CITATION: *Knox Presbyterian Church v. Oakwood Designers & Builders*, 2024 ONSC 3131
COURT FILE NO.: CV-23-92186
DATE: 2024/06/10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE TRUSTEES OF THE KNOX PRESBYTERIAN CHURCH MANOTICK Applicant	Dan J. Leduc, for the applicant
– and –	
OAKWOOD DESIGNERS & BUILDERS INC. Respondent	Melanie Levesque, for the respondent
	HEARD: December 14, 2023 (By videoconference)

REASONS FOR DECISION

CORTHORN J.

Introduction

[1] In 2018 and 2019, the parties entered into three agreements regarding the construction of a wheelchair-accessible addition to Knox Presbyterian Church Manotick ("the Project"). First, in 2018, the parties entered into an intent agreement. Pursuant to that agreement, the respondent prepared a concept design and scope of work report for the Project.

[2] In 2019, the parties moved forward with the Project. In the latter half of that year, the parties executed two agreements: (a) the Oakwood General Construction Contract ("the Construction Contract"); and (b) the CCDC14 Design-Build Stipulated Price Contract ("the CCDC Contract"). The Contract Price (a defined term) is $774,500.

[3] The respondent began working on the Project site on September 23, 2019. The next day, during excavation work, a buried Hydro One power line was exposed. As a result, work on the Project was paused until Hydro One completed relocation and repair of the power line. For reasons irrelevant to the motion now before the court, that work was not completed until August 2020.

[4] The disputes between the parties arise from the refusal of the respondent, in August 2020, to resume work on the Project unless the applicant agreed to a $180,000 increase in the Contract Price. The parties continued to communicate throughout the balance of 2020, the 2021 calendar year, and the first half of 2022.

[5] The parties did not resolve their disputes:

- In May 2022, the applicant sent a written notice of default to the respondent;
- In June 2022, the respondent sent a notice of termination to the applicant; and
- In November 2022, the applicant served the respondent with a notice to appoint or to participate in the appointment of an arbitrator ("the Notice to Appoint"). The respondent did not respond to the Notice to Appoint.

[6] In May 2023, the applicant commenced this proceeding. The applicant requests an order providing for the appointment of an arbitrator and requiring the respondent to participate in an arbitration to determine the disputes between the parties.

[7] In response, the respondent brings a motion for an order dismissing the application in its entirety or, in the alternative, an order staying the application pending service of the Notice to Appoint on Hydro One as a necessary party to the arbitration.

The Positions of the Parties

[8] The applicant submits that the method by which the parties are required to resolve their existing disputes[1] is governed by the CCDC Contract. Part 8, GC[2] 8.1, titled "Negotiation, Mediation and Arbitration", addresses differences between the parties "as to the interpretation, application or administration of the" CCDC Contract. GC 8.1 prescribes a dispute resolution process which begins with negotiation, is followed by mediation, and, if necessary, concludes with arbitration.

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1 Throughout the balance of these reasons, I refer to the "existing disputes" as "the disputes". The reasons apply to the existing disputes and are not determinative of the dispute resolution method applicable to any other disputes between the parties.

2 "GC" is the short form for "General Conditions".

[9] The respondent's position is that the disputes between the parties must be resolved pursuant to Section 36 of the Construction Contract. That section, titled "Disputes", makes no mention of arbitration.

[10] Section 36.1 stipulates that Section 36 applies to disputes "between the parties as to the interpretation of the Contract, plans and specifications, or purported deficiency". Section 36.3 requires that a "complaint or dispute must first be adjudicated by a Court of competent jurisdiction".

[11] On those grounds, the primary relief requested on the respondent's motion is an order dismissing the application.

[12] In the event the respondent's position regarding the applicable dispute resolution method does not prevail, the respondent asks the court to (a) find that Hydro One is a necessary party to the arbitration, and (b) stay the application until Hydro One is served with the Notice to Appoint.

