

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Angeles Contractor, Inc.

-and-

Mt. San Antonio Community College District

Case Number: 72 110 0308 13 SCH

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been duly designated in accordance with the Arbitration Agreement entered into by the above named Parties and dated September 23, 2009, and having been duly sworn, having duly heard the proofs and allegations of the Parties, do hereby AWARD as follows:

THE HEARING

Pursuant to the Commercial Arbitration Rules of the American Arbitration Association (AAA), evidentiary hearings were held on October 7, 8, 9, 14, 15, 16, 21, 27, and 30, 2014, before Arbitrator Paul R. Fine. Appearing at the hearing were Mark Feldman, Esq. and Travis Egan, Esq. of Feldman & Associates, Inc. on behalf of Angeles Contractor, Inc. (hereinafter "ACI" or "CLAIMANT"); and Colin Barr, Esq. and Sarine Abrahamian, Esq. of Orbach Huff Suarez & Henderson LLP on behalf of Mt. San Antonio Community College District (hereinafter "MT. SAC" or "RESPONDENT").

The following witnesses testified at the evidentiary hearing: Young Kang, ACI President; Raymond Yoo, ACI Vice President; Carl W. LaFraugh, P.E., ACI expert witness; Paul Versage, construction consultant; Samuel Lee, ACI Project Engineer/Manager; Sung Ho "Samuel" Yang, K&S Design Construction, Inc.; Ken Larsen, Church & Larsen Vice President and Operations Manager; Gary Nellesen, MT. SAC Director of Facilities Planning & Management; and, Paul Makris, MT. SAC expert witness.

THE PROJECT

This arbitration involved the work of improvement generally referred to as the "Administration Building Remodel General Construction Bid #2855". The project consisted of the renovation of an existing 2-Story concrete building of approximately 43,400 GSF (gross square footage) and related site improvements, located at Mt. San Antonio Community College,

1100 North Grand Avenue, Walnut, California 91789 (hereinafter “the Project”). MT. SAC elected to construct the Project using a “Multiple Prime Contractor” approach. MT. SAC separately contracted with Bovis Lend Lease (hereinafter “Bovis”) to serve as its Construction Manager for the Project.

THE CONTRACT

Effective September 23, 2009, ACI and MT. SAC entered into an Agreement for the “general construction” of the Project (hereinafter “the Contract”). The Supplemental Conditions of the Contract provided for a Project duration of 429 calendar days. Pursuant to MT. SAC’s Notice to Proceed letter of October 21, 2009, construction was to “commence on or about October 26, 2009” with “a final completion date of December 24, 2010.”

THE CLAIMS

On April 10, 2012, ACI submitted a Change Order Request for extended costs, (Cost Proposals #187 for extended home office overhead and #188 for extended job site costs), to MT. SAC for the total sum of \$505,778.50. [Document numbers MTSAC0003103-3108]. On March 26, 2013, ACI filed a Demand for Arbitration seeking \$844,732 in damages. The Demand for Arbitration stated: “Respondent delayed a construction project that it hired Claimant to perform, damaging Claimant in the amount of \$505,781. In addition, Respondent wrongfully refused to release Claimant’s retention in the amount of \$338,951.” The original claim submitted to this arbitration therefore consisted of a demand for the release of the unpaid retention of \$338,950.96 plus a demand for the extended job site costs and home office overhead in the sum of \$505,778.50.

Thereafter, ACI sought to assert a claim for “Loss of Labor Efficiency” which it valued at \$606,613. On May 30, 2014, the Arbitrator, pursuant to Rule 6(b) allowed ACI’s amendment of its claim.

ACI additionally sought prejudgment interest, penalty interest on improperly withheld retention pursuant to *California Public Contract Code §7102*, and attorneys’ fees.

MT. SAC claimed an entitlement to liquidated damages in the amount of \$479,000.00 and actual damages, pursuant to Supplemental Conditions section 4, in the amount of \$101,520.00 (Vinewood inspection costs of \$41,137 and Rancho Pacific Electric (“RPE”) delay claim of \$60,383).

ANALYSIS

Labor Inefficiency Claim:

ACI sought damages for loss of labor efficiency related to change orders, RFIs, ASIs, and the resultant delays to its work caused by MT. SAC and/or other multi-prime contractors. ACI calculated its labor inefficiency damage claim utilizing a “modified total cost” method. “Under the total cost method, ‘damages are determined by “subtracting the contract amount from the total cost of performance.” [Citations.]’ (*Amelco, supra*, 27 Cal.4th at p. 243.) This method may be used only after the trial court determines the following can be shown: (1) it is impractical for the contractor to prove actual losses directly; (2) the contractor’s bid was reasonable; (3) its

actual costs were reasonable; and (4) it was not responsible for the added costs. (*Id.* at pp. 243-244.) If some of the contractor's costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost. (*Servidone Constr. Corp. v. U.S.* (Fed.Cir. 1991) 931 F.2d 860, 862.)” *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal. App. 4th 1396, 1400.

