SUPREME COURT OF YUKON

Citation: *North America Construction (1993) Ltd v Yukon Energy Corporation*, 2016 YKSC 33

Date:20160801
S.C. No.:11-A0114
Registry: Whitehorse

Between:

North America Construction (1993) Ltd.

Plaintiff

And

Yukon Energy Corporation

Defendant

Before Mr. Justice G. Hawco

Appearances:

H. David Edinger / Harpreet Dosanjh — Counsel for the Plaintiff

Morgan Burris / Todd Shikaze — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] North America Construction (1993) Ltd. ("NAC") is a construction company with a fair amount of experience with respect to the construction of dams and generation plants. It had not worked in the Yukon before bidding for this particular job, but it was well aware of the location and the nature of the project.

[2] The man in charge of the project at the time was Mr. Pat Maloney, his first assignment as a project manager, Mr. Scott McPherson, the president of NAC, who had spent some 23 years with the company, knew him well and had no doubt as to his ability to carry out this job.

[3] Yukon Energy Corporation ("YEC") is a Crown corporation, owned by Yukon Development Corporation. YEC owns and operates the Aishihik generating station which is located 120 kms northwest of Whitehorse. The Aishihik facility has been in operation since 1975. It is a unique facility, located approximately 120 meters underground. It was originally built with two turbine-generator units and was designed for the future addition of a third turbine. In April of 2009 YEC's Board of Directors retained AECOM, an engineering firm, to work on preliminary budgeting and design. AECOM was to perform the engineering and detail design, as well as to perform construction management services.

[4] In January of 2010 YEC put the matter out for tender. NAC and two other construction companies attended at the site with YEC representatives and each submitted a tender. YEC cancelled the tender on the basis that all of the bids received exceeded the project budget. Instead of re-tendering, YEC negotiated directly with NAC and the other two contractors.

[5] On or about August 6, 2010, YEC accepted NAC's proposal of $7,136,885.00 subject to finalization of a number of matters, including what is described as a fan wall design, the size of the camp, the penstock design, which were the pipes to transport the water into the turbine, as well as a schedule.

[6] The contract price was originally based on a substantial completion date of June 11, 2011. The notice to proceed was issued by YEC to NAC in August of 2010, prior to the contract actually being completed. The contract was not executed until December of

2010. By the time it was executed, it was agreed that NAC was to obtain substantial completion by November 30, 2011.

[7] Because the contract price earlier agreed upon was based upon a completion date of June 19, 2011, it was agreed in Schedule D of the contract that:

> *The Price will be adjusted to reflect the contractor's actual cost caused by the new completion date of November 30, 2011 under Section 3.3. The price at Section 8.1 is based upon the original completion date of June 19, 2011 with a 6 week shutdown commencing May 1, 2011.*

[8] The contract also made provisions for changes to the work under Sections 4.5 and 4.6. Section 4.5(d) stated:

> *If a Change to the Work .... increases or decreases the cost to the Contractor by more than $1,000.00, the Parties will agree, in writing, upon a fair adjustment to the Price, on a time and material basis as per Schedule B....*

[9] The project was somewhat different and difficult because it appeared to have been a work in progress. As I indicated, when the parties entered into their agreement in early August, 2010, the design was not yet complete and the time frame for completion was yet to be determined.

[10] Notwithstanding the date of the execution of the contract, NAC had mobilized to the site and began its work in late August or early September, 2010.

[11] Because of the ongoing design changes, the parties entered into an agreement which was known as Schedule D. The clause dealing with adjustment to the cost are referred to above.

[12] NAC substantially completed the contract in early December, 2011. The facility has been generating power since December 6 or 7, 2011.

[13] There were ongoing discussions and disputes during the construction of the facility. Much work was done which was claimed by NAC to be extra, without a decision having been made on the cost. Many of the changes made were agreed upon. Some were not, in the sense that NAC has claimed that it was required to carry out certain work which it said was, or should have been, an extra, while YEC takes a position that such work fell under the existing terms and conditions of the contract. YEC claims that the contract provided that such work fell within the existing terms and conditions and therefore it ought not to pay any extra funds for such work.

[14] In addition to these disputes, YEC carried out what it determined to be remedial work which should have, in the normal course of events, been carried out by NAC. Once the project was substantially complete, YEC refused to let NAC back on the site after they had demobilized because they were of the view that NAC was so incompetent that they could not be relied upon to carry out the remedial work properly.

