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

In the Matter of	)	
	)	
WOLVERINE SUPPLY, INC.	)	OAH No. 21-2552-CON
	)	Agency No. #Z545940000
v.	)	
	)	
DOT&PF, CENTRAL REGION	)	
	)	

COMMISSIONER'S DECISION ON MOTIONS FOR SUMMARY ADJUDICATION

I. Introduction

The Central Region of the Alaska Department of Transportation and Public Facilities awarded a contract to Wolverine Supply, Inc., to rebuild a road located on the Kenai Peninsula. The contract allowed Wolverine two seasons to complete the project. Because of delays that Wolverine attributes to the utility companies working on the project, however, the project required a third season to complete.

Wolverine requested an award of additional compensation for the costs it incurred because of the delay. On March 19, 2021, the Region allowed a small amount of compensation but denied the bulk of the request. It cited a provision in the contract providing that extra costs due to utility delays are not compensable. Wolverine filed a claim for additional compensation on July 7, 2021. The Region denied the claim, finding that it was not timely because the contract requires that a claim be filed within 90 days of the time that a contractor became aware, or should have become aware, of the basis of the claim.

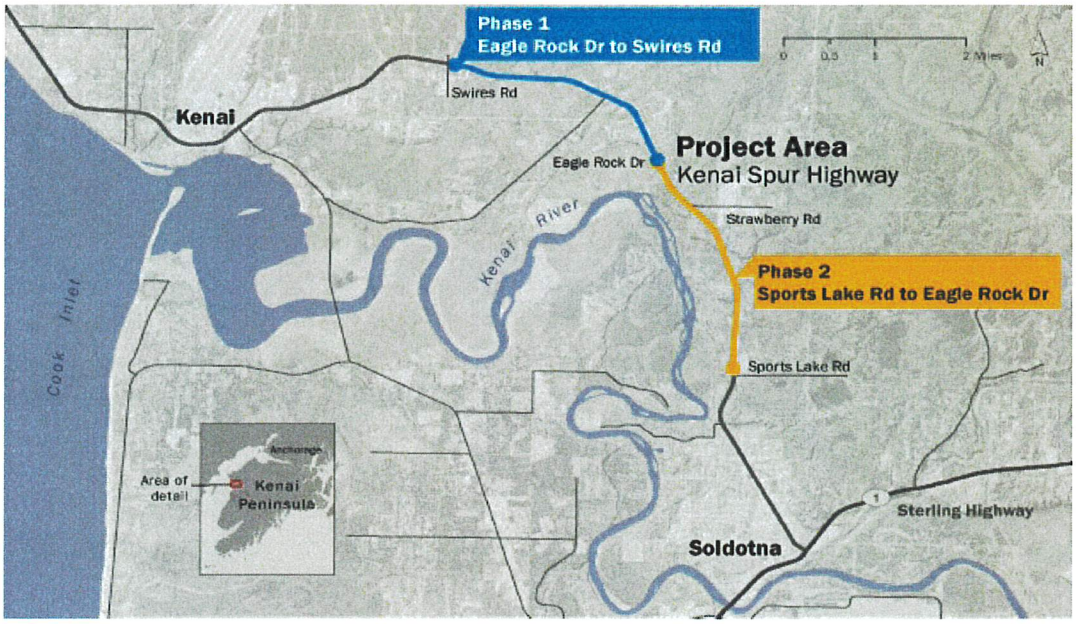
On appeal, Wolverine argued that its claim was timely because, in its view, Wolverine and the Region had agreed that the 90-day deadline would not be in effect while the parties were negotiating impacts due to the utility delay. Wolverine conceded, however, that the deadline would begin to run when the parties' negotiation reached impasse. Both parties filed motions for summary adjudication.

Viewing the facts in the light most favorable to Wolverine, and accepting that the 90-day deadline did not become effective until the parties reached impasse, the undisputed facts establish that impasse was reached on March 19, 2021, when the Region informed Wolverine that delay costs were not compensable. Wolverine's claim was filed more than 90 days after March 19th. Therefore, it was not timely. The Region's motion for summary adjudication is granted.

II. Facts

The Kenai Spur Highway is a 39-mile-long highway that provides access to Kenai and Nikiski from the Sterling Highway. Because it is a state highway, maintenance and construction of the highway is under the Central Region of the Alaska Department of Transportation and Public Development.

Over the last several years, the Region has undertaken to rehabilitate the highway in phases. This case involves phase one. As the following map indicates, phase one of the recent rehabilitation project was located between Eagle Rock Drive and Swires Road:[1]



On March 8, 2018, the Region issued an invitation for contractors to bid on phase one of the rehabilitation project. The invitation stated that the project would "reconstruct and widen" the highway "to a 5-lane configuration."[2] It explained that "[w]ork includes paving, drainage improvements, signing, striping, and guardrail."[3]

The low bidder for the project was Wolverine Supply, Inc. It was awarded the contract on April 5, 2018.[4] Project completion was set for October 1, 2019, giving Wolverine two construction seasons to complete the reconstruction.[5]

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1 https://dot.alaska.gov/creg/kenaispur/images/KSH_project_area_map.png (accessed on March 21, 2022).
2 Wolverine Ex. 1.
3 *Id.*
4 Wolverine Motion for Summary Adj. at 2.
5 Wolverine Ex. 1.

