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# HALEYS



## NEWSLETTER

**December 2010**

## Foreword

As we approach the end of 2010 and the first decade of the 21<sup>st</sup> Century draws to an end, many of us will reflect on life in the construction industry over the last 10 years with mixed feelings.

Whilst for most of us throughout the early part of the decade we experienced prosperity and growth it is unfortunate that this decade will be remembered for the last 3 years, which has marked the worst recession in the UK for over 70 years. Sadly this has seen the demise of construction related businesses at all levels in the supply chain. Those businesses that have not reacted promptly to the recession have either not survived or are now a shadow of their former selves.

Like many others in the industry, Haleys have been required to cut costs to become more competitive, maintain a high quality service and diversify our range of services in order to rise to the challenges. It is through those measures and the prudence of the

management that we approach the year end with a hope in our hearts and a relief that rather than decrease our work force in 2011, we will actually be able to maintain it and in some areas increase it. The economic indicators are certainly showing that 2011 will be a more prosperous year than 2010.

It goes without saying, but we will say it anyway, that this position of stability and order would not have been achievable without the hard work, commitment and sacrifices of our staff and we would like to thank each and every one of them for their unwavering commitment in these difficult times.



We would of course also like to thank all of our clients, new and old for their valued custom and for the loyalty shown to Haleys in the recession and it is

heartening to see and hear that our clients are not prepared to sacrifice quality when looking for technical assistance.

Haleys are also looking to markets elsewhere in the world following the success of the innovative 3D Cost Modeling process in the UK and we anticipate that we shall be able to roll the service out on an international basis in the next 12 months, with our eyes on markets such as the middle and far east and hopefully the USA.



The changes in technology and our service offering have given us a good reason to give our Web Site its long overdue overhaul and our updated web site will finally go live in December 2010 and will reflect the forward thinking business that Haleys has always been.

It only remains for me to wish all of our clients and staff the very best for the festive season. Let's hope that all our Christmas wishes come true.

A Merry Christmas and Happy New Year to everyone.

*Steve Haley*

## New Location for Haleys - London

Having outgrown the office at Monument where we had been for the last 2 years on Friday 1<sup>st</sup> October 2010, Haleys moved into its new London office located at number 3 Lloyds Avenue, off Fenchurch Street, London.

This recently fully refurbished building provides a striking modern internal design with monochrome colours contrasted against the Victorian architecture and was once the offices of James Pollock & Sons, Shipbuilders.



Throughout the spacious building there are numerous

breakout areas, a welcoming lounge area and a fantastic roof terrace with views across London's financial sector, including the imposing Heron Tower and Swiss RE buildings, both being projects that Haleys are proud to have been involved in.

The office location is convenient for underground connections with Aldgate and Bank Stations only a short walk away and provides a good location for our Construction Law and QS teams to service our city centre clients.

Once we had viewed the building we were left in no doubt that it represented Haleys modern approach, and strength gained from well



established foundations and a high quality finish.

We were delighted to welcome a good cross section of our clients to the formal office opening

on 28<sup>th</sup> November 2010 and were very pleased with the positive feedback that we received.

As we continue to develop the office space gives us great potential to expand as necessary and is extremely functional for our admin and management team.

For further details please contact Jamie Brown on 020 3036 0520.

# All Change!

It is a fact that despite having a good selection of standard forms of contract for use in the UK construction industry, the differences in the mechanisms within them to govern the same issues that arise on every contract can leave you with your head spinning.




For instance how many different ways can there be to manage and value standard procedures for directions, variations, delays and costs? The simple answer is a lot!

In this article we take a look at a number of standard forms that are in use and see how each of those forms requires the parties to deal with some of the fundamental elements of a contract which relate to changes or variations.

## IChemE Red Book Lump Sum

The IChemE publishes contracts for use in the process industries including forms for use specifically in the UK and those for international use. The contracts have been specifically written to reflect the particular needs of the process industries such as Water and Petrochem; the key features include:

They are multi disciplinary;

-  They are technology based (purchaser, contractor or licensor's technology);
-  They require a close integration between design and construction;
-  The project success is measured by extensive performance testing;

This part of the article takes us on a gallop through the basis of recording variations, entitlement to be paid and the timing of notices.

## Recording Changes

Variations

In Clause 16.1 it states that:

*The Contractor shall make no Variation **except as ordered in writing** by the Project Manager*

Or

*If no Variation Order has been issued and the Contractor considers that an amendment, omission or addition is significant, **he may give notice to the PM that a written VO is required before the amendment will be undertaken.***

This is a very specific requirement and is intended to avoid the complications of verbal instructions. It is clear that neither party should assume the risk of a variation without a requirement being recorded in writing, thus avoiding the pitfall of an oral direction.

The Project Manager (PM) has various powers under the Contract and in respect of Clause 16.2 (the instruction of a change) these include the following:

The PM may give the Contractor a VO at ANY TIME during the performance of the contract and the Contractor shall be bound by this VO as if it were part of the original contract and be entitled to recover an addition to the contract price where the variation affects the cost to the contractor of carrying out the works (valued under Clause 19).

