

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0670

CRAIG NEAL & SONS, L.L.C.

VERSUS

F.G. SULLIVAN, JR. CONTRACTOR, L.L.C. & STATE OF
LOUISIANA, DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT

DATE OF JUDGMENT: DEC 23 2014

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 540333, SECTION 2, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE R. MICHAEL CALDWELL, JUDGE

John W. Waters, Jr.
New Orleans, Louisiana

Counsel for Plaintiff-Appellee
Craig Neal & Sons, L.L.C.

Craig L. Kaster
Teresa D. Cop
Zachary, Louisiana

Counsel for Defendant-Appellant
F. G. Sullivan, Jr. Contractor, L.L.C.

BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Disposition: AFFIRMED.

Handwritten:
JW
JWP

KUHN, J.

Defendant-appellant, F.G. Sullivan, Jr. Contractor, L.L.C. (Sullivan) appeals a district court judgment holding it liable to plaintiff-appellee, Craig Neal & Sons, L.L.C. (Neal), for underpayment on a subcontract in the amount of \$32,376.14. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Sullivan was the general contractor on a project for the State of Louisiana, Department of Transportation and Development (the State), relating to roadwork to be performed on U.S. 61-LA 64, Route 964, in East Baton Rouge Parish. Sullivan entered into a subcontract with Neal, in which Neal agreed to perform certain work, including general excavation (Item No. 203-01-A) in the approximate quantity of 110,767 cubic meters for the unit price of \$2.616 per cubic meter.

After completion of the work, the State made payments to Sullivan, pursuant to the terms of the Original Contract, for certain line items, including payment for 110,767 cubic meters of general excavation work (Item No. 203-01-A). Additionally, the State made separate payments to Sullivan for the removal of Portland cement concrete pavement (pavement) (Item No. 202-02-C) and the removal of surfacing and stabilized base (base) (Item No. 202-02-G) totaling 12,376.2 cubic meters. Sullivan then calculated the amount of excavation work it believed it owed Neal under the subcontract and paid Neal \$257,390.33 for 98,390.8 cubic meters of general excavation work.

Neal filed the instant suit, claiming that Sullivan still owed it approximately \$42,099.00, since it was entitled under the terms of the subcontract to be paid the agreed-upon unit price for the full amount of general excavation work allowed and paid for by the State.¹ Sullivan filed a motion for summary judgment, which the

¹ Neal also named the State as a defendant in its petition, but later voluntarily dismissed the State without prejudice.

trial court granted, dismissing Neal's suit against Sullivan with prejudice. Neal appealed, contending that Sullivan was not entitled to summary judgment in its favor and that Neal was entitled to be paid in accordance with the "express terms of the subcontract."

On appeal, this court reversed the summary judgment, concluding that genuine issues of material facts remained on several issues, including who drafted the subcontract and whether Neal and Sullivan intended that the removal of the pavement and the base be part of the general excavation work that Neal had agreed to perform pursuant to the subcontract. This court further held that, "[i]n the absence of Sullivan establishing Neal's nonperformance of the obligations of the subcontract, Neal is entitled to recover payment 'on the basis of the quantities allowed and paid for by [the State].'" *Craig Neal & Sons, L.L.C. v. Sullivan*, 07-0741, p. 6 (La. App. 1st Cir. 2/20/08) (unpublished).

Following remand, a bench trial was held, and the trial court rendered judgment in favor of Neal and against Sullivan in the amount of \$32,376.14, plus interest and costs. Sullivan now appeals, arguing that the trial court erred in finding the subcontract ambiguous, in ordering it to pay Neal for more work than it performed, and in not taking into consideration the standard DOTD specifications.

DISCUSSION

Resolution of the instant dispute is a matter of contractual interpretation, that is, on what basis does the subcontract provide for payment to Neal?

The interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When 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. La. C.C. art. 2046. The words of a contract must be given their generally prevailing meaning. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to

the object of the contract. La. C.C. art. 2048. The use of extrinsic evidence is proper only when a contract is found to be ambiguous after an examination of the four corners of the agreement. *James Construction Group, L.L.C. v. State ex rel. Department of Transportation and Development*, 07-0225 (La. App. 1st Cir. 11/2/07), 977 So.2d 989, 993.