As with many road construction projects, this project required the relocation of utilities located in the right-of-way, including both underground utilities and aboveground electrical and telephone poles.[6] In a special notice to bidders, the Region advised that "Utilities will be relocated by others concurrently with construction of this project. The Contractor is responsible for the coordination with Other [Contractors]."[7]

After work had begun, issues arose with the utilities' schedules for completing their work.[8] On August 7, 2019, Tod Blohm, the Project Manager for Wolverine, sent Marcus Forkner, the Project Engineer for the Region, a "Request for Equitable Extension of Contract Time."[9] The Request stated that the project would be delayed due to "[t]he extended durations in which the utilities have utilized for relocation / removal."[10]

An important issue in this case is the distinction between delay *time* and delay *costs.* Although both types of damage may be due to a delay caused by factors beyond the control of the contractor, in construction work (as explained later in this decision), the two are treated separately. Here, the direct request made by Mr. Blohm in August 2019 was for an extension of time. He specifically asked for an immediate "contract time extension" and an "equitable adjustment, to suspend construction activities upon encountering inclement conditions this fall, resuming construction activities in the spring of 2020."[11] Mr. Blohm did, however, flag the issue of delay costs, stating, "[t]he contractor proposes meeting with the project engineer to discuss potential costs."[12]

Mr. Blohm did not get an answer to the request for an extension of time within seven days (after which, under subsection 105-1.17 of the standard specifications, if the engineer does not respond, timelines begin to run for further action by the contractor).[13] He followed up, sending an email to Mr. Forkner on August 27, 2019. The email noted that under the contract, if the basis of

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6 Region Ex. 1 at 3-4.
7 Wolverine Ex. 2 at 2.
8 Region Ex. 1 at 3-7.
9 Wolverine Ex. 12 at 1.
10 *Id.*
11 *Id.* at 1-2.
12 *Id.* at 2.
13 Region Ex. 16. The standard specifications referred to above are the Department's publication *Alaska Dep't of Trans. and Pub. Fac. Stan. Specs. for Hwy. Const., available at* https://dot.alaska.gov/stwddes/dcsspecs/assets/pdf/hwyspecs/sshc2020.pdf (February 2020). Unless amended by special provisions, these specifications lay out the terms of the contract that governs this case. The parties have not included a copy of the standard specifications in the record and I have not accessed this website. I include this citation to make clear what is being referenced in the communications in the record.

a potential claim was not resolved within seven days, Wolverine would be required to file an intent to claim form, which, if required, would be due 21 days after the initial request to the project engineer was made. He asked whether the intent-to-claim deadline "is waived pending the department's further evaluation" of "our previous Request for Equitable Extension of Contract Time."[14]

Mr. Forkner responded in an email sent on August 28th. He said that the Region was reviewing the schedule and timeline for the utility work.[15] He addressed Mr. Blohm's inquiry regarding the deadlines for filing claims, stating that "[s]ince you have not submitted an Intent to Claim, only a Request for Contract Time Extension, then the time requirements are not yet in effect."[16] He then stated that "[i]n the event that a satisfactory and timely agreement cannot be made, then you are of course welcome to submit an Intent to Claim."[17]

Mr. Blohm wrote back to Mr. Forkner thanking him for the clarification. He stated that "[w]e as well believe the claim provisions apply only after other avenues of equitable adjustment / extension of time have been exhausted."[18]

On October 1, 2019, the Region granted Wolverine's request for an extension of time.[19] The Region explained that the decision was "[b]ecause of delays attributed to Utility work on the Project."[20] It suspended liquidated damages and indicated that a new project completion date would be determined "pending further review of the impacts to Wolverine's schedule."[21]

A communication that explicitly addressed the issue of delay costs occurred on April 30, 2020, when Mr. Blohm sent an email to Mr. Forkner stating "[a]s we have not been able to get together and discuss the additional costs for the extended duration, I have attached for your review and comment a package of some of the additional costs."[22] Mr. Forkner did not respond to this email and Wolverine did not file an intent to claim or a claim regarding the costs identified in the April 30th communication.

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14 Wolverine Ex. 13 at 2.
15 *Id.* at 1.
16 *Id.*
17 *Id.*
18 *Id.*
19 Wolverine Ex. 14 at 2.
20 *Id.*
21 *Id.*
22 Wolverine Ex. 15. The record contains only the email. It does not include the packet of materials sent to Mr. Forkner. As Wolverine notes, the costs themselves are not at issue in this decision. *See* Wolverine Motion at 8 n.4.

The project was deemed substantially completed on July 30, 2020.[23] Final inspection and final completion occurred on September 28, 2020.[24]

Nine months after sending its estimate of delay costs, on January 29, 2021, Wolverine sent Mr. Forkner an email with a large attachment detailing its request for delay costs. The email explained that "we have not yet received your review of our previously submitted requests for equitable adjustment due to the utility delays. I have attached an updated copy, in which the previously utilized estimated costs have been replaced with actual costs, as well as the cost in which previously unable to be quantified [sic]."[25]

Approximately two months later, on March 19, 2021, Mr. Forkner sent a letter denying the bulk of Wolverine's request for delay costs. The letter quoted the provisions of the Department's Standard Specifications that address issues and problems related to work done by the utility companies. As the letter explained, although the contract allows the engineer to award additional time due to utility delays, it also provides that "no equitable adjustment will be made for the cost of delay, inconvenience or damage."[26]

The letter further identified two flaws in the request. First, it asserted that some of the claimed costs were not allowed in the contract. Second, it referenced an attached schedule of the utility work, and asserted that "the additional time it took to finish the Project exceeds the utility work delays."[27]

The letter affirmed, however, that the contract completion date was extended to the actual completion date, which it stated was July 29, 2020.[28] It then allowed compensation for some lump-sum item costs incurred in 2020 ($54,177.65 in per diem, SWPPP manager, construction signs, and field office expenses). The letter explained that this "compensation is based on the original bid amount and contract duration."[29]

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23 Region Ex. 6.

24 Wolverine Ex. 16.

25 Wolverine Ex. 17.

26 Wolverine Ex. 18 at 2 (quoting *Alaska Dep't of Trans. and Pub. Fac. Stan. Specs. for Hwy. Const.* § 105-1.06.4.d.).

27 *Id.*

28 *Id.* Whether substantial completion occurred on July 29th or July 30th is not clear and is not important for this decision.

