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**UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA**

**UNITED STATES OF AMERICA for  
the use of J&L PAVING LLC,**

**Plaintiff,**

**vs.**

**ROCKFORD CORPORATION and  
LIBERTY MUTUAL INSURANCE  
COMPANY,**

**Defendants.**

**3:18-CV-00156 JWS**

**ORDER AND OPINION**

**[Re: Motions at dockets 36, 37 & 46]**

**I. MOTIONS PRESENTED**

At docket 36 Plaintiff J&L Paving, LLC (J&L) moves for summary judgment on its claims for payment under a subcontract against Defendants Rockford Corporation (Rockford) and Liberty Mutual Insurance Company.<sup>1</sup> Defendants respond at docket 38 and submit a cross-motion for summary judgment at docket 37. Plaintiff replies at docket 41 and responds to the cross-motion at docket 40. Defendants reply to their cross motion at docket 45. Oral argument was requested at docket 46, but argument would not be of assistance to the court.

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<sup>1</sup>Rockford obtained a payment bond from Liberty Mutual Insurance Company as required by the Miller Act, 40 U.S.C. §§ 3131-3134.

1 **II. BACKGROUND**

2 This case is a payment dispute between a general contractor, Rockford, and its  
3 subcontractor, J&L, for paving work J&L performed as part of a government contract  
4 Rockford had with the United State Army Corps of Engineers to replace the existing  
5 military fueling station at Tinker Air Force Base in Oklahoma (the Prime Contract).  
6 Under Rockford's subcontract with J&L (the Subcontract), Rockford agreed to pay J&L  
7 \$274,620 to complete the paving work required under the Prime Contract.<sup>2</sup> The work  
8 required both the application of pre-asphalt bituminous coating and the laying of  
9 asphalt. Rockford asserts that J&L materially breached the Subcontract in both its  
10 application of the bituminous coating and in the laying of the asphalt, causing damages  
11 to Rockford in amounts that almost equal the value of the Subcontract. Although  
12 Rockford has received payment from the government pursuant to the Prime Contract for  
13 completion of the fueling station project, including the paving work, it has not paid J&L.<sup>3</sup>  
14 Rockford believes it is entitled to offset the damages it incurred against payments to  
15 J&L under the Subcontract.

16 J&L moves for summary judgment on its contractual claims, arguing it is entitled  
17 to be paid the full amount under the Subcontract. The issue it asks the court to resolve  
18 as a matter of law, however, is not whether it breached the Subcontract, but rather  
19 whether Rockford can withhold payment from J&L after applying for payment and being  
20 paid by the government under the Prime Contract. J&L argues that regardless of any  
21 breaches on its part, Rockford is required to pay the full Subcontract price because it  
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23 <sup>2</sup>The parties concede that a subsequent change order increased the Subcontract  
24 amount by \$4,679.62. Rockford contends that it immediately paid J&L the additional amount.  
25 J&L admits that it received \$4,679.62 from Rockford, although it points out that the record  
26 remains unclear as to when Rockford made the payment and as to whether Rockford submitted  
27 a payment request under the Prime Contract to cover this amount. In any event, the amount of  
28 the Subcontract effectively remained \$274,620 for the duration of the project and is the amount  
listed on the contract documents and in Rockford's payment applications.

<sup>3</sup>The parties concede that J&L has not been paid apart from the initial payment of  
\$4,679.62.

1 certified to the government, pursuant to the Prompt Payment Act, that J&L would be  
2 paid for its satisfactory work under the Subcontract. J&L asserts that Rockford's  
3 certifications constitute a waiver of any right to claim and offset damages or at least bar  
4 such a defense under the doctrine of quasi-estoppel.

5 In its response to Rockford's cross motion, J&L also asks that the court strike or  
6 disregard the affidavit of Lonny Rhude, which Rockford included as evidence supporting  
7 its motion. J&L argues that Rhude's affidavit is not based on his personal knowledge of  
8 events and contains legal conclusions and impermissible characterizations of the  
9 contents of business documents and communications attached to his affidavit. Rhude's  
10 affidavit is admissible to authenticate the attached business records and to establish  
11 certain facts that are within his knowledge. The court did not rely on any legal  
12 conclusions or characterizations of evidence offered by Rhude.

