No. 11-0783

In the Supreme Court of Texas

SOUTHERN ELECTRICAL SERVICES, INC., AS ASSIGNEE OF
THE MORGANTI GROUP, INC. and THE MORGANTI GROUP, INC.
Petitioners,
V.
CITY OF HOUSTON
Respondent.

ON APPEAL FROM THE
FIRST APPELLATE DISTRICT
COURT OF APPEALS
HOUSTON, TEXAS

**BRIEF OF AMICI CURIAE,
AMERICAN SUBCONTRACTORS ASSOCIATION, INC. and
ASA OF TEXAS, INC.
IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

STATEMENT OF INTEREST

The American Subcontractors Association ("ASA") is a national organization of construction trade contractors. Founded in 1966, ASA leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as stewards in the community. ASA emphasizes ethical and equitable business practices, quality construction, membership diversity, integrity, and a safe and healthy work environment. ASA has 5,000 members nationwide, including 500 members from five Texas chapters in Houston, North Texas, San Antonio, the Rio Grande Valley, and statewide. These chapters make up ASA of Texas, Inc., which is also sponsoring this brief. .

Although Amici Curiae, ASA and ASA of Texas, are not parties to this appeal, this brief has been submitted through the undersigned independent attorneys, who were paid a fee by the ASA to prepare it.

STATEMENT OF THE CASE

Nature of the case: This case arises out of a construction contract dispute between an owner (Respondent, The City of Houston) and a general contractor (Petitioner, the Morganti Group, Inc.) and its subcontractor (Petitioner, Southern Electrical Services, Inc.). Specifically, the dispute concerns the scope of standard, boilerplate site investigation clauses in construction contracts and thereby implicates the contractual duties imposed on owners, general contractors and subcontractors nationwide. The

dispute also implicates the duties imposed on public owners, such as the City of Houston, by Chapter 2258 of the Texas Government Code.

Trial Court: The Honorable Judge Randy Wilson, presiding judge of the 157th Judicial District Court of Harris County, Texas granted summary judgment in favor of Defendant, the City of Houston and dismissed all of Morganti Group, Inc. and Southern Electrical Services, Inc.'s claims in Cause No. 2005-35287.

Court of Appeals: Southern Electrical Services, Inc. and the Morganti Group, Inc. appealed the summary judgment order to the First Court of Appeals in Houston, Texas in Appellate Cause No. 01-10-00649-CV. The appellate court affirmed the trial court by holding that the site investigation clause imposed a duty on Morganti and SES to investigate and know the prevailing wage rates in the area despite the fact that the City provided them with information and required them to use it.

ISSUES PRESENTED

ISSUE 1: Whether the court of appeals incorrectly concluded that a "site investigation" clause in a construction contract imposes a duty on a contractor to ascertain economic conditions, such as prevailing wage rates?

Sub-issue 1: Whether the court of appeals' expansive interpretation and application of the site investigation clause elevates the provision to the exclusion of other applicable contractual provisions?

Sub-issue 2: Whether a site investigation clause imposes a duty on contractors to research and investigate information that the owner was statutorily obligated to provide?

Sub-issue 3: Whether a site investigation clause relieves an owner of its duty to provide to accurate information that it was statutorily and contractually obligated to provide?

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IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW**

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, AMERICAN SUBCONTRACTORS ASSOCIATION, INC. and ASA of TEXAS, Inc., and they submit this Brief of Amicus Curiae in Support of Petitioner, Southern Electrical Services, Inc., as Assignee of the Morganti Group, Inc., and the Morganti Group, Inc.'s Petition for Review, and respectfully request that this Honorable Court reverse the opinion of the appellate court of appeals.

BRIEF SUMMARY OF FACTS

In December 1999, the City of Houston (hereinafter "the City") solicited lump-sum contract bids for the construction of improvements at William P. Hobby Airport. *S.*

Elec. Serv., Inc. v. City of Houston, 355 S.W.3d 319, 321 (Tex.App—Houston 2011, pet. filed). During the course of the bidding process, the City provided bidding documents that included information and calculations regarding the "prevailing wage rates" in the area that would be applicable to the construction work that it was soliciting. *Id*. at 322. The construction contract (hereinafter the "Hobby Construction Contract") specifically required that the contractor use the prevailing wage rates provided as their minimum wage and that the contractor was not responsible for ascertaining whether the contract documents were in accordance with applicable laws, statutes, ordinances, codes, and regulations. *Id.*; see also V CR 990, 993, and 995. Additionally, the contract included a standard, boilerplate clause regarding site investigation. *See S. Elec. Serv., Inc.*, 355 S.W.3d at 322; see also V CR at 988.

