IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2428 OF 2004

BETWEEN	ATTORNEY GENERAL OF JAMAICA	CLAIMANT
A N D	CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED	DEFENDANT

B. St. Michael Hylton Q.C., Symone Mayhew and Kathryn Denbow for Claimant instructed by Director of State Proceedings.

Hilary Phillips Q.C., Kipcho West and Lloyd Perkins instructed by Grant, Stewart, Phillips and Company for Defendant.

Heard: January 11 and 13, 2005 and February 24, 2006.

Cor: Rattray, J.

In 1992, the Government of Jamaica acting through the Ministry of Health entered into an agreement with Construction Developers Associates Limited ('CDA') for the carrying out of construction and rehabilitation works at the May Pen Hospital in the parish of Clarendon. The contract entered into by the parties is generally known as a FIDIC contract, as it was based on an agreement prepared by the Federation Internationale Des Ingenieurs Conseils.

Clause 2 of the Form of Agreement dated the 9th day of December, 1992 provided that the following documents:

> "shall be deemed to form and be read and construed as part of this Agreement, viz

(a) The Letter of Acceptance

(b) The Tender Form and accompanying data

(c) The Bill of Quantities

(d) The Specifications

(e) The Drawings as numbered in the letter of transmittal to this tender

(f) The Conditions of Contract – Part 2

(g) The Conditions of Contract – Part 1

(h) Schedule of Supplementary Information"

The Part 2 Conditions of Contract were specifically drafted to reflect the terms of the particular agreement between the parties. The Part 1 Conditions of Contract on the other hand contained the general terms and conditions usually applicable for construction work where tenders are invited for domestic contracts or on an international basis.

It is in that scenario that Clause 3 of the Agreement provided that –

> "The aforesaid documents (that is, those referred to in Clause 2) shall be taken as complementary and mutually explanatory of one another, but in the case of ambiguities or discrepancies, these shall take precedence in the order set out above..."

Insofar as this is relevant to the present Application, the effect of this clause is that the Part 2 Conditions of Contract took precedence over the Part 1 General Conditions of Contract, in the event of there being any ambiguity or discrepancy between the two sets of Conditions.

A dispute arose between the parties with respect to the final Certificate to be issued, specifically in relation to the amount due. The Contract contained a provision under the Part 1 General Conditions of Contract for the parties to go to Arbitration where such a dispute arose. Clause 67.3 of the Part 1 Conditions of Contract so far as is relevant stated:-

> "Any dispute in respect of which:
>
> (a) the decision...of the Engineer has not become final and binding..., and
>
> (b) amicable settlement has not been reached...
>
> [shall be] finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules."

However, the issue of Arbitration is also dealt with in Clause 51 of the Part 2 Conditions of Contract – Conditions of Particular Contract Application. It is here that the first area of controversy has arisen, as each

party is relying on a different version of the said Clause 51. The wording of Clause 51 as relied upon by the Attorney General reads:-

> "Notwithstanding Clause 67.3, Arbitration shall be conducted in a manner set out in, and in accordance with the Arbitration Act of Jamaica."

CDA's version of the said Clause states:-

> "As an alternative to the Rules or (sic) Conciliation and Arbitration of the International Chamber of Commerce and with the agreement of both parties to the dispute the Arbitration may be conducted in a manner set out in and in accordance with the Arbitration Act of Jamaica."

A dispute having arisen under the contract, CDA, acting pursuant to Clause 67.3, by letter dated August 20, 2004 referred the matter to the Secretariat, International Court of Arbitration requesting arbitration of the dispute between itself and the Government of Jamaica. In that said letter, CDA proposed the appointment of a sole arbitrator and that the arbitration proceedings take place in the Bahamas with English being the language of the proceedings.

On the 6th September, 2004, the Secretariat wrote to the Government of Jamaica advising of the Request for Arbitration received from CDA, forwarding copies of that Request as well as the Rules of Arbitration and inviting its response within the time provided for in the Rules. In his letter of response dated September 29, 2004, the Solicitor General Mr. Michael

Hylton Q.C., on behalf of the Government of Jamaica agreed to the appointment of a sole Arbitrator, that Nassau in the Bahamas be the venue for the Arbitration and that English be its language. He also formally applied for a thirty (30) day extension of time for the filing of its Answer in accordance with Article 5(2) of the Rules. This application was made "without prejudice to any issue as to jurisdiction".

