BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CAM CONSTRUCTION COMPANY, INC.	)	
	)	Docket No. MSBCA 1088
Under DGS Contract No. BC-7326	)	

October 25, 1983

Contract Interpretation - The contract, when read as a whole, clearly required that all debris resulting from a clearing and grubbing operation be removed from the site.

Contract Interpretation - Although specifications pertaining to burning operations were set forth in the contract immediately following those relating to clearing and grubbing, the contract reasonably could not be read as requiring that burning be conducted to reduce the costs of disposal.

Warranty - The State did not warrant that burning could be utilized as a means of reducing debris derived from the clearing and grubbing operation because the contract language did not assure Appellant that burning could be used at the job site.

Assumption of Risk - When Appellant bid on the contract without verifying that it could burn debris at the site in accordance with local laws and ordinances, it assumed the risk that a burning permit would be denied and that its disposal costs would be increased.

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OPINION BY MR. KETCHEN

This is a timely appeal from a Department of General Services' (DGS) procurement officer's final decision dated June 4, 1982 denying Appellant's request for additional costs allegedly incurred in removing trees and vegetation from a construction site. Appellant, on behalf of its subcontractor, maintains that open burning of such materials was required and that the denial of a permit by local authorities constituted a change to the contract.

DGS contends that there was no change warranting additional compensation since the contract permitted open burning as an option only if permitted by local law and regulations.

Findings of Fact

1. DGS awarded Contract No. BC-7326 in the amount of $4,390,000.00 to Appellant on August 20, 1980 providing for construction of the District Court/Multi-Service Center in Ellicott City, Maryland.

2. The site clearing and excavation work to be completed under the contract sitework specifications, provided, in pertinent part, as follows:

SECTION 02200

EXCAVATION, FILL AND GRADING

PART I: GENERAL

1-01 SCOPE:

This section includes excavation, fill, backfill and grading.

* * *

1-03 MEASUREMENT:

Rock: The unit of measurement for rock will be the cubic yard. Rock to be paid for will be the number of cubic yards of material excavated as herein specified as rock excavation measured in the original position and computed by the average end-area method. Measurement will not include yardage excavated without authorization. The measurement will include authorized excavation of rock below grade.

1-04 PAYMENT:

Rock will be paid for at the contract unit price per cubic yard for rock. This payment will constitute full compensation for all labor, equipment, tools, supplies, and incidentals necessary to complete the work.

PART 2: PRODUCTS

2-01 TOPSOIL:

a. Existing topsoil meeting requirements for Topsoil, as specified, shall be stripped to a minumum depth of six inches, within the contract limits. Topsoil shall be deposited in storage piles, on the contract site, separate from other excavated material, and shall be free from roots, stones and other deleterious material.

b. Excess topsoil shall be removed from the site.

PART 3: EXECUTION

3-01 CLEARING AND GRUBBING:

a. Trees, noted on drawings to remain, shall be protected from any damage. Contractor shall employ qualified tree surgeons to repair any damage caused by contract operations. Trees shall be framed in plywood-boxed to lowest limbs.

b. The area within the limits of the contract, shall be cleared of other trees, down timber, stumps, roots, brush and vegetation. Stumps, roots, brush and organic matter shall be completely grubbed and removed within building lines, and to a minimum depth of 18 inches below finish grade outside building lines. Resulting depressions, where excavation is not required, shall be completely filled and compacted in accordance with Paragraph FILL AND BACKFILL.

3-02 BURNING OPERATION REQUIREMENTS:

a. Burning operations and burning areas shall be in accordance with the applicable local ordinances, codes and regulations as modified herein:

(1) Minimum cleared distance shall be three hundred feet. If this is impracticable, provide fire protection and control as required by the Architect, or burn material in assigned areas.

(2) Contractor shall obtain approval from the Architect prior to commencement of burning operations.

