

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 2168

BARBER BROTHERS CONTRACTING COMPANY, LLC

VERSUS

EAST BATON ROUGE CITY-PARISH, DEPARTMENT OF PUBLIC
WORKS

Judgment Rendered: June 8, 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 569,723

The Honorable Wilson Fields, Judge Presiding

John M. Madison, III
Scott E. Frazier
Baton Rouge, LA

Counsel for Plaintiff/Appellee,
Barber Brothers Contracting
Company, LLC

Randy B. Ligh
Baton Rouge, LA

Counsel for Defendant/Appellant,
City of Baton Rouge/Parish of East
Baton Rouge

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

This matter is again before us on appeal by defendant, the City of Baton Rouge/Parish of East Baton Rouge (hereinafter referred to as the “City/Parish”), from a judgment of the trial court awarding Barber Brothers Contracting Company, LLC (hereinafter referred to as “Barber Brothers”), a total of \$486,446.08 in price adjustments under the parties’ contracts for Burbank I and Burbank II projects. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

As set forth more fully in this court’s previous opinion,¹ in 2007, the City/Parish advertised for bids for the construction improvements to Burbank Drive in East Baton Rouge Parish, Louisiana, which were designated as City/Parish Project Nos. 06-CS-HC-0008 and 06-CS-HC-0009.² The low bidder, Barber Brothers, was awarded the contract for the project by the City/Parish. Subsequent to the acceptance of its bid, Barber Brothers contended that there was a significant, unexpected increase in the price for asphaltic cement and fuel. Thus, Barber Brothers sought a price adjustment pursuant to the *Supplemental Specifications for Street and Road Rehabilitation* (hereinafter “*Supplemental Specifications*”), which Barber Brothers contended were applicable to all construction projects awarded by the City/Parish. The City/Parish denied that the *Supplemental Specifications* were applicable to this particular project and refused to grant Barber Brothers the price adjustment.

¹See Barber Brothers Contracting Company, LLC v. East Baton Rouge City-Parish, Department of Public Works, 2010-0329 (La. App. 1st Cir. 9/10/10)(unpublished opinion); writ denied, 2010-2610 (La. 1/28/11), 56 So. 3d 963.

²Project No. 06-CS-HC-0008, pertaining to the bid proposal and contract for Burbank Drive Segment 1, and Project No. 06-CS-HC-0009, pertaining to the bid proposal and contract for Burbank Drive Segment 2, were bid and awarded jointly. Thus, for ease, throughout the opinion we refer to them collectively as “the project.”

On August 13, 2008, Barber Brothers filed a Petition for Declaratory Relief seeking a judicial declaration that the *Supplemental Specifications* applied and were to be used in conjunction with the *Standard Specifications for Public Works Construction* (hereinafter referred to as the "*Standard Specifications*") with respect to the project at issue, and that the City/Parish should thus be ordered to grant a price adjustment according to the contract. The matter was heard before the trial court on July 9, 2009. At the conclusion of the hearing, the trial court took the matter under advisement. On August 24, 2009, the trial court rendered oral reasons for judgment in favor of Barber Brothers, declaring that the *Supplemental Specifications* were incorporated into the contract with the City/Parish and applied to the project. A written judgment was signed by the trial court on December 21, 2009, containing the following declaration:

IT IS ORDERED, ADJUDGED AND DECREED that the *January 1998 Supplemental Specifications for Street and Road Rehabilitation* are to be used in conjunction with the *1997 Standard Specifications for Public Works Construction*, and as such, are applicable to those certain contracts for the public works projects designated as "*City of Baton Rouge/Parish of East Baton Rouge Project Nos. 06-CS-HC-0008 & 06-CS-HC-0009*", and further, the City of Baton Rouge/Parish of East Baton Rouge be and it is hereby ordered to grant a price adjustment in accordance with the terms of the contracts, and to pay all costs of these proceedings.

The City/Parish appealed, contending that the trial court erred in declaring that the *Supplemental Specifications* were a part of the contract documents and in signing a judgment directing the City/Parish to make a price adjustment.

