IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

SADLER ELECTRIC, INC.,	)	Doc. 1084 No. 846
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**ORDER**
	)	
OMAHA PUBLIC POWER DISTRICT, A Political Subdivision,	)	
	)	
	)	
Defendant.	)	

This matter comes before the Court on Defendant Omaha Public Power District's ("OPPD" or "Defendant") motion for summary judgment. A hearing was held on or about December 4, 2009. Evidence was adduced, arguments heard, briefs were submitted, and the matter taken under advisement. For the reasons discussed below, Defendant's motion for summary judgment is sustained as to Plaintiff's claims. As far as Defendant's counterclaim, Defendant's motion is sustained as to the claim and is overruled on the issue of damages.

Facts and Procedural Background

Plaintiff Sadler Electric, Inc. ("Sadler" or "Plaintiff") is a Nebraska Corporation that is authorized to do business in the State of Nebraska and maintains a place of business in Ralston, Nebraska. (Compl. ¶ 1). Defendant OPPD is a political subdivision which operates a power district in the State of Nebraska and maintains its principal place of business in the State of Nebraska. (Compl. ¶ 1). OPPD put out a request for bid for Proposal No. 2493 ("Proposal"), which involved new house service installation and street light maintenance. (Compl. ¶ 2). Sadler was the low bidder on the project, and on or about May 17, 2007, Sadler was awarded a contract based upon the proposal. (Compl. ¶ 4). Pursuant to the contract ("Contract"), Sadler performed

streetlight cable replacement work which involved either boring or plowing, which is generally cheaper, at each job site. The Contract gave Sadler the discretion to choose whether to bore or plow at each site. (Compl. ¶ 4).

On June 30, 2008, Sadler filed this claim for contract reformation against OPPD. Sadler claims that OPPD made misrepresentations in the Contract regarding the amount of discretion Sadler would have while performing the work and that OPPD failed to award the amount of work that was represented in the Contract. Specifically, Sadler claims that it was unable to plow at most locations because of site conditions and, therefore, the Contract misrepresented that the winning bidder would have discretion regarding whether to bore or to plow. Further, Sadler claims that OPPD contracted to award Sadler cable installation or cable termination projects on approximately 250 houses as represented in the Proposal, but OPPD failed to award any such work. On August 5, 2008, OPPD filed an answer and counterclaim, and on October 21, 2009, OPPD filed a motion for summary judgment. Additional pertinent facts will be discussed below in connection with the motion before the Court.

Standard of Review

The party that makes the motion for summary judgment has the burden of producing evidence and demonstrating that there are no genuine issues of material fact. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W. 2d 599 (2003). The moving party makes a prima facie case by offering sufficient evidence to demonstrate they are entitled to a judgment if the evidence is undisputed at trial. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005). Once the moving party has made out a prima facie case, the burden of production then shifts to the party opposing the motion. *Id.* at 710, 708 N.W. 2d at 223. The evidence is viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences deducible

from the evidence are decided in its favor. *Blinn v. Beatrice Comm. Hosp. and Health Center, Inc.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

However, even when there are no conflicting facts, summary judgment should not be granted if the ultimate inferences drawn from the facts are unclear. *Gilbert v. City of Tekamah*, 221 Neb. 614, 379 N.W.2d 758 (1986). Summary judgment is not proper when the credibility of evidence is a factor. *Blome v. Hottell*, 200 Neb. 528, 264 N.W.2d 424 (1978). The court does not weigh the evidence to determine the truth of the matter but only determines whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Therefore, summary judgment is properly granted when the pleadings and evidence allowed in the hearing disclose no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

Discussion

OPPD asserts that the Contract between OPPD and Sadler is clear and unambiguous, that OPPD did not breach the Contract, and that Sadler is not entitled to reformation of the Contract. "If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms." *Home Federal Sav. and Loan Ass'n of Grand Island v. McDermott & Miller*, 243 Neb. 136, 139, 497 N.W.2d 678, 681 (1993). Further, "the words of a contract must be given their plain and ordinary meaning, as an average, ordinary, or reasonable person would understand them." *Id.* A contract "must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract." *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 5 (2006).

Sadler, on the other hand, argues that Sadler is entitled to reformation of the Contract as a result of Defendant's conduct. "A court may reform an agreement when there has been either a

mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought." *Par 3, Inc. v. Livingston*, 268 Neb. 636, 641, 686 N.W.2d 369, 373 (2004). "The right of reformation presupposes that the instrument does not express the true intent of the parties, and the purpose of reformation is to make an erroneous instrument express the real agreement." *Twin Towers Development, Inc. v. Butternut Apartments, L.P.*, 257 Neb. 511, 516, 599 N.W.2d 839, 844 (1999). OPPD asserts that reformation is not appropriate, and that OPPD is therefore entitled to judgment as a matter of law.