Petitioner, the Morganti Group, Inc. (hereinafter "Morganti") was awarded the construction contract. Petitioner, Southern Electrical Services, Inc. (hereinafter "SES") entered into a subcontract to perform work on the project. *Id.* at 321. Both Morganti and SES were out of state contractors that relied on the prevailing wage information that the City provided to prepare and calculate their lump-sum bids in accordance with the terms of the contract.

Three years after the work started, the City directed use of a different prevailing wage information than had been provided when the bid was solicited from Morganti and SES. *Id*. at 322. Despite the fact the City wrote that it would reimburse the contractors and subcontractors for the variance, it later denied Morganti's claims for reimbursement on behalf of the subcontractors and itself. *Id.*

Morganti and SES filed the underlying lawsuit asserting claims of breach of contract and failure to comply with the Prompt Payment Act. *Id.* The trial court granted summary judgment in favor of the City and dismissed all of Morganti and SES's claims. *Id.* at 322-23. On appeal, the First Court of Appeals affirmed the trial court by holding that the site investigation clause imposed a duty on Morganti and SES to investigate and know the prevailing wage rates in the area despite the fact that the City provided them with prevailing wage information and required them to use it. *Id*. at 325-326.

SUMMARY OF THE ARGUMENT

The First Court of Appeals incorrectly concluded that the site investigation clause in the contract between the Morganti Group, Inc. and the City of Houston required the contractor to ascertain local prevailing wage rates. In so holding, the court of appeals' overly broad interpretation of a standard site investigation clause in a construction contract vitiated obligations that were both contractually and statutorily imposed on a public entity owners.

In the past century, site investigation clauses have been applied to require an investigation of ascertainable *physical* conditions in the environment of the construction project. No Texas court, other than the court's opinion below, ever applied a site investigation clause to prevailing wage rates. Additionally, such clauses have not been expansively applied to divest owners of any liability for their affirmative representations regarding the work or the site. Indeed, the courts have affirmatively stated that the application of site investigation clauses should be limited so as not to "frustrate" the application of other contractual provisions. Still further, construing a single boilerplate

site investigation provision to the exclusion of other contractual provisions violates well-established rules of contract construction.

Furthermore, the burden of investigating and determining prevailing wage rates was statutorily and contractually placed on the owner, the City. Thus, applying such a provision to a purely economic condition, such as local prevailing wage rates, extends the reach of the site investigation clause far beyond its accepted meaning in the industry, and causes it to conflict with not only Texas law but other provisions within the contract documents.

ARGUMENT AND AUTHORITY

I. THE COURT OF APPEALS' OPINION IGNORES WELL-ESTABLISHED RULES OF CONTRACT CONSTRUCTION AND INTERPRETATION AS WELL AS THE PLAIN LANGUAGE OF THE CONTRACT AT ISSUE.

It is well-established that "[i]n construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed by the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)(citations omitted). "To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Id.* "**No single provision taken alone will be given controlling effect**; **rather, all of the provisions must be considered with reference to the whole instrument.**" *Id*. (emphasis added); *see also Shintech Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144, 150 (Tex.App—Houston [14th Dist.] 1985, no writ).

In *Shintech*, the appellate court rejected an owner's argument that the contractor assumed the risk of delays and work hindrances through the application of a site

investigation clause. In construing the contract, the court had to reconcile the obligations imposed by the two following clauses:

- Site Investigation clause: "…Having fully acquainted itself with the work, its surroundings, and all risk in connection therewith, the CONTRACTOR, assumes full and complete responsibility for completing the work for the compensation and within the time provided in Paragraph 1.03." *Id*. at 151.

