

A Variation or not a Variation? That is the Question...

By **David S Longbottom** BSc(Hons) PgD(Law) MRICS MCI Arb, Senior Consultant



Modern day competitive tendering is a skilful art. A contractor normally goes through an exhaustive and costly process just to qualify to bid for a tender and, generally, only a contractor who is able to offer the most competitive tender bid wins the contract.

To offer the most competitive bid, pricing of the bills of quantities by a contractor is often strategic, whereby work stated in the bills of quantities may be priced not just according to the estimated cost but with regard to numerous other factors. For the purpose of reviewing what may happen in the event of a contractor strategically pricing a tender, consider the following hypothetical example:

- Contractor 'A' considered that the quantity of 300mm diameter water mains was under-measured in the tender documents and priced these at a higher than normal rate of HK\$4,000 per linear metre. To reduce the tender sum it also strategically reduced the rate for 400mm diameter water mains, which it considered were significantly over-measured in the tender documents and priced these at a lower than normal rate of HK\$2,000 per linear metre.
- Contractor 'A's tender was lower than all the other tenders.
- As is normal, prior to the contract award, the engineer questioned the tendered rates, which he considered were abnormally high and low.
- Eventually, the employer and contractor 'A' entered into a contract for the works and this was based on the contractor's tender including the strategically priced water main items.

So, what can go wrong?

For various reasons, it is common for an engineer to order variations during the progress of the works. Most contracts specifically provide for this scenario. In the Government's General Conditions of Contract for Civil Engineering Works (1999 Edition), the circumstances under which the engineer can order variations are limited. GCC Clause 60 provides that variations shall be:

"... necessary for the completion of the Works ...";

"in his [the Engineer's] opinion be desirable for or to achieve the satisfactory completion and functioning of the Works ...".

Sometimes, after contract award and notwithstanding that the rates set out in the contract had been accepted by the employer, the engineer orders variations to the strategically priced items varying them with works which were lower and less 'profitable' to the contractor.

So, in our example, the engineer ordered a variation to omit the 300mm diameter water mains and replaced them with 400mm diameter water mains.

By ordering this variation, the contractor would not recover the monies it expected to recover and upon which its tendered bid was structured and it would lose money on the underpriced 400mm diameter water mains. The adverse implications upon the overall financial position of the contractor were great.

Was the variation order valid?

It is common knowledge in construction contracts that unless specifically allowed for, an employer cannot omit works from the contract and give these works to others. The bills of quantities are not a 'shopping list' whereby an employer can elect its contractor to construct certain works but not others. But, in this example, work was not taken away from the contractor, it was varied.

So, in the example:

The contractor protests against the validity of the variation and the engineer responds with the argument that the variation was necessary to improve the functioning of the Works.

The Contractor then turned to the particular wording of the variation clause (GCC Clause 60) to see if the engineer was empowered to issue such an instruction.

The contractor determined that if the use of the word "and", in GCC Clause 60, is not conjunctive and the engineer can order variations relating solely to the "functioning of the Works", without the variation as well relating to the "satisfactory completion ... of the Works", then it is submitted that there may be an argument that the engineer is not empowered to order variations to achieve better "functioning of the Works", if the original design was already capable of "functioning" adequately. It is considered that GCC Clause 60 provides the engineer with the power to order variations when the original design was not adequate for the purpose intended, not to order variations for the "[improved] functioning" of the works.

Does the Contractor have to follow the variation if it is invalid?

GCC Clause 15, read with Clause 2(4) suggests that if the instruction is a "matter related to the Contract" then it appears that the contractor did have to comply with the instruction.

Clause 15 provides:

"... the Contractor ... shall comply with and adhere strictly to the Engineer's instructions ...".

Clause 2(4) provides:

"No act or omission by the Engineer ... shall in any way operate to relieve the Contractor of any of his duties, responsibilities, obligations or liabilities imposed upon him by any of the provisions of the Contract."

What remedy is open to the Contractor if the variation is invalid?

The above submission that the wording of GCC Clause 60 limits the engineer's power to order variations and does not allow the engineer to order variations for improved functioning of the works may be strengthened by: (1) the amendment to GCC Clause 60 in some contracts to specifically provide for variations that are desirable for improved or better economic functioning of the works; and (2) the use of very broadly worded variation clauses, like those currently seen in the KCRC's Form of Contract.

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If the contractor's interpretation is correct, then the engineer has failed to properly administer the contract and thus the primary appropriate remedy would be damages, which are generally understood, "*so far as money can do it, to be placed in the same situation with respect to damages*" as if the original works had been performed. Under the example, the contractor is, therefore, entitled to claim recovery for loss of profit resulting from the engineer's invalid variation.

Strategic pricing is often a risk and, in BERA's experience, it fails to achieve the objective more than it succeeds. In the example, it ought to have been obvious to the contractor that the engineer could vary the size of the watermains when it priced the 400mm diameter watermains at a lower rate than the 300mm diameter watermains. Although the contractor may be able to win its legal argument, like all disputes, it is an expensive experience and one to be avoided by realistic strategic pricing.