1947
Apr. 3 & 11
Aug. 23

BETWEEN:

BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED, SUPPLIANT;

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Crown—Public Work—Claim by suppliant for expenses incurred during stand-by period ordered by Deputy Minister of Public Works while contract entered into between suppliant and His Majesty in force—Public Works Act R.S.C. 1927, c. 39 s. 36—"Addition of Works" as set forth in specification forming part of contract.

Suppliant and respondent represented by the Minister of Public Works for Canada, entered into a contract whereby suppliant agreed "to perform, complete and finish . . . to the satisfaction of the Minister . . . or as may hereafter be directed by the engineer or officer in charge of the work", all the work required for the dredging and clearing of an obstruction in Seymour Narrows, British Columbia, known as Ripple Rock, suppliant to be paid the cost of such work plus a fixed fee. Specification 21 of the specifications attached to the contract and forming part of it states "The engineer shall have the power to add to . . . or alter the work herein specified . . . without violating the contract".

After operations had been carried on for a time a new method for completing the work was submitted to the Chief Engineer and his assistants and approved at a meeting between the Deputy Minister of Public Works, the Chief Engineer and the engineers under him in the Department of Public Works and the officials of suppliant company. The Deputy Minister of Public Works instructed suppliant to maintain intact that part of its organization known as the Ripple Rock Division while awaiting instructions to resume work. Later such instructions were given and work resumed under the original contract.

Suppliant claims in its Petition of Right payment by respondent of the expenses incurred by suppliant during the "stand-by" period. The bulk of these expenditures had been passed and approved by the

proper officers of the Department of Public Works. Respondent contends that the "stand-by" was not work under the contract and that the officials of the Department of Public Works had no authority to order the same by virtue of the Public Works Act, R.S.C. 1927, c. 39, s. 36.

Held: That the "stand-by" was so connected with the work to be performed that it can reasonably be held to constitute an "addition of works" to the work to be performed under the contract which the engineer had power to add under s. 21 of the specifications.

PETITION OF RIGHT by suppliant claiming payment by respondent of certain expenses incurred by suppliant under a contract entered into between suppliant and His Majesty represented by the Minister of Public Works for Canada.

The action was tried before the Honourable Mr. Justice O'Connor at Vancouver.

Knox Walkem, K.C. for suppliant.

F. A. Sheppard, K.C. and *W. S. Owen, K.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (August 23, 1947) delivered the following judgment.

The suppliant claims the sum of $28,529.34, the cost of work done under a contract, dated 16th May, 1942, between the suppliant and His Majesty represented by the Minister of Public Works of Canada. Under the contract the suppliant agreed to perform all the works required to deepen, dredge out and clear to a depth of thirty feet L.W.S.T. the obstruction in Seymour Narrows, British Columbia, known as Ripple Rock and to construct a rock fill across Maude Island Passage. In consideration whereof the respondent agreed to pay the suppliant the cost of the work as contained in the definition of "cost" in Schedule "B" to the contract, plus a fixed fee.

Part of the claim consisting of $2,811.06 is made up of items charged as part of the cost of the work during the actual operation and which were not approved by the officials of the Department of Public Works.

1947

BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED *v.* THE KING

O'Connor J.

The main claim of $21,021.55 is the cost incurred during a stand-by period which was directed by the officials of the Department of Public Works who have approved the expenditure.

The work under the contract required the operations to be carried on in the rapid and dangerous tidal waters of Seymour Narrows. The difficulty was to maintain the drill barge in position at Ripple Rock because of the current which, on occasions, reaches 17 knots per hour. The respondent in a letter, which is attached to and forms part of the contract (Exhibit 1) outlined the procedure it contemplated, which consisted of the construction of six reinforced concrete block anchors, the bow and stern anchors to be 150 tons, the four side anchors to be 75 tons each. These anchors would hold a specially constructed drill barge from which the rock would be drilled. The letter states that the position of the anchors would allow the barge to be shifted clear of the rock during the time that the turbulence of waters over it made staying there too dangerous. The barge was specially constructed at a cost of $160,000 and was insured. The suppliant paid the construction costs, the insurance premiums and all the expenditures required under the contract, and was reimbursed by the respondent, with the exception of the items claimed in this action. No question arises in these proceedings as to the fee, or any part of it, of the suppliant.

The drill barge was anchored near Ripple Rock and the work commenced. It was found that while the fore and aft lines held, the strain on the side lines caused vibrations which in turn caused them to heat and to crystallize and break. The Deputy Minister of Public Works inspected the drilling after it had been under way for some time, and was advised of the difficulty. He instructed the suppliant to try again the method which was then being used and if the side lines continued to break, to inform him and a decision would then be made as to the method of anchoring. Four days later the side lines parted again, and the President of the suppliant Company telephoned the Deputy Minister and advised him of this. The President of the suppliant Company also advised the Deputy Minister that in his opinion this method of mooring was dangerous and too expensive, and he proposed a new

method of anchoring the drill barge to the land by means of an overhead cable which would not impede shipping. The suppliant was instructed to move all the equipment to a safe place in Vancouver harbour, and the President and Chief Engineer were instructed to go to Ottawa. At that time only a few weeks were left in the season during which the work could be done. The extreme tides, snow and fog made it impossible to proceed with the work from the latter part of October until February in each year. The work was described by the President as seasonal work and this would be known and contemplated at the time the contract was entered into.

