70432-0

No. 92744-8

70432-0

No. 70432-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KING COUNTY,

Plaintiff/Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture, *et al.*,

Defendants/Appellants/Cross-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Laura Gene Middaugh)

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT KING COUNTY

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I. INTRODUCTION

In support of its cross-appeal, King County established that VPFK's claims for "extended repair of rim bar" fail for two separate and independent reasons.[1] *First*, because the contract documents made no representations about soil conditions at the locations where VPFK decided to repair the damaged rim bars, VPFK could not – and did not – offer any evidence that actual soil conditions differed from any contractual baseline. KC Br. 85-87. *Second*, there was no evidence at trial that VPFK's repair costs would have been any different if the soils at the STBM repair locations had stood up for 24 hours and then become unstable (as the contract documents indicated). KC Br. 87-88. For these reasons, the trial court erred in denying King County's motion for judgment as a matter of law with regard to these claims.

In response, VPFK admits – as it must – that to prevail on a differing site condition claim it has to prove that it encountered "a condition that differs materially from a condition indicated in the contract documents." VPFK Resp. Br. 54. As King County pointed out, VPFK also previously admitted that the baselines for soil conditions in the contract documents "*are not location specific*." KC Br. 86 (emphasis

[1] This reply uses the same abbreviations as King County's previous brief ("KC Br."). In addition, "VPFK Resp. Br." refers to the "Reply And Cross-Respondents Brief Of Appellant And Cross-Respondent Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV."

added) (quoting Ex. 68 at 2). VPFK does not dispute this point. These concessions, along with the corresponding absence of supporting evidence (as King County established in its briefing), are fatal to VPFK's rim bar repair claims.

Notwithstanding these concessions, VPFK argues that it did introduce evidence of differing site conditions in the following respects: (1) the absence of "natural safe havens," (2) pressures exceeding 75 psi, and (3) the presence of aquifers and sand deposits. VPFK Resp. Br. 53-55. VPFK further argues that these conditions increased the time required for and cost of its rim bar repair work. VPFK Resp. Br. 55-57. As set forth below, none of these arguments has merit.

II. ARGUMENT

A. VPFK Did Not Present Any Evidence Of Differing Site Conditions To Support Its Extended Rim Bar Repair Claims.

1. Natural Safe Havens. Starting with VPFK's argument that it encountered a differing site condition because it did not find "natural safe havens" (VPFK Resp. Br. 53-54), nothing in any of the contract documents indicates that natural safe havens would be found in any particular location in the Central Tunnel. Indeed, the phrase "natural safe haven" does not appear anywhere in the contract documents. VPFK coined this phrase – whatever it means – during the course of the project and has failed to point to any provision of the contract documents

indicating that it would find such conditions at the repair locations. In the absence of any such contractual provision, this argument fails.

None of the evidence cited by VPFK establishes that VPFK "should have been able to find a natural safe haven" at the repair locations. VPFK Resp. Br. 53. Rather, VPFK cites Mr. Portafaix's testimony about core holes drilled at the repair locations (RP 3185-87) and excerpts of claim letters asserting that actual ground conditions were not suitable for lengthy inspections or repairs and therefore differed from indications in the GBR and GDR (Ex. 1830 at KC0133042-43, Ex. 1699 at KC0091479). VPFK's reliance on these documents is misplaced because they do not refer to any *provision in the contract documents* indicating that VPFK should have been able to find "natural safe havens" at the repair locations. In addition, neither VPFK nor the County had any way of knowing where VPFK's machinery would break down.

VPFK's argument relies instead on general assertions to the effect that actual ground conditions were difficult at the repair locations and that those conditions were subjectively unexpected. But such general assertions are insufficient. To establish a differing site condition claim, VPFK had to demonstrate that the contract documents indicated natural safe havens. *See* KC Br. 24-26 (discussing Washington cases regarding four essential elements of differing site condition claims). As noted on

page 1 above, VPFK does not dispute that point. VPFK must therefore identify *specific contract provisions* indicating *specific locations* for the so-called "natural safe havens," which it has wholly failed to do. VPFK's safe-haven argument therefore fails.

