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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2024-000753
Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC, Appellant,

v.

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation, Defendants,

And

Library Associates, LLC, Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Precision Walls, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, Strong Tower Construction, LLC d/b/a Koch Corporation, Watson Electrical Construction Co., LLC, Trimark Foodcraft, LLC, Pleasant Places, Inc., David Allen Company, Inc., Premier Exteriors, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Low Country Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc., Third-Party Defendants.

Of which Strong Tower Construction, LLC d/b/a Koch Corporation and Watson Electrical Construction Co., LLC are the Respondents.

RECORD ON APPEAL – VOLUME III

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[kim - right]

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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign
require rejection of the deposition in whole or in
part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES
ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.
THE ABOVE RULES ARE CURRENT AS OF APRIL 1,
2019. PLEASE REFER TO THE APPLICABLE STATE RULES
OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
Strong Tower Construction, LLC d/b/a
Koch Corporation, Watson Electrical
Construction Co., LLC, Trimark Foodcraft,
LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC,
Warco Construction, Inc., Old North State
Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings, LLC, Balfour Beatty
Construction Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION
LLC'S MEMORANDUM IN OPPOSITION
TO SUMMARY JUDGMENT BY
STRONG TOWER CONSTRUCTION,
LLC d/b/a KOCH CORPORATION

The Plaintiff Balfour Beatty Construction, LLC ("Balfour"), through its below-signed attorneys, submits this Memorandum of Authorities and exhibits in opposition to the Motion for Summary Judgment filed by Strong Tower Construction, LLC d/b/a Koch Corporation ("Koch").

FACTS

Balfour filed this action against Library Associates, LLC, the owner of the Hotel Bennett in Charleston, for amounts due Balfour for work and materials incurred in the construction of the hotel, along with damages sustained by Balfour due to almost 500 days of delay Balfour attributes to the owner because of owner's changes and owner's delays in selections, and because of improper design and design services provided by the owner.

Koch supplied various work and material to the hotel which included custom Hope's doors which were part of the main entrance to the hotel. See Exhibit "B" "Subcontract Scope of Work", which is part of Exhibit "A" attached to the Motion and Memorandum filed by Koch. Koch has moved for summary judgment claiming that it is undisputed that it is owed a "minimum" of \$82,859.21 from Balfour. See page 3 of Koch's motion.

The project file documents establish that some of the work and materials provided by Koch were problematic. Specifically, the Hope's doors leaked which resulted in consequential damages and repair costs that were incurred by Balfour.

While Balfour has suffered major damages because of the breaches of owner, for purposes of Koch's motion, it must be noted that Library Associates has asserted claims for alleged deficient work and delays which it maintains were caused by Balfour and its subcontractors. Library claims liquidated damages of approximately \$1.4 million dollars, lost profits of approximately \$25 million and repair costs of approximately \$2.7 million dollars.

KOCH'S SUBCONTRACT

Koch's subcontract explicitly provides that any liquidated damages assessed against Balfour arising from delays attributable to Koch will be the responsibility of Koch.

(See paragraph 76. A), page 16 of Special Provisions attached to Exhibit “A” of Motion and Memorandum filed by Koch.) See also paragraph 58 which reads:

58. LIQUIDATED DAMAGES: Subcontractor is responsible for payment of liquidated damages as set-forth in Owner/Contractor Supplementary General Conditions for all delays attributed to this subcontractor for their scope of work.

On page 2 of the primary subcontract agreement (Exhibit “A” to Koch’s Motion) it is specifically recognized in Article 2: D that Balfour may withhold amounts otherwise due Koch to cover costs which Balfour has incurred or may incur by virtue of Koch’s breaches. In paragraph 24 of the Special Provisions, entitled “WARRANTY PROVISIONS”, Koch warranted that the work and materials it provided would be non-defective and that it would be liable for all repairs and damages resulting therefrom.

DOCUMENTATION OF SPECIFIC DEFICIENCIES WITH KOCH’S WORK

Prior to and after completion of the hotel, the project correspondence indicates that the Hope’s doors supplied by Koch leaked extensively and caused significant water intrusion into the interior of the hotel which caused resulting damages. See attached representative Exhibits A through G, which are part of Balfour’s response to Koch’s document production request. Indeed, on November 14, 2019, Library Associates wrote a letter, attached Exhibit A, specifically complaining about water intrusion through the doors supplied by Koch which “is causing damage to interior finishes, including but not limited to the wood floors.” In exhibits F and G it is noted that in excess of 400 hours had been spent by Balfour to remedy leakage problems through the doors supplied by Koch. See also Exhibits B – E, which indicate that potential delays to final completion would result from deficient work provided by Koch.

ARGUMENT

1. Library Associates' delay claims may implicate work and delays that are attributable to Koch.

While Koch states that two of the owners' representatives, Kim Brown and Jim Clements, have testified that they are unaware of delays caused by Koch's work, neither of those witnesses is a critical path delay expert. More importantly, after those depositions were taken, Library Associates produced a report from its scheduling expert, Mark Boe (see attached Exhibit H) which discusses in general terms issues related to delays and quality of work by Balfour's subcontractors, but does not specify what particular subcontractors may have caused what particular delays to the project. In addition, in the attached Exhibit I, which is a copy of a damages report from Library Associates' expert Sam Hadley, it is referenced that Library Associates seeks specific damages in the nature of repair costs to the Hope's doors that were provided and installed by Koch (See page 6, paragraph 6). Thus, questions of fact remain as to whether the work and/or materials of Koch will be claimed and/or found to have caused delays and repair/deficiency damages to the hotel, particularly in light of the file documentation noted above which specifically references issues regarding deficient work provided by Koch. Hence, issues of fact and reasonable inferences from the facts establish that Koch may be found to have caused or contributed to delays and/or repair damages, making summary judgment inappropriate. In addition, at a minimum, additional discovery will need to be conducted to determine if Library Associates' scheduling expert contends that any of the work of Koch was deficient and/or contributed to any delays. Lastly, it will remain to be seen if any other subcontractors complain that Koch caused or contributed to damages or delays.

2. There is no judicial estoppel.

Koch claims that Balfour is judicially estopped from asserting that it is owed money from the owner for work supplied by Koch, while also not paying Koch in full for the work Koch claims it is entitled to. Simply put, Balfour's response is that it is entitled to alternative pleading and there is no inconsistency with its position. As noted above, Balfour claims that the delays and damages were caused by the owner, Library Associates. However, to the extent that Library Associates establishes that delays or damages should be assessed because of Koch, then Balfour would be entitled to a set-off for all such damages. Balfour has specifically pled set-off as a defense to the claims for payment made by Koch. See paragraph 37 of answer of Balfour Beatty Construction, LLC dated July 29, 2019, to complaint for payment filed by Koch/Strong Tower Construction, LLC in case number 2019-CP-10-02868.

CONCLUSION

For the reasons stated above, Balfour respectfully submits that significant questions of fact exist that must be addressed at trial regarding any entitlement by Koch to payment, and therefore Koch's motion for summary judgment should be denied.

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Attorneys for Plaintiff Balfour Beatty
Construction, LLC

January 5, 2021

Exhibit A

LIBRARY ASSOCIATES, LLC

P.O. Box 1707
Charleston, SC 29402

November 14, 2019

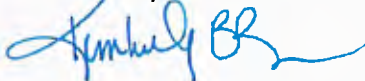
Mr. Jeff Sandeen
Mr. David Simonton
Balfour Beatty Construction, LLC
1930 Camden Road, Suite 200
Charlotte, NC 28203

RE: 404 King Street. Doors 147a, 147b, 147c

Dear Gentleman:

On September 9, 2019, Library Associates, LLC, through its hotel operator, made a claim for defective work located at Hotel Bennett, 404 King Street, Charleston, SC. The issue relates to water intrusion that is causing damage to interior finishes, including but not limited to the wood floors. After multiple request, Balfour Beatty responded by sending your subcontractor, Koch to investigate. Koch concluded that it was not their responsibility and it was in fact the responsibility of Balfour Beatty. The architect of record, WLA, has reviewed and confirms that the work requires remediation. As such, please identify the defect, provide us with the identification of the defect, address the repairs of the defect and any resulting damage, and provide us with confirmation that the repairs have been satisfactorily completed. Please accomplish this process by close of business, Tuesday, November 19, 2019.

Sincerely



Kimberly B. Brown

Cc: Ryan Quinlan
Marty Wall
Buck Lindsay
Larry Vihlidal

Exhibit B

On Aug 23, 2018, at 9:35 AM, Benjamin Feinn <Benjamin.Feinn@kochcorporation.com> wrote:

Tim;

The panels are ready and the labor is ready. We are looking forward to next week being successful. I hope that the plan that your and my team put together will work with regard to the cut outer left and right panels. We are playing with fractions of inches. If the plan does not work then your panels that were cut under your direction will need to be repurchased and will not be back until second half of October, my guess. We are hoping for the best.

But truthfully Tim, you have old change orders from us that go unanswered. Your days to pay approved monthly draws is the longest pay in my inventory of jobs with dates approaching 90 days and we need to determine the labor pay for the installation of these panels. Can we, together, get these solved this week? Please.

Benjamin

From: Spano, Tim <timspano@Balfourbeattyus.com>
Sent: Wednesday, August 22, 2018 11:10 AM
To: Larry Vihlidal <larry.vihlidal@kochcorporation.com>
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>; Peggy Grover <Peggy.Grover@kochcorporation.com>; Simonton, David <dsimonton@balfourbeattyus.com>
Subject: RE: 2759 - Hotel at Marion Square

Nick and I will get together to go through these and get back to y'all but I want to be clear that Koch definitely better be on site Monday not to delay this jobs TCO. We do not want to go down that road. Thanks

Tim Spano

Senior Project Mgr | Balfour Beatty
O: 843-974-4590 | C: 813-917-1656
E: timspano@balfourbeattyus.com | www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

From: Larry Vihlidal [<mailto:larry.vihlidal@kochcorporation.com>]
Sent: Wednesday, August 22, 2018 10:10 AM
To: Spano, Tim <tmspano@Balfourbeattyus.com>
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>; Peggy Grover <Peggy.Grover@kochcorporation.com>
Subject: 2759 - Hotel at Marion Square

Tim, we need to discuss the outstanding COR's that we have sent to your attention, COR 014 for the labor portion of the cladding, COR 006 for installation of the Mockup door, and COR 013 furnish and install flashing at the window sills, and to date we have not received our May pay request which is at 84 days, and our June pay request is at 60 days, or any acknowledgement of acceptance of the COR's

Koch will **not** be onsite Monday August 27 as promised unless we hear back from Balfour regarding the past due payments and outstanding COR's

Please let me know your decision in this matter.

<image004.png>

Respectfully,

Larry Vihlidal | Project Manager | Koch Corporation

1131 Logan Street | Louisville, KY 40204-2463

o: 502-873-2110 c: 502-552-5316 f: 502-636-3574

Larry.Vihlidal@kochcorporation.com |
www.kochcorporation.com

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Exhibit C

From: "Spano, Tim" <timspero@Balfourbeattyus.com>
Sent: Monday, September 17, 2018, 7:12 AM
To: Larry Vihlidal Koch Corp <larry.vihlidal@kochcorporation.com>;
"Benjamin.Feinn@kochcorporation.com" <Benjamin.Feinn@kochcorporation.com>
Cc: "Starcevic, Nicholas" <NStarcevic@Balfourbeattyus.com>; "Simonton, David"
<dsimonton@balfourbeattyus.com>
Subject: RE: Design pressure/water test - Notification of water test failure
and to cure issues
Attachments: IMG 2234.jpg

Larry, Due to the hurricane, I understand why no one from Koch was here last week but the doors need to be completed. We cannot have 1/4" gaps between doors as shown in the attached picture. These have been this way since install and need to be adjusted properly. We also had sealed and caulked transoms leaking. I need an answer today when your team will be back on site to complete the install properly. We are trying to turn over this building this week. Thanks

Tim Spano
Senior Project Mgr | Balfour Beatty
O: 843-974-4590 | C: 813-917-1656
E: timspero@balfourbeattyus.com | <https://protect-us.mimecast.com/s/qXGVCEQPXTD4vzBf9rDyn?domain=balfourbeattyus.com>
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Spano, Tim
Sent: Friday, September 07, 2018 7:32 AM
To: Larry Vihlidal Koch Corp <larry.vihlidal@kochcorporation.com>;
Benjamin.Feinn@kochcorporation.com
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Eldridge, Johnny
<JEldridge@Balfourbeattyus.com>; Ledford, Ryan
<RLedford@Balfourbeattyus.com>; Wertzberger, AJ
<AWertzberger@Balfourbeattyus.com>
Subject: RE: Design pressure/water test - Notification of water test failure
and to cure issues

Larry, The water test failed miserably, never even put any pressure on it to get to its design criteria, just water and it was coming through the transom and jams 1st. We must have someone here ASAP to re-seal transoms, fix gaskets with daylight between doors, gaskets on thresholds corrected to seal all the way across the door etcetera for another test. We need someone here Monday as we are Turning the building over next Friday. Thanks

Tim Spano
Senior Project Mgr | Balfour Beatty
O: 843-974-4590 | C: 813-917-1656
E: timspero@balfourbeattyus.com | <https://protect-us.mimecast.com/s/qXGVCEQPXTD4vzBf9rDyn?domain=balfourbeattyus.com>
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Spano, Tim

Sent: Wednesday, September 05, 2018 9:51 AM

To: Larry Vihlidal Koch Corp <larry.vihlidal@kochcorporation.com>;

Benjamin.Feinn@kochcorporation.com

Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>

Subject: Design pressure/water test

Guys, we're having the door tested today to make sure they meet their design criteria and these are concerns before we start. We know the doors will fail at these locations so we are going to fill these voids to test the rest of the door. We have these concerns in multiple doors.

Exhibit D

From: Larry Vihlidal <larry.vihlidal@kochcorporation.com>
Sent: Tuesday, September 18, 2018, 7:40 AM
To: "Spano, Tim" <timspano@Balfourbeattyus.com>; Benjamin Feinn
<Benjamin.Feinn@kochcorporation.com>
Cc: "Starcevic, Nicholas" <NStarcevic@Balfourbeattyus.com>; "Simonton, David"
<dsimonton@balfourbeattyus.com>; Peggy Grover
<Peggy.Grover@kochcorporation.com>
Subject: RE: Door glazing leak - 72 Hour notice to cure

Tim, there is no video attached just a picture

Respectfully,
Larry Vihlidal | Project Manager | Koch Corporation
1131 Logan Street | Louisville, KY 40204-2463
o: 502-873-2110 c: 502-552-5316 f: 502-636-3574
Larry.Vihlidal@kochcorporation.com | <https://protect-us.mimecast.com/s/KSyFCW6wNBi6WQAoF6F1CU?domain=urldefense.proofpoint.com>

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-----Original Message-----

From: Spano, Tim <timspano@Balfourbeattyus.com>
Sent: Tuesday, September 18, 2018 7:25 AM
To: Larry Vihlidal <larry.vihlidal@kochcorporation.com>; Benjamin Feinn
<Benjamin.Feinn@kochcorporation.com>
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Simonton, David
<dsimonton@balfourbeattyus.com>; Peggy Grover
<Peggy.Grover@kochcorporation.com>
Subject: FW: Door glazing leak - 72 Hour notice to cure

Larry Attached is a video showing the South door 148A leaking through the glass even with protection over the door and a light rain. I have repeatedly sent pics of these doors leaking. I also explained that in an attempt to water test door 107B that the transom was leaking and that was just with a light mist, zero pressure. Koch needs the proper tech down here to fix glass leaks, adjust door gaps, weather strip, trim out hinges, tighten door closure pressure, check paint peeling and fully punch these doors. The wood floors are completing this week with staining and finishing. Any damage to the wood will be replaced at Koch's expense. This hotel is turning over to the owner the end of this week. I requested that you have someone here last Monday but with the Hurricane threat, we lost last week but someone should be here now completing your scope. Pursuant to the contract, this is your 72 Hour - Notice to Cure all items listed above. We are out of time.

Tim Spano
Senior Project Mgr | Balfour Beatty
O: 843-974-4590 | C: 813-917-1656
E: timspero@balfourbeattyus.com | <https://protect-us.mimecast.com/s/cA15CXD7OVC4zgxrCViCUc?domain=balfourbeattyus.com>
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Spano, Tim
Sent: Tuesday, September 18, 2018 6:57 AM
To: Spano, Tim <timspero@Balfourbeattyus.com>
Subject: Door glazing leak

From: "Spano, Tim" <timspano@Balfourbeattyus.com>
Sent: Monday, November 12, 2018, 5:18 PM
To: Larry Vihlidal Koch Corp <larry.vihlidal@kochcorporation.com>;
"Benjamin.Feinn@kochcorporation.com" <Benjamin.Feinn@kochcorporation.com>;
Steve Redus <Steve.Redus@kochcorporation.com>
Cc: "Starcevic, Nicholas" <NStarcevic@Balfourbeattyus.com>; "Simonton, David"
<dsimonton@balfourbeattyus.com>
Subject: Center door in Dining
Attachments: IMG_3941.jpg; ATT00001.txt; IMG_3940.jpg; ATT00002.txt;
IMG_3939.jpg; ATT00003.txt; IMG_3938.jpg; ATT00004.txt

Rained pretty good today only water now is coming from the base of the cross
buck panels on each door of the center of dining, nothing above that.

Exhibit E

From: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>
Sent: Thursday, September 10, 2020 9:21 AM
To: Simonton, David; Morris, Taylor M.
Subject: FW: Hopes door leaks

Attorney-Client Privilege



-----Original Message-----

From: Starcevic, Nicholas
Sent: Saturday, October 13, 2018 6:53 AM
To: Spano, Tim <timspano@Balfourbeattyus.com>; Larry Vihlidal <larry.vihlidal@kochcorporation.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Cc: Peggy Grover <Peggy.Grover@kochcorporation.com>; Steve Redus <steve.redus@Kochcorporation.com>
Subject: RE: Hopes door leaks

Larry

What is going on with the doors? We're 4 weeks from opening the hotel and the doors are not operational. We continue to sustain damage and incur cost every time it rains, and the owner will not accept these doors as they are currently installed.

Please respond with an update.

Nick Starcevic
Project Mgr | Balfour Beatty
O: (843) 974-4590 | C: (704) 361-3265
E: nstarcevic@balfourbeattyus.com | www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Spano, Tim
Sent: Wednesday, October 10, 2018 3:13 PM
To: Larry Vihlidal <larry.vihlidal@kochcorporation.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Peggy Grover <Peggy.Grover@kochcorporation.com>; Steve Redus <steve.redus@Kochcorporation.com>
Subject: RE: Hopes door leaks

Larry, See the attached pictures of Hopes door leaks this morning. Steve only taped the door seams before he left but we are getting water through transoms and lights. BBC is now installing Plastic over all the entire doors before Michael gets here tonight. The cost to do so will be forwarded and any cleanup/damage to the wood floors.

Tim Spano
Senior Project Mgr | Balfour Beatty
O: 843-974-4590 | C: 813-917-1656
E: timspano@balfourbeattyus.com | www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Larry Vihlidal [mailto:larry.vihlidal@kochcorporation.com]
Sent: Monday, October 08, 2018 9:07 AM
To: Spano, Tim <timspano@Balfourbeattyus.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Cc: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>; Peggy Grover <Peggy.Grover@kochcorporation.com>; Steve Redus <steve.redus@Kochcorporation.com>
Subject: RE: Hopes door leaks

Tim, we received an e-mail from Hopes that some of the material shipped on Friday, I am still waiting on a ship date for the new astragals and pivot caps, once we have a confirmed date Koch will setup for Steve to return and complete the repairs.

Thank you,

Respectfully,
Larry Vihlidal | Project Manager | Koch Corporation
1131 Logan Street | Louisville, KY 40204-2463
o: 502-873-2110 c: 502-552-5316 f: 502-636-3574 Larry.Vihlidal@kochcorporation.com |
https://urldefense.proofpoint.com/v2/url?u=http-3A__www.kochcorporation.com&d=DwlFAw&c=eapt7ST1afUS6LykE1MB9bfkdYfSLNUVF7M5AC_OmtM&r=hKiYzrdW0adZgJKgrjzFFmit35xqlPIMODwRliiSSzA&m=ORPI7ZB9Hkj5biTbuZFylzB-LnbRNxzLopVtbV-SUI8&s=5atrbj57SO-liTZDu-vTCSicKQdkMFI_2_Re2B9Pt3M&e=

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-----Original Message-----

From: Spano, Tim <timspano@Balfourbeattyus.com>
Sent: Wednesday, September 26, 2018 2:05 PM

Exhibit F

From: Starcevic, Nicholas <NStarcevic@Balfourbeattyus.com>
Sent: Thursday, September 10, 2020 9:17 AM
To: Simonton, David; Morris, Taylor M.
Subject: FW: Hopes door leaks

Attorney-Client Privilege



-----Original Message-----

From: Starcevic, Nicholas
Sent: Wednesday, October 10, 2018 1:21 PM
To: Larry Vihlidal <larry.vihlidal@kochcorporation.com>; Spano, Tim <timspano@Balfourbeattyus.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Cc: Peggy Grover <Peggy.Grover@kochcorporation.com>; Steve Redus <steve.redus@Kochcorporation.com>
Subject: RE: Hopes door leaks

Larry - update? We're getting heavy rains all week and your doors are already leaking on the freshly stained wood floors. Tim will send pictures and a better explanation, but you need to expedite whatever remediation is necessary. We can't open the hotel with the doors in this condition.

We're going to once again cover these doors with plastic to minimize the damage and track the time associated to charge Koch. We've spent >400 hours trying to keep water out of the openings and cleaning up after since they've been installed. I don't think Balfour Beatty should be responsible for that cost since the doors themselves are failing.

Thanks,

Nick Starcevic
Project Mgr | Balfour Beatty
O: (843) 974-4590 | C: (704) 361-3265
E: nstarcevic@balfourbeattyus.com | www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

-----Original Message-----

From: Larry Vihlidal [mailto:larry.vihlidal@kochcorporation.com]
Sent: Monday, October 8, 2018 9:07 AM
To: Spano, Tim <timspano@Balfourbeattyus.com>; Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>

Exhibit G

From: "Starcevic, Nicholas" <NStarcevic@Balfourbeattyus.com>
Sent: Monday, April 8, 2019, 3:13 PM
To: Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Cc: Larry Vihlidal <larry.vihlidal@kochcorporation.com>; Peggy Grover <Peggy.Grover@kochcorporation.com>; "Spano, Tim" <timspero@Balfourbeattyus.com>; "Simonton, David" <dsimonton@balfourbeattyus.com>
Subject: RE: Marion Hotel Final Payment to Koch Corporation

Benjamin,

It's important to paint the entire picture because your email is misleading. You are correct that the "remove and install mock up door" change order was just recently submitted. However, we have been open with Koch about the timing of the submission and that we continued to compile additional mock up costs to submit as a final reconciliation to the owner. You may or may not know that the owner continued to make changes to the mock up over the past 4 years and some of those changes were just received at the end of 2018.

Also, your ASI 10 change order was first submitted to us on **2/27/19** after a close out conversation we had with you the week before. You broke out cost from a change order we rejected because you felt it could be attributable to the owner (this was 3 years after the ASI was originally issued). We rejected that change order on 3/25/19 because it included items you could not substantiate and were not allowable by the contract. It was revised on 3/28/19 by Koch, and we submitted it to the owner on 3/29/19.

At this time, neither the owner nor architect has not responded to either change order request.

Lastly, as we notified on 10/10/18 and reminded you during our call, we have spent >400 man hours cleaning up water from your leaking doors. We continue to work through all sub contractors change orders logs, back charges, etc to reconcile any outstanding issues so as soon as we can compile the temp labor tickets, material costs, rental invoices and BBC costs, we'll forward for your review.

Thanks,

Nick Starcevic

Project Mgr | Balfour Beatty
O: (843) 974-4590 | C: (704) 361-3265
E: nstarcevic@balfourbeattyus.com | www.balfourbeattyus.com
306 Meeting Street, Suite 300, Charleston, SC 29401

Balfour Beatty

From: Spano, Tim
Sent: Tuesday, April 2, 2019 4:24 PM
To: Simonton, David <dsimonton@balfourbeattyus.com>; Starcevic, Nicholas

<NStarcevic@Balfourbeattyus.com>; Heuer, John <JHeuer@Balfourbeattyus.com>; Dean, Pat
<pdean@balfourbeattyus.com>
Subject: Fwd: Marion Hotel Final Payment to Koch Corporation

See attached from Koch Corp

Sent from my iPhone

Begin forwarded message

From: Benjamin Feinn <Benjamin.Feinn@kochcorporation.com>
Date: April 2, 2019 at 3:51:38 PM EDT
To: "Spano, Tim" <timspano@Balfourbeattyus.com>
Cc: Peggy Grover <Peggy.Grover@kochcorporation.com>, Larry
Vihlidal <larry.vihlidal@kochcorporation.com>, Benjamin Feinn
<Benjamin.Feinn@kochcorporation.com>,
"jclements@matrixse.com" <jclements@matrixse.com>
Subject: Marion Hotel Final Payment to Koch Corporation

Tim;

I understand from our prior weeks phone calls that the Work of Koch's subcontract is complete. The following change orders have been given to Balfour Beatty months earlier. In our discussions you stated that these change orders are the responsibility of the Owner. We were disappointed to hear that our change orders have were not submitted to the Owner until just last week. These change orders are:

Koch COR 06 Remove and Install Mockup Door \$
9,564.65

Koch COR 15 ASI 10 Type Q Window \$ 8,030

Koch COR 16 Lien Cost and Release \$ 732.00

Remaining for pay apps 13 – 16 \$106,342.56

Exhibit H

Report to Bundy McDonald, LLC

regarding the Construction of the

Hotel Bennett (Hotel at Marion Square)

Rebuttal of Expert Reports



Prepared by:

A handwritten signature in black ink, appearing to read 'M. Boe', is written over a horizontal line.

Mark Boe, P.E., PSP

Capital Project Management, Inc.

December 15, 2020



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I. EXECUTIVE SUMMARY

Balfour Beatty Construction, LLC (“BBC”) was contracted by Library Associates, LLC (“LA”) to provide preconstruction and construction management services for the construction of a hotel at Marion Square (“The Project”), later known as Hotel Bennett, in Charleston, South Carolina.^{1,A} BBC was the Construction Manager and Constructor for the Project. The architect for the project was Winford Lindsay Architect (“WLA”) and Matrix Program Management (“Matrix”) acted as the Owner’s Representative. After entering into a Preconstruction services contract on September 22, 2014, LA issued a Notice to Proceed on March 30, 2015^{B,2,3,4,5} under a Guaranteed Maximum Price (“GMP”) contract (GMP dated February 18, 2015).⁶ The contract dictated a Hotel Opening date of July 30, 2017, with Liquidated Damages (LDs) to be assessed at \$9,000 per day for late completion.^C

Owner Change Orders were issued for \$5,637,169.15 through Payment Application #44,⁷ and the contractual Hotel Opening date was extended by 20 days to August 29, 2017⁸. Over the course of the project the work was delayed because of multiple issues. Hotel Opening actually occurred on February 1, 2019, 511 days later than the adjusted completion date. WLA provided a notice of substantial completion on February 15, 2019.

In January 2019, as the Project neared completion, BBC submitted a Preliminary Consolidated Claim⁹ seeking costs of more than \$22 million, and an unspecified compensable time extension. BBC alleged that LA delayed the completion of the work and was responsible for the additional costs incurred by BBC and its subcontractors. WLA responded on February 4, 2019, stating that the information provided was insufficient to analyze the claim.¹⁰ BBC submitted additional documentation to support its claim in March 2019 in the form of four binders.¹¹

On November 16, 2020, Contract Solutions LLC (CS) issued a Schedule Delay Analysis report authored by Mark Doran.¹² The report concluded that the project was delayed 516 days, all of which was compensable delay caused by the Owner. A report was also issued by Core International Consulting, LLC

^A For this report, footnotes are lettered, and endnotes (superscripted numbers) indicate exhibits

^B The original NTP was issued for March 23, 2015. BBC disputed the March 23, 2015 date stating a previous agreement for a March 30, 2015 NTP. Although a revised NTP citing March 30, 2015 could not be found in the Project records, subsequent project documentation refers to a March 30, 2015 NTP and corresponding completion date of July 30, 2017 as the baseline for the contract.

^C LDs are limited in the Agreement (Section 2.3.1.3) to “the Contractor’s stated fee.” Fee is stated (Section 5.1.1) to be 2.5% of the Cost of the Work.

(CORE) authored by Steve Huyghe,¹³ that had various opinions concerning the performance on the project by the Owner, the Architect, and the Contractor. While the report acknowledges it did not provide a critical path delay analysis, it appears to have opinions concerning project delay.

Also on November 16, 2020, Capital Project Management, Inc. (CPMI) issued a report reviewing the allegations in the original claim, to the extent possible.

This report will respond to the allegations of excusable and compensable delay from the two reports. Mr. Mark Boe, P.E., PSP is a Vice President and founding shareholder at CPMI, and is responsible for the preparation of this report. Mr. Boe has over 35 years in the construction industry, with the last 25 involving the preparation and analysis of critical path schedules, the analysis of delay and lost productivity claims, and claim damages. Mr. Boe's resume was included with his November 16, 2020 report.

CPMI has requested access to the documents reviewed by BBC's experts in order to properly respond to their reports. To date we have not received what was requested, and would require additional time to review and analyze the documents if received in the last days before the report due date. Significant missing documents include basic elements of the CS report, including the schedule files concerning the MSH-049 as-built schedule, and daily reports for the entire project duration, including subcontractor daily reports (with the exception of the mason, who included its daily reports in its claim). CPMI reserves its rights to revise this report based on additional documents or information.

II. OPINIONS

1. BBC did not meet its burden of proof regarding either excusable nor compensable delay.
2. The schedule analysis provided by CS ignores the contractual requirement to base time extensions on the contemporaneous schedules and updates, among others.
3. CS's schedule analysis is essentially a "total-time" analysis; it unreasonably assigns every day of delay to the Owner, and claims every day of delay as compensable. Total-time analyses are considered to be virtually worthless.
4. CS entitlement assessment is based on conclusory statements concerning an amalgam of allegations of changes and lack of design coordination, without acknowledgement of BBC's responsibilities based on BBC's pre-construction contractual duties, or its responsibility for coordination during construction. The analysis fails to identify specific change directive that caused critical path delay.
5. CS schedule analysis stated methodology (as-planned versus as-built or as-built critical path) is disfavored in the industry; among other criticisms it is not appropriate for a project of this length, is subject to manipulation through assignment of the as-built logic, and fails to account for concurrency.
6. CORE's schedule analysis was (by its own admission) not a critical path method analysis, and thus violates the contract requirements. It also is a "total time" analysis, and does not state a methodology, but appears to have the same problems as the as-planned versus as-built method.
7. CS's Period 1 alleged delay of 15 days for early completion is not allowable by the Contract, and conflicts with contemporaneous schedules and documents.
8. CS's Period 2 delay of 168 days to the Structure is unreasonably based on delays to the structure impacting the removal of the tower crane, but fail to account for the fact that the as-planned schedule does not include the removal and infill as a predecessor to Level 2 work, and the delay was actually caused by a BBC decision to set precast using the tower crane.

9. CS's Period 3 delay of 95 days was based on delay to the drywall installation of ceilings in the Level 2 Prefunction/Ballroom; that measure is unreasonable in that the activity cited as critical actually had nearly 90 days of float in the contemporaneous critical path schedule update, and CS's projected extension for this period projects nearly 60 more days of delay than were indicated at the time. Either CS is incorrect in its evaluation of the critical path or BBC's contemporaneous schedule was not accurate to within 60-90 days with respect to both what was critical and the projected completion.
10. CS's Period 4 delay of 141 days based on release of the Barn Doors was not on the critical path of the contemporaneous schedules.
11. CS's Period 5 delay of 76 days based on final inspection for elevators 1-4 and for the swimming pool failed to take into account the actual causes of delay, and ignored the contract requirements for Substantial Completion. CS failed to account for specific delays to elevator inspection caused by the elevator subcontractor.
12. CS's delay assessment in each period failed to account for labor and quality deficiencies by BBC's subcontractors. BBC had significant delays throughout the project caused by subcontractor's failure to provide the level of manpower needed to complete on time, and significant quality deficiencies that led to rework by critical trades.

III. CONTRACT SOLUTIONS LLC SCHEDULE DELAY ANALYSIS

A. Summary/Opinions

CS report concluded that each of the 516 days of delay were caused by the Owner, and that not even one day was caused by BBC, by its subcontractors, or by other causes outside its control – essentially a “total time” analysis. The report fails to adopt the Contract delay language, or to acknowledge the Contract’s language in any way. CS fails to utilize a method that complies with the Contract requirement to utilize the contemporaneous critical path schedules actually used on the project. It endorses a schedule analysis methodology (As-Planned versus As-Built) that is disfavored by the courts for good reason. And then it performs that analysis using an As-Planned schedule that is deficient in that it does not include work that it alleges is critical. Further, instead of using the schedules prepared by BBC, CS developed an “As-built critical path”^D schedule that is flawed in many ways. One of the criticisms of the As-Planned versus As-Built method is that it is not a critical path method, which is specifically required by the Contract. CS also either did not look for, or did not find, concurrent delays caused by BBC or its subcontractors. That is another known deficiency in the method chosen, and CS ignored several major concurrencies – the documents related to BBC’s difficulty in finding labor on the project is significant, and it contemporaneously blamed subcontractors for critical path delay.

Finally, CS’s review of entitlement issues, and its assignment of compensable time extensions is conclusory. CS’s analysis measured delays, and then repeated a mantra of alleged incomplete and uncoordinated design. Mr. Doran doesn’t profess design experience sufficient to suggest he is an expert in design standard of care. He isn’t a Professional Engineer. He expresses no views on the coordination responsibilities or failures of BBC, or of BBC’s subcontractors. Mr. Doran’s opinions on entitlement should be ignored.

There can be no argument that the Owner made significant changes to the project, or that some of those changes would impact the Contract Completion date. But the Contract required BBC to determine which issues caused critical path delay, provide timely notice and submit a critical path analysis , based

^D As discussed later, the term “As-built critical path” has no accepted definition in the industry. While as-built dates can be generated from contemporaneous documents, or, as in CS’s report assuming that the schedule files are accurate, the logic between each of the activities is wholly based on the judgement of the Analyst. So, while the report regularly addresses the as-built critical path as if it were fact, it is actually a series of (to date) undocumented assumptions.

on the contemporaneous schedule updates, so that the Architect could grant time incrementally in order to allow the Owner to plan for Hotel Opening in a reasonable way and mitigate the delay where possible. Instead, BBC failed to provide this delay analysis, and its schedule updates gave the Owner the idea that the delays were not significant. When the schedules did eventually show delay, they were accompanied by general allegations rather than detailed analysis. Only when the project was complete did BBC indicate that it considered all the delay to be based on Owner changes and all to be compensable. But even now BBC has not provided the detailed critical path method analysis of cause and effect anticipated/required by the Contract.

B. Contractual Burden

Summary: CS ignored the requirements of the Contract in its selection of analysis methodology, and in its review of the delays. It further ignored BBC's contractual burden related to its pre-construction responsibilities and field coordination.

Pre-construction: BBC contracted with the Owner to provide pre-construction services, and the Owner stated its expectations and BBC's duties in the Contract.

*The intent of Library Associates, LLC (the Owner) in enlisting the support of a Construction Manager in the design development stages of the Project is to benefit from that Construction Manager's **expertise with the design** and construction of similar buildings, regional market knowledge of construction materials, placement methods, and skilled trade considerations. During Preconstruction, the Construction Manager will provide a variety of services including but not limited to **design document review, scheduling** and costing services necessary **to support the design** and construction effort*

*The Construction Manager **will play an important role in providing information** that will maximize the ability of the Owner and Architect to meet the Owner's functional, aesthetic, and budgetary needs **in the least amount of construction time possible.**^E [Emphasis added.]*

CS' review of entitlement places no meaning on these words.

Time extensions: The Contract included several clauses involving time extension requests. It had a strict 20 day written notice requirement. The causation had to be outside the control or responsibility of the CM. The delays had to directly impact the Contractor's ability to achieve completion of the work. And the delay was specifically required to be indicated on the critical path of the project schedules: "*the Contract Time shall not be extended for unforeseen events or additional Work which is not associated*

^E RFP, Scope of Services (Part II), Summary (Section A)

*with Work indicated to be **on the critical path** in the **original or updated CPM construction schedules**” (AIA A201, 3.10.4, emphasis added).*

Thus the Contract did not allow for delays to be demonstrated through a schedule that did not exist on the project – it required the use of the contemporaneous project schedules used by BBC to prioritize its resources.

The Association for the Advancement of Cost Engineering International (AACE) maintains a nomenclature of delay analysis methodologies that includes an assessment of the inherent limitations of schedule analysis methodologies – AACEI Recommended Practice No. 29R-03 (the RP).¹⁴ First, the RP notes that “*as-built critical path*” is a misnomer since only CPM progress schedules show the critical path (and near critical paths) and activity sequencing for the Work contemporaneously with the delaying events:

*The as-built critical path cannot be directly determined using conventional float calculation on the past portion (left) of the data date. Because of this technical reason, often the critical set of as-built activities is called the **controlling** activities as opposed to **critical** activities.*

The Contract Documents made no reference to “*controlling activities*” nor “*as-built critical path*” and, as previously mentioned, “*Critical path*” is consistently associated in the contract documents with updated CPM progress schedules. These updated CPM schedules document “*contemporaneous perception of criticality by the project participants,*” information that the AACEI deems “*just as important as the actual fact of criticality because important project execution decisions are often made based on perceptions.*”

Regarding as-built controlling activities, the AACEI warns that “*objective identification of the controlling is difficult, if not impossible, without the benefit of any schedule updates.*” In addition to the painstakingly detailed process for identifying such “*As-Built Critical Path*” in Subsection 4.3.C of the RP, any attempt to identify ex post facto as-built controlling activities would first require a schedule-by-schedule assessment of their accuracy against as-built progress data and project management records. CS did not perform such an analysis.

If there is a sufficient number of reliable CPM schedule updates and project records for precisely identifying controlling activities, then there is no reason to go through this difficult exercise for the purpose of then using a disfavored delay analysis methodology when better, more accurate methodologies that directly use the critical paths of updated CPM construction schedule (as mandated by the Contract Documents) are available.

The Contract also disallowed time extensions that include delays due to the fault of the contractor:

*Furthermore, the Contractor is not entitled to an extension of time for concurrent delays that include delays **due to the fault of the Contractor** that, regardless of the delay caused by the Owner, increase the duration of the Work.” (AIA A201 § 8.3.8 – Emphasis added)*

In addition, extension cannot be granted where the delays were within the contractor’s scope of work.

*The Contractor is **not** entitled to an extension of time, compensation of any nature, costs, or damages, if the Contractor is delayed by any event or risk which was within the scope of the **Contractor's contractual responsibility to foresee, estimate, control, plan for, contract for, and manage** in order to accomplish the Work required by the Contract Documents. (Emphasis added)*

The Contractor's responsibilities include, but are not limited to, “anticipating and accounting for usual and customary fluctuations and variations in the availability of labor, materials, supplies, and site access.”^F

In addition to requirements for time extensions, the Contract establishes conditions concerning compensability of delays. The Contract Documents included a general bar on all damages for certain classes of delays:

The Contractor shall not be entitled to any additional compensation for its inability to complete the Work early (or prior to the date of Substantial Completion set forth in the Agreement) due to a Class 1 or Class 2 cause, as enumerated above.^G

It is noted that in its Period 1, CS alleges 15 days of early completion delay. CS alleges that BBC completed specific work early, but the Level 6 coordination problems overcame that delay. CS failed to account for this clause, and BBC cannot recover for this 15 days.

Class 1 causes include:^H

- (i) an act or failure to act on the part of the Owner, any consultant or employee of the Owner, or of a separate contractor employed by the Owner that is a breach of this Agreement; or*
- (ii) an injunction against Owner or Owner's representatives;*

^F AIA A201, § 8.3.1

^G AIA A201, § 8.3.9.

^H AIA A201 § 8.3.2 (4)(a)

This general bar on damages had one exception: the Contractor could claim some specific costs if the Class 1 delay was caused by a Change Directive:

The Contractor likewise waives claims for damages, costs, or expenses ..., except and solely to the extent of those costs allowed under Section 7.3.6 [adjustment in the Contract Sum for Change Directives], plus any necessary site-specific General Conditions costs incurred by the Contractor as a result of the delay.^I

Class 2 includes any other cause of delay not the responsibility of either the Owner or the Contractor, as defined herein. Such causes, include, but are not limited to,^J

- *adverse weather in excess of the normally expected seasonal weather in the location of the Project;*
- *acts of God; riots; civil commotions; acts of War; unavoidable casualties to the Work in progress, except where insurance pays the cost of overcoming resulting delays or extended General Conditions costs that eliminates the need for an extension of time; epidemics; quarantine restrictions; organized labor disputes; freight embargoes;*
- *financial non-responsibility or other cause traditionally defined as "force majeure."*
- *unanticipated and undiscoverable environmental issues (except as to matters addressed in Article 10);*
- *abnormal labor and material shortages not customarily encountered or caused by events not reasonable foreseeable;*
- *Subcontractor and supplier insolvency, default, non-performance (including the performance and correction of non-conforming work not otherwise the result of contractors negligence)*

Extended site overhead costs were not claimable for Class 2 delays:

Neither the Owner nor the Architect will be obligated or liable to Contractor for, and Contractor hereby expressly waives claims against Owner and Architect on account of, damages, costs, expenses, or related impacts that the Contractor, its Subcontractors, sub-subcontractors, suppliers, or other persons may incur as a result of a Class 2 cause enumerated in Section 8.3.2.^K

Conclusion: CS failed to account for the Contract requirements in its analysis. It failed to utilize the contemporaneous schedule updates for measurement and analysis of delay; its selected method relied on an after-the-fact, made for litigation schedule with logic based on CS judgments that conflict with contemporaneous updates and documents. It failed to account for significant delays by BBC and its

^I AIA A201 § 8.3.5

^J AIA A201 § 8.3.2 (4)(b)

^K AIA A201 § 8.3.5

subcontractors that would render the delays concurrent, and non-compensable, at best. And it failed to identify the delays as either Class 1 or Class 2 delays, or as based on Change Directives, which is required in order for the delays to be compensable.

C. Methodology

CS says it performed a forensic schedule analysis using an As-Built versus As-Planned method:^L

Contract Solutions performed an as-built versus as-planned schedule delay analysis. That is, we determined the as-built critical path to Contract completion and compared it to the as-planned schedule.

CS's method is also referred-to in the industry as an as-built critical path analysis. Regardless of the name of the method, CS's analysis method is disfavored in the industry because it is not a critical path method of analysis, it makes arbitrary determinations of criticality, it ignores and contradicts the BBC contemporaneous CPM schedule updates, it incorrectly measures delay by ignoring projected completion date and finds delay where there is no delay, and it contradicts industry standard. Each of these is addressed in more detail as follows.

1. As-built critical path method is a disfavored analysis method

CS's as-built critical path analysis method is a disfavored analysis method that generally is not a CPM method of analysis, ignores float, uses an after-the-fact assessment of the critical path that contradicts the critical path during the project, and ignores the scheduled portion of the CPM schedule including logic and re-sequencing of the work.^M AACE's RP has specific caveats for the use of the method:

^L CS Delay Report, page 10.

^M See generally, Chapter 9 As-built critical path, Dale and D'Onofrio, *Construction Schedule Delays* (Thomson Reuters 2020); §10.07, Wickwire, Driscoll, Hurlbut, Groff, *Construction Scheduling Preparation Liability & Claims* (4th Edition 2020 Supplement); §11.07, Bramble and Callahan, *Construction Delay Claims*, (6th Edition 2020-3 supplement).

M. Caveats in Using the Minimum Protocol / Conditions Requiring Enhanced Protocols

- Not suitable for project durations extending into multiple dozens of update periods.
- Not suitable for projects built in a manner significantly different than planned. The rate of error increases as the incidence of change increases.
- Not suitable for complicated projects with multiple critical paths.
- Does not consider the possibility of critical path shifts either within periods or across the project.
- Susceptible to unintentional or intentional manipulation by choice of as-built data that is incorporated into schedule.
- May fail to identify all critical delays or time extensions, and typically does not adequately consider concurrency and pacing issues.
- Does not consider that changes to original baseline schedule may have been the actual cause of delay instead of the identified delay issues
- Typically fails to consider chronological order of delays or reconcile periodic planned critical path shifts with the as-built critical path
- Not suited for clearly demonstrating acceleration

First, it is not suitable for multi-year projects – this project extended from NTP on March 30, 2015 to early 2019. The method is susceptible to unintentional or intentional manipulations by choice of as-built data that is incorporated into the schedule. CPMI found below that CS's as-built critical path cherry-picked items as its critical path that had months of float in the contemporaneous schedule updates. The method may fail to identify all critical paths and does not not adequately consider concurrency. Another contract requirement that CS's chosen methodology fails to follow. The method does not consider that changes to original baseline schedule may have been the actual cause of delay instead of the identified delay issues. CPMI found that the as-planned schedule did not include the string of activities, or the timing, for the removal of the tower crane – which CS claimed was the cause of over 200 days of delay. For many of those reasons, the as-built critical path method that CS uses is among the least accepted analysis method used in the industry.^N

^N See §12:5 Global schedule delay method comparison, Dale and D'Onofrio, *Construction Schedule Delays* (Thomson Reuters 2020) (study of decisions of legal tribunals around the world opining on acceptance of 241 methods for schedule delay analysis showing that as-built critical path is accepted only 14% of the time it is used).

2. CS method is not a critical path method analysis, makes arbitrary determinations of criticality, ignores and contradicts the BBC contemporaneous schedule updates, CS's method of analysis fails to take into account the contemporaneous schedule updates developed by BBC for management of the project labor, materials and equipment. The Contract required BBC to use CPM to develop schedules and to update the schedules to reflect progress on the job. CS's "*as-built critical path*" is inconsistent the actual critical path in BBC's contemporaneous schedule updates. The effect is that CS's method ignores the effect of BBC's site management in performing workarounds to overcome delays, whether caused by the contractor or the Owner. For example, in CS Period 2 (from August 11, 2016 to March 3, 2017), CS report opines that the critical path in the baseline and as-built were similar, and that ceiling framing in the Level 2 Prefunction and Ballroom was delayed by 204 days because "*...the driving delay to the critical path was removing the tower crane, infilling the slabs where the crane was removed, and completing the North & South Arch Windows at the Pre-function/Ballroom.*"

But the baseline schedule¹⁵ did not include the very logic that CS relies on in its "As-built critical path." The CS report fails to mention that the baseline had no activities related to tower crane removal, infilling the slabs where the crane was removed, and completing the north and south arch windows, and obviously no time for those events after the structure was complete. It is unreasonable to compare the late start of ceilings from plan to actual and not take into account that the plan excluded these activities. At the very least it is unreasonable to consider the delay from removal of the tower crane on February 3, 2017 to the start of work at ceilings at Level 2 Prefunction/Ballroom on March 3, 2017 as even excusable delay, since that work was left out of the as-planned schedule.

In fact, CS entire analysis of this issue is unreasonable. CS opinions concerning the late removal of the tower crane also are contrary to contemporaneous project documentation, including the contemporaneous schedule updates.

The importance of the tower crane on this project cannot be over-stated. In addition to the construction of the structure, the tower crane was needed to load the swimming pool at Level 9, was needed for the mason for Precast setting, and for setting of mechanical equipment. Its removal before completion of the precast was a significant concern to the Mason, Old North State Masonry (ONSM). The decision of when to remove the tower crane had built-in tradeoffs, and those tradeoffs included the later than planned start of Level 2 interiors.

In fact, BCC's plan concerning the tower crane removal changed several times, as demonstrated by its schedule. The baseline had no scheduled date for removal, and no indication what activities would be utilizing the tower crane. By August 2016 (the end of CS Period 1), the schedule showed a delay in removal of the Tower Crane until March 17, 2017 (6 weeks after it was actually removed), and was based on completion of Precast setting (not completion of the structure). CS's conclusion at the end of its Period 1 (August 10, 2016) was that the only delay to date was a 21 day delay in excavation, and a theoretical 15 additional days based on alleged early completion on Level 6. This belies what would have been at least an eight (8) month delay to the Level 2 ceilings caused by late removal of the tower crane that was already included in the contemporaneous schedule updates. CS's opinion highlights one of the primary dangers in this type of analysis – its failure to account for the contemporaneous schedule updates, and the project workarounds implemented by BBC, caused it to conclude the wrong reasons for delay to the tower crane removal.

The moving dates for the tower crane removal had a significant impact on the subcontractors. In December 2016, BBC issued a cure notice to ONSM for failure to keep up with the project. ONSM's response was that it was being delayed by BBC, and *"...moving forward the most important issue we need to resolve is the hoisting plan which will determine the number of masons we can put on this work."*¹⁶

In January 2017, BBC changed its plan for tower crane use again, determining to remove the crane in early February, before completion of the precast setting.¹⁷ The tower crane was removed on February 3, 2017.

CS's report also ignores the myriad of issues that BBC experienced with the tower crane and their impact on the project. BBC's Joe Lauricella notes on January 18, 2016 that one of the issues that has been impacting the job was the *"Tower crane down for approx. 7 days."*¹⁸ On February 17, 2016, while referring to the tower crane, BBC's Dan Riccis notes that the *"main motor is shot"* and that *"This really hurts in section 7 which hurts vertical"* while Scott Greene noted that this *"unit is a nightmare."*¹⁹ There were continuing issues with the tower crane in June 2016 as well when it was again shut down for several days, and BBC would later state that it cost them a week +/- . The team was working on L4 at this time which was delayed by the crane shutdown. Tim Spano requested support from his management in dealing with the crane company reporting: *"We have lost about three weeks so far from crane break downs and have 6-7 months to go."*²⁰ Lithko actually questioned the inspections being performed by the crane supplier, Heede, and urged BBC to perform thorough inspections at this time. Dan Ricci

questioned why the Marion Square job got stuck with an 8000 series crane while other BBC jobs were using a newer crane model. The crane failed a third party inspection in July 2016 and was shut down again for repairs causing a 2 day delay to Lithko work despite their attempts to mitigate.²¹ In September 2016, BBC discussed withholding payment to Heede based on *“all the issues we have had with the crane breaking down.”*²² There was an additional crane malfunction in December 2016 while hoisting stone for ONSM which required additional repairs and to which ONSM remarked *“Thank God with your team’s assistance no one was hurt.”*²³

In addition, the CS report states *“...any delays to the façade caused by late installation of the exterior CMU did not delay the project....”* There are numerous BBC internal emails, emails exchanged with the masonry subcontractor (ONSM) and Notices of delays that reflect the impacts and criticality of CMU work to the project, and BBC’s contemporaneous confidence that the masonry work was, in fact, critical.

