Employer to be granted an extension of time equal to the extended period for completion claimed by the replacement subcontractor to accept the re-nomination. If the Employer accepts such condition, the MC will be relieved from responsibility of incurred delays by the defaulting subcontractor which seems unfair to the Employer.

### **The MC's Responsibility towards NSCs**

Molloy (1998) said there is a traditional difficulty about determining the liability of the MC towards the default of the NSC. Twort and Rees (2004) found that many disputes may occur due to the mix of responsibilities between the Employer and the MC towards the performance of NSCs. Murdoch and Hughes (1996) stated that the NSC's work is under the full responsibility of the MC. However, Eggleston (1997) argued that the Employer will be held responsible of the NSC defaults if the Employer imposes NSCs on the MC. This argument looks fair as the MC was deprived from the opportunity to object the nomination. Shepherd and Koh (2006) emphasized that the MC will be entitled to claim against the delays by NSCs who were objected by him. However, Eggleston (2001) argued that if the Employer indemnifies the MC for the default of NSCs, the contractual chain of responsibility will be broken since neither the MC nor the NSC suffers losses. That is why; getting a collateral warranty from the NSC may be an effective solution for the Employer to protect his rights.

Murdoch and Hughes (1996) found that the liability of parties depends on the type of default, the kind of suffered loss, the subsequent actions from parties and the precise terms of contract. The question is whether the role of the MC is to technically supervise or to coordinate with the NSC only. Jordi (1999) referred to court cases to answer this question and concluded that it depends on the conditions of contract being used. Some conditions of contract include a provision that imposes a duty on the MC to ensure the subcontract work is done to the Employer's satisfaction. The MC may protect his position by having a provision in the subcontract agreement imposing a

duty on the subcontractor to indemnify the MC from any losses and damages incurred as a result of the default.

### **Direct Payment to NSC**

The NSC enjoys a special consideration under FIDIC in terms of getting paid directly by the Employer in case of the MC failure to pay the due amount. Wilkie and Walker (2002) consider such protection as the major benefit for NSCs. This advantage is controlled by a strict mechanism as defined in clause 59.5 of FIDIC 1987. The Engineer has the power to request the MC to submit a proof of payment in favor of NSCs in accordance with the due amount in the previous certificate prior to issuing the next one. Sinjakli (2003) emphasized that there is a need to include an express provision in the particular conditions for the assignment of right that allows the Employer to make a direct payment to the NSC to avoid problems. However, Smith (1997) strongly criticized the direct payment provision. Smith argued that in case of the MC's insolvency, the NSC will get unfair preference over creditors where his due amount will be put aside by the trustee or the liquidator to comply with the direct payment provision. Marsh (2000) asserted this argument claiming that the direct payment contravenes the insolvency rules.

### **Approaches of Improving the Nomination Practice**

The problems associated with the use of NSCs as discussed before forced the construction professionals to search for mitigation measures. Some researchers called for alternatives to nomination practice rather than improving it. Carmichael (2002) and Sinjakli (2003) suggested the named subcontractors approach rather than NSCs by defining a list of preferred subcontractors in the main tender documents. Nonetheless, employers still need nomination for many other reasons such as budget control. Hence, looking for improving nomination would be more demanding and practical for the construction industry. Twort and Rees (2004) suggested having direct contracts with specialists instead of nominating them under the main contract. However, this may require very effective project management and efficient contract administration to do the necessary control and coordination. Sinjakli (2003) and Thomas (2007) called for more detailed nomination provisions in the standard forms of contract to avoid ambiguities and conflicts but didn't explain how.

## **SURVEY RESULTS AND DISCUSSION**

The questionnaire was structured based on the findings from literature as well as interviewees and it was electronically mailed to the researcher's professional network in the UAE. After vetting the collected data, 132 out of 150 returned results scripts were found valid and reliable. The number of responses is considered high given the fact that the survey was distributed locally. Most of respondents were found seniors, experienced and familiar with nomination practice under FIDIC in the UAE market. 70% of respondents were uniformly distributed over the disciplines of employers, consultants and management consultancy firms and the rest of respondents were contractors and subcontractors.