29 Region Ex. 9 at 3. "SWPPP" stands for "storm water pollution prevention plan." The letter contrasted the lump-sum items with "wages for work performed in 2020, as well as services and other items not allowed for in the contract." *Id.*

One week later, on March 26th, Mr. Blohm responded with a letter. He characterized the Region's March 19th communication as evidence that "the department has been seeking an avenue within the contract to provide relief for our project as previously requested."[30] He noted "potential discrepancies in dates provided" based on his review of the Region's schedule.[31] He requested that the Region provide documents regarding the meetings, agreements, and correspondence with the utilities. He offered to pay the costs to produce those documents. He ended the letter by stating that "[w]e look forward to confirming the utility dates and durations as performed, allowing further negotiations regarding this project."[32]

Mr. Forkner responded by letter on April 6th. The letter alleged that Wolverine was at fault for failing to provide schedule updates required under the contract. It asked that Wolverine submit records so that "the project can review and adjudicate any discrepancies" regarding "the dates provided for utility delays."[33] The letter required that Wolverine submit a "formal FOIA request" for the records that Wolverine had requested.[34]

Two days later, on April 8, 2021, Wolverine sent a letter setting out its intent to file a claim for delay costs under subsection 105-1.17 of the contract.[35] It filed its claim on July 7, 2021.[36] The claim sought $1,754,250.26 in compensation for the utility delays that caused the need for a third season of work.[37] It argued that the contract's "no damages for delay" clause did not apply, in part because, in Wolverine's view, the Region had interfered with Wolverine's right to coordinate with the utilities.[38] Wolverine supplemented the claim with additional information on August 20, 2021.[39]

On November 19, 2021, Joel St. Aubin, the Contracting Officer for the Region, issued a "Contracting Officer's Decision" denying Wolverine's claim. The decision quoted subsection 105-1.17 of the Standard Specifications (the contract provision setting a deadline for filing a claim) as follows: "The Contractor shall submit a written claim to the contracting officer within 90 days after the date the Contractor became aware of the basis of the claim or should have

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30 Region Ex. 10 at 2.
31 *Id.*
32 *Id.*
33 Region Ex. 11.
34 *Id.*
35 Wolverine Ex. 19.
36 Region Ex. 1.
37 *Id.* at 12.
38 *Id.* at 8.
39 Region Ex. 13.

known of the basis of the claim, whichever is earlier."[40] It noted that the contract "additionally provides that, 'The Contractor waives any right to claim . . . if the Claim is not filed on the date required.'"[41]

The decision then surveyed the facts, including the August 2019 communications between Mr. Blohm and Mr. Forkner, to determine when Wolverine should have known that it had a claim for delay costs. It found that Mr. Blohm's August 7th email confirmed that Wolverine had knowledge that there would be delay costs caused by the delay in utilities. It concluded that "the 90-day claim filing period under subsection 105-1.17 began running – at the very latest – on August 7, 2019."[42]

With regard to Mr. Forkner's August 28th response to Mr. Blohm, advising that "the time requirements are not yet in effect," the decision did not view that communication as waiving the requirement that a claim be filed within 90 days of when the contractor learns of the basis for the claim. To the contrary, the decision found that the email sent the exact opposite message: "the Department specifically advised on August 27, 2019 that Wolverine's request for additional time (submitted on August 7, 2019) was not being handled as a claim. This communication arguably placed Wolverine on notice that, to the extent it wanted to pursue a claim, it needed to quickly invoke the procedures of subsection 105-1.17 to do so."[43]

The decision did not address the merits of Wolverine's claim that it was deserving of an award of costs for the delay caused by factors outside of its control. Because the decision was based solely on timeliness, the decision reserved the right to revisit the merits of the claim if it were determined on appeal that the claim was timely.[44]

Wolverine appealed the Contracting Officer's Decision to the Commissioner, and the Commissioner referred the appeal to the Office of Administrative Hearings for a hearing and recommended decision. Both parties filed motions for summary adjudication. Those motions are discussed below.

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40 Region Ex. 14 at 2 (quoting § 105-1.17 of the Standard Specifications). The decision further noted that "[t]his language tracks AS 36.30.620(a), which provides that, "[A] claim under this section must be filed within 90 days after the contractor becomes aware of the basis of the claim or should have known the basis of the claim." *Id.*

41 *Id.*

42 Region Ex. 14 at 6.

43 *Id.* at 6-7.

44 *Id.*

III. Discussion

Both parties have asked for summary adjudication on the issue of the timeliness of Wolverine's claim. Wolverine requests a decision holding that, as a matter of law, its claim was timely. If so, then it would receive partial summary adjudication—meaning that timeliness would not be an issue, but whether its claim had merit, and, if so, the amount of its damages, would be issues to be determined at an evidentiary hearing. The Region, on the other hand, seeks a ruling that the undisputed facts prove that Wolverine's claim was not timely.

A. What are the issues for summary adjudication and how will they be addressed?

Summary adjudication is a process that, in some cases, permits the administrative decisionmaker to issue a decision without having to hold an evidentiary hearing.[45] Not all cases can be decided upon summary adjudication. To grant summary adjudication, the decisionmaker must determine that a party is entitled to a decision in its favor as a matter of law. If material facts are in dispute, then those facts must be determined by an adjudicatory process and summary adjudication will be denied.[46] Thus, one task will be to determine what facts are material, and second, whether those facts are in dispute.[47]

In addition, if the facts in the record are subject to interpretation, they must be interpreted in favor of the nonmoving party.[48] That requirement is important here because Wolverine and the Region have very different interpretations of Mr. Forkner's August 28th email. Thus, when determining whether to grant Wolverine's motion, we must interpret Mr. Forkner's email in the light most favorable to the Region. When determining whether to grant the Region's motion, we take the opposite approach, and construe it in the light most favorable to Wolverine.

