



# FOCUS

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Flock 2019

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# PAQS 2019 in Malaysia



## IQSSL Delegates Attend PAQS Congress 2019 in Malaysia

The 23<sup>rd</sup> PAQS Congress 2019 was hosted by the Royal Institution of Surveyors Malaysia (RISM) with the theme of “Human Wisdom Amidst Emerging Technology”. The congress was held from 23<sup>rd</sup> to 27<sup>th</sup> of August 2019 in Kuching, Sarawak, Malaysia, with the presence of Quantity Surveying and Cost Engineering delegates from all over the world. This time too there was a strong delegation representing the Institute of Quantity Surveyors Sri Lanka with the attendance of 12 members led by the President Ch. QS Lalith Rathnayaka.

The aim of the congress was to address each important topic to integrate contemporary and future technologies, as well as concepts to elevate the profession and industry to greater heights. Many distinguished speakers in academic level and the industry level from various countries, have presented their studies on various topics such as BIM, Automation, Artificial Intelligence, Exemplary Virtues, Revolutionary Innovations, Sustainability etc. The representatives of IQSSL were able to exchange valuable knowledge and ideas with the worldwide Quantity Surveying and Cost Engineering professionals and academics who help to take the profession and the industry to a greater level.

The inaugural international QS academic forum (IQSAF) and a BIM work shop were held further to the main conference and the committee meetings of PAQS congress 2019. At the end of the congress it was announced that the next PAQS congress will be hosted in Singapore on 4<sup>th</sup> – 8<sup>th</sup> September 2020.



## Young QS Forum 2019, Kuching, Malaysia

Simultaneously to the PAQS Congress, the PAQS Young Quantity Surveyors’ (YQS) Programme was held on 23<sup>rd</sup> and 24<sup>th</sup> of August 2019 at the Ultimate Professional Centre in Kuching, Malaysia with the participation of young representatives from 9 PAQS members. Representing Sri Lanka, Ch. QS Hasitha Gunasekera chaired the YQS programme as the President of the current year. During this two-day programme, each member country articulated the latest developments in the respective countries with regards to construction, Quantity Surveying and the general economy. Ch. QS Majith Kodithuwakku and Ch. QS Dulesha Wijesiri attended the programme on behalf of IQSSL.

# Recent CPD Seminars

**IQSSL Continues to Disseminate  
Knowledge through Regular CPD  
Seminars**



Professional Affairs Board of the IQSSL organised several Continuous Professional Development Programmes during the last Quarter. On 18<sup>th</sup> July 2019 a valuable seminar on “Emerging Regulatory Environment for Local Construction Industry - implications on Quantity Surveying Fraternity” was organized with the participation of Ch. QS Upul Shantha and Ch. QS Indunil Senevirathne as resource personnel. On 15<sup>th</sup> August 2019 Ch. QS Tilak Kolonne, Ch. QS Prasad Jasinghe and Ch. QS Wathsala Nissanka contributed to a CPD seminar on “Conflicts/ Disagreements/ Disputes arising out of Variations” held at the CIDA Auditorium.



In addition, based on popular request a CPD seminar on “Commercial and contractual concerns of bonds and guarantees” was conducted by renowned practitioner Mr. Thejaka Perera (Attorney at Law) on 18<sup>th</sup> September 2019.

**Next CPD: Await the next IQSSL CPD that is planned to be held on the 24<sup>th</sup> of October 2019.**



# Corporate Members' Gathering and Fellowship 2019

The IQSSL organised Corporate Members' Gathering and Fellowship was held on 3<sup>rd</sup> October 2019 at the OPA Auditorium, Colombo 07. The President of the IQSSL, Ch. QS Lalith Rathnayake and the Chairpersons of Boards made it an opportunity to inform the membership of the activities IQSSL has carried out in the recent past, the future actions plan and how the corporate members can get actively involved in helping IQSSL to enhance the QS Profession in Sri Lanka.

Many corporate members shared their views on various current issues faced by the Quantity Surveyors and the QS Profession in the construction industry.



# Technical Members' Gathering 2019

The first ever IQSSL Technical Members' Gathering was successfully held on 17<sup>th</sup> August 2019 at the Broadwalk, Waters Edge, Battaramulla. The event was well attended by over 100 Technical Members passed out from the IQSSL College of Quantity Surveying. Many of the attendees made use of the opportunity to share their views with the Governing Council of IQSSL about several issues currently in the Construction Industry and the QS profession in Sri Lanka.

