

PAYMENT AND ADJUDICATION UNDER HYBRID CONTRACTS – C SPENCER LTD V MW HIGH TECH PROJECTS UK LTD

- For a hybrid contract (a contract which includes both construction operations and works which are not construction operations under HGCRA) it is simpler and safer to adopt one HGCRA compliant payment mechanism which covers all of the works.
- To avoid difficulties with adjudication the whole of the works should be subject to a HGCRA compliant adjudication procedure.
- For some commentators, recent cases add weight to the argument that the exclusion of non-construction operations from the operation of HGCRA should be removed.

WHAT'S IT ABOUT?

MW High Tech was appointed as main contractor to design and construct a power plant to process fuel produced from commercial and industrial waste and municipal solid waste. C Spencer Ltd was contracted to design and build the civil, structural and architectural works for the facility. Its contract also included ancillary works which were not construction operations for the purposes of HGCRA pursuant to the exclusion in section 105(2)(c) of the Act. As such the contract was a hybrid contract i.e. one relating in part to construction operations under HGCRA and in part to non-construction operations.

The contract provided for a single HGCRA compliant payment mechanism applying to both types of operations. The TCC was called upon to determine whether a payment notice issued under this mechanism, which did not separately identify the amount due in respect of the construction operations, was valid. Taking into account the purpose of the provisions of HGCRA, it was held that it was and that there was no need for the payment notice to identify separately the sums due in respect of construction operations. Note that separate identification would have been necessary if there had been separate payment mechanisms for the construction and non-construction operations.

WHY DOES IT MATTER?

This case highlights that when drafting a payment mechanism for a hybrid contract the simplest option is to draft a single HGCRA compliant mechanism, which allows a single payment to be applied for and made for all works. This avoids the complexity and risk of having 2 separate mechanisms.

In addition, to avoid difficulties with adjudication, the whole of the works should be made expressly subject to an HGCRA compliant adjudication regime. This avoids statutory adjudication applying only to that part of the works which comprises construction operations – potentially necessitating two separate dispute resolution procedures to be adopted for a dispute which relates to the whole of the works.

It is also important to check that there are no provisions which cut across the adjudication clause and limit its application, for example, to the extent (if any) required by HGCRA (as was the case here). In a separate case, between MW High Tech and Engie Fabricom (another sub-contractor employed in relation to the project), such wording led to the staying of an application for summary judgment for enforcement of an adjudicator's decision on the basis that there was an arguable case that the works fell within the power generation exclusion to HGCRA (as opposed to being for the primary purpose of the disposal and thermal treatment of waste as argued by the sub-contractor), in which case the adjudicator had no jurisdiction.

WHAT NOW?

Hybrid contracts are common in the offshore and power industries and this case highlights a potential pitfall where part of the works requires a payment mechanism which is compliant with HGCRA. If a hybrid contract contains separate payment mechanisms for both construction and non-construction operations it is crucial that the construction operations and related sums and basis of their calculation be separately identified in payment applications and notices.

The two cases relating to this project have highlighted the difficulties caused by the exclusion from the operation of HGCRA of any parts of the works which are not construction operations pursuant to section 104(5) of HGCRA. In her judgment Mrs Justice

O'Farrell commented that [the adoption of a single HGCRA compliant payment mechanism] could be described as a "pragmatic solution to the illogical and uncommercial impact of section 104(5) of the Act".

The TCC also considered the impact of the exclusion in section 104(5) in the case of *Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant and Waste Management Ltd*. This was a case to enforce an adjudicator's decision by summary judgment, in which the court considered that the simple delivery of concrete to site by pouring it into prepared expansion joints fell within the supply exclusion under section 105(2)(d) HGCRA as it did not involve an act of installation.

Some commentators have expressed the view that the *C Spencer Ltd v MW High Tech* case provides further reasons why the seemingly illogical exclusions from the operation of HGCRA should be removed. Whilst they remain, parties to hybrid contracts should draft and operate the payment mechanisms having regard to this case.

WHO TO CONTACT



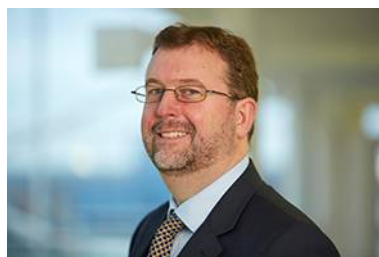
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