Internation Asbestos Removal v Beys Specialty, Inc.
2016 NY Slip Op 31188(U)
June 24, 2016
Supreme Court, New York County
Docket Number: 652494/12
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

INTERNATIONAL ASBESTOS REMOVAL, INC.,

Plaintiff,

– against –

BEYS SPECIALTY, INC. and FEDERAL INSURANCE COMPANY,

Defendants.

Index No.: 652494/12
Mot. Seq. No. 002

DECISION/ORDER

This is an action for breach of a construction contract. Plaintiff International Asbestos Removal, Inc. (IAR), an asbestos abatement subcontractor, sues defendant Beys Specialty, Inc. (Beys), the contractor, and its surety, Federal Insurance Company (collectively Beys), to recover compensation allegedly due for construction of decontamination units (decons) exceeding the number of such units that the subcontract between IAR and Beys estimated would be required for the abatement (additional decon units). Defendants move for partial summary judgment dismissing plaintiff's claim for compensation for the additional decon units. Plaintiff cross-moves for partial summary judgment on its claim for such compensation.

The subcontract between IAR and Beys was made in connection with a renovation project undertaken by the New York City Housing Authority (NYCHA). NYCHA entered into a contract with STV Construction, Inc. (STV), appointing STV to act as the construction manager (CM) for various NYCHA projects, including that at issue for renovation and asbestos removal at

James Wheldon Johnson Houses (the Project). Beys and STV entered into a contract, dated March 30, 2010 (Prime Contract), under which Beys was the contractor for the Project. (Anna Kougentakis Aff. In Supp. [Kougentakis Aff.], Exh. A.) Beys and IAR then entered into a contract, dated May 12, 2010 (Subcontract), in which IAR was the asbestos abatement subcontractor. (Id., Exh. B.) Section 2.1 of the Subcontract provides that the "Contract Work (the 'Work') shall include, but not be limited to, all labor and materials necessary to perform and deliver the work as more fully described in the following work schedule and below." The schedule includes the item: "Erect Decontamination Chamber." It specifies a quantity of three such chambers (i.e., decons) at a unit price of $3,400 each, for a total of $10,200.[1]

It is undisputed that NYCHA, through STV, required construction of additional decons pursuant to a "504 Variance" which had been put in place in previous NYCHA renovation projects. According to IAR, the 504 Variance required a two-phase process for asbestos abatement inside apartments, in which a decon would initially be placed near the entry to an apartment while phase I abatement inside the apartment occurred, and the decon would then be moved inside the apartment while the remainder of asbestos was removed. (See 504 Variance, Aff. of John Pastore In Opp. [Pastore Aff], Exh. B; IAR Memo. In Opp. at 3-4.) IAR claims that, as a result of the requirements of the 504 Variance for interior abatement, as well as NYCHA requirements for decons for exterior abatement, it was required to install 106 decons, as opposed to the three decons estimated in the Subcontract. (IAR Memo. In Opp. at 6.) It seeks payment for these additional decons.

[1] As explained by plaintiff, a decon is a "multi-room structure[] used to clean asbestos residue from technicians, equipment and containers leaving an asbestos work area." (IAR Memo. In Opp. at 2.)

Beys does not dispute that the 504 Variance required IAR to install a substantial number of additional decons. (Beys Reply Memo. at 6.) Rather, Beys argues, among other things, that IAR is not entitled to recover for the additional decons because it failed it comply with contractual notice provisions and requirements that it obtain change orders for the work. In particular, Beys contends that provisions of the Prime Contract required IAR to notify STV of "overruns" of unit price items, where any quantity of a unit exceeds 125% of the estimated quantity for that item set forth in the bid schedule, and to document its extra work by submitting daily written reports. Beys also cites provisions of the Prime Contract and Subcontract requiring that IAR obtain change orders or written authorization for extra work. (Beys' Memo. In Supp. at 7-8, 11-12, 13-15.)

