CONSTRUCTION CLAIMS MONTHLY

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FORUM SELECTION CAN DETERMINE WHETHER YOU GET PAID

A case involving a dispute over whether Texas or California would get to decide a payment dispute had big consequences for an unpaid subcontractor.

Vita Planning and Landscape Architecture, Inc. v. HKS Architects, Inc., 2015 Cal. App. Lexis 832 (Sept. 25, 2015) involved a Texas architectural firm, HKS Architects, Inc. (HKS), that provided architectural services on a hotel development project in Mammoth Lakes, California. HKS selected a California firm—InSite, subsequently bought by Vita Planning and Landscape Architecture, Inc. (Vita)—to perform landscape design on the project. After the project owner stopped issuing payments, Vita filed a complaint against HKS seeking $370,650 in damages for work it performed but was not paid for.

Vita's complaint was filed in California, but HKS moved to enforce the Texas forum selection clause contained in its Prime Agreement with the project owner. HKS argued that "the contract upon which [Vita] has filed suit" incorporated the Prime Agreement's terms, including forum selection. HKS and Vita had never signed a contract though they drafted one. But Vita performed work during the project's design phase. Thus, they "adopted [the contract's] provisions by performance thereunder," HKS claimed.

Both a trial court and the appellate court agreed that a valid contract existed between the parties. Vita's complaint affirmed that it entered into a "contractual agreement," and Vita conceded that the parties "conducted themselves as though they had an agreement." The appellate court was unconvinced that the parties intended to "negotiate a more complete contract in the future," an argument Vita made by pointing to an "Architect and Consultant Agreement and Release" that InSite signed prior to the Vita acquisition. That release referenced the contract (it authorized HKS to withhold payment for Vita's services until Vita signed the contract) but did not provide "assurances" of a separate, future agreement, the court found.

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CONTRACTOR WARRANTIED ONLY ITS 'WORKMANSHIP'—BUT WHAT'S THAT?

Warranty

Equitrans Services, LLCv. Precision Pipeline, LLC, 2015 U.S. Dist. Lexis 173454 (W.D. Pa. Dec. 31, 2015)

A contractor's warranty obligations may or may not be as far-reaching as a project owner contended, depending on what the contractor's contractual workmanship responsibilities were.

Equitrans Services LLC and Equitrans Investments, LLC (collectively, Equitrans) hired Precision Pipeline (Precision) to construct a 45-mile natural gas pipeline through Pennsylvania and West Virginia for $75.4 million. Following completion of the construction, 29 slides occurred along the project right-of-way. Equitrans, itself obligated to restore the landowners' property, demanded that Precision repair the slides. Precision repaired some and offered to repair others on a time-and-materials basis. Instead, Equitrans made the repairs itself, incurring a total of $6.7 million in damages. It then sued Precision, alleging breach of warranty (among other claims). Equitrans asserted that Precision was obligated to remedy all the slope failures.

The warranty wording

Section 8.1 of the parties' contract stated that Precision "warrants its Work against all deficiencies and defects in materials and/or workmanship and as required for [sic] in the Contract Documents." It also provided that "Contractor shall guaranty or warrant its Work for a period of one (1) year from the date of substantial completion of its Work."

Equitrans interpreted these two sentences separately, thereby reducing their limitations. According to Equitrans, the first meant that Precision promised there would be no defects or deficiencies in its workmanship or materials *without* any reference to a time limitation. And the second was a separate "bumper-to-bumper" warranty of Precision's "Work" that lasted for a year and was *not limited* to defects caused by the contractor's workmanship or materials. Thus, Equitrans argument was: Since all the slope failures occurred within this one-year time limit, and any slide was certainly a deficiency in Precision's "Work," all the slides were covered by the Section 8.1 warranty.

Article 64 of the project specifications also addressed Precision's warranty obligations. That provision held that the "Contractor shall warrant all earthwork for a period of fifteen (15) months after the retention has been accepted" and that it "agrees to remobilize to repair any earthwork or piping defect within fourteen (14) calendar days after receiving written notification that a project defect is attributable to the Contractor's workmanship or materials." Equitrans argued that this "all earthwork" warranty also covered the slides. Thus, by refusing to repair the slope failures within the above timeframe, the contractor breached its warranties.

Warranty of defective workmanship only

Precision disputed its obligation to remedy all but two of the slides. It maintained that it warrantied against defects in *its materials and workmanship only*—not defects caused by others. And, according to Precision, Equitrans failed to demonstrate that Precision's materials or workmanship caused the 27 slides in question.