3-03 EXCAVATIONS:

a. Site shall be cleared of structures, foundations pavements, fencing, utility lines, debris and other obstructions within the contract limits. Debris and obstructions outside building lines shall be removed to a minimum depth of two feet below finish grade. Excavations shall be of dimensions to allow space for placement and inspection of installations, unless otherwise specified.

* * *

e. Excavation material, meeting requirements as specified for FILL AND BACKFILL shall be utilized for fill, backfilling and grading. Excess or unsuitable excavated material shall be removed from the site.

* * *

3-04 FILL AND BACKFILL:

a. Material shall be earth free of debris, roots, organic or frozen matter, and stones larger than three inches in any dimension, and shall not be placed on muddy or frozen areas.

* * *

c. Backfilling shall commence after permanent installations are approved by the Architect, and the excavation cleared of trash and debris. Foundation or structure walls below grade, enclosing excavated areas, shall not be backfilled prior to completion of upper lateral supports. Shoring, including sheet piling, shall be removed in a manner to prevent damage or disturbance to surrounding areas. Excavation shall be free of forms and debris.

* * *

(Underscoring added.)

3. Contract Specifications §02820, "Landscaping and Planting," provided, in pertinent part, as follows:

* * *

3-10 CLEANING UP:

All excavated material, debris, or foreign material of any kind shall be removed from the site, leaving the property in a neat and clean condition. (Underscoring added.)

4. Contract Specifications §02010, "Environmental Protection," provided:

- 03 DEFINITIONS OF CONTAMINANTS:

* * *

b. Solid Waste: Rubbish, debris, garbage, and other discarded solid materials.

* * *

d. Debris: Includes both combustible and noncombustible wastes such as ashes, waste materials that result from construction or maintenance and repair work, leaves, and tree trimmings, metal and lumber scrap.

* * *

-04 PROTECTION OF NATURAL RESOURCES:

* * *

b. Land Resources: Except in areas indicated to be cleared, the Contractor shall not remove, cut, deface, injure or destroy trees or shrubs without special permission from the Architect * * *.

* * *

(3) Temporary Construction: The Contractor shall eliminate all signs of temporary construction facilities such as haul roads, work areas, structures, foundations of temporary structures, stockpiles of excess or waste materials, or any other vestiges of construction * * *.

* * *

-06 CONTROL AND DISPOSAL OF SOLID WASTE, AND CHEMICAL AND SANITARY WASTES:

a. General. * * * On completion, the areas shall be left clean and natural looking. All signs of temporary construction and activities incidental to construction of the permanent work in place shall be eliminated.

b. Disposal of Rubbish: Contractor shall transport all waste off of Owner's property and dispose of it in accordance with Federal, State and local requirements. The Contractor shall provide the Architect a copy of applicable permits or licenses which reflect an agency's approval and compliance with their solid waste disposal regulations. The permit or license and the location of the disposal area shall be provided prior to transporting any material off of the property.

* * *

(Underscoring added)

5. Paragraph 09 of Contract Specifications §01100, "Special Conditions," provided, in pertinent part, as follows:

> a. All trucks bringing to or removing from the site earth, loose materials or debris shall be loaded in a manner to prevent dropping of materials on streets. At all points, where trucks leave the project site and enter adjacent paved streets, the Contractor shall maintain an installation and crew to prevent any mud from being carried onto such adjacent paved streets.
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> b. Earth, loose materials or debris deposited on the streets due to contract trucking activities shall be removed daily. (Underscoring added.)

6. As defined by the contract specifications, debris included trees, brush, down timber, stumps, roots, brush, vegetation and any other organic matter (trees and vegetation), and both Appellant and DGS considered cleared trees and vegetation to be debris. (Tr. 67, 69-70, 90, 100).

