BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

MILLER CONSTRUCTION CO., LTD.	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, SOUTHCOAST REGION	)	OAH No. 19-0088-CON

ORDER ON THE APPLICATION OF AS 36.90 (PROMPT PAYMENT ACT)

1. The prompt payment act

The prompt payment act, AS 36.90, sets out procedural requirements for the Region when it engages a prime contractor such as Miller Construction on a public constructions project. Under the act, after Miller Construction filed a payment request, the Region had to pay the request in full within a certain time (21 or 30 days, depending on the source of the money).[1] If the Region did not pay in full, it would have to either pay an elevated interest rate (10.5 percent per year) on the amount not paid, or, within eight days of receiving the request for payment, provide a written notice explaining why the work was unsatisfactory or not in compliance with the contract, and what Miller Construction had to do to receive full payment.[2]

2. Miller Construction's interpretation of the act

In its termination for convenience claim, Miller Construction argues that the prompt payment act requires the Region to pay an interest rate of 10.5 percent per annum on all amounts owed under the termination claim. It asserts that the higher interest rate should start running on January 4, 2018—the date of the Region's last progress payment, which, in its view represents an underpayment of all amounts found to be owing in this proceeding. It reasons that the interest rate should begin as of that day because its final pay request asked for "much of the unpaid contract balances" and that it was constructively prohibited from filing additional pay requests.[3] Alternatively, it asserts that the higher rate *must* begin at the latest on October 4, 2018—the date that Miller Construction filed its claims.[4] In short, Miller Construction asserts that the Region's

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1 AS 36.90.200(a). If the source of the money is the federal government or a grant, the 21-day limit applies, unless the state has not yet received the federal money. *Id.*

2 AS 36.90.200(c).

3 Miller Construction's Termination for Convenience Claim at 14.

4 *Id.*

failure to pay the amount due (as adjudicated in this claim adjudication procedure) within 30 days of one of these dates constitutes a violation of the act.

3. The plain language of the act

The plain language of the act does not support Miller Construction's interpretation. The act applies only to *payment requests* submitted under the contract.[5] A claim is not a payment request.[6] Nor is constructive knowledge of a claim. The interest rate on the amount due under a claim is set by the claims provisions, AS 36.20.623, not the prompt payment act. Thus, at most, the elevated interest rate could only apply to the amount not paid for each payment request—not to the entire amount due.[7]

Although Miller Construction's argument fails for the entire amount due, it does have implications for the difference between the payment requests and the payment. For these amounts, Miller Construction's approach would assert that the elevated intertest rate applies automatically to disputed and unpaid amount following a pay request (based on this action's determination that the entire amount of the payment request was payable), even if the Region did provide adequate notice under AS 36.90.200(c). Thus, under this approach, Miller Construction would be relieved of any duty to prove that the Region had failed to provide adequate notice.

Under the plain language of the statute, however, the elevated interest rate would not be automatically applied to an amount owed under the contract. The rate is applied only when the Region failed to follow the *notice* requirements of AS 36.90.200(a). If the Region explained (in

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5 AS 36.90.;200(a) (stating that payment must be made within 21 or 30 days "of the date that the [state] receives a payment request from the prime contractor that complies with the contract.").

6 *Compare, e.g.,* AS 36.30.620-AS 36.627 *with* AS 36.90.200.

7 Further, as the Region argues, if interest is determined under AS 36.90 whenever a contractor prevails on a claim (without regard to whether there was a violation of the notice requirements of AS 36.90.200(c)), then AS 36.30.623 (which governs interest payable when a contractor prevails on a claim) would be superfluous because an aggrieved contractor could always demand the higher pre-adjudication interest rate allowed under the prompt payment act. Statutory construction should avoid interpreting one statute in a manner that makes another statute superfluous. *See, e.g., Mechanical Contractors of Alaska, Inc. v. State, Dept. of Public Safety,* 91 P.3d 240, 248 (2004) ("When we engage in statutory construction we will presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.'" (citations omitted)). This means that AS 36.90.200 cannot apply to all claims. Note, however, if AS 36.90 automatically applied to all underpayments (without regard to adequacy of notice), AS 36.30.323 would not be superfluous because it would still apply to all claims that were not reflected in payment requests. Nevertheless, even if we can find a nonsuperfluous use for AS 36.30.323, the general structure of the procurement code and the prompt payment act suggest that interest for claims is determined under AS 36.30.323, even if the claim is for an amount later judged to have been incorrectly withheld (but with adequate notice) after a payment request. Thus, the structure of the two statutes strongly supports an interpretation that the increased interest in AS 36.90.200 applies only when the government fails to adequately explain why the full payment request is not being paid.

