NO. 12-19-00264-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CITY OF PALESTINE, TEXAS, APPELLANT	*§*	***APPEAL FROM THE 87TH***
V.	*§*	***JUDICIAL DISTRICT COURT***
LS EQUIPMENT COMPANY, INC., APPELLEE	*§*	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

The City of Palestine, Texas (the City) appeals the trial court's judgment in favor of L.S. Equipment Company, Inc. d/b/a Lone Star Equipment Company (Lone Star). Appellants present three issues for our consideration. We affirm.

BACKGROUND

This appeal results from a trial over a contract dispute between the City and Lone Star regarding a road construction project in Palestine, Texas. The City hired a professional engineer, Gary Burton, to design a one thousand nine-hundred-and-fifty-foot road connecting Highway 79 to a new poultry processing plant built by Sanderson Farms. Burton prepared the written plans, bid document and contract, and administered the project for the City.

Burton calculated the quantities of materials and the amount of excavation necessary to build the road and prepared the bid document for the City using his calculations. The bid document contains a graph entitled the "base bid schedule" which includes thirty-seven numbered items that describe the materials and/or work needed to construct the road according to the City's plans. Each item column has an item number, description and actual unit price in

words, quantity, unit of measurement, apparent unit price, and apparent total price. The items are bid in lump sums or unit prices, depending on the materials and/or type of work.[1]

In order to submit a bid, the bidder filled in its actual unit price and apparent unit price for each of the items of work. The apparent total price is determined by multiplying the actual unit price for an item by the City's statement of the quantity that would be required for the item.[2]

Lone Star bid the job for an apparent total base bid of $1,279,012. The document states that the total base bid amount shown, i.e. the $1,279,012, is to assist the City in determining the apparent low bidder at the bid opening. The document explicitly states that the total base bid is "in no way provided to determine the official bid amount." The document states that "the official bid amount, for unit price contracts, shall be determined by multiplying the unit price written in words by the respective quantity shown in the bid proposal and totaling those amounts." On July 20, 2014, the City notified Lone Star that it was awarded the contract as the lowest bidder.

The City and Lone Star entered into a contract for the construction of the road, which was drafted by the City. The contract contained general contract conditions and supplementary conditions. Section 7 of the general contract conditions is entitled "Changes in the Work" and requires, in pertinent part, that

> "the Contractor shall make no change in the materials used or in the specified manner of constructing and/or installing the improvements or supply additional labor, services or materials, beyond that actually required for the execution of the contract, unless in pursuance of a written order from the Owner authorizing the Contractor to proceed with the change. No claim for an adjustment of the Contract Price will be valid unless so ordered.
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> ...
>
> If applicable unit prices are contained in the Agreement, the Owner may order the Contractor to proceed with desired unit prices specified in the Contract; provided that in case of a unit price contract the net value of all changes does not increase the original total amount of the agreement by more than twenty-five percent (25%) or decrease the original the total amount [sic] by eighteen percent (18%).

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[1] For example, on Lone Star's bid submission, column number two lists "[f]urnish and maintain temporary project sign, as shown on plan detail for the duration of construction." The quantity is listed as one. The unit is listed as "LS" for lump sum. The apparent unit price is $15,000 and the apparent total price is listed as $15,000.

[2] For example, item number 6 in the City's bid document states that the quantity of "select fill/embankment (loose)" required to build the road according to the City's plans is thirteen thousand two hundred cubic yards. Lone Star wrote its actual unit price for that item as $15 per cubic yard. The apparent unit price is calculated by multiplying thirteen thousand two hundred (number of units needed) by $15 (unit price) for an apparent unit price of $198,000.

Section 7 also states that change orders should include (1) a detailed description of the change in work; (2) the contractor's proposal (if any) or a confirmed copy thereof; (3) a definite statement as to the resulting change in the contract price and/or time; and (4) the statement that all work involved in the change shall be performed in accordance with contract requirements except as modified by the change order. Section 7 states that the procedures as outlined in the section apply for a unit price contract also apply in any lump sum contract.

