

APRIL 2013

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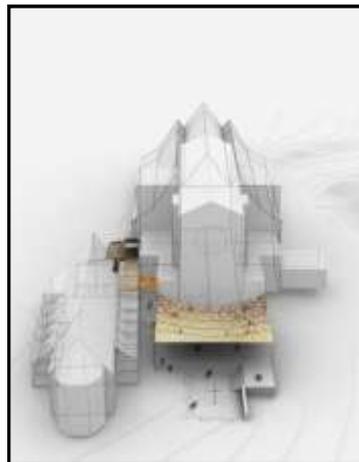
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THE FULL MEASURE

Auckland Cathedral of The Holy Trinity

Maltbys are proud to be donating our services for this prestigious project.

The project is being referred to as “*Selwyn’s vision: Let’s finish what history started*”, and the fundraising campaign is in full swing to raise the circa \$11m required to realise the vision. The project involves the construction of a new Chapel at the south end of the cathedral (The Bishop Selwyn Chapel), together with a new organ and the seismic strengthening and bridge removal within the existing cathedral. The new Chapel is being designed by Fearon Hay architects, who were the winners of a design competition for the new chapel. Subject to fund raising, construction work is due to be completed by the end of 2014, which is the Bicentenary of Anglicanism in New Zealand. Work on the organ will continue through 2015, followed shortly after with the consecration of the completed cathedral.



Wellington Office

Strathmore Community School
Mangaweka School
Christchurch Schools
Wellington Zoo The Hub
SPCA Project Rehome
Pahina O Tokelau Church
Wellington Housing Trust
Development
Wellington Zoo-Meet the
Locals
DOC- Christchurch

Auckland Office

Rotorua Police Station
New Lynn TC Gt Nth Rd
Sunnydene Special School
Sir Keith Park Special School
The Gardens School
MOE Kura Redevelopments
Holy Trinity Cathedral
Westhaven Cycle & Walkway
Pasadena Beach House
Kelston Deaf Education Centre
Cruise Terminal Shed
Aotea Centre Weathertightness
Marsden Cross Trust Board
Marlborough Primary New Admin
Tindalls Bay Beach House
Redhill Primary new Classrooms
Delonghi Showroom

Queenstown Office

Barley Station
Ardmore Street
H22 residences
Peacock House
McDowell Residence
Fong Gabler House
Green House

Christchurch Office

Ashburton Museum & Art
Gallery
Methodist Church
Idris Road

McCrae Way, New Lynn

McCrae Way—important shared space

Work on transforming the tired and under-utilized back street of McCrae Way into an important shared space street is now complete.

The area, located behind the New Lynn War Memorial Library, is a key part of New Lynn's ongoing urban regeneration and will provide new connections to Great North Road and Totara Ave. It will also provide new investment opportunities in central New Lynn, as well as a safe and attractive environment for residents, visitors and workers.

Delivered by Auckland Transport, the slow-speed, pedestrian-friendly zone will have similar design elements to the shared space opened in Totara Ave West last year and will serve new commercial, retail and residential developments.



Pedestrians rule in Great North Road and Delta Ave, New Lynn

In addition to McCrae Way, the upgrade of Great North Road and Delta Ave is almost complete.

The upgrade will create a more pedestrian-friendly town centre while maintaining a key arterial road that serves the wider West Auckland area.

On Great North Road, between the Clark Street extension and Memorial Drive, the plan allows for wider footpaths, new **seating and additional plantings to create a more pleasant "high street" environment for walking, shopping and socializing.** The old brick footpaths, which pose safety risks are well below the desired minimum width of two metres, will be replaced with modern concrete footpaths matching other redeveloped areas in the town centre.

