IN THE SUPREME COURT OF GUAM

M ELECTRIC CORPORATION,
Plaintiff-Appellant,

v.

PHIL-GETS (GUAM) INTERNATIONAL TRADING CORPORATION dba J&B MODERN TECH and CHUNG KUO INSURANCE COMPANY LTD.,
Defendants-Appellees.

Supreme Court Case No. CVA12-014
Superior Court Case No. CV1423-10

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted July 16, 2012
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Plaintiff-Appellant M Electric Corporation ("MEC") appeals from a final judgment of the Superior Court granting a motion for summary judgment in favor of Defendant-Appellee J&B Modern Tech ("J&B"). MEC challenges the trial court's findings that the job proposals did not constitute legal contracts and that the subcontract agreements were binding upon the parties. Moreover, MEC challenges the trial court's holding that the no-damage-for-delay ("NDFD") provisions in the subcontract agreements were enforceable as a matter of law. Finally, MEC argues that the trial court erred by failing to address MEC's other claims for damages.

[2] We hold that the job proposals were offers and J&B's acceptance by way of signature gave rise to legally binding contracts. Nevertheless, because the modifications reflected in the subcontract agreements were supported by additional consideration, the subcontract agreements, including the NDFD provisions found therein, were binding on the parties. Moreover, while we find that the no-damage-for-delay clause is valid and enforceable in Guam, MEC has alleged sufficient facts to indicate that one or more recognized exceptions to the enforcement of the NDFD clause may apply, thereby precluding summary judgment in favor of J&B. Furthermore, the trial court erred by failing to address MEC's claims for damages not based on the NDFD clause. Lastly, MEC may not raise a new claim for overtime costs for the first time in response to J&B's summary judgment motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This case arises from a contractual dispute between the primary contractor, J&B, and its subcontractor, MEC, relating to underground power line conversion projects for the Guam Power

Authority ("GPA"). As the subcontractor to J&B, MEC was to provide labor, equipment, and materials to excavate, install underground pipes, and restore excavated areas and roads. Two subcontract agreements were executed after J&B accepted two written job proposals furnished by MEC.

[4] The first job proposal pertains to the Macheche Guam International Airport Authority ("GIAA") line conversion project. MEC's president and general manager Marcelo Moises testified in deposition that J&B accepted the job proposal after reducing the contract sum from $2,016,000.00 to $2,000,000.00, which Moises marked on the proposal. Hours after J&B signed the job proposal, J&B produced a typed subcontract agreement, which Moises stated was not provided to MEC beforehand and which J&B represented as "only a formality." Record on Appeal ("RA"), tab 23 at 2 (Decl. Marcelo M. Moises, June 23, 2011). The second job proposal involving the Macheche-Harmon-San Vitores line conversion project was accepted and signed by J&B after the parties negotiated the price from $3,507,000.00 to $3,490,000.00. After J&B signed the second job proposal, J&B again handed a typed subcontract agreement to MEC, which was also not given to MEC beforehand and which J&B represented as "only a formality." *Id.*

[5] Both job proposals excluded, among other things, "permits and fees to any Gov. Agencies." RA, tab 23, Ex. 1 at 1 (Decl. Marcelo M. Moises); RA, tab 23, Ex. 2 at 1 (Decl. Marcelo M. Moises). Moises signed and initialed every page of the subcontract agreements. Moises testified that he did not receive or ask for a copy of the prime contracts before preparing the job proposals for the two projects, nor did he review the contents of the subcontract agreements prior to signing them.

[6] A dispute arose between the parties because the subcontract agreements contained a provision that states, "[s]ubcontractor shall procure all permits necessary for carrying on the Work . . . ." RA, tab 31 at 2 (Dec. & Order, Feb. 10, 2012); RA, tab 20, Ex. A at 5 (Aff. Generoso M. Bangayan, June 9, 2011); RA, tab 20, Ex. B at 5 (Aff. Generoso M. Bangayan). MEC contends that this clause was inserted by mutual mistake of the parties because such duty was explicitly excluded from the job proposals. MEC further contends that a dispute arose because the subcontract agreements contained a NDFD provision[1] that essentially provided that MEC's sole remedy for any delay related costs was a time extension which precluded any monetary recovery.

[7] MEC also claims that the subsurface conditions encountered during the course of the projects differed materially from those represented to them, thereby resulting in major changes to the location and scope of MEC's work and causing MEC to suffer $483,639.89 in damages.[2] MEC requested the trial court to reform the subcontracts to reflect the true agreements of the parties regarding the responsibility of obtaining building permits and allow an equitable adjustment to the subcontracts sum to allow delay damages despite the NDFD clause provided therein.

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[1] The NDFD provision provided:

> Section 3.3. In the event the Subcontractor is delayed in completing the Work by the act, neglect, delay or default of the Contractor or the Owner, or of any other subcontractor employed by the Contractor, then the time fixed for completion of the Work shall be extended for a period equivalent to the time lost, in the sole discretion of the Contractor, provided that no extension shall be granted unless written claim is made by Subcontractor within five (5) days from the inception of such delay. The extension of time hereinabove provided for shall be Subcontractor's exclusive remedy in the event of such a delay, no matter how or by whom caused.

