

1.1. What are ‘entire contracts’ and how relevant are they in the construction industry?

- 1.1.1. Those for whom construction work is undertaken usually require the contract price to be fixed at the outset and not to change throughout the construction of the project. This is to ensure that the final sum paid equates to the contract price. This is often referred to as a ‘lump sum fixed price’, or in legal circles ‘entire contracts’. Most major construction projects are let employing one of the standard forms of contract, which in the main do not provide for the contract price to be a fixed price. Construction work is bedevilled with uncertainties: for example, in many cases some of the work is constructed below ground, where surprises are often encountered during the construction phase. Who, therefore, takes the risk of ground conditions which are more difficult to work with than anticipated at the time the contract was let? The contract, if properly drafted, should provide the answer. If the contractor is expected to take the risk, then it is not unreasonable for a sum to be included in the contract price to cover the risk. Some standard forms of contract, for example the ICE 6th and 7th Editions and FIDIC, make it clear that the contractor’s price only includes conditions which could have been reasonably foreseen by an experienced contractor. Therefore, if ground conditions which are met during the construction process are more onerous to work with than could reasonably have been expected to have occurred, then any resultant additional cost incurred by the contractor will be added to the contract price. Some conditions of contract, for example JCT 2011 Standard Building Contract With Quantities, includes for the design to be undertaken by an architect or contract administrator appointed by the employer. Any additional cost incurred by the contractor in overcoming errors in the design will be added to the contract sum. Almost without exception, the standard forms of contract include a clause to the effect that the contract price will be adjusted if additional cost is incurred by the contractor because of changes in legislation which were unknown at the time the contract was entered into. The standard forms of contract in general use therefore cannot be classed as ‘entire’ contracts.
- 1.1.2. Contracts which do not provide for any change in the price and are thus fixed-price, are sometimes referred to as entire contracts, which encompass the inclusive price principle. This principle has been expounded in the 11th Edition of *Hudson’s Building and*

Engineering Contracts and states that on a construction project the contractor is entitled to be paid for the work defined in the contract, which is deemed to include all work that is both indispensably and contingently necessary. Indispensable work is all work which, by implication or as a matter of interpretation of the contract as a whole, has to be carried out in order that the final work should comply with the express requirements or descriptions in the contract documents. Contingent work is all work that is necessary to achieve completion of that described, irrespective of the difficulties which may be encountered. According to this principle, any additional work necessary to achieve completion of the work described in the contract documents must be done at the expense of the contractor. This is the situation unless the contract states otherwise.

- 1.1.3.** The inclusive price principle came to the fore in the case of *Safe Homes Ltd v. Mr and Mrs Massingham* (2007). Mr Dale, representing Safe Homes Ltd, undertook to construct a new house for the lump sum of £130,000 and to complete it in 17 weeks. The drawings were provided by Mr and Mrs Massingham's architect. Safe Homes claimed an entitlement to extra payment for additional and varied work owing to inadequately defined work, necessary but ill-defined work and compliance with building regulations and other statutory requirements. These claims were rejected by the court on the basis that the contract was an entire lump sum inclusive-price contract. Such contracts are subject to two over-riding principles that are applicable unless varied by the express terms of the contract. These principles are that contractors must, without additional payment, carry out all work necessary to enable the overall scope of work to be completed, even if that work has not been defined in the contract documents, and undertake all work needed to overcome any obstruction or unforeseen eventuality that must be overcome to complete their work.
- 1.1.4.** This case worked in favour of the building owner, as the contractor was required to undertake work which had not been foreseen at tender stage, for no additional payment, on the basis that the contract was a fixed-price entire contract. The case of *SWI v. P&I Data Services* (2007) provided the opposite result, where a subcontractor was paid for work which was not undertaken. SWI submitted a quotation to provide work for P&I at the GlaxoSmithKline site in Stevenage for £337,243, in accordance with drawings provided by P&I and tender record sheets produced by SWI. Some of the work was not required to be undertaken, and P&I reduced the price to be paid to reflect the reduced volume of work. It was agreed by both parties that the value of work which was not undertaken amounted to £40,000. The Court of Appeal, however, held that SWI was entitled to payment in full, with no reduction for the work which was not carried out. The contract was a fixed-price lump sum entire contract, with no provision for variations, and therefore the Court of Appeal ordered that the contract price be paid in full, even though some of the work had not been carried out.
- 1.1.5.** Whether the contract is let on a fixed-price basis or one which is subject to price change will depend upon the wording in the contract. To ensure that the rights and obligations of the parties are confined within the wording of the contract, some contracts include an entire agreement clause, also known as 'entire understanding' clauses, 'four corners' clauses or 'zipper' clauses. This clause usually states that the contractor's obligations are fully set out in the contract and no supplementary evidence based upon correspondence, discussions and the like is admissible. The purpose of this type of clause is to

eliminate any opportunity for introducing evidence in the form of other documents which may be at variance with the wording of the contract, as a means of enhancing payments.

SUMMARY

Entire contracts are not the norm on major construction projects. Whilst employers like a price which is fixed at the outset and does not fluctuate, most major projects are let using one of the standard forms of contract. These contracts contain a sharing of the risks between the contractor and employer. If one or more of the employer's risks becomes a reality, the contractor may become entitled to an additional payment. For example, unforeseen bad ground conditions on civil engineering contracts; architect or engineer design errors where employer design applies; and changes in legislation usually result in the contractor receiving additional payment.

There are examples of contracts where the inclusive price principle applies, referred to as 'entire contracts'. These contracts are fixed-price in every sense of the word. Where they apply, the contractor is required to undertake all necessary work to ensure practical completion in accordance with the work as described in the contract documents. Any additional work necessary to achieve completion, must be carried out at the contractor's expense.

1.2. Do projects where the parties enter into partnership arrangements require a formal contract to be agreed?

- 1.2.1. Sir John Egan created quite a stir when, in *Rethinking Construction*, he suggested that where parties to a construction project operate on a partnering basis, a formal contract is unnecessary. The exact words Sir John used are:

Effective partnering does not rest on contracts. Contracts can add significantly to the cost of a project and often add no value to the client. If the relationship between a constructor and employer is soundly based and the parties recognise their mutual dependence then formal contract documents should gradually become obsolete.

What he probably meant by this statement was that on partnering projects agreements reached between the parties do not require to be legally enforceable. There is no doubt that where collaborative working arrangements exist, formal disputes are a rarity. Disputes do arise, but they are usually resolved amicably by representatives of the parties without any involvement by lawyers or other external consultants.

- 1.2.2. Despite the good relationships which are fostered by partnering, there are examples of disagreements which have been referred to court. In the case of *Baird Textiles Holdings Ltd v. Marks and Spencer PLC* (2001), Baird claimed it had lost a sum of £50m as a result of Marks and Spencer breaching a partnering arrangement. Baird had been a supplier of garments to Marks and Spencer for more than 30 years, which represented between

30% and 40% of Baird's annual turnover. There was no guarantee of the number of garments which would be ordered, but over the years there had been a steady but varying amount of business. The parties worked together to ensure that what was not selling well could be returned and new designs jointly developed. The chairman and chief executive of Marks and Spencer stated that for over 70 years the relationship between Marks and Spencer and its suppliers was governed by the principles of partnership. Baird considered that their relationship with Marks and Spencer was a partnership.

