Federal Court  Cour fédérale

**Date: 20130813**

**Docket: T-583-06**

**Citation: 2013 FC 856**

**Ottawa, Ontario, August 13, 2013**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**ENVIREEN CONSTRUCTION (1997) LTD**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

## REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an action by the Plaintiff Envireen Construction (1997) Ltd [Envireen] in respect of the alleged improper termination of its contract to perform hazardous material abatement and demolition work on a decommissioned heating plant building [Building #77] located on a Department of National Defence [DND] base in Goose Bay, Newfoundland and Labrador. Public Works & Government Services Canada [PWGSC] was the contracting authority and manager of this project, and provided the request for tenders. The work was to be performed by Envireen from December 17, 2001 to September 23, 2002.

[2] On August 9, 2002, PWGSC advised the Plaintiff that work completed to date was not satisfactory and issued written notice that it would take steps to take work out of the Plaintiff's hands in six days, pursuant to GC 38 of the contract's General Conditions.

[3] On September 5, 2002, PWGSC formally terminated the contract with Envireen. PWGSC withheld $9,596.25 of the Plaintiff's $80,000 security deposit for the cost of re-tendering the contract, and paid the balance of the deposit to a number of Envireen's creditors, who had submitted Court judgments in respect of amounts owing to each of them arising from work done by Envireen.

[4] PWGSC also retained some of Envireen's materials and equipment, on site, to be used by the subsequent hazardous material abatement and demolition contractor after the Goose Bay project was re-tendered.

[5] Envireen claims damages for negligent misrepresentation (although not specifically pleaded), breach of contract representing unpaid invoices, improper retention of its security deposit, lost profits, and punitive and exemplary damages.

II. Issues

A. *Was PWGSC's Failure to Identify the Powdery White Substance Through the Hazardous Materials Survey Completed by Pinchin Leblanc, as Part of the Tender Documents, a Negligent Misrepresentation to the Contractors?*

B. *Breach of Contract*

1) Was PWGSC's Termination of Envireen as Contractor a Breach of Contract?
2) Was PWGSC's Retention of Envireen's Security Deposit and Materials on Site a Breach of Contract?
3) Was PWGSC's Refusal to Pay Envireen's Invoices for Delays and Standby Costs and Expenses a Breach of Contract?
4) Was Envireen Entitled to Payment for Work Done in Respect to Removing the Caustic Soda from the Site?

C. *Is Envireen Entitled to Punitive and Exemplary Damages?*

## III. Background

[6] The story of this demolition and hazardous waste abatement project has an unfortunate history. It involves DND Building #77, which, after being abandoned for over thirty years, was in such a bad state of disrepair that it had become a serious health and safety hazard and needed to be demolished.

[7] The contract for this work was awarded to Envireen following a request for tenders by PWGSC. The tender documents included contract specifications relating to the proposed contract, as well as a hazardous material survey [the Survey] that was completed by the consulting firm Pinchin LeBlanc Environmental Limited [Pinchin LeBlanc] in March 2001. Bidders were given the opportunity to visit the site prior to submitting a bid. Fiorentino Di Michele [Fiorentino], the owner of Envireen, took the opportunity to do so.

[8] On November 9, 2001, PWGSC published a fifth addendum [Addendum Five] to the tender documents. The Addendum included additional hazardous material abatement and demolition responsibilities. During trial, Giuseppe Di Michele [Joe], Fiorentino's son and the employee responsible for preparing Envireen's bid, stated that following receipt of the Addendum, and a second site visit by Fiorentino, no changes were made to Envireen's bid.

[9] The tender submission date for the contract was November 15, 2001. Seven bids were received by PWGSC. Most bids were near a 1 to 1.5 million dollar pre-tender estimate range prepared by PWGSC, but two were substantially lower.

[10] The lowest bidder, Philip Construction Limited [Philip] was given an opportunity to revise or withdraw its bid of $496,000 without penalty. Philip decided that it had failed to calculate substantial costs into its bid and withdrew. Two cost factors influencing Philip's decision to withdraw were the added costs of including both ferrous and non-ferrous metals and boiler brick to the abatement work, as set out in Addendum Five.

[11] Envireen was similarly contacted as to whether it wished to revise its bid. Fiorentino conducted a second site visit in early December 2001, and on December 10, 2001, confirmed in writing Envireen's bid of $548,621.00. On December 17, 2001, the contract for the hazardous material abatement and demolition work was awarded to Envireen, with a completion date set for September 23, 2002. This contract was secured by $80,000 in certified cheques from Envireen.