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. C.C. art. 2050. Further, courts should not strain to find an ambiguity where none exists. Finally, whether a contract is ambiguous is a question of law. In addressing this legal issue, a reviewing court conducts a *de novo* review and renders a judgment on the record. *James Construction Group, L.L.C.*, 977 So.2d at 943. Finally, in case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished the text. La. C.C. art. 2056.

The subcontract between Neal and Sullivan provides, in pertinent part, that:

THE PARTIES AGREE AND BIND THEMSELVES ... as follows:

1. PERFORMANCE:

Subcontractor agrees to perform the work specified and furnish all necessary labor, materials, equipment, supplies and other items therefore [sic] and to promptly pay for all of such, for which Contractor may be held and to complete the work in strict compliance with the terms of the Original Contract....

2. ORIGINAL CONTRACT:

The terms, conditions, specifications, drawings, schedules and contract documents forming a part of this subcontract by reference as fully as set out in detail. Subcontractor shall be bound to the same extent that Contractor is bound by each and every covenant, obligation and provision of said Original Contract insofar as the same is applicable to the work of Subcontractor.

3. WORK:

Subcontractor shall perform all of the necessary and incidentally [sic] required to complete the following items of the Original Contract and none other:

ITEM NO.	APPROXIMATE QUANTITY	DESCRIPTION	UNIT	APPROXIMATE PRICE	APPROXIMATE PRICE
20301A	110,767	GENERAL EXCAVATION	CM	\$2.616/	\$289,766.47

**APPROXIMATE AMOUNT OF THIS SUBCONTRACT:
\$453,277.89**

It is understood that all quantities set out above are approximate. Subcontractor shall perform said items for the Unit Prices set opposite each item and said prices shall constitute the sole consideration for all work performed hereunder. Any increase of (sic) decrease in quantities shall be adjusted on the same basis.

5. PAYMENT:

Subject to other provisions hereof, Contractor agrees to pay Subcontractor the stated consideration for said work *on the basis of the quantities allowed and paid for by Owner* Subcontractor fully understands that payment to the Subcontractor is contingent upon the Contractor receiving payment from the Owner. It is the intention of the parties to transfer the risk of payment by the Owner from the Contractor to the Subcontractor. If the Owner should not make payment to the Contractor, then the Contractor has no obligation to pay the Subcontractor.

21. SPECIAL OR ADDITIONAL PROVISIONS:

d) Item Number 20301A includes, but is not limited to, removing, hauling and stockpiling/placing all excavated material that is paid for under this Item Number. Excavated materials to be used as embankment or stockpiled on site for use by others.

[Emphasis added.]

Neal asserts that Paragraph 5 ("Payment") of the subcontract requires Sullivan to pay it the agreed-upon unit price for the full amount of general

excavation work "allowed and paid for by" the State under Item No. 203-01-A of the Original Contract, which was 110,767 cubic meters. In contrast, Sullivan argues that the subcontract provides for payment to Neal on a unit price basis only for the actual amount of work Neal performed, rather than on a lump sum/fixed price basis. Specifically, it points out that the "approximate quantity" of 110,767 cubic meters of general excavation work that was delineated in the subcontract was only an estimate and that, furthermore, this quantity included the removal of pavement and base, which was work performed by Sullivan rather than Neal.

Sullivan also points out that the Original Contract specifications indicate that the removal of pavement and of base are to be included in the calculation of the amount of general excavation for purposes of calculating payment by the State, even though the removal of pavement and base was paid for under separate line items in addition to the payment for general excavation. Thus, although the State paid Sullivan for 110,767 cubic meters of general excavation, Sullivan contends it correctly paid Neal \$257,390.33 for only the 98,390.8 cubic meters of general excavation work that it actually performed, *i.e.*, the amount remaining after the total cubic meters of pavement and base removed by Sullivan (*i.e.*, 12,376.2 cubic meters) were deducted from the 110,767 cubic meters of general excavation allowed and paid for by the State.

