

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF ADMINISTRATION¹**

SILVER BOW CONSTRUCTION)	
)	
v.)	
)	
DIVISION OF GENERAL SERVICES)	OAH No. 12-0025-CON
<hr/>)	Contract No. 2010-0222-9525

REVISED DECISION²

I. Introduction

Silver Bow Construction, Inc., [Silver Bow] was awarded a contract by the Division of General Services [Division] for the replacement of a rooftop air handler and associated canopy. After the air handler was installed, the Division asserted that Silver Bow was also required to provide air balancing services on each of the eight floors of the building served by the air handler. The contract’s technical specifications state that air balancing is not included in the contract, but another provision of the contract is to the contrary.

Silver Bow filed a contract claim asserting that the air balancing work was not within the scope of the original contract, and that it should be provided additional compensation for that work. The contracting officer denied the claim. Silver Bow appeals. The matter was submitted for decision on the written record. The Division argues that under the contract’s terms, the technical specification does not control; Silver Bow argues it does. Under the contract’s order of precedence term, the technical specification does not control. Silver Bow’s claim is therefore denied.

II. Facts

On July 6, 2010, the Division of General Services issued Invitation To Bid No. 2010-022-9525 (ITB), requesting bids to remove and replace a roof-mounted air handler at the Court Plaza Building in Juneau, with related electrical, mechanical, sprinkler and roof membrane installation and repair.³ The ITB’s project description in two different locations stated, “After

¹ This matter was appealed to the Department of Administration, pursuant to the instruction provided on the contracting officer’s letter denying the contract claim. The commissioner referred the matter to the Office of Administrative Hearings. The Commissioner of Transportation and Public Facilities subsequently delegated responsibility for the matter to the Commissioner of Administration, retaining authority to issue the final decision.

² This case was remanded to the administrative law judge for preparation of a revised decision consistent with a proposal for action filed by the Division of General Services. This revised decision constitutes the final decision in the case.

³ R. 1-2.

the new air handler unit is installed, the contractor shall conduct air balancing of the air flows on each of the eight floors within the building.”⁴

The ITB Table of Contents, sub headed “Division 0 – Bidding and Contract Requirements”,⁵ lists various sections, each (other than drawings) identified by a five-digit number, with a title, the form number (if applicable), and the number of pages.⁶ The listed sections contain procurement-related documents⁷ and contract documents, including General Conditions,⁸ Supplementary Conditions,⁹ certain labor-related provisions,¹⁰ a summary and extensive technical specifications,¹¹ and drawings,¹² with an appendix showing the various variable air volume (VAV) box locations and air flow (CFM) requirements.¹³

Section 01100 (Summary of Work) precedes the technical specifications and provides that the Work (services and labor “as required by the Contract Documents”)¹⁴ includes removal and replacement of a roof-mounted air handler at the Court Plaza Building in Juneau, with related electrical, mechanical, sprinkler and roof membrane installation and repair and “other work as required for an operational air handler and warranted roof” and does not mention air balancing on all eight floors.¹⁵ On the next page, however, the Work is stated to include two phases: Phase One consisting of the removal and replacement of the roof-mounted air handler and associated work, and Phase Two consisting of “air balancing of the air flows on each of the eight floors within the building[,]” referencing the appendix showing the VAV box locations and information.¹⁶ By contrast, Section 15950 of the technical specifications covers “[t]esting, adjusting and balancing of air systems; Roof Top unit and penthouse main branch ducts only”

⁴ R. 2, 5.

⁵ According to the Division, Division 0 was part of the 1995 MasterFormat indexing system. 3 AR 281. However, according to Silver Bow, Division 0 did not come into existence until the 2004 revision to the MasterFormat system, in which the number of divisions was increased to 50. *See* Silver Bow Reply, Attachment A.

⁶ R. 3.

⁷ R. 5-30 (Sections 00020-00670). The procurement-related documents are Sections 00020-00670, consisting of various forms (25D 3-4, 1-9, 10A, 12-14, 16). These forms appear to be the standard “Contract Forms for Construction Bids”, as issued by the Department of Transportation and Public Facilities Forms, which are available online at <http://www.dot.state.ak.us/stwddes/dcspubs/forms.shtml#>.

