



Alerts

Engineer Not Liable for Telling Contractor It Would Be Paid for Differing Conditions

April 7, 2014

Professional Lines Alert

JEM Contracting, Inc. v. Morrison-Maierle, Inc., 373 Mont. 391, 318 P.3d 678 (Jan. 28, 2014)

Plaintiff contractor was hired by two Montana Counties ("the Counties") to work on a road construction project. Defendant engineering company was hired by the Counties to provide engineering services and supervision on the project.

On the first day of the project, plaintiff encountered subsurface conditions that significantly differed from what was set forth in the plans upon which it had based its bid. Addressing the conditions would require increased time and costs. Plaintiff discussed the differing conditions with representatives of defendant engineering company, some of whom agreed that the conditions differed from the plans. The plaintiff went forward with the work but did not provide written notice to the Counties of the differing conditions until 18 days later. The contract provided that the plaintiff had to continue with the work pending approval of any change order, which was to be submitted within five days of discovery.

At a meeting held the same day plaintiff gave notice to its client, the Counties, plaintiff alleged that defendant engineering company agreed that the site conditions varied from that shown on the plans and promised that plaintiff would be paid for the increased costs if the plaintiff could find savings on the rest of the job so as to complete it within the original contract price. No dollar figures were discussed and plaintiff did not know the amount of the increased costs for these differing conditions. After another 20 days, plaintiff submitted a change order for additional compensation and defendant engineering company denied the change order because plaintiff had failed to provide sufficient evidence that the site conditions differed from the plans and because plaintiff had failed to follow the five day notification procedure. Plaintiff then presented a request directly to the Counties who denied the claim as well. Thereafter, plaintiff completed its work on the project and allegedly found enough savings in the remaining work to cover the increased cost of the differing conditions. The Counties once again denied plaintiff's change order for failure to provide certain documentation required by the contract. Plaintiff filed a complaint against the Counties for breach of contract and against defendant engineering company for detrimental reliance and fraud by inducement. The plaintiff settled with the Counties and defendant engineering company was granted summary judgment by the trial court on grounds that the plaintiff had failed to show that it was

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harmful by any alleged representations made by defendant engineering company whose promises were just "agreements to agree." The Supreme Court of Montana affirmed.

Question Before the Court and How the Court Decided It

Did the district court err by granting summary judgment to defendant engineering company on grounds that plaintiff had failed to show it was harmed by the representations and it had failed to give notice under its contract of the differing conditions?

No. The Supreme Court agreed that to succeed on its fraud claims, plaintiff was required to prove harm as an element. The contract provision that required plaintiff to continue to work on the project despite the dispute over the change order was held to be valid, and the Court found that the alleged misrepresentation by defendant engineering company only induced plaintiff to do what the contract required it to do in any event. The Court declined to address plaintiff's claims that it suffered harm in the nature of lost profits while continuing the work and found that it was the plaintiff's own failure to comply with the 5 day notification procedure that barred its claim for a change order for the differing conditions.

What the Court's Decision Means for Practitioners

The plaintiff's failure to follow the provisions in its contract mandated this result. The Supreme Court here refused to engage in an analysis of a lost profits claim by the plaintiff, because the contract clearly required it to continue its performance during the dispute, and it did not even come close to following the notification procedure in the contract for making such a claim.

For more information, please contact your regular [Hinshaw attorney](#).

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