UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABINGTON CONSTRUCTORS, INC.	)	
Plaintiff	)	
v.	)	Civil No. 98-0048-B
MADISON PAPER INDUSTRIES,	)	
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Plaintiff, Abington Constructors, Inc. (Abington), brings this action to recover $334,175 for what it terms "extra work" it performed on Defendant's, Madison Paper Industries (Madison), Anson Dam facility. By its complaint, Abington alleges *quantum meruit*; mutual mistake/reformation; impractibility/reformation; and breach of contract. Through its answer, Madison asserts a counterclaim against Abington for breach of contract.

The Court conducted a bench trial on this matter on December 7th and 8th, 1998. Testimony was given by John Tardif, Douglas Grahm, Christopher Bean, and Steve Small. The Court has before it deposition transcripts submitted by both parties, and exhibits admitted into evidence at the trial. In addition, the Court has

[1] Pursuant to 28 U.S.C. 636(c) (1994 & Supp. II 1996), the parties have consented to proceed before the United States Magistrate Judge.

before it both parties' post-trial proposed findings of fact and conclusions of law and post-trial briefs. After reviewing the evidence and considering the arguments advanced by both parties, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

Findings of Fact

Background

1. Madison is a general partnership located in Madison, Maine. At all times material to this matter, Madison operated and owned two hydroelectric facilities on the Kennebec River.

2. The Anson Dam is the upstream hydroelectric facility, and the Abenaki Dam is the downstream facility. Bean testimony.

3. Abington is a New Hampshire corporation. At all times material to this action, Abington was employed by Madison as a construction contractor to conduct work on the Anson facility.

4. The Anson facility consists of the following: 1) a dam; 2) a waste gate; and 3) a power station. Water from the river is held back by the dam and routed into the fore bay. The water from the fore bay then flows past the waste gate and under the power station, where the flow of the water turns the turbines to generate electricity. Once the water flows through the powerhouse, it empties into the "tail

race" or "tail pond" and then continues to flow down the river. Tardif testimony.

The Bid

5. In 1996, Madison embarked on a two part plan to upgrade its Anson Dam facility. First, Madison planned to hire a contractor to conduct repairs on the waste gate and the powerhouse. Second, Madison planned to hire a contractor in 1997 to conduct repairs on the dam itself. Bean testimony.

6. In May 1996, Madison put the waste gate project and the repairs to the powerhouse out to bid. Madison issued to bidders for their review a document entitled, *Anson Dam Waste Gate Repairs FERC Project No. 2365-ME, Project Manual, Issued for Agency Review, May 1996, Issued for Bid* (project manual). Exhibit 4.

7. The project manual contains the following: (1) bidding information, (2) an agreement to be signed by the owner and the contractor, also known as the Form of Contract (FOC), (3) conditions to the FOC, (4) Technical specifications, (5) a list of contract drawings and (6) an installation manual for the rubber dam. Exhibit 4.

8. The bidding instructions require the owner to permit the bidder to access the site to conduct such explorations and tests as the bidder deems necessary before submitting a bid and places the responsibility on the bidder to be familiar with the

site before submitting a bid. Exhibit 4, "Instructions to Bidders" at ¶ 4.1 - 4.5.

9. The project required the contractor to construct a cofferdam just upstream of the dam, hereinafter known as the upstream cofferdam, and a cofferdam just downstream of the dam, hereinafter known as the downstream cofferdam. A cofferdam is defined as "a watertight enclosure from which water is pumped to expose the bottom of a body of water and permit construction." *Webster's New Collegiate Dictionary* 256 (9th ed. 1983).

10. Abington visited the site to inspect the site before submitting a bid but the river flows were too high for Abington to conduct a survey of the river. Tardif testimony. Before Abington submitted its bid, Steve Small, Madison's project engineer, called John Tardif, Abington's project manager, and invited him to inspect the site because the river flows had subsided. Tardif declined the invitation. Small testimony; Tardif testimony.

