1978

Thorn Construction Company, Inc., A Utah Corporation v. Utah Department of Trans-Portation : Brief of Appellant Utah Department of Transportation

Utah Supreme Court

IN THE SUPREME COURT OF THE [illegible]

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THORN CONSTRUCTION COMPANY, [illegible]
INC., a Utah Corporation,

Plaintiff and
Respondent,

vs.

UTAH DEPARTMENT OF TRA[illegible]
PORTATION,

Defendant and
Appellant.

[illegible]

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Plaintiff and Respondent,	:	
vs.	:	Case No. 15647
UTAH DEPARTMENT OF TRANSPORTATION,	:	
Defendant and Appellant.	:	

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BRIEF OF APPELLANT UTAH DEPARTMENT OF TRANSPORTATION

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STATEMENT OF THE KIND OF CASE

This case arises out of a construction contract and involves the interpretation of contract specifications and whether the Respondent contractor is obligated to follow the contract as it is written or is excused from compliance with certain provisions regarding notice. Finally, the case involves the question of the amount of damages the Respondent is entitled to recover.

DISPOSITION IN LOWER COURT

The Third District Court, the Honorable Marcellus K. Snow presiding, awarded Plaintiff-Respondent Thorn Construction Company judgment against Defendant-Appellant for the sum of $24,500.00. This trial Judge determined that Respondent was entitled to additional compensation over and above contract unit prices for certain changes in the contract and that Respondent was excused from specification requirements to file notice of its intent to claim compensation or to provide details regarding how its unit prices were affected to Appellant. Finally, the Court allowed Respondent to present its evidence of alleged damages based on a "total cost" theory of damages over objections by Appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Judgment in favor of Respondent for $24,500.00 and in lieu thereof a judgment for the sum of $1,791.30, which amount was conceded by Appellant as due and owing based on an analysis of the unit cost for borrow material.

In the alternative, Appellant seeks a new trial with instructions that Respondent is not excused from compliance with contract provisions relative to notice of intended claims and from the requirement to base its claims for additional compensation upon detailed information related to changes in contract unit costs. Further, Appellant requests that the Court determine that Respondent cannot use the "total cost" approach as its method of establishing compensation.

As a further alternative, Appellant seeks a reduction in the judgment to correspond with the evidence before the Court.

FACTS

The parties on March 27, 1973, entered into a contract, a part of which was for construction of an access road at Rockport State Park.

Part of the contract provided for the importation of 28,100 cubic yards of borrow material. Section 106.02 of the State of Utah Standard Specifications for Road and Bridge Construction (1970 Edition), hereinafter "Standard Specifications," sets forth the requirements for suitability of such material. Neither the contract special provisions nor plans specify any source for the borrow material. The contractor determined his own source as provided in Section 106.02 of the Standard Specifications, and the State tested it for suitability.

Prior to submitting its bid, representatives of the Respondent visited the work site and Appellant's employee, Virgil Mitchell, accompanied them on an inspection. A "possible source" (R. 8, 10) referred to as the "Utelite Pit" was viewed. Virgil Mitchell was not the project engineer, and he had not been authorized by the engineer as his agent to make representations concerning the plans for the project. Mitchell is not trained or experienced in testing for suitability of materials, and he did not know of any previous use of the "Utelite Pit!" (R. 188-189) He simply stated that the source could "probably be used." (R. 8, 10) At the pre-construction conference Respondent stated it would use the "Utelite Pit" as its borrow site. When the source was tested in August of 1973, it was found to be unsuitable. (R. 37) Respondent

thereafter obtained suitable borrow material from Orland Crandall in Peoa. The increased distance one way to the alternate source is 1.7 miles. (R. 89) No notice either verbally or in writing was transmitted to Appellant by Respondent regarding a claim for additional compensation for the increased haul distance during the project. (R. 40) Specification No. 105.17 states that notice in writing is a pre-condition to a claim for additional compensation prior to doing the work. (Exh. D-1)

The actual measured quantity of roadway excavation was determined to be 15,305 cubic yards after the project was completed. This is more than a 25% underrun in the proposed quantity. Section 104.02 of the Standard Specifications states that Respondent can "demand a supplemental agreement." That section allows for price adjustments, but does not allow for anticipated profit. (Exh. D-1) Appellant requested data from Respondent regarding how its bid price was calculated, but Respondent refused to supply said data until trial of this matter. (R. 69, 88) The evidence shows that Respondent based its bid as follows:

Loading, hauling, placing and compacting	.95
Fixed costs, overhead and profit	.25
TOTAL	1.20 (R. 88)

During the project it was determined by Appellant that certain approaches and turns should be widened. On September 6, 1973 or thereabout, the Respondent was directed by the project engineer to accomplish the necessary widening. (R. 47) No amount was agreed upon or discussed as payment for this extra work. The Respondent did not notify Appellant in writing that it would claim additional payment before doing the work. (R. 40, 50) Respondent alleged that its records showed a total cost of doing this work in the amount of $56,985.07. (R. 63) This amount was calculated using actual paid labor and equipment based on rental rates established by the Associated General Contractors (AGC). To this amount was added certain factors for overhead and profit, which are percentages of the total. Respondent did not offer evidence to show how its "unit costs" were affected by the change in plan. (R. 65, 66) Respondent deducted payments made by Appellant at the unit price as bid leaving a balance of $38,642.83. Appellant's evidence shows that $1,791.30 would be due Respondent for the quantity underrun. (R. 280)

The matter was tried to the Court, the Honorable Marcellus K. Snow presiding, on September 22, 1977, and judgment was entered on the 6th day of January, 1978, for the sum of $24,500.00.