⁸ R. 31-73 (Section 00700; *see* R. 3).

⁹ R. 74-91 (Section 00800; *see* R. 3).

¹⁰ R. 92-126 (Section 00830; *see* R. 3).

¹¹ R. 127-212 (Sections 01100-15950; *see* R. 3).

¹² R. 213-231; *see* R. 3-4.

¹³ R. 232-246; *see* R. 4. *See generally* Silver Bow Appendix A.

¹⁴ *See* R. 37.

¹⁵ R. 127.

¹⁶ R. 128.

and states “[b]alancing of individual floor ventilation rates including grilles and diffusers is not included in the Work.”¹⁷

Preparation of the contract specifications was the responsibility of an architectural firm, Jensen, Yorba and Lott (architect), under a pre-existing contract with the Division.¹⁸ Murray and Associates, a mechanical engineering firm (mechanical engineer), was subcontracted by the architect to provide specifications and drawings for the portions of the work within the scope of that profession.¹⁹ As envisioned by the architect and the mechanical engineer, the project involved only replacement of the roof unit,²⁰ and the mechanical engineer had drafted Section 15950 accordingly.²¹ When the Division reviewed the contract documents presented to it by the architect, a Division employee pointed out that it would “be necessary to conduct air balancing on each of the 8 floors after the air handler is installed and operational.”²² Dan Aicher, the contracting officer for the project, drafted language to be included in Section 01100 to cover that work, “as a second phase to this project.”²³ The language in Section 15950, however, was not changed. Jeremy Adam, Silver Bow’s project manager on this contract, prepared Silver Bow’s proposal.²⁴ In preparing the proposal he relied on the language in Section 15950, which he “considered...to be controlling over any other contradicting language” in the ITB.²⁵

III. Discussion

A. The Order Of Precedence Gives Priority to Section 01100

It is apparent that Section 01100 and Section 15950 are in direct conflict: the former (in one location, while silent in another) states that the contractor is to provide air balancing on all floors; the latter states that work is not included. At issue in this case is whether the conflict may be resolved by resort to the contract’s order of precedence provision. That provision states:

¹⁷ R. 208. The appended drawings of the VAV box locations include sheet notes stating, “all bathroom exhaust fans to be balanced to 100 cfm.” R. 241-245 (note 4). Those drawings, however, were prepared by a different firm, Modern Mechanical, in connection with a prior project in 2001. *Id.*

¹⁸ R. 392, 394.

¹⁹ *See* R. 380, 389.

²⁰ *See* R. 374-375.

²¹ R. 368 (Email, D. Murray to T. Yorba, *et al.*, 7/1/2010 @ 3:05 p.m.); Silver Bow Appendix 8, p. 4 (“VAV box work was not included in the original project scope of work.”). *See* R. 273.

²² R. 369 (Email, D. Aicher to T. Yorba *et al.*, 7/1/2010 @ 12:13 p.m.).

²³ R. 369 (Email, D. Aicher to T. Yorba *et al.*, 7/1/2010 @ 12:13 p.m.).

²⁴ Silver Bow Appendix. Affidavit of Jeremy Adam (May 14, 2012).

²⁵ *Id.*

When conflicts[,] errors, or discrepancies within the Contract Documents exist, the order of precedence from most governing to least governing will be as follows:

- Contents of Addenda
- Supplementary Conditions
- General Conditions
- General Requirements
- Technical Specifications
- Drawings...[*etc.*]^[26]

The Division argues that Section 01100, which includes the requirement to perform air balancing on all floors, contains the General Requirements, and that it therefore takes precedence over Section 15950,²⁷ which both parties agree is part of the Technical Specifications.²⁸ Silver Bow asserts that Section 01100 does not contain the General Requirements.

