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 MOTIONS FOR RECONSIDERATION

On July 27, 2020, the Office of Administrative Hearings issued a Decision and Order on Miller Construction Company's five contract claims against the Southcoast Region of the Alaska Department of Transportation and Public Facilities regarding the Shelter Cove Road project. The Decision found that the Region had breached its duty to amend the contract when it failed to grant Miller Construction's request for an equitable adjustment. The Decision converted the Region's termination for default to a termination for convenience. The Decision deferred an award of damages to the damages phase of the proceedings.

The Order attached to the Decision allowed parties to file motions for reconsideration. The Order contemplated that a motion for reconsideration would likely be a request for additional briefing on an issue that required further deliberation. It also contemplated that no response from the other side would be required to reject any motion that simply re-argued the same arguments that had been thoroughly discussed and decided in the Decision. Both parties filed motions. No responsive briefs have been allowed.

Some of the issues raised in the motions are discussed below, and some will require further proceedings. Others are denied without discussion.

A. The Region's motion to reconsider the findings regarding Miller Construction's request for equitable adjustment is denied

The Region requests reconsideration of the ruling that it breached the contract when it did not amend the contract after receiving evidence that Miller Construction had already installed plan quantities. It asserts that under the contract it had no obligation to do anything at all when it received Miller Construction's request for an equitable adjustment because, in its view, "the contract makes no reference to [requests for equitable adjustments]."[1]

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[1] Region's Motion at 2.

1. Miller Construction's obligation was to give notice that plan quantities had been reached

The argument that the Region has raised on reconsideration—that it had no obligation to grant Miller Construction's July 2017 request for equitable adjustment—is the same argument that the Region asserted at the hearing. As the July decision explained, the Region characterized the issue raised by the request as merely a dispute about measurement of quantities. The only way to resolve that type of dispute, in the Region's view, would be for the contractor to follow the claims process. To the Region, Miller Construction was required to finish the job and then file its claim because the Region has unreviewable discretion to refuse a midstream request for equitable adjustment.

The Region's argument for reconsideration does not add to the analysis. The July decision acknowledged that under a different scenario refusing an equitable adjustment and instructing the contractor to file a claim might be permissible.[2] Under this contract, however, the Region's act was a breach of contract.[3] Moreover, it was an abuse of discretion.[4]

As the decision explained, under this contract, Miller Construction had no obligation to measure quantities. The Region deliberately took the risk that its guaranteed estimate of quantity might be in error. By taking this risk, it likely obtained a better price. Because it took this risk, once the Region was on notice that Miller Construction had excavated and embanked plan quantities, the Region did not have discretion to erroneously deny an amendment to the contract. When it erred in its measurement and wrongfully denied a request to amend the contract, it was in breach.

The Region argues that the July Decision was in error because, in its view, the July Decision "implicitly assumes that situations can arise where the Department's project managers are subject to an affirmative duty to carefully evaluate, and correctly decide, an REA – even though the contract specifications make no reference to them."[5] This argument, however, has no merit. The July decision interpreted the contract to put some obligation on Miller Construction.[6] That obligation was to provide reasonable notice. Once it provided reasonable notice, under this

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2 July decision at 141, 147. The July decision addressed whether "the error merely gives rise to a right for Miller Construction to file a claim." *Id.* at 147. The decision explained why this approach does not apply to this contract.

3 *Id.*

4 *Id.* at 151-52.

5 Region motion at 2.

6 In Miller Construction's view, it had no obligation—the Region had the duty to get the quantities right with or without a Request for Equitable Adjustment. The July decision rejected that argument also.

contract, Miller Construction had no obligation to provide precise measurements. If the Region wanted precise measurement, the obligation to be accurate fell on the Region.[7]

In short, although the Region is interpreting the July Decision to require it to "carefully evaluate, and correctly decide" the issue, the July Decision does not impose any such burden. The Region could have taken any number of approaches, including amending the contract to increase payment per lane station without ever evaluating Miller Construction's request for an equitable adjustment. Because it had made a promise that its original estimates would not be exceeded, however, the Region did not have discretion to wrongfully deny an amendment to the contract under Standard Specification 104-1.02 based on its erroneous conclusion that plan quantities had not been met. It follows that the Region did not have discretion to default Miller Construction when its own failure to make adequate progress payments and provide additional time caused the failure to finish the project on time.

