ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20030203

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STATE OF NORTH DAKOTA

Supreme Court No. **20030203**

Gratech Company, Ltd.

Claimant -Appellant,

and

Flickertail Paving and Supply, LLC.,

Claimant,

v.

State of North Dakota, the North Dakota Department of Transportation, and its Director David A. Sprynczynatyk,

Respondent -Appellee.

REPLY BRIEF OF APPELLANT GRATECH COMPANY, LTD.

Appeal from June 25, 2003, Order for Judgment and Judgment, including taxation of costs and disbursements
The Honorable Benny A. Graff
Burleigh County District Court
South Central Judicial District

Burleigh County Civil No. 03-C-1088

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REPLY AND EXCEPTIONS TO NDDOT'S STATEMENT OF FACTS

Gratech takes exception to NDDOT'S gratuitous comment concerning Gratech's claims against Wold Engineering. (NDDOT Brief 3, n. 2) Gratech's independent claims against Wold are subject to a separate action pending appeal in this Court. (Supreme Court No. 20030181) The NDDOT is not a party to that action.

The NDDOT takes out of context, and unfairly presents comments of Gratech's attorney during final argument to the Arbitrators. (NDDOT Brief 3-4)

NDDOT first focuses on the comment the Arbitrators were the judges of the law and the facts and the right to "determine issues based upon any reasonable theory of law that's presented." (NDDOT Brief 4) However, the NDDOT omits the following comment of counsel:

> And also before I start, I want to say that I am relying very heavily on the brief that we prepared and sent to you prior to this proceeding, which we believe fairly outlines the issues and fairly outlines the law that's applicable to the issues. * * * (See, Prehearing Brief of Flickertail and Gratech, Gratech's Appendix 56-95)

Counsel emphasized that Gratech was "relying very heavily on the brief" furnished the Arbitrators in advance of the hearing which outlined applicable law. Gratech expected the Arbitrators would follow applicable law.

Gratech argued that a detailed explanatory decision was unnecessary to an appeal to the court. The NDDOT readily admits it asked the Arbitrators for a

"detailed explanation of their award." (NDDOT Brief 4) (Emphasis added) The NDDOT prevailed and the Arbitrators issued a complex decision with a detailed "explanation of the award" containing numerous and obvious errors of law. (Gratech App. B)

The NDDOT argues that the Arbitrators' decision was only a "limited explanation" of the award. Id. However, if the Arbitrators' explanation discloses it erred as a matter of law, that error is not cured by other unstated explanations. If the decision is legally flawed for any reason it must fail.

The NDDOT argues the Arbitrators conclusion of law that the NDDOT's interpretation of Section 203 is "incorrect and inconsistent with the contract provisions" was merely advice to NDDOT. (NDDOT Brief 6) However, the NDDOT then takes issue and disagrees with the Arbitrators' conclusions of law. (Id. n. 4) The NDDOT is inconsistent and, moreover did not appeal to the court on that issue.

The NDDOT in its fact statement, and in its argument throughout its brief repeatedly attempts to distract the court with irrelevant and misstated fact issues. A prime example is NDDOT's irrelevant argument concerning Gratech's pricing of the quotes for "common excavation". (NDDOT Brief 7-8) Gratech quoted the price of $1.30 per cubic yard on the 032 rural grading project. The Rolla and Belcourt projects, which are the subjects of this appeal were city jobs. Harley

Neshem, who quoted the jobs for Gratech explained city work required dealing with complex utilities, much heavier traffic, and very short work areas which had to be closed every night for traffic. The city work is much more time consuming and costly. Neshem also explained that the state wide average includes both rural and city work and that the vastly greater quantity of rural work skews and lowers the average.

The NDDOT admits "additional work was required as a result of some of the soils being poor" but fails to point out the indeterminable costs of working the poor soil not disclosed on the project plans or made known to bidders. Id. Mr. Neshem testified that the poor soils caused scrapper inefficiencies the cost of which could not be determined from any Gratech records. (NDDOT App. 4; Tr. 140-141) Additionally, the job cost records of Gratech could not disclose the disruptions of the sequencing and scheduling of Gratech's equipment and manpower as bid as it occurred due to the unsuitable soils. (Id. 144; Tr. 141) There was no way to discover from Gratech's actual cost records the extra costs due to the directed plowing and disking and drying of the unsuitable soils treated as incidental to the bid item for common excavation by NDDOT. Id.

The most misleading statement by NDDOT appears at p. 11 of its brief concerning the period of time when no work was being done on Rolla. When the contractor does not work on the project there are no costs being incurred. This is a

particularly red herring. There is not a single penny in Gratech's total cost claim for this period of time since there were no costs incurred.

