In the spotlight of Arcadis Consulting v AMEC [2018], what are the legal and practical consequences for drafting and responding to LOIs and pre-construction services agreements?

David Sears QC

08.11.11: Buchan to Hyder:

"Please find attached the updated documents we propose to use for design work. The Terms and Conditions document is merely tidied up as I understand. The Protocol document is intended to be the instrument that creates the Agreement. It will be necessary to agree particular schedules for each contract in addition to these and further minor amendments may still be required. We intend to use the documents for the Wellcome Building works subject to your agreement and we will be providing more detail shortly. Accordingly I would be grateful if you could make any comments you may have as soon as possible as we are about to start your works on the above basis on this contract."

Clause 2A ('Limit of Liability'):

"The Consultant's liability for defective work under the Agreement shall be limited to whichever is the lesser of the following:

(a) The reasonable direct costs of repair, renewal and/or reinstatement of any part or part of the Sub- Contract Works to the extent that the Client incurs such costs and/or is or becomes liable either directly or by way of financial contribution for such costs; or

(b) The sum stated in Schedule 1."

ARCADIS CONSULTING (UK) LTD (formerly HYDER CONSULTING) v AMEC (BCS) LTD (formerly CV BUCHAN LTD)
[2015] EWCA Civ 1146

Schedule 1, at paragraph M:

"*the limit, if any, on the Consultant's liability for defects in the design (as referred to in Clause 2A) is…*"

09.11.11 Hyder to Buchan (re the Wellcome Centre):

"I understand the discussions between David Shotliff (Buchan) and Stewart Tyler (Hyder) on the Design Services Agreement are well advanced. However, it may still take a little time before this Agreement is formally signed. In the meantime I should be grateful if you would confirm that you would underwrite our fees for the design and drawing work and in order that there is a basis for these, propose the following schedule of rates…"

13.11.11: Buchan to Hyder in reply:

"Your work done under this instruction is to be on the basis of our instructions from Wates and the conditions and terms detailed in the Protocol Agreement, Design Consultancy Terms and Conditions in your possession at present.

It is our intention to enter these Agreements with yourselves in their present form with such minor amendments as may be mutually agreed and to award you the Design Works on the Wellcome Building Precast Concrete Package in the sum of £55,000 as previously agreed.

Pending formalisation of these Agreements, we will pay you for work done under this instruction up to a maximum of £10,000.

Once the Agreements are executed their terms and conditions shall supersede this letter and shall govern any work done retrospectively."

12.02.02 Hyder to Buchan (re Castlepoint Car Park):

"It was noted that the formal detailed design commencement date and Frozen Scheme date are both 11 February 2002 and that you wished to commence on that date. I confirm that the start has been made but should be grateful for a formal letter of instruction and limitation of expenditure subject to preparation and signature of the services agreement in due course."

06.03.02 Buchan to Hyder (the first letter):

"…we confirm our instructions to yourselves to commence design and detailing work on this project.

Your work is to be carried out in accordance to the Protocol Agreement and Terms and Conditions associated that we are currently working under with yourselves, the Design Scope and Deliverables document for Castlepoint Car Park previously provided (copy attached) and your quotation of 28 November 2001 in the sum of £285,000…

Pending finalisation of the Agreement and our directions on this project, we will pay you for work done under our instructions up to a maximum of £56,000.

Once the Agreement is executed and the Schedules for this project completed, their terms and conditions shall supersede this letter and shall govern any work done retrospectively…" [Emphasis added]

06.03.02 Buchan to Hyder (the second letter):

"*Design Agreement*

We wish to formally confirm the basis of our design and detailing work placed with yourselves.

We consider that the Protocol Agreement, Terms and Conditions, Contract Schedules and Instructions documents should apply to all work executed for ourselves. Copies of the documents are enclosed. There are some minor amendments, in particular to the limitation of liability clause. We believe that they should be acceptable to yourselves.

We trust that you will be able to agree to execution of the Protocol Agreement and would appreciate your confirmation…"

At Schedule 1, at paragraph M, it now read:

"*The limit, if any, on the Consultant's liability for defects in the design (as referred to in Clause 2A) is £610,515 – 10% of sub-contract packages for uninsured losses*"

ARCADIS CONSULTING (UK) LTD (formerly HYDER CONSULTING) v AMEC (BCS) LTD (formerly CV BUCHAN LTD)
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Coulson J concluded:

"I am conscious that, on my analysis, there is no limitation of Hyder's liability, despite the fact that every set of proposed terms and conditions included some sort of provision to that effect (albeit in radically different terms). Superficially, therefore, this might be regarded as a harsh result for Hyder. But on a proper analysis, I am bound to conclude that this was the inevitable consequence of Hyder's dilatory and often uncooperative approach to the proposed Protocol agreement and the negotiation of the terms and conditions…"

BRITISH STEEL CORPORATION v CLEVELAND BRIDGE ENGINEERING CO LTD
[1984] 1 All ER 504

Goff J:

"As a matter of analysis the contract (if any) which may come into existence following a letter of intent may take one of two forms: either the may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other; or there may be what is sometimes called an 'if' contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usually remuneration for his performance. The latter transaction is really no more than a standing offer which, if acted on before it lapses or is lawfully withdrawn, will result in a binding contract"

BRITISH STEEL CORPORATION v CLEVELAND BRIDGE ENGINEERING CO LTD
[1984] 1 All ER 504

Goff J:

"…if the buyer asked the seller to commence work 'pending' the parties entering into a formal contract, it is difficult to infer from the buyer acting on that request that he is assuming any responsibility for his performance, except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into. It would be an extraordinary result if, by acting on such a request in such circumstances, the buyer were to assume an unlimited liability for his contractual performance, when he would never assume such liability under any contract which he entered into…" [Emphasis added]

ARCADIS CONSULTING (UK) LTD (formerly HYDER CONSULTING) v AMEC (BCS) LTD (formerly CV BUCHAN LTD)
[2015] EWCA Civ 1146

Lessons to be learned:

- Ordinary rules of construction and incorporation apply
- Working under a LOI is inherently risky
- Do not do it! Delay work if necessary until key issues are agreed
- If you must do it, exercise extreme care drafting the LOI and/or the response
- Clearly state any limits of liability
- Beware of relying upon the incorporation of terms which have not been fully agreed
- Be clear in correspondence and keep a complete and accurate record
- Make it 'subject to contract' if you do not want to be bound