



Legal developments in construction law

1. Procurement award challenges – the disclosure dilemma

Disputes about public procurement contract awards can pose evidentiary problems for both tenderers and contracting authorities. Does the tenderer challenging an award have enough evidence to support its concern that something has gone wrong? If it does not, will its request for more information be rejected as a ‘fishing expedition’? Does the contracting authority, in turn, stick to the minimum information that it has to give, or, subject to protecting its confidentiality, does it, despite the time and costs involved, try to be helpful and provide more information, at the risk of opening the door to additional requests?

Bristol City Council’s award of a new contract was challenged by the unsuccessful incumbent contractor and the new contract award was automatically suspended. The council asked the court to lift the automatic stay. In deciding that there was a serious issue to be tried and rejecting the council’s interlocutory application, the court recognised the council’s dilemma but said that it should not try to follow both courses. It should not refuse requests for documents relating, say, to the evaluation of the successful tenderer’s bid, or the bid itself, but then, on the application to lift the suspension, provide, for the first time, evidence about the process or the successful bid in support of its case. Controversial material, and/or material which, because of the absence of prior disclosure, the claimant simply cannot address satisfactorily if produced for an interlocutory hearing, should not ordinarily be deployed on an application under Regulation 47(H), because of the risk of unfairness.

The court also considered that damages would not be an adequate remedy for a non-profit making organisation, whose bid allowed nothing for profit and a minimal amount for overheads.

[Bristol Missing Link Ltd v Bristol City Council \[2015\] EWHC 876](#)

2. On-demand bonds – pay now, argue later?

According to Mr Justice Stuart-Smith, the normal approach to on-demand bonds is pay now, argue later. But what if there is a dispute as to whether the demand is justifiable?

In refusing to stop the calling of an on-demand retention bond, the judge said, after considering previous case law, that the only established exceptions to the rule that the court will not intervene should be where there is a seriously arguable case of fraud, or it has been clearly established that the beneficiary is precluded from making a call by the terms (express or implied) of the underlying contract. The notion that there should be a preliminary dispute about whether the underlying demand is justifiable goes directly against the normal pay now, argue later approach to on-demand bonds.

MW High Tech Projects UK Limited v Biffa Waste Services Limited

(<http://www.casetrack.com/ct4plc.nsf/items/6-608-3345>)

3. Court of Appeal axes 20 year service life obligation for turbine foundations

A contractor's design for wind turbine foundations complied with the international standard specified in the contract but the standard was flawed, the foundations failed and remedial works cost €26.25million. The contractor had not been negligent but two other contract provisions required the foundations to have a service life of 20 years. A design and build contractor can have a double obligation, to comply with relevant specifications and standards and to achieve a particular result but was that the position for this contractor? The first instance court said it was; the two terms were consistent. A year later, the Court of Appeal came to the opposite conclusion.

Applying the rules of contractual interpretation to *“contractual documents of multiple authorship, which contain much loose wording”*, Lord Justice Jackson said the two paragraphs containing the 20 year service life obligation were inconsistent with all the other contractual provisions and insufficient to justify a finding of a warranty for the foundations of a 20 year life. He noted that contractual interpretation is an iterative process, which involves checking each rival meaning against the other contractual provisions and investigating its commercial consequences. The court must accept that there are likely to be ambiguities and inconsistencies in the documents and must not allow itself to be led astray by those ambiguities and inconsistencies.

MT Højgaard A/S v E.On Climate And Renewables UK Robin Rigg East Ltd & Anor [2015] EWCA Civ 407

4. CDM 2015 – and what if it all goes to penalties?

CDM 2015 has received its fair share of publicity. Less highlighted, so far, are the potential changes to the penalties for offences under the CDM Regulations. Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, now in force, gives magistrates the power to impose unlimited fines for certain offences, including those relating to health and safety. The Sentencing Council, the independent body responsible for developing sentencing guidelines for courts, has undertaken a consultation on its draft guidelines for sentencing health and safety (and other) offences.

The guidelines include tables of starting points and ranges for fines for health and safety offences, depending on culpability. For example, for large organisations (with turnover of £50million or more), the draft sets out a range of fines for very high culpability and harm category 1, from £2.6million to £10million, with a starting point of £4million. For individuals, the range of sentences for deliberate action and harm category 1 is from 1 to 2 years' custody with a starting point of 18 months' custody. Once the guidelines have been revised, now that the consultation is over, final guidelines are to be published and used by all adult courts.

See:

<https://consult.justice.gov.uk/sentencing-council/health-and-safety-offences-guidelines/supporting-documents/healthandsafetyoffencesconsultationguideline.pdf>

5. Building Regulation changes in October

Changes to the Building Regulations come into force on 1 October 2015, including the introduction of new Part Q (Security) for new dwellings and optional requirements for water efficiency and access in Approved Documents G and M.

See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418053/150327_dclg-circ-0115.pdf and

6. CDM 2015 – the HSE client short guide and construction phase plan

The HSE has published a short guide for clients on CDM 2015, aimed at building owners, users or managing agents having maintenance, small-scale building work or other minor works carried out in connection with a business.

It has also produced a list of essential points for builders working for a domestic client as the only contractor, or the principal contractor, on planning and organising the project and working with others involved to ensure the work is carried out without risks to health and safety. There is also a blank template for recording the construction phase plan.

See: <http://www.hse.gov.uk/pubns/indg411.pdf> and <http://www.hse.gov.uk/pubns/cis80.pdf>

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