

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PACIFIC NORTHWEST EARTHWORKS LLC,)	No. 66267-8-I
a Washington limited liability company,)	consolidated with
)	No. 66362-3-I
Appellant,)	
)	
v.)	
)	
THE CITY OF BELLEVUE, WASHINGTON,)	UNPUBLISHED OPINION
a municipal corporation,)	
)	FILED: February 21, 2012
Respondent.)	
)	

Ellington, J. — Pacific Northwest Earthworks LLC (Earthworks) was the low bidder on a public works contract to install sewer lines for the city of Bellevue (City). Earthworks claims it is entitled to compensation beyond the contract price because the City misrepresented the undertaking. We disagree, and affirm the trial court's dismissal and its award of attorney fees and costs to the City.

BACKGROUND

The City sought bids on a project to excavate for and install sanitary sewer lines and manholes along some 500 linear feet in the Cougar Mountain area. Prospective bidders received a construction contract packet that included bid instructions, special contract information, the general conditions and technical specifications applicable to

the project, detailed drawings, and a geotechnical report from GeoEngineers. One stated purpose of the GeoEngineers report was to “provide conclusions and recommendations for . . . [e]arthwork and site preparation including . . . trench excavation considerations.”¹

To prepare its report, GeoEngineers explored the subsurface conditions of the project site by drilling two borings along the route. It reported the bedrock material was sandstone and siltstone consistent with “Blakeley Formation bedrock,” which is “generally friable (crumbles easily by rubbing with fingers) . . . and is very soft with respect to rock hardness.”² It also noted the bedrock did not meet the criteria for “rock excavation” under the Washington State Department of Transportation (WSDOT) standard specifications:

Rock excavation shall cover the removal and disposal of rock that requires systematic drilling and blasting for its removal, and also boulders exceeding ½-cubic yard. Ledge rock, boulders, or stones shall be removed to provide a minimum clearance of 4-inches under the pipe.

Hardpan, hard clay, glacial till, sandstone, siltstone, shale, or other sedimentary rocks, which are soft, weathered, or extensively fissured will not be classified as rock excavation. *Rock is defined as one that has . . . unconfined compressive strength at field moisture content of more than 2,000-PSI.*^[3]

GeoEngineers opined that the trench excavation could be accomplished “with conventional excavation equipment, such as trackhoes or dozers.”⁴

¹ Clerk’s Papers at 284.

² Clerk’s Papers at 286.

³ Wash. St. Dep’t of Transp. Standard Specifications for Road, Bridge, and Municipal Construction, section 7-09.3(7)B (2008) (emphasis added).

⁴ Clerk’s Papers at 287.

GeoEngineers also explained, however, that “geoscience practices . . . are far less exact than other engineering and natural science disciplines . . . [which] could lead to disappointments, claims, and disputes.”⁵ Its report therefore included a section entitled “Report Limitations and Guidelines for Use,” which made several disclaimers:

- The geotechnical report was prepared for exclusive use of the City and not intended for use by others unless agreed to in writing;
- The report was compiled for a civil engineer or architect and may not fulfill the needs of a construction contractor;
- Interpretation of subsurface conditions was based on field observations only from the widely spaced sampling locations at the site;
- Actual subsurface conditions may differ, sometimes significantly, from those indicated in the report;
- The report, conclusions and interpretations should not be construed as a warranty of subsurface conditions;
- Contractors could misinterpret the report and could avoid risk by participating in pre-bid and pre-construction conferences;
- When providing the report to contractors, the City should provide the complete report and include with it a letter advising them that it was not prepared for bid development; and
- The City should be sure contractors have sufficient time to perform additional study.⁶

The City also disclaimed liability for reliance upon its representations:

[T]he bidder shall examine the site of the work and ascertain for himself all the physical conditions in relation thereto. . . . He will not be entitled to additional compensation if he subsequently finds the conditions to require other methods or equipment that he did not anticipate. . . .

Any statement or representation made by an officer, agent, or

⁵ Clerk’s Papers at 307.

⁶ See Clerk’s Papers at 305-07.

employee of the [City] with respect to the physical conditions appertaining to the site of the work shall not be binding upon the [City].^[7]

The construction contract included a bid item list for bidders to enter the price for various components of the project. Bid item 3 was for rock excavation. The contract provided that additional payment for rock excavation would require demonstration that the material excavated met the WSDOT definition of “rock.” The City further explained:

Payment for rock excavation when authorized by the [City] Engineer shall be made at the Contract Price bid per cubic yard. The Contract Price shall include full compensation for furnishing all labor, materials, tools, equipment, and incidentals, and for completing all work involved

. . . .

