

1958

State of Utah et al v. Union Construction Co. et al : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Maurice D. Jones; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *State v. Union Construction Co.*, No. 8816 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3041

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
Supreme Court of the State of Utah

STATE OF UTAH, by and through
its ROAD COMMISSION, C. H.
VANCE, Chairman, LAYTON MAX-
FIELD and LORENZO J. BOTT,
Members of the State Road Commis-
sion,

Plaintiff and Appellant,

vs.

UNION CONSTRUCTION COMPANY,
INC., and the UNITED STATES
FIDELITY AND GUARANTY COM-
PANY, a corporation,

Defendants and Respondents.

FILED

JUL 14 1958

Clerk, Supreme Court, Utah

Case No.
8816

BRIEF OF APPELLANT

E. R. CALLISTER,
Attorney General,

MAURICE D. JONES,
Assistant Attorney General,
Attorneys for Appellant.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	6
ARGUMENT	7
POINT I. THE STATE OF UTAH AND ITS POLITICAL SUBDIVISIONS ARE REQUIRED TO FORFEIT THE SECURITY FURNISHED AND FILED IN CONNECTION WITH BIDS FOR DOING WORK OR FURNISHING MATERIALS AND SUPPLIES UPON THE REFUSAL OF THE BIDDER ENTERING THE LOW BID TO ENTER INTO A CONTRACT ...	7
POINT II. THE EVIDENCE DISCLOSED THAT THE MISTAKE MADE BY THE AGENTS OF UNION CONSTRUCTION COMPANY WAS NOT AN HONEST MISTAKE BUT RATHER WAS DUE TO GROSS NEGLIGENCE IN PREPARING THE BID AND THEREFORE THE COURT ERRED IN FAILING TO DECLARE THE SECURITY FILED WITH THE BID FORFEITED, TO THE STATE	9
CONCLUSION	15

CASES

Baltimore v. J. L. Robinson Construction Company, 123 Md. 660, 91 Atl. 682, 80 A. L. R. 590	10
Daddario v. Milford, 269 Mass. 2, 5 N. E. 2d 23, 107 A. L. R. 1447	10
Leonard v. Howard, et al., 135 P. 549, 67 Ore. 203 ...	12, 13
Scott v. United States, 44 Court of Claims (F.) 524; 43 Am. Jur., Public Works, Sec. 63	10

TABLE OF CONTENTS—Continued

	Page
STATUTES	
14-1-1.1, Utah Code Annotated 1953, Supp.	8
27-2-7 (2), Utah Code Annotated 1953	8

In the Supreme Court of the State of Utah

STATE OF UTAH, by and through
its ROAD COMMISSION, C. H.
VANCE, Chairman, LAYTON MAX-
FIELD and LORENZO J. BOTT,
Members of the State Road Commis-
sion,

Plaintiff and Appellant,

vs.

UNION CONSTRUCTION COMPANY,
INC., and the UNITED STATES
FIDELITY AND GUARANTY COM-
PANY, a corporation,

Defendants and Respondents.

Case No.
8816

BRIEF OF APPELLANT

STATEMENT OF FACTS

During the first part of August, 1957, the State Road Commission, in contemplation of letting a road construction job, sent a state surveyor to stake a new line at the beginning of the proposed project. The surveying job was

completed by August 8th and the notes turned in to the Road Commission offices at the State Capitol on the 10th of August (R. 77). The engineer who surveyed the area during August 1957 testified all stakes were in place when he finished and no changes were later made (R. 77, 78). The engineer found only two stakes that had been set by the surveying crew that had surveyed the area for a road back in 1946 (R. 81). The stakes were several hundred feet apart and there were no legible marks on them (R. 81).

On August 25 and September 1, 1956, the State Road Commission of Utah published a "Notice to Contractors" calling for sealed proposals for the construction of five miles of bituminous surfaced road between Escalante and Henrieville in Garfield County. This project was identified as "Federal Aid Secondary Project No. S-0392 (1) First Contract." In the "Notice" were listed the principal items of work as follows: 594 tons of bituminous material, 25,500 tons of gravel, and *135,000 cubic yards of unclassified roadway excavation*. The Notice also stated that all proposals must be accompanied by either "cash, certified check, cashier's check or approved proposal guarantee bond for not less than five percent of the total amount of the bid." The checks and bonds were to be made payable to the State Road Commission *as evidence of good faith and a guarantee that if awarded the contract the bidder would execute the contract and furnish the contract bond as required* (Plaintiff's Ex. 2).

