

The Legal Beagle

Making an appointment - speed, time and pitfalls

I recently decided an adjudication between a quantity surveyor and his developer client. The surveyor was claiming additional fees. As the surveyor had not performed any more duties than the normal QS post-contract role, his client couldn't believe that there could be any right to additional fees.

In the end the surveyor was successful in about a third of his claim. Whilst that represented a better outcome for the client Respondent than the surveyor Referring Party, the developer client subsequently asked what he could do in future to safe-guard himself against similar circumstances.

I guess my advice would be the same as yours would be but many of us don't follow that advice all the time. The advice is to decide at the outset what you, as client, want from the contractual relationship and then ensure that is reflected, and safe-guarded, in the appointment contract. The contract should be executed before any work commences and it will then be clear what the consultant is to do and the context, terms and timescales in which he will do it.

Speed is usually the excuse for not doing this before work commences but arriving at a contract should not be a lengthy process. It will, however, take longer if the consultant has already started work, has his feet under the table and is steadily making himself indispensable. In those circumstances, why should he agree to terms he doesn't regard as entirely favourable to him? It will usually take you longer to get to a less than satisfactory set of terms if work starts, or other commitment made, before a contract is made. You may even get to the point where so much water, in the form of time and fees paid, has passed under the bridge that the consultant may see his best interests served by not tying himself down to a contract and its

obligations. These, get started and sort the rest out later, scenarios can cost time and money.

Making the contract before work starts should not be lengthy. A standard document can be evolved which can be included in invitations to fee tender and quickly produced for execution once a consultant has been selected. It can be styled to facilitate tailoring to particular project needs. It could be a standard form of appointment of the relevant professional body but don't just accept it. Where it gives boxes to be ticked and options to be selected, think about it carefully, in the context of the project, and complete accordingly - you'd be surprised how many RIBA and RICS forms I see with no boxes ticked, options selected or additional/special duties written in!! The SCALA Standard Form of Appointment of Consultants (Red Book) is particularly good at helping clients address these issues - but it can't do it for you!!

So why did the client in my recent adjudication not stipulate what he wanted but, instead, allowed the consultant to propose his own terms? Having done so, why were the proposed terms not disputed and not negotiated? Why did the project proceed to tender stage before the appointment contract was signed and then only on the instigation of the consultant?

Basically for speed and because of trust. Fatal! The speed was lost when the surveyor and client later started to argue about additional time and



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Rob, author of the SCALA and LGTF 'Guide to Standard Forms of Construction Contracts', has offered to share his experience and expertise with you and looks forward to hearing from readers.




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associated fees and the surveyor eventually exercised his alleged right to withdraw from the project. Trust? Well, what price trust when the wheels come off? Trust flourishes best in an environment of certainty - so you know what the other chap is going to (or should) do and you trust him to do it and do it properly; but you have a safety net if he doesn't. Contracts aren't a sign of distrust; they are an aid to trust.

The appointment contract documentation produced by the surveyor looked professional - at least, to the client at the time. It clearly drew heavily from the RICS standard form. However, like most such documents, it was selective in so doing. A major point of dispute was over time. The surveyor said the agreed fee was related to a stated timescale which, in respect of the construction period on site, had been exceeded and which entitled him to additional fees. The client said the lump sum fee was related to carrying out defined duties during the construction period - ie outputs, not time. Within reason, I expect most would agree with the client.

However, the RICS standard form provides for additional fees being payable for additional time. Additional to what programme? One must be very careful when setting out the proposed project programme at a time when the project is just a bit more than a twinkle in the client's eye - and probably no designing has commenced, so you don't know how big or complicated the building may be or what planning issues there may be and, hence, how long it will take to design or construct. I have had recent experience of major QS practices claiming additional fees on the basis that the anticipated or assumed (NB: not contracted; just assumed by them) programme they based their fees on has been exceeded - should be easily dismissed but can be made difficult by what the small print says or by there being no contract, thus allowing the consultant more scope to argue custom and practise and cite documents such as the RICS standard form of appointment.

Much better to gear the fee to outputs and not time, albeit some thought needs to be given to how one deals with major delays and associated inflation. Particularly under the current national financial climate, these issues are important to reaching a fair and workable agreement. I believe that any agreement that isn't fair is, ultimately, unworkable. There is no reason to believe that these issues will be easier to address if left until later - the evidence is the reverse. You must give thought to what you want at the outset and then make sure your contract entitles you to it. Don't prevaricate - or you'll be wasting more time reviewing what went wrong last time and how to safe-guard interests next time. Boring! There are too many reports in this world without adding to them - **life should be more fun than that!!** 

For more information on the SCALA Red Book click on the icon on the home page.