

A Different Ball Game

by Steve Revay



Construction is a mobile industry. Whereas most firms are regional in their operations, many others provide their services far afield. Increasingly, these fields are foreign.

Construction conditions, regulations and contract provisions vary widely within a country. Often it is not fully realized that the contractual environment in other countries can vary even more widely. As they say, "it is a different ball game."

Many overseas construction projects are executed on the basis of the FIDIC contract form. The accompanying article deals with some of the British provisions that are dramatically different from those normally applying in Canada and the United States.

The pattern of RAL's own operations is similar to those of many of its

clients. Whereas most of its work is "domestic", it has executed international assignments each year since its establishment in 1970. This experience and exposure has covered 18 countries in five continents.

Elsewhere in this issue is a report on a new association with J.W. Morris Ltd. and with Manning Seltzer which is designed to further enhance the value of our services to clients in the international construction field.

Other brief items of an international nature reflect the world-wide mobility of members of the construction fraternity and of the opportunities for business in the export markets.

THE BRITISH INFLUENCE ON INTERNATIONAL CONTRACTING

"Contracting", in the context of this article, refers to the administration of construction contracts. One may ask, even with this explanation, whether a "British influence" exists at all and, moreover, why it is of any interest to a North American constructor (e.g., owner, architect, consulting engineer or contractor)?

The answer to the first question is simple the most frequently used contract on international projects, i.e. the "Conditions of Contract (International) for Works of Civil Engineering Construction" is almost a carbon copy of the British Institute of Civil Engineers (I.C.E.) Conditions, even though it is published by the Federation Internationale des Ingenieurs - Conseils (F.I.D.I.C.) with headquarters in The Hague and the Federation Internationale des Entrepreneurs Europeens de Batiment et de Travaux Publics (F.I.E.E.B.T.P.) based in Paris.

The Associated General Contractors of America gave its approval to the F.I.D.I.C. Conditions some time ago,

accepting the Third Revision with all its English peculiarities such as the Bill of Quantities and the Nominated Subcontractor.

As these practices represent the rule rather than the exception in England, and have been around since the beginning of the twentieth century, they have been questioned, discussed and interpreted in English courts in a number of instances. Accordingly, there is a tendency, particularly by international arbitration tribunals, to follow English jurisprudence. More significantly, however, Canadians are inclined to rely on English decisions, even in domestic litigation, without considering (or perhaps even realizing) that industry practice supporting those decisions may be totally different from the North American method of contracting.

This latter possibility is the principal reason for needing to understand British contracting practices.

It would be impossible to offer an exhaustive treatment of this subject in

such a short article; the following comments are intended to highlight only some of the more dramatic differences such as the Bill of Quantities and the Nominated Subcontractor.

Generally, in England, two standard contract forms exist, namely:

1. Standard Form of Building Contract, issued by the Joint Contracts Tribunal, which was long known as the R.I.B.A. contract, and now known as the JCT Form. This form of contract goes back to the nineteenth century, but has been revised five times, the last time in 1980. This Contract comes in six variants.
2. I.C.E. Conditions, currently in its Fifth Revision (dated 1973).

The terms of these two forms of contracts vary widely, to the point that English legal texts nowadays deal with only one form in the same edition. There are similarities also; for example, both forms rely on the Bill of

Quantities and provide for Nominated Subcontractors, albeit treating these notions differently. It should also be noted that two of the six JCT variants are without quantities.

BILL OF QUANTITIES

The reader must be wondering by now what is so unique about a Bill of Quantities and, more importantly, how does it differ from the Schedule of Quantities and Prices used in many North American unit price contracts?

The Bill of Quantities contains a precise and detailed definition of the scope of the work. In the building industry, it is usually divided into trades and, in this respect, has a lot of similarities with the North American "Technical Specification", as opposed to a mere listing of quantities to be priced.

A JCT form of contract with quantities (as opposed to approximate quantities) is considered a lump sum contract, even though in practice neither the owner nor the contractor can be certain of the final price until the remeasurements have been completed.

Simply stated, the Bill of Quantities usually fulfils three independent contractual functions (at least in theory), as follows:

1. To value variations;
2. To calculate monthly progress certificates; and
3. To produce a final remeasurement of the ultimate contract sum, whether or not the work has been varied.

