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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

SWINERTON MANAGEMENT AND  
CONSULTING, INC.,

Plaintiff and Appellant,

v.

COUNTY OF SOLANO,

Defendant and Respondent.

A144640

(Solano County  
Super. Ct. No. FCS042112)

Swinerton Management and Consulting, Inc. (Swinerton) sued the County of Solano (County) for breach of contract and breach of the covenant of good faith and fair dealing after the County refused to pay Swinerton \$260,420 in additional fees related to a County project. The trial court granted summary judgment for the County. On the breach of contract claim, the trial court found that Swinerton could not recover for work performed without prior authorization and a properly executed work order, and no work order or contractual amendment authorizing Swinerton's requested compensation existed. The trial court granted summary judgment on the breach of covenant of good faith and fair dealing claim after concluding the allegations in Swinerton's complaint were inadequate. Additionally, the trial court found Swinerton's claims were barred because Swinerton had failed to timely comply with the requirements of the Government Claims Act.

We conclude there are no triable issues of material fact on the breach of contract claim or breach of covenant claim and affirm the judgment. Because summary judgment was proper, we need not address the timeliness of Swinerton's claims under the Government Claims Act.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The Contract***

On August 12, 2003, the County contracted with Swinerton to provide project and construction management and ancillary architectural/engineering services on an as-needed basis to the County for various capital improvement projects.

Section 2 of the contract, entitled "Compensation," contains terms for the County's payments to Swinerton for its services. Section 2A states in part, "Upon initiation of a Work Order approved by the County, compensation shall be for a total not to exceed (\$230,000) . . . accrued on an hourly basis for task oriented work or by a separate negotiated fee for other work as mutually agreed upon by County and Swinerton, when Swinerton is acting as an extension of County staff." Section 2C states, "No compensation shall be due without prior authorization and a properly executed Work Order."

Section 28, "Changes and Amendments," covers adjustments to the contract. Section 28A provides, "Any mutually agreed upon changes, including any increase or decrease in the amount of Swinerton's compensation, shall be effective when incorporated in written amendments to [the contract]." Paragraph 28B further provides, "Any adjustment to [the contract] shall be effective only upon the parties' mutual agreement in writing." Section 28C states in part, "No . . . requested Amendment shall affect or modify any of the terms or conditions of [the contract] unless reduced to writing."

### ***Amendments to the Contract***

Between 2004 and 2011, Swinerton and the County executed a number of amendments to the contract in the form of Adjusted Services Authorizations (ASAs), also referred to as work orders. The ASAs reflected changes to Swinerton's work from the original August 12, 2003 contract. Through these work orders, Swinerton agreed to perform altered or additional services for a specified "total not to exceed" amount, which generally increased the overall compensation due under the contract. Pursuant to the ASAs, the County agreed to compensate Swinerton for such services consistent with Sections 2 and 3 in the August 12, 2003 contract. The ASAs also noted that "[a]ll other terms and conditions of [the parties'] original agreement dated August 12, 2003 and all subsequent amendments remain in effect." Each ASA was signed and agreed to by both the County and Swinerton.

ASA No. 9, dated June 13, 2006, was one such work order. Under this ASA, the County engaged Swinerton to perform project and construction management services for the County's South County Government Center Project, which is the focus of this dispute. The project consisted of constructing two new health and social services facilities and renovating two existing facilities in Vallejo and Fairfield. According to the Scope of Work for ASA No. 9, the budget for the project was "subject to change as the project progresses." The project's duration was expected to be 37 months. For its construction management services, ASA No. 9 set Swinerton's compensation at an amount not to exceed \$1,595,000 for fees and expenses incurred, which at that point brought the total amount of the contract to approximately \$2.6 million. Additional ASAs for the South County Government Project followed, as well. The project lasted 44 months, involving 7 more months of construction management work than expected in ASA No. 9. When the project ended, the total not to exceed amount of the contract was approximately \$4.5 million.

### ***Swinerton's Request for Additional Fees***

In March 2007, Swinerton requested from the County an additional \$263,000 in construction management fees on the grounds that the scope and schedule for the South County Government Center Project had changed and the project would take longer to complete. No further written communication on this request appears in the record until March 2009, when Swinerton increased its request to \$629,205, which included work on a new facility not originally part of ASA No. 9. Swinerton reduced its request to \$559,466 a few months later.

