

Construction- Switzerland

Pricing of Additional Works

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Background
Decision
Comment

The Federal Supreme Court recently elaborated on some crucial aspects of construction law, particularly relating to the pricing of works beyond the initial scope of the contract issues.⁽¹⁾

Background

A dispute arose concerning a subcontract for scaffolding, masonry and reinforced concrete works in the framework of a large real estate project. The subcontract covered work on new buildings as well as the renovation of existing structures. The contractor and the subcontractor signed a tender conditions and proposal document providing for (i) a lump-sum payment of approximately Sfr5 million for the new building works, and (ii) the application of unit rates to be subsequently determined for the renovation of existing structures. Furthermore, the subcontractor agreed to grant the contractor a 5.9% tender discount and a 2% discount in case of early payment. The contractor mentioned only an overall discount of 7.9%. The contractor's general conditions of contract provided that additional works ordered in the course of the project would be governed by the same conditions as the original works.

The subsequent document awarding the works to the subcontractor referred to the tender conditions and proposal, as well as to the contractor's general conditions of contract, the contract conditions of the project at issue and the subcontractor's quote. It further provided that the contract was governed by the SIA 118 General Conditions of Contract for Construction Works published by the Swiss Society of Engineers and Architects.

The contractor paid the subcontractor's bi-monthly invoices during the first two years of the project. Then, payments stopped due to a dispute over the amount of the discounts and rebates. After the works were terminated, the subcontractor submitted its final invoice, totalling over Sfr 9 million, applying a tender discount of 5.9% on the total amount. The early payment discount, however, was applied only to parts of the works. The subcontractor further invoiced the contractor an amount in excess of Sfr200,000 for additional works. The contractor refused to pay part of the invoice, arguing that it had not agreed to the unit rates applied by the subcontractor and that the discounts granted were insufficient.

Decision

The High Court of Geneva granted the subcontractor's claim for payment of the invoices. The Swiss Federal Supreme Court confirmed the decision. The ruling is noteworthy in respect of:

- the rules applicable to the pricing of additional works in construction projects;
- the scope of the engineer's powers of representation; and
- the consequence of a party's failure to object to discounts applied by the other party during

the performance of the works.

Pricing of additional works

The contractor argued that under the general conditions, additional works were subject to the same terms as the initial works. It requested the appointment of an expert to establish whether the amounts invoiced by the subcontractor were in line with the prices agreed for the original works. The court rejected this argument. While the parties had initially not agreed on unit rates for additional works, a subsequent meeting of minds had, in the court's view, been reached. The subcontractor had repeatedly communicated to the contractor quotes, bills of quantities, progress reports and other documents showing unit prices for the additional works. The contractor had not objected. This was, in the court's opinion, tantamount to accepting the unit prices mentioned by the subcontractor.

Powers of representation of the engineer

As a subsidiary defence, the contractor asserted that it was not bound by the unit rates set out in the subcontractor's quotes, since these had been checked and approved only by the engineer as an agent of the employer, and not by the contractor itself. The court did not follow this argument and ruled that the contractor was bound by the engineer's acts.

Referring to earlier case law, the Supreme Court recalled that even in the absence of an explicit agency relationship, a party is bound by acts of a person that appears to act as agent of the party, if the party's conduct was such that a third party could, in good faith, believe that there was an agency relationship and relied on such relationship. The court found that the subcontract had given the impression that the engineer was an agent not only of the employer, but also of the main contractor. The subcontract incorporated the SIA 118 conditions, which provide that the engineer represents the employer. In the court's view, the subcontractor could therefore proceed from the assumption that the contractor (ie, the subcontractor's employer) intended to be bound by the engineer's approval of quotes, bills of quantities and such documents. The court added that the contractor was perfectly aware of everything that happened on the construction site and of the engineer's approvals.

Change of contractually agreed prices

Finally, the court had to decide whether there was an agreement on the amount of the discounts which the subcontractor had promised to grant. The contractor asserted a blanket discount of 7.9%, while according to the subcontractor, a 2% early payment discount was included within this 7.9%. The Supreme Court left open the question whether the subcontract comprised an agreement on the nature and amount of the discounts. It ruled that in any event there was a subsequent agreement as to the early payment discount for payment within a fortnight. The subcontractor's invoices and reminders had consistently applied a discount of 5.9% and granted an early payment discount only if timely payment had indeed been made. The contractor paid such invoices during two years without objection and again did not object when the subcontractor stated in a reminder that the early payment discount was subject to payment being made within two weeks. The contractor challenged the payment terms only when the subcontractor submitted its final invoice at the end of the project. The court considered that the contractor had accepted the subcontractor's payment terms irrespective of whether an initial agreement as to a different term (ie, a blanket 7.9% discount) existed.

Comment

What lessons can be drawn from this decision? Parties are well advised to draft their construction contract carefully and to monitor compliance throughout the construction project, with particular caution in the following areas:

- Parties should clearly set the method of pricing additional works and postponing the determination of rates for such works should be avoided; likewise, pricing clauses which are not self-standing (eg, those referring to pricing provisions for the initial works) should be unambiguous. Special attention should be paid if the pricing provisions are in separate contracts.
- The legal, construction and commercial departments of each party involved in a construction project should cooperate closely. Incoming and outgoing invoices, quotes, progress reports or other documents concerning prices should be checked by all departments for compliance

with the contract terms.

- A party that receives communications which deviate from the contractual terms should object or make appropriate reservations. A judge or arbitrator applying Swiss law may consider a failure to object to such communications to constitute acceptance of new terms. The risk of this happening is increased if the initial contract terms are unclear.

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Endnotes

(1) 4C.232/2006, dated January 4 2007.

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