Appellant thereafter filed this appeal.

POINT I

RESPONDENT IS NOT ENTITLED TO RELY ON REPRESENTATIONS, IF ANY, BY VIRGIL MITCHELL, OR RESPONDENT IS ESTOPPED TO CLAIM THAT THERE WERE REPRESENTATIONS BECAUSE THE CONVERSATION WAS "MERGED" IN THE CONTRACT.

A. NO RIGHT TO RELY ON STATEMENTS OF VIRGIL MITCHELL.

Respondent's evidence at trial showed that Grant Thorn, Jerry Thorn, Jack Jones and Larry Davis as representatives of Respondent Corporation visited the job site on the 19th of March of 1973 prior to submitting its bid. (R. 7) Said individuals have spent most of their adult lives in construction work, and Larry Davis is a graduate civil engineer. (R. 9, 11, 28) Said company has for years engaged in highway construction and has specialized in highway paving work. Said company also has operated and carried on sand, gravel and ready mix operations. (R. 28)

At the time Respondent's agents visisted the job site, an employee of the Appellant, Virgil Mitchell, toured the area of the job site with said individuals. The evidence shows that the said Mitchell has been employed by the Appellant for twenty-four years. During that time he has not worked in the area of materials, testing or inspection, and he has no training or education in materials. (R. 188) The evidence further showed that he knew nothing about the adequacy of the material on the Utelite property, didn't know of its being used by others or anything about that pit

site, except that it was available as a "possible" borrow source. (R. 188, 189) (Also, see Finding of Fact No. 4)

Grant Thorn stated that Virgil Mitchell showed them the pit as a "possible source" for borrow material. (R. 8, 10, 12)

The Court in its Finding of Fact No. 5 has stated the following:

> Relying on the representations of Mr. Mitchell, Thorn entered its bid in connection with the Wanship highway construction project and calculated the bit item of borrow on the basis of Mr. Mitchell's representations that the material from the Utelite pit could be used as borrow on the construction project.

The record further shows that Mitchell had not been designated by the Appellant's engineer, Ed Watson, to represent him or to make any representations concerning the project or any work items, and particularly materials. (R. 189-193)

The record does not disclose that Mitchell made any representations concerning the borrow material in the Utelite pit as to its suitability or availability other than as a "possible source." (R. 8, 10, 12, 189-193)

The State of Utah Standard Specifications for Road and Bridge Construction (1970 Edition) which are incorporated as part of the contract (Exh. D-1) state the following with regard to examination of the work:

> Section 102.05. Examination of plans, specifications, special provisions and site of work: The department will prepare full, complete and accurate plans and specifications

> giving such directions as will enable any competent contractor to carry them out. The bidder is required to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms before submitting a proposal. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract. (Emphasis supplied.)

Section 106.02 of said specifications (Exh. D-1) governs the contractor's responsibility in providing materials. In this contract there are no designated material sources. The section referred to says in part:

> . . . When material deposits are not designated in the special provisions, the contractor shall provide sources of acceptable material. . . .

The section further outlines that the responsibility is on the contractor to secure and provide the source and to explore and develop it. The State is further required to test the material for its suitability.

The record further discloses that Virgil Mitchell at the time of the alleged representation in March of 1973 was employed as an engineer's aid and accompanied Respondent's agents and employees as an accommodation to them. (R. 187, 195-197)

Respondent asserts that it relied on Mitchell's "representation" in preparing and submitting its bid, and th

Court has erroneously found this to be a fact and has allowed Respondent to recover for damages allegedly resulting from increased haul distances in transporting borrow material to the job site from an alternate source.

Appellant respectfully submits that Mitchell's statements do not amount to a positive representation or misrepresentation on the basis of the facts in evidence. (R. 8, 10, 12, 187, 200) Assuming a positive statement was made which Appellant asserts is not supported in the record, it is submitted that it was made without the authority of the State Engineer and the State herewith disclaims said representations or misrepresentations. On the basis of the evidence there is nothing to show that Mitchell had any authority to make any representations in conflict with the contract, plans, specifications, etc. No inquiry was made of Mitchell as to his authority. (R. 189, 193)

The case of State v. Bates, 20 Ut.2d 75, 435 P.2d 417, has enunciated the doctrine that the State is not bound by unauthorized statements of an employee absent a showing that the employee was "held out as having authority." The Court in that case said the following:

> An officer can, however, bind his government only by acts which come within the just exercise of his official powers and within the scope of his authority, unless the government held out the officer as having authority to do the acts. An unauthorized act or declaration of an officer does not estop the government from insisting on its invalidity.

