



LEGAL BRIEFING

Amec Group Ltd v Thames Water Utilities Ltd [2010] EWHC 419 (TCC), Mr Justice Coulson

The Facts

Amec was engaged by Thames Water to carry out construction maintenance work pursuant to a Framework Agreement. Each package of work was subject to a separate order or contract. Over 300,000 such orders were let under the Framework Agreement. The Framework Agreement provided for contractual adjudication using the ICE Adjudication Procedure.

Disputes arose between the parties and Amec claimed that they were not being paid in accordance with the Framework Agreement. By Application No. 57 Amec made an aggregated claim for sums due across a wide range of order and contracts. In response, Thames Water served a withholding notice setting out various alleged set offs and defences to Amec's claims.

Amec served a notice of adjudication on 30 October 2009 challenging the validity of many of the set offs and defences set out in the withholding notice. On 27 November 2009 Thames Water served its Response, together with 13 appendices, which ran to 50 lever arch files of papers. Amec served a Reply in response to which Thames Water complained about how detailed it was. Thames Water then sought permission to serve a rejoinder which Amec objected to.

On 15 December 2009 the adjudicator set a deadline of 21 December for either party to make final submissions. (The deadline for the decision was 24 December 2009). Only Thames Water took up this opportunity serving a rejoinder, with a further 15 appendices, on 21 December 2009. Much of this material was new and had not been provided to Amec before.

The adjudicator awarded Amec £959,907.67 and enforcement proceedings were brought by Amec when Thames Water failed to pay the full amount.

The Issues

There were a number of issues dealt with in the Judgment but perhaps the most interesting for adjudication practitioners was the extent to which an adjudicator is obliged to deal with late submissions and how this interacts with the principles of natural justice.

The Decision

Thames Water alleged that the adjudicator had failed to have regard and/or sufficient regard to their rejoinder dated 21 December 2009 and that this was in breach of the rules of natural justice. The Judge did not consider that the adjudicator was obliged to consider the further response in any detail. In view of the fact that the further response was provided just over two days before the adjudicator was obliged to complete his final decision, he was not acting in breach of natural justice if he simply glanced at the material it contained to see its general nature and to see if it contained anything of real significance.

The Judge noted that adjudication has a tight timetable and an adjudicator is not therefore obliged to consider in detail a second round of submissions or pleadings served very late in the adjudication process. His overriding obligation is to complete his decision within the time limits. If that means that he cannot read or digest in detail a document provided just

over two days before that decision had to be finalised and provided to the parties, then that is simply one of the consequences of the adjudication process.

Further, the Judge noted it is becoming very common for parties in adjudication to believe that they are entitled to respond to every submission put in by the other party. In his view unless a contract or the relevant adjudication rules expressly permit this, parties do not have such entitlement and adjudication is not intended to resolve disputes by reference to innumerable rounds of submissions or pleadings. The ICE Adjudication Procedure did not allow for a further response from the responding party and neither did the Scheme. He added that it would also be contrary to the usual rules of civil litigation which allow the claiming party to have the last word.

In making these comments the Judge noted that the withholding notice was Thames Water's creation. They should therefore have known at the outset precisely how they could justify every item in it. Given that Thames Water had only served much of their justification in their original response, the party under time pressure in the adjudication was, in his opinion, Amec and not Thames Water.

Comment

Practitioners who serve late submissions should be aware that the extent to which an adjudicator is likely, or able, to take these submissions into account may result in limited notice being taken of them. This will be viewed by the courts as being a result of the process rather than a breach of natural justice. Accordingly every effort should be made to ensure that, insofar as possible, submissions with the key information needed for the adjudicator to reach his decision properly are made sooner rather than later.

Claire King
March 2010
