SUMMER 2006

QS EYE

For Quantity Surveyors

As a result of the Gershon review, the Government is expecting to see public sector efficiency improvements of 2.5% per year over the next three years. In the social housing sector this means year on year efficiency gains that total £835 million by 2007/8. Over 40% of this is expected to come from the procurement of capital works.

In many ways none of this is new. After all, what was Best Value about if it was not about continuous improvement? However, the Government is looking for something more.

Phil Woolas, the Minister for Local Government, recently said that Local Authorities needed to "start thinking big". They had to radically rethink their whole approach to achieve the year on year improvement anticipated by the Efficiency Review. No doubt, so will the rest of the public sector.

The philosophy seems to be that "big is beautiful". Purchasing consortia working across a number of organisations are being touted as a way of getting economies of scale and reducing the cost of back office resources.

However, setting up such arrangements will take time and there are demanding Government targets to be met.

Some public sector landlords have already realised that longer term collaborative arrangements can improve efficiency and be particularly attractive for Decent Homes programmes, where the work can often be repetitive and it is possible to improve on the costs of both fitting and supply through a strategic partnering agreement.

Even so, such arrangements tend not to be as flexible as clients would wish; which is where Framework Agreements come in.

They offer the opportunity to establish longer term relationships with selected Contractors, whilst giving the Client a degree of flexibility. Such arrangements are essentially "agreements to agree" which means that once the frameworks are set up, mini competitions can then be held within the Frameworks to award works. It also means that the Framework Agreements themselves can be started before the details of individual projects are firmed up.

The EU Directive 2004/18/EC on Public Procurement limits the duration of Framework Agreements in the public sector to four years. However, once established, there is no requirement to advertise any of the subsequent contracts let through the Framework Agreement. This could be attractive for organisations where staff time is taken up with prolonged procurement exercises. So a Framework Arrangement could contribute efficiencies both through longer term relationships with Contractors and through reduced back office costs.

For unitary authorities with a housing stock, there is also the opportunity to share Frameworks with other departments. This might not be quite the same as working across organisations, but working across departments could be one step towards "thinking big".

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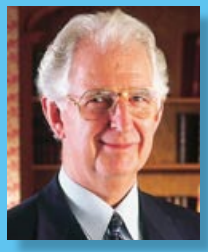
EDITORIAL

The career pattern of the QS is as often as not something of a patchwork quilt. Those of us of more mature years usually became junior quantity surveyors straight from school. This was before degree entry became the norm.

Many of us started work with no knowledge of the industry and possessed little in the way of appropriate skills whilst those who have completed appropriate degree courses slot into the work of the QS more easily. The entry point has changed little with the passage of time with the vast majority of budding QSs starting in private practice, the public sector or on the contracting side. With the increase in outsourcing there are however less opportunities in the public sector.

To say that "once a QS, always a QS" in this day and age is not correct. The world is our oyster and it is not uncommon for some who have trained and commenced work as a QS to develop their skills and move into other areas. Many project managers and planning supervisors started life as a QS. Commercial directors and managing directors of some of the major contracting and subcontracting organisations in the country were at one time QSs. Some of us have moved into the legal side to specialise in dispute resolution whilst others have entered niche markets such as delay analysis. We are all in the business of selling our skills in one way or another.

The QSi has set out as one of its goals to inform the industry of what we have to offer. We are currently working on publicity material to get the message across to those who are in a position to take advantage of the services of the QS as employees or service providers.



Roger Knowles
President

TOO SMALL FOR BILLS OF QUANTITY

Work Specifications / Schedules Of Work For Minor Works Projects

Early on in my QS career I worked in the pre-contract department of a large brewery. In those days, most major breweries owned and maintained hundreds of public houses, had rolling programs for alteration and refurbishment work and a budget that ran into millions.

Although there were some projects (such as a new public house) which warranted full Bills of Quantity, most of the minor work didn't. Most of the work of this nature was tendered on a simple specification and drawing basis.

But why bother with a specification at all?

Why involve a QS?

In answer to those questions, let's assume that we have a project and that pre-tender estimates suggest that the successful tender will be in the region of between of £100,000 to £120,000.

A brave man might hand a set of drawings over to a local builder and ask for a price. Alternatively, the same set of drawings could be handed to a number of builders.

Let's assume that is exactly what happens. Let's also assume that the following tenders are received:

BUILDER 1	BUILDER 2	BUILDER 3	BUILDER 4	BUILDER 5	BUILDER 6
Tender Sum: **£85,000**	*Tender Sum:* **£96,500**	*Tender Sum:* **£105,000**	*Tender Sum:* **£108,000**	*Tender Sum:* **£109,000**	*Tender Sum:* **£145,000**
Qualifications: Has only allowed for footings not exceeding 1 metre deep; No allowance for painting works; Provisional sum of £2,400 for roof lights.	*Qualifications:* Has allowed a provisional sum of £4,000 for the sanitary fittings; No allowance made for external pavings.	*Qualifications:* Has allowed for providing new 25mm water main; Has allowed for providing and laying yorkstone paving to new patio.	*Qualifications:* Has allowed a provisional sum of £6000.00 for plumbing, heating and sanitary fittings; Provisional sum of £4,000 for Ceramic wall tiles.	*Qualifications:* Has allowed a provisional sum of £3000.00 for the sanitary fittings; Has allowed a provisional sum of £5,000 for external works.	*Qualifications:* Has presumed that Sanitary fittings / heating etc. will be supplied and fitted by others; Has allowed for providing and laying concrete paving to new patio.

