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Dispatch

Issue 101
November 2008

Dispatch highlights a selection of the important legal developments during the last month.

EU Procurement

■ **Henry Brothers (Magherafelt) Ltd & Ors v Department of Education for Northern Ireland**

[2008] NIQB 105

We reported on the attempt by Henry Bros to obtain an injunction restraining the Education Department from concluding a Framework Agreement for the modernisation of schools in Northern Ireland in Issue 96. That attempt failed but the judgment in the full liability hearing has just been released.

In short, the Department wanted to establish a Framework lasting for 38 months; the estimated total value of the project was between £550m and £650m and the maximum number of envisaged participants would be 8. The contract was to be based on the NEC form with the adoption of a two-stage strategy involving a primary competition for the purposes of selecting those to include within the Framework and a second competition to identify which contractor on the Framework should be awarded each specific project. During the tender process, 8 clarification notes were issued. Clarification note 4 indicated that tenders would be evaluated in accordance with the following criteria, 80% qualitative and 20% commercial. The commercial criteria were based on a submission of direct fee percentages, sub-contract fee percentages and indicative fee percentages for design services. Following assessment, the eight highest ranking contractors were identified. Henry Bros were excluded. Their complaint to the court centred around the price criteria.

The Department explained that they had adopted this approach because of perceived flaws in competitive tendering based solely upon the lowest price. In the Department's view this tended to encourage a low bid/high claim culture, in that successful contractors made unrealistically low bids on the assumption that the project could be made profitable as a consequence of a series of claims made during the contract. The Department's approach also, in their view, eliminated any manipulation of the prices by bidders seeking to win the contract by means of unrealistic and unsustainable low prices. Henry Bros disagreed. They felt that such an approach was not capable of providing an accurate assessment of outturn cost. Under cross examination, the Department's experts accepted that fee percentage by itself could not predict outturn costs without the addition of further information.

Depending on circumstances, different contractors might be in a position to provide discounts and/or more advantageous prices. There may also be significant differences according to the manner in which the contractor allocated staff between the office and the working area which may be reflected in the difference between the allowance for profit and cost. Henry Bros said that whilst price was not expressed as a:

"mandatory element of the most economically advantageous offer criterion, the natural meaning of the word "economically" means that a component of the assessment must involve analysis of the comparative price or cost of each bid...Without comparison of the price the comparison is meaningless as any bidder can promise whatever it likes if it is not subject to the relevant financial constraints and comparisons of whatever it will expect to be paid to provide that which it is promised."

Henry Bros said that the failure to require the competing tenderers at the primary stage to submit a price was flawed. It was contrary to the application of the general principles of procurement law and the principles of equal treatment and transparency. It permitted specific contract prices to be established through a 1:1 negotiation or discussion between the department and the ultimately successful contractors within the framework. This was contrary to the general principles of competition law. Coglin J whilst recognising that a contracting authority enjoys wide discretion in choosing contract award criteria and that that discretion may include criteria that are not of a purely economic nature, said that this did not provide support for the proposition that, as had happened here, criteria relating to price and/or costs can be omitted altogether.

Unless the cost or price of the relevant goods or service was fixed or not in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or cost in relation to which other non-price advantages might be taken into account. Accordingly the original decision to rely upon the percentage fees was based upon an incorrect factual assumption, namely that costs would always be the same, which was sufficient to amount to a manifest error. Therefore, the Judge found the Department to be in breach. However, the third judgment, the one on liability, is still to come.

Watch this space!

Adjudication - same dispute

■ **Benfield Construction Ltd v Trudson (Hatton) Ltd**

[2008] EWHC 2333 (TCC)

We reported last month on the *Paddison* case where HHJ Kirkham declined to enforce an adjudicator's decision because the dispute was the same or substantially the same as an earlier dispute previously decided by another adjudicator. The same issue arose here. There had been three adjudications. In the first, Trudson sought a declaration that practical completion had not yet occurred as at 17 August 2007. The first adjudicator agreed. In the second adjudication, Trudson sought and were awarded liquidated damages. In the third adjudication, Benfield said that Trudson had taken partial possession of the building and was therefore not entitled to liquidated damages. Trudson said that the third adjudicator had no jurisdiction to address this issue. However, the third adjudicator, considered that practical completion should have been deemed to take place on the date of 17 August 2007. His view was that practical completion and partial possession were two different aspects of the same contract.

In Mr Justice Coulson's view, the relevant principles when considering the "same dispute" issue were as follows:

(i) the parties are bound by the decision of an adjudicator on a dispute until it is finally determined;

(ii) the parties cannot seek a further decision by the adjudicator if the dispute or difference in question has already been subject of a decision by an adjudicator;

(iii) the extent to which a decision is binding will depend on analysis of the term, scope and extent of the dispute referred to adjudication;

(iv) one must therefore ask whether the new dispute is the same or substantially the same and/or whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the new dispute; and

(v) whether one dispute is the same or substantially the same as another is a question of fact.

Mr Justice Coulson asked whether there were real grounds for concluding that there was a substantial overlap between what the third adjudicator was asked to decide and what had already been decided by the first adjudicator. In the first adjudication it was decided that practical completion had not taken place on 17 August 2007, whilst in the third adjudication it was decided that practical completion must be deemed to have taken place on the same date.

In the Judge's view, it was difficult to imagine a more obvious case of overlap and indeed a starker case of fundamentally contrary decisions. He was therefore in no doubt that the third adjudicator did not have the necessary jurisdiction to deal with the alleged dispute.

There were no different material facts presented in the third adjudication. In fact, it turned out that all of the adjudications had been based on the same handover form. The Judge also thought it important to distinguish between the underlying dispute between the parties and the issues and legal arguments which they raised when setting out their side of the dispute. Whilst partial possession and practical completion are different legal concepts and depending on the facts may give rise to different issues or even different disputes, what matters is what the underlying dispute was that existed between the parties at the time of the first and second adjudications. That dispute was whether practical completion under the terms of the contract could be said to have occurred on 17 August and if so whether liquidated damages were due to the employer. Therefore, the legal concept of partial possession only mattered because it was a way, and perhaps the only way which Benfield could argue that practical completion had occurred. Partial possession was here, an aspect of an issue to be determined within the resolution of the underlying dispute. Once the question of practical completion and liquidated damages had been decided by the first adjudicator, those decisions could not be opened up or, in the words of the Judge "comprehensively demolished" as they had been here by the third adjudicator. As the Judge noted:

"*adjudication is supposed to be a quick one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties. If, as it obviously was, the Claimant was unhappy with the results in adjudications 1 and 2, then the Claimant should have gone either to an arbitrator or to a Court in order to challenge those decisions.*"

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