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COURT OF APPEALS
DIVISION II

08 APR 01 PM 12:21

STATE OF WASHINGTON
BY 

No. 37592-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WALDNER CONSULTING, INC.

Appellant,

v.

MILLER CONTRACTING, INC.

Respondent.

BRIEF OF APPELLANT

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P.M. 8-19-2008

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B. ASSIGNMENT OF ERROR

The trial court erred by granting summary judgment in favor of Miller Contracting against Waldner Consulting by concluding that Miller's 180-day contract claim limitation with the prime contractor, Glenn Springs Holdings, "flowed down" to bar Waldner's claim against Miller.

C. ISSUE RELATED TO ASSIGNMENTS OF ERROR

Did the trial court err by granting summary judgment in favor of Miller Contracting against Waldner Consulting by concluding that Miller's 180-day contract claim limitation with the prime contractor, Glenn Springs Holdings, "flowed down" to bar Waldner's claim against Miller?

D. STATEMENT OF THE CASE

Plaintiff Waldner Consulting, Inc. is a broker of sand and gravel for construction sites. On or about November 15, 2004, Waldner Consulting entered into a contract (“the Subcontract”) with defendant Miller Contracting, Inc. CP 418. Waldner entered into the Subcontract after receiving a written promise from Miller on October 21, 2004 that Miller would “deal exclusively with Jeff Waldner for supply and delivery of the product to Slip 1”. CP 423.

The Subcontract defined “the Work” to be performed by Waldner:

1. WORK TO BE PERFORMED: The Sub-Contractor [Waldner] shall, under the direction and to the satisfaction of the Contractor [Miller], *provide that portion of the labour and materials and perform that portion of the work set out in the Prime Contract* [the Glenn Springs Holdings contract with Miller], namely:

Item D Supply, Transport and Place Clean Fraser River Sand in Slip One Up to Plus 16 Foot Elevation

Subcontractor’s Scope:

– Supply and Transport (F.O.B.

- Site) Only
Supply Approved Alternate
Pitrun Gravel from Dickson Pit

(hereinafter called "*the Work*")....

CP 424.

Item D in the Glen Springs Holdings Prime Contract shows an estimated quantity of 204,080 tons of material with a fixed unit price of \$5.50/ton. CP 63.

The Prime Contractor, Glenn Springs Holdings, is an affiliate of Occidental Chemical Corporation. Occidental was party to a Consent Decree between the U. S. Environmental Protection Agency and the Port of Tacoma for cleanup of the Hylebos Waterway. The purpose of the Prime Contract between Glenn Springs and Miller was to accomplish a portion of the Prime Contract cleanup mandated by the EPA Consent Decree. CP 62.

The Prime Contract called for placement of contaminated sediment from the Hylebos Waterway at Slip One. The

contaminated material would be capped with clean material, which would protect the contaminated material from release back into the waterway. CP 62.

Before Waldner executed the Subcontract, Waldner negotiated a price quote of \$1.63/ton of gravel from Wm. Dickson Company. CP 501. This quote was for a quantity of plus or minus 200,000 tons to be delivered before the end of February, 2005 (the Prime Contract deadline). CP 419. Dickson's normal posted price per ton of gravel at that time was \$2.33. CP 501.

The Subcontract deadline for delivery of the material was February 18, 2005. CP 425. Dickson agreed to sell the material to Waldner at the lower price because the high volume and short delivery time would result in lower overhead charges for Dickson per ton of material. However, it would require that Dickson mobilize additional equipment and workers at the gravel pit. CP 418.

Dickson mobilized the extra equipment and workers so that

it could deliver the material before the February 18 deadline. Waldner hauled the material on the days and in the amounts directed by Miller. On many days, Dickson's workers and equipment were idle while waiting for the anticipated demand for material. CP 450.

On January 24, 2005, while Waldner and Dickson were waiting for delivery calls, Miller signed a change order with Glenn Springs to substitute 15,000 to 20,000 cubic yards of material from the Port of Tacoma for Waldner's material. CP 366. Waldner was not notified of the change order. CP 232-233.

A change order substituting another 30,000 cubic yards of material was signed by Miller on February 5, 2005 without notice to Waldner. CP 233, 435.

In the first week of February, while Waldner and Dickson were still standing by waiting for instruction to deliver more material, Mr. Waldner observed placement of other material at Slip One and learned of the plan to use substitute material from

the Port. On February 7, 2005, Waldner's attorney sent a letter notifying Miller that Waldner had not been notified of the substitution and that it constituted a breach of the Subcontract. CP 429-430.