Clause 19 provides for an agreement between the PM and the Contractor that should be "reasonable" in the first case via either an agreed quotation, by agreement or by estimate in accordance with the rates and charges in the contract.

As an alternative, under Clause 16.4 the PM may instruct the Contractor to prepare or assist him to prepare a variation, however the Contractor is entitled to recover the preparation cost plus profit in complying with such an instruction.

Importantly under Clause 16.5, notwithstanding that consequent additions or deductions to the contract price are not agreed, the PM may issue a VO if he feels that delay would prejudice the satisfactory completion of the works.

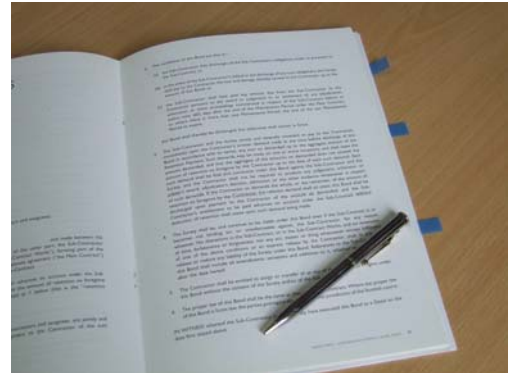
Interestingly, where there is a disagreement over the cost incurred as a result of a variation the parties are

directed to Clause 47 "Reference to an Expert" and in that respect Clause 16.8 it states:

*"if a disagreement arises between the PM and the Contractor about any cost incurred by the Contractor pursuant to this Clause or any modifications of the obligations of the Contractor necessary to incorporate any Variation into the works or the approved programme, the dispute may be referred to an Expert in accordance with Clause 47"*

In contrast, if a disagreement arises between the PM and the Contractor as to the value of an Extension of Time, the first port of call for resolution is Clause 45 (Disputes) and if this doesn't resolve the dispute, then the matter may be referred to an Expert in accordance with Clause 47 (Reference to an Expert).

There is no time scale given under Clause 16.8 in which the disagreement



should be referred to an Expert although there are timescales given within Clause 19 which deals with the Valuation of Variations, which it seems would be the first point of reference if the costs cannot be agreed.

In Clause 19.3 the Contractor shall as soon as is reasonably practicable or in any case within 28 days from receipt of a request from the PM, provide an estimate of the cost of a variation. In Clause 19.6, if the Contractor and Project Manager cannot agree the amount of any claim provided under 19.3, then the PM shall decide an amount as soon as it is reasonably practicable (in either case the amount shall be recorded by means of a VO). If the Contractor cannot agree with the

PM's valuation and such disagreement is not settled in accordance with Clause 45 (Disputes) the dispute can then be referred to an Expert under Clause 47.

It can be seen from the above that the emphasis is where possible to get agreement in advance of any change, but in all cases the change must be instructed in writing before being undertaken.

Where agreement cannot be reached the two tiered dispute system appears somewhat convoluted but potentially serves to attract the parties to reaching agreement and avoid a dispute.

### **The NEC3 Engineering and Construction Contract**

The NEC introduced language to construction that was unfamiliar in the 1990's. Terms such as Variation and Loss and Expense, which are still used in many standard forms, are not to be found in the NEC suite and instead are replaced with the term "Compensation Event".

#### **Notifying Compensation Events**

Anyone who has encountered the NEC Engineering and Construction Contract will be aware that the only means to recover additional time or additional money is through Compensation Events.

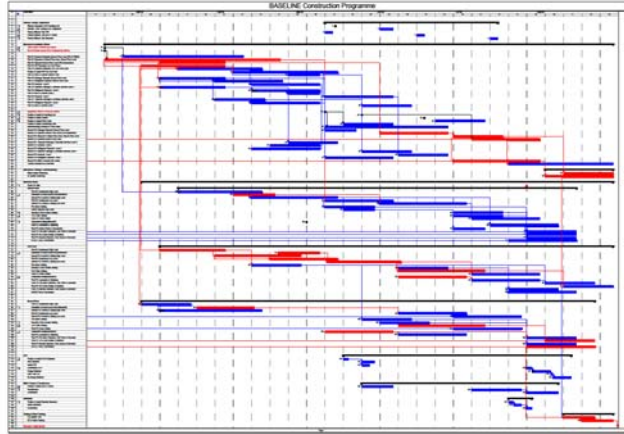
#### **Core Clause 60 – Compensation events**

Core Clause 60 identifies 19 separate Compensation Events which include:

- 60.1(1) Project Manager issuing an instruction changing the Works Information, e.g. an instruction to work in accordance with a revised drawing or specification;
- 60.1(2) The Employer not allowing access to and use of a part of the site; and
- 60.1(16) The Employer does not provide materials as stated in the Works Information.