It should be understood at this point that Mitchell was not authorized to make any representations other than those consistent with the plans and specifications. (Exh. D-1, Sec. 105.09) (Also, R. 16)

It is difficult to understand how the trial Court concluded that Respondent is entitled to rely on Mitchell's so-called "representations." There were four representatives of Respondent, including a civil engineer who examined the materials site. These men are experts in the field of road building and particularly road building materials. (R. 28) It is inconceivable that they would rely in any way on representations by Mitchell when they well knew that he was not the project engineer and when their own expertise in materials is so evident.

At the very least the Respondent had a duty to inquire of Mitchell as to his authority if they wanted to rely upon statements made by him.

The obvious conclusion is that the question of whether the material would meet the specification for borrow was probably not of concern to anyone. Almost anything will meet the specification for borrow. (R. 28, 32-33) There was not much likelihood that Respondent was concerned about anything except the fact of the materials availability from the owner and what the price would be. Since Respondent cannot show that they specifically inquired of Mitchell regarding the suitability of the material or that he in fact knew about

the materials inadequacy and failed to advise Respondent, it was error to charge Appellant with responsibility for the added costs of obtaining material from an alternate site. The United States Supreme Court has laid down guidelines in a series of cases as to when a contractor can and cannot recover for alleged misrepresentation: One of the leading cases is MacArthur Brothers Co. v. U.S., 258 U.S. 6, 66 L.Ed. 433, 42 S.Ct. 255 (1922). The Court there said the following:

> In the case at bar the government undertook a project and advertised for bids for its performance but there was no knowledge of impediments to performance, no misrepresentations of the conditions, exaggeration of them nor concealment of them, nor, indeed knowledge of them. To hold the government liable under such circumstances, would make it insurer of the uniformity of all work and cast upon it responsibility for all the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. (Emphasis supplied.)

Appellant respectfully submits that the same standard applies to representations by Appellant, be they written or verbal. The Respondent must show in either event that Appellant had (1) knowledge of impediments to performance; (2) misrepresented those conditions; (3) exaggerated them; or (4) concealed conditions. Here the Respondent has not shown that Virgil Mitchell had: (1) Knowledge that the Utelite Pit material was in fact unsuitable; (2) that Mitchell in fact misrepresented condi-

tions; (3) there is no evidence that Mitchell tried to build up the source or said anything about the source; (4) there is no evidence of concealment of any evidence of conditions by Mitchell. (How could he conceal anything if he didn't know anything?)

Clearly the trial Judge has committed error in concluding that Respondent can rely on "representations by Mitchell" and can therefore recover for the additional cost of going to an alternate source.

Since the Court made no breakdown of damages which it awarded Respondent, there is no way to separate the amount of recovery allowed Respondent for this erroneous award, and Appellant is therefore entitled to a new trial on this point alone. It is also entitled to directions to the trial Court not to allow recovery by Respondent for any damage related to the obtaining of borrow material from a source other than the Utelite Pit.

B. ESTOPPEL BY REASON OF MERGED CONVERSATION

Appellant believes there is also a "merger" question. The conversation with Mitchell took place before the submission of Respondent's bid. (R. 6-10) All conversations are therefore merged under familiar principles of contract law. This Court stated the following in the case of National Surety Corp. v. Christiansen Brothers, Inc., 29 U.2d 460, 511 P.2d 731:

> . . . Where parties engage in negotiations concerning a transaction pursuant to which they enter into a written contract, it is presumed that all matters relating to subject are merged in and constitute a complete integration of their agreement.

Obviously, the agreement is silent as to material sites or representations of any kind relating to them, and Respondent should therefore be estopped to assert anything concerning alleged statements by Mitchell since the conversation took place prior to the execution of the contract.

POINT II

RESPONDENT'S FAILURE TO TIMELY NOTIFY APPELLANT OF INTENTION TO CLAIM ADDITIONAL COMPENSATION IS A WAIVER OF RIGHT TO RECOVER SAME UNDER THE CONTRACT.

Respondent brought suit to recover additional compensation for, among other things, (1) the increased costs of obtaining material from a borrow source located further away from the construction than the planned source; and (2) increased costs of widening roadway sections already completed or partially complete when directed to do so by the engineer.

In the first instance there was no mention of a claim for additional compensation by Respondent during the period of construction. In the second case, there was apparently a discussion between Dennis Weir of Respondent and the State's engineer, Ed Watson. Weir alleged in the discussion which was held either September 6 or September 9, 1973, that

they would need additional money, and Watson allegedly agreed to this. (R. 50) No dollar amount was discussed and nothing was said about filing a notice of a claim or being excused from filing a claim.

In neither one of these instances was there a written notice filed by Respondent that it intended to claim additional compensation.

Section 105.17 of the Standard Specifications reads in pertinent part as follows:

> If, in any case where the contractor deems that additional compensation is due him for work or material not clearly covered in the contract, . . . the contractor shall notify the engineer in writing of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given . . . then the contractor hereby agrees to waive any claim for such additional compensation. . . .

This fact alone should defeat Respondent's claim to any additional compensation related to the obtaining of borrow material. In the absence of a waiver of said specification, the Respondent is clearly bound to give the requisite notice.

