

66267-8

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No. 66267-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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PACIFIC NORTHWEST EARTHWORKS, LLC,

Appellant,

v.

THE CITY OF BELLEVUE, a municipal corporation,

Respondent.

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BRIEF OF APPELLANT

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## INTRODUCTION

Pacific Northwest Earthworks LLC (“PNWE”), a small excavation contractor, was the low bidder to the City of Bellevue, Washington, (Bellevue) on Bid No. 9095, Cougar Mountain S.E. 45<sup>th</sup> Street Sanitary Sewer Extension. The amount of PNWE’s contract was \$126,550.

The project involved excavating for and installing sanitary sewer pipe in the Cougar Mountain Area of Bellevue.

PNWE contends that Bellevue’s bid documents misrepresented the type of subsurface conditions to be encountered. Both the geotechnical report incorporated in the bid documents and Bellevue’s specifications represented that no hard rock would be present.

The soils report which was produced by the owner’s geotechnical engineering firm, GeoEngineers, Inc., indicated that there would be no hard rock to be excavated. Rather, the soils report represented that the subsurface structure would be “soft and friable,” i.e. very soft, crumbles easily by rubbing with fingers. It reported that the rock did not meet the criteria in the specifications for rock excavation. This report was made part of the contract documents.

The owner, City of Bellevue, in the specifications instructed bidders that: "Excavated material meeting the standard specification definition of rock is not expected."

PNWE claims that it ran into very hard rock, which materially delayed its progress and made it necessary to utilize much heavier and expensive equipment.

PNWE's claim to the engineer of the City of Bellevue was rejected, and litigation of its relatively small claim, under \$50,000, commenced. The matter was referred to arbitration, but before it could be heard. Bellevue filed a motion for summary judgment. This motion was granted by the Honorable Catherine Shaffer, judge, on or about October 22, 2010. This appeal followed.

PNWE seeks reversal of the trial court decision, reversal of the award of attorney fees and costs to Bellevue, and an order remanding this case for arbitration.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred in its determination that there were no material facts that would preclude summary judgment in favor of the City of Bellevue. Among these material facts were:

- a. Whether PNWE was led by the bid documents to reasonably believe that conditions represented in the

contract documents existed and could be relied upon in bidding.

b. Whether PNWE actually and reasonably relied upon the inaccurate representations.

c. Whether the material did in fact vary from the description in the contract documents.

d. Whether Bellevue intended that bidders rely upon the contract representations to formulate their bids for the project.

2. The trial court erred in failing to consider the evidence in the light most favorable to the nonmoving party. In fact, the trial court, as established in the verbatim report of proceedings either did not review, or cursorily reviewed during argument the declaration of the principal of PNWE, Paul Traverso, before rendering its decision.

3. The trial court erred in manifestly weighing the evidence in favor of Bellevue, and also applying all possible inferences in favor of Bellevue in finding that a reasonable person could reach only one conclusion and that was that the City of Bellevue had not in fact misrepresented whether there would not be hard rock.

4. The trial court erred in determining that PNWE anticipated hard rock.

5. The trial court erred in determining that Bellevue had effectively disclaimed its representations in its specifications and geotechnical report.

6. The trial court erred in applying the incorrect legal standard to whether Bellevue had made actionable representations with regard to the presence of hard rock.

#### **STATEMENT OF THE CASE**

The Cougar Mountain S.E. 45<sup>th</sup> Street Sanitary Sewer Extension Project was bid on May 5, 2009. CP 420.

Included in the bid specification was a geotechnical report authored by GeoEngineers. CP 208-307. The stated purpose of the report was to provide a recommendation for earthwork and site preparation and also comment on any anticipated construction difficulties. CP 404-405, scope and fee estimate of GeoEngineers.

Under the contract definition, the soils report of GeoEngineers was incorporated as part of the contract documents. CP 102-104; CP 202.

The instructions to bidders VII mandated that:

**Bidders must bid on all items contained in the proposal.** The omission or deletion of any bid item will be considered nonresponsive and shall be cause for rejection of the bid.

CP 72-73. Thus, since there was a contingent bid item, rock excavation, under under Bid Item 3, omitting to put a unit price for rock excavation would have disqualified not only PNWE's bid, but also the bid of any other bidder who did not put in a figure for rock excavation.