The court found this reading of the warranties "the more logical." For example, it reasoned that separating out the second sentence of Section 8.1 would render the first superfluous. And it was hard to believe the parties would have put a time limit on one warranty (the "bumper-to-bumper" one) and not the other (for Precision's defective workmanship).

Additionally, Article 64's language, which restricted the earthwork warranty to defective workmanship, supported Precision's assertion. Equitrans' argument that Precision warrantied "all earthwork" was belied by the additional words of that provision: "after receiving written notification that a project defect is *attributable to the Contractor's workmanship or materials*." (Emphasis added.)

Design specs v. performance specs

Once the court concluded that Precision's warranty was limited to defective workmanship, it had to decide what "workmanship" was exactly. On that point, the contract contained an ambiguity that couldn't be resolved at the summary judgment stage.

Precision argued that its responsibilities were limited to constructing what Equitrans designed. It asserted that "Equitrans impliedly warranted the suitability of its design specifications, and Equitrans cannot rely on 'boilerplate' contractual provisions to shift responsibility to Precision for defects in Equitrans's design." See *U.S. v. Spearin*, 248 U.S. 132, 136-137, 39 S. Ct. 59, 63 L. Ed. 166, 54 Ct. Cl. 187 (1918).

However, *Spearin* applies only where the contractor relies on owner-provided design specs—not performance specs. The difference, outlined in *A.G. Cullen Construction, Inc. v. State System of Higher Education*, 898 A.2d 1145, 1156-57 (Pa. Commw. Ct.2006), is that design specs "describe in precise detail the materials to be employed and the manner in which the work is to be performed," whereas performance specs describe an objective standard and allow for discretion (such as in selecting means and methods) in achieving that objective. See also *Aquatrol Corp. v. Altoona City Auth.*, 296 F. App'x 221, 224 (3d Cir. 2008).

Here, Equitrans argued that it didn't provide any design specs related to earthwork. It presented evidence that Precision assumed responsibility to undertake earthwork mitigation measures—such as, to inspect all surfaces before beginning work, to inform Equitrans of "unacceptable" surface or subsurface conditions, and to refrain from beginning work until condition deficiencies were corrected. Plus, the project specs addressed Precision's responsibility to recontour project areas and recognized that "[s]tabilization of disturbed slopes may require the Contractor to determine and install sufficient mitigation ... to guarantee that slips will not occur."

The court also found that conflicting theories as to the root causes of the slides couldn't be resolved at summary judgment. Precision's expert opined that the slope failures were caused by the pipeline being routed on overly steep slopes and by the fact that the rights-of-way were located over old and/or active landslides or terrain susceptible to landslides. On the other hand, Equitran's witness testified that the primary cause of the slides was a failure to use engineered stability measures. He also questioned other workmanship issues, including the quality of the fill, the placement of additional fill over steep slopes, and inadequate control of groundwater seepage.

The court concluded that Precision was entitled to judgment on just 10 of the slides—those whose cause could not be determined without the specialized/ technical knowledge that Equitrans failed to offer. Thus, the court granted Precision's motion for summary judgment as to the slides numbered "20" through "29" only.

Editor's Note: There was an inherent problem in the way the contract's warranty clause was drafted. It is not uncommon on many construction jobs for a contractor to have at least some design/build responsibility, either for design of a part of the project or for decisions on the means of achieving the owner's design. Yet even though the owner expressly places some design decisions on the contractor, often the owner does not craft the warranty clause so that it covers defects in design. This disconnect between the contractor's design responsibility for soils stabilization and the limited "material and workmanship" warranty, which made no reference to design, is apparent in this case.

A related point concerns the court's interpretation of *Spearin*—that this doctrine of an owner's warranty of fitness of design does not apply to a design/build contract. In a well-reasoned decision in *Coglin Electrical Contractors, Inc. v. Gilbane Co.* (reported in *CCM*, Vol.37, No.10), the court there held that there was a sliding scale analysis applicable to a contractor's design liability versus the owner's responsibility where both participate in the design. ❖

PARTIAL PERFORMANCE UNDERCUT 'INTENTION NOT TO PERFORM' CLAIM

Contracts — Fraud

RMS of Wisconsin, Inc. v. S-K JV, 2015 U.S. Dist. Lexis 173560 (E.D. Wis. Dec. 31, 2015)

A subcontractor cried fraud when communications with the general contractor broke down before it could earn $6.3 million on a $6.785 million subcontract. But the fact that the parties started down the road of performance belied any charge that they never intended to do so.