The President of the IQSSL articulated his vision about the development of the Technical Members, the career paths which have been opened and how they can achieve the highest recognition of Corporate Membership of IQSSL. All attendees, who had an enjoyable evening catching up with some old friends, highly commended the initiative by IQSSL to organise such an event.



# Competitiveness of the Construction Market: An Industry Analysis using Porter's Five Forces



**Kavindya Indrarathne**



**Thamasha Jayanetti**



**Tharusha Ranadewa**

In the recent past, there has been an upward trend of construction activities in Sri Lanka, which has paved the way for increased competition among contractors. Consequently, foreign contractors working in Sri Lanka have no difficulty in finding craftsmen, labour force and finances they require to execute their contracts (Amarasekara, 2018), placing them in a comparatively more advantageous position than other local counterparts. Local contractors have to struggle to maintain their market position given the unpredictability, uncertainty and competitiveness of the business environment of the construction industry. A key determinant of the profitability of a firm engaged in construction is its competitive position within the construction industry. Hence, the intensity of this competition has to be properly measured and predicted into a par of formulating the competition strategies and competition policies in the industry. Yet, identification of strategies required a proper analysis of the industry. Thus, researchers (Mukherjee, 2018;

Gnjidic, 2018) emphasized on Porter's five forces matrix as most often used and significant tool for analysing the external competitive environment. 'Porter's five forces' were introduced by Michael E. Porter in 1979 to formulate competitive strategies to different sectors, and thus initiating a revolution in the business strategy field (Porter, 2008). Thus, these five competitive forces outline a rigorous approach that can be used to ascertain the position of the company in the industry. In view of that, following Figure 1 presents Porter's five competitive forces matrix developed for the Sri Lankan construction industry.

The state of competition in the industry will depend on five forces: Accordingly, Figure 1 depicts, power of suppliers, power of buyers, threat of substitutes and threat of new entrants were predisposed to the rivalry among the existing competitors. Thus, subsequent sections will discuss these five forces with respect to Sri Lankan contractors.