Agents of Union Construction Company, Inc., hereinafter referred to as Union Construction, obtained copies of the plans and specifications on the 31st day of August,

1956. The agents were Heber W. Glenn and his wife, Esther Glenn, President of Union Construction (R. 72).

On Sunday, September 2nd, Mr. Glenn and his wife inspected the site of the proposed project (R. 33 and 72). Upon arriving at the Escalante end of the project Mr. Glenn got out of his car and after briefly looking around, claims to have located some stakes, he didn't say how many (R. 31). Rather than finding a number of stakes as he at times claims, Mr. Glenn admitted that he found only one stake and the red flag later referred to was in line with this *one* stake (R. 43, Defendant's Exhibits 8, 9). The stake that he found was a " * * * reference stake that had been put out there on account of the bridge * * *" (R. 43). The Resident Engineer who accompanied the Glenns on September 11th identified the stake that Mr. Glenn claims led him astray as one that he had placed during the first part of August, 1957. He said that he followed this stake along the east side of a wash (R. 31). On the east side of the wash there were no rocks, whereas on the west side there was a considerable amount of rock. Mr. Glenn saw in the distance a red flag tied to a stake which according to him appeared to be in line with the stake he had already found (R. 31, 43). From this Mr. Glenn assumed that the road was going to go down through a farmer's field and there would not be any "rock work" in this particular area (R. 35). Mr. Glenn claims the stake he found was old (R. 35, 36 and 48) and all the markings had been weathered away (R. 47, 48). Although Mr. Glenn had in his car the plans and specifications for the job, he did not bother to take them with him (R. 48, 50, 52). Mr. Glenn

claims that the plans would not have helped him find the line of the proposed road; this in spite of the fact that the area had been completely staked before the advertisement for bids, and the stakes started at the end of the improved road (R. 77, 78). Mr. Glenn admits that the only time he looked at the plans was prior to reaching the site to find out where it was located (R. 63). It was only after returning home that Mr. Glenn studied the plans (R. 61). This, according to his own testimony is the only time the plans were studied because it is Mr. Glenn's position that plans are valueless in looking over the ground prior to preparing a bid for the construction of a highway (R. 62). Based upon his brief examination of the area a bid was prepared and submitted on behalf of Union Construction. The bid was accompanied by a bid bond with United States Fidelity and Guaranty Company as surety.

On September 10, 1956 at 2:00 p. m., the bids were opened and of the eight submitted, Union Construction was low. Because of the difference between the bid of Union Construction and the next low bidder, Mr. Glenn figured that he had either “* * * missed the stake or * * * was in the wrong canyon or something” (R. 41). Later that day Mr. Glenn told his wife that they had better take a second look at the area where the highway was to be constructed (R. 41).

On September 11, 1956, the Glenns again inspected the area. During this second look-see, the Glenns were accompanied by Haden S. Barnhurst, grade foreman for Union Construction, and the resident engineer in charge of construction, Rehnon D. Nelson (R. 42, 66, 89). Mr.

Nelson testified that while he was in the presence of Mr. and Mrs. Glenn neither one demonstrated any familiarity with the job (R. 89) and Mr. Glenn admitted at that time that he had not consulted the plans when first looking over the area (R. 90). Mr. Nelson also testified that Mr. Glenn told him that he had been told by one of the county commissioners that “* * * it was a good dirt job running down the middle of Mansfield [a man’s field] * * * that it was all dirt and that it was a good dirt job” (R. 90). It was at this time that Mr. Glenn asked Mr. Nelson “* * * how they could get out from under this job” (R. 89).