The new method described as a suspension type cable was submitted to the Chief Engineer and his assistants. After they had examined it for 10 days, the method was approved at a meeting between the Deputy Minister, the Chief Engineer and the Engineers under him in the Department, and the officials of the suppliant Company.

The Deputy Minister stated that the Department would decide whether to go ahead with the work or not on this method, and gave the officials of the suppliant Company definite instructions to return to Vancouver and to maintain intact that part of the suppliant organization known as the Ripple Rock Division. They were also instructed to have the drill barge docked and placed in good condition and to maintain the rented equipment and keep it on rental until further advised, and to keep all key men such as engineers and accountants, so as to be ready to resume work immediately the decision was reached. And in the meantime to place watchmen and to maintain insurance on all the equipment. The officials of the Department asked for an estimate of what this would cost and were advised that it would cost $5,700 per month, which included the rental of a special tug from Portland, Oregon. The Department officials approved these expenditures. Apparently both sets of officials expected the instructions to resume work to be given at once. But it was realized that there might be a short delay because, while the Portland tug was to be kept on, it was agreed that if the decision had not been reached within 30 days that the tug should be released. At the end of that period the Department instructed the suppliant to release the tug and it was sent back to Portland.

1947
BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED
v.
THE KING
O'Connor J.

The suppliant was able to further reduce the expenses so that they only averaged $1,800 per month during the stand-by period.

It is clear from this that the Deputy Minister regarded the removal of this obstruction as something urgently required, no doubt because the war in the Pacific had greatly increased the traffic in the channel in question. He expected the Government to authorize an additional expenditure for this work within a short period. He was then faced with the problem of either paying these expenses which are comparatively small in view of the total cost of the operation or of breaking up the organization and losing the key men and equipment. This would have resulted in loss and delay when the time came to replace them.

The further expenditure was not authorized until October, 1944, probably because other expenditures for the war were even more urgent.

Instructions were then given to the suppliant to resume the work under the new method. As there were only a few weeks left in the season in which it was possible to operate at all and the overhead anchorage had to be installed first, a further stand-by period of five months was arranged. No question arises as to the payment of the cost during this period because such cost has been repaid to the suppliant. Work was resumed under the new method in the Spring of 1945.

The President of the suppliant Company stated that he had been prepared at the time he suggested the new method (October 1943) to carry on under the old method but that in his opinion it was dangerous and much more costly to the respondent than it would be under the new method. No new contract was entered into between the parties. In his examination for discovery the Deputy Minister stated that the contract (Exhibit 1) was a subsisting contract all the way through. In addition the evidence establishes that both the officials of the suppliant Company and the officers of the Department believed these expenditures to be properly part of the "cost" under the contract and both acted accordingly. And the items in this part of the claim of the suppliant were approved by the Resident Engineer in charge of the actual operation; the District Engineer

and the Chief Engineer of the Department and by the Department of Public Works.

In the examination of the Deputy Minister he stated:—

Q. (27) The items which were subsequently disallowed had been, in fact, approved by the resident engineer?

A. Right and approved by us.

This fact was not disputed.

In addition a Treasury Official checked the items on each progress estimate rendered monthly during the period in question and certified that the amount claimed was in accordance with the contract.

It is not disputed that the suppliant acted in good faith and on the express orders of the officials of the Department of Public Works, nor that the respondent received the benefits of these disbursements.

No question arises as to the fee of the suppliant fixed under the contract, the issue is solely over the money paid out by the suppliant for insurance premiums on the respondent's property; for wages for watchmen guarding the respondent's property and for rental of equipment paid for by the suppliant and wages for key personnel.

The respondent having obtained the benefits resulting from these disbursements refuses to repay on the ground that the "stand-by" was not work under the contract and the officials of the Department of Public Works had not the authority to order the same.

Under the contract the suppliant agreed—

. . . to perform, complete and finish, in every respect, to the satisfaction of the said Minister in a good and workmanlike manner, agreeably to the true intent and meaning of the specification hereto annexed, marked "A", and forming part of these presents, and to the extent and in the situation described, *or as may hereafter be directed by the Engineer or Officer in charge of the work.*

All the works required to deepen, dredge out and clear wholly and entirely of all obstacles and materials whatsoever to a depth of thirty (30) feet L.W.S.T. the obstruction in Seymour Narrows, Province of British Columbia, known as "Ripple Rock" . . .

"Cost" is defined in Schedule "B" and includes:—

Section (*k*). Such other items of cost as shall be properly and reasonably incurred by the Contractor solely for the purposes of the work; provided that any such items shall have been approved by the Engineer.

