COMMONWEALTH OF PENNSYLVANIA,
BOARD OF CLAIMS

AIKEN FARMS	:	DOCKET NO. 3833
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	

FINDINGS OF FACT

1. Aiken Farms and PennDOT entered into Contract No. 08014063 ("Contract") whereby Aiken Farms was to mow 2,500.48 miles of secondary roadway in Mercer County in four cycles of 625.12 miles during the years 2004 and 2005. (Department Exhibit (Dept. Ex.) A; Hearing Transcript (H.T. 16)).

2. Aiken Farms was the lowest bidder on the Contract with a bid of $18.25 per mile at a total price of $45,633.76. (Dept. Ex. S).

3. The bids on the contract at issue ranged from a low of $45,633.76 to a high of $150,028.80 along with bids in between of $45,733.77, $49,734.55, $60,011.52, $100,019.20, and $122,523.52. (Dept. Ex. S).

4. Aiken Farms has been paid $45,633.76 under the Contract. (Dept. Ex. A; Aiken Farms Exhibit (A.F.) Ex. 1; Stipulation of Facts at ¶ 1, dated April 20, 2007).

5. The Contract states that the 2,500.48 miles is to be mowed for a payment of $18.25 per mile with total contract payment not to exceed $45,633.76. (Dept. Ex. A; H.T. 16-17).

6. The Contract included an Exhibit A. The first paragraph of Exhibit A to the Contract, attached thereto, states, "This work shall consist of the roadside mowing of all the State Routes herein tabulated and shall include the mowing of 5 (5) foot strips left and right of each side of the roadways as specified or as directed by the County Manager." (Dept. Ex. A; H.T. 26).

7. The second paragraph of Exhibit A to the Contract specifies four mowing cycles per contract, i.e. within the two year contract period, the routes would be mowed four times, once in the spring and once in the late summer of each year. (Dept. Ex. A; H.T. 27).

8. Exhibit A to the Contract also lists each segment of the routes to be mowed and the mileage of that segment, along with beginning and ending segments/offsets to mark the portion of each route to be mowed, resulting in a total of 625.12 miles mowed per cycle. (Dept. Ex. A; H.T. 30-31, 174-75).

9. Aiken Farms understood the total 2,500.48 miles to be mowed, as stated in the Contract, to be "lane miles." That is, Aiken Farms interpreted the Contract's mileage provision of 2,500.48 miles to represent the total of all the miles actually to be traveled in mowing up one side of the road and back down the other side. (Dept. Ex. A; A.F. Ex. 4; H.T. 42, 44).

10. In the case of a road segment beginning at point A and ending at point B, if the one way straight line distance between points A and B is one mile, the lane miles for this segment is two miles (i.e. one mile up one side plus one mile down the other side). (Dept. Ex. A; A.F. Ex. 4; H.T. 42, 44; Board Finding).

11. PennDOT, on the other hand, maintains that the contract mileage of 2,500.48 miles is correctly stated as the total distance of the segments to be mowed measured one way from end to end and includes mowing both sides of the roadway at the stated bid price per mile of $18.25. Although the PennDOT personnel involved with this particular contract have avoided using the term, this style of measuring or presenting roadway mileage for mowing purposes is often referred to as "center line miles." (Dept. Ex. A; A.F. Exs. 5 and 8; H.T. 44-45, 52, 171-173; Board Finding).

12. In the case of a road segment beginning at point A and ending at Point B, if the one way straight line distance between points A and B is one mile, the center line miles for this segment is one mile (even though mowing both sides would involve traveling two miles - one mile up and one mile back). (Dept. Ex. A; A.F. Exs. 5 and 8; H.T. 44-45, 52, 171-173; Board Finding).

13. The plain language of the Contract presents its mowing distance and/or quantity measurement in "miles" without identifying these "miles" to be "lane miles" or "center line miles" or providing any other clarification as to which type of mileage measurement was intended. (Dept. Ex. A; Board Finding).

14. The wide range of bids on the contract at issue includes groups of bids at the top and bottom of the range, with the highest bid more than two times as much as the lowest. This indicates that some contractors viewed the measurement term "miles" as "center line miles" while others interpreted it as "lane miles." (Dept. Exs. A, S; F.O.F. ¶ 3; Board Finding).

15. In other mowing contracts entered into by Aiken Farms and PennDOT in other counties or districts, PennDOT took great care to clarify the quantity of mowing to be performed. These other contracts use the terms "lane miles" or "center line miles" or additional spreadsheets to establish definitively the amount of mowing required. In the Contract here at issue, these clarifying terms are not used; instead PennDOT simply states "miles" with nothing more. (A.F. Exs. 10-15; H.T. 72, 75-76, 80-82, 84-85, 85-86).

16. The Board finds the other PennDOT contracts entered into with Aiken Farms (in other counties or districts) highly relevant and persuasive as indicators of trade usage of the mileage terms and a pattern of dealing between the parties. We further note that these other

contracts consistently use the terms "lane miles" or "center line miles" to more clearly illustrate the meaning of the mileage measurement used in those contracts. (A.F. Exs. 10-15; H.T. 72, 75-76, 80-82, 84-85, 85-86; Board Finding).

