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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

HUTTON CONTRACTING CO., INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-4130-JAR
)	
CITY OF COFFEYVILLE,)	
)	
Defendant.)	
)	

**MEMORANDUM ORDER AND OPINION DENYING MOTION FOR SUMMARY
JUDGMENT AND GRANTING MOTION TO EXCLUDE TESTIMONY OF
PLAINTIFF’S EXPERT**

This breach of contract action comes before the Court on defendant City of Coffeyville’s (the City) Motion for Summary Judgment (Doc. 29) and Motion to Exclude Testimony of plaintiff’s Expert (Doc. 22). The City seeks summary judgment on plaintiff Hutton Contracting Co., Inc.’s (Hutton) breach of contract claim, on the basis that it is entitled to offset the unpaid contract balance owed to Hutton, with liquidated damages that accrued because Hutton’s completion of a contract was untimely. In addition, the City seeks to exclude certain expert opinions pursuant to Federal Rule of Evidence 702 and *Daubert*. For the reasons stated below, the City’s summary judgment motion is denied and its motion to exclude testimony is granted.

I. Uncontroverted Facts

In early 2000, the City, through its retained architectural and engineering firm, Allgeier Martin & Associates, Inc., sent a proposed Contract containing plans and specifications for the erection of a 69 KV transmission grid known as project CVE-00-3LM (the project), to a number

of bidders. Under the Contract, the bidder proposed:

to receive and install such materials and equipment as may hereinafter be specified to be furnished by the [City], and to furnish all other materials, equipment, all machinery, tools, labor transportation and other means required to construct the electrical project CVE-00-3LM in strict accordance with the Plans, Specifications for Construction and Construction Drawings for the prices hereinafter stated.

A number of bids were received, but the Hutton's bid, \$1,131,947.12, was the lowest bid and was accepted by the City. Hutton was notified by letter dated March 29, 2000, of the acceptance of its bid.

Hutton was authorized by the Contract, to obtain materials after its bid was accepted, but before the Contract was consummated. The Contract contained a provision for Material Procurement which stated:

Procurement of materials to be ordered by [Hutton] will require expediting, therefore, the [City] proposes to authorize [Hutton] to order materials immediately during the period of time required to obtain the Contractor's Bond and complete the contractual arrangements between the City and [Hutton]. Authorization to order material would include the provision that the [City] will be responsible for the order in the event the contract between [Hutton] and the [City] cannot be consummated.

Pursuant to the Contract, Hutton agreed "to commence construction on the project on a date (hereinafter called the "Commencement Date") which shall be determined by the Engineer." Steven C. McNabb was the Engineer, as defined in the Contract. Article II, §1a of the Contract provided in relevant part that:

[Hutton] further agrees to prosecute diligently and to complete construction phases as described in strict accordance with the Plans, Specifications and Construction Drawings within **Forty-five (45)** calendar days (excluding Sundays) after Commencement Date; Provided, however, that [Hutton] will not be required to perform any construction on such days when in the judgment of the Engineer snow, rain, or wind or the results of snow, rain or frost make it impracticable to

perform any operation of construction and to the extent of the time lost due to the conditions described herein and approved in writing by the Engineer, the time of completion set out above will be extended if the Bidder makes a written request therefor to the [City] as provided in subsection b of this Section 1.

An additional reprieve from the 45-day construction period was contained in the Contract.

Article II, §1b provided:

The time for Completion of Construction shall be extended for the period of any reasonable delay which is due exclusively to causes beyond the control and without the fault of [Hutton], including Acts of God, fires, floods and acts or omissions of the [City] with respect to matters for which the [City] is solely responsible.

An extension of time pursuant to this subsection was conditioned on Hutton making a written request to the City within ten days of the occurrence of the event.

The Contract also contained a liquidated damage provision. Article V, §2 of the Contract states:

The time of the Completion of Construction of the Project is of the essence of the Contract. Should [Hutton] neglect, refuse or fail to complete the construction within the time herein agreed upon, after giving effect to extensions of time, if any, herein provided, then, in that event and in view of the difficulty of estimating with exactness damages caused by such delay, the [City] shall have the right to deduct from and retain out of such monies which may be then due, or which may become due and payable to [Hutton], the sum of **FIVE HUNDRED DOLLARS (\$500.00)** per day for each and every day that such construction is delayed beyond the specified time, as liquidated damages and not as a penalty; if the amount due and to become due from the [City] to [Hutton] is insufficient to pay in full any such liquidated damages, [Hutton] shall pay to the [City] the amount necessary to effect such payment in full: Provided, however that the [City] shall promptly notify [Hutton] in writing of the manner in which the amount retained, deducted or claimed as liquidated damages was computed.

Both the terms “Completion of Construction” and “Completion of Project” were defined in Article VI, §1d as follows:

The term ‘Completion of Construction’ shall mean full performance by [Hutton]

of [Hutton's] obligations under the contract and all amendments and revisions thereof except [Hutton's] obligations in respect of (1) Releases of Liens and Certificate of Contractor under Article III, Section 2 hereof, (2) the Inventory referred to in Article III, Section 1 hereof, and (3) other final documents. The term 'Completion of Project' shall mean full performance by [Hutton] of [Hutton's] obligations under the Contract and all amendments and revisions thereof. The Certificate of Completion, signed by the Engineer and approved in writing by the [City] shall be the sole and conclusive evidence as to the date of Completion of Construction and as to the fact of Completion of the Project.