In sum, the Region's argument that it had no obligation because "the contract makes no reference to [a request for equitable adjustment]" elevates form over substance. The form of the notice from Miller Construction is inconsequential. What matters is that the Region was given notice that Miller Construction had reached plan quantities, which triggered the duty of the Region to amend the contract.

2. The Kemp report was not needed to trigger the Region's obligation to amend the contract

The Region also asserts that the July decision is "largely based" on the Kemp report, from which it concludes it did not have any obligation to correctly measure quantities until it was provided the Kemp report.[8] The basis of the July decision's conclusion that the Region had erred, however, encompassed far more than the Kemp report. An important factor in reaching this conclusion was that the Region's expert was unconvincing in his measurement of final quantities. Instead of using the asbuilt survey to measure quantities, his approach involved making adjustments to original plan quantities. That approach was not credible. Had the Region's expert authoritatively measured final quantities, and proved that final quantities were within a reasonable

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[7] The Region appears to argue that Miller Construction's notice was not reasonable because it did not contain any evidence of actual truck counts or blast records for the EOP lane stations. The July Decision agrees that the Region could have asked for additional evidence. It did not, however, make that request. Instead, it treated the request for equitable adjustment as sufficiently reasonable notice to trigger a survey. It cannot now argue that the notice was insufficient.

[8] Region motion at 1, 8.

range of the original plan quantities, then the Region's denial of the equitable adjustment might have been within the Region's discretion.

Given that the Region's approach to final quantities had no merit, however, I accepted the Moore report and the Kemp report as authoritative. Accepting the Moore and Kemp reports as authoritative for final quantities supported the conclusion that the Region's interim measure of quantities in October 2017 was flawed. This means that the Region erred in failing to amend the contract in August when it had notice that plan quantities had been reached. This simply holds the Region to the terms of its contract under subsection 104-1.02.

Moreover, the July decision did not just accept that the Region's breach of its obligation to amend under 104-1.02 was material. Indeed, the July decision undertook a long, detailed, and careful analysis of the effect of this decision on progress payments and time. Had these issues been close, then the Region might well have had discretion to deny the request for equitable adjustment, require a timely finish, and then true-up the final amount due under the claims process. The facts, however, showed that the error was material and that therefore default was not appropriate.

In addition, another takeaway from the Kemp report is that a qualified engineer could have used more than one methodology to analyze the survey data generated by the Region in August/September 2017. Mr. Kemp, for example, analyzed the data using the surface-to-surface approach. Had the Region done this, it would have seen that it had made an error in its computation of quantities (without regard to its other error of failing to adjust the earthwork formula).[9] The point is not that the Region did not have the Kemp report. The point is that the Region should have done calculations similar to those in the Kemp report on its own.

By the same token, the Region's argument that it could not make reasonable progress payments in September-November because it did not have the Kemp Report telling it that it had erred in its survey is not well taken.[10] It had plenty of evidence on which it could base progress payments, including Miller Construction's truck hauls and pay requests as well as its engineer's and inspector's daily reports. That it chose to not rely on this evidence and do a survey means that it took on the obligation to do the survey correctly.

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[9] The point is not that surface-to-surface is better than the average-end approach. The point is that using different methodologies and approaches could help identify errors.

[10] Region motion at 8.

In short, the Region failed to catch its measurement error, even though it had reasonable notice of quantity from Miller Construction's truck hauls and blast records, and could have truth-tested its analysis. Furthermore, even if the Region had discretion to refuse to grant the request for equitable adjustment, its act of *defaulting* Miller Construction based on its erroneous measurement was an abuse of discretion.

With regard to damages, the Region's motion misreads the July Decision. The Region seems to assert that damages are being awarded for a "[c]ontractor claim for excess excavation" on the basis that it had erred in doing a survey that it had no obligation to do.[11] As made clear above, however, the issue being decided in the July Decision was whether the Region properly defaulted Miller Construction. For that issue, the Region bore the responsibility for the drastic nature of its action. No damages were awarded (yet) for excess excavation, and the July Decision did not relieve Miller Construction of the burden of proving its claim for damages. As will be explained below, however, further analysis is necessary to determine whether the July Order was correct that damages must be proved in accordance with the contract's claims and measurement provisions.

B. Miller Construction's motion for reconsideration of its election of remedies and the application of the cardinal change doctrine is granted

Miller Construction makes two arguments for why its damages for excess quantities should not be under the strict requirements of the claims and measurement provisions of the contract. First it argues that it has the option to elect a damage remedy based on its unit price for quantities, and that, under contract law, the damages can be determined under any reasonable measure. Second, it argues that the "cardinal change" doctrine applies here, meaning that the contractual limitations on damages no longer apply.

1. Election of remedies and measurement of quantities

Miller Construction takes issue with the July decision's order that damages for excess quantities can only be assessed for quantities that have been properly measured under subsection 109-1.02 of the Standard Specifications. It asserts that under the claims provision, subsection 105-1.17, it can elect its choice of damages. Thus, in its view, it can "elect[] to recover for extra-contractual earthwork at a unit price."[12] It then observes that subsection 105-1.17 does not cross-reference subsection 109-1.02 or otherwise limit a claim for unit price damages to volumes

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11 *Id.* at 6.

12 Miller Construction motion at 2.

measured by an approved methodology.[13] Based on a lack of a reference to measurement in subsection 105-1.17, Miller Construction concludes that if it elects to pursue a unit-price remedy, it can use any reasonable method to measure volume.

Subsection 105-1.17, however, does not state that Miller Construction has the option to pursue a unit-price remedy. Here, the contract provided for payment based on the lane station. (Had it provided for unit-price compensation, damages could be determined under 109-1.04, "in conformance with the contract.") The July Decision allowed Miller Construction to prepare a damage claim for excess quantities under the unit-price approach, but only because the Region had adopted the approach both in its Contracting Officer's Decision and in its theory of damages at the hearing.[14] The July Decision did not hold, however, that in adopting this approach the Region was waiving any requirement under 105-1.17.

I can understand Miller Construction's view that when the contract assigned the risk for determining whether plan quantities had been met to the Region, and directed that no measurements will be taken, it should mean that damages can be assessed without regard to strict compliance to the claims and measurements provisions of the standard specifications. The July Decision, however, treated the analysis of a claim by a contractor differently than the analysis of a default termination by the Region. That the contract assigned the risk regarding plan quantity to the Region means that the Region cannot ignore its obligation to amend the contract. Any error on this issue would mean that it cannot take the drastic action of default. The assignment of this risk to the Region does not, however, nullify the claims and measurements provisions of the contract.

Moreover, the contract's direction that no measurements will be taken must be interpreted in context. In context, this provision means that for purposes of payment by the lane station no measurement is necessary. (It also means that the Region, not the contractor, had the obligation to ensure that quantities were properly measured for purposes of the Region's obligation to amend the contract based on its promise that plan quantities were reliable.) The July Decision noted, however, that when Miller Construction kept working after reaching plan quantities, it elected to proceed under the claims provisions of the contract. Miller Construction's election to invoke the claims provision means that contract's statement that no measurement is required for payment by

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13 Miller Construction motion at 2

14 July decision at 170 n.702.

the lane station does not obviate the need to measure costs (and quantity, if quantity is the basis for a damage claim) under the claims provision.

Under the July Decision, if Miller Construction did not like the methodology adopted for quantifying damages on a unit-price basis (which was based on the Region's acquiescence that it will pay for damages based on a unit price), then it could proceed under subsection 105-1.17 and present a claim for compensation as measured by "specific daily records." By requiring this specificity, the subsection does not appear to contemplate allowing a carte blanche approach to measurement of quantities for purposes of damages. Indeed, the focus of the subsection is on measuring costs, implying that any damage remedy would be calculated by measuring costs, not volumes.

In my review of the July Decision and parties' briefing, however, I do not find a detailed discussion of the issue of election of remedies or what measures of damages are contemplated by subsection 105-1.17. Miller Construction's theory of damages included both damages based on volume and damages based on costs. The Region's approach, if I understood it correctly, was to admit that damages based on volume were theoretically possible, but volume had to measured correctly. It also acknowledged that damages based on cost were allowed, but not if they were measured by a "jury verdict" methodology.

The July decision deliberately did not discuss the issue of election of remedies because the parties had both been so vague regarding how damages were to be measured. I was never clear on how the parties intended to ensure that there was no duplicate recovery if both a cost theory and a volume theory were allowed. I was assuming that this would be explained during the damages phase of the proceedings. Miller Construction's motion, and its discussion of options, makes clear that the issue needs to be addressed further and clarified. As will be described soon, however, the issue is greatly complicated by Miller Construction's assertion of the cardinal change doctrine.

In addition, the July decision is unclear about when the requirement for measurement of volume for damages purposes attaches. Miller Construction may have a point with regard to using any reasonable approach to measure volume for damages for the excess excavation or embankment above plan quantities that occurred before some event triggered the requirements of section 105-1.17. Put another way, when does the specificity requirement of 105-1.17 begin? I do not think the July decision answers that question. Therefore, additional briefing on the issue of election of remedies, and, if damages are limited, when the limitations begin, will be allowed.

My granting of Miller Construction's request for reconsideration on the issue of election of remedies, however, does not mean that I agree with Miller Construction's argument that subsection 105-1.17 allows measurement of volume for damages purposes by "any reasonable method." In support of this argument, Miller Construction cites *State v. Northwest Construction.*[15] In *Northwest Construction,* the contractor had to excavate more classified material than was expected under the contract. The contractor then sued for breach of contract.[16] The Alaska Supreme Court held that the plaintiff "need only prove its damages to a 'reasonable certainty.'"[17] The court further noted that "a plaintiff in a contract action need not prove damages with mathematical precision."[18] Miller Construction concludes that this means that it can estimate its quantities of earthwork in order to calculate its damages.

The dispute in *Northwest Construction,* however, did not involve a dispute over the measurement of volume of earthwork, the specificity requirements of subsection 105-1.17, or the measurement requirements of subsection 109-1.02. At issue in *Northwest Construction* was the accuracy of the contractor's costs, in particular, its equipment and overhead costs.[19] *Northwest Construction* does not support a conclusion that a contractor seeking a damage claim for altered quantities is not bound by the requirements of measurement under section 109-1.02 and daily recordkeeping under section 105-1.17.

I agree, however, that the issue of measurement is problematic here because measurement was not required by the contract and the parties never had any agreement regarding how volume should be measured on this project. Moreover, had the Region granted Miller Construction's request for equitable adjustment, as it was required to do under section 104-1.02, the Region would have had to provide for some reasonable form of measurement or other method to compensate Miller Construction for its work. This does not mean, however, that Miller Construction is relieved of its duties under the claim procedures, unless such relief is required under the cardinal-change doctrine.[20] Accordingly, to that topic we turn next.

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15 741 P.2d 235, 237 (Alaska 1987).

16 It appears that the case was brought as a common-law contract matter rather than an administrative appeal. 741 P.2d at 237.

17 *Id.* (citing *Native Alaskan Reclamation & Pest Control v. United Bank Alaska,* 685 P.2d 1211, 1223 (Alaska 1984), *quoting* Restatement (Second) of Contracts § 352, at 144 (1981)).

18 *Id.*

19 *Id.*

20 I reject Miller Construction's assertion that I should relax the measurement requirement based on "equitable considerations." Miller Construction motion at 1. The Alaska Supreme Court has made very clear that contractors with the Department will be held to the terms of the damages and claims provisions of the Standard Specifications,

2. Cardinal Change

Miller Construction argues that the Region's failure to amend the contract upon notice that the contractor had reached plan quantities was a cardinal change. A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for."[21]

The July decision did not discuss the issue of cardinal change, even though Miller Construction did raise this issue in its prehearing brief. Given that the issue of default could be decided without reference to the cardinal change doctrine, the July decision did not undertake the analysis necessary to decide the issue.

It appears that the July decision did not consider whether the cardinal change doctrine could affect damages. Having reviewed section 4:16 of the Bruner and O'Connor Construction Law treatise, and the cases cited by Miller Construction, I now recognize that the cardinal change doctrine might affect how damages are calculated.[22] Therefore, I must grant Miller Construction's motion.

Granting the motion does not mean, however, that I am persuaded that the increase in quantities was a cardinal change or that, if it was, it would affect damages. Indeed, I am not yet sure if additional analysis is even necessary—at this point, I am only acknowledging that it appears that I have not considered the issue. How far to take this issue at this time is a matter for further consideration by the parties, as explained below.

ORDER

1. Miller Construction's Motion for Reconsideration is granted as to the issues of
   - Whether requiring more quantities of earthwork than estimated in the plan constituted a cardinal change;
   - The effect of a cardinal change on damages,

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without regard to the equity of the outcome. *North Pacific Erectors, Inc., v. State, Dep't of Admin.*, 337 P.3d 495 (Alaska 2013); *State, Dep't of Trans. and Pub. Fac., v. Osborne Constr. Co.*, 462 P.3d 991 (Alaska 2020).

