Chapter 2
Tenders and Bidding

2.1. What is meant by the Battle of the Forms?

2.1.1. The construction industry has a tradition of formal contracts being drawn up and signed before work commences. The use of standard forms of contract such as the JCT, ICE, FIDIC and NEC are examples of formal contracts regularly employed for the purpose. Legally binding contracts, however, may come into being employing less formal means. What is required is an agreement made by the parties involved. This may occur when an unambiguous offer is unconditionally accepted. A further ingredient required is consideration, which means that each party has to contribute something of value which is of benefit to the other party or parties. It is also necessary for the terms under which the work will be carried out to be agreed.

2.1.2. In the construction industry, it is quite common for a supplier of materials, or a subcontractor, to submit a quotation for the supply of goods and/or services. For a binding contract to come into play, what is required is an unconditional acceptance from the contractor. There is no need for a formal contract to be drawn up for the agreement to be binding. Where an invitation to tender is involved, this does not usually form part of the contract, although the intention is that the quotation falls into line with the invitation to tender. If the supplier or subcontractor submits a quotation which does not mirror the invitation to tender, but which is unconditionally accepted by the contractor, the contract will be based upon the quotation and acceptance. The status of the invitation to tender is merely what it purports to be, an invitation to the supplier or subcontractor to submit a quotation.

2.1.3. A struggle often occurs between prospective parties to a contract when conflicting sets of conditions are submitted by the parties to each other; which set of conflicting conditions of contract are to apply? In addition to the standard forms of contract, some commercial organisations will have their own conditions which they will normally wish to use, whilst others will have a set of preferred alterations to the industry standard forms for use as the basis of the contract. What often happens is that each party tries to impose its preferred terms upon the other. This is referred to as the battle of the forms. The classic case which deals with the battle of the forms is *Butler Machine Tools* v. *Ex-cell-o Corporation* (1979), where the plaintiff submitted a quotation for the supply of machine tools, which included terms and conditions stating that the prices quoted

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were variable dependent on inflation. The order, when it arrived, required a fixed price and had a tear-off slip to be signed by the plaintiff as acknowledging receipt of the order and agreeing to the terms included therein. An acknowledgement of order was sent, but the plaintiff, in an accompanying letter, made it clear that the supply of the machine tools would be on the basis of the terms included in the quotation, i.e. a fluctuating price. The quotation and letter accompanying the acknowledgement of the order were on the basis of a fluctuating price, whereas the order and signed acknowledgement referred to a fixed price. The court preferred to consider the order and the signed acknowledgment as being an offer and acceptance and hence the basis of the contract. The plaintiff unfortunately submitted a quotation based upon a fluctuating price, but was obliged to supply the machine tools at the price quoted, but without the benefit of it being subject to inflation. Lord Denning explained the law in the following terms:

> It will be found that in most cases where there is a battle of the forms there is a contract as soon as the last of the forms is sent and received without objection being taken to it . . . the difficulty is to decide which form, or which part or parts of which form is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot.

2.1.4. The subsequent case of *Chichester Joinery Ltd* v. *John Mowlem* (1987) illustrates the point that where there are conflicting conditions of contract, the party who submits its conditions last will usually triumph. The facts relating to this case are:

- Chichester submitted a quotation to Mowlem in November 1984, based upon its own terms and conditions which accompanied the quotation.
- Mowlem sent to Chichester a pro-forma enquiry form which referred to conditions on its reverse, but no conditions appeared. This was probably due to the document being a photocopy.
- The parties discussed the proposed contract at two subsequent meetings.
- On 14 March, Mowlem sent to Chichester a purchase order which stated that the terms and conditions of the purchase order, as set out on the reverse side, are expressly declared to apply to the purchase order. It requested Chichester to sign the acceptance of the order and return it within seven days. Chichester did not sign and return the acceptance.
- On 30 April 1985, Chichester, before commencing deliveries, sent a printed document to Mowlem headed 'Acknowledgement of Order'. The acknowledgement was stated to be 'subject to the conditions overleaf'.

2.1.5. The court held that Chichester's conditions applied to the contract. The original quotation sent by Chichester in November 1984 was an offer. Mowlem did not accept the offer, but instead sent a purchase order which constituted a counter-offer. This counter-offer was not accepted by Chichester, who sent an acknowledgement on 30 April 1985 which amounted to a counter-counter-offer. This was accepted by Mowlem by taking delivery of the joinery without in any way contesting the terms in Chichester's acknowledgement. This is referred to as acceptance by conduct.

SUMMARY

A struggle often occurs between prospective parties to a contract, as to which conditions of contract are to apply. In addition to the standard forms of contract, most commercial organisations will have their own conditions they will normally wish to use, whilst others will have preferred alterations to standard industry forms for use as the basis of the contract. What often happens is that each party tries to impose its preferred terms upon the other. The process may involve a quotation being submitted by one of the parties, which refers to its preferred conditions of contract. If the quotation is unconditionally accepted, the conditions included in the quotation will prevail. Alternatively the quotation may receive, by way of response, an order based upon differing conditions of contract usually referred to as a counter-offer. If there is no adverse response to the order, but work is allowed by both parties to get under way, the terms in the order will prevail. This is referred to as the 'battle of the forms' and, usually, the party who fires the last shot wins the battle.

2.2. If a tender which contains an error is accepted in full knowledge of the error, has the tenderer any redress?

2.2.1. A binding contract will come into being when an unambiguous offer receives an unconditional acceptance. Main contractors' quotations may be unconditionally accepted by building owners and quotations from subcontractors unconditionally accepted by main contractors, to form binding contracts. Where an error appears in a quotation which has been unconditionally accepted, the general rule is that errors cannot be corrected. Does this rule still apply if the person responsible for accepting the quotation is aware of the error at the time of the acceptance?

2.2.2. There is in law an ordinary commercial freedom or discretion to accept or reject a tender, or to negotiate with whoever seems best in the eyes of the person seeking tenders. However, business people are expected to act fairly and can be penalised for indulging in sharp practice. Where the dividing line comes between freedom to contract and a court's decision to intervene on the basis that the contract has come into being as a result of unfair sharp practice on the part of one of the parties is hard to define.