On February 14, 2005, four days before the delivery deadline and after delivery of only about half of the Slip One material— 111,447 tons— Waldner was for the first time informed by Miller that the balance of the material would be provided by the Port of Tacoma and deducted from the quantities required by Waldner's contract. CP 420.

Miller was paid an additional \$0.50 per ton by Glenn Springs to substitute the Port material for the Waldner material. CP 196-197.

Waldner's material price was based on the total project volume. The cancellation of Waldner's supply contract resulted in a bait and switch deal. Miller negotiated a price with Waldner based on volume of 204,000 tons. Miller, and by extension,

Glenn Springs and the Port of Tacoma, unfairly received a volume discount for the Waldner material when the Port of Tacoma decided that it could beat Walder's price with its own material after the Waldner contract was already in the middle of performance. CP 419-420.

The Port of Tacoma, Glenn Springs, and Miller made sporadic indications that Waldner's claim was under consideration, including a meeting with representatives from Waldner, Glenn Springs, Miller and the Port of Tacoma on May 25, 2006. CP 502.

On November 15, 2006, the Port issued a letter to Miller stating that "the Port considers the matter closed." CP 421. Waldner filed suit against Miller for breach of contract less than 180 days later on February 15, 2007. CP 1-45. Miller answered and cross-claimed against Glenn Springs on October 15, 2007. CP 46-54.

Glenn Springs moved for summary judgment against

Miller. Miller, in turn, moved for summary judgment against Waldner. Both summary judgment motions were granted on February 8, 2008. CP 517-522.

Waldner's Motion for Reconsideration was denied on March 14, 2008. CP 574-576. Waldner appealed on April 9, 2008. CP 577-587. Miller cross-appealed against Glenn Springs on April 23, 2008. CP 589-601.

E. SUMMARY OF ARGUMENT

Waldner Consulting contracted with Miller Construction to supply Miller with material required to complete a specific portion of Miller's contract with Glenn Springs Holdings. Miller's contract with Waldner specifically incorporates "Item D" in Miller's contract with Glenn Springs and labels it "the Work". Miller's contract with Waldner does not specifically incorporate the 180 claim limitation provision in Miller's contract with Glenn Springs Holdings.

Miller breached the contract with Waldner after Waldner supplied about half of the material described in Waldner's contract. Miller substituted another source of material for the balance of "the Work". Waldner submitted its claim to Miller and filed suit against Miller after Miller failed to recover the claim.

The trial court conclusion that the Glenn Springs-Miller contract's 180-day suit limitation period "flowed down" to the Miller-Waldner contract is not supported by the record. Contract

limitation periods do not “flow down” unless they are specifically incorporated by reference. The Miller-Waldner Subcontract does not reference the Glenn Springs-Miller Prime Contract suit limitation period. The trial court’s decision dismissing Waldner’s claim against Miller should be reversed.

F. ARGUMENT

ISSUE Did the trial court err by granting summary judgment in favor of Miller Contracting against Waldner Consulting by concluding that Miller’s 180-day contract claim limitation with the prime contractor, Glenn Springs Holdings, “flowed down” to bar Waldner’s claim?

1. Summary Judgment Standard.

Review of a summary judgment decision is de novo. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). In this case, the Court of Appeals is reviewing cross motions for summary judgment.

2. Contract Interpretation.

Transactions predominantly for the sale of goods are covered by Article 2 of the UCC. RCW 62A.2-102; *Tacoma Athletic v. Indoor Comfort*, 79 Wn.App. 250, 256, 902 P.2d 175 (1995). A contract for purchase of goods from a broker may be interpreted as predominantly a transaction for a service, and not

subject to the UCC. *Smith v. Skone & Connors*, 107 Wn.App. 199, 205, 26 P.3d 981 (2001).

It is Waldner's position that the Subcontract at issue is predominantly a transaction for a service. Waldner Consulting was hired predominantly to provide a service— expertise in brokering specialized cap material for the Hylebos Waterway cleanup at Slip One.

Interpretation of a contract provision is a question of law when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence. *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993).

Corbin states: "Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person." D A. Corbin, *Contracts* § 532, at 2 (1960). The Restatement definition is: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." Restatement (Second) of Contract § 200 (1981).

Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

3. Expressed Intention of the Parties.

“The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Berg*, 115 Wn.2d at 663 (quoting Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QUAR. 161, 162 (1965).

