

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

THE THRASHER GROUP, INC.,

CLERK OF COURT
KANAWHA COUNTY CIRCUIT COURT

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 20-C-772

Presiding: Judge Reeder

Resolution: Judge Farrell

BEAR CONTRACTING, LLC

Defendant/Counterclaimant

and GREAT AMERICAN INSURANCE COMPANY,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
REGARDING CERTAIN DIANA DECK AND PIKE FORK DAMAGE
COUNTERCLAIMS**

This matter came before the Court this 8th day of March 2023 upon Defendant Bear Contracting, LLC's Motion for Summary Judgment Regarding Certain Diana Deck and Pike Fork Damage Counterclaims. The parties have fully briefed the necessary issues. Oral argument was heard at a hearing held before the undersigned on February 9, 2023. Upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows:

FINDINGS OF FACT

1. This civil action arises from three construction projects in which Defendant Bear Contracting, LLC (hereinafter "Defendant" or "Bear") and Plaintiff The Thrasher Group, Inc. (hereinafter "Plaintiff" or "Thrasher") worked together. *See* Def's Mem., p. 1; *see also* Compl. Bear performs road construction and bridge erection services, and Thrasher is an architectural, engineering, design, and field services company. *Id.* The Court notes the claims regarding one

of the three projects were resolved by the Resolution Judge in this matter. Therefore, relevant to the instant motions, Thrasher and Bear worked on two projects: (i) West Virginia Department of Highway (“WVDOH”) Project Number NFA-2117(019)D (U351-15-8.67 00) (also known as the “Diana Deck” project) and (ii) West Virginia Department of Highway (“WVDOH”) Project Number NFA-2117(020)D (S309-23-8.20 00) (also known as the “Pike Fork” project).

Collectively these projects may be referred to as the “Projects.”

2. On September 8, 2017, Thrasher emailed Bear two “fee proposals” or “pricing proposals” which included the lump sum cost for Thrasher’s bridge project services. *See* Def’s Mem., p. 4-5; *see also* Def’s Mot., Exs. 3 and 4.

3. Although the Court did not glean a date from the pleadings, at some point after the September 2017 pricing proposals communication, the parties agree that work began and a significant portion of the work was performed. *See* Def’s Mem., p. 7; *see also* Pl’s Resp., p. 11. The Court notes Thrasher avers it had completed 70% of the work. *See* Pl’s Resp., p. 11. As of March 2018, the parties did not have a written contract. In March 2018, the parties began the process of executing written agreements. On or around March 19, 2018, Bear proposed contract agreements to Thrasher covering the work to be performed on the Diana Deck and Pike Fork projects. *See* Def’s Mem., p. 6; *see also* Pl’s Resp., p. 8. On March 21, 2018, Thrasher rejected Bear’s proposed contract agreements, explaining they are “geared more for subcontractors than engineering design work” and instead proposed using contracts developed by Thrasher in its other design-build projects, and attaching the pricing proposals to be attached to the contracts. *Id.* The Contracts for the Diana Deck and Pike Fork projects, including Section 3, was Thrasher’s own language. *Id.* Specifically, Thrasher admits in its Response that the original

Section 3 language was its own: “The Subcontract Services shall consist of all engineering, design and professional services required by the Prime Contract.” *See* Pl’s Resp., p. 9.

4. From there, the Court finds it is undisputed that modifications were made to the first draft and a final version was executed by both parties on April 25, 2018. However, the Court notes that Bear avers that Bear made modifications, versions were exchanged for over a month, and the final drafts (one for Diana Deck and one for Pike Fork) were executed on April 25, 2018 (*see* Def’s Mem., p. 6-7), and that Thrasher avers there was only one version exchanged during this month and it was the “original modification”. *See* Pl’s Resp., p. 9. These contracts were referred by the parties as the Contracts and the Subcontracts in the pleadings. *See* Def’s Mem., p. 9; *see also* Pl’s Resp., p. 8, Reply p. 4.

