[Cite as *Allied Environmental Servs., Inc. v. Miami Univ.*, 2006-Ohio-5668.]

IN THE COURT OF CLAIMS OF OHIO

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ALLIED ENVIRONMENTAL SERVICES, INC.	:	
	:	CASE NO. 2004-06887
Plaintiff		Judge Joseph T. Clark
	:	
v.		DECISION
	:	
MIAMI UNIVERSITY		
	:	
Defendant		

: : : : : : : : : : :

{¶ 1} Plaintiff, Allied Environmental Services, Inc. (Allied), brought this action against defendant, Miami University (Miami), alleging breach of contract and unjust enrichment.

{¶ 2} In 2003, Allied entered into a contract with Miami to perform renovations to McGuffey Hall, an academic building on Miami's campus. The work to be performed included asbestos abatement and interior demolition. Allied was hired to remove asbestos-contaminated materials, on, for example, hard plaster found on ceilings and walls. In its complaint, Allied alleges that Miami failed to provide adequate plans and specifications for the project; that there was a change in site conditions which amounted to a significant change in the manner in which the work had to be performed; and that, as a result, Miami realized a benefit from the extra work completed by Allied that exceeded the scope of the contract. In addition, Allied asserted that Miami refused to honor reasonable requests for any extension of time and that Miami failed to approve additional payments for cost overruns that were incurred by Allied.

{¶ 3} Miami asserts that Allied should have prepared its bid to reflect the level of difficulty necessary to perform asbestos abatement, particularly in reference to the stripping of hard plaster from the ceilings. Defendant further maintained that Allied had the opportunity both to review historical drawings of the building and to inspect the ceiling areas prior to submitting its bid. Miami also contends that in the event Allied were to

discover a change in the site conditions, the contract required Allied both to provide written notice of the situation and to obtain written approval before proceeding with work. Specifically, Miami argues that Allied failed to provide timely, written notice of the alleged changed condition and, that had such notice been provided, Miami could have avoided increased removal costs by choosing alternative solutions to the problems Allied encountered.

{¶ 4} The project in question was divided into two parts, Phase I and Phase II. Miami hired Steed, Hammond & Paul (Steed) as the project architect to develop the plans and specifications pertinent to all bidders. Steed then subcontracted with an asbestos consultant, Gandee & Associates (Gandee), who provided specifications for asbestos removal. Allied visited the site, participated in a pre-bid meeting, and then made a second site visit. Allied provided the low bid for asbestos abatement work in both Phase I and II, $618,000, and was awarded the contract. Allied signed a "Contract & Notice to Proceed" on September 3, 2003. The contract specified that the abatement work for Phase I was to be completed within 60 days.[1] Allied contends that it could not begin work until September 15, 2003, due to a ten-day waiting period to obtain the necessary permits from various state regulatory agencies. Allied also argues that this delay was not a result of any fault attributable to Allied and that this unforeseen delay contributed to its inability to complete the work on time. Evidence adduced at trial verified that Allied remained behind schedule for the entire time it was on site.

{¶ 5} Ben Smith, Allied's project manager, testified that initially a crew of six or seven workers began setting up the decontamination area. He explained that prior to starting demolition or removing the ceiling and wall plaster, Allied was required by contract to perform approximately 15 steps in order to cover the floors and seal off all windows, ducts

[1]The parties submitted the entire contract which was admitted as Joint Exhibit A.

and electrical outlets in order to prevent asbestos fibers and dust from escaping into the environment. (Joint Exhibit A, Section 02075:3.02 (A).) In addition, acoustical drop ceiling panels had to be removed in order that workers could obtain access to all of the asbestos-contaminated plaster in the ceiling and wall areas.

