

Epidemic of Disputes Arising out of Letters of Intent

By Jonathan Gold

A year ago I wrote an article about two recent cases at that time on letters of intent (ERDC Group Limited v Brunel University [2006] EWHV 687 (TCC) and Cunningham and others v Collett and another [2006] EWHC 1771 (TCC)). Subsequently several other letter of intent cases have been reported, leading me to conclude that the number of disputes arising out of contractors working under letters of intent, without a formal contract in place, has reached almost epidemic proportions.

Whether the recent glut of cases is simply coincidental or, more worryingly, a reflection on parties taking a more relaxed approach to procurement and the dangers of using letters of intent, is difficult to know. I suspect the latter, in which case the recent judgments in the Technology and Construction Court contain lessons for us all. I briefly summarise three of these other cases that, in addition to ERDC and Cunningham, highlight the difficulties that both contractors and employers can encounter.

Skanska Rasleigh Weatherfoil v Somerfield Stores Limited [2006] EWHC 947 (TCC)

In this case Skanska submitted a bid to carry out maintenance work to several of Somerfield's stores. Whilst the terms of the contract were being negotiated, Somerfield wrote to Skanska instructing them to "*provide the services under the terms of the contract [enclosed with Somerfield's invitation to tender] from 28th August 2000 ... until 27th October 2000*". It was common ground that an informal contract was formed by this instruction. However, a dispute arose on, amongst other things, whether the wording "*under the terms of the contract*" had the effect of incorporating all of the terms of the draft contract that Somerfield enclosed with its invitation to tender, which were not agreed by Skanska; or only those terms that were necessary to define the services Skanska was to provide. Mr Justice Ramsey agreed with Skanska's argument that it would have been illogical and therefore could not have been the intention of the parties if, in effect, all of the terms of the draft contract were incorporated into an informal contract based on the letter of intent, because the reason a letter of intent was issued was because these very terms were not agreed and were still being negotiated. However, the case subsequently went to the Court of Appeal, which disagreed with Mr Justice Ramsey's conclusions.

Contractors should therefore be aware of such wording, which is very common, since the affect of this may be that terms and conditions that a contractor does not intend to accept, govern the work it is carrying out under the letter of intent. If a formal contract is not subsequently entered into these terms and conditions will remain in force.

Hart Investments Limited v Fidler [2006] EWHC 2857 (TCC)

In this case the contractor had commenced works under a letter of intent that authorised the contractor to proceed with such works as ordered and instructed, pending the issuing of formal contract documentation. No formal contract was ever issued and the contractor completed the works.

The contractor had then referred various claims that it had to adjudication, and was seeking to enforce the decision of the adjudicator. The Court concluded, applying the well known judgment in RJT Consulting Engineers v DM Engineering, that there was not a construction contract in writing because not all of the terms of the contract were evidenced in writing. It therefore found that the adjudicator did not have jurisdiction and his decision was invalid and unenforceable.

The main reason that the Court gave for its ruling was that the workscope was not discernible from the letter of intent since it simply referred to subsequent orders and instructions for works, which may or may not have been in writing. The Court likened any contract that had been formed to being only a framework agreement.

This case highlights the concern that where a contractor is working under a letter of intent, the option of having any disputes that arise resolved cheaply and quickly by way of adjudication may not be available.

Bennett (Electrical Services Limited v Inviron Limited [2007] EWHC 49 (TCC)

This case, like Hart Investments, concerned the enforceability of an adjudicator's decision. However, the primary issue was whether or not a contract had even been formed.

The letter of intent was entitled "subject to contract" and referred to Inviron's intention of entering into a formal contract with Bennett if the main contractor approved this. The Court concluded that it was a matter of construction in each case as to whether the execution of a formal contract is a condition of the arrangements agreed in the letter of intent; or the parties are merely expressing a desire that the transaction already agreed should be set out in a formal contract. It found in this case, in light of the "subject to contract" wording and the requirement that the main contractor's approval had to be obtained before a contract could be entered into, that it was the former; and in the absence of a formal contract being entered into, no contract was formed whatsoever.

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