

FILED in the TRIAL COURTS  
State of Alaska Third District

MAY 23 2023

Clerk of the Trial Courts  
By \_\_\_\_\_ Deputy

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8 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
9 THIRD JUDICIAL DISTRICT AT ANCHORAGE

10 ROGER HICKEL CONTRACTING, )  
11 INC., )  
12 Plaintiff, )  
13 vs. )  
14 MUNICIPALITY OF ANCHORAGE, )  
15 Defendant. )

Case No. 3AN-23-5370CI

16 **MOTION AND MEMORANDUM FOR JUDGMENT ON THE PLEADINGS**

17 Pursuant to Alaska R. Civ. P. 12(c), Plaintiff Roger Hickel Contracting, Inc.  
18 (“RHC”), hereby files this Motion and Memorandum for Judgment on the Pleadings  
19 against Defendant Municipality of Anchorage (“MOA”) for RHC’s Breach of Contract  
20 and Quantum Meruit claims.

21 **I. INTRODUCTION**

There is no factual dispute between RHC and MOA regarding the events that give rise to this lawsuit. MOA terminated its contract with RHC for the MOA’s convenience, pursuant to a specific contract term that required MOA to compensate RHC for all

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1 completed work plus mark up. There is also no dispute that the parties' contract *required*  
2 MOA to issue payment to RHC and that MOA has failed to issue the required payment.  
3 As MOA has admitted all facts relevant to RHC's breach of contract and quantum meruit  
4 claims, RHC is entitled to judgment on the pleadings and as a matter of law.<sup>1</sup>

5 **II. STATEMENT OF FACTS**

6 Following a public bidding process, on or about March 21, 2022, the MOA and  
7 RHC executed a contract for pre-construction services, with a maximum price of  
8 \$50,000, related to the design and planning for the construction of a Navigation Center  
9 (the "Project") to assist the homeless population living in Anchorage. *Complaint*, ¶ 6;  
10 *Answer*, ¶ 6. On or about May 31, 2022, the MOA and RHC executed an amendment to  
11 the contract that changed RHC's scope of services to include serving as the general  
12 contractor for the Project and which incorporated the MOA's Standard Specifications-  
13 Buildings ("MASS B") General Conditions and Supplementary Conditions into the  
14 contract. *Complaint*, ¶ 9; *Answer*, ¶ 9. The contract-type was a Construction  
15 Manager/General Contractor ("CM/GC") contract. *Complaint*, ¶ 10; *Answer*, ¶ 10. A  
16 CM/GC contract is a project delivery method that allows the owner, designer, and

17  
18  
19 <sup>1</sup> RHC has not raised its breach of good faith and fair dealing claim as part of this Motion as it  
20 does not provide separate relief from RHC's breach of contract claim and is based on the same  
21 undisputed facts. In the event this Motion is granted, RHC will voluntarily dismiss its good faith  
and fair dealing claim prior to the issuance of the Final Judgment.

1 contractor to collaboratively develop the project scope to increase quality and assist in the  
2 management of costs. *Id.*

3 In accordance with RHC's contract responsibilities, between July 5, 2022, and  
4 August 27, 2022, it prepared and submitted to MOA eight (8) Work Packages for various  
5 stages of work, including, but not limited to, the procurement of a pre-fabricated structure  
6 ("Sprung Structure"), the ordering of long-lead plumbing and mechanical equipment, and  
7 the work necessary to provide a concrete foundation for the Sprung Structure.

8 *Complaint*, ¶ 11; *Answer*, ¶ 11. The Work Packages each contained a detailed breakdown  
9 of costs for labor, equipment, materials, subcontractor costs, and allowable mark up. *Id.*

10 Each Work Package was authorized and signed by Saxton Shearer as the authorized  
11 representative of the MOA prior to RHC proceeding with the work required under the  
12 Work Packages. *Complaint*, ¶ 12; *Answer*, ¶ 12. In light of Anchorage's short  
13 construction season, RHC worked expeditiously to meet the directions of the MOA.