2.2.3. In the case of *Traditional Structures Ltd* v. *HW Construction Ltd* (2009), the claimant was requested by the defendant to provide a quotation for the steelwork and roof cladding at a site in Sutton Coldfield. A specification was provided along with some details concerning the roof cladding. Due to an error on the part of the estimator, the tender which was submitted to the defendant contained only the price for the steelwork; no price had been included for the roof cladding. The following wording appeared in the quotation:

> For the supply and delivery of structural steelwork and claddings erected onto prepared foundations (by others) to form the proposed buildings as detailed above our budget price would be

Steelwork: £37, 573.43 + VAT

Terms: The above prices are net

2.2.4. The papers in the claimant's files made it clear that the price for the roof cladding was not included in the price for the steelwork. The defendant's managing director indicated that as far as he was concerned, the price for the steelwork included the roof cladding. The matter of whether the price included roof cladding was never raised by the defendant, despite the numerous meetings which took place between them during the period from the date of submission of the quotation to the date of the acceptance. In addition, the defendant in an email asked the claimant how long the £37,573.43 plus VAT 'for the floor support beams and roof structure was to remain open'. This was taken to mean the steelwork package without the roof cladding.

2.2.5. The problem became clear when the claimant made an application for payment for the roof cladding and the defendant refused to pay, on the grounds that the price for roof cladding was included in the price for steelwork. The matter was not resolved and was referred to the courts. In finding in favour of the claimant, the judge was convinced that the defendant's managing director was aware that the price for roof cladding had been missed out of the quotation. The managing director failed to ask the questions that an honest man would have asked.

2.2.6. The judge ordered that the contract be rectified to include the price for the roof cladding. He indicated that he considered that the defendant knew about the mistake and had wilfully and recklessly failed to make the sort of enquiries about the roof cladding, prior to accepting the quotation, which a reasonable and honest man would have made.

SUMMARY

Where a quotation containing an error is unconditionally accepted, the general rule is that the tenderer cannot adjust the error. If the error results in a loss, then the tenderer will be required to sustain the loss. Where, however, a quotation is submitted and the recipient is aware that it contains an error, a different result can apply. If the court is satisfied that the person receiving the quotation is aware of the error before acceptance and fails to do what an honest person would do, then the court will normally order rectification of the contract to eliminate the error.

2.3. Where a contractor or subcontractor submits a tender with its own conditions of contract attached, which are neither accepted nor rejected, do these conditions apply if the work is allowed to proceed?

2.3.1. The general rule is that silence never constitutes acceptance. This was well established in the case of *Felthouse* v. *Brindley* (1862), where an uncle, in a letter, offered to buy a horse from his nephew, for £30.15, adding, 'If I hear no more about him I shall consider the horse is mine for £30.15.' No reply was received by the uncle from his nephew. It was held that there was no contract and, therefore, the uncle did not gain ownership of

the horse. The reason for the rule is that it is in general undesirable to impose on an offeree the trouble and expense of rejecting an offer which he does not wish to accept.

2.3.2. A recipient of an offer who remains silent can still consent to the offer by his conduct, showing an intention to accept the terms of the offer. An old example of acceptance by conduct is well illustrated in the case of *Brogden* v. *Metropolitan Railway Co* (1877). A railway company submitted to a merchant a draft agreement for the supply of coal. He returned it, marked 'Approved', but also made a number of alterations, to which the railway company did not express assent. Nevertheless, the company accepted deliveries of coal under the draft agreement for two years. It was held that, once the company began to accept these deliveries, there was a contract on the terms of the draft agreement as amended.

2.3.3. Applying this principle to modern procurement methods, a main contractor who, having received a quotation from a subcontractor, allows the subcontractor to commence work without comment, may by its conduct be said to have accepted the quotation.

2.3.4. An example of acceptance by conduct on a construction project is illustrated by the case of *Jean Shaw* v. *James Scott Builders Co* (2010). This case involved the formation of a contract based upon an offer and acceptance by conduct. The Shaws employed the services of an architect, Mr Peter White, to design a new house. The defendant, Scott, was engaged to build the house. A draft contract was produced, but no formal contract. Work commenced, but the project got into difficulties and the architect was replaced by Mr Grime, who appointed Mr Percy, a quantity surveyor, to help sort out matters.

2.3.5. Mr Percy drew up a formal contract and emailed copies to Mr Shaw, Mr Grime and Scott on 23 November 2005. In the email, Mr Percy stated that there was some uncertainty as to the drawings which had been used to produce the original price. Mr Percy asked the parties to let him know if there was any objection or disagreement by close of business on 28 November 2005. Mr Shaw accepted the document, but Scott did not respond. Having heard nothing from Scott, Mr Percy wrote to Mr Shaw to advise him that the document represented a contract between him and Scott.

2.3.6. The work continued until January 2007, when disagreements between the parties began to surface. Mr Shaw wrote to Scott instructing that work should stop. Scott submitted a loss and expense claim, which was disputed. A disagreement occurred as to what constituted the contract. It was held by the court that Mr Percy's contract documents had expanded on the parties' pre-existing agreement. The court held that a party's silence does not imply consent to an offer. However, the surrounding circumstances might lead a court to infer that a party's silence is acceptance by conduct, particularly where the parties have been in negotiations. It concluded that despite Scott's silence when receiving the email from Mr Percy dated 23 November 2005, it should be treated as representing the agreed terms of the contract.

SUMMARY

It is fairly unusual for tenders to be submitted without there being any form of response. The recipient of the tender, however, may be satisfied with the offer and not bother to

send a formal communication of acceptance. An instruction to commence work may then follow. The general rule is that silence does not constitute acceptance, and if this rule applied to this situation there would be no contract. However, courts are ready to recognise that even though silence reigns, acceptance by conduct may have occurred. A contractor, on receipt of a subcontractor's quotation, may without accepting or rejecting the quotation, instruct that work be started. This instruction would amount to an acceptance by conduct of the quotation.

2.4. The submission of an unambiguous quotation which receives an unconditional acceptance can normally form the basis of a legally binding contract. If, following the commencement of work, a formal contract is signed which contains conditions which are at variance with those referred to in the quotation and acceptance, which of the competing conditions apply to the work: those in the signed formal contract, or those referred to in the offer and acceptance?

