Understanding the role of the Employer’s Agent

Steve Newcombe of the QSi explains the role of the Employer’s Agent

The role of Employer’s Agent, commonly referred to as the EA (now also known as Client’s or Employer’s Representative (C/ER)), is still one which is not clearly defined within the industry.

Many definitions which do appear tend to be based on limited experience of the role or possibly carrying out the role from the perspective of one industry discipline.

Where did the role start?
Looking at how the role has started and evolved helps understand the problems in arriving at a clear definition.

Initially the role of EA applied to a single form of contract which endeavoured to transfer not only construction risk but design risk to the Contractor. The success of this rapidly spread to other forms of contract and the role grew. However, these all tended to be written to manage smaller and medium sized projects. The generic name of “Design and Build” was applied to this form of construction, emphasising the role of the Contractor in performing both roles. At its peak 43% of construction projects were constructed in the UK using this process.

During the evolution of the role, bespoke alterations were made by many of the large developers to allow the process to be applied to large and major projects, and as a result the requirement of the EA role became more clear and definable. Currently the recent 2005 forms of JCT contract have now provided a “design and build” variant for each form. This will lead to extensive wide spread use of the process including much larger projects.

What is the role?
Many definitions which do appear tend to be based on limited experience of the role or possibly carrying out the role from the perspective of one industry discipline for a limited Client base. Whilst none of these are wrong, they all tend to cause confusion over what in fact the role requires and subsequently what liabilities are incurred.

The kernel element of the role is to act on behalf of the Client, and therefore the first risk is in complying with the law of agency. These requirements exist alongside any agreement or scope of services entered into with the Client. Unlike most of the other roles within the construction industry this means that in carrying out the role the business is being exposed to a risk under tort, meaning that there is no way to limit the levels of liability. The second more manageable risk is to comply with the contracted terms and conditions of employments produced to define the requirements needed in delivering the EA’s obligations under the contract.

Many in the industry are unsure whether the role is for a Quantity Surveyor or a Project Manager? The answer to this question is either, if they possess the correct skills for the project, each project is different. However by looking at the extent of the role and its potential application, it becomes clearer what those required skills are.

Quantity Surveyors have, for many years, been carrying out this role for organisations which are clear on what they want and provide their own Project and Quality Managers; as a result the remaining role is for a Quantity Surveyor with added Contract Administration role. This is the origin for definitions based on the role being a QS plus.

However this aspect of the role cannot be viewed in isolation, it is important now to review the other extent, large scale projects require teams to act together under the title of the EA. This is then a Project Manager’s role. And thus the dichotomy starts.

By looking at the skills required to deliver the role provides the true scope and definition of the role.
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Client
Firstly the Client has appointed the EA to manage the delivery of a project; many appointment documents will describe actions. These actions can only be successfully delivered if they are managed; even a request for information is a form of management. Therefore management is implied as it is indispensably necessary to produce a successful outcome to the action.

Secondly the Client has appointed the EA as a construction professional; the Client will expect that advice from the EA will be provided from the basis of knowledge and competence. An area which is highly subjective; however, it is implied through the appointment process and CDM regulations that someone suitably experienced will be acting as the EA. Because commentary on variations, design development, quality, programme and cost are required it is difficult to argue that one individual holds sufficient knowledge to meet these requirements. Therefore this should refer to the EA as an organisation providing a key individual who manages the knowledge of that organisation.

Contractor
Firstly the Contractor is appointed to manage the construction of the project, the EA is appointed to monitor and report on the Contractor. It is not for the EA to hinder or impede the works, clauses which refer to information management within contracted timeframes, imply that the EA must manage the Contractor and the Client. This is indispensably necessary in order to deliver the required outcomes. It required proactive actions as opposed to reactive responses.

Secondly the Contractor is also entitled to expect that the EA is suitably experienced in order that they can assist the Client in the decision making process required to answer in the contracted timeframes. The outcome of this implication is the same as the Client’s secondary point.

The Skills
QED the skills therefore necessary to carry out the role consist of management, cost control, risk management, construction experience, along with understanding of engineering and architectural needs. Hence on larger projects the use of teams, as to find an individual with this level of experience and understanding is rare.

It does however clearly demonstrate that in actuality the role primarily requires project management skills supported by others, either in the person appointed or by a team.

Legal Implications
In forensic audits of several projects it is clear that on the whole the most common failing is within the Cost Consulting profession. Implied terms are generally not complied with and therefore services have failed to deliver projects to the Client’s brief. Project managers usually understand their weaknesses and use teams to resolve these issues.

Because, unlike other appointments, this role is exposed to unlimited liability under tort (law of agency), then strict control measures need to be in place to reduce Client, professional and project risk. It is only required that one performs the role to one’s best ability, but it is necessary to place that in the correct context. The Client makes appointments based on levels of information and his right to expect the provider to use competent staff. It is therefore what a competent experienced professional within that field would be expected to know and do.

In order to mitigate the risk of failing to comply to both the contracted terms and the conditions under tort, it is important to consider these simple guidelines:-

1. Identify the contractual requirements
2. Identify the implied requirements
3. Provide experienced staff or a team
4. Produce a Project Control Document
5. Carry out a peer review of the outcomes of 1-4
In Conclusion
Currently there is considerably greater risk in EA commissions than that of project management or cost consultant, these risks mostly stem from a lack of understanding. All risk can be managed or catered for through training and management. As an industry it is important that suitable qualifications are developed to assist in providing professional protection within this field.

Further support to the industry is being developed by professional bodies and insurers. For example the QSi is currently involved with the internationally recognised University of Wolverhampton in developing an academic module to form part of a degree or as a standalone certificate that can demonstrate capability in this field.

To mitigate this risk it is important to look at projects on an individual basis, ensure that you have a robust management system in place, make sure that staff are suitably qualified and experienced and that both stipulated and implied terms within the contract are adhered to. If an internal peer review is not possible, ask your professional body or insurer to provide details of their recommended specialist advisor.

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The QSi is the only professional body which solely caters for Quantity Surveyors and those specialising in the financial aspects of construction and engineering. It is an international non-profit-making organisation with a global membership.

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