

IN THE COURT OF APPEALS OF IOWA

No. 2-465 / 91-440

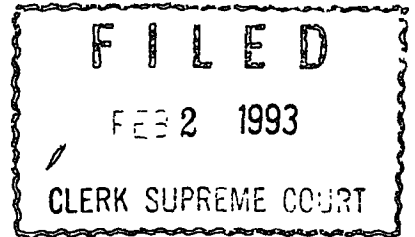
DeLOSS CONSTRUCTION, INC.,

Appellant,

vs.

IDA GROVE COMMUNITY SCHOOL,

Appellee.



Appeal from the Iowa District Court for Ida County,
Terry L. Huitink, Judge.

Plaintiff appeals a district court denial of recovery
on its suit to recover under a road construction contract.

AFFIRMED.

Donald J. Hemphill of the Hemphill Law Office, Spencer,
for appellant.

Laurel L. Boerner of the Boerner Law Firm, P.C.,
Ida Grove, for appellee.

Considered by Donielson, P.J., and Schlegel and
Perkins, S.J.

*Senior Judge from the 5th Judicial District serving on
this court by order of the Iowa Supreme Court.

PERKINS, S.J.

On June 29, 1988, the Ida Grove Community School District entered into a contract with DeLoss Construction, Inc. for the construction of a second access to the high school. The school hired an engineer to oversee the project, made arrangements with the neighboring landowner and took bids for the construction. DeLoss made the lowest bid.

The contract between the school and DeLoss provided that the work was to be completed within twenty-five days of the notice to proceed. The contract also provided the work was to be completed by August 1, 1988. Furthermore, the contract provided that DeLoss would be liable for liquidated damages of \$100 for every working day after August 1, that the work remained incomplete. Before work began, the parties agreed to extend the completion date to August 15, 1988.

When construction began, DeLoss discovered that the grade elevations were not what he expected when he made his bid. The overseeing engineer, employed by the school, recalculated the grades, changed the elevations and allegedly eliminated the need for extra grade work.

DeLoss did not complete construction of the access until October 3, 1988. The school district assessed a total of 24.5 days at \$100 per day as liquidated damages, for a total of \$2,450. The days were assessed beginning August 16, 1988.

DeLoss sued the school district for the amount withheld as liquidated damages. He also sought \$2,100 for the additional grading work he claimed was necessary. Additionally, he sought to recover attorney fees, interest, and costs. The case was tried to the court and recovery was denied. DeLoss has filed this appeal.

Our review is for the correction of errors at law. Iowa R. App. P. 4. The question of whether a liquidated damage clause is actually an unenforceable penalty clause is a question of law for the court which is dependent upon the court's construction of the contract. Rohlin Construction Co., Inc. v. City of Hinton, 476 N.W.2d 78, 79 (Iowa 1991).

I. DeLoss claims the liquidated damages of \$2,450 were improperly assessed as a penalty for late completion of the contract.

Liquidated damages must ordinarily be found reasonable to be enforceable. Engel v. Vernon, 215 N.W.2d 506, 516 (Iowa 1974). However, parties may fix damages by contract when the amount of damages is uncertain and the amount fixed is fair. Rohlin, 476 N.W.2d at 79. Liquidated damages must compensate for loss rather than punish for breach. Id. at 81. If the liquidated damages are out of reasonable proportion to the loss or injury actually sustained or reasonably to be anticipated, it will be treated as a penalty. Engel, 215 N.W.2d at 516.

In the present case, the school wanted the access road for safety purposes, and to provide a more direct route to the school from the residential areas. The only existing access was along a county road on the east boundary of the school property, then up a fairly steep narrow road to the school. Icy conditions made the road very treacherous. A stop sign at the bottom of the hill created congestion.

Bid forms were submitted to several contractors. Only two contractors submitted bids. The project was to start on June 27, 1988, and was to be completed in twenty-five days. DeLoss was awarded the contract. According to the testimony of the project engineer, the lack of bidders was attributable to the early completion requirements. If the actual completion date, October 3, 1988, had been the planned completion date, it is reasonable to conclude more contractors would have submitted bids. Usually, when there are more bidders the competition results in lower bid prices.

DeLoss argues that because the school had operated for eighteen years without the second access road the delay did not cause any actual damages. It is undisputed that both parties were aware that the access road was intended to be completed in advance of the 1988-1989 school year and that the contract contained the liquidated damages provision. Clearly, the school did not obtain what it had bargained for within the time period it had specified in the contract.

We conclude imposition of the liquidated damages clause is justified by the facts in this record. We find the actual amount of damages sustained by the school would be difficult to ascertain. As noted above, we must weigh the competing interests to determine whether the amount of liquidated damages is reasonable. We conclude the amount fixed by the contract, \$100 per day, is fair under all the circumstances of this case.

II. DeLoss also contends it is entitled to compensation for the additional grading work it performed.

A contractor may recover where defective specifications cause a lower bid than would have otherwise been made. Ida Grove Roofing & Improvement, Inc. v. City of Storm Lake, 378 N.W.2d 313, 315 (Iowa App. 1985).

The evidence in the record supports the district court's decision that DeLoss failed to prove by a preponderance of the evidence its claim for additional compensation. The evidence is that while the grade was outside the agreed limits when DeLoss arrived at the job site, the specifications were changed to obviate the necessity to bring the grade to the contract specifications. DeLoss originally sought \$1,000 for the "extra dirt work," then sought \$2,100 for the same work. The court found the evidence offered by the school on this issue was more convincing.

We affirm the district court's finding that DeLoss has not sufficiently shown he is entitled to additional compensation.

III. After considering all of the issues raised in this case, we affirm the decision of the district court. DeLoss' claims for attorney fees and interest are denied in light of this court's ruling on the merits in this case. Costs of this appeal are assessed to DeLoss.

AFFIRMED.