RA, tab 20, Ex. A at 2 (Aff. Generoso M. Bangayan); RA, tab 20, Ex. B at 2 (Aff. Generoso M. Bangayan).

[2] In its complaint, MEC claims it suffered $321,699.60 in standby costs and $161,940.29 for additional trench excavation and backfilling.

[8] J&B filed a motion for summary judgment, arguing that the subcontracts plainly and unambiguously provide that the subcontractor was responsible for obtaining permits, and that the provisions in both the subcontract agreements and the prime contracts concerning delay costs are clear and unambiguous. In opposition, MEC contended that: (1) the subcontracts were mere formalities rather than true agreements reached between the parties; (2) there was no consideration to support the subcontract provisions upon which J&B rely; (3) the NDFD provisions are not favored because they impose a forfeiture as a remedy; (4) the "no additional excavation costs" provision in the general notes do not apply to MEC; (5) and J&B ordered a change in work sequence for which Plaintiff is entitled to overtime pay. RA, tab 25 at 1-16 (Opp'n Mot. Summ. J., June 23, 2011).

[9] The trial court granted J&B's motion for summary judgment, finding that the job proposals are not legal contracts, and that the subcontract agreements are binding upon MEC and J&B. Furthermore, the trial court found that there was no genuine issue of material fact regarding MEC's duty to procure permits because J&B obtained the permits and because there were no allegations that J&B failed to act in accordance with the normal permit procurement process. Finally, the trial court found that the "no damage for delay" provisions in the subcontract agreements were enforceable as a matter of law, and MEC had failed to sufficiently allege an exception to the no damage for delay clauses. RA, tab 31 at 4-7 (Dec. & Order) at 4-7 MEC timely appealed.

II. JURISDICTION

[10] The Supreme Court has jurisdiction over this case based on 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-197 (2012)) and 7 GCA § 3107(b) (2005).

III. STANDARD OF REVIEW

[11] A trial court's decision to grant a motion for summary judgment is reviewed *de novo*. *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7 (citations omitted). Summary judgment may be granted to the moving party pursuant to Rule 56 of the Guam Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c). "A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Flores*, 2004 Guam 25 ¶ 8 (quoting *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 7). A properly supported motion for summary judgment will not be defeated by the mere existence of some alleged factual dispute between the parties. *Id.* A genuine issue precluding summary judgment exists "if there is 'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Id.* (quoting *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7).

IV. ANALYSIS

A. The Job Proposals Accepted and Signed by J&B are Legally Binding Contracts

[12] MEC argues that questions of material fact remain in dispute precluding summary judgment, first contending that the two proposals that were accepted and signed by J&B constituted legal contracts, and contending that the subcontracts signed by its president thereafter "were intended to be mere 'formalities' rather than the true agreements reached between the parties." Appellant's Br. at 8 (May 22, 2012). "In determining whether there was a contract, the first issue is formation. The three recognized elements of a contract are an offer, acceptance and

consideration." *Hong Kong & Shanghai Banking Corp., Ltd. v. Kallingal*, 2005 Guam 13 ¶ 28 (internal quotation omitted). In rejecting MEC's argument that the job proposals were offers, the trial court concluded that "the proposals were preliminary negotiations not binding contracts[;] thus, they were preliminary solicitations of an offer." RA, tab 31 at 4 (Dec. & Order).

[13] The case *Master Palletizer Systems, Inc. v. T.S. Ragsdale Co., Inc.*, upon which the trial court relied for this proposition, is readily distinguishable from the case at bar. 725 F. Supp. 1525 (D. Colo. 1989). First, the transaction involved in *Master* was for a sale of an automatic palletizer system and governed by Article 2 of the Uniform Commercial Code, rather than the common law rules that govern labor or services. *Id.* at 1531; *see also Colo. Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1387 (Colo. 1983) ("By its terms, the [UCC] applies only to contracts for the sale of goods, and not to contracts for labor or services"). The UCC differs from the statutory and common law governing contracts for services. *See Hensley v. Ray's Motor Co. of Forest City, Inc.*, 580 S.E.2d 721, 724 (N.C. Ct. App. 2003) (noting scope of UCC limited to sale of goods); *but see Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 832-33 (4th Cir. 1998) (recognizing the UCC applies to certain mixed contracts for goods and services).

[14] A price quotation relating to a specific construction project may constitute a bona fide offer giving rise to a binding contract upon the acceptance thereof. *See Gerard Lollo & Sons, Inc. v. Stern*, 168 A.D.2d 606, 606 (N.Y. App. Div. 1990); *Jaybe Constr. Co. v. Beco, Inc.*, 216 A.2d 208, 211 (Conn. Cir. Ct. 1965). The inquiry as to whether a price quote amounts to an offer "is a question of fact dependent on the nature of the particular acts or conduct and the circumstances surrounding the transaction." *Gerard Lollo*, 168 A.D.2d at 606-07 (reversing trial court's grant of summary judgment because fact issues existed with respect to character of supplier's letter containing price quotations relating to construction project). Moreover, whether

a communication naming a price is a quotation or an offer "depends on the intention[s] of the part[ies] as . . . manifested by the facts and circumstances of each particular case." *Jaybe Constr. Co.*, 216 A.2d at 211 (citation omitted).