11. Abington proceeded to submit the bid without inspecting the elevation of the tail pond, which was where Abington planned to place the downstream cofferdam. Instead, Abington relied solely on John Tardif's analysis of the hydrology data in the Project Manual entitled "Flow Duration Curves" and "Tailwater Rating Curves". Tardif testimony. This was the first time Tardif worked with such data. Tardif testimony.

12. The data in the project manual indicated that river flows exceeded 10,000 cubic feet per second (cfs) about five percent of the time in July and two percent of the time in August. Exhibit 4, Figure B.7, B.8. The flow duration curves in the bid package were intended to provide guidance to bidders on the historical average flows of the river. Graham testimony.

13. In submitting its bid Abington relied on the bottom elevation information provided by Madison in the project manual. Exhibit 4. The pre-bid drawings indicated that the average level of the tail pond was 222.65 feet above sea level, when in fact that average level was 223.65 feet. Exhibit 200; Exhibit 170. The pre-bid drawings failed to disclose several deep areas in the bottom elevation where Abington planned to perform construction work. Exhibit 200.

14. The FOC provided that the "CONTRACTOR may rely upon the *general accuracy* of the 'technical data'" in the materials provided, and authorizes "*Limited Reliance* by CONTRACTOR" on the pre-bid drawings. Exhibit 4, General Conditions, Sections 4.2.1 and 4.2.2 (italics added).

15. On May 31, 1996, Abington submitted a bid for $808,500, the lowest bid submitted. Exhibit 66.

16. Abington's bid was formally submitted on a bid form signed by Abington's manager of estimating, Robert Stewart. In the bid form Abington made the

following representations:

> (d) BIDDER has obtained and carefully studied (and assumes responsibility for obtaining and carefully studying) all such examination, investigations, site visits, explorations, tests and studies . . . which pertain to the subsurface or physical conditions at the site or otherwise may affect the cost, progress, performance or furnishing of the Work as BIDDER considers necessary for the performance or furnishing of the Work at the Contract Price . . . and no additional examinations, investigations, explorations, tests, reports or similar information or data are or will be required by BIDDER for such purposes.
>
> (f) BIDDER has correlated the results of all such observations, site visits, examinations, investigations, explorations, tests, reports and studies with the terms and conditions of the Contract Documents and all additional examinations, investigations, explorations, tests, studies and data with the Contract Documents.
>
> (i) BIDDER agrees that the submission of this Bid will constitute an incontrovertible representation by Bidder that Bidder has complied with every requirement of this Article . . . .

Exhibit 66.

16. The language of the FOC and the bid form was intended to make known to all bidders that a bidder should place limited reliance on the flow and elevation information provided by Madison. The Court finds as fact that by failing to conduct their own investigation prior to the bid, Abington did not act in a reasonable and prudent manner.

Entering into a Contract

17. The project manual package contained a FOC to be signed by Madison and the contractor. After being awarded the bid, Abington and Madison held a pre-construction meeting. At the meeting, John Tardif and Steve Small decided to issue a purchase order instead of signing the FOC. Exhibit 66.

18. In the purchase order the parties agreed to the following language:

> Perform work as described in Project Manual and drawings issued in May of 1996 *and* in accordance with Abington's bid form dated 5/31/96[.]
>
> Breakdown as follows:
>
> - Mobilization, Utilities, Temporary Facilities
> - Cofferdams and Dewatering
> - Concrete Foundations, Piers, Abutments and Resurfacing
> - Installation of Rubber Dam
> - Steel Bridge, Stanchion Stoplog System, Misc. Metals
> - Piping, Operating, and Control Equipment
> - Demolition of Existing Structures
> - Powerhouse Masonry Repairs
> - Curtain Wall and Other Concrete Repairs
>
> * Concrete Foundations, Etc. Based on 1450 Cubic Yards
>
> Certificate of Insurance on Hand and Contractor Safety & Health Requirements Also on Hand

Exhibit 8 at p.1 (italics added).

