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STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320
* * * * *

CITY OF HOLLAND,

Plaintiff/Counter-Defendant,

and

CITY OF WYOMING,

Plaintiff,

v

GRAND RIVER CONSTRUCTION, INC.,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

and

HARTFORD ACCIDENT AND INDEMNITY COMPANY, and **PREIN & NEWHOF, INC.,**

Defendants,

v

ALLIED MECHANICAL SERVICES, INC.,

Third-Party Defendant.
_____/

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY DISPOSITION

File No. 14-3899-CK

Hon. Jon A. Van Allsburg

At a session of said court held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 30th day of March, 2015

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Plaintiffs, the City of Holland and the City of Wyoming, brought this action following the catastrophic failure of a facility designed to connect the potable water systems of the two cities,

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called the Holland Wyoming Interconnect Facility. Plaintiffs sued the general contractor on the project, Grand River Construction, Inc. (Grand River), the engineer, Prein & Newhof, Inc. (P&N), and Hartford Accident and Indemnity Company (Hartford), which issued a performance bond on the project. Grand River, in turn, filed a counter-claim against the City of Holland for breach of contract and a third-party claim against its subcontractor, Allied Mechanical Services, Inc. (Allied).

In addition to claims of breach of contract and breach of warranty, plaintiffs include a request for declaratory judgment in which they ask the court to determine that Grand River is contractually liable (because it was responsible for a revised design of the joint that allegedly failed) under certain contract provisions in Grand River's contract. Plaintiffs' request for declaratory judgment is the subject of their motion for summary disposition, which they seek under MCR 2.116(C)(9) and (10). Plaintiffs state the question at issue as follows:

> If the Revised Design of the Joint is determined to be defective, is Defendant Grand River responsible for the adequacy, performance and functioning of the Revised Design that it submitted for the Joint pursuant to the Supplemental Condition Section 6.05 of the parties' contract as an "or equal" or "substitute" material or equipment?

Plaintiffs' motion is denied and Count IV of their complaint is dismissed for the reasons stated below.

BACKGROUND INFORMATION

The cities of Holland and Wyoming entered into an Emergency Interconnect Agreement signed April 29, 2011, which provided for the construction of an interconnection between their potable water systems to be used in the event of an emergency. The agreement indicated that Holland was to take the lead in the construction of the interconnect facility.

The City of Holland, through its Board of Public Works (Holland), entered into a service contract with P&N for the design of the interconnect facility.[1] Some months later, Holland entered into a construction contract for the interconnect facility with Grand River.[2] P&N issued

[1] The Holland/P&N Service contract is dated January 11. 2011. (Ex. 2 to Plaintiffs' Brief.)
[2] The contract with Grand River has an effective date of September 26, 2011. (Ex. 3 to Plaintiffs' Brief, Agreement, p 9 of 9.)

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plans, specifications, and drawings for construction. The drawings issued for construction dated June 23, 2011, showed the elevation of the Wyoming water main to which the system was going to connect to be 5'6" higher than the actual location of the existing pipe. Grand River bid the project on the basis of this erroneous information. It was awarded the contract, which had a construction start date of January 3, 2012 and a Substantial Completion date of October 1, 2012.[3]

The discrepancy in elevation was discovered on January 25, 2012. On January 30, P&N issued Bulletin No. 1, which summarized the modifications necessary to accommodate the actual elevation of the water main and asked Grand River to provide pricing for the changes to the work. The original plans contemplated a 30" ductile iron pipe travelling horizontally from the Wyoming high pressure pipe through the foundation wall of the interconnect building. After passing through the wall, the pipe was to connect to a 30" x 24" reducing 90 degree elbow. That elbow would be connected to a short riser pipe that penetrated the floor of facility and connected to a 24" 90 degree elbow.[4]

Grand River's subcontractor Allied put these plans out to bid by material suppliers and learned that the 30" x 24" reducing elbow was not available from domestic suppliers. Bulletin 1 did not change the elbow specifications. It showed that the 30" high pressure pipe would not penetrate the foundation wall but would, instead, be attached to the 30" x 24" reducing 90 degree elbow more than five feet further underground. A much longer riser pipe would extend vertically to penetrate the floor of the facility.[5]

Allied submitted Shop Drawings for Specification Section 11.2.1.3 Ductile Iron, on March 9, 2012,[6] which showed the use of a reducer fitting instead of a reducing joint.[7] Allied included the following note:

> Note: a 30" x 24" reducing MJ 90 was not available in domestic [s]ources so a 30" MJ 90 and a 30" x 24" SEB reducer is supplied.

