

IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO: 732 of 2015

BETWEEN

VISION ARCHITECTS & CONTRACTORS LTD CLAIMANT

AND

SOLID WASTE MANAGEMENT AUTHORITY

**MINISTER OF NATURAL
RESOURCES & AGRICULTURE**

DEFENDANTS

Keywords: Commercial Construction Contract; Contractor; Breach of Contract; Design Built Engineer; General Conditions of Contract; Special Conditions of Contract; Completion Date; Liquidated Damages; Bills of Quantity; Amendments to Contract; Change Orders; Intended Completion Date; Delays; Valuation of Works; Notice of Termination; Certificates of Assessed Values;

Before the Honourable: Mr. Justice Courtney A. Abel

Hearing Dates: 14th March 2018
15th March 2018
21st March 2018
11th April 2018
03rd May 2018.

Appearances:

Ms. Naima Barrow for the Claimant.

Mr. Yohhahnseh Cave for the 1st Defendant

Mr. Ravell Gonzalez for the 2nd Defendant

**WRITTEN JUDGMENT
Orally delivered on the 4th day of May 2018**

Introduction

[1] This contested commercial construction claim has been brought by a contractor, the Claimant, ("Vision Architects"), against the First Defendant,

("SWAMA"), and the Second Defendant, a Ministry of the Government of Belize ("GOB"), (collectively called "the Defendants") for balances totaling \$624,747.07 allegedly owed by GOB to the contractor. Vision Architects concedes that due to a typographical error, the claim ought to have been for \$524,747.07.

- [2] SWAMA is a statutory body formed under the Solid Waste Management Authority Act.
- [3] The claim relates to works which Visions Architects, as the contractor, undertook essentially for GOB in two popular tourist islands in Belize. The islands in question are Caye Caulker and San Pedro.
- [4] The works were carried out under two separate written contracts, each dated the 17th of June, 2014.
- [5] The works entailed the closure of dump sites for waste or garbage material and for design and construction of a location for a new dump site. The new dump site would in effect be a place for which such waste or garbage material would be deposited before being transferred to Belize City (so called transfer stations or material drop-off facility) in each such island.

The Court Proceedings

- [6] Vision Architects filed its claim and form and Statement of Claim on the 23rd of December, 2015.
- [7] Vision Architects is alleging that GOB has breached each of the contracts by not paying the claimed balances and by wrongfully terminating these contracts.
- [8] SWAMA filed its Defence on the 1st of February, 2016.
- [9] GOB filed its Defence on the 3rd of February, 2016.
- [10] I should say at this point that the material facts outlined in the Statement of Claim is largely uncontested actually in terms of the material facts. I will allude to such facts shortly.
- [11] This case was actually heavily case managed. There were some 13 case management conferences, the first of which was held on the 18th of March, 2016, and the last was held on the 26th of February, 2018.

- [12] The matter went to mediation but the parties didn't settle after two sessions.
- [13] At the trial, Directors for Vision Architects, Mr. Osmond Gomez and Mr. Sunjay Hotchandani gave factual evidence for Vision Architects; as well as Mr. Evondale Moody, a Chartered Engineer, who provided expert testimony on its behalf, as well as a valuation of the work which Vision Architects was claiming.
- [14] The witnesses for the Defendants were Mr. Gilroy Lewis, the Director of SWAMA, as well as Mr. Dwayne Thurton, a Civil and Structural Engineer, who also provided services to GOB in relation to the subject projects as Design Build Engineer (“DBE”) under the respective contracts.