### 13 **III. STANDARD OF REVIEW**

14 Summary judgment is appropriate where “there is no genuine dispute as to any  
15 material fact and the movant is entitled to judgment as a matter of law.”<sup>4</sup> The materiality  
16 requirement ensures that “[o]nly disputes over facts that might affect the outcome of the  
17 suit under the governing law will properly preclude the entry of summary judgment.”<sup>5</sup>  
18 Ultimately, “summary judgment will not lie if the . . . evidence is such that a reasonable  
19 jury could return a verdict for the nonmoving party.”<sup>6</sup> However, summary judgment is  
20 mandated “against a party who fails to make a showing sufficient to establish the  
21 existence of an element essential to that party’s case, and on which that party will bear  
22 the burden of proof at trial.”<sup>7</sup>

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25 <sup>4</sup>Fed. R. Civ. P. 56(a).

26 <sup>5</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

27 <sup>6</sup>*Id.*

28 <sup>7</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

1 The moving party has the burden of showing that there is no genuine dispute as  
2 to any material fact.<sup>8</sup> Where the nonmoving party will bear the burden of proof at trial on  
3 a dispositive issue, the moving party need not present evidence to show that summary  
4 judgment is warranted; it need only point out the lack of any genuine dispute as to  
5 material fact.<sup>9</sup> Once the moving party has met this burden, the nonmoving party must  
6 set forth evidence of specific facts showing the existence of a genuine issue for trial.<sup>10</sup>  
7 All evidence presented by the non-movant must be believed for purposes of summary  
8 judgment, and all justifiable inferences must be drawn in favor of the non-movant.<sup>11</sup>  
9 However, the non-moving party may not rest upon mere allegations or denials but must  
10 show that there is sufficient evidence supporting the claimed factual dispute to require a  
11 fact-finder to resolve the parties' differing versions of the truth at trial.<sup>12</sup>

#### 12 IV. DISCUSSION

##### 13 **A. Prompt Payment Act**

14 The Subcontract with J&L to perform a portion of work required under Rockford's  
15 Prime Contract with the government was subject to the Prompt Payment Act<sup>13</sup> and the  
16 Act's implementing regulations. Pursuant to these statutes and regulations, when  
17 requesting a progress payment from the government under a prime contract, the  
18 contractor is required to itemize work performed by its subcontractors.<sup>14</sup> The contractor  
19 must make certain representations concerning its subcontractors' work—namely, that  
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21 <sup>8</sup>*Id.* at 323.

22 <sup>9</sup>*Id.* at 323-25.

23 <sup>10</sup>*Anderson*, 477 U.S. at 248-49.

24 <sup>11</sup>*Id.* at 255.

25 <sup>12</sup>*Id.* at 248-49.

26 <sup>13</sup>31 U.S.C. § 3901, *et seq.*

27 <sup>14</sup>48 C.F.R. § 52.232-5(b)(1).

1 the requested amount is for work performed in accordance with specifications of the  
2 contract; that all payments due to subcontractors under previous payment requests  
3 have been made and payments will be made to subcontractors for work itemized under  
4 the current request; and that the payment request "does not include any amounts which  
5 the prime contractor intends to withhold or retain from a subcontractor or supplier in  
6 accordance with the terms and conditions of the subcontract."<sup>15</sup> The contractor is also  
7 allowed to assert that the certification "is not to be construed as final acceptance of a  
8 subcontractor's performance."<sup>16</sup>

9 The contractor cannot request payment from the government for deficient work.<sup>17</sup>  
10 If a contractor makes a payment request to the government certifying that no payments  
11 have been withheld and receives payment for work completed by a subcontractor but  
12 then discovers that the work is not in fact satisfactory, it must notify the subcontractor  
13 and government and pay the government interest on the amount received from the  
14 government but withheld.<sup>18</sup>

15 Rockford requested payment from the government for J&L's work on March 20,  
16 2017, after J&L had finished the paving work. The total amount requested was  
17 \$234,882.70, which is about \$40,000 less than the amount owed to J&L under the  
18 Subcontract.<sup>19</sup> Rockford contends that it deducted this amount from what was owed  
19 J&L under the Subcontract through a change order and that it did so in order to cover  
20 the costs it incurred to remediate an environmental hazard allegedly caused by J&L's  
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24 <sup>15</sup>31 U.S.C. § 3903(b)(1)(B); 48 C.F.R. § 52.232-5(c).