The bidding documents prohibited bidders from submitting "irregular" or "unbalanced bids." That is, a bid could be rejected if any of the proposed unit prices were excessively unbalanced (either above or below the amount of a reasonable bid to the potential detriment of the City). Section 1-02.3. Bellevue did not find that PNWE's bid was excessively unbalanced at its nominal price of \$2.50 per cubic yard of rock as compared to the City Engineer's estimate of \$100.00 per cubic yard. Nor did it find the bids of three other bidders who had bid under \$1.50 per cubic yard to be unbalanced. CP 420

Rock excavation was denominated a contingent item of work. Namely, Bellevue provided the quantities estimated for purposes of bidding only to provide a common basis for comparing

bidders and not as an actual estimate of rock expected to be encountered. CP 157.

Rock was defined in the specification as by reference to Sections 7-09.3(7) and 7-09.4 of the Standard Specifications for Road and Bridge Construction. This meant that the full compressive strength of the material being excavated to be classified as rock had to be over 2000 psi. CP 164-165.

Bellevue's specifications under "rock" indicated in part:

Excavated material meeting the standard specification definition of rock is not expected. (See Appendix G – Geotechnical Report). This contingent bid item is included for use only if such rock excavation is encountered. (CP 202.)

Appendix G of the contract documents was defined as "geotechnical reports and/or information." GeoEngineers, performed did the subsurface investigation under a purchase order from the City of Bellevue. The described purpose of the investigation as in part to provide recommendations for earth work and site preparation including suitability of onsite soils for reuse in trench backfill, trench excavation considerations, placement and compaction of trench backfill, pipe bedding and mitigation of unsuitable soils conditions. CP 404. (Emphasis Supplied.)

The cost of the subsurface investigation was \$12,000. (CP 407)

Bellevue bound the geotechnical report into the bid package and included it in the definitions as part of the “contract documents.” CP 102

Because the work was to be done under a paved and traveled road, the site investigation work by GeoEngineers required a right-of-away permit. CP 406.

The geotechnical report itself in its narrative held out that the bedrock at 4-1/2 to 7 feet was:

As observed in our borings, the bedrock is generally friable (crumbles easily by rubbing with fingers), very severely weathered, and is very soft with respect to rock hardness. (CP 286.)

In the further summary of the geotechnical considerations:

We evaluated the bedrock in accordance with the criteria of WSDOT Standard 7-09.3(7)B, rock excavation. The Blakely Formation bedrock does not meet this criteria. (CP 286.)

Further,

We anticipate that fill and weathered sandstone observed in the explorations can be excavated with conventional excavation equipment such as trackhoes or dozers. (CP 287.)

In the boring logs provided to bidders the rock was described as “severely weathered,” “friable,” and “very soft.” CP 299-300.

The term “very soft” was defined as “can be carved with a knife. Can be excavated readily with point of pick. Pieces one inch or more in thickness can be broken with finger pressure.” CP298.

GeoEngineers recommended that, if Bellevue wanted to limit the reliance by contractors on the geotechnical report, that the City ought to write a letter of transmittal to contractors telling them that the geotechnical report was not prepared for bid development. The City of Bellevue never did that. CP 307.

PNWE, when it bid the project, like all other bidders who were competitive, inserted only a nominal amount for the rock excavation. CP 420; CP 399-400.

Scott Traverso in his declaration in response to the motion for summary judgment indicated that his bid was based upon the representations by the City of Bellevue that no hard rock was expected. CP 399. Further, that in his experience, he could use his owned equipment, an existing backhoe, to excavate and employ his usual crew. CP 399.

When work began, a great majority of the trench excavation involved rock with an average psi over 2000. PNWE had the rock

tested by an engineering firm, and the tests showed an average psi of over 2000 psi. CP 400. The average was 2315 as established by laboratory tests done by Earth Consultants. CP 422-423. This was in excess of the standard specification definition of hard rock. CP 412 The actual quantities of hard rock encountered and excavated came to 284 cubic yards. CP 401. Since the contract specifications indicated that no hard rock was anticipated, PNWE's cost structure changed, causing it to expend much more time and much more money than it anticipated. CP 400-402.

Based on Paul Traverso's experience, the presence of rock and the consequence of slower excavation with expensive rented piece of equipment was a direct result of the misrepresentation of the soils condition that no rock meeting the requirement of hard rock would be encountered. CP 400.

As part of the defense to the motion for summary judgment, Scott Traverso completed a detailed declaration with exhibits with regard to his experience, the conclusions he drew, the conclusions that other bidders in the competitive range drew, and the effect of the presence of rock that the City did not believe exist had on his cost structure. CP 395-402.

The court, although stating that it had seen the exhibits, stated that it did not review Paul Traverso's declaration in opposition to Bellevue's motion for summary judgment. VRP 17-18. Or, it was briefly read during Traverso's counsel's argument. VRP 18.

