Case No: NOT KNOWN

Neutral Citation Number: [2010] EWHC 3723 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 21 December 2010

BEFORE:

HIS HONOUR JUDGE WILCOX

- - - - - - - - - - - - - - - - - - -

BETWEEN:

Claimant

IRVIN

- and -

Defendant

ROBERTSON

- -

MR MORT appeared on behalf of the CLAIMANT

MR NISSEN QC appeared on behalf of the DEFENDANT

- -

APPROVED JUDGMENT

- -

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1. HIS HONOUR JUDGE WILCOX: This is a part 8 claim in which the claimant seeks declarations that the parties entered into a construction contract, as defined in section 104 of the Housing Grants, Construction and Regeneration Act 1996, and that such contract was in writing within section 107 of the Act. Further and alternatively and in any event the parties agreed that either party could refer a dispute to adjudication under the Robertson adjudication procedure.

Introduction.

2. The dispute relates to an aspect of a PFI project for the design, construction and operation of a psychiatric hospital in Morpeth in the county of Northumberland. The ultimate client was the North Tyneside and Northumberland Mental Health Trust ("the Trust"). Under the PFI project the Trust employed Robertson Capital Projects Limited to deliver and operate the hospital. In turn Robertson Capital Projects Limited employed the defendant, Robertson Construction North-East of England Limited ("NEE"), to act as main contractor for the design and construction. NEE is a main contractor operating from Newcastle. The parent company is The Robertson Group. Its chairman is Mr Bill Robertson. Its executive directors material to this claim included Mr Derek Shewan and Mr Ian Fraser. The managing director of the subsidiary Robertson Construction North-East of England Limited ("NEE Limited") at the material time was Mr Peter Drury and the commercial director was Mr Martin Plumb. They are no longer employed by the defendant company. Mr John Hogbin was the project manager who reported to Messrs Drury and Plumb.

3. NEE's authority to enter into contracts was limited by the parent company, which required approval about certain financial limits. The limit for mechanical and electrical works to be carried out at Morpeth as part of the PFI project exceeded that limit and needed Group approval. Richard Irvin and Sons Limited, trading as Richard Irvin Building Services ("RIBS") is the M and E services subcontractor who in fact carried out M and E works on the Morpeth project. The principal issue to be decided is whether such work was governed by an agreed subcontract with Robertson.

4. Emcor Limited is an M and E services subcontractor who also tendered for the M and E work at Morpeth. RIBS and Emcor tendered on the basis of a supply and install contract. Emcor's price was substantially less than that of RIBS. On the basis of supply and installation only, had that been the approach sanctioned by The Robertson Group, Emcor was clearly the preferred candidate as M and E subcontractor. The clear evidence of Mr Shewan was that the M and E subcontract was to include full design responsibility. There was an existing M and E design which had been produced by consultants, TPS. That would have been considered in part by each of the tenderers in coming to their tendering price. It was envisaged that an M and E subcontractor, with full design responsibility being accepted by the subcontractor, would necessarily involve a novation of the TPS design contract and such further design input as might be considered necessary. Mr Troup of RIBS in his oral evidence seemed reluctant at first to accept this, although when pressed he did.

5. By November 2004 there was no contractual imperative upon Robertsons, deriving from the main PFI contract such as penalties and LADs that made it necessary to conclude an M and E subcontract in November or to commence M and E works in November 2004. However, by November 2004 the project was reaching a key stage according to Mr Hogbin, NEE's project manager, which underlined the desirability of procuring an M and E contract on site within a reasonable time. Mr Shewan has confirmed:

> *"The way we built this project from the start, all the way through it had been on a design and build basis because the project had been ongoing from bid to this particular point in time, nearly three years."*

6. The tender process initially was deliberately based upon a supply and installation basis. In evidence Mr Mort in questioning Mr Troup elicited the following:

> *"Answer: The concern was if we went to the five or six subcontractors that were available to us and gave them all the opportunities to commit to a D and B on this particular project, the amount of queries and vagueness it would have created and then trying to sift through to establish a level playing field, it was simpler to go on a supply and install process to eliminate most of the potential bidders to take it down to two and then to convert these into design and builds.*
>
> *"Question: What do you mean you would just have queries from fewer people if you were just negotiating?*
>
> *"Answer: If we are down to two then you could have a more complete understanding of what the issues were.*
>
> *"Question: That makes perfect sense. So instead of having queries from five or ten tenderers, you are just dealing with two.*
>
> *"Answer: yes."*

