

## **Quantity Surveyors – Negligence in Interim Valuations**

It is often the case in insolvency situations, such as with the demise of Carillion, that in addition to the huge negative impact on the employees, supply chain and clients, an issue that may come to light on some projects is that the contractor may have been over paid. Over the coming weeks there will be an analysis on all projects as to the value of works properly executed, the amount paid to Carillion by the employer and the amount of work remaining to be completed. If there is a difference, i.e. there is more work still to complete than there should be, by reference to the quantities of work paid for compared to the work remaining to be completed, then the employer may have an action against the firm of quantity surveyors responsible for valuing the works at interim valuations.

The process of valuing the works completed by a contractor for the purpose of providing an interim payment to contractors has existed in the forms of contract used by the construction industry for many decades. Given the financial size of many construction projects, providing the contractor with cashflow to avoid having to fund the project itself is generally the accepted practice and the form of contract should set out the process and procedure for valuing the works to a given date, stage, or after a set period of time, plus the certification and payment for those works on an interim basis.

The Housing Grants Construction & Regeneration Act 1996 as amended by the Local Democracy and Economic Development Act 2009 has provided a statutory minimum requirement that all contracts have to comply with in terms of the provision of periodic payments, payment notices and the issue of payless notices if monies are to be withheld from any certificate. Whilst receiving interim payments is good for contractors, it is also important that the employer does not pay more than the value of the work properly executed, plus any materials on site that have not been brought onto the site prematurely.

The role of valuing the work properly executed usually falls to the chartered quantity surveyor who is engaged by the employer or the architect/contract administrator, employer's agent or project manager to undertake that function. The chartered quantity surveyor, has a duty of care to the employer and a duty to value the works fairly between the employer and the contractor. That valuation will then be used by the certifier, be that the architect, contract administrator, employer's agent or project manager, depending on the contract, as the basis for the interim payment certificate.

The contractor will usually submit his own interim application for payment to the employer's quantity surveyor and he will use that as a reference for his own valuation. The employer's quantity surveyor will need to visit site, record the progress made, take appropriate measurements and will usually meet the contractor's quantity surveyor to discuss the detail and any disagreement with the application submitted by the contractor. The employer's quantity surveyor will conclude his valuation with the issue of a certificate to the named person responsible under the contract for issuing the interim payment certificate/payment notice.

As this is not a final account, it is not expected to be completely accurate and a balance has to be struck between protecting the employer's interests and ensuring that the contractor is not starved of cashflow. Since the advent of the Housing, Grants, Construction and Regeneration Act 1996 as amended, the employer's quantity surveyor does not want to run the risk of the employer being faced with an adjudication for under valuation. Furthermore, the employer does not want to be in the position of having over paid a contractor, in case of insolvency.

In the normal course of a construction project any over or under valuation can be adjusted in the following payment cycle but where an insolvency occurs, such an adjustment cannot take place and leaves the employer with a shortfall.

Given the approximate nature of the interim valuation and payment process, what should be the acceptable range of error, that the quantity surveyor is permitted to value within to protect himself from an action for negligent over valuation?

Anecdotally I have heard the magic 10% margin for error but that figure is not supported by any code of practice or custom. In order to remove the subjectivity, the Royal Institution of Chartered Surveyors (“RICS”) has produced a professional guidance note with the title “Interim valuations and payment 1<sup>st</sup> edition, August 2015” which became effective on 12 November 2015. This guidance is not mandatory on RICS members unlike international standards or a RICS professional statement however; it **“provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners”** with a status of being **“recommended best practice. Usual principles apply in cases of negligence if best practice is not followed”**

Under the section of the guidance note “Practical Application [Level 2 – Doing]” six stages are identified in preparing an interim valuation:

1. Planning
2. Pre-valuation
3. Valuation
4. Valuation Documents
5. Issue Valuation
6. Post-valuation

The guidance note emphasises that the interim valuations should be as accurate as possible and in effect are “mini final accounts”, and the level of inaccuracy should not exceed +/- 5% where the contract sum is not more than £2.5m and +/- 2.5% where the contract sum is more than £2.5m.

Many interim valuations that fall outside of this permitted range will become undetected as any error will be adjusted in the following period’s valuation and subsequent interim payment, but where a contractor becomes insolvent and its employment is terminated, there is no further interim valuation or payment.

So accurate valuation of the contractor’s work is ever more important to provide the contractor with proper payment for work completed but also that the employer has not over paid the contractor as any over payment will be unlikely to be recovered.

The employer’s quantity surveyor and his professional indemnity insurers, if he fails to be sufficiently diligent in his valuation, will be exposed to a potential legal action for the recovery of any over payment to the now insolvent contractor which falls outside of the RICS professional guidance.

I have been engaged as an expert witness in such a case where the employer’s quantity surveyor has over valued the works, payment was made to the contractor on the basis of that valuation, and the contractor had subsequently become insolvent, leaving the employer having overpaid. The outcome of the tribunal, was that the quantity surveyor had erred and had to recompense the employer for some of the shortfall.

By

Trevor Drury  
Managing Director  
Morecraft Drury