After returning to Salt Lake City, the Glenns consulted counsel who wrote a letter to the Road Commission claiming that the Union Construction made a mistake in bidding “Federal Aid Secondary Project No. S-0392 (1) First Contract”, and wished to be allowed to withdraw their bid, and the bond that had accompanied the bid. This letter was written September 13, 1956, and received the next day by the Road Commission. However, the Commission had accepted the bid of Union Construction prior to receiving this notice, and the Glenns had been so informed on September 12, 1956, Mrs. Glenn having talked with a Mr. Johnson, an employee of the Road Commission, on that day, who told her that the bid had been accepted and Union Construction could not withdraw (R. 73). Union Construction thereafter refused to enter into a contract. On September 24, 1956, the State Road Commission called for the forfeiture of the bid bond submitted by Union Construction, and at the same meeting awarded the contract to Mor-

rison-Knudsen Co., Inc., second low bidder. A complaint was filed in the Third District Court on November 23, 1956, naming Union Construction and United States Fidelity and Guaranty Company, its surety, as defendants, praying for the forfeiture of the bid bond. The matter was tried before the Honorable Martin M. Larson who found for the defendants, no cause of action; thereafter the plaintiff appealed.

STATEMENT OF POINTS

POINT I.

THE STATE OF UTAH AND ITS POLITICAL SUBDIVISIONS ARE REQUIRED TO FORFEIT THE SECURITY FURNISHED AND FILED IN CONNECTION WITH BIDS FOR DOING WORK OR FURNISHING MATERIALS AND SUPPLIES UPON THE REFUSAL OF THE BIDDER ENTERING THE LOW BID TO ENTER INTO A CONTRACT.

POINT II.

THE EVIDENCE DISCLOSED THAT THE MISTAKE MADE BY THE AGENTS OF UNION CONSTRUCTION COMPANY WAS NOT AN HONEST MISTAKE BUT RATHER WAS DUE TO GROSS NEGLIGENCE IN PREPARING THE BID AND THEREFORE THE COURT ERRED IN FAILING TO DECLARE THE SECURITY FILED WITH THE BID FORFEITED, TO THE STATE.

ARGUMENT

POINT I.

THE STATE OF UTAH AND ITS POLITICAL SUBDIVISIONS ARE REQUIRED TO FORFEIT THE SECURITY FURNISHED AND FILED IN CONNECTION WITH BIDS FOR DOING WORK OR FURNISHING MATERIALS AND SUPPLIES UPON THE REFUSAL OF THE BIDDER ENTERING THE LOW BID TO ENTER INTO A CONTRACT.

The State Road Commission of Utah has adopted the following regulations:

“1-2.8. No proposal will be considered unless accompanied by a proposal guaranty in the form of cash, certified check, cashier’s check, or proposal guaranty bond for not less than 5 per cent of the total amount of the bid, made payable to the State Road Commission of Utah. The proposal guaranty bond shall be made on form included in proposal.

“1-3.7. Failure to execute contract and file acceptable bonds within 10 days after the bidder has received notice that the contract has been awarded shall be just cause for the annulment of the award and the *forfeiture of the proposal guaranty which shall become the property of the State, not as a penalty but in liquidation of damages sustained.* Award may then be made to the next lowest responsible bidder or the work may be readvertised and constructed under contract or otherwise, as the Commission may decide.” (Emphasis added.)

(Standard Specifications for Road and Bridge Construction, Plaintiff’s Exhibit No. 6.)

Legislation granting to the Road Commission the authority to adopt these regulations is found in Section 27-2-7 (2), U. C. A. 1953 which reads, The Commission shall have the following powers and duties:

“(2) To formulate and adopt rules and regulations for the expenditure of public funds for the construction, improvement and maintenance of state highways, and other purposes authorized by law, *and for letting contracts for any work which the commission is authorized by law to do.*” (Emphasis added.)

Whenever any agency of the state has such a rule it is bound by Section 14-1-1.1, U. C. A. 1953, Supp., which requires the agency to declare a forfeiture of the security filed with the bid when the low bidder fails to enter into a contract. Section 14-1-1.1, U. C. A. 1953, Supp., reads as follows:

“Any person, firm, partnership, corporation, or association bidding to do work or furnish materials and supplies for the state, or for any political subdivision thereof, may, if the regulations of an institution, board, commission, or department of the state or the regulations of any political subdivision so authorize, be required to furnish and file security with said bid in the form of cash, certified check, or cashier’s check or a surety bond in an amount specified in the notice of the advertisement calling for such bid; provided that such security shall not exceed five per cent of the amount bid. *The state, or any political subdivision thereof, upon refusal by the contractor to enter into a contract and to furnish a payment and performance bond after having been notified that said contractor is the lowest responsible bidder will then require said contractor to forfeit*

to the state or its political subdivision the amount of the security as liquidated damages for the contractor's failure to produce a performance or payment bond and to enter into the contract as anticipated by the advertisement for bid." (Emphasis added.)