*“..The delays on the entry, stairwells, 5th floor and exterior repairs are **greatly affecting our critical path and building dry in**. I want to discuss the schedule effects from the completion delay in these areas as a team so everyone understands what’s at stake...”*

-BBC Senior Project Manager Tim Spano email to Nick Starcevic (Project Manager, BBC) and Joe Anastasi (ONSM), December 07, 2016²⁴

“....As critical path as masonry is ONS needs a competent person at all pull planning and Sub meetings as you know.”

-BBC Senior Project Manager Tim Spano email to Toby Holloway (VP of Operations, ONSM), February 08, 2017.²⁵

BBC issued at least four Notices of Delay and Demand for Cure to ONSM. CS report completely ignores all these contemporaneous ONSM and BBC issues and the way masonry work affected the critical path and is simply incorrect in its conclusion that CMU work did not result in critical path delays to the project.

This is a key problem with the methodology chosen – over 200 days of delay occurred to the start of the ceilings in the Level 2 Ballroom, but a review of the contemporaneous schedule updates makes clear that the delay was not as suggested by CS. In this case the schedules updates make clear that BBC’s decision to utilize the tower crane for precast erection was the reason for the extended duration. The delay certainly would have been more if not for BBC’s late decision to remove it before completion, at significant cost to other trades and particularly to ONSM.

2. CS method incorrectly measures delay by ignoring projected completion date, thereby ignoring mitigation and finding delay where there is no delay

CS's as-built critical path method only evaluates the as-built schedule, and doesn't identify whether or not the activities were on the critical path in the contemporaneous CPM schedule updates submitted by BBC to the owner, or the actual impact to the project completion. In its report CS states,

...as of October 7, 2017, the drywall ceiling in the Prefunction/Ballroom was in progress and was two hundred ninety nine (299) days behind schedule.... Based on this status, Substantial Completion would be achieved on May 25, 2018, two hundred nine (299) days after the original contract Substantial Completion date....

But if we review the contemporaneous schedule update MSH-033²⁶ with data date October 5, 2017, the substantial completion date of March 27, 2018. **CS's method incorrectly calculated a substantial completion date of May 25, 2018, two months more delay than BBC contemporaneously reported.**

In addition, the activity that CS says is critically delaying the project, Hang drywall ceiling in the Prefunction/Ballroom, had nearly thirteen (13) weeks of float relative to the longest path activity.^o The contemporaneous project schedule showed that the Hang Drywall activity was not critical. **It is inconceivable that BBC's contemporaneous reporting of both the critical path of the project and the completion date would be so inaccurate. If BBC was unaware that the Level 2 Ballroom was critical, it would certainly not apply critical labor and resources in the same way it would for critical work. CS's after the fact promotion of this work as critical, and critically delayed by the Owner and only the Owner is unreasonable.**

3. CS method contradicts industry standard

In addition to violating Contract requirements, CS's delay analysis method contradicts the industry standard for schedule delay analysis, American National Standards Institute/American Society of Civil Engineers Standard 67-17 (ASCE 67).²⁷ ASCE 67, identifies guidelines that any schedule delay analysis should follow. CS's delay analysis method is not consistent with, or contradicts, a number of guidelines in ASCE 67. In particular, it fails to measure delay by the change to the projected completion date, ignores the critical path, and ignores float. Each of these is consistent with the Contract requirements, and is discussed in more detail as follows.

^o -119 work days versus driving path of -187 work days; 187-119 = 68 work days float on a 5 day calendar =95 calendar days.

a) *Fails to measure delay by change to the projected completion date*

ASCE 67, Guideline 4.4 states that “[d]elay should generally be measured by the change to the schedule completion date caused by the delay.” The commentary on that guideline clarifies that “[d]elay should generally be evaluated by comparing the schedules before, during, and after the delay.” CS instead measures delay based on measurement between a flawed as-planned schedule and an unreasonable as-built critical path.

b) *Ignores the critical path, and ignores float*

ASCE 67, Guideline 4.1, states “[b]ecause the critical path is dynamic, delays should be evaluated based on the critical path during each delay.” CS’s as-built critical path method only looks at an as-built schedule, and does not look at whether or not the activities it identifies were on the critical path in the CPM schedule updates prepared and submitted by BBC during the project. ASCE 67 also states that float goes to the project, and the first party to use it. ASCE 67, Guideline 5.1, states that “[a]ctivities with float are not critical.” ASCE 67, Guideline 4.3 further identifies that “[d]elay must be critical to the current adjusted completion date for consideration of a time extension.”

CS opines that the as built critical path should be used to determine the amount of delay on the project even if the as built critical path does not align with the contemporaneous schedule critical path. However, this notion implies that the schedule is merely a historical document and not one of the primary tools used by a constructor to adequately plan and efficiently perform the project work. In fact, BBC routinely referred to the contemporaneous critical path when directing its subcontractors to perform specific scopes of work and demanding increased manpower to meet the critical path schedule. CS’s findings could be interpreted as a failure of BBC’s team to properly identify and control the true (as-built) critical path of the project.

Concerning the 141 day Barn Door delay alleged by CS in its Period 4, CS starts the alleged compensable delay on October 7, 2017, but CS acknowledges that there was no notice until at least January 30, 2018. Even with that notice (included as Attachment to CS report) there was no indication which of the dozens of alleged impacts were critical. As stated earlier, the October 2017 schedule update (MSH-033) did not indicate the critical path alleged by CS during Period 3, and its alleged critical path in Period 4 (the Barn Door submittal delays) were also not indicated as critical. A review of later schedule updates indicates over 60 work days (nearly three months) float in the Barn Door fabrication and installation activities. The Barn Doors were not critical in any of the contemporaneous schedule updates. In the February 14, 2018 update (MSH-038)²⁸ the Barn Doors had more than 50 work days of relative float. By May 2018

the float was even higher. The contemporaneous project schedules, which are required by the contract for the measurement of delay, do not support CS's opinions concerning delay in Period 4. **Again, CS's analysis is either an indictment of BBC's scheduling on the project, or is itself inaccurate. If the Barn Doors were considered critical contemporaneously, and reported to the Owner as such, the work would have been given added priority and the timeframe perhaps shortened. Reporting the work as critical and critically delaying the project two years after-the-fact, and using it to attempt to justify 141 days of compensable time extension, is unreasonable.**

c) *Improperly assesses delay damages when the Owner was not the sole cause of delay*

The industry standard for assessing damages against another party on a construction contract is that its own delay is not concurrent with the other party's delay. ASCE 67 instructs that "[f]or a delay to be compensable, it should be the sole cause of delay." This is consistent with a showing that any BBC-responsible or third-party responsible delay was *not* concurrent with any of the periods for which CS alleges Owner-responsible delay took place. CS has not performed any analysis of concurrency with BBC or subcontractor delays to the project.

D. BBC Labor Issues

By the start of 2016, BBC began having manpower issues throughout the job. The lack of available manpower was consistent and pervasive throughout the entire building. The CORE report performs an analysis of the manpower trends on the project. A comparison of CORE's estimate of required manpower levels to actual levels indicates that the project was significantly under-staffed. CORE opined that RFI's and items on the monthly Critical Issues log were the driving force behind the lower subcontractor staffing levels and that open issues prevented BBC from manning the job efficiently. However, correlation between monthly RFI's and manpower does not prove causation. One could argue that the lack of manpower prevented BBC and its subcontractors from proper planning and identification of field discrepancies in a timely manner and thus turned even minor issues into fire drills that required immediate resolution. Furthermore, BBC's internal correspondence disputes the CORE conclusion:

*"...it is obvious that Watson, and other trades are overwhelmed by the amount of work to complete **they simply don't have enough manpower** to handle the activities at hand.*

*As you know, **it's a red herring to state that design issues are holding up work**. The design issues are probably less than 10% of the list..."* [Emphasis added]

-BBC Senior Project Engineer Ryan Ledford reporting to Vice President,
Operations David Stanton, September 19, 2017²⁹

As will be presented below, in addition to BBC's own internal correspondence discussing the manpower shortages, it repeatedly sent notices to the offending subcontractors stating the schedule impact and requesting additional manpower. CPMI Tab B is a timeline of these manpower issues. BBC brought labor shortages to the subcontractor's attention via conversations, emails and formal cure notices.

In January 2018 BBC identified 400 items that needed the attention of its drywall subcontractor, Precision Walls. *"...The list of over 400 items is in no way 100% accurate, complete, or final, but is a clear indication that **Precision Walls does not have sufficient manpower onsite...**"*³⁰[Emphasis added].^P

Manpower became problematic in early 2016 while Waterproofing Specialties, Inc. ("WSI") was on site. During the first quarter of 2016, BBC's superintendent Dan Ricci exchanged numerous emails with WSI citing multiple issues such as a lack of material and manpower. Mr. Ricci noted in his emails that WSI was *"pushing us to the right"*³¹ and that *"this will push vertical."*³² During this time period, BBC was working to install foundations and the waterproofing was critical to completing foundations and getting the building out of the ground. BBC's Scheduling Manager, Joe Lauricella noted in January 2016³³ that the *"Waterproofing Subcontractor both lack of materials and manpower"* was one of the issues that impacted the job over the past month.

Issues continued into the second quarter of 2016 when the concrete contractor, Lithko Contracting, LLC ("Lithko") was working on Level 3 (L3) of the building. Mr. Lauricella again noted in his May 2016 schedule update email³⁴ that *"To date this has not been going well Lithko continues to lose days at each update and depleting valuable float in the schedule."* Things became worse in June 2016 when BBC issued a formal Notice to Cure³⁵ to Lithko citing *"the project schedule is currently 11 days calendar days behind schedule in large part due to Lithko"* and that *"Lithko has been averaging about 25 men on site"* which was determined to be *"half the crew size that should be on this job."* At this time, BBC notified Lithko that they were in default of their subcontract. CS argued in its report that the project was delayed during this period but fails to acknowledge any of the challenges and delays created by WSI and Lithko who were working on critical path activities.

^P The date in the letter has a typo referencing 2017 instead of 2018. 2018 is confirmed by the date of the email transmitting the cure notice.

From the third quarter of 2016 through first quarter of 2017, BBC consistently requested that the mason, ONSM provide more manpower to adequately staff the job. Prior to ONSM mobilizing to site on July 6, 2016, BBC was concerned about its ability to properly man not only the Hotel Bennett Project, but the 4 other projects that ONSM was working on for BBC noting that *“we need to have a meeting concerning Old North State Masonry and their Manpower issues, as all Masons right now have severe manpower issues.”*³⁶ ONSM was not in a position to hit the ground running as they needed to hire all new masons for the Project, were non-committal about start dates.³⁷

Both internal and external communications from BBC detail ONSM continuing manpower issues in August 2016 and October 2016. The situation further escalated when BBC issued a delay and cure notice to ONSM on December 16, 2016 formally stating the ONSM was in default of its subcontract. BBC specifically stated that they *“have concerns that Old North State Masonry (“ONSM”) has the proper manpower and supervision onsite to meet the schedule and quality necessary to complete this project.”*³⁸ ONSM was repeatedly put on notice by BBC in the first quarter of 2017 including formal delay/default notices on January 23, 2017³⁹ and March 15, 2017⁴⁰. Contemporaneous mail correspondence from this time period also shows that ONSM was *“grossly behind schedule”* and that the project was *“+/- 50 days behind schedule mostly, in part to masonry.”*⁴¹ It is curious why BBC would issue so many cure notices to ONSM if its work was not on the critical path or delaying the project as suggested by CS.

BBC was having significant problems with multiple subcontractors in March 2017 when, in addition to its default notice to ONSM, it also issued default notices to PASCO Incorporated (“PASCO”) and Watson Electrical Construction Co. LLC (“Watson”). According to BBC, PASCO was falling behind schedule due to manpower in February 2017⁴², was *“behind on L4 and up the building”* by the beginning of March⁴³, and *“L6 is 2 weeks behind with no available manpower”* by mid-March⁴⁴ when the default notice was issued. Discussions between BBC and PASCO’s superintendent indicated that two additional crews were needed. PASCO manpower issues would come up again in 2018 as well. Similarly BBC’s March 2017 notice to Watson indicated that Watson had missed schedule dates on L5 and L6.⁴⁵ BBC was also having issues with the mechanical contractor Bernhard MCC (“BMCC”). BMCC had a 15+ delay on L5 in April 2017⁴⁶ and was working to increase its manpower on site to compensate. In May 2017 BBC’s Vice President, Operations Tony Stoneking expressed the need for executive meetings between BBC and Watson to yield additional manpower.⁴⁷ The notion that manpower was being discussed at the executive levels simply highlights the fact that the inadequate subcontractor staffing was negatively

impacting the Project. A similar executive meeting was held with the carpentry/drywall subcontractor Precision Walls (“Precision”) with the goal of increasing manpower.

Prior to the May 2017 meetings, Precision acknowledged specific areas where it was behind schedule on the 8th and 9th floor and that it was stopped on the 1st floor due to other trades.⁴⁸ At this time, BBC expressed its concern with Precision’s performance on other floors as well, noting that Precision was “*behind schedule on floors 1-5*” and that despite the Tower Crane having been removed a month prior, Precision was not taking advantage of the opened up work. More specifically, BBC’s Senior Project Manager Tim Spano requested that Precision provide additional manpower for the 2nd floor work:

*“We also have allot of areas available on floor two for ceiling framing, ISO rod install, AC framing, Barrel ceiling etc. .. **BBC removed the tower crane a month ago** so P-walls could get these areas and we are not taking advantage of it with a few guys working ceilings on 2. There is allot of open areas ready to run and **we need P-wall to attack them with more men and stay ahead of all other trades.**”* [Emphasis added]

-BBC Senior Project Manager Tim Spano to Precision Walls Project Manager
Michael Zinna, March 7, 2017⁴⁹

Precision responded that it was being impacted by several issues, but Mr. Spano disagreed with respect to the Ballroom and barrel ceiling and stated “*This design change is 6 months old. BBC has been asking for the completion of that framing for Months.*”⁵⁰ Again, the CS report states that the delay during CS Period 2 was solely related to Owner/Architect lack of coordination and design changes, and fails to take into account subcontractor labor shortages or other issues.

Labor shortages continued to be a problem through CS’s Period 3; near the end of Period 3 in September 2017 BBC expressed its frustration with subcontractors blaming labor shortages on design changes:

*...it is obvious that Watson, and other trades are overwhelmed by the amount of work to complete **they simply don't have enough manpower** to handle the activities at hand.*

*As you know, **It's a red herring to state that design issues are holding up work.** The design issues are probably less than 10% of the list...* [Emphasis added]

-BBC Senior Project Engineer Ryan Ledford reporting to Vice President,
Operations David Stanton, September 19, 2017

Precision’s labor shortage continued to impact the project. In October 2017 BBC noted “*We currently lack framing completion on every floor of the hotel and need multiple framers.*” BBC discussed supplementing Precision’s workforce with framers from Construction Professionals Inc. (“CPI”), but Precision indicated that it would not help as CPI would be trying to “*pick out of the same limited labor*

pool that is out there now.”⁵¹ And while some, but not enough, manpower was added later that month, BBC noted that Precision “actually lost some of their framers which they need desperately.”⁵²

Manpower issues persisted into December 2017 when it was “*very clear that Precision Walls needs more framers, hangers and finishers.*”⁵³ BBC again discussed the idea of supplementing Precision’s workforce to get the job completed. And although Precision attempted to deflect blame for the delays by pointing to the owner or other contractors, BBC made clear that their intent was to “*stop weekly schedule slipping for items and areas that are in our control and not caused by changes or the owner.*”⁵⁴

Ultimately, BBC issued a default notice to Precision Walls on January 8, 2018 noting that Precision’s “*lack of manpower and quality control on site*” and that the “*schedule continues to slip.*”⁵⁵

Contemporaneous project records continued to show that the Project was delayed due to manpower shortages unrelated to owner changes. Updates from BBC’s scheduler Joe Lauricella point to manpower concerns in both November 2017⁵⁶ and January 2018.⁵⁷ Both times Mr. Lauricella indicates that the lack of adequate manpower is a separate issue and affecting original scope work.

As noted above, PASCO’s manpower became an issue again in the start of 2018 when BBC stated that PASCO’s manpower could not keep up with the available work and specifically mentions that PASCO is holding up the critical path of the Project.⁵⁸ In February 2018, PASCO was refusing to work overtime or commit to additional crews. BBC again noted that PASCO was continuing to hold up other trades and was considering bringing in supplemental manpower if PASCO was unwilling to.⁵⁹ The March 2018 schedule update from Mr. Lauricella noted PASCO did increase its manpower, however quality control issues related to the sprinkler installation on levels 3 through 9 would require even more manpower to avoid falling behind. As will be discussed later, these quality issues would involve extensive patching of drywall and finish paint to correct the problem in the already completed units. After missing a commitment to have pressure to the building, BBC’s Nick Starcevic laments to PASCO on April 6, 2018: “*When is PASCO going to step up and put forth the necessary manpower to maintain the schedule?*”⁶⁰

PASCO and Precision were not the only subcontractors struggling with manpower in 2018. Emails from BBC identify manpower issues with BMCC, Low Country Case & Millwork (“LCCM”) and Cook and Boardman (“C&B”) in the 1st quarter. The BMCC manpower issues were apparent to BBC when BMCC could not get water on L3 for the cleaners in January.⁶¹ BBC’s Mr. Spano cites a lack of material and manpower from LCCM in February.⁶² And in March Mr. Spano and Mr. Starcevic noted that C&B “*need more manpower, that is very apparent*”⁶³ and that “*we need more guys*”⁶⁴ respectively.

Finally, the CS report Period 5 claims a 76 day critical path delay to the elevator inspections at the end of the job was attributable solely to SI No. 67, which was provided June 12, 2018, and related inspection delays based on DOL limited resources to inspect elevators, and then additional work directed by the DOL inspectors. However CS fails to acknowledge the contemporaneous issues regarding Otis Elevator's staffing of the project and scheduling of inspections in November 2018. First, CS relies on MSH-049 as its source for the elevator work being completed on October 12, 2018. Contemporaneous documents show that the work was not complete, but Otis was not actively working on the Project.⁶⁵ During the October/November 2018 time period Otis did not complete its remaining work on Elevators 1-5 because it put its crews on other jobs instead of the Project. Otis had the DOL elevator inspector move to an alternate Otis jobsite on November 9, 2018 even though that date was scheduled for Hotel Bennett. The failure to pass inspection was due to unfinished wiring (not inspector changes to meet South Carolina codes as stated by CS). On November 17, 2017 BBC provided a formal notice to cure and notice of delay to Otis for its failure to complete its work, and threatened Otis with liquidated damages. Re-inspection could not be completed until November 30, 2018. CS indicates that there were additional changes made by the inspector on November 27, and completed that work on December 12, 2018, but provides no documentation, and CPMI has not seen evidence of this additional work.^Q

The Owner cannot be held accountable for Otis/BBC failure to assign labor to the project to complete in a reasonable time, and can't be held accountable for the time to inspect when Otis sends inspectors away from the Project or doesn't complete its work. With respect to changes made by the Inspector, CS seems to be assuming that these are design errors. Inspectors often disagree with tradesmen over code issues; CS's conclusory statements of design error do not make it so.

Throughout the Project, BBC was impacted by inadequate manpower on the job. There are very few period of times where BBC is not requesting additional manpower from one of its subcontractors in writing. This does not take into account how many verbal requests may have been made by the superintendents on site. How many times did a superintendent have to verbally request adequate manpower before not only the site project management but BBC's executive management had to step in? The lack of manpower not only affects the direct work which is being completed at a slower pace or not being completed at all, but it also has a secondary indirect effect on the Project because it diverts

^Q As stated earlier, CPMI has not been given access to BBC daily reports or daily reports of BBC's subcontractors.

the focus of BBC's staff from other issues. BBC's Vice President, Operations Tony Stoneking admits as much in an email regarding the use of Watson on a future project.

*"Watson is a good sub past 20 years with me but **has greatly struggled** on our last 2 jobs at Marion square and garner. Yes, I know there is 2 sides of every story especially at Marion... but this is a huge job and tight schedule with no margin for error. On those 2 jobs **they struggled with quality manpower, supervision, safety practices, quality of installations**, refusing to do changes at garner, change order price inflation ... **all of which ties up a lot of our resources.**" [Emphasis added]*

-BBC Vice President, Operations Tony Stoneking, August 31, 2018⁶⁶

Both CORE and CS failed to properly consider the manpower in their reports. CORE states that manpower was driven by ongoing design changes and outstanding questions at the jobsite all caused by or the responsibility of the owner. As described above, this is not consistent with the project record whereby BBC routinely requested additional manpower from the subcontractors, often disputed subcontractor attempts to deflect ownership of the issue and acknowledges that it was detrimental to the Project. Likewise, CS fails to acknowledge all of the critical path areas that were delayed by the lack of manpower and how this was at least concurrent with other on-going Project delays.

E. Subcontractor Quality and Cross Trade Damage

In addition to the delays due to trade labor shortages, the Project was also plagued by subcontractor quality control issues and repair work caused by trades damaging each others installed work. Often times these issues would cause delays to the Project by requiring rework and repair, delaying inspections, or contributing to an overall distressed job site. Problems began early on with the layout of control lines by the surveyor. BMCC identified a discrepancy on the 2nd floor on April 29, 2016 which resulted in additional subcontractor cost and *"significant delay to our pour schedule."*⁶⁷ This led to confusion between the subcontractors trying to perform layout as the building was constructed. Additional survey issues were identified in May 2016 on L3 as well which delayed all subcontractors while the control lines were verified and re-shot.⁶⁸ As the building progressed issues arose between Lithko and Watson. After Watson had installed branchways and cables on L7 and L8, Watson observed Lithko employees dropping form tables on raceways and cables, placing 4x8 sheets of plywood on their installations and walking and driving over them with a forklift.⁶⁹ This resulted in over \$150,000 of damage for which Watson was required to remove and reinstall branch circuiting and raceways. It took multiple months for BBC, Watson and Lithko to negotiate and resolve these issues and to get the

necessary repairs made. In total 46 rooms were affected and each had to be tested to verify the extent of the damage. 28 of those rooms required rewiring of the branch circuit feeders. Although the damage was done in 2016, repairs were not completed until well into 2017.⁷⁰

In March 2017, BBC also had quality issues with ONSM along side the manpower issues discussed earlier. Stair 3 was installed out of plumb and needed to be removed and rebuilt to match the façade on Levels 2 through 5.⁷¹ In addition to ONSM's self inflicted issues such as Stair 3, ONSM claimed they were impacted by the failings of other subcontractors and BBC by being forced to jump floors due to the waterproofer, BBC's failure to provide the contractually required hoisting of precast and BBC consistently turning over partial floors. ONSM's claim even went as far as to state that one of the issues was *"onsite management and lack of control and knowledge (Gross Negligence) of what was the root cause of the projects issues and how to correctly sequence and build this project."*

The electrical work was not the only work that was damaged by another contractor. Precision Wall's drywall work was affected by other trades as well. This issue was brought up by Precision in May 2017 after several completion dates for drywall were missed. Excessively large openings were being cut in the drywall for piping and other penetrations. This required Precision to go back and patch and repair these areas prior to fire caulking. This process delayed the completion of drywall and inspections multiple times particularly on L2 and L4. Precision Wall was diverting manpower from productive work to perform these repairs as well as repairs required for its own mistakes.⁷²

In September 2017, Precision Walls was a party to another jobsite dispute regarding the framing of the elevator shaftwalls. The shaftwalls were not properly aligned due to a combination of the slab edges not lining up from floor to floor and the elevators not being installed in the center of the shaft.⁷³ Contemporaneous correspondence indicates that the front shaftwalls were installed out of sequence by Precision Wall with dispute over whether or not BBC had directed Precision to do this.⁷⁴ At the time BBC alleged that the issue was jointly caused by Otis, Lithko and Precision and would be a *"\$100k mistake on someone."*⁷⁵

The shaftwalls were not the only defective work installed in the fall of 2017. In October 2017, BBC discovered that PASCO had installed the wrong sprinkler heads throughout a majority of the building guestrooms. The Project required concealed type sprinkler heads but PASCO failed to install the correct head types. This issue was not discovered until after the heads were installed on all guestroom floors 3-8. Additionally, drywall was already being installed up to the 7th floor while the 3rd floor was already

painted and in the process of having fixtures installed.⁷⁶ The repair work in the estimated 350-400 rooms would required replacement of the sprinkler heads, patching of the drywall and re-painting. Despite this issue being discovered on October 9, 2017, BBC did not reach out to Precision Walls or the painter, Merit, until over 2 months later on December 14, 2017.⁷⁷ Precision was concerned that it would be very difficult to make the patches disappear in a Level 4 ceiling.⁷⁸ BBC couldn't reach an agreement with Precision to perform this repair work due to its "exorbitant" pricing and Precision's struggle to adequately staff its existing work.⁷⁹ BBC ultimately brought in another subcontractor to perform the patching in January 2018. Further compounding the issue, in March 2018, PASCO notified BBC that some of the concealed heads on L6 through L8 were installed too low and would cause issues. This resulted in approximately 50 new holes being made in drywall that had already been patched.⁸⁰ Additionally there were areas that were still missing sprinkler heads and areas where sidewall type sprinkler head with the wrong temperature rating were installed. In total over 100 new holes were made by PASCO in areas that had already been patched and repaired. Finally on May 2, 2018, PASCO had its fourth water blow out in a two week span while testing its systems.⁸¹ Each instance resulted in damage to completed work that had to be repaired by other subcontractors.

F. Conclusory statements of entitlement and Cause and Effect

Throughout the CS report, Mr. Doran recites the reasons for delay as some form of "the architect's design coordination failures" or "design changes" without any specific cause and effect. The extent to which the schedules were impacted by specific design changes or specific coordination problems is not indicated. Mr. Doran's qualifications for determination of design standard of care are in question.

Further, while COREs report appears to provide more information about some specific changes and RFIs, CORE admits that it did not perform a critical path analysis.

Neither CS nor CORE attempted to identify or defend the significant problems BBC had in coordinating the work of its subcontractors. BBC sent out dozens of Notices to subcontractors to Cure their delaying conditions, and received dozens of delay notices from subcontractors identifying prior trade impacts. The CORE report appears to acknowledge that BBC never achieved the level of manpower that it needed to complete the project on time. BBC's correspondence with its subcontractors makes clear that the lack of trade labor impacted the project timing. But these issues are not mentioned by either CORE or CS.

G. Limits in Analysis

As-built dates from schedule cannot be verified – CS’s as-built dates are apparently solely from the MSH049 schedule files, without verification to contract records. CPMI would normally make an effort to verify the dates in MSH-049 are correct (it is not unusual for Actual Dates reported in schedule updates to be inaccurate by days or weeks, as indicated above in the Elevator work completion). However, CPMI, as of the date of the report, does not have access to either the P6 MSH-049 schedule file or to the BBC daily reports (or to subcontractor daily reports, except ONSM, whose daily reports were included with its claim). The existence of the daily reports is clear in that CORE identifies that it received the full collection in preparation for its analysis. The results of such an analysis would likely cast additional questions on CS’s as-built critical path.

IV. CORE SCHEDULE ANALYSIS

CORE determined major time periods of delay by comparing the as-built activities to the plan.^R It then allegedly determined delay associated with major work activities. CORE identified four time periods of delay.^S

Time Period	Description	Delay
1	Delay to Vertical Structural Work -- February 2016	3 weeks
2	Delay to start of Interior Work -- July 2016	2 months
3	Delay to Finish of Interior Work	11 months
4	Delay to Substantial Completion -- December 2018	2 months

In summary, the delays in CORE’s four time periods total approximately 16 months, the entire project delay. Similar to CS, CORE asserts that the owner and design team are responsible for all of the delay, while BBC bears no responsibility, a total time analysis.

CORE’s analysis of project delays is inconsistent with the contract requirements. It concedes that the type of evaluation utilized is *not* a critical path delay analysis.^T In fact, the methodology is at best an as-planned versus as-built at a summary, or even cursory level. CORE’s analysis, similar to the CS analysis,

^R CORE Report, paragraph 229.

^S CORE Report, paragraph 234 to 237.

^T CORE Report, paragraph 232.

is not a critical path method of analysis, makes arbitrary determinations of critical issues, ignores the BBC contemporaneous schedule updates and contradicts industry standard.

CORE asserts that BBC's original baseline schedule "*contained the adequate number of work activities, the proper logic, and durations, and denoted a correct critical path.*"^U However, as pointed out above, the baseline schedule did not include the critical fragnet involved with removal of the tower crane and in infill required to obtain closure to continue work at Level 2.

^U CORE Report, paragraph 353.

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- ¹ A133 Standard Form of Agreement between Owner and Construction Manager as Constructor between Library Associates, LLC and Balfour Beatty Construction, LLC.
- ² Email from Clements, March 19, 2015, HMS Notice to Proceed
- ³ Email from Clements, March 19, 2015, NTP
- ⁴ Email from Baumbach, March 20, 2015, Hotel Marion Square_Revised Notice to Proceed.doc
- ⁵ Email from Lindsay, February 11, 2019, 2009007 Bennet Hotel – contract closeout
- ⁶ The Hotel at Marion Square – Guaranteed Maximum Price – February 18, 2015
- ⁷ BBC Payment Application #44
- ⁸ Owner Change Order 003, May 5, 2016
- ⁹ Letter from BBC to LA, January 25, 2019, The Hotel at Marion Square – BBC Consolidated (Preliminary)
- ¹⁰ Letter from WLA to BBC, February 4, 2019, Response to BBC’s Consolidated Claims Letter
- ¹¹ The Hotel at Marion Square – Response to WLA Request for Consolidated Claim Additional Documentation, March 6, 2019, Volumes 1-4
- ¹² Contract Solutions, LLC, Schedule Delay Analysis, November 16, 2020
- ¹³ CORE International Consulting, LLC Expert Report, November 16, 2020
- ¹⁴ AACE RP 29r-07 Recommended Practice for Forensic Schedule Analysis
- ¹⁵ MSH-000 Detailed Baseline Schedule 11-13-15
- ¹⁶ 2016-12-20 ONSM Notice Reply to BBC Email dated 2016-12-16
- ¹⁷ 2017-01-11 Email from Nicholas Starcevic to Jason Kenna
- ¹⁸ 2016-01-18 Email from Joe Lauricella to Tim Spano
- ¹⁹ 2017-02-17 Emails between Dan Ricci and Scott Greene
- ²⁰ 2016-06-21 Email from Tim Spano to Jeff Sandeen
- ²¹ 2016-07-07 Email from Anthony Hazen to Dan Ricci
- ²² 2016-09-07 Email from Tim Spano to Nicholas Starcevic
- ²³ 2016-12-21 Email from Joe Anastasi to Nicholas Starcevic
- ²⁴ 2016-12-07 Email BBC to ONSM- ONSM work greatly affecting critical path
- ²⁵ 2017-02-08 Email Chain BBC pointing Out ONSM Delays
- ²⁶ MSH-033 Detailed Project Schedule 10-17-17
- ²⁷ ASCE Std 67-17 Schedule Delay Analysis
- ²⁸ MSH-038 Detailed Project Schedue 2-14-18
- ²⁹ 2017-09-19 Email Watson Manpower - Design is red herring and only 10 percent of issue
- ³⁰ 2018-01-08 BBC letter to Precision Notice of Delay and Cure
- ³¹ 2016-01-14 Email from Dan Ricci to Tim Spano
- ³² 2016-03-01 Email from Dan Ricci to Raunel Marion
- ³³ 2016-01-18 Email - WSI Manpower & Tower Crane Down 7 Days
- ³⁴ 2016-05-19 Email - Lithko continues to lose days and use up float
- ³⁵ 2016-06-07 Email - Lithko Delay Notice & Cure - Half crew size that is needed
- ³⁶ 2016-06-23 Email from Mike Bedell to Jeff Sandeen
- ³⁷ Not Used
- ³⁸ 2016-12-16 Email - ONSM cure notice
- ³⁹ 2017-01-23 Email - ONSM Notice of Delay - Request additional manpower
- ⁴⁰ 2017-03-15 Email - ONSM cure notice
- ⁴¹ 2017-01-27 Email from Nicholas Starcevic to Chip Venable
- ⁴² 2017-02-14 Email from Nicholas Starcevic to Leonce Vidal
- ⁴³ 2017-03-06 Email from Nicholas Starcevic to Leonce Vidal
- ⁴⁴ 2017-03-14 Email from Nicholas Starcevic to Leonce Vidal
- ⁴⁵ 2017-03-15 Email from Nicholas Starcevic to Dale Winovich
- ⁴⁶ 2017-04-07 Email - BMCC L5 Delay - Add 6 plumbers

-
- ⁴⁷ 2017-05-01 Email from Tony Stoneking to Jeff Sandeen
 - ⁴⁸ 2017-03-02 Email from Troy Morgan to Jeff Sandeen
 - ⁴⁹ 2017-03-07 Email - Precision wall issues - tower crane removed for a month
 - ⁵⁰ 2017-03-07 Email - Precision wall issues - tower crane removed for a month - follow up
 - ⁵¹ 2017-10-03 Email from Troy Morgan to Tim Spano
 - ⁵² 2017-10-18 Email from Pat Dean to Jeff Sandeen
 - ⁵³ 2017-12-15 Email from Nicholas Starcevic to Michael Zinna
 - ⁵⁴ 2017-12-19 Email from Tim Spano to Troy Morgan
 - ⁵⁵ 2018-01-08 Email from Nicholas Starcevic to Troy Morgan
 - ⁵⁶ 2017-11-17 Email from Joe Lauricella to David Stanton
 - ⁵⁷ 2018-01-11 Email from Joe Lauricella to David Stanton
 - ⁵⁸ 2018-01-23 Email from Nicholas Starcevic to Michael McGregor
 - ⁵⁹ 2018-02-17 Email from Nicholas Starcevic to Michael McGregor
 - ⁶⁰ 2018-04-06 Email from Nicholas Starcevic to Michael McGregor
 - ⁶¹ 2018-01-23 Email from Nicholas Starcevic to Robert Weyer
 - ⁶² 2018-02-14 Email from Tim Spano to Nicholas Starcevic and David Simonton
 - ⁶³ 2018-03-08 Email from Tim Spano to Dave Hoffman
 - ⁶⁴ 2018-03-09 Email from Nicholas Starcevic to Tim Spano and David Simonton
 - ⁶⁵ 2018 11 17 Email Elevator completions 72 hour cure, BBC_EMAILS_005522467
 - ⁶⁶ 2018-08-31 Tony Stoneking Email - Watson performance
 - ⁶⁷ 2016-04-29 Email from Nicholas Starcevic to John Byrnes
 - ⁶⁸ 2016-05-26 Email from Marty Dale to Eric Stoehr
 - ⁶⁹ 2017-02-10 Email - Lithko damaging Watson work
 - ⁷⁰ 2017-03-16 Email - Watson Damaged Cable Repair - Lithko responsibility
 - ⁷¹ 2017-03-04 Email - ONSM stair 3 defects and lack of manpower part 2
 - ⁷² 2017-05-03 Email - Issues among Trades_L-4 Fire Caulk
 - ⁷³ 2017-09-14 Email - Precision wall issues part 2
 - ⁷⁴ 2017-09-14 Email - Precision wall issues part 3
 - ⁷⁵ 2017-09-14 Email - Precision wall issues part 4 - 100k mistake
 - ⁷⁶ 2017-10-10 Email pasco issues 2
 - ⁷⁷ 2017-12-14 Email pasco issues 3
 - ⁷⁸ 2017-12-26 Email pasco issues 4
 - ⁷⁹ 2018-01-08 Email pasco issues 5
 - ⁸⁰ 2018-03-03 Email pasco issues 6
 - ⁸¹ 2018-05-02 Email pasco issues 7



Hotel Bennett – Manpower Issues

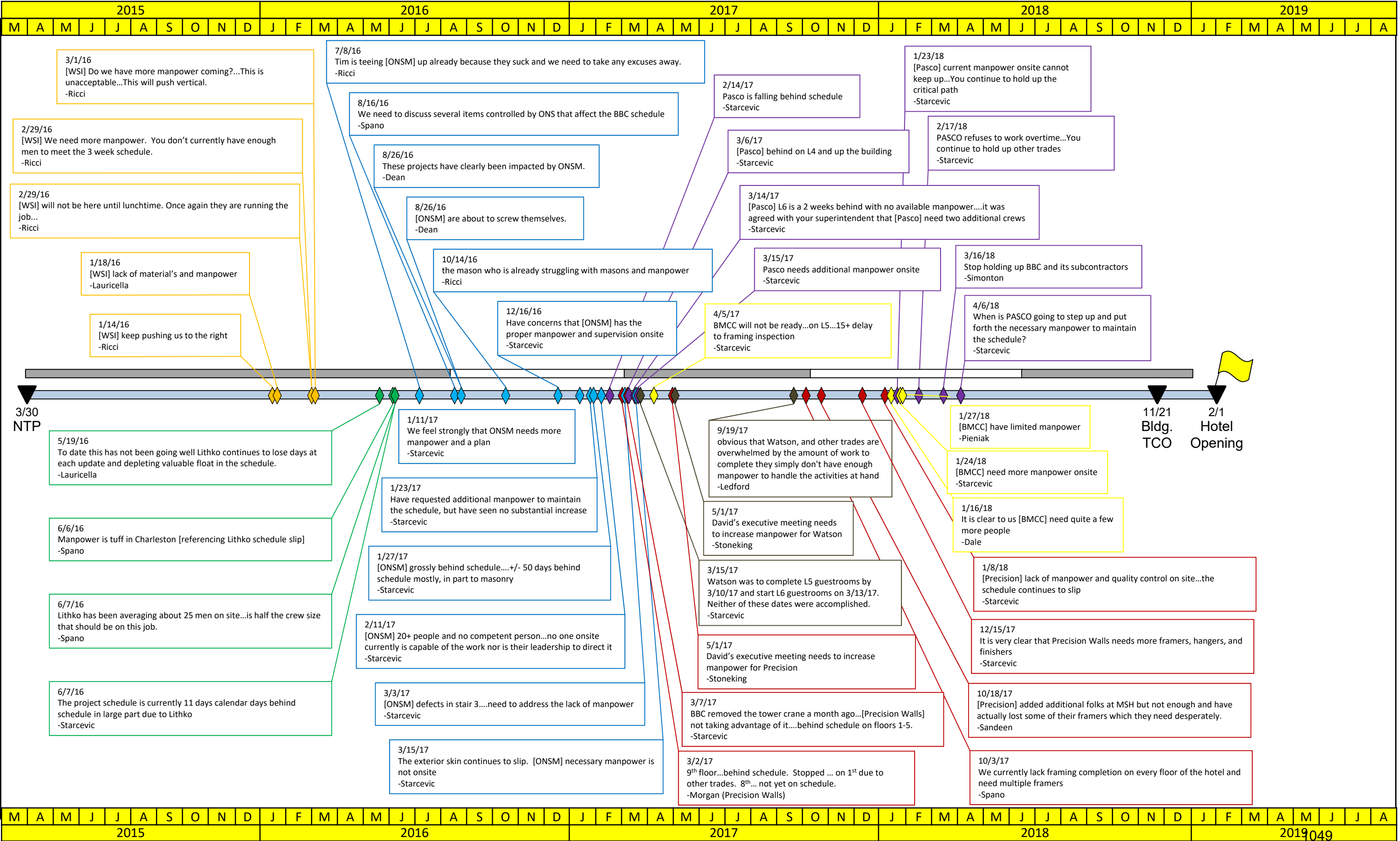
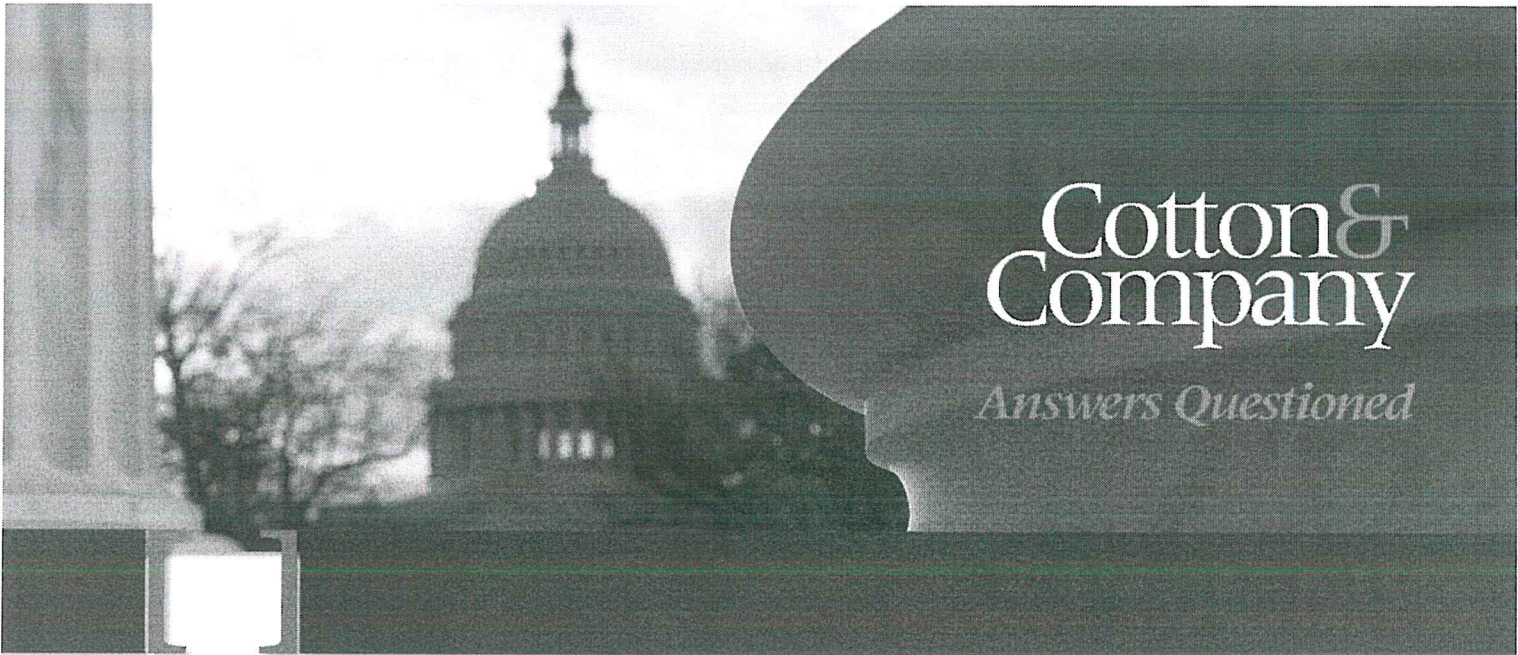


Exhibit I

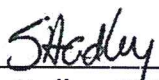


Cotton & Company

Answers Questioned

**LOST PROFITS AND COSTS INCURRED RELATED TO
CONSTRUCTION DELAYS FOR THE HOTEL AT MARION SQUARE
BALFOUR BEATTY CONSTRUCTION V. LIBRARY ASSOCIATES, LLC, ET. AL.
BEFORE THE COURT OF COMMON PLEAS, 9TH JUDICIAL CIRCUIT, FOR THE
COUNTY OF CHARLESTON
CASE No. 2019-CP-10-01108**

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November 16, 2020



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**LOST PROFITS AND COSTS INCURRED RELATED TO CONSTRUCTION DELAYS FOR
THE HOTEL AT MARION SQUARE**

SCOPE

This report contains an estimate of lost profits that Library Associates, LLC (Library) incurred as a result of a delayed project opening, additional costs that Library believes it incurred solely as a result of the unforeseen delayed opening, and costs that Library incurred to complete Balfour Beatty Construction's (BBC's) original contract scope. This was performed in accordance with the American Institute of Certified Public Accountants (AICPA) Statement on Standards for Consulting Services and follows the Forensic & Valuation Services Practice Aid: Calculating Lost Profits (FVS Practice Aid), promulgated by the Association of International Certified Public Accountants. Our report explains how the lost profits and additional costs were estimated and identifies the documentation that was used to prepare those estimates. Appendix A to this report includes a list of the documentation used.

Bundy McDonald, LLC (Bundy McDonald) and Library retained Cotton & Company to estimate lost profits and additional costs incurred due to construction delays. We¹ performed our analysis in accordance with the AICPA Statement on Standards for Consulting Services. Our analysis is continuing, and we will supplement this report as appropriate if additional information becomes available.

Schedule A contains an estimate of Library's lost profits and additional costs incurred. The Schedule is followed by notes that discuss the methodology used to estimate or accumulate those costs.

BACKGROUND

On September 22, 2014, Library and BBC entered into a cost-of-work-plus-fee contract with a guaranteed maximum price (GMP). Under the GMP contract, BBC was responsible for procuring services and managing construction related to Hotel Bennett, a boutique hotel located in Charleston, South Carolina. BBC was to perform its work under two separate GMPs. The first GMP totaled \$56,127,892 (GMP-Primary of \$56,061,113 and Pre-Construction of \$66,779) for direct project costs, which included \$828,645 in allowances and \$66,779 in pre-construction fees. The second GMP totaled \$3,216,855 for general conditions. During the course of the project, Library approved 22 BBC change orders that totaled \$5,893,720. The revised GMP values based on these change orders were \$61,916,393 (GMP-Primary of \$61,849,614 and Pre-Construction of \$66,779) and \$3,322,074, respectively.

Schedule of Values for GMPs and Change Orders			
Type	Original	Change Orders	Final
Pre-Construction	\$66,779	\$ -	\$66,779
GMP – Primary	56,061,113	5,788,501	61,849,614
GMP – General Conditions	<u>3,216,855</u>	<u>105,219</u>	<u>3,322,074</u>
Total Value	<u>\$59,344,747</u>	<u>\$5,893,720</u>	<u>\$65,238,467</u>

¹ In this report, "we" or "our" refers to the Cotton team led by Ms. Hadley.

The original planned completion date for the project was July 28, 2017; however, the hotel actually opened on January 27, 2019. Library contracted with Salamander Hotels and Resorts (Salamander) to obtain hotel management services. Salamander performed pre-opening activities for the hotel from December 2016 through January 2019.

SCOPE LIMITATIONS

Our analysis was limited by several factors:

- A. This report does not contain opinions regarding Library's legal entitlement to the amounts identified as either lost profits or additional costs incurred. It is the responsibility of the trier of fact to ultimately conclude as to entitlement. Instead, this report identifies the estimates made for each amount, and further discusses the methodology used to estimate each of the amounts.
- B. We did not assess the reasonableness of the elements included in the estimate of lost profits and additional costs incurred. For example:
 - We obtained certain amounts from contemporaneous pro forma financial statements that Salamander prepared. We accepted these amounts without performing further technical review.
 - We obtained certain amounts from Salamander budgets for pre-opening costs. We accepted these amounts without performing further technical review.
 - We did not assess the reasonableness of costs incurred from an industry standpoint. We did not perform a technical review of salaries, management fees, advertising, or other industry expenses to opine on the reasonableness of costs that Salamander and Library incurred.
- C. This report does not opine on whether additional costs incurred for repair, replacement, installation, or completion of work were related to activities that were identified in the GMP contract and were therefore BBC's responsibility.

If additional information becomes available we will supplement this report if necessary.

Lost Profits and Additional Costs That Library Incurred

Lost Profits and Additional Costs That Library Incurred		
Claim Elements	Amount	Note
Lost Profits Related to Delayed Opening		
Lost Operating Income	\$22,483,118	1
Costs Incurred Prior to Opening		
Base Management Fees	680,968	2
Pre-Opening Costs in Excess of Budgeted Amounts	1,105,041	3
Sales and Marketing in Excess of Budgeted Amounts	721,557	4
Guest Relocation and Resolution	<u>105,707</u>	5
Subtotal of Lost Profits Related to Delayed Opening	\$25,096,791	
Additional Costs Incurred²		
Repair Costs Incurred by Salamander	\$166,221	6
Outsourced Laundry Services Incurred by Salamander	140,193	7
In-House Repair Costs Incurred by Salamander	8,701	8
Costs That Library Incurred to Complete Construction	<u>2,423,680</u>	9
Subtotal of Additional Costs Incurred	\$2,738,795	
Total Lost Profits and Additional Costs Incurred	<u>\$27,835,586</u>	

² These costs do not represent a damage to Library if they are costs that BBC would have incurred, are allowable per the terms and conditions of the contract, and are costs that BBC would have included in the payment applications and recovered against either of the GMPs.

NOTES TO SCHEDULE A

- 1. Lost Operating Income.** Salamander prepared a pro forma 5-year forecast of hotel operations before the hotel opened. Salamander's initial forecast was dated July 15, 2016, and projected a hotel opening date of August 1, 2017.³ The hotel actually opened on January 27, 2019, a delay of approximately 18 months. Salamander also projected that after opening, the hotel would undergo a ramp-up period before it began operating at peak occupancy, and that the hotel would reach peak occupancy in its third year of operation. A typical lost profits model would therefore calculate lost revenues by comparing the budgeted revenues to the actual revenues for a period of approximately 5 years, which would cover the 18-month delay and the 3-year ramp-up period. The model would then apply present-value factors to the annual or monthly losses, to convert the losses to a damage amount in current-period dollars.

However, the accepted lost profits methodology is complicated by the COVID pandemic, as the hotel would not have reached the projected revenue levels during the pandemic period regardless of the delay. We therefore altered the methodology to include only the budgeted and actual activity that Library incurred prior to the pandemic, using a cut-off date of December 31, 2019. This alteration eliminates any need to project budgets during the period affected by the pandemic; however, the shortened time period understates lost revenues and profits. Further, Salamander and Library noted that the actual ramp-up period for the hotel took longer as a result of the multiple delayed openings, as Library was unable to effectively book large-group reservations and events prior to the actual opening date and received diminished returns on the pre-opening advertising campaign. It is not possible to fully quantify this issue while using a cut-off date of December 31, 2019.