19. The language used above indicates that the parties intended to incorporate two documents to govern the relationship during the construction work, the project manual and the bid form. When the parties agreed to perform work as described in the project manual they intended to incorporate by reference the entire manual, both the commercial terms and the technical specifications in the manual. The contract conditions in the project manual places on Abington the risk of high flows, the tail pond elevation, and knowledge of the river bottom conditions. Exhibit 4.

20. Under the FOC, Abington had the right to suspend performance if the river flows were high. Exhibit 4, Summary of Work, Section 1.3. High flows are those flows that exceed the powerhouse discharge capacity. Exhibit 4, Summary of Work, Section 1.3. The powerhouse discharge capacity is 5400 cfs. Exhibit 4, Technical Specifications, Section 1.6B.

21. The conditions on the reverse side of the purchase order are standard form language used in a contract for a sale of goods and was not intended by either party to replace the conditions set forth in the contract manual. Small testimony.

22. To support its position that the "commercial terms" in the FOC were not intended to be part of the contract, Abington lists examples of Madison's lack of compliance with certain terms of the FOC. For example, Madison and Abington

orally agreed to permit Abington to leave certain construction materials from the upstream cofferdam in the river. The FOC requires a written change order to issue. Madison also never required Abington to issue a performance bond as required by the FOC. The Court finds as fact that Madison's failure to strictly follow some of the conditions in the FOC is insufficient to demonstrate that the parties intented to not include the conditions in the FOC as part of the contract.

23. The Court reaches its conclusion that the parties intended to incorporate the entire manual based on the following: (1) the terms of the bid form clearly stated that by submitting the bid form Abington would agree to enter into the FOC; and (2) the absence of any discussion by the parties that Abington was no longer bound by the contract conditions in the project manual when it signed the purchase order. Small testimony.

24. At no time before or during the project did Madison tell Abington that it should construct a trestle from which to operate a crane in the downstream area of the site. Tardif testimony. Nor does the FOC or technical specifications require Abington to construct a trestle. Exhibit 4. The Court finds as fact that Abington's decision not to construct a trestle was neither unreasonable nor improper. Further, the Court finds that Abington did not act unreasonably when it made a cost-saving choice by using the crane to clear the sluice area instead of creating a chute even

though that choice may have delayed the project's completion.

Cofferdams

25. As part of the project, Abington was required to build two cofferdams, an upstream cofferdam and a downstream cofferdam. Exhibit 4.

26. Prior to awarding Abington the bid, Madison issued an Addendum (Addendum #1) to the contract. Addendum #1 reads in part as follows:

> 1. In the unlikely event of a major flood, MPI [Madison] will pay the direct replacement costs of coffer dams [sic] provided coffer dams [sic] have been completed and approved by MPI prior to flooding. Upstream coffer if used to be constructed to elevation 254.65. Downstream coffer to be constructed to elevation 226.25. After 11-1-96, substantial completion, this reimbursement offer is void.

27. Abington constructed two cofferdams. The upstream cofferdam was constructed of sheet metal and stood at an elevation of 254.65 feet above sea level. The upstream cofferdam was built with the assistance of River Engineering, an engineering consulting firm, and H. B. Fleming, a subcontractor. No significant overtopping occurred in the upstream cofferdam. Tardif testimony; Small testimony; Graham testimony.

28. The downstream cofferdam was designed by Joseph F. Neville, a professional engineer retained by Abington. PFOF ¶ 35. The design was approved by Klienschmidt Associates, an engineering firm retained by Madison, and the

Federal Energy Regulation Commission (FERC). Exhibit 169. In the submission for FERC approval Madison submitted a letter that stated its approval of the design. Exhibit 169. Although Abington anticipated that the dam need only hold back 1.7 feet of water, it was designed to hold back as much as 3.5 feet of water. Tardif testimony; Exhibit 74.

29. Before constructing the downstream cofferdam, but after it was awarded the bid, Abington had a supervisor, Robert Olsen, investigate the contour of the river bottom where Abington proposed to place the cofferdam. Tardif testimony.