#### **Core Clause 61 – Notifying compensation events**

Core Clause 61.1 requires the Project Manager (PM) to notify the Contractor of the compensation event at the time of giving an instruction. Accordingly if, for example, the Project Manager is to



instruct the Contractor to work in accordance with a revised drawing he should simultaneously notify the Contractor that the instruction is a Compensation Event (CE).

In practice instructions are often issued without the accompanying notification of a CE. In such situations the Contractor is able to notify the CE to the PM in pursuance of Core Clause 61.3.

Core Clause 61.3 provides that the Contractor is to notify the PM of events, which have happened or are expected to happen, which it believes are CE. Such events would include those identified at Core Clause 60.1(2) and 60.1(16) above.

Core Clause 61.3 also imposes a time limit for such notification; requiring it to be given within 8 weeks of the Contractor becoming aware of the event. The Contractor loses entitlement to recover time and/or costs associated with the CE where it fails to provide the notice within this time-limit. Such time-limit does not however apply where the PM was required to issue the notification pursuant to Core Clause 61.1 but failed to do so.

Following receipt of a notice pursuant to clause 61.3 the PM is required within a week to either notify the Contractor that the event is not a CE or instruct the Contractor to submit a quotation. If the PM fails to respond within the required time-scale and further fails to respond within 2 weeks of the Contractor

notifying him of his failure the event is deemed to be a CE and an instruction to submit a quotation.

Core Clause 61.5 provides that if the PM decides that the Contractor did not give an early warning of the event which an experienced contractor could have given, he notifies this decision to the Contractor when instructing him to submit a quotation. Core Clause 63.5 provides that failure by the Contractor to issue an early warning will result in the compensation event being assessed as if an early warning had been given, which could significantly reduce the value and any affect on time.

Some of the above language appears less than plain at first glance, however the NEC was drafted with a view to less adversarial arrangements and more openness. However, it is very prescriptive and requires that parties "do their bit" otherwise there are sanctions that do have teeth.

The reality is however that contractors and Project Managers find it hard to administrate due to the sheer volume of paperwork required and the cost of the staff to produce it. But if administered properly it is a very effective contract for ensuring that all liabilities for measured work, time and additional costs all get wrapped up under a single heading of Compensation Event.

### **The JCT Standard Building Contract (SBC)**

The JCT suite is one of the most familiar suites for building contracts in the Private Sector coming from a long family history going back to 1909 (known as "the RIBA form"). This subsequently evolved, through a series of editions published in 1931, 1939, 1963 and 1980, into the 1998 edition of the JCT Standard Form of Building Contract. The most recent edition is the 2005 version which is used below.

#### **Implementing Variations**

The JCT Standard Building Contract

(SBC) 2005 Conditions provide for the Architect/Contract Administrator to issue instructions to the Contractor within 'Section 3 Control of the Works'. The conditions relating to Variations are to be found in Section 5.

### Architect/Contract Administrator's Instructions

Under Clause 3.10 the contract provides that the Contractor is required to comply with instructions issued by the Architect/Contract Administrator 'forthwith' unless one of the exceptions set out in sub-clause 3.10.1 to 3.10.3 applies.

### Non-Compliance

Clause 3.11 allows that where the Contractor fails to comply with written instructions, other than for the reasons set out above, within 7 days of their receipt the Employer may employ others, at the Contractor's expense, to execute any works necessary to give effect to the instruction.

### Instructions to be in Writing

All instructions issued by the Architect/Contract Administrator are to be in writing (clause 3.12.1), unless otherwise agreed between the parties. This may allow the use of other means including email and oral directions.

However, if Instructions are issued other than in writing they are of no immediate effect and the Contractor is required to confirm in writing such instruction to the Architect/Contract Administrator within 7 days. If the instruction is not dissented from within a further period of 7 days the instruction takes effect as if it had been issued in writing (clause 3.12.2).

The Architect/Contract Administrator can also confirm an instruction in writing within 7 days of giving it by other means (clause 3.12.3).

### Instructions requiring Variations

Clause 3.14 provides that the Architect/Contract Administrator may issue instructions requiring a Variation (Clause 3.14.1) and further that the Architect/Contract Administrator may sanction in writing any Variation made by the Contractor other than pursuant to

an instruction (clause 3.14.4). This would allow the confirmation of a Variation carried out prior to receipt of an instruction to vary the Works.

### Valuation of Variations

The rules for the valuation of Variations state that values are to be agreed by the



Employer and the Contractor (clause 5.2.1).

However, Clause 5.6 provides the valuation rules for Measurable Work and requires that where work is of a similar character to work included in the Contract Documents the Valuation is to be consistent with rates and prices included with the Priced Document. Where work is not of a similar character it is to be valued at fair rates and prices. Adjustment is also to be made in respect of preliminary items.

### Extension of Time & Loss and Expense

Variations are also a Relevant Matter under clause 4.24 in relation to recovery of loss and expense. But unlike the NEC and akin to IChemE, the loss and expense or damages is recoverable under a different provision generally requiring the Contractor to give a relevant notice and/or provide all supporting evidence (in some cases within particular timescales). As set out in a recent bulletin, Contractors are warned to check their contracts as a failure to issue notices could mean that the Contractor loses its right to recover loss and expense.

