REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2010 -03594

EXPORT-IMPORT BANK OF TRINIDAD AND TOBAGO

Claimant

AND

WATER WORKS LIMITED

Defendant

AND

WATER WORKS LIMITED

Ancillary Claimant

AND

WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO

Ancillary Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Marcus, S.C., and Mr. J. Herrera instructed by Ms. D. James for the Claimant.

Mr. F. Hosein, S.C., and Ms. S. Bridgemohansingh instructed by Ms. N. Alfonso for the Defendant.

JUDGMENT

1. By original action the Claimant, Export-Import Bank of Trinidad and Tobago (Eximbank) Ltd ("the Bank") obtained judgement against Waterworks Limited in the sum of $5,236,634.95 together with interest at a rate of 10% per annum from the 31st August 2010. The matters now for my determination arise by way of an ancillary claim filed in these proceedings

by which the ancillary claimant, Waterworks Limited, ("Waterworks") seeks as against the Water and Sewerage Authority of Trinidad and Tobago ("WASA"), the sum of $12,416,611.22 which it claims is due to it as a result of the termination by WASA of two contracts for the construction of water treatment plants sited at Matura and Yarra. Waterworks also seeks a declaration that it is entitled to an indemnity from WASA with respect to sums due to the Bank.

2. By way of counterclaim, among other claims, WASA sought an order that Waterworks pay to it the sum of $642,686.25 on a third contract. On the 1st May 2012 WASA obtained judgment against Waterworks on this claim. In addition WASA seeks from Waterworks the sum of $1,776,968.63 due and owing to it under the Matura contract and the sum of $2,004,233.00 due and owing to it under the Yarra contract. These two sums, it says, represents the balance of money due to it from advance payments made to Waterworks after deducting the sums due to Waterworks under the contracts. While not specifically denying its liability to repay the advance payments Waterworks denies that these sums are due to WASA.

3. While the claim and counterclaim seem complicated by virtue of the sheer number of documents comprising the contracts the issues for my determination are simple. With respect to the Matura and Yarra contracts the issues for determination are:

(i) is Waterworks entitled to any money as a result of the termination of the contracts by WASA and if so what sums;

(ii) are there sums now due to either Waterworks or WASA under the contracts and if so what sums?; and

(iii) is WASA required to indemnify Waterworks with respect to its

liability to the Bank.

4. In the main the salient facts are not in dispute. The contracts were for the "design and build" of two water treatment plants situate at Matura and Yarra respectively. These contracts were awarded to Waterworks on the basis of its tenders. In accordance with the tenders the contracts defined the scope and fixed the price of the works required to be performed by Waterworks.

5. With respect to "design and build" contracts no separate contract is awarded for the design or the construction phase of a project. Under the contracts therefore Waterworks was responsible for both the designing of the plants and the construction of the works in accordance with the contract requirements. Waterworks' responsibility with respect to the construction of the works included the responsibility to procure and supply all materials and equipment needed to execute the design.

6. Basically both contracts were being performed simultaneously. By a letter of award dated the 27th September 2006 WASA indicated its acceptance of Waterworks' bid for the Matura water treatment plant. Similarly by a letter of award dated the 3rd April 2007 WASA indicated its acceptance of Waterworks' bid for the Yarra water treatment plant. Waterworks obtained a financial facility from the Bank and by an assignment agreement dated 26th February 2007 WASA agreed to assign the receivables due to Waterworks under the Matura contract to the Bank. The contracts for the projects were executed on the 30th July 2007 with respect to

Matura in the sum of $30,825,457.30 and on the 3rd October 2007 with respect to Yarra in the sum of $24,042,284.00.

7. In all material respects the contracts are in the same terms.[1] Both contracts required Waterworks, "as a prerequisite for the binding effect of the award", within 7 days of the notification of the award to provide a performance security as a guarantee for the due observance and performance of the contract in a sum representing 10% of the contract price. Accordingly performance security bonds were provided by Waterworks on the 27th April 2007 with respect to Yarra and on the 4th May 2007 with respect to Matura. Waterworks was also by the contracts required to insure the works and was required to provide to WASA evidence that the insurance had been effected and that the premiums had been paid by submitting a copy of the receipts to WASA.[2]

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[1]The contracts comprised:

(a) the Letter of Award and attached Appendix;
(b) the Performance Bond;
(c) the Invitation to Tender;
(d) the Minutes of Pre-bid meetings and Site visits;
(e) the Addenda;
(f) the Conditions of Particular Application;
(g) the Special Conditions of Contract
(h) the General Conditions of Contract;
(i) the Scope of Works;
(j) the General Specifications;

8. By the contracts Waterworks was mandated to commence the design and execution of the works immediately after the receipt of the notice to commence[3] which was to be issued 14 days after the signing of the agreement.[4] Thereafter Waterworks was required by the contracts to proceed with the works with due expedition and without delay until completion. The contract also provided that in the event Waterworks failed to complete the works within the time stipulated or any extended time it shall be liable to pay liquidated damages at the rate of 0.5% of the contract price for every day or part of a day to a maximum of 10% of the contract price[5]. In accordance with the contract therefore any delay attributable to Waterworks could have resulted in it being liable to damages amounting to a maximum sum of $3,825,457.30 with respect to Matura and $2,404,228.40 with respect to Yarra.

9. Both contracts provided for WASA to make an advance payment to Waterworks as an interest-free loan for mobilisation and design prior to the commencement of any work under the contract. In accordance with the contracts: on the 14th March 2008 an advance payment in the sum of $3,082,545.73 was paid with respect to Matura and on the 22nd April 2008 a similar payment in the sum of $2,404,228.41 was paid with respect to Yarra. The contracts provide that the advance payment be repaid through percentage deductions in payment certificates over the period of the contract. The contracts further provided that if the payment was not repaid prior to

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(k) the Drawings;
(l) Contractor's Bid;
(m)The Revalidation of Bid and
(n) The Contractor's Clarification of Bid Prices

[2] Clause 18 of the General Conditions of Contract as amplified by clause 18.1 of the Conditions of Particular Application and the Appendix to Tender

[3] Clause 8.1 of the General Conditions of Contract as amended by the Conditions of Particular Application.

