

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MCKINNEY DRILLING COMPANY : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
: :  
BTK, A JOINT VENTURE OF :  
BARCLAY WHITE INC., :  
TORCON, INC., AND :  
KEMRODCO, INC. : NO. 97-2983

M E M O R A N D U M

Padova, J.

October , 1997

Plaintiff, McKinney Drilling Company ("McKinney") brings this action against Defendant BTK, a Joint Venture of Barclay White, Inc., Torcon, Inc., and Kemrodco, Inc. ("BTK"), alleging breach of contract. BTK submits, for the Court's consideration, a Motion to Dismiss Count III of McKinney's Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, BTK's Motion will be denied.

**I. Factual Allegations**

BTK, a contractor, entered into an agreement with the University of Pennsylvania for the construction of the Biomedical Research Building II ("Biomedical II"), located at 417 Curie Boulevard in Philadelphia. In June, 1996, McKinney, a potential subcontractor, submitted a series of written proposals to BTK whereby McKinney offered to furnish all labor, materials,

equipment and supervision for the installation of caissons or drilled piers for the foundation of Biomedical II. On August 29, 1996, by letter of intent, BTK accepted McKinney's final revised proposal to provide these services for the Biomedical II project.<sup>1</sup> According to that proposal, the parties agreed that all subsurface excavation down to plan bottom elevation, including drilled piers, was to be performed on an unclassified basis, for a lump sum price of \$690,000.<sup>2</sup> However, for each cubic yard of rock which McKinney excavated below the plan bottom elevation of any pier, McKinney was entitled to additional compensation of \$1,450.00. The parties also designated "unit prices" for additions or deductions to the contract amount.<sup>3</sup> A subcontract, written in light of this proposal, was sent from BTK

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<sup>1</sup> Plaintiff attaches to the complaint copies of the revised proposal and letter of intent as Exhibits "A" and "B" respectively.

<sup>2</sup> Unclassified excavation refers to earth of unknown composition; whether the material to be excavated or moved is sand, loam, clay or rock, the contractor agrees to remove the unclassified excavation at a given price. See Weaver-Bailey Contractors, Inc. v. United States, 19 Cl Ct. 474 (U.S.Cl.Ct. 1990).

<sup>3</sup> The proposal contains a section labeled "UNIT PRICES." It reads as follows:

Soil Excavation	+ \$50.00 c.y. - \$45.00 c.y.
Rock Excavation	\$1,450.00 c.y.
Permanent Pipe	\$ 200.00 l.f.
Rebar Install (Add Only)	\$ .40 per lb.
Concrete	+ \$60.00 c.y. - \$54.00 c.y.

to McKinney on or about October 1, 1996. McKinney returned a modified signed copy to BTK about two weeks later.<sup>4</sup>

To date, Plaintiff has allegedly completed work both above and below plan bottom elevation and is seeking compensation. Plaintiff bases its claim for compensation on alternative theories of recovery. In Counts I and II of the Complaint, Plaintiff seeks compensation consisting of the agreed upon lump sum of \$690,000 for subsurface work down to plan bottom elevation, plus per unit payment for excavation below plan bottom elevation, less potential credits. In the alternative, under Count III, Plaintiff seeks compensation comprising the same \$690,000 lump sum payment plus per unit additions both above and below plan bottom elevation, less unit credits. The moving party asks the Court to exclude Count III as a viable alternative reading of the subcontract based on the document itself. For the reasons that follow, the Court is unwilling to do so at this stage in the litigation.

## **II. Legal Standard**

A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) only if the plaintiff could prove no set of facts in support of the claim that would entitle it to relief. See ALA, Inc. v. CCAIR,

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<sup>4</sup> Plaintiff's Complaint has five counts. Counts I and IV are based on the revised proposal. Counts II, III and V are based on the subcontract. A copy of the subcontract is attached to the Complaint as Exhibit "C".

Inc., 29 F.3d 855 (3d Cir. 1994). In deciding a motion to dismiss, the reviewing court must take as true all of the factual allegations made in the complaint and must make all reasonable inferences in favor of the plaintiff. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989); Wisniewski v. Johns Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). When reviewing a complaint, a court should consider not only the allegations contained in the complaint itself but also the exhibits attached thereto, which the complaint incorporates pursuant to Federal Rule of Civil Procedure 10(c). Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192 (3d Cir. 1993). Plaintiff has attached as exhibits to the Complaint, a copy of the proposal, letter of intent and subcontract. I will consider them accordingly.<sup>5</sup>

