The shape of things to come?

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With the increasingly onerous terms being introduced into construction contracts here are some suggested special conditions which may be in force by 2010.

Definitions
In the Contract the following words and expressions shall have the meaning hereby assigned to them unless the Architect otherwise requires:

'Contractor" means the person, firm or company who is given the honour of being allowed to lose money on the Contract.

"Architect" means the person, firm or company employed and paid by the Employer to carry out his instructions.

"Final Contract Sum" means the sum to be ascertained in accordance with the provisions of the Contract but not paid to the Contractor.

"Maintenance Period" means the period named in the Appendix to the form of tender or any other period decided by the Employer.

"Retention Money" means the sum retained by the Employer in accordance with the Contract and never seen again.

Discrepancies between Documents
The Contractor is to fully check the documents forming the Contract and notify the Architect of any discrepancies within two hours of receiving the documents. Any discrepancies found later will be resolved by the Employer by choosing the most expensive solution, even if it is not what he wants.

Alternative Revolutionary Proposal

The Quantity Surveyor shall check the documents forming the Contract (which he has been paid for preparing) for discrepancies before they are issued to the Contractor.

Issue of Drawings
As and when from time to time as may be necessary the Architect shall furnish the Contractor with such drawings as may be necessary in the opinion of the Architect either to explain or amplify the Contract Drawings.

If the Architect fails to do so the Contractor is responsible for determining the Architect's wishes and carrying out the work anyway. ~~If~~ When the Architect rejects the Contractor's work the Contractor shall be responsible for any number of attempts to find a solution which is to the unreasonable satisfaction of the Architect.

The Architect's obligation to provide such further drawings or details is subject to the Contractor having submitted a written request exactly 90 days before he actually needs the information. Any deviation from that period will be deemed to be a waiver of the Contractor's right to receive such information, and the Contractor shall then follow the procedure set out in the last clause.

Architect's Instructions
All instructions issued by the Architect shall be in writing, except if the Architect does not wish to do so. Any delay occurring as a result of the Contractor not complying with a verbal instruction or misinterpreting such instruction shall be the Contractor's responsibility and no claims for payment or extension of time will be entertained. The Architect, however, shall be entertained by the Contractor whenever instructed.

Substantial Completion
The Contractor is to notify the Architect when he considers that the works are substantially complete and request that a certificate to that effect is issued. Not less than one year following the date of such request the Architect shall consider the issue of such a certificate, but only if the Employer does not object.

Bills of Quantities
The quality and quantity of the work included in the Contract Sum shall be deemed to be that which should have been set out in the Contract Bills.

The quality and quantities of the Contract Bills shall be determined by the level of fees paid to the consultants by the Employer. Any error in description or in quantity in or omission of items from the Contract Bills shall not vitiate this Contract and such errors or omissions or anything else contained in the Contract Bills shall not override, modify or affect in any way whatsoever the quality and quantity of the work to be actually carried out by the Contractor.

The Bills of Quantities have been measured in accordance with the Hong Kong Standard Method of Measurement except where the Quantity Surveyor didn't feel like it. No claims for additional payment or extension of time due to deviations from such Method of Measurement will be entertained. However, the Quantity Surveyor shall be entertained whenever an interim valuation is to be carried out, and the Quantity Surveyor shall be carried out at the end of the entertainment.

Extensions of Time
Upon it becoming vaguely possible that the progress of the Works is delayed, the Contractor shall give written notice to the Architect. If the Architect can think of no possible reason, however unlikely, why the event will not have an effect on the completion of the Works he shall, not earlier than 12 months after completion of the Works, make in writing an extension of time which will have the minimum effect on the Employer's right to liquidated damages, which have already been deducted from payments due to the Contractor.

In the case of any delay for which the Employer may be responsible the Contractor hereby waives any right to extension of time and agrees that the Employer's right to deduct liquidated damages will not be affected.

It is a condition precedent to any right to extension of time that the Contractor's written notice has been delivered by hand to the Architect's Dubai office not later than 3 hours after the start of the event causing the delay, if not sooner. The Contractor shall constantly adopt whatever measures the Architect considers necessary to prevent or minimise any delay for which the Architect could possibly be blamed by the Employer.