7. Appellant subcontracted with Fred W. Allnutt, Inc. (Allnutt) for the excavation, fill and grading work which included clearing and disposal of the trees and vegetation. Although an amount for trees and vegetation is not specified, this subcontract was initially for $100,000. Allnutt billed Appellant for additional work up to $326,143.60. (Appellant's Exh. 6). Allnutt knew

that open burning at the construction site was subject to air pollution control laws and regulations based on his experience regarding onsite burning in other counties. However, there is nothing in the record showing that prior to bidding either Appellant or Allnutt made any attempt to determine whether open burning ordinances applicable to the instant site could be satisfied. (Tr. 75-78). In this regard, Contract Specifications §02010, Para. -02, b. provided that the "[c]ontractor's operations shall be in accordance with all referenced regulations pertaining to water, air, solid waste, and noise pollution."[1]

8. After Allnutt had cut the trees and vegetation and prepared this material for burning, it notified the Architect, Diversified Engineering (LBC&W), that it was prepared to burn using the 300 ft. "minimum cleared distance" specified by Contract Specifications §02200, Para. 3-02 a.(1). Minimum cleared distance refers to an area around trees and vegetation to be burned from which all combustible material is removed in order to protect against the spread of fires on site. (Tr. 103). Minimum cleared distance thus is distinguishable from the distances imposed by air pollution laws, as discussed below. (Findings of Fact No. 9).

9. On October 8, 1980 the Howard County Air Pollution and Noise Control Officer (Control Officer) notified Appellant's representatives at the site that he would not permit open burning based on applicable air pollution control regulations and practices.[2] According to the Control Officer in a

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[1]Art. 31 and Art. 36 of the General Conditions provided that Appellant's subcontractors were bound by the terms of the specifications. In pertinent part, Art. 31, b provided that "[t]he Sub-Contractor agrees: To be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all obligations and responsibilities that he, by those documents, assumes toward the State."

[2]The Maryland State Department of Health and Mental Hygiene requirements, COMAR 10.18.07.03B, applicable to the site, provided:

> B. In Areas III and IV
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> (1) In Areas III and IV, subject to review by the Department, the control officer, upon receipt of an application made on forms provided by the Department or local fire control agency, may issue or approve a permit in writing allowing an open fire, provided all of the following conditions are met:
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> (a) The control officer is satisfied that there is no practical alternate method for the disposal of the material to be burned or to conduct the desired activity;
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> * * *
>
> (c) Burning may not be done within 500 yards (457 meters) of one or more occupied buildings or heavily travelled public roadway;
>
> (d) Fire control laws or regulations of other governmental agencies will not be violated;
>
> * * *

letter subsequently sent to Appellant on January 12, 1981, the requirement (set-back limitation) that open burning could not be conducted within 1500 feet of occupied buildings or heavily travelled public roadways is adhered to in a majority of instances. It is only altered when this limitation cannot be met in one or perhaps two directions. Even this practice of altering the 1500 ft. set-back limit depends upon other factors including population density, season, and predicted prevailing winds. The set-back distance is seldom reduced to less than 900 ft. in one or two directions. In those instances where the 1500 ft. set-back requirement is reduced, there is an accompanying upgrading in the burning methods and equipment to compensate for the distance loss. Based on these considerations the Control Officer concluded that:

> The District Court Multi-Service Center site could not meet the 1500 foot requirement in any direction and is entirely surrounded by high density uses including single family dwellings, apartment buildings, the County Office Complex and, most significantly, the adjoining Linwood Children's Center. In addition, the terrain in the area is an almost classic river valley, which would tend to concentrate any local air pollutants.
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> Therefore, according to the provisions of the State regulations, an open burning permit for the site was not possible. The burning permit provisions of the State regulations are also largely reflected within the Howard County Code.

10. Following the Control Officer's denial of an open burning permit, on October 14, 1980, Appellant directed Allnutt to remove and dispose of the trees and vegetation offsite. By letter dated October 16, 1980, Allnutt requested a written change order before proceeding.