IAR argues, among other things, that these provisions did not require IAR to provide daily reports or notice of unit price item overruns, and did not require IAR to obtain change orders, because these provisions only apply "where IAR's work goes beyond the scope of the Prime Contract and triggers Beys' own obligations to notify STV." (IAR Memo. In Opp. at 8-9.) IAR further argues that its construction of additional decons did not expand Beys' scope of work under the Prime Contract because Beys was required by that contract to supply as many decons as necessary to complete the Project. (Id. at 9.) Put another way, IAR's position is that the notification provisions apply only if Beys itself would have been entitled to a change order or extra compensation under the Prime Contract, and that Beys was not so entitled because Beys agreed in the Prime Contract to install all decons necessary for asbestos abatement for a fixed price. (Oral Argument Transcript [Tr.] at 13-15.) In contrast, according to IAR, the Subcontract is a "unit price contract," which requires Beys to pay IAR for each decon it installs. (IAR Memo. In Opp. at 12-13.) In the alternative, IAR argues that even if it was required to obtain

Beys' authorization in writing for additional decons, Beys gave such authorization both orally and in writing. (Id. at 13-14.)

In replying to IAR's claim that the notice provisions of the Prime Contract did not apply because the additional decons did not exceed the scope of work under the Prime Contract, Beys argues that the Subcontract contains its own provision (§ 8.1) requiring notice and written authorization for the extra work and, in the alternative, that "it is inconceivable that the Prime Contract provisions would not be applicable when the alleged extra work was admittedly ordered by STV and NYCHA." According to Beys, these entities could not bind Beys to pay IAR for additional decons. (Beys Reply Memo. at 5-6.) Beys also disputes that the Prime Contract required it to install as many decons as was necessary to complete the asbestos abatement. (Tr. at 19.) Beys argues, however, that whether the Prime Contract is classified as a unit price contract or a fixed price contract with respect to decons "is irrelevant, because [Beys] would have been entitled to ask for a change order on these items." According to Beys, "[f]ixed price contracts have change orders all the time," where a contractor can "show that there is work beyond the scope of what was originally called for." Thus, if Beys "were able to demonstrate that STV and/or NYCHA ordered additional work, [Beys] would have been entitled to get paid for that, just like any other change order." (Id. at 19-20.)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d

851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is further settled that contracts should be construed "so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (Beat Sav. Bank v Sommer, 8 NY3d 318, 324-325 [2007] [internal quotation marks and citations omitted].) "All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Coversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].)

The critical issues on these motions are whether IAR's construction of additional decons constituted change order work or extra work, and whether IAR was required to comply with contractual notification provisions and to obtain written authorization from Beys to perform such work. Resolution of these issues in turn requires interpretation of the governing contracts. In analyzing the contractual requirements, however, plaintiff and defendants both quote selectively from the provisions on which they rely, ignore other potentially applicable or conflicting provisions, and fail to analyze or explain the interrelationship between the cited provisions and the two agreements in which they appear, in violation of the precepts of contract interpretation set forth above.

In support of its contention that IAR has no claim for compensation for additional decons, Beys relies primarily on Articles 25, 26, and 29 of the Prime Contract, which Beys contends are applicable to IAR under the Subcontract. These Articles are set forth in Section VI

of the Prime Contract, entitled "Changes and Extra Work," and by their terms impose obligations on Beys to obtain change orders and to provide notice of overruns and daily reports of extra work being performed under the Prime Contract.

Article 25, entitled "Contract Changes," provides that "[c]hanges may be made to this Contract only as duly authorized by the CM [STV]. Contractors deviating from the requirements of an original purchase order or contract without a duly approved change order document, or written Contract modification or amendment do so at their own risk." The Article further provides that "[t]he Contractor shall be entitled to a price adjustment for extra work performed pursuant to a written change order."

Article 26 is entitled "Methods of Payment for Extra Work." Subdivision (A), "Overrun of Unit Price Item," provides that if, "during the progress of the Work, the actual quantity of any unit price item required to complete the Work approaches the estimated quantity for that item [set forth in the bid schedule], and . . . it appears that the actual quantity of any unit price item necessary to complete the Work will exceed the estimated quantity for that item by twenty five (25%) percent, Contractor shall immediately notify CM of such anticipated overrun." This Article also provides that the "Contractor shall not be compensated for any quantity of a unit price item provided that is in excess of one hundred twenty five (125%) percent of the estimate[d] quantity for that item set forth in the bid schedule without written authorization from CM."

