STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JANIK PAVING AND CONSTRUCTION, INC.

Plaintiff

vs.

MEMORANDUM DECISION

ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY and LIRO ENGINEERS, INC.

Index No. 1452/06

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Lawrence C. Brown, Esq.**
Attorney for Plaintiff

Hurwitz & Fine, P.C.
Attorneys for Defendant Erie County
Industrial Development Agency
Earl K. Cantwell, Esq., of Counsel

Duke, Holzman, Yaeger & Photiadis, LLP
Attorneys for Defendant LiRo Engineers, Inc.
Matthew J. Beck, Esq., of Counsel

CURRAN, J.

Plaintiff was the successful bidder and entered into a contract ("Contract") with the Erie County Industrial Development Agency ("ECIDA") to perform road reconstruction of certain sections of North French Road and Millersport Highway in Amherst, New York. Defendant LiRo Engineers, Inc. ("LiRo") was retained by ECIDA to provide certain engineering services on the project, including preparation of the Specifications and Drawings for inclusion with the other bid documents. After entering into the Contract, and commencing

the work, plaintiff discovered that there were significantly different subsurface conditions affecting the roadway. In particular, plaintiff encountered utility conflicts regarding the Erie County Water Authority ("ECWA") water main and a duct bank of National Grid. Plaintiff seeks to recover various forms of damages from defendants arising primarily out of the "unanticipated" subsurface conditions.

Before the Court are two motions. The first is LiRo's motion for summary judgment dismissing the only cause of action against it for negligence and/or malpractice.[1] LiRo also seeks to dismiss ECIDA's cross-claim against it for contribution and/or indemnification. The second is ECIDA's motion to dismiss all causes of action against it.[2] The First cause of action against ECIDA alleges a "cardinal change." The Second and Fourth causes of action allege claims for interference and disruption by ECIDA. The Third cause of action alleges delay damages caused by ECIDA.

Both motions are largely premised on the language of the Contract and Specifications as denoted below.

Section I of the Instructions to Bidders provides as follows:

> 3. Inspection of Site and Examination of Bid Documents
>
> (a) It shall be the responsibility of each and every Contractor to thoroughly investigate all existing conditions and he shall acquaint himself with existing conditions, insofar as it may affect his work and/or proposal.

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[1] LiRo's motion, previously a motion to dismiss, was converted by the Court, on notice to all parties, to a motion for summary judgment.

[2] In the Order converting LiRo's motion to one for summary judgment, the Court granted plaintiff leave to amend its complaint against ECIDA. The current motions and decision are addressed to the Amended Complaint.

(b) The Contractor, before entering his proposal, shall satisfy himself fully as to the work called for on the Contract Documents, and to the working conditions and condition of the site, including the existence of other facilities and/or structures on, over or under the site which may interfere with, or make more difficult, the performance of the Contract.

(c) The signature of the Contractor upon his proposal form shall constitute a certification to ECIDA that such Contractor is fully informed regarding all the conditions affecting the work to be done, that such information was secured by personal investigation and that such Contractor accepts full responsibility for his proposal.

Section II of the General Conditions provides as follows:

25. Conditions Below Ground

The drawings and specifications may contain information relating to conditions below the ground surface at the site of the proposed work, but such information is furnished without express or implied guarantee as to its being complete or correct. The Contractor shall assume all risks and responsibility and shall complete the work in whatever material and under whatever conditions he may encounter or create, without extra cost to ECIDA.

Section V of the Technical Specifications, Section 01518, provides as follows:

1.5 Protection of Existing Structures

(A) Underground Structures:

(1) Underground structures are defined to include, but not be limited to, all sewer, water, gas, and other piping, and manholes, chambers, electrical conduits, tunnels and other existing subsurface work located within or adjacent to the Contract Limits.

(2) All underground structures except individual service connections (such as water, storm/sanitary sewer, electric, cable TV and telephone) known to Engineer, are shown on the Drawings. This information is shown for the assistance of Contractor in accordance with the best information available, but is not guaranteed to be correct or complete.

