IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5991

O. T. GRAHAM, SR., O. J. GRAHAM, SR., GEORGE T. GRAHAM, O. T. GRAHAM, JR., O. J. GRAHAM JR., FAY GRAHAM WALTON, T/A GRAHAM BROTHERS,
Appellants,

v.

COMMONWEALTH OF VIRGINIA, STATE HOSPITAL BOARD, AND SIDNEY C. DAY, JR., COMPTROLLER,
Appellees.

BRIEF AND APPENDIX FOR APPELLANTS

JAMES C. ROBERTS
Counsel for Appellants

TUCKER, MAYS, MOORE & REED
1407 State-Planters Bank Building
Richmond, Virginia

TABLE OF CONTENTS

Page

PROCEEDINGS IN THE LOWER COURT 2

STATEMENT OF FACTS 3

ASSIGNMENTS OF ERROR 4

QUESTIONS INVOLVED IN THE APPEAL 4

ARGUMENT 5

CONCLUSION 11

APPENDIX:

I. Material Provisions from Form of Agreement .....App. 1

II. Material Provisions from General Conditions .....App. 1

III. Material Provisions from Specifications .....App. 3

TABLE OF CASES

American Health Ins. Corp. v. Newcomb, 197 Va. 836, 91 S.E. 2d 447 (1956) 10, 11

Consolidated Sales Co. v. Bank of Hampton Roads, 193 Va. 307, 68 S.E. 2d 652 (1952) 11

Eppes v. Eppes, 169 Va. 778, 195 S.E. 694 (1938) 10

Krikorian v. Dailey, 171 Va. 16, 197 S.E. 442 (1938) 10

Russell Co. v. Carroll, 194 Va. 699, 74 S.E. 2d 685 (1953) 11

Williams v. Benedict Coal Co., 181 Va. 478, 25 S.E. 2d 251 (1943) 11

Worrie v. Boze, 191 Va. 916, 62 S.E. 2d 876 (1951) 11

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Appellees.

BRIEF FOR APPELLANTS

To: The Honorable, The Chief Justice and Justices of The Supreme Court of Appeals of Virginia:

The Appellants, O. T. Graham, Sr., O. J. Graham, Sr., George T. Graham, O. T. Graham, Jr., O. J. Graham, Jr., Fay Graham Walton, t/a Graham Brothers, respectfully represent that they are aggrieved by an order of final judgment entered by the Circuit Court of the City of Richmond on March 20, 1964, in the case of *O. T. Graham, Sr., et als.* v. *Commonwealth of Virginia, State Hospital Board, et al.*

PROCEEDINGS IN THE LOWER COURT

On July 5, 1963, the Appellants (hereinafter referred to as "Plaintiffs") filed their petition against the Appellees asserting a claim in the sum of $35,374.50 allegedly due them for extra work that the plaintiffs were required to perform under a contract between them and the State Hospital Board (hereinafter referred to as "Defendant") for the construction of a kitchen-cafeteria building for Central State Hospital at Petersburg, Virginia.

On September 10, 1963, the Appellees filed their grounds of defense admitting that some of the alleged extra work had been performed, denying that other of such work had been done, admitting that the plaintiffs were entitled to some compensation for the work, and denying that the plaintiffs were entitled to recover the amount sought.

On March 6, 1964, the case was heard by the lower court without a jury. The plaintiffs' aggregate claim was based upon allegations of the performance by them of two separate items of extra excavation work. The claim for the extra work which the defendant admitted was performed was in the sum of $8,314.50; the claim for the excavation not admitted by the defendant was in the amount of $27,060.00. At the conclusion of the plaintiffs' evidence, a motion to strike the evidence as to such latter claim was sustained. No error is assigned to this action of the trial court, and only the claim for $8,314.50 is involved in this appeal.

