2 Choice of Contracts

2.1 The first steps

There are three main categories of client who require the construction of, or alterations, or extensions to, a building or civil engineering project. The first category consists of clients who embark upon a building or civil engineering venture only once or perhaps a few times. The second category consists of clients who regularly have the need to refurbish, alter or expand existing premises or develop new projects in the course of their business. The third category comprises a variety of speculative developers who construct projects for sale or lease.

Clients who embark upon any construction venture for the first time are often faced with a number of alternative routes but usually the first stop will be at the office of a qualified architect or engineer. For the majority of projects this approach may be sufficient. Most professional firms of architects and engineers are well versed in the use of standard forms of contract and, unless the client has unusual requirements, a standard form of contract will be available to suit most purposes. They are, however, not without their pitfalls and some architects and engineers fail to provide the necessary advice which may make the difference between ultimate client satisfaction and a potential claim for professional negligence.

Whether it is an architect, engineer, quantity surveyor, solicitor or a lawyer specialising in construction contracts, the best advice is usually given by someone who has had ‘hands on’ experience in administering or managing contracts and is well versed in contract law, including all of the recent developments in case law which affects the interpretation and application of standard forms of contract. An unamended standard form of contract may be more appropriate than a masterful piece of legal drafting which fails to take account of practical reality and commercial practice. In most cases a good contract will comprise the appropriate standard form suitably amended to rectify its deficiencies and incorporating reasonable client’s requirements.

Clients who are familiar with the pitfalls of contracting often have their own amendments for use with a standard form or they may have a tailor-made form of contract to suit their own requirements. This is a step in the
right direction but recent cases in the courts have shown that many amendments to tried and tested standard forms of contract, and some provisions in hybrid forms of contract, fail to contain the standard of clarity necessary to ensure that the draftsman’s intentions are understood. The application of the ‘contra-proferentem rule’ and other well established principles in English law may assist contractors when the terms of the contract are decided in the courts.

The criticism of contractual provisions introduced by major corporations and public clients suggests that some of them should approach the problems of contracting with equal caution to first time venturers. The vast sums of money which may be at stake merit special attention to the contract conditions and one of the first steps which ought to be taken by any client embarking on a major project should be to obtain expert professional advice from someone who is not a member of its own organisation. If this is done, the incidence of provisions which may appear to be in the client’s interests, but which are likely to have the opposite result, may be reduced.

Some clients may be advised to proceed on the basis of an outline design brief and contractors may be invited to tender for the design and construction of the project. Independent advice is essential at all stages if this is to be adopted. If the client has confidence in a particular contractor, it may choose to go directly to the contractor to negotiate for the design and construction of the project. Only in exceptional circumstances should a client contract for work in this manner without the guidance of an independent professional throughout the contract.

2.2 Clients’ objectives

The principal objectives of any client will be to have the project completed on time, within budget and to an appropriate standard of design, workmanship and materials. The priority or emphasis placed on these objectives will depend on a number of factors. Cost or time may determine the scope for design and specification for the work.

In view of the commercial pressures to minimise finance costs and to obtain revenue at the earliest possible date, priority may have to be given not only to a method of construction which is conducive to speed of erection, but to ‘lead-in’ times, phasing of design and construction, phased completion of the project, design by contractor and subcontractors, installation of client’s equipment and many other factors depending on the complexity of the project. Major subcontractors or packages of work may have to be settled in advance of selection of the principal (or main) contractor. If a client has a generous budget, he may insist on the best quality and design whilst cost and time are secondary.

Whatever the client’s objectives it is important to set out a master