

IN THE COURT OF APPEALS OF IOWA

No. 9-610 / 09-0325
Filed November 12, 2009

SENECA WASTE SOLUTIONS, INC.,
Plaintiff-Appellant,

vs.

SHEAFFER MANUFACTURING COL, LLC,
and SHEAFFER PEN CORPORATION, A
Division of BIC USA, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Lee (North) County, Cynthia Danielson, Judge.

Seneca Waste Solutions, Inc. appeals from the district court order granting summary judgment in favor of the defendants on its breach of contract claim.

REVERSED AND REMANDED.

Brenda . Myers-Maas, West Des Moines, for appellant.

Benjamin P. Roach of Nyemaster, Goode, West, Hansell & O'Brien, P.C.,
Des Moines, for appellees.

Heard by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

Seneca Waste Solutions, Inc. (Seneca Waste) appeals from the district court order granting summary judgment in favor of the defendants on its breach of contract claim. Seneca Waste contends the district court erred in concluding the contract between the parties limited the amount it could be paid for its services to \$170,000.00. In the alternative, Seneca Waste contends it is entitled to the full \$170,000.00 available under the contract. We reverse and remand.

I. Background Facts and Proceedings. Sheaffer Manufacturing Co., L.L.C. (Sheaffer) operated a facility in Fort Madison that manufactured writing instruments. In 2006, the company decided to close the facility. The process required the cleaning and decontamination of the facility, and Sheaffer sought bids from several environmental contractors to perform this work.

On September 7, 2006, Seneca Waste submitted a bid to perform the required work for an estimated total cost of \$143,520.67. It submitted a second bid on September 17, 2006, for \$128,756.72 after a change in subcontractors lowered the projected cost of cleanup. Based on its bid, Sheaffer chose Seneca Waste to perform the work.

On November 9, 2006, the parties entered into a written contractual agreement for Seneca Waste to provide the cleanup services. The agreement provides in pertinent part:

2. Scope of Work. The Contractor will furnish all of the materials to perform all of the Work as described in the first page of the letter dated September 7, 2006, and sent by Seneca Waste Solutions, LLC to Michele Pancza, BIC Consumer Products Manufacturing Co. Inc., together with the itemized worksheet used

to calculate the project cost estimate, which are attached hereto and made a part of this Agreement as Exhibit A.

.....
5. Contract Price and Payments. The work shall be charged on a Time and Materials Cost Basis at the rates quoted by Contractor in Exhibit A, except that the Work shall not exceed One Hundred Seventy Thousand Dollars (\$170,000.), inclusive of all taxes, subcontractor fees, and any and all other surcharges, costs and expenses. Sheaffer will pay Contractor upon satisfactory completion of Work and within forty-five (45) days of receipt of invoice.

.....
9. Applicable Law. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be governed and construed with the laws of the State of Iowa without regard to the conflict of law rules of such State.

.....
12. Complete Agreement. This Agreement, together with all exhibits attached hereto, constitutes the full and complete understanding and agreement of the parties relating to the subject matter hereof and supersedes all prior or contemporaneous understandings and agreements relating to such subject matter. Any waiver, modification or amendment of any provision of this Agreement shall be effective only if in writing and signed by the parties hereto.

Attached to the agreement is Seneca Waste's September 7, 2006 letter and bid to Sheaffer.

The first paragraph of the September 7, 2006 letter described in paragraph two of the agreement reads:

Seneca Waste Solutions, LLC, is pleased to submit to the BIC/Sheaffer Pen this Budgetary T&M estimate for performing decontamination/cleaning/demolition services as per the scope of work specified in the Vendor-Provided Sheaffer Closure/Clean-up Activities Document. The project timeline is estimated at 20 working days. All vacuumed and rinsate residuals and decontamination liquids shall be off loaded on site in approved containers. This project shall be performed on a Time and Material Cost Basis Port-To-Port with an estimated cost based upon projects of similar nature, specified scope of work and onsite pre-estimate inspections. Attached is the itemized worksheet used to calculate the project cost estimate.

The bid goes on to note modifications to the scope of work being performed will affect the project time and cost. It further states the estimate for the disposal of 50/50 waste water sludge through Heritage Environmental Services to be \$5186 for 4000 gallons of sludge with the amount “subject to change based on waste analysis and volume.” The bid concludes with the following language:

Heritage environmental estimate is based on preferred rates extended to Seneca via a mutual aid agreement. Extra effort has been made to quantify the cost of this scope of work, however due to its nature, the rates and terms may be subject to modifications as the work proceeds and with mutual consent of BIC.

Seneca Waste began performing its services for Sheaffer. Around that time, Sheaffer shut down its on-site waste water treatment plant. Seneca Waste was informed of the shut down, but did not object. The rinsate, or washwater, was then disposed of through Heritage Environmental Services rather than on-site as previously anticipated. The amount of waste water requiring treatment or disposal ultimately amounted to 18,000 gallons.

On January 5, 2007, an email from Michele Pancza to another Sheaffer employee states Pancza had received a call from a Seneca Waste employee “indicating they may be approaching the ‘not-to-exceed’ price agreed upon by the contract.” Seneca Waste claimed “the difference is in the volume of wastewater which they have had to dispose.” Pancza states she did not agree to exceed the contract price but concedes “they may have a point.”

On January 15, 2007, Craig Smith sent an email to Pancza to inform her Seneca Waste was nearly finished with the project. It states in pertinent part:

We are keeping an eye on the total costs of the project as we near our price cap. We are coordinating our efforts with Brent Packard at Sheaffer to see that this project is completed soon and to your satisfaction. I just wanted to keep you in the loop as we finish up this project.

In response, Pancza asked to be informed as to the final cost of the project once known.

Seneca Waste billed Sheaffer for a total of \$211,599.47 to perform the cleanup work. Sheaffer paid, and Seneca Waste accepted, \$145,980.87 for this work. Upon being billed in an amount that exceeded the \$170,000.00 price cap for the contract, Sheaffer tendered \$24,019.13 to Seneca Waste to round out its total payment for services at \$170,000.00. Seneca Waste did not accept this payment.

Seneca Waste filed suit against Sheaffer and Sheaffer Pen Corporation.¹ It alleged the defendants failed to pay the amount due for the services provided. Both parties filed motions for summary judgment. Following a hearing, the district court entered its ruling granting summary judgment in favor of the defendants. It found the plain language of the contract capped Seneca Waste's billing at \$170,000.00. The court rejected Seneca Waste's argument that language in the bid anticipating a modification of the projected service costs if the workload were to increase was incorporated into the contract. Accordingly, the court held "[Seneca Waste's] claim that they are entitled to money in excess of the contract's 'not-to-exceed' clause fails as a matter of law."

¹ Sheaffer Pen alleges it should not have been a party to this action as it did not own or operate the facility in question, or contract with Seneca Waste for the services provided.

II. Scope and Standard of Review. We review the district court's ruling on summary judgment for the correction of errors at law. Iowa R. App. P. 6.907; *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). Summary judgment is appropriate

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3); *Lobberecht*, 744 N.W.2d at 106. The moving party has the burden to establish it is entitled to judgment as a matter of law, and the evidence must be viewed in the light most favorable to the nonmoving party. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).

III. Contract Construction. Seneca Waste contends the district court erred in construing the contract to have a \$170,000.00 price cap under the facts of this case. It argues the contract incorporates the initial bid by reference, and that only the work listed in the initial bid is subject to the \$170,000.00 price cap. Because it performed additional work not anticipated in its initial bid, Seneca Waste claims it is entitled to payment in excess of \$170,000.00.

When reviewing the district court's construction of a contract, we must keep in mind the cardinal rule that the intent of the parties controls. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991). Except in cases of ambiguity, we determine the parties' intent from what the contract says. *Id.* Therefore, if the parties' intent is clear and unambiguous from the words of the contract, we enforce the contract as written. *Id.* at 863. When

there are ambiguities in a contract, they are strictly construed against the drafter.

Id. An ambiguity exists when a genuine uncertainty exists concerning which of two reasonable constructions is proper. *Id.* “The test for ambiguity is an objective one: ‘Is the language fairly susceptible to two interpretations?’” *Id.*

The language at issue here states,

The work shall be charged on a Time and Materials Cost Basis at the rates quoted by Contractor in Exhibit A, except that the Work shall not exceed One Hundred Seventy Thousand Dollars (\$170,000.), inclusive of all taxes, subcontractor fees, and any and all other surcharges, costs and expenses.

This language is clear and unambiguous. It states the basis for how charges are calculated, the rates at which Seneca Waste may charge, and places a price cap of \$170,000.00 on all work performed.

Seneca Waste argues the contract incorporates by reference the September 7, 2006 letter and bid it submitted to Sheaffer. It claims that when read as a whole, the price cap only applies to the work set forth in the September 7, 2006 letter and bid. Under the paragraph entitled “Scope of Work,” the contract states:

The Contractor will furnish all of the materials to perform all of the Work as described in the first page of the letter dated September 7, 2006, and sent by Seneca Waste Solutions, LLC to Michele Pancza, BIC Consumer Products Manufacturing Co. Inc., together with the itemized worksheet used to calculate the project cost estimate, which are attached hereto and made a part of this Agreement as Exhibit A.

Under the doctrine of incorporation by reference, one document becomes part of another separate document simply by reference as if the former is fully set out in the latter. *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 228 (Iowa

2001). “Where a writing refers to another document, that other document, *or so much of it as is referred to*, is to be interpreted as part of the writing.” *Id.* (emphasis added). “[C]lear and specific reference is required to incorporate an extrinsic document by reference.” *Id.* Whether material is incorporated by reference presents a question of law. *Id.*

Seneca Waste points to the defendants’ response to its request for admissions. They responded “Admit” to the following request:

The Contractor Agreement attached as Exhibit A to Defendants’ Answer incorporates the September 7, 2006 letter from Seneca Waste Solutions, LLC to Michele Pancza, the “Budgetary T&M Estimate Worksheet prepared for: Sheaffer Pen Plant Closure,” and the “Vendor-Provided Sheaffer Closure Clean-Up Activities” worksheets, all of which are part of the Agreement governing this dispute.

We agree the contract agreement incorporates these documents. The September 7, 2006 letter and attachments were wholly incorporated into this contract. As such, there is a genuine issue of material fact concerning the amount that Seneca Waste is entitled to under the contract. This case is not ripe for summary judgment. We therefore reverse the grant of summary judgment and remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.