The original construction start date contemplated in the "Construction Coordinating and Timing" section of the Contract was May 1, 2000, and the completion date was July 1, 2000. A number of delays were encountered, and on August 11, 2000, following a pre-construction conference, Mr. McNabb, informed the parties that the Contract start date was April 5, 2000, the construction start date was August 9, 2000, making the Contract completion date October 9, 2000.

By letter dated October 4, 2000, Hutton requested that the commencement date be moved from August 9, 2000, to October 23, 2000 because poles and materials needed for construction had yet to arrive from the supplier. Mr. McNabb responded to Hutton's request by letter dated October 10, 2000. The letter stated:

You have further requested the contract commencement day be moved to October 23, 2000. We have discussed this with Mr. Jeff Tullis at the City of Coffeyville and reiterate their position stated during the preconstruction conference and again with you by telephone. The City of Coffeyville is willing to forgo liquidated damages provided that the project is entirely completed within 45 days as defined in the contract, with construction beginning on October 23, 2000. Should the project not be completed within that time, each day that the project extends past the 45 day construction period would be subject to liquidated damages. Days used for clearing would also then be included in the liquidated period.

On November 6, 2000, Hutton sent a letter to Mr. McNabb requesting another extension

of time to complete the Coffeyville project because a shipment of poles needed to complete the project would not arrive from its suppliers until approximately December 8, 2000, and would not be ready to pick up until the following week. Hutton did not ask for an extension by a certain number of days, but instead just generally requested an extension. Mr. McNabb did not respond to Hutton's letter. On December 5, 2000, Hutton sent a second letter to Mr. Jeff Tullis, a Department of Public Utilities employee of the City, informing the City that Hutton's contractor had failed and that Hutton was experiencing delays "because of our inability to obtain poles for causes beyond our contract and not our fault." Hutton asked for permission to stop construction until January 15, 2001, and for an extension of 30 days. The following day, Mr. McNabb received a telephone call from Hutton advising him that the poles had arrived in Houston, and Mr. McNabb informed Hutton that "there will be no extension or delay for now." Mr. McNabb did not follow this telephone conversation with a writing; in other words, the request for an extension or a delay in construction was only rejected orally.

Mr. Tullis received another request for a 30 day extension of time for late delivery of the poles on December 7, 2000. Mr. McNabb's notes indicate that this request was denied. Hutton states that it received no response to this request from Mr. Tullis or Mr. McNabb and that "this request was not rejected either orally or in writing, at least until construction was complete." Hutton stated that had this request been denied, it would have ceased performance of any further work on the project.

Hutton requested, through Contractor's field notes, weather delays for October 26-28; November 6, 8, and 10; and December 6, 13-16 and 25-27, in the year 2000. Mr. McNabb granted weather delays for these fourteen days. Construction progress reports indicate that an

additional one day delay was encountered in the November 1-15 period. Thus, the construction completion date, based only upon this fifteen day delay, was December 30, 2000.

On February 2, 2001, Hutton sent a letter to Mr. Tullis requesting an extension “due to the extremely muddy conditions from the rain and snow.” Neither Mr. McNabb nor his engineering firm has any record of receiving the February 2 request for additional time. Mr. McNabb testified that he did not recall seeing this request until litigation began. Hutton received no response to this request.

Additionally, by letter dated March 12, 2001, Hutton requested a twenty day extension “due to extreme rain and mud conditions” and noted that there were ten days of rain during February 2001. Hutton stated that “all this additional moisture actually cost additional days, as there were few days that the right-of-way dried.” Mr. McNabb received a copy of the March 12 letter. In the Construction Progress Report for the period of February 1, 2001 through March 23, 2001, Hutton included the twenty day request for extension of time. Mr. McNabb testified that this request was orally denied. The “Major Events Timetable” he prepared for the project indicates that the March 12 request was denied. Hutton states that it never received a response to this request, “either verbally or in writing, at least until after construction was complete.” Hutton assumed that both the February 2, 2001 and the March 12, 2001 requests were granted because similar requests were granted for the period from October 26 through December 27, 2000, and because no rejection or denial was ever communicated to Hutton.

Hutton energized the line related to the project by March 23, 2001. Construction progress reports, however, show that by March 28, 2001, very little road work restoration had been completed.

On April 9, 2001, Mr. McNabb reported to the City that Hutton, by failing to complete the project within 45 days, had not met the condition for granting the initial start date of October 23, 2000. McNabb stated that “[t]he October 10th agreement essentially said that if the construction was not complete within the allotted 45 days (including weather days) beginning October 23rd, that all days prior to the 10/23 start date plus any days past the newly calculated completion date would then be subject to liquidated damages.” McNabb reported that as of the most recent field report, dated March 22, 2001, the number of days subject to liquidated damages was one hundred fifty-nine; this totaled \$79,500 in liquidated damages. As of April 9, 2001, the total of liquidated damages was \$88,500. McNabb also estimated that the inspection costs incurred by the City as a result of the delayed performance were \$62,094.49.