ACI did not introduce its estimate or take-off sheets to establish the reasonableness of its bid. The testimony established that ACI's framing and drywall job cost estimate was based on the bid it received from Lone Eagle. ACI's expert, Karl LaFraugh, testified that he did not prepare an estimate for the framing and drywall scopes of work, but rather relied on the pre-bid estimate of Church & Larsen to establish his alternative labor inefficiency damage opinion.

To support a modified total cost claim, ACI was required to reduce its' total cost claim by those costs attributable to its own errors or omissions. ACI essentially adopted a total cost approach to its labor inefficiency claim with very minor adjustments. ACI deducted an “industry standard” three per cent (3%) of the total cost incurred for rework of completed work, but did not otherwise take responsibility for its own contribution to the increased cost of the work. In total, ACI deducted \$470 as “adjustments” from its “job cost” for its self performed work and its subcontracted work, and \$29,797 for the rework of completed work. Utilizing Lone Eagle's bid for the framing and drywall work, ACI calculated its labor inefficiency claim at \$606,613. Utilizing Church & Larsen's pre-bid estimate of \$680,000, rather than Lone Eagle's pre-bid estimate of \$400,000, reduced ACI's labor inefficiency claim to \$329,622.

The alternative labor inefficiency analysis submitted by ACI inferentially suggested that it understood that its job cost estimate for the framing and drywall work was inadequate and therefore unreasonable. Although the use of the Church & Larsen's pre-bid estimate attempted to address the job cost estimate error in the framing and drywall work, the remainder of the labor inefficiency analysis failed to properly account for those costs attributable to ACI's own errors or omissions. Notably, ACI's labor inefficiency damage analysis failed to address the delays and inefficiencies related to Golden Iron's untimely performance of the structural steel work; improperly included material costs; and, failed to consider the change order work approved and paid for by MT. SAC. Although ACI adjusted its labor inefficiency calculations to address its material cost inclusion and the payments it received for approved change order work, it failed to address labor inefficiency impacts caused by its own acts and those of its subcontractors.

It is well recognized that bidding inaccuracies can unjustifiably reduce a contractor's estimated costs and that inefficiencies can inflate a contractor's costs. As a result, these inaccuracies and inefficiencies can skew an accurate computation of damages. See *Servidone Construction Corp. v. U.S.*, *supra*, 931 F.2d at p. 862. The contemporaneous project records reflect that although MT. SAC may have contributed to some of ACI's work delays, ACI failed to properly plan its work, failed to timely submit shop drawings, failed to timely address interferences with its work, and failed to timely perform its work. Unlike the court in *Servidone*, the Arbitrator is not convinced that either the \$606,613 damage claim or the \$329,622 alternative damage claim or any of the damage claims submitted by ACI fairly represent the increased costs ACI directly suffered from the alleged acts of MT. SAC. As ACI failed in its burden of proof, the labor inefficiency claim is denied.

As the labor inefficiency claim of ACI is denied on the merits, there is no need to discuss MT. SAC's objections to the timeliness of its submission.

Extended Job Site Costs and Extended Home Office Overhead:

ACI's expert, Carl LaFraugh calculated extended overhead damages based on a contract duration of 425 calendar days. His 425 calendar day calculation was predicated on the dates contained in the Notice to Proceed. He determined that substantial completion occurred on December 16, 2011, or 782 calendar days after commencement of work. He determined that ACI was delayed 357 calendar days and that MT. SAC, through change orders added 204 calendar days to the contract duration, thereby leaving 153 calendar days of unresolved additional time.

LaFraugh concluded that the critical path of the project initially went through completion of the structure's roof and then through the structure's interior finishes. Roofing was planned to be complete in May 2010, but was not substantially complete until August 9, 2010. As of August 9, 2010, the skylight area construction was incomplete. The skylight area represented approximately 3% of the overall surface area of the roof. It was his opinion that the demolition contractor (Janus) delayed completion of the skylight area, and that MT. SAC accepted responsibility for the delay when it issued Change Order No. 2855-007 to ACI for the cost of covering the skylight area with a tarp to mitigate weather damage to the interior of the building. The skylight was completed on November 5, 2010, before the winter weather, although he acknowledged some drywall damage related to rain. He calculated that completion of the roof was delayed by 97 calendar days, all of which he attributed to MT. SAC. The reasons for his allocation of responsibility included, without limitation: abatement of asbestos from the bottom foot of the roof parapet; reglet design issues; change of the roof membrane from 60 mil to 72 mil; addition of plywood sheathing on parapet walls; extension of the roofing membrane to the full height of the parapet walls; and, the addition of roof equipment support and other design changes related to the HVAC system. With the exception of the asbestos and lead abatement, all of these changes were attributed to design errors or omissions.

