

**DEH CHO BRIDGE
ROWE/ATCON AND DOT**

**REFEREE CLAIM REVIEW
(Interim Report)**

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Introduction

At the request of Rowes Construction (Rowes), and the GNWT Department of Transportation, (DOT), TJ Consultants Ltd. (Referee) was asked to be the Referee to review the issue of the non-payment of subcontractor funds on the Deh Cho Bridge project. The contract in dispute was between Atcon Construction Inc. (Atcon), the general contractor, and Rowes Construction, one of the subcontractors. Both Rowes and DOT agreed to the selection of TJ Consultants as the Referee, and a Referee Services Agreement was approved by both parties in January, 2014.

I (the Referee) indicated, at the start of his work, that my opinion on the disputed items was not binding, and that it would be up to the two parties to decide how they will proceed after the report is finalized.

I reviewed the documents listed in Appendix "A", Rowe's 5 claimed items, and the documents listed in Appendix "B", the "Other Documentation" relevant to the claims.

The claim concerns the non-payment of contract funds by Atcon to Rowes. There were 5 items noted in Rowe's claim.

The "Historical Context" of the project and the roles of the various parties is described in the DOT "Report to the Referee" dated March 2014. For brevity sake, it will not be repeated in this report.

It is important to note that there is no contract and probably no legal requirement for the GNWT to pay Rowes for any claim Rowes may have with Atcon. However, the GNWT has a Funding Agreement with the Government of New Brunswick (GNB) which replaced the Letter of Credit previously provided by Atcon. A copy of this agreement is included in the Rowes submission. One of the stated purposes of this agreement, under clause 2e)iii, is to use these monies to pay "amounts otherwise owing under the Deh Cho Contract by Atcon Construction Inc". See General Issues, item #1 for further clarification on this issue.

DOT, in their email of April 25, 2014, indicated that, after they correct the defaults and deficiencies of Atcon, they "believe that the very best case scenario is that there will be less than \$200K remaining. Depending on the tender bids, it is still a distinct possibility that remediation costs will exceed the Letter of Credit replacement funds,....". If the remediation costs do exceed the funds available, then there are no project monies available to pay Rowes. However, if there are funds available after the deficiencies have been corrected, then I believe the GNWT could use the Letter of Credit funds to pay these "other amounts owing". It appears the clause 2e)iii was included in this agreement for this purpose. See General Issues, item #1 for further clarification on this issue..

General Issues

1. Contract security for construction projects usually consists of 2 bonds: a performance bond to ensure the works gets done in accordance with the contract, and a payment bond to ensure subcontractors and suppliers receive payment for their work. The other type of security that is occasionally used, in lieu of the bonds, is a letter of credit. In this scenario, the letter of credit serves to meet both of the purposes: to ensure that the work gets performed in accordance with the contract, and to ensure the subcontractors and suppliers get paid for their services. When it becomes necessary to use the letter of credit, ensuring that the work gets completed is usually the first priority and paying the subcontractors and

suppliers is the second priority. This is how the letters of credit have been used in the past by both the GNWT and the Federal Government.

With respect to the Deh Cho Bridge project (as noted in the "Report to Referee"), Atcon provided a letter of credit from the Bank of Nova Scotia "which could be called upon by either the DCBC or the GNWT in certain circumstances. The Letter of Credit automatically renewed every year unless the Bank issued a notice of non-renewal" "The Bank issued a non-renewable notice on August 13, 2010 with the result that the Letter of Credit was to expire November 1, 2010."

The GNB fully guaranteed the Letter of Credit. When the GNB realized that the GNWT was going to fully draw upon the Letter of Credit, the "GNB proposed that the GNWT refrain from drawing upon the Letter of Credit, and that, instead, the GNB would provide the GNWT with the full amount of the Letter of Credit, to be used in accordance with the terms of an agreement to be drafted between the GNB and the GNWT". I have referred to this as the Credit Agreement.

The wording in the Credit Agreement is consistent with the approach that the GNWT uses when it has called upon letters of credit in the past; i.e., the funds are to be used firstly to ensure the project gets completed, and secondly, if there are funds remaining, these can be used to pay subcontractors and suppliers.

In my experience, when funds from a letter of credit are used to pay subcontractors and suppliers, the general contractor has usually been paid for the work, but they did not pass on the monies to the subcontractors and suppliers. When this happens, one could say that the funds were used to pay for services that had already been paid for. However, one of the main purposes of using letters of credit is to provide subcontractors and suppliers protection for exactly this situation. If bonds were used, this would be the purpose of the Payment Bond. The "Report to the Referee" makes reference to the fact the GNB should not have to pay twice for the work. This approach, in my opinion, is not consistent with the purpose of, and the GNWT policies on, using letters of credit for construction projects.