It is not necessary to discuss at any length what the intent of the Legislature was and what it desired to accomplish by the passage of this law because the words used are clear. In the case now before the Court, Union Construction received notice that the contract had been awarded to it prior to its giving notice to the Road Commission that its agents claimed to have made a mistake in preparing the bid. Since Union Construction refused to enter into a contract, the Commission was required to declare a forfeiture of the security that had accompanied the bid. Union Construction has maintained that a mistake that was made in preparing the bid was not the result of negligence or lack of care on the part of its agents, but rather was an honest mistake. However, the evidence did show that the agent of Union Construction was not reasonable nor did he use due care when he surveyed the area through which the proposed road was to be constructed; that he failed and refused to consult the plans to help orient himself and find the correct line of stakes that had been placed for the construction of the highway.

POINT II.

THE EVIDENCE DISCLOSED THAT THE MISTAKE MADE BY THE AGENTS OF UNION CONSTRUCTION COMPANY WAS NOT AN HONEST MISTAKE BUT RATHER WAS DUE

TO GROSS NEGLIGENCE IN PREPARING
THE BID AND THEREFORE THE COURT
ERRED IN FAILING TO DECLARE THE SE-
CURITY FILED WITH THE BID FORFEITED,
TO THE STATE.

Where mistakes are alleged, courts must, in order to prevent collusion and fraud by parties making the proposals, inquire carefully into the existence of the alleged mistake and the courts are justified in refusing relief when there is good cause to believe that some other reason than mere mistake is behind the bidder's unwillingness to perform the contract or his desire to withdraw his bid. *Scott v. United States*, 44 Court of Claims (F.) 524; 43 Am. Jur., Public Works Sec. 63. Where bidders claim to have made an honest mistake in preparing a bid, the courts have granted relief but have also denied relief on the ground that the mistake did not clearly appear to be one of material fact, as distinguished from an unwise, hasty or careless statement of prices intended to be bid. *Daddario v. Milford*, 269 Mass. 2, 5 N. E. 2d 23, 107 A. L. R. 1447. If the mistake could have been avoided by the exercise of ordinary care and diligence on the part of the bidder, the courts have always denied equitable relief. *Baltimore v. J. L. Robinson Construction Company*, 123 Md. 660, 91 Atl. 682, 80 A. L. R. 590.

As the last case referred to indicates, a mistake is excused only when ordinary care and diligence was used on the part of the bidder. Mr. Glenn testified as follows concerning his attitude toward the use of the plans when ex-

amining the area prior to preparing a bid for Union Construction:

"Q. What are the plans used for?

"A. The plans are used to build the job after you get the bid.

"Q. Then, the plans are valueless as far as you are concerned?

"A. As far as I am concerned, they are valueless, yes.

"Q. Did you ever look at the plans while you were getting ready to make your bid?

"A. I don't think so. Not very much, if I did.

"Q. You didn't bother to orient yourself with them?

"A. I doubt if any other contractor does either.

"Q. You didn't bother to look at the plans to orient yourself to make a bid?

"A. I looked at them.

"Q. What I want to know is was this plan being used when you went down to make your bid?

"A. I don't deny that those are the plans. I've never denied that.

"Q. Then, your contention is that one stake led you astray?

"A. One stake! A lot of stakes! How many times was the place staked off?

"Q. That we can find out from the resident engineer. Then, you admit you never did look at the plans while you were down there?

"A. I admit I looked at them once to tell me where the job was" (R. 62, 63).