1. **Discretion to Bore or Plow**

Section 10.05 of the Instructions to Bidders of the Contract provides, in pertinent part, that "Contractor[s] may directional bore or plow at their discretion under bid unit 2.1 in section CD." (Exh. 1, Instructions to Bidders, p. H-7). Bid unit 2.1 provides "Bore or Plow 1 street light or triplexed secondary cable." (Exh. 1, Contract Documents, p. CD-2). The Instructions to Bidders also provides:

> 2.01 Before submitting their bids, all bidders shall visit and carefully inspect the proposed site of the Work, and fully inform themselves as to the general or special conditions that may be encountered. Failure to do so will not relieve bidders from responsibility for properly estimating the difficulty and cost of successfully performing the Work.
>
> 2.02 The District assumes no responsibility for any understanding or representation regarding any existing or future conditions at the site made by any of its employees or agents, unless expressly included and specifically warranted in the Contract Documents.

(Exh. 1, Instructions to Bidders, p. H-7, §§ 2.01 and 2.02). Thus, OPPD expressed in the Contract that it was not making any representations about the conditions at any possible worksite and that contractors wore responsible for becoming familiar with conditions that may be encountered. Although the Contract Documents stated that bidders could request clarification if

something in the Contract was unclear, Sadler did not request any clarification before submitting its bid. (Peterson Aff. ¶ 5).

Sadler noted that when Mr. Roger Peterson, a Supervisor of Contract Management for OPPD, was asked during his deposition how he would define "discretion," he testified that "[Contractors] have the decision to make whether to bore or plow." (Peterson Depo. 20:18-25). Implicit in such a definition is that Sadler have a choice to make. Sadler asserts, however, that because of site conditions, boring was only one option available to him, and he therefore had no ability to exercise discretion. Thus, Sadler claims the Contract should be reformed to allow it to recover $5.85 per foot for boring work completed pursuant to Unit 2.1, rather than the $1.50 per foot that Sadler actually bid.

To overcome the presumption that the written agreement correctly expresses the parties' intentions, the party seeking reformation must offer clear, convincing and satisfactory evidence. *Walker v. Walker Enterprises, Inc.*, 248 Neb. 120, 532 N.W.2d 324 (1995). "A party's right to reformation of an agreement depends on whether the agreement reflects the parties' intent." *Id.* Sadler does not claim that the agreement he entered into with OPPD does not represent the parties' intent, but that OPPD is attempting to distort the plain meaning of the contractual language into something it is not, thereby necessitating reformation of the parties' agreement. Sadler asserts it is entitled to relief based upon OPPD's inequitable conduct. Construing Sadler's petition liberally, the petition asserts that it was the intent of the parties, or, alternatively, it was Sadler's intention and OPPD's representation, that Sadler would have the option to choose to either bore or plow at each job site. However, Sadler has not shown that OPPD knew that plowing would not be an option at some worksites and therefore boring would be a bidder's only choice, or that the contractual language constitutes inequitable behavior.

OPPD maintains that Sadler did have discretion to choose whether boring or plowing was appropriate at each particular worksite. In its instructions to bidders, OPPD stated that it "assumes no responsibility for any understanding or representations regarding any existing or future conditions at the site...unless expressly included in and specifically warranted in the Contract Documents." At 2.2 in the Contract, contractors are directed to bore two to three streetlight or triplexed secondary cables. At section 2.3, however, as discussed above, contractors are given the discretion to bore or plow. This simply allows a contractor to choose whether to bore or plow, and makes clear that it may be either boring or plowing that must be used, depending on the site. The "pilot project," conducted before OPPD put out for bid a request for Proposal No. 2493, revealed that roughly 80 to 90 percent of the cable replacement work would likely require boring. (Peterson Depo. ¶ 14:2-15:13). This indicates that plowing would not be an option at every worksite, but that plowing would be an option at some worksites. The Instructions to Bidders clarify that under section 2.1, there will be opportunities for a contractor to decide whether to bore or plow at a particular work site. OPPD did not make representations that either boring or plowing would be appropriate or possible at every location, but that a contractor would be permitted to decide which method is best for each location. Accordingly, Sadler cannot satisfy the elements for reformation of the Contract, and summary judgment is appropriate on this issue.

2. New House Service Installations

In its second cause of action, Sadler claims that the Contract should be reformed to reflect OPPD's representation that the Contract would include installation of cable for house services and termination of such cables for approximately 250 homes. OPPD asserts that an estimate is not binding upon the parties. The Contract provides that "the undersigned [bidder] understands

that the quantities called for in the proposal are approximated and agrees that the actual quantities may vary without affecting the unit prices." (Exh. 1, Proposal Data, p. C-1). The Technical Specifications in the Contract also provide that OPPD may assign anywhere from zero to ten house service installations on any working day. (Exh. 1, Technical Specifications, § 9.01, p. H-3).