7. Then the observation was made by Mr Shewan:

> *"The remaining tenderers got a far better understanding of the project before the conversation starts on taking the design responsibility on."*

8. The strategy preferred by NEE Limited, articulated by Mr Drury, was to get a supply and install contract and then afterwards convert it, if possible, into a full design and build contract. NEE, however, did not have the authority to let such a contract. Their concern had a different emphasis to that of the Group. They were concerned more with progress on site than any potential commercial exposure that might result. It was accepted by both parties that it was reasonable for a subcontractor contemplating a full design and build contract to have confirmation from TPS in writing that their design

complied with the employer's requirements and construction proposals agreed, otherwise the element of risk would remain.

9. By the beginning of November 2004, according to Mr Troup, the chief executive officer and managing director of RIBS, it had a number of contracts which had been suspended and they were anxious to obtain replacement work. Their relationship with Robertsons at Group level was good and they were regarded by Robertsons as reliable and desirable partners, all other things being equal. It is also evident from the correspondence and from what was said by both, Mr Shewan and Mr Troup, that the Group director of Robertsons had a good professional relationship with Mr Troup and Mr Shewan had the ear of Mr Bill Robertson, the Group chairman.

10. On 9 November 2004 the defendant's Mr Noble sent a copy of the Trust construction requirements to the claimants. On Wednesday, 17 November 2004 there was a meeting between the personnel from the claimants and the defendants. It was a meeting convened by Mr Drury from NEE and attended by Mr Troup, the chairman of the claimants. Representatives from TPS were there, they being responsible for the design of the M and E works. It followed a similar meeting with a competing tenderer, Emcor, the day before, 16 November 2004. At the meeting on 17 November NEE asked the TPS representative present to confirm in writing that their design of the tendered drawings were fully compliant with the Trust construction requirements. The TPS representative orally confirmed that to be the case. The subsequent M and E recommendation report made by Mr Drury of NEE to the decision makers in Group recommended that Emcor Limited should have the contract on a supply and install basis because they were £186,000 cheaper than RIBS and were more local to the project both in terms of management and labour.

11. Both Emcor Limited and RIBS had expressed the view that they would want to have four to six weeks to carry out a due diligence exercise as to the compliance of the existing design with the Trust construction requirements and for completion of designs before they were willing to take on a full design responsibility. At the meeting of 17 November Mr Troup says that there was mention of a letter of intent from the defendants. None was forthcoming and clearly no agreement was concluded at that meeting. In any event no one representing NEE had the requisite authority to conclude a contract, as Mr Troup would have been well aware. He would have been well aware by virtue of his relationship with Mr Shewan and of course the many discussions he had had in dealings before.

12. Between 4 November 2004 and 19 November 2004 Mr Shewan and Mr Troup spoke with each other frequently and discussed the project. RIBS' original tender price on the basis of supply and installation was substantially reduced to £4.3 million from a figure in excess of £4.5 million, indicating the input of Mr Shewan as to acceptable profits and overheads and reflecting also a strong desire by RIBS to secure a contract. On 19 November 2004 Mr Shewan convened a meeting at a hotel venue in Huntly, Scotland, in order to discuss RIBS' revised tender price of £4.3 million. What transpired at this meeting and what appears from the e-mail correspondence shortly afterwards is relied

upon by the claimants to found their case that a supply and installation agreement was concluded between the parties with an option to bolt on full design obligation after due diligence.

The claimants' case.

