

COMMONWEALTH OF PENNSYLVANIA

JOSEPH B. FAY COMPANY : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA TURNPIKE COMMISSION : DOCKET NO. 3565

FINDINGS OF FACT

1. In early 2001, the Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (“Turnpike Commission”) began to prepare bid documents for a project it identified as “Modification and Expansion of Toll Plaza, Utility Building, Roadway, Data Control Building, Structures and Lighting for the Gateway Toll Plaza (the ‘Project’).” (N.T. 11-12)

2. The Project also involved a significant amount of work on the Turnpike roadway approaching the toll plaza. (N.T. 12-13)

3. Ms. Bonnie Shepler, the Turnpike Commission employee responsible for obtaining wage rate determinations for the Project, submitted a one-page form to the Department of Labor & Industry that included a description of the Project and a request for the prevailing wage rates. (N.T. 175-180)

4. On May 30, 2001, Labor & Industry employee, Robert Risaliti, provided the Turnpike Commission with the prevailing wage rates for building trade workers in Lawrence County. (Claimant’s Ex. 2)

5. Mr. Risaliti’s determination did not include prevailing wage rates for heavy/highway workers who would be needed to perform the road work on the Project, which comprised a substantial majority of the work to be performed under the general construction contract. (Claimant’s Ex. 2; N.T. 13)

6. Mr. Risaliti issued the wage rates based on the description given to him by the provider, i.e. Turnpike Commission. The one-page description on which he based his wage rate determination was not produced for Board inspection. (N.T. 105; Board Finding)

7. Any interested party can request a modification of the wage rate determination within ten days after the specifications for a project are released to the public, but subsequent to the ten day period any requests for a correction must come from the awarding authority. (N.T. 110, 114-115)

8. Mr. Risaliti's department will issue a modification to correct a wage determination made by Labor & Industry if the awarding authority requests it. (N.T. 109, 114-115)

9. Neither Ms. Shepler nor anyone else at the Turnpike Commission reviewed the wage rate determination supplied by Labor & Industry for accuracy or completeness before it was included in the Project specifications provided to bidders on the Project. (N.T. 187)

10. Although she has been responsible for obtaining wage rate determinations for projects since before 1989, Ms. Shepler was not aware of any distinction between building rates and heavy/highway rates. (N.T. 179)

11. The Turnpike Commission published a Notice to Bidders for the Project in June 2001. (Complaint ¶3)

12. The Turnpike Commission made specifications for the Project available for review on July 5, 2001. (Complaint ¶4)

13. Joseph B. Fay Company ("Fay Company") requested copies of the bid documents approximately ten days after the specifications were available for inspection. (Complaint ¶¶4-5)

14. Fay Company made no objections to the bid documents prior to the pre-bid meeting on July 25, 2001, and did not request a modification of the wage rate determination within the 10 day period provided by law. (N.T. 65, 110)

15. On July 25, 2001, a pre-bid meeting was held for the Project. (N.T. 19)

16. A Fay Company representative attended the pre-bid meeting. (N.T. 18-19)

17. Fay Company raised the absence of the heavy/highway rates in the specifications at the pre-bid meeting. (N.T. 17, 20)

18. At the pre-bid meeting, the Turnpike Commission officials indicated that they would review the issue, but instructed all potential bidders at the pre-bid meeting to base their bids only on the written materials in the original bid documents unless an addendum was issued changing the prevailing rates. (N.T. 2, 25; Complaint ¶9)

19. Neil Raup, the Turnpike Commission liaison for the Project, subsequently reported a prospective bidder's inquiry regarding the wage rates to Ms. Shepler. She told Mr. Raup the bidder would have to contact Labor & Industry about any omitted wage rates. (N.T. 192)

20. The Turnpike Commission issued an addendum to the specifications approximately one week before the bid opening on August 15, 2001 but the addendum did not address the absence of the heavy/highway rates. (N.T. 20-21)

21. Labor & Industry supplies state agencies with more than 5,000 wage rate determinations every year and those determinations occasionally have typographical or other errors. (N.T. 90, 108)

