

U
D. Wiles

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Clarksburg Division

BOARD OF EDUCATION, MONONGALIA)
COUNTY, WEST VIRGINIA,)
)
Plaintiff,)
)
v.)
)
MELLON-STUART COMPANY, and)
CONSTRUCTION COST CONSULTANTS,)
INC.,)
)
Defendants.)

Civil Action No. 87-11-C

MEMORANDUM OPINION

This case came before the Court on July 8, 1988 for a bench trial of the plaintiff's claims for breach of contract against the two defendants. At the opening of the trial, the Court, for reasons stated from the bench, granted the defendants' motion for summary judgment on the plaintiff's claims for misrepresentation and fraud.

On the basis of all the evidence introduced at trial, the Court concludes that the plaintiff has failed to prove that the defendants breached any of the construction contracts at issue. The Court will enter judgment for the defendants and now makes the following findings of fact and conclusions of law.

Between the years 1976 and 1981, the plaintiff Board of Education of Monongalia County, West Virginia, engaged in a major building construction program that consisted of five separate projects. The projects in question were: (1) construction of

the South Area Junior High School (the "South Junior High"); (2) construction of the Vocational Technical Center (the "Votech Center"); (3) construction of the University High School Gymnasium (the "University H.S. Gym"); (4) construction of North Morgantown Elementary School ("North Elementary"); and (5) construction of an addition to Clay-Battelle High School (the "Clay-Battelle H.S.").

The VoTech Center project was the first of the five projects planned and begun by the Board. Subsequently, when the voters of Monongalia County approved a construction bond issue, the Board commenced planning and construction of the remaining four projects. The five projects were underway at approximately the same time, from 1975 to 1981.

The Board decided that it would use "construction management" as the means of administering the VoTech Center project. Later the Board decided again to use construction management as the method for administering the four remaining projects. Construction management involves an owner, architect and construction manager working as a team throughout the entire construction process, with a particular emphasis toward keeping the project costs within an established budget.

The Board contracted with the firm of Gandee, Thomas and Sprouse ("GT&S") to serve as the architect on the VoTech Center project. GT&S also served as the Board's architect for the South Junior High and the Clay-Battelle H.S. projects. The Board contracted with S.E.M. Partners to perform the services of

project architect on the University H.S. Gym and North Elementary projects.

With the assistance of GT&S in 1975, the Board conducted interviews of construction management firms to work on the VoTech Center project, including Construction Cost Consultants ("CCC"). CCC was, at that time, a wholly-owned subsidiary of Mellon-Stuart Company. The Board, its officers, and administrative staff, knew that CCC and Mellon-Stuart were affiliated companies. See Testimony of Ward Stone, Jr.; Dr. Lawrence Derthick, Jr.; and Jack Dulaney (cross-examination); and Defendants' Exh. 12, at 2.

At some of the Board's meetings, certain individuals appeared on behalf of both CCC and Mellon-Stuart. The relationship between Mellon-Stuart and CCC was openly discussed before the Board. See Testimony of Robert H. Evans.

CCC had done business in West Virginia for a number of years and had served as construction manager for numerous school construction projects throughout the State prior to its involvement with these projects. In addition, CCC was the construction manager for a number of projects in West Virginia in which Mellon-Stuart was the general trades contractor.

In its presentation to the Board, representatives of CCC explained the duties of a construction manager, CCC's fee structure, and its relationship to Mellon-Stuart.

The Board, upon the recommendation of GT&S, selected CCC as the construction manager for the VoTech Center project and entered into a construction management contract with CCC for that

project (the "VoTech CM Contract"). Subsequently, the Board also selected CCC as the construction manager for the remaining four projects.

Prior to executing any of the construction management contracts ("CM contracts"), the Board and CCC understood and agreed that CCC's performance of construction management services would not prohibit Mellon-Stuart from bidding on general trades and other bid packages.

