IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
JAN 28 2009
Tennessee Claims Commission
CLERK'S OFFICE

EATHERLY CONSTRUCTION CO.,	)	
	)	
Claimant,	)	
	)	
vs.	)	Claim No. K20070705
	)	
STATE OF TENNESSEE,	)	
	)	
Defendant.	)	

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JUDGMENT

The claimant, Eatherly Construction Company ("Eatherly"), has brought this claim for breach of a construction contract with the Tennessee Department of Transportation ("TDOT") to widen portions of Elm Hill Pike in Davidson County, Tennessee. The claims remaining before the Commission are: 1) whether Eatherly is entitled to recover for "borrow excavation" on the project and 2) whether Eatherly is entitled to recover for removal of railroad tracks and related structurs.[1] The case was tried on June 24, 2008. Angus Gillis, III, Esq., appeared for the claimant. The State was represented by Assistant Attorney General David E. Coenen.

[1] Summary judgment was entered for defendant by Order of June 23, 2008, on Eatherly's claim that TDOT was not entitled to liquidated damages of $61,200.00 retained for failure to timely complete the project.

The Claims Commission has jurisdiction of this matter under Tenn. Code Ann. § 9-8-307(a)(1)(L), relative to "[a]ctions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract." Pursuant to Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Contract Provisions

A. EATHERLY'S CLAIM FOR RECOVERY FOR BORROW EXCAVATION.

Eatherly Construction Company is a Tennessee general partnership. Eatherly was a contractor for TDOT construction contract No. 1437 and Project No. 19958-3783-54 to widen Elm Hill Pike in Davidson County, Tennessee. The project required that Eatherly put in sidewalks, curb, and gutters on both sides of Elm Hill Pike, which it would also widen to five lanes. In addition, where there were ditches, Eatherly was to put in pipe culverts.

The contract was governed in part by the Tennessee Department of Transportation Standards and Specifications for Road and Bridge

Construction, March 1, 1995. The project was to be accomplished in phases. Phase I involved work on the westbound lane on the north side of Elm Hill. Once that work was completed, Phase II work on the eastbound lanes on the south side of the road was to begin.

The project plans called for various areas of "cut and fill," that is, areas where earth material would be removed from some locations and added to others. On the north side of the project, almost all of the areas were fill areas and the specifications anticipated that extra material or "borrow excavation" would be needed to be brought in.

Section 203.02(b) of the Standard Specification, relative to "borrow excavation" provides in relevant part:

> Borrow excavation shall consist of material required for the construction of embankments or other portions of the work and shall be obtained from approved sources outside the right-of-way limits, unless otherwise designated in the Plans. However, any material, other than borrow excavation that meets the specifications of the designated borrow material may be used in the project in accordance with the conditions prescribed in Subsection 104.10.

In addition, Section 203.04 of the Specifications requires that the contractor "notify the Engineer sufficiently in advance of opening any borrow area so that, after stripping, cross section elevations and measurements of the

ground surface may be taken, and so that the borrow material can be tested before being used." (Exhibit 2, p. 87).

Section 104.10 of the Standard Specification, relative to the use of borrow material, provides in pertinent part:

> **104.10 Rights in and Use of Material Found on the Work.** The Contractor, with the approval of the Engineer, may use on the project such stone, gravel, sand, or other material determined suitable by the Engineer, as may be found in the excavation, and will be paid both for the excavation of such materials at the corresponding Contract unit price and for the pay item for which the excavated material is used. He shall replace at his own expense with other acceptable material all of that portion of the excavation material so removed and used which was needed for use in the embankments, backfills, approaches, or otherwise. No charge for the material so used will be made against the Contractor. The Contractor shall not excavate or remove any material from within the rights-of-way which is not within the grading limits, as indicated by the slope and grade lines, without written authorization from the Engineer.
>
> The material from any existing structures, water lines, sewer lines, utilities, etc. which was required to be removed in the course of construction shall become the property of the contractor to use or dispose of as he sees fit unless otherwise designated on the plans.

Section 104.10, Standard Specifications. Section 101.20 of the Standard Specification defines the "Engineer" as "[t]he Commissioner of the

Department of Transportation or his duly authorized assistant or representative."

The contract contained an estimate of the quantity of borrow material that would be needed as well as the unit price to be paid. TDOT estimated the amount of borrow material to be 1,316.00 cubic meters, to be paid at $12.00 per cubic meter. The contract price for the estimated borrow excavation would have been $15,792.00. As provided for in Section 102.03 of the Standard Specifications, however, the TDOT did not guarantee the quantities appearing in the bid schedule and "[p]ayment to the Contractor will be made only for the actual quantities of work performed and accepted, and material furnished in accordance with the contract."

The witnesses testified that there was no specific provision or specification in the contract that required that the State provide the contractor with a place to store excess material during the course of the project. Nor was there a specific provision that required the contractor to haul material off site and bring it back later for use on the project.

