



Department of Civil Engineering
The University of Hong Kong



Centre for Infrastructure and
Construction Industry Development

SEMINAR

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Department of Civil Engineering and CICID, HKU

Supported by the **LARC Study Group – of CIB W113 and HKU CICID**

ENLIGHTENMENT OR PUNISHMENT – WHICH APPROACH IS PRODUCING THE BETTER RESULTS IN IMPROVING BEHAVIOUR IN THE UK CONSTRUCTION INDUSTRY?

by
Jim Mason
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Date: Wednesday 03 November 2010

Time: 4.00 – 5.00 pm

Venue: Room **404, T.T. Tsui Building**, The University of Hong Kong, Pokfulam Road, Hong Kong

ABSTRACT

The major development in terms of government sponsored initiatives since 2009 in the United Kingdom has come in the shape of Never Waste a Good Crisis (Wolstenhorne 2009). The report is subtitled “a report into progress since Rethinking Construction and thoughts for our future.” This document has pedigree as the inheritor of the movement for improvement in the industry in the last seventeen years since the Latham report (Latham, 1994). This report will be dispassionately reviewed by the speaker as the culmination of the “enlightenment” approach.

Punishment in the form of fines totalling £129 million levied on 103 main contractor companies has been dished out in the last two years. This has taken the form of an investigation into price fixing and bid rigging within the construction industry by the Office of Fair Trading - a non ministerial government department created by the Fair Trade Act 1973. Such behaviour has been condemned as anti-competitive and was outlawed in the United Kingdom by the Competition Act 1998. The seminar will investigate the background to the investigation, the reaction and improvements it has brought about.

Both approaches to improvement will then be analysed in order to provide a commentary on their current impact and the future directions the industry may embark upon as a result.

ABOUT THE SPEAKER

Jim Mason is a Senior Lecturer in Law with the Department of Construction and Property, Faculty of the Built Environment, University of the West of England. He is programme leader for Quantity Surveying and has recently established an industry supported Masters programme in Law for Construction Professionals.

Jim is a solicitor specialising in the discipline of construction law; and his research is in the area of collaborative contracts, partnering, good faith and the ethical improvement of the construction industry. He has published widely in refereed journals and conferences. He is a member of the editorial board of the International Journal of Law in the Built Environment. Jim is heavily involved in the CIB Working Commission W113 in Law and Dispute Resolution in which he is joint co-ordinator of the LARC study group and a member of the COPA study group.

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Promoting Improvement (1) Enlightenment – the Latham/Egan approach

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Latham and Egan in 2009

- “Partnering and close collaboration between the client and the whole construction team will mean that the project will come in to quality, time and cost.”
- “At the present time, a number of clients are being led by their construction costs consultants to abandon frameworks and go back to lowest price tendering. That is a mistake.”
- “What has been achieved? More than I expected but less than I hoped”
- “Since 1998 we could have had a revolution and what we've achieved so far is a bit of improvement
- “I would give the industry 4 out of 10”
- The opportunity remains just as large today, with the added incentives of harder economic times and major environmental pressures
– every crisis is an opportunity”

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The roadmap and the directions



- Top Ten Industry Reports Since Egan
- *Achieving Excellence*, Office of Government Commerce, 1999
- *Modernising Construction*, National Audit Office (NAO), 2001
- *Accelerating Change*, Strategic Forum for Construction, 2002
- *Improving Public Services Through Better Construction*, NAO, 2005
- *Be Valuable*, Constructing Excellence, 2005
- *Callcut Review of Housebuilding Delivery*, John Callcut, 2007
- *Construction Commitments*, Strategic Forum for Construction, 2008
- *The Strategy for Sustainable Construction*, Government/Strategic Forum, 2008
- *Construction Matters, Business and Enterprise Select Committee*, 2008
- *Equal Partners, Business Vantage and Construction*
- Clients' Group, 2008

