Liquidated and Ascertained Damages

JCT (RIBA) Standard Forms of Building Contract

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Authority for several statements made in this commentary will be found in the following reported cases:

(a) *Token Construction* v *Charlton Estates* (CA 1973) 1 BLR 48;

(b) *Peak Construction* v *McKinney Foundations* (CA 1970) 69 LGR 1 and 1 BLR 111;

(c) *Miller* v *London County Council* (1934) 50 TLR 479; 151 LT 425 and All ER 657;

Reference is also made to the following legal textbooks:

(d) *Hudson's Building and Engineering Contracts.* Tenth Edition by Duncan Wallace at pages 631 and 643 to 646 inclusive;

(e) *The Standard Forms of Building Contract* 1971 Edition and Supplements by The Right Hon. Sir Derek Walker-Smith, QC and Howard A. Close at page 95.

Liquidated and ascertained damages are agreed at the date of contract for the benefit of the Employer.

Per Salmon LJ in *Peak* v *McKinney:*

"The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him."

Liquidated and ascertained damages are supposed to be a fair and reasonable pre-estimate of the damage they are designed to cover. They are not to be a penalty to frighten the contractor nor to punish his failure to complete on time. The courts will not interfere with liquidated and ascertained damages; but nor will they enforce them against a contractor if they amount to a penalty. It does not matter what words the parties use in a contract. The court will decide whether or not the pre-estimate amounts to a penalty.

Per Lord Dunedin in *Dunlop Pneumatic Tyre* v *New Garage & Motor* (1915) AC 79; 83 LJKB 1574; 111 LT 862; 30 TLR 625:

"Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages".

The contractor should not suppose, however, that the courts will protect him from damages which are at a rate higher than was reasonable on second thoughts about the matter. The damages agreed are part of the bargain made, good or bad, and the courts will interfere only if they really are a penalty.

Liquidated damages run from a definite date. This is essential in that it must be possible to find a date from which liquidated damages can be calculated otherwise the employer's right to them is lost.

Contract clause 22 reads:

"If the Contractor fails to complete the Works by the Date for Completion stated in (the Contract) or within any extended time fixed under clause 23 or clause 33(1) (c) . . . and the Architect . . . certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer . . . Liquidated and Ascertained Damages . . . and the Employer may deduct such (Damages) from any monies due to the Contractor under this Contract."

Liquidated and Ascertained Damages may be deducted from Interim Certificates issued by the Architect in compliance with contract clause 30(1) notwithstanding the omission from the wording of that clause of any express reference to liquidated and ascertained damages. The words of clause 22 include "from any monies due to the Contractor under this Contract"; which is wide enough to embrace the monies due under clause 30(1).

Per Forbes J. in *Algrey Contractors* v *Tenth Moat Housing Society* (QB 1972) 1 BLR 45:

"(The Contract) says that the building owner is entitled to deduct sums from any monies due or to become due (and) it seems to me that it means what it says. As long as they are liquidated and ascertained, so that they can properly be deducted, and as long as they are also the subject matter of the architect's certificate, they should properly be deducted from sums due under the interim certificate."

However, clauses 22, 23 and 33(1) (c) are inserted in the contract for the Employer's benefit and the courts will construe them strictly in the manner least favourable to the Employer.

Liquidated and Ascertained Damages will be disallowed by the courts if the Architect has not concluded his opinion with regard to each and any request for extended time under contract clauses 23 and 33(1) (c) made by the Contractor.

Per Edmund Davies LJ in *Token Construction* v *Charlton Estates:*

"(Before clause 22 can be relied upon) it must first appear that, following upon a request for extension of time by the contractor, the architect formed the opinion that, in the relevant circumstances indicated by (the

Conditions of Contract), it was "fair and reasonable" to grant that request. The next stage is that he must "make" the extension, and this, of course, means that he must specify its duration, for unless this is done it would be impossible to find a date from which the liquidated and ascertained damages . . . could be calculated."

Furthermore, the right to liquidated damages will be lost if the Employer or his agents cause delay which falls outside the 13 reasons stated in clauses 23 and 33(1) (c) and which, therefore, does not give the rights to request or grant extended time under the Contract.

Per Salmon LJ in *Peak* v *McKinney:*

"If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the (liquidated damages) clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled."

