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

Utah Supreme Court

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Case No. 8816

IN THE SUPREME COURT

of the

FILED

STATE OF UTAH

73 - 1958

Clerk, Supreme Court, Utah

STATE OF UTAH, by and through its
ROAD COMMISSION, C. H. VANCE,
Chairman, LAYTON MAXFIELD and
LORENZO J. BOTT, members of the
STATE ROAD COMMISSION,

Plaintiff and Appellant,

—vs.—

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

Defendants and Respondents.

BRIEF OF RESPONDENTS

ROBERT W. HUGHES
Counsel for Respondent

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

All italics are ours. Parties will be referred to as in the Court below. Appellants will be referred to as plaintiffs, or the State. Respondent, Union Construction Company, Inc., will be referred to as Union.

STATEMENT OF FACTS

This appeal is from judgment and decree by the Court in favor of defendant and against plaintiff. Adjudging that the Bid Bond of defendant, Union Construction Company furnished by United States Fidelity and Guaranty Company in the sum of \$8,650.00 should not be forfeited to the State of Utah.

The pleadings and Pretrial Order makes basic disputed issues of fact.

The basic issues of fact set forth by the Pretrial Order were six in number and were as follows:

1. Did the State survey two roads as claimed by defendant Union Construction Company, Inc., and were the stakes for the two roads on the ground at the time the employees and agents of Union Construction Company, Inc., went upon the ground for the purpose of making their bids?
2. If only one road was staked, where were the stakes upon the ground at the time when the Union Construction Company, Inc., went upon the ground for the purpose of making its bid?
3. Did the Union Construction Company, Inc., make a mistake of fact as to where the road would be constructed?
4. If so, did the Union Construction Company act as a reasonably prudent person in making such mistake?

5. What amount of damage did plaintiff sustain as a result of the failure of Union Construction Company to accept its contract?
6. Did the plaintiff place any stakes upon the ground after the plans and specifications were prepared and submitted to the various bidders?

At the time of trial the State stipulated that if the Bond was not forfeited that it would not attempt to show any damage whatsoever and that it was an all or nothing proposition as far as the State was concerned. It would be entitled to the full amount of the bond, or it would be entitled to no judgment. R. 22.

The evidence presented by defendant supported the position which the Pretrial Order outlined.

Plaintiff's own witnesses testified that on three separate occasions the road had been staked in the vicinity. The first staking occurred in 1946. R. 77. The second staking occurred in 1954. R. 91. The third staking occurred in 1956 and immediately prior to the time that defendants' employees visited the area for the purpose of examining the terrain so that a bid could be made. R. 87.

Exhibits 9 to 13 are photographs of the area involved and show stakes being pointed out after the construction project was completed which were in place prior to the commencement of the construction project. These stakes

were those which employees of Union mistook for the proper stakes which marked the course of the highway.

The area was relatively flat where the stake examined by Union placed the road. The unclassified excavation work would have involved the handling of only loose and relatively soft dirt. Exhibit No. 10 shows that the course followed by the State in the actual construction of the road placed the road to the north far enough that it traversed a solid rock ridge extending down into the valley. The difference between excavation in rock such as is shown by Exhibit No. 10 and soft earth makes the material cost difference.

The bid openings at the State occurred on the 10th of September. After noticing the great difference between the other bids on unclassified excavation and the bid of Union, the employees of Union became very much alarmed. They immediately left for the site of the proposed road construction. They examined the site. On the morning of the 12th of September Union notified the Road Commission that there had been a mistake made. Union also, on September 13th, wrote the State that it could not follow through on its bid. The State then awarded the contract to the next lowest bidder.

No additional advertising or delays were necessitated as result of the refusal by Union to accept the contract on which they had bid.

The Findings of Fact by the Court point out that the difference between the Morrison-Knudsen Company bid and Union Construction company bid was \$35,380.62, and was primarily the difference between the bid for unclassified excavation made by Morrison-Knudsen Company and the bid for unclassified excavation made by Union Construction Company.