[21] 1A Bruner & O'Connor Construction Law § 4:16 (quoting *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205, (Fed. Cir. 1993). The court further explained that "[b]y definition, then, a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach." *Id.*

[22] *See Saddler v. United States*, 287 F.2d 411, 414–15 (Ct. Cl. 1961) ("We are of the opinion that the nature of this particular contract was so [changed] by the added work, albeit the same kind of work described in the original specifications, as to amount to a cardinal alteration falling outside of the scope of the contract."); *ThermoCor, Inc. v. United States*, 35 Fed. Cl. 480, 492 (1996) ("The court has no choice but to hear evidence on the cardinal change theory limited to plaintiff's claim for an equitable adjustment for increased quantities").

- The effect of the election of remedies doctrine on this matter, including Miller Construction's option to elect remedies for measuring damages (without regard to whether there was a cardinal change); and
- If damages are constrained by the claims and measurement provisions of the Standard Specifications, when that constraint applies.

The parties will confer and prepare a briefing and oral argument schedule for addressing these issues. The schedule is due on March 5, 2021. For further information on what the parties should consider in preparing the schedule, see the discussion below.

2. All remaining issues in Miller Construction's motion are denied.

3. The Region's Motion for Reconsideration is denied.

DISCUSSION REGARDING FURTHER PROCEEDINGS

In determining how to schedule further proceedings, I see at least four options for the parties to consider:

1. Reinstate the stay and return to settlement discussions, without undertaking the further briefing and argument allowed by this order;
2. Brief and argue the merits of the issues of cardinal change and election of remedies based on the facts in the record;
3. Brief and argue the issues of cardinal change and election of remedies, except that briefing will be limited to whether the July Decision should be amended to provide that the merits of the issues of cardinal change and election of remedies will be determined during the damages phase of the hearing;[23] or
4. Set the entire damages phase, including claims damages, termination damages, and the issues of cardinal change and election of remedies, on for further proceedings.

To help the parties in their determination of how to proceed, I will provide the following guidance.

If cardinal change is, in fact, a live issue, the parties should be aware that the issue will be very difficult. As to whether the increase in quantities was "so profound that it is not redressable under the contract," I see both sides of the issue. Until it is briefed and argued, however, I am not even sure that I am asking the right questions. If the parties undertake to brief the merits of the

[23] To explain, option 3 is similar to option 1. Option 3 acknowledges, however, that the Region has not had an opportunity to address the arguments in Miller Construction's motion regarding election of remedies and cardinal change. The merits of the issues would not be decided under option 3, but the parties would have the opportunity to brief whether the issues are live issues that need to be addressed during the damage phase.

cardinal change issue, the briefing will necessarily have to be comprehensive, supported by extensive research and cites to testimony at the hearing. This approach will be difficult and time consuming.

Even if we undertake this task, the briefing may not advance the ball. I am always leery of decisionmaking in the absence of an understanding of the context. Thus, I am not sure that I will be able to treat the issue of cardinal change as a separable issue from the entire damages case. Finally, although I am extremely reluctant to open this door, I must acknowledge that if I cannot decide the cardinal change issue on this record (and I may not be able to), we may have to reopen the record and allow some limited additional testimony.[24] However this plays out, if we engage in the merits of the cardinal change question, I would foresee lengthy proceedings on this issue. The parties should consider whether this means we should avoid tackling the merits of the cardinal change issue until it becomes absolutely necessary, or whether it means that we should simply take on all remaining issues at this time.

DATED: February 18, 2021.

By: [redacted]
Stephen Slotnick
Administrative Law Judge

Certificate of Service: I certify that on Februar 18, 2021, a true and correct copy of this order was distributed as follows: Garth Schlemlein (by email); Jesse Franklin IV (by email); Allen Benson (by email); Seneca Freitag, AAG (by email); Eugene Hickey, AAG (by email); Max Garner, AAG (by email); Dep't of Law Central email (by email). A courtesy copy was also sent to Charles Deininger (by email) and Christopher M. Kennedy, ALJ (by email).

By: Stephanie Peterson
Office of Administrative Hearings

[24] I am not suggesting that we would reopen the hearing based on an insufficiency of evidence. If that were the case, I would likely decide the issue on based on the burden of proof. It could be, however, that if your ALJ is struggling to understand how to analyze the evidence already presented by both sides on the cardinal change issue, some additional testimony would be helpful.