

DISTRICT OF COLUMBIA COURT OF APPEALS

Rustler Construction, Inc. v. District of Columbia

211 A.3d 187 (D.C. 2019) · No. No. 16-AA-1155; No. 17-AA-0092 · Decided July 3, 2019

SUMMARY

The District of Columbia Court of Appeals reviewed cross-petitions arising from a District of Columbia Contract Appeals Board decision concerning a roadway improvement contract. The court affirmed the CAB's award of \$155,481.70 plus interest to Rustler Construction for additional and out-of-sequence work, while rejecting damages based on overall project delay because Rustler failed to establish the critical path and the extent of delay. The court also upheld the CAB's use of the jury verdict method to calculate damages.

CASE DETAILS

COURT	District of Columbia Court of Appeals
WRITING FOR THE COURT	Fisher, Associate Judge; Thompson, Associate Judge; McLeese, Associate Judge
JURISDICTION	District of Columbia
DECIDED	July 3, 2019
DOCKET	No. 16-AA-1155; No. 17-AA-0092
DISPOSITION	affirmed
PROCEDURAL POSTURE	Cross-petitions for review of an order of the District of Columbia Contract Appeals Board awarding Rustler Construction, Inc. an equitable adjustment of \$155,481.70 plus interest.
STANDARD OF REVIEW	The court reviews CAB factual findings under the deferential standard in D.C. Code § 2-360.07, setting them aside only if fraudulent, arbitrary, capricious, grossly erroneous as to imply bad faith, or unsupported by substantial evidence. Legal determinations are reviewed de novo, with careful consideration and great respect given to the CAB's interpretations because of its expertise.
PRECEDENTIAL VALUE	Published opinion; binding precedent of the District of Columbia Court of Appeals.
PARTIES	Rustler Construction, Inc., District of Columbia v. District of Columbia, Rustler Construction, Inc.

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Rustler proved entitlement to and the amount of damages for overall project delay and field overhead.
2. Whether the CAB's awards for additional tasks and out-of-sequence work were supported by substantial evidence.
3. Whether the CAB could use the jury verdict method to calculate damages despite Rustler's failure to provide actual costs or cost estimates broken down by task.
4. Whether use of the jury verdict method is limited to resolving conflicting testimony.

HOLDINGS

1. A contractor seeking damages for overall delay must prove that government-caused delays affected activities on the critical path and must establish the extent to which those delays affected completion of the overall project. Rustler failed to make that showing.
2. The CAB's calculation of compensation for additional tasks and out-of-sequence work was supported by substantial evidence and was not arbitrary or capricious.
3. A contractor's failure to demonstrate that it was unable to keep better records does not necessarily preclude use of the jury verdict method when the contractor proves clear injury, no more reliable method of calculating damages is available, and the evidence permits a fair and reasonable approximation.
4. The jury verdict method is not limited to resolving conflicting testimony; it may also be used when gaps in the evidence or an inability to establish precise costs prevent exact calculation, provided the governing requirements are met.
5. The same preponderance-of-the-evidence standard applies to proving the amount of increased costs at the quantum stage as applies to entitlement; the inability to prove damages with mathematical exactitude does not create a lower burden of proof.

KEY QUOTATIONS

"Damages for overall delay are recoverable only if the claimant proves not only that the delayed tasks were on the critical path, but also the extent to which those delays affected completion of the overall project." (at 10-11)

"We therefore hold that a contractor's failure to demonstrate that it was unable to keep better records does not necessarily preclude use of the jury verdict method." (at 24-25)

“A contractor must prove its costs using the best evidence available under the circumstances.” (at 25)

FACTUAL BACKGROUND

In 2002, Rustler and the District entered into a \$5,217,550 contract to reconstruct part of Bladensburg Road while maintaining traffic through the work area. Problems arose when the District's lane-width specifications could not accommodate buses, catch basins were discovered above an active high-pressure gas line, supposedly abandoned Pepco manholes proved to be live, and the existing and new roadbeds differed in height. Rustler performed additional or out-of-sequence work, but its records did not reliably allocate costs by task and it failed to maintain updated critical-path schedules.

PROCEDURAL HISTORY

Rustler entered into a roadway improvement contract with the District and later filed an equitable-adjustment claim for additional costs arising from defective specifications, differing site conditions, and extra-contractual work. After the claim was deemed denied, Rustler appealed to the Contract Appeals Board, which found entitlement on four claims and later awarded \$155,481.70 plus interest using the jury verdict method. Both Rustler and the District petitioned for review; the District challenged the damages methodology, while Rustler sought greater recovery. The court affirmed the CAB's quantum award.

DISPOSITION

affirmed

CASES CITED

- *Tillery v. District of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1175 (D.C. 2006)
- *Dano Res. Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1351-52 (D.C. 1993)
- *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990)
- *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 240 & n.9 (2005)
- *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982)
- *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 433, 444 (1993)
- *Appeal of Civil Constr., LLC*, DCCAB No. D-1294 et al., 2013 WL 3573982, 62 D.C. Reg. 4422, 4439 (Mar. 14, 2013)
- *Blinderman Constr. Co. v. United States*, 39 Fed. Cl. 529, 537, 542, 585 (1997)
- *Eagle Maint. Servs., Inc. v. District of Columbia Contract Appeals Bd.*, 893 A.2d 569, 581 (D.C. 2006)
- *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317-18 (Fed. Cir. 2000)
- *Appeals of Tromel Constr. Corp.*, PSBCA No. 6303, 13 BCA ¶ 35,346, 2013 WL 3227344 (June 27, 2013)
- *District of Columbia v. Org. for Env'tl. Growth, Inc.*, 700 A.2d 185, 198, 203-04 (D.C. 1997)
- *Delco Elecs. Corp. v. United States*, 17 Cl. Ct. 302, 321, 328-33 (1989)
- *Freeman Gen., Inc. v. United States*, 918 F.2d 188 (Fed. Cir. 1990)
- *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880-82 (Fed. Cir. 1991)

- *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)
- Appeal of Lawrence D. Krause, AGBCA 76-118-4, 82-2 BCA ¶ 16,129, 1982 WL 7879 (Nov. 16, 1982)

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