CASE STUDIES IN CONSTRUCTION DISPUTES

By

FRANKLIN J. HILD

A THESIS PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF SCIENCE IN BUILDING CONSTRUCTION

UNIVERSITY OF FLORIDA

2007

To my mother, many times over, and to

taking the leap, the power of belief, and coming full circle

ACKNOWLEDGMENTS

I thank Faith Keating, J.D., for teaching me to keep looking for the cheese and not focusing on the wall when the path chosen in the maze hits a dead end. I thank Thomas F. Egan, J.D., Ph.D., for my enjoyment of the law generally and litigation specifically, and for making me a believer that the more improbable something seems the more likely it is to happen. I thank Art Witters for his extreme thoroughness and professionalism. His work let me get ahead of the learning curve before starting to practice once more. I would also like to thank my supervisory committee. I thank Dr. R. Raymond Issa for his respect and the fifteen banker boxes that put me here. I thank Dr. E. Douglas Lucas for his stories of stepping into the ring. And, I thank Dr. Svetlana Olbina for her genuine interest. As to the Rinker faculty, I thank Dr. Charles Kibert for teaching what he does. I thank Dr. Richard Smailes for teaching how he does. I thank Dr. Paul Oppenheim for both. And I thank Dr. Ajay Shanker for his humor and affirming that every construction project has a lawyer involved to some degree.

TABLE OF CONTENTS

LIST OF TABLES

Abstract of Thesis Presented to the Graduate School
of the University of Florida in Partial Fulfillment of the
Requirements for the Degree of Master of Science in Building Construction

CONSTRUCTION LAW CASE STUDIES

By

Franklin J. Hild

December 2007

Chair: Raymond Issa
Cochair: E. Douglas Lucas
Major: Building Construction

There is little room for error on any project in the building construction industry today. More so than ever, time is truly money. The construction contract defines a date by which the project shall be substantially complete and otherwise ready for the intended use. The final product is expected to be safe, free from defects or any impediment to use. The successful completion of a construction project within the given time frame and within the expected budget requires exceptional effort on the part of the owner, the design entity, the general contractor and any and all subcontractors. The margin for error is slim and the money involved is substantial. As such all of the parties' relationship to each other is defined by the most formal of legal relationships, the contract. Despite the best expectations expressed in the contractual relationship of the parties things not only go wrong on a construction project, things can go terribly wrong on a construction project. The modern construction lawyer is, therefore, involved at all aspects of the project, from contract negotiations to the claims that occur when one or more of the many parties involved in the construction relationship are dissatisfied or suffer damage. My research, referencing actual construction claims, presents case studies of construction litigation. The object is to offer a study of how and why a construction projects can devolve into claims and litigation, and thus avoid the same.

CHAPTER 1
INTRODUCTION

A construction project has a significant and unique reliance on the law. The average construction project involves numerous independent entities combining specific expertise and knowledge towards the completion of singular goal. Added to the challenge of focusing the energy of numerous entities towards completion of one goal is the reality that in any project time and money are finite. In fact time and money are defined by contract and those constraints are felt by each entity on the project. As the constraints of the project are defined by the legal contract, the remedies for failure to perform within those constraints are also defined by the legal contract or by the law of the jurisdiction where the project exists.

The construction lawyer has changed from being a general practice commercial lawyer to being a specialized practitioner. The Florida Bar, in last several years, added construction law as a board certified specialization area. The unique demands of the construction industry and the breadth and scope of claims related to the construction projects requires the construction lawyer to focus and perfect a practice on this area of the law. As such the modern construction lawyer is as likely to have Primavera scheduling software on the office computer as is the construction manager. The modern construction lawyer no longer relies on the expert to explain the project, but focuses the expert on the areas of the project that demand attention.

To err is human. Unfortunately in the construction industry any error may have consequences that negatively impact the time and money of a project. Additionally defects to the construction of the project may appear immediately or manifest after time. Defects may only appear upon the personal injury to an individual. Claims on a project may be substantial, relative to the project. For instance a mold damage claim on a million dollar home may easily total several hundred thousand dollars. Similarly, claims on a several hundred million dollar

commercial project may easily total $50,000,000. With the threat of such significant liability the entities involved in project delivery are legally astute.

The object of this thesis is to use actual claims and litigation to illustrate how and why projects became prone to error and subject to claims and litigation. The following studies contain examples of viable claims that involve all parties in the construction process. The entity causing a delay may be the owner or designer, just as well is it may be the general contractor. Included are claims to: 1) recover for general condition costs expended, but not contemplated in the contract; 2) remedy a wine cellar that produces interior condensation which sponges into the wine racks; 3) claims where both parties have engaged in patterns of practice that entirely destroyed a project schedule; 4) claims that turn on whether the architect or engineer are liable for design errors and omissions or professional malpractice.

The claims are presented in such a way as to provide a brief overview of the entire case, followed by a description of the parties and the project. The facts in common, i.e. the facts that might be stipulated to, are then presented. The nature of the dispute is the presented, describing the monetary nature and position of the claims. Finally separate sections are provided to outline the allegations by each party.

As in all things that surround a legal case, there is not a singular correct answer. Legal cases are resolved based on factual analysis and how do the facts of the case fit into the legal framework of the jurisdiction. References to statutes and case law are provided herein whenever applicable. The case studies are written seeking to advocate the best issues and arguments for each party. In some case studies the parties focus on separate issues and allegations, forcing the reader to determine if offsets on awards are applicable. In other case studies the parties are in dispute over singular delays, usually the failure to meet substantial completion and each party

has arguments that allege the other party is the cause in fact of the delay. Technical notice requirements also play an important aspect of the claims process and these are presented.

The case studies are summaries of actual claims and litigation, extrapolated from review of expert witness files and court files. As in all things law the reader is encouraged to discern the positive and negative arguments of both parties. The Literature Review is provided as a means of presenting a preliminary understanding of some of the most relevant case law. While the liability portion of the Literature Review is very on point and can be applied to the case studies that follow, the portion of the Literature Review that concerns lien law is also important. The lien law portion of the Literature Review discusses technical notice requirements that are of the type required in claims notification.

Furthermore the lien law portion of the Literature Review discusses surety coverage and remedies. Every entity involved with the construction project is expected to secure performance and/or payment bonds. The project is bonded at every turn. The case studies present real situations where one party will claim on the bond as the initial remedy. This is not insurance and the surety will seek indemnification from the bond holder. The bond holder then has a significant motivation to file a claim against the party that claimed on the bond. Because the surety will seek indemnification, the bond holder has a greater interest to become involved in the claims process than in litigation that involves an insurance carrier. These case studies present several situations where a party, perhaps a liable party, claimed on a payment or performance bond and were subsequently claimed on by the holder of the bond.

These case studies will offer the basis for understanding and discussion on the procedural, substantive and legal principles of construction law.

CHAPTER 2
METHODOLOGY

An extensive literature review forms the basis for this research analysis. A thorough review of case law was initially completed regarding all aspects of liability of the parties, liens and bonds. Using the foundation and context of the literature review, actual case studies were analyzed. The case studies were primarily reports from noted expert witnesses, with the majority of documents from the files reviewed being donated to the University of Florida by Art Witters. Most of the case studies used were based on voluminous expert reports, some having billed work of approximately nine hundred hours to generate. Additionally, settlements of claims take years and a trial of claims takes even longer. Thus the information reviewed was presented at a point in time of the claims process. To supplement the information in the voluminous expert reports, public information research was conducted in applicable court files. Some of these case studies were settled either informally or formally. In either event the primary documents that surround these cases are not in the public domain, and any such settlement remains confidential. Specific care was taken to not include any information or attach any exhibit that violates the potential confidentiality of any party. When matters proceed to circuit civil court, then a public records exists and is accessible via the clerk of courts office for a copying fee. Some of these case studies include the actual Complaints and related pleadings filed in the matter. This offers insight into the evolution of the claim from allegation to formalized pleading in a lawsuit.

My research includes a dispute over a courthouse complex construction. The issues include design negligence, design errors and omissions and contractor negligence. I analyze the construction of an airport terminal with issues that include delay damages for extended general condition cost, and the construction of a strip mall with the primary issues being active interference by the owner and delays caused by the general contractor in a cause and effect fact

pattern. The analysis includes the construction of a hospital and involves claims of design errors and omissions versus contractor negligence. Additional study concerns construction of wine cellar in a private residence and involves the applicability of Florida Statute Chapter 558 as concerns defective construction. Significant focus is directed in the construction of rocket launch facility and concerns issuance or withholding of substantial completion and delays involved with cutting edge technology. Finally analysis includes a subcontractor's ability to sue design professionals for professional malpractice in the absence of privity.

Table 1-1. Summary of Cases Studied by Dispute Subject Matter

	GC Breach	Owner Active Interference	Design Errors Omissions	Extended General Condition Costs	Construction Defects	Non Privity Claims	Owner Breach
Chapter 4	x		x	x			
Chapter 5	x			x	x		
Chapter 6	x	x					x
Chapter 7	x		x				x
Chapter 8					x		
Chapter 9	x			x			x
Chapter 10						x	

CHAPTER 3
LITERATURE REVIEW

Liability Issues of Owner, General Contractor and Architect/Engineer

Professional Negligence Liability Absent Privity of Contract

It is well settled that a contract binds and benefits only the parties themselves. Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971). The clear cut exception is if the contract at issue is entered into for the direct and substantial benefit of a third party. City of Tampa v. Thornton-Tomasetti, P.C., 646 So.2d 279, 282 (Fla. 2nd DCA 1994). The law of Florida further recognizes that professionals can be liable to non-privity parties if those professionals exhibit negligence which may foreseeably injure or cause economic loss to a third party. Id. @ 281. It is with this latter exception to privity that Florida contractors are most interested.

Liability for professional negligence accrues to some, not all, third parties. Third parties that may have a claim against the alleged negligent conduct of a contract party are usually limited to direct third party beneficiaries, as opposed to indirect third party beneficiaries. Id. @ 282. It is not enough that professional services rendered ultimately accrue to an entity for that entity to have a claim against the parties in contract. Publix v. Cheesbro Roofing, Inc., 502 So.2d 484, 488 (Fla. 5th DCA 1987).

There are several Florida cases that are counter to the "common law rule that privity of contract must exist in order for negligent performance of a contractual duty to give rise to liability for damage to an intangible economic interest". Biakanja v. Irving, 49 Cal.2d 647 (Cal. 1958). The primary construction industry case in Florida circumventing privity is A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973).

In Moyer a Contractor filed suit against the Architect for damages suffered by the Contractor as caused by the Architects professional negligence in performing the duties within the Architect's scope of service. The Florida Supreme Court in Moyer, held that the Contractor was entitled to recover costs incurred as proximately caused by Architect negligence. Id. @ 401-402. The Moyer Court further held that a Contractor might be a third party beneficiary to the contract between the Architect and Owner, depending on the supervisory role defined for the Architect in the Owner / Architect contract. Id. @ 402. Although no such contract was placed in evidence the record in Moyer was clear that the Architect had the power to stop work. Id. at 400-402. The power to stop work, therefore, establishes supervisory conduct.

The holding of Moyer is further defined by the 5th DCA in the case of Southland Construction, Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994). In Southland, a Contractor filed suit against an Engineering corporate entity and the designing Engineer for damages stemming from alleged negligent design of a retaining wall. The 5th DCA reasoned that the economic loss rule only applies to parties in privity and should not be a limitation or diminution to established theories of tort liability:

> The professional malpractice of persons not in direct privity with a person injured by the professional's services is the gist of numerous lawsuits in this state as well as elsewhere. Allowing tort recovery in this context is therefore not an extension of established tort liability. Rather, to deny tort liability on the basis of the "economic loss" doctrine would reduce already-established tort liability. Id. at 8.

The 5th DCA was the court that certified Moyer, 285 So.2d 397, to the Florida Supreme Court. The 5th DCA in Southland, explains the Moyer decision as the Contractor having no contractual claim for Architect negligence, unless specifically defined in the Owner / Architect contract. Id. at 8. Furthermore this absence of a 3rd party beneficiary contract claim by the Contractor against Architect, assured that the Contractor's remedy was in tort. Id, at 8.

The 5th DCA in Southland, held that the Engineer, not in privity with the Contractor, could be held liable in tort for damages arising from the alleged negligent design of a retaining wall. Southland, at 9. In Southland, therefore, the Contractor has a privity contract claim against the Engineer corporation and a tort claim against the Engineer, with whom it is not in privity.

Due to the legal posture of Southland, i.e. the surviving contract claim against the Engineer Corporation, the 5th DCA did not address the validity of the lower court dismissing the tort claim against the Engineer Corporation. However, the 5th DCA in Southland does state that damages from the negligent design of the retaining wall extended to "other property" by fact of damage to an abutting pool deck and another wall. Id. At 9. As such Southland, offers a clear direction for avoidance of the economic loss doctrine and pursuit in tort.

In City of Tampa v. Thonton-Tomasetti, 646 So.2d 279 (Fla. 2nd DCA 1994) the General Contractor filed claims for delay damages of $20M against the City due to being provided with faulty plans and specs. Approximately $9.5M of the claim was paid. In turn the City filed suit against the Architect and the Consultants retained by the Architect for provision of the faulty plans and specs. The Second DCA upheld dismissal of the tort and contract claims against the Consultants. The Second DCA upheld dismissal of the City's tort claims against the Consultants, based on City failing to show any damage other than purely economic. Id. @ 281.

The City's contract claims against the Consultants were based on the City being a third party beneficiary to the contract between the Architects and Consultants. Id. @ 282. The second DCA distinguished the facts in this matter from those in A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973) and Southland Const. Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994). The Second DCA in City of Tampa, 646 So.2d 283, held that the City was only an *indirect*, not a direct third party beneficiary of the contract between the Architect and the Consultant. In so

holding the Second DCA essentially found that the Consultants were but an agent for the design team entity ultimately liable for the design and specifications, i.e. the Architect.

E.C. Goldman, Inc, v. A.R.C. Associates, Inc, 543 So.2d 1268, 1271 (Fla. 5th DCA 1989) is a predicate to City of Tampa, Supra., and holds that a subcontractor roofer has no privity and no cause of action against consultant engineer. This is despite the fact that the consultant engineer was the second such consultant retained after first consultant agreed with Architect and Roof Sub that roof was built to specification and Owner should issue payment. Id. at 1268-1269. An independent consultant, therefore, does not assume liability in rendering an opinion.

Similar to E.C. Goldman and the companion case of City of Tampa, is McElvy, et.al. v. Arlington Electric, Inc., 582 So.2d 47 (Fla. 2nd DCA 1991), in which the Electrical Subcontractor sued the Architect for negligently rendering advice to City that caused Subcontractor economic distress due to City's prolonged refusal to substitute lighting manufacturer. Electrical Subcontractor did not sue Architect for faulty plans and specifications. Second District held, like E.C. Goldman, Supra., that Architects were not contracted with City to make material substitution decisions and as consultants the advice given by Architects to City towards material substitution requests was not binding upon City. McElvy, 582 So.2d 50. City issued denial of substitution letters so cause of action against City. Id. at 50.

In the more recent case of Moransais v. Heathman, 744 So.2d 973 (Fla. 1999), the Florida Supreme Court clearly defines the liability a professional may incur. Moransais also limits the scope of the economic loss rule in the State of Florida, which discussion will be addressed in that titled subsection of this paper. The Moransais facts involve buyer Moransais purchasing a home from seller Heathman. Buyer contracted with an Engineer Corporation for inspection of the house, pre-sale, and relied upon that inspection for purchase of the home. After buyer purchased

the home, defects were discovered that "should have been, but were not discovered in the engineering inspection". Id. at 974-975.

Buyer filed suit against the seller, the Engineering Corporation and individual engineers who performed services. The trial court reluctantly dismissed the tort actions against the individual engineers. The Second District upheld the dismissal based on Second District precedent while noting conflict with the Fifth District case of Southland Const. Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994). The Second District reasoned:

> that Moransais had no cause of action against the individual engineers… and permitting such a cause of action with whom Moransais has no traditional professional/client relationship runs afoul of the economic loss rule by allowing Moransais to pursue in tort what amounts to a breach of contract claim and, thereby, expand his remedy for breach of contract beyond that which he agreed to. Moransais, 744 So.2d 975.

The Second District recognizing the conflict with the Moyer, 285 So.2d 397, and its progeny Southland, certified the professional liability and economic loss rule issues to the Florida Supreme Court.

Citing statutory provisions for professional regulation, Fla. Stat. §471.023 (1999) regarding engineers, and Fla. Stat. §621.07 (1999) regarding professional associations, the Florida Supreme Court held that formation of a professional association "shall not relieve the individual members of their personal professional liability". Moransais, 744 So.2d at 978. Just as a lawyer in a firm and a physician in a practice group can be held individually liable for the malpractice suffered by a client contracting with the corporation, so too can the engineering professional be held liable. Id. at 979. The Court notes that this fixing of liability on the individual actor professional is simply the legislative extension of the common law duty placed upon the professions.

While the Contractor may not be considered a professional per statute, the Contractor faces the implied and express warranty issues inherent in providing the product to the consumer.

It is the design professional who must take Moransais to heart. The smart Contractor should interplead the Architect into any claim, especially when the Architect assumes an active, obstructionist or obstreperous role in the completion of the project. The liability of the Architect becomes even more evident when Moransais is further analyzed in the discussion of the economic loss rule (ELR) contained herein.

Owner, General Contractor and Designer Liability for Personal Injury

As a general principle, an entity who hires an independent contractor is not liable for any personal injury sustained by that independent contractor, or that independent contractor's employees, within the course and scope of the work. Van Ness v. Independent Construction Co., 392 So.2d 1017, 1019 (Fla. 5th DCA 1981). For liability to attach to the hiring entity, the hiring entity has to exercise active participation and control in the work of the independent contractor. Cecile Resort, Ltd. v. Hokanson, 729 So.2d 446 (Fla. 5th DCA 1999).

Conklin v. Cohen, 287 So.2d 56 (Fla. 1973) makes clear the Owner, Architect and Engineer may all be responsible for personal injuries sustained by a laborer. Florida workers' compensation law prohibits tort recovery by an inured worker against his employer if that employer obtains workers' compensation insurance. §440.10. Similarly, an independent contractor has no cause of action against the hiring entity. Van Ness, Supra.

Conklin, 287 So.2d 59-62, holds that an Owner and Architect are not entitled to any workers' compensation immunity afforded by Chapter 440, Florida Statutes. The Owner and Architect are defined as a third party tortfeasor. Id. at 59-62. The Owner and Architect do not have liability simply because they exist. The plaintiff has a distinct burden to prove liability for both Owner and Architect. Id. at 61.

Owner

As to the Owner a plaintiff must demonstrate that the Owner was "actively participating in the construction to the extent that the Owner directly influences the manner in which the work is performed". Conklin v. Cohen, 287 So.2d at 60. If the Owner is a passive non-participant then no liability may be ascribed to Owner for injuries sustained by a laborer. Id. at 60. In the matter of Cecile Resort v. Hokanson, 729 So.2d 446 (Fla. 5th DCA 1999), the Owner was entitled as a matter of law to a directed verdict as the plaintiff failed to show any "specific or identifiable acts of negligence" on the part of the Owner. Cecile Resort, 729 So.2d at 448.

Armentos v. Baptist Hospital of Miami, Inc., 714 So.2d 518 (Fla. 3rd DCA 1998) reinforces the high threshold an injured worker must meet to affix liability for the injury on the Owner. Limited acts by an Owner will not constitute the control element necessary to for a finding of liability. Id. at 521. Specifically the plaintiff Armentos made now showing that Baptist Hospital had "control of the methods of work and operative details". Id. at 523. See also:

St. Lucie Harvesting v. Cervantes, 639 So.2d 37 (Fla. 4th DCA 1994), directed verdict for defendant grove owner who told independent contractor at which citrus grove to pick fruit and did not direct worker to drive independent contractor's vehicle, with full load, to that site, where full load caused vehicle to flip on public highway and injure worker;

Eiler v. Camp, Dresser & McKee, 583 So.2d 1086, 1087 (Fla. 5th DCA 1991), County (Owner) not liable for workers' electrocution as record does not suggest active Owner participation in directing work for project;

Garcia v. Biltmore Court Villas, Inc., 534 So.2d 1173, 1176 (Fla. 3rd DCA 1989), No Owner liability for worker injury when no evidence Owner actively participated at site or exercised control over method and manner of work or over method and manner of safety

practices of independent contractors. No showing Owner aware of dangerous condition and neglected remediation.

Juno Industries, Inc. v. Heery Int'l., 646 So.2d 818, 823 (Fla. 5th DCA 1994) offers a succinct expression of Owner liability concerns regarding physical injuries on a job:

> Just because an owner has the right to inspect work for conformance with the contract does not change the owner from a passive nonparticipant to an active participant in the construction with the right to supervise or control the work, nor does it destroy the independent status of the contractor and render the owner liable for the contractor's negligence in performing the work by creating a dangerous condition.

In Ramos v. Univision Holdings, Inc., 655 So.2d 89 (Fla. 1995), the Florida Supreme Court defined the separate identity of an Owner from a Contractor via a workers' compensation claim issue. "Only where the owner assumes the role of contractor and employer and, consequently, the duty to provide workers' compensation benefits is the owner entitled to workers' compensation immunity". Id. at 90. This is distinguished from a case such as Croon v. Quayside Assoc., Ltd., 464 So.2d 178 (Fla. 1985), in which an owner discharged the GC during construction and assumed all duties and contractual obligations of the GC. Such an owner is entitled to workers' compensation immunity because such an owner now has the liability of the statutory employer. Ramos, 655 So.2d at 90.

Of specific importance is the case of Martin v. Venice Hospital, 603 So.2d 1377 (Fla. 2nd DCA 1992), which remained undisturbed by Ramos, Supra. Martin dealt with a wrongful death suit when an MEP worker was electrocuted by an uninsulated 7,620-volt power line. Martin, 603 So.2d at 1378. The project was being coordinated by a team composed of Owner reps, Architect reps and the construction manager. Id. at 1378. Evidence showed that the power line was exclusively in control of the Owner and FPL. Evidence further showed that the Owner was not the contractor and was not, therefore, the statutory employer. Id. at 1379.

The Second District held that material facts exist to allow a jury determination if the Owner was involved in scheduling the work that led to the electrocution or if the Owner allowed the utility lines to remain despite ongoing work. Id. at 1379. What Martin establishes is that an Owner may exercise enough control and direction to be ascribed liability, but that control and direction will not meet the requirements of being a statutory employer afforded workers' compensation immunity. This is an important middle ground for the Owner and Contractor to be aware. The lesson to the Contractor is to allow the meddling Owner to act as they will at their own peril.

Architect

The Architect faces varying exposure to liability for personal injuries. It is important to keep in mind that the facts which create greater personal injury liability for the Architect, create greater general liability for the architect. If the Architect merely acts as the Owner's agent and engages in passive nonparticipation inspections, then the Architect suffers no greater exposure to personal injury exposure than the Owner. The Architect, however, may incur greater liability generally if the Owner and Architect contract vests the Architect with independent contractor status to partake in hands on management and supervision of the construction.

Geer v. Bennett, 237 So.2d 311, 316-318 (Fla. 4th DCA 1970), holds that an Architect becomes liable upon assuming supervisory duties and obligations above and beyond mere production of plans. Specifically if the Architect contracts with the Owner and is specifically compensated by the Owner to undertake a wholly or contributory supervising role in the construction, then the Architect may be liable for personal injuries that occur on the site. Id. at 317.

Material issues of fact are created if the Architect becomes a supervising entity of the construction project. Id. at 317-318. Thus an Architect who becomes employed to supervise

construction is not entitled as a matter of law to prevail upon a motion to dismiss or summary judgments. Conklin, 287 So.2d 61. Credible and tangible disputed issues of material fact allow the plaintiff to get to the jury for finding of the scope of the supervisory role and, thus, liability of the Architect.

The Architect's supervisory role is often a matter of fact for jury decision. Schauer v. Blair Contruction Co., 374 So.2d 1160 (Fla. 4th DCA 1979). If the Owner relies upon the Architect for supervisory functions, the Architect may well be deemed either wholly or partly liable for an occurrence of negligence. Id. at 1162. An architect or engineer is always liable not only to those in privity, but to any third person who may foreseeably be injured as the result of professional negligence. Luciani v. High, 372 So.2d 530 (Fla. 4th DCA 1979).

An Architect accrues no liability for latent defects due to Contractor using non specified components if Architect was without knowledge of such use. Shepard v. City of Palatka, 399 So.2d 1044 (Fla. 5th DCA 1981). Architects liability in such a case may be dependent upon Owner Architect contract. Id. at 1045. Owner Architect contract that requires periodic inspections, but does not cause Architect to be responsible for safety, means, methods or for acts or omissions of contractor does not create type of supervisory role for Architect to accrue liability. Id. at 1045.

Again the Architect may always face liability for a defect in plans or specifications. LeMay v. U.S.H. Properties, 338 So.2d 1143 (Fla. 2nd DCA 1976). Such defect may simply be steps in a mall that are not differentiated by color, which is the cause of a slip and fall. A third party invitee injured from a non-obvious latent defect has a cause of action against the Architect for negligent design. Id. at 1145. In essence the third party personal injury hidden (latent) defect claim against the Architect is viable if the design documents created the latent defect.

In Moore v. PRC Engineering, Inc., 565 So.2d 817 (Fla. 4th DCA 1990) the Owner Engineer Contract placed all supervisory safety oversight on the Engineer. When personal injury occurred to an employee of Contractor the Engineer became a third party tortfeasor.

Warranty and Construction Defect Liability for Owner, Contractor and Architect

Patent and Latent Defects

The case of Kay v. Slavin, 108 So.2d 462 (Fla. 1959), continues to be good law in defining liability for latent versus patent defects. A latent defect is that which "is hidden from ordinary observation". Id. at 467. No ordinary, prudent inspection by a lay person will necessarily discover the latent defect. As such, "there is no intervening fault to sever the causal relation between the contractor's negligence and the injury" or problem that the defect presents. Id. at 467.

Whether a defect is latent or patent may be a matter for the jury. A defect may exist on a job site. In Hawkins v. Champion Int'l Corp., 662 So.2d 1005 (Fla. 1st DCA 1995), Material fact disputes existed whether the general warning Owner Champion issued Contractor Brown & Root encompassed a gap in the floor into which Plaintiff Subcontractor fell and was injured. If the Champions warning did not include the gap then the gap was a latent defect. If latent and Champion had actual or constructive knowledge of it, then Champion is liable to Plaintiff. Id. at 1008. These are issues for the finder of fact.

The test to determine if a defect is patent is the obviousness of the defective condition of the object, i.e. the nature of the object, not where the object is placed or how the object is oriented. Kala Investments, Inc. v. Sklar, 538 So.2d 909, 913 (Fla. 3rd DCA 1989). Thus in Kala, the latent/patent issue when a toddler fell out a window was not whether the window was obviously so close to the floor as to violate code, but was whether the screening was defective. Id. at 913. No evidence existed as to Owner's special knowledge of pressure loads of screens.

Id. at 913. The Third District held, therefore, that issues of fact existed as to whether the low window was an obvious defect to Owner and if so, should Owner have known if window screen was not code compliant for pressure loads. Id. at 913.

Whether the nature of material used in a job is unknown to the Owner and constitutes a latent defect is usually a question for the jury. U.S. Lodging of Jax, Ltd., v. H.B. Daniel Constr. Co., Inc., 617 So.2d 448 (Fla. 1st DCA 1993). In U.S. Lodging Owner accepted hotel built by Contractor, including pool built by Subcontractor. Guest slipped and fell on tile that spelled "no diving". Was Owner aware of nature of the tile that caused the fall? Based on premises liability the Owner was liable and the issue was the indemnification by Contractor and Subcontractor. Id. at 450. First District held it was a jury question whether Owner had specific knowledge of nature of tile that caused accident. Id. at 450. If no specific knowledge then tile was a latent defect and indemnification was viable. Id. at 450.

A patent defect by comparison does not create vicarious liability or subrogation liability to the Architect, Contractor or Engineer. A patent defect in a structure does not allow for recovery against the Architect, Engineer or Contractor for a personal injury to a third party. Easterday v. Masiello, 518 So.2d 260 (Fla. 1988). If a defect is patent, the Slavin doctrine permits recovery from the Owner of the real property who maintains the improvement. Id. at 261. The Developer and Contractor, of course, may be responsible for patent defects via express and implied warranties under Florida law.

Subrogation and Indemnification for latent Defects

Kala Investments, 538 So.2d 909, holds the Architect, Engineer and Contractor liable for latent defects where no privity and no vicarious liability exist. This is an important case as Kala, holds that a remote purchaser of a dwelling has a subrogation right Architect, Contractors and Engineer for latent defects. Id. at 919. The Kala Court utilizes the theory of equitable

subrogation" to hold the Architect and Defendants liable if the defects are latent. "The policy behind the doctrine is to prevent unjust enrichment by assuring that the person who in equity and good conscience is responsible for the debt is ultimately answerable for its discharge". Id. at 917; citing U.S. Fidelity v. Bennett, 119 So.2d 394 (Fla. 1928).

The more standard liability affixed to latent defects is indemnification liability to the contractor, sub-contractor and architect, by means of vicarious liability to the Owner or Developer. Biscayne Roofing Co. v. Palmetto Fairway Condo. Assoc., 418 So.2d 1109 (Fla. 3rd DCA 1982) involves a latent defect that presented itself as defective material and workmanship in a roof. The roofing contractor was held liable for constructing a defective roof after the project was completed. Latent defects may be expressed as "test of time" issues.

Biscayne Roofing illustrates the important reality of vicarious liability for the Owner/Developer as vicarious liability may attach regardless of direct liability or culpable action. Biscayne Roofing illustrates the indemnification remedy for the Owner/Developer to the negligent subcontractor, but does not relieve the Owner/Developer of liability. Id. at 1110.

Developers and Contractors should be aware that an implied warranty is granted to a condominium association for common areas and for first purchasers of residences or condominiums. A Developers and Contractors may be held liable for damages for breach of implied warranties in failure to construct according to plans. Schmeck v. Sea Oats Condo. Assoc., Inc., 441 So.2d 1092, 1097 (Fla. 5th DCA 1983) citing Drexel Properties, Inc. V. Bay Colony Club, 406 So.2d 515 (Fla. 4th DCA 1981). A Developers' and Contractors' also breach an implied warranty for failure to construct in a workmanlike or acceptable manner. Schmeck, 441 So.2d 1097, citing Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA 1972). Finally, Developers

and Contractors may breach an implied warranty for failure to provide a unit or building which is reasonably habitable. Schmeck, 441 So.2d 1097.

The Florida Supreme Court has declined to extend the implied warranty towards structures on the land that are not the dwelling. Specifically in Conklin v. Hurley, 428 So.2d 654 (Fla. 1983) the Florida Supreme Court refused to extend the implied warranty to a seawall that collapsed a several years after being installed. In so holding the Court in Conklin, 428 So.2d 659, made a point of stating that the purchaser "may still pursue an action in negligence against the builders of the seawall". That negligence action will be based upon a latent defect premise.

The Owner faces liability for a latent defect exclusively in a premises liability scenario as with an invitee or a lessee involvement. The Developer or Developer Contractor owes an implied warranty to the purchaser, which all but obviates the latent defect concern. The independent General Contractor, Architect, Engineer and Sub-Contractor are the entities who face liability for the latent defect when it manifests.

The Contractor should not deviate from plans or specifications without express, and ideally written, consent of the Architect and Engineer. If the Contractor unilaterally deviates the Developer will seek indemnification for any judgment entered against the Developer due to those unilateral changes. If the Developer instructs changes to plans or specifications, the contractor should ask for those changes in writing as means of insulating from potential liability the Developer may accrue for failure to follow plans and thereby breaching the implied warranty. Schmeck v. Sea Oats Condo. Assoc., Inc., 441 So.2d 1092 (Fla. 5th DCA 1983).

The Economic Loss Rule

The Economic Loss Rule in Florida Today

Judge Altenbernd of the Second District Court of Appeals wrote that the "economic loss rule is stated with ease but applied with great difficulty". Sandarac Assn. Inc. v. W.R. Frizzell,

609 So.2d 1349, 1352 (Fla. 2d DCA 1992). The benchmark case for the construction industry is Casa Clara Condominium Association v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993). It is fair to say that Casa Clara is considered the high water mark for the Economic Loss Rule ("ELR") in Florida. It is also fair to say that Casa Clara, was a 4-3 decision that would not have a similar outcome if decided by another Court, arguably even today's Court.

The ELR is significantly limited since Casa Clara. The most recent decision is Indemnity Insurance Co. of No. Amer. v. American Aviation, 891 So.2d 532 (Fla. 2004), which the Court took on certification from the United States 11th Circuit. Justice Pariente clearly writes in Indemnity Insurance, that:

> The Economic Loss Doctrine bars a negligence action to recover solely economic damages only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product and no established exception to the application of the rule applies. Id. at 534

Indemnity Insurance, holds that the ELR applies in two instances: 1) where parties are in privity and a party sues in tort for purely economic loss; or 2) there is a defect in the product that causes damage to that product as a whole, but causes no personal injury or damage to other property. Id.at 536. Economic loss is defined as damages for inadequate value, costs of repair or replacement of defective product, consequential loss of profits or loss of benefit of a bargain. Id. at 536. This products liability loss rule applies even in the absence of privity. Id. at 541.

Plaintiffs in Casa Clara, of course had breach of warranty claims against the Developer/Contractor, who in turn would seek indemnification against concrete supplier Toppino. This approach is neither direct nor serves the purpose of judicial efficiency. Perhaps as a sub-current the Florida Supreme Court has scaled back the ELD bar to corollary causes of action.

Prior to Indemnity Insurance, the Florida Supreme Court in HTP, LTD. v. Lineas Aereas Costariccecenses, S.A., 685 So.2d 1238 (Fla. 1996) stated that torts for purely economic loss are viable, and the ELD is inapplicable, if it is shown that such tort claim is independent of and extraneous to the contract at issue. Id. at 1240. Fraud in the inducement is such an independent tort claim. Id. at 1239. It is essential that the fraudulent inducement or misrepresentations be separable from the parties' agreement. Pressman v. Wolf, 732 So.2d 356, 361 (Fla. 3rd DCA, 1999). Some courts look for a temporal distance between the alleged fraud and the contract formation or look for facts of alleged fraud that are unique and distinct from the alleged breach. J. Square Enter. V. Regner, 734 So.2d 565, 567 (Fla. 5th DCA 1999).

In Moransais v. Heathman, 744 So.2d 973 (Fla. 1999), the Court stated, as discussed under the professional liability section of this paper, that the ELR does not bar actions for professional negligence. Id. at 979. Regarding the ELR specifically, the Court states that its holdings (i.e. Casa Clara) "have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent". Id. at 980.

Other Exceptions to the Economic Loss Rule and Remedies

Moransais clearly holds that the ELR does not bar a cause of action in professional negligence despite lack of personal injury or property damage. Id. at 979. The question then becomes what causes of action in tort escape the preclusion of the ELR. As stated above, fraudulent misrepresentation does so. Fraud in general appears to be grounds for circumventing the ELR.

While courts have voiced varying opinions, conversion appears to be a tort able to survive the ELR. Most Courts post-Moransais, have held conversion to be a viable tort in spite of the ELR. As a matter of law some courts have held that thievery and embezzlement go

beyond and are independent from a simple breach of contract. Targia v. U.S. Alliance Corp., 2003 LEXIS 21799 (S.D. Fla. 2003). In fact Targia specifically distinguished the limitations imposed by Casa Clara and held conversion to be a viable tort. Duncan v. Kasim, Inc., 810 So.2d 968 (Fla. 5th DCA 2002) has also held that a conversion claim is viable if such claim alleges facts that are beyond mere breach.

Pursuant to an action under Fla. Stat. §812.035 (2005), the civil remedy for theft, there is plaintiff has the ability to secure treble damages pursuant to Fla. Stat. §772.11 (2005). Snyder v. Bell, 746 So.2d 1096 (Fla. 2nd DCA 1999) Treble damages are tallied by taking a judgment amount tripling it and adding the initial judgment back to that amount. It held that treble damages are both mandatory in proving civil theft (conversion) and are non-punitive. Aagaard-Juergensen v. Lettelier, 579 So.2d 404 (Fla. 5th DCA 1991). By treble damages not being punitive, trebles do not run amok of the ELD. The ELD clearly prohibits punitive damages. J. Batten Corp. v. Oakridge Inv. 85, Ltd., 546 So.2d 68 (Fla. 5th DCA 1989).

Treble damages carry with it a higher burden of proof, clear and convincing rather than preponderance. The Fourth District's expression of trebles in the case of Anton v. Anton, 763 So.2d 404 (Fla. 4th DCA 2000) is the most apt.

> Any person who by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of Fla. Stat. §812.02 - §812.037, has cause for treble damages and at a minimum $200 plus attorney fees and costs in trial and appellate courts.

Summary of Liability Issues

The Developer, the Contractor, the Architect, the Engineer and the Owner all have distinct liability concerns and mitigated shelter from a deteriorating Economic Loss Rule. While Florida law may prevent some parties from sustaining a claim against an entity, the avenues of indemnification and subrogation make even the sheltered party at risk. The professionals in the construction field, the Architect and Engineer, have a heightened amount of exposure as the ELR

clearly does not protect them. These same professionals may have heightened protection against tort injury suits if and only if they maintain a non-supervisory role on a project.

Florida Lien Law

Overview

This focus on Florida lien law is limited to the following areas. Specifically Fla. Stat. §713.05 (2006) and Fla. Stat. §713.06 (2006) will be analyzed to provide a context for construction liens in Florida as relates to privity and non-privity relationships. The technical aspects and pitfalls of Florida construction liens will be addressed with discussion of lien priority and notice of commencements per Fla. Stat. §713.07 (2006) and Fla. Stat. §713.13 (2006). Lastly analysis of liens and performance bonds will be analyzed, per Fla. Stat. §713.23 (2006), as the Florida Supreme Court issued several recent opinions that demand attention.

General Lien Discussion

To begin, the impact of Florida construction liens cannot be overemphasized. While Florida may be a haven for debtors, notoriously transferring assets into homestead property for exemption from bankruptcy and beyond the reach of creditors, construction liens pierce this veil. Construction liens placed upon property are encumbrances and valid liens on that property, whether homestead or not. As such the impact of Florida construction liens is significant and requires a “devil in the details” approach from the lienor and lienee.

Secondly it is necessary to state how liens are foreclosed upon. While a lien is filed per the prescriptive modes of Chapter 713, Florida Statutes, foreclosure upon that lien is done by judgment. Judgment is entered by a court, assessing the validity and merit of the lien claim and establishing the dollar amount of the lien due and owing, with interest and attorney’s fees in most cases. A complaint for foreclosure on a lien is smartly accompanied by other causes of

action, such as breach of contract, quantum meruit, and the like. While separate and unique actions, the basis of a lien foreclosure is closely linked with the elements of other actions.

Finally, as a condition precedent, liens can only be filed and are only valid upon work done as a permanent improvement to property. Cutting the grass is not a permanent improvement. "Although planting for landscaping purposes may be considered a permanent improvement, maintenance landscaping services do not bestow a permanent benefit upon the land, and do not entitle the laborer to a mechanic's lien." Legault v. Suncoast Lawn Service, 486 So.2d 72 (Fla. 4th DCA 1986).

Liens with Privity and Absent Privity

Florida Statute §713.05 (2006) governs liens when the lienor is in privity with Owner. Thompson v. Jared Kane Co, Inc., Case No. 2D03-2011 (Fla. 2nd DCA 2004). When privity exists there is also the presumption that the Owner knows of the existence of the lienor. Privity, therefore, negates the Notice to Owner filing required of those lienors (i.e. subcontractors, materialmen, et. al.) not in privity with Owner. Thompson. Non-privity lienors have lien remedies via Fla. Stat. §713.06 (2006).

Lienors not in privity must announce themselves via a Notice to Owner. Fla. Stat. §713.06 (2006). This notice must be served upon the Owner (and possibly copied to Contractor if a materialman filing such notice is not in privity with Contractor) "before commencing or not forty-five (45) days after commencing to furnish his or her labor, services, or materials, but, in any event, before the date of the owner's disbursement of the final payment after the contractor has furnished the final payment affidavit". Fla. Stat. §713.06(2)(a) (2006).

The Florida Supreme Court has explicitly held that the forty-five (45) days within which to file a Notice to Owner does not begin to run until material or labor is supplied to the job site.

Stunkel v. Gazebo Landscape, 660 So.2d 623, 625 (Fla. 1995). Thus traveling with Owner to select material (or trees) does not constitute work that begins the 45 day period. Id. at 625

Express or Implied Contract And Notice to Owner As Requirement of Lien

A contract is essential for a mechanic's lien. Stunkel v. Gazebo Landscape, 660 So.2d 623, 625 (Fla. 1995); citing Viking Communities Corp. v. Peeler Constr. Co., 367 So.2d 737, 739 (Fla. 4th DCA 1979). This contractual basis must be: 1) an express contract; 2) a contract implied in fact; or 3) a contract implied in law.

An express contract is written, recorded or otherwise documented, while a contract implied in fact is exhibited clearly from the parties' actions and a contract implied in law is a quasi-contract based in equity. CDS v. 1711, 743 So.2d 1223, 1224 (Fla. 4th DCA 1999). An express contract is most clearly defined as it is specifically defined. A contract implied in fact "is inferred in whole or in part from the parties' conduct, not solely from their words". A contract implied in law is a quasi-contract with "an obligation created by the law without regard to the parties' expression of assent by their words or conduct". Id. at 1224; citing Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., 695 So.2d 383, 385 (Fla. 4th DCA 1997).

The clearest expression of the implied in law quasi-contract is the Fourth DCA in CDS v. 1711, Supra. at 1224, stating the elements of a contract implied in law as: 1) the plaintiff has conferred a benefit to the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred, and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. CDS v. 1711, supra. at 1224.

Such description of the quasi-contract implied in law contemplates the non-privity lien requirement of the Notice to Owner, defined in Fla. Stat. §713.06 (2006). For instance a

Materialman has no express contract or contract implied in fact with Owner, as the Materialman's only connection to Owner is through third parties, i.e. Subcontractor and General Contractor. Thus the Materialman's claim against Owner is wholly absent privity and is based on the contract implied in law. Florida law requires that for a lien and a contract implied in law to exist the non-privity lienor must announce their presence to the Owner. It is the duty of the non-privity lienor to inform the Owner as to the existence and benefit provided by the non-privity lienor.

The Florida Supreme Court long ago held that whether in privity or absent privity, certain conditions must be met for a lien to exist. In brief some material benefit must be conveyed to Owner and Owner must offer some consent, either directly or indirectly, for the benefit. Lee v Sas et.al., 53 So.2d 114 (Fla. 1951). In Lee v Sas the Lee family (mortgagee) sold a hog farm to the Dutchmen family (mortgagor) on favorable terms. The Dutchmen family hired foreman Branton to operate the hog farm. The Dutchmen family defaulted on the mortgage and the Lee family recovered the property. Upon default Branton claimed a lien upon the property for repairs made, labor provided, crops supplied and hogs fattened. In denying Branton's claims the Florida Supreme Court stated:

> If the Lees are to have a lien fastened on them they should have been a party to the contract or they should have had knowledge of each transaction in which it is attempted to bind them, brought to their attention at the appropriate time… As to most of the items on which the lien is fastened, the evidence does not show that the Lees were aware of them. A labor or materialman's lien must be grounded on **express or implied contract**. It can't be fastened on one like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend. Lee v. Sas, 53 So.2d 116 (emphasis added)

It is clear that Branton's lien claims against the Lee family do not satisfy the four (4) elements of an implied non-privity contract as defined by CDS v. 1711, 743 at 1224. The requirement for a Notice to Owner per Fla. Stat. §713.06 (2006) thus becomes clear. The

Subcontractor and Materialman not in privity must announce themselves to Owner and, at times, to the Contractor. Consent is implied from the notice acceptance.

In sum, the Notice to Owner is long held by the Florida Supreme Court to establish privity where privity otherwise does not exist and to form the basis of a contract implied in law.

> In Harper Lumber & Manufacturing Co. v. Teate, 125 So. 21 (Fla. 1929), this Court held that privity requires both knowledge by an owner that a particular subcontractor is supplying services or materials to the job site and an express or implied assumption by the owner of the contractual obligation to pay for those services or materials. Aetna Casualty and Surety Co. v. Buck, 594 So.2d 280, 281 (Fla. 1992).

The Notice to Owner is a near absolute requirement as only individual laborers are exempt from this filing. Fla. Stat. §713.06(2)(a) (2006). VL Orlando v. Skilled Services Corp., 769 So.2d 526 (Fla. 5th DCA 2000).

Slights of hand and technicalities do not defeat the requirement to file a Notice to Owner. Gulfside Properties Corp. v. Chapman Corp, 737 So.2d 604 (Fla. 1st DCA 1999). In Gulfside, a GC signed the Notice of Commencement where Owner was to sign, but all other information on the notice divulged the actual Owner of the project. A lien was defeated as the First District held that the intended lienor who did not file any Notice to Owner, with any entity, was in fact presented all necessary disclosure of the Owner's identity despite the GC signing for Owner on the Notice to Commence. Id. at 607.

Employment companies who provide labor to a job site, but are otherwise not subcontracted to the project, are not considered laborers and may not file a claim for lien as the actual laborer is able to do.

Liens and the Final Payment Affidavit

Florida Statute §713.06(3)(d)(1) (2006), requires the General Contractor to file a detailed affidavit, disclosing the payment status of all entities subcontracted to the GC. This final

payment affidavit is a condition precedent to Owner being obligated to issue final payment to GC.

The Florida Supreme Court held that the failure by GC to file the final payment application does not necessarily preclude GC from foreclosure on a lien action against Owner. Holding Electric, Inc. v. Roberts, 530 So.2d 301, (Fla. 1988). The Court reasoned that delivery of the final payment affidavit is not jurisdictional, but is a prerequisite to foreclosure against Owner, alerting Owner to any deficiency in payments and providing Owner opportunity to remedy any such deficiency prior to foreclosure. Id. at 303. The Court further stated that "the clear purpose of Fla. Stat. §713.06(3)(d)(1) is to protect Owner against the risk of having to pay for the same services or materials more than once, and to allow Owner to make proper payment before the suit is filed". Id. at 303. Holding Electric, allows the GC to file a Complaint, then file a missing payment affidavit and then file an amended complaint.

The more recent case of Puya v. Superior Pools, 902 So.2d 973, (Fla. 4th DCA 2005) makes the payment affidavit requirement of §713.06(3)(d)(1) to be absolute even if GC is terminated from the job. Id. at 975. Puya, affirms that GC's final payment affidavit must be filed even if work is stopped, contract relations break down and another entity is retained by owner to complete the job.