- Owner's Assumption of Risk of Delay and Hindrance clause: "A construction schedule will be established as early as feasible in the project which will be reviewed and approved by client. *Upsets of this schedule caused by the acts of the client or those over which he controls causing undue expense on the Contractor shall be for the Owner's account.*" *Id*. at 148.

The court expressly recognized that "under the rules of contract construction that an interpretation that enforces one contract term by completely nullifying another must be rejected unless the two clauses are irreconcilably different." *Id*. at 150. The court accordingly stated that the two provisions "must be interpreted consistently." *Id*. at 151. The court determined that the site investigation clause was not irreconcilably different from the clause regarding the owner's assumption risk liability for the delays it caused. *Id*. The court ultimately held that the site investigation clause did not constitute an assumption of risk by the contractor for defective specifications provided by the owner. *Id*.

Similarly, here it is undisputed that the Hobby Construction Contract included the following provisions:

> The City's Assumption of Responsibility Regarding Prevailing Wage Information:
>
> 3.6.1.1 Prevailing wage rates applicable to the Work shall be as stated in the Agreement, and as bound in the Project Manual. (V CR 993.)

3.6.1.2 The prevailing wage rates applicable to the Work shall be Document 00812—Wage/Scale/Engineering/FAA, as bound in the Project Manual. (V CR 995.)

3.12.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinance building codes, and rules and regulations…(V CR 990.)

Site Investigation Clause:

1.2.2 Execution of the Contract by the Contractor is conclusive that the Contractor has carefully examined the Contract Documents, visited the site of the Work, become familiar with local conditions under which the work is to be performed, and fully informed itself as to conditions and matters which can affect the Work or costs thereof. The Contractor further affirms that it has correlated personal observations with requirements of the Contract Documents.

The plain language of these terms regarding the prevailing wage information expressly states that: (1) the prevailing wage rates will apply to the Work being provided; and (2) that it is **not** the Contractor's responsibility to determine whether contract documents, such as the Document 00812, comply with the applicable laws, statutes, and regulations.

As discussed further *infra* at Section I(B), Texas Government Code §2258.022 explicitly places the burden of determining the prevailing wage rate on the "public body."[1] The statute sets forth two specific ways the public body can determine the prevailing wage rate in the area. *Id*. The contract, by its terms, expressly and specifically relieves Morganti and SES of any obligation to ascertain the accuracy of the prevailing wage information. (V CR 990.) Further, the terms reflect the intent of the parties that

[1] "Public body" is statutorily defined as a public body awarding a contract for a public work on behalf of the state or a political subdivision of the state. Tex. Gov't Code Ann. §2258.001 (West).

Contractor could rely on Owner to fulfill its statutory obligations, including but not limited to, providing the final prevailing wage rate. TEX. GOV'T CODE §2258.022.

Despite this, the court of appeals interpreted the site investigation clause to impose a duty on Morganti and SES to ascertain whether the wages stated in Document 00812 were accurate and in accordance with applicable laws, statutes, ordinance building codes, and rules and regulations. *See S. Elec. Serv., Inc. v. City of Houston*, 355 S.W.3d 319, 325 (Tex.App—Houston [1st Dist.] 2011, pet. filed). In determining that the Hobby Construction Contract "anticipates that Morganti and its subcontractors bear the risk associated with the costs to perform under the contract," the court of appeals disregards provision 3.12.3 which expressly states that ascertaining the prevailing wage in the area is not Contractor's responsibility. (V CR 990.)

The appellate court stated that provision 3.12.3 relieves Morganti and SES of a duty to verify that the prevailing wage rate was calculated in accordance with the law but does not relieve it of its duty to verify that the prevailing wage rate corresponds with local conditions. *See S. Elec. Serv., Inc.* at 325-26. This is nothing more than a distinction without a difference. The prevailing wage statute specifically requires that the prevailing wage rate be calculated by the public body based on current local conditions. See Tex. Gov't Code §2258.022(a). Accordingly, it follows that if the City provided prevailing wage rate information that was calculated in accordance with the statute, then the rate specified in the Hobby Construction Contract (and which the contractors were required to abide by) would provide Morganti and SES with all information they could need regarding the local labor conditions. In effect, by imposing a contractual

requirement to investigate local wage conditions under the site investigation clause, the appellate court wrongly transferred to Morganti and SES a duty that Texas law and the Contract unambiguously placed on the City (the duty to use, require, and verify that that the prevailing wage rate is accurate).