11. By letter dated October 23, 1980 Appellant notified the Architect that it had directed Allnutt to dispose of the trees and vegetation by hauling it offsite and requested additional compensation in the estimated amount of $13,329.36. This amount was based on the cost differential between hauling the debris and burning it, together with applicable overhead and profit markups. Allnutt completed the work, although the DGS procurement officer

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(2) Exceptions

(a) Methods of disposal by burning acceptable to the Department may be approved for use when distance limitations cannot be met.

did not issue a written change order pursuant to Appellant's request. By letter dated November 20, 1980, Appellant increased its claim to $19,495.00, representing Allnutt's actual costs for loading, hauling and disposing of the trees and vegetation offsite plus Appellant's markup.

12. On June 4, 1982, the procurement officer issued a final decision denying Appellant's claim for additional compensation.

13. On July 1, 1982, Appellant filed a timely appeal from the procurement officer's final decision.

Decision

This dispute concerns the interpretation of Contract Specifications §02200, Para. 3-01 directing the clearing and removal of trees and vegetation within the contract limits. The central issue raised by this dispute is whether the absence of an explicit direction in §02200, Para. 3-01 to remove cleared trees and vegetation from the site followed by §02200, Para. 3-02 describing burning operation requirements meant that Appellant was required to burn cleared trees and vegetation on site. Appellant contends that this was a reasonable interpretation since the specifications expressly directed offsite removal of other materials when that disposal method was intended. If Appellant is correct, it would be entitled to an equitable adjustment for extra work since burning was not permitted at this site under local burning requirements.

The law is clear that the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered the contract, unless the written language is not susceptible of a clear and definite understanding or unless there is fraud, duress, or mutual mistake. Ray v. William G. Eurice & Bros., 201 Md. 115, 93 A.2d 272 (1952); Kasten Const. Co., Inc. v. Rod Enterprises, Inc., 268 Md. 318, 327-28, 301 A.2d 12, 17 (1973). In interpreting the contract language we must ascertain the meaning attributable to the relevant contract language by a reasonably intelligent bidder. Fruin-Colnon Corp. and Horn Const. Co., Inc., MDOT 1001 (Dec. 6, 1979) at pp. 10-11. In this regard, a primary rule of contract interpretation requires that all written provisions be read together and interpreted as a whole giving effect to each clause if reasonably possible. Granite Const. Co., MDOT 1011 (July 29, 1981); Laurel Race Course, Inc. v. Regal Const. Co., Inc., 274 Md. 142, 153, 333 A.2d 319, 327 (1975); Kasten Const. Co. v. Rod Enterprises, Inc., supra.

Even a casual reading of the specifications fails to justify Appellant's assumption that cleared trees and vegetation did not have to be removed from the site. (Findings of Fact Nos. 2-5). The contract specifications expressly stated that "[a]ll excavated material, debris, or foreign material of any kind shall be removed from the site leaving the property in a neat and clean condition." (Findings of Fact No. 3). Without any doubt, under the terms of the contract cleared trees and vegetation constituted excavated debris, and both Appellant and DGS considered it such. (Findings of Fact No. 6). Thus when the specifications are read as a whole it could not have been more plain that trees and vegetation cleared within the contract limits were to be eliminated from the site, with transportation offsite as one of the means of disposal. (Findings of Fact Nos. 4-5).

Appellant, however, maintains that the positioning of the burning operation requirements in §02200, Para. 3-02 immediately following the clearing requirements in §02200, Para. 3-01, which did not specify that trees and vegetation had to be removed from the site, entitled it to infer that onsite burning of cleared trees and vegetation was the only means of disposal permitted. This interpretation is untenable for two reasons. First, as we have pointed out, it completely ignores specification provisions explicitly directing transportation of such material off the site. (Findings of Fact Nos. 4-5). Second, placing the optional burning requirements of §02200, Para. 3-02 immediately before Specifications §02200, Para. 3-03 of the excavation specifications made organizational sense and was consistent with the intent of the excavation specifications read in their entirety. Paragraph 3-03 directed removal of all excavated material from the site. This direction encompassed either removal of the trees and vegetation from the site, or the residue from burning the trees and vegetation. Thus, specifying removal of cleared trees and vegetation from the site in Specifications §02200, Para. 3-01 was unnecessary and would have been redundant when the following Para. 3-03 of Specification §02200 covering the same subject matter specified offsite removal of all such excavated material.[3]

