

1978

Thorn Construction Company, Inc., A Utah Corporation v. Utah Department of Transportation : Brief of Respondent Thorn Construction, Inc.

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

THORN CONSTRUCTION COMPANY, *
INC., a Utah corporation,

*
Plaintiff and
Respondent, *

vs. * Case No. 15647

*
UTAH DEPARTMENT OF TRANS-
PORTATION, *

*
Defendant and
Appellant. *

* * * * *

BRIEF OF RESPONDENT
THORN CONSTRUCTION
COMPANY, INC.

* * * * *

STATEMENT OF THE NATURE OF THE CASE

Plaintiff and Respondent, Thorn Construction Company, Inc. (herein referred to as "Thorn"), is seeking additional compensation from the Utah Department of Transportation (herein referred to as "The State") under a highway construction contract, NS-184(1) and NR-302(1), Wanship southeasterly toward Peoa and Rockport State Park access road, for extra expenses incurred in connection with (1) a greater than 25% underrun in the item of "borrow" and (2) a widening of the turning radii at the location where the new access road meets the existing roadway.

DISPOSITION IN LOWER COURT

At the trial of this matter, the Honorable Marcellus K. Snow, sitting without jury, determined that \$24,500.00 was a reasonable amount to be awarded to Thorn for extra expenses incurred in connection with the widening of the turning radii and the borrow underrun.

RELIEF SOUGHT ON APPEAL

Thorn seeks affirmance of the judgment of the lower court in the amount of \$24,500.00, together with interest thereon at the legal rate from and after October 15, 1974.

STATEMENT OF MATERIAL FACTS

While Thorn does not necessarily disagree with Appellant's statement of facts, some of the State's purported statements of fact are in reality conclusions of law and for that reason are disputed. Furthermore, Appellant has stated facts which are immaterial to the issues of this action and has failed to state facts which Thorn deems to be material. For these reasons, Thorn respectfully submits the following statements of material fact, together with statements controverting appellant's version of the facts.

On March 27, 1973, Thorn entered into a construction contract with the State covering a project known as NS-184(1) and NR-302(1), Wanship southeasterly toward Peoa and Rockport State Park Access Road (herein referred to as "the project"). The written agreement executed by the parties incorporated the Standard Specifications for Road and Bridge Construction, 1970 edition, (herein referred to as "Standard Specifications"). The Standard Specifications govern such items as scope of work, control of work, control of material, prosecution and progress, and measurement and payment. Significant words and phrases used in the Standard Specifications are defined in Section 101, wherein the term "engineer" is defined as "the state highway engineer of the department, acting directly or through his duly authorized representatives, who is responsible for engi-

neering supervision of the construction". The term "supplemental agreement" is defined as "a negotiated agreement constituting a modification of the originally executed contract and covering work beyond its general scope".

The engineer's estimate, prepared by the State in connection with the Wanship project, included a requirement for 28,100 cubic yards of borrow material. At the completion of construction, it was determined that only 15,305 cubic yards of borrow material had been removed, transported, and placed by Thorn at various points along the project. Because the actual quantity of borrow constituted a decrease of more than 25% in the quantity of a major contract item, Section 104.02 of the Standard Specifications became applicable. Section 104.02 states in part 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 except "excavation for structures" and "piles."

Section 104.02 further states that "* * *In the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed and that * * * no

allowance shall be made in the supplemental agreement for anticipated profits." As previously pointed out, a "supplemental agreement" is defined as "a negotiated agreement constituting a modification of the originally executed contract and covering work beyond its general scope." (emphasis added)

Section 104.02 further gives the engineer several alternatives whenever a satisfactory supplemental agreement cannot be negotiated:

"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."

