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Kimball Vance and Alta J. Vance, dba Vance Electric Service v. L. E. Arnold and R. B. Bean, dba Viking Automatic Sprinkler Company, and A. L. Eichholz, an individual trading as A. L. Eichholz Plumbing and Heating Contractor : Respondents' Reply to Appellants' Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Response to Petition for Rehearing, *Vance et al v. Arnold et al*, No. 7158 (Utah Supreme Court, 1948).
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In the Supreme Court of the State of Utah

KIMBALL VANCE and ALTA J.
VANCE, dba Vance Electric Service,

Plaintiffs and Appellants,

vs.

L. E. ARNOLD and R. B. BEAN, dba
Viking Automatic Sprinkler Company,
and A. L. EICHHOLZ, an individual
trading as A. L. Eichholz Plumbing and
Heating Contractor,

Defendants and Respondents.

Case No.
7058

RESPONDENTS' REPLY TO APPELLANTS'
PETITION FOR REHEARING

FILED CRITCHFIELD, WATSON & WARNOCK

FEB 24 1977

Attorneys for Respondents

CLERK, SUPREME COURT, UTAH

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In their Petition For Rehearing of the above case the Appellants advance two points, both of which were presented to the Court in the original Briefs and upon oral argument and both of which were obviously considered thoroughly by the Justices in rendering the prevailing and dissenting opinions in the case.

The prevailing opinion is based entirely upon the construction of the plans and specifications and holds that when considered in their entirety they require the

installation of the electric low air pressure alarm circuits. This construction of the plans eliminated the necessity of determining the Appellants' assignments of error relating to the admission of parol evidence of a conversation prior to the execution of the subcontract, and what the Appellants had included or omitted in estimating the job as a basis for their first bid of \$14,500.00, their revised bid of \$10,000.00 and their final bid of \$10,700.00.

THE EVIDENCE

Notwithstanding the fact that the prevailing opinion here holds that "all of his (the trial court's) findings are supported by substantial evidence," the Appellants devote practically all of their argument for rehearing to a discussion of the evidence. Appellants contend that it is preposterous to believe that the Appellants could or would have agreed to include the work of installing the low air pressure alarm circuits for only \$10,700.00, in view of the fact that they had originally bid \$14,500.00 for the electrical work without these circuits. This is the very same argument which Appellants advanced and argued at length in and under Point III (a) of their original brief. They now reiterate this argument, apparently in the hope of enlisting the sympathy of the Court to the extent of inducing one of the majority to change his opinion as to the construction of the plans and specifications. In so doing, the Appellants draw upon their imagination and assert as facts statements for which there is no

basis in the record, and omit others as to which there is clear and indisputable evidence in the record.

For example, Appellants repeatedly state that Mr. Bean "conceded" or "agreed" that the original bid of \$14,500.00 did not include the installation of the low pressure alarm circuits or some magnetic switches (Pages 14-15 of Petition). However the Appellants' original bid of \$14,500.00 was in writing (Exhibit 12) and in it we find the words:

"This bid includes the electrical heaters, thermostats, *magnetic* and safety switches, and electrical connections to the compressor motors."

In any event, Mr. Bean was on the other side and it is hard to see how he could know what work Mr. Vance or Mr. Swaner, his estimator, had included or left out. Mr. Bean was in no position to know what work and materials Vance had figured on, what costs he had computed or what sum he had allowed for profit.

In presenting this argument the Appellants seek to have the court believe that the \$700.00 added to their bid could not have been intended by Appellants to cover the cost of installing the low air pressure alarm circuits, including switches, and also the magnetic switches for the compressors. Such an argument ignores the fact (1) that automatic switches on the compressors were required under the plans and specifications upon which Vance bid the job; and (2) that magnetic switches were included in the original bid of \$14,500.00. Obviously the increase in the bid from \$10,000.00 to \$10,700.00 was not all one sided. Vance

agreed to furnish the low air pressure alarm circuits if, and only if required by the engineer in charge. The \$700.00 was deliberately added to take care of the possibility that the Engineer in Charge might require the installation of the low air pressure circuits, just as Swaner testified (see Swaner deposition, page 7).

The Appellants state on page 5 of their petition that "there is no item in the breakdown (referring to the cost breakdown for priorities, Exhibit 1) such as \$1077.34 for the low pressure electric alarm switches which were furnished by the Government." There was, however, an item of "switches - \$1100.00," which so far as any evidence in the case shows might well have been Swaner's estimate of the cost of magnetic switches and also low air pressure alarm switches (See Swaner deposition, page 13-14).

