A WOLF IN SHEEP'S CLOTHING?
MEETING THE NEEDS OF THE EMPLOYER? OR SORTING THE WHEAT FROM THE CHAFF.

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For the owner/developer who is not expert in the complexities of construction law and who requires certainty about a project's costs and time for completion, the fixed price design build contract has been in existence from time immemorial. Indeed it is what the prudent employer or riskaverse project financier might be expected to require of a contractor. Indifference as to risk allocation in contract conditions, incorrect assumptions and inadequate financial contingency for the unforeseen, or simple incompetence, means that many contractors undertaking such work have found at their expense that the outcome was not what they had anticipated.

Employers, unwilling to pay the risk premium for having work undertaken on a lump sum basis, have found ways of reducing prices and sharing more risk with contractors. This comes with new and different risks. In this process a division of responsibility is created, whereby the employer appoints consultants to undertake ground investigations, prepare specifications and bills of quantities and accepts liability for their work. The contract, from having been one of undertaking to get a certain result for a fixed sum of money,

becomes one where the contractor prices bills or schedules of quantities, representing the employer's estimate of the nature and extent of the work to be done by the contractor, the contractor being paid on remeasurement of the actual amount of work done at the rates and prices contained in the bills. Not only does this represent a fundamental shift in risk from the contractor to the employer, but it also creates an enormous division of responsibility between the employer's consultants: the geotechnical engineers; the designers; the quantity surveyors, and whoever might be responsible for overseeing and signing off the completion of the work on behalf of the employer. The employer who requires certainty about a project's cost and time for completion has often not appreciated the nature and the extent of risk assumed by him in such standard documentation.

Certainly if serving the needs of employers in general is one of FIDIC's functions, the development of a form of contract such as The Silver Book is long overdue. The employer's frustrations and the lack of suitability of other standard forms of contracting has led to the proliferation of bespoke forms of contract and underscores the need for such a form of contract. This is not to suggest that The Silver Book should be used in all instances. A well considered risk analysis and where technology and design capacity lies will show whether a fixed price turnkey (designed by the contractor) or some other form of ad-measurement contract (designed by the employer) is most appropriate to the

circumstances and whether it should be fixed price, ad-measured or a combination of the two. It is the function of the employers and advisers to recommend the most appropriate form of contract to suit the needs of the employer and the project.

Much is made of "fair and unfair balance of risk" . It is meaningless to speak of what is "fair or unfair" in risk allocation without having the specifics of the project to hand. Risk should be allocated to that party most able both technically and financially to carry that risk. FIDIC should be commended for having the courage and integrity to go through with such a contract (and let's not forget, simply as an additional choice of form of contract to those already well established through the world) in the interests of the employer.

Without debating detailed criticism of the drafting of the contracts, if the design builder is proficient in his profession, should he not carry the risk of poor or unexpected ground conditions, errors in the employer's requirements and the accuracy of site data provided by the employer, provided the employer is prepared to pay the financial risk premium for it? Is it not fundamental that the design-builder provides a design which is fit for its purpose? Is this not implied in law in any case? Should the employer not be entitled to intervene in the sense of giving instructions, nominating sub contractors, rejecting work, instructing the contractor to accelerate even where it is not in critical delay, provided again the employer is prepared to pay for it? The employer's motivation for embarking upon the project is, after all, governed by economic considerations, and technological and commercial forces which change significantly during the course of the contract. The employer must have the wherewithal to protect himself. As Nick Henchie has stated in his article "The Silver Book : A Wolf in Sheep's Clothing?" "At the end of the day, it is up to contractors to familiarise themselves with the provisions of any contract which they are about to enter into, to take a view as to whether the risks are acceptable, and, if they are. not, as to whether or not a price can be contained in the tender to cater for them." Perhaps contractors should be more cautious about professing levels of skill and technology which they may not have.

No doubt undertaking a contract on a fixed price turnkey basis places much more risk on a contractor than in an employer designed ad-measurement contract. The main objection of the contractors appears to be levelled at the principle of contracting on a fixed price turnkey basis, rather than the terms and conditions and draftsmanship of The Silver Book itself. The benefit of The Silver Book being a FIDIC publication lies in the fact that whatever one's views about this method of contracting or its terms and conditions, a much needed benchmark has been established against which the many bespoke forms of contract can be measured.

For the contractors who may be careless about the way they contract, consider a situation in which the engineer of a railway company prepared a specification of that proposed railway, and the contractor fixed prices to several items in the specification, and offered to construct the railway for a lump sum made up of these prices. Suppose the engineer made a mistake in the calculations of the earthworks of 2 million yards, and it was alleged that he, finding that this

involved more expense than he had calculated upon, promised that he would make other alterations, making a corresponding diminution so as to save the contractors from loss. Let us say that the engineer did not make any other alterations, and certified for the final sum due to the contractors without taking any account of the alleged extra works. No fraud was alleged.

What is the remedy of the contractor? Unless the engineer had willfully made miscalculations initially in order to deceive the contractors, they could not recover anything for the omission because the contractors had fixed prices to the several items in a specification prepared by the engineer, and the contractor had offered to construct the railway for a lump sum made of these prices (Sharpe v San Paulo Ry (1873) L.R.8 Ch. App. 597). If the contractors could have recovered anything it would have been only from the engineer personally, and not from the employer. If the contractors could not find any dishonesty or any fraud or sinister motive they would be bound by the engineer's certificate. What the contractors had contracted to do for a lump sum was to make the line from terminus to terminus complete and the contractors could not recover the excess as an extra. "It would be a singular hardship upon the shareholders - almost a fraud upon them - if they found when they had taken shares in a company based on this guarantee (that is, the contractors' contract to do the work for a lump sum), that they were compelled to pay something entirely different (Sir William James, LJ, at page 607). Had the form of contract been different, e.g. the "traditional" ad-measurement bill of quantities contract, the result would have been entirely.

different. It appears that the contractor did not appreciate the nature of the contract entered into by him and relied entirely upon the employer's engineer. However there will always be contractors who are sufficiently expert to knowingly undertake the risks of fixed price turnkey contracts and make a success of them. In reality the wolf will only catch those who carelessly roam from the flock!