

STATE OF MICHIGAN  
IN THE WASHTENAW COUNTY TRIAL COURT

L. LOYER CONSTRUCTION  
COMPANY,

Plaintiffs,

Case No. 03 243 CZ

vs.

Hon. Timothy P. Connors

CITY OF ANN ARBOR, et al.,

Defendants.

\_\_\_\_\_/ CONSOLIDATED WITH

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

L. LOYER CONSTRUCTION  
COMPANY,

Plaintiffs,

Case No. 06 78 MM

vs.

Hon. Timothy P. Connors

MICHIGAN DEPARTMENT  
OF TRANSPORTATION,

Defendant.

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**OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY DISPOSITION**

At a session of this Court held in the  
Washtenaw County Courthouse in the  
City of Ann Arbor on the  
14<sup>th</sup> day of August, 2009.

**PRESENT: HONORABLE TIMOTHY P. CONNORS, Circuit Court Judge**

This matter is before the Court on Defendant's Motion for Summary Disposition filed on May 5, 2009. The parties argued this motion before the Hon. Timothy P. Connors on May 29, 2009. For the reasons stated in this Opinion, Defendant's Motion is GRANTED.

## OPINION

### *FACTUAL BACKGROUND*

The undisputed facts are as follows:

1. MDOT issued a bid proposal for the West Liberty Street Reconstruction Project ("Project"), a local agency project located in Ann Arbor. The bid proposal included the plans and specifications for the Project. Exhibit 1. Bids were due September 7, 2001.
2. The bid proposal incorporated MDOT's 1996 Standard Specifications for Construction.<sup>1</sup> Loyer submitted a bid for the project, and was the low bidder and entered into a contract with MDOT for the Project on November 21, 2001, in the amount of \$2,383,396.44.
3. The total length of the Project was approximately 2.3 kilometers.
4. The bid proposal and Sec. 102.04 stipulate that the bidding contractor has examined the location of the work and is fully informed as to the conditions relating to the performance of the work.
5. The bid proposal stipulates that quantities shown are approximate only and are subject to either increase or decrease, and the 1996 Standard Specifications provide that the Project Engineer may direct changes in quantities and alterations in the work as are necessary to satisfactorily complete the project, or may require extra work necessary to complete the project.
6. Per an agreement between MDOT and the City of Ann Arbor, the City appointed a person to serve as Project Engineer. The 1996 Standard Specifications provide that the Project Engineer will decide all questions as to the interpretation of the plans and specifications and contract documents.

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<sup>1</sup> The 1996 Standard Specifications for Construction exceed 700 pages and are not attached. The sections MDOT cites are copied and attached as Exhibit 4. References in this brief to those sections are in the form "Sec. 103.04" without repeating the full title of the 1996 Standard Specifications or citing "Exh. 4."

7. The contract documents contained a "Special Provision for Utility Coordination." The Special Provision provides that the owners of existing utilities would move the utilities out of the right-of-way or to locations designated by the Project Engineer. It also states that no additional compensation will be paid to the contractor for delays on construction due to the encountering of existing utilities that are, or are not, shown on the plans.
8. The construction plans for the Project were prepared for the City of Ann Arbor by Midwestern Consulting ("Midwestern").
9. The construction plans explicitly provided:

"The existing utilities listed below and shown on these plans represent the best information available as obtained on our surveys. This information does not relieve the contractor of the responsibility to be satisfied as to its accuracy of and the location of existing utilities."
10. The plans, which were submitted to the City and MDOT on June 28, 2001, were based on the best information Midwestern had available.
11. Ameritech did not have as-built drawings for the location of its facilities and did not know the location of its facilities in West Liberty Street.
12. When the Project was bid in 2001 the plans showed an Ameritech conduit was within the influence of the trench that would be needed to install the 54 inch storm sewer pipe, thereby impacting the manner of construction.
13. As late as June 7, 2002, the Project Engineer believed Ameritech would relocate its duct to eliminate the conflict.
14. When it was discovered that the Ameritech duct was in a different location, causing greater conflict and that there was another, previously unknown, Ameritech duct in one place, the Project Engineer made the decision to modify the design of a portion of the Project rather than wait months or a year for Ameritech to move its conduit. One of two storm sewer pipe runs was eliminated and other changes were made.
15. This kind of alteration of a project design was standard for a project like this, as consistent with the utility coordination requirements of the contract and the Project was successfully completed.
16. The storm sewer in this section of West Liberty Street was only one item of work in the Project. As shown in the initial Project Schedule, it was part of the work on

Phase II of the Project.