30. The downstream cofferdam was constructed by using bulk bags filled with sand, stood between 224 and 226 feet above sea level, and was approximately 220 feet in length. Tardif testimony; Exhibit 74; Exhibit 162. A liner was placed over the bags to prevent any leaks in the dam. Tardif testimony.

31. Due to the unexpected configuration of the river bottom and the higher than expected tail pond level, Abington used about 300 bulk bags and five thousand small bags instead of the planned 180 bulk bags and 250 small bags. Tardif testimony. Further, Abington had to alter the planned route of the cofferdam on the pre-bid drawings, which including placing the route of the cofferdam between, as opposed to over, boulders. Tardif testimony.

32. During construction Steve Small, Madison's site supervisor, never reported

any complaints regarding the location or construction of the cofferdam. Small testimony. At trial Madison's expert witness was unable to state whether the route of the downstream cofferdam was an incorrect or correct choice by Abington. Graham testimony.

33. Although the downstream cofferdam did not stand at 226.25 feet as specified in Addendum #1, prior to constructing the downstream cofferdam, Madison approved the design of the downstream cofferdam. Exhibit 169.

34. Abington planned to begin construction when it received FERC approval. FERC approval was given on July 16, 1996, but construction of the downstream cofferdam was delayed by high water flows. Tardif testimony.

35. Although it was discussed internally among Madison personnel prior to the bidding process, the Court finds as fact that it was not possible for Madison to significantly adjust the tail pond elevation by decreasing the flow through the upstream Abenaki Dam due to the configuration of the river between the two dams. Exhibit 4 at 1.2G at 02300-2; Bean testimony.

Discussions subsequent to the Contract

36. On July 29, 1996, Abington began to construct the downstream cofferdam. Soon thereafter, Tardif notified Small that: (1) the tail pond elevation was deeper in some areas than depicted in the drawings supplied by Madison; and (2) the river

bottom as depicted in the drawings was inaccurate. Tardif testimony. Small acknowledged the error in the drawings and Abington proceeded to install the cofferdam. Tardif testimony.

37. Abington again mentioned its concern over the tail pond elevation and the river bottom configuration at a pre-construction meeting on August 8, 1996. Exhibit 20. Abington memorialized its concern in a letter to Madison. Exhibit 19. In the letter Abington noted the discrepancies and indicated that, "We [Abington] are currently compiling the costs associated with overcoming these unexpected conditions and request that a change order be issued." Exhibit 19. Madison did not respond to the letter. Tardif testimony.

38. Over the next several months a series of high river flows caused extensive delays on the project. On forty-eight occasions between July 29, 1996 and January 31, 1997, river flows exceeded the power house capacity of 5400 cfs. Exhibit 13.

39. The first flood occurred on August 9th and 10th when flows exceeding 15,000 cfs overtopped the downstream cofferdam. Work was not resumed until August 12th. At this time it was also discovered that the plastic membrane that sealed the exterior of the downstream cofferdam was damaged. Instead of rebuilding the cofferdam, Abington chose to place another plastic membrane over the exterior of the dam. Because the plastic membrane was damaged pervasive leakage

hampered efforts to dewater the site throughout the project. Tardif testimony.

40. On August 29, 1996, Tardif and Small attended a construction meeting. Tardif suggested that more bulk bags should be added to the downstream cofferdam to increase its height thereby preventing future overtopping. Small told Tardif that based on his experience at the site the river flows would soon subside. Tardif testimony. Small also stated he was a "gambling man", Small testimony, and that as partners, if Abington did not add additional bulk bags, Madison would assume the risk of direct costs associated with any future over toppings of the dam. Tardif testimony; Small testimony.

41. At the construction meeting Small also assured Tardif that Madison treated its contractors fairly and did not want their relationship to become adversarial and evolve into a paperwork war. Small further assured Tardif that as partners Madison wanted to work with Abington. Tardif testimony; Small testimony. As a result of this conversation, Abington chose to continue working on the project even though under the FOC Abington was entitled to delay performance. Tardif testimony.