[15] MEC asserts that "[e]ven if the parties contemplate the execution of a more formal agreement, the acceptance of a bid or offer results in a binding contract." Appellant's Br. at 11 (citing *Berkeley Unified School Dist. of Alameda County v. James I. Barnes Constr. Co.*, 112 F. Supp. 396, 399 (N.D. Cal. 1953)). However, the courts are not in accord on the issue of whether a construction bid proposal and its acceptance constitute a legally binding contract for the performance of the work.

[16] Some jurisdictions hold that acceptance of a bid to perform certain construction work constitutes a legally binding agreement, even if a formal contract and indemnity bond were contemplated and notwithstanding a stipulation that the contract shall be later reduced in writing. *See, e.g., MacKinnon-Parker, Inc. v. Lucas Metro. Hous. Auth.*, 616 N.E.2d 1204, 1205 (Ohio Ct. App. 1992) ("[T]he Ohio Supreme Court [has] held that a contract is formed when a party inviting construction bids accepts a proposed bid and gives notice of the acceptance of the bid to the bidder."); *see also Town of Winnfield v. Collins*, 78 So. 747, 749 (La. 1918) ("If the acceptance of the bid is to be regarded as entering into a contract, the written instrument, signed on a subsequent date, merely represented the same contract, embodying the terms, conditions, and stipulations thereof").

[17] In such cases, if the terms of the formal contract differed from the terms of the original contract, "the bidder may rightfully reject a formal written contract" and claim damages based on a breach of contract. *Lucas Metro.*, 616 N.E.2d at 1205. The Wisconsin Supreme Court described it best when it stated:

> The acceptance of plaintiff's bid by the city constituted a contract . . . .[W]hen the plaintiff's bid was accepted by the city, the plaintiff could have insisted that the city enter into a formal contract with it in accordance with its bid based upon the proposed specifications and contract on file. Had the city refused to enter into a formal contract in accordance with the plaintiff's bid and the city's acceptance thereof, it would no doubt have subjected itself to a claim for damages under the authorities just hereinbefore cited.

L.G. Arnold, Inc. v. City of Hudson, 254 N.W. 108, 109-10 (Wis. 1934) (citations omitted).

[18] At least one jurisdiction has taken the position that the bid and acceptance thereof does not create a contract for performance of the work. *Wayne Crouse, Inc. v. Sch. Dist. of Borough of Braddock*, 19 A.2d 843, 844 (Pa. 1941) ("In the formation of public contracts the formalities required by law or by the request for bids, such as a written contract, or the furnishing of a bond, often indicate that even after acceptance of the bid no contract is formed, until the requisite formality has been complied with.") (internal quotation omitted). A court in another jurisdiction has held that the offer and acceptance constitute a binding *preliminary agreement* to execute a formal contract provided that the owner or contractor, with intent and for the purpose of creating a contract, has informed the bidder of the acceptance. *Fed. Contracting Co. v. City of St. Paul*, 225 N.W. 149, 150 (Minn. 1929) ("The bid of the plaintiff and its acceptance by the city constituted a preliminary contract which contemplated the making of a formal contract. It created obligation upon the part of the plaintiff and of the city.") (internal citations omitted).

[19] Based on the evidence on the record, we hold that the job proposals were intended to be offers giving rise to legally binding contracts upon J&B's acceptance thereof. The documents were furnished in writing in response to J&B's request for price quotes rather than an invitation to negotiate, and the documents were amended by MEC after the parties negotiated the costs of the two projects. RA, tab 23 at 2 (Decl. of Marcelo M. Moises) (stating prices were reduced after oral negotiations between the parties); *see also* RA, tab 23, Ex. 1 at 1 (Decl. Marcelo M.

Moises); RA, tab 23, Ex. 2 at 1 (Decl. Marcelo M. Moises). In addition, the job proposals, which were signed and dated by J&B's general manager under "Acceptance of Proposal," are fairly detailed, providing the names of the parties to the contract, the costs of the services, and the scope of work, including the depth of excavation and the materials to be used. RA, tab 23, Ex. 1 at 1 (Decl. Marcelo M. Moises); RA, tab 23, Ex. 2 at 1 (Decl. Marcelo M. Moises).

[20] The evidence also indicates that the parties believed the subcontract agreements were executed "only [as] a formality," thereby suggesting that the parties believed agreements had already been made. RA, tab 23 at 2 (Decl. of Marcelo M. Moises). While we note that neither of the job proposals contained start or finish dates for the projects, information that may be considered important given MEC's claim for delays in completing its work, the absence of such information is not dispositive to a finding of a contract.

B. MEC's Claim for Reformation on the Basis of Mutual Mistake Fails

[21] MEC alleges that the subcontract agreements were "mer[e] formalities" rather than a true reflection of the agreements between the parties, and that parol, or "extrinsic," evidence should be admissible to show this.[3] Appellant's Br. at 8-9. J&B counters that parol evidence should not be considered because the language of the subcontract agreements, which were signed by MEC's

[3] Guam's parol evidence rule, codified at 6 GCA § 2511, provides:

> When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings; or
> 2. Where the validity of the agreement is the fact in dispute.
>
> But this Section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in § 2515 [Circumstances to be Considered], or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

6 GCA § 2511 (2005).

president and general manager, is clear and unambiguous on the face. *See* Appellee's Br. at 14 (June 12, 2012). The application of the parol evidence rule is a question of law that is reviewed *de novo*. *Sullivan v. Massachusetts Mut. Life Ins. Co.*, 611 F.2d 261, 264 (9th Cir. 1979).

