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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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SACRAMENTO MUNICIPAL UTILITY DISTRICT,

Plaintiff and Appellant,

v.

FCC CORPORATION formerly named FRU-CON  
CONSTRUCTION CORPORATION,

Defendant and Appellant.

C064248

(Super. Ct.  
No. 05AS00862 )

ORDER MODIFYING OPINION  
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion in the above matter, filed July 9, 2012, is modified to insert a footnote at the end of the first full paragraph on page 46, as follows:

In a petition for rehearing, Fru-Con argues that we must grant rehearing because we affirm the summary adjudication on a ground not relied upon by the trial court without having given Fru-Con the opportunity to address that new ground in supplemental briefing. Specifically, Fru-Con contends our conclusion that the section C work was not a separable part of the construction project lies at odds with the trial

court's finding the section C concrete work was separable. We reject Fru-Con's contention.

Code of Civil Procedure section 437c, subdivision (m)(2), requires us to grant rehearing if we affirm summary adjudication "on a *ground* not relied upon by the trial court." (Italics added.) Section 437c does not compel supplemental briefing if we happen to disagree with a finding that was not relied upon by the trial court in granting summary adjudication.

Fru-Con acknowledges that the trial court "held that GC-36 authorized SMUD to terminate the entire contract . . . ." As the trial court explained: "Under GC-36, SMUD could terminate Fru-Con's 'right to proceed with the work' if Fru-Con refused or failed 'to prosecute the work, or any separable part thereof, with such diligence as will insure [*sic*] its completion within the time specified in' the parties' agreement. It is undisputed that on December 22, 2004, more than two months after SMUD had informed Fru-Con of its default, Fru-Con adamantly stated that it would not remove Section C of the cooling tower foundation as directed by SMUD."

We affirm on the same ground, namely that General Condition 36 allowed SMUD to terminate Fru-Con's right to continue work on the construction project for refusal to comply with the project's technical specifications. Whether refusal to comply with the technical specifications pertained to a separable or nonseparable part of the construction makes no difference because General Condition 36 did not have a materiality condition. Our agreement with the trial court that General Condition 36 allowed SMUD to terminate Fru-Con under the construction contract renders inapplicable subdivision (m)(2) of Code of Civil Procedure section 437c.

The remaining footnotes in the decision are to be renumbered accordingly.

This modification does not change the judgment.

The petition for rehearing is denied.

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RAYE, P.J.

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ROBIE, J.

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HOCH, J.