42. Neither party ever came to a formal agreement over who would assume future costs if water overtopped the downstream dam in the future.

43. On September 14th and 15th river flows exceeded 18,000 cfs and overtopped

the downstream cofferdam causing damage to the work site within the dam.

44. On September 16, 1996, John Tardif sent a written message entitled "Confirm Verbal Agreements" to Steve Small that stated Abington's position that the costs associated with repairs and dewatering of the site would be covered by Addendum I of the contract. Exhibit 35. The document read in part, "We [Abington] assume that the costs associated with repairs and dewatering will be covered under Addendum II [sic] of the contract." Exhibit 35. Small signed the document but circled "covered under Addendum I" and wrote "No as mutually agreed upon by M.P.I. and Abington." Exhibit 35. Small was referring to his August 29, 1996 conversation with Tardif. *See* FFO ¶ 40.

45. By early October 1996, Abington began working on the project seven days a week to make up for the previous delays. Tardif testimony.

46. During this time Madison was aware that Abington expected to be reimbursed for what it considered "extra work" on the project. According to the October 17, 1996 construction meeting minutes, Madison indicated that it was waiting for Abington to submit its costs. Exhibit 42.

47. On October 18, 1996, Abington submitted to Steve Small a letter stating that it incurred $180,000 in additional costs. Exhibit 43. Small told Tardif that he was not authorized to approve the amount. Small further told Tardif that management

had changed in the past year and he did not know if he could "sell" the additional costs to management. Small once again stated that Madison was fair to its contractors but expressed concern that the costs did not take into account Abington's responsibility for the overruns. Small testimony.

48. In October 1996, Tim Shea, of Abington, told Steve Small that Abington might not finish the work in 1996. To encourage Abington to continue working, Small told Shea to consider other options to stay on the job. Small testimony.

49. Madison had an interest in encouraging Abington to continue working at the site even though it was entitled to cease work under the FOC during high flows. The total Madison stood to gain from completion of both phases of the Anson project was approximately $300,000 annually. Bean testimony. Therefore, the sooner Abington could complete the obvious first phase the sooner Madison could realize their gains. Bean Testimony.

50. At the October 24th and 31st construction meetings Madison indicated that it was reviewing the cost overrun information provided by Abington. Exhibit 44, and 45.

51. Steve Small prepared an internal document entitled "Project Report/Anson Dam Project Review" dated November 7, 1996. In the Project Review Small indicated that $100,000 should be set aside for anticipated extra costs from

flooding. Exhibit 86. Further, in the review Small conceded that questions existed regarding whether the tail pond elevations or bottom elevations were correct. Exhibit 86.

52. By November 7th both Steve Small and Christopher Bean, Madison's Director of Maintenance, Engineering and Utilities, knew that Abington estimated its cost overruns at $225,000. Small testimony; Bean testimony.

53. During Madison's November 14, 1996 construction meeting, Madison decided that "Flooding and Plan inaccuracies extra work will be resolved at job completion." Exhibit 46. Small also told Abington that cost overruns would be dealt with at the end of the job. Tardif testimony. Neither Madison nor Small ever stated to Abington that Madison refused to pay any additional money to Abington. Through Madison and Small's statement, they intended to convey to Abington that Madison would pay them some additional amount at job completion. Small testimony.

54. In the first week of December 1996, the river flows exceeded 15,000 cfs and the downstream cofferdam again overflowed, further delaying completion of the work. Tardif testimony; Exhibit 13.

55. Abington completed work on the project at the end of January 1997. Tardif testimony.

56. The parties contacted each other several times during the following months in an attempt to resolve the dispute. One of the statements Madison made included its recognition that Abington was "owed something." Various other representations were made in writing. These discussions resulted in Madison issuing a purchase order with an amount it deemed fair to resolve the dispute. Because these statements were made for the purpose of settling a dispute the Court places no weight on them. Fed. R. of Evid. 408.

