

I Didn't See That - Take Notice



The recent decision by the Technology and Construction Court in *Van Oord UK Ltd & Anor v Allseas UK Ltd [2015] EWHC 3074 (TCC) (12 November 2015)* touches upon 2 frequently occurring aspects in construction project claims:

- ***The foreseeability of ground conditions; and***
- ***The application and interpretation of notice provisions in respect of both delay and costs.***



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Introduction

Allseas UK Ltd ("AUK") had been engaged by Total E&P UK Limited ("TEP") as Principal Contractor to carry out offshore and onshore works involved in the laying of gas pipelines and had, in turn, appointed Van Oord UK Ltd and Sicim Roadbridge Ltd ("OSR") to carry out certain works including onshore works in respect of a gas export pipeline.

Works began in September 2011 with the mainline works being completed in September 2012 however, a separate and discreet area of work, referred to as the beach valve, was significantly delayed and not completed until July 2014.

OSR brought a claim against AUK comprising a number of heads; one being for disruption and prolongation arising out of what is alleged was unforeseen ground conditions, primarily arising from peat being encountered at greater

depths than had been identified in some of the pre-contract documentation supplied to it; thus, according to OSR, resulting in a change to the method of carrying out the work.

Relevant Contractual Provisions

In respect of this part of its claim the Contract provided:

Site Conditions

"12.2.3 Should CONTRACTOR during the performance of the WORK on SITE encounter sub-surface conditions:

- Different from those described in the CONTRACT DOCUMENTS,



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and

- Which an experienced CONTRACTOR could not reasonably have been expected to foresee
- Following an examination of the CONTRACT DOCUMENTS, and/or
- On the basis of the information and data obtained in performing the pre-installation SITE SURVEYS or of other data available (whether from COMPANY or elsewhere),

and

- On the basis of the information and data obtained in performing the pre-installation SITE SURVEYS or of other data available (whether from COMPANY or elsewhere),
- Which substantially modifies the SCOPE OF WORK and the CONTRACT PRICE and/or the WORK TIME SCHEDULE and/or the COMPLETION DATE,

Then CONTRACTOR shall give notice thereof to COMPANY and shall be entitled to request a CHANGE ORDER pursuant to Article 22."

Notice

Article 15 was entitled "Work Time Schedule And Progress Control" and required OSR:

- "to complete the WORK, and each separate designated part of the WORK, on or before the key dates and times for completion set forth in the WORK TIME SCHEDULE";

Article 15.4 set out a procedure by which OSR was to notify AUK:

- "of all incidents and/or events of whatsoever nature affecting or likely to affect the progress of the WORK..."

Article 22 provided:

- "22.2.5 CONTRACTOR shall issue such request for CHANGE ORDER to COMPANY within a maximum of five (5) days of the occurrence of any such event. CONTRACTOR shall prepare at its own cost and, within twelve (12) days (or any other mutually agreed period of time) from the occurrence of such event, submit to COMPANY an evaluation of all its consequences with fully substantiated supporting documents, failing which and notwithstanding any other provisions of the CONTRACT, CONTRACTOR shall not be entitled to any claim based on the occurrence of such event. COMPANY shall respond to CONTRACTOR within sixteen (16) days (or any other mutually agreed period of time) from the submittal to COMPANY of the evaluation.
- 22.2.6 CONTRACTOR shall not be entitled to any payment thereunder prior to receipt of a CHANGE ORDER signed by COMPANY."

Court's Decision

The Court rejected OSR's claim arising from unforeseen ground conditions for the following reasons:

Notices

Firstly, in respect of the notices the Court found:

- That a number of notices had been given in respect of Article 15 and not Article 22; and
- That they were given out of time.

It is perhaps disappointing that the Court merely considered the (rather tight) periods mentioned in Article 22 (of 5 days) had not been complied with and did not appear to consider argument as to whether this period was mandatory or merely directory, but simply proceeded on the basis of the former.

Foreseeability

Secondly, in respect of foreseeability and the claim for additional time and cost, the Court found that to be successful:

- The ground conditions had to affect the scope of the work and/or the completion date; and
- The actual ground conditions were such that no experienced contractor, having examined the Contract Documents and other available data, could have foreseen them.

On the facts presented to it the Court found:

- Whereas OSR had claimed that their price was based upon the results of a 'Mackintosh Probe Survey' provided to them pre-contract in early 2010 and that any difference between the results of that survey and the actual conditions on site were therefore unforeseen, this was untrue and their lump-sum price had actually been based upon OSR's original quotation prepared before receipt of this survey – therefore there was no link between the information contained in the survey and OSR's submitted price;
- That prior to the signing of the Contract further ground investigations were carried out which had shown that peat existed at greater depths than had been identified in the Mackintosh Probe Survey;
- That OSR had begun constructing an embankment without reference to the ground conditions and that they had not provided any evidence, nor had there been a suggestion, that OSR would have constructed this in any other way;
- That sub-soil conditions were not different to those described in the Contract Documents (a Contract Drawing had shown varying depths of peat of up to 3.5m) whereas the Mackintosh Probe Survey was not, in fact, a Contract Document;
- That the Mackintosh Probe Survey and/or similar surveys were not provided as a guarantee that the soil conditions would not deviate from them, instead contractors are provided with all available information and it is then for them to make a judgment as to the extent that they could rely upon the same; and



- That the average depth of the peat was 1.71m and although OSR's submissions were that they would not have anticipated depth greater than 1.5m (the judge found their evidence to be confused and contradictory as to what had been allowed for in their price) he did not consider the difference gave rise to a claim, finding that it was not possible to say that peat at 1.71m deep could not be reasonably foreseen whilst peat at 1.5m could.
- Perhaps surprisingly however, neither side had called expert engineering nor geological evidence in respect as to what could or could not be considered to be reasonably foreseeable (whilst expert evidence was submitted this concerned Quantum). This left OSR's evidence on this matter to be by way of witnesses as to fact and, as the Court had doubted the credibility of these witnesses; this aspect of OSR's claim was inevitably weakened.

Conclusions

Bearing in mind it transpired OSR had not based its Contract Sum on the Mackintosh Probe Survey and given that OSR had failed to demonstrate that it would have proceeded with

the Works utilising any alternative method than that they had used and, finally, given the lack of any expert evidence as to what was or was not reasonably foreseeable, it is perhaps not surprising that the Court reached the decision that it did.

However, this decision does demonstrate (once again) that the Courts are taking a rather robust approach to contract interpretation and applying provisions strictly.

Although the 'mandatory/directory' argument was regrettably not discussed in the Judgement, given the current mood of the Court, a contractor would be well advised to ensure its procedures and administration of a contract are sufficient to comply with the periods stated therein as any failure is unlikely to be viewed sympathetically by the Court.

As always, it is better that time and money is spent in examination and preparation of the tender submissions and contractual due diligence rather than a contractor having to face construction costs that it may not have allowed for or exposure to even more expensive dispute resolution procedures.



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