17. Even though the segments to be mowed are identified by segment marker points in Exhibit A to the Contract, there is no discernible relationship between segment marker numbers and distance that might help clarify what was intended by the term "miles" in the Contract document. (A.F. Ex. 1; Board Finding).

18. For the first mowing cycle of the Contract, Aiken Farms billed PennDOT $11,408.44 for 625.12 miles mowed, and PennDOT paid the invoice. This billing and payment evidences a "center line miles" interpretation of the Contract's "miles" term by both parties. (A.F. Ex. 2; H.T. 33, 180; Board Finding).

19. For the second mowing cycle, Aiken Farms billed PennDOT $22,816.88 for 1250.24 miles mowed, and PennDOT paid the invoice. This billing and payment reflects a correction for a "lane miles" interpretation of the Contract's "miles" term by both parties. (A.F. Ex. 3; H.T. 36, 180; Board Finding).

20. After the third mowing cycle, Aiken Farms again billed PennDOT $22,816.88 for 1250.24 miles mowed, consistent with a "lane miles" interpretation adjustment of the Contract's "miles" provision. At this point, PennDOT discovered this "overpayment error" in early 2005 and asked Aiken Farms to return the overpayment. Aiken Farms refused. PennDOT refused to make payment on this invoice for the third mowing cycle, instead asserting that it overpaid for the second mowing cycle and that this overpayment should be credited against the third cycle. PennDOT's refusal to pay the higher amount illustrates the "center line miles" versus "lane miles" dispute. (H.T. 39-40, 180-185; A.F. Ex. 7; Board Finding).

21. Following its refusal to return the overpayment, Aiken Farms asked to be let out of the Contract. Upon this request, PennDOT informed Aiken Farms that if PennDOT terminated the Contract it would be required by Commonwealth policies to file notification regarding Aiken Farms with the Contractor Responsibility Program. Furthermore, PennDOT advised Aiken Farms that it would pursue its rights against Aiken Farms under applicable contract law. (A.F. Ex. 5; H.T. 161, 183-84).

22. Aiken Farms performed the third mowing cycle and submitted another invoice for 1250.24 miles mowed, seeking $22,816.88. (A.F. Ex. 7).

23. PennDOT did not pay this invoice, reasoning that Aiken Farms had already received payment for the third mowing cycle when the second mowing cycle was inadvertently overpaid. (H.T. 185).

24. Aiken Farms completed the fourth mowing cycle and billed PennDOT $22,816.88 for 1250.24 miles actually mowed, but PennDOT only paid Aiken Farms $11,408.44 for 625.12 miles of roadway. (A.F. Ex. 9; H.T. 54-55, 185-86).

25. The evidence regarding billing and payment cuts both ways for each party since Aiken Farms and PennDOT took inconsistent action with respect to their interpretations of the Contract's "miles" provision as "lane miles" or "center line miles" respectively. However, the billing and payment evidence does exhibit that the Contract's term "miles" is subject to different interpretations even among Aiken Farms' and PennDOT's own employees. (F.O.F. ¶ 18-24; Board Finding).

26. The respective conduct of both parties in relation to this Contract is ultimately of little use since it shows varying and conflicting interpretations of the term "miles"by both Aiken Farms and PennDOT. (F.O.F. ¶ 18-25; Board Finding).

27. Viewed simply on the face of the Contract itself, the term "miles", as used in the Contract, may reasonably be interpreted as either "lane miles" or "center line miles." (Dept. Ex. A; H.T. 210-212; F.O.F. ¶ 1-26; Board Finding).

28. Prior to the bid opening for the Contract, Cynthia Supel, the contract officer for the Contract, received a telephone call from a potential bidder seeking information about how the mileage indicated in the Contract was calculated. (H.T. 171-173).

29. Ms. Supel did not recall to which potential bidder she spoke during this telephone call. (H.T. 175).

30. David Aiken, a principal of Aiken Farms, testified that prior to the bid opening, he contacted Ms. Supel via telephone to confirm how the mileage was calculated on the contract, specifically whether the Contract called for "lane miles" as opposed to "center line miles." (H.T. 19-20).

31. Mr. Aiken testified that Ms. Supel confirmed that the Contract's term "miles" meant "lane miles." (H.T. 20).

32. Ms. Supel testified that she only reiterated the actual language of the Contract to the caller without using the terms "lane miles" or "center line miles" in order to avoid giving one potential bidder information not contained in the bid documents or contract so she would not have to notify all of the other potential bidders of the same information. (H.T. 171-175).

33. Specifically, Ms. Supel testified that despite the potential bidder's attempts to have her state whether the Contract was for "lane miles" or "center line miles" she consistently repeated that the Contract stated the lengths of the roadways to be mowed and that such mowing should be completed on the left and right side of roadways. (H.T. 171-173).

34. Ms. Supel also testified that the potential bidder became frustrated and questioned whether she knew the difference between “lane miles” and “center line miles.” (H.T. 172).