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[3] Pl. Ex. 3, Agreement, p 2 of 9.
[4] See attached drawing 1, from Grand River Brief, Ex 1, p 4.
[5] See attached drawing 2, from Allied Brief, Ex.3, p 2.
[6] Pl. Ex. 4 to the Brief in Support of Plaintiffs' Motion, p PMSD0854. "Shop Drawings" is defined in section 1.01.A.40 of the Standard General Conditions (GS-1.01.A.40), Ex. 3.
[7] See attached drawing 3, from plaintiffs' brief, Ex. 6.

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P&N responded to Shop Drawing 28 on March 23 by approving the use of the 30" x 24" SEB reducer in lieu of the 30" x 24" MJ reducing 90 degree bend. It also raised several issues requiring additional information. P&N's notes included a statement that "Mega-Lugs shall be utilized" and asked that the Shop Drawing be revised and resubmitted.[8] Allied resubmitted the Shop Drawings on March 29, 2012, and, in its response, included an assurance that it would use Megalugs.[9] P&N approved Shop Drawing No. 28A "as noted" on March 29, 2012.[10]

After the interconnect facility was constructed, the piping was tested in April and May 2012, and again in March 2013, and passed the tests. On September 6, 2013, shortly after all of the parties had signed the Certificate of Substantial Completion, a leak occurred at the underground joint because the Megalug allegedly separated from the riser 30" x 24" reducer fitting. The interconnect system was not immediately shut down and an estimated 20 million gallons of water leaked under and into the interconnect facility, leading to its collapse.

STANDARD OF REVIEW

Summary disposition is warranted under MCR 2.116(C)(9) where the opposing party has failed to state a valid defense to the claim asserted. Only the pleadings may be considered. MCR 2.116(G)(5). "The well-pleaded allegations are accepted as true, and the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Nicita v City of Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996).

In reviewing a motion under MCR 2.116(C)(10), the court "considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor,* 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill,* 287 Mich App 58, 62; 783 NW2d 124 (2010). Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the

[8] Pl. Ex. 4, p PMSD0880.
[9] Pl. Ex. 4, p PMSD0885.
[10] Pl. Ex. 4, p PMSD0882.

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moving party is entitled to judgment as a matter of law. *Haliw v Sterling Hts*, 464 Mich 297, 302; 627 NW2d 581 (2001).

"[I]f contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). When interpreting a contract, the primary task of the court is to give effect to the parties' intention at the time they entered into the contract. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). To determine the parties' intent, the court must examine the language of the contract according to its plain and ordinary meaning and avoid an interpretation that would render any portion of the contract nugatory. *Id.* Determining whether a contract's terms apply to a set of facts requires a "straightforward analysis of the facts and the contract terms." *Id.*, quoting *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 356–357; 686 NW2d 756 (2004).

CONTRACTUAL DISPUTE

Plaintiffs argue that Grand River is liable under the terms of the contract between Holland and Grand River for the redesign of the underground joint that failed and has warranted its performance. The provisions they rely on are section 6.05 of the Standard General Conditions (GS-6.05) and section 6.05 of the Supplemental Conditions (SC-6.05).[11]

GS-6.05 provides in pertinent part:

> 6.05 *Substitutes and "Or-Equals"*
>
> A. Whenever an item of material or equipment is specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier, the specification or description is intended to establish the type, function, or appearance and the quality required. Unless the specification or description contains or is followed by words reading that no like, equivalent, or "or-equal" item or no substitution is permitted, other items of material or equipment or material or equipment of other Suppliers may be submitted to Engineer for review under the circumstances described below.
>
> 1. *"Or-Equal" Items:* If in Engineer's sole discretion an item of material or equipment proposed by Contractor is functionally equal to that named and sufficiently similar so that no change in the related Work will be required, it may be considered by Engineer as an "or-equal" item, in which case review and approval of the proposed item may, in Engineer's sole discretion, be

[11] Pl. Ex. 3.

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accomplished without compliance with some or all or the requirements for approval of proposed substitute items.

* * *

2. *Substitute Items:*

a. If in Engineer's sole discretion an item of material or equipment proposed by Contractor does not qualify as an "or-equal" item under Paragraph 6.05.A.1, it will be considered a proposed substitute item.

SC-6.05 adds warranties. With respect to an "or-equal" substitution, it adds to GC-6.05.A:

c. Contractor warrants that, if approved and incorporated into the Work, the "or-equal" will be functionally equal to the named item of material or equipment. Contractor assumes sole responsibility for the adequacy, performance and functioning of the "or-equal" material or equipment.