Excavated material meeting the [WSDOT] Standard Specifications definition of rock is not expected. . . . This contingent bid item is included for use only if such rock excavation is encountered.^[8]

Before bidding on the project, Earthworks investigated the site three times to ascertain traffic conditions, power line locations, and access difficulties. It did not make an independent subsurface investigation because the site was a traveled, paved road.

Fifteen contractors bid on the project. The amounts bid for rock excavation varied widely, from \$0.50 to \$250.00 per cubic yard. Earthworks submitted the lowest total bid of \$158,804, with \$2.50 per cubic yard for rock excavation.

Earthworks started the project using a 45,000 pound Komatsu 200 excavator with “tiger teeth,” which it owned. When it encountered rock that was too hard for the Komatsu, Earthworks rented a 60,000 pound Kobelco 215 excavator for two weeks. It

⁷ Clerk’s Papers at 108-09.

⁸ Clerk’s Papers at 202.

is undisputed that the Komatsu and Kobelco are “conventional excavation equipment.”

Earthworks hired an outside company to perform testing on some of the excavated material, which reported the mean compressive strengths of two sets of samples as 2,200 and 2,315 psi, respectively. Earthworks claimed it excavated 284 cubic yards of rock as defined by WDOT.

Claiming the presence of rock was unanticipated and constituted a “changed condition” on the job site, Earthworks sought compensation outside the terms of the contract. It requested \$55,456 to cover the costs of equipment rental and extra labor.⁹ The City denied the request.

Earthworks sued the City for breach of contract, alleging the City “fail[ed] to make an equitable adjustment to the contract to compensate the contractor for its misrepresentation of [the] site condition.”¹⁰ The City moved for summary judgment, arguing there was no evidence of misrepresentation and that, as a matter of law, there were no changed conditions entitling Earthworks to compensation outside the terms of the contract. The trial court agreed and dismissed the case. It awarded the City attorney fees and costs as the prevailing party.

Earthworks appeals.

DISCUSSION

The usual standard of review for summary judgment applies.¹¹ Determinations of

⁹ The average hourly rate for labor was about \$40 per hour. The total cost of the rental equipment was \$3,100.

¹⁰ Clerk’s Papers at 4.

¹¹ This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences therefrom in

“reasonableness” are generally questions of fact, but may be disposed of on summary judgment if, construing the evidence in favor of the nonmoving party, a reasonable person could reach only one conclusion.¹²

Compensation for Rock Excavation

Where plans or specifications for an excavation contract lead a contractor reasonably to believe that certain conditions exist and may be relied upon in making a bid, the contractor will be entitled to compensation for extra work or expense made necessary by the unanticipated condition.¹³ Reliance is reasonable if the contractor has made a reasonable investigation under the circumstances.¹⁴ Where no such representation exists, or reliance was not reasonable, a contractor who agrees to do a job for a fixed sum will not be entitled to additional compensation because of unforeseen difficulties.¹⁵

Earthworks points out that the City’s geotechnical report showed borings

the light most favorable to the nonmoving party. Halleran v. Nu West, Inc., 123 Wn. App. 701, 709-10, 98 P.3d 52 (2004). The moving party bears the burden of demonstrating the absence of any genuine issue of fact and entitlement to judgment as a matter of law; thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact. Magula v. Benton Franklin Title Co., Inc., 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

¹² See generally Basin Paving Co. v. Mike M. Johnson, Inc., 107 Wn. App. 61, 65-68, 27 P.3d 609 (2001).

¹³ Dravo Corp. v. Mun. of Metro. Seattle, 79 Wn.2d 214, 218, 484 P.2d 399 (1971) (quoting Maryland Cas. Co. v. Seattle, 9 Wn.2d 666, 670, 116 P.2d 280 (1941)).

¹⁴ Clevco, Inc. v. Mun. of Metro. Seattle, 59 Wn. App. 536, 542-43, 799 P.2d 1183 (1990); Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wn. App. 321, 328-29, 582 P.2d 511 (1978).

¹⁵ Dravo, 79 Wn.2d at 218 (quoting Maryland Cas. Co., 9 Wn.2d at 670); see also Basin Paving, 107 Wn. App. at 65-66; Clevco, 59 Wn. App. at 542-43; Nelson, 20 Wn. App. at 328-29.

containing only soft rock, and that the City did not expect the contractor to encounter subsurface rock meeting the WSDOT standards.