[12] Work on this project effectively began on February 22, 2002, when Envireen submitted its work plan, construction schedule, safety plan, emergency response plan, and environmental protection plan to PWGSC. In a response, PWGSC described a number of deficiencies with Envireen's plans, including: a lack of emergency protocols identified in its emergency response plan, no comprehensive work plan, and a generic safety plan that lacked sufficient detail for the project.

[13] By April 16, 2002, Envireen mobilized to the site at Goose Bay under the supervision of Joe. At the first site meeting, held on April 17, Western Thermal was introduced as Envireen's hazardous materials removal subcontractor and PWGSC reminded Envireen of its obligation to submit revised safety and emergency response plans. Envireen submitted at least four versions of these plans before a final version, prepared by Pinchin LeBlanc, was approved by PWGSC on June 6, 2002.

[14] At the second site meeting, on May 10, 2002, Envireen stated that their work preparing the building for asbestos removal was delayed by poor weather conditions. Envireen further advised PWGSC that Western Thermal was no longer the hazardous material abatement subcontractor on the project. Piero Di Michele [Piero], Joe's brother, took over responsibility for this aspect of the project.

[15] A third site meeting was held on June 5, 2002, where PWGSC expressed concern over the lack of progress on the project, which had thus far included sealing the building with tarp and the partial erection of a fence enclosure around the work site. Envireen advised that work was one week

behind schedule. On June 11, hazardous material abatement work commenced and continued until June 26, the date of the fourth site meeting.

[16] On June 26, 2002, Envireen announced that work was three weeks behind schedule. Envireen also informed PWGSC that Envireen's workers had encountered a white powdered substance [the Substance] in a maintenance room and fallen ill, despite the protective equipment in use at the time. PWGSC suggested the room be sealed off and that Pinchin LeBlanc be retained to sample the Substance. PWGSC suspected the Substance was caustic soda, a corrosive substance often used to clean boilers and pipes as part of regular maintenance in heating plants like Building #77.

[17] On June 27, 2002, Joe informed Envireen that after consultations with his health and safety officer, Jeremy McGrath, the work site was shut down pending identification of the substance. Envireen denied that it was responsible for identifying hazardous substances on site, a position that was contested by PWGSC by reference to specific terms of the contract.

[18] On July 9, 2002, Pinchin LeBlanc's test results of the substance were sent to PWGSC by Envireen. Pinchin LeBlanc concluded that it was a sodium-based product, likely to be a form of caustic soda. Envireen identified the Substance as caustic soda and informed PWGSC that a waste removal plan to deal with it was being developed.

[19] On July 11, 2002, Envireen sent PWGSC a letter stating that the Pinchin LeBlanc Substance test results and the Survey provided in the tender documents were incomplete, and that work would

not resume until a site meeting was held. In the letter, Envireen continued to dispute its responsibility to manage the Substance.

[20] Written communication between Envireen and PWGSC occurred frequently over the following weeks. On July 15, 2002, Envireen stated that PWGSC interfered with the test results and more testing was needed. On July 17, Envireen informed PWGSC that Piero fell ill as a result of exposure to the Substance. On July 25, PWGSC received the results of a second test of the Substance performed by Pinchin LeBlanc, which identified the Substance as having characteristics consistent with dibasic sodium phosphate.

[21] On July 27, 2002, a fifth site meeting was held. In attendance was Bruce Rogers of Rogers Enterprises Limited, an independent safety consultant that PWGSC had retained.

[22] At the meeting and in his later report, Mr. Rogers suggested that given the two different results from accredited laboratories, a worst-case scenario should be adopted: use safety equipment appropriate for removing caustic soda. To that end, Mr. Rogers suggested that the Powered Air Purifying Respirators [PAPR] and tyvek suits on site would be sufficient to handle and dispose of the substance, but if workers felt more comfortable, supplied air units and chemically-treated suits could be used instead.

[23] Regardless of the safety equipment recommended to remove the substance, Mr. Rogers recommended that the maintenance room be sealed and subjected to negative air pressure, so work

could continue on the rest of the building until appropriate engineering controls were put in place to remove the Substance.

[24] Mr. Rogers also took samples of the Substance to conduct a third test. The results of the testing indicated that the characteristics of the Substance were consistent with caustic soda.

[25] During the July 27, 2002 site meeting, Envireen took the position that the Survey provided in the tender documents was incomplete and workers would not be sent into the building until a new survey was completed by PWGSC. PWGSC refused to complete a new survey, and reminded Envireen that it was the contractor's responsibility to do ongoing hazardous material surveys under the General Conditions of the contract.

[26] On August 14, 2002, Envireen removed the Substance using supplied air and chemically treated suits, but refused to recommence work unless air quality sampling was conducted by PWGSC.