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Wolstenhome's Survey

- 1000 professionals
- 90% reported a positive impact from *Rethinking Construction*
- limited by partial uptake.
- a few shining examples of progress against a backdrop of entrenched behaviour
- In summary there has been too little change, too narrowly adopted and at too slow a rate.
- Success has been greater emphasis on integration, collaboration or partnering
- "...there is no evidence that the progress made in a small percentage of the industry's activity will ever spread to the rest."
- Lip service
- Cherry picking
- http://www.constructingexcellence.org.uk/pdf/Wolstenholme_Report_Oct_2009.pdf

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Report findings

- The era of client-led change is over.
- The supply side needs to demonstrate additional economic social and environmental value through innovation, collaboration and integrated working
- Sponsor smarter and more productive solutions and reduce the amount of money wasted on the procurement process
- If our present leaders do not feel up to the task, they should at least support the development of the next generation, who appear to understand very clearly what is needed.
- Frustration and exasperation at limited progress being made
- Recognition that things are getting tougher in the climate which will lead to further backsliding

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Summary of Enlightenment Approach

- Frustration and exasperation at limited progress being made
- Recognition that things are getting tougher in the climate which will lead to further backsliding
- Call for old guard to move over and let new talent through

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Promoting improvement (2) – crime and punishment

Based on Office Of Fair Trading and
Office of Government Commerce
releases

Anti-competitive behaviour

- Damage to procurers from anti-competitive behaviour includes higher prices, poorer quality, fewer partners and a lack of innovation
- In 2006 output of construction industry was worth £114 billion
- Office of Fair Trading is the government office tasked with implementing competition law

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Legislation

- Competition Act 1998 came into force in 2000
- Prohibits agreements which prevent, restrict or distort competition in the UK
- Applies to agreements which fix prices, limit or control markets or share markets
- Clash with existing English law
- Enterprise Act 2002 introduced the cartel offence
- This operates alongside the Competition Act 1998. The 2002 Act introduces a criminal offence for:
 - Price fixing
 - Limitation of supply/production
 - Market sharing
 - Bid rigging

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The Office of Fair Trading Investigation

- 2009 103 construction firms fined £129.2 million for engaging in bid rigging activities
- Largely in the form of cover pricing on 199 tenders from 2000 to 2006
- 4 year investigation one of OFT's largest under the Competition Act
- Appeals currently being heard – largely challenging amounts of the fines
- OFT powers of entry and search and forensic examination of computers
- First past the post leniency programme –immunity from fines in return for genuinely helpful material in an investigation
- 2010 report investigates the impact
- Now bid rigging practices seen as seldom occurring – 44% of survey indicate it is less common than in 2008

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Forms of Bid Rigging

- agreement amongst bidders that distorts or eliminates competition:
- Bid suppression (agreeing not to bid so another can win)
- Cover bidding (submitting a high bid after discussion with competitor to give impression of genuinely competitive bidding)
- Bid rotation (taking turns to be the successful bidder in order to share the market)
- Subcontracting (competitors agree not to bid on condition that some of the successful bidder's contract will be subcontracted to them)

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Market Conditions facilitating Cartels

- Collusion made more likely when:
- Restricted number of contractors
- Low product substitution
- Standardised products
- Repetitive purchases
- Social connections between competitors
- Meeting when submitting bids
- Highly competitive conditions

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Tips to avoid collusion for clients

- Let contracts simultaneously
- Use non-collusion clauses
- Avoid obligatory bids as a condition of staying on approved lists, but seek objective justification for any failure to bid
- Benchmark against other procurers
- Scrutinise for suspicious patterns – geographical prevalence and rotation

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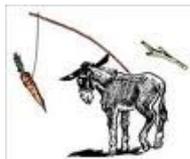
Office of Government Commerce Advice –an emerging picture?

- Attempt to make procurers more “savvy” whilst embracing commercial aspects of partnering
- “Credible suppliers” competition is incentivised
- “communities of practice” networks of procurers and suppliers actively seeking to work more effectively together
- Bidder’s conferences
- Gathering market intelligence

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Closing Thoughts

- Industry has “got the message” about bid rigging and is changing its ways
- Industry sees the sense of collaborative approach but resists change/finds opportunities limited
- New leaner/sleeker/arms length forms of partnering emerging
- As expected, the “stick” gets better results than the carrot



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