Article 29, "Performance of Extra or Disputed Work," provides that the Contractor shall furnish the CM with daily work reports "[w]hile the Contractor or any of its subcontractors is performing Extra Work ordered by the CM under Article 25 hereof (unless payment therefore [sic] is to be made by a lump sum or at unit prices previously agreed upon) or is performing

disputed Work . . . ." Beys emphasizes that Article 29 provides that "[f]ailure to comply strictly with these [reporting] requirements shall constitute a waiver of any claim for extra compensation . . . ."[2]

Relying on § 2.1 of the Subcontract, Beys contends that IAR is bound to Beys to the same extent that Beys is bound to STV under the Articles. Section 2.1 provides, in relevant part: "To the extent applicable to the Work to be performed by Subcontractor under this Agreement, the provisions of the . . . Prime Contract, are hereby incorporated into this Agreement with the same force and effect as though set forth in full herein and Subcontractor shall be bound to Contractor, to the same extent that Contractor is bound to the Construction Manager and Owner, by all of the terms and provisions of the Contract Documents and by all decisions, rulings and interpretations of the Construction Manager and Owner." Subcontract § 8.1 (b) further provides that "Subcontractor shall be subject to all provisions and requirements of Section VI 'Changes and Extra Work' of the Prime Contract, including any dispute resolution provisions contained therein." Beys also cites the portion of Subcontract § 8.1 (i) which provides that "Subcontractor shall comply with all recordkeeping and time sheet requirements contained in the Prime Contract."

IAR, in contrast, focuses on the portion of the Subcontract § 2.1 incorporation provision which states that the provisions of the Prime Contract are incorporated only "[t]o the extent applicable to the Work to be performed by the Subcontractor under this Agreement . . . ." IAR further argues, in effect, that the Articles cited by Beys are inapplicable because IAR's

[2] Although not cited by Beys, Article 51 of the Prime Contract further provides that "[n]o claim against the CM for damages for breach of contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims as herein before provided."

installation of additional decons did not constitute extra work under either the Prime Contract or the Subcontract.

As to extra work under the Prime Contract, IAR contends that "the Prime Contract states that Beys was to be paid a fixed unit price for each building to be abated." (IAR Memo. In Opp. at 2 [emphasis omitted].) More particularly, IAR's argument is that Beys contracted with STV to provide as many decons as necessary to complete asbestos abatement at the Project for a fixed price per building. IAR argues that the installation of more than three decons was therefore within the scope of the Prime Contract – i.e., it was not extra work under that contract. In support of this contention, IAR annexes a revised bid form submitted by Beys in connection with the Project, dated December 11, 2009. (Bid Form, Aff. Of Matthew C. Capozzoli In Opp. [Capozzoli Aff.], Exh. A.) This Bid Form contains a schedule similar to the schedule set forth in § 2.1 of the Subcontract. Like the Subcontract schedule, the Bid Form schedule includes an item labeled "Erect Decontamination Chamber" and estimates a required quantity of "3." (Id. at 3.) Unlike the Subcontract schedule, however, the Bid Form schedule identifies the "Unit" with respect to which the estimated quantity is calculated as "Bldg" (building).

As to extra work under the Subcontract, IAR contends that the Subcontract is a "unit price contract" with respect to decons. (See IAR Memo. In Opp. at 12.) According to IAR, Beys agreed under the Subcontract to compensate IAR at the unit price specified in § 2.1 for each decon actually provided, regardless of the total amount, and IAR therefore was not obligated to obtain a written change order from Beys or to notify Beys of anticipated "overruns." (Id.) In support of this contention, IAR quotes a portion of § 4.1 of the Subcontract, entitled "Lump Sum Price," to the effect that the "Subcontractor shall be paid an amount for each item of work completed, equal to the actual unit quantity amount of the Work item completed . . . , multiplied

by the corresponding unit price for said Work item . . . ." (Id. [quoting a portion of, but not identifying, § 4.1].)