On appeal, after reviewing the pertinent documents and considering the parties' arguments, this court affirmed the trial court's finding that the *Supplemental Specifications* were part and parcel of the contract and that they were to be used in conjunction with the *Standard Specifications*. In doing so, we determined that because the *Supplemental Specifications* specifically state that they "must be used in conjunction with" the *Standard Specifications*, and the

contract at issue herein provides that any reference to the *Standard Specifications* “include[s] officially adopted revisions and amendments thereto, which is in force at the time of advertising for bids,” the *Supplemental Specifications* were a part of the contract herein. We further determined that it was error, as a matter of law, for the trial court to order the City/Parish to grant a price adjustment in accordance with the terms of the contracts in a **declaratory judgment proceeding**. Thus, we vacated that portion of the judgment. In so finding, we specifically noted that “we express[ed] no opinion as to the merits of any claim for an adjustment or the amount of adjustment, if any, is ultimately due.” Barber Brothers Contracting Company, LLC v. East Baton Rouge City-Parish, Department of Public Works, 2010-0329 at p. 11 n.3.

While the matter was pending on appeal, Barber Brothers filed a “Petition for Supplemental Relief and Rule to Show Cause Pursuant to La. C.C.P. art. 1878,” seeking a judgment ordering contractual price adjustments pursuant to Section 10-8.1 of the *Supplemental Specifications*, entitled “Payment Adjustment (Asphalt Cement and Fuels),” in the amount of \$280,462.30 for Burbank Segment I and \$205,983.78 for Burbank Segment II. After our decision was rendered in the previous appeal, Barber Brothers’ petition was set for hearing before the trial court on May 16, 2011. At the conclusion of the hearing, the trial court granted the petition for supplemental relief and awarded Barber Brothers price adjustments for Burbank I and Burbank II in the amount of \$205,983.78 for each of the projects. Thereafter, a judgment was signed on May 26, 2011, awarding Barber Brothers the total amount of \$411,967.56.

Barber Brothers filed a motion to amend judgment or alternatively for a new trial, contending that the parties had stipulated to the price adjustment amounts of \$280,462.30 for Burbank I and \$205,983.78 for Burbank II, and although the trial court ordered “the amount prayed for,” it erroneously awarded

the same amount, i.e., \$205,983.78 as the price adjustment for both projects. The motion was heard on August 22, 2011, after which the trial court granted Barber Brothers' motion to award the amounts prayed for and stipulated to by the parties. A judgment was signed on September 2, 2011, awarding Barber Brothers price adjustments in the amounts of \$280,462.30 and \$205,983.78 for a total award of \$486,446.08.

The City/Parish then filed the instant suspensive appeal from the judgment of the trial court, contending only that the trial court erred in finding that Barber Brothers is entitled to a price adjustment.

DISCUSSION

On appeal, the City/Parish does not contest the computation of the price adjustment amounts sought by Barber Brothers. Instead, in its sole assignment of error, the City/Parish contends that the trial court erred in finding that Barber Brothers is entitled to a price adjustment and in making such an award herein.

The price adjustment sought by Barber Brothers was based on Subsection 10-8.1 of the *Supplemental Specifications*, entitled "Payment Adjustment (Asphaltic Cement and Fuels), which provides for a payment adjustment for asphalt cement and fuels as follows:

General

Payment for contract items indicated herein will be adjusted to compensate for cost differentials of asphalt cement, gasoline and diesel fuel when such costs increase or decrease more than 5% from the Louisiana Department of Transportation and Development's established base prices for these items. The base price index for fuels and asphalt will be the monthly price index in effect at the time bids are opened for the project.

Payment adjustments will be made each monthly estimate period when the price index for this period varies more than 5% from the base price index. The monthly price index to be used with each monthly estimate will be the price index for the month in which the estimate period begins.

* * * * *

Asphalt Cement

The base price index for this project is the price per ton of liquid asphalt cement for the month in which bids are received, as computed by the Louisiana Department of Transportation and Development. The monthly price index will be the average price for asphalt cement. F.O.B. refinery or terminal as determined from the quoted price on the first business day of each month from major oil companies supplying asphalt cement in Louisiana. Payment adjustment will be made in accordance with the following formulas:

$$\begin{aligned} &\text{If Monthly Price Index exceeds Base Price Index,} \\ &Pa = (A - 1.05B) \times C \times D \times (1.00 + T) \end{aligned}$$

$$\begin{aligned} &\text{If Base Price Index exceeds Monthly Price Index,} \\ &Pa = (0.95B - A) \times C \times D \times (1.00 + T) \end{aligned}$$

Where:

Pa = Price adjustment (increase or decrease) for asphalt cement

A = Monthly Price Index

B = Base Price Index

C = Tons of asphaltic concrete

D = Percent of asphalt cement per job mix formula, in decimals

T = Louisiana sales tax and local sales tax, in decimals

The engineer will furnish the information on the tonnage of asphaltic concrete placed during the monthly estimate period with the respective asphalt cement contents. If the asphalt cement content changes during the estimate period, the tonnage produced at each asphalt cement content will be reported.

All contract pay items under Section 371 will be eligible for payment adjustment. No payment adjustment will be made for other asphaltic materials, including emulsions and cutbacks.

* * * * *

The following is a listing of contract pay items that are eligible for payment adjustment and the fuel usage factors that will be used in making such adjustment.

**ELIGIBLE CONTRACT PAY ITEMS AND FINAL USAGE
FACTORS FOR FUEL PAYMENT ADJUSTMENT**

Item No.	Pay Item	Units	Fuel Usage Factors	
			Diesel	Gasoline
1134100	In Place Cement Stabilized Base Course (**inches thick)	gals/sq.yd.	0.04	0.03
1151000	Asphaltic Concrete, Pavement	gals./ton	(a) 2.40	0.20
1151200	Polymerized Asphaltic Concrete Pavement	gals./ton	(a) 2.40	0.20
1151210	Asphaltic Concrete, Pavement (Granite Fines)	gals./ton	(a) 2.40	0.20

The City/Parish argues that: (1) the construction proposal for Burbank I contains a "Schedule of Items," which lists by pay item number the materials that the contractor is to utilize for the project and that the bidder is to seek the bidder's price for the materials; (2) Asphaltic concrete is identified therein as item number 9900007 at a unit price of \$68.00; and (3) the construction proposal for Burbank II also contains a "Schedule of Items" that identifies asphaltic concrete as number 9900010 at a unit price of \$66.00.

The City/Parish contends that although the provisions of the *Supplement Specifications* set forth above allow for certain "contract items" of asphalt cement and fuels to be adjusted, i.e., when there is a 5% increase from the base price of cement and fuels, in the instant case, the "contract items" eligible for price adjustment do not exist in Burbank I and II construction proposals **as numbered**. The City/Parish argues, based on its reading of the contract and the *Supplemental Specifications* that the only items eligible for price adjustment are those items enumerated under "**Section 371**," and the only fuel items eligible for payment adjustment are item numbers "1134100, 1151000, 1151200, and 1151210."

Thus, the City/Parish argues, since the pay item numbers for asphaltic concrete set forth in the Burbank I and II construction proposals do not utilize the pay item number for asphaltic concrete in the *Supplemental Specifications*, a price adjustment is not allowed herein. We disagree.

At the hearing of this matter, Barber Brothers called Louis Wittie, the Chief Engineer for Barber Brothers, to testify. After reviewing the construction proposals for Burbank I and II and the *Supplemental Specifications*, Wittie identified "asphaltic concrete" as a pay item in the construction proposals for Burbank I and II that was clearly eligible for a price adjustment under the *Supplemental Specifications*.

The City/Parish called its Chief Construction Engineer, Jose Alvarez, to testify. Although Alvarez testified that the "asphaltic concrete" pay item numbers in the construction proposals did not match the "asphaltic concrete" pay item numbers in the *Supplemental Specifications*, he candidly acknowledged that the pay item "asphaltic concrete" appeared in both construction proposals for Burbank I and II. Moreover, both Wittie and Alvarez testified that they could not identify or find any "Section 371" in the *Standard Specifications* or the *Supplemental Specifications*.

After thorough review of the pertinent documents and entire record of this matter, we reject as unsupported the City/Parish's argument that Barber Brothers is not entitled to a price adjustment for the pay item of "asphaltic concrete" on the argued basis that the number designations for "asphaltic concrete" in the construction proposals differ from the number designations in the *Supplemental Specifications*. Indeed, to the extent that the different number designations used to refer to "asphaltic concrete" create any ambiguity, the interpretation of these provisions and their applicability must be construed against the City/Parish, which

authored the Burbank project construction proposals and forms at issue herein.

See LSA-C.C. art. 2056.³

Accordingly, on review, we find no error in the judgment of the trial court awarding the price adjustments contractually due to Barber Brothers.

This assignment lacks merit.

CONCLUSION

For the above and foregoing reasons, the September 2, 2011 judgment of the trial court is affirmed. Costs of this appeal in the amount of \$3,483.00 are assessed to the Defendant/Appellant, the City of Baton Rouge, Parish of East Baton Rouge.

AFFIRMED.

³As set forth in LSA-C.C. 2056:

In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.

A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.