



## CONSTRUCTION LAW UPDATE NO. 703

### Misleading tender documents - fixed price contract

#### Introduction

The NSW Supreme Court has recently handed down an assessment of damages in the long running dispute between Abigroup Contractors Pty Ltd ("**Abigroup**") and Sydney Catchment Authority ("**Sydney Water**"). The Warragamba Dam was constructed by Sydney Water between 1948 and 1962. In the late 1990s it was determined that a new spillway was required to prevent the possibility of heavy rain overtopping the dam causing damage to the Hawkesbury-Nepean Valley and its residents.

Abigroup and other contractors were invited by Sydney Water to tender on the spillway for the dam. Abigroup was the successful tenderer.

#### The project description and tender documents

The new spillway was to be constructed over an old embankment that was built in 1960 across Folly Creek to form a retention basin. The tender documents supplied by Sydney Water were prepared by the Department of Public Works and Service. Importantly, the documents included a statement that "no plans are available of this embankment or of any outlet pipe but allegedly local runoff from the surrounding areas is piped away from this retention basin".

Construction of the spillway required the removal of the filling forming the embankment and excavation down to a solid rock base before backfilling with cement stabilised fill. Based on the tender documents, Abigroup allowed for the excavation, removal and replacement of 24,300 cubic metres of fill.

The tender period was only seven weeks. Tenderers were not encouraged to go on site and there was no effective opportunity for them to carry out their own geotechnical investigations of the site.

#### The discovery of the pipe

When Abigroup commenced work, an old 30 inch diameter outlet pipe was uncovered in the embankment and solid rock was found to lie at a significantly lower level than indicated on the geotechnical surveys supplied by Sydney Water with the tender. In addition to its estimate of 24,300 cubic metres of fill, Abigroup had to excavate and

replace another 180,000 cubic metres. It claimed extra costs in excess of \$8 million.

#### The contract

The contract was a lump sum contract. The parties had agreed in the contract terms that Abigroup would take on all the risks of latent conditions or errors in the specifications or tender documents.

#### The 1951 plan

Some months after the contract was signed, and works had commenced, Abigroup discovered that Sydney Water possessed other documents relevant to the project. The documents included a plan dated 30 November 1951 showing a cross-section of a 30 inch pipe and the original ground level before the embankment was first constructed. It was agreed that, if Abigroup had been provided with the 1951 plan, it could have deduced the underlying rock level. However, there was evidence that the pipe found by Abigroup had not been installed until 1960 and accordingly there was a dispute between the parties as to whether the 1951 drawing referred to the same pipe as the pipe that was discovered during the works. Sydney Water said it was not the same pipe and that the 1951 plan was not relevant to the statement that "no plans" were available.

Abigroup claimed that the representation in the invitation to tender that there were "no plans ... of any outlet pipe" was misleading and deceptive and sought damages on account of the extra excavation it had been compelled to complete.

#### The long history of the litigation

Abigroup commenced proceedings in the NSW Supreme Court in 2001. The Court referred the dispute to a referee who found in favour of Sydney Water. Abigroup unsuccessfully appealed to the Supreme Court. Abigroup then appealed to the NSW Court of Appeal and this time, the referee's award was overturned. The matter was sent back to the Supreme Court for rehearing. The Court found in favour of Abigroup but found that it had not proved its loss on the basis that it had not given evidence of its total costs of the project to show it had suffered a loss by the misrepresentation. Abigroup said it did not need to lead such evidence;

it said it was entitled to the extra costs and only needed to provide evidence about the quantum of those costs. Abigroup again successfully appealed to the Court of Appeal; the most recent decision relates to the quantum of the damages.

### **The legal principles**

Generally, where a party agrees to a lump sum contract on the basis that it is not entitled to claim extra when latent site conditions are encountered (such as unexpected geotechnical conditions or an old drainage system), a court will not disturb the parties' bargain. Sydney Water sought to reinforce the allocation of ground conditions risk to the Contractor by including terms in the contract that required Abigroup also to assume the risk of errors in the invitation to tender.

Abigroup based its claim on the provisions of the *Trade Practices Act 1974* (Cth) in respect of misleading and deceptive conduct. Briefly, if a party makes a representation that is misleading or deceptive and the representation induces another party to enter into a contract, the loss that flows from the misrepresentation can be claimed from the party making the misrepresentation.

There was no suggestion that Sydney Water deliberately concealed the 1951 plan. For the purposes of the *Trade Practices Act*, the conduct amounting to misrepresentation does not need to be intentional for it to mislead or deceive. The *Trade Practices Act* contains provisions that preclude parties from contracting out of the prohibition in the Act on misleading and deceptive conduct. If the Court agreed with Abigroup's submission that the failure to disclose the 1951 plan was misleading and deceptive, the terms in the contract that excluded Abigroup's claim would be of no effect.

Sydney Water's argument that it had merely passed on the representation and had not itself made the representation was rejected.

### **The assessment of damages**

In relation to the assessment of damages, the Court considered the "what if" scenario – that is, what would Abigroup have done if the 1951 plan had been included in the invitation to tender. The evidence was to the effect that, subject to obtaining further clarification, it would have submitted a non conforming tender refusing to accept the risk of the extent of excavation and fill in the Folly Creek area.

On that basis, Abigroup said it was entitled to the entire cost of the excess excavation. The parties agreed that Abigroup's original estimate of 24,300 cubic metres of excavation was reasonable, based on the tender documents.

The Court agreed with Abigroup and damages were assessed at approximately \$7.5 million.

### **Conclusion**

Notwithstanding the general principle that parties are bound by the terms of their contract, where a party is led to enter into a contract by misleading or deceptive conduct, the damages that flow from that conduct can be recovered.

When providing tender documents, it is important to ensure the accuracy of the documents and avoid misrepresentations as to the existence or content of documents that are not included within the tender documents.

Latent conditions are a frequent source of disputes. Exhaustive investigations are necessary to fully inform tenderers and principals as to the extent of the risk, but even a clear allocation of this risk to the Contractor does not protect the Principal if misrepresentations are made in the tender documents, whether inadvertently or not.

Conduct can be misleading or deceptive in the absence of intention to mislead or deceive.

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