

## Regional News for September 2012

### Construction News

*Eric Tse / Denny Mak / Andrew Keung*

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**Disputes still prevalent despite UK Government emphasis on collaboration** - The number of disputes in the UK construction industry has not reduced and partnering has still not been widely adopted in spite of the Government efforts. These are the key findings of major new survey into contracts and legal issues undertaken by NBS. 92% of the 1,000+ respondents said that the number of disputes had either increased or stayed at the same level, with the current state of the economy being cited most frequently as the likely cause.

These views are borne out by the fact that almost one quarter of those taking part in the survey had themselves been involved in a dispute during 2011. Most commonly, these disputes (86%) were between the client and main contractor, with the primary causes being extension of time and valuation of variations.

Partnering - which has been vaunted as the way to reduce disputes for many years - is still not being widely used by the industry. Only 6% of those who took part used a form of partnering or alliancing on all projects in 2011, while more than one-third were not involved in any form of collaborative working during the same period. Questions about procurement and contract forms showed that traditional forms of contract (67%) still dominate, with single stage competitive tendering being the most widely used (78%). In today's technology dominated environment, more than 40% of consultants and clients are still not using electronic tendering in any form.

The research also highlighted the ongoing use of bespoke contracts rather than standard forms. Although standard contracts are still used in the majority of cases, almost one quarter of projects undertaken by those questioned used bespoke documentation. Given that 20 years ago, the Latham report concluded: "Endlessly refining existing conditions of contract will not solve adversarial problems. Public and private sector clients should begin to phase out "bespoke" documents-, this appears to be a lesson not yet fully learned.

Richard Waterhouse, Chief Executive of NBS's parent company, RIBA Enterprises said: "It is disappointing to see how relatively little seems to have changed since the publication of the Latham report back in 1994.

"It's clear that the Government is expecting greater efficiencies within our sector. These can best be made through increasing collaborative working between all members of the design and construction team and the adoption of enabling technologies such as Building Information Modelling (BIM).

"Given the exponential rise in the adoption of BIM it will be fascinating to see how responses to our survey change over the coming few years."

A report on the survey is now available at:  
[http://www.theNBS.com/pdfs/nbsContractsandLaw\\_low.pdf](http://www.theNBS.com/pdfs/nbsContractsandLaw_low.pdf).

**RICS Members and Fellows can join ICES using the new RICS Accelerated Route** – This new route simplifies the application process for RICS members considerably, removing the need to complete the ICES competencies, produce an experience report or undergo a review interview. ICES expect RICS members and Fellows to be able to demonstrate significant experience in the civil engineering or geospatial environment. For more details, please refer to ICES website.

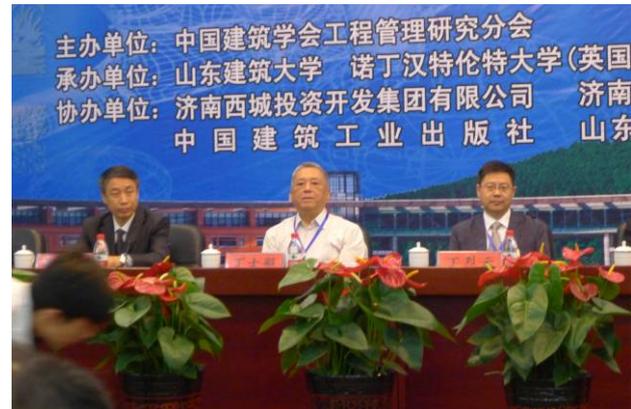
## Reaching out in China

*Eric Tse / Miranda Lui*

### Visit China Civil Engineering Construction Corporation, Beijing

In late August, Andrew Keung and Miranda Lui paid a visit to China Civil Engineering Construction Corporation and introduced ICES and the ICES Approved Development Scheme to their senior management. We have had good discussion with Mr Sun Yong, Vice President together with Mr Wang Kai, the Director of Bidding and Cost Management Department and a number of his deputies. Mr Yao Hengbin, Deputy Director of Human Resource also joined in the discussion on the needs of training for their staff.

