LAPOINTE ROSENSTEIN MARCHAND MELANÇON
L.L.P. Attorneys

Newsletter

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M^tre André Rousseau

This newsletter was written in collaboration with Tania L. Pinheiro, articling student.

The risks of non-compliance with the claim procedure stipulated in a construction contract

In Quebec, it is not uncommon for works to be built under a fixed price contract. The *Civil Code of Quebec* provides that where the price is fixed by a contract, the contractor cannot increase the price stipulated under a given contract because of changes in the terms and conditions of execution originally provided for in the contract[1]. Indeed, in a business contract, the contractor usually assumes the risk of unpredictability as well as all the foreseen or unforeseen difficulties of execution[2].

Acceptance of such risks by the contractor during the call for tenders has, as an immediate corollary, the obligation of the client not to contribute, by action or omission, to distort the risk or the risk assessment made by the contractor[3]. On this point, the Supreme Court of Canada noted in *Bank of Montreal* v. *Bail Ltée* that civil law imposes a positive obligation to provide information in cases where one party is in a vulnerable position with regard to information[4]. The tender documents must therefore not contain decisive errors for the purpose of price fixing by the tenderer.

Contractual claim procedure

Notwithstanding the immutability of the parties' respective obligations, the parties may include clauses allowing modifications to the work and the price stipulated under the contract[5]. Usually, only a significant variation to the contract or clearly different conditions may ground a claim for unforeseen work or costs[6]. In fact, these clauses generally apply only in the event of significant and marked deviations creating a real impact on the cost of the work[7].

However, these clauses are strictly enforced and usually provide for a mandatory claim procedure. These conventional procedures provide the parties with important benefits recognized by case law[8]. Contractors and subcontractors benefit from the possibility of being compensated for the excess costs, while the client ensures that he is informed of the changes to the conditions of execution, which reduces the risk of action for annulment of the contract due to error and therefore favors the completion of the work[9].

In order to benefit from the advantages granted by the procedure, contractors and subcontractors usually undertake to notify the client of any claim that may give rise to compensation[10]. The procedure's formalities with respect to construction contracts must be strictly observed, failing which the contractor shall forfeit his right to any compensation[11]. Thus, the observance of the formalities is essential as the client must be informed of the potential additional costs caused by discrepancies between tender documents and construction site conditions[12]. Upon receipt of a notice of claim, the client must be able to verify the claim and take appropriate measures to control the costs[13].

If the contractor or a subcontractor performs additional work without complying with the claim procedure, his claim for excess work or costs will be unfounded and inadmissible[14]. Moreover, he will be unable to institute court proceedings in this regard as his right of action only arises from the compliance with contractual formalities[15]. In fact, the right to compensation for excess work and costs exists only when the contractor or the subcontractor gives rise to it through the contractual claim procedure.

Even if the exact amount of a claim is not yet quantified, the contractor or subcontractor must notify the client of a potential claim in order to preserve his rights[16]. However,

a notice simply stating that the additional costs incurred for the work will have to be reimbursed will not suffice, without the subsequent sending of a notice actually claiming these expenses[17].

In *Cegerco inc.* c. *Équipements JVC inc.*, the Quebec Court of Appeal held that a subcontractor must comply with the claim procedure provided for in the tender documents if he has knowledge of the documents and is aware of their requirements, even if the procedure is not mentioned in the subcontract. Failure to comply could result in the rejection of his action[18].

Waiver of the claim procedure

The fatality of non-compliance with claim procedure requirements can be avoided if the claimant demonstrates that the client has waived the obligation of compliance with respect to the claim procedure or has agreed to compensate the claimant for the excess work and costs. Waiver of the claim procedure may be expressed or inferred from the client's behavior. It may arise from the recognition by the client of the right to a claim or by the failure of the client to invoke the breach of procedure in due time[19]. Renunciation can also be invoked if the client insisted on the completion of the additional work under the promise of the subsequent determination of the works' nature and price or if the client knew that the claimant considered said work as additional, therefore constituting an amendment to the contract[20]. The burden is, however, very demanding. Indeed, even if the waiver may be tacit, it must be unequivocal and the intention to waive the procedure must be demonstrated[21].