LaFraugh testified that the framing and drywall work was delayed between February 5 and June 2, 2010 by delayed precedent work and MT. SAC changes. On February 11, 2010, ACI was directed not to proceed with any wall framing (South) until all HVAC work was completed. On March 5, 2010, ACI notified MT. SAC that it was pulling work crews from the site "since there is not enough area for us to maintain crews to continue framing." From March 23, 2010 through April 20, 2010, framing of the electrical room was delayed awaiting confirmation of electrical equipment. On March 24, 2010, MT. SAC issued an Architectural Supplemental Instruction ("ASI") adding sound rated walls to the private offices (Change Order no. 2855-001, issued on July 28, 2010). On March 26, 2010, MT. SAC issued an ASI adjusting the fiscal office layout (Change Order no. 2855-003, issued September 15, 2010). On March 30, 2010, MT. SAC issued an ASI raising the ceilings of all spaces from 8' to 9', with the exception of four rooms (Change Order no. 2855-001, issued on July 28, 2010). Change Order no. 2855-007, issued on May 25, 2011, made architectural changes to rooms 137, 141, 142, 146, 147, and 222.

LaFraugh testified that following completion of the roof, MEP (mechanical, electrical, and plumbing) related work continued to delay framing and drywall construction and the completion of the interior. The delays, included without limitation, HVAC equipment start up

and climatization of the building and, the incorrect installation of the fire sprinkler system and failure to pass inspection. Additionally, errors or omissions in the plans and specifications led to RFIs (requests for information) and related delays and impacts to the construction. MT. SAC issued eighteen ASIs related to the punched window construction which caused the punched windows to be delivered to the site on September 21, 2010, ten months after the original schedule date. Design changes to the wood doors and interior windows delayed ACI from May 7, 2010 through September 24, 2010. Installation of the wood doors and interior windows was then delayed from November 23, 2010 through March 2, 2011 due to the delayed HVAC equipment start up and climatization of the building. Thereafter, completion of ASI 21 work by others delayed ACI from the period August 10, 2011 through December 28, 2011 (steel canopy).

LaFraugh testified that delayed responses to RFIs by MT. SAC's construction manager (Bovis) caused delays to the completion of the Project. ACI submitted 430 RFIs as the result of errors or omissions in the plans and specifications, field encountered conditions, and interferences with the work of other prime contractors. Response times to many RFIs were delayed (RFI 40, 72 calendar days; RFI 62, 70 calendar days; RFI 132, 80 calendar days; RFI 267, 32 calendar days; RFI 286, 54 calendar days; RFI 325, 42 calendar days; RFI 386, 36 calendar days; RFI 419, 33 calendar days; RFI 435, 29 calendar days; and, RFI 482, 95 calendar days).

In its extended job site costs claim ACI sought damages for 357 calendar days of delay. The 357 calendar days of delay included the 204 calendar days contained in Change Orders 1-13. Article 9.5 of the contracts General Conditions, provided that change orders were "in full payment and final settlement of all claims for direct, indirect and consequential costs, including without limitation, costs of delays or impacts related to, or arising out of, items covered and affected by the Change Order, as well as any adjustments to the Contract Time." (Exhibit 503.)

In its extended home office overhead claim ACI similarly sought damages for 357 calendar days of delay.

MT. SAC's expert, Paul Makris, testified that he used a construction start date of October 13, 2009; a contract duration of 429 calendar days; an original contract completion date of December 15, 2010; and, a substantial completion date of December 5, 2011, to reach his determination that the project duration was extended by 354 calendar days. He determined that MT. SAC was responsible for 191 days of the delay and that ACI was responsible for the remaining 163 days. He acknowledged that Change Order 14 granted ACI an additional 204 calendar days for its work, but noted that this was a math error. He attributed the causes for ACI's portion of the delay to: structural steel issues (mill certificates and purlin errors); framing errors (failed inspections, delays to electrical and plumbing subcontractors); failure to plan work (untimely RFIs); and, subcontractor substitutions and lack of manpower (no workmen on site). In its closing brief, MT. SAC clarified its position as follows: "For purposes of calculating its damages only, the District is granting ACI a credit of 13 calendar days (204 CO days – 191 CO days), plus 19 calendar days for RPE caused delays. Thus, for purposes of the District's revised damage calculation, ACI is responsible for 131 days of delay."

Makris disagreed with LaFraugh's conclusion that design issues and unforeseen site conditions concerning the roof caused non-concurrent delays to the project. Makris concluded that framing and other ACI caused delays impacted the project's critical path such that the roof

delays became concurrent delays. He concluded that the delays to completion of the roof were caused by ACI and its subcontractors. Based on Exhibits 713 and 714, he concluded that Golden Iron, ACI's structural steel subcontractor, failed to timely submit shop drawings, failed to obtain mill certificates, failed to properly layout roof penetrations and purlin locations, improperly bent bolts, failed pull tests, and, improperly cored holes requiring a submittal to and approval by the project architect of an approved fix. MT. SAC approved the substitution of Central Steel for Golden Iron on October 26, 2010.

