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Have your cake…

Commercial and Tendering Risk

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As long as I've been in construction they've been cracking the old jibe about the role of quantity surveyors and lawyers. You know the one; *quantity surveyors go in whilst no-one's looking and bayonet the wounded then Lawyers go in after the quantity surveyors and strip the corpses*. A cruel jibe implying that we have little more moral integrity apropos business than a three-card trick merchant; as John Wayne might have put it: *lower than a rattle-snakes belly in a wagon rut* – a condition that, were it true, would still leave us several notches higher than bankers in the current moral integrity stakes.

Sadly though, based upon my experiences of reviewing ITT documents since the downturn set in, there may be some truth in it. A gradual sense of *déjà vu* has crept in to my frequent forays into the world of tender preparation in the last few years as I'm constantly reminded of the sardonic irony of the Chief Estimator I worked under in the early eighties, who regularly defined a winning tender as one which left you wondering what you'd cocked up to finish lowest.

Despite all the profound efforts of the UK construction industry since *Latham* to leave behind the cultural baggage of two centuries of social and class discrimination, industrial unrest, machismo, commercial distrust, disrespect and adversarial posturing that lay at the root of an industry embroiled in a *them-and-us* approach to risk management, we are lately seeing an unmistakable *buyer's market* retrenchment of risk allocation policy amongst certain elements of those who procure construction work. Risk apportionment of the most *outré* kind is beginning to creep into tender and bid documents, seeking to impose increasingly heavy burdens upon contractors to accept risks which, without the gift of *crystal-ball gazing,* they simply don't stand a chance of being able to manage.

So here are a few snippets of the kind of thing I'm talking about: first, an old chestnut that all Contractors will recognise;

> *'The Contract Sum shall include for all items not specifically mentioned in the Contract Documents but necessary to carry out the Works.'*

Yes it's a favourite shortcut of less proficient Contract Administrators everywhere, the *'your price is deemed to include for everything we've forgotten or can't be bothered specifying'* clause. I thought this had gone out with flares and mullet haircuts but the above example featured in a recent ITT document for a major infrastructure project.

Design and Build contracts seem to be a favourite target for the risk transfer brigade. Here, the JCT standard clause 2.10 is replaced with

> *'The Contractor further warrants that the Contractor has made all necessary allowances in the Contractor's Proposals for all Site conditions (including latent or unforeseen conditions) …required as shown or described in or reasonably implied from the Employer's Requirements. The Parties agree that no such conditions… shall give rise to … any entitlement to an extension of time… loss and/or expense …any other addition to the Contract Sum and/or damages…The Contractor shall not be entitled to rely upon any drawing, survey, report or other document prepared or provided by or for the Employer …and the Employer makes no representation or warranty as to the accuracy or completeness of any such drawing, survey, report or document.'*

The entire risk for latent and/or unforeseen [note the distinction between unforeseen and *unforeseeable*; the former being a subjective rather than objective test] site conditions, whether or not such conditions are shown or described in any way [accurate or otherwise] in information provided by the Employer, is passed to the contractor.

The intention of the design and build forms is precisely that; the contractor both designs and builds. Employer's requirements are meant, under the standard forms, to be descriptive rather than prescriptive, allowing the benefit of the contractor's early expertise in solving, adapting and moulding the design of a project to achieve broadly stated rather than strictly defined objectives. All too often, however, employers [or more probably their design advisers] seek to strictly define design to the *nth* degree at pre-bid stage, more or less producing a fully detailed design, whilst imposing upon the contractor all liability for that design, which it has had no involvement in. A thinly veiled attempt to *have your cake and eat it* perhaps*?*

Here is a typical example;

> *'Any reference to the design which the Contractor has prepared or shall prepare or issue for the Works* ***includes a reference to any design prepared or issued by others, whether before or after the date of this Contract.'***

This is more or less the same risk imposition worded slightly differently;

> *"The Contractor warrants that it fully accepts responsibility for designs and specifications contained in* ***both the Employer's Requirements*** *and the Contractor's Proposals."*

All these bespoke and undeniably onerous clauses were drafted by well-known, established construction lawyers who I suspect have, in their time, championed the cause of balanced and systematic management of risk. Now it may well be that such flagrant disregard for the principles of sound risk apportionment emanates from the employers and developers themselves, but I'm inclined to think not. If anyone can *run with the hare and hunt with the hounds* it's the construction law fraternity.

Doubtless defenders of this approach to contracting risk will point out that contractors are perfectly at liberty to decline to tender on such terms. Whilst I accept that a fundamental tenet of English contract law is the right of the parties to freely bargain upon whatever basis they mutually agree, such clauses are drafted, in my view, with little or no thought for the balance of risk apportionment as between the parties or the *de facto* ability of contracting organisations to actually manage such risks successfully. Anyone who has

worked in contracting will know that, in a normal market, the idea of declining to tender because the employers' imposed conditions are too onerous is anathema; to think that, in the prevailing maelstrom of competitive bidding; contractors are any more likely to do so is simply obtuse. Contractors faced with high-risk conditions such as above, will generally deal with them by:

- Trying to offset them by getting the original designer to sign up to a collateral warranty arrangement or making them liable under Third Party Rights legislation.
- Trying to fully vet the pre-tender design so as to price any design failures or shortfalls into their price. Generally tender periods are far too short, and bid document deliverables far too copious to allow time for such an exercise to be undertaken with any semblance of accuracy.
- In the case of all-risks ground condition clauses, contractors might seek to undertake their own more intensive site investigations. However in my experience time and access restrictions, usually imposed by the employer, prevent this from yielding all but the most imprecise additional information.
- Insure such risks…a risky and prohibitively costly business itself, these days!
- Price such risks as an all-in risk allowance…How long is a piece of string?
- Ignore the risk and hope to chance that it doesn't happen. Beware Murphy's Law!!

None of these options are perfect. The last two ought not to feature in the reckoning at all…but they do!

Surely, if the history of construction law in the last decades of the 20th Century taught us anything it is that nothing is to be gained by any developer or employer in construction by merely passing risks on to parties who are no better able to manage them. This inevitably leads to discrepancy, misunderstanding and ultimately conflict…and very rarely serves the interests of a developer or employer in the construction process.

Whole libraries of books have been written and careers forged upon the principles of assessing and managing risks efficiently. Perhaps we need to go back and consult a few of them the next time we draft amendments…

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