[15] The disputes will be looked at separately, as the Parties have done. I will deal with NAC claims for monies owning for what it says were extra to the contract. I will then look at YEC's claim for remedial work carried out as well as for work which has not yet been carried out. As will be seen, for the most part, NAC has been successful with respect to its claims for extra work required to be carried out.

[16] YEC is also entitled to set off a certain amount for deficient work carried out by NAC.

[17] It is not unusual that friction develops when a project is, in both a literal and figurative meaning, highly charged and under time pressures. That was the case here and, unfortunately, the spirit of cooperation which marked this project in the beginning descended into an atmosphere of confrontation. In such a situation, each party inevitably suffers to some degree.

NAC CLAIMS

[18] YEC has agreed that under the terms of the contract, it owes NAC $1,308,462.00 which consists of holdbacks and extra work done where the price has been agreed upon, but not yet paid, as well as certain labour and materials. This amount has not been paid by YEC because it has claimed the right to set-off approximately that same amount for work that it says it had to carry out to properly complete the contract, or will have to pay.

[19] There are other monies which NAC claims to be due and owed for various change orders (CRX's). These will be looked at individually. I propose to deal with each of the outstanding CRX's. I will then look to YEC's claims of set-off.

CRX 20

[20] This is one of the most contentious of NAC's claims. It arises because of "Shut Downs" which were agreed upon but with respect to which there was no agreement as to the impact upon the project and the additional cost.

[21] The parties did agree, pursuant to s. 3.3 that:

> *Prior to the Completion Date, YEC will facilitate two shut-downs of the entire facility (the "Shut Down Windows") in*

> *order to permit the tie of the penstock and substation retrofit work:*
>
> > *a. The first Shut Down Window will commence on June 20, 2011 and be completed on June 30, 2011.....*
> >
> > *b. Subject to the status of Mayo outage, the Second Shut Down Window is tentative scheduled to start on October 1, 2011 and be completed by October 31, 2011....*
>
> *The price is based upon a completion date of June 19, 2011 with a six week shut down window commencing May 1, 2011. The price is subject to adjustment under Schedule D.*

[22] Schedule D of the contract provided that:

> *The [Contract] Price will be adjusted to reflect the contractor's actual costs caused by the new Completion Date of November 30, 2011, under Section 3.3.*

[23] NAC's position is relatively simple. Schedule D is a price adjustment clause. As stated in NAC's brief:

> *(b) It was intended to entitle NAC for additional payments for its costs resulting from the extension of the construction schedule and time that NAC had to spend on site to complete this work under the contract as a result of the scheduling changes which YEC determined to impose on NAC, with knowledge of NAC's expected additional costs.*

[24] The extra time that NAC spent on the project was 102 days. The cost of those extra 102 days was $633,510.48. That figure was based upon NAC's original estimate and was consistent with Mr. Landry's projected costs for a six week overrun on September 21, 2010. Mr. Landry had determined that figure by simply multiplying 102 days by the sum of $6,501.89, which was NAC's actual cost per day over the whole project.

[25] YEC's response was that NAC really did not incur any costs as a result of the schedule changes. Rather, the costs claimed were costs incurred because it took NAC longer than it expected to complete the project.

[26] There was a fair amount of evidence from a number of the YEC people on site. Mr. Bob Toms was the first project manager on YEC's behalf. He had no concerns in the beginning of the project with NAC, but did eventually have concerns with respect to what he considered to be their lackadaisical approach to general safety matters on site. He observed delays occurring because of a required design change to what was known as the "Thrust Box" and a delay which he attributed to NAC using an incorrect mix in the concrete used to level the floor in the tunnel. The completion of the floor of that tunnel was along the critical path of the project.

[27] In general, Mr. Toms was concerned about the competency of many of the NAC work crews, as was Mr. Bob Simonson and Mr. Ed Peake. Mr. Toms considered NAC's work to be somewhat sloppy and was generally of the view that NAC had been responsible for any delays to the project.

[28] What I found to be not only unusual, but somewhat incongruous, was that under cross examination, Mr. Toms agreed that NAC had expedited the delivery of the Penstock pipe which was critical to the project on time; that the switch gear building and the installation of equipment with respect to that building was critical and was delivered on time; that the Thrust Box was indeed delivered on time. Mr. Toms went on to admit that YEC continued to have difficulty getting drawings from AECOM throughout the project but that, generally, NAC was keeping up with its schedule.