As set forth above, the experts disagreed on whether the Project delays were concurrent or non-concurrent. Whether the delays were concurrent or non-concurrent determines whether or not ACI's claims for extended home office overhead and extended job site costs are compensable. To fully analyze the impact on the critical path of a project, a detailed analysis of the CPM schedule must be performed, including an analysis of the "logic ties" and "fragnets" contained in the schedule. That degree of analysis was not, and ACI argued could not be, performed in this case. LaFraugh testified that he did not perform a critical path analysis, but rather based his opinions on his analysis of the contemporaneous project records and the comments of ACI personnel. LaFraugh testified that all critical path delays were caused by MT. SAC or other multi-prime contractors and that ACI was not responsible for any delays to the Project's completion. This analysis ignored obvious delays caused to the critical path of the Project by ACI or its subcontractors. Given the multiple subcontractor substitutions; the timing of the subcontractor substitutions; the multiple delays in performance of the structural steel work (admitted by ACI in the Golden Iron litigation to be 60 days, Exhibit 614); the delays in the skylight construction; the delays in installation of the roof; the delays to the punch window construction; etc., it was implausible that ACI did not accept at least some responsibility for the overall delay of the Project. The credibility of ACI and its' expert suffered by this omission.

In evaluating the opinions of the experts, the Arbitrator considered the testimony of all of the witnesses and all of the documentary evidence presented.¹ The contemporaneous Project documentation strongly suggested that ACI and its subcontractors failed to comply with submittal deadlines, failed to properly plan their work, and, failed at times to properly man the project. Although MT. SAC contributed to and at times was responsible for delays to the critical path of the Project, ACI was compensated for those delays by way of Change Order. In short, the evidence established that ACI was responsible for causing the Project delays for which it sought compensation.

As ACI failed in its burden of proof, its claims for extended job site costs and extended overhead extension are denied.

Liquidated Damages:

The Agreement provided in paragraph 4. Liquidated Damages, that: "If the Contractor fails to achieve Final Completion of the Work within the Contract Time, including adjustments

¹ In evaluating the testimony offered by ACI, the Arbitrator was reminded of BAJI 2.25 Extrajudicial Admissions, which provides: "A statement made by a party before trial that has a tendency to prove or disprove any material fact in this action and which is against that party's interest is an admission." Specifically, the Arbitrator was troubled by sworn discovery responses in the Golden Iron litigation that conflicted with the testimony offered in this arbitration. Although ACI sought to justify the divergence in the testimony, the proverb "you can't have it both ways" resonated loudly.

thereto authorized by the Contract Documents, the Contractor shall be subject to assessment of Liquidated Damages in accordance with the Contract Documents. Failure of the Contractor to complete Major Milestones or to submit Submittals within the time(s) established to do so will result in the District's assessment of Liquidated Damages in accordance with the Contract Documents." (Exhibit 506).

General Conditions, Article 7, Section 7.5 Liquidated Damages provided in pertinent part: "Should the Contractor neglect, fail or refuse to: (i) submit Submittals in accordance with the Approved Construction Schedule; or, (ii) achieve Completion of the Work within the Contract Time, (subject to adjustments authorized under the Contract Documents), the Contractor agrees to pay to the District the amount of per diem Liquidated Damages set forth in the Supplemental Conditions, not as a penalty but as Liquidated Damages, for every day beyond the Contract Time, as adjusted, until Submittals are submitted or Completion of the Work are achieved. ..." (Exhibit 503).

Supplemental Conditions, Section 2.4 Major Milestones, provided that the Project be complete "within 429 calendar days after commencement of work," and further provided that "all other construction activities shall be performed as shown in the attached Bid Schedule and as modified thereafter during the progress of the work." (Exhibit 504).

Supplemental Conditions, Section 3: Bid Schedule, provided that: "This document shows anticipated timelines for project construction, and is issued for bidding purposes only. Contractor is still required to provide a detailed Construction Schedule as outlined in Section 01320 – Contract Schedules." (Exhibit 504).

Supplemental Conditions, Section 4. Liquidated Damages provided in pertinent part as follows:

"4.2 Delivery of Other Submittals. The per day assessment of Liquidated Damages for Contractor's delayed submission of Submittals pursuant to Article 4.8.2.1 of the General Conditions is Five Hundred Dollars (\$500.00) per Submittal per day per Prime Contractor until the Submittal(s) is/are submitted."

"4.3 Delayed Major Milestones. Delay in the completion of the work as indicated by any Major Milestone(s) shall be subject to the assessment of Liquidated Damages at the per day rate of One Thousand Dollars (\$1,000.00) per day per milestone per Prime Contractor."

