

IN THE MATTER OF A CONTRACT

and

IN THE MATTER OF AN AJUDICATION

BETWEEN

**Gee Construction Limited
Pheonix House
Christopher Martin Road
Basildon
Essex
SS14 3HG**

REFERRING PARTY

And

**Three Rivers District Council
Three Rivers House
Northway
Rickmansworth
Hertfordshire
WD3 1RL**

RESPONDING PARTY

AJUDICATOR'S DECISION

Paul Lomas-Clarke
C/o Knowles
Knowles,
26-28 Bedford Row
London
WC1R 4HE

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INTRODUCTION

1. This Decision is given in respect of disputes concerning a contract between Gee Construction Limited (hereinafter referred to as "Gee") Three Rivers District Council (hereinafter referred to as "TRDC") in which the parties agreed that Gee would carry out the refurbishment of the existing leisure centre known as William Penn Leisure Centre.
2. The Contract includes the JCT 2005 Standard Building Contract 2009. The Contract Administrator was W.S. Atkins ("Atkins"). This Contract includes adjudication provisions compliant with the requirements of the Housing Grants Construction and Regeneration Act 1996 and incorporates the Scheme for Construction Contracts (the Scheme). This adjudication is carried out in compliance with the provisions the Scheme.
3. A dispute having arisen, Gee issued to TRDC a Notice of Adjudication on 4 November 2009 and made an application to the Royal Institution of Chartered Surveyors (the RICS) for the nomination of an adjudicator. The RICS appointed me, Paul Lomas Clarke of Knowles, 26-28 Bedford Row, London WC1R 4HE to act as Adjudicator in this matter.

THE DISPUTE

4. The Contract was for Gee to carry out the refurbishment of the existing leisure centre to create two new swimming pools, associated wet side facilities, two new dance studios and all ancillary accommodation at the William Penn Leisure Centre.
5. The Works were split in to two sections: Section 1, the major portion of the works and Section 2, the partial refurbishment of the Entrance Foyer and Fitness Studio. The Section 1 Works were to commence in advance of the Section 2 Works but both Sections were to be completed by the same date.
6. This adjudication concerns only Section 2 work. Unless otherwise noted this adjudication will only refer to works (as I understand the submission) in Section 2.
7. Gee's claim is for extensions of time up to the partial possession of part of the work and for further extensions of time for work carried out after that date until the termination of the works by TRDC. The relevant events under which Gee claims extension of time are late instructions and additional work.
8. The start of Section 2 Works was deferred, it would appear (not withstanding the witness evidence put before me) with the tacit agreement or by acquiescence of both parties, from the agreed possession date of 6 November 2008 until 7 January 2008. The TRDC agreement to the deferment is indicated by the completion date for the Works (presumably all the Works) being revised and extended to 25 April 2008. Subsequently further extensions of time were awarded revising the completion date for all the Works to 3 July 2008. Partial Possession of Section 2 was certified on 17 November 2008. An email from TRDC dated 6 November 2008 refers to "Practical **Completion**" whereas Gee in fact received a certificate of Partial Possession. The issuing of a Partial Possession certificate indicates that not all the works were complete. No clear information has been provided which would explain what work was complete and which work remained incomplete.
9. Following the issue of Non Completion Certificates, TRDC served notice and deducted Liquidated Damages for the period 3 July 2008 to 18 November 2008. The Non Completion Certificate has been superseded in the Response to the Referral accepting that the date for completion of the work should be extended to 10 September 2008.

10. Gee made a number of applications for extensions of time for reasons of additional work which include (amongst other matters) additional floor trunking, additional timber encasements or battening adjacent to the floor trunking, changes to ductwork and incompatible light fittings. Gee aver these problems delayed completion of the works. Gee further aver TRDC have failed to adequately consider requests for extensions of time and grant appropriate extensions of time.
11. TRDC deny Gee have a right to further extensions of time beyond 10 September 2009.
12. Gee's notice of Adjudication seeks the following redress:-

"1 A declaration that Gee is entitled to an extension of time in respect of the Section 2 Works until the date of partial possession by TRDC on 17 November or such other date as I may decide

2 A declaration that TRDC are not entitled to withhold Liquidated Damages for the period from 19 May 2008 to 18 November 2008 or such other date as I shall decide

3 A declaration that Gee is entitled to a further extension of time in respect of the section 2 Works from the date of Partial possession by TRDC on 17 November 2008 to the date of the termination of Gee's employment on 30 January 2009 or such other date as I shall decide".

PROCEDURE

13. The "Referral" comprises 1 lever arch file of submissions and was received on 11 November 2009.
14. The TRDC Response was received on 23 November 2009.
15. A Reply to the Response was received on 1 December 2009.
16. A Rejoinder was received from TRDC on 9 December 2009.