General contractor Shea-Kiewit JV and J.F. Shea Construction, Inc. (collectively, Shea) hired excavation subcontractor RMS of Wisconsin, Inc. (RMS) to perform on the Indianapolis Deep Tunnel Project for a total of $6.785 million. After Shea paid RMS approximately $470,000, a dispute over equipment rates brought the project to a standstill. RMS, a minority or women-owned business, filed a complaint alleging fraud in the inducement, breach of contract, and breach of the covenant of good faith and fair dealing. RMS argued that Shea never intended to honor the subcontract and instead used RMS to fulfill a City of Indianapolis requirement to hire minority and women-owned business enterprises.

Fraud in the inducement requires proof of an untrue statement, made with the intent to defraud, and for the purpose of inducing the other party to act on it, which the other party reasonably does to its detriment. *Kailin v. Armstrong*, 2002 WI App 70, P 31, 252 Wis. 2d 676, 702, 643 N.W.2d 132, 145-46. RMS alleged that Shea knew at the time it signed the subcontract that it didn't intend for RMS to fully complete the subcontract work or to pay RMS the full $6.785 million value of the contract. RMS pointed out that Shea was well acquainted with RMS's equipment prices prior to entering the subcontract (the parties had worked together for six years on a previous project); therefore, Shea's contention that the contractual relationship broke down over disputed equipment rates must be untrue. The record also showed that, at the parties' final meeting on payment disputes, one of Shea's representatives asked RMS, "You didn't really think you were getting a $6.785 million contract, did you?" And another representative stated that the "situation had to be resolved soon or we could all go to jail."

Notwithstanding these contentions, RMS's allegation failed on the very first fraud-in-the-inducement requirement: an untrue statement.

The fact that the parties performed, if partially, under the subcontract was evidence that Shea did, in fact, intend to perform. See *Wausau Med. Ctr. v. Asplund*, 182 Wis. 2d 274, 514 N.W.2d 34 (Ct. App. 1994), in which an employer argued that the defendant intentionally misrepresented his interest in returning to work; the employee quit 45 days after he started his employment, but there was no false representation because the employee did return to work, if briefly. (An unpublished Wisconsin case, *Constr. Mortgage Investors Co. v. VWH Dev.*, LLC, 2009 WI App 56, P5, 317 Wis. 2d 732, 768 N.W.2d 64, affirms this principle. There, a "bit of performance [under an agreement] negates any inference that [the party] never intended to perform.")

RMS tried to show that the parties didn't even partially perform, asserting that the only payroll Shea paid was for Indiana employees. But the record showed that Shea paid all of RMS's invoices submitted over a three-month period and subtracted the amount paid ($467,947.77) from the full contract price. The fact that RMS performed and was paid negated the fraud allegation.

Lump sum vs. T&M

The court did agree with RMS that the subcontract was a lump sum agreement.

Shea argued that the subcontract was for time and materials, pointing out that RMS's invoices (which billed for the costs of labor payroll, equipment, overhead charges, a management fee, vehicle expenses, travel expenses, and a mark-up fee) were not typical in a lump sum scenario. But each payment application

also noted the original contract sum and subtracted from that number the "total completed and stored to date" to get the "balance to finish, including retainage."

Furthermore, the subcontract allowed for price adjustments related to additional work not covered in the agreement—unnecessary in a time-and-materials agreement. And, most convincing, the subcontract unambiguously stated that the contractor agrees to pay the sub the sum of $6,785,000 for "the full and complete performance of the Work."

The court dismissed RMS's fraud in the inducement claim and granted the sub's motion for partial summary judgment as to the lump sum contract issue. ❖

FEDERAL CASES

NO DEFAULT TERMINATION WHERE GOVT. KNEW PROJECT COULDN'T BE COMPLETED AS SPEC'D CONTRACT TERMINATION

Appeals of: Nelson, Inc., 2015 ASBCA Nos. 57201, 58166 Lexis 459 (Dec. 15, 2015)

Slow-going progress on a portion of the contract worth $1 million meant that a contractor lost out on earning the remaining $8 million worth of contract work. But the Armed Services Board of Contract Appeals ruled that the failure wasn't the contractor's fault.

