



GILA COUNTY ATTORNEY

Bradley D. Beauchamp

February 3, 2015

Robert A. Shull, Esq.
J. Gregory Cahill, Esq.
Dickinson Wright, PLLC
1850 N. Central Avenue
Suite 1400
Phoenix, Arizona 85004-4568

Re: Denial of Notice of Claim of Carson Construction Company, Inc.

Dear Mr. Shull and Mr. Cahill:

Please accept this letter as a denial of the notice of claim you filed October 3, 2014, on behalf of your client Carson Construction, Inc.

The Gila County Board of Supervisors voted unanimously on December 2, 2014, to deny Carson Construction's claim. While preparing the denial letter, Gila County was served with a Summons and Complaint regarding this Notice of Claim in *Carson Construction Company, Inc. v. Gila County* CV201500006.

Attached to this letter please find Gila County's Gila County's daily construction records. They are provided to give you the opportunity to review and evaluate your client's position as the facts of the case develop.¹ While the County maintains that the claim violates the Claims Statute, even if it did not, the County would still deny the claim. Your client may have an argument that can be made in good faith regarding whether the County waived its Claims Statute defense, however, your client failed to follow

¹Commenting on an attorney's Rule 11 duties to review and reevaluate his client's position as the facts of the case developed, the Arizona Court of Appeals has held,

Allen had an obligation as an attorney to review and reevaluate his client's position as the facts of the case developed and—although he should have known at the outset that the claims were frivolous—if he did not know at the outset, as he became aware of information that should reasonably lead him to believe there was no factual or legal bases for his position, he was obligated to re-evaluate any earlier certification under Rule 11. See *Boone v. Superior Court*, 145 Ariz. 235, 241–42, 700 P.2d 1335, 1341–42 (1985); *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 184–85, 745 P.2d 617, 632 (Ct.App.1987).

Standage v. Jaburg & Wilk, P.C., 177 Ariz. 221, 230, 866 P.2d 889, 898 (Ct. App. 1993).

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the dispute resolution provisions of the contract and therefore waived any claim to additional compensation. Even if your client had followed the dispute resolution provisions of the contract, its claims for damages are not even supported by its own flawed records. Although your client has never provided sufficient evidence for the County to evaluate any claim, the evidence it has provided contains obvious errors. Consequently, the County asks you to review this letter and the attached materials, and then to dismiss the action you have filed on behalf of your client.

I. Carson's Claim violates the Claims Statute.

Gila County notes that the claim accrued January 4, 2013. Consequently, the time to file a valid claim against Gila County pursuant to A.R.S. § 12-821.01 expired long before the October 3, 2014 claim was filed. The County understands that Carson claims that the County waived any claims statute violation defense by continuing to discuss the issue with Carson and by receiving Carson's daily project logs on June 17, 2014. The County notes that it had requested the daily project logs from the beginning of the project. The County doubts that Carson get around the County's Claims Statute defense by supplying the County project logs nearly a year and a half after project completion and long after it was first requested.

II. Carson Failed to Follow the Dispute Resolution Provisions Mandated by the Contract.

Section 30-09 of the Contract provides the dispute and resolution provisions of the contract. This provision mandates that if the "Contractor believes the action or decision of the County, lack of action by the County, or for some other reason will result in or necessitate the revision of the Contract, the County Engineer must be notified immediately." The provision then requires the Contractor to provide a written notice with specific information if within two days the County Engineer and the Contractor are unable to resolve the issue. Section 30-09 then provides "[o]nly if the issue cannot be quickly resolved will it be necessary to proceed to the next step in accordance with MAG Specs Subsection 110.2.2 Dispute Resolution." If nothing else, your client's Notice of Claim filed nearly a year and a half after the completion of project evidences the fact that your client's issue was not quickly resolved. Hence, your client's only option was to pursue dispute resolution pursuant to MAG Specs Subsection 110.2.2 Dispute Resolution.

