

Small Claims Court of Nova Scotia

Cite as: J.W.Lindsay Enterprises Ltd. v. Blackburn, 2015 NSSM 52

Between

J.W. Lindsay Enterprises Limited

Claimant

-and-

Dave Blackburn

Defendant

Adjudicator: David TR Parker QC

Heard: October 15, 2015

Decision: December 30, 2015

Counsel: Tracy Smith represented the claimant

Mike Feindel represented the defendant

Decision

1. This case came before the Small Claims Court on October 15, 2015 in Halifax Nova Scotia. Before the matter proceeded, the parties were asked if there were any preliminary motions and if there were any requests to amend their pleadings. There being none the matter proceeded accordingly.

FACTS

2. The Claimant is a construction company which did work for the defendant company which involved the construction of a Subway restaurant located at the Halifax Stanfield International Airport.
3. There were basically two phases in putting the eatery in a location at the Halifax airport. The first phase was the demolition phase and the defendant contracted with the claimant to do this phase of the operation.
4. The second phase was known as the “fit up” work which in essence was putting the eatery together at the Halifax airport so it would be up and running.

5. The defendant decided to get the “fit up” work phase done by the claimant and one of the reasons for that was that the claimant was familiar with jumping through the hoops, required of any tenant wanting to put their business into a location within the airport.
6. The airport required the completion of a “Tenant Facility Alteration Application Package” which was somewhat involved and which the claimant completed on the defendant’s behalf, in order to move the project forward.
7. The claimant’s Project Manager, Gordon Bishop had worked with the claimant company for 35 years, ten years as an onsite construction worker and 25 years as a project manager.
8. Gordon Bishop’s role as project manager was to look at the project, determine what was required, provide a job estimate and look after subcontractors through to completion of the job.
9. In early 2014, Terry Oxford, owner of the defendant company approached Gordon Bishop and requested that he put a price together for the “fit up” phase of the project.
10. The defendant owner anticipated the claimant would be able to take care of the stringent process required by the Halifax International Airport for anyone who wishes to do business in that location.
11. In June 2014 Terry Oxford met Gordon Bishop at his office and at that time Mr. Bishop had prepared an estimate of the costs of the subcontractors and also the cost for the claimant company to oversee and do work on the project.[Exhibit D3]
12. The quotes for the subcontractors as contained in exhibit D3 have been rounded up slightly but basically match the quotations Gordon Bishop obtain when he went out to get estimates from various subcontractors.
13. Gordon Bishop told Terry Oxford, he did not need to use the subcontractors that the claimant company would be using, for the “fit up” part of the job. The defendant was told he could use other subcontractors or his own people if he wished.
14. The electrical subcontract estimate, obtained by the claimant for the defendant was \$19,950.00. The defendant decided to use his own people or subcontractors for that part of the job.
15. The total amount for the job including the electrical was approximately \$171,000.00 and without the electrical subcontractor the total amount was

approximately \$151,000.00. None of the quotes for the subcontractors provided in exhibit D3 or for the cost of the claimant included HST.

16. The work that would be done by the claimant company involved; a foreman on site, labour, installation of walls, doors, hardware, ceiling, fireproofing, bulkheads, miscellaneous, installation of defendants equipment, trucking and cleanup. The claimant would also be responsible for dealing with all the subcontractors on site and overseeing them including the defendant electrical subcontractor.
17. The claimant was responsible for payment of all subcontractors listed on exhibit D3 except for the electrical which would be the direct responsibility of the defendant. The claimant was responsible for payment of its own employees labour and the materials it supplied to the "fit up" phase of the project.
18. A Progress Claim and payment request was sent out to the defendant on July 30, 2014.
19. That Progress Claim listed a number of items including, the Original Contract Sum of \$165,000.00 and that being the Contract Amount to Date.
20. This progress claim of July 30, 2014 required a payment of \$128,081.25
21. A second Progress Claim was sent to the defendant by the claimant dated September 30, 2014.
22. This second Progress Claim also indicated the original contract sum of \$165,000.00 and also included authorize changes in the amount of \$15,455.60 for a new contract amount to date of \$180,455.60.
23. The total amount payable under the September 30, 2014 Progress Claim was \$58,690.30.
24. A third Progress Claim was sent on October 31, 2014 showing the original contract sum of \$165,000.00 plus change orders of \$15,455.60 for total contract amount of \$180,455.60 and requiring a payment for the amount of \$20,752.39.
25. The total amount payable under the three Progress Claims was \$207,523.94 which was inclusive of tax.
26. The original contract price of \$165,000.00 as stated in the three Progress Claim invoices included payment to subcontractors that were hired and paid for by the claimant amounting to \$67,000.00 plus the claimant's invoice of

\$84,000.00 plus a 9.5% markup. The actual figure came to \$165,345.00 however the claimant rounded it off to \$165,000.00 as stated in the original Progress Claim invoices.