Gratech respectfully requests this Court ignore and/or strike the reference at p. 12 of the NDDOT brief concerning the other arbitration proceeding. There is nothing in the record of this case pertaining to the other referenced arbitration. The NDDOT knows, or should know that it is inappropriate, and a violation of Rule 30, N.D.R. App. P. to include or reference anything in its brief which is not in the record of this proceeding. Gratech requests the matter be stricken and NDDOT admonished.

I.

GRATECH'S REPLY TO ARGUMENT THAT IT IS BARRED BY THE DOCTRINES OF WAIVER AND ESTOPPEL FROM SEEKING RELIEF FROM THE ARBITRATORS' DECISION.

NDDOT argues that Gratech must be deemed to have waived, or be estopped from seeking relief from the Arbitrators' decision due to arguments made during closing argument in the arbitration proceedings. (NDDOT Brief 12-13) This is a specious and incomprehensible argument. There was no reliance on Gratech's argument by either NDDOT or the Arbitrators. The Arbitrators rejected Gratech's argument, and adopted the NDDOT argument to render a detailed explanation of their decision. None of the elements of either waiver or estoppel is present. This is readily apparent from a reading of the authority cited by NDDOT.

II.

GRATECH'S REPLY TO STANDARD OF REVIEW.

NDDOT now apparently argues for the "clearly irrational" standard of review. (NDDOT Brief 14-15) Gratech continues to argue for the heightened, or de novo standard of review as set forth in its opening brief. (Gratech Brief 8-16) In any event, this Court has clearly held that an Arbitrator's award may be vacated under the "completely irrational" standard if it is either (1) mistaken on its face; or (2) so mistaken as to result in real injustice. O.& K. Glass Co. v. Innes Constr. Co., 2000 ND 56, 608 N.W.2d 236. (Gratech Brief 8)

The de novo standard is especially appropriate to statutorily mandated arbitrations because the parties to a contract subject to statutorily mandated arbitration are not free to agree, implicitly or explicitly, that their dispute will be resolved in disregard of controlling principles of constitutional, statutory, or judge made law. (Gratech Brief 12) This Court in AllState Ins. Co. v. Nodak Mut. Ins. Co., 540 N.W.2d 614, 618 (N.D. 1995) referencing Byron's Constr. v. State Highway Dep't., 448 N.W.2d 630-635 (N.D. 1989) This Court acknowledges NDDOT arbitrations are the explicit choice of the Legislature rather than the result of any agreement between the parties. Id.

NDDOT again attempts to mislead this Court by its reference to the Legislature having recently adopted the revised Arbitration Act. (NDDOT Brief

15) There is nothing anywhere in that Act concerning the standard of review. The revised Act, in fact adopted the language of the original Act authorizing appeals and the vacation of arbitration awards " . . . if the arbitrators exceeded their powers". See , N.D.C.C. § 32-29.2-12(1)(c)

III.

GRATECH'S REPLY TO ARGUMENT ARBITRATORS CORRECTLY DETERMINED FAILURE TO GIVE CONTEMPORANEOUS NOTICE OF CLAIM BARRED GRATECH'S CLAIMS.

NDDOT responded to Gratech's notice of claim issues. (NDDOT Brief 15-27) Although this Court has strictly enforced the notice of claim requirements, there are a number of unique issues of first impression raised in this appeal which have never been considered. For example, this Court has never considered the notice requirement in relationship to the subsurface site condition specification or the application of equitable principles to the specific conclusions of fact evidenced on the face of the award. The Arbitrators concluded the NDDOT's erroneous legal interpretation to pay common excavation price for excavation of unsuitable material "unfairly shifts the cost of performance to the contractor."

As will be seen, the NDDOT continuously refuses to acknowledge this Court's holding in Byron's Constr. v. State Highway Dep't., 448 N.W.2d 630 (N.D. 1989) remanding a tort claim to arbitration for determination on its merits although no notice had been given. (NDDOT Brief 16, 18, 21-22)

NDDOT disputes Gratech's argument that the handling and payment for "unsuitable soil" is "covered by the contract" and exempt from the notice requirement. (NDDOT Brief 17-21) The Arbitrators found and concluded that the NDDOT's interpreptation of Contract Specification Section 203: " . . . whether customary or not, is incorrect and inconsistent with the contract provisions." The Arbitrators discussed the numerous contract provisions concerning the handling and payment for "unsuitable material" and concluded that the price should have been "negotiated" under the contract. The NDDOT disagrees with the legal conclusions of the Arbitrators that "unsuitable soil" is "covered by the contract." (NDDOT Brief 6, n.4) Although the Arbitrators found that "unsuitable soil" is covered by the contract they erroneously concluded there was a notice requirement contrary to N. D.C.C. § 24-02-26.1 and

§ 104.06 of the Contract Specifications.