[22] The subcontract agreements, each spanning ten pages, contained a number of provisions including a clause often referred to as a "merger provision." It provides:

> Section 18.4. It is agreed that all understandings and agreements heretofore had between the parties are merged in this Agreement, which alone fully and completely expresses their understanding, and this Agreement has been entered into after full investigation and consideration, neither party relying upon any statement or representation, not embodied in this Agreement, which may be claimed to have been made by any of the parties hereto.

RA, tab 20, Ex. A at 8 (Aff. Generoso M. Bangayan); RA, tab 20, Ex. B at 8 (Aff. Generoso M. Bangayan). Where a contract contains a merger provision, parol evidence is generally inadmissible to vary the terms of the contract, as "[a]ll negotiations entered into prior to or contemporaneously with the execution of a written contract are merged into the written contract." *Mitchell v. Excelsior Sales & Imports, Inc.*, 256 S.E.2d 785, 787 (Ga. 1979) (holding summary judgment proper where all prior agreements and negotiations were merged into final written contract and where there were no allegations of fraud which would have prevented tenant from reading merged agreement before acceptance by signature) (citation omitted); *see also Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.2d 624, 627 (N.Y. Ct. App. 1997) (noting merger clause bars introduction of evidence to vary or contradict written terms in agreement).

[23] MEC argues that parol evidence should be admissible in this particular case because the provision in the subcontract agreements—that "[s]ubcontractor shall procure all permits necessary for carrying on the work"—was inserted by mutual mistake. Appellant's Br. at 8-9. Indeed, parol evidence may be introduced "to show mutual mistake whereby a contract fails to express the actual agreement, and to prove the modifications necessary to be made . . . " *Austin*

Shoe Stores v. Elizabeth Co., 538 S.W.2d 677, 680 (Tex. Civ. App. 1976) (citation omitted); *see also Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1198 (E.D. Va. 1994) ("Parol evidence is admissible to reform a contract where there is clear and convincing evidence of a mutual mistake and of the actual understanding of the parties.") (citations omitted).

[24] The presence of a general merger clause does not bar parol evidence to show mistake, fraudulent representation, or lack of adequate consideration. *Galgani v. Fleming*, 56 A.D.2d 644, 645 (N.Y. App. Div. 1977) (stating parol evidence admissible to show presence of fraud); *Audubon. Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.3d 309, 316 (Tex. App. 2011) (stating parol evidence admissible to show want or failure of consideration and establish real consideration given for an instrument). A party seeking reformation of a contract based on mutual mistake must show by clear and convincing evidence "that the provision complained of was included or omitted due to the mutual mistake of the parties" and the party must also prove the true agreement of the parties to the instrument. *RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co.*, 700 S.W.2d 635, 639 (Tex. App. 1985). A mutual mistake is "one common to both or all parties . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provision of a written instrument designed to embody such an agreement." *Metro. Prop. & Cas. Ins. Co. v. Dillard*, 487 S.E.2d 157, 159 (N.C. Ct. App. 1997) (internal citation omitted). Furthermore, to defeat a motion for summary judgment, the appellant must show "that there is some evidence that the writing differs from the true agreement, and that these erroneous provisions were inserted by mutual mistake of the parties." *Dorchester*, 700 S.W.2d at 639.

[25] The two job proposals signed by J&B's general manager specifically excluded from MEC's scope of work "permits and fees to any Gov. Agencies." RA, tab 23, Ex. 1 at 1 (Decl.

Marcelo M. Moises); RA, tab 23, Ex. 2 at 1 (Decl. Marcelo M. Moises). In Moises' declaration, he stated that MEC excludes from its scope of work procurement of permits because contractors are required "to obtain performance bonds before it issues construction permits plus a 10% cash deposit on the amount of the bond." RA, tab 3 at 3 (Decl. Marcelo M. Moises). Moises further explained that "J&B knew this because [MEC] ha[d] worked with J&B before these projects." *Id.* During his deposition, Moises testified that prior to the projects at issue, MEC and J&B had worked on the Harmon-Tanguisson project doing the same scope of work. RA, tab 21, Dep. MEC at 22 (Aff. Seth Forman, June 9, 2011). Accordingly, the evidence presented by MEC shows there is an issue as to whether the language regarding MEC's duty to obtain permits for the project was included by mistake.

[26] Nevertheless, while it appears that MEC may have been mistaken as to the inclusion of the permit provision in the subcontract agreements, there is no suggestion that J&B was laboring under the same misconception as to the existence of this provision in the subcontract agreements. A unilateral mistake alone is not an adequate ground for reformation. *Kopff v. Econ. Radiator Serv.*, 838 S.W.2d 449, 452 (Mo. Ct. App. 1992); *see also* Restatement (Second) of Contracts § 155 cmt. b (1981) (noting unilateral mistake alone insufficient to reform contract). However, unilateral mistake accompanied by fraud or misrepresentation by the other party will warrant reformation. *See Ward v. Ward*, 387 S.E.2d 460, 462 (Va. 1990) (explaining that the equitable remedy of reformation provides relief against a mistake of fact where "the mistake is unilateral, but it is accompanied by misrepresentation and fraud perpetrated by the other [party].") (internal quotation omitted); *see also Otto v. Weber*, 379 N.W.2d 692, 695 (Minn. Ct. App. 1986) ("Reformation requires clear and convincing evidence that the written agreement does not reflect

the real agreement made by the parties and that this failure was due to either mutual mistake or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.").