The U.S. Army Corps of Engineers (Corps) contracted with Nelson, Incorporated (Nelson) to construct stone dike extensions at four sites on the Mississippi River for a lump sum of $9.2 million and in a total of 165 days. The Corps terminated Nelson's contract for default after the contractor had begun work at just two of the four sites because it failed to deliver work within the scheduled time. Nelson appealed the decision, and the Armed Services Board of Contract Appeals found in the contractor's favor, ruling that the government's default termination was improper. This ruling relied on the Board's interpretation that the four project sites were severable and therefore required discrete analysis as to the propriety of the termination.

Nelson never got a chance to begin work on two sites, one in Arkansas and one in Mississippi, that made up the majority of the project (approximately $8 million and 125 days' worth). Rather, the agency's decision to terminate was based on Nelson's partial performance at two Tennessee sites. The Corps issued a notice to proceed (NTP) for "Loosahatchie" on October 1, 2009 and "Robinson Crusoe" on October 15, 2009, and the contract prescribed a 20-day timeline for each site. By November 9, the work was still incomplete. The Corps issued a stop work order (SWO) and a "show cause" letter. It terminated Nelson's contract for default on February 9, 2010, stating that Nelson had completed just 5 percent of the Loosahatchie work and 2 percent of the Robinson Crusoe work.

Under F.A.R. 52.249-10, the contract gave the Corps the right to terminate for default if the contractor "fails to prosecute the work or *any separable part*, with the diligence that will insure its completion within the time specified in the contract" (emphasis added). Furthermore, where a contract is separable, severable, or divisible, and a contractor is delinquent on just one portion of the contract work, it is improper for the government to terminate the entire contract for default. See *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA P 18,026 at 90, 471-72.

How to divide a contact

Here, the work was separable, the Board ruled. First, the contract listed separate pricing for each activity (e.g., mobilization, demobilization, grading, excavation, paving, and standby) at each site. Second, the contract prescribed separate performance periods for each site—i.e, 20 days each for the Tennessee sites, and 50 days and 75 days for the other two. It also emphasized that separate NTPs would be issued for each site and referred in the "Project Description" to each site as a separate "contract." The Board noted that commencement of work at each location was independent of completion of work at others, and the work at each site "did not involve sequential or incremental and interdependent progression of construction."

Because the contract portions were separable, the F.A.R. default clause authorized the Corps to terminate only the portion on which Nelson performed in an untimely manner. That did not include the Arkansas and Mississippi work, for which the Corps never issued an NTP. Without a start or completion date for those tasks, there was "no yardstick to measure whether Nelson failed to diligently prosecute the work at those separable sites," the Board explained. Therefore, the government's default termination for the Arkansas and Mississippi site work was improper and must be converted to one of convenience.

Contractor couldn't get over 'hump'

Turning to the work Nelson began in Tennessee, the Board focused on the crucial matter of a "sediment hump" at Loosahatchie that precluded the contractor's ability to build the dike extension.

The Corps knew about the hump and did not resolve the problem prior to issuing the NTP. A month after the NTP, the parties executed a contract modification describing a "scour solution." But three months after that, Nelson informed the Corps that the sediment hump was growing larger instead of scouring as the Corps had hoped. The Corps offered no alternate solution. Instead, it terminated the contract for default even though it understood that no contractor could complete the dike extension work as currently specified. The Board ruled that the Corps should have granted Nelson additional time extensions as a result of the hump.

Note that one member of the Board found the above discussion of severability beside the point, since, on the matter of the sediment hump, the result would be the same: Because the Corps didn't solve the problem, it wasn't possible for Nelson to complete *all* specified contract work within the total 165 days set forth in the contract. See *Dynalectron Corp.*

(Pacific Div.) v. U.S., 518 F.2d 594, 207 Ct. Cl. 349 (Ct. Cl. 1975), holding that defective drawings/specs that preclude on-time contract work completion are a bar to default termination.

More time extensions warranted

Additionally, the Corps apparently should have issued time extensions for adverse water-level conditions at the Tennessee sites.

The contract contained a "River Stage Limitations" provision that prohibited stone-placing work at certain water levels. (For example, there was to be no placement of subaqueous stone when the river stage was more than 10 feet above the top elevation of the dike.) And the contract requirement that Nelson continuously prosecute the work made an exception for "any period when work is suspended due to river stages, weather, or other conditions outside the control of the Contractor."