[13] Regarding the respondent's alternative position, the applicant submits that Hydro One is not a necessary party to the arbitration. As a result, the request for a stay of the application should be dismissed.

Disposition

[14] Resolution of the existing disputes between the parties falls within the scope of the CCDC Contract. The parties must therefore follow the dispute resolution process prescribed in GC 8.1 of the CCDC Contract.

[15] An arbitrator shall be appointed, and the parties shall participate in an arbitration to determine their disputes. Whether Hydro One is a necessary party to the arbitration is a matter within the jurisdiction of the arbitrator.

[16] The application is granted, and the respondent's motion is dismissed in its entirety.

The Issues

[17] The issues raised on the respondent's motion overlap with those raised on the application. Taking that overlap into consideration, in these reasons, I determine the following issues:

1. Which dispute resolution method applies to the disputes: Section 36 of the Construction Contract or GC 8.1 of the CCDC Contract?

2. If the applicable dispute resolution method is that set out in GC 8.1 of the CCDC Contract, is the application stayed pending service, on Hydro One, of the Notice to Appoint?

3. Are the parties referred to arbitration and required to participate in the arbitration process prescribed by GC 8.1 of the CCDC Contract?

Issue No. 1 – The Dispute Resolution Process

a) The Contracts

[18] Both the Construction Contract and the CCDC Contract were signed by the parties in September 2019. The Construction Contract stipulates that it was "made on, September 13, 2019". The CCDC Contract stipulates that it was "made on the ___ day of September in the year 2019". The specific date in September 2019 on which the CCDC Contract was made is not filled in.

[19] The parties agree that the order in which the two contracts were signed is irrelevant to the outcome of both the respondent's motion and the application.

- ***GC 1.1.6 of the CCDC Contract***

[20] The respondent's position on both the application and the motion is premised in large part on GC 1.1.6 of the CCDC Contract. That general condition is found in the "General Conditions of the Design-Build Stipulated Price Contract" – specifically, in Part 1 General Provisions, GC 1.1 Contract Documents.

[21] GC 1.1.6 addresses conflicts within "*Contract Documents*" and provides as follows:

> If there is a conflict within the *Contract Documents*:
>
> .1 the order of priority of documents, from highest to lowest, shall be
>
> - the Agreement between the *Owner* and the *Design-Builder*,
> - the Definitions,
> - Supplementary Conditions,
> - the General Conditions,
> - the *Owner's Statement of Requirements*,
> - the *Construction Documents*,
>
> .2 later dated documents shall govern over earlier documents of the same type, and
>
> .3 amendments to documents shall govern over documents so amended.

[22] For several reasons, I find that GC 1.1.6 does not support the respondent's position regarding the applicable dispute resolution method. First, I find there is no conflict within the *Contract Documents*; as a result, the parties are not required to resort to GC 1.1.6 to determine the order of priority as between the CCDC Contract and the Construction Contract.

- ***There is no Conflict Between the Two Contracts***

[23] GC 1.1.6 applies, "If there is a conflict within the *Contract Documents*" (underlining added for emphasis). For the respondent to succeed, a conflict must exist between the Construction Contract and the CCDC Contract. The respondent has not satisfied me that, for the purpose of identifying the applicable dispute resolution method, such a conflict exists.

[24] The lack of such a conflict is clear when one compares the scope of GC 8.1 in the CCDC Contract to the scope of Section 36 in the Construction Contract. GC 8.1.1 stipulates that the dispute resolution method for differences between the parties "as to the interpretation, application or administration" of the CCDC Contract is that of negotiation, mediation, and arbitration. The CCDC Contract prescribes in general and broad terms, how the parties are to deal with one another.

[25] The wording of the CCDC Contract is based on work by the Canadian Construction Documents Committee (i.e., the CCDC). That committee is responsible for the development, production, and review of standard Canadian construction contracts, forms, and guides. With few exceptions, the CCDC Contract is in language which neither party chose. One such exception is the inclusion of the Construction Contract as a listed *Construction Document* in Article A-3 of the CCDC Contract (see paras. 39 to 41, below).