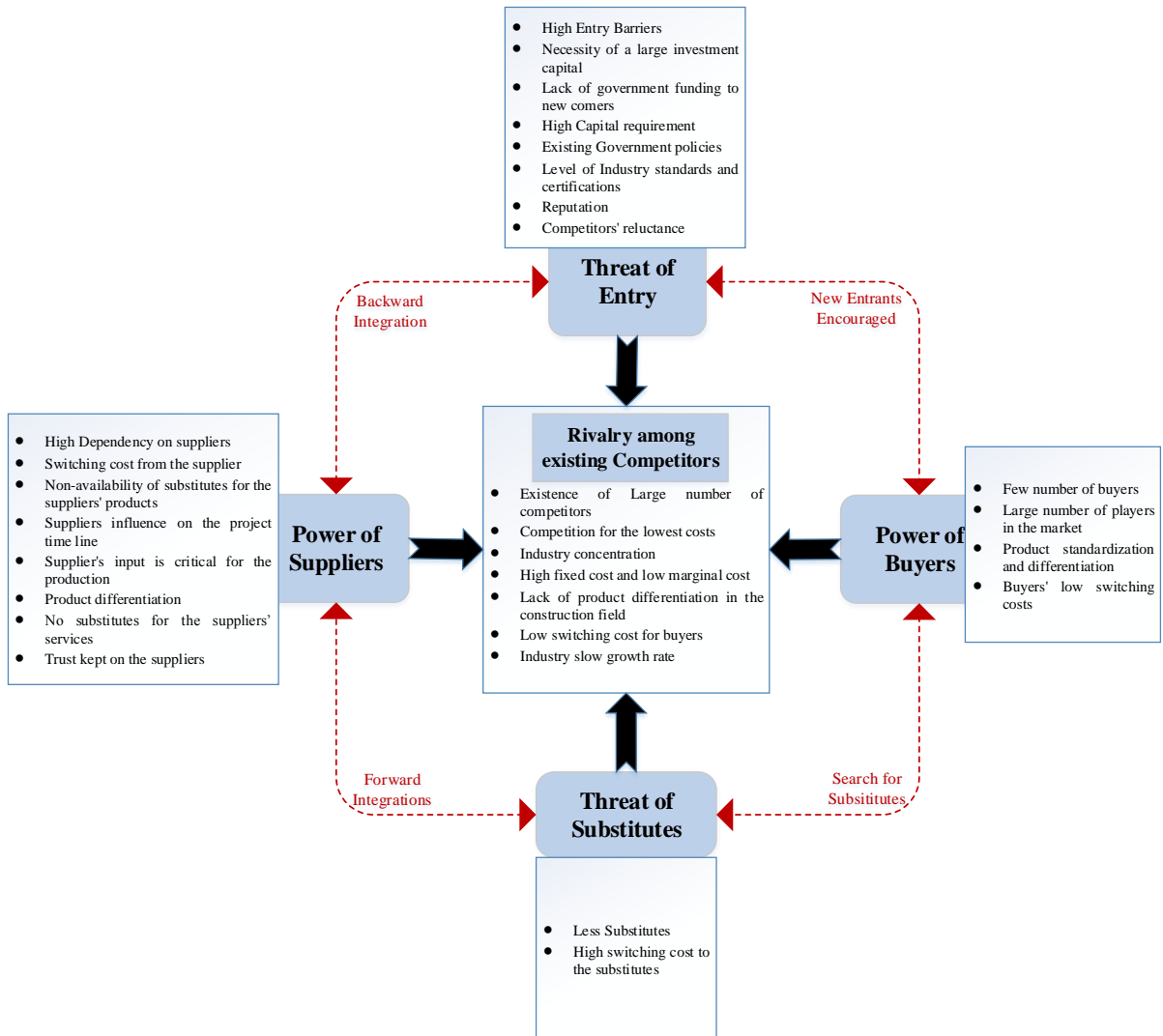


Figure 1: Five Forces Matrix developed for the Sri Lankan construction industry

### 1.1 Threat of Entry

Threat of new entry is primarily reflected in barriers to enter the industry and the reaction of existing players in the industry. Considering the current parameters of the Sri Lankan construction industry, there are several barriers that discourage the new entrants or potential contractors from entering the market. Hence, necessity of a large financial capital has become a key barrier that has directly halted the emergence of new players. Predominantly, with no proper government funding or financing options available, entrepreneurs who

wish to succeed as contractors have been discouraged due to the essential capital investments needed to start a contracting organisation. The existing government policies and requirements make it even more difficult for the newcomers, as they would be required to showcase a portfolio of professionalism as well as industry standards in order to get themselves established as competent contractor. Similarly, the Construction Industry Development Authority (CIDA) registration is a requirement to obtain government contract and major private contracts in Sri Lanka which necessitate a considerable time and effort of

the contracting organisation. Moreover, the reputation of the organisation is also a key requirement to succeed in the construction market, which is linked to the number of projects handled by the contractor successfully in a given time period.

### **1.2 Threat of Substitutes**

It is noteworthy to state that the impact from substitutes to construction industry is far lesser than other factors. Even though, there are few modern ways and means of construction, they have not been able to create a significant impact on the construction industry. Nevertheless, resistance of the contractors in Sri Lanka to change and their use of conventional construction methods lower the threat of substitutes in the industry.

### **1.3 Power of Suppliers**

Backward supply chain integration in construction industry has to be perfect to ensure smooth and streamlined operations. As construction depends on the availability of raw materials and other resources, it is inevitable that the contractors depend heavily on various suppliers. Since switching of suppliers will be a costly exercise, it is vital to maintain good relationships with the suppliers. These suppliers can directly affect the timeline of a construction project which ultimately determine the successful completion of a project. Since most of the supplied resources are not easily replaceable, the suppliers hold a certain bargaining power as well. Therefore, the suppliers have become key stakeholders where their power and influence will have a major impact on the industry.

### **1.4 Power of Buyers**

A moderate impact from buyers is visible in the construction field in the eyes of contractors in Sri Lanka. As there is an abundance of contractors in the country, the buyers have a free choice with a very little switching cost. Thus, this has created a situation where buyers get to bargain for the best price. With the uncertainties in the economy, number of buyers in the construction field is lesser and hence resulted in buyers playing a monopolistic role in the tendering stages. On the contrary, the standardisation of the industry practices and prices mitigates the power of the buyers. Hence, buyers rarely get a vast differentiation in the product as well as in the costs.