Finally, the Board found that the Corps confused Nelson with its SWO and "show cause" letter. The Corps never fully or explicitly lifted the SWO, nor did it definitively respond to or authorize Nelson's corrective work proposal. "At no time was either a specific corrective action plan or a general overall plan to correct deficiencies formally approved," the Board noted. Plus, given adverse river stages, it was unclear whether Nelson could have performed the corrective work prior to termination anyway.

The Board therefore concluded that there was a reasonable chance Nelson could have completed its work on time and that the Corps' default termination of the Tennessee work was improper.

Dissent focuses on 'progress'

Note that there was dissent within the Board (and this was, primarily, why the question of severability came in.) The dissenting opinion agreed with the conversion to a convenience termination as to the Mississippi and Arkansas site work, but it would have denied the appeal with respect to the Tennessee—Loosahatchie and Robinson Crusoe—work. Essentially, it held that none of the above cited reasons, including the hump problem, was enough to excuse Nelson's lack of progress. According to the dissent's calculations, at the time of the SOW, Nelson had no less than 55 percent of the Loosahatchie work still to complete with just 25 percent of the contract time left, and all of the Robinson Crusoe work to do with just 65 percent of the contract time left.

"Even viewed from the perspective of an 'extended completion date,' it was reasonable to conclude on 9 February 2010, that Nelson would be unable to complete the Loosahatchie and Robinson Crusoe work on time," the dissent opined.

Importantly, this contention is premised on a "failure to make progress" rather than a failure to timely complete work, as in the majority opinion. The dissent noted that the U.S. Court of Appeals for the Federal Circuit requires the Board to consider "whether the contracting officer's decision to terminate for failure to make progress was reasonable given the events that occurred before the termination decision was made."

Editor's Note: The question of whether a federal government contract can be considered severable has been answered inconsistently by the Boards and the Claims Court. A mid-century decision may have stated the issue best: that severability is a "very vexing problem . . . [and] that resolution of the question has more commonly been a matter of the intention of the court" and not the intention of the parties. *Spartan Aircraft Co. v. U.S.*, 100 F. Supp. 171 (Ct. Cl. 1951).

Here, there were four separate projects covered under one contract. Each had its own duration. The concurring opinion added the four durations together and reasoned that the contract had an overall duration of 165 days. The majority rejected that conclusion since the contract segments could have received NTPs at the same time, in groups, or seriatim. Even so, the Board held that two of the projects (Loosahatchie and Robinson Crusoe) should be considered as one severable segment because of their proximity to one another.

The importance of this decision lies in the factors used to find severability. Any contractor confronting a default termination would be well-advised to study these factors to determine whether an argument of severable segments could be justified in its case.

One major factor, not expressly discussed in the opinion but important for the conclusions reached, was that there was no one goal to be achieved by the Corps in having all four segments done within any specific timeframe. For example, if a contractor timely installed plumbing in all but a percentage of a building, the one goal of having a usable building would not have been reached. On the other hand, if there were four buildings with plumbing timely installed in three, making those structures usable independently of the fourth, there might be an argument of four goals, not one. ❖

UNILATERAL CHANGE ORDER PRICE FAILED TO MAKE CONTRACTOR WHOLE

Equitable Adjustment — Contract Modification

Appeal of: BAE Systems San Fran. Ship Repair, 2016 ASBCA No. 58809 (Jan. 11, 2016)

Because the Army didn't negotiate a fixed-price contract modification with its contractor, the government was forced to shoulder the risk of actual costs incurred—including overtime charges.

BAE Systems San Francisco Ship Repair (BAE) was the general contractor on a contract to clean and repair the U.S. Army vessel LSV-5. Just days before contract completion, the Army issued a unilateral contract modification directing BAE to replace 24 sockets located on the main deck. It was undisputed that BAE completed this additional work. It was also undisputed that BAE was entitled to an equitable adjustment. What the parties did dispute was just how much of an adjustment.

The modification instructed BAE to proceed with the work for a price of $96,157, which was based on the government ship surveyor's estimate. After completing the task, BAE submitted a claim for $381,258. With $96,157 paid, the contractor sought an additional $285,101, which it contended was based on actual costs incurred. The contracting officer (CO) denied the claim. The question before the Board was: Which amount represented adequate compensation for the work BAE performed?