[26] I contrast the general and broad terms of the CCDC Contract with the detailed, project-specific terms of the Construction Contract. Section 3.1 of the Construction Contract provides a "Project Description". That description includes the construction of a new entrance, which accommodates at least one wheelchair. The description speaks to the roof line, access to the church during construction, and the removal and reinstallation of a stained-glass window.

[27] It is undisputed that the Construction Contract is in language chosen by the respondent. Topics covered in the Construction Contract include Change Orders, Site Preparation, Meeting and Scheduling, Demolition, HVAC System, Plumbing, and Project and Site Control. From these and other topics covered in the Construction Contract, it is clear this contract addresses in detail how work on the Project will be carried out.

[28] Appendix A to the Construction Contract is a 21-page chart titled "Scope of Work Summary". The work to be done, including the amount to be charged for each component of the work, is set out in the chart. The chart concludes with the total cost of $774,500 (rounded figure and including HST).

[29] That same amount is set out in Article A-4 Contract Price of the CCDC Contract. Article A-4 stipulates that the Contract Price "shall be subject to adjustments as provided in the *Contract Documents*."

[30] The fact that the Contract Price of $774,500 appears both in the Construction Contract and the CCDC Contract does not give rise to a conflict between the two contracts regarding the method by which to resolve disputes involving the Contract Price.

[31] Section 36.1 of the Construction Contract relates to disputes "as to the interpretation of the [Construction Contract], plans and specifications, or purported deficiency". The time period for the delivery of notices of dispute under Section 36.1 is three business days; for replies to such a notice, the time period for delivery is two business days. Section 36.1 speaks to the work continuing, even if disputes are not resolved within two additional business days, and to the applicant being entitled to assert claims at the conclusion of the contract.

[32] Section 36 speaks to the types of disputes that arise on a day-to-day basis during a construction project.

[33] By contrast, the language of GC 8.1 of the CCDC Contract is much broader and much more general than the language of Section 36 of the Construction Contract. I find that GC 8.1 is intended to apply to the types of disputes which arose between the parties following the unexpected discovery of the buried Hydro One power line.

[34] Simply put, GC 1.1.6 is not relevant to the outcome of the motion or the application.

[35] As part of its reliance on GC 1.1.6, the respondent submits that the document listed first in priority therein is the Construction Contract. Although I find that the prerequisite "conflict within the *Contract Documents*" does not exist, I would, in any event, find that the Construction Contract is not the first listed document under GC 1.1.6.

- ***The CCDC Contract is First in Priority***

[36] The respondent submits that "the Agreement between the *Owner* and the *Design-Builder*" listed first in priority in GC 1.1.6 is the Construction Contract. I reject that submission for the following reasons:

- The first page of the CCDC Contract begins with the title, in upper case letters, "AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER";

- The inclusion of the word "the" before "*Owner*" and before "*Design-Builder*" in GC 1.1.6 is the only difference between the phrase, as it appears in that GC, and the title on the first page of the CCDC Contract;

- On the first page of the CCDC Contract, the applicant is defined as the "*Owner*" and the respondent is defined as the "*Design-Builder*";

- The title at the top of the first page of the Construction Contract is "Oakwood General Construction Contract"; and

- In the Construction Contract, the applicant is referred to as the "Owner" and the respondent is referred to either as "Oakwood" or "the Contractor". Nowhere in the Construction Contract is the respondent referred to as "the Design-Builder".

[37] There is simply nothing in the Construction Contract to support a finding that it is "the Agreement between the *Owner* and the *Design-Builder*" for the purpose of GC 1.1.6 of the CCDC Contract. By contrast, allowing for two minor and inconsequential differences, the title of the CCDC Contract is identical to the document listed first in priority in GC 1.1.6. If a conflict exists, the CCDC Contract is first in priority.