Lost Operating Income		
Element	Amount	Note
Budgeted Operating Income Through December 31, 2019		
12 Months Ending July 31, 2018	\$6,910,349	a
12 Months Ending July 31, 2019	12,203,372	a
5 Months Ending December 31, 2019	<u>6,385,212</u>	a
Budgeted Operating Income – Inception Through December 31, 2019	\$25,498,933	
Less: Actual Operating Income – Inception Through December 31, 2019	<u>(3,015,815)</u>	b
Total Lost Operating Income	<u>\$22,483,118</u>	

- We obtained the lost operating income for this 29-month period from the "Net Operating Income Before Incentive, Reserves, and Debt Service" line in Salamander's pro forma forecast. Because Salamander reported these amounts as annual totals with a year-end of July 31, 2019, we prorated the annual amount for the period ending July 31, 2020, for 5 months.
- We obtained the actual operating income from Salamander's profit and loss statement for the period ending December 31, 2019. This statement includes only those expenses that Library incurred for hotel operations after opening.

³ The hotel had a planned opening date of approximately July 28, 2017. Salamander incorporated this date into its financial projections as August 1, 2017.

2. **Base Management Fees.** Library entered into an agreement with Salamander to obtain hotel management services. Prior to the planned opening date of July 28 2017, Library paid Salamander management fees for work performed in preparation of the hotel's opening. Library also paid Salamander \$680,968 during the 18-month period from the planned opening date of July 28 2017, to the actual opening date of January 27, 2019. Library would not have incurred these costs if not for the delayed opening.
3. **Pre-Opening Costs in Excess of Budgeted Amounts.** Salamander prepared a budget of personnel positions and pre-opening activities that Library would have incurred regardless of when the hotel opened. The hotel began incurring these costs prior to the delay period, in anticipation of its planned opening in August 2017. Because the opening was delayed until January 27, 2019, Salamander was required to extend many of these costs (e.g., paying certain personnel that Salamander had already hired). In total, the actual costs that Library incurred prior to the hotel opening exceeded the budgeted costs by \$1,105,441.

Pre-Opening Costs in Excess of Budgeted Amounts	
Element	Amount
Actual Pre-Opening Costs Incurred	\$2,222,145
Budgeted Pre-Opening Expenses	<u>1,116,704</u>
Total Pre-Opening Costs in Excess of Budgeted Amounts	<u>\$1,105,441</u>

4. **Sales and Marketing Costs in Excess of Budgeted Amounts.** Similar to the pre-opening activities, Library began to incur certain sales and marketing costs in advance of the original planned opening date, and was then required to incur additional costs for the revised opening dates. Library was also required to incur expanded sales and marketing costs to communicate the revised dates to the public. In total, the actual sales and marketing costs that Library incurred prior to the hotel opening exceeded the budgeted costs by \$721,557.

Sales and Marketing Costs in Excess of Budgeted Amounts	
Element	Amount
Actual and Committed Sales and Marketing Expenses	\$2,276,865
Budgeted Sales and Marketing Expenses	<u>1,555,308</u>
Total Sales and Marketing Costs in Excess of Budgeted Amounts	<u>\$721,557</u>

5. **Guest Relocation and Resolution.** Library incurred unnecessary costs related to confirmed bookings that customers had made based on earlier opening date projections. Because the hotel was not able to host these events as a result of the delayed opening, it incurred costs to move events or resolve guest issues. Salamander identified these events and provided the costs incurred related to each.

Guest Relocation and Resolution	
Element	Amount
Relocated Events	\$92,460
Guest Resolution	11,862
Escort Guests During Construction	1,385
Total Guest Relocation and Resolution	<u>\$105,707</u>

6. **Repair Costs Incurred by Salamander.** Salamander incurred costs to perform punch-list-type repairs and installations after the hotel's opening. These costs were not part of normal operations, and Library did not plan to incur them.

Repair Costs Incurred by Salamander	
Element	Amount
Replacement Bulbs	\$6,980
Replacement Tile	2,940
Mold Mediation	1,490
Flood Damage Repair	13,327
Repair Bed Frames	870
Replace Sump Pump	8,200
Repair Cooler	999
Repair of Panels and Wallpaper	71,741
Electrical Installation	17,638
Elevator Repair	7,080
Plumbing Repairs	5,634
Trim Work	117
Hope Doors	414
Repair Flow Sensor	9,011
Freezer Repair	242
Housekeeping Preparation	19,538
Total Repair Costs Incurred by Salamander	<u>\$166,221</u>

7. **Outsourced Laundry Service Incurred by Salamander.** The hotel is equipped with in-house laundry facilities; however, the equipment did not perform correctly and needed repair. After its opening, the hotel was required to outsource laundry services until the in-house laundry facilities became operational, for a total cost of \$140,193.
8. **In-House Repair Costs Incurred by Salamander.** Salamander identified activities that hotel engineering was required to perform after the hotel opened, including minor repairs such as repairing faulty electrical circuits, replacing broken showerheads and thermometers, and fixing damaged sofas. Salamander also noted that housekeeping services incurred costs for re-preparing the rooms after hotel engineering completed the additional repairs.

In-House Repair Costs Incurred by Salamander	
Element	Amount
Housekeeping Services	\$1,555
Engineering Services	7,146
Total In-House Repair Costs Incurred by Salamander	<u>\$8,701</u>

9. **Costs That Library Incurred for Construction Completion.** Library identified costs it directly incurred as a result of the delayed opening, including work to complete construction on the hotel.

Costs That Library Incurred to Complete Construction	
Element	Amount
Repainting of All Guestrooms	\$1,661,144
Matrix Consulting	196,491
Extended Builders Risk Insurance	265,938
Removal of the Bar Sample Wall	7,216
Punch-list Repair Work & Painting	127,580
Punch-list Repairs Directed by City DRB	36,960
6th Floor Brackets	10,820
Payment to Precision Walls to Release Lien	75,000
Repair Glides for Guestroom Barn Doors	1,555
Replace Broken Wall Sconce in Boardroom	3,131
Replacement of Ballroom Chandelier Crystals	37,845 ⁴
Installation of Ballroom Chandelier Crystals	TBD ⁵
Total Costs That Library Incurred to Complete Construction	<u>\$2,423,680</u>

⁴ As of the date of this letter, Library had not yet purchased the replacement crystals. We based this amount on quotes that Library received for the replacement pieces.

⁵ Library does not currently have an estimate for the cost to install the ballroom chandelier. We will update this amount when that information becomes available.

APPENDIX A: LIST OF DOCUMENTS USED

1. *"Pro Forma Marion Sq Charleston 7-15-16 w parking added and Footnotes Final.pdf"*
2. *"Lost Profitability due to construction.xlsx"*
3. *"Lost Profitability due to construction_Cotton Notes.xlsx"*
4. *"Belmond Charleston Place Invoice.pdf"*
5. *"Pre-Opening Summary_Bennett.pdf"*
6. *"Sales and Marketing Summary_Bennett.pdf"*
7. *"Bennett – PreOpening Fees.xlsx"*
8. *"Guest Resolution Backup.pdf"*
9. *"Hotel Bennett 12.2019 P and L Summary.pdf"*
10. *"MSH-OOG Finalized Preliminary Project Schedule 5-27-16.pdf"*
11. Application and Certification for Payment Number 45 for Library Associates from Balfour Beatty Construction
12. Deposition of Kimberly Bennett Brown, dated August 4 through August 6, 2020
13. *"Hotel Bennett – CPI.pdf"*
14. *"Hotel Bennett – Hartford and AL Gallager Insurance.pdf"*
15. *"Hotel Bennett – Matrix.pdf"*
16. *"Hotel Bennet – Robbins & Morton.pdf"*
17. *"Hotel Bennett – Robert Thomas.pdf"*
18. *Hotel Bennett – Studio – AT – Light Fixtures.pdf"*
19. *"RE_Construction Costs Paid by Library Associates.pdf"*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-1108
COUNTY OF CHARLESTON	)	
Balfour Beatty Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Library Associates, LLC and Metropolitan	)	
Life Insurance Company,	)	
	)	
Defendants.	)	
	)	STRONG TOWER CONSTRUCTION,
Library Associates, Inc.,	)	LLC D/B/A KOCH CORPORATION'S
	)	NOTICE OF MOTION AND MOTION
Third-Party Plaintiff,	)	FOR SUMMARY JUDGMENT, WITH
	)	SUPPORTING MEMORANDUM
v.	)	
	)	
Lithko Contracting, LLC f/k/a Lithko Contracting,	)	
Inc., Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf	)	
Stream Construction Company, Inc., Palmetto	)	
Automatic Sprinkler Company, Inc., Cook &	)	
Boardman, LLC, Strong Tower Construction, LLC	)	
d/b/a Koch Corporation, Watson Electrical	)	
Construction Co., LLC, Trimark Foodcraft, LLC,	)	
Pleasant Places, Inc., David Allen Company, Inc.,	)	
Premier Exteriors, LLC, Warco Construction, Inc.,	)	
Old North State Masonry, LLC, Tom Rochester &	)	
Associates d/b/a Southeastern Architectural	)	
Systems, Lowcountry Case & Millwork, Inc.,	)	
Quantum Coatings, LLC, and Balfour Beatty	)	
Construction Group, Inc.,	)	
	)	
Third-Party Defendants.	)	
	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-2868
COUNTY OF CHARLESTON	)	
STRONG TOWER CONSTRUCTION, LLC,	)	
d/b/a KOCH CORPORATION,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	
	)	
BALFOUR BEATTY CONSTRUCTION,	)	
LLC, LIBRARY ASSOCIATES, LLC, and	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY,	)	
	)	
DEFENDANTS.	)	

TO: THOMAS C. HILDEBRAND, JR. ATTORNEY FOR BALFOUR BEATTY
CONSTRUCTION, LLC

The undersigned, as attorney for Strong Tower Construction, LLC d/b/a Koch Corporation (“Koch”), will move before the Charleston County Master-In-Equity within ten (10) days from the service of this Notice of Motion and Motion, or as soon thereafter as Counsel may be heard, for an order granting Koch summary judgment, or partial summary judgment, on its breach of contract cause of action against Balfour Beatty Construction, LLC (“BBC”), pursuant to Rule 56, SCRC.

FACTS AND PROCEDURAL HISTORY

The above-captioned actions arose out of the construction of the Hotel Bennett in downtown Charleston, owned by Library Associates, LLC (the “Owner”). BBC acted as the general contractor for the project, and, under a contract with BBC, Koch was a subcontractor responsible for installation of the ground level, storefront bronze windows and doors. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. A, Koch subcontract). After nonpayment of contractually owed sums, Koch filed a mechanic’s lien in the amount of \$124,080.21 (the “Koch Lien”), recorded on Book 0781, Page 071, of the Charleston County Register of Deeds. By that time,

BBC had already filed its own mechanic's lien on the project in the amount of \$8,409,658.54, recorded on Book 0774, Page 273 of the Register of Deeds. BBC later amended its lien to \$12,066,147.09, which was recorded on Book 0810, Page 324 of the Register of Deeds (the "BBC Lien").

On or about May 30, 2019, Koch filed Case No. 2019-CP-10-2868 for, *inter alia*, foreclosure of the Koch Lien and for breach of contract against BBC. Somewhat simultaneously, BBC filed Case No. 2019-CP-10-1108, in which it sought foreclosure of the BBC Lien. Ultimately, the two actions were consolidated, along with all the actions filed by the other subcontractors.

In Koch's written discovery requests to BBC, sent for the purposes of Koch determining the amount of the Koch Lien that BBC does not dispute, Koch requested BBC to set forth how much of the Koch Lien is included in the BBC Lien. BBC responded that \$104,859.21 of the Koch Lien is included in the BBC Lien. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. B, BBC Int. Resp.). BBC indicated that it had not paid Koch this amount because of the Owner's claims for delay and defects, in addition to a \$22,000 back charge.

Initially, two of the Owner's representatives, Kim Brown and James Clement, were deposed and both testified that there are no outstanding issues with Koch's work, that Koch did not cause any delays and that Koch should be paid under its contract with BBC. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. C, Brown and Clements Trs.). Clements testified that Koch was "a pleasure to do business with." (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. C, Tr. Clements 347:11-12).

As to the \$22,000 back charge, BBC has provided no documentation concerning it. However, even if the entire \$22,000 back charge is eventually substantiated, at minimum, BBC does not dispute that Koch is owed \$82,859.21 under the parties' contract, which is calculated

based on the \$104,859.21 of the Koch Lien that BBC included in the BBC Lien, minus the undocumented \$22,000 back charge.

On or about October 19, 2020, Koch moved for summary judgment against BBC on Koch's breach of contract claim, seeking \$82,859.21, which was uncontested by BBC. At a hearing on that motion, BBC, through its counsel, explicitly stated that Koch should be paid and hoped that Koch would be paid. Despite that direct statement, BBC withstood the motion based on its argument that it did not know yet whether the Owner would be presenting evidence of delays or damages associated with Koch's work. BBC argued that, without deposition testimony from the Owner's experts, that issue remained outstanding. Ultimately, the Court denied Koch's motion but encouraged Koch to bring the motion again, once the Owner's experts have been deposed.

Subsequent to a hearing on Koch's motion for summary judgment, this Court held a status conference on March 19, 2021, to discuss possible trial sequencing. At that hearing, BBC and the Owner both suggested that many of the subcontractors should be paid, but they both argued that the other should be the party paying the subcontractors, such as Koch. At one point, either BBC or the Owner suggested that the subcontractors, such as Koch, should bring their claims in dispositive motions. Koch reminded the Court that it had in fact brought such a motion (i.e., its October 19, 2020, motion for summary judgment). Growing frustrated with the significant costs that many of the subcontractors, such as Koch, were incurring to endure a very contested litigation between BBC and the Owner, this Court requested that subcontractors bring motions for summary judgment on just their breach of contract claims against BBC, the party with whom the subcontractors have a contractual relationship. This Court suggested that the subcontractors should get a clear understanding from the Owner's experts as to whether any of the Owner's claims or damages flowed down to the subcontractors.

Since that status conference, numerous additional depositions have been taken. Specifically, with respect to this motion, the following depositions have been taken: On April 22, 2021, Jim Clements was deposed a second time, as a person now named as an expert by the Owner in the areas of scheduling, supervision, sequencing, coordination, management and construction; On April 28 and 29, 2021, Kim Brown was deposed a second time, as the Rule 30(b)(6), SCRCPP, deponent for the Owner; On May 3, 2021, Mark Boe, Capital Project Management, Inc, the Owner's scheduling, management and construction expert, was deposed; and on May 5 and May 6, 2021, Sam Hadley, Cotton & Company, the Owner's cost and lost profits expert, was deposed. At this point, the Owner and all of its experts have been deposed, and none of them took issue with Koch or could identify any damage attributable to Koch. Koch has requested the transcripts of all these depositions, and it will supplement this motion with those transcripts.

The purpose of this motion is to adhere to the Court's request for subcontractors to bring motions for summary judgment on their breach of contract claims against BBC.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCPP; see also *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hamiter v. Retirement Div. of South Carolina*, 326 S.C. 93, 484 S.E.2d 586 (1997); *City of Columbia v. American Civil Liberties*

Union, 323 S.C. 384, 475 S.E.2d 747 (1996). However, the party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 545 S.E.2d 500 (2001).

DISCUSSION

I. There still exist no genuine issues of material fact as to at least \$82,859.21 owed by BBC to Koch under the parties' contract, entitling Koch to summary judgment on that amount under its breach of contract cause of action.

In BBC's written responses to Koch's interrogatories, BBC admitted that \$104,859.21 of the Koch Lien is included in the BBC Lien. (Ex. B). When BBC filed the BBC Lien, it was required by statute to submit a "subscribed and sworn" statement or affidavit "of a just and true account of the amount due to [it], with all just credits given..." S.C. Code Ann. § 29-5-90. BBC did in fact have its Vice President of Operations, David Simonton, sign an affidavit attesting that the BBC Lien is owed. (BBC Amended Compl., Ex. A). In admitting that \$104,859.21 of the Koch Lien is included in the BBC Lien, BBC is admitting that \$104,859.21 is owed to Koch under the parties' contract.

BBC refuses to pay that uncontested sum because of alleged delay or defective work claims by the Owner, in addition to a \$22,000 back charge. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. B). The Owner, all of its representatives and all of its experts have been deposed, and they all have testified that there were no delays caused by Koch and that they have no record of damages associated with Koch's work. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. C; the remaining transcripts have been ordered, and Koch will supplement this motion with those transcripts). Based on the testimony of these persons, the Owner is not maintaining delay or defective construction claims against Koch or associated with Koch's work, thus BBC cannot

continue to deny payment to Koch based on those alleged claims.

The second reason BBC is refusing to pay Koch is due to a \$22,000 back charge. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. B). BBC has provided no documentation concerning the back charge. Even if the entire \$22,000 back charge is eventually substantiated, at minimum, BBC does not dispute that Koch is owed \$82,859.21 under the parties' contract, which is calculated based on the \$104,859.21 of the Koch Lien that BBC included in the BBC Lien, minus the undocumented \$22,000 back charge.

If BBC's defense is believed in full, there is no genuine issue of material fact as to \$82,859.21 owed to Koch under the parties' contract, entitling Koch to summary judgment on that amount. Koch is further entitled to attorney's fees and costs from BBC under Section 10(D) of the parties' contract. (see Koch Mot. Summ. J., Oct. 19, 2020, Ex. A). Koch is also entitled to pre-judgment and post-judgment interest at the statutory rate.

CONCLUSION

Based on the absence of genuine issues of material fact with respect to at least \$82,859.21, Koch is entitled to judgment as a matter of law on that amount, plus interest, attorney's fees and costs.

SMITH CLOSSER & WHEELER, PA

s/Samuel M. Wheeler

May 6, 2021

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P.O. Box 40578, Charleston, SC 29423
843-760-0220; 843-552-2678 (fax)
*Attorneys for Strong Tower Construction,
LLC d/b/a Koch Corporation*

19-135

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-1108
COUNTY OF CHARLESTON	)	
Balfour Beatty Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Library Associates, LLC and Metropolitan	)	
Life Insurance Company,	)	
	)	
Defendants.	)	
	)	STRONG TOWER CONSTRUCTION,
Library Associates, Inc.,	)	LLC D/B/A KOCH CORPORATION'S
	)	ADDITIONAL MEMORANDUM IN
Third-Party Plaintiff,	)	SUPPORT OF SUMMARY
	)	JUDGMENT
v.	)	
	)	
Lithko Contracting, LLC f/k/a Lithko Contracting,	)	
Inc., Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf	)	
Stream Construction Company, Inc., Palmetto	)	
Automatic Sprinkler Company, Inc., Cook &	)	
Boardman, LLC, Strong Tower Construction, LLC	)	
d/b/a Koch Corporation, Watson Electrical	)	
Construction Co., LLC, Trimark Foodcraft, LLC,	)	
Pleasant Places, Inc., David Allen Company, Inc.,	)	
Premier Exteriors, LLC, Warco Construction, Inc.,	)	
Old North State Masonry, LLC, Tom Rochester &	)	
Associates d/b/a Southeastern Architectural	)	
Systems, Lowcountry Case & Millwork, Inc.,	)	
Quantum Coatings, LLC, and Balfour Beatty	)	
Construction Group, Inc.,	)	
	)	
Third-Party Defendants.	)	
	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-2868
COUNTY OF CHARLESTON	)	
STRONG TOWER CONSTRUCTION, LLC,	)	
d/b/a KOCH CORPORATION,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	
	)	
BALFOUR BEATTY CONSTRUCTION,	)	
LLC, LIBRARY ASSOCIATES, LLC, and	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY,	)	
	)	
DEFENDANTS.	)	

On or about May 6, 2021, Strong Tower Construction, LLC d/b/a Koch Corporation (“Koch”), filed a motion for summary judgment on its breach of contract claim against Balfour Beatty Construction, LLC (“BBC”). Koch’s motion and memorandum made reference to numerous depositions which had recently occurred but for which Koch did not have transcripts. Attached hereto as Exhibit A are the relevant portions of those depositions transcripts.

BBC’s prior rationale for refusing to pay Koch uncontested sums owed under the parties’ subcontracts was that it did not know how the project owners’ experts would testify concerning damages that may or may not flow downhill to BBC’s subcontractors. As shown in Exhibit A, those representatives and experts take no issue with Koch’s work and do not allege any delay being caused by Koch. Therefore, BBC can no longer rely on unknown and speculative testimony.

Moreover, BBC’s admissions make its refusal to pay its subcontractors even more absurd. For example, in the deposition of the owners’ costs expert, Sam Hadley, counsel for BBC openly stated, “[w]ell, I don’t think that Balfour disputes that it owes subcontractors money and that some of the subcontractors have not been paid and that’s an issue that will have to be

resolved between it and the subcontractors.” (Hadley Tr. pp.324-325: 23-25 and 1-2). This is not an isolated statement by BBC. It has acknowledged in open court, during a hearing for Koch’s first motion for summary judgment and at later status hearings, that BBC’s subcontractors should be paid.

SMITH CLOSSER & WHEELER, PA

s/Samuel M. Wheeler

August 9, 2021

19-135

Samuel M. Wheeler
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*Attorneys for Strong Tower Construction,
LLC d/b/a Koch Corporation*

Exhibit A

August 9, 2021 Memo



Deposition of:
James Clements - Excerpt

April 22, 2021

In the Matter of:
Balfour, Beatty v. Library Associates

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1 STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

3 BALFOUR BEATTY CONSTRUCTION, LLC,
4 Plaintiff,

5 vs.

CASE NO. 2019-CP-10-01108

6 LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE
7 INSURANCE COMPANY, A NEW YORK CORPORATION,

Defendants.

8 -----
9 LIBRARY ASSOCIATES, LLC,

Third-Party Plaintiff,

10 vs.

11 LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,
12 BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,
13 INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC
14 SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC,
15 1st CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION,
16 LLC d/b/a KOCH CORPORATION, WATSON ELECTRICAL
17 CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,
18 PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,
19 PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,
20 LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE
21 MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a
22 SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,
23 LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM
24 COATINGS, LLC, BALFOUR BEATTY CONSTRUCTION GROUP,
25 INC.

Third-Party Defendants.

DEPOSITION OF: JAMES M. CLEMENTS - EXCERPT ONLY
DATE: April 22, 2021
TIME: 10:16 AM

LOCATION: Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC

TAKEN BY: Counsel for the Plaintiff
25 REPORTED BY: TERRI L. BRUSSEAU

1 (EXCERPT OF QUESTIONS BY MR. WHEELER)

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4

5

6

7

8

9

EXAMINATION

10 BY MR. WHEELER:

11 Q. Mr. Clements, can you hear me all
12 right?

13 A. I can.

14 Q. Perfect. My name is Sam Wheeler. I
15 represent Strong Tower Construction, LLC doing
16 business as Koch Corporation. I think in your
17 previous testimony you said you were familiar with
18 that company?

19 A. I am.

20 Q. Okay. I'm going to refer to them as
21 Koch Corporation or Koch Company. That's how you
22 know them?

23 A. Yes, sir.

24 Q. Okay. Can you give me just in your own
25 kind of words what exactly are the areas in which

1 you are offering expert opinions in this case?

2 A. Pre-construction, change orders,
3 schedule, BIM, mockups, exterior, interior.
4 Schedule, of course, is inclusive of exterior
5 elevator structure. Staffing and, as we're
6 discussing, punch.

7 Q. Okay. And qualified by a court -- you
8 were probably already asked this, but have you ever
9 been qualified by a court or arbitrator to testify
10 as an expert in any of those areas?

11 A. No.

12 Q. Okay. Within any of those areas do you
13 have an opinion as to the quality of Koch's work?

14 A. I think I testified previously that I
15 only had the highest regard for Koch. I don't
16 recall -- the only issue we ever had with the
17 storefront or storefront doors was on the patio,
18 and we found that we were missing weatherstripping
19 that was letting rain blow through those patio
20 doors, but Koch fixed that. Koch replaced metal
21 fascia on the storefront that was -- got a little
22 bit butchered up during an installation, but, you
23 know, I really don't have any -- or recall any
24 negatives with the company or the installation. I
25 would have nothing to testify, if that's what

1 you're asking.

2 Q. Yes, that's what I'm asking. I
3 appreciate it. With respect to some of those minor
4 issues that you remember, did any of those issues
5 cause a quantifiable delay that you can actually --
6 let me strike that.

7 Did any of those issues that you just
8 mentioned cause the delay that you could actually
9 quantify?

10 A. No. There were no -- none of those
11 issues caused the delay.

12 Q. Okay. And in your testimony, I think
13 you just resaid it, but you actually said, quote,
14 they were a pleasure to do business with in your
15 previous testimony as a fact witness. Is that
16 still your testimony as a potential expert in this
17 case?

18 A. Yes. I mean, that's the experience
19 that I had with them.

20 MR. WHEELER: Okay. Thank you very
21 much. I appreciate your time.

22 EXAMINATION

23 BY MR. RANNIK:

24 Q. Mr. Clements, I'll go next. Are you
25 willing to continue without a break?

In the Matter Of:

South Carolina v Library Associates

Kimberly Brown

April 29, 2021



934 Glenwood Ave SE
Suite 250
Atlanta, GA 30316
855.478.7376

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON 9TH JUDICIAL CIRCUIT
3 BALFOUR BEATTY CONSTRUCTION, :
4 Plaintiff, :
5 vs. : CASE NO.
6 LIBRARY ASSOCIATES, LLC, and : 2019-CP-10-01108
7 METROPOLITAN LIFE INSURANCE :
8 COMPANY, a New York :
9 Defendants. :
10 (Caption Continues on Page 2)
11

12 30(b)(6) DEPOSITION OF LIBRARY ASSOCIATES, INC.,
13 through its designated representative,
14 KIMBERLY BENNETT BROWN
15 VOLUME 2 OF 2

16 DATE TAKEN: Thursday, April 29, 2021
17 TIME BEGAN: 9:10 a.m.
18 TIME ENDED: 3:34 p.m.
19 LOCATION: Bundy McDonald, LLC
20 1516 Old Trolley Road, 2nd Floor
21 Summerville, South Carolina
22 REPORTED BY: Marie H. Bruegger, RPR, CRR
23
24
25

1 A Yes.

2 Q Give me just one second, Ms. Brown. I
3 think I might be done.

4 I apologize for my dog barking in the
5 background.

6 I believe I'm done, Ms. Brown. Thank you
7 so much for your time. And I may have follow-up,
8 but I will mute myself with my barking dog.

9 A Thank you.

10 EXAMINATION

11 BY MR. WHEELER:

12 Q Hey, Kim. This is Sam Wheeler. How are
13 you?

14 A I'm fine.

15 Q Can you hear me all right?

16 A Yes. That's better.

17 Q I only have like a minute or so of
18 questions.

19 When we took your deposition in your
20 personal capacity, you had given some testimony
21 about my client, Strong Tower Construction, doing
22 business as Koch Corporation. I'll call them Koch
23 Corporation.

24 Now that you are the representative
25 designated to speak on behalf of Library

1 Associates, is there anything different -- has
2 anything changed about your testimony about Koch
3 Corporation since that time?

4 A No.

5 Q Do you -- and by "you," I mean Library
6 Associates -- know of any corrective costs incurred
7 by Library Associates associated with Koch's work
8 on the project?

9 A I don't have any knowledge of that. I
10 would have to ask Balfour Beatty, the construction
11 manager.

12 Q Okay. And so when you said you have to
13 ask Balfour, are you going to be relying on your
14 own expert, or are you going to be relying on
15 Balfour's testimony about costs and delays on the
16 project? I understand that they're the party you
17 contracted with, but I think you probably know
18 their position in this lawsuit, so I guess I don't
19 know what you mean by you're going to rely on
20 Balfour Beatty.

21 A They -- at this point, they have not
22 given me any information on any cost of repairs of
23 defective work from Koch Corporation at this time.

24 Q And to the extent they have some measure
25 of corrective costs or they have no corrective

1 costs, does Library Associates have any independent
2 evidence to contradict what those costs might be?

3 A Because I have no knowledge of any cost,
4 I do not have any information that would contradict
5 that.

6 Q Well, did Library Associates --
7 independent of what Balfour may have spent to
8 correct Koch's work, did Library Associates incur
9 any costs to correct any of Koch's work on the
10 project?

11 A None to my knowledge.

12 Q Okay. Do you know of any delays to the
13 project that were caused by Koch?

14 A None to my knowledge.

15 Q And would you be relying on your own
16 expert witnesses to potentially speak of delays on
17 the project?

18 A My contract is with Balfour Beatty, so I
19 would have to rely any information that they would
20 provide on any delays caused by Koch on this
21 project.

22 Q So I take that to mean that Library
23 Associates knows of no delays caused by Koch on the
24 project?

25 A That's correct.

1 Q Of all the damages that Library
2 Associates claims in this lawsuit -- well, hold on
3 a second. Let me back up. I know that "claim" is
4 not a word that I can use, so let me rephrase that.

5 Of all the damages Library Associates
6 asserts in this lawsuit, are any of those against
7 Koch?

8 A None specifically, but there would be --
9 no, none specifically.

10 Q And Koch Corporation was not a party to
11 this joint prosecution and defense agreement, to
12 your knowledge, correct?

13 A Correct.

14 Q So those claims related to conspiracy and
15 breach of contract associated with that agreement
16 do not apply to Koch, correct?

17 A Correct.

18 Q Of all the damages that Library
19 Associates asserts in this lawsuit, are any
20 attributable to Koch's work?

21 A Again, my contract's with Balfour Beatty,
22 so any damages I have are against Balfour Beatty.

23 Q So that's no?

24 A I have no knowledge of any that are from
25 Koch.

1 Q Okay. And I guess this is somewhat
2 something Jaan I think asked, but setting aside
3 your dispute with Balfour, to the extent there's an
4 amount of money that Balfour consents is owed under
5 the subcontract with Koch, does Library Associates
6 have any -- (chime sounds) -- delay, repair costs,
7 or anything to contest that that money should be
8 paid by Balfour to Koch?

9 A If you could repeat that. Someone I
10 think chimed in during the middle of that question.

11 Q Right. So setting aside your dispute or
12 Library Associates's dispute with Balfour, if there
13 is an amount of money that Balfour does not dispute
14 is owed under its subcontract with Koch, does
15 Library Associates have any reason or any damages
16 that would prevent Balfour from paying that amount
17 of money to Koch?

18 A No.

19 Q All right. Thank you.

20 MR. MCDONALD: Anybody else? I've
21 got some questions. I know there might be some
22 follow-ups, but I've got about ten or 15 minutes of
23 questions, but is there anybody else that hasn't
24 asked questions that wants to go?

25 MR. TERRY: Brent, this is Don

1 STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON

3 BALFOUR BEATTY CONSTRUCTION, LLC,
4 Plaintiff,

5 vs. CASE NO. 2019-CP-10-01108

6 LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE
INSURANCE COMPANY, A NEW YORK CORPORATION,

7 Defendants.

8 -----
LIBRARY ASSOCIATES, LLC,

9 Third-Party Plaintiff,

10

vs.

11

LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,
12 BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,
INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC
13 SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC,
1st CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION,
14 LLC d/b/a KOCH CORPORATION, WATSON ELECTRICAL
CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,
15 PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,
PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,
16 LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE
MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a
17 SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,
LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM
18 COATINGS, LLC, BALFOUR BEATTY CONSTRUCTION GROUP,
INC.

19

Third-Party Defendants.

20

DEPOSITION OF: MARK BOE - EXCERPT ONLY
21 (APPEARING VIA VIRTUAL ZOOM)

22 DATE: May 3, 2021
23 TIME: 10:06 AM

14

15

16

17

18

EXAMINATION

19 BY MR. CLOSSER:

20 Q. Mr. Boe, my name is Zach Closser. Can
21 you hear me all right?

22 A. Yes.

23 Q. I represent Koch Corporation. Are you
24 familiar with my client?

25 A. I know I've heard the name.

↑

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1 Q. On this project they did the storefront
2 windows and the doors. Okay?

3 After your analysis, are you aware of
4 any critical path delays attributable to Koch?

5 A. No, I'm not.

6 Q. Are you aware of any quality of work
7 issues attributable or associated with my client,
8 Koch?

9 A. I am not.

10 Q. Do you have any opinions regarding the
11 adequacy of the manpower provided by my client to

12 the project?

13 A. No.

14 Q. If there were a delay to the critical
15 path by Koch, sitting here today isn't it true that
16 you are unable to say how long that delay would
17 have been?

18 A. My report doesn't have a calculation of
19 the length of that delay.

20 Q. And I'll represent to you in going
21 through your report, your report does not mention
22 Koch at all. What, if anything, does that signify
23 to you regarding any delay by my client on the
24 project?

25 A. Mostly it -- it signifies that I didn't

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1 see significant opportunity for either as criticism
2 from BBC or as complaints about BBC quality that
3 would have driven you to be delayed, by Koch to be
4 delayed.

5 (Reporter asks for clarification.)

6 THE WITNESS: I don't -- for Koch to be
7 delayed. That's what I said. I'm going to need to
8 take a break. I'm going to have to go get my dog.

9 BY MR. CLOSSER:

10 Q. Real quick and just to clean that up,
11 you're not aware of any delay that Koch would have
12 caused?

13 A. No.

14 MR. CLOSSER: All right. Thank you,
15 sir. Let's take a short break and let you take
16 care of that dog.

17 THE WITNESS: Thanks.

18 MR. HILDEBRAND: Why don't we just take
19 five then if that's good with everybody.

20 (A recess transpired.)

21 MR. HILDEBRAND: Zach, were you
22 finished?

23 MR. CLOSSER: I have two follow-up
24 quick questions, sir.

25 BY MR. CLOSSER:

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1 Q. Knowing that Koch did the storefront
2 windows and doors, what trades would have been
3 impacted by their scope of work, if you know? What
4 other trades?

5 A. So assuming storefronts down on the
6 main level, I -- when I visited the project site in
7 March, it seems like that most of that work would

8 have impacted the completion -- ultimate completion
9 of drywall and painting, et cetera, perhaps
10 flooring.

11 Q. In those areas adjacent to the store
12 fronts?

13 A. Right. Possibly electrical, et cetera,
14 but...

15 Q. And what trades, if any, are you aware
16 of that would have impacted Koch's ability to
17 complete its scope or are we talking about the
18 whole building?

19 A. I mean, structure is the part that, you
20 know, immediately jumps out, but I just -- I would
21 have to see the drawings and see the specifics.
22 And I should have said that with respect -- I would
23 have to see the details.

24 Q. Did you use, though -- I mean, sitting
25 here today, you're speculating, you haven't done an

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1 analysis to fully answer either of those questions,
2 is that fair?

3 A. That's right.

4 MR. CLOSSER: All right. Thank you,
5 sir. I'm through.



Deposition of:
Sam Hadley - Excerpt

May 6, 2021

In the Matter of:
Balfour, Beatty v. Library Associates

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1 STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

BALFOUR BEATTY CONSTRUCTION, LLC,

3 Plaintiff,

4 vs.

CASE NO. 2019-CP-10-01108

5 LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE

INSURANCE COMPANY, A NEW YORK CORPORATION,

6 Defendants.

7 LIBRARY ASSOCIATES, LLC,

Third-Party Plaintiff,

8
9 vs.

LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,

10 BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,

INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC

11 SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC, 1st

CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION, LLC

12 d/b/a KOCH CORPORATION, WATSON ELECTRICAL

CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,

13 PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,

PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,

14 LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE

MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a

15 SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,

LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM

16 COATINGS, LLC, BALFOUR BEATTY CONSTRUCTION GROUP,

Third-Party Defendants.

17 *****E - X - C - E - R - P - T*****

VTC

18 DEPOSITION OF: SAM HADLEY, CPA/CFF, CFE, CGFM,

CCA, CCP - VOLUME II - EXCERPT

19 (APPEARING VIA VIRTUAL ZOOM)

20 DATE: May 6, 2021

21 TIME: 9:06 a.m.

22 LOCATION: Parker Poe Adams & Bernstein, LLP
Charleston, SC

23 TAKEN BY: Counsel for the Plaintiff

24 REPORTED BY: SUSAN M. VALSECCHI, RPR, CRR
25 (APPEARING VIA VIRTUAL ZOOM)

1 project?

2 A. Yes, to some extent the report does
3 identify that some of the changes relate to
4 back-charges.

5 So when we were assessing the
6 reasonableness of Balfour's changes claim, we did
7 identify some of those issues. I didn't have all
8 of the documentation to be able to do a complete
9 review, because I don't have the support for every
10 one of the RCOs and OCOs that are being claimed.

11 Q. Okay. I think that's all I've got for
12 you. Thank you for your time.

13 A. Thank you.

14 EXAMINATION

15 BY MR. CLOSSER:

16 Q. Ms. Hadley, do you want to take a
17 break?

18 A. Yeah, I don't care.

19 Q. Okay. I don't either.

20 I represent Koch Corporation. Are you
21 generally familiar with my client?

22 A. I am.

23 Q. Other than -- as has been asked of you
24 by a number of folks already this morning, other
25 than a duplication analysis, do you have any

1 opinion as to the validity of Koch's lien?

2 A. No, and I don't recall whether that
3 lien came with support or not.

4 Q. Do you have any opinions regarding the
5 value of the work performed by Koch Corporation?

6 A. No.

7 Q. It seems to me that much of your
8 analysis has relied upon representations made by
9 Balfour -- for example, its subcontractor status
10 logs -- in determining whether or not, you know, a
11 particular subcontractor's lien is duplicative.

12 Is that fair?

13 A. No, I think that in order to identify
14 duplication, you're identifying duplication in two
15 places, so you would need a certain level of
16 support in two places.

17 So we are looking at the accounting
18 records of Balfour to determine whether it's in
19 their records, but then I would also have to see
20 whether it's in the subcontractor's amount as well.

21 Q. If there is an uncontested or an
22 undisputed amount due by Balfour to its
23 subcontractor, or specifically Koch, do you have
24 any reason to take issue with that?

25 A. Take issue with it how?

1 Q. So Koch Corporation, for example, has a
2 mechanic's lien, a mechanic's lien foreclosure
3 action, you know, a quantum meruit action against
4 the owner, but it also has a breach of contract
5 action against Balfour for its work as a
6 subcontractor performed on the project.

7 Are you with me so far?

8 A. Yes.

9 Q. So what I'm asking is, if Balfour
10 doesn't dispute a certain amount of money that is
11 due to Koch Corporation for its work performed on
12 the project, do you have any reason to take issue
13 with Balfour's determination that that money is due
14 and owing to Koch? Simply on the breach of
15 contract claim, is the context of my question.

16 A. Nothing comes to mind that would give
17 me reason to have a problem with an amount that
18 Balfour believes should be paid to a sub.

19 Whether that, again, is properly
20 includable in the GMP, or an eligible project cost,
21 is a whole nother matter.

22 Q. Totally agree.

23 And just you can't associate any of the
24 delays in the project directly to Koch Corporation;
25 can you?

1 A. I did not identify the causation of
2 delays to any sub or Balfour.

3 Q. And you have no knowledge regarding the
4 quality of the work performed by Koch, correct?

5 A. Correct.

6 Q. In Exhibit 3, your November 16th, 2020
7 report, in Paragraph 6 you identify the repairs
8 incurred by Salamander.

9 Again, you can't attribute these -- any
10 line item on here -- or portions thereof, for that
11 matter -- to Koch Corporation or any other
12 subcontractor, can you?

13 A. No.

14 Q. Again, going back to the breach of
15 contract framework for my question between Balfour
16 and Koch, do you have any opinion regarding the
17 amount due and owing from Balfour to Koch
18 Corporation?

19 A. No. The only exception to that would
20 be, again, to review the payment applications; and
21 if both Balfour and Library agreed that that claim
22 on that Schedule of Values was 100 percent complete
23 and that payment application was paid, then I would
24 have an opinion that Balfour most likely owes that
25 amount to Koch, without knowing of any back charges

1 or other claims that they're taking as a credit
2 against that payment.

3 Q. And with regard to Koch's breach of
4 contract claim against Balfour, would it be
5 necessary that Library agree that the work
6 performed by Koch was 100 percent complete if
7 Balfour agrees that it's complete and due?

8 A. As it relates to that sub-party
9 litigation, no, only as it relates to me
10 accumulating total project costs.

11 Q. Can you attribute any of your opinions
12 or conclusions that assigned lost profits to the
13 liability of Balfour -- can you attribute any of
14 those to Koch specifically?

15 A. No, and I think, further, as a
16 correction, I have a scope limitation that I don't
17 even attribute them to Balfour.

18 Q. What was your directive, or what was
19 the purpose of you, your firm, creating these lost
20 profits analysis? The reason I ask is because
21 there is a liquidated damages clause, and those
22 tend to exist because of the uncertainty of lost
23 profits.

24 With that liquidated damages clause in
25 the prime contract, what is the purpose of the lost

1 profits analysis?

2 A. Well, the lost profits analysis, to be
3 silly, is just to compute an estimate of lost
4 profits. It was a task that I was asked to
5 perform --

6 Q. Was there --

7 A. -- so I was not asked --
8 Go ahead.

9 Q. I'm sorry.

10 A. Oh, I was just going to say, I was not
11 asked to itemize what I think is due and owing by
12 the hotel by reading the contract clause and making
13 a decision one way or another. I was asked to
14 estimate lost profits. Which is what that report
15 does.

16 Q. I understand.

17 Were you given a reason as to why you
18 were being asked to do that?

19 A. No.

20 Q. Bear with me a moment.

21 Can you draw any conclusions or do you
22 have an opinion regarding Balfour's
23 determination -- strike that.

24 Those are all the questions I have.

25 Thank you.

1 A. It has not been -- go ahead.

2 Q. If Balfour owes those monies to the
3 subcontractors, that is an accrued cost; isn't it?

4 A. It should be, but it isn't in this
5 case, because Balfour did not accrue for those
6 things. That was one of the problems that I was
7 having with trying to determine what total project
8 costs are.

9 Q. Okay. So you think if Balfour owes
10 money to subcontractors for work that was provided
11 and the owner has received that work, it's your
12 opinion that the owner does not owe Balfour for
13 that work?

14 A. I didn't say that.

15 Q. Okay. So if the owner -- if Balfour
16 provided work and materials that the owner got the
17 benefit for and actually were installed and used to
18 build that hotel, the owner owes those amounts;
19 doesn't it?

20 A. If Balfour did not pay or is not going
21 to pay that amount, then Library does not have to
22 pay Balfour that amount under the GMP contract.

23 Q. Well, I don't think that Balfour
24 disputes that it owes subcontractors money and that
25 some of the subcontractors have not been paid and

1 that's an issue that will have to be resolved
2 between it and the subcontractors.

3 But taking out of the equation that
4 Balfour does not agree that some subcontractors are
5 owed some monies -- and what those might be will
6 have to be determined at some future date -- but
7 taking that out of the equation, the issue is what
8 was provided to the owner in the form of work and
9 materials; and the owner owes those amounts under
10 my hypothetical, doesn't it?

11 MR. MCDONALD: Object to the form.

12 THE WITNESS: Under the contract type
13 that the parties agreed to, which is a GMP, the
14 amounts would have to be incurred by Balfour in
15 order to be reimbursed and paid by Library.

16 So I don't understand the hypothetical,
17 because, as you're saying, the amounts to be paid
18 between Balfour and the subs is going to get worked
19 out later. It can't get worked out later, because
20 it has to roll into total project costs and
21 eligible project costs to be compared to the GMP.

22 So Library can't pay Balfour an amount
23 that Balfour doesn't actually end up paying its
24 subs, or doesn't incur, so it has to be figured out
25 first.



Deposition of:
Grady W. Query

June 23, 2021

In the Matter of:
Balfour, Beatty v. Library Associates

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STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

BALFOUR BEATTY CONSTRUCTION, LLC,

Plaintiff,

vs. CASE NO. 2019-CP-10-01108

LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE
INSURANCE COMPANY, A NEW YORK CORPORATION,
Defendants.

LIBRARY ASSOCIATES, LLC,
Third-Party Plaintiff,
vs.

LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,
BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,
INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC
SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC,
1st CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION,
LLC d/b/a KOCH CORPORATION, WATSON ELECTRICAL
CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,
PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,
PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,
LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE
MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a
SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,
LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM
COATINGS, LLC, BALFOUR BEATTY CONSTRUCTION GROUP,
INC.

Third-Party Defendants.

DEPOSITION OF: GRADY W. QUERY
DATE: June 23, 2021
TIME: 10:02 AM
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: TERRI L. BRUSSEAU

1 THE WITNESS: Thank you.

2 EXAMINATION

3 BY MR. WHEELER:

4 Q. Mr. Query, my name is Sam Wheeler. Can
5 you hear me all right?

6 A. Yes, sir.

7 Q. Okay. I represent Strong Tower
8 Construction, LLC doing business as Koch
9 Corporation. Are you familiar with that entity?

10 A. I've heard of them, yes, sir.

11 Q. Okay. I will represent to you that
12 they were a subcontractor responsible for
13 installing the storefront window and door package,
14 including some of those Hope doors.

15 There was a conversation -- a little
16 bit of a conversation about the Hope doors a little
17 bit earlier. Can you explain to me, I saw your
18 draft reports, what the issue was with respect to
19 the BAR and the Hope doors?

20 A. I believe the BAR did not want the Hope
21 doors removed from the mockup panel to install in
22 the building, the BAR's expectation would there be
23 Hope doors on the mockup and on the building
24 simultaneously and they would, you know, make the
25 inspection of both of them comparing them.

1 And it was just -- it was -- I think
2 the plan and sincere hope of the GC and the owner,
3 that those doors could be transferred over and used
4 and not, you know, throw away 80,000 dollar, you
5 know, mockup doors in order to get the final BAR
6 approval. That was my understanding.

7 Q. Okay. So just to be clear, that wasn't
8 an installation issue, correct?

9 A. No.

10 Q. Okay. So are you -- I guess then begs
11 the question, similar to John's questions, are you
12 going to offer any opinions as to Strong Tower's
13 work on the project?

14 A. No. The building was in the dry --
15 there were not -- I never saw them on the critical
16 path.

17 Q. You never saw Strong Tower on the
18 critical path?

19 A. Not during my time on the project.

20 Q. So you never saw them in the critical
21 path and I'm assuming it would be safe to say that
22 they did not cause any delays or you're not going
23 to offer any opinions as to them causing delays?

24 A. I have -- I don't have any opinion on
25 them causing delays.

1 Q. Okay. And last question, do you have
2 any opinions as to the quality or sufficiency of
3 their work?

4 A. No, sir.

5 MR. WHEELER: Okay. Thank you very
6 much.

7 EXAMINATION

8 BY MR. TERRY:

9 Q. Mr. Query, I'm Don Terry. I represent
10 Watson Electrical Construction together with Al
11 Windle, who said he didn't have any questions,
12 Lithko Contracting, as well as Old North State
13 Masonry. My questions are related to Watson.

14 Are you familiar with Watson Electrical
15 Construction?

16 A. I am.

17 Q. Why are you familiar with Watson?

18 A. I've worked on projects with them
19 before.

20 Q. Okay. Have you worked -- when you say
21 you've worked on projects, what was your -- the
22 extent of your work with Watson?

23 A. I've worked with them both as an
24 owner's agent and as representing the GC.

25 Q. All right. And as an -- in your work

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
Strong Tower Construction, LLC d/b/a
Koch Corporation, Watson Electrical
Construction Co., LLC, Trimark Foodcraft,
LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC,
Warco Construction, Inc., Old North State
Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings, LLC, Balfour Beatty
Construction Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION,
LLC'S MEMORANDUM IN OPPOSITION
TO RENEWED SUMMARY JUDGMENT
BY STRONG TOWER
CONSTRUCTION, LLC d/b/a KOCH
CORPORATION

The Plaintiff Balfour Beatty Construction, LLC ("Balfour"), through its below-signed attorneys, submits this Memorandum of Authorities and exhibits in opposition to the renewed Motion for Summary Judgment filed by Strong Tower Construction, LLC d/b/a Koch Corporation ("Koch") on May 6, 2021.

FACTS AND ARGUMENT

Koch's motion is essentially a rehash of its prior Motion for Summary Judgment which was denied. The renewed motion should be denied as there are, inarguably, questions of fact that must be addressed at trial as noted in Balfour's prior Memorandum in Opposition to Koch's Motion dated January 5, 2021, which is expressly incorporated herein by reference with all exhibits.

Koch's prior motion was properly denied and since that time, additional questions of fact have been developed which make the motion inappropriate. Specifically, if a subcontractor is claiming a right of payment then under its contract with Balfour, Balfour is entitled to a set-off for any damages claimed by the owner that arise out of that subcontractor's work. In this matter, in an effort to prompt the owner to identify which subcontractor's work it claims caused it any damage because the work was defective or delayed the job, Balfour sent Library Associates specific requests for admission as to each subcontractor to determine if any claims were made arising out of or related to that subcontractor. As to a number of subcontractors, Library Associates refused to admit one way or the other as to whether it had any claims, and said it was without information sufficient to respond. (See attached Exhibit "A"). At this late date, after this case has been pending for over two and a half years and Library Associates has had every opportunity to engage in discovery, Balfour filed a motion to compel Library Associates to either admit or deny whether it had any claims related to each subcontractor. This Court agreed and issued an Order, attached as Exhibit "B", granting Balfour's Motion to Compel. As a result, Library Associates amended its responses and denied that it has no claim in relation to each and every subcontractor, to specifically include Koch. (See Exhibit "C").

CONCLUSION

As a result, and as an additional ground in opposition to Koch's motion, a question of fact exists as to whether the owner is claiming that Koch's work caused it damage, and for this additional reason Koch's motion should be denied.

PARKER POE ADAMS & BERNSTEIN LLP
200 MEETING STREET, SUITE 301
CHARLESTON, SC 29401

By: s/Thomas C. Hildebrand, Jr.
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Attorneys for Plaintiff Balfour Beatty
Construction, LLC

August 16, 2021

Exhibit A

April 26, 2021

Via US Mail & Email

Thomas C. Hildebrand, Jr., Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
tomhildebrand@parkerpoe.com

RE: Balfour Beatty Construction v. Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Company.
Case No.: 2019-CP-10-01108

Dear Tom,

Enclosed for service upon you, please find Defendant/Third-Party Plaintiff Library Associates, LLC's Response to Plaintiff Balfour Beatty, LLC's Request to Admit.

With kindest regards, I remain

Sincerely yours,


W.H. Bundy, Jr.

WHB/kjw

cc: All Counsel of Record

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC

Plaintiff,

v.

Library Associates, LLC; and Metropolitan Life
Insurance Company, a New York Corporation.

Defendants.