[29] I also found that Mr. Simonson, a contract administrator with CAP management, an agent of the Defendant, was quite critical of the Plaintiff and was of the view the Plaintiff, because of its inexperience and the laziness of its crew, could have finished the project 4 to 5 weeks earlier than they did.

[30] There is difficulty with some of Mr. Simonson's evidence with respect to the perceived delays which he observed. That is, that no witness for the Plaintiff, neither the project manager nor Mr. Laith Hamad, who was the electrical coordinator and very much on top of things overall with this project, was cross examined in any manner on any of this evidence.

[31] I spoke with counsel during the trial about my concerns about these and other matters that arose in the Defendant's case and had not been touched upon during the Defendant's cross examination of the Plaintiff's witnesses. I explained my concerns within the parameters of *Browne v Dunn* (1893), 6 R.67 (H.L.). I allowed the evidence to go in, but I advised counsel there would or could be a problem as to the amount of weight attached to such evidence.

[32] Having said this, I must say that little of Mr. Simonson's evidence in particular had any adverse impact upon the Plaintiff's claim under CRX 20. The fact is, and was, that the Plaintiff finished this project on time. The items to which Mr. Simonson referred, even if totally accepted, would be, in my mind, rather small. This is, of course, not something which should be simply rejected, but I do so because overall I was not greatly impressed with his evidence. Many of the matters which he considered to be

major appeared to me to be rather minor and with respect to which, hindsight is almost so much better.

[33] In the early stages, there was a lot of interaction between the Plaintiff and the Defendant, even commencing before the contract was executed. Both parties were acting in good faith. Everyone knew that there would be delays, indeed two shutdowns were planned. Discussions were occurring with respect to design changes. Drawings were not complete. The pipe had not yet even been ordered.

[34] It was, in short, organized confusion with much weight being placed upon good faith. Thus, Schedule D.

[35] Relatively early in the project, to be specific, September 27, 2010, Mr. Landry advised Mr. Joudry that they expected NAC costs would be some $278,000.00 for the additional six weeks spent on the project. The length of delay increased significantly.

[36] Certainly, the Plaintiff's work was often sloppy, to put it crudely. Their work habits often left YEC's management frustrated. They were not as efficient as they might have been. YEC's management may well have been better organized and more efficient. The bottom line, however, is they got the work done within the time agreed upon.

[37] YEC does have legitimate concerns with respect to a number of matters which either were done improperly, or simply poorly. These will be dealt with in this judgment in due course.

[38] I accept NAC's claim for $633,510.48. I am satisfied that the Plaintiff was required to spend 102 days more on this project than either they or the Defendant had anticipated when the contract was signed.

CRX - Lug Changes

[39] NAC claimed that YEC requested it to increase the number of lugs on various couplings. The original design was varied somewhat by YEC and its engineer, AECOM. Mr. Toms seemed to agree with the fact that it requested a change. He disputed the cost. The CRX is approved. The amount is $13,381.00.

CRX 39 - Flanges

[40] The issue between the parties here was whether this constituted a change by YEC. Mr. Maloney said that he had submitted the drawings from the pipe manufacturer to YEC, which indicated that the flanges were to be 150 pounds and that YEC had approved them. YEC later said it wanted 300 pound flanges, so the Plaintiff had to change them.

[41] The specifications referred to the court, in Volume 1, Tab 686, does not appear to support this position. I accept YEC's submissions that there was a mistake by NAC or its supplier. The flanges supplied were not in accordance with the contract specifications. That claim is not allowed.

CRX 43 - High Voltage Switch Support

[42] This was a claim for approximately $18,000.00 with respect to an item which Mr. Maloney appeared to concede may have been missed by NAC's estimator. That claim is not allowed.

CRX 52 - Lifting Equipment

[43] The Plaintiff has claimed approximately $21,000.00 because it had not allowed for its equipment to lift as much weight as was required. It may be that the original specifications indicated that the Plaintiff would only be required to lift X pounds, but the Defendant had told the Plaintiff before they prepared their tender that the equipment would have to lift Y pounds.

[44] This claim is not allowed.

CRX 71 - Fan Wall Installation

[45] The issue here was whether the Plaintiff should be paid to assemble an Air Handling Unit (AHU) which arrived unassembled. Document 167 would indicate that this was how it was originally supposed to arrive.

[46] That claim is not allowed.

CRX 92 - October Compressed Shutdowns

[47] In their claim, the Plaintiff says that it was required to do a certain amount of work in less time than it had planned. Mr. Hamad said he had 10 men doing 2 extra hours a day for 28 days.

