

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
for the use of)
CHURCHILL DRYWALL CO.,)
)
Plaintiff)
)
v.)
)
TLT CONSTRUCTION CORP., et al.,)
)
Defendants)

Civil Docket No. 96-166-P-DMC

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. This litigation arises in connection with a project known as Rehabilitation of Hangar 1 at the Brunswick Naval Air Station (“BNAS”), Contract No. N62472-90-C-9568, for which defendant and counterclaim plaintiff TLT Construction Corporation (“TLT”) was the general contractor, and for which defendant Firemen’s Insurance Company of Newark, New Jersey (“Firemen’s”) provided the payment bond as required by the Miller Act. Hangar 1 consists of a large hangar flanked on each side by a two-story wing of offices and support facilities.
2. Pursuant to a written contract executed in October 1994 between TLT and the plaintiff and counterclaim-defendant Churchill Drywall Company (“Churchill Drywall”), Churchill Drywall became a subcontractor for the Hangar 1 project in connection with certain aspects of the project involving insulation, metal support systems and gypsum board.
3. This subcontract required TLT to pay Churchill Drywall the sum of \$92,000 in exchange for

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

the performance of Churchill Drywall's work on the project.

4. The subcontract generally required TLT to provide materials and Churchill Drywall to provide labor, tools, equipment, staging and appurtenances in connection with Churchill Drywall's work on Hangar 1. However, the subcontract also specified that Churchill Drywall would be responsible for providing any materials required to complete the project to the extent they exceeded the quantities set forth in two attachments to the subcontract.

5. A term of the subcontract was that Churchill Drywall guaranteed its work and material for the period specified in the general contract between the Navy and TLT. However, the subcontract did not require Churchill Drywall to furnish any further written warranties as to its work in exchange for receiving payments under the subcontract.

6. The subcontract specified that the drawings and specifications prepared by the project's architect were a part of the subcontract, and that Churchill Drywall agreed to perform its work in accordance with these plans.

7. Pages A7 and A8 of the plans set forth a Finish Schedule for the rooms in the hangar building. The Finish Schedule required the installation of gypsum board on the ceiling of the following rooms, among others: E101, E102, E132, W104, W105, W106, W146, W148, W149 and W150. The Finish Schedule required the installation of gypsum board on "furring channels," above an acoustical tile ceiling, in the following rooms, among others: E103, E104, E216, E201, W201, W202, W235, W236.

8. Each of these rooms is at or near an end of one of the wings of offices and support facilities and, pursuant to indications on page A1 of the plans, is therefore reflected in Building Cross Section D-D that appears at page A15 of them. Cross Section D-D, in turn, shows gypsum board covering

the ceilings in rooms to the right of a dividing wall but no gypsum board covering the ceilings in rooms to the left of this wall. All of the rooms set forth in paragraph 7 hereof are to the left of the dividing wall.

9. The subcontract provided that any changes or modifications to its terms must be in writing, signed by an officer of TLT, and approved for payment as an “extra” to the general contract by the Navy.

10. During the times relevant to this litigation, JCN Construction Company (“JCN”) was the project manager at Hangar 1, in charge of all construction operations at the site. William Johnstone was JCN’s on-site quality control representative.

11. On October 25, 1994 -- in the midst of Churchill Drywall’s work on the project -- William Churchill, president of Churchill Drywall, approached Johnstone and Leland Anderson, the Navy’s project manager for Hangar 1, and asked both men whether it was necessary to install gypsum board on the ceiling of room E216. Both replied in the affirmative, after consulting the Finish Schedule.

12. In December 1994 Johnstone sent a written request to Lieutenant Alan Ballard, the resident naval officer in charge of construction at BNAS. The subject of Johnstone’s inquiry was the following rooms: E111, E113, E121, E123, W147 and W151. Johnstone asked Ballard if the Navy intended that gypsum board not be installed in the ceilings of these rooms. In reply, Johnstone indicated that gypsum board should not be placed on the ceilings of these rooms, as indicated on the Finish Schedule.

13. On January 29, 1995 Churchill wrote a letter to TLT and JCN again asserting that there was a conflict between the Finish Schedule and the Cross Section, noting: “It is my opinion that the building cross section accurately reflects the true intent of the drawings.” TLT replied to this letter

through Johnstone on February 9, instructing Churchill to have Churchill Drywall install gypsum board on the ceilings in rooms W201 and W236, as it did in rooms E201 and E216, pursuant to the Finish Schedule.

14. Johnstone's February 9 letter was not a change or modification of the terms of the original subcontract. At no time did an officer or agent of TLT sign an order authorizing a change in the subcontract concerning the installation of gypsum board on room ceilings at Hangar 1.

