

[Cite as *Suburban Maintenance & Constr., Inc. v. Ohio Dept. of Transp.*, 2016-Ohio-1253.]

SUBURBAN MAINTENANCE AND
CONSTRUCTION, INC.

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2014-00506

Referee Brian L. Buzby

DECISION OF THE REFEREE

{¶1} This cause came to be heard on a complaint brought by plaintiff, Suburban Maintenance and Construction, Inc. (SMC), against defendant, Ohio Department of Transportation (ODOT) for breach of contract. The case proceeded to trial on the issues of liability and damages on November 2-3, 2015, and post-trial briefs were simultaneously filed on January 8, 2016. SMC filed a response to ODOT's post-trial brief on January 15, 2016.

{¶2} The dispute in this matter is easily stated. SMC claims that a contract it signed with ODOT was ambiguous and, as a result, SMC was required to do additional work not included in its bid price for the contract work. SMC sues for that additional amount.

{¶3} ODOT, in turn, claims that the contract was clear, not at all ambiguous, and that SMC is bound to perform all of the contract work at the bid price. Accordingly, ODOT denies SMC's claim. This lawsuit followed.

{¶4} The law of contract interpretation for the court is also easily stated. Contract interpretation is a matter of law for the court. *City of St. Marys v. Auglaize County Bd. of Comm'rs*, 115 Ohio St.3d 387 (2007). When interpreting a contract, the court's main objective is always to give effect to the intent of the parties as expressed in the written contract itself. *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 714

N.E.2d 898 (1999). The intent of the parties is always presumed to reside in the precise language and terms they employed and set forth in the agreement. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987). And, in determining the intent of the parties, a court must read the contract as a whole and attempt to give effect to every part and term of the contract. *Foster Wheeler Enviresponse v. Franklin Cnty Conv. Facilities Auth.*, 78 Ohio St.3d 353, 678 N.E.2d 519 (1997).

{¶5} Most important for the court is the admonition from the Ohio Supreme Court that “[i]t is not the responsibility or function of this court to rewrite the parties’ contract in order to provide for a more equitable result. *Id.* at 362. A contract “does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto.” *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172, 143 N.E. 388 (1924).

{¶6} Also important to the court’s review is the long accepted tenet in contract interpretation that, if there are ambiguities in a contract, the document will be strictly construed against the party who drafted it or selected its language. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 667 N.E.2d 949 (1996); *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 406 N.E.2d 515 (1980). ODOT drafted the contract in dispute in this matter. With this well-settled law in mind, the court turns to the written contract between the parties.

{¶7} The written contract between the parties is comprised of various writings, project plans, and specifications. (Joint Exhs. 1, 2; Def. Exhs. A, B, C, D, E, F.) Interestingly, no party produced a distinct single signed written agreement between the parties at trial. Instead, the contract is somewhat of a challenge from the outset in that it requires that various documents, project plans, and specifications be read in conjunction with one another and harmonized into one certain agreement.

{¶8} The Project Description provided by ODOT specified that this was a project “of patching bridge pier columns . . . on the following structures . . .” located in five

counties in Ohio. The project involved eleven bridge structures in the five counties. (Joint Exh. 2.)

{¶9} The bid proposal was issued and dated in August 2012. (Joint Exh. 1.) The bid incorporated various general conditions that became the overall general terms of the contract (Def. Exhs. D, E, F), but the actual work required by the contract was set forth in specifications and drawings provided by ODOT. (Joint Exh. 2.)

{¶10} The dispute concerns only one bridge—bridge MOT-75-0712 at Sellars Road (Sellars Road bridge), and the dispute concerns only one item of work for the Sellars Road bridge—the matter of removing, or patching, eight cubic yards of concrete at the bridge.

{¶11} Page 25/44 of the project specifications sets out the work required for the Sellars Road bridge. The contested item is the first item listed—Item 202—described as “PORTIONS OF STRUCTURE REMOVED AS PER PLAN.” (Joint Exh. 2, 25/44.) The plan reads “8 CU.YD. PORTIONS OF STRUCTURE REMOVED, AS PER PLAN.”

{¶12} Item 202 work is titled in the project as “PORTIONS OF STRUCTURE REMOVED, AS PER PLAN DESCRIPTION.” (Joint Exh. 2, 3/44.) The description states that “[the] work consists of the removal of top 2 to 3 feet of pier columns for repair.” (Joint Exh. 2, 3/44.)

{¶13} After the project was well underway, the parties discovered that they were interpreting this work and Item 202 differently. ODOT read Item 202 as a specific, literal requirement to remove exactly and precisely eight cubic yards of concrete at the Sellars Road bridge. ODOT argues that page 25/44 specifically requires and references removal and that Item 202 also specifically requires and references removal of the concrete.