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MCC, LLC, Gulf Stream Construction
Company, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, Strong
Tower Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC, Warco
Construction, Inc., Old North State Masonry, LLC,
Lowcountry Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-10-01108

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**LIBRARY ASSOCIATES ANSWERS TO
BALFOUR BEATTY CONSTRUCTION,
LLC'S REQUEST TO ADMIT**

TO: TOM HILDEBRAND, ESQ. ATTORNEY FOR BALFOUR BEATTY CONSTRUCTION, LLC:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Library Associates, LLC (“Library”) submits their responses to Plaintiff Balfour Beatty Construction, LLC (hereinafter “BBC”) Request to Admit as follows:

REQUESTS TO ADMIT

1. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of any of the Third-Party Defendants above caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

2. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lithko Contracting, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

3 Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Guy M. Beatty, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is solely responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is solely responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as

the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

4. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Bernard MCC, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

5. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Gulf Stream Construction Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

6. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Palmetto Automatic Sprinkler Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is solely responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is solely responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within

the GMP. See Section 4.3.1 of the A201.

7. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Cook & Boardman, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

8. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Strong Tower Construction, LLC d/b/a Koch Corporation caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost,

Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

9. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Watson Electrical Construction Co., LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

10. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Trimark Foodcraft, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is solely responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is solely responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

11. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Pleasant Places, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied

12. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of David Allen Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

13. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Premier Exteriors, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

14. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Warco Construction, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have

contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

15. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Old North State Masonry, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

16. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lowcountry Case & Millwork, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.

17. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Quantum Coatings, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Library Associates, LLC (“Library”) is unable to admit or deny this request because, after reasonable inquiry, the information known or readily available to it is insufficient. By way of further response, there exists no contract between Library and subcontractors of any tier. See Section 1.1.2 of the A201. Library does not have contractual claims against subcontractors of any tier. Balfour is sole responsible for its subcontractors, See Section 2.1.6 of the A133. Balfour is sole responsible for the critical path construction schedule and all updates thereto. See Sections 3.10.4.2, 3.10.14.7, and 3.10.4.8. Finally, as the party purporting to make a claim for additional time and/or cost, Balfour has the burden of proof to show that its subcontractors did not contribute to any failure of Balfour to achieve substantial completion within the Contract Time and/or within the GMP. See Section 4.3.1 of the A201.



W. H. Bundy, Jr., Esquire;
M. Brent McDonald, Esquire;
Bundy McDonald, LLC
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Summerville, South Carolina 29485
888-552-1559
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brent@bundymcdonald.com
Attorneys for Library Associates, LLC

April 26, 2021
Summerville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC

Plaintiff,

v.

Library Associates, LLC; and Metropolitan Life
Insurance Company, a New York Corporation.

Defendants.

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MCC, LLC, Gulf Stream Construction
Company, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, Strong
Tower Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC, Warco
Construction, Inc., Old North State Masonry, LLC,
Lowcountry Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-10-01108

CERTIFICATE OF SERVICE

I, Kathy Jo Wentland, with Bundy McDonald, LLC, hereby certify that true and correct copy of Defendant/Third-Party Plaintiff Library Associates, LLC's response to Balfour Beatty Construction, LLC's Request to Admit was served on all parties this 26th day of April 2021, as follows:

VIA EMAIL

Thomas C. Hildebrand, Jr., Esquire
Robert C. Bryd, Esquire
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bobbybyrd@parkerpoe.com

ATTORNEYS FOR BALFOUR BEATTY CONSTRUCTION, LLC and BALFOUR BEATTY CONSTRUCTION GROUP, INC.

VIA EMAIL

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ATTORNEY FOR METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION

VIA EMAIL

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ATTORNEY FOR PALMETTO AUTOMATIC SPRINKLER COMPANY, INC.

VIA EMAIL

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Rachel Idgal
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igdalr@roblaw.net

ATTORNEYS FOR PLEASANT PLACES, INC.

VIA EMAIL

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Thurmond Kirchner & Timbes
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ATTORNEY FOR QUANTUM COATINGS, LLC

VIA EMAIL

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Graham Morgan
Hamilton Stephens Steele & Martin, PLLC
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VIA EMAIL

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ATTORNEY FOR BERNARD MCC, LLC

VIA EMAIL

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ATTORNEY FOR GULF STREAM CONSTRUCTION COMPANY, INC.

VIA EMAIL

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ATTORNEY FOR WARCO CONSTRUCTION, INC.

VIA EMAIL

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awindle@smithterrylaw.com

**ATTORNEY FOR WATSON ELECTRICAL CONSTRUCTION CO., LLC; and
OLD NORTH STATE MASONRY; and LITHKO CONTRACTING, LLC f/k/a LITHKO
CONTRACTING, INC.**

VIA EMAIL

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ATTORNEY FOR LOWCOUNTRY CASE & MILLWORK, INC.

VIA EMAIL

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Peter Phillips

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ATTORNEY FOR TRIMARK FOODCRAFT, LLC and DAVID ALLEN COMPANY, INC.

VIA EMAIL

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Sam Wheller

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ATTORNEY FOR STRONG TOWER CONSTRUCTION d/b/a KOCH CORPORATION

VIA EMAIL

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ATTORNEY FOR PREMIER EXTERIORS, LLC

VIA EMAIL

Sarah DiFranco

Poyner Spruill

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sdifranco@poynerspruill.com

ATTORNEY FOR COOK & BOARDMAN

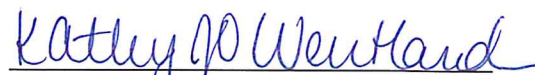

Kathy Jo Wentland

Exhibit B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1001108

Balfour Beatty Construction LLC
PLAINTIFF(S)

Library Associates LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

There are several outstanding motions in this matter:

1. Motion of Balfour Beatty to Require Library Associates to Respond Appropriately to Requests for Admissions filed May 27, 2021 is GRANTED;
2. Watson Electrical Construction Co., LLC's Motion for Protective Order filed May 17, 2021 is respectfully DENIED;
3. In response to Library Associates, LLC's Motion to Compel Documents Withheld by Balfour Beatty Co., LLC filed April 19, 2021, Balfour Beatty is required to provide copies of the documents to which privilege is asserted to the Court for in camera review with the detailed basis for the privilege within 21 days;
(CONTINUED ON NEXT PAGE)

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/19/2021 .

Case Party Info Protected for Old North State Masonry LLC,Lithko Contracting LLC
Case Party Info Protected for Watson Electrical Construction Co LLC
Lithko Contracting Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

4. In response to Watson Electrical Construction, Co., LLC and Old North State Masonry, LLC's Motion for Protective Order filed November 5, 2019, Watson Electrical and Old North State Masonry are required to provide copies of the documents to which privilege is asserted to the Court for in camera review with the detailed basis for the privilege within 21 days.

The following motions shall be heard on Monday, August 16 at 2:00 p.m.:

1. Balfour Beatty Construction, LLC's Motion to Reconsider the Order Denying its Motion to Compel Production filed March 18, 2021;
2. Strong Tower Construction, LLC's Motion for Summary Judgment filed May 6, 2021;
3. Library Associates, LLC's Motion for a Protective Order Regarding the Deposition of W.H. Bundy, Jr. filed July 7, 2021.



Charleston Common Pleas

Case Caption: Balfour Beatty Construction LLC VS Library Associates LLC ,
defendant, et al
Case Number: 2019CP1001108
Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2021-07-19 10:22:26 page 3 of 3

Exhibit C

Bundy McDonald
TRIAL LAWYERS

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July 20, 2021

Via Email

Thomas C. Hildebrand, Jr., Esquire
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RE: Balfour Beatty Construction v. Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Company.
Case No.: 2019-CP-10-01108

Dear Tom,

Pursuant to the July 19, 2021 Court Order, enclosed for service upon you, please find Defendant/Third-Party Plaintiff Library Associates, LLC's Amended Response to Plaintiff Balfour Beatty, LLC's Request to Admit.

With kindest regards, I remain

Sincerely yours,



W.H. Bundy, Jr.

WHB/kjw
cc: All Counsel of Record

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC

Plaintiff,

v.

Library Associates, LLC; and Metropolitan Life
Insurance Company, a New York Corporation.

Defendants.

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MCC, LLC, Gulf Stream Construction
Company, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, Strong
Tower Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC, Warco
Construction, Inc., Old North State Masonry, LLC,
Lowcountry Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-10-01108

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**LIBRARY ASSOCIATES ANSWERS TO
BALFOUR BEATTY CONSTRUCTION,
LLC'S REQUEST TO ADMIT**

TO: TOM HILDEBRAND, ESQ. ATTORNEY FOR BALFOUR BEATTY CONSTRUCTION, LLC:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Library Associates, LLC (“Library”) submits their responses to Plaintiff Balfour Beatty Construction, LLC (hereinafter “BBC”) Request to Admit as follows:

REQUESTS TO ADMIT

1. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of any of the Third-Party Defendants above caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

2. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lithko Contracting, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

3 Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Guy M. Beaty, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

4. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Bernard MCC, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

5. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Gulf Stream Construction Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

6. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Palmetto Automatic Sprinkler Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

7. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Cook & Boardman, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

8. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Strong Tower Construction, LLC d/b/a Koch Corporation caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

9. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Watson

Electrical Construction Co., LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

10. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Trimark Foodcraft, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

11. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Pleasant Places, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

12. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of David Allen Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

13. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Premier Exteriors, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

14. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Warco

Construction, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

15. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Old North State Masonry, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

16. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lowcountry Case & Millwork, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

17. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Quantum Coatings, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

[Signature Page Follows]



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July 20, 2021
Summerville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC

Plaintiff,

v.

Library Associates, LLC; and Metropolitan Life
Insurance Company, a New York Corporation.

Defendants.

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernhard MCC, LLC, Gulf Stream Construction
Company, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, Strong
Tower Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC, Warco
Construction, Inc., Old North State Masonry, LLC,
Lowcountry Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-10-01108

CERTIFICATE OF SERVICE

I, Kathy Jo Wentland, with Bundy McDonald, LLC, hereby certify that true and correct copy of Defendant/Third-Party Plaintiff Library Associates, LLC's response to Balfour Beatty Construction, LLC's Request to Admit was served on all parties this 20th day of July 2021, as follows:

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OLD NORTH STATE MASONRY; and LITHKO CONTRACTING, LLC f/k/a LITHKO
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VIA EMAIL

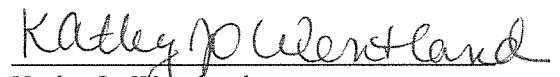
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ATTORNEY FOR COOK & BOARDMAN


Kathy Jo Wentland

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

BALFOUR BEATTY CONSTRUCTION,
LLC,

Plaintiff,

v.

LIBRARY ASSOCIATES, LLC; and
METROPOLITAN LIFE INSURANCE
COMPANY, a New York Corporation,

Defendants.

LIBRARY ASSOCIATES, INC.,

Defendant/Third-Party
Plaintiff,

v.

LITHKO CONTRACTING, LLC; GUY M.
BEATY, INC.; BERNARD MMC, LLC;
GULF STREAM CONSTRUCTION
COMPANY, INC.; PRECISION WALLS,
INC.; PALMETTO AUTOMATIC
SPRINKLER COMPANY, INC.; COOK &
BOARDMAN, LLC; 1ST CHOICE GLASS,
INC.; STRONG TOWER
CONSTRUCTION, LLC d/b/a KOCH
CORPORATION; WATSON ELECTRICAL
CONSTRUCTION CO., LLC; TRIMARK
FOODCRAFT, LLC; PLEASANT PLACES,
INC.; DAVID ALLEN COMPANY, INC.;
PREMIER EXTERIORS, LLC; ROBERT
THOMAS IRON DESIGN, LLC; WARCO
CONSTRUCTION, INC.; OLD NORTH
STATE MASONRY, LLC; TOM
ROCHESTER & ASSOCIATES d/b/a
SOUTHEASTERN ARCHITECTURAL
SYSTEMS; FORTON COMPANY, LLC;
LOWCOUNTRY CASE & MILLWORK,

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-10-01108

**THIRD-PARTY DEFENDANT WATSON
ELECTRICAL CONSTRUCTION CO.,
LLC'S MOTION FOR SUMMARY
JUDGMENT AND ALTERNATIVE
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

INC.; QUANTUM COATINGS, LLC;
BALFOUR BEATTY CONSTRUCTION
GROUP, INC.,

Third-Party Defendants.

PLEASE TAKE NOTICE that within ten (10) days of the date hereof, or as soon thereafter as it may be heard, Third-Party Defendant, Watson Electrical Construction Co., LLC (“Watson”), through its undersigned counsel, will move before this Court for an Order granting Watson summary judgment, or alternatively partial summary judgment, against Balfour Beatty Construction, LLC (“Balfour Beatty”), pursuant to Rule 56 SCRPC, because there is no genuine issue of material fact and Watson is entitled to judgment as a matter of law. The grounds for this motion are that the undisputed facts establish the following:

1. That Balfour Beatty is in breach of its contract with Watson because Balfour Beatty refused and continues to refuse to pay Watson the sum of at least \$597,546.28, including retainage.
2. That Balfour Beatty is in breach of its contract with Watson because Balfour Beatty refused and continues to refuse to pay Watson the sum of at least \$62,091.71 for change orders 33 through 40, the labor and services for which were provided to and for the benefit of the project by Watson.
3. That Balfour Beatty is in breach of its contract with Watson because Balfour Beatty refused and continues to refuse to pay Watson the sum of at least \$262,033.40 for changes and construction change directives Balfour Beatty ordered and directed Watson to perform, all of which added work to Watson’s scope of work for the project that is at issue in this case.
4. That Balfour Beatty is in breach of its contract with Watson because Balfour Beatty refused and continues to refuse to issue a change order to Watson in the amount of, or to pay Watson the sum of, \$937,687.61 for additional labor and services Watson provided, to the project

that is at issue in this case, because of delays and inefficiencies caused by persons other than Watson.

5. That neither Library Associates, LLC (“Library Associates”) nor Balfour Beatty can present any evidence of defective work by Watson in need of repair.

6. That neither Library Associates nor Balfour Beatty can present any evidence that Watson caused a delay to the critical path of the design or construction of the project at issue.

7. That Balfour Beatty cannot present any evidence that Watson is in default of its contract with Balfour Beatty.

8. That Balfour Beatty’s refusal to pay Watson until Balfour Beatty is paid by Library Associates and any provision of the subcontract stating that payment to Balfour Beatty is a condition precedent to payment to Watson is in violation of S.C. Code Ann. §29-6-230, which states as follows:

Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.

Watson will rely upon this Motion, its Memorandum of Law in Support as may be filed hereafter, the arguments of counsel at the hearing on this Motion, the Verified Statement of Account by Carroll Lipscombe, Jr. dated March 7, 2019 which is attached as Exhibit A to Watson’s mechanic’s lien attached as Exhibit “1”, the Rule 30(b)(6) deposition testimony of Balfour Beatty portions of which are attached as Exhibit “2”, the Rule 30(b)(6) testimony of Library Associates portions of which are attached as Exhibit “3”, the deposition testimony of Timothy Spano portions of which are attached as Exhibit “4,” other deposition testimony, applicable case law, and/or other supporting materials as may be filed hereafter. In addition to an Order granting summary judgment,

or partial summary judgment, in its favor, Watson seeks such further and additional relief this Court deems just and proper to include statutory interest, attorneys' fees, and costs.

Respectfully submitted this 20th day of August, 2021.

s/Don R. Terry

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT WATSON ELECTRICAL CONSTRUCTION CO., LLC'S MOTION FOR SUMMARY JUDGMENT** has been served by electronic mail as follows:

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This the 20th day of August 2021.

s/Don R. Terry
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In the Matter Of:
South Carolina v Library Associates

Kimberly Brown

April 28, 2021



934 Glenwood Ave SE
Suite 250
Atlanta, GA 30316
855.478.7376

1 change orders relating to the project that included
2 electrical changes?

3 A As I sit here today, I don't know
4 specific change orders that related to the
5 electrical work in the project.

6 Q To your knowledge, Balfour hasn't made
7 any claims against Watson, correct?

8 A I have no knowledge of any claims that
9 Balfour has made toward Watson.

10 Q And is it true that you're not aware of
11 any critical path project delays that were caused
12 by Watson?

13 A Library, as we stated before, did not
14 receive a critical path schedule from Balfour, so I
15 have no knowledge where Watson -- I have not been
16 told by Balfour that Watson delayed any critical
17 path items in the schedule.

18 Q And you have no knowledge or information
19 that shows that Watson delayed the critical path of
20 the project, correct?

21 A I have no knowledge.

22 Q Is there any reason, from Library's
23 perspective, why Watson should not be paid in full
24 for the work that it performed on the project?

25 A Repeat the question.

1 Q Is there any reason, from Library's
2 perspective, why Watson should not be paid in full
3 for the work it performed on the project?

4 A That's a question you'd have to ask to
5 Balfour. I have not been told by Balfour for any
6 reason why Watson should not be paid on the
7 project.

8 Q And I'm not -- again, I'm not interested
9 in what Balfour has to say about it, I'm concerned
10 about what Library Associates's position is.

11 A Library Associates doesn't have a
12 contract with Watson, they have a contract with
13 Balfour Beatty as the construction manager, so I
14 would have to rely on the information that I've
15 received from Balfour.

16 Q Are you aware of any reason that Watson
17 should not be paid in full for its work on this
18 project?

19 A Again, I have not been told by Balfour
20 for any reason why Watson should not be paid in
21 full.

22 Q And aside from whatever Balfour may have
23 told you, you're not aware of any reason Watson
24 should not be paid in full, correct?

25 A I have no knowledge.

1 Q Did Library Associates have any
2 correspondence with Watson's employees that you're
3 aware of?

4 A No.

5 Q Did you review any time extensions
6 during -- strike that.

7 During the course of the project, did you
8 review any requests for time extensions that Watson
9 made in its change order requests?

10 A If you present me the specific change
11 order that requested time extension, I could
12 respond, but please be specific.

13 Q Have you or anyone on your behalf done
14 any schedule analysis to determine whether Watson
15 delayed the project?

16 A No. Balfour Beatty was responsible for
17 the scheduling of the project.

18 Q Have you or anyone on your behalf
19 performed any schedule analysis to determine if
20 changes to the project design delayed completion of
21 the project?

22 A Repeat the question.

23 Q Have you or anyone on your behalf done
24 schedule analysis to determine if changes to the
25 design of the project delayed completion of the

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
C.A. NO. 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION, LLC,
Plaintiff,

vs.

LIBRARY ASSOCIATES, LLC; and METROPOLITAN
LIFE INSURANCE COMPANY, a New York Corporation
Defendants.

LIBRARY ASSOCIATES, LLC,

Third-Party Plaintiff

vs.

LITHKO CONTRACTING, LLC, et al.

**CERTIFIED
TRANSCRIPT**

ZOOM VIDEO DEPOSITION OF TIMOTHY SPANO

December 17, 2020

9:03 a.m.

* * *

Taken By the Defendant Library Associates
remotely By
Zoom Video Conferencing

Reported By:

Taura J. Vulcano, CSR, RPR

1 times. I think after August or September, I don't
2 think we received payment from the owner.

3 Q. So the reason for not paying Cook & Boardman
4 is because the owner hasn't paid Balfour Beatty?

5 A. I would probably say yes.

6 Q. Okay. So in your opinion is there any
7 reason other than that that Cook & Boardman should not
8 be paid?

9 A. Not that I'm aware of.

10 Q. Okay. And -- and did you have any input in
11 the decision not to pay Cook & Boardman the amounts
12 that it's owed on this project?

13 A. No.

14 MS. DiFRANCO: I don't have any other
15 questions for you. Thank you.

16 THE WITNESS: Sure.

17 EXAMINATION BY MR. TERRY

18 Q. Mr. Spano, my name is Don Terry. I
19 represent Watson Electrical Construction. How are
20 you?

21 A. I'm great. How are you?

22 Q. I'm good. You talked just briefly about
23 Watson earlier when talking with Mr. Bundy. And are
24 you familiar with Watson's work on this project?

25 A. I am.

1 Q. Okay. I want to talk a little bit about
2 them generally and then follow up on a few things
3 Mr. Bundy asked you. Generally, do you agree that
4 Watson is entitled to be paid for the work it
5 performed on this project?

6 A. I do.

7 Q. And do you agree that Watson should be paid
8 for all the additional work that it performed on the
9 project?

10 A. I agree.

11 Q. Okay. Watson was issued -- do you recall
12 issuing CCDs to Watson?

13 A. Yes. We would have done that, yeah. Any --
14 any CCD or changes that affected electrical would have
15 been issued to Watson, yes.

16 Q. Okay. And my understanding of your
17 testimony earlier is that it is your belief that all
18 the CCDs for this project were for additional work; is
19 that correct?

20 A. That's correct.

21 Q. And does that include the CCDs that were
22 issued to Watson?

23 A. Yes.

24 Q. Okay. When -- when Watson sent you prices
25 for additional work -- well, let me ask a better --

1 strike that.

2 Are you aware of any amounts that Watson
3 requested for additional work on this project that you
4 agree -- disagreed with?

5 A. Oh, gosh. I don't recall. There's --
6 usually when we get pricing, there's a lot of times
7 that we may disagree with an hourly rate or something,
8 but I don't remember specifically.

9 Q. If you submitted Watson's pricing to the
10 owner, does that mean that you agreed with Watson's
11 pricing?

12 A. Yeah, yeah. If we contested, we would
13 contest before we forwarded it on.

14 Q. Is there any reason that you know of that
15 Balfour has not paid Watson for the work it performed
16 on this project other than that the owner has not paid
17 Balfour Beatty?

18 A. No.

19 Q. Okay. During the project Balfour wrote some
20 letters to Watson discussing manpower issues. And
21 earlier you testified that Watson did not have
22 manpower issues on the base contract work. Did you
23 mean that there were other manpower issues Watson had?
24 And if so, what did you mean?

25 A. Well, all right. So I guess I'll elaborate

1 But it was not manpower based on the original
2 contract. That became change order issues in coverage
3 with still completing the base contract. Did that
4 answer your question?

5 Q. Okay. So these -- I'm sorry. Go ahead.

6 A. I was just saying -- wondering if that
7 answered your question or not.

8 Q. I think it did. And so essentially what
9 you're saying is that if Watson had any manpower
10 issues, it was because of issues caused by changes or
11 other impacts to the project, not something Watson
12 caused?

13 A. Correct. I feel if in general if we had
14 built the original contract, there's always changes.
15 But take away the multitude of changes, I guess
16 indecision on selections, things like that, yeah,
17 Watson had -- had -- definitely had manpower -- the
18 manpower it needed. It got more difficult --

19 Q. Did --

20 A. -- as a result of changes that came on
21 board.

22 Q. Are you aware to any delay to the project's
23 critical path caused by Watson?

24 A. No.

25 MR. TERRY: Those are all the questions

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
C.A. NO. 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION, LLC,
Plaintiff,

vs.

LIBRARY ASSOCIATES, LLC; and METROPOLITAN
LIFE INSURANCE COMPANY, a New York Corporation,
Defendants.

LIBRARY ASSOCIATES, LLC,
Third-Party Plaintiff

vs.

LITHKO CONTRACTING, LLC, et al.
Defendants.

**CERTIFIED
TRANSCRIPT**

30(b)(6) VIDEO DEPOSITION OF BBC, LLC
BY AND THROUGH JEFFREY SANDEEN
VOLUME I

June 15, 2021

9:21 a.m.

* * *

Taken By the Defendant Library Associates
At the Hampton Inn & Suites,
2688 Fernwood Drive
North Charleston, South Carolina

Reported By:
Taura J. Vulcano, CSR, RPR

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1 critical -- their critical path analysis of the 2 project, and we've provided that to you. 3 Q. Where -- this is the last time I'm going to 4 ask you for it before I go to the judge. Where in 5 those four exhibits is there a critical path analysis 6 of your delay claim? 7 A. I have provided all the information -- 8 Q. No, I didn't ask you whether you provided 9 it. I want you to turn to the page. I want you to 10 show me where it is. 11 A. Sir -- 12 Q. I can't find it. You show it to me. 13 A. -- well, in your -- as well as -- 14 MR. HILDEBRAND: Y'all are talking over 15 each other. Asked -- the question is asked and 16 answered. 17 MR. BUNDY: He hasn't answered the 18 question. 19 MR. HILDEBRAND: Yes, he has. 20 MR. BUNDY: No, he hasn't. 21 MR. HILDEBRAND: Absolutely he has. 22 MR. BUNDY: We're going to go to the 23 judge to find whether he answered the question. 24 MR. HILDEBRAND: And I think you're 25 badgering the witness. And he --	1 paid for those. 2 Q. So you have not paid them. Balfour Beatty 3 had not paid 22,452,281.51 in additional costs? 4 A. We have not recovered those costs from the 5 owner yet. 6 Q. You have not paid them either? 7 A. Right. We have not recovered -- 8 Q. Okay. Have the subcontractors paid their 9 claims of 11,118,344.20? 10 A. I do not know. 11 Q. Pardon me? 12 A. I don't know. 13 Q. You don't know. Okay. Does Balfour 14 Beatty -- and I'll just go through this quickly -- owe 15 the subcontractors 11,118,344.20? 16 A. The breakdown is here for what we owe and 17 what is owed to us. I don't know the exact number of 18 how it comprised right now. 19 Q. But I think we disclosed earlier or 20 determined earlier Balfour Beatty doesn't owe it until 21 the owner pays the menu of it, right? 22 A. That's consistent, yes. 23 Q. Now, if it's determined that only a portion 24 of what the subcontractor claims is owed is actually 25 owed by the owner, is the subcontractor claim over at
Page 111	Page 113
1 MR. BUNDY: I don't care what you 2 think. I don't give a shit what you think. 3 MR. HILDEBRAND: All right. Well, glad 4 you put that on the record. 5 Q. (By Mr. Bundy) So you're not going to point 6 out in this exhibit your claim where the critical path 7 analysis is? 8 A. We've provided all of the information to 9 you. 10 Q. All right, that's fine. 11 All right. Under damages, Balfour Beatty 12 and its subcontractors have incurred additional costs 13 in excess of what has been paid due to delays, 14 disruptions, accelerations, impacts, interferences, 15 and extra work in the aggregate of 22,452,281.51. 16 Now, "incurred additional costs," does that 17 mean that this \$22,452,282.51 has been paid by Balfour 18 Beatty? 19 A. These are costs that we have incurred and 20 the subcontractors have incurred. 21 Q. Have they been paid by Balfour Beatty? 22 A. No, these are costs that we have incurred 23 that we submitted for recovery from the owner. 24 Q. Have they been paid by Balfour Beatty? 25 A. The owner has not paid us and we have not	1 that point? Is that -- is that decision binding on 2 the subs, or does Balfour Beatty owe any additional 3 amounts between what the judge may find is owed and 4 what they claim? 5 A. The claims as submitted by the 6 subcontractors is what we have submitted to the 7 ownership group. 8 Q. Right. 9 A. So based on the resolution of those changes 10 and the funds that come as a result of it, that would 11 be passed on to the subs. 12 Q. Okay. And are y'all going to negotiate with 13 the subs if that amount is less than their full claim? 14 How is that going to work? 15 A. We've submitted their cost associated with 16 their claims. And once we recover those costs from 17 the owner, then we will pay the subcontractors. 18 Q. Right. But as it relates to a particular 19 sub if you don't get a 100 percent for that sub, let's 20 suppose -- let's use BMCC -- the Bernhard claim. They 21 want 6 million bucks. Suppose the judge only says 22 they're entitled to three. How is the other \$3 23 million going to be handled? 24 A. We submitted their costs as a total for what 25 they are owed for the project. We have full

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1 A. I don't know.

2 Q. Other tradesmen. What is he referring to

3 about not being able to complete their work due to

4 other tradesmen? Do you know anything about that?

5 A. All I know is that during the time that Old

6 North State was on-site, there were numerous changes,

7 design impacts, inefficient design documents that

8 resulted in tremendous delays on the project.

9 Q. But all of which were the owner's fault or

10 the architect's fault and not the fault of any

11 subcontractors or Balfour Beatty?

12 A. The critical items were fault of the owner

13 and the design team.

14 Q. All the problems he complains about were

15 caused by Library Associates or the architect?

16 A. The critical items that impacted the

17 schedule and the workmanship of the job was as a

18 result of the owner and the design team.

19 Q. Incomplete or incorrect proceeding of work

20 by other subcontractors. Do you know what caused

21 that?

22 A. Yeah, design changes that we couldn't

23 complete work in areas and had to go back.

24 Q. Do you know that as a firsthand knowledge or

25 based on what you've been told?

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1 A. Firsthand knowledge.

2 Q. So you were there during this period of

3 time?

4 A. I'm aware of the impacts that took place in

5 the -- I'm aware of the --

6 Q. You're aware.

7 A. -- impacts that took place during the

8 structure of this facility, yes.

9 Q. How are you aware of it?

10 A. Because that was a significant impact that

11 took place on the structure --

12 Q. Were you told --

13 A. -- at this time with the design --

14 THE COURT: Excuse me. Excuse me.

15 MR. HILDEBRAND: Let him finish his

16 answer.

17 Q. (By Mr. Bundy) How were you aware of it?

18 A. I was aware of the structural impacts on the

19 project and the fact that the design team did not

20 complete their design and was unable to complete their

21 design to allow the project to move forward.

22 Q. How did you become aware of it?

23 A. Because I was aware of it with the project

24 team when they notified us of it.

25 Q. So you were told by the project team?

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1 A. Right.

2 Q. Okay. Stacking of trades, that's all the

3 owner's problem too?

4 A. Yes.

5 Q. Design errors and design changes, et cetera,

6 that's all the owner's problem?

7 A. Yes.

8 Q. All right. Let's look in the middle of the

9 page, the next page. The coordination issues were

10 exacerbated by the fact that Balfour went through

11 numerous superintendents during the course of the job.

12 Now, was it Library Associates' fault that

13 Balfour went through numerous superintendents?

14 A. I don't know exactly what portion of the

15 project that they're talking about. We did have one

16 superintendent that we relieved from that project,

17 yes.

18 Q. So it is not true that Balfour went through

19 numerous superintendents during the course of the job?

20 A. Balfour Beatty relieved one superintendent

21 from that project.

22 Q. Okay. So Balfour Beatty only removed one

23 superintendent?

24 A. That's correct.

25 Q. So the lawyer representing Mr. Anastasi is

Page 245

1 lying when he says Balfour went through numerous

2 superintendents during the course of the job. That's

3 just a lie?

4 A. I don't know what it is. What I can tell

5 you is that there were multiple superintendents that

6 I'm sure they coordinated with, okay, but there was

7 one superintendent that Balfour Beatty relieved from

8 the project.

9 Q. Well, either it's true or it's not. Is it

10 true or is it not true that Balfour went through

11 numerous superintendents during the course of the job?

12 A. I'm not putting myself in the position of

13 what they stated. What I'm telling you is I'm sure

14 that they worked with numerous superintendents on the

15 project, and Balfour Beatty relieved one

16 superintendent of their position.

17 Q. The initial superintendent was Robert

18 Cotheman. You agree with that?

19 A. Yes. He's the individual that we removed.

20 Q. Who was replaced by Dan Ricci. You agree

21 with that?

22 A. Yes.

23 Q. Who was replaced by Geno Garrett. Do you

24 agree with that?

25 A. I don't know that I'd say replaced. Geno

Page 310 1 obligation at all to manage the subcontractors? 2 A. Yes, we've demonstrated that throughout the 3 project. 4 Q. And is one -- and does that duty to manage 5 include the obligation to notify subcontractors that 6 they're not performing adequately under the 7 subcontract? 8 A. Yes. If they are -- if they are in default 9 for whatever reason, we will notify them of the areas 10 that they need to address on a daily basis. I mean, 11 it's just the nature of working on a project. 12 Q. Right. But you do that, in part, because 13 that's what you -- that's the duty that you owe the 14 owner. That's what he's paying you to do, right? 15 A. That's my responsibility, yeah. 16 Q. To manage the subcontractors? 17 A. That's correct. 18 Q. Hence the name construction manager? 19 A. Right. 20 Q. Right? 21 A. Right. 22 Q. Okay. So this notice of default and delay 23 to Old North State Masonry was done honestly and the 24 information contained in it at the time was truthful, 25 correct?	Page 312 1 incomplete nature of that work as of January 23, 2017 2 was caused by Library Associates? 3 A. Again, numerous changes. 4 Q. Arches, notified to start 1/13/17. Scaffold 5 still not complete and no masonry started. Needs to 6 be complete by 1/27/17. Do you have any evidence the 7 failure to complete the scaffolding and the fact that 8 no masonry was started was a result of any actions of 9 the owner? 10 A. Numerous changes. 11 Q. Now, changes that occurred after this date, 12 would they be the cause of this? 13 A. Absolutely not. 14 Q. Okay. So if they move the TV two years 15 later, that wouldn't have prevented these people from 16 putting the scaffolding up? 17 A. But again, if you have a structure that has 18 an impact because it physically cannot be constructed, 19 that is an issue, right? And again, all of these 20 items that they're identifying here doesn't 21 necessarily mean that these are on the critical path. 22 These are items that been identified, that the sub has 23 not completed, that we notified them, and expect them 24 to go resolve. Day to day we have issues that happen 25 on a job. It's our responsibility to identify those
Page 311 1 A. Correct, yes. 2 Q. And it was done in part because it was 3 fulfilling Balfour Beatty's obligation to Library 4 Associates to manage the subcontractors, correct? 5 A. Correct. 6 Q. Okay. So let's look at this e-mail and 7 notice of default. Southwest front entry still 8 incomplete. Was scheduled to complete in November of 9 '16. Do you have any information that the failure to 10 complete was caused by the owner? 11 A. Yeah. There were numerous, numerous design 12 changes and lack of design that resulted in impacts 13 throughout the entire project. 14 Q. Do you have any information or facts as it 15 relates specifically to the southwest front entry that 16 the allegation here that it was still incomplete was 17 caused by the owner? 18 A. Again, numerous changes. If we go back and 19 look at the documents and look at all the revisions 20 that were made throughout the project and all the cost 21 events that took place, the schedule impacts that we 22 incurred, we still haven't received the change orders 23 and the schedule extension as it relates to that. 24 Q. As it relates to the southwest front entry, 25 do you have any evidence that that was -- the	Page 313 1 issues, work with the contractors to go fix it. To 2 the extent that we have delays on the owner and a lack 3 of design that impacts the overall project, that is 4 out of my control. My responsibility is to go manage 5 what I have and the work that I have in front of me. 6 Q. So the critical path is -- does come into 7 play when it relates to subcontractors? 8 A. Critical path is what drives the job, all 9 right? 10 Q. The critical path comes into play when 11 you're analyzing whether a sub's work delayed or did 12 not delay the job? 13 A. Again, the critical path through the project 14 was through all the changes. The changes and the 15 impacts in the lack of design on behalf of Library and 16 WLA is what impacted the critical path on this 17 project. Hands down. 18 Q. Would you agree with me that things that 19 occurred after January 13, 2017, could not have been 20 the cause of scaffolding not being complete and no 21 masonry started? 22 A. Maybe at the time. But if the decisions and 23 the lack of decisions continued, it most certainly 24 could have had an impact. 25 Q. Okay. So things that occurred after the

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WATSON ELECTRICAL)
CONSTRUCTION CO. LLC.,)

Claimant,)

vs.)

LIBRARY ASSOCIATES, LLC and)
METROPOLITAN LIFE INSURANCE)
COMPANY,)

and)

BALFOUR BEATTY CONSTRUCTION,)
LLC,)General Contractor.)**NOTICE AND CERTIFICATE OF
MECHANICS LIEN**

NOTICE IS HEREBY GIVEN pursuant to S.C. Code Ann. §29-5-10, et. seq. that the Claimant **WATSON ELECTRICAL CONSTRUCTION CO. LLC. (“Watson”)** claims and holds a lien upon real property hereinafter described, together with all improvements thereon, for the sum of **One Million Eight Hundred Fifty-Nine Thousand Three Hundred Fifty-Nine and 00/100 dollars (\$1,859,359.00)** plus interest, reasonable attorney’s fees for the collection of said sum, and for the cost of this action.

This lien is intended to attach and to affect the ownership interest of Owner and Contractor in those portions of the premises described as (“property”):

PROPERTY DESCRIPTION: That certain real property located at 404 King Street, Charleston, Charleston County, South Carolina, and identified as PIN number 4601604009 of the Charleston County, South Carolina registry.

Said sum is due and owing to the Claimant for labor and materials furnished in making improvements to the real property hereinafter described by virtue of an agreement with and consent of the persons or entities exercising possessory rights over the subject real property. The said labor and materials were actually used in improving said property within ninety (90) days prior to the date hereof.

That by virtue thereof, by the service and the filing of this Notice and Certificate, and pursuant to the provisions of the statutes, the Claimant has and claims a lien to secure the payment of the debt due and the costs, interest and attorney's fees involved in enforcing said lien upon real property located in Charleston County, South Carolina and being more particularly described as the property described above.

A verified statement of account and the amount due thereon for labor and materials actually provided is attached hereto as **Exhibit "A"**.

The subcontractor is required to be licensed or registered as contemplated by S.C. Code. Ann. § 29-5-15. The S.C. License or Registration number for Watson is M106527.

THIS THE 7th day of March, 2019



**Don R. Terry, Esq., SC Bar # 101395
SMITH TERRY & JOHNSON
11525 N. Community House Rd., Suite 425
Charlotte, NC 28277**

FILE NUMBER _____

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WATSON ELECTRICAL)
CONSTRUCTION CO. LLC.,)

Claimant,)

vs.)

LIBRARY ASSOCIATES, LLC and)
METROPOLITAN LIFE INSURANCE)
COMPANY,)

and)

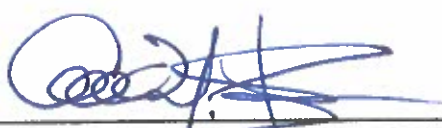
BALFOUR BEATTY CONSTRUCTION,)
LLC)

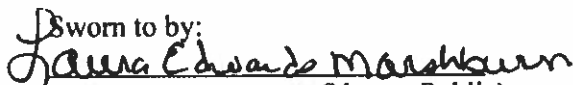
General Contractor)

VERIFIED

STATEMENT OF ACCOUNT

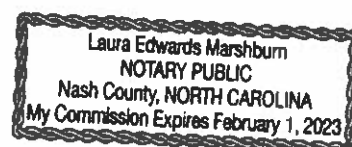
Personally, appeared before me, Carroll M. Lipscombe, Jr. who being duly sworn, deposes and states that I am the Chief Financial Officer of Watson Electrical Construction Co. LLC ("Watson"), and I am authorized to give this Affidavit. I am familiar with the accounts owed for services performed by Watson for the Owner's benefit on the property described in the Lien Claim. The amount owed to Watson in total is **One Million Eight Hundred Fifty-Nine Thousand Three Hundred Fifty-Nine and 00/100 dollars (\$1,859,359.00)** and is derived from the outstanding pay applications, change requests, and or claims.


Carroll M. Lipscombe, Jr. - CFO
Watson Electrical Construction Co. LLC

Sworn to by:

(Notary Public)

This 7th day of March 2019

My Commission expires on: 02 - 01 - 2023



EXHIBIT

A

1160

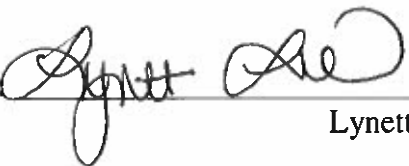
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served a copy of the foregoing **NOTICE AND CERTIFICATE OF MECHANICS LIEN** upon the parties listed below by depositing a copy thereof in the United States mail in Charlotte, North Carolina, postage pre-paid, certified, return receipt requested and addressed as follows:

**Library Associates, LLC
c/o Michael R. Bennett
17 Lockwood Blvd, Suite 400
Charleston, SC 29401**

**Balfour Beatty Construction, LLC
c/o Corporation Service Co.
1703 Laurel Street
Columbia, SC 29201**

This the 7th day of March, 2019.

By  _____
Lynette Lemor

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
Strong Tower Construction, LLC d/b/a
Koch Corporation, Watson Electrical
Construction Co., LLC, Trimark Foodcraft,
LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC,
Warco Construction, Inc., Old North State
Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings, LLC, Balfour Beatty
Construction Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION
LLC'S MEMORANDUM IN OPPOSITION
TO SUMMARY JUDGMENT BY
WATSON ELECTRICAL
CONSTRUCTION CO., LLC

Plaintiff, Balfour Beatty Construction, LLC ("Balfour"), through its below-signed attorneys, submits this Memorandum in Opposition to the Motion for Summary Judgment filed by Watson Electrical Construction Co., LLC. ("Watson").

FACTS

Balfour filed this action against Library Associates, LLC (“Library”), the owner of the Hotel Bennett in Charleston (“Hotel”), for amounts owed to Balfour for work and materials incurred in the construction of the hotel, along with damages sustained by Balfour due to almost 500 days of delay Balfour attributes to Library because of Library’s changes and delays in selections and because of improper design and design services provided by Library.

In response, Library has asserted claims for alleged deficient work and delays which it maintains were caused by Balfour and its subcontractors. Library claims liquidated damages for over \$4 million dollars, lost profits of approximately \$25 million, and repair costs of approximately \$2.7 million dollars.

Balfour did not self-perform any of the work at the Hotel. Instead, Balfour contracted with various subcontractors, including Watson, to perform all of the work at the project, work which Library now claims to have caused damages to Library. Watson supplied various work and material to the Hotel, including installation of the complete electrical system in the Hotel and the Hotel’s parking garage. See Watson’s Subcontract Scope of Work, previously filed with Watson’s answer to the second amended complaint filed November 3, 2020 at pp. 49-59.

Library has indicated that it intends to introduce evidence at trial that it will argue shows Watson caused or contributed to delays that entitle Library to recover damages from Balfour. For example, Library’s scheduling expert Mark Boe produced a report in which he opines there were “significant delays throughout the project caused by subcontractor’s failure to provide the level of manpower needed to complete on time, and significant quality deficiencies that led to rework by critical trades.” In support of this

contention, Boe points to, *inter alia*, numerous instances involving Watson (described in more detail below).

If Library proves it is entitled to liquidated damages or other damages from Balfour due to delays, defective work, or other breaches attributable to Watson, Balfour is entitled (pursuant to Balfour's subcontract with Watson) to a setoff in the amount of those damages from the sum that would otherwise be due to Watson. Therefore, questions of fact remain as to what amounts, if any, are owed by Balfour to Watson. Accordingly, Watson is not entitled to summary judgment.

Additionally, Watson is not entitled to partial summary judgment as to any portion of its claimed damages. First, Watson has failed to present evidence of any such specific subset of its claimed damages for which there are no factual issues as to Watson's entitlement to that amount. Library does not limit the impact of Watson's alleged breaches or delays to a specific amount, and Library seeks damages from Balfour for amounts far greater than the amount for which Watson seeks summary judgment from Balfour. When viewing the evidence in the light most favorable to Balfour (as required for purposes of this motion), Balfour could be entitled to a setoff for an amount greater than the total amount Watson contends it is due. As such, Watson is not entitled to partial summary judgment as to any subset of the \$1,859,359 for which Watson seeks payment from Balfour.

WATSON'S SUBCONTRACT

Balfour's subcontract agreement with Watson states:

Contractor may deduct and withhold from payments otherwise due Subcontractor the costs Contractor has incurred or may reasonably incur as a result of a default.

See Art. 5C of Watson's Subcontract Terms and Conditions, previously filed with Watson's answer to the second amended complaint filed November 3, 2020 at p. 23; see *also* Art. 2D ("Contractor may withhold amounts due under this Subcontract . . . to cover Contractor's reasonable estimate of any costs or liability Contractor . . . may incur for which Subcontractor may be responsible.") *Id.* at p. 20.

Under the agreement, Watson will be liable to Balfour for any and all damages incurred by Balfour caused by Watson's default. See Art. 5A of Subcontract Terms and Conditions, *Id.* at p. 23;¹ see *also* Art. 7 (requiring Watson to indemnify Balfour for any and all damages arising out of or occurring in connection with any default or failure to timely or fully perform as required by Watson). *Id.* at p. 24.

Moreover, Watson's subcontract specifically provides that any liquidated damages assessed against Balfour arising from delays attributable to Watson will be the responsibility of Watson. See ¶76 of Watson's Subcontract Special Provisions, previously filed with Watson's answer to the second amended complaint filed November 3, 2020 at p. 48 ("[S]hould Contractor be assessed liquidated damages and any part or all of the delay is attributable to Subcontractor's performance of the work, then Subcontractor will be responsible for its proportionate share of the liquidated damages amount.").

Art. 5C of Subcontract Terms and Conditions states:

[W]hen the Project has been completed by Contractor and accepted by Owner, if the unpaid balance earned under this Subcontract exceeds the expense incurred by Contractor or its sureties as a result of the default and **in paying any damages or costs due to Owner** or third parties because of Subcontractor's default, such excess will be paid by Contractor to

¹ If Library proves that it is entitled to damages from Balfour as a result of Watsons' work, it would be a "default" under the Subcontract. See Art. 5A of Subcontract Terms and Conditions ("If Subcontractor fails to fully or timely comply with any duty imposed by Legal Requirements or this Subcontract, including the Contract Documents, it is in default.") (emphasis added).

Subcontractor. If those expenses and/or damages exceed the unpaid balance, then Subcontractor will pay the difference to Contractor upon demand.

See Art. 5A of Watson's Subcontract Terms and Conditions previously filed with Watson's answer to the second amended complaint filed November 3, 2020 at p. 23, *Id.* at p. 23 (emphasis added).

That is, where, as here, the owner's claims for damages against Balfour may result in a setoff against Watson, the subcontract agreement envisions the present scenario where the owner's claims against Balfour are resolved before the unpaid balance otherwise due to Watson will be paid (less any credits due to Balfour on account of damages to the owner that Balfour is ordered to pay due to Watson's breaches).

SPECIFIC ALLEGATIONS AS TO WATSON'S WORK

Library's scheduling expert Mark Boe produced a report in which he opines there were "significant delays throughout the project caused by subcontractor's failure to provide the level of manpower needed to complete on time, and significant quality deficiencies that led to rework by critical trades." ("Exhibit A"). In support of this contention, Boe points to, *inter alia*, occurrences involving Watson. The following are quotes from Boe's report (with references to Watson in bold type):

- "[Balfour] was having significant problems with multiple subcontractors in March 2017 when . . . it also issued default notices to . . . **Watson**. . . [Balfour's] March 2017 notice to **Watson** indicated that **Watson** had missed schedule dates on L5 and L6."

Page 19 of Report of Mark Boe, P.E., PSP, dated Dec. 15, 2020, Exhibit A, p. 21.

- "In May 2017 BBC's Vice President, Operations Tony Stoneking expressed the need for executive meetings between BBC and **Watson** to yield additional manpower. The notion that manpower was being discussed at the executive levels simply highlights the fact that the inadequate subcontractor staffing was negatively impacting the Project."

Ex. A at p. 21-22.

- “Labor shortages continued to be a problem through CS’s Period 3; near the end of Period 3 in September 2017 BBC expressed its frustration with subcontractors blaming labor shortages on design changes:

*...it is obvious that **Watson**, and other trades are overwhelmed by the amount of work to complete they simply don't have enough manpower to handle the activities at hand.”*

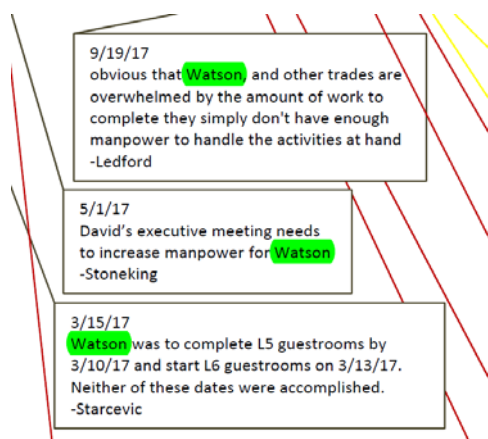
Ex. A at p. 21-22.

- “BBC’s Vice President, Operations Tony Stoneking admits as much in an email regarding the use of **Watson** on a future project.

*“**Watson** is a good sub past 20 years with me but has greatly struggled on our last 2 jobs at Marion square and garner. Yes, I know there is 2 sides of every story especially at Marion... but this is a huge job and tight schedule with no margin for error. On those 2 jobs they struggled with quality manpower, supervision, safety practices, quality of installations, refusing to do changes at garner, change order price inflation ... all of which ties up a lot of our resources.” [Emphasis added]
-BBC Vice President, Operations Tony Stoneking, August 31, 2018.”*

Ex. A at 24-25.

Boe’s Report includes a graphic depicting information he says relates to delays attributable to subcontractors, which specifically mentions Watson.



Ex. A at 32.

Boe's report suggests there were also other delays caused by Balfour's subcontractors other than the instances specifically listed in his report; the report states:

"Throughout the Project, BBC was impacted by inadequate manpower on the job. There are very few period of times where BBC is not requesting additional manpower from one of its subcontractors in writing. This does not take into account how many verbal requests may have been made by the superintendents on site. How many times did a superintendent have to verbally request adequate manpower before not only the site project management but BBC's executive management had to step in? The lack of manpower not only affects the direct work which is being completed at a slower pace or not being completed at all, but it also has a secondary indirect effect on the Project because it diverts the focus of BBC's staff from other issues."

Ex. A at 22-23.

Boe specifically references Watson again following this passage. Ex. A at 23.

Library's discovery responses also indicate its intention to argue that the facts support a finding that Watson caused or contributed to delays for which Library is entitled to damages from Balfour, as Library denied a request to admit under Rule 36, SCRCP that Watson did not cause or contribute to Library's claimed damages, as follows:

9. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Watson Electrical Construction Co., LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

Library's Responses to Balfour's Requests for Admission, Exhibit B.

ARGUMENT

I. Questions of Fact Exist as to Whether, and if so for What Amount, Balfour is Entitled to a Setoff against Watson.

Balfour is entitled to withhold amounts otherwise due to Watson to cover the costs of damages Balfour may be ordered to pay Library resulting from Watson's breaches. See Art. 5C Watson's Subcontract Terms and Conditions previously filed with Watson's answer to the second amended complaint filed November 3, 2020 at p. 23. Library asserts claims against Balfour for liquidated damages and other claimed damages including lost profits and repair costs, and (as shown in the preceding section) Library's expert Mark Boe opines that Watson caused or contributed to delays that Library intends to use to argue its entitlement to these claimed damages.

When viewing the evidence in a light most favorable to Balfour, Watson cannot show that the facts at trial will not result in a finding that Watson caused a delay that results in an award of damages against Balfour in favor of Library (which, in turn, would entitle Balfour to a setoff against Watson). While Balfour vigorously denies Library's entitlement to any damages and intends to prove the same at trial, these are matters of contested fact to be decided at trial. Therefore, based on the pleadings, expert reports, and discovery responses, Balfour may be entitled to a set off against amounts otherwise due to Watson. Accordingly, Watson is not entitled to summary judgment.