Direct Loss and/or Expense

If upon written application from the Contractor and after the Architect has stopped laughing, the Architect considers that the Contractor has incurred direct loss and/or expense

(a) For which the Architect cannot think of ~~a good~~ any reason to blame the Contractor, or

(b) For which the Architect can place the blame on another consultant, or

(c) For which the Employer is responsible (but this should not be stated in any claim submission).

Then the Architect will instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense whenever he has the time, on the basis of the 'YMBJ' principle (You Must Be Joking). Such loss and/or expense shall not include site or head office overheads, profit, plant, labour or any other costs that the Quantity Surveyor can think of a reason for excluding.

The Contractor's right to such loss and/or expense is conditional upon the submission of a written notice of intention to beg for additional payment not less than one month prior to the start of the event giving rise to the claim.

Within 1 day of the notice the Contractor shall submit a fully detailed application setting out the actual amount claimed, supported by receipted invoices, copies of cheques, bank statements and affidavits from all workers, suppliers and sub-contractors that they have actually received payment. Any excuse that the Contractor has not actually paid out the monies prior to the application will constitute a waiver of the Contractor's right to payment.

Notwithstanding the General and Special Conditions of Contract the Employer and Architect are empowered to take or fail to take any action they consider necessary, and no such action or inaction shall constitute a breach of the Contract.

On receipt of the Contractor's detailed application the Quantity Surveyor shall ignore it for a period considered by him to be sufficiently unreasonable, and then request further information which the Contractor must provide within 12 hours. If the Contractor fails to do so he will be deemed to have waived his right to such claim. Following receipt of such information the Quantity Surveyor shall make a request for even more information, and continue to do so until the Contractor abandons the claim.

Outbreak of Hostilities

~~If~~ When during the currency of this Contract there shall be an outbreak of hostilities (whether war is declared or not) in which one of the parties shall be involved on a scale involving the general mobilisation of solicitors, claims consultants, experts and the like then the other party may determine that such armed forces shall also be mobilised on his behalf, and battle shall commence.

Antiquities

Subject to the regulations set out in the Antiquities Ordinance all objects such as final accounts found at least three years after the completion of the Works shall be subject to the following procedure:

(a) The Quantity Surveyor shall use his best endeavours not to disturb the object,

(b) The Quantity Surveyor shall take all steps which may be necessary to preserve the object in the exact position and condition in which it was found.

The Architect shall issue instructions in regard to what is not to be done concerning the object.

Variations

The Architect may issue instructions requiring a variation but will not sanction any variation made by the Contractor without such instruction, even if the Works could not be completed without such variation.

The term 'variation' as used in these Conditions means the modification or alteration of the design, quality or quantity of the Works as shown on the Contract Drawings and described by or referred to in the Contract Bills, but does not include any change which a clairvoyant contractor could have anticipated as possibly required by the Architect, Employer, future owner or tenant or any of their heirs and successors.

The Architect may issue instructions for the omission of any work included in the Contract and give it to ~~his friend or relative~~ another contractor.

Any variations which the Architect mistakenly sanctions shall be measured and valued by the Contractor who shall submit such valuation to the Quantity Surveyor. On receipt of such valuation, and after he has stopped laughing, the Quantity Surveyor shall set aside the submission for not less than one year, at the end of which period he shall issue his own valuation, which shall be not more than ten per cent of the Contractor's valuation.

The Quantity Surveyor's valuation shall be calculated in accordance with the following rules:

(a) The prices in the Contract Bills shall determine the valuation of work of a similar character executed under similar conditions as work priced therein unless the Quantity Surveyor considers that the Bill rates are too generous;

(b) The said prices, where work is not of a similar character or executed under similar conditions as aforesaid, shall form the basis of prices for the same so far as they are considered by the Quantity Surveyor to be low, unless the Quantity Surveyor remembers that even cheaper prices were obtained on another project at least five years earlier.

(c) Where items are omitted the prices in the Contract Bills shall determine their valuation except where the Quantity Surveyor considers that ~~higher~~ more reasonable rates would be appropriate. The Contractor shall not be entitled to any loss of profit on such omissions, since he was not permitted to make any in the first place.

Some people may think that the above examples are greatly exaggerated, but the terms included in tender documents are getting more onerous, not less. Never mind the Grove and Tang Reports — the consultants keep thinking up terms that are designed to make life more difficult for contractors. The question arises — who are those terms meant to protect? It seems increasingly it is the consultants themselves. And as for partnering — YMBJ.