

THE CONSTRUCTION LAW BRIEFING PAPER

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SPRING LAKE CONTRACTOR RECOVERS \$866,000 FROM THE DNR ON A \$156,000 CONTRACT*

INTRODUCTION

Marvin Fabyanske and Michael Kinzer, attorneys with Fabyanske, Svoboda, Westra & Hart, P.A., recently obtained an arbitration award for R. J. Valek Construction. The award was *more than five times* the original contract price. The claim arose out of a Minnesota Department of Natural Resources project for the removal of the Flandrau Dam on the Cottonwood River near New Ulm, Minnesota.

PROJECT PLANNING AND BIDDING

The Flandrau Dam was originally built in the 1930's. The dam washed out several times and was modified by the DNR during the decades following its construction. During the 1960's and 1970's, several people drowned or were injured at the site of the dam. The DNR first considered removing the dam in the early 1980's, but postponed planning for the project for a decade. The DNR resumed its planning for the project in 1993, and put the project out for bid in September 1994. Because the DNR was very concerned about spring flooding conditions on the project site, the bid documents provided for completion of the project within two months of the December 1994 start date.

The DNR provided bidders a set of plans and specifications which purported to describe the features of the dam. Most of these features were buried under dirt or were under water,

making it impractical to verify the accuracy of the plans through a normal site investigation. Verification would have required exhaustive excavation as well as underwater exploration by skin divers. R. J. Valek Construction was awarded the contract on its low bid of \$156,000. In comparison, the second low bid was \$174,000, and the DNR engineer's estimate was \$120,000.

UNANTICIPATED SUBSURFACE STRUCTURES ENCOUNTERED

Within a few days after beginning work on the project, and thereafter throughout the course of the project, Valek discovered massive concrete and metal structures buried under the dirt and in the river which were not shown on the DNR's plans. Effective removal of these undisclosed structures required additional (and much larger) equipment which caused severe delays and pushed Valek's work into spring flooding conditions and on into fall 1995.

Valek did not finish removing the Flandrau Dam until early November 1995, establishing a 10-month duration for a project that was supposed to last only two months. This substantial extension of the project was caused by the requirement to remove the undisclosed structures, spring flooding, and the DNR's suspensions of Valek's work in March, April, June, July, August and September 1995 (for a total of four-and-a-half months).

DNR'S (NON-) RESPONSE

The DNR did nothing to assist Valek in addressing the problems caused by the undisclosed structures. On several occasions, for example, Valek asked the DNR whether they had any additional information about the site conditions, but the DNR consistently denied having any. On one such occasion during a March 1995 meeting with the DNR, Randy Valek (the owner of R. J. Valek Construction) observed the DNR looking at older sets of plans which had not been included in the bidding documents. He was not afforded the opportunity to review these plans during the meeting, however. After this meeting, Mr. Valek went to the DNR headquarters and asked a clerk if he could see any older Flandrau Dam plans. The clerk allowed Mr. Valek to review and make copies of the older plans. These older plans showed many of the undisclosed structures encountered by Valek. The existence of these older plans demonstrated that the DNR had information about most of these undisclosed structures before drafting the plans it provided to bidders.

Moreover, the DNR did not give serious consideration to Valek's claims of increased costs. In April 1995, Valek submitted a written claim to the DNR requesting approximately \$150,000 for costs Valek had incurred to that point in removing the undisclosed structures. The DNR, without any meaningful field investigation, denied Valek's claim in its entirety.

Rather than properly considering and redressing the problems encountered by Valek, the DNR continued throughout the project's duration to deny any liability to Valek for the delays and the extra work that Valek performed. The financial burden of the project caused Valek to become unable to pay many of its subcontractors, suppliers and employees. Valek also lost its bonding capacity and was unable to bid on any other public projects. The DNR's actions in the spring and summer of 1995 essentially put Valek out of business.

REDRESS THROUGH LITIGATION

Because the DNR continued to deny any liability to Valek, Valek was forced to commence a lawsuit to redress its damages. More than a year into the lawsuit, the DNR finally reversed its position and conceded liability to Valek for much of its original claim. Unfortunately, by this time Valek had already suffered the consequential damages of having its business sidelined for the 1995 and 1996 construction seasons. The DNR refused to acknowledge liability for these consequential damages, however, and the parties agreed to submit the issue of damages to binding arbitration.

Valek proved up the damages for its original claim and the consequential damages in the arbitration. Moreover, in an effort to recover attorneys' fees under Minnesota's Equal Access to Justice Act, Valek maintained that the DNR was not substantially justified in denying its claim during construction of the project. The arbitrator agreed. In addition to contract damages, consequential damages and interest, the arbitrator also awarded attorneys' fees to Valek, for a total award in excess of \$866,000.

CONCLUSION

This case presents a textbook example of the kinds of liabilities owners face when they withhold superior knowledge from a bidding contractor and when they breach warranties of accuracy which are implied when owners provide plans and specifications to bidders. This case also shows what can happen when an owner fails to adequately investigate a contractor's claim and refuses to acknowledge liability when common sense dictates that it should. If the DNR had worked with the contractor during construction and negotiated a reasonable increase in the contract price, the DNR would have been able to resolve this claim at a fraction of the \$866,000 award.