STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2011-CV-01887

Smith Contracting Inc.,

Plaintiff,

vs.

North Dakota Public Service Commission Abandoned Mine Lands Division,

Defendant.

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR HEARING

*** *** ***

TO: ALL PARTIES OF RECORD

PLEASE TAKE NOTICE that Defendant North Dakota Public Service Commission, Abandoned Mine Lands Division, has submitted the attached *Defendant's Motion for Summary Judgment* pursuant to Rule 56 of the North Dakota Rules of Civil Procedure and Rule 3.2 of the North Dakota Rules of Court.

PLEASE TAKE FURTHER NOTICE that Defendant requests a hearing on the motion.

Dated this 14th day of September, 2012.

By Mitchell D. Armstrong

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Attorneys for Defendant, North Dakota Public Service Commission Abandoned Mine Lands Division

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

*** *** ***

Pursuant to Rule 56 of the North Dakota Rules of Civil Procedure and Rule 3.2 of the North Dakota Rules of Court, Defendant North Dakota Public Service Commission, Abandoned Mine Lands Division, hereby makes this motion for summary judgment. This motion is supported by the attached brief, affidavit, and all of the materials thus far contained in the record.

Dated this 14th day of September, 2012.

By Mitchell D. Armstrong

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SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2011-CV-01887

Smith Contracting Inc.,	)	
	)	
Plaintiff,	)	
	)	**DEFENDANT'S BRIEF IN SUPPORT OF**
vs.	)	**MOTION FOR SUMMARY JUDGMENT**
	)	
North Dakota Public Service Commission Abandoned Mine Lands Division,	)	
	)	
Defendant.	)	

*** *** ***

I. INTRODUCTION

This lawsuit relates to an abandoned strip mine reclamation project, referred to as the 2010 Buechler/Velva AML Project ("the project"). The project site is located approximately nine miles southwest of Velva, North Dakota. After public bidding, Plaintiff Smith Contracting, Inc. ("Smith Contracting"), was awarded the contract for the project. Smith Contracting did not perform under the contract and eventually walked off the job. Defendant North Dakota Public Service Commission, Abandoned Mine Lands Division ("the PSC") declared a default and effectively terminated the contract. The PSC made a claim on Smith Contracting's performance bond, and the bonding company accepted, hired a completion contractor, and the project was ultimately completed in September 2011.

Smith Contracting brought this suit alleging breach of contract, breach of implied contractual obligation of good faith and fair dealing, breach of implied warranties of accuracy and providing bidders with information that will not mislead, fraud, negligent misrepresentation, breach of reasonable standards, doctrine of unconscionability, and equitable rescission. See

generally *Summons* (Aug. 26, 2009); *Complaint* (Aug. 26, 2009). The PSC answered, denying Smith Contracting's claims, and asserting a counterclaim for breach of contract and liquidated damages. See generally *Answer, Jury Demand, and Counterclaim* (Oct. 30, 2011). The PSC requests summary judgment, dismissing Smith Contracting's claims against it in their entirety with prejudice.

II. RELEVANT FACTS

In February 2010, the PSC began soliciting bids for the project. The PSC sought bids from qualified construction firms to complete the project as specified during the 2010 construction season. *Information for Bidders* at p. 2 (February 2010) (filed herewith as Exhibit 3 to the *Affidavit of Mitchell D. Armstrong*).[1] The *Information for Bidders* required the bid materials to be presented to the PSC by April 19, 2010. Id. A pre-bid, on-site conference was scheduled for April 7, 2010, to afford an opportunity to prospective bidders to visit the site and receive clarification related to the solicitation. Id. at p. 13, cl. 10. The *Information for Bidders* indicated *Standard Specifications for AML Reclamation Projects (February 2010)* outlined requirements for the project. Id. at p. 14, cl. 16. The *Information for Bidders* specified that work would begin within ten days of issuing a notice to proceed and the performance period would be 150 calendar days (approximately May 17 to October 13, 2010). Id. at p. 14, cl. 17. The *Information for Bidders* included a sample contract that would be required to be entered into upon the bid award. Id. at pp. 15-25.

The scope of work indicated:

> This project involves the backfilling of pits and highwalls at two

[1] Seven plan sheets were also provided to prospective bidders upon request. The plan sheets are not being provided because Smith Contracting has not alleged any error in the plans. *Barron Depo.* at 94:14-22 (*Armstrong Aff.*, Ex. A).

abandoned strip mines and the performance of other associated work items. It is estimated that approximately 1,850,000 cubic yards of excavation will be required to perform this work. This excavated material will be used, as shown on Plan Sheets, to backfill the highwalls and pits.

The contractor is advised that most of this site is located within areas containing abandoned strip mine workings. The contractor is required to understand that the excavation, backsloping, backfilling, and construction work specified in this IFB is inherently dangerous due to the presence of these unstable spoil piles, pits, highwalls, and end walls. The contractor is required to take the necessary precautionary steps to adequately protect workers and equipment used to complete this project.

The contractor shall provide all material, equipment and personnel necessary to perform the work. The contractor shall be capable of completing this project within one hundred fifty (150) consecutive calendar days between approximately May 17, 2010 and October 13, 2010. Please note that no work will be allowed on holidays or weekends unless specifically approved by the Project Manager.

Standard Specifications for AML Reclamation Projects presented under separate cover are understood to be incorporated into this contract.

Id. at p. 27. Excavation of spoil piles and highwall areas and backfilling of the highwalls and filling the pits was the major portion of the project.

The specific provisions of this work in the *Information for Bidders* provided, in relevant part:

D. DIRT WORK

1. **Scope of Work** — This item shall consist of the excavation of the spoil piles and highwall areas and the backfilling of the highwalls and filling of the pits as shown on Plan Sheets 2 of 7 through 7 of 7 and as described herein.

2. **Construction Requirements** — The spoil piles, pits and highwalls, as shown on the Plan Sheet 2 of 7, shall be backsloped and backfilled so as to leave a ground surface with approximate configuration of that shown on the Plan Sheets.

. . . .

. . . .

It is estimated that approximately 1,850,000 cubic yards of material must be

removed from existing spoil piles and highwall areas, as shown on Plan Sheets 3 of 7, 4 of 7, and 7 of 7, to achieve a desired slope. The excavated material will be moved to the pit and utilized as backfill material to achieve the desired post-reclamation topography of that shown on Plan Sheets 3 of 7, 5 of 7 and 7 of 7. The excavation areas will be cut to grade and any excess material not needed to meet final grade shall be placed along the entire slope of the fill areas. ...

Haul distance will vary, the contractor shall be familiar with the volume of material to be placed in the pit.

Please note that no extra payment will be made for rock that is moved into the pit and highwall fill areas. Also note that no extra payment will be made for any muddy or wet conditions encountered in the cut or fill areas. . . . .

....

Total payment for the dirt work line item will not exceed the total line item bid amount until the final survey results are completed; however, the dirt work production figures shall be submitted through the completion of the project work.

....

4. **Basis of Payment** — Payment shall be made at the contract unit price. Such payment shall constitute full payment for all labor, materials, equipment and any other incidentals required to complete the work.

Id. at pp. 30-31. A sample bid form was also provided with the *Information for Bidders*. Id. at 47-48.

The *Standard Specifications for AML Reclamation Projects* provide:

The bidder is expected to examine carefully the site of the proposed work, the bid form, plans, specifications, special provisions and contract forms before submitting a bid. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of all contract documents. ....

Standard Specifications for AML Reclamation Projects (February 2000) at p. 6, cl. 103.5 (*Armstrong Aff.*, Ex. 1).

