C.A. No. 117950

NOVA SCOTIA COURT OF APPEAL
Cite as: Nova Explosives Ltd. v. Winbridge Construction Ltd., 1995 NSCA 212

Hallett, Chipman and Flinn, JJ.A.

BETWEEN:

NOVA EXPLOSIVES LIMITED Appellant - and - WINBRIDGE CONSTRUCTION LIMITED Respondent	)	John D. MacIsaac, Q.C. for the Appellant Les D.M. Doll for the Respondent Appeal Heard: November 20, 1995 Judgment Delivered: December 22, 1995

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Hallett and Chipman, JJ.A. concurring.

FLINN, J.A.:

The appellant (Nova) applied to a judge of the Supreme Court of Nova Scotia, in Chambers, for an order to appoint an arbitrator to resolve a dispute between Nova and the respondent (Winbridge) arising from the terms of a construction sub-contract.

The Chambers judge dismissed the application, finding that arbitration was not available to Nova under the provisions of the particular contract documents.

Nova appeals that decision, submitting that the Chambers judge erred in law in concluding, from the terms of the contract between the parties, that there was no contractual agreement to submit this dispute to arbitration.

Winbridge is general contractor to Defence Construction Canada with respect to a project at CFB Halifax.

Winbridge entered into a sub-contract (in the form of a purchase order) with Nova providing for rock removal at the site. The purchase order was a "unit price" contract, based upon estimated quantities of rock to be removed as set out in the form of tender.

In the purchase order, the terms of the General Contract between Winbridge and Defence Construction Canada Limited (the General Contract) are incorporated as follows:

> "1. ..... the General Contract and the plans, specifications and conditions of the General Contract ..... in so far as they relate to the Work, shall be binding upon the Contractor and Sub-Contractor."

The General Contract contains provisions to amend the price per unit of material, in a unit price contract, if the quantity of material (rock removed from the site in this case) is either less than 85% of the estimated total quantity or in excess of 115% of the estimated total quantity.

It is common ground, between Nova and Winbridge, that the actual quantity of rock, removed from the site, was less than 85% of what was estimated in the tender form. That being the case, Nova would be entitled to an upward adjustment of the unit price because it was necessary to mobilize, and demobilize, for more work than was actually

required.

There is, however, dispute as to the amount of Nova's entitlement; and, as well, there is dispute as to the process by which Nova's entitlement is to be determined.

Nova's position is that its work was completed on the site on November 4th, 1994. Its requests, of Winbridge, to have the unit price amended have not been dealt with. It has given notice of its claim directly to the owner, Defence Construction Limited, pursuant to the general conditions (GC) of the General Contract. GC #42.1 provides as follows:

> "42.1 Her Majesty may, in order to discharge lawful obligations of and satisfy claims against the Contractor or a subcontractor arising out of the performance of the contract, pay any amount that is due and payable to the Contractor pursuant to the contract directly to the obligees of and the claimants against the Contractor or the subcontractor..... ".

Since the matter still has not been resolved, Nova wants the matter referred to arbitration pursuant to GC #42.3 which provides as follows:

> ""42.3 The Contractor shall, by the execution of this contract, be deemed to have consented to submit to binding arbitration at the request of any claimant those questions that need be answered to establish the entitlement of the claimant to payment pursuant to the provisions of GC42.1 and such arbitration shall have as parties to it any subcontractor to whom the claimant supplied material, performed work or rented equipment should such subcontractor wish to be adjoined and the Crown shall not be a party to such arbitration and, subject to any agreement between the Contractor and the claimant to the contrary, the arbitration shall be conducted in accordance with the Provincial or Territorial legislation governing arbitration applicable in the Province or Territory in which the work is located.

Winbridge, while acknowledging that the quantity of rock removed was less than 85% of estimated quantities, says that Nova has no claim because it did not give timely notice under the "change of soil conditions" provisions in the general conditions.

Alternatively, that its claim is fixed under the provisions relating to "amendments to the unit price table" (GC#47). In the further alternative, Winbridge contends that arbitration is not available under the contract documents.

It is clear that Nova has a legitimate dispute which must be resolved. The only issue before this Court is whether that dispute must be resolved through arbitration. If it must be resolved through arbitration, the amount of Nova's entitlement, and the question of whether or not Nova proceeded properly under the contract, are questions for the arbitrator, not for this Court.

It is necessary, then, to examine the contract documents to see what provisions there are for resolving such a dispute.