The appellate court's analysis and interpretation of the Hobby Construction Contract directly contravenes the basic tenants of contract construction by giving a single *general* provision that does not even mention or obviously refer to prevailing wage rates (the site investigation clause) controlling effect and precedence to the exclusion of *specific* provisions (clauses 3.6.1.1, 3.6.1.2, and 3.12.3) that directly involve the prevailing wage rate that was required to be used on the Project. The First Court of Appeals' overly broad interpretation and application of a boilerplate site investigation clause(a clause that has long been common to most construction contracts) exposes all contractors and subcontractors to the risk that other *specific* contractual terms and provisions can now be superseded by any site investigation clause. Further, it renders unreliable, and therefore useless, any information provided by an owner for purposes of bidding because the scope of site investigation clauses can now be construed to relieve any owner of any contractual duty to provide correct and accurate information.

II. THE COURT OF APPEALS' OPINION SIGNIFICANTLY CHANGES TEXAS LAW BY EXPANDING SITE INVESTIGATION AND SITE CONDITION CLAUSES WELL BEYOND THEIR COMMONLY ACCEPTED AND INTENDED SCOPE.

In its opinion below, the court of appeals cited §1.2.2 of the contract between the City of Houston and the general contractor, reciting that the general contractor, Morganti,

had a duty to "become familiar with local conditions under which the work is to be performed, and fully informed itself as to conditions under which the work is to be performed…and matters which can affect the work or cost thereof." *See S. Elec. Serv., Inc. v. City of Houston,* 355 S.W.3d 319, 325 (Tex.App.—Houston [1st Dist.] 2011, pet. filed). The court went on to state that the site investigation clause "anticipates that Morganti and its subcontractors bear the risk associated with the costs to perform under the contract." *See S. Elec. Serv., Inc. v. City of Houston,* 355 S.W.3d 319, (Tex.App.—Houston [1st Dist.] 2011, pet. filed). The court of appeals cited this language in determining that the contract allocated the risk of increased labor costs to the contractor. *Id.* This opinion, however, ignores nearly a century of statutory and judicial development regarding the interpretation, scope, and application of site investigation clauses and prevailing wage rate statutes.

A. SITE INVESTIGATION AND SITE CONDITIONS CLAUSES IN THE CONSTRUCTION INDUSTRY HISTORICALLY HAVE NOT BEEN CONSTRUED TO RELIEVE OWNERS OF THEIR RESPONSIBILITY FOR RELIABLE AND ACCURATE PLANS AND SPECIFICATIONS.

Although the general common law provided that contractors bore the risk that performance of their contractual obligations would exceed the contract price, it has long been established that "the contractor will not be responsible for the consequences of defects in the plans and specifications." *See U.S. v. Spearin* , 248 U.S. 132, 136 (1918). Further, the Supreme Court of the United States has explicitly held that the "responsibility of the owner [to provide accurate specifications and plans] is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and

to inform themselves of the requirements of the work…" *Id*. Accordingly, over time, rather than relying upon this strict common law rule, contracting parties in the construction industry have specifically allocated the risk of unforeseen *physical* conditions in their contracts. See Robert Cushman, et al. Proving and Pricing Construction Claims §5.02 [A] (3rd ed.) (Aspen Publishers 2001).

The most important reason for the development of contract clauses regarding site conditions was economic. *Id.* If a contractor bears the entire risk of unforeseen or unknown conditions, it will have to include a large contingency in its bid to turn a profit. *Id.* Clearly, this can be extremely costly to the project owner. Additionally, large developers, including the federal government, realized that the common law allocation of risk was inefficient. *Id*.

In an analysis of the relationship between changing conditions clauses and site conditions clauses, the United States Court of Claims stated:

> The purpose of the changed conditions clause is thus to take at least some of the gamble of subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface condition, and they need not consider how large a contingency should be added to the bid to cover the risk. …The Government benefits from more accurate bidding, without inflation for risk that may not eventuate….
>
> Faithful execution of the policy requires that the promise in the changed conditions clause **not be frustrated by an expansive concept of the duty of bidders to investigate the site.** (Emphasis added). That duty, if not carefully limited, could force bidders to rely on their own investigations, lessen their reliance on logs in the contract and reintroduce the practice sought to be eradicated—the computation of bids on the basis of the bidders' own investigations, with contingency elements often substituting for investigation.