Not the government estimate. That was calculated taking into consideration the tasks involved in cropping out and replacing 24 sockets—that is, welding, power tooling, cleaning, painting and testing the sockets. The record showed that the reality of the work was more complicated given that the modification came so late in the project's progress. Replacing the sockets affected the fuel tanks located below deck, and BAE had already completed 98 percent of its fuel tank tasks at the time of the modification. As a result, much of the work it did cleaning tanks, pumping oil into them, and then painting them had already been done and had to be re-done during the socket work.

The Board found similarly inadequate the Army's argument that it could use the price it has historically paid for replacing this socket type on other LSVs. The government failed to show that these historical prices were paid in similar circumstances—that is, when the replacement work was ordered so close to contract completion. In sum, the Board found that the Army had made no effort to determine the extent to which BAE's workforce and schedule would be affected when issuing the modification.

Contractor not obliged to delay

The Army objected to paying for work to be re-done because it contended that BAE should have halted any work related to the sockets as early as June 15, 2007, when the government first identified the need to replace them. The socket issue arose again on June 28, 2007 when the contracting officer (CO) orally directed BAE to do the work (and BAE objected to the price). But the unilateral, written contract modification did not come until July 19, 2007. Before that point, BAE had no obligation "to delay, suspend, or reschedule its existing contract work and risk completing its work late and subject itself to possible assessment of liquidated damages," the Board ruled. It also pointed out that the CO could have minimized the disruptive impact of the replacement work by issuing the change order on either of the two earlier occasions on which the work was identified and discussed.

The Army also argued that, under the contract, BAE agreed to a "fully burdened rate" of $73.50/hour for additional work, while its claim price used an hourly rate of $110.25. This reflected an overtime rate ($73.50 + $36.75), and the government contended that it did not authorize overtime.

The contract's fully burdened rate provision provided that "[o]fferors shall include a fully burdened labor rate to be used in negotiating changes." But there was no negotiation on the socket replacement work. (The Army could have negotiated a fixed-price modification with BAE but didn't, the Board pointed out.) Therefore, it was improper to impose the $73.50/hour fully burdened rate on BAE's overtime work.

After disallowing some labor charges claimed after the replacement work was completed, the Board ruled that BAE was entitled to $261,790 in equitable adjustment.

Editor's Note: Essentially, the Army was arguing that BAE's claim was simply too high for the work included. In support of this "gee whiz" position, the Army relied on two bases: (1) internal estimates and (2) amounts paid for similar work on other projects. The estimates were proven to be incomplete and faulty, and the "similar work" was shown not to be similar. That left BAE's actual cost data, and the Boards have always stressed the preference for actual costs over estimates.

What the Army was actually trying to show was that BAE overcharged for its efforts. That kind of defense is always difficult to prove. It requires an expert's detailed review of labor and equipment usage, analyses of the quality of the contractor's supervision, and the reasonableness of planning and cost controls. This defense also often requires proof of the contractor's own mistakes, missteps, and inefficiencies (tear-out work, crew turn-over, over-manning, etc.). There was no such evidence presented. (The Army tried to use portions of a government audit report to challenge BAE's costs to which the Board stated that it makes decisions on these questions, not the auditor.) ❖

BID PROTESTS

BIDDER ALLOWED TO CORRECT OUT-OF-WHACK PRICES

Denied: Bid Modifications

Matter of: Ultimate Concrete, L.L.C., 2016 U.S. Comp. Gen. B-412255,B-412255.2 (Jan. 13, 2016)

Though several bid line item prices were millions of dollars away from other bidders' prices and government estimates, the bid's total price was reasonable—and that's all that mattered.

Ultimate Concrete, L.L.C. (Ultimate) protested an award by the Department of the Army of a $10.1 million fence construction contract to Fortis Networks, Inc. (Fortis). Ultimate, whose bid was the second lowest at $10.4 million, claimed that the Army improperly allowed Fortis to revise its bid and reallocate a contract line item (CLIN) after bid submission. The Comptroller General found that the government's action was improper but concluded that Ultimate was not prejudiced as a result because the reallocated bid didn't change the bidders' relative competitive positions.

The project entailed removal and replacement of 2.5 miles of an existing section of fencing along the United States/Mexico International Border. The invitation for bids (IFB) described a base scope of work and two options. The base work, labelled CLIN 0001, was to remove and replace approximately 3,850 linear feet of fence, as well as construct a patrol road, retaining wall, culverts, and vehicle and drainage gates. Option 1, labelled CLIN 0004, called for an additional 3,100 linear feet of fence. And Option 2, labelled CLIN 0007, covered the construction of an access road. All three CLINs required the contractor to provide all materials, labor, and equipment necessary to complete the described work.

