EXAMINERS' ANALYSIS OF QUESTION NO. 6

Insider has a claim for breach of contract and should recover the entire $200,000.

A valid contract to build the mansion for $3.1 million existed once Fantastic Homes selected Insider's bid without change. A bid made in response to a request for bids is a valid offer, and a contract is formed when that bid is accepted without change. Restatement Contracts, 2d, § 26, comment d.

An examinee could argue in the first instance that the contract contemplated cost overruns. The parties had a prior course of dealing on fixed bid contracts where Insider was paid for cost overruns. This contract did not expressly preclude overruns. Moreover, when Fantastic Homes offered the bonus for not exceeding the bid price, it arguably contemplated overruns. On the other hand, the examinee could argue that the bonus took the contract out of the prior course of dealings and was a warning to Insider not to overrun his bid. But this latter analysis relies on the bonus offer, which came after the initial contract was formed and appears only to be an incentive to stay within the initial bid price. The intent of this question is for the examinees to analyze modification principles, but a solid discussion of whether the initial contract itself contemplated cost overruns will be awarded points.

The better argument is that the contract was modified. When Insider realized the costs would exceed his bid, he advised Fantastic Homes of this fact. Had Insider not had a history with Fantastic Homes, Insider's notice that the bid amount needed to be modified may not have been enough to amend the contract. Moreover, the contract contemplated the possibility or even likelihood of a cost overrun by offering a bonus for not exceeding the bid. Fantastic Homes accepted the modification by not objecting and allowing Insider to proceed, as it routinely had done in the past. *Gorham v Peerless Life Ins Co*, 368 Mich 335, 342 (1962). See also, Restatement Contracts, 2d, § 69(1) (silence constitutes acceptance where because of prior dealing or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept). Indeed, Fantastic's statement "thanks for the heads up" can also be construed as an implied agreement. *Dolen v Continental Airlines/Continental Express*, 454 Mich 373, 383 (1997) (when parties manifest their agreement by conduct, the agreement is an "implied-in-fact" contract).

The Statute of Frauds is not an issue because the contract contemplated being completed in less than one year. Examinees may also discuss the application of the Parole Evidence Rule and conclude that it does not apply to subsequent modifications. *Quality Products v Nagel Precision Inc*, 469 Mich 362, 371 (2002). Minor credit is given for those points.

Under a breach of contract theory, Insider's recovery should be the contract price as modified by Fantastic Homes' acceptance by silence and past practice, *i.e.*, payment of the additional $200,000. Having exceeded the original $3.1 million bid amount, Insider is not entitled to the $100,000 bonus.

An alternative argument for which some credit should be given for a cogent analysis is that Insider cannot recover under a contract theory because Fantastic Homes' knowledge of the cost overrun coupled with its silence was not "clear and convincing" evidence of mutuality, which is a requirement under a waiver or modification analysis. *Quality Products and Concepts Co v Nagel Precision Inc*, 469 Mich 362 (2003). Where course of conduct (including silence) is the alleged basis for modification, a waiver analysis is necessary. Knowledge coupled with silence was not clear and convincing evidence of mutuality in *Quality Products*. But the original contract there contained express non-modification and anti-waiver language. The better answer under the facts presented here is that silence or failure to object meets the clear and convincing evidence of a course of conduct waiver because there have been prior affirmative expressions of assent (Fantastic Homes' prior waivers by paying Insider in full under the same circumstances), there exists no non-modification or anti-waiver language in the contract, and there is an expressed intent to reward Insider monetarily for not exceeding the contract bid. See *Cascade Elec Co v Rice*, 70 Mich App 420, 427-428 (1976).

In discussing modification, some examinees may also appropriately discuss the principle that oral modification of a contract requires additional consideration. MCL 566.1 provides that written modification of a contract is not invalid for lack of consideration. This section is not intended to invalidate all oral modification agreements, just those without valid consideration. *Minor-Dietiker v Mary Jane Stores of Mich Inc*, 2 Mich App 585 (1966). Consideration arguably exists here because Fantastic receives the benefit of no delay - however brief - occasioned by Insider having to locate and contract for substitute products. See *GMC v Department of Treasury*, 466 Mich 231 (2002) (courts do not examine the adequacy of consideration); *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6 (2005). In addition, Restatement of Contracts Second, § 89 provides modification where the contract has

not been fully performed by either party, does not require additional or new consideration.

Assuming the contract claim fails, the alternative theory of recovery that Insider could argue would be unjust enrichment/quantum meruit. If there is a breach of contract claim, a quasi-contract claim would be precluded. An applicant could observe that the original contract for $3.1 million remains and that since there is a contract covering the same subject matter, it precludes a quasi-contract theory for recovery of the $200,000. Points for this observation will be given, but the question expressly asks the applicant to argue an alternative theory and it is expected that they will do so. *Cascade Electric, supra*, at 426.

Elements of quantum meruit/unjust enrichment would arguably be satisfied in the absence of a contract. Fantastic Homes withheld payment of the $200,000, even though Insider's total costs remained within parameters authorized by Mr. Money. Fantastic Homes' refusal to pay Insider the additional $200,000 was--in addition to being a reversal of its past practice--based on Fantastic Homes' desire to keep that money for itself. The elements of a claim of quantum meruit/unjust enrichment are (1) the defendant (Fantastic Homes) received a benefit from the plaintiff (Insider), (2) without providing compensation for the benefit, and (3) it would be inequitable for the defendant to retain the benefit. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463 (2003); *Keywell v Rosenfeld & Bithell*, 254 Mich App 300 (2002). Here, Fantastic Homes paid only $3.1 million of Mr. Money's allocated funds for a home it knew cost Insider $3.3 million to build. The $3.3 million total was within the range authorized by Mr. Money. And Fantastic Homes' offer of the $100,000 bonus for not exceeding the bid demonstrated that Fantastic Homes always intended to pay Insider something in excess of the $3.1 million bid. Nevertheless, Fantastic Homes did nothing to prevent Insider from incurring the additional costs, which he could have avoided by making substitutions had Fantastic Homes not been silent. Had Insider made the substitutions and stayed within the bid, he would have received the $100,000 bonus for a total of $3.2 million.

If analyzed under quantum meruit/unjust enrichment, the recovery also should be $200,000 in restitution. *i.e.*, the additional value Fantastic Homes received by remaining silent when notified of the need for modification. *Morris Pumps v Centerline Piping Inc*, 273 Mich App 187 (2006); Restatement Contracts, 2d, § 371.

Some examinees may raise promissory estoppel as an argument. Promissory estoppel does not apply because it requires a clear and

definite promise on which the party relied to its detriment. *State Bank of Standish v Curry*, 442 Mich 76, 84 (1993). The same standard governs whether a promissory estoppel promise is sufficiently clear as governs whether a contract offer is sufficiently definite to enforce. *Id*, 88. No definite promise exists here, and silence as course of dealings is insufficient to support this element of the claim.