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Garth Leavitt and Bob Allen v. Glendon Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH 920828 CA

GARTH LEAVITT and BOB ALLEN, Plaintiffs/Appellees,	)	
v.	)	Priority No. 15
GLENDON CORPORATION, A Utah Corporation, Defendant/Appellant.	)	Appellate Court No. 92-0828-CA

BRIEF OF APPELLANT

Appeal from Judgment Entered in the Second Circuit Court, State of Utah
Davis County, Bountiful Department, Honorable S. Mark Johnson, Presiding

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I.

JURISDICTION

The Utah Court of Appeals has appellate jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d).

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW, STANDARD OF APPELLATE REVIEW AND SUPPORTING AUTHORITY

A. Was the subcontract between Glendon, and Allen and Leavitt ambiguous?

Standard of Review: Whether a contract is ambiguous is a question of law which an appellate court reviews for correctness, according no particular deference to the trial court's conclusion. ***Lyngle v. Lyngle***, 831 P.2d 1027, 1029 (Utah App. 1992); ***West Valley City v. Majestic Inv. Co.***, 818 P.2d 1311, 1313 (Utah 1991).

B. Did the trial court err in denying Glendon's Motion to Amend Findings and Judgment or, in the alternative, for a New Trial because the evidence at trial was insufficient to support the findings?

Standard of Review: The "clearly erroneous" standard applies. A finding attacked as lacking adequate evidentiary support is deemed "clearly erroneous" only if the appellate court concludes that the finding is against the clear weight of the evidence. ***Reid v. Mutual of Omaha Ins. Co.***, 776 P.2d 896 (Utah 1989). A ruling on a motion for a new trial will

not be disturbed on appeal except when there is a clear abuse of the court's discretion. *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986).

C. Did the trial court err in excluding the prime contract from evidence?

Standard of Review: Abuse of discretion affecting a party's substantial rights. *Berrett v. Denver & Rio Grande W.R.*, 830 P.2d 291 (Utah App. 1992).

D. Did the trial judge err by basing his decision on facts not in evidence?

Standard of Review: The same as stated in Issue C above.

III.

STATUTES AND RULES WHOSE INTERPRETATION IS DETERMINATIVE

Rule 26(e), Utah Rules of Civil Procedure. The foregoing rule is set forth verbatim and attached hereto as Addendum A.

IV.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE TRIAL COURT

This case involves a contract dispute between GLENDON CORPORATION ("Glendon"), a General construction contractor, and its excavation subcontractors, BOB ALLEN and GARTH LEAVITT ("Allen and Leavitt" or "Allen" and "Leavitt"). Allen and Leavitt's complaint against Glendon, filed September 23, 1991, requested Seven

Thousand Seven Hundred Fifteen Dollars ($7,715.00) for excavation work on the Farmington City Public Safety Building located in Farmington, Utah. The complaint alleged breach of contract and unjust enrichment.

The case was tried July 9, 1992, before the Honorable S. Mark Johnson, Second Circuit Court, Bountiful Department. On September 15, 1992, the trial court entered findings of fact and conclusions of law, and judgment in favor of Allen and Leavitt for Seven Thousand Two Hundred Fifteen Dollars ($7,215.00), plus costs.

Glendon moved to amend the findings and judgment or, in the alternative, for a new trial on September 25, 1992. Counsel argued the motion on October 13, 1992. The court initially took Glendon's motion under advisement and then entered an order denying the motion on November 13, 1992. Glendon filed a Notice of Appeal on November 13, 1992.

B. STATEMENT OF FACTS

1. GLENDON'S PRIME CONTRACT WITH FARMINGTON CITY AND SUBCONTRACT WITH ALLEN AND LEAVITT

In late October, 1989, Glendon contracted with Farmington City to build the Farmington City Public Safety Building ("PSB" or "the Project"). (Transcript on Appeal, hereinafter "Tr.", 78). The project initially included a $9,000.00 budget for excavation work. During negotiation of the contract, however, Glendon agreed to a $2,000.00 credit for use of some City equipment and employees. (Tr. 8, 78, 79, 84).

Ted Cromer ("Cromer"), a Glendon employee, solicited a bid from Allen for the excavation work on the project. Cromer met with Allen and Leavitt on the project site and reviewed the plans and specifications for the PSB. Later, the parties agreed to a price of $9,000.00 less a $2,000.00 credit or a total subcontract price of $7,000.00. (Tr. 18, 30-31, 41-42,78-79,).

Cromer prepared a written subcontract dated November 10, 1989, and delivered a copy to Allen. (Tr. 30-31, 80-81, Plaintiff' Exhibit, hereinafter "PEx." 2). [A copy of PEx. 2 is attached hereto as Addendum B.] Allen and Leavitt did not execute the subcontract (Tr. 51, 85) but acknowledged that it represented the parties' agreement. (Defendant's exhibit, hereinafter "DEx.", 1, Tr. 30-31, 55). The obverse of the subcontract describes the work as "excavating per plans & specs". It then lists the section numbers of the project specifications relating to excavation. Under the headings "TERMS", it explains that invoices received by the 25th will be paid on the 25th of the following month.

The reverse of the subcontract contains thirty-two paragraphs incorporated into the parties' agreement. Pertinent terms include:

> No. 1. ACCEPTANCE-AGREEMENT: Seller's acknowledgement of receipt of this order or commencement of work on the goods and/or services subject to this purchase order is limited to acceptance of the express terms contained on the face and back hereof. Any proposal for additional or different terms or any attempt by seller to vary in any degree any of the terms of this offer in Seller's acceptance, is hereby objected to and rejected, ...

No. 5. DELIVERY: Time is of the essence of this contract and if delivery of items or rendering services is not completed by the time promised, Buyer reserves the right, without liability, in addition to its other rights and remedies, to terminate this contract, by notice effective when received by Seller, as to items not yet shipped or services not yet rendered, and to purchase substitute items or services elsewhere and charges Seller with any loss incurred.

No. 9. SETOFF: All claims for money due or to become due from Buyer shall be subject to deduction or setoff by the Buyer by reason of any counterclaim arising out of this or any other transaction with Seller.

No. 12. TERMINATION FOR CAUSE: Buyer may also terminate this order or any part thereof for cause in the event of any default by the Seller, or if the Seller fails to comply with any of the terms and conditions of this offer. Late deliveries, deliveries of products which are defective or which do not conform to this order, or failure to provide Buyer reasonable assurances of future performance, on request, shall each be a cause allowing Buyer to terminate this order for cause. In the event of termination for cause, Buyer shall not be liable to Seller for any amount, and Seller shall be liable to Buyer for any and all damages sustained by reason of the default which gave rise to the termination. . . .

No. 17. ENTIRE AGREEMENT - MODIFICATION: This purchase order, and any documents referred to on the face hereof, constitute the entire agreement between the parties regarding the subject matter hereof and supersedes all prior agreements, understandings, statements, etc., both written and oral, regarding such subject matter. No modification or change in, or departure from provisions of this order, shall be valid or binding on the Buyer unless approved by Buyer's authorized representative in writing.

No. 19. To assume toward the contractor, so far as the contract work is concerned, all the obligations and responsibilities which the contractor assumed toward the owner by the main contract which includes the general and special conditions thereof, and the plans and specifications and addenda, and all modifications thereof incorporated in the documents before their execution.

No. 20. To start work immediately, when notified by the contractor, and to complete the several portions and the whole of the work herein sublet, at such times as will enable to contractor to fully comply with the contract with the owner, ...

No. 21. To submit to the contractor applications for payment on contractor's standard forms of application at such reasonable times as to enable the contractor to apply for and obtain payment from the owner, and to receive payment from the contractor as the work progresses, but only after the contractor shall have received payment from the owner, unless otherwise noted payment will be 90% of work completed, final 10% retainage will be paid upon acceptance of work, but only after the contractor shall have received payment from the owner.

No. 28. To commence and at all times to carry on, perform and complete this subcontract to the full and complete satisfaction of the contractor, and of the architect or owner. It is specifically understood and agreed that in the event the contractor shall at any time be of the opinion that the subcontractor is not proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time, then and in that event the contractor shall have the right, after reasonable notice, to take over said work and to complete the same at the cost and expense of the subcontractor, without prejudice to the contractor's other rights or remedies for any loss or damage sustained.

2. EXCAVATION WORK AND ALLEN AND LEAVITT'S BREACH OF CONTRACT

While excavating for the foundation, Allen and Leavitt encountered sub-surface water at a higher level than anticipated. Since the water-table at the project site was higher than Farmington City's earlier testing revealed, Glendon negotiated a change order. Farmington City agreed to pay Glendon an additional Three Thousand Two Hundred Fifty Dollars ($3,250.00) from which Allen and Leavitt would receive an additional Two Thousand Dollars ($2,000.00) for helping remedy the ground water problem. The architect revised the plans and specifications to raise the foundation level one foot six inches. This change resulted in less excavation work for Allen and Leavitt, consequently, Farmington City reduced Glendon's contract by $500.00. (Tr. 10-11, 22-26, 92, 113-114, DEx. 3). The trial court properly accounted for this reduction in its final judgment.