[27] MEC does not allege fraudulent representation and there is nothing in the record to suggest misrepresentation and fraud. Nevertheless, assuming *arguendo* that the inclusion of the permit provision had been a mutual mistake, this by itself does not raise a genuine issue of material fact to preclude summary judgment because, although the subcontracts required MEC to obtain the permits, J&B obtained all of the permits throughout the project. If MEC had the duty to obtain the permits pursuant to the subcontract agreements, it did not show that it could have obtained the permits earlier or that such responsibility caused the delays. Instead, MEC alleges that the delays in the project were due to the subsurface conditions being materially different from those represented to it by J&B, and not by any negligence or intentional act of J&B (or any other party) in obtaining the permits. *See* RA, tab 3 at 2 (Compl., Aug. 19, 2010). Therefore, as the trial court indicated, even if J&B, and not MEC, was responsible for obtaining the permits, there are no allegations that J&B did not act in accordance with the parties' normal government permit processes. RA, tab 31 at 5 (Dec. & Order). Accordingly, MEC's claim for reformation on the basis of mutual mistake for inclusion of the permit provision is immaterial and must fail.

C. Subcontract Agreements are Valid and Contained Additional Consideration

[28] MEC and J&B disagree on what the subcontract agreement represents – a modification of the job proposals signed by J&B or a written memorialization of the parties' fully contemplated oral and written agreements. Guam statutory law provides "[a] contract in writing may be altered by a *contract*, in writing, or by an executed oral agreement, and not otherwise." 18 GCA § 89302 (2005) (emphasis added). J&B attempts to read the language of 18 GCA § 89302 as providing that a contract may be altered by executing another written instrument.

[29] Early California cases, interpreting section 1698 of the California Civil Code, have found that a written agreement to alter an existing written contract must be supported by consideration. *See Main St. & A.P.R. Co. v. Los Angeles Traction Co.*, 61 P. 937, 938-39 (Cal. 1900) ("[A]n agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it[;] though this, of course, may consist either in a new consideration, or in some favorable modification of the original contract"); *Meguiar v. Universal Die Casting Co.*, 239 P.2d 699, 701 (Cal. Dist. Ct. App. 1952) ("A written contract may be modified by a later written contract, and the covenants and agreements of one party thereto furnish a sufficient consideration to support the promises and agreements of the other party thereto."); *see also Major v. W. Home Ins. Co.*, 87 Cal. Rptr. 3d 556, 568 (Dist. Ct. App. 2009) ("Civil Code section 1698, subdivision (a) provides that '[a] contract in writing may be modified by a contract in writing.' Moreover, a modification ordinarily must be supported by new consideration.").

[30] The additional mutual consideration necessary for modification of an existing contract under section 89302 can be readily found in the subcontract agreements. True, the subcontract agreements impose new and onerous terms on MEC, including the NDFD provisions. *See Power Serv. Corp. v. Joslin*, 175 F.2d 698, 703 (9th Cir. 1949) (noting addition of no damage for delay clause "was ineffective for want of any consideration therefor."). However, the subcontract agreements equally limit J&B's rights, such as its right to a jury trial. *See In re Holmes' Estate*, 241 P. 660, 661 (Wash. 1925) ("[I]n discussing the subject of 'consideration,' it is said: 'It is a sufficient consideration to relinquish, or to agree to relinquish, a defense in a suit; to waive the right to a jury trial; to forbear, or to agree to forbear, from contesting judgment; not to appeal, or

to abandon an appeal.'") (quoting 13 C. J. p. 350, § 206 (Contracts)). Furthermore, the subcontract agreements make J&B "liable for all obligations and commitment that [MEC] may have previously undertaken in good faith in connection with the [Project]," thus imposing an additional obligation on J&B. RA, tab 20, Ex. A at 5 (Aff. Generoso M. Bangayan); RA, tab 20, Ex. B at 5 (Aff. Generoso M. Bangayan). Because mutual consideration is found in the subcontract agreements, the prior agreement expressed in the job proposals have been modified and the subcontract agreements are therefore binding on MEC and J&B.

[31] Furthermore, it is difficult to ignore the glaring fact that the very detailed subcontract agreements—both of which contain extensive and clear merger provisions—were signed and intialed on each page by MEC's president. Courts have long held that "contracting parties have a duty to learn the contents of a written contract before signing it, and such duty includes reading the contract and obtaining an explanation of its terms." *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1341 (D. Kan. 1996) *aff'd*, 145 F.3d 1347 (10th Cir. 1998) (citations omitted); *see also Tweedel v. Brasseaux*, 433 So. 2d 133, 137 (La. 1983) ("[S]ignatures to obligations are not mere ornaments. . . . [I]f a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentively whilst this is being done."). The Florida Supreme Court further points out that "[a] party to a written contract cannot defend against its enforcement on the ground that he signed it without reading it, unless he aver facts showing circumstances which prevented his reading the paper, or was induced by the statements of the other parties to desist from reading it." *All Florida Sur. Co. v. Coker*, 88 So. 2d 508, 510 (Fla. 1956) (internal quotation omitted). MEC is bound by the signature of its president and cannot now claim that the subcontract agreements are invalid.

