

Forensic Investigation in Cost and Contracts; Not Just for a QS Mindset

By:
Eugene Seah
Director
Threesixty Contract Advisory Pte Ltd
(Member of Surbana Jurong Group)



Introduction

Amidst ever-changing market conditions, the move towards new technologies and 'green' buildings would only mean that the role of the Quantity Surveyor (QS) also has had to evolve to keep up with such new demands.

Beyond the traditional QS functions such as measurement & documentation, price, value & cost of construction, pre-and-post tender management and final account, the role has now expanded in many aspects, such as the following:

- Performing due diligence for buildings;
- Risk and value management;
- Project financing;
- Advising on the potential of a site;
- Working out what a client can afford to build;
- Cost reinstatement for insurance purposes;
- Information technology in construction;
- Sustainability and environmental services; and
- Legal support

This article highlights the added role of the QS in providing legal support services.

Legal Support

Lawyers and expert witnesses often require the support of industry practitioners in handling legal disputes. For example, QS are called upon to provide support, especially in quantification and cost. With this support, the number of claims may potentially be reduced as there will be better

knowledge of how strong or weak the claims are set out to be, and merits of the case in dispute.

The findings are based primarily on the agreed bundle of documents where the parties exchange data and information. The investigative mindset of the QS starts here. He has to tear up the documents and comprehend what took place during the project timeline. This requires time and experience, and the ability to empathise with the parties concerned.

Ask, Ask, Ask...

Some basic tools that the QS can use include the 5 "Ws" and 1 "H"; When, Why, Who, What, Where & How, and the Root Cause Analysis. With these tools, the QS can systematically address each head of claims and record down the events that led to the claim and dispute. It is paramount that the QS leaves no stone unturned, ie to query everything that can be queried. This is required because the QS has to be absolutely sure of what he is going to advise the expert witness. If the QS is the expert witness himself, his statements withstand the stress of cross examination.

Facts presented have to be strong, sustentative and substantiated. When all the information is in, there is a need to look into the matter systematically, using the heads/categories of claims as a guide on the issues to be addressed. What is useful is that each head of claim should have one file, or individual section. This is so, that

all documentary evidence found in the jungle of papers in the agreed bundle can be systematically sorted and categorised as evidence - a good practice so that no information would be left out or unattended.

Tracking & Monitoring

A tool that is used for tracking would be a timeline or mind mapping¹ tool whereby timelines and information spin-offs can be tracked, monitored and systematically addressed.

Project teams would need to be vigilant and have all round sensory of the project and chronology of events. Substantiation and justification would then be made much easier, supported by well-kept correspondences. The methodology of getting these substantiation is by itself, a management process. For example, if the QS wants to support the cost of an item with a rate, he has to consider the following:

- a) What rate to use?
- b) Did the rate come from Bills of Quantities (BQ) or Schedule of Rates (SOR)?
- c) Under what circumstances was this rate (BQ or SOR) derived from, and were the conditions similar?
- d) What were the preambles and general notes covering the rates in the BQ or SOR? Were the conditions similar to the case's?
- e) Is the rate appropriate and correct? Is there a difference in rate for left-in sheet piles and sheet piles to be removed later (recyclable)?
- f) Are there any other rates that can be used to substantiate?
- g) Any legislation to consider that may affect the rate at that point? For example, an embargo is imposed on that material resulting a higher rate at that point in time.
- h) If the QS works the rate from 1st principle, will he get the same figure/rate value compared to the substantiated rate?
- i) Any external market forces or peculiar building design that would affect the quantum of the rate?

The list is non-exhaustive.

All these factors are important considerations when it comes to justifying a simple rate. This will help ensure that the rate which is used to cost an item is within reasonable doubt, and is from the perspective of the industry norms. Hence, this

will leave little or no room for the opposing lawyer to question.

This process would be similar to drafting contractual clauses as well. The QS should consider the following:

- a) What is written in the contract i.e. general terms and conditions in the contract?
- b) How would the common law stand?
- c) Any case law to support, and is the case law the latest?
- d) What would be the implied terms and how would this affect the issues?
- e) Will there be any legislation that will affect the clauses?

These processes do not just reside in the QS' thinking process, but also within the project team members as well. To the Engineer, would his specifications contradict his designs, or is it sufficiently clear? To the Architect, would his design befits a reasonably qualified person, having taken into consideration cause and effect of his design to future maintenance for instance. Therefore, proper records and documentation, coupled with experience and wisdom, is a recipe of success for an efficiently-run project team.

Communications have to be simple, yet effective. If the story line is convoluted, the effect of the report can be lost. Statements need to appear composed, consistent and logical and there must be a clear overall view of the problem. A technique would be to take the heads of claim and formulate the report and justification under these heads. When documentation is not clearly recorded, or when statements fall into grey areas, the project can potentially go in wrong directions. Clearing doubts up-front is probably the best policy forward, true to any Partnering ethos.

Conclusion

Providing legal support is a growing work scope for the QS. It is fast expanding, especially with the provisions of specialist law courses offered by the Universities². Being armed with the right mindset on cost and contracts is crucial for the QS to step up his plate and take on challenges which were previously unseen in the world of QS.

The opportunities are limitless for personalities with inquisitive minds and an investigative nature. Sweet success that comes with cracking a

construction case and/or settling a dispute is priceless!

This article is co-created by Surbana Jurong Academy.

End

Connect with Us

Eugene Seah

Eugene.Seah@surbanajurong.com

References

¹ Off the shelf programmes like Mind Mapper Pro offers an excellent array of tools to capture information and how the information can branch out to several sub information that has to be addressed.

² The National University of Singapore used to provide the Joint MSc in Construction Law and Alternate Dispute Resolution. This course provides the fundamental understanding and practicalities of the law in general, construction law and the related legislations. This is coupled by the spectrum of Alternate Dispute Resolutions.