1.2.3. Without giving any prior warning, Marks and Spencer gave notice to Baird that, following the end of the current production run, it would not be placing any more business with them. Baird commenced proceedings, claiming that the termination was a breach of an implied contract arising from the manner in which the parties had conducted their business over many years. On the basis of their past relationship, Baird considered it was entitled to be given a minimum of three years' notice if Marks and Spencer intended to terminate the arrangement. The court rejected the arguments made by Baird. It would only recognise an implied contract if it was necessary to do so. Courts are reluctant to make a bargain between the parties which they had not made for themselves.

1.2.4. There have been other cases where the parties have entered into a partnering arrangement, which have ended in disputes which have been referred to the courts. In the case of *BP Exploration Operating Co Ltd v. Kvaerner Oil Field Products Ltd* (2004), reliance was placed upon negotiations to establish a partnering relationship. This was not accepted by the courts as evidence for the interpretation of the parties' obligations to procure insurance. The case of *Birse Construction Ltd v. St David Ltd* (2000) involved a dispute arising from a contract on which a partnering relationship existed. The matter was referred to the Court of Appeal as the parties could not agree the terms which applied to the contract. No doubt the parties, in view of the relaxed atmosphere which existed relating to contractual matters, did not see any urgent requirement to enter into a formal contract before work commenced.

1.2.5. The CIC Guide to Project Team Partnering provides the following advice concerning the use of a formal contract on schemes where partnering applies:

An effective contract can play a central role in partnering, it sets out the common and agreed rules; it states the agreed mechanism for managing the risk and the reward; it lays down the guidelines for resolving disputes. But the central thrust of the new thinking is that the contract should not encourage a self-serving or adversarial state or a battle with other team members for the benefit of one party.

1.2.6. Some contracts have been designed to accommodate partnering and include:

- PPC 2000
- JCT Constructing Excellence
- NEC Partnering Option X12
- Public Sector Partnering Contract – Partnering Agreement

1.2.7. Parties who enter into arrangements where partnering is to take place have an option of either following the advice of Sir John Egan and avoiding the formal contract route,

or deciding to accept the guidance of CIC and enter into a formal arrangement. One of the points raised by Sir John is the significant cost of entering into a contract. *Rethinking Construction* was produced before any of the standard forms which are now available for use on partnering projects. There is no downside to the use of a standard form of contract, most of which are fairly simple to complete, with little expense involved. Perhaps the well-worn phrase is still appropriate, which states that parties are best advised to 'sign the form of contract, put it in a drawer and then forget all about it'.

SUMMARY

Advice has been provided by two good authorities as to whether it is advisable, where partnering relationships exist, as to whether or not the parties should enter into a formal contract. Sir John Egan, in *Rethinking Construction*, is of the opinion that a contract involves significant cost and adds no value to the client. On the other hand, the CIC advises that a contract can play a central role in partnering. Since Sir John produced his report, a number of standard forms of contract which cater for partnering have been produced and can be entered into at very little cost, which removes one of Sir John's arguments. He makes the point that a contract is of no value to the client, but omits to mention the benefit or otherwise to the contractor. Partnering relationships are all about people and with changes in personnel, takeovers and mergers, attitudes can change. Sign the contract, put it into a drawer and forget about it, may well be the best advice.

1.3. What is the effect of an agreement to undertake work which is expressed as being 'Subject to Contract'?

- 1.3.1. The term 'Subject to Contract' originated in agreements for the sale of land by private treaty. Such agreements were unenforceable until a formal contract had been drawn up and agreed by the parties. In recent times the use of the term 'Subject to Contract' has been used in the formation of construction contracts. This development has led to uncertainty as, in some legal cases, it has been held that the document in which the words 'Subject to Contract' appears constitutes a binding contract, whilst in others the reverse is the case.
- 1.3.2. In the case of *Bennett (Electrical Services) v. Inviron* (2007), Bennett was engaged by Inviron to carry out labour-only electrical work. A letter was sent by Inviron to Bennett headed 'Subject to Contract' and stated an intention for the parties to enter into a full subcontract, incorporating Inviron's standard terms. The letter instructed Bennett to proceed with the works required to progress the subcontract and Bennett duly obliged. A formal subcontract was never entered into; however, a dispute arose concerning payment and Bennett commenced adjudication proceedings. The first adjudicator to be appointed refused to proceed, as he considered that he had no jurisdiction, and a second adjudicator was appointed. He proceeded with the adjudication and provided in his decision that Inviron should make a further payment to Bennett. No such payment was made and the matter was referred to court for enforcement. It was held by Judge Wilcox

that 'Subject to Contract' had its ordinary meaning, whereby liability did not arise until a full contract had been entered into.

1.3.3. The decision in the case of *Skanska Rashleigh Weatherfoil Ltd v. Somerfield Stores Ltd* (2006) tells a different story. Somerfield sent a letter of invitation to tender to Skanska on 19 June 2000, enclosing a draft of the proposed Facilities Management Agreement. Negotiations took place following the sending of the letter, but were incomplete when Somerfield, who were anxious to get the work under way, sent a detailed letter to Skanska dated 17 August 2000 headed 'Subject to Contract'. The key matters included in the letter were:

- We now wish to appoint you to provide us with the Services which are more particularly described in the contract (Ref JRB/2240842 DRAFT3 14th June 2000 Contract) enclosed with the tender . . .
- This appointment is, however strictly subject to contract and to the approval of the board
- In consideration of the above and whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 23rd August 2000 (or such other date as we may advise to you) until 27th October 2000 (the Initial Period), such services to be provided at the prices detailed in the tender return provided by you (as subsequently amended) as more particularly itemised on the attached schedule.

This letter was signed and returned by Skanska. A dispute arose as to the meaning of the term 'provide the Services under the terms of the Contract'. Somerfield argued that the letter headed 'Subject to Contract' contained all the terms of the Facilities Management Agreement and therefore a contract existed between the parties. Skanska was of the view that the purpose of the letter was limited to identifying the nature of the work to be performed and therefore constituted only a temporary arrangement and not the contract for providing services for a three-year period. The judge in the lower court, Mr Justice Ramsey, agreed with Skanska, and Somerfield appealed. The Court of Appeal considered that Mr Justice Ramsey made a wrong decision. Lord Justice Neuberger considered that a contract had come into operation, which comprised the draft Facilities Management Agreement, except where inconsistent with the contents of the 17 August 2000 letter. Lord Justice Neuberger was influenced, in arriving at his decision, by the words 'under the terms of the contract' which appeared in the 17 August 2000 letter.

1.3.4. The meaning of the term 'subject to formal contract' was an issue in the Court of Appeal case of *Stent Foundations v. Carillion Construction (Contracts) Ltd* (2000). It was held that a contract, though never formalised, came into being, even though in the letter of intent the words 'subject to formal contract' appeared. The court was of the opinion that, as the parties had agreed all the essential terms, a contract had been properly formed.

