

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0625

M. MATT DURAND, L.L.C.

VERSUS

DENTON-JAMES, L.L.C., THE LOUISIANA DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT (D.O.T.D.),
PATRICK J. LANDRY AND ROBERT H. HENNIGAN

WFF
J.D.P.

Judgment rendered: DEC 22 2010

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Number C547608; Division 25
The Honorable Wilson Fields, Judge Presiding

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BEFORE: KUHN, PETTIGREW AND KLINE, JJ.¹

KUHN, J CONCURS IN PART & DISSENTS
IN PART & ASSIGNS REASONS

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

M. Matt Durand, LLC (Durand), appeals a judgment rendered in its favor against the Louisiana Department of Transportation and Development (DOTD) on the grounds that the award of damages for breach of a road construction contract was inadequate. For the following reasons, we amend the judgment of the trial court, and as amended, we affirm.

PERTINENT FACTS AND PROCEDURAL HISTORY

In the aftermath of Hurricane Rita's flood damage in 2005, DOTD needed to promptly repair miles of eroded roadway in Cameron and Calcasieu Parishes. One of the repair projects, entitled "District 07 Embankment & Shoulder Repair from Hurricane Rita," was let for bid and awarded to Denton-James, L.L.C. Durand was awarded a subcontract for approximately 40% of the project. The project required Durand to replace missing embankment and road shoulders with granular aggregate in accordance with the project plan's specified design.

The initial bid requirements called for Durand to provide 140,125 cubic yards of limestone, as shoulder material, over approximately 10 miles of roadway. This turned out to be a highly erroneous calculation of material. Ultimately, the project required only 40,854 cubic yards of limestone over approximately 30 miles of roadway.

As a result, Durand sought damages resulting from the significant under-run in material and the changes in distance covered. Durand claims the entire scope of the job was changed. Durand and DOTD did not agree to modify the agreement, but DOTD did agree to allow Durand to reserve its right to seek additional compensation for damages arising from the changed material and distance requirements. Durand completed its portion of the project.

When Durand and DOTD could not agree on the terms of a change order, Durand filed suit against DOTD² and two DOTD engineers. After a trial on the merits, the trial court entered judgment in favor of Durand and against DOTD, awarding Durand \$1,072,474.06. This sum represented an award of \$5,764,246.20 less the amounts previously paid by DOTD in the amount of \$4,661,356.20. The judgment also dismissed Durand's claim against the two engineers. This award in favor of Durand excluded recovery of any compensation for allegedly purchased but unused limestone, the full amount claimed for increased utilization of company owned equipment, the full amount of the claimed overhead and bid profit.³

Durand now appeals, asserting four assignments of error:

1. The District Court erred in finding that DOTD was not liable for the negligent acts of its engineers pursuant to Civil Code Article 2320 and the doctrine of respondeat superior.
2. The District Court erred in finding that [Durand] was not entitled to recover amounts expended for purchased but unused limestone in the amount of \$5,237,969.85.
3. The District Court erred in finding that [Durand] was not entitled to additional compensation for company owned equipment utilized on the Project in the amount of \$109,838.00.
4. Inasmuch as the amount of overhead and bid profit is a stated percentage of the total direct project costs, the District Court erred in effectively reducing the amount of overhead and bid profit awarded to [Durand] due to the reduction of [Durand's] claim for company owned equipment and elimination of [Durand's] claim for purchased but unused limestone by \$2,172,814.33.

DISCUSSION

Measure of Damages for Material Breach

We first review Durand's claim that DOTD is in material breach of the contract between them since this determination will control the determination of

² Prior to trial, the parties entered a joint stipulation allowing Durand's claims to be considered direct claims against DOTD, avoiding the necessity to include the general contractor, Denton-James, L.L.C. in the litigation.

³ The judgment appealed is a partial final judgment. By order dated December 14, 2010, the trial court certified the judgment as final pursuant to La. C.C.P. art. 1915B. This court, therefore, has jurisdiction to entertain this appeal since we conclude the certification was proper.

damages. We note that the trial court found in its written reasons that, "[a]s a result of the deficiencies and design changes in the DOTD plans and specifications, Durand became entitled to a renegotiated price for the work that it was performing ... and notified DOTD ... of its demand for such a renegotiated price." The trial court then found that DOTD "has thus far unjustly refused to issue a unilateral change order ... or pay" sums that DOTD determined that it owed Durand, even though Durand had fully performed its obligations under the contract.

From our review of the record, we conclude the trial court did not err in finding that Durand was entitled to a renegotiated contract. Accordingly, we conclude that DOTD did materially breach its contract with Durand.

Section 109.03 of the Louisiana Standard Specifications for Roads and Bridges generally governs compensation for altered quantities and provides in pertinent part as follows:

When alterations in quantities result in an increase or decrease of more than 25 percent in the contract quantity as awarded on any major item of the contract, **a supplemental agreement to the contract may be executed between the Department and the contractor at the request of either party**, prior to performance of any work in excess of 25 percent of the contract quantity. When the supplemental agreement is executed, the consent of the contractor's surety shall be obtained and furnished to the engineer.

