building blocks

- hot topics
- procurement pitstop
- JCT DB 2005
- delays
- protection from consultant insolvency
- the duties of the quantity surveyor

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Welcome to the Spring 2011 edition of *Building Blocks*.

Firstly, many thanks to all of you who took part in our Festive Crossword. I hope you all enjoyed it. Congratulations to the winner of the hamper, Emma Watson of Cyril Sweett. For those of you who did not quite finish the crossword, the hidden word was Reindeer.

In this edition, hot topics deals with State aid and new procurement cases, and Kat Souter continues the third in her series of articles on procurement.

Alexandra Price and Stuart Thompson also continue their series of articles on JCT 2005 Design and Build. For those of you with an interest in JCT 2005, Ron Plascow and Stuart Thompson will be speaking on the subject at seminars to be held on 17 March 2011 at 8am in our Cambridge office, 22 March 2011 at 4pm in our London office and 4 May 2011 at 8am in our Norwich office.

Also in this edition of *Building Blocks*, Martino Giaquinto completes his two part article on delay and Ruth Phillips comments on protection from consultant insolvency. The insolvency of consultants will be addressed in our seminars “The Big Freeze: insolvency in the construction industry”, which will be held in our London office at 4pm on 5 April 2011 and in our Cambridge office at 8am on 7 April.

If you are interested in attending any of our seminars please either email rachel.snow@mills-reeve.com or fax to 01223 355848 or register via our website www.mills-reeve.com/events

In this edition you will also find a short article by Alexandra Price on a recent judgement regarding the liability of quantity surveyors (*Dhamija and Another v Sunningdale Joineries Limited*).

AND FINALLY, do look out for our new blog called Practical Completion (www.practical-completion.co.uk) which will be launched shortly. This will provide timely news updates of interest to anyone involved in the construction and engineering industry. We will be sending out emails confirming its launch in due course.
State aid
The European Commission announced in December that the temporary framework for state aid measures to support access to finance in the current financial and economic crisis will be extended into 2011. What this means is that certain forms of aid can be granted without prior notification to the commission. Notably however there was a provision that allowed aid up to €500,000 to be granted without notification but this has now been reduced to €200,000 for applications made after 31 December 2010.

Procurement cases
1. Indigo v Colchester
Readers may be aware that the new Remedies Directive (which came into force in December 2009) introduced a new process for challenging a contract award. Claimants are now able to “automatically suspend” the award of a contract simply by issuing a claim form during the standstill period. Such an automatic suspension means that the contracting authority may not award the contract until the court orders the suspension to be lifted. Mills & Reeve recently acted in what we believe is the first hearing in relation to the automatic suspension process. Indigo Services UK Limited brought a challenge against Colchester Institute Corporation (“Colchester”) and suspended the contract award process. We acted for Colchester, which succeeded in lifting the automatic suspension imposed by Regulation 47G of the Public Contracts Regulations 2006. In a further case, Excel Europe Limited v University Hospitals Coventry & Anor (2010) (TCC), the court also decided that the automatic suspension could be lifted. The court found that there was a serious issue to be tried but damages would be an adequate remedy for the claimant.

2. Mears Limited v Leeds City Council (2011)
The High Court has also considered whether Leeds’ model answers, a document against which Leeds’ evaluation panel scored tenders, should be disclosed. The Court ordered disclosure of relevant documentation which included the model answers because the tender evaluation panel were told in guidance to assess the tenders by reference to them.

The judge acknowledged that the model answers may contain confidential information but that this would not prevent disclosure. A “confidentiality ring” could be applied so that only named solicitors and one director of Mears were allowed to view the documents, in order to decide whether they contained criteria or weightings that should have been disclosed.

The Court also provided a useful six point summary of when the clock should start ticking on the three month period to make a claims under Regulation 47(7) of the Public Contracts Regulations.

“Pay-less” notices: out with the old and in with the new?
The latest information suggests that the new Construction Act will not come into force before October 2011.

The new Act makes changes to adjudication to cover construction contracts whether they be in writing or not.

The new Act will also outlaw pay when certified clauses.

