

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

McCAW NORTH DRILLING AND BLASTING LTD.

Plaintiff

- and -

CLARK BUILDERS and THE GUARANTEE COMPANY OF NORTH
AMERICA

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiff McCaw North Drilling and Blasting Ltd. (McCaw) commenced an action against the Defendants Clark Builders (Clark) and the Guarantee Company of North America (Guarantee) over unpaid amounts that McCaw claims are owed to them pursuant to a contract. McCaw has now filed an application seeking summary judgment. Clark has also brought an application seeking summary dismissal of McCaw's claim. Guarantee took no part in these proceedings and this application does not address whether Guarantee is liable to pay any unpaid amounts to McCaw.

[2] For the reasons that follow, I am partially granting the application of McCaw and dismissing the application of Clark.

BACKGROUND

[3] Clark was retained by Public Works Government Services Canada (PWGSC) to be the Construction Manager for the Giant Mine Project (Project) and was authorized to retain subcontractors to carry out work on the Project. The purpose of the Project was to remediate the Giant Mine site which was contaminated with arsenic trioxide as a result of mining activity and to make it safe for the environment and the public.

[4] Clark and McCaw entered into a Standard Construction Agreement CCDC18-2001 No. 13310.001 (Contract 1) on or about September 12, 2013 in which McCaw agreed to perform services and work relating to the geotechnical drilling at the Giant Mine Project. Clark and McCaw entered into a second Standard Construction Agreement CCDC18-2001 No. 13301.007 (Contract 2) on or about December 20, 2013 in which McCaw agreed to perform drilling services and work relating to the Project.¹

[5] McCaw's claim against Clark relates to two things: 1) unpaid payments for partially deviated boreholes drilled by McCaw; and 2) stand-by costs incurred by McCaw as a result of equipment being contaminated by arsenic on the Project and the delay in the development of an equipment decontamination procedure.

[6] Clark filed a Statement of Defence in which it pled, amongst other things, that Clark is not required to pay for incomplete boreholes, that McCaw failed to submit its claim in time pursuant to the terms of the contract, and that McCaw failed to develop an equipment decontamination procedure and failed to obtain a Change Order as required.

[7] McCaw has brought an application for summary judgment seeking a determination that Clark owes McCaw the sum of \$825,452.32 plus taxes and interest. Clark has also brought a summary judgment application seeking to dismiss McCaw's claim except for the portion of the claim seeking payment for portions of the deviated boreholes up until the point of deviation, in the amount of \$64,157.52.

ISSUES

¹ In Contract 1, the contractor was listed as McCaw North/Tli Cho Drilling and Blasting Ltd. and in Contract 2, the contractor was listed as First Nations Drilling and Blasting Ltd. JV. Both contractors were joint ventures entered into by McCaw and Indigenous partners. The contractor was incorrectly described in Contract 1 and the actual joint venture name was Tli Cho/McCaw North Drilling and Blasting Ltd. The joint ventures have been terminated and McCaw brought the action in its own name. For ease of reference, I have referred to McCaw as the contractor in each contract.

[8] While McCaw and Clark have each filed a summary judgment application, the issues on each application are the same:

- 1) Is McCaw entitled to payment from Clark for partially deviated boreholes under the contracts?
- 2) Is McCaw entitled to payment from Clark for stand-by costs incurred as a result of delays in removing equipment from the Project site?

ANALYSIS

The Principles Applicable to Summary Judgment Applications

[9] Summary judgment is a method of determining an action without proceeding to trial. The *Rules of the Supreme Court of the Northwest Territories*, R-010-96 (*Rules*) permit either a plaintiff or a defendant to apply for summary judgment:

174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

(...)

175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

[10] The test on a summary judgment application has traditionally been whether there is a genuine issue for trial. This has been considered quite strictly and the standard was whether it was “plain and obvious” that there is no genuine issue for trial. *Leishman v Hoeschmann et al.*, 2016 NWTSC 27 at para 38.

[11] In *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court of Canada re-examined the approach to summary judgment applications. The Supreme Court concluded, at para 5, that rules regarding summary judgment “must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.”

[12] The approach taken in *Hryniak* is not whether there is a genuine issue for trial but whether a genuine issue requires a trial and the trial process to achieve a fair and just result. *Leishman*, para 40.