D. No Damage for Delay Clause

[32] J&B contends that, by the terms of the NDFD provisions contained in the subcontract agreements, MEC's sole remedy for delay in the construction of projects was the right to obtain a corresponding extension, or extensions, of time for the completion of its work. RA, Compl. at 2. MEC, on the other hand, contends that the NDFD clause should not be enforced because the delays were unreasonable in duration; thus, it claims that it is entitled to recover for actual damages it sustained as a result of the delay. Appellant's Br. at 16. The issue of whether the NDFD clause is enforceable is a matter of first impression in Guam.

[33] NDFD clauses exculpate an owner from liability for damages resulting from delays in the performance of the contractor's work by ordinarily limiting a contractor's remedy to an extension of time. *See* 13 Am Jur. 2d Building and Construction Contracts §§ 58-59 (2009); *see also* Maurice T. Brunner, Annotation, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construction Contract,* 74 A.L.R. 3d 187 (1976 & 2007 Cum.Supp.) (collecting numerous state and federal cases upholding "no damages for delay" clauses). NDFD clauses are common in public contracts and are recognized as valid and enforceable provided they satisfy the ordinary rules governing contracts. *See John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. 1984) ("No-damage-for-delay clauses 'are commonly used in the construction industry and generally recognized as valid and enforceable'") (citation omitted); *see also Owen Constr. Co., Inc. v. Iowa State Dep't of Transp.*, 274 N.W.2d 304, 306 (Iowa 1979) ("Such clauses are defended [in cases involving public contracts] on the theory they protect public agencies which contract for large improvements to be paid for through fixed appropriations against vexatious litigation based

on claims, real or fancied, that the agency has been responsible for unreasonable delays.") (citations omitted).

[34] However, because NDFD clauses are exculpatory by nature, they must be strictly construed against the party that relies on them. *See, e.g., Turner Constr. Co.*, 742 F.2d at 966 (applying Michigan law); *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1029 (5th Cir. 1977) (applying Alabama law); *Travelers Cas. and Sur. Co. v. Dormitory Authority-State of New York*, 735 F. Supp. 2d 42, 58 (S.D. N.Y. 2010) (applying New York law). Such clauses have been enforced in contracts between contractors and subcontractors. *Lichter v. Mellon-Stuart Co.*, 193 F. Supp. 216, 221 (W.D. Pa. 1961), *aff'd*, 305 F.2d 216 (3rd Cir. 1962). In the absence of such clause, a subcontractor who has been delayed in the performance of his contract may recover from the contractor or owner of the building damages for such delay if caused by the default of the contractor or owner. *See, e.g., Frank T. Hickey, Inc. v. L.A. Jewish Cmty. Council*, 276 P.2d 52, 59 (Cal. Dist. Ct. App. 1954) ("Ordinarily . . . the law places the [contractor] under an obligation to make good all losses consequent on delays in the progress of the work not attributable to the subcontractor. However, this rule may be made inapplicable by the express provisions of the subcontract.") (citations omitted).

[35] To support its contention that NDFD clauses should not be recognized and enforced in Guam, MEC cites to several California cases to suggest that California disfavors and rarely enforces, if at all, NDFD clauses. *See, e.g., Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590 (Ct. App. 1998). But a closer examination of statutory and common-law authorities reveals that California recognizes NDFD clauses. A statute in California, Public Contract Code section 7102, renders NDFD clauses void in public works contracts when owners are responsible for delays that are deemed "unreasonable" and "not

within the contemplation of the parties." Cal. Pub. Cont. Code § 7102 (West 2012). Section 7102 has no effect in the present case because Guam has no comparable statute. *See Howard Contracting,* 83 Cal. Rptr. 2d at 595 ("[D]amages are recoverable in spite of a 'no damage for delay' provision contained in a public agency contract.") (citation and internal quotation marks omitted).

[36] In addition, under California law, NDFD clauses are considered enforceable in contracts between private parties. For instance, in *Hansen v. Covell*, the Supreme Court of California upheld a contract between private parties containing a clause providing for extensions of time as a remedy for delays caused by "acts or neglect of the owner or his employees . . . or by the act of God." 24 P.2d 772, 774-75 (Cal. 1933). The court in *Hansen* explained that "[t]he parties had a right to agree upon the exclusive remedy available to the contractors by reason of such delay." *Id.* at 775. A NDFD clause was again enforced in *Harper/Nielson-Dillingham, Builders, Inc. v. United States*, where a federal court applying California law found that NDFD clauses were not *per se* unenforceable in private contracts. 81 Fed. Cl. 667, 677-78 (Fed. Cl. 2008). In reaching its conclusion, the court reasoned that decisions in previous cases such as *Hansen*, which expressly applied common-law exceptions to the enforceability of NDFD clauses in private contracts, had been superseded by the enactment of section 7102. *Id.* at 679 n.15. Because the common law exceptions no longer applied, the court found that an "express and unambiguous" NDFD clause constituted an "iron-bound bar" against potential liability as between private contractors and subcontractors in California. *Id.* at 679. Accordingly, California joins the majority of jurisdictions in recognizing and enforcing NDFD clauses. We are persuaded by the decisions arising from the federal and state courts, and we similarly conclude that "no damages for delay" clauses are valid and enforceable in Guam.