### **1.5 Rivalry among existing Competitors**

The construction industry in Sri Lanka is well compacted with a large number of competitors, each trying to enhance their market share through fierce competition. The Sri Lankan Construction market has several tiers, catering to different market segments. However, even with this divided market segments, the competition is still severe throughout the entire landscape. As most of the contracts are awarded to the bidder who has offered the most cost-effective bid, each and every bidder tries to quote the lowest possible bids creating a significant price war and causing increased competition among the rivals. Furthermore, all the contractors necessitate on developing their technological and human capacities which again has resulted a competitive environment where organisations that do not adapt and update



would be deprived of the state of the art methodologies. At the same time, the low switching cost for the clients accelerates the competition.

Consequently, the clients can effortlessly pick a different contractor and thus create all contractors trying to safeguard their client at any cost creating more competition among rivals.

A noteworthy recent development considering the competitiveness is the foreign contractors' involvement in the local market. The preference of the government has also been for foreign constructing firms and already many contracts have been awarded to them. In this backdrop, local contractors are compelled to contest with foreign contractors when bidding for tenders, often losing to win the contracts. Even though foreign collaboration enhances the local construction capacity through the transfer of knowledge and technology, there is unfair competition created by the foreign contractors, which is a challenge for the local contractors. This eventually increases the rivalry among the contractor organizations in the construction market. Moreover, Moreover, less differentiation in the final product has also nurtured a culture where it makes it harder to compete among rivals within narrow paths as they all have to come up with a fairly similar product.

## 2.0 Conclusion

Sri Lankan construction industry is highly affected by the market competition. Therefore, the strength of each competitive force should be identified in order to develop strategies that will increase its competitiveness in the Sri Lankan construction industry. Thus, the developed matrix can be used to develop a protection mechanism to safeguard the domestic construction companies from the said inevitable collapses. Moreover, using the matrix, the contractor will be able to analyse the impact of each competitive force to determine the necessary defensive / offensive strategies to be taken to survive in the market. Further, the analysis will be extended to take long term decisions for the stable existence of the business.

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# What Damages Are Entitled to the Contractor Due to Termination for Employer's Convenience?



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Termination of a Contract is always a serious step to take because it will almost certainly have substantial consequences, both practical and legal for the Parties. Accordingly, it is common for most commercial Contracts to grant one or both Parties with certain rights to terminate the Contract in certain circumstances. Nevertheless, a significant distinctiveness must be amongst a Party's right to terminate the Contract as set out in the Contract and the right to terminate at Law.

Accordingly, the general remedy that is available to one Party where the other Party to compensate the first Party for the losses suffered as a result of the breach and the common Law jurisdictions will also grant a Party the right to terminate a Contract in limited circumstances due to the other Party being in breach of the Contract. The precise circumstances in which a Party is entitled to treat itself as being discharged of its future obligations due to breach of the Contract by the other Party, and the consequences that follow such termination, are heavily dependent on the governing Law. Generally, under common Law instantly where the other Party obliges a fundamental breach or establishes an intention not to be bound by the Contract. Dependent on the governing Law, this may be a breach of a critical term of the Contract or

where the effect of the breach of a term 'goes to the root of the Contract'.

Contractual termination provisions will also often specify both the practical and financial consequences that follow the exercise of a right to terminate under the Contract. Nevertheless, it should be noted that the right to terminate under a Contract does not necessarily exclude the right to terminate under Law, although, where an express right to terminate has been negotiated.

## Termination for Employer's convenience

The Sub-Clause 15.5 provides the Employer the right to terminate the Contract 'for his convenience'. The purpose of termination for convenience provisions such as these is to permit an Employer to terminate the Contract at any time and for any reason, whether financial, political or otherwise, where the Contractor is not in default. In essence, termination for convenience provisions are primarily intended to be used where the project is abandoned. These provisions are nevertheless also sometimes used where an Employer considers that the Contractor is performing badly but does not wish to take the risk of terminating for a cause and having the Contractor dispute the validity of that termination.

## Procedure

Under Sub-Clause 15.5, the Employer works out his right to terminate at convenience by giving notice of such termination to the Contractor. Nevertheless, this notice should be complied with the Sub-Clause 1.3 [Communications] and thus must also be identified as such and thus must be in writing and delivered in accordance with the requirements and copied to the Engineer. The termination shall effect 28 days after the Contractor receives the notice or after the Employer has returned the Performance Security, whichever is later. After the termination has taken effect, the Contractor is required to proceed in accordance with the Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment], which requires him to cease all further work, hand over Contractor's Documents, Plant and Materials and remove all Goods from the Site. The Sub-Clause 15.5 expressly stipulates that, on issuing a Notice to terminate the Contract, the Employer shall immediately cease to have any right of use of any of the Contractor's Documents, and shall forthwith return all and any such Contractor's Documents to the Contractor.

## Contractor's entitlement to Payment

In the event of Termination by the Employer's convenience, the Contractor is entitled to the same payments as if the Contract had been terminated under Sub-Clause 19.6 as a result of Force Majeure. Nevertheless, in essence, the Contractor is entitled to recover the value of work done and any other Cost or liability that he has reasonably incurred in expectation of completing the Works, together with the cost of clearing the Site and repatriation of Staff. Nevertheless, there is no provision to compensate the Contractor for the loss of Profit that he would otherwise have made had the Works been completed, and but not expressly excluded.

Nevertheless, in MDB, the Contractor is entitled to payment in accordance with the Sub-Clause 16.4 [Payment on Termination] and therefore, termination for convenience is effectively treated as if the Contractor had terminated the Contract for cause under Sub-Clause 16.2 [Termination by Contractor]. It is also important to be noted that the Contractor is entitled for 'any loss or damage sustained by the Contractor as a result of this termination'. Further, the Sub-Clause 17.6 states expressly that the exclusion of liability for loss of use at any Works, loss of Profit or any other indirect or consequential loss does not apply to Sub-Clause 16.4.

# Does the Failure to Serve Notice Pursuant to Sub-Clause 20.1 Nullify the Contractor's Entitlement Under FIDIC Types of Contracts?



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The Sub-Clause 20.1 is an important provision which sets out the detailed procedure that must be followed in respect of the Contractor's Claims to which it applies. The scope of application of Sub-Clause 20.1 is important primarily for two main reasons;

1. Due to the possibly severe consequences to the Contractor if fails to comply with the notice provisions of this Sub-Clause.
2. Its application will conclude whether the Contractor must comply with the procedure set out in this Sub-Clause, including the submission of a fully detailed claim by the Contractor and response from the Engineer for the purpose of establishing the Contractor's entitlement to payment or an extension of time.

From the wordings of this Sub-Clause stating that *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract"* which becomes apparent that this Sub-Clause is intended to apply if the Contractor considers himself entitled to an Extension of Time for Completion and/or any additional payment.

## Express reference to Sub-Clause 20.1

The most obvious situations where Sub-Clause 20.1 applies are in those Sub-Clauses which expressly state that the Contractor is entitled to an Extension of Time and/or payment of Cost (and in some cases profit) "subject to Sub-Clause 20.1". The majority of these Sub-Clauses adopt the same standard wording. For instance, the Sub-Clause 2.1 [Right of Access to the Site], which governs the Employer's obligation to give the Contractor right of access to, and possession of the Site within a specified time: stipulates.

If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
- b) Payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine these matters. [Emphasis Added].

Nevertheless, it also should be noted that in respect of the Sub-Clause 4.12 of the MDB contains a variance which states that;

*"If and to the extent that the Contractor encounters physical conditions which are unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to **notice under Sub-Clause 20.1** [Contractor's Claims]"* [Emphasis Added]

Hence, it clearly proves that the Contractor's entitlement reserved subject to the notice served pursuant to Sub-Clause 20.1 and not subject to the Sub-Clause 20.1.

### **Outline of procedure for claims under Sub-Clause 20.1**

The procedure set out in Sub-Clause 20.1 commences following the occurrence of an event or circumstance which entitles the Contractor to "any extension of Time for Completion and/or any additional payment" under any Sub-Clause in the Conditions "or otherwise in connection with the Contract". Therefore, the Sub-Clause 20.1 stipulates the procedural rules as follows.