Having taken under advisement the issue of the defendant's liability upon the smaller claim, the lower court, on March 20, 1964, entered the order here complained of dismissing such claim "without prejudice to

the rights of the parties to determine the amount due to the plaintiffs from the defendants for such work under the terms and provisions of the Contract Documents upon which this action is based." The said order was accompanied by a memorandum opinion by the court. (R. 8-11)

STATEMENT OF FACTS

The plaintiffs, by agreement dated August 1, 1958, contracted with the defendant to construct a kitchen-cafeteria building for Central State Hospital, Petersburg, Virginia. The contract consisted of an executed Form of Agreement, a book of conditions and specifications and certain drawings, all of which were prepared by the State or its architect. The Form of Agreement and book of conditions and specifications were admitted together in evidence as Plaintiffs' Exhibit 2.

Under the contract, the plaintiffs were required to construct a small segment of roadway. During the course of their said construction, the plaintiffs encountered an unstable material within the area upon which the roadway was to be constructed. This fact was brought by the plaintiffs to the attention of the defendant's inspector and its architect, as a result of which the defendant issued to the plaintiffs its Change Order No. 15. (Plaintiffs' Exh. 4) This Change Order required the plaintiffs to excavate and remove 277 cubic yards of unstable material from the roadway area and to replace it with 277 cubic yards of suitable material excavated from other sources. The plaintiffs agreed to perform this work, but did not agree to the unit price of $3.50 per cubic yard set out in the Change Order.

Upon completion of this work, the plaintiffs presented the defendant with a statement of account for such work requesting payment of $8,314.50 for same. (Plaintiffs' Exh. 5)

By letter dated December 29, 1959, the defendant's architect returned the plaintiffs' statement of account and notified the plaintiffs of its disapproval. (Plaintiffs' Exh. 6)

ASSIGNMENTS OF ERROR

The Appellants assigned the following errors:

1. The Court erred in holding that the claim of the plaintiffs for the removal and replacement of unstable material from the roadway was subject to the provisions of section 38 of the General Conditions of the contract.

2. The Court erred in holding that under the provisions of section 38 of the General Conditions the defendant possessed a right to select the method of compensating the plaintiffs for the work represented by their said claim, and further erred in holding that as of the time of trial the defendant had made no such selection.

3. The Court erred in entering an order on March 20, 1964, dismissing the plaintiffs' said claim in the sum of $8,314.50.

QUESTIONS INVOLVED IN THE APPEAL

In essence, the several errors assigned by the Appellants raise one broad legal issue:

Whether or not, under the terms of the contract, the defendant possessed a right to select the method of com-

pensating the plaintiffs for the work represented by their claim, and whether such right, if it existed, was exercised.

ARGUMENT

The issue here presented is narrowly limited in scope. So much so that it may be fully developed under a single heading.

Involved here is the proper construction to be given several provisions of the contract entered into by the parties.

The contract consists of an executed Form of Agreement and a book of conditions and specifications (admitted together in evidence as Plaintiffs' Exh. 2) together with certain drawings not made a part of the record. There is appended to this brief those provisions of the contract documents pertinent to this appeal.

The excavation work called for by the contract falls under two general classifications. That performed in connection with the building structure and appurtenances is covered under the heading "Excavation" at pages 2-1 through 2-3 of the specifications. (Appendix III) Excavation work required in the construction of roadways is covered under the heading "Stripping And Grading" at pages 3-1 through 3-4 of the specifications. (Appendix III)

The nub of the present dispute is found in the following provision contained at page 3-2 of the specifications:

"Unstable Materials:

> "Where materials encountered within areas upon which roads . . . . are to be constructed are unstable, such as mud, muck, frozen material or highly organic

> material, the owner may make any tests at his own expense to determine C. B. R. ratio. *Any additional excavation and fill will be paid for in accordance with unit prices agreed upon.*" (Emphasis added)

When, in the course of construction of the roadway, the plaintiffs encountered an unstable material, they notified the defendant of this condition and were thereafter directed by the defendant's Change Order No. 15 (Plaintiffs' Exh. 4) to excavate and remove 277 cubic yards of such unstable material and to replace it with 277 cubic yards of suitable material excavated from other sources.

