

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

SHAWNEE BEND DEVELOPMENT CO., LLC)	
Missouri Charter Number LC0014864)	
Petitioner/Developer,)	
v.)	Case No. WC-2009-0116
)	
LAKE REGION WATER & SEWER CO. f/k/a)	
FOUR SEASONS WATER & SEWER COMPANY)	
Missouri Charter Number 00149504)	
)	
Serve registered agent:)	
D & A Agency Services, Inc.)	
3145 Broadway)	
Kansas City, MO 64111)	
Respondent/Company.)	

PETITIONER'S REPLY
with MOTION TO MAKE MORE DEFINITE AND CERTAIN
and MOTION FOR PRODUCTION OF CONTRACT DOCUMENT
with SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Shawnee Bend Development Company, L.L.C., by and through the undersigned counsel, pursuant to R.S.Mo. §386.230 and the contract of the parties, and, for its Reply to the Response filed by Respondent and its Motion to Make More Definite and Certain and Motion for Production of Contract Document, states and alleges as follows:

1. **Petitioner requests an order that the Respondent provide a copy of the Contract which it would allege to be an accurate copy.** With regard to Paragraph 4 of the Response, Respondent admitted that there was a written agreement as alleged, but stated that it “denies that Exhibit 3 attached to the Notice/Petition is a full, complete and accurate copy thereof.”

In the interest of time, effort and efficiency for all, Petitioner moves and requests an order that Respondent produce a copy of the Contract which it would allege to be an accurate copy at its earliest opportunity.

2. **Petitioner did attempt “informal mediation” and submitted the dispute to, and communicated with, the “Water and Sewer Department of the PSC” regarding the contract and nonpayment in 2006 and 2007 and after consideration of the matter, the responses from the PSC staff stated that if the Respondent, Lake Region Water and Sewer Company, did not voluntarily pay, “a formal complaint would be appropriate.” (See Ex. 10 & 11).**

The Petitioner did make a good faith effort to informally submit the dispute to the PSC staff as a third party and consistent with the contract for assistance in resolving the matter. Further, it believed that it had used the informal process available from the PSC. The Contract language does not define “informal mediation,” but does specifically state that the informal and non-binding mediation is to be done by the Water and Sewer Department of the PSC, and Petitioner believes it initiated that appropriate contact. There is no clear definition in the PSC statutes or regulations which establishes any particular method, manner, process or forum for informal mediation by the Water and Sewer Department of the PSC which is applicable or available under this Contract. Further, the PSC Water and Sewer Department staff did not suggest or indicate to Petitioner that any other informal process with them was necessary or available.

One definition of “mediation” found at Dictionary.com is, *“An attempt to bring about a peaceful settlement or compromise between disputants through the objective intervention of a neutral party.”*

The Respondent has not requested, suggested, proposed or otherwise approached or participated with the PSC Water and Sewer Department regarding the matter nor has it taken any steps to seek further informal mediation from the PSC or stated to Petitioner what it alleges that informal mediation under the contract must entail. Respondent’s Response does not request or propose any further informal mediation process.

The Response provides no legal basis to support its request for dismissal based upon its allegation of no informal mediation. It simply seeks an outright dismissal of the Petition filed.

3. Respondent has waived any claim that further informal mediation must occur and should be estopped from making assertions that arbitration is premature.

In its letter of October 11, 2007 to Petitioner, (attached hereto as Exhibit 14, and incorporated herein by reference) Respondent stated that Missouri Public Service Commission is the “forum where disputes will be resolved,” and that it would “move” for “an order enforcing the choice of arbiter provision.” With such language, Respondent acknowledged that arbitration was the next step under the contract, and Respondent should be estopped from now claiming otherwise.

4. Respondent’s allegations regarding the failure of a condition precedent should not be relied upon in this forum as grounds for a dismissal of the Petition.

5. The Respondent has not identified with specificity the contract provisions regarding an obligation of Petitioner to provide documentation to Respondent which it alleges to constitute a condition precedent. Therefore, Petitioner moves and requests an order that Respondent make its Response More Definite and Certain with regard to contract language which it asserts establish a condition precedent.

6. With regard to and in general reply and to statements made in the Response in Paragraphs 11, 26, 28 regarding allegations that Petitioner has failed to provide documentation required under the Contract:

a. Those contract obligations were satisfied by Petitioner.

