

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 2153

F. H. MYERS CONSTRUCTION CORPORATION

VERSUS

THE STATE OF LOUISIANA, DIVISION OF ADMINISTRATION
OFFICE OF FACILITY PLANNING AND CONTROL

Judgment Rendered: JUN 18 2014

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 604404

Honorable Todd Hernandez, Judge Presiding

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Theriot, J. Agrees in part, disagrees in part and Abident reasons

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

Plaintiff-appellant, F. H. Myers Construction Corporation (Myers), appeals a judgment of the trial court that granted summary judgment in favor of the defendant-appellee, State of Louisiana, Division of Administration, Office of Facility Planning and Control (the State), and dismissed Myers' claims. For the following reasons, we reverse the judgment of the trial court and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

On October 21, 2010, the State began receiving bids for a renovation and construction project at the Old U.S. Mint in New Orleans, Louisiana, to provide for a new jazz performance theater and recording venue. As the low bidder, Myers was awarded the contract. On November 29, 2010, the State and Myers entered into a public works contract, which included the agreement between the parties, the AIA General Conditions of the Contract for Construction, the Supplementary Conditions drafted by the State, and the project's plans and specifications.

After work began on the project, Myers encountered a pre-existing concrete and wood timber substrate underneath the floor that was not shown on the plans. This substrate was incompatible with the project's intended design features, so a redesign was developed.

The State required Myers to provide a draft change order with its cost proposals to remove the existing substrate. After receiving the draft change order, the State notified Myers that several of the items claimed by Myers in the change order were ineligible under the contract. The State issued a Construction Change Directive¹ directing Myers to proceed with the work required to move the existing substrate.

Subsequently, the State issued a modified design to construct a new flooring substrate. Myers submitted a draft change order for construction of the redesign.

¹ Construction Change Directive is an order directing a change in the work prior to agreement, if any, in the contract sum or contract time or both. (AIA General Conditions of the Contract for Construction).

Again, the State did not agree on the sums in the change order and issued a Construction Change Directive directing Myers to proceed with the work required to construct a new flooring substrate.

Myers completed the work required by the Construction Change Directives and submitted a claim to the State for its costs to complete the work. The State agreed to pay a portion of the costs submitted by Myers, but disputed certain items as ineligible pursuant to the contract. Specifically, the State disputed two items: first, a portion of Myers' labor burden and second, general conditions, also termed extended jobsite overhead. The State did not pay those portions of the costs submitted by Myers.

As a result, Myers filed a petition for damages against the State for breach of contract, seeking payment for the disputed amounts contained in its claim. The State answered the petition and filed a reconventional demand seeking reimbursement for overpayment under the contract.

On September 19, 2012, the State filed a motion for partial summary judgment requesting that Myers' claims be dismissed. On September 20, 2012, Myers filed a motion for summary judgment requesting judgment in the amount of \$49,248.99, which it contends was the amount owed by the State. The competing summary judgment motions were heard by the trial court on December 17, 2012. On March 11, 2013, judgment was signed denying Myers' motion for summary judgment, granting the State's motion for partial summary judgment, and dismissing all claims filed by Myers.² It is from this judgment that Myers appeals.

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact, and the summary judgment procedure is favored and designed to secure the just, speedy, and

² After the judgment was signed, the State filed a motion to dismiss its reconventional demand, leaving the parties competing motions for summary judgment as the only issues remaining.

inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Power Marketing Direct, Inc. v. Foster**, 2005-2023 (La. 9/6/06), 938 So.2d 662, 668. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2); **Id.**

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Power Marketing Direct, Inc.**, 938 So.2d at 669.

LAW AND ANALYSIS

There are two issues presented for review in this appeal. First, what portion of Myers' labor burden is compensable under the contract? Second, is the provision in the contract regarding Myers' entitlement to general conditions/extended jobsite overhead in violation of La. R.S. 38:2216(H)? We address each issue separately.

I. Labor Burden

In favor of the State's motion for summary judgment, it introduced the Supplementary Conditions included as part of the agreement between the State and Myers. The State contends that article 7.2.2(1) in the Supplementary Conditions specifically lists the items eligible under the contract for labor burden resulting from a change in the work. According to the State, several of the items Myers sought compensation for were not included in that list.