Allen and Leavitt grubbed the project site and excavated for the foundation and footings. (Tr. 18-21, 51). Excavated top soil was stockpiled for landscaping as required by the plans and specifications. (Tr. 9, DEx. 4).

After the foundation and footings were poured, Glendon's Project Supervisor, Steve Lefler ("Lefler"), notified Allen and Leavitt to begin the backfill work. After receiving a tip from the architect, Lefler caught Allen and Leavitt backfilling with topsoil. He ordered them to remove the topsoil and use engineered structural fill as required by the plans and specifications. (Tr. 35, 37-38, 93-94, 114, DEx. 4).

Rather than comply with Lefler's order, Allen and Leavitt demanded payment of $6,000.00 from Glendon. (Tr. 53). Lefler questioned the amount of the demand and asked them to support it in writing. (Tr. 52, 54). Allen testified at trial that he and Leavitt performed their work in September and October of 1989, and submitted a written draw "right after that". (Tr. 49). Lefler testified that he did not receive a written draw from Allen and Leavitt until after completion of the project. (Tr. 120). Allen and Leavitt did not keep daily logs on this project because their contract was for a fixed sum. (DEx. 1) (See Plaintiffs' Answer to Glendon's Request for Production No. 5). The written draw they submitted was based on hours worked, not percentage of job completed. (Tr. 36-37, 54, PEx. 1). [A copy of the written draw is attached hereto as Addendum C.] When Glendon did not immediately pay the draw, Allen and Leavitt "walked off the job". (Tr. 29, 103).

Lefler was "really upset" that Allen and Leavitt pulled off the job. (Tr. 15). On January 10, 1990, he prepared and mailed a letter to Allen and Leavitt demanding performance and threatening to enforce paragraph 28 of the subcontract. (DEx. 5). [A copy of Lefler's letter is attached hereto as Addendum D.] Allen and Leavitt did not respond to the letter (Tr. 101) and never returned to the project. (Tr. 29, 103).

As threatened, Glendon solicited bids from other excavation contractors to complete the work. Farmington City also submitted a bid which was the lowest received.

(Tr. 104-105). Glendon hired Farmington City and its employees completed the excavation work at a cost of $6,800.00.

On January 16, 1990, Lefler executed a Change Order that reduced the prime contract by $6,800.00. (DEx. 6). Additionally, Cromer and Lefler spent 69 hours at $30.00 per hour or $2,070.00 soliciting a replacement for Allen and Leavitt. (Tr. 84, 110-11, DEx. 7). Glendon did not pay Allen and Leavitt because its damages exceeded the amount owed on the subcontract.

3. DISCOVERY AND TRIAL

During discovery, Allen and Leavitt provided Glendon a copy of a summary sheet they prepared to support their claim. The summary sheet contains the following language:

> Balance on Contract Unused $ 1,285.00
> To Pay Grading of Parking
> Lot & Buying & Filling
> Road Base.

(DEx. 1) [A copy of this summary sheet is attached hereto as Addendum E.]

Also during discovery, Allen and Leavitt sent Glendon a request for "documents you intend to introduce into evidence at the trial of this matter". Glendon answered, "defendant has not determined which documents it will use at trial, but will provide this information prior to trial". Allen and Leavitt did not ask Glendon to supplement its

answers to the Request for Production of Documents. The trial court neither required an exchange of exhibit lists nor issued an Order compelling discovery.

At trial, Judge Johnson said he was troubled by Glendon's failure to pay Allen and Leavitt's draw. (Tr. 130). He also said:

> [E]very contractor I've ever had to do painting or tile work around my home, they always want some money before they're finished, and I've always given it to them. . .. When I had my home built, along the way the contractor made regular draws so he could pay his subs. (Tr. 140).

Despite no supporting evidence in the record, Judge Johnson made the following assumption:

> [B]ut as to the material and the transporting of that huge amount of material to the work site, that's where the expense came from I'm thinking at this time, that's that near - the vast majority of that $6,800.00 that Farmington City required to transport the backfill they're using their trucks. I assume that was the problem . . .. (Tr. 136-137).

The trial court sustained plaintiffs' objection to admission of the prime contract as a sanction for Glendon's failure to produce a copy before trial. (Tr. 74-77).

At trial, Judge Johnson thought there was no contract between the parties. "It [sic] makes this court extremely uncomfortable is that it's so difficult here to put our hands - having a contract that we can put our hands on. We don't have that here. . ." (Tr. 135). He also said, ". . . I'm really troubled here because I don't feel like I can really put my hands on the real contract. . . ." (Tr. 141). Yet, the trial court's Finding of Fact No. 3

states that the parties entered into a contract and Conclusion of Law No. 1 states there is a contract between the parties.

The trial court's Finding of Fact No. 7, that "at the time of the draw, the Plaintiffs had performed services having an approximate value of $5,715.00", is inconsistent with Conclusion of Law No. 4, that "judgment should enter for the Plaintiffs in the sum of $7,215.00".

The trial court awarded Allen and Leavitt judgment against Glendon in the amount of $7,215.00, plus court costs of $104.25. The court denied Glendon's Motion to Amend Findings and Judgment or, in the alternative, for a new trial, without explanation.

V.

SUMMARY OF ARGUMENTS

A. The project plans and specifications were incorporated into the parties' subcontract. The specifications required the excavation contractor to provide all labor, materials and equipment necessary to excavate the project. The specifications also mandated the use of engineered structural backfill. The plain meaning of the words in the subcontract conveys the parties' intention that Allen and Leavitt supply the structural backfill for the project. Rather than go beyond the four corners of the contract, the trial court should have interpreted it as requiring Allen and Leavitt to supply structural

backfill. Since they did not, the court should have set off Glendon's damages under paragraph 9 of the subcontract.

B. Evidence supporting the trial court's findings came exclusively from Allen and Leavitt's trial testimony. Their testimony on the backfill issue was inconsistent. Significantly, the discussion of backfill between Cromer, and Allen and Leavitt occurred even before a bid was submitted. All preliminary negotiation between the parties was superseded by the subcontract.

Allen and Leavitt demanded a draw of $6,000.00 from Glendon. They justified the draw by claiming that most, or all, of the excavation work required by the subcontract had been completed. When Glendon did not immediately pay the draw, they walked off the job and never returned. Farmington City's low bid of $6,800.00 to complete the excavation work suggests that Allen and Leavitt's valuation of the completed work is inflated. Allen and Leavitt acknowledged that the written draw was incorrectly based on hours worked rather than percentage of job completed. The trial judge relied on these incorrect figures to support his findings. Furthermore, Glendon was not contractually obligated to immediately pay Allen and Leavitt's draw request.

For the foregoing reasons, the evidence presented by Allen and Leavitt at trial on the backfill and draw issues was insufficient to support the trial court's findings.

C. The trial court sustained Allen and Leavitt's objection to admission of the prime contract as a sanction for Glendon's failure to produce a copy before trial. The Utah Court of Appeals, however, has indicated that a necessary prerequisite to the imposition of a sanction is an order that brings the offender squarely within possible contempt of court. The trial court issued no such order in this case.

D. The trial judge was troubled by Glendon's failure to pay Allen and Leavitt's draw. He said:

> Every contractor I've ever had do painting or tile work around my home, they always want some money before they're finished, and I've always given it to them.. . . When I had my home built, along the way the contractor made regular draws so he could pay his subs.

The trial judge relied on his own knowledge and experience, rather than the evidence presented at trial, to reach his findings on the draw issue.

VI.

ARGUMENT

A. THE SUBCONTRACT BETWEEN ALLEN AND LEAVITT, AND GLENDON WAS NOT AMBIGUOUS

The trial court concluded that the subcontract between Allen and Leavitt, and Glendon was ambiguous as to whether Allen and Leavitt were to supply backfill material. Rejecting a set off, the court apparently believed Allen and Leavitt's testimony that they were not obligated to supply structural backfill (Tr. 21, 28, 32, 67, 121), and assumed

most of the $6,800.00 Glendon paid Farmington City was for supplying and transporting backfill (Tr. 136-137). The court's ruling, in effect, requires Glendon to pay twice for backfill and grading of the project.

'The cardinal rule [of contract interpretation] is to give effect to the intentions of the parties, and if possible, to glean those intentions from the contract itself.' ***Home Sav. and Loan v. Aetna Cas. and Sur.***, 817 P.2d 341, 366-367 (Utah App. 1991) (citations omitted) (dissenting opinion of Judge Bench).

> Where questions arise in the interpretation of an agreement, the first source of inquiry is within the document itself. It should be looked at in its entirety and in accordance with its purpose. All of its parts should be given effect insofar as that is possible.

Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1213, (Utah App. 1989) (quoting ***Big Cottonwood Tanner Ditch Co. v. Salt Lake City***, 740 P.2d 1357, 1359 (Utah App. 1987)). The trial court should have applied these basic rules of contract interpretation.

The wording on the obverse of the parties' subcontract obligated Allen and Leavitt to excavate the project in conformance with the plans and specifications. The subcontract lists the section numbers in the specifications (DEx. 4) relating to excavation of the project (PEx. 2). On the reverse of the subcontract, Paragraphs 17 and 19 incorporate the plans and specifications (PEx. 2).

Division 02, the site work section of the specifications, includes the subheadings, "02 221 Excavating", "02 222 Backfilling & Compacting", and "02 501 Pavement Sub-base". The instructions in these sub-sections mandate the use of specified structural backfill. These sub-sections also incorporate the General Conditions sections of the specifications. Under the "Definitions" subsection, "the work" is defined as "the work includes all labor necessary to produce the construction required by the contract documents and all materials and equipment incorporated or to be incorporated in such construction. (Emphasis added) (DEx. 4). [A copy of the relevant sections of the specifications is attached hereto as Addendum F.]

"Language in a written document is ambiguous if the words used may be understood to support two or more plausible meanings". ***Jarman v. Reagan Outdoor Advertising***, 749 P.2d 492, 494 (Utah App. 1990) (***Whitehouse v. Whitehouse***, 790 P.2d 57, 61-62 (Utah App. 1990)). The language of the Project specifications obligated Allen and Leavitt to perform the labor, and supply the materials and equipment necessary to excavate the project. Excavation included backfilling with structural fill. The specifications did not say Allen and Leavitt could use topsoil for backfill or avoid supplying structural fill. "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement". ***Winegar v. Froerer Corp.***, 813 P.2d 104, 108 (Utah 1991) *citing* ***Atlas Corp. v. Clovis Nat'l***

Bank, 737 P2.d 225, 229, (Utah 1987); ***Oberhansly v. Earle,*** *572 P.2d* 1384, 1386 (Utah 1977).

The plain meaning of the words in the subcontract conveys the parties' intention that Allen and Leavitt supply structural backfill for the project. Since they did not, the trial court should have set off Glendon's damages under Paragraph 9 of the subcontract.

> . . . [A] court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself.. . . 'It cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts.'

Ted R. Brown & Assoc. v. Carnes Corp., 753 P.2d 964, 970-71 (Utah App. 1988) (citations omitted).

B. THE TRIAL COURT ERRED IN DENYING GLENDON'S MOTION TO AMEND FINDINGS AND JUDGMENT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT THE FINDINGS.

1. THE BACKFILL ISSUE

Even if the subcontract was ambiguous, the extrinsic evidence at trial was still insufficient to support the trial court's findings on the backfill issue. [A copy of the Findings of Fact and Conclusions of Law is attached hereto as Addendum G.] Evidence

supporting the findings came exclusively from Allen's and Leavitt's trial testimony. But their testimony on the backfill issue was inconsistent.

Leavitt initially testified on direct examination that at his first meeting with Cromer he asked what Glendon was going to use for fill. (Tr. 21). Later, however, he said the issue of hauling dirt was "never mentioned" at the first meeting. (Tr. 28).

Allen testified on direct examination that in the initial meeting "Garth [Leavitt] asked Ted [Cromer] where they were going to get the material to haul in to finish filling it and Ted indicated that he would take care of that at a different point, at a different time." (Tr. 42). On redirect examination, Allen said his only discussion of backfill came in the initial meeting with Cromer. "Garth indicated that there would have to be backfill brought in. Ted said they would take care of it at a later date as I recall. It's been quite a long time". (Tr. 67). Leavitt testified as a rebuttal witness that he talked to both Cromer and Lefler about backfill. Apparently, his discussion with Lefler was sometime after his meeting with Cromer. Leavitt, however, never related the substance of the discussion. When asked if he talked to Cromer about backfill, Leavitt testified, "I don't know how much discussion. I just said, well, I don't know where you're going to get your backfill from but we certainly didn't include it in our agreement". (Tr. 121-122).

On cross-examination, Leavitt admitted that the initial meeting with Cromer occurred before he and Allen even submitted a bid on the project. (Tr. 30). Statements

made by Cromer at the initial meeting were preliminary negotiation, and were superseded by the parties' subcontract. (PEx. 2 Para. 17).

Lefler testified that the plans and specifications required the excavation contractor to backfill with structural fill, not top soil. (Tr. 93). He testified that Allen and Leavitt were required by the terms of the subcontract to supply the structural fill material. (Tr. 99, 100, 115). The summary sheet attached hereto as Addendum E shows that Allen and Leavitt understood they were to buy road base as part of the backfill work identified in the plans and specifications. (DEx. 1, 4).

2. THE DRAW ISSUE

The trial court found that:

> 6. The Plaintiffs requested a draw and the Defendant neglected, refused or failed to pay that draw in the sum of $6,000.00.
>
> 7. At the time of the draw, the Plaintiffs had performed services having an approximate value of $5,715.00.
>
> 8. The relationship between the parties broke down at that time because the Plaintiffs had not been paid for services rendered and they refused to continue performance without payment or reasonable assurance of payment.

Allen and Leavitt demanded payment of $6,000.00 from Glendon. (Tr. 53). Lefler questioned the amount and asked them to support it in writing. (Tr. 54). Allen

said he submitted PEx. 1 "right after that". When Glendon did not immediately pay the draw, Allen and Leavitt walked off the job. (Tr. 29, 103).

During trial, Allen and Leavitt tried to create the impression that most, or all, of the excavation work required by the subcontract had been completed by the time they walked off the job. Leavitt said that they completed everything he understood the subcontract required. (Tr. 29). He denied that the subcontract required them to provide backfill. (Tr. 121). Allen, however, admitted they were still obligated to haul 256 tons of road base and grade the parking lot. (Tr. 53). He claimed the remaining work could not be completed until Spring so he demanded payment for work completed to date. (Tr. 66). Unlike Leavitt, Allen admitted an obligation to backfill, but only with existing material excavated on the construction site, not with imported structural fill. (Tr. 66-67).

Allen and Leavitt's written draw values the remaining work under the contract at $1,285.00. (PEx. 1). However, Farmington City's low bid of $6,800.00 to complete the excavation work suggests Allen and Leavitt's valuation of work completed is inflated. The written draw was based on hours worked multiplied by an hourly rate for the type of machinery used. (Tr. 36, 122, PEx. 1). Yet, Allen and Leavitt admitted their subcontract with Glendon was for a fixed sum. They also acknowledged that calculating the percentage of job completed would have been the proper method of determining the

draw. (Tr. 37, 54). Thus by Allen and Leavitt's own admissions, the method used to arrive at the figures supporting the trial court's findings are in error.

Paragraph 21 of the parties' subcontract required Allen and Leavitt to submit draws on standard forms and wait for payment until Glendon received payment from Farmington City. (DEx. 2). Allen and Leavitt's draw was not on a standard application form (PEx. 1). Furthermore, to ensure payment to subcontractors, Farmington City prepared separate checks payable to individual subcontractors, and delivered them to Glendon for disbursement. (Tr. 86, 118).

Glendon's policy was to pay a draw submitted by the 25th of the month on the 25th of the following month. (TR. 118-119). This policy is reflected on the obverse of the parties' subcontract under the headings "Terms". Consequently, Glendon was not obligated to immediately pay a draw request. Glendon did not receive Allen and Leavitt's written draw by November 25, 1989, therefore, it was not payable before Lefler sent his demand letter of January 10, 1990 and hired Farmington City. (Tr. 120, DEx. 5).

C. THE PRIME CONTRACT BETWEEN GLENDON AND FARMINGTON CITY SHOULD HAVE BEEN ADMITTED INTO EVIDENCE.

The trial court sustained Allen and Leavitt's objection to admission of the prime contract as a sanction for Glendon's failure to produce a copy before trial. (Tr. 74-77). Glendon stored the prime contract in an attic box and it was not discovered until a day

or two before trial. Allen and Leavitt's attorney received a copy at trial. The court took a five-minute recess to allow him to review the prime contract. (Tr. 75-77).

Barrett v. Denver & Rio Grande W.R., 830 P.2d 291 (Utah App. 1992), involved an action by former residents of Thistle, Utah against a railroad they allege caused a landslide that destroyed their town. Trial was set for August 14, 1989. Defendant complained at the June 27, 1989 pre-trial hearing that Plaintiffs had not responded to an interrogatory requesting a final witness list. The trial court warned Plaintiffs but did not set a deadline for final disclosure of witnesses. On Defendant's recommendation, the trial court instructed the parties to submit a scheduling order and pre-trial order within ten days. Neither order was ever submitted.