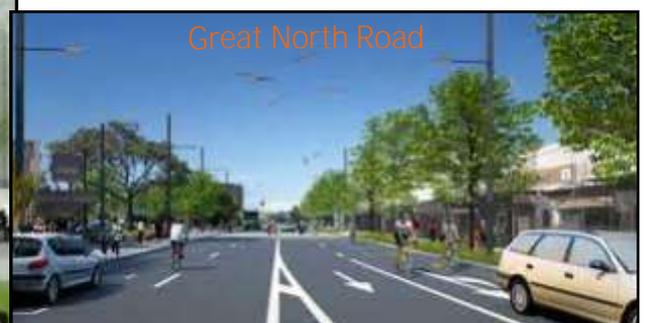
Delta Ave will be a tree-lined boulevard and a pedestrian-friendly environment for retail and leisure. The footpath on the retail side will be widened to encourage enhanced retail use such as café-style seating. The footpath on the Delta triangle side will be widened and landscaping work will feature new trees, seating, footpath surfaces, pavers and efficient LED lighting.

Delta Ave will be opened up for city-bound traffic from Great North road, improving accessibility to local businesses and large McNaughton Way car parking area.

The existing Delta Ave/ Hugh Brown Dr/ Memorial Dr intersection will be replaced with a raised mini-roundabout and zebra crossings to improve accessibility and pedestrian safety.

It is not possible to make the improvements and preserve all the current parking arrangements so Auckland Transport will replace the existing inset parking on Great North Road with off-peak parking available outside the peak travel times of 7-9am and 4-6pm, Monday to Friday. Delta Ave will retain both parallel and right-angled parking.

Changing the parking layout allows for wider footpaths, additional planting and seating and therefore safer, more functional and more attractive public spaces for people to enjoy. It also gives businesses the opportunity to make better use of the frontages.



MALTBYS

RICS Extract March 2013 Edition

Rise to the Challenge

The skills of specialist quantity surveyors have a crucial role to play in the governments integrated project delivery ambitions, says David Bucknall.

I have always admired contract dispute quantity surveyors. Their combination of a forensic knowledge of the construction process, an understanding of complex forms of contract and their dedication to sorting out complex disputes is a source of wonder to me.

During my career, I have observed the growth in the role and influence of the specialist quantity surveyor and it is good to see that they now sit alongside lawyers with their focus on quantity and professionalism in this important market niche. I have been impressed by the number of these quantity surveyors who have adapted their skills to be relevant for dispute avoidance and alternative dispute resolution.

This edition of the Construction Journal gives a great insight into the increasingly influential role played by these expert **quantity surveyors**. I am sure that it's theme of **conflict avoidance and dispute resolution**-with articles ranging from **adjudication cases and 'hot-tubbing'** to **international arbitrations and communication skills**-will provide useful reading. The word **'avoidance'** is obviously the crucial one here.

Increasing integration

But what is the future position of these dispute specialists at a time when the coalition government is demanding **integrated project delivery (IPD) as a key part of achieving its "More or Less" agenda, which aims at 20% real cost reduction in the provision of government-built assets? And what is RICS doing to help its members be part of the solution to this enormous challenge?**

Well, greater adoption of IPD is crucial to the strategy of Quantity Surveying and Construction Professional Group Board. The well-received New Rules of Measurement Volumes 1 and 2 and various Black Book guidance notes are important aspects of the IPD agenda.

Furthermore, we are urging chartered quantity surveyors to incorporate collaborative tools such as project bank accounts, pain/gain share mechanisms and integral project insurance into their core service offerings.

We are also taking the lead, in conjunction with university partner, on building information modelling (BIM). We plan to equip quantity surveyors with the skills to enable them to quickly fulfil the current market gap by becoming the natural first choice to be the BIM Facilitator / Manager on projects, large and small. It is against this backdrop that the specialist dispute quantity surveyor has a vital role in the development and wider implementation of IPD.

Back in the 1980's, the construction industry created the following statistic: Construction contributed to 10% of GDP but 80% of disputes handled by the Official Referee.

In the later part of the last century and the early part of this, specialist quantity surveyors have played a leading role in drafting the new suites of integrated/collaborative forms of contract that have taken the industry away from the above shocking situation. As a result, our clients and industry consultants now have an exceptional range of non-adversarial forms of contract to work with.

