Claim No: 435469

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: The Water Shed Conditioning Ltd. v. Bird Construction Ltd., 2015 NSSM 38

BETWEEN:

THE WATER SHED CONDITIONING LIMITED

Claimant

- and -

BIRD CONSTRUCTION LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on April 14, May 12 and May 28, 2015

Decision rendered on August 24, 2015

APPEARANCES

For the Claimant	Michael Tweel, counsel
For the Defendant	Ben Taylor, Brian Paquette and Colin Peters, project managers

BY THE COURT:

[1] The Claimant was a subcontractor chosen to construct a large geothermal field, as part of the project to build a new Northeast Nova Scotia Correctional Facility in Pictou County.

[2] The Defendant is a large, established construction company hired by the government to act as the “contractor” - which I take to be, in the colloquial sense, a general contractor.

[3] The subject of the Claim is the last payment of $23,000.00 (including HST) which the Claimant says is owing, following the completion of the project. The Claimant has already been paid the balance of the $400,000.00 subcontract.

[4] The Defendant has raised a number of defences and counterclaims, which - if accepted - would excuse it from paying the claimed remaining amount, and would also render the Claimant liable for approximately $20,000.00 to the Defendant.

[5] There is no real distinction, in principle, between the items claimed as “defences” and those styles as counterclaims. They are all “backcharges” - as that term is used in the commercial context - and I will refer to them as such.

[6] This raises a potential question of jurisdiction for this court, as what the Defendant is raising amounts to a counterclaim of some $40,535.75. This is well in excess of the court’s monetary jurisdiction limit of $25,000.00. The question

turns out to be academic, however, in light of my findings as reflected later in this decision, so I will not say more about the jurisdictional point.

[7] Construction of this facility was a large and complex project, overall, involving many people and companies, and not everything went smoothly. It appears to have been completed more than a half-year behind schedule. The geothermal part of the project was delayed in getting started, and ran into a number of issues along the way, some of which contributed to the delay and/or created additional cost. The Defendant blames the Claimant for these problems, and seeks to enforce them as contractual breaches. As these reasons will detail further, I regard that characterization as largely unfair.

Ross Refrigeration

[8] The most substantial backcharge is for the hiring of a company called Ross Refrigeration ("Ross"). The Defendant says that Ross was hired to provide a site foreman and supervision for the Claimant's crew. The Defendant says that this was necessary because the Claimant did not designate anyone to fulfill that role. The total amount paid to Ross (and mentioned in the defence) was $21,519.38, consisting of three invoices dated October 25, 2013 ($12,161.25), November 21, 2013 ($7,978.13) and January 21, 2014 ($1,380.00). Partway through the trial, a further Ross invoice surfaced, dated December 13, 2013 in the amount of $5,347.50, and the Defendant sought to amend its defence and counterclaim to include this amount. I accept that its non-inclusion earlier was through inadvertence. The result is that the Defendant seeks to charge the Claimant $26,866.88 for Ross's work.

[9] By the strict terms of the contract, the Claimant was obliged to supply a "full-time supervisor/foreman on site." (Appendix B, clause 8) The Claimant did not do this because, the owner of the Claimant company, Stephen Burke, believed he was supplying all of the necessary oversight by other means, including his own project management from a distance (i.e. his office in Halifax Regional Municipality). He was also satisfied that his onsite workers could fulfill that role, without any person performing a strictly oversight role.

[10] It is likely that the lack of a dedicated foreman led to the Claimant being unrepresented at some site meetings, and being slightly "out of the loop" at times. Mr. Burke appears to me to be a practical, results-oriented individual who did not entirely respect the letter of the contract that he signed. While I am not convinced that this placed him in actionable breach, it reveals a difference in culture and attitude which doubtless created some frustration and challenges for the Defendant.

[11] The construction contract has a procedure for enforcement. Article 10(b) required the Defendant to give three days' notice - in writing - of any alleged default. This in turn required the allegedly defaulting party to cure the default, failing which the Defendant could take steps to remedy the default itself at the defaulting party's cost.

[12] Of course, merely giving notice of a default does not establish that the other party is in default.

[13] It was not until December 5, 2013 that the Defendant purported to serve such a notice on the Claimant respecting an alleged failure to provide a

dedicated foreman. The email from the Defendant's project manager, Colin Peters, said that unless the Claimant did so, it would "hire Ross Refrigeration on a full-time basis" at the Claimant's cost.

[14] The Claimant did not accept that it was in default, and argued the point in a series of emails. The Defendant did not follow this up with any formal statement that Ross had been, or would be, hired. It was not until months later when the matter became litigious that the Ross invoices surfaced and the claim was made that the Claimant was responsible for them.

[15] The biggest problem with the Ross invoices is that almost all of the work referenced in them occurred before the notice of default. Mr. Burke testified that he obviously knew that Ross was onsite during October and November of 2013, but that he had no idea that Ross was supposedly acting as a foreman or site supervisor for his crew. He said that Ralph Ross (the principal of Ross Refrigeration) never told him that he was acting in that role. Given that Mr. Ross was not called as a witness, and there is no other contradictory evidence on the point, Mr. Burke's statement stands unchallenged.