Simply stated, it is the plaintiffs' position that this extra work constitutes "additional excavation," and that in accordance with the terms of the last sentence of the quoted provision, they are entitled to be compensated at the "unit price agreed upon" in the contract.

For a determination of this "unit price" regard need only be had to the Form of Agreement where the following provision is contained (Appendix I):

> "Unit Prices for Changes in Work as Follows:
>
> *Additional Work*
>
> "Excavation Add $15. per c.y."

This, it is submitted, is the construction that should have been given the contract. The construction given by the learned trial judge, however, is based upon a different approach to the contract's provisions.

The trial court's holding rests upon the language of Paragraph 38(a) of the General Conditions, which provides as follows (Appendix II):

"38. Changes in the Work.

"(a) The owner may at any time by written order and without notice to the sureties, make changes in the drawings and specifications of this contract and within the general scope thereof except that no change will be made which will increase the total contract price to an amount more than 20% in excess of the original contract price without notice to the sureties. In making any change, the charge or credit for the change shall be determined by one of the following methods as selected by the owner:

"(1) The order shall stipulate the mutually agreed price which shall be added or deducted from the contract price. If the price change is an addition to the contract price, it shall include the contractor's overhead and profit.

"(2) By estimating the number of unit quantities of each part of the work which is changed and then multiplying the estimated number of such unit quantities by the applicable unit price (if any) set forth in the contract or other mutually agreed unit price.

"(3) By ordering the contractor to proceed with the work and to keep and present in such form as the owner may direct, a correct account of the cost of the change together with all vouchers therefor. The cost shall include an allowance for overhead and profit to be mutually agreed upon by the owner and the contractor."

In his memorandum opinion, the trial judge reasoned that the additional excavation performed by the plaintiffs constituted a change in the work and that under Paragraph 38(a) of the General Conditions the de-

fendant has the right of selecting the method of compensating the plaintiffs for such additional work. The trial court's opinion concludes with the ruling that "as of this date" the defendant has not made its selection.

In arriving at his conclusion, the trial judge made the following observation:

> "In short, the Court holds that the 'Unit Price for Changes in the Work' for 'Excavation—Additional Work' in the Agreement [Plaintiffs' Exhibit No. 2] does not conflict with or supercede any provision of the General Conditions, but rather sets the unit price to which reference is made in Section 38(a) (2) of the said General Conditions."

With this much of the trial court's opinion the plaintiffs can agree. The real issue here involved, however, is whether or not Paragraph 38(a) of the General Conditions is in conflict with the provision of the specifications that "additional excavation and fill will be paid for in accordance with *unit prices* agreed upon."

A reading of Paragraph 38(a) of the General Conditions discloses that it provides that compensation for changes in the work shall be determined by one of three methods, "as selected by" the defendant. These three methods may be described, for the sake of brevity, as the lump sum method [Par. 38(a)(1)]; the unit price method [Par. 38(a)(2)]; and the cost-plus method [Par. 38(a)(3)]. As was recognized by the trial court in its opinion, the last mentioned basis of compensation is inapposite on its face, since the defendant did not order the plaintiffs to keep and present an account of the costs involved in their extra work. Nevertheless, the trial court so construed the

contract as to afford the defendant a selection between the lump sum method and the unit price method. And herein lies the court's error; for it is clear that the final sentence of the quoted specification permits of only one method of compensation, i.e., "in accordance with *unit* prices agreed upon."

Thus, it is quite apparent that a conflict does exist between Paragraph 38(a) of the General Conditions and those specifications which specifically govern the type of excavation performed. And it is equally as clear that the latter takes precedence over the former. In paragraph 2(d) of the General Conditions (Appendix II), it is provided that:

> "In case of discrepancies between the Contract Documents, the Specifications shall take precedence over the Drawings and over the General Conditions, and the Agreement shall take precedence over the Specifications, the Drawings and the General Conditions . . ."