Section 8 of the general contract provisions is entitled "Claims for Extra Cost." Section 8 states as follows:

> (a) If the Contractor claims that any instructions by Drawings or otherwise involve extra cost or extension of time, he shall, within ten days after the receipt of such instructions, and in any event before proceeding to execute the work, submit his protest thereto in writing to the Owner, stating clearly and in detail the basis of his objections. No such claim will be considered unless so made.
>
> (b) Claims for additional compensation for extra work, due to alleged errors in ground elevations, contour lines, or bench marks, will not be recognized unless accompanied by certified survey data, made prior to the time the original ground was disturbed, clearly showing that errors exist which resulted, or would result, in handling more material, or performing more work, than would be reasonably estimated from the Drawings and maps issued.
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> (c) Any discrepancies which may be discovered between actual conditions and those represented by the Drawings and maps shall be reported at once to the Owner and work shall not proceed except at the Contractor's risk, until written instructions have been received by him from the Owner.
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> (d) If, on the basis of the available evidence, the Owner determines that an adjustment of the Contract Price and/or time is justifiable, a change order shall be executed.

Section 11 of the general conditions is entitled "Disputes" and states as follows:

> (a) All disputes arising under this Contract or its interpretation except those disputes covered by FEDERAL LABOR STANDARDS PROVISIONS whether involving law or fact or both, or extra work, and all claims for alleged breach of contract shall, within ten (10) days of commencement of the dispute, be presented by the Contractor to the Owner for decision. Any claim not presented within the time limit specified in this paragraph shall be deemed to have been waived, except that if the claim is of a continuing character and notice of the claim is not given within ten (10) days of its commencement, the claim will be considered only for a period commencing ten (10) days prior to the receipt of the Owner.
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> (b) The Contractor shall submit in detail his claim and his proof thereof.
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> (c) If the Contractor does not agree with any decision of the Owner, he shall in no case allow the dispute to delay the work but shall notify the Owner promptly that he is proceeding with the work under protest.

Section 1 of the supplemental conditions state that "[t]he provisions of this Section of the specifications shall govern in the event of any conflict between them and the 'General Conditions of Agreement.'"

Section 15 of the supplemental conditions is entitled "Measurement" and states as follows:

> For lump sum price contracts, the CONTRACTOR, before ordering any material or doing any work, shall verify all measurements of any existing and new work and shall be responsible for their correctness. Any differences which may be found shall be submitted to the ENGINEER for consideration before proceeding with the work. No extra compensation will be allowed because of differences between actual dimensions and measurements indicated on the working drawings. For unit price contracts, measurement shall be made of the actual installed quantities and CONTRACTOR'S compensation shall be based on same.

On September 3, 2014, representatives from the City, Lone Star, and Sanderson Farms attended a pre-construction meeting. At the meeting, the City and Sanderson Farms emphasized the importance of finishing the road before the plant was scheduled to open on January 5, 2015. The City informed Lone Star that the new road would have to remain open for traffic and approximately two hundred trucks a day would be traveling on the new road. The City had not previously disclosed this to Lone Star and Ronnie Pruitt, the owner of Lone Star, expressed concerns that the interference of heavy traffic would delay the work and inhibit Lone Star from completing the road on time. The City informed Lone Star that it could begin working on the road on September 15, 2014.

In addition to delays caused by the heavy traffic, Lone Star encountered other difficulties in constructing the roadway. While Burton had a surveyor stake the right-of-way portion of the road in December 2013, more than half the stakes were missing by the time Lone Star began construction. Lone Star was forced to pay the surveyor to re-stake the roadway in September and December 2014. Lone Star also learned that Burton hired a surveyor in December 2013 to survey the land where the road was to be built, but later changed the location of part of the road on the plans. Burton's surveyor informed Pruitt that he would be unable to stake the last six hundred feet of the roadway because he did not survey that area. Burton never hired another surveyor to survey the entire area where his plans called for Lone Star to build the road. According to Pruitt, Burton told Lone Star to "make it work" without the benefit of surveying data. Thus, Lone Star had to construct the last six hundred feet of the City's road, the portion

which tied into a road constructed by Sanderson Farms to enter the plant, without the benefit of surveying data and construction staking.