By his further letter dated October 4, 2004, the Solicitor General referred the Secretariat to the wording of Clause 51 of the Part 2 Conditions of Contract on which the Government of Jamaica relied. He indicated that it was the Government's position, based on that Clause, that the International Chambers of Commerce and the International Court of Arbitration had no jurisdiction in the matter and stated that CDA had been invited to proceed in accordance with the provisions of the Arbitration Act of Jamaica. The Secretariat granted the Solicitor General's the request for the extension of time in its letter of October 7, 2004, and indicated that the jurisdictional objections raised would be dealt with by the International Court of Arbitration in accordance with Article 6(2) of the Rules.

CDA however was not prepared to accede to the jurisdictional challenge advanced by the Government, nor would it agree to a joint request to the International Chamber of Commerce to stay the arbitration proceedings it had initiated. Under these circumstances, the Attorney

General filed this application by way of Fixed Date Claim Form seeking inter alia, the following Declarations and Orders:-

1. A declaration that any arbitration proceedings arising out of the contract between the Government of Jamaica and the Defendant for construction and rehabilitation works at the May Pen Hospital, shall be conducted in accordance with the Arbitration Act of Jamaica including, but not limited to the appointment of an arbitrator, and that the arbitration proceedings shall not be conducted under the supervision of the International Chamber of Commerce's International Court of Arbitration.
2. An Injunction to restrain the Defendant by itself, servants and/or agents from participating or continuing to participate in any way, in arbitration proceedings against the Government of Jamaica under the Rules of Arbitration of the International Chamber of Commerce, concerning a dispute between the Government and the Defendant in respect of construction and rehabilitation works conducted at the May Pen Hospital by the Defendant.

CDA responded by filing a Notice of Application for Court Orders seeking the following orders:-

(1) That the action be stayed pursuant to section 5 of the Arbitration Act, or in the alternative.

(2) That the claim filed herein be struck out on the grounds that

(a) the Claimant has no reasonable cause of action

(b) the claim is frivolous, vexatious and an abuse of the process of the Court

(c) under the inherent jurisdiction of the Court.

One of the issues that this Court has to determine is on which wording of Clause 51 did the parties contract. There apparently is no dispute between them that initially, Clause 51 was drafted in the terms outlined and relied on by CDA.

In his Affidavit sworn to on the 15th day of October, 2004 and filed in support of this application, Brian Goldson, a Chartered Quantify Surveyor and principal in the firm Goldson Barrett Johnson deponed that his firm were the Quantify Surveyors for the project and prepared the tender documents, which included the proposed conditions of contract and specifications. He stated in his Affidavit that Clause 51 on page 8.28 in the original tender documents provided that any Arbitration should be held in accordance with the International Chamber of Commerce Rules, unless the parties agreed that it should be held in accordance with the Arbitration Act of Jamaica. He also stated that the tender documents were issued to three (3) " pre-qualified" prospective tenderers – CDA, Coopers and Associates and Higgs and Hill Overseas Limited.

Based on instructions subsequently received from the Architects McMorris Sibley Robinson, Brian Goldson deponed that he made the amendments to the tender documents. In particular, he amended the original page 8.28 by causing Clause 51 to be "whited out" and retyped, with that amended clause now providing that Arbitration must be conducted in accordance with the Arbitration Act of Jamaica. The pre-qualified tenderers were each advised by his firm of the several corrections to the tender documents, including the amendment to Clause 51, by letters dated the 20th December, 1991. In addition, Mr. Goldson said in his Affidavit that the Architects, apparently out of an abundance of caution, by letters dated the 8th January, 1992 wrote directly to the said tenderers forwarding the same documents.

Brian Goldson goes on to state that CDA signed and returned its form of tender dated February 5, 1992, without any objection or other reference to the amendments and by letter dated July 2, 1992, CDA's tender offer was accepted. The parties subsequently signed the Form of Agreement in July, 1992 and again at a public ceremony in December, 1992.