(3) Contractor shall explore ahead of his trenching and excavation work and shall uncover all obstructing underground structures sufficiently to determine their location, to prevent damage to them and to prevent interruption to the services which such structures provide. If Contractor damages an underground structure, he shall restore it to original condition at his expense.

(4) Necessary changes in the location of the Work may be made by Engineer, to avoid unanticipated underground structures.

LIRO'S MOTION

LiRo's motion involves questions of whether a claim for negligence and/or malpractice can be made against the engineer in the absence of privity of contract, and, even if the claim can be alleged without privity, whether the language of the Contract negates any allegation of reliance by plaintiff upon the representations made by LiRo pertaining to subsurface conditions.

"Before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (*Marcellus Constr. Co., Inc. v Vil. of Broadalbin*, 302 AD2d 640, 640 [3d Dept 2003]). "Where, as here, no privity of contract exists between the parties, the Court of Appeals has identified three criteria for imposing liability upon the maker of a negligent misrepresentation: (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (*Marcellus*, 302 AD2d at 640-641).

As was the case in *Marcellus*, even if plaintiff could arguably meet the first two prongs of the test, there is no conduct between plaintiff and LiRo evincing LiRo's understanding that plaintiff had, in fact, relied on LiRo's subsurface information in preparing its bid. To the contrary, the bidders' instructions unequivocally advised bidders that it was the responsibility of each contractor to thoroughly investigate all existing conditions at the site, including the existence of other facilities and/or structures on, over or under the site which may interfere with, or make more difficult, the performance of the Contract. Furthermore, the Specifications clearly state that information regarding subsurface conditions was not guaranteed. It is undisputed that the utility conflicts of which plaintiff complains are identified in some manner within the Specifications and Drawings provided to all bidders. Accordingly, there is no relationship approaching privity between plaintiff and LiRo sufficient to withstand a motion for summary judgment (*see Marcellus*, 302 AD2d at 641-642; *see also Bilotta Constr. Corp. v Vil. of Mamaroneck*, 199 AD2d 230 [2d Dept 1993]).

Moreover, "[b]y entering into the contract, plaintiff acknowledged that it had satisfied itself with respect to the nature of the subsurface conditions, and agreed to 'assume all risk including the risk that plaintiff may perform more work than it originally anticipated'" (*Kenaidan Constr. Corp. v County of Erie*, 4 AD3d 756, 757 [4th Dept 2004]). In the face of contractual obligations and responsibilities to the contrary, plaintiff cannot, as a matter of law, be heard to say that it reasonably relied upon any alleged misrepresentations. Plaintiff was under a duty to inspect the work site and the conditions for itself (*see IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89 [1st Dept 1999]).

In an effort to survive LiRo's motion, in its Amended Complaint against ECIDA, plaintiff incorporated additional allegations as against LiRo to the effect that LiRo "knew or should have known" that the plans and specifications prepared by it would be relied on by bidders on the project. As an initial matter, no leave was sought by or granted to plaintiff to amend its complaint against LiRo. Nevertheless, since the additional allegations incorporated by reference as against LiRo are stated "upon information and belief," and are refuted by affidavits submitted by LiRo, such allegations are insufficient to oppose a motion for summary judgment as they are not proof in evidentiary form sufficient to raise a question of fact (*see Wood v Nourse*, 124 AD2d 1020, 1021 [4th Dept 1986]).

Accordingly, LiRo's motion for summary judgment dismissing plaintiff's only cause of action against it is granted. LiRo's motion seeking to dismiss ECIDA's cross-claim against it for contribution and/or indemnification also is granted as unopposed.

ECIDA'S MOTION

First Cause of Action - Cardinal Change

In its First cause of action against ECIDA, plaintiff alleges that the redesigning of the project due to "unanticipated subsurface conditions," specifically the utility conflicts, constitute a "cardinal change" in the Contract, thereby entitling plaintiff to seek compensatory, consequential and incidental damages.

Where the contract clearly includes a disclaimer by the owner of any responsibility for the accuracy or completeness of information on drawings concerning existing conditions, and obligates the contractor to satisfy itself as to site conditions and the work required, there is no merit to a contention that the actual conditions encountered constitute a

cardinal change to the contract (*Costanza Constr. Corp. v City of Rochester*, 147 AD2d 929 [4th Dept 1989]; *see also Gene Hock Excavating, Inc. v Town of Hamburg*, 227 AD2d 911 [4th Dept 1996]).