22. Prior to the August 15, 2001 bid opening, Mr. Richard Barcaskey of the Contractors Association of Western Pennsylvania reported the absence of the heavy/highway rates in two voicemail messages for Mr. Risaliti and in a telephone conversation with Ms. Shepler. (N.T. 158-159)

23. Ms. Shepler responded to Mr. Barcaskey that she did not agree that the specifications were in error and she refused to take any action in response to his request. She told Mr. Barcaskey that any issue with wage rates needed to be directed to the Department of Labor & Industry. (N.T. 162; 182-183)

24. When shown the description of the work included in the Turnpike Commission's notice to bidders during this hearing, Mr. Risaliti concluded that the heavy/highway rates should have been included in the Project specifications in combination with other applicable rates. (N.T. 105, 120)

25. At the pre-bid meeting and at several monthly job site meetings, Fay Company asked the Turnpike Commission to amend the specifications to include the heavy/highway rates and to issue a corresponding change order to Fay Company. (N.T. 49)

26. Turnpike Commission official, David Sheridan, reported Fay Company's requests to Ms. Shepler, but Ms. Shepler refused to acknowledge any error in the specifications and refused to take any action to correct the error. (N.T. 196-197)

27. Shawn M. Fay, Sr., is the President of Joseph B. Fay Company. (N.T. 6)

28. Mr. Fay decides the final amount that is bid on every project. (N.T. 11)

29. Fay Company estimated that heavy/highway work represented approximately 98% of the Project work. (N.T. 49)

30. Fay Company estimators initially utilized heavy/highway rates they knew Fay Company would have to pay to calculate its bid. (N.T. 25-26, 29-32)

31. Fay Company estimated the difference between the building trade workers rates in the specifications and the heavy/highway rates in its union contract to be \$150,000.00. (N.T. 25-27, 30-31)

32. Mr. Fay understood a job the size of this Project typically includes risk items that are worth \$150,000.00, and the contractor must decide whether to take the risk or not. (N.T. 25-26, 39)

33. Mr. Fay considered the building trade rates versus heavy/highway rates issue a “risk item” when formulating Fay Company’s bid. (N.T. 26)

34. Mr. Fay reduced Fay Company’s bid by \$150,000.00 to match the wage rates in the bid specification knowing full well that Fay Company’s union contract would require it to pay heavy/highway rates on the Project. (N.T. 25-27, 30-32)

35. The uncompensated wage expense incurred by Fay Company was a direct result of its business decision to reduce its bid amount, not a result of reliance on the omission of the heavy/highway wage rates from the bid specifications. (N.T. 25-32; Board Finding)

36. Fay Company submitted the low bid for the Project in the amount of \$17,599,879.45, and was awarded Contract No. 00-016-RCN8-C for the expansion of the Gateway Toll Plaza (the “Contract”). (Complaint ¶¶ 12, 14)

37. The prevailing wage rates identified in the bid document were incorporated into the Contract between the Turnpike Commission and Joseph B. Fay Company. (Complaint ¶¶ 14, 15)

38. Mr. Fay admits that Fay Company had hoped that once they got the job that it would receive a change order adjusting the wage issue. (N.T. 87)

39. On July 11, 2002, the Fay Company submitted a claim to the Turnpike Commission seeking additional fees in the amount of \$218,661.38. (Complaint ¶18)

40. On December 6, 2002, the contracting officer made a decision denying the Fay Company’s claim. (Complaint ¶20)

41. A hearing was held before the Board of Claims on February 16, 2005. (N.T. 1)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction to hear this dispute concerning the contract between Fay Company and the Turnpike Commission. (62 Pa. C.S. §1724)

2. Fay Company has not established constructive fraud on the part of the Turnpike Commission based on omission of heavy/highway wage rates from the bid specifications because Fay Company officers knew it would have to pay heavy/highway wages for the Project regardless of said omission before it bid and before it signed the contract for the Project.

3. Fay Company has not established a right to additional compensation above the contract amount for heavy/highway wage differential on the Project based on omission of heavy/highway wage rates in the bid specifications because its officers knew it would have to pay heavy/highway wages for the Project regardless of said omission before it bid and before it signed the contract for the Project.

4. Fay Company is bound by the terms of the contract that it entered into with the Turnpike Commission with respect to the Project.