Background

- [15] Vision Architects is a Belizean Company in the business of construction which carries on from Belize City.
- [16] SWAMA has its main office situated at Market Square, Belmopan, Belize.
- [17] The Minister of Natural Resources and Agriculture, has ministerial responsibility for the Ministry bearing its name.
- [18] By an agreement in writing dated the 17th day of June, 2014 (“**the Caye Caulker Contract**”), made between the Defendants and Vision Architects, the Defendants engaged Vision Architects to execute the closure of the Caye Caulker dump site and for the design and construction of a transfer station and material drop-off facility.
- [19] By another agreement in writing made between the Vision Architects and the Defendants also dated the 17th day of June, 2014 (“**the San Pedro Contract**”), the Defendants engaged Vision Architects to execute the closure of the San Pedro dump site and to design the construction of a transfer station and material drop-off facility.
- [20] The Caye Caulker Contract and the San Pedro Contract contain similar provisions.
- [21] By clause 28 of the General Conditions of Contract (“**GCC**”) of the Contracts Vision Architects and the Defendants entered into the following covenants:

28.1 The Design Build Engineer shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for Completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work, which would cause the Contractor to incur additional costs.

28.2 The Design Build Engineer shall decide whether and by how much to extend the Intended Completion Date within 21 days of the Contractor asking the Design Build Engineer for a decision upon the effect of a Compensation Event or Variation and submitting full supporting information. If the Contractor has failed to give early warning of a delay or has failed to cooperate in dealing with a delay, the delay by this failure shall not be considered in assessing the new Intended Completion Date.

[22] By clause 49 of the GCC of the Contracts Vision Architects and the Defendants entered into the following covenants:

49.1 The Contractor shall pay liquidated damages to the Contracting Agency at the rate per day stated in the SCC for each day that the Completion Date is later than the Intended Completion Date. The total amount of liquidated damages shall not exceed the amount defined in the SCC. The Contracting Agency may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages shall not affect the Contractor's liabilities.

49.2 If the Intended Completion Date is extended after liquidated damages have been paid, the Design Build Engineer shall correct any overpayment of liquidated damages by the Contractor by adjusting the next payment certificate. The Contractor shall be paid interest on the overpayment, calculated from the date of payment to the date of repayment, at the rates specified in GCC Sub-Clause 43.1.

[23] The Special Conditions of Contract (“**SCC**”) of the Contracts provide that the liquidated damages for the whole of the Works are 0.05% per day and that the maximum amount of liquidated damages for the whole of the Works is 5% which amounts to 100 days.

[24] By clause 59 of the GCC of the Contracts Vision Architects and the Defendants entered into the following covenants:

59.1 The Contracting Agency or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract

59.2 Fundamental breaches of Contract include, but shall not be limited to, the following:

.....

(b) the Design Build Engineer instructs the Contractor to delay the progress of the Works, and the instruction is not withdrawn within 28 days;.....

(g) the Contractor has delayed the completion of the Works by the number of days for which the maximum amount of liquidated damages can be paid, as defined in the SCC.”

[25] Thus Clause 28 of the General Conditions of Contract, also Clause 49(1), 49(2), and the Special Conditions of Contract provide that the liquidated damages for the whole of the works are 0.05 percent per day and the

maximum amount of liquidated damages for the whole works is 5 percent, which amounts to 100 days.

- [26] The Special Conditions of Contract provide that the maximum number of days is ten days, intended completion date under both contracts was the 16th of February, 2015, and 100 days from the 16th of February. The maximum period to which liquidated damage is to be paid was 27th of May, 2017.
- [27] In order to ensure the smooth and proper functioning of both projects, the contracts specially provided for the appointment of a DBE who was responsible for supervising the execution of the works and administering the contract.
- [28] The DBE, appointed by GOB, was Anthony Thurton & Associates; and Mr. Dwayne Thurton was specifically assigned to the two projects. His responsibilities were set out in the contract.
- [29] I should interject here that generally I was impressed by the evidence of Mr. Dwayne Thurton. I thought he was quite an impressive witness frankly.
- [30] But prior to the commencement of the works, certain components were assembled at both the Caye Caulker and San Pedro sites in anticipation of the construction at both sites. A question arises about the ownership of these materials and I'll deal with that later on.
- [31] But I have summarily come to the conclusion that the steel frames and other such material was generally -- had been bought by Vision Architects from the Defendants.
- [32] Bills of Quantities for the projects were prepared and agreed between the parties and are reflected in signed contract documents and attached to those documents the agreement.
- [33] Vision Architects commenced execution of the project on or about July 2014.
- [34] The DBE prepared valuations of work executed by Vision Architects in relation to both locations during the course of the project arising from site

visits by him and resulting from his assessment of the works which Vision Architects had completed.