14 *Complaint*, ¶ 13; *Answer*, ¶ 13. This included obtaining materials prior to winter 2022  
15 and for on-site construction to begin in the early fall 2022. *Id.*

16 On September 14, 2022, pursuant to MASS B Article 5.25, the MOA notified  
17 RHC it was suspending all on-site work activities. *Complaint*, ¶ 14; *Answer*, ¶ 14. At the  
18 time the suspension occurred, RHC had made substantial improvements to the parcel of  
19 land upon which the Project was to be located, including, but not limited to, clearing the  
20

1 area and preparing it for construction, creating connections for underground utilities, and  
2 partially constructing the building foundation. *Complaint*, ¶ 15; *Answer*, ¶ 15.

3 On September 30, 2022, pursuant to MASS B Article 5.25, the MOA notified  
4 RHC it was suspending construction management activities. *Complaint*, ¶ 16; *Answer*, ¶  
5 16. This notice further stated the MOA would provide additional direction to RHC  
6 following the Anchorage Assembly's meeting on October 25, 2022. *Id.* Following the  
7 suspension of work, in accordance with MASS B Articles 5.25 and 5.22, RHC timely  
8 notified the MOA of the associated costs caused by the suspension, including storage  
9 costs for materials. *Complaint*, ¶ 17; *Answer*, ¶ 17.

10 On November 3, 2022, the MOA notified RHC it was terminating the contract for  
11 the MOA's convenience pursuant to MASS B Article 5.30. *Complaint*, ¶ 21; *Answer*, ¶  
12 21. MASS B Article 5.30 sets forth various steps the contractor is required to perform  
13 upon receipt of a notice of termination from the MOA, including, but not limited to, the  
14 cancellation of pending orders, the settlement of all outstanding liabilities for  
15 reimbursement by the MOA, and providing a list of inventory to the MOA. *Complaint*, ¶  
16 22; *Answer*, ¶ 22. MASS B Article 5.30 further states:

17 When the Owner orders termination of Work, effective on a certain date, all  
18 completed Work will be paid for at the contract price. Payment for materials  
19 included in the material inventory described in item 5 listed above will be  
20 paid at actual cost delivered to the project or storage site, including  
21 transportation charges. Allowable total markup on the actual cost shall be  
fifteen percent (15%).

1 *Complaint*, ¶ 23; *Answer*, ¶ 23.

2 Following its receipt of the termination notice, RHC proceeded in accordance with  
3 the steps required under MASS B Article 5.30, including delivering or disposing of  
4 materials at the direction of the MOA. *Complaint*, ¶ 24; *Answer*, ¶ 24. Both prior to and  
5 after the termination, RHC worked to mitigate and minimize costs for the MOA.

6 *Complaint*, ¶¶ 20, 24; *Answer*, ¶¶ 20, 24.

7 On December 16, 2022, RHC submitted its final invoice to MOA in accordance  
8 with the requirements of MASS B Article 5.30, requesting payment in the amount of  
9 \$2,459,101.92. *Complaint*, ¶ 25; *Answer*, ¶ 25. The MOA retained a third party, The  
10 Boutet Company, Inc. (“Boutet”), to evaluate RHC’s final invoice and costs. *Complaint*,  
11 ¶ 26; *Answer*, ¶ 26. On or about January 27, 2023, Boutet issued a report summarizing its  
12 methodology and findings. *Id.* This review identified a minor accounting error of  
13 \$3,749.99, resulting in a revised final invoice amount of \$2,455,351.93. *Id.* The Boutet  
14 report further states: “It is our overall opinion that the invoice submitted to MOA by  
15 RHC is complete and accurate and the costs are reasonable for this type and scale of  
16 construction.” *Id.* Following the issuance of the Boutet report, RHC confirmed to MOA  
17 its agreement with the revised final invoice amount of \$2,455,351.93. *Complaint*, ¶ 27;  
18 *Answer*, ¶ 27.