SC-6.05 adds the same warranty for an approved substitute item.

Plaintiffs argue that Allied's proposal to substitute a reducer fitting instead of a reducing 90 degree elbow was a "substitute" or an "or-equal" item and that Grand River has thus assumed sole responsibility for the adequacy, performance and functioning of the changed design. Plaintiffs point out that the change from a pipe to a fitting at the point where the elbow attached to the riser caused the system to include a joint not suitable for a Megalug attachment, and that joint failed. In the materials Allied included in the Ductal Pipe Shop Drawing submittals was a warning that "[t]he Series 1100 MEGALUG should not be used on plain end fittings."[12]

Grand River argues that the change that Allied proposed and P&N accepted was not a request for an "or equal" or "substitute" item. This argument is supported by the contract. The express terms of GC-6.05 provide that the provision applies only where "an item of material or equipment is **specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier** . . . " (emphasis added). Allied did not propose a change to an item "specified or described . . . by using the name of a proprietary item or the name of a particular Supplier" but, rather, proposed an alteration in the ductile piping plan, substituting a ductile reducer fitting for a ductile reducing elbow. Allied did not suggest a change in the joint restraint device, which the contract specifications required to be Megalug joint restraining glands. If Allied had, that change would have triggered the application of GC-

[12] Pl. Ex. 4, p PMSD0873 and 0878.

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6.05. The documents relating to the Allied submittal and P&N's review and approval of the ductile pipe Shop Drawings show that a change in the use of Megalugs was not proposed by Allied and not entertained by P&N.[13] GC-6.05 and GS-6.05 are thus inapplicable to the change at issue.

Grand River maintains that the change in the piping plan must be considered a submittal under the standard procedure for Shop Drawings, which provide for the Engineer's approval of variations from the Contract Documents. The contract Submittal Procedures[14] provide, at GC-6.17.C.3: "With each submittal, Contractor shall give Engineer specific written notice of any variations that the Shop Drawing or Sample may have from the requirements of the Contract Documents." In the following section, regarding the Engineer's review, the contract provides that the Engineer retains design responsibility for approved variations, provided that the Contractor complies with the submittal procedure quoted above. GC-6.17.D.3 provides: "Engineer's review and approval shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 6.17.C.3 and Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample." This provision does not relieve the Contractor of all responsibility for the change, however. The second sentence of GC-6.17.D.3 provides: "Engineer's review and approval shall not relieve Contractor from responsibility for complying with the requirements of Paragraph 6.17.C.1." The Contractor's responsibilities under GC-6.17.C.1 include the requirement that "[b]efore submitting each Shop Drawing or Sample, Contractor shall have:"

> c. determined and verified the suitability of all materials offered with respect to the indicated application, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work . . . .

While the parties note several issues related to compliance with submission procedures and the respective responsibilities of the contractor and engineer to recognize that Megalug restraints should not have been used with the proposed fitting, these issues raise questions of fact and cannot be determined by summary disposition.

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[13] Pl. Ex. 4.
[14] Pl. Ex. 3.

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CONCLUSION

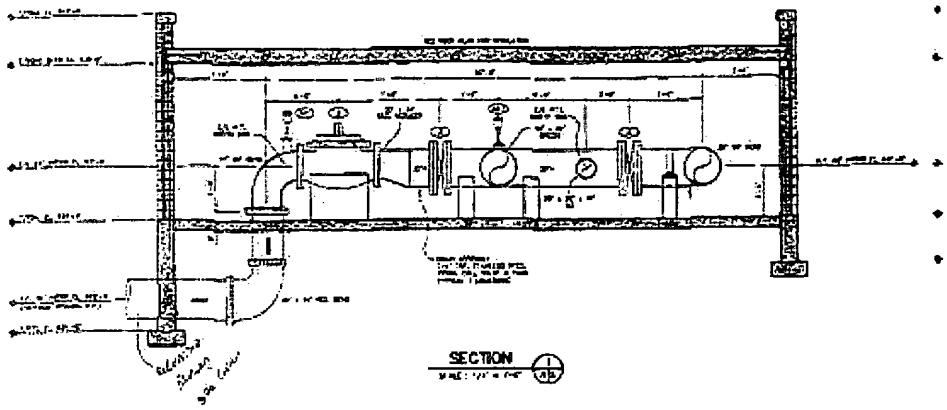
For the reasons stated above, Plaintiffs' motion is denied and Count IV of their Complaint is dismissed.