In the building industry both the initial preparation and the periodic and final remeasurement of the quantities rest with a Quantity Surveyor retained by the owner. In the civil engineering industry of England there is no separate profession concerned with the quantities and the above three functions are discharged by the Engineer of record.

One could argue that the usual contract schedules (of Quantities and

Prices) in North America have the same uses as described above - where then is the difference?

The Schedule type of contracts and probably the Third Edition of F.I.D.I.C. contracts are based on the principle that the quantities are estimated quantities (i.e. approximate) and the Engineer shall ... ascertain and determine by admeasurement the value in accordance with the contract of work done..." i.e., applying the tendered unit prices to the actually measured quantities. (Except where the contract contains a quantity variation clause).

As opposed to this, both the JCT Form and the Fifth Edition of the I.C.E. form consider quantity fluctuations as "variations" ordered pursuant to the appropriate variation clause to be valued according to the valuation clause allowing for "**fair valuation**" or "**reasonable price**" and not necessarily pursuant to the tendered unit prices.

A second area of concern with the use of Bill of Quantities is the incorporation of the Standard Method of Measurement (or the C.E.S.M.M. in conjunction with the I.C.E. form).

Both the JCT and the I.C.E. forms stipulate that the determination of the quantities shall be deemed to have been prepared and measurements shall be made according to the procedure set forth in the Standard Method, and

"Any error in description or in quantity or omission of items from the ... Bill ... shall be corrected and deemed to be a variation ... unless otherwise expressly stated in respect of any specified item or items."

These Standards are not without ambiguity and their use gave rise to a long line of litigation sometimes with inconsistent results. It must be realized that in English practice the Articles of Agreement and Conditions of Contract do not contain all the obligations of the contractor, many of which are set out in the Bill of Quantities. Nevertheless, Clause 12(1) of the JCT conditions (1963

Edition, but left unchanged in 1980) states as follows:

"...but save as aforesaid nothing contained in the Contract Bills shall override, modify or affect in any way whatsoever the application or interpretation of that which is contained in these Conditions."

The above restrictions were considered by the House of Lords in the case of **English Industrial Estates Corporation v. Wimpey (George) Co.** (1972) as they run contrary to the general rules of contract interpretation according to which the specific (in this case the Bill of Quantities) takes precedence over the general (in this case the JCT Form).

Lord Justice Denning, speaking for the Appeal Court, considered that because the Contract Bills formed the basis of the contractor's estimate these Bills ought to take precedence over Clause 12(1). The House of Lords disagreed, and Lord Justice Stevenson had this to say:

"To apply the general principle that type should prevail over print seems to me to contradict the express provision of clause 12 that the reverse is to be true of this particular contract: the special conditions in type are to give way to the general conditions in print. The words in clause 12, 'or affect in any way whatsoever the application or interpretation of that which is contained in these conditions', seem to mean that in this contract the bills of quantities are 'Contract Bills' insofar as they deal with 'the quality and quantity of the work included in the contract sum', but that insofar as they state conditions of the contract they have no effect on the printed conditions...

... Insofar as they introduce further contractual obligations, as they do at page 9, they may add obligations which are consistent with the obligations imposed by the conditions, but they do not affect them by overriding or modifying them or in any other way whatsoever.

It follows from a literal interpretation of clause 12 that the court must disregard - or even reverse - the ordinary and sensible rules of construction and that the first of the documents comprising the works Wimpeys offered in their tender of 17 December 1968 to carry out expressly prevents the court from looking at the second of those documents to see what the first of them means. But that is because the second document is ... a hybrid document and part of it deals with matters which should have been incorporated in the first; and that part can only live with clause 16 if it has ... a different subject matter..."

This decision, which is probably correct in law but is contrary to accepted practice, is an excellent example of the tendency of the English courts to interpret contracts literally even if the decision gives a patently unreasonable result.

A similar, but even more striking example of strict interpretation, is the decision rendered in the case of **Trollope E. Coils Ltd. v. North-West Metropolitan Regional Hospital Board** - House of Lords (1973) 9 BLR 60, which decision has already been considered in Canada.