Additionally Section 30-09 provides:

The provision set forth in Subsection 110.2 is a contractual obligation assumed by the Contractor in executing the Contract. ***It is understood that the Contractor will be forever barred from recovering against the County if the Contractor fails to give notice of any act or failure to act, by the County, or the happening of any event, thing, or occurrence, in accordance with Subsection 104.2, Alteration of Work.***

Emphasis added.

MAG Specs Section 110.2.2(A) requires the Contractor to:

provide in writing the following information to the Engineer. If known, a cost analysis may be included with the information.

- (1) The date of occurrence and the nature and circumstances of the issue for which initial notice was given.
- (2) Name, title, and activity of each Contracting Agency or all other persons knowledgeable of the issue.
- (3) Identity of any documents and the substance of any oral communication related to the issue.
- (4) Basis for an assertion that the work required is a change from the original contract work or schedule.
- (5) Identity of particular elements of contract performance for which a change in compensation and/or time may be sought, including:
 - (a) Pay item(s) that have been or may be affected by the issue and any adjustments to unit price(s) that are required;
 - (b) Labor and/or materials that will be added deleted or wasted by the problem and what equipment will be idled or required;
 - (c) Delay and disruption in the manner and sequence of performance that has been or will be caused;
 - (d) Adjustments to delivery schedule(s), staging, and contract time due to the dispute and
 - (e) Estimate of the time within which the Contracting Agency must respond to the notice to minimize cost, delay, or disruption of issue.
- (6) Any other items or information germane to the dispute.
- (7) The Contractor's written certification, under oath, attesting to the following:
 - (a) The request is made in good faith.
 - (b) Supportive data is accurate and complete to the Contractor's best knowledge and belief.
 - (c) When provided, the amount requested accurately reflects the Contractor's actual cost incurred.

MAG Specs Section 110.2.2(A). Nothing that Carson Construction has provided, including the January 4, 2013, letter and attachments, comes even remotely close to satisfying the mandatory requirements of MAG Specs Section 110.2.2(A). Nothing Carson Construction submitted was certified under oath. MAG Specs Section 110.2.3 provides "***[t]he failure of the Contractor to comply with the requirements of this subsection constitutes a waiver of entitlement to additional compensation*** or a time extension." Emphasis added. Consequently, Carson's failure to follow the dispute resolution provisions of the contract and MAG Specs Section 110.2.2 means that Carson is barred by the contract from making its claim and that Carson has waived any entitlement to additional compensation that it might have had.

III. Carson Failed to Notify the County in Writing Before Performing Any Additional Work As Required by the Contract and Thereby Waived Any Additional Compensation.

Notwithstanding the dispute resolution procedures found in the Contract, Section 50-16, CLAIMS FOR ADJUSTMENT AND DISPUTES, contains a procedure that allows the Contractor to make a claim for additional compensation for work and materials not clearly provided in the Contract. The section reads as follows:

If for any reason the Contractor deems that additional compensation is due him for work or materials not clearly provided for in the contract, plans, or specifications or previously authorized as extra work, he shall notify the Owner in writing of his intention to claim such additional compensation before he begins the work on which he bases the claim. If such notification is not given or the Owner is not afforded proper opportunity by the Contractor for keeping strict account of actual cost as required, then the Contractor hereby agrees to waive any claim for such additional compensation. Such notice by the contractor and the fact that the Owner has kept account of the cost of the work shall not in any way be construed as proving or substantiating the validity of the claim. When the work on which the claim for additional compensation is based has been completed, the Contractor shall, within 10 calendar days, submit his written claim, along with certification by the Contractor's Engineer, to the Owner for consideration in accordance with local laws or ordinances.

....