CONSIDERATIONS

17. Gee aver that certain additional or varied works were on the critical path for the Works and TRDC instructions in respect of these matters delayed the completion of the Section. On the programmes presented to me by Gee (in particular programmes 3 and 4) the critical path is sufficiently defined with a number of additional activities indicated by Gee on the programmes as critical, in particular delays caused by the installation of the floor trunking would have delayed following trades. TRDC admit that the last part of the information on the trunking was not given to Gee until 20 August 2008. Delays also occurred as a result of the instruction on the fixing of battens to support the floor screed either side of the trunking. Instructions for this work were not given until 2 September 2008. This work would be critical to the completion of Section 2. Gee's "as built" programme show the work as being installed in a three week period. There is however no contemporaneous evidence from Gee as to exactly how long the activity actually took.
17. The criticality of some of the items claimed by Gee as additional or delayed work is not clear, for example;
- a. Additional walls were added, their location and relevance to the critical path (given subsequent delays) are not clear.
 - b. Existing ducts were altered, the location and impact on the programme are not clear.
 - c. A variation instruction to remove the timber floor, however the location and criticality of the activity is not sufficiently explained.
 - d. Gee allege further delays arising as a result of instructions subsequent to the completion of the floor and other items beyond the date of the Partial Possession of Section 2. Gee's evidence on the impact of these items is less than adequate.
18. TRDC Response admits Gee is entitled to an extension of time up to 10 September 2008. By an email dated 6 November 2008 TRDC agreed that Liquidated Damages should not be withheld for a period between 3 November 2008 and 13 November 2008 because of Gee facilitating the execution of work by others.
19. Gee has not provided adequate contemporaneous supporting evidence to justify the duration of activities or resource levels to explain how the additional time claimed. Atkins' comments at paragraph 1.18 of their letter dated 24 August 2009 indicates scepticism of Gee's claims. Gee's reply of 30 September 2009 fails to address Atkins' questions.

20. Included within the Response to the Referral and in a Rejoinder from THDC was a reasoned and comprehensive report by a Dr Aldridge on the merits of Gee's right to extensions of time. He offers opinions on Gee's progress and the delays with a range of durations of those delays. Generally I have found Dr Aldridge report of considerable help in rationalising events and liability for delays. Not only has he identified that one of two possible scenarios could be used to establish Gee's right to extensions of time he has also presented extensive records of Gee's activities and analysis of events. Notwithstanding the extent of his reports it is impossible to establish which of those scenarios he considers is appropriate. I have considered both and my own understanding of Gee's programmes 3 and 4 to make an assessment of the correct extension of time.
21. Mr Aldridge does not mention in any detail the works which must be completed after the completion of the screed. On the Gee's programme 4 they indicated a programme of 12 weeks further work to be completed after the making good of floor screeds. Gee's "as built" programme indicates this following work was completed in 8 weeks.
22. TRDC refer to the matter of Balfour Beatty v Chestermount Properties which held that delays caused by the Contractor followed by Employer delays still leave the Contractor liable for their culpable delays. Dr Aldridge identifies from Clerk of Works records "Slow Progress" for a period of 11 weeks once work had started. This is confirmed on the programmes provided by Gee where there appears to be delays or at least limited activity in the period March 2008 to June 2008. Reference is made to additional rooms being added and duct work being installed but no evidence is provided explaining the extent of work and no evidence has been provided demonstrating the duration of days claimed. It must therefore be construed that Gee are liable for some of the delay. Allowing 8 weeks of work during the 16 week period, Gee would be liable for 8 weeks of delay.
23. Gee have provided very little detail of events or activities on site concerning the trunking and battening work, I have therefore relied to a considerable extent on Dr Aldridge's report. Diary notes provided by Dr Aldridge indicate site instructions increased the scope of the trunking in the floor. It appears these final details were provided on or about 15 August 2008. Allowing 1 weeks for completion of the

installation means the earliest date for completion of trunking was around 22 August 2008. There is little evidence of activity for one or two weeks until further instructions were given. However Gee cannot be blamed if they were lacking instructions. Final details of battening were given on or about 9 September 2008. Allowing 2 weeks work for installation of battens and screed means the earliest date for completion would be 23 September 2008.

24. Dr Aldridge also refers to the removal (and presumably the replacement) of an isolated area of screed on 20 October 2008 however I can find no details which would allow me to identify to identify a further extension of time.
25. On the basis of my analysis Gee could not have finished the floor trunking and screed work until 23 September 2008; added to this must be the 8 weeks for follow on works. From this period should be deducted the delays for which Gee are responsible, as noted above this would amount to a deduction of (by coincidence) 8 weeks.
26. The “as built” programmes produced by Gee and their schedule of additional instructions indicate further work being required after the Partial Possession date of 17 November 2008. However, Gee have provided no clear information or evidence on the extent of that additional work which would justify a further extension of time after this date. Taking account of the waiver of liquidated damages given by TRDC in respect of the fitting of equipment means Gee should be entitled to a further extension of time of calendar 10 days from 23 September 2008 meaning the completion date should be fixed as 3 October 2008.
27. Gee have, to a limited extent, been successful in this adjudication. Their success has been substantially aided by Dr Aldridge. It would therefore be perverse to award all my costs against TRDC. I therefore decide that each party should pay half of the total of my fees as invoiced by Knowles. For the same reason I make no award in respect of the adjudicator nominating fees incurred by Gee.

DECISION

I decide that:-

Gee is entitled to an extension of time in respect of the Section 2 Works up to 3 October 2008.

That TRDC are not entitled to withhold Liquidated Damages for the period from 19 May 2008 to 3 October 2008.

Gee is not entitled to any further extensions of time in respect of the Section 2 Works after 3 October 2008.

TRDC will forthwith pay my fees as invoiced by Knowles. Gee will reimburse TRDE 50% of my fees as invoiced by Knowles. The parties are in any event jointly and severally liable for my fees as invoiced by Knowles.



Paul Lomas-Clarke
Adjudicator

DATED: 23 December 2009