"4.4 Final Completion. The assessment of Liquidated Damages for failure to achieve Final Completion of the Work pursuant to Article 7 of the General Conditions shall be at the rate of One Thousand Dollars (\$1,000.00) per day per Contractor until Final Completion of the Work is achieved." (Exhibit 504).

General Conditions, Section 4.8.2.1 Prompt Submittals provided in pertinent part as follows: "... All Submittals required by the Contract Documents shall be ... submitted by the Contractor ... within the time frames set forth in the Submittal Schedule incorporated and made a part of the Approved Construction Schedule prepared and submitted by the Contractor pursuant to Article 7 of these General Conditions." (Exhibit 503).

Liquidated Damages for Late Submittal:

ACI argued that MT. SAC improperly relied on the "Bid Schedule" in assessing Liquidated Damages. ACI pointed to General Conditions Section 4.8.2.1 which required that Submittals be submitted by the Contractor within the time frames set forth in the "Submittal Schedule." ACI argued in essence that since there was no Submittal Schedule, there could be no Liquidated Damages for late submittals. ACI further argued that design changes and delays by others extended its time to for submission of the required submittals.

General Conditions Section 7.3 Construction Schedules required ACI to submit a Preliminary Construction Schedule within five (5) days following execution of the Agreement identifying, without limitation: "...each Submittal required by the Contract Documents, the date for the Contractor's submission of each Submittal and the date for the return of the reviewed Submittal to the Contractor."

MT. SAC took the position that the Bid Schedule was the Approved Construction Schedule. The contemporaneous Project documents confirm ACI's delay in submission of Submittals. Exhibit 539, Notices to Comply are but one example.

MT. SAC's assessment of 36 Calendar Days of Delay for submission of Skylight, Structural Steel, and Metal Stair Submittals is appropriate. MT. SAC is entitled to Liquidated Damages totaling \$54,000 for late submission of the Skylight, Structural Steel and Metal Stair Submittals.

Liquidated Damages for Delayed Major Milestones:

Supplemental Conditions Section 4.2 addressed the delay in achieving Major Milestone dates. Supplemental Conditions Section 2.4 Major Milestones provided that "all other construction activities were to be performed as shown in the attached Bid Schedule and as modified thereafter during the progress of the work." The Bid Schedule (Exhibit 538), established May 4, 2010 as the Milestone Date for building dry in; July 19, 2010 as the "tentative" Milestone Date for energizing the building; and, December 15, 2010 as the Milestone Date for substantial completion. The Bid Schedule reference to "Milestones" is unambiguous.

MT. SAC assessed Liquidated Damages of \$131,000.00 for ACI's alleged delay in energizing the building by the Milestone Date. The Milestone Date for completion of this work was stated to be "tentative," and no formal date for completion of this work was identified in the evidence. MT. SAC admitted that RPE delayed the critical path by at least 19 days. The evidence established that DSG Corp. ("DSG") delayed completion of the HVAC system and hence climatization of the building. As a formal date for energizing the building was never established and as DSG, RPE and others delayed energizing and climatization of the building, the assessment of Liquidated Damages for achieving this Milestone Date is denied.²

² Notably missing from MT. SAC's case was testimony from Bovis concerning the Construction Manager's scheduling and coordination of the work of the multi-prime contractors and testimony from the Project Architect re the quality and completeness of the contract drawings and the reasons and timing for design changes that occurred during construction. Although MT. SAC's expert based his analysis on contemporaneous job site records, given ACI's allegations of poor scheduling and coordination of the multi-primers and of poor quality plans and specifications, the absence of testimony from the Project's Construction Manager and Architect was conspicuous.

MT. SAC assessed Liquidated Damages of \$131,000.00 for ACI's alleged delay in achieving building dry in by the Milestone Date. Although the Arbitrator has found that ACI failed to carry its burden of proof with regard to its affirmative claims for extended job site costs and extended overhead extension, it does not necessarily follow that MT. SAC properly assessed Liquidated Damages for the delay in achieving building dry in. The evidence clearly established that the demolition contractor encountered asbestos in the base of the parapet walls and that multiple design changes by MT. SAC caused delays to timely building dry in. The evidence further established that ACI's steel subcontractor was responsible for delays to the roof and skylight, both of which delayed building dry in.

In its Reply Brief, ACI makes reference to Exhibit 157 to argue that it is not responsible for the delays in completion of the roof. The May 25, 2010 meeting note contained in that exhibit states: "...Roof is most critical item on schedule; SS (structural steel) work on roof is delaying schedule; Project is being pushed out to Dec 2010;" On July 15, 2010, MT. SAC sent a Notice to Comply to ACI which stated in pertinent part that: "We continue to experience delays from structural steel and roofing operations which are both on the critical path. ... According to our estimation, the project is at least 60 days behind schedule and the delays were caused by structural steel and roofing operations which are the responsibility of ACI. Taking the latest delays into consideration, ACI has been deemed by the District to be in Contractor's default of a material obligation. ..." (Exhibit 539, MTSAC0012486). It is important to note that in its lawsuit against its steel subcontractor, Golden Iron, ACI judicially admitted that its steel subcontractor delayed the Project by at least 60 days. Building dry in was achieved on January 14, 2011.