### Summary

The foregoing shows the differing approaches that can be taken with

distinct advantages and disadvantages. However, the message in all cases is quite clear and that is that one must read and understand the contract and operate it as written in order to secure entitlements. It is not always sufficient to say that "it's how we always present variations" or "this is our standard build up sheet" as in some cases it will not be appropriate.

It is also important to understand what the vehicle for change is as not all contracts permit oral changes and may not even allow confirmation of changes.

In short, make sure that you know your contractual obligations and rights

Clients are invited to submit any personal experiences or problems that they may have had in respect of any of the above contracts or any other standard forms via the email address below. All such submissions will be held in the strictest confidence.

The End

*The articles contained within this Newsletter should not be taken to be, or used as, a statement of law, or for the purposes of giving advice to any party on any legal or contractual matter or dispute. Haleys therefore do not accept any responsibility for any such use or purported use and in all cases parties should seek appropriate and specific legal advice for specific cases.*

*If you would like to discuss the circumstances of any of your contracts or projects, or you require further information on the services provided by the Construction Law Services Division, please contact us on either :*

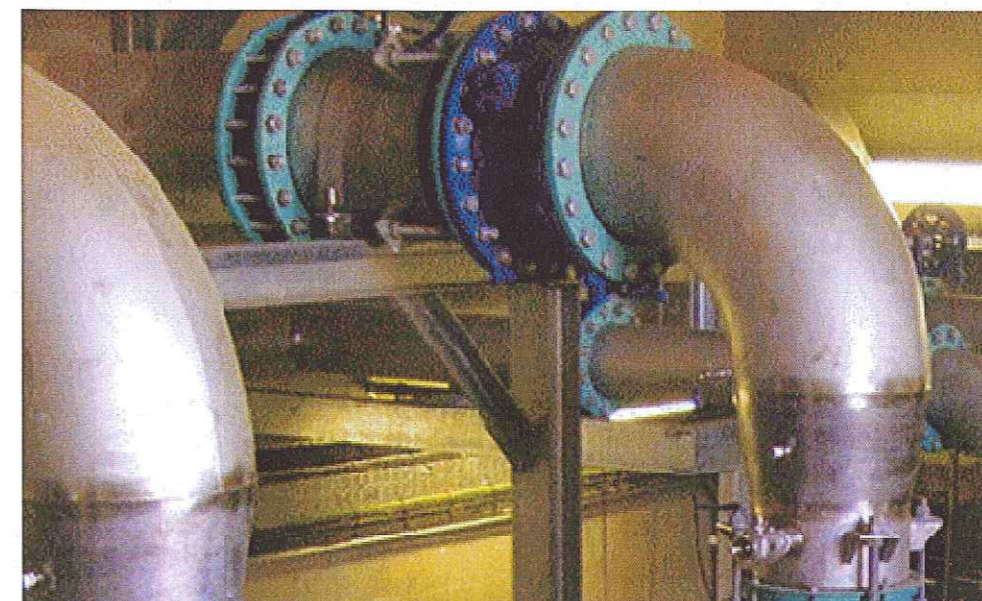
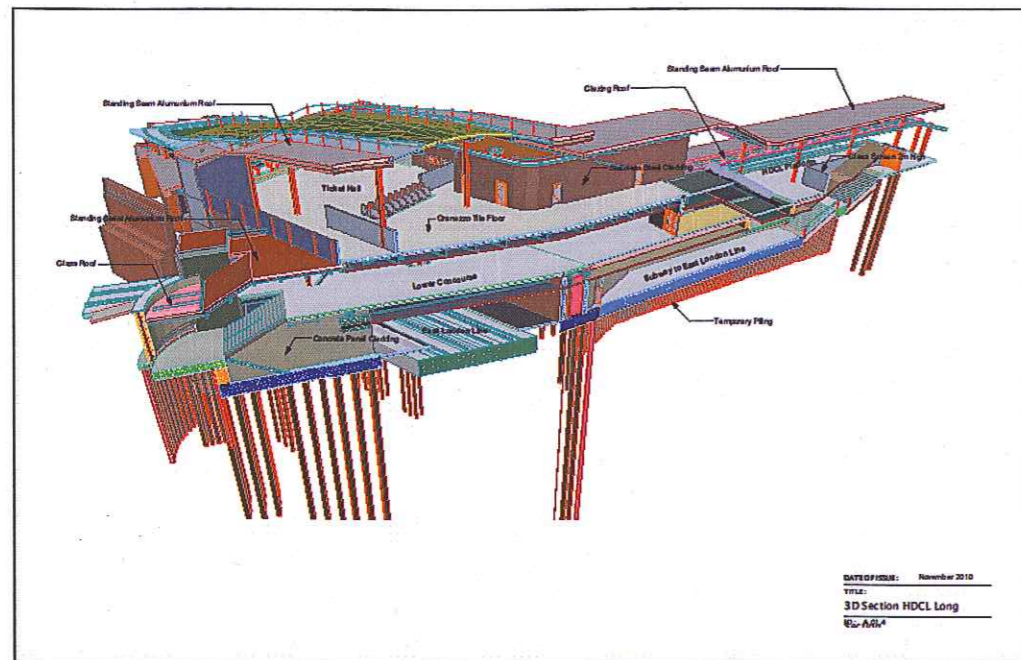
**The Construction Law Helpline on 0800 092 9272**

or alternatively at

[constructionlaw@haleys-ltd.com](mailto:constructionlaw@haleys-ltd.com)