One additional important consideration is that the record must establish some basis for a party's allegation of fact. Although not much evidence is required to avoid summary adjudication, there must be a showing that the party can produce evidence that would reasonably support the inference sought by the party. Facts cannot be assumed.[49]

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45 *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990). Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding. *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

46 *Christensen v. Alaska Sales & Services, Inc.,* 335 P.3d 514, 521-22 (Alaska 2014).

47 "[A] material fact is one upon which resolution of an issue turns." *Id.* at 519.

48 *Samaniego v. City of Kodiak,* 2 P.3d 78, 82-83 (Alaska 2000).

49 *See, e.g., Yurioff v. Am. Honda Motor Co.,* 803 P.2d 386, 389 (Alaska 1990) (explaining that moving party has initial burden to make *prima facie* showing of facts in support of judgment and that non-moving party would then have "to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict

To set the stage for the analysis, Wolverine's motion must be denied if we accept the Region's interpretation that Mr. Forkner did not waive the requirement for timely filing a delay cost claim. If we accept the Region's interpretation, it would follow that Wolverine's claim was not timely because, if the deadline for filing a claim had not been waived, Wolverine's claim was due 90 days after it became aware that it had a basis for a claim. Thus, to deny Wolverine's motion, we need only decide whether the Region's interpretation is plausible, viewing the facts in the record in the light most favorable to the Region. That would not mean the Region would prevail—it means that Wolverine's motion would be denied, allowing the Region to present additional evidence in support of its interpretation.

The Region's motion, however, presents a more involved inquiry. Wolverine interprets Mr. Forkner's email to suspend the timelines for filing a claim based on utility delay until impasse is reached in negotiation. If this inference can be drawn from the facts, then, for purposes of summary adjudication, we must accept it as correct. Unlike the situation with the Region, however, that would not automatically mean that Wolverine can escape summary adjudication. The question then becomes, based on the undisputed facts, when did Wolverine know, or should it have known, that impasse had been reached? If it did not file its claim within 90 days of that date, then its claim would not be timely, even accepting Wolverine's view of the facts. This decision will spend some time answering these questions. It will then ask whether any other disputed issues of fact—in particular, the allegation of bad faith—preclude summary adjudication.

B. Is Wolverine entitled to a decision that its claim was timely?

As stated above, Wolverine's motion is based on two-part theory. First, it argues that only one interpretation of Mr. Forkner's August 28, 2019, communication is possible. In its view, as a matter of law, that communication waived the 90-day requirement for filing a delay-cost claim until the parties reached impasse in their negotiations over the requested equitable adjustment. Second it argues that impasse was either never reached, or, at the earliest, not reached until April 8, 2019, when the Region denied Wolverine's request for utility records.[50]

Wolverine's motion will be denied if the Region can show that either part of Wolverine's theory is dependent upon a disputed issue of fact. To tackle that question, we only need to

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the movant's evidence and thus demonstrate that a material issue of fact[] exists." (quoting *State, Dep't of Highways v. Green,* 586 P.2d 595, 606 n.32 (Alaska 1978))).

[50] Wolverine's Motion for Partial Summary Judgment at 12-16; Wolverine's Opposition to DOT&PF's Motion at 2-7.

address the first issue—whether the undisputed facts prove that the August 28th communication waived the deadline for filing a claim for delay costs.

The Region argues that whether Mr. Forkner's August 28th email waived any deadline necessarily depends upon Mr. Forkner's intent. That, however, is not necessarily correct. Under contract law, the important issue is what the email would communicate to a reasonable person.[51] Therefore, to analyze whether Wolverine is entitled to summary adjudication, we must determine whether a reasonable person would interpret the August 28th email to waive the deadlines for filing a delay cost claim.

Interpreting the email in the light most favorable to the Region, a reasonable person would conclude that the August 28th email did suspend the deadline for filing an intent to claim an *extension of time* due to utility delay.[52] The email was a direct response to communications from Wolverine acknowledging the deadlines and asking that they be waived.[53] If the email was not suspending the requirement that a claim for additional time had to be filed within 90 days of the act giving rise to the claim, it could not say "[s]ince you have not submitted an Intent to Claim, only a Request for Contract Time Extension, then the time requirements are not yet in effect."[54] That is because if the Region was enforcing the contract (rather than suspending it), it would have to say that the time requirements were already in effect because it was apparent that Wolverine was aware of the basis of a claim for an extension of time. Thus, Wolverine could treat the communication as a suspension of the need to file a claim for an extension of contract time based on utility delay within 90 days of learning of the basis of the claim.

The problem for Wolverine, however, is that the communication does not, on its face, address the issue of a claim for delay costs. Although it is possible to interpret the communication as encompassing both a claim for time and a claim for costs, it is also possible to

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51 *See, e.g., Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 9 (Alaska 2009) (explaining that in contract interpretation, court's duty is "to determine 'the meaning which the recipient of the communication might reasonably have given' the disputed terms." (quoting *Day v. A & G Constr. Co.*, 528 P.2d 440, 445 (Alaska 1974))).

52 The term "waiver" may be troubling if it implies that there would be no deadline and that a deadline could not be reinstated. That is not, however, how Wolverine and Mr. Blohm are using the term. Here, the deadline for filing a claim for an extension of contract time based on utility delay has clearly been set aside. As Wolverine agreed in oral argument, the suspension of the deadline was not permanent in that Mr. Forkner could have reinstated the deadline by giving notice. The point is that Mr. Forkner clearly suspended the clock on the deadline for filing a claim for an extension of time.