2.4.1. It is not uncommon for work to commence before the contract has been drawn up and signed. Letters of intent are sometimes used as a mechanism for enabling a start to be made on site before a formal contract has been drawn up and signed. Where negotiations are still proceeding and there is no evidence of the existence of a contract, then a formal contract drawn up and signed after work has commenced will normally have retrospective effect. All the work undertaken from the start of the project will then be governed by the terms and conditions of the signed contract, the reason being that this is what the parties expect to happen. In the case of *Trollope and Colls* v. *Atomic Power Construction* (1963), the plaintiff submitted a tender for carrying out certain civil engineering work as subcontractor to the defendant. Negotiations were under way and work started in June 1959 on the basis of a letter of intent. Work continued and the formal contract was finally drawn up and signed on 11 April 1960. A dispute arose between the parties in respect of payment for variations. The matter in dispute was whether the conditions contained in the formal contract governed the work carried out before 11 April 1960.

2.4.2. Mr Justice Megaw, in finding that the contract had retrospective effect and therefore applied from the date work commenced, said:

> So far as I am aware there is no principle of English law which provides that a contract cannot in any circumstances have retrospective effect . . .

2.4.3. It is clear from this case that if there is no contract concluded when work commences, there will be no difficulty in a contract subsequently drawn up and signed having retrospective effect. What is the position if the process of quotation and acceptance results in a legally binding contract coming into effect, but with terms and conditions which vary from those include in the subsequently signed formal contract? It may be that the

parties at a later date decided that the terms and conditions referred to in the offer and acceptance process are inappropriate. Certain terms may change in the intervening period, for example the date for completion. There may be subsequent disputes, where the completion dates differ, due to the financial consequences of the changed completion date not being properly reflected in the formal contract. There is no reported case where this has been an issue. It will in all probability come down to the intentions of the parties. When all is said and done, the parties have willingly signed the formal contract and therefore it is not unreasonable to suppose that they were in agreement with all of its terms. If there is a dispute, the party who contends that the some of the conditions in the formal contract do not apply will have an uphill struggle to demonstrate, to the satisfaction of the court, that it was not the intention of the parties that the signed contract should supersede the quotation and acceptance contract.

SUMMARY

The case of *Tollope and Colls* v. *Atomic Power Construction* (1963) established that a contract when drawn up can have retrospective effect. If, therefore, work commences in accordance with an instruction contained in a letter of intent and a formal contract is subsequently signed, all the work will be subject to the terms and conditions contained in the formal contract. A more difficult situation may arise if, at the time work starts, there is a legally binding contract in place based upon a quotation being unconditionally accepted. If this is the case, the inference will be that the parties intended the terms and conditions included in the formal contract to supersede those referred to in the offer and acceptance. It will be for the party who disputes this to prove otherwise.

2.5. Where an employer includes with the tender enquiry documents a site survey which proves misleading, can this be the basis of a claim?

2.5.1. Problems often arise where unforeseen adverse ground conditions occur which add to the contractor's or subcontractor's costs. Who pays the bill? There is no obligation upon the employer to provide information concerning ground conditions. Most of the standard forms of contract make specific reference to the contractor satisfying himself as to the ground conditions he may encounter. If the contract is silent as to the ground conditions, the contractor will normally be deemed to have taken the risk.

2.5.2. Disputes may arise where the employer provides details of the ground conditions which prove to be inaccurate or misleading. Employers like to ensure that they do not take the risk for inaccuracies in the ground information which may lead to the contractor submitting a claim. Some standard forms of contract, however, make it clear that the contractor, in addition to making its own inspection of the site, has based its tender on the information made available by the employer.

2.5.3. The ICE 6th Edition, clause 11(3), deals with the matter in precise terms where it states:

> The contractor shall be deemed to have
>
> (a) based his tender on the information made available by the Employer and on his own inspection and examination all as aforementioned.

It would seem that where the ICE conditions apply, the employer is taking the responsibility for the accuracy of the information he provides at tender stage. The ICE 7th Edition is worded in a slightly different manner, where it states in clause 11(3):

> The Contractor shall be deemed to have . . . based his tender on his own inspection and examination as aforesaid and on all information whether obtainable by him or made available by the Employer . . .

The intention of the revised wording is that the contractor's tender is deemed to be based upon not only information provided by the employer or as a result of his own inspection but also information derived from other sources. This could include information obtained from utilities such as water or gas companies.

2.5.4. The Engineering and Construction Contract (NEC 3) provides in clause 60.1 for the contractor to recover time and cost where physical conditions are encountered which the contractor would have judged at the contract date to have had a small chance of occurring. In judging physical conditions the contractor, in accordance with clause 60.2, is assumed to have taken into account the site information which will normally be provided by the employer.

2.5.5. GC/Works/1, condition 7(1), requires the contractor to have satisfied himself, among other matters, as to the nature of the soil and materials to be excavated. Condition 7(3) goes on to say that if ground conditions are encountered which the contractor did not know of and which he could not reasonably have foreseen (having regard to any information which he had or ought reasonably to have ascertained) he will become entitled to claim extra.

2.5.6. Under the Misrepresentation Act 1967 a subsoil survey which proves to be misleading, though innocently made, could give rise to a claim for damages. A good defence for the employer is, however, available if he can demonstrate that he had reasonable grounds to believe and did believe that the information contained in the subsoil survey was correct.

2.5.7. Employers often include with information provided to contractors at tender stage a statement to the effect that they will have no liability to the contractor if the information proves to be inaccurate and as a result the contractor incurs additional cost. A disclaimer, however, will be of no effect unless it can be shown to be fair and reasonable, having regard to the circumstances which were, or ought reasonably to have been, known or in the contemplation of the parties when the contract was made. Max Abrahamson, in his book *Engineering Law and the ICE Contracts*, says:

> The courts are obviously disinclined to allow a party to make a groundless misrepresentation without accepting liability for the consequences.

In *Howard Marine & Dredging Co Ltd* v. *A Ogden & Sons (Excavations) Ltd* (1978), owners of a barge were held liable to contractors who had hired the barge for construction works on the strength of a misrepresentation of the barge's deadweight, even though the charterparty stated that the charterers'

> acceptance of handing over the vessel shall be conclusive that they have examined the vessel and found her to be in all respects . . . fit for the intended and contemplated use by the charterers and in every other way satisfactory to them.

The defendant's marine manager had said at a meeting that the payload of the barge was 1,600 tonnes, whereas in fact it was only 1,055 tonnes. The mis-statement was based on the manager's recollection of a figure given in Lloyds' Register that was incorrect. He had at some time seen shipping documents which gave a more correct figure, but that had not registered in his mind.