[48] However, it was clear from the evidence that NAC never did, at least during this particular period of time, have 10 men on the job. They only had 5 electricians on the job. In addition, the compressed work was done within 18 days. My math would consist of 5 men working 2 extra hours a day for 18 days at $58.25 for a total $10,485.00. The Plaintiff's claim on this CRX is allowed to that extent.

CRX 97 – Generator-Turbine Changes

[49] The Plaintiff claims that the original contract specifications were far less detailed than the actual plans and specifications which arrived. The original details were some 15 to 20 pages (excluding the drawings). On February 28, 2011, the provider supplied the manual and the installation plan, consisting of some 127 pages. The work itself was far more extensive than could have been anticipated in the estimate. NAC's original estimates had been 500 to 600 hours for the work, based upon the contract instructions. The actual man-hours expended were 1200. Mr. Maloney stated that the additional hours were due to the increased instructions.

[50] Indeed, Mr. Maloney had estimated that it could cost the Plaintiff $155,000.00 more than could reasonably have been anticipated. The Plaintiff was only seeking to recover less than half of that amount, or $65,868.00.

[51] I accept Mr. Maloney's reasoning and calculations and allow the claim in that amount.

CRX 100 – Cable Changes

[52] NAC claims for a change to the work for its additional labour costs incurred to comply with YEC's requirement that NAC perform extra work to install electrical cables which were not shown on YEC's drawings. The revised amount is $119,004.00.

[53] This was another contentious issue which arose because of the continuing problem which the Plaintiff faced, of building a generator and turbine some 400 feet underground while the designer/engineer was still working on producing all the

necessary drawings and information. Thousands of feet of cable were required, ranging from centimeters in diameter to inches in diameter.

[54] When NAC bid on the project, the design drawings and the information required to determine just how much cable and how many connections, receptors and receptacles would be required was not known, and, according to the Plaintiff, was not capable of being known. This led to NAC having to "guestimate" a cost for the materials.

[55] In late December of 2010 and early January of 2011, Mr. Hamad was very concerned that the information which he had received thus far from YEC and AECOM was not sufficient for him to even begin to order all of the cable required, as well as the electrical panels and the hundreds of connections.

[56] Mr. Hamad sent a number of requests for information (RFI's) to attempt to have a better understanding of what was needed. That RFI (RFI 44) was followed up by yet another RFI, RFI 44-1.

[57] It soon became obvious to Mr. Hamad that only about one half of the cable required was covered by the drawings and specifications NAC had received initially.

[58] Negotiations began about the cost of these additional materials, which resulted in CRX 24 being agreed upon. This CRX gave NAC an additional $46,000.00 to acquire the extra cable.

[59] Mr. Hamad was quite confident that CRX-24 only covered the cost of acquiring much of the "new" cable. It did not include any of the costs of connecting any of the cables as no one yet knew exactly where the connections would be located.

[60] Indeed, at the time CRX 24 was agreed upon, AECOM still had not provided the Plaintiff with any of the designs within the various panels or the input/output schematics.

[61] Further drawings and information continued to flow, resulting in yet further changes and the resultant costs. These new drawings and changes continued up to October 3, 2011.

[62] The situation was one described by Mr. Hamad as working and making changes "on the fly" without being assured they would be compensated adequately, but doing the necessary work because they were on the critical path and this work had to get done for the project to become completed on time.

[63] I found Mr. Hamad to be an honest and forthright witness. He was very familiar with the project and familiar with the various emails and other documentation that went back and forth between the parties.

[64] YEC's response to CRX 100 is primarily that NAC had already been compensated for the additional cable (CRX 24) and had been compensated for most of the other work in CRX 79, CRX 80, CRX 85 and CRX 86.

[65] In addition, YEC argued that Mr. Tillebrook and Mr. Peake had seriously undermined the basis of Mr. Hamad's projection of the cost increase after May 2011, as shown in Tab 347.

[66] I did find both Mr. Tillebrook and Mr. Peake to be very good and credible witnesses. However, what was particularly telling in Mr. Peake's evidence was his admission that there were indeed glitches in the design and that the equipment

sometimes arrived in a different conformation than expected and that AECOM's drawings were often unclear.

[67] It was Mr. Peake who was quite critical of the estimate of 4,000 meters of additional cable which NAC had estimated was required. In his opinion, the appropriate figure would have been closer to 400 meters.

