

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

HELLER ELECTRIC CO., INC.

Under Contract No. 018-AA-04-0-2-BJ

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CAB No. D-939

For the Appellant: Marc S. Zweben, Esquire. For the District of Columbia Public Schools: Cecelia E. Wirtz, Esquire and Christopher G. Lipscombe, Esquire.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Jonathan D. Zischkau, concurring.

OPINION

By this appeal, Heller Electric Co., Inc. (Heller), on behalf of its subcontractor Associated Builders, Inc. (Associated) and Associated's painting subcontractor P.M. Ballard, Inc. (Ballard), requests an equitable adjustment to its contract with District of Columbia Public Schools (DCPS) in the amount of \$31,334.65 plus interest, for the purchase of additional paint.^{1/} Heller appeals the decision of the Superintendent of Schools, which upheld the decision of the contracting officer (A.F. A)^{2/}

Findings of Fact

1. The contract at issue was for the electrical modernization at River Terrace and Noyes Elementary Schools in the amount of \$1,199,500.00 and \$35,000.00 per addendum No. 3, for a total of \$1,234,500.00. Work was to start on September 8, 1992 and to be completed within 270 calendar days or by May 27, 1993. The contract was signed by the Superintendent of Schools on November 25, 1992. (A.F. B).

2. The parties have jointly stipulated that Heller entered into an oral subcontract with Associated in the amount of \$352,500.00, for the interior finishing, restoration of areas disturbed by the electrical construction, and painting. Heller's bid and contract price to DCPS incorporated Associated's bid and subcontract price to Heller. (J.S.

^{1/}Because the amount of this appeal is less than \$50,000.00, this case has been decided pursuant to D.C. Code § 1-1189.4(c), and Board Rule 216, 36 DCR 2709, for Optional Accelerated Procedures. By joint motion of September 13, 1993, the parties requested to cancel the hearing set for this matter and instead requested a decision on the record, which motion was granted by Board Order of September 14, 1993.

^{2/}Documents in the appeal file submitted by DCPS are referred to as (A.F. ____).

4).^{3/} Associated entered into a written painting subcontract with Ballard on January 7, 1993, in the amount of \$69,700.00. (J.A.F. 16).^{4/} Associated's bid and subcontract price to Heller incorporated Ballard's bid and subcontract price for the painting. (J.S. 5). Heller's subcontract with Associated and Associated's agreement with Ballard were not submitted for agency approval, and were not approved pursuant to the general terms and conditions of the contract. (J.S. 6).

3. Painting requirements are set forth in the specifications, at section 09900 (J.A.F. 3), and in the contract drawings. Subsection 09900.1.1 provides in part as follows:

* * *

- B. Paint exposed surfaces whether or not colors are designated in 'schedules', except where a surface or material is indicated not to be painted or is to remain natural. Where an item or surface is not mentioned, paint the same as similar adjacent materials or surfaces. If color or finish is not designated, the Architect will select from standard colors or finishes available.

Subsection 09900.1.2 provides in part as follows:

- A. Product Data: Submit manufacturer's technical information, label analysis, and application instructions for each paint material proposed for use.

* * *

- K. Application: Apply paint in accordance with the manufacturer's directions. Use applicators and techniques best suited for substrate and type of material being applied

1. Paint colors, surface treatments, and finishes are indicated in 'schedules.'
2. Provide finish coats that are compatible with primers used.
3. The number of coats and film thickness required is the same regardless of application method. Do not apply

^{3/}The parties submitted to the Board on September 29, 1993, Joint Stipulations of Fact, which are hereinafter referred to as (J.S.____).

^{4/}A joint appeal file, supplementing the District's appeal file, was submitted to the Board on October 1, 1993, and is hereinafter referred to as (J.A.F.____).

succeeding coats until previous coat has cured. Sand between applications where required to produce a smooth, even surface.

4. Apply additional coats when undercoats or other conditions show through final coat, until paint film is of uniform finish, color, and appearance....

4. There are two sets of contract drawings affecting the painting, one that was issued with the original IFB (J.A.F. 1), and a second set that was issued with Addendum No. 3 to the IFB. (Id.)

5. The original drawings for both schools provided floor plans depicting the rooms in each building, at sheets C1E-6 and 7 (River Terrace) and C2E-8 and 10 (Noyes). The drawings include a "Room Finish Schedule" that provides information concerning the work to be performed in the rooms, including demolition, patching, plastering and painting. (J.S. 10).

The original drawings also set forth "Demolition Notes," "Finish Notes" and "General Notes." The Room Finish Schedules include columns for each category of notes, and indicate in the columns which notes apply to which rooms. (J.S. 11).

6. The "General Notes" column on the original drawings indicates that General Note D applies to certain of the rooms in the two schools. General Note D states as follows:

Finish all new work as required to match adjoining or existing.
(A.F. 4, C1E-6).

7. On May 22, 1992, the Agency issued Addendum No. 3 (J.A.F. 2), which includes 23 pages of notes and sketches, including deletions, revisions, and additions to the specifications, drawings, and general conditions. Addendum No. 3 also includes several sheets of drawings (J.A.F. 1).

8. Addendum No. 3 does not specifically refer to or revise the painting specifications. Pages 5 and 6 of the 23 pages list certain deletions and changes to drawings C1E-6 and 7. Page 15 and 16 of the 23 pages list certain deletions and changes to drawings C2E-8 and 10. The 23 pages of Addendum 3 notes and sketches do not reference that there are any deletions or changes to the Room Finish Schedules or General Notes shown on the original drawings. (J.S. 14).

9. Included in the drawings issued with Addendum No. 3 are drawing C1E-14 and 16 (River Terrace), and C2E-17 and 18 (Noyes). Drawings C1E-14 and C2E-17 are identified as "Finish Schedule," which provide information concerning painting in columns for "Room No.," "Room Name," "Floor," "Base," "Walls," "Column" and "Remarks." (J.A.F. 18).

10. The Addendum 3 drawings do not reference any deletions or changes to the Room Finish Schedules or General Notes shown on the original drawings. (J.S. 16). Drawings C1E-16 and C2E-18 set forth "Supplemental Finish Schedule and General Notes." Supplemental Notes 3 and 12 state as follows:

3. Contractor shall paint walls in corridors, offices, stairwells, classrooms, lunchrooms, cafeterias, assembly areas and toilet rooms as indicated in the finish schedule

12. Contractor shall provide manufacturer's standard color selection to be reviewed in the field. Colors will be selected by the architect. Contractor shall coordinate more than one color per wall where painted wainscots exist. (A.F. 1).

11. The prime contract contains the standard Changes clause, Article 3, which states that the Contracting Officer:

... may at any time ... by written order ... make any change in the work within the general scope of the Contract, including but not limited to changes ... in the Contract Drawings and specifications If any change under this Article causes an increase ... in the Contractor's cost of ... the performance of any part of the work under this Contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly (A.F. B).

12. On or about October 31, 1992, Heller forwarded to the Contracting Officer a submittal, from Ballard, for agency approval (J.A.F. 14). The submittal included a "color deck" of standard colors from the Duron Paint Company, together with an October 23, 1992 letter from Ballard to Associated (Id.) that states:

As per the note on the drawings [supplemental note 12, on sheets C1E-16, C2E-18], enclosed is a Duron color deck for the Owner's use and/or selection. However, it should be noted that since we only figured to prime new plaster patches and apply one finish coat to match existing, color selections must closely approximate those existing in order to adequately cover in one coat.

13. On or about October 31, 1992, the Contracting Officer sent Heller's transmittal, the Duron Color Deck and Ballard's October 23, 1992 letter, to DCPS' technical department, the Office of Capital Improvements and Construction Services, for input. (J.S. 18). No response thereto was received.