Watson argues that it is entitled to summary judgment based on the text of S.C. Code Ann. §29-6-230 (declaring that pay-if-paid clauses are not enforceable). However, the first sentence of §29-6-230 shows that this argument should be rejected, as it states that "performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts." (emphasis added). Here, there are genuinely disputed material facts (based on evidence expected to be offered by Library and its experts) as to whether Watson performed its

work in accordance with the contract. Art. 5C of Subcontract Terms and Conditions (quoted above, allowing Balfour to wait until Library's claim for damages is resolved before paying any unpaid balance to Watson after any setoff is applied) is not a "pay-if-paid" clause. Due to Library's claims for damages, there is uncertainty as to what amounts, if any, Watson will ultimately be due, and Art. 5C simply allows Balfour to withhold payment of what would otherwise be the unpaid balance to Watson until after that uncertainty is removed through resolution of Library's claim for damages.

Watson is not entitled to partial summary judgment for the same reasons. Watson cannot show that the facts could not result in a set off against Watson for an amount greater than the entire sum for which Watson seeks payment. For example, while Balfour intends to prove otherwise at trial, under the "most favorable" standard it is a factual issue at this juncture whether Library will recover the full amount of liquidated damages it seeks from Balfour and whether Watson was responsible for the delay entitling Library to the liquidated damages. In this scenario, the set off applied to Watson would be greater than the amount for which Watson seeks payment, meaning Balfour would owe nothing to Watson. Therefore, Watson is not entitled to partial summary judgment because there is a scintilla of evidence that could result in a finding at trial that Balfour owes nothing to Watson.

Moreover, Watson is also not entitled to partial summary judgment because it simply has not carried its burden in proving that undisputed facts show its entitlement to some subset of its claimed damages notwithstanding Balfour's contractual rights to a setoff. Watson seeks summary judgment for the entire amount of its \$1,859,359 in claimed damages and did not prove an independent entitlement to some subset of those damages even if a setoff against Watson is applied for the maximum amount reasonably

inferable from the evidence. Therefore, Watson is not entitled to partial summary judgment as to any amount of its claimed damages.

II. Questions of Fact Exists as to Watson's Initial Entitlement to Damages it Claims.

As discussed in the preceding section, the facts show Balfour may ultimately be found to be entitled to a setoff against amounts that would otherwise be due to Watson. However, for at least some of Watson's claimed damages, there are also disputed facts as to whether Watson is entitled to those sums in the first place, even without a set off.

For example, Watson seeks summary judgment in the amount of \$937,687.61 for "additional labor and services Watson provided, to the project that is at issue in this case, because of delays and inefficiencies caused by persons other than Watson." (emphasis added). As is evident from Watson's own categorization of these claimed damages, Watson's entitlement to these sums is dependent on a finding that this additional labor and services was performed due to delays and inefficiencies caused by someone other than Watson.

Article 4C of Watson's subcontractor agreement reflects this, as it states:

- C. To the extent that any Work delays or inefficiencies are caused by Subcontractor or those for which it is responsible, then Subcontractor will: (i) not be entitled to any additional compensation nor any time extension; (ii) on its own account, or as directed by Contractor, increase shifts, personnel, operations, days of work, equipment and facilities, and work overtime as needed, to overcome any such events at no increase in price; and (iii) if requested, submit within three business days for Contractor's approval a recovery schedule demonstrating how it will meet the current Project Schedule.

Art. 4C, Watson's Subcontract Terms and Conditions, previously filed with Watson's answer to the second amended complaint filed November 3, 2020 at p. 22 (emphasis added).

That is, Watson is not entitled to any portion of the \$937,687.61 in claimed delay damages for which the delays or inefficiencies resulting in this work are found to have

been caused by Watson. As discussed in more detail above, Library's expert opines that Watson did cause or contribute to delays at the project. Thus, whether and to what extent, if any, Watson caused the delays or efficiencies giving rise to this \$937,687.61 in additional work is a disputed factual matter to be resolved at trial.

Accordingly, for this additional reason Watson is not entitled to summary judgment as to the \$937,687.61 in Watson's claimed delay damages.

CONCLUSION

For the reasons stated above, Balfour respectfully submits that significant questions of fact exist to be addressed at trial regarding any entitlement by Watson to payment, and therefore Watson's motion for summary judgment should be denied.

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August 27, 2021

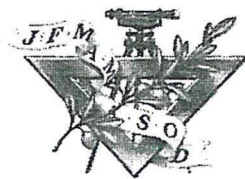
Exhibit A

Report to Bundy McDonald, LLC

regarding the Construction of the

Hotel Bennett (Hotel at Marion Square)

Rebuttal of Expert Reports



Prepared by:

A handwritten signature in black ink, appearing to read 'Mark Boe', is written over a horizontal line.

Mark Boe, P.E., PSP

Capital Project Management, Inc.

December 15, 2020



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I. EXECUTIVE SUMMARY

Balfour Beatty Construction, LLC (“BBC”) was contracted by Library Associates, LLC (“LA”) to provide preconstruction and construction management services for the construction of a hotel at Marion Square (“The Project”), later known as Hotel Bennett, in Charleston, South Carolina.^{1,A} BBC was the Construction Manager and Constructor for the Project. The architect for the project was Winford Lindsay Architect (“WLA”) and Matrix Program Management (“Matrix”) acted as the Owner’s Representative. After entering into a Preconstruction services contract on September 22, 2014, LA issued a Notice to Proceed on March 30, 2015^{B,2,3,4,5} under a Guaranteed Maximum Price (“GMP”) contract (GMP dated February 18, 2015).⁶ The contract dictated a Hotel Opening date of July 30, 2017, with Liquidated Damages (LDs) to be assessed at \$9,000 per day for late completion.^C

Owner Change Orders were issued for \$5,637,169.15 through Payment Application #44,⁷ and the contractual Hotel Opening date was extended by 20 days to August 29, 2017⁸. Over the course of the project the work was delayed because of multiple issues. Hotel Opening actually occurred on February 1, 2019, 511 days later than the adjusted completion date. WLA provided a notice of substantial completion on February 15, 2019.

In January 2019, as the Project neared completion, BBC submitted a Preliminary Consolidated Claim⁹ seeking costs of more than \$22 million, and an unspecified compensable time extension. BBC alleged that LA delayed the completion of the work and was responsible for the additional costs incurred by BBC and its subcontractors. WLA responded on February 4, 2019, stating that the information provided was insufficient to analyze the claim.¹⁰ BBC submitted additional documentation to support its claim in March 2019 in the form of four binders.¹¹

On November 16, 2020, Contract Solutions LLC (CS) issued a Schedule Delay Analysis report authored by Mark Doran.¹² The report concluded that the project was delayed 516 days, all of which was compensable delay caused by the Owner. A report was also issued by Core International Consulting, LLC

^A For this report, footnotes are lettered, and endnotes (superscripted numbers) indicate exhibits

^B The original NTP was issued for March 23, 2015. BBC disputed the March 23, 2015 date stating a previous agreement for a March 30, 2015 NTP. Although a revised NTP citing March 30, 2015 could not be found in the Project records, subsequent project documentation refers to a March 30, 2015 NTP and corresponding completion date of July 30, 2017 as the baseline for the contract.

^C LDs are limited in the Agreement (Section 2.3.1.3) to “the Contractor’s stated fee.” Fee is stated (Section 5.1.1) to be 2.5% of the Cost of the Work.

(CORE) authored by Steve Huyghe,¹³ that had various opinions concerning the performance on the project by the Owner, the Architect, and the Contractor. While the report acknowledges it did not provide a critical path delay analysis, it appears to have opinions concerning project delay.

Also on November 16, 2020, Capital Project Management, Inc. (CPMI) issued a report reviewing the allegations in the original claim, to the extent possible.

This report will respond to the allegations of excusable and compensable delay from the two reports. Mr. Mark Boe, P.E., PSP is a Vice President and founding shareholder at CPMI, and is responsible for the preparation of this report. Mr. Boe has over 35 years in the construction industry, with the last 25 involving the preparation and analysis of critical path schedules, the analysis of delay and lost productivity claims, and claim damages. Mr. Boe's resume was included with his November 16, 2020 report.

CPMI has requested access to the documents reviewed by BBC's experts in order to properly respond to their reports. To date we have not received what was requested, and would require additional time to review and analyze the documents if received in the last days before the report due date. Significant missing documents include basic elements of the CS report, including the schedule files concerning the MSH-049 as-built schedule, and daily reports for the entire project duration, including subcontractor daily reports (with the exception of the mason, who included its daily reports in its claim). CPMI reserves its rights to revise this report based on additional documents or information.

II. OPINIONS

1. BBC did not meet its burden of proof regarding either excusable nor compensable delay.
2. The schedule analysis provided by CS ignores the contractual requirement to base time extensions on the contemporaneous schedules and updates, among others.
3. CS's schedule analysis is essentially a "total-time" analysis; it unreasonably assigns every day of delay to the Owner, and claims every day of delay as compensable. Total-time analyses are considered to be virtually worthless.
4. CS entitlement assessment is based on conclusory statements concerning an amalgam of allegations of changes and lack of design coordination, without acknowledgement of BBC's responsibilities based on BBC's pre-construction contractual duties, or its responsibility for coordination during construction. The analysis fails to identify specific change directive that caused critical path delay.
5. CS schedule analysis stated methodology (as-planned versus as-built or as-built critical path) is disfavored in the industry; among other criticisms it is not appropriate for a project of this length, is subject to manipulation through assignment of the as-built logic, and fails to account for concurrency.
6. CORE's schedule analysis was (by its own admission) not a critical path method analysis, and thus violates the contract requirements. It also is a "total time" analysis, and does not state a methodology, but appears to have the same problems as the as-planned versus as-built method.
7. CS's Period 1 alleged delay of 15 days for early completion is not allowable by the Contract, and conflicts with contemporaneous schedules and documents.
8. CS's Period 2 delay of 168 days to the Structure is unreasonably based on delays to the structure impacting the removal of the tower crane, but fail to account for the fact that the as-planned schedule does not include the removal and infill as a predecessor to Level 2 work, and the delay was actually caused by a BBC decision to set precast using the tower crane.

9. CS's Period 3 delay of 95 days was based on delay to the drywall installation of ceilings in the Level 2 Prefunction/Ballroom; that measure is unreasonable in that the activity cited as critical actually had nearly 90 days of float in the contemporaneous critical path schedule update, and CS's projected extension for this period projects nearly 60 more days of delay than were indicated at the time. Either CS is incorrect in its evaluation of the critical path or BBC's contemporaneous schedule was not accurate to within 60-90 days with respect to both what was critical and the projected completion.
10. CS's Period 4 delay of 141 days based on release of the Barn Doors was not on the critical path of the contemporaneous schedules.
11. CS's Period 5 delay of 76 days based on final inspection for elevators 1-4 and for the swimming pool failed to take into account the actual causes of delay, and ignored the contract requirements for Substantial Completion. CS failed to account for specific delays to elevator inspection caused by the elevator subcontractor.
12. CS's delay assessment in each period failed to account for labor and quality deficiencies by BBC's subcontractors. BBC had significant delays throughout the project caused by subcontractor's failure to provide the level of manpower needed to complete on time, and significant quality deficiencies that led to rework by critical trades.

III. CONTRACT SOLUTIONS LLC SCHEDULE DELAY ANALYSIS

A. Summary/Opinions

CS report concluded that each of the 516 days of delay were caused by the Owner, and that not even one day was caused by BBC, by its subcontractors, or by other causes outside its control – essentially a “total time” analysis. The report fails to adopt the Contract delay language, or to acknowledge the Contract’s language in any way. CS fails to utilize a method that complies with the Contract requirement to utilize the contemporaneous critical path schedules actually used on the project. It endorses a schedule analysis methodology (As-Planned versus As-Built) that is disfavored by the courts for good reason. And then it performs that analysis using an As-Planned schedule that is deficient in that it does not include work that it alleges is critical. Further, instead of using the schedules prepared by BBC, CS developed an “As-built critical path”^D schedule that is flawed in many ways. One of the criticisms of the As-Planned versus As-Built method is that it is not a critical path method, which is specifically required by the Contract. CS also either did not look for, or did not find, concurrent delays caused by BBC or its subcontractors. That is another known deficiency in the method chosen, and CS ignored several major concurrencies – the documents related to BBC’s difficulty in finding labor on the project is significant, and it contemporaneously blamed subcontractors for critical path delay.

Finally, CS’s review of entitlement issues, and its assignment of compensable time extensions is conclusory. CS’s analysis measured delays, and then repeated a mantra of alleged incomplete and uncoordinated design. Mr. Doran doesn’t profess design experience sufficient to suggest he is an expert in design standard of care. He isn’t a Professional Engineer. He expresses no views on the coordination responsibilities or failures of BBC, or of BBC’s subcontractors. Mr. Doran’s opinions on entitlement should be ignored.

There can be no argument that the Owner made significant changes to the project, or that some of those changes would impact the Contract Completion date. But the Contract required BBC to determine which issues caused critical path delay, provide timely notice and submit a critical path analysis , based

^D As discussed later, the term “As-built critical path” has no accepted definition in the industry. While as-built dates can be generated from contemporaneous documents, or, as in CS’s report assuming that the schedule files are accurate, the logic between each of the activities is wholly based on the judgement of the Analyst. So, while the report regularly addresses the as-built critical path as if it were fact, it is actually a series of (to date) undocumented assumptions.

on the contemporaneous schedule updates, so that the Architect could grant time incrementally in order to allow the Owner to plan for Hotel Opening in a reasonable way and mitigate the delay where possible. Instead, BBC failed to provide this delay analysis, and its schedule updates gave the Owner the idea that the delays were not significant. When the schedules did eventually show delay, they were accompanied by general allegations rather than detailed analysis. Only when the project was complete did BBC indicate that it considered all the delay to be based on Owner changes and all to be compensable. But even now BBC has not provided the detailed critical path method analysis of cause and effect anticipated/required by the Contract.

B. Contractual Burden

Summary: CS ignored the requirements of the Contract in its selection of analysis methodology, and in its review of the delays. It further ignored BBC's contractual burden related to its pre-construction responsibilities and field coordination.

Pre-construction: BBC contracted with the Owner to provide pre-construction services, and the Owner stated its expectations and BBC's duties in the Contract.

*The intent of Library Associates, LLC (the Owner) in enlisting the support of a Construction Manager in the design development stages of the Project is to benefit from that Construction Manager's **expertise with the design** and construction of similar buildings, regional market knowledge of construction materials, placement methods, and skilled trade considerations. During Preconstruction, the Construction Manager will provide a variety of services including but not limited to **design document review, scheduling** and costing services necessary **to support the design** and construction effort*

*The Construction Manager **will play an important role in providing information** that will maximize the ability of the Owner and Architect to meet the Owner's functional, aesthetic, and budgetary needs **in the least amount of construction time possible.**^E [Emphasis added.]*

CS' review of entitlement places no meaning on these words.

Time extensions: The Contract included several clauses involving time extension requests. It had a strict 20 day written notice requirement. The causation had to be outside the control or responsibility of the CM. The delays had to directly impact the Contractor's ability to achieve completion of the work. And the delay was specifically required to be indicated on the critical path of the project schedules: "*the Contract Time shall not be extended for unforeseen events or additional Work which is not associated*

^E RFP, Scope of Services (Part II), Summary (Section A)

*with Work indicated to be **on the critical path** in the **original or updated CPM construction schedules**” (AIA A201, 3.10.4, emphasis added).*

Thus the Contract did not allow for delays to be demonstrated through a schedule that did not exist on the project – it required the use of the contemporaneous project schedules used by BBC to prioritize its resources.

The Association for the Advancement of Cost Engineering International (AACE) maintains a nomenclature of delay analysis methodologies that includes an assessment of the inherent limitations of schedule analysis methodologies – AACEI Recommended Practice No. 29R-03 (the RP).¹⁴ First, the RP notes that “*as-built critical path*” is a misnomer since only CPM progress schedules show the critical path (and near critical paths) and activity sequencing for the Work contemporaneously with the delaying events:

*The as-built critical path cannot be directly determined using conventional float calculation on the past portion (left) of the data date. Because of this technical reason, often the critical set of as-built activities is called the **controlling** activities as opposed to **critical** activities.*

The Contract Documents made no reference to “*controlling activities*” nor “*as-built critical path*” and, as previously mentioned, “*Critical path*” is consistently associated in the contract documents with updated CPM progress schedules. These updated CPM schedules document “*contemporaneous perception of criticality by the project participants,*” information that the AACEI deems “*just as important as the actual fact of criticality because important project execution decisions are often made based on perceptions.*”

Regarding as-built controlling activities, the AACEI warns that “*objective identification of the controlling is difficult, if not impossible, without the benefit of any schedule updates.*” In addition to the painstakingly detailed process for identifying such “*As-Built Critical Path*” in Subsection 4.3.C of the RP, any attempt to identify ex post facto as-built controlling activities would first require a schedule-by-schedule assessment of their accuracy against as-built progress data and project management records. CS did not perform such an analysis.

If there is a sufficient number of reliable CPM schedule updates and project records for precisely identifying controlling activities, then there is no reason to go through this difficult exercise for the purpose of then using a disfavored delay analysis methodology when better, more accurate methodologies that directly use the critical paths of updated CPM construction schedule (as mandated by the Contract Documents) are available.

The Contract also disallowed time extensions that include delays due to the fault of the contractor:

*Furthermore, the Contractor is not entitled to an extension of time for concurrent delays that include delays **due to the fault of the Contractor** that, regardless of the delay caused by the Owner, increase the duration of the Work.” (AIA A201 § 8.3.8 – Emphasis added)*

In addition, extension cannot be granted where the delays were within the contractor’s scope of work.

*The Contractor is **not** entitled to an extension of time, compensation of any nature, costs, or damages, if the Contractor is delayed by any event or risk which was within the scope of the **Contractor’s contractual responsibility to foresee, estimate, control, plan for, contract for, and manage** in order to accomplish the Work required by the Contract Documents. (Emphasis added)*

The Contractor’s responsibilities include, but are not limited to, “anticipating and accounting for usual and customary fluctuations and variations in the availability of labor, materials, supplies, and site access.”^F

In addition to requirements for time extensions, the Contract establishes conditions concerning compensability of delays. The Contract Documents included a general bar on all damages for certain classes of delays:

The Contractor shall not be entitled to any additional compensation for its inability to complete the Work early (or prior to the date of Substantial Completion set forth in the Agreement) due to a Class 1 or Class 2 cause, as enumerated above.^G

It is noted that in its Period 1, CS alleges 15 days of early completion delay. CS alleges that BBC completed specific work early, but the Level 6 coordination problems overcame that delay. CS failed to account for this clause, and BBC cannot recover for this 15 days.

Class 1 causes include:^H

- (i) an act or failure to act on the part of the Owner, any consultant or employee of the Owner, or of a separate contractor employed by the Owner that is a breach of this Agreement; or*
- (ii) an injunction against Owner or Owner’s representatives;*

^F AIA A201, § 8.3.1

^G AIA A201, § 8.3.9.

^H AIA A201 § 8.3.2 (4)(a)

This general bar on damages had one exception: the Contractor could claim some specific costs if the Class 1 delay was caused by a Change Directive:

The Contractor likewise waives claims for damages, costs, or expenses ..., except and solely to the extent of those costs allowed under Section 7.3.6 [adjustment in the Contract Sum for Change Directives], plus any necessary site-specific General Conditions costs incurred by the Contractor as a result of the delay.^I

Class 2 includes any other cause of delay not the responsibility of either the Owner or the Contractor, as defined herein. Such causes, include, but are not limited to,^J

- *adverse weather in excess of the normally expected seasonal weather in the location of the Project;*
- *acts of God; riots; civil commotions; acts of War; unavoidable casualties to the Work in progress, except where insurance pays the cost of overcoming resulting delays or extended General Conditions costs that eliminates the need for an extension of time; epidemics; quarantine restrictions; organized labor disputes; freight embargoes;*
- *financial non-responsibility or other cause traditionally defined as "force majeure."*
- *unanticipated and undiscoverable environmental issues (except as to matters addressed in Article 10);*
- *abnormal labor and material shortages not customarily encountered or caused by events not reasonable foreseeable;*
- *Subcontractor and supplier insolvency, default, non-performance (including the performance and correction of non-conforming work not otherwise the result of contractors negligence)*

Extended site overhead costs were not claimable for Class 2 delays:

Neither the Owner nor the Architect will be obligated or liable to Contractor for, and Contractor hereby expressly waives claims against Owner and Architect on account of, damages, costs, expenses, or related impacts that the Contractor, its Subcontractors, sub-subcontractors, suppliers, or other persons may incur as a result of a Class 2 cause enumerated in Section 8.3.2.^K

Conclusion: CS failed to account for the Contract requirements in its analysis. It failed to utilize the contemporaneous schedule updates for measurement and analysis of delay; its selected method relied on an after-the-fact, made for litigation schedule with logic based on CS judgments that conflict with contemporaneous updates and documents. It failed to account for significant delays by BBC and its

^I AIA A201 § 8.3.5

^J AIA A201 § 8.3.2 (4)(b)

^K AIA A201 § 8.3.5

subcontractors that would render the delays concurrent, and non-compensable, at best. And it failed to identify the delays as either Class 1 or Class 2 delays, or as based on Change Directives, which is required in order for the delays to be compensable.

C. Methodology

CS says it performed a forensic schedule analysis using an As-Built versus As-Planned method:^L

Contract Solutions performed an as-built versus as-planned schedule delay analysis. That is, we determined the as-built critical path to Contract completion and compared it to the as-planned schedule.

CS's method is also referred-to in the industry as an as-built critical path analysis. Regardless of the name of the method, CS's analysis method is disfavored in the industry because it is not a critical path method of analysis, it makes arbitrary determinations of criticality, it ignores and contradicts the BBC contemporaneous CPM schedule updates, it incorrectly measures delay by ignoring projected completion date and finds delay where there is no delay, and it contradicts industry standard. Each of these is addressed in more detail as follows.

1. As-built critical path method is a disfavored analysis method

CS's as-built critical path analysis method is a disfavored analysis method that generally is not a CPM method of analysis, ignores float, uses an after-the-fact assessment of the critical path that contradicts the critical path during the project, and ignores the scheduled portion of the CPM schedule including logic and re-sequencing of the work.^M AACE's RP has specific caveats for the use of the method:

^L CS Delay Report, page 10.

^M See generally, Chapter 9 As-built critical path, Dale and D'Onofrio, *Construction Schedule Delays* (Thomson Reuters 2020); §10.07, Wickwire, Driscoll, Hurlbut, Groff, *Construction Scheduling Preparation Liability & Claims* (4th Edition 2020 Supplement); §11.07, Bramble and Callahan, *Construction Delay Claims*, (6th Edition 2020-3 supplement).

M. Caveats in Using the Minimum Protocol / Conditions Requiring Enhanced Protocols

- Not suitable for project durations extending into multiple dozens of update periods.
- Not suitable for projects built in a manner significantly different than planned. The rate of error increases as the incidence of change increases.
- Not suitable for complicated projects with multiple critical paths.
- Does not consider the possibility of critical path shifts either within periods or across the project.
- Susceptible to unintentional or intentional manipulation by choice of as-built data that is incorporated into schedule.
- May fail to identify all critical delays or time extensions, and typically does not adequately consider concurrency and pacing issues.
- Does not consider that changes to original baseline schedule may have been the actual cause of delay instead of the identified delay issues
- Typically fails to consider chronological order of delays or reconcile periodic planned critical path shifts with the as-built critical path
- Not suited for clearly demonstrating acceleration

First, it is not suitable for multi-year projects – this project extended from NTP on March 30, 2015 to early 2019. The method is susceptible to unintentional or intentional manipulations by choice of as-built data that is incorporated into the schedule. CPMI found below that CS's as-built critical path cherry-picked items as its critical path that had months of float in the contemporaneous schedule updates. The method may fail to identify all critical paths and does not not adequately consider concurrency. Another contract requirement that CS's chosen methodology fails to follow. The method does not consider that changes to original baseline schedule may have been the actual cause of delay instead of the identified delay issues. CPMI found that the as-planned schedule did not include the string of activities, or the timing, for the removal of the tower crane – which CS claimed was the cause of over 200 days of delay. For many of those reasons, the as-built critical path method that CS uses is among the least accepted analysis method used in the industry.^N

^N See §12:5 Global schedule delay method comparison, Dale and D'Onofrio, *Construction Schedule Delays* (Thomson Reuters 2020) (study of decisions of legal tribunals around the world opining on acceptance of 241 methods for schedule delay analysis showing that as-built critical path is accepted only 14% of the time it is used).

2. CS method is not a critical path method analysis, makes arbitrary determinations of criticality, ignores and contradicts the BBC contemporaneous schedule updates, CS's method of analysis fails to take into account the contemporaneous schedule updates developed by BBC for management of the project labor, materials and equipment. The Contract required BBC to use CPM to develop schedules and to update the schedules to reflect progress on the job. CS's "*as-built critical path*" is inconsistent the actual critical path in BBC's contemporaneous schedule updates. The effect is that CS's method ignores the effect of BBC's site management in performing workarounds to overcome delays, whether caused by the contractor or the Owner. For example, in CS Period 2 (from August 11, 2016 to March 3, 2017), CS report opines that the critical path in the baseline and as-built were similar, and that ceiling framing in the Level 2 Prefunction and Ballroom was delayed by 204 days because "*...the driving delay to the critical path was removing the tower crane, infilling the slabs where the crane was removed, and completing the North & South Arch Windows at the Pre-function/Ballroom.*"

But the baseline schedule¹⁵ did not include the very logic that CS relies on in its "As-built critical path." The CS report fails to mention that the baseline had no activities related to tower crane removal, infilling the slabs where the crane was removed, and completing the north and south arch windows, and obviously no time for those events after the structure was complete. It is unreasonable to compare the late start of ceilings from plan to actual and not take into account that the plan excluded these activities. At the very least it is unreasonable to consider the delay from removal of the tower crane on February 3, 2017 to the start of work at ceilings at Level 2 Prefunction/Ballroom on March 3, 2017 as even excusable delay, since that work was left out of the as-planned schedule.

In fact, CS entire analysis of this issue is unreasonable. CS opinions concerning the late removal of the tower crane also are contrary to contemporaneous project documentation, including the contemporaneous schedule updates.

The importance of the tower crane on this project cannot be over-stated. In addition to the construction of the structure, the tower crane was needed to load the swimming pool at Level 9, was needed for the mason for Precast setting, and for setting of mechanical equipment. Its removal before completion of the precast was a significant concern to the Mason, Old North State Masonry (ONSM). The decision of when to remove the tower crane had built-in tradeoffs, and those tradeoffs included the later than planned start of Level 2 interiors.

In fact, BCC's plan concerning the tower crane removal changed several times, as demonstrated by its schedule. The baseline had no scheduled date for removal, and no indication what activities would be utilizing the tower crane. By August 2016 (the end of CS Period 1), the schedule showed a delay in removal of the Tower Crane until March 17, 2017 (6 weeks after it was actually removed), and was based on completion of Precast setting (not completion of the structure). CS's conclusion at the end of its Period 1 (August 10, 2016) was that the only delay to date was a 21 day delay in excavation, and a theoretical 15 additional days based on alleged early completion on Level 6. This belies what would have been at least an eight (8) month delay to the Level 2 ceilings caused by late removal of the tower crane that was already included in the contemporaneous schedule updates. CS's opinion highlights one of the primary dangers in this type of analysis – its failure to account for the contemporaneous schedule updates, and the project workarounds implemented by BBC, caused it to conclude the wrong reasons for delay to the tower crane removal.

The moving dates for the tower crane removal had a significant impact on the subcontractors. In December 2016, BBC issued a cure notice to ONSM for failure to keep up with the project. ONSM's response was that it was being delayed by BBC, and *"...moving forward the most important issue we need to resolve is the hoisting plan which will determine the number of masons we can put on this work."*¹⁶

In January 2017, BBC changed its plan for tower crane use again, determining to remove the crane in early February, before completion of the precast setting.¹⁷ The tower crane was removed on February 3, 2017.

CS's report also ignores the myriad of issues that BBC experienced with the tower crane and their impact on the project. BBC's Joe Lauricella notes on January 18, 2016 that one of the issues that has been impacting the job was the *"Tower crane down for approx. 7 days."*¹⁸ On February 17, 2016, while referring to the tower crane, BBC's Dan Riccis notes that the *"main motor is shot"* and that *"This really hurts in section 7 which hurts vertical"* while Scott Greene noted that this *"unit is a nightmare."*¹⁹ There were continuing issues with the tower crane in June 2016 as well when it was again shut down for several days, and BBC would later state that it cost them a week +/- . The team was working on L4 at this time which was delayed by the crane shutdown. Tim Spano requested support from his management in dealing with the crane company reporting: *"We have lost about three weeks so far from crane break downs and have 6-7 months to go."*²⁰ Lithko actually questioned the inspections being performed by the crane supplier, Heede, and urged BBC to perform thorough inspections at this time. Dan Ricci

questioned why the Marion Square job got stuck with an 8000 series crane while other BBC jobs were using a newer crane model. The crane failed a third party inspection in July 2016 and was shut down again for repairs causing a 2 day delay to Lithko work despite their attempts to mitigate.²¹ In September 2016, BBC discussed withholding payment to Heede based on *“all the issues we have had with the crane breaking down.”*²² There was an additional crane malfunction in December 2016 while hoisting stone for ONSM which required additional repairs and to which ONSM remarked *“Thank God with your team’s assistance no one was hurt.”*²³

In addition, the CS report states *“...any delays to the façade caused by late installation of the exterior CMU did not delay the project....”* There are numerous BBC internal emails, emails exchanged with the masonry subcontractor (ONSM) and Notices of delays that reflect the impacts and criticality of CMU work to the project, and BBC’s contemporaneous confidence that the masonry work was, in fact, critical.

*“..The delays on the entry, stairwells, 5th floor and exterior repairs are **greatly affecting our critical path and building dry in.** I want to discuss the schedule effects from the completion delay in these areas as a team so everyone understands what’s at stake...”*

-BBC Senior Project Manager Tim Spano email to Nick Starcevic (Project Manager, BBC) and Joe Anastasi (ONSM), December 07, 2016²⁴

*“....**As critical path as masonry is ONS needs a competent person at all pull planning and Sub meetings as you know.**”*

-BBC Senior Project Manager Tim Spano email to Toby Holloway (VP of Operations, ONSM), February 08, 2017.²⁵

BBC issued at least four Notices of Delay and Demand for Cure to ONSM. CS report completely ignores all these contemporaneous ONSM and BBC issues and the way masonry work affected the critical path and is simply incorrect in its conclusion that CMU work did not result in critical path delays to the project.

This is a key problem with the methodology chosen – over 200 days of delay occurred to the start of the ceilings in the Level 2 Ballroom, but a review of the contemporaneous schedule updates makes clear that the delay was not as suggested by CS. In this case the schedules updates make clear that BBC’s decision to utilize the tower crane for precast erection was the reason for the extended duration. The delay certainly would have been more if not for BBC’s late decision to remove it before completion, at significant cost to other trades and particularly to ONSM.

2. CS method incorrectly measures delay by ignoring projected completion date, thereby ignoring mitigation and finding delay where there is no delay

CS's as-built critical path method only evaluates the as-built schedule, and doesn't identify whether or not the activities were on the critical path in the contemporaneous CPM schedule updates submitted by BBC to the owner, or the actual impact to the project completion. In its report CS states,

...as of October 7, 2017, the drywall ceiling in the Prefunction/Ballroom was in progress and was two hundred ninety nine (299) days behind schedule.... Based on this status, Substantial Completion would be achieved on May 25, 2018, two hundred nine (299) days after the original contract Substantial Completion date....

But if we review the contemporaneous schedule update MSH-033²⁶ with data date October 5, 2017, the substantial completion date of March 27, 2018. **CS's method incorrectly calculated a substantial completion date of May 25, 2018, two months more delay than BBC contemporaneously reported.**

In addition, the activity that CS says is critically delaying the project, Hang drywall ceiling in the Prefunction/Ballroom, had nearly thirteen (13) weeks of float relative to the longest path activity.^o The contemporaneous project schedule showed that the Hang Drywall activity was not critical. **It is inconceivable that BBC's contemporaneous reporting of both the critical path of the project and the completion date would be so inaccurate. If BBC was unaware that the Level 2 Ballroom was critical, it would certainly not apply critical labor and resources in the same way it would for critical work. CS's after the fact promotion of this work as critical, and critically delayed by the Owner and only the Owner is unreasonable.**

3. CS method contradicts industry standard

In addition to violating Contract requirements, CS's delay analysis method contradicts the industry standard for schedule delay analysis, American National Standards Institute/American Society of Civil Engineers Standard 67-17 (ASCE 67).²⁷ ASCE 67, identifies guidelines that any schedule delay analysis should follow. CS's delay analysis method is not consistent with, or contradicts, a number of guidelines in ASCE 67. In particular, it fails to measure delay by the change to the projected completion date, ignores the critical path, and ignores float. Each of these is consistent with the Contract requirements, and is discussed in more detail as follows.

^o -119 work days versus driving path of -187 work days; 187-119 = 68 work days float on a 5 day calendar =95 calendar days.

a) *Fails to measure delay by change to the projected completion date*

ASCE 67, Guideline 4.4 states that “[d]elay should generally be measured by the change to the schedule completion date caused by the delay.” The commentary on that guideline clarifies that “[d]elay should generally be evaluated by comparing the schedules before, during, and after the delay.” CS instead measures delay based on measurement between a flawed as-planned schedule and an unreasonable as-built critical path.

b) *Ignores the critical path, and ignores float*

ASCE 67, Guideline 4.1, states “[b]ecause the critical path is dynamic, delays should be evaluated based on the critical path during each delay.” CS’s as-built critical path method only looks at an as-built schedule, and does not look at whether or not the activities it identifies were on the critical path in the CPM schedule updates prepared and submitted by BBC during the project. ASCE 67 also states that float goes to the project, and the first party to use it. ASCE 67, Guideline 5.1, states that “[a]ctivities with float are not critical.” ASCE 67, Guideline 4.3 further identifies that “[d]elay must be critical to the current adjusted completion date for consideration of a time extension.”

CS opines that the as built critical path should be used to determine the amount of delay on the project even if the as built critical path does not align with the contemporaneous schedule critical path. However, this notion implies that the schedule is merely a historical document and not one of the primary tools used by a constructor to adequately plan and efficiently perform the project work. In fact, BBC routinely referred to the contemporaneous critical path when directing its subcontractors to perform specific scopes of work and demanding increased manpower to meet the critical path schedule. CS’s findings could be interpreted as a failure of BBC’s team to properly identify and control the true (as-built) critical path of the project.

Concerning the 141 day Barn Door delay alleged by CS in its Period 4, CS starts the alleged compensable delay on October 7, 2017, but CS acknowledges that there was no notice until at least January 30, 2018. Even with that notice (included as Attachment to CS report) there was no indication which of the dozens of alleged impacts were critical. As stated earlier, the October 2017 schedule update (MSH-033) did not indicate the critical path alleged by CS during Period 3, and its alleged critical path in Period 4 (the Barn Door submittal delays) were also not indicated as critical. A review of later schedule updates indicates over 60 work days (nearly three months) float in the Barn Door fabrication and installation activities. The Barn Doors were not critical in any of the contemporaneous schedule updates. In the February 14, 2018 update (MSH-038)²⁸ the Barn Doors had more than 50 work days of relative float. By May 2018

the float was even higher. The contemporaneous project schedules, which are required by the contract for the measurement of delay, do not support CS's opinions concerning delay in Period 4. **Again, CS's analysis is either an indictment of BBC's scheduling on the project, or is itself inaccurate. If the Barn Doors were considered critical contemporaneously, and reported to the Owner as such, the work would have been given added priority and the timeframe perhaps shortened. Reporting the work as critical and critically delaying the project two years after-the-fact, and using it to attempt to justify 141 days of compensable time extension, is unreasonable.**

c) *Improperly assesses delay damages when the Owner was not the sole cause of delay*

The industry standard for assessing damages against another party on a construction contract is that its own delay is not concurrent with the other party's delay. ASCE 67 instructs that "[f]or a delay to be compensable, it should be the sole cause of delay." This is consistent with a showing that any BBC-responsible or third-party responsible delay was *not* concurrent with any of the periods for which CS alleges Owner-responsible delay took place. CS has not performed any analysis of concurrency with BBC or subcontractor delays to the project.

D. BBC Labor Issues

By the start of 2016, BBC began having manpower issues throughout the job. The lack of available manpower was consistent and pervasive throughout the entire building. The CORE report performs an analysis of the manpower trends on the project. A comparison of CORE's estimate of required manpower levels to actual levels indicates that the project was significantly under-staffed. CORE opined that RFI's and items on the monthly Critical Issues log were the driving force behind the lower subcontractor staffing levels and that open issues prevented BBC from manning the job efficiently. However, correlation between monthly RFI's and manpower does not prove causation. One could argue that the lack of manpower prevented BBC and its subcontractors from proper planning and identification of field discrepancies in a timely manner and thus turned even minor issues into fire drills that required immediate resolution. Furthermore, BBC's internal correspondence disputes the CORE conclusion:

*"...it is obvious that Watson, and other trades are overwhelmed by the amount of work to complete **they simply don't have enough manpower** to handle the activities at hand.*

*As you know, **it's a red herring to state that design issues are holding up work.** The design issues are probably less than 10% of the list..."* [Emphasis added]

-BBC Senior Project Engineer Ryan Ledford reporting to Vice President,
Operations David Stanton, September 19, 2017²⁹

As will be presented below, in addition to BBC's own internal correspondence discussing the manpower shortages, it repeatedly sent notices to the offending subcontractors stating the schedule impact and requesting additional manpower. CPMI Tab B is a timeline of these manpower issues. BBC brought labor shortages to the subcontractor's attention via conversations, emails and formal cure notices.

In January 2018 BBC identified 400 items that needed the attention of its drywall subcontractor, Precision Walls. *"...The list of over 400 items is in no way 100% accurate, complete, or final, but is a clear indication that **Precision Walls does not have sufficient manpower onsite...**"*³⁰[Emphasis added].^P

Manpower became problematic in early 2016 while Waterproofing Specialties, Inc. ("WSI") was on site. During the first quarter of 2016, BBC's superintendent Dan Ricci exchanged numerous emails with WSI citing multiple issues such as a lack of material and manpower. Mr. Ricci noted in his emails that WSI was *"pushing us to the right"*³¹ and that *"this will push vertical."*³² During this time period, BBC was working to install foundations and the waterproofing was critical to completing foundations and getting the building out of the ground. BBC's Scheduling Manager, Joe Lauricella noted in January 2016³³ that the *"Waterproofing Subcontractor both lack of materials and manpower"* was one of the issues that impacted the job over the past month.

Issues continued into the second quarter of 2016 when the concrete contractor, Lithko Contracting, LLC ("Lithko") was working on Level 3 (L3) of the building. Mr. Lauricella again noted in his May 2016 schedule update email³⁴ that *"To date this has not been going well Lithko continues to lose days at each update and depleting valuable float in the schedule."* Things became worse in June 2016 when BBC issued a formal Notice to Cure³⁵ to Lithko citing *"the project schedule is currently 11 days calendar days behind schedule in large part due to Lithko"* and that *"Lithko has been averaging about 25 men on site"* which was determined to be *"half the crew size that should be on this job."* At this time, BBC notified Lithko that they were in default of their subcontract. CS argued in its report that the project was delayed during this period but fails to acknowledge any of the challenges and delays created by WSI and Lithko who were working on critical path activities.

^P The date in the letter has a typo referencing 2017 instead of 2018. 2018 is confirmed by the date of the email transmitting the cure notice.

From the third quarter of 2016 through first quarter of 2017, BBC consistently requested that the mason, ONSM provide more manpower to adequately staff the job. Prior to ONSM mobilizing to site on July 6, 2016, BBC was concerned about its ability to properly man not only the Hotel Bennett Project, but the 4 other projects that ONSM was working on for BBC noting that *“we need to have a meeting concerning Old North State Masonry and their Manpower issues, as all Masons right now have severe manpower issues.”*³⁶ ONSM was not in a position to hit the ground running as they needed to hire all new masons for the Project, were non-committal about start dates.³⁷

Both internal and external communications from BBC detail ONSM continuing manpower issues in August 2016 and October 2016. The situation further escalated when BBC issued a delay and cure notice to ONSM on December 16, 2016 formally stating the ONSM was in default of its subcontract. BBC specifically stated that they *“have concerns that Old North State Masonry (“ONSM”) has the proper manpower and supervision onsite to meet the schedule and quality necessary to complete this project.”*³⁸ ONSM was repeatedly put on notice by BBC in the first quarter of 2017 including formal delay/default notices on January 23, 2017³⁹ and March 15, 2017⁴⁰. Contemporaneous mail correspondence from this time period also shows that ONSM was *“grossly behind schedule”* and that the project was *“+/- 50 days behind schedule mostly, in part to masonry.”*⁴¹ It is curious why BBC would issue so many cure notices to ONSM if its work was not on the critical path or delaying the project as suggested by CS.

BBC was having significant problems with multiple subcontractors in March 2017 when, in addition to its default notice to ONSM, it also issued default notices to PASCO Incorporated (“PASCO”) and Watson Electrical Construction Co. LLC (“Watson”). According to BBC, PASCO was falling behind schedule due to manpower in February 2017⁴², was *“behind on L4 and up the building”* by the beginning of March⁴³, and *“L6 is 2 weeks behind with no available manpower”* by mid-March⁴⁴ when the default notice was issued. Discussions between BBC and PASCO’s superintendent indicated that two additional crews were needed. PASCO manpower issues would come up again in 2018 as well. Similarly BBC’s March 2017 notice to Watson indicated that Watson had missed schedule dates on L5 and L6.⁴⁵ BBC was also having issues with the mechanical contractor Bernhard MCC (“BMCC”). BMCC had a 15+ delay on L5 in April 2017⁴⁶ and was working to increase its manpower on site to compensate. In May 2017 BBC’s Vice President, Operations Tony Stoneking expressed the need for executive meetings between BBC and Watson to yield additional manpower.⁴⁷ The notion that manpower was being discussed at the executive levels simply highlights the fact that the inadequate subcontractor staffing was negatively

impacting the Project. A similar executive meeting was held with the carpentry/drywall subcontractor Precision Walls (“Precision”) with the goal of increasing manpower.

Prior to the May 2017 meetings, Precision acknowledged specific areas where it was behind schedule on the 8th and 9th floor and that it was stopped on the 1st floor due to other trades.⁴⁸ At this time, BBC expressed its concern with Precision’s performance on other floors as well, noting that Precision was “*behind schedule on floors 1-5*” and that despite the Tower Crane having been removed a month prior, Precision was not taking advantage of the opened up work. More specifically, BBC’s Senior Project Manager Tim Spano requested that Precision provide additional manpower for the 2nd floor work:

*“We also have allot of areas available on floor two for ceiling framing, ISO rod install, AC framing, Barrel ceiling etc. .. **BBC removed the tower crane a month ago** so P-walls could get these areas and we are not taking advantage of it with a few guys working ceilings on 2. There is allot of open areas ready to run and **we need P-wall to attack them with more men and stay ahead of all other trades.**”* [Emphasis added]

-BBC Senior Project Manager Tim Spano to Precision Walls Project Manager
Michael Zinna, March 7, 2017⁴⁹

Precision responded that it was being impacted by several issues, but Mr. Spano disagreed with respect to the Ballroom and barrel ceiling and stated “*This design change is 6 months old. BBC has been asking for the completion of that framing for Months.*”⁵⁰ Again, the CS report states that the delay during CS Period 2 was solely related to Owner/Architect lack of coordination and design changes, and fails to take into account subcontractor labor shortages or other issues.

Labor shortages continued to be a problem through CS’s Period 3; near the end of Period 3 in September 2017 BBC expressed its frustration with subcontractors blaming labor shortages on design changes:

*...it is obvious that Watson, and other trades are overwhelmed by the amount of work to complete **they simply don't have enough manpower** to handle the activities at hand.*

*As you know, **It's a red herring to state that design issues are holding up work.** The design issues are probably less than 10% of the list...* [Emphasis added]

-BBC Senior Project Engineer Ryan Ledford reporting to Vice President,
Operations David Stanton, September 19, 2017

Precision’s labor shortage continued to impact the project. In October 2017 BBC noted “*We currently lack framing completion on every floor of the hotel and need multiple framers.*” BBC discussed supplementing Precision’s workforce with framers from Construction Professionals Inc. (“CPI”), but Precision indicated that it would not help as CPI would be trying to “*pick out of the same limited labor*

pool that is out there now.”⁵¹ And while some, but not enough, manpower was added later that month, BBC noted that Precision “actually lost some of their framers which they need desperately.”⁵²

Manpower issues persisted into December 2017 when it was “*very clear that Precision Walls needs more framers, hangers and finishers.*”⁵³ BBC again discussed the idea of supplementing Precision’s workforce to get the job completed. And although Precision attempted to deflect blame for the delays by pointing to the owner or other contractors, BBC made clear that their intent was to “*stop weekly schedule slipping for items and areas that are in our control and not caused by changes or the owner.*”⁵⁴

Ultimately, BBC issued a default notice to Precision Walls on January 8, 2018 noting that Precision’s “*lack of manpower and quality control on site*” and that the “*schedule continues to slip.*”⁵⁵

Contemporaneous project records continued to show that the Project was delayed due to manpower shortages unrelated to owner changes. Updates from BBC’s scheduler Joe Lauricella point to manpower concerns in both November 2017⁵⁶ and January 2018.⁵⁷ Both times Mr. Lauricella indicates that the lack of adequate manpower is a separate issue and affecting original scope work.

As noted above, PASCO’s manpower became an issue again in the start of 2018 when BBC stated that PASCO’s manpower could not keep up with the available work and specifically mentions that PASCO is holding up the critical path of the Project.⁵⁸ In February 2018, PASCO was refusing to work overtime or commit to additional crews. BBC again noted that PASCO was continuing to hold up other trades and was considering bringing in supplemental manpower if PASCO was unwilling to.⁵⁹ The March 2018 schedule update from Mr. Lauricella noted PASCO did increase its manpower, however quality control issues related to the sprinkler installation on levels 3 through 9 would require even more manpower to avoid falling behind. As will be discussed later, these quality issues would involve extensive patching of drywall and finish paint to correct the problem in the already completed units. After missing a commitment to have pressure to the building, BBC’s Nick Starcevic laments to PASCO on April 6, 2018: “*When is PASCO going to step up and put forth the necessary manpower to maintain the schedule?*”⁶⁰

PASCO and Precision were not the only subcontractors struggling with manpower in 2018. Emails from BBC identify manpower issues with BMCC, Low Country Case & Millwork (“LCCM”) and Cook and Boardman (“C&B”) in the 1st quarter. The BMCC manpower issues were apparent to BBC when BMCC could not get water on L3 for the cleaners in January.⁶¹ BBC’s Mr. Spano cites a lack of material and manpower from LCCM in February.⁶² And in March Mr. Spano and Mr. Starcevic noted that C&B “*need more manpower, that is very apparent*”⁶³ and that “*we need more guys*”⁶⁴ respectively.

Finally, the CS report Period 5 claims a 76 day critical path delay to the elevator inspections at the end of the job was attributable solely to SI No. 67, which was provided June 12, 2018, and related inspection delays based on DOL limited resources to inspect elevators, and then additional work directed by the DOL inspectors. However CS fails to acknowledge the contemporaneous issues regarding Otis Elevator's staffing of the project and scheduling of inspections in November 2018. First, CS relies on MSH-049 as its source for the elevator work being completed on October 12, 2018. Contemporaneous documents show that the work was not complete, but Otis was not actively working on the Project.⁶⁵ During the October/November 2018 time period Otis did not complete its remaining work on Elevators 1-5 because it put its crews on other jobs instead of the Project. Otis had the DOL elevator inspector move to an alternate Otis jobsite on November 9, 2018 even though that date was scheduled for Hotel Bennett. The failure to pass inspection was due to unfinished wiring (not inspector changes to meet South Carolina codes as stated by CS). On November 17, 2017 BBC provided a formal notice to cure and notice of delay to Otis for its failure to complete its work, and threatened Otis with liquidated damages. Re-inspection could not be completed until November 30, 2018. CS indicates that there were additional changes made by the inspector on November 27, and completed that work on December 12, 2018, but provides no documentation, and CPMI has not seen evidence of this additional work.^Q

The Owner cannot be held accountable for Otis/BBC failure to assign labor to the project to complete in a reasonable time, and can't be held accountable for the time to inspect when Otis sends inspectors away from the Project or doesn't complete its work. With respect to changes made by the Inspector, CS seems to be assuming that these are design errors. Inspectors often disagree with tradesmen over code issues; CS's conclusory statements of design error do not make it so.

Throughout the Project, BBC was impacted by inadequate manpower on the job. There are very few period of times where BBC is not requesting additional manpower from one of its subcontractors in writing. This does not take into account how many verbal requests may have been made by the superintendents on site. How many times did a superintendent have to verbally request adequate manpower before not only the site project management but BBC's executive management had to step in? The lack of manpower not only affects the direct work which is being completed at a slower pace or not being completed at all, but it also has a secondary indirect effect on the Project because it diverts

^Q As stated earlier, CPMI has not been given access to BBC daily reports or daily reports of BBC's subcontractors.

the focus of BBC's staff from other issues. BBC's Vice President, Operations Tony Stoneking admits as much in an email regarding the use of Watson on a future project.

*"Watson is a good sub past 20 years with me but **has greatly struggled** on our last 2 jobs at Marion square and garner. Yes, I know there is 2 sides of every story especially at Marion... but this is a huge job and tight schedule with no margin for error. On those 2 jobs **they struggled with quality manpower, supervision, safety practices, quality of installations, refusing to do changes at garner, change order price inflation ... all of which ties up a lot of our resources.**" [Emphasis added]*

-BBC Vice President, Operations Tony Stoneking, August 31, 2018⁶⁶

Both CORE and CS failed to properly consider the manpower in their reports. CORE states that manpower was driven by ongoing design changes and outstanding questions at the jobsite all caused by or the responsibility of the owner. As described above, this is not consistent with the project record whereby BBC routinely requested additional manpower from the subcontractors, often disputed subcontractor attempts to deflect ownership of the issue and acknowledges that it was detrimental to the Project. Likewise, CS fails to acknowledge all of the critical path areas that were delayed by the lack of manpower and how this was at least concurrent with other on-going Project delays.