SUMMARY

It seems clear that the term 'Subject to Contract', in terms of the sale of land, traditionally meant that, in the absence of a formal contract, no binding agreement arises. The

use of this wording in construction projects, however, does not ensure the same degree of certainty. From the legal cases referred to, it is not clear that whether a letter which is headed 'Subject to Contract' does or does not constitute a binding contract depends upon the wording in the letter.

1.4. What is Two-Stage Tendering and how does it operate?

- 1.4.1.** Two-Stage Tendering is best suited to large or complex schemes, as the tendering cost involved is usually greater than for a single stage tendering process. The main aim is to choose a contractor as early as possible. It is usual, where two stage tendering applies, to appoint the contractor during the design period, to enable the professional team to make use of the contractor's expertise. In particular, where an employer design method is adopted, two-stage tendering also enables the contractor to have an input in the planning of the project.
- 1.4.2.** Two-Stage Tendering can be used with any of the standard forms of contract. The method of procurement and the conditions of contract, or standard conditions if applicable, need to be established before inviting first-stage bids. If the employer intends to amend a standard form for use on the project, these amendments should be made known to first-stage bidders as, if they involve a major shift in risk, pricing levels may be affected.
- 1.4.3.** The first stage is the process used for the selection of a contractor and establishing a level of pricing to be used in the calculation of the contract price. Documentation is usually kept to a minimum for reasons of time and cost. In the more traditional method of procurement, where bills of quantities are the norm, approximate bills of quantities will normally be used to arrive at an estimated cost of the works and provide rates on which the contract price can be calculated. Bills of quantities are not as frequently used as in the past, so other methods have been devised. Where bills of quantities are not to be used, a schedule of work, with accompanying rates and prices, which can be employed to enable a fair comparison between competing contractors, is often used. Where the contract is to be let using a cost-reimbursable method, the pricing of overheads and profit and preliminaries should be established at the first stage. If the intention is to make use of a target price, this can form part of the contractor's bid and can be adjusted as the design is developed.
- 1.4.4.** It is important that the design process is frozen at the point at which first-stage bids are received. A comprehensive drawing register, which is properly updated with all revisions, together with a specification or schedule of works, is essential. This will enable the first-stage price to relate back to the design as it had developed up to that point. When arriving at the contract price, the first-stage price or target cost can be adjusted to reflect subsequent changes in design.
- 1.4.5.** It is helpful if the design of one of the early stages of the work, such as the substructure, is completed at the point of first-stage bids. This enables a final price to be established for one of the stages, and possibly an early start on that part of the work can be made.
- 1.4.6.** The situation is different where the procurement involves the contractor providing a full design service. The facility for making a selection mainly on price is more difficult.

In the final analysis, it may be that at this stage the contractor only produces details of the pricing of overheads and profit and the preliminaries, together with an approximate estimate of the overall cost; the intention being that the contractor will be required to design the project down to the estimated price.

- 1.4.7.** Once the tender enquiry documents for the first stage have been completed, a shortlist of interested contactors is invited to submit bids. Once tenders have been returned, one contractor is selected to proceed to the next phase. No contract is awarded at this stage and there is no guarantee that either the work will proceed, or, if it does, that the contractor who is successful at this stage will go on to be appointed. The contractor is very much at risk and can incur substantial costs without there being any obligation on the part of the employer to reimburse those costs. With no binding commitment by either party, the contractor can withdraw at any time, leaving the employer to face probable delay and additional costs.
- 1.4.8.** The first-stage selection process may be purely on the basis of lowest cost; however, it is now common practice for the bidding contractors to be asked to include quality as part of their submission. When making the selection, both price and quality are taken into consideration in making the choice of contractor to proceed to the second stage.
- 1.4.9.** The purpose of stage two is to convert the outline information produced during stage one into the basis for producing a firm contract between the client and contractor as soon as possible. The contractor will usually have an important input into the design process, by making suggestions which relate to the buildability of the project. The contractor may also have an input into drawing up the contract documents and, together with the professional team, arriving at an agreed contract price. The contractor will also have a major input into health and safety issues.
- 1.4.10.** In view of the substantial input which may be required from the contractor at this early stage of the project, there are now in place some standard mini contracts designed to cater for this type of arrangement, which include:
- JCT Pre-Construction Services Agreement
 - PPC2000 – Pre-Possession Agreement
 - PSPC – Prestart Agreement

These mini-contracts set out the services to be provided and also a payment mechanism.

- 1.4.11.** Examples of the type of services which may be provided by the contractor before a formal contract is entered into include:
- Health and safety
 - Risk management
 - Value management
 - Public consultation
 - Design
 - Life cycle costing
 - Environmental impact

- Establishing an open book accounting system
 - Training
 - Supporting funding applications
 - Selection of specialists whose work may or may not form part of the main contract.
- 1.4.12. During the period between the first stage and second stage the contractor may be required to undertake accommodation work, such as site clearance, which can be provided for under this early contractual arrangement.
- 1.4.13. The second stage is complete when a contract for the whole of the project has been drawn up and signed by the parties.

SUMMARY

The purpose of a two-stage tendering procedure is to provide for an early appointment of the contractor. This enables the contractor's knowledge to be used in the design of the work. Buildability and health and safety are two matters where the contractor will normally have a major input. The contractor can be appointed in competition with others, using pricing documents relating to the preliminary design. This pricing information is used during the second stage to build up the contract price for the work.

The contractor can expend a considerable amount of money during the second stage, with no certainty of being appointed. During this period he or she is at risk. To overcome this problem, there have been produced a number of mini contracts, which can be used to engage the contractor during this period, which set out the services to be provided and the method of payment. During this second stage, the contractor can be employed in undertaking accommodation work such as site clearance, using the mini contracts.

1.5. **Where tender enquiry documents indicate that an established procedure for selecting contractors will apply, but the employer does not follow the procedure, will an unsuccessful party be entitled to claim damages from the employer?**

- 1.5.1. Many tender enquiries in the private sector provide little, if any, information as to the methods to be adopted in deciding which contractor will be awarded the contract, following receipt of tenders. Contractors requested to submit tenders often assume that, as all tenderers have been through a prior vetting system, it will come down to the bidder submitting the lowest price being appointed. In an effort to regularise the tender selection process, the NJCC produced a Code for Selective Tendering. The Code laid down procedures for both single-stage and two-stage tendering. The use of these codes has, in the past, been used in the UK quite extensively. In order to give the process some credibility, employers or their architects, in the tender enquiry, would state that the tendering procedure was to follow the NJCC Code. The NJCC Code of Procedure has now been superseded by guidelines published by the CIB.