It also markedly alters the regime for the service of withholding notices which effectively become pay-less notices. Full details will be provided in due course.

Timber framed buildings
The London Assembly’s Planning and Housing Committee have published a report following their inquiry into “Fire risks in London’s tall and timber framed buildings.”

This report lists a number of recommendations including: the use of fire suppression systems; site security measures; informing the local fire brigade and the HSE that a timber framed building is to be constructed and no partial or full occupation to be allowed of timber framed buildings until completed as a whole.

These suggestions are an indication of what the Government is likely to consider in its review of the Building Regulations starting in 2012/2013, and finishing in 2015/2016.
procurement pitstop

This is the third in a series of four articles on public procurement. In the next and final procurement pitstop, I will look at bringing and defending challenges to public procurement decisions.

The OJEU notice has been published to invite expressions of interest, the economic suitability of each organisation who came forward has been assessed, a shortlist of bidders on that basis has been selected, the ITT has been issued and now the bids need to be marked and the award of the contract made to the successful bidder.

Decisions making
At this point the contracting authority should be looking at the merits of the bid and not the bidder. The Public Contracts Regulations say that a contracting authority may award a public contract on the basis of either:

- the most economically advantageous bid (MEAT); or
- the lowest price.

Examples of non-price elements that can be taken into account are quality, technical merit, aesthetic and functional characteristics, cost effectiveness, delivery and completion time. These are called the award criteria. We often see ITTs that ask bidders to prepare a suggested programme of the building works with materials and pricing where the contract is to be awarded to the bidder with the best price/time combination.

Bidders should be made aware when receiving the ITT of all award criteria that will be taken into account and scored by the contracting authority, this includes all sub-criteria, sub-sub criteria, maximum scores for each section and the percentage weighting given to each section which will finally make up the total bid score. Before releasing the ITT, test the marking scheme to ensure it works by marking a dummy or old bid from a previous project.

If an interview is to take place will this be marked? If so how? How much importance will be placed on interview performance? It is always prudent to award some marks to a face to face stage of the bid because meeting the personnel from the bidding organisation can influence a decision.

The evaluation of the tender must stick to the method described in the ITT. Re-read the ITT and keep a copy handy when evaluating tenders. Adequate records should be kept. Bear in mind the Freedom of Information Act 2000, Environmental Information Regulations 2004 and the Audit Commission Act 1998, all of which provide mechanisms that can be utilised by an unsuccessful bidder to seek access to procurement records.

If advice is sought on the application of the Public Contracts Regulations, remember that it is only communications between solicitor and client that may be protected from disclosure in later court proceedings; communications between solicitor and consultants will not.

Award letter
For procurements commenced on or after 20 December 2009, letters informing the successful and unsuccessful bidders to whom the contract will be awarded should set out:

- the award criteria and scoring method;
- the reasons for the decision, including the characteristics and relative advantages of the winning tender;
- the actual scores of the recipient of the letter and the overall score of the successful bidder;
- the name of the successful bidder; and
- information about the start and end of the standstill period.

A letter simply offering to debrief an unsuccessful bidder upon request is no longer acceptable.

Working out the standstill period
The standstill period should end, at the earliest, 10 days after the letters are all faxed/ emailed or 15 days after the letters are posted. Bear in mind the following points:

- The day on which the letters are emailed/faxed/posted should not be included in the calculation.
- If the last day of the 10 or 15 day period is not a working day then the period should be extended so that the last day is a working day.

The final administrative step is to publish a contract award notice in OJEU. This must be done within 48 days of the award of the contract.
The effects of partial possession and early use are very different and without amending JCT 2005 it can sometimes be difficult to distinguish between the two. Therefore, you may want to adapt JCT 2005 to make sure the contract works for you.

Partial Possession – risk passes to the employer
Under JCT 2005 the employer may take possession of part of the works before practical completion provided it obtains the contractor’s consent. Contractors are unlikely to withhold consent in most instances because taking possession of part of the works means that practical completion is deemed to have occurred for that part. Therefore one of the key risks passes to the employer. This is good news for the contractor as it can sidestep the usual rigours of having to demonstrate to a third party that the works are complete.