- [35] The DBE had also identified any defects of the works so that they could be remedied.
- [36] Pursuant to the contracts, advance payments were made and amendments were made to the contracts in relation to these advances.
- [37] Regular payments were made at various times to Vision Architects by the Defendants on the basis of various interim certificates which were made on the basis prepared by the DBE.
- [38] Several letters of concerns were written to Vision Architects on the 11th of September, 2014, 25th of September, 2014, 13th of January, 2015, 27th of February, 2015, 22nd of June, 2015, and the 26th of June, 2015.
- [39] By the 16th of February, 2015, however, the contractual completion date, disputes had arisen between the parties and the DBE which apparently remained unresolved. The DBE has to take some responsibility for this lack of resolution as it was his responsibility for supervising the execution of works and administering the contract.
- [40] In August 2015, the DBE submitted a report to SWAMA in relation to both projects. Amendments to the contracts were made at around this time and previous advances were formalized.
- [41] In around 22nd of September, 2015, the DBE forwarded the change orders of Vision Architects which led to disputes between Vision Architects and the DBE.
- [42] On the 15th of October, 2015, the DBE wrote a further letter to Vision Architects in relation to continuing concerns which it had.
- [43] Vision Architects exceeded the intended completion dates provided for in the contracts. This may have been partly contributed to by heavy rains in the month of October but it was likely due to some excessive delays by Vision Architects.
- [44] The question arises as to whether such delays were in breach of contract by Vision Architects as a result of undue and/or excessive delays in

completing the works, or, whether the delays were waived by the Defendants, and whether alternative completion dates were agreed, and if so, what such dates might have been.

- [45] I'm prepared to summarily accept, based on the evidence of the witnesses which I have heard, that the parties had extended the completion date although, it is unclear to me whether a firm or certain alternative completion dates had been agreed by them.
- [46] A question also arise as to whether Vision Architects is entitled to claim an additional sum and how much they are entitled to claim for in relation to an access road to the Caye Caulker Site.
- [47] As at the 1st of October, 2015, the Defendants had clearly become extremely anxious mainly because of pressure from their funding agencies, about the completion of the projects. The situation became more urgent by the 14th of October, 2015.
- [48] On the 2nd of November, 2015, Anthony Thurton & Associates, the DBE, instructed Vision Architects to delay the progress of work on the Caye Caulker Project.
- [49] On the same day Vision Architects wrote to the DBE to inquire as to the period of delay but received no responses.
- [50] By an e-mail on the same day, the DBE advised that SWAMA would make a determination on the way forward as soon as information was submitted to them.
- [51] By a further e-mail dated the 3rd of November, 2015, the DBE advised that the instructions to delay the progress of works extended to the San Pedro Contract as well.
- [52] On the 11th of November, 2015, Vision Architects, through its attorney, wrote SWAMA regarding some change orders issued for the contracts, the valuation and snag list prepared for the DBA and requested a meeting.
- [53] Though the letter was received, Vision Architects did not hear from SWAMA again until the 30th of November, 2015, some 287 days after the intended completion date, and 187 days after the maximum period for which

liquidated damages could be paid, when they issued a notice of termination of the Caye Caulker contract on the grounds that the contractor had delayed completion of works beyond the 27th of May, 2015.