OPINION

On January 6, 2003, Joseph B. Fay Company (“Fay Company”) filed its claim with this Board, demanding judgment against the Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (“Turnpike Commission”) for damages in the amount of \$218,661.38. On February 10, 2003, preliminary objections and a brief in support were filed on behalf of the Turnpike Commission. On March 13, 2003, the Fay Company filed a brief in opposition to the preliminary objections. On April 7, 2003, the preliminary objections were denied by this Board. On May 6, 2003, an answer and new matter was filed by the Turnpike Commission. On June 2, 2003, a reply to the new matter was filed by the Fay Company. Thereafter, the parties engaged in discovery. After Panel hearing on February 16, 2005, both parties filed proposed findings of fact and conclusions of law on April 28, 2005.

The claim filed by the Fay Company is based on the single fact that the Turnpike Commission’s bid documents for the public project at issue did not contain a designation for heavy/highway rates under the Prevailing Wage Act (43 P.S. §165-1, et seq.) Fay Company argues that inclusion of the “building” rates only, and not the “heavy/highway rates,” in the bid documents and in the contract was an omission and/or a misrepresentation because the work in question involved not only building construction but also heavy/highway work. Fay Company testified that it brought this issue to the Turnpike Commission’s attention at the pre-bid meeting and repeatedly thereafter, but no addendum to the bid or contract documents was issued correcting the wage determination. In fact, at the pre-bid meeting, the Turnpike Commission responded to wage rate questions by instructing bidders to base their bids solely on the bid documents provided.

While Fay Company's bid estimators initially computed its bid utilizing heavy/highway wages, Shawn M. Fay, President of Fay Company, lowered its bid to account for the omission of heavy/highway rates. This decision was made with full knowledge of the omission and the knowledge that Fay Company would be required to pay heavy/highway wage rates by union contract. Mr. Fay viewed this as a risk item of the competitive bid process. Fay Company then entered into the construction contract for this Project with only the building trade wage rates identified and calculated in its bid. Fay Company hoped that the Turnpike Commission would later issue a change order to compensate Fay Company for paying higher rates than those contained in the specifications.

The Turnpike Commission's position is that it followed applicable provisions of Pennsylvania law by obtaining wage rates from the Department of Labor and Industry for the Project. These rates were published in the Turnpike Commission's bid documents as required by law and represent only the minimum wages the contractor is responsible for paying. The Turnpike Commission contends that the Fay Company bid on the specifications with full knowledge of the nature of the work and the difference between the minimum wages in the bid/contract specifications and its obligations to its union workers under its own collective bargaining agreements. Thus, the Turnpike Commission argues that the Fay Company knowingly underbid the contract and now asks the Board to reform the contract as written and as performed in order to conform to the Fay Company's union contractual obligations.

This case has been characterized by Fay Company as an adjustment to the price of a general construction contract which is based on alleged errors and omissions in the contract specifications. It argues that, under Pennsylvania law, a contractor is entitled to an adjustment in the contract price when he relies, to his detriment, on a material misrepresentation by a

government agency in the bid specifications. Acchione & Canuso, Inc. v. Commonwealth, Dept. of Transportation, 501 Pa. 337, 461 A.2d 765 (1983), citing Commonwealth, Pennsylvania Turnpike Commission v. Smith, 350 Pa. 355, 39 A.2d 139 (1944). Also, courts in this Commonwealth have held that contractors are entitled to an adjustment in the contract price when they reasonably rely on material errors. See I.A. Const. Corp. v. Commonwealth, Dept. of Transportation, 139 Pa. Cmwth. 509, 591 A.2d 1146 (1991); Commonwealth, Dept. of Transportation v. James D. Morrissey, Inc., 682 A.2d 9 (Pa. Cmwth. 1996); Thomas M. Durkin & Sons, Inc. v. Commonwealth, Dept. of Transportation, 742 A.2d 233 (Pa. Cmwth. 1999).