Next Appellants argue it is impossible to believe that an intelligent man would think of allowing only \$700.00 to cover the possibility of having the Engineer in Charge require the installation of the low pressure alarm circuits—which it was stipulated (for the purpose of avoiding the time of the Court and parties which would be consumed had the Appellants been required to prove, item by item, his cost of doing the work later) actually cost the Appellants \$2,445.89 including 10% and 5% for profit and overhead, exclusive of the low air pressure switches furnished by the government.

Beyond this stipulation there is no evidence in the record of the cost, to Vance, of the materials or labor employed in doing the electrical work other than the

installation of the low pressure alarm circuits. Likewise, there is no evidence in the record as to the profit Vance made on the job. As far as we know he may well have made money and might have made more if he had installed the low air pressure alarms while his other work progressed.

Nevertheless counsel now contends that the total cost of materials used in the entire job was \$7,972.34 (Petition, page 6), using as a basis for this the total of \$6,895.00 set opposite the Appellants' cost breakdown for priorities (Exhibit 1 attached to the Swaner deposition) and adding to it the \$1,077.34 value of the low air pressure switches supplied by the government. However, Swaner himself testified that this cost breakdown was written just to obtain priorities for whatever materials might be needed and did not pretend to be an accurate estimate of items or costs (Swaner deposition, page 14). It will be noted that this breakdown included both "bells" and "switches" and Swaner testified that he intended the word "switches" to include switches of any description, including the low air pressure switches. By this method of computation Appellants hope to persuade the Court that less than \$2,800.00 of the total bid was left for labor, profit and overhead, and, we suppose, seek to have the Court infer that the labor must have equaled or exceeded this amount and so the job was done at a loss. As stated above, there is no evidence of either the cost of materials actually used (except the \$1,077.34 for low air

pressure switches), nor the labor nor the profit or overhead.

Beginning at the bottom of page 3 of Appellant's Petition, they say that "defendants conceded that plaintiff would be entitled to recover this sum of \$1,077.34 plus \$2,445.89 if they (plaintiffs) prevailed on their second cause of action." This statement is, of course, wrong. The \$1,077.34 is the cost of the switches which the government supplied, was deducted from the amount paid by the government to the principal contractor. The Appellants did not purchase or supply these switches and therefore would not under any circumstances be entitled to recover that amount from the defendants.

Appellants claim that the installation of these circuits "could only be installed after the other work had been performed and was in fact installed by the plaintiffs as a separate and distinct unit after the original electrical work had been done" (Petition, page 11). Of course, it is true that it was installed after the original work had been done, because Vance himself elected to decide the question of the interpretation of the plans and specifications in his favor, but there is no evidence in the record that the work of installing these circuits could not have been done when his crew was on the job at considerable saving of labor. There was certainly no evidence that no additional cost was incurred by doing the work later. Certainly the inference that the cost would be increased if the work was done after the original electrical contractor had withdrawn his

crew is more consistent with experience than that no extra cost was involved.

However, there is no merit to appellants' claim that the Court or any of the Justices have overlooked these contentions. Mr. Justice Latimer's statement of the facts and his opinion indicates that the contentions of the appellants were noticed, but that in view of the fundamental issue (namely, the construction of the plans and specifications) it was unnecessary to decide the evidentiary questions which had been decided by the Trial Court adversely to appellants upon conflicting evidence.

THE CONSTRUCTION OF THE CONTRACT

Beginning at page 7 of the Petition the Appellants argue that the majority of the Court has misunderstood the distinction between the plans and specifications on the one hand and the Special Provisions of the specifications on the other. It is obvious, however, from the prevailing and dissenting opinions that the Court was well aware of the purpose and provisions of the Special Provisions and had thoroughly considered Appellants' argument on this point appearing on pages 45-47 of their original brief herein and Respondents' argument beginning on page 20 of their brief. The prevailing opinion quotes and construes the section of the Special Provisions upon which the Appellants particularly relied and reconciles the claimed inconsistency between the one sentence of Section 1A-02 (c) of the Special Provisions on the one hand and

other sections of the Special Provisions and of the plans and general specifications themselves on the other. The dissenting opinion disagrees with this construction and it is quite clear that there was and could be no misapprehension in the minds of the participating Justices as to the issue involved and the contention of the parties.

We respectfully submit that all issues of law and of fact involved in the point assigned by Appellants in their petition were thoroughly presented and argued, and considered by the Court; that the decision is sound; and that there is no basis or reason for a rehearing of the cause.

Respectfully submitted,

CRITCHLOW, WATSON & WARNOCK

Attorneys for Respondents