[13] In considering whether there is an genuine issue requiring trial, the Supreme Court in *Hryniak* stated, at para 49:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[14] This approach has been adopted in the Northwest Territories in *Leishman* and Shaner J. described the test as follows (at para 42):

Although Karakatsanis J. rendered her judgment in the context of an appeal from a summary judgment order made under Rule 20 of the Ontario *Rules of Civil Procedure*, RRO 199, Reg 194, the rationale she articulated for the modern approach is equally applicable to litigants in the Northwest Territories. Like Ontario's Rule 20, Rules 175 and 176 of the *Rules of the Supreme Court of the Northwest Territories* are ultimately intended to allow the Court, in appropriate cases, to assess claims fairly and efficiently based on a record, rather than a formal trial. Thus, the test should be the same. The question for the Court in determining if a summary judgment application is appropriate is whether there is a genuine issue which requires a trial for fair and just resolution, rather than whether there is a triable issue.

[15] In this case, McCaw and Clark both claim that this is an appropriate case for summary judgment. I agree. An examination of the record provided by the parties permits a fair and just resolution and it is possible to make the necessary findings of fact and apply the law to the facts. Proceeding by summary judgment will permit a proportionate, more expeditious and less expensive means to achieve a fair and just resolution.

Principles of Contractual Interpretation

[16] The interpretation of contracts utilizes a practical, common-sense approach which is concerned with determining the intent of the parties and the scope of their understanding. It is not fixated with technical rules of construction. *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53 at para 47.

[17] In *Sattva*, the Supreme Court of Canada re-considered the principles of contractual interpretation and stated that practical, common-sense contractual interpretation requires (at paras 47-48):

(...) a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement.

[18] Surrounding circumstances are considered in contractual interpretation, but cannot be used to overwhelm the agreement or be used to interpret the contract in such a manner that it effectively creates a new agreement. The surrounding circumstances generally consist of objective evidence of the background facts at the time the contract was executed, and knowledge that was or reasonably ought to have been within the knowledge of the parties before or at the time of execution. *Sattva*, paras 57-58.

[19] In this case, a standard form contract was used. In the interpretation of standard form contracts, the surrounding circumstances carry less weight in the contractual analysis:

In sum, for standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties.

Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co., 2016 SCC 37 at para 32.

Is McCaw Entitled to Payment from Clark for Partially Deviated Boreholes Under the Contracts?

[20] Contracts 1 and 2 were awarded to McCaw by Clark following a request for tenders. The contracts required McCaw to drill boreholes into the Project site in

various locations and depths as directed by Clark and Golder Associates (Golder), who had been appointed by PWGSC as the consultant on the Project.

[21] Pursuant to Contract 1, the work was to commence on September 13, 2013 and was to be substantially completed by December 31, 2013. The work on Contract 2 was to commence January 6, 2014 and be substantially completed by March 31, 2014. Article 2.1 of each contract stated that it:

(...) supersedes all prior negotiations, representations, or agreement, either written or oral, relating in any manner to the *Work*, including the bidding documents that are not expressly listed in Article A-3 of the Agreement – CONTRACT DOCUMENTS.

[22] The contract documents in each contract were different. In Contract 2, one of the contract documents was a Drilling Report RFQ (RFQ) which was not included in the list of contract documents for Contract 1.

[23] The RFQ was authored by Golder and set out the general drilling requirements for the Project. There were two versions of the RFQ. The first version was issued on August 6, 2013 prior to the commencement of work by McCaw on Contract 1. A revised version was issued on October 31, 2013 after Contract 1 was awarded and the work had commenced. The revised version of the RFQ was the document included in Contract 2.

[24] McCaw worked on both contracts at the same time but the work on a specific hole was specific to one or the other of the contracts. The revised RFQ was used to guide all of McCaw's work on both contracts following its issuance at the end of October.

[25] Article 2.7 of the first RFQ dealt with Downhole Surveys and required downhole surveys to ensure that the borehole had not deviated from design. Excessive deviation was contemplated and it was expected that those holes might have to be abandoned and a new hole drilled.

[26] During the Project, as the work commenced, knowledge of the site conditions was evolving. The first RFQ required McCaw to provide information daily regarding the reliability of the hole orientation and any deviation from the planned orientation. It was apparent from the first hole drilled by McCaw that ground conditions were such that they contributed to deviation of the boreholes. The revised RFQ attempted to address the issues that were being encountered with the drilling.

[27] Article 2.7 of the revised RFQ dealt with Downhole Surveys and Expected Drilling Accuracy. The revised RFQ contemplated borehole deviation and required surveys at fixed intervals during hole advancement and after the borehole was completed. If a borehole deviated excessively, it was expected that the hole might need to be re-directed, abandoned or a new hole drilled.

[28] With respect to drilling accuracy, Article 2.7 of the revised RFQ contemplated payment for partially deviated boreholes, stating:

Regarding drilling accuracy, meterage will be paid on holes, or portions of holes, with accuracies of +/-1% from design.... Payment for holes or portions of holes, drilled which are outside of this accuracy will be done so at PWGSC and their engineers sole discretion.

[29] One of the issues was whether the payment basis for the boreholes which deviated was within the scope of work or required a change order to be processed before payment could be made. In oral argument, both parties appeared to agree that the drilling of boreholes which deviated was within the scope of work in the contracts. I agree. The drilling of boreholes was within the scope of work in the contracts. The contracts and revised RFQ contemplated that deviation might occur and could result in a hole being redirected, abandoned or re-drilled. A change order was not required in order for payment to be processed.

[30] Payments for drilling services provided by McCaw to Clark under both of the contracts were to be made pursuant to a Basis of Payment schedule attached to each contract. This differed slightly from the revised RFQ and stated:

Footage of piling will be paid on holes with accuracies of +/-1% from design. Payment for holes drilled which are outside of this accuracy will be done so at PWGSC and their engineers sole discretion [sic].

[31] Under Contract 1, Clark paid McCaw \$449.56 per meter drilled for 200mm holes. McCaw is claiming payment for 8 boreholes with a total depth drilled of 489.1 meters and for which 330 meters were drilled up to the point of deviation. Under Contract 2, Clark paid McCaw \$381.89 per meter drilled for 200mm holes. McCaw is claiming payment for 5 boreholes with a total depth drilled of 383.9 meters and for which 168 meters were drilled up to the point of deviation. The value of the unpaid boreholes that McCaw is claiming amounts to \$148,354.80 plus tax under Contract 1 and \$64,157.52 plus tax under Contract 2. McCaw acknowledges that these boreholes deviated beyond +/-1% from design but is

claiming payment for the boreholes and the meters drilled up to the point of deviation.

[32] As part of the process the parties followed during the work, McCaw produced Daily Quantity Reports listing the meters which had been drilled each day for each borehole under the contracts. Those were provided to Clark for approval. A review of those reports shows that on many of them, there is a signature indicating customer approval. The reports also have handwritten notations, checkmarks and alterations. On some sheets, the numbers were revised. Some are unsigned by the customer and one has a handwritten notation saying “not paying” and also says “resubmitted.” Clark signed off on the Daily Quantity Reports for each of the disputed 13 boreholes. The approved Daily Quantity Reports were used by McCaw to invoice Clark on a monthly basis.

[33] The procedure followed by the parties was a deviation from the payment process detailed in Part 5 of the General Conditions contained in both contracts. It is apparent that the process followed by the parties was not imposed by one party on the other but a process that both parties developed through the course of the contracts and which was mutually acceptable to both parties. The parties, through their conduct, developed their own payment procedure which deviated from the contracts such that the result is that Part 5 of each of the contracts is no longer applicable. See *Man-Shield Construction Inc. v Renaissance Station Inc.*, 2011 MBQB 71 at para 20.

[34] McCaw argues that because Clark approved the Daily Quantity Reports for the boreholes at issue, Clark obligated itself to pay for the meterage indicated. I do not think that Clark’s approval of the Daily Quantity Reports went so far as to bind them to pay for the holes drilled. The reports indicated the meters drilled per hole and the amounts associated with drilling the holes. In signing the reports, Clark confirmed the work completed by McCaw and the quantity and amounts claimed. If Clark were to claim that the meters drilled by McCaw for a particular hole were not accurate, the Daily Quantity Reports showing that Clark approved the amounts would be evidence to the contrary.

[35] The payment process developed by the parties still required McCaw to submit a monthly invoice to be processed by Clark. The Basis of Payment Schedule for each contract and the revised RFQ could still be considered by Clark in determining whether payment should be made for the boreholes and for deviations in the boreholes.

[36] As mentioned, the wording of the Basis of Payment Schedule differs from the revised RFQ. In Contract 1, for which the revised RFQ was not included in the Contract Documents, the Basis of Payment Schedule contemplated payment for “holes with accuracies of +/-1% from design.” Payment for holes drilled beyond +/- 1% from design was within PWGSC and their engineer’s sole discretion. The effect of this provision appears to be that the decision regarding payment for deviated holes was not ultimately within Clark’s discretion; it was payable at PWGSC’s discretion. The evidence establishes that PWGSC exercised their discretion and did not pay for holes under Contract 1 that deviated beyond the specifications in the Basis of Payment Schedule.

[37] As the Project progressed and ground conditions which contributed to deviation of the boreholes was encountered, the RFQ was revised to address these issues. Payment for partially completed boreholes, up to the point of deviation, was now included in the revised RFQ and formed part of the Contract Documents for Contract 2. The parties clearly intended to address the issue of payment for partially deviated boreholes in Contract 2. Payment was to be made for portions of holes, with accuracies of +/-1% from design; it was not within PWGSC’s sole discretion to determine if payment would be made.

[38] The situation for Contract 1 was different. While McCaw and those involved in the Project followed the revised RFQ once it was issued, there is no indication that the parties intended to change the basis for payment under Contract 1 to allow for payment beyond what was stated in the Basis of Payment Schedule. Contract 1 was not amended or altered to include the revised RFQ or to change the Basis of Payment Schedule. Work was conducted on both contracts at the same time and Contract 2 did not specify that the basis of payment for any holes drilled under Contract 1 would be altered in any way. Ultimately, it was still within PWGSC’s discretion to authorize payment for holes which deviated more than +/- 1% from design on Contract 1.

[39] In the circumstances, I conclude that Clark does not owe McCaw payment for any partially deviated boreholes drilled under Contract 1. Clark does owe McCaw payment for the 5 boreholes drilled under Contract 2 up to the point of deviation beyond +/-1% from design which amounts to \$64,157.52 plus tax and interest pursuant to the *Judicature Act*, R.S.N.W.T. 1988, c. J-1.

Is McCaw Entitled to Payment from Clark for Stand-by Costs Incurred as a Result of Delays in Removing Equipment from the Project Site?

[40] The purpose of the Project was to remediate the Giant Mine site which was contaminated with arsenic trioxide and to make it safe for the environment and the public. It was generally known that the Giant Mine site was contaminated with arsenic trioxide and the parties were aware of the contamination prior to entering into the contracts.

[41] While the parties expected that there may be contact with arsenic trioxide as part of completing the contracts, the extent to which there would be contact with arsenic trioxide was not known. McCaw understood that the drilling required under the contracts would not involve drilling into areas known to contain arsenic trioxide. Clark also believed that drilling would not occur into hot spots of arsenic trioxide.

[42] Article 2.1 General Drilling Requirements of the first RFQ, which was issued prior to Clark and McCaw signing Contract 1, addressed the issue of contact with arsenic trioxide dust:

Some of the voids may be filled, or partly filled with dry arsenic trioxide dust. All drilling near potentially arsenic trioxide filled voids will be done by wet drilling methods only. Drilling into known underground arsenic stopes, chambers and drifts will only be done from surface.

[43] In March 2014, there was an incident which occurred in another area of the Project, not involving McCaw, where a worker was exposed to dangerously high levels of arsenic and had to be hospitalized. The Workers' Safety and Compensation Commission of the Northwest Territories and Nunavut (WSCC) became concerned about worker safety at the Project and more specifically about exposure to arsenic trioxide dust.

[44] A meeting was held on March 12, 2014 between Clark, McCaw, the mine manager and others to discuss safety of the drilling program going forward. At the meeting, WSCC suggested that the drilling program may have already resulted in McCaw drilling into arsenic areas and that personnel and equipment may have been exposed to dangerous levels of contamination as a result.

[45] Following the meeting, a decision was made to establish two different categories for the drilling program. The first category was for holes within 10m of a known underground chamber containing arsenic and the second was for holes outside 10m of a known underground chamber containing arsenic.

[46] On March 20, 2014, McCaw sent a Request for Information (RFI) to Clark regarding McCaw's concerns about arsenic contamination from drilling activities. McCaw specifically asked about potential airborne arsenic concentrations from drilling activities and potential contamination of cuttings on-site as they were in the process of completing a revised procedure for drilling holes within 10m of a known arsenic chamber. McCaw claims they received no written response to this request. Clark sent an e-mail to PWGSC about the RFI but there is no evidence that Clark or PWGSC responded to McCaw in writing about the RFI. There was an oral response at a meeting on April 29, 2014 where it was stated that the air monitoring results looked good and that exposure limits were low.

[47] Following this, McCaw and its subcontractor, with the assistance of Clark and PWGSC developed a Standard Operating Procedure for "Drilling, Near and into Arsenic Chambers" (SOP3) which was the third Standard Operating Procedure developed for drilling on the Project.

[48] The development of SOP3 took a period of months and resulted in project delays and stand-by costs incurred as a result of labour, material and equipment sitting idle awaiting the finalization and approval of SOP3. These delays occurred up until July 21, 2014. McCaw requested that Clark pay for the SOP3 stand-by costs and the parties reached an agreement on those costs.

[49] McCaw was concerned that an equipment decontamination procedure needed to be developed. The concern about contaminated equipment was specifically raised at a meeting on June 6, 2014 where the Clark meeting minutes stated:

Contaminated equipment that may not be accepted back by rental company (reflex tools etc.) Potential fairly large cost impact.

[50] These concerns were again raised by McCaw at a meeting on June 13, 2014. SOP3 was finalized on July 21, 2014 and the final version did not include an equipment decontamination procedure, although it did contain a decontamination procedure for personnel.

[51] At meetings on July 22, 2014, July 25, 2014 and August 12, 2014, McCaw again raised concerns about contaminated equipment and the need for an equipment decontamination procedure.

[52] McCaw had its drill rigs located at the Project site tested for arsenic contamination. The report, received on August 15, 2014, confirmed that all of the

equipment tested had been contaminated with high levels of arsenic trioxide dust from the Project. McCaw provided the report to Clark shortly after receiving it.

[53] On August 21, 2014, Devon McCaw, President of McCaw sent an e-mail to representatives of Clark asking for a response to the report and stating “the equipment on the site cannot be demobilized until it is decontaminated and there is costs absorbed. We need to know how to proceed.”

[54] On August 25, 2014, WSCC inspected the Project site and the Inspector of Mines issued an Order to Clark pursuant to s. 26(2) of the *Mine Health and Safety Act*, S.N.W.T. 1994, c. 25. Order #002 was directed to Clark and stated:

Observation:	McCaw North will need direction on what to do with the equipment to get it off site. This information is normally available in an SOP that would take into consideration potential and actual exposure as well as the cleaning process that identifies parts that are not easily visible and filers or other disposable components.
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(...)

Officer/Inspector Order:	Develop an SOP that would take into consideration potential and actual exposure as well as the cleaning process that identifies parts that are not easily visible and filters or other disposable components.
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Req'd Compliance Date:	01/09/2014
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[55] On August 28, 2014, Clark forwarded to McCaw a memo that PWGSC had provided to Clark regarding the equipment decontamination issue. The memo stated:

PWGSC expects that the path forward from this point should include the following steps:

1. Clark Builders, or appropriate sub-contractors, will complete the decontamination SOP, as requested previously by WSCC. This will include procedures specific to non-arsenic and near-arsenic work activities. This SOP is required ASAP, as this was requested prior to the June 11 approval of the near arsenic surface drilling SOP (SOP 3) by WSCC.

2. Clark Builders will proceed with the cleaning of the three drill rigs in question, and immediately after cleaning, the drill rigs will be inspected by the Mine Manager. In addition, the drill rigs will be immediately swabbed in the same sample locations as previously sampled to provide re-assurance that the decontamination process is effective. This data will be used to form the decontamination SOP. Once the inspection is completed the equipment can be demobilized from site.

[56] On August 29, 2014, McCaw submitted a contract change request to Clark for the purpose of developing SOP4. Clark forwarded the request to PWGSC for approval.

[57] By September 3, 2014, McCaw had not received a response from Clark and sent an e-mail inquiring about the development of SOP4 and the equipment decontamination process. On September 8, 2014, McCaw sent another e-mail inquiring about the status of the development of SOP4. Clark responded later that day stating that development of SOP4 was not necessary and that the current approved SOP's could be implemented with modifications.

[58] On September 9, 2014, at a meeting with Clark and McCaw, McCaw indicated that it was still waiting for direction on how to proceed with equipment decontamination.

[59] On September 10, 2014, Clark issued a notice to McCaw giving McCaw 5 days to prepare SOP4. The notice stated that Clark had requested an SOP from McCaw on "various occasions". McCaw disputes that Clark had made any requests prior to September 10, 2014.

[60] Ken Szarkowicz, Project Manager for Clark, deposed in an affidavit that Clark had requested SOP4 on various occasions including at meetings on June 3, 2014, June 6, 2014, August 12, 2014, August 22, 2014, August 26, 2014 and August 29, 2014.

[61] The meeting minutes, which were prepared by Clark, for each meeting indicate a topic of discussion, commentary for each topic and a column stating "Action by" where the entity responsible for following up is indicated. Various topics state that Golder, PWGSC, McCaw, Clark, All or a combination of them was responsible for that item. Some indicate that the topic is for information purposes.

[62] A review of the meeting minutes does not indicate that Clark specifically asked McCaw to develop SOP4 at any time. None of the action items indicate that McCaw was responsible for developing SOP4. Many of the discussions of SOP's are indicated as for information only.

[63] At the meeting on June 3, 2014, under section 15 Comments, item 5 refers to McCaw sending a draft of a document for review and comment and needing a form that would be signed off on by at least 2 parties. McCaw is listed as being responsible for this action item. It is not clear what this is referring to as item 1 referred to decontamination and items 2-4 referred to hole completions and documentation and all were marked as info only. At this point, the parties were also still in the process of developing SOP3 which wasn't finalized until July 21, 2014. Mr. Szarkowic was cross-examined on his affidavit and confirmed that many of the discussions in the meetings in question were regarding SOP3.

[64] McCaw made a number of requests inquiring about the development of SOP4 in the period leading up to September 10, 2014 which is inconsistent with McCaw having been asked to develop the SOP by Clark on multiple occasions prior to that date. In addition, Clark told McCaw as late as September 8, 2014 that SOP4 was not necessary and to proceed using SOP3 with modifications. On the basis of the evidence before me, I cannot conclude that Clark specifically requested McCaw develop SOP4 or an SOP related to equipment decontamination at any time prior to the notice issued by Clark to McCaw on September 10, 2014.

[65] On September 11, 2014, McCaw inquired with Clark by e-mail about acceptable decontamination standards for the equipment. On September 14, 2014, Clark asked McCaw by e-mail how McCaw intended to respond to the notice. In response, McCaw referred to the e-mail of September 11, 2014 and advised that it was still awaiting a response.

[66] At a Project meeting on September 19, 2014, Clark indicated that it would be preparing SOP4. On September 29, 2014, McCaw received an approved SOP4 from Clark. Shortly after this date, McCaw cleaned its equipment in accordance with SOP4 and removed the equipment from the site.

[67] McCaw is seeking costs from the date that a potentially contaminated piece of equipment was no longer used on the Project until the time that McCaw received the approved SOP4 from Clark; that is, up until September 29, 2014. The stand-by costs relate to 9 pieces of equipment which were idle anywhere from July 28, 2014 to September 29, 2014. Some of the costs are calculated on the basis of

the actual costs of renting the equipment for equipment not owned by McCaw, and other costs are based upon the idle time of the equipment and based upon one 12-hour shift per day. The value of the claimed stand-by costs amounts to \$612,940.

[68] One of Clark's arguments is that under the terms of the Standby Cost Agreement (Agreement) entered into by Clark and McCaw on November 24, 2014, McCaw agreed to make no further claims with respect to stand-by costs. McCaw argues that the Agreement related to stand-by costs associated with the development of SOP3 and the stand-by costs up until SOP3 was released on July 21, 2014.

[69] The Agreement, in which Clark agreed to pay McCaw \$841,347 in stand-by costs was signed by McCaw and stated:

Upon agreement from [McCaw] there will be no further claims against the Geotechnical Drilling Program (Project #13301.007) with regards to the LME standby.

[70] The claim that McCaw submitted to Clark on August 11, 2014 was for stand-by costs incurred between May 30, 2014 and July 21, 2014 in the amount of \$1,762,471 (with a reduction to \$1,158,158 if approved by a specified date). Clark reviewed the claim and offered to pay McCaw \$841,347 in stand-by costs. The Agreement noted a start date of June 11, 2014 for the stand-by claim and that the dates from July 10-13, 2014 would be excluded from the claim.