As discussed above, the Specifications required plaintiff to thoroughly investigate all existing conditions and to satisfy itself fully as to the work called for under the Contract Documents, and to the working conditions and condition of the site, including the existence of other facilities and/or structures on, over or under the site which may interfere with, or make more difficult, the performance of the Contract. The Contract further states that information regarding subsurface conditions was not guaranteed and it is undisputed that the utility conflicts of which plaintiff complains were generally depicted in the bid documents. Plaintiff obligated itself to make its own investigation when it signed the Contract, and the result of its failure to do so does not constitute a "cardinal change" (*see Costanza*, 147 AD2d at 929). Accordingly, the First cause of action against ECIDA is dismissed.

Second and Fourth Causes of Action - Interference/Disruption

With regard to the Second and Fourth causes of action alleging claims for interference (primarily concerning the Millersport box culvert work) and disruption by ECIDA, ECIDA argues that plaintiff failed to comply with the condition precedent in the Contract, thereby barring the claims. Section 8 of the General Conditions to the Contract, titled "Claims for Extra Cost," expressly states that "if the Contractor claims that any instruction by Drawings or otherwise involve extra cost or extension of time, he shall within 10 days after the receipt of such instructions, and in any event before proceeding to execute the work, submit his protest in

writing to ECIDA, stating clearly and in detail the basis of his objections. No such claim will be considered unless so made."

"It is well established that compliance with the notice provisions of a municipal contract is a condition precedent to the commencement of an action for damages" (*Sicoli & Massaro, Inc. v Niagara Falls Hous. Auth.*, 281 AD2d 966 [4th Dept 2001]; *Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc.*, 306 AD2d 221 [1st Dept 2003], *appeal denied* 100 NY2d 628 [2003]; *Fahs Rolston Paving Corp. v County of Chemung*, 43 AD3d 1192 [3d Dept 2007]).

Plaintiff does not dispute that it failed to give proper notice in accordance with the Contract. Rather, plaintiff asserts that due to confusion resulting from proposed Change Order #2, it was "not practicable to segregate the Change Order #2 work from the original work to establish the value of an objection," thereby creating an issue of fact concerning the feasibility of compliance with the notice requirement (see Plaintiff's Memorandum of Law, Section I (E); *Dal Constr. Corp. v City of New York*, 108 AD2d 892 [2d Dept 1985]).

By its own terms, Section 8 of the General Conditions does not apply to general breach of contract claims and is limited to claims for "extra costs." The Amended Complaint alleges that ECIDA "intentionally delayed Janik in prosecuting the Millersport box culvert work" because ECIDA had not obtained funding for that portion of the project, thereby alleging a cause of action for breach of contract which cannot be disposed of on the "documentary evidence" (*see Greenwood Packing Corp. v Associated Tel. Design, Inc*., 140 AD2d 303 [2d Dept 1988]) (to prevail on a defense founded on documentary evidence, the document relied on must definitively dispose of plaintiff's claim).

Since it is unclear whether the Second and Fourth causes of action seek damages for breach of contract, "extra costs" or both, it cannot be said on this record that the Contract definitively disposes of plaintiff's claims. Moreover, plaintiff has alleged sufficient facts at this stage of the litigation entitling it to explore the issue of feasibility of compliance with the notice provision as to extra costs associated with ECIDA's alleged interference. Accordingly, ECIDA's motion to dismiss the Second and Fourth causes of action is denied.

Third Cause of Action - Delay Damages

The Third cause of action alleges delay damages caused by ECIDA. In addition to the condition precedent in the Contract, ECIDA notes that Addendum No. 1, dated September 2, 2005, and General Condition 10(b), specifically provide that "any additional or unanticipated costs or expenses required to complete all work required by this Contract by the Delivery Dates shall be the sole obligation of Contractor" (See Cantwell Aff, Exs. I and J). Further, General Condition 10(c), titled "Damages for Owner's Delay," contains a form of an exculpatory clause stating that "no claim for damages or any claim other than for extension of time as herein provided shall be made or asserted against the Owner by reason of any delay caused by the reasons hereinabove mentioned. Contractor hereby waives any claim for incidental or consequential damages arising out of any delay caused by ECIDA, or arising out of any other breach of the contract by ECIDA" (Cantwell Aff., Ex. J).