[4] The Appendix to Tender.

[5] Clause 4 of the Agreement.

termination under clause 15 the whole of the balance would become due and payable by Waterworks[6].

10. With respect to the progress of both contracts, although the sites had been identified and the tender and the contract documents drawn up based on those sites, WASA was experiencing some difficulties with the sites and obtaining a certificate of environmental clearance ("CEC") from the relevant authority. Both the obtaining of the sites and the CECs were WASA's responsibility under the contracts.

11. Both contracts were terminated by WASA before completion pursuant to sub-clause 15.5 of the General Conditions of Contract. The sub-clause provided that WASA be entitled to terminate the contract at any time for its convenience by giving notice of such termination and for Waterworks be paid in accordance with Sub-Clause 19.6.[7]

12. Sub-clause 19.6 provides:

> "The Engineer shall determine the value of the work done and issue a payment certificate which shall include:
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> (a) the amounts payable for any work carried out for which a price is stated in the contract;
>
> (b) the cost of plant and materials ordered for the works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this plant and material shall become the property of (and shall

[6] Clause 14.2 of the General Conditions of Contract.
[7] Clause 15.5 of the General Conditions of Contract.

be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;

(c) any other Cost or liability reasonably incurred by the Contractor in the expectation of completing the works;

(d) the Cost of removal of temporary works and the Contractor's equipment from the site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost): and

(e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination."

13. Under the contracts the Engineer is the person employed by WASA to act in that capacity from time to time for the purposes of the contract and who is required to carry out the duties assigned to the Engineer under the contract.

14. Although with respect to either contract there is no evidence of notices of termination in accordance with the sub-clause no complaint in this regard has been made by Waterworks in its statement of case. In September 2009 Waterworks was informed of WASA's intention to terminate the Matura contract and this termination was confirmed by a letter dated the 12th October 2009 from WASA. Indeed by its pleaded case Waterworks accepts that the contract was terminated on or about 11th September 2009. This was some 25 months after the execution of the contract. Similarly with respect to Yarra Waterworks accepts that the contract was terminated on or about 24th June 2009. This was some 26 months after the execution of this contract. At the time of the termination of both contracts no construction work had begun on either of the plants.

15. With respect to the Matura contract Waterworks submitted two claims. The first dated the 7th December 2009 sought payment in the sum of $10,114,876.22. The second dated the 29th October 2010 sought payment in the sum of $7,453,826.84. It is this second claim which is relevant to and has been pursued by these proceedings. By this claim Waterworks seeks:

(i) the sum of $1,497,413.00 representing the value of the works executed pursuant to sub-clause 19.6(a);

(ii) the sum of $4,619.028.30 representing charges accruing to sub-contractors and/suppliers as a direct consequence of the termination of sub-contracts pursuant to sub-clause 19.6(c); and

(iii) the sum of $4,420,931.17 representing loss of profit anticipated by it.

16. In response WASA valued the works executed at $1,306,577.00. In arriving at this sum WASA awarded Waterworks the whole of the sum claimed under the head 'General Requirements' with respect to mobilisation and temporary facilities; bonds and insurance and project management, engineering design, contract management, supervision and administration including necessary surveys, geotechnical investigations and setting out of works.

17. Of the sum claimed on the Matura contract for the value of the works the sum of $190,836.00 was not allowed. WASA refused payment of the sum claimed under 'Electrical' for a motor control centre on the ground that no motor control centre was supplied and that the sums representing the design of the motor control centre had already been taken into consideration in the award of $1,306,577.00. Similarly a sum claimed under 'SCADA' representing all system development works, including training system configuration, commissioning and start up and

system documentation as described under SCADA design system was not allowed on the basis that there had been no training on the use of the equipment, no equipment had been provided and that the design of the system had already been taken into consideration in the award of $1,306,577.00.

18. With respect to the sum of $4,619,028.00 representing charges accrued to sub-contractors this sum represented monies due to MAAK Technologies Group Inc ("MAAK") amounting to 30% of the total value of equipment and systems ordered by Waterworks. WASA rejected the claim on the grounds that: (i) no purchase order for the materials and equipment was provided to show that the items were in fact ordered for the plant; and (ii) the equipment and material ought not to have been ordered since the design of the plant was not finalised at the time Waterworks received the quotation from MAAK and it was impractical that the quotation issued by MAAK constituted a true listing of the equipment intended for the works. The sum $4,420,931.17 claimed for loss of profit was rejected on the ground that there was no provision for loss of profit under the clause.

19. By a claim submitted on 8th November 2010 Waterworks claimed the sum of $4,962,784.38 with respect to the Yarra contract. By this claim, repeated in these proceedings, Waterworks seeks:

(i) the sum of $651,411.60 representing the value of the works executed pursuant to sub-clause 19.6(a);

(ii) the sum of $3,577,942.46 representing charges accruing to sub-contractors and/or suppliers as a direct consequence of the termination of sub-contracts pursuant to sub-clause 19.6(b); and

(iii) the sum of $2,824,063.72 representing loss of profit anticipated by it.

20. Of the sum of $651,411.60 claimed by Waterworks for the value of the works executed Waterworks sought the sum of $525,000.00 for what it termed 'project management designs surveys etc.' This sum represented 70% of the total price agreed by the parties for this item under the contract. The Engineer awarded Waterworks the sum of $86,400.00 on the ground that this was consistent with the stage of the works and represented 11.5% of the total price for this item.

21. WASA disallowed: (i) the sum of $15,000.00 claimed for mobilisation and temporary facilities because the claim was never validated and Waterworks never mobilised the site or erected any temporary facilities; (ii) sum of $75,000 claimed for bonds and insurance on the ground that Waterworks had not presented to WASA any documentation in support of this claim; and (iii) the sum of $36,411.60 claimed for the provision of instrumentation and control equipment on the grounds that it could not be substantiated and that it was unreasonable to order this equipment at this stage of the contract.

22. The sum of $3,577,942.46 representing charges accruing to subcontractors and suppliers was rejected on the same basis as under the Matura contract and in particular on the basis that Waterworks was unable to show evidence of such a cost or of such a liability being actually incurred nor was it reasonable to incur such a liability. As with the Matura contract the

Engineer determined that a claim for loss of profits was not available to Waterworks under clause 19.6 of the contract.

23. Both claims by Waterworks acknowledged the need to deduct from the money sought the advance payment made under each contract. With respect to the Matura contract WASA's Engineer determined that after the advance payment was taken into account no monies were owed to Waterworks but that WASA was entitled to recover the sum of $1,776,968.63 from Waterworks. With respect to the Yarra contract WASA's Engineer determined that after taking into account the advance payment no moneys were due to Waterworks but that WASA was entitled to recover the sum of $2,318,228.41 from Waterworks. In these proceedings WASA relies on the positions taken by its Engineers on the claims made by Waterworks prior to the commencement of this action.

24. At issue is the reasonableness of the claims made by Waterworks. In this regard I accept the submissions of WASA that this is a matter of law for my determination on the evidence presented to me. While the opinions of persons knowledgeable in the construction industry may be relevant ultimately the question of reasonableness is one for my determination.

25. Evidence on behalf of Waterworks was given by its Managing Director, Marcia Romain ("Romain"); a civil engineering technician employed by it, Raymond Thomas, ("Thomas") and two persons employed by MAAK, Marius Caprariu ("Caprariu") civil engineer and Alnoor Allidina ("Allidina") the managing director at the time. Evidence on behalf of

WASA was given by the Engineers under the contracts, Eric Jones ("Jones"), the Engineer for the Matura contract and Shanelle Yearwood ("Yearwood") the Engineer for the Yarra contract.

26. Waterworks also sought to rely on witness statements of two additional witnesses, Hyacinth Simms, a chartered accountant and Willie Roopchan, a chartered quantity surveyor. It is clear from these witness statements that these witnesses were being presented as experts. Roopchan's witness statement dealt with the sums payable to Waterworks under clause 19.6 and in particular the types of claims allowable under the clause. In addition the witness purported to compute the value of the works executed at the date of ascertainment that is 29th October 2010, for Matura and 8th November 2010 for Yarra.

27. Simms' witness statement purported to deal with the award of interest and to calculate the interest awardable to Waterworks based on Roopchand's assessment of the termination costs due under the contracts and other claims not before the court. Simms also purported to ascertain the interest claimed by the Bank in the original action. Neither witness attempted to give evidence of any primary facts.

28. I struck out both witness statements on the grounds that no permission had been sought by or granted to Waterworks for the use of expert evidence in this regard and neither witness statement nor annexed report complied with the requirements of Part 33, and in particular Part 33.10, of the Civil Proceeding Rules 1998 as amended ("the CPR").

29. And that in any event, with respect to Roopchan, his evidence was to the interpretation to be placed on the relevant clauses of the contract which was a matter solely for me and on which his opinion was irrelevant and was not an expertise practiced by a quantity surveyor. With respect to Simms I was of the opinion that the question of the award of and quantum of interest awarded was solely in my discretion and in any event the opinion evidence proposed to be adduced through this witness was founded on the basis of conclusions arrived at by Roopchand and included claims not before the court. In the circumstance neither evidence would have assisted me in the matters for my determination in accordance with Part 33.4 of the CPR.

Is Waterworks entitled to any money as a result of the termination of the contracts by WASA and if so what sums?

30. The burden of proof of this issue is on Waterworks. Under sub-clause 19.6 Waterworks has claimed money representing (a) the value of the works executed; (b) charges accruing to sub-contractors and/or suppliers as a direct consequence of the termination of these sub-contracts; and (c) loss of the profit anticipated by it. The case presented by Waterworks is that these sums represent either the amounts payable for work carried out for which a price is stated in the contract: 19.6(a) or costs or liabilities, other than sums payable for any work carried out for which a price is stated in the contract and the cost of plant and materials ordered for the works which have been delivered to Waterworks, reasonably incurred by it in the expectation of completing the works: 19.6(c).

31. In this regard there are two questions to be answered: (i) are the payments sought the type of payments contemplated by the clause and (ii) if so, what is the quantum of the payment to be made to Waterworks.

32. It is not in dispute that under sub-clause 19.6 (a) Waterworks is entitled to be paid sums representing the value of the work executed. At issue here is the quantum of the payment to be made to Waterworks. It is also not in dispute that under 19.6 (c) Waterworks is entitled to be paid monies reasonably incurred by it with respect to payments to subcontractors and suppliers. At issue here is whether Waterworks is entitled under this clause to recover monies due to MAAK as a result of a contract for the purchase of equipment for the projects. WASA however disputes that a claim for loss of profits is maintainable under the clause.

Is a claim for loss of profits within the contemplation of the clause?

33. WASA relies on that provision of the contract that defines cost as meaning: "all expenditure reasonably incurred (or to be reasonably incurred) by the Contractor, whether on or off the Site, including overhead or similar charges, but does not include profit."[8] Waterworks, on the other hand, submits that on a proper interpretation clause 19.6 specifies items which may be included in the pay certificate but does not exclude everything else if any of them arises. In this regard Waterworks relies on the case of Pegler Limited v Wang (UK) Limited[9].

34. Unfortunately for Waterworks the case relied on by them does not assist. In that case the relevant clause provided that the Defendant: "shall not in any event be liable for any indirect,

[8] Sub-clause 1.1.4.3 of the Conditions of Particular Application.
[9] [2000] All E.R 260.

special or consequential loss, howsoever arising (including but not limited to loss of anticipated profits or of data) in connection with or arising out of the supply, functioning or use of the hardware, software or the services even if one should have been advised of the possibility of such potential loss and shall not be liable for any loss, except as provided for in this contract."

35. In arriving at the decision that the clause only excludes liability for indirect, special or consequential loss and not a claim for all loss of profits the Court stated:

> "The reference by the words in brackets to loss of anticipated profits does not mean that the exclusion effected by this clause includes all loss of profits: it is plain from the context that only loss of profits which are of the character of indirect, special or consequential loss are referred to. As was explained in Victoria Laundry v Newman Industries [1949] 2 KB 528 at 536 claims the lofts of profits may fall into either the first or the second rule in Hadley v Baxendale depending on the circumstances."[10]

It is clear therefore that the decision in the Pegler case turned on the interpretation to be placed on the particular clause.

36. Similarly, in the case at hand, it is the interpretation of the relevant clause which is at issue. In my opinion sub-clause 19.6 definitively identifies the types of expenses for which Waterworks can claim payment. The fact that the clause states "may include" to my mind refers to the fact that not all of the categories of expenses or payments identified would necessarily be applicable in all cases. That said the clause in my view identifies all the allowable categories of payment.

[10] per Boucher QC at paragraph 50 of the judgment.

37. In any event it is clear that by the use of word 'cost' and by the meaning given to that word in the contracts loss of profit is specifically excluded from being considered as costs under 19.6 (c). Neither in my opinion can a loss of profit be considered a liability incurred in the expectation of completing the works. By definition a profit is a financial gain rather than a financial liability. In my opinion a claim for loss of profit is by clause 19.6 specifically excluded from the sums due to a contractor as a result of a termination of the contract pursuant to clause 15.5.

38. That this is the position is to my mind confirmed by clause 17.6 which provides that neither party "shall be liable for loss of use of any works, loss of profit, loss of Contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract" other than under sub-clause 16.4 and sub-clause 17.1.[11] In the circumstances Waterworks is not entitled to any payments representing a loss of profit under either of the contracts.

Is Waterworks entitled to the payment of money due to MAAK representing equipment ordered from them?

39. The money sought under this head is money which Waterworks says is due to MAAK and represents a large percentage of Waterworks' claim in this action. Under the Matura contract Waterworks seeks the sum of $4,619,028.30. Under the Yarra contract it seeks the sum of $3,577, 942.46. Waterworks' position is that these sums represent 30% of the cost of equipment which it ordered from MAAK for the work pursuant to contracts in this regard.

[11] Sub-clause 17 of the general conditions of contract

40. At issue here is the reasonableness of this claim and in particular, with respect to each contract, whether it was reasonable to have entered into these contracts at that stage of the Matura and Yarra contracts. At the time of the termination of the contracts it is accepted that there were problems with both sites. There was also outstanding with respect to both sites certificates of environmental clearance. As well there were no approved final drawings nor were there approvals given by WASA for the purchase of equipment as required by the contracts.

41. The circumstances to be considered however do not include the fact of termination by WASA pursuant to clause 15.5 of the contract. While at the time of termination there were the problems with the sites and obtaining the CEC from the evidence it is clear that work was being done to remedy these problems. There is no suggestion by WASA or from the evidence that prior to June 2009, with respect to Yarra, or September 2009, with respect to Matura, of any indication given to Waterworks that the contracts were going to be terminated before completion or that the difficulties faced with respect to either contract were insurmountable. Up to that time Waterworks was proceeding as though the contracts were to be completed and, despite delays attributable to WASA, were entitled and in fact duty bound under the contracts to complete the contracted works with due expedition and proceed without delay until completion.

42. Much ado is made by way of cross-examination as to whether at the stage of the termination final drawings or designs had been submitted with respect to each contract. To my mind in dealing with this issue it is not necessary to determine whether the designs submitted were final designs but rather whether the designs submitted provided sufficient information to allow for the identification of equipment necessary for the construction phase of the contracts.

43. Evidence on behalf of Waterworks on this aspect of its case was given by Thomas and Allidina. The evidence of Thomas is that the preliminary design and pre-design report for Yarra and Matura was submitted and presented by Waterworks to WASA on the 26th March 2008. On the 25th March 2008, one day before the presentation, MAAK submitted to Waterworks its quotation for the equipment required for the Yarra plant. Attached to the quotation were the applicable terms and conditions.

44. These terms and conditions included a provision that, at a minimum, Waterworks be liable for cancellation charges of an amount equal to 30% of the quoted price. On 4thApril 2008 Waterworks issued a "purchase order" to MAAK for the equipment identified in its quotation at the prices quoted. It is clear from the document presented that this "purchase order" was in fact Waterworks' agreement to purchase from MAAK at sometime in the future the equipment referred to in its quotation at the prices quoted and under the said terms and conditions.

45. Thomas gives no evidence with respect to an order for equipment from MAAK for the Mathura plant. Evidence in this regard was given by Allidina. According to the documents tendered into evidence by this witness on 14th March 2008, 12 days before the presentation to WASA of the preliminary design, a quotation was provided by MAAK with respect to equipment for Mathura under the same terms and conditions as applied for Yarra. He also tenders into evidence an undated "purchase order" from Waterworks in this regard.

46. According to Allidina's evidence it was necessary and normal business practice for contractors to enter into such agreements so as to bind subcontractors to supply the equipment at

the prices used as the basis of the tender. He states that, pursuant to a request made by Waterworks for an estimate of its liability to MAAK in the event of a termination of the contracts, by letters dated 4th October 2010 he confirmed that there was due to MAAK from Waterworks with respect to the equipment the sum of $3,577,942.46 with respect to Yarra and the sum of $4,619,028.30 with respect to Matura. These sums, he says, represented 30% of the costs of the equipment as stated in the contracts. It is clear that this charge is in accordance with the terms and conditions of the contract between Waterworks and MAAK.

47. Under cross-examination Allidina states that it is the preliminary design which precedes the ability to cost any equipment. He says that this was all done during the tender stage. He accepts however that before there is an authorisation for the actual procurement of equipment, however, final designs would have to be submitted and WASA's approval obtained. With respect to the suggestion made to him in cross-examination that the quotation was devoid of details as to the number, type and/or specifications of the equipment he says that the quotation is to be read in conjunction with the drawings submitted since these details are identifiable on the drawings. In this regard the evidence of Yearwood that the preliminary design documents submitted with respect to Yarra included design calculations and equipment[12] gives credence to this evidence. I accept Allidina's evidence in this regard.

48. I accept the evidence of Thomas and Allidina that Waterworks and MAAK entered into these contracts. This evidence was not challenged by cross-examination. What was challenged in cross-examination, in accordance with WASA's defence and the evidence led by it, was the reasonableness of Waterworks' actions in this regard. In addition, the position of both

[12] Paragraph 8 of Yearwood's witness statement.

Engineers was that they would have expected to see a purchase order evidencing the contention that the materials and equipment were in fact ordered and this was not produced.

49. With respect to the issue of a purchase order from the evidence and the cross-examination and submissions made by WASA there is clearly some confusion as to whether the term 'purchase order' is used with reference to the letters from Waterworks agreeing to the terms for the supply of the equipment in the future or a purchase order to actually obtain the equipment. This confusion is clearly fuelled by the use by Waterworks of the words "purchase order" with respect to its acceptance of MAAK's quotation for the supply of the equipment. It is this use of the words "purchase order" in the document and repeated by the witnesses for Waterworks which, in my opinion, has encouraged the use of the word 'procurement' by WASA with respect to the arrangements between Waterworks and MAAK.

50. From an examination of the relevant documents I am satisfied that the arrangement between Waterworks and MAAK was not for the actual obtaining of the equipment at that time but rather an arrangement by which Waterworks agreed to procure the equipment from MAAK at some time in the future at the prices quoted to it by MAAK in 2008. What Waterworks did by entering into these contracts therefore was to secure the equipment at the quoted price. The cost of that benefit to Waterworks was that it was required to bind itself to purchasing the equipment from MAAK and commit itself to the payment of 30% of the contract price if it cancelled the contracts. In other words in 2008 Waterworks sourced the equipment and entered into an arrangement by which the equipment was to be made available to them in the future at a price fixed at the time the equipment was sourced.

51. I am satisfied that in these circumstances there was no initiation by Waterworks of the procurement process in the manner suggested by WASA. The fact that the construction phase had not as yet started is, to my mind, of no moment since at the stage of the termination of the contracts Waterworks had merely sourced, priced and locked in prices to the prices applicable in 2008. In these circumstances there would be no purchase order for the actual supply of the equipment in the true sense of the word and indeed to issue such a purchase order at any time prior to the termination of either of the contracts would have been premature.

52. Allidina's evidence that it was necessary and normal business practice for contractors to enter into such agreements so as to bind subcontractors to supply the equipment at the prices used as the basis of the tender was not challenged either by way of cross-examination or by the submission of evidence to the contrary. His evidence to me makes perfect business sense. One of the components in arriving at a contract price for tendering purpose would be the cost of the equipment necessary to be purchased under the contract. It would be to a contractor's advantage to ensure that the prices used as a basis for the tender not increase between the submission of the tender and the date for purchase.

53. To suggest, as was suggested by WASA, that with respect to the pricing of the equipment Waterworks ought to have relied on the clause in the contract which allows it to recover price fluctuations as variations to the contract or under the clause providing for adjustments for changes in cost is to my mind somewhat disingenuous. Why should a contractor prefer to engage in a dispute with the employer as to whether a price increase is a variation or not

or whether it is entitled to an adjustment for changes in the cost of equipment when it is able, by way of contractual arrangements, to prevent such an increase in price.

54. Similarly to suggest, as WASA does, that the issue of the purchase order and the initiation of the procurement phase before the design phase is completed was unreasonably premature and clearly imprudent, to my mind, is itself highly unreasonable. In the first place it misrepresents what was in fact done by Waterworks, no doubt encouraged by Waterworks' use of the words 'purchase order', but more importantly it is a statement which could only be proffered with knowledge of the termination at this particular stage of the contract. Had the contracts not been terminated by WASA this very act by Waterworks would have been a key contributor to its efficient performance of the contracts in that, despite the delays attributable to WASA, the equipment would have already been sourced and reserved for its use at the construction stage of both contracts.

55. WASA also submits that at the stage of the contract the equipment necessary for the work could not as yet have been determined. As I understand the submission it is that no final designs had been submitted or approved therefore Waterworks could not have been in a position to identify the equipment necessary for the construction component of the contract. As indicated earlier the real question is whether the designs submitted provided sufficient information to allow Waterworks to identify the equipment necessary for the construction phase of the contracts.

56. A design and build contract requires the contractor to undertake the whole of the work from design to construction inclusive of the provision of materials and equipment. In order to tender the contractor must therefore be able to cost the design of the work as well as its construction. Included in the cost of construction would of necessity be the cost of the equipment required for that construction. While it is highly probable that every piece of equipment may not be ascertainable until final drawings are produced it cannot be that at the stage of the tender none of the equipment necessary for the construction is ascertainable.

57. It would seem to me that, based on the design brief drawings forming a part of the conceptual design prepared by the employer and included in the tender documents, a contractor must be able to identify the equipment that it is likely to require in order to complete the construction phase of the contract. How else would the contractor arrive at a price for the construction phase of the contract. One of the components in arriving at such a price, fixed by the contract, must be the cost of the equipment necessary to be purchased under the contract.

58. It follows that in order to tender for a design and build contract there must be provided sufficient information in the tender documents to allow for a costing of equipment. The preliminary design, that is the design prepared by the contractor for the purposes of preparing his tender[13], must therefore contain the information necessary to identify the equipment required to construct the plant in accordance with the designs. It is these preliminary designs which form the basis of WASA's acceptance of Waterworks' tender.

[13] General conditions of contract as amended by the Conditions of Particular Application: clause 1.1.6.12

59. In these circumstances I find that even at the preliminary stages of the contracts, March 2008, it was possible to identify equipment necessary for the construction of the plants. In this regard it is to be noted that there was no suggestion by way of cross-examination or evidence led by WASA that any of the equipment agreed to be supplied was not necessary for the construction of either plant.

60. I accept the evidence of Allidina as to the normal business practice and find that even though there were no approved final drawings and even though no approvals had been given for the purchase of any equipment it was reasonable for Waterworks in the early stages of the contract to take steps to ensure that the cost of the equipment did not exceed the cost used as the basis of its tender. In order to do so they were required to enter into the contract with MAAK which fixed the prices of the equipment and provided for a payment of at least 30% of the contract price to MAAK in the event of cancellation. In this regard therefore the fact that there were still outstanding topographical and geological surveys do not to my mind affect the reasonableness of Waterworks entering into supply contracts for the equipment already ascertainable and in accordance with the information provided by the tender documents.

61. WASA submits that there is no credible evidence that the cancellation charges were in fact incurred. I disagree. I accept the evidence of Allidina in this respect. This evidence, not challenged by way of cross-examination, makes sense. There is no dispute that Waterworks and MAAK entered into contracts for the supply of the equipment. The terms of those contracts are also not disputed. The fact that WASA terminated its contracts with Waterworks before the construction phase for which the equipment would have been required is also not in dispute.

62. It follows therefore that the termination of the contracts by WASA would obviate the need for the items indentified in the supply contracts which would in turn result in the cancellation of the order. In accordance with the terms of the supply contracts this fact triggered Waterworks' liability under them.

63. There has been no suggestion, by way of evidence or even cross-examination, of any collusion or fraudulent behaviour on the part of either Waterworks or MAAK. Neither has there been any suggestion that this equipment was in fact supplied by MAAK to Waterworks. It must be therefore, in accordance with Allidina's evidence, that the termination of the Yarra and Matura contracts resulted in Waterworks having to cancel its commitment to MAAK under the supply contracts.

64. With respect to the Engineers' position that they would have expected to see a purchase order for the equipment at the time of the claim, given the status of the contracts between Waterworks and MAAK, I am not convinced that this was necessary. While in hindsight this would have been a more prudent course, in my opinion, the provision of the quotation and the terms and conditions coupled with the letters from MAAK to Waterworks as to its liability to it in the event of a cancellation of the supply contracts provided WASA with sufficient confirmation of the arrangement between Waterworks and MAAK for an assessment of the claim by the Engineers.

65. Finally, by way of its submissions, WASA suggests that the Matura quotation refers to items which do not appear to comprise equipment at all. This was never put to any of

Waterworks' witnesses in cross-examination. Neither was it raised by any of WASA's Engineers either in response to the claim or in their evidence before me. In any event the business efficacy and practice of locking in prices at an early stage of the contract in my view this applies whether what is to be supplied is equipment or services. Clause 19.6(c) makes no distinction between either but merely refers to costs or liabilities reasonably incurred in the expectation of completing the works. So that unless it can be demonstrated that this was work not required at all under the contracts the fact that the items may not be considered to be equipment is at the end of the day not relevant.

66. At the end of the day I am satisfied that Waterworks has a liability to MAAK pursuant to the supply contracts in the sum of $4,619,028.30 under the Matura contract and the sum of $3,577,942.46 under the Yarra contract. I find that this liability was reasonably incurred by Waterworks in the expectation of completing the works.

Value of the work executed

67. This represents the claims for Waterworks under sub-clause 19.6(a) that is the amounts payable for any work carried out for which a price is stated in the contract.

68. Under the Matura contract at issue is the sum of $190,836.00 which Waterworks says is due to it for a motor control centre and SCADA. According to the Engineer neither was provided. Further he says the cost of the design of both pieces of equipment was included in the sum of $983,852.00 awarded by him under the heading, project management, engineering

design, contract management, supervision and administration, including any necessary surveys, geotechnical investigations and setting out of works.

69. I accept this evidence. Waterworks has presented no contrary evidence with respect to this equipment. Neither has there been any cross-examination of Jones as to how much of the $983,852.00 he allocated to the design of this equipment. The end result is that even if I was satisfied that no consideration was given by WASA to the cost of the design for the motor control centre or SCADA I have no evidence of the cost of same. On the evidence before me therefore I find that the sum of $1,306,577.00 awarded by the Engineer for the value of the work executed by Waterworks under the Matura contract is reasonable.

70. Unfortunately the position is not as clear cut under the Yarra contract. Here out of a claim for $651,411.60 the Engineer, Yearwood, allowed only the sum of $86,400.00. This sum, she said, represented the preparation of the preliminary designs.

71. In coming to her decision the Engineer disallowed the sum of $75,000.00 claimed for bonds and insurance on the basis that Waterworks had not presented to WASA any documentation in support of the claim. The claim of $15,000.00 for mobilisation and temporary facilities was not allowed because the claim was never validated and in any event, according to the Engineer, Waterworks never mobilised the site or erected any temporary facilities. Also disallowed was the sum of $36,411.60 claimed for the provision of instrumentation and control equipment on the grounds that it could not be substantiated and that it was unreasonable to order this equipment at this stage of the contract.

72. With respect to the claims for mobilisation and temporary facilities and the provision of instrumentation and control equipment I accept the Engineer's evidence. It is clear to me that both at the time of the submission of the claim and before me no attempt was made by Waterworks to validate these claims.

73. With respect to the claim for the preparation of the preliminary designs at issue here the amount payable for the design work carried out. The contract fixed a price for the preparation of designs. Waterworks claims 70% of this fixed price WASA allowed them 11.5%

74. The evidence of Waterworks on this issue comes from Thomas and Caprariu. According to Thomas on or around the end of September 2008 Waterworks submitted 75% complete detailed designs to WASA. While there was cross-examination of this witness as to whether or not the designs submitted to WASA were final designs his statement as to the submission of 75% complete detailed designs was not challenged in cross-examination.

75. In disagreeing with a suggestion made to him by WASA in cross-examination that it was unreasonable to proceed to complete final designs when there were still outstanding topographical and geological surveys Thomas states that what is taken into consideration in the design is the type of land in the general area this he says will allow for the basic concept of the foundation to be developed without the geological surveys. According to him all the geological surveys would do is to say how much reinforcement was necessary to put in the foundation. As I understood his evidence and that of Caprariu in this regard it was that although the site may have changed the plant would have continued to be sited in the general area.

76. Thomas' evidence as to the ability to prepare designs without the benefit of topographical and /or geological designs is supported by the evidence of Caprariu obtained under cross-examination. Similarly with respect to the CEC Caprariu says that while the lack of such a certificate prevented construction it did not affect the presentation of detailed designs. According to Caprariu however designs could not be 100% completed without the topographical or geological surveys.

77. A lot of the cross-examination of these witnesses was taken up with the status of the drawings submitted by Waterworks and the requirement by the contract for approval of the designs and the lack of such approval. The fact is that before designs can be approved they must be prepared and submitted. At issue here is the work carried out by Waterworks.

78. The evidence from WASA with respect to Yarra came from Yearwood. This witness admits in her witness statement that the records for Yarra are incomplete in that there were documents which were missing. Her evidence with respect to these missing documents is a little confusing. She does not state when these documents went missing whether it was at the time of her assessment of the claim or at the time of her preparation of her witness statement. According to her she only "recalled" these documents when filing her witness statement. She says that the missing documents were not filed together with the other documents relative to the project and would have gotten lost or misplaced during a relocation of the office.

79. Yearwood's evidence that at the time of termination only preliminary designs had been submitted does not accord with that of Thomas or Caprariu. The designs submitted,

according to her, were the most elementary of the designs which set out the basic overall concept of the design rather than the specific details. Unfortunately the designs tendered by her in support of this statement bear no date. Neither does she in her evidence in chief indicate when these designs were submitted. According to her the notification by the EMA that a CEC would not be forthcoming in effect halted the "partial preliminary designs" from further progression.

80. Yearwood's stated position was that bearing in mind that the majority of the required design submissions had not been actually submitted the sum of $86,400.00, which amounted to roughly 11.5% of the total price for this item, could in fact be described as a very generous assessment. Her pronouncements as to the status of the designs submitted are however qualified by her admission under cross-examination that in her opinion all designs are preliminary until they are approved for construction.

81. It is clear from the evidence that while she might have been WASA's Engineer under the Yarra contract Yearwood was not in charge of the project. Thomas' evidence is that originally Jones was the project manager for the Yarra project and that around May or June 2009 he was replaced as project manager by Amzad Khan. This position is confirmed by the correspondence. While there is evidence from Thomas of Yearwood's involvement in the project his evidence suggests that at least up to and until June 2009 she was subordinate to Jones and then Khan on the project.

82. This evidence is supported by Romain when she says in her witness statement that the claim with respect to Yarra was in fact hand-delivered to Khan. In this regard it is interesting

to note that Jones who was the project manager during September 2008 gives no evidence with respect to the submission of the Yarra designs by Waterworks. Indeed despite his involvement as project manager for most of the period of the Yarra project he says nothing in his witness statement with respect to Yarra. This is of particular relevance given the differing positions between Thomas and Yearwood with respect to the designs submitted and Yearwood's evidence as to the missing Yarra documents.

83. Yearwood gives no specific evidence of her direct involvement with the Yarra contract prior to the assessment of the claim except to say that she performed the function of the Engineer/Employer's representative under the contract. Unlike Jones her evidence, even in chief, was unclear and sometimes even misleading. For example in her witness statement in dealing with the request to Waterworks that it provide a response detailing the implications consequent on termination of the contract she says:

> "the Ancillary Defendant pointed out that the fact that the Ancillary Claimant had already been [paid][14] a mobilisation fee of $2.4 M ..... "

thereby giving the impression that this was a conversation between persons representing WASA and Waterworks.

84. In truth and in fact, as admitted by her under cross-examination, this was a fact pointed out by her to her superior. Similarly her evidence in chief that a full suite of preliminary designs had not as yet been submitted by Waterworks completely ignores the definition of preliminary design under the contract. The contract describes preliminary design as the design

[14] This word was obviously left out inadvertently.

prepared by the contractor for the purposes of preparing the tender. In those circumstances once the tender was accepted there could be no such thing as partial preliminary designs.

85. In these circumstances I prefer the evidence of Thomas and Caprariu to that of Yearwood in this regard. At the end of the day, while I accept that final drawings with respect to Yarra had not been delivered to WASA by the time of the termination of the contract, I accept the evidence of Thomas that what was submitted were 75% complete detailed designs and that these documents were submitted in September 2008 some 10 months before the termination of the contract. I also accept the evidence of both Thomas and Caprariu and find that it was not impossible or unreasonable for Waterworks to have submitted designs which were 75% complete despite the fact that topographical or geoglogical surveys had not as yet been completed nor a CEC been obtained with respect to the site.

86. I am satisfied that given the period of the contract, 15 months, it was incumbent upon Waterworks to do all that it was required to do under the contract within the shortest possible time. To my mind the fact that any delays caused by WASA could not under the contract be attributed to Waterworks and in the circumstances ought not to result in the penalties for delay under the contract is to my mind no reason for Waterworks not to meet its requirements under the contract as quickly and efficiently as it was able. It would seem to me to be eminently reasonable and good business sense for a contractor to schedule and perform its work as far as it can with reference to the period fixed under the contract for its duration.

87. In the circumstances I find that by the date of the termination of the Yarra contract Waterworks had completed and submitted design drawings amounting to 75% of the final design drawings. Waterworks claims 70% of the contract price fixed for these designs. I find that such a claim is reasonable and ought to have been allowed. Waterworks is therefore entitled to the sum of $525,000.00 for the preparation of the designs for Yarra.

88. Yearwood's position on Waterworks' claim for $75,000.00 for bonds and insurance is also suspect. Yearwood refuses such claim on the basis that although a performance bond had been presented to WASA at the outset of the contract copies of the insurance policy and evidence of payment of premiums due as required under clause 18.1 were never presented to WASA. She therefore awards nothing with respect to this claim. This is in direct opposition to Jones' position under the Matura contract. Under that Matura contract Jones was of the opinion that a performance bond had been posted therefore the full sum claimed was to be paid.

89. Both of the items, the performance bond and the insurances, were items which Waterworks was required by the contract to provide to WASA early in the day. With respect to the performance bond it was a prerequisite to entering into the contract. Indeed Yearwood admits that this was done. With respect to the insurances required to be effected by Waterworks the contract required it to submit to WASA evidence that such insurances had been effected within 21 days of the commencement date. By the contract the commencement date was 14 days after the issue of the letter of award. In accordance with the contract therefore evidence that the insurances required to be effected by Waterworks would have been provided to WASA within 35 days from the 3rd April 2007.

90. To now refuse a claim based on no documentation is to my mind unreasonable, particularly in the light of the manner in which such a claim was treated under the Matura contract. There must have been documentation for these items provided at a very early stage of the contract. Further the admitted loss of some of the Yarra documents and Yearwood's admission under cross-examination that the sum of $75,000.00 was not an unreasonable amount to be claimed under this head confirms the unreasonableness of the stance taken by the Engineer in this regard. In my opinion Waterworks is entitled to the sum of $75,000.00 representing bonds and insurances.

91. With respect to the Yarra contract therefore under clause 19.6(a) Waterworks is entitled to the sum of $600,000.00 comprising the sum of $525,000.00 for the preparation of their designs and the sum of $75,000.00 for bonds and insurances.

Are there sums now due to either Waterworks or WASA pursuant to the Matura and Yarra contracts?

92. It is not it is not in dispute that WASA advanced to Water Works the sum of $3,082,547.33 on the Matura contract and the sum of $2,404,228.00 on the Yarra contract. Neither are the terms of the contracts with respect to the repayment of these sums in dispute. Waterworks' submission on this point is a little unclear. As best as I can decipher it is that the repayment of the mobilisation fee is a liability incurred by it the expectation of completing the works and so ought to have been taken into consideration by the Engineers.

93. I do not agree with the submission. In my opinion an advance payment of money not yet due and an agreement to repay this money without interest cannot be considered a liability or cost incurred. Neither can the fact of the requirement that it be repaid be considered a liability incurred as a result of the termination. In accordance with the provisions of the contract Waterworks was always required to repay the sums advanced. Indeed it would seem to me that an examination of the actual claims made by Waterworks confirms that Waterworks understood this to be the position and that the advance payments were to be deducted from any sums found due to them. WASA is therefore entitled to the repayment of the sums so advanced and to have these sums deducted from the money due to Waterworks under clause 19.6.

94. I am satisfied that under the Matura contract Waterworks is entitled to be paid the sum of $1,306,577.00, representing the value of the work executed and the sum of $4,619,028.30, representing liabilities due to MAAK as a result of WASA's termination of the Matura contract. The monies due to Waterworks as a result of WASA's termination of the Matura contract therefore amount to $5,925,605.30. From this the sum of $3,082,547.33, representing the advance payment made must be deducted. There is therefore due to Waterworks under the Matura contract the sum of $2,843,057.97.

95. With respect to the Yarra contract Waterworks is entitled to be paid the sum of $600,000.00 representing the value of the work executed and the sum of $3,577,942.46, representing liabilities due to MAAK as a result of WASA's termination of the Yarra contract. The money due to Waterworks under the Yarra contract therefore amounts to $4,177,942.46.

From this the sum of $2,404,228.00 representing the advance payment must be deducted. There is therefore due to Waterworks under the Yarra contract the sum of $1,773,714.46.

Is WASA required to indemnify Water Works with respect to its liability to the Bank?

96. Waterworks seeks declaratory relief in this regard. As I understand the submission of Waterworks it is that should any sums be found due and owing to it by WASA then WASA ought to indemnify it with respect to its liability to the Bank with respect to those sums. In other words insofar as it is liable to the Bank for monies which WASA ought to have paid it WASA is responsible for any liabilities payable to the Bank with respect to that portion of the debt.

97. In order to put this submission in its proper context reference must be made to Waterworks' plea in this regard. According to its plea contained in its statement of case WASA breached its obligations to satisfy outstanding balances payable to it under the Matura and Yarra contracts and as a consequence thereof it became indebted to the Bank. In order to succeed therefore Waterworks will have to show that there was money due to it from WASA during the currency of its loan with the Bank.

98. The burden of proof on this issue is on Waterworks. It is not in dispute that by a letter dated the 26th February 2007 WASA agreed to assign all monies payable to Waterworks under the Matura contract to the Bank. It is also not in dispute that WASA has made no payments to the Bank on Waterworks' behalf.

99. The evidence led by Waterworks in this regard is scant. Evidence on this claim was given by Romain. Her evidence is simply that WASA never forwarded any payments to the Bank in accordance with the undertaking given to the Bank by the assignment. As a consequence, she says, Waterworks became liable to the Bank for additional accrued interest on the facility and was sued on the claim by the Bank.

100. The problem with Waterworks' submission is that it is predicated on there being evidence of monies payable to Waterworks by WASA before the loan was called in by the Bank. There is no evidence of any other money due to Waterworks from WASA with respect to the Matura contract except pursuant to the claim before me. The only evidence I have from which I can make any assumptions as to the date when monies ought to have been paid by WASA under clause 19.6 of the Matura contract is by reference to the date of the claim made by Waterworks to WASA in this regard. The evidence is that the first claim was made in December 2009. The evidence is that this claim was revised and a new claim submitted on October 2010. It has not been disputed that with respect to the money due to it under the Matura contract it is the October claim that is relevant.

101. The action by the Bank commenced on the 30th August 2010. It would seem therefore that even if WASA had paid to Waterworks the sums now found due at the time the claim was made, that is October 2010, it would still have been after the Bank brought their action to recover the monies loaned. Up to the time of the commencement of the action against it by the Bank Waterworks had not even presented the claim, the subject matter of these proceedings, to WASA. On the evidence before me I can see no breach of the agreement to assign the proceeds

due to Waterworks under the contract by WASA. Nor can I see any merit in Waterworks' claim for an indemnity. In the circumstances the declaration sought is refused.

102. In all the circumstances therefore I am satisfied that there is due to Waterworks: (i) under the Matura contract the sum of $5,925,605.30. From this, the sum of $3,082,547.33, representing the advance payment must be deducted; and (ii) under the Yarra contract the sum of $4,177,942.46. From this the sum of $2,404,228.00 representing the advance payment must be deducted. There is therefore due to Waterworks under the Matura contract the sum of $2,843,057.9 and the sum of $1,773,714.46 under the Yarra contract.

Dated this 17th day of April 2014.

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Judith Jones
Judge