

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1799**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**SINGH CONSTRUCTORS, INC.,**

**Plaintiff-Appellant,**

**v.**

**TRAYLOR BROS., INC./FRONTIER-  
KEMPER CONSTRUCTORS, INC.,  
JOINT VENTURE, TRAYLOR BROS., INC.,  
FRONTIER-KEMPER CONSTRUCTORS, INC.,**

**Defendants-Third Party Plaintiffs-  
Respondents-Cross Appellants,**

**MILWAUKEE METROPOLITAN SEWERAGE  
DISTRICT,**

**Third Party Defendant-Cross Respondent.**

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge.  
*Affirmed; cross-appeal dismissed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Singh Constructors, Inc., appeals from a judgment, following a bench trial, dismissing its breach of contract action against the defendants. Singh argues that the trial court erred in concluding that the defendants did not breach the subcontract. Singh also argues that the trial court erred in denying prejudgment interest for retainage held by the general contractor in excess of the amount specified in the subcontract. We reject Singh's arguments and affirm the judgment.<sup>1</sup>

## I. Background

Singh, a grouting subcontractor, brought this breach of contract action against Traylor Bros., Inc./Frontier-Kemper Constructors, Inc., Joint Venture, Traylor Bros., Inc., and Frontier-Kemper Constructors, Inc., (collectively, "the Joint Venture"), the general contractor on a portion of the Milwaukee Metropolitan Sewerage District's Deep Tunnel Project. In June 1986, the Joint Venture entered into what the parties refer to as the "General Contract" with MMSD. In July 1986, the Joint Venture entered into a subcontract with Singh for the performance of certain grouting work under the General Contract. Sections II and III of the subcontract specifies the work as follows:

Singh hereby agrees to furnish all labor and materials and perform all work as more fully described herein for a part of the General Contract by and between Traylor/Frontier-Kemper and the OWNER [MMSD] ... in accordance with this agreement, the agreement between the OWNER and Traylor/Frontier-Kemper, and in accordance with the General Provisions of the Contract, the Drawings and Specifications and addenda prepared by the OWNER, its agents,

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<sup>1</sup> The cross-appeal concerns the Joint Venture's attempt to hold MMSD liable if it is found liable to Singh. We dismiss the cross-appeal, however, because our disposition of the appeal eliminates the need to address the issues raised in the cross-appeal.

representatives, and employees, all of which documents form a part of the Contract between the OWNER and Traylor/Frontier-Kemper ... and which are hereby incorporated by reference as previously set out; these said documents herewith become part of this agreement ....

Section III of the subcontract, in part, provides:

Singh and Traylor/Frontier-Kemper agree that the materials, labor and equipment to be furnished and work to be done by Singh are as specified as follows:

BID ITEM	DESCRIPTION
22	Stage grout hole drilling from surface
23	Stage grout drill from within subsurface structure
24	Preparation of grout holes for consolidation grouting and water testing
25	Portland cement for grout
26	Bentonite for grout
27	Flyash for grout
28	Chemicals for chemical grouting
29	Grout placement

The subcontract also recites that the General Contract is specifically incorporated into the subcontract. Section I of the subcontract, contains a "flow down" or "pass through" clause, which states:

The work to be done pursuant to this Agreement is a portion of the work required of the contractor under the GENERAL CONTRACT. Insofar as they may be applicable, Singh shall be bound by all of the terms, conditions and provisions of the GENERAL CONTRACT and the plans, drawings, specifications, change orders or amendments connected therewith or issued in connection therewith, and Singh hereby covenants that it shall strictly comply therewith. All rights and remedies reserved by the OWNER under the GENERAL CONTRACT shall also apply to and be possessed by Traylor/Frontier-Kemper, as well as the OWNER, in all dealings with Singh.

Additionally, section IX.A.1 of the subcontract further states that Singh shall “[b]e bound to [the Joint Venture] by the terms of the Contract Documents and this agreement, and assume toward [the Joint Venture] all obligations and responsibilities that [the Joint Venture] ... assumes toward the OWNER.”