A "Major Item" is an item included in the contract as awarded with a total cost equal to or greater than 10 percent of the original total contract amount.

Any adjustment in unit price will be made on only that portion of the major item exceeding 25% increase, or in the case of a decrease of the item by 25 percent or more the remaining portion will be adjusted. **The actual costs shall be itemized in accordance with Subsection 109.04, Headings (a) through (g), except that projected costs will be used in case of an increase in quantity.** (Emphases added.)

Durand argues, however, that due to DOTD's material breach of contract, resulting from its gross miscalculation of limestone needed and distance covered, it is entitled to damages including its expected profits. Durand asserts that it

repeatedly requested a new design and pricing structure because the work performed was totally different from that which was initially bid. Durand and DOTD were unable to re-negotiate an acceptable contract.

Durand points to several first circuit cases we find persuasive. In **Ronald Adams, Contractor, Inc. v. State, Dept. of Transp. and Development**, 457 So.2d 778, 780-81 (La.App. 1 Cir. 1984), this court found that a contractor was entitled to additional compensation where a significant difference exceeding 25% existed between proposed and actual quantities of aggregate. In **Con-Plex, Div. of U.S. Industries, Inc. v. Louisiana Dept. of Transp. & Development**, 439 So.2d 567, 570 (La.App. 1 Cir. 1983), this court ruled that where "DOTD has failed to provide sufficiently definite and explicit plans and specifications as required by the public bidding law," "the DOTD is liable for the additional cost incurred[.]" In **Sullivan v. State Through Dept. of Transp. and Development**, 623 So.2d 28, 30-31 (La.App. 1 Cir. 1993), this court cited **Con-Plex** approvingly and further held that because of such ambiguities, "the trial court was correct in looking beyond the original agreement to determine the true intent of the parties."

We also note that Standard Specification 109.03, set out above, entitled Durand to negotiate a new agreement, which DOTD declined to do. We therefore conclude that Durand was entitled to damages it could prove in excess of the amount provided in the contract. Where no contract controls, La. C.C. art. 1994 establishes and obligor's liability. This article provides as follows:

An obligor is liable for the damages caused by his failure to perform a conventional obligation.

A failure to perform results from nonperformance, defective performance, or delay in performance.

La. C.C. art. 1995 provides the legal measure of damages, as follows:

Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.

Accordingly we conclude the trial court erred in evaluating Durand's damages by applying Standard Specifications 109.03 and 109.04.⁴ We now turn our analysis to Durand's specific arguments on appeal.

Alleged Negligence of DOTD

Although the trial court judgment dismissed the negligence claims against DOTD's project engineers with prejudice, Durand argues in its first assignment of error that their alleged negligence should be imputed to DOTD. Durand is not seeking to reverse this aspect of the judgment, but it asserts that DOTD is liable on principles of respondeat superior.

Here, both Durand and DOTD offered expert testimony on the issue of the project engineers' negligence. Durand points out the major discrepancies between the original plans calling for 140,125 cubic yards of limestone over 10 miles of road and the actual project using 40,854 cubic yards of limestone over 30 miles of road. It notes that the estimates were not developed by survey data but by a "quick and dirty windshield survey." Durand's expert testified that given the significant differences between the estimated and actual quantities of limestone, the project engineers' conduct fell below the applicable standard of care for engineers.

Conversely, DOTD points to the exigent circumstances arising from the emergency nature of the project. One of DOTD's experts testified that under the circumstances, an engineer would act very much as did the project engineers and that the project engineers acted reasonably under the circumstances.

In reviewing for manifest error, the issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Department of**

⁴ Standard Specification 109.04 provides the contract "Compensation for Alterations of the Contract." This specification provides the methodology for determining the "actual cost" in five categories: a) labor, b) bond, insurance and tax, c) materials, d) equipment, and e) miscellaneous.

Transportation and Development, 617 So.2d 880, 882 (La. 1993). If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.** at 882-883. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. **Id.** at 883.

From our review of the record, we cannot conclude the trial court was clearly wrong in dismissing Durand's negligence claims against the project engineers. The trial court's conclusion that DOTD's engineers were not negligent is reasonable and supported by the record. Therefore, they have no negligence to impute. Accordingly, Durand's first assignment of error is without merit.

Purchase of Limestone

In its second assignment of error, Durand argues that DOTD should be required to complete the purchase of the limestone called for in the bid proposal but not needed for the road construction project. Apart from the bid profit and overhead, discussed below, we conclude the trial court did not err in failing to require DOTD to purchase and take possession of the limestone at issue.

As discussed previously, DOTD is liable to Durand for any loss it sustained as a result of DOTD's breach. La. C.C. arts. 1994 and 1995. Here, on review of the record however, we cannot conclude that Durand has suffered any loss. In its written brief and at oral argument, Durand acknowledged that the agreed price reflected the current fair market value of the limestone.

