

# CONSTRUCTION INSIGHT

The Latest News in Construction Contracts

## CRUNCH TIME

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It is hard to believe that Christmas is nearly upon us and another year is drawing to a close. A phrase that will be synonymous with 2009 and that will affect many of us this Christmas is 'the Credit Crunch'. This year we have seen an unprecedented economic downturn. For many of us involved in Construction, and in particular house building, the impact has been considerable. With the bottom falling out of the housing market many construction companies and employees have felt the pinch.

In the current climate contractual awareness and proper preparation are more important than ever. In this edition Pauric Marray looks at the old adage 'Failing to Prepare is Preparing to Fail' in the context of the construction industry. It is engrained in many of us that good record keeping and contractual awareness are key ingredients to a successful contract. Yet often these issues are ignored until it is too late. Pauric looks at the pitfalls of poor preparation and organisation.

Procurement issues have also featured prominently in 2008. Edward Quigg, who is a leading light on public

procurement issues, looks at what has gone wrong with procurement and why. Procurement is an area that has been subject to rigorous change in recent years. The industry has struggled and continues struggling to cope with the new rules. The result has been an unprecedented number of disputes, many of which we have been involved in. Edward Quigg looks at the reasoning behind this, giving particular focus to the recent case of *McLaughlin & Harvey -v- Department of Finance and Personnel*, in the High Court of Belfast.

Our personal profile section features one of Quigg Golden's directors, Mr James Golden. James has been involved in the construction industry for many years (perhaps more than he would ever care to mention!) and in his interview he shares some of the experience and memories that he has gained over the years.

Until next time...

*Caroline Eccles*



Editor



## QUIGG GOLDEN BACKS WOBBLY WILLIAMS



Bryn Williams and Edward Quigg prepare to start their charity walk at the West Highland Way. Quigg Golden recently supported the "Wobbly Williams" Charity walk across Scottish Highlands. The Charity was set

up by Bryn Williams, who was diagnosed with Parkinson's disease at age of 36. It aims to raise awareness of the condition and support research into possible cures.

Bryn's website is a mix of good humour and honesty about this challenging condition, and is well worth the read.

Edward Quigg said:

*"Bryn is a friend and we are delighted to help him in any way we can".*

Wobbly Williams' website can be accessed at [www.WobblyWilliams.com](http://www.WobblyWilliams.com).

# PREPARING TO FAIL?



contract regardless of form or size.

## Understanding the Contract

A useful first step to understanding the contract is to actually read the contract. If you do not understand some or all of the terms, seek advice as to their meaning. The key question you should be asking is "what does the contract require me to do in order to ensure full payment?" Once this base of knowledge is acquired, it is a matter of tailoring record

keeping procedures to meet the demands of the contract.

## Record Keeping

Good records are the key to ensuring correct payment. In our experience of pursuing claims in dispute forums, weak cases with good records are as likely to succeed as strong cases with poor records. The key to record keeping is to ensure the process is as simple

as possible and to understand the potential usage of records you already maintain. One example of such a record are timesheets which are filled in by or in relation to general operatives. Instead of simply recording the time in/time out, why not record the area(s) the operative was working in, the work carried out and anything that has delayed the operative on that day. This can be recorded in an agreed shorthand to decrease the administrative burden.

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*"Good records are the key to ensuring correct payment."*

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There is not sufficient space in this short piece to go through in detail all the possible records you could and/or should maintain.

Critical points to remember are to understand what records the contract requires you to keep and having the discipline to maintain those records throughout a project. Quigg Golden's experience makes it ideally placed to advise in this regard.

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Pauric Marray

It is somewhat of a cliché but the old adage of 'failing to plan is planning to fail' is extremely relevant to ensuring full recovery under a construction contract. The primary reasons why claimants find themselves unable to recover losses incurred or unable to refute a claim for liquidated damages is the failure to properly and accurately understand the terms of their contract and the failure to develop and maintain appropriate record keeping procedures.

Obtaining proper advice is the key to ensuring neither of these problems significantly affect your business.

Both of the above points are especially key if you are contracting under any of the new forms of Public Works Contracts. The PWC forms place an increased emphasis on the maintenance of records and set out mechanisms for the barring of claims if the contractual provisions are not adhered to. While contractors and sub-contractors will need to be particularly vigilant of this while working on the PWC forms, the management principles the PWC form seek to enforce could (in our view, should) be applied to any

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## GETTING TO KNOW US....

### In this edition of Construction Insight's Personal Profile Section features James Golden, Director of Quigg Golden.

**CI: James, you have been with QG for a number of years now, how did it all begin?**

I have been involved in the construction industry since I wheeled barrows for my father on sites when I was 11 years old. Since he was self employed and it was the 1970's the minimum working age did not seem apply! I have been steeped in the industry since as contractor, client and consultant. By far my most profound influences have been those gained on sites making construction work happen. However, I now practice mainly in the world of contract law and dispute resolution.

I joined Quigg Golden in 1997 where I have served as Director, Contracts and Arbitration Manager, Advocate and Expert Witness. I am actively involved in work in Northern Ireland, the Republic of Ireland and England but I have also worked recently in Scotland, Hong Kong and Middle East.

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*"My most profound influences have been those gained on site making construction work happen."*

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**CI: What is your role within Quigg Golden?**

My primary function is providing advice and representation related to disputes. My experience includes a spectrum from advocacy at arbitration hearings through to facilitating partnering and providing representation in mediation and conciliation. The disputes in which I have been involved include civil engineering, building and building services disputes under main contracts and sub-contracts, where I have

variously represented clients, main contractors and sub-contractors/suppliers.