- [54] On the 3rd of December, 2015, Vision Architects responded to the notice of termination, rejecting the Defendant's termination of the Caye Caulker contract on the grounds of delayed completion and giving notice of its termination of both the Caye Caulker Contract and the San Pedro Contract on the grounds that the Defendants had, in breach of the contracts, delayed the progress of the work on both contracts for longer than 28 days.
- [55] In its Notice of Termination Vision Architects requested the balance of the sums due to it on the contract and the amount due to it for the construction of the external access road within 14 days.
- [56] By letter dated the 11th of December, 2015, the DBE issued certificates for its assessed work -- value of work done by Vision Architects on both contracts less advance payments received by Vision Architects. The results of which is that there is a debt allegedly payable by Vision Architects.
- [57] The Defendants now accept that they breached the Caye Caulker Contract when the DBE terminated this contract but they deny that they breached in relation to the San Pedro Contract. It is therefore admitted that damages are due on the Caye Caulker.

Issues

- [58] Now, there was a long list of issues, I think totaling eight, but the parties were eventually able to reduce them to what I would call three with subdivisions.
- [59] The first is whether the DBE properly had validly terminated the Caye Caulker Contract.
- [60] The second is what is the measure of damage in relation to the Caye Caulker Contract and San Pedro Contract; whether:
- (a) loss of balance;
 - (b) loss of profits;
 - (c) possibly mean profits.

- [61] The third is whether the DBE, as representative of the Defendants, acted properly under the appropriate contracts in:
- (a) withholding certification of cost of completion in San Pedro for the external access road by excluding it from the contract price;
 - (b) by deducting \$122,278.40 for payment allegedly due on the Caye Caulker Contract for the steel components as part of the value of the works performed by Vision Architects ; and
 - (c) by excluding the material access road for Caye Caulker in the sum of \$116,834.24; or, (alternatively \$76,921.00) that had been proposed in the change order.
- [62] I'll deal with each of them.
- [63] I've already indicated to the parties what my position and reasons are as we've gone through the issues individually.

Whether the DBE properly had validly terminated the Caye Caulker Contract?

- [64] This issue appears to this court to be whether SWAMA gave the Vision Architects a lawful notice or a notice which was reasonable in all the circumstances to complete Caye Caulker project?
- [65] This court has carefully looked at all the evidence and heard Counsel for the parties and concluded that there was no reasonable ground existing on the 3rd November 2015 when by email of this date the DBE gave instructions to delay progress or works in relation to Caye Caulker Contract, which instructions were never rescinded, and no notice of termination was later issued in relation to this contract by SWAMA.
- [66] This court has arrived at this conclusion relating to reasonable grounds existing to delay progress mainly because the original agreed completion date had been waived indefinitely and no termination date given. That even if a termination notice was given by SWAMA (as in the case of the San Pedro Contract), this was imposed unilaterally and was in the circumstances of the case not given upon reasonable notice.

- [67] As a result of this court's determinations made in relation to this issue, this court has concluded that Vision Architects was thereby entitled to terminate Caye Caulker Contract, which it lawfully did.
- [68] This court therefore finds that the DBE did not validly terminate Caye Caulker Contract but that Vision Architect were thereby entitled to terminate this contract, which it did on the 3rd December 2015.
- [69] In relation to the DBE, Caye Caulker Contract, this court is, on balance, minded to conclude, which it has, that the DBE did not properly and validly terminate Caye Caulker Contract and that SWAMA fundamentally breached Caye Caulker Contract, which was thereby lawfully terminated by Vision Architects.
- [70] As a result of this finding, therefore damages are due and has to be assessed in relation to both the Caye Caulker and San Pedro Projects.

What is the measure of damage in relation to the Caye Caulker Contract and San Pedro Contract?

