

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0497-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**TERRA ENGINEERING & CONSTRUCTION CORPORATION,
a Wisconsin Corporation,**

Plaintiff-Respondent,

v.

LA CROSSE COUNTY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. La Crosse County appeals from a money judgment in favor of Terra Engineering & Construction Corporation. The issue is whether damages were calculated properly. We affirm.¹

Terra contracted to perform a construction project for the County. Terra commenced this action to increase the contract price due to soil conditions that were different than expected. The dispute on appeal centers on calculation of the increased price.

The parties are substantially in agreement as to how the contract applies to their dispute. The contract states the increased price is to be determined "on the basis of the Cost of the Work (determined as provided in paragraphs 11.4 and 11.5) plus a CONTRACTOR's fee for overhead and profit (determined as provided in paragraph 11.6)." Under paragraph 11.4, the cost of the work consists of costs for payroll, materials, equipment, subcontractors, consultants and certain "supplemental" items. Paragraph 11.5 provides that certain items shall not be included in calculating the "cost of the work," including expenses of the contractor's principal and branch offices off the site and "[o]ther overhead or general expense costs of any kind."

Paragraph 11.6 provides how the contractor's fee for overhead and profit is determined. The fee consists of several components. The amounts include fifteen percent of the payroll, material and equipment charges included in the cost of the work, and five percent of the subcontractor payments. Subparagraph 11.6.2.4 provides that no fee shall be payable on the basis of the consultant or supplemental costs, or on the items excluded from the cost of the work by paragraph 11.5.

The special verdict asked the jury to set separate amounts for "actual construction costs" and "home office overhead costs." The calculation of "home office overhead costs" is not discussed at all in the jury instructions. The calculation of "actual construction costs" received only cursory treatment:

¹ This is an expedited appeal under RULE 809.17, STATS.

In the event that you decide that the clay soil data provided Terra by the County did contain a significant discrepancy, you will then be asked to determine how much Terra's actual construction costs increased as a result of such discrepancy.

In answering this question, you should determine what increased costs, if any, reasonably resulted from the discrepancy

The jury set actual construction costs at \$82,850 and home office overhead costs at \$13,670. The County filed a post-verdict motion to change the answer on home office overhead to zero on the ground that the contract does not permit recovery of such costs. The trial court concluded that under the contract Terra should receive fifteen percent of the actual construction costs, or \$12,427.50. The court reduced the verdict accordingly, and also denied a subsequent motion for reconsideration. The County appeals.

The County argues that home office overhead costs cannot be recovered because of the provision in subparagraph 11.6.2.4 that no fee shall be payable on the basis of those items excluded from the cost of the work by paragraph 11.5. That paragraph excludes expenses of the contractor's principal and branch offices off the site and "[o]ther overhead or general expense costs of any kind." Therefore, the County argues, no recovery of "home office overhead costs" is possible.

We conclude the County's argument is irrelevant to the judgment in this case. The County concedes that a contractor is entitled to a fee for overhead and profit for direct expenses such as materials, equipment and employees at the site. By the terms of the contract, the fee on these items is fifteen percent. That is what the trial court allowed. The court reduced the jury's award of "home office overhead costs" to an amount that was fifteen percent of the "actual construction costs" set by the jury. It is not clear from the jury instructions or the briefs precisely what items were included in the "actual construction costs."² Thus, we do not know whether the entire amount was

² Nor were we provided with transcripts of opening or closing arguments, which might also provide some indication.

payroll, material and equipment costs on which the contractor is entitled to fifteen percent, or whether there were other costs on which only a five percent fee, or no fee at all, is allowed. However, the County is not arguing that the trial court erred by awarding a full fifteen percent on the "actual construction costs." Rather, the County argues that no additional fee is allowable at all. It does so, essentially, simply because the additional amount was referred to as "home overhead costs" on the special verdict. In view of the trial court's modification of the verdict amount, based on the language of the contract, the label on the verdict is irrelevant at this point.

Even if the County's reading of the contract is correct, meaning that the contractor's percentage fee for overhead and profit must somehow be reduced to eliminate any fee for home office overhead, the result would not be a complete reduction of the fee to zero. However, the County does not explain what the methodology for calculating the proper partial deduction would be, or what the figures would be in this case.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.