

This is the Cost Control of the Unexpended value of the works and shows the projected Budget position to completion at any stage during the Construction Period. Both reports are important. It is possible to have a good Budget Report with an adverse Cost/Value comparison on works executed on site.

#### **Selecting the Builder/Construction Manager**

This is an important task. Many of the problems facing Builders today are removed in the type of contract referred to above and without significant risk and with much of the site control of costs and sub-contract accounts dealt with by the Quantity Surveyor, the Construction Manager is also able to offer a lower margin to the Client.

However, the purpose of executing contracts in such a manner is to finish the job in *time* and to *budget*.

Therefore the Construction Managers are going to be selected on performance. Perhaps the greatest concern

regarding such contracts is that cheaper prices could be obtained by going to tender. We must admit that such an argument is valid. However, land costs and building values are such that some Clients cannot afford to have jobs completed one day late. The most difficult problem is to evolve a system of selecting a Builder upon performance without the traditional tendering techniques.

Construction Managers selected for this type of work cannot afford to fail for they will not be employed again and this in itself is incentive indeed.

#### **The Future**

Many will query whether such systems as described above will work. We will have to await events, of course, but I believe that during a time of great change the Quantity Surveyor must be prepared to adapt himself to providing budgetary control within new contract techniques being used in the Industry.

# **Nigeria - A case for a new standard form of Building Contract**

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*This paper is a review of the British Joint Contracts Tribunal Form of Building Contract, with Quantities, which is of general application in both the public and private building practice in the Federation of Nigeria. It reviews the pit-falls of the present Standard Form as seen by leading British lawyers, quantity surveyors and others on such matters as the role of professional control organisations, the bill of quantities and variations. A proposal is made and a guide line suggested for a new Standard Form to reflect the various local problems encountered during the building process in Nigeria.*

#### **Introduction**

The building industry in Nigeria, which is still very young, perhaps not more than fifty years old, is saddled with the problems of mass illiteracy, untrained labour, acute shortage of professional and sub-professional personnel, lack of building materials, inadequate transport facilities and the shortage of experienced contractors<sup>12</sup>. The problems of the Nigerian building industry are therefore quite different from those of the U.K. which has advanced technology, experienced manpower, sufficient building materials and adequate reliable transport facilities. In spite of those differences, the JCT Standard Form has been successfully used in many parts of the Commonwealth and has to an extent been successful in the Federation of Nigeria. The JCT form is not perfect for use in the U.K. and where it is used in Nigeria with little or no modifications, it is even less satisfactory for it has many pit-falls,

#### **Some Pitfalls of the Standard Form of Contract**

Leading British lawyers and professionals have strongly criticised the standard Form and called for a complete review or a completely new document. Jones<sup>7</sup> asserts that various parts of the Standard Form are undoubtedly ambiguous and obscure. Chavasse<sup>4</sup> complains that a Form of Contract which has lasted nearly sixty years still leaves many questions unanswered. However, in the UK, series of amendments are periodically made to some flaws and to accommodate some new legislation such as VAT.

Ginnings<sup>5</sup> observes that there is always the possibility that new legislation will have to be accommodated and that scope has been provided to incorporate "community law" in appropriate places in the Form. That is because the UK is now a member of the European Economic Community (EEC). That concept of including "community law," is of far greater dimensions than those

which encompass construction matters alone<sup>5</sup>. Therefore, for this reason alone a time may come when the present JCT Standard Form may in many ways be entirely unsuitable for Nigeria, which is not a member of the EEC. To continue to argue that Nigerian contract laws are based on English contract laws and to use it as an excuse for a continued adoption of the present Form will no longer be valid. Consequently, a complete review of that document is now necessary to properly reflect the various problems encountered in the contemporary local industry.

### Professional Control

Modern buildings in Nigeria are becoming Western-oriented and sophisticated with the structural and services engineers playing increasingly important functions. Also, the traditional role of the quantity surveyor as a technical accountant and cost adviser is fully recognised in both the public and private sectors. The Nigerian Government's recent austerity measures call for accountability of public funds. Regrettably, the quantity surveyor's duty was only specifically mentioned once in the Form whilst the Engineer was completely omitted.