On April 16, 2001, one of Mr. McNabb’s inspectors recorded two pages of items that still needed to be completed, including *inter alia*: repairing and seeding loose ground; picking up roots, wood chunks and trash piles; filling in ruts on the roadways and in the ditches; and coating and repairing barbed wire. Mr. McNabb forwarded a copy of his inspector’s notes detailing outstanding items to Hutton on April 20, 2001. Mr. McNabb stated that “[t]hese items need to be completed, along with any outstanding items made on the aerial inspection, as soon as possible so this project can be brought to a close.” On May 4, 2001, Hutton advised Mr. McNabb that all the items save one listed on the April 16, 2001 inspection “have been corrected as of today.” Hutton did not correct the relocation of an OPT-GW Static that had been placed on the wrong side of the structure because it was the duty of the substation contractor.

On May 29, 2001, Mr. McNabb sent Hutton a letter requesting copies of Hutton’s Certificate of Contractor and Waiver and Release of Liens because the project was “nearing

completion.” Mr. McNabb did not mention any items not yet completed by Hutton; nor did he advise Hutton that he considered any of the items identified during the April 16, 2001 inspection to be outstanding. Also on May 29, 2001, Mr. McNabb sent correspondence to Hutton regarding a number of additional units which altered the scope of the project, and thus the charges incurred. On June 4, 2001, Hutton responded to Mr. McNabb’s letter regarding the additional units, and on June 5, 2001, Mr. McNabb again corresponded with Hutton regarding the additional charges. Neither the May 29, June 4, nor June 5, 2001 letters contained any reference to items not yet completed. On September 6, 2001, Mr. McNabb acknowledged receipt of the Certificate of Contractor and Waiver and Release of Liens furnished by Hutton, but noted that two suppliers had yet to furnish a Waiver and Release of Liens and that the waivers would “be necessary to close the subject project.” No reference to any uncompleted restoration work appeared in this letter.

Mr. McNabb testified that as of November 15, 2001, work still needed to be performed as certain items identified on the April 16, 2001 inspection were still uncompleted. On November 28, 2001, Mr. McNabb sent a letter to Hutton advising that his inspector had not been contacted regarding cleanup items discussed on November 15, 2001. He emphasized that “[t]ime is quickly passing such that it will be too late to establish any type of vegetation” and asked Hutton to inform him of its schedule for completing the items. On November 30, 2001, Tony Campbell, a landowner affected by the project, sent Hutton a letter asking it not to seed the ground between the telephone poles on his property as he would prefer to leave the ground unseeded.

On January 21, 2002, Hutton sent Mr. Roger Enslow, an engineer at Mr. McNabb’s firm, a letter stating “[s]ince we never heard back from you on checking cleanup after two phone calls,

we assume all cleanup is completed.” Hutton enclosed the letter from Mr. Campbell regarding his desire not to have his property seeded. Hutton sent a letter to Mr. McNabb on March 25, 2002, requesting that he advise Hutton as to the status of Contract Close Out Documents. On April 15, 2002, Mr. McNabb responded to Hutton’s letters regarding cleanup by faxing “another copy of [the inspector’s] notes for cleanup on the project” and noting that seeding will not be required on the Campbell property. The inspector’s notes provided by Mr. McNabb reference inspections on January 8, 2002, and January 28, 2002 and refer to item numbers used on the original clean up notes from the inspection which occurred in April 2001. Hutton responded by letter dated April 26, 2002 that several of the items listed in the inspector’s notes attached to Mr. McNabb’s April 15, 2002 fax were not previously listed on other cleanup reports.

Hutton also requested, by way of the April 26, 2002 letter, a meeting with the City to complete “this warranty work.” Mr. McNabb never responded to Hutton’s request for a meeting with the City. On June 3, 2002, Hutton’s counsel sent Mr. McNabb a letter demanding that the City pay \$110,638.97, the unpaid balance on the Project. On June 28, 2002, Hutton again requested a meeting with the City to complete warranty work. Mr. McNabb provided Hutton the closeout documents for the Project on July 25, 2002, and noted that “[s]ettlement for late completion of the project will need to be considered at the time of final payment.” On August 2, 2002, Mr. McNabb sent the closeout documents, which had already been signed by Hutton, to the City for the City’s review and signature. The City sent Hutton a letter dated August 5, 2002, stating that Hutton had exceeded the 45-day construction period and that the City was therefore entitled to liquidated damages pursuant to the Contract. Hutton refused the City’s suggestion regarding liquidated damages on August 7, 2002.

The City does not dispute the adequacy of the performance of Hutton, other than the time of completion. Prior to the filing of this action, the City paid \$964,210.08, leaving a retainage of \$110,159.47. It is this retainage that is at issue; although the City admits that \$110,159.47 is due and owing on the Contract, it contends liquidated damages which Hutton owes more than offset the retainage. Thus, the City seeks summary judgment on Hutton's breach of contract claim, leaving open the issue of its counterclaim for liquidated damages in excess of the unpaid balance.

II. Summary Judgment Motion

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."¹ The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.² Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."³

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support

¹Fed. R. Civ. P. 56(c).

²See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³*Id.* at 251-52.

the nonmoving party's case.⁴ Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.⁵ "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial."⁶ Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.⁷ The Court must consider the record in the light most favorable to the nonmoving party.⁸

The Court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."⁹

B. Discussion

The City argues that it is entitled to summary judgment because: the new construction start date of October 23, 2000, was conditioned upon Hutton completing the construction within forty-five days, and the condition was not met; Hutton undertook the responsibility of timely procurement of materials and was not without fault in its failure to obtain the poles; and the Contract, including right-of-way restoration, was not completed until July 9, 2002. Therefore,

⁴See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

⁵See *Anderson*, 477 U.S. at 256.