[27] On August 20, 2002, PWGSC changed the locks on the project site, retained the Plaintiff's equipment and materials, and advised the Plaintiff that a recommendation was being made to take the balance of work out of its hands.

[28] On August 29, 2002, PWGSC and representatives of Envireen met in Toronto. It is generally agreed that the terms under which Envireen could continue work on the project were discussed and that no agreement was reached. According to meeting minutes prepared by PWGSC,

Envireen agreed to go back to work if a new hazardous materials survey and air sampling was conducted, an extension of time was granted, and payments for delays and standby time were made to Envireen. PWGSC refused these conditions and subsequently terminated the contract with Envireen on September 5, 2002.

[29] Over the course of the contract, PWGSC made two progress payments to Envireen. The first, a claim for the $50,000 dedicated to Envireen's site mobilization, was approved by PWGSC on May 27, 2002. The second was approved on June 22, and consisted of a payment for 10% of the $225,000 allocated for Hazardous Material Abatement Costs Type III, or $22,500. Envireen sent many invoices for standby costs to PWGSC during the period that the project site was shut down and one for the removal of the caustic soda, but there is no documentary evidence of any further requests for progress payments being made. No further payments were made to Envireen.

[30] Evidence on behalf of the Plaintiff at trial consisted of the documents provided in its list of documents and the testimony by the Di Michele family, Joe, Piero and Fiorentino, and a former employee of Defence Construction Canada, Alan Dunn, and of the Department of National Defence, Gordon Smith.

[31] Evidence on behalf of the Defendant consisted of the documents provided in its list of documents and the testimony of Bruce Rogers, Cecil Spurrell, the PWGSC Project Officer responsible for the Goose Bay site; Alice Holmes, a Team Leader in the Real Property Division at PWGSC; Perry Roberts, the PWGSC Project Manager responsible for the Goose Bay site; and Wilamina Martin, the Chief of Finance for PWGSC in Newfoundland and Labrador.

[32] To the extent it is relevant, I will comment on the witnesses' testimony below. As well, relevant clauses and terms of tender documents and the contract are appended in the Annex to this judgment.

## IV. Analysis of Issues

### A. *Was PWGSC's Failure to Identify the Powdery White Substance Through the Hazardous Materials Survey Completed by Pinchin Leblanc, as Part of the Tender Documents, a Negligent Misrepresentation to the Contractors?*

[33] Envireen alleges that PWGSC owed a duty of care to every potential contractor bidding on the project to ensure that the tender documents were accurate and complete. Envireen's evidence on this issue was provided by Joe, who was in charge of the site at Goose Bay and prepared Envireen's bid with his father. Joe gave evidence that the Survey was incomplete because of the snow and ice that would have accumulated in the building during winter, when the Survey was completed.

[34] PWGSC's evidence was given by Cecil Spurrell, who was primarily responsible for preparing plans and specifications for the Goose Bay project tender. He described the obligations of the contractor pursuant to the contractual terms, including the contractor's responsibility to identify, quantify, characterize and manage all hazardous materials encountered. In addition, he stated that the Survey was intended only as a guide to contractors.

[35] The General Instructions (01005) of the contract provide a number of qualifiers to the information provided within the contract documents, including the Survey. In particular, clauses 1.5.1 and 1.5.3 recommend that contractors complete their own assessment of site conditions prior

to submitting a bid. Clause 1.8.1 specifies that quantities and estimates described in the Survey are to be used only as a guide and disclaims PWGSC's responsibility for any errors, omissions or discrepancies. The specific terms and conditions of the General Instructions are in the Annex to this judgment.

[36] In order to prove a claim for negligent misrepresentation arising from the tender process, Envireen has to establish:

a) A duty of care based on a "special relationship" between the owner and the bidder;

b) A representation by the owner that was materially untrue, inaccurate, or misleading;

c) Negligence in making the representation;

d) Reasonable reliance upon the alleged negligent misrepresentation; and

e) Some detriment caused by the reliance that cannot be addressed in damages

*Queen v Cognos Inc*, [1993] SCJ No 3 at para 33.

[37] Envireen relies on two cases to support its position that PWGSC is liable for a claim of negligent misrepresentation (*Cardinal Construction Ltd v Brockville (City*), [1984] OJ No 238 [*Cardinal*]; *Alden Contracting Ltd v Newman Bros Ltd*, [1997] OJ No 6542 [*Alden*]).

[38] Both these cases are distinguishable from this case. In *Cardinal*, above, it was held that the tender documents must be prepared having in mind the average bidder, that the bidder is entitled and expected to rely on tender documents conveying the best information the engineer can give, and that there is a duty of care on the contracting authority to ensure care is taken that the information provided in the tender is accurate. There are several reasons why *Cardinal* is not applicable here.