It is noteworthy that Beys failed to annex the Bid Form for the Prime Contract to its moving papers, given its reliance on provisions of the Prime Contract which refer to and incorporate the "bid schedule." (See e.g. Prime Contract Art. 26 [A].) In response to plaintiff's production of the Bid Form, Beys urges the court to read that form as "indicat[ing] that there will be three decons per building." (Tr. at 19.) Even assuming arguendo that the Bid Form is reasonably susceptible to this interpretation, it is also reasonably susceptible to the interpretation that the "Unit" on which the fixed "Unit Price" is based is the building, and not the chamber. It is undisputed that the Project covered three buildings. The unit price set forth in the Bid Form of $13,422.10, multiplied by three, amounts to the $40,266.30 "Extended Unit Price" set forth in the Bid Form.[3] The Bid Form thus does not demonstrate, as a matter of law, whether the installation of the decons was extra work or was within the scope of the Prime Contract.

Significantly, in their memoranda of law, both parties inexplicably ignore the Prime Contract definition of "Extra Work," which is "work other than required by the Contract at the time of its execution." (Prime Contract § I, Art. 2 [L].) Although Beys contends that it is irrelevant whether the Prime Contract is classified as a "fixed price" or "unit price" contract with respect to decons, Beys does not explain how the notice requirements of Articles 25, 26, and 29 would be applicable to IAR if installation of more than three decons was required at the time that the Prime Contract was executed.

[3] Another category in the bid schedule for which a Unit of "Bldg" is specified is "Remove Exist. Roof System – Complete." An estimated quantity of three is listed. Applying the interpretation proposed by Beys to this category would require the court to conclude that Beys agreed to remove the existing roof system from each building three times.

The need for this explanation cannot be avoided by Beys' bare assertion that it could have obtained a change order from STV for additional compensation. (Tr. at 19.) It is undisputed that Beys did not request a change order or make any claim against STV until numerous decons had already been installed. When Beys did finally make an application to STV for a change order, on or about July 24, 2014, it did so on behalf of IAR. (See Ltr. of Charles Ludlow [Project Executive of STV] to Anna Kougentakis [Vice President of Beys], dated Sept. 15, 2014 [Kougentakis Aff., Exh. J].) It never made any claim for a change order on its own behalf. Neither party explains the extent to which these undisputed facts affect application of Articles 25, 26, and 29. Moreover, these Articles generally concern change orders for, and the performance of, extra work. The extent to which the Articles also apply where a change order is (or could be) sought for work not meeting the definition of extra work under the Prime Contract is not explained by either of the parties. The first paragraph of Article 25 provides that changes to the contract may be made by "a duly approved change order document, or written Contract modification or amendment . . . ." This Article further provides that "Contract changes may include any Contract revision deemed necessary by the CM, and as approved by NYCHA." These provisions are, however, unaddressed by the parties, as is the application of the notice provisions of Articles 26 and 29 to such changes.[4]

IAR's claim that it is entitled to be paid under the Subcontract at the unit price listed in § 2.1 for all decons actually constructed is also made without the requisite analysis of the contractual provisions. Subcontract § 4.1, on which IAR relies, provides that payment to IAR for unit price items will be "in accordance with the schedule located in Section 2.1." IAR fails to

[4] Whether the Prime Contract provided for three decons per building or a fixed price for decontamination per building, the parties appear to have contracted without reference to NYCHA's 504 Variance, which it is undisputed required many additional decons.

address whether this provision should be construed as authorizing IAR to be paid the unit price, without obtaining a change order, only for the three decon units set forth in the § 2.1 schedule.[5] Section 4.1, moreover, does not by its terms permit IAR to unilaterally increase the "actual unit quantity amount of the Work item completed" beyond the Work specified in the § 2.1 schedule. The section does not address the circumstances under which IAR would be entitled to install more decons than estimated in the Subcontract schedule. Rather, the Subcontract expressly provides in § 8.1 (a) that "Subcontractor shall not perform any change in the Work or be entitled to any compensation therefor, unless it has received a directive signed by George Kougentakis or Anna Kougentakis of the Contractor." Section 8.1 (h) also provides, in its entirety:

> "All change orders, and any subsequent modifications, changes, additions or deletions, must be in writing and signed by George Kougentakis or Anna Kougentakis of Contractor. This subcontract provision may not be modified orally. The Subcontractor understands that it is not entitled to rely upon the oral or written direction for change order of any other persons employed by the Contractor. Any work done without the written approval of George Kougentakis or Anna Kougentakis of Contractor shall be at the sole risk of the Subcontractor and without any further liability of the Contractor for any payment thereof."