The survey revealed some confusion regarding the extent of clarity and ambiguity of nomination provisions in FIDIC contracts, particularly, liabilities, procedures and allocation of risks. 36% of respondents believe that the role of MCs is to coordinate with NSCs only. 42% believe that the Employer and the Contractor are both responsible of the default of NSCs while 25% blame the Employer, 30% blame the Contractor and the rest were not sure. 65% of respondents consider that the delay is the most common default of NSCs comparing to poor quality and repudiation.

### **Nomination Reasons & Benefits**

From initial findings, five reasons of nomination were offered for rating. The overall score of the importance of the given reasons was about 70% as mentioned in table 1. The budget control got

the highest score regarding the most important reason of nomination. Apparently, employers believe that there are strong opportunities for the prices to go down in future in light of the current weak demand. However, some contradictions in the survey results were noticed. Respondents have considered cost uncertainty and late nomination as high risks while they also consider the budget control as the most important reason of nomination. Prices of nomination packages may go higher than estimated by employers for any reason such as cost escalation of labours and/or materials. This will badly hit the Employer's allocated budget for the project. Moreover, late nomination will lead to claims by the MC which will result in paying prolongation cost and other damages to the MC where the Employer will be contractually obliged to pay.

66% of respondents believe that reason of incomplete design is very important. This result reflects the actual situation in the market of the UAE since the outset of the construction booming. Employers were keen to fast track projects by commencing construction activities in parallel with the design progress to accelerate the income which is usually tied with the construction progress. This result explains the appearance of scope conflict risk as one of the consequences of the incomplete design. The design constraints reason was the lowest in rating in terms of importance.

Table 1. Rating the reasons of nomination in terms of importance

| Nomination reasons                              | Low       |            | High              |                   |                   | Ave. Score        |
|---|-----------|------------|-------------------|-------------------|-------------------|-------------------|
|   | 1         | 2          | 3                 | 4                 | 5                 |                   |
| Budget control by Employer                      | 5.30<br>% | 8.33<br>%  | 22.73<br>%        | 21.21<br>%        | <b>42.42</b><br>% | 77.40<br>%        |
| Incomplete project design/fast tracking         | 3.03<br>% | 7.58<br>%  | 23.48<br>%        | <b>40.91</b><br>% | 25.00<br>%        | 75.40<br>%        |
| Use of Employer's supply chain or own companies | 8.33<br>% | 12.12<br>% | <b>30.30</b><br>% | 28.79<br>%        | 20.45<br>%        | 68.20<br>%        |
| Improve quality                                 | 9.09<br>% | 16.67<br>% | <b>33.33</b><br>% | 19.70<br>%        | 21.21<br>%        | 65.40<br>%        |
| Design constraints                              | 6.06<br>% | 15.91<br>% | <b>37.88</b><br>% | 28.79<br>%        | 11.36<br>%        | 64.60<br>%        |
| <b>Overall Score</b>                            |           |            |                   |                   |                   | <b>70.20</b><br>% |

### Nomination Problems and Risks

Regarding a question about the satisfaction with current nomination approaches, more than 73% of respondents agree with the fact that NSCs are causing problems to the UAE construction industry. The result of 22% of respondents who disagree with this is relatively high and therefore, doubts are raised regarding the extent of exposure & involvement of those respondents in the nomination procedures and associated problems. The majority of respondents give high rating to all the listed risks as shown in table 2 which is almost in line with the initial findings. The late nomination and the failure of NSCs are rated as the highest risks while the scope conflict was relatively the lowest risk among the listed risks. Surprisingly, the ambiguity of contract provisions scored the fourth place among other risks in terms of severity which is relatively different that the findings from literature and interviews which criticized the inadequacy of FIDIC provisions about liabilities of parties, termination and re-nomination procedures.