⁶*Id.*

⁷See *id.*

⁸See *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

⁹*Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

the City suggests that a total of 633 liquidated damage days have accumulated and that it is entitled to in excess of \$300,000, more than enough to offset the unpaid Contract balance.

1. Conditional October 23, 2000 Construction Start Date

Under Kansas law,¹⁰ the construction of a contract is a matter of law to be resolved by the court.¹¹ The cardinal rule of contract interpretation is that the court must ascertain the parties' intention and give effect to that intention when legal principles so allow.¹² Where a contract is complete and unambiguous on its face, the court must determine the intent of the parties from the four corners of the document, without regard to extrinsic or parol evidence.¹³

Pursuant to the Contract, Hutton agreed to commence construction on the project "on a date . . . which shall be determined by the Engineer" and to complete construction within forty-five days. Mr. McNabb, after a preconstruction conference between the parties, set the construction start date as August 9, 2000 and the construction completion date as October 9, 2000. But, by October 4, 2000, only five days from the expiration of the forty-five day construction period, Hutton had still not obtained poles necessary for construction. On October 4, 2000, Hutton requested that the construction commencement date be moved to October 23, 2000. Mr. McNabb responded that the City would agree to the October 23, 2000 start date provided that Hutton timely complete construction within the forty-five day period and that if

¹⁰The parties do not dispute that Kansas law governs this contract dispute.

¹¹ *Hart v. Sprint Communications Co. L.P.*, 872 F. Supp 848, 854 (D. Kan. 1994) (citing *First Hays Banshares, Inc. v. Kansas Bankers Sur. Co.*, 769 P.2d 1184 (Kan. 1989)).

¹² *Kay-Cee Enter., Inc. v. Amoco Oil Co.*, 45 F. Supp. 2d 840, 843 (D. Kan. 1999) (citing *Hollenbeck v. Household Bank*, 829 P.2d 903 (Kan. 1992))

¹³ *Id.* (citing *Simon v. Nat'l Farmers Org., Inc.*, 829 P.2d 884 (Kan. 1992)).

Hutton failed to so complete construction, days used for clearing would be included in the liquidated damages calculation.

Hutton argues that the City did not have any authority to place new conditions on the Contract, and that the City's letter was an attempt to unilaterally modify the Contract, which should be enforced as written. At the same time, Hutton contends that the construction start date was October 23, 2000, thus advancing contradictory positions on the same issue. On one hand, Hutton argues that the City could not place conditions on the construction start date. Yet, on the other hand, Hutton urges that the construction start date was October 23, 2000, suggesting that it assented to the City's condition for a new start date. Hutton cannot have it both ways. If the City could not place conditions on a new start date, then the start day would be August 9, 2000, the unconditional last start date determined by Mr. McNabb, and the forty-five day construction period would end on October 9, 2000. Thus, under this interpretation of the Contract, liquidated damages would begin to accrue after October 9, 2000. Days prior to the construction completion date could not be included in the liquidated damages provision as the Contract only provides for damages "for each and every day that such construction is delay *beyond the specified time.*"

Contrary to Hutton's assertions, however, the Contract did not prevent the parties from agreeing to a later start date and a modified liquidated damages clause. Under Kansas law, it is clear that the modification of a contract, if supported by sufficient consideration, results in a new contract.¹⁴ It is also settled that an agreement to modify a contract can be implied from the

¹⁴*Frets v. Capitol Fed. Savings & Loan Ass'n.*, 712 P.2d 1270, 1276 (Kan. 1986)

parties' conduct if they do not continue to act according to the original terms of the contract.¹⁵

Whether any particular term of a written contract has been modified by a subsequent agreement is a question of fact.¹⁶

Here, modification of the Contract was arguably supported by consideration; in exchange for a new construction commencement date, the City agreed to forego liquidated damages, which had begun to accrue. Controverted facts remain, however, regarding whether an agreement to modify the Contract may be implied from the parties' actions. For instance, following the October 4, 2000 letter, the City did not demand payment of liquidated damages which accrued prior to the new commencement date, suggesting that the City intended to modify the Contract. At the same time, the Estimate Payment Report signed by Mr. McNabb for December 31, 2000, listed a Contract completion date of October 9, 2000, which suggests that the City never agreed to the October 23 commencement date. The Court finds that a factual issue remains regarding the parties' intention to modify the original Contract as reflected in Mr. McNabb's October 4, 2000 letter. Consequently, the construction start date and the City's entitlement to liquidated damages for the seventy-five day period from August 9, 2000 to October 23, 2000 are uncertain.

2. Completion of Construction

Hutton argues that the date of completion of construction is controverted precluding summary judgment on its breach of contract claim. Specifically, Hutton argues that the definition of "Completion of Construction" in the Contract is ambiguous and suggests that by

¹⁵*Galindo v. City of Coffeyville*, 885 P.2d 1246, 1253 (Kan. 1994); *Byers Transp. Co. v. The Fourth Nat'l Bank & Trust Co., Wichita*, 333 F.2d 822, 825 (10th Cir. 1964) (applying Kansas law) (parties demonstrated intent to modify contract when parties continued to negotiate despite passing of closing date).