# SERVICES PROVIDED BY HALEYS

3D Cost Modelling	Rail	Water	Building & Civils QS	M&E Design	M&E Commercial	Construction Law Services
Dynamic interactive 3D modelling	Bid support	Contract administration	Feasibility Studies	Design of M&E building services	Tender pricing	Contractual advice
High Quality 3D/2D image production	Commercial advise on conditions of contract	Commercial management	Tender Document Preparation	Performance specifications	Cost plan preparation	Risk management
Detailed BoQ's	Change control	Procurement	Contract administration	Planning of maintenance procedures	Procurement	Dispute management and resolution
Detailed parameterised estimates	Labour monitoring	Tender Analysis	Stock condition surveys	Contract management	Payment applications	Adjudication, Arbitration and Litigation support
Links to popular planning tools	Variation evaluation	Variation Costing	Measured surveys	Pre-acquisition surveys	Account administration	Expert witness appointments
Enhanced project control	Supply chain management	Management of sub-Contract Packages	Life cycle costings	Feasibility studies	Cost reporting	Claims preparation & claim defence
Effortless change Management	Budget and cost analysis	Claim Preparation	Bills of Quantities	Condition surveys	Variation valuation	
Virtual Fly Through Technology	Account agreement	Document Control	Measured Term Contracts	Alternative Energy Solutions	Supply Chain Management	
	Risk management	Planning & Programming	Final Accounts	Energy consumption	Final Accounts	
				Asset surveys		



Training topics include:  
 Commercial awareness  
 Contract administration  
 Standard forms of contract