In August 2009, the County informed Swinerton that it was not going to pay for any extended duration of the project but would negotiate about other claimed fees. Following negotiation, the parties executed ASA No. 26, dated December 15, 2009, in which the County agreed to pay Swinerton \$243,405 in additional fees largely related to the new facility that was not covered by ASA No. 9.

In a June 2010 letter to the County, Swinerton repeated its request for an additional \$192,000 in fees associated with the extended time for construction at the other facilities. In an August 2010 letter to the County, Swinerton added a request for \$38,850 in additional design fees it incurred when the project's outside architect stopped working. In an October 2011 letter to the County, with the subject line "Final Request for Additional Construction Management Fees due to Expanded Scope of Services and Extended Construction Durations," Swinerton requested \$260,420 additional compensation, the amount it is seeking to recover in this case. This consisted of \$192,775 in construction management fees for extended construction durations and \$38,850 for additional design services. In a March 2012 letter to Swinerton, the County responded that its position with respect to Swinerton's requests for additional compensation had not changed and effectively denied the request.

### ***Swinerton's Lawsuit***

On August 2, 2013, Swinerton filed suit against the County, asserting claims for breach of contract and breach of the covenant of good faith and fair dealing.

The County demurred. The trial court sustained without leave to amend the demurrer to Swinerton's breach of covenant claim on the grounds that it merely realleged Swinerton's breach of contract claim and was superfluous.

Following discovery, the County moved for summary judgment on the breach of contract claim, and the trial court granted summary judgment for the County. The trial court found no breach, interpreting the contract to preclude Swinerton from being compensated for work performed without prior authorization and a properly executed work order, and no amendment to the contract or work order authorizing Swinerton's requested compensation existed. The trial court also found the allegations in Swinerton's complaint inadequate to support its breach of covenant of good faith and fair dealing claim. The trial court also found Swinerton's claims to be untimely because Swinerton had failed to comply with the claims presentation requirements of the Government Claims Act. Swinerton timely appealed from the judgment.

## **DISCUSSION**

### ***Standard of Review***

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Scheidt v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.) A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, at p. 850.) If the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc. § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849.)

“While ‘[s]ummary judgment is a drastic procedure, should be used with caution [citation] and should be granted only if there is no issue of triable fact’ [citation], it is also true ‘[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one.’ [Citation.] ‘A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff’s asserted causes of action can prevail.’ ” (*M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 704.)

### ***Breach of Contract***

Swinerton contends we must reverse the breach of contract claim because several triable issues of material fact exist. Before addressing those contentions, we first analyze the language of the contract itself on which Swinerton’s claim for additional compensation is based.

“Contract interpretation presents a question of law which this court determines independently.” (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472.) “ ‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract.’ [Citation.] If contractual language is clear and explicit, it governs.’ ” (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.)

The contract between Swinerton and the County sets forth requirements for Swinerton’s compensation in clear and explicit terms. Section 2C provides that there shall be “[n]o compensation . . . due without prior authorization and a properly executed Work Order.” Section 28A provides that any changes that may result in any increase in Swinerton’s compensation must be “mutually agreed upon” and incorporated in written amendments to the contract in order to be effective. Section 28B states that any amendment to the contract is effective “only upon the parties’ mutual agreement in writing,” and Section 28C states that no requested change modifies the contract “unless reduced to writing.”

Based on the contract's plain language, these contractual provisions mean that any increased compensation owed to Swinerton must be mutually agreed upon by both Swinerton and the County and must take the form of a written amendment to the contract in order to be effective and enforceable.

No written amendment to the contract reflects any mutual agreement between Swinerton and the County for the additional fees Swinerton seeks. While the record contains work orders jointly signed by the parties amounting to over \$4.5 million in authorized charges, Swinerton has identified no work order or any other writing amending the contract for the \$260,420 in additional fees it has requested. Swinerton Project Executive John Baker testified that the County and Swinerton never reached any agreement about the extended construction fees, and also testified that Swinerton never had a work order or signed agreement with the County to incur additional fees for the extended project period. Swinerton's own acknowledgment in its opening brief that it *assumed* that both the scope and budget could change and if one changed so would the other—confirms the absence of such a writing. Since the plain language of the contract only obligates the County to pay Swinerton what the parties had mutually agreed to—as reflected in the contract or in writings amending the contract—Swinerton is not entitled to additional payments from the County in the absence of such an agreement that was reduced to writing.