53 Wolverine Exs. 12, 13. Wolverine was aware that the deadlines for claims would normally begin to run when Wolverine became aware of that basis for a claim. Wolverine Exs. 12, 13.

54 Wolverine Ex. 13 at 1.

conclude that it applies only to a claim for additional time.[55] The communication from Wolverine asking for a waiver was asking only about Wolverine's claim for additional time.[56] The August 28th email stating that "the time requirements are not yet in effect" specifically noted that this was because the only thing that Wolverine had submitted was "a Request for Contract Time Extension."[57] Further, Mr. Forkner has submitted an affidavit in which he testifies that on the day of this email he and Mr. Bohm had specifically discussed that the issue was time, not costs.[58] Depending on how the facts play out, whether the August 28th email applied only to the issue of time, and not to the issue of costs, is not clear. Interpreting the facts in the light most favorable to the Region, at this stage of the proceedings, we must conclude that whether the waiver in the August 28th email applied to a claim for delay costs is a disputed question of fact, amenable to resolution after the parties have an opportunity to present further evidence. Therefore, Wolverine's motion for summary adjudication is denied.

C. Is the Region entitled to a ruling that Wolverine's claim was not timely as a matter of law?

The Region seeks a ruling that the undisputed facts prove that Wolverine's claim was not timely. Its motion has at least three parts, as follows:

- First, the Region notes that Wolverine's primary theory for why the Region should pay delay costs is that, in Wolverine's view, the Region had maladministered and interfered with the contract and therefore was responsible, at least in part, for the delay. The Region seeks summary adjudication that, even if a delay-cost claim might be untimely, this theory was untimely because Wolverine did not raise the theory until it filed its intent to claim on April 8, 2021.[59]
- Second, the Region argues that the undisputed facts prove that it never suspended the time deadlines for filing a claim for delay costs. Therefore, it concludes, the time clock for filing a claim for delay costs began to tick no later than the day of completion of the project.[60]

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55 This statement does not imply that the August 28th suspension of the deadline for filing a claim could not be reasonably interpreted to apply to delay costs. The point is that although the communication is necessarily a suspension of the deadlines for a claim for delay time, it is not necessarily a suspension of the deadline for delay costs.

56 Wolverine Exhibit 13 at 2.

57 *Id.* at 1.

58 Forkner Aff. ¶ 8.

59 Region's Opposition at 13.

60 *Id.* at 16-18.

- Third, the Region argues that even if there was a suspension of the deadline for filing a claim for delay costs, the suspension was not indefinite. Given that on March 19, 2021, the Region informed Wolverine that its request for delay costs was denied, the Region argues that Wolverine had to know by that date that the time was running on its deadline to file a claim.[61]

[61] *Id.* at 19-20.

1. Do the undisputed facts prove that Wolverine did not provide timely notice of its theory that the Region's wrongful interference with the utilities caused the delay?

The Region argues that "the basis of [Wolverine's] claim is DOT&PF's alleged interference causing increased costs due to utility delays."[62] To explain, here, the Region is focusing on Wolverine's theory that the Region had prevented Wolverine from dealing directly with the Utilities. In Wolverine's view, this alleged action on the Region's part was a violation of the contract. If true, this theory might allow Wolverine to pursue delay costs, even though the contract does not normally allow recovery for costs caused by utility delays. But the Region objects to this theory, and asks for summary adjudication, because, it says, it did not learn of this theory until April 8, 2021, when Wolverine sent a notice of intent to claim.[63]

The Region's concerns with early notice are, of course, well founded. The Region needs early notice of possible problems so that it can address the problem. Early notice of cost overruns is needed because projects often have budget constraints. Thus, the contract requires that the "Contractor shall notify the Engineer" not only of "any act or occurrence that may form the basis of a claim" but also of "any dispute regarding a question of fact or interpretation of the Contract."[64] The notice must occur "as soon as the Contractor becomes aware of" the issue.

Here, Wolverine's claim argues that the Region usurped the contractor's prerogative under the contract to communicate with utilities. In the Region's view, this is a dispute regarding an interpretation of the contract that had to have been communicated to the project engineer when the alleged usurpation occurred.

As has been explained above, in analyzing the Region's motion, we take the opposite tack from the analysis of Wolverine's motion, and analyze the facts in the light most favorable to Wolverine. Here, the Region seeks a ruling that under no possible interpretation of the facts could Wolverine's theory regarding interference with contract be timely. The facts regarding when Wolverine communicated this theory, however, are not yet established—although Mr. Forkner testifies that he "does not recall" the theory being raised until Wolverine filed it claim in April 2021, the Region can only allege that "it appears" that the theory did not surface until April

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62 Region's Opposition at 20.

63 Region's Opposition at 7-8 ("This appears to be the first time that Mr. Blohm or WSI raised this new argument that WSI's basis for seeking additional costs was DOT&PF's alleged interference, rather than the utility delays referenced in the parties' prior communications going back to August 2019.").

64 *See, e.g.*, Forkner Aff. ¶ 14.

8, 2021.[65] This vagueness of fact is a reason to deny summary adjudication, and allow Wolverine an opportunity to prove that it did provide timely notice of the interference theory.[66] Further, summary adjudication on the untimeliness of the interference-with-contract theory, might still leave the door open for other theories.[67] Finally, the Region's argument does not address Wolverine's main contention—that the Region had given a broad, general suspension of the deadlines and requirements in the contract for all issues related to the utility delay. If true, then the suspension might have meant that Wolverine did not need to tell the project engineer that Wolverine considered the Region's approach to communication with the utilities to be a breach of contract. We turn next, therefore, to the issue of suspension of contract requirements.

2. Do the undisputed facts prove that the August 28th communication applied only to a request for an extension of time due to utility delay?