[71] Following July 21, 2019, McCaw incurred further additional stand-by costs over a period of months associated with the development of SOP4. In agreeing that there would be no further claims, it makes more sense that McCaw was agreeing that by accepting an amount more than \$300,000 less than what they had claimed (and more than \$900,000 less than the original amount claimed), they would make no further claims for stand-by costs incurred during the development of SOP3. Otherwise, McCaw would be agreeing not to claim later stand-by costs incurred during the development of SOP4 and foregoing not just the \$300,000 for the SOP3 stand-by costs but also hundreds of thousands of dollars in stand-by costs associated with SOP4. I conclude that the Agreement was for stand-by costs incurred during a specific time period related to the development of SOP3 and that it did not cover stand-by costs after July 21, 2019. The Agreement was not intended to cover all stand-by costs incurred by McCaw under Contract 2.

[72] Part 9 of the General Conditions of Contract 2 deals with Protection of Persons and Property. GC 9.3 deals with Toxic and Hazardous Substances and states:

- 9.3.1 For the purposes of applicable environmental legislation, the *Owner*² shall be deemed to have control and management of the *Place of the Work* with respect to existing conditions.
- 9.3.2 Prior to the *Contractor* commencing the *Work*, the *Owner* shall:
 - .1 take all reasonable steps to determine whether any toxic or hazardous substances are present at the *Place of the Work*, and
 - .2 provide the *Consultant* and the *Contractor* with a written list of any such substances that are known to exist and their locations.
- 9.3.3. The *Owner* shall take all reasonable steps to ensure that no person suffers injury, sickness, or death and that no property is damaged or destroyed as a result of exposure to, or the presence of, toxic or hazardous substances which were at the *Place of the Work* prior to the *Contractor* commencing the *Work*.
- 9.3.4. Unless the *Contract* expressly provides otherwise, the *Owner* shall be responsible for taking all necessary steps, in accordance with legal requirements, to dispose of, store or otherwise render harmless toxic or hazardous substances which were present at the *Place of the Work* prior to the *Contractor* commencing the *Work*.
- 9.3.5. If the *Contractor*
 - .1 encounters toxic or hazardous substances at the *Place of the Work*, or
 - .2 has reasonable grounds to believe that toxic or hazardous substances are present at the *Place of the Work*, which were not disclosed by the *Owner*, as required under paragraph 9.3.2, or which were disclosed but have not been dealt with as required under paragraph 9.3.4, the *Contractor* shall
 - .3 take all reasonable steps, including stopping the *Work*, to ensure that no person suffers injury, sickness, or death and that no property is damaged or destroyed as a result of exposure to or the presence of the substances, and

² Pursuant to the terms of the contract, Clark was the *Owner*, McCaw was the *Contractor*, and Golder was the *Consultant*.

- .4 immediately report the circumstances to the *Consultant* and the *Owner* in writing.

9.3.6 If the *Contractor* is delayed in performing the *Work* or incurs additional costs as a result of taking steps required under paragraph 9.3.5.3, the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor* and the *Contractor* shall be reimbursed for reasonable costs incurred as a result of the delay and as a result of taking those steps.

[73] Under section 9.3 of Contract 2, each of the parties had certain obligations. Clark was deemed to have control and management of the place of work with respect to existing conditions. Clark was also required to take all reasonable steps to ensure that no one suffered injury or death and that no property was damaged or destroyed as a result of exposure to toxic or hazardous substances at the place of work.

[74] Clark was also responsible for taking all necessary steps to dispose of or render harmless, toxic or hazardous substances at the place of work. It is not reasonable to interpret Clark's obligation, pursuant to section 9.3.4 of Contract 2, literally, as the whole purpose of the Project was to properly store or dispose of the arsenic on the site. It was known by all parties that the site was contaminated with arsenic trioxide prior to commencing work. The parties also knew that there was the potential to encounter arsenic trioxide during the course of the work, and it was a risk known and accepted by all. However, the contract placed obligations on Clark to take all necessary steps to address toxic or hazardous substances at the place of work, to minimize the risk, and this included developing Standard Operating Procedures to address risks to the health and safety of people and the decontamination of equipment.

[75] McCaw, upon encountering toxic or hazardous substances at the place of work, was required to take all reasonable steps, including stopping work, to ensure that no one suffered injury or death and that no property was damaged or destroyed as a result of exposure to toxic or hazardous substances. Contract 2 also provided that McCaw would be reimbursed for reasonable costs incurred as a result of delay incurred by encountering toxic or hazardous substances.

[76] Clark argues that the revised RFQ clearly placed the responsibility for developing standard operating procedures on McCaw and that it was the failure of

McCaw to develop SOP4 that caused McCaw to incur delays in equipment decontamination on the Project.