The General Contract contains the following provisions regarding MMSD's broad authority with respect to the performance of work under the General Contract.

(1) GENERAL CONDITIONS

Article 13. AUTHORITY OF THE ENGINEER<sup>2</sup>

....

The Engineer shall have the authority to interpret project schedule requirements and to establish the necessary priorities for resolving conflicts between Contractors, and to enforce such measures as may be necessary to maintain overall project schedules. It is the intent of this Article that there shall be no delays

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<sup>2</sup> The engineer on the project was CH2MHill, Inc.

in the progress of the critical elements of the project work, and the decision of the Engineer as rendered shall be promptly observed.

....

(Added by Supplementary Conditions)  
Notwithstanding the limitations on the Engineer's authority contained herein, Section 02970 [sic, should read 02971] DRILLING AND GROUTING ... assign additional authority and responsibility to the Engineer. The authority of the Engineer shall be interpreted to include the additional authority specified therein.

....

#### Article 37. RESPONSIBILITY TO ACT IN EMERGENCY

In case of an emergency that threatens loss of or damage to property or injury to person, the Contractor shall act, without previous instructions from the Owner or Engineer, as the situation may warrant. The Contractor shall immediately inform the Engineer of the emergency action taken. Any claim shall be submitted to the Engineer. The amount of compensation, if any, shall be determined by agreement prior to the issuance of a Modification order. However, if the emergency is created or aggravated by the Contractor, he shall be liable for the resulting damages. If the Contractor fails to take the necessary action as required by such an emergency, the Owner may assign another Contractor or use his own forces to perform the emergency work.

....

#### Article 65. CHANGES

A. The Owner may, at any time, without notice to the Sureties, by written order designated or indicated to be a Change Order, make any change in the work within the general scope of the Contract, including but not limited to changes (i) in the Specifications (including Plans and designs); (ii) in the time, method or manner of performance of the work; (iii) in the Owner-furnished facilities, equipment, materials, services, or site; or (iv) directing acceleration in the performance of the work.

The following language regarding "Section 02971 DRILLING AND GROUTING" is also applicable:

Drilling and grouting shall be performed at such locations, as shown in the Plans, in such quantities as stated in the Bids or at such times, as approved by the Engineer.

....

#### QUALIFICATION REQUIREMENTS

....

If, in the opinion of the Engineer, an experienced grouting specialist or grouting foreman is not assigned from the Contractor's staff, the Engineer will require that the Contractor acquire such experienced personnel or subcontract the work to a qualified firm specializing in grouting. Should such action be required, no adjustment in unit prices will be allowed.

....

#### D. PAYMENT

The Contractor shall be entitled to compensation for the actual quantity of the work as approved by the

Engineer. The Engineer retains the right to eliminate, increase, or decrease the work under any item.

According to the trial testimony, when the subcontract was executed, the portion of the grouting work under the General Contract that Singh was to do consisted of grouting two access shafts and the tunnel interior. After grouting the access tunnels, Singh started to do the grouting work on the tunnel interior in 1988, but interior grouting was brought to a halt sometime around February 1988 because of unexpected conditions, including what CH2MHill, Inc. Engineer John Ramage described as "very large uncontrolled water inflows into the tunnel." Engineer Alan Foreman testified that the "large inflows of water" that resulted during the tunneling and grouting "was totally unforeseen at the time the project was bid" and that it had not been paid under Bid Items 22-29. Ramage also testified that rock broke up making it impossible to support the opening of the tunnel, and that MMSD considered the conditions to be "absolutely incredible differing site conditions," and had even "very seriously considered" terminating the General Contract. Ramage and CH2MHill, Inc., Engineer Donald Olson testified that the situation constituted a differing site condition that required renegotiation of the price of the General Contract.

