

2013 WL 4033705

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

ASPEN LANDSCAPING CONTRACTING, INC.,
Plaintiff,

v.

A. JULIANO & SONS CONTRACTORS, INC.,
Defendant–Appellant,

and

County of Union, a body politic and corporate in
law in the State of New Jersey,

Defendant/Third–Party Plaintiff–Respondent,

v.

T & M associates (a/k/a “T & M”), Third–Party
Defendant–Respondent.

Argued May 22, 2013.

Decided Aug. 9, 2013.

On appeal from Superior Court of New Jersey, Law
Division, Union County, Docket No. L–1079–08.

Attorneys and Law Firms

[Richard T. Garofalo](#) argued the cause for appellant
(Garrity, Graham, Murphy, Garofalo & Flinn, P.C.,
attorneys; Mr. Garofalo, on the brief).

[Guido Stefan Weber](#) argued the cause for respondent
County of Union (Weber Dowd Law, LLC, attorneys; Mr.
Weber and Aleksandra Tasic, on the brief).

[Thaddeus J. Hubert III](#) argued the cause for respondent T
& M Associates (Hoagland Longo Moran Dunst &
Doukas, LLP, attorneys; Mr. Hubert III, of counsel and on
the brief; [Thaddeus J. Hubert IV](#), on the brief).

Before Judges [GRALL](#), [SIMONELLI](#) & [ACCURSO](#).

Opinion

PER CURIAM.

*1 Defendant Union County (the County) awarded
defendant A. Juliano & Sons Contractors, Inc. (Juliano),

the successful bidder, a public contract for excavation,
demolition and construction work needed to establish a
public park in Clark. In the context of consolidated
lawsuits filed by Juliano’s subcontractors seeking
payment from Juliano and the County, Juliano filed a
cross-claim against the County asserting entitlement to
payment on six change orders. After all claims, including
Juliano’s claims for amounts due under five of its six
change orders, were settled, the County filed a third-party
complaint seeking indemnification from and alleging
negligence by T & M Associates, its project engineer with
responsibility for drafting the specifications and managing
the project.

On December 22, 2011, the trial court granted the County
summary judgment on Juliano’s claim for \$631,895.27
allegedly due on the sixth change order for the cost of
borrow excavation material, and the court denied
Juliano’s timely motion for reconsideration on February
17, 2012. The third-party claims between the County and
T & M were pending in the trial court until May 31, 2012,
when the court entered the third parties’ stipulation of
dismissal without prejudice or costs.¹

¹ Although Juliano did not file its notice and amended
notice of appeal by July 10, 2012, its appeal is not
untimely, *R. 2:4–3*, because the orders did not resolve
all claims as to all parties. *R. 2:2–3. Janicky v. Point
Bay Fuel, Inc.*, 396 *N.J.Super.* 545, 550
(App.Div.2007). The

third-party claims between the County and T & M
were pending until the court dismissed them without
prejudice on May 31, 2012.

To the extent that the third parties’ stipulation of
dismissal without prejudice merely creates the
appearance of finality, we exercise our discretion to
grant leave to appeal sua sponte as within time. *R.
2:4–4(b)(2)*. A grant of leave to appeal is warranted
because Juliano was not a party to and is burdened
by the indefinite delay occasioned by the stipulation.
See Grow Co. v. Chokshi, 403 *N.J.Super.* 443
(App.Div.2008) (reaching that conclusion in a case
where the trial court’s order held unresolved claims
in abeyance).

In granting the County summary judgment and denying
reconsideration, the trial court concluded that because
Juliano’s change order for borrow excavation material
was based upon Juliano’s resolution of a patent ambiguity
in the bid documents not brought to the attention of the
County as required by the specifications, the relief it
sought was barred by “the patent ambiguity doctrine.”
Agreeing with that conclusion, we affirm.

I

We review a grant of summary judgment “using the same standard” as the trial court. *Dugan Const. Co. v. N.J. Tpk. Auth.*, 398 N.J.Super. 229, 238 (App.Div.), certif. denied, 196 N.J. 346 (2008). Thus, the question for us is whether the County is entitled to summary judgment on this ground as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

The controlling law is clear. Public contracts are different than private contracts, and the doctrine of patent ambiguity is best understood in light of the purposes of public contract law and the rules developed to effectuate it. Public contracts are “let only after the broadest opportunity for public bidding is given in order to secure competition, and guard against favoritism, improvidence, extravagance and corruption.” *D’Annunzio Bros., Inc. v. N.J. Transit Corp.*, 245 N.J.Super. 527, 532 (App.Div.1991). “An essential element of the bidding process is a common standard of competition.” *Ibid.*

A common standard of competition is achieved through equal application of “conditions and specifications ... to all prospective bidders,” which permits preparation of “bids on the same basis.” *Id.* at 532–33. The only two published decisions by courts of this state addressing the patent ambiguity doctrine describe it as a “necessary part of” our “salutary approach to public contracting.” *Id.* at 533; accord *Dugan, supra*, 398 N.J.Super. at 241 (quoting *D’Annunzio*).