Issuance of final payment by Owner absent Contractor's submission of the final payment affidavit does not bar otherwise valid lien claims. Superfos Construction v. HAJOCA Corp., 712 So.2d 1228 (Fla. 2nd DCA 1998). Florida Statute §713.06(2)(a) (2006) specifically states that a lien holder must file a notice to owner within 45 days of starting work or before the disbursement of final payment AFTER contractor furnishes the final payment affidavit. Making final payment

without receiving a final payment affidavit subjects Owner to the claim of any subcontractor who files a lien within 45 days of starting work or otherwise maintains a valid lien. Id. at 1229.

Notice of Commencement and Liens

The Notice of Commencement is held to be an indispensable record item to determine if Owner or Owner's agents were served a Notice to Owner by a non-privity lienor. Metal Foam Industries, Inc. v. Watson, 716 So.2d 328 (Fla. 2d DCA 1998). If Owner's agent is served the Notice by a non-privity lienor, that Notice is imputed to Owner and Owner's property for purposes of perfecting the subsequent lien claim, i.e. Owner was on notice. Id., at 329.

The Notice of Commencement is not defeated by shell game corporate identities. If Owner is also the landholder, the developer or Contractor on a job and all identities have one address, Notice to Owner is not mandatory. Privity is imputed to all such entities if it exists with any. Aetna Casualty and Surety Company v. Buck, 594 So.2d 280, 282 (Fla. 1992). "We find that privity exists either when an owner knows a subcontractor is working on the job and that owner assumed the contractual obligation for the work or when the owner and contractor share a common identity. In either situation notice is not required". Id. at 282.

The Claim of Lien per Florida Statute §713.08 (2006)

Entities either in privity or not in privity with Owner must file a claim of lien pursuant to §713.08, F.S. (2006), in order to claim against Owner's property. Understanding the claim of lien process is extremely important to lien perfection. A claim of lien "may be recorded at any time during the progress of work or thereafter but not later than ninety (90) days after the final furnishing of the labor or services or materials by the lienor" §713.08(5), Florida Statutes (2006).

All claims of lien must offer a detailed description: of the lienor; the direct or indirect relationship to Owner; the description and contract price of labor and material furnished to Owner; a description of Owner and Owner's property; the time the last labor and material was

furnished; and the amount unpaid to lienor for services rendered to including finance charges. Additionally the entity not in privity with Owner must state the date and method of service whereby Notice to Owner was provided. If the claim of lien is made by a person not in privity with GC or a subcontractor, the date and method of service of the copy of Notice to contractor or subcontractor shall be stated. §713.08, Florida Statutes (2006).

The trial court has discretion in remedying or overlooking errors in the Notice to Owner and Claim of Lien. §713.08(4)(a), Florida Statutes (2006). In Johnson v. Aqua Pool Co, Inc. 725 So.2d 458 (Fla. 2nd DCA 1999), GC's business dissolved, leaving the pool subcontractor and Owner at odds for payments not tendered to pool subcontractor. Owner defended pool sub's lien claim by alleging Notice to Owner not timely filed and contained incorrect information. The Second DCA held that because Owner "was not adversely affected because they still had funds to pay for the pool after paying all facially valid claims" that the trial court properly allowed for the Notice to owner to stand, thus preserving the subcontractor's lien. Id. at 460. In essence Owner doesn't otherwise experience a windfall due to technical error.

Johnson v. Aqua Pool stands for equity decisions oftentimes being an inherent part of lien litigation. In this case the GC dissolution prejudiced both Owner and the pool subcontractor. "Conceptually, the lien law seeks to assign the risk of loss. Ultimately where 'one or two innocent persons must suffer as a result of the default of another, the loss shall fall on him whose act made the loss possible'." Johnson v. Aqua Pool, 725 So.2d 459.

Appellate Court holdings indicate deference to the trial court as to the validity of the lien at issue. It is held that Florida Statute §713.05 is not an avenue for a breach of contract. Onionskin, Inc. v. DeCiccio, 720 So.2d 257, 258 (Fla. 5th DCA 1998). Including damages for breach in a claim of lien does not necessarily render the entire lien fraudulent or filed in bad faith

as to defeat the entire lien. Stevens v. Site Developers, Inc., 584 So.2d 1064 (Fla. 5th DCA 1991). Amount of lien claimed in excess of lien amount adjudicated does not render the lien fraudulent. Id. at 1064. But it is the trial judge that has discretion to determine the intent and good or bad faith of the prosecuting lienor. Onionskin, 720 So.2d 258.

Florida law allows concurrent lien and breach of contract claims. Fischer-McGann, Inc. v. Glick, 715 So.2d 994 (Fla. 4th DCA 1998) holds that GC has some offset rights when lien claims are brought by sub-subcontractors and breach claims are brought by the subcontractor. In Fischer-McGann, GC hired a subcontractor who in turn hired four (4) sub-subcontractors. GC and sub-subcontractors were not in privity. GC, short on cash, ceased making scheduled progress payments to subcontractor, who in turn ceased making payments to sub-subcontractors.

The subcontractor sued the GC for breach of contract, and the sub-subcontractors filed lien claims against the GC. At remand the trial court offset the full value of the lien claims, despite the sub-subcontractors only recovering approximately ten percent of the full lien claims. Id. at 996. The matter was again appealed and the Fourth DCA held that GC is only entitled to an offset for the actual amount GC paid on the lien claims to the sub-subcontractors, not for the amount claimed in the lien claims. Id. at 996. This is important to note, as a subcontracting entity should pursue damages in breach of contract against GC for damages the subcontractor may be liable for if sub-subcontractor claims breach of contract against the subcontractor.

Duration of Lien Claim

A construction lien may not exist for more than one year, unless a claim to enforce lien is brought within that one year period. Fla. Stat. §713.22(1) (2006). As litigation can span several years the lien holder must simply file the complaint to enforce lien within a year of filing the claim of lien. Any amendments to a claim of lien do not toll the time to file the claim upon that

lien, as the original lien claim filing date persists. Hoepner & Assoc. v. Gilman Co., 648 So.2d 854 (Fla. 5th DCA 1995).

Summary of Lien Notices and Claims

In sum the law places a burden on Owner to be proactive in investigating and managing the financial matters of a project. Once an entity files a Notice to Owner announcing itself, Owner has an ongoing liability to that entity that mere payments to the contractor will not extinguish. Keller v. Newman and Sons, Inc., 756 So.2d 120 (Fla. 3rd DCA 2000). This is why it is so important for Owner to demand the final payment affidavit from the GC, obtain lien releases as condition precedent for the final or progress payments (releases in the amount of work paid to date) and for Owner to reference all lien releases and entities paid in the final payment.

As means for Owner to escape from the potential liability of having liens placed on property, Owner can require provision of a payment bond where all lien claims will be transferred to bond claims and Owner's property will be safe from any encumbrance.

Liens and Payment and Performance Bonds

Payment Bonds

Payment bonds for construction activities in Florida are governed by the lien statute, Fla. Stat. §713.23 (2006). The payment bond shall be in at least the amount of the original contract price and a copy shall be attached to the Notice of Commencement. Fla. Stat §713.023(1)(a) (2006). The payment bond shall be issued by a surety authorized to do business in Florida and shall be conditioned upon GC making prompt payment for labor, services, and material to all lienors under the contractor's direct contract. Fla. Stat. §713.23(1)(a) (2006). Owner, GC or surety shall furnish a copy of the bond to any lienor demanding it. Fla. Stat. §713.23(1)(b) (2006).

"Either before beginning or within 45 days after beginning to furnish labor, material or supplies, a lienor who is not in privity with GC, except a laborer, shall serve GC with notice in writing that the lienor will look to the GC's payment bond for protection on the work." Fla. Stat. §713.23(1)(c) (2006). If a non-privity lienor is not notified of the bond's existence due to failure of recordation on Notice of Commencement or no reference to payment bond in Notice of Commencement, that non-privity lienor shall have 45 days from date notified of bond to file a Notice. Fla. Stat. §713.23(1)(c) (2006).

Most importantly, the lienor is required "as a condition precedent to recovery under the bond, to serve written notice of nonpayment to the contractor and the surety not later than ninety (90) days after final furnishing of labor, services and materials by lienor". Fla. Stat. §713.26(1)(d) (2006).

All claims against the bond must be commenced within one year from the performance of labor or completion of delivery of the materials and supplies. Fla. Stat. §713.23(1)(e) (2006). Note the year period is different than the time allowed to file an action on a lien, which is one year from filing of claim of lien, where such claim of lien may be filed up to 90 days from completion of labor, etc.

The payment bond shall secure every lien under the direct contract accruing subsequent to its execution and delivery, except that of the contractor. Fla. Stat., §713.23(2) (2006).

There also exists under Florida law, a conditional payment bond pursuant to Fla. Stat. §713.245, (2006). A conditional payment bond implicates the surety only to those payments made by Owner to GC and subsequently not paid by GC to those entities due and owed the payments. The conditional payment bond must have on its face, in 10-point type, the statement:

> THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE

> CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT. Fla. Stat. §713.245(1)(c) (2006).

Relevant Case Law on Payment Bonds

Several recent cases have both clarified and confused the payment bond landscape of Florida law. On July 7, 2005, the Florida Supreme Court issued the opinion American Home Assurance Co. v. Plaza Materials Corporation, 908 So.2d 360 (Fla. 2005). In American Home, the Court was dealing with a payment bond dispute pursuant to the public works construction of several sections of the Polk Parkway. Separate sections of the Parkway were under separate prime contracts.

In American Home, Owner (the Department of Transportation) made payment to GC who made payment to Subcontractor. Subcontractor never paid Materialman. Both GC and Subcontractor filed bankruptcy, leaving Materialman to claim against Owner's surety, American Home. American Home, 908 So.2d 362. American Home and Owner defended the Materialman's claim on the basis that the payment bond was a statutory bond and Materialman did not meet the statutory requirements of claiming against a payment bond, including filing the claim within one year and failing to serve notice of intent to claim against bond. Id. at 362. Materialman argued the bond was a common law bond because American Home surety and Owner failed to include the prescribed language on the face of the bond, indicating the bond type and the relevant time frames of the bond. As such a common law bond permits claims for five years, not one. Id. at 363.

Florida courts have long adopted that the manner in which to delineate between a statutory bond and a common law bond is in the coverage. A payment bond is a common law bond if it provides more expansive coverage than that provided for in statute. Standard Heating Services,

Inc. v. Guymann Constr., Inc., 459 So.2d 1103, 1005 (Fla. 2nd DCA 1984). More expansive coverage may include expanding the class of claimants. Nat'l Fire Ins. Co. of Hartford v. L.J. Clark Contstr. Co., 579 So.2d 743, 744-745 (Fla. 4th DCA 1991).

In American Home, the Court majority held that Surety was at fault for issuing a bond without the statutory prescriptive notices on the face of the bond, per Fla. Stat. §713.23(6) (2006). The Court also held that the Materialman was at fault for not complying with the claimant requirements of Fla. Stat. §713.23(4) (2006). The Court held that the failure of the notice requirements on the face of the bond rendered the bond a common law bond subject to a five (5) year claims period. The Court potentially allowed Materialman's claim by reasoning that:

> Once the claimant upon the bond makes a prima facie showing that the bond is facially deficient within the context of the statute AND establishes by a preponderance of the evidence that the claimant did not have actual notice of the provision, the surety is estopped from attempting to enforce those provisions. American Home v. Plaza, 908 So.2d at 370.

The majority of the Court in American Home, creates a two-prong test for the trial court. The facial sufficiency or deficiency of the bond is a question of law. The question arises in the second prong of the test of whether the claimant did or did not have actual notice of the notice requirements of the bond.

It is important to note that the Court was split 4-3 on American Home. Justice Cantero issued a lengthy dissenting opinion joined by Justice Bell and Justice Wells, who also issued a more concise dissenting opinion. The dissent in sum states that allowing a claimant to avoid the strict provisions of the statute based on the surety's failure to do so rewards the claimant for ignorance. American Home v. Plaza, 908 So.2d 378-379. What Justice Cantero essentially suggests is that in the abundance of caution a claimant should hire counsel and strictly comply with all aspects the statute that may govern the bond. Better safe than sorry.

A case of similar facts came out of the Florida Second District Court of Appeal on June 8, 2005, a mere month before the American Home, was decided by the Florida Supreme Court.

In Bridgeport, Inc. v. Tampa Roofing Co., 903 So.2d 306 (Fla. 2nd DCA 2005) Owner contracted with GC who in turn contracted with Subcontractor for roofing work. GC failed to make payment to Subcontractor, so Subcontractor sued GC for breach and claimed against GC's payment bond. Id. at 307.

Surety defended in stating that bond is a statutory bond and Subcontractor did not comply with the notice requirements of Fla. Stat. §713.23(1)(d) and did not bring an action within one year of last performance of labor per Fla. Stat. §713.23(1)(e). Id. at 307-308.

Subcontractor alleged in the complaint that the bond at issue was a common law, not statutory bond. "Subcontractor argued that the owner, the contractor and the surety failed to comply with various requirements contained in chapter 713". Id. at 308. Because of the noncompliance the bond was a common law bond, not statutory bond, and was subject to a 5 year claim period not 1 year. Id. at 308.

It is very important to note that nowhere in Bridgeport v. Tampa Roofing, does it enumerate or specify what or how Owner, GC and Surety failed to comply with the provisions of Fla. Stat. §713.23 (2006).

In holding that the bond was statutory Subcontractor was time barred from filing a claim the Second District held:

> We conclude that even if the subcontractor is correct that the owner, the surety and contractor did not fully adhere to the requirements of chapter 713, the subcontractor was not excused from complying with the requirements of §713.23, that it provide notice of nonpayment before filing suit and that it file suit within one year from its completion of performance, and the bond did not convert from a statutory payment bond to a common law bond… Finally the record does not demonstrate that the subcontractor suffered prejudice as a result of the alleged failure by others to comply with chapter 713 in a manner that could arguably excuse its own obligation to comply with the requirements of

section 713.23. For example the subcontractor did not establish that it was unable to file suit on the bond within the one year limitations period because of any noncompliance by the owner, contractor or surety.

The holding of American Home v. Plaza, 908 So.2d 360 provides for the two-prong test to determine if the claimant's bond claim is valid when the claimant does not comply with the statutory notice requirements. The second-prong of that test is whether the claimant had notice of the claim limitations of the bond.

Unfortunately Bridgeport v. Tampa Roofing, 903 So.2d 306, states that Owner, Surety and GC did not comply with the §713.23, but does not indicate specifics of the noncompliance. Was it the bond's failure to notice time limits or was it failure to attach the bond to the Notice of Commencement? Does the Second District's holding that a claimant must show prejudice by an omission of statutory prescribed action on the part of Surety/Owner/GC before being exempt from its own statutory requirements equate to the claimant's burden of establishing no notice of bond provisions as stated in American Home v. Plaza, 908 So.2d 360?

Conversely, the Second District's opinion in Bridgeport v. Tampa Roofing, 903 So.2d 306, is in line with Justice Cantero's dissent in American Home v. Plaza, 908 So.2d 360. Justice Cantero holds the claimant to an absolute standard of complying with statutory notice requirements despite ignorance, and the Second District seems to be stating that the chapter 713 is strictly adhered to and that a bond claimant has the burden to file the notice of non-payment prior to any litigation and despite whether the claimant has received a copy of a bond or not. Bridgeport v. Tampa Roofing, 903 So.2d at 309.

Construction Defects

Statute of Repose

Florida Statute, §95.11(3)(c) (2007) governs the time in which to file an action (lawsuit) due to a construction defect. That time is defined as four (4) years, generally. To wit:

> An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, *the action must be commenced within 10 years* (emphasis added) after the date of actual possession by the owner, the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Furthermore an action based on negligence is four (4) years. Florida Statute, §95.11(3)(a) (2007). This will apply to a professional negligence claim brought by a party not in privity with another party. An example of such a claim between entities on the construction project is discussed in Chapter 10 of this paper.

A noted exception to the statute of repose timelines occurs with an action based professional malpractice, between parties in privity of contract. Florida Statute, §95.11(4)(a) establishes a two (2) year period to pursue such a cause of action. The action itself may be founded in contract or tort, but the parties must be in privity for this two year limitation to apply. To wit:

> An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

Application of these statute of limitations timelines are utilized as affirmative defenses. Wishnatzki v. Coffman Construction, Inc., 884 So.2d 282, 285 (Fla. 2nd DCA 2004). Prohibiting an action based on a statute of limitation defense, i.e. expiration of time in which to file a complaint, should only be granted in extraordinary circumstances in which the facts pleaded in the plaintiff's complaint conclusively establish a time bar applies. Id. at 285. If a complaint

alleges latent defects that were discovered within the statute of limitations time period and those defects are alleged to cause damage in whole or part the complaint should not be dismissed. Id. at 285. The statute of limitations defense to a claim is more appropriate at a motion for summary judgment, once evidence is established. Id. at 286.

Florida Statute, §558

In 2004 the Florida Legislature amended the construction defect statute, Florida Statute, §558, that establishes prescriptive measures by which a claims process must adhere to or be dismissed. Several key provisions and requirement to pre-suit are: that the parties must exchange expert reports and other discoverable evidence, that a general contractor may inspect all buildings in a multi-family development and that destructive testing is permitted on all property subject to a claim.

A claimant must provide the contractor and any other allegedly responsible party with one hundred twenty (120) day written notification of an alleged defect prior to filing a complaint. The defect must be described in reasonable detail. The contractor, upon receipt of the notice, has fifty (50) days to inspect the dwelling or any other affected unit. During the first thirty (30) days of receiving the notice of defect, the contractor must notify any other entity the contractor reasonably believes is responsible for the alleged defect. Any other such notified entity may also inspect the dwelling within the same time period provided to the contractor for inspection.

The contractor must furnish a written response to the claimant within seventy five (75) days. The contractor's response should be based on competent evidence and all testing should be done by the time the response is issued. The claimant therefore has a duty to coordinate and facilitate any testing that the contractor seeks to perform, although all destructive testing is stated to be coordinated by mutual agreement. This testing may be destructive testing with the entity seeking to test being the financially responsible party for the testing and remediation of the

destruction. At the conclusion of the seventy five (75) day time period the contractor must furnish the claimant with a written response that either: contains an offer to repair the defect at no cost to claimant, contains an offer to compromise the claim by monetary payment or contains a written statement that the contractor disputes the claim. If multiple defects are alleged by the claimant the contractor's response may differ for each alleged defect.

CHAPTER 4
COUNTY COURTHOUSE DISPUTE; DESIGN NEGLIGENCE VERSUS CONTRACTOR NEGLIGENCE

Preface

Contractor alleged delay claims are commonly based on: O/A delays in issuing change orders; O/A suspension of work orders, O/A delays in providing inspections/approvals, faulty plans specifications and shop drawings (i.e. errors and omissions in contract documents) and O/A failure to coordinate work. The Contractor may terminate the contract for cause accordingly.

The Owner's contractual remedy for Contractor not meeting Substantial Completion is the Liquidated Damages provision of the contract. The Owner may terminate the GC prior to Substantial Completion, but only for cause, including the GC: (1) persistently failing to supply sufficient labor or materials; (2) failing to pay Subcontractors; (3) detrimentally disobeying laws, rules and regulations; or (4) being in substantial breach of the Contract Documents.

This case concerns the construction of a courthouse complex. This case is included to demonstrate the damaging effect of having a relatively unsophisticated owner rely exclusively on an architect that has never managed so large a project and a general contractor that appears overwhelmed.

Project, Scope and Parties

Project

County Administrative and Judicial complex built on the site of existing judicial buildings, after demolition or original complex.

Scope and Sequence of Construction at Time Contract Executed

- Demolition of existing jail;
- Construction of new administration building on site of the old jail, and renovation of certain areas of an adjacent "elections" building;

- Removing and reconstructing the exterior skin and interior finishes of a second building adjacent to the old jail and interconnecting these two buildings with the existing "old courthouse".
- Construction of site work, including a 3 area parking lot and a central court area.
- The County was to engage separate contract for asbestos inspection, abatement and removal.

The Parties

Owner is a County on west coast of Florida, seeking to build a new courthouse complex. The full scope of work is defined above. Evidence indicates that the County Attorney and a liaison in the County Administrative Offices were the primary Owner contacts at all relevant times.

Architect is a small firm, local to the County. This was the largest project, historically, that Architect at any time designed or administered.

Architect did not employ a full-service structural design engineer. The Architect employed a structural engineer on an as-need basis. This structural engineer's main job was to review work of others, i.e. review shop drawings, and to solve problems as needed.

GC is not local to the County. GC is located on the east coast of Florida. GC is a small firm with maximum bonding capacity of $10M. This County project, when awarded, consisted of approximately 26% of this GC's outstanding work and, potentially, GC's only profitable project.

The GC placed a superintendent on-site, full-time. The frequency that the project manager was on-site is disputed. How frequency that officers of the GC presented on-site is also disputed.

Bonding Company is the surety for GC's payment and performance bonds.

Facts in Common

The Bid, General Condition Requirements and Value Engineering

The Owner, a west coast Florida County (County), invited bids for a courthouse complex. The bids were required to conform to detailed specifications. As is customary in bids for public work, the lowest conforming bid is awarded the contract. GC submitted the second lowest base bid and the lowest bid with alternates. Owner decided to include alternates and, therefore, awarded bid to GC.

The Owner solicited bids with a stated time allowance of 545 days to substantial completion. GC stated in the bid that GC could achieve substantial completion in 365 days. An AIA 101 contract was executed between the parties on June 8, 1993 (6/8/93), and incorporates by reference AIA 201, General Conditions of the Contract. Per the GC's bid, the contract reflects substantial completion shall be achieved in 365 calendar days from the Date of Commencement. The contract imposes liquidated damages of $125 per day for each day final substantial completion is not obtained.

Upon entering the contract the GC submitted a 25 item bar chart schedule, in accord with the general conditions requirement of keeping the Owner informed of all scheduling. (APPENDIX A) Whether this was the only significant schedule submission by the GC is a matter of controversy between the parties.

After the contract documents were executed the GC endeavored in a value engineering exercise. This VE resulted in the slab system for the buildings being changed from precast to cast in place, post-tension. Change Orders reflected this structural change.

Date of Commencement and Delays

The contract defined the Date of Commencement as the "next calendar day following issuance of the building permit and Notice to Proceed, whichever is the later date". The building

permit was issued last on July 19, 1993, and Date of Commencement was established as July 20, 1993.

Delays occurred immediately. The initial construction sequence was scheduled as the demolition of the old jail. Demolition permits for the old jail were delayed due to asbestos remediation requirements. It was determined by the parties to build the parking lots first. The parking lot drawings did not reflect accurate civil engineer data and required destruction of trees that could not be permitted for removal. The parking lots required redesign.

The initial delays were so substantial that the parties stipulated that Date of Commencement was amended to September 20, 1993. Work on the parking lot began on 9/21/93 and demolition of the jail began on 9/28/93. Delays continued, however, with this initial work. Three (3) septic tanks, an unforeseen condition charged to the Owner, were found under the jail and caused additional delays in the jail demolition. The parking lots were also delayed and not finished until 11/23/93, as the proctor on the soil compaction continually failed, a means and methods condition charged to the GC.

All sides admit that the GC and Architect relationship became adversarial almost immediately. For instance, in regards to the jail demolition the bid specifications did not require the GC to perform asbestos remediation. The GC, therefore, did not bid on asbestos remediation. The Architect immediately drew a line in the sand and required the GC to supply asbestos remediation. Pursuant to negotiated change order and begrudgingly the GC performed asbestos remediation.

Further pronounced and exaggerated delays occurred with the cast-in-place post-tension slab system, curtain wall window system, CMU construction and brick façade installation. These will be discussed in detail below.

By the time the GC terminated the contract in January 1995, the project was six (6) months over the 365 day construction time frame of the contract, and only 50% complete.

Nature of Dispute

Termination of GC and Claim on Bond

The stipulated Date of Commencement is September 20, 1993. On January 23, 1995, the GC issued a seven (7) day Notice of Termination. GC claimed that the Owner consistently failed in the obligations and of the contract documents that relate to the progress of the project. GC alleges, therefore, that Owner and its agents caused repeated delays on the project. On January 30, 1995 the GC ceased work with approximately 50% of the project complete.

The Owner, thereafter, claimed against GC's surety (performance bond) and the second lowest bidder was employed to complete the remaining 50% of the project. The Owner collected $214,220 on the performance bond for damages associated with GC terminating the contract. The GC's surety also paid $401,521 on payment bond claims to subcontractors contracted to GC. The GC alleges it reimbursed the surety most of the $615,741 bond claims. The GC, as Plaintiff, filed a claim against Owner for reimbursement of bond indemnification and alleging damages and interest due to Owner Architect (O/A) induced delays.

Demands for Arbitration

The GC filed a Demand for Arbitration on September 3, 1997 (9/13/97) alleging that: "The Owner and its agents failed to fulfill their obligations under the contract documents which caused repeated delays on this project." GC alleges that O/A imposed delays rendered it impossible for GC to complete work on this project as GC faced mounting financial losses due to the intransigency and hostility of the O/A.

On March 16, 1998 (3/16/98), the GC filed an Amended Demand for Arbitration, wherein expert analysis alleges that GC suffered damages in the amount of $4,225,507 due to Owner's

breach of contract. GC's damage claim against Owner (APPENDIX B) include damages totaling $1.8M for extended general conditions, reimbursement for surety indemnification, lost profits, unpaid retainage and unfunded change orders. GC claims another $1.3M for lost bonding capacity. GC claims another $1M for prejudgment interest pursuant to Chapter 57, Florida Statutes. Costs, expenses and fees (legal) are ongoing and are not determined by Arbitration, but by the Circuit Court.

Allegations by GC (Plaintiff)

Design Errors, Omissions and Failure to Coordinate As Cause of Delays

The GC alleges that the specifications and design drawings contained significant errors and omissions at all relevant times. GC alleges that despite notice given the Architect never remedied errors and omissions in the contract documents. The GC alleges that the Architect, instead, engaged in a blame game with the GC to deflect responsibility for those errors and omissions. GC alleges Architect never provided current drawings to the field and without current, reliable drawings the building process was one of asking perpetual questions, rather than one of construction.

GC alleges that the Owner and Architect were consistently late in responding to RFI's, Change Orders and other inquiries filed by GC. GC alleges that many responses, when issued, were non-responsive or incomplete. GC was directed to perform work not in the scope of the bid and O/A forced GC to accept inadequate monetary and time compensation. O/A developed an adversarial and outright belligerent attitude to GC. O/A worked in bad faith against GC.

GC alleges that it informed Owner Architect of all delays in correspondence, sent via fax or U.S. Postal Service.

The project was initially delayed more than sixty (60) days. During this time Owner approved Change Order 1, to reflect value engineering. When this Change Order was approved

work still could not begin as no remediation of asbestos occurred as prerequisite to demolition of the jail and parking lot drawings were incomplete.

GC alleges that because work was scheduled per phased sequence that disruption to the initial part of the construction caused a cascade, cumulative effect of disruption and delay to all phases of the project.

GC alleges that Architect errors and omissions in regards to window/curtain wall design and structural tie-ins caused the most excessive delays. GC cites specific examples of delays associated with the window curtain wall and post-tension slab as indicative of contract document errors and omissions.

On October 1, 1993 GC submitted post-tension slab shop drawings, per Change Order #1 value engineering redesign. These were approved on October 20, 1993. Architect however *did not make necessary changes to overall plans to reflect connections* (emphasis added) of post-tension slab as replacement to pre-cast slab. The Architect never changed the cast in place connections to accommodate the post-tension design change.

On February 16, 1994, Architect provided to GC over thirty (30) revised MEP, Structural and Architectural drawings. On March 9, 1994 GC provided a floor by floor estimate for these changes in the sum of $109,239.90. Architect would only authorize $75,748 of this estimate. A Change Directive was issued by O/A for GC to complete this work, to debate the cost dispute at the end of the project. GC alleges that changing so many drawings at the mid-point to substantial completion caused excessive delay for GC and caused havoc for subcontractors.

Window and Curtain Wall

In regards to the window/curtain wall, the specifications suggest use of an EFCO brand system, with the specifications listing a permissible substitution from the manufacturer Craword-Tracey. GC sought approval of Crawford-Tracey and Architect approved same. Questions

about structural adequacy of window anchoring began when Architect returned curtain wall shop drawings on February 11, 1994. GC alleges that Architect did not provide structural elements by which windows could be installed.

Architectural drawings indicated curtain wall and windows anchored into the brick veneer. GC alleges that brick veneer was not a structural support. When GC noted to Architect the inadequacy of the window anchors as drawn the Architect in essence stated "that's your problem". After much delay and argument, the Architect finally transmitted to the on-call structural engineer the GC's suggestion of incorporating a structural "sub-buck" (window anchor platform). The Architect did this only after independent review of the issue.

An independent review of the curtain wall system in May 1994 supported GC's contention that structural revision and inclusion of a "sub-buck" must occur for proper installation of the window/curtain wall system. It was not until July 27, 1994 that Architectural and Structural approval was forthcoming for curtain wall shop drawings that included the structural sub-buck. GC alleges that more than six (6) months of delays with the curtain wall and window system originate in Architect not initially generating adequate drawings and subsequently being resistant to remedy of this problem.

In sum GC alleges that Architect failed by not initially providing or subsequently seeking a structural engineered solution to the window issue. Architect instead blamed the GC for the obvious structural error. GC alleges that Architect delayed providing the necessary follow-up window and curtain wall details into the Fall of 1994.

Post Tension Slab

In regards to the post-tensioning slab system, this was a value engineered choice that in fact saved the Owner money on the material and labor of the slab system. GC alleges it never assumed responsibility for the structural design of the post-tension slab system. In fact the

Architect, by letter at time of value engineering, stated that the post-tension system would add no great cost from the design perspective.

GC alleges that when construction was to begin on the post-tension slabs that the drawings did not accurately reflect tie-in capability as the Architect never revised the working drawings to accommodate the post-tension slabs. Essentially the drawings maintained connections for the pre-cast slab system and the walls were constructed as such. GC estimated over $68,000 of remediation work to accommodate the post-tension slabs. GC alleges that the placing of in-beds for post-tension slabs is relatively inexpensive if done at the time the walls were built. GC's position is that it builds to the contract documents in the field, as provided by the Architect. GC alleges that it is Architect's errors and omissions that caused the delay and remediation cost for the post-tension system.

GC Termination of Contract

GC alleges that by November 1994, Architect was not approving any pay requests, was stonewalling GC and was actively soliciting Owner to terminate GC.

"Under the circumstances of a hostile Owner and Architect, lack of cooperation, lack of payment, and worsening project schedule, and with no end in sight, GC was forced to give a Notice of Termination on January 23, 1995. Given the attitudes of O/A, this was the only was GC could mitigate its losses and the losses of the County".

Allegations by Owner (Defendant)

GC Ethical Lapse and Reliance On Inadmissible Facts

Owner alleges that the GC failed in its ethical obligation to inform O/A of deficiencies in the contract documents until after such deficiencies caused delay. In this sense the Owner alleges the GC used this project, from the start, to set-up claims for litigation.

Owner further contends that GC's Demand for Arbitration is based on facts not in evidence. Financial records and assessments referenced in the GC's Demand and relied upon as the basis of GC's damage allegations were not disclosed to the Owner, as required by rules of discovery. Field reports referenced by the GC were not disclosed to the Owner, per rules of discovery. As such the Owner has grounds for motions to dismiss or exclude this "evidence". The GC cannot sandbag the Owner.

GC's Financial Condition and Scheduling of Project

Owner's analysis reveals that the GC was hemorrhaging money on several other jobs. Financial records, generated prior to GC's submission of any claim, indicate that of the GC's four (4) largest projects three were losing $579,401.00, while the County project was making $136,680. (APPENDIX C)

Owner's expert opines that GC was relying on the County project to essentially bail out GC's other projects. Analysis of Daily Logs indicate that while GC had a superintendent on the County project full-time, the Project Manager and the executive management of the GC were rarely, if ever, on-site at the County project. This leads the Owner to allege that the County project was being massaged and billed while the GC focused on the other, financially troubled projects.

Owner alleges that GC produced a single twenty-five (25) item bar chart schedule (APPENDIX A). Owner alleges that GC made only slight alterations for one subsequent submission to Owner. Owner's expert opines the "for a contractor to schedule the largest and a most complex project into only twenty-five (25) activities is ludicrous". The GC's schedule was devoid of a critical path, dependent links, early starts/finishes, late starts/finishes or floats.

The Owner alleges that the GC's schedule was not viable at inception and when the schedule adjustments occurred the GC was completely unable to grasp the long-term impact of

those changes. Owner alleges that the GC never provided Owner with revised schedules to reflect the changes and or address the delays that plagued this project from the onset.

Response to Specific Delay Claims

Time computation

In regards to GC's delay claims Owner makes several cogent arguments in defense. First, Owner correctly points out that the GC, in all damage analysis, uses the initial Date of Commencement of July 20, 1993, and completely ignores the stipulated Date of Commencement of September 20, 1993. Owner has already stipulated to delays of approximately 62 days. Owner argues it paid general condition costs for this initial delay period and as GC was apparently pre-occupied with other troubled jobs, Owner does not owe GC any further damages for this initial 62-day delay regarding Date of Commencement.

Change order reservation of rights

Owner further alleges that GC waived any and all rights to delay claims associated with approved change orders. GC did not include time adjustments in change orders and submitted all change orders at issue absent any RESERVATION OF RIGHTS. Owner contends, therefore, that GC acquiesced to any and all time associated with redesign or clarification of issues associated with any and all change orders.

Dealings with subcontractors and buyout

Owner alleges that the majority of all delays after 9/20/93, were caused by the financial house of cards that GC was trying to keep standing. Owner contends that GC stopped submitting, as required by the contract, partial release of liens with payment applications. (APPENDIX D) While this most evidently occurred with the sixteenth payment application going forward, the subcontractors were clearly not being kept current as GC's surety paid in excess of $400,000 to settle all payment bond claims of subcontractors. Deposition testimony of

GC's on-site superintendent indicates that GC was having numerous problems with numerous subcontractors due to not being current on payment to those subcontractors.

GC's apparent financial malfeasance with subcontractors is further illustrated by the Owner's expert analysis timeline of when GC was entering into subcontracts. (APPENDIX E) It appears GC did not complete full buy-out of the contract until one month prior to GC terminating the contract. Owner's expert opines that not securing all subcontracts at the inception of the project makes it impossible to create a valid schedule (even one that is not viable) and leaves the GC exposed to price escalations. GC never provided Owner with names of subcontractors bidding on work, despite the contract requiring that GC submit all potential subcontractor names to Owner for approval.

Schedule and Sequence Failures

Owner alleges that GC's delay claims assume that construction proceeds in a purely linear manner. Owner alleges that GC ignores that construction can utilize a sequence, with adequate lead times built into a critical path schedule. Owner contends that having no CPM schedule and not entering subcontracts as soon as possible prevents this coordinated construction sequencing. Owner alleges that GC's scheduling malfeasance was the cause of excessive delays.

The CMU subcontractor started work on December 20, 1993 and left the job in mid-April 1994, either due to being run-off for quality issues or leaving due to non-payment by the GC. In either event the GC self performed the CMU work. CMU was complete on June 28, 1994, one hundred ninety-eight (198) days after CMU work began. Upon completion of CMU the GC did not have a brick subcontractor under contract. GC entered a brick subcontract on July 15, 1994, and brick work began on August 1, 1994. The brick work subcontract specified a three (3) month period for completion of brick work. The brick work in fact took six (6) months to complete.

Owner alleges that if the GC had a brick subcontractor under contract, brick work could lag behind CMU work, but both jobs could be performed simultaneously. Owner's expert estimates that brick work could begin on or about March 15, 1994 and take the scheduled three (3) months to complete. According to Owner, referencing the one schedule submitted by GC, CMU work and brick work was scheduled to span 12/20/93 – 6/15/94. Instead CMU was delayed and brick work was not complete until 1/27/95. This was a total period of four hundred three days (403) completely under the control of the contractor.

The Owner, while taking responsibility for some delays, attributes the bulk of delays on this job to the GC's poor contract management and not entering into sub-contracts at the inception of the job, but only hiring subcontractors on an as-needed basis.

Relevant Clauses of the General Conditions

Duties of General Contractor

- 3.2.1 The Contractor shall carefully study and compare the Contract Documents with each other and with the information provided by the Owner pursuant to paragraph 2.2.2 (i.e. Owner furnished site surveys and legal descriptions of property and utilities thereon) and shall at once report to the Architect errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

- 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

Claims Procedure

- 4.3.1 Definition of Claim: A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

- 4.3.2 Decision of Architect: Claims, including those alleging an error or omission by the Architect shall be referred initially to the Architect for action as provided in paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the claim is made, (4) 45 days have passed after the Claim is referred to the Architect or (5) the Claim relates to a mechanic's lien.

- 4.3.3 Time Limit on Claims: Claims be either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

- 4.4.1 The Architect will review the Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

- 4.4.2 If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

- 4.4.3 If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

- 4.4.4 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will

notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

- 4.5.4 When Arbitration May Be Demanded: Demand for Arbitration of any Claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final decision by that date, or (3) any of the five events described in Subparagraph 4.3.2.

Subcontractors

- 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, had reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

Time

- 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

- 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

Payments

- 9.3.1.2 Applications for Payment may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or material supplier because of a dispute or other reason.

- 9.3.3 The Contractor warrants that title to all Work covered by the Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates of Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, be free and clear of liens, claims, security interests

or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

- 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1

- 9.5.1 Decision to Withhold Certification: The Architect may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner… from loss because of (1) Defective work not remedied; (2) third party claims filed of reasonable evidence indicating probable filing of such claims; (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment; (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract sum; (5) damage to the Owner or another Contractor; (6) reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

Progress Payments

- 9.6.2 The Contractor shall promptly pay each Subcontractor upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work.

- 9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

Termination By Contractor

- 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor, or a Subcontractor, Subsubcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons: (1) issuance of an order of a court or other public authority; (2) an act of government, such as a declaration of national emergency, making material unavailable; (3) because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding the certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; (4) if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days

scheduled for completion, or 120 days in any 365-day period, whichever is less; or (5) the Owner has failed to furnish the Contractor promptly, upon Contractor's request evidence of Owner's financial status.

- 14.1.2 If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools and construction equipment and machinery, including reasonable overhead, profit and damages.

- 14.1.3 If the Work is stopped for a period of 60 days through no act or fault of the Contractor or Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.2.

Termination By Owner

- 14.2.1 The Owner may terminate the Contract if the Contractor: (1) persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials; (2) fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors; (3) persistently disregards laws, ordinances, or rules regulations or orders of a public authority having jurisdiction; or (4) otherwise is guilty of substantial breach of a provision of the Contract Documents.

- 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety: (1) take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor; (2) accept assignment of subcontracts pursuant to Paragraph 5.4; (3) finish the Work by whatever reasonable method the Owner may deem expedient.

Suspension By The Owner For Convenience

- 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

- 14.3.2 An adjustment shall be made for increases in the cost of performance of the Contract, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent: (1) that performance is, was or would have been so suspended delayed or interrupted by another cause for which

the Contractor is responsible; or (2) that an equitable adjustment is made or denied under another provision of this Contract.

CHAPTER 5
CONTRACTOR VERSUS AIRPORT AUTHORITY; EXTENDED GENERAL CONDITION COSTS

Preface

The Airport Authority engaged in a significant expansion project via multiple prime contracts. One Prime Contractor, the GC responsible for building the terminal and hotel, claims delay damages against Owner. The alleged delay damages are in two parts. The first aspect of the delay claim is based on alleged delays and disruptions caused by the Prime Contractor responsible for pile foundations. The second aspect of the delay claim is based on excessive change orders issued by the Owner throughout the course of the project. In sum, GC seeks damages for increased General Condition costs incurred. In sum, Owner seeks offsets for work it alleges to be faulty or to contain patent or latent defects.

Project, Scope and Parties

Project

Multi-phase expansion of existent airport located in large city and major tourist destination in Florida. Project involves construction of new terminal and hotel adjacent to terminal.

Scope and Sequence of Construction

The airport expansion was divided into more than 155 bid packages, based on numerous prime contracts for specific scopes of work. Of significance to this matter in controversy is that the pile foundation work was pursuant to a prime contract wholly independent from the prime contract for the terminal and hotel construction. The piling work was dependent on some demolition to occur. The Terminal and Hotel are in contiguous space, with a seamless transition. In essence the Hotel entrance and foyer is a part of the Terminal. The Terminal and Hotel

construction were entirely dependent on the successful and timely completion of the pile foundation work.

The Parties

The Owner is the Airport Authority, which is governed by a seven member board composed of; the mayor of the City, the Chairman of the Board of County Commissioners, and five other members who are appointed by the Governor and subject to confirmation by the Florida Senate. The Owner alleges defect damages in a counterclaim to delay damages claimed by the General Contractor.

The Architect and Engineer are moot in this matter. There is no prevalent claim of design errors and omissions.

The General Contractor (GC) for Prime Contract Bid Packages (BP's) one hundred twenty five (BP 125), the Air Terminal, & one hundred fifty five (BP 155), the Hotel, is a large commercial contractor (GC). The GC is experienced in the type of general contracting services it is providing to Owner. GC is the moving party (plaintiff) in the action for delay damages against owner.

The Piling Contractor was responsible for Prime Contract Bid Package 122 (BP 122), which is the piling foundation placement. Prime Contract of BP 122 is wholly and mutually exclusive from Prime Contract of BP 125 and 155. The GC of BP's 125 & 155 (the air terminal and the hotel) had no contractual relationship with Piling Contractor BP 122.

Facts in Common

The Contract and Time

The GC entered into a prime contract with Owner for construction of a landside terminal, BP 125, and a hotel, BP 155. The terminal was built first, with the hotel following in sequence. The Owner entered a separate prime contract with a piling contractor for foundation work, BP

122, for both the terminal and hotel. The bid package for BP 125 contained drawings issued by Owner indicating scope and duration for piling work. The pilings were the foundation for the GC's construction of the terminal and hotel. As such the GC's bid response analyzed the piling contractor's schedule of work. The GC's bid response scheduled construction in three (3) phases. The GC's bid submission relied upon the piling contractor's successful completion of the piling work as stated in the bid documents.

No damage for delay clause

The GC and Owner entered a contract based on the GC's bid. The GC's bid was dependent on the piling contractor completing the piling work in a timely and complete manner. The General Conditions of the Owner/GC contract contained a "no damage for delay" provision. All construction on this job was undertaken with time being of the essence.

Notice to Proceed

A Notice to Proceed was issued on 11/19/88, with the 559 day substantial completion deadline of 9/1/90 for the terminal, in the contract documents. The construction of the landside terminal, BP 125, was contracted to take 559 days. The Hotel construction was scheduled to take approximately three hundred seventy (370) days and start immediately after the terminal construction.

No time extensions provided

No extension of time was ever provided on the contract, despite the Terminal construction exceeding the contractually stipulated substantial completion date by approximately seven hundred eighteen (718) days. GC filed timely filed claim letters and reserved all rights to time extensions in timely filed change orders. The parties, in fact, stipulated to preservation of all claim rights in executed change orders, wherein all known and existing claims were stipulated to exist within the four corners of such change orders

Piling Contractor and Delays

The piling work encountered significant problems almost as soon as it started. (APPENDIX F) First the subsurface information that was provided by the Owner was incorrect. The piling system utilized was a precast and cast in sections system that was tied together as the individual sections were hammered downward. Some of the piles were driven more than one hundred (100) feet before hitting limestone. The piles were not designed for this depth. The piling contractor also experienced numerous access delays, in part due to delays with demolition of preexistent structures that covered piling placement.

The piling contractor employed a subcontractor to accomplish the actual casting of the pile sections. These pre-cast piling sections, in part, started to fail specification testing. To remedy this problem the piling contractor fired the subcontractor and started to cast the piles on site. The piling contractor's focus was apparently disturbed by self performing the pile casting, as some piles were found to be drifting off center of the specified locations. Another problem manifested itself with some pile heads being fractured.

While the piling placement was wrought with several delays, the total impact of these delays was exponentially magnified for the GC who was building the landside terminal and hotel on top of the pile foundation. This was because the problems with the pilings were completely random and scattershot, in no order or pattern. The GC's three (3) phased construction sequence was pockmarked with piling issues in all three (3) phases. All parties were aware of the piling issues and all parties recognized delays to some degree or other.

Change Orders

During the construction of the Terminal the Owner issued five hundred eleven (511) Owner Change Orders. (APPENDIX G) Of these, five hundred ten (510) were approved by the Airport Authority once the costs submitted by the GC were reviewed. Of the total approved, two

hundred twenty three (223) Owner Change Orders were issued after January 23, 1991 (1/23/91). The Architect issued a Certificate of Substantial Completion for the Terminal on October 16, 1991, (10/16/91). All Change work was not completed in the Terminal until August 20, 1992. The Hotel received Certificate of Substantial Completion on September 24, 1992 (9/24/92). Because the Terminal and Hotel are in the same space (the Hotel is at the end of the Terminal and is essence part of the Terminal) the lingering Owner Change Order work on the Terminal was part and parcel of the actual work on the Hotel.

Substantial Completion

The last Owner Change Order was approved by the Airport Authority on August 27, 1993 (8/27/93), almost one year after the Substantial Completion Certificate was issued on September 24, 1992 (9/24/92), for the Hotel (BP 155).

Nature of Dispute

Delay Claim Overview

The nature of this dispute concerns delay damages, in the form of extended Daily General Condition costs. (APPENDIX H) GC claims and alleges all delays are due to the Owner or agents of the Owner. On November 19, 1988 (11/19/88), the Owner issued the GC a Notice to Proceed (NTP) to commence building a landside air terminal (BP 125) and to immediately be followed by a Hotel connected to the terminal (BP 155). The Terminal and Hotel are in contiguous space. The Terminal was scheduled and contracted to reach substantial completion in 559 days, on 9/90/91. The Hotel was contracted to start construction immediately thereafter and reach substantial completion in 370 days.

It must be noted that the parties were in communication and discussions and were otherwise well aware of the delays occurring on the project. The GC, at all relevant times alerted Owner to pending claims for the alleged delay damages occurring. The parties agreed to keep

the project moving, as required by the contract, and preserved all delay claims in writing for resolution once construction was finalized.

Extended General Daily Condition Costs

The GC delay claim is two-fold. First, the GC alleges it suffered 156 days of extended Daily General Condition (DGC) costs due to delays directly caused by the piling disruption and delays. The GC also alleges it suffered an additional 562 days of extended Daily General Condition (DGC) costs due to an overwhelming number of Owner Change Orders (OCO's). The 156 day piling delay claim and the 562 day OCO delay claim are mutually exclusive and not concurrent.

The delay damages claimed by GC are for Daily General Condition (DGC) costs. GC's original bid contemplated a defined time period for construction of 559 days, 11/19/88 through 9/1/90. The GC contemplated DGC's for those 559 days and the GC's bid reflected that. GC alleges that piling delays reasonably caused the Terminal construction to extend 156 days to 2/4/91, or 754 days from NTP. GC argues it was not responsible for the piling delays and, therefore, GC claims it is owed reimbursement for 156 days of DGC costs.