writing within eight days) why an amount was not payable under the contract, and what Miller Construction could have done to receive full payment, then the Region complied with its duties under the plain language of the statute. This "either provide notice or pay the higher interest rate" structure is made clear by subsection (d), which requires that the state pay the higher interest "*until* [it] provides *notice* that does comply with (c) of this section."[8] Thus, under the plain language of the statute, the act of providing notice stops the elevated interest. The statute does not require certainty when the government identifies unsatisfactory performance or lack of compliance with the contract. Although the notice and its explanation would have to be reasonable and in good faith, the statute is incentivizing payment *or* notice. It does not say that the government must pay elevated interest when it pursues reasonable (but ultimately erroneous) disputes regarding the amount due.[9]

Accordingly, unless Miller Construction can prove through legislative history that the legislature intended a different result, the elevated interest rate of AS 36.90.200(b) will not apply to either the total amount due or to underpayments of payment requests for which Miller Construction has not proven inadequate notice. We turn next, then to the issue of the legislative history.

4. The legislative history of AS 36.90

Although the plain language of AS 36.90 does not support Miller Construction's approach, the plain language of the statute is not the end of our inquiry. As the Alaska Supreme

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[8] AS 39.90.200(d). Further, AS 36.90.200(e) requires payment of the amount requested within 21 days of the contractor's satisfactory performance of the remedial work identified in the notice. And AS 36.90.250 provides that interest must be paid on retainage, but only after the payment request has been approved—meaning that if a payment request is disputed, subjecting it to retainage would not lead to application of the 10.5 percent interest requirement until the request is approved. These provisions further support a conclusion that the plain language of the act would not apply the high interest rate unless a payment request is made and the Region failed to provide adequate notice for why it was not paying the full amount of the payment request.

[9] Miller Construction cites to a Texas case construing Texas's prompt payment act to apply interest to all underpayments of payment requests, as determined after a successful claim adjudication. *See* Miller Construction's Supplemental Briefing at 6 (citing *Patel v. Creation Const., Inc.,* 2013 WL 1277874 (Tex. App. 2013). The Texas act cited in *Patel,* however, provides:

> (a) An unpaid amount required under this chapter begins to accrue interest on the day after the date on which the payment becomes due.
> (b) An unpaid amount bears interest at the rate of 1 ½ percent each month.
> (c) Interest on an unpaid amount stops accruing under this section on the earlier of:
> (1) the date of delivery;
> (2) the date of mailing, if payment is mailed and delivery occurs within three days; or
> (3) the date a judgment is entered in an action brought under this chapter.

Tex. Prop. Code Ann. § 28.004. *See also id.* at § 28.003 (providing that good faith dispute allows withholding of payment but not addressing interest). Unlike Alaska's act, this statute does not set forth an option to avoid interest by providing adequate notice. Therefore, *Patel* has no bearing on this order.

Court has explained, "We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[10]

Although Miller Construction argues that the legislative history supports its interpretation, it has not cited any legislative history that supports an interpretation that the high interest rate of AS 36.90 was intended to apply to all successful claims, or all wrongful underpayments of payment requests, without regard to the adequacy of the notice. At best, Miller Construction takes from the legislative history a concern to promote prompt payment to contractors. It concludes that the "payment protections would be rendered meaningless if the State was allowed the accrual of interest where the justification cited for withholding payment was proven to be false, inaccurate, or not required by the Contract."[11]

This conclusion, however, does not necessarily follow from the premise of concern over prompt payment. A failure to pay a full payment request with no notice of why the request is being denied is different from a written refusal that explains why full payment is not being made and what must be done for payment to be received. For Miller Construction to prevail here, it would have to come forward with legislative history showing that the legislature intended the higher interest rate to apply to all claims, or at least to all underpayments of payment requests, without regard to adequacy of notice. I have read through all committee reports regarding HB 284 that I could find on line, as well as the sectionals provided the Region. I have found no evidence that the legislature intended to apply the high interest rate when the government provided adequate notice for why a payment request was being refused.

5. Estoppel

Miller Construction argues that the Region is estopped from contesting that the prompt payment act automatically applies to all underpayments of payment requests (without regard to adequacy of notice). In Miller Construction's view, the Region is estopped from denying that

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[10] *State, Dep't of Com., Cmty. & Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 597 (Alaska 2011) (internal quotation marks and citation omitted); *see also, e.g., City of Valdez v. State,* 372 P.3d 240, 248 (Alaska 2016). ("When construing statutes de novo, we consider three factors: "the language of the statute, the legislative history, and the legislative purpose behind the statute. We decide questions of statutory interpretation on a sliding scale: the plainer the language of the statute, the more convincing any contrary legislative history must be . . . . to overcome the statute's plain meaning." (internal quotation marks and citations omitted)).