In this case, the job was divided in three phases, each phase having a separate contract sum and set conditions. Phase III was to have started upon the completion of Phase 1, but had to be completed at a specific date. During the construction of Phase 1 the contractor was granted 57 weeks of extension. He argued that the same extension ought also to apply to the overall completion, as without such an extension, the time allowed for Phase III would be reduced to 16 months from the agreed upon duration of 30 months.

The House of Lords' decision was given by Lord Pearson as follows:

"The basic principle (is) that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for

themselves, however desirable the improvements might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.

The relevant express term is entirely clear and free from ambiguity: the date for completion of phase III is the date stated in the appendix to (the) conditions ... That terms in itself can have only one meaning".

I.N. Duncan Wallace, the Editor of **Hudson's Building Engineering Contracts**, in an article in 1975 in the **Journal of Maritime Law and Commerce**, had this to say about the use of Contract Bills:

"For the several reasons which I have endeavoured to make plain in this Article, employers and their professional advisers in countries other than the U.K. would do well to ponder carefully before yielding to the blandishments of those putting forward contracts for construction projects which use Bills of Quantities, certainly if their incorporation is effected in the terms which are now nearly universal in the U.K. The principal criticism is not that remeasurement is permitted (i.e. the "Schedule" principle), but that it is permitted in a way which positively encourages

apparently binding "Schedule" prices to be departed from to an unpredictable extent governed by no clear criteria."

NOMINATED SUBCONTRACTORS

The issue of Nominated Subcontractors is even more controversial. In both JCT and I.C.E. forms the owner has the right to nominate subcontractors. This is achieved by the architect negotiating with subcontractors and settling the terms of their agreement without prior consultation with the main contractor, merely informing him of the agreed upon terms, to which the main contractor is then bound.

This system, in the words of Lord Reid, is an ingenious attempt to give the employer the benefit of two opposing concepts. Theoretically, it enables him to have all the advantages of choosing his own specialist contractor and of bargaining with him for his price and the terms of his contract and for the performance of services, but avoids the disadvantages of multiplicity of direct contracts.

In practice, the system is full of pitfalls and headaches. It is a strange situation in which the contractor agrees under the terms of his contract (e.g. JCT or I.C.E. form) to accept, as a subcontractor, a firm imposed upon him by the Architect, subject to some nominal rights of objection. In return, the Owner agrees to limit his right against the contractor if that subcontractor fails, i.e. delay on the part of a Nominated Subcontractor can be grounds for an extension of time and for commensurate compensation in damages. On the other hand, the contractor assumes responsibility for the workmanship of the Nominated Subcontractors.

This anomaly in the respective relationship of the parties has been looked at by the House of Lords in the **City of Westminster v. J. Jarvis & Sons and Peter Lind Ltd.** (1970) 7 BLR 64. In this case, Jarvis contracted to build a multi-storey car park resting on piles (to be installed by Lind). Lind completed (apparently) his work on time and left the site.

Some weeks later, it was discovered that many of the piles were sub-standard and needed replacement. As a result, the main contract was delayed 21.5 weeks. Jarvis claimed extension due to delay caused by a Nominated Subcontractor. This request was refused because the delay was not "on the part of" the subcontractor although caused by him.

The relevant excerpt from Lord Wilberforce's speech is as follows:

"My Lords, if such an interpretation were imposed by the words used, it would have to be accepted whatever (short of completely frustrating the contract) the consequences might be. Within the limit I have mentioned the parties must abide by what they have agreed to and it is not for the courts to make a sensible bargain for them...

... It is only necessary to point to the fact that if the defects in the piles had been discovered before

the subcontract completion date, and work had been at once put in hand to remedy them - thereby producing a similar period of delay in the completion of the main contract - the clause would, it seems, have applied, but it does not do so if the work was 'complete' (though defective) on that same date so that the contractor could take over. One must set against this the advantage that, if the subcontract work is apparently completed and handed over, and some defects appear very much later but before the contract date, as they might in a large contract, this would not, on the employer's construction, be a case of delay, though it might be so on the subcontractor's. But even so, the first type of difficulty is a very grave defect and a serious reflection on the clause; indeed, I cannot believe that the professional body, realising how defective this clause is, will allow it to remain in its present form. But in my opinion, though it is

never agreeable to have to choose the lesser of two incongruities, we have to do so here, and I find the employer's version qualifies for this not very flattering description..."

