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	)	OAH No. 19-0088-CON
	)	

ORDER ON MOTIONS re QUANTUM MERUIT

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 Miller Construction had completed the quantity of earthwork that was guaranteed as a maximum quantity under the solicitation.

Although in many circumstances a construction company would be required to continue working on a project notwithstanding a breach by the owner, here, because the contract had set the maximum quantity to be installed, Miller Construction could have stopped work on the project after the breach.[1] It did not. Instead, it kept working. The decision found that in these circumstances, the contract remained in place after the breach.

In a motion for reconsideration, Miller Construction argued that the Region's failure to amend the contract meant that the subsequent extra work was done without a contract. If so, this would mean that Miller Construction could recover damages on an unjust enrichment or *quantum meruit* theory.

Quantum Meruit is a doctrine that applies "[w]hen parties to a contract dispute do not have a valid contract."[2] If the party seeking damages has provided goods or services to a person or entity who has accepted the goods or services, and it would be inequitable for the recipient to deny payment, then the provider "may generally recover in quantum meruit for services rendered."[3]

---

[1] July 2020 Proposed Decision at 150. It appears that neither party agrees with this conclusion—as explained below, even Miller Construction appears to consider the breach only a partial breach that would not have justified walking away from the project.

[2] *Krossa v. All Alaskan Seafoods, Inc.*, 37 P.3d 411, 419 (Alaska 2001) (citation omitted).

[3] *Id.* For the elements of *quantum meruit*, see, e.g., *Brady v. State*, 965 P.2d 1, 13 (Alaska 1998) (explaining that "[t]o gain restitution of the value of his services in *quantum meruit*," litigant must show that "(1) he conferred a

Here, Miller Construction seeks damages under a *quantum meruit* theory because the contract has clauses that limit its damages. In contrast, *quantum meruit* would allow a broader array of damage measures. To get to *quantum meruit*, however, Miller Construction must first prove that it was working without a contract after the Region had refused its request for an equitable adjustment.

In earlier proceedings, both parties had thoroughly briefed the question of whether the increase in quantities over the guaranteed maximum estimate meant that the additional work was outside the scope of the contract. This question was analyzed under the "cardinal change" doctrine, but the same analysis applies to *quantum meruit.* I found that the question was close, but the extra work here was not outside the scope of the contract.

That finding, however, did not answer the question of whether the Region's breach of its obligation to amend the contract upon notice that contract quantities had been reached meant that all subsequent work was not governed by the contract. This argument had been raised by Miller Construction, but not fleshed out by either party. Accordingly, I requested additional briefing as follows:

> I need to be advised on what the court meant regarding when "parties to a contract dispute do not have a valid contract." Does that statement apply here after the Region failed to amend the contract as it was required to do once plan quantities had been installed? Or were the parties still bound by the contract to build the lane stations? And how does Miller Construction's decision to elect to continue to install quantities affect the unjust enrichment/damages analysis?[4]

Both parties filed briefs and response briefs. I address the arguments made by the parties below.

A. Miller Construction's argument regarding the scope of the contract has already been rejected

Miller Construction argues that it was "a contractor who is compelled to perform work or provide materials beyond that contemplated in the original contract."[5] It concludes that, therefore, it is entitled to "recover the reasonable value of the extra work and materials [via quantum

benefit on the State; (2) the State appreciated the benefit; and (3) the State accepted and retained it under circumstances making it inequitable to do so without paying him." (citation omitted)). The court also explained that "[c]ourts generally treat actions brought upon theories of unjust enrichment, quasi-contract, contracts implied in law, and *quantum meruit* as essentially the same." *Id.* at n.38 (quoting *Alaska Sales and Serv., Inc. v. Millet*, 735 P.2d 743, 746 n.6 (Alaska 1987).

[4] Order Requiring Further Briefing on the Doctrine of *Quantum Meruit* at 2 (May 13, 2021).

[5] Miller Construction Initial Brief at 10-11 (quoting *Kandik*, 795 P. 2d at 799).

meruit]."[6] The argument regarding whether the extra work was "beyond that contemplated in the original contract," however, is simply an argument that the extra work exceeded the scope of the contract. It has already been considered and rejected.[7]

Furthermore, after the breach, Miller Construction was working to provide a deliverable that was, in fact, required under contract: 661 lane stations. Had Miller Construction been told to provide extra material for a road or product that had not been contemplated in the original contract, then, perhaps, the doctrine of quantum meruit might apply.

Moreover, the July 2020 proposed decision found that Miller Construction was not legally *compelled* to continue work after the Region refused its request for equitable adjustment. Under that decision, Miller Construction was entitled to stop work once it had installed plan estimate quantities.[8] The question being asked here, however, is whether Miller Construction's continued work was done under the contract or whether the Region's breach meant that the Region had abandoned the contract. To the question of abandonment we turn next.