When the parties attempted to negotiate a supplemental agreement in connection with the borrow underrun, the state took the position that Thorn was not entitled to any additional compensation except overhead expense calculated on the amount of the underrun (12,795 cubic yards) based upon a breakdown of the items comprising Thorn's original bid for the item of borrow (\$1.20 per cubic yard). In other words, the State took the position that Thorn was entitled only to the amount allocated to overhead (\$.14 per cubic yard) multiplied by the amount of the underrun (12,795 cubic yards), which amounts

to \$1,791.30. (R. 185-186)

Thorn, on the other hand, took the position that because of the greater than 25% underrun, it was entitled to negotiate a supplemental agreement based on the actual costs incurred in connection with the borrow item, including an overhead and profit factor for the borrow actually used on the project (15,305 cubic yards), but not for the amount of the underrun (12,795 cubic yards). In other words, Thorn, in its attempt to negotiate a supplemental agreement in connection with the borrow underrun, did not feel bound by its initial bid of \$1.20 per cubic yard. Moreover, the evidence adduced at trial demonstrated that Thorn's costs in connection with the borrow item increased substantially because the source of borrow material represented by Virgil Mitchell, an employee of the State, to be acceptable was later determined to be unacceptable, and Thorn was required to transport the borrow material from an alternate source a greater distance away from the project. (R. 38)

Interestingly, none of the witnesses who testified at the trial could ever remember another instance where a source of borrow material was found to be unacceptable. Virgil Mitchell testified, for example, that in his 24 years experience with the State he had never known of any other situation except the instant case where a source of borrow

was found to be unacceptable. (R. 225, 226) Grant Thorn further testified that in his 40 years experience in the highway construction business, he had never known of a potential borrow site that turned out to be unacceptable. (R. 39) At the outset of the proceedings, counsel for both parties argued their respective interpretations of Section 104.02 of the Standard Specifications, and the Court concluded that Thorn could introduce evidence bearing upon the actual costs of the borrow actually used on the project (15,305 cubic yards). (R. 33-35)

During the course of construction, it was determined by the State that the turning radii at the point where the new access road meets the existing highway should be widened. The project engineer, Edward Watson, instructed Thorn's Vice President, Dennis D. Weir, to perform the work necessary to widen the turning radii, although no specific amount was initially agreed upon with respect to the extra expenses which would be incurred in performing the work. (R. 77-82; 277-278) There was never any question that Mr. Watson ordered Thorn to widen the turning radii or that the State would pay the extra expenses incurred. (R. 278) A problem arose, however, when Thorn claimed an amount in excess of that which the project engineer, Mr. Watson, felt was reasonable. (R.280) On October 15, 1974, Thorn sent

a letter to the State claiming \$38,642.83 for extra expenses incurred in connection with the borrow under-run and the widening of the turning radii, and also requesting a supplemental agreement. (R. 280) Mr. Watson did not agree with the amount claimed by Thorn and felt he could not execute a supplemental agreement in the amount of \$38,642.83, and no supplemental agreement was ever reached. (R. 280)

Thorn commenced this action against the State seeking to recover \$38,642.83 for extra expenses incurred in connection with the borrow underrun and in widening the turning radii. The trial court concluded that \$24,500.00 was a reasonable amount to be awarded to Thorn in connection with these itmes, and on January 6, 1978, judgment was entered against the State in the amount of \$24,500.00, together with interest thereon at the legal rate from and after October 15, 1974.

The State subsequently filed this appeal, seeking reversal of the judgment and entry of a judgment in the amount of \$1,791.30 or in the alternative, a new trial.

POINT I

THE TRIAL COURT WAS CORRECT IN
CONCLUDING THAT \$24,500.00 WAS
A REASONABLE AMOUNT TO BE AWARDED

TO THORN IN CONNECTION WITH THE
BORROW UNDERRUN AND WIDENING THE
TURNING RADII

The State has attempted in this appeal to encroach upon the discretion of the trier of fact below and essentially re-try the case on the merits. With respect to the scope of appellate review of discretionary matters, the following statement is found in 5 Am Jur 2d "Appeal and Error", Section 772 at page 215:

"The necessities of judicial administration require the Courts of first instance be vested with a large measure of discretion in passing upon various matters which cannot, in their nature, be effectively reviewed on the cold record transmitted to the appellate court. Decisions reached in the proper exercise of such discretion have frequently been said not to be within the proper scope of appellate review, and it is clearly the ordinary practice of appellate courts to refuse to review the exercise of such discretion except for abuse."

And as this Court stated in Bambrough v. Bethers, 552 P.2d 1286 (Utah, 1976), "The judgment of the trial court will not be reversed unless it is shown that the discretion exercised therein has been abused." 552 P.2d at 1290.

