

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

LOBAR, INC., : No. 02-02299
: :
Plaintiff : :
: :
vs. : Civil Action - Law
: :
LYCOMING MASONRY, INC., : Defendant's
Defendant : Preliminary Objections

ORDER

AND NOW, this 3rd day of April 2003, upon consideration of the Defendant's Preliminary Objections to the Plaintiff's Complaint, it ORDERED and DIRECTED as follows:

1. The Court GRANTS the Defendant's Preliminary Objection that the Plaintiff failed to attach the entire subcontract it sent to the Defendant, which the Defendant refused to sign. The Plaintiff shall provide the remaining pages to the Court and defense counsel within twenty (20) days of this order.
2. The Court DENIES the Defendant's demurrers to the Plaintiff's Complaint. The allegations and reasonable inferences to be drawn from the Complaint are that: (1) the Defendant submitted a bid of \$436,580 on a masonry project with certain specifications including Trenwyth masonry units: (2) when a representative of the

Defendant called to ascertain whether the Plaintiff was awarded the project, the Plaintiff advised him that it used Defendant's bid and it was awarded the project; (3) the Plaintiff sent the Defendant a subcontract to memorialize their agreement that the Defendant would perform the masonry work for \$436,580; (4) the Defendant refused to sign the contract, because its bid was based on Beavertown masonry units, not Trenwyth as required by the bid specifications and to use Trenwyth the Defendant would raise its price \$150,000. In its preliminary objections, the Defendant asserts the subcontract had terms different from and/or in addition to those in its bid and the bid specification. Therefore, the parties did not have contract and the subcontract was a counter-offer. The Defendant relies on Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962). Hedden, however, was in a different procedural posture than this case. In Hedden, the trial court was ruling on a defendant's motion for compulsory non-suit. Further, because of the lack of trade custom in the record in Hedden,¹ the sole issue was whether the provisions of the subcontract so deviated from the conditions and requirements in the specifications as to constitute a counter-offer

1 Here, the parties haven't had the opportunity to engage in discovery to develop any evidence regarding trade custom.

rather than an acceptance of the defendant's bid. Here, the allegations and inferences from the Plaintiff's Complaint are that the subcontract memorialized the agreement of the parties as reflected in the bid specifications and the Defendant's bid. In other words, the Plaintiff asserted the subcontract did not deviate from the bid specifications. The bid specifications are not attached to the Complaint and both counsel indicated they are sufficiently voluminous that the Court should not require them to be attached to the Complaint. Based on all the above, the Court believes the Defendant is asserting a speaking demurrer and its allegations regarding deviations between the specification and the subcontract would more properly be the subject of its Answer and New Matter, not preliminary objections.²

² If the Defendant pleads additional facts in its Answer and New Matter regarding deviations between the bid specifications and the subcontract, the Plaintiff might respond that the "new and different" terms were within the contemplation of the parties due to trade custom or that trade custom supports Plaintiff's assertions of acceptance during the phone conversation with the Defendant's representative on or about September 19, 2001. See H.B. Alexander & Son, Inc. v. Mirade Recreation Equipment Company, 314 Pa.Super. 1, 460 A.2d 343 (1983). Thus, it appears likely that some discovery will need to be completed before the Court can rule on this issue.

In light of the Court's DENIAL of the preliminary Objections in the nature of demurrers, the Defendant shall file an Answer to the Plaintiff's Complaint within twenty (20) days of receipt of the remaining pages of the subcontract (Exhibit B).

By The Court,

Kenneth D. Brown, Judge

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