57. Abington also sought to admit evidence that on subsequent projects Madison increased the tail pond elevation on its maps by one foot. Madison argues that this is evidence of a subsequent remedial measure and therefore inadmissable. Fed. R. Evid. 407. Having previously found as fact that (1) the tail pond elevation on the maps were off by one foot; and that (2) pursuant to the terms of the contract it was Abington's responsibility to verify the elevation levels prior to submitting its bid; the Court finds as fact that even if it admitted the maps provided by Madison to the second contractor, in light of the findings above, the maps would add nothing to the determination of this matter.

58. Abington asks this Court to consider the fact that Madison had its second contractor sign the FOC and a purchase order as further proof that the FOC was never intended to be part of the contract between Madison and Abington. Initially,

the Court rejects Madison's suggestion that such evidence is excluded under the rules of evidence. Fed. R. Evid. 407. However, the Court is also satisfied that the practice Madison followed in entering into a contract with the contractor of the second project, has little relevance to the parties' intentions at the time they signed the purchase order.

Damages

59. To support its claim for damages, John Tardif put together a detailed analysis that divided the cost overruns into several sections. Exhibit 109. Within each section the costs are divided into: the budgeted costs; the amount the actual costs exceeded the budgeted costs; the amount of the costs attributable to Abington; and the amount of costs attributable to Madison.

60. According to John Tardif's analysis, Abington incurred $454,117 of total costs above budget. Exhibit 109. Of that, $49,379 was not disputed by Madison leaving a total of $404,738. Abington assumes responsibility for about 20 percent or $121,066 of the costs, leaving a claim of $283,680 against Madison. Although Madison pointed out some errors in Tardif's analysis, none of the errors affect the mathematical accuracy of the costs assigned to Madison.

61. The Court finds as fact that 17.8% is a reasonable percentage for overhead and profit for the services, $283,680, performed by Abington. Tardif testimony.

Therefore, the reasonable value of services plus overhead and profit is $334,175.

Counterclaim

62. The contract between the parties required Abington to remove all cofferdam construction materials from the river. During construction the parties orally agreed that Abington could leave the sheet steel from the upstream cofferdam provided that the steel did not interfere with the operations of the powerhouse. Based on this oral agreement Abington did not remove the steel sheeting and concrete placements in the river. Tardif testimony; Small testimony.

63. Madison took no action to remove the steel sheeting and concrete placements until July or August 1997, over six months after Abington left the job. Bean testimony. At that time Madison was installing a new rake system at the site when it determined that to properly install the raking system the steel sheets would need to be removed. Bean testimony. At no time between January and August 1997 did Madison ever state to Abington that the cofferdam material interfered with the operations of the powerhouse.

64. Based on the findings above, the Court is satisfied that the steel sheets did not interfere with the waterflow to the power station.

Conclusions of Law

Whether a valid, binding contract exists is a question of fact. *VanVoorhees v. Dodge*, 679 A.2d. 1077, 1080 (Me. 1996). In Maine, a legally binding contract exists if the following requirements are met: an offer; an acceptance of that offer; a meeting of the minds signifying that there was mutual assent to be bound by the terms of the contract; a finding that each party received value from the contract. *Roy v. Davis*, 553 A.2d 663, 664 (Me. 1989). Because one of the principal arguments advanced by Abington is that no contract existed between the parties, the Court will analyze each element below.

Offer. Based on the facts as found, the Court determines that Madison did make an offer to Abington. *See* FOF ¶ 6,7,8,9.

Acceptance. Based on the facts as found, the Court determines that Abington accepted Madison's offer. *See* FOF ¶ 17, 18.