- 1.5.2. Having stated that the tendering procedure would follow the NJCC Code, could the employer be exposed if he or she proceeded with the selection process completely ignoring the procedure? There may be a situation arising where an unsuccessful bidder could demonstrate that, had the Code been followed, he or she would have been awarded the contract.
- 1.5.3. This situation has been examined by the courts and an answer provided. In the case in question, *J&A Development v. Edina Manufacturing Ltd and Others* (2006), J&A Development was asked by Edina Manufacturing Ltd to submit a tender for the construction of a workshop, offices and associated work at an industrial estate in Lisburn. The tender enquiry documents prepared by ADP Architects and Design Partnership stated that the tendering procedure was to be in accordance with the principles of the Code of Procedure for single-stage selective tendering, published by the NJCC in 1996.
- 1.5.4. Section 7.1 of the Code of Procedure states:
- . . . good tendering procedure demands that a contractor's price should not be altered without justification. In particular NJCC strongly deplores any practice which seeks to reduce any tender arbitrarily where the tender has been submitted in free competition and no modification to the specification, quantity or conditions under which the work is to be executed, or to be made, or to reduce tenders other than the lowest, to a figure below the lowest tender.
- 1.5.5. Six tenders were received, of which J&A Development in the sum of £1,074,982 was the lowest. A decision was then made, following discussions between the architect and Edina, that meetings should be held with each of the three contractors who had submitted the lowest tenders, to see if their tender prices could be reduced. The meetings took place, at which the tenderers were invited to reduce their tender amounts. Two of the contractors agreed, but J&A Development refused. Kylan Construction, who had produced the second lowest tender, agreed to reduce its price by £25,000 and was awarded the contract.
- 1.5.6. J&A Development commenced proceedings against Edina, for damages for breach of contract, on the basis that Edina failed to follow the Code of Procedure. The court decided that J&A Development was entitled to be paid damages. Whilst no contract to construct the work had come into operation, there was a collateral agreement to the effect that the Code would be applied. Clearly, in inviting three tenderers to meetings to discuss reducing the sums tendered, Edina was operating in contravention of the Code. In arriving at its decision, the court took note of the Court of Appeal decision in the case of *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council* (1990) and the lower court decision in the case of *Fairclough Building Contractor v. Borough Council of Port Talbot* (1993).
- 1.5.7. The court awarded J&A Development damages for breach of the terms of the Code. As they had submitted the lowest price, if the Code had been followed, they would have been awarded the contract. The damages which Edina were ordered to pay were therefore based upon J&A Development's tender costs in the sum of £6,530, plus loss of profit in the sum of £161,247. The amount awarded for loss of profit was reduced by 20% to take account of the availability of other work.

SUMMARY

Where a tender enquiry states that a standard procedure for dealing with tenders, such as those produced by the NJCC or the CIB, will apply, there exists between the employer and tendering contractors a collateral agreement to the effect that this procedure will be applied. If the employer fails to implement the Code, this will amount to a breach of the collateral agreement. Any tendering contractor who can demonstrate a loss, as a result of the failure on the part of the employer to comply with the Code, will be entitled to reimbursement.

1.6. What liability does a tendering contractor have who in its bid names key personnel to be employed on the project, but when work commences replaces some of the named personnel?

1.6.1. It is common practice when submitting bids for work on construction projects for there to be a requirement for key personnel, who will be involved in the project, to be named in the bid document. Will there be any liability if, when the work proceeds, the person named is not employed on the project? This situation occurred in the case of *Fitzroy Robinson v. Mentmore Towers* (2010). The case concerns the redevelopment of the 'In and Out Club' in Piccadilly and an associated country house in Buckinghamshire, which was to be converted into a luxurious club with hotel accommodation. Mentmore engaged Fitzroy Robinson to act as the architect on the scheme. The programme indicated that work on the project was scheduled for completion at the end of May 2009. During the summer of 2005, meetings took place between the parties at which the project was discussed. Mr Blake was a key member of the Fitzroy Robinson team. It was made clear both before and in the bid document, dated 20 September 2005, that if Fitzroy Robinson was to be appointed, then Mr Blake would oversee the design and be actively involved in the project. The wording in the bid document stated:

Team Leader Mr Blake, or such other individual of comparable standing, ability and experience, as the Employer may at his discretion approve.

1.6.2. Mr Blake tendered his resignation on 17 March 2006. He received an offer to continue in his employment, but refused the offer. Mr Blake, under the terms of his employment, was obliged to work a 12 months' notice period. However, it was not until 5 November 2006 that Fitzroy Robinson informed Mentmore that Mr Blake was due to leave the company. Mr Blake was requested not to inform Mentmore of his intention to leave; in his words, he was sworn to secrecy. He was key to the project and the loss of Mr Blake, Fitzroy Robinson considered, could have affected their appointment.

1.6.3. Fitzroy Robinson's duties were to undertake the design of the project and achieve planning permission. An application for planning consent of the Piccadilly part of the project was submitted on 1 December 2006 and for the Buckinghamshire property in April 2007. Mr Blake left his employment on 16 March 2007 and continued to undertake work on the project on an hourly basis to help facilitate the submission of the planning

application for the Buckinghamshire property. It was argued by Mentmore that Fitzroy Robinson was guilty of fraudulent misrepresentation, which involved:

1. The existence of a contract between the parties.
2. The representation – i.e. that Mr Blake would be involved – occurred before the contract was entered into.
3. The representation was made knowing it to be false, or without belief in its truth, or recklessly, careless whether it be true or false.
4. The representation acted as an inducement to Mentmore to enter into the contract.
5. Mentmore had suffered loss.

- 1.6.4.** The court held that Fitzroy Robinson was guilty of fraudulent misrepresentation and that Mentmore was entitled to claim any loss which it incurred as a result. What Fitzroy Robinson was obliged to have done was to advise Mentmore, at the earliest opportunity, of Mr Blake's intending departure, which they failed to do. This notification should have been made after Mr Blake had turned down the offer made by Fitzroy Robinson to remain in post, having received his resignation.
- 1.6.5.** The court, however, decided that Mentmore would be unlikely to have suffered very much loss as a result of Mr Blake's departure. There was no evidence that his departure resulted in delay. In view of the timing of the notice being submitted, it was unlikely that Mentmore would have decided to appoint a different firm of architects. The case seemed to have been a pyrrhic victory for Mentmore.
- 1.6.6.** In this case, Fitzroy Robinson named Mr Blake as being the person who would be employed on the project, knowing full well that he was due to leave his employment with the company. The court held this to amount to fraudulent misrepresentation. This is not always the case, as quite often personnel named in the bid will leave after the contract has been entered into and their name has been submitted in good faith.
- 1.6.7.** Where personnel are named in the contract, it normally states that if they are not available, then a suitably qualified and experienced alternative will be found. This may not prove too difficult to achieve, although the temptation could be to name as an alternative a person who is available and not necessarily as experienced and qualified as the person originally named. The person named may have a high reputation and as a result cannot easily be replaced.
- 1.6.8.** Where a named person is not available and this situation is already known by the party submitting the bid, in like fashion to the Mentmore action, there may be a case brought for fraudulent misrepresentation. Where the naming is in good faith, it will be a matter of breach of contract if the person is named in the contract documents but is substituted, if the substitute is not up to the standard of the named person. However, if a person is named in the bid, or other document which does not become a contract document, it may be a question of breach of warranty.
- 1.6.9.** The most difficult part of any action by a disappointed employer who is deprived of a named person is to demonstrate that he or she has suffered a financial loss as a result. Without being able to demonstrate loss, in like fashion to the Mentmore action, there will be nothing to recover and therefore the award will be a nil recovery. If, for example,

the employer replaces the chosen consultant or contractor with another, due to the named person not being available, and this is a reasonable action to take, then any additional price paid by the employer for the work to be carried out by the replacement consultant or contractor would be the basis of the claim.