14. On or about February 2, 1993, DCPS issued revisions to the Addendum 3 drawings (drawing sheets C1E-14 and C2E-17) (J.A.F. 18). The revised drawings list two colors for River Terrace walls -- Duron's "Yuma Yellow" and "Cream Apricot" -- and four

colors for Noyes walls -- "Yuma Yellow," "Still Water Blue," "Mint Tone Green," and "Big Sur." The revised drawings also add a "Color" column to the finish schedules, under the "Room Name" heading, which indicates with which of the colors the rooms are to be painted. (Id.)

15. By letter to the Contracting Officer's Technical Representative dated February 12, 1993 (J.A.F. 19), Heller forwarded a February 9, 1993 letter from Ballard (Id.) in which Ballard stated that the "color selected for the walls will not cover the existing colors in a one coat application, " and contended that the colors were a change to the contract painting requirements.

16. By letter to the Contracting Officer's Technical Representative dated February 24, 1993 (J.A.F. 20), Heller forwarded a February 12, 1993 letter from Ballard (Id.) requesting a Contracting Officer's decision on the dispute over the finish paint color.

17. By letter dated March 24, 1993 (J.A.F. 22), the Contracting Officer issued her decision denying that the color selection set forth on the February 2, 1993 drawings was a change, and directing Heller to proceed in accordance with the color selection. Heller and Ballard proceeded in accordance with the Contracting Officer's March 24, 1993 directive, and the painting is virtually complete. (J.S. 22).

18. By letter of April 7, 1993 (J.A.F. 24), Heller appealed the Contracting Officer's decision to the Superintendent on behalf of Ballard. By letter of April 16, 1993, the Superintendent upheld the Contracting Officer's decision, and the instant appeal ensued. (A.F. A).

POSITION OF THE PARTIES

Appellant

Appellant takes the position that Heller informed DCPS, before the contract was signed, of Ballard's interpretation that the new wall finish paint colors were to match the existing paint colors and would therefore only require one coat of paint. Appellant urges that when DCPS entered into the contract without expressing a contrary view, it was thereby bound by Ballard's interpretation, Perry & Wallis, Inc. v. United States, 427 F. 2d 722, 728, 192 Ct. Cl. 310 (Ct. Cl. 1970); Creswell v. United States, 427 F. 2d 722, 725, 146 Ct. Cl. 119 (Ct. Cl. 1959).

Next, Appellant argues that its interpretation of the contract documents must govern because its interpretation gives force and effect to all of the contract provisions. Rastall v. CSX Transportation, Inc., 574 A. 2d 271, 278 (D.C. App. 1990). Finally, Appellant argues that even if DCPS' interpretation is also reasonable, Heller's interpretation should govern because DCPS furnished the contract documents. Intercounty Construction Corp. v. District of Columbia, 443 A. 2d 29, 32 (D.C. App. 1982).

DCPS

DCPS points out that Appellant has cited case law concerning contract principles for latent ambiguities in contract language. However, where, as here, there is no ambiguity, the wording of the contract controls and resort cannot be had to extraneous circumstances or subjective interpretations. Duhamel v. United States, 119 F. Supp. 192, 195, 127 Ct. Cl. 679, 683 (1954). DCPS further argues that Appellant's interpretation fails to give effect to the contract language which stated that the architect was to select the paint color. (See F.F. 10).^{5/} With regard to the contract principle that ambiguities are to be construed against the drafter, DCPS argues that because there is no ambiguity, the principle is inapplicable.

DECISION

We can find no merit in Appellant's position.

To support its argument that only one coat of paint was required by the contract documents, Appellant relies on General Note D which states, "Finish all new work as required to match adjoining or existing." (See F.F. 6). However the General Notes do not address painting specifically on drawing C1E-6.^{6/} Painting is addressed in the Finish Notes.^{7/} We do not agree that General Note D limits DCPS to use paint which matches

^{5/}Findings of Fact are hereinafter referred to as (F.F. ____).