Mutual assent or Meeting of the Minds. This is the principal point of contention between Abington and Madison. While Abington contends that it accepted Madison's offer to perform the project, it claims it never agreed to the FOC or the conditions to the FOC in the Project Manual. Instead, Abington contends that if any contract was formed, the conditions that governed the contract are those on the reverse side of the purchase order. Madison counters that the

parties intended the purchase order to act as a substitute to signing the FOC.[2]

After reviewing the evidence, the Court is persuaded by Madison's argument for several reasons. First, prior to being awarded the bid, Abington submitted a bid form that specifically stated that Abington agreed to enter into the FOC. Second, the purchase order provided that work would be completed as provided for in the project manual. At no time did either party expressly state that the FOC and accompanying conditions "dropped out" of the agreement and the terms of the purchase order governed the relationship between the parties. This appears to be an after-the-fact argument that, upon scrutiny, bears no weight. For example, Abington argues that if any contract exists, its terms are those on the reverse side of the purchase order. However the terms of the purchase order applies to the transportation, delivery, and receipt *of goods*. For example, as to the risk of flood, the purchase order provides:

> 5. If the manufacture, transportation, delivery, receipt or use by either party of any material covered hereby is prevented, restricted or interfered with by reason of:
>
> (A) . . . Flood . . .
>
> The party so affected upon prompt notice to the other party . . . *shall be excused from making or taking deliveries* hereunder to the extent

[2] Both parties agree that the technical provisions of the project manual were intended to be part of the contract.

> of such prevention, restriction or interference, but, at buyer's option, deliveries so omitted shall be made, upon notice thereof to seller, upon the cessation of such contingency. (Italics added)

The Court might be receptive to Abington's argument if it was delivering goods to Madison. Here, this provision does nothing to govern the relationship or the risks between the parties. Instead, the Court is satisfied that there was mutual assent to incorporate the FOC and attached conditions when the purchase order was issued.

Consideration. Neither party disputes that each received value from the contract.

On the facts as found, and based on the reasoning above, the Court is satisfied that the parties entered into a contract that placed the risk of high water flows, the variable elevation of the tail pond, and conditions of the river bottom on Abington. Further, under the contract, although Abington was not entitled to an adjustment for costs associated with those conditions listed above, it was entitled to delay work during the time high flows occurred.

Abington next argues that even if the Court finds that the parties agreed to the terms and conditions in the FOC, various equitable remedies afford Abington relief. Abington first argues that a valid claim in *quantum meruit* exists. A claim in *quantum meruit* requires that: (1) services were rendered to the defendant by the

plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment. *Paffhausen v. Balano*, 708 A.2d 269 (Me. 1998) Based on the facts as found, the Court is satisfied that the first two elements are satisfied. What is in dispute is the third element - whether under the circumstances it was reasonable for Abington to expect payment.

Abington claims that it is clear that Madison's statements during the project created a reasonable expectation on the part of Abington to be paid for the cost overruns. The Court agrees for several reasons. First, Abington made Madison aware that it expected to be paid for the overruns once it began work on the site. Second, Madison never disputed that it owed Abington money for the overruns during the project. In fact, Madison gave repeated assurances to Abington that it treated its contractors fairly and that Abington's claim would be reviewed after the project was completed. Even when Madison first questioned the cost submission by Abington, it only stated that the costs may be somewhat high. Third, both Steve Small and Christopher Bean testified at trial that during construction they thought Abington was entitled to payment for the cost overruns.[3] All these facts

[3] Madison contends that the Court should exclude those statements by Steve Small and other representatives pursuant to Fed. R. Evid. 408 because Madison disputed Abington's claim from the beginning. The Court does not agree. As Abington properly points out, Madison never

support Abington's contention that it was reasonable for it to expect payment for the cost overruns.