17. The storm water retention requirements for the Project were met.
18. Contract Modifications Nos. 1 – 12, cover those and other changes, including the elimination of work, extra work and adjustments to the contract amount based on actual quantities.
19. Loyer pursued its claims for additional compensation through MDOT's administrative review process.
20. The decisions at the first level of the administrative review process, the District level, was issued: January 24, 2005.
21. The decisions at the second level of the administrative review process, the Region level, was issued November 21, 2005.
22. The decision at the final step of the administrative review of Loyer's contract claims, the Central Office Review ("COR") was issued May 15, 2006.
23. The only claims that remain at issue in this case are those that are allegedly related in some way to the Ameritech duct.
24. Twelve contract modifications have been issued to adjust the amount due and paid to Loyer under the contract. The only amounts not yet paid are the additional amounts approved by the COR level panel that Loyer has placed in dispute by filing this lawsuit.
25. Sec. 109.07 describes the elements of compensation for force account work, including labor, materials and equipment. Sec. 109.07 specifies the contractor's obligation to document for force account purposes the hours, materials and equipment it used for the work and for which it is claiming compensation.
26. Loyer did not keep force account records to document its time and costs for its claims.
27. For Loyer's Claim 1 (Ameritech Spoils) the volume of materials, 247.73 m<sup>3</sup> (324 cyds), that the work was done on July 16, 2002, and that this work was extra work under Sec. 103.04 are undisputed.
28. The force account calculation for this work for labor, for equipment used and for taxes, insurance and bond costs, totals \$6,922.75.
29. \$1,694.47 has already been paid on Claim 1 and MDOT does not dispute payment of an additional \$5,228.28 on Claim 1.

30. For Loyer's Claim 3 (Sheeting & Tiebacks), calculation of payment for a portion of this work as extra work under Sec. 103.04 is undisputed.

31. The force account calculation done for this work for labor and for the steel plates, chains and binders and equipment used totals \$108,012.94.

32. Because the depth of the storm sewer pipe on the original plans and the soil types would have required a Loyer to use trench box, the trench box Loyer used was not compensable as extra work.

33. \$46,668.96 has already been paid on Claim 3 and MDOT does not dispute payment of an additional \$61,343.98 on Claim 3.

34. In Loyer's Claim 4 (Unproductive Labor & Equipment) Loyer is claiming all labor and equipment that was on the site of the Project from April 1 through August 30, 2002, even though work was in progress during that entire time and even though Loyer has been compensated for the work done during that time, other than the additional amounts still in dispute.

35. For its Claim 4, Loyer did not and cannot document specific instances of time that was compensable as idle time or otherwise under the contract.

36. For Loyer's Claim 7 (Extra Work on Structures) payment under Sec. 103.04 for some of the work on the storm sewer structures as extra work due to the design changes is not disputed.

37. Based on a review of the more than 40 structures for which Loyer claimed additional compensation in Claim 7, the COR panel determined that \$107,621.09 was eligible for compensation.

38. \$30,324.18<sup>2</sup> has already been paid on Claim 7 and MDOT does not dispute payment of an additional \$77,296.91<sup>3</sup> on Claim 7, per the COR panel decision.<sup>4</sup>

39. For Loyer's Claim 8 (Extra Work on Pipe Runs), which is for changes in material types (e.g., ductile iron instead of concrete) and for some extra work on the storm sewer pipe runs due to the design changes, compensation for this work is properly calculated

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<sup>2</sup> The Region and COR decisions round up this amount to \$30,325.00. The amounts stated in this brief and Attachment A as the additional amounts to be paid are based on the actual figure paid of \$30,324.18.

<sup>3</sup> This amount corrects the \$77,296.09 stated in the COR decision for Claim 7. See fn. 25, *supra*.

<sup>4</sup> The \$6,114.54 reduction in payment from \$30,325.00 to \$24,210.46 per the Region review panel decision on Claim 7 pre-dated the submission by Loyer of a revised Claim 7.

as extra work under Sec. 103.04.

40. \$2,485.47 has already been paid on Claim 8 and MDOT does not dispute payment of an additional \$8,697.75 on Claim 8.

41. Payment on Loyer's Claim 9 (Material Overruns) would duplicate payment to Loyer on Claims 7 and 8.

42. For Loyer's Claim 10 (Increase in Traffic Control Devices) the increase in flagger and traffic control device costs is calculated on the basis of the approved extensions of the contract time totaling 70 days, calculated as a percentage of the flagger and traffic control device costs under the contract without an extension.

43. The original contract time of 289 calendar days (November 13, 2001, to August 30, 2002) days is properly reduced by 114 calendar days for the seasonal shut down period on the Project (November 21, 2001 to March 15, 2002) when flaggers and traffic control devices were not used, Sec. 812.04, resulting in a calculation by the Region and COR panels of a 40% increase in traffic control costs for the authorized extension of 70 days.

44. Because the contractor was on site only 55 of the 70 days of the authorized extension of time, compensation for the flag control item in Claim 10 was properly calculated on the basis of 55 days.

45. The Region and COR panels both approved a total amount of \$12,168.08 for Claim 10.

46. \$8,052.74 has already been paid on Claim 10 and MDOT does not dispute payment of an additional \$4,115.34 on Claim 10.

47. For Loyer's Claim 11 (Road Sweeping), Sec. 107.15.A. provides that "If not shown as a pay item, dust control will be at the Contractor's expense." Dust control was not a pay item in Loyer's contract with MDOT and Claim 10 could have been denied in its entirety.

48. Using a force account type analysis, both the Region and COR panels determined that Loyer was entitled to compensation at a rate of \$105.51/hr. for dust control required for the days when Loyer was on site during the period of time the contract was extended. The \$105.51 rate includes both labor, based on certified payrolls, and equipment (broom truck and water truck) based on Blue Book rates for this type of equipment.

49. The Region concluded that Loyer was entitled to 110 hours at this rate (55 days x 2 hrs.), for a total of \$11,606.10.

50. The COR panel concluded that Loyer was required to document the hours it was claiming.

51. Loyer has never documented its hours for Claim 11 as required by the COR panel.

52. For both Loyer's Claim 12 (Additional Risk & Loss of Profit) and Loyer's Claim 13 (Administration Costs), Loyer concedes that there is no basis in the contract for allowing either of these claims.

53. Sec. 103.03.D. specifically provides that "[N]or shall an adjustment include a Contractor's loss of anticipated profits, loss of expected reimbursement, loss of incentives, or loss of premiums."

54. Sec. 103.02.B. also excludes compensation for loss of profits.

55. Based on the COR panel decision, the total additional amount that Loyer is due on its remaining claims is an additional \$156,682.26,<sup>5</sup> not including any amount for Claim 11 (Road Sweeping).

56. MDOT is willing and ready to pay Loyer the additional \$156,682.26 once this lawsuit over Loyer's claims is over.

Before bringing the current claim, Loyer had sued MDOT for additional compensation in the Court of Claims and lost. Loyer's remaining claims against MDOT are as follows: Counts VI) Abandonment and Termination, VII) Breach of Contract, IX) Violation of Statutory Due Process, XI) Taking Without Due Process and Without Adequate Compensation, XII) Cardinal Change, XVI) Constitutional Violations, XXI) Illegal Agency. MDOT brought a Motion for Summary Disposition of Loyer's claims alleging that there are no genuine issues of material fact in dispute and that dismissal is appropriate as a matter of law.

#### *STANDARD OF REVIEW*

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<sup>5</sup> This amount is based on a correction of the amount already paid for Claim 7. See fn. 25, supra. It is \$0.82 more than the total amount approved for Claims 1, 3-4 and 7-13 in the COR decision.

The Michigan Supreme Court has succinctly articulated the standard this Court must employ when considering a motion brought pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). MCR 2.116(C)(7) is described below:

MCR 2.116(C)(7) provides that summary disposition is appropriate if a “claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” Procedurally, To determine whether Plaintiff’s alleged pleadings justify a finding that recovery is not barred by [a] statute of limitations . . . , a court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. *Harrison*, supra; *Gracey v Wayne County Clerk*, 213 Mich App 412 (1995). This Court must consider the record in a light most favorable to the non-moving party.

Below, MCR 2.116(C)(8), explained:

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inference which can be reasonably drawn from those allegations. The motion will be denied unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Shirilla v City of Detroit*, 208 Mich App 434 (1995).

Finally, MCR 2.116(C)(10):

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich. 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* A trial court should grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10), (G)(4). In presenting a(C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362-363; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id.* If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. *Smith v. Globe Life Ins Co*, 460 Mich. 446, 454-455; 597 NW2d 28 (1999).

