

## Unrealistic Rates in Bill of Quantities

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This is a common problem. A contractor or a sub-contractor has included an unrealistically low rate in the Bills of Quantities. There is a substantial increase in the quantity of the item concerned, either due to a variation order or (in a remeasurement contract) resultant from the remeasurement of the works.

The question that arises is how should the quantity survey or engineer value the works?

Many quantity surveyors, if convinced that the contractor has included an unrealistically low rate in the Bill of Quantities, will insist upon the rate applying up to the quantity in the Bill, but will value any excess in quantities over and above the Bill quantity at a fair and reasonable rate.

This practice is recognised by 'Keating on Building Contracts', Sixth Edition, at pages 101 and 102 where he states:

*"Effect of Pricing Errors - When the contractor has made an error in his pricing of the tender for a lump sum contract and there are no grounds for rectification and the contract provides for payment of variations at rates shown in the tender, a difficult question can arise when pricing variations and the error is apparent. Should any, and if any, what, adjustment be made in the rate shown in the tender to arrive at the new rate for pricing variations? Many surveyors in practice claim to make an adjustment. It is thought that there is no generally accepted custom and that the question must always be one of construction."*

But Keating provides no assistance to determine whether this practice is correct.

Assistance can be found however in the case of Dudley Corporation -v- Parsons and

Morrin Ltd (1959) CA, 8 April. This is not a particularly well known case (although it is mentioned in 'A Building Contract Casebook' by Powell-Smith & Furnston), but it is a very important case which quantity surveyors should be familiar with.

The project in this case concerned the building of a school and the contract was the RIBA 1939 Form, with quantities. Whilst this is of course a very old form of contract, the contract terms in issue were essentially the same as those of both the JCT 1963 Edition which is the same as the current Hong Kong Private form of contract, and the JCT 1980 Edition which will soon be adopted as the new Hong Kong Private form of contract. So the case is as relevant today as it was in 1959.

The contractor, Parsons and Morrin Ltd, priced an item in the Bills of Quantities for excavating 750 cubic yards of rock at the equivalent of HK\$1.2 per cubic yard. This was a gross underestimate.

In carrying out the excavations described in the drawings and bills, the contractor excavated a total of 2230 cubic yards of rock.

The Architect valued the work at the equivalent of HK\$1.2 per cube for 750 cubic metres, i.e. the quantity in the Bills of Quantities and the balance of 1480 cubic yards at the equivalent of HK\$24 per cubic yard which he considered to be a reasonable rate.

The employer disputed this amount considering that the Architect should have insisted that the rate of HK\$1.2 be used.

The matter went to the Court of Appeal where Pearce J. agreed with the employer that in such circumstances the rate in the

Bills of Quantities must be used, even if it is unrealistically low. He said:

*"In my view, the actual financial result should not affect one's view of the construction of the words. Naturally, one sympathises with the contractor in the circumstances, but one must assume that he chose to take the risk of greatly underpricing an item that might not arise, whereby he lowered the tender by £1,425. He may well have thought it worth while to take that risk in order to increase his chances of securing the contract."*

Accordingly, this authority indicates that the practice of quantity surveyors when unrealistically low rates are encountered of using that rate for the quantity in the Bills of Quantities and a reasonable rate for any additional quantities is incorrect – the rate in the Bills of Quantities must be used even if it is unrealistically low.

The reasoning behind this is logical. A contractor when tendering is fully aware of the provisions of the contract. He is aware that his rates will be used for the valuation of variations and in the remeasurement of the works. When he submits his tender, with an unrealistically low rate in the Bills of Quantities he is accepting the risk of that rate being used for valuing additional quantities of the works.

However, what is often conveniently forgotten by employers is that the converse

is true. If a contractor puts an unrealistically high rate in the Bills of Quantities he is entitled to have that rate used for the valuation of variations and the remeasurement of the works. Whilst this may mean that the contractor makes large profit this is no reason for the employer to attempt to change the rate. When the employer accepts the tender, with an unrealistically high rate in the Bills of Quantities he is also accepting the risk of that rate being used for valuing additional quantities of the works.

So both the contractor and the employer are bound by unrealistically high and low rates contained in the Bills of Quantities for the valuation of variations and the remeasurement of the works, and it is submitted that this position is still applicable to Hong Kong Government forms of contract for remeasurement works which contain provisions at GCC Clause 59(4)(b) to amend rates when there are substantial increases or decrease in quantities. GCC Clause 59(4)(b) is not a clause enabling the Engineer to amend a rate because the rate itself is either high or low; it is a clause that enables the Engineer to amend the rate where the change in quantity has of itself rendered the rate inapplicable.

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