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<sup>5</sup> In addition to the exhibits annexed to the Complaint, both Plaintiff and Defendant introduce other documents. In its submission in opposition to Defendants' Motion to Dismiss, Plaintiff introduces sections of the project specifications and correspondence between Defendants' project manager and McKinney's counsel. Defendants attach to their Reply Brief the Affidavit of Edwin Jordan, President of Defendant Barclay White, Inc. If the Court were to consider these documents, which are neither attached to the Complaint nor expressly incorporated therein, the Motion would have to be properly converted into a summary judgment motion. Fed. R. Civ. P. 12(b)(6). The parties in this case have not had sufficient opportunity for discovery and any such conversion at this point in the litigation would be premature. Therefore, in deciding the Motion to Dismiss, the Court will consider only those documents attached as exhibits to the Complaint itself and incorporated thereby. Fed. R. Civ. P. 10(c).

### III. Discussion

Defendants argue that on its face, the subcontract is clear as to the scheduled compensation for the Biomedical II project. Because the subcontract distinguishes work performed above plan bottom elevation from work performed below plan bottom elevation, Defendants contend that Plaintiff's claim under Count III, seeking per unit compensation for work both above and below plan bottom elevation, in addition to the agreed upon lump sum, is "refuted by the very terms and provisions of the document on which [it is] based." (Defts.' Mem. of Law in Sup. of Mot. to Dis. at p.2.) Defendants ask the Court to decide therefore, that the subcontract is unambiguous and clearly provides for "per unit" additional compensation only for work completed below plan bottom elevation. To resolve this issue at this early stage, the Court would need to be able to determine, from the subcontract itself, the parties' intent as to the compensation schedule.

The intent of the parties is ascertained from the document itself when the terms are clear and unambiguous. See Steuart v. McChesney, 444 A.2d 659 (Pa. 1982). A contract is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." City of Erie, Pennsylvania v. Guaranty Natl. Insurance Co., 109 F.3d 156, 163 (3d Cir. 1997) (quoting Steele v. Statesman Insurance Co., 607 A.2d 742, 743 (Pa. 1992)). If there is ambiguity, then the court must consider the words of the agreement and the

possibility of alternative meanings. See Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96 (3d Cir. 1986).

A plain reading of the subcontract does not yield a clear intent of the parties. By virtue of Count III, Plaintiff is asserting, alternatively, that the intent of the parties allowed for per unit compensation for work both above and below plan bottom elevation. Plaintiff relies on the section of the subcontract entitled, "Units, Options & Alternates." (Complaint at p.9.) This section reads as follows:

Unit Prices - (Per Section 01026) The Unit Prices may, at the contractor's option, be used for additions or deductions to the Contract Amount. Unit prices are inclusive of contractor's labor, material, overhead, profit, insurance, taxes and all other applicable contingencies and shall be in accordance with applicable specifications. Differential between Add and Deduct unit prices shall not exceed 10%. Unit prices shall be applied on the net difference in quantity.

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|------------------------------------------------|------------------------------|
| 1. Soil Excavation                             | \$ 50.00/c.y. - \$45.00/c.y. |
| 2. Rock excavation below plan bottom elevation | \$1,450.00 c.y. (ADD ONLY)   |
| 3. Permanent pipe                              | \$ 200.00/l.f. (ADD ONLY)    |
| 4. Concrete                                    | \$ 60.00/c.y. - \$54.00/c.y. |

(Complaint Exh.C at p.6.)

The Court is unable to ascertain from this language, whether the parties intended per unit pricing to be a separate calculation to apply in addition to the lump sum payment "on the net difference in quantity," or whether Plaintiff was only entitled to a per unit addition for work done below plan bottom elevation. The intent is not clear or unambiguous.

Within the context of this Rule 12(b)(6) motion, Count III can only be dismissed if the Court finds that Plaintiff has

alleged no set of facts upon which relief could be granted. See Rocks, 868 F.2d at 645. At this stage, the Court cannot rule out that the intent of the subcontract was to compensate Plaintiff per unit excavated, both above and below plan bottom elevation. Therefore, with respect to Count III, "[i]t cannot be said at this juncture that Plaintiff can prove no set of facts that would entitle [it] to relief." In re Westinghouse Securities Litigation, 90 F.3d 696, 717 (3d Cir. 1996) (citing In re Craftmatic Securities Litigation, 890 F.2d 628, 637 (3d Cir. 1989)). In light of the 12(b)(6) standard requiring the Court to read the Complaint liberally and to construe it favorably to the pleader, and in light of the fact that the clear intent of the parties cannot be unambiguously determined from the subcontract itself, I will deny Defendants' Motion.

An appropriate Order follows.