The Supreme Court cases of Acchione and Smith, however, are distinguishable from the present matter. In both of those cases, the bid specifications misrepresented the content and condition of underground material with which the potential contractor was required to work. These conditions were not only hidden from the view of the contractor but were also uniquely within the government's knowledge or ability to know. In contrast, the Fay Company, in the present instance, was not only aware of the Turnpike Commission's omission of the heavy/highway wage rates, it was also aware of its obligations under union agreement to pay its workers at the heavy/highway rates for much of this work. There was no reasonable reliance by Fay Company on this supposed misrepresentation. The rationale and holdings of Acchione, Smith and related cases, therefore, do not apply to the present case.

The Board finds that the Fay Company had no right to rely, and did not rely, on the Turnpike Commission's omission of heavy/highway wage rates in its bid and contract specifications. Officials of the Fay Company knew the wage rates applicable to the job that it would have to pay and knew that these rates had been omitted from the bid specifications. These officials intended to pay their workers the correct wage rates and, indeed, were required to do so.

There was no reasonable reliance on this omission from the specifications in bidding a lower rate.

Moreover, the Prevailing Wage Act, which governs the project at issue here, prescribes the requirements for paying minimum wages to employees working under a public contract. These minimum wage rates only establish the lowest rates a contractor must pay workers on public projects. They do not necessarily reflect the wage rates a contractor would use when preparing its bid. Indeed, contractors may use a variety of wage rates which could well be greater than the minimum wage rates required by the Act.

The Fay Company is a union contractor and knew it would have to pay the higher heavy/highway rates in its union contracts. Therefore, it was obligated through its own collective bargaining agreement to pay certain rates to employees regardless of what rates were published in the bid documents. Fay Company had full knowledge of the wage rates it paid its workers during the bid stage of the subject contract. To the extent Fay Company made a business decision to lower its bid or utilize other rates in its bid calculation, it did so at its own risk. Indeed, it is clear that Fay Company considered the wage issue a risk item when calculating the bid. Mr. Fay candidly admitted that Fay Company took this risk in lowering its bid and hoped that if they were awarded the contract that they would get a change order regarding the wage issue. This never happened.

In contrast to *Acchione*, this case more closely resembles the Commonwealth Court cases of Argeros & Co., Inc. v. Commonwealth, Dept. of Transportation, 67 Pa. Cmwlth. 531, 447 A.2d 1065 (1982) and Commonwealth, Dept. of Transportation v. Brayman Construction Co., 33 Pa. Cmwlth. 485, 382 A.2d 767 (1978). In these cases, the bid specifications contained errors and omissions which made the job appear less costly to perform. In both cases, however, the

plaintiff contractors were aware of the actual conditions and requirements of the job. They were not, in fact, misled by the erroneous information or mistakes in the specifications. The Commonwealth Court held that despite mistakes in the specifications, these contractors entered into the contract understanding the full extent of the job, and that they were bound by their agreement. “Parties have the right to make their own contract, and it is not a function of the courts to rewrite it or give it a construction in conflict with the plain meaning of the language utilized.” Commonwealth, Dept. of Transportation v. Brayman Construction Co. 490, 382 A.2d at 769.

In order to establish an action for breach of contract, a party must demonstrate the existence of a contract, breach of duty imposed by the contract, and damages. J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002). This the Fay Company has failed to do. The Fay Company agreed to perform the work outlined in its contract at the price it bid. It has not shown that it was under any misapprehension as to what that work would cost in terms of its wage rates. The Turnpike Commission’s refusal to pay any differential in wages does not represent any breach of contract duty because it is only required by the contract to pay the amount of the accepted bid. The parties are bound to perform the contract that they knowingly agreed to.

Although we find nothing commendable about the Turnpike Commission’s relatively obdurate response to Plaintiff’s initial inquiry on the wage rate issue, for the reasons stated above, the Board of Claims finds that there is no breach of the subject contract and no additional amount owing to the claimant, Fay Company. We do, however, urge the Turnpike Commission to establish an internal procedure to prevent a recurrence of this situation as it would appear to have been avoidable with better communication earlier in the process.

ORDER

AND NOW, this 30th day of September, 2005, it is hereby **ORDERED, ADJUDGED** and **DECREED** that judgment is entered in favor of the Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission, and against Joseph B. Fay Company. The parties will each bear their own costs and attorneys' fees.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

John R. McCarty
Citizen Member

OPINION SIGNED