It is well settled that "contract clauses barring a contractor from recovering damages for delay in the performance of a contract are valid, that they will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was contemplated by the parties when they entered into the agreement, but that

they will not excuse or prevent the recovery of damages resulting from the contractee's grossly negligent or willful conduct, i.e., conduct which 'smacks of intentional wrongdoing'" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 305 [1986], citing *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377 [1983]; *see also A.R. Mack Constr. Co., Inc. v Central Square Cent. School Dist.*, 278 AD2d 839 [4th Dept 2000], *appeal denied* 96 NY2d 712 [2001]).

Likewise, "exculpatory clauses will not bar claims resulting from delays caused by the contractee if the delays or their causes were not within the contemplation of the parties at the time they entered into the contract" (*Corinno*, 67 NY2d at 309-310). Therefore, "even broadly worded exculpatory clauses, such as the one at issue in these actions, are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract" (*Corinno*, 67 NY2d at 310).

Moreover, even with an exculpatory clause, "damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*Corinno*, 67 NY2d at 309). Thus, the effect of the exculpatory cause can be overcome if the qualitative level of misconduct by the contractee is the equivalent of an intentional wrong (*Corinno*, 67 NY2d at 311). Stated another way, if it is established that the delay at issue was contemplated by the parties at the time they entered into the contract, the contractor needs to prove the deliberate nature of the defendant's conduct in causing the delays (*Corinno*, 67 NY2d at 310-311).

A. "Unanticipated" Subsurface Conditions

Here, as was the case in *Corinno*, the "unanticipated subsurface obstructions" were clearly contemplated by the parties. By the terms of the Contract, plaintiff expressly assumed responsibility for thoroughly investigating all existing conditions, including the existence of other facilities and/or structures on, over or under the site, assumed all risks and responsibility associated therewith, and agreed to complete the work in whatever material and under whatever conditions he may encounter or create, without extra cost to ECIDA. Moreover, as in *Corinno*, plaintiff undertook these contractual obligations with full knowledge that ECIDA provided the drawings, specifications and information relating to conditions below the ground surface without express or implied guarantee as to their being complete or correct (67 NY2d at 314).

"By entering into the contract, plaintiff acknowledged that it had satisfied itself with respect to the nature of the subsurface conditions, and agreed to 'assume all risk including the risk that plaintiff may perform more work than it originally anticipated'" (*Kenaidan Constr. Corp.,* 4 AD3d at 757). Thus, while the exact conditions may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement. Plaintiff may not then avoid the bar to delay damages posed by the contract construed according to the rule of *Kalisch-Jarcho* by claiming that the delay was uncontemplated (*Buckley & Co., Inc., v City of New York*, 121 AD2d 933, 934 [1st Dept 1986]). In the absence of any allegation that ECIDA made misrepresentations and withheld information at the time of the bid, and in light of the broadly worded exculpatory clause, plaintiff may not recover additional compensation for those conditions, as they were

contemplated at the time the parties entered into the Contract (*see All County Paving Corp. v Suffolk County Water Auth.*, 20 AD3d 438 [2d Dept 2005]; *Kenaidan Constr. Corp.,* 4 AD3d at 757; *Gene Hock Excavating*, 227 AD2d at 911-912). The Third cause of action seeking delay damages attributable to the "unexpected subsurface conditions" themselves is therefore dismissed.

