

FAILURE TO COMPLY WITH MATERIAL CONTRACTUAL OBLIGATION RESULTS IN LOST RECOVERY OF PAYMENT

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Summer 2007

The Michigan Court of Appeals recently held that a contractor was not entitled to payment for houses it demolished when it failed to obtain permission to perform the demolition from the municipality as provided in its contract.

As a result of *Able Demolition, Inc. v City of Pontiac*, May 17, 2007, (Docket No. 273295), contractors are to be reminded that recovery of payment otherwise due, may be precluded given a failure to comply with a material contractual obligation.

The appellate court ruled that the contract language made the "Letter to Proceed" mandatory on the date the demolition was to be performed and that the municipality must issue the pre-approval letter. The applicable contract provision was meant to protect property rights and to protect the city from liability. Therefore, it was an essential term of the contract, rather than a mere technicality. Accordingly, the contractor's failure to obtain formal notice to proceed was substantial and its action for damages against the municipality was precluded as a matter of law.

In *Able Demolition*, the plaintiff, a demolition contractor, entered into a contract with the municipality to demolish certain abandoned homes. The contract provided that the contractor must, on the date that the anticipated services would be performed, contact the municipality to secure written approval to proceed with the demolition. Upon request for approval by the contractor, the municipality was to provide the contractor with a letter to proceed, which specifically granted the contractor approval to proceed with the demolition services. Prior to payment for its services, the contractor was to present the letter to proceed to the municipality's finance department, verifying that approval to proceed was granted. Moreover, the contract provided that the contractor would forfeit payment for unauthorized services performed as a result of its failure to obtain the letter to proceed.*

The contractor demolished numerous buildings under the contract, but the municipality refused to pay for several of the completed demolitions. The contractor filed a complaint against the municipality and alleged claims of breach of contract, promissory estoppel, unjust enrichment and *quantum meruit* (meaning the reasonable value of services provided).

The municipality responded that the contractor was not entitled to payment because it did not comply with the material terms of the contract when it failed to obtain the letters to proceed as required by the contract for several of the demolished houses. Therefore, the contractor forfeited its right to payment for those demolitions.

The appellate court reviewed the contract and found that it unambiguously required that, on the

day of each demolition, the contractor was to obtain written assurance from the municipality before it could go forward with the destruction of the building. The contract plainly stated that, to be paid, the contractor must submit the letters to proceed to the city and its representatives. Moreover, the contract provided that, if a contractor fails to submit the letters, the company forfeits its right to payment.

The Michigan Court of Appeals noted that its obligation was to determine the intent of the contracting parties and that it was to construe and enforce the contract as written, if its language was unambiguous. Courts will enforce an unambiguous contractual provision given that it is reflective of the parties' intent as a matter of law.

With respect to the contract at issue in *Able Demolition*, the appellate court found that the language of the contract was clear – the contractor must obtain a letter to proceed from a municipality before it can proceed. Accordingly, the only issue was the legal consequence of the contractor's failure to comply with the contractual obligation.

A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. The court held that the provision that required the contractor to obtain letters to proceed was a condition precedent and that the contractor's failure to comply with the provision meant that it was not entitled to performance by the municipality (i.e., payment for demolition services).

In addition, the court ruled that the clear and unambiguous language of the disputed provision compelled the conclusion that the parties intended that the contractor must obtain a letter to proceed before each demolition, in order to trigger its right to payment. In so holding, the court relied on the provision that obligated the contractor to contact the municipality to secure written approval prior to any performance of services, coupled with the provision that forfeited payment under the terms of the contract, if the letter to proceed for each demolished property is not provided.

The appellate court also rejected the contractor's argument that the contract was a "services contract" and that mere failure to obtain and submit the approval letters should not excuse the municipality's obligation to pay for its services. To the contrary, the court found the contract to be "legal protocol" and, as such, the critical aspect of the agreement was that any demolition be accomplished in strict compliance with the procedures designated by the municipality to minimize the risk of legal liability and the serious violation of citizen's property rights. The court determined that the contract provisions were in place to protect property rights and to protect the city from exposure to liability and, therefore, were essential terms of the contract and not a mere technicality.

The *Able Demolition* case reinforces the concept that a contractor or a design professional generally must perform in accordance with the terms of the applicable contract if it wants to be paid for services performed. While legal theories such as *quantum meruit* or unjust enrichment exist to allow a party to be paid for the reasonable value of services performed, a court will not permit recovery under those theories if a material term of the contract is breached or a condition

precedent is not performed. Many contractual provisions, such as those discussed in the Able Demolition case, are in place to protect the health, safety and welfare of the general public. If a party seeking to recover payment fails to perform in accordance with these types of material terms, recovery may be precluded.

*Specifically, the contract provided: "If the contractor proceeds without the approval specifically granted in the letter to proceed, the contractor shall forfeit any payment for unauthorized services performed as a result of his failure to get pre-approval letter to proceed. The contract went on to state that "if the letter to proceed for each demolished property is not provided, the contractor forfeits any payment under the terms of this contract."

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