[5] The parties have also failed to discuss a number of seemingly important provisions in the contracts relating to the method of computing increases in compensation for extra work or other price adjustments under the contracts. For example, § 8.1 (i) of the Subcontract provides, in part, that "[t]he amount to be paid for any changes or extra work shall be determined by the methods set forth in the Prime Contract." Article 25 of the Prime Contract provides, also in part, that "[a]djustments to price shall be computed in one or more of the following ways: (i) by agreement of a fixed price; (ii) by unit prices specified in the Contract; (iii) by time and material records; and/or (iv) in any other manner approved by the CM." Neither party addresses the interplay between these provisions and Subcontract § 4.1, quoted supra. The parties also fail to discuss Article 26 (B) of the Prime Contract, which appears to contemplate payment for extra work at contract unit prices, but must arguably be read in relation to Article 26 (A), requiring notification of overruns, and reserving to STV the right to negotiate a new unit price for unit price items exceeding 125% of the estimated quantity for that item. The method of payment for extra work is significant for a number of reasons, not the least of which is that Article 29 of the Prime Contract, on which Beys heavily relies, appears to exempt, from its daily reporting requirements, extra work for which "payment . . . is to be made by a lump sum or at unit prices previously agreed upon."

IAR does not explain why these provisions did not, at minimum, require it to obtain a written directive from one of the persons specified in § 8.1 before installing more decons than specified in the Subcontract schedule.

The parties also dispute whether IAR is bound by the dispute resolution provisions in the Prime Contract (see § XI, Art. 61) and, more specifically, the September 15, 2014 decision of STV denying Beys' claim, on behalf of IAR, for extra compensation. Resolution of this issue is dependent on resolution of the extensive disputes, discussed above, as to the extent to which IAR's additional decon work was subject to the provisions of the Prime Contract.

In sum, given the parties' lack of analysis of the potentially relevant provisions and their interrelationship, the court declines, on this motion, to make a final determination as to the proper construction of the contracts. In any event, although IAR disputes that it was required to obtain written authorization from Beys before installing additional decons, the evidence in the record raises triable issues of fact as to whether IAR received such authorization.

It is undisputed that NYCHA required decons in each apartment in which asbestos removal was to be performed, pursuant to the 504 Variance. It is also undisputed that IAR was required by STV to formulate Asbestos Abatement Work Plans (AAWPs) providing for these decons, and that IAR did so. (See Kougentakis Aff. ¶ 11.) In opposition to Beys' motion, IAR submits the affidavit of Jason Pastore, a manager with IAR. The evidence provided with this affidavit includes, but is not limited to, an email, dated June 9, 2010, from Pastore to Anna Kougentakis, the Vice President of Beys, attaching an AAWP which expressly provides for the installation of two decons per apartment. (Pastore Aff., Exh. C.) Pastore also attaches an email, dated May 13, 2010, to him from Anna Kougentakis, which attaches tenant safety plans to be filed for the Project which state: "Decon units will be located within unit entries." This email

states: "Please proceed with all filings without delay." (Id., Exh. E.) Pastore attests, and Kougentakis does not dispute, that between May 13, 2010 and October 31, 2010, he received over 425 emails regarding the AAWPs from individuals at Beys and STV. (Id. ¶ 5.) Pastore also produces letters to IAR, dated September through December 2011, from George Kougentakis, Beys' President, and Anna Kougentakis, directing IAR to build specified decons. One attaches a schedule for 32 decons. (Id., Exh. N.)

Although Beys does not dispute that STV/NYCHA required additional decons pursuant to the 504 Variance (Kougentakis Reply Aff. ¶ 5), Beys challenges the import of the emails regarding the decons, and asserts that its comments in the emails were merely "intended to expedite IAR's performance of its subcontractual obligations," rather than to signify that Beys agreed to pay for the decons listed by IAR in its AAWPs. (Id. ¶ 7.) Beys also points to emails from IAR in September and October 2011 referring to IAR's intent to request a change order for the additional decons from NYCHA, not Beys. (Kougentakis Aff., Exhs. F, G.) According to Beys, the letters from George and Anna Kougentakis directing IAR to build specified decons in the fall of 2011 "simply constituted the notice and directive requirement of the change order provision in the subcontract, without conceding that the items were actually beyond the scope of the original contract." (Kougentakis Reply Aff. ¶ 13.) Beys contends that, "[a]s IAR should have been aware, it still needed to provide all of the required documentary support as a condition precedent to making the claim and was ultimately subject to NYCHA's determination of entitlement to payment." (Id.)