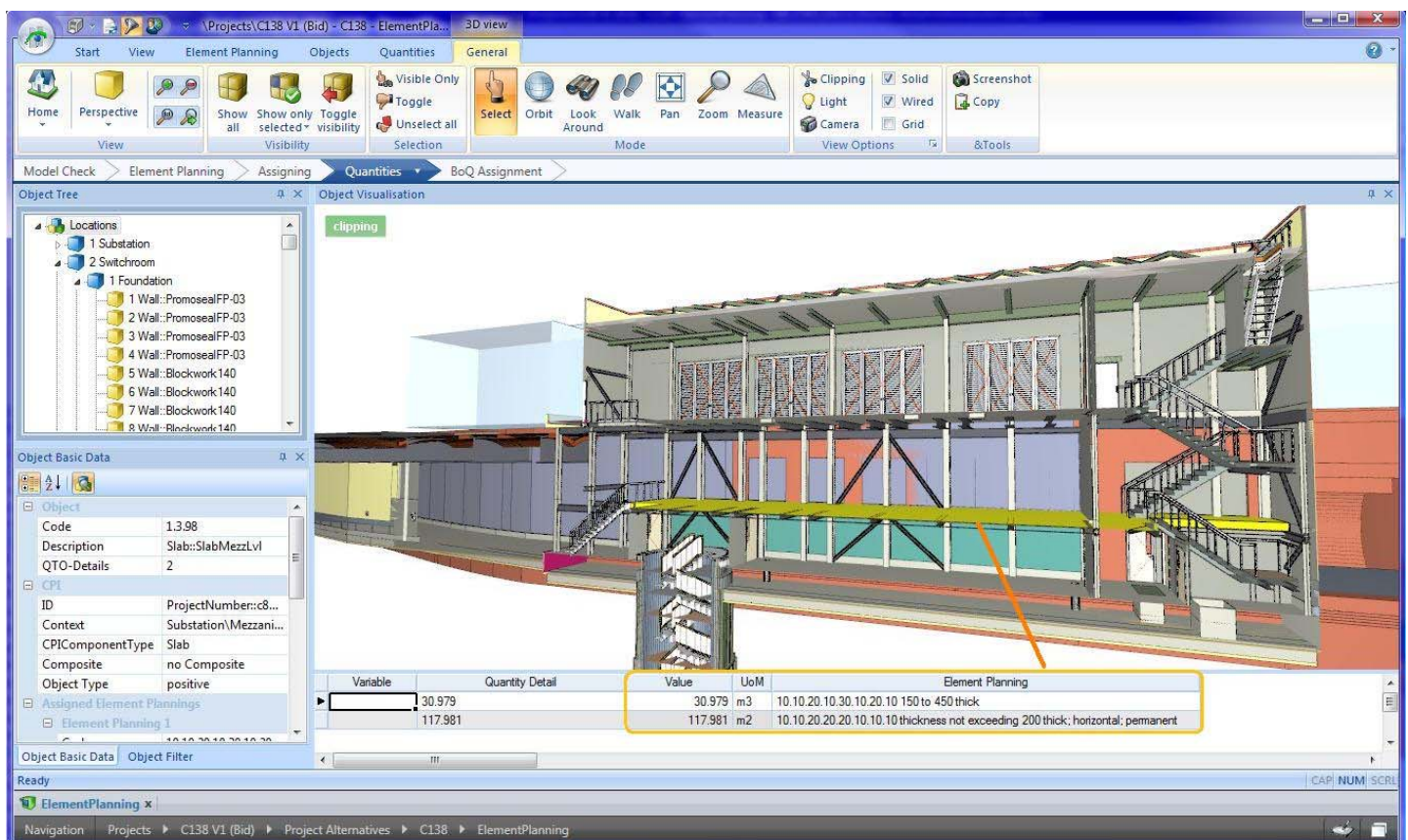
## 3D Cost Modelling – Update

Haleys have now completed the second stage of the investment programme for the next generation of 3D modelling and estimating systems.

Haleys have entered into a partnership agreement with the 3D cost modelling software provider RIB. This has resulted in Haleys acquiring software training and consultancy for the flagship product 'iTwo'.

Haleys new division comprising of quantity surveyors, 3D modellers and technology specialists have customised and developed a unique product that can achieve significant time savings for the preparation of cost plans and bills of quantities, as compared with traditional methods. As an added benefit the client also receives a live 3D model of the project.

Haleys are currently working on live projects using iTwo and 3D modelling software to produce a fully detailed bill of quantities for a Crossrail station. The 3D models that are also being supplied will form part of the Contractors overall tender presentation.



*Quantifying a live project in RIB iTwo*

Haleys have the technology and expertise to bring the benefit of the next generation of cost modelling to all our clients, which will lead to a potential increase in tender output and accuracy. The modelling system is also ideally suited to design and build projects at post contract stage for tender validation and procurement.

For further details please contact Ian Criddle on 020 8645 9708 or 07734 577378

# Haleys Hero

This year has seen a particular focus on the welfare and well being of our excellent armed forces personnel. Many people have carried out intrepid feats and have worked tirelessly to support the good causes that have been set up to support the forces and particularly those who were unfortunate enough to be injured



whilst serving their Country. It's for certain that few of us can have failed to be moved by the funeral parades through Wootton Bassett for those who gave their lives.

However, Haleys has its own hero in the form of Mike Kirk who felt so passionately about the cause that he gave up his own time and together with a former member of Haleys staff and serving T.A. Royal Marine Dave Scott (and a bad ankle), bravely set out in all kinds of weather to walk between Britain's West and East coast to raise much needed money for the wonderful support charity; Help for Heroes.

Mike tells the story.

## A Coast to Coast Walk - August 2010 - 190 miles in 10 Days

By Mike Kirk (Haleys, Nottingham)

This walk was devised by the late Alfred Wainwright in 1973 to link the Irish Sea and the North Sea via the hills, moors and valleys of northern England. The route crosses three National Parks: the Lake District, Yorkshire Dales and the North York Moors. It is scenic, but high-level with

tricky ascents to negotiate including some fairly demanding upland stretches and visiting only two towns of any real size en-route, Kirkby Stephen and Richmond.

The Coast to Coast Walk traditionally starts from St Bees on Cumbria's Western Coast, across the country to finish in Robin Hoods Bay on North Yorkshire's Eastern Coast. Some of you may have seen it featured on BBC recently when Julia Bradbury did it for Countryfile although she did have a 10 man production crew with her!

The route is 190 miles long and we planned to cover this distance over 10 days, although the normal duration is 12-14 days. Apparently some very fit person actually ran it in five!

We decided to camp en-route and we carried all the camping and survival equipment needed in back packs, which weighed in at approx 15kgs each (that's 15 bags of sugar if you fancy trying it).

Being keen walkers, we planned to undertake the walk initially just for the challenge, the adventure and the spectacular scenery that this walk has to offer. However, when Dave and I were talking about the plan it seemed obvious to try and raise some money for charity along the way.

The choice of charity was a straight forward selection for both of us; Help for Heroes, as we both know (David in particular) and are very good friends with the following serving soldiers (both from Nottingham):

Mark Nawarycz, a Lance Corporal in the Queens Royal Lancers, part of 4 Brigade based at Catterick Garrison and having completed a tour of Afghanistan earlier this year.

He also completed a tour of Iraq in 2006/2007 as part of the T.A. Royal Yeomanry, Sherwood Rangers Regiment.

John Wise of the Mercian Regiment, 2<sup>nd</sup> Battalion – served 2 tours of Afghanistan in 2007 & 2009.