Appellant asserts that the Court erred in deciding that,

> . . . Mr. Weir and Mr. Watson had enjoyed a favorable working relationship in connection with other projects with which they had both been involved in the past. Mr. Weir relied on the statement of Mr. Watson

to the effect that Thorn would be paid whatever additional costs were incurred in changing the turning radii, although a specific amount was not agreed upon.

Mr. Weir was never informed by Mr. Watson that he did not have to file a written notice. (R. 70)

Secondly, Mr. Weir knew of the specification requirement and had in fact filed notices of this character on other projects. (R. 72)

Since Mr. Watson did not tell Mr. Weir that he did not have to file a written notice of claim as required by the specifications, how can the Court conclude that Respondent had any right to rely on the statement of Mr. Watson that Thorn "would be paid" and that this excused Respondent from compliance with a contract provision?

Appellant submits that far from sustaining Respondent's position, the facts of the matter indicate a waiver by Respondent of its right to compensation by its silence and failure to file the notice in advance or a claim for compensation until after the project was complete. Appellant in the absence of a notice of a claim by Respondent was entitled to assume that Respondent was satisfied with the unit price and waived a claim for any additional payment.

The obvious conclusion is that the Court was wrong in concluding as it did in Conclusion of Law No. 2 that the provisions of Section 105.17 do not apply and that

the contractor is excused from giving notice of its intent to file a claim.

This Court in the case of Zion's Properties, Inc. v. Holt, 538 P.2d 1319, said the following at page 1322:

> . . . unless there is some showing of legal excuse or justification for failure to perform the obligations of a contract, it must be enforced according to its terms. [Citing Puggi v. Skliris, 54 U.88, 179 P.79 (1919)]

This proposition applies even more forcefully when the State is a party. As the U.S. Supreme Court said in the case of Federal Crop Ins. Corporation v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10:

> . . . Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. . . .

The record in fact shows that Appellant's engineer Watson in response to a question from Respondent's counsel about how he would characterize his relationship with Mr. Weir prior to the conversation about payment for the extra work of widening the curves radius said the following: (R. 24

> Well, up until after, with Mr. Weir or any other contractor representative, I try to establish a good rapport. However, I try to stay within the realms of the specification bands, because we know that is part of our- well, I just don't know how to word it, but we have plaques on the wall that tell us what happened (sic) if we don't.
>
> Q (By Mr. Stewart) What do you mean by that?

A Well, I don't really know how it is worded, but if you get off the beat too far you can end up in San Quentin or wherever.

This does not indicate any special relationship with Respondent contractor which justifies their reliance on this relationship as an excuse for failing to comply with a contract provision.

To say that this "relationship" so-called justified Respondent ignores the explanation by the witness Watson in answer to a question by Respondent's counsel at page 243 of the Record as follows:

> Q (By Mr. Stewart) In your experience, and perhaps we ought to limit this, well, I won't limit it, but in your experience over the course of years is that there had been a time when you have gotten together with the contractor and agreed, without the formality of submission of a written request or a notice and actually agreed, to pay for extra work in an informal way?
>
> A I think on some minor items where the paper work would have cost more than the work itself, and I can't specify just what it could be, we might have paid for an item in a few loads of gravel or something to that effect that would be equal to the money involved.

The facts are that Respondent under the law that pertains and the facts of this case cannot excuse itself from the requirement of timely notice and the Court's conclusion to the contrary is clearly error, and the judgment should be reversed.

POINT III

SECTION 104.02 OF THE STANDARD SPECIFICATIONS LIMITS THE RECOVERY OF DAMAGES TO FIXED COSTS AND OVERHEAD FOR BID ITEMS WHICH UNDERRUN MORE THAN TWENTY-FIVE (25%) PERCENT.

The bid item of borrow in the original proposal is estimated to be 28,100 cubic yards. The actual quantity measured and paid for pursuant to specifications is 15,305 cubic yards. This results in an underrun in excess of twenty-five percent (25%).

Section 104.02 of the Standard Specifications allows relief to the contractor by way of supplemental agreement in this event. The actual provision in pertinent part reads as follows:

> . . . The contractor agrees to accept the work as altered . . . provided, however, that if demand is made in writing by either party to the contract, a supplemental agreement will be necessary before any alteration is made which involves any one of the following:
>
> . . . (3) An increase or decrease of more than 25% in the quantity of any major contract item. . . .
>
> . . . The adjustment in compensation provided for under conditions (2) and (3) above, . . . In the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed.
>
> In the case of decreased quantities of work, no allowance shall be made in the supplemental agreement for anticipated profits. . . .

It should be noted that the foregoing provision contemplates that the supplemental agreement shall be worked out before the change is made. In this case, the fact of the underrun in quantity was not anticipated in advance. It was not until the final quantities were calculated at the conclusion

of the project that the underrun was discovered. (R. 93)

Past precedent within the Department of Transportation has been to compensate the contractor for his fixed costs and overhead which he would not otherwise recover because of the quantity underrun. (R. 303) The reasoning for this approach is that a contractor in determining his bid on a contract item would normally include his estimated costs of labor, materials and equipment; to this he would then add his fixed costs, overhead and profit. In theory then, it is reasonable in an underrun to pay only fixed costs and overhead. The specification does not allow for payment of profit, and the contractor has not incurred labor, material and equipment costs, so all that is left is the fixed costs and overhead.