E. Subcontractor Quality and Cross Trade Damage

In addition to the delays due to trade labor shortages, the Project was also plagued by subcontractor quality control issues and repair work caused by trades damaging each others installed work. Often times these issues would cause delays to the Project by requiring rework and repair, delaying inspections, or contributing to an overall distressed job site. Problems began early on with the layout of control lines by the surveyor. BMCC identified a discrepancy on the 2nd floor on April 29, 2016 which resulted in additional subcontractor cost and *"significant delay to our pour schedule."*⁶⁷ This led to confusion between the subcontractors trying to perform layout as the building was constructed. Additional survey issues were identified in May 2016 on L3 as well which delayed all subcontractors while the control lines were verified and re-shot.⁶⁸ As the building progressed issues arose between Lithko and Watson. After Watson had installed branchways and cables on L7 and L8, Watson observed Lithko employees dropping form tables on raceways and cables, placing 4x8 sheets of plywood on their installations and walking and driving over them with a forklift.⁶⁹ This resulted in over \$150,000 of damage for which Watson was required to remove and reinstall branch circuiting and raceways. It took multiple months for BBC, Watson and Lithko to negotiate and resolve these issues and to get the

necessary repairs made. In total 46 rooms were affected and each had to be tested to verify the extent of the damage. 28 of those rooms required rewiring of the branch circuit feeders. Although the damage was done in 2016, repairs were not completed until well into 2017.⁷⁰

In March 2017, BBC also had quality issues with ONSM along side the manpower issues discussed earlier. Stair 3 was installed out of plumb and needed to be removed and rebuilt to match the façade on Levels 2 through 5.⁷¹ In addition to ONSM's self inflicted issues such as Stair 3, ONSM claimed they were impacted by the failings of other subcontractors and BBC by being forced to jump floors due to the waterproofer, BBC's failure to provide the contractually required hoisting of precast and BBC consistently turning over partial floors. ONSM's claim even went as far as to state that one of the issues was *"onsite management and lack of control and knowledge (Gross Negligence) of what was the root cause of the projects issues and how to correctly sequence and build this project."*

The electrical work was not the only work that was damaged by another contractor. Precision Wall's drywall work was affected by other trades as well. This issue was brought up by Precision in May 2017 after several completion dates for drywall were missed. Excessively large openings were being cut in the drywall for piping and other penetrations. This required Precision to go back and patch and repair these areas prior to fire caulking. This process delayed the completion of drywall and inspections multiple times particularly on L2 and L4. Precision Wall was diverting manpower from productive work to perform these repairs as well as repairs required for its own mistakes.⁷²

In September 2017, Precision Walls was a party to another jobsite dispute regarding the framing of the elevator shaftwalls. The shaftwalls were not properly aligned due to a combination of the slab edges not lining up from floor to floor and the elevators not being installed in the center of the shaft.⁷³ Contemporaneous correspondence indicates that the front shaftwalls were installed out of sequence by Precision Wall with dispute over whether or not BBC had directed Precision to do this.⁷⁴ At the time BBC alleged that the issue was jointly caused by Otis, Lithko and Precision and would be a *"\$100k mistake on someone."*⁷⁵

The shaftwalls were not the only defective work installed in the fall of 2017. In October 2017, BBC discovered that PASCO had installed the wrong sprinkler heads throughout a majority of the building guestrooms. The Project required concealed type sprinkler heads but PASCO failed to install the correct head types. This issue was not discovered until after the heads were installed on all guestroom floors 3-8. Additionally, drywall was already being installed up to the 7th floor while the 3rd floor was already

painted and in the process of having fixtures installed.⁷⁶ The repair work in the estimated 350-400 rooms would required replacement of the sprinkler heads, patching of the drywall and re-painting. Despite this issue being discovered on October 9, 2017, BBC did not reach out to Precision Walls or the painter, Merit, until over 2 months later on December 14, 2017.⁷⁷ Precision was concerned that it would be very difficult to make the patches disappear in a Level 4 ceiling.⁷⁸ BBC couldn't reach an agreement with Precision to perform this repair work due to its "exorbitant" pricing and Precision's struggle to adequately staff its existing work.⁷⁹ BBC ultimately brought in another subcontractor to perform the patching in January 2018. Further compounding the issue, in March 2018, PASCO notified BBC that some of the concealed heads on L6 through L8 were installed too low and would cause issues. This resulted in approximately 50 new holes being made in drywall that had already been patched.⁸⁰ Additionally there were areas that were still missing sprinkler heads and areas where sidewall type sprinkler head with the wrong temperature rating were installed. In total over 100 new holes were made by PASCO in areas that had already been patched and repaired. Finally on May 2, 2018, PASCO had its fourth water blow out in a two week span while testing its systems.⁸¹ Each instance resulted in damage to completed work that had to be repaired by other subcontractors.

F. Conclusory statements of entitlement and Cause and Effect

Throughout the CS report, Mr. Doran recites the reasons for delay as some form of "the architect's design coordination failures" or "design changes" without any specific cause and effect. The extent to which the schedules were impacted by specific design changes or specific coordination problems is not indicated. Mr. Doran's qualifications for determination of design standard of care are in question.

Further, while COREs report appears to provide more information about some specific changes and RFIs, CORE admits that it did not perform a critical path analysis.

Neither CS nor CORE attempted to identify or defend the significant problems BBC had in coordinating the work of its subcontractors. BBC sent out dozens of Notices to subcontractors to Cure their delaying conditions, and received dozens of delay notices from subcontractors identifying prior trade impacts. The CORE report appears to acknowledge that BBC never achieved the level of manpower that it needed to complete the project on time. BBC's correspondence with its subcontractors makes clear that the lack of trade labor impacted the project timing. But these issues are not mentioned by either CORE or CS.

G. Limits in Analysis

As-built dates from schedule cannot be verified – CS’s as-built dates are apparently solely from the MSH049 schedule files, without verification to contract records. CPMI would normally make an effort to verify the dates in MSH-049 are correct (it is not unusual for Actual Dates reported in schedule updates to be inaccurate by days or weeks, as indicated above in the Elevator work completion). However, CPMI, as of the date of the report, does not have access to either the P6 MSH-049 schedule file or to the BBC daily reports (or to subcontractor daily reports, except ONSM, whose daily reports were included with its claim). The existence of the daily reports is clear in that CORE identifies that it received the full collection in preparation for its analysis. The results of such an analysis would likely cast additional questions on CS’s as-built critical path.

IV. CORE SCHEDULE ANALYSIS

CORE determined major time periods of delay by comparing the as-built activities to the plan.^R It then allegedly determined delay associated with major work activities. CORE identified four time periods of delay.^S

Time Period	Description	Delay
1	Delay to Vertical Structural Work -- February 2016	3 weeks
2	Delay to start of Interior Work -- July 2016	2 months
3	Delay to Finish of Interior Work	11 months
4	Delay to Substantial Completion -- December 2018	2 months

In summary, the delays in CORE’s four time periods total approximately 16 months, the entire project delay. Similar to CS, CORE asserts that the owner and design team are responsible for all of the delay, while BBC bears no responsibility, a total time analysis.

CORE’s analysis of project delays is inconsistent with the contract requirements. It concedes that the type of evaluation utilized is *not* a critical path delay analysis.^T In fact, the methodology is at best an as-planned versus as-built at a summary, or even cursory level. CORE’s analysis, similar to the CS analysis,

^R CORE Report, paragraph 229.

^S CORE Report, paragraph 234 to 237.

^T CORE Report, paragraph 232.

is not a critical path method of analysis, makes arbitrary determinations of critical issues, ignores the BBC contemporaneous schedule updates and contradicts industry standard.

CORE asserts that BBC's original baseline schedule "*contained the adequate number of work activities, the proper logic, and durations, and denoted a correct critical path.*"^U However, as pointed out above, the baseline schedule did not include the critical fragnet involved with removal of the tower crane and in infill required to obtain closure to continue work at Level 2.

^U CORE Report, paragraph 353.

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- ¹ A133 Standard Form of Agreement between Owner and Construction Manager as Constructor between Library Associates, LLC and Balfour Beatty Construction, LLC.
- ² Email from Clements, March 19, 2015, HMS Notice to Proceed
- ³ Email from Clements, March 19, 2015, NTP
- ⁴ Email from Baumbach, March 20, 2015, Hotel Marion Square_Revised Notice to Proceed.doc
- ⁵ Email from Lindsay, February 11, 2019, 2009007 Bennet Hotel – contract closeout
- ⁶ The Hotel at Marion Square – Guaranteed Maximum Price – February 18, 2015
- ⁷ BBC Payment Application #44
- ⁸ Owner Change Order 003, May 5, 2016
- ⁹ Letter from BBC to LA, January 25, 2019, The Hotel at Marion Square – BBC Consolidated (Preliminary)
- ¹⁰ Letter from WLA to BBC, February 4, 2019, Response to BBC’s Consolidated Claims Letter
- ¹¹ The Hotel at Marion Square – Response to WLA Request for Consolidated Claim Additional Documentation, March 6, 2019, Volumes 1-4
- ¹² Contract Solutions, LLC, Schedule Delay Analysis, November 16, 2020
- ¹³ CORE International Consulting, LLC Expert Report, November 16, 2020
- ¹⁴ AACE RP 29r-07 Recommended Practice for Forensic Schedule Analysis
- ¹⁵ MSH-000 Detailed Baseline Schedule 11-13-15
- ¹⁶ 2016-12-20 ONSM Notice Reply to BBC Email dated 2016-12-16
- ¹⁷ 2017-01-11 Email from Nicholas Starcevic to Jason Kenna
- ¹⁸ 2016-01-18 Email from Joe Lauricella to Tim Spano
- ¹⁹ 2017-02-17 Emails between Dan Ricci and Scott Greene
- ²⁰ 2016-06-21 Email from Tim Spano to Jeff Sandeen
- ²¹ 2016-07-07 Email from Anthony Hazen to Dan Ricci
- ²² 2016-09-07 Email from Tim Spano to Nicholas Starcevic
- ²³ 2016-12-21 Email from Joe Anastasi to Nicholas Starcevic
- ²⁴ 2016-12-07 Email BBC to ONSM- ONSM work greatly affecting critical path
- ²⁵ 2017-02-08 Email Chain BBC pointing Out ONSM Delays
- ²⁶ MSH-033 Detailed Project Schedule 10-17-17
- ²⁷ ASCE Std 67-17 Schedule Delay Analysis
- ²⁸ MSH-038 Detailed Project Schedue 2-14-18
- ²⁹ 2017-09-19 Email Watson Manpower - Design is red herring and only 10 percent of issue
- ³⁰ 2018-01-08 BBC letter to Precision Notice of Delay and Cure
- ³¹ 2016-01-14 Email from Dan Ricci to Tim Spano
- ³² 2016-03-01 Email from Dan Ricci to Raunel Marion
- ³³ 2016-01-18 Email - WSI Manpower & Tower Crane Down 7 Days
- ³⁴ 2016-05-19 Email - Lithko continues to lose days and use up float
- ³⁵ 2016-06-07 Email - Lithko Delay Notice & Cure - Half crew size that is needed
- ³⁶ 2016-06-23 Email from Mike Bedell to Jeff Sandeen
- ³⁷ Not Used
- ³⁸ 2016-12-16 Email - ONSM cure notice
- ³⁹ 2017-01-23 Email - ONSM Notice of Delay - Request additional manpower
- ⁴⁰ 2017-03-15 Email - ONSM cure notice
- ⁴¹ 2017-01-27 Email from Nicholas Starcevic to Chip Venable
- ⁴² 2017-02-14 Email from Nicholas Starcevic to Leonce Vidal
- ⁴³ 2017-03-06 Email from Nicholas Starcevic to Leonce Vidal
- ⁴⁴ 2017-03-14 Email from Nicholas Starcevic to Leonce Vidal
- ⁴⁵ 2017-03-15 Email from Nicholas Starcevic to Dale Winovich
- ⁴⁶ 2017-04-07 Email - BMCC L5 Delay - Add 6 plumbers

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- ⁴⁷ 2017-05-01 Email from Tony Stoneking to Jeff Sandeen
 - ⁴⁸ 2017-03-02 Email from Troy Morgan to Jeff Sandeen
 - ⁴⁹ 2017-03-07 Email - Precision wall issues - tower crane removed for a month
 - ⁵⁰ 2017-03-07 Email - Precision wall issues - tower crane removed for a month - follow up
 - ⁵¹ 2017-10-03 Email from Troy Morgan to Tim Spano
 - ⁵² 2017-10-18 Email from Pat Dean to Jeff Sandeen
 - ⁵³ 2017-12-15 Email from Nicholas Starcevic to Michael Zinna
 - ⁵⁴ 2017-12-19 Email from Tim Spano to Troy Morgan
 - ⁵⁵ 2018-01-08 Email from Nicholas Starcevic to Troy Morgan
 - ⁵⁶ 2017-11-17 Email from Joe Lauricella to David Stanton
 - ⁵⁷ 2018-01-11 Email from Joe Lauricella to David Stanton
 - ⁵⁸ 2018-01-23 Email from Nicholas Starcevic to Michael McGregor
 - ⁵⁹ 2018-02-17 Email from Nicholas Starcevic to Michael McGregor
 - ⁶⁰ 2018-04-06 Email from Nicholas Starcevic to Michael McGregor
 - ⁶¹ 2018-01-23 Email from Nicholas Starcevic to Robert Weyer
 - ⁶² 2018-02-14 Email from Tim Spano to Nicholas Starcevic and David Simonton
 - ⁶³ 2018-03-08 Email from Tim Spano to Dave Hoffman
 - ⁶⁴ 2018-03-09 Email from Nicholas Starcevic to Tim Spano and David Simonton
 - ⁶⁵ 2018 11 17 Email Elevator completions 72 hour cure, BBC_EMAILS_005522467
 - ⁶⁶ 2018-08-31 Tony Stoneking Email - Watson performance
 - ⁶⁷ 2016-04-29 Email from Nicholas Starcevic to John Byrnes
 - ⁶⁸ 2016-05-26 Email from Marty Dale to Eric Stoehr
 - ⁶⁹ 2017-02-10 Email - Lithko damaging Watson work
 - ⁷⁰ 2017-03-16 Email - Watson Damaged Cable Repair - Lithko responsibility
 - ⁷¹ 2017-03-04 Email - ONSM stair 3 defects and lack of manpower part 2
 - ⁷² 2017-05-03 Email - Issues among Trades_L-4 Fire Caulk
 - ⁷³ 2017-09-14 Email - Precision wall issues part 2
 - ⁷⁴ 2017-09-14 Email - Precision wall issues part 3
 - ⁷⁵ 2017-09-14 Email - Precision wall issues part 4 - 100k mistake
 - ⁷⁶ 2017-10-10 Email pasco issues 2
 - ⁷⁷ 2017-12-14 Email pasco issues 3
 - ⁷⁸ 2017-12-26 Email pasco issues 4
 - ⁷⁹ 2018-01-08 Email pasco issues 5
 - ⁸⁰ 2018-03-03 Email pasco issues 6
 - ⁸¹ 2018-05-02 Email pasco issues 7



Hotel Bennett – Manpower Issues

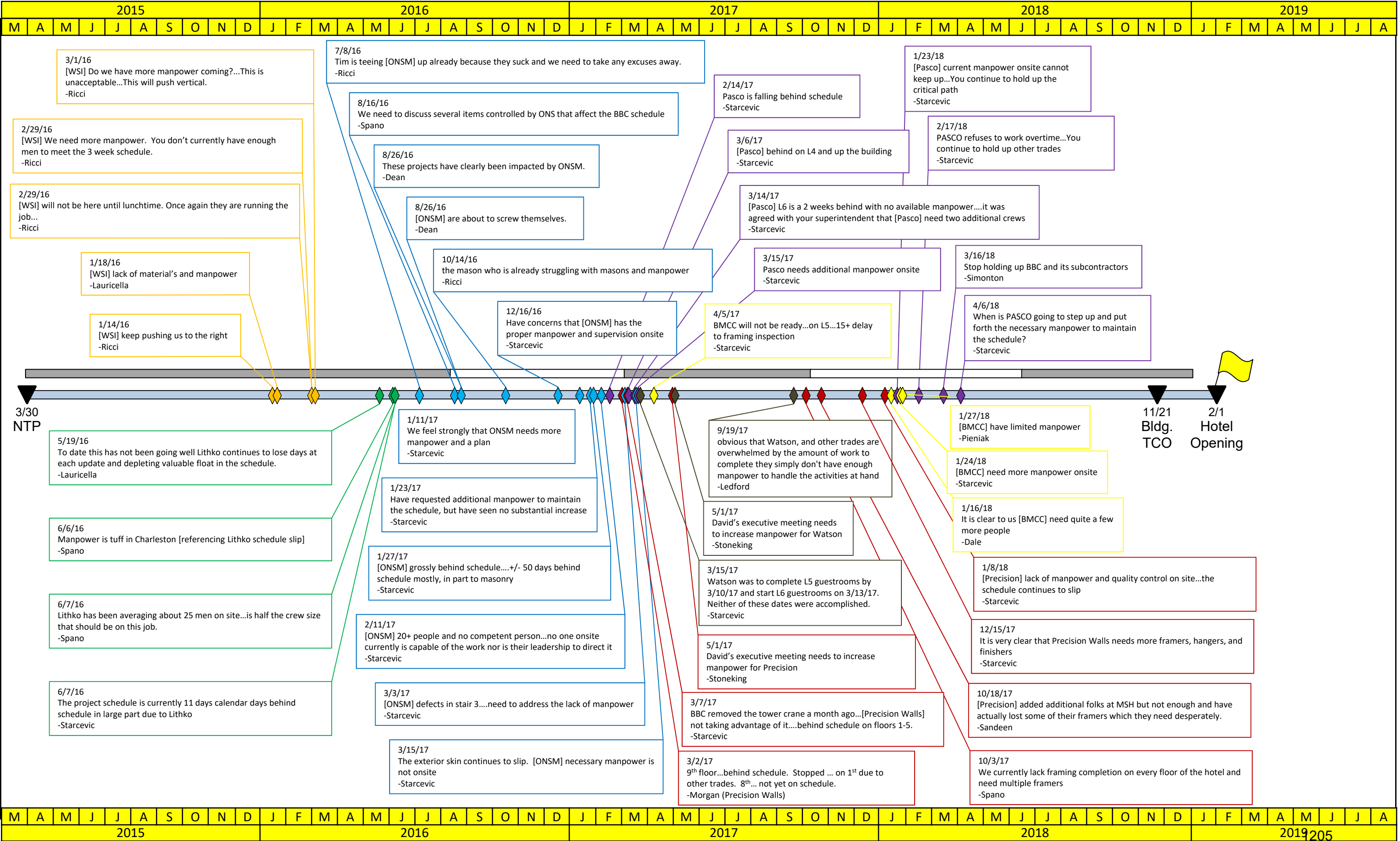


Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC

Plaintiff,

v.

Library Associates, LLC; and Metropolitan Life
Insurance Company, a New York Corporation.

Defendants.

Library Associates, Inc.,

Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MCC, LLC, Gulf Stream Construction
Company, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, Strong
Tower Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC, Warco
Construction, Inc., Old North State Masonry, LLC,
Lowcountry Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-10-01108

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**LIBRARY ASSOCIATES ANSWERS TO
BALFOUR BEATTY CONSTRUCTION,
LLC'S REQUEST TO ADMIT**

TO: TOM HILDEBRAND, ESQ. ATTORNEY FOR BALFOUR BEATTY CONSTRUCTION, LLC:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Library Associates, LLC (“Library”) submits their responses to Plaintiff Balfour Beatty Construction, LLC (hereinafter “BBC”) Request to Admit as follows:

REQUESTS TO ADMIT

1. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of any of the Third-Party Defendants above caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

2. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lithko Contracting, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

3 Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Guy M. Beaty, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

4. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Bernard MCC, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

5. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Gulf Stream Construction Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

6. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Palmetto Automatic Sprinkler Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

7. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Cook & Boardman, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

8. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Strong Tower Construction, LLC d/b/a Koch Corporation caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

9. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Watson

Electrical Construction Co., LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

10. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Trimark Foodcraft, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

11. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Pleasant Places, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

12. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of David Allen Company, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

13. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Premier Exteriors, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

14. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Warco

Construction, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

15. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Old North State Masonry, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

16. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Lowcountry Case & Millwork, Inc. caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

17. Admit that Library agrees and admits that it does not and will not hereafter, through the conclusion of this litigation, claim or assert through any witness (lay or expert), document, data, or argument of counsel that any breach, act, error or omission of Quantum Coatings, LLC caused or contributed in any manner to the Claims and Damages as defined above.

RESPONSE: Denied.

[Signature Page Follows]



W. H. Bundy, Jr., Esquire;
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Attorneys for Library Associates, LLC

July 20, 2021
Summerville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-10-1108

Balfour Beatty Construction, LLC.

Plaintiff,

vs.

**Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation.,**

Defendants.

**DEFENDANT WATSON ELECTRICAL
CONSTRUCTION, CO., LLC'S
MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION FOR ENTRY OF
JUDGMENT AGAINST LIBRARY
ASSOCIATES, LLC**

Library Associates, Inc.

Third-Party Plaintiff,

vs.

**Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
1st Choice Glass, Inc., Strong Tower
Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC,
Trimark Foodcraft, LLC, Pleasant Places,
Inc., David Allen Company, Inc., Premier
Exteriors, LLC, Robert Thomas Iron
Design, LLC, Warco Construction, Inc., Old
North State Masonry, LLC, Tom Rochester
& Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings,. LLC, Balfour Beatty
Construction Group, Inc.**

Third-Party Defendants.

COMES NOW Third-Party Defendant Watson Electrical Construction Co., LLC (“Watson”) by and through undersigned counsel, and files and serves its memorandum of law in support of its MOTION FOR ENTRY OF JUDGMENT AGAINST LIBRARY ASSOCIATES, LLC (“Motion”).

This case arises out of the construction of the Hotel Bennett in Charleston, South Carolina (“Project”). Balfour Beatty Construction, LLC (“Balfour”) was the construction manager for the Project, and Library Associates, LLC is the Project owner (“Library”). The construction of the Project was delayed approximately five hundred days. A significant issue in the case is a dispute between Balfour Beatty and Library Associates about which delayed completion of the Project. Balfour’s subcontractors are also parties, in part due to mechanic’s liens the subcontractors filed as a result of Balfour Beatty failing to pay for labor and materials the subcontractors provided to the Project. Watson is one of the subcontractors with a lien enforcement claim in this case.

On July 29, 2021, Library, pursuant to South Carolina Code § 29-5-20, made an offer to pay Watson the sum of \$100.00, exclusive of costs and attorneys’ fees, to resolve Watson’s mechanic’s lien claim (“Library’s Offer”). Thereafter, on August 6, 2021, within ten days of the filing of Library’s Offer, Watson filed a responsive offer of settlement (“Watson’s Offer”). The trial of this case is set to begin on September 13, 2021. On September 3, 2021, at least five days before commencement of the trial term, Watson filed and served its written acceptance of Library’s Offer. On September 8, 2021, Watson made a motion for entry of judgment against Library based on Watson’s acceptance of Library’s offer of settlement made pursuant to S.C. Code §29-5-20. On September 9, 2021, Library filed its RETURN TO WATSON ELECTRICAL CONSTRUCTION CO., INC’S MOTION FOR ENTRY OF JUDGMENT, notifying the Court that Watson’s Motion failed to advise the Court of Watson’s Offer.

The issue before the Court is, is Watson's August 6, 2021 offer of settlement relevant to the Court's consideration when determining whether to grant Watson's Motion, and relevant to the Court's entering judgment against Library Associates. For the reason discussed below, Watson's Offer is irrelevant to the Court's decision on Watson's Motion. Watson's counsel was unable to find any South Carolina case addressing the issue raised in this memorandum. Presumably this issue is not reported in any South Carolina case because South Carolina's mechanic's lien statute is so clear that no court has failed to appropriately address the issue, and no reasonable attorney would bother to argue about the issue on appeal.

South Carolina's mechanic's lien statutes, beginning at S.C. Code § 29-5-10 et seq, gives contractors, subcontractors and other person a lien on the real property for which labor is performed or furnished or for material furnished. See S.C. Code § 29-5-10 et seq. In the mechanic's lien statutes, the legislature sought to encourage settlement, and therefore set up a process for making offers of settlement. See Id. Initial offers of settlement may be made at least fifteen days before the trial term, and responsive offers may be made within ten days after receipt of an initial offer. Id. Nothing in the mechanic's lien statutes prohibit a party from making an initial offer more than fifteen days before the trial term. Id. Similarly, nothing in the mechanic's lien statutes prohibit a party that has already responded to an initial offer, from making another offer fifteen days before the trial term or a subsequent trial term. See Id. The competing settlement offers allowed by the mechanic's liens statutes lead to two outcomes: (1) acceptance of an offer and resolution of a mechanic's lien claim; or (2) use of the offer by the Court for determining the prevailing party after verdict. Id.

S.C. Code §29-5-20(C) states, "[a]n offer of settlement is considered rejected unless acceptance in writing is filed and served on the party making the offer five days before

commencement of the term.” This means that each offer of settlement remains an acceptable offer so long as “acceptance in writing is filed and served on the party making the offer five days before commencement of the term.” See South Carolina Code § 29-5-20(C). Failing to accept an offer of settlement at least five days prior to commencement of the trial term is the only mechanism in mechanic’s lien statutes that results in rejection of an offer of settlement.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Garvin v. State, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Knotts v. S.C. Dept of Natural Resources, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). The primary purpose in construing a statute is to ascertain legislative intent. Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Knotts, 348 S.C. at 10, 558 S.E.2d at 516 (quoting Norman J. Singer, Sutherland Statutory Construction, 46.03 at 94 (5th Ed. 1992)); Bayle v. South Carolina Dept of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). The legislatures intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996).

The first question of statutory interpretation is whether the statutes meaning is clear on its face. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)). Where the statutes language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). [T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation. Municipal Assn of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Morgan, 352 S.C. at 366, 574 S.E.2d at 206 (Ct. App. 2002) (citing Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Assn, 306 S.C. 339, 412 S.E.2d 377 (1991)). Under the plain meaning rule, it is not the courts place to change the meaning of a clear and unambiguous statute. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) (citing Hodges, 341 S.C. 79, 533 S.E.2d 578; Bayle, 344 S.C. at 122, 542 S.E.2d at 739). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Georgia-Carolina Bail Bonds, 354 S.C. at 24, 579 S.E.2d at 337 (citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount

Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dept of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) (Where the terms of a relevant statute are clear, there is no room for construction.)).

Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008).

The plain meaning of the mechanic's lien statutes clearly allow Watson to accept Library's Offer, which puts an end to the inquiry before the court. There is no room for construction of the mechanic's lien statutes.

Furthermore, in the mechanic's lien statutes, the legislature did not create a system where responsive offers are treated as counteroffers that reject an offer made by another party. The legislature could have chosen to create such a system, and could have easily crafted the statute to state, "within ten days thereafter the party served may respond by filing and serving his offer of settlement which is a rejection of the offer received by the responding party," but it did not include such language. Furthermore, the fact that the legislature allows an initial offer of settlement any time, so long as the offer is made at least fifteen days before the trial term, yet allows acceptance up through five days before the trial term, shows that the legislature intended for offers to remain acceptable until the fifth day before the trial term.

Additionally, the mechanic's lien statutes only allow the court to consider the offer of both parties if the case goes to trial, and then, only for the purposes of determining the prevailing party. See S.C. Code 29-5-20(C) (stating in part, "For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer of settlement is closer to the verdict reached is considered the prevailing party in the action." The term "one verdict" means that all claims in a civil action are tried to conclusion, and the Court enters a verdict. When an offer of settlement is accepted, no verdict is reached as to

“the mechanic’s lien and the consideration of compulsory counterclaims.”) Watson’s acceptance of Library’s offer fully resolves Watson’s lien claim against Library, and Watson’s Offer is irrelevant, and the Court should GRANT Watson’s Motion and entry judgment against Library Associates, LLC.

This the 9th day of September, 2021.

Respectfully submitted,

SMITH TERRY JOHNSON & WINDLE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she served the foregoing **DEFENDANT WATSON ELECTRICAL CONSTRUCTION, CO., LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR ENTRY OF JUDGMENT AGAINST LIBRARY ASSOCIATES, LLC** by electronic mail addressed to the following:

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This the 9th day of September 2021.

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379 S.C. 564
Supreme Court of South Carolina.

EAGLE CONTAINER CO., LLC, and Jeffrey Spotts, as Personal
Representative of the Estate of Alfred D. Spotts, Respondents,

v.

COUNTY OF NEWBERRY, a political subdivision, and Susie Berry, in
her capacity as Zoning Administrator of Newberry County, Petitioners.

No. 26538.

|
Heard May 29, 2008.

|
Decided Sept. 2, 2008.

Synopsis

Background: Applicant for landfill permit sued county to rescind revocation of landfill permit and sought writ of mandamus to compel issuance of a new permit. On cross-motions for summary judgment, the Circuit Court, Newberry County, James W. Johnson, Jr., J., granted summary judgment to applicant. County appealed. The Court of Appeals, 366 S.C. 611, 622 S.E.2d 733, Anderson, J., affirmed.

Granting certiorari, the Supreme Court, Kittredge, Acting Justice, held that amendment to zoning ordinance to add word “landfill” to uses permitted in rural district did not change classification of landfills from a “special exception” to a “permitted use.”

Judgment of Court of Appeals reversed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****893** George Robert DeLoach, III, of Merritt, Flebotte, Wilson, Webb & Caruso, of Columbia; and Hardwick Stuart, Jr., of Berry Quackenbush & Stuart, of Columbia, for Petitioner.

Thomas H. Pope, III, of Pope and Hudgens, of Newberry, for Respondent.

Robert E. Lyon, Jr., and M. Clifton Scott, of Columbia, for Amicus Curiae South Carolina Association of Counties.

Opinion

Acting Justice KITTREDGE:

566** We granted a writ of certiorari to review the court of appeals' opinion in *Eagle Container Co. v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct.App.2005). We are called upon to construe the effect of an amendment to the Newberry County Zoning Ordinance. The Newberry County Council amended the county zoning ordinance on December 11, 2002 by adding a single word—“landfill”—to a list of uses that may be allowed *894** in what is classified as R–2 Rural District. It is undisputed that prior to the amendment, a landfill was permitted in R–2 districts only as a “special exception.” The question before us is whether the single-word amendment to the ***567** zoning ordinance effected a change in a landfill from a “special

exception” to a “permitted use.” We hold the amendment had no effect on the proper use classification of a landfill. A landfill remains a “special exception” in R–2 districts. We reverse the contrary opinion of the court of appeals.

I.

Eagle Container owns a 328–acre tract of land in Newberry County which is zoned R–2 Rural District. On May 16, 2003, Eagle Container applied for a special exception to construct and operate a landfill on the property. Before this request was acted upon, Eagle Container apparently learned of the amended ordinance. On June 2, 2003, it applied for, and received, a permit to operate the proposed landfill. Two days later, on June 4, 2003, a representative for Newberry County wrote Eagle Container a letter advising the permit had been issued in error and was being revoked. The letter stated, “Pursuant to Newberry County Zoning Ordinance, landfills are permitted only in R–2 [d]istricts as special exceptions, which require approval of the Board of Zoning Appeals after a hearing. Consequently, I am hereby reinstating the Special Exception Application filed on May 16, 2003.”¹

On June 17, 2003, Eagle Container filed suit, contending a landfill was a “permitted use” under the ordinance and, as such, the permit should be reinstated. The parties filed cross motions for summary judgment, each contending there were no genuine issues as to any material fact. The circuit court granted Eagle Container summary judgment, ruling a landfill is a “permitted use” within the meaning of the County’s recently amended ordinance. The County appealed, and the court of appeals affirmed. *Eagle Container Co. v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct.App.2005).

II.

Because we are called upon to construe the meaning of an unambiguous ordinance, our review does not track the *568 fact-based summary judgment review path.² Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments & Appeals*, 321 S.C. 548, 550, 471 S.E.2d 142, 143 (1996). “Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, ‘a broader and more independent review is permitted when the issue concerns the construction of an ordinance.’” *Charleston County Parks & Recreation Comm’n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (internal citation omitted) (quoting *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments & Appeals*, 316 S.C. 231, 235, 449 S.E.2d 254, 256 (Ct.App.1994)). “The determination of legislative intent is a matter of law.” *Id.*

III.

We begin our analysis with the procedural history which led to the December 11, 2002 amendment to the Newberry County Zoning Ordinance that is at the center of this dispute. In December 2001, Newberry County adopted Zoning Ordinance No. 12–24–01 to provide a comprehensive plan for land uses and restrictions in Newberry County. Article 3 of the ordinance establishes zoning districts. **895 The various zoning districts were established “for the purposes of guiding development ... and promoting public health, safety, morals, convenience, order, appearance, prosperity, and general welfare....”

Section 301 sets forth a nonexclusive listing of what uses may be allowed in the respective zoning districts. When the ordinance was enacted, R–2 Rural Districts were defined in section 301 as follows:

***569** R–2 districts require large parcels for uses, allow rural and residential uses, including manufactured homes on individual lots, agricultural and related uses, ranching, recreation and hunting, a variety of government service uses, and limited business uses.

The ordinance provides for three classifications of uses that may be permitted: a “permitted use,” a “conditional use,” or a “special exception.” These terms of art are defined in Article 2 of the zoning ordinance and are applied to the specific uses in Article 5, specifically section 501:

1. *Permitted Uses*: Permitted uses listed in the district use tables in this Division are **permitted** outright.
2. *Conditional Uses*: Conditional uses in the district use tables are **permitted** by the Zoning Administrator without further review upon compliance with the conditions specified in the tables.
3. *Special Exceptions*: Special exceptions are **permitted** after review and approval by the Board of Zoning Appeals upon compliance with the general conditions in the regulations.

(Emphasis added.)

The County amended section 301 on December 11, 2002 by adding “landfill” as a use allowed in R–2 Rural Districts. The amendment reads:

~~§=BQP:0022~~**WHEREAS**, Ordinance No. 12–24–01 permits various uses in R–2 Rural Districts; and

WHEREAS, landfills should be allowed in the R–2 Rural Districts.

NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS:

Article 3, Section 301 is amended to add text “**landfill**” to the uses permitted in R–2 Rural District. The text is added to the Newberry County Zoning Ordinance.

(Last emphasis added.)

It is undisputed that prior to this amendment a landfill was allowed in R–2 districts only as a “special exception” under section 501. Section 501 sets forth the following conditions for approval of a landfill within R–2 districts by the Board of Zoning Appeals:

- *570** (1) Approvals shall be conditioned on the applicant receiving all state and federal approvals;
- (2) All uses are a minimum of 1,000 feet from adjoining property lines;
 - (3) The use would not constitute a safety hazard or a traffic hazard;
 - (4) The use is not detrimental to adjacent land uses in the vicinity.

When Eagle Container's post-amendment permit application was ultimately treated by the County as an application for a “special exception,” Eagle Container filed the underlying action in circuit court seeking declaratory relief and mandamus. Eagle Container successfully argued in the circuit court that the single-word amendment to section 301 changed landfills from a “special exception” to a “permitted use.” The court of appeals affirmed, from which we granted a writ of certiorari.

The dispositive question is whether the Newberry County Council, in amending section 301, changed landfill from a “special exception” to a “permitted use.”

We proceed from the familiar premise that in the area of statutory construction, our role is limited to determining legislative intent and effectuating that intent. “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

“[W]ords in a statute must be construed in context,” and “the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.” *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass’n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). “The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). “If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for ***571** or impose another meaning.” *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

Both the circuit court and the court of appeals construed the phrase “uses permitted” in the descriptive language of the announcement setting forth the amendment as unambiguously reflecting the intent of County Council to change the classification of a landfill in R–2 districts from a “special exception” to a “permitted use.” In so ruling, the courts erroneously elevated the significance of this prefatory, nonbinding language. In any event, such a construction cannot withstand scrutiny, because reference to an allowed use as a “use permitted” is not the same thing as the term of art “permitted use.”³ In fact, each of the three use classifications (permitted, conditional and special exception) incorporates the term “permitted” by definition. Referring to any allowed use as a “use permitted” sheds no light on the proper classification ***572** of the use. Under the clear and unambiguous approach utilized by the Newberry County Zoning Ordinance, it is section 501, not section 301, that determines whether an allowed use is classified as a “permitted use,” “conditional use,” or “special exception.”

Moreover, neither the circuit court nor the court of appeals was persuaded by County Council’s failure to amend section 501 of the ordinance, which lists a landfill as a special exception. In this regard, the court of appeals invoked the principle of “last legislative expression” to confer a landfill as a “permitted use.” “Under the ‘last legislative expression’ rule, where conflicting provisions exists, the last in point of time or order of arrangement, prevails.” *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). The last legislative expression rule, however, “is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted.” *Feldman v. S.C. Tax Comm’n*, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943). Here, there is no irreconcilable conflict. Because Articles 3 and 5 of the zoning ordinance serve different functions, the amendment at issue here creates no conflict as to the proper use classification of a landfill in a R–2 district.

****897** The court of appeals further held that “the amending ordinance directly contradicts section 501’s classification of landfills thereby repealing the classification and obviating the need to consider the existence of the ‘special use’ requirements.” *Eagle Container*, 366 S.C. at 626, 622 S.E.2d at 741. From this finding, the court of appeals held that the amendment to section 301 repealed section 501. *Id.* This was error, for the reasons noted above. Succinctly stated, the addition of the term “landfill” in the listing of allowed uses in section 301 creates no conflict within the ordinance. Article 3 of the zoning ordinance simply does not speak to the proper use classification of allowed uses within the various zoning districts; the proper use classification is the function of Article 5. Given the different purposes served by Articles 3 and 5, the single-word amendment to section 301 may be easily reconciled with the balance of the ordinance, specifically including Article 5 and section 501. *See, e.g., Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 141–42, 628 S.E.2d 38, 41 (2006) (“Repeal by implication is disfavored, and ***573** is found only when two statutes are incapable of any reasonable reconciliation. Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them.” (internal citation omitted)).

IV.

We readily acknowledge this statutory construction dispute was fostered by the actions of Newberry County, especially the initial granting of Eagle Container's permit application. Nevertheless, well established principles of statutory construction dictate the result we reach today.

In sum, the Article 3, section 301, listing of uses permitted has no bearing on the proper use classification of an allowed use as a “permitted use,” a “conditional use,” or a “special exception.” We hold the mere addition of the word “landfill” to the listing in section 301 of uses permitted did not alter the use classification of a landfill. Use classification is governed by Article 5, and accordingly, a landfill remains a “special exception” use in R–2 districts.

REVERSED.

TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.

All Citations

379 S.C. 564, 666 S.E.2d 892

Footnotes

- 1 The record on appeal does not contain the “Special Exception Application filed on May 16, 2003.” It is undisputed that the County revoked the permit approval on the basis that a landfill is a “special exception” in the R–2 District.
- 2 When reviewing a fact-based grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 659 S.E.2d 496 (2008). Under Rule 56(c), SCRCP, summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
- 3 We, too, view the intent of County Council as unambiguous, and when we examine the purpose of Article 3 of the ordinance juxtaposed to Article 5, we conclude that Article 3 is not intended to distinguish the various classifications of uses allowed. As the court of appeals correctly observed, “Article 3 of the Zoning Ordinance establishes zoning districts and lists the general purposes for each zoning district.... Article 5 sets forth the zoning district regulations [and] [s]ection 500 classifies three types of uses for the zoning districts....” *Eagle Container*, 366 S.C. at 617, 622 S.E.2d at 736. A review of the various districts listed in section 301 reveals a collection of uses without regard to classification as permitted, conditional or special exception. The proper use classification of allowed uses is the very function of Article 5, specifically section 501. Moreover, were we to find an ambiguity as a result of the amendment to section 301, the result would not change. It is clear that the County amended the ordinance with full knowledge that a landfill was a “special exception” in R–2 Districts. Prior to the passing of the amended ordinance, the Newberry County Planning/Zoning Director explained:

This has been a source of confusion for some applicants who were interested in finding out what was permitted in R–2 and where in particular landfills were permitted. We thought it might need to be added as a clarification only. It is not adding the use to the district; the district already has that use as a Special Exception.

Notably, these recorded statements were made at a County Council meeting during a reading of the amended ordinance. In any event, were we to indulge in the fiction that the amendment to section 301 created a conflict within the ordinance,

the ordinance itself provides the manifest legislative intent for the resolution of any such conflict. Article 4, section 400, of the ordinance requires “the most restrictive ... standards shall govern” in the event of a conflict among provisions.

End of Document

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-1108
COUNTY OF CHARLESTON	)	
Balfour Beatty Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Library Associates, LLC and Metropolitan	)	
Life Insurance Company,	)	
	)	
Defendants.	)	
	)	
Library Associates, Inc.,	)	NOTICE OF MOTION AND
	)	MOTION TO DISMISS, TO
Third-Party Plaintiff,	)	END THE CASE AS TO STRONG
	)	TOWER CONSTRUCTION, LLC
v.	)	AND TO CERTIFY SUMMARY
	)	JUDGMENT AS THE FINAL
Lithko Contracting, LLC, Guy M. Beatty, Inc.,	)	JUDGMENT WITH RESPECT TO
Bernard MMC, LLC, Gulf Stream Construction	)	MOVANT
Company, Inc., Precision Walls, Inc., Palmetto	)	
Automatic Sprinkler Company, Inc., Cook &	)	
Boardman, LLC, 1 st Choice Glass, Inc., Strong	)	
Tower Construction, LLC d/b/a Koch Corporation,	)	
Watson Electrical Construction Co., LLC, Trimark	)	
Foodcraft, LLC, Pleasant Places, Inc., David Allen	)	
Company, Inc., Premier Exteriors, LLC, Robert	)	
Thomas Iron Design, LLC, Warco Construction,	)	
Inc., Old North State Masonry, LLC, Tom	)	
Rochester & Associates d/b/a Southeastern	)	
Architectural Systems, Forton Company, LLC,	)	
Lowcountry Case & Millwork, Inc., Quantum	)	
Coatings, LLC, Balfour Beatty Construction	)	
Group, Inc.,	)	
	)	
Third-Party Defendants.	)	
	)	

TO: ALL ABOVE-NAMED PARTIES:

PLEASE TAKE NOTICE that Strong Tower Construction, LLC d/b/a Koch Corporation (“Strong Tower”), by and through its undersigned counsel, will move before the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, for an Order, pursuant Rules 41 and 54,

SCRCP, dismissing Strong Tower, ending this action as to Strong Tower, and certifying Strong Tower's partial summary judgment award against Balfour Beatty Construction, LLC ("BBC") as the final judgment with respect to Strong Tower.

Strong Tower brought or was a named party in four separate cases involving the underlying project: Case No. 2019-CP-10-1108 ("1108"), Case No.: 2019-CP-10-2868 ("2868"), Case No.: 2019-CP-10-3005 ("3005"), and Case No.: 2019-CP-10-3727 ("3727"). Strong Tower filed 2868, asserting four causes of action: (1) breach of contract against BBC; (2) foreclosure of a mechanic's lien against Library Associates, LLC (the "Owner"); (3) constructive trust against the Owner and (4) quantum meruit against both BBC and the Owner. 2868 was consolidated with 1108, with Strong Tower maintaining the same claims. In both 3005 and 3737, Strong Tower was named by virtue of its lien on the project, with no substantive claims made against Strong Tower. BBC has not asserted any claims against Strong Tower in any of these actions.

On September 9, 2021, this Court granted Strong Tower's motion for partial summary judgment against BBC on its breach of contract cause of action.

On September 13, 2021, this Court issued a consent order in which Strong Tower and the Owner dismissed all claims by and between them in all of the above cases.

At this point, no other party has direct claims against Strong Tower, and the only remaining claims keeping Strong Tower in these actions are its own quantum meruit claim against BBC and its breach of contract claim against BBC, for damages above the judgment amount in the summary judgment order. With trial on Strong Tower's claims scheduled for late October, Strong Tower seeks to dismiss its remaining claims/damages and have the partial summary judgment order certified as the final order as to Strong Tower, thus fully ending these cases as to Strong Tower.

Rule 41 states, "[e]xcept as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Rule 41(a)(2), SCRCP. Strong Tower is the only party with claims keeping it involved, so dismissal of its remaining claims should be proper. It should be able to control and dismiss its own claims.

Rule 54 states, “[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Rule 54(b), SCRPC. To certify a judgment under Rule 54, there “must be multiple claims for relief or multiple parties; the judgment entered on the certified claim must be a final judgment; and the [] court must expressly determine that there is no just reason for delay.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct.App.2002).

In these cases, Strong Tower has made multiple claims for relief, and has obtained partial summary judgment on one claim, so the first element is met. Second, with this motion, Strong Tower seeks to dismiss all remaining claims and damages above its summary judgment award, thus, after dismissal, there will be no other claims involving Strong Tower, and its summary judgment award would be final. Lastly, there is no just reason for delay. In fact, there are compelling reasons to grant this motion. A trial involving Strong Tower is scheduled for late October. It involves multiple other parties and is scheduled to last at least two weeks. Strong Tower seeks to be fully dismissed from these cases, so it does not have to attend trial. Further, it is dismissing damages above its summary judgment award, to get a final judgment, again, to avoid trial. And Strong Tower is the only party with claims keeping it involved in the case. If it is willing to dismiss those claims, there is no reason why it should remain in the cases. With all other claims being dismissed by Strong Tower, there is no logical step other than to certify the

summary judgment as the final judgment. This would end the cases with respect to Strong Tower and eliminate a party from trial, thus weighing in favor of judicial economy.

For these reasons, Strong Tower should be dismissed from Case No. 2019-CP-10-1108, Case No.: 2019-CP-10-2868, Case No.: 2019-CP-10-3005, and Case No.: 2019-CP-10-3727. Further, the summary judgment award, entered September 9, 2021, should be certified as the final judgment, and the cases should be ended, as to Strong Tower.

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September 15, 2021
Charleston, South Carolina
19-135

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
Strong Tower Construction, LLC d/b/a
Koch Corporation, Watson Electrical
Construction Co., LLC, Trimark Foodcraft,
LLC, Pleasant Places, Inc., David Allen
Company, Inc., Premier Exteriors, LLC,
Warco Construction, Inc., Old North State
Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Low Country Case & Millwork, Inc.,
Quantum Coatings, LLC, Balfour Beatty
Construction Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION
LLC'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING STRONG TOWER
CONSTRUCTION, LLC d/b/a KOCH
CORPORATION'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Plaintiff Balfour Beatty Construction, LLC ("Balfour"), by and through its undersigned counsel, hereby moves the Court, pursuant to Rule 59(e) S.C.R.C.P, for an order altering, amending, or vacating the Order filed September 9, 2021, granting Strong Tower Construction, LLC d/b/a Koch Corporation's ("Strong Tower") Motion for Partial Summary Judgment.

Specifically, Balfour moves the Court to reconsider its finding that Strong Tower is entitled to partial summary judgment because the Subcontract between Balfour and Strong Tower does not provide for attorney's fees and because the Order does not address Balfour's right to withhold payment should a setoff result against Strong Tower.

LEGAL STANDARD

A motion to alter or amend a judgment pursuant to Rule 59(e) is available to parties when "an issue or argument has been raised to but not ruled upon by the trial court." *Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 400, 693 S.E.2d 1, 6 (Ct. App. 2010). It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court to "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. See *id.* at 21-22, 602 S.E.2d at 778-79.; see, e.g., *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"). A party may file a motion for reconsideration "when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam*, at 24, 602 S.E.2d at 780. "The court may open the judgment if one has been entered and amend his findings of fact and conclusions of law or make new findings and conclusions and

direct the entry of a new judgment.” *NCNB S.C. v. Floyd*, 303 S.C. 261, 263, 399 S.E.2d 794, 795 (Ct. App. 1990).

ARGUMENT

Strong Tower is not entitled to attorney’s fees pursuant to Article 10.D of the Subcontract because Article 10.D only applies to claims brought under Article 10.A.

In its Motion, Strong Tower argued that it was entitled to attorney’s fees and costs pursuant to Article 10.D of the Subcontract. However, Strong Tower’s reliance on Article 10.D is misplaced because Article 10.D does not apply to the claim in this case. Article 10.D cannot be read without examination and consideration of both Articles 10.A and 10.B of the Subcontract.

Article 10.A of the Subcontract provides:

“Any disputes between Subcontractor and Contractor **not involving the conduct of the Owner** or the Contract Documents will, at the election of Contractor, be settled by the American Arbitration Association under its Construction Arbitration Rules, or by a specified arbitrator or different arbitration service if the parties agree in writing.”

Article 10.B of the Subcontract provides:

“If disputes between Contractor and Subcontractor **involve the conduct of the Owner** or an interpretation or requirement of the Contract Documents, then Subcontractor must follow all claim, notice and disputes procedures and requirements of the Contract Documents, and Subcontractor recognizes that it may be joined into any court or arbitration proceedings required by the Contract Documents. Subcontractor is bound to Contractor to the same extent that Contractor is bound to the Owner by the terms of the Contract Documents, and by any and all preliminary and final decisions or determination made by the party, board or court authorized in the Contract Documents or by law, regardless of whether Subcontractor is a party to the proceedings.”

Article 10.D of the Subcontract provides:

“If Contractor elects not to invoke the arbitration procedures set forth in **Article 10.A**, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation in the state court in the County of the Project or in the federal court closes

to the location of the Project. The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation. EACH PARTY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS AGREEMENT, UNLESS THE MATTER ARISES ARTICLE 10.B AND THE CONTRACT DOCUMENTS ALLOW THE OWNER A RIGHT TO TRIAL BY JURY."

The dispute in this litigation involves the conduct of the Owner as stated in Article 10.B, thus, Articles 10.A and 10.D do not apply. The first sentence of Article 10.D provides that if the Contractor does not decide to invoke arbitration procedures, then the provisions of Article 10.D are applicable. Article 10.D only contemplates providing attorney's fees when the dispute arises under Article 10.A, not Article 10.B. Therefore, the prevailing party provision in the Subcontract does not apply, and Strong Tower is not entitled to its attorney's fees and costs.

Balfour is entitled to withhold payment from Strong Tower because a setoff against Strong Tower may result should the Court find that Strong Tower caused a delay that results in damages against Balfour in favor of Library Associates, LLC.

The Summary Judgment Order did not fully consider Balfour's right to withhold payment to Strong Tower because a setoff may result, and therefore, Balfour requests that the Court rule on this issue. Under the Subcontract between Strong Tower and Balfour, Strong Tower will be liable to Balfour for any and all damages incurred by Balfour that were caused by Strong Tower's default. See Article 5.A of Subcontract.

