

BETWEEN

AFE Ltd

APPLICANT

AND

ZUR Ltd

RESPONDENT

AND

ZUQ

SECOND RESPONDENT

Date of Order:

25 June 2013

Referee:

Referee ter Haar

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZUR is to pay AFE the sum of \$13,365.31 by 4pm on 2 July 2013. The claim against ZUQ is dismissed.

Facts

[1] On 17 November 2010, AFE Ltd and ZUR Ltd came to an agreement regarding the development of [a wheelchair].

[2] An email from AFE Ltd dated 17 November 2010 sets out the terms of that agreement.

[3] In that email AFE Ltd estimated its costs to be \$12,800.00 excl GST.

[4] No payment has been made for any of the work completed by AFE Ltd and it now makes a claim in the Tribunal for \$15,000.00, which includes \$13,365.31 – that being the total of three invoices dated 30 November 2010, 23 December 2010 and 20 January 2011.

Issues

[5] The issues to be decided are as follows:

- (i) What were the terms of the agreement between AFE Ltd and ZUR Ltd?
- (ii) Who, if anyone breached the contract?
- (iii) If there was a breach of contract, what is the appropriate remedy?
- (iv) Is ZUQ Ltd personally liable for any debt owed by ZUR Ltd?
- (v) Is AFE Ltd entitled to claim for the costs it incurred in pursuing the debt as well as interest on the amount it states ZUR Ltd owes?

Decision

What were the terms of the contract?

[6] It was common ground between the parties that the terms of the agreement were largely contained within an email dated 17 November 2010 from SK, representing AFE Ltd, to ZUQ, representing ZUR Ltd. It was also common ground that other terms were verbally agreed upon at the time.

[7] After considering the email and the evidence relating to the verbal agreement, I find that the terms agreed upon included:

- (i) AFE Ltd would provide a mechanical design at an estimated cost of \$12,800.00, plus GST.
- (ii) The design would be of a prototype that was able to be made by EH.
- (iii) The designed unit was to incorporate a common column feature and two separate bases allowing bed and wheelchair use.
- (iv) The unit was to be designed so that it was “suitable for both medical testing/evaluation of requirements”.
- (v) AFE Ltd would arrange for a computer to be part of the design so that there was an ability to record data – an estimated cost of \$5,500.
- (vi) “Budget blowouts” would be discussed immediately and explained.
- (vii) The billing of work was to be done to ZUR Ltd at the end of each calendar month and payable by the 20th of the following month.

Who breached the contract?

[8] This issue must be determined based on the evidence provided. Each party accuses the other of breaching the contract and I take each of their contentions in turn.

[9] ZUR Ltd states that AFE Ltd breached the terms of the contract by concentrating on a design of a telescopic column, which soaked up a significant number of the estimated total design hours. ZUR Ltd states that this meant that a budget blowout was inevitable and that AFE Ltd had therefore breached that term of the contract relating to communication and discussion regarding such matters.

[10] To support this contention, ZUR Ltd points to TK's report, which shows his opinion that preliminary design work is about 20 per cent of the work required to get to working drawings. CM, for ZUR Ltd, states that on that analysis, since AFE Ltd had only provided preliminary drawings, it should only be paid 20 per cent of the total estimated worth of the design work. However, I accept SK's point that TK's report is of limited value since he is in fact a construction engineer who works in the area of building, not in the area of designing such things as wheelchairs.

[11] I also accept that when writing his report, TK was not aware of all the work AFE Ltd had completed. This was because ZUR Ltd did not have that work in its possession to show him.

[12] Given the lack of evidence supporting ZUR Ltd's contention that a budget blowout was inevitable, I find that AFE Ltd did not breach the terms of the contract in this way.

[13] AFE Ltd states that the design costs were increasing because ZUR Ltd was changing its mind as to what was required. In particular, ZUR Ltd wanted a simpler machine than was formerly intended when the contract was made between them, and later wanted a collapsible hub which also had not formed part of the required design when the contract was created. SK states that ZUR Ltd ought to have known that such changes would result an increased number of payable design hours.

[14] While I acknowledge CM's point that small changes ought to be built into an initial estimate of design hours, I accept that the design changes in these instances were not small changes. Further to this, ZUR Ltd did not stop the design process even though they say they were concerned as to the costs right from the first invoice at the end of November. In fact, the conversations between the parties continued through December, resulting in AFE Ltd doing further design work based on those discussions. This amounts to ZUR Ltd affirming the contract, rather than putting a stop to it because of any supposed breach of contract by AFE Ltd.

[15] Support for this finding is also found in a taped telephone conversation in which ZUQ tells SK that he had always stated that 'we are responsible for the debt'. While ZUQ now says

that this was his way of proactively trying to resolve the issues between them, I find that SK was entitled to assume that ZUQ meant that there was no dispute between them and it was merely a matter of finding the required funding.

[16] Taking into account all the evidence, I therefore find that ZUR Ltd breached its contract with AFE Ltd by failing to pay the invoices as it was required to do by the terms of the contract.

What is the appropriate remedy?

[17] The law of contract provides that where there is a breach of contract, damages are payable so that the non-breaching party is put in the position it would have been in had the terms of the contract been performed.

[18] In other words, ZUR Ltd is required to pay the invoices of 30 November 2012 (\$5,440.31), 23 December 2012 (\$7,153.00) plus \$772.00 for the evidenced cost of the cycle computer required as part of the original design format. This amounts to a total of \$13,365.31.

[19] I note that ZUR Ltd states that apart from six or seven images, it has not received any of the fruits of AFE Ltd's design work. However, I accept SK's point that both invoices state that all goods remain AFE Ltd's property until full payment is made and that this is particularly important in contracts involving intellectual property of this kind.

Is ZUQ personally liable?

[20] SK states that ZUQ is personally liable for ZUR Ltd's debt because he was the person with whom he had always dealt, and because ZUQ had offered to be personally responsible for the debt.

[21] However, I find that ZUQ cannot be made to be personally liable.

[22] I say this because all invoices were made out to ZUR Ltd and because there was no personal guarantee in writing from ZUQ, as required by law if it is to be enforceable.

Is AFE Ltd entitled to be awarded costs and interest?

[23] Section 43 of the Disputes Tribunals Act 1988 precludes the Tribunal from awarding costs except in certain situations, none of which occur in this instance. Further to this, interest is not generally awarded in situations where there is a genuine dispute.

[24] Having heard the evidence provided over two hearings, I am satisfied that there was a genuine dispute between the parties and I am therefore not awarding interest on the amount owed.