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Supreme Court of Texas.
El Paso Field Services L.P. and Gulfterra South Texas L.P.
v.
MasTec North America Inc., et al.
No. 10-0648.

January 11, 2012.

Appearances:

Murray Fogler and David M. Gunn of Beck, Redden & Secrest, LLP, for Petitioners.

Kevin Dubose of Alexander Dubose & Townsend, LLP, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter, 10-0648, El Paso Field Services v. MasTec North America.

MARSHAL: May it please the Court, Mr. Fogler will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF MURRAY FOGLER ON BEHALF OF THE PETITIONER

ATTORNEY MURRAY FOGLER: May it please the Court, I have three points that I would like to make in my argument today, but before I get to these three points, there's a very important factual matter, a misconception, I believe, that the court of appeals seemed to have held that I would like to dispel. This is a pipeline construction case. I represent the owner of the pipeline. The misconception seems to be that the owner was in possession of some superior information than had been provided to all of the bidders.

JUSTICE EVA M. GUZMAN: Was there a second pipeline, though, that would have revealed the almost 750 crossings that weren't reflected in the 250 count that was in the bid documents.

ATTORNEY MURRAY FOGLER: There was, yes, there was a second pipeline, but no, it would not have revealed the additional foreign crossings because it, too, like the old line that was being replaced was ancient. It was very old and the materials that El Paso inherited as a result of acquiring Coastal, when it got these two pipelines was old and it did not reveal all of the lines that had come in.

JUSTICE EVA M. GUZMAN: They weren't in the alignment sheets for that second pipeline?

ATTORNEY MURRAY FOGLER: That is correct.

JUSTICE EVA M. GUZMAN: Okay, and what about the O'Connor Ranch and as far as being in the superior position. Was it the O'Connor Ranch that they couldn't go on?

ATTORNEY MURRAY FOGLER: Well,, there was a dispute in the records, Your Honor, about whether they were permitted to walk or drive through the O'Connor Ranch. The problem here though, frankly, was that neither side was going to be in a position to discover all of the plastic lines that were not detectable by the device that both sides used in order to find these foreign crossings. So neither side was in a position even walking or driving or flying over the route of the pipeline to discover all of these pipes. So my point is that everybody started with an equal footing. Everybody knew and by everybody, I mean all of the bidders who put out bids for this particular project, understood that the due diligence, if you will, that El Paso had done, consisted of hiring a third-party surveyor to go out and map the route and use this metal detection device to find the lines.

JUSTICE DEBRA H. LEHRMANN: May I ask-

JUSTICE EVA M. GUZMAN: But they still missed 208 metal pipe crossings, you know, so I mean shouldn't the companies be able to expect that El Paso would hire a surveyor that did a good job?

ATTORNEY MURRAY FOGLER: Yes, and of course, there was a dispute, again, in the evidence about how many and we don't dispute that there were a number of, perhaps an excess number of metal lines and plastic lines that were not discovered.

JUSTICE EVA M. GUZMAN: About a quarter of them, about 20 or 25% if it's 208 out of 1000, right?

ATTORNEY MURRAY FOGLER: Well,, it wasn't really 1000, but your point is well, taken, but my point is whether we exercise diligence or not, we did not know about those lines at the time we put this out for bid.

JUSTICE EVA M. GUZMAN: But I guess the question is, were you in a better position to know?

ATTORNEY MURRAY FOGLER: Well,, that would matter if there were not provisions specifically in the contract that dealt with this particular point.

JUSTICE DEBRA H. LEHRMANN: And that's what I want to ask about. If the notwithstanding language of the contract is controlling and all the risks were borne by MasTec, then what was the purpose of the diligence provisions in the contract?

ATTORNEY MURRAY FOGLER: The purpose, that's an excellent point. This is the contract. It's quite thick and it's divided into a number of different parts. There's the main body of the contract that sets out the pricing terms, the warranties, the terms for extra compensation, those types of terms at the beginning of the contract. The specifications that is an exhibit to the contract and indeed, part of the contract, sets out El Paso's guidelines for how it wants the contractors to actually perform the work. The two provisions, these two diligence provisions, one of them is in the ditching part and the other one is in the horizontal directional drilling part. It is telling the contractor to be concerned about, to protect against and to locate all of the foreign crossings and it tells them here is a limit of what we are going to do, what we the owner. We are going to have exercised diligence to give you what we know, but it is part of your job, it is the scope of the contractor's work to locate and protect against all of the foreign crossings.

JUSTICE EVA M. GUZMAN: So in your brief, you point to the restatements and you contend that they had

business purposes and that that was the purpose of the due diligence provisions. So what are those business purposes because you didn't talk about that? You just pointed to the restatement and said, they had business purposes.

ATTORNEY MURRAY FOGLER: The purpose, again, is to advise the contractor that it is part of its job and that there is a limit on what the owner is going to do.

JUSTICE EVA M. GUZMAN: Well,, I guess you were responding to the assertion that that would render this particular provision of the contract meaningless and that we have to interpret the contract to give meaning to everything so you discuss the restatement and say they have business purposes. Today, is that what you contend the purpose of the due diligence and if so what is the business purpose?

ATTORNEY MURRAY FOGLER: You have to put it in the context of the entire group of specifications that are part of the contract because it tells the contractor for each aspect of the job, fencing and grading and ditching and every other aspect, here are some guidelines that we want you to use in order to perform the work. It is not a guarantee on the part of El Paso. It is not a pricing mechanism to permit the contractor to submit claims for additional work or an additional cost. It is simply a guideline to tell the contractor here is what we're going to go, but here is what is part of your job.

JUSTICE DAVID M. MEDINA: Let's talk about all the risk and what does that actually mean? I look at it like an insurance policy. This policy or this contract covers everything and you assume all the risks except whatever the exclusions may be. So are there any exclusions here to limit that language?

ATTORNEY MURRAY FOGLER: Actually, there are no exclusions in this provision and again, I want to focus on where that is placed in the contract. It is in the warranty provisions of the contract and the warranties run only from MasTec to El Paso and they say MasTec represents that. It understands what it's getting into and it's going to assume in connection with its work, I mean what I understand the arguments that were made in MasTec's brief about well, we don't assume the risk of acts of God or bad weather and that sort of stuff, but in connection with anything that's within the scope of MasTec's work, and that includes any of these foreign crossings, they assume all of the risks and they agree that they are going to do the work for the compensation that's stated in the contract.

JUSTICE EVA M. GUZMAN: Is the all-risk provision that governs obtaining materials and acts of God and those sorts of things, is that the same provision that encompasses the risk of the unknown foreign crossings? Is it in the same part of the-

ATTORNEY MURRAY FOGLER: And if so then how do you exclude these risks, obtaining materials and delays caused by weather, etc., so how do we find those exclusions, but not the one for the foreign crossings?

ATTORNEY MURRAY FOGLER: Well,, there are provisions in the main body of the contract that deal with, for example, delays caused by El Paso or delays caused by weather.

JUSTICE EVA M. GUZMAN: I'm really focusing on the all-risk provision because that's what you focused on and your assertion is that that means that they assume every risk that could possibly be associated with this contract, yet you agree that there are some risks that they don't assume under that all-risk provision. So why is it that under that same provision, they have to then, it has to include the foreign crossings? It's just not logical.

ATTORNEY MURRAY FOGLER: Because the parties knew exactly how to state specifically when there was going to be some exception. For example, on the delay provision, this is in Article 4.6 of the contract, all delays in the performance of the work resulting from causes other than those attributable to companies shall be at cost and expense of the contractor. They knew how to say that. That's not how they handled this due diligence provision in the specifications in the ditching part of the specs. They didn't say, here's the consequence if there hap-

pened to be more foreign crossings than we disclosed in our drawings. It didn't say you can come back and seek additional compensation if it turns out that we were wrong. In fact, it says, exactly the opposite of that in these risk allocation provisions that we cited in the contract.

JUSTICE DALE WAINWRIGHT: Mr. Fogler, let me see if I can get a handle on what you believe your duties, your client's duties were as the owner, who contracted with MasTec to build this pipeline, take out the old one, put a new one in. As has been discussed, there's all-risks provisions in the contract that say MasTec undertakes all risks, all risks. Then there's the due diligence provision, which has been pointed out, that says, your client had to exercise due diligence in locating foreign pipelines and utility lines' crossings. So obviously, your client could exercise due diligence and not find all of the crossings, but if exercising due diligence and some were found, you still satisfied your duty, but the jury found that your client had not exercised due diligence. It breached the contract in that provision. So what is your duty compared to MasTec's duty when you have an all-risk provision and you have a due diligence provision as well? Just succinctly, what is your duty and it may flow from the language or the structure of the contract or both, but I'm not clear on what you believe your client's duty is.