[68] As well, the estimate of the crane time, which NAC had estimated was far more than he would have thought necessary.

[69] Unfortunately, we once again come back to the cross examination of Mr. Hamad and Mr. Maloney, or the lack of cross examination of either of these individuals on these very specific points.

[70] I have referred to my concerns about the failure of the Defendant to adhere to the principles annunciated in *Browne v Dunn* and it is particularly telling here.

[71] The Defendant would have known, during the examination-in-chief and cross examination of the Plaintiff's witnesses, that it was going to be proffering a witness (Mr. Peake) who had estimated that the amount of cable and the amount of crane time would be significantly less than either Mr. Hamad or Mr. Maloney had taken into consideration when preparing the estimates with respect to these particular items. It is, quite frankly, simply an issue, as I remarked to counsel, of fair play. If one knows one is about to put forth evidence that calls into question, for example, cost estimates of time and materials, the witnesses putting forth that evidence should be cross examined on the discrepancy that is intended to put forth by the Defendant. That was not done. In my

view, not very much weight may be placed upon the evidence from Mr. Peake with respect to just how much cable was required and the resultant crane time. I do not, as I have said, question Mr. Peake's credibility, what I question is how there can be a legitimate gap in the quantity of cable when nothing was asked of Mr. Hamad with respect to these rather important items. There were questions put to Mr. Hamad about CRX 100, but none that involved the quantity of cable or the crane time.

[72] In the end, I am quite satisfied that as a result of the lack of drawings and detailed connections, due to the evolving design and changes to the previous plans, the Plaintiff was put to a lot of extra time and materials.

[73] I am satisfied that CRX's which were agreed upon, being CRXs 24, 79, 80, 85, and 86 did not included any amount for cable which had yet to be shown to be required.

[74] Both parties were somewhat lax in adhering to a proper extra work charge protocol. It was, as said by Mr. Hamad, a moving target and a reaction to that which had not been envisaged or planned by either party. While both Mr. Hamad and Mr. Peake were good witnesses, and credible witnesses, both cannot be totally right.

[75] I am not able to come up with any firm costs. I will therefore award one half of CRX 100, which would, by my calculations, be $59,500.00.

[76] My calculation of the amount owing to NAC is, therefore, that which was agreed upon, being $1,308,462.00 plus those amounts which I have found due and owing pursuant to the various claims, being $633,510.48 for CRX 20, $13,381.00 with respect to the Lug Changes, $10,485.00 with respect to the October Compressed Shutdown,

$65,868.00 with respect to the Generator-Turbine Changes and $59,500.00 with respect to CRX 100 – Cable Changes, for a total of $2,091,206.48.

YEC's Claims

[77] I now turn to YEC's claim for its costs to what it characterizes as poor workmanship of NAC and additional work it claims had to be carried out because of the actions, or inactions, of NAC.

CRX 104

[78] The first of these would be CRX 104, relating to Bentley-Nevada. This dispute concerned whether Bentley-Nevada was even on site on the dates for which a claim was made covering the 18th, 19th, and 20th of October. There were further claims with respect to two additional days spent after completion of the project, which I have not taken into consideration, because of the date and lack of sufficient evidence.

[79] With respect to the three days, Mr. Hamad was quite clear. He had requested that Bentley-Nevada attend on October 18, 2011. His recollection was that they did not show up on the 18th because YEC had told them to work on another YEC site. He recalls that they did return on October 21st when the Plaintiff was demobilizing and that he therefore had no opportunity of supervising them. As a result, one of YEC's representatives attended with them.

[80] It was Mr. Hamad's recollection that Bentley-Nevada did the work which was required and that NAC paid them directly.

[81] Mr. John Bruineman, a Bentley-Nevada representative, sent Mr. Hamad an e-mail on October 21, 2011 which seems to indicate that Bentley-Nevada was indeed on site on the 18th and 19th, and perhaps 20th. There were other e-mails (see Tab 546) which indicate that Bentley-Nevada was only on the site two days.

[82] While I have already assessed Mr. Hamad's credibility as being quite high, the e-mails back and forth would indicate that Mr. Hamad was mistaken with respect to this issue. One of the other e-mails which I referred to immediately above does indicate that the time spent by Bentley-Nevada was two days, not three. I have simply reduced the claim by YEC by 1/3. They are allowed the claim of $15,166.00 with respect to the Bentley-Nevada matter.