Article 5.A of the Subcontract provides:

"If Subcontractor fails to fully or timely comply with any duty imposed by Legal Requirements or this Subcontract, including the Contract Documents, it is in default. Subcontractor will be liable to Contractor for all losses, costs (including attorneys' fees and court costs) damages, claims, suits, fines or penalties incurred by Contractor or its sureties to the extent caused by the default. Subcontractor will remain liable to Contractor for the same period of time, and to the same extent, as Contractor may be liable to Owner, other subcontractors or third parties for any claims against Contractor or its sureties by any such parties arising from a default."

Should Library Associates, LLC prove that it is entitled to damages from Balfour as a result of Strong Tower's failures, a default is triggered under the Subcontract making Strong Tower liable for any and all damages incurred by Balfour caused by Strong Tower.

Additionally, Article 5.C of the Subcontract authorizes Balfour to withhold payment of what would otherwise be the unpaid balance to Strong Tower until the resolution of Library's claim for damages and provides a right of setoff to Balfour against Strong Tower.

Article 5.C of the Subcontract states:

"Contractor may deduct and withhold from payments otherwise due Subcontractor the costs Contractor has incurred or may reasonably incur as a result of a default. When the default has been cured, or when the Project has been completed by Contractor and accepted by Owner, if the unpaid balance earned under this Subcontract exceeds the expense incurred by Contractor or its sureties as a result of the default and in paying any damages or costs due to Owner or third parties because of Subcontractor's default, such excess will be paid by Contractor to Subcontractor. If those expenses and/or damages exceeds the unpaid balance, then Subcontractor will pay the difference to Contractor upon demand."

As Balfour argued in its Opposition to Strong Tower's Motion for Partial Summary Judgment, uncertainty exists as to what amounts, if any, Strong Tower is due.

The Court did not fully address or consider Balfour's right to withhold payment should Balfour be entitled to a setoff against Strong Tower in its Order. Therefore, Balfour respectfully asks that the Court fully consider and rule on this issue.

CONCLUSION

This Motion is based on the pleadings, all arguments and evidence in the record, the applicable statutes and legal authorities, and such arguments as may be submitted in support hereof.

WHEREFORE, for the reasons stated above, Balfour respectfully requests the Court reconsider its Order and enter an order denying Strong Tower's Motion for Partial Summary Judgment.

Respectfully Submitted

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September 20, 2021

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision Walls,
Inc., Palmetto Automatic Sprinkler Company,
Inc., Cook & Boardman, LLC, Strong Tower
Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction Co., LLC,
Trimark Foodcraft, LLC, Pleasant Places, Inc.,
David Allen Company, Inc., Premier
Exteriors, LLC, Warco Construction, Inc., Old
North State Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern Architectural
Systems, Forton Company, LLC, Low
Country Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION
LLC'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING WATSON ELECTRICAL
CONSTRUCTION CO., LLC'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Balfour Beatty Construction, LLC ("Balfour"), by and through its undersigned counsel, hereby moves the Court, pursuant to Rule 59(e) S.C.R.C.P, for an order altering, amending, or vacating the Order filed September 13, 2021, granting Watson Electrical Construction Co., LLC's, ("Watson") Motion for Partial Summary Judgment.

Specifically, Balfour moves the Court to reconsider its finding that Watson is entitled to partial summary judgment because the Subcontract between Balfour and Watson does not provide

for attorney's fees and because the Order does not address Balfour's right to withhold payment should a setoff result against Watson.

LEGAL STANDARD

A motion to alter or amend a judgment pursuant to Rule 59(e) is available to parties when “an issue or argument has been raised to but not ruled upon by the trial court.” *Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 400, 693 S.E.2d 1, 6 (Ct. App. 2010). It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court to “‘alter or amend the judgment,’ but also as a vehicle to seek ‘reconsideration’” of issues and arguments. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *See id.* at 21-22, 602 S.E.2d at 778-79.; *see, e.g., Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (“purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits”); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a “motion to reconsider” or “motion for reconsideration”). A party may file a motion for reconsideration “when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Elam*, at 24, 602 S.E.2d at 780. “The court may open the judgment if one has been entered and amend his findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment.” *NCNB S.C. v. Floyd*, 303 S.C. 261, 263, 399 S.E.2d 794, 795 (Ct. App. 1990).

ARGUMENT

Watson is not entitled to attorney's fees pursuant to Article 10.D of the Subcontract because Article 10.D only applies to claims brought under Article 10.A.

The Order granting Watson partial summary judgment states that it is entitled to attorney's fees and costs pursuant to the Subcontract. However, Watson's reliance on a provision in the subcontract awarding Watson attorney's fees is misplaced because Article 10.D does not apply to the claim in this case. Article 10.D cannot be read without examination and consideration of both Articles 10.A and 10.B of the Subcontract.

Article 10.A of the Subcontract provides:

"Any disputes between Subcontractor and Contractor **not involving the conduct of the Owner** or the Contract Documents will, at the election of Contractor, be settled by the American Arbitration Association under its Construction Arbitration Rules, or by a specified arbitrator or different arbitration service if the parties agree in writing."

Article 10.B of the Subcontract provides:

"If disputes between Contractor and Subcontractor **involve the conduct of the Owner** or an interpretation or requirement of the Contract Documents, then Subcontractor must follow all claim, notice and disputes procedures and requirements of the Contract Documents, and Subcontractor recognizes that it may be joined into any court or arbitration proceedings required by the Contract Documents. Subcontractor is bound to Contractor to the same extent that Contractor is bound to the Owner by the terms of the Contract Documents, and by any and all preliminary and final decisions or determination made by the party, board or court authorized in the Contract Documents or by law, regardless of whether Subcontractor is a party to the proceedings."

Article 10.D of the Subcontract provides:

"If Contractor elects not to invoke the arbitration procedures set forth in **Article 10.A**, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation in the state court in the County of the Project or in the federal court closest to the location of the Project. The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation. EACH PARTY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS AGREEMENT, UNLESS THE MATTER ARISES ARTICLE 10.B AND THE CONTRACT DOCUMENTS ALLOW THE OWNER A RIGHT TO TRIAL BY JURY."

The dispute in this litigation involves the conduct of the Owner as stated in Article 10.B, thus, Articles 10.A and 10.D do not apply. The first sentence of Article 10.D provides that if the

Contractor does not decide to invoke arbitration procedures, then the provisions of Article 10.D are applicable. Article 10.D only contemplates providing attorney's fees when the dispute arises under Article 10.A, not Article 10.B. Therefore, the prevailing party provision in the Subcontract does not apply, and Watson is not entitled to its attorney's fees and costs.

Balfour is entitled to withhold payment from Watson because a setoff against Watson may result should the Court find that Watson caused a delay that results in damages against Balfour in favor of Library Associates, LLC.

The Summary Judgment Order did not fully consider Balfour's right to withhold payment to Watson because a setoff may result, Balfour requests that the Court rule on this issue. Under the Subcontract between Watson and Balfour, Watson will be liable to Balfour for any and all damages incurred by Balfour that were caused by Watson's default. See Article 5.A of Subcontract.

Article 5.A of the Subcontract provides:

"If Subcontractor fails to fully or timely comply with any duty imposed by Legal Requirements or this Subcontract, including the Contract Documents, it is in default. Subcontractor will be liable to Contractor for all losses, costs (including attorneys' fees and court costs) damages, claims, suits, fines or penalties incurred by Contractor or its sureties to the extent caused by the default. Subcontractor will remain liable to Contractor for the same period of time, and to the same extent, as Contractor may be liable to Owner, other subcontractors or third parties for any claims against Contractor or its sureties by any such parties arising from a default."

Should Library Associates, LLC prove that it is entitled to damages from Balfour as a result of Watson's failures, a default is triggered under the Subcontract making Watson liable for any and all damages incurred by Balfour caused by Watson.

Additionally, Article 5.C of the Subcontract authorizes Balfour to withhold payment of what would otherwise be the unpaid balance to Watson until the resolution of Library's claim for damages and provides a right of setoff to Balfour against Watson.

Article 5.C of the Subcontract states:

“Contractor may deduct and withhold from payments otherwise due Subcontractor the costs Contractor has incurred or may reasonably incur as a result of a default. When the default has been cured, or when the Project has been completed by Contractor and accepted by Owner, if the unpaid balance earned under this Subcontract exceeds the expense incurred by Contractor or its sureties as a result of the default and in paying any damages or costs due to Owner or third parties because of Subcontractor’s default, such excess will be paid by Contractor to Subcontractor. If those expenses and/or damages exceeds the unpaid balance, then Subcontractor will pay the difference to Contractor upon demand.”

As Balfour argued at the hearing and in its Opposition to Watson’s Motion for Partial Summary Judgment, uncertainty exists as to what amounts, if any, Watson is due.

The Court did not fully address or consider Balfour’s right to withhold payment should Balfour be entitled to a setoff against Watson in the hearing or its Order. Therefore, Balfour respectfully asks that the Court fully consider and rule on this issue.

CONCLUSION

This Motion is based on the pleadings, all arguments and evidence in the record, the applicable statutes and legal authorities, and such arguments as may be submitted in support hereof.

WHEREFORE, for the reasons stated above, Balfour respectfully requests the Court reconsider its Order and enter an order denying Watson’s Motion for Partial Summary Judgment.

Respectfully Submitted,

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September 23, 2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-10-1108

Balfour Beatty Construction, LLC.

Plaintiff,

vs.

**Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation.,**

Defendants.

Library Associates, Inc.

Third-Party Plaintiff,

vs.

**Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC, 1st
Choice Glass, Inc., Strong Tower
Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction, Co., LLC,
Trimark Foodcraft, LLC, Pleasant Places,
Inc., David Allen Company, Inc., Premier
Exteriors, LLC, Robert Thomas Iron Design,
LLC, Warco Construction, Inc., Old North
State Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern Architectural
Systems, Forton Company, LLC,
Lowcountry Case & Millwork, Inc.,
Quantum Coatings,. LLC, Balfour Beatty
Construction Group, Inc.**

Third-Party Defendants.

**DEFENDANT WATSON ELECTRICAL
CONSTRUCTION, CO., LLC'S
MEMORANDUM IN OPPOSITION TO
BALFOUR BEATTY CONSTRUCTION,
LLC'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING WATSON ELECTRICAL
CONSTRUCTION, LLC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COMES NOW Third-Party Defendant Watson Electrical Construction Co., LLC
("Watson") by and through undersigned counsel, and files and serves its memorandum in

opposition to Balfour Beatty Construction, LLC's ("Balfour") Motion for Reconsideration of Order Granting Watson Electrical Construction, LLC's Motion for Partial Summary Judgment filed September 21, 2021 ("Motion").

On September 13, 2021, this Court granted Watson summary judgment on its breach of contract claim against Balfour, (i) finding there was no genuine dispute of any material fact relating to Watson's performance of its subcontracts, nor as to Balfour's nonpayment, and (ii) awarding Watson its attorney's fees pursuant to the terms of the subcontract between Watson and Balfour. The Court's ruling should not be disturbed.

I. WATSON'S MOTION AND THE COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On August 20, 2021, the Court heard arguments on Watson's Motion for Summary Judgment, or Alternative Motion for Partial Summary Judgment. Prior to the hearing, Balfour submitted a memorandum of law in opposition to Watson's motion. Balfour's memorandum in opposition made several of the same arguments Balfour now makes. Additionally, at the hearing the Court heard and considered, arguments by counsel for Balfour and counsel for Library Associates, LLC in opposition to Watson's Motion. Similarly, Balfour's arguments at the hearing included some of the same arguments Balfour makes in support of its Motion for Reconsideration. Despite the arguments Balfour made in its memorandum in opposition and at the hearing, this Court concluded that there is no question of material fact, and Watson is entitled to partial summary judgment.

The Court's order explains in detail the undisputed facts upon which the Court determined that Watson is entitled to partial summary judgment, and that Balfour failed to offer any evidence that creates a question of material fact in opposition to Watson's Motion. Notably, Balfour has not offered any new facts for the Court's consideration.

II. ARGUMENT

A. Attorneys' Fees and Costs

Balfour's Motion incorrectly advances an argument that the attorneys' fee provision in the subcontract between Balfour and Watson does not apply to this dispute. Section 10.D of Balfour's Subcontract Terms and Conditions (incorporated into the subcontracts between Balfour and Watson) states that, as to any dispute covered by Section 10.A, the prevailing party is entitled to recover its attorneys' fees and cost.¹ Section 10.A refers to "disputes between Subcontractor and Contractor not involving the conduct of the Owner."

Watson asserted a breach of contract claim against Balfour, and this Court heard argument and granted summary judgment to Watson on that cause of action only. Watson's breach of contract claim was not asserted against the Owner, accordingly, Watson's breach of contract claim constitutes a "dispute between the Subcontractor and Contractor not involving the conduct of the owner" as described in Section 10.A.

That Balfour points to nonpayment by the Owner as the reason for its own nonpayment to Watson does not make the Owner's conduct relevant to Watson's breach of contract claim, because nonpayment by an owner is not a valid defense under South Carolina law. *See* S.C. Code §29-6-230 ("The payment by the owner to the contractor ... is not... a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is unenforceable."); *Elk & Jacobs Dry Wall v. Town Contractors, Inc.*, 267 S.C. 412, 418, 229 S.E.2d 260, 262 (1976) (recognizing that a contractor may delay payment to a subcontractor only for a reasonable time while it attempts to obtain payment from an owner, and that such payment from the owner is not a condition precedent to the contractor's obligation to pay the subcontractor). Watson contracted with Balfour;

¹ Balfour concedes that the attorneys' fee provision applies to any dispute under Section 10.A. **Mot.** at 3-4.

it performed its contract, as acknowledged by Balfour; and it was not paid in full by Balfour. The Owner's conduct is irrelevant because Balfour was obligated to pay Watson regardless of whether the Owner paid Balfour.

Balfour, though, contends the dispute *does* involve the conduct of the Owner² and thus implicates Section 10.B of Balfour's terms and conditions, not Section 10.A. For the reasons above, Section 10.B. is inapplicable to Watson's breach of contract claim against Balfour; but further, the language of section 10.B belies Balfour's contention:

Contractor will, at its option: (i) present to the Owner in Contractor's name or (ii) authorize Subcontractor to present to the Owner in Contractor's name, all of Subcontractor's claims, and answer the Owner's claims involving subcontractor's work, whenever Contractor is permitted to do so by the terms of the Contract Documents."

This is not what happened because Watson has no breach of contract claim against the Owner for Balfour to present or the authorize Watson to present in Balfour's name.

Furthermore, section 10.B. clearly does not apply because Balfour has already rested its case in chief, and did not pursue all Watson's claims on its behalf against the Owner, did not call a single Watson employee as a witness, and upon information and belief did not present evidence in support of Watson's claims. Similarly, Balfour did not authorize Watson to pursue claims in Balfour's name against the Owner.

Finally, should the Court find that an ambiguity exists regarding the applicability of the attorneys' fee provision in the subcontract to this claim, it must be construed against the drafter, Balfour. *E.g., Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) ("Moreover, even if the language creates an ambiguity, a court will construe any doubts

² Such a claim would generally, if not always, involve the filing of a mechanic's lien against the property, and the South Carolina Mechanic's Lien Statute already provides for attorneys' fees to the prevailing party as defined therein. S.C. Code §29-5-10 et seq.

and ambiguities in an agreement against the drafter of the agreement.”).

B. Balfour’s Remaining Arguments

This Court previously rejected the remaining arguments set forth in Balfour’s Motion, namely, that (i) the Owner might possibly establish delay on the part of Watson resulting in damages against Balfour, and that (ii) Balfour is entitled to withhold payment to Watson pending resolution of the Owner’s claim of damages.

First, “the mere existence of [a] potential right of setoff does not create a genuine issue of material fact.” *Wachovia Bank, N.A. v. Winona Grain Co., Inc.*, 2004 WL 6334915, at *4 (S.C. Ct. App. Sept. 20, 2004). Second, the deposition testimony in this matter which was submitted with Watson’s Motion (including from the Owner’s and Balfour’s witnesses), establishes that Watson was not the cause of any delay to the project and that no party has complaints about Watson’s work on the Project. Finally, and as noted *supra*, unconditional pay-when-paid provisions are treated as pay-if-paid provisions and are unenforceable under South Carolina law. S.C. Code § 29-6-230; *Elk & Jacobs*, 267 S.C. at 418, 229 S.E.2d at 262 (1976).

To the extent Balfour’s contention is that this Court did not rule on these arguments previously, this is error, as the Court’s granting of summary judgment after considering Balfour’s arguments constitutes a rejection of these arguments. *See, e.g., Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (finding an implicit ruling obviating the need for a motion to reconsider when “the circuit court's ruling that Church was entitled to prejudgment interest implied by necessity that she met the standard for an award of prejudgment interest”).

III. CONCLUSION

For the reasons included in Watson's Motion and argued at the hearing on Watson's Motion, and the reasons stated above, Watson's Motion should stand, and this Court should deny Balfour's Motion for Reconsideration.

This the 19th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she served the foregoing **DEFENDANT WATSON ELECTRICAL CONSTRUCTION, CO., LLC'S MEMORANDUM IN OPPOSITION TO BALFOUR BEATTY CONSTRUCTION, LLC'S MOTION FOR RECONSIDERATION OF ORDER GRANTING WATSON ELECTRICAL CONSTRUCTION, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** by electronic mail addressed to the following:

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-10-1108

Balfour Beatty Construction, LLC.

Plaintiff,

vs.

**Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation.,**

Defendants.

**STIPULATION OF DISMISSAL
BETWEEN WATSON ELECTRICAL
CONSTRUCTION CO., LLC AND
BALFOUR BEATTY CONSTRUCTION,
LLC**

Library Associates, Inc.

Third-Party Plaintiff,

vs.

**Lithko Contracting, LLC, Guy M. Beaty,
Inc., Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision
Walls, Inc., Palmetto Automatic Sprinkler
Company, Inc., Cook & Boardman, LLC,
1st Choice Glass, Inc., Strong Tower
Construction, LLC d/b/a Koch
Corporation, Watson Electrical
Construction, Co., LLC, Trimark
Foodcraft, LLC, Pleasant Places, Inc.,
David Allen Company, Inc., Premier
Exteriors, LLC, Robert Thomas Iron
Design, LLC, Warco Construction, Inc.,
Old North State Masonry, LLC, Tom
Rochester & Associates d/b/a Southeastern
Architectural Systems, Forton Company,
LLC, Lowcountry Case & Millwork, Inc.,
Quantum Coatings,. LLC, Balfour Beatty
Construction Group, Inc.**

Third-Party Defendants.

Pursuant to Rule 41 of the South Carolina Rules of Civil Procedure, Watson Electrical Construction Co., LLC (“Watson”) and Balfour Beatty Construction, LLC (“Balfour”), by and through their respective counsel, hereby stipulate to the dismissal without prejudice of Watson’s Remaining Claims against Balfour in this action. Remaining Claims means all claims not already decided by summary judgment. This stipulation does not affect Watson’s judgment against Balfour, which was granted and ordered by this Court on Watson’s Motion for Partial Summary Judgment (“Judgment”). Likewise, this stipulation does not dismiss or affect Balfour’s right to contest, defend against or appeal the Judgment. Balfour specifically reserves its indemnity rights to the extent, if any, it incurs damages in this action to Library Associates that may have been caused or contributed to by a breach of Watson. This stipulation does not end the case or affect any claims against other parties, including without limitation, Balfour’s or Watson’s abilities to recover from Library Associates, LLC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served a copy of the foregoing **STIPULATION OF DISMISSAL WITHOUT PREJUDICE BETWEEN WATSON ELECTRICAL CONSTRUCTION CO., LLC AND BALFOUR BEATTY CONSTRUCTION, LLC** upon the parties listed below via electronic mail and/or by depositing a copy thereof in the United States mail in Greenville, South Carolina, postage pre-paid and addressed as follows:

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This the 1st day of December 2021.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-1108
COUNTY OF CHARLESTON	)	
Balfour Beatty Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Library Associates, LLC and Metropolitan	)	
Life Insurance Company,	)	
	)	
Defendants.	)	
	)	STRONG TOWER CONSTRUCTION,
Library Associates, Inc.,	)	LLC D/B/A KOCH CORPORATION'S
	)	MEMORANDUM IN OPPOSITION TO
Third-Party Plaintiff,	)	BALFOUR BEATTY'S MOTION FOR
	)	RECONSIDERATION
v.	)	
	)	
Lithko Contracting, LLC f/k/a Lithko Contracting,	)	
Inc., Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf	)	
Stream Construction Company, Inc., Palmetto	)	
Automatic Sprinkler Company, Inc., Cook &	)	
Boardman, LLC, Strong Tower Construction, LLC	)	
d/b/a Koch Corporation, Watson Electrical	)	
Construction Co., LLC, Trimark Foodcraft, LLC,	)	
Pleasant Places, Inc., David Allen Company, Inc.,	)	
Premier Exteriors, LLC, Warco Construction, Inc.,	)	
Old North State Masonry, LLC, Tom Rochester &	)	
Associates d/b/a Southeastern Architectural	)	
Systems, Lowcountry Case & Millwork, Inc.,	)	
Quantum Coatings, LLC, and Balfour Beatty	)	
Construction Group, Inc.,	)	
	)	
Third-Party Defendants.	)	
	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-2868
COUNTY OF CHARLESTON	)	
STRONG TOWER CONSTRUCTION, LLC,	)	
d/b/a KOCH CORPORATION,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	
	)	
BALFOUR BEATTY CONSTRUCTION,	)	
LLC, LIBRARY ASSOCIATES, LLC, and	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY,	)	
	)	
DEFENDANTS.	)	
	)	

On or about September 9, 2021, this Court awarded Strong Tower Construction, LLC d/b/a Koch Corporation (“Koch”) partial summary judgment, including attorney’s fees, costs and interest, against Balfour Beatty Construction, LLC (“BBC”). On or about September 20, 2021, BBC filed a motion for reconsideration of this Court’s award in favor of Koch. BBC’s motion is identical to the motion it filed against other subcontractors who were awarded summary judgment, including Low Country Case & Millwork, Inc. (“Low Country”). On or about October 19, 2021, Low Country filed a memorandum in opposition to BBC’s motion for reconsideration. Low Country’s memorandum properly analyzes the subcontract language at issue and the relevant case law.

For the reasons set forth in Low Country’s memorandum, the reasons set forth in the filing and oral argument leading up to the summary judgment award, and the reasons set forth in the September 9, 2021, order, this Court should deny BBC’s motion for reconsideration.

SMITH CLOSSER & WHEELER, PA

s/Samuel M. Wheeler

December 1, 2021

19-135

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,
Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC
Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision Walls,
Inc., Palmetto Automatic Sprinkler Company,
Inc., Cook & Boardman, LLC, Strong Tower
Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction Co., LLC,
Trimark Foodcraft, LLC, Pleasant Places, Inc.,
David Allen Company, Inc., Premier
Exteriors, LLC, Warco Construction, Inc., Old
North State Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern Architectural
Systems, Forton Company, LLC, Low
Country Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

BALFOUR BEATTY CONSTRUCTION,
LLC'S MEMORANDUM IN SUPPORT OF
ITS MOTIONS TO RECONSIDER THE
ENTRY OF SUMMARY JUDGMENT IN
FAVOR OF VARIOUS
SUBCONTRACTORS

Plaintiff Balfour Beatty Construction, LLC ("Balfour"), submits this Memorandum in Support of its Motions to Reconsider the entry of Summary Judgment in favor of various subcontractors.

Background

Prior to trial, the Court awarded summary judgment to each of the following subcontractors; (1) Watson, (2) Warco¹, (3) Premier Exteriors, (4) Low Country Case and Millwork, and (5) Strong Tower/Koch. Those Orders contain the following findings:

Watson

Watson performed the work it was required to perform under the Subcontract, Watson's work was accepted by BCC and the Owner, and Watson is entitled to judgment as a matter of law against BBC in the amount of \$921,671.39 on its breach of contract claim.

See Order Granting Watson's Motion for Partial Summary Judgment, at 4–5 (Sep. 13, 2021).

Warco

"There Exists no Genuine Issues of Material Fact as to at Least \$157,268.04 Being Due and Owing By Balfour to Warco Under the Subcontract." *See, e.g.*, Order Granting Warco's Motion for Partial Summary Judgment, at 3 (Sep. 13, 2021).

Premier Exteriors

"Mr. Bremer's Affidavit, including its attachments, and Mr. Clements' deposition testimony evidence Premier's entitlement to payment from BBC under the subcontract in the principal amount of \$104,703.51." Order Granting Premier Summary Judgment, at 7 (Dec. 22, 2021).

LCCM

"The court...finds that there is no genuine dispute of any material fact and Low Country is entitled to summary judgment against Balfour Beatty Construction, LLC...in the amount of \$369,333.25." Order Granting Low Country's Motion for Partial Summary Judgment, at 1 (Sep. 9, 2021)

Strong Tower

"There exist no genuine issues of material fact as to at least \$82,859.21 owed by BBC to Koch under the parties' contract, entitling Koch to summary judgment on that amount under its breach of contract cause of action." Order granting Strong Tower's Motion for Partial Summary Judgment, at 6–7 (Sep. 9, 2021).

¹ Warco was previously been granted summary judgment. However, Balfour and Warco entered into a settlement agreement wherein Balfour paid Warco \$160,000.00. That settlement is reflected in the June 9, 2022 stipulation of dismissal filed with this Court. Therefore, Warco's summary judgment is moot and should be vacated.

Discussion

First, for the detailed reasons set out in Balfour's Memoranda in Opposition to Summary Judgment by each of these subcontractors, and for the reasons set forth in Balfour's motions for reconsideration of the orders granting summary judgment to the subcontractors (which are included herein by reference), the orders granting the subcontractor's summary judgment were improper because (1) the subcontractors were not entitled to attorneys' fees under the contracts, and (2) Balfour established an issue of fact to show that Balfour had a right of set-off against amounts claimed by these subcontractors because of potential breaches by those subcontractors.

Second, for the Court to make the findings above, then subsequently issue its Order on October 6, 2023 wherein it determined that these amounts are not "recoverable costs" or "Costs of the Work" under the contract is clear error. Stated differently, to rule that these are not "Costs of the Work" but allow these summary judgments to stand is clear error.²

In addition, as forecasted by Balfour in its memoranda in opposition to the motions for summary judgment, the Court has now made findings that entitle Balfour to a claim for indemnity against those same subcontractors. For example, specifically included in the repair costs awarded to Library are damages for repairing the electrical work at the hotel. Library Exhibit 146B. Balfour has a claim against Watson for those repair costs. Premier Exteriors and Low Country Case and Millwork are similarly implicated in the Court's award of repair costs. These subcontractors also have liability to Balfour now that the Court has awarded Library liquidated damages. *See generally* testimony from Library scheduling experts.

² The Court is respectfully reminded that when Hadley testified that the summary judgment awards claimed by the subcontractors were not costs of the work, which Balfour strongly disagrees with, she also unequivocally stated that the award of attorney's fees to the subcontractors is improper under the terms of the subcontracts. Trans. Hadley p. 4090, line 12 - 16.

Finally, the Court's rulings with respect to Balfour's right to payment from Library and its obligations to the subcontractors are patently inconsistent, and the Court should either alter or amend its October 6, 2023 Order and Judgment to include the subcontractor summary judgment amounts as Cost of the Work, or vacate each of the orders granting summary judgment to the subcontractors.

Respectfully Submitted,

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March 7, 2024
 Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2019-CP-10-1108
COUNTY OF CHARLESTON	)	
Balfour Beatty Construction, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Library Associates, LLC and Metropolitan	)	
Life Insurance Company,	)	
	)	
Defendants.	)	
	)	
Library Associates, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Lithko Contracting, LLC, Guy M. Beatty, Inc.,	)	
Bernard MMC, LLC, Gulf Stream Construction	)	
Company, Inc., Precision Walls, Inc., Palmetto	)	
Automatic Sprinkler Company, Inc., Cook &	)	
Boardman, LLC, 1 st Choice Glass, Inc., Strong	)	
Tower Construction, LLC d/b/a Koch Corporation,	)	
Watson Electrical Construction Co., LLC, Trimark	)	
Foodcraft, LLC, Pleasant Places, Inc., David Allen	)	
Company, Inc., Premier Exteriors, LLC, Robert	)	
Thomas Iron Design, LLC, Warco Construction,	)	
Inc., Old North State Masonry, LLC, Tom	)	
Rochester & Associates d/b/a Southeastern	)	
Architectural Systems, Forton Company, LLC,	)	
Lowcountry Case & Millwork, Inc., Quantum	)	
Coatings, LLC, Balfour Beatty Construction	)	
Group, Inc.,	)	
	)	
Third-Party Defendants.	)	
	)	

MEMORANDUM IN SUPPORT
OF MOTION FILED BY STRONG
TOWER CONSTRUCTION, LLC
TO CERTIFY SUMMARY
JUDGMENT AS THE FINAL
JUDGMENT AND IN SUPPORT
OF A LIFT OF STAY ON
EXECUTION

On March 7, 2024, the remaining parties to the above-captioned action attended a status conference at which this Court formulated a plan to address all pending motions, some of which will be heard on March 13, 2024. With respect to Strong Tower, two motions will be heard on March 13, 2024: (1) Balfour Beatty Construction, LLC's ("BBC") motion to reconsider an order

granting Strong Tower Construction, LLC d/b/a Koch Corporation (“Strong Tower”) summary judgment, entered on or about September 9, 2021; and (2) Strong Tower’s motion to certify its judgment as final under Rule 54, SCRCP, filed on September 15, 2021. Following the award of summary judgment, Strong Tower also obtained a writ of execution and sought to collect its judgment. At that time, the trial between Library Associates, Inc. (“LA”) and BBC was approaching, so this Court stayed execution. Strong Tower has addressed BBC’s motion to reconsider in previous filings and memorandums. This memorandum is intended to support Strong Tower’s motion to certify and address the stay on execution of its judgment.

At the status conference held on March 7, 2024, both this Court and certain parties expressed concern about this Court certifying Strong Tower’s judgment, due to the fact that there exist many post-trial motions and issues between BBC and LA. Strong Tower anticipates that the argument against certifying Strong Tower’s judgment is that a certification will trigger an appeal, which will divest this Court of jurisdiction over the entire case. In effect, the fear is that the trial between BBC and LA that occurred in late 2021, resulting in millions of dollars in awards, and, depending on post-trial motions, potentially tens of millions in attorneys’ fees, costs, and punitive damages, will be halted before final disposition due to the appeal of, by comparison, a nominal summary judgment award.

Certification of Strong Tower’s judgment, however, will not divest this Court of jurisdiction. Rule 205, SCACR, states, “[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. **Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal** [emphasis added].” In *Metts v. Mims*, 384 S.C. 491 (2009), the South Carolina Supreme Court took up this issue. In *Metts*, the lower court issued a contempt order that was immediately appealed. While on appeal, the lower court granted one party summary judgment, and the party against whom summary judgment was awarded argued that the lower court should not have considered a motion for summary judgment, given the pending

appeal of the contempt order. Citing the above italicized language of Rule 205, SCACR, the Supreme Court ruled that the lower court appropriately proceeded to review the merits of the case, even while the case was on appeal for other reasons. *Id.* Ultimately, the summary judgment award was overturned due to the existence of an issue of fact, but the Supreme Court ruled unequivocally that a lower court can proceed with matters not affected by an appeal. *Id.*

This case presents a much stronger basis for this Court to certify Strong Tower's judgment while continuing to rule on post-trial motions between BBC and LA. In *Metts*, the Supreme Court determined that an appeal in the same case between the same parties did not divest the lower court of its jurisdiction to hear and rule on dispositive motions. In this case, Strong Tower's summary judgment award is completely attenuated and unrelated to the trial and post-trial motions between BBC and LA. First, there exist no claims between Strong Tower and LA. In fact, Strong Tower and LA dismissed claims against each other. Second, Strong Tower did not attend the trial between BBC and LA, nor was there a reason for it to attend, considering it was already awarded summary judgment. Third, neither the trial nor the post-trial motions touch on anything remotely related to Strong Tower's summary judgment award. The trial was limited to claims between BBC and LA.

Moreover, the argument that an appeal will divest this Court is predicated on a fact that does not exist – the filing of an appeal of Strong Tower's summary judgment award. It is unknown whether BBC will appeal this award. Even if it does, nothing prevents this Court from continuing to address post-trial matters between BBC and LA.

Strong Tower understands and appreciates that there have been several extraordinary factors that have prolonged this case. However, Strong Tower was awarded summary judgment nearly two and a half years ago. Issues presently existing between BBC and LA are complex and, if history between these parties is any indication, have the high likelihood of drawing this case out for a long, undetermined amount of time. It would be extremely prejudicial to Strong Tower to delay certification any longer. The appellate rules, the case law and equity all support certification,

which Strong Tower respectfully requests this Court grant. In doing so, Strong Tower would further request the stay on execution be lifted.

For all of the above reasons, Strong Tower requests that its summary judgment award be certified as final under Rule 54 and the stay on execution be lifted.

Respectfully submitted this 7th day of March, 2024

WHITFIELD-CARGILE LAW, PLLC

s/Samuel M. Wheeler

Samuel M. Wheeler
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Attorney for the Strong Tower

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Balfour Beatty Construction, LLC,

Plaintiff,

vs.

Library Associates, LLC; and Metropolitan
Life Insurance Company, a New York
Corporation,

Defendants.

Library Associates, LLC

Third-Party Plaintiff,

vs.

Lithko Contracting, LLC, Guy M. Beaty, Inc.,
Bernard MMC, LLC, Gulf Stream
Construction Company, Inc., Precision Walls,
Inc., Palmetto Automatic Sprinkler Company,
Inc., Cook & Boardman, LLC, Strong Tower
Construction, LLC d/b/a Koch Corporation,
Watson Electrical Construction Co., LLC,
Trimark Foodcraft, LLC, Pleasant Places, Inc.,
David Allen Company, Inc., Premier
Exteriors, LLC, Warco Construction, Inc., Old
North State Masonry, LLC, Tom Rochester &
Associates d/b/a Southeastern Architectural
Systems, Forton Company, LLC, Low
Country Case & Millwork, Inc., Quantum
Coatings, LLC, Balfour Beatty Construction
Group, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-10-01108

**BALFOUR BEATTY CONSTRUCTION
LLC'S MOTION FOR
RECONSIDERATION OF ORDER
DENYING BALFOUR
BEATTY CONSTRUCTION, LLC'S
MOTION FOR RECONSIDERATION
OF THE ORDER GRANTING WATSON
SUMMARY JUDGMENT**

Plaintiff Balfour Beatty Construction, LLC ("Balfour"), by and through its undersigned counsel, hereby moves the Court, pursuant to Rule 59(e) S.C.R.C.P, for an order altering or amending the Order filed April 12, 2024, denying Balfour's Motion to Reconsider the Order granting Watson Electrical Construction Co., LLC's, ("Watson") Motion for Partial Summary Judgment.

The grounds for this motion are as follows:

1. On September 13, 2021, this Court entered an Order granting Watson's motion for partial summary judgment in the amount of \$1,360,236.58.
2. On September 23, 2021, Balfour filed a Motion to Reconsider the September 13, 2021, Order granting Watson partial summary judgment.
3. On November 22, 2021, Balfour issued payment to Watson in the amount of \$208,188.73 (Balfour trial exhibit no. 351).
4. On April 12, 2024, the Court entered an order denying Balfour's Motion to Reconsider the Order granting Watson Summary Judgment. The Court's April 12, 2024, Order states in footnote 2: "As of the date the Motion was heard, \$299,331.62 in post-judgment interest has accrued."
5. The interest calculation in footnote 2 did not account for the payment Balfour issued to Watson in November 2021.
6. The Court's April 12, 2024, Order should be amended to state in footnote 2: "As of the date the Motion was heard, \$225,774.15 in post-judgment interest has accrued."
7. Rule 59, SCRCP, permits the Court to amend its findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment.
8. A Proposed Order reflecting the requested revision to footnote 2 is being filed herewith. Watson consents to the entry of the Proposed Order.

WHEREFORE, Balfour respectfully requests the Court reconsider and amend its Order denying Balfour's motion to reconsider the Order denying Balfour's motion for reconsideration and enter the proposed order filed herewith.

Respectfully Submitted,

PARKER POE ADAMS & BERNSTEIN LLP

By: s/James Lynn Werner
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greysonland@parkerpoe.com
nicknybo@parkerpoe.com

April 22, 2024
Charleston, South Carolina

*Attorneys for Plaintiff Balfour Beatty
Construction, LLC*



**Watson Electrical
Construction Co. LLC**

P.O. Box 3105
1500 Charleston St (27893)
Wilson, NC 27895-3105

Phone 252-237-7511
Main Fax 252-243-1805
Finance Fax 252-243-1607
www.watsonelec.com

NC Electrical License 213U
VA Contractors License:
2705 075109A
SC Electrical License
M106527

May 14, 2015

**Balfour Beatty Construction, LLC
1930 Camden Road
Charlotte, NC 28203**

Attn: Mike Baumbach, Senior Vice President

**Re: Hotel at Marion Square
Project Number: 13026000
WECC Job Number: 21046**

Dear Mr. Baumbach,

Attached please find the signed subcontracts, Exhibits B (Electrical Scope of Work) and C (Subcontract Special Provisions), insurance certificates and our W9 in support of the above referenced project.

In review of the Subcontract Documents we have noted the following clarifications and exceptions:

Article 1 D: Please provide a copy of the Prime contract for our use.

Article 9 A iii: This section indicates a five (5) day turn around on all change order proposals. Special Provisions Exhibit C, Section 4 H allows for a ten (10) day turn around, which we will comply with.

Exhibit B – Scope of Work

Clarifications, item 2: We take exception to the 30 day turn around for all shop drawings and submittals and will require 90 days.

Clarifications, item 7: We are only providing conduits for the security system. The security system is to be furnished by the owner.

Clarifications, item 8: This requirement did not appear to be included as part of the Bid Documents.

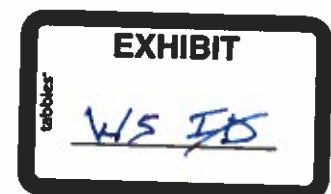




Exhibit C – Subcontract Special Provisions

Section I 1.b: We take exception to the 28 day turn around for all shop drawings and submittals and will require 90 days.

Section I 41A (10): We take exception to providing access road to work areas and Crane pads.

Section I 41A (12): We take exception to providing any Dewatering for the site.

Section I 42: The cost of Composite Cleanup was removed from our subcontract.

Thank you for selecting Watson Electrical to assist you with this project!

Sincerely,

A handwritten signature in blue ink, appearing to read 'Carroll M. Lipscombe, Jr.', is written over a circular blue ink stamp. The signature is fluid and stylized.

Carroll M. Lipscombe, Jr.
Chief Financial Officer

**Balfour Beatty
Construction**

1930 Camden Road
Charlotte, NC 28203

EXECUTED

704-319-4000
704-319-4001 (fax)

SUBCONTRACT

ELECTRICAL

DATE: March 20, 2015

TO: Watson Electrical Construction Co., LLC
3215 Fortune Drive Suite 109
Charleston, SC 29418

PROJECT NAME: Hotel at Marion Square
PROJECT ADDRESS: 404 King Street
Charleston, SC 29403

804-550-4881 (phone)
804-550-4889 (fax)

PROJECT #: 13026000
VENDOR #:
CONTRACT #: 003
COST TYPE: 42040

ATTN: Bill Brittelli

You are authorized to proceed with furnishing and installing all work specified on the Attached Scope of Work and required by this Subcontract:

\$3,963,792.00 (Three million nine hundred sixty-three thousand seven hundred ninety-two dollars)

Retainage: 10.0000 %

The Owner of the Project is: **Library Associates, LLC.**

The "SUBCONTRACT Documents" include this Subcontract, form, the Subcontract Terms and Conditions, and all other applicable Exhibits including:

Exhibit A - Contract Documents
Exhibit B - Scope of Work
Exhibit C - Special Provisions
Exhibit D - Safety Plan
Exhibit E - Site Logistics Plan
Exhibit F - Lien Releases

Exhibit G - Pay Application
Exhibit H - Project Schedule
Exhibit I - Quality Control Plan
Exhibit J - Insurance Certificate
Exhibit K - Bond Forms

Exhibit L - Provisions Applicable to Publicly
Funded Projects
Exhibit M - EEO Policy
Exhibit N - Design Build Design Assist Rider
Exhibit O - State Law Rider

Exhibits may be omitted even if listed above. The Special Provisions will list the omitted exhibits, if any.

Watson Electrical Construction Co., LLC
Subcontractor

By: 
Name: Camell Lipscombe
Title: CHIEF FINANCIAL OFFICER
State Contractor License #: M106527
Federal ID#: 61-1440043
Date: 5-13-15

Balfour Beatty Construction, LLC
Contractor

By: 
Name: Mike Baumbach
Title: Senior Vice President/BUL
State Contractor License #: 110668
Federal ID#: 20-1627180
Date: 28 May 2015

This Subcontract is not binding until accepted
This Subcontract covers the contract amount only
Additional work is to be billed separately

SUBCONTRACT TERMS AND CONDITIONS

Article 1: General

- A. Subcontractor will fully perform and timely complete, as an independent contractor, all work (Work) in accordance with the Subcontract, including the documents identified on **Exhibit A** (Contract Documents), the Scope of Work described in **Exhibit B** and the Special Provisions described in **Exhibit C** for the Subcontract Price as shown on the Subcontract. The Subcontract Price includes all materials, equipment, bonds, labor, sales and use taxes, supervision, insurance, overhead and profit required to perform the Work. If there is any conflict between the Subcontract and a Contract Document, the more strict provision governs. Time is of the essence in performing all Subcontract obligations.
- B. Prior to executing this Subcontract, Subcontractor has carefully determined to its satisfaction all requirements of this Subcontract and the extent and the costs of all aspects of the Work, and has:
 - i. ascertained the conditions and requirements of its Work, including: a) the location, accessibility and character of the site and adjacent areas; b) surface conditions and reasonably ascertainable subsurface conditions (including potential water, materials, utilities or obstacles); c) any errors, omissions or conflicts in the Contract Documents that could reasonably be discovered by a Subcontractor experienced in the Work in the area of the Project; d) existing facilities at or near the site; e) transportation, disposal, handling and storage of materials or equipment; f) labor availability; g) location and availability of utilities; h) needed equipment and facilities; i) uncertainties of weather; and j) all federal, state, and local legal requirements, codes and regulations (collectively, Legal Requirements) applicable to any aspect of the Work or to Subcontractor; and
 - ii. reviewed this Subcontract and all information made available by Contractor or others, satisfying itself with the correctness and accuracy of this Subcontract and the Subcontract Price in light of all information and required investigations.
- C. Subcontractor acknowledges the critical importance to the Project and to all Project personnel of Contractor's "Zero Harm" safety initiative and Contractor's safety requirements. Subcontractor will comply with Contractor's safety requirements in **Exhibit D**, all Legal Requirements relating to safety in executing the Work and disposing or handling materials (including any hazardous materials), and all rules of Contractor and Owner regarding the performance of Work and the Project site, including compliance with the Site Logistics Plan attached as **Exhibit E**. Subcontractor at all times maintains primary control of and responsibility for safety for its Work, and will meet or exceed all safety requirements of this Subcontract. Subcontractor will at no time start, continue or resume any Work which Subcontractor or any representative of Contractor or Owner identifies as unsafe, until Subcontractor has taken corrective measures satisfactory to Contractor. Failure of Contractor or others to stop an unsafe practice will not relieve Subcontractor of its responsibilities. If Subcontractor or any person for whom Subcontractor is responsible fails to enforce the Contractor's safety requirements or any safety-related Legal Requirement, Contractor may, in addition to other remedies, bar such party from the site.
- D. With respect to its Work and this Subcontract, and in addition to the other duties specified in this Subcontract, Subcontractor owes to Contractor the duties timely and fully to: (i) comply with all Legal Requirements; (ii) provide within 3 business days any requested written assurances of complete and timely performance, including assurances prompted by any actual or potential insolvency, bankruptcy or failure to continue as a going concern; (iii) be responsible for the acts or omissions of its laborers, and those of its subcontractors and suppliers at all tiers (collectively, Lower Tiers); (iv) ensure that all obligations of this Subcontract and the Contract Documents are included in all agreements involving Lower Tiers as respects their performance of any Work; (v) comply with this Subcontract and the Contract Documents, assuming towards Contractor all obligations that Contractor has assumed towards Owner in the Contract Documents, and being bound to Contractor in the same manner as Contractor is bound to Owner under the Contract Documents, with respect to the Work; (vi) enforce Balfour Beatty's Supplier Code of Conduct (<http://balfourbeattyus.com/Partners/Sub-Contractors/Suppliers--Code-of-Conduct.aspx>), or one just as stringent, and otherwise to insure that no laws are broken in respect of this Subcontract; (vii) promptly provide all financial and performance information required by Contractor as part of Contractor's program for qualifying subcontractors to work on a Project with Contractor; and (viii) allow no bankruptcy or receivership filing to delay or otherwise adversely impact the Work, and consent upon request to any request by Contractor to expedite hearings or other actions by the bankruptcy court to minimize impacts on the Work or the Project.

SUBCONTRACT TERMS AND CONDITIONS

Article 2: Payments to Subcontractor

- A. Unless a shorter time is provided by the Contract Documents or by law, Contractor will make progress payments to Subcontractor within ten (10) days after Contractor's receipt of payment from Owner for Subcontractor's Work (including changes in the Work paid by Owner), to the extent of Subcontractor's interest in that payment. To the extent permitted by law, payment from Owner of amounts due Subcontractor is a condition precedent to the obligation to pay Subcontractor. Unless the Contract Documents or applicable law specify a different amount, 10.0000 % retainage will be withheld, which will be reduced and/or paid to Subcontractor as it is reduced and/or paid to Contractor by Owner, so long as Subcontractor is not in default. Contractor may withhold funds from monthly progress payments to protect Contractor because of any actual or reasonably likely default by Subcontractor. Title to material and Work incorporated into the Project will transfer to Owner as specified in the Contract Documents or if not so specified upon payment to Subcontractor. Neither title transfer nor payment by Contractor or Owner is an acceptance of any Work or stored materials.
- B. Subcontractor must deliver the following as conditions precedent to Contractor's duty to make any progress payment: (i) the documents identified in Article 3.B below; (ii) certified payrolls, if applicable to the Project, in the form and frequency required by the Contract Documents; (iii) monthly, or at intervals as specified in the Contract Documents, Subcontractor's executed Partial Waiver and Release Upon Progress Payment, in the form attached as part of Exhibit F and, upon request by Contractor, an executed Partial Waiver and Release Upon Progress Payment from each Lower Tier which may have lien or bond claim rights, in the form also attached as part of Exhibit F; (iv) other releases and documents required by the Contract Documents or reasonably required by Contractor; (v) all items listed in Contractor's Stored Material Checklist (payment for materials stored off site is subject to Owner approval); and (vi) at intervals specified in the Contract Documents and at least five (5) business days prior to Contractor's deadline for submitting its partial payment estimate, an acceptable partial payment estimate on the form at Exhibit G. After review and any appropriate adjustments, Contractor will include Subcontractor's partial payment estimate in its payment request to Owner.
- C. Subcontractor should send all final payment requests within thirty (30) days of its completion of its Work. As conditions precedent to final payment, Subcontractor must: (i) complete all Work in accordance with the Contract Documents and to the reasonable satisfaction of Owner and Contractor; (ii) deliver all final lien and claim waiver forms from it and from Lower Tiers which might have lien or bond claim rights (in the form at Exhibit F), all required warranties and guaranties, all maintenance manuals, all attic stock, certified payrolls, insurance information and all other documents or materials required by the Contract Documents; and (iii) send all final payment requests no later than sixty (60) days after final completion of the Project. Subcontractor's failure to send a payment request within sixty (60) days after final completion of the Project waives any and all claims by the Subcontractor.
- D. Contractor may withhold amounts due under this Subcontract or any other agreement between the parties to cover Contractor's reasonable estimate of any costs or liability Contractor or its surety has incurred or may incur for which Subcontractor may be responsible. The phrase "any other agreement between the parties" includes any agreement between Subcontractor and Contractor or any joint venture or other entity in which Contractor and/or Subcontractor have an ownership interest.
- E. Contractor may issue joint checks to Subcontractor and any laborer, Lower Tier, pension or benefit fund, or labor union if, in Contractor's reasonable judgment, joint checks are necessary to ensure payment to those parties or if those parties have threatened to file or filed liens, suits or demands against Owner, the Project, Contractor or its sureties. Contractor may also pay such party directly in those circumstances. All joint checks or direct payments will be for the account of Subcontractor. No payment under this Article will create a contract with any third party nor any continuing duty to make payments to any party.

Article 3: Operations

- A. Subcontractor will promptly provide all information and documents required by Contractor or the Contract Documents as needed to utilize BIM or similar modeling, or as otherwise as needed to eliminate potential conflicts between areas of work on the Project, including but not limited to conflicts arising from wall openings needed for delivery or construction, conflicting structural and/or MEP requirements, and potential interferences from lifts, cranes and scaffolds.
- B. Subcontractor must deliver the following as conditions precedent to performing any Work on site: (i) a fully executed Subcontract; (ii) insurance certificates satisfying the requirements of Article 8 below; (iii) acceptable, fully executed Performance and Payment Bonds unless waived in this Subcontract; (iv) a schedule of values

SUBCONTRACT TERMS AND CONDITIONS

reflecting the best estimate of the true value of each phase of the Work, in accordance with this Subcontract and the Contract Documents; and (v) a written injury and illness prevention program and its code of safe work.

