ADDLESHAW GODDARD

CLANCY DOCWRA V E.ON

- This case is a prime illustration of the importance of checking technical, pricing and pre-tender documents thoroughly before including them in a contract – and the risks of relying too heavily on contract amendments written in general terms.
- At face value it might seem the Technology and Construction Court (**TCC**) went against an order of precedence clause, in giving Clancy's tender documents priority over E.ON's ground risk amendments to the JCT subcontract terms.
- In practice, the technical documents (which determined the scope of the subcontract works) were more narrowly drawn than E.ON had wished – meaning the ground risk clause didn't bite at all. Clancy would therefore be entitled to more time and money for dealing with ground conditions.

What's it about?

Clancy was appointed by E.ON under an amended JCT subcontract, to excavate trenches and install underground pipework for a residential development in central London. E.ON's contract amendments included a clause that sought to pass the risk of adverse ground conditions on to Clancy. Another gave precedence to the contract terms over any appended technical and pricing documents, in the event of inconsistency. The clauses were fairly conventional, and written in general terms.

Various 'Numbered Documents' were included in the contract. One contained EON's initial tender scope of works, which suggested Clancy was required to do 'all civil works'. Others contained tender documents, in which Clancy excluded various types of work that might become necessary if adverse ground conditions were encountered.

Adverse ground conditions were duly discovered, and the parties disputed responsibility for the resulting civils works. Clancy argued that its tender exclusions meant those works were outside the scope of the subcontract works. The ground risk clause only allocated risk in the subcontract works - so it should not bite.

E.ON argued that the subcontract works were defined in the initial tender scope, and this should take precedence over the other Numbered Documents. Second, the ground risk clause clearly passed risk of the new civils works onto Clancy. Third, the precedence clause would also support E.ON's case.

Why does it matter?

As ever the TCC's reasoning is nuanced, and turned heavily on the facts. However, this case illustrates the importance of only including technical documents that reflect the final deal agreed between the parties, and gives an example of how a court might view those documents and their interface with the 'front end' legal terms.

The TCC favoured Clancy's interpretation: the ground risk clause allocated risk in the subcontract works only, and not more widely. It would not operate to make Clancy responsible for works outside their agreed scope. The contract contained a separate variation mechanism for this.

Notwithstanding broad descriptions of the subcontract works in the 'front end' of the contract, the precise scope was defined by the specific provisions of the Numbered Documents. Those Numbered Documents needed to be read as a whole, and the tender scope could not take precedence. Clancy's exclusions therefore defined the scope of the subcontract works – meaning the civils works were out of scope, and the ground risk clause would not bite. The works would therefore be a variation.

Finally, although the TCC was satisfied there was no inconsistency (in which case the precedence clause would not bite), it is noteworthy that the precedence clause did not appear to address inconsistencies as between the Numbered Documents. Accordingly, there was no clear statement that the tender scope should have priority over Clancy's exclusions.

Now what?

The technical and pricing documents are a critical part of any building contract (or subcontract), and should be thoroughly reviewed before being included in a tender, or in any resulting contract. Care must be taken when reviewing tender responses – as it is not uncommon for such documents to contain exclusions, or otherwise seek to adjust contractual risk allocation. Items that do not reflect the final deal should not be included.

Admittedly this can be difficult in practice – as such documents are often negotiated under tight timescales, with input needed from a range of professional disciplines. We therefore recommend liaison between the relevant teams / advisors as early as possible.

Finally, although precedence and risk allocation clauses and broad descriptions of the works can be helpful, clear and specific wording will be needed if they are to extend a party's obligations, or distinguish between specific technical or pricing documents.

Who to contact

JOE WILKINSON
Partner

0113 209 2332
07775 586366

MIKE TRODDEN
Associate

0113 209 2357
07885 809314