19 On or about February 24, 2023, the Acting Municipal Manager, Kent Kohlhase,  
20 issued a memorandum to the Anchorage Assembly stating the MOA’s intent to issue

1 payment to RHC on March 24, 2023, in the amount of \$2,455,351.93. *Complaint*, ¶ 28;  
2 *Answer*, ¶ 28. The MOA failed to issue payment to RHC on March 24, 2023.  
3 *Complaint*, ¶ 30; *Answer*, ¶ 30. It remains unclear when and if the MOA will issue  
4 payment as required by the contract. *Id.*

5 On March 28, 2023, RHC filed its Complaint against the MOA alleging breach of  
6 contract, breach of good faith and fair dealing, and quantum meruit. *See, generally,*  
7 *Complaint*. Prior to filing suit, RHC completed all conditions precedent to seek  
8 compensation from the MOA for the balance due under the contract terms and for which  
9 the MOA is responsible. *Complaint*, ¶ 31, *Answer* ¶ 31. The MOA filed its response to  
10 the Complaint on May 12, 2023.<sup>2</sup> The MOA's Answer to the Complaint admits nearly all  
11 facts alleged by RHC, including the facts underlying the causes of action for the claims of  
12 breach of contract and quantum meruit. *See Answer*, 3-4. The MOA listed a single  
13 affirmative defense, which states that RHC voluntarily assumed the risk of nonpayment.  
14 *Id.* at 5. The MOA further denied RHC's legal entitlement to damages for both claims  
15 and the allegation that it breached the contract with RHC, though these denials of legal  
16 entitlement are inconsistent with the MOA's factual admissions. *See, generally, id.*

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19  
20 <sup>2</sup> The MOA's Answer to Complaint and the certificate of service are incorrectly dated April 13,  
2023. The MOA simultaneously filed and served the Answer via email at 3:42 p.m. on May 12,  
2023. This discrepancy is not relevant to this motion, but is noted to avoid confusion.

1     **III.   LEGAL DISCUSSION**

2           A.     Standard for Judgment on the Pleadings.

3           Alaska R. Civ. P. 12(c) provides for judgment on the pleadings. Rule 12(c)  
4 provides “a means of disposing of cases where the material facts are not in dispute and a  
5 judgment on the merits can be achieved by focusing on the content of the pleadings and  
6 any facts of which the court will take judicial notice.” *Herbert v. Honest Bingo*, 18 P.3d  
7 43, 46 (Alaska 2001) (quoting 5a Charles Alan Wright & Arthur R. Miller, *Federal*  
8 *Practice and Procedure 2d* § 1367, at 509-10 (1990)). The standard used to evaluate a  
9 12(c) motion is “identical to that of a Rule 56 motion for summary judgment: The  
10 motion can be granted only if there exists no triable issue of fact and the moving party is  
11 entitled to judgment as a matter of law.” *Id.* (internal citations omitted). A court will  
12 view facts presented in the light most favorable to the non-moving party. *Id.* at 46-47. In  
13 the context of a plaintiff’s Rule 12(c) motion, “judgment on the pleadings will be  
14 awarded only if the answer raises no issues of material fact that, if proven, would bar  
15 recovery.” *Id.* at 47.

16           This case is unusual as the MOA freely admits all of the relevant facts underlying  
17 RHC’s claims of breach of contract and quantum meruit, including (1) the MOA  
18 affirmatively stated its intention to pay RHC (*Complaint* and *Answer* at ¶ 31); (2) the  
19 MOA has retained and appreciated the benefit of RHC’s work without compensation to  
20 RHC (*Id.* at ¶¶ 30, 47); (3) the contract requires the MOA to issue payment to RHC (*Id.*,

1 ¶ 30); and (4) the MOA is responsible to RHC for the balance owed under the contract  
2 terms (*Id.*, ¶ 31). The parties do not even dispute the amount owed to RHC pursuant to  
3 the contract's terms. *Id.* at ¶ 28. Despite these admissions, the MOA denies its legal  
4 obligation to compensate RHC as required by the contract terms. The denial of a legal  
5 conclusion does not affect RHC's entitlement to judgment as a matter of law based on the  
6 undisputed facts. *See ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*,  
7 322 P.3d 114, 132–33 (Alaska 2014) (holding that disputes as to legal conclusions do not  
8 preclude the court from issuing summary judgment). As set forth below, the undisputed  
9 facts establish RHC's right to judgment under either legal theory raised in this Motion.