Lone Star had to deviate from Burton's calculations to build the road to conform with the Texas Department of Transportation (TxDOT) regulations.[3] TxDOT required a "super" be built on the roadway, which is a curve in which the outside of the roadway is higher than the inside of the roadway, to assist vehicles with staying on the road. However, the City's bid document did not include any quantity of fill dirt to build a super. Additionally, the City's bid understated the quantity needed for item number five "roadway excavation" by approximately thirty percent and the quantity needed for item number 6 "select fill/embankment" by approximately sixty percent. According to Pruitt, Lone Star made Burton aware of the mistakes and Burton told Lone Star that a change order would be prepared at the end of the project due to the volume of paperwork required for a change order.

After the road was constructed, Lone Star hired a registered professional land surveyor, Kevin Kilgore, to measure the road and embankments to determine the actual quantities of excavation and fill dirt supplied by Lone Star. Kilgore determined that Lone Star provided two thousand five hundred and ninety-eight yards in additional excavation work and eighteen thousand six hundred seventy-one yards in additional fill and embankment work. Lone Star sent the City the surveyor's report and an additional invoice for the cost of the materials actually installed. The City did not pay Lone Star for the additional quantities.

The City likewise failed to pay Lone Star for other quantities of work installed. Item number eight in the bid document specified that "lime type C" was to be used to stabilize the soil beneath the road. At the pre-construction meeting, all parties agreed to substitute cement for lime to stabilize the base. The City did not approve a change order for this substitution for approximately three months. Lone Star had to install almost all of the cement on the project prior to the approval of a change order because of the City's January deadline. The City did not pay Lone Star for the cement.

Item number fourteen in the bid document required Lone Star to furnish and install one thousand three hundred and forty-one tons of two-inch hot mix asphalt concrete (HMAC). The City failed to pay Lone Star for 102.7 tons of that quantity which Lone Star installed on the road.

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[3] The contract required Lone Star to build the road according to the Texas Department of Transportation's regulations.

Furthermore, while Lone Star was constructing the roadway for the City, a contractor for TxDOT was working on Highway 79. The HMAC plant in Palestine, Texas gave priority to the TxDOT project, and Lone Star was forced to obtain HMAC from a plant in Jacksonville, Texas, the nearest available plant. Lone Star incurred additional freight costs for transporting the HMAC to the project site. The City failed to pay Lone Star for the additional freight charges incurred in transporting the HMAC.

Item number thirty six in the bid document required that Lone Star install three hundred and sixty cubic yards of 12 inch stone "rip-rap with grout fill."[4] Lone Star had to install an additional one hundred and twenty three cubic yards to complete the roadway. The City did not pay Lone Star for the additional rip-rap.

During the construction of the road, the City required Lone Star to change the plans for the area where the road would tie into Highway 79. Lone Star had already constructed the road to tie in with Highway 79, but TxDOT placed a red light and concrete paving on Highway 79 at the intersection. Lone Star then had to tear out its prior work and tie into Highway 79 with concrete and a different layout from the original plan. The City did not pay Lone Star for this work.

By January 5, 2015, Lone Star had built a hard surface on the roadway on which employees at the Sanderson Farms plant and work trucks were able to travel. Lone Star placed the first course of asphalt on January 29 and 30. On February 16, Burton certified in writing that the job was substantially complete. On March 17, Burton certified in writing that the final inspection had occurred, and the project was complete. Lone Star later completed the City's "punch list," which is a document typically presented by the owner or engineer of a project to the contractor and contains minor changes or improvements to the project.

Lone Star submitted a claim for retainage, but the City denied the claim and penalized Lone Star for liquidated damages because the project was not completed in one hundred and fifty days as required by the contract.[5] Lone Star disputed the liquidated damages claiming that any delays were excused under the contract. Thereafter, Lone Star sued the City for breach of

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[4] Rip-rap is rock measuring approximately twelve inches in diameter that is installed in the ditch near the roadway to stop erosion.

[5] The practice of retainage is common in the construction industry. A project owner holds retainage, a portion of the agreed contract price, deliberately withheld until the work is substantially complete to assure that a contractor will satisfy its obligations and complete a construction project.

contract. Lone Star sought damages for its unpaid expenditures in excess of its bid for roadway excavation, fill/embankment, rip-rap, HMAC and freight charges, cement, extra traffic handling, delays due to traffic, staking, alignment changes, and for retainage.

The case proceeded to a jury trial. At trial, Lone Star argued that the City significantly understated the quantities of materials and work needed to construct the road which resulted in Lone Star submitting a bid below the true cost to build the road. Lone Star further argued that the City did not tell Lone Star that the road would be under heavy, continuous traffic during construction. Lone Star argued that it was under the impression the roadway would not be in use during construction because the contract's supplementary condition 52 stated that the engineer would determine a detour route. Lone Star argued that the City was attempting to benefit from its miscalculations and misrepresentations by relying on an inapplicable change order clause in the contract. The change order clause, contained in the general conditions, requires the contractor to give notice and seek approval from the project owner prior to constructing or installing materials beyond that actually required for the execution of the contract or making any claims for "extra cost." Lone Star argued that Section 15 of the supplemental conditions applied because the contract was let on a unit price basis. According to Lone Star, Section 15 of the supplemental conditions, which applies over the general conditions when there is a conflict, required that the City pay for the actual quantities of work installed.

The City, in turn, argued that Lone Star did not substantially comply with the contract. Specifically, the City argued that Lone Star should not recover damages for extra traffic handling because Section 12A in the contract's supplemental conditions states that the contractor must conduct the work with the least practical inconvenience to traffic. The City argued that Lone Star should bear the cost for the realignment of the roadway to tie in with Highway 79, despite the fact that the City required the change to comply with TxDOT's regulations without a written change order. The City argued that Lone Star should also bear the additional costs for staking, despite the contract specifically requiring the City to provide horizontal and vertical base control with staking along the proposed location of the work. The City argued that Lone Star should bear all the other additional costs it claimed the City owed because Lone Star did not comply with the change order provisions for extra costs set forth in the contract's general provisions.

The trial court's charge provided the following definitions, questions, and special instructions to the jury:

> The failure of the City to provide correct or adequate plans and specifications as were necessary to carry out the work required by the [c]ontract constitutes a breach of the [c]ontract. If the City breached the [c]ontract, it relinquished its contractual procedural rights concerning change orders and claims for additional costs.
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> A party cannot hinder, prevent, or interfere with the other party's ability to perform its duties under a contract. When one party prevents another from timely performing its contractual obligations, the failure to timely perform is excused.

The trial court's first question to the jury was "Did Lone Star substantially perform the [c]ontract?" The trial court defined "substantially perform" to mean that:

> Lone Star, in good faith, intended to comply with the [c]ontract and substantially accomplished the purpose of the [c]ontract by completing the road in a manner it could be used for its intended purpose.

The second question asked whether the City failed to comply with the contract, and the third question asked the jury "what sum of money...would fairly and reasonably compensate Lone Star for its damages, if any, that resulted from such failure to comply?" The charge then listed each item of work for which Lone Star claimed it was not compensated and left a blank spot for the jury's award.

The jury found that Lone Star substantially complied with the contract and that the City failed to comply with the contract. The jury awarded Lone Star damages as follows:

a.	Roadway Excavations	$33,054
b.	Fill/Embankment	$264,262
c.	12" Stone Rip Rap	$18,450
d.	2" HMAC	$12,837
e.	Cement	$4,657
f.	Hot Mix Freight	$5,840
g.	Extra Traffic Handling	$20,000
h.	Delay Due to Traffic	$60,000
i.	Staking	$5,137
j.	Highway 79 Alignment Changes	$25,805
k.	Retainage Held by the City	$62,517

On May 3, 2019, the trial court signed a final judgment in accordance with the jury's verdict. Thereafter, the City filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court did not rule on either motion. This appeal followed.