For the 754 day period from 11/18/88 (NTP) to 2/4/91 (expected substantial completion with the piling delays) General Condition costs average $14,546 per day. GC then multiplies this average DGC cost by the 156 day piling delays to obtain a total DGC delay cost of $2,269,176, directly attributable to the piling delays. The 156 days is itself an average of the piling delays encountered on all three (3) phases of the Terminal Construction.

The GC uses actual hard data to the extended DGC costs for the 562 day delay period, 2/4/91 through 8/20/92. This is 562 days of extended DGC costs is recorded in actual monthly totals by the GC. The total General Condition costs from 2/4/91 through 8/20/92, is $3,273,216.

Total extended delay and disruption costs for the Terminal construction claimed by the GC for 156 day piling delays and 562 day Owner Change Order delays are $5,542,392.

Additional Claims by GC

There are other corollary claims made by the GC as well. The GC claims Terminal retainage held by the Owner in the amount of $1,223,902. The parties stipulated to segregate all crane costs from the DGC costs. GC claims extended crane costs for the alleged 156 piling disruption delay days and for the alleged 562 OCO delay days. The total extended crane costs claimed are $656,916 and $255,943 respectively. Total extended crane costs alleged by the GC are $912,859. All crane costs are subsumed under the Terminal claim.

Other corollary claims include claims from a prime subcontractor, who also experienced significant delay damages due to the piling and OCO delays. In total $1,714,027 is claimed by the GC for delay damages suffered by subcontractors. There is an additional claim with a subcontractor in the amount of $54,363.00, as negotiated and agreed to between the Owner and Subcontractor.

Claim Dollar Amounts by GC and Offset Claimed by Owner

All claims for the Terminal subtotal $9,447,543. Overhead and Profit at ten percent, on the DGC costs only, equals $554,239. This is a total claim of $10,001,782. In June 1991, GC formalized all previously filed Terminal claims and claims this is the date from which interest on total claims accrues. As such the interest claim is $5,000,890.

The GC's total claim for the Terminal BP 125 is $15,002,672.

The GC makes a similar type claim for the Hotel, BP 155. All claims for the Hotel, including unpaid contract balance, delay and disruption claim, subcontractor claims, overhead and profit and interest totals $5,070,983. The total claim of the GC for the Terminal and Hotel is $20,073,655. (APPENDIX I)

The Owner, in response, makes two offset claims. The first is for welding defects and the second is for construction defects alleged to cause mold intrusion in the Hotel. The Owner claims damages of $1,385,000 for the welding defects and damages of $1,120,000 for the mold intrusion. Owner claims $411,000 of interest on combined claims. In total the Owner claims $2,916,000 for damages. Owner claims these damages as an offset against the claim of the GC.

Allegations by GC

Delays Due to Piling Contractor

The GC delay claim is two-fold. First the GC claims delay damages for one hundred fifty-six (156) days beyond the original 559 days for construction of the Terminal. These 156 days are wholly attributable to delays suffered due to piling delays and disruptions. (APPENDIX J)

The Notice to Proceed (NTP) for the Terminal was issued on 11/19/88, with construction contracted to reach substantial completion by 9/1/90, 559 days. This did not happen. The GC alleges that piling delay and disruptions delayed substantial completion of the Terminal construction 156 days, from 9/1/90 to 2/4/91.

The GC alleges that piling delays were so disruptive because of the scattershot nature of the delays. The GC scheduled the terminal construction in a sequenced three (3) phase plan. Most importantly concrete pours were scheduled to occur in total in Phase I, prior to pours in the adjacent space of Phase II, prior to pours in the adjacent space of Phase III. Concrete pours in each phase were scheduled to occur in the most efficient manner to eliminate access problems.

The piling disruptions were apparently random over all three phases. As a result concrete pours were dictated by lack of piling problems, rather than by efficient scheduling. Concrete pour may take place in an inner quadrant of Phase I and then proceed to an outer quadrant of Phase III. The hopscotch nature of the concrete pours caused extreme inefficiency and excessive delays.

The GC suffered the largest cost delay in the steel work that preceded the concrete pours. Rebar placement was significantly disturbed due to the hopscotch approach of the concrete pours. The reinforcing steel work bounced around between Phases and quadrants in Phases. GC's expert witnesses document delays caused by piling disruption at 156 days minimum.

The 2/4/91 date, however, reflects only an anticipated date of substantial completion for the Terminal due to piling delays and disruptions. The Architect did not issue a Certificate of Substantial Completion on the Terminal until 10/18/91. Owner Change Order work continued on the Terminal until 8/20/92. A total of 510 Owner Change Orders were implemented for the Terminal and 223 occurred after 2/4/91, the anticipated substantial completion date reflecting only piling delays.

GC cites Construction Committee Minutes dated 3/5/91, that GC's contract was delayed at minimum ninety (90) days as a result of the piling delays. The context of the meeting minutes was pursuant to a discussion for a $200,000 change order that related to the delays of the piling contractor. In addition GC points out that Owner is actively pursuing a claim against the piling contractor for all direct and indirect costs associated with all piling delays.

Delays Due to Change Orders

The GC claims five hundred sixty two (562) days of delay due to 510 implemented Owner Change Orders (OCO's). GC claims these change orders delayed the Terminal for the period 2/4/91 (the anticipated Terminal extended substantial completion date with piling delays included), through 8/20/92, the date of actual substantial completion of the Hotel. GC alleges that as the Terminal and Hotel occupy contiguous space that the nature of the Owner Change Orders extended Terminal work until, approximately, substantial completion on the Hotel was achieved.

The GC alleges that the staggering scope of the Owner Change Orders is evident in that 223 OCO's were issued after 2/4/91. The total sum of the 510 OCO's added approximately 43% to the Terminal contract price. The GC alleges that the sum value of the 510 implemented OCO's, 223 of which were implemented after 2/4/91, indicates the reasonableness of the delays claimed in relation to the change order work.

Retainage

GC alleges that Owner is holding retainage that is due and owed on the Terminal construction. GC alleges that Owner is holding this Terminal retainage pending outcome of litigation between Owner and GC's Bonding Company for alleged defective pipe welding on work. The alleged defective pipe welding work is pursuant to separate bid packages wholly unrelated to the Terminal or Hotel bid packages. GC alleges that no matter what the outcome of that litigation GC is not a party and any indemnification by GC would be to the surety and not to Owner.

GC references correspondence dated May 18, 1990 from Owner, wherein Owner stated that all crane time extension costs will be reimbursed at the end of the project. GC alleges this supports that Owner considered the delays that occurred are compensable.

Mold Offset Claim by Owner

GC alleges that any mold intrusion in the Hotel is due solely to a design defect, not to a construction defect. Specifically GC alleges that the interior decorator placed vinyl wall paper on the interior side of all exterior walls. GC alleges that it is well known in the hotel industry that in humid climates the placement of vinyl paper on the interior side of exterior walls will create mold problems.

GC's expert witness opines that vinyl paper on the interior side of exterior walls creates a vapor barrier on the interior of the wall. GC cites engineering articles which hold that in humid

climates the vapor barrier is to be placed on the exterior side of a wall system to prevent the transfer of vapor into the wall system. GC alleges that the interior design placement of vinyl wallpaper on the interior side of the exterior walls is the cause of mold intrusion. GC alleges that this design defect allows outside water vapor to transfer through the wall system and accumulate in the insulation of the wall cavity and in the sheet rock finish of the interior wall.

Secondly, GC alleges that the construction defects alleged by Owner's mold expert are actually design defects. GC alleges that it built the exterior walls of the hotel exactly to the specifications of the contract documents. GC alleges that it is the design itself that allows for some water intrusion by letting humid air into wall cavities..

Finally, in regards to the offset claimed by Owner due to mold intrusion, GC's expert points out the deficiencies of Owner's expert mold witness. First Owner's expert mold witness is not a licensed engineer in the State of Florida, where this claim arises. GC alleges, therefore, that Owner's mold witness is not a qualified expert in any venue in the State of Florida.

Allegations by Owner

Response to GC Claims

Owner does not assert any defense, affirmative or otherwise, to the piling delays. Owner at best seeks to mitigate the amount of time claimed by GC for the piling delays. On record Owner speaks to piling delays totaling approximately ninety (90) days. In fact Owner alleges piling delays in that Owner is pursuing reimbursement against the piling contractor and the piling contractor's surety for the cost of the piling delay claims.

As to the 510 implemented Owner Change Orders, Owner does not directly respond to the delay associated with these change orders other than to argue for a reduction in the amount of time claimed as necessary for the completion of the work.

Owner's Independent Claims

Owner's allegations concern matters related to the construction generally, but are essentially counter-claims for items wholly independent of what is claimed by the GC. In essence Owner's tact seems to be to offer a minor defense to the claims alleged by GC, but to raise significant other claims in an effort to offset the claims of the GC. (APPENDIX K)

What Owner's counter-claims essentially allege is both construction and design defect. Owner by letter states that it is either the GC's or design engineer's defect and that those parties should conference to resolve all Owner alleged defect issues prior to Owner allocating such liability.

The primary offset claim alleged by Owner regards mold intrusion in the Hotel rooms. Owner alleges that construction defects are cause in fact of the mold intrusion. Owner offers an expert from the Atlanta area that renders an opinion to support the allegation that construction defects are the cause in fact of the mold intrusion.

Owner alleges that the moisture intrusion into the wall cavity, the cause of the mold intrusion, is due to construction defects. Owner alleges that GC's installation of window and door systems is defective and permitted excessive moisture into the wall system. Owner alleges that the gaps in construction joints between concrete members and other components of the building envelope were so wide that light transferred between some of these joints. Owner alleges that GC performing the subsequent remedial measure of caulking some of the accessible joints after the mildew problem developed is evidence of construction defects. Owner alleges that the demising walls (walls that separate units) were not properly taped and sealed, resulting in fan coil plenums directly contacting gaps in joints in the exterior walls.

CHAPTER 6
CONTRACTOR VERSUS STRIP MALL DEVELOPER; ACTIVE INTERFERENCE AND CONTRACTOR NEGLIGENCE

Preface

Owner/Developer withheld retainage and the final pay application from GC at the conclusion of this project. GC sued Owner for the money due pursuant to the contract. The Owner counterclaimed alleging that GC breached the contract and delayed substantial completion of the project and, therefore, damaged Owner. Owner alleges that any non-payment by Owner is due to Owner's loss as caused by GC's breach. GC alleges that due to a pattern and practice of Owner behavior, GC was forced into a position of failure. This matter was presented to a jury, was appealed to the Florida First District Court of Appeal and a written opinion was issued; Newberry Square v. Southen Landmark, 578 So.2d 750 (Fla. 1st DCA 1991). (APPENDIX L)

Project, Scope and Parties

Project

This project is the construction of a K-Mart and Publix strip mall in Gainesville, Florida. The facilities will provide for numerous secondary tenants. This was one of three near identical projects the General Contractor was contracted to build for the Owner/Developer.

Scope and Construction

This entire project was defined as a time is of the essence project. The Owner was essentially building core and shell space for the anchor tenants K-Mart and Publix and for smaller secondary tenants. As such this was a straightforward sequence of construction beginning with site work, to foundations to the core and shell. The K-Mart building was contracted to finish first, to allow the tenant additional time for tenant finish work enabling the entire plaza to open for business at or near the same time.

Parties

Owner/Developer (Owner) is a business entity that engages in retail development throughout North Central Florida. Owner is not a consortium, but is under the direction of one principal and corporate staff. It is Owner that is identified by the GC as the cause of delays.

General Contractor (GC) has a diverse portfolio of commercial projects including apartments, retail and educational construction. GC had an approximate ten million dollar bonding capacity.

The Architect/Engineer is of interest in this matter only insofar as GC alleges that design drawings and specifications that reflected changes to the original drawings were slow to be issued and approved.

Subcontractors are relevant to the extent of those subcontractors who filed claims for unpaid work.

Facts in Common

Contract Bid Package

Owner and GC contracted for construction of three (3) separate K-Mart plazas throughout Florida. As such GC was actively building somewhat identical core and shell strip malls for Owner in Pasco, Hardee and Alachua Counties. The Alachua County project is the subject of this case study, as the delays on this project evolved into lawsuit and eventual appellate court written decision, i.e. case law.

Each contract between the Owner and GC was awarded per a traditional bid system. GC was awarded the Alachua County project based on a bid of $4,277,000.00. Discovery in the course of litigation indicated that the GC estimated the job at $4,214,552.00, inclusive of all general conditions and subcontractor costs. This indicates that the GC was allowing only $63,000, or 1.5% of the contract price, for combined home office overhead and profit. There

was discrepancy between the parties whether or not the Publix pad was in fact part of the bid package. The GC did not include the Publix pad in the bid.

The contract between the parties contained a special provision, a rider, indicating that time was of the essence on this project. Both parties initialed this provision in addition to signing the contract.

Notice to Proceed, Change Orders and Substantial Completion

A Notice to Proceed was issued on the Alachua County project on March 15, 1985 (3/15/85). The contract stipulated substantial completion for the K-Mart on January 1, 1986 (1/1/86) and for the other stores on February 1, 1986 (2/1/86).

There were ninety-seven (97) change orders issued on the project for a total addition of $43,760.20 (or 1.06% of net value) to the contract price. Accordingly the change orders adjusted included requests for time which were granted. The adjusted substantial completion date for the K-Mart was to February 9, 1986 (2/9/86). The adjusted substantial completion date for the retail stores was to April 6, 1986 (4/6/86). The adjusted substantial completion dates were not achieved. Substantial Completion was issued for the K-Mart on September 1, 1986 (9/1/86) and at varying times for the other retail stores in the strip mall from November 1986 to April 1987. The other two contracts between the parties for similar retail construction in Pasco and Hardee Counties were finished at substantial completion.

All structural drawings for the K-Mart were finalized to include all changes in June 1985. All structural changes to the drawings were minor. The final drawings reflecting changes were issued to and received by GC no later than July 15, 1985, as indicated by GC's date stamp. GC did not begin vertical construction on the K-Mart until mid-November 1985.

Payment Issues

Payment issues are central to this dispute. The contract stipulated that the pay application end of period was the twenty fifth (25^{th}0 of each month and all payments would be issued within fifteen (15) days of the 25th of the month. The contract did not stipulate that a late submittal by GC allowed or required the Owner to withhold payment until fifteen days after the 25th of the next month, i.e. the next payment application deadline. The contract simply stated that Owner was to issue payment fifteen days after receipt of a payment application and a pay application period was not due and owing until the period ended on the twenty-fifth (25th) of the month.

GC submitted almost all pay requests late. The Owner was late issuing payment on all pay requests. After the thirteenth (13th) Pay Application a co-payee system was instituted due to subcontractors not receiving full payment pursuant to periodic payments issued by Owner. As such Owner became an oversight entity to ensure that payments issued were received by the Subcontractors. (APPENDIX M)

There is no indication in the record that Owner requested GC to obtain partial release of liens from the subcontractors, as a condition precedent of issuance of the subsequent month's periodic payment.

In apparent protest to GC missing the extended substantial completion dates, Owner withheld payment on GC's final pay application. Owner also withheld payment on all retainage held. Owner did not file a claim against the GC. GC filed a lawsuit against Owner to obtain the monies held by Owner. In response Owner filed affirmative defenses and cross-claimed GC for damages due to GC's delay in reaching substantial completion.

Nature of Dispute

GC's Claims

The nature of this dispute is two-fold. First the GC claims that the Owner is in breach of contract for not paying the final pay application and for holding all retainage due and owed on this project. The total amount claimed by GC for the unpaid contract balance and retainage is $448,661.83.

GC also had claims for previous outstanding balance claims from subcontractors, but GC did not plead these claims within the four corners of the Complaint (the lawsuit). GC never amended the Complaint to include those subcontractor claims. GC did present these claims as damages to be considered by the jury. These damages were awarded. The First District reversed this award for subcontractor balances as these damages were not specifically pled in the Complaint or in an Amended Complaint. A defendant must be given the procedural opportunity to put a claim through discovery.

Owner's Counterclaims

Owner counterclaims against GC for damages that offset and exceed those claimed by the GC. The Owner claims $578,962.70 in lost rental income GC's failure to achieve substantial completion. Owner claims $146,349.82 for costs of completion, correction and warranty work. Owner claims interest loss of $49,520.89, due to Owner capital expenditures in remedy of GC's late or defective work. Owner lastly claims costs of $70,000.00 from corrective and finish work on a parking lot abandoned by GC. In sum Owner claims gross damages of $844,833.41. When this amount is reduced and offset by the unpaid contract balance and GC retainage held by Owner and claimed by the GC, there is a net claim by Owner for $396,171.58. (APPENDIX N)

Conditions Relevant to Both Parties

It is important to keep in mind while reading the below allegations of the parties that Owner unilaterally withheld payment from GC for amounts due and owed for the unpaid contract balance (final pay application) and for retainage. Owner, in its counterclaims, is asserting justification for withholding of those monies from the GC, due to GC missing substantial completion by six months at minimum. Owner is essentially saying that GC was remiss and, therefore, does not deserve to be paid. GC, in response, is using the best defense to this allegation, that the Owner's actions and interference is the root cause of the delays.

The crux of the lawsuit, therefore, becomes a question of whether GC's delay was due to negligence by the GC or due to interference by the Owner. Each side is pointing fingers at the other. In framing the lawsuit in such a manner the jury is forced to determine two essential facts. How clean are the hands of each party? Can the jury find a single "but for" cause that triggered the delays and, therefore, assign liability to one party?

Allegations by GC (Plaintiff / Cross Defendant)

Overview

The allegations of the GC are simple. The Owner is in breach of the contract by failing to issue payments to GC. The Owner failed to pay the GC amounts due and owed for the remaining, unpaid contract balance and for all retainage. The GC alleges that Owner threatened to "crush" the GC for missing substantial completion. The GC alleges that of the three (3) projects it was contracted with Owner, only the Alachua County project was delayed. GC alleges that the Owner's active interference on all three (3) projects were the cause of the Alachua County project being delayed.

As to all of Owner's allegations (discussed herein), the GC has a singular response; that it was Owner interference on all three (3) projects that caused the GC to experience delays and miss substantial completion on the Alachua County project.

Active Interference by Owner

GC alleges Owner actively interfered with the project via habitual failure to issue periodic payments on a timely basis. The parties agreed by contract that the Owner would issue payment within fifteen (15) days of the end of the pay application period defined as the twenty-fifth (25^{th}) of the current month. The GC's stipulates that a pay application for a current month is not timely until, at least, the twenty-fifth (25^{th}) of that month. A July pay application can be submitted prior to, but is not due until at least July 25^{th}. The Owner has fifteen days to issue payment once the pay application is due and owed.

GC argues that a pay application for a month is timely if submitted on the twenty-fifth (25^{th}) of the current month or at any time after that. GC argues that if it files a pay application on the twenty-seventh (27^{th}) of the current month or the second (2^{nd}) of the next month that Owner must pay within fifteen days of that submission. In essence, GC argues that a pay application can only be early (i.e. before the 25^{th} of the month claimed on the pay application), but cannot be late.

GC alleges that whether GC submitted pay applications on the twenty-fifth of the month or at some point after that, the Owner <u>never</u> issued payment within the contractually stipulated fifteen (15) days after Owner's receipt of the pay application. GC alleges that this caused a delay cascade effect when this alleged Owner intransigence is compounded over all three (3) projects. GC alleges the primary effect of Owner's chronic late payments was disruption of subcontractor performance.

GC alleges that the Owner was always five (5) to forty (40) days late on issuing payment in response to pay application submitted by the GC. Of significance is that this pattern started from the initial payment period and the Owner's delays were often more severe at the beginning of project. GC alleges that subcontractors, therefore, were always placed in the position of playing catch-up. GC alleges that this de-motivated the subcontractors who immediately began to focus on other jobs that maintained current, prompt payments for work completed.

GC alleges that GC submitted payment applications on the twenty-fifth (25^{th}) of the month for the initial four (4) months of this Alachua County project and the Owner responded by tendering payment consistently later and later each of those initial four (4) months. Payment for GC's month four (4) payment application was tendered by Owner approximately forty days late.

It must be noted that Owner is late upon expiration of the fifteen (15) day payment window, as defined by contract. If Owner pays forty (40) days late, this equates to fifty-five days since GC submitted the payment application. Thus at the beginning of this Alachua County project GC alleges it was delayed in paying subcontractors by almost sixty (60) days due to Owner's delays payments.

Breach by Owner

GC alleges, therefore, that Owner immediately breached the contract. GC further argues that while it attempted to mitigate Owner's breach that the delays to subcontractor work caused by Owner's late payments were insurmountable. Thus any alleged breach by GC was only due to Owner's active interference in the project. This interference is an act of omission, Owner's breach of never issuing one timely periodic payment. In the alternative GC argues that once Owner was in breach of the contract that the GC could not breach.

GC alleges that the co-payee arrangement that occurred at the time of the 13^{th} pay application was an intentional effort by GC to get Owner involved in the process of paying

subcontractors. GC alleges this allowed the subcontractors to be fully informed as to the payment practices of the Owner in an attempt to hold harmless the GC for late payments to subcontractors for work performed.

As regards the Publix pad site work and foundation placement, GC testified under oath in deposition that the bid package and contract drawings did not include the Publix pad in the scope of work.

GC further alleges that excessive delay occurred with approval of all change orders. GC alleges that Owner, per Owner's inclusion of a time of the essence clause in the contract, failed in the obligation to achieve efficient processing of the change order requests. GC alleges that due to the time of the essence nature of the contract, that change order delays caused a cascade delay effect on the construction as a whole.

Allegations by Owner

Overview

Owner, with the support of expert opinion, offers detailed analysis of alleged breaches of contract by GC and resultant delays to the project. Owner is able to demonstrate numerous worst practices employed by GC. The total critique by Owner points to an unsophisticated GC that entered the job on its heels and spiraled downward from that point.

Owner alleges that a full account of GC's malfeasance is impossible to ascertain due to the GC failing to produce daily job logs and related project documentation. GC, pursuant to litigation discovery requests, did not produce daily logs, meeting minutes or subcontractor payment logs. Daily logs in particular are a known insulation mechanism to liability and standard operating procedure demands they be kept in triplicate.

Estimate and Bid Deficiencies

Owner alleges significant deficiencies with GC's estimate and bid. The Owner alleges that GC made two initial estimate blunders. GC's bid was $4,277,000. GC's estimate for all direct costs was $4,214,552. This allowed only $63,000, or a combined 1.5% for home office overhead and total profit. Owner's alleges that this was not feasible and GC was setting itself up to fail. Owner alleges industry standard is for 7% overhead and 3% profit.

Owner further alleges that GC has no credible evidence that that the Publix pad site work and foundation was excluded from the bidding requirements. The Architectural drawings clearly show the Publix pad and as such all site work and foundation placement were within the defined scope of the contract documents issued for invitation for bid. Owner's expert opines that the estimate inclusive of the Publix pad, 7% overhead and 3% profit renders a feasible bid of $4,771,559. Owner alleges, therefore, that GC submitted a bid that placed GC in an approximate $500,000 red hole at the point the contract was awarded to GC.

Change Orders, Staffing and Scheduling

Owner alleges any change order delays were due to the repeated practice of the GC submitting inflated change order requests, to ostensibly recoup the monies GC lost in submitting a short bid based on an incomplete estimate. Owner alleges that all change orders were subject to an unreasonable amount of haggling over price. Owner's expert witness, furthermore, provides analysis that the subject matter of the change orders was structural in nature and was easily resolved at the time of the final structural drawings being received by GC in mid-July. No vertical construction began until Mid-November.

Owner alleges, from the minimal records produced by GC and from other evidentiary sources, that GC did not fully staff the project until vertical construction began in mid-November. Owner alleges that staffing shortages were due to GC pulling people off one project

when it reached a level of completion and putting that staff on another project that was behind schedule. Owner alleges that such staffing plans cannot meet a schedule.

Regarding schedules, Owner alleges that GC never produced a total schedule. GC produced a schedule after all structural drawing changes were made and delivered to GC in mid-July. GC missed all deadlines on the schedule it produced.

Periodic Payments

Owner alleges that the GC mismanaged all periodic payments issued. First Owner alleges that only two of the twenty-one total pay requests were on submitted on time. Owner is silent as to Owner's timeliness of issuing payments in response to GC's pay applications. Owner simply alleges that GC mismanaged periodic payments that GC received.

Owner alleges that by mid-1986 suppliers and subcontractors were so derelict in their contractual obligations and were causing so much delay to the project that a co-payee system had to be established, wherein the Owner had oversight and direct payment participation to subcontractors and suppliers. Owner alleges the problems started because the GC engaged in a line item discount of the Schedule of Values it presented to the Owner for issuance of payment. In other words, Owner alleges that GC was crediting the subcontractors with less work completed than GC billed to Owner. Owner alleges in some instances GC was providing the subcontractors with greatly reduced payments or non-payments.

Lost Lease Income Claim

Owner alleges that it is seeking lost revenue only in the form of lost lease income. (APPENDIX O) Owner further alleges that it is only seeking lost lease income for leases that were secured and in place by the time the extended substantial completion was to occur, i.e. substantial completion dates that take into account the change order delays. Owner alleges that it is not claiming any potential lease income via speculation or projection of a percentage of the

vacant space that would be under lease if substantial completion was met. Only hard leases in hand at the time when extended substantial completion was to occur are being used for lost lease revenues.

CHAPTER 7
COMMERCIAL GC VERSUS HOSPITAL; DESIGN ERRORS AND OMISSIONS

Preface

The subsidiary of a large, national commercial construction firm contracted with a hospital for construction to include renovations and additions. This case study is excessively biased towards the allegations and position of the general contractor, as the reader will appreciate. This is due to the near overwhelming evidence to indicate that the general contractor was subject to delay caused by the design team. The owner's defense of this claim is limited, reduced to general allegations of the general contractor negligence. This case study is included to demonstrate the evolution of project design since 1993. This case study demonstrates why it is in the owner's best interest for their general contractor to participate in the design and development (D&D) phase of the project.

Project, Scope and Parties

Project

This project included both substantial renovations to an existing three floor hospital, and also some expansion construction to all three floors of the existing hospital. This is a small to medium sized hospital overall.

Scope and Sequence

Construction renovation and additions were planned for all three (3) floors of a local hospital. (APPENDIX P). Owner employed one General Contractor (GC) and requested an aggressive schedule be employed to reach substantial completion. The additions occurred vertically on the east side of the building. The square foot scope of new construction and additions increased with each floor above ground level. GC attempted to employ a phased schedule of construction that would accommodate Owner and cause the least amount of off-line

time possible. Owner had very aggressive expectations for the schedule and time requirements of the design development and construction phases of the project.

The Parties

Owner is a regional hospital in Greensboro, North Carolina. Owner engaged in a traditional bid-build plan for the renovations and additions to the hospital. Owner did not employ an owner's representative. Owner relied exclusively upon the Architect for the administration of the contract. Owner pushed for an aggressive design development phase of the contract.

Architect is a regional design firm with in-house engineering services. As such, all design documents were created and vetted through a single source, i.e. Architect.

GC is the local subsidiary of a national commercial construction contractor. GC submitted a lump sum bid, the lowest, and was awarded the contract. GC is experienced in the type of general contracting services provided to Owner. GC is the moving party (plaintiff) in the action for delay damages against owner.

Subcontractors do not play a significant role in the claims between the parties.

Facts In Common

Overview

The GC responded to an invitation to bid on a lump sum contract for hospital renovations and additions. The original bid invitation was issued on September 2, 1993, and included two hundred fifty five (255) drawings. Bid opening was scheduled for October 12, 1993. Notice to Proceed (NTP) was issued on November 12, 1993. The contract called for substantial completion in less than two (2) years. Substantial completion was not met. In fact, due to project delays that Owner attributed to GC, GC was terminated from the job in April 1996 (six months after the initial substantial completion date). A completion contractor was hired to finish

the balance of outstanding work. The completion contractor began to experience problems by November 1996.

Design Documents

During the approximate six (6) week time frame from bid invitation to bid opening, six (6) separate addenda were issued. Addenda were issued on September seventeenth, twenty-third, and twenty-ninth (October 17th, 23rd and 29th) and on October fifth, seventh, and eleventh (October 5th, 7th and 11th). Emphasis is placed on addenda being issued within twenty-four (24) hours of bid opening on 10/12/93. (APPENDIX Q)

The addenda consisted of fifty-nine (59) contract drawing reissues, two hundred sixty eight (268) bulletin drawings issued, two hundred one (201) contract drawing revisions via text narrative issued in the addenda, and three hundred and three (303) pages of specification changes. The specification changes were either new issues or reference drawings.

Change Directives

The project had a total of one-hundred twenty-seven (127) Construction Change Directives (CCD's) (i.e. directives by Owner/Architect to GC to perform work with costs and times associated with the work to be determined by stipulation or claim at the conclusion of the project). These CCD's can be summarized with a before and after date. On January 12, 1995, Owner Change Order number five (O.C.O. #5) was issued, an agreed upon change. Prior to 1/12/95, thirty nine (39) CCD's were issued. After 1/12/95, eighty eight (88) CCD's were issued. Eighty eight CCD's after the point when, arguably, 60% - 70% of the project should be completed is a good indication of the type of delays and problems in the relationship between the Owner/Architect and the GC.

Nature of Dispute

Both parties make claims in this dispute. GC claims for extended General Condition costs, acceleration costs, and for lost profits due to termination and forced non-completion of the contract. The GC alleges that Owner was in breach of the contract by issuing incomplete design documents at the time of bid invitation. GC further alleges that the Owner was in breach of the contract by issuing design documents plagued with errors and omissions. GC seeks to recover the costs of the monies it paid to the surety when the Owner called upon the GC's performance bond to complete the project.

Owner pursued action against GC's surety, i.e. GC's performance bond, for costs associated with completion of the work and costs associated with brining a completion contractor to the job. Owner defends against GC's claims for costs and damages, including recoup of the monies GC paid to indemnify the surety, by alleging that GC was the sole cause of delays on the project due to poor management, coordination, scheduling and untimely buy outs, all of which were the cause in fact of the project being delayed.

Allegations by GC (Plaintiff/Cross Defendant)

Overview of Delay Allegations

GC's alleges delay damages as the result of significant errors and omissions of all design documents. GC alleges that the design of the project was not complete at the time bids were solicited, nor at the time NTP was issued. GC further alleges that the Architect, as sole contract administrator and owner's representative, completely failed in its responsibilities as contract arbiter. Architect's design errors and omissions give rise to the GC alleging to what amounts to professional negligence.

The GC points to multiple instances and specific examples of the design team being the cause in fact of the delays that the project suffered. The GC's stance is that any and all delays

are solely due to not being provided plans and specifications that the GC could easily or otherwise construct. GC alleges that Architect's contract management and responsiveness to GC's inquiries caused further delay of the project.

GC was terminated on or about April 15, 1996. A completion contractor was retained by Owner. Owner made a claim on GC's performance bond for the delay and completion costs of the project. By October of 1996 GC alleges that the completion contractor was behind schedule and complained that said delays were due to the design not being coordinated and the drawings not being conformed. GC alleges the systemic scope of the design errors is proven by the completion contractor making allegations identical to GC.

Duty to Provide Design Documents (Spearin Doctrine)

GC alleges that for responsive, accurate, low risk bids Owner and Architect must provide design documents that define quantities, products, locations and time deadlines for construction in an organized and coherent manner. This is set forth in the AIA Handbook of Professional Practice. GC also alleges that Owner and Architect have a responsibility to review the schedules submitted by GC and remedy any target dates that Owner and Architect consider to be unachievable. Specifically Architect has the most insight into whether target dates are achievable due to Architect having the most knowledge of the status and completeness of the design documents.

GC's allegations as to the insufficiency of the design documents are allegations of a breach of an implied warranty as defined by the Spearin Doctrine. In United States v. Spearin, 248 U.S. 132 (1918), the Supreme Court first held, and its progeny have further defined, that an implied warranty exists as to plans and specifications. Specifically the person or entity supplying the plans warrants the design and materials defined by the plans and specifications will permit the intended construction within the time defined by contract. In other words there exists an implied

warranty as to the accuracy and constructability, i.e. the suitability, of the plans and specifications. The question is, therefore, whether the plans and specifications supplied by Owner and Architect could be reasonably relied upon to meet substantial completion as defined by contract. On a more basic level GC alleges that Owner has to be realistic and helpful if the project is to be a success.

Bulletin Drawings

GC alleges that Architect's excessive use and misuse of Bulletin Drawings (BD's) to substantiate the design errors omissions inherent in this project. A total of six hundred and fifty (650) BD's were issued on this project, three hundred fifty two (352) of which were issued after NTP. GC alleges that BD's were issued randomly and without consistency. GC points to instances where one BD issued in a package issued by Architect directly conflicted with another BD issued in the same package. (APPENDIX R)

GC alleges that Architect labeled many of the BD's with the term "Clarification". GC alleges that these clarifications on the BD's were actually the provision and furnishing of essential or critical design data that was not on the contract drawings. GC alleges, therefore, that the Architect attempted to remedy errors and omissions with issuance of BD's under the guise of clarification.

GC alleges that by Architect seeking to remedy errors and omissions of the contract drawings with issuance of hundreds of BD's that the Architect set up the BD's to take precedence over the contract drawings. GC alleges that this is improper. GC further alleges that this creates significant confusion and that significant confusion was created on this project by the trickle of accurate design documents being issued. GC alleges that despite numerous requests at the start of the project, throughout the project and just prior to the termination of GC, that Architect and Owner never issued an updated conformed copy of the contract drawings. GC

alleges that it is standard for a conformed set of drawings to be issued at NTP. GC states that it is impossible for the various subcontractors and trades to follow narratives and BD's that are to be considered updates to the contract drawings.

Lack of Error Free Conformed Contract Drawings

GC alleges that the need for multiple issuances of conformed contract drawings was essential in this matter. GC alleges that the design documents that were issued suffered from internal errors, omissions and conflicts. GC's analysis indicates that sixty three percent (63%) of the drawings issued did not disclose the drafter and were not checked. The lack of drawings being checked and verified created repeated problems.

Many of the updated design drawings were overlaid on the wrong design sheet, a condition that was avoidable if the 63% of the drawings were properly checked. GC alleges that the Architect relied on CAD drawings to the detriment of the project. By placing design updates on the wrong base sheet the errors provided to GC, and by extension the subcontractors, were compounded and amplified. This was manifest in numerous ways, namely repeated errors on the structural drawings.

The structural drawings suffered from the repeated absence of column line references. As a result the BD's that were issued to remedy the errors and omissions of the structural contract drawings (or what the Architect deemed "clarifications") could not be reconciled with the intended structural drawings. GC and subcontractors often had to reconcile the BD's to the structural drawings by matching up room numbers or identifying other like similar features. GC's analysis indicates that eight percent (8%) of the BD's did not have meaningful registration (location) information; that twenty seven percent (27%) of the original contract drawings issued for bid on 9/2/93, were never updated (revised) with structural changes that in fact occurred; and

that thirty eight percent (38%) of the revisions issued were overprinted on the wrong base sheets and were never corrected.

Drawing Scale and Dimensions

The overall quality of the design drawings was poor, as alleged by GC. The Architect used computer drawings and utilized small scale that worked well on the computer with the ability to zoom and pan. When the drawings were actually printed and issued the scale was too small and GC alleges that significant amount of design details that the Architect attempted to include on portions of the drawings were impossible to read.

Architect also failed to uniformly dimension the drawings or placed incorrect and conflicting dimensions on the drawings. In either event the GC and subcontractors had significant problems in trying to determine even the simplest dimensions and reference measurements. Architect relied upon marked up shop drawings to remedy the lack of dimensioning specification and definition. GC alleges that it is not an acceptable solution to use shop drawings as the sole source of design dimensions that control the project.

Requests for Information

GC alleges that the nature of Requests for Information (RFI's) speaks volumes in regards to the errors and omissions that the design documents suffered. Approximately seventy percent (70%) of the RFI's submitted concerned design clarification issues; twenty three percent (23%) of the RFI's submitted concerned construction field conditions; and seven percent (7%) of the RFI's went unanswered. (APPENDIX S)

GC alleges that the majority of RFI's were caused by incomplete, uncoordinated, incorrect and sometimes conflicting drawings. In all there were four hundred and thirty five (435) single issue RFI's submitted. Architect, furthermore, did not directly respond to RFI's submitted.

Architect often responded with Architect Engineer Supplemental Instructions (AESI's). GC alleges this tactic was an intentional means of obscuring what was an otherwise design error and omission. Architect used AESI's to forward answers to RFI's, issue BD's, issued CCD's, give instructions and solicit solutions to design problems. GC alleges that the use of the AESI's by Architect was wholly improper and was another means of compounding the mess that existed with the design documents.

GC alleges Architect was often in conflict with its own specifications or appeared to have no actual knowledge of the conditions of the job. Specifically Architect specified installation of wood handrails to match those in the operating room (OR). GC issued an RFI asking for an example of the type of wood handrail intended by the design, as there were no existing wood handrails in the OR. Architect responded to the RFI that an AESI was being drafted as there were no wood handrails on the entire job.

GC uses the elevator as another example of the design errors and omissions, due to Architect's lack of coordination of the design documents. Between 9/2/93, when the bid documents were issued, and 9/17/93, the elevator location was moved. Many of the contract drawings and BD's issued at all times after the change of elevator location showed the elevator in the old/wrong location. In total thirty percent (30%) of the contract drawings that were deemed "current" and from which the building was to be constructed showed the elevator in the wrong location. The elevator was shown in different locations on four (4) Amended Bulletin Drawings (ABD's) issued on the same date, 9/17/93.

Architect specified that the elevator was front door operable. On the shop drawings Architect marked that the elevator, per Owner's requested conditions, was to be front and rear door operable. This issue was resolved with a change order.

A total of eighteen drawings were issued specifically with column lines on the second floor near the elevator. These were comprised of three (3) contract drawings and fifteen (15) BD's. Many of these drawings showed incorrect column line reference points for the elevator, or failed to show any column line reference points for the elevator. Only three (3) of the 18 drawings were checked. The actual contract drawings were not used to construct the area at or near the elevator. An Amended Bulletin Drawing issued directly to GC was the document used to construct the area at or near the elevator. The Electrical Bulletin Drawings (EBD) were also incorrect. The electrical subcontractor never possessed a correct design drawing for the area at and near the elevator.

Design by Shop Drawing

The GC alleges that Architect attempted to design significant portions of the electrical and mechanical systems of this project by marking up shop drawings. GC alleges that if the Architect alters shop drawings to correct omissions or errors as exist in the design drawings, as issued, that this is a basis for a change order.

In fact Architect termed the HVAC drawings as schematic only, at all relevant times from the pre-construction meeting forward. GC alleges that this showed Architect's technical design deficiencies and Architect's reliance on the subcontractor to solve all design problems. GC alleges that this places the design liability and responsibility on a normally unlicensed entity.

CHAPTER 8
WINE CELLAR CONSTRUCTION DEFECT CLAIM

Preface

A physician in Tampa, Owner, contracted with a residential general contractor for the construction of a wine cellar on the first floor of the home. The wine cellar was constructed with a separate hvac system designed to keep the conditions at seventy (70) degrees Farenheit and at fifty (50) percent relative humidity (70F/50RH). Within a short time of the wine cellar being operational moisture started to accumulate on the inside of the wine cellar. The moisture accumulation caused semi-saturation of the wood storage racks occurred. Operational conditions of the wine cellar, therefore, were not as intended.

Project, Scope and Parties

Project and Scope

This project involved the construction of a wine cellar in an existing private residence. The project relied on the conversion of closet space into a functioning wine cellar.

The Parties

Owner is a private homeowner who contracted with GC for a wine cellar addition to the Owner's residence. Owner did extensive research on the design criteria for construction of a wine cellar.

GC is a small volume, local contractor with primary business of residential construction, additions and renovations. The GC was licensed in Florida and, therefore, experienced with an environment of high outside temperature and humidity levels.

There was no architect of record for this wine cellar. The wine cellar was the renovation and conversion of an existent food storage closet with Owner and GC collaborating as the design entity.

Facts In Common

Design Process

The Owner contracted with GC for addition of a small wine cellar on the first floor of the Owner's residence. The GC converted an existent food closet that separated the dining room from the garage. As an existent structure the Owner and GC avoided pulling any permits for this work or generating any drawings for the design of this wine cellar. The GC discussed with Owner what GC believed to be a working design.

The Owner considered himself something of a wine connoisseur and researched extensively the design requirements of a wine cellar. Owner conveyed to GC the specific operating conditions of the working wine cellar. GC renovated the food storage closet to meet the operational standards detailed by the Owner.

The GC proposed numerous construction designs to the Owner. The Owner expressed certain budgetary constraints. The Owner discussed the various price parameters versus performance expectations. Owner agreed to the design details and price of the wine cellar, as-built.

The wine cellar sits in one corner of the first floor. One small wall is the common outside wall; one long wall is the common wall with the garage; the other long wall is the common wall with the dining room; the fourth wall is the entrance to the wine room and faces the kitchen.

Construction Materials and Techniques

The outside wall and garage wall are eight inch concrete masonry unit (CMU) construction. The interior of the CMU has fur strips with expanded poly insulation (Styrofoam). The interior common walls are wood framing with batt type fiberglass insulation. The ceiling is insulated. All walls and ceiling utilize green board as the gypsum product. Green board is

gypsum board with a moisture resistant paper. All green board was covered in a skim coat of stucco.

The GC's renovations included stripping the inside of the intended wine cellar of all existent gypsum board. GC insulated the walls and ceiling as noted. GC then installed greenboard and finished with a skim coat of stucco. Electrical additions included a 220-volt feed for a ductless split system to maintain conditions in the cellar. All 110-volt needs were pre-existing.

The wine cellar utilized a ductless split system, designed to keep conditions at seventy degrees Fahrenheit (70º) maximum, with a relative humidity of fifty-five percent (R.H. 55%).

Manifest Problems

Once the wine cellar became operational and summer like conditions persisted in the outside environment, the wine cellar exhibited moisture retention on the inside stucco walls and ceiling.

The moisture collection on the inside of the wine cellar caused the wine racks to show signs of moisture retention, to include swelling and discoloration. Additionally some degrading of corks was visible and documented.

The Owner responded to the moisture in the wine cellar by lowering the temperature of the wine cellar. The Owner believed that if the hvac ran at a colder temperature the unit would have greater evaporation potential and would, therefore, rid the cellar of the moisture build-up. This did not occur. The colder that the Owner ran the unit the more it appeared moisture collected on the inside stucco walls.

Contract Omission

The contract signed between the Owner and GC did not contain the Notice of Construction Defect Claim language that is required by law per §558, Florida Statute.

Nature of Dispute

Owner contracted with GC to build a wine cellar in the Owner's residence. The construction techniques are described above.

The Owner seeks correction of the moisture problem in the wine cellar. The Owner seeks replacement of wine racks, mold remediation and construction of a wine cellar that does not accumulate moisture on the inside walls. Owner wants a humidity controlled wine cellar. GC contends that is built the wine cellar to the specifications of Owner. GC's position is that any further construction or remediation will be at cost to Owner.

Allegations by Owner

Owner alleges that the GC is liable for a construction defect. Specifically Owner alleges that GC is liable for a deficiency in the construction and remodeling of the wine cellar, where such construction suffers from defective design, defective components and does not meet the accepted trade standards of good and workmanlike construction.

Breach of Express Warranty and Implied Warranty of Fitness

Owner further alleges that GC is in breach of the express warranty in that Owner alleges the GC made affirmative statements that GC would construct a wine cellar to function to the specifications defined by the Owner. Those specifications were conveyed to GC, that the room shall be no more than seventy (70) degrees Fahrenheit and no more than fifty (50) percent relative humidity. Owner alleges GC affirmed the desired specifications of the wine cellar were realistic and achievable.

Owner lastly alleges that GC is in breach of an implied warranty of fitness. This claim is based on the alleged fact that the wine cellar cannot be used for its intended purpose. The implied warranty of fitness claim is based solely on the fact that Owner wanted a functioning wine cellar and GC contracted to deliver a functioning wine cellar. GC was bound, therefore, to

deliver the product that GC contracted to deliver. The wine cellar, as alleged by Owner, is non-functional as it traps condensation on the interior stucco walls, causing ruin to wine racks and corks.

Owner alleges that GC made affirmative promises to Owner, that the construction of the wine cellar would be easy, straightforward and not produce any delays or problems. Owner asserts that this was a warranty in regards to the performance of the wine cellar. Owner alleges that GC assured Owner that a design professional was not necessary for the construction of this wine cellar, in response to Owner's inquiries of the need to hire a design professional for drafting plans for the wine cellar. Owner further alleges that GC indicated that no entity at the county or city permit review level had any experience in wine cellar construction, that no codes exist in regards to wine cellars and that Owner would only be opening up a can of worms by seeking municipal inspection and permitting of the wine cellar.

Construction Expert Opinion

The Owner hired a construction expert who rendered certain opinions concerning the condensation problems of the wine cellar. The expert opines that the design is inadequate to prevent the transmission of water vapor across the walls. The significant difference in temperature and, more importantly, relative humidity between the wine cellar and the two exterior walls is targeted as the source of the problem. The two exterior walls are preexistent cmu construction and there was no significant vapor barrier applied to either. The vapor transmission that occurs, even to a minimal extent, is amplified as the hot humid outside air migrates into the wine cellar. The air in the wine cellar has a lower dew point and cannot hold the moisture that is migrating into the room, thus the condensation problem.

The Owner retained expert makes several suggestions that include applying specific vapor barrier applications to the outside surface of the exterior CMU walls. This is an attempt to

prevent the moisture from migrating into and through the CMU. The expert suggests application of products similar to those that are applied to below grade CMU walls. Expert also opines that foil backed gypsum board be applied to walls of the wine cellar that are common with interior areas of the home, as less vapor transmission will be occurring at these locations, including the ceiling which is common with the second floor of the home.

Allegations by GC

Design Defect Not Construction Defect

GC alleges that all limitations of the wine room design were discussed with Owner. GC alleges that GC provided Owner with alternative construction designs and Owner, limited by budget, chose the design that was constructed. GC further alleges that GC advised Owner to hire a design professional for the best design results of the wine cellar. GC alleges that Owner held himself out to be an expert in the design specifications of the wine cellar. Owner utilized GC's knowledge of construction materials and costs to choose the design that Owner wanted, within Owner's budget.

GC alleges that there is nothing inherently wrong with the quality of construction, that there is no construction defect per se. GC contends that the problems with the wine cellar are design issues and GC never held itself out as a design professional. GC alleges it discussed with Owner, in response to Owner inquiry, the lack of municipal inspectors, in GC's opinion, with knowledge of wine cellar construction and that all municipal inspectors would be looking for was the sufficiency of construction not whether the wine cellar was viable in operation.

GC alleges that this was, in fact, an easy straightforward renovation and that the Owner assumed implicit control of the design elements. GC alleges that it offered Owner numerous materials and methods of construction that could be possible. GC emphasizes that there was never a representation to Owner that GC was any type of design professional.