See *Foster Constructions C.A. v. United States*, 435 F.2d 873, 887 (Cl. Ct. 1970). Thus, site investigation and site condition clauses were developed primarily to allocate the risk of either foreseeable or unforeseeable physical conditions at a construction site so that bids are based upon predictable factors, and not unpredictable factors. Further, if site investigation clauses are not limited in their application, they will frustrate the very risk allocation purposes that they are intended to provide. Accordingly, such provisions should not be applied to alleviate owners of duties that have been contractually and statutorily assigned to them.

In *Spearin*, the Court held that plans and specifications provided by owners constituted an implied warranty and that "[t]his implied warranty is not overcome by the general clauses requiring the contractor to examine the site." 248 U.S. 137. In Texas, the courts began applying similar contract and implied warranty analyses to site investigation clauses. In *City of Dallas v. Shorthall*, the court stated that, in order for a contractor-plaintiff to be entitled to damages for extra expenses incurred due to inaccurate plans or specifications, "it must appear that the [representation made] was made as an affirmative statement of fact, or as a positive assertion, and made under such circumstances, or with such accompanying assurance, as justified plaintiff in relying thereon, without investigation on his part; and that he in fact made no independent investigation on his part to ascertain the truth." 114 S.W.2d 536, 542 (Tex. Comm'n App. 1938). In effect, the court left open the possibility that the risk of site conditions could be allocated to an owner, if the owner misrepresented those conditions. *Id.*

Since those cases, the intermediate appellate courts have continued to analyze the issue under both theories of contract and implied warranty. *See e.g Newell v. Mosley*, 469 S.W.2d 481 (Tex. Civ.—Tyler 1971, writ ref'd n.r.e.) (owner's plans and specifications constituted an affirmative representation on which a contractor could rely); *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W.2d 792, 793 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (owner's failure to provide correct or adequate plans and specification was a breach of the contract); *Turner, Collie & Braden v. The Brookhollow, Inc*., 624 S.W.2d 203, 208 (Tex. Civ. App.—Houston [1st Dist] (1991) (recognizing a cause of action for a contractor against an owner or architect who furnishes defective plans and specifications).

Most recently, in a case currently pending before this court, the same court of appeals came to a much different result than the opinion below by granting relief to a contractor despite a site investigation clause. *MasTec N. Am., Inc. v. El Paso Field Servs., L.P.*, 317 S.W.3d 431 (Tex.App.—Houston [1st Dist.] 2010, pet. filed) (opinion on rehearing). Specifically, the site investigation clause was construed to emphasize the parties' expectations that the owner's bidding documents be relied upon, due to the emphasis upon examining those documents in a careful manner. *Id.* Here, the site investigation provision recites nearly identical expectations that the contract documents (which include the prevailing wage rate information and provisions) be carefully examined. (V CR 988)(stating "[e]xecution of the Contract is conclusive that Contractor *has carefully examined the Contract Documents*.")(emphasis added).

While the above cases included a diversity of outcomes and legal reasoning, they all had commonality in one respect. That is, they each discussed the duty to investigate physical conditions, physical dimensions, or the amount of physical materials on a particular project or in particular bidding documents. No Texas case, prior to the First Court of Appeals' opinion below, had *ever* applied a site investigation clause to a purely economic condition such as prevailing wage rates.

B. THE DUTY TO DETERMINE PREVAILING WAGE RATES IN THE CONSTRUCTION INDUSTRY HAS STATUTORILY BEEN ASSIGNED TO THE PUBLIC ENTITY OWNER.

The history of regulating worker wages in public construction projects began with the Davis-Bacon Act (the "Act"), which requires paying prevailing wages to workers on federal or federally-assisted construction projects. J. Canterbury and R. Shapiro Texas Construction Law Manual (Third Edition) §4.30 (Thomson West 2005). The Act was passed in 1931 to ensure that local workers have stable wages in construction projects spending federal dollars. See D. Burnstein, African Americans, Labor Regulations in the Courts for Reconstruction to the New Deal 79 – 84 (Duke University Press 2001).