You now have to advise your client. Which contractor's price should be accepted?

The problem with the above schedule is that you are comparing apples with bananas, not apples with apples.

Assuming that the four highest tenders are ruled out on price alone, a large number of questions still leap to mind.

1. Builder 1's tender for the work is £85,000, eleven and a half thousand lower than the next tenderer. As the pre-tender estimate indicated tenders in the region £100,000 to £120,000 has Builder 1 made a bad mistake?
2. What is the value of the painting works? If the value was added to Builder 1's price, would it still be the most competitive?
3. Has Builder 2 allowed for painting and roof lights? If so, how much?
4. Has Builder 1 allowed for ceramic wall tiles, external works, plumbing and heating works?
5. Builder 2's price is higher but it is very close to the pre-tender estimate. Should this price be considered?
6. What depth of foundations has Builder 2 allowed?
7. Have Builders 1 & 2 allowed for a new water main?

And the questions continue.

Of course, the person in question could pick up the phone / write to the tenderers and ask the necessary questions. Then, once the answers have been supplied, the tenders could be more fully analysed. It's a slow process but it could be done.

As you have probably already guessed, the questions posed above touch on the fundamental reasons for a quantity surveyor being involved in most building projects. By analysing the works (even if it is not quantified) and providing a frame work for the contractors to price, the QS in charge of the project should be able to guide the various estimators and avoid tender qualifications / future claim situations / large variations.

If a simple specification / schedule of works had been sent out with the drawings, tender evaluation would have been far easier, especially if the two lowest tenderers agreed to send in fully priced specifications for evaluation. The QS would have then been able to compare apples with apples.

Obviously, a fully priced specification also makes interim valuations and evaluation of variations far easier when they arise.

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PRICE ESCALATION CLAUSES? WHATEVER HAPPENED TO INCREASED COSTS?

This missive is not an in depth analysis of price escalation clauses, but a reflection on how things have turned full circle. Anyone who heard The Cream the first time around, wore denim jackets before the year 2000 and watched the Morecambe and Wise Christmas Show will probably remember when price escalation was known as increased costs. Increased costs took up a significant proportion of my time as a young assistant QS working for a South Yorkshire contractor. In those days, inflation in the UK was in double figures and many employers sensibly shared the risk of price escalation with the contractor by including an increased cost clause in the contract. This was administered by virtue of the contractor submitting a basic price list of materials with his tender and being allowed to claim for any increase in prices for the materials on the list over the duration of the contract. He was also allowed to claim for increases in the cost of employing labour, by reference to the basic wage for construction employees agreed with the unions.

What all this meant to a lowly assistant QS whose real ambition in life was to be out on site having the crack with the brickies and seeing magnificent buildings arise from green field sites, was that I spent most of my time in the head office wrestling with time sheets and invoices. Each site operative had to be entered on a claim sheet together with the hours worked during each week and a cost comparison made between the base prices and increased prices for the basic hourly rate, guaranteed minimum bonus, tool money (I kid you not), holiday stamps (do they still have those?), employer's national insurance contributions and probably some other weird and wonderful method of recompense agreed with the unions.

And that was the easy bit! Increased cost of materials claims involved making forays into the accounts office and being forced to brave the wrath of Old Ma Richards who ruled the department with a management style that Maggie Thatcher could only hope to emulate. I have seen grown men tremble at the knees when obliged to approach Old Ma Richards with a request for a new pencil from the stationery cupboard. In fact, it was an Old Ma Richards' regulation that no new pencils would be issued unless the previously issued equipment had demonstrably been reduced to a maximum length of 1.5".

Increased cost claims for materials involved trawling through the invoices and entering the invoice number, date, quantity of materials invoiced, basic price and invoiced price on a claim sheet and doing a few calculations to ascertain the cost escalation. I don't know if anyone knows just how many invoices for ready mixed concrete there would be on a 12-storey concrete-framed building with multi-storey car park attached? Well neither do I actually, but I can vouch for the fact that it's a lot! Oh yes, and copies of the invoices had to be attached to the claim sheets, no doubt so that some equally hapless assistant QS in the consultant quantity surveyor's office could have the pleasure of checking the submissions.