15. In a claim arising under the Miller Act, the law of the state in which the contract was performed governs the contract issues raised by the litigation. *United States for the use of Endicott Enter. Inc. v. Star Brite Const. Co.*, 848 F. Supp. 1161, 1168 (D. Del. 1994); *United States for the use of Arlmont Air Condition Corp. v. Premier Contractors, Inc.*, 283 F. Supp. 343, 348 (D. Me. 1968); accord *American Auto Ins. Co. v. United States for the use of Luce*, 269 F.2d 406, 411-12 (1st Cir. 1959). Maine law therefore governs the interpretation of the subcontract at issue in this litigation.

16. Construction of an unambiguous contract is a question of law rather than fact, *SC Testing Technology, Inc. v. Department of Env'tl. Protection*, 1996 WL 765375 at *3 (Me. Dec. 30, 1996), and the predicate issue of whether an ambiguity exists is likewise a legal rather than a factual issue, *Maine Mut. Fire Ins. Co. v. Grant*, 674 A.2d 503, 505 (Me. 1996).

17. In construing a contract, the court must "avoid an interpretation that renders meaningless any particular provision of the contract." *SC Testing Technology*, 1996 WL 765375 at *3.

18. The contract at issue here unambiguously required Churchill Drywall, in consideration of the \$92,000 contract price, to install gypsum board on the ceilings of rooms E101, E102, E132, W104, W105, W106, W146, W148, W149, W150, E103, E104, E216, E201, W201, W202, W235 and

W236 by virtue of the clear indications to that effect on the Finish Schedule. That this requirement is not indicated on cross section D-D appearing on page A-15 of the plans fails to generate an ambiguity, as urged by Churchill Drywall.

19. Because the subcontract is unambiguous, none of the written or oral communications that passed between the parties, or agents of the parties, subsequent to the execution of the subcontract had any effect on Churchill Drywall's obligation under the subcontract to install gypsum board on the ceilings in the rooms in question. Therefore, Churchill Drywall is not entitled to its claim for \$13,185 in connection with the work it performed in these rooms.

20. Churchill Drywall did, however, perform certain work at the request of TLT that was not called for in the subcontract. This work included repairs to the hangar's east-west "draft curtain," framing of the hangar's north-south "draft curtain," unspecified work on the hangar's "pocket doors" and applying gypsum board to the hangar's sprinkler rooms. TLT agreed to pay Churchill Drywall the additional sum of \$3,250 for this work.

21. None of these additions to Churchill Drywall's work on Hangar 1 were confirmed in writing prior to Churchill's undertaking the additional work.

22. Churchill Drywall used a material known as "First Coat," instead of the originally specified joint compound, on a portion of the project. This represented a change in the subcontract to which the parties agreed orally but did not confirm in writing. TLT accepted a credit from Churchill Drywall on account of the savings resulting from this change.

23. A "course of dealing" is "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Restatement (Second) of Contracts*, § 223(1) (1981).

24. A course of dealing supplements or qualifies a contract unless the parties have “otherwise agreed.” *Id.* at subsection (2).

25. “There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing.” *Id.* at cmt. b.

26. The events described in paragraphs 20-22 hereof established a course of dealing between the parties whereby TLT would authorize changes in the subcontract orally, notwithstanding the language in the contract requiring changes to be in writing.

27. A course of dealing between parties to a contract may have the effect of waiving a requirement in the written contract that any additional work outside the scope of the original contract be itself authorized in writing. *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 687-89 (Fed. Cl. 1994) (citations omitted), *accord Kirkham v. Hansen*, 583 A.2d 1026, 1027 (Me. 1990) (discussing waiver doctrine); *Maine Mortgage Co. v. Tonge*, 448 A.2d 899, 902 (Me. 1982) (any contract may be modified by subsequent agreement of the parties); *cf. Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 605 A.2d 609, 613 (Me. 1992) (course of dealing cannot supercede requirement of written modification when original contract contained anti-waiver provision stating defendant would not waive default provisions by inaction); *Aroostook Valley R.R. Co. v. Bangor & Aroostook R.R. Co.*, 455 A.2d 431, 433 (Me. 1983) (courts should hesitate to use course of dealing to create new contract by implication, covering same subject matter as original contract, “if the evidence does not compel an inference that the parties intended to make one”). The course of dealing established by the events described in paragraphs 20-22 constitutes a waiver of the requirement in the subcontract that any additional work outside the scope of the original subcontract

be itself authorized in writing. As noted, *supra*, TLT has agreed to pay Churchill Drywall for these items in the agreed-upon amount of \$3,250.

28. Churchill Drywall seeks an additional \$966 for three tasks, beyond those described in paragraph 20 hereof, that were also not part of the original contract. These tasks involved finishing certain exposed steel beams on the second floor of the east wing, a cleanup at the hangar on or about February 22, 1995, and placing gypsum board on an exposed beam in the hangar's center "core."

29. Churchill Drywall performed these tasks after William vonRumpf, TLT's on-site construction superintendent at Hangar 1, orally authorized president William Churchill of Churchill Drywall to do so.