I believe that the construction sector will change 'custom and practice' more in the next five to ten years than in the past forty. IPD is both a fine aspiration and a very tough option-but it is critical to achieving our clients demands. The specialist quantity surveyor's unique combination of skill and knowledge is vital to ensuring IPD achieves the intended results.

Quantity Surveyors have a vital part to play in achieving the sector's biggest challenge-that of lower whole life outturn costs and sustainable improved margins right across the sector. Are we up for it?

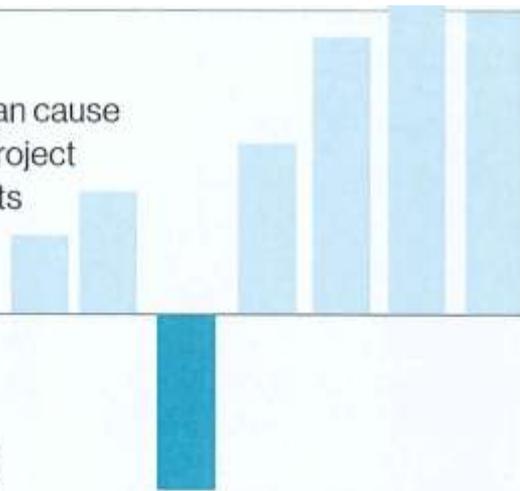
This article is from the RICS Construction Journal March 2013.

David Bucknall is Chairman of the Quantity Surveying and Construction Professional Group Board.

RICS Extract

Below is an extract from RICS magazine April 2013 written by James Golden, Director of Quigg Golden

Abnormally low tenders are a complex area that can cause problems in relationships, affect the delivery of a project and be expensive to police. **James Golden** reports



Paying the price



Abnormally low tenders (ALTs) are generally abhorred by those bodies representing procurers and tenderers alike. They have been the subject of much debate and a number of recent cases. However, there is no consensus on the nature of the problem and how it should be dealt with within the present law.

The topic is very relevant given the economic recession since 2008. The cost of construction has fallen and the industry has suffered from insolvency and under-investment. ALTs submitted by economic operators (EOs) to contracting authorities (CAs) are blamed by many as contributing to these woes.

Another important aspect is the commitment to use the most economically advantageous tender (MEAT) for procurement. In the UK, this is usually linked to the government's commitment to partnering with the industry, a movement pioneered by Latham in *Constructing the Team* and Egan in *Rethinking Construction and Accelerating Change*. ALTs are frequently cited as the cause of failed partnering and a factor in the creation of tensions, poor-quality products and disputes.

There are two parts to the issue: identification of a tender as an ALT and a subsequent rejection. There is some inconclusive case law on the first issue and virtually nothing on the second (and

crucial) issue of actual rejection by the CA. There is limited information on what might amount to a sensible (and so legally valid) reason to reject an ALT.

ALT definition

What is meant by an abnormally low tender? The etymology of the phrase suggests that the tender must be abnormally low 'in comparison to something'. The datum could be some pre-tender estimate carried out (presumably) by the procurer, or it could be in relation to other bids. Suggested systems are legion, including formulae and fixed figures.

The European Court has tended to be relaxed about the actual system for identification. The proposed revisions to the Procurement Directive also suggest a formula for identification of ALTs!

How do ALTs arise?

There are many reasons for tenderers submitting ALTs, which fall into five categories:

Simple error – this is the easiest category and is often fixed by pointing out the error and the tenderer withdrawing. This can be driven by poor tender documentation or inadequate tendering time being made available

Deliberate underpricing (or 'tendermanship') – perhaps to stay in business, to break into markets, or to 'push back' during contract, or even because of reliance on the black market. This can be caused by poor contract and tender documentation

Differing views of risk – a type of tendermanship, but who knows their business better, the tenderer or the person assessing the tender?