CRX 106 – Fuel Leak

[83] NAC admits having caused a fuel spill while on site. It only disputes the amount of money required to adequately remedy the situation.

[84] The Defendant's witness was Ms. Shannon Mallory, who was the YEC environmentalist coordinator.

[85] The Plaintiff received a plan prepared by EBA on June 15, 2011. The anticipated costs at that time were $15,245.00, plus GST (see Tab 575).

[86] YEC did not approve this report and so NAC requested EBA to prepare another estimate. This next estimate, dated March 15, 2012, came in at $42,070.00. This was also presented to Ms. Mallory who was not satisfied with that report either and proceeded to draw up her own estimate, which was based, primarily, upon the EBA estimate.

[87] Ms. Mallory produced a document showing a budget of $116,517.00 to totally clean up the site. She arrived at that figure by unilaterally doubling the EBA estimate, and adding another 20%, after having increased the EBA estimate by 20% before doubling it.

[88] Quite frankly, I considered Ms. Mallory to be not particularly helpful at all in this regard. She had no idea of how much soil had been excavated and hauled away and she had no real reason for rejecting the second EBA report.

[89] This claim is allowed, but in the amount of $42,070.00, being EBA's second estimate.

CRX 111 – Cabinets

[90] YEC's claim with respect to this item is that NAC failed to supply the control and protection panels with open backs.

[91] NAC's response was that it had ordered cabinets with removable backs, but their supplier did not provide these cabinets with either open or removable backs.

[92] YEC approved NAC's drawings without having noted that the drawings required cabinets with open backs.

[93] In any event, the cabinets which were supplied had welded backs. Modifications had to be made to them by making holes in the sides and in the backs so that they could be used. They are still being used, but are not what was requested or required by YEC.

[94] YEC is seeking to replace the cabinets totally at a cost of some $206,000.00. Mr. Maloney estimated that it would cost $20,000.00 to $30,000.00 to cut the panels out. Mr. Peake thought they could be “fixed” for $100,000.00.

[95] I am satisfied that the cabinets should have been delivered with either removable backs or open backs.

[96] They should be repaired. I accept Mr. Peake’s evidence and allow this claim in the amount of $100,000.00.

Deficiency Claims

[97] This is perhaps the most contentious claim. YEC says that NAC was sloppy, unprofessional and unsafe with respect to so much of its work that it had totally lost confidence in NAC’s ability to repair or remedy any of the multitude transgressions which it alleges have occurred.

[98] NAC maintains that the list of deficiencies prepared by YEC is quite exaggerated, as is the cost of remedying them.

[99] NAC has always indicated its willingness to attend and rectify any deficiencies. Indeed, numerous discussions were held and at least one walkthrough.

[100] NAC also argues that YEC has a duty to mitigate its damages and that by not allowing NAC back on site, or doing some of the work itself, it has failed to mitigate and that this claim should be dismissed.

[101] As I said earlier in this decision, the spirit of cooperation which permeated this project initially slowly faded. In its place, a sourness began to creep into the relationship.

[102] Minor items such as lack of orderliness and a failure to be careful, or a perceived failure to live up to what YEC considered a minimum standard of quality became more than irritants. Work was viewed as sloppy or careless. Standards began to be imposed without anyone having been given notice that much more was now being expected.

[103] The installation of the cables in the elevator shaft is a good example of how the dynamics changed:

(i) Notwithstanding that it was YEC itself who determined what "Code" was to be followed, what had been acceptable before was now considered to be not acceptable.

(ii) How cable was to be fastened to the duct should not be done the way it had been done just years before.

(iii) The cable trays no longer were sufficient.

(iv) The clearance was no longer sufficient.

(v) The electrical code was being followed or not being followed, depending on who was interpreting it at any given time.

(vi) The cables were now not "tidy".

(vii) "Sloppy" work became "deficient work".

(viii) A very slight indentation in a cable coverage became "damage".

[104] It seems to be, and did seem to me during the trial, that the Defendant had formed the view toward the end of the project that the Plaintiff was simply incompetent. It began viewing the work done through coloured glasses, “rose coloured” not being one of the lenses.

[105] Complaints of deficiencies were being directed at the Plaintiff without specifics being given.

[106] It was clear that the Defendant had had enough of the Plaintiff and it was not going to be fixing anything for the Defendant in the future, or doing any more work once they demobilized.