The Court found that there were two sets of stakes in the area, one to the south of where the road actually was constructed and that the agents of Union mistakenly followed the stakes that were south of the true stakes.

The Court found that the agents of Union acted in a reasonable manner, and were not negligent in following the wrong set of stakes; that there was nothing in the vicinity to indicate and put them on notice that they were following the wrong set of stakes. The Court further found that the mistake was an honest mistake and that the agents of Union believed the stakes they followed were the true markers of the roadway.

The Court found that the notification by Union of the mistake occurred prior to the formal offer of contract made by the State to Union on September 24, 1956.

The Court concluded Union had made a bona fide mistake of a fundamental character in calculating the bid; that the mistake was not the result of any negligence on the part of defendant but was due to the fact that there

was present in the vicinity where the road was to be constructed two separate sets of stakes, either one of which defendant could, in the exercise of ordinary care, follow and believe marked the site of the road to be constructed. The Court concluded also that the forfeiture should not be permitted; that to require forfeiture under the facts and circumstances would be inequitable and unfair and would create an intolerable burden not required by law.

In accordance with the Findings of Fact and Conclusions of Law the Court entered the Decree that Union be permitted to withdraw its bid and that the State return to Union the Bond which had been deposited to guarantee performance of the bid.

The Statement of Facts set forth in brief of appellant contains several quotes and references which are most favorable to it. The evidence to the contrary of that quoted is contained in the record and is set forth in part in this Brief.

STATEMENT OF POINTS

POINT I

WHERE A MISTAKE IN CALCULATING A BID IS FUNDAMENTAL IN CHARACTER AND NOT DUE TO GROSS NEGLIGENCE FORFEITURE OF BID BONDS WILL NOT BE PERMITTED BY A COURT OF EQUITY.

POINT II

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT UNION WAS NOT NEGLIGENT, BUT MADE AN HONEST MATERIAL MISTAKE CONCERNING THE PROPER MARKINGS FOR THE PROPOSED ROADWAY.

ARGUMENT

POINT I

WHERE A MISTAKE IN CALCULATING A BID IS FUNDAMENTAL IN CHARACTER AND NOT DUE TO GROSS NEGLIGENCE FORFEITURE OF BID BONDS WILL NOT BE PERMITTED BY A COURT OF EQUITY.

Equitable relief will be granted a bidder for public contract where he has made a material mistake of fact in the bid which he submitted, and upon the discovery of that mistake, acts promptly in informing the public authorities and requesting withdrawal of his bid, or opportunity to rectify his mistake, particularly where he does so before any formal contract is entered into. This general rule is without dissent in the cases and has been recognized generally in all areas of the United States.

The trial court, in its memo decision R. 99 relied upon and quoted the general rule. It cited the Michigan case of *Kutsche v. Ford*, 222 Mich. 442, 192 N.W. 714. It quoted from the decision of the Michigan Supreme Court which reads as follows:

“Where a mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in statu quo, equity will interfere in its discretion, to prevent intolerable injustice.”

In the *Kutsche* case the Michigan Supreme Court examined carefully the proposition that to permit the bidder to withdraw his bid would cause damage to the State and result in the public work costing more than it should, and answered the claim of the State in the following language:

“In the instant case it may be thought that the school district cannot be said to be placed in statu quo when it is considered that the building cost nearly \$6,000 more than plaintiff’s bid. To place in statu quo does not mean that one shall profit out of the mistake of another. It does not appear that plaintiff’s mistake has made the school building cost more than it otherwise would have cost. The school district, if placed back where it was before the bid, loses nothing except what it seeks to gain out of plaintiff’s mistake. To compel plaintiff to forfeit his deposit, because of his mistake, would permit the school district to lessen the proper cost of the school building at the expense of plaintiff, and that, in equity, is no reason at all for refusing plaintiff relief.” Page 717.

Respondent has examined all of the cases it has been able to discover which have a bearing on the fundamental proposition argued by the State in its first point, and can find no support for the state's position. It will be noted that the State cites no authority for the proposition that the State Road Commission could not permit the withdrawal of the bid where there has been a material mistake of fact made by the bidder.

The United States Supreme Court has had an occasion to pass upon the proposition. It set forth the general rule in the case of *Moffatt, Hodgkins, & Clarke Company v. City of Rochester*, 178 U.S. 373, 44 L. Ed. 1108, 20 S. Ct. 957. The opinion dated May 21, 1900 was written by Mr. Justice McKenna. The case has been cited many times and has become known as the case of the near-sighted engineer. The near-sighted engineer made two mistakes in calculating the bid. One mistake involved writing the figure of 70c as 50c. The other involved writing the sum of \$15.00 as \$1.50. The Supreme Court of the United States carefully considered the near-sighted engineer's mistakes and set down the legal principles which would seem to be applicable to the present set of facts. The following quotes outline the Court's reasoning:

“There was no doubt of the mistake, and there was a prompt declaration of it as soon as it was discovered and before the city had done anything to alter its condition. Indeed, according to

the testimony of one witness, the clerk of the board before the mistake was declared by complainant's engineer expressed the thought that 50 cents per cubic yard for earth excavation was too low, and there was some discussion about it at the time, but Mr. Aldridge (he was chairman of the board) said he (the clerk) might as well go on and read it, as the bid was informal. The reading proceeded, and subsequently the Board let the work on contract No. 1 to Jones & Son, and accepted complainant's proposals containing the mistakes for the work on line B, contract No. 2, although complainant protested that there was a mistake in the price of earth excavation and also in tunnel excavation. This was inequitable, even though it was impelled by what was supposed to be the commands of the charter. It offered or forced complainant the alternative of taking the contract at an unremunerative price, or, the payment of \$90,000 as liquidated damages. We do not think such course was the command of the statute or the board's duty."

"If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth \$1,000,000 for \$10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground.

"These remarks are so apposite and just it is difficult to add to them. The transactions had

not reached the degree of a contract — a proposal and acceptance. Nor was the bid withdrawn or canceled against the provision of the charter. A clerical error was discovered in it and declared, and no question of the error was then made or of the good faith of complainant.”

There are numerous cases which have been decided since the cases cited herein. One of the most recent is *Puget Sound Painters, Inc. v. The State of Washington, et al.*, 45 Wash. 2d 819, 278 P. 2d 302. The Supreme Court of Washington set down the general rule applicable where a painter made a mistake in calculating its bid in the following language:

“* * * that equity will relieve against forfeiture of a bid bond, (a) if the bidder acted in good faith, and (b) without gross negligence, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the bidder will suffer substantial detriment by forfeiture, and (e) if the other party’s status has not greatly changed, and relief from forfeiture will work no substantial hardship on him.”

Apparently, it is the position of appellant that, as matter of law, Union was grossly negligent and that forfeiture regardless of care or negligence must be required under the State Road Commission rules and regulations.

The general rule of law recited herein has been the subject of several annotations and is set forth in the general text writers. See 59 ALR 827, 80 ALR 586, 107

ALR 1451, 126 ALR 837. LRA 1915A P. 229, 43 Am. Jur. 805, 81 CJS Section 116, p. 1095.

It is respectfully submitted that the general rule is where a mistake in calculating a bid is fundamental in character and not due to gross negligence, forfeiture of bid bond will not be permitted by a court of equity.

POINT II

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT UNION WAS NOT NEGLIGENT, BUT MADE AN HONEST MATERIAL MISTAKE CONCERNING THE PROPER MARKINGS FOR THE PROPOSED ROADWAY.

The trial court specifically found that there were two sets of stakes on the area over which the roadway was to pass. The agents of Union mistakenly followed the southernmost set of stakes and believed at the time they made their bid that the road was to be constructed over a relatively smooth loose dirt type of material, when as an actual fact the roadway as staked to the north passed through solid rock and greatly increased the cost of handling unclassified excavation.

