Excavating Contractor Denied Recovery for Additional Subgrade Stabilization

by

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Missouri's Southern District Court of Appeals recently denied an excavating contractor's attempt to dig up more money for its work. The court reversed a jury's verdict in favor of the contractor for $356,058 in damages and $134,498 in pre-judgment interest, and a trial judge's ruling on contract provisions that favored the contractor.

A $325 fixed-price bid provision on a line item by the contractor led to a $495,556 dispute on a $1,873,939.50 contract.

The case is *Herion Company v. Taney County, Mo.*, 514 S.W.3d 620 (S.D. Mo. App. 2017), decided February 6, 2017.

The dispute involved Taney County's 2008 Casey Road Improvements Project. The work included sub-grade stabilization using shot rock (SSUSR).

The bid form for SSUSR limited the quantity of shot rock to five cubic yards. Herion Company provided a bid to the County of $65.00 per cubic yard which totaled $325.00, per the bid requirements of only five cubic yards.

In January 2008, Taney County and Herion entered into a written contract to do the project for $1,873,989.50 including $325 for five cubic yards of SSUSR work. The contract was subject to adjustment for changes in the quantities by approved change orders.

By April 22, 2011, Herion used more than 4,500 cubic yards of SSUSR which amounted to $292,510.00. That is when the County first learned of the additional SSUSR work, materials and cost. This led to the dispute ultimately resulting in the lawsuit.

The Southern District on appeal noted the parties agreed on two important points: Herion did not seek or obtain prior written permission from the County to proceed with the extra SSUSR work.

To resolve their differences, the parties entered into Addendum No. 2 to their original contract. Herion amended its unit price from $65.00 per cubic yard to $52.00 for all work it had performed up to that point and any future work it

would perform. The County paid Herion $685,000 for 13,500 cubic yards of SSUSR work.

This Addendum did not end the dispute.

Herion sued the County alleging the County breached its original contract by paying the reduced price for SSUSR and alleging that the SSUSR work did not require a change order prior to the work's completion. Herion also alleged that Addendum No. 2 was not binding because Herion signed it under duress.

The original contract contained a provision addressing adjustments to the contract price due to changing conditions. This provision required the contractor to inform the County before incurring any additional expense. And it stated there would be no additional compensation without prior written approval from the Chief Engineer for the County.

It also provided: "The Contractor agrees that any claims made without such advance notice, and not presented in such manner as to enable the Engineer to observe conditions as they occur and to verify expenses as they occur and to determine with certainty the correctness of such claims and of the expenses involved, are waived and shall be null and void."

Another provision in the original contract addressed sub-grade stabilization. It provided that unsuitable sub-grade that was twenty-four inches or less in depth was to be removed and replaced with crushed limestone containing minimal fines. It further provided that the contractor was to be paid at the contract unit price for this work.

The provision directed that "unsuitable sub-grade shall be removed, disposed of and replaced using material and compaction methods stated in these Special Provisions for Embankment in place."

In a pre-trial ruling, the trial judge held there was a conflict between these two provisions. The trial court decided that the sub-grade stabilization provision was more specific and thus controlled over the more general position concerning payment for additional work.

In other words, the one provision trumped the other. This prevented the County from arguing to the jury its contract defenses to Herion's claim that Addendum No. 2 should be set aside based on alleged duress.

The jury then found in favor of Herion for a total of $495,556.00 in damages and pre-judgment interest.

The Appellate Court reversed the finding of the trial judge and the jury verdict. The Southern District agreed with the County that the two contract provisions were not in conflict.

Instead, the two contract provisions should have been read in harmony. The one provision did not cancel out the other.

The Appellate Court opined that Herion's interpretation of the contract effectively rendered meaningless "every number associated with SSUSR, including the quantity of 5 cubic yards, the total bid amount of $325.00 and the total Contract cost of $1,873,989.50." This interpretation, according to the Southern District, from both the trial judge and Herion, "stripped the County of any ability to control costs in the Contract."

The Southern District also agreed with another position of the County: additional work required prior written approval under Missouri law (namely, Section 229.050.5 R.S.Mo.).

This section reads in part: "The bidder must agree that before the county or political subdivision shall be liable for any additional work or material, the county or political subdivision must first order the same, and the cost thereof must be agreed upon in writing and entered of record before such additional work shall apply in case of omissions, deductions or changes and the unit prices shall be the basis of the value of such changes."

This statutory provision requires that any additional work or material on any government project must be agreed upon in writing before the work is performed. The purpose of this provision is to control costs for public projects and protect governmental entities from unauthorized expenditures.

The Southern District reversed the jury's verdict and sent the case back to the trial judge for further proceedings. This result undid the trial court's early rulings, the trial, and the jury's verdicts, rendering all of them moot.

The Appellate Court further noted that the case had already generated a thirty-four volume, 7,000 page legal file. The Appellate Court's decision promises to expand that legal file even more.

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