Contract, Section 50-16, CLAIMS FOR ADJUSTMENT AND DISPUTES. (Emphasis added). Carson's first claim in writing did not come until its January 4, 2013, letter to the County. The letter was not only after this alleged extra work was performed but also after the entire project was completed. Additionally, the letter merely concludes that Carson was delayed due to utility conflicts. It completely fails to provide the County sufficient details to justify any additional compensation. Essentially, it proclaims Carson incurred a fifty percent reduction in production for the period June 25 through October 18, 2012, without even attempting to explain specifically how this occurred or submitting any records to substantiate the claim.² Nothing in the letter or the logs Carson later supplied nearly a year and a half later afforded the County the opportunity to have the contractor keep a strict account of the actual cost as required. Consequently, Carson agreed "to waive any claim for such additional compensation."

III Carson's Claims Are Not Supported by Either Carson's or the County's Records.

Even if Carson Construction's claims are not barred or waived by its failure to follow the dispute resolution provisions of the contract and the MAG Specs, Carson's claims are not supported either by the records Carson submitted or the County's own records.

² Carson's letter of January 4, 2013, bases its claim in part on "Arizona Department of Transportation guidelines for idled equipment." I cannot find anywhere in the contract that references Arizona Department of Transportation guidelines for idled equipment.

A. The Days of Delay Claimed by Carson have Obvious Errors.

Carson claims delays of 29 working days between June 25 through August 13, 2012, based upon four ten hour days per week. While there would have normally been 29 working days during this period, Gila County records show that no work was done on Wednesday July 4 or Thursday July 5. Carson's log which was submitted long after the project was completed claims that Carson had ten employees working on the site July 4 working on three pieces of machinery. Carson's log for July 5 shows ten workers working on trenching but does not list any equipment used. The County believes that the County's records are correct for these dates and that it would be highly unusual for a contractor to work on July 4. However, if Carson worked on the project July 4-5 as claimed, neither day could be counted as a day of delay for which Carson would be entitled to compensation.

Additionally, Carson claimed 39 days between August 14 and October 18. For this period, Carson's logs do not claim that any work was performed on Labor Day, yet Carson is claiming some entitlement for compensation for work that was not performed on that day.

B. Carson Failed to Explain How It Was Harmed by Alleged Utility Delays.

Carson failed to explain in its claims how they were delayed by any alleged utility delay. Carson's daily logs for the period in question show that for most of these days, Carson had crews of up to ten employees doing various jobs associated with the contract. The logs do not mention employees being idled by utility delays. Even if there were some utility delays during this period, Carson would not be entitled to compensation for having idled workers if their workers were busy performing other contract assignments that had to be completed anyway. With the exception of June 25-26, July 13, August 3, 6, 7, 8, 9, 10,³ and September 11, Carson's own logs show that it had crews working on the site doing tasks that were required by the contract. Most of these days show 8-12 employees working and do not specify any of them being idled. If Carson's employees were busy working on necessary contract tasks on the days Carson claims it was delayed, Carson is not entitled to additional compensation for being idled.

C. Some of the Delays Were Caused by Carson.

Some of the delays during this period were caused by Carson. Carson had to redo most of the waterline to repair leaks caused by Carson's faulty installation of the line. Additionally, Carson failed to properly anchor a culvert which led to it having to be replaced. Once replaced, it had to be replaced again because it was crushed when one of Carson's employees ran over it with a scraper.

³ The County's records for these dates differs from Carson's records as follows:

June 25 Carson was milling the road per Carson schedule remove AC scheduled to start on July 18: week of June 25 was water line.

June 26 Carson installing pipe and digging water line.

Aug. 3 Shows 1 employee on site (Rupert screening material in yard in the AM).

Aug. 6 Shows 5 employees on site. Contractor working on drainage and installing ARV's (air release valve).

Aug. 7 Shows 6 employees on site. Contractor working on drainage and driveway culverts.

Aug. 8 Shows 8 employees on site. Nothing specific on log for work activity.

Aug. 9 Shows 8 employees on site. Contractor working on sub-grade and installing culverts.

