

Equitable Conflict and the Standard Forms of Contract!

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Introduction

During the past year my articles have considered some of the issues concerned with the standard forms of contract and their interpretation. In this last article of the series, some consideration is going to be given to pursuing a thought which was raised at the end of the article entitled "The 1980 JCT Design and Build Contract".

This thought concerned whether we are prepared to pay the cost in terms of lengthy forms of contract, in the search for equity, created by the use of words we use within them, when equity can exist in practice without the use of such words. This concept introduces a hitherto much under-estimated consideration, relationships.

Apportionment of Risk

All contracts involve rights and obligations and as with the Standard Form of Building Contract, much time is spent considering how best to apportion the associated risks. It is this attempt to achieve, a balance that is referred to as equity in the foregoing, notwithstanding the fact that equity can be achieved even where in the view of others a balance does not exist. For instance, a contractor may take on a risk and so long as he is aware or should be aware of that risk under the contract and has had the opportunity of reflecting that risk in his tender, can it be said that it is unfair and therefore inequitable. Nevertheless, the SFBC attempts to achieve a balance which in the

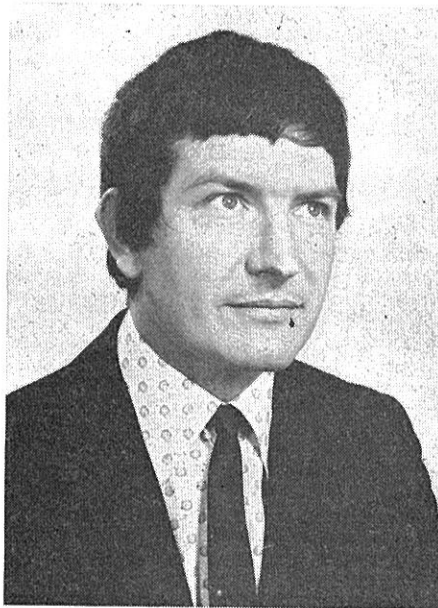
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often the people involved are never given the title of manager.

The ability to lead, motivate and pull people together into effective teams has never been more important to the survival of a quantity surveying business than it is today.

References

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view of the authors creates a situation where the risk is apportioned in the most acceptable way. That is, the contractor is not required to assess any matters that may have an undue effect upon the tender price through his inability to evaluate accurately any such risk.

In the USA contractors are much more willing to enter into a true lump sum contract, whereby they take upon themselves many of the risks associated with building. This type of contracting together with those contracts based upon agreements unilaterally prepared by the Employers can often be seen to be at one extreme of our spectrum, with cost reimbursement type contract at the other extreme. The JCT SFBC, however, fits somewhere midway. Now when one considers this range in the way risk is apportioned one is left wondering which of these contracts gives rise to the greatest contractual problems.

A contract which requires the Contractor to complete by a specified date regardless, is very much clearer in its intent than one which provides for extensions of time for a variety of reasons. One is aware that one reason for the existence of such clauses is to let the employer/architect off the hook rather than the contractor, but, nevertheless it is submitted that the former situation creates less opportunity for dispute. The latter situation, now opens up a wider area of contractual dispute because that which is fundamentally black and white has become grey and it is these areas that the human relationships become strained as a consequence of conflicting interests.

The Human Element

Human relationships are involved in every building operation but the human element

related to claims only manifests itself if certain other conditions exist, and then frequently, good human relationships start to deteriorate, pre-supposing that good relations did exist at sometime. Quite recently, Owen Luder wrote a delightful article on the republished Honeywood File and Honeywood Settlement and in this article he draws out a number of worthwhile observations made in these books, but possibly the most illuminating is "no contract can be carried out at all if the letter of the conditions only are to be observed. A common spirit of fair play and good sense are necessary" If this statement has any merit it must mean that, whatever, is written by way of conditions, they cannot alone create the right climate in which to carry out building works, and as such recognises that the human element plays a fundamental part in contractual relationship. Consider, clause 30 JCT Standard Form of Building Contract, whereby the express provisions provides that interim certificates should be the total value of the work properly executed. . . . This provision can only operate if there is a spirit of goodwill and fairness because otherwise you will never get past defining value.

It could be said that building contracts frequently work harmoniously in spite of the legal contract. The contract itself is dealing with conflicting interests and it is only the human element which overcomes the situation where a possible claim exists with regard to the way the clause should operate. There are varying degrees of conflict and what one is trying to achieve is a situation whereby a different viewpoint (the initial conflict) is quickly and amicably resolved without recourse to hours of wrangling and contentious litigation. This generally means that the parties view of the situation has to be modified by good management and if this is so it is absolutely essential that a rigid and inflexible stance is avoided. Superficially, there may be seen a conflict here, with the desire to see clear statements of intent. However, this is not so, as it/the approach to those express intentions with which we are now concerned in our search for equity, which is defined in Chambers Twentieth Century Dictionary as ". . . a moral justice of which laws are the imperfect expression, the spirit of justice which enables us to interpret laws rightly".