Jones<sup>7</sup> observes that the Standard Form grants twenty-one powers to the architect to issue instructions on issues that he is authorised to deal with including three powers of outstanding significance under clause 6, to:— (a) open up for inspection any work covered up, (b) test any materials or goods (whether already built into the works or not) or (c) remove any work not in accordance with the contract. The architect is also conferred the power in clause 15(3) and 16(b) to accept certain defects with some adjustment in the contract sum at his discretion.

To continue to invest the architect with what may be regarded as "excessive powers" is to invite confusion and misunderstanding amongst professional people. Supporting that concept, Mallam<sup>11</sup>, regrets that architects are not in some cases very good lawyers or very good administrators of contracts and that that gave rise to pressures by contracting interests for each step of what an architect should do under any clause to be set out *in extenso* as part of the contractual obligation.

Mallam's views on the competence of architects may be controversial. Mallam's views may be controversial, for in Nigeria architects have for many years remained administrators of public building contracts and with the assistance of the various administrative arms of the government have discharged their duties well. In fact some architects, due to their administrative capabilities, have risen to the posts of Permanent Secretaries in the civil service of Nigeria. Macebuh<sup>10</sup> reviews the activities of a leading Nigerian architect, Falade who is a Federal Permanent Secretary, "Falade is a consummate administrator, . . . he designed and supervised the building of the new Federal secretariat . . ."<sup>10</sup>. Unfortunately, due to an acute shortage of architects in Nigeria<sup>13</sup>, there are not enough architects to supervise the post-contract aspects of public building works. The powers of architects with respect to supervision are therefore delegated to provincial or district engineers. The engineers, who are always over-stretched, delegate much of the full-time supervision to field Technical Officers and Works Superintendents whose level of technical education lies between Ordinary and Higher National Certificate levels.

However, although the JCT used in Nigeria makes reference to the "architect" or "the supervising officer", it is essentially the architect who is meant to take on any real professional responsibilities. Therefore the section granting powers to the architect should be revised. It is better for a legal document to be specific on the apportionment of responsibilities. Also, a case has been established by the author<sup>12</sup> that in modern building practice in Nigeria, the transfer of professional responsibilities at any stage should be clearly defined.

On bills of quantities, Trickey<sup>16</sup> observes that contract bills are always specific to one building and wonders why in practice there is not enough flexibility in the usage of contract conditions to suit some other buildings or circumstances. But Jones and Walker-Smith *et al.* remark that the JCT Standard Form, in clause 12, has provisions for such flexibility, for it allows bills to be produced either (a) in accordance with the SMM or (b) not in accordance with the SMM, providing the bills contain specific statements to identify clearly the items at variance. Walker-Smith *et al.*<sup>18</sup> also explain that clause 12 dwelling on contract bills provides amongst other things that "errors and omissions should be treated as variations." Such may be a general statement. The Standard Form should therefore be more specific on the type and nature of errors and the magnitude and type of omissions to be treated as variations.

### Variations

According to Trickey<sup>16</sup>, clause 11(4) is widely drawn. It lays down the rules for valuing work the character of which is different from that in the contract bills or which is executed under different conditions. On that particular sub-clause 11(4), Walker-Smith *et al.*<sup>18</sup> point out that it provides for the measurement of variations and of work carried out by the contractor for which provisional sums were included in the contract bills and for their valuation in accordance with specific rules, the effect of which is broadly as follows:

(a) "where the work is capable of measurement and valuation its valuation is determined by the pricing in the Contract Bills for work of similar character executed under similar conditions."

In Nigerian situations, the pricing of bills is generally haphazard and unskillfully handled by unqualified and inexperienced estimators<sup>13</sup>, who cannot provide detailed and sound analysis of prices for negotiations under that condition.

(b) "where the work is capable of measurement and valuation . . . the prices in those Bills are to be a basis of the prices for the extra work if this is reasonable, if it is not, a fair valuation must be made by the Quantity Surveyor."