By letter dated July 12, 1989, Defendant's counsel requested Plaintiffs' final witness list no later than August 1st. Plaintiffs complied. The list included seven potential witnesses named for the first time. On August 3, 1989, Defendant moved to exclude the new witnesses. The trial court excluded all witnesses not disclosed on or before July 11, 1989 (the pretrial order due date). At trial, the jury rendered a special verdict in favor of Defendant. On appeal, Plaintiffs argued that the trial court abused its discretion in excluding one of Plaintiffs' potential witnesses.

> Plaintiffs contend[ed] that inasmuch as there was no court order mandating disclosure by a certain date, they acted reasonably in relying on representations from Defendant that August 1, 1989, was an acceptable date for submitting the final

> witness list. In particular, Plaintiffs' [relied] upon the July 12th letter referring to August 1st as the date Defendant expected Plaintiffs' final witness list. . . .
>
> Defendant, on the other hand, contend[ed] that despite any representations it may have made, Plaintiffs were bound by a deadline set by the trial court. . . . According to Defendant, the trial court set a deadline for the disclosure of witnesses when it indicated at the June 27th hearing that a pre-trial order was to be prepared within ten days.

Id. at 294.

The Court of Appeals noted that "[a]s has been recognized by other states, the necessary pre-requisite to the imposition of a sanction is an order that 'brings the offender squarely within possible contempt of court.' *Id.* (citations omitted). The court said:

> Contrary to Defendant's assertion and the trial court's belief, a review of the record reveals that the trial court did not set a deadline for witness disclosure at the June 27th hearing. While the disclosure of witnesses was discussed at the hearing, no motion was before the trial court and no order was made establishing a deadline.

Id. at 294-95. The court held that the trial court abused its discretion, then considered whether the error was prejudicial. The court followed the reasoning of the Supreme Court in ***Joseph v. W. H. Groves Latter-Day Saints Hosp.***, 7 Utah 2d 39, 318 P.2d 330, 334 (1957).

> Some indication of the importance of the error with which we are here concerned is to be found in the fact that counsel

> thought the matter of sufficient consequence that he objected to [the admission of the evidence]. It strikes the writer as being somewhat inconsistent that counsel now urges that depriving Plaintiff of the use of such evidence was merely harmless error. If it is so plain that it would not have helped Plaintiffs' case, one is led to wonder why counsel made the objection and insisted that it not be used. The obvious answer seems to be that Defendant's counsel was actually apprehensive that it may have a substantial affect against his client. Of course, he could not be sure, nor can we.
>
> In view of the fact that there is such substantial doubt that we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the Plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.

Id. at Page 297.

In the instant case, there was no pre-trial order or scheduling order that required an exchange of exhibit lists. There was no motion for an order compelling discovery under Rule 37, Utah Rules of Civil Procedure, and no order compelling discovery. Rule 26(e), Utah Rules of Civil Procedure, requires supplementation of responses in only a few circumstances, none of which apply here. Allen and Leavitt did not request supplementation of prior responses.

Exclusion of the prime contract was prejudicial to Glendon because Paragraph 19 of the subcontract required Allen and Leavitt:

> [t]o assume toward the contractor, so far as the contract work is concerned, all the obligations and responsibilities which the contractor assumed toward the owner by the main contract

> which includes the general and special conditions thereof, and the plans and specifications and addenda, and all modifications thereof incorporated in the documents before their execution.

(PEx. 2). Also, there was conflicting testimony at trial about the starting date of the project. (Tr. 43, 80-81). The prime contract could have been used to pinpoint the starting date. Since the prime contract is wholly incorporated into the subcontract, its provisions could affect key issues in this case such as backfill and draw requests. Any doubt about the usefulness of the prime contract should be resolved in favor of allowing Glendon to have full and fair presentation of its case.

D. THE TRIAL JUDGE ERRED BY BASING HIS DECISION ON FACTS NOT IN EVIDENCE

The trial judge was troubled by Glendon's failure to pay Allen and Leavitt's draw. (TR. 130). Relying on his own experience, the trial judge said:

> Every contractor I've ever had to do painting or tile work around my home, they always want some money before they're finished, and I've always given it to them . . .. When I had my home built, along the way the contractor made regular draws so he could pay his subs. (Tr. 140).

He also assumed, without supporting evidence, that most of the $6,800.00 Glendon paid Farmington City was for transport of structural fill. (Tr. 136-137).

In ***Salt Lake City v. United Park City Mines Company***, 28 Utah 2d 409, 503 P.2d 850 (1972), the trial judge, as fact finder, used a book not in evidence and a computer at the University of Utah operated by his son to make calculations. The trial court's calculations

differed from those reached by two acknowledged experts who testified at trial. The trial judge used his own calculations in deciding against the party for whom the expert witnesses had testified. The Utah Supreme Court reversed and remanded for a new trial. The court said:

> In deciding a case tried without the aid of a jury, the court has great leeway in deciding what are the facts as presented by the evidence before him. However, neither a judge nor a jury is permitted to go outside the evidence to make a finding.

Id. at Page 852.

> The purpose of a trial of the issues is to have the facts determined impartially and fairly by a court or jury. Jurors as well as judges must base their verdicts or decisions on the evidence presented during the trial, not on the basis of some independent personal investigation or determination of the facts outside of court.

Provo River Water Users' Ass'n v. Carlson, 133 P.2d 777, 782 (Utah 1943). (citations omitted).

In ***O'Sullivan v. Scott***, 25 Wash. App. 430, 607 P.2d 1246 (1980), the trial court held defendant land owners in contempt based on his view of the premises and personal determination that they had failed to comply with a prior order to remove certain obstructions. The trial judge relied on his own view of the premises rather than an affidavit filed by the defendants. They objected. Since the trial court's viewing of the property was outside the evidence, and the record contained no evidence to dispute the

defendants' affidavit, the Appellate Court held that the trial court abused its discretion. The Appellate Court quoted the Washington Supreme Court for the rule that:

> [t]he trial court may view the premises for the purpose of clarifying and harmonizing testimony. In other words, the view of the premises is said to aid in the understanding of the evidence introduced in the case. . . .
>
> In this jurisdiction, the trial judge cannot view the premises for the purpose of proving some res gestae fact not in evidence, nor may he view the premises for the purpose of searching for extrinsic evidence to be applied in corroborating or discrediting the testimony of a witness. If he does so, and his judgment is based thereon, it is reversible error.

Id. at Page 1247. (*quoting* ***Christensen v. Gensman***, 53 Wash. 2.d 313, 318, 333 P.2d 658, 662 (1958).

In the instant case, the trial judge relied on his own knowledge and experience, rather than the evidence presented at trial, to reach his findings on the draw issue.

VII.

CONCLUSION

Glendon respectfully requests this court to reverse the judgment and remand the case to the trial court with instructions to set off Glendon's damages against Allen and Leavitt's claim.

In the alternative, Glendon respectfully requests the court to reverse and remand for a new trial.

DATED this _____ day of November, 1993.

Ronald E. Griffin
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of December, 1993, I caused to be mailed two true and correct copies of the attached and foregoing BRIEF OF APPELLANT by United States Mail, postage prepaid, to the following:

James T. Dunn, Esq.
ANDERSON & DUNN
2089 East 7000 South, Suite 200
Salt Lake City, UT 84121

ADDENDUM INDEX

A. Rule 26(e), Utah Rules of Civil Procedure.

B. Plaintiffs' Exhibit 2, Subcontract between Glendon, and Allen and Leavitt.

C. Plaintiffs' Exhibit 1, Plaintiffs' Written Draw.

D. Defendant's Exhibit 5, Steve Lefler's Demand Letter of January 10, 1990.

E. Defendant's Exhibit 1, Allen and Leavitt's Summary Sheet.

F. Defendant's Exhibit 4, Relevant Portions of the Project Specifications.

G. Findings of Fact and Conclusions of Law dated September 15, 1992.

ADDENDUM A

(e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

ADDENDUM B

PURCHASE ORDER

Glendon Corporation
450 East 1000 North, Third Floor
North Salt Lake City, Utah 84054
(801) 295-7700 Fax 298-0895

DATE	NUMBER	CHANGE #	PAGE
11/10/95	№ 005661		___ of ___

SUPPLIER: Bob Allen Excavating,

SHIP TO: Farmington P.S Building
82 N 100 E.
Farmington

OUR P O NUMBER MUST APPEAR ON ALL INVOICES, PACK SLIPS, PACKAGES, AND ALL RELATED CORRESPONDENCE

SALESPERSON Bob Allen

VENDOR INVOICE # _____

VENDOR NO	TERMS	F O B	# OF DAYS TO COMPLETE WORK	CONFIRMING	INSTALLED	TAX INCLUDED	LIEN WAIVER REQ
(A.E.)	INV. By 25TH	☑ SHIP POINT ☐ DEST (OTHER)		☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO

BUYER'S NAME	JOB NO	JOB NAME	REQUISITION NO
TED	8933	FPSB	

ITEM #	QTY.	UNIT	DESCRIPTION OF WORK	UNIT PRICE	IMPORTANT SUB TOTAL	SUPPLIER DELIVERY DATE QUANTITY	MO	DAY	YR	ACCOUNTING CODE	CAT	SUB CAT
			Excavating per Plans & Specs									
			Spec # 02 100 Grubbing / Hole Plugging / Loading									
			02 200 Backfill / Parking, Islands,									
			02 501									
			02 513		7000.00							
			City Credit Less		2000.00							
				TOTAL	7000.00					01222		5
				TAX								
				TOTAL								

PLAINTIFF'S EXHIBIT
EXHIBIT NO. P2
CASE NO.
DATE REC'D IN EVIDENCE 9-1-95
CLERK

TERMS

1 Discounted invoiced rec'd the 15 through end of month, will be paid the 10th of following month if taken
2 Net invoices will be paid on 25th of following month
3 Any quantity variation must have prior approval
4 This order is subject to terms and conditions as printed on reverse side

IMPORTANT

In order to maintain effective control of our procurement requirements you are instructed to accept only those changes additions and deletions issued to you by the designated buyer No other will be valid

No other personnel may place orders make commitments or carry on negotiations All contract will be made through the buyer including those relating to engineering instructions No redirection will be valid without written instructions from the designated buyer

P O TOTAL VALUE

TAXABLE ☐ YES ☐ NO

AUTHORIZING PURCHASING REPRESENTATIVE

1 **ACCEPTANCE-AGREEMENT** Seller s acknowledgement of receipt of this order or commencement of work on the goods and/or services subject to this purchase order is limited to acceptance of the express terms contained on the face and back hereof Any proposal for additional or different terms or any attempt by Seller to vary in any degree any of the terms of this offer in Seller s acceptance is hereby objected to and rejected, but such proposals shall not operate as a rejection of this offer unless such variances are in the terms of the description quantity price or delivery schedule of the goods, but shall be deemed an acceptance of the prior offer by Seller such acceptance is limited to the express terms contained on the face and on the back hereof Additional or different terms or any attempt by Seller to vary in any degree any of the terms of this purchase order shall be deemed material and are objected to and rejected by this purchase order shall not operate as a Seller s offer unless it contains variances in the terms of the description quantity price or delivery schedule of the goods

2. **PRICE WARRANTY** Seller warrants that the prices for the articles sold Buyer hereunder are not less favorable than those currently extended to any other customer for the same or similar articles in similar quantities. In the event Seller reduces its price for such article during the term of this order Seller agrees to reduce the prices hereof correspondingly Seller warrants that prices shown on this purchase order shall be complete and no additional charges of any type including but not limited to shipping packaging labeling custom duties, taxes storage, insurance boxing and crating shall be added without Buyer s express written consent

3. **INVOICES/DISCOUNTS** Time in connection with payment of invoices and obtain ng any discount offered will be computed from (a) the scheduled delivery date and (b) the date of actual delivery or (c) the date an acceptable invoice is received whichever is later For the purposes of earning a discount, payment is deemed to be made on the date of mailing the Buyer s check

4 **PACKING AND LABELING** Items shall be packed and labeled (at no additional charge) in accordance with good commercial practice and all applicable federal state and local laws regulations and orders (a) to insure against personal injury or harm and against damage from weather handling and transportation and (b) to permit efficient handling and secure lowest transportation charges All damages resulting from improper packaging of items or otherwise shall be paid by Seller

5. **DELIVERY** Time is of the essence of this contract and if delivery of items or rendering services is not completed by the time promised Buyer reserves the right without liability in addition to its other rights and remedies, to terminate this contract, by notice effective when received by Seller as to items not yet shipped or services not yet rendered and to purchase substitute items or services elsewhere and charges Seller with any loss incurred

6. **SHIPMENT** If in order to comply with Buyer s required delivery date it becomes necessary for Seller to ship by a more expensive way than specified in this purchase order any increased transportation costs resulting therefrom shall be paid for by seller unless the necessity for such rerouting or expedited handling has been caused by Buyer

7 **CHANGES** Buyer shall have the right at any time to make changes in drawings, designs specifications, materials quantities, packaging time and place of delivery and method of transportation If any such changes cause an increase or decrease in the cost or the time required for the performance a mutually agreeable equitable adjustment shall be made and this agreement shall be modified in writing accordingly Seller agrees to accept any such changes subject to this paragraph and proceed without delay to perform the order as changed. Unless Seller presents to the Buyer an itemized claim within thirty (30) days after the receipt of notice of such change, the Seller shall be conclusively deemed to have claims against the Buyer with respect thereto

8 **WARRANTY** Seller expressly warrants that all goods or services furnished under this agreement shall conform to all specifications and appropriate standards will be new and will be free from defects in material workmanship and design Seller warrants that all such goods or services will conform to any statements made on the containers or labels or advertisements for such goods or services and that any goods will be adequately contained packaged marked and labeled Seller warrants that all goods or services furnished hereunder will be merchantable and will be safe and appropriate for the purpose for which goods or services of that kind are normally used If Seller knows or has reason to know the particular purpose for which Buyer intends to use the goods or services Se ler warrants that goods or services furnished will conform in all respects to samples inspection tests acceptance or use of the goods or services furnished hereunder shall not affect the Seller s obligation under this warranty and such warranties shall survive inspection tests, acceptance and use Seller s warranty shall run to Buyer its successors assigns and customers, and users of products sold by Buyer Seller agrees to replace or correct defects of or issue a refund for at Buyer s option any goods or services not conforming to the foregoing warranty promptly without expense to Buyer when notified of such nonconformity by Buyer provided Buyer elects to provide Seller with the opportunity to do so in the event of failure of Seller to correct defects in or replace nonconforming goods or services promptly Buyer after reasonable notice to Seller may make such corrections or replace such goods and services and charge Seller for the costs incurred by Buyer in doing so

9. **SETOFF** All claims for money due or to become due from Buyer shall be subject to deduction or setoff by the Buyer by reason of any counterclaim arising out of this or any other transaction with Seller

10. **ASSIGNMENTS AND SUBCONTRACTING** No part of this order may be assigned or subcontracted without the prior written approval of Buyer

11 **TERMINATION FOR CONVENIENCE OF BUYER** Buyer reserves the right to terminate this order or any part hereof for its sole convenience in the event of such termination Seller shall immediately stop all work hereunder and shall immediately cause any of its suppliers or subcontractors to cease such work Seller shall be paid a reasonable termination charge which shall not exceed an amount consisting of a percentage of the order price reflecting the percentage of the work performed prior to the notice of termination plus actual direct costs resulting from termination Seller shall not be paid for any work done after receipt of the notice of termination nor for any costs incurred by Seller s suppliers or subcontractors which Seller could reasonably have avoided Seller agrees that the basis for assessing a termination charge if any in such instances shall be no less favorable to Buyer than that which Seller has used in assessing and collecting similar charges from any other customer

12. **TERMINATION FOR CAUSE.** Buyer may also terminate this order or any part thereof for cause in the event of any default by the Seller or if the Seller fails to comply with any of the terms and conditions of this offer Late deliveries, deliveries of products which are defective or which do not conform to this order or failure to provide Buyer reasonable assurances of future performance on request, shall each be a cause allowing Buyer to terminate this order for cause In the event of termination for cause Buyer shall not be liable to Seller for any amount, and Seller shall be liable to Buyer for any and all damages sustained by reason of the default which gave rise to the termination In the event Seller shall become insolvent or makes a general assignment for the benefit of creditors or files or has filed against it a petition in bankruptcy or for reorganization or pursues any other remedy under any law relating to the relief of debtors or in the event a receiver be appointed of Seller s property or business, or in the event a substantial or controlling interest in Seller's property or business or in the event a substantial or controlling interest in Seller is acquired by a party having interests that may be adverse to Buyer's, Buyer may at it option cancel this order in accordance with this clause.