Resolution of the parties' difference on this point turns on the definition of General Requirements:

Sections of Division 1 of the Specifications that contain administrative and procedural requirements as well as requirements for temporary facilities applying to Specification Divisions 2 through 16.^[29]

The reference to Divisions 1-16 in this definition reflects the terminology used in a standardized construction contract format, the MasterFormat system, maintained by the Construction Specification Institute and utilized by both the Department of Administration and the Department of Transportation and Public Facilities, and expressly identified in Section 01100 as the organizational format for the Specifications.³⁰ In the standard MasterFormat system, the General Requirements are indexed as Division 1³¹ or 01.³²

In this particular case, nothing in the ITB expressly identifies Division 1 (or 01), and nothing expressly identifies Section 01100 as part of Division 1 or states that sections beginning 01 constitute Division 1. Moreover, Section 01100 is titled "Summary", rather than "General Requirements." In the absence of an index or table of contents identifying specific divisions and showing which sections belong to each, or a title specifically identifying Section 01100 as the

²⁶ R. 39 (Section 00700, ¶3.5.2).

²⁷ Division Response at pp. 4, 6.

²⁸ See Silver Bow Brief at 10.

²⁹ R. 35 (Section 00700-General Conditions).

³⁰ R. 129 (Section 01100-3) ("The Specifications are organized into Divisions and Sections using the 16-division format and CSI/CSC's 'MasterFormat' numbering system." See also, Division Response at 6, note 2; 3AR 281.

³¹ R. 281.

³² Silver Bow Reply, Attachment A.

General Requirements, Silver Bow argues it “strains credulity” to read the Section 01100 as stating the contract’s General Requirements.³³

In fact, rather than straining credulity, it is entirely reasonable to read Section 01100 as stating the contract’s General Requirements. First, and critically, under the express terms of Section 00700, the General Requirements are defined and identified not by their title, as Silver Bow would have it, but by their functional role. Second, Section 01100 clearly and expressly states that the specifications “are organized into Divisions and Sections using the 16-division format and CSI/CSC’s ‘MasterFormat’ numbering system[.]”³⁴ Third, it is apparent from a review of the MasterFormat division headings and the text of the other sections in the ITB that the initial two digits of each section correspond to the sixteen different divisions.³⁵ These considerations make it reasonable to infer that the first two digits of each section number identify a MasterFormat division number, and that Section 01100 contains the contract’s General Requirements, as defined in Section 00700.

Rather than treating Section 01100 as part of Division 1, and as containing the contract’s General Requirements, Silver Bow would read the contract as having no Division 1 and no General Requirements,³⁶ and, because the ITB table of contents lists sections, rather than divisions,³⁷ as not following the MasterFormat structure at all.³⁸ This reading is unreasonable, for several reasons. First, it would effectively write out of the contract the language in Section 01100 expressly adopting the MasterFormat numbering system, and the contract should be read

³³ Silver Bow Brief at 11.

³⁴ R. 129-130 (Section 0110, ¶1.10). Specifications are defined as ““those portions of the Contract Documents consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain administrative and procedural details applicable thereto.” R. 36 (Section 00700).

³⁵ For example, Section 01732 (Selective Demolition) includes information regarding temporary facilities. *Id.*, ¶3.3(B). Information about temporary facilities is specifically identified as part of the General Requirements, and as such, part of Division 1. *See* Section 00700. Sections 07542 (Polyvinyl-Chloride (PVC) Roofing and 07620 (Sheet Metal Flashing and Trim) are within the scope of Division 7 (Thermal and Moisture Protection); Section 09911 (Exterior Painting) is within the scope of Division 9 (Finishes); and Section 13925 (Fire Suppression Sprinklers) is within the scope of Division 13 (Special Construction). The remaining sections, all with the prefix 15, consist of the bulk of the work, and describe matters within the scope of Division 15 (Mechanical).

³⁶ Silver Bow Brief at 10 (“[T]here is no ‘Division 1- General Requirements’ section set out in the contract.”).