David Smith is the owner of Smith Contracting. *Deposition of David Smith* at 1 (July 25, 2012) (*Armstrong Aff.*, Ex. B) Smith Contracting is based in Butte, Montana, and performs heavy dirt moving, work on tailings dams, mine tailings, train loading and hauling, and subdivision work. Id. at 6. Lee Barron is a project manager for Smith Contracting. *Deposition of Lee Barron* at 7-9 (July 25, 2012) (*Armstrong Aff.*, Ex. A) As project manager, Barron's roles include acting as a liaison between the owner and engineers, bidding jobs, making sure the engineers have the materials they need to do the job, and having general oversight on projects. Id. at 9-10. Barron spotted this project on the internet in early 2010. Id. at 12-13. Barron reviewed the *Information for Bidders* and the plan sheets in preparing Smith Contracting's bid. Id. at 13-14. Barron bid the job without looking at or obtaining the *Standard Specifications*, though he knew before bidding they existed. Id. at 15.

David Smith attended the on-site conference on April 7, 2010. *Smith Depo.* at 9. Before attending the on-site conference, Smith reviewed the *Information for Bidders*. *Smith Depo.* at 10-11. Smith alleges that at the conference, another contractor asked what kind of conditions to expect on site, whether the material was consolidated or unconsolidated. Id. at 12-13. Smith says he remembers a PSC representative stating the material was unconsolidated. Id. Smith, however, concedes there was no discussion on-site about the definitive characteristics of the material, whether it was clay or loam or other type of material. Id. at 18. Smith did not ask any questions at the meeting, did not seek clarification on the type of material, and did not talk with any other North Dakota contractors about the material on site. Id. at 13, 24. Following the conference, Smith testified he dug three small holes and the material appeared to be a "silty loam." Id. at 13-14. Smith did not seek any further information from the PSC regarding the nature of the materials "because it looked like it was just a big pile of dry dirt. Wherever the

piles were, they were just decomposed kind of and, you know, half grown in with grass and that." Id. at 17.

Based on Smith's assessment from the samples dug, the IFB, and the plan sheets, Barron proceeded to prepare the bid. *Barron Depo.* at 16-17. Barron testified it is important to find out what type of material is on site. Id. at 24-25. Neither Smith nor Barron did any other research about the project site or the type of material at the site. Id. at 18; *Smith Depo.* at 25-27. Before working for Smith Contracting, Barron worked for the United States performing soil surveys in Northern Minnesota. *Barron Depo.* at 25. He was aware that soil surveys are published and can be found online. Id. at 25-26. However, he did not check for a soil survey, or do any other research, on the types of soil in the area of the project. Id. at 18-19, 25.

Smith Contracting submitted a bid on this project for $1,225,500. *Smith Contracting's Bid* (*Armstrong Aff.*, Ex. 4). Barron prepared most of the bid calculations, including the dirt work line item for $00.47 per cubic yard. *Barron Dep.* at 29-30. Smith Contracting was the low bidder on the project by $478,428. See *2010 Buechler/Velva Bidders List* (*Armstrong Aff.*, Ex. 30). After the bids were opened, Mark Knell (environment/design engineer and project manager for the PSC) and William Dodd (assistant director of the AML division) separately called Barron to verify Smith Contracting's bid due to the difference between it and the next lowest bidder. *Deposition of Mark Knell* at 52-53 (July 26, 2012) (*Armstrong Aff.*, Ex. C); *Deposition of William Dodd* at 32 (July 27, 2012) (*Armstrong Aff.*, Ex. E); *Barron Depo.* at 35-36, 39. Barron admits he informed Knell, "I don't think we're low because I think we can do this." *Barron Depo.* at 36.

Smith Contracting was then awarded the contract. *Notice to Award* (*Armstrong Aff.*, Ex. 50). Smith Contracting signed the Contract for the project on May 5, 2010. *Contract No. AM-*

588-10 (*Armstrong Aff.*, Ex. 35). The contract contains several clauses and incorporates the *Invitation for Bid* and *Standard Specifications*. Id. at pp. 10-11. Smith Contracting sent a letter to the PSC on May 7, 2010, providing details and a project schedule. *Barron Depo.* at 51 & Ex. 5. The letter estimated Smith would begin work on May 24, 2010 and complete the project on September 30, 2010. Id. The PSC then forwarded a Notice to Proceed, which was signed by Smith Contracting on May 19, 2010. *Notice to Proceed* (*Armstrong Aff.*, Ex. 6).

Smith Contracting mobilized equipment close to the site after signing the Notice to Proceed. See *Barron Depo.* at 45-46; *Smith Depo.* at 30-34. On June 5, 2010, Smith Contracting ultimately began work on the project. See *Barron Depo.* at 64. The PSC became concerned with Smith Contracting's progress and the lack of sufficient equipment and employees on site, and sent a letter to Smith Contracting on June 28, 2010. *Deposition of James Deutsch* at 97 (July 26-27, 2012) (*Armstrong Aff.*, Ex. D) & Ex. 8. At the time, only 21,000 cubic yards of the required 1,850,000 cubic yards had been moved. Id. Smith Contracting submitted a revised schedule on June 11, 2010, which indicated 186,300 cubic yards should have been moved by the end of the day June 26, 2010. Id. The PSC requested Smith Contracting provide an updated project schedule and mobilize additional equipment and manpower. Id.

Smith Contracting sent a letter to the PSC on July 2, 2010, addressing the PSC's concerns and providing an updated project schedule. (*Armstrong Aff.*, Ex. 9). The letter proposed to double shift, instead of bringing in more equipment. Id.; see also *Barron Depo.* at 77, 80, 83-84. Attached to Smith Contracting's July 2, 2010, letter was an updated production schedule, which estimated the dirt work line item would be completed on September 25, 2010. Ex. 9; see also *Barron Depo.* at 86-87. After Smith continued to remain behind schedule, Barron sent a letter to the PSC on August 4, 2010. *Barron Depo.* at 90 & Ex. 10. Barron admits that this letter was the

first time he had mentioned anything about alleged different site conditions. *Barron Depo.* at 65, 81, 91). Deutsch (the Director of the Abandoned Mine Lands Division of the PSC) confirms that August 4, 2010, was his first indication received by Smith Contracting that it had any concerns about the type of material at the project site. *Deutsch Depo.* at 28.

The PSC responded on August 10, 2010, noting concerns with Smith Contracting's progress and addressing Barron's contentions. Ex. 11. The PSC reiterated its concern about Smith Contracting's ability to fulfill the terms of the contract. Id. As of August 1, Smith Contracting had moved approximately 350,000 cubic yards, less than 20%, of the required 1,850,000 cubic yards. Id. The letter indicated the PSC would be willing to discuss a short extension to the performance period and requested a meeting between Smith Contracting, PSC, and Smith Contracting's bonding company, First National Insurance Company of America, to determine the steps and procedures to be followed to insure required work would be completed. Id.

In his deposition, Barron agreed that, at the time of the PSC's response, the PSC had reason to believe the contract was not going to be completed on time. *Barron Depo.* at 105:20. Barron did not dispute that Smith Contracting had only moved 350,000 cubic yards as of August 1. Id. at 111-12. A meeting was held with the PSC, Smith Contracting, and the performance bond company on August 20, 2010. *Deutsch Depo.* at 43-45. At the meeting, Smith Contracting's August 4, 2010 correspondence was discussed. *Barron Depo.* at 108-09. Smith Contracting requested additional time in order to complete the project, and for the first time, requested more money in order to complete the project. *Barron Depo.* at 73. The PSC's concerns about Smith Contracting being behind in schedule were also discussed. Id. at 108-09.