35. The Board concludes that Ms. Supel’s testimony regarding her telephone conversation with a prospective bidder (Mr. Aiken), wherein she only repeated the Contract’s terms, consistent with her intent to avoid the need to notify all potential bidders of a change in the terms of the contract, is credible. Moreover, Ms. Supel’s testimony regarding the specific conversation is credible when she testified that the potential bidder (presumably Mr. Aiken) became frustrated and further questioned whether she knew the difference between "lane miles" and "center line miles." (F.O.F. ¶ 25-34; Board Finding).

36. Mr. Aiken’s frustration and questioning of whether Ms. Supel knew the difference between “lane miles” and “center line miles” does not support a reasonable belief that Ms. Supel confirmed what he thought. (H.T. 20, 172).

37. The Board concludes that Mr. Aiken’s testimony regarding his telephone conversation with Ms. Supel wherein he claimed Ms. Supel told him the Contract’s mileage terms were “lane miles” is not credible. (F.O.F. ¶ 25-36; Board Finding).

38. Based on the Board's own review of the Contract, the evidence of differing interpretations of the term “miles”, the evidence of trade usage and prior dealing utilizing more specific distance measurement terms, and the parties' own inconsistent actions interpreting same, the Board concludes that the "miles" term in the Contract is ambiguous as “miles” is susceptible to differing constructions and is capable of being understood in more than one way. Specifically, the Contract’s mileage provision (“2,500.48 miles”) is ambiguous as written as it is unclear whether this provision means 2,500.48 miles one way (“center line miles”) or both ways (“lane miles”). (Dept. Exs. A, S; A.F. Exs. 10-15; F.O.F. ¶ 1-37; Board Finding).

39. Mr. Aiken testified that he was familiar with some of the roads included in the Contract as he drives those roads on a regular basis. (H.T. 104).

40. Mr. Aiken’s familiarity with some of the road segments to be mowed also casts doubt on his purported belief that Ms. Supel confirmed that the mileage was expressed in "lane miles." To the contrary, his familiarity with the roads should have alerted him to the fact that the mile measurement was the straight line distance measurement (“center line miles”) instead of the “lane miles” of the roads to be mowed. (Dept. Ex. A; F.O.F. ¶ 9-39; Board Finding).

41. Despite questioning the mile measurement in the Contract, Mr. Aiken did not undertake an inspection of the road segments to be mowed under the Contract. (H.T. 104-105).

42. Mr. Aiken did not offer a reasonable explanation as to why he did not check the mileage, particularly given his questioning of the mile measurement. (F.O.F. ¶ 27-41; Board Finding).

43. PennDOT Publication 408, in use at the time of the bidding on this Contract, stated:

> 102.05 Examination of Proposal, Plans, Specifications, Special Provisions, and Site of Work – The Department's plans and specifications are complete and are prepared so any competent contractor is able to complete the proposed work. The bidder is required to carefully examine the proposal, plans, specifications, and project site before submitting a bid. The submission of a bid will be considered proof that the bidder has made such examination and understands the conditions to be encountered; the character, quality, and quantities of work to be performed; the material to be furnished; and the requirements of the plans, specifications, and proposal. The Department will make no allowance or concession for a bidder's failure to make the required examination.[1]

(See, Commonwealth of Pennsylvania, Department of Transportation, Specifications, Publication 408/2003 at 102.105 (Initial Edition, Effective 10/1/03, as amended), available at ftp://ftp.dot.state.pa.us/public/bureaus/design/pub408).

44. The "Mowing Specifications" section of the Contract incorporates PennDOT Publication 408 which imposes a duty on the bidder to inspect the site and confirm quantities. (Attached at Exhibit "A" to Dept. Ex. A; A.F. Ex. 1; F.O.F. ¶ 43; Board Finding).

45. If Mr. Aiken had performed the required inspection, it would have been obvious that the 2,500.48 miles stated in the contract were expressed as "center line miles"; therefore, his interpretation that the Contract measurement was expressed in "lane miles" was not reasonable and there was no ambiguity of the "miles" term in fact. (F.O.F. ¶ 1-44; Board Finding).

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[1] This language from Publication 408, Section 102.05 has been substantially the same since at least 1994 (the earliest version of the Publication available online through PENNDOT). Furthermore, the only change was not substantive as the versions prior to 2003 used "proposal" language instead of "bid" language. Publication 408 from 1994 through 2002 used this version of Section 102.05:

> 102.05 Examination of Proposal, Plans, Specifications, Special Provisions, and Site of Work – The Department's plans and specifications are complete and are prepared so any competent contractor is able to complete the proposed work. The bidder is required to carefully examine the proposal *forms*, plans, specifications, and project site before submitting a *proposal*. The submission of a *proposal* will be considered proof that the bidder has made such examination and understands the conditions to be encountered; the character, quality, and quantities of work to be performed; the material to be furnished; and the requirements of the plans, specifications, and proposal *form*. The Department will make no allowance or concession for a bidder's failure to make the required examination.