¹⁶*In re Estate of Snook*, 38 P.3d 684, 689 (Kan. 2002).

March 23, 2001, it had finished all of its duties other than restoration work, and energized the line. Hence, Hutton argues that the construction was substantially complete on March 23, 2001. The City, however, points to the definition contained in the Contract and other provisions specifically discussing restoration to suggest that construction had not yet been completed.

The interpretation of an unambiguous contract is a judicial function.¹⁷ If the language of the contract is ambiguous, however, evidence is admissible to determine the intent of the parties to the contract, which is an issue of fact.¹⁸ Whether or not the language of a contract is ambiguous is a question of law for the court to resolve.¹⁹

To be ambiguous, the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from the natural and reasonable interpretation of its language.²⁰ An ambiguity does not appear until application of pertinent rules of interpretation to the face of the instrument leaves it generally uncertain which one of two or more meanings is the proper meaning.²¹ A written contract is not ambiguous unless two or more meanings can be construed from the contract provisions themselves.²² The Court is to use common sense and not strain to

¹⁷*Missouri Pac. R. Co. v. Kansas Gas & Elec. Co.*, 862 F.2d 796, 799 (10th Cir. 1988).

¹⁸*See Wood River Pipeline Co. v. Willbros Energy Servs. Co.*, 738 P.2d 866, 869 (Kan. 1987) (quoting *Hall v. Mullen*, 678 P.2d 169 (Kan. 1984)).

¹⁹*Carland v. Metro. Life Ins. Co.*, 935 F.2d 1114, 1120 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991); *Simon v. Nat'l Farmers Org., Inc.*, 829 P.2d 884, 888 (Kan. 1992).

²⁰*Brumley v. Lee*, 963 P.2d 1224, 1226 (Kan. 1998).

²¹*Hart v. Sprint Communications Co., L.P.*, 872 F.Supp 848, 854 (D. Kan. 1994); *Allied Mut. Ins. Co. v. Moeder*, 48 P.3d 1, 4 (Kan. Ct. App. 2002).

²²*Albers v. Nelson*, 809 P.2d 1194, 1197 (Kan. 1991).

create an ambiguity in a written instrument when one does not exist.²³ The fact that the parties do not agree over the meaning of terms does not in and of itself prove that the contract is ambiguous.²⁴

Hutton argues that the definition of “Completion of Construction” contained in the Contract is ambiguous, and that by March 23, 2001, the construction was substantially completed. The Contract specifically defines the phrase:

The term ‘Completion of Construction’ shall mean full performance by [Hutton] of [Hutton’s] obligations under the contract and all amendments and revisions thereof except [Hutton’s] obligations in respect of (1) Releases of Liens and Certificate of Contractor under Article III, Section 2 hereof, (2) the Inventory referred to in Article III, Section 1 hereof, and (3) other final documents. The term ‘Completion of Project’ shall mean full performance by [Hutton] of [Hutton’s] obligations under the Contract and all amendments and revisions thereof. The Certificate of Completion, signed by the Engineer and approved in writing by the [City] shall be the sole and conclusive evidence as to the date of Completion of Construction and as to the fact of Completion of the Project.

In particular, Hutton advances that “full performance . . . of [its] obligation under the contract and all revisions thereof” is ambiguous. Hutton claims this phrase means that once the construction sequence was completed, the Contract was complete, and that because the construction sequence does not list restoration or cleanup, such was not required for construction completion.²⁵

The Contract, however, belies Hutton’s interpretation. First, the unambiguous definition

²³*Eggleston v. State Farm Mut. Auto. Ins. Co.*, 906 P.2d 661, 662, (Kan. Ct. App.) *rev. denied*, 257 Kan. 1091 (1995).

²⁴*Ryco Packaging Corp. v. Chapelle Int’l, Ltd.*, 926 P.2d 669, 674 (Kan. Ct. App. 1996), *rev. denied*, 261 Kan. 1086 (1997).

²⁵Hutton also suggests that the construction was substantially completed when the line was energized on March 23, 2001. To support this conclusion, Hutton relies on Herb Dierks’ expert opinion, but as discussed *supra* this expert opinion is not admissible.

of completion of construction includes full performance of all Hutton's obligations, other than those specifically excluded. Restoration or cleanup are not specifically excluded. Moreover, the "Particular Undertakings of the Bidder" section of the Contract provides that "[p]rior to completion of construction, [Hutton] shall clean and smooth all rutted and scarred areas, rebuild stream and road crossings and damaged areas as directed by the [City]." Finally, the Court notes that Hutton's contention that the "sequence of construction" should be determinative of the construction completion date is nonsensical in that the last step in the sequence of construction is "Construct Line C to Industrial Park." The Contract's "specifications for line construction," includes a provision regarding restoration, which states:

[Hutton] shall have a continuous cleanup program throughout construction. [Hutton] shall restore the land that is crossed to its original condition. This restoration includes the removal of deep ruts and the disposal of foreign objects such as stumps or chunks of concrete. It also includes smoothing and reseeding damaged vegetation similar to the original, cleaning out gullies and restoring terraces. Roads existing prior to construction shall be restored to equal or better than their original condition.