[107] The Plaintiff urges the Court to reject all of the Defendant’s deficiencies list because the project was substantially completed and the deficiencies were not serious ones. That being the case, the Plaintiff argues, there was no fundamental breach of the terms of the contract. That, in turn, required the Defendant to mitigate its damages. The best way to mitigate its damages was to allow the Plaintiff to carry out the necessary remedial work.

[108] I agree with the Plaintiff that that the deficiencies were not so serious as to amount to a fundamental breach of the contract having been committed by the Plaintiff.

[109] I also agree with the Plaintiff that an owner is required to mitigate its damages. However, with the greatest respect to the learned trial judge in *Beta Construction Inc. v Chiu*, 2015 ONSC 5288, at para 86, I do not agree that the owner must allow the contractor an opportunity to repair the deficiencies.

[110] In my respectful view, to compel an owner to allow a contractor with whom it has no confidence simply makes no sense.

[111] But, if such an owner - in this case - YEC, does not want NAC to perform the deficiency work, it cannot simply get the most expensive estimate it can find and ask the Court to award damages in that amount.

[112] I do wish to comment on some of the deficiencies within the elevator shaft before turning to the estimate to which I referred to above.

[113] It struck me time and again during the trial that while some of NAC's work was indeed sloppy, YEC's expectations were perhaps higher than they should have been.

[114] I am aware of the term in the contract that provides that: "The Contractor will perform the Work diligently in a workman like manner and in accordance with the highest industry practice used in Canada."

[115] I am also aware that the majority of this contract was carried out some 140 km north of Whitehorse, much of it in the middle of winter, and at a depth of some 400 feet underground.

[116] Mr. Tillbrook, an electrical engineer on site, considered much of NAC's electrical work to be sloppy. He thought that NAC was "not structured enough". He did not like NAC's overall plan, but admitted that the commissioning of the project did go forward and that the project was up and running within a few days of the substantial completion date. He was of the opinion that the tie wrapping was contrary to the electrical code,

depending on how one might interpret it. But I saw no evidence which satisfied me that the wrapping was improper.

[117] In this connection, it should be noted that the cables which were wrapped, lowered and supported during this project were done much in the same way that the previous cables had been suspended, wrapped and generally looked after.

[118] Mr. Tillbrook was critical of the protection given by NAC to the grips and wrapping, but admitted that nothing was contrary to any approved procedure.

[119] He criticized or commented on “damage” to the covering of one of the cables. The photograph of this particular piece of cable showed a very slight indentation in the wrapping.

[120] Mr. Bob Simonson’s criticisms had more to do with safety issues and lack of organizational skill than to deficiencies in the work carried out. Mr. Peake was also quite critical of NAC’s work within the cable trays. It was primarily sloppy and did not appear to be neat, in his mind. He thought the cable trays themselves were not secure enough and that they had been structurally weakened.

[121] It seemed to me that Mr. Peake’s key concern and complaint was that NAC’s people were not very qualified and that the work they were performing met the “bare minimum” quality level but did not meet what he considered would be the industry standard.

[122] Some of Mr. Peake’s other criticisms were that the wiring was not tidy; that the trays were overstuffed; and that the clearance was not sufficient.

[123] A fair amount of Mr. Peake's evidence concerned the cable trays. Some of his evidence arose as a result of an incident which occurred in October of 2013 when the elevator wires and the cable trays came into contact, resulting in a visit from the Yukon Workers' Compensation Health and Safety Board. In their report, the Board noted that minimum clearance distances between the conveyance and cables and cable trays were not being met. It also referred to the fact that there were deficiencies that were noted in an inspection report dated May 5, 2011 that had not been rectified.

[124] The end result of that incident was that a new design was prepared and the cable trays were ultimately fixed. However, my difficulty is that at the time of the installation, YEC was the electrical code authority and it was admitted that NAC was not advised of the clearance requirements prior to installing the trays or "overstuffing them".

[125] I very much hesitate to consider the cable trays and much of the remedial work done within the elevator shaft as a deficiency as a result of a report made by the Occupational and Safety Board some two years later. Admittedly, the way the wires were "stuffed" into the trays was not particularly tidy or pretty. However, I am not satisfied it constituted a deficiency.

[126] Much of the "Deficiency Claim", indeed, some $264,000.00, related to the elevator cables (See Exhibit 41). My concerns with respect to the legitimacy of recovering these costs have been voiced.