{¶14} SMC, however, read and understood the contract differently and contends that, when the contract is viewed as a whole, the true meaning of Item 202 is that this work was to be determined and adjusted in the field based on the actual condition of the

concrete. SMC believed that what the contract actually required was the removal of up to eight cubic yards of concrete, which might be less depending on field conditions. SMC contends that a fairer reading of the contract required that SMC retain an engineer to assess what concrete needed to be removed, versus what needed to be merely patched. SMC further contends that it retained an engineer to assess the concrete, and that because eight cubic yards did not need to be removed at Sellars Road, it bid a lower amount for the work. When ODOT ordered the removal of the entire eight cubic yards, SMC's contract costs increased, giving rise to this claim.

{¶15} ODOT is correct that Item 202 is titled as "PORTIONS OF STRUCTURE REMOVED. . ." and specified in no uncertain terms that "[t]his work consists of the removal of top 2 to 3 feet of pier columns for repair." If the inquiry stopped here, ODOT would prevail. But, as noted, the fundamentals of contract interpretation require that the entire contract be read and, if possible, that all terms be read together in conjunction with one another such that every term and provision has meaning. Applying this basic legal tenet leads to the inevitable conclusion that the contract is ambiguous in this one regard.

{¶16} The ambiguity begins with the wording of Item 202 itself. While the first sentence of Item 202 states unequivocally that the concrete is to be removed, the very next sentence of Item 202 states that "[t]he provisions of Item 202 apply except as specified by the following notes." This is akin to saying that Item 202 applies, except when it does not. Furthermore, as noted earlier, the initial description of the project is that the project "shall consist of patching existing bridge pier columns . . ." (Joint Exh. 2, 1/44.) Patching, it would seem clear, is much different than removing.

{¶17} The contract documents also contained an Item titled "EXISTING STRUCTURE VERIFICATION" that reads "[d]etails and dimensions shown on these plans . . . have been obtained from plans of the existing structure and from field observations and measurements . . ." and that, "consequently . . . they shall be

considered tentative and approximate . . .” This Item goes on to provide that because “of the uncertainties described above” ODOT “will pay for all project work based upon actual details and dimensions which have been verified in the field.” (Joint Exh. 2, 3/44.) This provision supports SMC’s view that the contract did not call for the absolute removal of eight cubic yards of concrete from the Sellars Road bridge, but only for the amount determined from the actual work verified in the field.

{¶18} Indeed, Item 202 itself supports this view since Item 202 also references “the removal of top 2 to 3 feet of pier columns,” which is not precise and further specifies that “[t]he department will measure the quantity of removals on a cubic yard basis” which will then “be paid for at the contract cubic yard price bid.”

{¶19} Again, all of these provisions read in conjunction with one another suggest that the matter of the concrete to be removed was something that would be determined in the field based on actual need and conditions, and then paid for on the cubic yard bid price.

{¶20} Further, there is an additional Item in the contract documents titled “STRUCTURE, MISC.: STRUCTURAL ASSESSMENT.” This Item states that “[t]he contractor will be responsible for the structural assessment of the structure when removing disintegrated/unsound concrete.” This was the Item that led SMC to understand that, as the contractor on this project, it was required to assess the structure to determine what “unsound concrete” needed to be removed. This Item also goes on to require the contractor to engage an Ohio registered professional engineer to “assess the structural integrity of the pier column during concrete removal and any other time an assessment is requested by the ODOT project engineer.” This suggests that the engineer engaged by the contractor is tasked with assessing what concrete is unsound and needs to be removed, and must also be prepared to do any other assessment requested by ODOT.

{¶21} Moreover, page 25/44 in the project plans that sets forth the specific work for the Sellars Road bridge is titled “ESTIMATED QUANTITIES – MOT-75-0712.” Again, a fair reading of this is that the eight cubic yards was an estimate, not a firm, absolute figure to be determined and verified in the field based on actual conditions and need.

{¶22} ODOT goes on to contend that the plans or cut sheets for the work specify exactly eight cubic yards for removal. The plans or cut sheets visually depict the actual columns and display those parts that call for “removal and repair.” (Joint Exh. 2, 26/44–29/44.)

{¶23} David Lay, ODOT’s construction administrator for the district, where this work was performed, testified at trial:

Q. So I’m focusing now on the Sellers Road [sic] part of this proposal that deals with the line items.

A. Okay.

Q. And I want to go over those with you.

A. Okay.

Q. And this is page 3 of that attachment.

A. Yes.

Q. The first one is portions of structure removed as per plan. What does that mean?

A. What that means is there are eight cubic yards of structure to be removed on it, those will refer back into – into the plan sheets. When you get into the plan sheets, you’ll see a summary that looks very similar to this proposal. And it will look the same, it will have the same quantity, it will show eight cubic yards of material to be removed to do this work under structure removed as per plan.