We turn next to the meaning of Specification §02200, Para. 3-02, entitled "Burning Operation Requirements." If Appellant elected burning as a means of disposal of the cleared trees and vegetation, Specifications §02200, Para. 3-02 stated that "[b]urning operations and burning areas shall be in accordance with the applicable local ordinances, codes and regulations as modified herein . . . ." The modifications in Para. 3-02 were:

> (1) Minimum cleared distance shall be three hundred feet. If this is impracticable, provide fire protection and control as required by the Architect, or burn material in assigned areas.
>
> (2) Contractor shall obtain approval from the Architect prior to commencement of burning operations.

Consistent with the requirements of Para. 3-02, General Conditions, Art. 7c, stated that "[t]he Contractor shall . . . comply with all State and Federal laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified."

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[3]The Board has considered Appellant's argument that in the excavation industry the term "cleared" and "grubbed" does not necessarily include removing cleared material from the owner's site. A specific direction to do so is required. While custom and usage may be used as an aid to interpretation, such extrinsic evidence is not permitted to override specific contract provisions expressing the parties' intent. Compare Appelstein v. Royal Realty Corp., 181 Md. 171, 173, 28 A.2d 830 (1942); WRB Corp. v. United States, 183 Ct.Cl. 409 (1968). However, we do not determine the applicability of custom and usage here since the contract specifically directed that cleared material be eliminated from the owner's site.

Appellant contends, however, that the phrase, "as modified herein," in Para. 3-02 conveyed to it an understanding that local requirements had been modified such that it had to provide a 300 foot minimum cleared distance before burning as set forth in the specifications but did not have to comply with the 1500 ft. set-back distance set forth in local air pollution laws.

Appellant's interpretation of Para. 3-02 is unreasonably narrow. There would have been no reason to specifically inform prospective contractors in Para. 3-02, and also by Art. 7.c, that local requirements regarding open burning had to be complied with had that not been what was reasonably intended. It would have been sufficient merely to have specified the two contract burning conditions. Accordingly, we find that the contract required compliance with local laws regarding open burning in addition to the two stated contract provisions. This interpretation gives meaning to Para. 3-02 in its entirety and avoids a construction which implies that the parties used superfluous words. Compare Blake Construction Co., Inc., GSBCA No. 2477, 71-1 BCA ¶8870.

Here local authorities obviously had authority to deny permission to burn if applicable burning requirements could not be met, and the contract pointed this out by requiring compliance with local law. Under the contract's terms, Appellant thus assumed the risk that open burning would not be permitted. Compare George R. Mackay, AGBCA No. 454, 75-2 BCA ¶11,395; Western Structures Inc., AGBCA No. 76-200, 77-1 BCA ¶12,527; Electronic & Missile Facilities, Inc., ASBCA No. 8627, 1963 BCA ¶3979; Bromley Contracting Co., ASBCA Nos. 14884, 15483, 16045, 72-1 BCA ¶9252 (1971) at p. 42,903. Accordingly, when such permission was denied there was no basis for an equitable adjustment under the terms of the contract, particularly where the contract provided a means within its scope by which Appellant could meet its obligations.

For the foregoing reasons, therefore, the appeal is denied.

