the works contracts do nothing to address this dilemma.

All in all the JCT 87 Management Form of contract bears all the hallmarks of the horse designed by committee. Produced with much painful effort to meet the desire of the UK contracting industry for a catch-all standard form which would replace the one off management contract previously produced by developers and others, it appears to fall between all stools; as a record of the legal obligations of the parties it is defective – the back-to-back damages provisions mentioned earlier are matched by confusion as to the status of the parties prior to signature of the second part of the document; as a means of controlling the time, cost and quality of a project to a client it fails to give the necessary incentives; it also does the contractor a disservice by building in the old chestnut of an architect/contract administrator, who will carry out his traditional arms-length role of certifier and valuer when in reality the contractor would, by all accounts rather have full control of the project, design function and all and the client needs to employ one of those new breed of consultants who can avoid him having, in the words of the PSA 'to do the management contractor's job for them" – a project manager.

Perhaps the trend in the industry towards precisely this kind of structure using design and build forms of contract will solve the problem, spurred on by a recession which appears more and more likely.

The *JCT87* form may then be left behind as a relic of an era, its inconsistencies to be fought over in the courts to the disadvantage most probably of those employers (or their professional advisers) who embraced it too enthusiastically and used it without modification.

Elizabeth Jones is a partner with Fox Williams solicitors

Should our offer be of interest. .

The future credibility of the Code of Procedure for Single Stage Selective Tendering lies with the QS says to Jonathan King

The *Code of Procedure for Single Stage Selective Tendering* is rightly widely respected as a document. The document is prepared by the National Joint Consultative Committee for Building and therefore synthesises the views of all the major participants in the building industry. Contractors, architects and quantity surveyors generally accept the code and it is usual for tender invitations to prescribe that the tender procedure will be in accordance with it.

The public perception of the construction industry, based perhaps on unfortunate experiences with domestic building works and headlines when major projects are in delay, is often one of an old fashioned and inefficient industry where business is conducted in an adversarial manner, usually at the client's expense. Documents such as the Code of Procedure help to present to the industry's clients an alternative impression of competence and professionalism.

It is therefore disappointing to gain, increasingly, an impression that adherence to the code is not regarded universally as essential.

"Should our offer be of interest there are a number of matters which we would wish to discuss before entering into contract." These words, or variations on the theme, are increasingly seen on covering letters enclosing the contractor's form of tender. The wording is clever in that it seeks to introduce a negotiating stage into the tender process and it is not obvious that the letter constitutes a qualification to the tender.

The code defines a "qualification" as a matter which (in the opinion of the architect) conveys an unfair advantage on the tenderer. It is not immediately apparent whether or not the "number of matters" which the contractor wishes to discuss convey such an advantage or whether they are merely matters of clarification.

However the letter is definitely not in accordance with the code which envisages that a tender shall be unconditional and shall comprise a formal offer which the employer is open to accept and thereby establish a binding contract.

It is my impression that contractors are very conscious of the requirement of the code not to divulge their tender price prior to the date and time for the submission of tenders. (There are obvious good commercial as well as professional reasons for this.) However agencies exist which will receive and record details of tenders submitted by contractors and will pass these to all the tenderers after the date and time set. Therefore when the quantity surveyor telephones the lowest tender to call for his priced bills of quantities, if these have not been submitted already he may find that the tenderer is already aware not only that his tender is lowest but also the amount of the difference to the second lowest tender.

If the quantity surveyor falls into the trap set by the letter and allows a negotiation stage to develop he will therefore be negotiating with a tenderer who probably knows the upper limit to which he will seek, by negotiation, to enhance his tender.

The correct procedure, as envisaged in the code, is of course simply to require the contractor to withdraw his covering letter and, if he refuses to do so, to disqualify the tender and proceed to examination of the next tender. In practice the tenderer, if presented with a resolute and uncompromising requirement to withdraw the qualification, will usually stand by his tender. The marginal benefit he might achieve by a modest negotiated increase is greatly out-weighed by the risk of his tender being disqualified and his losing the business altogether.

If the quantity surveyor takes the alternative pragmatic view that it is better to ask his client to pay a little more than the lowest tender than the full extra cost of going to the second lowest then he is failing to meet his obligations under the code and is actually encouraging contractors to submit qualified tenders in future.

The future credibility of the code is in the hands of quantity surveyors. Those in contracting organisations can discourage and discontinue the practice of submitting covering letters and can avail themselves more of the facility to clarify any perceived ambiguity or omission in the tender documents before the date for return of tenders.

Those quantity surveyors in private practice directly appointed by the employer must take a firm position regarding qualifications and ensure that their other obligations under the code, particularly those relating to the prompt notification of unsuccessful tenderers, are rigorously observed.

We are all aware of the practices in property transactions, eg "gazumping", which have led to calls for a Code of Procedure. It would be regrettable if our practices in tendering building works fell into similar disrepute.

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