(See, Commonwealth of Pennsylvania Department of Transportation, Specifications, Publication 408/2000-9 at 102.105 (Change No. 9, Effective 7/2/02) (emphasis added to illustrate difference between pre-2003 and 2003-Present Publication 408 language), available at ftp://ftp.dot.state.pa.us/public/Bureaus/design/Pub408/Change9/Pub408).

46. Although Mr. Aiken may have believed subjectively that the contract provided for "lane miles" as opposed to "center line miles", his belief is not reasonable in light of Mr. Aiken's familiarity with many of the roads covered by the Contract, his questions to, and frustration with, Ms. Supel regarding the mileage term clarification he sought, and his failure to inspect the work site and confirm quantities, which would have clearly indicated that Contract's term "miles" meant "center line miles." (F.O.F. ¶ 1-45; Board Finding).

47. Despite the fact that the term "miles" as written is capable of differing interpretations, Mr. Aiken had no reasonable basis for his belief that the term "miles" was intended to mean "lane miles" because of the surrounding circumstances. (F.O.F. ¶ 1-46; Board Finding).

48. Aiken Farms mowed both sides of the roadway for 2,500.48 center line miles and has been paid $45,633.76 on the Contract. (Dept. Ex. A; A.F. Ex. 1; Stipulation of Facts at ¶ 1, dated April 20, 2007; F.O.F. ¶ 4, 18-25).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine this matter as a claim against the Commonwealth of Pennsylvania, Department of Transportation, arising from a contract entered into by the Commonwealth. Board of Claims Act, 72 P.S. §§ 4651-1 – 4651-10, repealed by Act of December 3, 2002, P.L. 1147, No. 142 (current law now codified at Sections 1701-1751 of the Commonwealth Procurement Code, 62 Pa.C.S. §§ 1701-1751).

2. The Board of Claims has jurisdiction over the parties as well as the subject matter of the claim asserted by plaintiff, Aiken Farms. Board of Claims Act, 72 P.S. §§ 4651-1 – 4651-10, repealed by Act of December 3, 2002, P.L. 1147, No. 142 (current law now codified at Sections 1701-1751 of the Commonwealth Procurement Code, 62 Pa.C.S. §§ 1701-1751).

3. In this claim for recovery on an alleged breach of contract, it is Aiken Farms, as the asserting party, which has the burden of proof to establish the breach and support its requested recovery. See eg., Commonwealth, Department of Transportation v. Burrell Const. & Supply Co., Inc., 534 A.2d 585, 588 (Pa. Cmwlth. 1987).

4. When construing a contract, a court must determine the intent of the parties and give effect to all of the provisions therein; an interpretation will not be given to one part of the contract which will annul another part of it. Capek v. Devito, 767 A.2d 1047, 1050 (Pa. 2001).

5. A contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction. Commonwealth, Department of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

6. A contract will be found ambiguous "if, and only if, it is reasonably or fairly susceptible to different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness or expression or has a double meaning." Id.

7. In determining whether contract terms are clear or ambiguous, a court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings. Walton v. Philadelphia National Bank, 545 A.2d 1383, 1388 (Pa. Super. 1988).

8. Evidence of custom in the industry, usage in the trade and/or course of conduct between parties is relevant and admissible in construing ambiguous terms in commercial contracts. See e.g., Sunbeam Corporation v. Liberty Mutual Insurance Company, 781 A.2d 1189, 1193 (Pa. 2001); Resolution Trust Corporation v. Urban Redevelopment Authority of Pittsburgh, 638 A.2d 972, 975-976 (Pa. 1994).

9. The conduct of the parties to the contract may be used to aid interpretation of ambiguous terms in the contract. See e.g., Commonwealth, Department of Transportation v. IA Construction Corporation, 588 A.2d 1327, 1330-1331 (Pa. Cmwlth. 1991).

10. The trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. Ct. 2002).

11. Aiken Farms failed to establish that Ms. Supel confirmed Mr. Aiken's reading of the Contract that the mileage measurement used in the Contract was stated in "lane miles." Id.

12. In light of the different constructions offered by the parties in this matter, the Board's own review of the contract, the evidence of differing interpretations of the term "miles", the evidence of trade usage and prior course of dealing utilizing more specific distance measurement terms and the parties' own inconsistent actions interpreting same which establishes that the Contract's term "miles" is readily capable of being understood as "lane miles" or "center line miles", the Board concludes that the term "miles", as used in the Contract, is ambiguous as written. We therefore also conclude that the quantity of work to be performed pursuant to the Contract was ambiguous as written. See e.g., Walton, 545 A.2d at 1388.

13. While it is a well settled rule of construction that in cases of ambiguity contracts should be construed most strongly against the drafter, it is equally clear that the rule is not intended as a talismanic solution to the construction of ambiguous language. Instead, inquiry "should always be made into the circumstances surrounding the execution of the document in an effort to clarify the meaning that the parties sought to express in the language which they chose. [cites omitted]. It is only when such an inquiry fails to clarify the ambiguity that the rule of construction relied upon . . . should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document." Burns Manufacturing Company v. Boehm, 356 A.2d 763, 767 n. 3 (Pa. 1976).