HVAC System Not in GC's Scope

GC alleges that the Owner installed the hvac system for the wine cellar per separate contract with an entity that Owner represented as being skilled and knowledgeable in the installation of wine cellar mechanical systems. GC simply obtained specifications from this mechanical supplier and stubbed out, framed in and otherwise provided the necessary conditions that facilitated the mechanical subcontractor to simply install the mechanical system.

As such GC alleges that the mechanical system may be sized incorrectly or not of the type that is necessary to achieve the Owner's desired operating specifications. Furthermore GC alleges that the Owner did not want to enter a formal contract that included notices of claims rights and procedures per Florida law, i.e. Chapter 558, Florida Statutes. Owner conceived and abbreviated contract that simply stated the amount due and owed to the GC for general home repairs. GC points to this fact to allege that Owner was aware and accepted the potential shortcomings of the wine cellar construction and was, in fact, experimenting with construction techniques to determine what was ultimately successful.

Relevant Portions of §558.002, Florida Statutes (2007)

558.002 Definitions

> (1) "Action" means any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of real or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect.
>
> (2) "Association" has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(9), or s. 723.075.
>
> (3) "Claimant" means a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.

(4) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

(a) Defective material, products, or components used in the construction or remodeling;

(b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;

(c) A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

(5) "Contractor" means any person, as defined in s. 1.01, that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.

(6) "Design professional" means a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor.

(7) "Real property" or "property" means land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes and excluding public transportation projects.

(8) "Service" means delivery by certified mail, return receipt requested, to the last known address of the addressee.

(9) "Subcontractor" means a person, as defined in s. 1.01, who is a contractor who performs labor and supplies material on behalf of another contractor in the construction or remodeling of real property.

(10) "Supplier" means a person, as defined in s. 1.01, who provides only materials, equipment, or other supplies for the construction or remodeling of real property.

558.005 Contract provisions; application

(1) Except as otherwise provided in subsections (3) and (4), the provisions of this chapter shall apply to every contract for the design, construction, or remodeling of real property entered into:

(a) Between July 1, 2004, and September 30, 2006, which contains the notice as set forth in paragraph (2)(a) and is conspicuously set forth in capitalized letters.

(b) On or after October 1, 2006, which contains the notice set forth in paragraph (2)(b) and is conspicuously set forth in capitalized letters.

(2)(a) The notice required by paragraph (1)(a) must be in substantially the following form:

CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

(b) The notice required by paragraph (1)(b) must expressly cite this chapter and be in substantially the following form:

CHAPTER 558 NOTICE OF CLAIM
CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

CHAPTER 9
ALASKAN ROCKET FACILITY

Preface

The Owner, via state funding and federal grants, pursued construction of a rocket launch facility on Kodiak Island. The construction of the facility occurred in three (3) phases, bid packages. Lowest responsive bid was awarded the fixed price contract. Phase I was site work. Phase II and Phase III were construction of the numerous separate buildings, assemblies and facilities that compose a launch complex. This case study only concerns the claims between Owner and the General Contractor (GC) who built Phases II and III. Of importance is that several aspects of this project were technologically unique and new to implementation. The claims between the Owner and the GC concern a small portion of work that is the basis of Substantial Completion not being issued.

Project and Parties

Project

This project involves the construction of a rocket payload processing, assembly and launch facility on Kodiak Island, Alaska. The

The Parties

Owner is a state chartered corporation, formed for the sole purpose of developing a commercial rocket launch facility. The Owner relies on state and federal grants as the funding source. Owner further relies on a specialized Architect Engineer firm as the Owner's agent and contract management entity.

General Contractor (GC) is a large commercial contractor located in Seattle, Washington. GC is experienced with doing work in Alaska having completed thirty eight (38) projects in Alaska. At the time of prequalification and bid, GC had numerous ongoing Alaska jobs. GC has

a history of successful completion of jobs in Alaska, and thereby is familiar with the conditions and limitations of working in the Alaska environment.

Architect Engineer (AE) is a single entity, specialty firm located in Melbourne, Florida. AE has significant experience in providing design and engineering services for N.A.S.A., in both Florida and Texas, and other private launch facilities in the United States. AE was retained initially to assist Owner in developing criteria upon which to base design. This included choosing location. AE's involvement continued as the design entity and the sole agent for Owner engaging in contract management.

Facts in Common

Design and Development

An Alaska state chartered corporation, Owner, was created for the specific purpose of bringing online a commercial orbital and sub-orbital rocket launch facility. The business plan included providing services to public and private clients. Private clients include communication related payloads. Besides research payloads, public clients of course included N.A.S.A., the United States Air Force and other military related contract business. In fact the construction of the facility was interrupted for two Air Force launches. Launches since completion include the two (2) tests for the U.S. missile defense shield.

Owner, not being sophisticated in the technical specifications of building such a launch complex, contracted with a design engineering firm (AE) in Melbourne, Florida. This AE brought specific relevant experience to the table, having worked with N.A.S.A., the U.S. Air Force and other public entities in all design and construction aspects of manned and unmanned launch facilities. As such the Owner relied upon the AE to provide technical analysis and consulting services while feasibility studies were conducted. The AE then assisted in choosing

the peninsular location for the intended launch site. After more than eight months of preliminary development, design work began in earnest in 1994.

Owner and AE spent approximately three (3) years on design and development. This project was intended to be a fixed price, hard bid construction contract and as such the GC was not included in D&D and did not offer input as to design, value engineering or the like. The design drawings and specifications were complete, with no expectation of delay due to design errors and omissions.

Unique Technology

It is important to note that the Owner, and AE at Owner's behest, was seeking to implement design ideas that existed at no other facility in the world. In order to make the Alaskan site truly accessible the design team sought to insulate from weather conditions as much as possible. In Florida the launch vehicle and payload are established in a Vertical Assembly Building (VAB) and slowly wheeled to the launch pad. This is impossible in Alaskan conditions due extremely high winds and weather that has the tendency to quickly deteriorate at most times of year.

The Alaskan facility was designed with a track on which a Space Craft Assemblies Transport (SCAT) building could move between the Integration Processing Facility (IPF) and the Launch Support Structure (LSS). An entire rocket could be assembled, fit with payload and moved in segments to the launch facility with zero exposure to outside conditions. The LSS also was designed to rotate at a center point, to provide for assembly of the rocket on the launch pad with zero exposure to outside conditions. The rocket is entirely prepared for launch in interior conditions. Rolling assembly buildings and a rotating launch pad required unique design conditions.

Bid and Contract

Phase I was all site work. It was placed out for bid just prior to November 21, 1997 (11/21/97). It was awarded to a large site work contractor located in Anchorage. Phase II was all remaining work. Phase II was put out for bid on 11/21/97, with a bid opening date set for February 11, 1998 (2/11/98). A pre-bid meeting was held that clearly established the Owner's expectations for substantial completion. At the pre-bid meeting Owner stressed the time of essence nature of the contract. Owner further indicated potential construction delays due to U.S. Air Force use of facility prior to full completion.

During the bid period seven (7) addenda were issued to clarify the design documents issued. On bid day, 2/11/98, all bids exceeded the current funding level available to the Owner.

Owner split the construction into Phase II and Phase III. The total project consisted of five (5) unique buildings: the Launch Control Center (LCC); the Payload Processing Facility (PPF); the Integration Processing Facility (IPF); the Space Craft Assemblies Transport (SCAT); and the Launch Support Structure (LSS).

Bid documents were reissued solely for Phase II, with full resolution of all design clarification issues raised in the seven (7) addenda during the first bid period. Phase II bids were opened on April 8, 1998 (4/8/98) and GC won with the lowest responsive bid of sixteen million, one hundred ninety thousand dollars. Owner and AE obtained ALL necessary permits for construction prior to issuance of the bid document, except a domestic water permit to be obtained by the GC.

The parties entered a lump sum contract with numerous detailed provisions. Graduated Liquidated Damages (LD's) were defined. Within fifteen (15) days of the contract signing GC was required to provide AE the list of the manufacturers of all products to be used. Any substitutions were required to be approved during the bid phase. Within thirty (30) days of

signing the contract the GC was required to provide AE a confirmation list of subcontracts and material delivery dates. AE provided GC with a schedule for submittals. GC could only submit items for submittal during the time periods defined on the submittal schedule. This was all defined in the General Conditions to maximize efficiency as determined by AE.

Notice to Proceed and Substantial Completion

Notice to Proceed (NTP) was issued on April 20, 1998 (4/20/98). Phase II was scheduled to meet substantial completion, as defined by the contract, in three hundred thirty five (335) days, on March 20, 1999 (3/20/99). Total completion of Phase II was contracted to occur thirty days later on April 19, 1999 (4/19/99). GC staff did not arrive at the jobsite until June 15, 1998, (6/15/98), fifty six (56) days after NTP was issued. This equates to GC staffing the project seventeen percent (17%) between NTP and substantial completion.

GC management staff on site consisted of five (5) persons. There were two Project Managers, one Project Engineer, one Superintendent and one person responsible for Quality Control. Of this group the longest tenure with GC was three (3) years. Some of this on-site staff had construction management degrees, some had business degrees and some had no formal education.

During the construction of Phase II the Owner secured the funding for Phase III. This scope of work was negotiated with the GC for a price of nine million ($9M) dollars. Rather than enter a separate contract, Phase III was tied to the existing contract between the parties via Owner Change Order (O.C.O.) #10. O.C.O. #11 was a supplement adding another three hundred fifty thousand dollars to the contract price. In total Phase III added nine million three hundred fifty thousand dollars ($9,350,000) to the contract price. The Phase II contract price was sixteen million, one hundred ninety thousand ($16,190,000). The total contract price for Phase II and

Phase III was twenty five million five hundred forty thousand dollars ($25,540,000). Change orders added in excess of a million dollars to the contract price.

The addition of Phase III to the contract, via O.C.O. #10, included changes to some of the key contract specifications. A new schedule of liquidated damages was created, wherein progressive LD's were maximized in a shorter time. New substantial completion and completion dates were agreed upon. The GC and Subs agreed to waive all claims for the period prior to March 15, 1999 (3/15/99). Owner provided a built-in incentive to complete the Payload Processing Facility (PPF) by date certain.

Phase III provided for an additional two hundred thirty six (236) days to achieve substantial completion. O.C.O. #19 added an additional eight (8) days. Phase II contract, inclusive of Phase III, i.e. O.C.O. #10, set substantial completion for January 7, 2000 (1/7/00).

The G.C. submitted a schedule the day after O.C.O. #10 was executed. This schedule showed substantial completion one hundred two days after the date, 1/7/00, established by O.C.O. #10. Subsequent schedules submitted by the GC showed substantial completion one hundred ninety seven (197) and then one hundred eighty eight (188) days later than the 1/7/00, substantial completion date set by O.C.O. #10. Each schedule update showed more and more slippage.

Owner Termination of GC

Owner offered numerous incentives to get the project to substantial completion. On occasion Owner would offer financial bonuses or other incentives to ensure that substantial completion was achieved.

In early August 2000 the GC walked off the project declaring substantial completion was achieved. Substantial completion was contracted for 1/7/00. AE did not issue substantial completion when GC walked off project in 8/00. On August 29, 2000 (8/29/00), the GC, Owner

and AE agreed to conditions for GC to complete and correct all outstanding work by September 30, 2000 (9/30/00). This was two hundred and sixty seven (267) days after the contract date 1/7/00 substantial completion.

On September 20, 2000, Owner declared GC in default of the contract, issuing notice to GC. Seven (7) days later, on September 27, 2000 (9/27/00) Owner terminated GC's contract.

It is important to note that the U.S. Air Force utilized the launch facility on two (2) occasions during the middle of construction. On November 5, 1998 (11/5/98), the Air Force launched the first Atmospheric Interceptor Technology (A.I.T.) test missile. On September 15, 1999 (9/15/99), the Air Force launched the second A.I.T. test missile. During both launches the facility was restricted and construction was disrupted for a period and suspended for a shorter period. In addition the Air Force reconfigured, re-wired and made substantive changes to parts of the electric and control systems to accommodate the launch needs.

Nature of Dispute

Unlike most claim disputes that involve termination of a GC the construction of this facility was, more or less, complete. The dispute between the parties concerned issuance of substantial completion. The facility was operational with launches occurring while construction was ongoing. This claim dispute concerned the last percentage of work, mainly punch list items and items deemed to be latent defects. There was no completion contractor brought to the job and no claim on bond. The Owner filed a claim for liquidated damages (LD's) and the GC responded with a claim for delay damages.

The Owner claims there exists just over four hundred thousand dollars ($403,931) in mechanical latent defects and just over four hundred fifty thousand dollars ($451,943) in electrical latent defects. (APPENDIX T). The latent defects are, arguably, realized only due to

the use of the facility and are not the common patent punch list items. In addition there were other ongoing, traditional punch list items that Owner argues prevents substantial completion.

The GC claimed it reached substantial completion, at the latest, when the GC walked off the job in August 2000. The Owner and, more importantly, the AE disagreed that substantial completion was appropriate in August 2000. Inspections by Owner, AE and retained consultants continually yielded long lists of "critical", "necessary" and "required" corrections to work installed. The work in question mostly concerned mechanical and electrical systems. Once the GC was terminated the Owner and AE were in no rush to issue substantial completion. As of June 4, 2001 (6/4/01), once all claims were filed by all parties, the AE would still not issue substantial completion for the PPF, IPF, SCAT or LSS. Only the LCC was designated substantially complete.

On March 1, 2001 (3/1/01) the Owner submitted two claims for Liquidated Damages (LD's). (APPENDIX U). The first claim is solely for the Payload Processing Facility (PPF) and covers the periods August 23, 1999 to December 8, 1999 (8/23/99 – 12/8/99) and then from December 8, 1999 to termination on September 27, 2000 (8/23/99 – 9/27/00). The LD's claimed for the PPF total one million two hundred eighty three thousand dollars ($1,283,000). The Owner's isolation of the PPF claim is based on the fact that the PPF was a unique part of the construction and substantial completion of the PPF would allow mitigation of loss.

The Owner's second LD claim is for the remainder of the facility construction. The LD period is August 23, 1999 to March 1, 2001, (8/23/99 – 3/1/01), the date of claim filing. The Owner's second LD claim totals one million nine hundred three thousand ($1,903,000). In sum the Owner claims combined LD's in the total amount of three million one hundred eighty six thousand dollars ($3,186,000).

The GC's claim, in summary, seeks the difference between what the GC bid and what the GC spent. (APPENDIX V). On March 27, 2001, the GC submitted two claims. The first claim, based on the total cost approach, covers twenty-two (22) items and totals eleven million seven hundred ninety four thousand three hundred eighty six ($11,794,386). This first claim covers specific delay damages alleged by GC. The GC's second claim is based on the modified total cost approach and totals thirteen million one thousand two hundred fifty four dollars ($13,001,254). The GC's second claim is for extended General Condition costs. The GC adds one million nine hundred eighty two thousand two hundred seventy one dollars ($1,982,271.00) as 20.2% to account for overhead, profit, bond, insurance, claim preparation costs and interest. The GC's claim in total is for twenty six million seven hundred seventy seven thousand nine hundred eleven dollars ($26,777,911).

The Owner claimed and unilaterally recovered Liquidated Damages by withholding the funds of GC's pay application twenty seven. In addition the Owner withholds retainage. It is uncertain if the Owner used these funds to offset the claim made against the GC's performance bond.

Allegations by Owner

Owner alleges that it held pre-bid meetings to specifically convey that need for the project to finish on time. Owner further alleges it conveyed the extremely technical nature of the project and the need to have as many of the fine points resolved up front, as possible. Owner alleges that GC sought to secure Phase II, knowing that it would more likely be awarded Phase III. Thus GC's performance in Phase II belied the actually competency of GC on the project as a whole.

Schedule

Owner alleges that GC never intended to meet substantial completion dates. GC entered into O.C.O. #10, the Phase III addendum to the contract, and GC immediately submitted a schedule that exceeded the agreed upon revised substantial completion by six months. Owner alleges that the six hundred one (601) days that GC scheduled to achieve substantial completion for Phases II and III was unrealistic. Owner contends that GC never submitted a feasible schedule. The record substantiates that the GC anticipated being able to gain compensable time extensions as well as increased profit from change orders. Owner points out that the GC never met one milestone date that it set. (APPENDIX W).

Owner states that GC provided schedules that were structurally not feasible. Owner submitted a two hundred (200) activity bid schedule and represented that the working schedule, required for submission and review by contract, would be significantly more complex. The working schedules submitted by the GC never exceeded four hundred (400) items. Owner states the schedules for a project of this complexity required between one thousand five hundred and two thousand (1500 – 2000) items. Owner does not contend that the GC manipulated the schedule to show false progress, but simply that the schedule was weak from inception.

When Owner brought up the scheduling issues to the GC, the GC's alleged response was that the start finish dates in the submitted schedules were for payment purposes only. Owner contends that this position by GC raises the issue of fraud, if GC was submitting payment application based on a schedule that had not bearing to reality. Owner shows that the as-build schedule compiled by the GC was also ripe with errors and did not reflect actual completion dates. All activities took far longer to complete than GC planned, not just activities in either parties' claims.

Management Issues Causing Delay

GC delays were self induced as the GC's plan of attack did not seek to maximize progress in segments. For instance the GC scheduled the same activity sequentially on each part of the project and would not start simultaneous activities until the previous activity completed. GC progressed in too linear a manner and did not place increased focus on any one aspect of the project. One of the first negative consequences was that all of the initial concrete work was delayed until the winter.

Another incident Owner points to is that steel fabrication subcontractor for the vertical portion of the Launch Support Structure (LSS) informed GC that, at minimum, it would take thirteen (13) months from date of Order to delivery of steel at the docks. Despite this knowledge the GC allowed this aspect of the project to suffer. GC is arguing for substantial completion, at earliest, that is one hundred and fifty nine (159) days late. Owner contends not only is LSS substantial completion later than this, but that the GC's disregard for material delivery is the reason that substantial completion was not met and forms the basis for LD's. Owner uses this steel delivery example to show that GC intentionally provided completion dates it could not meet.

Owner alleges that GC had a weak staff, with not one person on staff having more than three (3) years of experience with the GC and, by extension, the complexity of the launch facility project. GC had nine (9) other projects ongoing in Alaska worth fifty five million dollars ($55M) and short staffed the launch complex job. Owner points to the fact that the GC staff did not arrive on the jobsite for approximately sixty (60) days once NTP was issued.

Basis of Withholding Substantial Completion

Owner points out that the supplementary general conditions of the contract specifically state that Owner may be jeopardized if substantial completion is issued without all permits,

approvals, licenses and other documents from any agency with jurisdiction to assess the beneficial occupancy of the work. As such Owner contends that from the time GC was terminated until May 6, 2001 (5/6/01), after Owner filed the LD claim, that the punch list showed seventy four (74) incomplete items. Thirteen (13) of these seventy four (74) items the Owner deemed critical for the intended use of the facility. These critical items all concern redundancy and standby systems, which Owner contends prevent substantial completion from occurring.

Owner states that to issue substantial completion with these critical punch list items outstanding will be a liability issue for the Owner and AE. (APPENDIX X). Owner contends it has a duty to mitigate any known potential hazard and these unresolved punch list items are more akin to latent defects and issuance of substantial completion causes Owner to accept all liability that should arise with these critical punch list items. Owner states that the GC cannot claim substantial completion is met without otherwise addressing and completing the punch list work presented to the GC and the Subs. The cost of the punch list work is wholly the responsibility of the GC. Unless and until GC corrects the punch list items to the satisfaction of AE and other consultants employed by the Owner, the AE is under no obligation to issue substantial completion.

Response to GC's Claim

Regarding the claim presented by the GC, the Owner points out that the GC goes down the impossible road of trying to quantify specific delays on individual activities. The reason, Owner alleges, that the GC does not state how many days delay outside influences, design errors and omissions or climate had on the project as a whole is because the GC never had an accurate schedule for the whole project. The GC, thus, is trying to quantify as much individual delay as possible to obscure the fact that the GC has no timely progression and schedule to rely upon.

The GC's claim is prone to huge overstatements. The Modified Total Cost Approach, known as the Eichleay formula, is inapplicable unless the Owner actively interferes to effectively halt work or issues a stop work order and the GC cannot mitigate the damages with other work. That did not happen here. More importantly the GC is taking the most generous analysis with calculation of alleged damages.

Instead of doing monthly equipment rental cost averages, the GC did daily averages for a select period. The difference is monthly estimated costs at two hundred ninety thousand ($290,000) versus more than three million ($3.3M). The GC did not supply or submit any methods or calculations for delays. The GC also did not submit any methodologies and factors for productivity losses. The GC offered no specificity, derivations or calendar dates that delays allegedly in fact occurred. The GC exhibited reluctance and at times did not respond to Architect's Information Requests (A.I.R.).

Owner points out that the GC previously performed over thirty eight (38) projects in Alaska, worth several hundred million dollars. This GC was well aware of conditions in Alaska and was competent to plan, schedule, staff the project, coordinate material shipping and work with the weather conditions. GC represented it had these capacities upon qualifying to bid for the work. Owner contends that GC simply got lazy and dropped the ball in not finishing the project to full substantial completion. Owner contends that GC and GC's Subs did not accept that Owner needed completely operational facilities.

Termination of GC

Due to Owner termination of GC, for cause, the Owner made a claim against the GC's surety for completion of the work. The Owner alleges that the GC repeatedly failed in attempts to complete the punch list items that were repeatedly presented to it. Owner alleges that the facility is not fully functional and poses liability issues unless and until the punch list items are

fully completed. GC's termination and claim against the GC's bond allowed the Owner to address what Owner considered the items preventing issuance of substantial completion.

Owner admits that the majority of the unfinished or punch list items are electrical or mechanical in nature. Owner also makes claim against the performance of the siding in the Payload Processing Facility (PPF) which exhibited a problem in allowing significant air intrusion and exchange in the building. There also existed an issue with the siding allowing excessive rain water intrusion. Owner claims that in the pre-bid meeting Owner stressed the need for siding to withstand high winds and horizontal rain.

Owner also makes a claim against the integrity of the paint on the structural steel. The paint is a requirement to protect against the elements of the coastal environment. Painting of the structural steel was also a requirement of providing facilities that were maintained to the highest degree as required by the nature of the launch facility. As such it was imperative that the paint on the structural steel perform.

Allegations by GC

GC filed two claims based on the premise of Delayed Acceptance of Substantial Completion. The GC claims that it met substantial completion on all buildings and that the Owner and AE refuse to formally issue substantial completion. GC claims that it will be impossible for substantial completion to ever be issued based on the standards adhered to by Owner and AE, standards that GC claims are unreasonable under the circumstance.

Delays Due to Design

This launch center is absolutely unique. Nowhere else in the world does a launch complex have the capabilities for unmanned payload launches as does this facility. The GC points out that the permitting authorities were without perspective or knowledge as to this facility. The

Owner and the AE were required to hold information and educational sessions regarding the technologies and design criteria of the launch facility.

GC alleges that AE is self motivated in not issuing certificates of substantial completion. The contract documents vest AE as the sole entity to determine substantial completion. GC alleges that many of the items claimed to impede substantial completion are, in fact, latent design issues not latent construction defects. GC points out that most if not all of the items AE states are delaying issuance of certificates of substantial completion are issues with systems, electrical or mechanical.

The GC alleges that it put together the building and systems as exist on the drawings. If the systems don't work or are not working as designed, GC alleges these are design defects. If this facility incorporates cutting edge designs then the Owner and AE should expect some glitch and delay in getting all systems to operate as intended. These are design bugs to be ironed out, not construction flaws to suspend issuance of certificates of substantial completion.

GC uses the example of the Space Craft Assemblies Transport (SCAT) building as evidence of AE ironing out design issues on GC's dime. The SCAT is a building that travels between the Integration Processing Facility (IPF) and the Launch Support Structure (LSS). The purpose of the SCAT is to allow for complete rocket and payload assembly via interior, climate controlled conditions. This is a unique design concept, without a working model elsewhere.

The AE required that the GC demonstrate the working nature of the SCAT. The AE used the demonstration to note design flaws, made modifications and required the GC to implement the modifications under the pretext that the GC was responsible for construction defects. GC alleges that the AE's actions and demands violate the Spearin Doctrine. The Spearin Doctrine, derived from a U.S. Supreme Court case, places an affirmative obligation on the Owner and AE

to supply construction plans and specifications that are feasible, constructible and will work. The GC states that if it builds in conformance with the plans and specifications that it is not responsible for the functionality of the design. At minimum the GC claims it should not have to "test" or be responsible for the design performance of the SCAT or any other design component of this project.

The GC contends that the issue with the SCAT is representative of the greater tension between the GC and the AE on this rocket launch facility project. The GC is only responsible to build what the AE provides via plans and specifications. If the unique design aspects of this project require that the AE make design changes once the functionality of the design is tested post-construction, the GC contends that if the GC is not held harmless for subsequent design modifications violates the Spearin Doctrine. GC alleges that any design changes post-construction, whether for feasibility, functionality or otherwise, are compensable to the GC for both time and cost.

GC alleges that AE relied too heavily on CAD drawing to the detriment of designing a building that could be built as drawn. The AE never considered how to build it. GC alleges that the tolerances on the AE drawings were simply not feasible. The CAD drawings were very accurate, but not realistic to build with exactitude. GC alleges that the AE had a vision of the glass half empty, as the AE measured the GC's success against the CAD drawings.

On this point the GC contends that the AE was overly concerned with the Owner and never gave any benefit of any doubt to the GC. The AE staff, excluding management, was mostly Alaskan residents, locals. These were not highly trained professionals in high technology construction. GC contends that the AE local staff defaulted to a position of animosity or

contempt for the GC due to on-site management of AE expressing uncertainties with GC's performance. GC contends this created greater communication issues.

Assertion of Substantial Completion

GC disputes the failure of all buildings except the Launch Control Center (LCC) to reach substantial completion. GC claims that the AE will not issue substantial completion on all buildings due to a very small punch list that is confined to items the GC contends are design flaws and are subject to change order work, not contract work. GC further defends any delays that occurred as either due to weather or compensable delays Owner using the facility while construction was ongoing. (APPENDIX Y).

Specifically the use of the facility while construction was ongoing caused something of a nightmare, GC contends. The U.S. Air Force made substantial changes to existing electrical systems in LSS, in order to make the facility conform to Air Force requirements and allow use of military proprietary technologies. This was in addition to physical disruption that occurred during the time that the Air Force used the facility. Between August 1, 1999 and October 1, 1999 (8/1/99 – 10/1/99) the Air Force declared a one hundred fifty foot (150') exclusionary radius around the LSS. GC contends this interfered with progress in good weather. GC also contends that July 2000 was disrupted due to a Lockheed Martin launch. GC states that while July 2000 is beyond the time of contracted substantial completion, that other compensable or excusable delays made it reasonable that construction was ongoing in July 2000. Owner further delayed contractor by scheduling a Lockheed launch in July 2000.

The GC claims the following in regards to substantial completion. The Launch Control Center (LCC) reached substantial completion sixty (+60) days before the contracted date of January 7, 2000 (1/7/00). The Payload Processing Facility (PPF) reached substantial completion fifty nine (+59) days before 1/7/00. The Space Craft Assemblies Transport (SCAT) reached

substantial completion eight (+8) days before 1/7/00. The Integration Processing Facility (IPF) reached substantial completion one hundred thirty nine days (-139) after 1/7/00. The Launch Support Structure (LSS) reached substantial completion one hundred fifty nine days (-159) after 1/7/00. The delays to the IPF and the LSS the GC, in its claim, attributes wholly to the Owner's use of the facility and various circumstances beyond the GC's immediate control.

The Claim

As stated the GC seeks reimbursement for the difference between the contract price and the amount GC expended. GC makes this claim via claim for all monies expended, irrespective of the contract or payments pursuant to the contract. GC's claim strategy relies on the allegation of Owner breach of contract to allow for complete recovery of actual monies spent until the time of contract termination. (APPENDIX Z).

GC alleges that the reason the Owner terminated GC was for Owner to have direct control over the subcontractors. GC previously walked off the job in protest of having substantial completion withheld due to items that GC considered the tweaking and making functional of design specifications. GC considers that the Owner and AE made an end run by terminating the contract and relied upon a remedy what was otherwise not available to correct and complete design errors and omissions. Once the Owner claimed on the GC's bond the GC was left to argue with the surety about the appropriateness of completing design issues that the Owner cloaks as construction defects. GC points to the total claim against the surety being no more eight hundred thousand dollars ($800,000) and being almost exclusively composed of electrical and mechanical items.

Specific Delay Claim Issues

Weather

All bidders were pre-qualified for experience in Alaskan construction. All subcontractors intended to be used by the GC were also required to pre-qualify with Owner. A significant aspect off the prequalification was familiarity with the weather that plays such a factor in construction in Alaska generally and north Alaska specifically.

Owner contends that weather in and of itself cannot be the excuse for delay and will not excuse the imposition of Liquidated Damages. Owner contends that weather delays are only the basis for delay if the weather is so unusual and not reasonably anticipated for the specific season in the specific geographic location.

The GC claims a total of one hundred ninety (190) days of weather delays. GC claimed days beyond the contracted substantial completion date of 1/7/00. The basis of the GC's weather delay claim is the sum of all days that were either of below average temperature or of conditions more severe than historical data suggests as "normal".

Owner contends that the GC's use of weather delays is invalid. Owner alleges that GC makes no showing that the weather in fact on any day actually prohibited construction. Owner contends that if the temperature on a day was minimally below historic averages that no delay automatically results from this. The GC offers no other proof that conditions were excessively abnormal as to prevent or interfere with ongoing construction. Owner also points out that the weather delays in GC's claims differ significantly and far exceed the weather delays shown in all of GC's schedules. Owner relies upon Army Corp of Engineer data which shows an average of twenty (20) expected days of weather delay for the contract period. The GC's own logs only show sixty nine (69) lost days until termination and only thirty nine (39) lost days for the contract period, ending on substantial completion of 1/7/00.

Surety Costs

GC claims for the monies paid by the surety pursuant to Owner's call on the bond. The resolution of this claim depends upon the validity of GC's termination.

Labor Productivity

GC claims labor productivity loss due, primarily, to Owner use of the facility and due to weather. Owner alleges that productivity loss was project wide and cannot be attributed to labor. GC's claim alleges only estimated production loss due to labor and does not offer an actual loss per scheduled item.

Heat, Cover, Snow and Concrete Forms

GC claims seventy nine thousand ($79,000) in labor costs and sixty three thousand ($63,000) in equipment and expendable costs due to weather effects on forms and construction generally. Owner alleges that GC's claim is not valid as GC has over two hundred fifty million ($250M) in Alaskan construction experience. GC bid this job with only twenty eight thousand ($28,000) for temporary heat and lights. Owner alleges that this is a conscious short fall on part of GC. GC claims that the delays caused by Owner's use of the facility in turn caused the GC to do more than expected construction in the winter and cause greater expense for these items.

Electrical and Phone Charges

GC makes a claim for reimbursement of all electrical and telephone charges. Owner defends by alleging that under Section 3.4.1 of the General Conditions the GC is responsible for all fees associated with the installation and use of utilities and communications.

Interest on Retainage

GC makes a claim for interest due and owed on all retainage held by Owner. Owner held retainage as part of recovery of Liquidated Damage claim alleged by Owner. GC alleges that termination was improper and that Owner did not follow the proper notice procedure. GC also

alleges that termination was also improper because AE has no basis to withhold issuance of certificates of substantial completion.

Owner defends, simply, by asserting that substantial completion was not issued, so retainage is not due and owed. If substantial completion is not issued and retainage is not due and owed, then no interest on retainage is due and owed.

GC alleges that if substantial completion is found to have constructively occurred then all retainage and interest on retainage is due and owed from the date of constructive substantial completion forward.

Pass-thru Claim by Steel Erector

Steel erection in Phase II was scheduled by GC for August 1, 1998 through October 31, 1998. In fact the GC did not enter a steel erection subcontract for Phase II until September 10, 1998. Steel erection on Phase II actually occurred between September 21, 1998 and June 28, 1999.

GC makes claim to Owner for extended overhead costs regarding steel erection, in response to steel subcontractor's claim to GC for extended overhead costs. Steel subcontractor experienced multiple weather delays and was required to undertake numerous re-mobilizations during the nine (9) month period that steel erection actually occurred. GC adds overhead and profit to the subcontractor's claimed damages.

Owner contends that it is not responsible for any extended costs associated with this Phase II steel erection. Owner contends that GC entered the steel erection subcontract late and steel erection began almost two (2) months over schedule as the winter months were fast approaching. Any weather delays were avoidable if GC had started steel on time.

Anchor Drilling Claim

All of the immoveable structures, i.e. those not on rail or the parts of those structures that are immoveable, were designed to be anchored to the ground as means of support against the winds and weather. The anchor drilling subcontractor files a claim with GC for three hundred sixteen thousand three hundred fifteen dollars ($316,315.00) doe delays. The drilling subcontractor claims costs that include remobilizations, rentals, extended overhead, legal services and interest. The GC adds to the drillings subcontractor's claim eighty four thousand dollars ($84,000) for overhead, profit, bonding, claim preparation and interest.

The GC's bid to Owner only priced one (1) remobilization for the drilling subcontractor. The contract between the GC and the drilling subcontractor contemplated five (5) remobilizations. Owner alleges that the subcontract indicates that the GC had knowledge of the requirements of mobilization and intentionally left these requirements out of the bid to Owner as means of reducing the bid amount. Owner alleges that GC must live by its bid. The subcontract called for drilling to occur for a period of one hundred five (105) days. Fifty five (55) of these days were considered work days and fifty (50) of these days were provided as down days due to weather or other necessary delay. The drilling took just under one (1) year to complete. The drilling subcontractor claims interference and brings the claim against GC.

CHAPTER 10
SITE SUBCONTRACTOR VERSUS DESIGN PROFESSIONALS; DELAY CLAIM

Preface

A Florida municipality contracted for the expansion of a municipal park, to include parking, playing fields and sanitary sewer facilities. The municipality maintained some engineering oversight of the project, but contracted for the design and development of the architectural and engineering. The municipality contracted with a regional general contractor, who in turn contracted with a site subcontractor for all civil construction (i.e. pipe placement, parking, sidewalks). This municipal park and all construction expansion of this municipal park existed and occurred on what was a former naval training base. The site work subcontractor was terminated for not meeting the general contractor's scheduled completion date and brings a professional negligence tort suit (non-contract claim) against the design professionals alleging errors and omissions as the cause in fact of all delays.

The Parties

Owner is a major Florida city seeking to expand an existing municipal park. Owner maintains some design control with the Director of Public Works listed as the record engineer.

Architect is primarily a landscape architectural and engineering firm who entered a prime contract with Owner for design and development of an expansion to an existing municipal park.

Engineer is a civil engineering firm in contract with the Architect. Engineer is to provide all civil engineering design for the municipal park expansion. Civil engineering work not only includes storm water management, but a large indoor restroom facility is being constructed and Engineer must design all sanitary sewer requirements.

Geotechnical Engineer (Geotech) entered a consulting agreement with the Engineer to provide soil and subsurface data related to this project.

General Contractor (GC) is a southeast regional GC, in prime contract with Owner to provide construction management services for the construction of the municipal park expansion.

Site Work Subcontractor (Sitesub) is in contract with the GC to perform all site work for the municipal park expansion, to include grading and installation or providing for installation of all underground utilities. Sitesub is directly responsible for placement of storm water and sanitary sewer piping, curb and gutters and parking lot construction.

Facts in Common

The Owner seeks construction of a Community Park project. It is a large site with construction to occur throughout fifty four (54) acres. The pre-existing facilities of the park include baseball fields, soccer fields and some picnic facilities. The expansion includes additional parking, sidewalks and an indoor conditioned restroom facility. The Director of Public Works for the Owner is listed in the project manual as the record engineer. The site as exists and on which construction will occur was a naval training facility.

Owner contracted with Architect for design and development. Architect is a full service firm, with a stated specialty in landscape architecture and engineering. Architect entered a subcontract with Engineer. Engineer is a civil engineering firm and was responsible for design of civil engineering concerns on this project. Engineer entered a consulting agreement with a geotechnical specialty firm, to obtain soil and subsurface data for the site.

Schedule and Notice to Proceed

This project was heavy on the site and civil work. The Sitesub was to complete all sitework to include all piping, paving and sidewalk placement. The Sitesub submitted a twenty five (25) item bar chart schedule to the GC, which the GC approved and incorporated into the initial critical path schedule produced by the GC. The Sitesub's schedule indicated thirty seven (37) weeks to complete all site work. The GC produced a finalized critical path schedule to the

Owner prior to the start of construction. The contract between the Owner and the GC allowed for the issuance of a Notice to Proceed (NTP) prior to all permits being obtained for the full scope of construction.

The NTP was issued by Owner on September 21, 2001 (9/21/01). This NTP was issued prior to all permits being issued for the full scope of construction. The Owner wanted the construction to begin and believed that the permit issuance would keep up with the construction schedule. On October 5, 2001, (10/5/01) the Owner contacted GC and gave verbal release for the grading and earthwork, but water and sewer piping could not begin due to permit not being issued by the Department of Environmental Protection (DEP). Owner also indicated on 10/5/01, that some revisions to the plans were to occur prior to the final plans being sealed and issued.

Delays Documented

On October 10, 2001 (10/10/01) the Sitesub sent a letter to the GC indicating that the lack of permit for the underground pipe work was starting to negatively effect compliance with the schedule. Essentially pipe was onsite and pipe and labor were sitting idle waiting for permit clearance. On October 11, 2001, (10/11/01) Owner indicated that DEP was approved, but would not be issued for up to sixty (60) days. Owner indicated that work under the permit could not begin until official issuance of the permit. To Sitesub this meant up to sixty days of idle time.

On November 6, 2001 (11/6/01) the Owner allowed Sitesub to start installing storm pipe, prior to issuance of the DEP permit. The installation of the storm pipe was out of sequence, as the sanitary sewer pipe needed to be under the storm pipe. This out of sequence work is one of delay issues that surround this project. On or about 11/6/01, the Sitesub directly contacted the Engineer and informed the Engineer of the problems that the Sitesub was having in trying to install the storm pipes first, with the expectation of installing the sanitary sewer pipes below the storm pipes at a later date.

The other related issue is which engineering design entity, i.e. the Owner, the Architect or the Engineer, was primarily responsible for obtaining which permits for which scope of construction. Neither the GC nor the Sitesub were responsible for obtaining the permits necessary for the installation of the underground utilities and piping.

The Owner was handling contract management of this project. This began to prove problematic as the information chain from subcontractors in the field to the civil engineer required passing through five (5) separate entities. To simplify and speed up the information gathering and issue resolution process on December 17, 2001, (12/10/01) the Owner expanded the Architect's contract to include construction administration services. A further point of contention is that the Engineer's proposal for services stated the Engineer would provide construction administration services. The Owner and Architect, apparently, never vested this power in the Engineer.

Grade Elevation

By November 9, 2001, which was within three (3) days of the Sitesub starting to lay storm pipe the Sitesub discovered that grade elevations and all work to date were off by one (1) foot. On November 9, 2001, the Sitesub notified the GC that the benchmarks shown on the design drawings did not correlate to the elevations given in the plans for existing structures. This correspondence further states that the north area is completely graded, three hundred (300) feet of storm pipe and two (2) structures are installed. This correspondence further states that the Sitesub is suspending all work until the Engineer verifies the benchmark to be used and relied upon.

It is disputed as to the cause of the benchmark error. The Owner supplied the vertical datum for the project. The Engineer did not include a benchmark reference or indicate the vertical datum to be used on the project. The Owner produced reclaimed water drawings that

indicated a benchmark to be used. The reclaimed water drawing has a note on it that it is issued For Information Only.

There are two (2) vertical datum sources that appear to be integrated into this project. The County utilizes a vertical datum source via 1929, the National Geodetic Vertical Datum (NGVD). The City, i.e. the Owner, uses the modern North American Vertical Datum (NAVD). At the project site the difference between these vertical datum sets is approximately one (1) foot. Upon investigation two benchmark locations, in addition to the benchmark used by the Sitesub, were discovered in the vicinity of the benchmark used by the Sitesub. That totals three (3) separate benchmarks in the same vicinity that reference two (2) separate vertical datum sets.

The contract documents vested the GC with the responsibility of determining the vertical datum, but all contract documents and drawings were silent on the multiple vertical datum sources and benchmarks. The Sitesub is the entity that discovered, sorted through and clarified all of the vertical datum confusion. The Owner clearly utilized and provided the modern vertical datum. It is questionable if the Owner's drawings indicated the correct benchmark reference. It is unclear if the Engineer utilized the vertical datum issued by the Owner or obtained the 1928 vertical datum via its own resources. What is clear is that the vertical datum control was, at best, unclear and ripe for confusion and misinterpretation.

Design Conflicts

The contract between the Owner and GC contained a stipulation that the existing ball fields, immediately adjacent to the expansion site, were not to be disturbed or interfered with in any manner to prevent ongoing use. Problematically, the design drawings indicated placement of storm popes, sanitary sewer pipes and structures that crossing swaths of the ball fields. Disruption of the ball fields, thus, was necessary as dictated by the design drawings. The Sitesub

was placed in the position of being the cause of a breach between the Owner and GC or deviating from the design plans.

There is no record evidence of the Engineer, Architect or Owner resolving the conflict between the design documents and the ball field intrusion. The Sitesub submitted proposals for redesign of the storm and sanitary sewer line installation without disturbance to the ball fields. On December 7, 2001, the Sitesub sent correspondence to GC with full description of sheet reference and structure movement to accommodate the stipulation to leave the ball fields undisturbed. The Owner, Architect and Engineer all approved the proposed design changes.

An eight inch (8") pvc sanitary sewer line was designed to run between two existing structures, as part of the greater facility renovation. The design documents indicated a path for this 8" line that directly intersected an existing forty-two inch (42") storm line. The Owner and Engineer's solution was to install the 8" pipe through the 42" pipe. A greater problem existed in the civil design provided for a 0.5% slope of the 8" pipe. Sitesub could not achieve this 0.5% slope with under the existing conditions and tie-in requirements. In essence, the design documents were not constructable. The Owner's minimum slope requirement for sanitary sewer was 0.3%. The Owner and Engineer eventually allowed Sitesub to place the sanitary sewer line with the maximum obtainable slope of 0.28%.

The GC and Sitesub submitted a total of eleven (11) RFI's in November and December 2001, in regards to site civil engineering issues. These RFI's required an average of forty one (41) days response time. Some of the concrete pipes that Sitesub was required to excavate turned out to be asbestos cement pipes. There was no indication in the contract document as to the existence of asbestos concrete pipes and there was no policy outlined for remediation of asbestos concrete pipes.

The Geotech only performed eighteen (18) boring tests for the entire fifty four (54) acre construction site. The Geotech's report did not reference any subsurface encumbrances. Sitesub started to excavate significant quantities of buried debris, such as concrete footings and other construction garbage, believed to be buried when the site was a naval training facility.

GC's Acceleration of Schedule

The Sitesub's original schedule estimated thirty eight (38) weeks or two hundred and sixty six (266) calendar days to complete the work. The GC accepted this schedule and integrated it into the CPM schedule submitted to Owner. On or about January 28, 2002, the one hundred twentieth (120^{th}) day after NTP, the GC accelerated the Sitesub's completion date by ninety seven (97) days. At the time this occurred the Sitesub was left with less than sixty (60) days to complete the contract work. The GC set the Sitesub's completion date at March 13, 2002. The Sitesub was not able to meet the GC's revised completion date and did not finish the job on March 13, 2002. The Sitesub finished the job on July 24, 2002.

The need for the GC to accelerate the Sitesub's schedule is stated by the GC to be the delay in issuance of the general building permit. The building permit was delayed due to the delay in obtaining the DEP permit, which itself was a function of design errors and omissions on the civil drawings. The general building permit was also allegedly upheld due to deficiencies in the architectural and structural drawings. While the Owner issued NTP on 9/21/01, the GC had not received the general building permit as of December 2001. Thus the GC faced a time crunch and was forced to speed up all subcontractor's work on the project. Sitesub was the first sub on the job and was forced to bear the initial brunt of this acceleration.

Nature of Dispute

The GC withheld payment to the Sitesub for one hundred thirty three (133) days, from the March 13, 2002, accelerated completion date the GC implemented to July 24, 2002, the date

the Sitesub actually finished the job. The GC terminated the Sitesub once the initial site and civil work was completed on July 24, 2002.

Claim History

The Sitesub filed a claim against the GC and Owner for one hundred thirty three (133) days of delay damages, as the Sitesub was in direct contractual privity with the GC. The Owner, being a Florida municipality, was immunized by Sovereign Immunity with recovery limited to one hundred thousand dollars. The GC defended the claim by alleging design errors and omissions as being the cause in fact of the Sitesub's delays. The GC further defended by alleging that the accelerated schedule implemented by GC was achievable absent the numerous design errors and omissions.

The Sitesub and GC settled the claim based on a comparative negligence basis, where the total damages claimed by Sitesub were offset by percentage of delays reasonably attributed to design errors and omissions. Procedurally the GC was obligated to plead the design entities into the claim. The GC and Sitesub agreed to settle the claim and allow the Sitesub to pursue the design entities directly on the basis of professional negligence.

The Sitesub initiated a lawsuit against the Architect and the Engineer alleging delay damages due to professional negligence on the part of those design entities. This was not a contract action as no privity existed between the Sitesub and either the Architect or Engineer. The negligence action is a tort action, which Sitesub claims are not subject to the limitations of the economic loss rule.

Claim Basis

The Sitesub claims damages for the one hundred thirty three (133) days that include increased labor costs, increased equipment costs, increased field overhead, increased home office

overhead, loss and diminution of payment and performance bond capacity, loss of future profits, loss of business value, interest and penalties. The Sitesub also claims wrongful termination.

The Sitesub uses a total cost approach to calculate damages in this matter. This calculation is based on dividing the five year average general conditions cost by the five year average revenues. This percentage obtained is then multiplied by the total billings for the current job, i.e. the weighted percentage of general condition costs for the matter in dispute. Additionally labor and equipment damages are calculated. The total delay damages claimed by the Sitesub against the Architect and Engineer are two hundred seventy two thousand one hundred fifty nine dollars ($272,159). This is exclusive of penalties, interest and attorney fees.

Allegations by Sitesub (Plaintiff)

The Sitesub alleges professional negligence against the Architect and Engineer. The Sitesub alleges that the Architect and Engineer are liable for preparing erroneous design documents with knowledge that GC would design documents to Sitesub and that Sitesub would be injured by their inadequacy. Sitesub further alleges that the Architect and Engineer were careless and negligent in the performance of their duties in connection with the planning and construction of this project. (APPENDIX AA).

Failure to Exercise Reasonable Care

The Sitesub claims that the Architect and Engineer failed to exercise the reasonable care, and technical skill, ability and diligence as are ordinarily required of an Architect or Engineer in the production of plans, specifications and other contract documents. The Architect and Engineer, furthermore, did not exercise the care and skill, ability and diligence ordinarily required in regards to the inspection and supervision of the construction. Sitesub further alleges that the Architect and Engineer failed in their duty to respond to schedule sensitive requests, including RFI and submittal responses.

