THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-03573

BETWEEN

POWER AND UTILITY CONTRACTORS LIMITED

Claimant

AND

TRINIDAD AND TOBAGO ELECTRICITY COMMISSION

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Ms. F. Khan for the Claimant
Mr. R. nanga for the Defendant

JUDGMENT

1. The claimant, Power and Utilities Contractors Limited (PUCL) is a company involved inter alia in the business of line clearing. The defendant, Trinidad and Tobago Electricity Commission (T&TEC) is the Statutory Corporation charged with the ownership of the undertaking of the supply of electricity throughout Trinidad.

2. In November 2007 the defendant invited tenders for line clearing maintenance for several areas. The tender package of documents for each included an Invitation to Tender, Instructions, a Draft Agreement, Performance Bond, Scope of Works, Payment Schedule, Drawings for Feeders in the area, the Defendant's line clearing policy, Safety Procedures and Contractor Insurance requirements.

3. The claimant's offer was accepted for clearance of lines for two feeders, Fyzabad 12 KV and Moruga 12 KV. It was not in dispute that a contract in terms of the draft which was included in the tender package was signed by the parties sometime about the 1st March 2008. That signed contract was not produced in evidence, but during the course of the trial, Counsel for the claimant confirmed that this claim was founded on alleged breaches of that contract. In her closing submissions, for the first time, Counsel sought to place reliance on an alleged collateral contract, but I rejected this attempt to change the case so late in the day.

4. Essentially, the claimant says it performed works in accordance with the contract but it was not paid on all the invoices it submitted. The reliefs claimed on the statement of case included reimbursement of the sum of $25,000.00 which it paid in lieu of the Performance Bond and reimbursement of the Insurance premium in the sum of $11,903.00, as well as the cost of employment of two crews of workers at $800.00 per day for the period March 2008 to the 17th December.

5. As for the general reliefs, there was a claim for damages for breach of contract or alternatively the sum of $86,250.00 being moneys due and owing under the contracts, as well as a claim for $130,350.00 being the value of additional works allegedly carried out by the claimant. In respect of these works the claimant's case was that it was instructed to clear lines which did not appear on the diagrams which were included in the tender package and in some instances in both Moruga and Fyzabad it was required to clear

vegetation outside of the 30 foot corridor along the lines. It submitted invoices for these but they were not paid.

6. Insofar as the claims for additional works or the alleged variation of the scope of works was concerned, the defendant denied them. At all times it relied on the terms of the contract which contain an "entire constitution" clause; it said in any case the diagrams included in the tender package were diagrams which indicated only the general direction of the lines and they were never intended to represent the extent of the lines required for clearance. Further, it denied any request for additional works and relied on the express term contained in the contract that any variation was required to be in writing. On the evidence, even of the claimant, at no time did any of the defendant's agents agree to pay for additional works.

7. By letter dated 17th December 2008 the defendant terminated the contract because of the claimant's alleged failure to supply a resource list for the tree trimming works, and because of several alleged complaints from customs about faulty work. The claimant denied this and claimed that the termination was unlawful.

8. The parties agree that works did not actually commence upon the execution of the contract about 1st March 2008. Works actually began about the 11th June 2008. In the statement of case (paras. 17-19) no complaint was made regarding the delay in commencement and it was accepted that work began on the 11th June 2008.

9. The defendant claimed that the delay arose as a result of the claimant's failure to completely satisfy requirements in respect of safety orientation, work plan and tools inspection, insurance requirements etcetera.

10. At the trial stage much was made of the reason for the delay. It seems to me on the pleadings that it could only be relevant to two things, first the issue of whether the claimant's claim (para. 39 SOC) for the cost of crews from March to June 11th could be entertained, and second and more importantly, the effect on the running of time for payment as specified under the contract.

11. On the evidence I found that although the defendant's requirements for safety compliance insofar as kits and equipment were not entirely clear, and that the safety orientation exercises were not held as frequently as one might expect, in any case, the claimant also fell short in meeting the requirements. On the matter of insurance for example, the importance of which must be obvious given the nature of the works and the risks involved, the requirement was for coverage for the duration of the contract. What was attached to the statement of case was a policy which provided cover for 12 months only.

12. On the face of it the claimant was therefore not ready at 1st March. His attempts to gloss over his failure in this regard (where the documents easily identify it) explains why perhaps in setting out his case originally this was not made an issue. My finding on this aspect of the evidence has led me to reject his claim that he was ready as at 1st March

2008. In the circumstances his claim for expenses of employing crews from 1st March 2008 to the actual date of commencement of works cannot be entertained on this basis.

13. The contract was signed on the 1st March 2008 but works actually began on the 11th June 2008 (the effective date). Clause 7 of the contract dealt with the manner of payment. It was first subject to the satisfactory performance of the works for the quarter in respect of which the claim is made. Given that the works actually started on the 11th June 2008, I find that payment for the works done in the first quarter could only have become due on the 11th September 2008. In other words, there having been no services provided between March 1st and May 30th, the claimant could not have been entitled to payment for that quarter, the date of the contract notwithstanding.