13. **INSURANCE.** In the event that this order requires or contemplates performance of services by Seller's employees, or persons under contract to Seller to be done on Buyer s property or property of Buyer's customers, the Seller agrees that all such work shall be done as an independent contractor and that the persons doing such work shall not be considered employees of the Buyer Seller shall maintain all necessary insurance coverages including public liability and Workers Compensation Insurance Seller shall indemnify and save harmless and defend Buyer from any and all claims or liabilities arising out of the work covered by this paragraph

14 **LIMITATION ON BUYERS LIABILITY-STATUTE OF LIMITATIONS** In no event shall Buyer be liable for anticipated profits or for incidental or consequential damages. Buyer s liability on any claim of any kind for any loss or damage arising out of or in connection with or resulting from this agreement or from the performance or breach thereof shall in no case exceed the price allowable to the goods or services or unit thereof which gives rise to the claim Buyer shall not be liable for penalties of any kind Any action resulting from any breach on the part of Buyer as to the goods or services delivered hereunder must be commenced within one (1) year after the cause of action has occured

15. **APPLICABLE LAW** The terms of this purchase order and any resulting contract shall be governed by the laws of the state from which this purchase order is issued

16. **COMPLIANCE WITH LAWS.** Seller warrants and represents that (a) all services and goods supplied hereunder will have been performed designed, produced packaged shipped and sold in compliance with and Seller agrees to be bound by all applicable federal state and local laws, orders rules and regulations including, but not limited to OSHA, the Toxic Substance Control Act and the Fair Labor Standards Act as applicable, and (b) Seller will comply unless exempt, with the provisions of Executive Order 11246 (as amended) of the President of the United States on Equal Employment Opportunity and the rules and regulations issued pursuant thereto which are hereby incorporated by reference in this purchase order Seller agrees to indemnify defend and hold harmless Buyer and its customers from any liability loss, or damage arising out of Seller's failure to comply as set out herein.

17 **ENTIRE AGREEMENT-MODIFICATION** This purchase order and any documents referred to on the face hereof constitute the entire agreement between the parties regarding the subject matter hereof and supersedes all prior agreements understandings statements etc both written and oral regarding such subject matter No modification or change in or departure from provisions of this order shall be valid or binding on the Buyer unless approved by Buyer's authorized representative in writing

18. That these supplementary conditions for Subcontracts are in addition to all other conditions

19 To assume toward the Contractor so far as the contract work is concerned all the obligations and responsibilities which the Contractor assumed toward the Owner by the main contract which includes the general and special conditions thereof and the plans and specifications and addenda, and all modifications thereof incorporated in the documents before their execution

20 To start work immediately when notified by the Contractor and to complete the several portions and the whole of the work herein sublet, at such times as will enable the Contractor to fully comply with the contract with the Owner and to be bound by any provisions in the main contract with the Owner for liquidated damages, if caused by the Subcontractor

21 To submit to the contractor applications for payment on Contractor standard forms of application at such reasonable times as to enable the Contractor to apply for and obtain payment from the Owner and to receive payment from the Contractor as the work progresses but only after the Contractor shall have received payement from the Owner unless otherwise noted payment will be 90% of work completed final 10% retainage will be paid upon acceptance of work but only after the Contractor shall have received payment from the Owner

22 To make no claims for extras unless the same shall be fully agreed upon in writing by the Contractor prior to the performance of any such extra work, nor shall any extra work be allowed or paid for in any event, unless the same is first allowed and paid for by the Owner to the Contractor

23 That he has the status of an Employer as defined by the Unemployment Compensation Act of the State, and all similar acts of the National Government, and including all Social Security Acts, that he will withhold from his payrolls the necessary Social Security and Unemployment Reserves and pay the same that the Contractor shall in no way be liable as an Employer to or on account of any of the employees of the Subcontractor that the Subcontractor will as an Employer to the extent of any of his employees under this contract conform to all rules and regulations of Social Security Acts and Unemployment Commissions created by said laws, and that he will furnish satisfactory evidence to the Commissions created by said laws and that he will furnish satisfactory evidence to the Contractor that he is conforming to said laws rules and regulations The Subcontractor hereby releases and indemnifies the Contractor from any and all liability under said laws.

24 That the Subcontractor will pay any and all federal state and municipal taxes and licenses, including sales taxes if any for which the Subcontractor may be liable in connection with the labor and materials herein, or in carrying out the Subcontract, prior to final payment being made to him

25 To provide and maintain Workmen s Compensation Insurance and to comply in all respects with the employment and payment of labor required by any constituted authority having legal jurisdiction over the area in which the work is performed

The Subcontractor shall maintain such third party public liability and property damage insurance including general products and automobile liability as will protect it from claims for damages because of bodily injury including death or damages because of injury to or loss destruction or loss of use of property which may arise from operations under this agreement, whether such operations be by it or its Subcontractors or anyone directly or indirectly employed by either of them Limits for third party public liability including general products and automobile insurance shall afford not less than $250 000 00 each person and $500 000 00 each occurrence as respects bodily injury and not less than $100 000 00 each occurrence and $250 000 00 aggregate as respects property damage If the prime contract requires higher limits than those listed above then such equ rements shall govern and the higher limits shall be provided The Subcontractor agrees to furnish a completed certificate of insurance within 10 days of signing said purchase order All insurance required hereunder shall be maintained in full force and effect in a company or companies satisfactory to Contractor shall be maintained at Subcontractor's expense until performance in full hereof (certificate of such insurance being supplied by Subcontractor to Contractor) and such insurance shall be subject to requirement that Contractor must be notified by ten (10) days written notice before cancellation of any such policy In event of threatened cancellation for nonpayment of premium Contractor may pay same for Subcontractor and deduct the said payment from amounts then or subsquently owing to Subcontractor hereunder

26. That all materials delivered by or on account of the Subcontractor and intended to be incorporated into the construction hereunder shall become the property of the owner as delivered but the Subcontractor may re-posses himself of any surplus remaining at the completion of his contract. That all scaffolding, apparatus, ways, works, machinery and plans brought upon the premises by the Subcontractor shall remain his property but in case of default, and the completion of the work by the Contractor the latter shall be entitled to use the said scaffolding apparatus, ways works, machinery and plant without cost, or liability for depreciation or damage by use and without prejudice to Contractor's other rights or remedies for any damage or loss sustained by reason of said default.

27 To immediately after receiving written notice from the Contractor proceed to remove or take down from the grounds or buildings all materials condemned by the Contractor proceed to remove or take down from the Contractor whether worked or not, as unsound or improper or as in any way failing to conform to the main contract, including the general or special conditions drawings, specifications, or addenda. Failure of the Contractor to immediately condemn any work or materials as installed shall not in any way waive the Contractor s right to object thereto any subsequent time

28. To commence and at all times to carry on perform and complete this Subcontract to the full and complete satisfaction of the Contractor and of the Architect or owner It is specifically understood and agreed that in the event the Contractor shall at any time be of the opinion that the Subcontractor is not proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time then and in that event the Contractor shall have the right, after reasonable notice to take over said work and to complete the same at the cost and expense of the Subcontractor without prejudice to the Contractor s other rights or remedies for any loss or damage sustained

29 Upon completion of any unit of the work, and upon final completion thereof to clean up all refuse and rubbish around or alongside the same caused by the Subcontractor and to promptly remove all excess material tools structures, etc which may have been brought on the premises or erected by the Subcontractor and in the event of the failure of the Subcontractor to do so the Contractor may so clean up the premises at the cost and expense of the Subcontractor The Subcontractor shall be responsible for his own work, property and/or materials until completion and final acceptance of the contract by the Owner and shall bear the risk of any loss or damage until such acceptance In the event of loss or damage until such acceptance in the event of loss or damage he shall proceed promptly to make repairs or replacement of the damaged work property and/or materials at his own expense as directed by the Contractor Subcontractor waives all rights Subcontractor might have against Owner and Contractor for loss or damage to Subcontractor s work, property or materials.

30 The Subcontractor shall have a direct liability for the acts of his employees and agents for which he is legally responsible and the Subcontractor shall not be required to assume the liability for the acts of any others.

31 To guarantee his work against all defects of materials and/or workmanship as called for in plans specifications and addenda, or if no guarantee is called for then for a period of one (1) year from the date of partial or total acceptance of the Subcontractor s work by the Owner

32. And does hereby agree that all work shall be done subject to the final approval of the Architect or Owner's authorized agent, and his decision in matters relating to artistic affect shall be final if within the terms of the contract doucments.

ADDENDUM C

451-2624

Grub Lot

Dratt	20 hrs	1500
Dump	20	600
580	16 hrs	720
		2820

Excavate Hours

Dratt	24 hrs	1800
Dump	16 hrs.	480
Dic Footings	5 hrs	375.00
Truck Hauling Gravel / Rock		240.00
		5715.00

Work on contract yet to be done
Grade parking lot haul 256 ton
Road base - Bal 1285.00
Total Contract 9000.00
less City Credit 2000.00
Bal 7000.00

Extra. To place Rock. Drain line
Mafie Paper #2000.00

#7715

ADDENDUM D

Glendon Corporation

January 10, 1990

Bob Allen
11265 South 1300 West
South Jordan, Utah

Dear Bob,

Pursuant to our meeting yesterday, it is unfortunate that we cannot agree on the work to de done on the Farmington City Public Safety building. We have a contract with Farmington City to complete the job according to the plans and specifications. You, having started the job, are required to complete the job in accordance with the plans and specifications and the subcontract documents.

You are hereby given notice to proceed, as time is of the essence. Failure to do so will force us to execute Article 28 of your subcontract, a copy of which is enclosed.