Table 2. Rating the main risks of nomination

| Nomination Risks                              | Low        |            |                   | High              |                   |                   |
|---|------------|------------|-------------------|-------------------|-------------------|-------------------|
|   | 1          | 2          | 3                 | 4                 | 5                 | Ave. Score        |
| Cost uncertainty                              | 10.61<br>% | 9.85<br>%  | 28.03<br>%        | <b>33.33</b><br>% | 18.18<br>%        | 67.80<br>%        |
| Late nomination                               | 4.55<br>%  | 9.09<br>%  | 22.73<br>%        | 29.55<br>%        | <b>34.09</b><br>% | 76.00<br>%        |
| Scope conflict                                | 7.58<br>%  | 17.42<br>% | 28.03<br>%        | <b>31.06</b><br>% | 15.91<br>%        | 66.00<br>%        |
| Failure to enter into subcontract agreement   | 6.06<br>%  | 18.18<br>% | 8.03<br>%         | <b>28.03</b><br>% | 19.70<br>%        | 67.40<br>%        |
| Adversarial relationship with MC              | 6.06<br>%  | 10.61<br>% | <b>34.85</b><br>% | 23.48<br>%        | 25.00<br>%        | 70.20<br>%        |
| Ambiguity of the relevant contract provisions | 3.79<br>%  | 15.15<br>% | 31.06<br>%        | <b>37.12</b><br>% | 12.88<br>%        | 68.00<br>%        |
| Default of NSC                                | 7.58<br>%  | 6.82<br>%  | 21.21<br>%        | 31.82<br>%        | <b>32.58</b><br>% | 75.00<br>%        |
| <b>Overall Score</b>                          |            |            |                   |                   |                   | <b>70.06</b><br>% |

### Possible Measures of Improving Nomination

The main approaches for improving nomination as derived from initial findings were offered for rating to better understand the trends in the UAE. All listed measures of improving the nomination practice were highly recommended for implementation in the UAE as mentioned in table 3 with recommendation average score of 80%. Improving FIDIC nomination provisions in terms of procedures and liabilities of parties, involving the MC in nomination process and using compatible contract & subcontract conditions are relatively the most recommended measures of improving nomination.

Table 3. Rating the recommended approaches of improving nomination

| Recommended Approaches of Nomination   | Low   |       |            | High       |                   |             |
|--|-------|-------|------------|------------|-------------------|-------------|
|  | 1     | 2     | 3          | 4          | 5                 | Aver. Score |
| Improve the contract relevant provisions regarding procedures and liabilities of parties | 4.55% | 3.79% | 9.85<br>%  | 22.73<br>% | <b>59.09</b><br>% | 85.60<br>%  |
| Educate and train construction professionals   | 8.33% | 9.09% | 18.94<br>% | 25.76<br>% | <b>37.88</b><br>% | 75.20<br>%  |
| Nominate the best subcontractors only  | 6.06% | 9.09% | 22.73<br>% | 28.79<br>% | <b>33.33</b><br>% | 74.80<br>%  |
| Minimize nomination packages for easy control  | 6.06% | 7.58% | 22.73<br>% | 31.06<br>% | <b>32.58</b><br>% | 75.40<br>%  |
| Use compatible main contract and subcontract conditions                                  | 4.55% | 5.30% | 7.58<br>%  | 32.58<br>% | <b>50.00</b><br>% | 83.60<br>%  |

|   |       |       |            |            |                   |                   |
|---|-------|-------|------------|------------|-------------------|-------------------|
| Involve and consult MC early in nomination process. | 3.79% | 4.55% | 11.36<br>% | 22.73<br>% | <b>57.58</b><br>% | 85.20<br>%        |
| <b>Overall Score</b>                                |       |       |            |            |                   | <b>79.97</b><br>% |

## CONCLUSION

This paper has discussed difficulties and problems associated with the subcontract nomination in the UAE and how to deal with them to improve nomination. The main common reasons for the Employer to nominate are the incomplete design, the need to have better control over the project budget and the use of the Employer's sister companies while uncommon reasons include the need to achieve better quality and design constraints. Late nomination, default of NSCs and the ambiguity of FIDIC nomination provisions are major high risks facing nomination practice in the UAE. Significant conflicts were found among construction practitioners in the UAE regarding liabilities and the nature of the contractual relationships among employers, MCs and NSCs. To improve the nomination practice, FIDIC nomination provisions need serious update to cover the liabilities of parties regarding the default of NSCs, limitations of damages, termination and re-nomination procedures. Employers should obtain collateral warranties from NSCs prior to nomination to get indemnified against the NSCs default.

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