There is an acute shortage of qualified professional quantity surveyors in Nigeria<sup>12</sup>. Therefore in such situations, the services of a qualified surveyor may not be readily available, for although the surveyor prepares bills of quantities at pre-contract stage, due to over-stretched work load he often has no time to visit sites scattered in different parts of the Federation to perform post-contract site valuations. The use of unqualified staff (who are also in acute shortage)<sup>12</sup> is not proper.

(c) "where work cannot be properly measured and valued, the contractor is to be paid either daywork

rates at the prices inserted by the contractor in the contract bills . . . together with the percentage additions set out by the contractor in the contract bills."

Because inexperienced and unqualified estimators often price bills for contractors in Nigeria<sup>12</sup>, bills sent in for consideration always omit daywork rates and percentages. The fact is that such estimators (who are mostly semi-literate) are not conversant with and have no access to the daywork clauses set out in documents published by the Nigerian Federation of Building and Civil Engineering Contractors.

Walker-Smith *et al.*<sup>18</sup> also note that no reference in the whole of clause 6 was made to any recommended basis for charging for dayworks carried out in connection with a lump sum contract. Keating<sup>9</sup> also reviews the entire clause 6 and concludes that the composition of some parts of its sub-clauses are inadequate because the effective operation of the sub-clauses is generally dependent upon written notice having been given by the contractor at the time that the problem occurs. In Nigerian situations, indigenous and some foreign contractors are not, in most cases, conversant with the exact provisions of the Standard Form<sup>12</sup> and may not know when to give written notice in circumstances as discussed by Keating<sup>9</sup>.

A new Standard Form must recognise the existence of the peculiar problems discussed above under this sub-heading and provide appropriate solutions.

#### **Other Problems**

Chavasse<sup>4</sup> wonders why the Standard Form has not been able to provide specific answers to four important and often occurring questions. Firstly, what is the main contractor's obligation with regard to work for which a prime cost has been included in the bill of quantities? Secondly, can a main contractor be required to perform such work by a variation order? Thirdly, is a main contractor responsible for ensuring that such work is executed and if so, does that responsibility arise before a nomination or only on it? Fourthly, is a main contractor answerable to the client for the special skill of a sub-contractor?

On the question of insurance, Keating<sup>9</sup> observes that insurance provisions are elaborate but regrets that in some cases they are inadequate in the protection which they afford the employer. That particularly arises in the case of a third party claim not caused by the contractor's default as explained in clause 20(A) and (B). Although there are benefits to be derived in having such a wide range of risks to be insured against, it may sometimes discourage the contractor from taking care of the works. Various sections dwelling on insurance matters must be structured to be easily understood by contractors in Nigeria. Odeyemi<sup>15</sup> reports that the Insurance Institute of Nigeria has been requested by Government to ensure that various forms of agreement between Insurance Companies and their clients are simplified.

#### **Structuring a New Standard Form**

In structuring a new Standard Form for Nigeria, client-contractual relationship must be properly defined and well catered for. On contractual relationship, Wallace<sup>19</sup> indicates that the client organisation objectives consist of minimisation of cost, own risk, project time and the

maximisation of quality and competition and meeting the requirements of users and local authorities; while the contractor organisation objectives comprise minimisation of acceptable quality, own risk, the maximisation of profits and plant utilisation, ensuring work continuity and meeting the requirements of users and share-holders.

The various problems encountered during the building process (briefing, design, construction, maintenance and demolition) must be fully considered not only in conjunction with the contractual relationship discussed above but also with the legal, social, economic, political and technological problems of Nigeria.

In the problems of brief and design, the new Form must recognise that in practice the RIBA plan of work is not strictly followed. There are always no properly fully detailed as well as sufficient working drawings and specifications at pre-tender stages. It gives rise to inevitable and numerous variations and delays. In construction, maintenance and demolition, the problems of late arrival of materials (always due to reasons beyond contractor's control), labour intensive operations (that always give rise to poor quality performance and delays), must be fully analysed and allowance given in appropriate clauses, particularly to sections dwelling on timing of events.