In *Professional Service Industries, Inc. v. J.P. Construction, Inc.*, 241 Neb. 862, 491 N.W.2d 351 (1992), the Nebraska Supreme Court held that only when an estimated figure is a guaranteed maximum or minimum may a court treat an estimate as a fixed amount to which the parties are bound. In *Professional Service Industries*, Plaintiff, Professional Service Industries, Inc., provided the testing services at an estimated cost for a road paving project of which J.P. Construction, Inc. was the prime contractor. Having determined that the parties clearly expressed a written intent to contract for a particular result, the Nebraska Supreme Court found that it was not necessarily the intent of the parties to hold close to their estimated cost figure. *Id.*

The court stated that "[t]he objective conduct of the parties manifests an intent of the parties to create a service contract for testing-service requirements at the proposed fees and costs." *Id.* at 867, 491 N.W.2d at 355. "A fair interpretation of the contract leads to the conclusion that in the absence of allegations and evidence of either bad faith or unconscionability, the contract formed by the parties here is valid, enforceable, and unambiguous as a matter of law." *Id.* The court found that no "duty to hold close to an estimate arises simply because an estimated figure is stated. On the contrary, when an estimated figure is a guaranteed maximum or minimum, or when the parties expressly provide otherwise, only then may the court treat the estimate as a fixed amount to which the parties are contractually bound." *Id. See,*

Ruzicka v. Petersen, 213 Neb. 642, 330 N.W.2d 913 (1983); *Griswold & Rauma, Architects v. Aesculapius Corp.*, 301 Minn. 121, 221 N.W.2d 556 (1974).

Plaintiff asserts that the industry standard for an approximation is roughly five to ten percent. Sadler, based upon such standard, assumed that the actual amount of assigned projects would be within ten percent of the estimate, or 225 to 275 projects. Sadler claims that OPPD's reliance on *Professional Services Industries* and *Griswold v. Rauma* is misplaced because the cases involve amount of compensation as opposed to, as here, ability to earn compensation at all. However, Sadler has not offered any authority to the contrary, or any authority regarding a five to ten percent industry standard. Further, the estimated 250-job figure was not a guaranteed maximum or minimum figure. Accordingly, even when the evidence is viewed in the light most favorable to Plaintiff, Defendant is entitled to summary judgment on this issue.

3. Defendant's Counterclaim

OPPD filed a Counterclaim against Sadler alleging that because Sadler failed to perform certain work under the Contract, OPPD was forced to hire another contractor to complete the work at a substantially higher cost than the rate at which Sadler was contracted to charge OPPD. OPPD asserts that the work assignments were made to Sadler more than two months before the expiration of Sadler's Contract. In May 2008, Sadler advised OPPD that it would not be able to complete the thirteen jobs before the contract expired at the end of the month. OPPD claims that Sadler's failure to complete the work in a timely fashion constitutes a breach of contract, and that OPPD is therefore entitled to summary judgment.

Sadler, on the other hand, claims that there is a genuine issue of material fact regarding whether OPPD failed to mitigate damages. Sadler claims that prior to the Contract's expiration, it attempted to resolve the issue with OPPD. Brian Sadler testified that he contacted Roger

Peterson of OPPD a few days before the Contract expired and offered to complete the projects after the Contract's expiration, but that Peterson refused the offer. (Sadler Depo. 134:16-137:4). OPPD then hired another construction company to complete the work at an increased rate. (Peterson Depo. 31:16-23). Sadler claims that if OPPD had allowed Sadler to complete the work following the expiration of the Contract, OPPD would not have incurred any additional costs.

OPPD relies on *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008) for the proposition that mitigation of damages is an affirmative defense. *Lockwood*, however, involves very different issues, and the concept of mitigation of damages did not come up until a dissenting opinion. Along with the affirmative defense argument, OPPD claims that the law does not require OPPD to wait for Sadler to cure its breach of contract, particularly where the Contract required Sadler to complete the work in March 2008, more than two months before the Contract expired. Neither party offers any other authority in support of their positions.

An anticipatory breach of a contract or anticipatory repudiation is "committed before the time when there is a present duty of performance and results from words or conduct indicating an intention to refuse performance in the future." 23 Williston on Contracts § 63:29 (4th ed. 2000). "A breach of contract caused by a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due[,] allows the nonbreaching party to treat the repudiation as an immediate breach of contract and sue for damages. *Union Pacific R.R. v. Certain Underwriters at Lloyd's London*, 771 N.W.2d 611, 621-22 (S.D., 2009). Sadler told OPPD that it could not complete the projects before the expiration of the contract, and offered to continue working after the contract was expired. However, Sadler did unequivocally indicate that the work would not be done when performance was due. Accordingly, summary judgment is sustained in part on this issue, leaving open the issue of damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion for summary judgment is sustained as to Plaintiff's claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's motion for summary judgment is sustained as to Defendant's counterclaim, and is overruled only on the issue of damages.

DATED this 2 day of February, 2010.

BY THE COURT:

PATRICIA A. LAMBERTY
DISTRICT COURT JUDGE