Article 7.2.2 provides:

“Cost of the Work” for the purpose of Change Orders shall be costs required to be incurred in performance of the work and paid by the Contractor and Subcontractor which shall consist of:

1. Wages paid direct labor personnel, delineating a labor burden markup for applicable payroll taxes, worker's compensation insurance, unemployment compensation, and social security taxes.
2. Cost of all materials and supplies, including the identification of each item and its cost.
3. Identify each necessary piece of machinery and equipment and its individual cost.
4. Other documented direct costs.

The State maintains that per the contract Myers' labor burden is limited by article 7.2.2(1.), which expressly lists the items that can be included as part of the contractor's labor burden. The items include applicable payroll taxes, worker's compensation insurance, unemployment compensation, and social security taxes. Myers' cost proposal for its labor burden included many items that were not in that list such as, general liability insurance, auto insurance, vacation and holiday, 401K matching, and education training among other things. The State rejected these items and any items that were not included in the list provided in article 7.2.2(1.). Myers contends that it is entitled to the other items submitted as part of its labor burden under the language of article 7.2.2(4.) allowing "[o]ther documented direct cost" to be recovered. Additionally, Myers contends that the items submitted as part of its labor burden are part of a "wage" under 7.2.2(1.).

The issue before us is one of contract interpretation which is subject to *de novo* review. "Interpretation of a contract is the determination of the common intent of the parties." La. Civ. Code art. 2045. Louisiana Civil Code article 2046 provides that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." Furthermore, when considering "[t]he words of a contract[, they] must be given their generally prevailing meaning;" if "the contract involves a technical matter," "[w]ords of art and technical terms must be given their technical meaning." La. Civ. Code art. 2047. "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code art. 2050. "A doubtful

provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.” La. Civ. Code art. 2053. “In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.” La. Civ. Code art. 2056.

The Supplementary Conditions, which include the article at issue, were drafted by the State, and the State noted that it was a standard provision in public contracts. Therefore, in case of doubt, the contract must be interpreted in favor of Myers.

Article 7.2.2(1.) requires “delineating a labor burden markup” for certain items, but the clear language of the contract does not limit the labor burden to those listed items. “Delineate” is defined by Merriam-Webster as “to describe portray, or set forth with accuracy or in detail.” Requiring the contractor to “set forth with accuracy or in detail” certain items does not by the clear language of the contract limit the labor burden to those items. For these reasons, we find that Myers’ labor burden markup was not limited exclusively to the items listed in article 7.2.2(1.) of the Supplementary Conditions. Therefore, genuine issues of material fact remain in determining what items claimed by Myers as part of its labor burden are compensable under the contract.

II. General Conditions (Extended-Fixed Jobsite Overhead)

In Myers’ breakdown of cost for both change orders, it included a sum for general conditions. A portion of the general conditions included extended-fixed jobsite overhead. The State asserts that article 7.2.7 explains when extended-fixed jobsite overhead is compensable under the contract, and it was not in this case.

Article 7.2.7 provides:

The Contractor will be due extended-fixed jobsite overhead for time delays only when complete stoppage of work occurs causing a contract completion extension, and the Contractor is unable to mitigate financial damages through replacement work. The stoppage must be due to acts or omissions solely attributable to the Owner.

In the State's motion for summary judgment, the State contends that there was not a "complete stoppage of work" as required by the contract for extended-fixed jobsite overhead to be due to Myers. Myers does not dispute that there was never "complete stoppage of work," but argues that article 7.2.7 is in violation of La. R.S. 38:2216 and should be severed from the contract.

Louisiana Revised Statute 38:2216(H) states:

Any provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable. When a contract contains a provision which is void and unenforceable under this Subsection, that provision shall be severed from the other provisions of the contract and the fact that the provision is void and unenforceable shall not affect the other provisions of the contract.

As pointed out by Myers, the statute disallows any provision that waives Myers' right as the contractor to seek damages or equitable adjustment for "**delays** in performing such contract, if such delay is caused in **whole, or in part**, by acts or omissions within the control of the contracting public entity." La. R.S. 38:2216(H). (Emphasis added.) Article 7.2.7 requires that for Myers to recover extended-fixed jobsite overhead cost there must be "complete stoppage of work...solely attributable to [the State]." Myers argues that the more stringent requirements of the article are in violation of the statute in two distinct ways. First, Myers asserts that there can be a delay in accordance with the statute without a complete stoppage of work as stated in the contract. Second, Myers argues that "solely attributable to [the State]" requires the State's full responsibility for the delay damage recovery, while La. R.S. 38:2216(H) allows recovery where delays

are only partly attributable to acts or omissions within the control of the public entity. We agree.