“Unexpressed impressions are meaningless when attempting to ascertain the [parties’] mutual intentions.” *Lynott v. Nat’l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (quoting *Dwelley v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977).

(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts § 201 (1981).

The Miller Subcontract contains a clearly defined and limited scope:

1. WORK TO BE PERFORMED: The Sub-Contractor [Waldner] shall, under the direction and to the satisfaction of the Contractor [Miller], *provide that portion of the labour and materials and perform that portion of the work set out in the Prime Contract* [the Glenn Springs Holdings contract with Miller], namely:

Item D Supply, Transport and Place Clean Fraser River Sand in Slip One Up to Plus 16 Foot Elevation

Subcontractor's Scope:

- Supply and Transport (F.O.B. Site) Only
- Supply Approved Alternate Pitrun Gravel from Dickson Pit

(hereinafter called "*the Work*")....

CP 424.

The Subcontract provision incorporating the Prime Contract into the Subcontract explicitly limits the extent of incorporation of the Prime Contract to “the Work” as defined in paragraph 1 of the Subcontract:

5. PRIME CONTRACT: The Sub-Contractor agrees to perform and comply with all of the covenants, obligations, terms and conditions binding on the Contractor under the Prime Contract, *in respect of the Work...*

CP 425 [italics added].

4. Ambiguity

A written contract is ambiguous when its terms are uncertain or capable of being understood in more than one manner. *Farmers Ins. Co. v. U.S.F. & G. Co.*, 13 Wn.App. 836, 840-41, 537 P.2d 839 (1975). Words should be given their ordinary meaning; courts should not make another or different contract for the parties under the guise of construction. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

If contract language is ambiguous, then the ambiguity is to be interpreted most strongly against the party who drafted the contract. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966).

In this case, Waldner denies that any ambiguity exists in the Subcontract. To the extent that the contract could be considered ambiguous on the subject of incorporation of the Prime Contract's dispute resolution provisions, then the ambiguity should be interpreted most strongly against Miller's interpretation, because Miller drafted the Subcontract.

5. Flow Down Provision.

Incorporation by reference allows the parties to "incorporate contractual terms by reference to a separate... agreement to which they are not parties, and including a separate document which is unsigned." 11 WILLISTON ON CONTRACTS § 30:25, at 233-34 (4th ed. 1999) (footnotes omitted). "But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning."

WILLISTON, *supra*, at 234. Incorporation by reference must be clear and unequivocal. *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994). "[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms[.]" WILLISTON, *supra*, at 234.

Adventists v. Ferrellgas, Inc., 102 Wn.App. 488, 494-495, 7 P.3d 861 (2000).

A subcontract can incorporate both the contract specification and procedural terms of a prime contract if the subcontract incorporation clause is general and unlimited. *Sime Construction v. WPPSS*, 28 Wn.App. 10, 16, 621 P.2d 1299 (1980).

A contract incorporation clause that mentions specifications but not procedural terms in the prime contract may be insufficient to incorporate the entire prime contract. *See, A-C Construction, Inc. v. Bakke Corp.*, 153 Or. App. 41, 45-46, 956 P.2d 219, 222-223 (1998) (a purchase order stating "All work to be done according to plans and specifications by Pacific Power

and Light Company” did not incorporate the payment provisions in the prime contract).

The Miller Subcontract does not contain a “pay when paid” clause or an unqualified “flow-down” clause:

18. CONTROVERSIES: The Contractor and Sub-Contractor agree that... if the dispute or controversy involves the liability of any third party, which third party has a contractual relationship with the Contractor but not with the Sub-Contractor, the Sub-Contractor agrees to supply to the Contractor all information and assistance required by the Contractor for the purpose of negotiating and settling the third party claim or liability, and *the Contractor* [Miller] agrees to be bound by the settlement reached whether by way of negotiation or action between the Contractor and the third party. If the Contractor shall fail to collect any amounts owing or claimed owing to the Sub-Contractor as a result of the failure of the Sub-Contractor to comply with the terms of this Agreement, including any documents incorporated herein, the Contractor shall be fully released from any liabilities for such claims. In no event, however, shall the Sub-Contractor cease or disrupt the Work.

CP 426 (italics and comment added).

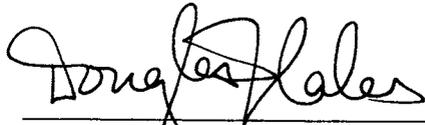
Paragraph 18 binds Miller by any third party controversy settlement, but it does not bind Waldner.