On August 25, 2010, Smith Contracting submitted a request for a change order. (*Armstrong Aff.*, Ex. 12). Smith Contracting requested additional money and time to complete the project by October 30, 2010. Id. The PSC denied Smith Contracting's request. *Deutsch Depo.* at 52 & Ex. 13 (Sept. 2, 2010). Smith Contracting's requested change order would have increased the total contract price from $1,225,500 to $2,953,500, more than any of the other bids on the project. Id.; see also *Barron Depo.* at 129; Ex. 30. Further, Smith Contracting's request of $1.37 per cubic yard was almost triple the per unit price in its bid. *Deutsch Depo.* at 55. In its denial letter, the PSC paraphrased appropriate contract language, stating "A change order cannot be issued in order to increase the contractors profit or convert a loss to a profit. A contractor who has underestimated his bid or encountered unanticipated expense or inefficiencies may not use a change order as an excuse to reform the contract or shift his own risks or losses to the Commission." Ex. 13; see also Ex. 1, p. 13, § 105.5. Ultimately, the PSC indicated its position was that Smith Contracting's inadequate performance was due to underbidding the project, not mobilizing sufficient equipment, and inefficient operation at the site. Ex. 13, p. 2; *Deutsch Depo.* at 76.

Smith Contracting ultimately walked off the job on or about September 15, 2010. *Dodd Depo.* at 26; *Smith Depo.* at 52-54. Smith Contracting's representatives testified it was apparent that it could not get the job done so they decided to wrap things up and maybe come back and finish in 2011, though Smith Contracting admits no such request to finish the project in 2011 was ever made to the PSC. *Smith Depo.* at 52-54; *Barron Depo.* at 137-38.

On September 30, 2010, the PSC sent a Notice of Default for Failure to Perform Required Work on the Buechler/Velva AML Project. (*Armstrong Aff.*, Ex. 14). The letter detailed the PSC's plan to initiate action with the bonding company for performance and payment bonds on

the project to perform the remaining work. Id.; see also *Deutsch Depo.* at 80. Smith Contracting's performance bond company accepted the claim on the bond, entered into a tender agreement with the PSC, and supplied a completion contractor to complete the project. *Tender Agreement* (*Armstrong Aff.*, Ex. 45); *Deutsch Depo.* at 80. Kern & Tabery completed the project on September 30, 2011. *Deutsch Depo.* at 82-83; *Knell Depo.* at 135-38; Ex. 41.

The PSC requests summary judgment because no genuine issue of material fact exists which would allow Smith Contracting to prevail. In addition, Smith Contracting's *Complaint* must be dismissed as a matter of law because it has failed to follow the applicable notice requirements for bringing its claim and has failed to exhaust administrative remedies. The PSC requests Smith Contracting's *Complaint* be dismissed with prejudice in its entirety.

III. LAW AND ARGUMENT

The standard for summary judgment is well-settled:

> Under Rule 56, N.D.R.Civ.P., summary judgment is a device used to promptly and expeditiously dispose of an action without a trial if a party is entitled to judgment as a matter of law, and no dispute exists as to the material facts or the reasonable inferences to be drawn from the undisputed facts, or if resolving disputed facts will not change the result. The party seeking summary judgment has the burden of showing no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law.
>
> > In considering a motion for summary judgment, a court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from that evidence to determine whether summary judgment is appropriate. Although the party seeking summary judgment has the burden to clearly demonstrate there is no genuine issue of material fact, the court must also consider the substantive standard of proof at trial when ruling on a summary judgment motion. The party resisting the motion may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact, and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue

> of material fact. Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. When the opposing party fails to present competent evidence on an essential element of the claim to the district court in opposing a motion for summary judgment, it is presumed such evidence does not exist.

Grandbois and Grandbois, Inc. v. City of Watford, et al., 2004 ND 162, ¶ 17, 685 N.W.2d 129 (internal citations and quotations omitted).

A. Summary Judgment Is Appropriate On All Claims Because Smith Contracting Failed to Comply with Statutory, Jurisdictional Notice Requirements and Failed to Exhaust Administrative and Contractual Remedies.

Section 32-12-03, N.D.C.C. provides:

> No action upon a claim arising upon contract for the recovery of money only can be maintained against the state until the claim has been presented to the department, institution, agency, board, or commission to which claim relates for allowance and allowance thereof refused. The neglect or refusal of the office to act on such claim for a period of ten days after its presentation for allowance must be deemed a refusal to allow the claim.

The North Dakota Supreme Court has stated:

> In 1991, the Legislature amended N.D.C.C. § 32-12-03 to require contractual claims for money to be presented to the "department, institution, agency, board, or commission to which the claim relates" instead of the "office of management and budget." 1991 N.D. Sess. Laws ch. 359, § 1.". ...
>
> ....
>
> The 1991 amendments to N.D.C.C. § 32-12-03 were "housekeeping" changes intended to eliminate OMB from the process for making contractual claims against the State and, instead, to require a claim to be made directly to the appropriate department, institution, agency, board, or commission. Hearing on H.B. 1097 Before the Senate Judiciary Comm., 52nd N.D. Legis. Sess. (Jan. 28, 1991) (testimony of Bud Walsh, OMB Director of Accounting Operations). The 1991 amendments changed only the entity that must be presented with a written claim for money. Nothing in the legislative history suggests the amendments deleted the requirement for presentment of a written claim for money. As in Livingood [v. Meece, 477 N.W.2d 183 (ND 1991)], we reject the argument that

> an administrative appeal satisfies the statutory requirement for presentment of a written claim for money. We believe construing the statute to allow an administrative appeal to satisfy the statutory requirement for presentment of a claim would make meaningless the language requiring presentment of a claim for the recovery of money. We construe statutes to give meaning to each word and phrase, if possible. Raboin v. North Dakota Workers Comp. Bureau, 1997 ND 221, ¶ 32, 571 N.W.2d 833. We hold both versions of N.D.C.C. § 32–12–03 require presentment of a written claim for money to the designated entity.

Messiha v. State of North Dakota, 1998 ND 149, ¶¶ 16, 18, 583 N.W.2d 385.

Smith Contracting filed suit against the PSC without presenting written notice of its claim in accordance with the statute. The record is devoid of any such showing and Smith Contracting's *Complaint* also fails to provide any information or proof that it presented a written claim for money to the PSC before bringing this action. There were several written communications between Smith Contracting representatives and PSC representatives related to this project. However, none of the written communications satisfy or reference the notice requirements of the statute. Therefore, the Court does not have subject matter jurisdiction over Smith Contracting's claims, and they should be dismissed. Id., see also Dimond v. State Bd. Of Higher Educ., 1999 ND 228, ¶¶ 20-21, 603 N.W.2d 66 (university professor's failure to comply with the claim presentment requirement of N.D.C.C. § 32-12-03 rendered the trial court without jurisdiction over the professor's claim for breach of contract in his action against the State).

During the course of the contract, Smith Contracting requested a change order, which was denied. However, requesting a change order and submitting a claim to the department, agency, or institution at issue is not the same. Further, this lawsuit is markedly different from Smith Contracting's request for a change order because it seeks damages under a different theory, rather than a change to the contract price. The North Dakota Supreme Court has ruled that an administrative appeal is not enough to satisfy the notice requirement. Messiha, at ¶ 18. Further,

the Supreme Court has recognized several legitimate state interests are served by claim presentment requirements, including settlement. See, e.g., Messiha, at ¶ 17 (citing Herman v. Magnuson, 277 N.W.2d 445, 453-54 (N.D. 1979)). A denied change order is insufficient under the statute, particularly where the alleged damages and claims differ materially from the change order request. See *Complaint* at ¶¶ 56-66 (asserting damages on a modified cost basis based on equitable adjustment). Because Smith Contracting has failed to comply with statutory, jurisdictional notice requirements, its claim must be dismissed.