{¶ 6} Smith testified that he had prepared the bid based on his belief that the vast majority of the contaminated ceiling plaster was affixed to a metal wire mesh which was suspended a few feet from the decking of the floor above. The contract listed the specifications for removing suspended ceilings in Section 02075:3.02 (F).[2] Smith anticipated that his workers would break holes into the plaster with hammers, then insert hoses through the holes, whereupon they would saturate the ceiling plaster with water to minimize the release of any asbestos fibers. Allied then planned to enlarge the holes in order that a worker could squeeze through and cut any wires connecting suspended wire mesh, which would allow the entire plaster/mesh ceiling system to fall to the floor. Allied's

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[2] Section 02075:3.02(F) contains the following:

"F. Stripping of Suspended Ceiling Materials (Beneath Areas of Materials Containing Trace Amounts of Asbestos): Strip suspended ceiling materials necessary to access work as follows:

"1. Enclose duct openings *** with two layers of polyethylene film sealed with tape.

"2. Progressively strip ceiling mounted objects (e.g. lights, speakers, diffusers, etc.) as ceiling materials are stripped. ***

"3. Strip suspended ceiling material including tiles, panels, and suspension systems. Unless heavily contaminated, remove loose hard plaster debris from panels; panels should be transported to a recycler. ***

"4. Ceiling and fallout material shall be treated with amended water to reduce fiber release during stripping."

workers would then cut the debris into manageable sections and dispose of it in large plastic bags. Indeed, Allied insists that its low bid was based on the expectation that most of the ceilings in McGuffey Hall were suspended and that Allied's workers would be able to remove ceiling systems quickly and efficiently.

{¶ 7} In several areas of the building, however, Allied encountered what it alleges were differing site conditions from those set forth both in the plans and specifications and in the bid materials. Specifically, Allied discovered that instead of being attached to a suspended wire mesh, the ceiling plaster in many areas was held fast to grooved clay tile substrate. Thus, neither the plaster could be wetted nor could it be cut down in sections. Rather, it had to be broken or chipped off by using electric hammers while workers were lying on their backs on elevated scaffolding. Allied further maintains that the substrate then had to be cleaned with rotating or hand-held wire brushes to remove any trace of particulate matter that was contaminated with asbestos fibers. Smith testified that this process took approximately two to three times longer than removal of any suspended plaster/mesh ceiling system. Allied also found that in some areas the wall plaster had been affixed to a brick masonry surface that also required the use of hammers to chip off the plaster, that was then followed by vigorous scrubbing with wire brushes in order to completely remove traces of contaminated plaster.

{¶ 8} According to Smith, Gandee would not sign off on an area until no visible trace of plaster remained on the substrate. Smith stated that Gandee occasionally sent Allied back to reclean a surface two or three times before it met with Gandee's approval and that Gandee refused to authorize any extension of time or additional monies for Allied. Smith maintained that he was misled by the contract documents inasmuch as the substrate was not described or identified in the contract documents and that the process for removing plaster from a clay tile surface was not noted prominently in the contract specifications. Smith recalled that on or about October 21, 2003, he realized the full extent of the existence of the clay tile substrate throughout the other floors of the building and that those

conditions would result in the need of additional time, equipment, and labor, all of which would substantially increase Allied's costs.

{¶ 9} Smith related that, at approximately the same time, he became concerned about the integrity of the clay tile substrate and consequently sought a determination from a structural engineer whether the use of electric hammers would damage or weaken the floor above. During the seven-day delay incurred in waiting for the structural engineer to sign off on the use of the hammers, Allied was able to perform some limited amounts of work in other areas. Nonetheless, on November 12, 2003, Miami notified Allied that the rate of progress was inadequate. Miami sent Allied a formal three-day notice ordering Allied to increase the workforce or else Miami would hire additional workers and charge the cost to Allied. Allied increased the number of workers on site and added a second shift as well. According to Allied, this additional effort also resulted in increased costs both for labor and for Gandee who had to oversee another shift.

{¶ 10} Allied completed the Phase I work in January 2004. Allied presented Miami with a written change order on January 14, 2004, wherein it sought an additional $300,000 for the work it had completed in Phase I. That change order was initially denied, and again after Allied availed itself of dispute resolution procedures outlined in Article 8 of the contract. However, Miami released Allied from its contractual obligations for Phase II.