The Region argues that the undisputed facts prove that Mr. Forkner did not waive any deadlines for filing a claim for delay costs. It cites the well-known rule that "[w]aiver is generally defined as 'the intentional relinquishment of a known right.'"[68] It also cites Mr. Forkner's testimony that at the time of the communication, the parties had discussed the fact that Wolverine was seeking only delay time, not delay costs, to conclude that the undisputed facts prove there was neither an express nor an implied waiver of the deadlines for filing a delay cost claim.[69]

The problem for the Region, however, is that, as explained above, Mr. Forkner's August 28th communication certainly set aside the claim deadlines for at least claims for extensions of time due to utility delay. Moreover, although the August 28th email was addressing only a claim for delay time, the email was written very broadly. On its face, the email ignores the actual language of the contract (that the timelines start when the contractor knows or should know the basis of the claim) and instead seems to adopt an approach that, for at least some purposes, the timelines would not apply.[70]

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65 Forkner Aff. ¶ 14; Region Opposition at 7.

66 At oral argument, Wolverine asserted that although it may have had knowledge that the Region was misinterpreting the contract by usurping the contractor's prerogative to communicate with utilities, it considered this act harmless error and did not learn of the harm until it received documents from the Region after April 2021. I agree with Wolverine that the murkiness of the facts regarding this issue preclude summary adjudication. I agree with the Region, however, that early notification of issues regarding contract interpretation is mandated by the contract.

67 *See, e.g.,* Region Ex. 1 at 7-8 (Wolverine claim arguing that prohibitions on delay-cost claims are disfavored and strictly construed).

68 Region's Opposition at 16 (citing *Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1136 (Alaska 2008) (citation omitted)).

69 *Id.* at 4.

70 Wolverine Ex. 13 at 2.

Given how broadly this communication was written, the scope and effect of the communication is unclear. Viewing the facts in the light most favorable to Wolverine, it could be read to suspend or waive contractual requirements related to the utility delay. Indeed, Mr. Forkner's affidavit, submitted by the Region with its opposition, clearly shows that additional facts are necessary to determine whether the promise to not enforce the contractual deadlines until after negotiation applied to all claims arising from delay, or to just to a claim for additional time due to utility delay. Although Mr. Forkner's testimony may eventually help resolve whether the August 28th communication applies to delay costs, in these circumstances, Mr. Forkner's testimony could not be the basis for summary adjudication in part because Wolverine has not yet had an opportunity to question Mr. Forkner and in part because the scope of the August 28th communication is inherently a question of fact.

3. Do the undisputed facts prove that impasse on negotiations regarding delay costs was reached no later than March 19, 2021?

Above, we have determined that for purposes of the Region's motion for summary adjudication, we must assume that the August 28th communication suspended the deadlines for filing a claim, and that the suspension applied to all claims arising out of utility delay, including claims for costs. The next question to address is when that set aside would expire so that the deadlines would begin to run. Wolverine does not assert that the set aside of the deadlines was permanent. Instead, Wolverine argues that the August 28th communication established that the set aside would end when the parties reached impasse in their negotiations regarding the impact of the utility delay.

To support that argument, Wolverine cites to the language of the communication. In the email, after explaining that the timelines had not yet started, Mr. Forkner said, "[i]n the event that a satisfactory and timely agreement cannot be made, then you are of course welcome to submit an Intent to Claim."[71] Wolverine reads this statement to mean that, at least with regard to claims arising from utility delays, the claim deadlines do not start to run until it becomes clear that the parties have failed to reach a "satisfactory and timely agreement" regarding the claimed delay costs. As Wolverine points out, this means that the timelines would begin when the parties reach impasse—a point where it becomes clear that further negotiation would not be fruitful.

Interpreting the facts in the light most favorable to Wolverine requires that we adopt Wolverine's interpretation of the communication. Thus, for purposes of summary adjudication,

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[71] *Id.*

the deadline for filing a claim for utility delay costs would be 90 days after the parties reached impasse in negotiation. Next, then, we must address whether the undisputed facts establish a date that impasse was reached, and, if so, whether Wolverine's claim was timely based on that date.

With regard to when impasse was reached, Wolverine has come forward with two arguments. First, it argues that negotiations for utility costs had never reached impasse. Instead, Wolverine had simply determined unilaterally to file a claim.[72] Second, it argues in the alternative that impasse was reached on April 8, 2021, when the Region refused to provide it with information regarding utility schedules.[73] Under either argument, Wolverine asserts, its claim was timely.

The Region also has two arguments for when impasse was reached. First, it argues that the last possible date on which the deadlines could begin to run was the date of project completion, July 30, 2020.[74] This argument makes sense in that project close out is a time that one would normally expect all costs to be either wrapped up or at least in the process of being wrapped up, meaning that would be a time when we would expect negotiations regarding costs to end, and final bills presented. That conclusion, however, is not compelled—costs and charges can continue to be negotiated after project completion. Interpreting the facts here in the light most favorable to Wolverine, the fact that Wolverine submitted its formal request for delay cost on January 29, 2021, could be evidence that both parties understood that delay costs were still on the table to be worked out after closing.

The Region's second argument, however, focuses on the March 19, 2021, communication from the Region to Wolverine. This letter denied almost all of Wolverine's request for delay costs. As a general matter, a communication denying a request would be considered an end to negotiation about the request. Indeed, here, the communication invoked an absolute rule to bar all recovery for delay costs (citing subsection 105-1.06.4.d of the contract).[75] In short, a reasonable person would interpret the language of the March 19th letter to mean that Wolverine's request was denied. Negotiation was over.

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72 Wolverine Opposition at 3 (arguing that the Region's communication "did not, in itself, foreclose negotiation").