³⁷ Silver Bow Brief at 11. As noted in Section 01100, the table of contents provides numbers and names of sections. R. 130 (Section 01100, ¶1.10). The table of contents includes only one reference to a division: it bears the heading Division 0, which (according to the Division) is CSI’s designation for Introductory Information, Bidding Requirements, and Contract Requirements. *See* R. 3, 281. Silver Bow’s submission does not include a Division 0. *See* Silver Bow Reply, Attachment A.

³⁸ Silver Bow Brief at 11 (“The air handler contract does not follow the template suggested by Master-Format.”).

to give effect to all its provisions if that is reasonably possible.³⁹ Second, Section 01100 “contain[s] administrative and procedural requirements...applying to [the technical specifications]”, which is just what General Requirements are supposed to do.⁴⁰ Third, Silver Bow’s interpretation disregards the patent symmetry between the section numbers and the MasterFormat division structure.⁴¹

B. The Order of Precedence Term Need Not Be Construed Against the Division

Silver Bow argues that, to the extent the contract is ambiguous with respect whether Section 01100 states the General Requirements, it should be construed against the Division, because the Division drafted the contract and it is a contract of adhesion.⁴² This rule comes into play only if, after examining the language of the contract and any relevant extrinsic evidence, the terms are reasonably susceptible of differing interpretations.⁴³ As discussed above, however, the Division’s interpretation is reasonable and Silver Bow’s is not. Because the contract is not reasonably susceptible of Silver Bow’s interpretation, the rule that contracts of adhesion are interpreted against the drafter does not apply. Similarly inapplicable, for the same reason, is the rule cited by Silver Bow to the effect that ambiguities are resolved against the government.⁴⁴

C. The Order Of Precedence Does Not Give Section 15950 Priority

Even if one were to accept Silver Bow’s argument that Section 01100 should not be construed to state the contract’s General Requirements, that would not end the analysis. Silver Bow argues that if the contract does not contain any General Requirements, then under the order of preference provision Section 15950 controls.⁴⁵ That is a misinterpretation of the order of precedence provision. Under the order of precedence provision, technical specifications

³⁹ See, e.g., Wolf v. Cunningham, 187 P.3d 479, 482 (Alaska 2008).

⁴⁰ Section 00700.

⁴¹ See note 35, *supra*.

⁴² Silver Bow Brief at 15; Silver Bow Reply at 6. It has been said that the rule that a contract is interpreted against the drafter applies only to contracts of adhesion. See, e.g., Little Susitna Construction Company v. Soil Processing, Inc., 944 P.2d 20, 25 n. 7 (Alaska 1997). A contract of adhesion has been defined as one presented as a take-it-or-leave-it contract, in which the drafting party has substantially greater bargaining power. See, e.g., Stordahl v. Government Employees Insurance Company, 564 P.2d 63, 66 note 4 (Alaska 1977). The Division denies that the contract at issue in this case as a contract of adhesion. Proposal For Action at 2, note 2, *citing* Bruner & O’Connor on Construction Law §3.55.

⁴³ See C.P. ex rel. M.L. v. Allstate Insurance Company, 996 P.2d 1216, 1222 note 38 (Alaska 2000).

⁴⁴ See Silver Bow Brief at 14-15, *citing* Blount Brothers Construction Co. v. United States, 346 P.2d 962, 972-973 (Ct. Claims 1965). See also Duncan v. City of Fairbanks, 567 P.2d 311, 313-314 and at note 10 (Alaska 1974) (“[W]here the local government agency has selected the language of the contract clause in dispute, any doubt or ambiguity will be resolved in favor of the private party. 1A C. Antieu, Municipal Corporation Law §1056 at 801) (1974.”).

⁴⁵ Silver Bow Brief at 10.

expressly control over drawings. Technical specifications, such as Section 15950, are not expressly afforded controlling significance over work requirements, such as those set forth in Section 01100.⁴⁶ The order of precedence provision provides that the technical specifications control drawings, such as the VAV drawings in Appendix A, but it does not provide for the precedence of technical specifications over work requirements or a Summary, such as is contained in Section 01100. The order of precedence simply does not apply to items that it does not mention. Thus, to accept Silver Bow's argument that Section 01100 does not state the contract's General Requirements would not establish that Section 15950 controls over Section 01100. Rather, it would leave a contradiction that cannot be resolved by the contract's order of precedence term.