14. It follows from this finding that several of the claimant's invoices were in fact premature even on the face of them, that is, they relate to periods which precede the time when there would have been an obligation on the part of the defendant's line inspectors, to inspect and assess the works.

15. The claim for the return of the performance bond can easily be disposed of. Clause 8 of the contract which the claimant signed clearly indicated the requirement of a surety in the sum of 10% of the contract price. Indeed the very first clause 1(c) identifies the bond as forming part of the contract. The evidence established that the claimant provided a cheque in lieu of a bond. The statement of case set out (para (8) that "the claimant agreed to provide a cheque in lieu of the performance bond, which was provided

on the 28th February 2008. In the light of this, the claimant's claim to the return of the bond on this basis is unsustainable.

16. A substantial portion of the quantified damages claimed arose out of the alleged performance of additional works. This arose in two ways, clearing vegetation outside of the 60 foot wide corridor where it was necessary and for lines cleared outside of the areas shown on certain diagrams which were included in the tender package. The claimant alleged that these works were outside the scope of works defined in contract and that the request to execute them effectively varied the contract. The claimant did not set out either in the claim form or its evidence of Mr. Changoor, the particulars of the additional works as was required.

17. The invoices upon which the claimant relied, did not assist on the issue. All that they reflected, were very general and vague claims to having done additional work. The claimant failed to adduce cogent evidence of the alleged additional work. Mr. Changoor volunteered under cross-examination that he kept a log book which would have indicated the details. This was never produced. The failure to produce this logbook or to plead its content in the statement of case undermined the claimant's credibility.

18. The defendant agreed that in one instance, it paid the sum of $2,250.00 claimed for clearing outside the corridor. This was after it had visited the site and satisfied itself that the works were necessary and had been done. In all other instances, the defendant denied that any additional work outside the corridor were requested or authorised. The

claimant's witness, Mr. Changoor, agreed that none of the defendant's agents agreed to pay, nor indeed that they were authorised to vary the contract.

19. As to the claim on invoices for works on lines in areas not shown on the diagrams, while the diagrams were included in the tender package, they were not identified as relevant to the scope of works. They were clearly not among "the accompanying documents" which were expressly incorporated into the contract. The scope of works defined in the contract specifically described what was to be done "included **clearing the entire path of the overhead circuit**" (emphasis mine), including all High Voltage, Low Voltage circuits on all T-off. It included all 12KV feeders inclusive of all 3 phase and 1 phase T-off and associated Low Voltage Lines.

20. The claimant has not established that it did work outside of the part of the circuit of either feeder. It has simply sought to establish that some areas where it did works did not appear on the diagram in the tender package. Given the purpose of the contract, it could only be expected that it would contemplate as it expressly stated, clearing all the lines on the entire circuit. Whether it appeared on a diagram or not would hardly make a difference. The claimant has not claimed that it cleared lines on any other circuit.

21. The claimant was in the business of line clearing and involved in the industry. Its Manager, Mr. Changoor was a former employee of the defendant. He said that before submitting the tender he familiarized himself with the general route. He used the diagrams. On a balance of probabilities and given his experience in the field I do not

believe that Mr. Changoor would have been misled by the diagrams. If the circuits for the two feeders in respect of which he was awarded contracts ran outside of the areas shown on the diagram, he must have observed this on his site visit before he tendered. There is no evidence that between the time of the award of the contract and when he allegedly executed the work, that the circuits were extended. Indeed that is not the claimant's case.

22. So a contract to clear the entire circuit could only mean exactly and just that, and I find the diagrams to be irrelevant to the scope of works. I accept the evidence of the witnesses for the defendant that the diagrams show the general direction of the lines and are not meant to indicate the area of the complete circuit. In the circumstances, I reject the claim insofar as it relates to the clearing of additional lines not shown on the diagrams.

23. But further to this, I find that the claim on invoices for additional works should be rejected because they arise out of alleged variations to the scope of works which were not made in accordance with Clause 21 of the contract. Given that the substantial sums claimed in respect of the "additional works" increase the contract price by almost 50%, they cannot be allowed. The contracts in issue were awarded at the end of a tender process. A claim in respect of the same contracts (allegedly amended) which had the effect of so significantly increased the price could not be lightly entertained. The requirement for an amendment to be in writing in these circumstances must be strictly adhered to. In the absence of such an amendment I am not inclined to allow the claim.

24. The fact that Mr. Austin did as Area Manager on the recommendation of Mr. Ramsumir agreed to pay for additional work clearing outside the corridor to the tune of $3,450.00 on one occasion, does not change the position, nor does it establish a course of dealings by which the scope of works could be so substantially varied without adherence to Clause 21. The claim for the "additional works" is therefore rejected.

25. The last claim relates to the alleged unlawful termination. In the statement of case (paras. 36, 37, 38) the claimant alleged that by letter dated 17th December, 2008 its contract was terminated. The defendant claimed that the termination was lawful and cited numerous trouble reports and interruptions in service which were the result of shoddy or unsatisfactory work of the claimant. The reports spanned the period June 2008, the commencement date to termination in December, 2008. The claimant said that this was the result of his refusal to re-execute a contract, without being afforded the opportunity to take it away.

26. While I accept on the evidence that there were occasions when the claimant's work was the subject of complaints and may have resulted in trouble reports, on the evidence it emerged that between the 18th September, 2008 and about the end of November, 2008 the defendant had in fact suspended the claimant's services. In those circumstances it could hardly be responsible for the problems during that time. The production of these reports by the defendant to support the claims of unsatisfactory work significantly undermined the credibility of the defendant on this issue.

27. Further it is clear from the defence (para. 2m) that the defendant believed the refusal/neglect by the claimant to re-execute the contract justified its "retracting its offer". The defendant's letter of 23rd September 2008 was very clear on this position. The original executed contract has never been produced in evidence. No satisfactory explanation has been given for the failure to produce it. More importantly the need to have it re-executed by the claimant, has not been properly explained. The defendant's explanation that its representative signed in the wrong place hardly justifies its demand for execution of a new contract by the claimant.

28. By letter of 23rd September, 2008 the defendant indicated its position. It clearly and erroneously in my view believed it was entitled to retract the offer or require the claimant to resign because of his refusal to re-execute and I have formed the view that this was what led the defendant to terminate. The letter served as a more contemporaneous record of the reason for the defendant's conduct. The letter confirmed that since the 15th September, 2008 the claimant had been asked to stop works under the contract. Significantly, no allegations of unsatisfactory work were made in it, although line clearing inspections would have submitted in the month of July 2008. The claimant was not allowed to resume work until some time in late November after Mr. Changoor met with Mr. Austin.

29. The defendant has not adequately explained or justified the suspension. Indeed it was never raised in the defence. Noto only did the defence not set out the circumstances of the suspension it consequently never explained the reason it would have needed to give

permission for the resumption of work. The letter of termination sought to give the impression that the suspension was never lifted because the claimant failed to supply a work schedule. The defendant has however sought to rely on unsatisfactory work for the period June to December and has relied upon trouble reports throughout the period. This inconsistency in the defendant's position did not impressed me, neither did the nebulous position over the "suspension".

30. If the defendant suspended the contract on September 15th, that was not justifiable. The defendant's claim therefore, that the claimant resumed work between November 26th to December 17th without its authority only confirms it. I find that the defendant "suspended" and effectively terminated the contract because of the claimant's refusal to execute the contract which was not unreasonable in my view. The claimant's resumption works between November 28th and December 17th does not assist the defendant, whose position remained that they had not authorised this resumption. I reject the defendant's explanation that this was because of a failure to supply work schedules.

31. I turn to the issue of damages. For breach of a contract of this sort the claimant is entitled to what it would have earned if he had been allowed to complete the contract. The quantum of damages in this regard would be his loss of profit. That figure was not specifically identified on the claimant's pleadings or evidence.

32. I recall the claimant's evidence that in attempting to argue against the performance bond, he did say that 10% was almost what the profit would be. I am

prepared to accept that as a basis on which I can avoid a purely nominal sum and award damages for breach of contract. Since I have found that the contract was unlawfully terminated I find that the claimant is entitled to recover his bond in the sum of $25,000.00. The claimant is also entitled to recover a portion of the insurance premium he paid for the period he did since coverage was no longer required after the termination.

33. I have found that the contract was unlawfully and effectively terminated on the 16th September 2008. While the defendant claimed it was a suspension I do not accept this. This finding is not affected by the fact that there was a resumption of works sometime between the 28th November, 2008 and 17th December 2008. The defendant's position is that the resumption was unauthorized.

34. In the circumstances of what was indicated as a suspension I do not consider it unreasonable that the claimant would have had to have workers on standby. I found the claim for two crews to be exaggerated. An early letter written by the claimant's then attorney, Mr. Dhaniram, referred to one crew having been retained on standby.

35. In my opinion, the claimant is entitled to recover those costs which were reasonably incurred and which he would not have recovered since he received no payment for that period.

36. On the final day of hearing I indicated my approach to the assessment of damages to Counsel and sought their assistance on the calculations which they readily offered.

Counsel for the defendant was careful to explain that he is not consenting to the assessment in the sums and I understand this to be the position.

37. There shall be judgment for the claimant in the sum of $78,935.00, with interest thereon at the rate of 6% per annum from the date of the claim, to today's date, broken down as follows:

Loss of Profit	-	$ 25,000.00
Return of Sum of Bond	-	$ 25,000.00
For Expenses of having one standby Crew for the period16/9/08 - 28/12/08	-	$ 21,000.00
Pro-rated rebate on Insurance Premium	-	$ 7,935.00

38. The defendant shall pay 80% of the claimant's prescribed costs in the sum of $15,829.00.

Dated this 21st day of January 2014

CAROL GOBIN
JUDGE