Sitesub further alleges that Architect and Engineer failed to properly investigate existing conditions at the site and failed to obtain sufficient geotechnical data as is ordinarily required. Sitsub alleges that the Architect and Engineer completely disregarded the ordinary duty to obtain and verify accurate and complete survey data and to include accurate and complete survey data and references on the contract plans and specifications. Specifically Sitesub alleges that the Architect and Engineer permitted the inclusion of conflicting benchmarks and vertical datum in the design documents.

Lastly the Sitesub alleges that the Architect and Engineer failed to supervise, inspect or visit the project on a regular, timely and routine basis. Sitesub alleges that as part of this lack of direct supervision the Architect and Engineer routinely delegated contractual, statutory and common law professional duties that were required to be performed by a licensed architect or engineer.

Sitesub's Complaint, in sum, alleges that the Architect and Engineer failed to exercise the reasonable care and technical skill, ability and diligence expected of a professional in the community where the project site is located. Professional negligence must be proven in regards to the professional community in which professional negligence is alleged. This is also termed the Standard of Care threshold. (Compare to The Duty of Care standard wherein an architect and engineer is expected to design a building that does not collapse or cause third party injury.) Sitesub alleges that as a direct and proximate result of the Architect and Engineer violating the Standard of Care and committing professional negligence that the Sitesub suffered the damages delineated herein.

Sitesub alleges that in GC accelerating the completion of the site work from June 18, 2002, to March 13, 2002, any and all room for delay was removed from the schedule. With the

removal of all potential float from the Sitesub's schedule it was necessary that Sitesub not be subject to any delay in its work. Sitesub alleges that not only did it encounter excessive delay, but that the delay encountered was wholly beyond control of Sitesub.

Construction Sequence Disruption

Sitesub alleges that the Architect or Engineer had a responsibility to obtain the DEP permit as soon as feasible in the design process. Failure to do so is the alleged cause in fact for delay. For NTP to occur without the DEP permit was essentially starting a job that could not, in actuality, be started. The 10/10/01, letter issued by Sitesub to GC clearly indicates that the lack of DEP permit is creating an idle work force for Sitesub. The solution achieved by the Owner, Architect and Engineer, i.e. to lay the storm pipe first, Sitesub alleges was not a solution at all.

Sitesub alleges that the Architect and Engineer were negligent in producing design documents that specifically called for the placement of sanitary sewer lines under the storm water piping. Sitesub alleges, therefore, that it was incumbent for Architect and Engineer to ensure that the DEP permit was obtained so that work could proceed in sequence and not be subject to redundancy. Sitesub alleges that Architect and Engineer did not use reasonable diligence in obtaining the DEP permit or issuing signed and sealed plans as the condition precedent to obtain the DEP permit. Sitesub alleges loss of fifteen to thirty days due to this permit fiasco.

Vertical Datum Grade Error

Sitesub claims delay caused by the confusion of the vertical datum and benchmarks. Sitesub alleges that the Engineer produced all civil drawings to conform to the vertical control used by the County, not the control used by the Owner (City). While the civil drawings do not show a specific temporary benchmark for vertical reference control, the Engineer's use of incorrect data without specifying a benchmark caused significant confusion. The Owner

produced drawings showing a temporary benchmark and this is what the Sitesub relied upon throughout the project. The problem is that the overlay vertical dimensions on the civil plans were pegged to a different benchmark with a variance of one foot (1'). Sitesub alleges that it is the Engineer that was responsible for identifying this conflict and resolving it in the design and development phase.

Ball Field Pipe Conflict

Sitesub claims delays due to the design conflicts with the existing ball fields. As previously stated the Owner and GC entered a stipulation in the prime contract that the existing ball fields will not be disturbed during construction. The final design documents released by the Architect and Engineer show placement of sanitary sewer pipes in portions of the ballfields. For the Sitesub to follow the design drawings, the use of the ball fields would be disrupted and the stipulation between the Owner and GC would be violated.

The Architect and Engineer did not offer any input or revised design drawings in regards to the pipe placement conflict with the ball fields. The Sitesub was required to cease work and configure redesign of the pipe placement in conformance with the stipulation that the ball fields would remain undisturbed. The Sitesub's design work was forwarded to the Owner, Architect and Engineer for review and approval. By the Sitesub taking on site design duties the Sitesub was delayed in the performance of its contract obligations, namely performing site work.

Other Alleged Delays

Sitesub alleges delay damages regarding the installation of an eight inch (8") sewer line and reclaimed water line. As stated herein, the design documents specified a 0.5% slope for the sanitary sewer line, which was not achievable per existing conditions in the field with regards design specifications. The Sitesub also encountered a high pressure gas line adjacent to the line of sewer pipe placement defined by the design documents. Sitesub also encountered existing

forty two inch (42”) round concrete pipe storm pipes in the specified path of the sanitary pipes to be installed.

Additionally there existed large amounts of buried construction debris from the time the site was a naval facility. This debris included buried fuel oil tanks, partially full, and abandoned asbestos concrete pipe that required remediation. Specifically the asbestos pipe required a HAZMAT containment procedure. None of the subsurface debris and hazards were anticipated as they were not noted by Architect or Engineer and were not discovered by Engineer’s subsurface consultant. The Sitesub alleges the delay days claimed due to the subsurface issues are wholly reasonable.

The Sitesub alleges that the Architect and Engineer did not make an adequate preliminary investigation of the existing subsurface site conditions prior to issuing design documents. Sitesub alleges that Architect and Engineer, furthermore, made no effort at design remediation once the subsurface problems and conflicts were discovered. As with all site work problems on this project, the Sitesub made the design modification suggestions for approval by the Owner, Architect and Engineer.

The design modifications and solutions so approved by the Owner, Architect and Engineer created additional time constraints for the Sitesub. The solution for the conflict between the 8” sanitary pipe and the 42” storm pipe was for the 8” pipe to bisect the 42” pipe. This solution required construction of a box, which was far beyond the original plan of simply running pipe.The asbestos concrete pipe issues were resolved by removing of the asbestos water line and not disturbing the asbestos sewer line.

Sitesub claims a further delay due to design errors and omissions regarding the reclaimed water pipe. The designed tie in for the system was not feasible due to the tie in location being

too close to all other existing utilities. The Sitesub suggested moving of this reclaimed water tie in to a location more suitable for the excavation and work necessary to be performed. Secondly the design documents for the reclaimed water line did not include a backflow prevention valve. The Architect and Engineer had not included the specification for a backflow prevention valve on the design documents.

Summary of Sitesub Claim

Sitesub alleges that the failure of an oversight design entity and contract administration entity became clear as the project became more and more problematic. To remedy this problem and to create a condition to support the efficient administration of the contract and address the numerous design errors that were evident, the Owner renegotiated the contract with the Architect to include contract administration services. Sitesub alleges that despite this additional contractual duty on the part of the Architect, that the Architect and Engineer were mostly absent from the project. Sitesub can point to only one or two site visits by either the Architect or Engineer for the entire duration of Sitesub's work on the project.

Allegations by Architect and Engineer

Architect and Engineer, represented by separate counsel, offer identical defenses and counter-allegations to the claims and allegations of the Sitesub. Architect and Engineer allege that the Sitesub failed to mitigate any and all alleged damages by failing to timely seek review and clarification of alleged design errors and omissions (as exist in the contract documents). This position by the Architect and Engineer states that the end user of the design documents has a duty to identify any issues that exist upon field implementation and to immediately seek resolution of those issues. (APPENDIX AB).

Architect and Engineer allege that the Sitesub did not follow the design recommendations of the Architect and Engineer. This alleges that the Sitesub failed to follow the plans and

specifications as designed and failed to follow the clarification and resolution of issues as supplied by the Architect and Engineer.

The Architect and Engineer further allege that the work product these entities produced met the specifications of the contract they entered with Owner. Architect and Engineer further allege that even if portions of the contract work with Owner were not satisfactory that the work of the Architect and Engineer were accepted and approved by all of the appropriate enforcement and permitting agencies, including the Owner and relevant State agencies (i.e. the Department of Environmental Protection and the Water Management District).

Architect and Engineer allege that Sitesub cannot pursue any claim for failure to notify the Architect and Engineer of the claim in a timely manner. Architect and Engineer allege that any such timely notification required Sitesub to inform the Architect and Engineer of any alleged design errors and deficiencies, thus allowing Architect and Engineer the opportunity at remedying same.

Architect and Engineer further allege that any delays suffered by the Sitesub are due to the acts, errors and omissions of persons or entities other than the Architect or Engineer. Architect and Engineer define these other entities and persons as other subcontractors, suppliers and any and all agents, representatives or employees of the Sitesub or of other entities or persons. Architect and Engineer allege that the alleged other entities and persons were intervening or supervening causes of Sitesubs alleged damages.

The allegations of the Architect and Engineer, known as affirmative defenses, do not state with specificity any details of events, conditions or acts. The posture that the Architect and Engineer are taking is that once discovery begins, i.e. depositions, document production, etc…, the evidence will indicate that the Architect and Engineer did not commit professional

negligence and that the delays suffered by the Sitesub will be clearly and wholly attributable to entities other than Architect and Engineer. Architect and Engineer, to be safe, claim for any and all offsets available as the result of monies previously paid to Sitesub by third parties for delay damage. Architect and Engineer further claim for a comparative offset of negligence based on actions of any other Defendant, whether currently named as a party or to be discovered as negligent during the course of the action.

Economic Loss Rule Defense

The initial defense relied upon by the Architect and Engineer is that Economic Loss Rule (ELR) bars the claim by the Sitesub. The ELR, broadly defined, bars a tort claim if the damages are purely economic (no personal injuries involved) and the subject matter of the dispute is contractual in nature. The ELR, historically, was used as a very effective defense to tort claims brought as the result of a construction dispute.

In Florida numerous opinions were issued by the Supreme Court in the last ten to fifteen years that limit the application of the ELR. These cases have reached a culmination. One of the most recent opinions rendered by the Florida Supreme Court on the application of the ELR is Indemnity Insurance Co. of No. Amer. v. American Aviation, 891 So.2d 532 (Fla. 2004), which the Court took on certification from the United States 11th Circuit. Justice Pariente clearly writes in Indemnity Insurance, that:

The Economic Loss Rule bars a negligence action to recover solely economic damages only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product and no established exception to the application of the rule applies. Id. at 534

Indemnity Insurance, holds that the ELD applies in two instances: 1) where parties are in privity and a party sues in tort for purely economic loss; or 2) there is a defect in the product that causes damage to that product as a whole, but causes no personal injury or damage to other property. Id.at 536. Economic loss is defined as damages for inadequate value, costs of repair or replacement of defective product, consequential loss of profits or loss of benefit of a bargain. Id. at 536. This products liability loss rule applies even in the absence of privity. Id. at 541.

CHAPTER 11
CONCLUSION

In conclusion many of the construction disputes that arise can be avoided if all parties involved in the project are first able to communicate and adhere to realistic expectations. The failure to communicate and do what is promised is the greatest issue for any contractual relationship.

The attention to detail is another means of avoiding many of the issues and disputes contained herein. The industry as a whole has moved towards remedying avoidable problems by bringing all of the parties to the table early in the process. It is common for the general contractor to not only be available, but to participate in the design and development phase of a project. Additionally the reliance on hard bids is being phased out for the preference of negotiated work. Contractors are able to be involved in the process early, provide input and negotiate a price that involves the realistic success of the project.

As a general rule as much detailed, up front work as possible must occur to eliminate the occurrence of the claim at the end of the project.

Despite all of the attempts to reduce the occurrence of claims and litigation these still occur. There are so many pieces to a puzzle that is the reality of the construction process that if one piece is missing or one link is weak the cumulative and cascading effect can be pronounced. As such it is necessary for an entity in the process to know its liability and remedies.

APPENDIX A
GC'S 25 ITEM BAR CHART SCHEDULE

NOTICE TO PROCEED DATE: JULY 8, 1993
SUBSTANTIAL COMPLETION DATE: 30 OCT 1995 PREPARED BY:
CURRENT DATE: 06-Jan 1995

*WEEKENDING PROGRESS SCHEDULE CURRENT UPDATE :06-Jan 1995
PERIOD NO. 58 59 60 61 62 63 64 65 INDICATES
REVISED DATE: 06-Jan 1995 66

ITEM	DESCRIPTION	06-Jan	03-Feb	07-Mar	06-Apr	06-May	05-Jun	05-Jul	04-Aug	03-Sep
1	*WINDOWS									
2	REMEDIAL STEEL BRACE									
3	ADD'L INTERIOR FRAMING									
4	DRYWALL									
5	CEILING GRID									
6	MILLWORK/CABINETS									
7	RESILIENT FLOORING									
8	PLUMBING TRIM									
9	ELECTRIC FIXTURES									
10	PAINTING									
11	HVAC TRIM									
12	ELECTRICAL TRIM									
13	CARPETING									
14	RELOCATE SEATING									
15	PUNCH LIST/MOVE IN									
16	COURT ABATEMENT									
17	COURT EARTHWORK									
18	COURT STRUCTURE									
19	COURT FINISHES									
20	EXTG COURT/ELECT DEMO									
21	EXTG COURT/ELECT STRUCT									
22	EXTG COURT/ELECT FINISH									
23	PRESSURE CLEAN EXTG CTHSE									
24	SITEWORK/PAVING									
25	SUBSTANTIAL/PUNCH LIST									
26										
27										

APPENDIX B
CLAIM SUMMARY

SUMMARY OF CLAIM AGAINST

I.	Extended, Unabsorbed Home Office Costs	$ 200,837
II.	Extended Jobsite Overhead Costs	266,432
III.	Completion Costs Initially Borne by Reliance Insurance and Ultimately Paid by Altman-Barry	615,741
IV.	Unpaid Retainage	244,559
V.	Work Completed but Unpaid by Hendry County	196,318
VI.	Unfunded Extra Work Change Orders (Design Defects and Changed Conditions)	107,989
VII.	Lost Profit on Remaining Work Performed by SOWESCO	181,145
VIII.	Unpaid Directed/Forced Change Order Work	40,848
	SUBTOTAL	$ 1,853,867
IX.	Lost Bonding/Capital Capacity Loss	1,342,200
X.	Prejudgment Interest (Thru June 1, 1998)	1,029,440
XI.	Compensable Fees, Costs, Expenses (To Be Resolved During Arbitration Confirmation Proceedings in Circuit Court)	Still Accruing
	TOTAL	$ 4,225,507 +

I. EXTENDED, UNABSORBED HOME OFFICE OVERHEAD ($200,837)

We have calculated Altman-Barry's extended, unabsorbed home office overhead costs based on its audited financial records for the fiscal year ending January 31, 1995. This time period encompasses the majority of the actual Altman-Barry construction period of July 1993 thru January 1995. During this fiscal year, GC had home overhead expenses of $857,988, including $349,000 of officers salaries.

During fiscal year ending January 31, 1995, the Courthouse project comprised 26.78% of all GC billings. Therefore, the allocation of home office overhead to the County Courthouse project is $857,988 x 0.2678 = $229,808. On a daily basis, the allocated home office overhead is then $229,808/365 = $629.61/day.

Therefore, the calculated extended, unabsorbed home office overheads are as follows:

a.	*Extended Home Office Overhead Prior to Building Permit ($629.61/day x 31 days)*	$ 19,509
b.	*Extended Home Office Overhead After Building Permit thru 1/23/95 ($629.61/day x 200 days)*	125,922
c.	*Extended Home Office Overhead After 1/23/95 Termination of Work ($629.61/day x 88 days)*	55,406
	Total Extended, Unabsorbed Home Office Overheads Cost:	$ 200,837

II. EXTENDED JOBSITE OVERHEAD ($266,432)

We have calculated GC's extend jobsite overhead cost based on available, internal, computerized, job cost records for the period thru January 1995 (but as reported in January 1996) for general conditions, exclusive of site and project supervision. Site and project supervision daily costs are as calculated by Altman-Barry as of October 31, 1994.

The jobsite general conditions costs from July 12, 1993, thru January 23, 1995 were a total of $303,278, excluding site and project supervision. For this time period of 560 days, the ***daily general conditions cost is then $303,278/560 = $541.57.*** Per GC the cost for ***project and site supervision at the jobsite was a total of $703.50/day***. Therefore, the ***total daily cost for extended site overhead is $541.57 + $703.50 = $1,245.07***.

Calculated jobsite extended overhead costs are then:

a.	***Extended Jobsite Overhead Prior to Building Permit ($1,245.01/day x 7 days)***	***$ 8,715***
b.	***Extended Jobsite Overhead After Building Permit thru 1/23/95 ($1,245.01/day x 200 days)***	***249,002***
c.	***Extended Jobsite Overhead After 1/23/95 Termination of Work ($1,245.01/day x 7 days)***	***8,715***
	Total Extended Jobsite Overhead Cost:	***$ 266,432***

a.		$ 12,918
b.		29,100
c.		1,138
d.		8,958
e.		60,692
f.		16,957
g.		1,550
h.		1,700
i.		4,000
j.		1,888
k.		101
l.		71,353
m.		3,276
n.		4,188
o.		213
p.		7,606
q.		3,021
r.		8,545
s.		37,106
t.		30,221
u.		39,987
v.		16,024
w.		39,120
x.		1,172
y.		687
	TOTAL	$ 401,521

Per the above, the total amount of monies paid by SURETY ty for bond claims was then a ***total of $214,220 + $401,521 = $615,741, a great majority of which*** ***has repaid*** SURETY

GC

IV. UNPAID RETAINAGE ($244,559)

When GC was forced to terminate its work in January 1995, there was a total of $244,559 of retainage held by County. This retainage has not been paid and is still owed to GC

Retainage of $244,559 is still owed to GC

IX. LOST BONDING/CAPITAL CAPACITY LOSS ($1,342,200)

As detailed above, GC y incurred lost capital funding on the project from June 1993 through January 1995 in the amount of $1,853,867 (Claim Items I thru VIII). GC was not able to receive capital infusion in the amount of $1,853,867 due to nonpayment of contract money and unfunded direct and overhead costs. This, necessarily, had a disastrous impact upon GC ability to undertake other projects and, thereby, resulted in lost profits on work never obtained.

Experience in the bonding industry reveals that every $1.00 of capital translates into $10.00 of bonding capacity. Experience in the construction industry reveals that same ratio of capital to project work, i.e., for every $1.00 of capital, a construction company is able to undertake $10.00 of contract work.

Therefore, taking the total base claim of $1,853,867, this translates into $18,538,670 of lost bonding capacity/lost contract work capacity.

Review of GC's ; overall financial performance for the previous ten (10) year period (January 1986 through January 1995) revealed that GC's ***average profit on its projects was 7.24%***. Thus, if GC y incurred lost bonding capacity/lost contract work capacity of $18,538,670, with an expected profit of 7.24% reasonably expected, GC ***suffered a projected lost profit of $1,342,200 on unobtained work.***

This projected calculation of damages is not deemed speculative, based on the work record of y and the availability of work historically suited to / GC / in the period of 1994-1997.

APPENDIX C
FOUR YEAR FINANCIALS OF GC

GC CONSTRUCTION, INC.
STATEMENTS OF INCOME AND RETAINED EARNINGS
FOR THE YEARS ENDED JANUARY 31, 1994 AND 1993

	1994	1993
CONTRACT REVENUES EARNED	$ 10,514,132	$ 7,589,364
COST OF REVENUES EARNED	9,835,859	6,550,606
GROSS PROFIT	678,273	1,038,758
OPERATING EXPENSES		
Selling, general and administrative expenses	470,170	532,361
Bad debts	0	17,000
Officers' salaries	270,000	422,000
TOTAL OPERATING EXPENSES	740,170	971,361
OPERATING INCOME (LOSS)	(61,897)	67,397
RECOVERY OF BAD DEBTS	319,990	0
INTEREST & MISCELLANEOUS INCOME	17,428	35,528
NET (LOSS) ON DISPOSITION OF ASSETS	0	(20,087)
PROVISION FOR INCOME TAXES	(103,267)	(25,284)
NET INCOME	172,254	57,554
RETAINED EARNINGS – Beginning of year	613,069	555,515
RETAINED EARNINGS – End of year	$ 785,323	$ 613,069

See notes to financial statements which are an integral part of these statements.

CONSTRUCTION, INC.

STATEMENTS OF OPERATIONS AND RETAINED EARNINGS
FOR THE YEARS ENDED JANUARY 31, 1992 AND 1991

	1992	1991
CONTRACT REVENUES EARNED	$ 8,716,195	$ 9,903,766
COST OF REVENUES EARNED	7,684,124	9,137,256
GROSS PROFIT	1,032,071	766,510
OPERATING EXPENSES		
Selling, general and administrative expenses	437,461	490,081
Bad debts	283,875	0
Officers' salaries	378,000	297,008
TOTAL OPERATING EXPENSES	1,099,336	787,089
OPERATING (LOSS)	(67,265)	(20,579)
INTEREST & MISCELLANEOUS INCOME	39,598	25,555
INCOME TAXES BENEFIT (PROVISION)	7,610	(746)
NET INCOME (LOSS)	(20,057)	4,230
RETAINED EARNINGS - Beginning of year	575,572	571,342
RETAINED EARNINGS - End of year	$ 555,515	$ 575,572

See notes to financial statments which are an integral part of these statements.

APPENDIX D
PAYMENT HISTORY AND LIEN RELEASES

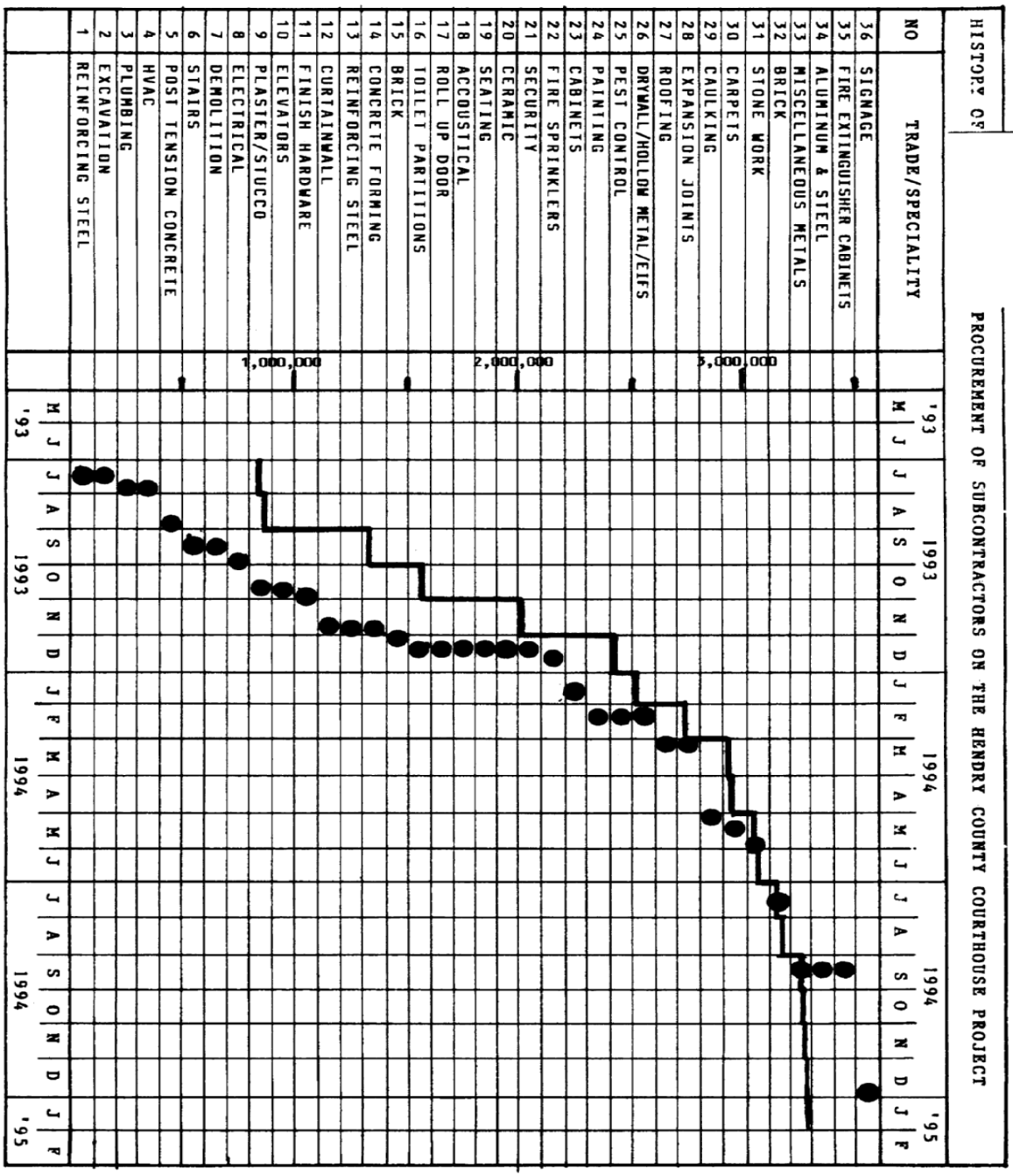
HISTORY OF REQUISTIONS

REQ. NO.	AMOUNT	DATE OF REQUEST	DATE OF PAYMENT	ELAPSED TIME
1	62,550.00	06/25/93	07/23/93	28
2	35,073.00	07/28/93	09/30/93	32
3	24,390.00	08/26/93	10/27/93	61
4	103,319.10	10/31/93	11/29/93	30
5	119,303.10	11/30/93	12/22/93	23
6	160,002.00	12/31/93	01/25/94	26
7	176,373.00	01/25/94	02/09/94	15
8	150,201.00	02/25/94	03/10/94	14
9	172,426.50	03/25/94	04/11/94	17
10	125,947.80	04/25/94	05/27/94	32
11	177,885.90	05/25/94	06/14/94	20
12	197,291.70	06/25/94	07/14/94	19
13	232,121.70	07/25/94	08/11/94	17
14	70,438.50	08/29/94	09/16/94	18
15	67,475.70	9/28/94	10/14/94	16
16	48,154.50	10/31/94	11/30/94	31
17	198,363.60	11/30/94	12/20/94	21
18	79,718.40	12/25/94	0	0

LIEN RELEASES SUMMARY

PAY APPLI. NO.	DATE SUBMITTED	RELEASE OF LIEN REC'D	ELAPSED TIME
1	06/25/93		
2	07/28/93	10/07/93	71 DAYS
3	08/26/93		
4	10/31/93	12/14/93	54 DAYS
5	11/30/93	12/30/93	30 DAYS
6	12/31/93	01/25/94	25 DAYS
7	01/25/94	02/28/94	34 DAYS
8	02/25/94	04/06/94	40 DAYS
9	03/25/94	04/26/94	32 DAYS
10	04/25/94	04/25/94	0
11	05/25/94	06/03/94	9 DAYS
12	06/25/94	06/29/94	4 DAYS
13	07/25/94	07/25/94	0
14	08/29/94	09/28/94	30 DAYS
15	09/28/94	10/31/94	33 DAYS
16	10/31/94	11/30/94	30 DAYS
17	11/30/94	12/12/94	12 DAYS
18	12/25/94		

APPENDIX E
SUBCONTRACTOR BUYOUT ANALYSIS



SUB BOYOUT RATE
PER A/B SUB STATUS REPORT DATED 1/26/96

YR	MO			
93	7		847,470.00	847,470.00
	8		30,500.00	877,970.00
	9		4,588,694.00	1,336,664.00
	10		2,411,105.00	1,577,769.00
	11		432,702.00	2,010,471.00
	12		395,639.33	2,406,110.33
94	1		96,227.00	2,502,337.33
	2		257,098.00	2,759,435.33
	3		162,523.32	2,921,958.65
	4		500.00	2,922,458.65
	5		116,605.00	3,039,063.65
	6		12,664.00	3,051,727.65
	7		81,274.46	3,133,002.11
	8			3,133,002.11
	9		27,822.00	3,160,824.11
	10			3,160,824.11
	11		16,201.00	3,177,025.11
	12		2,113.00	3,179,138.11
95	1		360.00	3,179,498.11
	2			
	3			
	4			
	5			
	6			
	7			
	8	CONTRACT CANCELLATION	(1,887,002.08)	1,292,496.03
	9			
	10			
	11			
	12			
96	1			
	2			
	3			
	4			
	5			
	6			

	LABOR	MATERIAL	SUB
BID ESTIMATE	181,504.00	218,560.00	3,419,565.00
FEE	180,371.00		
ALTERNATES 1-12	2,247,100.00		

APPENDIX F
PILING DELAYS

EXTENSION OF COMPLETION DATES CALCULATIONS

		SOUTH SIDE	RESIDUAL
CONTRACT COMPLETION DATES		JUN 1,'90	SEPT 1 '90
PILING COMPLETION DELAY 156 DAYS			
JUNE	29		
JULY	31		
AUGUST	31		
SEPT	30		
OCTOBER	31		
NOV	4	156 days	
SEPT	29		
OCTOBER	31		
NOV	30		
DECEMBER	31		
JANUARY	31		
FEB	4		156 days
NEW COMPLETION DATES		NOV 4,'90	FEB 4,91

PILING DISRUPTION AND DELAYS
GENERAL CONDITIONS COSTS

Month	GC Costs	Crane Costs Only
12/19-31/88	$14,096.00	$0.00
1/89	$110,595.00	$2,299.00
2/89	$255,688.00	$124,743.00
3/89	$261,764.00	$101,016.00
4/89	$322,065.00	$108,796.00
5/89	$338,940.00	$112,691.00
6/89	$371,852.00	$125,972.00
7/89	$395,298.00	$146,049.00
8/89	$352,790.00	$89,840.00
9/89	$422,001.00	$152,364.00
10/89	$401,906.00	$105,364.00
11/89	$401,070.00	$108,528.00
12/89	$514,299.00	$192,264.00
1/90	$637,843.00	$205,746.00
2/90	$603,195.00	$182,163.00
3/90	$704,850.00	$214,579.00
4/90	$744,010.00	$263,487.00
5/90	$566,379.00	$147,936.00
6/90	$528,392.00	$150,593.00
7/90	$553,269.00	$133,143.00
8/90	$652,999.00	$206,481.00
9/90	$551,751.00	$105,573.00
10/90	$453,862.00	$102,296.00
11/90	$316,508.00	$19,046.00
12/90	$379,281.00	$43,967.00
1/1-12/91	$113,090.00	$29,839.00
754 Days	$10,967,793.00	$3,174,775.00

Avg. Daily Costs: $10,967,793.00 ÷ 754 = $14,546.00

EXTENDED GENERAL CONDITIONS
$14,546.00 x 156 = $2,269,176.00

EXTENDED CRANE COSTS
$4,211.00 x 156 = $656,916.00

APPENDIX G
CHANGE ORDER SUMMARY

CHANGE ORDER SUMMARY

OWNER CHANGE ORDERS PREPARED BY OWNER'S		511
APPROVED BY Owner CONSTRUCTION COMMITTEE		510
NOT APPROVED BY OWNER CONSTRUCTION COMMITTEE		1
SUMMARY OF AMOUNTS INVOLVED		
a. NET DOLLAR TOTAL		$ 34,623,615.15
b. OWNER PURCHASED MATERIAL		23,712,985.27
c. SUB TOTAL		$ 58,336,600.42
d. NOT APPROVED (OCO 125-487 CECO SHORING)		54,363.00
e. NET TOTAL		$ 58,282,237.42
f. OTHER DEDUCTIVE CHANGE ORDERS		
OCO 125-119	$ 27,631.00	
126	9,254.00	
131	157,147.00	
144	9,528.00	
132	2,814,58	
180	7,579.00	
206	234.00	
207	25,000.00	
208	19,908.00	
211	9,914.00	
257	465,838.00	
259	766.00	
266	15,688.00	
272	691.00	
293	6,182.00	
341	15,000.00	
401	1,100,000.00	
415	562.00	
416	2,217.00	
417	3,200.00	
444	99,707.00	
427	410.00	
433	3,504.00	
462	51,000.00	
468	30,863.00	
470	13,000.00	
493	1,995,827.00	
507	22,289.00	
510	4,477.00	
511	1,822.00	4,102,052,58
ADDITIVE AMOUNT OF CHANGE ORDERS		$ 62,384,290.00

APPENDIX H
EXTENDED GENERAL CONDITION COSTS

BREACH OF CONTRACT NO. 1.
CALCULATION OF GENERAL CONDITION

MONTH	DAY	TOTAL GC COSTS	ONLY CRANE COSTS
/19-31/88	12	$14,096.00	$0.00
1/89	31	$110,595.00	$2,299.00
2/89	28	$255,688.00	$124,743.00
3/89	31	$261,764.00	$101,016.00
4/89	30	$322,065.00	$108,796.00
5/89	31	$338,940.00	$112,691.00
6/89	30	$371,852.00	$125,972.00
7/89	31	$395,298.00	$146,049.00
8/89	31	$352,790.00	$89,840.00
9/89	30	$422,001.00	$152,364.00
10/89	31	$401,906.00	$105,364.00
11/89	30	$401,070.00	$108,528.00
12/89	31	$514,299.00	$192,264.00
1/90	31	$637,843.00	$205,746.00
2/90	28	$603,195.00	$182,163.00
3/90	31	$704,850.00	$214,579.00
4/90	30	$744,010.00	$263,487.00
5/90	31	$566,379.00	$147,936.00
6/90	30	$528,392.00	$150,593.00
7/90	31	$553,269.00	$133,143.00
8/90	31	$652,999.00	$206,481.00
9/90	30	$551,751.00	$105,573.00
10/90	31	$453,862.00	$102,296.00
11/90	30	$316,508.00	$19,046.00
12/90	31	$379,281.00	$43,967.00
1/1-12/91	12	$113,090.00	$29,839.00
	754	$10,967,793.00	$3,174,775.00

AV DAILY COSTS $\frac{\$10,967,793.00}{754}$ = $14,546.00

AV DAILY CRANE COSTS $\frac{\$3,174,775.00}{754}$ $4,211.00

A. EXTENDED GENERAL CONDITIONS
$14,546.00 x 156 $2,269,176.00

B. EXTENDED CRANE COSTS
$4,211.00 x 156 $656,916.00

BREACH OF CONTRACT NO. 2

GENERAL CONDITIONS COSTS

MONTH	DAY	C/C COSTS	CRANE COSTS
2/04-28/91	24	$ 228,762.00	$ 44,163.00
3/91	31	$ 235,875.00	$ 39,369.00
4/91	30	$ 241,560.00	$ 66,704.00
5/91	31	$ 216,754.00	$ 24,339.00
6/91	30	$ 218,452.00	$ 23,974.00
7/91	31	$ 186,570.00	$ 9,275.00
8/91	31	$ 276,563.00	$ 9,325.00
9/91	30	$ 225,027.00	$ 10,275.00
10/91	31	$ 155,646.00	
11/91	30	$ 150,205.00	$ 2,427.00
12/91	31	$ 165,067.00	$ 14,648.00
1/92	31	$ 171,958.00	
2/92	28	$ 128,131.00	$ 7,604.00
3/92	31	$ 124,503.00	$ 2,638.00
4/92	30	$ 118,302.00	
5/92	31	$ 104,554.00	
6/92	30	$ 134,485.00	
7/92	31	$ 116,843.00	
8/01-20/92	20	$ 73,953.00	$ 1,202.00
	562	$3,273,210.00	$ 255,943.00

APPENDIX I
CLAIMS AND OFFSET SUMMARY

On the 125 and 155 projects, GC claims are as follows:

LANDSIDE TERMINAL EXPANSION, CONTRACT #125.

Claim Item	Amount of Claim
GC Contract Balance (incl. Subs retainage)	$ 1,223,902
GC Extra Crane Costs	$ 912,859
GC Delay & Disruption	$ 5,542,392
Rogers & Ford Claim	$ 1,714,027
CECO Claim	$ 54,363
SUBTOTAL:	$ 9,447,543
OVERHEAD & PROFIT @ 10% (GC PORTION ONLY):	$ 554,239
INTEREST FROM 6/91 ON $10,001,782:	$ 5,000,890
TOTAL CLAIM:	$15,002,672

HYATT HOTEL, CONTRACT #155

Claim Item	Amount
GC Contract Balance (incl. Lake P. retainage)	$ 1,119,663
RCO's: Mader	$ 69,833
Metcon	$ 39,177
GC's Delay & Disruption	$ 581,820
Lake Plumbing Extras	$ 178,821
ERMCO Claim	$ 1,708,789
SUBTOTAL:	$ 3,698,103
OVERHEAD & PROFIT @ 10% (GC PORTION ONLY):	$ 58,182
INTEREST FROM 9/92 ON $3,756,285:	$ 1,314,698
TOTAL:	$ 5,070,983

Thus, GCY's claim on all five projects, including interest, is as follows:

PROJECT	CLAIM
•Parking Garage (#115)	$ 89,829
•Rental Car Lobby (#124)	$ 157,000
•Landside Terminal (#125)	$15,002,672
•Airside Terminal (#126B)	$ 7,500
•Hyatt Hotel (#155)	$ 5,070,983
TOTAL:	$20,327,984

OWNER'S OFFSETS

Based upon information presented during the mediation process, it is GC 's understanding that the following offsets have been calculated by OWNER to be assessed against GC contract balances on all of the above projects:

Offset Item	Amount
Welding defects (125 & 126B) and related costs	$1,385,000
Vinyl wall coverings, improper drywall taping at air return plenums, defective fan coil units, untimely guest air, no T & B report, improper metal stud anchoring, cracked balcony stucco, deficient sealant, excess bond premiums, recessed roadway leaks, electrical problems, out of plumb walls, Westinghouse backcharge and liquidated damages.	$1,120,000
SUBTOTAL:	$2,505,000
Interest earned by owner	$ 411,000
TOTAL:	$2,916,000

To summarize, a full accounting of the parties' respective positions and the net claim of GC ' as a result thereof is as follows:

GC's Claim (w/o interest)	Amount
Parking Garage, Contract #115.	$ 52,532
Rental Car Lobby Renovations, Contract #124.	$ 100,000
Landside Terminal Expansion, Contract #125.	$10,001,782
Airside Terminal Expansion, Contract #126B.	$ 5,000
Hyatt Hotel, Contract #155.	$ 3,756,285
SUBTOTAL:	$13,915,559
OWNER'S Offsets	
Welding defects and related costs	($ 1,385,000)
Other miscellaneous offsets	($ 1,120,000)
SUBTOTAL:	($ 2,505,000*)
GC NET CLAIM AFTER OFFSETS:	$11,410,599
INTEREST ON NET CLAIM (3.875 year average):	$ 4,849,503
NET AMOUNT CLAIMED BY GC	$16,260,102

*Note: owner retains $411,000 in interest earned on monies withheld.

DAMAGES: PILING DISRUPTION AND DELAY

- **Revised Completion Dates**
  - **South Side: 6/1/90 to 11/4/90**
  - **Residual: 9/1/90 to 2/4/91**
- **156 Day Delay Within 754 Days**
- **Average Daily General Conditions**
  - **12/19/88 - 1/12/91 (754 days) = $14,546/day**
- **156 day delay x $14,546 = $2,269,176**

GC **cost records supporting the amount of General Conditions incurred on the 125 project are attached hereto as Exhibit "M." Mr** GC **actual calculation is as follows (crane costs have been separated out due to GOAA's separate agreement to pay for same):**

ii. Massive Scope Changes

GC **was also significantly delayed and disrupted in the progress of the work by a massive number of changes in the scope of the work generated from numerous sources, most notably** OWNER. **These additive change orders increased the original $133,972,000 contract price on the project by $62,384,290, an increase of over forty six percent (46%). A summary of such change orders appears on the following page.**

DAMAGES: MASSIVE SCOPE CHANGES

- Revised Completion Date: 2/4/91
- 223 Change Orders after 1/3/91

- Total: $10,671,901
- Latest Significant Change Order ($112,145) on 7/20/92 extended completion to 8/20/92
- 2/4/91 - 8/20/92 = 562 Days Extended GC's

ACTUAL GENERAL CONDITIONS COST DURING PERIOD OF DELAY

Month	G/C Costs	Crane Costs Only
2/4-28/91	$228,762	$44,163
3/91	$235,875	$39,369
4/91	$241,560	$66,704
5/91	$216,754	$24,339
6/91	$218,452	$23,974
7/91	$186,570	$9,275
8/91	$276,563	$9,325
9/91	$225,027	$10,275
10/91	$155,646	
11/91	$150,205	$2,427
12/91	$165,067	$14,648
1/92	$171,958	
2/92	$128,131	$7,604
3/92	$124,503	$2,638
4/92	$118,302	
5/92	$104,302	
6/92	$134,485	
7/92	$116,843	
8/1-20/92	$7,953.00	$1,202
562 Days	$3,273,216	$255,943

- TOTAL EXTENDED GENERAL CONDITIONS: $3,273,216
- TOTAL EXTENDED CRANE COSTS: $ 255,943

HYATT HOTEL, CONTRACT #155

As stated above, the elements of GC claim on the Hyatt Hote as follows:

Claim Item	Amount
GC's Contract Balance (incl. Lake P. retainage)	$ 1,119,663
RCO's: Mader	$ 69,833
Metcon	$ 39,177
GC's Delay & Disruption	$ 581,820
Lake Plumbing Extras	$ 178,821
ERMCO Claim	$ 1,708,789
SUBTOTAL:	$ 3,698,103
OVERHEAD & PROFIT @ 10% (GSW PORTION ONLY):	$ 58,182
SUBTOTAL:	$3,756,285
INTEREST FROM 9/92 ON $3,756,285:	$ 1,314,698
TOTAL:	$ 5,070,983

APPENDIX J

COMPLAINT

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.:

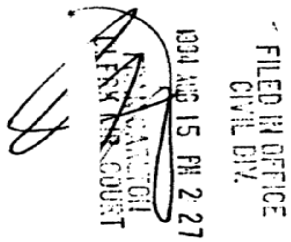
GC

Plaintiff,

v.

OWNER, SUBS & SURETY OF SUBS

Defendants.



COMPLAINT

Plaintiff, GC sues Defendants,

OWNER, ELECTRIC SUB, SURETY FOR ELECTRIC SUB, CONCRETE SUB AND SURETY FOR CONCRETE SUB and

states:

ALLEGATIONS APPLICABLE TO ALL COUNTS

1. This is an action for damages in excess of $15,000.00.

2. GC is a Florida corporation and a Florida state certified general contractor.

3. Owner is a public body created by the Legislature of the State of Florida pursuant to 1957 Fla. Laws Ch. 57-1658, and operates the Orlando International Airport.

4. Defendant, Electric SUB, is a Florida corporation authorized to do business, doing business, and that did business in the State of Florida during all material times set forth in this Complaint.

5. Electric Surety is a New Jersey corporation authorized to do business and doing business in the State of Florida.

6. Defendant, Concrete SUB, is a Missouri corporation authorized to do business, doing business, and that did business in the State of Florida during all material times set forth in this Complaint.

7. Concrete SURETY is a Connecticut corporation authorized to do business and doing business in the State of Florida.

8. On or about November 29, 1988, GC entered into a contract with Owner for the construction of the Landside Terminal Expansion at Airport (hereinafter the Contract). The project name for the contract in issue is "Bid Package 125-Landside Terminal Expansion"

The remaining Contract Documents are in Owner's possession and are too voluminous to attach hereto.

9. The original sum of the Contract was $133,972,000. Numerous Change Orders and Directives issued by

Owner resulted in a final Contract Price of $168,597,437.18, not including $23,712,985 in owner furnished materials. Copies of the various Change Orders and Directives are in the possession of Owner and are too voluminous to attach hereto.

10. On or about December 9th, 1988, GC entered into a Subcontract with Electric Sub (E.S.), pursuant to which E.S. agreed to provide labor, equipment, and materials on the Project, specifically that portion known as "Division 16 work."

11. The Contract, plans, specifications, and general conditions of the Contract were specifically made a part of the Electric Subcontract pursuant to Article 6 of the Electric Subcontract.

12. Owner has alleged numerous defects in Electric Subs work, and is withholding a portion of GC's final Contract balance as a result of the alleged defects more specifically outlined below.

13. On or about December 1, 1988 GC entered into a subcontract with Concrete Sub, pursuant to which Concrete Sub agreed to provide labor, equipment, and materials on the Project, specifically that portion known as Concrete work.

14. The contract, plans, specifications, and general conditions of the Owner/GC Contract were specifically made a part of the Concrete Subcontract pursuant to Article 6 of the Concrete

Subcontract. These additional Contract Documents are not attached because of their voluminous nature.

15. Owner has alleged numerous defects in Concrete Sub's work, and is withholding a portion of GC's final Contract balance as a result of the alleged defects more specifically outlined below.

COUNT I – BREACH OF CONTRACT AGAINST Owner

16. This is an action for breach of contract against Owner

17. The Project was a "multi-prime" project, meaning that Owner contracted directly with more than one prime contractor on the Project. The nature of the Project, and the scheduled time of completion for the Project, were such that Owner was required to provide GC with an accurate, detailed, and well coordinated set of Contract Documents, all of which were critical requirements of the orderly prosecution of work by GC.

18. Owner was responsible for scheduling, contracting and managing its contractors and consultants on the Project, had the responsibility to make the site available for GC, and was required to coordinate the schedules of its own contractors in such a manner as not to interfere or impact GC's work. Specifically, Section 6.1.3 of the General Conditions to the Owner GC Contract provides in part that:

> Owner shall provide for coordination of the activity of the owner's own forces and of each separate contractor with the work of the Contractor.

19. During the Project, Owner failed to ensure timely completion of prior and concurrent contractors' work. Owner by separate contract was to provide foundation pilings in accordance with a schedule contained in the Contract Documents. During the course of the Project, incomplete, untimely, and defective construction of foundation piles by Owner's contractor, PILING CONTRACTOR, resulted in significant impacts and delays to GC's forces. The Contract completion dates for the foundation piling work to be performed by Piling Contractor were not met. This failure to meet these dates prevented GC from gaining access to critical work areas, and further resulted in trade stacking, inefficient work effort, and numerous structural changes that resulted in GC experiencing an extended performance period of 165 days.

20. Additional problems arose as a result of Owner's failure to tender complete and accurate Contract Documents. Numerous ambiguities, errors and omissions in the plans and specifications resulted in an excessive number of Requests for Instruction, Requests for Change Orders and Design Bulletins. A total of 508 Change Orders were issued by Owner. Many of the Change Orders and Design Bulletins were issued after the specified completion date for the Project and the extended completion dates which should have been established as a result of the late completion of foundation piling work. A total of 160 additive Change Orders totaling $7,994,880 were issued after the adjusted completion

date of February 12, 1991. Although Owner acknowledged that these late changes to the plans and specifications resulted in an extended performance period to GC's work of 565 days, Owner refused to afford GC additional time or compensation for the resulting impacts. At the time it executed these Change Orders GC specifically reserved its right to seek compensation for the impacts resulting from these changes.