IT IS SO ORDERED.

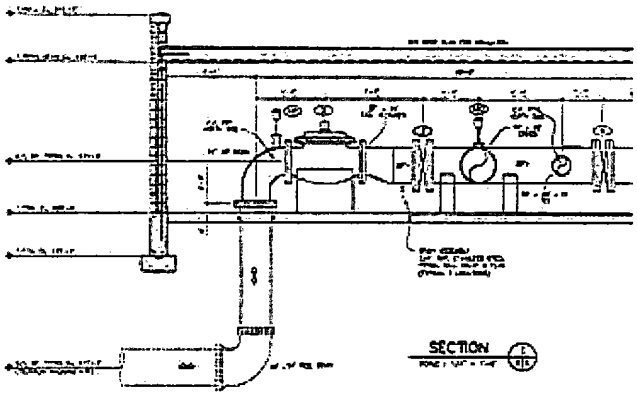
Dated: March 30, 2015

Hon. Jon A. Van Allsburg, Circuit Judge

Drawing 1



Drawing 2



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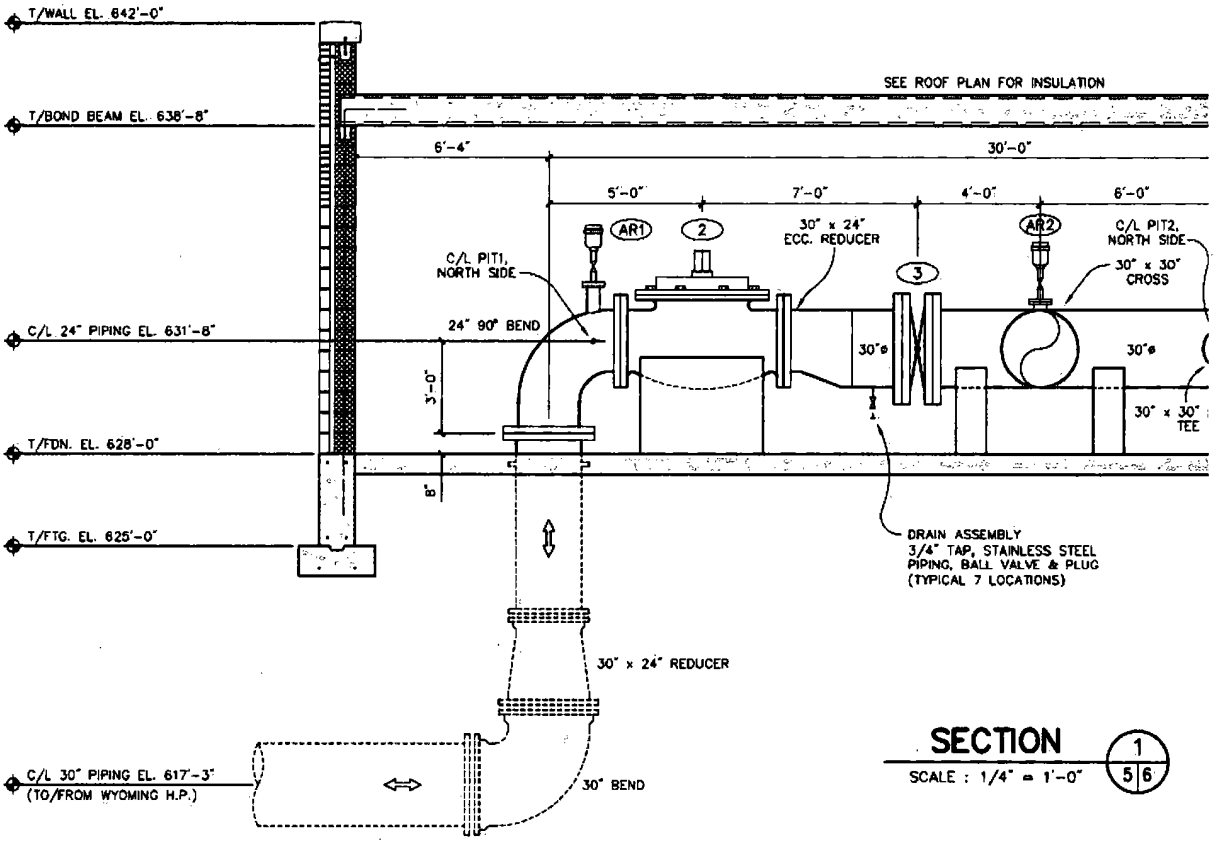
Drawing 3