Claim No: 341627

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dennis Lively Construction & Backhoe Services Ltd. v. Beaver Bank Children's Learning Centre Ltd., 2011 NSSM 53

BETWEEN:

DENNIS LIVELY CONSTRUCTION & BACKHOE SERVICES LTD.
Claimant

- and -

BEAVER BANK CHILDREN'S LEARNING CENTRE LTD.
Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax and Dartmouth, Nova Scotia on April 6, 7, 11 and 26, 2011,

Decision rendered on August 31, 2011

APPEARANCES

For the Claimant Emad Al-Sharief, counsel

For the Defendant Geoffrey C. Newton, counsel

BY THE COURT:

Introduction

[1] The Claimant, as its name suggests, is in the construction and excavation business, based in Beaverbank. One of its areas of specialty is installing septic systems. The principal of the company is Arni Lively, son of the founder.

[2] The Defendant operates a Children's Learning Centre in Beaverbank. The principals of that company are Marina Johnson and Cheryl Leadlay.

[3] In 2007 the Defendant decided to expand its business by purchasing some vacant land and constructing a new, larger facility. At the time it was operating in leased space at a community centre.

[4] Mark Leadlay, the husband of Cheryl, volunteered to serve as construction manager for the project. Mr. Leadlay works in a different field and is not a professional project manager.

[5] The project was to be undertaken with financing from the Nova Scotia Department of Community Services (hereafter "the Department") through one of its programs. One of the results was that fairly tight financial controls were in place, with all plans and estimates having to be approved by the Department.

[6] Plans were drawn up and bids were solicited. The excavation contract ended up being awarded to the Claimant.

[7] This Claim seeks payment of the balance claimed to be owing on that contract. The amount sought is $18,351.29 plus interest and costs, out of a total invoiced amount of $127,832.21.

The Facts

[8] Many of the facts are not in real dispute and need not be recited at length. The excavation work was awarded to the Claimant on the basis of an initial site plan, which produced a quote which was deemed acceptable. Long before any work was done, the site plan was changed and the scope of work for the excavating contractor was considerably expanded. Based on the new plans the Claimant put forward a quote reading as follows:

> 6 July 2009
>
> Job Location Lot 10-B Kinsac Road, Beaver Bank
>
> • Remove stumps
> • Excavate for foundation as per plan
> • Backfill with site material
>
> Total $5,000.00
>
> • Excavate for and install C3 septic system, as per SDMM drawing dated 6 November, 2007
>
> Total $26,500.00
>
> • Excavate for and install 82' x 82' parking area and 230' driveway 25' wide
> • Install 18" culvert with concrete headwalls

Total $14,000.00

• HRM permits

Total $2,500.00

• Elevate driveway and parking area with rock as per site and grading plan
• Construct 90' rock wall 3" high
• Supply and place 100 loads of fill
• Extension of culvert pipe

Total $59,000.00

5% fuel surcharge will apply

This estimate does not include the cost of breaking removing rock, if necessary or landscaping

HST is not included in this estimate.

Price valid 90 days.

[9] The total of the items in this quote was $107,000.00, not counting HST, the fuel surcharge, or any extras.

[10] Although it is quite clear in the quote that landscaping was not included in the price, Mr. Leadlay appeared initially to be confused on this point and only conceded after being cross-examined, that landscaping work would attract an extra charge. Previously the Defendant's reckoning had disputed a charge for certain landscaping work. The amount claimed as an extra for landscaping, and which was ultimately not contested by the Defendant, is $5,500.00.

[11] The one other extra involved in the contract is a charge of $1,500.00 for an interceptor trench, which is a charge that the Defendant questions.

[12] The Claimant included a fuel surcharge amount of $1,625.75 on the first of his invoices, which is not contested. No further fuel surcharge was sought because the cost of fuel eased slightly.

[13] The total of the quoted contract price ($107,000.00) the extras ($5,500.00 landscaping plus $1,500.00 for the interceptor trench) and the fuel surcharge of $1,625.75 is $115,625.75. With HST at 13% (at the time) that would have added $15,031.35, for a total of $130,657.09, unless some of the items did not attract HST[1].

[14] There appeared to be a difference of opinion on certain facts which, in the final analysis, do not impact much on the result, but which appear to have fuelled the conflict which eventually poisoned the relationship. The Claimant testified that he was not aware of the fact that the project was being financed through the Department, and was unaware of any special rules or requirements that such an agency might impose. This is difficult to believe, as it is inconceivable that Mr. Leadlay would have failed to mention that fact, as he so clearly explained it to others including the General Contractor, Gerald Mitchell Contracting.