2. Since there appears to be limited funding available (\$200K maximum) to address Rowe's claims, I will only address Claim#1 at this time. This claim is for \$373,241.73, would more than use up the anticipated funds available, and is one of the best documented claims by Rowes. If there are more funds remaining than anticipated, if more funds become available at a later date, or if Rowe's deficiencies offset a sufficient portion of this claim such that there are funds remaining, then the other claims made by Rowes could be considered at that time.
3. The GNWT, in their "Report to Referee", have repeatedly made issue with the fact that there was not a signed contract between Rowes and Atcon. This appears to be correct. However, from the documentation received from Rowes, it appears that both Rowes and Atcon proceeded on the understanding that the subcontract agreement included in Rowe's claim documentation (under claim #1) would govern. Rowes worked, and was paid in part for this work, from the spring of 2008 (first progress claim dated May, 2008) until sometime during the 2009 construction season. (It is not clear from the documents I received when the Atcon/DCBC contract was terminated.)

Rowes has indicated that the contract form they were proceeding under was the one noted in their documentation. Scott Orr, the Project Controls Manager for Atcon, noted that "to the

best of my knowledge, the unsigned Subcontract Agreement appears to that which was used for administering the subcontract with Rowes". It appears that both parties are in agreement on this issue.

In researching the unsigned contract issue, the book "Hudson's Building and Engineering Contracts" notes: "Conduct will also, it is submitted, amount to acceptance, if no other reasonable inference can be drawn from the conduct in question. This is most important in the field of building contracts, because even in major projects it is not uncommon for a builder or sub-contractor to commence work when all the terms have been negotiated and agreed but no formal acceptance has been recorded. In such a case both the employer, by standing by and giving up possession) and the builder (by doing the work) will, it is submitted, be evidencing their acceptance of the contract terms." Rowes also referenced certain court cases that supported the position that the "conduct of the parties" may be used to determine whether or not there is a contract.

Although it would have been nice to have seen a signed written contract, my opinion is that there was still a contract in place between Rowes and Atcon and the the lack of a signed contract, in this case, should not negate the claim made by Rowes.

4. There have been numerous comments made regarding deficient/defects in the work done by Rowes. As I understand it, DOT is now in the process of correcting the work which was not done by Atcon plus any defective work done previously by Atcon and/or its subcontractors. I would assume, then, that any defective work done by Rowes, and previously paid to Rowes, could be assessed against Rowe's claim once the deficiencies have been corrected. I believe Atcon had also previously assessed Rowes for some defective work and this should be taken into consideration. As well, some of the work done by Rowes which may have been deficient may not have been paid for by Atcon, and this too should be taken into account.
5. There have been references made in the DOT submissions that the GNWT will not pay funds out of the Credit Agreement monies unless the GNB agrees with the payment. In my view, payment to Rowes under the Credit Agreement does not require the approval of the GNB. Additionally, the GNWT agreed to this alternate Credit Agreement as a favour to the GNB. If the original letter of credit was used, then this would not be an issue now

Claim #1

Under the first claim, Rowes is claiming that they were not paid for the holdback monies (\$373,241.73) owing to them on the Bridge. The amount claimed, to some extent, is substantiated by Atcon's "Deh Cho Bridge – Outstanding Invoice Reconciliation" (sheet 3) as submitted by Rowe's Construction in their claim.

The non-payment claim is also substantiated by Scott Orr's e-mail of April 8, 2014, where he notes: "To the best of my knowledge, no holdback was paid to Rowes since none had been released by the Corporation to Atcon. As I remember, the Corporation had considered a couple deficiencies related to the scour protection supply (gradation) and approach fills (wash out). *Note The coordination of payments (progress and holdback) was based on payments by the Corporation to Atcon (i.e. 'pay when paid').*"

Although I am not sure it is the same washout, Rowe's Claim #5 was for washout work (\$554,400) which apparently was never paid for by Atcon.

The GNWT in their "Report to Referee", under Clause 3.3 noted that this claim failed for the following reasons:

1. "Lack of documents to prove that Atcon asserted Rowes work was completed in accordance with the contract specifications and holdback funds were payable to Rowes, not set off against deficiencies;
2. Lack of documents to prove that the amounts claimed have not been paid to Rowe's; and
3. No clear evidence of a signed and formal subcontract between Atcon and Rowe's."