[11] Miller Construction's Supplemental Briefing on the Prompt Payment Act at 3.

the prompt payment act applies to all wrongly withheld payments (without regard to notice) because it (the Region) had asserted that Miller Construction had violated the act when it withheld payment from subcontractors.[12] This, in Miller Construction's view, establishes quasi-estoppel because the Region took an inconsistent position in this matter and it would be unconscionable to allow the Region to change positions.[13]

Miller Construction's assertion does not meet the elements of quasi-estoppel. It has not shown that it had a dispute with the subcontractors that it had allegedly failed to pay or that it had provided adequate notice to those subcontractors under AS 36.90.230. Further, the June 23, 2017, letter from Victor Winters to Terry Miller, asserts that the Region had specifically paid Miller Construction for the materials in question, giving rise to the Region's assertion that Miller Construction had the obligation to pay its suppliers under AS 36.90.210.[14] Therefore, the position taken by the Region is not inconsistent with its position here and it would not be unconscionable to rule that the prompt payment act in Alaska applies only when a contractor submits a payment request and the owner fails to provide adequate notice.

6. Schedule for further proceedings on the application of the prompt payment act

Above, this order has held that Miller Construction's primary theory for application of AS 36.90 is invalid. At this time, it is unclear whether Miller Construction is requesting that the act be applied to underpayments of payment requests for which the Region allegedly did not provide adequate notice. If Miller Construction is asserting a claim that the Region owes the higher interest rate on amounts withheld without adequate notice under AS 36.90, the following schedule governs adjudication of this claim.[15]

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12 Miller Construction's Supplemental Brief at 4.

13 *See, e.g., Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 114 n.2 (Alaska 1990) ("Quasi-estoppel precludes a party from taking a position inconsistent with one taken previously when circumstances render the assertion of the second position unconscionable.").

14 SCR 75.

15 The July 27, 2020, proposed decision found that the notices provided by the Region did not always make clear how much withheld money was attributable to each alleged instance of unsatisfactory performance. The decision concluded that the notices were, therefore, technically deficient, and that this deficiency could be considered when evaluating the Region's justification for default. The decision also found that Mr. Foster admitted that the Region had violated the act before he arrived on the project. It did not hold, however, that any specific notice was materially deficient for purposes of applying the elevated interest rate of AS 36.90.200(b). Proposed Decision at 99. Therefore, if Miller Construction seeks to apply the 10.5 interest rate in 36.90.200, it will have the burden of proving that the Region violated AS 36.90.200, and establishing the date of the violation and the amounts at issue for each underpaid payment request.

1. February 14, 2022. Deadline for Miller Construction to provide notice that it intends to seek 10.5 percent interests for all underpayments of progress payments for which inadequate notice was provided by the Region.
2. March 1, 2022. If Miller Construction is seeking to apply AS 36.90, it must file a claim no later than this date identifying the amounts and dates where it seeks to apply the 10.5 percent interest. It must also identify the notice provided by the Region, and the reason it alleges the notice was inadequate.
3. April 1, 2022. If AS 36.90.200 is at issue, no later than this date, the Region must identify the instances where it agrees that the 10.5 percent interest rate applies, and those for which it disputes application of AS 36.90.200. To the extent that the Region controverts Miller Construction's allegations of inadequate notice, the Region must cite to the notice and explain why it considers the notice adequate.
4. April 29, 2022. If AS 36.90.200 is at issue, each party's hearing brief must identify all agreed and disputed dates and amounts where the 10.5 percent interest applies, and whether the disputes are to be resolved on documentation or additional witness testimony.

DATED: February 5, 2022.

By: _____
Stephen Slotnick
Administrative Law Judge

Certificate of Service: I certify that on February 7, 2022, a copy of this document was distributed by email to: Jesse O. Franklin IV (by email); Allen R. Benson (by email); Garth Schlemlein (by email); Laurel Barton (by email); Tess Keeley (by email); Max D. Garner (by email); Chris A. Robison (by email); Patricia Runyan (by email); Leilani J. Tufaga (by email); Christina M. Fisher (by email); Dep't of Law central email (by email). A courtesy copy was also sent to Hilary Porter (by email) and Christopher M. Kennedy, ALJ (by email).

By: Patricia Sullivan
Office of Administrative Hearings