{¶ 11} Ohio law allows contractors to recover additional costs when differing site conditions negatively affect their work. *Sherman R. Smoot Co. v. State* (2000), 136 Ohio App.3d 166. "Differing site conditions claims arise from two separate and distinct circumstances, usually referred to as Types I and II differing site conditions. *H. B. Mac, Inc. v. United States* (C.A.Fed., 1998), 153 F.3d 1338, 1343; Cushman, Jacobsen & Trimble, Proving and Pricing Construction Claims (2d 1996), Section 7.2. A Type I differing site condition occurs where actual site conditions differ from the conditions indicated in the contract. A Type II differing site condition occurs where actual site conditions differ from

conditions normally encountered in work of the character provided for in the contract. *Youngdale & Sons Construction Co., Inc. v. United States* (1993), 27 Fed. Cl. 516, 528; *H. B. Mac, Inc*., supra." Id. at 173.

{¶ 12} To prevail on a Type I claim, Allied must prove "(1) that its contract contains an affirmative indication regarding the subsurface or latent physical condition that forms the basis of the claim; (2) that the contractor interpreted the contract as would a reasonably prudent contractor; (3) that the contractor reasonably relied upon the contract indications regarding the subsurface or latent physical condition; (4) that the contractor encountered conditions at the job site which differed materially from the contract indications regarding the subsurface or latent physical condition; (5) that the actual conditions encountered by the contractor were reasonably unforeseeable; and (6) that the contractor incurred increased costs which are solely attributable to the materially different subsurface or latent physical condition. *Youngdale & Sons*, at 528; *Weeks Dredging & Contracting, Inc. v. United States* (1987), 13 Cl. Ct. 193, 218; Cushman, Jacobsen & Trimble, at Section 7.4." Id. at 174.

{¶ 13} As owner, Miami is required to supply sufficient plans and specifications such that a contractor can perform under the contract. According to Allied, Miami had superior knowledge of the building conditions, had knowledge of the areas where plaster had been affixed to clay tile, and failed to disclose such information to Allied during the bid process. Defendant admits that the contract documents failed to identify the clay tile substrate found in McGuffey Hall. Rather, Miami contends that it was unnecessary inasmuch as any contractor should have expected to find this type of substrate in a building of such vintage. In addition, Miami provided the contractors with access to all of the historical "as-built" drawings for review, pre-bid.

{¶ 14} Smith testified that in terms of visible substrate and ceilings, he had observed concrete, wire mesh and metal lath covered with plaster, and cementitious board. Smith also claimed that he learned of the existence of historical drawings showing the

presence of the clay tile substrate only after he had commenced work on Phase I. Smith acknowledged that he had no prior experience performing asbestos abatement in a building with a clay tile substrate, nor had he ever prepared a bid for asbestos abatement in such a building. Indeed, Smith admitted that he had never before seen a clay tile form used in combination with concrete flooring in such a manner as that displayed in McGuffey Hall. Smith maintained that the presence of the clay tile should have been identified in the contract specifications and in the materials provided at the pre-bid meeting to alert bidders to this unusual architectural element.

{¶ 15} Employees for both Steed and Gandee testified that they were aware of the presence of clay tile in the building, that the substrate was visible during the building site inspections, that it was identified in historical drawings which were made available to bidders, and that it was not unusual for clay tile to be present in a building of this era. It is undisputed that McGuffey Hall had undergone multiple renovations from 1909 through at least 1965. Steed's architect, Greg Lonergan, testified quite credibly that he recalled specifically advising bidders that several sets of historical "as-built" drawings were located in another building on Miami's campus and that they were available for review, pre-bid. Mel Shidler, Miami's project manager for the renovations, recalled seeing Ben Smith reviewing sets of drawings after the pre-bid meeting, although he admitted that he could not identify the specific drawings that Smith viewed. Rob Epling, another of Steed's employees, testified that he was familiar with clay tile being used for an entire ceiling, especially in buildings of this era. He explained that the unique feature of McGuffey Hall with respect to the use of clay tile was that clay tile was used as a form for the concrete that was poured over it such that the clay tile provided a support underneath and between the concrete beams.