^{6/}The General Notes provide:

General Notes:

- A. All walls and ceilings should be restored to match original condition prior to commencement of work.
- B. For mounting heights of new fixtures see specifications.
- C. All cutting and patching shall be included for completion of this work. Materials shall match adjoining.
- D. Finish all new work as required to match adjoining or existing.

(A.F. D., C1E-6)

^{7/}The Finish Notes provide:

Finish Notes:

- 1A. All newly patched and plastered walls are to receive paint finish to match adjacent walls.
- 2A. New wall tiles should match existing wall tiles.

(continued...)

existing colors. Instead, the plain language of the contract requires the contractor to "paint walls in corridors, offices, stairwells, classrooms, lunchrooms, cafeterias, assembly areas and toilet rooms as indicated in the finish schedule...." (emphasis added). (F.F. 10). Finish schedules were in fact provided by DCPS which set forth information for painting (F.F. 9), including the colors to be used for River Terrace and Noyes Schools. (F.F. 14). Further, the plain language of the contract states, "Colors will be selected by the architect." (F.F. 10). Appellant also can point to no contract language which states that only one coat of paint is necessary. To the contrary, the plain language of the contract states, "[a]pply additional coats when undercoats or other conditions show through final coat, until paint film is of uniform finish, color and appearance." (F.F. 3).

We conclude therefore, that there is no ambiguity in the contract language with respect to paint colors, or number of coats of paint required. Instead, Appellant has advanced an unsupported position with respect to contract interpretation because the painting subcontractor Ballard apparently based the bid on its erroneous assumption that only one coat of paint was necessary. (See J. Ballard Affidavit, J.A.F. 33). As DCPS has correctly pointed out, a contract is not rendered ambiguous by the mere fact that the parties disagree as to its meaning, when the disagreement is not based on reasonable uncertainty of the meaning of the language used. Perry & Wallis, Inc., 192 Ct. Cl. at 315; Bishop Engineering Co. v. United States, 180 Ct. Cl. 411, 416 (1967). Where a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations to determine such meaning. Perry & Wallis, Inc., 192 Ct. Cl. at 315; Duhame, 127 Ct. Cl. at 683.

Further we are not persuaded by Appellant that only its interpretation of the contract gives force and effect to all of the provisions of the contract. To the contrary, Appellant's interpretation misconstrues or ignores the finish schedules for painting, the paint color selected by DCPS, the numbers of coats of paint required, and the authority of the architect to select the paint colors. (See F.F. 3, 5, 9, 10). With respect to the contract provision which states that the architect shall select the colors (F.F. 10), Appellant asserts that "the reason for having the architect make the selection is that there are many gradations of similar colors from which to choose, and the architect is responsible for decisions on aesthetics." (Appellant's Brief, p. 20). However, there are no contract provisions which limit the architect to selecting only gradations of similar colors. Instead, the architect is limited only by Subsection 00900.1.1B, which provides, "If color or finish is not designated, the Architect will select from standard colors or finishes available." (F.F. 3). However, the colors for both River Terrace and Noyes were selected and indicated in the contract

2/ (...continued)

- 3A. New painted plaster ceiling should match existing.
- 4A. New wood wainscot should match existing wainscot.
- 5A. New wood ceiling should be painted to match existing.


(A.F. D., C1E-6).

documents (F.F. 14). In any event, Appellant's "understanding" of the Architect's role is not supported by the contract documents.


We need not address Appellant's final argument concerning construing ambiguities in its favor because we have found that there is no ambiguity.

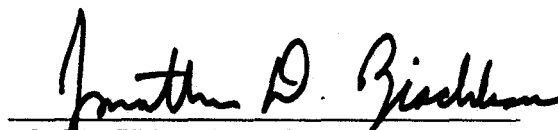
WHEREFORE, the foregoing premises considered, the appeal is hereby **DENIED**.

DATE: November 17, 1993


ZOE BUSH
Chief Administrative Judge

CONCUR:


TERRY HART LEE
Administrative Judge


JONATHAN D. ZISCHKAU
Administrative Judge

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