In this case, the contract provision at issue requires that the delay must be due to “complete stoppage of work” solely the fault of the State for Myers to recover extended-fixed jobsite overhead. A complete stoppage would be a delay of an extended period where no work was being done. Louisiana Revised Statutes 38:2216(H) contemplates that a contractor who is a party to a public contract shall be able to recover for **any delay** that they may suffer out of fault of the state entity, but requires a lower degree of delay than proposed in the contract. Thus, the contract as a whole waives Myers’ rights as the contractor to seek damages for extended-fixed jobsite overhead for any delay short of a complete stoppage of work. This provision in the contract imposes a stricter requirement than the statute allows.

Further, article 7.2.7 allows for damages only if the State is 100% at fault for the delay. Louisiana Revised Statutes 38:2216(H) also prohibits waiver for delay damages when the State is only partially at fault for the delay. Again, article 7.2.2 imposes stricter requirements for delay damages than the statute allows.

In a similar case, this court affirmed a summary judgment severing a contractual provision in a public contract involving the Department of Transportation and Development because the provision allowed for equitable adjustment but attempted to bar damages for delay in specific circumstances. **Barber Bros. Contracting Co., LLC v. State ex rel. Dept. of Transp. and Development**, 2011-2305 (La. App. 1st Cir. 11/8/12), 110 So.3d 1085, 1088-89, writ denied, 2012-2680 (La. 2/8/13), 108 So.3d 87. In **Barber Bros.**, the DOTD argued that the contractual provision did not conflict with La. R.S. 38:2216(H) because although damages for delay were waived, equitable adjustment was still available. Due to the limiting nature of the contract in **Barber**, this court resolved that the provision was directly in conflict with La. R.S. 38:2216(H) and affirmed

the summary judgment that effectively nullified the contractual provision. **Id.** Similarly, in the current matter the words “solely” and “complete stoppage of work” also limit the circumstances that damages for delay can be recovered. Like the DOTD in **Barber**, the State in this matter has attempted to partially waive a contractor’s ability to redress a delay caused wholly or partially by the public entity.

For these reasons, the contractual provision at issue in this case is void and unenforceable under La. R.S. 38:2216(H). The inclusion of the phrases “solely” and “complete stoppage of work” attempt to limit a contractor’s ability to recover damages for delay to specific circumstances narrower than the statute allows.

Louisiana Revised Statutes 38:2216(H) provides that when a contract contains a provision which is void and unenforceable under the statute, the provision **shall** be severed from the other provisions of the contract and the fact that the provision is void and unenforceable shall not affect the other provisions of the contract. Therefore, article 7.2.2 of the Supplementary Conditions drafted by the State shall be severed from the contract. The remaining provisions of the contract are not affected.

Having found article 7.2.2 of the Supplementary Conditions void and unenforceable, genuine issues of material fact remain to determine what is compensable under the contract. For these reasons, the trial court’s judgment granting summary judgment in favor of the State is reversed. We do not have before us evidence to determine what amount of money, if any, that should be paid to Myers under the contract. Therefore, the matter is remanded to the trial court to determine what damages Myers is entitled to under the remaining provisions of the contract.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this opinion. All costs

of the appeal are assigned to defendant-appellee, State of Louisiana, Division of Administration, Office of Facility Planning and Control, in the amount of \$2,383.00.

REVERSED AND REMANDED.

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OFFICE OF FACILITY PLANNING AND CONTROL**

THERIOT, J., concurring and assigning reasons.

I agree with the result reached by the majority, the matter should be remanded. Article 7.2.2 of the Supplementary Conditions is void and unenforceable. Therefore, it shall be severed from the contract. I further agree that we do not have before us evidence to determine what amount of money, if any, should be paid to Myers under the contract. Therefore, the matter needs to be remanded to the trial court to determine what damages Myers is entitled to under the remaining provisions of the contract.

Although, I reach the same conclusion that the matter should be remanded, I differ with the majority in its finding that “article 7.2.2(1) requires ‘delineating a labor burden markup’ for certain items, but the clear language of the contract does not limit the labor burden to those listed items”. I interpret 7.2.2(1) to state the labor burden markup is limited to the listed items, i.e. payroll taxes, worker’s compensation insurance, unemployment compensation and social security taxes. The question on remand is whether Myers cost proposal regarding general liability insurance,

auto insurance, vacation & holiday, 401K matching, education training, etc.
fall under 7.2.2(4).