But this does not amount to a lack of anticipation. Both the City and GeoEngineers warned bidders against reliance on the geotechnical report, and the City specifically disclaimed liability for expenses from subsurface conditions unanticipated by the contractor. The geotechnical report warned contractors not to draw conclusions about subsurface conditions based on GeoEngineers' analysis of the two widely-spaced borings. Most notably, the contract included a contingent bid item for rock excavation. The City clearly foresaw the possibility that harder rock might be present at the project site, and Earthworks submitted its bid price for exactly that.

Earthworks points to the fact that some other bidders' excavation prices were even lower than the Earthworks price, and concludes these other contractors similarly relied upon the City's bid information and expected to encounter no rock, so Earthworks' expectation was reasonable. But most of the bidders' prices were higher than the Earthworks bid, so this inference is not supported, and in any event, there is no evidence showing why other contractors bid as they did.

The rule for excavation contracts is that recovery of additional compensation for unforeseen conditions is limited to situations where the “condition complained of could not reasonably have been anticipated by either party.”¹⁶ The rule has been applied in a long line of cases involving public works contracts for excavation or dredging, including Basin Paving Company v. Mike M. Johnson,¹⁷ Dravo Corporation v. Municipality of Metropolitan Seattle,¹⁸ Maryland Casualty v. City of Seattle,¹⁹ and Nelson Construction Company of Ferndale, Inc. v. Port of Bremerton.²⁰ The government in these cases either disclaimed liability for information it provided about subsurface conditions or gave no information about subsurface conditions at all.²¹ The contractors failed to include in the contract price the cost of dealing with certain subsurface conditions.²² All

¹⁶ Basin Paving, 107 Wn. App. at 65 (citing cases).

¹⁷ 107 Wn. App. 61 (court refused to grant contractor extra-contractual compensation for unanticipated subsurface conditions where city disclaimed liability for accuracy of boring tests and for any conclusions drawn therefrom, and where it advised the contractor it would not pay additional compensation for rock excavation).

¹⁸ 79 Wn.2d. 214 (court refused to grant contractor extra-contractual compensation for unanticipated subsurface conditions where city disclaimed accuracy of subsurface test results and contractor assumed risk by terms of contract).

¹⁹ 9 Wn.2d 666 (court refused to grant contractor extra-contractual compensation for unanticipated subsurface conditions where city provided no warranty regarding those conditions).

²⁰ 20 Wn. App. 321 (court refused to grant contractor extra-contractual compensation for unanticipated subsurface conditions it encountered where those conditions were foreseeable based on the specifications and contractor failed to follow contractual procedure for additional compensation).

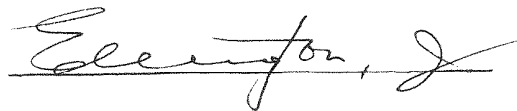
²¹ See Dravo, 79 Wn.2d. at 215-16, 218; Maryland Cas., 9 Wn.2d at 668, 675-76; Basin Paving, 107 Wn. App. at 63-64; Nelson, 20 Wn. App. at 323-25.

²² See Dravo, 79 Wn.2d. at 216-17; Maryland Cas., 9 Wn.2d at 677; Basin Paving, 107 Wn. App. at 64-67; Nelson, 20 Wn. App. at 325-26.


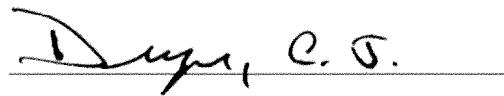
risk of unanticipated subsurface conditions was allocated to the contractors.²³

Earthworks contends that in those cases “there could be no dispute but that the basic information and test borings provided to the contractors for bidding purposes were accurate.”²⁴ But nothing in the record indicates the analysis of GeoEngineers’ two boring samples was not accurate. Further, the City and GeoEngineers actually *disclaimed* reliance upon the accuracy of the geotechnical report and pointed out that the information came from only two samples.

The possibility that Earthworks would encounter rock was foreseeable, and Earthworks is not entitled to additional compensation. We affirm the court’s order on summary judgment and its award of attorney fees and costs to the City as the prevailing party pursuant to the contract.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, A.C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dyer, C.J.", written over a horizontal line.

²³ See Dravo, 79 Wn.2d. at 218-19, 222; Maryland Cas., 9 Wn.2d at 670, 680; Basin Paving, 107 Wn. App. at 67-68; Nelson, 20 Wn. App. at 329.

²⁴ Appellant’s Br. at 16.