Furthermore, the right to liquidated damages will be disturbed if the Architect does not certify his opinion in words free of ambiguity.

Per Roskill LJ in *Token Construction* v *Charlton Estates:*

"It is important to appreciate that the architect, when acting or purporting to act (in extending time under the contract) or indeed under any other empowering clause or condition in (the) contract, is exercising a power which affects the contractual rights of the parties to the contract by varying those rights in one or more ways as the parties have agreed should be the case. It is therefore of crucial importance that any exercise of power by the architect should be done clearly and unambiguously so that the parties know where they are and should not be left in doubt or indeed in dispute as to their consequential mutual rights and liabilities after the exercise or purported exercise of this power."

Furthermore, the right to liquidated damages may be disturbed if the Architect does not (in the words of clause 23) "so soon as he is able to estimate the length of the delay . . . make in writing a fair and reasonable extension of time for completion of the Works". These words contemplate an exercise by the Architect of his power to extend time within a reasonable time of the cause of delay having ceased to operate. "So soon as he is able" are words which the courts will construe strictly on the facts of a particular case. The Employer's right to liquidated damages will be lost on the authority of *Miller* v *London County Council* if the courts decide that the Architect acted or purported to act too late in extending time, thereby placing time at large under the contract and denying the Contractor any target date for completion towards which (again in the words of clause 23) he might "use constantly his best endeavours to prevent delay and (might) do all that may reasonably be required to the satisfaction of the Architect to proceed with the Works." If the Contractor is denied a realistic target date under the Contract, in my opinion, he cannot use his best endeavours (since they presuppose realism) and the Architect is prevented from being reasonable no matter what his requirements may be.

On the other hand, however, the words of clause 23 do permit retrospective time extensions where it is not possible for the Architect to estimate the length of the delay until after the target date for completion currently fixed by a contract. In such circumstances time must truly be at large since, if the Contractor has made a request for extended time and if the cause of delay is one about which the Architect fairly and reasonably cannot estimate the duration, then the current completion date must be held to be temporarily waived until such time as the Architect can conclude an opinion and fix a certain date. The onus of proof as to the uncertainty would lie with the Employer and his agents. Similarly, the inability to "estimate the length of the delay" could not be used by the Architect as a cloak to conceal any reluctance to conclude an opinion regarding matters which (no matter with what difficulty) might reasonably so be "estimated".

The Oxford English Dictionary gives four basic meanings for the verb "estimate" two of which are obsolete. The two current meanings are:

"2. To form an approximate notion of (the amount, number, magnitude or position of anything) without actual enumeration or measurement; to fix by estimate at." and;

"4. To gauge; to judge of, form an opinion of."

In my opinion, once a cause of delay has ceased to operate there can be very few instances in which it is not possible to form an approximate notion of the likely length of the delay brought on by that cause. The issue can become complicated if further delay is suffered as a direct consequence of the initial cause of delay as, for example, where the giving of possession of the site of any Works is delayed until a date when the Contractor's workforce has gone on strike. Many such permutations are possible in the varying conditions of building contracts. However, the resolution of such difficulties is not beyond human ingenuity. In my submission such confusion of causes of delay should be conveniently parcelled by the Architect into concluded and continuing causes so that extensions are possible for those causes which have concluded even though as a direct consequence further delay continues.

The words "certify in writing" in clause 22 and "make in writing" in clause 23 mean the same thing. Subject to the proviso as to clearness and freedom from ambiguity, the Architect may express his opinions under clauses 22 and 23 in the manner he sees fit to use.

Per Roskill LJ in *Token Construction* v *Charlton Estates:*

". . . it is, in my judgment, essential that, while the architect is left free to adopt what form of expression he likes for the grant or certificate, as the case may require, he must do so clearly so that the intent and substance of what he does is clear."

Whether or not the Architect's opinions will fail for want of written form is an open question. The requirement as to writing in clauses 22 and 23 is for the removal of doubt, but the JCT Standard Forms of Building Contract elsewhere make notice in writing a "condition precedent" to the enjoyment of rights under the Contract. The absence of such words from clauses 22 and 23 may preserve the parties' respective rights and obligations

under the contract even if the Architect's action under those clauses is not in writing, provided that the parties are in no doubt what their mutual rights and liabilities are. Proper written notice, however, is always to be prefered.