[39] First, the court in *Cardinal* found that the individuals responsible for preparing the bid knew about a major impediment to construction before the bids were accepted, yet they did not offer an addendum to that effect. As a result, the tender documents provided were inaccurate. In the case before me, the fact that caustic soda may have been present in Building #77 was provided to bidders, through Addendum Five.

[40] Second, almost all of the delays and increased costs created by finding the caustic soda were not necessary, and were caused by Envireen's own actions or inactions, whereas in *Cardinal*, the delays were accepted by all parties as necessary.

[41] Third, the contract at issue in *Cardinal* permitted reliance on the technical specifications in the tender by explicitly contemplating the potential for inaccurate information giving rise to increased costs, whereas the provisions in 1.8.1 of the General Instructions in this case explicitly references the Survey as a guide only, and, puts the onus squarely on the contractor, Envireen, to be responsible for identifying and dealing with all hazardous wastes on site.

[42] Fourth, the Plaintiff in *Cardinal* was diligent in proceeding via the terms of the contract. It completed the disputed work under protest. Envireen did not do so.

[43] Finally, an exclusionary clause relied on by the Defendant in *Cardinal* was described by the judge as "convoluted and confusing." This is not the case with the various disclaimers relied upon

by the Defendant in this project; it is clear as to what use is to be made of the Survey: it is a guide only.

[44] In *Alden*, above, the Plaintiff made requests to come to the site and conduct testing to determine whether its favoured method of rock blasting could be used, but was refused by the Defendant. In contrast, destructive testing and site visits were encouraged by PWGSC to the prospective contractors, and specifically to Envireen.

[45] Second, the consulting firm which helped prepare the tender documents in *Alden* had recommended that further testing on the site be completed, but these requests were refused by the defendent. There is no evidence of similar tests being thought necessary by the Defendant in *Envireen*.

[46] Third, the Defendant in *Alden* was of the opinion that the Plaintiff's favoured rock excavation method could not be used, but did not reveal this information. There is no evidence that PWGSC withheld information from Envireen.

[47] Fourth, the inaccuracies in the tender documents in *Alden* caused a substantial change in the work methods employed by the Plaintiff, necessitating significant delays. As described above in reference to *Cardinal*, the evidence does not establish that the delays at issue in *Envireen* were the fault of PWGSC.

[48] Finally, as in *Cardinal*, the exclusionary clause relied on by the Defendant was also held to be convoluted and confusing, in contrast to the clear disclaimers contained in the tender documents relied on by PWGSC.

[49] As I stated above, the hazardous material survey provided with the tendering documents was only meant to serve as a guide. The correspondence between PWGSC and Envireen also made it clear that it was Envireen's responsibility to ensure, after two site visits, that Envireen understood the full scope of the project, including the provisions of Addendum Five, which specified caustics/corrosive materials could be present. Thus, there is no evidence that PWGSC negligently made representations that were untrue, inaccurate or misleading, nor was there any negligence in making representations to Envireen in respect of the caustic soda. The claim for negligent misrepresentation cannot succeed.

B. *Breach of Contract*

1) Was PWGSC's Termination of Envireen as Contractor a Breach of Contract?

[50] Both Mr. Spurrell and Mr. Roberts gave evidence that the impetus to terminate Envireen's contract occurred as a result of persistent concerns by PWGSC about Envireen's progress in demolishing Building #77.

[51] Joe gave evidence to explain Envireen's delays in completing the project. He stated that the delays in producing appropriate safety and emergency preparedness plans were due to unspecific requests for revision by PWGSC.

[52] Furthermore, Joe gave evidence that the delays in carrying out hazardous waste abatement and demolition work at the Goose Bay site from April until June 26, 2002 were caused, through no fault of Envireen, by ice, snow and rain impeding progress.

[53] As for the lack of progress on site after the Substance was encountered on June 26, 2002, Joe's evidence is that despite wearing PAPR protection and tyvek suits, Envireen employees became sick after encountering the Substance. These employees included Piero, who testified to that effect. As a result, Joe placed worker safety as his top priority and refused to enter the building until supplied air could be used to remove the Substance. Joe's explanation as to why the Substance was not removed until August 14, 2002 is that he did not have supplied air units at the Goose Bay site.

[54] However, a number of Joe's positions were inconsistent or raised questions. His explanation for the repeated delays in submitting an appropriate safety plan, namely that PWGSC was not providing clear direction as to the deficiencies in the plans, was rebutted in cross examination by a letter sent from PWGSC to Joe on February 27, 2002, which contained specific directions on what needed to be changed in the various plans that had been submitted.