The court found that the geotechnical report made of the contract was not binding on the City of Bellevue. VRP 25. The court found that the contractor had not demonstrated that the materials encountered during excavation met the definition of "rock." The court found that the fact that PNWE had filled in a number next for the bid item for rock proved that it did anticipate and other contractors anticipated encountering hard rock excavation. VRP 27-28. The court found that notwithstanding that the average psi of the rock was over 2000, that that was not a difference that would allow recovery by the contractor. VRP 28. The court found as a matter of fact that everybody knew from the beginning that rock would be encountered. VRP 29.

The court proceeded to go through the evidence, the disclaimers, soils reports, and find that the disclaimer limited the use that a bidder could make of the information, including finding that the heavier rental backhoe that PNWE had to rent was

conventional. VRP 24. The court further found that the general statement that the bidder had to examine the site for himself and ascertain the physical conditions acted as an effective disclaimer, as well that no statement of any representative or owner or agent or employee of the owner was binding. VRP 25. The court found as a matter of fact that since bidders all included a rock pay item under the contingent pay item of work, as a matter of law that they anticipated rock. VRP 27-28. The court found as a matter of fact that the rock actually encountered by PNWE did not vary from that represented in the geotechnical report. VRP 29. The court found that Bellevue did not intend bidders to rely upon the geotechnical report. VRP 30.

The court found:

Rather it seems to me that the City is correct in pointing out that under the appellate court rulings, when a municipal corporation provides a geotechnical report of subsurface conditions and disclaims legal liability, the contractor can't recover on a changed condition claim. (VRP 35.)

## **ARGUMENT**

### **THE TRIAL COURT IMPROPERLY RESOLVED MATERIAL ISSUES OF FACT AGAINST PNWE.**

It is well established that summary judgment orders are reviewed *de novo* by appellate courts. Hayden v. Mutual of

Enumclaw Insurance Company, 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). Reviewing courts observe the well-known principle that summary judgment is appropriate only:

If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

CR 56; Van Noy v. State Farm Mutual Automobile Insurance Company, 142 Wn.2d 784, 790, 16 P.3d 574 (2001).

Such a motion will be granted, after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion.

Van Noy, 142 Wn.2d at 790, citing Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Cited in National Concrete Cutting, Inc. v. America West GM Contractors, Inc., 107 Wn. App. 657, 27 P.3d 1239 (Div. I 2001).

Further, the facts submitted and all reasonable inferences from the facts must be considered the light most favorable to the nonmoving party. Yakima Fruit & Cold Storage Company, et al. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1972).

This case was originally referred to arbitration because of its relatively small monetary claim. Appellant was entitled to have the facts resolved by the arbitrator selected.

In this case, under the guise of deciding a summary judgment, the trial court resolved what are commonly understood to be factual issues under the summary judgment standard against the PNWE.

Among what are commonly understood to be factual issues are whether when reviewing the bidding documents, a reasonable and prudent contractor would have anticipated the actual soil conditions that it encountered. See P.J. Maffei Building Wrecking Corp. v. United States, 732 F.2d 913, 917 (Fed. Cir. 1984); McCormick Construction Company, Inc. v. United States, 12 Cl. Ct. 496 at 498 (1987).

This implicates the sufficiency of the boring logs, and raises a question as to the materiality of the actual differences between what was forecast and what was experienced. . . .

Brechen Enterprises, Inc. v. United States, 12 Cl. Ct. 545, 551 (U.S. Cl. Ct. 1987). In this case it is evidence that a number of bidders (the lower bidders) did not anticipate hard rock.

Further, would a pre-bid site investigation have indicated to a “reasonable and prudent contractor” the subsurface conditions actually encountered? McCormick, 12 Cl. Ct. 496 at 498-499. This was a very small contract. Bellevue’s geotechnical engineers had to obtain a street use permit in order to perform the geotechnical investigation at a cost to Bellevue of \$12,000. It was not feasible for bidders to do their own subsurface investigation.

**THE TRIAL COURT NOT ONLY FAILED TO CONSIDER THE FACTS IN THE LIGHT MOST FAVORABLE TO PNWE BUT ALSO MADE INFERENCES FAVORABLE TO BELLEVUE**

In this case the trial court determined facts and inferences from facts adversely to PNWE finding that, among other things, (a) PNWE was not reasonable in its interpretation of the soils report in concluding that the soils as described would be easily excavated with its existing equipment, (b) that it was not reasonable in not foreseeing that hard rock as defined by the specifications would be encountered; (c) that in fact the rock that was encountered was not hard rock as demonstrated by the contract documents; (d) that in fact what was encountered and had to be excavated was fairly described by the soils report and contract documents. All of these are factual determinations, and the court squarely determined them, including that no reasonable person could have understood

the contract documents as did PNWE. The court also impliedly determined that PNWE's site investigation was inadequate given the facts. D.F.K. Enterprises, Inc. dba American Coatings v. United States, 45 Fed. Cl. 280 (1999).