[16] Mr. Burke may well have wondered why Ross was there, and where he fit into the budget. He conceded that Ross was helpful. But in the end, the Claimant cannot be held responsible for the hiring of Ross allegedly on his account, absent reasonable advance notice that this would be the arrangement.

[17] Had the Claimant been advised before any of the Ross work was done that Ross was to be hired, and that the cost would be coming out of Water Shed's contract, Mr. Burke would have had a chance either to argue the point or

satisfy the Defendant's requirement in some fashion. I am certain that Mr. Burke would never have given the Defendant what amounted to a blank cheque for Ross to work away and charge large amounts on the Claimant's account.

[18] I therefore find that the invoices in the amounts of $12,161.25 and $7,978.13 cannot be charged to the Claimant, as there was no advance notice to support the charge.

[19] This leaves the two later invoices to be considered. At best, the Defendant could claim for the work done after the expiry of the 3-day notice and the opportunity to cure the default. Looking behind the invoices, it appears that the amount of Ross's charges for work done on or after December 8 totals $3,000.00, plus HST, with the balance on those invoices being for earlier work.

[20] The evidence of what Ross did in support of those charges is thin, in the extreme. The invoices refer to "consulting work." There is no reference to acting as foreman or supervisor. Ross was not called as a witness to confirm exactly what he was doing, and how much - if any - of the work would be considered supervision.

[21] I am more inclined to the view that the Defendant hired Ross as an expert consultant much earlier, probably in October, for reasons of its own. Perhaps it lacked faith that the Claimant could perform the contract without an additional expert on site, as a fail safe. In the context of a fairly large and complex project, this may have been a good idea and money well spent. But the effort to re-brand this role as supplying the missing foreman/supervision lacks credibility. There are a number of things that call into question the Defendant's good faith, in this respect. For one thing, the Defendant did not attempt to backcharge

these invoices to the Claimant until after it had been sued, well over a year after those invoices had been rendered. Secondly, the failure to call Ross as a witness raises an inference that his evidence would not have been helpful.

[22] In the result, I find that the Ross invoices do not qualify as legitimate backcharges. Even if the Claimant were in default of supplying a foreman or supervisor, these invoices do not qualify as costs directly attributable to that alleged breach.

Other backcharges

[23] One backcharge is for the cost of glycol provided by another contractor. The Claimant has conceded that it is responsible for $847.29.

[24] Another charge is for “breaking frost.” The Defendant has claimed that the Claimant should be responsible for $1,759.50 as the cost of breaking up frost in the ground on February 17, 2014. This is based on an extra charge claimed by Dexter Construction, which was involved in this project.

[25] The theory underlying this charge is that the Claimant was responsible for delays that caused the project to extend into the winter months. The corollary to that proposition is that had drilling and construction of the geothermal happened earlier in the season, there would have been no frost needing to be broken.

[26] I find it quite unfair to place the blame on the Claimant for the timing of its work. The project was behind schedule for reasons that had nothing to do with the Claimant. Back in September 2013, Mr. Burke had been asking for access

to the site in order to start and get ahead of the cold weather. While the geothermal system was obviously important to the project, it was apparently not shown on the earlier versions of the master schedule, and clearly was not driving the agenda

[27] It is fair to conclude that the geothermal work was challenging, and may have taken longer than everyone had hoped, and longer than projected when they finally got around to agreeing to a schedule. But there is nothing that was pointed out to me in the contract that required this work to be done in a confined period of time.

[28] Winter construction can entail extra cost. Frozen ground had to be broken. I see no contractual basis to place this burden on the Claimant.

[29] Another fairly minor backcharge was $1,0125.80 for the cost of excavating and locating a leak in the geothermal firld on March 17, 2004. The company that did this work was also Dexter.

[30] I accept that this work had to be done, and the Claimant has not provided a convincing argument as to why it should not be responsible. It must stand by its work, and if someone else had to perform a repair, the Claimant should be responsible.

[31] There was also evidence from one of the Defendant's witnesses to the effect that Mr. Burke had verbally agreed to this charge. Mr. Burke had the opportunity to, but did not, deny that he had made this statement. As such, I am prepared to allow this backcharge.

Purging the field

[32] The Defendant seeks to hold the Claimant responsible for two invoices paid to another contractor, Atlantica Mechanical, namely an invoice for $6,025.40 dated June 24, 2014 and another for $4,010.87 dated June 28, 2014.

[33] Atlantica's main job was to supply and install all of the geothermal equipment inside the four walls of the building structure. This included a small amount of piping to route the glycol solution in and out of the heat exchange equipment. As already discussed, the Claimant's contract was to drill the geothermal wells, run the piping through this network of wells, and fill it with the glycol solution.

[34] Of course, there is a point where the two systems had to be connected together. As I understand the evidence, there are valves just inside the building which, when closed, isolate the "outside" from the "inside." However, it also appears that because of the placement of the valves, the "outside loop" includes a small amount of Atlantica piping.