2.5.8. In *Pearson and Son Ltd* v. *Dublin Corporation* (1907), the engineer had shown a wall on the contract drawings in a position which he knew was not correct. There was a clause in the contract to the effect that the contractor would satisfy himself as to the dimensions, levels and nature of all existing works and that the employer did not hold himself responsible for the accuracy of information given. Nevertheless, this was held to be no defence to an action for fraud. Alternatively, the contractor who is misled may have a remedy in tort for negligent mis-statements, on the principle of *Hedley Byrne & Co Ltd* v. *Heller & Partners* (1963).

2.5.9. The question of misrepresentation under the Misrepresentation Act 1967 and negligent mis-statement was the subject of the decision in *Turriff Ltd* v. *Welsh National Water Authority* (1979). An issue in the case related to an alleged misrepresentation in the specification, in which it was stated that satisfactory test units had already been carried out by Trocoll Industries. It was also stated that if competently incorporated into the works, the units could achieve a standard of accuracy within the desired tolerances and also that all the features of the units were proven. These representations were found by the court to be incorrect. The judge found that Turriff had relied upon the statements and had entered into the contract on the understanding that the representations were true. It was found by the court that the employer was unable to prove there were reasonable grounds for believing the representations to be true and therefore, in accordance with the Misrepresentation Act 1967, Turriff was entitled to the damages they had suffered as a result. The court also held that in so far as the representations contained in the specification were statements of opinion and not fact (and thus not within the ambit of misrepresentation), they in any event amounted to negligent mis-statements. In line with the decision in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* (1963), Turriff was entitled to damages.

2.5.10. It is common for contracts to state that the contractor is responsible for satisfying himself as to the conditions of the subsoil and that no claim will be accepted for failure to do so. The ICE 7th Edition states in clause 11 (2) that the contractor is deemed to have inspected and examined the ground and subsoil and hydrological conditions. This type of wording was examined in the Australian case of *Morrison Knudsen International Co Inc* v. *Commonwealth* (1972). The employer had provided the contractor

with information concerning ground conditions, which did not form part of the contract. Unfortunately, it failed to disclose the presence of large quantities of cobbles in certain locations, which cost the contractor a significant sum of money to remove. The employer argued that a clause in the contract which required the contractor to satisfy himself of the ground conditions rendered the contractor's claim worthless. The court, however, disagreed in holding that the clauses did not protect the employer from liability for any misleading or erroneous content in the site information, supplied to the contractor prior to the submission of a tender.

2.5.11. Contractors who suffer from incorrect subsoil surveys may be able to demonstrate that the survey became a condition or warranty in the contract, as was the situation in the case of *Bacal Construction* v. *Northampton Development Corporation* (1975). The contractor had submitted as part of his tender sub-structure designs and detailed priced bills of quantities for six selected blocks in selected foundation conditions. The designs and the priced bills of quantities formed part of the contract documents by virtue of an express provision in the contract. The foundation designs had been prepared on the assumption that the soil conditions were as indicated on the relevant borehole data provided by the corporation. During the course of the work, tufa was discovered in several areas of the site, the presence of which required the foundations to be redesigned in those areas and additional works carried out. The contractor claimed that there had thereby been breach of an implied term or warranty by the corporation that the ground conditions would accord with the basis upon which the contractor had designed the foundations. They claimed they were entitled to be compensated by way of damages for breach of that term or warranty. The corporation denied liability, maintaining that no such term or warranty could be implied, but the court found in favour of the contractor.

2.5.12. The liability for inaccurate subsoil information provided by the employer at tender stage was an issue in *Co-Operative Insurance Society* v. *Henry Boot* (2002) in connection with a contract for the reconstruction of Lomond House in Glasgow. In this case the employer, the Co-Operative Insurance Society, had commissioned Terra Tek Ltd to undertake a subsoil survey before tenders were sought. During the excavation work, water and soil flooded into the sub-basement excavations. It was alleged by Henry Boot that the problem stemmed from the inaccuracy of the ground water levels as shown in the subsoil survey. It argued that the method used for dewatering would have been adequate if the information on the subsoil survey had been accurate. The court was asked to decide as a preliminary issue whether the employer was responsible for the information contained in the Terra Tek report. The contract bills, under a heading 'Site Investigation', stated that the report had been issued to the contractor with the tender documents. In addition, drawing A303 expressly stated that the piling design and specification were based upon the Terra Tek report and drawing 303A stated that for prevailing ground conditions refer to Site Investigation Report'. It looked to be game, set and match at this stage. The court took a different view from that expressed on behalf of Henry Boot. Even though the drawings were referred to as contract documents and contained reference to the Terra Tek report, the judge felt that the report itself was not a contract document and did not form a part of the contract. The judge considered that clause 2.2.2.4 in the contract was more persuasive. This clause stated that the contractor is deemed to

have inspected and examined the site and its surroundings and to have satisfied himself as to the nature of the site, including the ground and subsoil, before submitting his tender. The judge may have been legally correct, but his decision defied the practicalities of preparing a tender and also common sense. Who would expect a contractor, provided at tender stage with a detailed subsoil survey, to visit the site of an existing building in a street in Glasgow and start digging up the ground to ensure that the information included in the Terra Tek report was correct? The conditions of contract used were the JCT conditions. If the conditions of contract had been ICE 7th Edition, then the decision might have been different. Clause 11(2) indicates that the contractor is deemed to have inspected and examined the site and satisfied himself as to the form and nature of the subsoil, but only in as far as is practicable and reasonable. This should be read with clause 11(3), which states that the contractor is deemed to have based his tender on his own inspection and all information, whether obtained by him or made available by the employer.

2.5.13. It would seem that where an employer provides a site survey to contractors at tender stage they are entitled to rely upon it when calculating their tender price. If the survey proves to be inaccurate and as a result the contractor incurs additional costs, he will usually be able to make out a good case for recovering those costs.

2.5.14. Many contracts are let, however, where the employer provides a subsoil survey but no specific reference is made to the employer taking responsibility. In many instances the specification will include a disclaimer. Despite silence in the contract, or even a disclaimer, if the information is incorrect because of fraud or recklessness by the employer, architect or engineer and the contractor suffers loss as a consequence, he may have a good case for recovering his additional costs. Employers who specifically exclude liability for information provided or who limit the liability for incorrect information will have to show, in accordance with the Unfair Contract Terms Act 1977, that the exclusion or limitation is reasonable. In any event, exclusion clauses will not relieve employers from the results of their negligence unless liability for negligence is expressly excluded.