25 <sup>16</sup>48 C.F.R. § 52.232-5(c)(4).

26 <sup>17</sup>31 U.S.C. § 3905(h).

27 <sup>18</sup>31 U.S.C. § 3905(e); 48 C.F.R. § 52.232-5(d).

28 <sup>19</sup>Doc. 35-4 at p. 1.

1 application of pre-asphalt coating before a forecasted rain event.<sup>20</sup> The record shows  
2 that there had been communications between J&L and Rockford about the clean up and  
3 that J&L knew that Rockford believed J&L was responsible for clean-up costs.<sup>21</sup>

4 One day after Rockford submitted its March payment application, government  
5 engineers informed Rockford that J&L's work did not meet project specifications. J&L  
6 submitted a proposal as to how to correct the deficiencies in its work and eventually  
7 completed the rework in early August of 2017.<sup>22</sup>

8 In October of 2017, Rockford submitted another payment application. This one  
9 included a request for the balance of the J&L subcontract, which was about \$40,000  
10 (the amount they had not asked for in the previous application).<sup>23</sup> As described above,  
11 in order to obtain payment, Rockford had to itemize its subcontractors' work for which it  
12 sought payment and certify that such work was completed according to the  
13 specifications of the contract. It also had to certify that payments due to subcontractors  
14 under previous payment requests had been made and that it did not intend to withhold  
15 any payments. Despite this certification, Rockford had not yet paid J&L from the  
16 proceeds of the prior payment request and intended to withhold the balance that it was  
17 asking for in the current payment request.

18 The parties do not dispute that Rockford failed to comply with the required  
19 withholding procedures and that its October certification was incorrect. Rockford,  
20 however, asserts that its noncompliance is an issue between it and the government and  
21 does not have any bearing on this contractual dispute between private entities.

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25 <sup>20</sup>Doc. 35-8 at pp. 2, 3 7; doc. 35-8.

26 <sup>21</sup>Doc. 35 at ¶¶ 7-8; Doc. 35-3 at p.1.

27 <sup>22</sup>Doc. 35 at ¶¶ 11-13; doc. 35-5; doc. 39-5.

28 <sup>23</sup>Doc. 35 at ¶ 14; Doc. 35-6.

1 Rockford has since informed the government of its errors.<sup>24</sup> While J&L concedes that it  
2 cannot enforce the provisions of the Prompt Payment Act through this lawsuit, it  
3 nonetheless argues that Rockford's false certifications and its failure to provide the  
4 required notice affect the equities of this contractual dispute. J&L believes Rockford's  
5 false representations and inconsistent positions as to J&L's performance and the  
6 withholding now bar Rockford from denying full payment to J&L.

7 **B. Waiver**

8 J&L asserts that Rockford's actions amount to a waiver of its right to deny J&L  
9 payment based on performance when it averred to the government that J&L's  
10 performance met contractual standards and would not be subject to withholdings.  
11 Waiver may "be implied from a party's conduct" if that conduct is "clear and  
12 unambiguous."<sup>25</sup> "An implied waiver arises where the course of conduct pursued  
13 evidences an intention to waive a right, or is inconsistent with any other intention than a  
14 waiver, or where neglect to insist upon the right results in prejudice to another party."<sup>26</sup>  
15 Conduct that could be a result of a mistake, negligence, or incompetence does not  
16 constitute an unequivocal waiver of a right.<sup>27</sup>

17 As for J&L's performance, Rockford's payment certifications did in fact indicate  
18 that J&L's work met the specifications of the contract, but the certifications also made  
19 clear that they were not to be construed as a final acceptance of the subcontractor's  
20 work. Thus, the payment certifications did not clearly and unambiguously set out  
21 Rockford's acceptance of J&L's performance or an abandonment of any claim for  
22 damages. J&L does not provide evidence to show that it even received a copy of the  
23 certifications; instead, the record shows that Rockford consistently communicated with

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25 <sup>24</sup>Doc. 35-8.