Sincerely,

Steve Lefler
Vice President

SL/psd

enclosure

ADDENDUM E

Regular Contract

Repaired for City work
done by City Personnel

Extra work for
Cable, rock + drain pipe.
OK by Ted + Steve. for
Glenwood Coop

Bar on Contract unbid
for pay grading & parking
lot & buying & filling
road bed.

ADDENDUM F

GENERAL CONDITIONS

SECTION 1. DEFINITIONS:

1. OWNER - Farmington City Corporation

2. AUTHORIZED REPRESENTATIVE OF THE OWNER - Max Forbush City Manager of The City of Farmington.

3. ARCHITECT - The Architect is the person or organization, a licensed Architect or Engineer, so designated in the Agreement, hereinafter referred to as "Architect".

4. CONTRACTOR - The Contractor is the person or organization identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term "Contractor" means General Contractor or his authorized representative.

5. SUBCONTRACTOR - The person, firm, or corporation supplying direct or indirect labor and/or materials at the site of the Project and under separate contract or agreement with the Contractor.

6. THE WORK - The Work includes all labor necessary to produce the construction required by the Contract Documents and all materials and equipment incorporated or to be incorporated in such construction.

7. THE PROJECT - The Project is the total construction designed by the Architect of which the Work performed under the Contract Documents may be the whole or a part.

8. WRITTEN NOTICE - Written Notice shall be deemed to have been duly served if delivered in person to the individual or member of the firm or to an officer of the Corporation for whom it was intended or, if delivered at or sent through the United States Mail, to the last business address known to him who gives the notice.

SECTION 2. THE CONTRACT DOCUMENTS:

1. The Contract Documents consist of the Agreement, the Conditions of the Contract (General, Supplementary, and other Conditions), the Drawings, the Specifications, all Addenda issued prior to execution of the Contract, and all Modifications thereto. A Modification may be made only after execution of the Contract. A Modification is:
   a. A written amendment to the Contract signed by both parties,
   b. A Change Order,
   c. A written interpretation issued by the Architect pursuant to Section 4, or
   d. A written order for a minor change in the Work issued by the Architect pursuant to Section 21.

2. The Contract - The Contract Documents form the Contract. The Contract represents the entire and integrated agreement

D I V I S I O N 0 2 S I T E W O R K

02 011 SOILS REPORTS

GENERAL - PART I

1.1 Summary:

A. Section Includes But Not Limited To -
   1. Availability of soils investigation data.
B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.

1.2. System Description:

A. Owner has secured the services of a soils engineer to aid in design of the structure. Following conditions apply -
   1. A soils investigation report has been prepared by Sergent Hauskins & Beckwith/Doug Beck referred to as the Soils Engineer.
   2. Copy of this report may be inspected at office of Architect, his design engineer, or Owner.
   3. This report was obtained only for use in design by Architect and is not a part of the Contract Documents.
   4. Report and log of borings are available for Contractor's information but are not a warranty of subsurface conditions.

1.3. Project/Site Conditions:

A. Visit site and become acquainted with site conditions.
B. Prior to bidding, Contractor may make his own subsurface investigations to satisfy himself with site and subsurface conditions.

02 117 GRUBBING

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
   1. Excavation and disposal of stumps, roots, and root bulbs, buried debris and removal of topsoil, non-engineered fill from all areas to be structurally loaded in addition the existing non-engineered fill must be removed from all foundation and floor slab areas.
B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.

EXECUTION - PART III

3.1. Examination:

A. Examine site to determine type of problems to be encountered.

3.2. Preparation:

A. Protection -
1. Trees -
a. Protect tops, trunks, and roots of existing trees on site which are intended to remain. Do not use heavy equipment within branch spread. Interfering branches may be removed only with permission of Architect.
2. Other Plants -
a. Protect other plants and features which are to remain.
3. When existing grade around plants is lower than new finish grade, perform regrading by hand.
4. Do not expose or damage shrub or tree roots.

3.3. Performance:

A. Grub out stumps and roots to not less than 12 inches below original ground surface, or additional as needed to remove entire root bulb.

3.4. Cleaning:

A. Dispose of cleared and grubbed material off site.

02 118 STRIPPING VEGETATIVE LAYER & TOPSOIL

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
1. Stripping existing vegetation layers.
2. Stripping and storing topsoil.
B. Related Sections -
1. General Conditions and Division 01 apply to this Section.

EXECUTION - PART III

3.1. Examination:

A. Examine site to determine type of problems to be encountered.

3.2. Preparation:

A. Protection -
1. Trees -

a. Protect tops, trunks, and roots of existing trees on site which are intended to remain. Do not use heavy equipment within branch spread. Interfering branches may be removed only with permission of Architect.

2. Other Plants -
   a. Protect shrubs, plants and other features which are to remain.
3. When existing grade around plants is lower than new finish grade, perform regrading by hand.

3.3. **Performance:**

A. Strip existing vegetation layer.
B. Carefully strip topsoil and store off site nearby for later use.

02 205 TOPSOIL

GENERAL - PART I

1.1. **Summary:**

A. Includes But Not Limited To -
1. Conditions governing use of existing topsoil.

B. Related Sections -
1. General Conditions and Division 01 apply to this Section.
2. Section 02 118 - Stripping
3. Section 02 212 - Finish Grading
4. Section 02 921 - Soil Preparation & Soil Mixes

1.2. **Systems Description:**

A. Definition -
1. Existing topsoil is defined as 6 inches to be stripped as specified in Section 02 118.
2. Existing topsoil is property of Contractor.

B. Potential Re-Use -
1. Subject to conditions specified, existing topsoil may be used in one of following ways -
   a. Reuse, as is, for topsoil required on site.
   b. Amend and reuse for topsoil required on site.
   c. Used for fill under lawn or planting areas.
   d. Remove from site.

C. Conditions For Re-Use -
1. Soil has been tested for horticultural use by licensed laboratory and recommendations given to establish following -
   a. Site soil is suitable/unsuitable for reuse as topsoil, or
   b. Use following procedures and chemical or organic additives to make topsoil suitable for reuse as topsoil.
      1) Composted sludge, 1/4 volume of soil.
      2)
      3)

D. Imported top soil shall be tested by licensed laboratory,

using criteria on Owner Form 3332. It shall meet minimum requirements specified under "PRODUCTS" and be approved by Architect prior to use.
1. Tests shall be paid for by Contractor.

PRODUCTS - PART II

2.1 Topsoil:

A. Use onsite material as approve by Architect.

EXECUTION - PART III

3.1 Performance:

A. As specified in Section 02 118, or remove from site and dispose of legally.

02 211 ROUGH GRADING

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
1 All rough grading work to prepare site for construction in building area.
B. Related Sections -
1. General Conditions and Division 01 apply to this Section.
2. Section 02 221 - Structure excavation & trenching
3. Section 02 222 - Backfilling & compacting

1.2. System Description:

A. Performance Requirements -
1. Maximum variation from indicated grades shall be 1/10 of one foot.

EXECUTION - PART III

3.1 Examination:

A. Carefully examine site with Architect prior to beginning of work to pre-plan procedures for making cuts, placing fills, and other necessary work.
B. Before making cuts, determine areas needing fill and organize to most efficiently place fill.

3.2. Preparation:

A. Before making cuts, remove top soil not already removed by Section 02 118 over areas to be cut and filled and stockpile in suitable area.

3.3. **Performance:**

A. Compaction of fills shall be as specified in Section 02 222.
B. Make proper allowance for final finishes of parking lot and planting areas as described in Contract Documents. Finished rough grade prior to placing topsoil is -
   1. Lawn Areas - 7 inches below top of walk or curb.
C. Finish grade of soil is top of sod dirt after sod has been laid.
D. If soft spots, water, or other unusual excavating conditions are encountered, stop work and notify Architect.

02 212 FINISH GRADING

GENERAL - PART I

1.1 **Summary:**

A. Includes But Not Limited To -
   1. Furnishing and spreading of top soil over lawn and planting areas.
   2. Fine grading required because of tolerances allowed in Section 02 211. Do not commence work of this Section until these tolerances are met.
B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.
   2. Section 02 921 - One inch of humus material, to be applied over finish grading.
   3. Section 02 118 - Stripping and storing of existing topsoil.
   4. Section 02 205 - Topsoil

1.2 **Quality Assurance:**

A. As specified in Section 02 205.

EXECUTION - PART III

3.1 **Performance:**

A. During preliminary grading, dig out weeds from planting areas by their roots and remove from site.
B. Remove from site rocks larger than 1-1/2 inches in size and foreign matter such as building rubble, wire, cans, sticks, concrete, etc, before placing top soil.
C. Redistribute top soil stored on site and provide additional soil required to bring surface to elevation relative to finish walk or curb grades as follows:
   1. For sodded areas - 3 inches
   3. Planting areas shall receive a minimum of 5 inches of topsoil.
   4. Areas where Drawings indicate planting of shrubs

shall have 12 inches of top soil throughout the entire shrub bed area.