The facts of the instant case are in many respects identical to the case of Jack B. Parson Construction Company vs. The State of Utah, 552 P.2d 107 (Utah, 1976). In that case, the plaintiff ("Parson") sued the State in what was

essentially an attempt to renegotiate the entire contract governing a highway construction project on Interstate 80 between Wendover and Knolls, Utah. In Finding No. 28 of its Findings of Fact and Conclusions of Law, the trial court found that the items of bituminous material, bituminous surface course, and rubber latex additive all under-ran in excess of 25% of the proposal quantities and that Parson was entitled to a "supplemental agreement" in those three areas under the provisions of Section 104.02 of the Standard Specifications, the purpose of which was " * * * to help Parson recover costs not otherwise recovered because of the reduced quantity." The Court further stated in Finding No. 29 of its Findings of Fact and Conclusions of Law that " * * * the reasonable cost which it (Parson) is entitled to recover as a result of the underrun in quantities of bituminous items is \$258,034.00." Parson's total claim was for \$743,986.00.

The appeal of Parson apparently arose from a finding of the trial court that there was a decrease of less than 25% of the total cost of the work, calculated from the original proposal quantities at the unit contract prices. The only issue appealed to this Court was whether agreed upon deletions from the contract amounting to \$133,765.00 should be considered in calculating whether

there was a decrease of more than 25% of the total cost of the work. This Court construed Section 104.02(2) of the Standard Specifications in favor of Parson, concluding that there had in fact been a greater than 25% decrease in the total cost of the work and that Parson was entitled to an additional \$116,664.00.

In reversing the decision of the lower Court, this Court made the following statement with respect to its interpretation of Section 104.02 of the Standard Specifications:

"However, the language of the specifications set forth reserves to the State the right to make changes in the quantities and alter the details of construction as may be found necessary or desirable. Such changes may be made and apparently were made during the performance of this contract unilaterally. On the other hand the supplemental agreement is one which must be assented to by both of the contracting parties. In making a determination of whether or not there was an overrun or an under-run in a particular contract the language of the above referred to specification is controlling. The language is clear and unambiguous and states that the percentage must be calculated from the original proposed quantities. * * * We conclude that the calculation of the final contract price must be based on the original proposal which does not permit the state to deduct from the original contract price the change orders reducing the quantities. To

decide otherwise would permit the state to greatly alter the terms of the contract by the simple device of issuing minus or plus change orders. * * *

A substantial reduction in the amount of work to be performed would tend to increase this unit cost and may in certain instances compel him (the contractor) to accept a loss he could not anticipate or guard against."

552 P.2d 108 (emphasis added)

The claim asserted by Thorn in the instant case with respect to the borrow underrun is identical to the claim asserted by Parson in connection with the bituminous material, bituminous surface course, and rubber latex additive underruns. Thorn claimed in the lower court, as did Parson, that it was entitled to negotiate a supplemental agreement to recover costs related to the work actually performed and not otherwise recovered because of the reduced quantities. The damage exhibit used by Parson in connection with the bituminous underruns included amounts for overhead and profit related to work actually performed, not "anticipated profits" on the quantity of the underrun. The trial court accepted Parson's damage exhibit with the profit and overhead factors included, and the State did not question that finding on appeal, although it could have done so.

Likewise, in the instant case, Thorn attempted to negotiate a supplemental agreement in connection with the

borrow underrun which included a profit factor for the borrow actually used on the project, and the trial court accepted Thorn's construction of Section 104.02 of the Standard Specifications. To have done otherwise, would have rendered meaningless the definition of a supplemental agreement, which states that such an agreement is a "negotiated agreement constituting a modification of the originally executed contract and covering work beyond its general scope". (emphasis added) According to the State's interpretation of a supplemental agreement in underrun situations, there is no negotiation necessary, as evidenced by the following statement found on page 19 of the State's brief:

"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 of the underrun. * * *In theory then, it is reasonable in an underrun to pay only fixed costs and overhead."