[35] One of the last steps before the system would become functional is for the fluid to be subjected to various tests, including concentration of glycol (to water), pressure and purging of all air and debris. There is nothing abnormal about a large system accumulating a certain amount of air, most or all of which was originally dissolved in the water or glycol, and which over time will bubble up to be purged. Large pockets of air can be damaging to the system because it can

cause a pump to overheat and burn out. So purging the system of air is a necessary and usual step.

[36] By the time the Defendant was getting ready to join the two systems and perform these tests, most of the Claimant's work had been done and it would not appear that there were any Water Shed personnel on site on a consistent basis.

[37] On May 30, 2014, the project manager for Atlantica noted in an email to the Defendant that "things are not coming through very well after we combined the two systems." The email suggested that Atlantica would continue to monitor the system, but it would be at an extra cost. Ben Taylor of the Defendant forwarded this email to Mr. Burke on that same day, and gave the Claimant three days' notice under the contract to "rectify the problem," failing which the work would be done by another contractor at the Claimant's expense.

[38] In my opinion, the response from the Claimant ought to have been to send a qualified person to the project immediately, to see the problem first-hand and do whatever was necessary to ensure that the Water Shed side of the system was free of air and debris.

[39] The Claimant's response by email that same day was only partly responsive to the issue. Mr. Burke insisted that the required amount of glycol was already in the system and that "you just have to run it until all is homogenized." On that point, he was undoubtedly correct.

[40] By then the relationship between the Claimant and the Defendant, at least from the Claimant's point of view, had become highly conflictual, with Mr. Burke threatening legal action for money that he believed was overdue.

[41] Mr. Burke also began to express his concern that the Defendant was habitually leaving things until the last minute, then panicking and demanding immediate action without regard to whether the subcontractor (such as the Claimant) could reasonably respond.

[42] Only one of the issues being raised by the Defendant was glycol concentration. As noted, this concern was likely premature as, once the fluid was circulated for a period of time, the glycol became more evenly distributed and normalized.

[43] The larger issue was purging the system of air. Mark Delorey, the site mechanical supervisor for Atlantica, described the work done by his company. Before the two sides of the system were joined, Atlantica circulated its own side of the system until it flowed freely without air. At the request of the Defendant (because the Claimant was not responding to requests that it do so itself) Atlantica began to circulate the Water Shed side of the system for approximately two weeks until it eventually stopped giving off air. At that point the two sides could be safely joined.

[44] The Claimant has a number of objections to paying for Atlantica to do this work. It argues that it had already purged its side of the system back in March, and that there was no legal obligation to do so again. I cannot accept this argument. The Claimant must be taken to have understood that it can take a long time for a large volume of fluid to be purged of all dissolved air, and that some follow up might be required. The Claimant ought to have been prepared to stand by its work.

[45] A more legitimate concern is the amount of time and work it allegedly took for Atlantica to purge the system. According to the invoices, over a period of approximately three weeks there were usually two men spending entire days at a time "bleeding air out of the geothermal system." It appears that some of this time occurred after the two sides were joined together.

[46] According to Mr. Burke, which evidence makes sense, running the system to purge it of air does not require constant monitoring. The system can be left alone to run for hours at a time, and then someone needs to allow the trapped air to be released.

[47] While I do not doubt that Atlantica actually spent the time it did, I have a hard time believing that all of the work was directly connected to purging the Water Shed side of the system. More likely than not, the Atlantica people were attending to other tasks associated with their own extensive system. If I am wrong about that, then I find that their efforts were in the nature of overkill - an excessive response to the need to purge the exterior geothermal field. The Defendant would not be entitled to backcharge any more than was necessary to rectify the breach of contract which was the Claimant's unwillingness to come back on site and purge its system.

[48] I am therefore prepared to allow a partial backcharge for the work done by Atlantica. In my opinion, it is equitable to charge the Claimant with one-half of the Atlantica invoices, namely $5,018.13.

Summary

[49] In summary, I have found that the Defendant is entitled to backcharge the Claimant for three things:

a.	Cost of glycol	$847.29
b.	Finding leak	$1,025.80
c.	Purging system	$5,018.13
	Total	$6,891.22

[50] The net result is a judgment in favour of the Claimant for the amount of its claim, less the allowable backcharges. I propose to calculate it without specific regard to holdbacks for potential liens. Should the parties be in agreement that there is still a legitimate basis for some holdback, then the Defendant may do so.

[51] The amount owing to the Claimant under the original contract is $20,000.00 plus HST in the amount of $3,000.00, for a total of $23,000.00.

[52] The Defendant is allowed $6,891.22 for backcharges (which are technically counterclaims), with the net judgment to the Claimant being $16,108.78 (subject to potential holdback).

[53] Prejudgment interest is a matter within the discretion of the court. Given that the Claimant has had substantial, but not total success, I am prepared to allow interest at 4% (the prescribed rate) for a period of one year. That amount is $644.35. The Claimant is also entitled to its cost of issuing the claim in the amount of $193.55.

Eric K. Slone, Adjudicator