5. On a prior day, the parties disputed the responsibility of certain services. On October 28, 2019, Thrasher emailed Bear and stated that starting on October 29, 2019, Thrasher would no longer be providing any services moving forward on the Diana Deck project. *Id.* at 8. On October 29, 2019, Bear terminated the Diana Deck contract for cause, and it contends this was in response to the letter and after Thrasher did not appear on the jobsite on October 29, 2019. *Id.* With regard to the Pike Fork project, on November 16, 2019, Bear terminated Thrasher’s Pike Fork contract for cause, arguing this was for failure to pay its subcontractor OR Colan. *Id.*

6. On November 29, 2022, Defendant filed the instant Motion for Summary Judgment Regarding Certain Diana Deck and Pike Fork Damage Counterclaims, seeking summary judgment in their favor regarding its breach of counterclaims, as well as certain damage claims arising from the two projects, contained in its Counterclaim. *See* Def’s Mem., p. 1. Specifically, it argues there is no genuine issue of material fact remaining that Bear sustained

damages stemming from “costs incurred related to inspection services, erection plans, overhang calculations, survey layouts, and right of way acquisitions”, which it argues “are services Thrasher was required to provide but did not”. *Id.* at. 2.

7. This motion was fully briefed. A hearing was held February 9, 2023. The Court notes that in Thrasher’s Response, it agrees that the section of Bear’s motion regarding Thrasher’s claimed damages reflects the amounts accurately and argues that the fees are due and owing to Thrasher from Bear. *See* Pl’s Resp., p. 14.

8. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

9. Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

10. Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the

evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

11. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

12. In the instant motion, Bear argues the Court should grant summary judgment in its favor as to certain damages that incurred in completing the project after Thrasher’s contract termination. *See* Def’s Mem., p. 15. These damages are: inspection costs (on both projects), erection plan and overhang calculation (on the Diana Deck project), survey layout (on both projects), and right of way acquisition (on both projects). *Id.* On the other hand, Thrasher argues, as detailed in its own motion for partial summary judgment, that it provided an itemized list of services in its pricing proposal, that Bear agreed to this scope, and that the disputed damage categories are outside of the scope of services to which Thrasher was meant to provide. *See* Pl’s Resp., p. 6, 8. The Court will take up the issues in turn.

Inspection and Quality Control Services

13. First, Bear seeks summary judgment on its damage counterclaim as to damage amounts related to inspection and quality control services, arguing it is entitled to recover the replacement cost of hiring an outside entity to provide said services. *See* Def’s Mem., p. 9. With regard to inspection vs. quality control, the Court notes quality control testing was the only

service accounted for outside of the lump sum price by a separate hourly rate. *Id.* Bear contends quality control (or QC) was billed hourly because it was not easily ascertainable how much QC services would be needed as it was needed on a sporadic, as-needed basis, whereas inspection was needed onsite every day as an onsite inspector is required to be present when Bear is working on the projects, and Thrasher could budget for this expense. *Id.* at 9, 10. Bear seeks \$46,944.12 in replacement costs related to inspection services on the Diana Deck project, and \$114,228.41 on the Pike Fork project. *Id.* at 11. Further, Bear seeks a declaration that inspection services were included under the lump sum price. *Id.*

14. On the other hand, Thrasher contends inspection services were outside of the lump sum fees and were to be billed on an hourly basis to Bear. *See* Pl's Resp., p. 14-15. For this reason, Thrasher argues the inspection fees Bear had to pay to Ascent or CEC would have been incurred in any event to complete the projects if it were completed by Thrasher, and consequently, Bear is not entitled to recover these fees. *Id.* at 15.

15. Here, the Court considers it has found the governing contracts clear and unambiguous. It concludes quality control and inspection are, therefore, separate and distinct items. Quality control testing was the only service accounted for outside of the lump sum price by a separate hourly rate of \$68.00 per hour. *See* Def's Mem., p. 9. It appears Thrasher contends that quality control services (QC) and inspection (sometimes referred to as quality assurance or QA) are the same thing, and should both be covered under the separate, \$68 per hour, rate. *Id.*; *see also* Reply, p. 10. The Court notes that Bear proffered that Thrasher initially provided inspection services on the Diana Deck project pursuant to the contract, and later began claiming they were excluded and would be charged under the \$68 hourly rate. *See* Def's Mem., p. 9. Thrasher did not perform inspection services on the Pike Fork project. *Id.* at 11.

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16. The Court considers QC is needed on an as-needed basis, whereas an onsite inspector is required to be present at any time Bear is working on the projects. *Id.* at 9, 10. In sum, giving the words their plain and ordinary meaning, the Court finds inspection or QA is separate and distinct from quality control or QC, and therefore, Thrasher cannot bill inspection services separately from the lump sum figure. If the parties had intended for both to be billed hourly, they could have specified “QC/QA” rather than “QC testing on site during construction” which is listed on the pricing proposal.

Erection plan and overhang calculations

17. Next, Bear seeks summary judgment on its damage counterclaim as to damage amounts related to erection plan and overhang calculations, arguing it is entitled to recover the replacement cost of hiring an outside entity to provide said services because they were included in the contract. *See* Def’s Mem., p. 11-12. Bear seeks summary judgment in its favor on this issue and \$15,196.00 in damages due to breach of contract. *Id.* at 12.

18. Thrasher contends these services were not included in its list of services for the lump sum pricing, and as a result, they constitute additional, non-included services. *See* Pl’s Resp., p. 15. Further, Thrasher argues the Court should reject Bear’s request for markup. *Id.* at 16.

19. Because this Court has found that the parties’ Contracts entered April 25, 2018 are unambiguous, and that Section 3 (drafted by Thrasher) clearly and unambiguously encompasses all engineering, design and professional services, the Court must conclude that these services (erection plan and overhang calculations) are services Thrasher was required to provide but did not. For this reason, summary judgment is found in Bear’s favor as to erection plan and overhang calculations. Accordingly, the Court concludes Bear is entitled to the

replacement damage related to retaining third-parties to complete the services in the amount of \$15,196.00. *See* Def's Mem., p. 2, 12, 15.

20. For these reasons, summary judgment is found in Bear's favor as inspection costs. Accordingly, the Court concludes Bear is entitled to the replacement damages related to retaining third-party firms Ascent Consulting & Engineering and then Civil and Environmental Consultants, Inc. perform the inspection services work in the amount of \$46,944.12 for Diana Deck and \$114,228.41 for Pike Fork. *See* Def's Mem., p. 2, 12, 15.

Survey and layout services

21. Next, Bear seeks summary judgment on its damage counterclaim as to damage amounts related to survey and layout services, arguing it is entitled to recover the replacement cost of the hours worked by Bear's own employees on this service and multiplying it by its labor burden for the time spent on these two categories, seeking damages in the amount of \$5,172.61. *See* Def's Mem., p. 12.

22. On the other hand, Thrasher contends these services were not included in its list of services for the lump sum pricing, and as a result, they constitute additional, non-included services. *See* Pl's Resp., p. 16. Thrasher avers it agreed to provide construction layout and staking one time at the beginning of the project so that Bear could use the survey stakes to measure from in constructing the projects, and it fully performed that task, but Bear then requested Thrasher to provide surveyors to check Bear's work which was never contemplated by the parties. *Id.*

23. Because this Court has found that the parties' Contracts entered April 25, 2018 are unambiguous, and that Section 3 (drafted by Thrasher) clearly and unambiguously encompasses all engineering, design and professional services, the Court must conclude that

these survey and layout services are services Thrasher was required to provide but did not. In making this determination with the language of Section 3, the Court also notes and considers that “surveys” was listed in Section 3, and that survey and “construction layout” services were listed in the pricing proposals that Thrasher claims are controlling. *See* Def’s Mot., Exs. 3 and 4 and 8 and 9.

24. Because this Court has determined that survey and layout services were clearly, unambiguously the responsibility of Thrasher under the Contracts (and the pricing proposals), the Court must reject Thrasher’s argument that it actually agreed to provide construction layout and staking one time at the beginning of the project so that Bear could use the survey stakes to measure from in constructing the projects, and it fully performed that task, not to provide surveyors to check Bear’s work later. *See* Pl’s Resp., p. 16. Based on the clear and unambiguous language of Section 3, as well as the further evidence of the inclusion of these services in Section 3’s enumerated items and the pricing proposal’s bulleted list, the Court must conclude that survey and layout services are services Thrasher was required to provide. For this reason, summary judgment is found in Bear’s favor as to survey and layout services.

Accordingly, the Court concludes Bear is entitled to the replacement damage related to retaining its own employees to self-perform the survey and layout work in the amount of \$5,172.61 for Diana Deck and \$9,233.20 for Pike Fork. *See* Def’s Mem., p. 2, 12, 15.

Right-of-way acquisition

25. Finally, Bear seeks summary judgment on its damage counterclaim as to damage amounts related to right of way acquisition, arguing Thrasher was responsible for ensuring any of the necessary right of ways for performance of the Prime Contract with the DOH, making paying Thrasher’s subcontractor OR Colan for the right of way work Thrasher’s responsibility,

not Bear's. *See* Def's Mem., p. 13. Bear seeks damages in this category in the amount of \$108,170.38.00 (\$6,184.44 for Diana Deck and \$46,985.94 for Pike Fork). *Id.* at 14.

26. Thrasher contends it was not responsible for paying OR Colan because OR Colan was Bear's right of way consultant, not Thrasher's, and that this service was outside of what was originally agreed to under the pricing proposals. *See* Pl's Resp., p. 17-18. Thrasher contends it solicited prices on a right of way consultant on behalf of bear, while Bear contends Thrasher got Bear's approval for its own subcontractor right of way consultant as required by Section 14 of the Subcontracts. *Id.* at 19; Def's Mem., p. 13.

27. Here, like the previous section, "securing of any necessary right of ways" was specifically set forth in Section 3, after the sentence requiring Thrasher to provide all engineering, design and professional services. *See* Def's Mot., Exs. 8 and 9. The Court considers that the Diana Deck pricing proposal, attached as Exhibit 3 to the motion, lists "Right of Way, if needed"¹ as a bulleted service. *See* Def's Mot., Ex. 3. Further, the Pike Fork pricing proposal, attached as Exhibit 4 to the motion, lists "Right of Way, if needed" as a bulleted service. *See* Def's Mot., Ex. 4. The Court also notes that right of way acquisition was identified on the executive summary page of each technical proposals submitted to the WVDOT for initial approval (one for Diana Deck and one for Pike Fork), and notably also listed under the "Design" section of the schedule attached to the technical proposals. *See* Def's Mem., p. 3, 13. Additionally, the technical proposals identify a Thrasher employee as in charge of right of way. *Id.* at 13.

¹ The Court notes Defendant's memorandum explains that "[a]lthough Thrasher stated the same services were included, whether by intent or scrivener's error, the Diana Deck fee proposal changed the line item "Right of Way, if needed" to "Right of Way Plans, if needed". *See* Def's Mem., p. 5, 13.

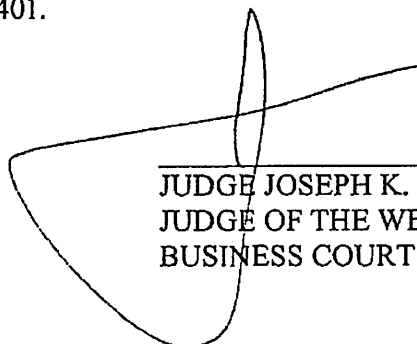
28. Because of these references in Section 3 and the pricing proposals attached to the contracts (that Thrasher argues its services are limited to), as well as the references in the technical proposal, and the Court's finding regarding the clear and unambiguous language of the contract and of Section 3, the Court concludes there is no question that the right of way acquisition at issue in the instant motion was covered by the parties' agreement. The Court must conclude that right of way acquisition is a service Thrasher was required to provide. For this reason, summary judgment is found in Bear's favor as to right of way acquisition. Accordingly, the Court concludes Bear is entitled to the cost of subcontractor OR Colan performance of the right of way work in the amount of \$108,170.38.00 (\$6,184.44 for Diana Deck and \$46,985.94 for Pike Fork). *See* Def's Mem., p. 2, 14, 15.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant Bear Contracting, LLC's Motion for Summary Judgment Regarding Certain Diana Deck and Pike Fork Project Counterclaims is hereby **GRANTED**.

The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

3/8/23
date of entry


JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 09
DAY OF March, 2023
Cathy Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 93