10 B. The Undisputed Facts Confirm MOA Breached the Contract.

11 Under Alaska law, "to assert a claim for breach of contract, a plaintiff must  
12 generally allege: (1) existence of a contract; (2) breach; (3) causation; and (4) damages."  
13 *Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1068 (D. Alaska 2012). When the  
14 facts are undisputed and the Parties' disagreement is based on the interpretation of the  
15 applicable contract, judgment on the pleadings is appropriate. *See, e.g., Allstate Ins. Co.*  
16 *v. Teel*, 100 P.3d 2, 3-4 (Alaska 2004) (granting judgment on the pleadings based on the  
17 reasonable interpretation of the contract). As set forth above, there is no dispute the  
18 parties entered into a contract and RHC incurred costs on behalf of the MOA pursuant to  
19 that contract and at the MOA's direction. The short Alaskan construction season required  
20 RHC to act quickly, and it did so with the MOA's knowledge and direction.

21



1 Central to this Motion, there is also no dispute the MOA terminated the contract  
2 for convenience. Article 5.30 of the contract sets forth specific actions for both parties in  
3 the event of a convenience termination. The contractor (RHC) is required to pay its  
4 subcontractors and suppliers, in addition to delivering all materials and equipment to the  
5 MOA. In exchange, the MOA is required to compensate the contractor for the cost of the  
6 work performed, including the cost of materials and equipment, plus a mark up of 15%.  
7 It is undisputed that RHC fully complied with the requirements of Article 5.30. It is also  
8 undisputed the MOA has failed to comply with its obligations under Article 5.30,  
9 constituting a material breach of the contract. That breach has damaged RHC in the  
10 undisputed amount of \$2,455,351.93. As the MOA does not dispute the facts underlying  
11 this claim, including the amount owed, RHC is entitled to judgment as a matter of law.

12 C. The Undisputed Facts Support RHC's Quantum Meruit Claim.

13 While RHC is entitled to relief under its breach of contract claim, it is also entitled  
14 to relief, in the alternative, under the doctrine of *quantum meruit*. To obtain restitution of  
15 the value of RHC's services in *quantum meruit*, RHC must show: (1) it conferred a  
16 benefit on MOA; (2) MOA appreciated the benefit; and (3) the MOA accepted and  
17 retained the benefit under circumstances that make it inequitable for the MOA to do so  
18 without paying RHC. *Brady v. State*, 965 P.2d 1, 13-14 (Alaska 1998).

19 While admitting to all of the other facts alleged above, the MOA denies that it  
20 would be inequitable for the MOA to retain the benefit of RHC's work without

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1 compensating RHC. But the MOA's position fails as a matter of law. As discussed in  
 2 *Brady*, the question of equitability turns to whether the benefit was voluntarily given and  
 3 if there was no expectation of payment. *Id.* at 14. The undisputed facts of this case are  
 4 clear as to RHC's expectation of payment. RHC only incurred costs on the MOA's  
 5 behalf after the MOA approved detailed Work Package summaries that included  
 6 breakdowns of the underlying costs. RHC further paid such amounts as part of its  
 7 compliance with the directions provided in Article 5.30 and then submitted a final invoice  
 8 to the MOA listing all costs incurred and requesting payment. Lastly, the MOA cannot  
 9 maintain that it did not believe RHC expected payment as the MOA affirmatively stated  
 10 its intention to issue payment to RHC. Its subsequent failure to do so does not alter both  
 11 parties undisputed expectation that MOA would pay RHC for the work performed and  
 12 the materials obtained prior to MOA's decision to terminate the contract.

13 D. The MOA's Affirmative Defense Does Not Preclude Judgment on the  
 14 Pleadings.

15 The MOA's sole affirmative defense is that RHC "assumed the risk of  
 16 nonpayment." *Answer* at 5. While it is unclear how this affirmative defense, which is  
 17 generally referenced in tort claims, applies to this case, such a determination is not  
 18 necessary for judgment to be issued in RHC's favor. Article 5.30 is clear and  
 19 unambiguous as to the required payment owed to RHC for the work performed prior to  
 20 the termination. It does not contemplate any assumption of nonpayment by the  
 21 contractor, nor does it cross reference any other section of the contract that could limit or

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1 prohibit the contractor's recovery, provided such recovery meets the termination for  
2 convenience requirements set forth in Article 5.30.