Concurring Opinion By Chairman Baker

The captioned contract, among other things, required that certain designated areas within the contract limits be cleared and grubbed. As explained by Appellant's clearing and grubbing subcontractor, Mr. Allnutt, the

term "[c]lear means to take it [trees, vegetation] down . . . and "[g]rub means to take it [stumps, roots] out of the ground . . . ." (Tr 83). A requirement to clear and grub, we are told, thus does not obligate a contractor to dispose of debris resulting from this operation. (Tr 13).

As Mr. Ketchen's opinion correctly points out, it is essential that all written provisions in a contract be read together and that the contract be interpreted as a whole. Accordingly, the clearing and grubbing provisions must be read together with other contract requirements pertaining to excavation, backfill and clean-up in order to ascertain the totality of Appellant's responsibilities. These latter provisions obligated Appellant to remove debris and excess excavation from the site so as ultimately to leave the completed project in "a neat and clean condition." See Contract Specifications §02200, paragraphs 3-03, 3-04 and 3-10. Since the term "debris" is defined broadly in Contract Specifications §02010, paragraph 03d to include leaves and tree trimmings and the term "excavated material" necessarily would include tree stumps and roots, the contract as a whole indisputably mandated that all materials derived from the clearing and grubbing operations be removed from the site.

At issue here is the method of removal intended by the contract. Appellant contends that the contract was written in such a manner as to mandate the use of a burning operation as the means of removal for material derived from its clearing and grubbing work. In this regard, Appellant notes that burning is a common method used in the removal of organic materials derived from clearing and grubbing and that it was reasonable to interpret the contract as requiring this operation since the burning operation requirements were placed directly behind the clearing and grubbing provisions in the contract. This interpretation is said to be reinforced by the existence of language elsewhere in the contract requiring that specific materials such as excess or unsuitable excavation actually be transported from the site. Compare Contract Specifications, §02200, paragraph 3-03e, §02820, paragraph 3-10. Since the contract allegedly was silent with regard to transporting materials resulting from the clearing and grubbing operation, we are told that burning must have been intended.

Neither the contract nor the record, however, prescribes burning as a method of removing debris. Instead burning is identified as a means of reducing the volume of debris for purposes of efficient and inexpensive hauling. The ash residue which would result from any burning operation is listed under the contract definition of debris and, accordingly, would have to be transported from the site if produced. See Contract Specifications §02010, paragraph .03d, §02820, paragraph 3-10. Thus, hauling would have been the method of removal regardless of whether burning was employed to reduce bulk. The hauling of materials, however, would have been less costly to Appellant had burning been permitted.

The ultimate issue, therefore, is whether the contract warranted that burning could be utilized to reduce the volume of debris resulting from the clearing and grubbing operations. In this regard, ". . . a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself." Dale Construction Company v United States, 168 Ct.Cl. 692, 699 (1964). Put another way, a warranty amounts to a promise to indemnify the promisee for any loss if the

fact warranted proves untrue. Metropolitan Coal Co. v Howard, 155 F.2d 780, 784 (2nd Cir. 1946). Here, however, DGS contractually did not represent to Appellant that burning could be utilized at the job site. Contract Specifications §02200, paragraph 3-02 merely apprised Appellant that any burning operations undertaken would have to comply with the requirements set forth in that paragraph as well as applicable local ordinances, codes and regulations. Such a provision hardly could be read to relieve Appellant of the obligation to research the applicable ordinances, codes and regulations and determine whether a burning operation was feasible. Accordingly, the contract, in my view, did not warrant that burning could be utilized to reduce the volume of debris derived from clearing and grubbing.

In summary, the captioned contract clearly required that all debris be removed from the contract site. Whether Appellant could make portions of this debris more manageable and hence less expensive to dispose of depended upon whether it could comply with the contract and local requirements for burning. When Appellant bid the job without verifying that the conditions imposed upon burning operations by Howard County could be satisfied, it assumed the risk that a local permit would be denied and that its disposal costs would be increased.

For the foregoing reasons, therefore, I concur with Mr. Ketchen's conclusion that the appeal should be denied.