Petitioner again states that it has already provided the documentation required under the Contract to the Respondent Company which a former officer of the Company has acknowledged by affidavit (Ex. 7).

b. Respondent should be estopped from denying receipt of the documentation, and estopped from making a claim that the contract is unenforceable or estopped from making its claim that payment is not owed.

As stated above, the Respondent Company has acknowledged in writing that it received the required documentation. The contract does not require that Petitioner provide such documentation twice to Respondent Company.

- c. **The contract does not establish that Petitioner may not be paid because Respondent cannot now locate the documentation provided previously to Respondent.**
- d. **The provision of documentation from Petitioner to Respondent was not intended by the parties to be a condition precedent to the obligation of the Respondent to pay, and Respondent has not provided factual or legal support to establish that it was a condition precedent.**

The contract language regarding documentation was not a clear and unambiguous provision which established a condition precedent to the obligation to pay or the right to be paid. The Respondent appears to attempt to persuade the decisionmaker that there is no obligation of Respondent to pay Petitioner any amount under the Contract because of an alleged lack of documentation. Conditions precedent in contract enforcement are disfavored by the law and courts will only construe them when and if they are required to do so by plain and unambiguous language. Meco Systems v. Dancing Bear Entertainment, 42 S.W. 3d 794, (Mo. App. S.D. 2001) referencing American Drilling v. City of Springfield, 614 S.W.2d 266 (Mo. App. 1981); Kansas City Southern Ry. Co. v. St. Louis-S.F. Ry. Co. 509 S.W.2d 457, 460 (Mo 1974); Juengel Const. Co., Inc. v. Mt. Etna, Inc., 622 S.W.2d 510, 513-14 (Mo. App. 1981).

It could be helpful here to look to those cases which involved what were termed to be “pay if paid” contract provisions, and in those situations, the courts have looked to a clear intention that the subcontractor intended to assume the risk and burden of not being paid if the owner or lender did not pay the general contractor. A contractor will not ordinarily purposely agree to terms which will prohibit it from being entitled to

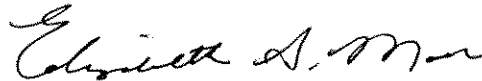
payment and in order for that risk to be shifted, the clause must unambiguously express that intention. See Meco, and cases cited.

Also in Meco, "...it is said the clause is not intended to provide the [contractor] with an eternal excuse for nonpayment..."

It is notable that none of the current representatives or officers of the Respondent were affiliated with the Respondent or involved in the agreement which was made in 1998 or during the construction, but the Petitioner's current representative is the same as in 1998 and the Respondent's former representative has given his affidavit in agreement that the required documentation has been provided by Petitioner.

WHEREFORE, PETITIONER prays for an order that denies Respondent's request that the Petition be dismissed, that requires Respondent to provide a copy of the contract(s) and attachments which it alleges to be accurate and complete, and that requires Respondent to make more definite and certain its claims of failure of condition precedent and the sources of authority therefor.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon counsel of record on this 21 day of November, 2008 by depositing same in the U.S. Mail, postage prepaid to:

Mark W. Comley
Newman Comley & Ruth P.C.
P.O. Box 537
Jefferson City, MO 65102-0537

Attorney for Respondent

And to

Shelly Syler Brueggemann
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102


Elizabeth A. Marr

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October 11, 2007

VIA FACSIMILE 1-573-374-4432

AND FIRST CLASS MAIL

Mr. Gregory D. Williams

16533 North State Highway 5

P.O. Box 431

Sunrise Beach, MO 65079

Re: Shawnee Bend Development Co., LLC

Dear Mr. Williams:

Your letter dated October 1, 2007 has been forwarded to me for response. Our office has been retained by Lake Region Water & Sewer Company in connection with the matters referred to in your letter.

Lake Region is not liable for the claims outlined in your letter. Among other things, the contractually required detail of expenditures on the referred to project has never been received by Lake Region. This is a condition precedent to any obligation for payment.

Furthermore, the contract establishes the Missouri Public Service Commission as the forum where disputes will be resolved. If suit is filed in circuit court, Lake Region will move for dismissal and for an order enforcing the choice of arbiter provision.

Sincerely yours,

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:sw

EXHIBIT

14

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