- The Contractor is required to furnish the notice to the Engineer, describing the event or circumstance giving rise to the Claim, "as soon as practicable" and in any event "not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance".
- The Contractor is required to keep "such contemporary records as may be necessary to substantiate any Claim". The Engineer is entitled to monitor the record-keeping, inspect the records and may instruct the Contractor to keep further contemporary records.

- Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the Claim, it is required to send to the Engineer 'a fully detailed Claim', which is to include supporting particulars.
- Within 42 days after receiving the fully detailed Claim from the Contractor, the Engineer is required to respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within the above defined time period.

If the event or circumstance has a continuing effect, then;

- c) his fully detailed claim shall be considered as interim;
- d) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
- e) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

### **Notice**

Provisions requiring the Contractor to give and timely notice of a claim to the Engineer or Employer are common in construction contracts and serve a valuable purpose. In the English case of *Multiplex Constructions (UK) Ltd V Honeywell Control Systems Ltd*, such notice enables matters to be investigated while they are still existing. Furthermore, such notice sometimes gives the Employer the opportunity to withdraw instructions when the financial consequences become apparent. Investigations include proper records are kept. Potential claims being notified at an early stage necessarily means that they may be resolved earlier.

Nevertheless, it is advisable no set out in the notice that it is given under Sub-Clause 20.1 to avoid any uncertainty. On the other hand, it also should be noted that the notice under Sub-Clause 20.1 is not intended to serve an early warning of a potential future problem.

### Dual Notice Provision in FIDIC

The FIDIC conditions of contract stipulate that the Contractor should serve a notice additionally is required to "submit any other notices which are required by the Contract, and supporting particulars for the Claim all as relevant to such event or circumstance". Nevertheless, it should be noted that the second paragraph of the Sub-Clause 20.1 stipulates a special qualification;

*"If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply."* [Emphasis Added]

But, this paragraph has not expressly stated that if the Contractor has not served any other notices provided in the Contract, the Contractor has no entitlement and the Employer is discharged from his liabilities. Therefore, these 'any other notices' are required since there should be mitigation measures undertaken by the Contractor. Nevertheless, these notices should be signified as a 'procedural rule' rather than a 'Condition precedent'. Accordingly, if the Contractor has not complied with any other notices as set down in the Contract, still the Contractor's entitlements prevail.

Accordingly, the notice under Sub-Clause 20.1 is a Condition precedent. Nevertheless, there has

been much debate recently in common Law circles as to the enforceability or effect of conditions precedent on a Contractor's entitlement to an extension of time (but, it should be stressed, not additional payment) in light of the 'prevention principle'. In effect, the issue revolves around the argument that, if the contractual procedures for making a claim for an extension of time constitute a condition precedent to a claim, failure to satisfy them would make it impossible for an extension of time to be granted, thus jeopardizing the liquidated damages provision.

In the case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*, [2014] EWHC 1028 (TCC), among the other issues it was considered the approach to take to Sub-Clause 20.1, the which says that a Contractor, if he wishes to make a claim must give notice in writing to the Engineer:

*"as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware of the event or circumstance."*

The Contract was based on FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, designed by the contractor, 1st edition, 1999 (better known as the "Yellow Book"). OHL was entitled to no more than seven days' extension of time (rock and weather). However, this was subject to compliance with sub-clause 20.1 and was accepted by OHL that Sub-Clause 20.1 imposed a condition precedent on the contractor to give notice of any claim.

Nevertheless, it also should be noted that under FIDIC 1999, still no judgement has been delivered which amounts to the provisions set down under the Sub-Clause 20.1.

## ෂ 2019

'ෂ' (Flock), the annual gathering of College of Quantity Surveying will be held on 10<sup>th</sup> November 2019. ෂ is organised by the professional level III students of the 2017/2019 batch with the view of providing opportunities for students, lecturers, and professionals of the field of Quantity Surveying a space to detach from the routine rhythm of life. This would also be a platform for everyone to show their talents and creativity, while providing a space to connect with each other on a joyous, entertainment-filled, and lively day.



Dear Technical Members We Invite you All

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Members can submit their research articles directly to the Chairman of BQSP, Mr. Duleesha Wijesiri, by emailing to [duleesha.wijesiri@gmail.com](mailto:duleesha.wijesiri@gmail.com).

