[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10547

IPS AVON PARK CORPORATION,
D E JONES CONSULTING, INC.,

Plaintiffs-Appellants,

versus

KINDER MORGAN, INC.,
EL PASO LLC,
MESQUITE INVESTORS, LLC,

Defendants-Appellees,

SHADY HILLS POWER COMPANY, LLC,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:20-cv-01643-TPB-CPT

Before BRANCH and BRASHER, Circuit Judges, and WINSOR,* District Judge.

PER CURIAM:

Appellants D E Jones Consulting, Inc., and IPS Avon Park Corporation held an equity interest in an electric power generation plant they helped develop. When they later sold that interest, the sales contract provided each would receive an additional $1.25 million payment if the project were later expanded. Years later, and after an unsuccessful effort to expand the facility, they demanded the additional payment. The issue in this appeal is whether they are entitled to that payment.

The trial court granted summary judgment against Jones Consulting and Avon Park, concluding that under the sales contract's plain language, no additional payment was due. After

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* Honorable Allen C. Winsor, United States District Judge for the Northern District of Florida, sitting by designation.

carefully reviewing the record, and with the benefit of oral argument, we affirm.

I. BACKGROUND

Shady Hills Power Company, LLC, formed to develop and own a Pasco County electric power generation project. Jones Consulting and Avon Park worked on the project, and each received a 2.5% interest in that LLC. They eventually sold that interest to Shady Hills Holding, which held the remaining 95%.[1]

The parties recognized that future expansion would increase the project's value, and the sales contract included a future-payment provision to account for this. Under that provision, Jones Consulting and Avon Park would each receive an additional $1.25 million "upon the issuance of notice to proceed with construction of the Expansion of the Project under any engineering, procurement and construction contract[2] related thereto." The agreement further provided that "an Expansion of the Project shall be deemed

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[1] Appellees are Mesquite Investors, LLC, which has assumed the obligations under the payment provision; El Paso LLC, which is the obligor on the guaranty; and Kinder Morgan, Inc., which has assumed the liability associated with the guaranty. The parties agree that these other entities—not Shady Hills Holding—are those obligated to make any payments due under the payment provision. For simplicity, we refer to these three collectively as "Kinder Morgan."

[2] An "engineering, procurement and contract" or "EPC contract" is an industry term referring to a specific kind of contract. DE 32-1 at 48:11-15; DE 35-1 at 13:24-14:7.

to have occurred upon (i) the conversion of the Project or any portion thereof from a simple cycle to a combined cycle configuration or (ii) the addition of one or more combustion turbines to the site of the Project."

Years after the sale, Shady Hills Energy Center, LLC—a Shady Hills Power affiliate—began efforts to construct, design, operate, and maintain a new combined-cycle facility on adjacent property. Though the new facility was never completed, Shady Hills Energy entered certain contracts related to the plan. Four of those contracts are at issue here: those with Duke Energy Florida LLC, General Electric Company ("GE"), Aquatech International, LLC, and The Industrial Company ("TIC").

The Duke Energy contract was to connect the new facility to Duke Energy's power grid. The GE contract was for the sale of power-generation equipment and related services. The Aquatech contract was for the construction of a water treatment facility. And the TIC contract was for the construction of a combined-cycle electric power generation facility.

After Jones Consulting and Avon Park learned about the expansion efforts, each demanded the $1.25 million payment. When no payment came, they sued, alleging breach of contract and breach of guaranty. Kinder Morgan removed the action to federal court, where the parties later filed cross-motions for summary judgment. The district court granted Kinder Morgan's motion and denied Jones Consulting and Avon Park's motion. This appeal followed.

II. STANDARD OF REVIEW

This court reviews de novo the district court's summary-judgment decisions. *Klaas v. Allstate Ins. Co.*, 21 F.4th 759, 766 (11th Cir. 2021).

III. ANALYSIS

As the parties agree, Florida law governs in this diversity case. Under Florida law, "[t]he elements of a breach of contract action are (1) a valid contract; (2) a material breach; and (3) damages." *Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir. 1999) (citing *Abruzzo v. Haller*, 603 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1992)). Breach is the only disputed element here. And that turns on the interpretation of the contract.