B. EATHERLY'S CLAIM FOR RAILROAD TRACK REMOVAL

Contract Item 720M06 provided for the removal of contract forty-one meters of track at $120.00 per meter for a total of $4,920.00. Removal of the railroad track included picking up crossties, taking down cross arms and taking down the concrete pillars holding the cross arms.

In addition, Section 107.16 of the Standard Specifications provides:

> **107.16- Liability Insurance**. In addition to any other forms of bonds or guaranties or insurance required under the Contract, when any part of the Work is to be constructed on railroad-owned property, the Contractor shall procure and maintain liability insurance coverage of the kinds and amounts, and in the manner stipulated in the Special Provisions of the Contract. The costs involved in furnishing the insurance specified will not be paid for directly but shall be included in the unit price bid for other items of construction.

The contract did not specify the "other items of construction" in which the cost of insurance was to be included.

The contract's "Special Provision Relative to Protection of Railroad Property Railroad Flagging and Insurance Requirement," obliged Eatherly to purchase Railroad's Protective Public Liability and Property Damage Liability Insurance to carry out work within the railroad right-of-way. The

plans contain a special note relative to the track removal, which provides in relevant part:

> All costs for removal, stockpiling and disposal of rails, ties, signal equipment and other materials are to be included in the price bid for item no. 720M-06, track to be removed.

Section 104.04 of the Standard Specifications permits TDOT to make alterations in the plans or in the character of construction during a project.

> **104.02 –Alterations in Plans or in Character of Construction.** The Department reserves the right to make, at any time during the progress of the work, such increases or decreases in quantities and such alterations in the work within the general scope of the Contract, including alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable. Such increases or decreases and alterations shall not invalidate the Contract nor release the Surety, and the Contractor agrees to accept the work as altered, the same as if it had been a part of the original Contract.
>
> Under no circumstances shall alterations of Plans or of the nature of the work involve work beyond the termini of the proposed construction except as may be necessary to satisfactorily complete the project.

II. Performance of the Contract

Eatherly started on the North side of Elm Hill Pike per the contract, installing a storm sewer in the existing ditch. Construction was begun at the low end of the project, which was down by Mill Creek. Eatherly

excavated for the installation of new pipe for the storm sewer and after the pipe was installed stored the excess excavated material on the fifty foot wide easement area that ran from Elm Hill Pike down to Mill Creek, ultimately filling up the easement area. Although the contract called for completion of Phase 1, the north side of the project, before proceeding to Phase 2, Eatherly was unable to put in sidewalks, curb and gutter and complete the backfilling on the north side because of the wet weather conditions. Therefore, Eatherly moved on to Phase 2 before completing Phase 1. At the time that Eatherly moved to Phase 2 on the south side, it did not have adequate fill material to complete the backfilling for sidewalks, curb and gutter in Phase 1 on the north side.

Eatherly had to excavate for the storm sewer installation on the south side of the project. Some of the material excavated from the south side of the project went into the easement area on the north side of the project. Doug Hagar, the project supervisor, testified that material was also pushed off of the slopes on the south side. According to Joel Ledbetter, the project inspector, some of the material was hauled off site to a location on Murfreesboro Road behind Channel 2. Steve Eatherly

testified that the excess material was taken to the Kenworth property, a privately owned piece of land located adjacent to the south side of the project. Eatherly had made arrangements with the owner, Lester Turner, to temporarily store the material at that location.

According to Mr. Hagar, during the course of the project, more than a hundred truckloads of excavated material were hauled away. Mr. Hagar testified that it was up to Eatherly where it stored the material if it decided to haul it off site.

Mr. Hagar also testified that Eatherly could have stored the excess material on the south side of the project in front of the Kenworth property while it was building on the north side. The State bought right-of-way at that location to widen the road.

All of the material that Eatherly hauled to the Kenworth property originally came from the Elm Hill Pike project. The stored material was then transported by Eatherly back to the site and used as fill in the embankment on the north side of the project.

At trial, Eatherly acknowledged that the TDOT Standard Specification 203.04 required that 1) the Contractor identify a borrow site

and request that the borrow site be tested by TDOT; 2) the Contractor request that the borrow site be measured by TDOT; and 3) the Contractor must request a final measurement of the borrow site.

The proof was disputed as to whether Eatherly made such a request. Steve Eatherly testified that he asked Joel Ledbetter, the project inspector, about testing the material; however no test was ever conducted. Mr. Ledbetter denied that such a request was ever made to him.

Eatherly purchased Railroad's Protective Public Liability and Property Damage Liability Insurance for $8,054.00 from Willis of Tennessee, Inc. Eatherly had estimated that the insurance would cost between $2,000.00 and $2,500.00, which was figured into its bid of $4,920.00 for the railroad track removal.