13. The claimants rely upon a schedule of 23 letters and e-mails between 28 July 2004 and 25 April 2006 as also evidencing a concluded subcontract compliant with the requirements of section 107 of the Housing Grants and Reconstruction Act 1996. In the alternative they assert that there was in any event a freestanding agreement between the parties to adjudicate disputes between them based upon the fact that a provision for adjudication was contained in the Robertson tender documents and "that this was the defendants' own procedure". Mr Mort submits that adjudication has obvious advantages, specifically the quick and cheap resolution of disputes by an independent specialist from the industry, and it is "relatively non-confrontational" (sic) and allows parties to resolve their disputes during the course of a long project, whilst keeping some sort of ongoing commercial relationship alive. He goes on to submit that each of these advantages are equally valid whether or not for some technical reason the subcontract is achieved. As pleaded the claimant's case for such a freestanding agreement has no legal basis.

14. In reality the claimant's case that there was a concluded subcontract for mechanical and electrical works on a supply and installation basis falls to be determined mainly, but not exclusively, as to what transpired at the meetings on 17 November 2004 and 19 November 2004, as evidenced in the e-mails between the claimant's Mr Troup and the defendant's Mr Shewan. Accordingly the oral evidence at the hearing focused on these events and matters.

The meeting of 17 March 2004.

15. This was clearly part of the tender assessment procedure. I am satisfied that it was an exploratory meeting convened by NEE, who were not the decision makers, to assess the respective merits of Emcor Limited and RIBS. It led to the report to the Group that I referred to earlier. RIBS may have been made aware of NEE's view that it would be appropriate to approach the engagement of an M and E subcontractor, firstly, on a supply and install basis and then to separately and subsequently, after due diligence, follow the option of converting to a full design and build contract with novation of the TPS design, all by bolting on a total design agreement. I am satisfied that Mr Troup, a canny and very experienced contractor, however fortified by the subsidiary team's view, was aware of the approach of Mr Shewan and the Group in a PFI contract setting. There had been discussions with Mr Shewan about pricing, including acceptable levels of overhead and profits. On 4 November 2004 RIBS were asked for prices were TPS' design was novated to them and what RIBS' price would be to reflect the employer's requirements and construction proposals. I deal with the prelude to the meeting of 19 November 2004.

The essential background.

16. Without a doubt the claimant’s preferred option was to have a supply and install

contract and the option after due diligence to convert, if commercially attractive, to a full design and build contract. It had the assurance that the operational team of NEE were in favour of such an approach and that in principle Mr Shewan favoured RIBS as a reliable and trustworthy M and E partner. On the other hand, RIBS were at a distinct commercial disadvantage insofar as their price on a supply and install basis was £186,000 above that of Emcor Limited, who were local to Morpeth, with the mobilisation and supervisory advantages which that gave in the estimation of NEE. Mr Shewan knew that there was an operational necessity to have an M and E contract in place by late November or December in order to fulfil the programme requirements for the build team. For him, whilst there was a risk that neither Emcor Limited or RIBS would not accept full design responsibility after due diligence, leaving him with no choice other than to accept an install contract only, nonetheless, Emcor were available at a significantly lower price than RIBS on that basis.

17. In discussions with Mr Shewan, Mr Troup accepts that he suggested a price of £250,000 for taking on the full design responsibility and that in pre-meeting discussions with his colleague, Mr Murdoch, they agreed starting at a figure of £250,000 to cover that element and being prepared to come down in negotiations. Immediately prior to the meeting, on the morning of 19 November, Mr Troup was told by Mr Shewan that there was a significant price difference between RIBS and Emcor. Mr Shewan said that:

> *"RIBS was £186,000 more expensive than Emcor and that at this point the only way that RIBS would win the work was for them to enter into a full design and build contract. I suggested to Stan [Mr Troup] that £186,000 should essentially be treated by him as a contribution towards RIBS' contingency as they took the design risk. I said that I believed that RIBS could get their actual costs nearer to what Emcor had come up with. In turn we would add £100,000 for them taking on the design risk. As far as I was concerned, this meant that then RIBS benefit from taking on the design risk was nearly £300,000. "*

This of course comprises the additional £100,000 over and above the £4.3 million, and added into that would be the difference between that price and Emcor's price, nearly £186,000, making a figure of £286,000.Prior to the meeting I am satisfied that RIBS were reluctant to enter into a design and build contract and had expressed that reluctance to Mr Shewan.

The meeting of 19 March 2004.