SUMMARY

Where a contractor states that a named person will be employed on a project, and the person is substituted, there will be no right of action on the part of the employer if the contract allows for a substitute. The wording of the contract, however, will usually state that if the named person is not available, then a substitute of equal experience and qualification will be provided. Where a substitution is made and the substitute turns out not to be of equal experience and qualification to the named person, the employer may have a right of action for breach of contract. Alternatively, if the person is named in a document which is not a contract document, then any action may be based upon a breach of warranty. Should the contractor name a person, knowing that person will not be available, there may be a right of action for fraudulent misrepresentation. For the employer to succeed, however, it is essential for resultant monetary loss to be demonstrated.

1.7. Can a contract which is freely entered into by the parties not be enforced on the grounds that the effect would be commercial nonsense?

1.7.1. The basic rule when interpreting contracts, as explained in *Pioneer Shipping v. BTP Tioxide* (1982), is that:

whilst it seeks to give effect to the intention of the parties, it must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used

In arriving at a conclusion, evidence is permitted of the circumstances in which the contractual document was made, any special meaning of words, the customs and certain other matters which may assist the court in arriving at the expressed intention of the parties.

1.7.2. When deciding the rights and responsibilities of the parties to a contract, the usual source of information is the contract entered into by the parties. There are, however, many examples of agreements on matters relating to the contract which were never included in the finally concluded contract. What is the status of these agreements? Are they enforceable, or, as they have not been included in the concluded contract, are they non-binding?

1.7.3. This was the subject of a dispute which was referred to the House of Lords in the case of *Chartbrook Ltd v. Persimmon Homes Ltd* (2009). The parties to the dispute involved a developer, the defendant, and a claimant who sold them land for development. The

intention was for planning consent to be obtained by the developer for the construction of mixed residential and commercial premises which were to be sold on long leases. The claimant would then be paid for the sale of the land in accordance with a formula. This comprised the Total Land Value, comprising the value of land for housing, commercial and car parking, which caused no problems. There was also a further payment which related to the success of the project, referred to as the Additional Residential Payment (ARP), the interpretation of which was the subject matter of the dispute. The APR was defined as:

23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives

The Minimum Guaranteed Residential Value was the Total Land Value divided by the number of flats. However, when a straight calculation was carried out, the net result was that the claimant became entitled to be paid in total £9,168,427.

1.7.4. It was argued by the defendant that the purpose behind the division of the total payment into the Total Land Price and the Additional Residential Payment was to provide a minimum payment for the land and a further payment to allow for the possibility of an increase if the market prices rose and the flats sold for more than expected. The formula adopted by the defendant resulted in a total payment of £5,580,565. In support of their argument the defendant sought to introduce negotiations which were undertaken prior to the contract being entered into, to overturn the wording in the contract. The House of Lords refused to accept this argument and in so doing relied upon the decisions in *Inglis v. John Buttery and Co* (1878) and *Prenn v. Simmonds* (1971), where it was held that pre-contractual negotiations are inadmissible evidence for the purpose of supporting the construction of a contract.

1.7.5. The House of Lords nonetheless came down on the side of the defendant. It was considered that the wording included in the contract regarding the Additional Residential Payment made no commercial sense. The decision followed the reasoning of the House of Lords in its decision, in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998). It was held in this case that the principal question to be answered when seeking to interpret a contract is 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to mean using the language in the contract'. In this case, Lord Hoffman laid down the following five principles to be used when considering the meaning of a clause in a contract:

- The correct meaning is what the document would convey to a reasonable person with the relevant background knowledge
- The background includes everything in the matrix of fact, i.e. relevant background material
- The law excludes the prior negotiations of the parties
- The meaning of words in a document is not the same as the literal meaning of words, but the meaning that one would reasonably understand against the relevant background

- The rule that the words should be given their natural and ordinary meaning reflects the commonsense proposition that it is not easily accepted that people have made linguistic mistakes, particularly in formal documents.
- 1.7.6. Whilst the courts do not easily accept that parties have made linguistic mistakes when drawing up a contract, where something has clearly gone wrong with the language which the parties have used, the courts are not required to attribute to the parties an intention which a reasonable person would not have understood them to have had.
- 1.7.7. This decision allows for contracts to be interpreted in a manner which is not expressed by the wording and may leave the door open to a party having made a bad deal to argue later that the wording makes no commercial sense and would not have been used by a reasonable person. In other words, what was stated in the contract was not what the parties really meant.

SUMMARY

The basic rule, when interpreting contracts, is that a court will enforce the intentions of the parties which are expressed in the contract. If the contract does not include what the parties intended, then those intentions do not form part of the contract. The next point to consider, when interpreting the meaning of a contract, is that the court will take into account what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the contract to mean, using the language in the contract.

In the case of *Chatbrook Ltd v. Persimmon Homes Ltd* (2009), the House of Lords refused to enforce a clause in a contract for the sale of land to be used for house building regarding an enhancement of the price dependent upon the sale price achieved for the houses. This was based upon how a reasonable person would have interpreted the wording in the contract of sale to mean. In this case, the literal interpretation of the wording would have resulted in the seller of the land becoming entitled to uplift of the price, which would be commercial nonsense and out of all proportion with reality.

1.8. Can an architect or engineer be held to have acted negligently for advising a client to use a procurement method which is inappropriate for the project concerned?

- 1.8.1. Architects and engineers are usually involved in projects from the outset. Early advice given often relates to the procurement methods to be adopted. There is an ever-growing array of alternatives from which to choose. Is it to be the lowest price, or partnering with collaborative working? Will contractor design be appropriate and is this procurement method in the client's best interest? If a JCT contract is to be employed, will the advice regarding which of the JCT alternatives is to be used follow the recommendations included in 'Deciding on the Appropriate JCT Contract', published by the JCT? If the project is mainly of an engineering nature, should the client be advised to use the current

version of the standard ICE contract or the Engineering and Construction Contract (NEC 3)?