As has been previously pointed out, the trial court noted in its opinion that the portion of the Agreement dealing with "Unit Price for Changes in the Work" sets the unit price to which reference is made in Paragraph 38(a)(2) of the General Conditions. With equal force, it is submitted, it set the unit price to which reference is made in the last sentence of the provision quoted from page 3-2 of the specifications.

In reality, what has occurred here is that the defendant, in an effort to minimize the risks involved under Paragraph 38(a), has secured in advance of the execution of the contract an agreement by the plaintiffs to perform

additional excavation work at a stated unit price, and has agreed that such additional excavation would be paid for only on a unit price basis. If such be not the situation, then it is difficult to understand why the parties agreed in advance upon a unit price for additional excavation. It cannot be said that the parties were merely agreeing upon a unit price between which and other methods of compensation the defendant was to have a selection. For, as shown, the plain language of the quoted specification provides that the additional excavation is to be paid for on a unit price basis. The parties, of necessity, were agreeing upon the "unit price" referred to in the specification.

It is quite interesting to note that while the defendant at one time stated a desire to select a method of determining compensation under Paragraph 38(a) of the General Conditions (Plaintiffs' Exh. 6), yet in its grounds of defense and upon the trial of the case, the defendant's position was that the plaintiffs should "be compensated on a price to be agreed upon as provided for in the section of the Specifications headed 'Stripping and Grading,' commencing on Page 3-1 of said Specifications." (Grounds of Defense, par. 4) Thus, it would seem that the defendant's real contention is that the words "unit prices agreed upon" contained in the quoted specification should be construed as meaning "unit prices to be agreed upon."

The ready answer to this position inheres in its failure to acknowledge two well established legal propositions governing the construction of contracts. It is quite settled law that in the construction of contracts, words are to be given their plain and ordinary meaning. *Eppes* v. *Eppes,* 169 Va. 778, 195 S.E. 694 (1938); *Krikorian* v. *Dailey,* 171 Va. 16, 197 S.E. 442 (1938); *American Health Ins.*

Corp. v. *Newcomb,* 197 Va. 836, 91 S.E. 2d 447 (1956). Nor is it any less settled, that doubtful or ambiguous contractual provisions or terms should be construed against their author. *Williams* v. *Benedict Coal Co.,* 181 Va. 478, 25 S.E. 2d 251 (1943); *Worrie* v. *Boze,* 191 Va. 916, 62 S.E. 2d 876 (1951); *Consolidated Sales Co.* v. *Bank of Hampton Roads,* 193 Va. 307, 68 S.E. 2d 652 (1952); *Russell Co.* v. *Carroll,* 194 Va. 699, 74 S.E. 2d 685 (1953).

Even if it be assumed, *arguendo,* that the defendant possessed the right of selecting the method of compensating the plaintiffs, nevertheless, it is quite apparent here that the defendant has exercised such right in favor of the unit price method provided for in Paragraph 38 (a) (2) of the General Conditions. An examination of the defendant's Change Order No. 15 (Plaintiffs' Exh. 4) clearly discloses that the unit price method had been selected. This being so, then the "applicable unit price set forth in the contract"—i.e., $15.00 per cubic yard—comes into play as the compensation for the extra work performed.

CONCLUSION

In summary, it is respectfully urged that the trial court erred in holding that the defendant has a right to select the method of compensating the plaintiffs for the additional excavation performed, in holding that such alleged right of selection has not been exercised, and in dismissing the plaintiffs' petition.

For the reasons stated, the Appellants pray that the final order of judgment entered on March 20, 1964, be so reversed as to remedy the errors herein assigned, and that

such other relief be granted the Appellants as to this Court may seem proper.

Respectfully submitted,

JAMES C. ROBERTS.
Counsel for Appellants

TUCKER, MAYS, MOORE & REED
1407 State-Planters Bank Building
Richmond, Virginia

CERTIFICATE OF SERVICE

I, James C. Roberts, do hereby certify that three copies of this brief were mailed postage prepaid to Richard N. Harris, Assistant Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, counsel for the Appellees in the trial court on the 15th day of January, 1965, prior to its filing with the Clerk of this Court at Richmond.