73 Wolverine Motion at 3 ("These negotiations eventually reached an impasse shortly after ADOT issued a response to a request from WSI seeking documents related to the utility issues, indicating that ADOT would no longer negotiate in good faith."

74 Region's Motion at 7.

75 Wolverine Ex. 18 at 2.

Wolverine, however, cites to the following as support for its view that it is entitled to a hearing on whether negotiations were at an impasse on March 19th:

- The March 19th letter closed with an invitation for Wolverine to submit additional questions. To Wolverine, this raises a factual question regarding whether the letter was inviting further discussion and negotiation.
- Wolverine argues that Mr. Bohm's response to the March 19th communication, which stated his impression that the Region intended to "allow[] further negotiations concerning this project," is proof that facts are in dispute regarding whether impasse had been reached.[76] In Wolverine's view, this response "unambiguously confirms WSI's belief that no dispute yet existed."[77]
- Wolverine cites Mr. Forkner's April 6, 2021, response as further proof that, drawing all inferences in its favor, impasse had not been reached. In this email, Mr. Forkner instructed that if Wolverine had evidence of utility schedules different from what the Region had provided on March 19th, then Wolverine should submit that evidence, so that he could "adjudicate any discrepancies." Wolverine asserts that this promise of further review supports an inference that the issue was still in flux and that the parties were negotiating.
- Wolverine points out that, although the August 28, 2019, communication had, in its view, promised negotiation over utility delay, as of March 19, 2021, no negotiation had occurred.[78] In Wolverine's view, this means that further facts are needed to determine whether the March 19th letter was an end to negotiation or a beginning.
- The March 19th letter awarded some costs from the 2020 season. Wolverine argues that if the Region was willing to award some costs on March 19th, a reasonable person could conclude that the Region was willing to award more costs, or at least continue to negotiate costs.[79]

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76 Wolverine Opposition at 2-3 (quoting Region Ex. 10 at 2).

77 *Id.* at 3.

78 *Id.* at 8

79 *See* Wolverine's oral argument (April 8, 2022). In a related argument, Wolverine argued in its appeal that sound policy favored having the Commissioner decline to strictly enforce the claim deadlines in the contract. Letter from Anne Marie Tavella to Ryan Anderson (Dec. 2, 2021) at 3. In Wolverine's view, strict enforcement will lead to an increase in in claims, be inefficient, and likely increase bid prices. *Id.* As the Region's allowance of some 2020 costs shows, Wolverine is correct that the Department may, in some circumstances, grant equitable adjustments on

The problem for Wolverine, however, is that impasse does not require that both parties refuse to negotiate further. As Wolverine agreed at oral argument, impasse is reached when one party says that it is through.

This means that here we are not searching for facts that could raise a dispute about whether a person in Mr. Bohm's shoes could reasonably hope on March 19th that negotiations could continue. Here, to avoid summary adjudication, Wolverine must come forward with facts that would support an inference that a reasonable person would interpret the March 19th, communication to mean that the Region intended to negotiate delay costs (so that the clock on a claim for delay costs was not running).

The March 19th communication, however, was a denial of Wolverine's request. Although the communication invited questions, it did not invite negotiations. Regardless of whether Mr. Blohm may have been justified in hoping that further negotiation was possible, the letter itself does not support an inference that the Region wished to negotiate.

Wolverine then turns to Mr. Forkner's April 6th letter, and argues that it could be viewed as affirming that the March 19th letter kept the door open to negotiation. It cites to the letter's instruction that "the project had a difficult time determining what were delays in completing the project due to utility work and what delays in contractor work were. If you feel that there are discrepancies in the dates provided for utility delays, please submit your records so that the project can review and adjudicate any discrepancies."[80] To Wolverine, this request for additional records signaled that the Region wanted a back-and-forth dialogue—meaning that for the Region, impasse had not yet been reached.

The April 6th letter, however, confirmed what had already been made clear in the March 19th letter—that the Region was unilaterally deciding the question of compensation for costs for the 2020 season. It was not negotiating the compensability of these costs. Even viewing the facts in the light most favorable to Wolverine, Mr. Forkner's statement that he would "adjudicate" a difference in schedules cannot be interpreted as an offer to negotiate a request for delay costs. Adjudicating the facts regarding the utility schedule on the project would be a unilateral action undertaken by the project engineer. That is consistent with the project engineer's role under the

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policy grounds, including a recognition that contractors should be treated fairly. Here, however, there are many policies to consider. Enforcing contract terms, and requiring early disclosure of potential disputes (so that they can be addressed if necessary), are not necessarily unfair to contractors or contrary to sound policy. Here, neither party has engaged in a thorough discussion of the policy issues and this decision will not address them further.

[80] Region Ex. 11.

contract—the contract does not require the project engineer to engage in bilateral negotiation regarding a request for an equitable adjustment, or a disagreement regarding the utility schedule.[81] Even if this evaluation would result in a change in Mr. Forkner's decision, Mr. Forkner's use of the term "adjudicate" can only mean that he would be making a unilateral, take-it-or-leave-it decision. This affirms that the issue was not subject to negotiation.

Moreover, two of the facts cited by Wolverine in support of its argument cut the opposite way—in support of the Region. First, Wolverine cites that "no negotiations – whatsoever – had occurred prior to [March 19, 2021]."[82] Wolverine argues that the absence of negotiations heretofore means that Wolverine could reasonably interpret the March 19th communication to mean that negotiations were yet to take place. But a reasonable person who has made a request, and then had the request denied without any negotiation, would not interpret that denial as the beginning of negotiation. Even assuming that 19 months earlier the other party had said that deadlines for filing a claim about the issue would not begin to run until "the event that a satisfactory and timely agreement cannot be made," the absence of negotiation, combined with a "no" answer, would lead a reasonable person to conclude that "the event" had occurred.