[15] Even so, I do not believe that Arni Lively lied on this point, as I found him generally to be a credible witness. Rather it suggests to me that he was occasionally inattentive to details that he thought may not have any impact on him, and as such he forgot that he was given that information. In the end, it

---

[1]This amount is actually $2,825.00 (i.e. $2,500.00 + HST) higher than the total of the invoices, a discrepancy which appears can only be explained by the apparent fact that the Claimant did not include the $2,500.00 for Halifax Regional Municipality permits in his bills.

matters little as there is nothing that the Claimant did which was out of step with the process that the Department required.

[16] On the other side of the coin, Mr. Leadlay on behalf of the Defendant contended that one of the Department's requirements was that there be a 10% holdback for (among other things) deficiencies, which led to certain funds being held back and not released to the Claimant. There was no documentation put forward substantiating that requirement.

[17] I am far from convinced that the Defendant is correct in this position, for the following reason. The *Builders' Lien Act* already contains provisions for a 10% holdback in s.13(2), to be reduced (if appropriate) to a 2.5% holdback:

> 13 (2) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of sixty days after the contract is substantially performed, ten per cent of the value of the work, service and materials actually done, placed or furnished as mentioned in Section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.
>
> (3) Sixty days after the contract is substantially performed the amount required to be retained pursuant to subsection (2) may be reduced to two and one-half per cent of the value of the work, service and materials actually done, placed or finished and this balance of two and one-half per cent may be retained by the person primarily liable upon the contract until all required work is performed completely.

[18] With a statutory 10% holdback for potential liens already mandated, if the Department had more stringent requirements it would necessarily increase the amount of the required holdback to perhaps 20%. I conclude that the Defendant misunderstood the purpose of the 10% holdback, which may have contributed to some extent to the conflict.

[19] In the end this also does not matter much, as the time for a holdback has long passed, and there were never any issues with liens. Again this was a misunderstanding that merely created friction.

The breakdown of the relationship

[20] After the events of late 2009 and early 2010, which will be discussed further below, the relationship appears to have broken down irretrievably. The Defendant sent a letter dated May 9, 2010 to Arni Lively, which I quote substantially below as it is necessary to consider whether the Defendant had the right to take the positions that it did.

> Beaver Bank Children's Learning Centre Ltd. May 9, 2010
>
> We have received your invoice #100621 dated May 5, 2010 and as per your revised summary of costs dated July 6, 2009 please note the following:
>
> • The charge of $3975.00 for the completion of the C3 septic system is an additional charge as the $26,500.00 was charged and paid (less the 10% hold back) as per your invoice #08241 on Aug 15,2009 with our cheque # 1198
>
> • The charge of $1,500.00 for "excavate for & installed interceptor trench" is not applicable as it was part of the original estimate dated Feb 8,2008 which was prior to your revised estimate July 6,2009 which was based on an engineered site plan.
>
> Additionally we would like to note and address that your negligent actions have put our business at risk and the reputation of our business at risk. On February 19, 2010 the foreman for Gerald Mitchell Contracting was at the HRM Planning and Development Office in Sackville applying for an Occupancy Permit for our business. The only concern that Planning and Development had was the exposed dirt from the excavation on the site could erode and cause sediment to go into Duck Pond. Frank Dorrington called you from the Planning and Development Office and you assured him that you would cover the exposed dirt with straw to hold it in place until topsoil and hydro seeding was done. An Occupancy permit was issued based on your commitment. The problem is that no straw has been put over the exposed dirt to this date.

We have just been advised by our Project Manager, Mark Leadlay, that on May 7, 2010 you have backed out on a verbal agreement you had with him to top soil and hydro seed the exposed dirt. This is very disappointing in that we had expected this work to be completed by this date. Last month Marina Johnson contacted you and you assured her that this would be addressed. During the last four week Mark Leadlay, trying to address the same issue, called you 5 times, left 3 voice mails and on two occasions you answered the phone and told him you would call him right back. His calls were never returned. We view to refusal to communicate with us and your last minute decision to not top soil and hydro seed as irresponsible and negligent and I repeat: your actions have put or business at risk and the reputation of our business at risk.