None of the arguments Swinerton advances convinces us a different conclusion is appropriate under the facts of this case.

First, Swinerton contends that whether the County pre-authorized Swinerton to perform construction management services for an extended period is a triable issue of fact. We disagree. Because the plain language of the contract requires any increase in Swinerton's compensation to be in writing and no such writing exists for the fees at issue here, it is not material whether Swinerton was pre-authorized to do the work underlying its additional claims for compensation. Swinerton's effort to imply such authorization

from the parties' conduct, including from the County's silence in response to Swinerton's initial notices regarding such work, only reflects the absence of a work order or other writing essential for Swinerton's compensation.

Second, Swinerton attempts to read ambiguity into the contract's requirement for a "properly executed Work Order." Swinerton argues that any interpretation that requires a "prior" work order would result in a forfeiture of Swinerton's ability to be paid for extended construction management services. However, the plain language of the contract states only that there must be a "properly executed Work Order" without regard to the time when it must be executed. Since no work order or other writing reflecting the mutual agreement of the parties for increased fees owed to Swinerton exists, the *timing* of such a document is immaterial.

Third, Swinerton tenders a factual dispute regarding the overall value of its contract with the County and the amount ultimately paid to Swinerton by the County. On this point, Swinerton contends that the overall amount budgeted for its contract with the County (as reflected in the contract and all subsequently executed work orders) was \$4,548,964. Swinerton further contends that since the County ultimately paid Swinerton only \$4,366,934.99, it is owed at least the \$181,929.01 difference based on the invoices it submitted to the County for its hourly fees for the work at issue in this lawsuit. We disagree.

As an initial matter, the difference between the overall contract budget and the amount the County ultimately paid to Swinerton under the contract is not at issue in this case. "In independently reviewing a motion for summary judgment . . . [w]e identify the issues framed by the pleadings . . . ." (*Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 714.) The breach alleged here concerns \$260,420 in fees for additional work done for which there is no executed work order. The triable issue Swinerton seeks to inject concerns fees for work for which *there are executed work orders*. Had Swinerton alleged in its complaint that the County refused to

pay the fees it had agreed to pay in properly executed work orders, such an issue could matter. Based on the issues framed by the complaint, Swinerton's proffered factual dispute is irrelevant.<sup>1</sup>

Swinerton also cannot disregard the specific requirements to permit its compensation set forth in the contract by resorting to more general contractual provisions elsewhere. Swinerton relies on language in ASA No. 9 whereby the "County agrees to compensate Swinerton for above services as invoices are permitted, based on the above fee proposal, and as set forth in Section 2, Compensation, and Section 3, Payment." It then focuses on the "accrued on an hourly basis" language in Section 2 of the contract to justify its claim to be paid for all its hourly fees up to the total contract amount. But this interpretation completely and improperly overlooks the threshold work order requirement of Section 2C. Swinerton also relies on Section 7 of the contract, which provides that "Swinerton shall be reimbursed for all expenditures made in good faith that are unpaid at the time of termination, not to exceed the maximum amount payable under [this contract]." "[U]nder well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235.) The general provision requiring payment of any unpaid expenses cannot supplant the specific requirement for a written amendment to the contract for Swinerton's increased compensation from the County.

Further, Swinerton's invoices to the County and whether the County paid the maximum amount allowed under the contract do not change or excuse the fundamental contractual requirement for a written amendment to the contract to allow increased

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<sup>1</sup> Swinerton also contends there is a disputed fact as to the proper project budget and refers to a \$350,000 County increase in the project budget in December 2007. No record evidence in the form of an ASA, Work Order, or any other written contractual amendment reflects any \$350,000 increase at that time.

payments to Swinerton. As long as this requirement remains unsatisfied for the extended duration and additional services at issue here, the amount Swinerton invoiced to the County or whether Swinerton submitted invoices to the County for the disputed amounts do not create material factual disputes.

Finally, Swinerton's argument that the County cannot relieve itself of its obligation to pay additional fees by refusing to execute a work order does not excuse the contractual requirement for a work order for payment. Where a contract expressly allows the defendant to act in a way that prevents performance of a condition, a plaintiff has no cause for complaint because he assumed the risk. (See *Kline v. Johnson* (1953) 121 Cal.App.2d Supp. 851, 854.) The contract Swinerton entered into with the County plainly empowered the County to approve—and conversely disapprove—work orders. Further, by requiring mutual agreement for changes to the contract, the contract also extended to the County the ability to agree—and conversely disagree—to a requested amendment for increased compensation. Swinerton cannot cry foul when the County exercises the options available to it under the contract.

While our ruling is based on our interpretation of the clear and explicit language of the contract, the following cases, neither cited by Swinerton or the County, underscore our conclusion and are instructive.

In *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 (*Katsura*), an engineer and the city entered into a contract for consultant services. The contract required that any modifications were only to be made by mutual written consent of the parties. (*Id.* at pp. 106–107.) After the project was completed, Katsura submitted a final invoice for an additional \$23,743.75, which the city refused to pay in part because it included work that was not authorized by the contract. (*Id.* at 107.) Katsura, who admitted that he did not follow the procedure set forth in the contract to obtain authorization for the extra work, sued the city for breach of contract and argued that his contract with the city was orally modified to authorize the work. (*Id.* at pp. 107–108.)

The court ruled that the city was not required to pay Katsura for the extra work. (*Katsura, supra*, 155 Cal.App.4th at p. 108.) Observing that “public works contracts are the subject of intensive statutory regulation and lack the freedom of modification present in private party contracts,” the court held that oral modification was inapplicable. (*Id.* at p. 109.) The court found no provision in the city charter that allowed for the execution of oral contracts by city employees who do not have the requisite authority. The court ruled that the alleged oral statements by the associate city engineer and project manager were insufficient to bind the city because such acts were in excess of their authority. (*Ibid.*)

*Katsura* further added, “We are not unsympathetic to the seeming unfairness of denying payment for work done in good faith by one who has no actual knowledge of the restrictions applicable to municipal contracts. [Citations.] ‘ “ ‘It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he . . . is bound to see to it that the [city] charter is complied with. If he neglect[s] this, or choose[s] to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated.’ ” ’ ” (*Katsura, supra*, 155 Cal.App.4th. at p. 111.) The court further noted that Katsura was not the victim of an innocent mistake because he was aware of the public contracting procedures and he knew the extra work was outside the scope of his contract. (*Ibid.*)

In *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332 (*P&D*), a civil engineering firm sought payment for extra work it claimed was orally authorized. On appeal, the city contended that as a matter of law, the jury’s award in excess of \$100,000 to the contractor for extra work could not stand because there was no written change order, in violation of provisions of the contract and public contract law. The city argued that the trial court erred in instructing the jury that the contract could be modified orally or through the parties’ conduct. (*Id.* at p. 1335.)

*P&D* reversed the judgment based on the contract’s requirement for written change orders. “Unlike private contracts, public contracts requiring written change

orders cannot be modified orally or through the parties' conduct. Thus, even if [the contractor's] evidence pertaining to oral authorizations of a city employee for extra work is fully credited, [the contractor] cannot prevail." (*P&D, supra*, 190 Cal.App.4th at p. 1335.) The court concluded that "[t]he plain language of the contract limit[ed] the City's power to contract to the prescribed method. By relying on . . . oral authorization or direction to begin or perform extra work without a written change order, [the contractor] acted at its peril." (*Id.* at p. 1341–1342.)

In reaching this conclusion, *P&D* acknowledged that *Katsura* did not involve the issue of whether a written modification requirement in a public contract can be modified through the parties' *conduct*, but asserted its reasoning applied equally to modification through conduct. (*P&D, supra*, 190 Cal.App.4th at p. 1341.) The court further noted, "The purpose of including a written change order requirement in a municipal work contract is obviously to protect the public fisc from the type of situation that occurred here." (*Id.* at p. 1342.)

