

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5562
Summary Calendar

THREE DDD CONSTRUCTION COMPANY, INC.

Plaintiff-Appellant,

VERSUS

ROSIEK CONSTRUCTION COMPANY, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(85-CV-3393)

(July 8, 1994)

Before REYNALDO G. GARZA, DUHÉ, and EMILIO M. GARZA, Circuit
Judges.

PER CURIUM*:

This case comes before us once again after having been
reversed and remanded in part by this court on the issue of
damages. On remand, the district court modified several of the
damage awards. Concluding that the modifications are in
conformity with the mandates of this court, we affirm.

* Local Rule 47.5 provides: "The publication of opinions
that have no precedential value and merely decide particular
cases on the bases of well-settled principles of law imposes
needless expense on the public and burdens on the legal
profession." Pursuant to that Rule, the Court has determined
that this opinion should not be published.

I. Background

This civil action was originally instituted by Three DDD Construction Company in November, 1985, and arises from a Corps of Engineers project on the Black River in Concordia Parish, Louisiana, at its confluence with Wild Cow Bayou. The project called for two stage development of both a gravity flow drainage structure and a powered pumping plant, each of which would drain the interior of Concordia Parish and discharge flood waters into Black River. The suit arose as a result of disputes between the prime contractor on the second phase, Rosiek, and the excavation contractor on the second phase, Three DDD.

The case was tried to the court, and at the conclusion the court issued its written Reasons for Judgment finding that Rosiek had breached its contract with Three DDD by not dewatering the excavation cite, and therefore, Three DDD was entitled to recover both compensatory damages and unpaid sums of money due Three DDD for work actually performed and accepted by the Corps of Engineers. Both Three DDD and Rosiek offered expert testimony as to the calculation of damages, and the amounts of damages. The expert offered by Three DDD was Michael Callahan of CCL Construction Consultants. Rosiek offered the opinion of Richard Roy. Damages were awarded to Three DDD in the amount of \$570,193.86.

Both parties appealed to the United States Court of Appeals for the Fifth Circuit. On February 13, 1992, this court rendered its unpublished decision affirming the judgment of the Trial

Court on the issue of liability, but reversed and remanded portions of the damage award. Those portions of the award remanded for additional consideration were:

1. Excavation inefficiency
2. Extra bulldozers
3. Stand-by damages
4. Lost profit
5. Idled equipment

On remand, the trial court modified its previous awards as follows:

<u>Item of Damage</u>	<u>Initial Award</u>	<u>Modified Award</u>
1. Inefficiency Damages	\$69,493.72	\$12,865.03
2. Additional Bulldozer	28,506.28	6,911.59
3. Standby Damages	98,757.77	15,251.31
4. Lost Profit	56,163.68	-0-
5. Idled Equipment	33,350.00	-0-

Three DDD appeals the district courts implementation of this court's order of remand. For the foregoing reasons, we affirm.

II. Discussion

In remanding the case to the district court, this court asked the trial court to reconsider five categories of damages previously awarded to Three DDD in the lower court: (1) recalculate Three DDD's inefficiency damages according to actual productivity rates which Three DDD experienced in 1983 and 1984, rather than the rates Three DDD estimated in preparing its bid; (2) determine ownership of the additional bulldozer and the amounts of rental damages, if any, Three DDD actually incurred; (3) determine whether any standby damages should be reduced due

to inclement weather; (4) recalculate lost profits according to actual indicators of profit rather than bid estimates; and (5) determine whether any idled equipment damages reflect equipment previously transferred to LaSalle Leasing. We address each damage issue in turn.

Inefficiency Damages

The trial court initially determined that Three DDD incurred additional costs as a result of inefficiencies created by Rosiek's failure to dewater the outlet channel area. In other words, the presence of water at the worksite (a situation which Rosiek was contractually obligated to correct), and Rosiek's methods of construction dictated to Three DDD, increased the time and money incurred by Three DDD during its excavation.

This court reversed the district court award to Three DDD of \$69,493.72 in damages for extra costs incurred by it in attempting to perform the excavation of the outlet channel as a result of Rosiek's failure to dewater that aspect of the project. In this court's original opinion, we stated:

We have expressed a preference for actual damage calculations based upon contemporaneous records as opposed to formulations relying on bid estimates. Moreover, we have expressed our dissatisfaction with the use of total cost theories of recovery in situations calling for use of specific cost figures.

The record reflects that Douglas Robertson (Robertson), president of DDD, testified the work conducted by DDD in 1983 and 1984 was completed according to "industry standard" and no problems were encountered. Suggestions to the contrary made by Callahan are based on conjecture and speculation, unacceptable in this context. Roy's use of the actual productivity rates rather than the bid estimates are in line with Louisiana cases and cases of this court applying Louisiana law. Therefore, "[u]nder the

circumstances presented, the interests of justice are best served by setting aside the award of [inefficiency] damages and remanding this case to the district court" for a determination of the amount of those damages as measured by the actual productivity rates ascertained from the work performed by DDD in 1983 and 1984. (citations and footnotes omitted).

Upon remand, and in accordance with the above setforth mandate of this court, the district court adopted the calculation of "baseline productivity" based upon actual production in the years 1983 and 1984 which were unaffected by Rosiek's failure to dewater the outlet channel. We find that the district court properly followed the dictates of this court in recalculating the inefficiency damages. Appellant reurges their argument that the computations of Callahan, which were based on bid productivity which this court originally rejected in favor of computations based upon actual productivity achieved on the job, should be adopted. Appellant's brief merely challenges the wisdom of this court's prior opinion, but cannot refute the fact that the trial court followed the mandates of this court to the letter.

Additional Dozer

This court remanded this issue for a determination as to whether Three DDD actually incurred rental expenses in connection with the project. Three DDD failed to cite any fact testimony or exhibit that would establish that they actually incurred rental expenses in connection with this item of damage. Because Three DDD presented no evidence that they either owed or paid rent for the use of additional dozers, the district court was correct in

rejecting any amounts for rental charges.¹

Stand-By Damages

In its original opinion, the trial court awarded Three DDD stand-by damages of \$98,757.77 for forty-eight (48) days from September 16, 1985 through November 7, 1985. According to the evidence adduced at trial, on September 9, 1985, Three DDD's outlet channel excavation operations at Black River were shut down by the Corps of Engineers pending completion of contractually required flood protection by Rosiek. On November 7, 1985, Three DDD was allowed to resume operations.

This court remanded this portion of the award to consider a discount for idled time by number of days between September 6, 1985, and November 7, 1985, for which work was impossible due to inclement weather. Upon remand, the district court modified the stand-by award to \$15,251.31.

Three DDD reurges the argument that it previously used before this court, that Callahan's calculations are more reasonable than those calculated by Rosiek's expert. This court admonished the speculative nature of Callahan's calculations since they were based on bid estimates and accounted for inclement weather days with a factor rather than with a statement of the actual days which Three DDD could or could not have worked during this period due to bad weather. The district court correctly recalculated this damage amount based upon the actual

¹ While the district court rejected any amount for rental charges, it did award Three DDD direct labor expense and profit related to labor expenses.

amount of time Three DDD would have been able to work taking into account lost days due to inclement weather.

Lost Profit

The trial court originally awarded Three DDD damages for its lost profits based on Callahan's "across the board" profit margin of 11.1% of the remaining contract value. Finding error in the reliance on bid estimates, this court remanded for new calculations based on Three DDD's actual experience on the job.

On remand, the district court denied Three DDD's claim for lost profits. The court found that Three DDD, who continued to rely on bid estimates to arrive at lost profits, was unable to carry its burden of proving that the Wild Cow Project would have been profitable for Three DDD even if the entire project had been dewatered and if Three DDD had operated the job as it had planned. We find no error to have occurred in the district court's determination.

Idled Equipment

This element for damages was remanded on the following grounds:

The District Court found LaSalle was a separate corporate entity from Three DDD and our review of the record and relevant law leads us to conclude it was correct on this point. However, the Court also found Three DDD transferred all of its heavy equipment to LaSalle in July of 1984. The damages awarded Three DDD for the idled equipment did not occur until late 1985 and 1986. The District Court's award of the fair rental value of Three DDD's equipment during this period, appears when Three DDD could not find additional work, is thus in conflict with his finding that LaSalle was the owner of the equipment. This

situation forces us to remand this issue of damages for the determination by the Court as to the extent to which any of the calculations submitted by Callahan rested upon equipment transferred to LaSalle.

Although the district court notes on remand that LaSalle Leasing was in fact the owner of this equipment and that the equipment was used by Three DDD under a "Master Lease Agreement" between Three DDD and LaSalle, Three DDD contends that it is entitled to rental damages sustained during the idled period since, under its lease, it was obligated to continue to make minimum monthly rental payments on this equipment. The district court held that the minimum monthly lease payment owed to LaSalle under the Master Lease was to compensate LaSalle for its loss, if any, which it may sustain in granting Three DDD priority treatment in selecting and using the equipment desired by Three DDD. This provision, the court ruled, is irrelevant to Three DDD's alleged rental costs for idled equipment. We agree. Furthermore, Three DDD presented no evidence to the trial court that it either actually paid or owed to LaSalle Leasing under this or any other lease provision. The district court is affirmed on this point as well.

III. Conclusion

We find that the district court correctly recalculated the damage awards in accordance with the mandates of this Court. The appellee's claim for frivolous appeal is denied.

AFFIRMED.