2. Pressures Greater Than 75 psi. Turning to VPFK's argument regarding pressures greater than 75 psi at the repair locations (VPFK Resp. Br. 54), this argument similarly fails. The contract documents address anticipated pressures for maintenance stops at Specification § 02310 – 3.02(O) of the Central Contract (Ex. 6). This specification provides the following baseline percentages for face support pressures to perform "Maintenance and Boulder Stops" along the entire Central Tunnel: 30 percent will be at atmospheric pressure; 20 percent will be at pressures between atmospheric and 50 psi; and 50 percent will be at pressures between 50 psi and 75 psi. Ex. 6 at KC0001033.

Although the above specification is consistent with VPFK's assertion that it would not encounter pressures greater than 75 psi at locations chosen for maintenance stops, King County *paid* VPFK's claims for maintenance stops at such pressures before trial. RP 741-42, 872-73, 1199 (Cochran); RP 1746-47, 1816, 3285 (Portafaix). In settling these pressure-related claims, VPFK obtained all of the compensation to which it was entitled for encountering pressures greater than 75 psi. As a result,

evidence regarding such pressures cannot – and does not – provide evidentiary support for VPFK's extended rim bar repair claims. VPFK ignores this point entirely.

But even putting that aside, the evidence that VPFK cites does not support its argument. VPFK cites various claim letters complaining that the pressures at the repair locations exceeded VPFK's expectations that "stoppages at this location could be performed at low or atmospheric pressure." Ex. 1596 at KC0091026; Ex. 1699 at KC0091479. But like its argument regarding natural safe havens, VPFK does not cite to provisions of the contract documents indicating that pressures at the repair locations would be "at low or atmospheric pressure." *Id.* Nor can VPFK do so, as the contract documents did not indicate any baselines as to where atmospheric interventions could occur and its own witnesses acknowledged that fact. RP 2981-82 (Launay).

VPFK's reliance on Exhibit 141 is equally misguided. VPFK Resp. Br. 54 (citing Ex. 141 at KC0091636). Exhibit 141 is a 2009 claim letter that references an October 2007 letter containing an analysis of anticipated soil permeability and pressures. *See* Ex. 1436 (October 8, 2007 letter referenced in Ex. 141). VPFK's reliance on this evidence is misplaced because, like the cited claim letters, the October 2007 letter was prepared *after* VPFK submitted its bid in 2006. RP 1317-18 (Dugan).

Nor was the analysis part of VPFK's pre-bid evaluation; it was prepared for another company that never submitted a bid, and VPFK did not have the analysis at bid time. RP 3617-18, 3809-10 (Rescamps). To establish a differing site condition claim based on contract indications of pressure, VPFK had to demonstrate not only that the contract documents indicated certain pressures but also that it relied on such indications *when it made its bid*. *See* KC Br. 24-26; VPFK Resp. Br. 5-6 n.1.[2] VPFK could not have relied on the October 2007 letter or the analysis contained therein when it submitted its bid in 2006. That document, therefore, cannot support VPFK's argument regarding pressures at the repair locations.

3. Aquifers And Sand Deposits. As to VPFK's argument that it encountered aquifers at the repair locations that differed from indications in the contract documents (VPFK Resp. Br. 54-55), this argument, too, is unsupported. VPFK has not cited to any provision of the contract documents indicating the location or nature of aquifers along the tunnel alignment. The testimony VPFK cites does not concern specific provisions of the contract documents. *See* RP 2691, 5101. In this respect as well, VPFK did not offer any evidence establishing that actual conditions differed from contract indications.

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[2] In addition to the Washington cases cited by King County in its previous briefing (at pages 24-26), *see also Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1349 (Fed. Cir. 2008) (contractor must prove it "relied on the contract representation" in making its bid (citing *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (Fed. Cir. 2007))).

The same is true for VPFK's argument concerning sand lenses. VPFK Resp. Br. 54-55. The contract documents made no representation that sand would not be found at the repair locations. On the contrary, the GBR advised VPFK that it very well might encounter other types of soils, such as sand, within reaches composed of a different dominant tunnel soil group. Ex. 7 at KC 0001789 ("Within each group color, thin intervals of a different TSG have been encountered."). The GBR also stated that several of the 12 types of face conditions would contain sand (Ex. 7 at §§ 5.1-5.3), and it represented that VPFK would encounter certain percentages of these conditions along the entire alignment. In addition, VPFK's own consultants advised it that there would be sand lenses along the tunnel alignment. RP 2983 (Launay).

The only evidence VPFK cites on this issue is the testimony of its dewatering subcontractor, Scott Bender, that "[w]e didn't expect" to encounter sand deposits. RP 5130. Mr. Bender's expectations in 2009 are not relevant to VPFK's expectations prior to submitting its bid. In addition, Mr. Bender testified that he found sand deposits at a location "between" the borings depicted in the GBR. RP 5131. As VPFK previously admitted, "the County's GBR provided *no information* about soil conditions at locations other than bore holes." VPFK Br. 22 (emphasis added). In this respect as well, VPFK failed to present any

evidence that site conditions differed from indications in the contract documents. Its sand deposit argument, like its other arguments, therefore fails because the contract documents did not include any such indications.

B. VPFK's Extended Rim Bar Repair Claims Also Fail Because There Was No Evidentiary Basis For An Award Of Substantial Damages.

VPFK's final argument is that the above alleged differing site conditions, together, resulted in several months of excusable delay and compensable work. VPFK Resp. Br. 56-57. Because it focuses on those specific issues, it offers no substantive response to King County's argument that whether the tunnel face stood up for 24 hours or for a shorter period of time (the claim set forth in Jury Instruction 9) was immaterial because VPFK could not have completed the repairs in under a day. KC Br. 87-88. In addition, as set forth above, VPFK has failed to show any *other basis*, such as differing site conditions, for which it could properly recover rim bar repair damages.

Moreover, the evidence at trial showed that VPFK's extended repair period was not caused by King County or any differing site conditions but rather was part of VPFK's "dead weight" strategy. KC Br. 14-17. VPFK attempts to explain away the substantial evidence regarding its dead weight strategy as nothing more than an effort to carefully evaluate and analyze the issues it faced. VPFK Resp. Br. 3-5, 56. The

trial court record does not support that revisionist view. Instead, the record shows very clearly that VPFK intentionally delayed finding solutions while deliberately trying to shift the economic risk to its client, knowing full well that extended delay would put pressure on King County. KC Br. 14-17. Particularly in light of this evidence, there was no evidentiary basis for the jury to award damages for VPFK's extended rim bar repair claims.

III. CONCLUSION

In sum, VPFK failed to introduce evidence establishing essential elements of its extended rim bar repair claims. The contract documents did not indicate particular soil locations at the repair locations, and VPFK has not pointed to any provisions that could be read to make such indications. In the absence of such evidence, the trial court erred in denying King County's motion for judgment as a matter of law on these claims. This Court should therefore reverse the trial court's ruling and set aside the jury's award of damages on the rim bar repair claims, thereby increasing the net award to King County by $8,297,551.

DATED: August 26, 2014.

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I certify under penalty of perjury under the laws of the state of Washington that, on August 26, 2014, I caused **Reply Brief of Respondent/Cross-Appellant King County** to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the following parties in the manner indicated below:

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DATED: August 26, 2014, at Seattle, Washington.

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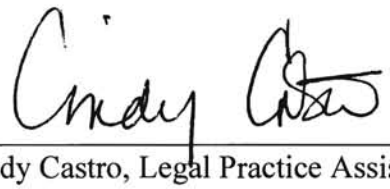

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