At trial, it was established that the disputed subcontract was a standard form utilized and drafted by Sullivan. Further, the Sullivan employee who executed the subcontract on Sullivan's behalf acknowledged that, although it was always intended that Sullivan would perform the removal of the pavement and the base (items included in the calculation of general excavation under the Original Contract), no deduction for the estimated amount of those items was made in the approximate quantity of general excavation work stated in the subcontract with Neal. Nor did the subcontract otherwise make it clear that, in calculating

Sullivan's payment to Neal, these items would be deducted from the total amount of general excavation allowed and paid for by the State to Sullivan.

In rendering judgment in favor of Neal, the trial court gave the following oral reasons for judgment:

... Sullivan drafted this contract, so any ambiguities or interpretations in the contract would be construed against Sullivan as the drafter and provider of the contract. ... [P]erhaps [Sullivan] could have used another term for the excavation that was to be done by Neal. They could have used a lesser estimate for the amount of estimated work, but they did not. It was ...confirmed by [an employee of] the state Department of Transportation and Development, that actually 203-01-A, general excavation, included the items under 202-02-C and G for removal of the pavement and removal of the base. No one knew why the state listed all of that or listed three different items but included two of them in the third. But that's apparently the way the state did it, and that's what Sullivan understood. But there is no evidence that Neal and Sons understood that 202-02-C and 202-02-G were to come out of 203-01-A. But more importantly, the contract, again provided by Sullivan, in paragraph 5 under PAYMENT says that Sullivan would pay "on the basis of the quantities allowed and paid for by the owner." The stipulated facts were that the owner, the state, allowed and paid Sullivan 110,767 cubic meters for "general excavation." But then Sullivan only paid Neal for 98,390.8 cubic meters. Now ... I can understand how Sullivan came to those figures and why they came to those figures. And as a practical matter, it makes sense, but unfortunately it's not what the contracts says. The subcontract says they will pay on the basis of quantities allowed and paid for by the owner. And the amount allowed and paid for by the owner is 110,767 cubic meters. If Sullivan didn't intend to pay Neal for all of what Sullivan was paid for general excavation, then Sullivan should have used other terms in its contract to make that clear. It should have shown an estimate of general excavation less pavement and base or it should have used some term other than, "general excavation," which I view as a term of art under the standards set forth by the state. By using that term and by referencing that line item of the contract with the state, and then agreeing to pay the quantities "allowed and paid for by the owner," Sullivan obligated itself to pay Neal the quantity of general excavation paid by the state which was the full 110,767 cubic meters. Thus, it is the finding of this court that Sullivan still owes Neal the difference, which is, I believe \$32,376.14.

As previously noted, the proper interpretation of a contract is a question of law subject to *de novo* review on appeal. *Solet v. Brooks*, 09-0568 (La. App. 1st Cir. 12/16/09), 30 So.3d 96, 99. Based on our *de novo* review, we find the trial court's interpretation of the subcontract to be correct. The subcontract referenced

Item No. 203-01-A, *i.e.*, general excavation, and provided for payment to Neal for its general excavation work “on the basis of the quantities allowed and paid for by [the State],” which in this case was 110,767 cubic meters. The subcontract made no mention of any deductions from the quantity allowed by the State for general excavation for the quantities of pavement and base removed by Sullivan. As such, the subcontract clearly provided for Neal to be paid on the basis of the full amount of general excavation work allowed and paid for by the State. Moreover, assuming *arguendo* that any ambiguity exists due to Sullivan’s failure to draft the subcontract to make it clear that payment to Neal for general excavation would not include the quantities of pavement and base removed by Sullivan, such ambiguity must be construed against Sullivan as the drafter of the subcontract. See La. C.C. art. 2056.

CONCLUSION

For the reasons assigned, the judgment of the trial court is affirmed. Sullivan is to pay all costs of this appeal.

AFFIRMED.