Where clauses 23 and 33(1) (c) clearly cover the causes of delay in question any extension of time given by the Architect as a concluded opinion (or any expressed refusal to grant time) will bind the Contractor to the existing or revised Date for Completion even if the Architect is truly in breach of contract and even if the Contractor disputes the Architect's opinion on the matter. Under the JCT Standard Forms of Building Contract the Architect has no power to open up and review his own opinion previously given regarding extensions of time and the Date for Completion. It follows that the Architect's estimate of extended time may be wrong to the detriment of either party to the contract. The Employer may be denied his entitlement to liquidated damages, and the Contractor may be denied his right to fair and reasonable time for completion of the Works.

In the event of such error the following remedies are available:

(a) the Employer need not exercise the discretionary power of clause 22 when it would be unjust to do so, the operative phrase in that clause being "the Employer *may* deduct" liquidated damages;
(b) clause 35 gives either party the right to ask an Arbitrator to "open up, review and revise any" opinion, requirement or notice given under the Contract.

From what has been said, therefore, and on the basis of the precise words used in clause 22, it follows that an Employer is entitled to liquidated and ascertained damages under the JCT Standard Form of Building Contract only if completion of the Works has been delayed beyond the date fixed by the Contract for reasons which are the fault of the Contractor; and only if the Employer (through the agency of his Architect) has given in due time grants of extended time where appropriate under the Contract; and only if the Employer through his own actions or those of his agents has not prevented the Contractor from completing by the date fixed.

If liquidated damages are properly due under the contract, it is no part of the Architect's duty to deduct such damages from payments otherwise certified as due under the contract nor, indeed, to do anything other than certify the date when in his opinion the Works ought reasonably to have been completed. Such action is all that is required by clause 22, and the Architect's opinion may yet be reviewed by others.

Per Roskill LJ in *Token Construction* v *Charlton Estates:*

> "It is no part of (the Architect's) duty to state to one party, his own clients, a legal consequence, whether certain or only possible, of what he has certified. That consequence arises, if at all, from the contractual conditions which come into play upon, and only upon, due performance by the architect of his limited functions under the condition."

Roskill LJ then speaks of the "independent exercise by the architect" of those "limited functions which the architect is required to perform" by virtue of the contractual condition regarding liquidated damages, and distinguishes them from the architect's duties to his client outside the impartial duties imposed by the Contract.

Technical Queries

The following is a selection of questions submitted to the Members' Advisory Panel, together with the replies which were forwarded to the enquirers. We would be interested to receive the comments of readers who may be able to amplify any of the replies or who may have different views to offer in respect of them.

Members sending queries to the Panel are particularly requested to ensure that all relevant information is included, especially in regard to the precise edition of which form of contract, the method of measurement, specification clauses and bill preambles. When forwarding photostatic reproductions of documents it would be appreciated if ten copies could be sent for distribution to Panel members, as it is not always possible to make satisfactory photostat copies of photostats.

Profit on Nominated Supply Items

QUESTION

Under the current edition of the JCT Form of Contract (With or Without Quantities) when is the Main Contractor entitled to receive, in Interim Valuations, his profit on Nominated Supply items?

(a) After delivery of the goods, but before they are fixed
or (b) Only after the goods are fixed.

REPLY

Clause 30 (2) says "The amount stated as due in an interim certificate shall . . . be the *total value* of the work properly executed and of the *materials and goods delivered . . .*".

It is submitted that the total value would include contractor's profit in proportion to the amount included in the certificate as due to the nominated supplier.

In the case of nominated supply items, the fixing is

normally a separate item measured elsewhere in the bill and the rate for this would also include an element of profit. However, the profit item which immediately follows the P.C. for supply is payable when the goods are received on site and included in an interim valuation and so (a) in the enquirer's letter is correct.

It should be remembered that there is a provision in clause 30 (2) that the goods shall be included in a certificate only at ". . . such time as they are reasonably, properly and not prematurely brought to . . . the works . . ."

Discount and profit on Nominated Sub-Contractors fluctuations

QUESTION

Under Clause 31 D5(b) in the Main Contract, clauses 31A, 31B and 31C shall not apply and we are to refer to the relevant clauses of the Standard Form of Sub-Contract (Clauses 23A–D).