*Katsura* and *P&D* underscore our adherence to the express requirements in the contract between the County and Swinerton. The clear and explicit language of their contract limits Swinerton's compensation to fees that have been mutually agreed upon and reduced to a writing. Swinerton's efforts to read a contractual obligation into this agreement through implication, oral authorization, course of conduct, or even by assumption, is self-defeating in the context of the contract at issue.

Swinerton's efforts to secure a work order reflects its understanding that one was critical for its compensation. Further, Swinerton knew at least by August 2009 the County was disinclined to honor its requests for fees for the extended construction period but nonetheless continued to work.<sup>2</sup> Swinerton was also aware by this time that the

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<sup>2</sup> Swinerton contends that it could not have simply "refused the work," as the County argues. Swinerton bases its position on its own contractual commitment to deliver "completed, accepted projects," as well as deposition testimony from the County

County was not inclined to honor requests for compensation for work done beyond its scope of work and for which no prior authorization had been sought. In electing to undertake work without executed work orders that committed the County to pay more, Swinerton—like the contractors in *Katsura* and *P&D*—acted at its peril. The trial court properly granted the County summary judgment on Swinerton’s breach of contract claim.

***Breach of the Covenant of Good Faith and Fair Dealing***

Swinerton contends the trial court’s decision on its breach of covenant of good faith and fair dealing claim should also be reversed. Swinerton argues the County breached the covenant by failing to maintain the project’s original scope as set forth in ASA No. 9, or by failing to increase Swinerton’s compensation when it increased the scope of the project. Swinerton also claims the County breached the covenant by failing to supply the project with an architect, the absence of which caused Swinerton to incur design fees that account for approximately \$38,850 of its requested damages.

Additionally, Swinerton contends that the trial court erred in failing to address the merits of these arguments by instead basing summary judgment on the ground that Swinerton’s complaint had not adequately alleged breach of the covenant.

“The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] ‘The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purpose.’ [Citation.] . . . ‘In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which

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reflecting its expectation that Swinerton perform until construction was complete. However, neither reason mandated Swinerton business-as-usual performance of work it viewed as extra for which the County had failed to respond to requests for a work order or additional compensation, or required Swinerton to undertake work which had not been authorized and which was beyond Swinerton’s scope of services. Based on our review of the record, it does not appear that Swinerton even performed the work underlying its fee dispute in protest.

(while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' ” (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032, original emphasis.) “ ‘The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.’ ” (*Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094, original italics.) “It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349–350.)

Here, there was no express contractual obligation for the County to undertake any of the actions Swinerton contends the County should have taken. Neither the contract or ASA No. 9 includes terms that required the County to maintain the original scope of the South County Government Center Project. In fact, the contract between the parties plainly contemplates that the “County may request changes in Swinerton’s scope of services.” Neither the contract or any later work order includes terms that required the County to increase Swinerton’s budgeted compensation as a result of the project taking longer to complete. Nor does the contract or any work order require the County to compensate Swinerton for architectural services that it undertook beyond its scope of work absent any written agreement with the County to pay for such services. Rather, as discussed above, the clear and explicit terms of the contract required mutual agreement about any changes or amendments to the contract for any increases to Swinerton’s compensation. The same goes for amendments to Swinerton’s scope of work. The duty of good faith and fair dealing cannot create obligations not contemplated by the contract between Swinerton and the County.

Given that the payments Swinerton seeks would extend to the County obligations not contemplated by the contract—namely, compensation without a written work order—

we reach the same conclusion as the trial court that summary judgment is properly granted for the County on the breach of the covenant of good faith and fair dealing.

In light of our consideration of the merits of Swinerton's breach of covenant claim, we do not address Swinerton's arguments that the trial court erred in granting the County summary judgment on this claim based on deficiencies in Swinerton's pleading. Because our ruling goes to the merits of Swinerton's claim, we also do not address Swinerton's appeal of the trial court's demurrer as to the same cause of action based on a deficient pleading, which is moot.

***Government Claims Act***

Because the issues determined on summary judgment resolve the matter, we do not address the timeliness of Swinerton's claims.

**DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

*Swinerton Mgt. v. Solano*, A144640