A legal problem to be encountered is that of a possible use to his own overall advantage, by an illiterate contractor, of some provisions of the Illiterate Protection Act. Under that Act, an illiterate contractor may declare a contract null and void on the grounds that he is not literate in the language of that contract document. Therefore, there may be a need for translating the Standard Form into local languages. Since the achievement of independence in 1960, some changes have been made in laws affecting contracts - by legislation, decrees and edicts. But those changes have not been incorporated in the Standard Form used in Nigeria.

It is well to note that there are growing demands for a total overhaul of the Nigerian legal system. In a symposium sponsored by the Federal Military Government to discuss some legal problems of the country with special emphasis on the proposed draft constitution, Dr. Abashiya<sup>1</sup> advocated the creation of separate divisions for the different laws within a single court system. He suggests the creation of Sharia law division, a customary law division, a common law division in the nation's judicial system. A Nigerian chief, Etsu Lapai advised that tradition and culture must be included in any legal framework<sup>1</sup>. Also a leading Nigerian daily, the "New Nigerian" of 6th August, 1977 carried a front page headline captioned, "Our legal system is outdated." It quotes the Commissioner for Justice and Attorney-General of the Federation, Dr. A. Nnamani, as saying that the country's present legal system is outdated and needs urgent reformation and that the Federal Military Government would soon set up an agency to tackle the problem. When established, the paper reports, "the law agency would be empowered to carry out a thorough review of the country's laws with the basic aim of making them applicable to our national laws and circumstances." Therefore, a new Standard Form must be structured in the light of possible new developments in the Nigerian legal system.

Economic issues that must be looked into include money and banking practices and policies of the Central

Bank of Nigeria, difficulties in the granting of loans, foreign exchange transactions, and insufficient banking facilities. They can affect some of the provisions made on clauses on bankruptcy and liquidation. Also a thorough study must be made of the general administrative machinery of the civil service in Nigeria with special emphasis on financial and accounting procedures, for they affect such important matters as payments to contractors<sup>14</sup>. Technological issues to be considered are those of plant and plant-usage. Plant is scarce and plant-owning companies are relatively few. Spare parts are hard to come by, and consequently maintenance becomes a major problem.

A close study of plant and plant usage coupled with that of labour is necessary. The various problems of the mechanical divisions of some selected building firms can be studied, using operational research techniques. Special emphasis could be laid on inventory control, queueing, sequencing and transportation problems. Labour problems which can be studied include the time for mobilising scarce skilled labour to commence work on sites, the rate of resignation of such labour during construction, and the general problems of the unskilled building worker. The results obtained from such studies can help in suitably phrasing up clauses on delays.

Similarly, a study of available statistics of trade disputes may help to formulate clauses on "arbitration". From figure 1, it can be seen that for the period 1966-1971, the method for settling disputes was principally by the intervention of government and non-government functionaries. Arbitration clauses in the Standard Form should therefore be reviewed to make it become better machinery for settling disputes. It is better for parties in building disputes to resort to private arbitration than wait for government or labour officials who are saddled with the unnecessary red tape and protocol prevalent in the Nigerian civil service<sup>14</sup>. Moreover, those officials are generally not well experienced in building law and practice, though they have very good working knowledge of Nigerian labour laws and codes.

### Communication

The new document must not fail to communicate important legal issues to all parties to a contract. While there is a need for simple documentation as well as vivid, clear and short phraseologies, over-simplification will not be adequate. Essentially, it should serve the purposes of project and management information systems. It should have integrative and predictive capacity as well as be dynamic and possess a time horizon<sup>2</sup>. Each major part should be able to answer the questions: who, where, why, what, whom and when? It should be seen as a medium of communication<sup>6</sup> between the client, statutory and constructing organisation on one hand, and illiterate, semi-literate and expatriate contractors on the other hand. Legal draftsmen must bear in mind that a majority of building operatives and constructors who carry out the obligations contained in the Standard Form have no good working knowledge of the English language and often do not understand the fundamentals of Nigerian contract law. It would be advisable to consider the algorithmic procedure suggested by Jones<sup>8</sup>.