Because Singh's grouting could not control the inflow of water, MMSD came up with a plan that required grouting in places, in amounts, and in a manner different than what had been contemplated at the execution of the General Contract or Singh's subcontract. According to the testimony of Ramage, MMSD directed the Joint Venture to retain the Construction Drilling Services Division of Layne Northwest Co. in order to use a different approach to stop the water inflow. The new plan involved doing surface grouting that would be done in advance of the tunnel boring machine. This different grouting plan required drilling holes at an angle to a depth of approximately 300-400 feet. MMSD also directed the Joint Venture to retain Micon Services, Inc., to perform specialized grouting work, which involved using a polyurethane grouting system. Olson testified that polyurethane grout was not covered by Singh's subcontract. Additionally, MMSD also directed the Joint Venture to retain The Prepakt Concrete Company to perform certain grouting work.

In mid-1989, MMSD decided to add two additional drop shafts (NS-4 and NS-5) to the General Contract. According to the testimony of Ramage and Olson, these shafts were originally to be constructed under a different contract with the Joint Venture. MMSD directed the Joint Venture to perform work relating to the new shafts, so the Joint Venture sought bids on the grouting work for these shafts. Singh submitted a bid; however, Frazer & Co. Exploration Services, Inc., submitted a lower bid and was ultimately selected.

In early 1991, MMSD directed the Joint Venture to do some emergency grouting work, in addition to the grouting work Singh was doing. This direction was in response to the emergency situation that MMSD believed threatened numerous buildings in downtown Milwaukee. In "Transmittal No E-637," a letter from MMSD to John McDonald, an engineer for the Joint Venture, MMSD specifically directed that this work "be manned and supervised strictly by [the Joint Venture's] personnel."

In April of 1992, the Joint Venture wrote to Singh, reminding it of MMSD's tunnel grouting completion date of May 15, 1992, and stating that its services would not be required after that date. After May 15, 1992, the Joint Venture performed some "contact" grouting, which was not included in the subcontract.

Singh eventually completed the grouting work called for under the subcontract. Singh performed and received payment for approximately \$11.3 million of grouting work under the subcontract, which originally had an estimated amount of \$5.2 million. In fact, Singh performed all of the work specified under the subcontract and did some additional work.



## II. The Right to Perform All Grouting Work

In general, Singh claims that it was entitled under its subcontract to perform several million dollars in grouting work that was performed by the Joint Venture, Layne, Micon and Prepakt. In a factually detailed and well-reasoned written opinion, the trial court concluded that the Joint Venture did not breach Singh's subcontract because under the terms of the General Contract, MMSD was entitled to direct the Joint Venture to subcontract grouting work to other subcontractors and to perform certain grouting work itself, and that the Joint Venture was obligated to comply with MMSD's directive. The trial court also concluded that under the terms of the General Contract, MMSD was entitled to direct the Joint Venture to terminate Singh's contract and the Joint Venture was required to comply with that directive. Singh argues that the trial court erred in concluding that the Joint Venture did not breach the subcontract and seeks the "lost mark-up" on approximately \$8.54 million in grouting work done by the Joint Venture and the other subcontractors.

A trial court's findings of fact will be upheld on appeal unless they are clearly erroneous. *See* § 805.17(2), STATS. Interpretation or construction of a contract is subject to our independent review. *See Hoeft v. United States Fire Ins. Co.*, 153 Wis.2d 135, 140, 450 N.W.2d 459, 461 (Ct. App. 1989).

We reject Singh's argument. The trial court's detailed findings of fact support its conclusions of law that MMSD was entitled to direct the Joint Venture to arrange for additional and emergency grouting work once there was a change of conditions. The change of conditions here involved a massive influx of water and different soil conditions that, according to the trial court's findings, required grouting work in a different manner than was being done by Singh. Singh's subcontract expressly provided that its subcontract with the Joint Venture was subject to MMSD's contract with the Joint Venture. The Joint Venture's compliance with directions issued by MMSD to hire other grouting contractors to deal with the differing site and emergency conditions was not a breach because, as correctly noted by the trial court, "the subcontract granted to the Joint Venture, and MMSD, in all dealings with Singh all the rights possessed by MMSD under the general contract."

