

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

**COOPER EXCAVATING, LLC,**

**Plaintiff,**

v

**Case No. 15-150667-CB**

**Hon. Wendy Potts**

**CRAIG BLUE EXCAVATING, LLC**

**Defendant.**

**OPINION AND ORDER RE: THIRD PARTY DEFENDANT'S MOTION FOR  
SUMMARY DISPOSITION**

At a session of Court  
Held in Pontiac, Michigan

On

OCT 17 2016

This matter is before the Court on Third Party Defendants' WCI Contractors, Inc. and Merchants Bonding Company (Mutual)'s Motion for Summary Disposition pursuant to MCR 2.116(C)(10). For purposes of background, Defendant/Third Party Plaintiff Craig Blue Excavating, LLC and Third Party Defendants WCI Contractors, Inc. and its bonding company Merchants Bonding Company (Mutual) entered into a subcontract to perform certain construction services and to supply certain labor and/or materials to the project.

The subcontract provides that the "Contractor and SDS (hereinafter 'Owner') have entered into a contract dated SDS [sic] for the construction of SDS [sic] (hereinafter 'Project'), according to the contract documents listed in Exhibit A attached hereto (hereinafter 'Contract Documents') which are made a part of this Subcontract insofar as they apply; . . ." Exhibit A of the subcontract contains a Document List. The items listed in the Document List are

Specifications Dated 9/27/13, Addendum #1 Dated 10/8/13, Addendum #2 Dated 10/14/13, Drawing List Dated 9/27/13 and a Sheet Index containing sheet numbers and titles.

The subcontract further provides, in part, that “[s]ubcontractor shall submit in writing to Contractor, along with substantiating evidence deemed satisfactory by Contractor, any claims for adjustments in the Subcontract Price, schedule or other provisions of the Subcontract claimed by Subcontractor for changes directed by Owner, or for damages for which the Owner is liable, or as a result of deficiencies or discrepancies in the Contract Documents (“Owner Claims”), as least five (5) business days prior to the time specified in the Contract Documents, otherwise such claims are waived.” See paragraph 7.d. The subcontract also states that “[w]ith respect to any controversy between Contractor and Subcontractor not involving the Owner, the Contract Documents or an Owner Claim, Contractor shall issue a decision which shall be final and binding unless, within five (5) days of receipt, the Subcontractor files a notification in writing of its intent to litigate the controversy in accordance with Paragraph 9.d. Notification of any such claim under this Paragraph 9.b. must be submitted in writing within ten (10) days of Subcontractor’s awareness of the facts underlying the claim. Failure of Subcontractor to submit timely its notice of claim or notice of intent to litigate shall constitute an absolute bar and complete waiver of Subcontractor’s right to recover on account of such claim.” See paragraph 9.d.

Third Party Defendants now move for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The parties submitted a stipulation to have the matter ruled on without oral argument. Accordingly, the Court dispenses with oral argument. MCR 2.119(E)(3).

Third party Defendants assert that Craig Blue failed to preserve its claims and follow the contractual notice provisions as provided in the contract, and therefore Craig Blue is barred from recovering on its claims. In response, Craig Blue argues that paragraph 7d does not apply because Craig Blue had no obligation to comply with the time requirements in the prime contract because the prime contract is not incorporated into the subcontract. Craig Blue further asserts that even if the prime contract were incorporated as part of the contract documents, WCI has failed to establish that paragraph 7d bars WCI's claims.

Resolution of the instant dispute turns on the time for submission of claims specified in the contract documents. However, the subcontract containing the document list is ambiguous on its face as it refers to "Specification Dated 9/27/13" and neither party attaches a document to its brief entitled "Specification Dated 9/27/13." Further, the parties repeatedly refer to the "Prime Contract" but a document entitled "Prime Contract" is not attached to the brief or contained in the Document List in Exhibit A.

A contract is ambiguous if its language is reasonably susceptible to more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). "It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury. Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions. Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning. In resolving such a

question of fact, i.e., the interpretation of a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence.” *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 453-454; 663 NW2d 447 (2003) (internal citations and quotations omitted).

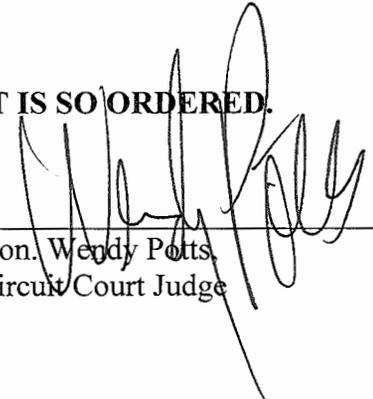
The Court finds that the subcontract is ambiguous insofar as it refers to a document list that may or may not include the “Prime Contract” which also appears to the Bidding and Contract Document attached as an exhibit entitled “State of Michigan Department of Technology, Management and Budget Facilities and Business Services Administration DCSPEC Bidding and Contract Document Minor Projects.”

Accordingly, for all of the reasons stated above, the Court denies Defendants’ motion for summary disposition in its entirety.

Dated:

OCT 17 2016

**IT IS SO ORDERED.**

  
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Hon. Wendy Potts,  
Circuit Court Judge