- 1.8.2. The possibility always exists for the recommendation to be incorrect. For example, an architect may recommend that a JCT With Quantities form of contract be used. This is a contract which involves the architect producing a full design and the quantity surveyor a complete bill of quantities before the work goes out to tender. This process is time-consuming if it is to be done properly. It is not suitable where time constraints require tenders to be received at a time which would not allow sufficient time for the design to be properly completed and a full bill of quantities prepared. Delays and additional cost may be incurred during the construction period as a result of the architect's drawings not being issued to the contractor on time. Under the circumstances a design and build would have been more suitable.
- 1.8.3. The appropriate procurement method was the issue in the case of *Plymouth and South West Co-operative Society Ltd v. Architecture Structure and Management Ltd* (2006). Plymouth and South West Co-operative Society Ltd (Plymco) wished to develop its flagship store, including the construction of a number of retail units at Derry Cross, Plymouth. Plymco appointed Architecture Structure and Management Ltd (ASM) to undertake the necessary architectural, engineering and quantity surveying services. It was a priority that the cost of the scheme did not exceed £5.5m. ASM produced a budget in the sum of £5.65m and was instructed to make savings to ensure the price fell within the budget. Plymco's board decided to go ahead with the scheme in April 1996 and ASM was appointed shortly thereafter. On 10 October 1996 an agreement for lease was signed by Plymco with Argos, which provided for the completion of the Argos works by 21 April 1997. At this stage Argos was the only tenant Plymco had secured. It was anticipated that the building contract would be let by July or August 1996. One of the problems associated with the scheme was that it was a requirement that the store remained open for business during the construction of the works.
- 1.8.4. ASM advised letting the building contract by means of a two-stage tender process using the National Joint Consultative Committee for Building's Code, with a view to entering into a JCT 1980 With Approximate Quantities Form of Contract. Competitive tenders were received and Exeter Building Company (EBC) was selected in late October 1996. The contract, however, was not signed until January 1997. The contract sum was £5,036,061; however, due to the tight timescale, 87% of the approximate bill of quantities was provisional and described as 'not detailed save in outline'. The work was completed on time, but the final account was in the region of £7.8 million and, because of the high volume of provisional work, included 7,500 variations.
- 1.8.5. It was alleged by Plymco that £2 million of the overspend resulted from the procurement method recommended by ASM, which made it impossible to operate effective cost control. It was alleged that ASM should have advised that the work be carried out in two distinct phases, referred to as the Argos first solution: the first phase to comprise the work for Argos, followed by the remainder of the work.
- 1.8.6. The court held that ASM's overriding obligation was to ensure that the cost of the work did not exceed £5.5 million. ASM had a duty to advise Plymco on the most suitable method of procurement to achieve completion within the financial ceiling. It was the court's view that ASM should also have advised as to what decisions were required to

be taken by Plymco and the dates by which they were to be made, but had failed to do so. It was the view of the court that ASM should have advised Plymco to have work carried out in two phases, which would have resulted in a later completion of the works, but with cost certainty. The court was convinced that Plymco would have accepted this advice.

- 1.8.7.** The court experienced some difficulty in arriving at a sum to be paid by ASM to Plymco. The documents which would have greatly assisted in proving Plymco's cost entitlement should have been retained by ASM but were not. The quantity surveying experts retained by each side reached agreement on the basis of comparing what the scheme would have cost, had the Argos first approach been used, with the actual final cost. The difference, which amounted to £1.3m, ASM was obliged to pay to Plymco.
- 1.8.8.** Whilst this case went against the architect, it is often very difficult to demonstrate that, if a different method of procurement had been employed from the one advised, the costs incurred would have been less. In the Plymco case, no doubt ASM was under great pressure to secure the completion of all the work by 21 April 1997. It is easy for the judge in hindsight to say that if ASM had suggested the Argos first option, it would have been accepted by Plymco. ASM however appears to have badly managed the process of securing decisions from Plymco, which were essential for completion of the project, resulting no doubt in delay and additional cost.
- 1.8.9.** There are examples of cases being brought by contractors against professional consultants they have engaged in compiling their tenders. In the case of *Copthorne Hotel v. Arup and Associates* (1996) the pre-tender assessment of piling costs was half the actual costs incurred by the contractor, but negligence was not established. In a case relating to advice provided by professional consultants in assisting contractors to secure contracts, the contractor must be able to show that it relied upon the information provided by the consultant, which they often are unable to demonstrate. In *Gable House Estates v. Halpern Partnership* (1996) it was shown that the employer would have taken a course of action regardless of the consultant's advice, which meant there was no loss involved.
- 1.8.10.** In cases of this kind, expert evidence plays a large part. In the Plymco case, experts appointed for both sides were of the opinion that, if cost certainty was the objective and if Plymco lacked sufficient experience of this kind of work and the need to make timely decisions, then ASM had not performed its duties in the appropriate manner. The experts, once the court had decided on liability, agreed the *quantum*.

SUMMARY

There will usually be some difficulty in successfully bringing an action against a professional consultant for advising the use of the wrong procurement method. Where it seems apparent that this is the case, it is essential for the employer to be able to demonstrate that additional cost has been incurred as a result of the advice given. In the Plymco case it is clear that, due to the tight timescale, the procurement method recommended by the architect was inappropriate. The court was convinced that the cost of the scheme was the most critical factor and not the time for completion. In the court's view, the architect should have advised the use of a procurement method which

would have been more cost certain, but would have resulted in a much later completion date. The judge was of the opinion that it would have been acceptable to the client if given the option at the outset. However, this was very much a matter of speculation on his part.

1.9. Where an unsuccessful tenderer is prevented from adjusting its tender after it has been submitted but before the deadline for submission of tenders has arrived, is the tenderer entitled to compensation?

- 1.9.1.** It is not uncommon for a tender to be submitted and subsequently an error discovered by the tendering organisation, which may or may not have an effect upon the price. Sometimes the error is discovered after the deadline for submission of tenders has passed. However, there are occasions when the error is discovered before the closing date. What are the options available to the tenderer? It is always open to the tenderer to withdraw its tender. Alternatively, a polite request to adjust the tender may be a favoured option. If a request made for an alteration to be made is refused, does the tenderer have any entitlement to compensation?
- 1.9.2.** There are no hard and fast rules concerning this matter. The Public Contracts Regulations 2006, which apply only in the public sector, require all tenderers to be treated equally and in a non-discriminatory manner. This requirement is unlikely to be of much assistance. Often, tender enquiry documents stipulate that where a genuine error has occurred, a tenderer may amend its tender prior to the deadline. To allow a tenderer to adjust its tender, however, could, in certain cases, lead to abuse. A tenderer, having heard details of its competitors' bid prices, may decide it would be in its interest to alter its own price if it were permitted.
- 1.9.3.** The request to amend a tender may not affect the price, but may relate to supporting documentation which is intended to support the bid. For example, tenderers may be required to submit their health and safety records with their bid, but, because of an error, the documentation was omitted.
- 1.9.4.** Where the tender enquiry stipulates that genuine errors may be corrected prior to the latest time for receipt of tenders, there should be no problem in making amendments. What rights, if any, do tenderers have for amending tenders to correct errors when the tender enquiry documents are silent on the matter? There is very little authority which relates to this aspect of tendering.
- 1.9.5.** The case of *J B Leadbetter and Co v. Devon County Council* (2009) involved a dispute which arose in connection with the award of a four-year framework agreement in Devon. The tender process was governed by the Public Contracts Regulations 2006. Tenders were to be uploaded electronically to a dedicated website. Only one upload was allowed, as the electronic system had been designed so as not to be capable of accepting additional information, to prevent collusion. An integral part of the tender process was the completion of four case study templates. One of the bidders omitted to upload the case studies with its tender and was allowed to send the documents in hard copy, which they accomplished before the deadline. The claimants accidentally omitted the case

studies element when uploading their bid, and as a result they tried to re-upload again, 15 minutes prior to the tender deadline of 3.00 pm, but were unsuccessful as the system allowed only one upload. They sent an email with the case studies attached, but this occurred at 3.26 pm, which was too late. The tender was rejected by the defendant.

- 1.9.6.** The case turned upon whether, in rejecting the tender, the defendant was in breach of regulation No 4 of the Public Contracts Regulations 2006, which required them to treat tenderers equally and in a non-discriminatory way. In addition, it was argued that the defendant, as a general principle of community law, owed the claimant an obligation to act proportionately in relation to the tender, and it had been in breach of that obligation. The specific wording in the Invitation to Tender stated:

Should a material and genuine error be discovered in the tenderer's submission during the evaluation period by the tender evaluation team, the tenderer will be given the opportunity of confirming their offer or of amending it to correct the error.