I quote Clause 23D(3) "The Contractor on behalf of and in consultation with *the Sub-Contractor may agree with the Quantity Surveyor . . . what shall be deemed for the purposes of this Sub-Contract to be the* net *amount payable to or allowable by the Sub-Contractor in respect of fluctuations. . . .". This falls in line with the Main Contract Clause 31 D3 and seems to establish pretty conclusively that fluctuations for Nominated Sub-Contractors shall be paid and allowed strictly nett.*

However, some Contractors request payment of Nominated Sub-Contractors fluctuations under Clause 30 5 (C) which requires profit adjustment "pro rata" to that included in the Schedule of Rates in settlement of Nominated Sub-Contractors accounts. Therefore the fluctuations would attract Contractors profit and not be strictly in accordance with Clause 31 D 4 (C) (ii). These two Clauses seem to be in contradiction.

If the Nominated Sub-Contractors fluctuations are adjusted under clause 31/F do the calculated fluctuations already include a provision for discount under clause 27(b)?

REPLY

Clause 31 is not applicable to this matter; it deals only with the contractor's own fluctuations and those of his domestic sub-contractors.

Clause 23 of the "Green Form" only deals with the payment to the sub-contractor by the main contractor.

Payment to the main contractor in respect of nominated sub-contractors' accounts is dealt with under 30 (5) (c) which states in line 1 ". . . the amounts . . . payable under the appropriate contracts . . ." and in lines 11/12 ". . . after allowing in all cases *pro rata* for the Contractor's profit at the rates shown in the Contract Bills . . .".

The profit percentage should therefore be added to the whole sub-contract account including fluctuations.

There exists unfortunately an anomaly between the main contract form and the green nominated sub-contractors form in the matter of main contractor's discount. JCT form clause 27 (a) (vii) requires that the contractor shall be allowed $2\frac{1}{2}\%$ discount on nominated sub-contractors' accounts (the *whole* accounts including fluctuations and dayworks). Green form clause 23A requires that the sub-contractor shall be paid his fluctuations *nett.* Clearly the two cannot be reconciled, except by the addition of 1/39 to the amount of the sub-contractor's account. There is no authority in the contract for adding the 1/39. However, many surveyors do so on grounds of equity. A majority of the panel members support this.

It is understood that the revision of the green form which is currently being carried out deals with the problem.

If the nominated sub-contractors' fluctuations are calculated by the formula method under green form clause 23F, the same situation as above exists as regards main contractor's discount. No separate provision is made.

Fluctuations after contract completion date

QUESTION

The Form of Contract is the JCT Standard Form of Contract where quantities form part of the contract and is on a fully fluctuating basis.

Am I correct in assuming that where a contract runs over the date for completion (or in this case, over the extended date for the completion) that the contractor is entitled to reimbursement of increased costs based upon the invoices presented even if these invoices are dated after the extended date for completion? The alternative which has been suggested to me by the local authority surveyor is that the increases should be frozen at the amount of the latest invoice received prior to the date of completion. Any invoices that are received after the date of completion he contends should be only used for their quantity and the quantity extended at the rate of the latest invoice prior to the date of completion.

My contention is that the contractor is entitled to all actual increases occurring and the building owner's redress is in the liquidated and ascertained damages.

REPLY

Fluctuations are payable in full right up to the date of practical completion whether or not the date for completion (or extended completion) has been exceeded. This was decided in the case of Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1971), where it was found that this was applicable irrespective of delays and by whom they were created.

If Clause 31F (the formula method) was applicable however, then the indices would indeed be frozen at the completion or extended completion date, subject to 31F(7) (b).

As the enquirer states, the Employer's redress is in liquidated damages.

Preliminaries in Bills of Quantities for Building Works

By N. O. M. Azu, MSc, DipQS (Nottm), (Associate)

There are some members of the construction industry who see very little purpose in investigating the subject of Preliminaries (Prelims), however, it became apparent during a recent study by the author that there was, in fact, considerable scope for research into the subject if only because of the divergent views held by many members of the design and construction team.

This article is based partly on the analysis of replies received from two sets of questionnaires on Prelims sent out to members of the construction team in an effort to reconcile theory and practice, and partly on the results and conclusions taken from the overall study.

The questionnaires were designed to find out what the members of the construction team, including all the expertise involved in preparing and using Prelims either directly or indirectly, thought about the subject and, where prudent, to compare these thoughts with existing theoretical concepts. Finally, ways of postulating the optimum use of the general concept of Prelims was investigated.