2.5.15. It may be in the employer's interests, when providing a subsoil survey, to make it clear that the information is intended to show the ground conditions which occur at the location of the boreholes only and on the dates on which they were taken. The contractor should be expressly informed not to assume that the conditions apply anywhere else on the site or at any later period.

2.5.16. It is worth noting that in the case of *Railtrack plc* v. *Pearl Maintenance Services Ltd* (1995) it was held that, as the contract provided expressly for the contractor to ascertain the routes of existing services located below ground, he was liable for damage which occurred to underground services when the work was being carried out.

2.5.17. The decision in the USA case of *T.L. James and Co Inc* v. *Traylor Brothers Inc* (2002) drew attention to the pitfalls that contractors can encounter in not undertaking their own site investigations prior to submitting a tender. Traylor submitted the lowest bid for the construction of a marine terminal, which included dredging, driving piles and constructing a deck and terminal building on the piles. The tender documents warned that the site had 'numerous steel and timber piles removed to the approximate existing mudline'. The documents also advised that a more detailed map was available in the

archive rooms of the Port of New Orleans. Bidders were also instructed to undertake a pre-bid site investigation. Traylor neither looked at the map nor undertook more than a cursory site investigation. James, Traylor's dredging subcontractor, encountered a large number of cut-off piles, and Traylor claimed compensation, arguing that the actual number and nature of the piles had not been disclosed and could not have been reasonably foreseen. The United States Court of Appeal, Fifth Circuit, rejected this. The real issue was whether the site conditions could have been anticipated based on the information available at the time the bid was submitted. The court concluded that the conditions could have been anticipated, but were not, because Traylor had failed to conduct an adequate site investigation.

2.5.18. Employers can often protect themselves from claims for additional payment resulting from incorrect information they supply to contractors prior to receipt of tenders by including a 'no reliance' clause in the contract. Such a clause provides that the contractor has not relied upon the information provided by the employer or its agent in entering into the contract. The clause will normally provide protection for the employer, whether or not the contractor has relied upon the information so provided. This type of clause has received legal backing by the courts in such cases as *Howard Marine and Dredging Co* v. *A Ogden and Sons* (1978) and *Emcor Drake and Scull* v. *Edinburgh Royal Venture* (2005), on the basis of evidential estoppel. Contractors may, however, resist such a clause on the basis that despite what the clause states, the employer believed that the contractor had in fact relied upon the information provided. In the case of *Watford Electronics Ltd* v. *Sanderson GFL* (2001), the judge said:

> . . . It may be impossible for a party who has made representations, which he intended to be relied upon, to satisfy the court, that he entered into the contract in the belief that a statement by the other party, that he had not relied upon those representations, was true.

SUMMARY

The ICE 6th and 7th Editions conditions make it clear that the contractor's tender is deemed to have been based upon his own inspection of the site and any information provided by the employer. With this in focus, any additional costs resulting from unforeseen physical conditions will be recoverable. In the absence of specific wording in the conditions, the employer may wish to introduce a clause excluding liability, should the site survey prove inaccurate. Whilst it is feasible to exclude liability if for any reason, including negligence, the information proves inaccurate, such an exclusion would have to be reasonable. However, the few cases which deal with this matter tend to lead to the conclusion that exclusion clauses of this nature are unlikely to find favour with the courts.

Employers, however, may wish to include a non-reliance clause in the contract, which states that the contractor has not relied upon the information provided by the employer in putting together his tender. This type of clause, however, may fail if the employer in fact considered that the contractor had relied upon the information provided.

2.6. If, after tenders have been received, the employer decides not to proceed with the work, are there any circumstances under which the contractor/subcontractor can recover the costs associated with tendering or preparatory work, for which no instruction was given?

2.6.1. It is not unusual for contractors or subcontractors to carry out work prior to a contract being let. Often, this is done in contemplation of the contract being entered into to help the client, or to ensure a flying start or keep together key operatives. Sometimes, the contractor having made a start without the benefit of a contract, the employer decides not to proceed with the work. Contractors look to recover payment for their efforts and employers will usually deny any liability.

2.6.2. The case of *Regalian Properties plc* v. *London Docklands Development Corporation* (1991) dealt with this matter. Negotiations began in 1986 for the development of land for housing. A tender in the sum of £18.5m was submitted by Regalian for a licence to build when London Docklands obtained vacant possession. The offer was accepted 'subject to contract' and conditional upon detailed planning consent being obtained. Delays occurred in 1986 and 1987, because London Docklands requested new designs and detailed costings from Regalian. Because of a fall in property prices in 1988, the scheme became uneconomic, the contract was never concluded and the site never developed. Regalian claimed almost £3m which they had paid to their professional consultants in respect of the proposed development. The court rejected the claim. The reasoning was that, where negotiations intended to result in a contract are entered into on express terms that each party is free to withdraw from negotiations at any time, the costs of a party in preparing for the intended contract are incurred at its own risk and it is not entitled to recover them by way of restitution if for any reason no contract results. By the deliberate use of the words 'subject to contract', each party has accepted that if no contract were concluded any resultant loss should lie where it fell.

2.6.3. A different set of circumstances arose in the case of *Marston Construction Co Ltd* v. *Kigass Ltd* (1989). A factory belonging to Kigass was destroyed in a fire in August 1986. Kigass thought that the proceeds from its insurance policy would cover the costs of rebuilding and accordingly invited tenders for a design and build contract for this work. Marston submitted a tender. It was believed by Kigass that the terms of its insurance policy required that the rebuilding work be performed as quickly as possible, so Marston was invited to a meeting in December 1986 to discuss its tender. At this meeting, it was made clear to Marston that no contract would be concluded until the insurance money was available, but both Marston and Kigass firmly believed that the money would be paid and that the contract would go ahead. Marston received an assurance that it would be awarded the contract (subject to the insurance payment), but did not receive an assurance that it would be paid for the costs of the preparatory work. Marston carried out the preparatory work, but no contract was signed because the insurance money was insufficient to meet the costs of rebuilding. It was established that no contract between the parties existed and there was no express request for preparatory work to be carried out. However, the judge found in favour of the contractor on the basis that Kigass had

expressly requested that a small amount of design work be carried out and that there was an implied request to carry out preparatory work in general.

2.6.4. A leading case on the subject matter is *William Lacey (Hounslow) Ltd* v. *Davis* (1957), where it was found that the contractor was entitled to be paid for preparatory work. The proper inference from the facts in this case is not that this work [i.e., the preparatory work] was done in the hope that this building might possibly be reconstructed and that the plaintiff company might obtain the contract, but that it was done under a mutual belief and understanding that this building was being reconstructed and that the plaintiff company would obtain the contract.