B. Has Miller Construction established that the Region's breach meant that the Region had abandoned the project?

Although the question I was asking here was whether the Region's breach, and Miller Construction's ability to walk away after the breach, meant that the parties no longer had a contract, Miller Construction did not argue that the Region's action was an abandonment of the contract. Instead, Miller Construction cites the statement in the July Decision that "Miller Construction could [have declared] the Region in breach and walked away from the project" to necessarily mean that, after the breach, the parties had no contract."[9] It concludes, without explanation or citation to any cases, that its *ability* to walk means that there was no contract, even though it did not, in fact, walk.

Yet, in these circumstances, the facts indicate that neither party abandoned the contract. First, as stated above, the contract to build the lane stations was still in existence. Second, both parties continued to act as if their rights and obligations were controlled by the contract. The Region continued to issue directives and require performance. Miller Construction continued to

---

6 *Id.*

7 Order on Motions re Cardinal Change and Election of Remedies (June 11, 2021).

8 Miller Construction argues that it was *factually* compelled to continue working, pointing out that it could not overcome the Region's threat of default and that only an intrepid contractor would dare to stop working even if the owner breached. Miller Construction Response Brief at 2 n.13; Initial Brief at 12-13. I agree that stopping work would have been difficult and that Miller Construction's decision to continue working was understandable. That, however, does not affect the conclusion that once it elected to continue work under the contract, Miller Construction was required to seek its remedy under the contract.

9 Miller Construction Initial Brief at 11 & n.62 (quoting Proposed Decision at 150).

perform and to file claims under the contract claims provision, rather than file its claim under AS 36.30 for unjust enrichment. Third, Miller Construction argues in its briefing that it could not actually walk—in its view, it was still obligated "to perform its other contractual obligations – such as slope stabilization, culvert installation, and the as-built survey."[10] Its admission that its obligations under the contract continued in existence after the breach establishes that there was a contract even after the breach—it effectively concedes that the Region did not abandon the contract. Although the extra work was not expected, the parties anticipated the possibility that extra work could occur. The contract had provisions for compensating Miller Construction for unexpected extra work. When extra work is done under valid and enforceable contract provisions, claims for the extra work must be made under those provisions, rather than under a *quantum meruit* theory.[11]

Moreover, as the Region points out, under the common law of contracts, after a breach of contract, the nonbreaching party's decision to keep working under the contract generally means that the party has elected to pursue damages as allowed under the contract. As Professor Lord explains in the *Williston on Contracts* treatise,

> When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—it can either elect to allege a total breach, terminate the contract and bring an action or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach—but the nonbreaching party, by electing to continue receiving benefits under the agreement, cannot then refuse to perform its part of the bargain.[12]

Here, Miller Construction's election to continue working means that it considered the Region's failure to amend only a partial breach, not an abandonment of the contract. Given that the contract was still in place, Miller Construction cannot argue that there was no contract.

C. Was there no contract for the extra earthwork because the parties never reached agreement on an essential term or because the Region's promise to

[10] Miller Construction Initial Brief at 12. Note that Miller Construction's admission here is at odds with the finding of the July Decision. The July Decision held that Miller Construction could have walked away from all remaining obligations with impunity. July Decision at 150. The July Decision did not, however, address whether the Region had abandoned the contract. Because Miller Construction has admitted in briefing that the contract was still in force, it has waived any argument that the Region's breach meant that the Region had abandoned the contract.

[11] *See, e.g., ResQSoft, Inc. v. Protech Solutions, Inc.*, 488 P.3d 979, 989-90 (Alaska 2021) (rejecting claim under unjust enrichment because all aspects of claimant's claim "can be asserted as legal claims" in contract action).

[12] Richard A. Lord, 13 Williston on Contracts § 39:32, *Election following breach* (4th ed.).

pay was illusory?

Although Miller Construction does not argue that the Region had abandoned the contract, it does argue that there was no valid contract governing the *extra* work. First, it cites the absence of a price term for quantities of earthwork performed above the maximum.[13] Because price is an essential term of a contract, and the absence of a price term means that the parties never had a meeting of the minds necessary to effect a binding contract, Miller Construction concludes that all of the extra earthwork was done with no contract.

Second, Miller Construction argues that the Region's promise to amend the contract after contract quantities had been reached was illusory.[14] It reasons that because the Region would be better off by refusing to amend and then paying damages, the Region's promise to negotiate a price term for the extra quantities was hollow. With no promise to pay for the extra work, again, in Miller Construction's view, there was no meeting of the minds, and no contract.