Problems with tender documents – something the CA is responsible for, not the bidder

Genuinely more efficient or 'better' service – it is entirely possible that a tender is low for good reasons. Really efficient service can produce dramatic savings. However, there are still potential risks. Two classic scenarios illustrate this:

- **'the Henry Ford'** – a tenderer who has invested in their manufacturing procedure so that they can deliver the product required dramatically more efficiently than their competitors. But you can only get what they make.
- **'the blue slates in the yard'** – a contractor may have a particular redundancy of material (or possibly plant and labour). It may have a 'stack of blue slates in the yard' that perfectly suits the procurer's roof, and it is willing to (in effect) give them away. But problems will arise where there is a change to the roof removing that advantage.

The first two reasons are something to be discouraged. The final three are really procurer problems, although the extent to which the bidder may exploit the situation is often frustrating.



ALTs are frequently cited as the cause of failed partnering and a factor in the creation of tensions, poor-quality products and disputes

RICS Extract

Why are ALTs a problem?

For the procurer, on the face of it, a cheaper tender is a good thing. A clear understanding of why ALTs are a problem is difficult to discern but they tend to be:

Project specific, including:

- likelihood of breach by the EO due to below-specification workmanship, poor site management and failure to comply with all the requirements of the contract (such as paying the regulated minimum wage)
- risk of non-performance due to insolvency (or refusal to work)
- the threat of claims and disputes due to tendermanship

Market risk – This includes lack of investment, failure to develop a sought-after partnering culture, sustainability issues, the elimination of competition and the spread of corruption. However, competition remains a cornerstone of procurement and so a low price is undeniably a goal.

Many project risks can be controlled by rigorous contract management. This may mean additional costs for project management. This is the 'cost of policing' and has practical implications for the project management team. Project fears are much more specific and conceptually easier than market risk fears.

The law on ALTs

The regulatory framework comes from the following broad sources:

- Treaty principles, enshrined or implied in national regulations
- the relevant Directive and implementing national regulations
- specific judicial decisions concerning ALTs, more usually concerned with the process of investigation than actual rejection.

In the Public Contracts Regulations 2006 (UK) SI 2006/5 (as amended) the main rules for excluding EOs from a procurement are in Regulations 23, 24 and 25 in the UK (53-56 in the Republic of Ireland) for poor conduct, financial capacity or technical capacity.

Then there is the separate concept of exclusion of a tender for being

abnormally low. Regulations 30(6) and 30(7) (Regulation 69 in Ireland) merely set out the obligations on the CA before it may reject an ALT. Unlike the other exclusion provisions, Regulation 30(6) does not set out the test for exclusion. It merely, tantalisingly, provides a series of pre-conditions to rejection including a written request for explanations, obligation to take account of the evidence provided and subsequent verification that the offer is low.

These pre-conditions were explored in *Impresa Lombardini SpA v ANAS* [2001] ECR I-9233, [2004] 1 CMLR 2 (ECJ), which explains that separate parts can be investigated and how they must be dealt with, and implies that a procurer can set its own criteria. It is clear that the information must be considered properly and capable of influencing the outcome. So a tender cannot be excluded simply for being abnormally low.

The Regulation 30(7) factors are:

- the economics of the method of construction, etc
- the technical solutions and exceptionally favourable conditions available
- the originality of the work proposed
- compliance with the employment protection and working conditions law
- the possibility of state aid.

This list is not necessarily exhaustive, but the safer view would be that it is. All of the information goes to the subject matter of the contract, except possibly the fourth point and definitely the fifth. There is nothing in the list that touches on the purpose or motivation behind adopting a particular pricing level, whether it is the laudable protection of a workforce or skills, or the reprehensible destruction of competition.

The inclusion of state aid as a reason for rejection indicates that considerations wider than merely the subject matter of the contract were relevant to the drafters of the Directive. This opens up the possibility that a tender at below cost could fall into this category. If that were an acceptable reason for rejection, it is likely to be popular since it will be relatively easy to identify.