18. That meeting was held in informal surroundings at the Gordon Arms in Huntly. Essentially present were Mr Shewan, Mr Troup, Mr Fraser and Mr Murdoch. Other personnel expected did not make it because of the adverse weather. They came later. Mr Shewan deposed that the majority of meeting time was focused on the price for which RIBS would consider taking responsibility for design. Mr Troup said that the meeting, which lasted an hour or so, resulted in the Shewan proposal of a price of £100,000 being accepted because he "understood" the design to be substantially complete and the acceptance of the proposal was based upon RIBS' insistence that it was

based upon satisfactory due diligence. Mr Shewan was adamant that no further time would be given to RIBS to review the design because they already had adequate information from TPS and details of the employer's requirements and were called upon to make a commercial decision. On that basis he agreed that they could commence work. The only opportunity, he said, for change attracting payments would be on the basis of the Trust's instructions to vary their requirements.

19. Mr Shewan's evidence is that in effect £286,000 was accepted by Mr Troup to take on a commercial risk of full design responsibility absent the completion of a full due diligence process. It was a commercial discussion and a commercial decision. Had he not agreed, the defendants would not have achieved a supply and install contract because they were substantially more expensive than Emcor, who were preferred by the operational team as local and cheaper. Mr Murdoch said that he broadly supported the account of Mr Troup in his account of the meeting. He seemed to accept that a Guaranteed Maximum Price (GMP) was discussed but in relation to novation of design, rather than acceptance of complete design responsibility. Clearly it could not be in a supply and install context that a GMP was agreed, given that the subcontractor would then have no control. It was said by Mr Troup that neither he or Mr Shewan took notes. Mr Shewan said that he did take notes and they formed the basis of his e-mail sent on Sunday, 21 November 2004. I see no reason not to accept his evidence.

20. Mr Sean McArthur of RIBS missed the main part of the meeting because of the weather delay. Mr Ian Fraser was the other participant in the meeting from the defendants. He was the Robertson Group construction director who reported directly to Mr Brian Robertson. He worked primarily with PFI design and build projects. He related thus:

> *"Derek Shewan proposed to RIBS that if they took responsibility for the mechanical and electrical design TPS had produced, they would be paid an additional £100,000 to the previously proposed tender figure of £4.3 million, making £4.4 million in total. These figures excluded the costs of specialist subcontractors, which were to be paid in addition. This proposal also involved RIBS accepting novation of TPS' contract. The additional amount of £100,000 was proposed in relation to the commercial risk for RIBS in taking design responsibility. In particular I saw this as a payment for any risk that the contract drawings as then prepared did not properly reflect NEE's employer's requirements for the construction of this hospital. In this way Robertson aimed to buy the removal of risk to them in relation to design."*

21. I was impressed by Mr Fraser's evidence. He corroborated the account given by Mr Shewan that the proposed price to be paid for the removal of risk in relation to design he proposed was not £100,000 but £286,000. If Mr Troup is right he initially would have been asking for something like £436,000 originally for the acceptance of full design responsibility. That is the £250,000 that he agreed with Mr Murdoch and the £186,000 representing the price difference on a supply and install basis between RIBS and Emcor. In reality the price agreed by the parties in relation to the design responsibility according to Mr Shewan exceeded the original £250,000 held out for by

RIBS given the baseline price for a supply and install established by Emcor, disclosed to RIBS before the meeting at Huntly. Mr Shewan's evidence is that the enhanced price for the full design responsibility and guaranteed maximum price was to compensate RIBS for undoubted additional risk and assumption of full design responsibility at that stage. Troup and Murdoch were adamant that, whilst in principle RIBS would accept design responsibility, it would only be after due diligence and then as a bolt-on four to six weeks later.