The State of Texas requires that a worker employed on a public works project by or on behalf of the State or a political subdivision must be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed and not less than the general prevailing rate of per diem wages for legal holiday and over-time work. TEX. GOV'T. CODE ANN. §2258.021. Significantly, in Texas, "[i]t is the province of the public body to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft

or type of worker needed to execute the contract and the prevailing rate for legal holiday and over-time work." Canterbury at § 4.30; *see also* TEX. GOV'T. CODE §2258.022. Specifically, the public body must either: (a) conduct a survey of the wages received by classes of workers employed on projects of a character similar to the contract work in a political subdivision of the state in which the public work is to be performed; or (b) use a prevailing wage rate developed by the U.S. Department of Labor. *Id.* The Texas Government Code squarely places the responsibility on the public body to determine the general prevailing rate of per diem wages in dollars and cents, and to specify the wages rates in its bid information and in subsequent contract documents. Tex. Gov't Code Ann. § 2258.022 (c), (d) (Vernon's Supp. 2004). Thus, unlike physical conditions and material amounts referenced in site investigation clauses, by law, prevailing wage rates are required to be determined by the public body, not the contractor.

Another historical contrast between prevailing wage rates and site conditions is the element of reliance. While at the old common law, a contractor was not allowed to rely upon the owner's plans and specifications, and thus assumed the entire risk, the Government Code clearly contemplates a contractor relying on information from others. See Tex. Gov.'t Code §2258.022(d-e)(stating that that the "public body shall specify in the call for bids for the contract and in the contract itself the wages rates determined in this section" and that such determination will be "final."). Specifically, by statute, a contractor is entitled to rely on the certification by a subcontractor regarding the subcontractor's compliance with the prevailing wage rates. TEX. GOV'T. CODE ANN. §

2258.026 (West). Chapter 2258 provides that the prevailing wage rate provided by the public body is not only reliable, but that it is "final." TEX. GOV'T. CODE §2258.022(e).

By using the site investigation clause to shift the risk of prevailing wage determination from the public body to the contractor, the appellate court's opinion renders Chapter 2258 a nullity. Even though the statute states that the prevailing wage determination issued by the public body to the contractors "is final," the appellate court's opinion renders the determination neither "final" nor "reliable" thereby eviscerating the statute of its intended purpose.

In summary, there are three significant differences between the development of site investigation and site condition clauses and prevailing wage rates. First, the former were developed in the field of construction law for the protection of owners and contractors. The latter was passed by both the state and federal governments for the protection of the workers on a construction project. Second, instead of allocating the duty to investigate to the contractor, as a site investigation clause does, the law of prevailing wage rates specifically allocates that responsibility to the public owner by statute. Third, unlike the general common law, the law of prevailing wage rates specifically contemplates reliance by a contractor.

C. THIS COURT SHOULD NOT PERMIT PUBLIC BODY OWNERS TO AVOID THEIR STATUTORY AND CONTRACTUAL OBLIGATIONS BY EXPANDING THE SCOPE OF BOILERPLATE SITE INVESTIGATION CLAUSES BEYOND THEIR HISTORICAL AND CUSTOMARY USE AND APPLICATION.

In light of the foregoing statutory and judicial precedence regarding site investigation clauses and prevailing wage rates, it was inappropriate for the court of

appeals to apply §1.2.2 of the contract to a dispute over prevailing wage rates. This section was clearly a site investigation clause, pertaining to physical conditions and physical amounts of the job, and not purely economic matters such as prevailing wage rates. Tellingly, the court of appeals opinion cites no Texas case that applies a site investigation clause to the economic cost of labor. Moreover, the City of Houston's brief on the merits cites no such case. Indeed, the City of Houston's discussion of §1.2.2 of the Morganti contract, located in its brief at pages 38-40, contains plenty of argument but no caselaw or other authority whatsoever.