The State is simply misconstruing the language of Section 104.02 of the Standard Specifications, which states that "in the case of decreased quantities of work, no allowance shall be made in the supplemental agreement for anticipated profits." The State takes the arbitrary position that in underrun situations, the contractor must submit a

breakdown of its initial bid calculation and then accept the amount allocated to overhead multiplied by the amount of the underrun as payment for whatever expenses were actually incurred in connection with the underrun. The State's theory flies in the face of this Court's statement in Parson that "a substantial reduction in the amount of work to be performed would tend to increase this unit cost and may in certain instances compel him (the contractor) to accept a loss he could not anticipate or guard against." 552 P.2d 108. Indeed, Section 104.02 also states that "in the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed." (emphasis added) The foregoing statement, coupled with the language allowing the negotiation of a supplemental agreement for decreases of more than 25% of a major contract item, clearly gives the contractor the right to calculate his actual costs with respect to the quantity of work actually performed, and negotiate from that basis. The State somehow has the mistaken impression that the damages awarded by the lower court in the instant case included a profit factor connected with the amount of the borrow underrun, but both Thorn and Parson calculated their damages relative to the work actually performed, not the anticipated work which was never performed.

Thorn respectfully submits, therefore, that the trial court was correct in its interpretation of Section 104.02 of the Standard Specifications, which governs the negotiation of supplemental agreements. Section 104.02 clearly states that in situations where there is a decrease of more than 25% in the quantity of a major contract item, the adjustments in payment shall apply to the quantity or quantities of work actually performed and that no allowance will be made for anticipated profits. The trial court correctly concluded that the amount awarded to Thorn was related to the costs of removing, transporting, and placing 15,305 cubic yards of borrow material at various points along the project, and the decision of the trial court should be affirmed.

POINT II

THE REPRESENTATIONS OF VIRGIL MITCHELL
CONCERNING THE UTELITE BORROW PIT WERE
BUT ONE FACTOR WHICH THE TRIAL COURT
CONSIDERED IN AWARDED DAMAGES, NOT
THE ENTIRE BASIS OF THE AWARD

One of the reasons for Thorn's increased costs in connection with the borrow underrun was that the initial source of borrow known as the Utelite Pit, represented by Virgil Mitchell, a State employee, to be acceptable, was later determined to be unacceptable. In calculating its initial bid price of \$1.20 per cubic yard for borrow

material, Thorn relied on the representations of Virgil Mitchell to the effect that the Utelite Pit was an acceptable source of borrow. While the State and Mr. Mitchell attempted to absolve themselves of any responsibility in connection with "positive" representations concerning the Utelite Pit, certain facts support the conclusion of the trial court that Thorn was entitled to rely on the representations of Mr. Mitchell. First, the items comprising the cost factors in calculating a bid in connection with borrow include royalties to the pit owner, removal costs, and transportation costs. It is axiomatic that transportation costs increase proportional to the distance the borrow material is hauled. When the State informed Thorn that the Utelite Pit was unacceptable as a source of borrow, arrangements were made to use the Crandall Pit located south of Peoa, Utah, a considerably longer distance from the project, as an alternate source. Second, in the trial court, both parties had opportunity to present evidence relative to cost factors, and the trial court did not abuse its discretion in determining that Thorn's increased transportation costs resulting from Mr. Mitchell's representations should be considered as a factor in the ultimate amount of damages awarded.

In E. H. Morrill Company vs. The State of Cali-

fornia, 59 Cal.Rptr. 479, 423 P.2d 551 (1967), the California Supreme Court held that a contractor is entitled to rely on the representations of the State relative to subsurface conditions where the State makes a positive representation concerning such conditions. The Court stated:

"The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work. (Cit. omitted) Accordingly, the language in Section 4 requiring the bidder to satisfy himself as to the character of subsurface materials or obstacles to be encountered cannot be relied upon to overcome those representations as to materials and obstacles which the State positively affirms * * * not to exist, and plaintiff was entitled to rely and act thereon." 423 P.2d at 554

In the instant case, the trial court, acting as both the trier of fact and law, heard conflicting evidence relative to the representations made by Mr. Mitchell. Mr. Mitchell testified, in self-serving fashion, that the only representations he made to Thorn consisted of statements that the Utelite Pit was a prospective source of borrow material. (R. 229) Witnesses for Thorn, on the other hand, testified that Mr. Mitchell represented that material

from the Utelite Pit was available and could be used as borrow on the project. (R. 38-39; 55-56) The trial court, after having heard the evidence, concluded that Mr. Mitchell made a positive representation to Thorn to the effect that the material in the Utelite Pit was available and could be used as borrow on the project.