Respondent was requested to supply data regarding how his bid was calculated. (R. 68-69 and Exh. D-12 and D-13) The Respondent failed to provide this information. (R. 69)

The evidence at trial finally disclosed how the Respondent had calculated his bid price for the borrow item. The Respondent had estimated twenty-three cents for loading, thirty-seven cents for hauling, thirty-five cents for placing, and twenty-five cents for overhead, fixed costs and profit. (R. 88)

Notwithstanding the failure to demand a supplemental agreement before doing the work, the Appellant admits

an obligation to pay the fixed costs and overhead on the underrun quantity of 12,795 cubic yards which calculates to something less than twenty-five cents per ton.

This Court in construing this section of the State of Utah Standard Specifications in the case of Jack B. Parson Construction Co. v. State of Utah, 552 P.2d 107, chose to construe this section literally as it is written. With this precedent, Appellant submits that Respondent's claim for relief in the absence of a supplemental agreement before accomplishing the work should be denied.

Appellant believes that in agreeing to compensate Respondent for "fixed costs and overhead," the Respondent is placed in the same condition it would have been but for the underrun. It is further respectfully submitted that any recovery allowed over and above fixed costs and overhead must be supported by clear and convincing evidence that the Respondent has actually incurred the expense and that it is directly related to the pay item and could not have been avoided by Respondent. This the Respondent did not do during trial. The Respondent instead has taken the position that because of the quantity underrun he is entitled to recover his entire costs as calculated by "force account." The fact that he did not calculate his bid by means of "force account" methods does not seem to trouble him.

The Utah Court in the old case of Wilson v. Salt Lake City, 52 U. 506, 174 P. 847 (1918) made a very pertinent observation concerning payment for extra work. The Wilson case involved a claim by the contractor for "extra work" which the City felt was not extra but "additional" and therefore covered by contract prices. The case also involved a question of whether procedural requirements had been followed. The Court stated the following at page 513:

> . . . Unjust and exorbitant demands are so often made for extra labor by those undertaking the work of constructing public improvements that the text writers have frequently taken occasion to comment concerning the claims of contractors for extra labor performed. We quote:
>
> > 'Municipal corporations have so frequently been defrauded by exorbitant claims for extra work under contracts for public improvements that it has become usual to insert in contracts a provision that the contractor shall not be entitled to compensation for extra work unless it has been ordered in a particular manner. 19 R.C.L. 1077 (sec. 362)
> >
> > Experience, however, keeps a dear but a good school, and those who have a broader knowledge of such transactions agree that by some mysterious process of calculation, things valued afterward in that way usually cost a great deal more than if contracted beforehand. In general, the ordering of the extra work must be made by the properly qualified agent of the person to be charged. 4 Elliott on Contracts, Section 3740.' . . .

This case, it is respectfully submitted, exactly fits the type of situation the Wilson Court had in mind. Pro-

cedural requirements were not followed in the instant case by Respondent to protect its claim. The engineer was not able to perform his duty vis-a-vis the claim since Respondent refused to submit information regarding how his unit costs were affected. Now Respondent asserts a grossly inflated claim which makes no attempt to explain why the placement of seventeen percent (17%) of the total yardage can account for an overall increase in the unit price for borrow from $1.20 per yard to $3.72 per cubic yard. (Bid price was $1.20, $3.72 is derived by dividing total claim amount of $56,985.07 by yardage moved of 15,305 cubic yards.) The Respondent has either grossly inflated his claim, or he made a bad bid. The Appellant has no responsibility to underwrite the "bad bid" and should not have to pay an inflated claim. Either way, the figure asserted by Respondent and the amount found by the Court cannot be supported by the evidence.

This Court was indeed right in the case of Huber Rowland Construction Co. v. City of South Salt Lake, 7 Ut.2d 273, 323 P.2d 258 (1958) when it said the following:

> . . . If contractors such as plaintiffs can make a competitive bid on a project, omitting such a substantial item, then sue and recover on quantum meruit, it is readily seen what havoc could be wrought with the competitive bidding.
>
> . . . It would have to be considered as "extra work" beyond that specified in the

> contract. In such event the contract clearly provides that it cannot be done and charged for without written approval of the engineer, which admittedly was not done.

In the instant case the contract clearly provides a procedure to be followed if the contractor desires to assert a claim for additional payment. Respondent did not follow the procedure, therefore the claim should be denied with the single possible exception that because of the quantity underrun in borrow which no one foresaw, the Respondent should recover his fixed costs and overhead not otherwise recoverable, which amounts to $1,791.30 on the basis of Respondent's testimony.