The CM contracts for each of the five projects provided that CCC was to be paid a 6% fee, calculated on the basis of total construction costs, plus reimbursable costs, as defined in the CM contracts. In addition to providing administrative services, CCC also contracted to provide the Board with assurances as to the maximum cost, or the Guaranteed Maximum Price ("GMP") for each of the five projects. The GMP was, in effect, a ceiling on the total cost to the Board for each of the projects.

Pursuant to the terms of the CM contracts, if construction costs exceed the GMP, CCC alone was to be responsible for the total amount of the excess, or "overage." For example, the construction costs for the VoTech Center project exceeded the GMP by \$7,803.21, and CCC bore the financial responsibility for the total amount of this overage.

Construction costs for the South Junior High project exceeded the GMP by \$15,783.12, and CCC bore the financial responsibility for the total amount of this overage. Similarly, construction costs for the Clay-Battelle H.S. project exceeded

the GMP by \$23,245.48, and CCC bore the financial responsibility for this total amount.

After the CM contracts were awarded to CCC and executed by both parties, bid packages were "let" for the trade contracts for each of the projects. As expected, Mellon-Stuart submitted a bid for the general-trades bid packages for each of the projects. Mellon-Stuart also submitted bids for bid packages other than the general-trades package, although Mellon-Stuart was not awarded any of these other trade contracts.

At the time that Mellon-Stuart submitted its bids, the Board, through its dealings with CCC and Mellon-Stuart, was fully aware that the individuals with whom it dealt represented both Mellon-Stuart and CCC. See above, and Testimony of Robert Evans; John A. Miller; and Ronald Cooke.

The Mellon-Stuart bids were the lowest of the general trades bids received in connection with any of the projects. As a result, the Board awarded Mellon-Stuart the general trades ("GT") contracts for each of the projects, based upon the amounts of its bids.

Prior to signing the VoTech Center GT contract, the representatives of CCC, Mellon-Stuart and the Board discussed the billing of CCC's reimbursable costs through the Mellon-Stuart GT contract. See Testimony of Robert Evans; Defendants' Exhs. 11 and 17.

On other school projects in West Virginia which involved both CCC as construction manager and Mellon-Stuart as

general-trades contractor, the reimbursable costs due to CCC were billed through the Mellon-Stuart general trades contract.

The rationale for using this billing procedure was to ensure the school boards that construction management fees would be subject to the lower 1.2% Business and Occupancy ("B&O") tax rate for services, rather than the 2.2% B&O construction tax rate that arguably applied to a construction manager's reimbursable costs. The Board was aware of this possible tax savings. See Testimony of Thomas Kibel; Defendants' Exhs. 4, ¶16, and 5.

CCC and Mellon-Stuart informed the Board's representatives that the reimbursable costs billed through the Mellon-Stuart GT contract would be identical to those that would be due and owing to CCC, and that this billing procedure would not result in the Board paying for additional reimbursable costs. See, e.g., Testimony of Robert Evans.

The Board approved the billing of reimbursable costs owed to CCC through Mellon-Stuart's GT contracts, rather than through CCC's own CM contracts. See Testimony of Robert Evans; Defendants' Exhs. 11, ¶3, and 17.

The inclusion of CCC's reimbursable costs in the GT contract amounts did not create an additional project cost for the Board, i.e., it did not alter or affect the GMP, but was merely a means of simplifying the billing process to the advantage of the Board. Testimony of Thomas Kibel, Robert Evans, and Glen Walker.

Shortly after receiving the award of each of the GT contracts, Mellon-Stuart began the general trades work on each of

the projects. The GT contracts had not been executed by the parties at the time that Mellon-Stuart began its work. In some cases, it was not until months later that the parties actually executed the GT contracts.

Despite the absence of an executed GT contract, Mellon-Stuart began its work with the good-faith understanding that it would be timely paid by the Board. Mellon-Stuart submitted its monthly Applications and Certificates for Payment as its work was performed. GT&S or S.E.M., the project architects, reviewed and approved Mellon-Stuart's applications and certificates for payment, and the Board paid such applications and certificates for payment on time, with respect to each project.

