

WHEN CAN YOU SEEK ADDITIONAL COMPENSATION?

Occasionally, a contractor on a project of significant size will encounter delays that are translated into substantial sums of money. In an effort to avoid or reduce a project loss, the contractor may examine the potential of recovering all or part of the project loss from the owner on various grounds. Design professionals have a continuing need to understand these legal claims for additional compensation asserted by contractors in order to properly advise owners during construction. A State of Washington case involving the City of Seattle and a local King County contractor, decided in 1977 by the Court of Appeals of Washington, is a good case to use as an example.

In *City of Seattle v. Dyad Construction, Inc.*, the contractor filed a claim for damages against the City for additional compensation arising out of a sanitary sewer project. The location of the proposed sewer line, designed by the City, was shown on the plans, staked by the City survey crew and examined by the contractor before bids were submitted. The sewer trench was to be cut through tide flats available only during periods of favorable low tides.

The contractor commenced work and encountered groundwater. The City, concerned about protecting contiguous private property, ordered the work to stop temporarily. The City required the contractor to install sheet piling and replaced native beach material with imported backfill. However, groundwater was again encountered and the contractor stopped work and asked the City to redesign the line by moving it. The state safety inspector considered the construction location unsafe and ordered the line moved. The initial revision of the line's relocation did not satisfy the state inspector and the City submitted a revised plan which was found acceptable. The line was completed approximately four months later than scheduled. The City then commenced an action to recover money claimed to have been erroneously paid the contractor, and the contractor counterclaimed for additional compensation.

The trial court found that the work had been completed by the contractor and that the contractor had given the City timely and proper notices of its claim for additional compensation, alleging breach of contract, extra work and owner interference. The trial court also found that the City had interfered with the contractor's operation when it ordered the contractor to install sheet piling not called for by the original contract documents and directed the replacement of excavated native material with imported backfill. The trial court held that the City did not have the right under the contract to order those changes because they related to the contractor's means and methods of construction. The court concluded that the contractor had been performing adequately and any incidental damage that the contractor might cause to contiguous property was the risk of the contractor.

These conclusions supported the court's opinion that the City had materially increased the scope of the work under the construction contract entered into between the City and the contractor, delayed the contractor's operations and caused extra costs in labor and equipment, entitling the contractor to recover additional compensation.

The trial court looked carefully at the construction contract and concluded that the contractor was not entitled to recover its expenses with regard to the backfill, because the City had specifically retained the right to order such backfill under the terms of the contract. However, the court held that the city did not have a similar right with regard to ordering the installation of sheet piling.

The trial court also found that the contractor was entitled to additional compensation because the City's engineer had unjustifiably located the line in the wrong location. That conclusion was buttressed by the position of the state safety inspector. The court concluded that the delay associated with reacting to the problems encountered in the field were delays ultimately caused by the City and therefore recoverable by the contractor.

On appeal, the City claimed the trial court's findings were not supported by the evidence. The court stated the general rule that findings by a trial court supported by substantial evidence will not be overturned on appeal by the Court of Appeals. That is a rule that every trial lawyer learns early in his or her career. The Court of Appeals then turned to an examination of the construction contract and the facts in the trial record.

The contract contained provisions that are not normally found in pre-published engineering and architectural contracts today. For example, the contract provided that the architect/engineer shall give all orders and directions contemplated relative to the execution of the work, and shall determine the amount, quality, acceptability and fitness of the several kinds of work and materials, and shall decide all questions which may arise in relation to the work. The contract also appointed the architect/engineer as the determiner of issues arising between the owner and the contractor.

The Court of Appeals held that this contract language indicated that the division of responsibility between the architect/engineer acting on behalf of the City, and the superintendent acting on behalf of the contractor, placed the duty of inspection and acceptance on the architect/engineer, but permitted the contractor to determine the means and methods of meeting the specifications of the contract.

The Court of Appeals also found that the contract placed the initial responsibility for handling emergencies upon the contractor unless the architect/engineer had been notified of the existence of an emergency, and concluded that if the contractor failed to act in the face of a need to take action, then the architect/engineer had authorization to do so. The Court of Appeals therefore concluded that since the trial court had found the contractor was operating in a workmanlike fashion using normal construction procedures and that there was no clear danger to adjacent property, the action taken by the City in ordering extra protective measures was not supported by the contract and entitled the contractor to additional compensation.

This case could have gone either way but for the rule that the Court of Appeals would not interfere with the findings of the trial court if those findings were supported by substantial evidence. That is often the situation in these construction claims cases. If the trial is to the court without a jury and the trial court makes findings of fact, the Court of Appeals will not set them aside unless they are not supported by substantial evidence, even though the Court of Appeals might not have decided the case the same way as the trial court did. Considering these sensitive but significant factors in the disposition of construction cases that find their way to court, it is obviously important to carefully consider the wisdom of settlement because either party might lose.

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