Another difference between British and North American practices is that English law does not recognize construction acceleration, and in fact in most cases the architect/engineer can grant an extension in retrospect. This is not so, however, if delay was caused by the Owner. **See Amalgamated Building Contractors Ltd. v. Waltham Holy Cross Urban District Council** (decision by Lord Denning).

These points are not exhaustive, but they ought to act as beacons against complete reliance on court decisions or adoption of contract administrative practices (e.g. terms of contracts) without proper understanding of the underlying circumstances.

SHORT PIECES

DRIE Sponsors Study on Construction Export Benefits

The Federal Department of Regional Industrial Expansion has commissioned a study on the direct and indirect benefits to Canada resulting from the export of consulting and construction services. A number of actual case studies are involved and the indications are that the spin-off benefits are appreciably larger than have previously been identified.

RAL Vice-President Baker Daigle is acting as Construction Advisor to the consultants, Robertson Nickerson Limited,

RAL Papers at Overseas Conferences

RAL also participates in international conferences on construction topics. For example, Steve Revay attended the International Colloquium on Concrete in Developing Countries, Pakistan, last December, where he

presented a paper on "Foundations and Concrete Structures". This experience prompted him to prepare a paper advocating the use of Value Engineering methodology to ensure that appropriate recognition is given to local construction resources and practices by those sponsoring capital projects in Third World countries. This was given at the Building Economics Conference of the Conseil International du Batiment (CIB W-55) in Balatonfured, Hungary, in May 1986.

MSR INTERNATIONAL INC.

RAL has recently joined forces with J.W. Morris Ltd., a Washington-based Management Consulting firm, with a view to pursuing the international and the U.S.A. markets more actively. The new Company offers the same basic services as RAL, with a high degree of interchangeability among the personnel of the two Companies.

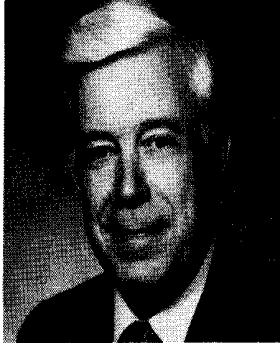
The name of the new Company is MSR INTERNATIONAL INC. and its office is located at 3800 N. Fairfax Drive, Suite 7, Arlington, Virginia 22203 (Tel: 703-525-4875). The President of MSR is J.W. Morris, its Secretary-Treasurer is Manning Seltzer, and General Manager is

Stephen G. Revay. A brief resume of Jack Morris follows.

During the past forty years, General Morris has been integrally involved in the programming, planning, design, construction, operation and maintenance of major construction projects both in the United States and

overseas. General Morris is a graduate of the United States Military Academy and holds a Masters Degree in Engineering from the University of Iowa.

LTG (Ret.) J.W. MORRIS



In 1980, General Morris retired as the Chief of Engineers, United States Army Corps of Engineers. His duties included direct responsibility for the \$9 billion annual budget associated with military and civilian construction

in the United States and overseas. General Morris also established the organization and management procedures for the \$20 billion construction program in the Kingdom of Saudi Arabia and the design and construction organization to build two modern airfields in Israel as a result of the Camp David Agreement. In 1977, General Morris received the "Construction Man of the Year Award" from **Engineering News-Record** in recognition of his contributions to the construction industry and was inducted into the National Academy of Engineering.

During his military service, General Morris inaugurated value engineering in the Corps of Engineers. He also established the Office of Foreign Programs for the Chief of Engineers and has personally consulted with the leaders of various foreign countries concerning design, construction and operation of major military and

civilian construction projects outside the United States.

General Morris is a member of numerous professional societies and has received many awards including the Presidential Citation for Management by President Lyndon B. Johnson. As a professor at the University of Maryland, he developed a graduate course in Construction Management. He has extensive experience in the field of contract administration, project control and construction management. He has written and lectured extensively in these fields.

General Morris has been for many years a principal in a consulting firm providing management and marketing services to the construction industry. He has also participated in the review and analysis of major construction claims, and has been retained as a consultant and expert witness.

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