There are some other issues that need to be addressed. Please note the following:

• In September 2009 Servant Dunbrack McKenzie & MacDonald Ltd. was hired by the BBCLC to confirm that the work you had completed, thus far met the specs of the site plan. There were 5 problem areas. You were given a copy of this an assured us that these issues would be corrected. To date there remain 4 outstanding issues.

a) "Driveway grading cross slope not currently shaped, water will travel down driveway rather than north and south sides, ditch and culvert"

b) "Driveway grading drainage scheme not maintained, water currently travels west towards septic field rather than east towards ditch"

c) "Ponding Water: Ditch has flat sections, ditch to have positive grade from 12" to 18" culvert (1% min)"

d) Lake side of Building - Areas currently drain towards building: positive drainage required towards lake:

• When you ordered the wrong control panel for the pump in the septic field and instructed the electricians without consulting with Dan Gerard from Servant Dunbrack, we incurred additional expenses from the electricians in regards to direct wiring in the pump on a temporary basis, moving electrical connections above ground and rewiring in the correct panel. Total amount $2241.05. This money will be deducted from the 10% holdback on Invoice #09158 and #08241.This is in addition to having Dan Gerard make three separate trips to insure that your work in regards to the set up of the septic tank and all connections were done correctly and his extra work in getting a temporary permit for the septic field while we waited the additional 5 weeks to get the proper control panel.

> What we require is a written plan of how you will address these outstanding issues and a date of completing. In the meantime will be proceeding with the landscaping and any additional expenses we incur in correcting the grade of the land to meet the site plan and correcting/resolving the erosion that has occurred, these costs will be deducted from the outstanding 10% holdback on Invoice #09158 and #08241. If the plan is not received and corrections made to the items previously listed as "a" and "b" we will have the contractor that we have hired to pave the driveway make these corrections and any additional expenses we incur in correcting the grade of the driveway and parking lot to meet the site plan will also be deducted from the 10% holdback on Invoice # 09158 and #08241.
>
> We also require a written plan of how you will address item "c". The stagnant water in this ditch smells and it is a breeding ground for mosquitos. It is absolutely unacceptable. If we do not receive a written plan of how and when you will correct this issue hire another contractor to correct it to the specs of the site plan and any additional expenses we incur will be deducted from the 10% holdback on Invoice # 09158 and #08241.
>
> Until your written plan we insist that no one from Dennis Lively Construction and Backhoe Services Ltd. be on the premises of 95 Kinsac Road unless an appointment is made with me or Marina Johnson. We look forward to your prompt reply.
>
> Cheryl Leadlay
> Marina Johnson

[21] This letter was met with a detailed and considered response dated May 19, 2010, from a lawyer representing the Claimant. This counts as a fairly prompt response, given the complexity of the issues. The Defendant appears to have taken objection to the involvement of lawyers, and treated that fact as an escalation of the dispute. In fact, as I read the response, it appears to me that it was a good faith effort on the part of the Claimant to get to the heart of the problem and resolve the issues, although it did raise the stakes somewhat by stating that the Claimant's willingness to resolve the issues was contingent upon the Defendant paying the balance of its account. In light of the fact that the Defendant had taken a wrong view of its right to holdback funds, this was not an unreasonable demand. At the very least, this was a point that the parties could have discussed further.

[22] Rather than reproduce the whole letter, I will quote from it in turn as I consider the issues raised by the Defendant and its principals.

Issues

[23] The specific issues that I have identified and must decide, include:

a. Did the Defendant have the right to bring in other contractors to complete work that was the responsibility of the Claimant, and accordingly have the right to offset the amounts paid to other contractors?

b. Did the Claimant cause delays in the completion of the building, in breach of its contract?

c. Was it part of the Claimant's contractual responsibility to supply the electrical connections to the septic field? Who should bear the cost of bringing the electrical service to the septic field up to standard? Were there other deficiencies in the septic system?

d. Was the driveway constructed by the Claimant deficient, in the sense that it did not allow water to run off? Or was that part of "paving detail" which was not part of the Claimant's contract?

e. Was the drainage ditch deficient because it didn't drain properly, leaving some standing water? Who should be responsible for the cost of rectifying it?

f. Was the Defendant improperly charged an extra $1,500.00 for an interceptor trench?

g. Is the Defendant entitled to a credit for incomplete landscaping?

h. Is the Defendant entitled to a credit for extra engineer visits, which the Defendant says were necessary because of deficiencies in the Claimant's work?

a. Did the Defendant have the right to bring in other contractors to complete work that was the responsibility of the Claimant, and accordingly have the right to offset the amounts paid to other contractors?