Second, Wolverine argues that the Region never actually said that it was at impasse. In Wolverine's view, apparently, the timelines for filing claim would never have started but for Wolverine's "*impression* ADOT would prefer the REA to proceed through the claim process and not based on any affirmative statement from ADOT to that effect."[83] Wolverine, however, is demanding communication using precise legal terminology when the law merely requires reasonable communication. As the Alaska Supreme Court observed many years ago, "Courts would impose too great a burden on the business community if the standards of certainty were set too high."[84] Here, a reasonable person would have interpreted a communication saying that Wolverine had no right to delay costs to mean that Wolverine and the Region had a dispute. Wolverine's approach that impasse continues indefinitely in the absence of precise legal language

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81 *See, e.g.,* Region Ex. 16 (§ 105-1.17). This subsection of the contract discusses that the project engineer may "investigate" issues that the contractor brings to the engineer's attention. Although the engineer and the contractor may resolve the issue by agreement, subsection 1.17 does not establish an obligation that the engineer must negotiate. If the matter is not resolved within seven days, then the contractor must initiate the claim process to preserve the issue. *Id.* Applying this subsection here, the March 19th and April 6th letters make clear that Mr. Forkner was not trying to resolve the issue through negotiation in order to avoid Wolverine having to file an intent to claim.

82 Wolverine Opposition at 8.

83 Wolverine Opposition at 3 (emphasis in original).

84 *Rego v. Decker,* 482 P.2d 834, 837 (Alaska 1971).

is not consistent with the contract (which puts the burden on the contractor for making a timely claim based on the contractor's awareness of the basis of the claim) or with how contracting parties generally communicate with one another.

Turning to Wolverine's final argument, the fact that the Marth 19th communication provided compensation for some lump-sum costs incurred in the 2020 construction season does not undermine the conclusion that *impasse* had been reached. The lump-sum items totaled $54,177.65.[85] The claim was for $1,754,250.26.[86] This allowance of a small sum cannot be interpreted as an offer to negotiate the bulk of the claim. As the letter explained, the payment for lump-sum items was being offered because these items were "based on the original bid amount and contract duration."[87] The letter contrasted the lump-sum items with "wages for work performed in 2020, as well as services and other items not allowed for in the contract," which were denied.[88] It did not open the door for negotiation over the denied items.

In sum, to the extent that the issue of delay costs was negotiable before March 19th, it was not negotiable after March 19th. Thus, the undisputed evidence proves that as of March 19, 2021, Wolverine knew, or should have known, that impasse had been reached.

D. Does Wolverine's allegation of bad faith give rise to a factual dispute that precludes summary adjudication?

Before concluding, this decision must address Wolverine's allegation that the Region's denial of its claim was in bad faith. Under Alaska law, "[a] covenant of good faith and fair dealing is an implied component of all contracts as a matter of law."[89] This covenant has both subjective and objective elements. The subjective element "prohibits one party from acting to deprive the other of the benefit of the contract."[90] The objective element "requires both parties to act in a way that a reasonable person would consider fair."[91] Because an allegation of bad faith often depends upon the facts, an allegation of bad faith must be analyzed to determine whether it raises material issues of fact that require further exploration.

At oral argument, however, Wolverine confirmed that the issue of potential bad faith here arises from the Region's denial that the August 28th communication had agreed to extend the

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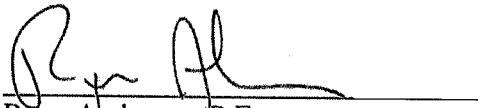
85 Region Ex. 9.
86 *Id.* at 12.
87 Wolverine Ex. 18 at 2.
88 *Id.*
89 *Alaska Pac. Assur. Co. v. Collins,* 794 P.2d 936, 947 (Alaska 1990), *as amended on denial of reh'g* (Aug. 30, 1990).
90 *McConnell v. State, Dep't of Health and Soc. Servs.,* 991 P.2d 178, 184 (Alaska 1999).
91 *Id.*

deadline for filing a claim. Because this decision accepts that the Region had agreed to suspend the deadline until impasse was reached, even if the Region later acted in a manner unfair to Wolverine regarding the effect of the August 28th communication, that act would not affect the outcome here. Therefore, the issue of bad faith is not a barrier to summary adjudication.

IV. Conclusion

For purposes of summary adjudication, this decision accepts that on August 28, 2019, the Region agreed to suspend deadlines for filing claims related to utility delays on phase one of the Kenai Spur Highway project. The suspension would be in place until a party determined "that a satisfactory and timely agreement cannot be made." Even viewing the facts in the light most favorable to Wolverine, however, the undisputed evidence proves that as of March 19, 2021, Wolverine knew, or should have known, that there would be no satisfactory and timely agreement regarding compensation for the costs incurred because of utility delays. This means that the Region is entitled to summary adjudication that Wolverine's July 7, 2021, claim for utility delay costs on the project was not timely. Wolverine's motion for summary adjudication is denied. This case is dismissed.

DATED: June 2, 2022.



Ryan Anderson, P.E.
Commissioner
Alaska Department of Transportation and Public Facilities

D. In accordance with AS 44.64.060(e)(5), the adopted decision clarifies the cites to the record and to a definition contained in the proposed April 18, 2022, decision. No substantive changes have been made. The clarifications were made on pages 3, 4, 8, 11, 12 and 13.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this Decision and Order.

DATED this 2nd day of June, 2022.

By: _____

Ryan Anderson, P.E.
Commissioner
Transportation & Public Facilities

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the forgoing was provided to the following individuals:
Anne Marie Taveira, Attorney - by mail & email
Jordan O'Connell, AAG - by email
Hilary Porter - by email
Dept of Law - by email
Signature Stephanie Peters Date 6-3-2022