Sufficiency of the Evidence/Jury Charge Error

In its first issue, the City contends that the jury's verdict is not supported by legally sufficient evidence because the evidence conclusively establishes that Lone Star did not comply with the contract's change order provisions. In the City's second issue, it argues that the trial court abused its discretion in instructing the jury as follows:

> The failure of the City to provide correct or adequate plans and specifications as were necessary to carry out the work required by the [c]ontract constitutes a breach of the [c]ontract. If the City breached the [c]ontract, it relinquished its contractual procedural rights concerning change orders and claims for additional costs.

The City argues that the above instruction is an incorrect statement of the law and "pushed" the jury to an "inevitable conclusion" that the City was liable despite Lone Star's failure to comply with the change order provisions.

Lone Star argues that the City failed to preserve its legal sufficiency complaint or its charge complaint. Alternatively, Lone Star argues that the jury's verdict is supported by legally sufficient evidence and the trial court did not abuse its discretion in submitting the complained of instruction to the jury.[6]

Because the City's legal sufficiency argument is predicated on Lone Star's failure to comply with the change order provisions, it is inextricably linked to its jury charge argument, and we will address them together.

Analysis

Our review of the record before us shows that the City did not preserve its complaint that the trial court abused its discretion by instructing the jury that the City's failure to provide adequate plans constitutes a breach of the contract. At the final charge conference, the trial court gave the parties the proposed final charge. The City objected, without providing a legal basis, to "questions one and two and also exhibit 50 as questions one through 11A as my alternative."[7] Question one asks "[d]id Lone Star substantially perform the contract?" Question one further states "'[s]ubstantially perform' means that Lone Star, in good faith, intended to comply with the

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[6] The City did not file a reply brief addressing Lone Star's arguments.

[7] Exhibit fifty is the City's proposed jury charge. A copy is contained in the exhibit index to the reporter's record but is missing approximately half its pages.

[c]ontract and substantially accomplished the purpose of the [c]ontract by completing the road in a manner that it could be used for its intended purpose." Question two asks "[d]id the City fail to comply with the contract?" The City lodged no objection to the instruction it now complains of on appeal.

Rule 274 of the Texas Rules of Civil Procedure requires that "[a] party objecting to a charge must point out distinctly the objectionable matter and the grounds for the objection." TEX. R. CIV. P. 274. A charge error objection does not meet Rule 274's requirements unless the alleged error and the grounds of the objection are stated specifically enough to show the trial court was fully cognizant of the objection's basis and deliberately chose to overrule it. ***Saenz-Guerrero v. Gardner***, 587 S.W.3d 191, 194 (Tex. App.–Houston [14th Dist.] 2019, no pet.). Thus, the objecting party must clearly designate the alleged error and specifically explain the basis of its objection. ***Id.*** Because the City failed to object to the inclusion of the instruction it now complains of on appeal, we conclude the City did not preserve this complaint. ***Id.***

When attacking the sufficiency of the evidence, the appellant must present a complete record of the evidence received at trial. ***Richards v. Schion***, 969 S.W.2d 131, 133 (Tex. App.–Houston [1st Dist.] 1998, no pet.) (citing ***Christiansen v. Prezelski***, 782 S.W.2d 842, 843 (Tex.1990)). As an alternative to producing a complete reporter's record, an appellant may limit the appeal by complying with Rule 34.6(c) of the Texas Rules of Appellate Procedure. ***Richards***, 969 S.W.2d at 133; TEX. R. APP. P. 34.6(c). Rule 34.6(c)(1) requires an appellant who intends to appeal with a partial reporter's record to include in its request a statement of the points or issues to be presented on appeal. TEX. R. APP. P. 34.6(c)(1) When an appellant appeals with a partial reporter's record but does not provide the list of points as required by Rule 34.6(c), it creates the presumption that the omitted portions support the trial court's findings. ***Richards***, 969 S.W.2d at 133; *cf.* TEX. R. APP. P. 34.6(c)(4) (if the appellant includes the statement of points with its request for the record, "[t]he appellate court must presume that the partial reporter's record … constitutes the entire record for purposes of reviewing the stated points….").