From interviewing many people concerned with the subject from all sides of the contractual fence, i.e. people who want to maintain the *status quo,* people who want to see Prelims left out of the Bills of Quantities (BoQ) and people who advocate minimal change, it became apparent that a small sample would be adequate for the study, however, the results obtained, like all statistics, are subject to normal sampling bias.

Two sets of questionnaires were sent out:
1. to construction firms, and
2. to independent professionals, e.g. quantity surveyors and architects in private practice, education, government departments and research establishments.

The construction firms were chosen at random but from the Midlands area, although because some of the larger firms operate their Estimating Departments on a national basis, it is reasonable to suggest that the results may reflect a national pattern.

Questionnaire (2) was sent to people in all parts of England and Wales, whom it was thought had strongly held views.

The contents of Questionnaire (1) covered:
- Preliminary particulars
- Format and layout of the Prelims bill
- Contract
- Pricing
- Importance
- Uses
- Observations
- Generally
- Research

The contents of Questionnaire (2) covered:
- History of Prelims bill
- Preparation of Prelims bill
- Format and layout of Prelims bill
- Contract
- Uses
- Research
- Generally

Size of Firm v Present Format of Prelims Bill Annual Turnover up to £	Satisfactory	Unsatisfactory	Needs a change
100 000	*	*	*
250 000	*	*	*
500 000	–	–	–
750 000	–	–	–
1 000 000	–	–	–
Over 1 000 000	58	17	25

Figure I. E.g. 25% of firms with Annual Turnover exceeding £1m think that the present format needs a change.

The analysis of both questionnaires showed that:

73% of construction firms think that not too many items are covered in the Prelims bill and the same percentage use Prelims clauses in detail. This is surprising as the majority of the other members of the construction team, not intimately involved, hold a contrary opinion.

87% think Prelims should be an integral part of the BoQ. It appears that contractors are generally not impressed with the "get-out" clauses sometimes included on behalf of the employer by his agents.

60% want the contract clauses listed. It is not clear why they want these since they are not usually priced, perhaps to serve as a reminder of their importance in a general sense.

The result from the answers on the philosophy of pricing is interesting for it is not generally known what lies behind this. Only 7% price based on intelligent guesswork, a higher result was expected. This result is clearly counter to the views expressed by the Institute of Building (IOB) East Midlands Region Estimating Section in 1971 where it vigorously recommended the incorporation of sufficient items from the Code of

Difficulty in Pricing v Philosophy of Pricing	1 First Principles	2 Historical Data	3 Intelligent Guesswork	4 Combination of 1 & 2	5 Combination of 1, 2 & 3
1 Insufficient information	—	—	—	50	50
2 Difficult to price	—	—	50	—	50
3 A combination of 1 & 2	—	—	—	—	*
4 Better priced elsewhere	—	—	—	—	*

Figure II. E.g. 50% of firms that have difficulties in pricing because of insufficient information price from a combination of 1 and 2 (First Principles and Historical Data).

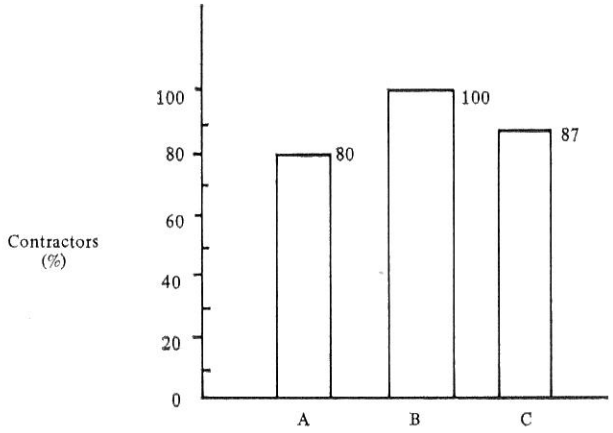

Figure III. Observed relationships between value of Prelims and A – Contract Period, B – Size of Project, C – Type of Project.

Adequacy v Present Format	Satisfactory	Unsatisfactory	Needs a change
Cannot be adequately covered elsewhere	75	0	25
Can be adequately covered in the Preambles and measured work	*	*	*

Figure IV. E.g. 75% who say that Prelims cannot be adequately covered think that the present format is satisfactory.

Practice into the Prelims to offset the degree of guesswork in pricing Prelims.