The trial court erred as a matter of fact in finding that no reasonable person would have read the soils report and statements by the City of Bellevue and conclude that there would be no hard rock to be excavated and base their bids accordingly.

Paul Traverso's opinion based on his investigation included visits to the site of the work itself (obviously he could do not subsurface investigation due to the small size of the project and the fact that the pipeline would be under a traveled street).

Not only Paul Traverso's opinion but also that reflected by the bids of all other experienced contractors who were competitive in seeking the award are direct evidence that they interpreted the contract documents as telling a contractor to assume that no hard rock would be encountered. These include Pioneer Excavating, 50 cents a cubic yard or \$50; R.W. Scott Construction, \$1 a yard or \$100; Laser Underground, \$1 a yard or \$100; Construct Company, \$1 a yard or \$100. CP 420.

**THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD FOR MISREPRESENTATION OF CONDITIONS CLAIMS-THE INFORMATION ITSELF WAS INCORRECT, NOT THE CONTRACTOR'S CONCLUSION FROM CORRECT INFORMATION**

In its reliance on Basin Paving Company v. Mike M. Johnson, Inc., et al., 107 Wn. App. 61, 27 P.3d 609 (2001), and Nelson Construction Company of Ferndale, Inc. v. Port of Bremerton, 20 Wn. App. 321, 582 P.2d 511, rev. denied, 91 Wn.2d 1002 (1978), the court misread and misapplied the law. In both Basin Paving and Nelson Construction there could be no dispute but that the basic information and test borings provided to the contractors for bidding purposes were accurate. In both or those cases the trial courts had examined the contractor's reasonable belief before passing judgment.

Further, in the case of Basin Paving, the contract documents provided in clear and prominent language that the soils reports were not contract documents. Moreover, in those cases the owners did not express the belief that no "hard rock" would be encountered.

Both of those cases relied upon by the trial court in preference to the authorities urged by PNWE, which have been the accepted jurisprudence in this state for 70 years.

The difference between the situation where the data is correct and that where the data is incorrect was set forth in Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957 (U.S.D.C. N.D. Ga. 1976). The court there found that two predicates were necessary for a contractor to recover on claim for misrepresentation.

Thus, the first question that must be asked in each contract case involving misrepresentation is whether the contractor could have discovered the true facts through reasonable investigation. In determining whether such investigation should have been done the court should consider the time constraints involved, the cost of the investigation in comparison to the total bid price, and the detailed nature of the government's data. If the court finds that it would be unrealistic to expect bidders to uncover the error on their own, then the exculpatory clauses should be given no effect.

414 F. Supp. at 960.

The second condition that the court placed in McKee was the materiality of the misrepresentation itself.

Recovery cannot be had for a contractor's own misjudgment based on information which itself is accurate. Thus, where the government undertakes a series of borings which are accurate, but which seem to indicate that there is less rock in this subsoil than actually exists, the contractor cannot recover for the cost of removing the extra rock (citations omitted). When the contractor has the actual, and accurate, statistics before him when he makes his bid, he assumes the risk of any deviation in conditions from

those indicated by the samples. In other words, if the government does not provide incorrect factual representations, the exculpatory clauses in the contract placing the burden of uncertainty on the contractor should be given full force and effect. “[The] state is not liable for conclusions drawn by a bidder when the state has done little more than represent the results of its investigation and the bidder knew or should have known the factual bases for the representations,” (citations omitted).

414 F. Supp. at 960.

The court in McKee indicated that summary judgment should be reversed. 414 F. Supp. at 961.

**CONTRACTORS MAY RECOVER FOR MISREPRESENTATION IN THE ABSENCE OF A CHANGED CONDITION CLAUSE**

It appears that Bellevue argued and the court accepted that no recovery could be had unless there was a changed conditions clause. Based on the case of Clevco, Inc. v. Municipality of Metropolitan Seattle, 59 Wn. App. 536, 799 P.2d 1183 (1990), this is incorrect. Clevco at 543.

**PNWE’S INVESTIGATION AND CONCLUSIONS WERE REASONABLE**

In this case there was no disputed issue of fact but it cost the City \$12,000 to get a right-of-way permit and have GeoEngineers drill test holes. It was not reasonable for a contractor to perform its own subsurface investigations. Further, in this case, in contrast with Basin Paving and Nelson Construction, there was no data

whatever presented in the soils report that indicated hard rock. All descriptions of the subsurface indicated that it was soft, friable, easily excavated even by hand, and no inkling whatsoever that hard rock would be encountered. Also in contrast to the City's cited cases, the City itself in the specification section dealing with rock, stated:

Excavated material meeting the standard specifications definition of rock is not expected. (See Appendix G, Geotechnical Report.) This contingent bid item is included for use only if such rock excavation is encountered.

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT BELLEVUE HAD EITHER NOT REPRESENTED THE SITE CONDITIONS OR HAD ADEQUATELY DISCLAIMED ANY REPRESENTATION**

Bellevue convinced the trial court that by virtue of (1) including a pay item for hard rock and (2) it's geotechnical engineer's mentioning that they did not warrant the geotechnical report to Bellevue, all statements that no hard rock was anticipated, no rock meeting the definition of hard rock was found by the geotechnical engineer, and that the rock was "soft and friable" are effectively disclaimed.

Nowhere in the specifications was there an express clause placing the risk of unexpected soils conditions on PNWE. Nowhere was there an express denial in the owner's contract documents of a

warranty of the accuracy of the representation of the soil conditions.

In contrast, much like the U.S. Supreme Court in U.S. v. Atlantic Dredging Company, 253 U.S. 1, 64 L.Ed. 735, 40 S. Ct. 423 (1920):

The specifications stated that “the materials to be removed is believed to be mud or mud with an admixture of fine sand.”

The U.S. Supreme Court held that contractors were justified in acting upon the government’s representation even though they were expressed as a “belief” and were qualified. Maryland Casualty Company v. City of Seattle, 9 Wn.2d 666, 670-671 (1941), citing U.S. v. Atlantic Dredging Company.

Again, as stated in Woodcrest Construction Company, Inc. v. U.S., 187 Ct. Cl. 249, 408 F.2d 406 (1969):

The effect of an actual representation is to make the statements of the government binding upon it, despite exculpatory clauses which do not guarantee the accuracy of a description.

187 Ct. Cl. at 256.

Bellevue and its geotechnical engineer presented not only data showing no hard rock, but both also expressed their finding and expectation that no hard rock would be encountered. There is no dispute of fact that a tremendous amount of rock meeting the contract definition was encountered.

Bellevue wants to have it both ways. It wishes contractors to rely on its representations and statements of belief gain the advantage of low bids. Then, despite having referred the contractor directly to the geotechnical report in support of the City's believe that no hard rock will be encountered, the City claims that disclaimers to the city in the very report to which it referred the contractors for purposes of bidding the job serve to bar the contractor from relying on such representations..

In the bid documents Bellevue provides that a contractor must upon penalty of disqualification include a number for a bid item that Bellevue represents that it does not expect to encounter. Bellevue argues that this fact is conclusive that the contractor actually foresaw that it would encounter hard rock.

That is a very good example of sharp practice that courts in the cases the PNWE cites have refused to endorse by their limitation on disclaimers on the part of public owners who have made actual representations with the intention that contractors rely upon them.

This sort of mischief on the part of public owners will continue unless this court reaffirms that contractors who reasonably rely upon information provided to them are not misled. Bellevue

should not be allowed to invite reliance and to then claim that it never should have been believed.

This Court ought to rule that Bellevue is liable for the reasonable conclusions drawn by bidders from its contract documents and that Bellevue did not disclaim the right to rely upon its and its geotechnical engineer's findings and conclusions.

This summary judgment and the attorney fees and costs awarded after judgment should be reversed and a decision on the amount of recovery for PNWE referred to arbitration.

Respectfully submitted this 7<sup>th</sup> day of February, 2011.

JAMESON BABBITT STITES &  
LOMBARD, P.L.L.C.

By: \_\_\_\_\_

  
Bruce P. Babbitt WSBA #4830  
Attorneys for Appellant

CERTIFICATE OF SERVICE

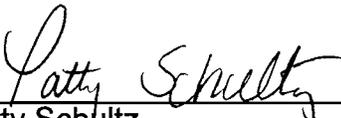
I, Patty Schultz, declare as follows:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.
2. On February 7, 2011, I sent via ABC-Legal Messenger Service a copy of the foregoing Brief of Appellant and a copy of the Verbatim Report of Proceedings to:

Cheryl A. Zakrzewski  
City of Bellevue  
450 – 110<sup>th</sup> Avenue NE,  
Bellevue, WA 98004  
[czakrzewski@bellevue.gov](mailto:czakrzewski@bellevue.gov)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7<sup>th</sup> day of February, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
Patty Schultz