21. As a direct result of the aforementioned impacts and delays caused by Owner and/or other prime contractors, GC was restrained, restricted, hindered, delayed, disrupted, accelerated, forced to work out of sequence, forced to perform additional and extra work from that planned, and otherwise significantly impacted. These delays, extended performance periods, disruptions, and hindrances were not the type normally experienced on a project of this type.

22. The aforementioned problems and impacts, which were the responsibility of Owner, Owner's consultants, and other prime contractors for whom Owner was responsible, constituted a breach of the Owner/GC Contract.

23. Despite the innumerable delays and impacts to GC's work, Owner refused to extend the date of final completion beyond an adjusted completion date of February 12, 1991.

24. The impacts endured by GC were not the result of any act or omission of GC, and were otherwise excusable as to said entity.

25. The delays, extended performance periods, disruptions, hindrances, interferences, accelerations and other impacts to the work of GC were so extreme as to have been beyond the contemplation of GC at the time the Owner/GC Contract was executed.

26. During the course of construction on the Project, Owner improperly rejected certain welding work performed by GC's mechanical subcontractor, and notified GC that the welding work did not meet the requirements of the Contract Documents. As a result of this rejection of work, Owner has improperly withheld $1,223,902 from GC's application for payment on the Project.

27. As a further consequence of Owner's breach of its Contract with GC, several of GC's subcontractors have claimed that their work was also impacted and delayed, and have asserted claims against GC. GC has incurred costs to defend these claims, and may in the future incur damages as a result of Owner's actions.

28. As a result of Owner's breaches of contract, GC suffered and continues to suffer monetary damages, both direct and special, including the following:

(a) increased general conditions;

(b) extended home office overhead;

(c) increased labor and material costs;

(d) increased equipment rental costs;

(e) increased bond premium costs;

(f) unpaid Contract balance and retainage;

(g) cost of extra work;

(h) lost use of funds;

(i) acceleration costs;

(j) delay damages;

(k) engineering/consultant fees; and

(l) costs in defending claims asserted by subcontractors.

29. GC notified Owner during the Project on numerous occasions that its work was being impacted by the aforementioned problems and specifically reserved the right to seek compensation for the increased costs resulting from these impacts.

30. GC has retained the law firm of in this action, and is entitled to obtain a reasonable fee for its services. Pursuant to the terms of the Owner/GC Contract, and Fla. Stat. § 57.105, Owner is liable for the attorney's fees incurred in the prosecution of this action.

31. All conditions precedent to the filing of this action, including but not limited to, the serving of all required notices, have occurred, been waived, or are otherwise excused.

WHEREFORE, Plaintiff,

demands judgment for damages against Defendant, including prejudgment and postjudgment interest, costs, attorney fees, and such other relief as the Court deems just and proper.

COUNT II – BREACH OF CONTRACT AGAINST Electric Sub

32. This is an action for breach of contract against Electric Sub.

33. Paragraph A-3 of the additional provisions of the Subcontract states that Electric Sub agreed that all of its work under the Electric Sub Subcontract would be of the highest quality, and would meet applicable codes.

34. Electric Sub breached the Electric Sub Subcontract by failing to properly perform the work, as alleged by owner, as follows:

(a) Failing to individually fuse the lighting on the recessed roadway service road.

(b) Failing to individually fuse the metal halide and canopy fixtures in the parking garages.

(c) Numerous defects in the installation of service cables in the main electrical vault, including tie in to the utility/electric transformer.

35. The above described defective work constitutes code violations that were latent and not discovered until after the date of substantial completion.

36. GC provided notice to Electric Sub of Owners allegations of the defects, code violations, and improper workmanship.

37. GC has demanded that Electric Sub remedy the defects, however, Electric Sub has refused.

38. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert consultants, delay, disruption, interest, costs, and attorneys' fees.

39. GC has performed all conditions precedent and has fully performed under the Electric Sub Subcontract.

40. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover attorneys' fees pursuant to the POWER Subcontract.

WHEREFORE, Plaintiff, GC demands judgment against Defendant, Electric Sub for damages plus interest, costs, and attorneys' fees.

COUNT III – BREACH OF GUARANTEE AGAINST Electric Sub

41. This is an action for breach of a specific guarantee against Electric Sub

42. Pursuant to Electrical Subcontract , Electric Sub guaranteed its work to be free from defects for a period of one year from the date of acceptance of the work.

43. The date of acceptance of the work has never occurred nor has the date been established since the work has never been accepted.

44. Electric Sub breached the guarantee by failing to properly perform the work so as to be free from defects, as alleged by owner, as follows:

(a) Failing to individually fuse the lighting on the recessed roadway service road.

(b) Failing to individually fuse the metal halide and canopy fixtures in the parking garages.

(c) Numerous defects in the installation of service cables in the main electrical vault, including tie in to the electricity transformer.

45. GC provided notice to Electric Sub of Owners allegations of the defects, code violations, and improper workmanship.

46. GC has demanded Electric Sub to remedy the defects pursuant to the guarantee set forth in Electric Subcontract, however, Electric Sub has refused.

47. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert consultants, delay, disruption, interest, costs, and attorneys' fees.

48. GC has performed all conditions precedent and has fully performed under the Electric Subcontract.

49. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover attorneys' fees pursuant to the POWER Subcontract.

WHEREFORE, Plaintiff, demands judgment against Defendant, for damages plus interest, costs, and attorneys' fees.

COUNT IV – PERFORMANCE BOND CLAIM AGAINST SURETY OF ELECTRIC SUB (SOES)

50. This is an action for breach of a performance bond.

51. GC realleges and incorporates by reference paragraphs 30 through 36 and 39 through 45 of this Complaint.

52. Pursuant to the requirements of the Electric Subcontract, Defendant Electrical Sub as principal, and Defendant SOES as surety, executed and delivered to GC a performance bond.

53. Electrical Sub breached the Electrical Subcontract by failing to properly perform the work as alleged by owner and detailed above.

54. The above described defective work was latent and not discovered until after substantial completion of the Project. Alternatively, the defects were warranty obligations of Electric Sub as same were discovered within the one year guarantee period

55. GC provided notice to Surety of the discovery of the defects, code violations, and improper workmanship. A copy of GC's February 24, 1994, and June 1, 1994, letters to Surety are attached

56. GC has demanded that Electric Sub remedy the defects, however, Electric Sub has refused.

57. GC has made demand upon Surety for payment of damages and expenses arising from Surety's failure to remedy the defective work.

58. Surety has failed to perform the remedial work and has failed to pay to GC any of the costs of the remedial work, losses, damages, and expenses under the Performance Bond.

59. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert consultants, disruption, interest, costs, and attorneys' fees.

60. GC has performed all conditions precedent to payment and is entitled to recover against the surety

61. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover attorneys' fees pursuant to the POWER Subcontract, Florida Statute Section 627.756, and the Performance Bond.

WHEREFORE, Plaintiff, GC

demands judgment against

Defendant, SOES (Surety of electric Sub) for damages plus interest, costs, and attorneys' fees.

COUNT V - BREACH OF CONTRACT AGAINST CONCRETE SUB

64. Paragraph A-3 of the additional provisions of the Subcontract states that Concrete Sub agreed that all of its work under the Concrete Subcontract would be of the highest quality.

65. Concrete Sub breached the Concrete Subcontract by failing to properly perform the work, as alleged by Owner as follows:

(a) Improperly installing the water stops in the joints of the recessed roadway.

(b) Improperly installing the waterproofing system for the retaining walls.

(c) Improperly installing the retaining wall sections such that there exists a lack of proper isolation between the wall sections as required by the Contract Documents.

(d) Failing to correct the defects noted in the May 6, 1991 punch list,

(e) Failing to correct the defects noted in the July 2, 1991 punch list,

66. The above described defective work was latent and not discovered until after March 19, 1991. Additionally, the defects were not discoverable by the exercise of due diligence until after March 19, 1991.

67. GC provided notice to Concrete Sub of Owner's allegations of the defects and improper workmanship on July 9, 1991 and on many occasions thereafter.

68. Due to the improper workmanship of Concrete Sub., the recessed roadway has incurred cracking, there is water leakage through the retaining walls, and cracking and spalling has occurred at the retaining wall expansion joints.

69. GC has demanded on many occasions that Concrete Sub remedy the defects, however Concrete Sub has refused.

70. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert

consultants, delay, disruption, interest, costs, and attorneys' fees.

71. GC has performed all conditions precedent and has fully performed under the Concrete Subcontract.

72. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover attorneys' fees pursuant to the Concrete Subcontract.

WHEREFORE, Plaintiff, GC , demands judgment against Defendant, Concrete Sub for damages plus interest, costs, and attorneys' fees.

COUNT VI--BREACH OF GUARANTEE AGAINST Concrete Sub

73. This is an action for breach of a specific guarantee against Concrete Sub

74. Pursuant to CONCRETE Subcontract, GARNEY guaranteed its work to be free from defects for a period of one year from the date of acceptance of the work.

75. Concrete Sub ratified its guarantee obligations in the Settlement Agreement on March 19, 1991 as set forth in Paragraph 63 of this Complaint.

76. The date of acceptance of the work has never occurred nor has the date been established since the work has never been accepted.

77. Concrete Sub breached the guarantee by failing to properly perform the work so as to be free from defects, as alleged by owner as follows:

(a) Improperly installing the water stops in the joints of the recessed roadway.

(b) Improperly installing the water proofing system for the retaining walls.

(c) Improperly installing the retaining wall sections such that there exists a lack of proper isolation between the wall sections as required by the contract documents.

(d) Failing to correct the defects noted in the May 6, 1991 punch list, attached as Exhibit "H".

(e) Failing to correct the defects noted in the July 2, 1991 punch list,

78. Due to the improper workmanship of Concrete Sub the recessed roadway has incurred cracking, there is water leakage through the retaining walls, and cracking and spalling has occurred at the retaining wall expansion joints.

79. GC provided notice to Concrete Sub of owner's allegations of the defects and improper workmanship on July 9, 1991 and on many occasions thereafter.

80. GC has demanded on many occasions that Concrete Sub remedy the defects pursuant to the guarantee set forth in Section XX of the Concrete Subcontract, however Concrete Sub has refused.

81. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert consultants, delay, disruption, interest, costs, and attorneys' fees.

82. GC has performed all conditions precedent and has fully performed under the Concrete Subcontract

83. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover attorneys' fees pursuant to the Concrete Subcontract.

WHEREFORE, Plaintiff, demands judgment against Defendant, Concrete Sub for damages plus interest, costs, and attorneys' fees.

COUNT VII--PERFORMANCE BOND CLAIM AGAINST Concrete Sub Surety (CSS)

84. This is an action for breach of a performance bond.

85. GC realleges and incorporates by reference paragraphs 63 through 64 and 74 through 76 of this Complaint.

86. Pursuant to the requirements of the Concrete Subcontract, Defendant Concrete Sub, as principal, and Defendant Concrete Surety as surety, executed and delivered to GC a Performance Bond

87. Concrete Sub breached the Concrete Subcontract by failing to properly perform the work, as alleged by Owner, as follows:

(a) Improperly installing the water stops in the joints of the recessed roadway.

(b) Improperly installing the water proofing system for the retaining walls.

(c) Improperly installing the retaining wall sections such that there exists a lack of proper isolation between the wall sections as required by the contract documents.

(d) Failing to correct the defects noted in the May 6, 1991 punch list.

(e) Failing to correct the defects noted in the July 2, 1991 punch list.

88. The above described defective work was latent and not discovered until after March 19, 1991. Additionally, the defects were not discoverable by the exercise of due diligence until after March 19, 1991. Alternatively, the defects were warranty obligations of Concrete Sub as same were discovered within the one year guarantee period set forth in Electrical Subcontract.

89. Due to the improper workmanship of Concrete Subcontractor the recessed roadway has incurred cracking, there is water leakage through the

retaining walls, and cracking and spalling has occurred at the retaining wall expansion joints.

90. GC provided notice to Concrete Sub of owner's allegations of the defects and improper workmanship on July 9, 1991 and on many occasions thereafter.

91. GC has demanded on many occasions that Concrete Sub remedy the defects, however Concrete Sub has refused.

92. GC has made demand upon Concrete Surety for payment of damages and expenses arising from Concrete Sub's failure to remedy the defective work.

93. Concrete Surety has failed to have the remedial work performed and has failed to pay to GC any of the costs of the remedial work, losses, damages, and expenses under the performance bond.

94. GC has incurred or will incur expenses for the cost of repair or replacement to remedy the defects, the cost of expert consultants, delay, disruption, interest, costs, and attorneys' fees.

95. GC has performed all conditions precedent to payment and is entitled to recover against the CONCRETE SURETY

96. GC has been caused to retain the undersigned counsel to prosecute this action and is obligated to pay said counsel reasonable attorneys' fees. GC is entitled to recover

attorneys' fees pursuant to the Concrete Subcontract, Florida Statute Section 627.756, and the Performance Bond.

WHEREFORE, Plaintiff, GC demands judgment against Defendant, CONCRETE SURETY for damages, plus prejudgment interest, costs, and attorneys' fees.

APPENDIX K
COUNTERCLAIM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

GC

Plaintiff,

vs.

OWNER
ELECTRIC SUB, SURETY FOR ELECTRIC SUB
CONCRETE SUB AND SURETY FOR CONCRETE SUB

Defendants.

_____/

DEFENDANT OWNER **COUNTERCLAIM**

COMES NOW Defendant/Counterclaimant OWNER, by and through its undersigned counsel, and brings this Counterclaim against Plaintiff/Counter-Defendant GC and for cause of action, states:

GENERAL ALLEGATIONS

1. The OWNER is a governmental agency duly authorized and existing pursuant to Chapters 57-1658 and 75-464 of the laws of the State of Florida, and operates the Airport.

2. GC is a corporation, duly organized and existing in accordance with the laws of the State of Florida, and is a Florida state certified general contractor.

3. On or about November 29, OWNER entered into a contract with GC for the construction of the Landside Terminal Expansion , known as "Bid Package No. 125 - Landside Terminal Expansion, 'the Landside Project"). GC has in its possession a copy of the Contract Documents for the Project, which are too voluminous to attach to this Counterclaim.

4. On or about May 11, OWNER entered into a contract with GC for the construction of the Airside Terminal , known as "Bid Package No. 126 - Airside Terminal GC has in its possession a copy of the Contract Documents for the Project, which are too voluminous to attach to this Amended Counterclaim.

5. The OWNER has retained the law firm of to represent it in this action, and has agreed to pay said firm a reasonable fee for its services. In accordance with the provisions of Sections 3.18 and 4.6.6 of the General and Supplemental General Conditions to the contracts for the Projects, the OWNER is entitled to recover reasonable attorney's fees incurred in pursuing this action.

COUNT I - BREACH OF CONTRACT - (WELDING DEFICIENCIES)

6. This is an action against GC for breach of contract related to deficient performance of welding on the . Projects, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

7. The Authority reincorporates herein the allegations of paragraphs 1 through 5 above.

8. Pursuant to Section 3.5.1 of the General Conditions of the Contract Documents for both the Projects, GC warranted that the work performed under the contract would be of good quality, free from defects, and would conform to the requirements of the Contract Documents.

9. Pursuant to Section 12.2.1 of the General Conditions of the Contract Documents for both the Projects, GC was required to promptly correct work which was rejected by the Architect or which failed to conform to the requirements of Contract Documents, and GC was obligated to bear all costs of correcting such work, including additional testing and inspection and compensation for additional professional services and expenses made necessary thereby.

10. Under the provisions of Section 15100 of the Technical Specifications for both Projects:

a. the piping systems were required to meet the requirements of ANSI/ASME B31.1-1986, Power Piping Code, and ANSI/ASME B31.9-1982, Building Piping Code;

b. welding was required to conform with the procedures of the National Certified Pipe Welding Bureau, and comply with the requirements for ANSI Code Pressure Piping (ANSI/ASME B31.1-1986); and

c. backing rings had to be used on all connections larger than six inches.

11. ANSI/ASME B31.1 and B31.9 require that welds:

a. have complete penetration; and

b. be as thick as the minimum wall thickness of the pipe being welded.

12. Based upon concerns over the quality of the welds performed on the Projects, the OWNER exercised its right to perform radiographic testing on a random sample of the total number of welds on the projects. Because the welding had already been performed by GC and visual inspection could not determine the extent of penetration, the thickness of the welds, or the use of backing rings in the welding process; therefore, radiographic testing was the best available non-destructive means of determining the sufficiency of the welds.

13. The radiographic testing performed by OWNER demonstrated that GC breached the Project contracts by improperly failing to provide welds with complete penetration, weld thickness equal to or greater than the minimum wall thickness of the pipe being welded, and failing to use backing rings for connections larger than six inches, in approximately 75% of the welds tested.

14. Based upon the testing performed by the OWNER it is reasonably estimated that approximately 75% of the welds performed on the Projects fail to meet

contractual requirements due to incomplete weld penetration, weld thickness less than the minimum wall thickness of the pipe being welded, and the absence of backing rings for connections larger than six inches.

15. As a result of GC breach of its contractual requirements, the OWNER has been damaged in that it has received inferior welds which will experience leaks, cracks and ruptures well before the normal life expectancy of forty years. To repair or replace the defective welding, the OWNER must either (1) radiograph all existing welds and repair or replace all welds determined to be defective at the present time; or (2) repair and replace defective welds which develop leaks, cracks or ruptures throughout the normal forty year life expectancy of the welds.

16. The OWNER notified GC within twenty-one days of discovery of the defective condition of the welds on the Projects, in accordance with the requirements of the Contract Documents. Since receipt of notification, GC has failed and refused to repair and replace the defective welds, or otherwise take steps to cure its breaches of the Project contracts.

17. The cost which is likely to be incurred by the OWNER to either (a) radiograph all existing welds and repair or replace all defective welds at the present time; or (b) repair and replace defective welds which develop leaks, cracks or ruptures throughout the normal life expectancy of the welds; in addition to the costs already incurred for additional testing and inspection

and compensation for additional professional services and expenses made necessary by the defective welding, are reasonably expected to exceed the remaining contract balances on the Projects. The OWNER has therefore withheld payment of the remaining contract balances under the provisions of Section 9.1.2 of the General and Supplemental General Conditions to those contracts.

18. All conditions precedent to the commencement of this action have been performed by the OWNER or have otherwise occurred.

WHEREFORE, the OWNER demands judgment against GC for damages equal to either: (a) the cost of radiographing all existing welds, and repairing or replacing all welds determined to be defective at the present time; or (b) a reasonable estimate of the costs which will be incurred by the OWNER to repair and replace defective welds which develop leaks, cracks or ruptures throughout the normal life expectancy of the welds; as well as recovery of costs incurred by the OWNER for additional testing and inspection and compensation for additional professional services and expenses made necessary by the defective welding, costs and attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

COUNT II - BREACH OF CONTRACT (RECESSED ROADWAY)

19. This is an action against GC for breach of contract related to defective construction of the recessed roadway on the

Project, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

20. The OWNER reincorporates herein the allegations of paragraphs 1 through 3, 5, 8 and 9 above.

21. GC breached its obligations under the Contract by providing defective work on the recessed roadways which failed to meet the requirements of the Contract Documents, resulting in leaking, cracking and deterioration of the recessed roadway.

22. The OWNER notified GC within twenty-one days of discovery of the defective condition of the recessed roadway on the Project, in accordance with the requirements of the Contract Documents. Since receipt of notification, GC has failed and refused to repair and replace the defective portion of the recessed roadway, or otherwise take steps to cure its breaches of the Project contract.

23. As a result of GC'S deficient performance, the OWNER has incurred costs for additional testing and inspection and compensation for the professional services and expenses made necessary thereby, and has or will be required to incur damages to repair and replace the defective work of GC in accordance with the requirements of the Contract Documents.

24. All conditions precedent to the commencement of this action have been performed by the OWNER or have otherwise occurred.

WHEREFORE, the OWNER demands judgment against GC for all damages arising out the defective performance of the work on the recessed roadway as described in this Count, as well as costs and attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

COUNT III - BREACH OF CONTRACT
(LANDSIDE BUILDING ELECTRICAL VAULT)

25. This is an action against GC for breach of contract related to the defective construction of the electrical vault, and for the improper fusing of lighting on the recessed roadway and the canopy fixtures, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

26. The OWNER reincorporates herein the allegations of paragraphs 1 through 3, 5, 8 and 9 above.

27. GC breached its obligations under the Landside Contract by providing defective work in the electrical vault, and the installation of the recessed roadway lighting and the canopy fixtures, which failed to meet the requirements of the Contract Documents, resulting in excess costs to repair or replace the defective work.

28. The OWNER notified GC within twenty-one days of discovery of the defective conditions alleged in the prior paragraph, in accordance with the requirements of the Contract Documents. Since receipt of notification, GC has failed and refused to repair and replace the defective work, or otherwise take steps to cure its breaches of the Project contract.

29. As a result of GC's deficient performance, the OWNER has incurred costs for additional testing and inspection and compensation for the professional services and expenses made necessary thereby, and has or will be required to incur damages to repair and replace the defective work of GC attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

COUNT IV - BREACH OF CONTRACT (BOND PREMIUM OVERCHARGES)

30. This is an action against GC for breach of contract related to GC's bond premium overcharges related to change orders issued on the Projects, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

31. The OWNER reincorporates herein the allegations of paragraphs 1 through 5, 8 and 9 above.

32. GC breached its obligations under the Project Contracts by overcharging the OWNER for bond premiums paid on approved change orders.

33. The OWNER notified GC within twenty-one days of discovery of the bond premium overcharges, in accordance with the requirements of the Contract Documents. Since receipt of notification, GC has failed and refused to reimburse the Authority for the amounts overcharged or otherwise take steps to cure its breaches of the contract.

34. As a result of GC's improper actions, the OWNER is entitled to reimbursement for the bond premium overpayments.

35. All conditions precedent to the commencement of this action has been performed by the OWNER or have otherwise occurred.

WHEREFORE, the Owner demands judgment against GC for all damages arising out the bond premium overcharges on change orders issued on the Projects, as well as costs and attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

COUNT V - BREACH OF CONTRACT (PERSISTENT LEAKS)

36. This is an action against GC for breach of contract related to deficient performance related to construction of the persistent leaks on the Projects, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

37. The Owner reincorporates herein the allegations of paragraphs 1 through 5, 8 and 9 above.

38. GC breached its obligations under the Project Contracts by providing defective work which failed to meet the requirements of the Contract Documents, resulting in leaking, cracking and deterioration of the Buildings as set forth in the Owner's June 10, 1994 letter to GC a copy of which was received by GC on or before June 17, 1994.

39. The Owner notified GC within twenty-one days of discovery of the defective conditions of the Projects, in accordance with the requirements of the Contract Documents. Since receipt of notification, GC has failed and

refused to repair the leaks or otherwise take steps to cure its breaches of the contracts.

40. As a result of GC's deficient performance, the OWNER has incurred costs to repair the leaks, for additional testing and inspection and compensation for professional services and expenses made necessary thereby, and has or will be required to incur damages to repair and replace the defective work of GC in accordance with the requirements of the Contract Documents.

41. All conditions precedent to the commencement of this action have been performed by the Authority or have otherwise occurred.

WHEREFORE, the OWNER demands judgment against GC for all damages arising out the defective performance of the work resulting in persistent leaks in the Projects, as well as costs and attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

COUNT VI - BREACH OF CONTRACT (DELAYED PERFORMANCE)

42. This is an action against GC for breach of contract related to delayed performance on both the Projects, seeking damages in excess of $15,000, exclusive of interest and attorney's fees.

43. The OWNER reincorporates herein the allegations of paragraphs 1 through 5 above.

44. Pursuant to paragraph 1.5 of Section 01000 of the General Conditions of the Contract, GC was required to have completed the majority of the Contract, including the

steel and concrete structures, finish work for all of level one of the terminal and parking garage, finishes in the south half of the second and third floors of the terminal, and elevators, escalators and moving walks, on or before June 1, 1990.

45. Pursuant to paragraph 1.4 of Section 01000 of the General Conditions of the Project, GC was required to have completed all work on the Project on or before May 14, 1990.

46. Section 8.2.2 of the General Conditions for both the Projects states that the time limits in the Contract Documents are of the essence of both contracts. Sections 8.3.4 and 8.3.5 of the Supplemental General Conditions for both the Projects further states that if GC failed to complete the work in a timely fashion, the OWNER was entitled to recover from GC damages associated with delayed performance, including, but not limited to, costs for employee salaries, fees for additional services by the Owner's Representative and the Architect, fees for engineering, testing, inspection services and attorney's, consequential damages associated with the unavailability of the facilities being constructed, and liabilities incurred by the Authority to other contractors as a result of GC's delayed completion.

47. GC failed to complete the work on both the Projects in a timely manner. Partial completion and occupancy of both the Projects did not occur

until September 11, 1990. The acceptance of the work has not occurred and the date of final completion has not been established.

48. As a result of GC's delayed performance, the OWNER incurred costs for employee salaries, fees for additional services by the Owner's Representative and the Architect, fees for engineering, testing, inspection services and attorney's, consequential damages associated with the unavailability of the facilities being constructed, and liabilities to other contractors.

49. All conditions precedent to the commencement of this action have been performed by the Authority or have otherwise occurred.

WHEREFORE, the OWNER demands judgment against GC for all damages arising out the delayed performance of work on both the Projects, as well as costs and attorney's fees incurred in this action, and such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Counterclaimant, OWNER demands trial by jury of all issues so triable pursuant to Rule 1.430(b), Fla. R. Civ. P.

APPENDIX L

NEWBERRY SQUARE V. SOUTHERN LANDMARK, 578 SO.2D 750 (FLA. 1ST DCA 1991)

Page 750
578 So.2d 750
16 Fla. L. Weekly 856
NEWBERRY SQUARE DEVELOPMENT CORPORATION, Diversified Centers, Inc., and Robert L. Miller, Appellants,
v.
SOUTHERN LANDMARK, INC., and Aetna Casualty & Surety Co., Appellees.
No. 89-1363.
District Court of Appeal of Florida,
First District.
March 29, 1991.
Rehearing Denied May 21, 1991.

Page 751

Stephen B. Rakusin, of Rakusin & Ivey, Gainesville, and S. Larue Williams, of Kensey, Vincent & Pyle, Daytona Beach, for appellants.

Philip N. Hammersley, of Trawick, Hammersley & Valentine, Sarasota, for appellees.

WENTWORTH, Senior Judge.

Appellants (hereinafter Newberry Square) 1 seek review of an order by which appellees (hereinafter Southern Landmark) were awarded damages in a construction contract dispute. We find that the only point which requires reversal is the allowance of damages, in Southern Landmark's

award, for two of Southern Landmark's subcontractors. We reverse the order as to this portion of the total damages, and otherwise affirm.

Southern Landmark entered into a contract to construct a shopping center for Newberry Square. The contract specified completion dates for Southern Landmark's work. When the work was not completed until after the scheduled dates Newberry Square withheld payment of the outstanding contract balance and refused to pay the full amount of Southern Landmark's final pay requisition. Southern Landmark thereafter filed an action seeking recovery which included damages related to delays which it contended were attributable to Newberry Square.

Although the contract contained a "no damage for delay" clause which purported to limit Southern Landmark's available remedy to an extension of time, such a clause does not preclude recovery for delays resulting from a party's fraud, concealment, or active interference with performance under the contract. See United States for the Use & Benefit of Seminole Sheetmetal Company v. SCI Inc., 828 F.2d 671 (11th Cir.1987); C.A. Davis Inc. v. City of Miami, 400 So.2d 536 (Fla. 3d DCA 1981), pet. for review dismissed 411 So.2d 380 (Fla.1981). And despite such a clause damages may be awarded upon a "knowing delay" which is sufficiently egregious, see Southern Gulf Utilities Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1972), or upon the willful concealment of foreseeable circumstances which impact timely performance. See McIntire v. Green-Tree Communities Inc., 318 So.2d 197 (Fla. 2d DCA 1975). These exceptions to the no damages clause are generally predicated upon an implied promise and obligation not to hinder or impede performance. See Seminole Sheetmetal, supra. In the present case there was evidence that Newberry Square delayed in providing approved plans and specifications, and in providing plans and specifications which incorporated desired changes. There was also evidence that Newberry Square delayed in executing change orders and required that construction not proceed without such orders. And it was indicated that Newberry Square repeatedly failed to make timely payments required by the contract. This course of conduct was established not only as to the Newberry Square project, but also as to two other construction projects involving these parties. And Southern Landmark's president testified that appellant Robert Miller had threatened "that he would break me before he'd pay...." There was thus adequate evidence to present a jury question as to whether Newberry Square actively impeded, or willfully and knowingly delayed, Southern Landmark's ability to timely perform under the contract, and in these circumstances the "no damage for delay" clause does not preclude Southern Landmark's recovery.

Newberry Square argues that Southern Landmark should not have been allowed to present evidence as to the delays and difficulties which occurred on the other two construction projects which were not a part of the contract in this case. However, all three projects were bid during the same month, and it was indicated that the procedures in administering the contracts, including the payment process and change orders, were identical. Evidence was presented as to various delays which Newberry Square occasioned on the other two projects, and the manner in which these difficulties impacted Southern Landmark's ability to perform under the contract in the present case. The evidence was pertinent to Newberry Square's motive, knowledge, and intent and thus admissible under section 90.404(2)(a), Florida Statutes, as it reflected the totality of the circumstances and the course of dealing between the parties as related to the dispute in the present case.

Newberry Square also argues that it should have been allowed to present the testimony of an accountant who performed a cash flow analysis of payments on the construction project in this case. But it was indicated that this analysis did not include all overhead costs, and did not consider the impact of payment delays from the other projects. And similar testimony

was presented by two other witnesses who suggested that Southern Landmark had not adequately paid their subcontractors when payments were made to Southern Landmark. Given the questionable accuracy of the accountant's cash flow analysis, and the presentation of similar evidence by other witnesses, the exclusion of the accountant's cash flow testimony does not constitute reversible error.

During the presentation of Southern Landmark's evidence a witness used a chart titled "Summary of Amounts Claimed." Newberry Square asserts that the chart was also used during argument by Southern Landmark's counsel, although the record is not entirely clear in this regard. The chart contained figures reciting the various amounts claimed as damages. One of the items was modified in accordance with the concession of Southern Landmark's president that certain damages should be excluded. After the jury retired to begin deliberations it requested that the court provide a written breakdown of the damages claimed. Counsel for Newberry Square suggested that it would be "inappropriate ... to provide the jury with any ... information," and expressed a preference that the chart "not go in" to the jury room. The court then returned the jury to the courtroom where the chart was displayed, and advised the jury: "this is not evidence. This is a chart ... used to explain to you what their damage--what claims there are. You should not use this chart as evidence of damage, just what their claims of damage are." The court explained to the jury why one of the figures on the chart had been altered, and noted that the bottom-line figure needed to be adjusted accordingly. The jury thereafter returned to the jury room and continued deliberations.

Louisiana-Pacific Corp. v. Mims, 453 So.2d 211 (Fla. 1st DCA 1984), suggests that a chart used during argument "must be promptly removed from the jury's observation" when the argument is concluded. See also, Ratner v. Arrington, 111 So.2d 82 (Fla. 3d DCA 1959). But in Mims the jury was allowed to take the chart into the jury room as a court exhibit, whereas in the present case the chart was not allowed into the jury room. Rather, the jury was merely permitted to again view the chart, which had also been used by a witness during testimony, for approximately five minutes in the courtroom, after which it remained outside the jury's view. The present case is also unlike Ballard v. W.E. Rowe, 234 S.E.2d 890 (S.C.1977), where a blackboard display of claims was taken into the jury room. In Ballard the blackboard display had been utilized in response to a jury request, and then additional claims were displayed upon a further request initiated by the trial court. The appellate court cautioned against "any intimation" by the trial court which might influence the minds of the jurors. In the present case the trial court clearly informed the jury that the chart was merely a summary of amounts claimed, and should not be considered as evidence. It has not been shown that the trial court's actions imperiled the fairness of the proceeding by prejudicing the minds of the jurors, as has been required for reversal in cases such as Pennsylvania Thresherman v. Koltunovsky, 184 So.2d 450 (Fla. 3d DCA 1966). The brief and limited use of Southern Landmark's claim chart in response to the jury's inquiry does not create the necessary inference of prejudice, and does not constitute reversible error.

Southern Landmark's damage award included amounts for two subcontractors ($39,000 for Newsom Brothers, and $141,000 for Home Electric). Such claims, when a contractor sues a project owner on behalf of a subcontractor, have been allowed when the contractor would be liable to the subcontractor, and in situations such as public contracts where the subcontractor is unable to establish an express or implied contract with the project owner. See Farrell Construction Co. v. Jefferson Parish, 693 F.Supp. 490 (E.D.La.1988); Public Health Trust of Dade County v. M.R. Harrison Construction Corp., 454 So.2d 659 (Fla. 3d DCA 1984); see also, Wexler Construction Co. v. Housing Authority

of Norwich, 149 Conn. 602, 183 A.2d 262 (1962). But the present case does not involve a public contract, and Southern Landmark is made contractually liable to the subcontractors "only to the extent" that Newberry Square is liable to Southern Landmark. The circumstances of this case thus do not accord with the standard announced in Farrell, and the other cited cases, for such claims. And as a matter of special damages peculiar to this case, the claims for the subcontractors' losses should have been specifically pleaded. See Fla.R.Civ.P. 1.120(g); cf., Safeco Title Ins. Co. v. Reynolds, 452 So.2d 45 (Fla. 2d DCA 1984). While Southern Landmark's complaint refers to additional expenses for material, labor, and services, and notes that litigation was filed by subcontractors, it does not make any more specific request for damages pertaining to subcontractors' losses. Special damages should be pleaded with particularity sufficient to apprise the opposing party of the nature of the special damages claimed. See Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320 (Fla.1956); see generally, Fla. Power Corp. v. Zenith Ind. Co., 377 So.2d 203 (Fla. 2d DCA 1979), cert. denied 388 So.2d 1120 (Fla.1980). Although Southern Landmark attempted in its pretrial compliance statement to increase the claim to encompass the subcontractors' losses, this document was filed less than three weeks before trial commenced and does not serve as an amendment of the pleadings. Indeed, in its pretrial statement Southern Landmark acknowledged that Newsom Brothers' and Home Electric's losses had not been included in Southern Landmark's claim. The failure to specifically plead a claim for these damages, and the absence of a basis for presentation of these claims, precludes the inclusion of such damages in Southern Landmark's award.

The order appealed is reversed insofar as the subcontractors' losses were included in Southern Landmark's damages. The order is otherwise affirmed, and the cause remanded.

MINER, J., concurs.

ERVIN, J., concurs and dissents w/written opinion.

ERVIN, Judge, concurring and dissenting.

I concur in all aspects of the majority's opinion except those relating to the trial court's refusal to permit testimony regarding how Southern Landmark used construction funds following payment from Newberry Square, the admission of hearsay statements made by an employee of Southern Landmark regarding what other employees told him about problems on the job, and the lower court's comments on and revisions to Southern Landmark's damages chart in the presence of the jury after jury deliberations had begun. If the first two issues were the only errors which occurred at trial, I could concur with the majority in affirming under the theory that such errors were only harmless. Because, however, I consider that the third issue requires reversal and remand for new trial, I would reverse as to the former two as well.

As to the first issue, after the trial court ruled inadmissible certain evidence pertaining to the manner in which appellant had paid construction funds to Southern Landmark on the Newberry Square project, the appellants proffered Ira Baron as an expert witness. Baron testified that he had examined and analyzed various financial data belonging to Southern Landmark, including cancelled checks, general ledgers, cash receipt journals, and check vouchers, and concluded therefrom that for the final eight months of 1985, and the first seven months of 1986, Southern Landmark had been overpaid in excess of $160,000. As such, Baron's testimony challenged Southern Landmark's theory that it could not pay its subcontractors because Newberry Square was not making prompt payments to Southern Landmark. The purpose of that testimony was clearly relevant to establish that Southern Landmark was receiving payments from Newberry in excess of that needed on the project and at the same time was not paying its subcontractors. Because the evidence concerned Newberry Square's theory of defense, it complied

with the definition of relevant evidence, 2 and was therefore admissible.

Appellees defend the trial court's decision to exclude such testimony on the ground that Baron's cash-flow analysis was incomplete in that it neither took into consideration cash-flow problems which existed at the other two construction projects, nor contemplated the contractor's home office overhead. In my judgment this argument goes more to the weight of the submitted evidence--not its admissibility. See Gershanik v. Department of Professional Reg., Bd. of Medical Examiners, 458 So.2d 302 (Fla. 3d DCA 1984), review denied, 462 So.2d 1106 (Fla.1985); Nat Harrison Assocs., Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). Any weakness in the underlying basis of Baron's opinion testimony could have been effectively brought to the jury's attention during cross-examination and later during the arguments of appellee's counsel. But his testimony for that reason alone should not, in my judgment, have been the cause for its exclusion.

Moreover, in determining whether the evidence was admissible, the trial court should have considered the counterbalancing factors outlined in Section 90.403, Florida Statutes (1989). Although a trial court enjoys wide discretion in deciding whether to admit or exclude relevant evidence pursuant to section 90.403, Dale v. Ford Motor Co., 409 So.2d 232 (Fla. 1st DCA 1982), such discretion is not unlimited. As section 90.403 expressly provides, the discretion to exclude relevant evidence may be exercised only if the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." (Emphasis added.) In commenting upon Federal Rule of Evidence 403, after which section 90.403 is patterned, Wright and Graham point out that "the discretion under Rule 403 is far from a license for free-wheeling exclusion; it carefully delineates a balancing test that must be applied before the evidence can be excluded." 22 C.A. Wright & K.W. Graham, Jr., Federal Practice and Procedure Sec. 5166, at 74 (1978). The balancing process required by section 90.403 was analyzed in the following terms by a well-known commentator:

In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.

1 C.W. Ehrhardt, Florida Evidence Sec. 403.1, at 103 (2d ed. 1984).

In my judgment appellant's need for the opinion evidence outweighed any adverse consideration. At the very minimum it clearly was not substantially outweighed by any of the countervailing factors listed in section 90.403. Baron was the only witness who actually testified as to the amount of overpayment, stating that as of January 31, 1986, Southern Landmark received $228,230 more than it paid out, and that during the seven months ending July 31, 1986, Southern Landmark received $1,881,000 and paid out $1,879,000. This testimony went to the very crux of appellants' defense, and therefore had substantial probative value.

Appellees finally argue that the cash-flow analysis was offered in the face of undisputed evidence that each of the payments to the contractor on the project were made following a certification by the architect that the contractor was due the amount, and, pursuant to the contract documents, that the architect's certificate for payment was conclusive. I agree with appellant that such certificates for payment would simply show how much the contractor had been paid, but would not show whether Southern Landmark actually used such amounts on the Newberry Square project.

Turning next to the issue relating to hearsay testimony, Southern Landmark's employee, Ed Johnson, testified that he had

been informed that Robert Miller, the sole shareholder and chief executive officer of Newberry Square, had failed to timely pay design professionals. He also stated that the civil engineer had advised him that he was owed money. Appellee asserted that this hearsay testimony was harmless because it was cumulative. On the contrary, the only testimony which corroborated Miller's was that of an architect who testified that he had delayed paying the electrical engineer, because he was not being paid promptly by Miller. Under the circumstances, it cannot be said that Johnson's hearsay testimony was cumulative.

As to the third issue, the majority omits the fact that the trial judge, in the presence of the jury, crossed out the item listed on Southern Landmark's damages chart as the "amount due under the contract[,] $481,132.28," and replaced it with the figure $478,470.32. As he did so, the judge made the following comments to the jury: "What I did at the top [of the chart], is the initial claim was four eighty-one what have you, and subsequent testimony reduced that to $478,470.32[,] and the bottom number [the total sum for all items of damages claimed on the chart] needs a deduct, too...." (Emphasis added.)

Despite the court's cautionary instruction to the jurors that the chart should not be considered as evidence, the court's other comments could have no effect other than to convey the impression that the court tacitly approved the revised figure. This assumption is supported by the fact that the amount which the jury awarded to Southern Landmark for this item of damages corresponded precisely with the court's revised figure.

The majority, in affirming as to this issue, focuses upon distinguishing facts in other cases in which--unlike the present case--the jurors were permitted to take exhibits into the jury room. The majority also emphasizes that the trial judge below specifically instructed the jury that the chart should not be considered as evidence. These distinctions, in my judgment, are not compelling when it is considered that the jurors were not only permitted to view the chart in the courtroom, but were also provided with pads and pencils.

Implied comments on the evidence, such as those made here, have been continuously disapproved in a substantial body of case law. For example, in Louisiana-Pacific Corp. v. Mims, 453 So.2d 211 (Fla. 1st DCA 1984), this court reversed a judgment in which the trial court permitted a list of damages to be taken to the jury room as a court's exhibit, notwithstanding that the trial judge cautioned the jury that the chart was not evidence. In so holding, we observed that "[t]he designation of the chart as a court's exhibit, lending to it the sanction and influence of the judge, is an error far more grievous than leaving it in the view of the jury during phases of the trial for which its use is unnecessary." Id. at 212-13.

The effect that a trial judge's comments, express or implied, may have on a jury's verdict was further alluded to in Ballard v. Rowe, 268 S.C. 517, 234 S.E.2d 890 (1977)--a case this court relied upon in Mims--in which the jury, during deliberations, requested a list of the items claimed by the plaintiff. Both the plaintiff and the defendant listed their claims on a blackboard and the court permitted the jury to view the lists and take them into the jury room. The Supreme Court of South Carolina reversed and remanded for new trial, stating,

Although the judge admonished the jury that the matters written on the blackboard (which were the equivalent of an exhibit) were merely the claim or contention of the general contractor, we must keep in mind the fact that the presiding judge has great influence upon the minds of the jurors, who are quick to seize upon any intimation by [word] or gesture from him.

Id. 234 S.E.2d at 892.

Finally, in Steele v. United States, 222 F.2d 628 (5th Cir.1955), the trial court permitted the jury to take into the jury room two government exhibits which were compilations of the alleged income of the defendant, who had been charged with tax evasion. The court reversed the judgment of conviction as to this issue and remanded, stating:

[W]e agree with appellant that the jury could scarcely consider this act of the court [sending the exhibit to the jury

room] other than as investing these exhibits with an air of credibility as demonstrative evidence over and above, and independent of, the evidence which they purported to summarize and embody, with the undoubted effect of completely erasing from the minds of the jury, as to the so-called exhibits, any therapeutic effect the charge to the jury that the exhibits were not original evidence and were not binding upon the jury, was intended or calculated to have.

Id. at 630.

The above cases clearly demonstrate the persuasive influence which an exhibit, prepared simply to support a party's theory of the case, may have upon jurors, once it is allowed to go with them into the jury room during their deliberations. The prejudicial effect is no less when a trial judge revises an item of damages on a chart which has no evidentiary value and comments that he has done so in order that the item may be conformed to the evidence. In both cases the items are invested with an aura of credibility. And, in the latter case, the item may be additionally perceived in the jurors' minds as having been clothed with judicial approval.

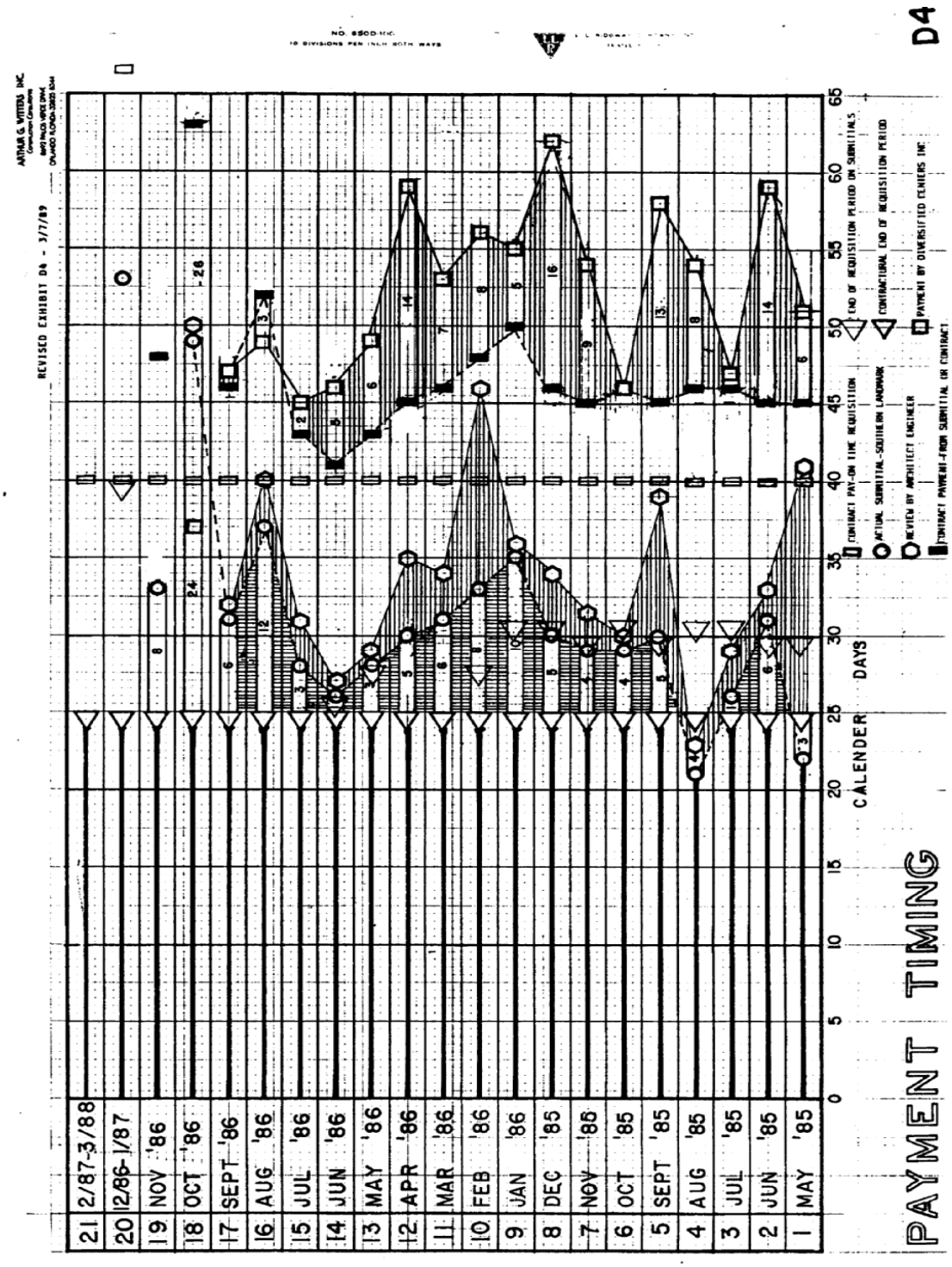
For the above reasons I would reverse the judgment and remand the case for new trial.

