

# CONSTRUCTION ALERT



## Notices of Withholding- the end?

Well, probably not. But change is here.

The first case under the Construction Act has made its way to the House of Lords and it has changed how most thought Notices of Withholding worked.

If you have ever been caught on the wrong end of failing to issue a Notice of Withholding, you know how painful it can be and if you have ever been on the right end of such a failure, you know how beneficial it can be.

The Construction Act states that once a sum for works falls due, it must be paid unless a Notice of Withholding is served stating why it will not. A Notice is not required if the works do not conform to contract (because they are not really due), but it is required if you want to set off sums due to the payer (e.g. LADs). The Notice of Withholding must be served a minimum number of days (the default is 5) before the sum for works must be paid.

If you do not serve the Notice of Withholding outwith the minimum period, you may not withhold payment. No ifs, no buts.

Except now there are ifs and there are buts.

The House of Lords decided that in the case where a contractor went into liquidation after the start of the minimum period, a Notice of Withholding was not required in order to avoid paying.

There is a good chance the courts will decide this decision applies only to cases where the person to be paid becomes insolvent. The problem is- that is not quite what the House of Lords said.

What they actually said was that if the event permitting sums to be withheld arises after the minimum period starts, then a Notice of Withholding is not required to avoid paying. That event could be anything. Even if such an event does not arise, it gives the payer an incentive to delay payment in case such an event does arise.

Now there are good reasons for thinking the House of Lords got it wrong (it was a 3-2 decision). And there are good reasons for thinking that when the judges who actually deal with construction disputes on a daily basis have to apply this judgement, they will put it in a box and follow it only when the facts give them no choice.

But... they might not.

So, now we have gone from a position where the lack of Notice of Withholding was potentially a nasty or pleasant surprise, depending on whether you are due to pay or be paid, to a position where the lack of a Notice of Withholding is not necessarily the knock out blow it once was.

## Procurement Comes Alight

In January 2006, new procurement regulations came into force. Their bite has not yet been felt, but their bark may be enough following a recent case under the regulations which preceded them.

In *Aquatron Marine v Strathclyde Fire Board*, the Court decided that the Board had breached the right of Aquatron to be treated equally with all other tenderers. As a consequence, the Court ordered the Board to pay Aquatron £122,149.20. Ouch!

How did it come to this? It all came down to the Board not doing what it said it would do.

The procurement procedure used by the Board was a two stage one. The first stage was one to meet technical requirements. The second stage is the evaluation of the bid, proper. The first stage required Aquatron to produce an ISO Certificate issued by a recognised accreditation centre. Aquatron produced one issued by QMS, a recognised accreditation centre, albeit a private one. The Board, however, had been expecting one from UKAS or another E.U. member state recognised accreditation body. The first stage also included interviews at which the quality of the tenderer's staff was assessed, despite the fact this did not form one of the qualifying technical criteria. Aquatron were rejected at the first stage for failing to meet the technical requirements for staff quality and ISO Certification.

But there had been no technical requirements for staff quality and Aquatron did have ISO Certification, so Aquatron sued the Board. The Court made clear that the Board's mistake was to use people to undertake the evaluation procedures who, while they acted properly and in good faith, did not understand their obligations under the Procurement Regulations.

Aquatron argued that as it had the lowest tender, it would have won the second stage; and as it had been kicked out at the first stage, it had not made the profit on the deal it would have done and the Board was liable for that lost profit. The Court agreed and assessed that lost profit at £122,149.20.

The new regulations also allow for damages. They go further and even allow for the award of a contract to be suspended pending arguments over whether it should be awarded.

If you were the rejected tenderer, would you want to do that, though? True, Aquatron swapped the risk of running the contract for that of running the court

case and better the devil you know, but... easy money? Perhaps not, but an option. Either way, though, a potentially expensive mistake if you run procurement without understanding your obligations under the Procurement Regulations.

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