[38] The respondent's submission that the Construction Contract is the first listed document in GC 1.1.6 ignores the fact that the respondent chose to list the Construction Contract as a "*Construction Document*" in Article A-3 of the CCDC Contract. The importance of the respondent having done so is discussed immediately below.

- ***The Construction Contract is a "*Construction Document*"***

[39] The CCDC Contract addresses "*Contract Documents*" in detail. The references to *Contract Documents* begin in Article A-1 Design Services and the Work. Pursuant to Article A-1, the respondent is required to provide "Design Services" and perform the "Work" for the applicant "as provided for in the *Contract Documents*".

[40] Article A-3 is titled, "Contract Documents". Referring back to Article A-1, and the identification therein of *Contract Documents*, five types of *Contract Documents* are listed:

> - Agreement Between *Owner* and *Design-Builder*
> - Definitions in this *Contract*
> - General Conditions of this *Contract*
> - *Owner's Statement of Requirements*, consisting of the following (*list those written requirements and information constituting these documents intended to comprise the Owner's Statement of Requirements*):
>
> Owners Statement of Requirements – Lnox[3] Presbyterian Church Dated Nov. 9, 2017.

[3] The typographical and/or spelling error appears as in the original document.

- *Construction Documents*

* OakWood General Construction Contract between Knox Presbyterian Church and OakWood Designers and Builders[4]

Permit Plans dated APril 10, 2019 prepared by IDEA[5]

[41] The second last type of *Contract Document* in the list is *Construction Documents*. The Construction Contract is included under that heading. By definition, the Construction Contract is a *Contract Document* and distinct from "the Agreement Between the *Owner* and the *Design-Builder*" listed first in GC 1.1.6.

- ***Summary – Interpretation of the Contracts***

[42] The language of the two contracts does not support the respondent's position on Issue No. 1. I find that the resolution of the disputes between the parties is governed by GC 8.1 of the CCDC Contract. If the parties are unable to resolve the disputes through negotiation or mediation, then they are required to proceed to arbitration.

[43] The applicant submits that the respondent's position on interpretation of the two contracts runs contrary to the respondent's conduct when it delivered the notice of increased costs. In the next section of the reasons, I review the respondent's conduct in that regard.

b) The Respondent's Conduct – Reliance on GC 6.4 of the CCDC Contract

[44] A copy of the change order, which the respondent served reflecting the increased costs said to be caused by the discovery of the buried Hydro One power line is not before the court. That change order is, however, referred to in each of the respondent's notice of motion, the affidavit filed in support of the motion, and the respondent's factum. The supporting affidavit is from the respondent's president.

[45] In each of those documents, the respondent asserts that it was entitled to deliver a notice of increased costs (i.e., the change order) pursuant to GC 6.4 of the CCDC Contract. That General Condition is titled "Concealed or Unknown Conditions". In his affidavit, the respondent's president refers to the buried Hydro One power line as a concealed site condition.

[46] GC 6.4 sets out the rights of the parties in the event of the discovery of concealed or unknown conditions at the Project site. GC 6.4.1 addresses what is meant by "concealed or unknown" and stipulates how the party who discovers the condition shall give notice of the discovery to the other party.

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[4] The Construction Contract as defined in these reasons.

[5] The types of *Contract Documents* appear as they are listed in the CCDC Contract. The typographical and/or spelling error appears as in the original document.