[24] This is somewhat of a threshold question and it is a difficult one, because of the nature of the contract. While in some contracts it is appropriate to say that it either has, or has not, been breached, that is overly simplistic. Certainly a contractor in the case of the Claimant here has an obligation to warrant its work, and also a corresponding right to be given the opportunity to remedy deficiencies before others are called in. However, if the contractor refuses to recognize its responsibility in one area, while remaining willing to honour the warranty in other areas, it would be unjust to say that it forfeits the right to fix its own work, or that the client (here the Defendant) is justified in hiring others to remedy all deficiencies regardless of whether or not the contractor accepts responsibility.

[25] I prefer to regard the contract here as an amalgam of several contracts, and only to accept the Defendant's right to hire others (and backcharge the cost)

where the Claimant has shown itself unwilling or unable to make reasonable and timely corrections.

[26] I appreciate the argument made by the Defendant that it had lost faith in the Claimant, but I do not accept that this loss of faith was reasonable or sufficient to justify refusing the Claimant any opportunity to honour its responsibility in any area of the contract.

b. Did the Claimant cause delays in the completion of the building, in breach of its contract?

[27] The single event that most caused the relationship to break down was the delay in obtaining a special electrical panel to control the septic system. In the May 19 response, counsel for the Claimant wrote:

> Our client acknowledges that this was an issue and that the electrical controller should have been delivered on-site earlier then it was. However, much of the delay that occurred was beyond our client's control.
>
> First, the original supplier ordered the wrong controller, which required our client to hire a new supplier. The proper controller was ordered but delivery was again delayed when the item was held up in customs. During the intervening period, the second supplier unexpectedly quit.
>
> As acknowledged in your letter, a temporary solution was put in place and the project ought to have been able to progress forward in a reasonable fashion.

[28] As I understand it, the type of septic system that was required for a facility that would be used considerably during the week and rarely on weekends, was one that pumped liquids from the dual tanks into the field on a programmed schedule. This was inherent to the design of the system, which means that the Claimant at all times knew what parts he needed to supply.

[29] The evidence supports a finding that Mr. Lively did not order this part well in advance of it being needed, and when the order was placed there were problems with the supplier, and again at the border because the part looked suspiciously like a component for a bomb. Apparently, the first one that arrived was wrong and it had to be reordered, with further delay.

[30] I note that there is nothing in the documentation that specifies any particular completion date. I accept that there were likely discussions about hoped for completion dates, but the issue of completion only became urgent when there was a fire that destroyed the Defendant's existing location at the Beaverbank Community Centre on September 24, 2009. The Defendant had to find temporary facilities to operate and targeted getting the new building up and running by sometime in late December of 2009, or by the beginning of January 2010 at the latest.

[31] The delay in getting the electrical part coincided with this time frame. Although there were other issues that played a role in delaying completion of the new building, the Defendant and its principals focussed a great deal of their frustration on the Claimant and on Arni Lively, who they believed had not moved quickly and who they suspected was ducking their phone calls. Rightly or wrongly, they had the perception that everyone else involved in the project was hustling to get the job done, while Arni Lively was taking his sweet time.

[32] From Arni's perspective, he had ordered the part in advance of it being needed and he did not anticipate the problems that caused its eventual arrival to be delayed. He was also prepared to, and did, fashion a temporary system that allowed the septic system to function without this electrical panel. He also

denied ducking telephone calls, saying that he did receive a few calls on his cell phone when he was busy with other things, and in all cases he offered to get back to them when he could. He also testified that there was not much he could do to speed things up once the problems at Customs developed.

[33] I suspect the truth here lies somewhere in the middle. I believe that Arni was probably a bit slow in ordering the part in the first place, because he did not appreciate the new sense of urgency that developed after the fire. I suspect also that he may have brushed off a few telephone calls because he had nothing to report to the Defendant. However, I do not accept that he was indifferent to the Defendant or that he breached the contract in this respect. I see nothing in the written quote that speaks of a completion date. The evidence of conversations about a completion date were vague, and no completion date can be said to have been agreed upon and imported into the contract. In contracts generally, time is not of the essence unless it is so agreed. Where there is a general time frame for completion, parties' performance will be judged on a reasonableness standard, because it would be implied in most cases that there should be no unreasonable delay in completing the work.

[34] I am unwilling to find that the Claimant breached any contractual obligation as a result of his delay in obtaining the electrical panel. I note also that the evidence of the builder and engineer suggests that even as the electrical panel was pending, there were other deficiencies that had to be rectified in order for the necessary occupancy permit to be obtained, and the delay that can solely be placed at the feet of the Claimant is three or, at the most, four weeks, which does not seem to me to be unreasonable in the scope of the entire project.

[35] I acknowledge that the timing was unfortunate for the Defendant because its inability to open right after the winter holidays meant that some parents made other arrangements for their children, and business opportunities for the Defendant were lost. The Defendant also believes that it suffered a loss of business reputation. But in light of my finding that time was not of the essence, and that the delay was not unreasonable, these losses are not claimable against the Claimant.

c. Was it part of the Claimant's contractual responsibility to supply the electrical connections to the septic field? Who should bear the cost of bringing the electrical service to the septic field up to standard? Were there other deficiencies in the septic system?

[36] There is a fundamental disagreement as to whether or not supplying the electrical connections to the septic field was a responsibility of the Claimant. Counsel for the Claimant put it thus in the May 19 response:

> Our client wishes to remind you that electrical connections were not within the scope of work for which it was responsible. We are advised that, in new construction, electrical connections are the responsibility of the in-house electricians.
>
> In this case, the electrical wiring, conduit and box were installed by Dennis Lively Construction Limited. We are further advised that the wire failed Nova Scotia Power's inspection and, therefore, the electricians ran new wire into the controller box supplied by our client. Mr. Lively advises that if the in-house electricians had supplied the required conduit and wiring during the initial installation (which was their responsibility and not our client's) the wiring likely would have passed inspection.
>
> In any event, while the amount invoiced ($2,241.05) appears reasonable, our client would remind you that this work was not part of your contract with Dennis Lively Construction Limited and there is no legal basis (by way of contract or equity) to deduct this amount from the balance owing to our client.

[37] In his testimony, Arni Lively insisted that it was his job to install all of the equipment in a state ready for the owner (the Defendant) to hook up to its electrical system. The Defendant says that there was never any qualification placed on the contract, and that the contractual words “install C3 septic system” are broad enough to include hooking it up so it actually functions.

[38] Given that the contract is not explicit, the question is whether there is any implied term as to whose responsibility it was to supply the electrical hook up. I suspect that if ten casual bystanders were asked, almost all would say that “install” includes doing everything necessary to have the system up and running.

[39] I allow for the possibility that there could be an established practice to the contrary within this particular industry, but the evidence was far from establishing that. Neither the builder’s project manager, Frank Dorrington, nor the engineer Dan Gerard, supported the Claimant’s view. Dorrington allowed for the fact that almost all of his experience was residential, but testified that when his company contracts to do a septic system it includes everything. Gerard testified that in his experience, the contractor who builds the septic either does the electrical or subcontracts it out.

[40] Given this evidence, I simply cannot accept the Claimant’s position. Arni Lively has to take responsibility for the quote that he drew up, which appears on its face to contemplate doing everything necessary for the septic system to operate.

[41] The practical implications are that the Defendant should be entitled to a credit for the amount expended on electrical work to get the system up and running. The credit which I would allow to the Defendant is $2,241.05 which is

the amount paid to George Mitchell Contracting for such work, and which the Claimant appears to accept as reasonable for that aspect of the work.

[42] As for other problems with the septic system, it appears that the system as installed did not meet standard in a number of respects. Engineer Dan Gerard had some very unflattering things to say about how the system was put together, and there was testimony about the various repairs that had to be made. Details are also contained in an undated letter from the engineer to the Defendant, but which was created sometime in or after May of 2010 - namely after the initial letter from the Defendant to the Claimant, which explains why there is no mention in that letter of the additional problems with the septic system.

[43] Ultimately most of this work was done by another contractor, Kynock, at a cost of $2,950.00 plus HST ($3,333.50).

[44] I believe that Arni Lively has a bit of a blind spot concerning the quality of his work in this respect. He refused to concede that there was anything wrong with it. That testimony stood in stark contrast to that of Mr. Gerard. In all of the circumstances, I accept Gerard's evidence and hold the Claimant responsible for the cost to bring the system up to standard.

d. Was the driveway constructed by the Claimant deficient, in the sense that it did not allow water to run off? Or was that part of "paving detail" which was not part of the Claimant's contract?

[45] The following was the response to this complaint in the May 19 letter:

> At page two of your letter, you allege that our client is responsible for a deficiency relating to the driveway grading cross slope. Our client states that the shaping of the slope of the driveway is the responsibility of the paving contractor that you hired and is not part of the scope of work provided for in your contract with Dennis Lively Construction Limited. Our client would add that the required cross slope needs to be created by the paving contractor using their paving detail; this is clearly detailed at top center of Plan #16-759-0.
>
> Therefore, our client would suggest that you contact your paving contractor to arrange remediation of the driveway cross slope.

[46] My understanding of the evidence is that the Claimant was supposed to prepare the driveway, in accordance with the site and grading plan, for eventual paving by someone else. Arni Lively's evidence was that putting a crown [my word] through the centre of the roadway to allow for water to run off in either direction was part of the paving detail which would be the responsibility of the paving contractor and not the Claimant.

[47] I see nothing in the evidence adduced by the Defendant that sufficiently answers this contention. The Claimant's position makes sense. It is common experience that paving contractors attend to the final details of the grading. Although it is not easy to draw a fine line as to where the responsibility of the excavator ends and that of the paver begins, I am satisfied that the Claimant did not breach the contract in this respect.

e. Was the drainage ditch deficient because it didn't drain properly, leaving some standing water? Who should be responsible for the cost of rectifying it?

[48] The Claimant's response to this issue in the May 19 letter was this:

> At page two of your letter, you've suggested that the gradation of the ditch is deficient. Our client states that the work on the gradation of the ditch was correctly completely; however, unforeseen issues have arisen.
>
> Mr. Lively states that anytime a one percent (1%) slope is created in a ditch; there is a high risk of ponding. When silt birms are added to this same ditch, the risk of ponding is inevitable.
>
> In order to address this issue, our client installed a surge feature in the ditch to keep water below surface. Again, you were not billed for this additional work, even though it is properly an extra. Our client is not certain whether the surge feature has resolved this issue.
>
> If the ponding water continues to be an issue, our client states that a possible solution would be to remove the filter fabric from the silt birms and, if problems continue, the next step would be to place more rock in the ditch to cover any ponding water.
>
> Assuming a resolution can be achieved on other issues, our client is willing to undertake the suggested solutions if the ponding problem has not resolved.

[49] The evidence of Arni Lively is that he constructed the ditch as per the plans, and that such plans included silt berms to filter the water before it entered the lake system, with a fabric filter which helps to keep the berms together. It was his evidence that these berms have a tendency to slow down the flow of water, which in this case led to standing water in part of the ditch.

[50] The position of the Defendant was that the problem was that the ditch did not have a sufficient grade to cause the water to flow toward the lake.

[51] It is conceded by the Claimant that standing water is undesirable, as it can breed pests such as mosquitos, can be smelly and it is unsightly. As the May 19 letter demonstrates, Arni Lively was willing to continue to work on this issue as part of an overall solution to the dispute.

[52] The Defendant essentially refused to negotiate with the Claimant and as such the Claimant never had a chance to attempt a solution.

[53] I am unconvinced that the Claimant's work was deficient. I am further satisfied that he ought to have been given a chance to work toward a solution.

f. Was the Defendant improperly charged an extra $1,500.00 for an interceptor trench?

[54] The answer to this complaint in the May 19 letter was this:

> You state that the charge of $1,500.00 for the installation of the interceptor ditch is "not applicable" because it formed part of our client's original estimate. However, as you correctly acknowledge in your letter, this estimate and the work specifications were revised when you provided our client with an engineered site plan.
>
> Mr. Lively states that the new site \ grading plan called for the omission of interceptors which were replaced with swale. Mr. Lively states that he discussed this issue with Mr. & Mrs. Leadlay which led to your instructions to fill and level the swale area. While the interceptor was not called for on the engineered site plan, the decisions to level the area and add fill necessitated the installation of an interceptor to prevent surface water from entering the field. All of these changes were discussed with you and the work was carried out on your instructions; therefore, this work is an extra for which you are responsible.
>
> Our client would note that, in order to level the area in question, fifty (50) loads of material had to be brought on-site. This material was paid for by our client. Without legal obligation to do so, our client did not invoice you for the cost of this material. While Dennis Lively Construction Limited has not billed you for the material, it has rendered an invoice for extra work that was done. It is expected that this work will be paid for.