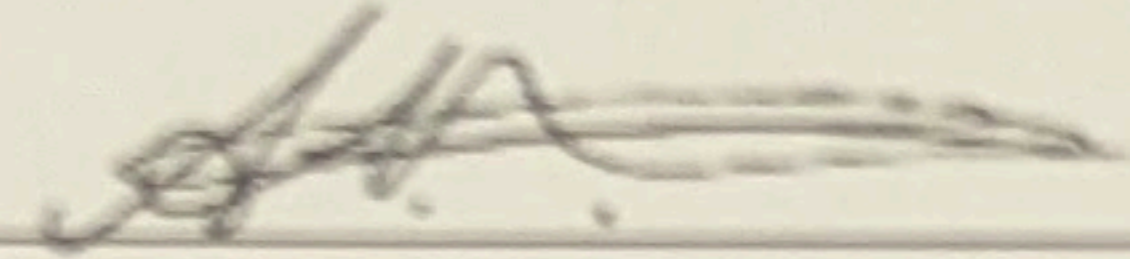
3 As Article 5.30 is unambiguous and there is no dispute the contract was terminated  
4 for convenience, the Court need not look further than the plain language of the contract to  
5 grant RHC's Motion. However, it is notable the parties' undisputed actions confirm their  
6 mutual interpretation of the contact, *i.e.* that RHC is entitled to payment for its costs  
7 incurred prior to termination plus markup. These actions include: (1) RHC settled all  
8 outstanding liabilities and claims related to the contract as required by Article 5.30, (2)  
9 RHC timely submitted its costs to the MOA following the termination, (3) the MOA  
10 hired a third party consultant to evaluate such costs, and (4) the MOA affirmatively stated  
11 its intent to pay RHC in accordance with the requirements of Article 5.30. Even if the  
12 factual basis of the MOA's affirmative defense was relevant to this Motion, which it is  
13 not in light of the plain language of Article 5.30, the Parties' actions do not reflect any  
14 factual support for the allegation that RHC waived its rights or otherwise "assumed the  
15 risk" of nonpayment and, therefore, the affirmative defense cannot create a factual  
16 dispute to preclude the granting of this Motion. That is, the MOA's affirmative defense  
17 cannot overcome judgment in RHC's favor as it is directly contrary to the plain wording  
18 of Article 5.30 and inconsistent with the parties' actions following the termination for  
19 convenience.

1 IV. CONCLUSION

2 For the foregoing reasons, RHC respectfully requests the Court issue an order  
3 granting RHC's Motion for Judgement on the Pleadings and allow RHC to move for final  
4 judgment on the undisputed amount owed of \$2,455,351.93, plus pre-judgment and post-  
5 judgment interest, attorneys' fees under Civil Rule 82, and any other relief awarded by  
6 the Court. A proposed Order is filed herewith.

7  
8 DATED this 23<sup>rd</sup> of May, 2023.

9 DAVIS WRIGHT TREMAINE LLP  
10 Attorneys for Plaintiff

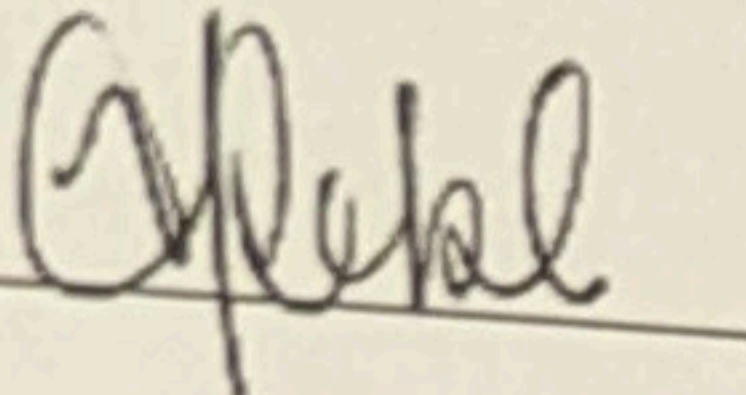
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Certificate of Service

1  
2 On the 23<sup>rd</sup> of May, 2023, a true and correct  
3 copy of the foregoing document was sent to the  
4 following parties via Email and U.S. Mail, postage paid:

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