Aug. 10 Shows 1 employee on site (Rupert screening material in yard).

Sep. 11 No work rain day.

D. Carson Is Not Entitled to Compensation for Idled Equipment.

Carson provided the County with lists of idled equipment for both June 25 – August 13 and August 14 – October 18. Yet, as previously discussed, even according to Carson's own records, Carson's employees were usually fully employed using equipment performing contract tasks during these periods. Some but not all specific examples of problems with Carson's request for compensation for idled equipment include:

1. Carson's own projected start date for the paving was September 20. Yet, Carson claims it is entitled to nearly \$500.00 per day from August 14 through September 19--apparently for storing the paver on the job site. Even if Carson could now claim something for delays, there could be no valid claim for having a piece of equipment on the site before the scheduled use of the equipment.

2. When the paving did begin October 18, County logs show that Carson's paver broke down shortly after starting the machine, and Carson had to borrow a paver from the County to keep the project going. Carson is not entitled to compensation for paver that did not work. \$19,389.24 of Carson's \$155,019.38 claim against the County is attributed to this paver that did not work.

3. On both of Carson's idled equipment lists, Carson lists two John Deere 310 backhoes. Yet, as early as June 27 Carson's logs show use of a Cat 420 backhoe. The use of this Cat 420 backhoe appears regularly throughout the project during the periods Carson is claiming that it was delayed. The County is not obligated to pay Carson for two John Deere 310 backhoes that Carson chose to park on site when it actively used another backhoe to complete its work. \$8,375.56 of Carson's claim is attributed to these backhoes.

4. Carson was asked but never provided the County with project schedule updates. Gila County logs show that as early as July 19 Gila County asked Carson to provide a schedule of delays in writing. Carson never provided either schedule updates or a schedule of delays. In its January 4, 2013, letter and then again in the Notice of Claim, Carson claims \$116,751.11 for idled equipment but fails to provide dates for any specific piece of machinery that would indicate when it was first scheduled to be used and when, because of delays not caused by Carson, the machinery was actually used. Taking everything else in Carson's claim at face value, Carson at best could ask for compensation for the time it was delayed for each specific piece of machinery. Because Carson failed to provide schedule updates or a schedule of delays, it would be impossible to even calculate the amount of a claim for idled equipment.

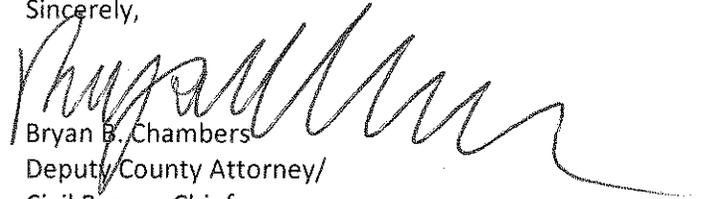
5. Carson's claim assumes that each piece of equipment on Carson's list was idle for the entire periods Carson claims it was delayed. Yet, some of the equipment was used during those periods. Additionally, Carson could not possibly have used all of the equipment it claimed was idle for each of the 68 days it claims it was delayed with the workforce that it had available to it. For most of the days in question, Carson had eight to ten workers on the site. If each worker was on a different piece of equipment at the same time, some of the equipment on Carson's list would have been idle even without delays. So some of the equipment Carson claimed was idle would have been idle anyway and was merely present at the site for Carson's

convenience. Consequently, there is no set facts that would entitle Carson to reimbursement for all of the equipment it claimed for the entire periods it claimed to be idle.

IV. Conclusion.

The County encourages you to dismiss your client's complaint. The County will seek attorney's fees and costs should this matter proceed to trial. This letter is not meant to waive any other defenses the County has to your Client's Complaint. Please feel free to contact me, if you would like to discuss this matter further.

Sincerely,



Bryan B. Chambers
Deputy County Attorney/
Civil Bureau Chief