Paragraph 18 releases the Contractor, Miller, from liability for a failure to collect any amounts owing to the Subcontractor, Waldner, only if the failure is caused by the Subcontractor. Paragraph 18 and the rest of the Subcontract does not include any “flow-down” provision limiting Waldner’s right of action against Miller to the terms of the Prime Contract.

G. CONCLUSION

The trial court’s conclusion that the Prime Contract’s 180-day cause of action limitation period flowed-down to Waldner’s Subcontract is not supported by any provision in the Subcontract. Nor does any case law support a general flow-down of prime contract limitation of action clauses to subcontracts spawned by the prime contract absent a clear and unequivocal incorporation by reference. The trial court’s dismissal of Waldner’s suit against Miller should be reversed.

RESPECTFULLY SUBMITTED
this 19th day of August, 2008.

A handwritten signature in cursive script, appearing to read "Douglas W. Hales". The signature is written in black ink and is positioned above a horizontal line.

Douglas W. Hales WSBA #22555
Attorney for Appellant Waldner Consulting, Inc.

CERTIFICATE OF SERVICE

On penalty of perjury under the laws of the State of Washington, I certify that I served copies of the foregoing document, with appendices attached, by first class mail to the following:

Attn: Jeff Waldner
Waldner Consulting, Inc.
6202 Troon Lane SE
Olympia WA 98501

Attn: Richard Dickson
Wm. Dickson Company
3315 South Pine Street
Tacoma WA 98409

Attn: David Smith
Law Offices of David Smith PLLC
201 Saint Helens Avenue
Tacoma WA 98402

Attn: John R. Welch, Esq.
CARNEY BADLEY SPELLMAN
701 Fifth Avenue, Suite 3600
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999 Third Avenue, Suite 3100
Seattle WA 98104-4088

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BY _____

DATED this 19th day of August, 2008.



Douglas W. Hales

H. APPENDICES

1. CONTRACT CHRONOLOGY

- 30 Sep 04 Prime Contract between Glenn Springs and Miller. CP 65-184.
- 21 Oct 04 Miller written promise to “deal exclusively with Jeff Waldner for supply and delivery of the product to Slip 1”. CP 423.
- 15 Nov 04 Subcontract between Miller and Waldner. CP 424-427.
- 24 Jan 05 Miller executes CO 14 approving substitution of first 15,000-20,000 cubic yards of Dickson Pit material (Waldner not notified of change). CP 366.
- 7 Feb 05 Waldner’s attorney sends letter to Miller warning of breach if material substituted. CP 429-430.
- Of the 204,000-ton estimated amount, 111,500 tons of material had been delivered to the Port by Waldner to that point. CP 419.
- 11 Feb 05 Miller executes CO 16 approving substitution of another 30,000 cubic yards. CP 435.
- 14 Feb 05 Miller sends letter to Waldner with copy of CO 16. CP 434-435.
- Miller sends copy of Waldner’s February 7 letter to GSH citing Article 26 in Prime Contract. CP 437.
- 15 Feb 05 Waldner serves Miller with letter and Notice of Claim Against Bond and Retainage. CP 442.

17 Mar 05 CO 21 issued substituting total of 114,700 tons Dickson material for Port material. CP 387.

23 Mar 05 Miller letter to Waldner with copy of CO 21, and request for additional “detailed back up”. CP 481-483.

Miller forwards Waldner’s Claim to GSH and protests change, citing Article 9. CP 485-487.

31 Mar 05 Waldner letter to Miller explains claim and requests more defined list of “detailed backup”. CP 488-490.

12 Apr 05 Miller letter to GSH requesting clarification of “detailed backup” request. CP 492-493.

23 Mar 06 Hales letter to Port w/copies of Waldner’s claim, including contract. CP 508.

24 May 06 Miller notifies Waldner of meeting with GSH and Port of Tacoma. CP 421.

26 May 06 Representatives for the Port of Tacoma, Glenn Springs, Miller and Waldner meet at GSH office to discuss Waldner’s claim. Richard Dickson, who attended on Waldner’s behalf, left the meeting with the understanding that payment of the claim was still under consideration by the Port and Glenn Springs. CP 502.

15 Nov 06 Port letter to Miller claiming (wrongly) that “the Port has not received copies of any contracts nor had any further conversations with the claimants. Accordingly, the Port considers the matter closed...” CP 499.

- 7 Dec 06 Waldner letter to Miller stating, again, that all documents were provided. CP 500.
- 7 Feb 07 Meeting attended by Waldner, Miller, counsel for Miller; Miller offers to assert claim on behalf of Waldner if Waldner will release Miller of liability. CP 523-525.
- 15 Feb 07 Waldner files suit against Miller. CP 1-45.

2. PERTINENT SUBCONTRACT PROVISIONS
(With Emphasis Added)

1. WORK TO BE PERFORMED: The Sub-Contractor [Waldner] shall, under the direction and to the satisfaction of the Contractor [Miller], *provide that portion of the labour and materials and perform that portion of the work set out in the Prime Contract* [the Glenn Springs Holdings contract with Miller], namely:

Item D Supply, Transport and Place Clean Fraser River Sand in Slip One Up to Plus 16 Foot Elevation

Subcontractor's Scope:

- Supply and Transport (F.O.B. Site) Only
- Supply Approved Alternate Pitrun Gravel from Dickson Pit

(hereinafter called "*the Work*")....

2. PAYMENT: In consideration of the covenants and Work of the Sub-Contractor, the Contractor agrees to pay to the Sub-Contractor and the Sub-Contractor agrees to receive and accept as full compensation *for doing all the Work, furnishing all materials and supplies required or contemplated in this Agreement*, the following prices:

Item D \$4.25 Per Ton (U.S. Dollars)

Subcontractor to provide certified truck scale slips as confirmation of load for all loads delivered. Cumulative tonnage on scale slips to be basis for payment....

CP 424.

5. PRIME CONTRACT: *The Sub-Contractor agrees to perform and comply with all of the covenants, obligations, terms and conditions binding on the Contractor under the Prime Contract, in respect of the Work,* together with any changes thereto, and hereby expressly declares that he has fully informed himself of all such covenants, obligations, terms and conditions by reference to the Prime Contract. For the purposes of incorporation of the Prime Contract and the interpretation of these contract documents, “Contractor” shall be deemed to mean “Sub-Contractor” in the Prime Contract....

CP 425.

12. PROSECUTION OF THE WORK: Sub-Contractor agrees to do the Work in co-operation with the Contractor and other sub-contractors and not to interfere unduly with any of the Work performed by the Contractor or other sub-contractors. The Sub-Contractor shall keep a competent representative at the job at all times to receive and prosecute the orders from the Contractor.

Sub-Contractor agrees that if *the Work* shall be abandoned or if at any time *the Work* is unreasonably delayed by the Sub-Contractor, or if the Sub-Contractor breaches any of the provisions herein contained or if the Sub-Contractor fails to diligently prosecute *the Work*, then and in that event,... the Contractor may terminate the *Sub-Contractor's right to prosecute the Work*,... and *the Contractor may thereupon complete the Work*.... All expenses incurred in taking over the Work by the Contractor shall be deducted out of any monies then due or becoming due to the Sub-Contractor hereunder. Upon the taking over of the Work by the Contractor as herein provided for, no further payments will be made to the Sub-Contractor until the Work is completed and *in the event the expenses incurred by the Contractor in completion of the Work and performing the Sub-Contractor's*

obligations, shall exceed the sums due or to become due the Sub-Contractor, the Sub-Contractor's sureties shall pay such excess to the Contractor upon completion of the Work....

14. EXTRA WORK AND CHANGED WORK: The Contractor may at any time order any extra work or changed work to be done by the Sub-Contractor but no such extra work or changed work shall be done except on the written order of the Contractor. All clauses of this Agreement shall remain valid and apply to any extra work or changed work.

Payment for extra work or changed work shall be made at the unit prices stipulated herein or, if not applicable, at unit prices and/or lump sums mutually agreed upon in writing by the Contractor and Sub-Contractor; PROVIDED, HOWEVER, if no agreement can be reached by the parties, the Sub-Contractor shall be paid the actual cost thereof received by the Contractor from the Owner plus a . . . N/A. . . percent of the mark up received by the Contractor from the Owner, as and when it is paid therefor by the Owner....

18. CONTROVERSIES: The Contractor and Sub-Contractor agree that if any controversy or dispute arises between the Sub-Contractor and Contractor pertaining in any way to this Sub-Contract or the Work herein described, the parties shall endeavour to forthwith negotiate and settle the dispute or controversy; PROVIDED, HOWEVER, that if the dispute or controversy involves any claim advanced by a third party or the liability of any third party, which third party has a contractual relationship with the Contractor but not with the Sub-Contractor, the Sub-Contractor agrees to supply to the Contractor all information and assistance required by the Contractor for the purpose of negotiating and settling the third party claim or liability, and *the Contractor agrees to be bound by the settlement reached whether by way of negotiation or action between the Contractor and the third party.* If the Contractor shall fail to collect any amounts

owing or claimed owing to the Sub-Contractor as a result of the failure of the Sub-Contractor to comply with the terms of this Agreement, including any documents incorporated herein, the Contractor shall be fully released from any liabilities for such claims. In no event, however, shall the Sub-Contractor cease or disrupt the Work.

CP 426.

3. PERTINENT PRIME CONTRACT PROVISIONS

Description of Work	Unit	Unit Price	Estimated Quantity	Extended Price
...D. Supply, Transport & Place Clean Fraser River Sand in Slip One up to +16' Elevation				
Supply & Transport	Ton	\$5.50	204,080	1,122,440
Place	Ton	\$3.00	204,080	612,240

CP 68.

- B. Changes in the quantity of unit price Work. Where the nature of the changed Work does not differ materially from Work which is unit price Work, the change shall be measured and paid for (or credited) at the established unit prices, subject to the following exceptions:
1. Where quantity is less than 80%. If the quantity of an item or unit price Work actually performed or to be performed is less than 80 percent of the bid quantity for that item, the Contractor or the Contracting Entity may request a Change Order revising the unit price for the item. Such request shall be accompanied by evidence to support the requested revision. The proposed revision will be evaluated by the Contracting Entity considering such factors as the changes in actual costs to the Contractor of the item, and the share, if any, of fixed expenses properly chargeable to the change in quantity of that item. If the Contracting Entity and the Contractor agree on the change, a change order will be executed. If the parties cannot agree, the

Contracting Entity may nevertheless issue the change order directing Contractor to perform the Work as changed and Contractor shall proceed with the Work. Contractor's performance of such work shall not prejudice its position that such direction constitutes a change, that the Scheduled Completion Date should be adjusted, or that Contractor should receive additional compensation for such work, nor any claim by Contracting Entity for a credit.

D. Procedure for Protest by the Contractor

1. If the Contractor accepts the terms of a change order by the Contractor's endorsement thereon, or by failure to protest as provided in this paragraph, payment by the Contracting Entity in accordance with the terms of the change order shall constitute full compensation, including but not limited to that for labor, material, equipment, overhead, fee (including profit), and damages (direct or indirect) or any other claim, if any, and for all changes to the Work and to the Contract Time.
2. If the Contractor disagrees with any of the terms of a change order issued by the Contracting Entity, the Contractor shall give immediate oral notice of protest to the Contracting Entity prior to performing the Work and shall submit a written protest to the Contracting Entity within ten (10) calendar days of the Contractor's receipt of the change order. The protest shall identify the point of disagreement, those portion of the Contract believed to be applicable, and an estimate of quantities and costs involved in the change. When protest of a change order relates to compensation, the Contractor shall keep full and complete records of the cost of such Work and shall

permit the Contracting Entity to have such access to those records as requested by the Contracting Entity to enable the Contracting Entity to evaluate the merits of the protest.

F. Notice and Detailed Breakdown of claim, Prerequisite to Suit; 180-Day Limitation Period

No action against the Contracting Entity may be brought on account of a claim or other liability arising out of or related to this Contract unless: 1) the requirements of this Article 9 have been complied with and 2) such suit is instituted within 180 days following substantial completion of the Work....

CP 73-76.

ARTICLE 24

SUBCONTRACTORS, SUCCESSORS AND ASSIGNS

....The Contractor shall not enter into any subcontract for the Work or any portion thereof without the prior written consent of Contracting Entity....

ARTICLE 26

RESPONSIBILITY OF CONTRACTOR TO FURNISH NOTICE

The Contractor shall immediately notify Contracting Entity in writing if (I) notice is received of violation of any governmental enactment, requirement, or authorization which relates to the Contractor's performance or non-performance under this Contract; (ii) proceedings are commenced or threatened which could lead to revocation of permits, licenses, or other governmental authorizations which relate to such performance; (iii) permits,

licenses, or other governmental authorizations relating to such performance are revoked; (iv) litigation is commenced or threatened which could affect such performance; (v) there has been, except as is inherent in the proper performance of the Work, a release or further release into the environment of any pollutant, whether pre-existing or otherwise; or (vi) any other condition occurs or is threatened to occur which the Contractor reasonably believes or should reasonably believe may have a material adverse effect on the timely performance of any of the Contractor's duties under this Contract.

CP 84.