{¶ 16} Upon review, the court finds that Allied failed to prove it encountered a Type I or Type II differing site condition. The contract documents did not identify any particular surfaces or substrate; thus Smith did not rely on any affirmative indicator when

preparing the bid. In addition, the clay tile does not constitute a latent condition as there was sufficient testimony that the substrate was visible during inspection on at least two separate floors of McGuffey Hall. Smith testified that he was aware that there were areas in McGuffey Hall that did not contain a suspended ceiling and that the plaster was attached to some type of decking. Thus, the court finds that Smith had actual notice that at least some of the ceilings were not suspended wire mesh systems. The court further finds that Allied had ample opportunities to discover the presence of the clay tile substrate during either of its pre-bid inspections, during the pre-bid meeting, or upon review of the historical drawings. Thus, the court also finds that the conditions encountered by Allied were reasonably foreseeable.

{¶ 17} Allied alleged that, during at least one of the site inspections in occupied areas of the building, Gandee prevented Allied from moving aside acoustical drop ceiling tiles that obscured some of the ceilings where plaster was adhered directly to clay tile. According to Smith, movement of the panels posed a risk to building inhabitants of exposure to asbestos-contaminated dust or fibers. However, Miami submitted photographs depicting areas where acoustical tiles were missing or permanently removed, exposing upper walls and ceilings. (Defendant's Exhibits C, D.) In addition, the ceilings had multiple instances where pipes and metal penetrated the plaster and exposed the clay tile substrate. Smith admitted that although he observed areas in the fourth floor corridor/mezzanine where the ceiling was not suspended, he failed to inquire or ascertain whether such condition prevailed throughout McGuffey Hall. Instead, he prepared his bid based on his assumption that most of the ceiling systems were suspended. The court finds that Smith failed to appreciate the precise nature of the ceilings in the various rooms on each of the floors. In essence, the court finds that Allied failed to exercise due care in evaluating the quantity of work to be performed before placing its bid.

{¶ 18} Initially, the court notes that the "Contract & Notice to Proceed" signed by Allied states, in pertinent part:

{¶ 19} "1.1 [Allied] shall perform the entire WORK described in the Contract Documents and reasonably inferable by [Allied] as necessary to produce the results intended by the Contract Documents ***.

{¶ 20} "***

{¶ 21} "3.2 It is understood and agreed that all Work to be performed under this Contract shall be completed within the established Contract Completion time *** unless an extension is granted by the UNIVERSITY in accordance with the Contract Documents.

{¶ 22} "***

{¶ 23} "4.1 The Contract Documents *** shall be considered to be incorporated by reference into this Contract & Notice to Proceed as if fully rewritten herein. All capitalized terms in this Contract shall have the meaning given said term in the Definition section of the bid package." (Plaintiff's Exhibit 51.)

{¶ 24} In addition, Article 2 of the construction project contract contains a list of bidding procedures and includes the following warning:

{¶ 25} "2.1.2 Failure of a Bidder to be acquainted with the amount and nature of Work required to complete any applicable division of the Work, in conformity with all requirements of the Project as a whole, will not be considered as a basis for additional compensation."

{¶ 26} According to Miami, Section 02075:3.03(A)(1) describes the general process for stripping interior building materials, and instructs the contractor to spray the area with water and "saturate material sufficiently to wet it to substrate without causing excess dripping." In addition, Section 02075:3.03(A)(2) states that the stripped surfaces "shall be brushed or wet cleaned to remove visible material. One hundred percent stripping of visible material is required." Section 02075:3.03(B) references stripping of hard plaster containing trace amounts of asbestos and instructs the contractor that if "hard plaster finish is stripped from substrate, demolish portion of wall system to be removed as necessary for one hundred percent stripping of visible material." Despite all of the

specifications listed above, Allied insists that its bid was based on the specifications listed in Section 3.03(B)(3), which describes stripping of plaster ceiling and wall systems.[3]

{¶ 27} At trial, the parties agreed that the terms of the contract are clear and unambiguous. As such, the court notes that if no ambiguity exists, the terms of the contract must simply be applied without resorting to methods of contract construction and interpretation. See *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241; *Freiling v. Ohio Lottery Comm'n*, Court of Claims No. 2003-11275, 2004-Ohio-6583, ¶14. Upon review, the court finds that the specification of the contract that Smith relied upon has no more or less significance than any other specification in reference to the entire asbestos abatement process. Based on the testimony and evidence presented, the court finds that Smith mistakenly presumed that the areas with hard plaster adhered to clay tile were limited and that such assumption proved costly.

{¶ 28} It is undisputed that Smith was questioned prior to commencing work on the project to ascertain whether he understood the scope of the project. During the interview, Smith never sought any clarification from the architect and he did not inquire as

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[3] Section 02075:3.03(B)(3) states as follows:

"3. Strip hard plaster ceiling and wall system as follows:

"a. Select location(s) to penetrate ceiling or wall and thoroughly wet surface of system. Carefully cut hole(s) in plaster system to access areas above or behind it.

"b. With access to both sides of plaster system now provided, saturate both sides.

"***

"d. Strip ceiling and wall components (e.g. finish and base coats, nails, metal lath, electrical conduits, suspension system, *masonry substrate*, hangers, etc.) ***." (Emphasis added.)

to the materials present in the building. Moreover, the court is persuaded by the testimony of Greg Lonergan that the historical drawings were mentioned and made available pre-bid and that the "as-built" drawings not only showed the presence of a tile substrate but also noted with the designation "su." where the suspended ceiling systems were located. The court also finds credible and gives weight to the testimony of Rob Epling, who stated that it was not unusual for a building from this era to have clay tile in place.

{¶ 29} Moreover, even if Allied had encountered a changed condition, Allied provided notice to Miami of the increased time and costs only after the work was substantially complete, and such request amounted to a doubling of the bid price that had been submitted and accepted. Allied insisted that it first notified Miami in writing on November 12, 2003, when it responded to Miami's three-day notice to cure. Allied's letter stated that "our sense on the man-days required to perform the actual abatement of the trace plaster in each area was not sufficient due to the type of substrate and quantity of plaster that required electric hammers for removal. In spite of this, Allied will continue to increase the project manpower to expedite the completion of our contracted work for this phase of the rehabilitation project. Allied plans to continue to increase manpower and utilize that manpower on a second shift. *** In adding additional manpower of this quantity Allied believes it will create a substantial deduction in the number of calendar days required to complete each area. ***" (Plaintiff's Exhibit 20.) Miami argues that this language does not provide proper notice of a differing site condition nor does it constitute a request either for an extension of time or for reimbursement of additional, unforeseen costs. The court agrees.

{¶ 30} In regard to differing site conditions, the contract describes the following procedure:

{¶ 31} "7.3.2 Should the Contractor encounter, during the progress of the Work, concealed physical conditions at the Project, differing materially from those upon which the Contract Documents permit the Contractor to rely, and differing materially from those

ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract, the Contractor shall notify the Associate in writing of such conditions, before they are disturbed.

{¶ 32} "7.3.3 The Associate will promptly investigate the conditions and if the Associate finds that such conditions do materially differ from those upon which the Contract Documents permit the Contractor to rely, of differ materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract, causing an increase or decrease in the cost of the contract, an appropriate Change Order shall be processed.

{¶ 33} "7.3.3.1 The Contractor will only proceed with proper authorization, in writing, as provided by the Contract Documents.

{¶ 34} "7.3.3.2 No claim of the Contractor under paragraph K 7.3.3 shall be allowed unless the Contractor provided the notice required in paragraph K 7.3.2."

{¶ 35} In addition, Article 6 outlines the procedure to be followed when the contractor requests a time extension. The contract language reads as follows:

{¶ 36} "6.4.1 Any request by the Contractor for an extension of time shall be made in writing to the Associate no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time. Failure to timely provide such notice to the Associate shall constitute a waiver by the Contractor of any claim for extension, damages or mitigation of liquidated damages, to the fullest extent permitted by law."

{¶ 37} Article 7.1.2 states that the "Contractor shall not proceed with any change in the Work without the required written authorization. If the Contractor believes that any item is not work required by the Contract Documents, the Contractor shall obtain a Change Order before proceeding with such item. Except as provided in K Article 8,[4] failure to

[4]Upon review of the contract, specifically Article 8, the court finds that the only exception to the requirement of prior written notice of a changed condition is the language addressing alternative dispute resolution which reads as follows:

obtain such a Change Order shall constitute a waiver by the Contractor of any claim for additional compensation for such item."

{¶ 38} Consequently, even if the court were to accept plaintiff's argument that the presence of hard plaster which was adhered to a clay tile substrate throughout the building constituted a condition that was not generally recognized as inherent in the process of asbestos abatement in a project of the character provided for in the contract, plaintiff failed to notify Gandee in writing within ten days of discovering the condition and failed to obtain written approval to proceed. The court finds that Allied effectively deprived Miami of the opportunity to view the alleged differing condition before it was disturbed or to consider alternatives before proceeding. Allied's failure to provide notice also prevented Miami from being able to track any increased costs as they were incurred.

{¶ 39} In addition, the court finds that the contract required Allied to give prompt, written notice prior to incurring any increased costs that it intended to charge to Miami. Indeed, Allied was prohibited by contract from proceeding with a change in the scope of the work to be performed without first obtaining written approval from Miami. "It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner or employer." *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio St.3d 353, 360, 1997-Ohio-202. According to Miami, Allied forfeited its right to recover when it failed both to provide timely notice and to follow the terms and conditions

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"8.5.1 If, upon consideration of a claim, the University recommends, and the parties mutually agree, the dispute resolution procedure provided in this Article may be waived, or the claim may be referred to a form of Alternative Dispute Resolution ***."

outlined and agreed to in the contract. The court agrees. According to the contract, such failure constitutes a waiver of any claim for increased costs to perform.

{¶ 40} Inasmuch as the contract required any asbestos-contaminated hard plaster to be removed from walls and ceilings, the court finds that Allied's claim that it provided extra work not required by the contract also fails. In *Struna v. Ohio Lottery Commission,* Franklin App. No. 03AP-787, 2004-Ohio-5576, the Tenth District Court of Appeals stated that "[u]njust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. *Turner v. Langenbrunner*, Warren App. No. CA2003-10-099, 2004 Ohio 2814, at P38, citing *University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St. 3d 118, 2002 Ohio 3748, at P60." In the instant case, the amount of money Allied was entitled to with respect to asbestos abatement, which is the subject matter of plaintiff's unjust enrichment claim, was governed by the terms of the contract between Allied and Miami. Consequently, the unjust enrichment doctrine has no application to this case.

{¶ 41} The court finds that Allied substantially underbid the project from the start, that it was not able to remove the hard plaster as quickly or efficiently as it had estimated, and that it then sought to recoup the cost of its mistake from Miami. For the foregoing reasons, the court finds that defendant is not liable to plaintiff in this matter and accordingly, judgment shall be rendered in favor of defendant.

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IN THE COURT OF CLAIMS OF OHIO

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ALLIED ENVIRONMENTAL SERVICES, INC.	:	
	:	CASE NO. 2004-06887
Plaintiff		Judge Joseph T. Clark
	:	
v.		JUDGMENT ENTRY
	:	
MIAMI UNIVERSITY		
	:	
Defendant		

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This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____

JOSEPH T. CLARK
Judge

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SJM/cmd/Filed September 15, 2006/To S.C. reporter October 27, 2006