Regulation 30(7) does not include anything on financial capacity. Prequalification and award are two distinct stages and we must not confuse



For the procurer, on the face of it, a cheaper tender is a good thing so why would it even be considered a problem?

the two. But prequalification is ongoing and financial checks listed under Regulation 23 are not exclusive.

Therefore, we may be able to revisit financial checks on receipt of an ALT.

In England, Flaux J's judgment in *J Varney and Sons v Hertfordshire County Council* [2010] EWHC 1404 (QB), discusses rejection for being "not sustainable over the life of the contract" (the Court of Appeal upheld the judgment). This amounts to (at least tangential) judicial authority that an appropriate test is whether a tender is sustainable over the life of the contract. This has recently been confirmed as the appropriate test in the recent Scottish case *Amey AG Ltd v The Scottish Ministers* [2012] CSOH 181 handed down on 27 November 2012.

A few conclusions from this are:

- being in receipt of 'illegal' state aid (i.e. not approved and regulated by the European Commission) is a distinct category – if it is proved, then the tender may be rejected
- the process for identification, investigation and rejection must be transparent and equal
- failure to respond to the investigation satisfactorily may be sufficient reason to reject the bid
- it is unclear whether the considerations for rejection must be linked to the subject matter of the contract, but it is probably safer if they are
- the explanations from the EO must be considered – this probably prohibits formula-based exclusion criteria (but not identification)
- the most attractive reasons for rejecting are project risks and the tests with some judicial support are:

- the bid is not genuine – from the European jurisprudence
- that considered in *Varney*, which can be summarised as 'the offer is not sustainable over the life of the contract'.

What to do with ALTs?

From a procurer's point of view, the best starting point is to decide the rationale for rejection, should the need arise. The system must include:

- Identifying ALTs
- considering them, including as a minimum the statutory obligation to correspond
- deciding to reject or accept them.

The possible reasons for rejection are:

- withdrawal by the tenderer – a tried, tested and uncontentious route
- identification of improper state aid
- the ALT represents an unacceptable market risk
- the project risk is too high – there is too great a risk of non-delivery.

The first two items are relatively straightforward. The state aid rejection reason is clearly contemplated by the Regulations. If improper state aid is identified, the procurer has an automatic right to reject. Rejection on market risk grounds is also clearly problematic, for the reasons already suggested (it is too legally uncertain and difficult to crystallise in practice).

What remains is rejection based on project risks. The two tests are identified above but how are these to be applied? First, the tenderer will have had the potential problem with their bid being identified as an ALT. They could withdraw it but they may confirm to the CA that the bid is 'genuine' and that they are prepared (or, more to the point, determined) to stand over performance and price.

The investigation of the ALT may mean the procurer carries out more diligent checks. These could lead to rejection for failing to comply with tender requirements rather than for failing more contentious ALT tests. The complexity of an investigation and the resources needed are likely to be high both for procurer and tenderer. The rejection test to be applied must be sufficiently clear to be operated practically.

A procurer should always keep an option to restart the process as a reserve position. The simplicity of the system masks issues discussed next.

Transparent and proportionate

Tenderers must be treated fairly and transparently. So rules for exclusion should be in the tender documentation (this ensures fairness for the purposes of EU law). The rules should include a clear test and mechanism for deciding whether a tender is abnormally low and when it will be rejected.

It is an understatement to say that some considerable thought must be put into this because it will become binding on the CA. The equal treatment principle obliges procurers to operate the system even if they do not want to. This has real implications for the drafting of the Contract Notice, Memorandum of Information, Pre-Qualification Questionnaire and Information to Tenderers.

The issue of evidence is also difficult and will potentially create considerable work for bidders and procurers. It is also difficult to be prescriptive about all the evidence that may be gathered and considered. Regulation 30(7) provides a list of considerations for ALT rejection, but if the cause is to be a failure to provide sufficient evidence of financial capacity, then the wide range of evidence under Regulation 24 may be needed.

