

## Destroying the Purpose of Bills of Quantities

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I have recently had cause to consider the various clauses inserted into the conditions of contract by employers that are intended to prevent the contractor from raising claims arising from the misinterpretation or misapplication of the applicable standard method of measurement.

These claims, normally for items omitted from the bills of quantities or errors in the description of items already contained therein, most commonly (at least in Hong Kong) arise in civil engineering contracts and they are the subject of much criticism by authors of leading textbooks. None more so than the learned author of Hudson's Building and Engineering Law, Mr. Ian Duncan Wallace, who extends his dislike of such claims to a dislike of bills of quantities in general.

Perhaps predictably one of the contracts most strongly drafted to prevent claims arising from the bills of quantities is the Singapore Institute of Architects Conditions of Contract drafted by Mr. Duncan Wallace himself. The relevant clauses provide:

"... the items and rates and prices separately set out in the Bills shall be treated as inclusive of all work, materials and expenditure, whether permanent or temporary, which will be either indispensably necessary in any event to complete the works as described in or to be inferred from the Drawings, Specification, Bills or other Contract Documents ..."

"Any suggestions or recommendations or requirements in the Standard Method for the separate description and pricing of individual items of work or work-processes shall have no contractual force, and any omission of the Bills to comply with the same shall be of no effect where the full extent of the work undertaken by the

Contractor can be deduced or interpreted from the Specification, Drawings, Bills or other Contract Documents taken as a whole as being included in the items set out in the Bills pursuant to paragraph (a) of this sub-clause as being included in such items."

Closer to home the KCRC West Rail contracts include an item at the end of every bill of quantities (or Cost Centre in KCRC terminology) for 'Contractor's Other Charges'. These are defined in the contract as follows:

"Contractor's Other Charges inserted in the Pricing Document shall cover items which are necessary for the execution of the Works, as required by the Contract, which have been omitted from or have not been separately itemised in the Cost Centres and/or Schedule of Rates nor listed against the headings 'Coverage Rules' in the Methods of Measurement nor included in the AAMM (additions and amendments to the Methods of Measurement) and for which a separate charge is required." and

" ... In the event that the Contractor has not inserted any Contractor's Other Charges in respect of any Cost Centre, the Cost Centre value of such Cost Centre shall be inclusive of all the Contractor's obligations to execute that part of the Works ... and the Contractor shall not be entitled to receive any further or additional payment in respect of such ..."

Both the clauses in the Singapore conditions and the KCRC conditions have the effect of denying the contractor the right to claim for items omitted from the bills of quantities, although in the KCRC contracts this is only the case for lump sum bills, not remeasurement bills.

If there are items omitted the contractor is deemed to have allowed for such items in

the other rates in the Singapore conditions and deemed to allow for such items in either the item for contractors other charges or in the other rates in the KCRC conditions.

But whilst these provisions do successfully negate claims for items omitted from the bills of quantities do they really benefit the employer for whom they are written? In my opinion they do not. Rather than benefit the employer they prejudice him because the effect of clauses such as the ones detailed above, is to destroy the whole purpose of the bills of quantities, and the functions of the bills of quantities benefit both the contractor and the employer equally. Bills of quantities serve four important functions.

- **Tender preparation.** A detailed bill of quantities assists a contractor to prepare an accurate tender in a timely and cost efficient manner.
- **Tender assessment.** The bill of quantities enables the employer to decide realistically whether it can afford to proceed with the works, and, secondly, permits a detailed examination of the tenders received and a meaningful comparison between them to be made.
- **Interim and final payment.** In contracts where there are no bills of quantities the assessment particularly of interim payments can be a very tiresome and difficult exercise. With bills of quantities it becomes simple and straightforward.
- **Valuation of variations and deemed variations.** The bills of quantities provide rates that can be used for the valuation of variations. The use of such rates is important for both the employer and the contractor because the rates represent the bargain entered into between the parties.

However, are these functions still achieved when the Singapore and KCRC provisions are applicable and a tendering contractor is deemed to have allowed in its rates for all

the works shown on the drawings whether measured in the bills of quantities or not?

**Tender Preparation** - the contractor's tender preparation is made more complex by the knowledge that the items in the bills of quantities are not the comprehensive measurement of the works and that he must re-check the bills of quantities himself for any items that may have been omitted. Consider, for example that the bills of quantities do not include an item for a retaining wall shown on the drawings. If the contractor notices the omitted retaining wall he will allow for it in other rates in the bills of quantities, generally in rates which are to be used to value works carried out early in the job. If the contractor does not notice the omitted retaining wall no allowance for such works will be made in the tender. In either event this creates a problem for the employer.

**Tender Assessment** - taking the above example, if the employer does not know where, or even whether, the contractor has allowed for the retaining wall, this makes tender assessment and comparison with other tenders impossible and meaningless.

**Interim Valuation** - If it is not possible for the engineer to know what the contractor has allowed for in each rate then how can he properly carry out interim valuations of the works completed on the basis of such rate? Using the above example the contractor may have included the cost of the omitted retaining wall in the rates for works carried out in the first month whilst the retaining wall may not be constructed until years later. The contractor will therefore be paid early for the works and this could in the event of the contractor's bankruptcy cause significant problems for the employer.

**Valuation of Variations** - Similarly, if the engineer does not know for certain what is allowed for in each rate how can he use those rates for the valuation of variations? More importantly, if an item (such as the

above example of the retaining wall) which is not measured, but 'deemed to be included', is omitted, how can such omission be valued? All conditions of contract require that works omitted be valued " at the rate stated in the contract for such works..". If there is no rate stated in the contract for such works (because they are deemed to be included elsewhere) then no sum in omission is possible.

Put simply it is my opinion that steps taken to avoid civil engineering measurement disputes that place the risk for items omitted etc on the contractor are short-sighted and that whilst they ostensibly place the risk on the contractor they do in reality prejudice the employer for whose benefit they are written.

A far simpler and more effective means of negating claims in respect of items omitted is to ensure that the bills of quantities are measured in accordance with the standard method applicable, and that they are measured as accurately as possible on the information available at tender time.

Unfortunately this simple solution does not appear to be the solution of choice for employers who are often guided by their legal advisers, who do not properly understand the function of bills of quantities, when drafting their contracts.

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