Miller Construction is correct that price is an essential element of a contract. Absence of evidence of agreement on price before the work is done could, in some circumstances, mean that the parties had no contract.[15] Yet, a gap in an agreement, including, in some circumstances, the absence of specific price, is not fatal to contract formation when the intent of the parties is evident.[16]

Here, the contract did not specify a price for the extra work. It provided payment by the lane station up to the maximum quantity of earthwork. It had no provision for the price of earthwork performed above the maximum. Perhaps more important, the contract did not specify any way to measure the volume or area of extra earthwork to be provided. Indeed, it stated that no measurement was required. Because measurement is necessary to determine unit price, and because measurement of volume is not easy on a remote site, this absence of specificity does provide some support for Miller Construction's argument.

The contract did, however, anticipate changes in the work required, and provide a mechanism for setting the price. It specifically addressed the situation here, and provided three

---

13 Miller Construction Initial Brief at 8, 10-11.

14 Miller Construction Response Brief at 6.

15 *See, e.g., Alaska Fur Gallery v. Tok Hwang,* 394 P.3d 511, 515 (Alaska 2017) (holding that failure to include price term or method for determining price in option for purchase of property meant no contract for sale had been formed); *see also, e.g., Alaska Creamery Prod., Inc. v. Wells,* 373 P.2d 505, 510 (Alaska 1962) ("Until those terms are determined and agreed upon there can be no meeting of the minds of the parties; nor is the court free to fix the terms for the parties upon equitable considerations. We have here at best an agreement to agree in the future for the breach of which the law provides no remedy.").

16 *Alaska Fur Gallery,* 394 P.3d at 515 (discussing cases where court was able to fill gaps in contracts, including cases where price was not specified but was determinable).

options for setting the price where the change "is materially different in character or unit cost from specified Contract work."[17] The contract also listed several alternative methods for measurement, if the parties should elect to continue on a unit-price basis.[18] These provisions were never implemented because the Region erroneously concluded that no extra work was needed or performed. The presence of these provisions, and the conduct of the parties, however, makes it possible for a decisionmaker to construe the intent of the parties regarding price and measurement of extra work. (And I have, in fact, construed the parties' intent to be that Miller Construction would do the extra excavation and embankment for 10 dollars per cubic yard, measured under the most convenient method prescribed under §109-1.02.) Therefore, the absence of a price term for extra work does not mean that the extra work was done without a contract.

With regard to Miller Construction's argument that the agreement to amend the contract under §104-1.02(1)(b) was illusory because the Region would be better off by forcing Miller Construction to file a claim rather than amend, Miller Construction has not proved its point. Although we do not yet know all that will be awarded in a damage claim under §105-1.17, a claim based on actual damages measured by actual costs should be a substantial claim. Certainly, in this situation, the Region would have been far better off if it had issued a change order to pay for the extra work rather than to have incurred liability for damage claims.

The most important reason that the agreement to amend the contract was not illusory, however, is that the Region had a duty to issue a change order when plan quantities had been reached. If it refused to do so because it would be better off forcing Miller Construction to work without a change order and then file a claim, it likely would lead to a finding that it violated its duty of good faith and fair dealing. Acting in bad faith would be bad for the Region because it would allow Miller Construction to claim damages without regard to the limitations in the contract.

Here, the Region did not refuse to amend in order to force Miller Construction to file a damage claim. It declined to amend only after undertaking a labor-intensive measurement exercise, which led it to incorrectly conclude that no extra work had been done and none would be needed. The magnitude of effort expended by the Region on this exercise is consistent with a

---

[17] SCR 330 at 21 (§ 104-1.02(1)(b)).

[18] *Id.* at 68-69 (§109-1.02). Note that in the alternative to proceeding on a unit-price basis, the parties could have amended the amount to be paid per lane station. The evidence in this record, however, indicates that the parties intended to switch to a unit-price approach, and did, in fact, do so for some of the extra earthwork.

good-faith attempt to do the right thing and amend the contract if an amendment was appropriate. In sum, the Region had incentive to amend, and the promise to do so was not illusory.

In sum, although the Region breached the contract, Miller Construction elected to treat the breach as a partial breach, and continue to work under the contract. The contract provides procedures for claims for extra work. Although the contract did not specify a price for extra earthwork, it provided mechanisms for determining the parties' intent with regard to the price. Finally, Miller Construction filed its claims under the claims provisions in the contract, not as a quasi-contract claim under the procurement code. Therefore, Miller Construction is required to seek damages for the Region's breach as provided in the contract. It cannot pursue damages under a *quantum meruit* theory.

DATED: August 18, 2021.

B [redacted]
Stephen Slotnick
Administrative Law Judge

Certificate of Service: I certify that on August 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); Christopher Robison, 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: Patricia Sullivan
Office of Administrative Hearings

.