### Research

The building industry in Nigeria cannot exist in complete isolation from those of other countries. The contemporary building industry the world over cuts across many national and international boundaries. Therefore, there must be exchange of ideas. The legal documents in use in non-Commonwealth countries like France, the Netherlands and West Germany, deserve thorough examination.

The French have "cahiers des conditions charges generales" and "cahiers des charges particuleres," the Germans use the VOB (Verdingungsordnung fur an estumgen), while the Dutch adopt the UAV68 (Uniforme Administratieve Voorwaarden voor de Vitovoering Van Weken). They are the British equivalents of the Standard Form of contract<sup>2</sup>. Formulating a new Standard Form of Building Contract for Nigeria should not just mean taking up a British Standard Form of Contract or any combination of some other foreign documents, altering and inserting some clauses or sub-clauses. A sound basis can be formed if the problem is first tackled on a research basis<sup>13</sup>. Overseas and Nigerian Universities teaching Quantity Surveying, Construction Management and Law to higher degree levels could be briefed to research into various aspects of that document with a view to a total overhaul to suit Nigerian conditions. That overhaul must be done in conjunction with those of other contract documents. In any case, it should not only be subject to academic research. Academic research findings can only be a platform for further discussions and examination by clients, professional and statutory control organisations, trade unions, legal authorities and other interested parties. Views expressed can be collected and re-examined by a working party suitably constituted in line with the British Joint Contracts Tribunal.

Quantity Surveyors should play a dynamic role in the exercise. A profession which is daily concerned with the legal and financial administration of building contracts is in a good position to spearhead a radical change in the existing Standard Form of Contract. Professor Bennett<sup>9</sup> charged that quantity surveyors should not only measure quantities but should look far beyond and explore avenues for more meaningful contributions to the building industry. The Nigerian Institute of Quantity Surveyors should, as a matter of urgency, set up a Research and Development Committee and a Professional Practice Board which would assist in evolving the proposed document. External assistance can be obtained from the Institute of Quantity Surveyors and the RICS, both of the UK.

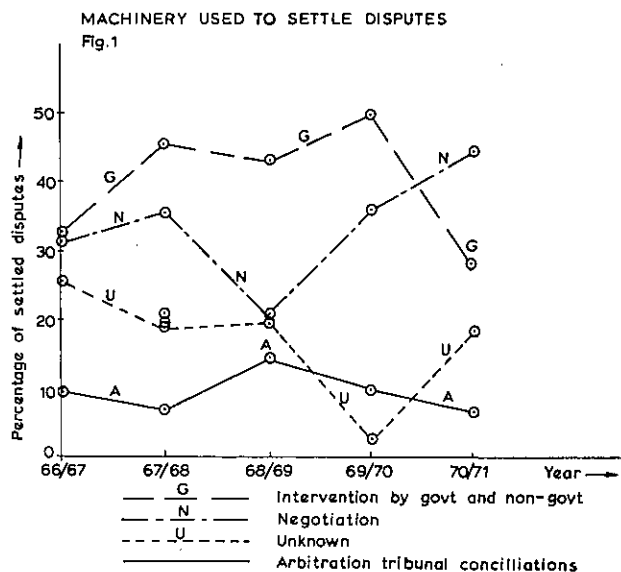
### Conclusion

The new document when published will need to be gradually phased in while the present one will similarly be gradually phased out. It must be subject to periodic reviews. It should be alterable and extendable to accommodate new developments and ideas and flexible enough for use for different contractual arrangements. A sound feed-back mechanism must be formulated to ensure its efficient operation.

The administration of building contracts in the Federation can be enhanced if a disciplined national legal document is evolved. As argued earlier, such a

document must be structured to accommodate various local and national problems of Nigeria. It will not only give a measure of national pride to Nigerians, it will help the outside world to appreciate the problems of a building industry in a developing country.