[55] I am essentially in agreement with the Claimant. The interceptor appears to have been a necessary corollary to the work that the Claimant was asked to do, and it appears that he did have discussions about it. While perhaps the communication was not as clear as it might have been, this is a reasonable charge and would be allowed on a quantum meruit basis, even if an explicit contractual basis were not shown.

g. Is the Defendant entitled to a credit for incomplete landscaping?

[56] There were several aspects to this complaint, which was answered in these terms:

> **F. Areas draining towards building**
>
> You suggest that our client is responsible for the drainage issues near the building. Our client states that it had assurances that pressure treated wood would be installed by another contractor (Frank Dorrington) on the north side of the building's stairwell. The installation of this material was required to enable our client to lift the grade to address the drainage around the building. As you ought to know, the installation of this feature was never completed. In order to remedy this issue, machine work will be needed to correct the grading around the building.
>
> Our client is willing to complete this work at no additional expense whereas it was part of your contract.
>
> **I. Covering exposed dirt with straw**
>
> Our client acknowledges that he was contacted by Frank Dorrington to place straw on the affected area to satisfy HRM's concerns. Our client agreed to return to complete this work; unfortunately, scheduling conflicts arose and our client was not able to send workers to the site to place the straw. While the straw has not been placed, our client states that there are other sediment controls in place on-site which have functioned adequately to date.
>
> Our client remains open to completing this work assuming the parties can resolve some of the more significant issues between the parties.
>
> **J. Landscaping of the property**
>
> Our client would note that landscaping was never part of the original or revised contract. There were discussions regarding the possibility of Dennis Lively Construction Limited landscaping the property with Mr. Leadley; however, no consensus was ever reached to incorporate this detail into the parties' contract. When the parties' relationship became contentious, Mr. Lively, on behalf of Dennis Lively Construction Limited, decided that he would not negotiate any further on this point.
>
> It should be evident that many of the disputed issues will need to be resolved before this topic can ever be considered by either of the respective parties.

[57] The Claimant has always acknowledged that he had a responsibility to place straw on some areas to prevent erosion, and that he failed to do so. However, there is little if any evidence of real harm having come about because of this.

[58] Other complaints about incomplete grading or landscaping do not appear to have any validity. I accept the answers in the May 19 letter as being a reasonable interpretation of the situation as it stood.

h. Is the Defendant entitled to a credit for extra engineer visits, which the Defendant says were necessary because of deficiencies in the Claimant's work?

[59] The answer in the May 19 letter was this:

> **H. Engineer Site Visits**
>
> As you are well aware, numerous changes were made to the septic field design at various times during this project. Some of the details added include but are not limited to:
>
> - Splitting of septic field;
> - Addition of valve; and
> - Incorrect analysis of leaking tank.
>
> These changes were significant and warranted the additional site visits by Mr. Gerard. Moreover, you had full knowledge of these changes, which were authorized by you.
>
> Our client would also note that, while you may have had to pay Mr. Gerard for the additional site visits, you were not billed for any of the above-noted extras (because this work was outside your contract, our client was entitled to bill for these items, but chose not to maintain relations between the parties). We would suggest that this result is more than fair to you. In the event that you do not share this viewpoint, we would add that you have no legal basis to deduct these charges from the holdback amount.

[60] There is little doubt that the Defendant ended up using Mr. Gerard more frequently than was initially planned, but likely no more than would have been reasonably foreseeable for a project of this complexity. Much of the additional expense for the engineer was expended for his assistance in responding after the fact to the dispute that arose between the parties. I do not believe that this can be said to be a reasonable backcharge under the contract.

Allowable Credits

[61] In the end these are the credits I allow to the Defendant:

Electrical work on septic	$2,241.05
Other work on septic	$3,333.50
Total credit	$5,574.55

[62] It follows that the claim succeeds to the extent that the Claimant is entitled to the amount claimed, namely $18,351.29 minus $5,574.55, for a total of $12,776.74.

[63] The Claimant seeks interest and costs. In the exercise of my discretion I will not allow any interest. I believe that there is blame on both sides of this dispute, giving rise to the delay in payment. I will only allow the Claimant costs of issuing this claim in the amount of $179.35.

[64] There will accordingly be judgment for the Claimant in the amount of $12,956.09.

Eric K. Slone, Adjudicator