[55] Further, Mr. Rogers gave evidence that the personal protective equipment in use by Envireen, PAPR and tyvek suits, would have been sufficient to handle and dispose of the Substance. If workers felt more comfortable with a higher level of protective equipment, supplied air units and chemically-treated suits could have been used. In addition to these recommendations, Mr. Rogers testified that the maintenance room could be sealed and subjected to negative air pressure so work could continue on the rest of the building until the desired safety equipment was available to remove

the Substance. This evidence was not challenged in cross examination and it contradicts Joe's assertions regarding the safety procedures that were necessary to appropriately deal with the Substance and to continue work on the project in a timely fashion.

[56] Mr. Rogers also gave evidence regarding pictures taken by Joe after the Substance cleanup. These pictures show an Envireen worker in Building #77 post-removal of the Substance with bare hands and improperly attired boots. Mr. Rogers stated that the lack of skin protection on the hands of the worker meant that toxic gas could infiltrate the suit and harm the worker. This is an inconsistency that undermines Joe's stated paramount concern, and one that was supposedly responsible for delays on the project: worker safety.

[57] General inconsistencies in Joe's evidence also cast doubt on his version of who was responsible for delays at the Goose Bay site:

- He found it unnecessary to change Envireen's bid price following the receipt of Addendum Five, despite it imposing what appears to be substantial additional costs for contractors;
- His letter of July 11, 2002 to PWGSC stated that the Substance was unidentified, contrary to his letter to PWGSC on July 9, 2002, which stated that the Substance was caustic soda;
- His letter to the Newfoundland and Labrador Department of Labour listed five supplied air units as being at the disposal of Envireen, when they were in fact at another Envireen work site in Alberta;
- He did not look for a distributor of supplied air units closer to Goose Bay before ordering them from Pennsylvania, nor did he provide an explanation as to why he waited until mid-August before driving to Labrador City to pick up other supplied air units;

- Despite putting great emphasis on the potential salvage value of the Goose Bay contract, he claimed that there was no assumption in Envireen's bid that it was going to be able to sell any scrap material; and
- Despite working for Envireen from an early age, he did not know whether Envireen was still operative.

[58] In sum, I find that PWGSC was justified in its concerns regarding the cause of the delays. Its position that Envireen was responsible for the delays is plausible on all fronts.

[59] As a result of these concerns, PWGSC issued a six day notice on August 9, 2002, pursuant to General Condition GC 38 of the contract. This Condition gives PWGSC discretion to take work out of the contractor's hands with six days notice unless steps are taken to remedy issues identified by the contracting authority. When the six days elapsed and work had not recommenced, PWSGC was in a legal position to take work out of Envireen's hands. It effectively did so on August 20, 2002, when it changed locks on the Goose Bay site entrance.

[60] Alice Holmes attended a final meeting between the parties on August 29, 2002 and gave evidence that Envireen's list of demands, including payment for unpaid invoices, air sampling, a new hazardous materials survey, and an extension of time, were rejected by senior management present at the meeting. Envireen was reminded of its obligations under the contract and the right to protest under General Condition 34.

[61] Following this meeting, a final decision was made to terminate the contract with Envireen, pursuant to General Condition GC 41.1, which gives PWGSC discretion to terminate the contract. On September 5, 2002, PWGSC exercised this right, formally terminating the contract with Envireen.

[62] There were numerous delays at the Goose Bay site, which I find were primarily caused by Envireen's own actions and inactions. Following deliberation and appropriate notice, PWGSC exercised its rights pursuant to GC 38 and 41 of the General Conditions to take work out of the contractors hands and finally, to terminate the contract. PWGSC was entitled to do so. There was no breach of contract with respect to this issue.

2) Was PWGSC's Retainer of Envireen's Security Deposit and Materials On Site a Breach of Contract?

[63] General Condition GC 43 supports the Defendant's position that it was entitled to convert the security deposit and withhold $9,596.25 to cover the Defendant's re-tender costs, and the remainder of the deposit was properly paid out to creditors of Envireen, pursuant to conditions GC 42.1 and GC 42.2.1. PWGSC provided evidence of default judgments by each of the creditors against Envireen in respect of which an appropriate, discounted payment made to each of the creditors, leaving no amount of the security deposit payable to Envireen by PWGSC.

[64] Envireen also claims its equipment was wrongfully detained by PWGSC after the contract was terminated. General Conditions GC 39.2 and GC 39.3 provide authority for PWGSC to retain all plant and material for the use of PWGSC after taking the work out of the contractors hands pursuant to GC 38. This was done and there is no dispute the equipment was subsequently returned.

