Legal Briefing

Merit Process Engineering Ltd v Balfour Beatty Engineering Services (HY) Ltd

[2012] EWHC 1376 (TCC)

This case concerned issues regarding formation of contract and in particular it addressed whether the parties had reached an agreement on price and insurance arrangements and ultimately whether each agreement included an arbitration clause.

The Facts

During 2003 and 2004 Merit Process Engineering Ltd ('Merit') negotiated with Balfour Beatty Engineering Services (HY) Ltd ('BBES') on three separate work packages for plant and pipeworks in the construction of scientific and research facilities. The Main Installation Package and the Vacuum Drainage Package concerned works on the Diamond Synchrotron Project at Chilton, Oxfordshire, whereas the third package related to the Isis Project at Didcot.

The Main Installation Package was procured by way of a letter of intent dated 2 March 2004 and limited to the value of £500,000 pending the agreement of a formal sub-contract. The limit was raised as the works progressed to £1.6 million in September 2004. The letter of intent did not include an arbitration clause.

BBES did not wish to commit to any contractual arrangements with Merit until BBES had finalised its contract with the main contractor Costain. During March 2004 there were various meetings, telephone and email exchanges between the BBES and Merit. On 25 March 2004, BBES sent an email to Merit offering a contract price of £1.6 million subject to a deduction of 2.5% settlement discount with payment in 35 days from each application date. The alternative to this was a reduction in contract price and 60 day payment terms. On 30 March 2004 Merit sent an email stating that the contract price was £1,637,500 subject to 2.5% discount and 35 day payment terms. BBES did not reply to this email.

Merit continued with the works under the letter of intent. On 10 December 2004, BBES entered into a contract with Costain. On 21 March 2005, BBES sent Merit a proposed sub-contract agreement with a contract price of £1.6 million. The conditions of contract included an arbitration clause and indicated that Merit was required to maintain personal injury and public liability insurance each to the value of £10 million. Merit sought an amendment so that the contract documents provided for a contract price of £1,637,500 and suggested that public liability insurance coverage should be £5 million. BBES responded on 22 April 2005 stating that the contract price was to be £1.6 million and that any shortfall in insurance would be covered by site insurances. Merit replied reiterating its position on the contract price and stating that the position regarding a shortfall between insurance levels would have to be documented. In the event there was no further correspondence and Merit never signed or returned the contract documents but did continue working.

As regards the Vacuum Drainage Package, on 31 March 2005 BBES sent Merit two signed copies of the contract documents for counter-signature. The proposed insurance arrangements were the same as for the Main Installation Package. There was no discussion about the contract documents and Merit proceeded with the work..

In 2011, Merit filed Court proceedings in respect of all three work packages. BBES applied for a stay of the proceedings under CPR 62.3(2) and s. 9 of the Arbitration Act 1996 on the basis that the work package contracts included arbitration clauses.

In relation to the Main Installation Package, Merit's position was that the parties had not agreed the contract price or the insurance arrangements, so no binding contract incorporating an arbitration clause had been entered into. BBES argued that the price of £1.6 million had been agreed and that the only difference between the parties related to the application of the main contractor's discount and that this did not constitute an essential term of the contract. BBES also submitted that the insurance position had been agreed. In relation to Vacuum Drainage Package, there was no dispute about price but Merit contended that the proposed insurance arrangements had not been agreed.

Merit accepted that the Isis package contract included an arbitration clause and that the proceedings should be stayed to arbitration. However, Merit submitted that BBES was being unreasonable by insisting upon its right to have that dispute referred to arbitration if the other two disputes were to be resolved by litigation and Merit applied for its costs of issuing the TCC proceedings.

The Issues

(i) Had the parties reached agreement on the price for the Main Installation Package works?
(ii) Had the parties reached agreement on the insurance provisions for the Main Installation Package works?
(iii) Should Merit's claims for the Main Installation Package works be stayed to arbitration?
(iv) Should Merit's claims for the Vacuum Drainage Package works be stayed to arbitration?

The Decision

Mr Justice Edwards-Stuart held that the parties had not reached agreement on the price for the Main Installation Package works. The £37,550 difference between the parties could not be regarded as either *de minimis* or non-essential and there was no machinery otherwise agreed between the parties by means of which a fair price could be arrived at.

The Judge held that the parties had reached agreement on the insurance provisions for the Main Installation Package works. Merit could be taken to have agreed with the position on insurance set out in BBES's letter of 22 April 2005 or agreed that this could be resolved at a later date.

The Judge's decision that the parties had not reached agreement on the price for the Main Installation Package works meant that there was no contract between the parties which included an arbitration clause. It was therefore held that Merit's claims regarding the Main Installation Package works should not be stayed to arbitration.

In relation to the Vacuum Drainage Package, the Judge held that Merit's claims should be stayed to arbitration. Merit could again be taken to have agreed with the insurance position proposed by BBES or agreed that this could be resolved at a later date. Merit had therefore accepted by conduct the terms proposed by BBES in the contract documents (which included an arbitration clause) and its letter dated 31 March 2005.

The Judge held that in light of his finding that the Main Installation Package proceedings should not be stayed, Merit's application for costs in relation to the Isis package would appear to have no prospects of success.

Comment

It is essential that parties agree on the price to be paid for works under a contract, or at least agree on a mechanism for determining the price subsequently. Failure to do so is likely to preclude the parties from arguing that a binding contract has come into existence. As can be seen from the result of this case, a failure to agree on price meant that the Main Installation Package was governed by the terms of the letter of intent, whereas the Vacuum Drainage Package was subject to the terms and conditions of the contract documents provided by BBES because all essential terms had been agreed.

In addressing whether the parties had agreed the price for the Main Installation Package, the Judge noted that the difference of £37,500 might seem insubstantial when compared with the total price of £1.6 million. However, in accepting the submissions of counsel for Merit, which were of course not evidence, the Judge relied upon judicial knowledge that profit margins for this type of works were low, at around 2-3%, meaning a difference of £37,500 would be significant.

The parties' failure to ensure that there was clear agreement on the essential terms of each work package ultimately meant that having spent time and money arguing about stays of proceedings, Merit's £685,000 claim made in relation to the Main Installation Package would be resolved in Court but the disputes relating to the other two works packages would be resolved in arbitration proceedings, which would add further costs to the resolution of these disputes.

Andrew Hales
July 2012