A considerable proportion of my work is the provision of contractual advice and dispute management for building contracts and civil engineering projects of varying size, including disputes over sums less than £20,000 on contract sums of less than £250,000, to multi-million pound disputes on contracts worth over £50,000,000.

**CI: What pitfalls are to be avoided by those in the Construction Industry?**

Quigg Golden's mantra and something that you would have heard before if you attended any of our seminars is "Records Records Records". Every organisation needs to keep records of what was supposed to happen, what actually happened and why it happened. It is true to say that "the side with the better records wins." I can not stress enough how important it is to maintain good records.

Signing up for conditions of contract without understanding them properly is also common. This is one practice that can no longer survive. The GCCC or Public Works Contracts (PWC) are a radical change from the past and place different risks with contractors and consultants. One of the most important changes brought in by the PWC is that contractors or sub contractors will automatically lose their entitlement to any claim if they fail to submit the appropriate notice and details required. As cash flow is the "lifeblood" of the construction industry especially in this economic climate no organisation can afford to be complacent when it comes to securing its income.



James Golden  
Director

It is also important to seek professional advice when feeling outgunned or out of one's depth. Remember good advice is always value for money - if you act on it!

**CI: Who is best placed to support? Is it a quantity surveyor, barrister or a solicitor?**

Engaging professional help when things go sour is the first step in the right direction. As the construction industry takes place within a web of relationships, the breakdown of one or more makes meeting your own requirements very difficult. That's when the right kind of advice and prompt action is crucial. I believe commercial success depends upon obtaining the right advice at the correct time. What makes Quigg Golden unique is the intermingling of legal and construction backgrounds within the firm. This and our ability to take a claim right from dispute to resolution makes it much more efficient than trying to pull together the different skills and knowledge of surveyors and lawyers.

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# NORTHERN IRELAND PROCUREMENT CASE SENDS RIPPLES...



Edward Quigg  
Director

**A recently decided Northern Ireland case has shaken up procurement there, and will send ripples south of the border, writes Edward Quigg of Quigg Golden.**

September saw yet another court ruling demonstrating that the public bodies requesting tenders are simply not getting it right. All this leads to wasted money and a lack of work for contractors at a time when it is needed.

Both EU directives and the common law place obligations on public bodies when considering tenders. If they breach those obligations, a contractor who loses out can stop the works proceeding and even claim for the profit he could have made on the project. This means the public will have to pay one contractor to carry out the work and another for not doing it.

In Northern Ireland, several major infrastructure awards have been delayed as courts consider applications from unsuccessful contractors claiming that they did not have a fair chance to obtain the work. Despite the huge implications of poor practice, public bodies do not seem to be learning as they should.

In the most recent case, the leading Northern Ireland contractor, McLaughlin and Harvey, was not allowed on to a select list of five contractors who would have an exclusive right to tender for some £800m (€1bn) worth of work. When McLaughlin and Harvey attended a debriefing meeting with the NI Central Procurement Directorate (CPD), it emerged that the marking criteria for the tenders had only been drawn up after the tenders had been submitted. There was no way McLaughlin and Harvey could have known how the scheme was to be marked.

The Court held that the CPD had a duty to disclose all the criteria in advance to the tenderers. While it might be reasonably expected that contractors could predict some of the criteria without being expressly informed in advance, the judge noted that the contractors had not been told of the weightings attached to each point. This compounded the breach.

The judge expressly found that there was no intention to discriminate against any individual contractor. However, the CPD's problems were not helped by their poor record keeping. Three highly placed officials spent two months considering thirteen tenders yet not a single note could be produced. The judge rather mildly noted that this was "somewhat surprising".

While the judge found that McLaughlin and Harvey had been unfairly treated, he has not yet dealt with the issue of compensation. However, it is anticipated to run into millions of pounds.

## Significance, North and South

The judge based his reasoning primarily on European legislation, which obviously applies South of the border. Recent high profile cases demonstrate that public bodies have not yet adapted to the new regime. However, cases which make it to court are only ever a small minority.

Experience and anecdotal evidence would suggest that many Irish public authorities are opting to cancel or abandon advanced procurement processes after flaws are pointed out to them. While this may be of benefit to the individual contractor who has a chance to resubmit a tender, questions must be asked as to the cost efficiency of this approach. The project is delayed causing frustration to the end user and the tax payer bears the cost of civil servants and

consultants retained on the abandoned process. Meanwhile, private contractors must bin an expensive tender.

Public Bodies simply must seek proper advice before initiating tender processes. Failure to do so is to leave themselves open to repeating the mistakes of the past. A lack of discrimination alone is simply not sufficient to ensure the validity of an award, and from the very outset, bodies must be made aware of the stringent requirements which are laid upon them.

Similarly, contractors tendering for work are entitled to expect the highest standards from public bodies. They should not be shy in ensuring that every part of the adjudication criteria has been given to them before tendering. In particular, the distinctly Irish practice of declining the opportunity to attend a debriefing has the twin effect of ensuring that companies do not learn from their mistakes, and preventing them from ensuring that they have received fair play.

A culture shift all round is required to prevent the wastage of money by public bodies and contractors alike. Civil service incompetence is leading to wasted money and delays at a time when the construction industry needs the work. The McLaughlin and Harvey case clearly indicates to Public Bodies in the Republic that the regulations must be strictly adhered to. It should also serve as a reminder to the contractor that they may be entitled to compensation where a scheme has not been operated in strict accord with the rules.

*Edward Quigg, BEng LLB MIEI MCI Arb FInstCES, barrister (non-practising), is a director of Quigg Golden and a leading authority on procurement. Edward is leading a series of free workshops on procurement issues in Dublin, London and Belfast in Autumn 2008. He can be contacted at Edward@QuiggGolden.com or on 01 6766744.*

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