- 1.9.7.** It was held that the defendant had not been in breach of the duty of equality and non-discrimination. The court found that it was wrong to describe the claimant's tender as submitted before the deadline as containing an error. It was substantially incomplete, by reason of the omission of the case studies. The wording of the tender enquiry neither obviated the need to submit a complete tender, nor provided a means by which tenderers could supply substantial documents, or substantial sections of documents, after the deadline, so as to complete their tenders.
- 1.9.8.** Proportionality was capable of applying to the implementation of the terms of a procurement process. The exercise of discretionary powers necessarily involved judgment and the court would not intervene unless the decision was unjustifiable. In this case the court considered that it would not intervene in respect of the provisions included in the invitation to tender. There might be circumstances where proportionality would, in exceptional circumstances, require the acceptance of a late submission of the whole, or significant portions, of a tender, most obviously where there was an error on the part of the procuring authority. Generally, even if there is a discretion to accept late submissions, there is no requirement to do so, particularly where, as in this case, it results from a fault on the part of the tenderer.
- 1.9.9.** This case does not specifically deal with the matter relating to an error which the tenderer wishes to correct. The court was of the opinion that it was not a case of correcting an error but a straightforward late submission. This ensured that the court did not have to consider the provision in the tender enquiry document, which allowed genuine errors to be corrected in the period when tenders were being evaluated.
- 1.9.10.** There is no hard and fast rule as to whether genuine errors can be corrected prior to the deadline as of right. In the absence of an express clause in the tender enquiry document to the effect that errors either can or cannot be amended, we will have to await a case on the matter. The court would have to recognise an implied term to this effect if such an entitlement were to exist.
- 1.9.11.** If the employer is in breach of an expressed obligation to allow tenders containing genuine errors to be corrected, or in breach of an implied term, the disadvantaged tenderer would be entitled to recover financial damages in respect of the breach. How

they would be calculated depends upon the circumstances. If it could be shown that the disadvantaged tenderer would have been awarded the project, the damages would be based upon wasted tendering costs and loss of profit. If there was uncertainty as to whether the disadvantaged tenderer would have been successful, then the damages would be based on loss of opportunity of making a profit. This figure would be based on how much profit the tenderer would have made on the project, but heavily discounted to take into account the chances of being successful.

SUMMARY

There is little in the form of case law which deals with this problem. What little case law exists demonstrates that courts have little sympathy with tenderers who wish to amend their tenders due to their own shortcomings.

To allow a tenderer to adjust a tender price after submission, due to an error, may lead to abuse of the system, particularly where information concerning prices submitted by competitors becomes known to other tenderers. There seems little to fear of problems arising by allowing tenders to be amended where an error occurred which does not affect price.

Some tender enquiry documents include a specific clause which allows genuine errors to be corrected. In the absence of such a clause, it would require a court to accept that there was an implied term to the effect that errors were capable of being corrected. So far, there is no record of any court recognising such a right.

1.10. What is the difference between Management Contracting and Construction Management?

Management Contracting

- 1.10.1. Management contracting is appropriate for large-scale projects requiring an early start on site. The design is undertaken on behalf of the employer and this procurement route is ideal where work needs to be started before the design on the project is completed. It therefore is of great assistance where the period available up to completion is restricted. This procurement route is also suitable for projects where the design is sophisticated or innovative, requiring proprietary systems or components designed by specialists.
- 1.10.2. The management contractor does not carry out any construction work, but manages the project on behalf of the client. It is a cost-reimbursable form of contract, with the management contractor being paid a fee. All the work is undertaken by subcontractors, referred to as works contractors, in distinct works packages, employed by the management contractor. A cost plan is produced at an early stage based upon estimates of the works packages, plus preliminaries and the management contractor's fee.
- 1.10.3. The employer appoints the architect or contract administrator, CDM co-ordinator, quantity surveyor and any other consultant who may be required. There are two distinct

time periods involved. During the first period, which is the preconstruction period, the management contractor should be appointed as early as possible to enable it to have an input into such matters as the design of the project, in particular the buildability aspect; health and safety matters; preparation of the budgets for works packages; and the programme. The fee to be paid to the management contractor is usually agreed at the outset of the preconstruction period.

- 1.10.4. During the construction period the works packages are put together by the management contractor in conjunction with the employer's professional team. The management contractor will be required to manage, organise and supervise the works contractors, to ensure that the work is carried out in accordance with the requirements of the contract and completed on time.
- 1.10.5. The management contractor is paid the final cost of all the works packages plus any preliminaries and the fee. The fee is usually a lump sum, as paying the fee as a percentage of the total of the works package is not conducive to keeping the works package costs to a minimum.
- 1.10.6. The most commonly used standard form of management contract is the JCT Management Building Contract. It is an important concept of this management contract that the consequences of any default on the part of any works contractor do not fall on the management contractor. The management contractor is required to ensure that the work is carried out without defects and on time. However, this requirement does not bite if the only reason for a breach of the obligation is a breach of the works contract by a works contractor. There is no such comfort offered to the management contractor by the Engineering and Construction Contract (NEC 3) Option F Management Contract, which makes it clear that the management contractor is responsible for all work undertaken by the subcontractors.
- 1.10.7. This type of procurement method is generally regarded as low financial risk from the management contractor's point of view. The client, however, is at greater risk financially than would be the case with a traditional procurement route, where the contractor works for a pre-determined lump sum. Employers can be caught out where the contract runs over a long period and unexpected inflation takes place, which results in the final cost of the project exceeding the cost plan.

Construction Management

- 1.10.8. Construction management offers an alternative to management contracting and in like manner is suitable for large projects where an early start on site is required. The major difference between construction management and management contracting is that the construction manager acts solely as a manager and is not in contract with the trade contractors, who undertake all of the work.
- 1.10.9. An additional difference between management contracting and construction management is that the construction manager is a first appointment and will be responsible for selecting the design team, even if they are in contract with the employer.
- 1.10.10. The employer enters into separate trade contracts with each of the trade contractors who will be carrying out the work. The JCT has produced a standard Construction

Management Appointment and a standard Construction Management Trade Contract for use on construction management projects.

- 1.10.11. The construction manager acts as an agent on behalf of the employer and manages the trade contractors' work and also the design. It is usually advisable for the employer to select and appoint its own quantity surveyor, who will act independently from the construction manager, to ensure that impartial cost advice is being provided.
- 1.10.12. In like manner to the management contract, the construction management contract is a cost-reimbursable contract, with the construction manager being paid a fee.
- 1.10.13. The downside of this procurement route is that, if there is a serious dispute between the construction manager and a trade contractor which cannot be amicably resolved, any formal proceeding must be commenced by the employer against the trade contractor.
- 1.10.14. In like manner to management contracting, construction management is low financial risk from the construction management constructor's point of view. The financial risk for the employer arising from the two procurement routes is also the same.