The Affidavit of Vayden McMorris, partner in the firm McMorris, Sibley Robinson, the original Architects under the contract, sworn to on the 19th day of November, 2004 confirmed to a large extent the affidavit evidence of Brian Goldson. He stated that during the period prior to the

award of the contract, his firm issued six (6) Addenda to the three (3) pre-qualified tenderers indicating corrections and amendments to various pages in the tender documents. He made specific reference to Addendum No. 3 dated January 8, 1992 which, inter alia, dealt with the changes to Clause 51 at page 8.28. This Addendum, according to Mr. McMorris, was required to correct errors in the Quantity Surveyor's letter of December 20, 1991.

Vayden McMorris in his Affidavit maintained that his firm had no record of CDA acknowledging receipt of Addendum No. 3, nor in fact of several of the other Addenda. He confirmed from his experience as an Architect on other construction works using the FIDIC form of contract, that there is no consistent practice in Jamaica of acknowledging receipt of such Addenda.

The Solicitor General contended that the tender offer by CDA dated February 5, 1992 could only have been made on the basis of the terms of the tendering documents. Clause 6 of the Instructions To Tenderers itemizes those forms and instruments which comprise the tendering documents, including any Addenda issued by the Architect. He further contended that Clause 8 of the said Instructions To Tenderers enabled the Architect to amend the tender documents at any time before an offer was made. That Clause reads:-

"Clause 8 – <u>Amendment of Tendering Documents</u>

1. At any time prior to the deadline for submission of tenders, the Architect may, for any reason...modify the tendering documents by the issuance of an Addendum.

2. The Addendum will be sent in writing or by cable to all prospective tenderers who have purchased the tendering documents and will be binding upon them. Prospective tenderers shall promptly acknowledge receipt thereof by cable to the Architect."

The argument advanced on behalf of the Claimant is that the tendering documents were duly amended in January, 1992. Thereafter a binding contract, based inter alia on the documents as amended by the Addenda, was entered into by the parties when the Government of Jamaica accepted the offer of CDA on July 2, 1992. In support of this submission, learned Queen's Counsel Mr. Hylton relied on Clause 32 of the Instructions To Tenderers which points out that "the notification of award will constitute the formation of the contract."

Mr. Hylton also referred to Clause 10.2 of the said Instructions which reads:-

> "Each Tenderer shall use a complete set of Tender Documents in preparing his Tender; neither the Employer nor the Architect assumes any responsibility for errors or mis-interpretations

resulting from the use of an incomplete set of Tender Documents"

He argued that by virtue of that Clause, it was the obligation of CDA to use a complete set of Tender Documents in preparing its Tender Offer and its failure to do so would impose no liability on the Employer (the Government of Jamaica) or the Architect.

Another issue addressed by the learned Solicitor General was the interpretation of the version of Clause 51 on which the Government of Jamaica relied. He submitted that it was clear from the language of that version of the said Clause and from the provisions of the Arbitration Act, that the jurisdiction of the International Chamber of Commerce, International Court of Arbitration (ICC, ICA) should be excluded. He further submitted that there were instances where the provisions of the Arbitration Act conflicted with the sections of the ICC Rules of Arbitration as they relate for example, to the appointment of an Arbitrator. The Act he stated empowered a Judge of the Supreme Court to make such appointment in certain circumstances, while the ICC Rules provided that that appointment be made by the ICC. These provisions he contended were irreconcilable and that the manifest intent of the Clause was to oust the jurisdiction of the ICC.

The question of whether or not the Government of Jamaica had submitted to the jurisdiction of the ICC was another point of dispute in this

matter. The Solicitor General strenuously maintained that it had not done so and he directed the Court's attention to his first communication with the ICC of September 29, 2004, in which an extension of time was sought to file an Answer. This application he argued was expressly stated to be "without prejudice to any issue as to jurisdiction". He further argued that an application for an extension of time would not constitute a step in the arbitration proceedings, nor would it amount to an election by the Government to have the parties' dispute determined by the ICC, ICA.