[127] It was Mr. Peake who quite honestly said that while conducting the walkthrough with Mr. Hamad and others from NAC toward the end of the project, that he and the other YEC people who were attending with him had already determined that they were

not going to have NAC come back to do any of the deficiencies. They did not like NEC's work and refused to allow them to carry any further work out.

[128] YEC was entitled to come to that conclusion and was entitled to make such a decision.

[129] The question then becomes should NAC have to pay anything since the deficiencies did not amount to a fundamental breach of the contract. In my view, they do, because they did not complete the job as they were required to do under the contract.

[130] As I have already said, YEC is entitled to come to that conclusion and make the decision to have someone else perform the work. They are not, however, entitled to have the work carried out in the manner suggested by the Orbus report, prepared by Mr. Amin Kassam. Mr. Kassam had estimated the cost of remedying the deficiencies would be $970,961.25.

[131] I found Mr. Kassam to be a very interesting witness. He declared himself to be an independent expert and not biased in any manner. However, his bias came through quite clearly.

[132] On a number of occasions, he appeared to suffer from a loss of memory with respect to information which he had received from Mr. Mortimer, a fellow colleague who had prepared an earlier estimate, and was argumentative when, in my view, there was no need to be.

[133] Mr. Mortimer, Mr. Kassam's former colleague, had prepared an estimate as to the cost of remedying the deficiencies. His estimate was $686,500.00. Mr. Kassam professed to be more aware of the "conditions" and "factors" that should be taken into consideration notwithstanding that Mr. Mortimer was a senior field technology expert and that Mr. Mortimer had spent some 35 years with the company, presumably mostly in the North.

[134] Notwithstanding Mr. Mortimer's apparent expertise in the field, Mr. Kassam determined that Mr. Mortimer had not taken into consideration that:

1) the plant would be operating, not shut down;

2) the plant was located in a Northern site, and

3) the people carrying out the work would not be as skilled as Mr. Mortimer was.

[135] Mr. Craig Miller, an employee of NAC, is an operations analysist and an electrical estimator. He has prepared dozens of estimates on jobs throughout Canada. He was retained to prepare a report and did so. That was introduced as Exhibit 35 in these proceedings.

[136] Mr. Millar had been given a copy of Mr. Kassam's estimate. In fact, he was given both the Orbus reports of 2012 and 2016. He prepared a very detailed estimate of the work that would need to be carried out. He examined the deficiency list prepared by YEC and specifically the list and report of Mr. Kassam. He was very familiar with the site, visited it at least twice. He did not question whether any of the deficiencies were in fact deficiencies. He simply assumed that they were.

[137] Mr. Miller's estimate of the cost to repair was $251,521.52.

[138] Mr. Kassam was of the view that all of Mr. Miller's estimates of time required were far too low. Where Mr. Miller had estimated some 65 hours to complete "the labelling", Mr. Kassam estimated 482 hours. Where Mr. Miller estimated some 40 hours to prepare as built to drawings, Mr. Kassam estimated some 653 hours. Where Mr. Miller estimated some 4 hours to complete what were described as "code items", Mr. Kassam estimated that this should take some 1,116 hours.

[139] These are rather stunning contrasts, none of which were put to Mr. Miller. Mr. Miller did, however, have access to and read the reports, so would have been aware of them. No cross examination was put to him, however, in that regard.

[140] Mr. Kassam did say that he was aware of a number of matters which he had estimated had been removed from the list as a result of the evidence, primarily, of Mr. Peake. That, in his view, would have reduced his costs by some 10 to 15%. The total hours on site which he had anticipated would be 5,268 hours, would have been reduced by some 37% if the items removed were considered.

[141] Had YEC mitigated their damages, they would have been able to revenue the deficiencies at a cost of, depending on the estimates used, some $252,000.00 to $433,000.00 (using Mr. Mortimer's estimate less the 37% with respect to items which had been removed and as conceded by Mr. Kassam).

[142] I was not particularly impressed by Mr. Kassam's evidence. Mr. Mortimer was not called and therefore not questioned with respect to his estimate. Mr. Miller's report was,

in my view, fair and reasonable. I award YEC the sum of $251,500.00 with respect to the deficiencies as prepared by YEC.

[143] In the end result, from the total of $2,091,206.48 is payable to NAC pursuant to the terms of the contract, YEC is entitled to deduct the sum of $408,736.00 for a total judgment owing to NAC of $1,682,470.48.

[144] The Plaintiff is, of course, entitled to interests and costs. Costs may be spoken to by counsel by means of a conference call.

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HAWCO J.