The foregoing facts bring the instant case within the purview of Morrill, supra. Under the reasoning of Morrill, language in the contract requiring the bidder to satisfy himself as to the character of surface and sub-surface materials or obstacles to be encountered cannot be relied upon to overcome those representations as to materials and obstacles which the State positively affirms. 423 P.2d at 554. Similarly, the trial court in the instant case correctly concluded that language in Sections 102.05 and 106.02 of the Standard Specifications, requiring the contractor to examine the construction site and determine the availability of materials, could not be relied upon by the State to overcome the positive representations of Virgil Mitchell that material from the Utelite Pit was available and could be used as borrow on the project.

POINT III

BECAUSE THE PROJECT ENGINEER ORDERED
THE WIDENING OF THE TURNING RADII, AND
BECAUSE THE AMOUNT OF THE BORROW UNDER-

RUN COULD NOT HAVE BEEN DETERMINED
UNTIL THE PROJECT HAD BEEN COMPLETED,
THORN EITHER COULD NOT HAVE GIVEN OR
WAS NOT REQUIRED TO GIVE THE STATE
ADVANCE NOTICE OF ITS INTENDED CLAIMS

It is an undisputed fact that there was a greater than 25% decrease in the quantity of borrow used on the project and that Thorn could not possibly have determined the underrun until the final quantities had been calculated. It is also undisputed that Edward Watson, the project engineer, ordered the work done and agreed to compensate Thorn for extra expenses incurred in widening the turning radii at the point where the new access road meets the existing highway. Section 104.02 of the Standard Specifications clearly gives Thorn the right to negotiate a supplemental agreement based upon its actual costs incurred for work actually performed in placing 15,305 cubic yards of borrow on the project. And because Mr. Watson, the project engineer, ordered Thorn to widen the turning radii, the only material issue of fact to be resolved at the trial of this matter was the reasonableness of the amounts to be awarded to Thorn. And because Section 104.02 of the Standard Specifications authorizes the project engineer to "order the work performed on a force account basis", any ambiguity in the language must be construed against the State. It should be remembered, in addition, that like the trial

court in Parson, the trial court in the instant case did not award the full amount of Thorn's claim.

In its brief, the State relies heavily on Section 105.17 of the Standard Specifications to assert that Thorn is barred from recovering any damages because of its alleged failure to comply with procedural requirements. Section 105.17 states in part:

"If, in any case, where the contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the engineer as extra work as defined herein, the contractor shall notify the engineer in writing of his intention to make a claim for such additional compensation before he begins the work on which he bases the claim." (emphasis added)

With respect to the borrow underrun, the State admits in its brief that it would have been impossible for Thorn to have given notice of its claim before the final borrow quantities had been calculated. Where the underrun exceeds 25%, as it did in the instant case, Section 104.02 clearly states that " * * * a supplemental agreement will be necessary * * * ". On October 15, 1974, Thorn requested a supplemental agreement in the amount of \$38,642.83, and the sole basis for Thorn's commencement of this action lies in the fact that a satisfactory supplemental agreement

could not be reached.

In summary, because (1) the amount of the borrow underrun could not have been determined until after the work had been completed; (2) the State misconstrued Section 104.02 of the Standard Specifications and was willing to award only \$1,791.30 for the borrow underrun; and (3) the State ordered the work done but was unwilling to compensate Thorn in any amount for extra expenses incurred in widening the turning radii, the trial court correctly concluded that Thorn either could not have given or was not required to give the State advance notice of its intended claims.

CONCLUSION


The trial court correctly held that (1) Thorn was entitled to be awarded a reasonable amount in connection with the work actually performed in removing, transporting, and placing 15,306 cubic yards of borrow material on the project; (2) because the project engineer, Edward Watson, ordered the work done, Thorn was entitled to be awarded a reasonable amount for extra expenses incurred in connection with widening the turning radii at the point where the new access road meets the existing roadway; (3) Thorn either could not have given or was not required to give the State advance notice of its intended claims; and (4) the amount

of \$24,500.00 was a reasonable amount to be awarded for these items under the circumstances.

The State has had its day in Court and, even though dissatisfied with the results, cannot prevail in its assertion that there was an abuse of discretion in the court below. Thorn respectfully submits, therefore, that the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent were served upon the Appellant by mailing the same, postage prepaid, to Leland D. Ford, Assistant Attorney General and Attorney for Appellant, 115 State Capitol, Salt Lake City, Utah 84114, this 30th day of June, 1978.


Steven H. Stewart