Durand also acknowledged that it has made little attempt to sell the limestone of which DOTD has declined to take possession. In this regard, La. C.C. art. 2002 imposes a duty on Durand to mitigate its damages, as follows:

An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee

fails to make these efforts, the obligor may demand that the damages be accordingly reduced. (Emphasis added.)

Further, we recognize the trial court's finding Durand's payments on the limestone were all made after "Durand knew of the change in amount of limestone that would be needed for this project." We also recognize Special Provision Item S-401, included in the letter bid proposal, which states as follows:

Payment for the accepted quantities will be made at the contract price that includes furnishing the equipment, labor, and materials necessary to complete the item. No direct payment shall be made for acquisition of materials, stockpiling, and rehandling of materials, precautionary measures to protect other facilities, or furnishing necessary equipment required to complete the work.

In sum, since there is no evidence in the record to show that Durand has sustained a loss on the limestone, other than bid profit and overhead, and since Durand has apparently made little effort to mitigate any damages it might have sustained, we cannot conclude the trial court erred in awarding payment to Durand for only the limestone used in the road construction project. Durand's second assignment of error is without merit.

Company Owned Equipment

Durand next argues in its third assignment of error that the trial court erred in adopting DOTD's computation of damages arising from company-owned equipment. Here, both Durand and DOTD put on evidence of the value of the reimbursable cost of Durand's equipment. We conclude the trial court did not err in accepting DOTD's computation and valuation for these damages.

Durand's expert testified to a method for calculating the costs of the company-owned equipment to include time during which the equipment was on site, regardless of whether it was being utilized because large construction equipment is not easily moved, such as excavators, dozers and graders. DOTD's

expert, in contrast, applied a different systematic method more aligned with the actual operating time over which the equipment was used.

In its written reasons, the trial court adopted the DOTD's methodology and valuation for company-owned equipment as follows:

The Court finds that [DOTD's] calculations of the shop costs and the equipment use in this Project seem[] to be more in line with the actual costs of this project.

The trial court's factual finding that accepts DOTD's calculation for the use of company-owned equipment was not manifestly erroneous. Durand's third assignment of error is without merit.

Overhead and Bid Profit

In rendering judgment, the trial court stated in its written reasons that it took into account all of the direct and indirect costs associated with the project except a yard lease, barge costs, and superior yard repair. As stated above, pursuant to La. C.C. arts. 1994 and 1995, Durand is entitled to recover the loss he sustained, including the profit of which he has been deprived.

Durand put on expert testimony and evidence showing that Durand made the following allocations in its bid proposal, stated as percentages of the total direct project costs:

- indirect shop overhead at 5.33%
- home office overhead at 4.43%
- bid profit at 30.87%

Durand also put on evidence through invoices showing the value of unused but proposed limestone at \$5,237,969.85. By reducing the amount of Durand's claim, the trial court erred in effectively reducing the overhead and bid profit. Accordingly we conclude Durand is entitled to an increased award in the amount of \$2,128,187.14, calculated as follows:

Indirect shop overhead: $.0533 \times \$5,237,969.85 = \$ 279,183.79$
Home Office overhead: $.0443 \times \$5,237,969.85 = 232,042.06$
Bid Profit: $.3087 \times \$5,237,969.85 = \underline{1,616,961.29}$
Total increase in award: \$2,128,187.14

DECREE

For the foregoing reasons, we amend the judgment of the trial court to increase the damage award by \$2,128,187.14. Accordingly, we vacate the judgment insofar as it awards Durand \$1,102,890.00 and render judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that Louisiana Department of Transportation and Development is liable to M. Matt Durand, LLC, in the amount of \$3,231,077.14, plus interest and costs, the appropriate amount of costs to be determined by the Court on post trial hearing.

As amended, we affirm the judgment of the trial court. Costs of this appeal are assessed to the Louisiana Department of Transportation and Development in the amount of \$7,594.82.

AMENDED; AFFIRMED AS AMENDED

M. MATT DURAND, L.L.C.

FIRST CIRCUIT


VERSUS

COURT OF APPEAL

DENTON-JAMES, L.L.C., THE
LOUISIANA DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT
(D.O.T.D), PATRICK J. LANDRY, AND
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NO. 2010 CA 0625

 KUHNS, J., concurring in part and dissenting in part.

I concur in the majority's opinion insofar as it increases the trial court award, but I would increase the award further by awarding the sums that Durand seeks related to the unused limestone. Durand is not required to mitigate its damages, as the majority reasons, in order to be able to recover compensation for the purchased but unused limestone. The terms of the contract control. As part of its damages for DOTD's breach of contract, Durand is entitled to recover the costs associated with the limestone in the full amount ordered pursuant to the quantities stated in the initial bid requirements. Durand satisfied its contractual obligations, but DOTD seeks to deny recovery based on the fact that Durand still has possession of the limestone. Although Durand has the obligation to deliver the limestone – i.e., the object of the completed sale, it also sought to deliver the limestone at the price and the quantity agreed upon. DOTD cannot frustrate the completed sale by refusing to accept delivery. The buyer is bound to pay the price and to take delivery of the thing. La. C.C. art. 2549.