Despite the back packs (and the weather) we completed the walk in the 10 days as planned and in process were pleased to have raised £1,292.18 for the Help for Heroes appeal. Should anyone wish to add their sponsorship to the total it's not too late to do so and you can do this by using the link below to the charity web-site:

<https://www.bmycharity.com/V2/kirkscottC2C>



If any one else feels like supporting the cause, the charity will be grateful for all contributions no matter how big or how small and it will help to get our brave guys and girls the support that they need.

### Note from the Editor

I can't begin to tell you how proud we all are of Mike and of course our former colleague and friend Dave and it is wonderful that they and others like them continue with a passion to support such a worthy cause.

Well done guys, my hat is well and truly off to you and of course to the fantastic people that you have helped to support.

# Return of the Big Freeze!

Earlier this year we ran an article on the effect of the un-seasonal and prolonged cold and snowy weather. The conditions have returned to hit the UK again with no immediate sign of letting up, we are running an updated article as a warning to all to make sure that you protect yourselves from the potential peril of delay.

### Introduction

Most forms of construction contract recognise that the weather can have a significant impact upon construction activities and hence identify it as a risk. However contracts are not consistent in how they apportion the risk of the effects of the weather or how the extremities of the weather are to be established.

Traditionally construction contracts have used phrases such as 'adverse' or 'inclement', usually prefixed by 'exceptionally', to describe types of weather which in the event of them impacting upon the works will give the contractor an entitlement to additional time and/or money.

The problem that often arises with such contracts is how a subjective term like 'exceptionally adverse weather conditions' (as used in the JCT 2005 suite) is to be interpreted.

### **Interpretation of Contract Terms**

A dictionary, such as the Cambridge Advanced Learners Dictionary, can provide us with definitions of the words commonly included in weather clauses:

*Adverse* - having a negative or harmful effect on something

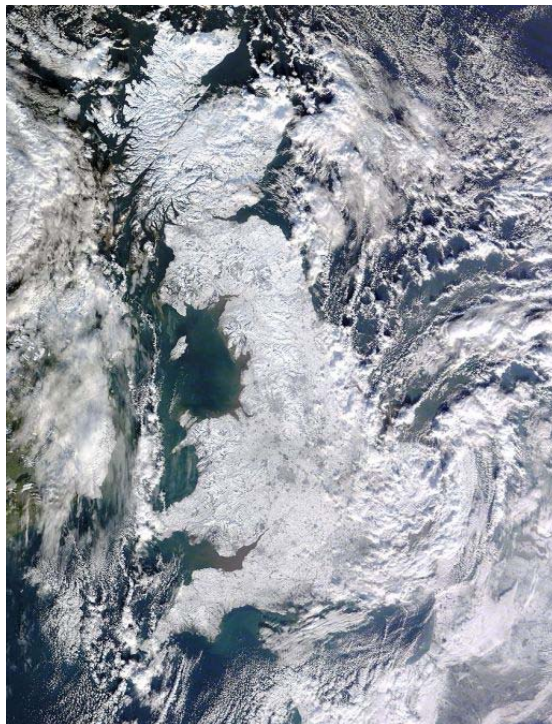
*Inclement* - unpleasant

*Exceptionally* - much greater than usual

It is therefore submitted that the term 'exceptionally adverse weather conditions' can be interpreted to mean those conditions which have a negative or harmful effect on the works, being such conditions that the contractor could not have foreseen on account of them being more extreme than usual.

Whilst such an interpretation helps it still leaves a question as to what extremities the contractor should anticipate. It is certainly not the first time that it has

snowed in the UK in winter nor is it unusual to have daytime temperatures below zero. What may warrant the current conditions to be considered as 'exceptionally adverse' is the number of days on which snow has fallen or the temperature has remained constantly below zero. A claimant would therefore need to demonstrate that the current weather conditions differed 'greatly' from those usually encountered. One way of doing this is to look at historic weather data for a preceding period of say 10 years. Such data can be used to establish, for example, the average number of days on which snow was



lying on the ground in a particular month. This can then be compared with data for the current period.

However such a method of analysis could still be challenged thus: If for example the weather data recorded that during the preceding 10 years snow had laid on the ground in the month of January for a total number of 30 days one may deduce that the average number of days to expect snow to be laying on the ground in January is 3 days (30÷10). However it may be the case that 6 of the 30 days occurred in a particular year thus supporting the alternative submission that the contractor should allow for another such similar occurrence.

It is this second method of analysis that is adopted by the NEC suite of contracts. The NEC Engineering and Construction Contract (ECC) identifies a weather measurement being recorded, the value of which is shown to occur less frequently than once in 10 years, as being a Compensation Event. In order to facilitate its 'objective and measurable' approach a contract based on the ECC conditions should include weather data within the Contract Data and further identify the weather measurements which are to be recorded. These recorded measurements are then compared against the historic data to identify measurements giving rise to a Compensation Event.

### Entitlement to additional time and/or money

Once it has been established that the weather conditions experienced have been out of the ordinary and further impacted upon the works any entitlement to time and/or money is to be established.

