

CONNECTING THE DOTS

Showing causation in contracting cases is critical

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Carefully connecting all the dots is critical to show causation in construction contracting cases.

In this asphalt case, the prime contractor agreed to perform a \$13 million road project for the South Dakota Department of Transportation on U.S. Highway 83 in Lyman and Stanley Counties in South Dakota (near the State Capitol of Pierre). The prime subcontracted with plaintiff for just under \$3 million-worth of aggregates and asphalt paving work. Three asphalt mixes were to be used: base course, Superpave, and Class S. The plan was to complete all paving work from about mid-June until mid-September. The Sub's work was subject to inspection and acceptance by the DOT.

As usual, the terms and specifications prescribed certain materials testing and acceptable parameters for passage. Nearly seven months after the subcontract was formed and only three months before the project was planned for completion, the subcontractor submitted the first mix design for the Superpave to the DOT, which passed testing by the Prime's third-party lab and with room to spare. However, the same mix design only marginally passed the DOT's internal testing lab.

Concerned about the marginal pass, all parties collectively agreed to alternative testing protocols, which took over a month to perform. In early August, a DOT representative orally informed the Sub that testing of the mix design had passed. However, only the aggregate testing had passed, not the mix design. By mid-August, the DOT formally notified the Sub that testing of the mix design had failed. Thereafter, the prime contractor and DOT worked together trying to find a suitable mix design, but they were unsuccessful before unsuitable weather set in until the following June. Ultimately, the project was successfully completed during the following summer.

The Sub litigated a claim against the DOT. (As an aside, it appears the Sub litigated directly against the DOT despite there being no contract between them. This is unusual, but not impossible. The court opinions do not explain why.) *Morris, Inc. v. State Dept. of Transportation*, 806 N.W.2d 894 (S.D., 2012).

After a nine-day bench trial (with judge, no jury), the trial court ruled for the sub awarding over \$1.5 million in damages plus over \$770,000 in prejudgment interest. The trial court ruled that the DOT breached the contract in several ways. Among others, the DOT broke its own protocols when its representative orally informed the Sub that the testing had passed. The trial court held this error alone caused enough delay to push completion of the project into the following summer. The DOT appealed.

On appeal, the South Dakota Supreme Court completely reversed the trial court. The Supreme Court found that the trial court failed to adequately connect or explain the improper notification of testing results to the alleged delays. The Supreme Court reasoned that even though the notification was improper, it did not necessarily delay performance. In other words, the DOT was not spotless, but the improper act was not the legal cause the delays. Simply when something is done improperly does not mean the alleged damages or delays followed therefrom. The appellate court did not the actual cause of delay and it did not have to. The sub had to prove that.

The appellate court also reversed because the trial court confused acceptance testing with quality testing. Generally, quality testing is performed before installation while acceptance testing is performed during or after installation. Here, the trial court found that because the Sub's work failed the DOT's acceptance testing procedure that could have been applied earlier, the DOT was to blame for not testing and informing the Sub sooner. The appellate court reasoned it was possible, as happened here, that quality testing could and was performed and passed while acceptance testing, which naturally occurred later, failed. Passage of one did not guarantee passage of the other.

Parents can use the phrase, "because I said so." Claimants cannot.