Based on the evidence received in the Arbitration, the Arbitrator finds that ACI delayed building dry in by 60 Calendar Days and that MT. SAC is entitled to \$60,000.00 in Liquidated Damages.

Liquidated Damages for Delay in Final Completion:

The Agreement, the General and Supplemental Conditions all clearly required that the Contractor achieve Completion of the Work within the Contract Time, subject to adjustments authorized under the Contract Documents. MT. SAC assessed 131 Calendar Days of Delay to ACI for late Completion of the Work.

The evidence established that the work commenced (according to ACI) on October 26, 2009 and substantial completion (occupancy) was achieved on December 5, 2011. The contract duration was therefore 770 calendar days. ACI was allotted 429 calendar days for the original contract work and 204 calendar days for change order work. Of the remaining 137 calendar days, MT. SAC allocated 19 calendar days of delay to RPE, and the Arbitrator has previously found that 60 calendar days of delay were caused by ACI's steel subcontractor. ACI argues that it is entitled to 99 calendar days for the performance of "allowance" work under the contract. The contract allowance was \$100,000 and as set forth in Section 011000 Section 1.3.B. was to be used mainly for miscellaneous scope changes and/or for any other unforeseen elements encountered during construction. An entitlement to 99 calendar days or 71 working days for this scope of work is not credible.

Based on the evidence received in the Arbitration, the Arbitrator finds that ACI delayed completion of the Project by 118 Calendar Days and that MT. SAC is entitled to \$118,000.00 in Liquidated Damages.

Claim for Actual Damages:

Section 4 of the Supplemental Conditions provides in pertinent part that: “Contractor understands and agrees that the following amounts represent Liquidated Damages for the District’s loss of use of the Project resulting from delays in the Work only, and that Contractor shall be liable for other losses, liabilities, damages or costs, if any, incurred by the District in addition to the following Liquidated Damages.” (Exhibit 504).

MT. SAC sought \$41,137 for added inspection and re-inspection related to ACI’s delayed construction work; and \$60,383 for RPE’s extended overhead related to ACI’s critical path delays. MT. SAC additionally sought \$30,644 for MT. SAC’s expert fees in analyzing ACI’s labor inefficiency claim.

Simply stated, MT. SAC’s claim for The Vinewood Company inspection costs represented all inspection billings subsequent to the adjusted contract completion date. Logically, if the construction work was delayed, the inspection of that work would be delayed, and, without more, it cannot be said that The Vinewood Company charges are damages incurred by MT. SAC. MT. SAC’s claim for added inspection and re-inspection costs is denied.

Similarly, MT. SAC’s claim for RPE’s extended overhead costs assumes that RPE’s delayed completion of its work is directly related to ACI’s critical path delays. As previously noted, MT. SAC admits that RPE itself was responsible for 19 calendar days of delay to the Project. Without analyzing RPE’s specific claims to MT. SAC, this claim is tenuous at best. MT. SAC’s claim for RPE’s extended overhead costs is denied.

Lastly, MT. SAC’s claim for its expert fees in analyzing ACI’s labor inefficiency claim is more properly addressed in conjunction with a motion for attorneys’ fees and costs.

POST-INTERIM AWARD ATTORNEYS’ FEES AND COSTS HEARING

Following the submission of cross motions for attorneys’ fees and costs on March 23, 2015, the Arbitrator heard the oral argument of counsel on the issue of attorneys’ fees and costs, the compensation and expenses of the Arbitrator, and the administrative expenses of the AAA.

ATTORNEYS’ FEES AND ARBITRATION COSTS PER CONTRACT

General Conditions, Article 16, Section 16.11.2, provides in pertinent part: “... The expenses and fees of the Arbitrator(s) shall be divided equally among the parties to the arbitration. Each party to any arbitration commenced hereunder shall be responsible for and shall bear its own attorneys’ fees, witness fees and other cost and expense incurred in connection with such arbitration. The foregoing notwithstanding, the Arbitrator(s) may award arbitration costs, including Arbitrators’ fees but excluding attorneys’ fees, to the prevailing party.” (Exhibit 503, MTSAC0022542).

General Conditions, Article 16, Section 16.13 Attorneys Fees, provides: “Except as expressly provided for in the Contract Documents, *or authorized by law*, neither the District nor

the Contractor shall recover from the other any attorneys fees or other costs associated with or arising out of any legal, administrative or other proceedings filed or instituted in connection with or arising out of the Contract Documents or the performance of either the District or the Contractor thereunder.” (Exhibit 503, MTSAC0022542). (Emphasis added by italics.)