30. "[W]hen the conduct of the principal leads a third person to believe that a given party is his agent," that party is deemed to have the "apparent authority" that will effectively bind the principal. *Williams v. Inverness Corp.*, 664 A.2d 1244, 1246 (Me. 1995) (citations and emphasis omitted).

31. As on-site superintendent, vonRumpf had apparent authority to bind TLT in contract because TLT permitted him to represent to on-site subcontractors that he had such authority.

32. Therefore, the evidence compels a finding that the three additional items for which Churchill Drywall seeks payment, which TLT disputes, and which were never the subject of a written change order, are nevertheless obligations of TLT upon which Churchill Drywall is entitled to recover payment. This is so because of the assurances that Churchill, as president of Churchill Drywall, received from vonRumpf that Churchill Drywall would receive additional payment for this work if the company performed it.

33. The \$966 demanded for these services by Churchill in his invoice (Exhibit 47) -- i.e., \$300 for the work on the second-floor beams, \$276 for the hangar cleanup and \$390 for the work on the

center core -- represents the fair and reasonable price for these contract services.

34. The parties to the subcontract effected no modification to its explicit written term regarding responsibility for materials. Therefore, Churchill Drywall is not entitled to any payment for materials purchased by TLT and subsequently returned to their supplier for credit. This has reference to the items marked on Churchill Drywall's invoice (Exhibit 47) as "Credits Charles Chase" and "Credits Kamco."

35. TLT is entitled to a credit on its account with Churchill Drywall in the amount of of \$1,499.26 to reflect Churchill Drywall's use of "First Coat," as agreed to and as set forth in paragraph 22 hereof.

36. Accordingly, adding the sums appearing in paragraphs 3, 20 and 33 hereof, and subtracting the sum in paragraph 35 hereof, Churchill Drywall was entitled to be paid the sum of \$94,716.74 by TLT for the work performed pursuant to the subcontract.

37. The parties have stipulated that TLT has paid Churchill Drywall the sum of \$89,182.54. This figure includes the additional sums tendered to Churchill Drywall by TLT in June and July of 1995, as referenced in Exhibits 44 and 46.

38. The difference between what Churchill Drywall is owed and what it has been paid is \$5,534.20. This is the sum Churchill Drywall is entitled to recover on its claims.

39. Robert York, as president of JCN, was authorized to bind TLT as its agent.

40. In his capacity as agent for TLT, York communicated to Churchill Drywall that TLT interpreted the provisions of the contract concerning materials as requiring Churchill Drywall to pay only for additional materials needed because of wastage or other loss. According to this interpretation, Churchill Drywall was not responsible for the cost of additional materials if their use

was legitimately required in order to build the project according to the specifications. This interpretation is binding on TLT as a course of dealing between the parties.

41. The evidence does not establish that the \$3,200 charge for additional drywall, asserted by TLT in its counterclaim, is owed by Churchill Drywall pursuant to the contractual provisions governing extra materials as interpreted by York.

42. Again in his capacity as agent of TLT, York indicated to Churchill Drywall that if Churchill Drywall would perform the requested work on the north-south draft curtain at the agreed-upon price, TLT would for this purpose permit Churchill Drywall to use without charge a “scissor lift” that TLT had rented for use on the site.

43. Accordingly, the evidence does not establish that TLT is entitled to recover any sums from Churchill for use of the scissor lift, as asserted in the counterclaim.

44. The evidence does establish that TLT expended the sum of \$367.74 for “Ramset” fasteners, which represent additional material for which Churchill Drywall is responsible for payment under the contract. Accordingly, TLT is entitled to recover this sum on its counterclaim.

45. In December 1995 a piece of gypsum board fell from the ceiling of the hangar. It was later determined that this material was pre-existing gypsum board and not material that had been installed by Churchill Drywall. Accordingly, TLT is not entitled to recover any sums from Churchill Drywall in connection with this incident, as asserted in the counterclaim.

46. TLT and the Navy are in the midst of a dispute involving the Navy’s contention that it is entitled to substantial liquidated damages, pursuant to the general contract with TLT, occasioned by delays in completing the Hangar 1 project. Although these delays occurred, at least in part, during the time Churchill Drywall’s personnel were working on the construction site, and although these

delays affected Churchill Drywall's work, Churchill Drywall was not responsible for causing any of the delays. Accordingly, TLT is not entitled to recover any sums from Churchill Drywall in connection with project delays, as asserted in the counterclaim.

47. Offsetting the \$5,534.20 to which Churchill Drywall is entitled on its claims by the \$367.74 to which TLT is entitled on its counterclaim yields the sum of \$5,166.46. Churchill Drywall is entitled to judgment against the defendants in this amount.

In light of the foregoing, judgment shall enter in favor of Churchill Drywall and against the defendants for the sum of \$5,166.46.

So ordered.

Dated this 27th day of February, 1997.

David M. Cohen
United States Magistrate Judge