Smith Contracting also alleges three tort-like causes of action. See *Complaint*, ¶¶ 82-95 (alleging actual fraud, negligent misrepresentation, and "breach of reasonable standards"). However, this Court does not have subject matter jurisdiction over any tort claims because Smith Contracting failed to satisfy the notice requirements to bring tort claims against a state entity under N.D.C.C. § 32-12.2-04, which provides:

> 1. A person bringing a claim against the state or a state employee for an injury shall present to the director of the office of management and budget within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, the names of any state employees known to be involved, and the amount of compensation or other relief demanded. ...
>
> ...
>
> 5. A person bringing a legal action against the state or a state employee for a claim shall deliver a copy of the summons, complaint, or other legal pleading in which the claim is first asserted in the action to the director of the office of management and budget at the time the summons, complaint, or other legal pleading is served in the action. This provision is in addition to any applicable rule of civil procedure.

"A party seeking to bring a claim against the State or its employees must strictly comply with the requirements of N.D.C.C. § 32-12.2-04(1)." Voigt v. State, 2008 ND 236, ¶ 4, 59 N.W.2d 530 (emphasis added). A district court lacks subject matter jurisdiction for claims brought against the

state or a state employee if the notice-of-claim requirement of N.D.C.C. § 32-12.2-04 is not "strictly" complied with. Id.

With respect to any tort claims, Smith Contracting has failed to comply with N.D.C.C. §32-12.2-04 because it did not submit a notice of claim to the Office of Management and Budget within 180 days of its claim accruing and did not deliver a copy of the initial pleadings to the director of the office of management and budget when it brought this action. "If a party suing the state fails to satisfy the notice of claim provision under N.D.C.C. §32-12.2-04(1), dismissal of the party's complaint is proper." Voigt at ¶ 5.

"The plain language of the statute requires explicit written notice of the claim; actual notice is insufficient. The statute explicitly requires that the notice of claim must be presented to the director of the [Office of Management and Budget]. Presenting a claim letter to an assistant attorney general does not satisfy the statute." Ghorbanni v. North Dakota Council on Arts, 2002 ND 22, ¶¶ 8-9, 639 N.W.2d 507 (internal citations omitted). Smith Contracting's failure to strictly comply with the notice requirement of N.D.C.C. § 32-12.2-04 prevents this Court from having subject matter jurisdiction over any tort claim, and therefore, Smith Contracting's fraud, negligent misrepresentation, and breach of reasonable standards claims must be dismissed.

Not only did Smith Contracting fail to comply with the statutory, jurisdictional notice requirements, it also failed to exhaust its administrative remedies under the contract. The contract contains a disputes clause requiring Smith Contractor to attempt to resolve disputes arising by informal administrative process and negotiations in lieu of litigation. Ex. 35, p. 3. If the contractor follows the procedures available, and is not satisfied, it has an opportunity to appeal directly to the Public Service Commission rather than the Commission's representative. Id. In this case, Smith Contracting never took its dispute to the PSC, and therefore it has failed to

exhaust its administrative and contractual remedies and its claim must be dismissed. See Thompson v. Peterson, 546 N.W.2d 856, 861 (ND 1996) ("Our decisions have also consistently required exhaustion of remedies before the appropriate administrative agency as a prerequisite to making a claim in court. [several citations omitted] Failure to exhaust administrative remedies generally precludes making a claim in court.")

Regardless, even if the Court determines it has subject matter jurisdiction, summary judgment is warranted on Smith Contracting's claims.

B. Summary Judgment Should Be Granted on Smith Contracting's Breach of Contract Claims.

It is well-settled that:

> A breach of contract is the nonperformance of a contractual duty when it is due. The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. The burden of proving the elements of a breach of contract is on the party asserting the breach. Although the interpretation of a contract is a question of law, whether a party has breached a contract is a finding of fact that will not be reversed on appeal unless it is clearly erroneous. A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if it is not supported by any evidence, if, although there some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous concept of the law.

WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 13, 730 N.W.2d 841 (internal citations omitted).

"Ordinarily, the construction of a contract to determine its legal effect is a question of law for the court. In construing the terms of a contract, the contract should be considered as a whole, and every clause, sentence or provision, should be given effect consistent with the main purpose of the contract." St. Paul Fire and Marine Ins. Co. v. Amerada Hess Corp, 275 N.W.2d 304, 307 (ND 1979). "When a contractual term is in dispute, a factual question is raised for the court, and

this issue should be decided in a manner consistent with the other terms of the contract admitted by the parties." Id.

> The object of interpreting and construing a contract is to ascertain and give effect to the parties' mutual intention at the time of contracting. The interpretation of a written contract to determine its legal effect is a question of law. Except as otherwise provided by law, public and private contracts are interpreted by the same rules of interpretation. The parties' intention must be ascertained from the writing alone, if possible. A contract must be construed as a whole to give effect to each provision, if reasonably possible. A contract must be interpreted to make it lawful, operative, definite, reasonable, and capable of being carried into effect. Words in a contract must be construed in their ordinary and popular sense. If a contract is uncertain, the language of the contract should be interpreted most strongly against the party who caused the uncertainty to exist; however, for contracts between a public entity and a private party, it is presumed that all uncertainty was caused by the private party. N.D.C.C. § 9-07-19. Under N.D.C.C. § 9-08-02.1, any provision in a construction contract which would make the contractor liable for the owner's errors or omissions in the plans and specifications of the contract are against public policy and void.
>
> If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. If a written contract is ambiguous, however, extrinsic evidence may be considered to show the parties intent. Whether or not a contract is ambiguous is a question of law. An ambiguity exists when rational arguments can be made in support of contrary provisions as to the meaning of the language in question.

City of Bismarck v. Mariner Const., Inc., 2006 ND 108, ¶¶ 11-12, 714 N.W.2d 484 (emphasis added) (internal citations omitted).

Further, a written contract supersedes any prior oral negotiations or stipulations which were made before the execution of the contract. See N.D.C.C. § 9-06-07 ("[t]he execution of a contract, in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument"). Section 9-06-07, N.D.C.C., prohibits any testimony or evidence that could alter, vary, contradict, add to, or impeach the terms of the contract if the written contract is clear, complete, and unambiguous, absent fraud, mistake or accident. See Dahl v. Messmer, 2006 ND

166, ¶ 9, 719 N.W.2d 341; Garwruluk v. Poynter, 2002 ND 205, ¶¶ 8-9, 654 N.W.2d 400.

Smith Contracting's allegation the PSC breached its contract is based upon four main allegations: (1) differing site conditions; (2) initiating the commencement of the start date under § 109.3, knowing the road limits were in effect and for failing to extend contract time under § 109.6; (3) breach of the disputes clause requiring good faith negotiations; and (4) breach of contract for making claim against the bonding company and terminating the contract without justifiable cause. See *Complaint*, ¶¶ 67-69. No material issue of fact exists which would allow Smith Contracting to prevail on these allegations.

1. Summary judgment is warranted on Smith Contracting's allegations of breach of contract for "differing site conditions."

Smith Contracting alleges breach of contract due to "differing site conditions", alleging (1) the clay material was materially different than as indicated in the IFB and contract documents as the documents represented the conditions on the site to be "dirt", (2) it was indicated at the pre-bid meeting that the material was "unconsolidated", and (3) the conditions were reasonably unforeseeable based upon information available at the time of bidding. See *Complaint*, ¶¶ 68(1) (a) – (e). No genuine issue of material fact exists upon which Smith Contracting can prove the site conditions are different than what is provided for in the contract documents. Smith Contracting first alleges the material was different than what the contract documents represented them to be. Smith Contracting seems to base this allegation on the use of the term "dirt work" in the contract documents.

