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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Procurement - criteria and sub-criteria

J Varney & Sons Waste Management Ltd v Hertfordshire County Council
[2011] EWCA Civ 708

HCC published an OJEU contract notice indicating that it was seeking service providers for contracts for the operation of 18 Household Waste Recycling Centres. Varney, who was the operator at three of the sites, submitted tenders for contracts to operate 17 of these sites. The tender notice indicated that the award criteria would be (i) price 65% and (ii) customer satisfaction 35%. Tenderers were required to submit a number of return schedules, providing details of the services and service levels that the tenderer would provide in a number of areas and the prices to be charged. However Varney was unsuccessful coming either fourth, fifth or sixth and brought claims from HCC for alleged breach of the 2006 Regulations.

At first instance the claim was dismissed. Varney's main complaint was that it had been led to believe by the ITT that staffing levels proposed by tenderers would play a very significant part in the evaluation of tenders. In consequence, Varney's tender proposed high levels of good quality staff for each site - with a consequent increase in price - yet, in the event, staffing levels were given very little significance by HCC when it came to marking tenders. As a result, Varney had little chance of winning any tender, since it overpriced its bid.

Varney submitted that HCC was required to disclose to tenderers in advance of tenders being submitted the criteria which will be used for evaluating tenders and the weightings to be accorded to those criteria. Further, the obligation of transparency required HCC to disclose to tenderers in advance of tenders being submitted the sub-criteria which would be used for evaluating tenders and the weightings to be accorded to those sub-criteria. The disclosure of criteria and sub-criteria does not consist merely of stating relevant matters in the ITT. Criteria and sub-criteria must actually be identified as such. Finally, having disclosed the criteria, sub-criteria and weightings, HCC must have actually applied them.

HCC said that the return schedules concerning the standards of service which were expected did not constitute award criteria but sub-criteria. The award criteria were "price" and "customer satisfaction." The return schedules were not separate principles or standards or tests but no more than sub-sets of those principles or standards or tests. The importance of this distinction, according to HCC, was that it meant that in accordance with the European Court decision of *ATI EAC v ACTV Venezia*, HCC was entitled not to identify sub-criteria and disclose their weightings.

This was provided that the sub-criteria:

(i) do not alter the criteria for the award of the contract set out in the contract documents;
(ii) do not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and
(iii) were not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

HCC said that these three conditions were satisfied in this case. The disclosure of sub-criteria and their weightings would have made no difference to the preparation of tenders. LJ Stanley Burnton agreed noting that:

"…the criteria for the award of the contract were identified by the council in the contract notice as price and customer satisfaction. To require such matters such as the return schedules and their weightings, to be identified at such an early stage would be a significant imposition on contracting authorities."

In the view of the CA, the matters referred to in the return schedules were relevant to the criteria identified in the contract notice. They were identified in advance, in the ITT. Varney knew that the information sought by the schedules was to be used in awarding the contracts. The Judge at first instance had correctly held that the return schedules were sub-criteria. This meant that there was no absolute requirement that their weightings be specified in the ITT. There was no breach of the principles of equality and transparency, and that every tenderer was given the same information. It was obvious to Varney and everyone else that the information required by the return schedules would be used to decide on the award of the contracts. Further, Varney's tender was unaffected by the fact that the return schedules were not identified as criteria or sub-criteria and the bidder did not know the weightings to be attributed to them.

The CA agreed with the Trial Judge's comment that:

"… in reality it was perfectly obvious that the award criteria were going to be marked by reference to the information provided in response to the return schedules and if any of the tenderers had wanted clarification of that or of what marks would be attached to each return schedule, they would surely have asked. Accordingly I am satisfied that this is a case where, within the ATI principle, there was no requirement to disclose in advance the sub-criteria or the weighting attached to each of them, because such disclosure could not have affected the preparation of any of the tenders. In the circumstances, the council was not in breach of the obligation of transparency in that regard."