Again, the Court's ruling gives us no basis to determine how much, if any of the judgment awarded by the Court, is based on the quantity underrun. In fact, the Findings of Fact and Conclusions of Law are silent as to whether any consideration was given to this item by the Court. Since there was considerable evidence before the Court on this question the Court may have considered it or may have rejected it. In any event, Appellant submits that without a determination in the Findings, Conclusions or Judgment there is no way to rationalize the Court's judgment. If the Court in fact awarded in excess of the sum conceded by Appellant ($1,791.30), it is error in Appellant's opinion. The judgment simply cannot be harmonized with the evidence unless the

Court breaks down the amount to disclose how it was arrived at to determine what is erroneous and what, if any, is possibly supported by the evidence.

The Appellant is entitled to a new trial.

POINT IV

RESPONDENT IS NOT ENTITLED TO RECOVER ITS TOTAL COSTS ON A "FORCE ACCOUNT" THEORY AS THE TRIAL COURT HAS ERRONEOUSLY FOUND BECAUSE OF CHANGES ORDERED BY THE ENGINEER.

During construction of the fill connecting the Rockport State Park Access Road to the highway (Wanship to Peoa) it was decided by Appellant that said fill should be widened, and in addition certain turning radii in the park access road were ordered widened. These changes were requested on or about September 6, 1973, and the question of compensation was also discussed by Appellant's engineer, Ed Watson, and Dennis Weir, representing Respondent. (R. 47-49) There was no agreement reached regarding the amount to be paid Respondent for this additional work. (R. 105) Likewise, no claim as required by Section 105.17 of the Standard Specifications was filed at any time while the project was under construction. (R. 70-72 and Finding of Fact No. 15) This point has already been discussed in this brief under

Point II, supra, and that argument is herewith incorporated by reference.

Section 104.02 of the Standard Specifications has already been referred to herein. (See Point III) That argument was related to the relief which is provided for in said Section when there is an underrun in a major item in excess of twenty-five percent (25%).

The Court in its Conclusion of Law No. 4 has concluded that Respondent is entitled to recover extra expenses incurred in widening the turning radii and does not have to submit data as to how its unit costs are affected, but can recover a "reasonable amount." The Court then found $24,500.00 to be a "reasonable amount . . . for extra expenses incurred in transporting borrow material from the Crandall Pit and in widening the turning radii of the location where the new access road meets the existing roadway."

There is no attempt in the Findings of Fact, Conclusions of Law or the Judgment to itemize the portion assigned to: (1) increased hauling costs and other costs incidental to the alternate borrow pit over the originally planned pit; (2) the costs associated with the quantity underrun in the bid item of borrow; and (3) the costs associated with widening the fill and turning radii of the new

park access road.

Appellant respectfully submits that the trial Court appears to have used an improper approach to determine the damages recoverable by Respondent for widening the approach road. At the very least it was error to allow Respondent to submit its evidence on a "total cost theory" which is the way Respondent submitted its evidence. Appellant objected to this approach at the commencement of trial and urged the trial Court not to allow evidence based on a "total cost" theory. (See R. 4-6) Under the "total cost" theory of damages the Appellant becomes an unwilling insurer in effect. The Respondent in this instance over Appellant's objections has added up his total labor, equipment rental, overhead, fixed costs and profit to get a gross total cost. (R. 55-64 and Exhibit P-9 and P-10) From this figure he has deducted the amount paid under the contract unit price for the total amount of yardage moved and asserts that this represents his damages. The obvious problem with this approach is that it turns a competitive bid into a guaranteed profit contract.

Section 104.02 of the Standard Specifications and particularly subsection (4) contains the following pertinent language which Appellant asserts is directly applicable to the instant case:

> . . . Written requests for a supplemental agreement under condition (4) [Condition 4 refers to a change in the nature of the design or in the character of construction which measurably increases or decreases the unit cost of performing any item of work.] shall set forth in detail the particulars and character by which the work was changed and by what amounts the unit costs of the contract items will be altered.
>
> . . . When it is determined by the Engineer that under the provisions of this subsection, a supplemental agreement is justified and an agreement satisfactory to both parties cannot be made, the Engineer may determine an amount which he feels is fair and equitable, and order the Contractor to proceed accordingly, or may order the work performed on a force account basis or cancel the work from the contract. If the work is performed at the adjusted price as established by the Engineer and the Contractor considers additional compensation is due him, he may request further consideration as provided in Article 105.17.

Factually, in this case the following points are of importance:

1. There was no request for a supplemental agreement submitted by Respondent.

2. There was a general recognition by Appellant's engineer in the September 6 meeting of a change in the plan or character of construction (condition 4) which qualified for additional compensation.

3. There was no agreement as to the amount of additional compensation.

4. There was no attempt at any time by Respondent to "set forth in detail the particulars and character by which

the work was changed and by what amounts the unit costs were altered."

5. The engineer did not "determine an amount which he felt was fair and equitable," nor did he "order the work performed on a force account basis."

6. Testimony of Dennis Weir was that about 2,500 yards of 17% or the total yardage in the fill was involved in widening of the fill. (R. 87)

As to the "total cost theory" of damages, the best reasoned cases have rejected this approach or at the very least have allowed evidence of that nature as preliminary only.