It cannot seriously be contended that the Contract is ambiguous or that restoration and cleanup were not required before construction would be complete.

It is uncontroverted that as of April 16, 2001, Hutton had much restoration and cleanup work yet to complete. The inspection report dated April 16, 2001 and provided to Hutton on April 20, 2001, listed two pages of items that still needed to be completed including, *inter alia*: repairing and seeding loose ground; picking up roots, wood chunks and trash piles, filling in ruts on the roadways and in ditches; and coating and repairing barbed wire. On May 4, 2001, Hutton certified that it had completed all restoration identified in the April 16 inspection. However, on November 28, 2001, over six months later, Mr. McNabb sent Hutton a letter indicating that

certain cleanup items had yet to be completed. The parties again corresponded about restoration and cleanup work on January 21, 2002, when Hutton informed Mr. McNabb that it assumed all work had been completed since it had not heard from him after two phone calls. Additional inspections were apparently completed on January 8, 2002 and January 28, 2002. On March 25, 2002, Mr. McNabb faxed Hutton “another copy” of the January 2002 inspection lists. Hutton requested meetings with the City by way of letters sent April 26, 2002, and June 28, 2002. It was not until July 25, 2002, that Mr. McNabb provided close out documents to Hutton.

As is clear from this summary regarding restoration and the communication between the parties, controverted facts remain regarding the exact date the construction was completed. Hutton has presented some evidence that all restoration work was completed on May 4, 2001. On the other hand, the City suggests that restoration and cleanup work was still uncompleted in March of 2002. Although the Contract provides that the Certificate of Completion “shall be the sole and conclusive evidence as to the date of Completion of Construction,” neither party has informed the Court what date appears in the Certificate of Completion, or provided the Court with a copy. The Court finds that the date of construction completion is disputed; therefore, summary judgment may not be granted on this issue.

3. Good Faith

Even if the City had provided the Court with the Certificate of Completion listing July 25, 2002, as the date of completion of construction, summary judgment would still not be proper. Hutton’s suggestion that the City breached the implied covenant of good faith and fair dealing by delaying the completion of construction makes it impossible for the Court to calculate liquidated damages. Kansas law imposes upon parties an implied agreement that they will act in good faith

and fair dealing throughout the performance of the contractual obligations assumed by both.²⁶ Questions of good faith are fact questions for a jury.²⁷ No triable issues of fact are present, however, if the evidence in the record is insufficient to support a verdict for the party opposing a motion for summary judgment.²⁸

Hutton has presented evidence that it was denied extensions for poor weather and for lack of necessary materials and argues that this denial was in bad faith. In addition, Hutton argues that Mr. McNabb and the City substantially delayed the project by not timely responding to Hutton's letters regarding restoration efforts. Hutton also suggests that the City wrongfully withheld closeout documents for the project until Hutton threatened to file a lawsuit. Because Hutton has presented some evidence to support these claims, the City's good faith is a question of fact which may not be properly disposed of at the summary judgment stage.

4. Delays Attributable to Weather and the Availability of Materials

Hutton also urges that the City should have extended the construction period because of the weather and the unavailability of poles, and that such an extension would reduce the number of days included in the liquidated damages calculation. In light of the Court's conclusion that both the date of construction commencement and construction conclusion are controverted, as well as the unresolved issues of good faith, the Court need not reach this issue, for even after resolving the issue of weather and material related delays, the amount of liquidated damages would still be uncertain, and may not completely offset the unpaid Contract balance.

²⁶*Morriss v. Coleman Co., Inc.*, 738 P.2d 841, 849 (Kan. 1987)

²⁷*Bonanza Inc. v. McLean*, 747 P.2d 792, 800 (Kan. 1987).

²⁸*Id.*

III. Motion to Exclude Testimony

A. Legal Standard

Federal Rule of Evidence 702 imposes upon the trial judge an important “gatekeeping” function with regard to the admissibility of expert opinions.²⁹ Rule 702 allows expert testimony, by opinion or otherwise, if the witness is qualified as an expert and his specialized knowledge “will assist the trier of fact to understand the evidence or to determine a fact in issue.”³⁰ Expert testimony is admissible only if it is both relevant and reliable.³¹

To determine relevancy, the Court considers whether the testimony is so “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.”³² To determine reliability, the Court analyzes all aspects of the expert’s testimony, including the facts underlying the opinion, the methodology, and the link between the facts and the conclusion drawn.³³ The Court must make a practical, flexible analysis of the reliability of the testimony considering relevant factors in the circumstances of the case.³⁴ The Supreme Court has held that Rule 702 imposes a special obligation on a trial judge to ensure that all expert testimony, even non-scientific and experience-based expert testimony, is both relevant and reliable.³⁵

²⁹See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (citing *Daubert*, 509 U.S. 579).

³⁰Fed. R. Evid. 702.

³¹*Id.*

³²*Worthington v. Wal-Mart Stores, Inc.*, 257 F. Supp. 2d 1339, 1341-42 (D. Kan. 2003).

³³See *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).

³⁴See, e.g., *Kumho Tire*, 526 U.S. at 149-52; *Heller*, 167 F.3d at 155.

³⁵*United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001) (citing *Kuhmo*, 526 U.S. at 147).