14. The Board may take judicial notice of the content of Pennsylvania Department of Transportation, Specifications, Publication 408, Section 102.5 effective for the Contract period because Publication 408 is a public document and its content is capable of accurate and ready determination by resort to PennDOT publications and/or the PennDOT website at ftp://ftp.dot.state.pa.us/public/bureaus/design/pub408, and because the accuracy of these two

sources cannot reasonably be questioned. Pa. R.E. 201; See also, In the Interest of F.B., 726 A.2d 361, 366 (Pa. 1999), Soloman v. U.S. Healthcare System of Pennsylvania, Inc., 797 A.2d 346, 352 (Pa. Super. Ct. 2002); Alaica v. Ridge, 784 A.2d 837, 840 fn3 (Pa. Cmwlth. 2001).

15. Specifically, the Publication 408 in use at the time of the bidding on this Contract stated:

> 102.05 Examination of Proposal, Plans, Specifications, Special Provisions, and Site of Work – The Department's plans and specifications are complete and are prepared so any competent contractor is able to complete the proposed work. The bidder is required to carefully examine the proposal, plans, specifications, and project site before submitting a bid. The submission of a bid will be considered proof that the bidder has made such examination and understands the conditions to be encountered; the character, quality, and quantities of work to be performed; the material to be furnished; and the requirements of the plans, specifications, and proposal. The Department will make no allowance or concession for a bidder's failure to make the required examination.

(Commonwealth of Pennsylvania Department of Transportation, Specifications, Publication 408/2003 at 102.105 (Initial Edition, Effective 10/1/03, as amended), available at ftp://ftp.dot.state.pa.us/public/bureaus/design/pub408).

16. The "Mowing Specifications" section of the Contract incorporates PennDOT Publication 408 which imposes a duty on the bidders (including Aiken Farms) to inspect the site and confirm quantities. (Attached at Exhibit "A" to Dept. Ex. A; A.F. Ex. 1).

17. Where a contract expressly imposes a duty to inspect the work site and confirm quantities, a contractor who does not undertake such measures cannot argue an issue that would have been resolved given such an inspection. By not inspecting, the contractor assumes the risk of the consequences of its failure of inspection. Acchione v. Commonwealth, 32 A.2d 764, 765-66 (Pa. 1943); Com., Dept. of Transp. v. Mitchell's Structural Steel Painting Co., 336 A.2d 913, 916 (Pa. Cmwlth. 1975).

18. If Aiken Farms had performed the required inspection, it would have been obvious that the "miles" term in the Contract was "center line miles" and Mr. Aiken's interpretation that it meant "lane miles" was not reasonable. Because there is no ambiguity in the Contract's mileage measure, in fact, the principle of "*contra proforentem*", construing the contract against the drafter, is not applicable in this case. Id.; See also, Burns Manufacturing, supra.

19. Aiken Farms was paid, in full, the amount it was owed under the Contract, $45,633.76, and therefore its claim for further remuneration thereunder must be denied.

OPINION

Plaintiff, Aiken Farms ("Aiken Farms"), asserts claims for damages on roadway mowing Contract No. 08014063 (the "Contract") in the amount of $45,633.76 against the Department of Transportation ("PennDOT" or "Dept."). Although Aiken Farms was paid $45,633.76 pursuant to the Contract, Aiken Farms contends that it was actually required to mow twice as many miles as indicated under the Contract. Therefore, Aiken Farms seeks an additional $45,633.76. Aiken Farms argues that the express terms of the Contract, which state 2,500.48 miles to be mowed, actually required 5,000.96 miles of mowing. PennDOT argues that the same express terms of the Contract require 2,500.48 miles to be mowed, and that is all it required Aiken Farms to do.

To begin with, the Board notes that there is no significant disagreement regarding several of the more significant terms of the Contract. First, the quantity of mileage to be mowed over the two year contract period is stated on the face of the contract as 2,500.48 miles. This 2,500.48 miles is the total of four mowing cycles of 625.12 miles each. (Dept. Ex. A; A.F. Ex. 1). Second, each 625.12 mile cycle is comprised of specific segments of roadway listed in the "Mowing Specifications" contained in Exhibit A to the Contract, which instruct the contractor on the exact portions of each road to be mowed. Exhibit A also expressly states the following mowing instructions: "This work shall consist of the roadside mowing of all the State Routes herein tabulated and shall include the mowing of 5 (5) foot strips *left and right of each side of the roadways* as specified or as directed by the County Manager." [Dept. Ex. A; A.F. Ex. 1 (emphasis added).]. Third, the price of the contract of $45,633.76 is formulated by multiplying Aiken Farms' bid of $18.25 per mile by the 2,500.48 miles to be mowed under the Contract. [Dept. Ex. A; A.F. Ex. 1 (emphasis added).].

The fundamental disagreement between the parties however, and the crux of the case at hand, is the interpretation of the term "miles." Aiken Farms argues that the contract language, together with the verbal confirmation it allegedly received from PennDOT and Aiken Farm's own history of work under mowing contracts with different PennDOT districts and counties, led it to believe that the Contract's mileage provision of 2,500.48 miles was stated in terms of "lane miles." Pursuant to this interpretation, the 2,500.48 miles stated in the Contract represented the total of all the miles actually traveled in mowing up one side of the road and back down the other side.[2] PennDOT, on the other hand, argues that the Contract mileage of 2,500.48 miles is correctly stated as the total distance of the segments to be mowed measured one way from end to end and includes mowing both sides of the roadway at the stated bid price per mile of $18.25. Although the PennDOT personnel involved with this particular contract have avoided using the term, this style of measuring or presenting roadway mileage for mowing purposes is often referred to as "center line miles."[3] For the sake of clarity in our discussion, the Board will adopt the terms "lane miles" and "center line miles" as we have herein defined them. Plaintiff also argues that, even if the Board does not agree with it that the mileage measurement in the Contract is properly understood as "lane miles", we must at least find that the term "miles" as written in the Contract is ambiguous (i.e. capable of being read as either "lane miles" or "center line miles"). Therefore, Plaintiff asserts, we must construe this ambiguity in the Contract against the drafter, PennDOT, and find in favor of Aiken Farms.

[2] In the case of a road segment beginning at point A and ending at point B, if the one way, straight line distance between points A and B is one mile, the lane miles for this segment is two miles (i.e. one mile up one side plus one mile down the other side).

[3] In the case of a road segment beginning at point A and ending at Point B, if the one way, straight line distance between points A and B is one mile, the center line miles for this segment is one mile (even though mowing both sides would involve traveling two miles - one mile up and one mile back).

A contract is not ambiguous simply because the parties do not agree upon its proper construction. Commonwealth, Department of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996). Instead, a contract will be found ambiguous, "if, and only if, it is reasonably or fairly susceptible to different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness or expression or has a double meaning." Id. A contract is not ambiguous "if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends." Id. In determining whether contract terms are clear or ambiguous, a court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings. Walton v. Philadelphia Nat. Bank, 545 A.2d 1383, 1388 (Pa. Super. 1988).

Viewed simply on the face of the Contract itself, the term "miles" as used therein, is ambiguous. As illustrated by the hearing testimony and the evidence presented, the term "miles" may reasonably be interpreted as either "lane miles" or "center line miles." In reaching this conclusion, the Board notes, inter alia, that in other mowing contracts entered into by Aiken Farms and PennDOT in other counties or districts, PennDOT took great care to clarify the quantity of mowing to be performed.[4] While these contracts did not use one term or the other exclusively, they did use the terms "lane miles" or "center line miles" or additional spreadsheets to establish definitively the amount of mowing required. (A.F. Exs. 10-15; H.T. 72, 75-76, 80-82, 84-85, 85-86). In the Contract here at issue, these clarifying terms are not used; instead PennDOT simply states "miles" with nothing more. We further note that, even though the

[4] PennDOT objected to the introduction of these other PennDOT mowing contracts on the grounds of relevance. The Board admitted same, finding these contracts very relevant to establish both trade usage and a course of dealing between Aiken Farms and PennDOT.

segments to be mowed are identified by segment marker points, there is no discernible relationship between segment marker numbers and distance that might help clarify what was intended by the term “miles” in the Contract document or attachments. (A.F. Ex. 1).

The Board also finds that the wide variance in the prices of the bids received on the Contract at issue also evidences different constructions of the term “miles” by the bidders. Bids on the contract ranged from a low of $45,633.76 to a high of $150,028.80, along with bids in between of $45,733.77, $49,734.55, $60,011.52, $100,019.20, and $122,523.52. (Dept. Ex. S). The bids basically break themselves into low and high categories. The low bids are generally separated from the high bids by a factor of at least two, illustrating that the high bidders likely understood the mileage measurement in the Contract to be based on “center line miles” while the low bidders, like Aiken Farms, understood the miles to mean “lane miles.”

Having found the Contract language itself to be ambiguous as to the term “miles” (and therefore ambiguous as to the quantity of mowing to be done), our next line of inquiry turns to the conduct of the parties. Although it is well-established that the conduct of the parties may be used to interpret otherwise ambiguous contract terms, the respective conduct of Aiken Farms and PennDOT in relation to this Contract is ultimately of little use since it shows varying and conflicting interpretations of the term “miles” by both parties. For the first mowing cycle of the Contract, Aiken Farms billed PennDOT $11,408.44 for 625.12 miles mowed, and PennDOT paid the invoice. (A.F. Ex. 2; H.T. 33, 180). This billing and payment evidences a “center line miles” interpretation of the Contract’s “miles” term by both parties. However, for the second mowing cycle, Aiken Farms billed PennDOT $22,816.88 for 1250.24 miles mowed, and PennDOT paid the invoice. (A.F. Ex. 3; H.T. 36, 180). This billing and payment reflects an adjustment to

compensate for a "lane miles" interpretation of the Contract's "miles" term by both parties. After the third mowing cycle, Aiken Farms again billed PennDOT $22,816.88 for 1250.24 miles mowed, consistent with a "lane miles" interpretation of the Contract's "miles" provision. (A.F. Ex. 7). At this point, PennDOT refused to make payment on this invoice for the third mowing cycle, instead asserting that it overpaid for the second mowing cycle and that this overpayment should be credited against the third cycle. (H.T. 185). PennDOT's refusal to pay the higher amount illustrates the "center line miles" versus "lane miles" dispute. Finally, Aiken Farms completed the fourth mowing cycle and billed PennDOT $22,816.88 for 1250.24 miles actually mowed, but PennDOT only paid Aiken Farms $11,408.44 for 625.12 miles of roadway. (A.F. Ex. 9; H.T. 54-55, 185-86). The evidence regarding billing and payment cuts both ways for each party as Aiken Farms and PennDOT took inconsistent action with respect to their interpretations of the Contract's "miles" provision as "lane miles" or "center line miles" respectively. However, the billing and payment evidence does exhibit that the Contract's term "miles" is subject to different interpretations even among Aiken Farms' and PennDOT's own employees.

Finally, testimony was presented by both Aiken Farms and PennDOT as to the meaning of the Contract's term "miles" as discussed in a telephone conversation. This conversation appears to have occurred during the bid period between Ms. Supel, the designated PennDOT contact person for the Contract, and Mr. Aiken.

Mr. Aiken testified that after he received the bid packet for the contract at issue, he contacted PennDOT regarding the mileage terms and spoke with Ms. Supel via telephone. (H.T. 19). According to Mr. Aiken, he was transferred to Ms. Supel after he asked to speak with her

because, to his knowledge, she was the contracting officer. (H.T. 19-20). Mr. Aiken testified that he called specifically to determine if the contract mileage was stated in "lane miles" because he wanted to ensure he knew the total miles of mowing required under the contract. (H.T. 20).

Ms. Supel confirmed that she spoke with a potential bidder who wanted her to specifically state whether the contract was for "center line miles" or "lane miles", but could not confirm that it was Mr. Aiken. (H.T. 171, 175). Ms. Supel testified that, during the conversation, she intentionally avoided using the terms "lane miles" or "center line miles" because this terminology was not part of the bid specifications. (H.T. 171). Ms. Supel testified that she was vigilant not to use the terms the potential bidder sought because she believed to do so would require her to notify all other potential bidders of the same information, since those terms were not part of the bid specifications. (H.T. 175). Instead of using the terms "center line miles" or "lane miles", she simply explained to her caller that the roadway lengths were in the contract and that both right and left sides of each roadway were to be mowed. (H.T. 171-72). According to Ms. Supel's testimony, the caller continually attempted to have her say either "center line miles" or "lane miles", but Ms. Supel refused to do so and only repeated the language of the specifications. (H.T. 172, 175). She also testified that the potential bidder eventually became frustrated with her and, in a different tone of voice, questioned whether Ms. Supel even knew the difference between the terms and subsequently ended the conversation. (H.T. 172).

Although the Board finds it troubling that Ms. Supel refused to clarify the ambiguous mileage term used in the Contract simply in order to avoid issuing a written clarification to all

bidders,[5] we do find her testimony regarding the telephone discussion with Mr. Aiken to be the more credible and accurate of the two versions offered by the parties. Accordingly, the Board is unable to conclude that Mr. Aiken's testimony is credible when he asserts that Ms. Supel confirmed to him that the Contract's mileage measurement was in "lane miles." To the contrary, the Board finds that Mr. Aiken had no reasonable basis to conclude that Ms. Supel was confirming his interpretation, particularly in light of the following factors: (1) Ms. Supel's mere repetition of the Contract's language and her refusal to use the terminology "lane miles"; (2) Mr. Aiken's frustration during the telephone conversation belying his supposed belief that Ms. Supel was confirming the Contract was in "lane miles"; (3) Mr. Aiken's questioning whether Ms. Supel knew the difference in terminology; (4) Mr. Aiken's personal familiarity with many of the roads to be mowed.

It is, in fact, the last aspect of this case noted above that the Board finds most curious and telling. Specifically, we note that Mr. Aiken had independent means and ample opportunity to determine the mowing distances in question. Aiken Farms also had a contractual obligation to make use of them. For one thing, the evidence presented shows that Mr. Aiken was already familiar with some of the roads to be mowed and could have readily determined the mileage involved by sampling a few of the segments identified in the Contract. Moreover, Aiken Farms had a contractual duty to undertake an inspection of the work site and confirm the miles to be mowed, but apparently did not do so. We find this inexplicable in light of the importance and uncertainty of the "miles" measurement.

The Contract at issue imposes a duty to inspect the work sites and confirm quantities of

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[5] Although it was proper for Ms. Supel to refrain from unique verbal advice to Mr. Aiken, this question should have generated a prompt written addendum to all bidders clarifying this ambiguity. We note, inter alia, that the Contract at issue specifically states questions regarding the Contract can be made to the Department via the Contracting Officer, Ms. Supel, by mail or telephone. (Mail: Dept. Ex. A, A.F. Ex. 1 (General Conditions and Instructions to Bidders for Service at Paragraph 2); Telephone: Dept. Ex. A (Service Bid Contract, Instructions to Bidders)).

work through incorporation of PennDOT Publication 408 in the Mowing Specification section.[6]

Section 102.05, as in effect at the time of bidding on the Contract at issue, states:

> 102.05 Examination of Proposal, Plans, Specifications, Special Provisions, and Site of Work – The Department's plans and specifications are complete and are prepared so any competent contractor is able to complete the proposed work. *The bidder is required to carefully examine the proposal, plans, specifications, and project site before submitting a bid. The submission of a bid will be considered proof that the bidder has made such examination and understands the conditions to be encountered;* the character, quality, and *quantities of work to be performed*; the material to be furnished; and the requirements of the plans, specifications, and proposal. *The Department will make no allowance or concession for a bidder's failure to make the required examination.*

(See Commonwealth of Pennsylvania Department of Transportation, Specifications, Publication 408/2003 at 102.105 (Initial Edition, Effective 10/1/03 as amended) available at ftp://ftp.dot.state.pa.us/public/bureaus/design/pub408).

In testimony, Mr. Aiken admitted that he did not undertake an inspection of the road segments to be mowed. He also failed to provide a reasonable explanation as to why he did not investigate the mileage – especially given his questioning of the term "miles." (H.T. 104-105).

In light of the foregoing, the Board must conclude that if Aiken Farms had inspected the road segments (or even a portion thereof) and confirmed the quantities to be mowed, as required by the Contract, the ambiguity in the Contract's term "miles" would have been clarified and there would be no reasonable interpretation on Aiken Farms' part that the Contract's 2,500.48 "miles" was "lane miles" instead of "center line miles." In fact, Mr. Aiken's testimony that he was familiar with some of the road sections contained in the Contract casts further doubt upon the reasonableness of his interpretation of the Contract's term "miles" as "lane miles" even without an inspection, since he likely would have been able to determine with even casual

[6] The Mowing Specifications specifically state: "The current Pennsylvania Department of Transportation Specifications, Form 408 shall prevail with the following supplements: Section 102: Section 102.01. Prequalification of Contractors and Subcontractors, will not be applicable to this project. Section 107: Section 107.22. Minimum Wage Specifications and Rates, will not be applicable to this project. Dept. Ex. A; A.F. Ex. 1. Other than the two subsections specifically identified, all the remaining provisions of Form 408, including section 102.05, Examination of Proposal, Plans, Specifications, Special Provisions and Site of Work, are incorporated in Mowing Specifications of the contract."

observation whether the mile measurement for a segment was straight line distance ("center line miles") or half that (as it would be if the Contract measurement was given as "lane miles"). Pennsylvania courts have held that where provisions such as 102.05 exist in public contracts, contractors are responsible for investigating the work sites and bidding accordingly. Acchione v. Commonwealth, 32 A.2d 764, 765-66 (Pa. 1943); Commonwealth, Department of Transportation v. Mitchell's Structural Steel Painting Co., 336 A.2d 913, 916 (Pa. Cmwlth. 1975).

As stated above, the Board's analysis began with our acknowledgement that the Contract "is reasonably or fairly susceptible to different constructions." Brozzetti, 684 A.2d at 663. Specifically, the Contract's term "miles", as it appears on the face of the Contract, is capable of being understood in more senses than one (e.g. as "lane miles" or "center line miles"). Moreover, the conduct of the parties in performing the Contract is, itself, conflicted and of little use in resolving this ambiguity. Id. However, despite this ambiguity in the term "miles" as written, the required site inspection (which Aiken Farms inexplicably failed to perform) would have provided Aiken Farms with actual knowledge that the Contract's term "miles" meant "center line miles", and that Aiken Farms' own interpretation of "lane miles" was unreasonable. Therefore, the Board concludes there was no ambiguity in fact as to the "mile" measurement in the Contract. Accordingly, this Contract term will not be construed against its drafter, PennDOT.[7] Therefore, the Board determines that Aiken Farms was paid, in full, the $45,633.76 amount that it was owed under the Contract and is not due a further recovery. The claim of Aiken Farms is denied.

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[7] While it is a well settled rule of construction that ambiguities in contract terms should be construed most strongly against the drafter, it is equally clear that the rule is not intended as a talismanic solution to the construction of ambiguous language. Burns Manufacturing Company v. Boehm, 356 A.2d 763, 767 n.3 (Pa. 1976). Instead, inquiry "should always be made into the circumstances surrounding the execution of the document in an effort to clarify the meaning that the parties sought to express in the language which they chose. [cites omitted]. It is only when such an inquiry fails to clarify the ambiguity that the rule of construction relied upon . . . should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document." Id.

ORDER

AND NOW, to wit, this 8th day of January, 2008, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the claim of Aiken Farms against the Commonwealth of Pennsylvania, Department of Transportation on Contract No. 08014063 is **DENIED**. Each party will bear its own costs and attorney fees.

BOARD OF CLAIMS

OPINION SIGNED

____
Jeffrey F. Smith
Chief Administrative Judge

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Ronald L. Soder, P.E.
Engineer Member