The parties agree the contract here is unambiguous, so we must "give effect to the plain language." *Equity Lifestyle Props., Inc. v. Fla. Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1242 (11th Cir. 2009) (quoting *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1246 (11th Cir. 2002)). We must "give meaning to each and every word" and "avoid treating a word as redundant or mere surplusage 'if any meaning, reasonable and consistent with other parts, can be given to it.'" *Id.* (quoting *Roberts v. Sarros*, 920 So. 2d 193, 196 (Fla. Dist. Ct. App. 2006)).

Jones Consulting and Avon Park's principal argument is that *any* notice to proceed related to construction of the project expansion qualifies to trigger the payment provision. But the provision's

unambiguous language is narrower than that. The payment is due "upon the issuance of notice to proceed *with construction of the Expansion of the Project* under any engineering, procurement and construction contract related thereto."[3] The "related thereto" language connects "construction of the expansion of the project" to "any engineering, procurement, or construction contract." Thus, a qualifying notice to proceed must be both (i) for construction of the expansion of the project and (ii) under an EPC contract related to construction of the expansion. It is not enough to have a notice to proceed for just anything "related to" project expansion.

With that interpretation in mind, we consider whether any notice to proceed under any of the four contracts at issue sufficed to trigger the payment obligation. As we explain below, the answer is no.

A. Duke Energy

The parties dispute whether the Duke Energy contract is an EPC contract. But that ultimately makes no difference. Either way, there was no "notice to proceed with construction of the Expansion of the Project." The Duke Energy contract was to connect the proposed new facility to Duke Energy's existing power grid—not for the addition of a turbine or for conversion of the facility to a

[3] As noted above, "Expansion of the Project" is a defined term and occurs upon "(i) the conversion of the Project or any portion thereof from a simple cycle to a combined cycle configuration or (ii) the addition of one or more combustion turbines to the site of the Project."

combined-cycle facility. It is true the contract relates to the expansion project, but as discussed above, this is not enough.

B. GE

The parties also dispute whether the GE contract is an EPC contract. Again, this makes no difference. The notice to proceed was for the work authorized by the contract, which is the supply of equipment (including turbines), and the provision of services (including engineering services and project management services). This is not construction.

Jones Consulting and Avon Park argue the engineering services suffice because engineering is construction. But under any plain-meaning interpretation, engineering services are not "construction." In short, the notice to proceed did not authorize construction of the expansion of the project.

C. Aquatech

The Aquatech contract is an EPC contract, under which a limited notice to proceed was issued.[4] The limited notice to proceed was for construction of a water treatment facility—which is neither an additional turbine nor the conversion of the facility into a combined-cycle facility. It is not enough to argue, as Jones

[4] For both the Aquatech and TIC contracts, Kinder Morgan maintains the limited notices to proceed do not qualify because they are not general notices to proceed. Because they were, in any event, not qualifying notices to proceed, we need not reach this alternative argument.

Consulting and Avon Park do, "that the water treatment plant is essential to the Expansion." Perhaps it is essential, but there was no notice to proceed *with* the Expansion. So this likewise was no triggering event.

D. TIC

The TIC contract was also an EPC contract, and several limited notices to proceed issued under it. But none was for construction of the expansion of the project: They authorized engineering work, construction of a concrete pad for a fire pump, installation of a fence, mowing, clearing trees, and more mowing. Only the one about the concrete pad involved construction. And even that one was for construction of a concrete pad for a fire pump—not construction of an additional combustion turbine. As before, that these activities may have related to the overall planned expansion does not make them "notice[s] to proceed with construction of the Expansion of the Project."

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In short, there was never a notice to proceed with construction of the expansion of the project issued under any EPC contract. Without such a notice, the payment provision was never triggered.

IV. CONCLUSION

The district court's order granting summary judgment for Kinder Morgan and denying summary judgment for Jones Consulting and Avon Park is **AFFIRMED**.