*2 A patent ambiguity in a publicly bid contract is one that “either (1) would have been apparent to reasonable prospective bidders from the facts available, or (2) was in fact known to the contractor before submitting its bid.” *D’Annunzio, supra*, 245 N.J.Super. at 534 (citations omitted). Where ambiguity is patent, the bidder has a duty to inquire, and a failure to do so bars a claim based on the contractor’s resolution of the ambiguity. *Ibid.* Thus, the doctrine acts as a bar to relief sought by a successful bidder who did not bring the ambiguity to the bidding authority’s attention.

The doctrine of patent ambiguity, applied by federal courts in addressing claims under federal public contracts, has been adopted by this court. *Id.* at 533–34. In effect, the patent ambiguity doctrine precludes reliance on an interpretation of a patently ambiguous contractual term against the drafter; it requires an interpretation disfavoring the successful bidder whose price is based on his or her independent resolution of a patent ambiguity.

See *Brezina Constr. Co. v. United States*, 449 F.2d 372, 375 (Ct.Cl.1971) (discussing the effect of the doctrine as applied by federal courts); *D’Annunzio, supra*, 245 N.J.Super. at 533 (explaining this established principle used in interpreting federal government contracts).

The difficulty is in distinguishing between ordinary and patent ambiguity. It requires “a case-by-case judgment based upon an objective standard.” *Newsom v. United States*, 676 F.2d 647, 650 (Ct.Cl.1982). The question is whether a reasonable person would find the ambiguity “patent and glaring.” *L. Rosenman Corp. v. United States*, 390 F.2d 711, 713 (Ct.Cl.1968); see also *Newsom, supra*, 676 F.2d at 650 n. 6 (incorporating by reference *L. Rosenman’s* objective standard). Resolution of that question requires a court to place “the contractual language at a point along a spectrum” and ask whether the ambiguity is “so glaring as to raise a duty to inquire[.]” *Newsom, supra*, 676 F.2d at 650.

By way of illustration, courts deem an ambiguity patent when there is no way to resolve a conflict without ignoring or violating one of the provisions. *Ibid.* In contrast, where a contract is simply silent on a point such as the location of transmitters required by the contract, a finding of patent ambiguity is unwarranted because a reasonable contractor can assume that the matter was left to his or her discretion. *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed.Cir.1987).

The first part of the two-part standard for assessing patent ambiguity iterated in *D’Annunzio* and set forth previously—ambiguity that “would have been apparent to reasonable prospective bidders from the facts available”—is consistent with the federal standard. The second and alternate part of the *D’Annunzio* standard—the ambiguity “was in fact known to the contractor before submitting its bid”—is best viewed as addressing a contractor who actually perceived an ambiguity, patent or not, and resolved it without inquiry. Cf. *Blount Bros. Constr. Co. v. United States*, 346 F.2d 962, 973 (Ct.Cl.1965) (finding an ambiguity latent and noting, “the contractor was genuinely misled and not deliberately seeking to profit from a recognized error by the Government” in determining that the contractor was entitled to relief).

II

*3 Application of the public contract law discussed above to the undisputed facts requires a grant of summary judgment in favor of the County. Consideration of the bid

form, specifications, certifications, post-bid correspondence and deposition testimony of Mr. Juliano, Juliano's principal, compels the conclusion that there is glaring ambiguity that a reasonable bidder would have recognized.

Consistent with the principle of patent ambiguity, a specification for this bid directed prospective bidders to submit all requests for information about the "meaning or interpretation" of the contract documents in writing to the county engineer. The specification further advised that bidders were "required to bring ... any apparent ambiguity, inconsistency, error, discrepancy [or] omission" to the attention of the engineer "at least seven (7) working days before opening of [the] bids." There is no dispute that neither Juliano nor the other two bidders requested information from or brought any problem with the bid documents to the attention of the county engineer prior to submitting a bid.

The bid form called for unit pricing, which requires "fair estimates" of the quantities to the extent possible because that permits fair comparison and avoids post-hoc manipulation. *James Petrozello Co. v. Chatham Twp.*, 75 N.J.Super. 173, 179 (App.Div.1962). The bidders had to state a unit price for each item on the bid form and calculate a total price by multiplying the quantity of units specified on the form by the bidder's unit price. Some items on the form, such as "Site Work" called for a single unit and a lump sum price.

