Conference on avoiding a dispute

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An interesting and informative one day Conference was held at Trent Polytechnic Nottingham on Friday, 17th March, 1978, concerned with ways and means of avoiding disputes on building contracts and the appropriate administrative arrangements. The Chairman was John H. M. Sims, Building Contracts Consultant and the Speakers were: George Davies, Quantity Surveyor; Keith Roberts, Contractor; and Stuart Hendy, Architect. The general arrangements for the Conference were organised by Roy Morledge, Senior Lecturer in the Department of Surveying at Trent Polytechnic. John Sims introduced the Speakers and complimented the Polytechnic on organising a Conference concerned with avoiding disputes, rather than settling them after they had arisen – it was a very refreshing change of approach.

Stuart Hendy stressed the importance of the RIBA Plan of Work as a guide to orderly working and planning and how the members of the building team needed to have confidence in one another to achieve the successful operation of a building contract. A major source of dispute was lack of information at the appropriate time and this was sometimes accentuated by disputes between the members of the design team. Other matters dealt with by Mr. Hendy included the need for adequate time for tendering, the nomination of sub-contractors not later than the tendering period and the need to give more guidance to the contractor as to the records to be maintained. Mr. Hendy's advice to architects was "Don't wait until the contractor asks for information – act in advance". In fact, there is a need for improved communication between all parties to a building contract.

George Davies gave a wealth of advice on the quantity surveying aspects of contract administration. He highlighted the use of approximate quantities where a design is incomplete rather than producing a bill of quantities containing numerous provisional items. Other alternatives were the use of prime cost plus fee and management fee contracts. He emphasised how the type of contract used depends on conditions and how it was sometimes advisable to use a two-stage process. He warned against trying to override the contract by the inclusion of clauses in the bill of quantities. Furthermore, this practice is contrary to Clause 12 of the Standard Form of Contract. He also viewed with disfavour the inclusion of specific items aimed at opting out of the Standard Method of Measurement. Mr. Davies outlined the problems that sometimes occur when provisional sums are incorporated in bills of quantities to cover small buildings on large complexes due to the problem of agreeing rates for scaffolding, preliminaries and smaller items. This procedure is sometimes adopted with the intention of obtaining lower quotations from small builders but at the end of the day it may be decided to give the work to the main contractor.

An interesting discussion centred around the definition of "running sand". It had been suggested that it might be water-bound sand, or sand that will not stand up. It seems evident that the term applies to sand whose condition changes after being worked. Another matter for discussion was the valuation of preliminaries, some of which are time-related and some of which are value-related. The question was also posed as to the ownership of materials on site but it seemed evident that the quantity surveyor should value them and the architect should decide whether or not to pay for them. With regard to defective work, the RICS Standard Valuation Form has a note inserted at the bottom requesting the architect to delete from the valuation any defective work. Mr. Davies queried whether the deduction should cover the cost of replacement but Mr. Sims expressed the view that the valuation should be on the basis of the work not having been carried out. Many disputes arise from the operation of Clause 31 relating to fluctuations. A typical instance was the question of fluctuations on bonus payments.

"I'm not accustomed to disputes being settled verbally."

Keith Roberts argued that the term claims should only be in respect of fundamental breaches of the contract and that the remainder were contractual entitlements. This was in general supported by Mr. Davies who pointed out that the Standard Form of Contract does not use the term claims. Mr. Roberts also highlighted some of the main problems with which the contractor is faced, such as the interpretation of "quality" in Clause 1 of the Standard Form and the provision of setting out drawings under Clause 5, particularly when the construction work is to be carried out on very confined urban sites. With regard to Clause 11, it is necessary that very clear written instructions should be given in respect of all variations and it is necessary for the quantity surveyors acting for both parties to consider carefully the conditions under which the work is to be executed in order that reasonable rates may be determined. Mr. Roberts emphasised the need for all conditions relating to nominated sub-contractors' quotations to be made known to the contractor. Far too often, the small print on the rear of quotations include conditions which do not comply with those in the main contract. It is essential that the architect checks quotations and conditions to ensure that they are acceptable. Mr. Roberts felt that the designer was too remote from the builder and probably all would agree that there is great merit in bringing in the contractor at the earliest possible stage. It was also felt that there was a need for greater integration of building education and Dr. Seeley, in the ensuing discussion, indicated the problems involved in operating common years of building courses covering a range of disciplines and of the limited value to the students on account of their restricted backgrounds. He did, however, advocate the use of joint working procedures on courses and arrangements whereby young architects and quantity surveying students spent some time with contractors after graduating.

Following the addresses by each of the three speakers, each of them commented on the others' addresses and an interesting discussion then ensued. George Davies drew attention to the problems arising from the idiosyncrasies of pricing by contractors and by architects who delayed unduly in settling extensions of time. Stuart Hendy believed that the quantity surveyor was far better able to deal with contractual claims on account of his particular expertise and the fact that he was one further removed from the cause of the problem. With a view to avoiding disputes he felt that a pre-tender meeting with tenderers to explain the contract and the documentation was well worthwhile. He also believed that drawings and specifications should be carefully integrated to jointly cover all details of the work.

Keith Roberts posed the question – "Why does the contractor submit inflated claims?" and he answered it by saying that he did this because he did not believe he would get all that to which he was entitled. It is obviously preferable that realistic claims should be submitted and that there does seem to be a need for a more professional attitude to be adopted to contract administration by all the disciplines concerned. Where a contractor submits a claim for £80,000 and some two years later accepts £15,000 in settlement, then obviously a quantity surveyor must be suspicious. It can, of course, be argued that the payment is now far removed from the financial year in question and hence becomes an additional bonus to the contractor in the year in which it is paid, but I do not believe this to be a very good argument. Keith Roberts also believed that there was a need for a standard approach to the pricing of preliminaries and this suggestion met with general support. He also believed that the architect, as team leader, should understand the financial implications of the contract and should not delegate entirely all his responsibilities in this respect to the quantity surveyor.