2.6.5. Payment is due in restitution if the contractor, in the absence of a contract, is instructed to carry out work. In the case of *British Steel Corporation* v. *Cleveland Bridge & Engineering Co Ltd* (1981), the judge held:

> Both parties confidently expected a formal contract to eventuate. In those circumstances, to expedite performance under the contract, one requested the other to expedite the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to that expectation, no contract is entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract, or, as we now say, restitution.

2.6.6. A situation may occur where work is undertaken on a speculative basis – for example, preliminary design work – and it is agreed that payment will be made if the construction work on the project goes ahead. In the case of *Dinkha Latchen* v. *General Mediterranean Holdings SA* (2003) an architect undertook preliminary design work in connection with a hotel and also a tennis club, both of which were in Tangiers, on the basis that no payment would be made until a building permit was obtained. The work began to escalate, with the client instructing the architect to do a great deal of design work and to visit Tangiers to engage local architects. It was the view of the court that there must come a point in the relationship when each party, had they addressed the question, would have recognised that there was no longer any intention that further work would be unremunerated. It was held by the court that at some point between May 1994 and February 1995 the conduct of the parties was such as to give rise to an intention that any further work would be remunerated.

SUMMARY

The basic rule is that if a contractor carries out work prior to a contract being entered into he does so at his own risk. However, the court may order payment if it can be shown that the work was expressly requested or there was an implied requirement that the work be carried out. There may also be an obligation to make payment, if a benefit is derived from the work which was undertaken.

2.7. What is a tender contract and will it assist a contractor/subcontractor who submits a valid tender which is ignored in seeking compensation?

2.7.1. Contractors and subcontractors often fear that tenders they submitted were not considered. The reasons can be varied. For example, the successful bidder of an earlier stage of the work is almost certain to be awarded the work in a subsequent phase; or the employer may appoint a subsidiary who will do the work, alternative tenders being invited merely to put pressure on the subsidiary to reduce the price.

2.7.2. In *Blackpool & Fylde Aero Club Ltd* v. *Blackpool Borough Council* (1990), the council invited tenders for a concession to operate pleasure flights from the airport. Tenders were to be received by 12 noon on 17 March 1983. The letter box was supposed to be emptied by 12 noon each day, but this was not always the case. The club's tender, although delivered on time, was rejected as being late. The club maintained that the council had warranted that if a tender was returned by the deadline it would be considered and sought damages in contract for breach of that warranty, and in negligence for the breach of the duty that it claimed was owed. It was held that the form of the invitation to tender was such that, provided an invitee submitted his tender by the deadline, he was entitled, under contract, to be sure that his tender would be considered with the others. The court as a result found in favour or the aero club. A tenderer whose offer is in the correct form and submitted in time, is entitled, not as a matter of expectation, but of contractual right, to be sure that his tender will be opened and considered with all other conforming tenders, or at least that his tender will be considered if others are. This is sometimes referred to as a tender contract. A contractor or subcontractor whose properly submitted tender is not considered could levy a claim for damages, which would normally be the abortive tender costs. Where the tender was submitted on a design and construct basis, this could prove expensive. There may also be a possibility that the contractor or subcontractor could successfully frame a claim based upon loss of opportunity.

2.7.3. In the case of *Fairclough Building Ltd* v. *Borough Council of Port Talbot* (1992) a different set of circumstances arose. The Borough Council of Port Talbot decided to have a new civic centre constructed and advertised for construction companies to apply for inclusion on the selective tendering list for the project. Fairclough Building Ltd in March 1983 applied to be included on the list. Mr George was a construction director of Fairclough, whose name appeared on Fairclough's letter of application. His wife, Mrs George, had been employed by the council since November 1982 as a senior assistant architect and the Borough Engineer was aware of the connection between Mrs George and Fairclough for some time, as she had disclosed this at the time that the council employed her. Fairclough was invited to tender under the NJCC Two-Stage Tendering Code of Procedure. Mrs George, now the Principal Architect, was to be involved in reviewing the tenders and wrote to the Borough Engineer reminding him of her connection with Fairclough. The council considered the position and, having obtained counsel's opinion about how to proceed, decided to remove Fairclough from the select tender list for the project. Fairclough brought proceedings for breach of contract. The

Court of Appeal held that, under the circumstances, the council had only two alternatives. One was to remove Fairclough from the tender list, and the other was to remove Mrs George altogether. In removing Fairclough from the list, the council had acted reasonably. The council had no obligation to permit Fairclough to remain on the selected list and were not in breach of contract.

2.7.4. In giving its decision, the Court of Appeal distinguished *Blackpool & Fylde Aero Club Ltd* v. *Blackpool Borough Council*. Blackpool and Fylde Aero Club did in fact submit a tender by posting it, by hand, in the council's letter box before the deadline. However, the council's staff failed to empty the letter box properly, with the result that the tender was considered to have been delivered late, and rejected. In Fairclough, the council had perhaps been in error in shortlisting Fairclough in the circumstances of the connection, but had acted reasonably in removing them from the select tender list in the light of Mrs George's involvement.

2.7.5. Employers in the public sector must comply with the provisions of the Public Contracts Regulations 2006 where the value is above the financial threshold. In addition, they may find themselves at odds with any obligations derived from an implied tender contract. In the case of *Lettings International* v. *London Borough of Newham* (2008) the authority was held to have acted in breach of the Public Contracts Regulations 2006 and of an implied contract when conducting a tender procedure for contracts for procurement, maintenance and management of private-sector leased accommodation, through a failure to disclose weightings for the award criteria and irregularities in the scoring criteria.

2.7.6. The New Zealand case of *Pratt Contractors Ltd* v. *Transit New Zealand* (2003) dealt with a claim from a contractor whose tender was rejected, despite being the lowest by over £1m. An appeal from a decision of the Court of Appeal in New Zealand was referred to the Privy Council in London. The reason for not awarding the contract to the lowest bidder was that the appointment of the successful contractor was based upon a 'weighted attribute method'. This system adopted a formula by which marks were given to quality attributes as well as price. The Privy Council, in reaching a decision against the contractor, laid down a few ground rules to be applied when selecting a contractor. It was the duty of the employer to comply with any procedures set out in the tender enquiry. There was no obligation, however, for the employer to follow any of its own internal procedures. An obligation exists of good faith and fair dealings, but this does not extend beyond a requirement for members to express views honestly held. This duty of fairness did not require the employer to appoint people who approached the task of tender selection with no preconceived views about the tenderers.

