Cerno

Distinguish; determine; resolve.

Date 21 January 2016

Welcome

Welcome to the first newsletter from Cerno for 2016. Already the year is throwing up some interesting issues for discussion and I look forward to be able to convey my thoughts on a regular basis. This newsletter was to be devoted to a non-controversial topic; however the decision yesterday, in the High Court of the Republic of Trinidad and Tobago, in a case between Bynoe Rowe Wiltshire Partnership and the State evoked such strong emotions that I felt compelled to make the case the subject of my article.

Contractor loses $14 million!

Bynoe Rowe Wiltshire Partnership (BWRP) is an architectural firm based in Trinidad and providing architectural design and construction supervision services and related surveying and consultations. As is the case for many construction orientated operations in the twin island Republic, it gets a not insignificant portion of its work from the public sector.

Between 2008-2009 BWRP was engaged in undertaking refurbishment work on a number of schools. For reasons that are largely irrelevant to my points herein, BWRP was owed money for those works but was not paid. In fact the amount claimed by BWRP as owing to it was approximately $14 million (or approximately US$2.25 million).

I'm sorry; you're out of time!

BWRP eventually took its claim to court and the Honourable Judge, Justice Frank Seepersad dismissed the claim on the grounds, in accordance with the Defence entered, that BWRP did not bring its claim within the four year limitation set out in statute law.

So why has this case prompted such emotion for me? I have no connection with BWRP. In the eight years I have lived and worked in Trinidad & Tobago I have been engaged by public and private sector clients, employer organisations, consultants and contractors alike; I have no strong allegiances. What concerns me is that this case is stereotypical of many I see and of which I have been warning privately. The situation can be avoided and, before seeing the transcript of the Judgment, I hazard to guess that it could have been avoided for BWRP.

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Looking at the example initially from the side of the contractor there is a common complaint that the employer organisation does not pay on time or does not pay what the contractor claims it is entitled to, yet there is a persisting reluctance with contractors to invoke the dispute resolution provisions of the underlying contract. I appreciate the reluctance to jump straight in at the first sign of a delay in payment, as late payment is an all too regular occurrence; however, to delay acting for so long that the right of action is lost through the effluxion of time is beyond my comprehension. Surely no personal or other affiliation can be so strong as to cause anyone to risk losing such large sums of money. Even if the contractor is averse to 'biting the hand that feeds' there must come a point in time where the fear associated with taking action is outweighed by the survival instinct.

In my personal experience within this jurisdiction, contracting organisations and consultants do not do enough to protect themselves. For some 10 years there has been regular training given in the management of construction projects under the FIDIC forms of contract, which documents are used extensively on construction projects; yet the attendance by representatives from contracting organisations hardly ever Rachel double figures in an audience numbering 40 to 60 persons. My advice in this respect is to learn what you are doing wrong and act on that; don't keep repeating the same errors. You may not think that spending money on attending courses has value but I can guarantee that you will see a positive move in your balance sheets if you do and if you embrace what is being taught.

The obverse side of this particular 'coin' is the position of the employer and I am often drawn to consider why employer organisations are reluctant to pay, regularly, on time and in full discharge of the proper entitlement. For me it comes down to two recurring factors; lack of financing and acceptance of responsibility. That is oversimplifying as the reasons are many fold but, for me, can be reduced to those categories. What is more, the local market is not unique in experiencing those difficulties but the approach to resolving them is yet to find a balance point.

Without going into detail, almost all construction projects come with problems; even the most successful do. Invariably problems cost money somewhere in the chain of participants; but why should the burden be with the contractor, who in many cases is the party least able to carry the load?

His Honour Judge Seepersad did comment, somewhat critically, on the actions of the State by saying that when the State advances a technical, legal argument so as to avoid the payment of a legitimate debt, such an action can erode significantly the public trust and confidence in the Executive and can lead to a heightened state of unlawfulness and anarchy. I have sympathy with this view but to a limited extent only. If the Honourable Judge had encouraged the State to pay its debts on time, or not to enter into contracts that it could not afford from the outset I would have not had any issue; but I do not support a suggestion that a legitimate legal defence should waived, especially in the circumstances of the 'innocent' party not availing itself the remedies open to it.

My advice, if it carries any value, is to both parties; both can improve their 'game'.

A related issue for further consideration, but which I will defer to a later newsletters is how both the State and the private sector might benefit from legislative changes.

Other News

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Upcoming Events

It is intended that future newsletters will include details of local events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

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