FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff-Counterdefendant, vs. GMP HAWAII, INC., a Hawaii corporation, d/b/a GMP ASSOCIATES, Defendant-Counterclaimant.	)	CIVIL ACTION NO. 2008-004

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Dennis K. Yamase
Associate Justice

Hearing: January 21, 2011
Decided: July 1, 2011

APPEARANCES:

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HEADNOTES

Civil Procedure – Summary Judgment – Grounds

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 569 (Pon. 2011).

Civil Procedure – Summary Judgment – For Nonmovant

When a party's summary judgment motion has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine factual issue and that its opponent is not entitled to judgment as a matter of law. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555,

569 (Pon. 2011).

Contracts – Breach

To succeed on a breach of contract claim, a plaintiff must show that the defendant breached the contract and that the breach was material. The elements of a breach of contract claim are: 1) a valid contract, 2) a material breach, and 3) resulting damages. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011).

Contracts

U.S. common law decisions are an appropriate source of guidance for contract issues unresolved by statutes, FSM court decisions, or FSM custom and tradition. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 n.1 (Pon. 2011).

Contracts – Breach

The material breach of a contract justifies the injured party's halt of performance under the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011).

Contracts – Breach

Not every departure from a contract's literal terms is sufficient to be deemed a material breach of a contract requirement, thereby allowing the non-breaching party to cease its performance and seek appropriate remedy. The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible. A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011).

Contracts – Breach

Whether a breach is material may be a question of fact depending on several factors, particularly when the breach deprives the injured party of the contract's benefits. In some cases, the determination of whether the breach is material is a mixed question of law and fact, but when the facts are undisputed, the determination of whether there has been a material non-compliance with a contract's terms is necessarily reduced to a question of law. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011).

Civil Procedure – Summary Judgment – Procedure

Once a movant presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-movant to present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the movant has relied on inferences it drew when a name was not on a list of the nonmovant's employees produced during discovery and when it could not find anyone with his surname registered as a surveyor in either Guam or Hawaii, it has not produced any admissible evidence that the person was anything other than a employee and thus has not overcome the nonmovant's admissible evidence that that person was its salaried employee. Accordingly, the nonmovant will be entitled to summary judgment that its employment of that person did not breach the contract's subcontracting prohibition. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570-71 (Pon. 2011).

Agency; Contracts

A subcontractor is one who is awarded a portion of an existing contract by a contractor. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 (Pon. 2011).

Agency; Contracts

An independent contractor is one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 (Pon. 2011).

Agency; Contracts

The two terms – subcontractor and independent contractor – are not mutually exclusive. A subcontractor may or may not have an agency relationship with the contractor and that relationship does not control whether or not a subcontract has been struck. A party might be both an independent contractor and a subcontractor. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 (Pon. 2011).

Agency; Contracts; Employer-Employee

A subcontractor's status, when compared to that of an employee, is ordinarily that of an independent contractor. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 (Pon. 2011).

Contracts – Interpretation

A contract's prohibition of subcontracting includes independent contractors as well as those subcontractors over whom the contractor would exercise strict supervision and close control. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 (Pon. 2011).

Contracts – Interpretation

Contracts are not interpreted and enforced on the basis of one party's subjective, uncommunicated views or secret hopes but on an objective basis based upon the parties' words and actions and the circumstances known to them when the contract was made. A court should try to determine the meaning of the contract's words rather than rely on what a signatory later says was intended. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 n.3 (Pon. 2011).

Agency; Contracts

Subcontracting is merely "farming out" to others all or part of work contracted to be performed by the original contractor. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 (Pon. 2011).

Contracts – Interpretation

For the final expression of the parties' intent, the court relies primarily on the terms as expressed in the contract's words although when the contract language is ambiguous, it can look beyond the contract's words to the surrounding circumstances to determine the parties' intent without changing the writing. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 n.4 (Pon. 2011).

Contracts – Breach

When the contract itself permitted waivers of the subcontracting prohibition only by the FSM's "prior written consent" and then only within the FSM's discretion and "only in exceptional cases," the prohibition was of vital importance to the contract and went to the contract's essence so that a breach of this prohibition is likely a material breach. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

Since, if a survey was not done as part of the required work under the contract, then the surveyor would not have been a subcontractor for that survey as he would not have been awarded part of an existing contract, whether any particular survey was work required under the contract is a genuine disputed factual issue, barring summary judgment for breach of the contract's subcontracting prohibition. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 (Pon. 2011).

Contracts – Interpretation

When waiver of the subcontracting prohibition can only be granted by the FSM's "prior written consent," the FSM's contracting officer's failure to object to subcontracting is not a waiver under the contract, nor can it be deemed an acceptance of subcontracting as in compliance with the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 (Pon. 2011).

Civil Procedure – Summary Judgment – Procedure; Contracts – Breach

At the summary judgment stage, the nonmovant plaintiff must show that it has admissible evidence of damages that were proximately caused by the contract breach. It does not need to prove the exact amount of damages or the extent of the damages. But it must show that it has admissible evidence that can. The time to do that is now, or never. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 572 (Pon. 2011).

Contracts – Breach

Causation is an essential element of damages in a breach of contract action; and, as in tort, a plaintiff must prove that a defendant's breach directly and proximately caused his or her damages. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds

When a plaintiff has failed to make a showing sufficient to establish the existence of any element essential to its case on which it will bear the burden of proof at trial, summary judgment in the defendant's favor is appropriate. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Contracts – Breach; Contracts – Damages

Even if a contract breach causes no loss or if the amount of loss is not proved with sufficient certainty, the injured party can recover as nominal damages a small sum, commonly six cents or a dollar, fixed without regard to the amount of loss. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Contracts – Breach

When a subcontracting prohibition was deemed an important public policy and when, to avoid the risk of proving actual damages or being awarded nominal damages, the FSM could have included in the contract a liquidated damages provision for a breach of that prohibition but did not, the contractor's breach of the subcontracting ban could, even if there were no direct monetary damages, entitle the FSM to terminate the contract and to nominal damages and could stand as a possible defense to a breach-of-contract counterclaim. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Contracts – Damages

The function of a liquidated damages provision is for the parties to agree in advance to a damages amount that will be assessed in the event of a certain contract breach where, for both parties, it may ease the calculation of risks and reduce the cost of proof; where it might be the only compensation possible to the injured party for a loss that cannot be proven with sufficient certainty; and where it would save litigation time and expense. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 n.5 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

Summary judgment on an allegation that the contract's subcontracting ban was breached will be denied when factual disputes remain on 1) whether the surveyor did any particular survey work as part of the required work under the contract or whether the surveys were undertaken to protect contractor from boundary line lawsuits; and 2) whether, for any survey proven to be a subcontract, the subcontracting proximately caused any damages and can those damages be proven or should nominal

damages be awarded. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Agency; Contracts

When an Hawaii-based architect undertook to perform part of the contractor's existing contract but his initial designs were never used and his later conceptual design work was not actually used since the final designs were prepared by an employee of the contractor and not by an independent contractor or other subcontractor, this transaction might better be described as an unsuccessful attempt to subcontract part of the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 573 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When all the admissible evidence, depositions, and affidavits, indicate that an employee, not a subcontractor, prepared all the final designs and thus any damages to the FSM from those designs, even nominal damages, must necessarily be attributable to contractor itself and not to its unsuccessful attempt to subcontract, the FSM has failed to make a showing sufficient to establish an essential element and the contractor is therefore entitled to summary judgment on this subcontracting allegation. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 574 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the movant offered evidence that certain entities were not its subcontractors and the nonmovant's opposition was silent about these alleged subcontractors and the nonmovant did not mention them during the hearing, the nonmovant has abandoned these allegations and the movant is entitled to summary judgment that it did not breach the contract by subcontracting work to these entities. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 574 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts – Breach

When the FSM could have terminated GMP by written notice to GMP if, after notice and a hearing, the contracting officer found that GMP or its agent or representative had offered or given gratuities to any FSM officer or employee, but when the FSM never invoked this contractual procedure or gave notice or held a hearing, the FSM has waived any claim that it can use this alleged breach of contract to lawfully terminate the contract. Since the FSM failed to follow the contractual administrative procedure for termination when a gratuity allegation is made, GMP is entitled to summary judgment on the FSM's breach of contract claim based on allegations that GMP offered gratuities. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 574-75 (Pon. 2011).

Civil Procedure – Discovery; Civil Procedure – Summary Judgment

Discovery is designed to prevent litigation by ambush. Just as a plaintiff cannot use an opposition to a defendant's summary judgment motion to effect a de facto amendment to its pleadings to assert a new claim, a plaintiff ought not to be able to use the summary judgment process to, in effect, amend its discovery responses without allowing the defendant to conduct necessary discovery into the basis and circumstances of that new allegation. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 (Pon. 2011).

Civil Procedure – Discovery

A party should disclose a new allegation once it becomes aware of it since the party is under a duty seasonably to amend a prior discovery response if it obtains information upon the basis of which it knows that the response was incorrect when made, or it knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 (Pon. 2011).

Civil Procedure – Discovery; Civil Procedure – Summary Judgment – Procedure

When a party has failed to disclose an alleged incident and seems to have knowingly concealed

it until it had to respond to the opposing party's summary judgment motion, it should not be allowed to put this allegation before the court. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 (Pon. 2011).

Civil Procedure – Discovery; Civil Procedure – Summary Judgment – Procedure

Since narrowing issues actually in dispute is one function of discovery, a party may not benefit at the summary judgment stage by tendering evidence it was under a discovery obligation to produce, but did not. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 (Pon. 2011).

Civil Procedure – Discovery; Civil Procedure – Summary Judgment – Procedure

When a party was asked in discovery for the instances where it was alleged to have offered or given gratuities and the opposing party disclosed only one incident, the opposing party is limited to that instance and cannot seek to introduce evidence of another instance in its summary judgment opposition. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 (Pon. 2011).

Civil Procedure – Discovery; Civil Procedure – Summary Judgment

When the court has not previously considered aspects of discovery procedure and the interplay between the discovery rules and the summary judgment rule and when the civil procedure rules covering discovery and summary judgment are similar to U.S. rules, the court may look to U.S. authorities for guidance. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 575 n.6 (Pon. 2011).

Contracts – Damages

The economic waste principle of contract law states that although a party has the right to insist on performance in strict compliance with the contract's specifications and can require a contractor to correct non-conforming work, the party should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 576 n.7 (Pon. 2011).

Contracts – Breach

Where, under a construction contract, work is accepted with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The rule is not any different under a construction design contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 577 (Pon. 2011).

Contracts – Breach

Since the FSM did not have to accept the 35% design and could have withheld payment and insisted that GMP first conduct soil tests on the actual sites but did not, it cannot contend that, by its actions, it did not intend to waive the soil testing requirements that one time and for the Utwe and Lelu school projects when the FSM waived in writing the pre-35% design soil testing requirements for just those projects. It thus cannot claim damages for breach because the pre-design soil tests were not done. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 577 (Pon. 2011).

Contracts – Breach; Torts – Negligence – Professional Malpractice

A claim that a design contractor used the wrong coordinate system for a road survey work seems more like, or as much a professional malpractice claim as a breach of contract claim. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 577 n.9 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts – Damages

When GMP used the wrong coordinate system for the Chuuk road survey work, it was a breach of the contract and when there was expert testimony that the survey could have been corrected by converting it to the proper coordinate system with the right computer software and some fieldwork,

the court cannot presume that this would have been successful or that it could have been accomplished at no direct cost to the FSM, and GMP will thus be denied summary judgment on this claim and the FSM granted summary judgment that the contract was breached but not for its claim because whether the breach was material is a factual dispute – whether the measure of damages should be the cost of the new survey or what the cost would have been to convert the GMP survey to the Truk-Neoch Coordinate System or whether any damages, other than nominal, are due at all. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 577-78 (Pon. 2011).

Contracts – Breach

Ordinarily in a design contract or in a construction contract, it is expected that from time to time the contractor may be asked to re-do work that has not met the contract's specifications, that is, to cure any defects, especially when a contract paragraph provides that the FSM is not obligated to pay until an assigned task has been satisfactorily completed, that is, the FSM was expected to tell the contractor to do the work over until the FSM was satisfied. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 578 n.10 (Pon. 2011).

Contracts – Breach

It is difficult to see how the actions of a non-party, albeit a contract beneficiary, can be construed as a material breach of the contract by one of the two contracting parties. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 578 (Pon. 2011).

Contracts – Breach

Being put in a politically awkward situation does not constitute a breach of contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 578 (Pon. 2011).

Contracts – Breach; Contracts – Interpretation

When a contract provision unequivocally authorizes a party's involvement in Asian Development Bank development projects since the ADB is a foreign donor organization and when there is no contractual provision requiring the party to contact foreign donor organizations only through the FSM diplomatic channels or requiring any particular procedure at all, the party's direct contact with the ADB may have caused puzzlement and delay by the ADB and become politically awkward for the FSM, but it was not a breach of the contract between the party and the FSM. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 579 (Pon. 2011).

Torts – Negligence – Professional Malpractice

FSM law has previously recognized professional malpractice as a cause of action for the profession of medicine (medical malpractice) and for the profession of law (legal malpractice). FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 579 (Pon. 2011).

Torts – Negligence – Professional Malpractice

Adopting the common law standard for professional malpractice (or recognizing it beyond just the medical and legal professions) is desirable, needed, and appropriate, and would be appropriate even if the FSM had an extensive regulatory and licensing regime for professionals. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 579 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

Generally, one who undertakes to render professional service is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 579-80 (Pon. 2011).

Torts – Negligence – Professional Malpractice

U.S. common law decisions are an appropriate source of guidance for the FSM Supreme Court for contract and tort issues unresolved by statutes, decisions of FSM courts, or FSM custom and tradition and professional malpractice may implicate both contract and tort issues. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 n.13 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

The law imposes upon persons performing architectural, engineering, and other professional and skilled services the obligation to exercise a reasonable degree of care, skill and ability, which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Common Law

Although the FSM Supreme Court may not be bound by 1 F.S.M.C. 203, which points to the Restatements as the rules of decision for courts in determining and applying the common law, that FSM Code provision does permit the Restatements to be used when applying common law rules in the absence of written law, while keeping in mind the suitability for the FSM of any given common law principle. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 n.14 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

The circumstances to be considered in determining the standard of care, skill, and diligence to be required of a professional include the terms of the employment agreement, the nature of the problem which the supplier of the service represented himself as being competent to solve, and the effect reasonably to be anticipated from the proposed remedies. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

Although a professional's duty of care exists independent of and is not created by contract, a contract may furnish the conditions for that duty's fulfilment. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Torts – Negligence – Professional Malpractice

Professional malpractice sounds in tort as a form of negligence. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Torts – Duty of Care; Torts – Negligence – Professional Malpractice

The reasonable care standards apply similarly to architects, engineers, doctors, lawyers, and like professionals engaged in furnishing skilled services for compensation and general negligence principles apply. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 (Pon. 2011).

Evidence – Expert Opinion; Torts – Duty of Care; Torts – Negligence – Professional Malpractice

Ordinarily, a determination that the care, skill, and diligence exercised by a professional engaged in furnishing skilled services for compensation was less than that normally possessed and exercised by members of that profession in good standing and that the damage sustained resulted from the variance

requires expert testimony to establish the prevailing standard and the consequences of departure from it in the case under consideration. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580-81 (Pon. 2011).

Evidence – Expert Opinion; Torts – Duty of Care; Torts – Negligence – Professional Malpractice

Because the fact-finder is not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised a reasonable degree of care, expert testimony is required. Only in a few very clear and palpable cases can a court dispense with the expert testimony requirement to establish the parameters of professional conduct and find damages to have been caused by a professional's failure to exercise reasonable care, skill, and diligence. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 581 (Pon. 2011).

Contracts – Breach; Torts – Negligence – Professional Malpractice

Although the argument that acceptance of the 100% design and payment for it is waiver of any claims that the wastewater plant design was defective and that any alleged "defects" were not latent but were obvious and patent and known beforehand could prevail on a breach of contract claim, when this is a professional malpractice tort claim, the question is not whether the contractor breached the contract's terms but whether it violated its duty of reasonable care towards its client. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 581 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Negligence – Professional Malpractice

When the court does not have before it evidence (and expert testimony would likely be needed) of what a design professional's duty entails when questions are raised about whether a proposal was over-designed or is unworkable under local conditions, the court will not speculate in that regard. The existence of these factual issues bars summary judgment on the professional malpractice allegation. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 581 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds

The court will disregard an allegation when it is raised for the first time, and without factual support, in a written opposition to a summary judgment motion. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 582 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Negligence – Professional Malpractice

When the court has nothing before it about what a design professional's duty is in relation to designing within a proposed budget, it will not speculate in that regard. Thus, whether the cost overruns in the design were such that they were the result of not exercising the reasonable care a professional in good standing would under similar conditions and like surrounding circumstances is a factual question barring summary judgment. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 582 (Pon. 2011).

Contracts – Breach; Torts – Negligence – Professional Malpractice

When the parties' contract creates the deadlines, the tardy submission of reports, except in the most egregious cases, may be less professional malpractice than a contract breach, although even then the breach might not be material. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 582 n.16 (Pon. 2011).

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure

An affidavit opposing summary judgment must be made on personal knowledge and when it is not it is not competent evidence and cannot rebut a prima facie showing that the movant is entitled to summary judgment. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 582 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Negligence – Professional Malpractice

Even when there is no FSM regulatory or statutory requirement that final design plans be stamped or that certain professionals stamp only certain plans, the court will not speculate about the standard against which to measure the civil engineer's acts in determining whether he acted properly in stamping electrical designs to indicate they were the final version rather than having an electrical engineer do it or indicating it in some other manner since evidence, most likely expert, must be produced about the standard professionals should be expected to follow in the FSM – in this case, not whether plans should be stamped by a professional but whether a civil engineer's stamp on electrical engineering plans is contrary to the degree of care a civil engineer should exercise. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 583 (Pon. 2011).

Civil Procedure – Affidavits; Civil Procedure – Depositions; Civil Procedure – Summary Judgment – Grounds

To the extent that a deponent's later affidavit contradicts his deposition testimony, it cannot be used to create factual issues to defeat summary judgment because a party cannot create a triable issue in opposition to summary judgment simply by contradicting his deposition testimony with a subsequent affidavit. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 583 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Negligence – Professional Malpractice

When, because the only evidence it produced was not competent, the nonmovant has not overcome the movant's admissible evidence that all the required plans were left behind and when the nonmovant gave the movant no opportunity to cure its omission, if in fact it had failed to leave every plan it should have, the movant is entitled to summary judgment on the claim that it committed malpractice by failing to leave its plans behind. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 583-84 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Civil Procedure – Summary Judgment – Procedure; Torts – Negligence – Professional Malpractice

When the movant asked in discovery for how it was to have committed malpractice and the nonmovant did not mention assuring that construction contractors produced shop drawings, the nonmovant is limited to what instances of malpractice it alleged and disclosed and cannot seek to introduce in its summary judgment opposition another instance based on different facts and theory of liability. The movant is therefore entitled to summary judgment on the claim that it committed malpractice by failing to see that the construction contractors produced the required shop drawings. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 584 (Pon. 2011).

Torts – Fraud

The elements of intentional misrepresentation are: 1) a misrepresentation by the defendant, 2) scienter or the defendant's knowledge that the statements were untrue, 3) intent to cause the plaintiff to rely on the misrepresentations, 4) causation or actual reliance by the plaintiff, 5) justifiable reliance by the plaintiff, and 6) damages; and since the elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment, which means that a plaintiff must show that the misrepresentations were done to induce action by him, and that he relied on them to his detriment, a close reading indicates that the elements of fraud and of intentional misrepresentation are the same and they are the same cause of action. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 584-85 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Fraud

If the contractor had told the FSM that it done soil testing when it had not and if the FSM relied on that misrepresentation to its detriment, then that could have constituted an intentional material misrepresentation or fraud. But when the contractor informed the FSM that it had not done soil testing but had instead used the soil tests done elsewhere for its design preparations and the FSM then waived this requirement for these two projects; when the contractor included clauses in draft construction bid documents submitted to the FSM for its approval that the construction contractors conduct soil testing; and when, even if soil testing has been done in the design phase, soil testing is still necessary in the construction phase (and may have been particularly necessary here since the pre-design soil testing has been waived), there was thus no misrepresentation made to the FSM. The contractor is entitled to summary judgment on the FSM's fraud claim based on putting soil testing requirements in the bid documents. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 585 (Pon. 2011).

Torts – Fraud

Since reliance upon a defendant's misrepresentation to one's detriment are essential elements of a plaintiff's case for fraud or intentional misrepresentation, when the plaintiff has not identified any misrepresentation by the defendant upon which the plaintiff relied to its detriment, the plaintiff has failed to make a showing sufficient to establish the existence of elements essential to its case and summary judgment in the defendant's favor is appropriate. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 585 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Fraud

When the plaintiff does not identify any statement made during one incident that it detrimentally relied on or any damages caused by it and the other alleged incident is not properly before the court and was not pled with particularity, the defendant is entitled to summary judgment on the fraud or misrepresentation claim based on those allegations. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 585 (Pon. 2011).

Civil Procedure – Pleading – Amendment; Civil Procedure – Summary Judgment – Procedure; Torts – Fraud

A party cannot, by raising a new fraud claim in a summary judgment opposition, bypass the Rule 9(b) provision that the circumstances constituting fraud must be pled with particularity and effect a de facto amendment to its pleading. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 586 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Fraud

When a project was never put out to bid and its bid documents never used, the plaintiff cannot show elements essential to its claim – that it relied on those bid documents to its detriment. Accordingly, the defendant is entitled to summary judgment on the fraud or misrepresentation claim based on allegations that the bid documents prepared by the defendant contained terms that they should not have. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 586 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Fraud

When the plaintiff has not shown that it relied to its detriment on the exculpatory language in bid documents prepared by the defendant, elements essential to its fraud claim, the defendant will be granted summary judgment on the fraud or misrepresentation claim based on allegations that the defendant prepared bid documents with exculpatory language. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 586 (Pon. 2011).

Contracts – Interpretation

When, in a contract, the nearest antecedent to the term "on a monthly basis" is "submission of duplicate invoices and progress reports," the phrase "on a monthly basis" qualifies when duplicate

invoices and progress reports are due, not when payments are due because the grammatical construction of contracts generally requires that a qualifying or modifying phrase be construed as referring to its nearest antecedent. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 587 (Pon. 2011).

Contracts – Conditions; Contracts – Interpretation

Contractual terms that provide that payment is due upon the occurrence of a stated event are generally not considered to be conditions indicating a forfeiture or a breach of contract but are merely a means of measuring time, and, if time is not of the essence of the contract, then the payment is due after a reasonable time, and what constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 587-88 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts – Breach

When the court has nothing before it from which it can determine whether any delayed payment was made within a reasonable time, it must deny summary judgment on the claim that the contract was breach by untimely payments. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 588 (Pon. 2011).

Contracts – Interpretation

Interpretations of contract terms are matters of law to be determined by the court. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 588 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When neither side has provided the court with the regulations or other legal authority illustrating the mechanism by which and the circumstances under which the U.S. Department of the Interior can cut off previously authorized Compact funds and when the parties dispute whether a letter was legally effective to cut off existing funds so that the FSM would be unable to certify those funds availability, the court is unable to conclude, based on the undisputed facts, that, as a matter of law, that there were no funds available to be certified or that the FSM funds were available to be certified but that the FSM did not do so. Consequently, neither side can be granted summary judgment on this issue. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 589 (Pon. 2011).

Contracts – Formation; Contracts – Interpretation

When the previously agreed percentages for completed work should be sufficient for a court to determine a contract price for any work done during the contract's last three years; when there is no indication that these same percentages were not intended for use throughout the contract's remaining three years and the overall grant award from the U.S. had a set figure; and when, if the parties thought that the payment terms for the contract's last three years were uncertain, the contract could be amended at any time with or without additional consideration, the court cannot conclude that there was no contract beyond the first two years because no prices had been set for the last three years or that there was no consideration for the last three years. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 589 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts – Breach

When the court has granted the movant summary judgment on only some of the seven grounds that the nonmovant asserted were grounds for termination of the contract for cause but that the movant asserted were pretextual, the court must deny the movant summary judgment on its counterclaim that the termination was a breach of contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 590 (Pon. 2011).

Civil Procedure – Declaratory Relief

The test whether the court can render a declaratory judgment is whether there is a case or

dispute within the meaning of article XI, section 6(b) of the Constitution. Additionally, the granting of a declaratory judgment rests in the trial court's sound discretion exercised in the public interest. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 590 (Pon. 2011).

Civil Procedure – Declaratory Relief

Although the court must first look to FSM sources of law, rather than foreign authorities, when an FSM court has not previously construed an aspect of FSM Civil Procedure Rule 57, which governs declaratory judgments and which is similar to U.S. Federal Rule of Civil Procedure 57, it may consult U.S. sources for guidance in interpreting the rule. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 590 n.22 (Pon. 2011).

Contracts – Third-Party Beneficiary

The usual reason for determining whether a non-contracting party is an intended third-party beneficiary to a contract is when that beneficiary is seeking to enforce some favorable contract provision or to collect damages for the contract's breach. This is because a third-party beneficiary can enforce a contract if it is an intended beneficiary of the contract, but it cannot if it is only an incidental beneficiary. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 591 & n.23 (Pon. 2011).

Civil Procedure – Declaratory Relief; Contracts – Third-Party Beneficiary

When none of the four states, the entities that would normally assert third-party beneficiary status, are parties to the action; when the contract itself is plain and unambiguous; and when all of the issues in the declaratory judgment request are also before the court in the parties' direct actions, the court sees no need for a declaratory judgment on whether the four states are third-party beneficiaries of the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 591 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When whether the FSM failed to perform a duty to coordinate is a factual (or a mixed factual and legal) question, it is inappropriate for resolution at the summary judgment stage. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 591 (Pon. 2011).

Attorney's Fees – Court Awarded – Private Attorney General

A party will not be entitled to a private attorney general fee and cost award when it is a private party suing for purely civil claims involving money damages which will only vindicate the rights of just one plaintiff, itself. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 591 (Pon. 2011).

Statutes – Construction

The question of whether a statute acts retrospectively or only prospectively is one of legislative intent. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 592 (Pon. 2011).

Statutes – Construction

Courts observe a strict rule of construction against a statute's retrospective operation, and indulge in the presumption that a legislature intends the statutes it enacts, or amendments thereto, to operate prospectively only, and not retroactively. A contrary determination can be made only when the legislature's intention to make a statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 592 (Pon. 2011).

Constitutional Law – Due Process; Statutes – Construction

It generally violates the constitutional right to due process to apply a law retroactively that would divest someone of a vested right or property interest. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 592 (Pon. 2011).

Civil Procedure – Declaratory Relief; Civil Procedure – Summary Judgment – Grounds – Particular Cases; Public Contracts; Statutes – Construction

When a public law's statutory language seems to speak only in prospective terms and certainly does not expressly state or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously show legislative intent to make the statute retroactive or for it to be applied retrospectively to previously-awarded public contracts, the movant is entitled to summary judgment and a declaration that the public law does not apply to the parties' earlier contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 592 (Pon. 2011).

Contracts – Damages

An injured party may be compensated for the injuries flowing from a contract breach either by awarding compensation for lost profits (expectancy damages), or by awarding compensation for the expenditures made in reliance on the contract (reliance damages). That is, if an injured party cannot be compensated for the value it had expected to receive from a breached contract, it might then be compensated for its reliance expenditures and placed in as good a position as it would have been if it had not entered into the contract. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 592 (Pon. 2011).

Civil Procedure – Injunctions

In exercising its broad discretion in considering whether to grant a preliminary injunction, the court will consider four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 593 (Pon. 2011).

Civil Procedure – Injunctions – Irreparable Harm

The threat of irreparable harm before the litigation's conclusion is a prerequisite to preliminary injunctive relief. When money damages or other relief will fully compensate for the threatened interim action, a preliminary injunction should be denied. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 593 (Pon. 2011).

Civil Procedure – Injunctions – Irreparable Harm

Since either expectancy damages (lost profits) or reliance damages should make GMP whole on its counterclaims against the FSM, the court cannot find that the harm will be irreparable even if Compact funds are expended instead of enjoined since there will still be a source of funds from which to pay any damages awarded because the FSM has other revenue sources and the court is unaware of any judgment against the FSM that has ever gone unpaid. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 593 (Pon. 2011).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On January 21, 2011, this came before the court for hearing the defendant-counterclaimant's Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof, filed October 7, 2009, with supporting exhibits filed October 9, 2009; the plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Partial Summary Judgment, filed November 25, 2009, with supporting exhibits; GMP's Reply in Support of Motion for Summary Judgment, filed December 15, 2009, with supporting exhibits and affidavits; Defendant's Supplemental Brief in Support of Motion for Partial Summary Judgment Re: John Okita, filed October 4, 2010; the FSM's

Supplemental Memorandum of Points and Authorities, filed November 15, 2010; and GMP's Reply to the FSM's Supplemental Memorandum of Points and Authorities, filed November 19, 2010. The motion is granted in part. The court's ruling and reasoning follows.

I. Summary Judgment Standard

This case involves a consultancy contract between GMP Hawaii, Inc. ("GMP"), and the FSM under which GMP was to administer a project management unit ("PMU") having the duty "to provide planning, project management, conceptual project engineering design services, and construction management." Contract ¶1. The FSM terminated part of the contract in June 2007 and the remainder in January 2008. The FSM then filed suit, alleging various damages arising from GMP's conduct. GMP counterclaimed for damages arising out of the same contract and for further relief. A number of other pretrial motions have been decided, leaving this partial summary judgment motion as the only matter to be resolved before trial.

Defendant-counterclaimant GMP moves for summary judgment on the FSM's breach of contract claims, the FSM's professional malpractice claims, and the FSM's misrepresentation and fraud claims; for partial summary judgment on its breach of contract counterclaim; and for summary judgment on its declaratory relief counterclaim and on its injunctive relief counterclaim. The FSM counters that not only should the court deny GMP's motion in its entirety but that it should also, because of the lack of genuine issues of material fact, enter summary judgment in the FSM's favor on each claim or counterclaim.

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 358 (App. 2003); Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998). But when a party's summary judgment motion has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine factual issue and that its opponent is not entitled to judgment as a matter of law. *See, e.g.*, Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 n.5 (Pon. 2010); FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 338 (Chk. 2009); Alokoa v. FSM Social Sec. Admin., 16 FSM Intrm. 271, 277 (Kos. 2009); Western Sales Trading Co. (Phils) v. B & J Corp., 14 FSM Intrm. 423, 425 (Chk. 2006); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

II. FSM's Claims

GMP seeks summary judgment on all of the FSM's causes of action – breach of contract, professional malpractice, and misrepresentation or fraud.

A. *Breach of Contract*

GMP seeks summary judgment that it is not liable for breach of contract because none of GMP's alleged actions or omissions were material breaches of the Contract. The FSM alleges that GMP breached their contract by subcontracting certain parts of the Contract; by offering or giving gratuities to government employees in violation of Contract paragraph 19; by failing to conduct soil testing at the sites of the Lelu and Utwe Elementary Schools in Kosrae; by using the North American Datum of 1983 Projection for the Weno road survey instead of the Modified Azimuthal Equidistant Projection on Clark's Ellipsoid of 1866 (Truk-Neoch Coordinate System); by soliciting and taking instruction from the state

governments; and by interfering with Asian Development Bank funded projects.

For the FSM to succeed on its breach of contract claims against GMP, it must show that GMP breached the contract and that the breach was material. The elements of a breach of contract claim are: 1) a valid contract, 2) a material breach, and 3) resulting damages. *See, e.g.*, Beck v. Lazard Feres & Co. 175 F.3d 913, 914 (11th Cir. 1999); TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc., 880 F. Supp. 1572, 1583 (N.D. Ga. 1995); St. John Med. Ctr. v. State ex rel. Dep't of Soc. & Health Servs., 38 P.3d 383, 390 (Wash. Ct. App. 2002).[1] The material breach of a contract justifies the injured party's halt of performance under the contract. George v. Alik, 13 FSM Intrm. 12, 15 (Kos. S. Ct. Tr. 2004) (citing O'Byrne v. George, 9 FSM Intrm. 62 (Kos. S. Ct. Tr. 1999)). "Not every departure from the literal terms of a contract is sufficient to be deemed a material breach of a contract requirement, thereby allowing the non-breaching party to cease its performance and seek appropriate remedy." Stone Forest Indus., Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992). "The standard of materiality for the purposes of deciding whether a contract was breached 'is necessarily imprecise and flexible.'" *Id.* at 1550-51 (quoting RESTATEMENT (SECOND) CONTRACTS § 241 cmt. a (1981)). "A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract." Thomas v. Department of Housing & Urban Dev., 124 F.3d 1439, 1442 (Fed. Cir. 1997). Whether a breach is material may be a question of fact depending on several factors, particularly when the breach deprives the injured party of the contract's benefits. Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 128 (Pon. 1991). In some cases, the determination of whether the breach is material is a mixed question of law and fact, but when the facts are undisputed, the determination of whether there has been a material non-compliance with a contract's terms is necessarily reduced to a question of law. Enron Fed. Solutions, Inc. v. United States, 80 Fed. Cl. 382, 396-97 (2008).

1. *Subcontracting*

The FSM alleges that GMP breached their Contract by subcontracting part of the work that GMP was obligated to do under the Contract. The FSM specifically points to work done by John M. Okita, Tim McVey, and Tony Manzano, as work that was subcontracted. GMP asserts that they were not subcontractors because they were all either GMP employees (Manzano) or independent contractors (McVey and Okita).

a. *Manzano*

GMP has produced evidence that would (with the proper foundation) be admissible at trial that Manzano was a GMP (Guam office) employee who did survey work for GMP on Weno, Chuuk. Once a movant presents a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-movant to present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM Intrm. 400, 405 (Pon. 2001). The FSM has instead relied on inferences it drew when Manzano's name was not on a list of GMP employees produced during discovery and when it could not find anyone with his surname registered as a surveyor[2] in either Guam or Hawaii. It has not produced any admissible

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[1] U.S. common law decisions are an appropriate source of guidance for contract issues unresolved by statutes, FSM court decisions, or FSM custom and tradition. Black Micro Corp. v. Santos, 7 FSM Intrm. 311, 314 (Pon. 1995); FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987).

[2] In its reply and during the hearing, GMP stated that Manzano's survey work was preformed under a civil engineer's supervision and that Chuuk law permits that type of survey.

evidence that Manzano was anything other than a GMP employee.

The FSM has not overcome GMP's admissible evidence that Manzano was its salaried employee. Accordingly, GMP is entitled to summary judgment that its employment of Manzano did not breach the Contract's subcontracting prohibition.

b. *McVey*

The FSM contends that GMP breached the Contract by subcontracting survey work to Tim McVey of Pacific Survey. GMP contends that it is entitled to summary judgment on this point because McVey was an independent contractor and not a subcontractor; because the FSM produced no evidence that McVey's work was under the PMU; because the FSM contracting officer knew of McVey's work and never objected to it; because the FSM accepted the work as in compliance with the Contract thus waiving the issue; and because the FSM is unable to prove any damages. The Contract provides that

> GMP, its subsidiaries and its affiliates shall neither assign nor subcontract any portion of this Contract and furthermore, no assignment of any monies due to [GMP] . . . shall be valid without the prior written consent of the [FSM]. It is expressly understood and agreed such consent will be wholly within the discretion of the [FSM] and will be granted only in exceptional cases.

Contract ¶4. GMP contends that while the Contract clearly barred subcontracting, it does not prohibit hiring independent contractors, and that, since McVey was hired as an independent contractor, GMP did not breach the Contract.

A subcontractor is one "who is awarded a portion of an existing contract by a contractor." BLACK'S LAW DICTIONARY 1560 (9th ed. 2009). An independent contractor is one "who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." *Id.* at 839. It should thus be apparent that "[t]he two terms are not mutually exclusive. A subcontractor may or may not have an agency relationship with the contractor and that relationship does not control whether or not a subcontract has been struck." Avondale Indus., Inc. v. International Marine Carriers, Inc., 15 F.3d 489, 494 (5th Cir. 1994). "[A] party might be both an independent contractor and a subcontractor." Building Specialties, Inc. v. Liberty Mut. Fire Ins. Co., 712 F. Supp. 2d 628, 649 (S.D. Tex. 2010). A subcontractor's status, when compared to that of an employee, is ordinarily that of an independent contractor. Thomas v. Southside Contractors, Inc., 543 S.W.2d 917, 919 (Ark. 1976). The court therefore concludes that the Contract's prohibition of subcontracting includes independent contractors as well as those subcontractors over whom GMP would exercise strict supervision and close control.[3]

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[3] Since the Contract did not mention independent contractors, GMP may have subjectively thought that the subcontracting prohibition did not bar it from hiring independent contractors. But this is not what GMP agreed to in the Contract. Contracts are not interpreted and enforced on the basis of one party's subjective, uncommunicated views or secret hopes but on an objective basis based upon the parties' words and actions and the circumstances known to them when the contract was made. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 146 (Pon. 2003); Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 504-05 (Pon. 2002); Kihara v. Nanpei, 5 FSM Intrm. 342, 345 (Pon. 1992). A court should try to determine the meaning of the contract's words rather than rely on what a signatory later says was intended. Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995).

The case that GMP relied on for the proposition that an independent contractor is not a subcontractor, Hardware Mut. Cas. Co. v. Hildebrandt, 119 F.2d 291 (10th Cir. 1941), involved a plumber hired by an agent of a hotel owner to work on the hotel's heating system. The Hildebrandt court held that the plumber was not a subcontractor because there was no existing contract that the plumber could have assumed part of since the only contract was between the plumber and the hotel and that the plumber was an independent contractor since he was not an employee but was left free to do the assigned work and to choose the method for accomplishing it. *Id.* at 297. Here, GMP had an existing contract and "farmed out" – subcontracted – part of it. "[S]ubcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor." Gaydos v. Packanack Woods Dev. Co., 166 A.2d 181, 184 (N.J. Passaic County Ct. 1961).

The FSM asserts that the subcontracting prohibition[4] was a critical part of the Contract. The Contract itself permits waivers of the prohibition only by the FSM's "prior written consent" and then only within the FSM's discretion and "only in exceptional cases." Contract ¶ 4. The court concludes from this that the prohibition was of vital importance to the contract and went to the contract's essence so that a breach of this prohibition is likely a material breach.

GMP however, contends that the McVey survey was not part of the required work under the Contract and that the FSM has not produced any evidence that it was. GMP asserts that the McVey surveys were primarily undertaken to protect itself if there were boundary line disputes and lawsuits. The FSM has shown that McVey surveys were noted on GMP project designs and has produced some evidence that the Utwe school site may involve a McVey survey. If a McVey survey was not done as part of the required work under the Contract, then he would not have been a subcontractor for that survey since he would not have been awarded part of an existing contract. Whether any particular McVey survey was work required under the Contract is a genuine disputed factual issue, barring summary judgment.

GMP further contends that it is entitled to summary judgment because the then FSM contracting officer knew of McVey's work and never objected to it. A waiver of the subcontracting prohibition can only be granted by the FSM's "prior written consent." Contract ¶ 4. The contracting officer's failure to object is not a waiver under the Contract. Nor can it be deemed an acceptance of subcontracting as in compliance with the Contract. There being no written consent, GMP is not entitled to summary judgment on this ground.

GMP asserts that it also is entitled to summary judgment because the FSM has not shown any damages. The FSM asserts that it will prove its damages at trial. This statement is not enough to escape summary judgment. At the summary judgment stage, the FSM must show that it has admissible evidence of damages that were proximately caused by the contract breach. It does not need to prove the exact amount of damages or the extent of the damages. But it must show that it has admissible evidence that can. The time to do that is now, or never. *See* Dereas v. Eas, 15 FSM Intrm. 135, 140 (Chk. S. Ct. Tr. 2007) (promise to produce admissible evidence at some future time is not the production of admissible evidence in response to a summary judgment motion; contention that evidence will be introduced and that it will show certain things is hearsay and generally inadmissible).

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[4] The FSM points to the Contract's tendering documents as proof that the FSM intended to hire only a multi-disciplinary firm that could handle all the needed services in-house. For the final expression of the parties' intent, the court relies primarily on the terms as expressed in the contract's words although when the contract language is ambiguous, it can look beyond the contract's words to the surrounding circumstances to determine the parties' intent without changing the writing. Nanpei, 7 FSM Intrm. at 324. The Contract is unambiguous. It prohibits subcontracting.

This is because "[c]ausation is an essential element of damages in a breach of contract action; and, as in tort, a plaintiff must prove that a defendant's breach *directly and proximately caused* his or her damages." National Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 525 (2d Cir. 2004) (emphasis in original). When a plaintiff has failed to make a showing sufficient to establish the existence of any element essential to its case on which it will bear the burden of proof at trial, summary judgment in the defendant's favor is appropriate. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578, 583 (Pon. 2002) (when party fails to make sufficient showing to establish the existence of an essential element on which it bears the burden of proof at trial, there can be "no genuine issue as to any material fact," since a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial); Kosrae v. Worswick, 10 FSM Intrm. 288, 291-92 (Kos. 2001) (same).

The FSM argues that the subcontracting prohibition is an important public policy and for that reason it does not need to show damages from the breach in order to maintain an action on it. This is true to a certain extent because "[e]ven if the breach caused no loss or if the amount of loss is not proved with sufficient certainty, the injured party can recover as nominal damages a small sum, commonly six cents or a dollar, fixed without regard to the amount of loss." E. ALLAN FARNSWORTH, CONTRACTS § 12.8, at 838-39 (1982). Since the subcontracting prohibition was deemed an important public policy, the FSM could have, to avoid the risk of proving actual damages or being awarded nominal damages, included in the Contract a liquidated damages provision[5] for a breach of the subcontracting prohibition. It did not. The FSM also contends that GMP's breach of the subcontracting ban would entitle it to terminate the Contract even if there were no direct monetary damages. This contention would stand as a possible defense to GMP breach-of-contract counterclaim.

Accordingly, summary judgment on the McVey subcontracting allegation is denied because factual disputes remain on 1) whether McVey did any particular survey work as part of the required work under the Contract or whether the McVey surveys were undertaken to protect GMP from boundary line lawsuits; and 2) whether, for any survey proven to be a subcontract, the subcontracting proximately caused any damages and can those damages be proven or should nominal damages be awarded.

c. *Okita*

GMP also asserts that when John M. Okita, an Hawaii-based architect, did some design work for GMP, he was an independent contractor and not a subcontractor. This assertion fails because Okita, as an independent contractor, undertook to design the Lelu and Utwe schools, that is, he undertook to perform part of GMP's existing contract. His initial designs, however, were never used, and his later conceptual design work was not actually used since the final designs in the Lelu and Utwe projects were prepared by Vincent Sablan, a GMP (Guam) employee and not an independent contractor or other subcontractor. This GMP transaction might better be described as an unsuccessful attempt to subcontract part of the Contract to Okita.

The FSM contends that whether Okita prepared the final drawings for the Lelu and Utwe schools is irrelevant to its allegation that GMP breached the Contract by subcontracting to Okita architect

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[5] The function of a liquidated damages provision is for the parties to agree in advance to a damages amount that will be assessed in the event of a certain contract breach where, for both parties, it may ease the calculation of risks and reduce the cost of proof; where it might be the only compensation possible to the injured party for a loss that cannot be proven with sufficient certainty; and where it would save litigation time and expense. E. ALLAN FARNSWORTH, CONTRACTS § 12.18, at 896 (1982).

services that GMP had already contracted to provide to the FSM. While whether Okita prepared the final drawings for the Lelu and Utwe schools may be irrelevant to the allegation, it is very relevant to whether the FSM can prevail on a breach-of-contract cause of action against GMP because, for the FSM to prevail, GMP's breach must be material and must proximately cause damages to the FSM.

Since all the admissible evidence, depositions, and affidavits, indicate that a GMP employee prepared all the final designs for the Kosrae schools, any damages to the FSM from those designs, even nominal damages, must necessarily be attributable to GMP itself and not to its unsuccessful attempt to subcontract to Okita. The FSM has failed to make a showing sufficient to establish an essential element. GMP is therefore entitled to summary judgment on the FSM's Okita subcontracting allegation. Suldan, 10 FSM Intrm. at 578, 583; Worswick, 10 FSM Intrm. at 291-92.

d. *Other Alleged Subcontractors*

At various times during the discovery phase, the FSM asserted that GMP also subcontracted work to 1) an unknown survey company from Guam, 2) an unknown U.S. engineering firm, and 3) Geo Engineering and Testing on Guam. GMP moves for summary judgment on these allegations. As part of its motion, GMP offered evidence that these were not GMP subcontractors. The FSM's opposition was silent about these alleged subcontractors and it did not mention them during the hearing. The FSM having abandoned these allegations, GMP is entitled to summary judgment that it did not breach the Contract by subcontracting work to these three entities.

2. *Gratuities to Government Employees*

The FSM alleges that GMP breached their contract by offering gratuities to FSM government employees in violation of Contract paragraph 19. That paragraph provides that the FSM

> may by written notice to [GMP], terminate the right of [GMP] to proceed under this agreement if it is found, after notice and hearing, by the Contracting Officer that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by [GMP] or any agent or representative of [GMP] to any officer or employee of the United States or the FSM NATIONAL GOVERNMENT, including officials or employees of the State Governments, with a view toward securing an agreement or securing favorable treatment . . . .

Contract ¶ 19. The FSM, in its written opposition, cites two instances of violation of this provision.

a. *Yatilman*

In its discovery responses, the FSM alleged only one instance of a gratuity, an incident on Guam where someone, ostensibly a GMP employee, met FSM Secretary of Transportation, Communication, and Infrastructure ("TC&I") Andrew R. Yatilman at the Guam airport and told Yatilman that Yatilman had a hotel room at the Guam Hilton and he was at the airport to take Yatilman there. Yatilman declined and stayed elsewhere. Yatilman, in his deposition, was uncertain exactly what he had been offered but said that he felt uncomfortable enough to report the incident to the FSM President as the possible offer of a gratuity. The FSM took no action.

Although the FSM could have terminated GMP by written notice to GMP if, after notice and a hearing, the contracting officer found that GMP or its agent or representative had offered or given gratuities to any FSM officer or employee, Contract ¶ 19, the FSM never invoked this contractual procedure. No notice was given. The contracting officer never held a hearing. Because the FSM failed

to follow the contractual administrative procedure to terminate GMP when a gratuity allegation was made, the FSM has waived any claim that it can use this alleged GMP breach of contract to lawfully terminate GMP. GMP is therefore entitled to summary judgment on the FSM's breach of contract claim based on allegations that GMP offered gratuities to Secretary Yatilman.

b. *Yakana*

In its written opposition, the FSM alleges a GMP payment of a gratuity to Pohnpei Lieutenant Governor Jack E. Yakana. GMP objects to this as a new, and in its view baseless, factual allegation, which was not disclosed during discovery but raised for the first time in the FSM's summary judgment opposition, leaving GMP unable to form a proper response to it and Yakana's supporting affidavit, which is generally conclusory with few details. GMP asserts that it is unfair to add new allegations after discovery has closed and it can no longer take depositions or propound interrogatories on the subject. GMP objects to trial (or litigation) by ambush especially since the FSM seems to have been aware of the allegation while discovery was still being conducted and did not disclose it then.

Discovery is designed to prevent litigation by ambush. Just as a plaintiff cannot use an opposition to a defendant's summary judgment to effect a de facto amendment to its pleadings to assert a new claim, Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350 (App. 2011) (Rule 15(a) amendment procedure should be used), *aff'g* Berman v. Pohnpei Legislature, 16 FSM Intrm. 492, 498 (Pon. 2009) (new claim made in cross motion for summary judgment disregarded because it fell outside the scope of the plaintiff's complaint and was thus not properly before the court), a plaintiff ought not to be able to use the summary judgment process to, in effect, amend its discovery responses without allowing the defendant to conduct necessary discovery into the basis and circumstances of that new allegation. The FSM could have produced the Yakana allegation during discovery or shortly thereafter. The FSM should have disclosed the Yakana allegation once the FSM became aware of it since the FSM was "under a duty seasonably to amend a prior response if [it] obtains information upon the basis of which (A) [it] knows that the response was incorrect when made, or (B) [it] knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." FSM Civ. R. 26(e)(2).

Since the FSM failed to disclose the alleged Yakana incident and seems to have knowingly concealed it until it had to oppose GMP's summary judgment motion, the FSM should not now be allowed to put this allegation before the court. The FSM's discovery responses narrowed the FSM's gratuity claims to the Yatilman incident. Narrowing issues actually in dispute is one function of discovery. *See* People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010). The FSM may not benefit at the summary judgment stage by tendering evidence it was under a discovery obligation to produce, but did not. *Cf.* Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001) (party may not derive benefit post-trial by tendering evidence that he was under a discovery obligation to produce pre-trial, but did not), *rev'd on other grounds sub nom.*, Panuelo v. Amayo, 12 FSM Intrm. 365 (App. 2004).

Since GMP asked in discovery for the instances where it was alleged to have offered or given gratuities and the FSM disclosed only the Yatilman incident, the FSM is limited to that instance and cannot seek to introduce evidence of another instance in its summary judgment opposition. *See* Primes v. Reno, 999 F. Supp. 1007, 1008 n.3 (N.D. Ohio 1998)[6] (on defendant's summary judgment motion,

[6] When the court has not previously considered aspects of discovery procedure and the interplay between the discovery rules and the summary judgment rule and when the civil procedure rules covering discovery and summary judgment are similar to U.S. rules, the court may look to U.S. authorities for guidance.

plaintiff's discrimination claim limited to acts identified in his interrogatory responses). Accordingly, the court does not consider the Yakana gratuity allegation to be properly before it.

GMP is therefore entitled to summary judgment on both allegations of the FSM's gratuity breach of contract claim.

3. *Soil Testing at Lelu and Utwe School Sites*

The FSM alleges that GMP materially breached their Contract by not conducting soil tests at the Lelu and Utwe Elementary School sites in Kosrae before it submitted its 35% design plan; that the Kosrae Economic Policy Implementation Council ("KEPIC") did not have the authority to waive the soil testing requirement; that the FSM's acceptance of that plan did not constitute a waiver of the soil testing requirement; and that this failure to test caused damages through construction delays and the future possible need to demolish the completed buildings and rebuild the two projects.[7] It contends that, since soil testing is the basis of design, GMP, by not doing its own soil tests on the sites before submitting the 35% designs, materially breached Contract subparagraph 1(C). That subparagraph provides that GMP

> upon receipt of a notice to proceed from the [FSM] to assist the five FSM governments in the preparation of IDP project planning documents required by the US Government for release of project funds, including the submission of thirty-five percent (35%) design, inclusive of soil testing and survey, of projects deemed necessary by the FSM for packaging bid proposals

Contract ¶ 1(C)(1).

GMP asserts that the FSM waived this soil testing requirement and allowed GMP to use soil tests that someone else had done earlier and contends that the FSM's later knowing acceptance of the 35% design plan and payment for it means that the FSM cannot now claim defects and seek damages. For this, GMP relies on Contract paragraph 3 and correspondence with the FSM. The Contract provides that "[p]ayment is subject to acceptance in writing by the [FSM] of [GMP]'s satisfactory completion of specified and assigned duties."

Both parties agree that under the Contract GMP was normally expected to perform soil testing and submit it as part of the 35% design. But since it would have taken considerable time to get the proper drilling equipment to Kosrae to do the soil tests, GMP suggested, with KEPIC's approval, that it use soil tests that were done in a similar reclaimed mangrove swamp at the Kosrae Airport. When the FSM inquired about the soil test results which had not be furnished, GMP informed the FSM about its use of the historical tests from the airport site. The FSM responded in writing that, if GMP was to use that information, it should be provided and that GMP's "professional Engineer should sign off or certify the soil test results[, which] should be applicable to these particular projects only. The rest will

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See, e.g., Berman v. College of Micronesia FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008).

[7] This might not be a possible remedy. The economic waste principle of contract law states that although the government has the right to insist on performance in strict compliance with the contract's specifications and can require a contractor to correct non-conforming work, "the government should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose." Granite Constr. Co. v. United States, 962 F.2d 998, 1007 (Fed. Cir. 1992).

be in accordance with the contract documents as stipulated. Please be mindful that the soil test is part of the pre design services." Letter from Waynold Yamaguchi, Acting TC&I Secretary, to Fred Gutierrez, GMP/PMU Project Manager (July 10, 2006). Payment followed. Under Contract paragraph 3, that would mean that, in the FSM's opinion, GMP had satisfactorily completed its assigned duty.

The court construes this as a one-time waiver. The FSM does not, but cites no authority in support. "Where work is accepted (under a construction contract) with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects." McQuagge v. United States, 197 F. Supp 460, 470 (W.D. La. 1961); *see also* Roberts v. United States, 357 F.2d 938, 948 (Ct. Cl. 1966) (acceptance does not preclude suit for latent defects). The FSM does not claim that the rule is any different under a construction design contract.

The FSM did not have to accept the 35% design and could have withheld payment and insisted that GMP first conduct soil tests on the actual sites. It did not. It cannot now contend that, by its actions, it did not intend to waive the soil testing requirements that one time and for just the Utwe and Lelu school projects. The court concludes that the FSM waived in writing the pre-35% design soil testing requirements[8] for the Utwe and Lelu school projects. It cannot now claim damages for breach because the pre-design soil tests were not done.

Accordingly, GMP is entitled to summary judgment on the FSM's claim that GMP breached their Contract by not conducting soil tests before submitting the 35% designs for Utwe and Lelu.

4. *Weno Road Survey Coordinate System*

The FSM alleges that GMP breached their Contract when it used the North American Datum of 1983 Projection for the Weno road survey instead of the Modified Azimuthal Equidistant Projection on Clark's Ellipsoid of 1866 (Truk-Neoch Coordinate System) as required by statute, Truk D.L. No. 21-17, § 3. GMP acknowledges that it did not use this statutorily-required coordinate system but contends that there was no contract breach because GMP, if asked, could have, and would have (at GMP's own expense as admitted by the FSM's then contracting officer in a later deposition), converted its road survey data to the correct system by using an appropriate computer software program and a few days' work in the field. The FSM contends that it was damaged by GMP's use of the wrong coordinate system because it had to do a new survey. GMP counters that the only reason the FSM needed a new survey was because it had decided to terminate GMP.

It is undisputed that GMP used the wrong coordinate system for the Chuuk road survey work. This is a breach of the Contract.[9] GMP contends that the breach was not material, or would not have been material because, if it had been asked to correct the survey by converting it to the proper coordinate system, GMP would have and there would then have been no damages. Although there was expert testimony that this could have been done with the right computer software and some fieldwork, the court cannot presume that this would have been successful or that it could have been accomplished

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[8] The construction bid documents that GMP prepared and that the FSM issued for the construction of the Utwe and Lelu schools included requirements that the construction contractors conduct soil testing before construction. *See infra* part II.C.1.

[9] This FSM claim that GMP used the wrong coordinate system for this Weno road survey work seems more like, or as much a, professional malpractice claim as a breach of contract claim.

at no direct cost to the FSM. Accordingly, GMP is denied summary judgment on this claim. The FSM is granted summary judgment that the Contract was breached but is not granted summary judgment on its claim because whether the breach was material is a factual dispute – whether the measure of damages should be the cost of the new survey or what the cost would have been to convert the GMP survey to the Truk-Neoch Coordinate System or whether any damages, other than nominal, are due at all since GMP apparently would have been willing to do the conversion[10] itself at its own expense.

5. *Contact with State Governments*

The FSM alleges that GMP improperly solicited and took direction from state governments.[11] The FSM points to only one example, a letter from the Chuuk Governor that it alleges was sent at GMP's behest and that told GMP to proceed with various design projects in Chuuk. It is undisputed that the state governments had no authority to direct GMP to proceed with PMU contract design work. The FSM states that the Governor's letter put it in a politically awkward position and contends that the "real point of the matter is that GMP knew or should have known that State government cannot issue a Notice to Proceed and cannot obligate the FSM National Government to pay funds for work done." Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. for Partial Summ. J. at 30 (Nov. 25, 2009).

It is also undisputed that GMP did not bill or receive payment from the FSM for any work that the FSM national government had not first authorized. The Governor's letter did not obligate any FSM funds and GMP never claimed that it did. No FSM funds were obligated until the FSM national government issued notices to proceed. It is difficult to see how the actions of a non-party, albeit a contract beneficiary, can be construed as a material breach of the contract by one of the two contracting parties. The FSM's being put in a politically awkward situation does not constitute a breach of contract. The FSM cannot show that GMP committed a material breach or causation or damages. Accordingly, GMP is entitled to summary judgment on the FSM's claim that GMP breached the Contract by inducing state government officers to write GMP letters authorizing it to proceed with work under the Contract.

6. *Asian Development Bank Projects*

The FSM alleges that GMP improperly interfered with its relations with the Asian Development Bank ("ADB"). The FSM seems to have initially asserted that GMP had no rights to any involvement with any ADB development project.

The Contract provides that among GMP's duties, GMP was "[t]o establish and use transparent processes of international and local competitive bidding for all consulting, construction, and maintenance contracts to be funded from Compact grants for infrastructure or grants and loans from

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[10] The FSM contends that it had no contractual obligation to ask GMP to re-do the survey correctly and expresses some doubt about the GMP's survey's accuracy, thus making any conversion also inaccurate. It seems to the court that ordinarily in a design contract of this type (or in a construction contract), it is expected that from time to time the contractor may be asked to re-do work that has not met the contract's specifications, that is, to cure any defects. That would seem to be the function of Contract paragraph 3, where the FSM is not obligated to pay GMP until GMP had satisfactorily completed the assigned task, that is, the FSM was expected to tell GMP to do the work over until the FSM was satisfied. Either party may present evidence that this Contract was not meant to, and did not, operate that way.

[11] The Contract required GMP to have extensive contact with the state governments. *See infra* part III.B.1.

foreign governments and donor organizations." Contract ¶ 1(a)(4). This contract provision[12] unequivocally, and the FSM conceded as much during the hearing, authorizes GMP involvement in ADB development projects since the ADB is a foreign donor organization. The FSM now asserts that GMP breached their contract by not going through (unspecified) proper diplomatic channels in dealing with the ADB. The FSM contends that GMP's improper contact, or interference, with the ADB resulted in delays in the implementation of the ADB loan program to the FSM (and thus unspecified damages).

There is no contractual provision requiring GMP to contact foreign donor organizations only through the FSM diplomatic channels or requiring any particular procedure at all. The parties could have included such a clause in the contract if they had chosen to. They did not. The court can understand that GMP's direct contact with the ADB may have caused puzzlement and delay by the ADB and become politically awkward for the FSM, but it was not a breach of the Contract between GMP and the FSM. Accordingly, GMP is entitled to summary judgment on the FSM's breach of contract claim based on GMP's alleged interference with ADB projects.

B. *Professional Malpractice*

GMP seeks summary judgment on the FSM's professional malpractice claims. The FSM alleges that GMP committed professional malpractice by preparing an engineering design for a Weno, Chuuk wastewater treatment plant that was too complex for local conditions; by submitting a design for a Yap Early Childhood Education Center that was over-budget, defective, and environmentally insensitive; by failing to timely deliver infrastructure plans and reports; by a civil engineer putting his seal on electrical engineering drawings; by submitting designs for Lelu and Utwe Elementary Schools with defects; by failing to leave plans and designs in its office after its January 2008 termination; and by failing to produce or submit shop drawings for the Lelu and Utwe school projects.

1. *Professional Malpractice as a Cause of Action*

FSM law has not previously recognized professional malpractice as a cause of action other than for the profession of medicine (medical malpractice), *see, e.g.*, William v. Kosrae State Hosp., 13 FSM Intrm. 307, 309 (Kos. 2005); Joe v. Kosrae, 13 FSM Intrm. 45, 47 (Kos. 2004); Samuel v. Pryor, 5 FSM Intrm. 91, 104 (Pon. 1991); Amor v. Pohnpei, 3 FSM Intrm. 519, 536 (Pon. 1988), and for the profession of law (legal malpractice), *see, e.g.*, Palsis v. Tafunsak Mun. Gov't, 16 FSM Intrm. 116, 129-30 (App. 2008); Heirs of George v. Heirs of Dizon, 16 FSM Intrm. 100, 114 (App. 2008); In re Sanction of Woodruff, 9 FSM Intrm. 414, 415 (App. 2000); Kishida v. Aizawa, 13 FSM Intrm. 281, 284 (Chk. 2005); Heirs of Tulenkun v. Simon, 16 FSM Intrm. 636, 644 (Kos. S. Ct. Tr. 2009) (explaining the parameters of legal malpractice).

Because of the FSM's social and geographic configuration, neither the national government nor the state governments are in a position in which they can effectively monitor, regulate, and license all of the many professions and professionals required in the FSM these days. It thus seems adopting the common law standard for professional malpractice (or recognizing it beyond just the medical and legal professions) is desirable, needed, and appropriate, and would be appropriate even if the FSM had an extensive regulatory and licensing regime for professionals.

Generally, "[o]ne who undertakes to render professional service is under a duty to the person

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[12] Fairly early in the contract performance stage, the FSM sought to amend the contract to eliminate any GMP participation in ADB projects. This is an acknowledgment that this provision authorized GMP involvement but that the FSM was no longer amenable to that result.

for whom the service is to be performed to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances." City of Eveleth v. Ruble, 225 N.W.2d 521, 524 (Minn. 1974).[13]

> The law imposes upon persons performing architectural, engineering, and other professional and skilled services the obligation to exercise a reasonable degree of care, skill and ability, which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions.

H. Elton Thompson & Assocs. v. Williams, 298 S.E.2d 539, 540 (Ga. Ct. App. 1982). "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." RESTATEMENT (SECOND) OF TORTS § 299A (1965).[14]

> The circumstances to be considered in determining the standard of care, skill, and diligence to be required . . . include the terms of the employment agreement, the nature of the problem which the supplier of the service represented himself as being competent to solve, and the effect reasonably to be anticipated from the proposed remedies . . . .

Ruble, 225 N.W.2d at 524-25. Although this duty[15] exists independent of and is not created by contract, a contract may furnish the conditions for that duty's fulfilment. Milwaukee Partners v. Collins Eng'rs, Inc., 485 N.W.2d 274, 276-77 (Wis. Ct. App. 1992). Professional malpractice sounds in tort as a form of negligence. *See* Resolution Trust Corp. v. Western Techs., Inc., 877 P.2d 294, 298 (Ariz Ct. App. 1994). The reasonable care standards apply similarly to architects, engineers, doctors lawyers, and like professionals engaged in furnishing skilled services for compensation and general negligence principles apply. Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 477 (8th Cir. 1968) (whether required standard exercised is factual question).

> Ordinarily, a determination that the care, skill, and diligence exercised by a professional engaged in furnishing skilled services for compensation was less than that normally possessed and exercised by members of that profession in good standing and that the damage sustained resulted from the variance requires expert testimony to establish the prevailing standard and the consequences of departure from it in the case

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[13] U.S. common law decisions are an appropriate source of guidance for the FSM Supreme Court for contract and tort issues unresolved by statutes, decisions of FSM courts, or FSM custom and tradition. Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 142 (Pon. 1985). Professional malpractice may implicate both contract and tort issues.

[14] Although the FSM Supreme Court may not be bound by 1 F.S.M.C. 203, which points to the Restatements as the rules of decision for courts in determining and applying the common law, Ray v. Electrical Contracting Corp., 2 FSM Intrm. 21, 23 n.1 (App. 1985), that FSM Code provision does permit the Restatements to be used when applying common law rules in the absence of written law, Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 24 (App. 2006), while keeping in mind the suitability for the FSM of any given common law principle, Senda v. Semes, 8 FSM Intrm. 484, 495 (Pon. 1998).

[15] During the hearing, the FSM asserted that, since GMP was to act as an agent of the FSM government, GMP became a fiduciary and thus had a higher duty of care than an architect would. The FSM's pleadings do not contain a breach of fiduciary duty cause of action.

under consideration.

Ruble, 225 N.W.2d at 525; *see also* Department of Transp. v. Mikell, 493 S.E.2d 219, 223 (Ga. Ct. App. 1997). Expert testimony is required because the fact-finder is "not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised a reasonable degree of care." Williams, 298 S.E.2d at 540. Only in a few very clear and palpable cases can a court dispense with the expert testimony requirement to establish the parameters of professional conduct and find damages to have been caused by a professional's failure to exercise reasonable care, skill, and diligence. *Id.*; Ruble, 225 N.W.2d at 525.

2. *Specific Claims*

a. *Weno Wastewater Treatment Plant Design*

The FSM alleges that GMP committed professional malpractice by preparing an engineering design for a Weno, Chuuk wastewater treatment plant that was too complex for local conditions because it required maintenance equipment not available on Chuuk; because its operating costs were too large for its end users to afford if its costs were passed on to them; because there were no local technicians available to maintain the sophisticated monitoring equipment and computerized control system; because there was insufficient water supply available to run the facility; because the Chuuk Public Utility Corporation did not have the ability to reliably generate enough electricity to run the plant; and because GMP did not conduct the required soil survey for the plant. GMP asserts that the Weno wastewater treatment plant design was reasonable and not too complex and that the FSM has no contrary evidence; that these criticisms were all known when the FSM accepted the design plan and submitted it to the U.S. to obtain a construction grant and so are waived; and that the FSM was not damaged since the wastewater treatment plant project was not put out to bid because Chuuk could not assure or acquire clear title to the land.

The design GMP used was the same type it had used, apparently with great success, for a wastewater treatment plant in Kona, Hawaii. The FSM raised some questions at the 35% design stage but then directed GMP to proceed with a 100% design and did not tell GMP to alter the design. When the 100% design was received, the FSM never asked for a redesign. GMP was eventually paid for the design. The Weno wastewater treatment plant was not put out to bid because land ownership issues arose.

GMP, relying on Contract paragraph 3, contends that acceptance of the 100% design and payment for it is waiver of any FSM claims that the Weno wastewater design is defective and furthermore, that any alleged "defects" were not latent but were obvious and patent and known beforehand. That argument could prevail if this was an FSM breach of contract claim. But this is a tort claim and the question is not whether GMP breached the Contract's terms but whether it violated its duty of reasonable care towards its client – the FSM.

The FSM has produced enough competent evidence that GMP may have produced a design that was technologically not feasible for the community it was to serve, to show that there is a genuine factual issue over whether the design would work on Weno. The court does not have before it evidence (and expert testimony would likely be needed) of what a design professional's duty entails when questions are raised about whether a proposal was over-designed or is unworkable under local conditions. The court will not speculate in that regard. The existence of these factual issues bars summary judgment on this FSM allegation.

GMP also contends that the FSM has not been harmed or shown any damages because the

Weno wastewater plant project was canceled. The court is not so convinced. The FSM paid for the plans. The time may come when Chuuk has resolved its land tenure problem and is ready to go forward. If the GMP plan is usable as is or can be easily modified, the plant project can proceed quickly. If it is not, then someone must start over.

b. *Yap Early Childhood Education Center Design*

The FSM alleges that GMP, by submitting a design for the Yap Early Childhood Education Center that was over-budget, defective, and environmentally insensitive, committed professional malpractice and damaged the FSM because it had to retain another architecture and engineering firm to prepare a completely different design for the project. GMP contends that the cost overruns were due to features added, at the State of Yap's request, between the pre-design stage and the 35% design stage; that there are U.S. Office of Insular Affairs mechanisms for dealing with cost overruns; and that the FSM's claim it was environmentally insensitive is a new claim raised for the first time in the FSM's opposition and thus should be stricken.

The court will disregard the environmentally sensitive allegation because it was raised for the first time, and without factual support, in the FSM's written opposition. *See* Primes, 999 F. Supp. at 1008 n.3. However, the court has nothing before it about what a design professional's duty is in relation to designing within a proposed budget and the court will not speculate in that regard. Whether the cost overruns in GMP's design were such that they were the result of GMP not exercising the reasonable care a professional in good standing would under similar conditions and like surrounding circumstances is a factual question barring summary judgment. Accordingly, GMP is denied summary judgment on this claim.

c. *Untimely Infrastructure Plans and Reports*

The FSM, relying on an affidavit by Robert Westerfield, alleges that GMP committed professional malpractice by failing to timely deliver infrastructure plans and reports.[16] GMP contends that the FSM has not produced any admissible evidence that its plans were untimely and that its own admissible evidence shows that there were extensions granted and that the reports were timely based on those extensions.

Westerfield, in his deposition, testified that he had no independent knowledge that the reports were late but that he thought they were based on a discussion with Yatilman. Westerfield's affidavit was thus not made on personal knowledge as an affidavit opposing summary judgment must be, FSM Civ. R. 56(e) ("[s]upporting and opposing affidavits shall be made on personal knowledge"), and thus is not competent evidence. Yatilman, the then contracting officer, testified in deposition that he was pretty sure an extension had been granted, which was corroborated by GMP's principal in his affidavit.

The FSM's opposition not having produced any competent admissible evidence to rebut GMP's prima facie showing that its reports were timely, GMP is accordingly granted summary judgment on this professional malpractice claim.

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[16] It seems that, when the parties' contract creates the deadlines, the tardy submission of reports, except in the most egregious cases, is less professional malpractice than a contract breach, although even then the breach might not be material. *See infra* part III.A.1.

d. *Seal on Electrical Engineering Drawings*

The FSM alleges that GMP, by allowing a civil engineer to put his seal on electrical engineering drawings, committed professional malpractice. GMP counters that since there are no requirements in the FSM that drawings and plans prepared by professional engineers be stamped by the relevant engineers, or that they be stamped at all, the FSM's claim has no substance. GMP states that its principal civil engineer placed his stamp on the electrical plans solely so that those plans would be readily identifiable as the final version. GMP concedes that this would not have been proper in either Guam or Hawaii, jurisdictions in which it regularly practices.

Even though there is no FSM regulatory or statutory requirement that final design plans be stamped or that certain professionals stamp only certain plans, the professionals involved usually practice in jurisdictions in which they must adhere to such requirements. The court does not wish to speculate about the standard against which to measure the civil engineer's acts in determining whether he acted properly in stamping the electrical designs to indicate they were the final version rather than having an electrical engineer do it or indicating it in some other manner. Evidence, most likely expert, must be produced about the standard professionals should be expected to follow in the FSM – in this case, not whether plans should be stamped by a professional but whether a civil engineer's stamp on electrical engineering plans is contrary to the degree of care a civil engineer should exercise. GMP is denied summary judgment on this claim.

e. *Lelu and Utwe Schools Design Defects*

The FSM alleges that GMP committed professional malpractice by submitting designs for Lelu and Utwe Elementary Schools with defects that required design changes before or during construction or which at some future time, may require contract modifications and change orders that may increase costs to the FSM. GMP counters that the defects were minor and that based on the construction contractors' deposition testimony that all of the design changes needed and performed during construction were minor and did not result in any increased costs to the FSM, the FSM has failed to show any actionable damages.

Westerfield testified in his deposition that any needed design changes in the Lelu and Utwe school projects could easily be solved at no appreciable extra cost to the FSM. To the extent that Westerfield's later affidavit contradicts this testimony, it cannot be used to create factual issues to defeat summary judgment because "a party cannot create a triable issue in opposition to summary judgment simply by contradicting his deposition testimony with a subsequent affidavit." Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 438 (4th Cir. 1999); *see also* Donohoe v. Consolidated Operating & Prod. Corp., 982 F.2d 1130, 1136 n.4 (7th Cir. 1992); Jones v. General Motors Corp., 939 F.2d 380, 385 (6th Cir. 1991); Babrocky v. Jewel Food Co., 773 F.2d 857, 861 (7th Cir. 1985) (result could differ if deponent and affiant were different people); Reisner v. General Motors Corp., 671 F.2d 91, 93 (2d Cir. 1982). The Westerfield affidavit therefore cannot be considered on this point.

Accordingly, the FSM has not overcome GMP's prima facie showing of entitlement to summary judgment. GMP is entitled to summary judgment of the FSM's professional malpractice claim based on design defects remedied during the Lelu and Utwe school construction projects.

f. *Failure to Leave Plans after Termination*

The FSM alleges that, after GMP was terminated, it failed to leave working field copies of its design plans in the Kosrae PMU office. To support this allegation, the FSM relies on an affidavit by Robert Westerfield, who was not present on Kosrae. The Westerfield statement is not competent

evidence in a summary judgment opposition since it was not of the affiant's personal knowledge. FSM Civ. R. 56(e). The FSM's own contractors testified in their depositions that GMP had left all the required plans behind in Kosrae. The contractors' depositions present evidence that would be admissible at trial. GMP also asserts that the FSM never asked it for any missing plans and that if the FSM had, it would have complied with any request to turnover to the FSM any records for which the FSM had paid.

The FSM has not overcome GMP's admissible evidence that all the required plans were left behind. Furthermore, the FSM gave GMP no opportunity to cure its omission, if in fact GMP failed to leave every plan it should have. Accordingly, GMP is entitled to summary judgment on the FSM's claim that it committed malpractice by failing to leave its plans behind.

g. *Failure to Produce or Submit Shop Drawings*

The FSM alleges that, although GMP had no contractual duty to actually produce shop drawings,[17] GMP failed in its professional responsibility to assure that these drawings were prepared by contractors on the Lelu and Utwe school projects. GMP counters that, at the time it was terminated, the Lelu and Utwe projects were only in the excavation phase and had not reached the point were shop drawings were required. Furthermore, GMP objects to the FSM's claims in its opposition that GMP failed in its professional responsibility to see that the contractors prepared shop drawings since this was not a theory of liability the FSM pled in its first amended complaint or disclosed in response to discovery requests specifically asking what the FSM meant by its pleading that GMP had the duty to and had failed to produce shop drawings.

GMP asked in discovery for how it was to have committed malpractice and the FSM did not mention assuring that construction contractors produced shop drawings. The FSM is limited to what instances of malpractice it alleged and disclosed and cannot seek to introduce in its summary judgment opposition another instance based on different facts and theory of liability. *See* Primes, 999 F. Supp. at 1008 n.3. Accordingly, GMP is entitled to summary judgment on the FSM's claim that it committed malpractice by failing to see that the construction contractors produced the required shop drawings.

C. *Misrepresentation and Fraud*

GMP seeks summary judgment on the FSM's claims that it committed fraud or misrepresentation. The FSM alleges that GMP committed fraud or misrepresentation by including in contract specifications for the Lelu and Utwe school projects that the contractors perform soil testing; by inducing the Chuuk governor to prepare a letter directing GMP to proceed with design work; by offering gratuities to government employees; by placing overly restrictive provisions in its bid documents for the Weno wastewater treatment plant; and by placing exculpatory language in bid documents for the Weno road and Yap Early Childhood Education center projects.

The elements of intentional misrepresentation are: 1) a misrepresentation by the defendant, 2) scienter or the defendant's knowledge that the statements were untrue, 3) intent to cause the plaintiff to rely on the misrepresentations, 4) causation or actual reliance by the plaintiff, 5) justifiable reliance by the plaintiff, and 6) damages. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 442 (Chk. 1998); Isaac v. Palik, 13 FSM Intrm. 396, 401 (Kos. S. Ct. Tr. 2005). Since the elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by

[17] Construction contractors prepare, for submission to the design professional, shop drawings to show the details of how the contractor will fabricate and install the design on site.

the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment, a plaintiff must show that the misrepresentations were done to induce action by him, and that he relied on them to his detriment. Arthur v. Pohnpei, 16 FSM Intrm. 581, 597 (Pon. 2009); Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 526 (Pon. 1996); Chen Ho Fu v. Salvador, 7 FSM Intrm. 306, 309 (Pon. 1995); Pohnpei v. Kailis, 6 FSM Intrm. 460, 462 (Pon. 1994). Although the cases have described the elements somewhat differently, a close reading indicates that the elements of fraud and of intentional misrepresentation are the same and they are the same cause of action.

1. *Specifications That Contractors Perform Soil Testing*

The FSM alleges that GMP committed misrepresentation or fraud by trying to assign to the construction contractors GMP's contractual obligation to perform soil testing and survey for the Lelu and Utwe schools. The FSM contends that GMP misrepresented to the FSM and to the bidding contractors GMP's contractual obligations by inserting in the bid documents the requirement that the construction contractor conduct soil tests on the Lelu and Utwe school sites.

If GMP had told the FSM that it done soil testing when it had not and if the FSM relied on that misrepresentation to its detriment, then that could have constituted an intentional material misrepresentation or fraud. Here, GMP informed the FSM that it had not done soil testing but had instead used the soil tests done at the Kosrae Airport for its design preparations. The FSM then waived this requirement for these two projects.[18] GMP included clauses in draft construction bid documents submitted to the FSM for its approval that the contractors conduct soil testing. There is no dispute that even when soil testing has been done in the design phase, soil testing is still necessary in the construction phase, and may have been particularly necessary here since the pre-design soil testing had been waived. There was thus no misrepresentation made to the FSM. Accordingly, GMP is entitled to summary judgment on the FSM's fraud claim based on putting soil testing requirements in the Lelu and Utwe school site bid documents.

2. *Chuuk Governor's Letter*

The FSM alleges that GMP committed fraud by soliciting and inducing the Chuuk Governor to draft a letter that, in the FSM's view, purported to authorize and direct GMP to proceed with contract design work or that, in GMP's view, merely expressed Chuuk's desire that the design work proceed promptly. It is undisputed that only the FSM national government had the authority to authorize and direct GMP to proceed with contract design work.

Even assuming, as the FSM wants the court to do, that letter was drafted at GMP's behest and might therefore be considered a GMP representation or statement, the FSM has not identified any GMP misrepresentation upon which the plaintiff (the FSM) relied to its detriment. Reliance upon a defendant's misrepresentation to one's detriment are essential elements of a plaintiff's case for fraud or intentional misrepresentation. The FSM has not made a showing that the Chuuk Governor's letter caused it to rely on a GMP misrepresentation to its detriment.

Since the FSM has failed to make a showing sufficient to establish the existence of elements essential to its case, summary judgment in GMP's favor is appropriate. Suldan, 10 FSM Intrm. at 578, 583; Worswick, 10 FSM Intrm. at 291-92 (Kos. 2001). Accordingly, GMP is granted summary judgment on the fraud or misrepresentation claim based on the Chuuk Governor's letter.

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[18] *See supra* part II.A.3.

3. *Offering Gratuities to Government Employees*

The FSM alleges that GMP offered gratuities to FSM national and state officials and that this constituted fraud and misrepresentation. The FSM cites only the two instances of alleged gratuities mentioned earlier, the Yatilman Guam hotel room incident and $1,000 allegedly given to Pohnpei Lieutenant Governor Jack E. Yakana.

The FSM does not identify any statement made during the Yatilman hotel room incident that the FSM detrimentally relied on or any damages caused by it. Nor, for reasons stated above in part II.A.2.b, is the Yakana allegation properly before the court. Additionally, unlike other allegations and averments, a party must plead "the circumstances constituting fraud . . . with particularity." FSM Civ. R. 9(b). The Yakana allegation was never pled at all. A plaintiff cannot bypass Rule 9(b) by raising a new fraud claim in a summary judgment opposition, Samuels v. Wilder, 871 F.2d 1346, 1349-50 (7th Cir. 1989), and effect a de facto amendment to its pleading, *see* Berman, 17 FSM Intrm. at 350; Berman, 16 FSM Intrm. at 498. GMP is thus entitled to summary judgment on the fraud or misrepresentation claim based on allegations of offering gratuities to government employees.

4. *Weno Wastewater Treatment Plant Bid Documents*

The FSM alleges that GMP committed misrepresentation or fraud by placing overly restrictive terms in bid documents that GMP prepared to be used to bid out the Weno wastewater treatment plant project. Specifically, the FSM alleges that certain terms in the bid documents, such as requiring brand-name products, excessive bonding requirements, and unreasonable or unnecessary requirements for a firm to qualify to do business, would serve to limit full and open competition for the Weno wastewater treatment plant project thus restricting the number of bidders and potentially increasing the contract price to the FSM.

The Weno wastewater treatment plant project was never put out to bid. Its bid documents were never used. It seems they could have been relatively easily modified (presumably at GMP's expense) and used if the Weno wastewater project had gone forward. The FSM thus cannot show elements essential to its claim – that it relied on those bid documents to its detriment. Accordingly, GMP is entitled to summary judgment on the fraud or misrepresentation claim based on allegations that the Weno wastewater project bid documents prepared by GMP contained terms that they should not have.

5. *Exculpatory Language in Bid Documents*

The FSM alleges that GMP placed exculpatory language in bid documents it prepared and that, even though those documents were not used, GMP is liable because the FSM would, if GMP's work was defective, need to pay another firm to re-do the documents. GMP counters that the exculpatory language in the proposed bid documents was to limit its liability to any bidders and did not purport to limit GMP's liability or obligations to the FSM in any way. GMP also adds that, since these were proposed bid documents, GMP, if it had been asked, could have easily modified them (presumably at GMP's expense) to address the FSM's concerns.

The FSM has not shown that it relied on the exculpatory language in those bid documents to its detriment, elements essential to its claim. GMP is thus granted summary judgment on the fraud or misrepresentation claim based on allegations that GMP prepared bid documents with exculpatory language.

6. *Summary*

Since GMP is entitled to summary judgment on each of the FSM's fraud and misrepresentation allegations, it is granted summary judgment on the FSM's entire misrepresentation and fraud cause of action.

III. GMP's Counterclaims

GMP also seeks summary judgment on its counterclaims for declaratory relief and injunctive relief and partial summary judgment on its breach of contract counterclaim.

A. *Breach of Contract*

GMP seeks partial summary judgment on its breach of contract claims against the FSM. It contends that the FSM breached their Contract 1) by withholding payments due under the Contract; 2) by terminating Paragraph 1(A) of the Contract in June 2007; and 3) by terminating the rest of the Contract in January 2008.

1. *Withheld Payments*

GMP contends that the FSM breached the Contract by withholding or delaying payments that were due it and that the FSM breached the Contract by not paying GMP monthly. It points to the contract language that provides that GMP "is entitled shall [sic] be paid upon submission of duplicate invoices and progress reports on a monthly basis." Contract ¶ 3. GMP seeks summary judgment that the FSM is liable to it for withheld or late payments but leaves the question of just which withheld payments, and in what amount, entitle it to damages for resolution at trial. GMP relies, in part, on Secretary Yatilman's deposition testimony that he had, at times, withheld or delayed payments to GMP when he should not have or had no specific authority to do so.

The FSM asserts that the Contract does not contain any provision directing the time and manner of payment, when payment is due, or when the payment would be late. The FSM contends that the Contract only asks that GMP submit monthly billings and does not require that GMP be paid monthly. The FSM further contends that any liability for any withheld or delayed payments for GMP work before February 9, 2007, was fixed and settled by the Second Amendment to the Contract and that if any other payments were withheld or delayed it had to have been for uncompleted work.

The court concludes that the phrase "on a monthly basis" qualifies when duplicate invoices and progress reports are due, not when payments are due. The grammatical construction of contracts generally requires that a qualifying or modifying phrase be construed as referring to its nearest antecedent. *See, e.g.*, New Castle County v. National Union Fire Ins. Co., 174 F.3d 338, 348 (3d Cir. 1999); Bakery & Confectionery Union & Indus. Int'l Pension Fund v. Ralph's Grocery Co., 118 F.3d 1018, 1026 (4th Cir. 1997); Gibbs v. Air Canada, 810 F.2d 1529, 1536 (11th Cir. 1987); *see also* Interstate Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325, 1329 (9th Cir. 1994). The nearest antecedent to "on a monthly basis" is "submission of duplicate invoices and progress reports."

Even if the court were to infer that the clause providing that GMP "is entitled shall be paid upon submission" was intended to mean that GMP was to be paid as soon as it submitted its paperwork and thus contemplated monthly payments to GMP because GMP was expected to submit its paperwork on a monthly basis, that contemplation is qualified by the contractual provision that "[p]ayment is subject to acceptance in writing by the [FSM] of [GMP's] satisfactory completion of specified and assigned duties," Contract ¶ 3. Contractual terms that provide that payment is due upon the occurrence of a

stated event are generally not considered to be conditions indicating a forfeiture or a breach of contract but are merely a means of measuring time, and, if time is not of the essence of the contract, then the payment is due after a reasonable time.[19] *See* Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995); Panuelo, 5 FSM Intrm. at 127.

What constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. The court has nothing before it from which it can determine whether any delayed payment was made within a reasonable time. Accordingly, GMP is denied summary judgment on this claim. Furthermore, although GMP did not respond to the FSM's assertion that this claim was barred by the Second Amendment to the Contract, which settled and fixed the amounts due GMP on GMP's work before February 9, 2007, the court has nothing before it from which it can determine if those sums were paid in full within a reasonable time after the contract's second amendment on February 15, 2007. The FSM would, of course, be liable for any GMP work satisfactorily completed after February 9, 2007, for which GMP has not been paid. Whether there is any such work is undetermined although the FSM did concede during the hearing that it owes GMP something[20] for work done as construction manager on the Utwe and Lelu school projects after February 9, 2007, and maybe a few other invoices.

2. *June 2007 Termination*

GMP contends that its June 2007 termination by the FSM was a breach of the Contract because, in its view, the Contract had, by its express provisions, a five-year term. The FSM concedes that the Contract, under Paragraph 5, provided for a five-year term but argues that that general term was subject to a condition terminating the contract after two years, or on any one year anniversary thereafter, if the FSM was unable to certify the further availability of funds. The FSM also asserts that there was no valid enforceable contract after the first two years because there was no fixed contract price after that time period. GMP replies that not only were there funds available, but that the evidence shows that those funds could have been certified. GMP further argues there was a set price for the first two years and that the rest of the contract was limited by the existing $3 million U.S. grant for the project.

a. *Contract Length*

The FSM contends that the Contract, by its own terms, ended after two years because the FSM could not certify the availability of further funds. Interpretations of contract terms are matters of law to be determined by the court. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 621 (App. 1996); Yoruw v. Mobil Oil Micronesia, Inc., 16 FSM Intrm. 360, 364 (Yap 2009). The Contract provides that: "Should the Government be unable to certify the availability of funds at the beginning of any year after the initial two-year period of this contract, the contract will terminate at no expense to the Government and no further Government funds shall be obligated by the Consultant." Contract ¶ 5.

The FSM does not dispute that the parties intended the Contract to last five years. *Id.* ("assigned duties . . . shall be completed within the Special Contract Term of 5 years"). Nevertheless,

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[19] Even a contract that required payments "on or about the 15th day of each month" has been construed to mean within a reasonable time from the 15th of the month. *See* DeMarion Janitorial Servs. v. Universal Dev. Corp., 625 F. Supp. 1353, 1356-57 (N.D. Miss. 1985).

[20] Presumably, the FSM anticipates that this unspecified sum would be set off against the judgment it expects to obtain against GMP.

it contends that the Contract ended after the two years because no more funds were certified as available. GMP contends that the funds were available and could have been certified. "Unable" is the key contract term. If the FSM were able to certify the availability of funds but, for some reason, did not do so, the contract would continue in force.

For its position, the FSM relies on an April 25, 2007 letter to the Executive Director of Office of Compact Management Epel Ilon from Tom Bussanich, Director of Budget and Grants Management in the U.S. Department of Interior, stating that "Compact grant funds may not be used past May 19, 2007 as a source of funding for any additional task orders under the existing contract between the FSM National Government and GMP and Associates, Inc." and on the June 6, 2007 letter from TC&I Secretary Yatilman to GMP informing it that, under Contract paragraph 5 and effective June 19, 2007, the PMU portion of the Contract was terminated because the U.S. Department of the Interior decided that no additional funds could be used for the GMP contract.

GMP asserts that there then existed a bit less than $2 million in already issued grant funds which could have been certified. For its position, GMP relies on the deposition testimony of two FSM witnesses, head of Office of Compact Management Epel Ilon and former TC&I Secretary Akillino Susaia, who stated that Tom Bussanich did not have the authority to cut off access to the funds; that there are specific procedures, including an opportunity to cure, that had to be followed before the funds could be cut off; and that those procedures were not used. GMP also asserts that the April Bussanich letter and a later June letter did not (and could not) cut off existing funds (the remaining $2 million that had already been issued), but were only cutting off funds for new future activities, not those issued for an already existing purpose.

Neither side has provided the court with the regulations or other legal authority illustrating the mechanism by which and the circumstances under which the U.S. Department of the Interior can cut off previously authorized Compact funds. The parties dispute whether the Bussanich letter was legally effective to cut off existing funds so that the FSM would be unable to certify those funds availability. The court is thus unable to conclude, based on the undisputed facts, that, as a matter of law, that there were no funds available to be certified or that the FSM funds were available to be certified but that the FSM did not do so. Consequently, neither side can be granted summary judgment on this issue.

b. *Definiteness of Terms*

The FSM's argument that there was no contract beyond the first two years because no prices had been set for the last three years or that there was no consideration for the last three years is without merit. The Contract contains terms that set forth the payments to which GMP was entitled, which were based on various percentages of project construction costs. Although these terms were specifically applied to the $725,000 not yet appropriated by Congress (as of the Contract's execution date) but to be disbursed from the original $975,000 two-year commitment, there is no indication that these same percentages were not intended for use throughout the Contract's remaining three years. The overall grant award from the U.S. had a set figure. That and the previously agreed percentages for completed work should be sufficient for a court to determine a contract price for any work done during the Contract's last three years. Furthermore, if the parties thought that the payment terms for the last three years of the contract were uncertain, the Contract could "be amended at any time . . . with or without additional consideration," Contract ¶ 6, to alter or add any new or revised payment terms. The parties did just that when they executed the Second Amendment to the Contract settling and fixing the amounts due GMP on GMP's work before February 9, 2007.

The FSM also asserts that it cannot certify the availability of funds when the contract price cannot be determined. This argument seems disingenuous. The FSM could, under the usual

circumstances, always execute a contract at a price less than the amount of funds available (thus saving the FSM part of the appropriated funds). Contracts are often negotiated and executed after funds have become available.

3. *January 2008 Termination*

GMP seeks summary judgment that the FSM's January 2008 termination of the rest of the Contract was also a breach. In January 2008, the FSM terminated GMP for cause[21] and listed seven grounds as giving it cause. GMP contends that each of those grounds was a pretext; that none of the grounds given were material breaches of the Contract by GMP; and that the real reason the FSM terminated the Contract was because it wanted to establish the PMU in-house. The FSM replies that it had already established an in-house PMU six months earlier (after the June 2007 termination) so GMP's argument must fail.

This order grants GMP summary judgment on some of the grounds that the FSM cited as cause for the January 2008 termination but denies it for the rest of the grounds, and sets the matter for trial. Since genuine, material factual issues remain concerning the other grounds for GMP's termination, summary judgment on this counterclaim must be denied.

B. *Declaratory Relief*

GMP seeks a declaratory judgment: 1) that the four FSM states are third-party beneficiaries to the Contract, that GMP was obligated to coordinate all public projects financed through the Compact, and that the FSM failed to perform its duty to coordinate, and 2) that FSM Public Law No. 14-48, which was enacted after the parties entered into their contract, does not apply to the contract.

The test whether the court can render a declaratory judgment is whether there is a case or dispute within the meaning of article XI, section 6(b) of the Constitution. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997). But additionally, "the granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest." 10B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2759, at 540 (3d ed. 1998);[22] *cf.* Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 306 (Chk. 1998) (declaratory relief inappropriate when plaintiff has already procured permanent injunctive relief based on the nonexistence of any genuine issue of material fact; declaratory relief would be redundant).

1. *Third-Party Beneficiaries*

GMP asks the court for a declaratory judgment that the four FSM states are third party beneficiaries to the Contract. It asserts that, under the Contract, it had an express obligation to provide services to the four state governments as well as the national government. The FSM asserts that GMP

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[21] The Contract provided that the FSM could terminate the Contract with GMP for cause, Contract ¶ 10.A, for the FSM's convenience, *id.* ¶ 10.B, for GMP's default, *id.* ¶ 10.C, and for GMP offering or giving government employees gratuities, *id.* ¶ 19.

[22] Although the court must first look to FSM sources of law, rather than foreign authorities, when an FSM court has not previously construed an aspect of an FSM civil procedure rule which is identical or similar to a U.S. rule, it may consult U.S. sources for guidance in interpreting the rule. *See, e.g.*, George v. Albert, 17 FSM Intrm. 25, 31 n.1 (App. 2010). Declaratory judgments are governed by FSM Civil Procedure Rule 57, which is similar to U.S. Federal Rule of Civil Procedure 57.

cannot even raise this issue since, as a general rule, parties have no standing to assert the rights of third parties or non-parties and none of the four states are a party to this action. GMP replies that because the FSM disputes whether GMP should have had certain contacts with the state governments, it is merely asserting its own rights.

The usual reason for determining whether a non-contracting party is an intended third-party beneficiary[23] to a contract is when the beneficiary is seeking to enforce some favorable contract provision or to collect damages for the contract's breach. None of the four states is a party to this action. No beneficiary state is trying to enforce a Contract provision. It therefore seems unnecessary to rule on whether the four states are intended third-party beneficiaries; that is, to determine whether one or more of the states could claim some right under the contract or could enforce certain contract provisions. To the extent that GMP is seeking a declaration that the Contract obligated it to work with the four states, the Contract speaks for itself.

Under the Contract, it is GMP'S duty: "[t]o assist the five FSM governments in securing funds . . ." Contract ¶ 1(A)(1); "[t]o assist the National Government and the four states on the Plan for the implementation of the Infrastructure Maintenance Funds," *id.* ¶ 1(A)(3); "[t]o assist the five FSM governments in contract negotiations . . ." *id.* ¶1(A)(6); "[t]o review the status in each of the four FSM states of basic database development for planning and monitoring purposes of terrestrial and marine mapping . . ." *id.* ¶1(A)(7); "[t]o ensure that conditions precedent to commencement of implementation of any segment of the Infrastructure Development Plan in any state, and of individual projects, are fully met . . ." *id.* ¶1(A)(10); "[t]o identify for the five FSM governments for within a 5-year period . . . how the Infrastructure Development Plan should be amended . . ." *id.* ¶ 1(A)(13); and "[t]o respond to other requests by any of the five FSM governments to assist in any facet of Infrastructure Development Plan implementation," *id.* ¶ 1(A)(18). GMP, in performing its duties, was thus obligated to have extensive contacts with the state governments.

Accordingly, since none of the four states, the entities that would normally assert third-party beneficiary status, are parties to this action; since the Contract itself is plain and unambiguous, Vandiver v. Transcontinental Gas Pipe Line Corp., 222 F. Supp. 731, 733 (M.D. Ga. 1963) (no need of declaratory judgment if contract so plain and unambiguous of any logical construction except its unmistakable mandate); and since all of the issues in the declaratory judgment request are also before the court in the parties' direct actions, In re Orion Pictures Corp., 4 F.3d 1095, 1100 (2d Cir. 1993) (court may exercise its discretion to dismiss declaratory judgment action when those issues are also raised in a direct action and decided therein), the court sees no need for a declaratory judgment on whether the four states are third-party beneficiaries of the parties' Contract. And whether the FSM failed to perform a duty to coordinate is a factual (or a mixed factual and legal) question inappropriate for resolution at this stage.

The FSM's written opposition also opposes a declaratory judgment because the FSM believes that GMP intends to use it as a basis to claim an attorneys' fees award under the private attorney general doctrine. The court notes that it has already ruled that GMP, even if it prevails, will not be entitled to a private attorney general fee and cost award since it is a private party suing for purely civil claims involving money damages which will only vindicate the rights of just one plaintiff, itself. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 601, 606 (Pon. 2009) (applying rule in M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM Intrm. 49, 64-65 (App. 2008)).

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[23] A third-party beneficiary can enforce a contract if it is an intended beneficiary of the contract, but it cannot if it is only an incidental beneficiary. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 75 (Pon. 2001).

2. *Public Law No. 14-48*

GMP seeks a declaratory judgment that FSM Public Law No. 14-48 does not apply to its Contract with the FSM because that Contract was executed in May 2005 and the public law was enacted in January 2006. The FSM contends that the court should not rule on this point because there is no indication that the court would need to interpret Public Law No. 14-48 since there is no allegation pointing to any dispute at issue before the public law's effective date. GMP responds that since the FSM continues to rely on an April 2007 Tom Bussanich letter which relies on Public Law No. 14-48 for its recommended or purported action, there is an actual active dispute.

The question of whether a statute acts retrospectively or only prospectively is one of legislative intent. Herman v. Municipality of Patta, 12 FSM Intrm. 130, 136 (Chk. 2003). Courts observe a strict rule of construction against a statute's retrospective operation, and indulge in the presumption that a legislature intends the statutes it enacts, or amendments thereto, to operate prospectively only, and not retroactively. Esa v. Elimo, 15 FSM Intrm. 198, 204 (Chk. 2007). A contrary determination can be made only when the legislature's intention to make a statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown. *Id.* at 204-05. It generally violates the constitutional right to due process to apply a law retroactively that would divest someone of a vested right or property interest. *Id.* at 205.

Public Law No. 14-48 provides that the national government has "jurisdiction, in coordination with the respective state, over activities relating to any public contract that is or may be awarded for a civil works project to implement any part of the Infrastructure Development Plan and that is supported by funds provided through Section 211 of the Amended Compact of Free Association . . . ." *Id.* § 1(1) (to be codified at 55 F.S.M.C. 419(1)). This statutory language seems to speak only in prospective terms. It certainly does not expressly state or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously show legislative intent to make the statute retroactive or for it to be applied retrospectively to public contracts that the national government had previously awarded.

Accordingly, GMP is entitled to summary judgment and a declaration that Public Law No. 14-48 does not apply to the parties' May 2005 contract.

C. *Injunctive Relief*

GMP seeks to preliminarily and permanently enjoin the FSM from continuing its efforts to award to other contractors work previously awarded to GMP and to have those contractors perform the work. GMP contends that it will be irreparably harmed if it is not granted injunctive relief because, if it prevails, the Compact funds will no longer be available to compensate it and it would be too difficult to obtain money compensation from the FSM if the Compact funds were no longer available.

The underlying basis of GMP's counterclaims is its assertion that the FSM breached their Contract and GMP was damaged thereby. The usual remedy for a contract breach is money damages – the benefit the party would have expected to receive had the contract been performed. In a contract such as this, those expectancy damages would be GMP's lost profits. An injured party may be compensated for the injuries flowing from a contract breach either by awarding compensation for lost profits (expectancy damages), or by awarding compensation for the expenditures made in reliance on the contract (reliance damages). Kihara Real Estate, Inc. v. Estate of Nanpei (III), 6 FSM Intrm. 502, 505 (Pon. 1994). That is, if an injured party cannot be compensated for the value it had expected to receive from a breached contract, it might then be compensated for its reliance expenditures and placed in as good a position as it would have been if it had not entered into the contract. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 623 (App. 1996). Either way, money damages would be the relief

ordered to make the plaintiff whole.

In exercising its broad discretion in considering whether to grant a preliminary injunction, the court will consider four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 152, 159 (Chk. 2010). The threat of irreparable harm before the litigation's conclusion is a prerequisite to preliminary injunctive relief. Nelson v. FSM Nat'l Election Dir., 16 FSM Intrm. 356, 358 (Chk. 2009); Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 332, 334 (App. 1992). When money damages or other relief will fully compensate for the threatened interim action, a preliminary injunction should be denied. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 276 (Pon. 1986).

GMP asserts that if the Compact funds are expended instead of enjoined, the harm will be irreparable because there will no longer be a source of funds from which to pay GMP any damages it is awarded. The court, however, is unaware of any judgment against the FSM that has ever gone unpaid. The FSM has other revenue sources, income and import taxes and fees derived from the use of the FSM EEZ. The court therefore cannot find any irreparable harm. Since either expectancy damages (lost profits) or reliance damages should make GMP whole on its counterclaims against the FSM, GMP, as a matter of law, is not entitled to injunctive relief. Accordingly, GMP's motion for summary judgment on its injunctive relief counterclaim is denied and summary judgment on that counterclaim will be entered in the FSM's favor.

IV. Conclusion

Accordingly, GMP is granted summary judgment:

1) on the FSM's breach of contract cause of action a) based on the FSM's allegation that GMP subcontracted with Tony Manzano, John M. Okita, an unknown survey company from Guam, an unknown U.S. engineering firm, and Geo Engineering and Testing on Guam; b) based on GMP's alleged offer or payment of a gratuity to FSM national and state government officials; c) based on the fact that GMP did not perform pre-design soil testing at the Utwe and Lelu school sites because the FSM waived that Contract requirement; d) based on the allegation that GMP induced state government officers to write letters to GMP authorizing GMP to proceed with work under the Contract; and e) based on GMP's alleged interference with ADB development projects; and

2) on the FSM's professional malpractice cause of action based on a) alleged failure to timely deliver infrastructure plans and reports; b) on alleged submission of designs for Lelu and Utwe Elementary Schools with defects; c) on alleged failure to leave plans and designs in its office after its January 2008 termination; d) on alleged failure to produce or submit shop drawings for the Lelu and Utwe school projects; and

3) on the FSM's fraud and misrepresentation cause of action; and

4) that Public Law No. 14-48 does not apply to the parties' May 2005 contract.

The FSM is granted summary judgment on GMP's injunctive relief counterclaim and that GMP's use of the North American Datum of 1983 Projection for the Weno road survey was a contract breach.

The other claims and counterclaims remain for trial.

V. PRE-TRIAL ORDER

This matter should now be set for trial. Pursuant to the December 22, 2009 stipulated order, trial is to start no sooner than 42 days after the disposition of GMP's partial summary judgment motion. NOW THEREFORE IT IS HEREBY ORDERED that trial will start on Tuesday, September 20, 2011, at 9:30 a.m.;

IT IS FURTHER ORDERED that no later than August 31, 2011, the parties shall confer and discuss settlement possibilities and shall file and serve:

1) a report on the likelihood of settlement and on the efforts made toward settlement, mediation, or arbitration (but omitting the specific details of any offers or counteroffers);

2) a list of the witnesses each expects to call with a short concise statement of what the witness is expected to testify to;

3) a trial brief containing:

a) a statement of the parties' causes of action and claims remaining to be tried,

b) a statement of facts not in dispute,

c) a statement of facts in dispute, and

d) a statement of the law and the expected evidence that will support the party's position; and

4) any joint stipulation of undisputed facts;

AND IT IS FURTHER ORDERED that parties' counsel shall, no later than September 15, 2011, meet at the FSM Supreme Court's clerk's office:

1) to identify and mark all the exhibits that each party expects to introduce,

2) to stipulate, to the extent practicable, to exhibits' authenticity, and also

3) to stipulate, if possible, to the admission of those exhibits whose admissibility neither party questions.

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