Just in case you younger colleagues out there don't see a problem in such an exercise, let me add that the only computers around in those days were owned by the Inland Revenue and the Bank of England. Consequently, all this had to be done using pen and paper as these were our most sophisticated office aids. We only had one calculator to share between a whole QS department and this was about the size of today's laptop computers and probably cost the equivalent of a month's salary for an assistant QS (pretty cheap then!). Extensive mathematical calculations were therefore handled by the comptometer department, which is another thing that anyone who has not tasted plain crisps with salt added from a little blue bag will not have heard of. Comptometers, as far as I could gather operated on the abacus principle and looked like something out of Dr. Who's Tardis, complete with lots and lots of buttons which had to be pressed all at once, often using all 10 digits. The advantage of comptometers to a young and virile assistant QS was that the comps department was staffed by a couple of attractive young ladies. Well, young compared to Ma Richards anyway. There was usually a gaggle of assistant QSs hanging around in that office for one reason or another.

Anyway, things might have been hard in the days when price escalation was known as increased costs, but at least we had a good time. You could have a night on the town, sink six pints of Wards best bitter, smoke a packet of 10 Number 6, get the bus home and still have change out of ten shillings for a bag of chips ... now there's price escalation for you!

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A Case Of Mistake

The settlement of a final account can be a long drawn out and tedious affair with many exchanges between the client's quantity surveyor and the contractor.

Quite often, as a means of endeavouring to draw matters to a conclusion, the client's quantity surveyor will produce a document entitled Final Account that will be sent to the contractor for approval. On the last page of this document, where the final amount due to the contractor is indicated, the quantity surveyor will often include a provision that states something to the effect of:

"The Contractor accepts the final payment set out above in full and final settlement of all matters arising under the Contract".

and a space will then be provided for the contractor to sign his agreement to the final payment and hence the settlement.

Contractors sometimes sign final accounts containing such wording without giving full consideration to the ramifications of their actions. Often the account is signed simply as a means to secure early payment of at least the sum shown therein.

But what happens if subsequent to signing such a provision the contractor realises that he has made a mistake and that there are other matters that he is entitled to claim for that have not been included in the final account?

At first glance the obvious conclusion would be that the contractor is bound by the agreement set out in the final account, and if he has made a mistake therein, it is simply his bad luck for

being careless and not giving proper consideration to the terms he was signing.

However, the position may not be so straightforward, as the recent case of Hurst Stores and Interiors Ltd v ML Europe Property Ltd (April 2004) in the Court of Appeal of England and Wales, indicates.

ML Europe entered into a contract with Hurst for the fitting out of the toilet blocks at Merrill Lynch's headquarters in London. ML Europe appointed Mace Ltd as the construction manager. The Contract Sum was approximately £2.4 million, but during the course of the works extensive variations were instructed.

The contract provided for a lump sum price adjustable only in respect of variations. The valuation of such variations was required to include for any associated disruption costs.

During the course of the works Mace prepared Interim Statements of Account on a monthly basis.

Approximately six months before the completion of the works, Hurst prepared a document entitled 'Final Account' which provided a valuation of the variations issued at that time by way of their direct cost, i.e. an assessment of labour, plant and materials, but included no assessment of the associated costs of disruption. The document was submitted to Mace.

After various discussions between Mace and Hurst, Mace produced a document in the same form as the Interim Statements of Account that had been prepared monthly throughout the project, but included the variations as priced by Hurst, and also changed the title to Final Statement of Account. At the end of the document the following wording was included:

"In consideration of the agreement that final payment is to be made by the Client, we hereby agree that payment to us of THE FINAL PAYMENT will be accepted by us in full and final settlement of all our claims arising out of or in connection with the Trade Contract works which have accrued up to and including the date of this statement".

Hurst signed the document, but did not actually read it, or consider the consequences of the wording.

Subsequently six months later when the works were completed Hurst prepared and submitted a further final account which included a significant sum in respect of the costs of disruption to the progress of the works, caused by the variations, most of which had been valued in the Final Statement of Account.

Mace rejected the claim on the basis of the signed agreement in the Final Statement of Account, i.e. that Hurst had accepted the payment as being in full and final settlement of all claims which had accrued up to the date of the statement.

The matter went to court where it was argued by Hurst that the Final Statement of Account was entered into on the basis of a unilateral mistake on its part, and that the document should be rectified to remove the reference to it being made in full and final settlement of all claims accruing up to the date of the statement.

Hurst gave evidence that it was a misnomer to call the document a final account and that it had only called his original document a final account because he had been told to do so by Mace. Hurst further stated that the documents had never been intended to be final accounts, simply an agreed record of labour, plant and materials used in the variations that had been issued at that time.

In both the Court of First Instance and subsequently the Court of Appeal, the courts agreed with Hurst, and held that the document entitled Final Statement of Account should be rectified on the grounds of unilateral mistake to remove the offending words.

In reaching its judgment the Court of Appeal found that there were three elements to consider. Firstly, whether Hurst was mistaken as to the contents of the document. Secondly, whether Mace had either actual or 'shut-eye' knowledge of that mistake, and thirdly whether overall the conduct of Mace was unconscionable.

The court found for Hurst on all three elements, and were particularly swayed by the fact that they felt Mace had acted in an unconscionable manner. Accordingly they ordered that the document be rectified permitting Hurst to pursue its claim for the costs of disruption.