Beys thus appears to concede that it issued written directives for IAR to install at least 32 decons. IAR, in contrast, appears to concede that it did not receive Subcontract § 8.1 (a) written directives from Beys prior to installing all of the additional decons. (See Dep. of IAR by Jason

Pastore, at 113-114, 144 [Cooke Aff., Exh. D].) IAR further concedes that it did not provide the daily written reports allegedly required by Article 29 of the Prime Contract. (Dep. of IAR by Karen Grando, at 276-277 [Cooke Aff., Exh. C]; Dep. of IAR by Jason Pastore, at 114, 145-146 [Cooke Aff., Exh. D].) The import of these concessions depends, however, on the applicability of the various notice, authorization, and reporting requirements in the contracts.

The parties also dispute whether the notice and reporting requirements of Section VI of the Prime Contract, if applicable, must be strictly enforced. IAR contends that strict compliance is required only in public construction contracts and "is not required in the context of private disputes where public funds are not at risk." (IAR Memo. In Opp. at 11.) IAR, however, cites no authority in support of its contention that the Subcontract, which largely delegates responsibility for work on a NYCHA Project, qualifies as a private contract. In any event, although Barsotti's, Inc. v Consolidated Edison Co. of N.Y., Inc. (254 AD2d 211, 212 [1st Dept 1998]), on which IAR relies, required less than strict compliance with written authorization and notice-of-claim provisions in a private contract, this Department has subsequently explained that "Barsotti's did not involve a condition precedent-type notice provision setting forth the consequences of a failure to strictly comply." (Northgate Elec. Corp. v Barr & Barr, Inc., 61 AD3d 467, 468-469 [1st Dept 2009]; F. Garofalo Elec. Co. v New York Univ., 270 AD2d 76, 80 [1st Dept 2000], lv dismissed 95 NY2d 825 [2000] [concluding that "notice and documentation requirements for extra work" in a private contract were "conditions precedent to plaintiff's recovery and the failure to strictly comply is deemed a waiver of such claims"]; see also American Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc., 2010 WL 144426, * 14 [ED NY, No. CV 05-5155, Jan. 11, 2010, Tomlinson, M.J.] [holding that "rigid compliance with a

notice-of-claim provision may be strictly required regardless of whether the contract at issue is one for a private or public construction project"].)

As noted above, Article 29 of the Prime Contract expressly provides that "[f]ailure to comply strictly with these [reporting] requirements shall constitute a waiver of any claim for extra compensation . . . ." This provision is substantially similar to provisions held by Courts to constitute conditions precedent, requiring strict compliance. (See A.H.A. Gen. Constr., Inc. v New York City Hous. Auth., 92 NY2d 20, 26 [1998], rearg denied 92 NY2d 920.) Assuming arguendo that this Article applies, however, there is at least some authority, which the parties do not discuss, holding that even where strict compliance is required, "failure to give notice compliant in every technical respect" may be excused where "there is an extensive record of timely written correspondence between the [parties] . . . addressing the disputed subject matter." (Huff Enters. v Triborough Bridge & Tunnel Auth., 191 AD2d 314, 317 [1st Dept 1993].)

To the extent that Subcontract § 8.1 required IAR to obtain written authorization from George or Anna Kougentakis before installing more than three decons, there is authority, also unaddressed by the parties, that "[s]ubstantial compliance will be found where there is sufficient correspondence between the parties to give the owner actual notice of the claims." (See Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assoc., LLC, 129 AD3d 807, 810 [2d Dept 2015].) Resolution of these compliance issues must therefore await more comprehensive analysis by the parties of the applicable contractual provisions and amplified discussion of the governing legal authority.

The court has considered the parties' remaining arguments and considers them unavailing. It is accordingly hereby

ORDERED that the motion of defendants Beys Specialty, Inc. and Federal Insurance Company for partial summary judgment is denied in its entirety; and it is further

ORDERED that the cross-motion of plaintiff International Asbestos Removal, Inc. for partial summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
June 24, 2016

MARCY FRIEDMAN, J.S.C.