- [71] What's the measure of damage?
- [72] After a long discussion between the parties, quite frankly I'm not happy with Vision Architects' loss of balance for the reasons which I've set out in discussions.
- [73] The basis of Vision Architects' claim was that they were entitled to all the monies that they would have earned had the contract -- no -- the full benefit value of the contract if it had not been breached.
- [74] In my view, that would result in a windfall for Vision Architects which contractually would put them in a far better position, as a result of the breach, than if they had executed the contract.
- [75] Frankly, I prefer as a measure of damages to award damages on the basis of loss of profits.
- [76] I accept that loss of profits was not specifically pleaded or particularized in the Statement of Claim, but it's clear to me that in the alternative damages was claimed for breach of two contracts. And in my view, it would be

inequitable not to allow loss of profits especially, as in the witness statement of Sunjay Hotchandani at paragraph 13 he specifically testified, and I quote:

"I am informed by Counsel that we are entitled to be paid the expected profit from the Contract as damages and claim for our benefit \$66,482.00 being the expected profit on the remaining contract [\$69,567.00, 30% of \$231,890.00 (the value of the balance of the work remaining on the contract) less the \$3,085.00 more collected]".

[77] And then at paragraph 20 under the San Pedro Contract he testified:

"I am informed by Counsel that we are entitled to be paid the expected profit from the Contract as damages and claim for our benefit \$74,310.00 [30% of \$247,700.00 (the value of the balance of the work remaining on the San Pedro Contract)".

[78] I had tentatively, without hearing the parties fully, and all the other issues, or provisionally considered that because of the difficulties of the evidence and in making a determination on loss of profits and in all the circumstances, that I would not grant 30% of the profits but half it, do almost a Salomon-like, decision reducing it to 15%.

[79] Now, having considered all the other issues and made determinations on them, I can now safely firm up my provisional award and make a determination, which is that I will keep that award of 15% profits on their claim.

Whether the DBE, as representative of the Defendants, acted properly under the Respective Contracts?

[80] Now, in relation to the external access road at San Pedro, I won't go through all the evidence, but it's clear to me that the -- I looked at the Bills of Quantities which formed part of the contract and it seems to me quite clear

that the DBE was wrong. I have concluded that this access road did form part of the contract agreement or contract price in San Pedro and that the DBE, as a representative of the Defendants, acted improperly by excluding it from the contract price. Therefore, Vision Architects is entitled to the line item and its claim. They are both the same,

- [81] In relation to the other access road at Caye Caulker, again I went through the pleadings, the evidence and the contractual documents, including the Bills of Quantities, and having looked at all the circumstances, I have concluded and have made a determination that it would be equitable and fair to allow \$76,921.00 to Vision Architects for this item.
- [82] In relation to the steel components, again I looked at the pleadings with the parties, the witness statements and all the evidence, and I've concluded that the steel components were the property of Vision Architects.
- [83] On balance, I have concluded that Vision Architects bought such steel components from the Defendants and that in the contract under the Bill of Quantities, they were required to supply this item, but that the DBE has withheld, wrongly in my view, payment in respect of this item which is the property of Vision Architects . He was withholding \$122,278.00.
- [84] I had said earlier on that I allow the \$103,000 but I think it would be fair to allow the \$122,278.00 for payment due on the Caye Caulker Contract for steel components as its part of the value of the works performed by Vision Architects.
- [85] The breakdown of the loss of profit is as follows: for San Pedro it's \$37,155.00, for Caye Caulker its \$34,783.50, all for a combined total of \$71,938.50.
- [86] With the other items this will total \$436,419.40.
- [87] When the additional sum of \$71,000.00. is added in everything gives a total of \$508,357.90. This will be the amount I will award to Vision Architects for damages.
- [88] I won't grant any interest on the sum of \$71,000.00, but Vision Architects obviously would get statutory interest from this date of judgment.

Costs

[89] Because Vision Architects has wholly succeeded it is entitled to its cost on the basis prescribed by the rules with the value of the claim being what I have assessed it to be \$508,357.90.

Disposition

[90] This court will therefore grant judgment to Vision Architects for damages in the total sum of \$508,357.90 plus interest at the rate of 6% from the time of entering Judgment together with costs on the prescribed basis under the rules amounting to \$70,417.90.

The Hon. Mr. Justice Courtney A. Abel

18th June 2018