SUMMARY

A tenderer who submits a tender in the correct form has a contractual right to have his tender opened and considered, but circumstances may arise in particular cases, where conflicting duties make it reasonable for properly submitted tenders not to be considered. This follows a number of legal cases which have established that, when submitting a tender, the employer and tendering contractor often enter into an implied tender

contract. The terms of these tender contracts may vary, depending upon the circumstances.

2.8. If an architect/engineer, acting as employer's agent in a Design and Construct contract, approves the contractor's drawings and subsequently errors are found, will the architect/engineer have any liability?

2.8.1. A matter which needs to be addressed at the outset is whether the employer's agent should involve himself in approving contractor's drawings? Often, the employer's agent is a quantity surveyor or other non-design specialist without the appropriate expertise.

2.8.2. The standard forms of contract deal with the matter of the contractor submitting drawings to the employer in several different ways.

- JCT Design and Build 2011 Edition: requires the contractor to submit to the employer copies of the contractor's design documents, as and when necessary from time to time, in accordance with the contractor's design submission procedure set out in Schedule 1, or as otherwise stated in the contract documents. No reference is made to any action to be taken by the employer or its agent on receipt of the drawings.
- GC/Works 1/Design and Build: Condition 10A forbids the contractor from commencing work until the drawings have been submitted and they have been examined by the project manager, who has either confirmed that he has no questions to raise in connection with the drawings, or that such questions have been raised and answered to his satisfaction.
- ICE Design and Construct: Clause 6(2)(a) requires the contractor to submit drawings to the employer's representative and not to commence work until the employer's representative consents thereto.

2.8.3. One standard form which makes reference to approval of contractor's drawings is MF/1, which refers in clause 16.1 to the engineer approving drawings. If, however, an employer's agent, whether he be architect or engineer, approves the contractor's drawings which are subsequently shown to include an error, he may be liable. It would in the first instance be necessary to identify, in the conditions of employment, what his responsibilities were. Most consultancy agreements require the consultant to exercise due skill and care in carrying out his duties.

2.8.4. *George Fischer (GB) Ltd* v. *Multi Design Consultants Roofdec Ltd, Severfield Reece and Davis Langdon and Everest* (1998) is a case which, among other matters, examined the obligations of the employer's representative. George Fischer was the employer under an amended JCT With Contractor's Design. Multi Construction were main contractors and Davis Langdon and Everest both quantity surveyors and employer's representative. The project included the construction of the employer's UK head office. From the outset the roof leaked and, despite some reduction of the problems following the taping over of the end lap joints, the leaking continued. The main contractor, Multi Construction Ltd, became insolvent and went into liquidation. A claim was made against Davis Langdon

and Everest as a result of the roof leaks. The case against them was that, under their contract with George Fischer, they had an obligation to approve all working drawings. They were also, it was alleged, obliged to make visits to the site to ensure that the work was being carried out in accordance with the drawings and specification. George Fischer claimed the problems with the roof would not have occurred had Davis Langdon and Everest carried out their duties as required by their contract. A further difficulty arose in that, under the terms of George Fischer's contract with Multi Construction, Davis Langdon and Everest were obliged to issue a certificate of practical completion, which had the effect of releasing the bond. Davis Langdon and Everest's defence was that they were not obliged to approve all working drawings. With regard to site visits, they contended that access was unsafe, which prevented them making these visits and even if such site visits were made, the defective formation of the lap joints would not have been seen, as workmen usually provide work of appropriate quality when being observed by the employer's representative. Their defence to the claim resulting from the issue of the certificate of practical completion was that in fact the certificate they issued was not one of practical completion but a substantial completion certificate, accompanied by a two-page document of incomplete work under a heading of reserved matters. The judge was not impressed with Davis Langdon and Everest's defence. He considered that the contract made it clear that they were obliged to approve working drawings. The reasons given for not inspecting the work were dismissed. Davis Langdon and Everest's certificate he considered to be a certificate of practical completion as, apart from the final certificate, this was the only certificate of completion referred to in the contract. The moral of the story is that those who work as employer's representatives should ensure that the wording of their contracts with the employers is crystal clear as to the duties they are required to undertake and, for the avoidance of any doubt, equally clear as to the duties that are not required.

SUMMARY

If the employer's agent approves contractor's drawings he may have a liability. Most consultancy agreements require the consultant to exercise due skill and care in carrying out his duties. If, due to a failure to exercise due skill and care, an error remains unnoticed, then the employer's agent may have a liability. As with any claim based on allegations of negligence, the employer will have to demonstrate that the errors resulted in additional cost. It is important for the employer's agent's conditions of engagement to spell out whether or not he is required to approve drawings.

2.9. Does an employer have any liability for not sending a subsoil survey which is in his possession to tendering contractors, the absence of which leads a successful contractor to significantly underprice the risk of bad ground?

2.9.1. Some contracts specifically require employers to disclose information in their possession which is relevant. The FIDIC 1999 Edition in clause 4.10 requires the employer to make

available to the contractor all relevant data in the employer's possession on sub-surface and hydrological conditions. By way of contrast, the ICE 7th Edition, clause 11(1), provides for the contractor to take into account in the price only the information concerning the nature of ground and subsoil and hydrological conditions made available by the employer.

2.9.2. In the absence of specific obligations written into the contract, the law in the UK is vague on whether there is a legal obligation on an employer to disclose to a contractor relevant information which is in his possession. It has been argued that a failure to disclose information concerning ground conditions which may affect the contractor's tender price could amount to a negligent misstatement on the part of the employer. This line of argument was used in the Australian case of *Dillingham Construction Pty Ltd* v. *Downs* (1972), where it was recognised that the employer could owe the contractor a duty of care and this would include disclosure of relevant information. The decision went against the contractor, as it was held that there had been no reliance by the contractor on the employer providing the information.

2.9.3. There have been decisions of the Canadian courts which support the view that a duty of disclosure exists. In the case of *Quebec (Commission Hydroelectrique)* v. *Banque de Montreal* (1992), it was held that the law imposes a positive obligation to provide information in cases where one party is in a vulnerable position. In the case of *Opron Construction Co* v. *Alberta* (1994), the court took into account lack of time, the opportunities available for the tenderer to acquire the information, whether the information was indispensable and the degree of technicality of the data.