The evidence adequately supports the trial court's finding. The State's own witnesses testified that the road had been staked on three different occasions. The pictures taken prior to trial show, without dispute, the existence of stakes to the south of the stakes which marked

the road as constructed. In addition to the old stakes, at the time Glenn examined the road area on behalf of Union he discovered on the banks of the wash a red flag in line with the old stakes which he was following. The situation which the evidence discloses was one calculated to mislead a person examining the area if he became involved with the old stakes on the area.

The Plans and Specifications were picked up from the State on the 31st day of August, 1956, on the 2nd of September, 1956, the agents of Union were on the road project examining the area. Glenn, who examined the area on behalf of Union, testified that he had in his car, at the site of the project, the Plans and Specifications for the road project; that as he got out to examine the site of the road, the plans were left in his car (R. 48). Glenn testified that one of the things which was misleading was the red flag on the bank of the wash in line with the old stakes. When questioned about the red flag one of the engineers at the road project site said: "Well, I guess I should have pulled it."

The great disparity between the bid of Union Construction Company and the bid of Morrison-Knudsen Company for the unclassified excavation work demonstrates that Glenn had made a basic miscalculation. The unclassified excavation item was the only one in which there was such a wide disparity between the bidders.

The State did not produce any evidence refuting or contradicting the testimony of Glenn concerning the basic mistake which he made in calculating the cost of doing the unclassified excavation. It did not produce any evidence refuting or contradicting Glenn concerning the existence of the red flag and the line of stakes leading to it at the job site. The Court accepted the testimony of Union's witnesses and found that there had been a material mistake made which was without negligence on the part of Union and that the equitable powers of the Court required it to relieve Union of the forfeiture required by the State Road Commission Rules and Regulations.

The State was not damaged in any way. The evidence reveals that Union employees became alarmed immediately following the bid opening and proceeded back to the road project site to re-examine the area to ascertain if there had been some kind of a mistake. The bid openings were on the 10th of September. Glenn was back at the job site on the 11th of September. The morning of the 12th of September, a call was made by Mrs. Glenn to the State Road Commission, and it was informed that there had been a mistake. That the Union Construction Company desired to withdraw its bid. On September 13th, a letter was written to the Commission by Counsel for Respondent informing the Commission of the mistake, outlining the nature of the mistake, and notifying the Commission that Union would not be able to sign a contract and undertake the work for the bid price. The

Commission re-awarded the bid to Morrison-Knudsen Company and the project was actually constructed.

There is no dispute concerning the unequivocal withdrawal of the bid by Union upon discovering the mistake which it had made. The second leg of the general rule quoted herein under Point I was thus complied with. Prompt notification of the mistake was given. The State of Utah suffered no damage by reason of the fact that Union had made a mistake in calculating the bid.

The State, in its brief, claims that Glenn did not take the plans to the site of the job when he examined it on the first occasion, prior to the making of the bid. This, as has been demonstrated, is not so. The Plans and specifications were in his car and he had had an opportunity to examine them before going to the site to examine the roadway itself.

The evidence is clear that where there is a discrepancy between plans and the road as staked, the actual staking on the physical site must be the determinative factor in making the bid.

Glenn had had many years of experience in making construction bids. The area over which the road was constructed, as demonstrated by the pictures, was an area covered with sage brush, cheat grass, russian thistle and other types of vegetation. All of these facts, the Court could well consider, in determining that Glenn was not

negligent in following the wrong set of stakes when he examined the site for the road construction work.

Respondent is unable to find any evidence which would justify a claim that, as matter of law, respondent Union and its employees were negligent.

The mistake was made, and it is respectfully submitted, as a practical matter, it is conceded, it was a material mistake and would justify the Court in exercising its equitable powers and ordering the return of the Bond to Union.

It is respectfully submitted that the evidence supports the trial court's finding that Union was not negligent but made an honest material mistake concerning the site of the proposed road.

CONCLUSION

It is respectfully submitted that this Court should affirm the Findings of Fact, Conclusions of Law and Decree as made by the trial court and dismiss the appeal.

Respectfully submitted,

ROBERT W. HUGHES

Counsel for Respondent