The *Information for Bidders* unambiguously refers to the material on site as "spoil piles", "highwall areas" and "pits." Ex. 3, p. 30. The contract clearly states the parties' intention as it clearly defines the material on site as "spoil piles", and Smith Contracting was required to move

the spoil piles into the pits and backfill the highwalls. Id. The contract does not contain any other descriptions and does not use the words "unconsolidated" or "loose" to further describe the spoil piles. Id. Smith Contracting acknowledges that the contract documents define the type of material on site as "spoil piles" and concedes that this is the actual material found on site. Lee Barron testified:

> Q. When you're bidding this project, can you just tell me your general understanding of what the intent of the project was, what you thought you were doing?
>
> A. Well, we were moving material from high areas to low areas and basically contouring the site. And then, later on, topsoil.
>
> Q. And the material you were moving was spoil piles. Would you agree with that?
>
> A. Yes.
>
> Q. Do you know what spoil piles are?
>
> A. Well, it's material that's been taken from one place and put in another in a stockpile of sorts.
>
> Q. Is that what was at the site, to your understanding?
>
> A. I believe so.

Barron Depo. at 22:6-22. In other words, the material on site was exactly what was contained in the contract documents—spoil piles.

Further, the contract specified a procedure for addressing differing site conditions, and Smith Contracting never raised or followed those procedures. *Standard Specifications* at p. 12, § 105.4. The undisputed facts indicate the PSC indicated the material on site consisted of spoil piles, and that is precisely what the material was. See id. at p. 6, § 103.5 ("The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is

satisfied as to the conditions to be encountered in performing the work and as to the requirements of all contract documents.")

Smith Contracting attempts to create ambiguity in the contract by stating it believed the material on-site was unconsolidated, loose dirt. Smith Contracting cannot identify any language in the contract to support its position. In fact, Smith Contracting admits that the terms "unconsolidated" and "loose" do not appear in the contract documents. *Barron Depo.* at 21. Smith Contracting attempts to base its claim on a heading of "dirt work" and interpret it to mean loose dirt. This argument is unreasonable and ignores the contract language that "titles or headings of sections and subsections herein are intended for convenience of reference and shall not be considered as having any bearing on their interpretation." *Standard Specifications* at p. 4, § 102.39.

The *Invitation for Bidders* had a "dirt work" heading generally describing the type of work to be done on the project. Under that heading, the materials are described as excavated "spoil piles" and "highwalls." *Information for Bidders* at p. 30. "In construing the terms of a contract, the contract should be considered as a whole, and every clause, sentence or provision, should be given effect consistent with the main purpose of the contract. ... When a contractual term is in dispute ... this issue should be decided in a manner consistent with the other terms of the contract admitted by the parties." St. Paul Fire and Marine Ins. Co. v. Amerada Hess Corp, 275 N.W.2d 304, 307 (ND 1979). When looking at the contract as a whole, it is clear that the use of the heading "dirt work" is used as a general heading and does not describe the material on site. Further, Smith Contracting concedes that "dirt work" is a generic term used in the industry, and admits to using this term to generally explain the type of work it does, which accounts for more than moving "unconsolidated, loose dirt." *Barron Depo.* at 19:19-22, 92-93; *Smith Depo.*

at 6-7 (describing the work Smith Contracting does as "heavy dirt moving" and "dirt work"). The contract cannot reasonably be interpreted as indicating the material on site was loose, unconsolidated dirt.

Finally, the contract provides it is Smith Contracting's responsibility to ascertain the materials on site. Ex. 1, § 103.5. Accepting Smith Contracting's argument would be completely altering the contractual responsibilities. Smith Contracting did little to no investigation to verify the type of material on site before bidding the project. See *Barron Depo.* at 18, *Smith Depo.* at 25-27. Further, Smith Contracting did not perform any research or obtain soil surveys of the project area, even though its representatives were aware this information existed and was available to the public. *Barron Depo.* at 26, 98-99, 144-45. Smith Contracting concedes that if it would have done this research prior to bidding, it would have discovered the site generally contains clay loams with inclusions of clays and other similar soils. Id. at 99 & Ex. 10. In fact, as the project progressed and Smith Contracting fell further and further behind, Lee Barron's notes indicate he attempted to determine whether Smith Contracting could create some argument that it had been misled. On July 22, 2010, Barron's notes indicate "Find USDA Soils Map. If Not Mapped Clayey then we may have been misled." *Barron Depo.* at 145 and Ex. 18 (attached to the *Armstrong Aff.*)

Smith Contracting also alleges it was represented at the pre-bid meeting that the material on site was "unconsolidated" and it was justified in relying on this statement. *Complaint*, ¶ 68(1)(b). While the PSC denies this occurred, whether or not someone used the word "unconsolidated" at the pre-bid meeting is immaterial because the contract, which does not define the material on site as "unconsolidated", supersedes any prior oral statement. N.D.C.C. § 9-06-07. The Parole Evidence Rule, partially codified in N.D.C.C. § 9-06-07, "precludes the use

of evidence of prior oral negotiations and agreements to vary or add to the terms expressed in the written contract. All preliminary negotiations, conversations, and verbal agreements are merged into and superseded by the subsequent written contract. The rule is founded on experience and public policy, created by necessity, and designed to give certainty to a transaction that has been reduced to writing by protecting the parties against the doubtful veracity and uncertain memory of interested witnesses." Evenson v. Quantum Industries, Inc., 2004 ND 178, ¶ 11, 687 N.W.214. Under North Dakota law, any alleged discussions at the pre-bid meeting defining the site material as "unconsolidated" are superseded by the written contract, which defines the material only as "spoil piles." Therefore, this alleged statement is not competent, admissible evidence which can be used to create an issue of fact.

Overall, Smith Contracting's argument would materially alter the contract, ignore its plain language, and result in an unreasonable interpretation of the contract. No genuine issue of material fact exists with respect to Smith Contracting's claim for alleged breach for misrepresentations of the site conditions.

2. Summary Judgment is appropriate on Smith Contracting's allegations of breach of contract for initiating commencement of the start date and failing to extend the contract time.

Smith Contracting also alleges the PSC breached the contract by "breaching Specification § 109.2 by initiating the commencement of the starting date knowing the NDDOT road limits were in effect, that the contract start date was only 'approximate'...and by breaching Specification § 109.6 by having failed and refused extend the contract time." *Complaint*, ¶ 68 (2) and (4). Specification § 109.2 provides: "The 'Notice to Proceed' will be issued within (30) days after contract execution. The notice will stipulate a date, not to exceed ten (10) days from date of issuance, on which it is expected the contractor will begin the construction and from which date

contract time will be charged. Commencement of work by the contractor may be deemed and taken as a waiver of this notice." Ex. 1, p. 30, § 109.6. It is unclear how Smith Contracting alleges the PSC breached this provision. The PSC issued a Notice to Proceed within 30 days after the contract was executed and the date to proceed did not exceed ten days. See *Notice To Proceed* (Ex. 6); *Contract AM-588-10* (Ex. 35).

Further, Smith Contracting began mobilizing equipment when it received the Notice of Award, or "right close to it", which was prior to the Notice to Proceed. *Smith Depo.* at 32:6-21; see also *Notice to Award* (Ex. 50) (May 5, 2010) and *Notice to Proceed* (Ex. 6) (May 19, 2010). The contract does not require that before a *Notice to Proceed* can be issued that all road restrictions must be lifted. See generally Ex. 1, 3, and 35. Again, Smith is attempting to revise the contract, and summary judgment should be granted dismissing this claim.

Smith Contracting also asserts the PSC breached Specification § 109.6, by failing and refusing to extend the contract time. Section 109.6 provides, in relevant part:

> When the contract time is on a calendar basis it shall consist of the number of calendar days stated in the contract counting from the effective date of the engineer's order to commence work, including all Sundays, holidays and non-work days. . . .
>
> ....
>
> If the contractor finds it impossible for reasons beyond the contractor's control to complete the work within the contract time as specified or as extended in accordance with the provisions of this subsection, the contractor may, at any time prior to the expiration of the contract time as extended, make a written request to the engineer for an extension of time setting forth therein the reasons which the contractor believes will justify the granting of this request. The contractor's plea that insufficient time was specified is not a valid reason for extension of time. If the engineer finds that the work was delayed because of conditions beyond the control and without the fault of the contractor, the time may be extended for completion in such amount as the conditions justify. The extended time for completion shall then be in full force and effect the same as though it were the original time for completion.

