IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

EASTERN STATES CONSTRUCTION SERVICE, INC.,)	C.A. No.	12C-05-041 JTV
221(162,11(6.))	0.11.110.	120 00 0 11 01 7
Plaintiff,)		
)		
V.)		
)		
CITY OF DOVER,)		
)		
Defendant.)		

Submitted: October 28, 2013 Decided: February 26, 2014

Victoria K. Petrone, Esq., Logan & Petrone, LLC., New Castle, Delaware. Attorney for Plaintiff.

William W. Pepper, Sr., Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Defendant.

VAUGHN, President Judge

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OPINION

The plaintiff, Eastern States Construction Service, Inc., filed this action against the defendant, the City of Dover, for breach of contract and quantum meruit, seeking additional payment for replacing certain water main pipes under Route 13 in Dover, Delaware. The parties have stipulated to submit their dispute to the Court for decision based on written briefs and the record.

FINDINGS OF FACTS

I make the following findings of fact. On May 16, 2011, the City entered into a contract with Eastern States to replace water lines in trenches which crossed Route13 in various configurations, restore the trenches, and then repave the entire roadway. The contract was divided into "Bid Items" with a unit cost associated with each Bid Item. There are three Bid Items at issue.

Bid Item 01 required Eastern States to install approximately 5,535 linear feet of 12" DIP water pipes beneath Route 13. Eastern States was to be paid \$317 for each linear foot. The specifications for Bid Item 01, located at Specification Section 01027, Pages 5 through 10, provide that certain items would be included in the contract unit price of \$317 for each linear foot, and would "not be independently measured for payment, but will be considered incidental to the installation of 12" DIP Water Pipe." The specifications are detailed and included such things as the filling in of the trench after the pipe was laid with select backfill, an 8" GABC DelDot Type B material, a 6" Superpave Bituminous Concrete Base, and 6" of Superpave Hotmix Type B. The final specification for Bid Item 01, entitled "Trench Restoration," reads as follows: "Trench Restoration shall include restoring the road surface back to the

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original elevation to provide a smooth traveling surface. The restoration detail as shown on the Plans will be the required finished surface after water main installation is complete." Note 59 on Sheet W-1 provides that "Trench restoration work within state maintained right-of-way will require permanent replacement. Refer to trench detail sheet W-10. GABC patching will not be permitted within a state-maintained right-of-way." Trench detail sheet W-10 is a cross section drawing of a trench which shows the materials described above and, in addition, a top layer of 2" Superpave Hotmix Type C over the 6" of Superpave Hotmix Type B.

Under Bid Items 03 and 04, once the trench work was completed, the entire southbound lanes of Route 13 within the affected area were to be milled and repaved with 2" of Superpave Hotmix Type C, PG76-22. Eastern States was to be paid \$2.90 per square yard for an estimated 21,794 square yards of milling, and \$104.50 per ton for an estimated 3,750 tons of Superpave Hotmix Type C, PG76-22.

Superpave Hot Mix is discussed at section 2.03 of the contract:

Superpave Hot Mix shall be paid for in accordance with Section 01027 – Measurement and Payment. Superpave Hot mix used for trench restoration will not be measured for payment, but shall be considered incidental to the installation of 12" DIP Water Pipe. Only Superpave Hot Mix used for Type C 2" overlay of the entire southbound travel lanes will be measured for payment.

In July 2011, Eastern States began the project. The construction, or at least it appears most of it, took place at night. At the conclusion of each work session,

¹ Contract Specifications at 01027-10.

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Eastern States filled the trenches to the original elevation of the roadway, that is, the same elevation as the undisturbed roadway on either side of the trench. It did this by using a top layer of 2" temporary Type B hotmix over the 6" of Superpave Hotmix Type B, so the road could be reopened and traffic could travel on a smooth road surface. The layer of temporary Type B hotmix was intended to be temporary, pending the milling and repaving of the southbound lanes of Route 13 with Hot Mix Type C under Bid Items 03 and 04, which would occur after all of the water pipe was laid. This process continued through July, August, and into September.

At some point the City and DelDOT apparently came to a disagreement on some aspects of the project, and DelDOT decided that it would do the milling and repaving of the southbound lanes of Route 13 itself. In other words, DelDOT decided that it would do what was described as Bid Items 03 and 04 in the contract between Eastern States and the City.

On September 20, 2011, in the wake of DelDOT's decision to do the milling and repaving, the City issued a change order to the Eastern States contract which relaxed a certain milling requirement which was incidental to Bid Item 01 (no relation to the milling work described in Bid Item 03). The change order provided the following justification:

This change is required in order to provide a suitable roadway surface prior to the October race weekend. These recommendations have been made with the understanding that the entire south bound travel lanes will be milled and overlayed as part of the state contract.

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Eastern States objected to the change order, but continued to perform Bid Item 01.