27. All the work was done by the time of the final progress claim on October 31, 2014.
28. The defendant made payments to the claimant in November 2014 of \$63,250.00; in December 2014 of \$63,250.00; in February 2015 of \$47,150.00; and in April 2015 of \$17,773.94 for a total amount of \$191,423.94 leaving a shortfall of \$16,100.00.
29. The Chief Financial Officer, Jeffrey Skinner provided evidence to the court that the labour and material cost to the claimant was approximately \$84,000.00.
30. On December 10, 2014 Gordon Bishop went through the billing with the defendant's owner and sent out a letter on December 15, 2014 enumerating the costs of each subcontractor and the claimant's costs which amount to \$151,000.00 plus a markup of 9.5% or \$14,345.00 the letter indicated that they reduced that bill by \$345.00 so the total amount of the original contract was \$165,000.00 plus there were extras of \$15,455.60 for total amount of \$180,455.60. Gordon Bishop indicated in that letter that they only charged 9.5% markup where they would normally charge a 15% markup.
31. Payments continued to be made by the defendant in February 2015 and in March 2015.
32. It was in March 2015 that the claimant first heard the defendant say it would not pay the markup.
33. **ISSUES:**
 - a. Was there a valid contract?
 - b. If there was a valid contract what were the terms the contract?

ANALYSIS:

34. The defendant had successfully bid on putting in an eatery at the Halifax International Airport.
35. The defendant then contacted the claimant to do the demolition work, being Phase 1 of the project.

36. Once the demolition work was completed the defendant had to put in the eatery, which would be Phase 2 of the project which was termed the "fit up."
37. The defendant's owner, Terry Oxford, decided to involve the claimant construction company to complete the "fit up". Mr. Oxford felt that this made sense as there was a particular process or procedure required by the airport authorities when a business wants to locate at the airport and the claimant was aware of this procedure and could handle it.
38. Mr. Oxford and Gordon Bishop project manager with the claimant company met to go over what had to be done and what costs would be involved.
39. The claimant's project manager then looked at the project and did estimates up for the job.
40. The project manager determine what subcontractors would be required and priced those subcontractors out and also priced out the claimant's costs for looking after the subcontractors and the cost for the claimant for their part as a general contractor and also as a contractor for the job.
41. The claimant's part of the job included having a foreman on site, supplying certain labour, supplying and installing walls, doors, hardware, ceilings, fireproofing, bulkheads, installation of the defendant's equipment, and trucking and cleanup.
42. Following a meeting between Mr. Oxford and Mr. Bishop, Mr. Oxford was to leave with the list of prices supplied by the claimant, for the subcontractors and determine if he wished to use those subcontractors or obtain his own at a more reasonable price. In the event the defendant found his people could do the job at a more reasonable price then he could substitute his subcontractors for the ones the claimant had contacted.
43. There was only one major change and that had to do with electrical. The claimant was able to obtain a quote from an electrical subcontractor for \$19,950.00. The defendant wanted to use his own people for the electrical and therefore this amount was removed from the original estimate.
44. The claimant's project manager, Mr. Bishop said that during his meeting with Mr. Oxford, he outlined all the prices for the subcontractors that he could get plus the claimant company's own price of \$84,000.00. The claimant's project manager also said he told the defendant there would markup of between 15% to 20%.

45. The defendant's owner, Mr. Oxford said that when he left the meeting he was under the understanding that the prices that were quoted would be the final prices that he would have to pay.
46. Ultimately the claimant marked up the overall cost of the subcontractors and claimants costs, by 9.5%.
47. The markup of 9.5% is what the argument centers around in this action. There was no written contract. The claimant says that there was to be a markup and the defendant says the final price he was given by the defendant was the price he was to pay and there was no discussion about any markup.
48. That is the real question that has to be answered. Did the oral contract include a markup or not?

49. What indicators or evidence is there to show that the contract would not to include a markup?

- a.] When the defendant's owner left the offices of the project manager Mr. Bishop he had a list of all the subcontract prices and the claimant's price. These prices were as follows: ventilation \$20,000.00; sprinkler \$4400.00; plumber \$11,000.00; flooring central tile \$11,650.00; walls \$3000.00; electrical \$19,950.00; voice + data \$850.00; simplex \$2000.00; fire dampers \$14,000.00; the claimant company \$84,000.00. The total contract price, taking away the electrical of \$19,950 which the defendant could have his own people complete for the defendant, resulted in total cost of \$150,900.00. This is the amount the defendant expected to pay.
- b.] There is no mention of a markup on this the estimate list which the defendant took with him.
- c.] There was no written contract which would indicate a markup.
- d.] The testimony of the defendant was that a markup was never discussed.
- e.] When the progress payments invoices came in to the defendant showing the contract price as \$165,000.00 the defendant's owner said that he thought the claimant forgot to take off the \$19,950.00 for the electrical which he decided to do himself instead of having one of the claimant's suggested subcontractors do the electrical work.

50. What evidence is there to show that the contract was to include a markup?

- a.] The project manager for the claimant company said that he clearly told the defendant there would be a markup somewhere between 15% and 20%.

b.] When the first progress invoice or claim, dated July 30, 2014 went out to the defendant it showed the original contract sum of \$165,000.00. There was no objection as to the full contract sum of \$165,000.00.

c.] On September 30, 2014 a second progress claim or invoice went to the defendant again showing the original contract sum at \$165,000.00 plus authorize changes of \$15,455.60. There was no objection as to the full contract sum of \$165,000.00.

d.] It was only after the project was completed in December, did the defendant object to the total contract price which he believes should have been \$151,000.00.

e.] The chief financial officer of the claimant company provided evidence to show that the approximate direct cost to the claimant was \$84,000.00. In other words the claimant would only cover its costs with no allowance for profit.

f.] The claimant oversaw the entire project except for the purchase of refrigeration units which were bought by the defendant.

g.] the claimant paid for materials used by the claimant, paid the labour costs it incurred and was also responsible to pay out the subcontractors on behalf of the defendant excluding the electrical subcontractor.

51. Counsel for the claimant argues that the subcontractors as well as the claimant provided direct costs and there was no profit margins built into those direct costs.

52. The project manager said during his testimony that "he did me dirty".

53. The defendant owner was not unsophisticated in this area. He said in his testimony he would not be surprised that the claimant would be looking for a profit he just assumed it was built into the \$84,000.00. The defendant owner did acknowledge he was familiar with how the process worked with the general contractors.

54. So the question still becomes what was said in the meetings between the defendant owner and the claimant's project manager with respect to markup.

55. I have considered the factors listed above including the fact that the claimant manager had 35 years of experience in the industry and 25 of those years as a project manager which involved looking at a project, making estimates on the project and looking after the subcontractors until completion of the job. Further the defendant was aware the estimates quoted in the beginning were all cost estimates to the subcontractors which lead to a reasonable probability standard

conclusion that the defendant owner was aware there would be a markup on all aspects of the project and this was conveyed to the defendant owner by the claimant's Project Manager.

56. I did consider the defendant owner's argument that he believed the claimant made a mistake and did not take out the electrical subcontractors estimated cost of \$19,950.00 from the original contract amount of \$165,000.00. However that would have made the original contract amount be \$145,050.00 which is considerably different than \$165,000.00 nevertheless nothing was said at that time by the defendant. Further this was never raised with the claimant until after the project was completed and subsequent to the defendant owner receiving three progress claims showing \$165,000.00 as the original contract amount. Also the extras were added to \$165,000.00 bringing the total contract up \$180,455.60 and still no request by the defendant owner to change what he considered a mistake.
57. Based on all of this I have concluded that the defendant was told there would be a markup, the defendant was knowledgeable and expected a markup and the work done justified a markup.
58. The evidence showed that the total, including tax came to \$207,523.94 and the total amount paid by the defendant was \$191,423.94 leaving an amount outstanding of \$16,100.00

Is Therefore Ordered That the defendant pay the claimant the following sums:

\$16,100.00

\$ 199.35 court costs

\$16,299.35 total

Dated at Halifax this 30th day of December 2015