Clause 7 of the purchase order, between Nova and Winbridge, provides as follows:

> "7. Any dispute arising out of this order shall be determined in the same manner as disputes between the Owner hereinafter referred to and the Contractor are to be determined under the provisions of the General Contract and as if the dispute arising out of this order was a dispute between such Owner and the Contractor but if the General Contract does not contain provisions for the determination of disputes between such Owner and the Contractor then any dispute arising out of this order shall be determined in accordance with the general conditions of the C.C.D.C. form of contract, current edition, a copy of which may be inspected at the Contractor's office during ordinary business hours." {Emphasis added}

Therefore, Nova's dispute with Winbridge shall be determined in the same manner as Winbridge resolves its disputes with the owner, under the terms of the General Contract.

GC#47-GC#50 of the General Contract set out a specific, and detailed, procedure for dealing with the precise dispute at issue here. These General Conditions provide, initially, that the contractor and the engineer (the owner's representative) may, by agreement, amend the unit price of a unit price contract. There is provision for negotiation between the

contractor and the engineer. Finally, failing resolution of the matter by negotiation, GC#50 establishes a formula for determining the matter.

The documentation which was before the Chambers judge indicates that when Nova advanced its claim, for an amended unit price for the rock removal, directly to Defence Construction Limited, Defence Construction Limited responded to Winbridge by fax. In that fax, dated January 3rd, 1995, Defence Construction Limited advised Winbridge that the matter was to be dealt with by negotiation in accordance with GC#47. On the next day, January 4th, 1995, Winbridge sent the fax of Defence Construction Limited to Nova, and asked Nova to provide a breakdown of its claim.

Counsel for Winbridge, in his affidavit which was filed in this matter, deposes to the fact that several requests were made of Nova, by Winbridge, to provide further details concerning their claim so that it could be properly assessed; and that those requests were never dealt with by Nova. This deposition was not disputed.

Since it is not clear, from the material which was before the Chambers judge, as to what, if any, negotiations took place between Nova and the engineer with respect to this matter, counsel for Nova was questioned during the course of the hearing of this appeal as to what negotiations took place. Counsel advised the court that there were no negotiations.

Counsel for Nova takes the position, essentially, that Nova can ignore the provisions of GC#47-GC#50; and, as an alternative, have its dispute resolved by arbitration under GC#42.3 (set out earlier in his opinion). I do not agree.

The arbitration provision in GC#42.3 applies only to claims made pursuant to the provisions of GC#42.1.

GC#42.1 sets up a mechanism whereby the owner (in this case Her Majesty the Queen because Defence Construction Limited is a Crown corporation) can deal directly with the claim of a third party against the General Contractor or a Sub-Contractor. This

mechanism exists because the third party cannot file a lien against the Crown. It is these such claims to which the arbitration provision of GC#42.3 applies.

I do acknowledge that, by the express terms of the purchase order, all general conditions of the General Contract apply to it. However, the purchase order also expressly states that disputes between Nova and Winbridge "shall be determined" in the same manner as disputes between the owner and the general contractor are to be determined under the provisions of the General Contract.

The purpose of the arbitration provision of GC#42.3 is not to resolve disputes between the owner and the general contractor. Therefore, since the arbitration provision of GC#42.3 is not a method by which Winbridge would resolve a dispute which it had with Defence Construction Limited, then, by the express terms of the purhcase order, it is not a method by which Nova resolves its dispute with Winbridge.

On the other hand, under the terms of the General Contract, the owner and Winbridge have agreed to a specific and detailed method for dealing with the very dispute which Nova wants resolved (GC#47-GC#50). Since this procedure does not involve arbitration, Nova is not entitled to an order appointing an arbitrator.

In my opinion, therefore, the Chambers judge made no error in law in refusing Nova's application for the appointment of an arbitrator.

I wish to make it clear, that in coming to this conclusion, I am not accepting the position advanced by counsel for Winbridge, that Nova did not give the required notice of an intention to claim extra expense arising out of a change in soil conditions (GC#35.2.1). Winbridge could not have determined that the quantities of rock removed from the site were more, or less, than the estimated quantity until it completed its work. Nova's dispute arises, not because soil conditions were different than what was actually contemplated; Nova's dispute arises because there was less, in quantity, of rock removed from the site than was

initially contemplated. GC#47.-GC#50 specifically deal with this matter. GC#35.2.1. has no application.

I would dismiss this appeal with costs to the respondent in the amount of $750 inclusive of disbursements.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.

C.A. No. 117950

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

NOVA EXPLOSIVES LIMITED	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
WINBRIDGE CONSTRUCTION LIMITED	)	
	)	FLINN, J.A.
Respondent	)	