Importantly, the NDDOT takes the position that Gratech's claims were of "differing site conditions" under Specification § 104. (NDDOT Brief 20) This Court has never considered the application of the notice requirement under Specification § 104.04 concerning a "differing site condition". This issue was briefed to the Arbitrators. (Gratech App. L 21-25)

Contract Specification § 104.04 concerning differing site conditions reads in relevant part as follows:

> During the progress of the work, if subsurface or latent physical conditions at the site which differ materially from those indicated in the contract; . . . the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before they are disturbed and before the affected work is performed. * * * (Emphasis added)

Presently, there is no dispute but that the NDDOT discovered or simultaneously knew of the "unsuitable soils", investigated, and directed Gratech how to handle and dispose of such soils. As to costs, NDDOT waived its right to compile costs by its illegal interpretation as to payment as concluded by the Arbitrators.

The identical specification, concerning differing site conditions was construed by the Mississippi Supreme Court in Ronald Adams Contractor, Inc. v. Mississippi Transportation Comm'n., 777 S. So.2d 649 (Miss. 2000) In that case the court held that the language stating that "the party discovering such conditions shall promptly notify the other party in writing" created a mutual obligation on the part of the State Highway Department. That case involved a soil condition like that encountered by Gratech on these projects.

The court states the relevant facts at p. 654 of the decision as follows:

> "The evidence is undisputed that both the commission project engineer and Adams knew of the unsuitable material at the grade line each time the condition was encountered. In fact, it was the commission which determined where the soil conditions at the grade line were acceptable or unacceptable, and it was the commission which directed Adams to 'undercut' and 'backfill' below the grade line at certain locations along the roadway base. * * * (Emphasis added)

The court noting that the "differing site conditions" clause specifically states that the purpose for giving notice of this condition was so that, "the engineer will investigate the conditions." The court continues

> It is therefore clear that the purpose for written notification by the contractor to the commission is to trigger an investigation by the commission of the physical conditions at the location. The commission's engineer investigated the physical conditions at each undercutting location before any work was performed. Although S.P. No. 907-104-10 states that 'no contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice' it would have been useless for Adams to give written notice to the commission of that condition which the commission was already investigating. In Mississippi, there is a well recognized rule that a person or entity is never required by law to proceed with a vein and useless act. * * * (Emphasis added)

The NDDOT, rather than tracking costs erroneously interpreted the contract to pay for the unsuitable material at the bid price for common excavation. Under the circumstances, it was the NDDOT which had the mutual duty to give the notice and waived any right to cost records. The specification is a two-way street. The NDDOT illegally priced and made payment for the unsuitable soil at suitable soil prices. Gratech was contractually bound to NDDOT's interpretation of the contract. (Specification § 105.01 clearly states that the Department decides all questions regarding the interpretation of the contract)

The sole purpose of notice for purposes of Specification § 104.04 is to allow investigation of the condition before it is disturbed. That purpose was fully

satisfied in this case. The NDDOT investigated the condition, considered alternative methods of dealing with the problem and directed Gratech what to do.

The NDDOT had previously paid Gratech common excavation prices for the handling and disposal of unsuitable soil. Gratech at the time had no reason to believe that NDDOT's interpretation of the contract was unlawful. NDDOT represented to Gratech that its interpretation was correct, and Gratech had every reason to rely upon the NDDOT interpretation. The unlawfulness of NDDOT's interpretation was properly raised during the arbitration, and the Arbitrators concluded that NDDOT's interpretation was unlawful and inequitable. The Arbitrators nevertheless refused to grant relief to Gratech. The state was unjustly enriched.

The NDDOT opposes Gratech's arguments that no notice was required because the claims were in tort or were for breach of warranty or defective specifications. (NDDOT Brief 21-27) Gratech relies upon its argument and authority in its opening brief in these regards. (Gratech Brief 25-35)

NDDOT continues to argue that arbitration is limited to contract claims and that tort claims cannot properly be arbitrated. (NDDOT Brief 23-24) This flies in the face of this Court's holdings in both Byron's and All-State. In All-State this Court acknowledges that tort claims are appropriate subjects for arbitration.

The NDDOT's "economic loss" argument is irrelevant to any claim before

this Court (NDDOT Brief 24-25) This is again a red herring.

IV.

GRATECH'S REPLY TO ARGUMENT THAT CLAIMS ON THE ROLLA PROJECT WERE BARRED BY CHANGE ORDER AMENDMENTS.

NDDOT argues that the change orders on the Rolla project constituted an accord and satisfaction. (NDDOT Brief 27-29) The change orders were based upon the NDDOT's legally erroneous interpretation to pay common excavation price for excavation of unsuitable material. As earlier noted, Gratech at that time was contractually obligated to abide by the NDDOT's interpretation of the contract. It is only as a result of the mandatory arbitration that the Arbitrators determined that the NDDOT's contract interpretation was legally incorrect and inconsistent with the contract provisions and unfairly shifted the cost of performance to Gratech.

As noted in Gratech's opening brief, the question of classification and payment for materials involves a construction of the contract rather than an interpretation of the intended meaning of the specifications, and the construction of the contract is a matter of law for the court and not the engineer. (Gratech Brief 17-25) The Arbitrators determined that the NDDOT's classification and payment of the unsuitable material was erroneous as a matter of law, but wrongfully refused to grant any relief even in light of its conclusions that the NDDOT's interpretation

"unfairly shifted the cost of performance" to Gratech. The change orders were no accord and satisfaction under any definition.

V.

GRATECH'S REPLY CONCERNING DAMAGES ISSUE.

The NDDOT does not want Gratech to have another "bite at the apple". (NDDOT Brief 29-31) Although the Arbitrators did not like Gratech's total cost damage methodology it acknowledged that Gratech was in fact damaged. (Gratech App. B-6) The Arbitrators state that they "believe that Gratech could have determined many of its losses with a reasonable degree of accuracy, and certainly with better accuracy than provided by the total cost approach." Id. There are obviously many ways of estimating damages. The courts universally acknowledge estimating of damages where actual amounts are impossible to ascertain.

Since the Arbitrators acknowledged that Gratech suffered losses Gratech should be entitled to attempt to reasonably estimate such losses on remand.

VI.

GRATECH'S REPLY TO DEPARTMENT'S COMMENTS ON OTHER DEFENSES.

The fact that the Department may have asserted other defenses is irrelevant and another red herrring. If the Arbitrators' Award is defective due to error of law as disclosed on the face of the award it does not matter what other factors it may or may not have considered. If the award is wrong as a matter of law for any reason

it must be vacated and the matter remanded.

The NDDOT interestingly states at p. 32 of its brief that it "does not concede that subcontractors have the right to arbitrate directly with the Department." If that is true then the award should be vacated and this matter remanded for jury trial in the district court. The other defenses have nothing whatsoever to do with any issue in this appeal.

VII.

GRATECH'S REPLY TO DEPARTMENT'S ARGUMENT CONCERNING COSTS.

The Department sought, and the court granted costs to NDDOT under a totally erroneous section of the Code. Gratech stands on its argument and authority in its opening brief.

CONCLUSION AND REQUEST FOR RELIEF

Gratech respectfully requests that the court vacate the Arbitrators' Award and remand this matter for arbitration before new Arbitrators. The NDDOT's request in its conclusion that this Court order the Department's Counterclaim against Flickertail for indemnity be restored is incomprehensible and irrelevant. Flickertail's claims have been paid and the respective parties' rights satisfied and released as a matter of law. Moreover, NDDOT has not appealed or established any record concerning any such issue.

DATED 10-15, 2003.

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AFFIDAVIT OF SERVICE BY MAIL

Re: Gratech Company, Ltd.v. State of North Dakota Department of Transportation, and its Director David A. Sprynczynatyk
Burleigh County Civil No. 03-C-1088
Supreme Court No. 20030203

Myrna L. Meyers being first duly sworn on oath, does depose and say: She is a citizen of the United States, of legal age, and not a party to the above-entitled matter.

That on October 15, 2003 affiant deposited in the United States Post Office at Rapid City, South Dakota, a true and correct copy of the following document:

Reply Brief of Appellant Gratech Co., Ltd. with Affidavit of Service

The copy of the foregoing was securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Charles Miller
Special Assistant Attorney General
P. O. Box 2798
Bismarck, ND 58502-2798

To the best of affiant's knowledge, the address above given was the actual post office address of the party intended to be served. The above document was duly mailed in accordance with the provisions of the rules of Civil Procedure.

Myrna L. Meyers

Subscribed and sworn to before me this 15th day of October, 2003.

(SEAL)

Notary Public
State of South Dakota

My commission expires: 11-24-2007