Ex. 1, pp. 32-33.

The evidence provides no indication Smith Contracting experienced conditions that made it impossible to complete the project according to the project schedule. Smith Contracting's revised schedule dated July 2, 2010, provided an actual start date of June 5, 2010, and an end date October 13, 2010. See Ex. 9. Further, this allegation is unfounded as the PSC continually indicated to Smith Contracting that it was willing to provide additional time as long as the project was completed during the 2010 construction season. For instance, in its letter denying Smith Contracting's request for a change order, the PSC indicated it was denying the price increase from $1,225,500 to $2,953,500, but indicated that the project needed to be finished by the end of October. Ex. 13. Smith Contracting started construction on June 5, 2010, and any delay allegedly caused by road restrictions (although not required by the contract to begin with), was accounted for by the PSC's agreement to extend the time to the end of October and other accommodations. There is no genuine issue of material fact upon which Smith Contracting can prevail on this allegation.

3. Summary judgment is appropriate on Smith Contracting's breach of contract claim regarding the contract's dispute clause.

Smith Contracting asserts the PSC breached the dispute clause of the contract "requiring good faith negotiations of Smith Contracting's request for the renegotiation of the contract time and costs." *Complaint*, ¶ 68(3). The Dispute Clause of the contract, provides:

> The Contractor agrees to attempt to resolve disputes arising from this contract by informal administrative process and negotiations in lieu of litigation. Continued performance by the Contractor during disputes is assured.
>
> Any dispute concerning a question of fact arising under this contract which is not settled by informal means shall be decided by the authorized representative of the Commission who shall reduce the decision to writing and mail or otherwise

furnish a copy thereof to the Contractor.

The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of an appeal. Pending final decision of a dispute, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Commission.

The State does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolutions. The parties have the right to enforce their rights and remedies in judicial proceedings. The State does not waive any right to a jury trial.

Ex 35, page 3. It is unclear how Smith Contracting alleges the PSC breached this provision and it appears to be inserting requirements into the dispute process which do not exist. Further, as discussed above, Smith Contracting did not complete the disputes resolution process contained in the contract and instead walked off the project on September 15, 2010. Regardless, the disputes clause does not require the PSC to accept a baseless change order for over 2.5 times the amount Smith Contracting bid and more than any of the other contractors' bids on the project.

As will be discussed further below, the North Dakota Supreme Court has specifically declined to apply the doctrine of an implied covenant of good faith or fair dealings. Regardless, "the implied covenant of good faith and fair dealings ...does not operate to alter the material terms of a contract ... does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions, nor does the duty of good faith inject substantive terms into the parties contract." WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 17, 730 N.W.2d 841. Therefore, summary judgment is warranted on this alleged breach, which is not based on the contract language and is not supported by law.

4. Summary judgment should be granted on Smith Contracting's claim of breach for making a claim against the bonding company and terminating the contract without justifiable cause.

Finally, Smith Contracting alleges PSC breached its contract by "making a claim against Smith's bonding company and terminating the contract without justifiable cause." *Complaint*, ¶ 68(5). Smith Contracting does not specify what provision in the contract the PSC allegedly violated for making a claim against Smith Contracting's bonding company. The PSC cannot be said to have breached the contract by making a claim on the bonding company after Smith Contracting walked off the job, especially considering the contract does not specify when the PSC can make a claim on the performance bond.

The Termination Clause of the contract provides, in relevant part:

> The State, by written notice of default listing causes and reasons, may terminate this contract in whole or in part if (1) the Contractor fails to provide services required by this contract within the time specified or any extension agreed to by the State; or (2) the Contractor fails to perform any of the other conditions or provisions of this contract, or so fails to pursue the work so as to endanger performance of this contract in accordance with its terms. ... The rights and remedies of the State provided in the termination provisions related to defaults by the Contractor are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

Ex. 35, p. 2. Additionally, the *Standard Specifications* provide:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will ensure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the commission may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the commission may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefore. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties, if any, shall be liable for any damages to the commission resulting from his refusal or failure to complete the work within the specified time.

Ex. 1, pp. 34-35, 109.9(a). The PSC's notice of default to Smith Contracting on September 30 (over two weeks after Smith had walked off the project), while made under section 109.9(a) of the *Standard Specifications* satisfies both of these contractual termination provisions. *Notice of Default* (Ex. 14) (Sept. 30, 2010).

It is unclear on what basis Smith Contracting alleges the PSC violated this provision. Smith Contracting walked off the project on September 15, 2010, stating at that time it could not get the job done. Id.; see also *Smith Depo.* at 52-54; *Barron Depo.* at 137-38. It was only after Smith Contracting ceased working on the job that the PSC sent a Notice of Default for Failure to Perform Required Work, on September 30, 2010, which, in effect, terminated the contract. The letter provided the details required by the Termination Clause as it outlined how Smith Contracting failed to provide the services required under the contract within time specified. Further, not only did the PSC follow the contract, but the bonding company accepted the PSC's claim, entered into a tender agreement, and furnished another contractor to complete the project. *Tender Agreement* (Ex. 45).

Accordingly, no genuine issue of material fact exists which would allow Smith Contracting to prevail on this alleged breach.

C. Summary Judgment is Warranted on Smith Contracting's Claim for Breach of Implied Contractual Obligation of Good Faith and Fair Dealing.

Smith Contracting's next cause of action is for alleged breach of implied contractual obligation of good faith and fair dealing. *Complaint*, ¶¶ 71-72. This cause of action fails as a matter of law because North Dakota only recognizes this doctrine in insurance contracts. WFND, LLC, 2007 ND 67, ¶ 17, 730 N.W.2d 841 ("in North Dakota the doctrine of an implied covenant of good faith and fair dealing has only been applied to insurance contracts"). North

Dakota has declined to extend this doctrine beyond insurance contracts, and therefore, no such claim exists under the applicable law.

Regardless, even where the implied covenant of good faith and fair dealing applies, it "does not operate to alter the material terms of a contract[,] ... does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions, nor does the duty of good faith inject substantive terms into the parties' contract." Id. It cannot be reasonably argued that the PSC had a duty to accept Smith Contracting's requested change order for almost three times the price it bid. Summary judgment is appropriate on this cause of action because it does not exist under the law, and even if it did, there is no genuine issue of fact which would allow Smith Contracting to prevail.

D. Summary Judgment Should be Granted on Smith Contracting's Alleged Breach of Implied Warranties of Accuracy and Providing bidders with Information that will Not Mislead.

Smith Contracting also claims the PSC breached the implied warranties of accuracy and providing bidders with information that will not mislead. It alleges the PSC prepared the plans and specifications, represented on the project that the material was unconsolidated, and that it was misled by the erroneous statements in the contract documents. See *Complaint*, ¶ 74-81. Smith Contracting admits the contract requires "the contractor to examine the site, to check up the plans, and assume responsibility for the work until completion and acceptance" but allege this clause does not overcome the implied warranty that if the specifications set out in the contract documents were complied with the work as bid would be adequate. Id., ¶ 77.