SUMMARY

Management contracting and construction management are both suitable for large projects where an early start on site is required. These are cost-reimbursable contracts, with the management contractor and the construction manager being paid a fee. The major difference between the two procurement systems is that in the case of management contracting, all the work is undertaken by works contractors who are subcontracted to the management contractor, whereas with regard to construction management, all the work is carried out by trade contractors who are all contracted to the employer. Both methods are low financial risk from the point of view of the management contractor and construction management contractor, but in times of unpredictable high inflation, the final cost paid by the employer often exceeds the cost plan.

- 1.11. **A public sector project is advertised and tenders invited. Within the advertisement, it is stated that selection will be on the basis of the most advantageous submission. After tenders have been submitted, selection is made employing an evaluation method which has not been revealed to the tenderers. Would the unsuccessful tenderers have any entitlement to compensation and on what basis?**

- 1.11.1. There is a requirement under European law, embedded in the laws applicable in the UK, which applies to most public bodies and publicly funded organisations and provides for equal treatment of all tenderers. Where appointments are based upon the most economically advantageous bid, the contracting authority must specify which criteria from a specified list it will use to determine the most economically advantageous. The prin-

ciple is designed to be transparent and objective. Unsuccessful tenderers are entitled, where practical, to be informed of their score and the reasons why the successful tenderer was preferred.

- 1.11.2. Contractors who are not appointed and consider that the regulations have not been followed may challenge the award. There is a 10-day standstill period if the challenge is made electronically and 15 days, if made otherwise. Contracts cannot be entered into during this period.
- 1.11.3. There have been a number of court cases brought by unsuccessful contractors on the basis that the authority has failed to comply with the regulations. Courts have the power to set aside awards, which can involve expensive re-tendering and/or award damages to unsuccessful tenderers. Often the court will make a decision which is for the award damages to be assessed, leaving the parties to agree the *quantum*. If agreement cannot be reached, the parties would then normally revert back to the court for a decision.
- 1.11.4. Legal cases where these matters have been the subject of the dispute include:

- 1.0. *Aquatron Marine v. Strathclyde Fire Board* (2007)
This dispute related to a contract for the repair and maintenance of breathing apparatus. The contractor was awarded £110,000, based upon loss of profit, because the authority used different criteria in the evaluation from what appeared in the invitation to tender, which appeared in the OJEU.
- 2.0. *Henry Brothers (Magherafelt) Ltd and Others v. Department of Education Northern Ireland* (2007)
The work for which tenders were received involved the provision of major construction works relating to the modernisation of schools. Several unsuccessful contractors brought an action relating to the methods used in the selection process. It was argued that the price evaluation, based merely on a percentage to be added to the prime cost for overheads and profit, was unfair, as it failed to take account of efficiency levels. The court rejected the claim on the basis that the evaluation was transparent, fair and without discrimination.
- 3.0. *Lettings International v. London Borough of Newham* (2008)
The requirements of the authority were for management and other services related to private sector lettings. The authority was held to be at fault for not disclosing in the OJEU advertisement that the bids were to be evaluated using weightings and sub-criteria which were not stated.
- 4.0. *McLaughlin and Harvey v. Department of Finance and Personnel Northern Ireland* (2008)
In this case, the method of selection was not disclosed prior to receipt of tenders. It was held by the court that this was not transparent and therefore unfair.
- 5.0. *McConnell Archive Storage Ltd v. Belfast City Council* (2008)
The case related to the selection of a company to undertake a document storage and retrieval service. Following the evaluation process, McConnell was advised that it was the successful bidder. Subsequently, at a debriefing of Morgan, a rival bidder, it became clear that the spreadsheet used in the evaluation process contained an arithmetical error, which, if adjusted, would make Morgan the winner.

Morgan was then appointed, which was contested by McConnell. The court rejected the submission on the grounds that the notification to McConnell was not a contract and could subsequently be changed.

- 6.0. *Emm G Lianakis AE and Others v. Dimos Alexandroupolis and Others* (2008)
This case was heard before the European Court of Justice and involved the Municipal Council of Alexandroupolis, which had sought bids for open planning services. The authority was held liable for introducing the weighting factors and sub-criteria after submission of tenders. This information should have been made known at the outset.
- 7.0. *Sita UK Ltd v. Greater Manchester Waste Disposal Authority* (2010)
Dissatisfied bidders who wish to contest an award must do so under the Regulations within three months. The contract was placed by GMWDA for a waste disposal project with VL on 8 April 2009. To comply with the Regulations, Sita should have commenced an action within three months of that date. Sita did not commence proceedings until 27 August 2009, which the court held to be out of time.
- 8.0. *Mears Ltd v. Leeds City Council* (2011)
This case involved capital improvement and refurbishment work for social housing in the Leeds area. Mears claimed that Leeds had been in breach of the Regulations in that they failed to act transparently. It was alleged that Leeds had issued changes to the pricing aspects of the Online Solutions Submission after receiving the tenders. In making an application for an injunction to prevent Leeds from entering into a contract with another bidder, Mears applied for disclosure of certain documents, including the model answers used by those who evaluated the tenders after submission. The court considered that the model answers should be disclosed as being necessary for disposing fairly of the proceedings and determining whether there were criteria, sub-criteria or weightings which had not been made available to tenderers.
- 9.0. *J Varney and Sons Waste Management Ltd v. Hertfordshire County Council* (2011)
In this case Varney tendered unsuccessfully for the operation of 18 Household Waste Recycling Centres in Hertfordshire. It was alleged that the council applied criteria, sub-criteria and weightings which were inconsistent with the information which it had disclosed. In the invitation to tender there was a statement to the effect that the staffing levels proposed by the tenderers would play a significant part in the evaluation of tenders. In submitting its tender, Varney had included for supplying high levels of good-quality staff for each site. When it came to evaluating tenders, staffing levels were given very little significance by the council. The Court of Appeal, however, found against Varney. It was held that it was made clear to tenderers that the basis of the award would be customer satisfaction and price.
- 10.0. *Traffic Signs and Equipment Ltd v. Department for Regional Development and Dept. of Finance and Personnel* (2011)
A decision to award a contract using assessment criteria where 40% of the marks were allocated to quality was found to be unlawful on the basis that the allocation could not be justified.

SUMMARY

There is a requirement under European law, which is embedded in UK laws which apply to most public bodies and publicly funded organisations and provides for equal treatment of all tenderers. Where appointments are based upon the most economically advantageous bid, the contracting authority must specify which criteria from a specified list it will use to determine the most economically advantageous bid. The principle is designed to make the selection process transparent and objective. Unsuccessful tenderers are entitled, where practical, to be informed of their score and the reasons why the successful tenderer was preferred.

Contractors who have unsuccessfully bid for projects covered by the Regulations may wish to consider what actions they may take. Courts now have a number of options they can adopt if a public body fails to comply with the Regulations. Unsuccessful contractors are entitled to be awarded damages where this occurs. If the contractor would have been awarded the contract, had the correct process been followed, as was the situation in the case of *Aquatron Marine v. Strathclyde Fire Board* (2007), an award of loss of profit would be appropriate. If there is no certainty that the claimant would have been awarded the contract, then any award would be based upon loss of opportunity which amounts to a discounted profit loss. The court also has power to order the tender process to be repeated.

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