22. Despite the advantage of having a subcontractor considered reliable, the commercial advantage of paying £186,000 over the odds for a supply and install contract is not readily obvious. It might be said that there would be slight incentive for the claimants then to accept the full design obligation and give a guaranteed minimum price for a modest £100,000 on top of the £4.3 million for the supply and install contract they assert was agreed. At 10.50 on Sunday, 21 November 2004 Mr Shewan sent an e-mail to Mr Troup asking for confirmation of RIBS' offer in relation to the M and E services at Morpeth. I make reference to that e-mail in some detail:

> *"With reference to our meeting on Friday afternoon, I would be obliged if you would confirm your offer with regards to the M and E services on the above project. My understanding of the offer is as follows:*
>
> *"(1) Richard Irvin to take full responsibility for the design and installation of all mechanical and electrical services on the project.*
>
> *"(2) TPS to be novated to Richard Irvin and any monies outstanding to TPS in relation to their agreed fee will be paid to Richard Irvin.*
>
> *"(3) The management and control of the specialist subcontractors will be passed to Richard Irvin. These quotations will be reviewed and investigated by Richard Irvin and any further discounts will be retained by them. Should any quotation be found to be incorrect, this will be reviewed by the parties.*
>
> *"(4) Any variations, including the amendments to the PICU unit, will be valued on a totally open book basis. The basis for this valuation will be the cost information provided by you with your original offer.*
>
> *"(5) All clarifications, etc, discussed with the regional manager and the site team to be as discussed. All costs established during these discussions are to be contained within your offer with the exception of holes through masonry and erection of external lamp stands.*
>
> *"(6) Monthly meetings to be held with senior management of both companies to review the progress, et cetera, of the project.*
>
> *"(7) Your offer of £4,400,000 plus the value of specialist subcontractors and the value about standing fees to TPS is a Guaranteed Maximum Price for the*

project subject only to Trust variations. I trust we are in agreement and we can move the project forward to achieving the desired objective for both companies."

23. That e-mail clearly records that an offer was made and confirmation was sought of it. The crucial elements relate to the assumption of full design responsibility which includes the novation of the TPS contract, a price of £4.4 million for that and the contract to be a Guaranteed Maximum Price contract.

24. The next event of contractual significance was the telephone conversation between Mr Troup and Mr Shewan of 21 November 2004. There are conflicting accounts. Mr Shewan received a call in his car with his family present whilst on a Sunday outing. Mr Troup said he made it clear that he did not agree with the thrust of Mr Shewan's e-mail, in particular the part on the design. Both accept that there was discussion of Mr Troup's offer to give holiday employment to Mr Shewan's daughter. Mr Shewan said that Mr Troup wanted to know why the e-mail was sent. Mr Shewan said that there was no point by point discussion of the e-mail and agreed that there are discrepancies in recollection of what transpired on 19 November.

25. The next event after this telephone call, the object of which was not solely social, it was certainly sparked by Mr Shewan's e-mail, and Mr Shewan's assumption that his point of view expressed in the e-mail was not seriously questioned. However, Mr Troup felt the necessity to reply nonetheless. He did so shortly after the conversation. He wrote:

"Re your e-mail this morning and telephone conversation this afternoon, I confirm the following, as my interpretation of our agreement."

26. He confirmed exactly (what appears) in the recollection of Mr Shewan in his e-mail:

"(1) Richard Irvin would take full responsibility for the Mechanical and Electrical Service, Design and installation.

"(2) The TPS contract between Robertson and TPS will be novated to Richard Irvin subject to sight of the initial instructions to TPS, their written confirmation that the design meets the Employer's Requirements, their agreement to the sum that represents the balance and fees due to Robertson's; a reconciliation chronologically/numerically between the room data sheets and the Drawings upon which we based our price.

"(3) Richard Irvin will review all specialist subcontractors, benefits deriving from this review will pass to Richard Irvin. Deficiencies in the form of quantum or price will be met by Robertson.

"(4) All variations will be priced on an open book basis at prime cost plus our declared mark-up of 5 per cent.

"(5) As far as the matter of what is in our price relative to 'Builders' Work' is concerned, we should identify a checklist of what is contained within our price. For the avoidance of doubt we have not allowed for any coring through masonry and concrete and the erection of lamp stands.

"(6) Monthly meetings will be held with senior management.

"(7) Our offer of £4.4 million is a GMP based on information issued at the time of tender. The specialist subcontractors will be added to this figure on completion of the review, as will the balance of the TPS fees once this figure is confirmed. This figure also assumes no change to the existing programme and is exclusive of any trust variations and the implications in isolation that they might have on the programme.