26 <sup>25</sup>*Powers v. United Servs. Auto. Ass'n*, 6 P.3d 294, 298-99 (Alaska 2000).

27 <sup>26</sup>*Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978).

28 <sup>27</sup>*Airoulofski v. State*, 922 P.2d 889, 895 (Alaska 1996).

1 J&L about its deficient performance. It informed J&L about the need to cure the defects  
2 in the paving shortly after learning of the problems, and J&L knew that its work had to  
3 be redone.<sup>28</sup> The record also shows that Rockford informed J&L that it believed the  
4 resulting delays caused damages for which J&L was liable.<sup>29</sup> At best, Rockford's  
5 conduct as a whole—looking at the government certifications and Rockford's  
6 communication's with J&L—was ambiguous as to J&L's performance.

7 As for Rockford's intention to withhold payment to J&L to offset alleged damages,  
8 the October 2017 certification indeed included a misrepresentation about its plans to  
9 pay J&L. Again, this certification was made to the government and not J&L. The record  
10 shows that Rockford communicated its belief that J&L was liable for damages as a  
11 result of its performance and that it had used deductive change orders to the  
12 Subcontract to reduce the amount owed to J&L in order to offset those damages.<sup>30</sup>  
13 Given these communications by Rockford, along with the fact that Rockford continues to  
14 withhold J&L's payment,<sup>31</sup> this court is prevented from finding an unequivocal waiver  
15 based on Rockford's submission of a contrary government certification—one that J&L  
16 does not contend it even received or saw.

17 J&L also asserts that Rockford's failure to send the requisite withholding notices  
18 under 31 U.S.C. § 3905(e) amounts to an intentional waiver of its right to withhold  
19 disputed payments from J&L. However, as noted by Rockford in its reply brief, § 3905  
20 cannot be used in this dispute to determine the parties' rights under the Subcontract:

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23 <sup>28</sup>Docs. 35-5; 39-5; 35-9 at p.15; 39-7.

24 <sup>29</sup>Docs. 35-5; 35-8 at p. 42; 35-8 at pp. 43-47; 39-7.

25 <sup>30</sup>Docs. 35-3; 35-5; 35-8 at p. 5-10; 35-8 at pp. 37, 42, 43-47; 39-7.

26 <sup>31</sup>See *Duenas-Rendon v. Wells Fargo Bank, N.A.*, 354 P.3d 1037, 1042 (Alaska 2015)  
27 (affirming the superior court's ruling that mortgagee bank did not waive its right to foreclose by  
28 accepting monthly payments after notice of mortgagor's default because the bank's conduct of  
continuing the foreclosure after receiving the payments was consistent with exercising that  
right).



1 [T]his section shall not limit or impair any contractual, administrative, or  
2 judicial remedies otherwise available to a contractor or a subcontractor in  
3 the event of a dispute involving late payment or nonpayment by a prime  
contractor or deficient subcontract performance or nonperformance by a  
subcontractor.<sup>32</sup>

4 Also, the failure to send formal notice cannot be considered in isolation. As noted  
5 above, the record shows that J&L knew about its deficient performance. Indeed, it  
6 proposed a cure and eventually fixed its original work.<sup>33</sup> Rockford thereafter informed  
7 J&L of its intention to assert a claim for damages because of the delayed  
8 performance.<sup>34</sup> There is no reasonable basis to conclude that the failure to send the  
9 § 3905 notices conveyed a message that Rockford was waiving its ability to assert a  
10 claim for damages based on deficient performance.

11 Rockford's certification to the government regarding performance and withholding  
12 and its failure to provide formal notice under the Prompt Payment Act could very likely  
13 be the product of something other than intentional waiver of a claim for damages, such  
14 as negligence or incompetence in reading and filling out the government's form for  
15 payment and understanding the requirements of the Prompt Payment Act submissions.  
16 Given these other possible explanations for Rockford's Prompt Payment Act missteps,  
17 the court cannot conclude that through these actions Rockford clearly intended to  
18 abandon its claim for damages stemming from J&L's delayed performance and its  
19 intention to offset those damages.