CALIFORNIA PUBLIC CONTRACT CODE INTEREST AND ATTORNEY’S FEES

California Public Contract Code §7107 provides in pertinent part as follows:

“(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, ‘completion’ means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

...

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. *Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney’s fees and costs.*

...

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.” (Emphasis added by italics.)

ANALYSIS

Two percent per month sanction: In this case, MT. SAC withheld \$338,951 from ACI’s retention. Prior to commencement of the arbitration hearings, MT. SAC sought \$654,622 in liquidated and actual damages (i.e. \$306,461 in net damages after application of the retention). In its Closing Arbitration Brief, MT. SAC reduced its net damage claim to \$260,563. The Arbitrator awarded ACI \$106,951 in net damages (i.e. \$338,951 retention less \$232,000 in Liquidated Damages). Whether the permissible 150% withhold is calculated on MT. SAC’s original damage claim, its post arbitration hearing claim, or the Arbitrator’s Award (i.e. \$232,000 x 150% = \$348,000), is of no moment as the amount withheld was within the permissive amount

authorized by statute. The Arbitrator therefore finds that ACI is not entitled to the sanctions set forth in Public Contract Code §7107 (f).

Prevailing party: The contract prohibits an award of attorneys' fees except "as authorized by law." The only statutory or legal basis for the award of attorneys' fees in this matter is found in Public Contract Code §7107. As set forth above, §7107 mandates that the "prevailing party shall be entitled to attorneys' fees and costs." Notably, §7107 does not define the term "prevailing party." If "prevailing party" is defined as the party that prevailed on the §7107 claim, then MT. SAC is the prevailing party. If on the other hand, "prevailing party" is defined as set forth in Code of Civil Procedure §1032, ACI is the party with "a net monetary recovery" and therefore the prevailing party. MT. SAC argued that it was the prevailing party under §1032 as ACI did not "recover any relief" against it. But for the fact that MT. SAC permissively withheld payment to ACI of the contract retention, there is no question but that MT. SAC would have been the prevailing party under §1032. ACI argued that had it not proceeded to arbitration it would have forfeited the retention sums awarded in this matter, and therefore as it obtained affirmative relief and a "net monetary recovery," it was the prevailing party in the arbitration.

"Section 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.' (§1032, *subd. (b)*.) For purposes of *section 1032*, a party with a net monetary recovery, like plaintiff here, is a "[p]revailing party." (§1032, *subd. (a)(4)*.)" *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal. 4th 1103, 1108.

As explained by the California Supreme Court in *Goodman v. Lozano* (2010) 47 Cal. 4th 1327 at pages 1333-1334: "...The common meaning of the word 'net' is 'free from all charges or deductions' or 'to get possession of: GAIN.' (Webster's Collegiate Dict. (10th ed. 1993) p. 780.) The word 'monetary' obviously means 'relating to money.' (Webster's Collegiate Dict. (10th ed. 1993) p. 750.) The word 'recover' means to 'gain by legal process' or 'to obtain a final legal judgment in one's favor.' (Webster's Collegiate Dict. (10th ed. 1993) p. 977.) Thus, the common meaning of the phrase 'the party with a net monetary recovery' is the party who gains money that is 'free from ... *all* deductions.'"

As ACI recovered a portion of the withheld retention in this arbitration, based on the holdings in *Scott Co. of California v. Blount, Inc.* and *Goodman v. Lozano*, it is the "prevailing party" in this arbitration.

Section 998: On March 11, 2014, ACI served a pre-arbitration settlement offer (C.C.P. §998) in the sum of \$400,000.00 that MT. SAC did not accept and was therefore deemed withdrawn. On May 16, 2014, MT. SAC served a pre-arbitration settlement offer (C.C.P. §998) in the sum of \$338,950.96 that ACI did not accept and was therefore deemed withdrawn. As a result, entitlement to attorneys' fees and costs in this matter is based upon the complex interaction of the contract and several statutes.

C.C.P. §998 provides in pertinent part as follows: "(a) The costs allowed under Section 1031 and 1032 shall be withheld or augmented as provided in this section. ... (c) (1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment

or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, ... , the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.”

C.C.P. §998, (c)(2)(A) provides: “In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.” ACI's preoffer costs consist of: (1) arbitration administrative costs - \$8,700.00; (2) arbitrator compensation - \$11,005.00; and, (3) attorney' fees as the prevailing party under Public Contract Code §7107 - \$106,012.25. Although “arbitration costs, including Arbitrator's fees” are discretionary under Section 16.11.2 of the contract, they are arguably the equivalent of “filing, motion, and jury fees” under §1033.5 (a)(1), and the Arbitrator has therefore awarded these costs to ACI. The Arbitrator did not include ACI's preoffer expert fees (\$135,106.31) as they are not an allowable cost under §1033.5 and are not awardable pursuant to contract. Adding the permissible §1033.5 costs (\$125,717.25) to the interim award of \$130,713.30 produces a total award of \$256,430.55, which is less than MT. SAC's C.C.P. §998 offer of \$338,950.96. ACI therefore failed to obtain an award more favorable than MT. SAC's §998 offer and MT. SAC is therefore entitled to the benefits allowable under §998.

The benefits to which MT. SAC is entitled were explained by the California Supreme Court in *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal. 4th 1103, 1112-1113, as follows:

“... Thus, under *section 998* a defendant whose pretrial offer is greater than the [award] received by the plaintiff is treated for purposes of postoffer costs as if it were the prevailing party.

But what costs? The postoffer costs that *section 998* denies to the plaintiff and awards to the defendant whose offer exceeds the judgment for plaintiff are ‘[t]he costs allowed under Section [] ... 1032’ (*§998, subd. (a)*) to a prevailing party. In turn, as discussed previously, *section 1033.5* specifies the ‘items ... allowable as costs under *Section 1032.*’ The costs specified by *section 1033.5* include attorney's fees ‘when authorized by ... [¶] (A) Contract.’ (*§1033.5, subd. (a)(10)(A).*) The contract here authorizes attorney fees. Therefore, in this case defendant is entitled under *section 998* to those costs incurred after the settlement offer to which a prevailing party would be entitled under *section 1032*; by operation of *section 1033.5*, attorney fees are costs allowable under *section 1032* to which defendant is entitled.”

As *section 1033.5, subd. (a)(10)(B)* provides for the recovery of statutory attorney fees as an allowable cost the reasoning of *Scott Co. of California v. Blount, Inc.* is equally applicable to this case. As ACI failed to obtain a more favorable award than MT. SAC's §998 offer, MT. SAC is entitled to recover its postoffer costs. Pursuant to General Conditions, Article 16, Section 16.11.2, the Arbitrator awards MT. SAC its postoffer arbitrator fees of \$26,250.00. Pursuant to C.C.P. §1032 and §1033.5, the Arbitrator awards MT. SAC. its postoffer service of process costs of \$495.84; ordinary witness fees of \$225.83; and, exhibit photocopy costs of

\$8,167.97. Pursuant to C.C.P. §998 (d), Public Contract Code §7107 (f), and the holding in *Scott Co. of California v. Blount, Inc.*, the Arbitrator awards MT. SAC postoffer attorney's fees of \$461,820.50 and postoffer expert fees of \$157,803.96. MT. SAC is therefore entitled to recover \$654,764.10 from ACI.

MT. SAC shall recover from ACI the net sum of \$398,333.55 (i.e. \$654,764.10 less the offset of \$256,430.55, said sum being the ACI award and preoffer costs described above).


The Arbitrator has considered all claims, demands, and defenses asserted by the Parties in this Arbitration. To the extent that any claim, demand, or defense has not been specifically addressed above, it is the Arbitrator's intent to deny such claim, demand, or defense.

AWARD

1. The claims of CLAIMANT, Angeles Contractor, Inc., for extended job site costs, extended overhead extension, and labor inefficiency are denied.
2. CLAIMANT, Angeles Contractor, Inc., shall recover from RESPONDENT, Mt. San Antonio Community College District, the sum of One Hundred Six Thousand Nine Hundred Fifty One Dollars (\$106,951.00) i.e. the Retention (\$338,951.00) less Liquidated Damages (\$232,000.00).
3. CLAIMANT, Angeles Contractor, Inc. shall recover from RESPONDENT, Mt. San Antonio Community College District, interest to the date of this Interim Award in the amount of Twenty Three Thousand Seven Hundred Sixty Two Dollars and Thirty Cents (\$23,762.30).
4. CLAIMANT, Angeles Contractor, Inc. shall recover from RESPONDENT, Mt. San Antonio Community College District, the sum of One Hundred Twenty-Five Thousand, Seven Hundred Seventeen Dollars and Twenty-Five Cents (\$125,717.25) in preoffer costs as the prevailing party in this Arbitration.
5. RESPONDENT, Mt. San Antonio Community College District, shall recover from CLAIMANT, Angeles Contractor, Inc. the sum of Six Hundred Fifty-Four Thousand, Seven Hundred Sixty-Four Dollars and Ten Cents (\$654,764.10) in postoffer costs as the prevailing party under Code of Civil Procedure Section 998.
6. RESPONDENT, Mt. San Antonio Community College District, shall therefore recover from CLAIMANT, Angeles Contractor, Inc. the net sum of Three Hundred Ninety-Eight Thousand, Three Hundred Thirty-Three Dollars and Fifty-Five Cents (\$398,333.55) (i.e., Mt. San Antonio Community College District award of \$654,764.10 less Angeles Contractor, Inc. award/offset of \$256,430.55).

This AWARD is in full settlement of all claims submitted to this arbitration.

Dated: April 7, 2015



Paul R. Fine, Arbitrator