At no time during the course of the projects did the Board raise with CCC or Mellon-Stuart any questions or concerns about Mellon-Stuart's and CCC's billing procedures, or the substance of their respective bills. See Testimony of Robert Evans, Dr. Lawrence Derthick, Jr., Jack Dulaney, and Keith Collins; Defendants' Exh. 7.

The GT contracts were prepared and submitted by CCC to the Board for execution. The GT contracts explicitly identified the total GT contract amounts and the various categories of costs on which the GT contract amounts were based.

The Board raised no questions that were communicated to Mellon-Stuart or CCC regarding the form or content of the various GT contracts. The Board, through its Superintendent, knowingly and voluntarily executed each of the GT contracts. Testimony of Ward Stone, Jr., and Dr. Lawrence Derthick, Jr.

The combined total amount which the Board paid to CCC and Mellon-Stuart was unaffected by the election to charge CCC's reimbursable costs through the Mellon-Stuart GT contracts. See, e.g., Testimony of Thomas Kibel, Glen Walker. Neither CCC nor Mellon-Stuart represented to the Board, at any time, that the GT contract amounts would be equal to Mellon-Stuart's general trades bid amount.

The amounts billed as reimbursable costs through the Mellon-Stuart GT contracts represent the actual reimbursable expenses incurred by CCC. See Testimony of Thomas Kibel, Robert Evans.

The construction of the projects was substantially completed on or about the following dates:

South Junior High:	January 10, 1980
VoTech Center:	May 1, 1978
University H.S. Gym:	October 19, 1978
North Elementary:	December 10, 1979
Clay-Battelle H.S.:	September 15, 1978

Mellon-Stuart and CCC each received final payments for work they performed on the contracts. Construction of each of the projects was completed to the satisfaction of the Board.

All payments by the Board to CCC or Mellon-Stuart were authorized by a representative of the Board after a review by the Board of invoices and applications for payment submitted by CCC and Mellon-Stuart.

The applicable West Virginia B&O tax rates at the time of the projects were 2.2% on construction and 1.2% on services.

On December 31, 1978, CCC was merged with and into Mellon-Stuart, with Mellon-Stuart being the sole surviving corporation.

CONCLUSION

Based on these findings of fact, the Court concludes that CCC did not breach any of the construction management (CM) contracts between it and the Board. Furthermore, Mellon-Stuart did not breach any of the general trades (GT) contracts existing between it and the Board.

Neither CCC nor Mellon-Stuart misrepresented to the Board the corporate and working relationship existing between CCC and Mellon-Stuart.

The CM contracts entitled CCC to a 6% fee for its construction management services, plus reimbursement of certain costs specifically enumerated in the contracts. The Board was responsible for CCC's cost reimbursable expenses, regardless of the contract through which they were billed.

The combined total amount paid to CCC and Mellon-Stuart was unaffected by the Board's election to charge CCC's reimbursable costs through the Mellon-Stuart GT contracts. As a result, the Board has incurred no damages from CCC's billing of its reimbursable costs through the Mellon-Stuart GT contracts.

Therefore, the plaintiff Board has failed to show that the defendants CCC and Mellon-Stuart breached any contract between the parties. Furthermore, the Board has failed to show that it suffered any damages as a result of the billing practices

used by CCC and Mellon-Stuart. Accordingly, the Court finds for the defendants and will enter judgment in their favor.

An appropriate order shall issue.

8/18/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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JUDGMENT ORDER

This case came before the Court for a bench trial of the plaintiff's claim. At the opening of the trial bench, the Court granted the defendant on the plaintiff's claims for misa

The Court tried the plaintiff's contract. In accordance with the conclusions of law set forth in the Memorandum Opinion, the Court finds in favor of the defendant. JUDGMENT is hereby ENTERED on all of the plaintiff's claims in favor of the defendant.

Contracts - breach - construction, Findings of Fact, (West Virginia Cases?)

It is so ORDERED. Let the Clerk send a copy of this Order and the Memorandum Opinion to all counsel of record.

8/18/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE