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EVCO Sound & Electronics v. Seaboard Sur. Co. Respondent's Brief Dckt. 34898

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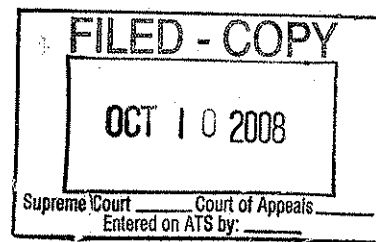
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IN THE SUPREME COURT OF THE STATE OF IDAHO

EVCO SOUND & ELECTRONICS, INC.,)
)
Plaintiff-Respondent,)
)
vs.)
)
CEDAR STREET ELECTRIC AND CONTROL,)
INC., SEABOARD SURETY COMPANY,)
)
Defendants-Appellant.)

Supreme Court No. 34898



RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable John T. Mitchell Presiding

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I. STATEMENT OF THE CASE

A. Introduction and Summary of Argument

This is an action by EVCO Sound and Electronics, Inc. to recover on a Public Works Bond posted by Seaboard Surety Company pursuant to Idaho Code § 54-1927.

The trial court found that a contract existed between EVCO and Defendant, Cedar Street Electric and Control, Inc.; that there was a balance of \$76,105 due from Cedar Street to EVCO; and that EVCO's claim against Seaboard's bond was timely.

Seaboard appeals claiming that the trial court erred "as a matter of law" in finding that a contract existed. In doing so, Seaboard attempts to create an agreement or requirement that any agreement between EVCO and Cedar Street be in writing.

EVCO will show that the trial court's findings were based on substantial evidence; that the law applied by the trial court is well settled and that Seaboard's appeal is therefore unreasonable and without foundation.

B. Factual Background

FACTS¹

1

The Facts as numbered are taken from the Trial Court's Findings of Fact and supplemented with citations to the Record, Exhibits and Transcript. The paragraph numbers are from the Trial Court's Findings and the quoted portion is indented but not single spaced. (R. p. 257-265)

1. Parties

1. Plaintiff, EVCO Sound and Electronics, Inc. (“EVCO”) is a Washington Corporation, principally located in Spokane, Washington. [R., p.2; Ex 4]. EVCO conducts business as a low voltage electrical supply and installation company. [Tr. Vol. I, p. 5, l. 4-20]. EVCO was established in 1969 [Tr. Vol. I, p. 100, l. 13-15] and EVCO’s business is comprised of 80% public works projects, 60% of which are school projects such as the project at issue in this matter. [Tr. Vol. I, p. 6, l.1-7] EVCO works on between 20 and 30 schools per year [Tr. Vol. II, p. 101, l. 8-10] and it performs work throughout Washington, Northern Idaho and Montana. [Tr. Vol. I, p. 5, l. 21-25].

2. Defendant, Cedar Street Electric and Control, Inc. (“Cedar Street”) is an Idaho Corporation, principally located in Sandpoint, Idaho. [R., p. 2, 252; Ex. 9]. Cedar Street was an electrical contractor. [Ex. 9].

3. Defendant, Seaboard Surety Company (“Seaboard”) is a surety licensed to do surety business in Idaho. [R., p. 2, 11].

4. Although not a party to the action, [R., p. 2] Ormond Builders, Inc. (“Ormond Builders”) [of Idaho Falls, Idaho Ex. M, p. 1] acted as a general contractor and was the principal on the bond issued by Seaboard as Bond No.

SS7377, bearing a date of March 18, 2004, consistent with the Idaho Code § 54-1925 *et seq.* (the “Bond”). Exhibit 1. [Appellants Brief , p. 4]. This bond was for Ormond Builders construction of the Timberlake Junior High School Project at Spirit Lake, Idaho, for Lakeland School District #272. The Lakeland School District No. 272 (the “School District”) was the Owner of a project known as the Timberlake Junior High School Project (the “Project”). Ormond Builders was the general contractor on the Project and the Bond was issued pursuant to Idaho Code § 54-1927. [Appellant’s Brief, p. 4-5].

2. EVCO’S Claim

1. Cedar Street submitted a bid to Ormond Builders to perform all of the electrical work on the Project. Exhibit 9. On or about March 3, 2004, in a competitive bidding process for construction of the . . . [project] . . . , EVCO proposed to supply labor and materials to Cedar Street for the fire alarm, intercom, telephone and television media sections (the low voltage portions) of the Project specifications at a lump sum price of \$165,850 excluding tax. Exhibit 4. [Tr. Vol. I, p. 9, 1 14-23; Vol. II, p. 40, l. 13-14].

2. Cedar Street requested that EVCO include Idaho Use Tax in its proposal. Jim Kuzmich of Cedar Street testified that they used EVCO’s price

and asked for use tax to be added, and that is what Cedar Street used to get the bid from Ormond Builders. [Tr. Vol. II, p. 62, l. 18-23]. Kevin Bauer of EVCO testified that Jim Kuzmich of Cedar Street later decided to take off the Idaho Use Tax and that Bauer was “fine with that amount” and that arrangement. [Tr. Vol. II, p. 17; l. 23 - p. 18, l. 1].

3. On the bid date of March 10, 2004, EVCO revised its proposal to Cedar Street to include Idaho Use Tax and a detailed description of the work EVCO would perform. Exhibit 7, Exhibit 8: [Tr. Vol. I, p. 18, l. 1 - p. 20, l. 1].

4. Cedar Street used EVCO’s bid in its bid to Ormond Builders. Exhibit 9. [Tr. Vol. II, p. 62, l.18-23].

5. Ormond Builders was the apparent low bidder on the project. Testimony of Greg Hostert. Although Ormond Builders was low bidder, Ormond Builders’ bid was above the School District’s budget for the new school. *Id.* [Tr. Vol. II, p. 125, l. 9-19].

6. As a result of Ormond Builders’ bid being in excess of the School District’s budget, after the bid opening, the School District, Ormond Builders, Cedar Street and EVCO were involved in a process of identifying

and pricing possible deductive changes (“value engineered items”, Exhibit 15) to the Project. Exhibits 5, 10, 11, 12, 15. Testimony of Greg Hostert. Hostert testified that there were meetings with Ormond Builders and the three biggest contractors on the project to reduce the cost of the project. [Tr. Vol. II, p. 125, l. 12 - p. 126, l. 6]. Exhibit 11. EVCO was . . . advising Cedar Street as to which items could be cut from its contract with Ormond Builders. [Ex. 10, 12, 15]. Cedar Street had the electrical contract [Ex. M], and EVCO provided cost break-downs to do certain parts of the low-voltage portion of that electrical contract. Kevin Bauer testified Jim Kuzmich of Cedar Street prepared the information Exhibit 9, page 2 (Bates stamp 87), and presented that information to Ormond Builders, but that Kevin Bauer supplied the information to Cedar Street in the first place. [Ex. 10, 12, 15]. Cedar Street used EVCO’s figures to submit Cedar Street’s bid to Ormond Builders [Tr. Vol. II, p. 62, l. 18-23], then used EVCO’s advice and figures in the “value engineering” involved after Ormond Builders’ bid was accepted. [Ex. 10, 12, 15, 18; Tr. Vol. I, p. 26, l. 13-180].

7. Ormond Builders entered into a contract with the School District for construction of the Project [on March 18, 2004. Ex. M, p. 1]. Exhibit 5

shows Cedar Street and EVCO were discussing implementation of the project at least by March 5, 2004.

8. Ormond Builders entered into a subcontract with Cedar Street in April 2004, for all the electrical portion of the Project. Exhibit M. This incorporated the electrical specifications set forth in Exhibit 3. [*Id.*]

9. On June 14, 2004, Cedar Street notified EVCO of its “intent to enter into contract” and requested that EVCO supply materials to the Project “ASAP”. Exhibit 14.

Exhibit 14 was signed by Mike Coulter, who as project manager for Cedar Street, was authorized to request that EVCO start and continue to supply labor and material to the project. (Tr. Vol. II, p. 67, l. 6 - p. 69, l. 4).

10. On June 22, 2004, Cedar Street requested a revised proposal amount based on the deletion of three items and a change to some wiring. Exhibit 15. Cedar Street established the price for the three items Cedar Street wanted deleted, and EVCO accepted the prices for those three deletions. Testimony of Kevin Bauer [Tr. Vol. I, p. 25, l. 18 - p. 26, l. 18]; Exhibit 18. The remaining term, the change in the plenum wiring, was established by EVCO. Exhibit 18. [*Id.*]

11. On June 23, 2004, [Mike Coulter of] Cedar Street sent EVCO a form subcontract that did not include a contract amount or scope of work description. Exhibit 16, F.

Mr. Coulter had no authority to negotiate for or bind Cedar Street. (Tr. Vol. II, p. 40, l. 21 - p. 41, l. 2; p. 42, l. 13-16). The form did not refer to EVCO. (Tr. Vol. II, p. 13, l. 23 - p. 14, l. 6).

12. On the same day, June 23, 2004, Cedar Street sent EVCO a Joint Check Agreement for \$130,000. Exhibit 16. [T]he \$130,000 amount on the joint check agreement was the amount shown on Exhibit 18, less the amount shown for the Idaho Use Tax. [Tr. Vol. II, p. 17, l. 23 - p. 18, l. 1].

13. On June 29, 2004, EVCO sent Cedar Street a "revised contract price" of \$129,430.00 reflecting the four deductive changes requested by Cedar Street's fax of June 22, 2004 [Ex. 15] Exhibit 18.

14. In Idaho a contractor is bound to a subcontract once the contractor notifies the subcontractor of its intent to contract and requests performance. The contractor is bound to pay for the subcontractor's performance until the contractor tells the subcontractor to stop or until an agreement is reached that supersedes the

request for performance. Testimony of Don Ormond. [Tr. Vol. II, p. 191, l. 7 - p. 192, l. 16]

. . . Cedar Street notified EVCO of its intent to contract and requested performance. [Ex. 14, 18] . . . Cedar Street's Mike Coulter administered the contract with EVCO, . . . Coulter was authorized by Cedar Street to coordinate all work on the Project, [Tr. Vol. II, p. 67, l. 23 - p. 69, l. 4] and . . . Coulter did request EVCO to start work on the Project. [Tr. Vol. II, p. 20, l. 12-14; p. 247, l. 7-19].

15. In EVCO's line of work in Idaho, on public works contracts, much of the low voltage subcontract work is done without a signed, written agreement between the electrical subcontractor and the low voltage specialty contractor. Testimony of Kevin Bauer. [Tr. Vol. II, p. 240, l. 4-7].

16. After June 14, 2004, Cedar Street requested that EVCO supply material and labor to the Project. Exhibit 14. [Tr. Vol. II, p. 20, l. 12-14; p. 68, l. 21 - p. 69, l. 4, p. 247, l. 7-19].

17. EVCO supplied to the Project that material and labor described in its revised proposal of March 10, 2004 (Exhibit 8) less the four deductive changes described and priced in EVCO's statement of the "revised contract" of June 29, 2004. Exhibit 18. [Tr. Vol. II, p. 240, l. 14 - p. 243, l. 3; p. 79, l.

11-20; p. 84, l. 6-8]).

18. There was absolutely no evidence that after June 29, 2004, that Cedar Street directed EVCO to reduce its performance as set forth in Exhibit 8, Exhibit 9 and Exhibit 18.

19. EVCO's Dan Miller conducted Project training sessions for the School District on April 15, 2005. Exhibit 21. [Tr. Vol. II, p. 91, l. 5 - p. 94, l. 25; Ex. 22]

The training was required by the project specifications. (Ex. 3, p. 341, 352, 367, 368). This training was original contract work according to the Project Architect, Scott Fisher. (Tr. Vol. II, p. 230, l. 6-8). This training occurred approximately 60 days after initial training as specified. (Tr. Vol. II, p. 238, l. 23 - p. 239, l. 13; Ex. 3, p. 367).

20. EVCO's Larry Nipp installed part of the Project television system on April 26, 2005. Exhibit 22. [Tr. Vol. II, p. 82, l. 1 - p. 83, l. 21]

This work was delayed by a late connection to the TV cable. (Tr. Vol. II, p. 185, l. 19 - p. 186, l. 1). The final connection and tuning of the television after the cable connection was part of the original contract work according to the Project Architect. (Ex. 3, Bates No. 371-372; Tr. Vol. II, p. 229, l. 18 - p. 230, l. 8).

20. [Continued] . . . EVCO invoiced Cedar Street for progress payments. [Ex. 20]. [Tr. Vol. II, p. 24, l. 3-25; p. 69, l. 23 - p. 70, l. 5; Vol. I, p. 28, l. 14 - p. 31, l. 2]. Exhibit 24.

20. [Continued] . . . EVCO completed its Project as-built drawings on June 15, 2005. Exhibit 22. [Tr. Vol. I, p. 45, l. 4-150].

The as-builts were part of the original contract work according to the Project architect. (Tr., Vol. II, p. 230, l. 9-11).

21. [T]he project was not completed as of May 31, 2005. [Ex. 25, Pay Application No. 13; Tr. Vol. II, p. 229, l. 4-11]. [T]he School District requested additional training and [Hostert of Ormond Builders] had a discussion with Kevin Bauer of EVCO about performing such, and . . . this occurred after the initial training that occurred in January and February, 2005. [Tr. Vol. II, p. 138, l. 3-21].

23. Cedar Street invoiced Ormond Builders for EVCO's work. [See, Tr. Vol. II, p. 151, l. 24 - p. 152, l. 4] [O]f the \$565,000.00 [Ormond - Cedar Street] contract price, all but about \$3,000.00 to \$3,500.00 has been paid [by Ormond] to Cedar Street or on Cedar Street's behalf. [Tr. Vol. II, p. 207, l. 9-19].

Included in Ormond payments to Cedar Street or on Cedar Street's behalf are payments made to the Idaho State Tax Commission and the Idaho Department of Labor. The payments were unrelated to the project. (Tr. Vol. II, p. 218, l. 4 - p. 219, l. 9).

24. Ormond Builders sought and received payment from the School District for materials and labor that EVCO supplied to the Project. Exhibit Q.

25. EVCO received two payments for its work on the Project. The first, a joint check from Ormond Builders to EVCO and Cedar Street dated August 17, 2004 was in the amount of \$3,325. The second, a check directly from Ormond Builders to EVCO dated March 30, 2005, was for \$50,000. Testimony of Kevin Bauer [Tr. Vol. I, p. 35, l. 3 - p. 36, l. 20], testimony of Don Ormond. [Tr. Vol. II, p. 205, l. 1 - p. 206, l. 15]. Exhibit 2, p. 313.

26. Given the contract price of \$129,430.00 (Exhibit 18, Finding of Fact 13), less the payments mentioned above, EVCO is owed \$76,105.00 on its subcontract with Cedar Street for materials and labor that EVCO provided to the Project.

27. EVCO served a Notice of Claim on Ormond Builders on June 13, 2005. Exhibit 2, [page no. 316, 317. Tr. Vol. I, p. 31, l. 25 - p. 42, l. 13].

28. EVCO served a Claim on Seaboard dated September 29, 2005.

Exhibit 2.

29. This action was filed on March 10, 2006. (R., p. 2)

II. ISSUES PRESENTED ON APPEAL

A. Is the trial court's finding that "the conduct of the parties shows a meeting of the minds occurred and a contract was formed in the amount of \$132,688.04, less the Idaho Use Tax amount of \$3,258.04, for a total contract price of \$129,430" based on substantial evidence? (R., p. 262).

B. Is the trial court's finding that "EVCO is owed \$76,105.00 on its subcontract with Cedar Street for materials and labor that EVCO provided to the Project" based on substantial evidence? (R., p. 265).

C. Is the trial court's finding that EVCO performed original contract work on the Project on April 15, 2005, April 26, 2005 and on June 15, 2005 based on substantial evidence? (R., p. 263).

D. Are the trial court's findings of fact supporting its conclusion that the statute of frauds did not bar EVCO's claim based on substantial evidence? (R., p. 268-269).

E. Did the trial court misapply the law on contract formation? (R., p. 266-268).

F. Did the trial court misapply the law on claim timeliness? (R., p. 271-272).

III. ATTORNEY FEES ON APPEAL

EVCO requests an award of attorney fees pursuant to Idaho Code § 54-1929, which provides:

In any action brought upon either of the bonds provided herein . . . the prevailing party, upon each separate cause of action, shall recover a reasonable attorneys fee to be taxed as costs.

Id.

This appeal was taken from a judgment of the trial court enforcing a claim against a public contracts bond. *See, Oldcastle Precast v ParkTowne Const., Inc.*, 142 Idaho 376, 379, 128 P.3d 913 (2005).

EVCO requests an award of attorney fees pursuant to Idaho Code § 12-120(3) which provides in pertinent part:

In any civil action to recover on [a] . . . guaranty . . . relating to the purchase or sale of goods . . . or services . . . the prevailing party shall be allowed a reasonable attorneys fee to be set by the court, to be taxed and collected as costs.

This is an appeal from a civil action to recover on Seaboard's guaranty relating to EVCO's sale of goods and services. Attorney fees are awardable on appeal and are mandatory under this section. *Swanson v BECO Const. Co., Inc.*, Idaho Supreme Court (2007) Opinion No. 116 (filed: November 23, 2007); *Sainsbury Const. Co., Inc. v Quinn*, 139 Idaho 269, 275, 47 P.3d 772, 778.

An award of attorney fees to EVCO is proper under Idaho Code § 12-121 because Seaboard's appeal is brought and pursued unreasonably and without foundation.

In this appeal, Scott has not been able to point to any findings of fact which were clearly, or even arguably, unsupported by substantial and competent evidence. On some points the evidence was conflicting but it is not our function to second-guess a trial court on conflicting evidence. *See, T-Craft Aero Club, Inc. v Blough*, 102 Idaho 833, 642 P.2d 70 (Ct.App.1982). Moreover, we have not been asked to establish any new legal standards, nor modify or clarify any existing standards. Rather, the narrow focus of this appeal has been the application of settled law to the facts. There was no showing that the trial court misapplied the law. *Compare Christensen v Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P. 2d 70 (Ct.App.1983). In our view, this appeal was brought and pursued unreasonably and without foundation. Accordingly, we award attorney fees on appeal to Castle, in an amount to be determined as provided in I.A.R. 41(d).

Scott v Castle, 104 Idaho 719, 726-27, 662 P.2d 1163, 1170-71 (1983).

Seaboard "has not been able to point to any findings of fact which were clearly or even arguably, unsupported by substantial and competent testimony." *Id.* The trial court painstakingly dealt with and resolved conflicting testimony. (*See, R.*, p.264). It is not the Appellate Court's function to second guess a trial court on conflicting evidence. *Id.*

Seaboard has not asked this Court "to establish any new legal standards, nor modify or clarify any existing standards. Rather, the narrow focus of this appeal has been the application of settled law to the facts." *Id.* The law regarding contract formation is well settled.

“There was no showing that the trial court misapplied the law”. *Id.* The trial court discussed and applied the law as stated by this Court in *Barry v Pacific West Const., Inc.*, 140 Idaho 827, 103, P.3d 440 (2004) in a strikingly similar fact pattern, to the facts at hand.

This Appeal was brought and pursued unreasonably and without foundation, *Scott, supra.* EVCO should be awarded its attorney fees on appeal.

IV. ARGUMENT

A. The Trial Court’s Finding That “The Conduct of the Parties Shows a Meeting of the Minds Occurred and a Contract Was Formed in the Amount of \$132,688.04, less the Idaho Use Tax Amount of \$3,258.04, for a Total Contract Price of \$129,430” Was Based on Substantial Evidence and Should Not Be Overturned.

The district court’s findings of fact are reviewed to determine whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Electrical Wholesale Supply Co., Inc. v Nielson*, 136 Idaho 814, 820, 41 P.3d 242, 248 (2001). In a court-tried case, the findings of fact are liberally construed on appeal in favor of upholding the judgment interest. *Id.* If the findings of fact are based on substantial evidence, even where that evidence is conflicting, they will not be overturned on appeal.

Barry, supra. (Emphasis added).

Seaboard attempts to legitimize its appeal by framing the issues as issues of law. However, Seaboard’s own words belie that. Seaboard framed the contract formation issues on appeal as:

- (1) Whether the district court erred by as a matter of law in holding that an express contract was established between EVCO and Cedar Street.

- (2) Whether the district court erred as a matter of law in awarding EVCO's alleged expectation damages against Seaboard's bond.

A thorough reading of Seaboard's brief makes it clear that Seaboard's claim on appeal is that the trial court's finding that "the conduct of the parties shows a meeting of the minds occurred and a contract was formed . . . " was not based on substantial evidence. See, Seaboard's brief at p. 2.

Contrary to the legal conclusions of the Court, the evidence failed to support a meeting of the minds which is a necessary prerequisite to finding an express contract.

Seaboard's brief, p. 17 (emphasis added).

As detailed in the facts above, the trial court's findings (that there was an express contract), were supported by substantial evidence and by the trial court's resolution of conflicting testimony.

The absence of evidence can be substantial evidence. (*See*, R. P. 262, ¶ 18). There were obvious material gaps in evidence to support Seaboard's case at trial and on appeal. Cedar Street, a defendant in the lawsuit and one of the two contracting parties in the contract at issue, conceded all of EVCO allegations in EVCO's complaint by not responding and allowing a default judgment to be entered against it. (R., p. 252). There was no evidence that anyone from Cedar Street told EVCO that Cedar Street would not proceed without a

written or signed agreement. There was no evidence that anyone from EVCO told Cedar Street that EVCO would not proceed without a written or signed agreement. There was no evidence that Cedar Street had written subcontracts with its other subcontractors on the job. In fact, Mr. Kuzmich could not remember if other subcontracts existed. (Tr. Vol. II, p. 66, l. 14-24). Cedar Street produced no purchase order or subcontract that it had available to it at the time of EVCO's bid. Mr. Coulter testified that he could not find a purchase order or subcontract at Cedar Street. (Tr. Vol. II, p. 42, l. 23- p. 43, l. 5). There was no evidence that anyone for Cedar Street even told anyone from EVCO that Cedar Street was considering reducing EVCO's scope of work much less actually taking steps to do so. There was no evidence that Mr. Kuzmich for Cedar Street contested EVCO's position that Exhibit 18 was the agreement between the parties when Mr. Hostert of Ormond Builders was investigating the Cedar Street - EVCO agreement late in the job. (Tr. Vol. II p. 135, l. 15 - p. 137, l. 20). There was no evidence that the not-to-exceed amount of \$130,000 figure in the third party check agreement drafted by Ormond came from anyone other than Cedar Street. There was no evidence that anyone ever objected to EVCO's work or to an EVCO invoice. There was no evidence as to how much Ormond paid the Idaho State Tax Commission or the Idaho Department of Labor on Cedar Street's behalf and obligations unrelated to the Project. (Tr. Vol. II, p. 218, l. 20 - p. 219, l. 9). Finally, there was no evidence of an accounting by either

Cedar Street or Ormond on their subcontract. (Tr. Vol. II, p. 74, l. 7 - p. 75, l. 15; p. 215, l. 24 - p. 219, l. 9; p. 142, l. 22 - p. 143, l. 7).

The trial court entered detailed findings of fact based on the evidence that was presented then entered the critical finding that “the conduct of the parties shows a meeting of the minds occurred and a contract was formed . . . “. (R., p. 262, Finding of Fact No. 17).

In its conclusions of law, the trial court set out specific evidence to support its findings:

The “scope of the work” was delineated in Exhibit 18. EVCO was told to begin work in Exhibit 14. Exhibit 18 establishes the contract price. EVCO did the work called for in Exhibit 18. Accordingly, Cedar Street, Ormond Builders and the School District received the benefit of EVCO’s work., and those exhibits also establish the contract price.

(R., p. 270, Conclusion of Law B(2)(d).)

Other evidence supporting the court’s finding of a meeting of the minds and the formation of a contract include: the scope of work and price were identified in documents. Exhibit 4, 8, 15, 18, “An Intent to Contract” and specific direction to perform were contained in Exhibit 14. This was followed by further direction to provide labor and material. (Tr. Vol. II, p. 68, l. 21 - p. 69, l. 4). EVCO responded by providing drawings, submittals, labor and material. (p. 247, l. 7 - p. 248, l. 4). Cedar Street performed its part of the low voltage systems consistent with Exhibits 4 and 18. Evco did its part on the low voltage systems consistent with Exhibits 4 and 18. (Tr., Vol. II, p. 240, l. 14 - p. 243, l. 3). Cedar Street told

Ormond the EVCO contract would not exceed \$130,000. Pay requests were submitted, processed and paid. (*See*, Tr., Vol. II, p. 207, l. 9-19). Submittals, shop drawings, operations and maintenance items and as-builts were prepared and submitted consistent with Exhibits 4 and 18. Neither Mr. Kuzmich nor anyone else from Cedar Street ever contested Exhibit 18 as a substantial statement of the contract. (Tr. Vol. II, p. 136, l. 25 - p. 137, l. 20). Cedar Street defaulted in this action without contesting allegations by EVCO. Finally, and to some point significantly, Ormond had money left over on Cedar Street's subcontract even after unquantified payments to state agencies unrelated to the project. (Tr. Vol. II, p. 207, l. 9-19).

The court's finding of a meeting of the minds and of a contract is based on substantial and competent evidence. *Barry, supra*.

B. The trial court's finding that "EVCO is owed \$76,105.00 on its subcontract with Cedar Street for materials and labor that EVCO provided to the Project" was based on substantial evidence.

The trial court's finding that \$76,105 was the "sum justly due" EVCO was based on substantial evidence. *See*, Idaho Code 54-1927.

The trial court found the contract amount to be \$129,430 not including Idaho Use Tax. (R., 262, Finding of Fact No. 17). The court found that there had been full performance of EVCO's work based upon the facts that all of the low voltage work had been accepted and paid for by the owner. (R., p. 264-265, Finding of Fact 23, 24). The court found that

payments of only \$53,325 had been made to EVCO. (R., p. 265, Finding of Fact 25). The mathematical balance due after crediting these payments is \$76,105. (R., p. 265, Finding of Fact 25 and 26).

The Trial Court's Finding that the Sum Justly Due From Cedar Street to EVCO is Based on Substantial Evidence.

C. The Trial Court's Findings That EVCO Performed Original Contract Work on the Project on April 15, 2005, April 26, 2005 and on June 15, 2005 Were Based on Substantial Evidence.

The trial court found:

19. EVCO's, Dan Miller, conducted project training sessions for the School District on April 15, 2005. (Exhibit 21).

20. EVCO's, Larry Nipp, installed part of the Project television system on April 26, 2005. (Exhibit 22). EVCO completed its Project as-built drawings on June 15, 2005. (Exhibit 22).

....

22. Scott Fisher testified that training of the owner School District on the low voltage systems was part of the original contract between the School District and Ormond Builders, as was final connection and tuning of the cable television system after hook-up to the street, as was submission of as-built drawings for the low voltage systems.

(R., p. 263-264, Finding of Fact, No. 19, 20, 22)

The findings are supported by substantial evidence. Dan Miller's training sessions were documented in time records. (Exhibit 22). The requirement for training was detailed

in the specifications. (Exhibit 3, Bates No. 341, 367). The timing of a training session was established by the specification to be 60 days after initial training which had taken place at substantial completion in February. (Ex. 3, Bates No. 367; Tr., Vol. II., p. 238, l. 25 - p. 239, l. 13). The School District had made a special request for the training. (Tr. Vol. II, p. 138, l. 3-21). Ormond did not provide the training. (Tr. Vol. II, p. 169, l. 9-24). Cedar Street did not provide the training. Finally, Scott Fisher, the Project architect, confirmed that training was part of the original contract work. (Tr. Vol. II, p. 229, l. 15 - p. 230, l. 5).

The court's finding relative to the television balance work were based on substantial evidence. The date and quantity of time required for the work were documented. (Exhibit 22). The balance work had been delayed by the cable installation. (Tr. Vol. II, p. 185, l. 19 - p. 186, l. 1). The Project architect, Scott Fisher, confirmed that this work was original contract work.

The court's finding relative to EVCO's production of as-built drawings was supported by substantial evidence. The date and hours of the labor was documented. (Exhibit 22). The Project pay requests reflect incomplete as-built work in June late May. (Ex. 25, Pay Application 13). As-built drawings for EVCO's work were specifically required by the specification. Exhibit 3. The Project architect, Scott Fisher, confirmed that as-builts were original contract work. (Tr. Vol. II, p. 230, l. 9-11).

D. The Trial Court's Findings of Fact Supporting its Conclusion That the Statute of Frauds Did Not Bar EVCO's Claim Is Based on Substantial Evidence.

The trial court in dismissing Seaboard's statute of frauds defense stated in pertinent part:

EVCO's full performance takes the EVCO/Cedar Street contract out of the statute of frauds. When Cedar Street and Ormond Builders requested and obtained payment for the materials and equipment supplied by EVCO, the materials and equipment were accepted and the contract was taken out of the statute of frauds. Idaho Code § 28-2-201(3). Neither Cedar Street nor Ormond Builders objected in any way to the work and materials EVCO installed on the Project. Acceptance is a failure to reject or any act inconsistent with the sellers (EVCO in this case) ownership. Idaho Code § 28-2-606.

Additionally, Exhibit 18, satisfies the state of frauds. Idaho Code § 28-2-201(2) states: "between merchants if, within a reasonable time, arriving in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of § 1(1) against such party unless written notice of objection to its contents if [sic] given within ten (10) days after it is received". Both EVCO and Cedar Street are merchants as defined by Idaho Code § 28-2-104(1). Exhibit 18 and Exhibit 8 were received by Cedar Street, and not only were they not objected to, but Cedar Street told *EVCO to start performing the work discussed.*

(R., p. 268, Conclusion of Law No. B(2)(c)).

Ormond received payment for EVCO's work. (Exhibit Q). Cedar Street was in turn paid for all or nearly all of EVCO's work. (Tr. Vol. II, p. 207, l. 9-19).

A merchant is "a person who deals in goods . . . involved in the transaction

Idaho Code § 28-2-104(1). Both EVCO and Cedar Street dealt in the goods required by the main contract. (Exhibit 8, 18, M).

E. Seaboard Has Failed to Show That the Trial Court Misapplied the Law on Contract Formation.

Seaboard has not asked this court to establish any new legal standards nor to modify or clarify any existing standards. *Scott, supra*. The focus of Seaboard's appeal has been the trial court's application of settled law to the facts.

The trial court discussed much of the authority cited by Seaboard in all of its briefing and explained why it was or was not applied. (R., 267-271). The trial court included a succinct summary of its findings and conclusions:

EVCO's contract with Cedar Street was expressed via the revised proposal shown by Exhibit 8 by EVCO was accepted by Cedar Street's statement of intent and request for performance of June 14, 2004, signed by Mike Coulter of Cedar Street. Exhibit 14. The contract was then modified by Exhibit 15 and 16 due to "value engineering" entered into between Cedar Street (with EVCO's input) and Ormond Builders, culminating in a revised contract scope and price memorialized in Exhibit 18. The only item that changed after Exhibit 18 was Cedar Street and EVCO orally agreed (Cedar Street dictated and EVCO did not argue) that the Idaho Use Tax would be deleted from that amount, and even *that* feature was documented in Exhibit 18 as EVCO wrote: "Note: if Cedar Street wants to hand the Use tax, you can delete it from our bid."

(R., 266, Conclusions of Law No. B(2)(a)).

The trial court also discussed and applied *Barry v Pacific West Const., Inc.*, 140 Idaho

827, 103, P.3d 440 (2004) which was decided by this court but not cited by either party. The trial court found the *Barry* case to be “on point”. (R., 269). The *Barry case, supra*, and *Miller Const. Co. v Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985) (cited by Seaboard) are both strikingly similar to the instant case. As in the instant case, both cases involve public projects with public bidding. *Barry* at page 830; *Miller* at page 188. As in the instant case, a written contract was involved but not signed by the parties. *Barry* at page 830; *Miller* at page 188. As in the instant case, the courts in *Barry* and *Miller* found that the parties had made a contract despite the fact that a contemplated written contract was never signed by the parties. *Barry* at page 832; *Miller* at page 188.

The trial court has applied the settled law from this court’s decision in *Barry, supra*, and the Court of Appeals decision in *Miller, supra*, to its findings which are based on substantial evidence.

F. Seaboard Has Failed to Show That the Trial Court Misapplied the Law on the Timeliness of EVCO’s Claim.

The trial court, without citation, appears to have applied the bright line rule set out in *United States ex rel. Interstate Mechanical v International Fidelity Insurance Co.*, 200 F.3d 456 (2000):

[T]his court concludes the correction-or-repair versus original-contract test presents a useful framework to determine when the Miller Act’s statute of limitations begins to run.

*Id.*²

The court in applying the bright line test of *Interstate, supra*, found the claim to be timely because it had found that EVCO had performed original scope work on April 15, April 26 and June 15, 2005. (R., 271-272).

V. CONCLUSION

Seaboard has done its best to confuse the issues of contract formation. It has accomplished nothing more than a tempest in a teapot.

The trial court found not only that there was a meeting of the minds and a contract formed but that the contract had been fully performed by EVCO. EVCO's claim against Seaboard under the bond statute is for "the sum or sums justly due [it]". All of the trial court's findings that were challenged by Seaboard were based on substantial evidence, including the findings and conclusions that EVCO is justly due \$76,105 together with interest and attorney fees.

Seaboard has not asked this court "to establish any new legal standards, nor modify or clarify any existing standards." *Scott, supra*. The narrow focus of Seaboard's appeal has been the application of settled law to the facts. *Scott, supra*. There was no showing that the

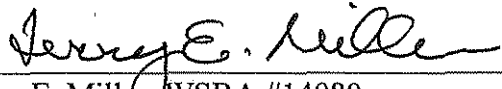
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Interstate, supra, was cited with approval by Seaboard in its brief on summary judgment. (R. 49-51) and in its brief on appeal at page 39-40.

trial court misapplied the law. As a result, Seaboard's appeal was brought and pursued unreasonably and without foundation.

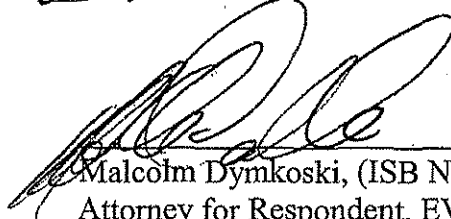
The trial court should be affirmed and EVCO should be awarded attorney fees on appeal

RESPECTFULLY SUBMITTED this 7th day of October 2008.



Terry E. Miller WSBA #14080
Attorney for Respondent, EVCO Sound
& Electronics, Inc.

RESPECTFULLY SUBMITTED this 8TH day of October 2008.

A handwritten signature in black ink, appearing to read 'M. Dymkoski', written over a horizontal line.

Malcolm Dymkoski, (ISB No. 3014)
Attorney for Respondent, EVCO Sound
& Electronics, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Washington, resident of and with my office in Kennewick, Washington, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivery, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 7th day of October 2008.

DOCUMENT SERVED: RESPONDENT'S BRIEF

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- First Class Mail*
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Terry E. Miller