In a recent case in California, entitled Huber, Hunt & Nichols, Inc. v. Moore, 136 Cal. Rptr. 603 (1977), the California Court of Appeal delivered a lengthy opinion involving a suit by a contractor for damages arising out of the construction of the Fresno Civic Center. In this case the contractor-plaintiff attempted to submit a three-inch thick computer printout of items identified by cost coding as his evidence of damages. The Court refused to allow this as too confusing for the jury. The Court observed at page 619 the following:

> . . . Contractor's entire attitude in the court below and in this court is that it is entitled to be compensated for all losses sustained over its original estimate. . . . Stated in its simplest form contractor's position is that since the plans and specifications

> contained errors and omissions and the architects were negligent in supervising the work and there were delays in completing the project and contractor sustained a loss, contractor should be made whole by architects. . . .

The Court further discussed the attempt by the contractor to prove damages under a total costs approach, including the attempt to justify this approach since that is the way its records are kept and it is "standard business practice." The Court then stated the following at page 622:

> . . . If the computer printout was not organized in a manner to indicate the specific cause of particular cost overruns, a qualified accountant should have been able to make the calculations from the original records which were the source for the data fed into the computer. But nobody took the time and effort to make such calculations. No explanation is given for the failure.
>
> If we were to accept contractor's contention as to the law of this state, the result would for all practical purposes, nullify all laws regarding competitive bidding on public contracts. Under such a concept, contractors could submit any bid necessary to obtain the job knowing that the public agency would be required to pay whatever costs contractor incurred on the project if contractor could discover some error or omission however irrelevant in the plans and specifications. . . . (Emphasis supplied.)

Appellant submits that the same reasoning applies in the instant case. For instance, why should Respondent recover any additional costs for the yardage delivered to the fill before it was widened? Why should Respondent be allowed to

recover anything additional without calculating exactly how much additional costs are involved with the 2,500 yards hauled in to widen the existing fill? Stated in terms of the specification, why shouldn't respondent be required to "set forth in detail the particulars and . . . amounts the unit costs of the contract items will be altered?"

One of the leading cases cited by the California Court in Huber, supra, is the case of Boyajian v. U.S., 423 F.2d 1231 (1970). This is a case decided by the U.S. Court of Claims and involves contract claims based on a "total cost" theory. The total claimed contract costs were $694,735.00 and total receipts under the contract were $486,210.00 for a difference of $208,525.00 which plaintiff sought to recover. The Court in commenting on defendant's defense based on plaintiff's failure to prove damages, stated as follows:

> The so-called "total cost" method upon which plaintiff relies is here unacceptable. Accordingly, there is no need to make any determination on the merits of these three causes, for even assuming they are valid and that defendant's conduct amounted to the claimed breaches, plaintiff's failure to make any satisfactory showing of the amount of damages flowing from such breaches would require the dismissal of such causes anyway.

The Court further observed as follows:

> . . . Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach. "The costs must be tied in to fault on defen-

dant's part." River Construction Corp. v. U.S., 159 Ct.Cl. 254, 270 (1962) As the court held in J.D. Hedin Construction Co. v. U.S., 347 F.2d 235, 259, 171 Ct.Cl. 70, 108 (1965):

> As in all breaches of contract cases, the proper measure of damages for defendant's breaches is the amount of plaintiff's extra costs directly attributable to said breaches. [Citing Sadler v. U.S., 287 F.2d 411 (1961)]
>
> . . .
>
> However, contrary to these basic causal connection damage principles, no attempt is here made to relate any specific amount of increased costs to any particular alleged breach. Nor is any satisfactory explanation given as to why such an attempt was not made or why it would not have produced reasonably accurate results. Instead, the damage proof consists only of an accountant's schedule (and the accountant's testimony in support thereof), setting forth computations, based on plaintiff's books and records, of plaintiff's total expenditures in performing and subtracting therefrom the total contract receipts, thus arriving at a total "loss" figure, for which plaintiff demands recoupment.
>
> . . .
>
> As was pointed out in J.D. Hedin Const. Co. v. U.S., supra, the ascertainment of increased costs directly attributable to delay resulting from a breach of contract by defendant is normally measurable with a reasonable degree of accuracy.
>
> . . .
>
> It is settled, however, that a contractor is not entitled to recover "expenses" which would properly have been incurred regardless of the [breach]. Sadler v. U.S., 287 F.2d 41, 415, 152 Ct.Cl. 557, 564 (1961)

Other cases from the Court of Claims that have reached this same basic conclusion regarding the "total cost" approach are as follows: Christensen Construction Corp. v. U.S., 325 F.2d 458, 163 Ct.Cl. 351; Lilley Ames Co., Inc., v. U.S., 293 F.2d 632, 154 Ct.Cl. 549; Turnbull Inc., et al., v. U.S., 389 F.2d 1015, 180 Ct.Cl. 1025.

As to the adequacy of the proof submitted by Respondent, the Court of Claims in rejecting this submission of proof by an accountant's schedule said the following in the case of River Construction Corp. v. U.S., 159 Ct.Cl. 270:

> Recoverable damages cannot be proved by a naked claim for a return of costs even when they are verified. The costs must be tied in to fault on defendant's part.

