Subcontractor Recovers for Extra Work Even Though its Bid is not a Contract

by

James R. Keller

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Missouri's Eastern District Court of Appeals recently ruled that the general contractor's use of a subcontractor's bid did not constitute a binding contract between them, but the subcontractor could recover in quantum meruit for extra work performed. The case is *City of Cape Girardeau ex rel. Kluesner Concreters v. Jokerst, Inc.,* 2013 WL 2483690, decided June 11.

General contractors typically use the bids of specific subcontractors when putting together a bid proposal to an owner to do work at a fixed lump sum price. This opinion gives important guidance that subcontractors cannot rely on a general contractor's use of the subcontractor's bid—without evidence of something more—to create a binding contract.

For example, the court noted that a specific promise from the general contractor that if it is awarded the work, the subcontractor will have the job as set out in its bid would be enough.

In this case, the project was the Cape Splash Aquatic Center for the City of Cape Girardeau, Missouri. General contractor Jokerst, Inc. provided a fixed price bid that included a bid from subcontractor Kluesner Concreters for concrete for $104,747.40.

Kluesner's bid was two pages long with the word "estimate" at the top of each page. It also provided that final billing will be based on actual measurements of completed work.

Jokerst was the low bidder and won the job.

Jokerst sent a fax to Kluesner stating that its bid of $104,747.40 was used for the concrete work and the project was a lump sum contract.

Kluesner did some work, submitted invoices and was paid. Then, Jokerst asked Kluesner to change the construction of a particular curb. The original plan called for "curb and gutter." The owner changed this to a "stand-up curb," and Kluesner complied.

Kluesner originally listed in its bid $20.90 per lineal square foot for the curb and gutter. There was no discussion how this change in design may affect the price.

Kluesner sent two invoices to Jokerst labeled "Extra Work Order" that included base contract items and the change in the curbs. There was a line item for the stand-up curb work at $30 per lineal square foot. Jokerst paid the invoices except for $24,090.00 relating to the curb work.

After completion, Jokerst sent a check to Kluesner for $1,349.82 to close out the job with a notation this was a "Final Check Amount Paid." Kluesner deposited the check and sued for the difference.

The trial court found Kluesner's bid was enough to create a contract for unit prices, and not enough for a lump sum as Jokerst had argued. The trial court also found that quantum meruit should apply.

Quantum meruit or unjust enrichment comes into play when there is no formal contract. To support the claim there must be the performance of materials or services at the request of the party from whom you seek compensation, the materials or services had reasonable value, and the party who received them has refused to pay.

The Eastern District concluded the bid was not enough to be a contract, even though Jokerst intended to hire Kluesner and Kluesner performed the work per its bid.

Kluesner could recover in quantum meruit for the extra work, however. The work was requested, received, and the owner and general contractor benefited from it. To determine that the charge for the materials and services was reasonable, a subcontractor must show that the rate was "objectively reasonable" in the marketplace.

Kluesner's president had testified that the standard rate for stand-up curbs in that area was $40 per lineal square foot, far more than he charged. The appellate court determined that this was sufficient to establish a reasonable rate.

The appellate court rejected Jokerst's argument that by cashing the check there was an "accord and satisfaction" of any outstanding amount otherwise due. Accord and satisfaction is a contract that constitutes a meeting of the minds between the parties.

The notations with the check did not clearly state that cashing the check was expressly conditioned on a release of Kluesner's claim for extra work. In this

instance, because there was no express condition that cashing the check satisfied any remaining claim, there was no accord and satisfaction.

The Eastern District also upheld the award of prejudgment interest at nine percent per Missouri law, finding the work had been invoiced and it was due even though there was no express contract and the recovery was in quantum meruit.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.