Assuming that the order of precedence provision does not resolve the conflict between Section 01100 and Section 15950, the Division argues that under the ordinary rules of contract interpretation, the contract should be interpreted to include air balancing. The Division argues that reading the contract as a whole, a knowledgeable person would conclude that air balancing on all floors is required.⁴⁷ Silver Bow responds that reading a contract as a whole may resolve ambiguities, but it does not resolve a direct contradiction in terms, such as exists in this case.⁴⁸

Because the order of precedence clause controls, it is not necessary to decide whose interpretation would be applied if that clause were absent.

D. Duty to Identify Ambiguity or Conflict Is Immaterial

On appeal, Silver Bow asserts that it was under no obligation to bring the conflict between Section 01100 and Section 15950 to the contracting officer's attention, because the order of precedence provision in its view resolved the apparent conflict.⁴⁹ As for any issue with respect to whether Section 01100 should be deemed to contain the General Requirements, Silver

⁴⁶ It does not appear that the order of precedence provision makes technical specifications controlling over the items listed beyond drawings. It appears that the additional items list specific items that control another within the same category (*e.g.*, conflicting technical specifications or drawings), rather than a continuing order of priority. In any event, the language at issue in Section 01100 plainly does not fall within the parameters of any of the subsequent items listed.

⁴⁷ Division Response at 13. Apart from the familiar rule that contracts should be interpreted as a whole, the Division makes no specific reference to particular rules of contract interpretation.

⁴⁸ Silver Bow Reply at 3-4.

⁴⁹ Silver Bow Brief at 12.

Bow contends that it was under no obligation to bring that issue to the attention of the contracting officer because the problem was latent, rather than patent.⁵⁰

The Division asserts that Silver Bow had a duty to bring defects in the ITB terms to the attention of the contracting officer prior to submitting a bid, whether or not the Division was aware of those defects, and that the conflict between Section 01100 and Section 15950 was patent, rather than latent.⁵¹

Whether Silver Bow did, or did not, have an obligation to bring conflicts or ambiguity in the contract documents to the attention of the contracting officer is immaterial to the question of how the contract should be interpreted. That question has been answered based on review of the contract language. That Silver Bow did not bring either matter (the conflict between Section 01100 and Section 15950, or the absence of expressly identified General Requirements) to the attention of the contracting officer prior to submitting a bid (or prior to contract award) played no role in that analysis.

E. The Division Is Not Estopped

Silver Bow argues that the Division was under a duty (under its contract with the architect, under the public interest, and under a covenant to bidders) to review the draft ITB language provided by the architect (including the mechanical engineer's subcontracted contribution) for obvious errors⁵² and that it breached this duty by failing to detect either the absence of an express General Requirements provision (which Silver Bow characterizes as a latent ambiguity) or the presence of the conflict between Section 01100 and Section 15950 (which Silver Bow characterizes as a patent contradiction).⁵³ By putting out the ITB, Silver Bow asserts, the Division represented that (1) the contract contained no obvious contradiction that could not be resolved by the order of precedence clause, and (2) the contract does not contain a General Requirements clause.⁵⁴ Silver Bow contends that it reasonably relied on those implicit representations by submitting a bid based on a belief (induced by the Division's implicit

⁵⁰ Silver Bow Brief at 13-15.

⁵¹ Division Response at 16-19.

⁵² Silver Bow Brief at 16-17. Silver Bow also mentions a duty arising under the contract between the Division and Silver Bow. *Id.*, at 17, note 11. Any duties the Division has that arise under the contract arose after the ITB was issued. They would have no bearing on the Division's duty with respect to issuing the ITB in a form free of obvious errors.

⁵³ Silver Bow Brief at 18. See Silver Bow Reply at 5-6.

