

SD 678

IN THE HAY RIVER TERRITORIAL COURT OF THE NORTHWEST TERRITORIES
BETWEEN:

KARL MUELLER CONSTRUCTION LTD

Plaintiff and
Defendant by
Counterclaim

- and -

N.W.T. HOUSING CORPORATION

Defendant

- and -

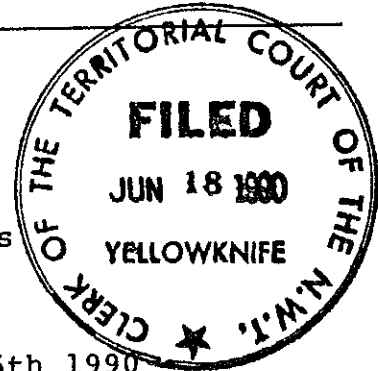
IGLOO BUILDING SUPPLIES GROUP

Defendant and
Plaintiff by
Counterclaim

REASONS FOR JUDGEMENT

of

His Honour Judge T. B. Davis



Trial held at Hay River on January 14th and 15th 1990

Judgement filed: June 18th 1990

Counsel for the Plaintiff: Ms. Ann Leskew

Counsel for the Defendant: Stephen M. Shabala, Esq.

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Decision

The Plaintiff, Karl Mueller Construction Ltd. claims against the Defendant, Igloo Building Supplies Group on a number of grounds relating to the purchase by the Plaintiff from the Defendant and the supply of goods by the Defendant to the Plaintiff and for expenses resulting from the delay in the delivery of some of the goods supplied.

The Plaintiff, Karl Mueller Construction Ltd. claims against the Defendant, N.W.T. Housing Corporation for monies paid by the Corporation without authorization to the Defendant Igloo Building Supplies Group from funds held back by the Housing Corporation on a service and construction contract between the Plaintiff and the Corporation.

A brief summary of the facts as presented at the trial are as follows:

Karl Mueller Construction Ltd. - hereinafter referred to as Mueller, the Plaintiff, entered into a contract on September 29, 1988 to do construction work at Fort Providence, N.W.T. on five houses of the N.W.T. Housing Corporation, hereinafter referred to as the Housing Corporation or the Corporation.

Mueller had made inquiries from the Defendant, Igloo Building Supplies Group, hereinafter called Igloo, about prices of some of the materials required for the construction project.

Upon being awarded the contract, Mueller purchased some of the required material on September 30th, 1988, having been quoted prices before September 14th, 1988, on four or five of the major items required, including boxes of Bituthene membrane at \$160.00 each on the belief by the Defendant, Igloo, that each box contained 450 square feet, thereby being priced at 35.6 cents per square foot.

Upon checking the 10 boxes at the job site, the Plaintiff became aware that each box contained only 180 square feet. On being notified of this error Igloo acknowledged the mistake in the quotation and agreed to provide the material at the same unit price. Igloo then calculated each of the boxes so delivered to be priced at an amended price of \$68.00 for the purchase by the Plaintiff, that being about \$100.00 per box less than the then current price of the membrane.

Because there were only 180 square feet in each of the 10 boxes, Mueller ordered another twenty or twenty-three boxes in order to obtain the square footage required for the construction project.

The Plaintiff claims to have ordered the full quantity of 5400 square feet before September 30th, expecting that the membrane would have been either in stock or available from Igloo's suppliers in Edmonton within two days.

Igloo did not stock this rather new-to-the-market material and was dependent on obtaining the material from its usual suppliers from Alberta. Igloo did however have 10 boxes available from its own storage area which were picked up by the Plaintiff before September 30th, 1988 and which Igloo had sold to the Plaintiff on the understanding that the quantity was sufficient to meet the needs of the Plaintiff.

Igloo, immediately upon learning of the error in square footage, inquired about additional Bituthene membrane from

a number of its suppliers, ordering the required amount from the supplier who then had it available. There resulted a short delay in providing the material to the Plaintiff awaiting its transportation from Southern Canada. In total, the Plaintiff claims a five day delay had occurred during which time it incurred operating expenses.

The Plaintiff picked up from Igloo other building materials and supplies during its contract period, using most on the construction site and returning some unused items.

The Plaintiff has abandoned its claims for errors in calculations on rebate credits after evidence was given at trial to explain the different terms used to identify some of the items.

The Plaintiff has also abandoned its claim for overcharges on prices for individual items when evidence was adduced by its witness that prices in the supply of building materials fluctuate weekly and are subject to change to the customer on a monthly basis unless a quote has been provided for a specific quantity and amount by a specific date for completion.

Evidence disclosed that it is the custom in the business to provide the supplies at the location of the supplier, not at the job site. Expenses incurred by the Plaintiff for telephone calls to Igloo and freight charges for the delivery of small items to Fort Providence are not valid claims against the Defendant and are hereby dismissed.