E. Exceptions to "No Damage for Delay" Clauses

[37] While NDFD clauses are generally valid, a majority of jurisdictions recognize certain exceptions to these clauses. Among the recognized exceptions are: (1) unreasonable delays not contemplated by the parties when the agreement was made;[4] (2) delays not covered by the plain language of the clause; (3) delays caused by the contractor's bad faith or its willful, malicious, or grossly negligent conduct; and (4) delays resulting from a breach of a fundamental obligation of the contract. *See* Brunner, Annotation, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R. 3d 187, § 7[a]. In its complaint and on appeal, MEC focuses on two exceptions to the enforcement of the "no delay for damage" provisions found in the subcontract agreements: that the delays were so unreasonable in duration that they were not contemplated by the parties when the agreement was made, and that J&B breached a fundamental duty to provide timely access to the project site. RA, tab 3 at 3 (Compl.); Appellant's Br. at 15-19.

[38] Under the first exception, recognized by a number of courts, a NDFD clause will not bar claims resulting from delays caused by the contractor if the "unreasonable" delays or their causes were not within the contemplation of the parties at the time they entered into the contract. *See, e.g., Dep't of Transp. v. Arapaho Constr., Inc.,* 357 S.E.2d 593, 594 (Ga. 1987); *Corinno Civetta Constr. Corp. v. City of N.Y.*, 493 N.E.2d 905, 910 (N.Y. Ct. App. 1986); *City of Seattle v. Dyad Constr., Inc.,* 565 P.2d 423, 431-32 (Wash. Ct. App. 1977). The rationale for this exception is that "[i]t can hardly be presumed . . . that the contractor bargained away his right to bring a claim

[4] Some courts refer to this exception as "a delay so unreasonable in length as to amount to project abandonment." *See, e.g., J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009 (Nev. 2004).

for damages resulting from delays which the parties did not contemplate at the time." *Corinno*, 493 N.E.2d at 910.

[39] But this view is not universally accepted and has been questioned by a number of courts. *See, e.g.*, *State Highway Admin. v. Greiner Eng'g Sciences, Inc.*, 577 A.2d 363, 370 (Md. Ct. Spec. App. 1990); *John E. Gregory and Son, Inc. v. A. Guenther and Sons Co., Inc.*, 432 N.W.2d 584 (Wis. 1988). In *Gregory*, the Supreme Court of Wisconsin explained its reason for rejecting an exception for unreasonable delays not contemplated by the parties under Wisconsin law:

> [D]elay 'not contemplated by the parties' is not an exception to the general rule that 'no damage for delay' clauses are enforceable. We conclude that parties can mutually assent to such a clause without contemplating in particularity all of the potential causes of delay. Indeed, the adoption of a 'no damage for delay' clause shows that the parties realize that some delays cannot be contemplated at the time of the drafting of the contract. The parties include the clause in the contract in order to resolve problems conclusively should such delays occur. The parties can deal with delays they contemplate by adjusting the start and completion dates or by including particular provisions in the contract. '[I]t is the unforeseen events which occasion the broad language of the clause since foreseeable ones could be readily provided for by specific language.' Thus, the doctrine of mutual assent supports our conclusion that delays not contemplated by the parties should not be an exception to the rule that 'no damage for delay' clauses should be enforced.
>
> This result is neither unfair nor inequitable. Knowing that unforeseen delays...can occur, parties can bargain accordingly. A subcontractor can protect itself from the risk of unforeseen delay simply by adjusting its bid price in recognition of the potential additional costs or by refusing to accept such a provision in the contract."

Gregory, 432 N.W.2d at 587 (citations and footnote omitted).

[40] Moreover, while most jurisdictions recognize an exception for delays that are of unreasonable duration, the specific length of time that constitutes an "unreasonable" delay is subject to court discretion. For instance, in *E. C. Nolan Co., Inc. v. State*, the Michigan Court of Appeals found that a 9 1/2 month delay on a construction project originally scheduled for completion in twenty-four months was "unreasonable and excessive." 227 N.W.2d 323, 327

(Mich. Ct. App. 1975) ("A delay of 9 1/2 months, or almost one-half of the total time allowed for the complete project, is in our view clearly unreasonable and excessive"); *see also American Pipe & Constr. Co. v Westchester County*, 292 F. 941, 952 (2d Cir. 1923) (finding delay in excess of three months in providing right of way "unreasonable").

[41] In *Bovis Lend Lease LMB v. GCT Venture*, the New York appellate court determined that the delay of 2 1/2 years caused by the contractor "were so unreasonable" that triable issues of fact were raised as to whether the delays went beyond the contemplation of the contracting parties, or whether the delays were so unreasonable as to constitute an intentional abandonment of the contract. 6 A.D.3d 228, 229 (N.Y. App. Div. 2004). Notably, the court in *Bovis* held that the inquiry as to whether a delay was so unreasonable precluded summary judgment. *Id.* at 228-29 (finding full trial must be conducted to determine whether delay was unreasonable); *see also Hansen*, 24 P.2d at 772 (noting when determining enforceability of NDFD clause, the issue of whether delay was so unreasonable is question of fact precluding summary judgment).