⁵⁴ Silver Bow Brief at 19, 20.

representations) that air balancing was not required.⁵⁵ Estoppel serves the public interest, Silver Bow contends, because it will encourage contracting agencies to be more careful in ensuring that the contracts they issue are free from obvious errors.⁵⁶ The doctrine of quasi estoppel should be applied, Silver Bow contends, because it is unconscionable that the Division issued the contract in the form it did, after the mechanical engineer had informed the Division that his specifications (*i.e.*, Section 15950) did not include air balancing.⁵⁷

Silver Bow's argument rests on the premise that because the Division had an obligation to inspect the proposed ITB documents for obvious errors, the Division implicitly represented that the documents as issued were absent any such errors. That is simply not a valid premise. If the Division made any implicit representation, it was that it had examined the contract documents, not that they were free of any obvious errors. Moreover, even if one were to accept the premise, it pertains to only one of the defects, namely, the patent contradiction between Section 01100 and Section 15950. The other purported defect in the contract was the absence of an expressly identified General Requirements clause. Silver Bow characterizes that as a latent ambiguity. As such it was not an obvious error, and thus not within the scope of the representation that Silver Bow contends was made, *i.e.*, that the ITB was free of obvious errors. Accordingly, even under Silver Bow's analysis, the Division is not estopped to interpret the order of precedence clause as it did.

With respect to the assertion that Silver Bow reasonably relied on the Division's alleged implicit representation that the documents were error free, such reliance is completely inconsistent with the order of precedence clause, which on its face exists in order to resolve contradictions in terms. The only fact mentioned in support of Silver Bow's assertion that it reasonably relied on the Division's alleged implicit representation is Mr. Adams' affidavit, which states that he relied on Section 15950: he says nothing about relying on a belief that the contract documents were error free and he does not state the reason he considered Section 15950 controlling, or even if he was aware of the contradictory language in Section 01100. In short, Mr. Adams' affidavit establishes only that Silver Bow relied on Section 15950, not that it had

⁵⁵ Silver Bow Brief at 19, 21.

⁵⁶ Silver Bow Brief at 21-22.

⁵⁷ Silver Bow Brief at 26-27.

any reason to disregard the contradictory language in Section 01100, particularly when it was expressly called upon to examine the documents closely.⁵⁸

As for quasi estoppel, the essence of that doctrine is “the existence of facts and circumstances making the assertion of a different or inconsistent position unconscionable.”⁵⁹ In this case, the Division has not changed its position; rather the contracting officer and the mechanical engineer had different understandings of what the project entailed. The contracting officer has consistently asserted that air balancing was required, and Section 01100 included language to that effect. The contradictory language in Section 15950 was patent and equally apparent to either party. In that light, and in light of the specific language in the ITB project description, it is not unconscionable that Silver Bow be held to the reading required by the order of precedence clause, even though the Division’s error created the contradictory terms.

IV. Conclusion

The central issue in this case is whether language in Section 01100 describing the scope of work takes precedence over Section 15950. If the language in Section 01100 is part of the General Requirements, as defined in Section 00700, then Section 01100 controls.

The contract is not reasonably susceptible of the reading proposed by Silver Bow, which is that because there is no provision in the contract labeled General Requirements, the contract contains no General Requirements at all. Rather, the definition of General Requirements is a functional one, and the contract is reasonably susceptible of the Division’s interpretation, which is that the initial two digits of Section 01100 reflect the division number as used in the MasterFormat system, and that Section 01100 includes the contract’s General Requirements as defined in Section 00700. Therefore, under the unambiguous terms of the order of precedence clause, Section 001100 controls Section 15950.

Silver Bow’s appeal is denied.

⁵⁸ See R. 8.

⁵⁹ Jamison v. Consolidated Utilities, 576 P.2d 97, 102 (Alaska 1978).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court within 30 days after the date of this decision.

DATED July 9, 2013

Signed _____
Patrick J. Kemp, P.E.
Commissioner
Department of Transportation and Public Facilities

[This document has been modified to conform to the technical standards for publication.]