In its opposition to this application, CDA asserted that the agreement between the parties was signed at a public ceremony on the 9th December, 1992. It produced to the Court the original bound agreement signed by the parties which contained the agreed arrangements for the settlement of any disputes by way of arbitration in Clause 67 of the Part 1 General Conditions. Clause 51 of the Part 2 Conditions of that bound document provided that as an alternative to the Rules of Conciliation and Arbitration of the ICC and with the agreement of both parties to the dispute, the arbitration proceedings may be conducted in accordance with the Arbitration Act of Jamaica. CDA contended that no such agreement was ever arrived at by the parties.

The affidavit evidence of Roy Williams, Managing Director of CDA sworn to on the 9th November, 2004 disclosed that of the four (4)

original bound agreements, three (3) were kept by the Ministry of Health and one (1) by CDA, all containing CDA's version of Clause 51. The company therefore argued that it was on the terms and conditions as contained in the original bound agreement, the copies of which the Ministry of Health was unable to locate, that the parties contracted and in respect of which they were obliged to honour.

CDA further argued that the evidence of Messrs. Goldson and McMorris did not establish that the amended Clause 51 was ever incorporated into the tendering documents. CDA maintained that it had no record of receiving any of the letters purporting to amend Clause 51, nor did it acknowledge receipt of any such correspondence. As such, it further maintained that in the absence of acknowledgment from the tenderers of the letters of December 20, 1991 and/or January 8, 1992, the amendments to the tendering documents as contained in Addendum No. 3 were neither effective nor binding on the parties.

An alternative submission advanced by CDA was that even if the version of Clause 51 favoured by the Government were to have been incorporated into the contract as alleged, a proper construction of the wording of that Clause would show that the jurisdiction of the ICC, ICA had not been excluded. Learned Queen's Counsel, Miss Phillips contended that the language of that version of Clause 51 contemplated the continued

existence of Clause 67.3 (i.e. the general provision as to arbitration), with the purported amendment indicating that those arbitration proceedings would be conducted in accordance with the Arbitration Act of Jamaica. She further argued that the mere fact that there was a provision that those proceedings were to be conducted in accordance with certain legislation did not mean that the said proceedings had to take place in Jamaica.

The Court she submitted would have to ascertain the intention of the parties in that regard, as evidenced by their written agreement. She further submitted that it was accepted by the parties that the agreement to arbitrate disputes was to be found in Clause 67.3 which conferred jurisdiction on the ICC and specific reference was made to that clause in the amended Clause 51. Therefore she claimed that even if the amended Clause 51 were found to be incorporated into the contract, the ICC would still have jurisdiction to hear the arbitration proceedings as the parties had agreed, with the applicable law being the Arbitration Act of Jamaica.

A further claim advanced by Miss Phillips was that Clause 67.3, which dealt with the parties' agreement to arbitrate disputes, amounted to a submission within the meaning of the Arbitration Act. Section 2 of that Act defines 'submission' as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". She contended that by correspondence between the parties and the ICA from

August 20, 2004 up to and including September 29, 2004, the parties had affirmed their agreement to arbitrate and were bound by that agreement.

Alternatively, she urged the Court that a further agreement to arbitrate arose by virtue of the said correspondence and that further agreement amounted to a submission within the meaning of section 2 of the Arbitration Act. Learned Queen's Counsel Miss Phillips, claimed in the further alternative that the Government of Jamaica, by its letter of September 29, 2004 submitted to the jurisdiction of the ICC, ICA and by applying for an extension of time for filing its Answer, took a step in the arbitration proceedings. She further claimed that by so doing, it elected to have the rights of the parties determined and the dispute resolved by the International Chamber of Commerce.

An arbitration agreement is the contractual basis for the resolution of disputes utilising a particular process of adjudication. The law respects the parties' freedom to enter such agreements. The duty of the Court is to give effect to those terms that the parties themselves have agreed and upon which they have contracted. A pivotal issue in this matter then is for the Court to ascertain, based on the evidence before it, the provisions of the agreement between the parties insofar as they relate to arbitration. More specifically, the Court must determine whether the purported amendment of Clause 51 took effect as urged by the learned Solicitor General.

