

Building Relationships

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DESIGN-BUILD

Design-build contracts have become more prevalent in the construction arena. These contracts have good and bad points and have their own legal twists and turns. We will discuss two cases dealing with some of these twists. The first is Coldmatic Refrigeration of Canada Ltd. v. Kenaidan Contracting Ltd., a 2004 Ontario Superior Court of Justice decision; the second is Design Services Ltd. v. The Queen, a 2005 Federal Court Trial Division decision.

Scope of Work

The Coldmatic case arose out of a dispute between a general and two subs as to the responsibility to perform specified work on the prime contract. Each sub pointed to the other.

The subcontract with the freezer sub stated that the freezer sub would "*design, supply, manufacture and install the walk-in refrigerator and freezer panel system, including doors and accessories..*" There was a specific exclusion for the "*supply of electrical power to the doors (sic) operators and perimeter heat tracing*".

The dispute related to the wiring. Initially, the electrical sub did not want to supply any power (the "Primary Power") to the locations at which the freezer sub had installed its equipment and certainly did not want to supply power (the "Secondary Power") from the control boxes near the equipment into the equipment itself. The general de-

termined that the electrical sub, which had to provide power for the building, also had to supply the Primary Power because it would be untenable for other subs to be running wires throughout the building. Conversely, it determined that the freezer sub was responsible for providing the Secondary Power to ensure that its electrical equipment would operate.

The electrical sub accepted this division of work; the freezer sub did not and refused to provide the Secondary Power. The general had no choice but to hire the electrical sub to provide the Secondary Power. Its cost was \$65,000, including \$11,000 for the electrical sub's premium time. Of course, the general then back-charged all costs to the freezer sub.

Difference

The project was a design-build project. The owner provided basic specifications that the general was to design to and ultimately build, but left the fine details of the design to the general and its team. The general assumed the basic responsibility for the design-build and subcontracted all aspects of the design to its various subcontractors and designers.

The judge analysed the responsibilities of the subs, bearing in mind the design-build nature of the contract. He stated, "*Thus, while there was no express reference to the Secondary Wiring Work, the*

scope of tasks assigned to the refrigerated room subcontractor under the performance specifications was quite broad. In my view, this is a logical approach in a design-build arrangement: the subcontractor who assumes responsibility for the installation of a particular system assumes both design and installation responsibilities; the subcontractor's knowledge or intention with respect to design thus informs and enables it to understand the nature and extent of installation work that is required. Put another way, neither the owner nor the prime contractor necessarily knows what sort of installation work will be necessary in order to carry out the design that the subcontractor will produce; at the bid and contracting stage, therefore, it is logical to assign installation responsibility to the Designer-subcontractor."

The judge noted the scope of work included the freezer panel system and interpreted that to mean the delivery and installation of all components, connected to each other and ready to operate. He also noted that there was a specific exclusion in the subcontract for power to the door operators and for perimeter heat tracing, but not for Secondary Power; had the sub wished to exclude the Secondary Power, it should have excluded it also.

Accordingly, the judge held that the freezer sub was responsible to supply the Secondary Power, breached its contract to do so, and was liable for the general's damages. The nature of the design-build contract heavily influenced the judge's decision

regarding scope of work.

Tender Breach

In the Design Services case, the question was not "who was responsible for what." The aggrieved party had never started the work because the owner had wrongfully awarded the contract to a non-compliant tenderer. The general sued and ultimately settled with the owner. However, the rest of the design-build team also sued the owner for their damages. Should they be able to claim their damages directly against the owner when the tender came from the general?

Process

In this case, the design-build process took design-build to its logical extreme. Approximately 13 designers, suppliers, and subs, along with the general, were part of the design team. The owner required the general to supply full details about all of the team members. This included details about the role each of the team members would play, the relationship of each of the team members to the others, team members' experience with other projects and their history of working with each other, and the principals of the team members. This information is usually only requested from the general and the main designer. All team members had to declare that they had been involved in the preparation of the drawings and specs and certify the deliverables, work plan, and quality control program. Further, the successful bidder had to ensure that all team members would attend a "partnering session" with the owner. All this evidence was tendered to persuade the judge that

a contract with the general was equivalent to a contract with all of them.

Breach of Contract

The judge held that the owner had not entered into Contract A with any team players other than the general. The tender was clear that only the general made the proposal. It allowed the design team to enter into a written joint venture agreement and for the joint venture to submit the proposal, but the design team and general did not do this. Accordingly, just as the owner would have been unable to claim against the design-build team members, other than the general, for breach of contract A, the team members were not able to claim against the owner for its breach.

Tort

The team members were not entirely out of luck. The judge held that the owner owed a duty of care to the team members to treat them fairly. It was not a case of indeterminate liability to an indeterminate class of people because the owner knew exactly who the team members were and therefore knew to whom it would owe its duty of care. Further, the harm to the team members was foreseeable. The judge stated, "*This is a case that cries out for a remedy.*"

The parties had not addressed the quantum of damages and that issue was left for another day. We suspect that the damages would be the cost of providing the design and bid and not the profit that the team members expected to gain from the contract.

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