As an initial matter, such a cause of action has never been recognized in North Dakota, and on this basis alone, should be rejected. Where this implied warranty has been applied, the courts have stated:

> Courts have recognized a cause of action in contract against a public entity based upon the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. In order to recover on such an action, the contractor must prove that the agency affirmatively misrepresented, or actively concealed, material facts which rendered the bid documents misleading, and that the contractor reasonably relied on such misrepresentations in preparing its bid. Affirmative misrepresentation or concealment is required to avoid burdening public entities with liability where the contractor underbids due to lack of diligence in examining specifications and plans which are themselves accurate.

Thompson Pacific Construction, Inc., v. City of Sunnyvale, 155 Cal.App.4th 525, 551, 66 Cal.Rptr.3d 175, 196 (Ct. App. 6th Dist, 2007) (emphasis added) (internal citations omitted).

Further,

> public entities have no obligation to investigate the costs of performance independent from the obligation to provide prospective bidders with correct plans and specifications. A public entity is not responsible for erroneous assumptions drawn by a contractor from accurate information provided by the public entity or for unsupported assumptions drawn from the public entity's silence, nor does it have any duty to disclose information that is reasonably available or that the contractor knew or had a realistic opportunity to discover. ... In sum, established law provides public entities substantial protection against careless bidding practices by contractors and forecloses the possibility that a public entity will be held liable when a contractor's own lack of diligence prevented it from fully appreciating the costs of performance.

Los Angeles Unified School District v. Great American Insurance Co., 49 Cal.4th 739, 752, 234 P.3d 490, 498 (CA 2010) (emphasis added) (internal citations omitted).

Even if North Dakota recognized an implied warranty of accuracy in bid information, Smith Contracting could not prove such a warranty was breached because, as discussed above, the contract documents describe the material at the site accurately—as spoil piles. With respect to the *Standard Specifications*, Smith Contracting admits it did not even review them prior to

submitting its bid even though it knew they existed and were part of the contract. *Barron Depo.* at 15. Smith Contracting also admits it is not claiming any error with the plan sheets. Id. at 94:14-22. Smith Contracting's allegations that the contract documents did not provide accurate information is unsupported. Even if the implied warranty exists, the PSC cannot be held liable for Smith Contracting's careless bidding based on erroneous assumptions.

E. Smith Contracting's Claim of "Doctrine of Unconscionability" Should be Dismissed

Smith Contracting alleges a claim for the "doctrine of unconscionability" and requests the Court "deny enforcement of the Contract because of procedural abuses arising out of the Contract's formation, and substantive abuses related to the terms of the contract under the facts and circumstances alleged herein." *Complaint* at ¶¶ 96-97. Smith Contracting does not identify what procedural or substantive abuses allegedly occurred. In any event, Smith Contracting has failed to show this doctrine should be invoked in this case.

The North Dakota Supreme Court has recently analyzed unconscionability in a case involving a competitive bid for public works between the City of Mandan and a private contractor, Markwed Excavating, Inc. See Markwed Excavating, Inc. v. City of Mandan, 2010 ND 220, 791 N.W.2d 22. The contractor argued a clause in the contract was "unconscionable because the clause is so one-sided that it would be unjust and unfair to enforce it." Id. at ¶ 21. The Supreme Court recognized:

> "Unconscionability is a doctrine which allows courts to deny enforcement of a contract because of procedural abuses arising out of the contract's formation and substantive abuses relating to the terms of the contract." Strand v. US Bank Nat'l Ass'n, 2005 ND 68, ¶ 4, 693 N.W.2d 918. We have said, "An agreement is unconscionable if it is one no rational, undeluded person would make, and no honest and fair person would accept, or is blatantly one-sided and rankly unfair." Eberle v. Eberle, 2009 ND 107, ¶ 18, 766 N.W.2d 477 (citations omitted). In assessing whether a contractual provision is unconscionable, courts "'look at the

> contract from the perspective of the time it was entered into, without the benefit of hindsight,'" and determine "'whether, under the circumstances presented in the particular commercial setting, the terms of the agreement are so one-sided as to be unconscionable. The principle underlying . . . unconscionability provisions is the prevention of oppression and unfair surprise.'" Strand, at ¶ 4 (quoting Construction Assocs., Inc. v. Fargo Water Equip. Co., 446 N.W.2d 237, 241 (N.D. 1989)). The determination whether a contractual provision is unconscionable is a question of law, but depends upon the factual circumstances of the case. Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 21, 765 N.W.2d 705. "Because the determination of unconscionability is fact specific, courts must 'consider such claims on a case-by-case basis' and assess the totality of the circumstances." Strand, at ¶ 5 (citations omitted).
>
> A two-prong framework is used to determine whether a contractual provision is unconscionable. Rutherford, 2009 ND 88, ¶ 22, 765 N.W.2d 705. The first prong involves procedural unconscionability "'which encompass factors relating to unfair surprise, oppression, and inequality of bargaining power.'" Strand, 2005 ND 68, ¶ 7, 693 N.W.2d 918 (quoting Construction Assocs., 446 N.W.2d at 241). The second prong involves substantive unconscionability "'which focuses upon the harshness or one-sidedness of the contractual provision in question.'" Strand, at ¶ 7 (quoting Construction Assocs., at 241). To prevail on a unconscionability claim, "a party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is 'so one-sided as to be unconscionable.'" Strand, at ¶ 12 (quoting Construction Assocs., at 241).

Id. at ¶¶ 22-23. Smith Contracting does not specify the contractual provisions it claims are unconscionable.

Regardless, the Markwed analysis requires dismissal of Smith Contracting's allegation. "An agreement is unconscionable if it is one no rational, undelued person would make, and no honest and fair person would accept, or is blatantly one-sided and rankly unfair." Id. at ¶ 22. Smith Contracting has not specified in any manner whatsoever how it meets this standard. Further, eight other contractors bid on this project, which required acceptance of the same contract terms. See Ex. 3, pp. 16-25. One such contractor, Kern & Tabery, was hired as the completion contractor under the same terms as the contract Smith Contracting entered. See Ex.

45, p. 1, Recital B. There is simply no evidence to support the conclusory allegation that the contract between Smith Contracting and the PSC was unconscionable. As such, this claim should be dismissed.

F. Smith Contracting's Claim for Equitable Rescission Should be Dismissed.

As an alternative, Smith Contracting requests to equitably rescind the contract, alleging no adequate remedy at law. *Complaint* at ¶¶ 98-99. It is unclear what basis Smith Contracting is seeking equitable rescission as it is also seeking damages in its complaint. Smith Contracting's attempt to seek a dual remedy of damages and equity is contrary to the doctrine of election of remedies. See Barker v. Ness, 1998 ND 223, ¶¶ 6-10, 587 N.W.2d 183 (recognizing the doctrine of election of remedies requires a plaintiff to elect between two inconsistent remedies, requiring "a plaintiff [to] choose between rescission or damage remedies" and "[t]he plaintiff must elect either to sue for damages (affirm [the contract]) or to rescind the contract (disaffirm) and seek the return of the consideration given"). The law does not allow Smith Contracting to alternatively seek damages and equitable rescission, and therefore, Smith Contracting's claim for equitable rescission must be dismissed.

Rescission is addressed in two chapters of the Century Code—(1) N.D.C.C. chap. 9-09, which dictates rescission actions based in law when "the plaintiff may bring an action at law based upon an election to rescind and offer to restore under N.D.C.C. § 9-09-04" and; (2) N.D.C.C. chap. 32-04, which dictates rescission actions based in equity when the plaintiff brings a "claim in equity asking the court to cancel the contract under N.D.C.C. § 32-04-21". Barker at ¶¶ 7-10. Smith Contracting appears to be making a claim under N.D.C.C. chap. 32-04 for equitable rescission as it has never tendered of a notice of rescission and offered to restore pursuant to N.D.C.C. § 9-09-04.