---

1 Appellant Diversified Centers is Newberry Square's parent corporation, and appellant Robert Miller is the sole shareholder of both entities. The parties agreed below that appellants are the same for the purpose of liability.

2 "Relevant evidence is evidence tending to prove or disprove a material fact." Sec. 90.401, Fla.Stat. (1989).

APPENDIX M
PAYMENT TIME ANALYSIS

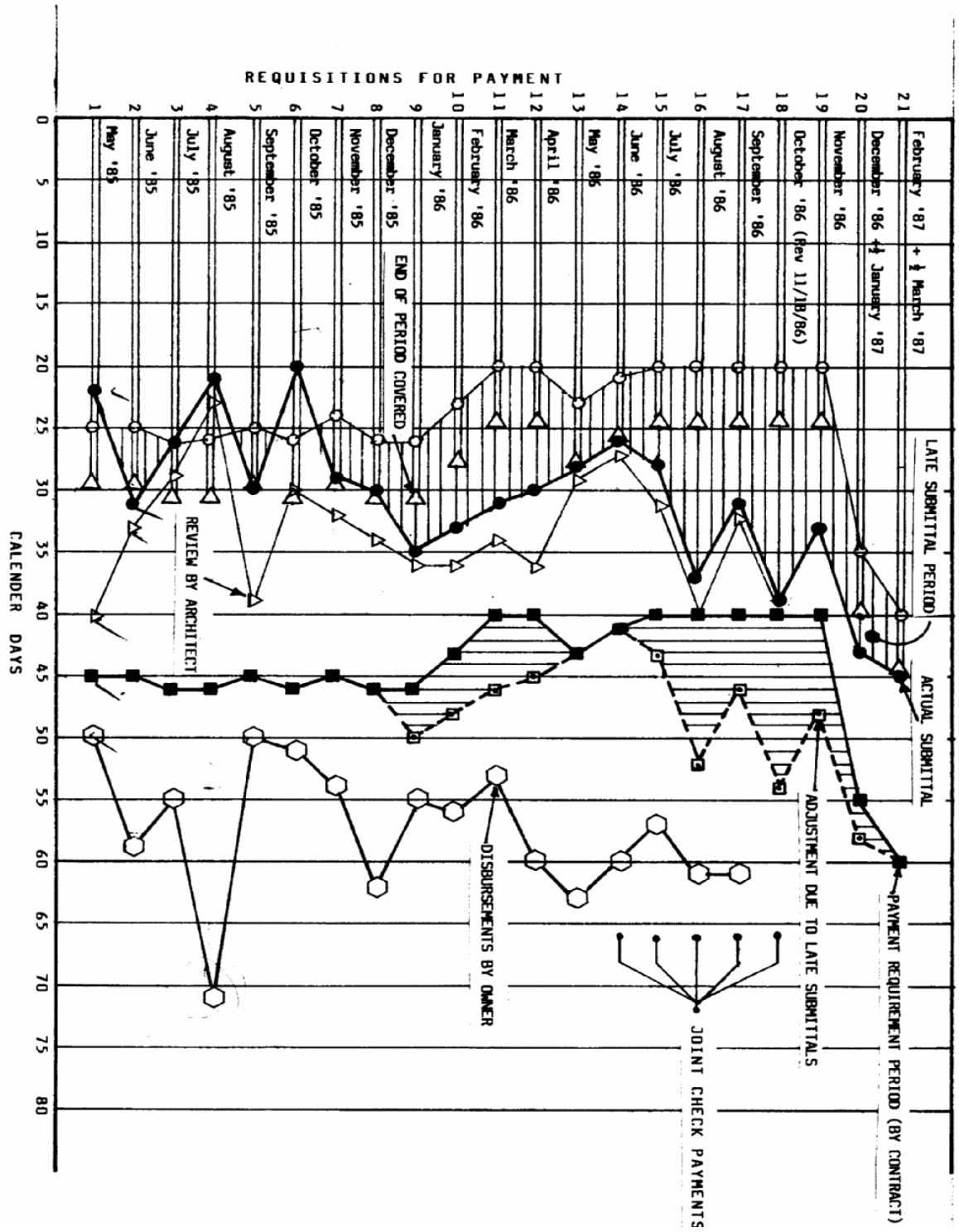


3/7/89 AGW

REQ No	END OF PERIOD SUBMITTED	No Da	SUBMITTAL	No Da	REVIEW BY ARCHITECT	No Da	REVIEW BY BANK	No Da	15 DAY BEYOND END OF SUB PERIOD OR SUBMITTAL	No Da	PAYMENT	No Da		
1	5/30 '85	30	5/22	22	6/10	41			6/14	45	6/20	51		6
2	6/30	30	7/1	31	7/3	33			7/15	45	7/29	59		14
3	7/31	31	7/26	26	7/29	29			8/15	46	8/16	47		1
4	8/31	31	8/21	21	8/23	23			9/15	46	9/23	54		8
5	9/30	30	9/30	30	10/9	39			10/15	45	10/28	58		13
6	10/31	31	10/29	29	10/30	30			11/15	46	11/15	46		—
7	11/30	30	11/29	29	12/2	32			12/15	45	12/24	54		9
8	12/31	31	12/30	30	1/3	34			1/15	46	1/31	62		16
9	1/31 '86	31	2/4	35	2/5	36			2/19	50	2/24	55		5
10	2/28	28	3/5	33	3/18	46			3/20	48	3/28	56		8
11	3/25	25	3/31	31	4/3	34			4/15	46	4/22	53		7
12	4/25	25	4/30	30	5/5	35			5/15	45	5/29	59		14
13	5/20	28	5/28	28	5/29	29			6/12	43	6/18	49		6
14	6/26	26	6/26	26	6/27	27			7/11	41	7/16	46		5
15	7/25	25	7/28	28	7/31	31			8/12	43	8/14	45		2
16	8/25	25	9/6	37	9/9	40			9/21	52	9/18	49		-3
17	9/25	25	10/1	31	10/2	32			10/16	46	10/17	47		1
18	10/25	25	11/18	49	11/19	50			12/2	63	11/6	37		-26
19	11/25	25	12/3	33					12/18	48				
20	1/9 '87	40	1/22	53	2/16	78			2/6	68				
21	3/17													

BY AGW DATE 7/6/88 SUBJECT PAYMENT HISTORY NEWBERRY SHEET NO. 1 OF 1

CHKD. BY AGW DATE 7/6/88 SQUARE, GAINESVILLE, FL JOB NO.



D4

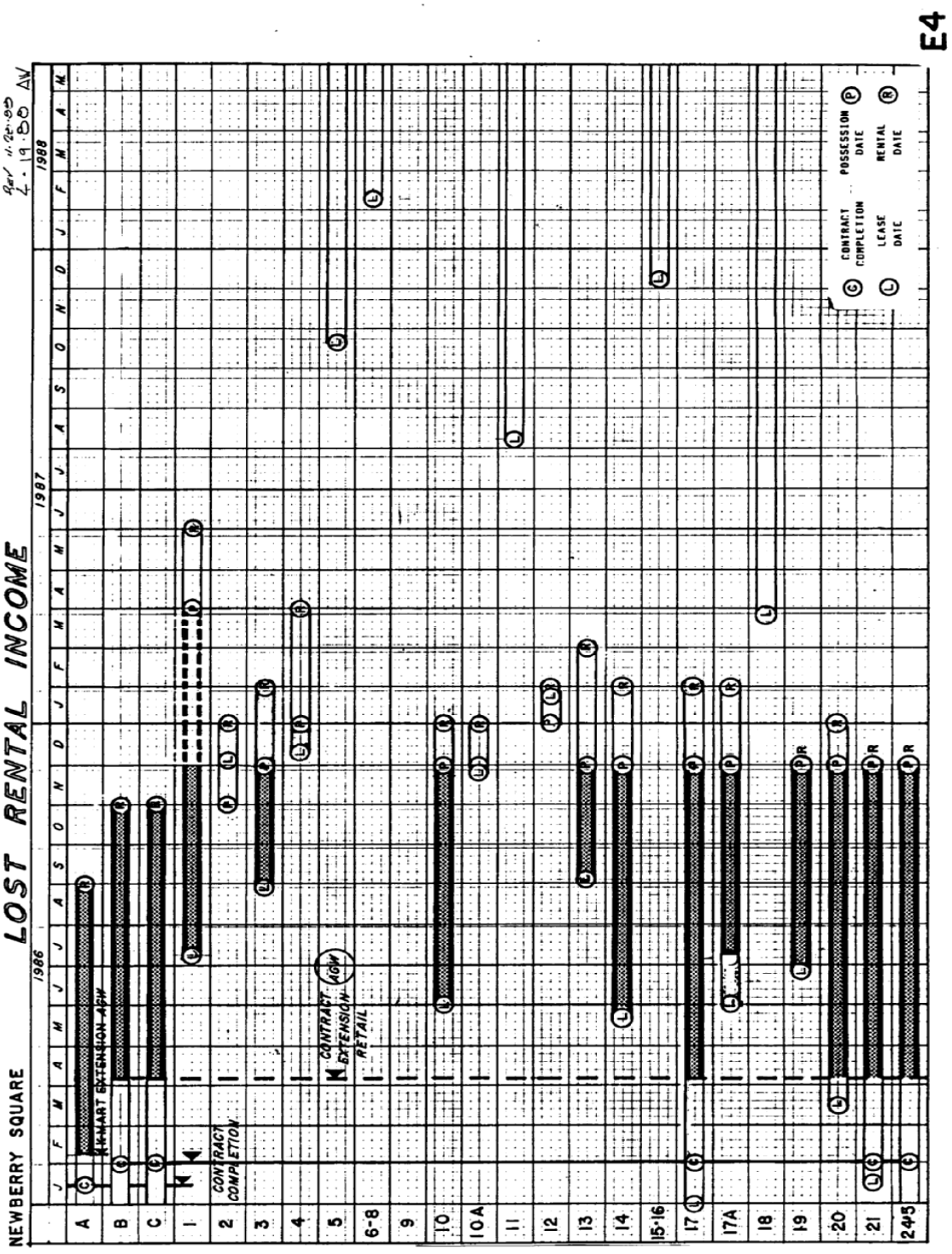
APPENDIX N
OWNER CLAIM SUMMARY

INCL. No.

PROJECT SUMMARY

1. CONTRACT			
(a) Original Contract		$ 4,239.000.00	
SEE EX F (b) Change Order Total Net (1.06%)		43.760.20	
Total Revised Contract			$ 4,282,760.20
(See Summary 3 of 3 Sheets)			
2. PAYMENTS SEE EX D			$ ~~3,828,854.32~~ 3,834,098.37 448,661.03
(See Payment Record 3 of 3 Sheets)			
3. BALANCE DUE ON CONTRACT			$ ~~453.905.88~~
4. BACKCHARGES/DAMAGES TO DCI			
(a) Lost rental income/reimbursements SEE EX E		$ 578,962.70	
(See Attachments A B C & D)			
(b) Costs of Completions, Corrections Warranty Work etc.		$ 146,349.82	$ 725,312.52
SEE ANSWERS TO INTERROGATORIES (See Answer to Interrogatory No. 9)			
5. INTEREST ON EXPENDITURES -LOSSES SEE EX E-6			$ 49,520.89
(See attached Schedule)			
6. UNCOMPLETED REPAIR (PARKING LOT) SEE EX H			$ 70,000.00 (E
(Pending As Built Survey - Corrective Design & Contract Price)			
COSTS TO DCI			$ 844,833.41
7. IMBALANCE (Item 3 less items 4,5, & 6) = CREDIT TO DCI =			$ ~~390,927.13~~ 396,171.50

APPENDIX O
LOST RENTAL INCOME



NEWBERRY SQUARE - LEASE SUMMARY

SHEET 1 OF 2

PARCEL NUMBER LETTER	LEASEE	TERM YEARS	DATE OF LEASE	DATE LEASE SIGNED	RENT PAYMENT ACCUATOR (A-Actual Rent Start)	RENT PER MONTH	CPI MULTIPLIER NO DECREASES	OVERRIDE ON GROSS PROCEEDS		PRO RATA R/E TAX	PRO RATA INSURANCE
								%	FLOOR		
	A.	B.	C.	D.	E.	G.	H.	I.	J.	K.	L.
A	KMART Department Store (84,146sf)	25	10/04/84	10/04/84	Construction Compl. NLT 12/15/85 (A-9/86)	$ 38,342.17	NO	1%	15 million	Yes 65K Cap	Yes
B	Publix Market (39,795sf)	20 (+4x5)	9/07/84	9/17/84	Compl. of Constr. + 1 mil. (A-11/86)	$ 16,914.58	NO	1%	$21,690,325.00	Yes	Yes
C	Revco Drug (Constr. NLT 4/1/85) (10,500sf)	10 (+3x5)	9/18/84	9/18/84	Open for Business (A-11/86)	1-2 $ 7,875.00	NO	2%	1-2 $3,780,000.00	Yes	Yes
						3-10 $8,312.50	↓		3-10 $3,990,000.00	↓	↓
1	Copy's Uniform Shop (1,050sf) Jonathan & David, Inc.	5	7/07/86	7/07/86	60 Da after possession (A-6/87)	$ 1,181.25	YES	7%	$ 202,500.00	Yes	Yes
2	Gainesville Dental Care Dr. Davidson (1,715sf)	5	-	12/03/86	Possession (A-1/87)	$ 1,786.46	4+5 Yr .3rd + CPI	NO	NO	Yes	Yes
						$ 1,929.37	↓	↓	↓	↓	↓
						$ 2,072.29	↓	↓	↓	↓	↓
3	Outdoor Plus (1/10/86) (1/09/88) (1,400sf)	2	8/29/86	8/29/86	60 Da after possession (A-2/87)	$ 1,691.66	NO	NO	NO	Yes	Yes
4	Little Caesars Pizza & P's of Gainesville (1,400sf)	5	-	12/10/86	60 Da after possession (A-4/87)	$ 1,458.33	YES	NO	NO	Yes	Yes
5	Balloon A-Go-Go McQuillan & Rosenquist (1,732sf)	3	-	10/20/87	75 Da after possession (A-2/88)	$ 1,732.00	YES	6%	$ 346,400.00	Yes	Yes
6	(Yrs. 1-10)					1-10 Yrs $3,899.58	↑	5%	$ 800,000.00	↑	↑
7	Jo Ann Fabrics (6,685sf) (ext. 5 yrs)	10	-	2/9/88	45 Da after Const.Comp. (A-)	+5 Yrs $ 4,484.52	NO	5%	$ 1,000,000.00	Yes	Yes
8	(extended 5 yrs.)					+5 Yrs $ 5,157.19	↓	5%	$ 1,200,000.00	↓	↓
9	VACANT	-	-	-	-	-	-	-	-	-	-
10	Men's Store Davis & Nutt (2,100sf)	5	5/30/86	5/30/86	30 Da after possession (A-1/87)	$ 2,362.50	Yes	6%	$ 118,125.00	Yes	Yes
10A	Alexandria's Stilner (1,750sf)	3	11/14/86	11/24/86	30 Da after possession (A-1/87)	1st Yr $ 1,750.00	Yes	7%	$ 362,500.00	Yes	Yes
						2nd Yr $ 1,932.29	↓	↓	↓	↓	↓
						3rd Yr $ 2,114.58	↓	↓	↓	↓	↓
11	Electronics Store (2,800sf) Franella (Zepplin, Inc.)	5	8/07/87	8/07/87	120 Da after possession (A-4/88)	$ 2,333.33	Yes	NO	NO	Yes	Yes
12	Shell Carpet M.J. Shell (2,800sf)	5	1/22/87	1/22/87	30 Da after possession (A-2/87)	$ 3,150.00	Yes	6%	$ 630,000.00	Yes	Yes
13	Hit or Miss Commonwealth Trading (3150SF)	10	9/02/86	10/6/86	30 Da after possession (A-3/87)	1-5 Yr $ 2,887.50	NO	3%	$ 800,000.00	Yes	Yes
						5-10 Yr $ 3,150.00	↓	↓	↓	↓	↓
14	Stride Rite Shoes (1,050sf) Handel	3	5/22/86	5/23/86	60 Da after possession (A-2/87)	(S/T $ 603.75) $ 1,093.75	Yes	7%	$ 46,875.00	Yes	Yes

As of 5/22/88

E

NEWBERRY SQUARE - LEASE SUMMARY

SHEET 2 of 2

Parcel NUMBER Letter	LEASEE	TERM Years	DATE OF LEASE	DATE LEASE SIGNED	RENT PAYMENT ACCUATOR (Actual Rent Start)	RENT PER MONTH	CPI MULTIPLIER NO DECREASES	OVERRIDE ON GROSS PROCEEDS		PRO RATA R/E TAX	PRO RATA INSURANCE
								%	FLOOR		
	A.	B.	C.	D.	E.	G.	H.	I.	J.	K.	L.
15	Floride Lottery (2508sf)	3	12/08/87	12/08/87	12/15-31/87 (A)	1) $ 2,508.00	NO	NO	NO	NO	NO
16						2) $ 2,612.50					
						3) $ 2,717.00					
	Extension					4)(Extension) $ 2,821.50					
						5) $ 2,926.00					
						6) $ 3,030.50					
17	Eyeglass Express Lowndes (960sf)	5	1/03/86	1/03/86	60 Da after possession (A-2/87)	$ 1,000.00	YES	7%	$ 171,428.50	YES	YES
17A	Advantage Hair Salon Dean & Bush (1,200sf)	3	5/30/86	5/30/86	60 Da after possession (A-2/87)	$ 1,218.75	YES	7%	$ 208,928.56	YES	YES
18	Boston Seafood (1,220sf) Boston Seafood Distributors	3	3/27/87	3/26/87	90 Da after possession (A-6/87)	$ 1,474.00	YES	NO	NO	YES	YES
19	Hogan's Heros (12/10/86-12/9/91) (2,670sf)	5	6/25/86	6/26/86	Possession (A-12/86)	$ 2,781.25	YES	7%	$ 476,785.92	YES	YES
20	Dorn's Liquor (2,600sf)	5	3/15/86	3/15/86	30 Da after possession (A-1/87)	$ 2,708.53	YES	3%	$ 1,080,000.00	YES	YES
21	Movies & More Kearney & McGregor (1,400sf)	5	1/18/86	1/18/86	Open for Business (A-12/86)	$ 1,458.33	YES	7%	$ 248,000.00	YES	YES
24	Quality Cleaners (1,575sf)	5	12/20/85	12/20/85	30 Da after possession (A-12/86)	$ 1,772.00	YES	7%	$ 303,750.00	YES	YES
25											

As of 8/22/90 E
1/2 1/2/91

11/20/88 ⚠1

UARE (178 306 SF)

RIDA

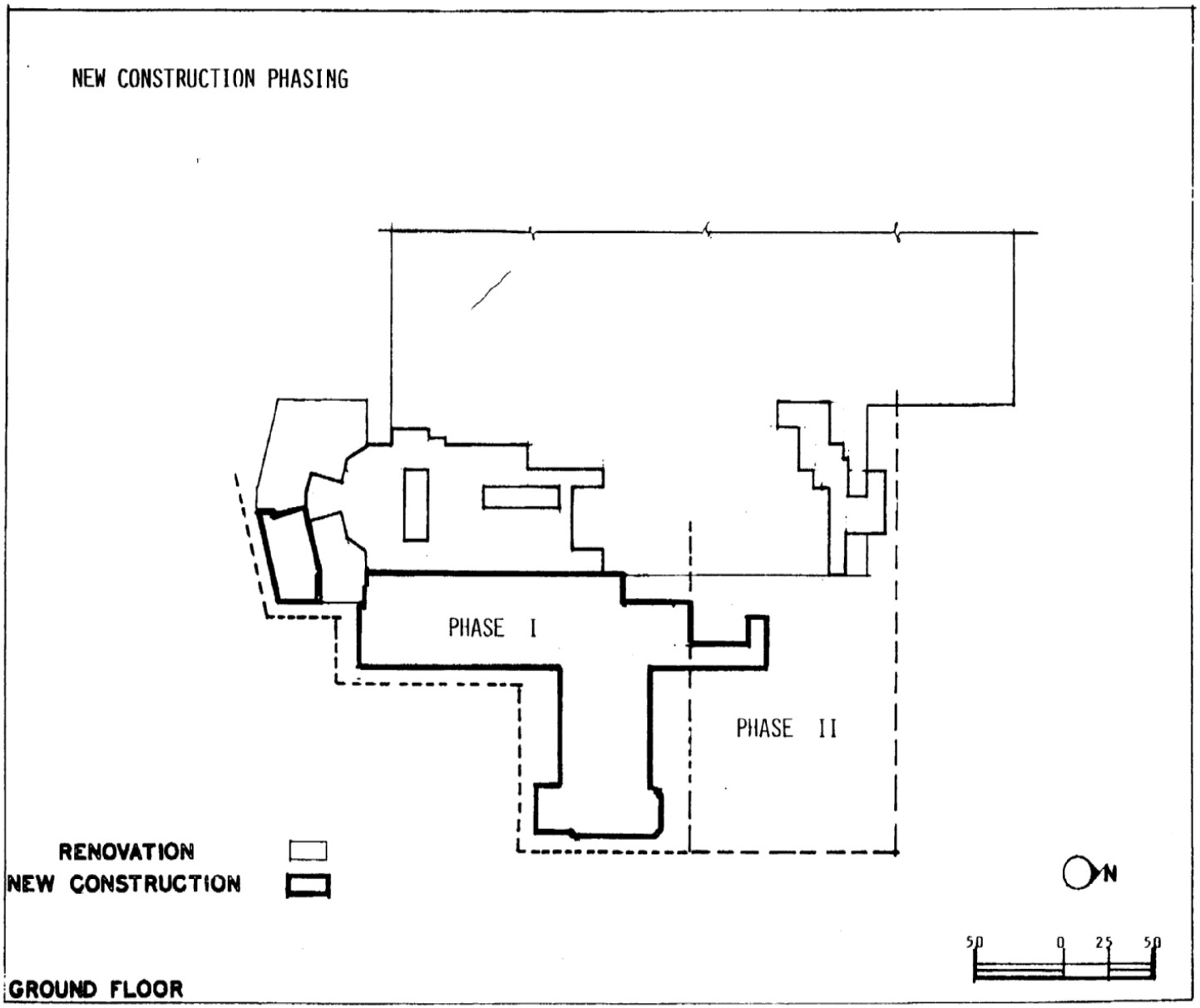
SUBJECT CALCULATION OF LOST REVENUES.

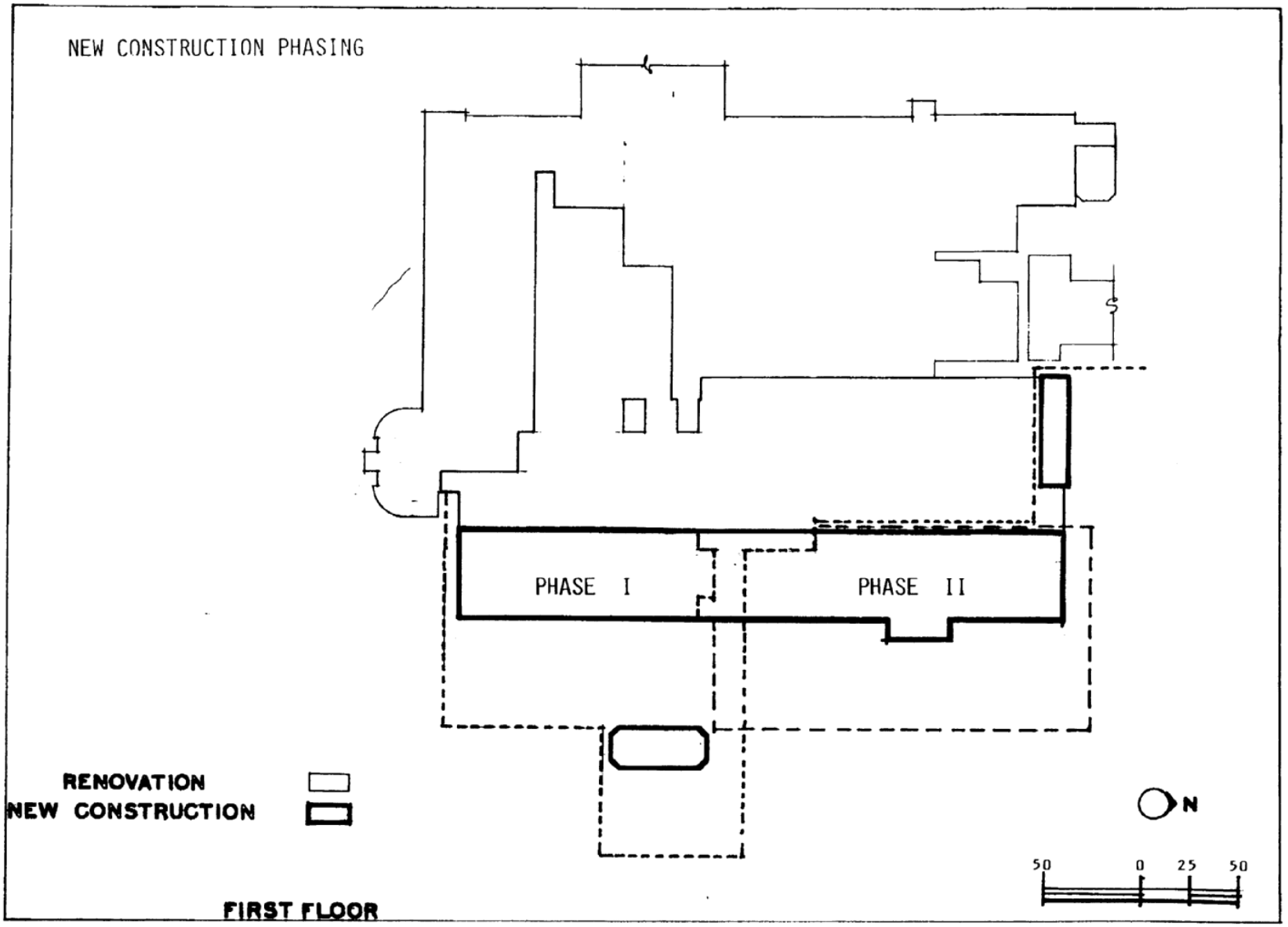
NO.	SECTION OF WORK		SIZE IN SQUARE FEET	DELAY IN MONTHS	RENT PER MONTH	LOST RENT	.021/SF/MO LOST TAX REIMBURSE	.0168/SF/MO LOST INSURANCE REIMBURSEM'T	TOTAL LOSS	
A	KMART	2/9 - 9/1	84146	6.64 Mo	38842.17	254592.01	11733.34	9586.64	275911.99	⚠1
B	PUBLIX	4/6 - 11/1	39795	6.85 Mo	16914.58	115864.87	5724.57	4579.61	126168.99	
C	REVCO	4/6 - 11/1	10500	6.85 Mo	7875.-	53943.75	1510.43	1208.34	56662.52	
1	CODY'S UNIFORM SHOP	7/7 - 4/1	1050	8.75 Mo	1181.25	10335.94	192.94	154.35	10703.23	} ACTUAL POSSESSION
		[7/1 - 12/1]		[4.79 Mo]		[5658.19]	[105.62]	[84.50]	[5848.31]	
2	DENTAL CARE	—	1715	—	—	—	—	—	—	
3	OUTDOOR PLUS	8/29 - 12/1	1400	3.05 Mo	1691.66	5159.56	89.67	71.74	5320.97	
4	LITTLE CEASER'S PIZZA	—	1400	—	—	—	—	—	—	
5	BALLOON A GO-GO	—	1782	—	—	—	—	—	—	
6-8	JO ANN FABRICS	—	6685	—	—	—	—	—	—	
9	VACANT	—	2100	—	—	—	—	—	—	
10	MEN'S STORE	5/30 - 12/1	2100	6.03 Mo	2362.50	14245.88	265.92	212.74	14724.54	
10A	ALEXANDRIA'S	—	1750	—	—	—	—	—	—	
11	ELECTRONICS STORE	—	2800	—	—	—	—	—	—	
12	SHELL CARPET	—	2800	—	—	—	—	—	—	
13	HIT OR MISS	9/2 - 12/1	3150	2.92 Mo	2887.50	8431.50	193.16	154.53	8779.19	
14	STRIDE RITE	5/22 - 12/1	1050	6.3 Mo	1093.75	6890.63	138.92	111.13	7140.68	
15-16	FLORIDA LOTTERY	—	2508	—	—	—	—	—	—	
17	EYEGLASS	4/6 - 12/1	960	7.84 Mo	1000.-	7840.-	158.05	126.44	8124.49	
18	ADVANTAGE HAIR SALON	—	1200	—	—	—	—	—	—	
19	HOGAN'S HEROS	6/25 - 12/1	2670	5.18 Mo	2781.25	14406.88	290.44	232.35	14929.67	
20	DORN'S LIQUORS	4/6 - 12/1	2600	7.84 Mo	2708.53	21234.88	428.06	342.45	22005.39	
21	MOVIES & MORE	4/6 - 12/1	1400	7.84 Mo	1458.33	11433.31	230.50	184.40	11848.21	
21.5	QUALITY CLEANERS	4/6 - 12/1	1575	7.84 Mo	1772.-	13892.48	259.31	207.45	14359.24	
17A	BOSTON SEAFOOD	7/6 - 12/1	1800	4.83 Mo	1479.-	7119.42	121.72	97.37	7338.51	⚠1
	TOTALS		178286			545911.11	21336.91	17069.54	583817.62	
						[540713.36]	[21249.15]	[16999.69]	[578962.70]	

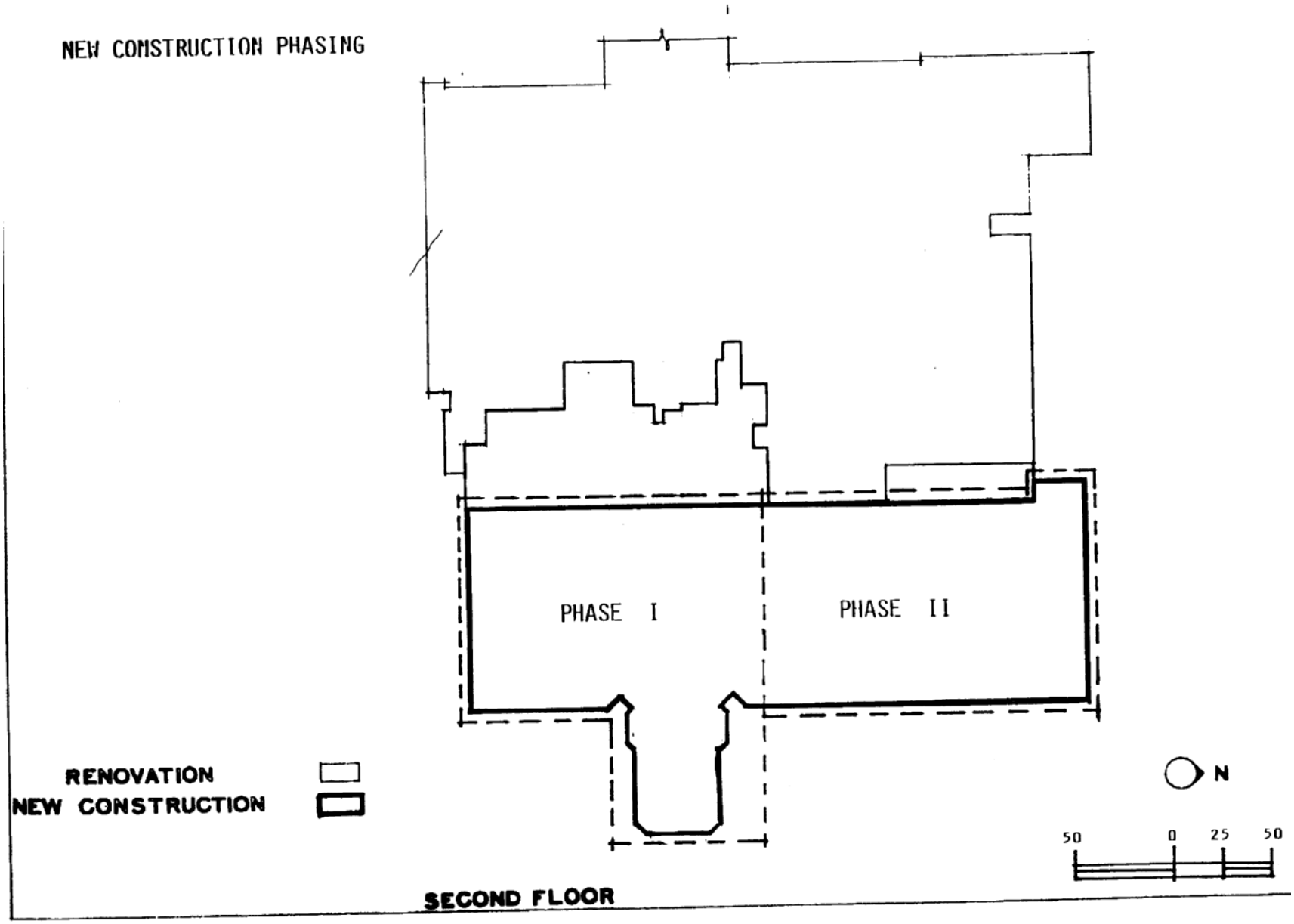
E3

227

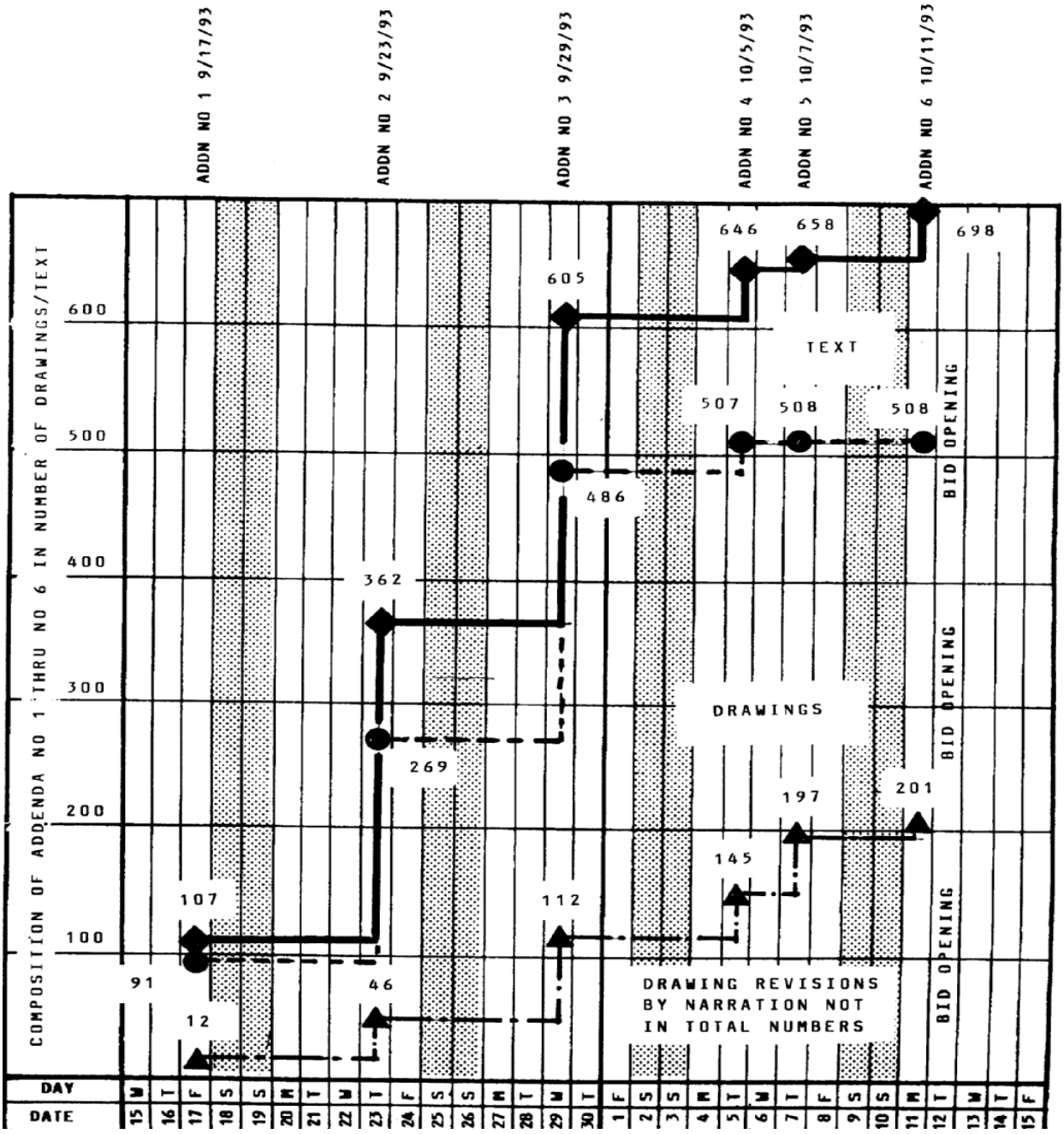
APPENDIX P
HOSPITAL PHASING PLAN


NEW CONSTRUCTION PHASING
PHASE I
PHASE II
RENOVATION
NEW CONSTRUCTION
N
50
0
25
50
GROUND FLOOR


NEW CONSTRUCTION PHASING
PHASE I
PHASE II
RENOVATION
NEW CONSTRUCTION
N
50
0
25
50
FIRST FLOOR


NEW CONSTRUCTION PHASING
PHASE I
PHASE II
RENOVATION
NEW CONSTRUCTION
N
50
0
25
50
SECOND FLOOR

APPENDIX Q
HOSPITAL ADDENDA DRAWINGS DURING BID PERIOD



SUMMARY OF THE SCOPE OF PRE-BID ADDENDA

	DAYS PRE-BID	PAGES SHEETS	DWGS. REV. *	TOTAL PAGES SHEETS
1. ADDENDUM NO. 1.	25			
a. Specification Text - Additions/Changes		16		
b. Bulletin Drawings		63		
c. Drawings Revised			12	
d. Drawing Issues (Manufacturers)		28		107
2. ADDENDUM NO. 2.	10			
a. Specification Text - Additions/Changes		77		
b. Bulletin Drawings		25		
c. Drawings Revised			34	
d. Equipment Schedule		10		
e. Finish Schedule		32		
f. Drawings Issues (Manufacturers)		111		255
3. ADDENDUM NO. 3.	13			
a. Specification Text - Additions/Changes		26		
b. Bulletin Drawings		159		
c. Drawings Revised			66	
d. Drawings Reissued		58		243
4. ADDENDUM NO. 4.	7			
a. Specification Text - Additions/Changes		20		
b. Bulletin Drawings		21		
c. Drawings Revised			33	41
5. ADDENDUM NO. 5.	5			
a. Specification Text - Additions/Changes		11		
b. Drawings Revised			52	
c. Drawings Reissued		1		12
6. ADDENDUM NO. 6.	1			
a. Specifications Text - Additions/Changes		40		
b. Drawings Revised			4	40
TOTALS		698	201	698

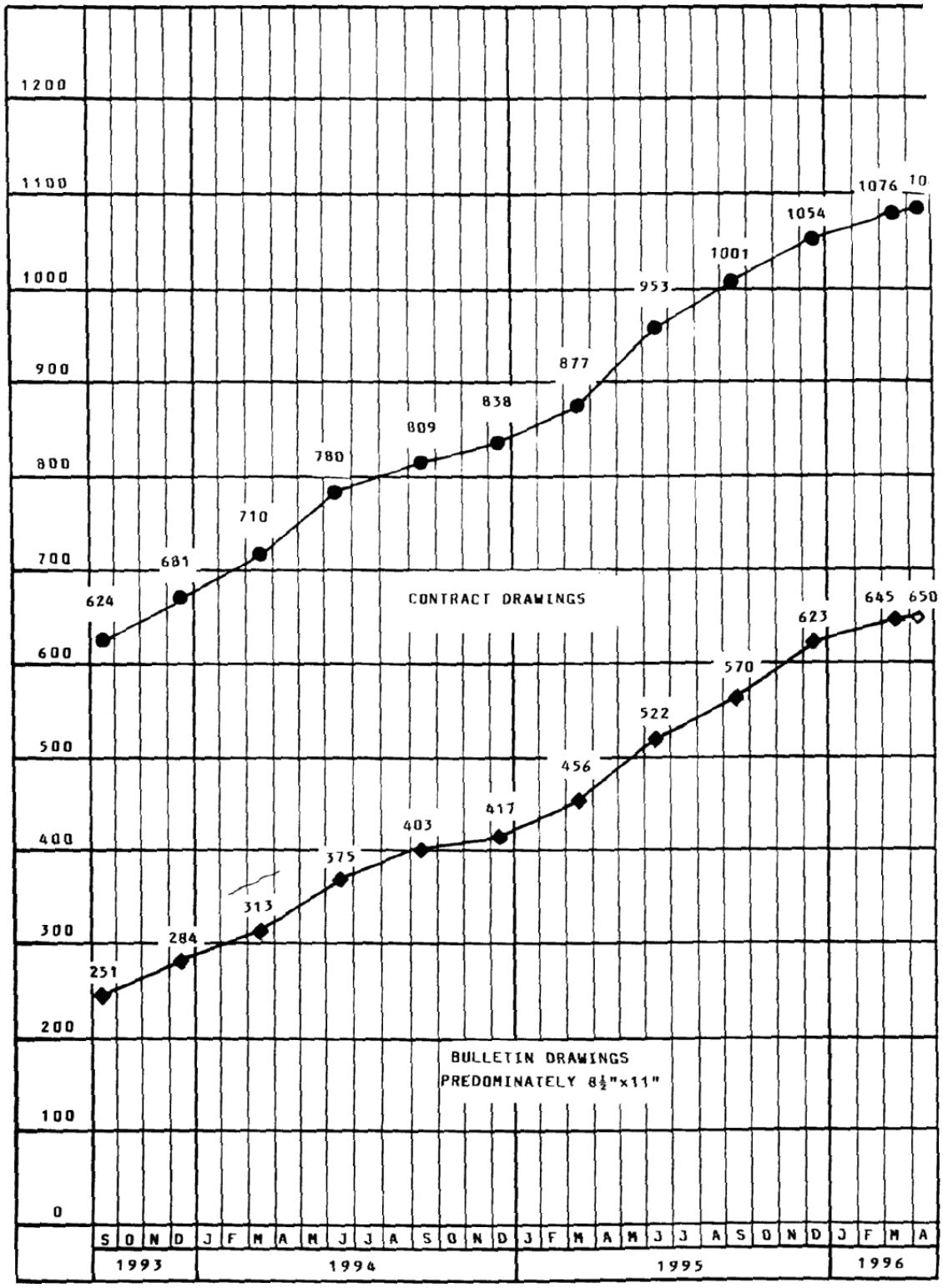
* Drawings revised by narration

DRAWING SUMMARY DURING BIDDING PERIOD

	ADDENDUM								
DISCIPLINE	1	2	3	4	5	6	SUB TOTAL	NON ADDN	TOTALS
1. Architectural									
Revisions	12	22	55	26	7	2	124		124
Reissues			9				9	21	30
Bulletin Dwgs.	32	4	63	14			113		113
2. Civil									
Revisions				1	1		2		2
Reissues								1	1
Bulletin Dwgs.			4	2			6		6
3. Structural									
Revisions				2	3		5		5
Reissues									
Bulletin Dwgs.	1	3	25				29		29
4. Mechanical									
Revisions		12	7		30	1	50		50
Reissues			11		1		12	19	31
Bulletin Dwgs.	10	18	12	5			45		45
5. Plumbing									
Revisions					6		6		6
Reissues			16				16	5	21
Bulletin Dwgs.			8				8		8
6. Medical Gas									
Revisions					2		2		2
Reissues			7				7	2	9
Bulletin Dwgs.	6		1				7		7
7. Fire Protect.									
Revisions					3	1	4		4
Reissues			8				8	5	13
Bulletin Dwgs.	5		10				15		15
8. Electrical									
Revisions			4	4			8		8
Reissues			7				7	5	12
Bulletin Dwgs.	9		36				45		45
9. Equip. Sched.		10					10		10
10.Finish Sched.		32					32		32
11.Refer. Dwgs.	28	111					139		139
TOTALS	103	212	283	54	53	4	709	58	767
Sub Totals									
Revisions	12	34	66	33	52	4	201		201
Reissues			58		1		59	58	117
Bulletin Dwgs.	63	25	159	21			268		268
Sched. & Ref.	28	153					181		181
									767

NOTE: "NON ADDN" REFERS TO REISSUES NOT COVERED IN ADDENDA OR ANY OTHER DOCUMENT.

APPENDIX R
DRAWING SUMMARY



DRAWING SUMMARY

The drawing documentation prepared for the construction of the subject facility beginning with the initial bid set through the termination totaled 1081 drawings (431 contract drawings at 31"x42" and 650 bulletin drawings, mostly at 81/2" x 11")

CONTRACT DRAWINGS			BULLETIN DRAWINGS		TOTAL
Single Idenity	Revisions	Total			
2		2		Title Sheets	2
11	2	13	27	Civil	40
91	23	114	296	Architectural	410
17		17	87	Structural	104
39	52	94	86	Mechanical	177
28	24	52	34	Plumbing	86
14	14	28	8	Med Gas	36
22	17	39	18	Fire Protect.	57
44	31	75	93	Electrical	168
			1	No Ident.	1
268	163	431	650		1081

These statistics are from the attached inventories of data available in Centex-Simpson files. Since letters of transmittals were not used by the A/E verification is not possible.

Analysis of Information
of the 1081 drawings

62% did not show drafters identity
63% were not checked
(Breakdown Contract Drawings = 31% & 31%)
Bulletin Drawings = 82% & 84%)

8% of bulletin drawings did not have meaningful registration (location) information

27% of original contract drawings (9/2/93) were never updated (revised) with major structural changes

38% of the revisions issued were overprinted on the wrong base sheets AND NEVER CORRECTED

APPENDIX S
RFI SUMMARY

NARRATION TO ACCOMPANY ANALYSIS OF REQUESTS FOR INFORMATION (RFI'S)

This consultant reviewed Centex-Simpson's RFI files (5 notebooks). These files contained most of the pertinent information except some results of answers achieved in the field. The RFI's number some 408 but with more than one cause in some the analysis ends up with 435 opinions. The categories of "cause" assessment and percentage results were as follows.

DESIGN - CLARIFICATION - information requested was needed to clarify drawings, specifications or difference between.
25.3%
ERROR - questions concerning apparent errors on the drawings, specifications or other project documentation.
15%
OMISSION - questions concerning the lack of information.
22.3%
CONFLICT - questions concerning apparent conflicts on the drawings or in the specifications or other project documentation.
7.1%
CONSTRUCTION - FIELD CONDITIONS - questions concerning conditions found in the field.
3%
LACK OF INTERPRETATION - questions resulting from poor interpretation by contractors.
6.4%
SUBSTITUTIONS - some proposed substitutions to solve design problems.
4.1%
CONTRACTOR ERROR - questions concerning correction or retrofit due to contractor error.
2.8%
CLARIFICATION - questions regarding construction placement problems which require clarification.
6.9%

UNANSWERED - answers not in files but which might have been answered in the field or in meetings etc.
7.1%

It is the overall opinion of this consultant that the majority of the RFI's were caused by incomplete, uncoordinated, incorrect and sometimes conflicting drawings. There are numerous examples of errors on the initial drawings, on concerned Bulletin Drawings, and responses thereto. Comments by the design team, and the owner, regarding the necessity for RFI's are not supported by this consultant's review of the record. Completed, coordinated, and correct drawings at the start with only necessary changes thereto usually result in the need for **FEW** RFI's.

