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[Mountain Cascade Inc v. City and County of San Francisco](#)

United States District Court, N.D. California - November 18, 2013 - Not Reported in F.Supp.2d - 2013 WL 6069010

MCI, a general engineering contractor, entered into a contract with San Francisco, acting through the General Manager of the San Francisco Public Utilities Commission ("SFPUC"), for construction work known as Bay Division Pipeline No. 5 Reliability Upgrade, Contract No. WD-2542 (the "Contract"). The project involved the installation of nine miles of 60" welded, mortar-lined and coated steel pipe (the "Project:") through East Palo Alto, Menlo Park, San Mateo County, and Redwood City. The total awarded contract amount was \$52,183,400.

The contract contained a provision that MCI agreed "to perform the Work in good and workmanlike manner to the satisfaction of the GENERAL MANAGER [of SFPUC], ... and to otherwise fulfill all of CONTRACTOR's obligations under the Contract Documents, as and when required under the Contract Documents to the satisfaction of the GENERAL MANAGER."

On or around January 21, 2011, San Francisco informed MCI that certain welds did not conform with the plans, specifications, and approved submittals for the Project. As of that date, San Francisco and the Project's inspectors had accepted four miles of the completed pipeline. On or around January 26, 2011, San Francisco ordered MCI to stop welding operations effective January 27, 2011, based on deficiencies in the welds. On or around May 13, 2011, San Francisco notified MCI that it rejected all interior and exterior welds on the Project placed prior to January 26, 2011 until they were inspected for compliance with Contract requirements. San Francisco had a contractual duty to inspect the welds before allowing MCI to cover and backfill them, and MCI alleges that San Francisco represented that the welds were accepted and that MCI could cover the welds and backfill the area, even though San Francisco knew that the welds were unacceptable and/or that it would require MCI to uncover the welds.

Ultimately, San Francisco required MCI to remove and replace 628 interior and 94 exterior pipe joint welds, even though MCI submitted expert opinions that repair of the welds was appropriate. MCI alleges that San Francisco's order of removal and replacement of the welds was contrary to the requirements of the specifications, the Contract, code, and applicable welding industry standards. MCI further alleges that San Francisco's acts and omissions caused substantial delay in the completion of the Project.

MCI filed its complaint in state court alleging seven causes of action. San Francisco removed the case to federal court. MCI filed an amended complaint, alleging causes of action for 1) breach of contract; 2) violation of the Equal Protection Clause of the United States Constitution; and 3) breach of the implied warranty of correctness of project plans and specifications.

San Francisco moved to dismiss MCI's Equal Protection claim on the grounds that such a claim is not cognizable as a matter of law.

MCI's second cause of action alleges a violation of the Equal Protection Clause of the Fourteenth

Amendment of the United States Constitution, based upon a class-of-one theory. MCI asserts that San Francisco treated it differently from other similarly-situated contractors on other projects and that San Francisco's actions were "arbitrary, capricious, intentional and/or reckless." Specifically, MCI claims that San Francisco used different inspection standards for MCI's work than for the work of other contractors and subcontractors; rejected MCI's welds but did not reject similar welds by other contractors on other projects on the Pipeline; required MCI to remove and replace welds, rather than repair them, while allowing other contractors to repair allegedly deficient welds; selectively enforced specifications; and materially and unilaterally changed the contract terms, scope of work, and schedules in bad faith.

San Francisco argues that a class-of-one equal protection claim by a government contractor is not cognizable as a matter of law.

The court concluded that the exercise of discretionary decision-making that Engquist and Douglas Asphalt held is immune from a constitutional challenge, applies to government-contractor relationships for the same reason that it applies to government-employee relationships. See Douglas Asphalt, 541 F.3d at 1274 ("decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'" (quoting Engquist, 553 U.S. at 604)). Accordingly, MCI's class-of-one equal protection claim was dismissed with prejudice.

As the court granted San Francisco's motion to dismiss the sole federal claim over which it had original jurisdiction with prejudice, the court declined to exercise supplemental jurisdiction over MCI's remaining state law claims. Accordingly, the case was remanded to state court.