

Valuing Variations - The Applicability of Bill Rates

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In the Surveying Newsletter, Volume 8, Issue 7, which was published in July 1999, I reported on the case of Henry Boot Construction Ltd v Alstom Combined Cycles Ltd, a case of great importance for quantity surveyors.

In that case the extent to which rates in the Bills of Quantities should be used in the valuation of variations was considered, particularly in circumstances where the Bill rate was exceptionally or unreasonably high or low. The judge held that Bill rates must be used without consideration of their particular reasonableness. The Bill rates were, the judge said, 'sacrosanct, immutable and not subject to correction'.

The case has recently been the subject of an appeal to the Court of Appeal, and I will be discussing the result of that appeal in my article next month.

However, this month I wish to report on another recent case that considered the applicability of Bill rates in valuing variations, the case of Aldi Stores Ltd v Galliford (UK) Ltd (8th March 2000). This case confirmed the same principles as the Henry Boot case, but had the opposite result. In Henry Boot, the use of the Bill rates resulted in the contractor making a very large profit due to a high Bill rate. In the Aldi Stores case the use of the Bill rates resulted in a significant loss for the contractor.

The case concerned an appeal from an arbitrator's award. Galliford was the main contractor who entered into a contract with Aldi Stores Ltd to construct a new retail book store in Swansea in Wales. The form of contract was the JCT Intermediate Form 1984 Edition.

The Bills of Quantities prepared by the consultant quantity surveyors contained two items for disposal of excavated materials off site, being:

- A. Disposal of Excavated Material off site
1,547 m³
- B. Disposal of Excavated Contaminated Material off site in a licensed tip
1,463 m³

In their tender Galliford priced item A at the rate of £8.63 per m³ and item B at the rate of £44.60 per m³, and their total tender sum was £1,017,792.11.

Whilst Galliford's tender appears to have been the lowest, it was nonetheless more than the employer Aldi Stores could afford, and so the consultant architect and quantity surveyor entered into negotiations with Galliford to discuss various means by which Galliford's tender may be reduced to a level acceptable to Aldi Stores. During these negotiations two principal matters were discussed that could lead to Galliford putting in a revised and reduced tender. These were firstly burying contaminated excavated material on site in borrow holes, and secondly raising the levels of the site to take the clean materials excavated for these borrow holes, thus negating the need for disposal.

There was however no agreement from the Architect that these measures would be instructed, merely that he would look into their possibility.

However as a result of the discussions Galliford submitted a revised and reduced tender in the sum of £855,627.00, and in the revised Bills of Quantities the rates for both disposal items A and B above were amended to £0.00 per m³. Item B was reduced in recognition of the above proposal,

and item A reduced to be consistent with the rate for B, but Galliford made it clear that the cost for the works of A was included elsewhere in their rates.

The revised tender was accepted and Galliford commenced work. During the course of the works it was found that all the material to be excavated was contaminated and thus could not be buried in borrow holes on the site. All material excavated thus had to be disposed of off site and predictably a dispute arose as to the valuation of the works. Galliford considered that it was entitled to have the disposal works valued at the originally tendered rate of £44.60 per m³, but Aldi Stores maintained that the rate in the Contract Bills of Quantities of £0.00 per m³ must be used.

In the arbitration the arbitrator held that there was an error in the quantity of item B for disposal of contaminated material in that it should have been 3010m³ (the quantity of 1463m³ plus the original quantity for clean material 1547m³). Whilst he decided that the original quantity for item B, i.e. 1463m³ must remain valued at the rate of £0.00 per m³, he valued the additional quantity of 1547m³ at the rate of £36.10 per m³ (being the original rate for disposal of contaminated material, £44.60 per m³ less the original rate for disposal of clean material £8.50 per m³).

The arbitrator's reasoning was that the additional quantity amounted to a variation which required valuation pursuant to Clause

3.7 of the contract, and in particular he considered that a fair valuation of the works was called for in accordance with Clause 3.7.4 that provided:

"a fair valuation shall be made... where there is no work of a similar character set out in the priced document...."

The arbitrator's decision was appealed and the appeal was upheld. The judge stated that there was no basis for the arbitrator to depart from the rates in the Bills of Quantities. A fair valuation could only be made if there was no work of a similar character set out in the Bills of Quantities, but here there was work of a similar character (at item B) and it was priced at the rate of £0.00 per m³. Therefore the arbitrator should have valued the additional quantity of disposal of contaminated material off site at the Bill rate of £0.00 per m³.

The judge said he had much sympathy for Galliford on the facts of the case. However the rules for the valuation of variations must be adhered to, and Bill rates must be used if the work is of the same character to work in the priced document.

This is a salutary lesson to all contractors to take care when pricing tender documents and in particular take care with including money for an item elsewhere and pricing the item itself at \$0.00.

(Adopted from the HKIS Newsletter 9(5) June 2000)