STATE OF MICHIGAN

COURT OF APPEALS

LANZO CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
September 27, 1996

No. 181944
LC No. 94-15215-CM

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10) on plaintiff's breach of contract claim. We affirm.

Plaintiff contracted with defendant to perform underground utility relocation work in connection with an expansion of Cobo Hall. The project was to be completed on October 1, 1986. Because of numerous change orders, defendant extended the completion date to May 11, 1988. The project was timely completed.

In a letter dated November 8, 1990, plaintiff submitted a written claim for "extended overhead, interest, and interest on unpaid items of construction from 5/31/87." Plaintiff filed suit against defendant alleging, inter alia, that a breach of contract occurred when defendant failed to compensate plaintiff in the amount of $580,273.76 for overhead expenses incurred because of the extended completion date.

The dispute centers upon the interpretation of § 1.05.12 of the Michigan Department of Transportation (MDOT) 1984 Standard Specifications for Construction, which states:

> *In case the Contractor deems extra compensation is due for work or materials not clearly covered in the contract, or not ordered by the Engineer as extra work, or due to changed or altered conditions (as defined under Changes in*

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* Circuit judge, sitting on the Court of Appeals by assignment.

> *Quantities, Plans, or Character of the Work, 1.04.02), the contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim* and shall afford the Engineer every facility for keeping actual cost of the work. The Contractor and the Engineer shall compare records and bring them into agreement at the end of each day. *Failure on the part of the contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual costs will constitute a waiver of the claim for such extra compensation* except that consideration will be given to claims to the extent that they are substantiated by Department records. *The determination of extra compensation made by the Department, where the Contractor has failed to give proper notice of his claim for extra compensation* as provided herein or has failed to afford the Engineer proper facilities for keeping strict account of actual costs, *shall be final and binding on the Contractor*. The filing of such notice by the Contractor and the keeping of cost by the Engineer shall not in any way be construed to establish the validity of the claim. *When the work has been completed, the Contractor shall file the claim for extra compensation with the Engineer. Such claims shall be filed with the Engineer in a timely manner by no later than 60 days after the contract is completed.* A written decision will be given to the Contractor in a timely manner, regarding the approval, partial approval, or disapproval of the Contractor's claim for extra compensation. The Department will determine procedures for reviewing the Contractor's claim. [Emphasis added.]

The parties do not dispute that the MDOT 1984 Standard Specifications for Construction are part of the contract.

On appeal, plaintiff argues that § 1.05.12 is ambiguous and, therefore, an issue of fact exists regarding whether the provision applies to overhead claims. Plaintiff's claim is premised upon the argument that § 1.05.12 is ambiguous regarding whether "overhead" is included within the terms "work" and "materials." Plaintiff essentially contends that overhead costs are not included within those definitions and, therefore, the section does not apply and plaintiff need not satisfy the notice requirements.

The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id*.

In this case, the trial court concluded that the language of the contract was unambiguous as a matter of law. After reviewing the contract, we agree.

Section 1.05.12 provides that "[i]n case the Contractor deems extra compensation is due for *work or materials* not clearly covered in the contract, . . . the Contractor shall notify the Engineer in

writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim." Plaintiff points to the definition of "work" as set forth in the specifications, arguing that it does not include overhead expenses:

> Work shall mean the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project and the carrying out of all the duties and obligations imposed by the contract.

The language is only "ambiguous" to the extent that plaintiff failed to provide the contract and pertinent portions of the specifications to the Court. It appears that defendant includes the cost of overhead in its determination of the costs of labor. Section 1.09.05(b) of the 1984 Specifications provides the following compensation for "labor":

> For all labor and for all craft foremen directly engaged in the specific work, the contractor will be paid the actual rate of wages and the number of hours paid . . . ***to which sum 26 percent will be added (this sum includes a one percent allowance for the Single Business Tax)***.

In addition, that section also provides that defendant will pay a contractor for workers' compensation insurance, liability insurance, social security, and other similar costs "at actual cost, to which sum 20 percent will be added." The additional sums afforded by § 1.09.05(b) are apparently provided to compensate the contractor for overhead, which includes, among other things, taxes. Since "overhead" is included in the determination of "labor," and "labor" is included in the definition of "work," any request for additional compensation for "overhead" must comply with the mandates of § 1.05.12.

Section 1.05.12 requires a contractor to notify the engineer in writing of the intention to claim extra compensation "before beginning work on which the Contractor intends to base a claim." A contractor's failure to provide the engineer with the required notification "will constitute a waiver of the claim for such extra compensation." Although plaintiff claimed below that it provided notification, it failed to attach documentation to support its claim.[1] Further, plaintiff failed to submit the eighty-seven work orders in support of its claim that the written work orders constitute an implied claim for extended overhead. Plaintiff failed to sustain its burden of showing a genuine issue of material fact regarding whether it gave written notice as required under § 1.05.12. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Because that section requires written notice to preserve a claim for extra compensation, the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Myron H. Wahls
/s/ E/ Thomas Fitzgerald
/s/ Leopold P. Borrello

[1] The evidence showed that the November 8, 1990, letter was the first *written* notice of such a claim.