At trial, Lone Star played video deposition testimony from Burton, Tim Perry, and Rodney Blue. Perry was the City's director of public works in charge of the project and the City's designated representative. Blue was the City's inspector on the project. The reporter's record indicates that these three witnesses' video depositions were played, but the court reporter

did not transcribe their testimony. The City has not provided this Court with a transcript of the three witnesses' deposition testimony or the exhibits containing the testimony.

At oral argument, the City's counsel acknowledged the missing portions of the reporter's record, but claimed that the record was "complete enough" to show error. A copy of the City's request for the reporter's record is in the clerk's record. The request is for the entire reporter's record, and contains no designation of points for the appeal.[8] Therefore, we must presume the omitted parts of the record are relevant to the disposition of this appeal. ***Richards***, 969 S.W.2d at 133. With the record before us, we cannot say the evidence was insufficient to support the jury's findings. ***Id.***

Had the City complied with Rule 34.6(c), it would still not prevail. We review the legal sufficiency of the evidence by measuring the evidence against the charge given, and applying the definitions given without regard to whether it is a correct statement of the law. ***Chesser v. LifeCare Mgmt. Services, L.L.C.***, 356 S.W.3d 613, 629 (Tex. App.–Fort Worth 2011, pet. denied) ("In the absence of an objection to a definition, when reviewing the legal and factual sufficiency of the evidence, we measure the evidence against the charge given, applying the definitions given."); *see also* ***Hirschfeld Steel Co., Inc. v. Kellogg Brown & Root, Inc.***, 201 S.W.3d 272, 283 (Tex. App.–Houston [14th Dist.] 2006, no pet.) (if no objection to jury instruction is made the appellate court reviews sufficiency of evidence against instruction given without regard to whether instruction is a correct statement of law).

The City's argument that the evidence is legally insufficient is based on Lone Star's failure to comply with the change order provisions in the contract. The City argues that Lone Star was obligated to establish that it complied with the change order provisions as a condition precedent to recovery for its breach of contract claims. However, the jury was instructed, without objection, that the City's failure to provide correct or adequate plans and specifications as were necessary to carry out the work required by the contract constituted a breach of the contract. The trial court further instructed the jury that if the City breached the contract, it

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[8] In ***Bennet v. Cochran***, the Texas Supreme Court held that an appellant who filed its points or issues in a separate document from its request for a reporters record, and approximately two months late, did not waive its right to appeal the legal sufficiency of the evidence supporting the jury's verdict. 96 S.W.3d 227, 229 (Tex. 2002). The Court reasoned that a more flexible approach was warranted because the appellee did not claim he was prejudiced by the delay and was afforded ample time to respond to the appellant's points or issues and designate additional portions of the record. ***Id.*** However, the Court also reaffirmed that an appellant's complete failure to file a compliant issue statement, as has happened in this case, requires the appellate court to presume the record's omitted portions support the trial court's judgment. ***Id.***

relinquished its contractual procedural rights concerning change orders and claims for additional costs. Because the City did not object to this instruction, we must measure the sufficiency of the evidence against the instruction without regard to whether the instruction is legally correct. In so doing, we conclude there is ample evidence in the portion of the record that Appellant submitted to establish that the City failed to provide correct or adequate plans and specifications.

Ronnie Pruitt, the owner of Lone Star, testified that the City did not disclose in its bid information that there would be approximately 200 trucks traveling on the road while Lone Star was building it. At trial, Burton testified both live and by deposition. In his live testimony, he acknowledged that Pruitt "raised the issue" that he was unaware there would be that volume of traffic on the roadway. Pruitt testified that, although TxDOT regulations required Lone Star to build super curves, the City's bid information did not include any quantity of fill dirt to build the super curves.

As previously discussed, Lone Star hired a surveyor to measure the quantities of excavation work done and quantities of fill/embankment installed. Kilgore testified that he analyzed the surveying data that Burton had done for the road construction project and compared it with the survey he completed for Lone Star. Kilgore testified that Burton's survey did not cover the entire area where the plans called for the road to be built. Kilgore further testified that Lone Star provided two thousand five hundred and ninety-eight yards in additional excavation work and eighteen thousand six hundred seventy-one yards in additional fill and embankment work.