Estimating surely involves foretelling situations about which little is known, more so with Prelims. There is some evidence to show that estimators try to evade the real problems of their trade by presenting socially acceptable forecasts.

73% actively collect data from sites and head office for future use in pricing Prelims whilst only 13% price from first principles and historical data and 7% from historical data only. There appears to be some inconsistency here.

67% agree that site management is the most expensive Prelims item. There may well be some correlation between this figure and Fine's assertion that if you discard cover prices, the difference in price between the highest and lowest bidder is about equal to the mean estimate of the labour content of the job or, to put it another way, if you discard cover prices, the difference in tenders is caused by the costing of labour by the different firms.

93% think that pricing Prelims in detail is a help. This is very surprising indeed because to put it mildly, very few contractors price their Prelims bill in detail.

It is surprising that 87% think that Prelims could not be adequately covered elsewhere in the BoQ. Perhaps this result reflects the construction industry's reluctance to change established practice, however inadequate it might appear to be.

Research v Prospects for BoQ	Good Prospects	Some Prospects	No Prospects
Positive Suggestions	67	11	22
Negative Suggestions	80	20	0

Figure V. E.g. 67% of these who made positive suggestions think that there are good prospects for the BoQ in general.

Distinctively split v Present format	Satisfactory	Unsatisfactory	Needs a change
To split into priceable and non-priceable items	25	*	*
Not split into priceable and non-priceable items	*	*	11

Figure VI. E.g. 25% who want Prelims split into priceable and non-priceable items think the present format is satisfactory.

100% think that the size of the project has some relationship with the value of Prelims as shown in Figure 3. If size is synonymous with tender figure, then this is not borne out by the facts since the analysis of tenders of various sized projects showed no identifiable trend.

The results of the questionnaires appeared to show that both the design and production teams want to retain Prelims as an integral part of the BoQ, i.e. 94% of the former and 87% of the latter.

The construction firms (73%) and professionals (63%) see good prospects for the continuation of BoQ prepared by the independent quantity surveyor (QS). This confirms the observation that the industry is not ready for any radical change as far as the documentation of building contracts is concerned.

54% of the construction firms want Prelims clauses split into priceable and non-priceable items, whilst only 25% of the professional groups see this as an advantage.

The fact that only 25% of professionals and 27% of construction firms think Prelims play some role in facilitating claims is not particularly surprising since Fine observed that only 0·1% of contractors' incomes come from claims whilst 6% emerges through extra items.

General Conclusions

Several eminent quantity surveyors have queried the role of Prelims in the construction industry as a whole, but due to the conservative nature of the industry, little, if any, action has been taken to bring in a radical change.

The building industry is not ready for the total abandonment of Prelims but some change is required to bring it in line with the current thoughts of both people who prepare and use the section in practice. This need is emphasised by the lack of consistency in the preparation and use of Prelims.

Contrary to the majority opinion expressed in the questionnaires, the author believes that some of the Prelims clauses can be adequately covered elsewhere in the Preambles or measured work in the BoQ.

The Preambles should precede the relevant work section. According to the Working Party on BoQ by the Junior Organisation of Quantity Surveyors (JOQS) Research Programme in 1968 80–85% preferred the Preambles to precede the trades or work section in the BoQ and that the bill item be fully described in preference to full Preambles.

The fact that 73% of the construction firms think that not too many items are covered in the Prelims Bill in a way confirms the findings in the Banwell Report of 1964 on the simplification of the BoQ where builders regarded BoQ as essential and did not wish to see in the existing conditions any diminution in their size or the range of information they contained.

The view is, however, often expressed that the contracts manager rarely reads in detail the mass of information sometimes contained in or implied by the Preliminary Clauses to Bills of Quantities.

Anything that can be done to minimise the amount of data the contractor has to assimilate, providing all relevant information to the project is given, is a step in the right direction. More practical information regarding the project, sometimes included in the Prelims should be given on the drawing which is, perhaps, a more practical document.

There is some evidence to show that in spite of the complexity of construction projects Sweden, for instance, has managed to rationalise the amount of contract documentation due to the growth of mutual trust between professional members of the construction team.