Fortis' initial bid prices for CLINs 0001 and 0007 were, respectively: $3 million and $4.3 million. Compared to the other five bidders', these numbers were way off. The next lowest

price for CLIN 0001 was $5.3 million, and the next highest CLIN 0007 price was $709,300.

Five days after bid submission, Fortis asked the Army for permission "to redistribute the CLIN numbers to be more balanced," explaining that it didn't want to raise its price but to correct an allocation error. Fortis submitted evidence of its mistake in the form of estimating worksheets, asserting that it had initially prepared a single bid price for the entire project and then erred when it split the totals among the CLINs. Specifically, it claimed that it mistakenly read CLIN 0001 to be "fence only" and CLIN 0007 "as *all* roads/culverts/retaining" work.

The contracting officer (CO) accepted this evidence, reasoning that there was little risk of higher costs to the government since Fortis' base price was "lower than appears to be correct," while the access road option, "which may not be awarded," was priced higher. As a result, the Fortis bid, though "mathematically unbalanced," was not "materially unbalanced" or "unresponsive." The Army granted permission for the reallocation. Fortis' revised prices for CLINs 0001 and 0007 were: $6.5 million and $283,525.

In general, agencies may not consider whether an alleged bid mistake is correctable if the bid is unbalanced (i.e., nonresponsive). An exception applies where, as here, the mistake involves the allocation among line item prices only and has no bearing on the evaluative ranking of bids. See *McKnight Constr. Co.*, 1994 U.S. Comp. Gen B-257782, 94-2 CPD para. 177 at 3-4 (1994) and *Satellite Servs., Inc.*, 1986 U.S. Comp. Gen. B-224412, 86-2 CPD para. 521 at 2 (1986).

However, the bidder must submit "clear and convincing evidence" of both the existence of the mistake *and* what it intended to bid. *Wynn Construction Co.*, 1986 U.S. Comp. Gen. B-220649, 86-1 CPD para. 184 at 3, recon. denied, B-220649.2, 86-1 CPD para. 360 at 4 (1986). The Comptroller agreed with Ultimate that Fortis failed to prove this latter point.

Fortis stated that it misread the CLIN requirements and believed that the base work included fencing only and not the additional construction elements of a road, wall, culverts, etc. As a result, while Fortis' initial bid did include all the necessary equipment, materials, and labor necessary to perform the additional construction elements, it placed their associated prices under the wrong CLIN. That could be a genuine mistake, or an error in judgment or interpretation of the—very clear—solicitation instructions, the Comptroller reasoned. It was hard to know since Fortis' reallocated numbers were messy, and the bidder provided no straightforward explanation for its revision. For example, it transferred all the extra costs associated with fence work (e.g., for retaining walls) to CLIN 0001 and did not place any in CLIN 0004, which required the same extra construction elements to support the fence work. Thus, Fortis' evidence of the bid it intended to turn in was far from "clear and convincing," and the Army improperly allowed the reallocation after bid opening.

Nevertheless, as the government contended and the Comptroller conceded, because the bid correction didn't change Fortis' total price, neither did it change the bidders' relative competitive positions. Ultimate was unable to show that it would have had a substantial chance of receiving the award but for the agency's action.

Total bid price was what mattered

Ultimate did try to argue that the agency shouldn't have even considered Fortis' bid in the first place because its prices were so out of whack compared to those in the other bids.

However, the Comptroller found it reasonable that the Army focused on Fortis' total price, which was not so far out of line (about 7.5 percent less than the government estimate and 3 percent less than the second-lowest bid). Second, Fortis' mistake involved the allocation of price across line items only. Importantly, this was not a case of failing to account for contractual work or initially underbidding and then making an upward adjustment to a total price after bid submission. As a result, the award was allowed to stand, and the protest was denied.

Advanced payment risk was small

Ultimate also argued that Fortis' initial bid created a risk of advance payment. It reasoned that Option 2, which was for construction of an access road, have to be completed first; therefore, by overbidding that line item, Fortis was ensuring it would receive a large sum upfront. F.A.R. used to but no longer prescribes automatic bid rejection where there is a risk of advance payment. See F.A.R.; Part 15 Rewrite; Contracting by Negotiation & Competitive Range Determination, 62 Fed. Reg. 51224, 51225 (Sept. 30, 1997). Now, the government must conduct a risk assessment instead.

