

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 27, 2020)

M & J CONSTRUCTION CO., INC.

v.

BRET SMILEY, DIRECTOR,  
ACTING BY AND THROUGH THE  
STATE OF RHODE ISLAND,  
DEPARTMENT OF  
ADMINISTRATION, DIVISION  
OF PURCHASES, AND NANCY  
MCINTYRE, PURCHASING AGENT,  
ACTING BY AND THROUGH THE  
STATE OF RHODE ISLAND,  
DEPARTMENT OF  
ADMINISTRATION, DIVISION OF  
CAPITAL ASSETS MANAGEMENT  
AND MAINTENANCE

C.A. No. PC-2020-00657

DECISION

GIBNEY, P.J. Before this Court is Petitioner M & J Construction Co., Inc.’s (M & J) request to appoint a mediator in a contract dispute between M & J and the Rhode Island Department of Administration, Division of Capital Asset Management and Maintenance (the State). M & J alleges that the State did not comply with the requisite contractual procedure for termination and asks this Court to appoint a mediator to resolve the dispute.

On February 1, 2018, the State entered into a contract agreement (the Contract) with M & J to renovate and replace two elevators in the William E. Powers Building in Providence. (State Ex. 6, Request for Certification at 1, Dec. 16, 2019.) The State alleges that the scheduled completion time for the work was extended from October 2018 to July 2019 and that the work presently remains unfinished. *Id.*

On December 16, 2019, the State sent its Request for Certification that Sufficient Cause Exists to Justify Termination of Contract (Request for Certification) to State Purchasing Agent McIntyre. *Id.* McIntyre served as the Initial Decision Maker under the Contract. (Compl. at ¶ 6.) The State alleged that it had cause to terminate the Contract under two termination provisions: first, that M & J “repeatedly failed or refused to supply enough properly skilled workers or proper materials”; and second, that M & J breached the contract. (Request for Certification at 1; Contract A201 at § 14.2.1.) Specifically, the State alleged that M & J allowed its primary subcontractor to stop work without advanced notice; that M & J failed to verify existing conditions at the elevator site; that M & J failed to coordinate generator testing and improperly installed elevator hall stations; and that M & J breached the Contract by failing to complete the work on the contractually agreed schedule. (Request for Certification at 1-3.)

On January 23, 2020, McIntyre certified that the State had cause to terminate the Contract. *Id.* at 5. On January 24, 2020, McIntyre sent a Notice of Termination for Cause to M & J, informing them that the Contract was terminated for cause, pursuant to §§ 14.2.1 and 14.2.2 of the Contract, as of January 31, 2020, and that all work on the Contract would be suspended immediately. (State Ex. 7, Notice of Termination for Cause at 1, Jan. 24, 2020.)

On January 24, 2020, M & J contacted this Court seeking appointment of a mediator. M & J alleged that the State did not follow the applicable procedure for terminating the Contract. Specifically, M & J claimed that McIntyre, as the Initial Decision Maker, was required to render a decision in writing as to the termination, and that the Contract could not be terminated until mediation occurred. Thereafter, on January 28, 2020, M & J filed a Complaint in the Superior Court, appealing the termination and seeking injunctive relief. This Court heard argument on February 10, 2020.

Section 14.2.2 of the Contract states that where cause to terminate the contract exists “the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may . . . after giving the Contractor . . . seven days’ written notice, terminate employment of the Contractor . . .” (Contract A201 at § 14.2.2.) (Emphasis added.) However, M & J argues that § 15.2.5 required McIntyre, as the Initial Decision Maker, to “render an initial decision” that “shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties . . . of any change in the Contract Sum or Contract Time or both.” *Id.* at § 15.2.5.

The latter provision comes from Article 15 of the Contract, titled “Claims and Disputes.” The Contract defines a Claim as “a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract.” *Id.* at § 15.1.1. M & J contends that a termination of the Contract qualifies as a Claim and therefore required a written decision from the Initial Decision Maker. In response, the State argues that the termination provisions of Article 14 are distinct from the Claims and Disputes requirements of Article 15.

The Contract further provides that “[c]laims, disputes, or other matters in controversy arising out of or related to the Contract . . . shall be subject to mediation as a condition precedent to binding dispute resolution,” and that “[t]he parties shall endeavor to resolve their Claims by mediation which shall be administered by the Presiding Justice of the Providence County Superior Court.” *Id.* at §§ 15.3.1-15.3.2. M & J thus argues that these provisions require the parties to mediate the termination.

This Court shall “refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity into a [contract] where none is present.” *America Condominium Association, Inc. v. Mardo*, 140 A.3d 106, 113 (R.I. 2016) (quoting *Bliss Mine Road Condominium*

*Association v. Nationwide Property and Casualty Insurance Co.*, 11 A.3d 1078, 1083 (R.I. 2010)). Therefore, where “the contract terms are clear and unambiguous, judicial construction is at an end for the terms will be applied as written.” *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004) (citing *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)).

Here, the Court finds that the termination provisions under Article 14 of the Contract are distinct from the “Claims and Disputes” requirements under Article 15. Therefore, the Initial Decision Maker was only required to certify that the State had cause to terminate the Contract and did not have to render a written decision as required under § 15.1.2. Further, a termination for cause is distinct from a Claim. To the extent that M & J could raise a Claim and challenge the determination of cause, it has not done so here; it has merely challenged the procedure of termination and did not allege that there was no cause to terminate.

Accordingly, the Court denies M & J’s request for it to appoint a mediator.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** M & J Construction Co., Inc. v. Bret Smiley, et al.

**CASE NO:** PC-2020-00657

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** February 27, 2020

**JUSTICE/MAGISTRATE:** Gibney, P.J.

**ATTORNEYS:**

**For Plaintiff:** Girard R. Visconti, Esq.

**For Defendant:** Daniel W. Majcher, Esq.  
Jennifer S. Sternick, Esq.