In considering conflict resolution one cannot help but feel that one is subjecting one's belief in the meaning of the conditions to the paramount virtue of expedience. Nevertheless, it is interesting to compare this approach to the view expressed in "A review of building construction practices in local authority".

". . . that many difficulties arise from failure to adhere to the contractual provi-

sions and procedures, in some measure this is due to sentiments sometimes expressed by architects that on site the contract conditions are unimportant, the essential requirement being to maintain goodwill . . ."

Development of Future Standard Forms of Contract

Standard Forms of Contract have their place, because standardization assists communication and where ambiguity has resulted in litigation the court decision provides a precedent. The problem with many standard forms is that they attempt to cover too much, thus obscuring many of the real issues, creating difficulty in comprehension and therefore engendering much of the ill-feeling that we set out to obviate. They sometimes are too comprehensive because of the ill-conceived notion of fairness and also as a consequence of trying to accommodate a tendering procedure that has within it many shortcomings.

Therefore, it does seem a possibility that alternative tendering procedures may develop more freely than has been the case in the past and new standard forms will be created to reflect the changes.

Some Final Thoughts

If new standard forms of contract come into existence it seems likely that the authors will as a consequence of the JCT 1980 become very much more aware that the needs of those charged with the responsibility of erecting buildings can only be met if contracts become substantially shorter than at present. This can perhaps be best achieved by resorting to autocratic principles in the belief that less conflict and greater efficiency accrues than is the case if we adopt time consuming democratic (so called) procedures. This comment must get someone, somewhere, hot under the collar.

Finally, one more thought, if we accept the view that human relations play a pre-dominate part in building contracts we must therefore ensure that the contractor is matched with the employer, and that the design team is likewise carefully considered, in relation to the employer and contractor, rather than relying upon the *ad hoc* arrangements whereby those concerned are frequently thrown together, for all variety of reasons but seldom have they anything to do with efficiency.

A Place in the Sun

BSI has published an important new Draft for Development, DD 67 *Basic data for the design of buildings: sunlight*, which should be of interest to a wide cross-section of the construction industry, particularly architects and planning authorities. It covers many different aspects of the subject and offers valuable guidance on fundamentals such as the adequacy of sunlight for various functions, the means by which it may be assessed, the effects on the environment concerned, and also measures for controlling its admission.

In preparing this document the BSI technical committee responsible has had to consider a number of problems ranging from uncertainty about human needs on the one hand and the

changing pattern of building practice on the other. Post-war, for example, it became fashionable to reduce ceiling heights, to have combined living/dining rooms and generally make freer use of available living space. 'Picture' windows and the importance of a view also helped to shape attitudes regarding the admission of sunlight.

Office buildings, meanwhile, became noted for their indiscriminate use of glass and this, together with the adoption of lightweight cladding and structures of low thermal capacity gave rise to problems of heat control. Then came the swing towards large and deep office blocks with comparatively limited areas of glazing and substantial thermal insulation. Such buildings are, in effect, giant thermostat units with a further substantial contribution being made by artificial lighting and other heat-producing installations.

More recently still, the need for energy conservation has redirected attention to the possible value of sunlight as a supplement to heating systems in winter. Solar heat gain from the admission of direct sunlight is, in fact, considered in the new draft but the utilization of solar energy in the full context of heating requirements does not lie within the scope of the document and only passing reference is therefore made to this aspect.

The information and principles given in the draft are generally applicable to occupied space in all types of buildings but detailed recommendations for the admission of sunlight are given for residential buildings, offices and schools, together with some comments on the requirements of hospital wards.

Copies of DD 67 may be obtained from the BSI Sales Department, 101 Pentonville Road,

London N1 9ND. Price £22.00 (BSI Subscribing Members £11.00).

Taxation for Consultants

The British Consultants Bureau (BCB) of London has published a valuable new booklet: "General Aspects of Taxation".

The booklet, written jointly by two senior partners in consultancy practice, was sponsored by the BCB Finance Advisory Committee. It discusses aspects of taxation of interest to firms exporting their services overseas and is particularly useful for small firms who do not have their own in-house expertise in taxation.

"General Aspects of Taxation", which runs to 28 pages, opens by comparing the different forms of commercial organisation found in UK consultancy practice, and relates them to the law on losses, capital gains and charitable trusts.

The booklet goes on to discuss the methods of conducting business abroad and includes chapters on Double Taxation Relief, Individuals Working Abroad and Retirement Arrangements. It concludes with a general chapter on fringe benefits, stock relief, wives as business partners, termination payments and profit sharing.

"General Aspects of Taxation", which should be read and referred to by every executive in professional firms working or seeking to work overseas, is priced at £1.50 per copy, including post and packing, and is available from the British Consultants Bureau's offices at Westminster Palace Gardens, 1-7 Artillery Row, London SW1P 1RJ.



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