The principle of "item coverages" adopted by the Department of the Environment is recommended for cutting out large amounts of repetitive material in the BoQ and with particular regard to Prelims where it is imperative to state particular items. A standard booklet, or code of procedure, could be devised and could be deemed to be in the possession of every tenderer and this would list the items to be included in the rate. This would enhance the concept of standard descriptions generally making the life of estimators easier and also cutting down arguments at the Final Account stage. It could be argued, of course, that this will place greater specific responsibility on the QS.

There is no doubt that the overwhelming majority of the items in the Prelims are not priceable as such, therefore some practitioners advocate cutting down the amount of this type of information. On the notion of stating only priceable items, there is a problem regarding who should determine what is priceable, since contractors in general are not consistent in their pricing methods.

The minimisation of what costs are included in the Prelims, thus putting the costs in the appropriate sections of the BoQ, would make the BoQ rates more realistic for the purpose of valuing variations in accordance with Clause 11 (4) (a) of the JCT Form. The practice of some contractors of including the whole of the profit under clauses such as Contractors' Obligations or the like undermines this assumption.

Contractors are under great pressure when estimating Prelims with any degree of accuracy, therefore information which would help to facilitate pricing should be given. There is a tendency however to note superfluous information with the attendant danger of overlooking important information. The idea of a checklist would be a help in solving this type of problem.

In situations where a lump sum value is submitted to cover the whole of Prelims which is generally quite unsatisfactory, it should be made obligatory for contractors, when submitting their priced BoQ, to break down the value of Prelims into:

- fixed and variable costs
- detail pricing of the constituents of site management costs

'Have you no idea how many estimating pads we should order?"

- detail pricing and list of plant where not included in the other rates elsewhere in the BoQ, together with particular utilisation periods
- detail pricing of any other major factors which the contractor considers to be crucial in arriving at his tender for the project, e.g. projected cashflows, etc.

These would enhance the use of Prelims for interim valuations, variations and cost studies generally.

While the Prelims are an integral part of the BoQ, which is a contract document, it should be noted that the provisions in the Prelims are only binding insofar as they relate to "the quality and quantity of work". The extra conditions which some architects and quantity surveyors are in the habit of including in the Prelims to cover any eventuality have no contractual effect unless physically incorporated in the JCT Form.

The actual Form should be incorporated in the BoQ thus eliminating the need for listing the clause headings of the JCT Form. Clauses not required should be physically deleted on the Form and preferably initialled by the parties. Consequently the real danger of discrepancy between the JCT Form and the Prelims will be eliminated.

In the absence of cash columns where the contractor wishes to price a contract clause, he should extract the clauses giving details of his pricing when required by the employer.

Quantity surveyors should desist from disclaimer or get-out clauses such as "do not order from the Bills", as this is often regarded as acting in an unprofessional manner.

The details in the Prelims should contribute in no small measure towards the total cost of the project, therefore it is prudent that great care should be taken in its drafting, notwithstanding the format.

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Correspondence

A Tale of Woe

Sir,

I am following with interest the continuing saga of the Senior, Lesser Partnership and, with humblest apologies to Mr. Miller, put forward the following possible anomalies in the contract, in like style.

Jim
Have you seen these items in Green's claim?

Sam
Oh no! Not more worries from that man. OK, what has he done now?

Jim
Firstly, he claims that we have no right to make deductions from his fluctuations for those items we discovered on invoices which were lower than his basic list.

Sam
And why not? – clause 31A talks about decreases as well as increases!

Jim
Ah, but . . . he is quoting 31D(2), he didn't give notice of any of the decreases which is a condition precedent to payment.

Sam
Oh God. Why do these people have to read the contracts rather than leave things to us. Was there more?

Jim
One more point. He claims interest for breach of clause 30.

Sam
How come? Surely our valuations included for the total of work executed, etc.

Jim
No. He doesn't dispute that the calculation of the valuation was fair but points out that the "total value" must be inclusive of fluctuations and . . .

Sam
But he didn't even submit fluctuation claims until after practical completion. What's he got to complain about, we included the value as soon as possible.

Jim
He quotes 30(5) (b) – he doesn't have to provide necessary documents prior to payment of interim certificates and he goes on to state that, as invoices would not have been available for recently delivered materials, we should have used the notified increases to calculate the total amount due in interim certificates.

Sam
Think I'll go off for a round of golf – this account is going to give me a nervous breakdown before long.

Exit Jim.

Yours faithfully,

P. D. Horne

Maidstone, Kent