As a starting point, it is instructive to examine certain aspects of the Instructions to Tenderers prepared by Goldson Barrett Johnson, the Quantity Surveyors for the project on behalf of the employer, the Government of Jamaica. Eligibility for the award of the contract was limited only to pre-qualified tenderers (Clauses 3(1) and 5). Each tenderer was obliged to examine all instructions, conditions and specifications in the tendering documents and failure to comply would be at its own risk (Clause 6(2). Tenders found not to be substantially responsive to the requirements of the tendering documents would be rejected (Clauses 6(2) and 26(3)). Any tenders received after the specified deadline for submission would be returned unopened to the tenderers (Clause 21). The Employer was under no compulsion to accept the lowest or any tender submitted. It could accept or reject any tenders or annul the tendering process prior to the award of the contract without incurring any liability and was not obliged to give reasons for its actions (Clause 31). All costs associated with the preparation and submission of tenders, regardless of the outcome of the tendering process were to be borne by the tenderers (Clause 4).

In viewing these terms, I find the dicta of Bingham L.J. (as he then was) in **Blackpool and Fylde Aero Club Ltd. vs Blackpool Borough Council** 1990 3 All E.R. 25 at page 30, most appropriate. In that case, the specifications of the tendering documents were similar and the learned law

Lord stated "A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor." The Court of Appeal held inter alia: -

> "In certain circumstances an invitation to tender could give rise to binding contractual obligations on the part of the invitor to consider tenders which conformed with the conditions of tender."

In the present case, it is agreed that Clause 51 was originally worded in the terms relied on by CDA. The Solicitor General argued that subsequently, by letter dated December 4, 1991, instructions were given to the Architect to have this clause replaced and the version relied on by the Government of Jamaica substituted, and this was carried out. Miss Phillips in her submissions has said that no reason was given in the correspondence for the proposed change, nor any explanation offered in the evidence before the Court. Whilst this may be so, Clause 8 of the Instructions to Tenderers empowered the Architect, at any time prior to the deadline for submission of tenders, for any reason, to modify the tendering documents by the issuance of an addendum.

Once such a modification of the tendering documents has been effected however, two (2) obligations arise pursuant to the said Clause - firstly, the Architect is obliged to send the addendum in writing or by cable to all prospective tenderers. Secondly, the said tenderers are required to promptly acknowledge receipt of the addendum by cable to the Architect.

The reason for this latter stipulation is obvious and is set out in subsection (2) of Clause 8, which provides that any such addendum is binding upon prospective tenderers. Additionally, such notification to the Architect confirms the receipt by the tenderers of the addendum containing the modification of the tendering documents, thereby assuring him that all prospective tenderers are operating on a level playing field. In the absence of such an acknowledgement, the Architect is put on enquiry as to whether the changes or variations have in fact been received prospective tenderers.

One of the primary purposes of Instructions to Tenderers is to enable prospective tenderers to submit conforming tenders. Any employer examining and comparing tenders submitted in respect of a project, particularly where there have been modifications, must do so on the basis that the tenders have all been put forward on the same terms and conditions. Variations of tendering documents are a regular occurrence in the construction industry and prospective tenderers must be aware of any such changes.

Where the employer, as in the present case, exercises a controlling hand with respect to the terms of the tendering documents, there is a legal duty on it as the invitor of tenders, to ensure that all tenderers receive the same tendering documents. It is only when this duty is satisfied that the invitor can be in a position to fulfil the corresponding duty to consider all

conforming tenders, which can only occur where the tendering documents are identical.

CDA maintains that it has no record of receiving the letters of December 20, 1991 and January 8, 1992, advising inter alia, of the amendment to Clause 51. The Claimant has no acknowledgement from CDA that the said letters were received, nor is there evidence of any of the other two (2) prospective tenderers acknowledging receipt of the said letters. Further, there is no affidavit evidence from either of those other tenderers indicating that they received the correspondence but failed to acknowledge same, thereby providing an opportunity for an inference to be drawn that service was in fact effected on all three tenderers. In a matter as important as this, the Claimant could have obtained this information, or at the very least provided evidence as to why this information was not available.

I do not accept the explanation offered on behalf of the Claimant that the practice of tenderers in the industry, in effect is to ignore the provision requiring them to acknowledge receipt of amending addenda, or as was stated in Mr. McMorris' Affidavit, that "there is no consistent practice in Jamaica of acknowledging receipt of such addenda." When Clause 8(2) provides that the amending addendum will be binding upon prospective tenderers, the imposition of this liability rests on the supposition that not

only was the addendum sent, but also received and acknowledged by the party whom it was addressed.