An expert may offer an opinion even if it “embraces an ultimate issue to be determined by the trier of fact.”³⁶ Even after *Daubert*, rejection of expert testimony has been the exception rather than the rule.³⁷ “Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”³⁸ Nonetheless, an expert may not simply tell the jury what result it should reach.³⁹

B. Discussion

The City objects to the expert opinion of Herb Dierks, Hutton’s expert, on two grounds. First, the city argues that Mr. Dierks is employing an incorrect standard of liability, which fails to meet *Daubert*’s “fit” requirement and therefore his opinion is irrelevant. In addition, the City suggests that Mr. Dierks’ expert opinion is in essence a legal opinion, outside the scope of “scientific, technical, or other specialized knowledge,” and not helpful to the trier of fact.

1. Incorrect Legal Standard

The City argues that Mr. Dierks’ opinion is inadmissible under *Daubert* because he has applied an erroneous legal standard by focusing not on the Contract, but instead on industry custom. In Kansas, the legal meaning of a contract including whether a contract is ambiguous is

³⁶Fed. R. Evid. 704.

³⁷Fed. R. Evid. 702 (Dec. 1, 2000) (advisory committee notes); *Burton v. R.J. Reynolds Tobacco Co.*, 183 F. Supp. 2d 1308, 1311 (D. Kan. 2002).

³⁸*Daubert*, 509 U.S. at 595.

³⁹*United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993).

a question of law for the Court.⁴⁰ Testimony as to a standard industry practice may be admissible to interpret an ambiguous contract provision.⁴¹ However, where the contract is clear and complete, it cannot be changed or supplemented by evidence of prevailing industry practice. In addition, “[a]bsent any need to clarify or define terms of art, science or trade, expert opinion testimony to interpret contract language is inadmissible.”⁴² Thus, in the absence of an ambiguous contract provision, evidence of industry custom is simply irrelevant and properly excluded pursuant to Rule 702 and *Daubert*.⁴³

Mr. Dierks begins his report by noting the standard utilized to reach his conclusions:

The purpose of this review is intended to identify items that may not be a part of the norm in contracting work. The reference for the evaluation is the standard RUS Form 830 (Rev. 2-95). This is a common form throughout the industry for Construction Contracting contracts. We recognize that the use of this form outside of the RUS control does not compel the use of the form as it is written.

In addition to basing his testimony on “the norm,” Mr. Dierks rests his conclusions on his experience in the construction contract arena. He admits that “we have little knowledge of the actual project.”

Mr. Dierks’ opinions regarding weather-related extensions are not relevant because they are not based upon the unambiguous language contained in the Contract, but rather, on his views

⁴⁰*Kay-Cee Enter., Inc. v. Amoco Oil Co.*, 45 F. Supp. 2d 840, 843 (D. Kan. 1999) (applying Kansas law).

⁴¹*Havens v. Safeway Stores*, 678 P.2d 625, 629 (Kan. 1984).

⁴²*Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1401 n.4 (D. Kan. 1998).

⁴³*See, e.g., Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1288 (10th Cir. 2000) (where expert testimony was extrinsic evidence contradicting the plain language of the contract, the testimony was properly stricken); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 202 F. Supp. 2d 1212, 1217 (D. Kan. 2002).

about construction contracts in general. He opines in paragraph 2 of his report:

The way that we handle extensions requires that there is nothing that can be done due to the weather. If there is work that can be done, then the work should be done rather than delay the project. When construction time is lost at the beginning of a project, there may be a matching delay at the end of the project. Some times a contractor can bring in a few more people and gain back some of the delays. However, there is a limit to the number of people on site before it becomes an exercise in futility.

Mr. Dierks refers to his experience and possible solutions to a weather delay, but the Contract itself anticipated this problem and vested Mr. McNabb with discretion to grant delays for weather-related problems. Hutton does not argue that this Contract provision is ambiguous. Nor does Mr. Dierks opine that Mr. McNabb failed to act in good faith by granting delays; he does not suggest that he was familiar with the weather conditions Hutton encountered and that such conditions would, in good faith, require the City to grant an extension. In short, Mr. Dierks' opinion concerning the industry custom of granting extensions ignores the clear Contract provisions, and as such, is irrelevant.

Similarly, Mr. Dierks' opinions regarding the procurement of poles for the project in paragraph 3 fail to meet *Daubert's* "fit" requirement. He states that:

We have never had such a problem attaining materials. Normally, the OWNER would work with the CONTRACTOR so that the materials are delivered before work begins. Contractors lose money when there are delays in the materials needed. It is customary to extend the completion date when materials are not available.

Again, Mr. Dierks fails to mention the Contract provisions governing the procurement of materials. The Contract specifically authorized Hutton, before its bid was even selected, to order materials because time was of the essence for the City. Hutton does not suggest that this

provision is ambiguous. Moreover, regardless of whether it is “customary” to extend the completion date, the Contract did not provide for such an extension. Hutton argues that Mr. Dierks’ opinion is relevant because the Contract provides for an extension for “any reasonable delay which is due exclusively to causes beyond the control and without the fault of the Bidder.” However, Mr. Dierks does not opine that the delay in attaining the poles was a reasonable delay, nor does he suggest that the delay was beyond Hutton’s control or that Hutton was without any fault. Indeed, Mr. Dierks could not reach such a conclusion since he admittedly was unfamiliar with the Project. Finally, the Court notes that Mr. Dierks does not suggest that the City’s failure to grant additional extensions was not in good faith.