JAMES C. ROBERTS

APPENDIX

APPENDIX I

Material Provisons from Form of Agreement

FORM OF AGREEMENT

. . . . .

"Unit Prices for Changes in Work as Follows:

	Additional Work	*Credit*
Excavation	Add $15 per c.y.	Deduct $ 1 per c.y.
Reinforced concrete footings	Add $40 per c.y.	Deduct $22 per c.y.
Plain concrete footings	Add $35 per c.y.	Deduct $16 per c.y.
Formed reinforced concrete	Add $75 per c.y.	Deduct $30 per c.y.
Profit for additional work on basis of labor and materials	20%"	

. . . . .

APPENDIX II

Material Provisions from General Conditions

GENERAL CONDITIONS OF THE CONTRACT

FOR CAPITAL OUTLAY PROJECTS

. . . . .

"2. Contract Documents.

(a) The Contract Documents consist of the Agreement, the General Conditions, the Drawings and Specifications including all modifications thereof incorporated in the documents before their execution. . . .

. . . . .

(d) In case of discrepancies between the Contract Documents, the Specifications shall take precedence over the Drawings and over the General Conditions, and the Agreement shall take precedence over the Specifications, the Drawings and the General Conditions. . . ."

. . . . .

"38. Changes in the Work.

(a) The Owner may at any time, by written order, and without notice to the sureties, make changes in the drawings and specifications of this contract and within the general scope thereof except that no change will be made which will increase the total contract price to an amount more than 20 per cent in excess of the original contract price without notice to sureties. In making any change, the charge or credit for the change shall be determined by one of the following methods as selected by the Owner:

(1) The order shall stipulate the mutually agreed price which shall be added or deducted from the contract price. If the price change is an addition to the contract price, it shall include the Contractor's overhead and profit.

(2) By estimating the number of unit quantities of each part of the work which is changed and then multiplying the estimated number of such unit quantities by the applicable unit price (if any) set forth in the contract or other mutually agreed unit price.

(3) By ordering the Contractor to proceed with the work and to keep and present in such form as the Owner may direct a correct account of the cost of the change together with all vouchers therefor. The cost shall include an allowance for overhead and profit to be mutually agreed upon by the Owner and the Contractor."

. . . . .

APPENDIX III

Material Provisions from Specifications

EXCAVATION

. . . . .

"Scope:

The work of this section comprises the performing of Excavation as shown or called for by the drawing and/or as herein specified:

Stripping.
Excavation.
Drainage.
Shoring and permanent sheet piling.
Filling.
Backfilling.

Work Not Included:

This section of specifications covers all excavation work for building structure and appurtenances. Excavation work for utilities, mechanical trades, roads, paved service courts and sidewalks are included under applicable sections of specifications for trade involved."

. . . . .

STRIPPING AND GRADING

. . . . .

"Scope:

The work of this section comprises the performing of all Stripping and Grading as shown or called for on the drawings and/or as herein specified subject to terms and conditions of the contract:

Stripping and grading of areas upon which roads, road embankments, drainage swales, service court paving, gutters, curbs, curb drop inlets, drainage gullets, walks are to be constructed and areas where new grades are indicated. A perimeter line shown on the drawings defines the area of work on this Contract."

. . . . .

"*Excavation:*

Sequence of Operations:

After all stripping operations have been completed, excavation of every description and of whatever substances are encountered within the grading limits of the project shall be performed to the lines, grades, cross-sections and dimensions shown on the drawings.

Excavation for building construction, utilities systems and storm drains is specified under the respective divisions of the specifications.

Unstable Materials:

Where materials encountered within areas upon which roads, drainage gullet, service court paving, curbs, curb inlet drops, gutters, culvert headwalls, walks, or ditch pavement are to be constructed are unstable, such as mud, muck, frozen material or highly organic material, the owner may make any tests at his own expense to determine CBR ratio. Any additional excavation and fill will be paid for in accordance with unit prices agreed upon."