If the intent of the employer was that modifications to its tendering documents would be binding once sent, the clause could have been drafted to simply express that intention. Why then would a requirement be inserted for the said tenderers to "promptly acknowledge receipt...by cable to the Architect"? The logical answer must be to ensure receipt and acceptance by the prospective tenderers of the amendments to the tendering documents in order to enable them to submit conforming tenders, if they wished to continue to be involved in the process.

I find that any modifications as contained in Addendum No. 3 can only be binding and enforceable once the addendum had been sent by the Architect and received and acknowledged by the prospective tenders, unless the parties had mutually agreed some other procedure. The Claimant shoulders the burden of satisfying the Court that it is entitled to the Declarations sought and this it has failed to do.

I find therefore that the purported amendment to Clause 51 was not incorporated into the tendering documents and that CDA is not bound by those provisions. I am fortified in my finding by the unchallenged fact that the contract signed by the parties, as evidenced by the bound copy prepared and put together by representatives of the Claimant and shown to the Court

by CDA, contained provisions relating to arbitration in terms of the original Clause 51. I therefore find that the terms of the contract between the parties are those contained in the said bound copy agreement.

In the event that I am wrong in my findings on this issue and the clause relied on by the Claimant was incorporated by amendment into the tendering documents, I now go on to consider whether on a proper construction of the amended Clause 51, the jurisdiction of the ICC, ICA would be excluded. For ease of reference, it is worth restating the said Clause which reads:

> "Notwithstanding Clause 67.3, Arbitration shall be conducted in a manner set out in, and in accordance with the Arbitration Act of Jamaica."

I find on a literal interpretation of this Clause that its wording speaks to the manner in which the arbitral proceedings are to be conducted, that is, in accordance with the provisions of the Arbitration Act of Jamaica, rather than any jurisdictional considerations.

I accept the submission of Miss Phillips that the fact that arbitration proceedings are to be conducted in accordance with the Arbitration Act of Jamaica, does not mean that those proceedings must take place in Jamaica. Wherever the said proceedings are heard however, they must be conducted in accordance with the provisions of the stipulated legislation.

Article 17 of the ICC Rules of Arbitration, under the sub-head 'Applicable Rules of Law' makes accommodation for such an agreement between the parties. Subsection (1) reads:

> "The parties shall be free to agree upon rules of law to be applied by the Arbitral Tribunal to the merits of the dispute."

When the amended Clause 51 is read in conjunction with Article 17(1), the contention that the effect of the clause is to exclude the jurisdiction of the ICC, ICA has a hollow ring to it.

If the employer, through its Architect could at any time before a contract was signed vary any of the terms and conditions upon which tender offers were invited and wished to provide that any arbitration proceedings be heard in Jamaica or to exclude the arbitral jurisdiction of the ICC, ICA, specific wording could and would have been employed to put into effect that intent. But this was not done.

I do not therefore accept that the effect of the amended Clause 51, even if incorporated into the contract would be to deprive the ICC, ICA of jurisdiction in this matter, and I find no merit in that submission.

For completeness, although not necessary for my ruling in this matter, I am of the view that the parties agreed, as is usual in contracts of this nature, that disputes under this contract as provided for in Clause 67.3 of the Part 1 Conditions of Contract would be subject to arbitration. That clause

amounted to a submission within the meaning of the Arbitration Act and their written agreement to arbitrate was affirmed by the parties in their correspondence with the ICA. I am also satisfied that through its correspondence agreeing an arbitrator, the place and language of the arbitration, as well as advising that body of its Counsel, the Claimant submitted to the jurisdiction of the ICC.

In light of my findings in this matter, it is not necessary for any ruling to be made with respect to the application by CDA for the action to be stayed or in the alternative struck out.

The application brought on behalf of the Attorney General of Jamaica by way of Fixed Date Claim Form is hereby refused. Costs of these proceedings to be paid by the Claimant to the Defendant, such costs to be taxed if not agreed.