With respect to item #1, I would assume that most of the work done by Rowes was completed in accordance with the contract; if not, why did they receive payment for much of this work? As Rowes indicated, their "work was measured in accordance with the contract and QA, QC reports along with survey information was provided to Jivko Engineering who represented DCBC." Perhaps Jivko Engineering could be used by DOT in determining the amount of defective work by Rowes.

With respect to the deficiencies, some were already deducted by Atcon. If not deducted already, and if the money for the work was paid to Rowes previously, then these deficiencies should be deducted from the holdback funds owed to Rowes.

With respect to item #2, Rowes has claimed they were not paid these funds, and there is no indication, from the documents I have received, that this is not the case. From the documentation received, it appears the holdback funds were not paid as of the date of the Atcon Outstanding Invoice Reconciliation report, as verified in the April 8, 2014 email from Scott Orr. As well, in a letter from Atcon to Rowes dated August 17, 2009, Mr. Frank Flanigan notes: "Atcon Construction Inc. is willing to release to Rowe's all holdback, released to it, on the Deh Cho River Bridge project that are attributable to the earthworks portion executed by Rowe's as confirmed and agreed upon with the Deh Cho Bridge Corporation". Rowes had, apparently, not received their holdback at this point in time.

Rowes has also indicated that they will sign an affidavit affirming the fact that they were not paid any holdback funds.

Item number 3 was addressed previously under General Issues, item #3.

The Other Claims

Claim #2 appears to have merit for many of the same reasons as noted under Claim #1. As well, it is very doubtful that Atcon was previously paid for this item. This and the other issues claimed by Rowes could be addressed at a later date if there is a need to do so; i.e., there are funds available and the GNWT is willing to pay substantiated claims to Rowes.

Conclusion

Prior to proceeding any further with this claim, DOT needs to complete the project and correct any unfinished work, defects and deficiencies. It will then be known if there are any monies left in the Credit Agreement. If there are funds available, then DOT needs to total the assessments to Rowes for work that they were paid for that was defective/deficient. If the defective work totals more than the amount being claimed by Rowes, then I do not believe Rowes is entitled to

any further payment. However, if there are monies available, and if Rowes defective work is less than the amount of the claims (roughly \$1.3 million), then I believe Rowes is entitled to a part or all of the monies still owing to them up to the amount of the funds available under the Credit Agreement. In looking at Claims #1 and #2, both seem to have merit. I have not looked into the other claims in any detail at this point in time.

The Agreement Funds, in my opinion, were to be used to both complete the work (priority #1) and to pay unpaid valid claims by subcontractors and suppliers (priority #2). I do not agree with the GNWT's position that this requires the approval of the GNB.

I have said previously that the GNWT probably has no legal obligation to pay any subcontractor or supplier. However, if there are funds available under the Credit Agreement, the GNWT has, in the past, used letter of credit funds to pay the subcontractors and suppliers that did not get paid their valid claims by the general contractor, and this is a specified purpose under the Credit Agreement. I do not see why this project should be treated differently.

This report has been titled "Interim", and no further work will be done on it until it is known whether or not there are Credit Agreement funds available, whether or not Rowes deficiencies exceed the amounts claimed, and whether or not the GNWT is willing to use these funds to pay Rowes, if both of the above conditions are met.

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**REFEREE CLAIM REVIEW
(Phase 2 Report)**

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September 2014

Introduction

At the request DOT and Rowe's Construction, the Referee was asked to complete the review of the claims by Rowe's for non-payment of subcontractor funds alleged to be owed to them by Atcon. The background and general issues of this claim were discussed in the initial Interim Report dated May 2014, and these issues will not be addressed any further in this report. Rowe's Claim #1 was also addressed in this Interim report.

As well, both parties requested the Referee to do no further work on the funding issues. The Referee is only to look at Rowe's remaining 4 claims as to their merit and value.

It should be pointed out that the dollar amounts noted in both reports exclude GST. As the payment of any further funds would be made by the GNWT, I will let the parties involved decide on how the issue of the GST will be handled.

Claim #1

See the May 2014 Interim Report.

Claim #2

The basis for his claim is specified in the subcontract agreement between Atcon Construction and Rowe's Construction. This subcontract is included in Rowe's Claim #1 documentation. On page 10 of 15 of this subcontract it states: "All components of the EARTH WORK associated with this Contract are payable as Lump Sum Prices as reflected in the Schedule of Contract Prices. It is agreed that the signing of this Agreement shall be conclusive evidence that the Subcontractor is willing to assume and does assume all risk with regard to these lump sum bid items. Estimated quantities associated with the lump sum bid items in the Schedule of Contract Prices are provided for information purposes only." This was further confirmed in the October 8, 2008 email from Scott Orr to John Hopf.

