COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP423 **Cir. Ct. No. 2011CV164**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MIRON CONSTRUCTION COMPANY INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF OSHKOSH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Miron Construction Company, Inc., appeals a grant of summary judgment in favor of the City of Oshkosh. Miron claims the City breached the parties' construction contract and was unjustly enriched by its refusal to reimburse Miron for additional expenses incurred due to site conditions—an

underwater retaining wall—that Miron alleges differed from the plans and specifications the City supplied. We reject Miron's arguments and affirm.

¶2 In 2008, Miron was the successful bidder on an over $6 million public works contract involving the City's water treatment plant. The contract provided that, if the City required the performance of services not specified in the contract, Miron may be entitled to an increase in the contract price.

¶3 After the project was underway, a Miron subcontractor discovered a subsurface concrete retaining wall that thwarted the installation of the new supply pipe. The City directed Miron to remove the wall. The demolition necessitated abandoning the method Miron claimed it had intended to use as a ground stabilization system and developing an ultimately more costly plan.

¶4 Miron asked the City to authorize payment for the over $340,000 it incurred in additional costs. Miron contended the contract price could be equitably adjusted because the retaining wall was an undisclosed and unforeseen condition that "differ[ed] materially from that shown or indicated in the Contract Documents." *See* Standard General Conditions of the Construction Contract (General Conditions), sec. 4.03A.3. The parties' contract incorporated the General Conditions by reference.

¶5 The City denied the request and moved for summary judgment. It argued that the wall was not undisclosed and unforeseen because Miron itself had constructed the wall pursuant to a 1997 contract to construct the City's new water treatment plant and, further, plans and drawings from that earlier project were available for Miron's review before bidding on the 2008 project. Miron did not dispute that it built the retaining wall, but claimed it was without knowledge of the wall's presence because the City failed to disclose that it still existed.

¶6 The circuit court disallowed the adjustment in the contract price because, having constructed the wall and put it in the plans, Miron knew of the wall's existence when it submitted its bid.[1] Miron appeals.

¶7 We review summary judgments de novo, using the same methodology as the circuit court. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12). In other words, summary judgment should not be granted "unless the facts presented conclusively show that the [nonmovant's] action has no merit and cannot be maintained." ***Smaxwell***, 274 Wis. 2d 278, ¶12 (citation omitted).

¶8 Miron asserts that it presented sufficient evidence that it did not know, nor reasonably should have known, of the wall's current existence or proximity to the current project area because the wall was not visible from the

[1] Under sec. 4.03C.2. of the General Conditions,

> Contractor shall not be entitled to any adjustment in the Contract Price … if:
>
> > a. Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price … by the submission of a Bid or becoming bound under a negotiated contract; or
> >
> > b. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such final commitment[.]

surface and it had no obligation to conduct a subsurface investigation. Accordingly, Miron argues, the City failed to make the prima facie showing necessary for summary judgment. We disagree.

¶9 The concrete wall Miron built just ten years earlier was shown in "as-built" plans from information Miron provided in the 1997 contract. Miron offers explanation as to why the wall might have disintegrated or have been demolished or removed. "Conditions once proved to exist are presumed to continue in the absence of evidence to the contrary." ***Bruss v. Milwaukee Sporting Goods Co.***, 34 Wis. 2d 688, 695, 150 N.W.2d 337 (1967).

¶10 Moreover, the 1997 contract documents, construction reports, as-built drawings, and photos of Miron employees constructing the retaining wall were available for Miron's review before bidding on the 2008 project. The 2008 bidding documents instructed bidders to "carefully study" all bidding documents and any supplemental data relating to "surface, subsurface, and Underground Facilities" that could affect cost, progress, or specific means of construction. By signing the contract, Miron represented that it both had "examined and carefully studied the Contract Documents and other related data identified in the Bidding Document" and was familiar with the site and any condition that could affect cost, progress or performance of the work.

¶11 The City contends that even if, for whatever reason, Miron did not initially know of the wall's existence, the bidding documents' requirement that Miron carefully study available plans forecloses a price adjustment. Miron's position is that the bidding documents are not part of the contract. *See* General Conditions, sec. 4.03A.3. (the revealed condition "differ[ed] materially from that

shown or indicated in the Contract Documents"). Miron's argument strikes us as hair-splitting.

¶12 In sec. 7.1.1 of the parties' contract, Miron represented that it "examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents" so as to "induce [the City] to enter into this Agreement." Section 4.03C.2.b. of the General Conditions disallows a price adjustment if Miron reasonably could have discovered an unknown condition by conducting the investigation "required by the Bidding Requirements or Contract Documents." As noted, the contract incorporated the General Conditions by reference.

¶13 Assuming the wall's presence necessitated a different and more expensive stabilization system, Miron either knew or should have known about the wall and factored that cost into its bid. We conclude that the facts presented conclusively show that Miron's action cannot be maintained.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.