The Court of Claims in the case of F.H.McGraw & Co. v. U.S., 130 F. Supp. 394, 131 Ct.Cl. 501 (1955) made this very pertinent observation:

> . . . The court, after stating that "[T]his [total cost] method of proving damage is by no means satisfactory, because among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed which is not always the case, by any means," "flatly stated . . . approval was not given to proof of damages for breach of contract by showing the difference in plaintiff's bid and his costs on the entire job."

Finally, the Court in Boyajian v. U.S., supra, at p. 1244, ruled that where the record did not contain "reasonably satisfactory evidence" separate from that presented as in the instant case by an accountant's schedule, as follows:

> . . . The court has been obliged to dismiss the claim for failure of damage proof, regardless of the merits, citing Roberts v. U.S., 357 F.2d 943; Snyder-Lynch Motors, Inc. v. U.S., 297 F.2d 910, and River Const. Corp. v. U.S, supra, among others.

Appellant submits that the most the Respondent is entitled to under the best reasoned cases is the opportunity to submit its evidence of damages sustained by reason of its being required to widen the approaches and turning radii. Further it is submitted that Respondent had the burden of showing how its unit costs were affected by the change. Since the change only applied to 2,500 cubic yards, there is no reason to alter the unit price for the other yardage already placed when the change was ordered. If Respondent is entitled to recovery under force account payment, then it is again respectfully submitted that only the work accomplished subsequent to September 6, 1973 can qualify for consideration, and indeed only if this Court finds that Respondent's failure to file a claim prior to doing the work is not procedurally fatal to the claim.

The Respondent indeed has cavalierly admitted that it failed to supply information as to its unit cost of the con-

tract item of borrow to Appellant although it was requested to do so at least twice. (R. 68, 69)

Since the Respondent failed to submit evidence under either approach there is no competent evidence before the Court for the Court to consider in assessing damages. The trial Court is obviously in error and had to resort to speculation to determine the amount it awarded Respondent as damages. The judgment should therefore be reversed.

CONCLUSION

There is no way the judgment of the Court can be sustained based on the Findings of Fact and Conclusions of Law. It is also evident from an examination of the record that the facts will not support a judgment against Appellant in excess of the sum of $1,791.30 conceded by Appellant if the law is properly applied.

The Court found that Respondent was entitled to rely on the representations of Virgil Mitchell concerning the borrow site. However, it is clear from the record that the representation was a simple statement that it was available as a "possible" source. The facts further demonstrate that Mitchell knew nothing about materials, was not instructed or authorized by Appellant's engineer Watson to say anything about the borrow site, and further, that he did not know of any use of the area by any other contractor, or whether it

was suitable. On the other hand, the facts show that Respondent's personnel are trained professionals in materials and were charged by specification requirement to make their own investigation, and the submission of a bid is prima facie evidence of their satisfaction as to conditions to be encountered. It is obvious error for the Court to permit Respondent to rely on the so-called "representation" of Virgil Mitchell.

The Court further found that Respondent was excused from specification requirements to give timely notice of its intent to file a claim for additional compensation or to submit certain essential information showing how its unit costs were affected by the alleged changes in plans or character of work. Again, the facts do not justify these findings and conclusions by the Court. There is no evidence that the State's engineer Watson had any special relationship with this Respondent contractor or that he customarily ignored specifications, or that he excused Respondent from complying with specifications. Further, there is evidence to show that Respondent knew of the notice requirement and had in fact complied with that requirement on other jobs. The law is clear both generally and specifically in this State that particular adherence is required to contractual provisions particularly where a public agency is involved. In other words, the Court's findings and conclusions

in regard to contractual provisions are not supportable either factually or legally.

The Court further committed error in permitting the Respondent to submit evidence of its damages by using a "force account" method which is the same as a "total cost" theory of damages, which theory has been rejected by the most prestigious Courts such as the United States Court of Claims and the State of California. A further analysis of the evidence before the Court which relates to damages shows that the "change in plan," if indeed it amounts to that under the specification, only affected seventeen percent (17%) of the total borrow amount. The Court on the other hand permitted evidence to come in as if the entire bid item of borrow was affected. This, it is submitted, violates the specification, ignores the facts, and permits Respondent to completely circumvent its bid and reap a windfall.

Finally, since the Findings of Fact, Conclusions of Law and Judgment are all silent as to how the judgment amount was determined by the Court, it is impossible to ascertain what the Court considered in arriving at the judgment amount. At the very least Appellant is entitled to know what the Court awarded for the elements of damage claimed by Respondent, including those associated with the alternate borrow site and the so-called "change in plans" or "character of construction."

It is respectfully submitted that this Court should reduce the judgment to the amount conceded of $1,791.30, or in the alternative, reverse the judgment and remand it for a new trial with instructions to eliminate any consideration for the alternate borrow site and to require Respondent to show, if it can, exactly how and in what manner its unit costs were affected only upon 17% of the borrow item and to allow recovery only upon a showing of actual damage, without being permitted to use a "total cost" approach to damages.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Appellant's Brief were mailed, postage prepaid, to Steven H. Stewart, Attorney for Respondent, 220 South Second East, Suite No. 450, Salt Lake City, Utah 84111, this 1st day of May, 1978.