On September 23, 2011, the City sent a letter to Eastern States complaining that Eastern States was not in compliance with Bid Item 01's requirement that a "smooth traveling surface" be provided. The letter also informed Eastern States that DelDOT was requiring that the road surface be restored to the detail shown on the above-described Trench Detail sheet W-10. It also removed Bid Items 03 and 04 from the contract. In removing Bid Items 03 and 04, the City relied upon sections 4.04² and 4.06³ of the Contract's General Conditions. Finally, insofar as is pertinent to this action, the letter advised Eastern States that "the removal of Bid Items associated with 2" Mill and Overlay and Type C Hotmix for the entire southbound travel lanes in no way relieves the Contractor of their obligation to fully restore the road surface in accordance with the Trench Detail previously mentioned."

Eastern States objected to the points raised in the September 23 letter. It contended that pavement milling and Superpave Hotmix Type C were contained in Bid Items 03 and 04, not Bid Item 01. Nonetheless, Eastern States completed the work as directed by the City, that is, it performed pavement milling and installed 2"

² Section 4.04(A) states in pertinent part: "The City reserves the right to increase and decrease the amount or quantity of unit price items included in the bid wherever he deems it advisable or necessary to do so and such increase or decrease shall in no way violate the contract."

³ Section 4.06(A) states in pertinent part: "The City may unilaterally, at any time, without notice to the sureties, if any, make any change in the work within the general scope of the contract. . . "

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Superpave Hotmix Type C to the areas affected by its work. On November 23, 2011, Eastern States submitted a change request for payment for the milling and 2" Superpave Hotmix Type C, which was denied by the City.

PARTIES' CONTENTIONS

Eastern States contends that the City breached the contract by deleting Bid Items 03 and 04 from the contract; that its damages caused by the City's wrongful removal of Bid Items 03 and 04 are overhead (which it had spread over all bid items) and lost profits of \$144,706.52; that the milling and application of 2" of Superpave Hotmix Type C was not included in Bid Item 01; that in the alternative the City should be required to pay Eastern States it's actual cost of finishing the surfaces where it worked with 2" Superpave Hotmix Type C; and that the amount of such actual cost is \$124,840.

The City contends that the deletion of Bid Items 03 and 04 was within its contractual rights and that Eastern States was contractually obligated to finish the areas where it worked with 2" of Superpave Hotmix Type C under Bid Item 01; that 2" of Superpave Hotmix Type C was incidental to Bid Item 01 and within the \$317 linear foot unit cost of Bid Item 01; that no milling was required under Bid Item 01, and milling would not have been required but for Eastern States' failure to "provide a smooth traveling surface" as required under Bid Item 01.

CONCLUSIONS OF LAW

I reach the following conclusions.

The deletion of Bid Items 03 and 04 was within the City's contractual rights. Eastern States discusses a number of cases involving clauses which allowed for

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adjustment of estimated quantity units or for omission of bid items, where the court concluded that deletion of an entire Bid Item was not permitted under the contract. While the contract in this case did not contain an omission clause, I find that Section 4.06(A) is broad enough to have allowed the City to remove Bid Items 03 and 04. It provides that "[t]he City may unilaterally, at any time, . . . make any change in the work within the general scope of the contract, including but not limited to . . ." Bid Items 03 and 04 were within the general scope of the contract. While deletion of entire bid items is not included within the list of potential changes which followed the quoted language, that language is broad enough to include entire Bid Items. Therefore, Eastern States' claim for overhead and lost profits caused by the deletion of Bid Items 03 and 04 is denied.

I conclude that Superpave Hotmix Type C was not included in Bid Item 01. Superpave Hotmix Type C is not included in the items stated to be incidental to the installation of 12" DIP water pipe, whereas Superpave Hotmix Type B is listed. This conclusion is also supported by Section 2.03, the third sentence of which provides that Superpave Hot Mix Type C is to be measured for payment. I interpret the second sentence of Section 2.03 as referring to the Superpave Hotmix Type B that was part of Bid Item 01, not Type C. The 2" layer of temporary hotmix used to finish the trench while construction was in progress was always intended to be temporary. Its purpose was to create a smooth traveling surface until all the lanes were resurfaced under Bid Items 03 and 04. For several months Eastern States proceeded in this manner without objection from the City. Section 4.06 of the agreement provides that the City did not anticipate that there would be any change orders. Under the contract

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as written, therefore, there was no need to lay Superpave Hotmix Type C under Bid

Item 01 because that was going to be done under Bid Item 04. The City's entire

argument rests on the second sentence of Trench Restoration under Bid Item 01. In

the context of the contract taken as a whole, including the provisions I have

mentioned herein, I interpret that sentence as a recitation of how the trench will

appear after the entire project is completed, not as creating an obligation to lay

Superpave Hotmix Type C as part of Bid Item 01. I therefore conclude that when the

City insisted that the trenched areas be finished with Superpave Hotmix Type C after

having removed Bid Items 03 and 04 from the contract, it incurred an obligation to

pay for the Superpave Hotmix Type C and the milling necessary to lay it.

CONCLUSION

Since Bid Items 03 and 04 were removed from the contract, the unit costs for

those items are no longer relevant. My conclusion is that the City is liable to Eastern

States for its actual costs of milling and Type C paving work in the amount of

\$124,840.07, plus interest at the legal rate, plus costs. Counsel for the plaintiff

should submit a form of final order approved as to form by defense counsel.

/s/ James T. Vaughn, Jr.
President Judge

cc:

Prothonotary

Order Distribution

File

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