Moreover, courts of all levels have long held that owners cannot rely upon site investigations to exculpate themselves from liability that arises due to a contractor's reliance on information, representations, plans, and/or specifications provided by the owner. *See e.g. U.S. v. Spearin*, 248 U.S. 132 (1918). Site investigation clauses are not to be construed to either: (1) overcome implied warranties made by the owner; or (2) other contractual provisions which impose responsibility for such information on the owner. *Id*.; *Shintech, Inc.*, 688 S.W.2d at 149-50. In the instant case, an expansive application of the site investigation clause has directly frustrated the application of the prevailing wage clauses and statutes contrary to established jurisprudence. *Foster Const. C.A. & Williams Bros. Co.*, 435 U.S. at 887 (holding that "[f]aithful execution of the policy requires that the promise in the changed conditions clause not be frustrated by an expansive concept of the duty of bidders to investigate the site.").

Furthermore, the allocation of risk of the cost of complying with prevailing wage rate statutes was governed by other provisions of the contract. Specifically, in the Project

Manual, the City required that "Prevailing wage rates applicable to the Work shall be as stated in the Agreement, and is bound in the Project Manual." Additionally, §3.12.3 of the contract documents provided that it was "not the contractor's responsibility to ascertain that the contract documents are in accordance with applicable laws, statutes, ordinances, building codes and rules and regulations." *See* Petition for Review at page 3.

Neither the City of Houston, nor the court of appeals addressed the intent of this language to relieve the contractor of the risk that the contract documents inaccurately stated. In other words, as discussed above, the City had both a statutory and contractual duty to survey and to provide prevailing wage data. The contractor, however, was not to be responsible for ensuring that the information in the contract documents was consistent with the City's statutory duties.

By applying a site investigation clause in a contract to prevailing wages that are governed by statute, the court of appeals extended language in a construction contract far beyond its clear understanding in the construction industry. A site investigation clause requires prospective bidders to examine the contract documents, visit the site of the work and visually inspect its physical characteristics (or assume responsibility for doing so). Brunner, J. and O'Conner, P., Brunner & O'Conner on Construction Law, § 2:64 (West Group 2002). The purpose of the site investigation is to verify site conditions that may affect the bid estimate. *Id.* It is usually limited to a visual "site" inspection and a review of site information provided on the bidding documents by the owner. *Id.*

To apply this clause to prevailing wages, which would not be ascertainable through an inspection of the project documents or the physical location, would be to

place the construction industry in the situation it historically faced at the beginning of the twentieth century. That is, the risks associated with inaccurate information and unforeseen economic conditions (specifically, that of labor) would be borne entirely by the contractor, who would have to build a contingency into its bid for such events. The resulting increase in bids and costs discussed by the U.S. Court of Claims in the *Foster* case cited above will inevitably result. This is unwise public policy. This is why the legislature allocated the responsibility for surveying prevailing wage rates to the public entities in the Government Code.

In summary, this Honorable Court should reverse the court of appeals' opinion which ignores, without significant analysis, nearly a century of development of Texas law applicable to the construction industry. In effect, the opinion:

1) creates uncertainty with regard to the contracting and bidding process in the construction industry by significantly expanding general boilerplate provisions to supersede other more specific risk allocation provisions;

2) nullifies risk allocating provisions which previously permitted contractors to rely on the representations made by owners and thereby provide more accurate bids;

3) forces contractors to once again include large contingencies in their bids to protect against unknown conditions that they do not have the resources to discover;

4) authorizes owners to contractually avoid statutory duties through an expansive interpretation of boilerplate site investigation clauses; and

5) immunizes owners, and particularly public body owners, from any liability for their own express misrepresentations to contractors during the bidding process.

In light of these detrimental consequences which will be borne by all contractors and subcontractors in the Texas construction industry, this Honorable Court should reverse the court of appeal's opinion.

PRAYER

WHEREFORE PREMISES CONSIDERED, Amici Curiae, American Subcontractors, Inc. and ASA of Texas, Inc. respectfully requests that this Honorable Court reverse the opinion of the court of appeals and remand Petitioners' claims to the trial court for further proceeding.

Respectfully submitted,

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/s/ *Brianne Watkins*

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CERTIFICATE OF SERVICE

As required Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that I have served this document on all counsel of record and on Appellant on the 31st day of August, 2012, by regular mail, certified mail, return receipt requested, and/or by facsimile, as indicated below:

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