In the case of *Leonard v. Howard, et al.*, 135 P. 549, 67 Ore. 203, the court declared that a bidder who failed to carefully study the plans presented to him in order to help him prepare a bid is grossly negligent if he fails to use the plans for the purpose for which they were given. Mr. Glenn was fully aware of the importance of examining the plans. He testified that he had read the Standard Specifications printed by the Road Commission and was aware that Section 1-2.5 on page 13 states:

"The bidder is required to examine carefully the site of the proposed work, proposal, plans, specifications, special provisions, and contract form before submitting a proposal. It is mutually agreed that 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 added.)

On page 60 of the record the following question was asked:

"Q. Have you ever read through the manual 'Standard Specifications for Road and Bridge Construction' which is made a part of all road jobs, Mr. Glenn?

"A. There is nothing there that tells you to bid by those plans.

"Q. Would you care to make reference to 1-2.5 in the 'Standard Specifications for Road and Bridge Construction,' plaintiff's Exhibit 6?

"A. Yes.

"Q. Have you ever read that before?

"A. Yes.

"Q. Does it require you to look at the plans and look at them carefully?

"A. Yes. In a way it tells you, but it tells you to look at the land, too; and if you see the stakes in one place and not on the plans, that is different.

"Q. It says, 'The bidder is required to examine carefully the site of the proposed work, the proposal, plans, specifications, special provisions, and contract forms before submitting a proposal * * *.'

"A. That is right.

"Q. Did you examine carefully the plans?

"A. I examined the plans after I had them on my desk at home.

"Q. That was after you went on the job?

"A. Yes.

"* * *."

Because the agents of Union Construction were negligent in their preparation of the bid, they cannot now claim there was no meeting of the minds upon a contract. The contract had been advertised as required by law, Union Construction entered a bid accompanied with security as required by law, the bids were opened as required by law, and the bid of Union Construction was found to be the low bid. There was nothing in the Union Construction bid to give notice to the State Road Commission that there had been a mistake made in preparing the bid. As the court said in the *Leonard* case, *supra*:

"We cannot assent to the proposition that by reason of the mistake made by Howard there was no 'meeting of the minds' upon the contract * * *. They bid upon the contract, but by inattention overlooked some of the details, and bid too low. * * *

in our opinion the evidence shows that the low bid made by them was the result of a mistake and this mistake the result of Howard's careless examination of the plans. Under such circumstances neither law nor equity will help them; * * *."

There are many cases which would allow equity to relieve an honest mistake in a similar situation. 80 A. L. R. 586, 52 A. L. R. 2d 779. However almost all of these cases recognize that if the party making the bid had been negligent, the relief requested would not have been granted. In this case it is the contention of the appellant that the agents of the respondent were grossly negligent. The agent failed and refused to look at the plans even though he knew that the Standard Specifications issued by the Road Commission required that he do so. Mr. Glenn contends that the stake that led him astray was an old one and had been placed there by the agents of the state at some time prior to the date he examined the area. However, the stake that he pointed out to the Resident Engineer on September 11th was one that had been placed in the ground by the Resident Engineer not more than a month and a half prior to that time. It was a new stake and had surveyors marks upon it. If Mr. Glenn had but looked at the stake and consulted his plans, he would have been able to tell that it was not in the center line of the proposed road.

It would be difficult to fix the money value of the state's loss due to a bidder's failure to enter into contract. Among the many factors involved are the following: First, delay in getting a new contract; Second, the higher price the state would probably have to pay under a new contract;

Third, cost of readvertising, (although not required in this case) ; Fourth, the fact that possibly in view of their experience at the first bidding, other bidders would not bid at all.

Provisions requiring a deposit accompanying a bid for a road contract or for the forfeiture thereof are necessary as a matter of public policy to protect the public interest. If, as here, a bidder were allowed, without loss to himself, to withdraw his bid after bids had been publicly opened, fraudulent practices would develop. Any bidder who found that in comparison with other bidders his bid was quite low, could withdraw his bid and the state would thereby lose the value of competitive bidding and be forced to pay the price of higher bidder with no compensation to itself for the loss sustained.

CONCLUSION

Appellant respectfully submits that the decision of the lower court should be overturned and that the security furnished by the respondent should be forfeited to the state.

Respectfully submitted,

E. R. CALLISTER,
Attorney General,

MAURICE D. JONES,
Assistant Attorney General,

Attorneys for Appellant.