[42] By contrast, in *Siefford v. Hous. Auth. of City of Humboldt*, the Nebraska Supreme Court upheld the enforcement of a "no damage for delay" clause following a 162-day delay on a contract scheduled for completion in 300 days. 223 N.W.2d 816, 824 (Neb. 1974). Similarly, in *Hansen*, which was cited by J&B, the court upheld the NDFD clause, finding that the exclusive remedy of the contractor for the delay caused by the acts of the owner was an extension of time within which he might complete the contract.

[43] So-called "time of the essence" clauses complicate matters further because, when violated, they can result in a material breach and render a delay per se "unreasonable." *See Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (finding "time of the essence" clause found in contract made timely performance essential, and

party's failure to timely perform constituted material breach of contract); *see also Lotz v. City of McKeesport*, 453 A.2d 74, 76 (Pa. Commw. Ct. 1982) (observing "[i]f time were of the essence, any delay—in this case, a three-day delay—would not be reasonable."); *Elkins Manor Assocs. v. Eleanor Concrete Works, Inc.*, 396 S.E.2d 463, 467 (W. Va. 1990) ("[W]here time is of the essence in the performance of a contract, a delay in performance beyond the period specified in the contract, unless caused by the other party or waived by such party, will constitute a breach of the contract, entitling the aggrieved party to terminate it.").

[44] The March 24, 2008 subcontract agreement for the Macheche-GIAA project states that the "[s]ubcontractor shall substantially complete the Work to the satisfaction of the Contractor and the Owner on or before December 20, 2008. Time shall be of the essence in the Subcontractor's performance of this Assignment." RA, tab 20, Ex. A at 2 (Aff. Generoso M. Bangayan). According to Moises, this project was not completed until December 28, 2009, thereby resulting in over one year of delay. RA, tab 23 at 4 (Decl. Marcelo M. Moises).

[45] In addition, there remains a question of whether such delays were contemplated by the parties at the time they entered into their agreement. There is evidence that none of the parties seemed to know where exactly the underground utilities were located since the engineering drawings that both J&B and MEC relied on were wrong. *See* RA, tab 21, Dep. MEC at 58-63, 68-71 (Aff. Seth Forman). Likewise, the record suggests MEC could not have anticipated performing multiple GPR readings because J&B had to obtain the permits first. *See id.*

[46] Based on the evidence presented, we find that there is a question of material fact as to whether the delays were unreasonable and not contemplated by the parties at the time of the agreement. Because we find that the unreasonable delay exception not contemplated by the parties when the agreement was entered may apply in this case to preclude summary judgment,

we need not address whether J&B breached a fundamental obligation of the subcontract agreements. MEC alleged sufficient facts indicating that one or more of these recognized exceptions to the enforcement of the NDFD clause applies to this case; accordingly, summary judgment in favor of J&B is improper at this juncture.

F. Additional Damages that are not Due to the Delay

[47] MEC argues that it directly incurred additional costs for trench excavation and backfilling on one of the projects to which it was entitled. RA, tab 3 at 3 (Compl.). The trial court did not address these claims in its February 10, 2012 decision and order. *See* RA, tab 31 (Dec. & Order). There is nothing in the subcontract agreements that would preclude MEC from claiming such damages. As such, the trial court erred by failing to address these claims.

[48] MEC further contends that it is entitled to overtime pay due to the change in work sequence. Appellant's Br. at 22. MEC failed to assert this overtime claim in its original complaint or seek leave to amend its complaint for its inclusion. Indeed, the overtime claim was only brought forth in MEC's memorandum in opposition to summary judgment. *See* RA, tab 25 at 16 (Opp'n Mot. Summ. J.). Generally, an issue or claim may not be raised for the first time in an opposition to a motion for summary judgment. *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *Perkins v. Compass Group Use, Inc.*, 512 F. Supp. 2d 1296, 1306-07 (N.D. Ga. 2007) ("A non-moving plaintiff may not raise a new legal claim for the first time in response to the opposing party's motion for summary judgment."). MEC did not assert this claim at an earlier stage in the litigation and may not do so for the first time in opposition to J&B's motion for summary judgment. Further, the trial court did not address this claim in its decision and order denying summary judgment. Lastly, J&B did not move to amend its complaint for overtime due for the additional trenching work. Therefore, we will not address

this claim in the first instance on appeal. On remand, the trial court can decide any amendment to the complaint and, when appropriate, the merits of the claim.

V. CONCLUSION

[49] We hold that the job proposals were intended to be offers and J&B's acceptance gave rise to legally binding contracts between the parties. We further determine that the subcontract agreements were supported by additional consideration and were, therefore, also binding on the parties. Moreover, while no-damage-for-delay clauses are enforceable in this jurisdiction, one or more recognized exceptions to their enforcement may apply, thus precluding summary judgment in favor of J&B. In addition, we find that the trial court erred in failing to address MEC's claims for additional costs not based on the no-damage-for-delay clause. Finally, because MEC's claim for overtime costs was raised for the first time in response to J&B's summary judgment motion, we will not address this issue in the first instance on appeal.

[50] Accordingly, we **REVERSE** the trial court's grant of summary judgment to J&B. The matter is **REMANDED** for further proceedings consistent with this opinion.

'nal Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice