The *Amelco* Case: California Bars Abandonment Claims in Public Contracts

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I. Introduction: Setting the Stage

In *Amelco Electric v. City of Thousand Oaks*,[1] the California Supreme Court dealt a crushing blow to what I shall call post-completion, inefficiency claims. This case was a bombshell to the construction bar, particularly those who represent contractors in California. It surprised those who write about construction law. They thought the decision by the intermediate court of appeals, called the DCA by those who practice in California, represented a confirmation of the trend toward giving contractors a chance, though not a good one, to recoup certain losses caused by the owner or those for whom the owner is responsible.[2]

Before I describe and critique this important case, let me open up the chest of construction lore. One legend that pops out of this chest, and one directly pertinent to *Amelco*, has a contractor and its lawyer desperately seeking a theory under which it can make a claim against the owner after performing a losing contract. They search for a theory that would allow the contractor to show (1) more changes than a contractor could reasonably have expected; (2) additional costs not captured by the amount allowed for the changes; (3) incompetent administration; and (4) anything else chargeable to the owner that would have caused unexpected charges, diminished productivity, and increased administrative charges.

The contractor would search whatever records it has that would establish the amount of diminished productivity, its cost of redoing work, and any unabsorbed overhead. These could make its cost of performance greater than it should have been or was expected to have been. If it can charge them to the owner, it can convert a loser into a winner, or at least one that did not generate a loss.

In Part II, I describe the facts that support these claims, note the legal issues surrounding them, and explore the remedies awarded when they are recognized. We shall see that a number of labels have been attached to these attempts by the contractor (or subcontractor in claims against the prime contractor) to receive more money. In Part III, I describe *Amelco*. In Part IV,

1. 38 P.3d 1120 (Cal. 2002).

2. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159 (Ct. App. 2000), *rev. granted*, 11 P.3d 956 (Cal. 2000). For comments see JUSTIN SWEET & JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS, § 11.05 (4th ed. Supp. 2002); Reginald M. Jones, *Lost Productivity: Claims for the Cumulative Impact of Multiple Change Orders*, 31 PUB. CONT. L.J. 1, 43–44 (2001).

I critique the court's decision. In Part V, I speculate about the effect of the decision in this case on California construction practices and claims procedures, as did the majority and the dissent in *Amelco*.

II. Post-Completion Claims

A. *Description*

I refer to these claims as post-completion, inefficiency claims. They are made after the project has been completed, the contractor has been paid off, and—as I suggested when I went into the chest of construction lore—the contractor seeks a way of justifying its contention that it should be paid more money. It reviews its records or consults its claims consultants with the hope of tracing expenses to the wrongful conduct of the owner (or prime) or someone for whom the owner or prime is responsible, such as the architect or engineer or, more rarely, a multiple prime (separate contractor).

Others have probed these post-completion claims (they may call them by other names) more thoroughly than I shall in this sketch.[3] I present this sketch as a prelude to *Amelco*. I do this to help us see whether *Amelco* is "in line" with judicial attitudes toward these post-completion claims. If it is not, what are the reasons for this resistance?

But first let me make some observations on the classification of what I call inefficiency claims as "post-completion" claims. The bulk of disputes are handled by negotiation, courts, or ADR methods after the work has been completed. They generally are not post-completion claims as I define them.

I shall use post-completion, inefficiency to describe claims made by the contractor against the owner after the contractor has been paid what the owner thinks the contract compels, the original cost as adjusted for changes. The contractor demands additional compensation for costs it has incurred to perform the work, costs that it claims are chargeable to the owner. These claims are much like the claims that I described in my invocation of a legend extracted from the chest of construction lore.

B. *Labels: Efficient Performance*

There are a number of labels attached to these post-completion claims. Some came from federal procurement. The first was the cardinal change. This term has been used to describe a changes-related claim. If the owner orders a great number of changes, more than could have been reasonably expected or whose scope went beyond the power granted to it under the

3. For some recent papers see Jones, *supra* note 2; Lynn Hawkins Patton & Cheri Turnage Gatlin, *Claims for Lost Labor Productivity*, 20 CONSTR. LAW. 21 (2000); Geoffrey T. Keating & Thomas F. Burke, *Cumulative Impact Claims: Can They Still Succeed?*, 20 CONSTR. LAW. 30 (2000); Michael R. Finke, *Claims for Construction Productivity Losses*, 26 PUB. CONT. L.J. 311 (1997).

changes clause, these are cardinal changes. It made the contract into something drastically different than it was when it was originally made.

Some federal procurement claims are based upon constructive changes. These are events that should have been the basis of a formal change order. When there is a constructive change, the contractor receives an equitable adjustment.

Some labels reflect the effect on the contractor's performance of the conduct claimed as the basis for the claim, such as impact, ripple, cumulative impact of multiple changes, inefficiency, diminished productivity, or delay and disruption claims. The classification of abandonment, as in *Amelco*, related to its presumed effect on the original contract.

However denominated, essentially they are claims that the owner or those for whom it is responsible did not do a proper job of communicating information (*Spearin* claims of defective information furnished the contractor), designing (excessive changes), or administering the project (e.g., improper sequencing, poor coordination, and sloppy communication). Generally, the claims are based on a combination of these failures. These failures frustrated the contractor's expectation that it would be able to do the work in a logical, orderly, and efficient way.

C. *Claimant Conduct During Performance*

By using the term "post-completion," I do not mean to suggest that the claim made at the end of the job comes as a complete surprise to the owner. In most cases, the contractor (or subcontractor) does not silently acquiesce when it believes it is not being treated properly during performance. Often it makes loud complaints that the work is being changed too much, that it has to stand around waiting to do work or conditions are not those that it expected, and that it is spending more than it should.

It even may reserve its rights to assert such a claim at important benchmarks, such as the execution of a formal change order, receipt of progress payments, or issuance of a completion certificate. The formal presentation of the claim, however, is likely to come after the project has been completed and final payment made. That is why I am calling them post-completion claims.

D. *History: Federal Procurement*

Before I proceed to the facts that give rise to these claims, the substantive bases for them, and the remedy, let me present some history of these contractor (or subcontractor) claims for more money after it has been paid the balance of the contract price.

Although I cannot say that such claims were unknown before that time, I think it accurate to say that it has been in the past fifty years that such claims have been seen with some regularity and only in the past twenty-five years have they been in the construction bar spotlight.

One of the first decisions that dealt with these claims was the decision of the U.S. Supreme Court in *Rice v. United States*.[4] It involved a claim by the contractor upon encountering unexpected subsurface conditions, based upon what was then called the changed conditions clause, now called the differing site conditions clause. The Court held that the contractor could not recover decreased productivity and extended home office overhead because of the delay caused by the discovery of unforeseen subsurface conditions. The contractor could recover only for the work changed under a change order but not for the increased cost of doing unchanged work. This case established the *Rice* doctrine that at least for a while barred what I have called post-completion, inefficiency claims.

The *Rice* doctrine was abolished by a change in federal procurement standard contracts and exceptions carved out by the courts and various federal government boards of appeal.[5] This did not eliminate the policy effectuated at least for a time by the *Rice* doctrine, the policy to protect the contract price and, as we shall see in *Amelco* ahead, the competitive bidding process.

Another milestone was the development in federal procurement of the cardinal change concept. Because changes are often the basis for post-completion claims, let me note briefly the development of the concept.

Originally, the concept had a jurisdictional function. Federal contracts contain disputes clauses. All disputes under the contract must be submitted to the head of the agency that awarded the contract, in effect to an agency board of appeal. To get to a court, such as the then Court of Claims or, in small claims, to a federal district court, the claimant had to show there had been a breach of contract. To support its claim of a breach, the claimant would contend that there had been many more changes ordered than could have been expected or, less commonly, that the scope of the change had exceeded the power granted to order changes.

The Federal Contracts Disputes Act of 1978[6] eliminated the jurisdictional problem. This gave the claimant a choice. It might go to the U.S. Claims Court or to an agency board of contract appeals.

Although the jurisdictional basis for the cardinal change was abolished, the concept did not die. We shall see why when we examine the various bases for such post-completion claims.

Why have these claims become almost routine in the construction world in the past twenty-five years? In my view these claims have become more common because of the increasingly low profit margins of contractors and the proliferation of claims consultants. They often combine to generate such a claim when, as I suggested in the chest of construction lore, the contractor finds it has suffered a loss and turns to claims consultants. Now

4. 317 U.S. 61 (1942).
5. *See* Jones, *supra* note 2, at 18–19.
6. Pub. L. No. 95–563, 41 U.S.C. §§ 601 *et seq.* (2002).

let me present an encapsulated view of the facts that generally support post-completion claims.

E. *Diminished Productivity*

Diminished productivity often lies at the heart of demands for additional compensation. Let us look at things that can reduce productivity.

Reginald M. Jones, in his recent study of this topic, quotes a bulletin from the Mechanical Contractors Association of America that identifies factors that "degrade efficient performance of the contract work."[7] These factors include

> (1) stacking of trades, (2) morale and attitude, (3) reassignment of craft-personnel, (4) crew size inefficiency, (5) dilution of supervision due to diversion of supervisors to analyze and plan for changes, (6) site access, (7) changes in one trade's work affecting another trade's work, (8) control over material flow to work areas, and (9) season and weather changes.[8]

One federal agency board spoke of inefficiencies caused by changes by the Government. It divided costs into "hard core" costs, those directly related to the changed work, and "impact" costs, those arising from the interaction between changed work and unchanged work. It defined impact costs as those that include "inefficiencies due to overcrowding, over- or undermanning, skill dilution, extended overtime, shift work and local and cumulative disruption."[9] By the latter it meant synergism, that individual changes have a cumulative effect beyond the cost of individual changes.

Another writer speaks of "job rhythm," noting that "[l]abor productivity is at its optimum when there is good job rhythm. When that job rhythm is interrupted, the productivity . . . is definitely impacted and the effect can spread to other concurrent activities as well."[10]

This should give us an idea of the types of productivity losses that are at the heart of a post-completion, inefficiency claim. Later we shall see that the problem encountered in *Amelco* and other cases of its type is the difficulty of establishing the costs attributable to specific breaches of contract that support a post-completion claim.

F. *Substantive Bases*

Out of the mass of such post-completion cases it is not simple to provide a brief picture of the substantive basis for these claims. To understand them, however, we must try.

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7. Jones, *supra* note 2, at 8.
8. *Id.*
9. Triple "A" South, ASBCA No. 46866, 94-3 BCA ¶ 27,194, at 135,523.
10. Jones, *supra* note 2, at 9 (citing Thomas R. Burke, Productivity Loss Claims, a paper presented to the Surety and Fidelity Claims Conference Association, Apr. 18, 1991).

Sometimes the claim is based on pre-performance breaches, such as those based on the *Spearin* doctrine, based upon *United States v. Spearin*.[11] It held that the government owner warrants the accuracy of its plans and information furnished the bidders. This information usually relates to the conditions under which the work will be performed. *Spearin* is also the basis for holding that the owners warrant that the contractor who does the work as specified will achieve the intended result, that the design is "buildable."

Another substantive basis for these claims is the implication that the design will be reasonably complete and not have to be revised too often during performance. That was crucial in *Amelco*. This, and the desire to police abuse of the contractual power to order changes, is at the heart of the cardinal change concept. The substantive basis for the cardinal change is breach of the power granted by the changes clause.

Sometimes the contract itself, supplemented by implied terms, may be the basis for the post-completion claim. For example, the contractor may encounter unforeseen subsurface conditions, report them to the owner, and await the owner's instructions. If there is unwarranted delay in giving instructions, this may be the basis for a delay and disruption claim.

Another substantive basis is the implication that the project will be administered properly. Requests for Information (RFI) will be answered promptly as will requests for substitutions. Submittals will not languish on the architect's desk indefinitely.

The owner should not unreasonably prevent the contractor from doing the work efficiently. Also, where cooperation is needed, such as providing sequencing of the work, it will be given. Another way of expressing this is that the owner is required to act in good faith and to deal fairly with the contractor.

G. *Effect of Breach*

Suppose there is a breach by the owner. What effect does it have? Although I shall look at the remedy for such a breach shortly, my concern at this point is the effect such a breach has on contract provisions.

One thing is clear from the cardinal change cases. The contract price does not limit recovery.[12] What of other clauses?

Contracts often contain dispute-oriented clauses. Examples are disputes or arbitration clauses, ones that require the contractor give notice of an intent to make a claim or ones that require claims to be preserved at designated performance benchmarks.

Here we are not sure of the effect on such dispute-oriented clauses when the contractor makes a post-completion, inefficiency claim. My guess is that the establishment of a valid post-completion claim will bar the owner from

11. 248 U.S. 132 (1918).

12. C. Norman Peterson Co. v. Container Corp. of Am., 218 Cal. Rptr. 592 (Ct. App. 1985) (called abandonment).

pointing to contract dispute–oriented clauses. We shall see this again when we look at *Amelco*.

H. *Preservation of Claim*

Even a valid claim can be lost. For example, at important benchmarks of performance, such as execution of formal change orders, receiving payment, or issuance of a certificate of final completion, failure to reserve the claim may bar it.[13]

I. *Remedies*

Remedies lie at the heart of the post-completion, inefficiency claim. As I noted when I extracted a legend from the chest of construction lore, often the claim is not really thought about with seriousness until the work has been completed. Also, the records often do not separate out costs that would have had to have been incurred in any event from those that were generated by the owner's breach. As a result, the contractor will find it difficult or even impossible to point to specific losses caused by particular breaches.

Yet the law requires that the claimant show with reasonable certainty that the defendant was a substantial factor in causing the loss (that others played a part in causing the loss is not a bar), that the loss was reasonably foreseeable as a result of the breach, and—this is crucial—that the amount of the loss be established with reasonable certainty.

In federal procurement one frequently hears that the contractor must prove liability, causation, and resultant injury. Jones writes that "the contractor must prove 'entitlement and quantum, i.e., that the Government or owner is responsible for the condition giving rise to the claim and that a specific amount of additional costs were incurred.'" (By condition Jones means that the work was performed under adverse conditions reducing productivity.) He concludes that "causation and resultant injury lie at the heart of proving an inefficiency claim."[14]

It is the remedy that makes these post-completion claims so controversial and terrifies owners. Often the claimant seeks to employ a crude, global formula, a formula based not upon the particular activity or work packet impacted but upon the cost of the entire project.

The crudest of all the formulas is total cost. The contractor deducts from the actual cost the cost that it asserts should have been incurred. Such a formula does not take into account that the expected costs were unreasonable or that the actual costs were the fault of the contractor, not that of the defendant.

13. Vicari v. United States, 47 Fed. Cl. 353 (2000) (claim of economic duress rejected). *See also* Jones, *supra* note 2, at 42–45 (suggesting that failure to reserve the claim will bar it under Federal Procurement).

14. Jones, *supra* note 2, at 29.

These causation defects are supposed to be cured in the modified total cost formula. It requires the contractor to show that its estimate of the costs was reasonable (often that its bid was in line with other bidders is sufficient.) It must also exclude actual costs attributable to the claimant.

The last crude formula to measure the value of the claim is the jury verdict.[15] It seeks to simulate the educated guess that juries make. It is used only if better proof is not available and it is clear that the cost overrun is chargeable to the owner.

These methods are not favored, only used as a starting point or a last resort. Some courts simply will not allow them.[16]

We shall see in *Amelco* that cases using the abandonment theory remove the contract price as a limit to recovery by concluding that the parties have abandoned the contract, particularly the contract price, and invoke restitution by employing quantum meruit. This usually means the reasonable value of the services.

As we shall see below, quantum meruit resembles total cost. Each starts with actual costs or outlay. The quantum meruit measure deducts the costs for which the claimant contractor is responsible. Total cost reduces the claim by any costs for which the claimant contractor is responsible, in effect converting total cost into modified total cost. Modified total cost requires the claimant contractor to show that its bid, to which actual costs are compared, was reasonable.

Generally, a narrow and well-defined work packet that has been adversely affected by the owner's failure to live up to its obligation will allow work productivity formulas that more directly connect the breach with the loss suffered. This method is preferable to global formulas that employ all actual costs of performance.

Other methods are preferred to global formulas. One is the measured mile. It seeks to compare the productivity in the area of work when impacted or disrupted with the same or similar work when not impacted or disrupted.[17]

Another preferred method is the use of industry or trade association productivity studies.[18] Finally, there is qualified expert opinion.

Now let us move to *Amelco*.

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15. *See* State of California *ex rel.* Dep't of Transp. v. Guy F. Atkinson Co., 231 Cal. Rptr. 382 (Ct. App. 1986), discussed *infra* Part III.E.3. There one will see that the measure of recovery was the actual expenditures by the contractor less 35 percent, arrived at by a jury verdict to cover those costs attributable to the contractor.

16. For more detail on these formulas, see JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS, § 27.02 F (6th ed. 2000); Jones, *supra* note 2, at 30–34; Patton & Gatlin, *supra* note 3, at 24–25, 27–28; Bernhard A. Aaen, *The Total Cost Method of Calculating Damages in Construction Cases*, 22 PAC. L.J. 1185 (1991) (cited in *Amelco*).

17. P.J. Dick, Inc., VABCA No. 5597 et al., 01–2 BCA ¶ 31,647; *see also* Jones, *supra* note 2, at 34–37; Patton & Gatlin, *supra* note 3, at 25–26.

18. Clark Constr. Group, Inc., VABCA No. 5674, 00–1 BCA ¶ 30,870; Patton & Gatlin, *supra* note 3, at 26–27.

III. *Amelco v. City of Thousand Oaks*

A. *Relevant Facts*

The facts are crucial to an evaluation of *Amelco*. They also show a typical inefficiency claim made after completion. Amelco's claim was based upon two theories. The first was that the original contract had been abandoned and the claimant was allowed to recover based on quantum meruit. I shall refer to this claim as the abandonment claim.

The second claim was based on breach of contract; the claimant attempted to measure its recovery by the total cost method. I shall refer to it as the breach claim. As we shall see, each claim was submitted separately to the jury and Amelco won on both. Nevertheless, the jury award of some two million dollars on each claim was not cumulative.

Although total cost played a significant part in both claims, I think it advisable to treat the two claims separately. For this reason, I shall first state the relevant facts for the abandonment claim and then the ones relevant to the breach claim. My emphasis will be on the details provided in the discussion of the abandonment claim. They also form much of the basis for the breach claim.

The facts are taken mainly from the opinion of the Supreme Court of California, supplemented by facts contained in the intermediate court opinion not referred to in the supreme court's opinion.

B. *Abandonment Claim*

The project was for a Civic Arts Plaza for the City of Thousand Oaks. It included a civic center or office building; a dual-purpose, 400-seat council chamber and forum theater; an 1,800-seat civic auditorium or performing arts theater; and an outside area.

The dissenting opinion pointed out:

> [I]t appears the City let the project out for bid before its plans were sufficiently complete to permit knowledgeable and informed bidding by building contractors, placed itself under an unreasonable time pressure by booking entertainment into the new facility without allowing a reasonable amount of time to complete the project, and then imposed numerous and substantial changes to the project while giving Amelco no extra time to complete the additional work.[19]

The city decided to use a multiple prime contract managed by a construction manager, Lehrer McGovern Bovis (LMB). The city awarded Amelco, a national electric contractor, the electrical work in competitive bidding. All bids were quite close to each other; Amelco's bid did not appear out of line. Its bid of $6,158,378 was $91,000 less than the next lowest bid. Before the city awarded the contract to Amelco, its electrical consultant confirmed that the bid contained no major omissions.

19. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1135 (Cal. 2002).

The bid package described the technical specifications and drawings as complete. The contract stated that "detail sketches . . . may be furnished by the Engineer from time to time during construction in explanation of said Drawings or other Contract Documents."[20]

This recital was clearly an understatement. These sketches were at the heart of the claim. The court noted that "[d]uring the two-year construction process, City furnished 1,018 sequentially numbered sketches to the [multiple primes] to clarify or change the original contract drawings, or to respond to requests for information."[21] Of them, 248 affected the electrical cost. Amelco requested 221 change orders and the city and Amelco agreed on thirty-two of them, increasing the price about a million dollars, or nearly 17 percent.

Although the state supreme court noted in Amelco's claim at the trial that "an unusually high number of sketches . . . were difficult to work with"[22] and created scheduling and coordination problems with other contractors, it was the DCA that fleshed out this description.

It stated that the sheer number of sketches was more than Amelco had anticipated "or had ever seen on other jobs."[23] According to Amelco, by the time the project was concluded, the city had changed "*every part of the electrical work at least once.*"[24] The city had changed the electrical work in one room forty times.

An expert for Amelco testified that given the number of sketches, the electrical design was not complete at the time of bid. He testified further that most of the sketches were not clarifications, which could have been expected at the time of the bid, but changes in the design. He also stated that no experienced contractor could have estimated the number of sketches.

The sketches were difficult to work with for Amelco. The DCA stated:

> Many were drawn at a different scale from the contract drawings. Some sketches did not mark or "cloud" the changes being made . . . Other sketches were incomplete, failed to identify the contract drawing being modified, or were based on out-dated drawings that did not reflect prior changes.[25]

Because of the many changes and difficulties in dealing with the drawings, the DCA found that Amelco had to use more workers with more experience than it planned. This increased labor costs and reduced productivity and efficiency.

Amelco also complained about delay by the design professionals in responding to requests by the contractors for information. Amelco further complained about being told to proceed with changed work "without awaiting prior approval of the estimated costs."[26]

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20. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 163 (Ct. App. 2000).
21. *Amelco*, 38 P.3d at 1122.
22. *Id.*
23. *Amelco*, 98 Cal. Rptr. 2d at 163.
24. *Id.*
25. *Id.*
26. *Id.*

Amelco contended that "[s]cheduling and sequencing the various contractors' work was also complicated and became more difficult as construction progressed and changes became more frequent."[27]

Although the DCA, as had the state supreme court, pointed to complications in scheduling and sequencing the work, the DCA also noted that Amelco's employees "testified they had never worked on a project as disorganized and uncoordinated as this one."[28]

I bring these additional facts from the DCA opinion to your attention to show that Amelco's basic complaint was not simply that there were too many changes. Rather, this was a poorly run project. This can justify classifying the so-called abandonment claim as one for delay and disruption, or, better, one based upon the owner administering a project so badly that the contractor was not able to do the work in a logical, orderly, and efficient way.

That the jury found for Amelco should lead us to the conclusion that the facts DCA stressed, the excessive number of changes and mismanagement, are to be taken as true.

We also should look at the way the parties acted while all these problems were developing and at the end of the job. For example, the supreme court pointed to Amelco's inability to "produce documentation of instances in which its performance . . . [was] interfered with by LMB's actions, and for which it was not compensated."[29] This was, said the court, despite Amelco's maintenance of daily records of its work activities.

The court cited testimony of Amelco's foreman. The city had given him a hypothetical question regarding record-keeping practices. Responding to this hypothetical question, he stated that he would not put movement of a wall in his daily log.

The court also quoted testimony of an Amelco official that "the sheer number of changes made it 'impossible' to keep track of the impact any one change had on the project or on Amelco likening the effect to 'death by 1,000 cuts.'"[30]

The conduct of the parties during performance also is significant. It can provide evidence that the claimant was really suffering and made the city aware of it. The DCA directed its attention to this, as did the court, something we shall see later. The DCA noted that "[t]hroughout the construction, Amelco personnel complained to LMB about the number of changes, the sketches and the lack of organization and coordination among trades."[31]

Amelco requested a change order to do work that it claimed the construction manager should have done but refused to do. The city denied the request.

27. *Id.*
28. *Id.*
29. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1122–23 (Cal. 2002).
30. *Id.* at 1123.
31. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 163 (Ct. App. 2000).

Amelco accepted the city's action because the city promised that things would get better. Despite the verbal complaints, the city contended that Amelco "did not provide LMB with written notice that it was losing money on the project until after it had completed its work."[32]

C. *Breach Claim*

Most of the supreme court's recital of the facts came from that part of its opinion dealing with the abandonment claim. It dropped the facts relating to the breach claim to a footnote dealing with jury instructions.

From that footnote, it appears that the bases for the breach claim were (1) failure to comply with the California version of the *Spearin* doctrine relating to the warranty of the correctness and completeness of the specifications and (2) nondisclosure of material facts.

Most important, the instructions stated that the city breached the contract if it hindered or prevented Amelco's performance.

The instructions also stated that the city breached and/or abandoned the contract by "1. Providing an inadequate design; 2. Making excessive changes to the project; 3. Making changes in a disorganized manner; 4. Failing to properly coordinate the work of the multiple prime contractors; 5. Accelerating Amelco's work; and 6. Failing to make payments to Amelco in a timely manner."[33]

These instructions show the multidimensioned nature of a classic post-completion case. To be sure, changes play an important role. So does failure to run the project in a way that will allow the contractor to work efficiently.

D. *Importance of Case*

The construction industry and those at the construction bar considered this case a crucial one, as the number of amicus curiae briefs submitted before both the DCA and the supreme court demonstrates. In the former, attorneys for the League of American Cities, various California municipalities, the Engineering Contractors Association, the Southern California Contractors Association, and the Associated Contractors of California submitted amicus briefs.

Before the supreme court these groups, in addition to the National Electrical Contractors Association and the Association of Specialty Contractors, again submitted amicus briefs.

This indicates that the public entities and the contractors looked at this case as a crucial one, one justifying spending much money. It also indicates that the courts were likely given a good deal of relevant construction information.

32. *Id.* at 164.
33. *Amelco*, 38 P.3d at 1132 n.1.

E. *Three Critical Cases*

Before we move to the decisions in the DCA and the supreme court, we must take note of three intermediate court decisions that have been central to California construction law and important enough to be mentioned in the *Amelco* opinions. We must know the effect of *Amelco* on these seminal cases in California construction law.

1. *Huber, Hunt & Nichols, Inc. v. Moore*

The first was *Huber, Hunt & Nichols, Inc. v. Moore*.[34] Decided in 1977, the facts were complicated. I will relate them briefly because they bear heavily on the decision in *Amelco*, the court in the latter having cited, described, and followed the case. The court in this case barred the contractor's claim.

It was essentially a post-completion, inefficiency case dealing with change orders. The contractor, Huber, Hunt, made a claim against the City of Fresno, Fresno County, and its architect. The contractor settled with the public owners and pursued the architect in tort. (This raised collateral source problems.)

The court's decision was devastating to the contractor. The court refused to admit the contractor's cost computer printouts as they did not separate costs for which the defendant owner was responsible from those that were not its responsibility. Then it pointed to the contractor's not having preserved its claim as a reason to bar it. If this were not enough, the court held that the contractor should have taken any impact costs connected with unchanged work into account when it negotiated the change orders.

Then the court made quite clear that it would not allow the total cost theory to be employed. It did suggest that it was not holding that total cost might *never* be used, but it was not appropriate for this case. Still, construction lawyers and legal writers assumed this global formula might not be used in California.

The court also worried about the effect of allowing total cost. It was afraid that a contractor might submit a low bid with the hope that it could claim total cost if it could find "some error or omission."[35]

2. *C. Norman Peterson Co. v. Container Corp. of America*

The second case, *C. Norman Peterson Co. v. Container Corp. of America*, was decided in 1985, some eight years later.[36] It was a claim under a private contract, based upon a huge number of changes and many of the inefficiency factors that we have seen. It was a classic post-completion, inefficiency claim, though called an abandonment claim. The court allowed it.

The court found that the contract became abandoned when the owner ordered so many changes that the scope of the original contract was altered.

34. 136 Cal. Rptr. 603 (Ct. App. 1977).
35. *Id.* at 622–23.
36. 218 Cal. Rptr. 592 (Ct. App. 1985).

Abandonment requires that both parties, either expressly or impliedly, agree that the contract, from that point on, will be disregarded.

The owner ordered an excessive number of changes, which the contractor performed. The court held that this created an abandonment. The parties now operated on an understanding that the parties were proceeding on a quantum meruit basis. *Peterson* gave new hope to the contractors after the bitter pill of *Huber, Hunt*.

The court allowed the claimant to proceed on the basis of both abandonment and breach as long as there is no double recovery.

This description of *Peterson* was taken from the opinion of the Supreme Court of California in *Amelco*.[37] Yet *Amelco*, though citing, describing, and not overruling *Peterson*, went in the opposite direction, at least in public contract cases.

3. *State Department of Transportation v. Guy F. Atkinson Co.*

The third case, *State Department of Transportation v. Guy F. Atkinson Co.*[38] gave more hope to contractors. It was decided a year after *Peterson*. The case involved a post-completion claim under a state contract. The dispute was required to be submitted to a hearing officer. Although called an arbitrator, the hearing officer conducts a judicial-like arbitration. This process is unlike an ordinary commercial arbitration; the latter affords a minimal scope of judicial review. The award in this statutory arbitration system must be supported by substantial evidence.

The claimant contractor introduced cost estimates for its entire performance. The arbitrator started with the highest cost estimate submitted by the claimant contractor. Then he used the jury verdict to deduct 35 percent to take into account the costs for which the claimant contractor was responsible.

The trial judge and the intermediate court of appeals affirmed this decision. The arbitrator, according to the appellate court, was "eminently reasonable."[39] The state criticized what it called "the total method of calculation," evidently focusing on the first step of using actual cost. But the court said this method (subtracting payments from total costs) is "permitted where accurate assessments are difficult if not impossible to ascertain."[40]

Atkinson was another victory for contractors. It permitted the contractor to use a combination of total cost and jury verdict to replace proof of specific losses connected to particular breaches.

4. Summary

Let me sum up the effect of these three intermediate court decisions. *Huber, Hunt* was a stake in the heart of contractors. *Peterson* and *Atkinson*

37. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1125 (Cal. 2002).
38. 231 Cal. Rptr. 382 (Ct. App. 1986).
39. *Id.* at 385.
40. *Id.*

gave new hope to them. As we shall see, the DCA decision in *Amelco* reinforced the hope that contractors could pursue these hard-to-win post-completion, inefficiency claims. But then, as we shall see, the California Supreme Court decision in *Amelco* exploded like an atomic bomb on contractors that do work for public entities.

F. *DCA Opinion*

Amelco sought recovery from the city on two theories although based on the same facts. One was that the excessive changes caused an abandonment of the contract and allowed the contractor to recover for the reasonable value of its services. The other was that the city breached the contract by ordering excessive changes and doing a bad job of administration. It held that the contractor could recover on a total cost theory. Let us first look at abandonment.

Trouble with the abandonment theory can be seen at the outset. The court admitted that abandonment "is a word of art in the context of construction contracts."[41]

In this context it does not mean the parties have agreed to abandon the contract in the sense of a mutual discharge. When the owner has imposed upon the contractor "an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered," there has been abandonment of the contract.[42] Following *Peterson*, the court said that the owner expects that the contractor will complete the project. Nevertheless, abandonment removes the contract price.

Even before it summarized the facts, the court emphasized that this is a case involving a public works contract. Then it moved to *Peterson*. It quoted and followed *Peterson* for the proposition that if the contract has been abandoned, the "contractor who completes the project is entitled to recover the reasonable value of its services on a quantum meruit basis."[43]

We should remember that in *Peterson* the court concluded that after the contract is abandoned, there is an understanding between the parties that the contractor will proceed on a quantum meruit basis. It is this ancient common count that, as we shall see, frightened the supreme court.

The court's handling of the city's contention that this writ is not available in a claim against a public agency demonstrates its difficulty with quantum meruit. The court had to deal with an earlier case holding that a contractor supplying labor or services under a contract that violated the competitive bidding laws cannot recover for the value of its services under quantum meruit.[44]

41. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 162 n.1 (Ct. App. 2000).
42. *Id.*
43. *Id.* at 164.
44. Miller v. McKinnon, 124 P.2d 34 (Cal. 1942).

The court distinguished the earlier case as one that involved a contract void at its inception, not one that is valid when made but later abandoned as in *Amelco*.

The city then argued that the jury finding that the contract had been abandoned was not supported by substantial evidence. The court again returned to the private contract *Peterson* case to amplify its earlier statement as to when a contract has been abandoned. It cited *Peterson* as holding there had been incomplete drawings and the owner redesigned the project in an extensive manner "beyond the contemplation of the parties when the contract was first executed."[45]

Finally, the court noted that in *Peterson* time pressures were the reason that contractual change order procedures were not followed.

The city then contended that to support a finding of abandonment, there must not only be an excessive number of changes, but that parties must ignore change order procedures and that the owner's conduct made it impossible for the contractor to keep accurate records of the cost of performing the extra work.

The court rejected this. It concluded that in many cases, including this one, change order procedures were not followed and the contractor was unable to keep good records. These facts are simply evidence of abandonment, not essential elements of abandonment.

It is interesting to see the relationship between abandonment and record keeping. Presumably, if the abandonment is based on an excessive number of changes, and the contractor can keep adequate records and be compensated through the changes process, it cannot say the contract has been abandoned.

Suppose, however, the claim is also based upon breach of a promise to administer the project in such a way as to allow the contractor to perform in a logical, orderly, and efficient way. This was certainly the case here. Record keeping becomes crucial. If adequate records connecting the breach with losses and their amount cannot be produced, contractors must resort to a crude, global formula. This leads us to Amelco's second theory, that of breach of contract.

Before Amelco could get to the measure of recovery for its breach claim, it had to bypass the contractual clauses that pertain to claims, such as clauses requiring a change order to change the contract price or, more important, that the contractor give a notice of an intention to make a claim. If the contractor wins on its abandonment theory, it need not worry about these clauses. In the breach claim the court had to deal with these clauses, a factor quite important in the supreme court's decision.

The court approved an instruction stating that the claim would be barred by failure to give notice unless the claim arose out of the defendant's breach of contract, the defendant knew of the condition that gave rise to the claim,

45. *Amelco*, 98 Cal. Rptr. 2d at 166.

the defendant was unable to show prejudice by absence of the notice, or the defendant waived the condition of notice.

It concluded that a breaching party cannot demand notice of an intent to make a claim. It also found that Amelco did not waive its claim. It complained about how it was being treated and reserved its rights to make a claim later.

Finally, after dealing with causation and foreseeability, the court went into the measure of recovery, crucial in these cases. The court held that reasonable value invoked something like the total cost formula. The court cited *Peterson* as precedent that this method may be used. You will recall that *Peterson* was a private contract case.

The city contended that this global formula might not be used unless the contractor showed the impracticability of proving losses directly, the reasonableness of its bid, the reasonableness of its actual cost, and its lack of responsibility for the added costs. In effect it was contending for the modified total cost, the additional factors stripping out those aspects of total cost that made pure total costs unfair to the defendant.

The court held that the city waived this contention by failing to ask for such an instruction.

Then the court stated that had the city done so, it would have denied the request. The court cited a number of garden-variety cases in which the contractor ordered to do extra work still recovers the reasonable value of its work despite its inability to produce a written change order.[46] But they were not post-completion cases such as *Amelco*, with its drastic remedy of revaluing the whole work. As we shall see, the supreme court would seize on this distinction.

Especially important, the court rejected the city's claim that the overhead and profit rates used by the jury exceeded the rates for profit and overhead provided by the contract. The court now shifted back to abandonment and said recovery was not measured by any contractual formulas.

Let me make one final remark. The court did not advert to the inefficient administration by the city as being an important element of the claim despite the facts so indicating. The court treated this as an excessive changes (cardinal changes) case.

G. *Supreme Court Decision*

1. Abandonment Claim

The opinion begins on a revealing note. In attempting to set out the background for its opinion, the supreme court stated that "Amelco submitted a $1.7 million total claim for costs allegedly resulting from the *noncaptured cost of the change orders*."[47]

46. *Id.* at 173.

47. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1123 (Cal. 2002) (emphasis added).

The change order basis for the abandonment claim requires that we look at the changes process to understand what the court meant by "noncaptured costs." If a change is ordered, in the event the parties cannot agree on time and price adjustments, the changes clause usually includes a mechanism for adjusting the time and price. If Amelco had been compensated for the changes, as in *Huber, Hunt*, it would have had no further claim. Amelco's claim, according to the court, was that it had not been compensated. It makes no difference how many changes were ordered if the contractor has been compensated.

But may the contractor recover for the delay and disruption caused by the change? It may have to resequence its work, incur downtime while awaiting instructions, or have trouble coordinating its work with other contractors. (This was a multiple prime contract.) If it receives conflicting orders, it may have to redo work. If it has to spend more time than necessary in dealing with poorly drafted sketches, it suffers additional losses.

If it has suffered losses for these reasons, it would face practical difficulties claiming these expenses through the formal change order process, mainly because the difficulty of establishing that damages were caused by the change and the amount of the loss. For this reason contractors often expressly reserve their right to claim further losses later.

Suppose there are excessive changes, as in *Amelco*. If the volume of changes greatly exceeds what could have been expected, this can generate a number of theories in a post-completion, inefficiency claim, as I explained in Part II.B.

In California, as we shall see, the abandonment concept is employed in such claims. This was one of the principal issues in *Amelco*. The court had to deal with whether abandonment may be employed against a public entity. The DCA would have allowed it; the supreme court would not.

At this point let us look at the supreme court's analysis of abandonment. The California cases, particularly *Peterson*, discussed in Part III.E.2, used that concept. According to the supreme court, if the owner orders excessive changes that

> make it difficult and more costly to perform the contract because of delay, interference with the work of other trades, and other problems not captured in the price of the executed change orders . . . private parties may impliedly abandon a contract when they fail to follow change order procedures and when the final product differs substantially from the original.[48]

The court then cited some DCA cases, including *Peterson*. Citing *Peterson*, it stated that "[a]bandonment requires a finding that *both* parties intended to disregard the contract."[49]

The court then quoted another case for the proposition that "[a]bandonment occurs . . . only where both contracting parties agree 'that the

48. *Id.* at 1124.
49. *Id.* at 1125.

contract is terminated and of no further force and effect.'"[50] (As we shall see, this was crucial to the court.) The court then returned to oft-quoted language of *Peterson*: "Although the *contract* may be abandoned, the *work* is not."[51] This will again be seen in the dissent.

In effect, there are two implied agreements: one to abandon the original contract entirely and another to continue work on a quantum meruit basis. This led the court to discuss work performed under a void contract.

Here, California is very strict. The contractor is presumed to know the law. If it commences to perform or performs extra work under a valid contract, despite the contract or the extra work order violating the competitive bidding laws, it does so at its own peril.

We are in the world of unjust enrichment or, better, restitution where the contract or the extra work is done under a void contract. The court gave this away by its reference to the contractor who performs under these conditions as "a mere volunteer."[52]

There are always unjust enrichment issues when a claim is made against a public entity that is not based on a valid contract. Although some courts are more lenient when these claims are made,[53] as the court said, California is strict.

The law, according to the court, must protect competitive bidding laws. Here, however, we had a contract valid at its outset. There was no violation of these statutes when the contract was awarded. Yet the court was very concerned about public officials playing fast and loose with competitive bidding statutes. The implied agreement to proceed on the basis of quantum meruit was a contract that violated the competitive bidding laws. If I understand the court, after the implied abandonment, the city should have put out the rest of the work for competitive bidding. This ties in with the court's concern over the mechanics of this implied abandonment, a point I shall discuss shortly.

The court buttressed its argument that abandonment should not be available to a contractor in its claim against a public agency by expressing concern that allowing such a claim would "fashion damages remedies in an area of law governed by an extensive statutory scheme."[54] It did this by referring to Public Contract Code section 7105.

That section provides in part that public contracts made with certain public agencies that are required to be bid competitively may be "terminated, amended, or modified"[55] only if termination, amendment, or modification is authorized by the contract or by law. Any compensation for an amendment

50. *Id.*
51. *Id.*
52. *Id.* at 1124.
53. Layne Minnesota Co. v. Town of Stuntz, 257 N.W.2d 295 (Minn. 1977); Blum v. City of Hillsboro, 183 N.W.2d 47 (Wis. 1971).
54. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1128 (Cal. 2002).
55. *Id.*

or a modification must be determined by the contract. Compensation for termination must be determined by the contract or statute providing for termination.

Amelco contended that this requirement does not apply to damages for abandonment. Nevertheless, said the court, the drastic remedy of setting aside the contract and giving the contractor the reasonable value of its services has to be considered a modification or termination controlled by the remedy provisions in section 7105. Abandonment is not one of the changes authorized in section 7105.

Evidently the court saw abandonment as termination. If so, the contractor may not recover common law damages but must point to a provision in the contract or a statute allowing termination as a basis for granting a remedy for damages.

I shall look at the dissent in Part III.G.3, *infra*. Here, let me note that the dissent concluded that abandonment relevant to this case was not termination and not controlled by the statute. It concluded that that abandonment was more like a mutual rescission than a termination. Therefore, the statute with its remedial provision exclusivity did not apply to such a claim.

In seeking to justify its private–public distinction, the majority also pointed to Amelco's being one of the largest electrical contractors in the country and "certainly was aware . . . that public works contracts are the subject of intensive statutory regulation and lack the freedom of modification present in private party contracts."[56]

Apparently the court felt that Amelco should have been aware of the fact that there could not be an implied abandonment in the case of drastic changes making the contract something different than the original contract.

The court worried about the effect of finding there had been an abandonment. It was concerned that the contract would disappear, along with any protective provisions for the public entity, and the dispute solved by a global quantum meruit or reasonable value of the services formula. This would amount to revaluating all the work that has been performed.

This is revealed when it discussed the doctrine used in federal procurement. It noted that Amelco contended that there is no difference between the abandonment and cardinal change doctrines. The court stated that the cardinal change is a material breach of contract and the contractor can recover its damages for that additional work.[57] It does not recover on a quantum meruit basis.

The court rejected Amelco's contention that abandonment is the same as cardinal change. The court stated that if the contract changes process is not followed, and "the final project is materially different from the project con-

56. *Id.* at 1129.

57. *Id.* at 1126 (citing C. Norman Peterson Co. v. Container Corp. of America, 218 Cal. Rptr. 592, 598 (Ct. App. 1985); Opdyke & Butler v. Silver, 245 P.2d 306, 310 (Cal. Ct. App. 1952)).

tracted for, the contract is deemed inapplicable or abandoned and is set aside."[58] The claimant can recover the reasonable value of its work. The difference, according to the court, between abandonment and cardinal change is the remedy. (As we shall see in Part III.G.3, the dissent did not see a difference between abandonment and cardinal change.)

The court echoed this concern when it discussed the federal procurement cases involving the cardinal change. The court stated:

> There is no hint in any Federal Circuit or Court of Claims case to which we have been directed that the terms of the federal contract are held inapplicable or set aside for the period prior to the breach, or that the government's payments for other work not affected by the cardinal change are suddenly compensated on a quantum meruit basis.[59]

The court would not allow the so-called abandonment theory to be applied in public contracts for two reasons. One, it feared the state entity will lose protection of state-mandated contract language. Two, the court showed an almost pathological fear of quantum meruit. It mentioned it six times.[60] The court noted its equivalent, reasonable value, four times.[61]

Yet despite the similar effects of cardinal change and abandonment, the court refused to rule out the use of the cardinal change in California or determine whether the changes in this case constituted a cardinal change. This unwillingness to pass on the cardinal change resulted from the jury not having been instructed on the cardinal change theory.

As I stated, the court expressed concern over the mechanics of this abandonment. At what point is the contract abandoned?

In this regard the court pointed to testimony of one of Amelco's experts. He said there was no one point in time when Amelco could conclude the contract had been abandoned.[62]

The court went further with the mechanics of the abandonment. It asked at what point changes become "excessive." This would justify abandonment. At that point "the competitively bid contract is set aside, and the contractor recovers on a quantum meruit basis from the beginning of the project onward."[63]

It carried this a step farther. It stated that such a vague definition of what is excessive would make it difficult for the public entity to know when it must make "project management, budget, or procedural adjustments."[64]

Contracts usually require the contractor to notify the owner in writing within a designated period of time from the occurrence of an event that is to be the basis for a claim. This requirement is designed to fend off dishonest

58. *Id.*
59. *Id.*
60. *Id.* at 1124, 1127, 1128 (twice), and 1129 (twice).
61. *Id.* at 1127, 1128, 1132, and 1133.
62. *Id.* at 1127.
63. *Id.* at 1128.
64. *Id.*

claims and give the owner a chance to investigate, take corrective measures to avoid further losses, and make budgetary adjustments. As you will recall, this was an issue before the DCA. The court concluded that the owner had waived it.

The court stated that the uncertainty of whether there has been an abandonment would create "intolerable uncertainty in the budgeting and financing of construction projects."[65]

We shall see this again when we deal with the breach claim. The abandonment theory wipes out the contract terms designed to protect the public entity. This, according to the court, is another reason not to apply abandonment against public entities.

The court expressed concern that contractors would submit low bids, another legend from the chest of construction lore, with the idea of "prevailing on an abandonment claim based on the numerous changes inherent in any large public works project."[66]

If these were not enough reasons, the court expressed concern that recognizing the abandonment theory would "encourage frivolous litigation and further expend public resources."[67]

To sum up, the court refused to apply the abandonment concept to public entities. It based its refusal upon the effect recognition would have on competitive bidding laws, the difficulty of telling when the parties had abandoned the contract, the over-expansive remedy when there is abandonment, and the effect abandonment would have on comprehensive statutorily mandated contract provisions designed to protect the public entity. What the court is telling us is that the abandonment concept is too powerful a claims weapon to be in the hands of the contractor.

2. Breach Claim

At this point I think it useful to review the decision of the DCA on the damages issue. The city did not challenge the jury finding of breach. The issue was the amount of damages and how it was determined. The jury instruction simply stated that the claimant Amelco was entitled to the reasonable value of its work less what it had been paid and less any losses for which the claimant contractor is responsible. The DCA treated this as the total cost formula. That formula, according to the DCA, "is frequently used in cases involving abandonment or breach of a construction contract."[68]

The city argued that modified total cost requirements, such as reasonableness of estimate and actual expenses, difficulty of proving actual damages,

65. *Id.*
66. *Id.*
67. *Id.* (citing Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth., 1 P.3d 63, 70 (Cal. 2000)).
68. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 173 (Ct. App. 2000).

and exclusion of losses for which the defendant is not responsible, should have been given to the jury.

The DCA said that the city had waived this contention by not having asked for such an instruction. Even it if had been requested, the court would have refused it. Citing some ordinary extra work cases, it concluded that reasonable costs were a proper measure for breach of a construction contract.

As to the city's contention that the overhead and profit used to show reasonable value of the work were greater than those specified in the contract, the DCA held that the parties had abandoned the contract.

The supreme court introduced its discussion to the breach claim by noting that the city was not contending that total cost is never appropriate against a public agency but that it was inappropriate here. As a result of this concession, the court stated that it is not determining whether total cost is ever appropriate "in a breach of a public contract case."[69]

After some general discussion of causation and foreseeability, the court tackled total cost. After brushing aside the failure of the city to ask for proper instructions, it stated that total cost is disfavored, to be used cautiously and only as a last resort. It concluded that Amelco should have satisfied the four-part test, essentially converting total cost into modified total cost.

It concluded with lengthy excerpts from *Boyajian v. United States*[70] and *Huber, Hunt*[71] as to the dangers of total cost and, in the case of *Huber, Hunt*, why total cost could nullify competitive bidding laws.[72]

Applying its holding, the court held there was no substantial evidence introduced by the plaintiff to support the four-part test, especially the fourth element, that only the defendant and no one else, such as other multiple primes, was responsible for the extra cost.

Interestingly, it made reference to *Atkinson*,[73] noting that the case allowed a jury verdict that is "used to determine a rough approximation of damages, especially in sizeable construction cases when mathematical precision is impossible."[74]

As stated in Part III.E.3, *Atkinson* approved an arbitrator in a judicial-like arbitration starting with actual costs and using the jury verdict to reduce it by 35 percent to take account of the damages caused by the contractor.

Amelco reduced its claim, according to the court, by an arbitrary 5 percent "to account for any inefficiency on its part."[75] Rather than seeing this as an

69. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1129 (Cal. 2002).
70. 423 F. 2d 1231 (Ct. Cl. 1970).
71. 136 Cal. Rptr. 603 (Ct. App. 1977) (discussed *supra* Part II.E.1).
72. *Amelco*, 38 P.3d at 1130–31.
73. State Department of Transportation v. Guy F. Atkinson Co., 231 Cal. Rptr. 382 (Ct. App. 1986) (discussed *supra* Part II.E.3).
74. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1130 (Cal. 2002) (quoting *Atkinson*, 231 Cal. Rptr. at 385–86).
75. *Id.* at 1132.

attempt to follow what had been approved in *Atkinson*, the court used this as a concession that Amelco had been inefficient.

The court reversed the judgment and remanded the case for a retrial on the breach claim on the issue of damages.

3. Dissent

Two justices dissented; the dissent was written by Justice Werdegar. She recognized that if excessive changes so change the scope of the contract, "the original contract is *considered* mutually abandoned and replaced with a new contract that allows the contractor to recoup its actual costs."[76] (She did not dissent as to the global formulas, total cost, modified total cost, or the jury verdict.)

This is quite different from the analysis of the majority. The majority looked upon abandonment as used in this case as a consensual, though implied, abandonment. The dissent said the acts of the owner in ordering excessive changes are "considered" an abandonment. In effect she said that excessive changes can be a breach that allows the contractor to use an abandonment-like remedy: the original contract is considered abandoned and a new cost-type contract is substituted for it.

Justice Werdegar's principal concern was the holding of the majority that refused to apply the abandonment concept to state public contracts. She was not persuaded that application of the abandonment doctrine to claims against public entities would render the competitive bidding laws meaningless. She noted that the cardinal change arose in federal procurement. Correctly, in my view, she saw the doctrine, whether labeled abandonment or cardinal change, "as a safety valve for contractors to recover their actual costs for construction projects that, through no fault of their own, go out of control, far beyond the intention of the contracting parties."[77]

Justice Werdegar equated abandonment with cardinal change, something the majority would not do. Justice Werdegar appears to believe that the labels used do not disguise the essential nature of these post-completion claims, at least those based in whole or substantial part on excessive changes.

She wrote that abandonment in construction contracts differs from conventional abandonment. Quoting *Peterson*, she saw the conventional abandonment as an agreement by the parties that "the contract is terminated and of no further force and effect."[78] Completion would be inconsistent with abandonment. She saw conventional abandonment as termination or rescission.

She concluded that abandonment of the construction contract because of excessive changes drastically changing the scope of the original contract is quite different. With approval and expectation of the owner, the contractor

76. *Id.*
77. *Id.* at 1134.
78. *Id.* at 1136.

may complete the project. The contract is abandoned; the work is not. The majority saw an implied understanding that performance will continue. If it is an agreement, it must conform to the competitive bidding laws. The dissent did not see it that way. Apparently the dissent saw the excessive changes as providing the contractor a remedy, continuing to work but with a new pricing mechanism: the contract price is replaced by a cost formula.

IV. Critique

A. *Basic Contract Law Rules*

Certain rules of contract law relate to an evaluation of *Amelco*. Let us look at them as a background against which we can evaluate this case.

1. Implied Terms

The law will imply terms into a contract under certain conditions. I cannot go into all the requirements that must be met before a court will imply terms into a contract. Clearly the written contract, how it was made, and the level of specificity of relevant language will play a role. The law looks at the likelihood that the contracting parties would have thought the implied terms were a part of the contract anyway. Some states are more reticent to imply terms than others. Much depends on the sanctity ascribed to the written contract.

Though like all states California will imply terms into a written contract, it has erected a number of significant barriers to implication.[79]

Implied terms are important because some post-completion, inefficiency claims are based upon the implied promise not to hinder or interfere with the performance of the other contracting party and to cooperate with the other to allow it to perform in a logical, orderly, and efficient way. For example, the jury in *Amelco* was instructed that the city breached if it prevented or hindered Amelco's performance.[80]

2. Waiver Excusing Condition

Excusing a condition through waiver is another relevant rule of contract law. For example, the DCA had to face the city's contention that Amelco's breach claim was barred because it did not give the contractually required notice of an intention to file a claim. The court held that the city had waived the condition of notice.[81]

79. Ben-Zvi v. Edmar Co., 47 Cal. Rptr. 2d 12 (Ct. App. 1995). This case was cited by *Amelco* for another reason. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1125 (Cal. 2002).

80. *Amelco*, 38 P.3d at 1132–33.

81. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 169–70 (Ct. App. 2000).

The supreme court did not have to face this issue; it held that there could be no abandonment of a contract with a public agency. On the breach claim, the city did not challenge the finding of breach and never raised the issue of notice.

Yet waiver of the condition of notice is quite important in these post-completion, inefficiency claims. The contractual notice requirement was important to the supreme court. Fear that abandonment would eliminate the notice requirement was a powerful factor in its refusal to allow abandonment in state public contracts. If waiver is freely found, as in the trial court and the DCA, the notice requirement loses much of its vigor as a protector against false claims.

3. Restitution and Failed Contracts

In Part III.G.1, we saw that restitution becomes relevant if a valid contract had not been made. *Amelco* concluded that California does not permit a quantum meruit claim against a public agency for work performed under a void contract.

This issue, as we saw, divided the DCA from the supreme court. The DCA did not believe that restitution in the event of a void contract was relevant as here the contract was not void at its inception. The supreme court concluded that the implied agreement to continue work after excessive changes was a void contract and quantum meruit could not be applied against a public entity.

4. Restitution in Contract Claims

Restitution can be used in two ways in construction claims. One is as a gap-filler. Suppose the contractor makes a claim for extra work but did not obtain a contractually required written change order from the owner. The owner's defense may be that the contractor did not meet the formal requirements.

Suppose the contractor can overcome this defense. In the absence of a contractual method to determine the amount of compensation, the law will award a restitution measure, the reasonable value of the contractor's services in performing the extra work.

This is sometimes called quantum meruit. The DCA mentioned this use of restitution when it stated that in the event of the owner's refusal to pay for extra work, the owner must pay for the reasonable value of the services.[82]

There is another aspect of restitution that bears heavily on the remedial aspects of contract breach. If one party has partly performed and then refuses with cause or is ordered without cause not to perform further, the innocent party can recover the reasonable value of its services. To invoke the restitution remedy, the breach must be material.

82. *Id.* at 173.

Most, though not all, courts allow restitution even if the reasonable value of the services exceeds the contract price.[83] Sometimes this is cast as a recovery in quantum meruit. This is useful in a losing contract.[84]

But this right to use restitution as a measure of recovery for breach of contract is denied if the claimant has fully performed and all that remains is for the breaching party to pay money.[85] In such a case, all the contractor can recover is any unpaid balance of the contract price. It can still sue for damages for any breach. This is often ignored when the contractor makes a post-completion, inefficiency claim that employs a global formula, such as total cost, modified total cost, or the jury verdict.

5. Abandonment of a Contract

This is one of the most difficult concepts to apply, something *Amelco* demonstrated. The difficulty lies in what constitutes abandonment, how it is done, and its effect. When it is invoked, we can compare it to cancellation, rescission, termination, discharge for material breach, repudiation, to name some.

At the risk of oversimplification we can say that both parties can choose to abandon all or part of a contract (by mutual rescission, cancellation, or termination). One party may have legal justification for abandoning the contract (discharge from any obligation to perform further) because the other party has committed a material breach, the other party repudiated the contract, or supervening events have occurred. I shall amplify on this in the next section.

B. *Abandonment Claim*

Much of the supreme court's opinion examined whether the concept of abandonment of a construction contract can be applied in what is essentially a post-completion, inefficiency claim against a public agency. As we have seen, the court held it could not.

As I suggested in Part III.G.1, I think this is traceable to the court's concern that the effect of abandonment is too drastic, that it allows the contractor to get rid of contract clauses benefiting the city and to revalue all of its work. This gave the contractor too potent a claims weapon.

Interestingly, there is another method by which the public entity can avoid these claims. Subject to the limits imposed by the California Public Contract Code § 7102, reasonableness of the clause and delay not within the contemplation of the parties, a "no pay for delay" or "no damage" clause can limit the public contractor to time extensions.

83. E. Allan Farnsworth, Contracts § 12.20 (3d ed. 1998).
84. *Id.*
85. *Id.*

Presumably the city did not choose to go this route. But its availability could have enabled the court to avoid the tortured analysis it believed it had to take to protect the city.

How does abandonment enter the picture in essentially a post-completion, inefficiency claim centered largely, though not exclusively, around excessive changes?

We see the use of abandonment in contract claims for remedies less drastic than abandonment of an entire contract, which *Amelco* claimed. For example, we see it used where the contract has a requirement that all modifications be in writing and the asserted modification was oral. Some courts conclude that the making of the oral agreement implicitly disregards the writing requirement. This shows that the parties had abandoned the writing requirement.[86]

Similarly, requirements that change orders be given in writing are sometimes found to have been waived. Waiver can be based on past conduct showing that the parties have disregarded the writing requirement. They have abandoned it.[87]

Abandonment can be compared to cancellation, rescission, and termination. Justice Werdegar, as I noted in Part II.G.3, stated that abandonment used in the conventional context is largely the same as mutual termination, both parties agreeing that neither need perform further. But in the construction context, she applied abandonment to excessive changes claims.

Two things show us we are in trouble when we use this slippery term "abandonment." In a footnote, the DCA stated that it is "a word of art in the context of construction contracts."[88]

If this were not enough to show us the term is a troublesome one, we see the oblique ways it is referred to in *Amelco*. The DCA quoted *Peterson*, discussed in Part III.E.2, as stating that "[a] construction contract *may be considered* abandoned" when there are excessive changes.[89] In the footnote mentioned in the preceding paragraph, the DCA stated that if there are excessive changes, "an abandonment of the contract *may be found*."[90]

The majority in the supreme court opinion said that the contract "*is deemed* inapplicable or abandoned"[91] and that "the parties *implicitly* set aside a public works contract."[92]

Finally, the dissent stated that "the original contract is *considered* mutually abandoned and replaced with a new contract that allows the contractor to

86. *Id.* § 7.6.

87. SWEET & SWEET, *supra* note 2, § 21.04(H).

88. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 162 n.2 (Ct. App. 2000).

89. *Id.* at 166 (emphasis added).

90. *Id.* at 162 n.2 (emphasis added).

91. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1127 (Cal. 2002) (emphasis added).

92. *Id.* (emphasis added).

recoup its actual costs."[93] The dissent also seemed to equate abandonment with "cardinal change."[94]

The guarded and cautious reference to abandonment shows that it simply does not mean what it appears to mean. In truth there never was an abandonment. It is an artificial code word used to describe a concept used as the basis for a post-completion, inefficiency claim based to a large degree on excessive changes. It is a term that allows the contractor to recoup its losses when the project is poorly designed and administered as I described in Parts II.A. and B.

Jones, writing in 2001, is revealing on the interrelationship between these post-completion, inefficiency claims and abandonment. First, he canvases the federal procurement cases and gives the various labels used for these claims. Then he moves to state courts.[95]

He introduces the discussion by citing *Peterson*,[96] *Amelco* (the DCA opinion),[97] and a Kentucky case employing cardinal change, constructive change, and abandonment.[98] Then he states that "[i]nstead of applying the terminology of cardinal change, state courts often characterize these claims as an abandonment of the contract by the owner."[99] He cites cases that employ the cardinal change concept and then moves to abandonment.

Jones sees abandonment as another possible label for these post-completion, inefficiency claims, not in any way related to a real mutual abandonment. He also seems to equate abandonment with cardinal change, as did Justice Werdegar in her dissent. Finally, he states that the contract is abandoned *by the owner*, not by both parties. In other words abandonment is simply a classification label used to describe a certain type of claim. In *Amelco*, it is not an understanding between the parties as the DCA stated.[100] Nor does Jones see it as parties impliedly abandoning the contract as did the majority in *Amelco*.[101]

But suppose in the middle of the work the contractor announced it would work no more as the badly administered project was more than it could take. Suppose it was, in the words of Justice Werdegar in her dissent, a contract that went "out of control, far beyond the intention of the contracting parties."[102] Then the contractor could quit. This would be a justified "real" aban-

93. *Id.* at 1133–34 (emphasis added).
94. *Id.* at 1134.
95. Jones, *supra* note 2, at 16–22.
96. *See supra* Part III.E.2.
97. *See supra* Part III.F.
98. L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 931 (E.D. Ky. 1993).
99. Jones, *supra* note 2, at 22.
100. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 166 (Ct. App. 2000).
101. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1124 (Cal. 2002).
102. *Id.* at 1134.

donment by one party of the contract. But we would call it a discharge justified by a material breach of contract.

Suppose that the contractor has finished and wants more money. Under restitution, as I have noted, it would not be able to get more than the balance of the contract price unless it can show breach and damages. The law does not allow quantum meruit. It is the specter of that revaluing measure of the work that we saw frightened the majority.

All agree that the excessive changes constituted a material breach.[103] Materiality only is relevant to determine whether the parties are discharged from any future performance. In *Amelco* the work was completed. Termination is not the issue in these post-completion, inefficiency claims.

Before entering the tangle of public contracts, the court should have simply said that abandonment is not the correct term to describe these claims. The proper way of dealing with such a post-completion, inefficiency claim is to consider the poor design and administration as breaches of the implied term to allow the contractor to work efficiently. This is much simpler and more accurate.

Suppose the court had done what I have suggested it should have done. At the outset there would be no need to distinguish public from private contracts. The court's concern that abandonment would have made competitive bidding meaningless would have been obviated. There would have been neither worry about nullifying the state-protective clauses in the contract nor concern about the open-ended quantum meruit revaluing all the work. Dropping the abandonment rationale would reconcile majority and dissent, who each stated that once a valid contract is made with a public agency, it would be treated the same way as a private contract.[104]

We would have been spared the court's unconvincing discussion of the negative effect on competitive bidding, the use of quantum meruit as the governing measure in the event of abandonment, the effect of Public Code section 7105, and the hopelessly inarticulate treatment of Civil Code section 3262 dealing with lien and stop notice waivers, that I have spared you.[105]

Suppose the contractor brings a post-completion, inefficiency claim and the court is not saddled with the abandonment fiction. Then the claim is one for breach of the implied term that the owner would not hinder or interfere and would extend reasonable cooperation to allow the contractor to work in a logical, orderly, and efficient way.

The court would not have to face the drastic effect California has given to a finding of abandonment, in public or private contracts. The contract terms would not simply drop out. The dreaded quantum meruit need not be employed. California would be in line with the restitution rule that once a

103. *Id.* at 1126.
104. *Id.* at 1129, 1134.
105. *Id.* at 1128–29.

contract has been completed, restitution cannot be used. Finally, California would be in line with the law as expressed by the decisions from federal procurement and sensible state court decisions. It would not be "out there."

In my opinion, the court should have approved the handling of the claim in *Peterson* for both public and private contracts. But it should have concluded that abandonment plays no part in the handling of such claims. Instead it should have replaced it with breach of an implied term. It would be implied that the owner promises to not prevent or hinder the contractor and to extend reasonable cooperation that allows the contractor to perform in a logical, orderly, and efficient way.

Now the issue moves to the measure of recovery. If the contractor could not prove the actual amount lost for each breach, it would have to try to persuade the court to allow it to use one of the measures of recovery discussed in Part II.I. This would involve the measures discussed by the supreme court in *Amelco*, particularly the most crude global formulas such as total cost, modified total cost, and jury verdict. These will be discussed next.

C. *Crude Global Formulas*

In Part II.I, I sketched the remedies that are sought in a post-completion, inefficiency claim. In this section I shall look at the most crude global (for the whole project) formulas in these claims as they were the ones to which the supreme court devoted its energies in *Amelco*. To help evaluate the decision, let me compare the handling of this issue in the DCA and the supreme court.

The trial court instructed the jury, using quantum meruit, that Amelco was entitled to "the reasonable value of the work performed by it less the payments made by the City, and less any costs incurred by Amelco which are not fairly attributable to the City."[106] The DCA treated this instruction as the total cost formula, one "that is frequently used in cases involving the abandonment or breach of a construction contract."[107]

The city contended this was error as it did not force the jury to take into account four criteria that make up for the defects in the total cost formula. These criteria are that it was impracticable to prove actual losses directly, that the bid was reasonable, that actual costs were reasonable, and that Amelco was not responsible for the added costs. The city wanted the modified total cost formula used and not the total cost formula.

Initially, the DCA said the city did not ask for these instructions. Then it added that had the city asked for them, the judge would have rejected the request. It stated that when an owner refuses to pay, the contractor recovers the reasonable value of its work. To back this up, it cited a number of simple extras cases, none that involved a post-completion, inefficiency claim. It did

106. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 173 (Ct. App. 2000).

107. *Id.*

not cite *Huber, Hunt*,[108] which had given the cold shoulder to the contractor's use of total cost.

It also rejected a contention by the city that the amounts recovered for overhead and profit were greater than the formulas for these items found in the contract, basing rejection on abandonment.

As we have seen, the supreme court held that abandonment could not be the basis for such a claim against a public agency. The court had to deal with the total cost question under the breach claim.

I do not criticize the court's correction of the DCA's handling of total cost. The DCA should have accepted the city's contention that would have refined the crudeness of total cost by using the modified total cost. Without these correctives, the contractor could shift to the owner losses that were its responsibility.

The court held that Amelco should have established the four criteria the DCA thought irrelevant, particularly the one requiring that it show it was not responsible for the added costs. Put another way, the court held that Amelco had to show that the city, and no one else, including other multiple primes, was responsible for the added costs. The court stated that Amelco made no effort to "distinguish between those inefficiencies that were Amelco's and those believed to be the responsibility of the city (and presumably other prime contractors and subcontractors)."[109]

Although I approve of the court's desire to refine total cost by replacing it with modified total cost, there is more than meets the eye here.

For example, if the four elements are made quite difficult to establish, the formula is dead. Let us look at them.

The first, impracticality of proving actual losses directly, could be a stumbling block. The court's heavy emphasis on *Huber, Hunt*, with its extremely negative attitude toward these contractor claims and its unwillingness to allow computer records, could make this a formidable obstacle. Much will depend upon the state of the art in record keeping and the willingness of the trial court to punish the contractor for what it perceives to be sloppiness and laziness.

Although the reasonableness of the bid (here supplied by the closeness of Amelco's bid to other bidders) and the reasonableness of actual costs (use of experts can satisfy this), the final requirement, that the expenses are not attributable to the owner, could prove to be an insurmountable obstacle. Proving a negative is always hard.

This is compounded on a multiple prime project. The contractor must show that added costs, or at least some of them, are not attributable to other multiple primes.

Does showing that some of the added costs were caused by the contractor or other multiple primes mean the modified total cost formula is not avail-

108. *See supra* Part III.E.

109. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1132 (Cal. 2002).

able? Or does it require a deduction for those costs for which the owner is not responsible? I prefer the latter.

Moreover, in some states multiple prime contractors can maintain a claim against another multiple prime directly if the latter causes losses to another multiple prime.[110]

In some multiple prime contracts, a multiple prime can hold the owner responsible for damage caused by another multiple prime.[111] Sometimes such a claim is barred by the contract.[112] In any event, multiple prime contracts have a greater propensity to produce inefficiency claims than do traditional single prime contracts. Yet, in multiple prime contracts, the use of crude formulas, such as total cost, modified total cost, or jury verdicts, will be difficult to sustain. Losses caused by other multiple primes, though hard to prove, may reduce the claim and may even bar the use of such a formula.

There is another reason why such formulas will be difficult to maintain in public or private construction contracts in California after *Amelco*. The lengthy quotation from *Boyajian v. United States*[113] and *Huber, Hunt*, with their negative attitude toward these formulas, could create an atmosphere in the trial and appellate courts that would make it hard to employ a global formula successfully. True, the criticism in these cases is mainly against use of unmodified total cost, not modified total cost, but judges and lawyers often do not read cases that carefully.

In that respect, it is interesting how the court treated the article by Aaen.[114] It cited the article as the basis for requiring the four added conditions for the application of total cost. Yet it ignored note 10 of Aaen's paper.[115] There he stated that since the late 1970s, the majority of reported cases accept total cost (citing twenty-two cases, many of them public contract cases, including *Atkinson*). Nor did the court cite Aaen's conclusion that total cost is "now generally accepted as a valid method of computing damages in the appropriate case where the four-part test is met."[116]

To be sure, when Aaen uses total cost, he really means modified total cost, a formula approved by the supreme court. But if the court had referred to the observation by Aaen and his collection of cases, it is more likely that the contractor would have a decent chance of using such a formula successfully. Instead, the grudging approval of the formula does not auger much success for the contractor who tries such an approach. (Were I a claimant contractor, I would try to use more acceptable formulas, such as measured mile or trade formulas for diminished productivity that I discussed in Part II.I.)

110. Moore Constr. Co., Inc. v. Clarksville Dep't of Elec., 707 S.W.2d 1 (Tenn. App. 1985).
111. *Id.*
112. *See, e.g.*, Broadway Maint. Corp. v. Rutgers, 447 A.2d 906 (N.J. 1982).
113. 423 F.2d 1231 (Ct. Cl. 1970).
114. Aaen, *supra* note 16.
115. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1129 (Cal. 2002).
116. Aaen, *supra* note 16, at 1204.

The third crude formula is the jury verdict. It was not directly before the court, but it made a "see also" reference to *Atkinson* when the *Amelco* court discussed total cost.[117] It made a parenthetical description of *Atkinson* that includes the phrase "upholding application of jury verdict," then cited a quotation from *Atkinson* that states it is "used to determine a rough approximation of damages, especially in sizable construction cases when mathematical precision is impossible."[118]

Does this mean the court approved the jury verdict? This was surely a dictum. The jury verdict was not before the court. But what does a parenthetical reference mean? The reference to *Atkinson* follows statements in the opinion that the total cost must be used cautiously and only as a last resort, that total cost is never favored and tolerated only when no other method is available.[119]

This shows a negative attitude toward these crude formulas. Yet the parenthetical reference to *Atkinson* states that the case approved the jury verdict formula. This, however, was when mathematical precision is impossible to establish the losses for which the public entity is not responsible. We can conclude that the jury verdict can be used either to establish the loss or to cure the defect of causation in the total cost formula. To be sure, it is a dictum but one by the supreme court.[120]

To sum up, I approve of the conclusion that modified total cost should be used rather than total cost. But the court's grudging acceptance of these formulas and the strict requirements that must be met do not make it an attractive one for contractors. I would have preferred a more positive approach to modified total cost, a formula, crude though it is, that is absolutely necessary in post-completion, inefficiency claims. Without availability of these formulas, these claims have at best a rare chance of success.

V. Effect of Decision

I would like to analyze *Amelco* from another vantage point. It is not uncommon for a court to say that if it decided a certain way, bad things would result. It is, like following applicable precedent, a reason for the court to come out a certain way.

This can also, and often does, reflect itself in any dissent. It complains that the majority's decision will have a bad effect.

117. *See supra* Part III.E.3.

118. *Amelco*, 38 P.3d at 1130.

119. *Id.*

120. *Id.* Please see my summation of that case in Part III.E.3. There, I state the case is sometimes described as an arbitration case. In commercial arbitration, courts exercise very limited judicial review. This could reduce the precedent value of the case. But this was a statutorily mandated arbitration. It is really a judicial arbitration, requiring the award to be supported by substantial evidence.

I went through both *Amelco* decisions, the DCA and the supreme court, to see whether this approach was used. Although not unknown in the past, I suspect it is used more these days. We are more attuned to such an instrumental approach of arguing by result.

Generally, the DCA decision was a "straight on the marks" opinion. It cited and followed what the court thought to be the applicable precedents. But it took one foray into noting the positive effect its decision would have.

It justified its holding that a contractor could bring an abandonment claim against a public agency by stating that "in future cases, a public entity will not put a project out for competitive bidding until it knows what it wants built with adequate plans and specifications so that reasonably intelligent competitive bidding can take place."[121] This way the public entity can protect itself from any abandonment claims. We shall see that the dissent in the supreme court decision picked up this justification for allowing abandonment claims.

The majority and dissent in the supreme court gave us many such justifications for their conclusions. Let us look at them.

The majority in this divided court was concerned with the mechanics of any abandonment concept. At what point can the city believe it has gone too far? The court was concerned about some "indeterminate point" when the next change makes the change excessive and the contract abandoned.[122]

The public entity, here the city, would not know when that line has been crossed. It would not have notice of claims. Notice is needed in order "to make project management, budget, or procedural adjustments."[123]

The court noted other horrors. The contractor could wait until the project was completed before giving notice of too many changes. This would create uncertainty in budgeting and financing the project.

Not only that but the remedy, quantum meruit, would "encourage contractors to bid unrealistically low with the hope of prevailing on an abandonment claim based on the numerous changes inherent in any large public works project."[124]

The court next cited *Huber, Hunt* for the same concern. It quoted *Huber, Hunt* as stating that the contractor could submit any bid necessary to get the job, knowing that the public entity would have to pay its actual costs "if contractor could discover some error or omission *however irrelevant* in the plans and specifications."[125]

The majority even plugged corruption into its chamber of horrors. It spoke of a hypothetical that encompasses "a friend of a public official [that] bids

121. Amelco Electric v. City of Thousand Oaks, 98 Cal. Rptr. 2d 159, 166 (Ct. App. 2000).
122. Amelco Electric v. City of Thousand Oaks, 38 P.3d 1120, 1127–28 (Cal. 2002).
123. *Id.* at 1128.
124. *Id.*
125. *Id.* at 1131.

extremely low, with the understanding that numerous changes in the contract, many perhaps not even affecting the contractor, will be forthcoming. Such scenarios would simply provide an end run around the public works bidding requirements."[126]

These scares are hoary tales straight from the chest of construction lore I mentioned at the beginning of this article. *Amelco* speaks of inherent change, and *Huber, Hunt* speaks of errors in the plans and specifications. Both worry about the effect these can have on competitive bidding. (*Huber, Hunt* involved a tort claim against an architect who had contracted to design a public project.)

This scenario did not go unchallenged. The dissent stated that it defies common sense to hypothesize putting in a low bid to get the contract, incur costs to complete it at a loss, incur the high costs of modern litigation to process the claim, and hope to recover its loss several years later. To do so, said the dissent, "[s]uch a hypothetical contractor . . . would also have to hope the public entity would make so many substantial changes to the original project that a plausible claim of abandonment can be made."[127] Were he unable to do so, said the dissent, he would have to bear the cost of his below-market bid.

The majority saw more horrors were abandonment available to a contractor in a claim against a public agency. It stated, "the possibility of significant monetary gain alone may encourage frivolous litigation and further expend public resources."[128]

Not to be outdone, Amelco, the contractor claimant, presented a moral hazard scare. It claimed that if it cannot use total cost, "[p]ublic entities [will] be motivated to change, mismanage and disrupt problem projects as much as possible to make it impossible for a contractor to determine the separate cost of each distinct change."[129]

Countering the majority's concern that allowing the abandonment claim will harm the public, the dissent saw great harm to the public in the majority's refusal to allow abandonment against a public agency.

Allowing abandonment claims, said the dissent and the DCA, would warn the public agency not to put the project out to bid prematurely. This would generate "intelligent competitive bidding," a benefit to the public. It would encourage a contractor who had been the victim of excessive changes to "finish the project (clearly in the public interest) and recoup its actual cost, rather than . . . stop building."[130] This would require drawing up new plans,

126. *Id.* at 1128.

127. *Id.* at 1136.

128. *Id.* at 1128 (quoting Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth., 1 P.3d 63, 70 (Cal. 2000) (unsuccessful bidder who should have been awarded the contract can recover only bidding expenses, not lost profit)). The author of the *Kajima/Ray Wilson* opinion wrote the majority opinion in *Amelco*.

129. *Id.* at 1133.

130. *Id.* at 1136.

conducting a new competitive bid, and awarding a new contract. This would cause delays and increased costs.[131]

If you will recall, the majority seemed to have wanted a new competitive bidding rather than let the contractor continue and be paid on the basis of quantum meruit.[132]

I may have missed other similar uses of predictions as to the effect of going one way or the other, but this is enough to demonstrate how the court uses predictions as to future effect of a decision to justify (the majority) or criticize (dissent) its outcome.

Let us summarize these arguments. Allowing abandonment, said the majority, would frustrate planning by the public entity, would encourage "low ball" bidding and making it up with an abandonment claim, would encourage corruption by public officials, and would generate frivolous litigation. (The dissent said the "low ball" bid scenario does not make sense.)

Permitting abandonment, said the dissent, would provide an inducement to the public entity to put out better plans, would encourage the contractor to keep working when it can walk off, and would avoid rebidding the project.

On the total cost issue, Amelco, the contractor, invoked the moral hazard if it, the contractor, cannot use total cost. If the public entity need not respond to a total cost claim, it will design poorly and administer in a casual manner.

Why do I collect these arguments in this Part V? I want to demonstrate how some courts seek, often with very little evidence other than experience and guesswork, to justify their decisions by pointing to all the bad things that would happen if they do not rule a certain way or the good things if they do.

I do not believe that this surprises those who are aware of the judicial process. But it becomes dangerous if done with little or no knowledge or too often.

That is my complaint with *Amelco*. It uses these arguments to a point that the reader or critic cannot help noticing and wondering. Let us look at one example, the contention made by the majority and the rebuttal by the dissent—that of the hypothetical "low ball" bid.

As I mentioned, this is a hoary legend that can be pulled out of the chest of construction lore. It is usually applied to the unscrupulous contractor that makes a low bid and expects to make it up on extras. I use it as an example because there is a difference of opinion between majority and dissent.

That common sense seems, in my view, to support the dissent is not the issue. The issue is the danger of using such an argument as a reason for a conclusion and holding.

If I, as an attorney, anticipated such a debate, how do I prepare for it in the trial? I could, of course, make in my argument the points made by the

131. *Id.*
132. *Id.* at 1127.

majority and the dissent. But a bewildered jury might seek some guidance on this question. A juror might want to know what a hypothetical contractor would do given a particular outcome. Is it subject to proof?

If it is, should the judge ask for empirical data on this issue? Should he or she allow experts to testify on this question? What kind of experts would be qualified? How should the judge instruct the jury?

You may say that this trial problem is as bad a scenario as those portrayed by majority and dissent. We cannot, you may say, go into these questions. It could take a lot of time and give us a problematic answer. You are correct.

Does that mean we must just trust the intelligence of the judges? Does this mean that judges should stay out of these things, that they should not engage in such speculation in order to decide the case or to justify what they have decided?

One of the problems that we encounter if we seek to answer these questions is the competence of the judge to make these factual assumptions. This is particularly a problem in construction law litigation.

Most courts, particularly those in California, see very few of these cases. Because they are factually complicated, trying them is expensive. Most disputes are negotiated or arbitrated.

Very few judges come out of the construction bar. Even the lawyers who try the cases are not often knowledgeable on construction practices and the ins and outs of the workings of the industry. I doubt that most lawyers, even those who consider themselves construction lawyers, could answer these practical, hypothetical questions with confidence.

If they make arguments that include these warnings, they will simply say what helps their client or what their client tells them. We simply do not know the answers to these questions.

I could apply the same conclusions to the other similar justifications, such as the need for planning (the public entity will not be shocked by the claim in my view), that the public entity will draw up better and more complete designs (hard to really know), that the public entity is better off encouraging the contractor to continue rather than stop and rebid (either can be costly), or that the public entity will be sloppy if the contractor cannot use total cost (I doubt it).

What does this mean? First, I am suspicious of an opinion that has too many of these speculative assumptions as to the effect of coming out one way or the other. They are often a way of avoiding difficult questions. Usually, such conclusions are hopelessly speculative even if made by an intelligent judge. They should not be the basis for an opinion.

I recognize that they may be tossed in after the judge has used other criteria, such as the facts and, dare I say, the law, as well as the proper roles of trial, intermediate, and supreme courts. There are simply too many "we had better hold this way or else" reasons given in *Amelco*.

Let me make a final observation on these justifications for coming out one way or another. It should be apparent that I do not think much of the aban-

donment classification. I prefer a simpler one, less laden with unneeded baggage, such as that revealed by *Amelco*.

I would look at these post-completion, inefficiency claims as being based on a breach of the implied obligation to act in such a way so as to allow the contractor to do the work in the way it planned, in a logical, orderly, and efficient way.

If this were the basis for these claims, many of the justifications employed by the court in *Amelco* would not be relevant. I would base my decision on the reasonable expectation of the parties, not on hypothetical evils that will result if the outcome is this way or that.

Despite all these cautions, I stated that I would give my opinion as to the effect of this decision. So despite my negative attitude toward the court's doing it so often (I am not a judge deciding a case), I will suggest what I think will be the results of *Amelco*.

Were I a contractor bidding on California public work, I would first study the design to check for completeness. If it is like the one given in *Amelco*, I would worry.

I also would gather whatever information I could on the reputation of the public entity and its consultants, such as architects and engineers, for professional skills in managing projects. If their reputation is poor and the design looks incomplete, I would not bid if there were other work around. If this project is all that were around, I would add something to my bid to cover costs I will have to absorb, but only if this would not make my bid uncompetitive.

I would be particularly worried if the project uses multiple primes. This creates many opportunities for reduced productivity, inefficiencies, and difficult liability outcomes.

I would be concerned with any breach claim (assuming I cannot use abandonment) if I felt that I cannot use a global crude formula. Of course, I would worry less if I can use a computerized method of keeping track of costs that can separate costs that are the responsibility of others.

What about private contracts? In theory, *Amelco* should not bother me. But as I have suggested, the case reeks with suspicion about contractor claims. I would take certain steps to avoid this risk.

I would use some form of ADR to stay out of California courts if I could. If I could use my resources in another state that gives contractor claims a fair chance, I would consider doing so. In the end someone pays for mistakes, either through claims or a higher bid. I think *Amelco* shows that the court wants to help public entities avoid claims. In the end it will mean higher bids and more administrative costs. There is no free lunch.

VI. Conclusion

Amelco involved a post-completion, inefficiency claim by a contractor against a public entity. The claimant asserted two claims: one that excessive

changes caused abandonment of the contract and the other for breach of contract.

The supreme court held that an abandonment claim may not be brought against a public entity and that the total cost method of measuring damages may not be used unless modifications were made to ensure that the claimant did not recover costs that should not be charged to the city. In effect, the court allowed the modified total cost.

The court should not have predicated such a claim on the fictional abandonment of the contract. Such a claim should have been predicated on the implied promise by the city that it would not prevent or hinder the contractor's performance and would cooperate in such a way as to allow the contractor to work efficiently.

The preferred measure of recovery connects specific losses to specific breaches. If this cannot be done, the next best measures are the measured mile, established industry productivity guidelines, or carefully crafted expert testimony.

If these measures cannot be used, global crude formulas, such as modified total cost or the jury verdict, should be available if there has been a loss and no better way to establish the amount.

Amelco does not mean that all contractors who work on California state projects will go bankrupt. General economic conditions and market forces are far more important than case decisions, even one by the Supreme Court of California.

Amelco does, though, present unneeded obstacles to post-completion, inefficiency claims in California public contracts, some of which spill over into private contracts. It also reflects a suspicion if not hostility toward contractor claims.[133]

The supreme court could have put California in the mainstream of jurisdictions that deal with post-completion, inefficiency claims. It did not. I do not give this opinion a high rating.

133. Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth., 1 P.3d 63 (Cal. 2000).