Daniel Kotzur, a civil engineer, was retained by Lone Star to review the engineering issues in the case. Kotzur reviewed the surveying data that Burton relied upon, and agreed with Kilgore that Burton did not have surveying data for the entire area where the plans called for the road to be built. Kotzur testified that it was important for Burton to have the surveying data for the entire roadway because without accurate survey data, it would be impossible to calculate the quantities of materials needed to build the road. Kotzur opined that the quantities for fill and excavation in the city's bid package were too low because the cross sections used by Burton to calculate the quantities did not correspond to his plans to build the road. Kotzur prepared exhibits showing examples of stations where Burton's cross sections did not conform to the 3:1 slope called for in his plans. Kotzur also prepared exhibits comparing Burton's typical plan drawing to his cross sections, which portray the areas of fill dirt that Burton mistakenly omitted

in his calculation of the quantities. Kotzur testified that of the twenty-eight cross sections used by Burton to calculate the quantity of fill dirt, twenty included less fill dirt than what the plans required Lone Star to install to build the embankments.

In reviewing a legal sufficiency challenge to the evidence, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. ***City of Keller v. Wilson***, 168 S.W.3d 802, 827 (Tex. 2005). A legal sufficiency challenge "will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." ***Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.***, 299 S.W.3d 106, 115 (Tex. 2009) (quoting ***Merrell Dow Pharms., Inc. v. Havner***, 953 S.W.2d 706, 711 (Tex. 1997)). Moreover, as previously stated, because the City did not object to the trial court's instruction regarding change orders, we must measure the evidence by the instructions given to the jury, regardless of whether the definitions or instructions are legally correct. ***Chesser***, 356 S.W.3d at 629; ***Hirschfeld Steel Co., Inc.***, 201 S.W.3d at 283. The jury was instructed that if the City failed to provide correct or adequate plans and specifications as were necessary to carry out the work required by the contract, such constitutes a breach of the contract. Reasonable jurors could have credited the testimony of Pruitt, Kilgore, and Kotzur in finding that the City failed to provide correct or adequate plans and specifications to Lone Star. The jury was further instructed that if the City breached the contract, it relinquished its contractual procedural rights concerning change orders and claims for additional costs. Because reasonable jurors could have credited the testimony above, the jury could have found that the City breached the contract and therefore relinquished its contractual procedural rights concerning the change orders. Therefore, even had the City complied with Rule 34.6(c), we could not reach its argument that the evidence is legally insufficient based on Lone Star's failure to submit change orders. This is because the City failed to object to the trial court's instruction that the failure to submit accurate plans constitutes a breach of the contract. Therefore, we overrule the City's first and second issues.[9]

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[9] In the City's third issue, it asks this Court to reverse the award of attorney's fees to Lone Star because Lone Star should not have prevailed at trial. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015) ("A

CONCLUSION

Having overruled the City's first and second issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered August 26, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs if the claim is for...an oral or written contract."); *see also* ***Intercontinental Group P'ship v. KB Home Lone Star L.P.***, 295 S.W.3d 650, 653 (Tex. 2009) ("before a party is entitled to fees under section 38.001, that 'party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages.'") (quoting ***Green Intern., Inc. v. Solis***, 951 S.W.2d 384, 390 (Tex. 1997)). The City could only prevail on this issue if it had prevailed on its legal sufficiency issue, thus we need not address its third issue. *See* TEX. R. APP. P. 47.1.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 26, 2020

NO. 12-19-00264-CV

CITY OF PALESTINE, TEXAS,
Appellant
V.
LS EQUIPMENT COMPANY, INC.,
Appellee

Appeal from the 87th District Court
of Anderson County, Texas (Tr.Ct.No. DCCV17-003-3)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal be, and the same are, adjudged against the Appellant, **THE CITY OF PALESTINE, TEXAS**, for which let execution issue; and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.