

### Abandonment of Contract: No Longer a Viable Claim Against a Public Entity

The Supreme Court of California recently issued a decision which may substantially limit the remedies available to any contractor dealing with public construction projects. That case, *Amelco Electric v. City of Thousand Oaks*, eliminates the ability of a contractor to recover *quantum meruit* damages from a public entity under an abandonment of contract theory. The decision also casts further doubt on the viability of proving breach of contract damages against a public entity by use of the "total cost" approach.

#### THE PROJECT

In 1992, Amelco Electric ("Amelco") was awarded a contract by the City of Thousand Oaks in the amount of \$6,158,378 to provide electrical work in the construction of a Civic Arts Center. During the course of the project, the City issued 248 sketches which clarified or changed the electrical contract drawings. Amelco requested 221 change orders and the City ultimately agreed to 32 change orders, adding \$1,009,728 to the original contract price.

Amelco claimed at trial that it was required to delay and/or accelerate particular tasks and perform work out of sequence as a result of the manifold changes imposed by the City's revised drawings. At trial, Amelco claimed that it had been damaged in excess of \$2.2 million. However, Amelco admitted that it was responsible for some inefficiencies, but attributed most of its cost overruns to the City or the City's project manager.

During the trial, the Court allowed the case to proceed to the jury on both abandonment of contract and breach of contract theories. The case was submitted to the jury who found that the City had both breached and abandoned the contract and awarded Amelco \$2,134,586 for each claim (but not cumulatively).

#### II. ABANDONMENT OF CONTRACT DAMAGES AGAINST A PUBLIC ENTITY

The Supreme Court determined that an abandonment of contract theory of recovery cannot be applied to a contract with a public entity. Generally, under an abandonment theory, when an owner imposes upon the project an excessive number of changes which essentially create an entirely different scope of work, the contract's payment terms are disregarded and the contractor is entitled to recover the reasonable costs (i.e., *quantum meruit*) for all of the work performed.

The California Supreme Court disagreed with the trial court's decision to allow Amelco to proceed on an abandonment theory. Ultimately, the Supreme Court determined that public entities are immune from recovery based on the abandonment theory. The Supreme Court's decision was based on several factors. The Court first noted that contractors on *public works* projects (as opposed to private works projects) are generally *not* entitled to recover for work performed beyond the contract requirements based upon a *quantum meruit* theory. The Court

also noted that generally, where there is a defect in the bidding process on a public works contract rendering the contract void, *quantum meruit* recovery is also denied.

However, the Court's primary concern seemed to be with the impact of the abandonment theory on the competitive bidding requirements for public works contracts. The Court reasoned that allowing the contractor to abandon the contract and recover the reasonable value of the services rendered, regardless of the contract price, would provide an "end-run" around the competitive bidding statutes. The Court was also concerned with the timing of the abandonment. If the contractor could recover all costs incurred, regardless of when the abandonment occurred, it could interject substantial uncertainty into the budgeting and financing of public construction contracts. The Court also opined about potential collusive or strategic bidding practices in which a contractor could submit an unrealistically low bid in the hopes that the numerous changes "inherent in any large public works project" would give rise to a potential abandonment claim. Finally, the Court relied upon Public Contracts Code § 7105 which provides that the compensation payable for any termination or modification of a public works contract shall be determined as provided in the contract.

Justice Werdegar dissented from the majority's opinion, attacking each of the bases for the majority's decision. In particular, the dissent attacked the notion that there is any reasoned basis for distinguishing between public and private contracts with respect to the abandonment theory. The dissent also persuasively attacked the majority's concerns about the dangers to the competitive bidding process. First, the facts of the case did not support the concern as there was no evidence that Amelco had circumvented the bidding process. Rather, it appeared that the City had insufficiently planned the project and let the project out for bid well before the plans were sufficiently complete.

As noted by the dissent, the majority's belief that contractors might submit unrealistically low bids in the hopes of receiving a "windfall" under the abandonment theory borders on the absurd. Assuming a contractor did submit such a below market bid, it would take years of litigation expense and inconvenience to successfully pursue the abandonment claim. Moreover, if the contractor fails to prove its abandonment claim, it would be forced to bear the loss of the below market bid. The belief that a contractor would take on these risks for the possibility of receiving a *quantum meruit* "windfall" several years down the road defies common sense.

Notwithstanding the rather persuasive reasoning of the dissent, the majority's position remains the current law of California. For now, a contractor cannot recover from a public entity under an abandonment theory.

### III. FURTHER EROSION OF TOTAL COST RECOVERY

The majority also took issue with Amelco's use of the total cost approach in proving damages for its breach of contract claim. Initially, the Court noted that it was not addressing the question of whether total cost recovery is *ever* appropriate against a public entity *only* because the City had not raised the issue.

The Court found that Amelco's use of the total cost approach in this case was unsupportable. In order to utilize the total cost approach, Amelco was required to establish: (1) the impracticality of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) that it was not responsible for the added costs.

The Court had little difficulty finding that Amelco had not satisfied all of the requirements for using the total cost approach. First, Amelco never attempted to demonstrate how a particular breach caused damages and made no effort to distinguish between its own inefficiencies and those of the City. Rather, Amelco simply

reduced its demand by an arbitrary 5% to take into account its own contribution to the impacts and delays. The Court was not persuaded by this arbitrary reduction or the resulting assumption that the other 95% of the damages were solely attributable to the City.

The Court was also concerned with the fact that Amelco did not try to pinpoint the timing of any particular breach. For example, if the City's breaches did not occur until the end of the project, it would be unreasonable to assume that Amelco was entitled to recover its total costs over the course of the entire project. Based upon Amelco's clear failure to satisfy its burden of proof, the case was remanded for further proceedings on damages.

The lesson to be taken from *Amelco* and the cases cited therein regarding total cost recovery is that the approach should only be used as a last resort. The method is generally disfavored and will only be allowed when there is no other method of proving damages available. Moreover, if the unavailability of other methods of proof is a result of the contractor's own practices (e.g. poor record keeping), the courts may prohibit total cost recovery as well.

#### IV. CONCLUSION

Despite its potential flaws, the majority opinion in *Amelco* represents a significant limitation on the remedies available to a contractor seeking recovery from a public entity owner. With the demise of the abandonment theory in public works cases, contractors must rely almost exclusively on breach of contract claims. In turn, proving breach of contract damages may prove more difficult with the continuing decline of the total cost approach.

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