For the same reasons, Mr. Dierks’ suppositions contained in paragraph 7 of his report, also related to extensions, are inadmissible. He concludes that:

In the application of extensions, the Owner or his agent is informed of the requested extensions as part of the weekly progress reports. Unless the Owner denies in a timely manner, it is generally assumed that the extension is accepted.

Mr. Dierks’ conclusion regarding extensions is negated by the Contract language. The Contract provided that requests for extensions would be “approved *in writing* by the Engineer.” This provision is not ambiguous, nor does it contain technical language; as such, extrinsic evidence of industry custom is not permitted.

2. Impermissible Legal Opinion

The City argues that the remainder of Mr. Dierks' expert report is inadmissible because it is a legal conclusion and therefore not helpful to the trier of fact. Hutton urges that its expert is not attempting to interpret the Contract, but rather that "Mr. Dierks is expressing an expert opinion as to whether or not the contract between the parties was breached." It is settled that an expert may not apply the law to the facts of the case to form legal opinions.⁴⁴ It is permissible, however, for an expert to refer to the law in expressing his opinions.⁴⁵

The Court agrees that the remainder of Mr. Dierks' report contains legal conclusions in addition to inadmissible extrinsic evidence of industry custom. Paragraph 4 of the report contains Mr. Dierks' interpretation of the Contract's liquidated damages provision:

The liquid [sic] damages are estimated in the contract to protect the Owner from additional costs for failure to perform. In our practice, the \$500 is the high end of what might be owed if damages were pursued. We will offer some thoughts on the amounts. I agree that there were long delays in getting materials and getting the line(s) done. However, we would work with the owner and the contractor with an open dialog. This also assumes that the people on the project have no place else to go during this time. We would typically reassign our inspector(s) to work on other projects until this project is ready to restart. In these ways, the costs to keep the OWNER whole is [sic] better managed for all involved.

Mr. Dierks' attempt to interpret the Contract by providing the reason for the liquidated damages clause is inadmissible; contract interpretation is purely a matter of law for the Court. His discussion of industry custom and possible methods to reduce costs in the event of a long delay is likewise inadmissible. Hutton has never suggested that the liquidated damages clause is

⁴⁴*A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991).

⁴⁵*Id.*

ambiguous, nor that the clause contains technical terms warranting explanation through extrinsic evidence. The liquidated damages clause is clear and unambiguous and provides that damages in the amount of \$500 will accrue for each and every day that the construction extends beyond the forty-five day construction period. That Mr. Dierks would reassign his inspector and keep an open dialogue were he faced with a situation similar to the situation faced by the City is irrelevant.

Likewise, paragraph 5 of the report contains inadmissible legal opinions regarding the conditional construction start date. Mr. Dierks opines:

Regarding a FAX from the Engineer to the Owner dated April 9, 2001, the extension agreement dated 10/10/2000 was set up so that they would take back the extension if the contract didn't meet the contract days of the project. This was impossible without the performance of the pole supplier. Poles can be a "long lead" item. If we see that the lead times are getting long, we would work with the Owner to purchase them (as Owner Furnished Materials) on a separate contract to get that started ahead of the construction contract. In review of the information on the requests [sic] extensions, the data that we saw appears to be normal for requesting extensions.

Mr. Dierks' interpretation of the "extension agreement" is a legal conclusion. The construction of the letter regarding the new construction date is purely a question of law for the Court.

Moreover, Mr. Dierks' comments about poles being a "long lead" item are not relevant. He again resorts to industry custom to suggest that the City should have purchased the poles in advance on a separate contract. But, the parties did not contract for the City to pre-purchase the poles. Pursuant to the Contract, Hutton was authorized even before the Contract was consummated to order the necessary materials. In addition, the Contract governed requests for extensions making Mr. Dierks' conclusion that the extension appear "normal" irrelevant as well.

Paragraph 6 of Mr. Dierks' report is not only irrelevant, but even if it were relevant, it would be an impermissible legal conclusion. Mr. Dierks states:

Once the line is energized, the Owner has use of the line. An energized line is considered substantially completed. Therefore, liquidated damages are no longer an issue. The issues of clean up, punch lists, and warranties, etc. can be managed through the use of the 10% retention in the contract.

The phrase "substantially completed" does not appear in the Contract. Thus, Mr. Dierks' definition of substantially completed is irrelevant. Moreover, the Contract provides that liquidated damages will accrue until "Completion of Construction." The parties agreed that "Completion of Construction" meant "full performance by the Bidder of the Bidder's obligations under the Contract and all amendments and revisions thereof" except those obligations specifically excluded. This provision is clear and unambiguous. Mr. Dierks' opinion that liquidated damages are no longer an issue after the line is energized ignores the clear provisions of the Contract and is inadmissible.

IT IS THEREFORE ORDERED BY THE COURT that the City's Motion for Summary Judgment (Doc. 29) is DENIED.

IT IS FURTHER ORDERED BY THE COURT that the City's Alternative Motion to Exclude Testimony or For a 104(a) Hearing to Determine Admissibility (Doc. 22) is GRANTED.

IT IS SO ORDERED.

Dated this 24th day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Court Judge