At some point, the railroad, CSX Transportation, decided to have the tracks removed itself and paid another contractor to do the work. CSX subsequently billed TDOT for the work and TDOT paid CSX Transportation $4,851.27. There was no proof as to what prompted CSX to have the track removed, why Eatherly was not allowed the opportunity to

perform the work, or why TDOT was liable for payment of the work ordered by CSX Transportation.

TDOT did not issue a change order relieving Eatherly of the obligation to remove the railroad track. While the CSX contractor did the majority of the work to remove the railroad tracks, not all of the railroad crossties were removed. Eatherly removed the remaining crossties as well as two concrete pillars that had been used in conjunction with the railroad crossing arms. Steve Eatherly testified that it cost $700 to $800 to remove the concrete footers and the buried cross-ties. Eatherly has received no payment for performance of this work.

CONCLUSIONS OF LAW

The Claims Commission's jurisdiction over this action is set forth in Tenn. Code Ann. § 9-8-307(a)(1)(L), which states:

> The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:
>
> * * *
>
> (L) Actions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the

> contract; provided, that the group insurance agreements created pursuant to §§ 8-27-201 and 8-27-302 shall be considered contracts for purposes of this subsection in order for the commission to determine insurance claims which have been previously rejected by the state insurance committee or the local education insurance committee[.]

I. BORROW EXCAVATION

Eatherly argues that if material had to be hauled onto the job site at any time, it is paid for as borrow excavation. Because TDOT did not provide it with a place to store the material, Eatherly was left with no choice but to store the material offsite. Because the material was needed to use as fill on the project and was appropriate for that use, Eatherly contends that it is entitled to payment for this borrow excavation.

The cardinal rule for interpretation of contracts is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975); *Winfree v. Educators Credit Union*, 900 S.W.2d 285, 289 (Tenn.App. 1995). In resolving disputes concerning contract interpretation the court's task is to ascertain the intention of the parties based upon the usual, natural, and ordinary

meaning of the contractual language. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999).

The contract defines "borrow excavation" as "material obtained from approved sources outside the right-of-way limits, unless otherwise designated in the Plans." The excess material for which Eatherly seeks payment was not obtained from a source outside the right-of-way limits, but rather from inside the project itself. Therefore, it does not appear that Eatherly's contention that anytime material is hauled onto the site for use it is paid for as borrow is support by the plain reading of the contract. This conclusion appears to be supported by Standard Specification 104.10, which provides that material that the contractor must remove during the course of the project becomes the property of the contractor, but that a contractor who removes material that is needed for use on the project, must replace the material at his own expense.

The material excavated from the project site and stored on the Kenworth property fails to meet the contractual definition of borrow material. Because Eatherly did not prove that it used borrow material on the project, the Commission finds no breach as to this issue.

II. REMOVAL OF RAILROAD TRACK

Eatherly argues that it should be allowed to recover the sum of $4,920.00, which it bid for removal of the railroad track and related structures, despite the partial performance of this work by the contractor engaged by CSX Transportation. According to Eatherly, the major cost associated with this task was the purchase of the insurance, which it factored in to the bid for this item.

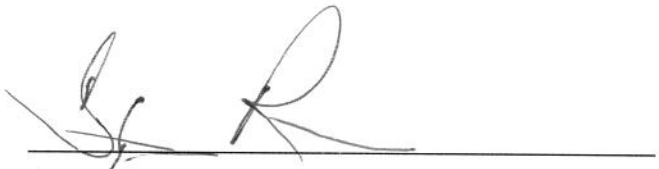
The State points out that Eatherly was required to obtain the insurance in order to bid on the project and argues that the cost for the insurance was not reimbursable. Standard Specification 107.16 reflects that costs for furnishing railroad liability insurance would not be paid for directly and instructed bidders to include the cost in the unit price bid for other items of construction. Eatherly offered proof that it did so by including the cost of the insurance in the price of the bid for the railroad work.

The State also argues that under Standard Specification 104.02, TDOT reserved the right to make changes to the contract, so long as they are not "major" items. The Specifications allow the Engineer to make the

changes to the work necessary to satisfactorily complete the project. In this case, however, TDOT did not so much change the work to be performed as pay another party to perform the work that it had already contracted with Eatherly to perform. The contract required that Eatherly purchase railroad liability insurance to perform work within the railroad right-of-way. The Section 107.16 further directed Eatherly to include the price for the railroad insurance under other items in the contract, but did not specify any particular manner in which this should be done. There was no proof that the contract prohibited Eatherly from including this cost in the bid for removal of the railroad ties. To the extent to which any ambiguity was created by Section 107.16, the Commission notes that an ambiguous provision in a contract will generally be construed against the party drafting it. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609 (Tenn. 2006).

Having considered the proof, the Commission finds that Eatherly Construction Co. shall recover the sum of $4,920.00, which was its bid for removal of the railroad track and related structures.

It is so **ORDERED** this the 27th day of January, 2009.



STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

This is to certify that I have mailed a true and correct copy of the foregoing document to the following parties:

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This 28 of Jan, 2009.

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission