

4205

CONTRACT—COAL PURCHASED BY CITY FOR VARIOUS DEPARTMENTS—SPECIFIED MINE—ANALYSIS REQUIREMENTS—PROVISION, CITY SHALL MONTHLY PROCURE ANALYSIS BY INDEPENDENT LABORATORY—CONTRACTOR LIABLE FOR COST OF ONE MONTHLY ANALYSIS—WHEN CONTRACTOR OTHERWISE LIABLE—WHEN BONUS MAY BE LEGALLY CLAIMED BY COAL DEALER.

SYLLABUS:

1. *Where a city enters into a requirement contract for the purchase of coal for the needs of its various departments during the ensuing year, which coal is to be furnished from a specified mine to meet stipulated specifications, and therein designating the coal to be furnished during the year to each of its departments as their needs require as separate items, which contract contains a provision that the city shall monthly procure an analysis by an independent laboratory of each item furnished under the contract at the cost of the contractor and may obtain such additional analyses as it desires, the cost of which is to be borne by the contractor if the analysis shows that the item does not equal the specifications, the contractor is liable only for the cost of one monthly analysis even though, at the direction of the city, portions of the coal are delivered to different locations.*

2. *Where the specifications of the contract designate the British*

thermal unit, the ash, sulphur, volatile matter and inherent moisture content and minimum ash fusion temperature; and an additional analysis shows the ash fusion temperature below or not equal to the specifications, the contractor under such agreement is liable for the cost of such analysis.

3. When such city, having so contracted, enters into a contract with an analytic laboratory to take daily samplings from each designated point of delivery, twice each month to make analysis of a composite of such samples so collected for surface moisture, inherent moisture, ash, sulphur and B. T. U. content and a monthly determination from a composite of such samples with respect to each delivery point for a lump sum of two hundred fifty dollars, it may not, under the terms of the requirement contract, legally compel the contractor to pay such sum so contracted to be paid to the analysis company.

4. Where, in a contract between a city and a coal dealer, certain minimum specifications for the coal to be furnished thereunder are set forth, and thereafter, in such contract, it is provided that the city is to pay a bonus to the contractor, measured by the excess B.T.U. contained therein above the specifications, "provided the coal so delivered is otherwise in accordance with these specifications," no bonus can be legally claimed if the coal furnished analyzes with respect to any minimum specification element lower than the specified minimum even though the analysis shows the B.T.U. in excess of such minimum.

Columbus, Ohio, September 17, 1941.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I am in receipt of your request for my opinion concerning the following proposition:

The city of C purchases the coal used for its municipal purposes by virtue of a "requirement contract" under which it agrees to purchase the coal needed by it for such purposes during the year succeeding the date of such contract upon the terms therein specified. Such contract for the year 1938-1939 contains the following provision, among others:

“LABORATORY TESTS. — The City of C reserves the right to test all supplies delivered during the life of the proposed contract, at an independent laboratory to be designated by the Commissioner of Purchases and Supplies of the City of C. This laboratory test shall include each item of the specifications to determine whether the supplies delivered are in conformity therewith. Tests shall be made on supplies selected at random from deliveries made under the proposed contract or contracts. There shall be one test of each item in each calendar month of the contract period and the expense of such test shall be borne by the contractor (the bidder in this proposal). The City of C also reserves the right to make such further or additional tests of supplies during the period of the contract as may be deemed advisable by the Commissioner of Purchases and Supplies. Where the result of such test shows that the supplies delivered are not equal to the specifications, then the expense of making such test shall be paid by the contractor (the bidder in this proposal.) If the result of any additional test (over and above the tests required for each calendar month) shall show that the supplies delivered and tested conform to the specifications, then and in such case the expense of making such test shall be paid to the City of C.”

The contract contains minimum specifications concerning the analysis of the coal to be furnished and provides that “all coal delivered under this proposal must conform to the following analysis.” Then follow specifications concerning the

1. Percentage of moisture.
2. Percentage of ash.
3. Percentage of sulphur.
4. Number of British thermal units (B.T.U.) per pound of coal.
5. Degree of ash fusion temperature to be present in the coal furnished.

Such city has entered into a contract with an independent laboratory to make tests concerning the above mentioned coal specifications with reference to the coal purchased for its Department of Water and Heat, which, in so far as seems material, you have summarized as follows:

“Chemical analysis — for percentage of moisture, ash and sulphur — Two to be made each month at each of the city’s three plants; one on the first and one on the fifteenth of each month, based on a composite sample of samples gathered daily during the preceding half month. Ash fusion temperature determination — one to be made each month, based upon a composite sample of all daily samples collected during the preceding month.

Such contract further requires the laboratory to take daily samples from each of the city's three stations."

The contract with the independent laboratory provides that the compensation for such services shall be two hundred and fifty dollars per month as follows:

"(a) Daily samplings at Fairmount, Kirtland and Division Stations, from which a composite sample shall be prepared for each station on the 1st and 15th of each month, to be analyzed for surface moisture, inherent moisture, ash, sulphur and B.T.U. determinations; also a composite determination of fusing temperature of ash for each station once each month, for the sum of TWO HUNDRED FIFTY (\$250.00) DOLLARS per month.

(b) For each additional analysis for determination of surface moisture, inherent moisture, ash, sulphur and B.T.U., SEVEN DOLLARS AND FIFTY CENTS (\$7.50) per analysis; for fusion temperature of ash of the same sample, FIVE (\$5.00) DOLLARS additional."

The laboratory, in billing the city, itemizes its monthly bill as follows:

1. Chemical analysis: 2 at each of 3 stations — 6 at \$7.50....	\$45.00
2. Ash fusion temperature determination — 1 at each of 3 stations — 3 at \$5.00.....	15.00
3. Daily sampling at each of 3 stations.....	190.00
	Total
	\$250.00

In view of such facts, you inquire as follows:

"1. When two chemical analyses are made in one month, which is the one chargeable to the contractor and which is the 'additional' test?

2. Is the ash fusion temperature determination which is based on coal received during the *whole* month, a part of complete tests for each half-month? In other words, if the ash fusion temperature determination is below specifications, would this alone make the contractor liable for the cost of 'additional' tests?

3. Who is liable for the cost of the ash fusion temperature determination?

4. If the coal contract contains only one item, covering deliveries of coal from the same mine to all three stations, is

the contractor liable for the costs of tests at all three stations or only at one? If at one station only, at which one?

5. Some contracts contain 3 items; each of these items cover delivery of coal to one of the three stations; the coal is of the same grade and all from the same mine. Under this type of contract, is the contractor liable for the cost of tests at all three stations or only at one? If at one station only, at which one?

6. Some City of C contracts contain this clause:

'54. *BONUS*: The City of C will award the proposed contract or contracts only for coal that is known to be equal to or can be expected to be equal to the minimum quality herein specified; but because it is impossible to deliver coal to any exact analysis, the City of C will pay a bonus or premium for any coal delivered hereunder in which the B.T.U. per pound exceeds the requirement stipulated herein, provided the coal so delivered is otherwise in accordance with these specifications. The bonus to be paid for such coal is as follows:

I — *SCHEDULE OF BONUS ON GRADE "A" COAL*:

<i>B.T.U.</i>	<i>BONUS</i>
(13800-14000)	
14001-14200	2.5c
14201-14400	5.0c
14401-14600	7.0c

II — *SCHEDULE OF BONUS ON GRADE "C" COAL*:

<i>B.T.U.</i>	<i>BONUS</i>
(12800-13000)	
13001-13200	2.0c
13201-13400	4.0c
13401-13600	6.0c

The City of C pays for its coal on a semi-monthly basis, that is, on the basis of the chemical analysis made each half-month. Can a bonus be paid on coal received during either half of a month, when the ash fusion temperature determination for that month was below specifications?

7. If a bonus is payable under the conditions stated in No. 6 above, is it payable for either half-month or for both?"

Your inquiry involves a single proposition — What is the proper interpretation or construction of Item 26 of the written contract between the city of C and the coal dealer?

As stated in 4 Page on Contracts, 2d Ed., Section 2021:

“The primary object of construction in contract law is to discover the intention of the parties, as it existed at the time that the contract was made. The courts should give to a contract such construction as fair-minded men of ordinary intelligence would give to it. It is not the actual secret intention of the parties to the contract, which the court is to ascertain, but it is the intention which the law attaches to the words which they have used, when read in connection with the surrounding facts and circumstances.”

The contract must be construed as a whole and not by isolated statements or paragraphs. Every provision therein contained must, if possible, be given some effect, even though by so doing the effect is to limit some other provision. See:

Gibbons v. Metropolitan Life Insurance Company, 62 O.App., 280;

Legler v. United States Fidelity etc. Company, 88 O.S., 336;

Stein v. Steamboat Prairie Rose, 17 O.S., 471;

German Fire Insurance Company v. Roost, 55 O.S., 581;

Comstock Amusement Company v. Opera Ball Company, 93 O.S., 46.