No explanation was provided by evidence to remove the usual cost of transportation of supplies to its depot in Hay River being that of Igloo, so the Freight charge of \$9.95 is allowed against the Defendant, Igloo.

Evidence before the court indicated that it is customary for contractors to allow between two weeks and up to a number of months for the delivery of supplies after they are ordered, depending on the usual availability of the items. For items usually in stock, a shorter period is required than for items that must be brought in from manufacturers or wholesalers.

Evidence also indicated that purchasing contractors usually wait until they learn that their supplies are on hand before they attend at the supplier to pick them up.

Claims for expenses incurred by the Plaintiff on two trips to the Defendant, Igloo, to pick up goods which had not then arrived from Igloo's suppliers are therefore hereby dismissed.

The Plaintiff, during the trial and after hearing the evidence relating to a re-calculation of interest charges on the invoices of Igloo, and upon recognizing that Igloo had not made any charges for interest to accumulate on its outstanding balance for a number of months, had agreed that the claim for the reduction of overcharged interest, should be reduced from a claim

of \$27.78 to the amount of \$6.00, which amount is allowed for the Plaintiff against the Defendant, Igloo.

Igloo's invoices showed that the final unit price charged for the Bituthene membrane was 2.2 cents per square foot more than the original quote, before the error in size came to the attention of the parties. The claim for refund of 2.2 cents for each of 4500 square feet is allowed against the Defendant, Igloo, in favour of the Plaintiff in the amount of \$118.20. If all the Bituthene membrane had been supplied as the parties had thought was done when the 10 boxes were originally picked up by the Plaintiff, the evidence discloses that the Plaintiff would not have had some employees on salary for a few days while doing nothing except awaiting the arrival of the product.

Although the Plaintiff had claimed a waste of five days at the cost of \$325.00, the evidence showed only three days of unproductive time resulted from the lack of supplies.

Although the Igloo's management explained that the supply of the Bituthene membrane at the price charged resulted in a loss of \$2,500.00 to the Defendant and was accepted as a learning experience, the delay in having the material on the site did result in some expense to the Plaintiff. The Plaintiff will be entitled to the equivalent of three days expense delay in the amount of \$195.00.

The Defendant, N.W.T. Housing Corporation advanced proceeds to suppliers and persons so entitled on the instruction

of the Plaintiff in accordance with the terms of the contract then in effect. It would have been preferable if the Plaintiff had been advised and made fully aware of the intentions of the Corporation when the discussions and advances were made with and to the Defendant Igloo, but I see no wrong doing on the part of the Corporation. The claim of the Plaintiff against the Northwest Territories Housing Corporation is dismissed without costs to either party.

The Counterclaim

Igloo, the Plaintiff by counterclaim, has revised its calculations on the account of Karl Mueller Construction Limited by acknowledging the payment of \$1560.96 made by the N.W.T. Housing Corporation on June 15, 1989. It also had acknowledged receipt of a payment from the Housing Corporation for credit to the Mueller account of \$5025.10, thereby putting the balance on its books at \$1792.05 from which must be deducted the final payment made on June 15, 1989 of \$1560.96 leaving then a balance on the books of record of \$231.09 owing by Karl Mueller Construction Limited. These claims are not opposed by the defendant on the Counter Claim, Karl Mueller Construction Limit, and are hereby allowed for Igloo against Karl Mueller Construction Limited in the amount of \$231.09. There shall be no costs to either party on the Counterclaim.

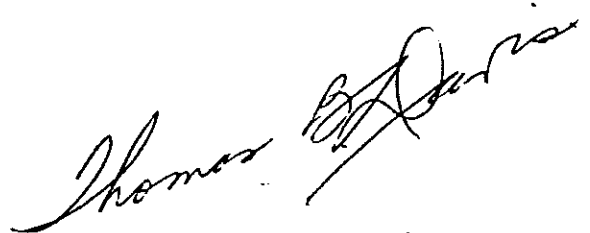
Conclusion

The claim of the Plaintiff is allowed as noted above for:

Freight Charges of	\$9.95
Membrane cost overcharge	\$118.20
Delay Expenses	\$195.00

for the total \$329.15 against Igloo less the amount allowed on the Counter Claim at \$231.09 leaving a balance of \$98.06 for Karl Mueller Construction Ltd. against Igloo Building Supplies Group- Judgement may be entered in the amount of \$98.06.

Because of the division of responsibilities on the dismissal on many of the items claimed by the Plaintiff there will be no costs allowed to either party.



Thomas B. Davis
Judge - Territorial
Court of the N.W.T

Yellowknife, Northwest Territories
June 18th 1990