ATTORNEY MURRAY FOGLER: Our position, Your Honor, is that there's not really a conflict between these two provisions because the due diligence is not, in fact, a representation or warranty on our part and it's certainly not a guarantee on El Paso's part, just as Justice Jennings said, in his dissent. If there is a conflict, though, it is reconciled by the language of the all-risk provision that says, notwithstanding anything else we have said, in this contract and we are telling them, you asked what our duty was. Our duty is merely to have exercised due diligence. That's it. If we did not, though, we have told them not once, but twice, that we are not going to suffer the consequence of that. Everybody knows that when you're dealing with an old pipeline and you're dealing with old oil fields that the risk of underground surprises is the biggest risk that they got.

JUSTICE EVA M. GUZMAN: Well, but generally in the industry though is 10 to 15% about what's allotted in these contracts for that risk of unknown foreign crossings? Is that pretty standard?

ATTORNEY MURRAY FOGLER: Well, there certainly was testimony to that effect by the MasTec people.

JUSTICE EVA M. GUZMAN: Do you dispute that?

ATTORNEY MURRAY FOGLER: Well, not necessarily, but look at what the other bidders who looked at the same drawings and the same route of the pipeline and they came up with two to four times as much as MasTec.

JUSTICE EVA M. GUZMAN: It was a great deal for El Paso because they represented 250 crossings. There were really 1000. They got someone to bid this at 250 with 10 to 15% risk allotment in there and then it turns out that it cost what, \$4 million almost, 50%?

ATTORNEY MURRAY FOGLER: You can put it that way, Judge. Yes, it was a good deal for us, but the evidence was that we were very concerned about MasTec's bid and we called, them in and said, look, we don't think you can do it for this job.

JUSTICE EVA M. GUZMAN: That was disputed at trial though, right?

ATTORNEY MURRAY FOGLER: It was, yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was the contract drafted before the bids went out or is it true that once you saw how low the bid was in comparison with the others, that's when this provision, the notwithstanding provision was written. How did that work?

ATTORNEY MURRAY FOGLER: The contract was part of the bid package. It had already been drafted and so

it told the contractors who were bidding that we want a lump sum bid and it's going to be all inclusive and you better make sure that it covers everything that you think you're going to find.

JUSTICE DALE WAINWRIGHT: So as to the duty, if I could circle that around and close that loop, it sounded like you were saying that even if El Paso did not exercise due diligence, the notwithstanding provisions of the contract relieved you from liability?

ATTORNEY MURRAY FOGLER: Absolutely.

JUSTICE DALE WAINWRIGHT: So the jury finally recognized, but under the contract, it should have been-

ATTORNEY MURRAY FOGLER: It was immaterial. We objected to even submitting an issue because this language overrode any lack of diligence.

JUSTICE PAUL W. GREEN: So the petition asserted fraud claims as well, as breach of contract and yet it wasn't submitted. Does that mean that because there was no evidence to support a fraud claim?

ATTORNEY MURRAY FOGLER: Well, I'm not sure I can answer why MasTec elected at the time not to submit those issues and we're not dealing with a situation here where you have certain legal or public policy reasons to avoid the language of this contract. We're not dealing with Forest Oil or Italian Cowboy or those kinds of things. This is not a fraudulent inducement case. We have to apply the contract as it is written and the court of appeals didn't think that it was reasonable or equitable, but that is how it is written and that is how it needs to be enforced.

JUSTICE EVA M. GUZMAN: May I ask you one final question? You didn't challenge the jury's finding that you breached the contract and the due diligence provision.

ATTORNEY MURRAY FOGLER: We simply said, it was immaterial.

JUSTICE EVA M. GUZMAN: And so the due diligence provision, did it impose a contractual obligation on you, yes or no?

ATTORNEY MURRAY FOGLER: No.

JUSTICE EVA M. GUZMAN: Okay and if it did, the consequence for breach is?

ATTORNEY MURRAY FOGLER: There is no consequence for breach in this contract.

JUSTICE EVA M. GUZMAN: I just want to make sure that's your position that you had a contract, that you dispute you had a contractual obligation, but even if you did, there's no consequence for the breach?

ATTORNEY MURRAY FOGLER: That is correct.

JUSTICE EVA M. GUZMAN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Fogler. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Debose will present argument for the Respondents.

ORAL ARGUMENT OF KEVIN DUBOSE ON BEHALF OF THE RESPONDENT

ATTORNEY KEVIN DUBOSE: May it please the Court. The key to interpreting this contract so that both the due diligence clause and the assumption of risk clause both have meaning is to understand that those clauses are addressing very different things. Those clauses are sent out in the bench exhibit that I filed yesterday and they set forth the language of those contracts and they highlight in boldface what those clauses pertain to. The due diligence clause addresses a very specific term of art that is well, understood in the pipeline industry. We've been abbreviating it in the briefing in most of the trial as foreign crossings, but the phrase that is actually used is foreign pipelines and utility crossings. That's used four times in these two paragraphs, a very specific industry term that imposes a due diligence obligation on El Paso to look for those things. The other clauses, the assumption of risk clauses, talk about general topography, accessibility in structure, soil structure, subsurface conditions, obstructions and conditions pertaining to the work, which are very general terms. Nowhere in that list of terms do you find the words foreign pipelines and utility line crossings even though it's a well,- understood term of art that was used in the due diligence provision, it's not used here. I think there are three differences between the two terms or groups of terms that we're talking about. First of all, the terms used in the assumption of risk provision all describe physical conditions, soil conditions, obstructions, physical things in the ground, which you might not know about because they're underground whereas the due diligence provisions when talking about foreign pipelines although they certainly have a physical manifestation, they are also talking about a bundle of legal rights, easements. Now that's significant because those underground physical conditions are both unknown to the parties and unknowable until you get in and start drilling. The foreign pipeline crossings and utility line crossings, however, may be unknown to the parties, but they're not unknowable. You can discover most of them through due diligence and El Paso was talking about how we didn't really weren't in a better position to know. There was extensive evidence at trial about the ways in which they could have found this. Not only the files that they maintain on their pipelines, which they said, we inherited bad files from Coastal, that may be, but you also had parallel pipelines that would have shown the same foreign crossings. There was another pipeline owned by Valero that was a parallel pipeline and Valero had a person on the site at all times with drawings and there was testimony that his drawings did show most of those foreign crossings.

JUSTICE DEBRA H. LEHRMANN: Are you saying that-

JUSTICE EVA M. GUZMAN: What obligation does the, excuse me, what obligation does the contractor have though to investigate the number of foreign crossings and to ask for more documents and to make appropriate inquiries so that when they bid, they've done some due diligence of their own, quite frankly?

ATTORNEY KEVIN DUBOSE: Sure. The due diligence provisions both address that very specifically and it is a quid pro quo with a mutuality of obligation. It says that, El Paso will have exercised due diligence in discovering the foreign line crossings and the utility crossings so that's their duty, which they violated and that hasn't been challenged on appeal. The next sentence is about those paragraphs then say that MasTec, once they get out there in the field and they start their work, they have a duty to verify those crossings that have been identified and not to damage the crossing pipelines and utilities and if they do damage the foreign crossings, then they're responsible for that. Let's say the responsibilities are divided. MasTec has to exercise due diligence in finding them and telling us about them, but once we get out there, we have to then exercise due diligence and finding what's really under the ground and if we do any damage, then we're responsible for that.

JUSTICE DEBRA H. LEHRMANN: And where does discoverability fall within that as far as what's actually possible to be discovered and who's in the best position? Where does that play in this?

ATTORNEY KEVIN DUBOSE: I'm not sure I understand your question, Your Honor, except that it-

JUSTICE DEBRA H. LEHRMANN: I mean as far as one of the parties or the other being in the best position to be able to discover what problems there are, where does that play? How does that play?

ATTORNEY KEVIN DUBOSE: Certainly, the evidence was undisputed that El Paso was in a superior position to discover those things because the parallel crossings with their own pipeline, with Valero's pipeline, the ability

to communicate with neighbors all that sorts of thing and that superior ability to know is why the due diligence responsibility was assigned to El Paso and not to MasTec.

JUSTICE DEBRA H. LEHRMANN: That's what I'm asking.

ATTORNEY KEVIN DUBOSE: Right.

JUSTICE DEBRA H. LEHRMANN: Is that the distinguishing-

ATTORNEY KEVIN DUBOSE: Right. Right And in all the cases that El Paso relies on, the situation was the opposite. There were cases in which there was a contractor and owner often plans made by an architect or an engineer and the courts held that the contractor was in a superior position to the owner to know that the plans were deficient. That's not true here.

JUSTICE EVA M. GUZMAN: That Lonergan case and it's progeny notwithstanding, shouldn't parties be free to contract and allocate risk appropriately, particularly when this risk is inherent in this type of work?

ATTORNEY KEVIN DUBOSE: Yes, they are and our position is that they did in this case. They delineated those risks and we're trying to interpret the contract so that both those provisions have meaning and it's El Paso that wants to take the position, that one of them is pretty much completely meaningless.

JUSTICE DALE WAINWRIGHT: Mr. Debose, in the provisions where MasTec warrants in El Paso, there's some additional language that says, MasTec has to make sure it's familiar with the local and special conditions under which the work is to be performed. It's to make all investigations essential to a full understanding of the difficulties which may be encountered and then says, assumes full and complete responsibility for any such conditions. That's very broad isn't it?

ATTORNEY KEVIN DUBOSE: It is broad and that's part of our point. This Court's jurisprudence is clear that in a contract, the specific provisions prevail over the broad. In the specific provision here, which uses the term, of art about foreign pipelines and utility crossings says, it's their responsibility. The broad language says that, we have to conduct a physical inspection, which we did. We both flew over the property and drove over it, but you could fly and drive over it 100 times and that wouldn't help you with the foreign crossings. It's a matter of legal rights, which El Paso was in a far superior position to us to discover. Let me talk about a couple of other differences between the foreign crossings and the physical obstructions that were in the land. As I talked about not only the different languages, but one is knowable by due diligence and the other one isn't. The other difference is and it makes a big difference in the practical effect of laying this pipeline. If you discover these other kinds of physical obstructions, what you need to do is either drill through it or remove it, but somehow, you take care of that obstruction and you keep laying your straight pipeline, which is the way that you efficiently lay pipe. With the foreign crossings, however, because there's somebody else's legal rights involved, you can't just plow through the foreign crossing. You have to stop and work around it. You do a tie-in. There are at least two, sometimes three different wells and that takes 10 hours on the average to do that and when you have to do that 1000 times and 750 of them are unanticipated, it dramatically affects the cost of the work. There was also testimony that there are a number of different teams involved in pipeline construction that have to be sequenced with each other, if you discover an unrevealed foreign crossing, all those are put on hold.

CHIEF JUSTICE WALLACE B. JEFFERSON: Could an owner draft a contract that would relieve it of all liability for all foreign crossings and if so how would that have been done other than to say notwithstanding anything else we say in the contract, you're responsible for everything?

ATTORNEY KEVIN DUBOSE: The way that they could have drafted this contract so that they didn't assume the responsibility of foreign crossings is just to use those words and the parts of paragraphs 7.1 and 8.1 where they say you're responsible for general topography, soil structure, substructure conditions, etc., all they had to

do was insert in that series of phrases foreign pipeline crossings and utility line crossings and they were familiar with those terms. They used them elsewhere in the contract, but they do not appear here.

JUSTICE DALE WAINWRIGHT: And the language that says, anything in the contract documents or any representations or information furnished by El Paso notwithstanding, MasTec still assumes all responsibility, still doesn't get them there in your opinion? Because this is information we're talking about, right?

ATTORNEY KEVIN DUBOSE: Sure. I've done a lot of thinking and researching about the word notwithstanding.

JUSTICE DALE WAINWRIGHT: I'm glad you have.

ATTORNEY KEVIN DUBOSE: You have to. There's not a lot of jurisprudence on it, but let me share with you what I found and what my thoughts are. The Helmerich case that is relied upon by El Paso is a situation where there were two contract provisions that were squarely in conflict. The notwithstanding clause there said, notwithstanding anything to the contrary contained herein and that opinion said, when you have clauses that say notwithstanding anything else in this contract to the contrary, that means that if you have two contractual provisions that are squarely in conflict, then you have to choose one over the other. That means the one that follows the notwithstanding clause wins and that makes sense. This is not one of those situations. As I say, they address different terms and they're not in conflict. So what do you do in that situation? I would direct the Court's attention to a case and I apologize, this is not in my brief. I will be happy to follow up with supplemental letter, but I will go ahead and give the Court the name and the cite of the case. It's Wells Fargo Bank of Minnesota v. North Central Plaza I, the cite is 194.SW3rd 723. That case involved the interpretation of the deed of trust. There was a deed of trust. Then it was in default so the bank took over this building in Dallas and starting before the foreclosure, but finishing after, there was a condemnation proceeding of a little strip of land that was used by the state in a big highway interchange. There were a couple of different clauses in the deed of trust that had to do with who obtained proceeds of the condemnation proceeding and the company took the position that they were in conflict and one of them had a notwithstanding clause in it and therefore, that trumped the other one. The court analyzed the contract and said, no, actually, one of them talks about foreclosure proceedings that were begun after the deed of trust and the other applies to all other kind of foreclosure proceedings and in this case, the foreclosure proceeding was commenced before the deed of trust. The court looked at the notwithstanding language and it said that, doesn't mean that you have to disregard everything else in the contract. If you can harmonize those two clauses and they pertain to different situations, then that doesn't mean the other one becomes irrelevant. One of the sides had argued that notwithstanding means no matter what other provisions of the deed of trust provide and the court rejected that argument. Here's what I think the notwithstanding clause does in this case. Knowing that there was an obligation in the specifications for El Paso to use due diligence in discovering this very specific foreign pipelines and utility line crossings, the purpose of the notwithstanding clause is to say regardless of that specific obligation, don't think that you can infer from the duty to discover that specific thing that El Paso is going to be responsible for all these other kind of unknown and unknowable physical obstructions and so it was to keep the specific from being expanded and inferred to create a general rule. The purpose of it was not to let the general rule completely swallow the very specific provision about foreign pipeline crossing.

JUSTICE EVA M. GUZMAN: As a practical matter, El Paso contends that it had business dealings with Mr. White in the past with another company and that a very similar circumstance arose. Essentially, he billed I think it was \$11 million or something at the end of the contract. So if we're looking at the purpose in this contract, it is not unreasonable to believe they were trying to find a way to use notwithstanding to prevent that type of situation and where in the letter of the contract is that necessarily excluded other than what you've stated?

ATTORNEY KEVIN DUBOSE: Right. First of all, El Paso has taken the position that this is not an ambiguous contract and if that's true, then we don't even attempt to consider that might be inferred.

JUSTICE EVA M. GUZMAN: I realize that. I'm just trying to harmonize this and put it in context.

ATTORNEY KEVIN DUBOSE: Sure. And as a practical matter, that previous experience cuts both ways. As Mr. White testified repeatedly that he had worked with El Paso before and he knew that if there were a large number of unexpected foreign line crossings, much more than revealed, that they would take care of it at the end. So and that's what he told MasTec. So MasTec was under the impression that this was going to work like last time. El Paso was under the impression we don't want last time to happen again, but there's nothing in the record that they ever told MasTec that or that they put that in the contract so I think we're bound by the language of the contract and you can separate the two clauses.

JUSTICE NATHAN L. HECHT: These are very sophisticated parties.

ATTORNEY KEVIN DUBOSE: I think that's fair to say, Your Honor. I mean this is MasTec's first rodeo in the pipeline industry, but they're a sophisticated party, sure.

JUSTICE NATHAN L. HECHT: And there was no question going in that this was a huge issue because if there were a lot more, then it could end up like it did and they only bid 50% what they should have.

ATTORNEY KEVIN DUBOSE: It is one of the most important factors in arriving in a bid and El Paso takes the position that this was our first rodeo and the problem is we just grossly underbid the bid. There was testimony from our representative that without these additional 750 foreign crossings, that we would have come in very close to being on time and on budget. Our bid was not grossly underbid even though it was different from the other ones. It was a fairly modest bid that didn't seek to obtain a huge profit, which is understandable when somebody's trying to break into the field, but it wasn't an off-the-charts bid. What made it an incorrect bid was the large number of unforeseen circumstances.

JUSTICE PHIL JOHNSON: What does this language in 8.1 say where it says, MasTec has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the work. Now it seems like that that may go, actually, beyond a little some of the language about conditions, obstructions and all of that. Pretty all inclusive, full understanding of the difficulties and as Justice Hecht just discussed and as everybody agrees, these unanticipated crossings are a major difficulty in the work that has to be done.

ATTORNEY KEVIN DUBOSE: Right. They are and there was testimony that the industry standard was about 5 or 10% more than were revealed and that for bidding purposes, most people bid 10 to 15% more, but not 300% more. This is just off the charts and the language that you're talking about follows their opportunity to have a physical inspection.

JUSTICE PHIL JOHNSON: And if 10 to 15% or the under, is what we're dealing with, does this contract take care of that?

ATTORNEY KEVIN DUBOSE: Our bid took care of that. Our bid built in 10 or 15% contingency.

JUSTICE PHIL JOHNSON: Because, you knew that there were unanticipated crossings of some nature?

ATTORNEY KEVIN DUBOSE: That's right.

JUSTICE PHIL JOHNSON: So this contract would cover 10 to 15%?

ATTORNEY KEVIN DUBOSE: Right.

JUSTICE PHIL JOHNSON: But not 40%?

ATTORNEY KEVIN DUBOSE: I don't know where you draw the line exactly, Your Honor, and I don't think we have to because we can say that 300% error is way beyond what anybody could reasonably expect.

JUSTICE PHIL JOHNSON: Why? Is it in the contract or what? Why the difference between 10 or 15 and 40 and 300?

ATTORNEY KEVIN DUBOSE: Sure, we get to a problem with, let me put it this way. If El Paso had complied with its duty of due diligence, there's no question that the risk would have been shrunk tremendously and whether it shrunk to 10 or 15% or 20% or 40%, but this is a breach of contract case alleging that they violated their duty to do due diligence at all and that hasn't been challenged and because they didn't do that and this number was so high, I mean I think if it was 40 or 50%, I think under this contract still, they still breached their duty and we had consequential damages following from that.

JUSTICE PHIL JOHNSON: So it could be that under these circumstances, you did, in fact, assert a fraud because they induced you to make a low bid by that representation, but it was not submitted to the jury. I think the question was asked earlier why not. Do you know the answer to that?

ATTORNEY KEVIN DUBOSE: We went through that because we didn't have any evidence of knowledge or intent. We don't know that, we have never alleged that they had more information and withheld it from us. It's just that they didn't do enough to try to get the information. Under their interpretation of the contract, they could have done nothing, could have not hired a subcontractor and told us we're of zero foreign crossings and we go out and discover 1000 and under their interpretation, we're still on the hook for it.

JUSTICE EVA M. GUZMAN: So does the 40% variance, does that tend to indicate a lack of due diligence and-

ATTORNEY KEVIN DUBOSE: Part of it's the number, but also just the things that they could have done that they admitted they didn't do.

JUSTICE EVA M. GUZMAN: And how important are those specifications to the bidding process?

ATTORNEY KEVIN DUBOSE: They're extremely important, Your Honor, and the contract says, that they're part of the contract. Testimony was that they were offered by El Paso with the intent that we would rely upon them and it was a big factor in arriving at the bid.

JUSTICE EVA M. GUZMAN: And does Danny Dial that testified about the trust that the contractor puts in this information, can you put that type of trust not given the other language of the contract? Was your client really made to rely and trust without and then take on the all-risk obligation as well?

ATTORNEY KEVIN DUBOSE: We were and in the testimonies we were factually and in the contract says, that we're entitled to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Debose. The Court will hear rebuttal.

MARSHAL: May it please the Court, Mr. Gunn will present the rebuttal on behalf of the Petitioners.

REBUTTAL ARGUMENT OF DAVID GUNN ON BEHALF OF PETITIONER

ATTORNEY DAVID GUNN: May it please the Court, Justice Johnson, your question about line drawing and 15 versus 40% demonstrates the answer to the question that Justice Wainwright and Justice Guzman posed. It creates an untenable line drawing problem where you cannot say, we can't have a contract meaning be dependent on these numbers, 10, 20, 40%. The 10 or 15% cushion confirms that they knew it was their problem to

build in the risk of an overrun. That's why it's in there and the question that Justice Wainwright and Justice Guzman were appropriately getting to earlier was be clear, Counsel, tell me is it your position the due diligence language, does that impose a duty on you or not? The answer is no. Our position is it does not.

JUSTICE DEBRA H. LEHRMANN: So what does it mean?

ATTORNEY DAVID GUNN: It is the business purpose that I wanted to get to and I'm glad you asked, Your Honor. It is a statement to the contractor you're not starting empty handed. The specs, which are 500 pages thick, are off-the-shelf specifications like a giant bluebook. Here's how you do ditches. Here's you do horizontal drilling. Every imaginable kind of job in the world. We pull off the land pipeline specs and attach it to the contract. They're not custom made for this contract and they are not warranties on us. Warranties will show up in the warranty section in the body of the contract. The specs, it's critical for me to get this across. The specs tell an otherwise independent contractor I have some requirements of you, how you do your work. Why do we hire contractors?

JUSTICE EVA M. GUZMAN: Your representative, Danny Dial, testified the specifications are very clear that the operating companies are going to be diligent in providing this information to the contractor. So your representative testified to the diligence that goes into preparing this and that brings up a question 250 versus 1000?

ATTORNEY DAVID GUNN: I think no testimony is legally material to the meaning of the writing. We should not have had this trial. They certainly have evidence both ways on due diligence as a factual matter. That's the fight we bargained not to have. We bargained to put all the risk on the other side four times. It's not just the notwithstanding in 7.1 and 8.1. It's notwithstanding what? They're assuming any and all such risks pertaining to the work, the conditions. I didn't hear anything about the any and all that you see repeatedly through 7.1. They cannot extract foreign crossings or foreign utility pipelines from the expansive language any such conditions pertaining to the work. I don't know how else to do it. When we leave, what do we tell the client if they say I don't want to have this fight again? Tell me how do I draft it?

JUSTICE EVA M. GUZMAN: They can extract the materials cost and weather delays and whether an employee gets injured and they're not responsible. They can seek [inaudible], they can't extract all of that out of that language.

ATTORNEY DAVID GUNN: Yes, Your Honor, if an employee gets injured, that is not a condition pertaining to the work. We bargained not to have to fight about conditions pertaining to the work and if this doesn't do it, I don't know how we write a contract to do it.

JUSTICE EVA M. GUZMAN: Materials.

ATTORNEY DAVID GUNN: Like Chinese drywall or?

JUSTICE EVA M. GUZMAN: Additional materials, yeah.

ATTORNEY DAVID GUNN: It's supply in the market. I don't think that has anything to do with what's underground. These clauses are aimed at what's underneath the surface. Otherwise, I have no idea what to tell the client when they say draft me a contract so I don't ever have to have this fight again. This was expensive. We don't understand this. These guys wanted a loss leader deal so they could get their foot in the door in this industry. We asked the man who fired Mr. White. Remember, Mr. White made this bid that was far out of the mainstream. We asked the man who fired him in the middle of the project, Mr. White got fired, and the company realized how far under water they were, we asked the man who fired him, does this language cover foreign crossings and he said, yeah, your language does cover, the any and all, the notwithstanding, the warranties, that absolutely foreign crossings are included.

JUSTICE EVA M. GUZMAN: Would this contract have been so far out of the mainstream if there had been 250 crossings and not 1000 or almost 1000, would it have been?

ATTORNEY DAVID GUNN: Who knows? Nobody would have known. This is such an ancient pipeline. Everybody inherited this.

JUSTICE EVA M. GUZMAN: Well, you can assess costs to each individual crossing. I mean, you do it's probably, is it somewhere in this record that it would have been within the mainstream had it not, had there been only about 250?

ATTORNEY DAVID GUNN: I don't know the answer. I'm not dodging. I just don't know.

JUSTICE DON R. WILLETT: At the top of the hour, Mr. Fogler mentioned there were three points he was hoping to make in argument. Do you happen to know what they were?

ATTORNEY DAVID GUNN: I don't, Your Honor. I wanted to.

JUSTICE DON R. WILLETT: Maybe you'll send us a letter.

ATTORNEY DAVID GUNN: I wanted to make a couple of points in closing. The dissent got it just right. I don't think there is a due diligence obligation at all, zero, no legal effect, but if there is, then as the man said, to Dustin Hoffman, I just have one word I want to say to you, not plastics. It's notwithstanding. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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