The words of a contract are to be construed and interpreted in accordance with their common, ordinary and usual meaning (Cohn-Hall-Marx Company v. Vanesdall, 25 O.App., 360; New Amsterdam Casualty Company v. Johnson, 91 O.S., 155), unless the context clearly shows that they were used in some other sense. However, when a term is used, which has a technical legal sense, well understood in the business to which it relates, the court will presume it to have been used in that sense in the context unless the context clearly shows that it was used in some other sense. Thomas v. Mathews, 94 O.S., 32; Central National Bank v. Bennett, 33 O.App., 396; Cincinnati Insurance Company v. Duffeld, 6 O.S., 200.

In paragraph 26 of the contract, above quoted, the language of the contract is unambiguous in providing that the city of C shall have made one laboratory test per month by an independent laboratory, to be selected by it, of each item of the contract to determine whether the article or articles delivered conform with the specifications of the contract. The language of such paragraph or article of the contract is also definite to

the effect that the cost of such independent monthly laboratory tests is to be paid by the contractor. The provision of the contract is that the city may have such additional tests made as it deems advisable, but that the cost of such tests is not to be borne by the contractor unless the result of the test so conducted shall show that the article or articles furnished by the contractor do not comply with the minimum specifications contained in the contract.

The meaning of the term "item" as used in such provision of the contract is clarified by reference to paragraph "33" of the contract, wherein the ten items to be furnished by the contractor are defined. "Item 1" is there defined as "Grade 'C,' 2" nut and slack" to be delivered to the three stations of the Department of Water and Heat, which are the ones concerning which you inquire. The remaining nine items define the type of coal to be delivered elsewhere under the "requirement contract."

In paragraph "36" of the contract, the minimum analysis requirements are set forth for "item 1" coal, as follows:

"B.T.U. (dry basis)	12,800 or over
Ash	12% or less
Sulphur	4% or less
Volatile matter	30% or over
Moisture — Inherent	2% or less
Ash fusion — minimum	2050° F."

The language of the contract authorizes the city to procure an analysis from an independent laboratory to determine whether the coal being furnished to the three stations of the Department of Water and Heat comply with the minimum specifications above quoted; that is, one complete monthly analysis is to be made to determine whether the specifications are being met with respect to each element above mentioned. The contract, as above stated, provides that the expense of each additional analysis is to be borne by the city unless the analysis shows the coal to be defective as to one or more of the agreed minimum specifications.

An examination of the contract between the city of C and the laboratory concerning the analyses of the items of coal to be furnished under the

“requirement contract” reflects that such agreement sets forth an “entire contract” for the services of the laboratory to make daily samplings at each of the three stations of the Department of Water and Heat and to make composite samples therefrom twice per month and analyze the same twice each month for surface moisture, inherent moisture, ash, sulphur and B.T.U. determinations and to make a determination once each month with respect to each of the three stations as to the fusing temperature of ash with respect to the samples so collected, at a single consideration of \$250 per month. The contract further provides that if additional analyses are required by the city, the consideration therefor shall be seven dollars and fifty cents for the analysis with respect to surface moisture and inherent moisture, ash, sulphur and B.T.U. content, and with respect to fusion temperature of ash, the sum of five dollars.

Since the contract price for tests beyond those specifically contracted for does not include the cost of collecting the samples but rather contemplates tests to be made from samples for which the laboratory will have been paid under its monthly regular compensation, it is evident that you have not submitted to me sufficient data from which I can compute the cost of making the routine monthly analysis regularly chargeable to the coal dealer under the terms of his contract. Since the compensation figure used in the contract with the analysis laboratories is not alone for the services which the contractor has agreed to pay but includes compensation for additional services and there is nothing in such contract which designates the cost of a single regular monthly analysis, it is impossible from the facts presented to give a categorical answer as to the amount to be paid by the contractor for a single monthly analysis as contemplated by paragraph 26 of his contract.

It must be borne in mind that the obligations of a party to a contract with reference thereto must be determined from the language of the contract itself. Since the obligation of the coal contractor must be determined by his contract and not from a subsequent contract entered into by the city of C with some other person, I am of the opinion that such contractor is only liable for the cost of one complete analysis of a sample taken during such month, which analysis should determine the B.T.U., ash content, sulphur content, percentage of volatile matter, inherent moisture content, and ash fusion temperature of the sample of the coal delivered during such month. It would seem to be immaterial as to the delivery point from which such sample was procured, in view of the

facts that all the coal delivered to the three stations referred to constitute but a single item of the "requirement contract" and the further fact that all of the coal is, pursuant to the terms of the contract, to be obtained from one mine — the "Norton Mine." However, if the city elects to make additional tests or analyses of the coal and in any one or more such analyses it is determined that the coal delivered and tested did not equal the specifications of the contract, then, under the terms of the contract submitted, the cost of such particular analysis is to be borne by the contractor.

In respect to the bonus provisions of the contracts in question, referred to in your sixth and seventh inquiries, you will observe the following language in the promise of the city of C to pay the bonus: "will pay a bonus or premium for any coal delivered hereunder in which the B.T.U. per pound exceeds the requirement stipulated herein, *provided the coal so delivered is otherwise in accordance with these specifications.*" The terms of the promise are that the bonus is to be paid only if the coal delivered meets with all of the specifications contained in the contract, including: grade, size ash, sulphur and volatile matter, inherent moisture content and ash fusion minimum temperature specification, but exceeds the B.T.U. specification in the proportions specified.

The method of payment for the items of coal purchased pursuant to the requirement contract is set forth in paragraph 22 thereof as follows:

"Payment shall be made for the net number of units accepted at the price bid per unit. The City will pay within thirty (30) days after due and proper delivery, accompanied by invoice, for all merchandise purchased under this proposal, with the following exceptions: that on all proposals for supplies which call for periodic deliveries, the Commissioner of Accounts will cause to be prepared monthly estimates of such quantities delivered, and such estimates shall become payable within twenty (20) days after the monthly period. If public necessity requires the use of any commodity which is subsequently found not to comply with the specification requirements, the City will make such deductions as the City shall determine to be the difference in value, based upon the results of analyses, tests or examinations."

Under the terms of such contract, it appears that it was contemplated that the month was to be considered as the unit for payment. Such is further indicated by the fact that monthly tests or analyses are required. It, therefore, appears that even though the B.T.U. content for the month

or a part thereof was in excess of the minimum specification requirement but that the ash fusion temperature for the month was below the minimum specifications for that month, then no bonus is agreed to be paid during any part of such month. In view of such conclusion and further in view of the fact that you state that the ash fusion tests are made monthly, it becomes unnecessary to consider your seventh inquiry.

Specifically answering your inquiries, it is my opinion that:

1. Where a city enters into a requirement contract for the purchase of coal for the needs of its various departments during the ensuing year, which coal is to be furnished from a specified mine to meet stipulated specifications, and therein designating the coal to be furnished during the year to each of its departments as their needs require as separate *items*, which contract contains a provision that the city shall monthly procure an analysis by an independent laboratory of each *item* furnished under the contract at the cost of the contractor and may obtain such additional analyses as it desires, the cost of which is to be borne by the contractor if the analysis shows that the item does not equal the specifications, the contractor is liable only for the cost of one monthly analysis even though, at the direction of the city, portions of the coal are delivered to different locations.
2. Where the specifications of the contract designate the British thermal unit, the ash, sulphur, volatile matter and inherent moisture content and minimum ash fusion temperature; and an additional analysis shows the ash fusion temperature below or not equal to the specifications, the contractor under such agreement is liable for the cost of such analysis.
3. When such city, having so contracted, enters into a contract with an analytic laboratory to take daily samplings from each designated point of delivery, twice each month to make analysis of a composite of such samples so collected for surface moisture, inherent moisture, ash, sulphur and B.T.U. content and a monthly determination from a composite of such samples with respect to each delivery point for a lump sum of two hundred fifty dollars, it may not, under the terms of the requirement contract, legally compel the contractor to pay such sum so contracted to be paid to the analysis company.
4. Where, in a contract between a city and a coal dealer, certain

minimum specifications for the coal to be furnished thereunder are set forth, and thereafter, in such contract, it is provided that the city is to pay a bonus to the contractor, measured by the excess B.T.U. contained therein above the specifications, "provided the coal so delivered is otherwise in accordance with these specifications," no bonus can be legally claimed if the coal furnished analyzes with respect to any minimum specification element lower than the specified minimum even though the analysis shows the B.T.U. in excess of such minimum.

Respectfully,

THOMAS J. HERBERT,

Attorney General.