Fiorentino claimed damage to the equipment but there is no evidence to substantiate that. Further, the jurisprudence relied upon by Envireen in respect of the seizing of equipment is not applicable here.

[65] I find that there was no breach of contract on this issue.

3) Was PWGSC's Refusal to Pay Envireen's Invoices for Delays and Standby Costs and Expenses a Breach of Contract?

[66] Envireen submitted 15 invoices between July 2 and September 30, 2002. All but three were for standby costs associated with the site shutdown after Envireen encountered the Substance. The remaining three were for invoices relating to completing an additional 20% of asbestos removal work, costs for the testing of the Substance, and the cost of removing the Substance, respectively.

[67] The Plaintiff is not entitled to any damages or costs associated with delays and standby time. The contract specifically states, in clause 1.18.3 of the Safety Requirements (01545), that Envireen is responsible for all such delay costs, and Envireen was primarily responsible for such delays in any event. Supply of appropriate equipment to safeguard the removal of the caustic soda was also the responsibility of Envireen, pursuant to the provisions of Safety Requirements (01545), clause 1.12.1.

[68] Likewise, any additional tests were the responsibility of Envireen, pursuant to the provisions of Safety Requirements (01545) clause 1.12.1, 1.13.1; and Hazardous Material Abatement Type Work III (02083) clause 1.11.1. The need for a more complete hazardous waste survey was, if

desired or needed, the responsibility of Envireen alone, under Safety Requirements (01545) clause 1.17.1.

[69] The Plaintiff has also not provided sufficient evidence to show that an additional 20% of asbestos removal work was completed.

[70] In sum, the Plaintiff is not entitled to payment for standby costs, testing expenses, or payment for additional asbestos removal work, as there is no evidence to justify such an award.

4) Was Envireen Entitled to Payment for Work Done in Respect to Removing the Caustic Soda From the Site?

[71] The Plaintiff claims payment for the removal of the caustic soda, which it did do, and was not paid for. PWGSC takes the position that no proper progress request or claim was made for payment, and no proper support for the claim of $9,660 ($7000 before tax) was prepared or submitted by Envireen.

[72] However, clause 8.1 of the contract's "Terms of Payment – B" states:

> If the contract is terminated pursuant to GC41, Her Majesty shall pay the Contractor any amount that is lawfully due and payable to the Contractor as soon as practicable under the circumstances.

[73] PWGSC acknowledges that Envireen did remove the caustic soda from Building #77, and that no payment was made to Envireen for this work. While no progress claim was technically made, I find that Envireen is entitled to payment for removal of the caustic soda. Reviewing Envireen's itemized list in support of its claim for this work, I find that Envireen is entitled to the claim for $5,500 plus tax and interest, which represents the cost of removing the caustic soda alone.

C. *Is Envireen Entitled To Punitive and Exemplary Damages?*

[74] Given my findings of fact above, this is not a case for awarding punitive and exemplary damages. Punitive damages may be awarded in situations where the Defendant's misconduct is so malicious and oppressive that it offends the Court's sense of decency. The purpose of these damages is not to compensate the Plaintiff's for his or her loss, but rather to punish the Defendant. The standard is very high, and is not appropriate based on the facts of this matter (*Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 195-196; *Planification-Organization-Publications Systems (POPS) Lteé v 9054-8181 Québec Inc*, 2013 FC 427, at para 151-152).

V. Conclusion

[75] The Plaintiff's action for breach of contract and negligent misrepresentation is dismissed. No damages or profits are awarded.

[76] The Plaintiff's claim for unpaid services and return of its security deposit is dismissed subject to below.

[77] The Plaintiff is entitled to payment of $5,500 plus tax and interest for the removal of the caustic soda from Building #77.

[78] Costs to the Defendant.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The Plaintiff's action for breach of contract and negligent misrepresentation is dismissed. No damages or profits are awarded.
2. The Plaintiff's claim for unpaid services and return of its security deposit is dismissed subject to below.
3. The Plaintiff is entitled to payment of $5,500 plus tax and interest for the removal of the caustic soda from Building #77.
4. Costs to the Defendant.

"Michael D. Manson"
Judge

# ANNEX

i). *General Instructions (01005)*

1.2.1: …the complete demolition of the Central Heating plaint (Building #77) located at 5 Wing, Goose Bay, Labrador, complete in strict accordance with the specifications, plans and subject to the terms and conditions of the contract."

1.3.4: Preparation, submission, and implementation of an approved site specific Health and Safety Plan, Demolition Work Plan, Emergency Response Plan, Waste Management Plan and Demolition Schedule.

1.3.5: Complete removal, containerization, transportation, storage and disposal of all hazardous materials.

1.5.1: Prior to submitting a bid for this demolition work, it is recommended that contractors visit the site and make their own assessment of the condition of the structures, the facilities available in the area, the severity, exposure and general uncertainty of weather conditions, actual site and soil conditions and any other contingencies which may attend the execution of this contract.

1.5.3: Contractors are permitted to carry out destructive testing during the tender period to identify and/or confirm existing conditions.

1.8.1: NOTE 1: Quantities and estimates noted in the reference report are to be used only as a guide. There will be no compensation to the Contractor for any errors, omissions or discrepancies in the report. Engineer accepts no responsibility for the accuracy of information provided in the report.

NOTE 2: work will be completed as outlined in this specification, not as recommended or stated in the report.

ii.) *Safety Requirements (01545)*

1.11.1: The Contractor shall as a minimum perform a hazard survey of the work area on a daily basis.

1.12.1: Personal protective equipment (PPE) shall be selected and used to protect workers and visitors from actual and potential hazards that are identified by hazard surveys and air quality monitoring

1.12.2: PPE selection shall be based on an evaluation of the performance characteristics of the PPE relative to the requirements and limitations of the site, task-specific conditions, duration, and hazards and potential hazards identified at the site.

1.13.1: Contractor shall complete air quality monitoring to identify, quantify and characterize airborne concentrations of hazardous substances/materials and health hazards to:

1.13.1.1 Establish, determine and evaluate suitability of PPE; and,

1.13.1.2 Establish work area boundary air quality to determine and evaluate adequacy of site work zones (exclusion zones, contaminant reduction zones, clean areas).

1.17.1: The Contractor shall:

1.17.2.1 Contractor is solely responsible for investigating, evaluating and managing any report of actual or potential hazards.

1.18.3: The Contractor shall be responsible for any and all costs associated with delays in completing the contract as a result of the Contractor's failure to comply with requirements outlined in this section.

iii.) *Hazardous Material Abatement Type III Work (02083)*

1.1.1: The Work will consist of, but not necessary be limited to the following:

1.1.1.3 Complete removal, containerization, transportation, placement and storage/disposal of all hazardous materials in the Central Heating Plant (Building #77)

1.2.1 The Contractor shall provide at each work site all necessary fire suppression equipment for safe completion of the work.

1.2.2 Temporary power at the work area is to be provided by the Contractor for the performance of the work.

1.2.3 The safety of workers and authorized persons entering the work site during the course of the contract is the Contractor's

responsibility. All necessary provisions shall be made to ensure the safety of workers and authorized persons. Of particular importance:

1.2.3.1 Glass, metal and sharp objects are to be removed from the immediate work area before proceeding with the removal activities.

1.2.3.2 All devices required in order to elevate workers such as ladders, scaffolding, staging and lifts are to be inspected by the Contractor daily and maintained in accordance to manufacturer's requirements.

1.2.3.3 Workers and authorized persons shall be trained in safe work and hygiene practices.

1.2.4 All necessary removal, handling, transport and storage procedures and engineering controls shall be used to maintain the structural integrity of the hazardous material to minimize airborne concentrations of the material.

1.2.5 The Contractor shall maintain on site at all times, a supervisor qualified and experienced in the removal and management of hazardous materials.

1.2.6 The Contractor shall be registered with the Government of Newfoundland and Labrador as an asbestos removal Contractor, prior to the commencement of any hazardous material abatement work.

1.7.16 (Definition) Hazardous Material: As specified and as defined in Section 01545, Safety Requirements, including material that contains or is assumed to contain either asbestos, lead, mercury, hydrocarbons, PCBs, ash, heavy metals, fungus/mold and miscellaneous containerized or solid chemicals.

3.5.2 If air monitoring shows that areas inside and outside the work area are contaminated, these areas shall be enclosed, maintained and cleaned in the same manner as that applicable to work areas at the Contractors expense.

iv.) *Demolition of Structure (02060)*

1.7.1 Demolition of Building #77: As specified including all plant, material, labour and equipment will constitute a fixed price (FP) item

for measurement purposes. Include incidental to this the removal of concrete steps and ramps, manholes, catch basins, utility poles, electrical/mechanical equipment, transformers, roads and parking lots, concrete steam manholes, various other small foundations, electrical conduit, disconnection and capping of services, crushing concrete, recycling/disposal of materials, importing backfill, blending backfill materials, excavating and backfilling, compaction, site grading and final site clean-up.

1.7.2 Estimating quantities is the Contractor's responsibility. Estimate all quantities based on an inspection of the building and other structures to be removed.

NOTE: Quantities and estimates noted in the referenced report are to be used only as a guide. The assessment of quantities and estimates is the "Total Responsibility" of the Contractor.

3.3.3 Remove all hazardous materials from building before commencing demolition work. Refer to section 02081 – Hazardous Material Abatement Type I Work and Section 02083 – Hazardous Material Abatement Type III Work for Requirements.

v.) *Addendum Five – November 9, 2001*

4 Add Clause 3.5, Purging/Inerting:

1. Prior to removing tanks, pipelines and equipment, provide an access port for removal of flammable/combustible gases, liquids and caustic/corrosive materials.

vi.) *General Conditions "C"*

**GC 33**: Non-compliance by Contractor

33.1 If the contractor fails to comply with any decision or direction given by the Engineer pursuant to GC 18, GC24, GC 26, GC 31 or GC 32, the Engineer may employ such methods as the Engineer deems advisable to do that which the contractor failed to do.

**GC 34**: Protesting Engineer's Decisions

34.1 The Contractor may, within ten days after the communication to the Contractor of any decision or direction referred to in GC30.3 or GC33.1, protest that decision or direction.

34.2 A protest referred to in GC34.1 shall be in writing, contain full reasons for the protest, be signed by the Contractor and be given to Her Majesty by delivery to the Engineer.

34.3 If the Contractor gives a protest pursuant to GC34.2, any compliance by the Contractor with the decision or direction that was protested shall not be construed as an admission by the Contractor of the correctness of that decision or direction, or prevent the Contractor from taking whatever action the Contractor considers appropriate in the circumstances.

34.4 The giving of a protest by the Contractor pursuant to GC34.2 shall not relieve the Contractor from complying with the decision or direction that is the subject of the protest.

34.5 Subject to GC34.6, the Contractor shall take any action referred to in GC34.3 within three months after the date that a Final Certificate of Completion is issued under GC44.1 and not afterwards.

34.6 The Contractor shall take any action referred to in GC34.3 resulting from a direction under GC32 within three months after the expiry of a warranty or guarantee period and not afterwards.

34.7 Subject to GC34.8, if Her Majesty determines that the Contractor's protest is justified, Her Majesty shall pay the Contractor the cost of the additional labour, plant and material necessarily incurred by the Contractor in carrying out the protested decision or direction.

34.8 Costs referred to in GC34.7 shall be calculated in accordance with GC48 to GC50.

**GC 38**: Taking the Work Out of the Contractor's Hands

38.1 The Minister may, at the Minister's sole discretion, by giving a notice in writing to the contractor in accordance with GC 11, take all or any part of the work out of the contractor's hands, and may employ such means as the Minister sees fit to have the work completed if the contractor

38.1.1 has not, within six days of the Minister or the Engineer giving notice to the contractor in writing in accordance with GC 11, remedied any delay in the commencement or any default in the diligent performance of the work to the satisfaction of the Engineer.

**GC 39:** Effect of Taking the Work Out of the Contractor's Hands

39.2 If the work or any part thereof is taken out of the contractor's hands pursuant to GC 38, all plant and material (…) used or provided by the contractor under the contract shall continue to be the property of Her Majesty without compensation to the contractor.

39.3 When the Engineer certifies that any plant, material (…) referred to in GC 39.2 is no longer required for the purposes of the work, or that it is not in the interests of Her Majesty to retain that plant, material, or interest, it shall revert to the contractor.

**GC 41:** Termination of Contract

41.1 The Minister may terminate the contract at any time by giving a notice of termination in writing to the contractor in accordance with GC 11.

**GC 42:** Claims Against and Obligations of the Contractor or Subcontractor

42.1 Her Majesty may, in order to discharge lawful obligations of and satisfy claims against the contractor or a subcontractor arising out of the performance of the contract, pay any amount that is due and payable to the contractor pursuant to the contract (…)

**GC 43:** Security Deposit – Forfeiture or Return

43.1 If

> 43.1.2 the contract is terminated pursuant to GC 41
> Her Majesty may convert the security deposit, if any, to Her own use.

43.2 If Her Majesty converts the contract security pursuant to GC 43.1, the amount realized shall be deemed to be an amount due from Her Majesty to the contractor under the

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-583-06 |
| **STYLE OF CAUSE:** | Envireen Construction (1997) Ltd v. HMTQ |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | June 3, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | MANSON J. |
| **DATED:** | August 13, 2013 |

**APPEARANCES:**

| | |
|---|---|
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| William Knights | FOR THE DEFENDANT |
| Rina Li | FOR THE DEFENDANT |

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