Here, the Army concluded it was unlikely the optional access road work would have to be performed first. In fact, both prior to award and in response to the protest, it explained that the notice to proceed for CLIN 0007 might be delayed or not issued at all because of ongoing condemnation proceedings. The Comptroller ruled that the Army reasonably determined that the risk of an advance payment to Fortis was minimal. ❖

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California statute protects subs

So there was a contract between the parties, and it incorporated the forum selection clause. Nevertheless, the appeals court ruled that the clause was unenforceable.

The forum selection provision read: "All claims, disputes, and other matters in question between the parties arising out of or relating to Agreement ... be resolved by the ... courts in ... Texas."

Previously, the trial court had found this language *enforceable* because HKS and Vita were two design professionals—and not construction contractor and subcontractor. Therefore,

California's Code Civ. Proc. §410.42 did not apply; the statute precludes out-of-state contractors from forcing California subcontractors to litigate certain contract disputes out of state.

Specifically, the statute renders "void and unenforceable" a contract provision "between the contractor and a subcontractor with principal offices in this state, for the construction of a public or private work of improvement in this state" that "purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state" or that "purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in this state or the courts of this state."

On appeal, Vita successfully characterized itself as a "subcontractor" and HKS as a "general contractor" under §410.42.

Forum selection would violate 'public policy'

At the center of the parties' payment dispute was a paid-if-paid clause contained in the "Architect and Consultant Agreement and Release." HKS explained that it inserted the provision because it didn't want to be on the hook for paying consultants if it wasn't itself being paid by the owner for their work. Pay-if-paid clauses are enforceable in Texas. They are not in California.

Vita argued that enforcing the forum selection clause in this case would therefore violate California public policy. And "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 12 [108 Cal. Rptr. 2d 699 (2001).

The court declined to consider whether this argument provided a basis to invalidate the forum selection clause because it had another one.

Statute protects designers, too

Vita argued, §410.42 barred the forum selection clause, and the appellate court agreed.

The statute does not define the terms "contractor" and "subcontractor." Black's Law Dictionary defines a "contractor" simply as "a party to a contract"—and not specifically a "builder," as HKS contended. Therefore, the court ruled that the statute was not limited to "builders," nor did it exclude an architect or other design professional.

It ruled similarly with regard to "subcontractor," which Black's defines as "[o]ne who is awarded a portion of an existing contract by a contractor, esp[ecially] a general contractor." The court found Vita was "unquestionably" a sub because it was "awarded a portion" of HKS's contract and because it didn't have "a direct contractual relationship" with the project owner. (It was undisputed that Vita had no interaction, communication, or negotiation with the owner.)

24 states bar forum selection clauses

The court explained that §410.42 was designed specifically to offer California subs the protections of California courts and law, including prompt pay laws. See *Templeton Devel. Corp. v. Superior Court*, 144 Cal.App.4th 1073, 1083 [51 Cal. Rptr. 3d 19] (2006). The idea behind the statute is to reduce the unfair advantage of large, out-of-state general contractors who can muscle California subs into signing away their rights to have disputes resolved in the state where they work and perform. At least 24 states have similar codes voiding forum selection clauses that take litigation outside the state where the project is located, the appeals court noted. See Travers & Berg, *Forum-Selection Clauses After Atlantic Marine* (Summer 2014) 34 Construction Law. 6.

The court concluded that §410.42 applied, and Vita will not need to take its payment dispute to Texas.

Editor's Note: A clear implication of this case is that multi-state contractors—including architects—should research the contract laws of each state in which they do business. A contractor may have to modify its subcontract terms and conditions to meet the unique statutory and decisional mandates in each separate jurisdiction. In addition, contractors may have to seek a modification of the project owner's terms and conditions.

Here, the hotel owner and HKS had a contract with a Texas forum selection in the event of disputes. That clause is acceptable in California. However, HKS was not allowed to have the same provision in its subcontract. Had there been a three-way dispute between the owner, HKS, and Vita, the case might have been split in two, a part being tried in Texas and a part being tried in California.

There was no indication here of an HKS-owner dispute. Had there been one, HKS's posture with the owner would have been heavily influenced by the knowledge that its pay-if-paid clause with Vita was unenforceable. In other words, HKS might have settled its disputes with the owner not realizing that it remained fully liable to its sub for all payments due. ❖