Finally, it should be noted that HCC also argued that the defects in the ITT alleged by Varney were evident when the ITT was published. Varney could and should have brought proceedings against HCC well before the date when it did in fact bring proceedings. Remember the strict 3-month time limit for bringing claims. A tenderer cannot necessarily wait until it has become a disappointed tenders before bringing a claim. The key date is when the tenderer had knowledge of the information in question.

Adjudication: failure to consider a counterclaim

Urang Commercial Ltd v Century Investments Ltd & Eclipse Hotels (Luton) Ltd

[2011] EWHC 1561 (TCC)

Urang brought adjudication enforcement proceedings against both Century and Eclipse in relation to two separate adjudications. The issue common to both claims was whether the adjudicator could consider counterclaims that had been brought by Century and Eclipse. The defendants argued that the adjudicator had failed to make a ruling on the respective respondent's counterclaim in breach of natural justice and failed to take into account, also in breach of natural justice, the fact that the respondent had served a withholding notice.

For example, Century had sought payment of £20k for remedial work to soil drains, loss of revenue during repairs and liquidated and ascertained damages. The adjudicator's view was that these claims were presented as a counterclaim and were properly the subject of a Withholding Notice. Absent such a Notice the adjudicator said he was unable to assess a value on these claims.

Urang said that the adjudicator did not fail to address the counterclaim but simply regarded it as a defence that was bound to fail in the absence of a withholding notice. If this was an error, then it was an error made by the adjudicator when addressing the right question, namely whether or not the counterclaim could be deployed as a defence to Urang's claims in the adjudication.

Mr Justice Edwards-Stuart noted that the provisions relating to certificates and payments were set out at section 4 of the JCT Standard Form of Building Contract 2005 Edition. Under this section the contract administrator was required to issue certificates stating the amount due to the contractor from the employer, specifying to what the amount relates and the basis on which it was calculated. Then, not later than 5 days before the final date for payment, the employer may give a written notice to the contractor which shall specify any amount proposed to be withheld from the amount due.

The effect of these provisions, in the view of the Judge was that the amount stated in the certificate as due is a "sum due" under the contract and the employer must pay that sum on the date specified unless he has issued an appropriate withholding notice in time. In these circumstances, the contractor need do no more than prove the existence of a properly issued certificate. He does not have to prove that the valuation in the certificate is correct or that there are no other potential cross claims by the employer, such as, for example, a claim for defects.

This meant that the amount stated the Interim Valuation under dispute was a "sum due" under the contract and, since Century did not issue a valid withholding notice in time, there can be no defence to a claim for that sum (or any unpaid balance of it). However, under this contract, the need to issue a withholding notice applied only to sums stated as due in interim valuations.

There was no requirement to serve a withholding notice in relation to other claims made by a contractor, whether under a different provision in the contract or for damages. The requirement for a withholding notice is confined to the procedure in relation to interim valuations as required by sections 110 and 111 of the HGCRA.

Accordingly, Mr Justice Edwards-Stuart considered that the adjudicator was wrong to decide that Century could not deploy its counterclaim as a defence to Urang's claims in the adjudication (apart from the claim under the certificate) in the absence of a withholding notice. Century submitted that in adopting this approach the adjudicator wrongly failed to deal with an issue that was before him, namely to consider the counterclaim. The Judge disagreed. The question for the adjudicator was whether, and if so to what extent, Century's counterclaim could be deployed as a defence to Urang's claims in the adjudication. If the adjudicator concluded, as he did, that the counterclaim could not be deployed as a defence to the claims in the absence of a valid withholding notice, then he answered the question. The fact that he answered it wrongly afforded Century no defence to enforcement of the decision.

The Judge said that the position here was similar to that where a party raises a limitation defence. If an adjudicator were to conclude that a claim or counterclaim was statute barred, he would not be obliged to go on and consider it on its merits. If statute barred it could not be deployed as a claim or a defence to a claim whatever its merits.

Further the adjudicator's decision was not a ruling on jurisdiction; rather it was a conclusion that the attempt to deploy the counterclaim as a defence must fail by reason of the absence of a withholding notice. Accordingly, Urang were entitled to enforce the two decisions.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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