Early Use – risk remains with the contractor
The effect of early use is different from partial possession. Under clause 2.5 if the contractor allows the employer to use part of the site before the works are ready (e.g. to allow the employer’s fit-out contractor to carry out its works), practical completion is deemed not to have occurred. The risk of completing the works on time remains with the contractor. Of course, the employer should always keep one eye on clause 2.26 (Relevant Events) as its actions may give rise to a claim for an extension of time and loss and expense.

Partial Possession or Early Use: which one applies?
The courts have decided that the central issue is to establish which party has exclusive possession of the relevant part of the site. If it’s the employer, the partial possession provisions apply. If it’s the contractor, the early use provisions apply. However, without amending JCT 2005 it is not always easy to decide which regime wins through and this uncertainty can lead to some odd decisions. For example, where an employer’s tenant used part of the site to carry out fit out works the court decided this was partial possession. In contrast, where an employer occupied and operated a hotel before practical completion, the court decided this was no more than early use. Therefore if you are going to use the works early, you may want to amend JCT 2005 so the parties are clear which set of rules applies.

How should you amend the contract?
A common amendment is to include an agreed access regime to make it clear when and how the employer can occupy the works without triggering the partial possession provisions. Parties can also use the access regime to deal with insurance, health and safety and security issues. The employer may also want to amend JCT 2005 so that the contractor waives its rights to claim an extension of time or to recover loss and expense for complying with the access regime. The parties may also decide to amend the contract to clarify that when the parties use the access regime the contractor remains responsible for the site.

Conclusion
The parties should consider modifying JCT 2005 to suit their needs as the amendments can often result in a more flexible contract for both parties. The amendments can also avoid confusion and therefore prevent disputes occurring. In the next issue we will consider extensions of time.
There are four key elements in delay analysis that the courts must be satisfied of:

- There must be a discernable nexus between the event alleged and the consequent delay. However because construction claims are complex, it is difficult to prove that a particular breach has caused a particular delay.
- There must be proof of causation. What is causation? The courts have said “causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them.” The court decides whether the event was the cause of the delay by using common sense.
- There must be a fundamental understanding of the legal and evidential burdens of proof and how they are discharged.
- In delay cases the standard of proof is satisfied on a balance of probabilities.

So, how can a successful claim be presented? It is all about the evidence and there is a hierarchy.

Delay is a question of fact, not a question of law. The best evidence is direct evidence. In many cases there can be some factual proof by witness evidence and this should be used.

Then there is indirect evidence. If relying on inferences that the event caused the delay, a party needs to carry out a proper analysis of the facts by establishing the scope and extent of the event/complained and what the immediate effect was. Then there is use of the contemporaneous documents and records.

Finally, there is the opinion evidence used to support all of the above.

A claimant generally needs to demonstrate critical delay caused by the events complained of. Critical delay is usually assessed at the end of the project. As to presentation, it is generally unwise for a party to adopt an approach which keeps everything in just in case. A better approach is to adopt a bolder and more analytical approach to the key issues.

What about tips for improving the chances of a successful outcome?

1. A party may present its case as it thinks fit. A court will require a party to spell out its case, and where the case depends upon the effect of an interaction of events, to spell out the nexus in an intelligible form. Being able to summarise the delay claim on one sheet of paper or in a logical schedule helps.

2. Carry out a proper analysis of the facts to prove cause and effect, preferably directly rather than by inference.

3. It can be helpful if the claim is divided up into discrete parts eg. areas of a project, particular activities or trades or particular time periods.

4. A computer generated analysis that just shows an end result is a dangerous approach. All analyses are based on assumptions and to avoid the analysis being worthless (if a major assumption is wrong) make the analysis transparent and sensitive to any assumptions. Facts analysed must be apparent and explainable for the same reason.

5. Computer generated analyses are useful provided certain steps are taken:

- Get an agreed as-planned programme and actual as-built programme.
- The programmes should take into account any changes in resources or in logic.
- Include narratives.
- If necessary provide a revised as-planned or as-built to reflect what occurred and logic changes.