[47] GCs 6.4.2, 6.4.3, and 6.4.4 address the potential impact, on the Contract Price, of the discovery of a concealed or an unknown condition:

> 6.4.2 The *Owner* will promptly investigate such conditions. If the conditions differ materially from the *Contract Documents* and this would cause an increase or decrease in the *Design-Builders*' cost or time to perform the *Design Services* or the *Work*, the *Owner* will issue appropriate instructions for a change in the *Contract* as provided in GC 6.2 – CHANGE ORDER or GC 6.3 – CHANGE DIRECTIVE.
>
> 6.4.3 If the *Owner* is of the opinion that the conditions at the *Place of the Work* are not materially different or that no change in the *Contract Price* or the *Contract Time* is justified, the *Owner* will advise the *Design-Builder* in writing of the grounds on which this opinion is based.
>
> 6.4.4 The *Design-Builder* shall not be entitled to an adjustment in the *Contract Price* or the *Contract Time* if such conditions were reasonably apparent during the request for proposal period or bidding period and prior to proposal closing or bid closing.

[48] The impact, or potential impact, of the discovery of a concealed or unknown condition on the Project site is specifically addressed in the CCDC Contract. The respondent relied on GC 6.4 to issue a notice of the resulting increase in the Contract Price. The disputes between the parties arise – at least in part – from the delivery of that notice. The resolution of those disputes requires interpretation and/or application of GC 6.4 and falls squarely within the scope of GC 8.1.

[49] In addition to relying on interpretation of the two contracts and the respondent's conduct, I rely on the case authorities, discussed in the next section of these reasons, regarding the precedence to be given to the arbitration process.

c) The Competence-Competence Principle

[50] "[I]t is well-established in Canadian law that, absent legislated exceptions, a court normally should refer challenges to an arbitrator's jurisdiction to the arbitrator": *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2023 ONCA 260, at para. 19, citing *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 29 C.L.R. (5th) 203, at para. 41. That approach "follows from the adoption and application of the competence-competence principle that gives precedence to the arbitration process": *Husky*, at para. 19, citing *Peace River*, at para. 39.

[51] In *Husky*, the Court of Appeal for Ontario determined an appeal from the decision of the motion judge staying an action. The motion judge stayed the action because she was satisfied that an arbitration agreement between the parties existed. The motion judge referred the matter to arbitration.

[52] Central to the outcome on the appeal was the court's determination of the standard of proof the party moving for a stay of proceeding must meet to establish the existence of an arbitration agreement. The court concluded that the motion judge applied the correct test. She determined whether it was "arguable" that an arbitration agreement exists: *Husky*, at para. 27. The standard of proof is not a balance of probabilities: *Husky*, at paras. 27-30.

[53] On the matters before this court, the applicant asks the court to conclude that, at a minimum, it is "arguable" that an arbitration agreement exists between the parties. As a result, the court should apply the competence-competence principle. Questions of jurisdiction should be left to the arbitrator to decide.

[54] Under Issue No. 1, subsection (a), above, I conclude that an arbitration agreement exists. The applicant has more than met the burden of proof set out in para. 52, above. The disputes must be referred to an arbitrator.

[55] It will be up to the parties to address before the arbitrator any questions as to the arbitrator's jurisdiction. The role of this court is restricted to referring the parties to arbitration, on such terms as may be necessary.

d) Summary – Issue No. 1

[56] The method by which the parties are required to resolve their disputes is that set out in GC 8.1 of the CCDC Contract.

[57] Before turning to Issue No. 2, I will provide reasons for an interim ruling made during the hearing of the motion. The respondent was prohibited from relying on an argument, related to Issue No. 1, addressed for the first time in oral submissions.

e) Interim Ruling (on the Respondent's Motion)

[58] In her oral submissions, counsel for the respondent made submissions regarding GCs 8.1.5, 8.1.6, and 8.1.8 of the CCDC Contract. GCs 8.1.5 and 8.1.6 deal with the appointment of a Project Mediator. GC 8.1.8 sets out when and how a party "may" refer a dispute for arbitration. I refer to the submissions or argument as "the GC 8 argument".

[59] Counsel for the applicant objected to the submissions on two grounds. First, there is nothing in the affidavits from the respondent's president (on either the motion or the application) in which he addresses these general conditions and, specifically, alleged prerequisites to proceeding to arbitration. Second, the respondent does not address the GC 8 argument in its factum.