D. Slope grade away from building for 12 feet minimum from walls at slope of 1/2 inch per ft minimum unless otherwise noted. High point of finish grade at building foundation shall be 6 inches minimum below finish floor levels or tops of foundations as indicated.

E. Direct surface drainage in manner indicated on Drawings by molding surface to facilitate natural run-off of water. Fill low spots and pockets with top soil and grade to drain properly.

02 221 EXCAVATING

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
   1. Project excavation and trenching.

B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.
   3. Section 02 211 - Structure excavation & trenching.
   3. Section 02 212 - Top 12 inches of backfill in landscape planting areas, other than lawn areas, within 10 feet of building.

PRODUCTS - PART II

2.1 Materials:

A. Backfill material shall be free from debris, stones over 6 inches diameter, frozen materials, brick, lime and concrete.
   1. Fill shall conform to AASHTO Spec A-2-5 granular, non-plastic material.
      a. Contact local State Road Commission for location of pits containing specified materials.

EXECUTION - PART III

3.1 Preparation:

A. Protection -
   1. Damage to dampproofing, moisture barrier, waterproofing, or other portions of the work due to work of this Section shall be repaired by original installer at no additional cost to Owner.

B. Before backfilling, locate on record set of Drawings utility and service lines to be covered.

C. Do not backfill until utilities involved have been tested and approved by Architect.

D. Subsequent to stripping and removal of all topsoil, organics, and other unsuitable materials and prior to the placement of any structural site grading fill, the upper six inches of the exposed subgrade shall be scarified and compacted to the requirements for structural fill. If

excessively soft, loose, or otherwise unsuitable soils are encountered, they must be completely removed from beneath the proposed structure and removed to a maximum depth of two feet below design finished grade in proposed pavement areas and be replaced with compacted structural fill. Following the above operations, structural site grading fill may be placed.

E. Do not backfill until instructed by Architect
F. Take into account landscaping and finished grades.

3.2 Performance:

A. Backfilling -
   1. Slope grade away from building as specified in Section 02 212.
   2. Hand backfill when close to building or where damage to building might result
   3. Do not use puddling to consolidate fill areas.

B. Compaction of Backfills -
   1. Fills Under Footings, Slabs, Walks, Parking Surfaces, & Around Foundation Walls -
      a. Place backfill in 8 inch layers, dampen (do not soak), and mechanically tamp to 95% minimum of maximum denisty as established by ASTM D. 1557

      b. The width of structural fill, where required below footings, should be extended laterally at least six inches beyond the edges of the footings in all directions for each foot of fill thickness beneath the footings.

02 222 BACKFILLING & COMPACTING

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
   1. Backfilling and compacting except as specified below.
   2. Procedure and quality for backfilling and compacting performed on Project unless specifically specified otherwise.

B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.
   2. Section 02 221 - Structure excavation & trenching
   3. Section 02 212 - Top 12 inches of backfill in landscape planting areas, other than lawn areas, within 10 feet of building.
   4. Backfilling and compacting inside and outside of building required for electrical and mechanical work shall be responsibility of respective Section doing work unless arranged differently by Contractor.

PRODUCTS - PART II

2.1 Materials:

A. Backfill material shall be free from debris, stones over 6 inches diameter, frozen materials, brick, lime, and concrete.
   1. Fill shall conform to AASHTO Spec M-145, A-1-A, A-1-B, A-2-4, or A-2-5 granular, non-plastic material.
      a. Contact local State Road Commission for location of pits containing specified materials.

EXECUTION - PART III

3.1 Preparation:

A. Protection -
   1. Damage to dampproofing, moisture barrier, waterproofing, or other portions of the Work due to work of this Section shall be repaired by original installer at no additional cost to Owner.

B. Before backfilling, locate on record set of Drawings utility and service lines to be covered.

C. Do not backfill until utilities involved have been tested and approved by Architect.

D. Do not backfill until instructed by Architect.

E. Take into account landscaping and finished grades.

3.2 Performance:

A. Backfilling -
   1. Slope grade away from building as specified in Section 02 212.
   2. Hand backfill when close to building or where damage to building might result.
   3. Do not use puddling to consolidate fill areas.

B. Compaction of Backfills -
   1. Fills Under Slabs, Walks, Parking Surfaces, & Around Foundation Walls -
      a. Place backfill in 8 inch layers, dampen (do not soak), and mechanically tamp to 90% minimum of maximum density as established by ASTM D 1557-78, "Tests for Moisture-Density Relations of Soils & Soil-Aggregate Mixtures Using 10 Pound Rammer and 18 Inch Drop," unless greater density is required by local governing codes.
   2. Backfill Under Footings -
      a. Not allowed.
   3. Other Backfills -
      a. Place other fills in 12 inch layers and mechanically tamp.

C. If site material will not compact to specified density or it is suspected that it will not, remove and replace with material specified in PRODUCT section above.

02 501 PAVEMENT SUB-BASE (ALT # 3)

GENERAL - PART I

1.1 Summary:

A. Includes But Not Limited To -
   1. Preparation of sub-base to receive base and paving.
B. Related Sections -
   1. General Conditions and Division 01 apply to this Section.

PRODUCTS - PART II

2.1 Materials:

A. Imported granular subbase as approved by Soils Engineer. 8" thick over properly pre-paired natural subgrade of structural site grading fill.

EXECUTION - PART III

3.1 Performance:

A. Fine grade parking surface area as required and thoroughly compact with power equipment.
B. Provide engineering and staking to assure slope for drainage of paved areas as designed.

ADDENDUM G

JAMES T. DUNN #3785
ANDERSON & DUNN
2089 East 7000 South, Suite 100
Salt Lake City, Utah 84121
Telephone: (801) 944-0990

IN THE SECOND CIRCUIT COURT, STATE OF UTAH

IN AND FOR DAVIS COUNTY, BOUNTIFUL DEPARTMENT

GARTH LEAVITT and BOB ALLEN, Plaintiffs, vs. GLENDON CORPORATION, a Utah corporation, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 913000923CV Judge Mark S. Johnson

The trial of the above-entitled matter was held before the Honorable Mark S. Johnson, Judge of the above-entitled Court on Thursday, July 9, 1992, at the hour of 10:30 a.m. Plaintiffs were present and represented by their counsel of record, James T. Dunn. The Defendant was present through its agents and represented by counsel of record, Ronald E. Griffin. Witnesses were sworn, documentary evidence was introduced and based upon that evidence, the Court is prepared to enter its:

FINDINGS OF FACT

1. The Plaintiffs were at all times relevant hereto partners in an excavation business.

2. The Plaintiff, Garth Leavitt, is a licensed contractor.

3. The parties entered into a contract for excavation and grading work for the Farmington Public Safety Building.

4. The Plaintiffs performed their work in a timely manner and in a good and workmanlike manner and in fact credited the City for the assistance of City equipment, trucks and personnel.

5. While excavating, the Plaintiffs encountered subsurface water which necessitated a change order with the Defendant general contractor and Farmington City. That change entitled Plaintiffs to an additional $2,000.00 pursuant to the negotiations between the parties.

6. The Plaintiffs requested a draw and the Defendant neglected, refused or failed to pay that draw in the sum of $6,000.00.

7. At the time of the draw, the Plaintiffs had performed services having an approximate value of $5,715.00.

8. The relationship between the parties broke down at that time because the Plaintiffs had not been paid for services rendered and they refused to continue performance without payment or reasonab le assurance of payment.

9. Because of the subsurface water, the Plaintiffs were not required to excavate as deeply as Plaintiffs might otherwise have been required to do.

10. The Defendant acquired substitute performance for the Plaintiffs and credited Farmington City the sum of $6,800.00 for bringing in backfill material, performing backfill work and grading and providing road base to the parking lot.

11. With the exception of backfill labor, final grade and road base for the parking lot, the Plaintiffs performed their contract.

12. The Defendant owes Plaintiffs the sum of $7,715.00, less a credit of $500.00 arising from the change order since the Plaintiffs did not need to excavate as deeply.

13. The total amount owed to the Plaintiffs is $7,215.00, together with costs and interest.

CONCLUSIONS OF LAW

1. There is a contract between the parties.

2. There is ambiguity in that contract and that ambiguity must be strictly construed against the drafter, the Defendant in this instance. The ambiguity is whether or not the Plaintiffs were to provide backfill material.

3. That the Plaintiff, Bob Allen, is not licensed as a contractor is not a bar to recovery by either Plaintiff.

4. Judgment should enter for the Plaintiffs in the sum of $7,215.00, together with post-judgment interest at 12% per annum and court costs.

DATED this 15 day of September, 1992.

BY THE COURT

S. Mark Johnson

Mark S. Johnson
Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, postage prepaid, to Ronald E. Griffin at The Valley Tower, Suite 900, 50 West 300 South, Salt Lake City, Utah 84101, this 10th day of September, 1992.

Christine Dorr

JTD:8