B. Defective Plans, Drawings & Specifications

A fair reading of the Amended Complaint reveals that plaintiff also is seeking damages in connection with "uncontemplated delays" resulting from defective plans, drawings and specifications for the project (Amended Complaint ¶ 126-127). However, delays caused by a contractee's ordinary negligence, such as the negligent evaluation of subsurface conditions, design defects and poor planning, fall within the scope of the exculpatory clause (*Buckley*, 121 AD2d at 934; *see also Earthbank Co., Inc. v City of New York*, 145 Misc 2d 937 [Sup Ct, New York County 1989]; *T.J.D. Constr. Co., Inc. v City of New York*, 295 AD2d 180 [1st Dept 2002]; *Blue Water Envtl., Inc. v Incorporated Vil. of Bayville*, 44 AD3d 807 [2d Dept 2007]). Accordingly, to the extent the Third cause of action seeks delay damages attributable to defective plans, drawings and specifications, such claims are dismissed.

C. Bad Faith/Unreasonable Delay

In the Amended Complaint and the papers in opposition to this motion, plaintiff asserts that ECIDA intentionally delayed and/or interfered with plaintiff in prosecuting its work under the Contract by, among other things, unreasonably refusing to allow plaintiff to perform certain items of work involving the Millersport box culvert due to ECIDA's failure to obtain funding for the work, unreasonably delaying in preparing and approving new plans and designs

and providing decisions and/or directions to plaintiff regarding project redesign once the subsurface conditions were discovered, and refusing to negotiate with plaintiff to resolve Change Order issues. Plaintiff further alleges that these actions by ECIDA prevented plaintiff from resuming work and ultimately resulted in plaintiff's termination from the project. Accordingly, even if the subsurface conditions were contemplated by the parties at the time the Contract was entered into, plaintiff asserts that the delays occasioned by ECIDA's actions were either uncontemplated, unreasonable and/or done in bad faith, thereby allowing it to meet one or more of the exceptions to an exculpatory clause as set forth in *Corinno* (67 NY2d at 309).

Since the plaintiff has alleged facts indicating that one or more of the recognized exceptions to the enforcement of the no-damages-for-delay clause may exist, and accepting the facts alleged in the complaint as true and affording plaintiff the benefit of every possible favorable inference, as the Court must on a motion to dismiss, the complaint adequately states a cause of action to recover damages for delays caused by ECIDA's interference and/or delays caused by ECIDA's alleged bad faith (*see Trataros Constr., Inc. v New York City Hous. Auth*., 34 AD3d 451, 453 [2d Dept 2006]; *Tougher Indus., Inc. v N. Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003]).

Moreover, plaintiff can rightfully expect to operate free from needless interference from the owner, and therefore may be entitled to compensation should the record establish unreasonable delays on the part of ECIDA in both preparing and approving new plans and designs and in making decisions which prevented plaintiff from resuming work as directed by ECIDA (*see Grow Constr. Co., Inc. v State of New York*, 56 AD2d 95, 99 [3d Dept 1977]; *D'Angelo v. State of New York*, 46 AD2d 983 [3d Dept 1974]; *Callanan Indus., Inc. v Glens*

Falls Urban Renewal Agency, 62 AD2d 1091 [3d Dept 1978]; *J.R. Stevenson Corp. v County of Westchester*, 113 AD2d 918, 922 [2d Dept 1985]).

Based on the foregoing, the Third cause of action is dismissed in part, insofar as it seeks delay damages attributable to the "unexpected subsurface conditions" themselves or the alleged defective plans, drawings and specifications, but survives insofar as it seeks damages for delays caused by ECIDA's alleged interference and/or delays caused by ECIDA's alleged bad faith.

Incidental/Consequential Damages

All four causes of action also seek incidental or consequential damages. General Condition 10(c) states that "Contractor hereby waives any claim for incidental or consequential damages arising out of any delay caused by ECIDA, or arising out of any other breach of the contract by ECIDA" (Ex. J). Clear and conspicuous contract provisions limiting claims for consequential damages in commercial contracts are enforceable (*Scott v Palermo*, 233 AD2d 869 [4th Dept 1996]; *A.R. Mack Constr.,* 278 AD2d at 839). Accordingly, plaintiff's claims for incidental and/or consequential damages against ECIDA are dismissed.

Defense counsel should settle the Order(s) with plaintiff's counsel. A pretrial conference shall take place on **April 22, 2008 at 2:00 p.m.**

DATED: March 3, 2008

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HON. JOHN M. CURRAN, J.S.C.