We further reject Singh's attempt to apply the well-accepted rules regarding "changed conditions" and "differing site" clauses to the issue in this case: namely, whether the contracts between MMSD, the Joint Venture, and Singh permitted MMSD to relieve Singh of its obligation—if called upon—to perform work resulting from changed conditions when in the view of MMSD or the Joint Venture the situation required another subcontractor. The General Contract and the subcontract contain contractual provisions reserving significant rights to MMSD and the Joint Venture; the contracts do not contain covenants that entitle Singh to an unlimited right to receive all grouting work that Singh felt it should be able to perform. The express contract language quoted in the trial court's decision together with the trial court's findings of fact amply support the trial court's decision.

Singh also argues that the change order regarding NS-4 and NS-5 reflects that work was intended to be construed as part of the work that falls under the General Contract. The trial court's findings that MMSD had intended to construct the NS-4 and NS-5 shafts under a contract other than the General Contract with the Joint Venture are not clearly erroneous. Additionally, the subcontract contains clauses granting the Joint Venture the right to award other contracts or even to eliminate or decrease grouting work. See *Hunkin Conkey Constr. Co. v. United States*, 461 F.2d 1270 (Ct. Cl. 1972) (rejecting plaintiffs's argument that it had the right to perform "all" work under the contract that contained "changed conditions" and "other contracts" clauses). We conclude that the trial court's conclusion that the Joint Venture was free to accept bids on that work is supported by the record.<sup>3</sup>

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<sup>3</sup> Singh cites *Westinghouse Electric Supply Co. v. Fidelity & Deposit Co.*, 560 F.2d 1109, 1114 (3d Cir. 1977), in support of its position that the changed conditions clause gave it the right to perform the NS-4 and NS-5 work. *Westinghouse*, however, did not involve an attempt by a subcontractor to obtain work under a changed conditions clause. Instead, *Westinghouse* held that a subcontractor that had a duty to comply with the plans and specifications contained in the primary contract, also had a duty to comply with modifications made by change orders. *Id.* at 1114-1116.

### III. The Retainage

Singh claims that it is entitled to prejudgment interest for retainage held by the Joint Venture for what Singh claims to be "in excess of the amount allowable under the subcontract." Singh's subcontract provided for retainage as follows:

Payment shall be made for the work done and material furnished ... less any percentage thereof retained by the OWNER under the provisions of the said contract with [the Joint Venture] .... [The Joint Venture] shall pay to Singh the retained percentage of the amount due Singh after receipt of payment by [the Joint Venture] from the OWNER.

In approximately June 1990, Singh informed the Joint Venture that it was having financial problems that made it unable to meet its payroll. In response, the Joint Venture agreed to pay Singh's payroll and to pay Singh's suppliers. In return, Singh agreed to allow the Joint Venture to retain an amount equal to approximately one month of Singh's gross billings. Foreman testified that the retention was necessary to provide the Joint Venture with protection against the risk of Singh not paying its suppliers.

The trial court found that the Joint Venture's agreement with Singh to pay Singh's bills directly but withhold one month's payments as retainage was supported by consideration and was therefore effective. Singh claims, however, that the trial court erred in allowing the Joint Venture to assert a modification-of-contract defense regarding the retainage as the basis for concluding that Singh had been timely paid under the subcontract.

Singh's claim that the Joint Venture had to plead modification of the contract in order to rely on it as a defense is moot because Singh did not object to the evidence. See § 901.03, STATS.; see also *Servi v. Draheim*, 254 Wis. 356, 362-363, 36 N.W.2d 273, 276 (1949). Indeed, Singh testified about the agreement.

Singh also claims there is no credible evidence in the record that Singh had executed an unauthorized assignment that entitled the Joint Venture to find it in default. The trial court found that Singh had assigned the proceeds of its subcontract to a financial institution without the Joint Venture's consent, and that the Joint Venture could have declared Singh in default under the terms of the subcontract. The actual existence of an assignment is immaterial. The modification is not dependent upon an assignment. Indeed, the record supports the trial court's finding that Singh specifically agreed that the Joint Venture could retain one month's gross billings in consideration for making advances to pay his payroll and suppliers.

In sum, the trial court's findings of fact and legal conclusions, based on the express contract language, are well-supported. Therefore, we affirm.

*By the Court.* – Judgment affirmed; cross-appeal dismissed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.