Attached to the contract and forming part thereof are these Specifications, Tenders and General Conditions, and

Dredging Specifications. In the Tenders and General Conditions Section 21 and Section 22 are as follows:—

21. Alterations. The Engineer shall have the power and right . . . *to add to,* omit, change, modify, cancel or alter the works and material herein specified or shown on the drawings without rendering void in any way or vitiating the contract.

22. Meaning of Terms etc., alterations, deductions, omissions, modifications or deviations are to be understood as applying . . . *the additions of works neither shown nor described etc.,* and for these or similar matters alone, will any sum be allowed to the contract or deducted from the contract, and then only upon the written order of the Engineer.

The respondent contends that what was done during this stand-by period was not part of the work to be performed under the contract. And, therefore, the Chief Engineer would not by reason of Section 36 of the Public Works Act have power to add work that was not work to be performed under the contract. Section 36 of the Public Works Act is as follows:—

36. Whenever any works are to be executed under the direction of any department of the Government, the minister having charge of such department shall invite tenders by public advertisement for the execution of such works, except in cases

(*a*) of pressing emergency in which delay would be injurious to the public interest; or

(*b*) in which from the nature of the work it can be more expeditiously and economically executed by the officers and servants of the department; or

(*c*) where the estimated cost of the work is less than five thousand dollars and it appears to the minister, in view of the nature of the work, that it is not advisable to invite tenders.

2. Whenever in case of any work tenders are required to be or are invited, the minister having charge of the department concerned shall submit all tenders received therefor to the Governor in Council and the contract for the work shall be awarded under the direction of the Governor in Council. R.S., c. 39, s. 36.

The officials of the Department of Public Works could not by reason of the provisions of Section 36 have added to the work under the contract, work that had no connection with the work to be performed under the contract. They could not for example have added as work under this contract the construction of a canal through Seymour Narrows, nor a bridge over the Narrows. If they had directed such work the suppliant could not recover because of the provisions of Section 36 of the Public Works Act. All persons dealing with officers of the Crown must be taken to have a knowledge of the statute. *Queen* v. *Woodburn* (1).

(1) (1898) 29 S.C.R. 112.

The work under the contract was to be performed in the dangerous tidal waters of Seymour Narrows. It is clear from the letter of the suppliant attached to the contract and from the evidence that the work to be performed was highly dangerous and of an experimental nature. It was known by both parties that the work could not be carried on from October to February each year due to the extreme tides. The letter sets out the fact that during some tides in each day the current would be too fast and it would be impossible to drill. And the digging would be even more difficult than the drilling. The drilling was stopped because of the difficulty encountered and the Engineers of the Department of Public Works considered the new method of anchorage proposed by the suppliant. Eventually this method was adopted and the drilling resumed after a second stand-by period. The expenditures made during the second stand-by period have all been repaid by the respondent. It is clear that the respondent in paying those disbursements considered that "stand-by" as "work" to be performed under the contract.

In addition it was known to be seasonal work and that a "stand-by" period of four months or so each winter would be necessary.

I am of the opinion that in the circumstances, the "stand-by" was so connected with the work to be performed that it can reasonably be held to constitute an "addition of works" to the work to be performed under the contract which the Engineer had power to add under Section 21 of the Specifications. And I so hold.

The Tenders and General Conditions are headed "For Bulk Sum". This contract is not on that basis but on the cost plus fixed fee basis and that must be taken into account in considering Clauses 38 and 7. Clause 38 provides that no claim for extras will be entertained by the Department of Public Works on account of unforeseen difficulties in carrying out the work provided. The claim here is clearly not a claim for extras of that kind.

Clause 7 provides that no claim for extra work or materials will at any time be recognized or entertained by the Department unless the contractor has first obtained a written order therefor from the Engineer.

1947
BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED
v.
THE KING
O'Connor J.

That the Engineer has done so is quite clear because the Department has not only recognized and entertained the claim, but has approved payment of the claim. The Deputy Minister's evidence was that the claim had been "approved by us".

For these reasons I hold that the suppliant is entitled to the amount claimed under this head of $21,021.55.

The balance of the claim of the suppliant for the sum of $2,811.06 is in connection with a number of items which the officials of the Department of Public Works refused to approve. I have considered the evidence of the President of the suppliant Company and that of Mr. Robert Henderson, the Resident Engineer, who was in charge of the work at Ripple Rock, and I come to the conclusion that of these items, the suppliant is entitled only to item referred to as No. 9 for $200.95, which Mr. Henderson stated was owing.

The contract expressly provides that the respondent is to pay the suppliant the cost of the work on the written certificate of the Engineer or Officer in charge. The Engineer has refused to approve the other items and his certificate is a condition precedent to payment. *O'Brien* v. *Queen* (1).

The suppliant is, therefore, entitled to $21,222.50 and costs.

Judgment accordingly.