In a claim for equitable rescission, "the plaintiff does not retain what he received. It is a fundamental principle of equity that parties must be restored to their pre-contractual positions. Therefore, once the trial court renders a formal rescission, it must restore each side to its respective pre-contractual position." Barker v. Ness, 1998 ND 223, ¶ 16, 587 N.W.2d 183.

> Generally, restoration of the preceding status quo is a requirement for rescission. This requirement is founded upon the equitable principle that he who seeks equity must do equity. ...
>
> One who has been led into a contract upon which he has received something of value cannot ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He cannot, while retaining its benefits, and thus affirming the contract, treat it as though it did not exist. He cannot treat it as good in part and void in part, but must affirm or avoid it as a whole.

Borsheim v. O & J Properties, 481 N.W.2d 590, 593-94 (ND 1992). "Although section 9-09-04, N.D.C.C., does not expressly apply to adjudicated rescission (*see* section 32-04-21, N.D.C.C.), we have said it must be complied with if such compliance is necessary to do equity." Id. at 594. "Under N.D.C.C. 9-09-04, rescission is proper only if the party seeking rescission uses reasonable diligence to rescind promptly and to return everything of value which was received under the contract. Compliance with these requirements is a precondition to maintaining a rescission action." Bourgois v. MDU, 466 N.W.2d 813, 816 (ND 1991)

It is recognized that a court of equity "has wide and extensive powers" but must "place the parties in status quo and do equity between them." Id. "Because the remedy of rescission is not held in high esteem by the courts, the power of a court to rescind ... should never be lightly exercised. Rescission of a contract is not a matter of absolute right, but instead is committed to the district court's sound discretion." American Bank Center v. Wiest, 2010 ND 251, ¶ 25, 793 N.W.2d 172.

Smith Contracting alleges its consent to the contract "was given by mistake and based upon the representation made in the Contract." *Complaint*, ¶ 99(b). Smith Contracting further alleges it "would not have bid or entered into the Contract had it known of the actual project conditions at the time it bid and entered into the contract." Id. at ¶ 99(a). These accusations are not supported as discussed above. Regardless, rescission cannot be made "for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same condition as if the contract had not been made." N.D.C.C. §32-04-22. There is no evidence indicating the PSC could be restored to substantially the same condition as if the contract had not been made at this point, and Smith Contracting's attempt at rescission after the contract has been terminated for almost a year at the time it brought this action. Therefore, Smith Contracting's equitable rescission claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the PSC respectfully requests this Court grant summary judgment, dismissing Smith Contracting's claims in their entirety, with prejudice.

Dated this 14th day of September, 2012.

By Mitchell D. Armstrong

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STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2011-CV-01887

Smith Contracting Inc.,

Plaintiff,

vs.

North Dakota Public Service Commission Abandoned Mine Lands Division,

Defendant.

AFFIDAVIT OF MITCHELL D. ARMSTRONG

*** *** ***

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

Mitchell D. Armstrong, being first duly sworn, deposes and states as follows:

1. I am an attorney for Defendant and make this affidavit in connection with the Defendant's Motion for Summary Judgment filed herewith.

2. Attached hereto as Exhibit A is a true and correct copy of the deposition transcript of Lee Barron taken on July 25, 2012.

3. Attached hereto as Exhibit B is a true and correct copy of the deposition transcript of David Smith taken on July 25, 2012.

4. Attached hereto as Exhibit C is a true and correct copy of the deposition transcript of Mark Knell taken on July 26, 2012.

5. Attached hereto as Exhibit D is a true and correct copy of the deposition transcript of Jim Deutsch taken on July 26-27, 2012.

6. Attached hereto as Exhibit E is a true and correct copy of the deposition transcript of William Dodd taken on July 27, 2012.

7. During the depositions in this matter, various exhibits were marked consecutively and referred to throughout the several depositions. Because not all of the deposition exhibits are relevant for purposes of this motion, the relevant exhibits are being provided separately from the depositions. For ease of reference, the exhibits are produced using the same number as used during the depositions.

8. Attached hereto is Deposition Exhibit 1, a true and correct copy of the *Standard Specifications for AML Reclamation Projects* (February 2000).

9. Attached hereto is Deposition Exhibit 3, a true and correct copy of the *Information for Bidders* (February 2010).

10. Attached hereto is Deposition Exhibit 4, a true and correct copy of Smith Contracting's Bid for the project.

11. Attached hereto is Deposition Exhibit 5, a true and correct copy of a letter from Smith Contracting to Mark Knell dated May 7, 2010.

12. Attached hereto is Deposition Exhibit 6, a true and correct copy of the *Notice to Proceed.*

13. Attached hereto is Deposition Exhibit 8, a true and correct copy of a letter from the Public Service Commission to Smith Contracting, Inc. dated June 28, 2010.

14. Attached hereto is Deposition Exhibit 9, a true and correct copy of a letter from Smith Contracting, Inc. to James Deutsch dated July 2, 2010.

15. Attached hereto is Deposition Exhibit 10, a true and correct copy of a letter from Smith Contracting, Inc. to Jim Deutsch dated August 4, 2010.

16. Attached hereto is Deposition Exhibit 11, a true and correct copy of a letter from the Public Service Commission to Smith Contracting, Inc. and First National Insurance Company of America dated August 10, 2010.

17. Attached hereto is Deposition Exhibit 12, a true and correct copy of a change order request from Smith Contracting, Inc. to Jim Deutsch dated August 25, 2010.

18. Attached hereto is Deposition Exhibit 13, a true and correct copy of a letter from the Public Service Commission to Lee Barron dated September 2, 2010.

19. Attached hereto is Deposition Exhibit 14, a true and correct copy of the letter from the Public Service Commission to Smith Contracting, Inc. dated September 30, 2010.

20. Attached hereto is a true and correct copy of Deposition Exhibit 18.

21. Attached hereto is Deposition Exhibit 30, a true and correct copy of the *2010 Buechler/Velva Bidder's List* for the project.

22. Attached hereto is Deposition Exhibit 35, a true and correct copy of *Contract No. AM-588-10.*

23. Attached hereto is Exhibit 41, a true and correct copy of the *Contractor Production Figures* (with attachments).

24. Attached hereto is Deposition Exhibit 45, a true and correct copy of the executed *Tender Agreement* between the Public Service Commission, First National Insurance Company of America, and Kern & Tabery, Inc.

25. Attached hereto is Deposition Exhibit 50, a true and correct copy of the *Notice to Award.*

Dated this 14th day of September, 2012.

By _____
Mitchell D. Armstrong

Subscribed and sworn to before me this 14th day of September, 2012.

(SEAL)

_____
Notary Public
State of North Dakota

TIFFANY HEIM
Notary Public
State of North Dakota
My Commission Expires June 29, 2018

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF BURLEIGH — SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2011-CV-01887

Smith Contracting Inc.,

Plaintiff,

vs.

North Dakota Public Service Commission
Abandoned Mine Lands Division,

Defendants.

AFFIDAVIT OF SERVICE

*** *** ***

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

Tiffany Heim, being first duly sworn, deposes and states that she is over the age of eighteen years and not a party to the above-entitled matter. That on September 14, 2012, she filed the following documents:

1. **Defendant's Notice of Motion for Summary Judgment and Request for Hearing;**

2. **Defendant's Motion for Summary Judgment;**

3. **Defendant's Brief in Support of Motion for Summary Judgment; and**

4. **Affidavit of Mitchell D. Armstrong**

electronically with the Clerk of Court through the Odyssey File and Serve system and served as follows:

Ronald G. Schmidt
Attorney at Law
P.O. Box 860
Rapid City, SD 57709-0860

VIA U.S. MAIL

Tiffany Heim

Subscribed and sworn to before me this 14th day of September, 2012.

SARA FORSBERG
Notary Public
State of North Dakota
My Commission Expires Oct. 16, 2013

Notary Public
Burleigh County, North Dakota