2.9.4. In the USA, there is authority for the proposition that, at least in government contracts, when the government agency is in possession of information which may be relevant to the work to be undertaken by the contractor, there is a duty to fully disclose the information to the contractor: *D Federico Co* v. *Bedford Redevelopment Authority* (1983).

2.9.5. The Misrepresentation Act 1967 may come to the aid of contractors who have made no financial provision for bad ground conditions, for which an allowance could have been made if the employer had issued information in its possession. It is possible for a liability to arise under the statute in respect of a failure to provide correct or relevant information, or where only a part of the information is provided. This was an issue in the decision of *Howard Marine and Dredging* v. *Ogden* (1978). In this case it was held that Howard Marine's manager was negligent in stating that the payload of a barge was 1,600 tonnes, when in fact it was only 1,055 tonnes. Howard Marine was held to be liable for the manager's misrepresentation under section2(1) of the Misrepresentation Act 1967.

SUMMARY

The terms of the contract may require the employer to disclose information concerning ground conditions to the contractor. In the absence of a contractual obligation, the law in the UK is unclear. In Canada, it has been held that the employer's obligation to disclose will depend upon the time available, the opportunities for the tenderer to acquire the information, whether the information was indispensable and the degree of technicality of the data. The law in the USA requires government agencies to disclose relevant

mark-up of 20% was allowed on the subcontractors' accounts, 15% on materials and 25% on the operatives' wages.

2.10.5. With these decisions in mind, it is important for contractors and subcontractors to appreciate that, if the intention in submitting an estimate is that it is not intended to be a firm offer to carry out the work, this should be made clear. If, on the other hand, it is intended to be a firm offer but the price is subject to subsequent adjustment, then again this must be explained.

SUMMARY

The word 'estimate' has two meanings. It may refer to a probable cost or approximate sum which can later be adjusted, or a firm price which is fixed. When submitting a quotation, the term 'estimate' should either not be used at all, or qualified to provide its precise meaning.

2.11. Where a tender enquiry requires tenders to remain open for acceptance for a specific period of time, can a contractor or subcontractor who has submitted a tender as required withdraw the tender before the period expires, without incurring a financial liability?

2.11.1. It is a well-established principle of English law that an offer can be withdrawn at any time up to its being unconditionally accepted. This rule applies even if the offeror undertakes to leave the offer open for a specified period of time. In the case of *Routledge* v. *Grant* (1828), the defendant offered to buy a house, giving the plaintiff six weeks to provide an answer. It was held that the offer could be withdrawn within the six-week period without incurring any liability. The situation would be different if consideration, e.g. a payment, were made to the offeror in return for keeping the offer open.

2.11.2. On international projects, contractors are often required to provide a tender bond. If the tender is withdrawn before the period for acceptance has expired, the employer will be entitled to levy a claim against the bondsman.

2.11.3. The law in Hong Kong appears to differ from UK law. In the case of *City Polytechnic of Hong Kong* v. *Blue Cross (Asia Pacific) Insurance HCA* (1999), the plaintiff invited tenders from several insurance companies to provide health insurance for its staff. The tenders were required to remain open for acceptance for a period of three months. Blue Cross submitted the lowest tender, but withdrew it before the three months period elapsed. The Polytechnic accepted another and more expensive insurer's tender and claimed the difference back from Blue Cross. At first instance, the claim was rejected. On appeal, however, the claim was successful on the grounds that there existed an implied contract that the tender would remain open for acceptance for a period of three months. Blue Cross was in breach of the implied contract and was obliged to pay damages.

information to contractors where government projects are involved. There has been no legal decision in the UK on this matter; however, in the event of such a case being heard, the court may consider that a failure to disclose amounts to a negligent misstatement or a liability under the Misrepresentation Act 1967. Alternatively, the courts may chose to follow the legal decisions arrived at in the Canadian courts and in courts of the USA.

2.10. If a subcontractor submits a lump sum estimate to a contractor to carry out the subcontract work and it is unconditionally accepted, can he later change the price on the basis that the lump sum was only an estimate?

2.10.1. The *Building Contract Dictionary* by Chappell, Marshall, Powell-Smith and Cavender, 3rd edition, published by Blackwell Publishing, provides two possible meanings for the word 'estimate':

- 'Colloquially and in the industry it means "probable cost" and is then a judged amount, approximate rather than precise';
- 'A contractor's estimate, in contrast, may, dependent upon its terms, amount to a firm offer, and if this is so, its acceptance by the employer will result in a binding contract'.

2.10.2. With two meanings attached to the word, using 'estimate' in the submission of an offer to carry out construction work can be ambiguous. In the case of *Crowshaw* v. *Pritchard and Renwick* (1899) a contractor submitted a quotation for construction work in the following terms:

> ESTIMATE – Our estimate to carry out the sundry alterations to the above premises, according to the drawings and specifications, amounts to £1,230.

2.10.3. The quotation was accepted, but the contractor refused to proceed with the work. He contended that submitting an 'estimate' for carrying out the work was not intended to amount to an offer capable of acceptance. It was held by the court that the submission was a firm offer which had been accepted.

2.10.4. The case of *Sykes* v. *Packham* (2011) involved a house refurbishment contract. The contractor submitted a price of £88,830 plus VAT, referred to as an 'estimate of cost' for undertaking the work, which he alleged was an estimate. He considered that an entitlement existed to be paid in accordance with the costs involved in carrying out the work. The house-owner considered the price to be a fixed price. The judge had his own opinion, which was that the builder had an entitlement to be paid a reasonable price for the work undertaken, which was *not* 'cost plus'. In deciding what was a reasonable price, the judge explained that he took a 'rough justice' approach. He knocked 20% off the wages bill for time wasted and a sum of £175 per day was allowed for the builder's expenses. All the subcontractors' accounts were allowed, plus the cost of materials. A

SUMMARY

Under English law, an offer can be withdrawn at any time up to its being unconditionally accepted. This applies even if the offeror agrees to keep the offer open for a fixed period of time. Where some form of consideration, e.g. a payment, is provided to the offeror in return for keeping the offer open, it cannot be withdrawn until the period for acceptance expires. In Hong Kong it has been held that an undertaking to keep an offer open for acceptance for a given period of time represents an implied contract. A withdrawal of the offer before the period comes to an end constitutes a breach of contract.