A number of written questions were submitted by delegates and the speakers gave their views on these under the able chairmanship of John Sims. Some discussion took place on the desirability of requestng programmes from contractors and the architects and quantity surveyors favoured this but the contractors believed that it should be restricted to star debts. Another question was directed at the contractor's application for loss or expense in a reasonable time. From decided cases it seems unlikely that the High Court would bar a delayed application as it could constitute a denial of justice. Clause 24(2) of the Standard Form also has some significance here as it stated that provisions of the loss and expense clause are without prejudice to any other rights which the contractor might possess. Mr. Davies drew attention to the need for provisional quantities, provisional sums, or a contingencies item to cover facilities needed by sub-contractors such as special scaffolding and hard standings for steel erectors. The quantity surveyor must not attempt to be too precise when the conditions do not permit it.

Mr. Hendy advised avoiding appointing designing sub-contractors wherever possible. He instanced the case of air conditioning where it could take six to eight weeks for design work and the architect could not wait for this period of time before appointing a sub-contractor. Mr. Davies also pointed out the problem of meeting the cost of the design cost sub-contractor's drawings if the sub-contractor did not proceed. He also posed the question as to whether there were adequate services consulting engineers available and there was a general feeling that there was a deficiency in this area and that the terms of appointment were somewhat imprecise. An architect in the audience asked the speakers' view of whether present design team arrangements were considered satisfactory. Stuart Hendy supported the *status quo* and believed that negotiated contracts have proved more expensive. However, George Davies saw the desirability of introducing management contracts on occasions where a contractor manages the contract for a fixed fee or by some other arrangement and takes no part in the actual construction work. This is an approach which has come from the United States. With this system it was possible to secure competition for all services be they fencing, hutting, meals or whatever. There is no nominated sub-contracts as all work is carried out under contract working arrangements. George Davies also instanced the appointment of the project manager as another alternative – this was done at the National Exhibition Centre at Birmingham. Under discussion it was accepted that the project manager could be substituted for the architect in the Standard Form of Contract. Keith Roberts favoured the design and build concept and showed how it can be a multi-disciplinary approach

including, where thought necessary, a project manager. On the other hand, Stuart Hendy believed that at the end of the day it was quality that was the most important aspect of all.

John Sims summed up the proceedings in a delightful way. He described how the United Kingdom building industry was potentially the most efficient in the world but it did suffer problems because of the large number of disputes that arose, relating principally to direct loss and expense. All the necessary machinery is available but it does need maximum co-operation between all parties. "Too often", said John Sims, "the signing of the contract seems to be regarded as a declaration of war yet, in fact, it ought to be a pact of co-operation". It should be the combined aim of all parties to the contract to supply the client with the type of building he wants, in the prescribed time and within the anticipated cost. Many of the problems seem to stem from the attitudes that had developed within the industry and many seem to arise from the notices which contractors are duty bound to serve upon architects. The architect often seems to be aggrieved when he received a large number of letters from the contractor and yet he would also be disturbed if he received no letters at all, but a request for an additional sum at the end of the contract with no prior notice. It was also a bad approach for the architect to adopt the attitude that he should resist all claims – it is without doubt the architect's responsibility to ensure that the contractor receives full payment for the work that he has done and that he is adequately reimbursed any loss of expense to which he is subjected as a result of disturbance of the regular progress of the work by matters outside his control.

Surveyors Fee Scales

The Report by the Monopolies and Mergers Commission on the supply of surveyors' services with reference to fee scales was published in mid-November 1977. We reported the main recommendations, together with the initial reaction of the Institute, in the November/December 1977 issue.

A great deal has happened since then. Roy Hattersley, the Secretary of State for Prices and Consumer Protection reported in Parliament that he had accepted the report and had asked the Office of Fair Trading (OFT) to discuss its implications with the professional bodies concerned before any action was decided. The Institute's negotiating team, consisting of the President, Mr. Forde (Past President), Mr. Ashford (Vice-President) and the Director had three meetings with Mr. Glaves-Smith, Deputy-Director OFT, and his staff over the period from December to March, and the matter was discussed by Council in April before our views were put formally to OFT. Some progress was made. The Institute agreed that amendments should be made to Bye Laws 19(6), 19(7), 19(10) and 37, to make it clear that our fee scales were recommended and not mandatory, but was unable to accept that there should be unrestricted competition over fees, or that the scales negotiated with associations of clients should be subject to further re-negotiation between individual suppliers and clients. We also agreed to co-operate in the formation of an independent committee to issue future fee scales provided that the interests of the profession and the Institute are represented on such a committee. OFT reported on these discussions to the Minister in May.

The Institute's representatives also had several meetings with RICS, RIBA and other interested institutions in an attempt to establish a common front. These meetings were in general successful, and led to basic agreement on a number of important principles although at the end of the day there were some differences between RICS and ourselves. The Minister had already agreed to meet the President of RICS and RIBA but it was felt to be important that the Institute should put its own point of view directly. Our request was granted, and the incoming President, together with Mr. Ashford and the Director, had a meeting with John Fraser, the Minister of State at the Department of Prices and Consumer Protection, on 17th July 1978.

The matter now rests with the government. The Institute believes that it has made a genuine attempt to meet as far as possible the wishes of the government but professional institutions also have a very clear duty to the public and there is therefore a line beyond which further concessions cannot be made. We hope that the Minister will heed our views.