"We are now proceeding to move things forward and to this end an early meeting with TPS would be welcomed as there will be outstanding information on room data sheets. We will be contacting the specialist subcontractors in an effort to identify any problems as soon as possible. Additionally, we have spoken to our personnel re site management team, et cetera, and I am happy to confirm that the envisaged personnel are in place."

27. I accept the evidence of Mr Shewan and Mr Fraser that the offer relating to full design was not qualified in the 19 November 2004 discussion. The object of that meeting was to persuade RIBS to accept full design responsibility with the attendant commercial risk compensated for. The TPS representative at the 17 November meeting had confirmed design compliance with the Trust construction requirements. Paragraph 1 of Mr Troup's e-mail confirms full acceptance of the design responsibility in terms:

> *"Richard Irvin will take full responsibility for M and E services, design and installation."*

This introduces two qualifications, one of due diligence in relation to novation of the TPS design, the confirmation of monies due to TPS.

28. Paragraphs 3 to 6 inclusive deal with matters clearly of importance to the parties but which are to be approached first through further discussion with the operational team. Paragraph 7 confirms that the offer price was a guaranteed maximum price. That in itself necessarily implies acceptance of a full design responsibility. Mr Troup accepts that the e-mail makes no mention of a supply and install contract. A guaranteed minimum price is referable only to a full design contract. There is no mention of a bolt-on contract for design or build or a fallback position of a mere supply and installation contract. Mr Troup would have known from the meeting of 19 November that the defendants had no intention to enter into a supply and installation contract with them, or indeed with anybody else at that time. Mr Troup knew from his discussions with Mr Shewan that there was no prospect of his being awarded a supply and install contract at a price of £4.3 million, when Emcor was £186,000 below. He had been

shown the tender report by Mr Shewan comparing the two tenders.

29. He says that they were not desperate for work but, in my judgment, they had a very keen appetite for work to replace that that was lost. That was evidenced by his willingness having tenderers on a supply and install basis on 30 October in the sum of £4,576,696 to reduce that to £4.3 million, effectively foregoing any element of profit. He also signified in his e-mail of 21 November that the envisaged personnel were already in place.

30. Mr Shewan and Mr Troup had no further contact by e-mail until 29 November 2004 where Mr Shewan e-mailed in the following terms:

> *"Derek, Just confirming we will be mobilising on Monday, 29 November as indicated. Relevant to this we will be contacting Rob Noble to this effect, we have also scheduled a meeting with TPS for next Tuesday. As far as Contract conditions are concerned, Sean McArthur will be contacting Gem as soon as possible."*

31. There had been contact of course at an operational regional level between the parties in the meantime. Clearly, as is evidenced from the e-mail exchange above, there are a number of significant matters proposed for discussion and future agreement between the parties. These included variations and the appropriate terms and conditions to be incorporated into any contract agreed. That these were of importance to the parties was underlined by their common experience in a former PFI contract, when an M and E subcontractor was removed because of unwillingness to agree terms and conditions and RIBS became the beneficiary and substitute subcontractor. Robertson's stance in relation to that matter indicated that those were essential terms in that context.

32. Mr Mort, on behalf of the claimants places reliance upon the meeting of 17 March 2004 when many operational practicalities common to a supply and install contract and full design GMP contract were discussed at regional level. In particular he is able to point to the express preference that NEE had expressed for the supply and install contract with a bolt-on element later, converting it to a full design contract. The reality is they were not the decision makers. Mr Troup of course from the outset knew that. The Group's directors in Scotland, characterised by Mr Troup as "The men from the Glen", were the decision makers. As he pointed out in evidence, there was an antipathy amounting to an animosity between the regional team and the Scottish masters.

33. The claimants entered on site at Morpeth on 29 November 2004 without the comfort of a letter of intent and without any agreement in place. They carried out only work on the Morpeth project and were paid. The documentation which was used and the administration that followed was that appropriate to a complex project and the operational staff understandably used documents to hand. Those would also be used in a full contractual setting. Operational staff and memoranda referred to "the contract". I regard that in the context of this letter as being a shorthand way to describe "the project". There is no significance, in my judgment, to be attached to these descriptions.

