

Reshaping Agreements

Oral agreements must be written in stone

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Reuse, reshaping, and/or reapplication of existing materials was the goal in this roadway rehabilitation story. The intermediate Texas Court of Appeals aptly stated, “[r]oad construction is ubiquitous in Texas and sometimes ends in disputes between the contractors who do that work.” The same could be said for any jurisdiction, not just Texas. This is the simple story of *Cox Paving of Texas, Inc. v. H.O. Salinas & Sons Paving, Inc.*, Court of Appeals of Texas, El Paso, October 12, 2022.

In 2014, Martin County, Texas selected a prime contractor for scarifying and reshaping about 90 miles of the County’s roads. Although the prime contractor was in the business of seal-coating, not road base work and the prime disclosed this fact before bidding, the County encouraged the prime to bid anyway.

After the prospective sub’s project manager and superintendent “spent a day driving ‘at least’ 75-80% of the roads” on the Project, the Sub offered to perform the road base work for the prime. During a pre-construction meeting and before the subcontract was formed, the County stated directly to the prime and the sub both that “most” of the roads already had the prescribed six-inch base but also stated that “some” of the roads did not, which would require caliche be added to achieve the prescribed six-inch base. The County was obligated to provide the necessary caliche for the prime and sub to perform most of the repairs. The County assured the prime and sub that sufficient materials to achieve the proper road depth would be provided.

After the pre-con meeting, the subcontract was created, which provided that the sub “had examined the contract documents, the condition of the [existing] road, and that [the sub] was not relying on any statements of the County or [the prime].” The subcontract also expressly denied extra compensation caused by delays or acts of the County or the prime – a no-damage-for-delay clause.

Shortly after work began, the County’s provision of caliche was slower than planned and soon thereafter it dried up altogether. The prime stepped in and provided the necessary materials. However, the sub incurred additional costs due to the slower pace of caliche deliveries and extra equipment needed to process and spread caliche. The prime first informed the sub that it would seek additional compensation from the County for the sub, but thereafter the prime refused to intercede. Upon the sub’s completion of about 40% of the project, the prime and sub agreed to terminate their agreement for convenience.

The sub sued the prime seeking payment for improper reductions on some payment applications submitted under the written subcontract and payment for extra work per an alleged oral agreement. From the sub, the prime sought its increased costs to replace the terminated sub.

The sub argued it was only obligated to reshape the “existing” roadways. However, under the subcontract terms, the sub agreed to not only reshape the existing roadways but also to “perform all of the obligations and responsibilities” of the prime under the prime contract “to the extent [they] cover or relate to” the sub’s work. Under the prime contract, caliche must be processed “as necessary” to achieve the proper final road depth, regardless of the existing road depth. A jury sided with the sub. In a subsequent appeal, however, the court held that the effective incorporation of the prime contract into the subcontract and the sub’s representations that it was satisfied with the existing conditions precluded the sub’s claims.

The appellate court upheld the jury’s award to the sub of the partial payments that the prime had wrongfully withheld from the sub for alleged defective work. However, the appellate court reversed the jury’s determination that the sub could recover for extra work under the alleged oral agreement. In short, when a written agreement exists, there can be no oral agreement related to the same subject matter, task(s), or project.