To counter Abington's *quantum meruit* claim, Madison first argues that once the Court found a contract existed between the parties, Abington cannot obtain equitable relief. This principle is generally true. *See e.g., Commerce, Crowdus & Canton, Ltd. v DKS Construction, Inc.*, 776 S.W.2d 615, 620 (Tex. App. 1989); *First National Bank v. Burton, Parsons & Co.*, 57 Md. App. 437, 451 (1984). However, Maine has refused to adopt such an absolute rule. *Combustion Engineering, Inc. v. Miller Hydro Group*, 812 F. Supp. 260, (D. Me. 1992). In *Miller Hydro*, this Court, addressing the same argument raised by Madison, found that while Maine requires the Court to be "most hesitant to imply a second contract, which covers the same subject matter," *Aroostook Valley R. Co. v.*

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sent *any* document to Abington that indicated that it disputed Abington's claim until after construction was completed. To be excluded under Rule 408, the claim must be disputed or a *clear difference* of opinion must exist. *See Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 527 (3rd Cir. 1995). Further, "[A] dispute arises only when the claim is rejected at the initial or some subsequent level." *H.A. Healy Co. v. Milwaukee Metropolitan Sewage Dist.*, 50 F.3d 476, 480 (7th Cir. 1985).

Small's statement when he initially received the cost assessment from Abington that he would have a problem "selling" the costs to management does not constitute a dispute of the claim for the purposes of Rule 408. Nor was Small's contemporaneous statement asking Tardif how the job got out of control constitute a dispute under the rule. In fact, as late as November 14, 1996, minutes from Madison's meeting indicate that the extra work performed by Abington would be resolved at job completion. Exhibit 46. Because Madison did not clearly dispute or reject Abington's claim until after the project was completed the Court refuses to exclude those discussions pursuant to Rule 408.

Bangor & Aroostook R. Co., 455 A.2d 431, 433 (Me. 1983), a party can assert a *quantum meruit* claim. *Miller Hydro*, 812 F. Supp. at 262. Instead, the Court laid down the following principle, that a party may obtain equitable relief that covered the same subject matter as the contract if the plaintiff's performance, even if it was in breach of the contract, "was a good faith effort to fulfill its part of the contract." *Id.* at 264.

Here, the evidence supports the finding that Abington performed in good faith to fulfill its part of the contract. For example, in spite of its right under the contract to suspend performance during "high flows", Abington continued to perform in the face of Madison's express and implied assurances that Abington would be fairly compensated. Further, all the evidence offered by both sides leads the Court to conclude that while Abington's failure to conduct a pre-bid investigation was a breach, it was not done in bad faith.

Having found that Abington is entitled to recover on its *quantum meruit* claim, it need not address the other claims for relief. Instead, the Court now turns to Madison's counterclaim against Abington for breach of contract.

Under the contract, Abington was required to remove all construction materials from the river. Both parties agree that during construction, Madison and Abington orally agreed that Abington could leave the upstream cofferdam

materials[4] in the river provided that the materials did not interfere with the flow of water into the powerhouse. Once the job was complete, Abington determined that the materials did not interfere with the powerhouse operations and left the materials in the river.

Madison disagrees and argues that the materials left in the river by Abington did, in fact, interfere with the operation of the powerhouse. Based on the facts found above, the Court is satisfied that the materials in the river did not interfere with the operations of the powerhouse. As stated in the Court's findings, it was only several months after construction was completed - when Madison was installing a new rake system - that Madison felt it was necessary to remove the materials. *See* FOF ¶¶ 63, 64, 65. Accordingly, the Court finds that Madison has not shown by a preponderance of the evidence that Abington breached the contract.

Damages

In successfully asserting its *quantum meruit* claim, Abington is entitled to the reasonable value of its services, *Paffhausen*, 708 A.2d at 271, including a reasonable overhead and profit. *Belanger v. Haverlock*, 537 A.2d 604, 606 (Me. 1988). The Court has found that the reasonable value of Abington's services,

[4] Mainly consisting of tremie concrete and steel sheeting.

including overhead and profit, is $334,175. Accordingly, the Court finds that Abington is entitled to $334,175. See FOF ¶¶ 59, 60, 61, 62.

Conclusion

Based on the facts found, the Count awards the Plaintiff $334,175 plus costs and fees.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on March 31, 1999.