### 2012 Annual Conference - Engineering Management Research Division of the China Architectural Association



In late September, Honby Chan, LC Yu, Jacob Lam and Miranda Lui attended the annual conference of the China Architectural Association in Shandong. As the conference was sponsored by a number of universities in Mainland and overseas, we had made good network with the following universities :- 东南大学 (School of Civil Engineering, South East University SEU) - 李啓明教授; 同濟大學 (Tongji University) - 孫繼德教授; 清華大學 (Tsinghua University) - 方東平教授; 深圳大學 (Shenzhen University) - 張謙教授; 重慶大學 (Chongqian University) - 竹隰生副院長; 山東建築大學 (Shandong Jianzhu University) - 王海滋書記; 東北大學 (Northeastern University) - 丁烈雲校長; 華僑大學 (Huaqiao University) - 張雲波校長助理; 福建農林大學 (Fujian Agriculture and Forestry University) - 賴芟宇副院長; 華中科技大學 (Huazhong University of Science and Technology) - 駱漢賓副院長. They all have interest to collaborate with ICES and suggested to start with Student member for the YES group.

## Legal Corner

Steven Yip

### How and when to draft an effective letter of intent

In the construction industry, letters of intent are used for almost all types of projects. It is a document provided by the employer to a contractor (or by a superior contractor to its sub-contractor) to confirm the instruction for work to commence while the formal and more detailed contract document is being prepared. One of the main purposes of a letter of intent is to provide comfort to the contractor that a binding agreement has been reached, so that work can commence immediately. This would particularly apt where, for example, there is a long lead time for ordering relatively expensive materials. Although used widely in Hong Kong and elsewhere, there is no standard form letter of intent, unlike the many standard forms of formal contracts in use. This is perhaps unsurprising, given that the objective of a letter of intent is to quickly and informally give instruction to commence work, which would mandate that its use not be tied down by the rigidity that could come with a standard form. We revisit below some matters which should be borne in mind when choosing to proceed with work and when drafting a letter of intent.

#### Should only be a short term solution

By its very nature, a letter of intent cannot contain all the detailed terms of the parties' agreement except in the simplest situations. This could result in problems regarding the actual agreed scope of works, payment terms and the consequences of a breach of the parties' agreement.

An unclear and under-detailed letter of intent could therefore lend itself to much uncertainty and disputes, and parties should opt to enter into a formal and detailed written contract shortly after the letter of intent, and in any event before substantial works are commenced.

#### What is to be included?

First and foremost, the letter of intent should expressly be stated to be legally binding on

the parties pending the execution of the later detailed contract. To give added security to cover for the possibility that no formal contract would be signed at all, the letter of intent might contain wording to the effect that it would remain binding in the event that no formal contract is executed (though for the reason mentioned above it is not advisable to not sign a detailed contract).

Alternatively, the letter of intent should state what payment the contractor will be entitled to if no formal contract is executed. In such a situation, the contractor under common circumstances will be entitled to payment on a *quantum meruit* basis, that is, its incurred costs (plus a reasonable margin) and reasonable site withdrawal costs.

In *RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & Company KG (UK Production)*, the United Kingdom Supreme Court held that works carried out subsequent to the expiry of the agreed validity period of the letter of intent was pursuant to a form of contract discussed, but not executed between the parties. To avoid surprises as to what was or was not agreed, the formal contract should be signed.

Although the parties desire for the letter of intent to be brief, they can still incorporate by reference detailed terms which they have agreed in advance to adopt. They may, for example, specify that the terms of a standard form of contract (such as a Standard Form of Building Contract Private Edition by the HKIA or a FIDIC form) are to be adopted. If so, it is most important to expressly spell out in the letter of intent the order of precedence in the event of inconsistency or conflict between its wording and the standard form. The letter of intent should also clearly specify which terms of the standard form of contract are not to apply (if any).

The wording of the key terms should be clear and certain, such as those relating to the scope of works, payment terms (including how payment will be calculated and timing for payment) and consequences of breach.

Terms which are considerably more onerous than those in a standard form of contract should be spelt out in detail: if for example, the parties have agreed to allow termination at will (without cause) or extended suspension of work (both of which might be significantly more detrimental to a party than in a standard form), clear details will need to be contained to avoid later argument. The items which commonly give rise to disputes, such as valuation of variations (and the rates to be used) and the grounds for extension of time should be clearly stated.

To avoid argument as to whether the letter of intent was actually agreed, the document should be counter-signed by the addressee.

### Other considerations

In *RTS v Muller*, the UK Supreme Court stated that the case ‘*demonstrate[d] the perils of beginning work without agreeing the precise basis upon which it is to be done. The moral of the story is to agree first and to start work later.*’

Letters of intent are no doubt useful, but if

over or inappropriately used, can often give rise to disputes.