The JCT 2005 Standard Building Sub-Contract for example identifies, at clause 2.19.10, exceptionally adverse weather conditions as being a 'Relevant Sub-Contract Event'. The occurrence of such an event entitles the Sub-Contractor to an extension of time accordingly. However there are further conditions with which the Sub-Contractor must comply.

Firstly, pursuant to clause 2.17.1, the Sub-Contractor is obliged to give written notice to the Contractor if and whenever it becomes reasonably apparent that the completion of the works is likely to be delayed by the exceptionally adverse weather conditions.

Secondly, pursuant to clause 2.18.6.1, the Sub-Contractor is required to constantly use its best endeavours to prevent delay. This is once again subjective and open to interpretation. For example it could be argued that once the Sub-Contractor becomes aware that adverse weather is expected he should implement measures to prevent such weather causing delay.

Whilst under the JCT 2005 conditions 'exceptionally adverse weather conditions' entitle the Contractor/Sub-Contractor to an extension of time they do not provide entitlement to recover Loss and Expense. Hence costs such as additional site preliminaries associated with such an extension of time are not recoverable.

The ECC however in identifying the occurrence of a weather measurement as a Compensation Event entitles the Contractor to be compensated for not only any time that is lost but also any additional costs which may be incurred.





Whilst the ECC appears favourable on account of it allowing the recovery of both time and money it should be noted that the ECC like the JCT 2005 also requires the giving of an appropriate notice. Furthermore, pursuant to clause 61.3 of the ECC, if the Contractor fails to give such notice within eight weeks of becoming aware of the Compensation Event then it will lose entitlement to recover any additional time or money.


### Health & Safety

In deciding whether or not to close a construction site due to adverse weather, it is of paramount importance to ensure that the safety of construction personnel is protected. Whilst it may seem obvious that a site covered in several feet of snow should be closed, the problem that has been seen to occur in the recent cold weather conditions is the ability to travel to the site via the public transport and road systems due to ice and snow.

Where employers require their workers to drive as part of their duties they will need to consider a range of issues including but not limited to:





-  Driving in adverse conditions;
-  Weather effects especially if snowed

in or stranded in remote locations;

-  Increased travel times and thus ensuring break periods are safeguarded.

It is reasonable for employers to expect their staff to turn up for work by whatever reasonable means is available to them, however this must be at their own discretion and can be dependent upon the prevailing weather conditions in the location of their own home. This will also be affected by their personal circumstances including the available modes of transport and whether or not to travel at all would add risk to their own personal safety.

Whether or not it is possible for employees to travel in icy conditions, such as those that have just occurred, will be a matter for consideration between the employer and the employee and will be affected by the following:

-  The distance involved.
-  The weather conditions.
-  Time of day.
-  Age and health of the employee.

It must be remembered that Employers have a general duty under the *Health and Safety at Work Act 1974* to ensure, so far as is reasonably practicable, the health, safety and welfare of their employees at work.

The employer therefore may find difficulties in dealing with any delays arising from non-attendance where a site remains open and relatively unaffected by the weather, but workers travelling from a neighbouring county cannot get to site due to prevailing local weather conditions.

The JCT contract (and others) talk about the need to notify of any delay in the completion of the Works brought about by a relevant event and a relevant event will include exceptionally adverse weather conditions. However, whether or not the exceptionally adverse weather entitlement will extend to say a sub-contractor who's site team is stuck due to remote snowy conditions whereas local labour is unaffected is a matter for consideration and could depend upon the circumstances in which the contract or sub-contract was entered into.

### Conclusion

Contractors who have been affected by the current cold spell should carefully examine their conditions of contract to establish whether they are entitled to make a claim for additional time and/or money.

Contractors should further ensure that they provide any necessary notice within the prescribed period.

Having now seen significant snow and sub-zero temperatures impact upon construction projects in 2009 and 2010, those entering into contracts should consider whether a repeat in subsequent years will be considered to be 'exceptionally adverse'. It would appear that pursuant to the ECC 10 year rule such a repeat may not be a Compensation Event.

If the experts are right and the affects of global warming include harsher winters, then the potential to recover weather related delays during the winter months may prove increasingly difficult. For those undertaking ground and civil's works in particular, this could prove to be a financial consideration when tendering projects.

One further point that might be worth considering is the usual obligation of an Employer to provide access to the site. If the site cannot be accessed because the Employer has not cleared snow from an access road for which he is responsible it could possibly be deemed to be an act of prevention. Such acts of prevention usually allow the Contractor to recover time and money and hence may prove to be a preferable route to a claim resulting from 'exceptionally adverse weather conditions', however before engaging in any correspondence or notices it is always best to check the contract.

Haleys will be pleased to provide further advice in respect of any weather related delays and in the first instance you can contact us on **0800 092 9272** or alternatively at :

[constructionlaw@haleys-ltd.com](mailto:constructionlaw@haleys-ltd.com)

# HALEYS

If you would like further information on any of the articles contained within this Newsletter please contact us at either;

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