For the purpose of progress payments, Rowe's was paid by Atcon for earthworks on a unit price basis. From the documentation submitted, Sub-Arctic Survey's, in their letter of May 15, 2013, indicated that Rowe's placed 35,354 cm of material for Item # F1.006. Sub-Arctic also noted that this volume completed the Phase 1 Approach Fill to the design elevations. Atcon, through their progress payments, paid Rowe's for this material on a unit price basis, for a total amount of \$509,097.60.

As noted previously, final payment for this work was to be based on a lump sum basis. I assume then, that an adjustment would have been made at the end of the project. The total final lump sum payment for Item #F1.006 was specified as \$547,200.00. This is the final contract amount owed to Rowe's. Deducting the amount already paid (\$509,097.60), this results in the amount of \$38,102.40 that is still owing to Rowe's.

For Item F1.016, Sub-Arctic Surveys noted that the "volume of Armour Rock supplied and placed by Rowe's Construction Ltd. was 1647 cu.m. during 2008. This volume of material represents 100% of the material supplied and placed to design elevations. This volume represents the full quantity of Armour Rock required for the north approach."

Rowes progress payments for this work amounted to \$378,810.00. The lump sum item specified was \$690,000.00. This results in the amount of \$311,190.00 that is still owing to Rowe's. (Note, the amount \$371,190.00 calculated by Rowe's in their claim was in error).

The total amount claimed for these 2 items then is \$349,292.40. In my opinion, this amount has been sufficiently substantiated by Rowe's in their claim as noted herein. I do not believe Rowe's was paid for this adjustment and I am sure they would sign an affidavit confirming this.

Claim #3

This claim is for extra earth work that was apparently completed to allow access to the temporary bridge on the north side. The claimed amount is \$13,214.57 as detailed in Rowe's invoice No. 20070925 (included in Rowe's claim).

In reviewing the subcontract between Rowe's and Atcon, on P10 of 15 under Scope of Work, it notes that: "Requests for 'extras' will not be considered unless there is a bona fide change to the documents or Scope of Work and that such change is originated by the Contractor and confirmed in writing." Also, with respect to this issue, in Michael Love's (Atcon) email of June 3, 2009, to Rowe's he notes that Rowes must "have your supervisor present us with an hourly equipment usage form to be signed daily for this work."

In reviewing this claim I note the following:

1. There was no written authorization (from Atcon) submitted in Rowe's documentation for this extra work. Although a purchase order was referenced, a copy of this PO was not included in their documentation.
2. The hourly equipment usage forms requested in the email referenced above were not included in Rowe's documentation.
3. There was no indication in Rowe's documentation that the work was accepted by Atcon.
4. There is no documentation in the claim that notes that this work was not already paid for by Atcon.

Without this documentation, I cannot recommend that this claim has been sufficiently substantiated to enable payment.

Claim #4

This claim is for the site preparation work for the south side concrete site. The total amount claimed is \$23, 775.00. This work was also considered to be extra work.

This claim, as well, has not been sufficiently substantiated for reasons similar to Claim #3. Namely:

1. There was no written authorization (from Atcon) submitted by Rowe's for this extra work.
2. There is no indication in Rowe's documentation that the work was accepted by Atcon.
3. There is no documentation in the Rowe's claim that Atcon did not already pay for this work.

Claim #5

This claim is for equipment and materials needed to repair the South Landing ferry washout in May of 2008. The amount claimed is for \$528,000.00. This work was also considered to be extra work.

Again, this claim has not been sufficiently substantiated for reasons similar to Claim #3. Namely:

1. There is no written authorization from Atcon to proceed with this extra work.
2. There is no documentation presented that this work was accepted by Atcon.
3. There is no documentation presented that this work was not already paid for by Atcon.

Conclusion

In reviewing both this report and the Interim Report of May, 2014, it is my opinion that Rowes has sufficient justification to support their Claims #1 and #2. With respect to Claims #3, #4 and #5, it is my opinion that Rowes has not provided sufficient documentation to support these claims.

The funding issues were addressed in the Interim Report, and as stated previously, these will not be revisited in this report. As well, as noted in the Interim Report, this review is not binding on either party, and it is up to the two parties to decide on how they will proceed to resolve this dispute.

I would like to thank both parties for their help and cooperation in providing me with their supporting documentation. I hope these reports will help in trying to resolve this issue.

Joseph D Auge
TJ Consultants