IN THE COURT OF APPEALS OF IOWA

No. 6-618./ 95-2017 000295

SIOUX CITY ENGINEERING CO.,

Appellee,

vs.

CITY OF SIOUX CITY, IOWA,

Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

The City of Sioux City appeals a district court judgment for plaintiff and a dismissal of the City's counterclaim in plaintiff's action for breach of contract due to monies withheld by the City on a construction contract. **AFFIRMED.**

James L. Abshier, City Attorney, and C. Maurice Rawe, Chief Deputy Attorney, Sioux City, for appellant.

Sam S. Killinger and Rebecca A. Nelson of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City, for appellee.

Heard by Sackett, P.J., and Streit, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Plaintiff-appellee Sioux City Engineering Co. constructed sewer lines in defendant-appellant City of Sioux City. Following completion and approval of the project, the City paid plaintiff but withheld $12,960 plaintiff contended should have been paid to it. Plaintiff sued the City for the money withheld. The City filed a counterclaim contending plaintiff had failed to follow the original plans and the failure resulted in additional costs for the City in the amount of $23,817.92. The matter was tried to the district court and judgment was entered for plaintiff on its claim of $12,960. The district court denied the City's counterclaim. This appeal follows. We affirm.

After approving the project, the City received bids on May 27, 1993. Plaintiff was the second lowest bidder at $278,758. A contract was awarded on May 27, 1993, to the company that submitted the low bid of $181,908. The low bidder declined to accept the contract and was released from its bid. Plaintiff was approached about accepting the contract but declined to do so, having accepted other work.

Subsequently, Leroy Satrang, the consulting engineer on the project, and Paul Stensland, the city engineer, recommended the grade of the sewer line be adjusted and the project again be let for bids. The August 2, 1993, city council agenda included items for rejecting all bids on the original design and putting a new design out for bids. The council neither rejected all bids nor put a new design out for bids.

Richard Sulzbach, Sr., a principal in plaintiff company, was at the August 2 council meeting and said plaintiff would be interested in the project if there were changes and a later completion date. The city council deferred action on the project. Sulzbach met with Satrang and Stensland off the council floor and discussed (1) raising the depth of the sewer; (2) increasing the length of the sewer to accommodate the sewer depth change; and (3) moving back the completion date. They did not discuss deducting any money from plaintiff's bid because of the revisions.

Sulzbach returned to the council meeting and agreed to accept the project. A change order was to be issued to change the completion date, design changes, and for an additional 600 feet of sewer line. The city council awarded the contract to plaintiff for the amount of its original bid.

After the contract was awarded but prior to the actual execution of the contract by the city attorney on August 9, 1993, Satrang sent plaintiff a proposed change order revising the completion date, changing the sewer depth, deducting an amount from the contract sum due to the change in depth, and adding the additional sewer line. Plaintiff rejected the change order because the City was trying to change the contract price. Stensland wrote plaintiff on August 4, 1993, indicating the deduction would have to be included in the change order but the matter could be settled in the future.

Plaintiff began work on the project. City employees staked the project at the raised depth and monitored the installation. Plaintiff completed the project. The City's August 29, 1994 resolution accepting the work found the city engineer reported

the work satisfactory and in accord with the contract. The city engineer's report indicated there should be a $12,960 deduction from the bid price because of the change in sewer depth. The City paid plaintiff but withheld $12,960.

Plaintiff filed a petition at law alleging the City breached the August 3, 1993 contract in failing to pay the $12,960. The City answered and stated, among other things, plaintiff performed the contract to a lesser degree than required by the original specifications of the contract and would be unjustly enriched by allowing it full recovery of the contract price. The City additionally filed a counterclaim alleging plaintiff's failure to perform in strict compliance with the original plans and specifications resulted in the City having to add a longer sewer line in order to provide adequate sewer services to its residences, resulting in $23,817.97 in damages plus interest.

The case was tried to the district court. The court found the change in sewer depth made the construction less expensive, but that this savings was offset in part by the overtime plaintiff incurred to finish the project because of the City's delay in accepting its bid. The district court found:

> In this case the defendant knew before the work began that the plaintiff would not agree to change the contract price because of the change in the sewer depth. It nevertheless directed the plaintiff to construct the sewer in compliance with the redesigned plans. When the work was completed, it accepted the work as being in compliance with the contract. There was no fraud, no mistake, and no unknown defect in the work. Having directed that the work be done in compliance with the redesigned plans and having accepted the work as properly done, the City is now barred from withholding part of the contract price on the ground that the plaintiff did not comply with the specifications.

The court entered judgment for plaintiff for $12,979.53 plus ten percent interest. The court found against the City on its counterclaim.

On appeal, the City contends the district court erred. The City contends (1) plaintiff breached the contract approved by the city council and cannot recover for noncomplying performance; (2) plaintiff cannot rely on the city engineer or a consulting engineer in constructing a project that varied from plans and specifications approved by the council; (3) the contract sued on by plaintiff is an ultra vires and void contract; and (4) plaintiff's breach of the contract approved by the city council resulted in damages to the City.

This is an appeal of an action at law. We correct errors of law. *Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 916 (Iowa App. 1995). The factual findings made by the trial court are binding on us if supported by substantial evidence. *Id.*

The City first contends plaintiff breached the only contract approved by the city council. The trial court found the City knew before the work began plaintiff would not agree to a change in the contract price. Plaintiff made its bid and the City expected completion as specified and plaintiff expected $278,758. The trial court found city employees staked the sewer depth as well as inspected the sewer during the construction and did not tell plaintiff the sewer was being installed at an improper depth. The city engineer found the project constructed according to specifications. Had there been complaints about the depth of the sewer, the complaints could and

should have been called to plaintiff's attention at a time they could be remedied. *See Osceola v. Gjellefald Constr. Co.*, 279 N.W. 590, 593-94 (Iowa 1938). There is no basis to reverse on this issue.

The City next contends the contract is ultra vires and void. In ruling on a motion for summary judgment, the court found that neither party contended the changes were so substantial as to require the adoption of new plans and specifications and resubmission of bids. We agree with the City that one who contracts with a municipality is bound on its own peril to take cognizance of the statutory authority on the municipality. *Thompson v. L. J. Voldahl, Inc.*, 188 N.W.2d 377, 380 (Iowa 1971). We distinguish *Scheckel v. Jackson County, Iowa*, 467 N.W.2d 286 (Iowa App. 1991), from the facts here. *Scheckel* involved a suit to enforce an alleged oral contract. This is not an attempt by plaintiff to bind the City to an oral contract. Plaintiff is attempting to enforce the written contract modified by a change order. The contract was not a new contract but corrections to an existing contract made by change orders. We affirm the trial court on this issue.

The City further contends it should have expenses for constructing additional sewer line made necessary by the change in depth. The changes were made by the City, not plaintiff. The trial court was correct in dismissing the counterclaim. We affirm.

AFFIRMED.