Recently, the Superior Court of Quebec held in *Catalogna & Frères ltée* c. *Construction DJL inc.* that discussions at construction site meetings and the client's acceptance to pay certain additional work upon presentation of change requests, without sending the memorandum provided for in the claim procedure, are not sufficient to infer a waiver of the claim procedure for all additional work[22].

On the contrary, in 2015, the Superior Court of Quebec held in *Groupe Aecon Québec ltée* c. *Société québécoise des infrastructures*, that constant communication between the contractor and the client's engineers, as well as the approval and modification by the latter of the plans submitted by the contractor constituted a waiver of the claim procedure. In this case, the contractor had verbally denounced the additional work to the client and the contractual procedures had been adapted in the context of an accelerated construction site[23].

To avoid any dispute, it is essential for contractors and subcontractors to observe the contractual claim procedure. Failure to comply with these contractual requirements may result in the loss of recourse for additional work and costs. In the event of a claim, we will be pleased to assist you in drafting the various notices required by the tender documents to ensure the preservation of your rights.

1. Art. 2109 CcQ.
2. *Catalogna & Frères ltée* c. *Construction DJL inc.*, 2018 QCCS 1918, at para 47, discontinuance on appeal.
3. *Régie d'assainissement des eaux du bassin de la Prairie* c. *Janin construction (1983) ltée*, 1999 CanLII 13754 (QCCA), at 30.
4. *Bank of Montreal* v. *Bail Ltée*, [1992] 2 SCR 554, at 587.
5. *Supra* note 1.
6. *Compagnie d'assurances générales Kansa internationale ltée* c. *Lévis (Ville de)*, 2016 QCCA 32, at para 44.
7. Olivier F. Kott et Claudine Roy, *La construction au Québec: perspectives juridiques* (Wilson & Lafleur, 1998) at 383.
8. *Corpex (1977) Inc.* v. *The Queen in right of Canada*, [1982] 2 SCR 64.
9. *Supra* note 2 at para 80 and *supra* note 7 at 382.
10. *Cegerco inc.* c. *Équipements JVC inc.*, 2018 QCCA 28, at para 60.
11. *Construction Infrabec inc.* c. *Paul Savard, Entrepreneur électricien inc.*, 2012 QCCA 2304, at para 64.
12. *Supra* note 2 at para 100.
13. *Ibid*.
14. *Supra* note 8 at para 55.
15. *CFG Construction inc.* c. *Construction Bau-Val inc.*, 2017 QCCS 5119, at para 28.
16. *Ibid* at para 29.
17. *Ibid* at paras 11-12.
18. *Supra* note 10 at paras 67-75.
19. Stéphane Pitre, "L'importance de la transmission des avis en droit de la construction" (2012) 354, Développements récents en droit de la construction 107 at 111.
20. *Groupe Aecon Québec ltée* c. *Société québécoise des infrastructures*, 2015 QCCS 3478, at para 122.
21. *Société de cogénération de St-Félicien, société en commandite/St-Felicien Cogeneration Limited Partnership* c. *Industries Falmec inc.*, 2005 QCCA 441, at para 58.
22. *Supra* note 2 at para 91. See also *Excavation Loiselle et Frères inc.* c. *Procureure générale du Québec*, 2017 QCCS 3675 at para 75 and *Consortium MR Canada ltée* c. *Commission scolaire de Laval*, 2015 QCCA 598 at para 52.
23. *Supra* note 20.

For more information, please contact one of the team members:

Louis P. Brien
514 925-6348
louis.brien@lrmm.com

Harry H. Dikranian
514 925-6382
harry.dikranian@lrmm.com

Julien Grenier
514 925-6302
julien.grenier@lrmm.com

Sarah Laplante Bazzi
514 925-6416
sarah.laplantebazzi@lrmm.com

Antoine Leduc, Ad. E.
514 925-6323
antoine.leduc@lrmm.com

Jean-Claude Jr. Lemay
514 925-6351
jean-claude.lemay@lrmm.com

Michel G. Ménard
514 925-6328
michel.menard@lrmm.com

Mélissa Rivest
514 925-6387
melissa.rivest@lrmm.com

Jacques Rossignol
514 925-6336
jacques.rossignol@lrmm.com

André Rousseau
514 925-6389
andre.rousseau@lrmm.com

Stéphane Roy
514 925-6349
stephane.roy@lrmm.com

Michel Tourangeau, ASC, Adm.A.
514 925-6317
michel.tourangeau@lrmm.com