Although the purpose of using a letter of intent is to allow work to commence as soon as possible, there are still matters which should not be overlooked before work starts. For example, the relevant insurance policies will need to be effected, and if there is an agreement for a party to provide an advance payment or a security bond, this should be done before any work.

Despite various precautionary measures, a letter of intent will not be as safe as a detailed contract, and the parties should agree a timetable for executing the detailed contract as soon as possible. Before such time, the parties might consider holding progress meetings and preparing cost updates on a more frequent basis than otherwise to keep a close track of things.

Pending the detailed contract, the parties should pay close attention to any limitations set out in the letter of intent, such as a cap on the maximum amount payable for work carried out under the letter of intent.

## Past Events

*Eric Tse / Denny Mak*

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**4 September** : 42 members attended the evening CPD Talk “ **MTR Approach to Dispute Avoidance**”, presented by Mr Martin Dunn, FCInstCES, General Manager-Procurement & Contracts, MTR Corporation at Duke of Windsor Social Service Building in Wanchai.

**12 September** : ICES was invited by The Hong Kong Polytechnic University to the Orientation Day of the Department of Land Surveying & Geo-Informatics. Our Treasurer, Mr CK Liu was one of the guest speakers addressed to the young engineering surveying students.

**17 September** : 100 delegates attended the full day Conference at Hong Kong Convention and Exhibition Centre on “**Collaboration and Cooperation in Contracts for Hong Kong’s Expanding Infrastructure**” organized by the Lighthouse Club and BKSurco. The event was supported by ICES. A keynote address was given by Ir Wai Chi Sing, JP

## Coming Events

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**11 October** : “ **From 1D to 6D, BIM application for Engineers and Surveyors**”, an evening CPD Talk presented by Mr Elvis Li, CEO of isBIM Ltd will be held at Rm 103, Duke of Windsor Social Services Building, Hennessy Road, Wanchai. Mr Li will share his views and practical experience on the latest industry hot topic - how BIM could value-add to Quantity Surveyors’ current practices with the readily available BIM quantity data to accelerate the entire cost estimation cycle.

**21 November** : “**BK SURCO Annual Construction Conference**” a full day conference on “**Managing Construction Risks for the benefit of Employers and Contractors**” organized by BKSURCO and supported by ICES will be held at the Hong Kong Convention and Exhibition Centre. Our CEO, Mr Bill Pryke and some senior members of ICES will speak at the conference. Members of the Chartered ICES are entitled to the discount price.

**7 & 8 December** : a factory visit will be arranged at Guangzhou for satellite reference station system; details to be given.

**December** : a CPD seminar for Contract Dispute Resolution will be delivered by Mr. Joseph Gilfeather; details to be given.

**23 November** : “**Lighthouse Club Annual Dinner**” will be held at the Hong Kong Convention and Exhibition Centre. Ir Wai Chi Sing, Permanent Secretary for Development (Works) will be the guest speaker of the evening. ICES Hong Kong is also hosting our CEO and other senior members from UK at this charity function. Members are welcome to book their seats through Lighthouse Club.



**BK SURCO TRAINING** presents its Annual Conference on

## Managing Construction Risk for the benefit of Employers and Contractors

21 November 2012 ★ Hong Kong Convention and Exhibition Centre



**BK SURCO Training** is the International Training Company of the Chartered Institution of Civil Engineering Surveyors providing commercial and contract management training to engineers, project managers, quantity surveyors and others engaged in the construction and engineering industries.

**BK SURCO Training** will be making a donation from this conference to the Lighthouse Club Construction Industry Charities.

- ◆ Introduction to Managing Construction Risk
- ◆ Construction Design Management – effective planning and coordination to reduce Risk
- ◆ Managing Employers' Risks from a Legal Perspective
- ◆ Managing Contractors' Risks from a Legal Perspective
- ◆ How can the Risk of Unforeseen Ground Conditions be avoided/mitigated by Employers and Contractors using Hong Kong's Standard Forms of Contract? – a view based on UK Experience
- ◆ Geotechnical Baseline Reports – Excellent Tool for Measuring Effects of Changes in Ground Conditions – Let's make it work!
- ◆ Architect's and Engineer's Risks – Awareness from a Legal Perspective
- ◆ Managing Construction Arbitration Risks
- ◆ Panel Discussion

The subject of this one-day conference will be of interest to everyone involved in the Construction Industry and has been designed to meet CPD requirements (CPD Points applied for from the Law Society of Hong Kong).