EXAMINER'S ANALYSIS OF QUESTION NO. 8

Builder is not liable for breach of contract

No contract was formed between Township and Builder because Township did not validly accept Builder's offer. If an offer "prescribe[s] no specific form of acceptance," then "the manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct." *Ludowici-Celadon Co v McKinley*, 307 Mich 149, 153 (1943), quoting 1 Restatement Contracts, § 21. But if an offer prescribes an exclusive mode of acceptance, a contract is formed only if "acceptance is unambiguous and in strict conformance with the offer…." *Independence Twp v Reliance Bldg Co*, 175 Mich App 48, 53 (1989) (citations omitted); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452 (2006).

Township's bid advertisement prescribed the exclusive mode of acceptance: "formal notice of acceptance" sent to the selected builder. Township's attempt to accept Builder's offer did not constitute "manifestation of mutual assent," *Ludowici-Celadon*, 307 Mich at 153, because it did not conform to this mode of acceptance. Architect sent Builder a deposit and architectural requirements but did not include any language stating that Township was formally accepting Builder's bid. The conclusion that this did not constitute a "formal notice of acceptance" is further supported by two facts: First, Township's board had not yet approved awarding the contract to Builder; and second, Township in contrast sent a "formal notice" to the second lowest bidder, Contractor. "As plaintiff prescribed the exclusive manner of acceptance, any attempt on its part to accept defendant[']s] bid offer in a different manner failed to bind defendant[] in the absence of a meeting of the minds on the altered type of acceptance." *Independence Twp*, 175 Mich App at 54; see also *Pakideh v Franklin Commercial Mtg Grp, Inc*, 213 Mich App 636, 642 (1995) ("[W]e conclude that because plaintiff did not timely accept defendant's offer in the manner specified in the commitment letter, no contract was formed.").

Township seeks to offer evidence of industry practice showing that mailing a deposit and architectural specifications constitutes notice of acceptance. But "where a contract is not ambiguous, evidence of custom and practice in an industry is not admissible." *Independence Twp*, 175 Mich App at 54. Here, the language of the bid advertisement requiring "formal notice of acceptance" was unambiguous (a conclusion again buttressed by the fact that Township sent such a "formal notice" of acceptance to

Contractor). See *id.* at 53 (finding identical language "clear and unambiguous"). Consequently, Township's evidence is inadmissible.

Township's board approval of awarding the contract to Builder also failed to satisfy the requirements for acceptance. Moreover, notice of the approval was not sent to Builder. Thirty days having passed since Builder submitted its bid, Builder was free to revoke it.

Since the court is "bound to construe an unambiguous agreement according to its plain meaning," *id.*, the court should conclude that Township did not validly accept Builder's offer and no contract was formed. Township's claim for breach of contract against Builder thus fails.

Contractor is liable for breach of contract

A valid contract was formed between Township and Contractor. "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 246 (2008) (citation and internal quotation marks omitted); see also *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359 (1982) ("[A] contract … can fail for indefiniteness if the trier of fact finds that it does not include an essential term …."). However, "when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness…. [T]he absence of certain terms … does not necessarily render a contract invalid…. [A] contract may be enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement[.]" *Calhoun Cty v Blue Cross Blue Shield Mich*, 297 Mich App 1, 14-15 (2012).

Here, the only term alleged to be missing is an indication of whether the amount due would be paid in even installments or at specified benchmarks in the construction process. All essential promises of the parties, including the amount of money owed by Township and the required performance owed by Contractor (as specified by Architect), are set forth with reasonable certainty. Township indicated its intent to be bound by the agreement when it advertised for bids and expressly accepted Contractor's bid; Contractor indicated its intent to be bound by the agreement when it submitted its bid.

The fact that the parties have not specified the precise method of payment is not fatal to the formation of a valid contract under these circumstances. "So long as the essentials are defined by the parties themselves, the law supplies the missing details by

construction." *Nichols v Seaks*, 296 Mich 154, 159 (1941); see also *Rasheed v Chrysler Corp*, 445 Mich 109, 126 n 25 (1994) ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the courts." (quoting Restatement Contracts, 2d, § 204)).

To the extent that the terms regarding Township's payment to Contractor are ambiguous, a court can consider extrinsic evidence to fill in any gaps and thereby resolve the ambiguity. As the Michigan Supreme Court has explained:

> [F]acial or patent ambiguity in a contract does not render it void. If the language of a contract is ambiguous, the court's duty is to look beyond the bare language of the agreement to determine its meaning. . . . Ambiguity in a contract focuses and intensifies the court's duty to ascertain the intent of the parties in order that the agreement be carried out; it does not invalidate it.

Stine v Continental Cas Co, 419 Mich 89, 112 (1984) (footnotes omitted); see also, *e.g.*, *Brauer v Hobbs*, 151 Mich App 769, 774 (1986) ("Extrinsic evidence … is admissible to clarify the meaning of any ambiguous contract. In no event is an ambiguity to result in a declaration that the contract is void." (citation omitted)); *Brotman v Roelofs*, 70 Mich App 719, 727 (1976) ("Written provisions which are indefinite may be clarified by extrinsic factors."). Thus, the court would consider the Township's proffered evidence that the usual method of payment is at specified benchmarks in the construction process. Such evidence would allow the court to fill in the missing payment details and resolve the ambiguity, rendering the contract enforceable. The court should find in favor of Township's claim for breach of contract against Contractor.