(Trial Trans., pg. 368.)

{¶24} But, on cross-examination, Mr. Lay agreed that the plan or cut sheets do not specify exactly eight cubic yards, but show, instead, just a range or an approximation.

{¶25} Mr. Lay testified:

Q. Now, the so-called clear and prescriptive drawings do not in each case show two to three feet being removed, do they?

A. No. They show – it's within the range.

Q. I'm sorry? It's within the two to three feet?

A. It's within a range.

Q. It's within the two to three feet?

A. Yes.

Q. Would you turn to Exhibit C, and the second page of that exhibit is sheet 26 of 44.

A. Yes.

Q. And if you look at column 1, what's the distance from the top of column to the cut lines shown there?

A. One and a half feet.

Q. Is that between two feet and three feet?

A. 2.0 or if you round off and don't say the half, if you call it two to three, it's an approximation.

Q. Oh, it's – the note in Item 2 refers to an approximation?

A. Yes.

(Trial Trans., pgs. 412–413.)

{¶26} And so, not even the project plans or cut sheets call out for the removal of eight specific cubic yards of concrete. Even ODOT agrees that its own plans show an

“approximation” or a “range” of the concrete to be removed. This is consistent with SCM’s view that all of this was to be verified and determined in the field.

{¶27} It is also significant to note that the entire project was bid largely on a unit price basis for all of the various items of work, not a fixed lump sum. Indeed, the bid for this project called for bids on seventy-seven separate bid items, most on a unit price basis. (Def. Exh. G.) As such, the very manner in which the bid was structured suggested that the actual work and payment would be based on what happened in the field in terms of what work actually needed to be done. This is not a situation where SMC bid a firm price to remove eight cubic yards of concrete. Instead, it bid a unit price to be applied against the actual concrete removed. Again, this suggests that the final figure was meant to be determined in the field based on the actual work performed.

{¶28} Finally, it was also telling that ODOT agreed, through the testimony of Mr. Lay, that it did not have much experience bidding projects in this manner where most of the work items were bid at unit prices based on what was actually performed in the field, while this one single item was different and called for removing a specific amount of concrete stated in the contract.

{¶29} As Mr. Lay testified:

The Court: Now, in terms of this specific project, and I’ve heard all the testimony about the confusion of the documents and the interpretation and so forth in Item 212 and 516 and so on and so forth. Is this an unusual project? I mean are there many other projects bid this way?

The Witness: Very very common. The only unusual part would be the removal of the pier column tops. We haven’t done that one in our district before.

(Trial Trans., pg. 428.)

{¶30} It is telling that ODOT agrees this project was the first project of this type in this district, supposedly calling for the removal of a specified amount of concrete on this one lone item of work. This suggests that no party had experience with this contract wording or performance. The more common contract specifications, like the balance of this contract, called for all work and payments to be based on the work actually performed and verified in the field. This one item for this one scope of work on the Sellars Road bridge was an aberration that, apparently, neither SMC nor ODOT had ever experienced before.

{¶31} In sum, reading the contract as a whole and attempting to give meaning to all of its provisions, as any court is required to do, leads to the conclusion that this contested provision of the contract about the need to remove eight cubic yards of concrete is unclear, ambiguous, and subject to various interpretations when read together with the balance of the contract. As the drafter of the contract, it must be construed against ODOT. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 667 N.E.2d 949 (1996); *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 406 N.E.2d 515 (1980).

{¶32} ODOT further defends its position with the argument that the contract required SMC to raise any questions or ambiguities before signing the contract and that, if SMC did not, any claims based on any alleged ambiguities would be waived. (Def. Exh. D, Bidding Requirements and Conditions, 102.5, 102.7.) ODOT argues that SMC did not raise this ambiguity and, as such, these claims have been waived.

{¶33} The problem with this argument, naturally, is the very fact that the ambiguity prevented SMC from raising this. As SMC read and understood the contract, it saw no ambiguities and, as such, raised none. It was only when ODOT presented this differing interpretation on the job that these issues arose. Stated otherwise, no one knew the ambiguity existed until the differing positions were revealed based on the differing interpretation of the contract requirements. And, while ODOT suggests that SMC is to blame for not realizing and noting this ambiguity in advance, there is also

evidence in the record to suggest that ODOT should have seen these issues based on the bids it received and that ODOT had every opportunity to confront and resolve these ambiguities before the contract was signed.

{¶34} As noted, this was not a typical construction project where a single lump sum bid was received for all the contract work. Instead, bidders were required to bid some seventy-seven items of work, most at unit prices, which also supports SMC's view of the contract that these unit price bids would then be used to pay for the actual work as verified, determined, and calculated in the field. (Def. Exh. G.) There were, however, some startling variations in the bids that, it would seem, would have alerted ODOT that the bidders were viewing—and bidding—this work very differently.

{¶35} For example, in the specific bid for this work to remove the eight cubic yards of concrete, bid Item 34, which turned out to be the ambiguous item of work, SMC bid a unit price of \$500 or \$4,000 total to do this work, while the next two bidders bid \$23,525.36 and \$35,329.44 to do the same work. (Def. Exh. G, pg. 83.) The difference between the high and low bid here is almost nine times. This is a startling discrepancy and would alert anyone looking at these bids to realize that the bidders were viewing this work very differently.

{¶36} The reason for the discrepancy seems to be clear. SMC, based on its field observations, did not believe there was that much unsound concrete to remove, while the other bidders were likely bidding on the basis of removing much more unsound concrete. Regardless, the stark difference in the bids demonstrates that the bidders were viewing this work—and the contract—very differently, which should have attracted ODOT's attention.

{¶37} Similarly, in bid Item 10, the bid price for the structural assessment, SMC bid \$15,000 for this work, while the low bidder bid only \$1,800. Again, this is a striking difference that should have alerted anyone following the bids that the bidders were viewing this work very differently. SMC's price, no doubt, was much higher since it

understood the contract to require that it retain an engineer to determine what concrete needed to be removed, which was a significant undertaking, while the low bidder likely envisioned a more limited engineering assessment.

{¶38} The evidence at trial was unclear whether SMC was made aware of these bid discrepancies, but ODOT was certainly aware. As such, it would seem that ODOT also had notice of possible ambiguities based on how the bidders were viewing the requirements of this contract and had an opportunity to confront these ambiguities before the final contract was signed.

{¶39} As noted, the ambiguity became known on the project when ODOT ordered SMC to remove eight cubic yards of concrete from the Sellars Road bridge regardless of its condition, while SMC contended the contract required only the removal of unsound or deteriorated concrete. SMC called at trial an engineering expert who testified that the concrete at the Sellars Road bridge was, for the most part, sound. (Trial Trans., Jeff Spangler, pgs. 291–292.) SMC claims as damages the increased cost to remove this sound concrete.

{¶40} Interestingly, while considerable time was spent at the trial on the issue of the alleged ambiguities in this contract, there was very little evidence about the amount of the damages being claimed. SMC claims two items of damage. First, it claims \$84,949.16 for the cost of removing the concrete that SMC claims was sound and, thus, was unnecessary and extra work. (Plt. Exh. 24.) Second, SMC claims \$59,000 for the alleged cost to remobilize to return to the work site to complete this additional work.

{¶41} Apart from putting into evidence the letter exhibit that contained these damage calculations, there was little firsthand testimony or evidence about how the damages were actually calculated. With respect to the \$84,949.16, SMC's representatives testified that they kept an ongoing force account of the cost of this work, which they presented to ODOT on the job for payment. (Trial Trans., pgs. 126, 130–

132, 214.) There was also testimony that ODOT, knowing this item of work was being contested, kept its own force account as well. (Trial Trans., pgs. 130, 479.)

{¶42} While SMC presented little evidence at trial as to how these damages were calculated, ODOT also presented little, if any, evidence challenging these numbers. As such, since the evidence was undisputed that these damage numbers were prepared on the basis of ongoing force accounts as the work progressed, that they were presented to ODOT during the project itself, and since ODOT did not challenge the numbers at trial, the \$84,949.16 is accepted as the true and actual cost of doing this additional work. Adding this amount of damages to SMC's low and winning bid still leaves SMC as the low bidder for this project. This further supports the damages number and brings it closer to the other bids such that ODOT is not getting the windfall of an unrealistic low price for this work based on the ambiguities and misunderstandings on the scope of work being bid on this project.

{¶43} SMC also claims \$59,000 for alleged remobilization to complete this work. However, the evidence offered at trial to support this number was wholly inadequate. This number was not proven to any degree of satisfaction. The only justification offered by SMC for this number was that it was taken from its initial bid as the cost to mobilize for the project. However, there was no evidence as to how and why mobilizing for the entire project was somehow comparable to mobilizing to return to just one bridge to finish this one item of work. Similarly, there was considerable evidence at trial presented by ODOT that SMC was itself responsible for being required to remobilize since it chose not to do this work when it was directed to do so, but, instead chose when it would return to complete the work. In sum, SMC's support for the alleged \$59,000 was inadequate and that amount cannot be awarded.

{¶44} Based on the foregoing, it is recommended that SMC's claims be allowed and that it be awarded damages in the amount of \$84,949.16 against ODOT with prejudgment interest from March 31, 2015, the date on which this claimed amount was

forwarded to ODOT for payment. (Plt. Exh. 24.) All other claims, damages, and costs prayed for should be denied as not supported by the greater weight of the evidence or the law.

{¶45} *A party may file written objections to the Referee's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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