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### In *Amelco Electric v. City of Thousand Oaks*, the California Supreme Court Rules that Contractors Cannot Bring Abandonment Claims Against Public Entities in California

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Working on public construction projects just got a lot riskier for contractors in California. In *Amelco Electric v. City of Thousand Oaks*, 02 CDOS 1056 (2/4/02), the California Supreme Court held that a contractor cannot rely on the abandonment theory of liability to recover its added costs from a public owner where the owner made excessive changes beyond the initial scope of the contractor's work. This means that when a contractor bids on a public project, it assumes the risk that, if the project really goes bad and is very substantially changed, the contractor will not be paid for the cost of its added work.

*Amelco* arose from Amelco's contract to provide electrical work as part of the City of Thousand Oaks's construction of a Civic Arts Plaza. Amelco was awarded the contract after presenting the low bid at \$6.1 million. As the dissenting opinion noted, "it appears the City let the project out for bid before its plans were sufficiently complete . . . , and then imposed numerous and substantial changes to the project while giving Amelco no extra time to complete the additional work." As a result, the City issued more than one thousand sketches to clarify or change the original contract drawings, nearly a quarter of which affected the electrical cost. The City agreed to only 31 of Amelco's 221 requested change orders, increasing the contract price by \$1 million. At the end of the project, Amelco filed a claim against the City that eventually totaled more than \$2 million for the additional uncompensated work, based on a theory that the City abandoned the original contract through its excessive change orders. The City denied Amelco's claim.

Amelco sued the City under two theories of liability: breach of contract and abandonment. Under the latter theory, existing California case law held that a contractor could recover from a private owner for the reasonable value of its services where the owner had made so many changes to a contract that it could be deemed to have abandoned the contract. At trial, the court allowed Amelco to submit evidence of its damages under both theories using a modified total cost measure. Amelco prevailed, with the jury reaching a verdict in Amelco's favor on both of its causes of action and awarding Amelco damages under its modified total cost measure. The Court of Appeal affirmed, and the City appealed to the California Supreme Court.

The Supreme Court ruled for the City, reversing the Court of Appeal's decision and holding that a contractor cannot recover against a public owner under the theory of abandonment. The decision gives new life to the void contract rule in California and pointedly extends it from problems which arise from the initial bidding of the contract to problems which arise during performance. The void contract rule prohibits a contractor from being paid for work performed under a contract that is subsequently declared void because the Government was not authorized to award the contract in the first place. In *Amelco*, the Court extends the application of this rule from problems that arise during the bidding of a contract to problems that arise during performance. The Court concludes that application of the theory in the public works context would render the concept of competitive bidding meaningless.

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The opinion distinguishes between a contractor's right to bring an abandonment claim, which it rejects, and its right to bring a cardinal change claim, which it does not address. According to the Court, under an abandonment claim, the contractor is entitled to recover its total cost (less payments received) for work both before and after the contract was abandoned. In contrast, under a cardinal change claim, the contractor is only entitled to breach of contract damages for the additional work constituting a cardinal change. Although the Court does not reach the issue of whether a cardinal change claim would be viable in California, it is unclear under the Court's logic how a contractor could assert a cardinal change claim against a public owner without running afoul of the void contract rule, as applied by the majority opinion. If work beyond the scope of the contract must be bid, then permitting the contractor to do that work without competition would be illegal, regardless of whether that extra work resulted from abandonment or a cardinal change.

With regard to Amelco's submission of a modified total cost claim, the Court holds that Amelco did not submit sufficient evidence to warrant instructing the jury on that method of measuring damages. Calling this method "disfavored," the Court adopts the federal test, stating that a contractor must establish four elements before it can proceed with a total cost claim: (1) the impracticality of proving its actual losses directly; (2) its bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs. The Court concludes that Amelco did not meet its burden of estab-

lishing the fourth element because it neither established how any particular breach caused certain damages nor when any particular breach occurred.

Two justices dissented, noting that most jurisdictions allow abandonment claims and that, under the majority decision, California becomes the first jurisdiction to allow abandonment claims for private but not public projects. The dissent opines that allowing abandonment claims for public projects benefits the public because it deters poor construction planning and management by public entities and because its absence will lead contractors to stop building where the public owner has imposed excessive changes, rather than continuing to work at the risk of never getting paid.

As a result of *Amelco*, contractors who perform public work will assume substantially greater risks than they do on private jobs. Contractors should consider this when pricing their bids. During performance, contractors faced with excessive changes will face a difficult decision: continue working at the risk of not being paid for the added, out-of-scope work, or walk off the job at the risk of being found to have breached the contract. If a contractor continues the work and later brings a claim for added costs, it will have to argue that the extra work is within the scope of the contract and seek recovery on a breach of contract theory. If, on the other hand, a contractor decides to walk off the job, it should consider filing a lawsuit first seeking a declaration from a court that the added work is beyond the contract scope.

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