Item No. 6 on the bid form called for a unit price on "Borrow Excavation, Select Material (If & Where Directed)." For this item, a unit was a cubic yard and the bid form specified a "contract quantity" of 25,190 units. Juliano bid \$19 per unit—a total of \$478,610 for this item. Juliano's bid on that item accounted for approximately nineteen percent of its total bid, which was \$2,518,030.75. The quantity of select material, or any other grade of borrow excavation material, required for the project is not addressed elsewhere in the bid documents the parties have provided to us on appeal.

Although there is no item on the bid form calling for a unit price for zone 3 borrow excavation material, several specifications reference two types of borrow excavation material—select material and zone 3. Specification 204.02 references other specifications prescribing the characteristics of each of these two types of fill.² Specification 200.09 states, "Borrow Excavation, Zone 3, or Borrow Excavation, Select Material, shall be placed in embankment to the limits and at the location(s) specified, shown on the Plans or directed by the Engineer."³ (Emphasis added). Specification 204.03 states, "The

Contractor shall provide Borrow Excavation, Zone 3, or Select Material from outside borrow pits, *if required*, to bring the site on the proposed subgrade elevation/contours."⁴ (Emphasis added).

² Specification 204.02 is set forth in an appendix to this opinion.

³ Specification 200.09 is set forth in an appendix to this opinion.

⁴ Specification 204.03 is set forth in an appendix to this opinion.

*⁴ Other specifications refer to only zone 3 material. Specification 203B describes "soil reinforcing geogrid" work as consisting of "furnishing and placing a geogrid base reinforcement on the original ground surface *prior to placing Zone 3 materials*."⁵ (Emphasis added). And, specification 200.15, addressing payment, indicates the County will pay for zone 3 material used in site work and does not refer to select material at all.⁶

⁵ Specification 203B is set forth in an appendix to this opinion.

⁶ Specification 200.15 is set forth in an appendix to this opinion.

The foregoing specifications referring to two types of borrow excavation material are in direct conflict with Item 6 on the bid form, which calls for a price on 25,190 cubic yards of borrow excavation, select material. Because there is no item on the bid form calling for a price for zone 3 material, there is a blatant conflict.

The blatant conflict is a glaring ambiguity. It amounts to a patent ambiguity because a bidder would have to ignore either Item 6 on the bid form, addressing nothing other than 25,190 cubic yards of select material, or the specifications, indicating that zone 3 material will be used as well, and that payment will be made based only upon the provision of zone 3 material. *See Turner, supra*, 819 F.2d at 286.

This patent ambiguity cannot be resolved with reference to any bid document before us. Specification 200.15,

which addresses nothing other than zone 3 material, is of no avail. In pertinent part, it provides:

Payment for the Item “SITE WORK” will be made on a lump sum basis and shall include all clearing, excavation, backfilling, grading, debris removal, construction layout, maintenance, and all else necessary as described herein and as directed by the Engineer to put the entire site to subgrade elevations.

Payment for Site Work will be made on a lump sum basis prorated over the duration of the contract.

Payment will be made under:

PAY ITEM	PAY UNIT
Site Work	Lump Sum
Borrow Excavation, Zone 3	Cubic Yard
Miscellaneous Additional	Lump Sum
Work (If & Where Directed)	Amount

This provision does not eliminate the patent ambiguity because it is, in itself, ambiguous. It can be understood to require a bidder to include an undesignated cubic yard price for borrow excavation, zone 3 in the lump sum for site work, or it can be read to require a bidder to exclude the cost of borrow excavation from site work because it will be paid by the cubic yard under a separate item on the bid form. As the quantity of cubic yards of borrow excavation covered by this provision is not stated, a bidder could not include a per cubic yard cost in its lump sum bid for site work. Nor could a bidder include the cost in Item 6, which calls for a per cubic yard price on borrow excavation, select material only.

nothing in any document available to bidders that we have seen allows a bidder to determine the amount of borrow excavation, select material and borrow excavation, zone 3 material that will be required.

We briefly address Juliano’s interpretation of the bid documents offered to defeat a determination of patent ambiguity. In this regard, Juliano relied upon Mr. Juliano’s reading of the documents, which he explained during his deposition and in his certification.

Neither interpretation eliminates the patent ambiguities: 1) Will the County pay only for zone 3 material as specification 200.15 suggests, or will it pay only for 25,190 cubic yards of select material, as the bid form suggests? and 2) How will a bidder be paid for zone 3 material?

Relying upon specification 200.15, he explained that the specification says the County will pay for “borrow excavation zone 3, not borrow excavation, select material.” Acknowledging that the specifications referred to both types of materials, he asserted that, read as a whole,⁷ the documents describe borrow excavation, zone 3 as the material to be used. Asked why he included a price for zone 3 material in Item 6 when it called for a price on select material, Mr. Juliano explained that he read it to call for a composite bid including the cost of both zone 3 *and* select material. He admitted that the unit price he stated for Item 6 was a composite of the per cubic yard cost of 1500 cubic yards of the higher priced select material and a per cubic yard price for zone 3 for the

*5 A reasonable contractor would have noted the glaring problem and either declined to bid or requested a clarification from the county engineer as the bid specifications directed. After all, as previously noted,

remaining yards of borrow excavation. He admitted, however, that no quantities for either type of fill were specified anywhere in the bid documents, notes, directions or contract drawings. To Mr. Juliano, there was no ambiguity. In his view, his reading was clearly correct.

⁷ The parties have not provided all of the specifications and documents available to prospective bidders. Thus, to the extent Juliano argues that Mr. Juliano's reading of the documents as a whole resolves the ambiguity, we are in no position to address that claim. It is not a reasonable interpretation on the documents submitted to us.

Assuming the truth of Mr. Juliano's explanation, as we must in reviewing a grant of summary judgment in favor of the County, a reasonable bidder on a public contract would not assume Item 6 called for a composite bid of the sort Mr. Juliano claims to have filed. That is not an interpretation upon which reasonable prospective bidders would rely. First, if that were the intent, Item 6 would have called for a per cubic yard price for Borrow Excavation, Select Material *and* Zone 3 (If & Where required). Second, the resulting bids would be wholly inconsistent with the purpose of unit pricing, which is to provide a uniform basis for comparing bids. See *James Petrozello Co., supra*, 75 N.J. Super. at 179. A composite bid of the sort Mr. Juliano envisioned on Item 6 would leave the County to compare bids on this item with no way to know the price or the quantity the prospective bidders assigned for each grade of borrow excavation.

For all of the foregoing reasons, the trial court's conclusion that Juliano's claim is barred by the patent

PAY ITEM

Site Work

Borrow Excavation, Zone 3

Miscellaneous Additional Work

(If & Where Directed)

ambiguity doctrine is affirmed.

Juliano has raised equitable arguments on appeal that were not presented to the trial court. In conformity with general principles of appellate practice, we decline to consider them. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) (discussing the limited circumstances in which an appellate court will consider an argument first raised on appeal). We simply note that Mr. Juliano's admissions raise a serious question about Juliano's entitlement to equitable relief. He acknowledged that his bid on borrow excavation, select material was a composite bid, but Item 6 plainly requests a bid on select material in a quantity of 25,190 cubic yards.

*6 Affirmed.

Appendix

200.15 Basis of Payment:

Payment for the Item "SITE WORK" will be made on a lump sum basis and shall include all clearing, excavation, backfilling, grading, debris removal, construction layout, maintenance, and all else necessary as described herein and as directed by the Engineer to put the entire site to subgrade elevations.

Payment for Site Work will be made on a lump sum basis prorated over the duration of the contract.

Payment will be made under:

PAY UNIT

Lump Sum

Cubic Yard

Lump Sum Amount

(as described in Section 200.13)

200.09 Borrow Excavation:

The following is added to subsection 204.01 of the Standard Specifications:

Borrow Excavation, Zone 3, or Borrow Excavation, Select Materials, shall be placed in embankment to the limits and at the location(s) specified, shown on the Plans or directed by the Engineer.

204.02 MATERIALS:

The first paragraph of this Article of the Standard Specifications is changed to read as follows:

Borrow Excavation, Zone 3, material shall conform to the requirement specified therefore by Section 204 of the Standard Specifications.

Borrow Excavation, Select Material shall conform to the requirements of Section 901.21 of the Standard Specifications for Soil Aggregate I-11.

204.03 METHODS OF CONSTRUCTION:

The following is added to this Article of the Standard Specifications:

Methods of Construction for Borrow Excavation, Zone 3, or Borrow Excavation, Select Material shall be in accordance with applicable requirements specified for the various types and methods of construction contained in Section 204.03 of the Standard Specifications.

The Contractor shall provide Borrow Excavation, Zone 3, or Select Material from outside borrow pits, if required, to bring the site on the proposed subgrade elevation/contours.

203B—SOIL REINFORCING GEOGRID:

203B.01 Description

This work shall consist of furnishing and placing a geogrid base reinforcement on the original ground surface prior to placing Zone 3 materials in order to provide a stable working table for the vertical wick drain operation.

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All Citations

Not Reported in A.3d, 2013 WL 4033705