### 20 **C. Quasi-Estoppel**

21 J&L also argues that the doctrine of quasi-estoppel bars Rockford from denying  
22 J&L payment for its work under the Subcontract. "Quasi-estoppel . . . appeals to the  
23 conscience of the court to prevent injustice by precluding a party from asserting a right  
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26 <sup>32</sup>31 U.S.C. § 3905(j).

27 <sup>33</sup>Docs. 35-5; 39-5; 35-9 at p.15; 39-7.

28 <sup>34</sup>Docs. 35-5; 35-8 at p. 42; 39-7.

1 inconsistent with a position previously taken by him . . . ."35 "The essence of the  
2 doctrine of quasi-estoppel is the existence of facts and circumstances making the  
3 assertion of an inconsistent position unconscionable."<sup>36</sup> Unlike estoppel, quasi-estoppel  
4 does not require a showing of reliance as an essential element; however, reliance is  
5 one factor for the court to consider.<sup>37</sup> Other factors include

6 whether the party asserting the inconsistent position has gained an  
7 advantage or produced some disadvantage through the first position;  
8 whether the inconsistency was of such significance as to make the  
9 present assertion unconscionable; and, whether the first assertion was  
10 based on full knowledge of the facts.<sup>38</sup>

11 Given the equitable nature of the doctrine, the issue is one that is appropriately decided  
12 by the court.<sup>39</sup>

13 The court is not persuaded that Rockford's erroneous certifications to the  
14 government provide a basis for J&L to assert quasi-estoppel in this contract dispute  
15 between the parties. As noted by Rockford in its briefing, J&L is not the aggrieved party  
16 in relation to the misrepresentations made in Rockford's request to be paid pursuant to  
17 the Prime Contract. The government is. J&L does not assert, and the record does not  
18 show, that J&L was privy to these payment applications. Rather, as discussed above,  
19 the record shows that Rockford took a consistent position with J&L concerning its  
20 performance and the issue of damages. Therefore, the false certification has little  
21 significance to the parties' current contract dispute. Also diminishing the significant of  
22 Rockford's inconsistency is the fact that there is no evidence of bad faith in the record;  
23 that is, Rockford's false certification could be a result of negligence or incompetence.

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24 <sup>35</sup>*Jamison v. Consol. Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978).

25 <sup>36</sup>*Id.*

26 <sup>37</sup>*Id.* at 102-03.

27 <sup>38</sup>*Id.* at 103.

28 <sup>39</sup>*See Alaska Interstate Constr., LLC v. Pac. Diversified Inv., Inc.*, 279 P.3d 1156, 1179,  
1180 (Alaska 2012).

1 The fact that Rockford may have improperly benefitted from not disclosing its  
2 withholding—by avoiding interest payments or other penalties under the applicable  
3 federal statutes—or may have violated the False Claims Act is a matter for the  
4 government to address. It does not make Rockford's long-standing claim for damages  
5 against J&L in this contract dispute unconscionable.

6 Similarly, Rockford's failure to send the requisite notice under 31 U.S.C.  
7 § 3905(e) does not amount to unconscionable conduct justifying the application of  
8 quasi-estoppel. Aside from the fact that § 3905(j) prevents the issue from limiting  
9 Rockford's contractual rights, Rockford, as noted above, took a consistent position with  
10 J&L. J&L knew what was needed to cure its paving work and did so and knew that the  
11 issue of damages stemming from delays remained unsettled. The court is hard pressed  
12 to see how any unconscionable situation arose from the lack of a § 3905(e) notice.

13 **V. CONCLUSION**

14 Plaintiff's motion at docket 36 is DENIED. Defendants' cross-motion at docket 37  
15 is GRANTED—Rockford is not barred by virtue of its payment applications to the  
16 government or failure to send notices under 31 U.S.C. § 3905(e) from arguing that J&L  
17 breached the Subcontract, thereby entitling it to offset any resulting damages against  
18 J&L's payment. The motion for oral argument at docket 46 is DENIED.

19 DATED this 3<sup>rd</sup> day of May 2019.

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21 /s/ JOHN W. SEDWICK  
22 SENIOR JUDGE, UNITED STATES DISTRICT COURT  
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