[60] The respondent was not permitted to rely on the GC 8 argument. I agree with the applicant that, in his affidavit in support of the motion ("the motion affidavit"), the respondent's president does not address GC 8 and/or any procedural prerequisites to the parties proceeding to arbitration.

[61] The respondent attempted to rely on paras. 17 and 18 of the motion affidavit. In those paragraphs, the respondent's president refers to "The Ontario Dispute Adjudication for Construction Contracts" ("ODACC"). The ODACC is not the process described in GC 8. As acknowledged by the respondent's president (at para. 18 of the motion affidavit), the ODACC came into effect after the parties executed both the Construction Contract and the CCDC Contract. When responding to the objection, the respondent's counsel made the same acknowledgement.

[62] The respondent's counsel also acknowledged that the GC 8 argument is not addressed in the respondent's factum. It would be unfair to permit the respondent to make an argument not addressed in its factum. There is nothing about the timing of the exchange of documents on these matters, which prevented the respondent from including the GC 8 argument in the factum delivered for the motion and application.

[63] For those reasons, the respondent was not permitted to make the GC 8 argument for the purpose of either the motion or the application.

Issue No. 2 – Is Hydro One a Necessary Party to the Arbitration?

[64] Whether Hydro One is a necessary party to the arbitration is an issue for the arbitrator to determine. With precedence given to the arbitration process, it is important that the court refrain from venturing, including on a piecemeal basis, into the arbitrator's jurisdiction.

[65] Nor it is reasonable or necessary, from a procedural perspective, to stay the application pending the arbitrator's decision as to whether Hydro One is a necessary party to the arbitration.

[66] The respondent's motion for relief related to the potential involvement of Hydro One as a party to the arbitration is dismissed.

Issue No. 3 – Referral to an Arbitrator and Participation in an Arbitration

[67] It has been close to four years since the disputes arose between the parties. It has been one and one-half years since the Notice to Appoint was served. For more than two years, the parties attempted to negotiate a resolution of the disputes.

[68] On the return of the application, the respondent raised only a single potential impediment to proceeding with arbitration – service, on Hydro One, of the Notice to Appoint. As discussed under Issue No. 2, whether Hydro One is a necessary party to arbitration is an issue within the jurisdiction of the arbitrator.

[69] There is no reason to delay referral of the parties for resolution of their disputes through arbitration.

[70] The respondent proposed Gerald Genge, and the applicant accepts Mr. Genge, as the arbitrator in this matter. Unless the parties agree otherwise within 15 days from the date of release of these reasons, Mr. Genge shall be appointed as the arbitrator. If Mr. Genge is unwilling or unavailable to act as arbitrator, the parties shall select an arbitrator.

[71] It is within the jurisdiction of the arbitrator to determine whether the parties (a) have completed all of the pre-arbitration steps set out in GC 8.1, and (b) are entitled to proceed immediately to arbitration.

[72] The parties shall, in accordance with GC 8.1, attend and participate in an arbitration of their disputes.

Disposition

[73] The respondent's motion is dismissed in its entirety. The application is granted.

Costs

[74] The applicant is entirely successful in opposing the respondent's motion and on the application. If the parties are unable to resolve the issue of costs of the respondent's motion and of the application, then the court will determine both the scale for and quantum of costs payable by the respondent to the applicant.

[75] The parties shall, no later than 3:00 p.m. on Monday, June 24, 2024, notify the court as to whether they have resolved the issue of costs. Notification shall be given by email to my attention at the generic email account for the Judicial Assistants to the Ottawa-based Superior Court Judges.

[76] If the parties do not resolve the issue of costs by 3:00 p.m. on Monday, June 24, 2024, the court will determine both the scale for and the quantum of costs payable by the respondent. In doing so, the court will rely on the parties' respective costs outlines uploaded to Caselines for the motion and the application.

Madam Justice Sylvia Corthorn

Released: June 10, 2024

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