APPENDIX T
MECHANICAL AND ELECTRICAL LATENT DEFECT COSTS

COST TO COMPLETE-LATENT DEFECTS
SUMMARY

COSTS TO COMPLETE	MECH	ELEC
SITE	$ 6,588	$ 60,752
PPF	17,919	85,671
IPF/SCAT	14,641	47,505
LPI	1 6,942	22,026
COSTS/NON CONFORM		
SITE	65,265	0
LCC	85,082	8,162
PPF	0	1,785
IPF/SCAT	36,605	0
LPI	120,887	221,467
LATENT DEFECTS		
LSS	40,002	4,575
	$ 403,931	$ 451,943

These costs were developed by [illegible] and published in a document called "Comments and Non Compliant Issues" dated 10/12/00.

document and annotated same. (enclosed).

FIGURE NO 6

APPENDIX U
OWNER LIQUIDATED DAMAGE CLAIMS

ANALYSIS OF OWNER LIQUID DAMAGES CLAIM

OWNER has filed a claim for Liquidated Damages. (Exhibits No. 30 and 31 to their claim). They are based on simple arithmetic calculations. One claim is based on the difference between established Substantial Completion dates (set forth in the contract documents) and the date of termination.

CLAIM NO. 1.

PPF – 8/23/99 thru 9/27/00 = 401 days
All others – 12/8/99 thru 9/27/00 = 294 days.
Calculation

401 days @ $1000/day =		$ 4 01,000
294 days @ $3000/day =		882,000
	Total	$ 1,283,000

The second claim takes the same Substantial Completion dates and takes the difference between them and the date of March 1, 2001.

CLAIM NO. 2.

PPF – 8/23/99 thru 3/1/01 = 556 days
All others – 12/8/99 thru 3/1/01 = 449 days
Calculation

556 days @ $1000/day =		$ 556,000
449 days @ $3000/day =		1,347,000
	Total	$1,903,000

Our review of the record indicates that GC incurred disruption, delays, and other impacts at the rate of one day per week (6/15/98 thru 9/20/00) or 118 days. We opine that these days should offset claims for Liquidated Damages. We further opine that any claim for Liquidated Damages should end at termination. Therefore we opine that the Liquidated damages CLAIM (SINGLE) be

PPF – 401 DAYS – 118 DAYS = 283 @ $1000 =		$ 283,000
All other – 294 days –118 days = 176 @ $3000 =		528,000
	Total	$ 811,000

This sum should be an offset against the Contract sum as adjusted. See Tab C – Summary of Opinions.

APPENDIX V
PAYMENT HISTORY

RECONSTRUCTION OF AIA DOC G702 FROM FAXED COPY OF APPLICATION NO. 28 (DTD 12/5/00)

1. ORIGINAL CONTRACT SUM		$ 16,190.000.00
2. NET CHANGE BY CHANGE ORDERS (1-26)		$ 10,787,379.00
	ACTUAL	$ 10,794,822.00
3. CONTRACT SUM TO DATE		$ 26,977,329.00
4. TOTAL COMPELTED & STORED		$ 26,977,329.00
5. RETAINAGE		0
6. TOTAL EARNED		$ 26,977,329.00
7. PAID TO DATE		$ 25,172,831.00
8. CURRENT PAYMENT DUE		$ 1,804,498.00

APPENDIX W
SUMMARY GC SCHEDULE UPDATES

Summary of GC's Schedule Updates

Phase II		Phase III	
Notice to Proceed	4/20/98	Phase III Notice to Proc	11/17/98
Phase II Duration	335	Phase III Duration	378
Substantial Completion	3/21/99	Substantial Completion	11/30/99
Punchlist & Cleanup	30	Punchlist & Cleanup	30
Final Completion	4/20/99	Final Completion	12/30/99

Update ID	Data Date	Finish Date	Days in Period	Change in Completion	Completion Date	Ahead/ Behind	
RL00	4/20/98	7/31/99			4/20/99		Initial
RL01	4/20/98	11/3/99	0	95		-197	Interim Revision
RL02	4/20/98	7/31/99	0	-95		-102	Accepted Baseline
RL03	4/20/98	7/31/99	0	0		-102	
RL04	8/21/98	7/31/99	123	0		-102	
RL05	9/30/98	7/31/99	40	0		-102	
RL06	10/31/98	7/31/99	31	0		-102	
RL07	11/30/98	11/1/99	30	93		-195	
RL08	12/31/98	12/31/99	31	60	12/30/99	-1	CO 10&11
RL09	3/1/99	1/19/00	60	19		-20	
RL10	4/1/99	1/3/00	31	-16		-4	
RL11	4/30/99	2/1/00	29	29		-33	
RL12	4/30/99	12/31/99	0	-32		-1	
RL13	5/31/99	1/10/00	31	10		-11	
RL14	6/30/99	1/29/00	30	19		-30	
RL15	7/31/99	1/27/00	31	-2		-28	
RL16	8/31/99	3/31/00	31	64		-92	
RL17	9/16/99	3/10/00	16	-21		-71	
RL18	9/30/99	1/26/00	14	-44		-27	
RL19	10/31/99	6/23/00	31	149		-176	
RL20	11/30/99	6/3/00	30	-20		-156	
RL21	12/31/99	6/3/00	31	0		-156	
RL22	1/31/00	6/3/00	31	0		-156	
RL23	2/29/00	6/3/00	29	0		-156	
RL24	3/31/00	6/3/00	31	0		-156	
RL25	4/30/00	6/3/00	30	0		-156	
RL26	5/31/00	7/12/00	31	39		-195	
RL27	6/30/00	7/31/00	30	19		-214	

Kodiak-Schedule Summary.xls

6/7/01 Page 1

FIGURE NO 12

APPENDIX X
PUNCH LIST EXAMPLES

LAUNCH COMPLEX
October 12, 2000

Civil Punchlist (6-12-00)
Review & Comments

~~9. PPF Wellhouse: Repair leaking booster pump fitting. (Disputed).~~
13. PPF Wellhouse: Provide required 5-micron filter bags for the large filter assembly. (Disputed) Slayden Transmittal reads bags were delivered, ~~BRPH claims that bags provided were 1 and 10 micron filters.~~ VERIFIED 1 & 10 µ
16. Fire Pumphouse: The broken test valve handle has not been replaced. Incorrect size was sent. ~~Missing bolt on test valve flange has not been replaced.~~
~~23. Water Storage Tank: Replace cracked valve for backflow preventor. (Disputed). AADC replaced on 9/11/00.~~
~~24. Water Storage Tank: Provide and install the tank level gauge. (Installed, but not operating correctly now. ECCI reworked wiring near the end of September. See also electrical list.~~
42. Site/Lower Laydown: Do final cleaning of site and surrounding areas of construction waste/debris and windblown materials. (Styrofoam packing peanuts in the fields around PPF). Lower Laydown approximately 8 acres.

Other Civil Non-Conforming/Non-Compliant Issues

1. Remove lumber and concrete footing from site entry sign location.
2. Complete outstanding items on NRMP Report.
~~3. PPF Wellhouse: Water pressure gauge from pump to bladder tank is defective and does not work. System is not operating properly. Correct deficiencies.~~
~~4. Water Storage Tank: Verify calibration of water depth sensor. Verify that cable of sensor is sufficient length to allow it to lie on bottom of tank.~~ WILL NOT REACH
~~5. Water Storage Tank: Unistrut support for supply line is ineffective. Repair or replace to correctly support piping.~~
6. LCC: The aggregate walkway and final grading around the perimeter of the LCC needs additional work. Seeded areas slope towards the building instead of away. Rocks and debris need to be removed from seeded area.

LAUNCH COMPLEX
October 12, 2000

LCC Architectural Punchlist (6-6-00)
Review & Comments

3. Rainwater is an ongoing issue. Rainwater observed and photographed on 10/4/00.

~~16. Training & Turnover Requirements list:~~

~~Carpet: turnover of 3% = +/- 29 square yards or 261 square feet. Carpet is to be of full width: 12'x0". There was one piece of carpet 12'x0" wide x 7'-10" long. This equals 93.99 square feet or 10.44 square yards. Therefore the turnover amount is 19 square yards short. There were 2 pieces turned over that were not of the 12'-0" full width. One piece is 5'-2" x 7'-7" and the other is 5'-7" x 14'-0". These two pieces do not meet turnover requirements. Grant Leader verified all dimensions of carpet on 10/2/00. Therefore a piece 14'-0" x 12'-0" wide is needed to fulfill the turnover requirements.~~

Other LCC Non-Conforming/Non-Compliant Issues

1. Ceiling Tile Stains: At least nineteen locations have tile stained from moisture. Rainwater has been observed dripping onto the stained tile in Room 132 from inside of the vapor barrier at the roof. It is suspected that these ceiling tile stains are caused by leaks in the roof.

PPF Architectural Punchlist (6-6-00)
Review & Comments

~~2. Crane debris shield has not been provided.~~

~~3. Caulking level is above the floor at column line 3.5 & 4.5 between lines E and F. Also at column line F from the wall at column line 3 south to the trench, and at the northwestern side of the trench.~~

6. The vapor barrier in the chases needs to be sealed. There are horizontal seams that need to be taped. The vapor barrier needs to be sealed against the columns. All penetrations through the vapor barrier need to be sealed tight to the objects that are penetrating the barrier. There are areas that are not currently accessible. STOP GAP MEASURE IN PLACE - RESEAL EXTERIOR SKIN WILL COMPLETE THE EFFORT

~~7. Auto reverse safety bar on exterior grid H overhead door does not work. It is believed that the required electrical terminations have not been made.~~

~~34. Complete installation of weatherproof covering over motor on grid H exterior roll up door.~~

40. Training and Turnover List:
    Acoustical ceiling tile were delivered, but were damaged. There were no exposed suspension system components delivered.

Other PPF Non-Conforming/Non-Compliant Issues

~~1. The back side of the stainless steel Operational Intercom box in the chase at column line 3C in the wall on the Equipment Airlock side needs to be sealed off.~~

2. BRPH has not received updated warranties for Firestone membrane roofing reflecting 6/1/00 revision date.

~~3. PPF Man Doors:~~
   ~~Weather Stripping: On doors 108B, 110A, 111A, and 111D, the weather stripping was not continuous across the top of the door opening. On door 110A, the door does not close tight against the weather stripping. On doors 107B & 108B, the doors do not close tight against the weather stripping at the sill. Door 111A does not seal across the sill. Whistling observed due to exterior wind.~~
   ~~Panic Devices: Door 108A does not latch. Door 108B does not latch properly every time. Door 111A does not latch properly every time.~~
   ~~Flush Bolts: Door 104A. Top flush bolt does not work.~~
   ~~Overhead Closer: Door 111D does not close.~~

~~4. PPF Rollup Doors:~~
   ~~Weather Stripping: Door 111C has a gap at the bottom of the northern jamb.~~
   ~~Automatic Reversing Controls: Door 111C does not operate. See #7 under Review and Comments.~~

Other LP-1 Non-Conforming/Non-Compliant Issues

~~1. Steel sleeve (unnecessary) located at floor level 100 directly below fire protection riser. This is a tripping hazard. Remove sleeve and cover hole in floor with steel plate~~.

2. Bolts at steel connections in the elevator shaft need to be painted. Weld burns at elevator shaft where plate was welded to the beam need to be cleaned and painted. ~~Beam ledges inside of the shaft need to be cleaned of dirt and drywall debris. Floor of the elevator shaft needs to be cleaned of construction debris. (BRPH and Alimak cleaned the pit floor and ledges behind screening).~~

3. Structural steel rust blooms and areas with less than 4 mils DFT of epoxy paint are to be cleaned of rust and painted to a thickness of at least 4 mils DFT.

4. Steel floor plate is to be painted with an abrasive non-slip finish.

~~5. Drywall mud finishing in the elevator shaft is to be completed to a smooth finish.~~

~~6. All drywall is to be painted.~~

7. FSS column ii/f is missing a stainless steel nut for one anchor bolt.

~~8. BEST padlocks have not been received per Hardware Schedule and Submittals. (Typical Phase 2 and Phase 3)~~.

9. Door 101 – This item is still not finished. ~~Also, the weather stripping halfway up the door on the outside needs to be repaired.~~ The neoprene-looped gasket across the head with the retainer bar is still not installed.

~~10. Door 102 – There is a gap at the top of the door~~.

~~11. Door 103 – Door will not open from the inside. There is hardware missing between the panic device and the security lock~~.

~~12. Door 014 – The door is hard to open; it sticks when being opened. Door does not seal properly on the latch side~~.

~~13. Door 106 – Hinges are rusted. Doorframe has been pulled away making door stick when opened and closed.~~

~~14. Door 107 – The door handle has been broken off.~~

~~15. Door 108 – Gaskets are not installed properly.~~

~~16. Door 501 – Door handle on vestibule side sticks in up position.~~

~~17. Door 503 – Door handle on tower side sticks in up position.~~

~~18. Door 601 – Gasket toward the bottom of both jambs is not on properly.~~

~~19. Door 702 – Door does not latch~~.

~~20. Door 903 – Automatic door bottom does not close properly. There is a push-button lock on the vestibule side of the door, which needs to be removed and replaced with a passage lever handle~~.

~~21. Door 1003 – Door handle on vestibule side sticks in the down position. The automatic door bottom doesn't come down~~.

APPENDIX Y
SUBSTANTIAL COMPLETION ANALYSIS

Analysis of Claimed Contract and Substantial Completion Dates

Facility	Contract Complete RSC III.A	Contract Complete AADC Exhibit 13	RSC Claimed Substantial RSC III.A Substantial	RSC Claimed Substantial RSC KCAB Substantial	Days from RSC Date	Days from AADC Date
LCC	8/31/99	8/23/99	6/24/99	5/15/99	68	60
PPF	8/31/99	8/23/99	6/25/99	12/29/99	67	59
IPF	9/6/99	8/29/99	1/15/00	11/10/99	-131	-139
SCAT	8/31/99	8/23/99	8/15/99	10/1/99	16	8
LSS	12/8/99	12/8/99	5/15/00	5/31/00	-159	-159

APPENDIX Z
DAMAGE CALCULATIONS AND FORMULA

CONSTRUCTION CLAIMS MONTHLY

Devoted exclusively to the problems of construction contracting

Volume 16 Number 8 August 1994

RECOVERING UNABSORBED OVERHEAD: DEFINING A COMPENSABLE SUSPENSION

The use of the Eichleay formula for contractor recovery of unabsorbed home office overhead was formally sanctioned in 1984 by the U.S. Court of Appeals for the Federal Circuit. This ended two and a half decades of contention among owners and contractors, courts and administrative boards, regarding the legitimacy of Eichleay and the recoverability of unabsorbed overhead. It did not end the controversy entirely, however.

The Court of Appeals ruled that Eichleay must be allowed when (1) there is a distinct period of suspended operations caused by the project owner and (2) the suspension has an economic impact on the absorption of the contractor's fixed home office overhead expenses. Over the past ten years, much of the Eichleay litigation has addressed the application of this standard. How does one recognize or define the type of suspension that warrants the use of the Eichleay formula?

Background

When a contractor submits a fixed-price bid on a construction contract, the contractor reasonably anticipates a certain cash-flow from that contract. This expectation is based on the contract price, the progress payment provisions, and the scheduled performance period established by the contract itself. The contractor expects the cash-flow to absorb a certain portion of the contractor's fixed home office expenses during the scheduled performance period.

If the project owner suspends the contractor's performance of the work, the contractor is unable to submit requisitions and receive progress payments at the anticipated rate. The extended performance period for the fixed-price contract results in diminished cash-flow. The funds available to the contractor to pay for fixed expenses are reduced. This is the unabsorbed or underabsorbed home office overhead the contractor seeks to recover from the owner. This loss is measured according to the Eichleay formula.

The formula itself is stated as follows:

$$\frac{\text{contract billings}}{\text{total billings for contract period}} \times \text{total overhead for contract period} = \text{overhead allocable to the contract}$$

$$\frac{\text{allocable overhead}}{\text{days of performance}} = \text{daily contract overhead}$$

$$\text{daily contract overhead} \times \text{days of delay} = \text{amount recoverable}$$

(Continued on page 7)

TABLE OF CONTENTS

Business Publishers, Inc. · Leonard A. Eiserer, Founder & Chairman · Lawrence Fishbein, President & Publisher
Executive Editor: Mary E. Crowley **Assistant Managing Editor:** Roger Gilroy **Editor:** Bruce Jervis, Esq.

Construction Claims Monthly (ISSN 0272-4561), published monthly. Subscription rate: $198 per year for subscribers in the U.S., Canada and Mexico (shipping included); all other countries, add $6. Six-month and multiple-year rates available upon request. POSTMASTER: Send address changes to BPI, 951 Pershing Drive, Silver Spring, MD 20910-4464. Editorial: (301) 587-6300; Circulation: D.C. Area: (301) 589-5103; Outside D.C. Area: 1-800-274-0122; FAX (301) 585-9075. For more efficient service, include account number when you call or write. *This publication is designed to provide accurate and authoritative information with regard to the subject matter covered. It is sold with the understanding that the information will not be applied to specific factual situations without the advice of legal counsel.*

(Continued from page 1)

As stated earlier, in 1984 the U.S. Court of Appeals for the Federal Circuit recognized the legitimacy of Eichleay on federal contracts. *Capital Electric Co. v. United States*, 729 F.2d 743 (Fed.Cir. 1984); ***CCM*** April 1984, p. 2. Many state courts have followed, citing *Capital Electric* as precedent. *Broward County v. Russell, Inc.*, 589 So.2d 983 (Fla.App. 1991); ***CCM*** April 1992, p. 2. The use of the formula is now widely allowed when there is an owner-caused suspension of operations and that suspension has an economic impact on the absorption of fixed home office expenses. The question then becomes, how does one define and prove a "suspension" and an "economic impact."

Suspension of Operations

A suspension occurs when the project owner orders a work stoppage or causes a work stoppage through the failure to meet some contractual obligation. Many contract documents, notably the federal contracts, give the owner the right to stop work in order to respond to unexpected developments. But if the suspension continues for an unreasonable period of time, it becomes compensable. And if the duration of the suspension is uncertain, the contractor is unable to employ its forces in other productive activities and is forced to stand by. This entitles the contractor to recovery of unabsorbed home office overhead. *Appeal of 102 Construction, Inc.*, ASBCA No. 45223 (May 18, 1993); ***CCM*** August 1993, p. 4.

In order for a true suspension to occur, the contractor's forces must be idled and must be prevented from performing other paying work. If the nature of the suspension enables the contractor to demobilize from the site and perform work on other projects, no recovery of unabsorbed home office overhead will be allowed. *Appeal of Gaffny Corp.*, ASBCA No. 36497 (February 7, 1991); ***CCM*** May 1991, p. 4. Similarly, if the contractor is able to perform other productive work at the project site, no recovery is allowed. *Appeal of Webb Mechanical Enterprises, Inc*, ASBCA No. 41345 (October 8, 1992); ***CCM*** January 1993, p. 5.

It should be noted that it is not enough for a contractor to show that it did not perform other work during the period of suspension. The contractor has the burden of proving that it was unable to obtain other work. *Appeal of Sippial Electric & Construction Co., Inc.*, ASBCA No. 43993 (November 19, 1992); ***CCM*** February 1993, p. 4.

One issue that has been hotly contested is a contractor's right to recover unabsorbed home office overhead when the period of contract performance is extended by a change order. Contractors routinely included an Eichleay calculation when submitting change order proposals, arguing that the longer performance period was attenuating the cash-flow from the project and causing an underabsorption of fixed home office expenses. Project owners argued that the extra work authorized by the change order included a mark-up for overhead, so the contractor was already being compensated.

This issue was resolved in favor of the project owners by the U.S. Court of Appeals for the Federal Circuit. On federal projects, at least, the Eichleay formula cannot be utilized when the performance period is extended by compensable extra work.

"The Eichleay formula was devised to calculate reimbursable home office overhead costs in the event of a suspension of work on a contract, when the suspension decreases the stream of direct costs against which to assess a percentage rate for reimbursement....It is inappropriate to use the Eichleay formula for contract extensions because adequate compensation for overhead expenses may usually be calculated more precisely using a fixed percentage formula." *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669 (Fed.Cir. 1992); ***CCM*** March 1993, p. 2.

It should be noted, however, that if a contractor is forced to stand by awaiting an owner decision on a change order, the contractor may be allowed to recover unabsorbed home office overhead for that period of suspension prior to issuance of the directive. *Appeal of A. A. Beiro Construction Co., Inc.*, ENG BCA No. 5103 (June 28, 1991); ***CCM*** October 1991, p. 4.

Economic Impact

In the *Capital Electric* decision, the Court of Appeals made it clear that in order to utilize the Eichleay formula, a contractor must be able to prove that a period of owner-caused suspension resulted in an actual economic impact on the contractor. Courts and administrative boards have been grappling with the definition and proof of economic impact.

The continuation of home office activities during a period of suspension is not, in itself, proof of an economic impact. *Daly Construction, Inc. v. Garrett*, 5 F.3d 520 (Fed.Cir. 1993); ***CCM*** January 1994, p. 3. When a suspension resulted in only a modest reduction in contract billings, there was not a sufficient economic impact to warrant the use of the Eichleay formula. *Appeal of Single Ply Systems, Inc.*, ASBCA No. 43148 (May 2, 1994); ***CCM*** August 1994, p. 4. The most tangible and best recognized proof of economic impact is the impairment or exhaustion of the contractor's bonding capacity which prevents the contractor from seeking other work. *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053 (Fed.Cir. 1993).

It should be emphasized that proof of an economic impact will not necessarily entitle a contractor to the rote application of the Eichleay formula. Where a contractor was able to replace some, but not all, of the contract revenues from the suspended contract, the contractor was instructed to adjust the formula accordingly. Presumably, this would be done by adding the billings from the other work to the total billings for the contract period, thereby reducing the home office overhead allocable to the suspended contract. *Appeal of E. C. Morris and Son, Inc.*, ASBCA No. 36706 (February 15, 1991); ***CCM*** June 1991, p. 5.

Finally, contractors will be required to exclude from their home office overhead pool any costs which are directly attributable to other projects. The Eichleay formula can only be applied to costs that are truly of a general, indirect nature. *Wickham Contracting Co., Inc. v. Fischer*, 12 F.3d 1574 (Fed.Cir. 1994); ***CCM*** May 1994, p. 3.

CALCULATING DAMAGES FOR EXTENDED HOME OFFICE OVERHEAD

The Eichleay Formula is the best known and most widely used method for calculating extended home office overhead damages. It may be interesting to create a set of facts so that the damages resulting from the three versions of the Eichleay Formula can be compared. Therefore, assume the following:

Original Contract Price	$2,250,000
Total Contract Billings	2,925,000
Total Company Billings for Original Contract Period	8,200,000
Total Company Billings for Actual Contract Period	11,700,000
Contract Billings for Extended Period	450,000
Direct Costs Incurred During the Extended Period (excluding job site overhead)	360,000
Total Home Office Overhead for Actual Contract Period	$1,520,000
Total Home Office Overhead for Original Contract Period	1,350,000
Total Fixed Home Office Overhead for Original Contract Period	950,000
Home Office Overhead as a Percent of Direct Costs	15%
Original Days of Contract Performance	90 Days
Actual Days of Contract Performance	120 Days
Number of Days Delay	30 Days

Figure 1

ORIGINAL – EICHLEAY FORMULA

(1) $\frac{\text{Total Contract Billings}}{\text{Total Company Billings for Actual Contract Period}} \times \text{Total Home Office Overhead for Actual Contract Period} = \text{Home Office Overhead Allocable to Contract}$

(2) $\frac{\text{Allocable Home Office Overhead}}{\text{Actual Days of Contract Performance}} = \text{Daily Home Office Overhead Allocable to Contract}$

(3) Daily Home Office Overhead Allocable to Contract $\times$ Number of Days of Delay $=$ Extended Home Office Overhead Damages

Sample Calculation:

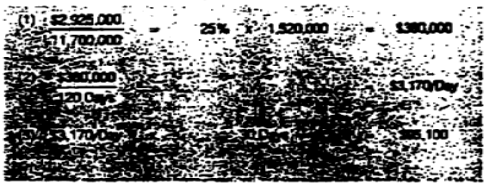


Figure 2

MODIFIED VERSION 1 – EICHLEAY FORMULA

(1) $\frac{\text{Original Contract Price}}{\text{Total Company Billings for Original Contract Period}} \times \text{Total Home Office Overhead for Original Contract Period} = \text{Home Office Overhead Allocable to Contract}$

(2) $\frac{\text{Allocable Home Office Overhead}}{\text{Original Days of Contract Performance}} = \text{Daily Home Office Overhead Allocable to Contract}$

(3) Daily Home Office Overhead Allocable to Contract $\times$ Number of Days of Delay $=$ Extended Home Office Overhead Damages

Sample Calculation:

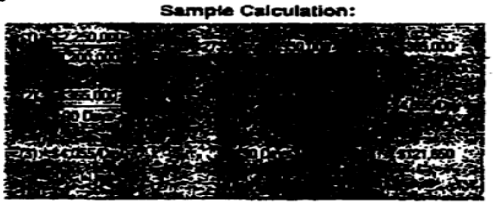


Figure 3

MODIFIED VERSION 2 – EICHLEAY FORMULA

(1) $\frac{\text{Original Contract Price}}{\text{Total Company Billings for Original Contract Period + Contract Billings for Extended Period}} \times \text{Total Fixed Home Office Overhead for Original Contract Period} = \text{Fixed Home Office Overhead Allocable to Contract}$

(2) $\frac{\text{Fixed Home Office Overhead Allocable to Contract}}{\text{Original Days of Contract Performance}} = \text{Daily Fixed Home Office Overhead Allocable to Contract}$

(3) Daily Fixed Home Office Overhead Allocable to Contract $\times$ Number of Days of Delay $=$ Extended Home Office Overhead Damages

Sample Calculation:

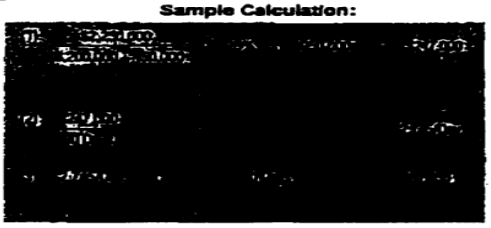


Figure 4

DIRECT COST MARKUP METHOD

(1) Direct Costs Incurred During The Extended Period $\times$ Home Office Overhead Percent of Direct Costs $=$ Extended Home Office Overhead Damages

Sample Calculation:

As can be seen by the above calculations, Modified Version 1 of the Eichleay Formula produces a significantly higher value for extended home office overhead damages than the original version, whereas Modified Version 2 produces a significantly lower value. The direct cost markup method produces a value lower than all versions of the Eichleay Formula.

No specific set of rules clearly identifies the most appropriate method. The deciding factor must be — use the method which more fairly approximates an accurate allocation of your home office overhead costs.

ect

Extended Home Office Overhead
Original-Eichleay Formula

1) Original contract Price	$349,000
2) Total Contract Billings	$492,215
3) Total Company Billings for actual contract time (5-20-98 thru 9-26-98)	$1,971,331
4) Total Company billings for original contract time	$656,503

492,215 x 781,000 = 195,000
1,971,330

195,000 = 380/day
513

380 x 384 days delay = 145,920

APPENDIX AA
COMPLAINT

2601

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT IN AND FOR , FLORIDA

SITE SUB

Plaintiff,

DIVISION:

vs.

ARCHITECT & ENGINEER

Defendants.

2001 JAN 16 P 3:20

COMPLAINT

Plaintiff, SITE SUB , by and through its undersigned counsel, sues Defendants ARCHITECT AND ENGINEER and alleges:

1. 1 CAUSE of action for damage that exceed $5,000 ~
2. Site Sub is a Florida corporation with its principal place of business located in Orange County, Florida.
3. Architect is a Florida corporation with its principal place of business located in County, Florida.
4. Engineer is a Florida corporation with its principal place of business located in County, Florida.

1

5. Venue is proper in County, Florida, as that is where all actions complained of herein occurred.

6. On or before August 30, 2001, the City entered into a Contract with the Contractor, GC to perform all the work and furnish materials for the construction of Community Park Project ("Project").

7. On or about August 30, 2001 Site Sub entered into a Subcontract Agreement with the Contractor, GC , for the performance of site grading and clearing work on the Project.

8. Upon information and belief, ARCHITECT had entered into a Contract with the City to provide architectural and engineering services for the Project.

9. Upon information and belief, ARCHITECT contracted with ENGINEER to perform some or all of the civil engineering design for the Project.

COUNT I
Professional Negligence Against ARCHITECT

10. Site Sub realleges and adopts the Common Allegations contained in Paragraphs 1 through 9, above, as if they were fully set forth herein.

11. ARCHITECT prepared erroneous design documents with the knowledge that the Contractor would supply them to Site Sub and that Site Sub would be injured if they were inadequate.

12. ARCHITECT was careless and negligent in the performance of its duties in connection with the planning and construction of the Project, and failing to exercise such reasonable care, technical skill and ability and diligence as are ordinarily required of

architects/engineers in the course of drawing plans, inspection and supervision during construction, and in responding to schedule-sensitive requests, including RFI and submittal responses.

13. ARCHITECT also failed to properly investigate existing conditions at the site, resulting in numerous unforeseen conditions and erroneous benchmarks and grade data.

14. ARCHITECT'S professional architects and engineers failed to visit the Project site on a regular and timely basis, did not supervise the Project, and routinely delegated contractual, statutory and common law duties that should have been performed by a licensed architect or professional engineer.

15. As a direct and proximate result of ARCHITECT'S failure to exercise due care and reasonable skill, SITESJO suffered the following damage:

a. Out of sequence work which led to the wrongful termination of SITE SJO

b. Increased labor costs;

c. Increased equipment costs;

d. Increased field overhead;

e. Increased home office overhead;

f. SITESJO lost its ability to procure payment and performance bonds from sureties which will prevent it from successfully bidding on future project; and

g. Lost business value, and interest and penalties due to repossessions and delinquent accounts.

16. SITESJO has met all conditions precedent to filing this action, or they have otherwise been waived or excused.

WHEREFORE, Plaintiff, Site Sub demands a jury trial of all issues so triable, and demands judgment against Defendant, Architect for damages, pre and post-judgment interest, costs and such other equitable relief as this Court may deem proper.

COUNT II
Professional Negligence Against Engineer

17. Site Sub realleges and adopts the Common Allegations contained in Paragraphs 1 through 9, above, as if they were fully set forth herein.

18. Engineer prepared erroneous design documents with the knowledge that the Contractor would supply them to Site Sub and that Site Sub would be injured if they were inadequate.

19. Engineer was careless and negligent in the performance of its duties in connection with the planning and construction of the Project, and failing to exercise such reasonable care, technical skill and ability and diligence as are ordinarily required of architects/engineers in the course of drawing plans, inspection and supervision during construction, and in responding to schedule-sensitive requests, including RFI and submittal responses.

20. Engineer also failed to properly investigate existing conditions at the site, resulting in numerous unforeseen conditions and erroneous benchmarks and grade data.

21. Engineer's professional architects and engineers failed to visit the Project site on a regular and timely basis, did not supervise the Project, and routinely delegated contractual, statutory and common law duties that should have been performed by a licensed architect or professional engineer.

22. As a direct and proximate result of Engineer's failure to exercise due care and reasonable skill, Site Sub suffered the following damage:

a. Out of sequence work which led to the wrongful termination of Site Sub

b. Increased labor costs;

c. Increased equipment costs;

d. Increased field overhead;

e. Increased home office overhead;

f. Site Sub lost its ability to procure payment and performance bonds from sureties which will prevent it from successfully bidding on future project; and

g. Lost business value, and interest and penalties due to repossessions and delinquent accounts.

23. Site Sub has met all conditions precedent to filing this action, or they have otherwise been waived or excused.

WHEREFORE, Plaintiff, Site Sub demands a jury trial of all issues so triable, and demands judgment against Defendant, Engineer for damages, pre and post-judgment interest, costs and such other equitable relief as this Court may deem proper.

APPENDIX AB
ENGINEER COUNTERCLAIM AND AFFIRMATIVE DEFENSES

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR COUNTY, FLORIDA

Site Sub

Plaintiff,

v.

Architect and Engineer

Defendants.

/

DEFENDANT'S, ENGINEER AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

COMES NOW, Defendant, ENGINEER by and through its undersigned counsel and hereby files this, its Amended Answer and Affirmative Defenses to Plaintiff's Complaint and would states as follows:

1. Denied.
2. Without knowledge and therefore denied.
3. Admitted.
4. Admitted.
5. Without knowledge and therefore denied.
6. Admitted.
7. Without knowledge and therefore denied.

8. Admitted.

9. Admitted.

COUNT I
PROFESSIONAL NEGLIGENCE AGAINST ARCHITECT

10. Defendant, ENGINEER reiterates and readopts each response contained in paragraphs one through nine above, inclusive, as fully set forth therein.

11. The allegations contained in paragraph eleven solely pertain to a Defendant other than this Defendant and, this Defendant would state that he is without knowledge of same, and therefore, are denied.

12. The allegations contained in paragraph twelve solely pertain to a Defendant other than this Defendant and, this Defendant would state that he is without knowledge of same, and therefore, are denied.

13. The allegations contained in paragraph thirteen solely pertain to a Defendant other than this Defendant and, this Defendant would state that he is without knowledge of same, and therefore, are denied.

14. The allegations contained in paragraph fourteen solely pertain to a Defendant other than this Defendant and, this Defendant would state that he is without knowledge of same, and therefore, are denied.

15. The allegations contained in paragraph fifteen and its subparts solely pertain to a Defendant other than this Defendant and, this Defendant would state that he is without knowledge of same, and therefore, are denied.

16. Denied.

COUNT II
PROFESSIONAL NEGLIGENCE AGAINST ENGINEER

17. Defendant, ENGINEER reiterates and readopts each response contained in paragraphs one through nine above, inclusive, as fully set forth therein.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

a. Denied

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

23. Denied.

AFFIRMATIVE DEFENSES

24. Defendant, Engineer affirmatively alleges that the subject action is barred by the economic loss rule. To the extent that the Plaintiff has incurred any of the damages alleged in this action, said damages are based upon alleged duties arising in tort and, are not covered by an exception under the rule.

25. Defendant, Engineer affirmatively alleges that Plaintiff has failed to mitigate its alleged damages by, among other things, failing to properly and timely review and seek clarification of any alleged errors and omissions within the plans and specifications for the Project, and follow the advice, counsel and recommendations of Defendants, relating to the project.

26. Defendant, Engineer affirmatively alleges that Plaintiff is barred from raising any claim for any alleged defective design or work under the doctrines of waiver and estoppel in that, among other things, Plaintiff failed to properly and timely notify ENGINEER of any alleged claims.

27. Defendant, Engineer affirmatively alleges that Plaintiff is barred from raising the claims in this action in that the Plaintiff failed to timely notify ENGINEER of any alleged errors of deficiencies in the plans or specifications.

28. Defendant, Engineer affirmatively alleges that the acts, errors or omissions of persons or entities other than ENGINEER including but not limited to Plaintiff and its subcontractors and suppliers, and their respective employees, agents and representatives, were the intervening or supervening cause, or both, of Plaintiff's alleged damages, if any.

29. Defendant, Engineer believes its work product and other professional services met the requirements of its contract, however, even if portions of the contract requirements were not met, they were approved by the appropriate enforcement agencies, including, but not limited to, the City , Florida Department of Environmental Protection and South Florida Water Management District.

30. Defendant, Engineer decisions relating to contract administration are protected by the judicial immunity doctrine.

31. Defendant, Engineer affirmatively alleges that Plaintiff, was itself negligent and careless in regard to its own conduct and that its negligence was the sole proximate cause, or alternatively, an appreciable contributing cause to any damages sustained by it. To the extent that Plaintiff's own negligence caused or contributed to any damages, any amount to which Plaintiff might otherwise be entitled must be proportionately reduced by the ratio to which it's own negligence contributed to the overall negligence involved in this action.

32. Defendant, Engineer affirmatively alleges that the Defendant's liability, if any, for economic and/or non-economic damages must be reduced proportionately, not only by the negligence of Plaintiff, but also by any negligence, malfeasance, misfeasance or nonfeasance of any other entities or parties whose negligence contributed to cause the loss, or damage as set forth in the Complaint pursuant to Florida Statute §768.81.

33. Defendant, Engineer affirmatively alleges any recovery by the Plaintiff herein must be diminished by the total amount of all benefits, paid or payable, to Plaintiff from collateral sources as defined within Florida Statutes, Chapter 768.76.

34. Defendant, Engineer affirmatively alleges that they are entitled to a set-off for any payments made by any other parties, persons or entities to the Plaintiff or in his behalf pursuant to §768.041, Florida Statutes.

35. Defendant, Engineer, affirmatively alleges that the damages sustained by Plaintiff were occasioned by and resulted from the negligence of other parties, persons

or entities over which this Defendant had no control, and said conduct constituted an intervening and superseding cause of the alleged injuries and damages.

36. Defendant, Engineer affirmatively alleges that to the extent the alleged damages Plaintiff claims to have sustained as a result of the incident described in the Complaint were the result of the negligence of other non-parties who participated in the project but were not in the custody, or control of these Defendants, Plaintiff cannot recover against these Defendants, or in the alternative, these Defendants should be liable, if at all, only for their respective proportionate share of liability, pursuant to Florida Statutes §768.81(3), Messmer v. Teachers Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991) and as further supported in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). More Specifically, Defendant would include each and every Co-defendant in this action as a potential Messmer/Fabre Defendant including Architect

and by reference would incorporate the specific allegations contained in Plaintiff's Complaint as the potential basis for their inclusion on the verdict form should any settle or otherwise be Dismissed from this action prior to trial.

37. Defendant, Engineer, affirmatively states that the claim of the Plaintiff herein is barred by the applicable statute of limitations.

38. Defendant, Engineer, affirmatively alleges that Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

39. Defendant, Engineer affirmatively alleges that there was a lack of contractual privity between Plaintiff and this Defendant.

40. Demand trial by jury on all issues so triable.

LIST OF REFERENCES

Aagaard-Juergensen v. Lettelier, 579 So.2d 404. (Fla. 5th DCA 1991)

Aetna Casualty and Surety Company v. Buck, 594 So.2d 280 (Fla. 1992)

American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360 (Fla. 2005)

Anton v. Anton, 763 So.2d 404 (Fla. 4th DCA 2000)

The Architect's Handbook of Professional Practice. The American Institute of Architects; David Haviland, Editor, 1897

Armentos v. Baptist Hospital of Miami, Inc., 714 So.2d 518 (Fla. 3rd DCA 1998)

A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973)

Biakanja v. Irving, 49 Cal.2d 647 (Cal. 1958)

Biscayne Roofing Co. v. Palmetto Fairway Condo. Assoc., 418 So.2d 1109 (Fla. 3rd DCA 1982)

Bridgeport, Inc. v. Tampa Roofing Co., 903 So.2d 306 (Fla. 2nd DCA 2005)

Casa Clara Condominium Assoc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993)

CDS v. 1711, 743 So.2d 1223 (Fla. 4th DCA 1999)

Cecile Resort, Ltd v. Hokanson, 729 So.2d 446 (Fla. 5th DCA 1999)

City of Tampa v. Thonton-Tomasetti, P.C., 646 So.2d 279 (Fla. 2nd DCA 1994)

Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., 695 So.2d 383 (Fla. 4th DCA 1997)

Conklin v. Hurley, 428 So.2d 654 (Fla. 1983)

Croon v. Quayside Assoc., Ltd., 464 So.2d 178 (Fla. 1985)

Drexel Properties, Inc. v. Bay Colony Club, 406 So.2d 515 (Fla. 4th DCA 1981)

Duncan v. Kasim, Inc., 810 So.2d 968 (Fla. 5th DCA 2002)

Easterday v. Masiello, 518 So.2d 260 (Fla. 1988)

E.C. Goldman, Inc. v. A.R.C. Associates, Inc., 543 So.2d 1268 (Fla. 5th DCA 1989)

Eiler v. Camp, Dresser & McKee, 583 So.2d 1086 (Fla. 5th DCA 1991)

Fischer-McGann, Inc. v. Glic, 715 So.2d 994 (Fla. 4th DCA 1998)

Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA. 1972)

Garcia v. Biltmore Court Villas, Inc., 534 So.2d 1173 (Fla. 3rd DCA. 1989)

Geer v. Bennett 237 So.2d 311 (Fla. 4th DCA 1970)

Gulfside Properties Corp. v. Chapman Corp., 737 So.2d 604 (Fla. 1st DCA 1999)

Harper Lumber & Manufacturing Co. v. Teate, 125 So. 21 (Fla. 1929)

Hawkins v. Champion Int'l. Corp., 662 So.2d 1005 (Fla. 1st DCA 1995)

Hoepner 7 Assoc. v. Gilman Co., 648 So.2d 854 (Fla. 5th DCA 1995)

Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988)

HTP, LTD. v. Lineas Aereas Costariccecenses, S.A., 685 So.2d 1238 (Fla. 1996)

Indemnity Insurance Co. of North Amer. v. Amer. Aviation, 891 So.2d 532 (Fla. 2004)

J. Batten Corp. v. Oakridge Inv. 85, Ltd., 546 So.2d 68 (Fla. 5th DCA)

Jervis, Bruce, ed. "Recovering Unabsorbed Overhead: Defining a Compensable Suspension." Construction Claims Monthly os 16 (1994): 1+

Johnson v. Aqua Pool Co., Inc., 725 So.2d 458 (Fla. 2nd DCA 1999)

J. Square Enter v. Regner, 734 So.2d 565 (Fla. 5th DCA 1999)

Juno Industries, Inc. v. Heery Int'l. 646 So.2d 818 (Fla 5th DCA 1994)

Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3rd DCA 1989)

Kay v. Slavin, 108 So.2d 462 (Fla. 1959)

Keller v. Newman and Sons, Inc., 756 So.2d 120 (Fla. 3rd DCA 2000)

Lee v. Sas Et.Al., 53 So.2d 114 (Fla. 1951)

Legault v. Suncoast Lawn Service, 486 So.2d 72 (Fla. 4th DCA)

LeMay v. U.S.H. Properties, 338 So.2d 1143 (Fla. 2nd DCA 1976)

Lesser, Steven B. "Florida's New Construction Defect Statute; The Aggrieved Homeowner's Obstacle Course." The Florida Bar Journal 9th ser. 77 (2003): 18.

Lesser, Steven B. "The 2004 Amendments to Florida's Construction Defect Statute: Some Solutions and More Confusion." The Florida Bar Journal 9th ser. 78 (2004): 47

Luciani v. High, 372 So.2d 530 (Fla. 4th DCA 1979)

Martin v. Venice Hospital, 603 So.2d 1377 (Fla. 2nd DCA 1992)

McConnell, Hugh. "Distinguishing Quantum Meruit and Unjust Enrichment in the Construction Setting." The Florida Bar Journal 3rd ser. 71 (1997): 88.

McElvy et. al. v. Arlington Electric, Inc., 582 So.2d 47 (Fla. 2nd DCA 1991)

Metal Foam Industries, Inc. v. Watson, 716 So.2d 328 (Fla. 2nd DCA 1998)

Moore v. PRC Engineering, Inc., 565 So.2d 817 (Fla. 4th DCA 1990)

Moransais v. Heathman, 744 So.2d 973 (Fla. 1999)

Nat'L Fire Ins. Co. of Hartford v. L.J. Clark Constr. Co., 579 So.2d 743 (Fla. 4th DCA 1991)

Newberry Square v. Southern Landmark, 578 So.2d 750 (Fla. 1st DCA 1991)

Onionskin, Inc. v. DeCiccio, 720 So.2d 257 (Fla. 5th DCA 1998)

Publix v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987)

Puya v. Superior Pools 902 So.2d 973 (Fla. 4th DCA 2005)

Ramos v. Univision Holdings, Inc., 655 So.2d 89 (Fla. 1995)

Sansarac Assn., Inc. v. W.R. Frizzell, 609 So.2d 1349 (Fla. 2nd DCA 1992)

Schauer v. Blair Construction Co., 374 So.2d 1160 (Fla. 4th DCA 1979)

Schmeck v. Sea Oats Condo. Assoc., Inc., 441 So.2d 1092 (Fla. 5th DCA 1983)

Shepard v. City of Palatka, 399 So.2d 1044 (Fla. 5th DCA 1981)

Snyder v. Bell, 746 So.2d 1096 (Fla. 2nd DCA 1999)

Southland Construction, Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994)

Standard Heating Svcs, Inc. v. Guymann Constr., Inc., 459 So.2d 1103 (Fla. 2nd DCA 1984)

Stevens v. Site Developers, Inc., 584 So.2d 1064 (Fla. 5th DCA 1991)

St. Lucie Harvesting v. Cervantes, 639 So.2d 37 (Fla. 4th DCA 1994)

Stunkel v. Gazebo Landscape, 660 So.2d 623 (Fla. 1995)

Superfos Construction v. HAJOCA, 712 So.2d 1228 (Fla. 2nd DCA 1998)

Targia v. U.S. Alliance Corp., 2003 Lexis 21799 (S.D. Fla. 2003)

Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971)

Thompson v. Jared Kane Co., Inc.,. 2D03-2011 (Fla. 2nd DCA 2004)

United States v. Spearin, 248 U.S. 132 (1918)

U.S. Fidelity v. Bennett, 119 So.2d 394 (Fla. 1928)

U.S. Lodging of Jax, Ltd. v. H.B. Daniel Constr. Co., Inc., 617 So.2d 448 (Fla. 1st DCA 1993)

Van Ness v. Independent Construction Co., 392 So.2d 1017 (Fla. 5th DCA 1981)

Viking Communities Corp. v. Peeler Constr. Co., 367 So.2d 737 (Fla. 4th DCA 1979)

VL Orlando v. Skilled Services Corp., 769 So.2d 526 (Fla. 5th DCA. 2000)

BIOGRAPHICAL SKETCH

Frank Hild received a Juris Doctor from the University of Florida in 1998, and practiced civil and criminal law. The diverse practice provided significant exposure to complex litigation. Mr. Hild maintains a significant interest in criminal law. However it was the practice of commercial law and a personal interest in design and construction that prompted Mr. Hild to enroll in the Rinker School of Building Construction to obtain a master of science, which he will realize in December of 2007. Mr. Hild is resuming a practice specializing in construction law.