However, contractors would be wise to treat this case with caution, and remain careful of what documents they sign, particularly with regard to the final account. To establish a claim for rectification for unilateral mistake is a difficult test. Hurst succeeded largely because they were able to establish that Mace had knowledge (either actual or shut eye) and that Hurst did not understand the significance of the document they were signing. In most situations a contractor who has mistakenly signed a final account would not be able to satisfy this test.

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A Two Day Mediation

Appointing the Mediator

I received a phone call a few weeks ago from a building owner who was in dispute with a Contractor over a recently completed development in London. Long and hard negotiations had taken place but the matters in dispute remained unresolved. Litigation was about to commence, but in keeping with UK High Court Protocol, the parties were required to submit themselves to mediation. The building owner considered that a fresh pair of experienced eyes may be of benefit and hence the phone call. No mediator had been appointed at this stage and this was therefore one of the first tasks to be completed. My client was represented by his in-house Solicitor, whilst the Contractor had engaged the services of a firm of Solicitors. First attempts to agree who was to be the mediator failed and therefore the parties decided to approach CEDR to make a recommendation. Three names were produced and the parties had no difficulty in choosing a QS from the list.

The First Steps

It was agreed between the Solicitors that each party would produce a Positional Statement to be exchanged a few days before the mediation took place. The Mediator agreed with the procedure as it helped to clearly identify the issues and assisted him in becoming familiar with the matters in dispute. These documents were duly produced and, as they contained nothing which was controversial, were exchanged on time. I saw it as one of my tasks to ensure that all members on my side understood the tasks they had to perform and were familiar with what was likely to happen on the day. We met up a week before the mediation was to take place, our team comprising the in-house Solicitor, project manager, QS, external claims consultant and my client's director responsible for the project. The contract was a JCT management form which had been amended. Work had been completed on time but the Contractor claimed for acceleration costs. A significant number of the works packages had not been agreed and there was a substantial counterclaim mainly associated with defective work. Taking into account the sums claimed and the counterclaim, the parties were approximately £15m apart.

Getting Started

We all met up at 9am at a hotel near Heathrow Airport. The Mediator had been in prior contact by telephone with both Solicitors and requested that the parties congregate together at the outset in separate rooms. He visited each party to explain how the proceedings were to be conducted. The Mediator had no background in construction, and, to ensure that he understood the technicalities, brought with him an Assistant Mediator who was a Quantity Surveyor. He asked if we were in attendance to try to settle the dispute and seemed pleased that the response was in the affirmative. It was not the Mediator's role to give a decision, he explained, and neither would he be expressing any views on the respective merits of either party's case. The Mediator's role was to try to help them to reach agreement. There was no set procedure, it developed as it went along. The Mediator suggested that the proceedings should get underway with us all congregating together, when each party would be given about half an hour to outline its respective case. The Contractor's Solicitor gave the first presentation which took up about half an hour and was received without comment from our side. By way of response, my client's Claims Consultant produced a Powerpoint presentation as he wished to illustrate examples of poor workmanship. This took up approximately three quarters of an hour, again without comment being made by the other side. The Mediator suggested that the parties should then go back to their own rooms to discuss what they had heard and be prepared to return to offer their comments.

Mud Slinging

When in our own room, my client's QS and Project Manager, who were fully conversant with all the facts of the contract, took the floor. They explained that difficulties had been experienced in agreeing many of the works packages due to a lack of information. During the final stages of the work, when all were under pressure to complete and long hours were being worked, many of the works contractors were paid substantial sums on the basis that full details would be submitted later. Unfortunately, having received payment, the provision of the information became a nil priority for some of these works contractors. Again, in the haste to complete, work was switched from one package to another with claims being made from those who finished up doing more work than expected but little sign of credits from those whose work content was reduced. These and other matters were debated at length by the members of the team until the Mediator suggested it was time to meet the other side again. Each party was now given the opportunity of commenting on the other side's case. No holds were barred and both parties let fly. It became clear that those who had been close to the job were most unhappy concerning the performance of the other side and did not hold back in expressing their views. The Mediator let the debate go on until it petered out of its own accord and, as the time was 9pm, it was agreed to call proceedings to a halt for the day.

Doves and Hawks

The beginning of the second day saw us back in our own rooms. If progress was to be made, the parties would have to start to come together. We looked carefully at the disputed items and divided them up into various categories comparing items which were agreed in principle with those which had been totally rejected. It soon became clear that the team was divided into those who were obviously hawks and the doves. Agreement was eventually reached as to where compromises could be made and what were the sticking points. It was now time for another get together with the other side. This proved a friendlier meeting than the last one, with both

parties showing willingness to compromise. Revised figures were discussed and, after a lengthy debate we retuned to our rooms. We were now in the afternoon of the second day and the Mediator was spending more time with each of the parties. He talked about the options which were available if the parties failed to reach agreement, and the uncertainty concerning the likely outcome of litigation, no matter how confident the parties were of their case.

End Game

In the late afternoon it was agreed we would make a once-and-for-all final offer to settle. We congregated again with the other side when the offer was made and instantly rejected. Following more time in our own rooms with the Mediator doing his best to get a better offer from our side and trying to persuade the Contractor to offer a lower figure to settle, the Contractor produced his counter-offer which was rejected. The mediation did not result in an immediate settlement, but a week or two later matters were resolved following a good lunch.

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Online CPD - Life and Learning

The QSi strives to provide CPD to suit work and life patterns.

Our CPD modules are available online free of charge but only to members.
They can be downloaded for study purposes at any time to suit the individual.

The first stage of our programme will consist of 20 modules of which 15 are now available.
For more information or to download the modules visit www.theqsi.com

INDEX OF MODULES

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2. Open Book Accounting - Maximum 4 hours, 8 CPD points
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IN PREPARATION

1. Quantum Meruit / A Fair Valuation; 2. Recent Non-Adjudication Cases Part I
3. Recent Non-Adjudication Cases Part II; 4. Risk Analysis

Retrospective Delay Analysis
Rubbish In - Rubbish Out?

There was a time when Architects and Engineers assessed extensions of time by reference to their understanding of the project and their general experience of the construction process. A variation adding one manhole would be issued. The Contractor would write claiming seven days extension of time. The Architect or Engineer would consider the matter, would conclude that a delay was caused to the works but that the Contractor had (predictably) overstated the extent of the delay. The Architect or Engineer would then grant an extension of time of five days which the Contractor would invariably accept.

Nowadays, even for simple delays like the above example, Architects or Engineers require that the Contractor produce a programme showing the critical path and how it was affected by the additional manhole and the impact on completion of the Works before an extension of time is granted.

This situation has arisen since the advent of sophisticated computer based planning techniques which assist in the identification of the cause of critical delay to a project and, in the more advanced cases, assist in the computation of claims for lost productivity.

The use of such techniques was first promulgated by Contractors eager to prove their entitlements, but has now been equally used up by Architects and Engineers similarly eager to disprove the Contractor's entitlement.

Indeed now that programming and planning engineers have turned to specialize in these techniques a new profession of 'delay analysts' has arisen.

Whilst the use of such delay analysis techniques is now common in construction claims, it is in arbitration and litigation where it has really become important with Contractors employing expert delay analysts to carry out detailed retrospective

delay analysis and Employers employing similar experts to challenge the analysis. In retrospective delay analysis the project is re-constructed from the beginning to the end to identify the causes of the delays to the progress of the works. Such analysis often involves a 'window' or snapshot' technique whereby the base programme is updated at particular intervals to show the impact of delays at the time that they occurred and the effect that such delays had on the critical path for the works.

These techniques are undoubtedly beneficial in supporting (and indeed defending) claims for extensions of time, however the results that such analysis produces can not always be accepted at face value. Whilst the computer software is clearly very sophisticated, the analysis is only as good as the information put into it!

The recent case of Skanska Construction UK Limited v Egger (Barony) Limited TCC 30 July 2004 is a good example of this principle and shows the pitfalls of accepting the results of a retrospective delay analysis without proper examination of the base information. Egger entered into a contract with Skanska for the design and construction of a factory to produce chipboard and other timber products to be built in East Ayrshire in Scotland. Skanska were responsible for design development, management and construction of the factory for a guaranteed maximum price of £12 million.

The works proved to be very difficult with many claims arising from Skanska and their subcontractors such that by completion, Skanska was making claims for a further £12 million relating to what it argued were extras to the contract. There was also a counterclaim by Egger for more than £4 million.

The disputes went to court where, after a decision of the Court of Appeal on liability, the matter went for a separate trial to

hear evidence concerning quantum. The hearing on quantum included the evidence of two expert delay analysts who provided evidence on the delay suffered by some of Skanska's subcontractors which lead to loss and expense claims which Skanska sought to pass on to Egger.

In the course of his judgement, Judge Wilcox made several comments on the evidence of the delay analysis experts, and in particular on the evidence of the expert employed by Egger who was a person of considerable renown within the construction industry.

The expert employed by Skanska was a planning consultant originally employed by Skanska during the project and later retained by them as an expert.The Judge considered the expert's knowledge of the actual events that occurred during the works an advantage and he was further impressed by how accessible his evidence was to the court. It was in an easy to understand series of charts and the Judge was most impressed by the expert for being objective, meticulous as to detail and, importantly, not hide-bound by theory when demonstrable fact collided with computer programme logic.

However it appears that the judge was not of the same view when considering Egger's delay analyst. Judge Wilcox was extremely critical of the evidence for a number of reasons:

- Firstly, the judge found the delay analyst's report too complicated and not accessible to the court. The report had been prepared by the delay analyst and a team of assistants and was several hundred pages long with appendices containing over 240 charts, and it was clear that the judge had difficulty in understanding them. On the basis that the role of an expert is to assist the tribunal in understanding complex technical matters, this was clearly a serious error.

- Secondly, the Judge was very concerned about the quality of the information which was entered into the delay analysis programme. He commented that the report had largely been based upon factual matters provided third hand, from employees of Egger, and that such information had not been tested or examined by the delay analyst before it was entered into the programme. The Judge gave an example to the delay analyst of information concerning a crane base that had been made available to him, which contradicted the information the delay analyst had included in his report. The Judge commented that this showed that no matter how impeccable the logic of the computer programme the information it produced would be flawed if the information inserted was wrong.

- Thirdly and finally, the Judge was also clearly irritated by the attitude of Egger's delay analyst on a number of counts. In the first instance, despite the Judge showing him the crane base information which contradicted the information that he had included in his report, the expert refused to consider changing his view whereby the Judge commented that it was surprising that the expert was not exercising sufficient intellectual rigour to admit the possibility of doubt. In the second instance, the judge commented that the expert had lacked a balanced approach and he gave the example of the delay analyst's method of dealing with concurrent delays. Egger's expert had taken the view that where there was a delay event that Skanska did not claim to be the responsibility of Egger; he had assumed without further investigation that Skanska was accepting liability for the event. Judge Wilcox described this as applying the logic of Humpty Dumpty - 'it is so because I say it is so'!

After comments such as these, it is not surprising that the Judge found strongly in favour of the evidence provided by the expert of Skanska.

The conclusion however is clear. Whilst sophisticated computer delay analysis techniques are a valuable tool for proving delay, they are solely dependant upon the delay analyst's selection of facts and interpretive judgment of them. The results of the analysis are only as good as the data put in, or more simply - if you put rubbish in, you will get rubbish out!

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THE ADMINISTRATOR'S VIEW

Some of you may be aware that I have been absent from my duties for a while. I have spent 4 months travelling, beginning in Hong Kong, travelling down South East Asia to Singapore, on to Australia and New Zealand, followed by a flight to Santiago de Chile from where we travelled across part of South America, finally ending up in Rio de Janeiro. A mammoth trek in 4 months, but worth every moment.

It has been the most amazing experience. We have done so much - from zorbing (a Kiwi 'sport' which involves being launched down a hill in a giant plastic ball hamster-style!) to sky diving. We have seen so much - from man made giants such as the Petronas Towers in Kuala Lumpur, the Christ the Redeemer Statue on the Corcovada in Rio and the splendour of the ancient temples in Angkor Watt, to natural features as diverse as glaciers and volcanic springs, and we have met so many interesting people from all walks of life, each with their own stories to tell.

Since my return, the question I have been asked most is "What did you enjoy the most?". This question is almost impossible to answer as each place has its own merits, from the huge, bustling cities to the peace of the tiny rural villages. However, I guess the real answer to that question lies not in a place name, or even a specific activity that we undertook, but in the lesson that I have brought away - the fact that this world is full of diversity and beauty, whether natural or man made, and that to have the chance to visit some of these is a life changing experience.

Suzanne Cash
Administrator to the QSi General Council

SO YOU THINK IT'S EASY TO DRAFT A CONTRACT !

I have just finished reviewing a contract for one of our clients. It was not difficult to work out that the contract was a hybrid document. Clauses had been taken from various sources and combined somewhat inconsistently to form a contract of about 150 pages. The result was, to say the least, a document full of contradictions, obscure in meaning and intent.

Nevertheless, I felt some sympathy with the draughtsman. No doubt he or she (or was it a committee?) was only trying to accommodate the numerous specific and complex requirements of his or her own client. In such a situation it can often be difficult to produce a lucid and user friendly contract. No doubt the draughtsman would have drawn some comfort from a letter which appeared in the Times recently.

Mr Mainprice was one of a team of lawyers charged with the task of drafting the original VAT legislation. Now, if you think a construction contract is complex, have a quick look at any Act with deals with taxation. (Sadly, there are many of them to choose from.)

When the Conservatives decided to introduce VAT they stated that the tax "would not apply to the working man's fish and chips". The Treasury lawyers were instructed that the supply of fish and chips was to be zero rated. On the face of it a fairly straightforward requirement to include in an Act. But what of Dover sole and French Fried potatoes served in the Savoy Hotel Grill Room ? Was this to be zero rated too ? No, said the Treasury: this was to be taxable at the standard rate.

So the resultant Act allowed for "food supplied in the course of catering for consumption off the premises on which it was supplied" to be zero rated. This, according to Mr Mainprice, only led to further difficulties. In the case of a wedding reception for example, what were the premises from which the supply came ? Was the supply made by the caterer from his premises, or at the place of the wedding reception itself ? The former would be tax free, the latter would not.

You can begin to see how a simple concept becomes difficult to apply.

Complex issues inevitably result in complex contracts (or Acts - in the case of VAT and fish and chips). However, we must not confuse complexity of content with simplicity of language. If you think they cannot comfortably co-exist, read some of the judgments of Lord Denning in the earlier editions of the Building Law Reports.

Encouragingly, standard forms of contract (and some Acts) are now being written in far more user friendly, plain English style. Nevertheless, this has not prevented (and will not prevent) disputes arising.

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How can a subcontract be determined on the ground that progress has not been regular and diligent?

The new standard form of building subcontract SBC Sub/C at clause 7.4.1.2. allows the contractor subject to notice to determine the subcontract if the subcontractor "fails to proceed regularly and diligently with the subcontract works". This reflects clause 8.4.1.2 of the main contract SBC/Q and therefore can be said to be "back to back" with it, but is it an effective clause? The writer suggests it is not.

Irrespective of what is provided for within the termination clauses the contractor will not lawfully be able to terminate on the basis that the works have not progressed regularly and diligently unless that is a requirement of the subcontractor under the subcontract, which it is not under the SBC Sub/C conditions.

The time for commencement and completion of the subcontract works are set out at clause 2.3 of SBC Sub/C which has two requirements; first, to carry out and complete in accordance with the programme details in the subcontract particulars, and secondly, to proceed reasonably in accordance with the progress of the main contract works. Neither of these requirements equate to an obligation to progress regularly and diligently. In practice no contractor requires its subcontractor to progress regularly but rather to be responsive to work being made available to it on site.

Even if it can be shown that the subcontractor has an obligation to progress regularly and diligently how does the contractor demonstrate that that is not happening and how does the contractor demonstrate, after notice of default, that the breach is continuing? The phrase would appear to imply that there is to be a consistent output of effort and that that effort is to be applied effectively. Thus, it could be said that the subcontractor was not working regularly if its labour output varied considerably or not being diligent if the effort was carelessly or ineffectively applied.

However, over what period of time is this performance to be measured? If a subcontractor's output varies from day-to-day

or week-to-week, is this a failure to perform regularly? For example, a bricklayer gang may comprise a team of 4 bricklayers and 2 labourers. If the production rate required by the project equates to a steady output from 2 bricklayers, is the obligation of the subcontractor satisfied if the actual production achieved averages to 10 bricklayer days per week? While this may be satisfactory it is less likely that if all a month's output was done in one visit that this would be considered working regularly.

Further, in order to give an effective notice under a termination provision for failure to progress regularly and diligently must the subcontractor have failed to act on both accounts. Since the provision does not state regularly and/or diligently, an effective defence may be that the subcontractor has not failed on both accounts?

It is suggested therefore that in order to issue an effective notice for an alleged breach of an obligation to progress regularly and diligently it will not be sufficient merely to state that the subcontractor has failed to proceed regularly and diligently but to describe how it is alleged to have failed, by stating clearly the rate of production the subcontractor was bound to have achieved and/or the nature of its failure to act diligently. It will be against this standard that the subcontactor's subsequent performance will be judged to ascertain whether the breach has been rectified or not.

Further details on subcontract issues are to be found in the writer's book entitled: "The Law and Management of Building Subcontracts"

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HOW TO SCORE AN OWN GOAL !

Leyton Football Club is the oldest in London. Less well known than its neighbour Leyton Orient, it belongs to the Ryman Premier League.

In 2001 the football club wanted to extend its clubhouse, provide office accommodation, a club shop, restaurant and a function suite. It bought a piece of land next to its ground on Lea Bridge Road in East London. The site was occupied by a car showroom which was to be demolished to make way for the new club facilities.

Having obtained planning permission for its development, the club appointed Clark Smith, a firm of consulting engineers, to obtain building regulation approval, arrange tenders and administer the contract whilst the works were carried out on site. The football club and the engineers agreed a fee of £32,000 for these services on the basis of the ACE Conditions 1998 Second Edition.

Tenders were obtained but the prices came in higher than the club expected. The club chairman thought the works could be procured more cheaply if he made arrangements with individual trade contractors of his own choice. He had a background in housing development projects and he was in a position to make arrangements with suitable trade contractors instead of appointing a main contractor and having the works carried out in a more traditional way.

Clark Smith were concerned with this change of arrangement. They pointed out that there were increased risks with this revised method of procurement. They were happy to provide a service assisting the trade contractors on site but the extent of this service would depend on the competence of the trade contractors. Clark Smith were also concerned that the original scope of works, for which they had agreed a fee had fundamentally changed and that it was now impossible for them to provide a fixed fee for services of an unknown scope and duration.

The construction work eventually started without any real agreement as to the scope of Clark Smith's works and how they would be paid. It was only at the end of the job that the parties properly addressed the issue. Not surprisingly a dispute arose.

Clark Smith claimed that they had carried out a substantial amount of additional work and were entitled to be paid a total fee of £91,627 (compared with the original fee of £32,000). As far as the football club was concerned, it admitted liability to the extent of £37,600 and initially counter-claimed damages for breach of the Engineer's duty to exercise reasonable skill and care. Having failed to provide particulars of the counter claim it was struck out by the court.

Mr Recorder Colin Reese QC sitting in the Construction and Technology Court decided that Clark Smith Partnership had carried out works additional to the original agreement at the request of the football club and, in the absence of an agreed fee or rates, should be paid a reasonable remuneration. As a result the Engineer was entitled to be paid a total fee of £84,000 subject only to some relatively minor adjustments for non productive works for which the football club was not liable.