6. It should be remembered that computer generated analyses are merely tools and are to be considered with other evidence. The evidence of programming experts may be persuasive.

7. A programming expert who fails to use accurately updated schedules and logic changes or fails to assess the delays of his own client, risks having his evidence disregarded.
The news that Archial, the UK’s sixth largest architectural practice, was placed in administration last year will not have escaped many in the construction industry’s notice and, unfortunately, it is unlikely that it will be the last consultant to become insolvent. With experts agreeing that 2011 is going to continue to be a difficult year for the construction industry, employees and funders need to be aware that the insolvency of a consultant can be as harmful for a project as that of the main contractor.

Employers must ensure that the forms of appointments they sign their consultants up to provide as much protection as possible from the effects of consultants becoming insolvent.

- To start off with, employers must ensure that consultants’ appointments contain a robust “termination at will” clause so they can terminate the appointment immediately.
- The appointment should also allow for important rights, such as copyright licence, and the provision of all design documents (unfettered by any dispute over unpaid fees) to continue beyond termination.
- One other practical point is that consultants’ appointments should contain a comprehensive payment schedule rather than just a single fee for the whole project. Employers should liaise with their project managers to ensure that all payment requests are in line with that agreed in the consultants’ appointments, as they do not want to find that they have paid an insolvent consultant for services that have not been carried out, especially as it is unlikely they will recover the overpaid fees.

Employers should be particularly cautious where they have appointed a lead-consultant to employ all the other design consultants as sub-consultants. While there are numerous advantages to having one point of responsibility, these advantages could come crashing down if the lead-consultant becomes insolvent. The risks surrounding lead-consultancy insolvency are very similar to those of main contractors. An employer could be paying all the sub-consultants’ fees directly to the lead-consultant, but that does not mean that the lead-consultant is then paying the sub-consultants for the services they are providing. If an employer is concerned with lead-consultancy insolvency, it might decide to try and pay the sub-consultants fees direct to ensure that they continue to provide their services. However, the danger with this is that the lead-consultant or its administrator would be entitled to claim from the Employer those very same fees again.

One solution that is currently becoming popular in circumventing the issue of direct payment to sub-contractors, is the use of project bank accounts. There is no reason why project bank accounts cannot be used in this scenario as well.

Finally, employers should ensure that the sub-consultants’ appointments are back-to-back with lead-consultant’s appointments. Sub-consultants’ warranties in favour of the employer should also be drafted so that sub-consultants have to immediately inform the employer if the lead-consultant has failed to pay its last two months’ fees. At this point the employer should have the right to step into sub-consultants’ appointments in place of the lead-consultant to enable the project to continue with limited delay and additional cost.
the duties of the quantity surveyor

The recent judgment in Dhamija and another v Sunningdale Joineries Ltd and others considers the role of the QS when assessing the contractor’s work prior to advising the employer on payments to be made.

Background
The Dhamijas appointed the contractor, Sunningdale Joineries, under a JCT IFC 98 form of contract. Under that contract, as is usual in both the JCT 1998 and 2005 suites of contract, the contract administrator’s role includes the issue of interim certificates for payment. The contract administrator looks to the QS to value the contractor’s work, and will certify on the basis of that valuation.

In this case the Claimants alleged that the QS owed a duty “to only value work that had been properly executed by the contractor and was obviously not defective”. In other words the QS was to take a view on whether the work was defective. The QS denied this, and argued that its duty was to provide a value for the interim certificates based on the works properly executed, as advised by the architect.

Role of the QS
The trial judge accepted the position of the QS. The standard of care required of a QS did not extend to implying a duty upon the QS to assess quality. The only implied duty with regard to quality was to exclude work that was “clearly wrong”.

Conclusion
This judgment is helpful in making clear that a QS’s duty is limited at common law to issues of quantity and does not extend to issues of quality; the latter responsibility lies with the architect.

While a QS can take some comfort from this judgment, any QS should be alive to the fact that the specific contractual terms of the QS’s appointment could create a more onerous duty and legitimately require the QS to also assess the quality of a contractor’s work.