A new Standard Form properly structured will not only cut down causes of conflicts and disputes but will help to reduce excessive expenditures often incurred by government and the private sector who pay dearly for inappropriate and wrongly set out pieces of information.



## REFERENCES

1. **Abashiya, Dr. C. S.** Customary Law is natural to Nigeria (A symposium on the proposed Draft Constitution for Nigeria) - *Daily Times*, 31st August, p. 11.
2. **Anderson, R. G.** "Data Processing and Management Information systems" - *Macdonald and Evans*, London 1974, pp. 16-17.
3. **Bennett, Prof. J.** "Quantity Surveying" - *The Chartered Surveyor* February 1977, pp. 224-227.
4. **Chavasse, M.** "The position of sub-contractors under the RIBA Standard Form of building contract." *The Chartered Surveyor*, January 1969, pp. 339-342.
5. **Ginnings, A. T.** "Amendments to the Standard Forms" - *The Quantity Surveyor*, March 1977, pp. 145-147.
6. **Holms, D.** "Some Aspects of human communication" - *Visual Education*, August/September 1964.
7. **Jones, G. P.** "And now for something completely different" - *The Quantity Surveyor*, September/October 1973 and November/December 1973.
8. **Jones, G. P.** "A hybrid form of contract for the construction industry" - *Building Technology and Management*, February 1975, pp. 6-12.

9. **Keating, D.** "Some pitfalls in the use of the Standard Form of building contract Part I - (Blundell Memorial Lectures, May 1977) RICS, London.
10. **Macebuh, S.** Exemplary civil servant - A spotlight on Architect Falade - *Daily Times*, 1st September 1977, p. 7.
11. **Mallam, D. C.** "JCT contracts" - Correspondence. - *The Quantity Surveyor*, July/August 1973.
12. **Mogbo, T. C.** "Tendering for Building Works in Selected EEC countries, the United States of America and Nigeria", M.Sc Thesis, University of Reading, England 1976, (Unpublished) pp. 1-40 and 160-219.
13. **Mogbo, T. C.** "Cost Control in the Construction Industry" - 6th Annual Conference, Nigerian Institute of Quantity Surveyors, 24th June, 1977 (NIQS Lagos, Nigeria).
14. **O'Connell, Prof. J.** "Political constraints on planning - Nigeria as a case study in the developing world." *Journal of the Nigerian Institute for Social and Economic Research*, March 1971, Vol. 131 No. 1, pp. 39-56.
15. **Odeyemi, S.** "Insurance Companies Told to Live Up to Expectation" - *New Nigerian*, 2nd September, 1977, p. 15.
16. **Trickey, G. G.** "Some Pitfalls In The Use of The Standard Form of Building Contract" Part II - Blundell Memorial Lectures, May 1977, RICS, London.
17. **Tunncliffe, J. K.** "JCT contracts" - Correspondence - *The Quantity Surveyor*, September/October 1973.
18. **Walker-Smith, Sir D., Close, H., Chavasse, M. and Povey, P. J.** "The Standard Forms of Building Contract," Charles Knight & Co. Ltd., London, 1971.
19. **Wallace, H.** "Contract Specifications in dredging Operations" - *The Dock and Harbour Authority*, May 1974 Vol. 55, Part 643, pp. 2-5.

## BIBLIOGRAPHY

- A. **Chevasse, M.** "A reply to Mr. Duncan Wallace".
- Free, H. D.** "JCT contracts" - Correspondence: *The Quantity Surveyor*, September/October, 1973.
- B. **Green, B.** "Insolvency and the building contract" - *Quantity Surveying Practice: The Chartered Surveyor*, January 1968, pp. 348-353.
- C. **Ogunpola, G. A.** "The pattern of organisation in building - A Western Nigeria case study" - *Journal of the Nigerian Institute for Social and Economic Research*, November 1968, Vol. 10, No. 3, pp. 339-360.
- D. **Wallace, I. N. D.** "A criticism of the RIBA Joint contracts tribunal contracts." - *The Quantity Surveyor*, May/June 1973 and July/August 1973.

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