This is yet another example of parties becoming involved in expensive litigation because they have failed to reach agreement on fundamental issues. No doubt the combined legal fees and the parties' own costs were well in excess of the amount in dispute.

Hoping that something can be agreed at the end of the day is often just wishful thinking. Even if the scope and duration of works is ill defined, it should at least be possible to agree a method of calculating the remuneration due. Sadly, Leyton Football Club found out the expensive way how to score an own goal.

(Clark Smith Partnership Limited v Leyton Football Club, 2005)

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Use QS Eye to Recruit Staff or Enhance Business Opportunities

We are offering space in the QS Eye magazine to those who are looking for staff or would like to advertise their services.

The advertising rates are:

Quarter Page £150 **Half Page £250** **Full Page £400**

Bursaries

As a way of attracting student members we are offering bursaries to universities to be spent on prizes for the best final year student on QS courses. The first to accept the offer was Liverpool John Moores University, where the award was presented at the prize giving ceremony last summer.

If you have any suggestions as to universities who you consider it may be worth us approaching please contact:

admin@theqsi.com

QSi Corporate Membership

The General Council has decided to offer corporate membership. This will apply in respect of consultancies, contractors, subcontractors and suppliers. Departments in the public sector would also qualify for corporate membership.

Subscriptions in respect of five or more members who are employed by a corporate member will be reduced by 50%.

Corporate members will, subject to their approval, be included on the Corporate Members List which will be used where appropriate for PR purposes and should provide the member with useful exposure.

Retired Members

We have been approached by some of our retired members requesting a subscription at a concessionary rate. The General Council has decided that forthwith the **subscription for retired members will be £25 per annum.**

WORDSEARCH COMPETITION!

Answers appear vertically, horizontally and diagonally in all directions - **GOOD LUCK!!**

Please send your completed entry to the address below no later than **1st October** for your chance to **WIN a bottle of bubbly!** The winner will be drawn from a hat in the event of a tie.

Words to search for:

Act
Claim
Contract
Damages
Design
Diligence
Dispute
Mediator
Quantities
Specification
Survey
Target
Tender
Theodolyte
Variation

Completed entries to:
Suzanne Cash, QSi, 61 School Lane, Hartford, Northwich, CW8 1NY

Y	G	S	B	U	S	V	N	G	S	J	D	S	H	T	L	H	A	V	J
Q	D	C	F	S	P	E	C	I	F	I	C	A	T	I	O	N	S	D	F
B	F	D	A	E	G	H	N	U	I	F	Z	M	A	H	T	J	Q	F	D
E	A	W	B	C	Q	S	A	H	R	A	S	H	D	R	M	L	T	Y	I
D	D	E	E	O	E	R	A	G	Y	T	E	N	D	E	R	R	T	E	L
I	G	T	S	N	H	Q	X	C	Q	F	V	F	D	B	R	F	N	H	I
S	B	Y	X	T	L	R	C	F	U	N	E	I	G	C	F	A	D	Y	G
P	E	L	B	R	U	V	A	F	Q	H	A	S	H	R	D	H	B	E	E
U	U	O	K	A	T	H	B	R	L	T	B	V	S	F	A	Y	A	B	N
T	V	D	L	C	L	A	I	M	O	Q	E	B	N	G	C	V	E	D	C
E	D	O	Q	T	D	I	D	R	E	R	F	A	F	A	N	S	W	U	E
W	L	E	E	Q	R	E	W	M	S	N	S	F	T	V	S	W	Q	K	T
G	P	H	B	W	S	Q	F	Q	D	U	V	W	Y	E	E	E	B	B	R
C	Y	T	T	I	F	M	H	A	Z	F	R	Q	R	D	G	F	E	W	J
K	R	R	G	R	H	Y	L	Q	J	H	Q	V	B	W	A	R	G	G	S
R	W	N	O	I	T	A	I	R	A	V	T	W	E	Q	M	T	A	F	B
W	E	D	W	D	R	E	J	X	P	L	T	D	G	Y	A	G	R	T	G
R	B	H	N	B	F	T	R	N	Q	E	X	B	W	F	D	R	Q	E	R
K	Q	J	E	Q	U	A	N	T	I	T	I	E	S	E	A	L	G	H	M
Q	V	L	Q	C	E	F	K	L	J	A	W	Q	V	B	T	R	T	C	A

Answers for the Spring 2006 issue Crossword:

Across 1 Solution. 6 Aisle. 7 Muck. 8 Aesop. 9. Etc. 11 Davies. 13 Deputy. 15 Oil. 17 Chilly. 19 Egan. 20 Oology. 22 Eland. 23 Gander. 24 Sieve. 25 Dene.

Down 1 State. 2 Tempest. 3 Once. 4 Mite. 5 Allowed. 10 Captivate. 12 Vineyard. 13 Dickens. 14 Yoyo. 16 Anyone. 18 Lodge. 21 Link.

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