It is evident from internal documentation that the defendant from a relatively early stage reluctantly accepted that there would be no contract in place and valuation would be on a quantum merit basis. Mr Mort submits that this was an opportunistic way to contrive to defeat an adjudication. I reject that. The parties were not operating as if a contract for M and E supply and installation had been agreed between them merely because some of the organisational incidents of a construction contract were followed.

34. It is not for the court to imply a contract where matters considered essential by the parties had not been agreed and which remained outstanding. Applications for interim payments by the claimants refer to a contract value of £4.4 million. This shows the opportunistic way in which documentation was used that might be appropriate to a contract, but in this case certainly was not. No such price of course was ever agreed, according to the claimant's case.

35. Mr Troup admitted that the fundamental issue between RIBS and the defendants was whether RIBS could accept the full design responsibility and that issue remained until he left the company in June 2005. That continuing difference is demonstrated in the e-mail of Mr Shewan of 29 November 2004:

> *"Following our recent discussion following your offer to complete the M and E installation on the above project on a design and build basis, for the avoidance of doubt between the parties, your offer is an all-inclusive lump sum price only subject to variation instructed by the Trust. This is to include any changes directed by any statutory body or obtaining approval for any product/element which requires client approval through the RDD process. I trust this is a true reflection of our discussions to date. Regards, Derek."*

36. That e-mail was not replied to until 10 December 2004 by Mr Troup, who wrote:

> "Dear Derek, Reference to your recent e-mail re the above. The e-mail of 21st November 2004 is the basis upon which our offer was made. As we progress to obtaining clarification of the points I have made in the e-mail we will be able to eliminate any initial qualification. We are making progress and had a constructive meeting with TPS but as far as other issues are concerned, such as programme, et cetera, we still await certain information before we can categorically return to you on the basis of your recent e-mail. "

The defendants regarded the acceptance of the full design responsibility to be a fundamental and an essential term of any proposed contract to be agreed. Such a term would govern whether the contract would be a guaranteed maximum price, what the price will be and what it would in fact include.

37. There is no question that the defendants agreed to conclude a contract on any other basis. I reject the submission that because the claimants were committed to commence work, it must evidence an agreed supply and install basis. As Mr Troup conceded, nothing in the correspondence evidences such a default position, the bolt-on provision,

subject to due diligence. I am satisfied that the position was as to this essential term that an offer was made by Mr Troup on 19 November to enter into a GMP contract with full design responsibility at a price of £4.4 million. Other essential but relatively less important terms were still to be agreed between the parties. The scope of builders' work was still being questioned by RIBS on 21 November 2004. There was a difference between the parties as to the outcome of a proposed price review for specialist subcontractors. There was clearly no completion date agreed between the parties, although the claimants had seen the proposed programme. The claimants accept that the conditions under which they would accept novation to TPS' design were not fulfilled. Further, it seems on the evidence that the parties had not agreed on the meaning of cost for the purposes of making valuations, although Mr Fraser of the defendants thought that the difference was reconcilable.

38. Throughout there have been ongoing negotiations as to terms and conditions. I have referred to those before. It is clear that the defendants regarded the agreement on these to be essential. The claimant's position is that they did not intend to make an unqualified GMP offer to the defendants on 19 November. That they appeared to do so is clear from the evidence of Mr Shewan and Mr Fraser.

39. Mr Troup's equivocation or second thoughts are manifest in his oral evidence and in his e-mail of 21 November 2004, allied to his long silence.

40. Such offer as was made on 19 November was not the subject of any agreement. It is clear that as to further essential terms the parties were not in agreement. Such offer on 19th November as was articulated by Mr Troup withered when it became convenient. The purported acceptance of a GMP and the necessary concomitant of a full design responsibility constituted a position, giving advantage to RIBS. Because it was never unambiguously withdrawn by the responsive e-mail of 21 November it enabled them to go on site. Reference to the offer continued to be made by RIBS in documentation later in 2004 and 2005.

Conclusion.

41. There is no concluded subcontract. The parties were not *ad idem* as to the essential issues as to the design responsibility, price or whether there was to be a guaranteed maximum price for the contract. There was clearly no agreement on the other essential terms that I have mentioned earlier. Secondly, there was never any agreement whereby the defendants agreed to adjudicate their differences, either freestanding or to be implied.