[77] In addition to the terms of Contract 2, the revised RFQ was also part of the Contract Documents. The revised RFQ addressed Health and Safety. It stated:

Site specific Standard Operating Procedures for drilling in and around voids that contain arsenic trioxide dust are required. PWGSC, Clark and their consultants will work with the Proponent to develop such procedures. For example, standard operating procedures used for previous projects involving drilling into arsenic filled voids are available and can be used by the project team to assist the successful proponent in development of such procedures. An emergency response plan for dealing with accidental arsenic releases will need to be developed prior to the initiation of drilling near arsenic bearing underground openings.

[78] The revised RFQ did not place sole responsibility to develop SOP4 on McCaw. It required PWGSC, Clark, and Golder to work with McCaw to develop procedures for drilling in and around voids that contained arsenic trioxide which were done. Standard Operating Procedures were developed throughout the Project. The revised RFQ did not place sole responsibility on McCaw to develop an equipment decontamination procedure.

[79] Safety was a concern on the Project and the parties were aware of the risk of exposure to arsenic trioxide but it was not expected that exposure to high levels would occur. It was only after the incident in March 2014 that concerns about exposure to higher than anticipated levels of arsenic trioxide arose. The issue of safety of the drilling program going forward was specifically raised at the March 12, 2014 meeting. The discovery of this issue resulted in the development of SOP3 which did not deal with equipment decontamination procedures.

[80] McCaw raised the issue of equipment decontamination several times with Clark and specifically at a meeting on June 6, 2014. Around August 15, 2014, Clark also became aware that McCaw's equipment had been contaminated with high levels of arsenic trioxide dust when they received the report with the results of the testing of McCaw's equipment which McCaw had arranged.

[81] Clark was also directed by WSCC on August 25, 2014 to develop an SOP to develop an equipment decontamination procedure by September 1, 2014. Despite this, Clark made no specific request for McCaw to develop SOP4 until September 10, 2014. On September 8, 2014, contrary to WSCC's direction, Clark suggested

to McCaw that SOP4 was not required and other SOP's could be implemented with modifications. Following the September 10, 2014 request to McCaw, Clark did not respond substantively to McCaw's September 11, 2014 request about acceptable decontamination standards.

[82] The terms of the Contract, in my view, obligated Clark to take all necessary steps to address risks to the health and safety of people and the decontamination of equipment and that included being responsible for developing Standard Operating Procedures. Ultimately, Clark is responsible for the failure to develop SOP4 until September 29, 2014 and pursuant to the terms of Contract 2 is liable to reimburse McCaw for the reasonable costs incurred as a result of the delay.

[83] The direction by PWGSC on August 28, 2014 that Clark, or appropriate sub-contractors complete the decontamination SOP requested by WSCC does not change Clark's liability. PWGSC was not a party to the contracts and ultimately, McCaw had no contractual relationship with PWGSC; McCaw's contract was with Clark.

[84] In the circumstances, I conclude that Clark owes McCaw payment for reasonable costs incurred as a result of the delay in development of an equipment decontamination procedure which consists of the stand-by costs claimed by McCaw in the amount of \$612,490.00 plus interest pursuant to the *Judicature Act*.

CONCLUSION

[85] In conclusion, for these reasons, I conclude that Clark does not owe McCaw payment for any partially deviated boreholes drilled under Contract 1. Clark does owe McCaw payment for the 5 boreholes drilled under Contract 2 up to the point of deviation beyond +/-1% from design which amounts to \$64,157.52 plus tax and interest pursuant to the *Judicature Act*.

[86] I also conclude that Clark owes McCaw for the reasonable costs incurred as result of the delay in the development of an equipment decontamination procedure in the amount of \$612,940.00 plus interest pursuant to the *Judicature Act*.

[87] Costs are awarded to McCaw, pursuant to the *Rules*, on a party and party basis.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
29th day of November, 2019

Counsel for the Plaintiff:	Toby Kruger
Counsel for the Defendants:	Alexandra Bochinski and Jessie Black

S-1-CV-2015-000181

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

McCAW NORTH DRILLING AND BLASTING
LTD.

Plaintiff

- and -

CLARK BUILDERS and THE GUARANTEE
COMPANY OF NORTH AMERICA

Defendants

MEMORANDUM OF JUDGMENT
OF
THE HONOURABLE JUSTICE S.H.
SMALLWOOD
