

Accepting a Tender in Knowledge of Errors

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Some years ago I wrote an article in this journal entitled "The Dangers of Withdrawing a Tender". That article examined the case of City University (formerly Polytechnic) of Hong Kong v Blue Cross (Asia-Pacific) Insurance HCA No. A10750 of 1993 and in particular an application to strike out the City University's claim for damages resultant from Blue Cross withdrawing its tender to provide medical insurance to the Polytechnic.

The facts of the case are simple and remarkably commonplace. The City University invited tenders from several insurance companies, including the Blue Cross, to provide health insurance for its staff. The tender form included the following express term:

"I/We agree to abide by this tender for a period of three (3) months from the date fixed for receiving the same and it shall remain binding upon me/us and may be accepted at any time before the expiration of the period."

Blue Cross submitted its tender but following a telephone conversation with City University's consultants soon realised that it had made a serious error in the tender, which was not even sufficient to cover claims from the previous year, let alone the administrative costs. The second and third lowest tenderers were 70% and 80% higher than Blue Cross's tender.

Notwithstanding a meeting during which Blue Cross made it clear that it was intending to withdraw its tender, City University nevertheless wrote accepting Blue Cross's tender. However, Blue Cross refused to issue any insurance policy. The University then accepted another insurer at a higher premium, so as to mitigate its loss,

but sued Blue Cross for damages for breach of the requirement to abide by the tender for three months.

Blue Cross sought an order to strike out the claim on the basis that there was no reasonable cause of action, and it based its application on what was perceived to be the common law position at that time and which can be seen from the leading textbooks on contract law, such as Chitty on Contracts. In the twenty seventh edition of this famous work, published in 1994, it is stated:

"The general rule is that an offer may be revoked at any time before it is accepted. The rule applies even though the offer or has promised to keep the offer open for a specified time for such a promise is unsupported by consideration."

However, Rhind J dismissed the application. He held that the modern law of contract did contemplate the possibility that, in tendering situations, an implied contract could come into existence binding the tenderer to keep his tender open for the specified period. The consideration for such a contract was that there is either an express or implied agreement on the invitor of tenders part that he would consider all timely and conforming tenders before awarding the contract.

Accordingly, an implied contract existed, whereby Blue Cross agreed to keep its tender open for three months, and by withdrawing its tender prior to the expiry of the three month validity period, Blue Cross was in breach of the implied contract and City University was entitled to seek damages for that breach. The measure of damages was the difference between the Blue Cross tender which was the lowest, and the next lowest tender which City University were forced to accept.

This much I have previously reported. However the matter has now been heard in full before Deputy High Court Judge Woolley who handed down his judgment on 8 March 2001.

Whilst the judge refused to depart from the decision of Rhind J in the striking out application, i.e. that an implied contract existed that Blue Cross would abide by its tender for a period of three months, he ultimately held against City University, and his reasons for doing so will be of great interest to all involved in the construction industry tendering process.

In addition to the clause detailed above, the conditions of tender also contained Clause 8, which relates to errors in tenders. The clause, which is not uncommon in construction, contracts reads as follows:

"Should examination of a Tender reveal errors of such magnitude as in the opinion of the Polytechnic would involve the Tendered (sic) in serious loss, then the nature and amount of such errors will be communicated to the Tenderer and it will be asked to confirm in writing that it is prepared to abide by its Tender."

The wording of this clause is clear in that it imposes an obligation on the employer to draw the attention of the tenderer to what it perceives to be an error, which would cause the latter serious loss.

The judge considered that in this case all three factors were present. There was undoubtedly an error, City University was clearly aware of that error (it was its representative who verbally drew it to Blue Cross's attention), and expert evidence indicated that such an error would have caused Blue Cross serious loss.

On this basis, City University then had an obligation under Clause 8 to ask Blue Cross to confirm in writing that it was prepared to

abide by its tender. This the University failed to do, and it was thus in breach of that obligation and the judge held that it could not now seek to take advantage of Blue Cross's error.

The judge then went on to look at the position at common law. He noted that it has long been held that a mistake as to the terms of a contract, if known to the other party, may avoid the contract. He considered that price is a term of a contract, and where, as here, City University must have known that the price had been quoted in error, it could not make a binding contract by accepting it.

In making this decision, the judge considered the meaning of Clause 8 - a clause which he stated had at first troubled him because it appears to be a clause requiring a tenderer to confirm that it will abide by its tender when by reason of the other clauses in the conditions of tender it must in any event do for three months.

However, the judge found consistency and good sense in Clause 8 when it is looked at in light of the common law position, namely that the contract can be avoided by errors known to the employer, but providing that they can protect their position by asking the tenderer to confirm their tender, then they can validly enter into a binding contract.

Accordingly, on the basis that City University had accepted Blue Cross's tender in the knowledge that it contained errors and because it had not requested Blue Cross to confirm in writing pursuant to Clause 8 that it would stand by its tender in light of those errors, the judge held that Blue Cross was entitled to refuse to enter into the contract and dismissed City University's claim. Of course, had City University requested Blue Cross to confirm and they had refused to do so, then City University would have validly been able to bring the action for breach of the requirement to abide by the tender for three months.

The earlier decision upheld again here, that an employer could sue for breach if a contractor withdraws its tender within the period during which the tender must remain open is a point that contractors must be wary of. The final decision that an employer is under a duty to report errors to the contractor and seek its written confirmation

that it will abide by its tender is similarly a matter that employers must be careful to follow as failure to do so will allow a contractor to withdraw its tender without recourse.

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