'Go, but be careful'

A decision to proceed with an ALT encourages the procurer to be alert to potential problems. So how can the procurer react?

The CA can increase the resources to police the contract. In addition, they could include terms in the contract to oblige the ALT submitter to provide increased financial protection, such as additional bonds. This would have to be carefully considered. It must not amount to a negotiation or change to the bid. So it seems only possible when such details are spelled out in the procurement system. ●

“

There is nothing in the list that touches on the motivation behind a pricing level, whether it is the laudable protection of a workforce or the reprehensible destruction of competition

Further information

Article 69 of the Proposal for a Directive of the European Parliament and of the Council on Public Procurement, COM/2011/0895 final (20 December 2011)

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Further +info

Bid and Tender Management Skills, various dates/locations,
www.rics.org/training

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T062



New Faces

Brian Gibbons

Hi, I'm Brian Gibbons. I've recently relocated to Christchurch, commencing my role with Maltbys as the Christchurch Regional Manager after enjoying an 18 month "active" sabbatical to assist family and friends.

Having previously contemplated a move here to assist with the earthquake recovery, it was a timely decision to take up the challenge of building Maltbys Christchurch office and assist in the rebuild works taking place in the Canterbury region where mother nature has wrought havoc.

Professionally, I am a qualified Quantity Surveyor and a member of NZIQS. I have also been actively involved as a Professional and Construction Project Manager over many years, both here and abroad. Having lived and worked overseas, it is really very gratifying to now be in New Zealand in a place of need, more so with the bonus of contributing to the growth and prosperity of a great New Zealand Company with a proud tradition.

I look forward to the opportunity of working with the Maltbys team at all levels and the future success of the Christchurch Office. Thank you to those I have already had assistance from, and the opportunity of working with to date. It has been a pleasure to also experience the great culture and generosity of spirit that abounds within.



Luke Sutton

My name is Luke Sutton and I have been working at Maltbys in Auckland for a few months on a part time basis as I finish off my last few papers toward a Bachelor of Construction at Massey University.

As a Waikato boy I enjoy watching rugby, especially the Chiefs, and many other sports. Other interests of mine include going out and attending music gigs. I am thoroughly enjoying my time at Maltbys so far and I am looking forward to the new experiences that come in the future.



MALLTBYS

SOCIAL EVENTS

Wellington Fundraising Special Dinner

David Morriss, Wellington Director won a fundraising event for The Ronald McDonald House to which they were treated to a wonderful Cordon Blue Dinner cooked and served in your own home. Please see a copy of the menu and a grand night was had by all.

DINNER MENU

AMUSE BOUCHE

Boudin de volaille aux pistaches et truffe feuilles de mauve sauce au laurier

Chicken and pistachio sausage with purple truffle leaves and laurel sauce

ENTRÉE

Daurade rôtie a l'**unilatérale**, légère infusion à la sauge

Croustilles **d'orange** et tétragone

Roasted sea bream with a light sage infusion

Orange crisps with New Zealand spinach

PLAT PRINCIPAL

Carré **d'Agneau** légèrement fumé au thym, jus léger

Legumes **d'automne**

Roasted rack of lamb smoked with thyme, jus, and autumn vegetables

DESSERT

Forêt noire réinterprétée

Reinterpretation of Black Forrest Gateaux

FROMAGES

Plateau de fromages et salade de notre cueillette

Confiture de tomates vertes

Cheese platter with foraged leaf salad and green tomato jam



MALTBYS

Auckland
Arthur Gabriel Memorial Fishing Competition

At the beginning of each calendar year, the Auckland office compete for “The Arthur Gabriel Memorial Trophy”, a competition to catch the largest snapper on the day. The winner this year was Arthur Brown who pipped off Luke by the smallest of cm. Well done Arthur.

Once again the weather gods blessed us with wonderful sunny conditions. The fishing started off slowly but with modern technology of the GPS were able to find more fish.

We would like to thank our skipper who took us to some great fishing spots so that we all managed to go home with at least three fish each.