- C. Subcontractor will at all times be thoroughly familiar with all requirements regarding the Work, and promptly notify Contractor, in writing and before proceeding with affected Work, of any deficiencies, errors, discrepancies, unanticipated site conditions, anticipated conflicts or unusual difficulties not specifically addressed in this Subcontract. Subcontractor will coordinate its Work with that of Contractor and all other subcontractors. Contractor will upon reasonable request provide shop drawings by other subcontractors to Subcontractor. Subcontractor will attend all coordination meetings and project meetings. Subcontractor's superintendent or foreman will represent Subcontractor and will have full authority to make decisions and commitments regarding Subcontractor's Work. All communications and notices given to the superintendent or foreman will be binding. Subcontractor represents that its superintendent or foreman is an expert in the Work, is a competent person as defined by OSHA, and is knowledgeable of all Legal Requirements
- D. Contractor is not responsible for damage to Subcontractor's Work or stored materials or equipment caused by others, but will cooperate with Subcontractor to secure payment for such damage from the responsible party.
- E. Subcontractor will be responsible for, and will use the highest degree of care in regards to, erecting and using scaffolding and all loading/ unloading of materials, tools and equipment from and onto hoists, elevators and/or cranes. During regular working hours and without charge, Subcontractor may share available cranes, temporary elevators and material hoists with Contractor and others; however, equipment use is subject to Contractor's schedule and reasonable construction priorities and Subcontractor's execution of any required release and indemnity agreements. Costs for equipment use on an overtime basis will be paid by Subcontractor. If "leave-out" areas are required by Contractor in the building skin, Subcontractor may be required to return out of sequence at these locations, the costs of which are included in this Subcontract Price.
- F. Subcontractor will employ only laborers who will work in harmony with those employed by Contractor or other subcontractors, or by Owner in its operations. Subcontracts may be awarded and labor employed by Contractor or its other subcontractors without regard to union status. Subcontractor will not allow labor disputes to delay or hinder its Work, that of any other subcontractor, or Owner's operations.
- G. Subcontractor will maintain a lien-free and claim-free Project, and timely and fully pay and/or insure payment of: (i) wages and benefits due to laborers; (ii) taxes, contributions, fees, penalties, and the like in respect of the Work or the Subcontract; and (iii) all amounts due all Lower Tiers and their laborers. Contractor may require satisfactory evidence as to the status of any payments or payment obligations in connection with this Subcontract.
- H. In performing its Work, and in addition to the other duties specified in this Subcontract, Subcontractor owes to Contractor the duties timely and fully to: (i) furnish and pay for all permits, licenses, equipment, labor, materials, supervision, required safety measures, employee parking and transportation, hoisting and scaffolding required for the proper and complete performance of the Work; (ii) perform all Work with no unapproved deviations or substitutions; (iii) provide quality control to ensure that Work is performed in strict accordance with the Contract Documents and as needed to ensure first class quality; (iv) correct/replace any Work identified as defective during construction; (v) comply with Contractor's written directives; (vi) submit proper notices, warranties, change order proposals, shop drawings, as-built drawings, submittals, parts lists, O&M manuals and other documents or materials required by the Contract Documents or by Contractor; (vii) correct defects in the Work which appear within the guaranty or warranty period established in the Contract Documents or by law (if no period is stipulated in the Contract Documents or by law, then the guarantee and/or warranty will be for one (1) year from date of completion and written acceptance of the Work by Owner); (viii) perform all required lay-out accurately and completely from control lines or benchmarks provided by Owner or Contractor; (ix) execute and deliver, and/or deliver from suppliers, any special guaranty or warranty required by the Contract Documents; (x) clean up daily from its operations as required by Owner or Contractor, and/or if requested contribute reasonably to a composite clean-up crew at no additional cost; (xi) prevent any damage to or trespass on adjoining lands or facilities; (xii) reasonably inspect work of other trades to insure that it has been performed properly to accommodate Subcontractor's Work, and advise Contractor in writing of any deficiencies that would prohibit or interfere with the proper performance of the Work; (xiii) pay all royalties and avoid any infringement of patents or copyrights; (xiv) provide daily reports, Safety Data Sheets (or similar sheets as required), job hazard analyses (or similar documents reflecting safe planning for safety risks in the Work), copies of all subcontracts and purchase orders and other reasonable documentation requested by Contractor; (xv) remove any employee for reasonable cause upon written request of Contractor; (xvi) protect its Work and stored materials from damage or destruction until final payment, and avoid damage to the work or materials of other trades; (xvii) provide punch lists and complete all punch list work identified by Contractor or Owner; (xviii) release no hazardous materials, and

SUBCONTRACT TERMS AND CONDITIONS

properly document and dispose of any hazardous materials discovered or used so as not to violate any Legal Requirement; (xix) provide and pay for power, gas, water, trailers, storage, temporary protection, guardrails, overhead protection and other temporary facilities needed for the Work; and (xx) provide such other services, documentation and materials needed to meet the Owner's requirements for the Work.

Article 4: Schedule

- A. Contractor has provided the Project Schedule prior to execution of the Subcontract – an initial draft is attached as **Exhibit H**. Subcontractor will fully comply with the Project Schedule. Subcontractor will, within fifteen (15) days after the date of the Subcontract or within such other time as may be reasonably specified by Contractor, submit its input with respect to the Project Schedule. Subcontractor's input will be consistent with the Project Schedule, and will list Subcontractor's sequence and duration of activities. Contractor may prepare a revised Project Schedule and if so will consider Subcontractor's input in developing that schedule. Subcontractor will proceed with its Work in accordance with the Project Schedule or as otherwise reasonably directed by Contractor, and perform the Work so as to avoid delays or inefficiencies to work of other subcontractors and Contractor so as to permit timely Project completion.
- B. Contractor may change the sequential order and/or duration of any work activities in the Project Schedule, including those of this Subcontract, to account for unanticipated delays, occurrences and other factors which alter Contractor's original Project Schedule, and may provide subsequent Project schedules. Contractor may require Subcontractor to prosecute its Work in such sequence as the progress of other subcontractors and the current Project Schedule dictate, with payment for additional costs and/or grants of additional time only as specified in Articles 4.D through 4.G.
- C. To the extent that any Work delays or inefficiencies are caused by Subcontractor or those for which it is responsible, then Subcontractor will: (i) not be entitled to any additional compensation nor any time extension; (ii) on its own account, or as directed by Contractor, increase shifts, personnel, operations, days of work, equipment and facilities, and work overtime as needed, to overcome any such events at no increase in price; and (iii) if requested, submit within three business days for Contractor's approval a recovery schedule demonstrating how it will meet the current Project Schedule.
- D. To the extent that any Work delays or inefficiencies are caused solely by Contractor or its other subcontractors, then Subcontractor will upon request take reasonable steps at no cost to Contractor or other subcontractors to mitigate the event. If those steps are unsuccessful, Contractor may: (i) grant Subcontractor in writing an equitable time extension, to the extent that Contractor reasonably determines that the time extension does not materially and adversely impact the Project critical path or the work of other subcontractors; or (ii) direct Subcontractor to work overtime, or other steps to accelerate. Where Subcontractor has been granted a time extension due to delays caused by Contractor or other subcontractors, the time extension will be the sole remedy for the delay, and no damages will be payable. Contractor will be liable for overtime or acceleration costs under this Article 4.D only to the extent caused by the gross negligence of Contractor in scheduling the Work with the work of other subcontractors. In that case, Contractor will pay Subcontractor for reasonable and demonstrable overtime wages (plus taxes, benefits, bond and insurance costs on those overtime wages) and increased material and equipment costs. To the extent that Contractor orders acceleration or overtime due to the acts or omissions of another subcontractor, Contractor will present Subcontractor's claims to the responsible party and Subcontractor's costs are recoverable only to the extent that they are paid by other subcontractors.
- E. To the extent that any Work delays or inefficiencies are caused by an event for which Contractor and/or subcontractors are not entitled to a time extension under the Contract Documents (except for delays described in Article 4.D, for which compensation is allowed only as set forth in that Article), or in situations where the Owner has failed to grant a time extension requested by Contractor or directed a compensable acceleration, Subcontractor will, at Contractor's direction, work outside of regular work hours or take other necessary measures to maintain the current Project Schedule, without additional cost or expense to Contractor unless those costs are paid by Owner to Contractor. If Owner orders acceleration, then Subcontractor will be paid those amounts only paid by Owner to Contractor on account of Subcontractor's acceleration. Other impact or inefficiency costs arising from events covered by this Article 4.E are recoverable by Subcontractor only to the extent paid by Owner.
- F. To the extent that any Work delays or inefficiencies are caused by an event for which the Owner provides a time extension, Subcontractor will receive an equitable extension of time but will not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays or related inefficiencies unless Owner pays those costs. Contractor will promptly pay Subcontractor the amount paid by Owner for Subcontractor's delay or inefficiencies.

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- G. Contractor will use reasonable efforts in presenting Subcontractor's claims for additional costs to Owner in those cases where Owner has accelerated Subcontractor or where the Contract Documents provide for payment for Work delays or inefficiencies and Owner's payment of such claims is a condition precedent to Subcontractor's recovery on its claims.
- H. Within three (3) business days after commencement of any event of delay, disruption, acceleration, or other impact, unless a shorter time is required by the Contract Documents, Subcontractor must notify Contractor in writing of the event, and promptly provide any requested additional information. In all cases, Subcontractor must provide written notice to Contractor in sufficient time and form so that Subcontractor's claim may be reviewed by Contractor and, if appropriate, timely presented to the Owner. Compliance with the notice requirements of this Subcontract and the Contract Documents is a condition precedent to any claim for additional time or compensation arising out of a delay.
- I. The remedies provided by this Article 4 are Subcontractor's exclusive remedies for all delays, impacts, inefficiencies or accelerations of the Work.

Article 5: Default and Damages

- A. If Subcontractor fails to fully or timely comply with any duty imposed by Legal Requirements or this Subcontract, including the Contract Documents, it is in default. Subcontractor will be liable to Contractor for all losses, costs (including attorneys' fees and court costs) damages, claims, suits, fines or penalties incurred by Contractor or its sureties to the extent caused by the default. Subcontractor will remain liable to Contractor for the same period of time, and to the same extent, as Contractor may be liable to Owner, other subcontractors or third parties for any claims against Contractor or its sureties by any such parties arising from a default.
- B. If Subcontractor has failed to cure a default within three (3) business days following written notice of default to Subcontractor (or where cure is not possible in that time, has failed to provide an acceptable plan to do so and to commence and continue to cure), then Contractor may do any or all of the following or take any other action permitted by law, without diminishing Subcontractor's liability for damages or costs arising from the default: (i) terminate this Subcontract for default, in whole or in part; (ii) make demand on Subcontractor's surety to perform the Subcontract and/or to indemnify Contractor for costs arising from the default; (iii) allow Subcontractor to continue to perform in whole or in part, but collect all damages arising as a result of the default; (iv) enter on the premises and take possession of all materials and equipment for the purpose of continuing or correcting the Work; (v) supply additional materials or labor at Subcontractor's cost; (vi) employ other firms or persons at Subcontractor's cost to complete or correct all or any part of the Work; or (vii) accept the conditions arising from the default but collect from Subcontractor the difference in value between the condition as required by this Subcontract and the accepted condition. Notice of a default is not required, and if not provided then Contractor will be deemed to have allowed Subcontractor to continue to perform without waiving the default, and Contractor may collect all damages arising as a result of the default.
- C. Contractor may deduct and withhold from payments otherwise due Subcontractor the costs Contractor has incurred or may reasonably incur as a result of a default. When the default has been cured, or when the Project has been completed by Contractor and accepted by Owner, if the unpaid balance earned under this Subcontract exceeds the expense incurred by Contractor or its sureties as a result of the default and in paying any damages or costs due to Owner or third parties because of Subcontractor's default, such excess will be paid by Contractor to Subcontractor. If those expenses and/or damages exceed the unpaid balance, then Subcontractor will pay the difference to Contractor upon demand.
- D. No failure to enforce terms of this Subcontract, nor any course of conduct by Subcontractor or Contractor, will amount to a waiver of any requirement of this Subcontract nor prohibit Contractor from enforcing its rights.
- E. Subcontractor must timely and fully comply with the terms of the Project Quality Control Plan attached as Exhibit I.

Article 6: Electronic Documents

- A. Subcontractor will utilize Contractor's electronic document management system if it is made available to Subcontractor for the Project. This system can accept electronic submission of submittals, applications for payment, proposed change orders and other items. By submitting documents electronically, Subcontractor is

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affirming that it has the appropriate license to use the documents, and it is not violating any copyright or other rights of owners of original documents.

- B. Subcontractor will utilize an electronic plan room to reference drawings if one is provided for its use. Subcontractor is responsible for updating the electronic plans with electronic as-built drawings as is necessary and required by the Contract Documents.
- C. If Building Information Modeling (BIM) is being used on the Project as referred in Article 3.A., Subcontractor is responsible to comply both timely and completely with all requirements for the successful implementation of BIM on the Project. This includes submitting all necessary information on a timely basis that is required to successfully build the BIM model that will be used during construction.

Article 7: Indemnity

- A. To the full extent permitted by law, Subcontractor will indemnify, protect and hold harmless Contractor and its surety (and any other parties as required by Contract Documents) and each of their respective officers, directors, members, managers, agents or employees, (individually, the "Indemnified Party" and collectively the "Indemnified Parties") from any and all claims, losses, demands, judgments, suits, actions and proceedings, as well as all attorneys' fees and costs which may be asserted against any Indemnified Party, to the extent arising out of or occurring in connection with: (i) any default or failure to timely or fully perform as required by Subcontractor; and/or (ii) any injury, loss, damage or death to any person or persons (including but not limited to any Indemnified Party) or any destruction of or damage to property, but only to the extent caused by the negligence or intentional wrongful acts of Subcontractor, its Lower Tiers, and its and their employees, or any other persons for which Subcontractor is responsible.
- B. To the full extent permitted by law, in addition to the express duties to indemnify, protect and hold harmless, there is a duty, separate from the duties in Article 7.A, to defend each Indemnified Party in connection with a claim, demand or suit described in Article 7.A(i) or 7.A(ii) (collectively, the "Claims"). The duty to defend includes all costs of litigation, attorneys' fees, expert and consultant fees, settlement costs and reasonable expenses in connection with the claim or litigation, regardless of whether the Claims are valid or groundless and regardless of whether the defense of an Indemnified Party is maintained by that party or assumed by Subcontractor, as long as the Claims asserted are causally connected to Subcontractor's alleged or actual default described in Article 7.A(i), or to an alleged or actual negligent act or omission or intentional wrongful act as described in Article 7.A(ii). An Indemnified Party at its option may defend any or all of the Claims (at Subcontractor's expense) or tender to Subcontractor the defense of any or all of the Claims. Upon tender to Subcontractor, Subcontractor will promptly assume the defense of the Claims. If an Indemnified Party tenders the defense of a Claim to Subcontractor and Subcontractor fails to assume the defense, an Indemnified Party facing liability for the Claim may defend, compromise and/or settle any such suit or action, and Subcontractor will be bound and obligated to reimburse each Indemnified Party for the amount expended in settlement, and/or the amount expended in paying any judgment, together with all reasonable attorneys' fees and costs of litigation, so long as the Indemnified Party demonstrates that the settlement or compromise was made in good faith and the Claim was one for which the duty of defense was owed. If a Claim under Article 7.A(i) is tendered and the defense is accepted, uninsured defense costs (if any) incurred by Subcontractor are subject to repayment by Contractor only to the extent that a final judgment in connection with the Claim determines that Contractor rather than Subcontractor is responsible for the Claim.
- C. In addition to the foregoing obligations, where the Contract Documents require either Contractor or Subcontractor to provide an indemnity or defense of Owner or any other party in circumstances beyond those stated in Articles 7.A and/or 7.B, Subcontractor agrees that, in respect of its Work under this Subcontract, it will indemnify, defend and hold harmless: (i) all such parties to the full extent required of Subcontractor by the Contract Documents; and (ii) Contractor, to the full extent that Contractor is required by the Contract Documents to indemnify, defend or hold harmless any such party with respect to Subcontractor's Work.
- D. The obligations of this Article are not limited by insurance limits in policies maintained by Subcontractor. Nothing in this Article will be interpreted to require Subcontractor to indemnify, defend or hold harmless any party to the extent such an obligation is prohibited by law. To the extent that applicable law would invalidate any part of the indemnity and defense obligations of this Article, then this Article will be interpreted and applied only to the extent legally permitted.
- E. Neither termination for any reason, nor final payment by Contractor, nor acceptance of the Work, will waive any obligations of Subcontractor under this Article.

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- F. The cause of action on a claim for indemnity under this Subcontract or any bond provided by Subcontractor will accrue on the later of: (i) the date of a written demand for indemnity to Subcontractor or its surety; or (ii) the date when Contractor or its surety makes the last payment with respect to which indemnity is sought.

Article 8: Insurance and Bonds

- A. Prior to starting Work, Subcontractor will provide a certificate that corresponds, at a minimum, to insurance evidenced on Exhibit J (Sample Insurance Certificate) and, if requested by Contractor, certified copies of all insurance policies. All policies will be written through a company authorized to transact that class of insurance in the state of the Project and will be with insurers acceptable to the Contractor with an A.M. Best rating of A- or better. Subcontractor will maintain all insurance for the periods required by the Contract Documents, and in no event less than one year after completion of the Work and for a period equal to any applicable statute of repose years in the case of products-completed operations coverage. Limits and terms shown are the minimum acceptable, and in no way limit available coverage under policies maintained by Subcontractor.
- B. Certificates of insurance for the commercial general liability policies will name Contractor, and others as required by the Contract Documents, as additional insureds for both ongoing and completed operations, as evidenced on Form No. CG 20 10 11 85, CG 20 26 11 85 or equivalent forms (ISO Form B, to be supplied to Contractor together with insurance certificate). The Project/job description and/or description of operations on all certificates, endorsements and other insurance documentation will include the provision "All Work Performed for the Additional Insureds." Commercial general liability policies will:
- i. be written on an "occurrence" basis, with a provision that defense costs are paid in addition to and do not deplete policy limits, provide that the limits apply per project, and contain a severability of interest or separation of insureds provision; and
 - ii. include coverage for broad form property damage coverage, on-going and products-completed operations, bodily injury or property damage, premises operations, blanket contractual liability (for this Subcontract), independent contractor's liability, mobile equipment, elevators, damage from explosion, collapse and underground hazards ("XCU"); and
 - iii. Contain no exclusions for cross-liability or cross suits, soils or earth movement, or residential, condominium, multi-family or multi-unit dwellings.
- C. Subcontractor's insurance will be primary and non-contributory to any insurance maintained by Contractor and/or Owner. Subcontractor will provide thirty (30) days written notice to the Contractor prior to expiration or cancellation of any insurance. Subcontractor is responsible for all deductibles in policies provided by Subcontractor. Renewal certificates and endorsements for commercial general liability will be provided to Contractor, at no expense to Contractor, prior to expiration of such insurance. Subcontractor will insure all material stored off site and all material in transit.
- D. Subcontractor, for itself and on behalf of its insurers, waives claims as to, and releases Contractor, its surety, Owner and any other additional insureds as required by this Subcontract from, liability for loss or damage covered by Subcontractor's policies of insurance, or liabilities or losses that are required to be covered by insurance under this Subcontract. Subcontractor will obtain a waiver of any subrogation right that its insurers may hold or acquire against the Owner, Contractor and any additional insureds by virtue of payment of any such loss covered by such insurance. To the extent permitted by applicable law, Subcontractor waives all rights of its carrier to any statutory workers compensation liens. Subcontractor and its lower-tier subcontractors will submit worker's compensation, commercial general liability, and business auto liability accident reports to their insurance carriers immediately after any accident and will furnish to Contractor copies of such reports.
- E. Subcontractor will require insurance coverage from Lower Tiers identical to that required of Subcontractor. Subcontractor will require Lower Tiers to name Contractor, and others as required by the Contract Documents, as additional insureds on the Lower Tiers' commercial general liability insurance policies and will provide Contractor with a waiver of subrogation from the Lower Tiers' worker's compensation carriers. Subcontractor will require its Lower Tiers to obtain Form No. CG 20 10 11 85, CG 20 26 11 85, or equivalent forms (ISO Form B), for ongoing and completed operations from its commercial general liability carrier, which endorsements will be furnished to Contractor as a condition precedent to Subcontractor's right to be paid for any Work performed by the Lower Tier.

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- F. If Subcontractor or any Lower Tier fails to procure, maintain or pay for the insurance required by this Agreement, Contractor may, in its discretion and at Subcontractor's cost, establish other financial risk transfer mechanisms and/or secure the same or similar insurance coverage.
- G. Subcontractor will immediately notify (or cause its insurers or insurance broker to notify) Contractor of any notice of cancellation or rescission received from an insurance carrier referring to or relating to a policy which names Owner, Contractor, its parent, subsidiary or affiliated companies or their officers, directors or employees as additional insureds or which may otherwise impact the ability of Subcontractor to fully perform its obligations.
- H. The insurance requirements in this Article are independent from all other obligations of Subcontractor under this Agreement, the Contract Documents or at law, including, without limitation, all indemnification provisions. This Article will survive termination for any reason, and will apply regardless of the enforceability of any other provision in this Agreement.
- I. Contractor or Owner will furnish and pay for builder's risk insurance, which will include fire, extended coverage, vandalism, named windstorm, and malicious mischief. Subcontractor's Work performed and materials stored on the jobsite for incorporation into the Work will be covered to the extent of such policy. Proceeds from the policy will be paid to Subcontractor to the extent paid by the insurance company for Subcontractor's loss. Builder's risk insurance does not include temporary buildings, Subcontractor's tools or equipment not incorporated in the Work. If there is a loss insured under the builder's risk policy, Subcontractor will be bound by any adjustment made between Contractor and/or Owner and the insurance company or companies, and Contractor's liability to Subcontractor for such loss will in all cases be limited to amounts actually paid on Subcontractor's claims. If the builder's risk insurance contains any deductible not paid by Owner, the deductible cost will be paid by Subcontractor to the extent that the loss is caused by Subcontractor. If an event not caused by Subcontractor causes loss to Subcontractor and others, any deductible costs will be equitably allocated among all parties suffering damage.
- J. Unless expressly waived in the Special Provisions or in writing by an officer of Contractor, Subcontractor will pay for, furnish to Contractor at the time this Subcontract is delivered by Subcontractor, and maintain in full force and effect an acceptable 100% performance bond and a 100% payment bond on Contractor's standard bond forms (Exhibit K), written by a surety company acceptable to Contractor. The surety must have a Treasury limit of not less than the amount of the Subcontract Price or the sum of \$500,000, whichever is greater, and which will have an AM Best rating of A- or better. The bond cost is included in the Subcontract price unless otherwise provided in the Special Provisions. Upon a default by Subcontractor and notice to the surety, the surety will either indemnify Contractor for losses and costs arising from the default, or timely and fully perform Subcontractor's obligations, or both, all in accordance with the terms of the bond. No change, alteration or modification to or deviations from this Subcontract or the Contract Documents will release in whole or in part any surety on any bond and Contractor will be under no obligation to notify the surety of any such change. Any increase in the Subcontract amount will automatically result in a corresponding increase in the penal amount of the bonds without notice to or consent from the surety, such notice and consent being waived by this Subcontract. Decreases in the Subcontract amount will not, however, reduce the penal amount of the bonds unless specifically provided in any Change Order decreasing the scope of Work.
- K. Contractor may at its option elect to enroll Subcontractor in a Subguard default insurance program in lieu of Subcontractor's providing bonds. If Contractor so notifies Subcontractor in writing, then Subcontractor will provide a letter from its surety confirming that Subcontractor is eligible for and qualified to receive bonds for its Work on the Project and provide other required qualification information. No obligation to provide a bond is excused until Contractor provides a written notice of that waiver. The use of Subguard does not limit Subcontractor's liability.
- L. If required bonds are not timely delivered, Subcontractor is in default. Contractor may either waive such requirement in writing signed by an officer of Contractor, or terminate this Subcontract in whole or in part and seek damages. The insolvency of the surety, the revocation of the surety's right to do business or license to issue bonds in the state of the Project, the removal of the surety from the list of federally approved sureties as indicated by the Federal Register, or the surety's failure to maintain an AM Best rating of A- or better, will each be deemed an act of default of Subcontractor.

Article 9: Changes

- A. Unless a different standard is specified in the Contract Documents or on the Scope of Work or Special Provisions attached, Subcontractor has included in the Subcontract Price all amounts necessary timely to perform all Work

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shown on and reasonably inferable from the Contract Documents, including all Work needed to obtain Owner's acceptance of the Project. Subcontractor agrees to provide all such Work without additional compensation or time except to the extent that Owner provides a time extension or additional compensation for the Work or unless Contractor specifically requests in writing a change proposal and/or authorizes additional Work in writing. Claims for additional costs or time extensions for errors, inconsistencies or omissions in the Contract Documents will not be recognized unless recognized and paid by Owner. The following apply to all changes or requests for changes:

- i. Subcontractor will be bound by all interpretations of Owner or its authorized representative that, by the Contract Documents, are binding on Contractor.
- ii. Contractor may at any time, unilaterally or by agreement with Subcontractor, without notice to Subcontractor's sureties, make changes in the Work covered by this Subcontract. Upon written direction by Contractor, Subcontractor will proceed with specified extra work or changes so as not to delay the Work or the current Project Schedule. Any unilateral directive or mutual agreement must be in writing. If a change is ordered in writing by Contractor independent of the Owner or the Contract Documents provided by the Owner, Subcontractor will be entitled to an equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by Contractor other than a formal written change order to be a change, it will so notify Contractor in writing within three (3) business days of the action or inaction, and seek a confirmation in writing from Contractor before proceeding with alleged change.
- iii. Subcontractor will submit requested or required change order proposals in a form reasonably acceptable to Contractor, within five (5) business days of the request or the event giving rise to the proposal, unless a shorter time period is specified in the Contract Documents. Requests or claims that involve the conduct of the Owner or the Contract Documents must always be submitted in writing in sufficient time to allow Contractor to comply with the applicable provisions of the Contract Documents. The quotation must be supported by a time impact analysis, a cost breakdown, a quantity survey, unit prices and unit labor hours, markup for overhead and profit, and any other information requested by Contractor. The amount to be paid to Subcontractor and/or its Lower Tiers for overhead and/or profit for additive changes will be as allowed by the Contract Documents. If a change in the Work consists of both additions and deletions, any overhead and profit will be computed on the excess of the additive costs over deductive costs. Subcontractor will pay any additional bond and insurance premium associated with any change, and keep its surety informed at all times of changes to the Subcontract.
- iv. Contractor's liability for costs arising from changes ordered by the Owner, or for deficiencies in the Contract Documents provided by the Owner, is limited to the amounts Contractor recovers from the Owner for those events. Payment on account of pending changes made by the Owner will be made only to the extent that Contractor receives payment from the Owner for Subcontractor's changed Work. Unless the change order as executed by Contractor reserves specific rights, an executed change order is a full and final settlement of all claims for time and compensation arising from the changes and events referenced in the change order.

- B. Work done on a time-and-material basis must be signed for daily by Contractor's authorized representative and invoiced weekly no later than the month in which the Work was done. No payment for time-and-material work will be made unless the Work has been authorized in writing by Contractor's representative, outlining the rates and terms of payment and the appropriate daily approval requirements. A signed ticket is not an acknowledgement that additional compensation is due or an acceptance of any Work.

Article 10: Contract Interpretation and Disputes

- A. Any disputes between Subcontractor and Contractor not involving the conduct of the Owner or the Contract Documents will, at the election of Contractor, be settled by arbitration by the American Arbitration Association under its Construction Arbitration Rules, or by a specified arbitrator or different arbitration service if the parties so agree in writing. The arbitration may include other parties if appropriate. The award rendered by the arbitrator(s) is final and may be entered in and enforced through any court having jurisdiction. Arbitration will be in the county of the Project unless the parties agree otherwise in writing. The arbitrator must apply the laws of the state of the Project and this Subcontract in determining responsibility and liability, and explain in writing the factual and legal basis for the decision. The arbitrator will have the authority to award the prevailing party its share of the arbitration costs. Absent such an award, each party will pay its pro rata share of the arbitration costs. The prevailing party will be entitled to attorneys fees for the arbitration only to the extent that such fees are required by applicable law, or to the extent that the arbitrator finds that it is equitable and just to award some or

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all such fees because either: (i) the claims or defenses of either party were asserted or maintained without a reasonable basis in fact or law; or (ii) the party seeking its fees had made a written offer of settlement which was rejected (or to which no response was provided) and: (a) if the requesting party is the claimant, then the requesting party recovered as much or more than its offer; or (b) if the requesting party is the defendant, then the requesting party prevailed in the arbitration at least to the extent that the claimant did not recover more than the amount of the written offer. The prevailing party in any litigation required to enforce or vacate an arbitration award will be entitled to recover its attorneys' fees and costs.

- B. If disputes between Contractor and Subcontractor involve the conduct of the Owner or an interpretation or requirement of the Contract Documents, then Subcontractor must follow all claim, notice and disputes procedures and requirements of the Contract Documents, and Subcontractor recognizes that it may be joined into any court or arbitration proceedings required by the Contract Documents. Subcontractor is bound to Contractor to the same extent that Contractor is bound to the Owner by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made by the party, board or court authorized in the Contract Documents or by law, regardless of whether Subcontractor is a party to the proceedings. Subcontractor will, as a condition precedent to its right to prosecute any claim, comply with all notice, claim and dispute resolution provisions of the Contract Documents, including allowing a reasonable time for Contractor to analyze and forward to the Owner any required communications or documentation. Contractor will, at its option: (i) present to the Owner in Contractor's name or (ii) authorize Subcontractor to present to the Owner in Contractor's name, all of Subcontractor's claims, and answer the Owner's claims involving Subcontractor's Work, whenever Contractor is permitted to do so by the terms of the Contract Documents. If the dispute is prosecuted or defended by Contractor, Subcontractor at its expense agrees to furnish all documents, statements, witnesses, and other information required by Contractor and to pay or reimburse Contractor for Subcontractor's allocable share of reasonable costs incurred by Contractor in connection with the dispute, including attorneys' fees. Subcontractor will timely furnish Contractor with any claim certification required by the Contract Documents or by a Legal Requirement, in a form satisfactory to Contractor, and agrees to indemnify, defend, and hold Contractor harmless from any losses, claims, damages or expenses Contractor may incur as a result of Subcontractor's failure or inability to support any part of the claim as required by the certification or by a Legal Requirement. Contractor will not certify a claim when it cannot do so in good faith.
- C. If Contractor or its surety notifies Subcontractor in good faith that any arbitration or lawsuit brought under Article 10.A involves a controversy within the scope of Article 10.B, then dispute process under Article 10.A must be stayed until the procedures under Article 10.B are completed.
- D. If Contractor elects not to invoke the arbitration procedures set forth in Article 10.A, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation in the state court in the County of the Project or in the federal court closest to the location of the Project. The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation. **EACH PARTY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS AGREEMENT, UNLESS THE MATTER ARISES UNDER ARTICLE 10.B AND THE CONTRACT DOCUMENTS ALLOW THE OWNER A RIGHT TO TRIAL BY JURY.**
- E. The warranty period specified in the Subcontract or in the Contract Documents is not the exclusive period during which Subcontractor is liable for defects in its Work; that liability will extend to the end of applicable statutes of limitation and/or repose.
- F. Unless otherwise agreed in writing by the parties, Subcontractor will timely and fully perform the Work during any dispute and Contractor will make payments to Subcontractor to the extent required. Subcontractor will make relevant books and records available for inspection and copying if it asserts a claim for additional compensation or if Contractor reasonably contends that Subcontractor is in default under this Agreement.
- G. This Subcontract is governed by the laws of the state of the Project, without regard to any contrary conflicts of laws rules of that state. Both parties waive all claims for their own special, indirect or consequential damages in connection with any dispute or claim related to this Subcontract or the Project. This waiver does not preclude liability for liquidated damages or consequential damages assessed by Owner or payable to third parties.

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Article 11: Termination

- A. Contractor may terminate this Subcontract for Contractor's convenience and without cause by written notice to Subcontractor. If there has been a termination for convenience of Contractor's contract with the Owner, then Subcontractor will be paid the amount if any paid by Owner to Contractor as termination costs for Subcontractor's Work. In case of termination just for Contractor's convenience, Subcontractor will be paid for Work executed through the date of termination and reasonable demobilization costs. No recovery will be allowed for overhead or profit on any Work not performed by the date of termination.
- B. If Subcontractor is terminated for default in whole or in part due to its failure to cure or commence to cure a default as required by Article 5.C, that termination will not relieve Subcontractor of any liability for damages, claims or suits caused by any default or arising from the termination. If a court or arbitrator determines that Contractor erred in terminating Subcontractor for default, Subcontractor is limited to the damages it would have recovered had it been terminated for convenience.
- C. Subcontractor is not entitled to unabsorbed overhead, anticipatory profits or any similar damages for any termination. Upon receipt of termination payments, the parties will have no further obligation to each other except for Subcontractor's obligations to perform corrective and/or warranty work relating to Work actually performed by Subcontractor, to indemnify, defend, and hold harmless Contractor as provided in this Agreement, and to maintain required insurances regarding its Work in place.

Article 12: Miscellaneous

- A. If the Contract Documents identify certain public procurement clauses, regulations, or laws applicable to this Subcontract and the Project, then Exhibit L restates some or all of those clauses as required by the Contract Documents. Subcontractor confirms its obligation to comply with all applicable clauses in Exhibit L, the Contract Documents, and all Legal Requirements. Subcontractor will insure that all clauses and obligations of Exhibit L and/or the Contract Documents are included in all Lower Tier subcontracts and purchase orders as required by Exhibit L or the Contract Documents. On all projects that receive federal, state or local funding, Subcontractor will comply with Contractor's Equal Employment Opportunity Policy set forth on Exhibit M attached and in addition will comply with all such policies promulgated by any governmental authority.
- B. To the extent that Subcontractor is obligated by this Subcontract or the Contract Documents to perform any design or design- assist services, Subcontractor will comply with all requirements of Exhibit N.
- C. All notices, consents, requests or other communications will be in writing, unless otherwise expressly provided to the contrary and will be deemed to have been made or given on the date sent when e-mailed, hand-delivered, or transmitted as electronic facsimile to the other party, at the address noted in the Subcontract. If notice is sent by first class mail or by overnight or similar services, it will be deemed made three (3) business days after mailing or upon receipt, whichever is first. Either party may designate a different address by written notice given to the other.
- D. Exhibit O includes any changes to this form required by the law of the state of the Project. If any provision of this Subcontract is determined to be illegal, invalid or unenforceable under present or future laws, the parties intend the remainder to be unaffected and enforceable. In place of each clause or provision that may be determined to be illegal, invalid or unenforceable, and to the full extent permitted by law, the court or arbitrator is authorized to add a legally permissible clause or provision as similar as possible to that found unenforceable.
- E. This Subcontract has been reviewed, negotiated and accepted voluntarily and after due consideration, with advice from counsel as the parties deemed appropriate, and represents the entire agreement of the parties. This Subcontract may be amended only by change order signed by the parties. No part of this Subcontract may be assigned by Subcontractor without Contractor's written consent.
- F. Except as required by law, Contractor's sureties have no greater or different obligation to pay Subcontractor than does Contractor, and further are entitled to enforce this Agreement if the sureties perform in place of Contractor. Contractor's surety is an express third party beneficiary of this Subcontract. Owner, Architect and Owner's lender are third party beneficiaries to the extent required by the Contract Documents. There are no other third party beneficiaries.

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- G. Execution of the Prime Contract by Owner and Contractor is a condition precedent to the effectiveness of this Subcontract.**
- H. The persons executing this Subcontract, and any change orders, claims, and lien or claim waivers or releases on behalf of Subcontractor, have actual authority to execute those documents.**

EXHIBIT G – APPLICATION FOR PAYMENTPay Request #: _____
Work Performed Through _____Subcontractor's Name: Watson Electrical Construction Co., LLC
Subcontractor's Address: 3215 Fortune Drive Suite 109, Charleston, SC 29418
Phone Number: _____
Fax Number: _____Project Name: Hotel at Marion Square Project No.: 13026000 Date: _____
Owner: _____Description of Work: Electrical
Original Contract Amount: \$3,963,792.00
Change Order Total: _____
Through C/O#: _____
Total Revised Contract _____
Value of Work Performed to Date _____
Value of Materials Stored On Site _____
Value of Materials Stored Off Site _____
Current Month (Stored Materials) _____
Total _____
Less 10.0000 % Retainage _____
Amount Earned to Date _____
Less Previous Billings/Payments _____
Less Adjustments/Joint Checks _____
Less Pending Back Charges _____
Total Amount this Requisition _____

Subcontract	☐	Purchase Order	☐
Other Contract Type	_____		
Unit Price	☐	Lump Sum	☐
Bonded	☐	Unbonded	☐
Subguard	☐	Alternate Plan	☐
Contract Increased 20%?	Y ☐	N ☐	
If yes, bond rider received	Y ☐	N ☐	
EEO Reports Current	Y ☐	N ☐	
Certified Payrolls Current	Y ☐	N ☐	
Insurance Status	_____		
Insurance Expiration Date	_____		
Release Attached	Y ☐	N ☐	
Tier/Supplier Release	Y ☐	N ☐	
if Required	_____		
Reducing Retention	Y ☐	N ☐	
If reducing retainage, reducing	From	To	
Consent of Surety for retention reduction if bonded	Y ☐	N ☐	
New materials stored off site	Y ☐	N ☐	
If yes, attach stored materials checklist	_____		
Final Payment	Y ☐	N ☐	
If yes, see attached checklist	_____		
Owner Billing Number	_____		
Owner Payment Rec'd Date:	_____		
Payment Terms:	_____		
Pay Select #	_____		

For Balfour Beatty Construction Use Only:

CO #	Vendor #	Job #	Contract No.
		13026000	003
Date	Invoice #	Description	
Gross Amount	Retainage Amt	Net Amount	
Accrue Tax	Tax Code	Pay Item & Cost Code	
Yes			
No			
Halt Codes			

Approvals:

PM / Date

PA / Date

APA / Date

Balfour Beatty Construction

Exhibit B

The Hotel at Marion Square: Subcontract Scope of Work

ELECTRICAL SCOPE OF WORK

1. DEFINITION, CORRELATION AND INTENT:

Subcontractor agrees to make the project complete in every respect insofar as this Subcontract is concerned in strict accordance with Bid Package No. 16A - ELECTRICAL, the Contract Documents listed on Exhibit "A" and shop drawings and submittals as approved by the Architect and/or Owner. The Subcontractor shall not perform any portion of the work at any time without Contract Documents or, where required, approved Shop Drawings, Product Data, Manufacturer's Instructions or Samples for such portion of the work. The Subcontract includes but is not limited to providing of all submittals, shop drawings (and associated engineering), trade coordination, layout, hoisting, supervision, tools, equipment, scaffolding, supplies, incidentals, plant, labor, materials, services, cutting, cleaning, and any other work or systems required to perform the work as described below:

2. SPECIFICATION REFERENCE:

The organization of the specifications into divisions, sections and articles, and the arrangement of the drawings shall not control the Contractor in dividing the work among the Subcontractors or in establishing the extent of the Work to be performed by any Subcontractor.

Reference is made to the following Divisions of Work and Specification Sections which relate to the Scope of Work, but is in no way intended to limit or alter the intent of the Contract Documents:

<u>SECTION/DIVISION NO.</u>	<u>TITLE and DESCRIPTION</u>
DIVISION 0	BIDDING/CONTRACT REQUIREMENTS, complete;
DIVISION 1	GENERAL REQUIREMENTS, complete;
DIVISION 2	SITE WORK, pertinent portions thereof applicable to the work of this Subcontract;
DIVISION 3	CONCRETE, pertinent portions thereof applicable to the work of the Subcontract (such as housekeeping pads and transformer pads, etc.)
DIVISION 6	WOOD AND PLASTICS
SECTION 06 100	ROUGH CARPENTRY, pertinent portions thereof applicable to the work of this Subcontract;
DIVISION 7	THERMAL AND MOISTURE PROTECTION
SECTION 07 700	ROOF SPECIALTIES AND ACCESSORIES, as applicable to the work of this Subcontract;
SECTION 07 841	THROUGH-PENETRATION FIRESTOP SYSTEMS, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 07 900	JOINT SEALANTS, pertinent portions thereof applicable to the work of this

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Subcontract;

DIVISION 8	DOORS, WINDOWS AND GLASS
SECTION 08 300	ELEVATOR DOOR SMOKE CONTAINMENT SYSTEM, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 08 305	ACCESS DOORS, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 08 310	ACCORDION FOLDING FIRE DOORS, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 08 334	OVERHEAD SECTIONAL GRILLE, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 08 710	FINISH HARDWARE, pertinent portions thereof applicable to the work of this Subcontract;
SECTION 08 741	ELECTRICAL LOCKING SYSTEMS, pertinent portions thereof applicable to the work of this Subcontract;
DIVISION 9	FINISHES
SECTION 09 900	PAINTING, pertinent portions thereof applicable to the work of this Subcontract;
DIVISION 10	SPECIALTIES
SECTION 10 001	MISCELLANEOUS SPECIALTIES, pertinent portions thereof applicable to the work of this (i.e. electrical connections such as electrical projection screens, etc.) Subcontract;
DIVISION 11	EQUIPMENT , all sections pertinent portions thereof applicable to the work of this Subcontract.
DIVISION 12	FURNISHINGS
SECTION 12 242	ROLLER WINDOW SHADES as applicable to the work of this Subcontract;
DIVISION 13	SPECIAL CONSTRUCTION
SECTION 13 151	STAINLESS STEEL SWIMMING POOL
SECTION 13 155	POOL LIFT
DIVISION 14	CONVEYING SYSTEMS , all sections; pertinent portions thereof applicable to the work of this Subcontract;
DIVISION 15	MECHANICAL , all sections; pertinent portions thereof applicable to the work of this Subcontract
DIVISION 16	ELECTRICAL , complete.

3. INCLUSIONS:

It is understood and agreed this Electrical Work includes all inclusions as described in the following subparagraphs regardless of whether or not they are in the above specifications or any other specification section or shown on the plans;

3.A. Design Intent

1. It is the intent of the Scope of Work to convey to this Subcontractor the total responsibility for the ELECTRICAL Work required for the The Hotel at Marion Square Project. This Subcontractor understands that Construction Documents may not be 100 percent complete and will develop as the project progresses. However, the Subcontractor shall perform all work required or reasonably inferred under the best practices in the Construction Industry for a complete and fully functional and operational system(s) for the purpose intended.
2. This project will require the Subcontractor to work as a team member with the Contractor and other members of the project team through the completion of construction to assure that all work required by this Scope will be performed in such a manner that it is complete, fully functional, and in accordance with the contract documents within the contract price.
3. References to the term "Contractor" in the Drawings and Specifications shall be interpreted to mean work by this Subcontractor as they relate to this scope of work.

3.B. Electrical Scope of Work Specific Inclusions

The Subcontractor shall furnish and install the work of this Subcontract in accordance with the Contract Documents, including, but not limited to the following:

General Requirements

1. Subcontractor will make every effort to fabricate as much of this scope of work off-site as possible, that will limit the required hours and manpower on-site
2. Subcontractor shall furnish for installation by others access doors and panels as necessary or specified for work within this package. Access Doors shall be in accordance with specifications for this bid package or the access panel specifications whichever is more stringent.
3. Subcontractor shall coordinate, provide all sleeves, blockouts, coring and supports necessary for the work within this package. It is intended that all penetrations throughout the structure(s) will be sleeved or formed-in-place whenever possible. With respect to cast in place concrete work, Subcontractor will furnish sleeves which can be attached to the inside of these forms without requiring a penetration of the plywood or steel formwork. Subcontractor to include waterproof collars between piping and sleeve bodies as applicable, Subcontractor shall further provide all grouting, waterproofing or other work as required to ensure that the penetration is watertight. Subcontractor to ensure that all openings provide for proper spacing between penetrations and annular space around opening to accommodate listed UL fire stopping assemblies which are by Firestop Subcontractor.

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4. Subcontractor shall furnish all embeds needed for this scope of work to the Concrete Subcontractor for installation.
5. Subcontractor will provide their own cutting (including metal decking and concrete), coring, and patching of new or existing openings as it pertains to their work. Subcontractors will furnish and install all miscellaneous steel required at their openings. Subcontractor shall be responsible for any cutting or core drilling (and associated patching) required if sleeves are not used. If core drilling is required, Subcontractor shall obtain approval of the process, and Subcontractor will x-ray or provide for GPR scanning to located rebar or other reinforcing to avoid cutting.
6. All raceways and sleeves shall be coordinated with adjacent walls to ensure that all penetrations enter and exit walls at 90 degree angles.
7. Subcontractor shall provide for all anchor bolts, hangers, straps, unistrut, rods and other miscellaneous metal items as required for the support of Electrical work. Install all anchor points and supports prior to fireproofing when possible and patch otherwise at the expense of this package.
8. Blocking/backing required by this scope of work will be the responsibility of this Subcontractor.
9. Subcontractor shall provide all pads, curbs, and other concrete work necessary for the installation of the work within this package. The Power Company's transformer pad shall be included, as required by the power company's transformer pad requirements. Primary raceway and feeders to the transformer pad shall also be included by this subcontractor. Transformer location to be per the civil drawings or as required by SCE&G.
10. Subcontractor shall provide authorized factory start up and owner training, of all equipment and systems, this will include all labor, fuel, appliances, etc., required or necessary for final testing of all systems and equipment associated with the work of this Subcontract. Subcontractor specifically includes all fuel for testing of all emergency generators.
11. Subcontractor shall provide for all labels, color coding, stencils, nameplates, required for identification and warning of Electrical Work and Equipment (both temporary and permanent) installed by this Subcontract as required by the contract documents or governing codes.
12. Subcontractor shall provide factory-applied prime and factory-applied finish painting of equipment, motors, and other apparatus as specified. Subcontractor shall be responsible for all factory prime painting of hangers, rods (galvanized), and other metal device supporting electrical work as well as touch-up of abraded surfaces.
13. Excavation, backfill, compaction and spoils removal necessary for the work within this package.
14. Final cleaning of all Equipment, integral with this work is the responsibility of this package.
15. Subcontractor shall provide for testing and system certifications as required.
16. Hoisting, rigging, street closures, and all coordination of loads in excess of 15,000lbs., will be the responsibility of this Subcontractor.

Electrical Systems

1. Subcontractor is responsible for the complete Electrical System in the Hotel and Parking Garage.
2. Interior lighting and lighting controls systems as shown on the Contract Documents. Including all supports, brackets, hangers (including additional hangar wires for light fixtures mounted in acoustical tile ceilings) and standards for mounting light fixtures as required.

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3. Subcontractor shall provide electrical to all areas and items/fixtures shown on the Contract Documents, including Fire / Smoke dampers. Duct mounted smoke detectors to be provided to Division 15 to install, wired by this subcontractor.
4. All raceways, conduits and boxes, including but not limited to, EMT (Electrical Metal Tubing) and fittings, intermediate metal conduit and fittings, electrical metallic tubing, metal clad tubing and fittings, flexible metal conduit and fittings, wall and ceiling outlet boxes, pull and junction boxes, non-metallic conduit and fittings and all terminators and accessories.
5. All cable, wire and connectors required for power distribution and circuitry, lighting circuitry, appliance and equipment circuitry and motor-branch circuitry.
6. Provide all medium voltage and high voltage switchgear (277/480v and 120/208v).
7. Provide all transformers and panels.
8. **Mechanical Coordination**
 - a. Motor, motor starters, and circuit disconnects where not integral with mechanical, fire sprinkler and plumbing equipment, as indicated on Contract Documents.
 - b. Install all variable frequency drives specified for mechanical equipment.
 - c. Coordination of actual versus specified or scheduled power requirements for all equipment to which final connections are made under this contract. If an item of owner furnished or contractor furnished equipment is specified to require electrical connections, this electrical connection shall be included, whether or not shown on the electrical drawings.
 - d. This Subcontractor shall also be responsible for coordinating all power, gas and water requirements which may be required for all equipment furnished herewith with the other MEP trades.
 - e. Subcontractor understands the relationship which exists between mechanical, plumbing, fire protection, and electrical activities and the installation of the metal studs and drywall. This Subcontractor also understands that there will be areas where metals and drywall shall be installed prior to this Subcontractor's work in order to achieve proper installation (i.e. shafts, rated walls, corridors, etc.).
9. **Elevator Coordination**
 - a. Power to, and hookup of, Division 14 items including all conduit, wiring (power only) and devices necessary to bring permanent power to conveying systems.
 - b. Coordinate location and connections of the elevator controllers and disconnects with elevator subcontractor. Subcontractor has included all building electrical work to comply with applicable codes as they relate to Elevators, i.e. elevator pits to contain GFI receptacle outlets, pit lights to maintain code required foot candles, switches for lights and sump pumps (power to), and shunt trip breakers.
 - c. Subcontractor shall also furnish and install conduit and pull string from Elevator shaft as required for the Elevator Life Safety Panel and all other communication points relative to the elevator system.
10. **Site Electrical Work**
 - a. All site electrical work including underground conduit and wiring.
 - b. Ductbank system.
 - c. Subcontractor shall make all tie-ins or connections to feeder service and at entrances into the building structure where indicated.
 - d. Subcontractor shall provide all grounding to system.
11. All components required for bus duct system.
12. All grounding required of electrical systems and equipment.

13. Power rough-in, wiring and final connection of all owner-furnished equipment and equipment furnished by others, as indicated on the Contract Documents.
14. Furnish and install all lightning protection system, complete; and surge protection system, for work installed by this scope of work.
15. Encasement and other concrete work necessary for the installation of the work within this package unless specifically detailed on the architectural or structural documents.
16. Support as required for electrical panels, and other equipment furnished by this package, including unistrut, independent supports, etc.
17. Generator, transfer switch, and distribution, thereof complete.
18. All light bulbs used are to be in coordination with Contract Documents..
19. Provide power for Owner Furnished signage in locations shown on the plans.
20. Connection of all heat-trace systems provided by others, and as shown on the Contract Documents.
21. UL rated Back Boxes, Floor boxes, and conduit including those that show data (combined), are by this Subcontractor.
22. Normal and emergency power distribution system.
23. Standard and special receptacles as shown on the drawings with normal and emergency and branch circuiting.
24. All rough-in and final hook-up of all items requiring electrical service that are specified in any other section of the specifications and/or shown on the electrical drawings
25. All electrical connections to power operators and accessories for work included in other specification sections including 120/208v power to electrified door hardware.

Temporary Electrical Provisions

1. Provide and maintain and remove throughout duration of the job (or until permanent power is available) Temporary power, wiring, lighting and distribution in accordance with current OSHA requirements. Temporary power (with GFI) including (4) standard 120 and 220 volt as necessary outlets shall be located within 100' radius of all work activities on all level with not less than 16 outlets per floor. Location of this temporary power distribution shall be coordinate with Balfour Beatty prior to installation. Temporary power to be provided to the bottom of the excavation.
2. Temporary lighting per OSHA standards to include but is not limited to: lighting of tower crane jibs and masts at street level, buckhoist platform, temporary and permanent stair towers, at core jumping forms and along perimeter fence. Conforming with OSHA regulations lighting systems for the building corridors and the lighting systems for the stairwells shall be installed on separate circuits and independently switched at panel boards. Light stringers and power distribution shall be supported in a manner to meet OSHA standards and to permit physical installation of permanent ceiling systems, hollow metal, partitions, and any other permanent work in all work areas.
3. Provide temporary lighting under King Street covered pedestrian walkway. Lighting to be tamper resistant and inspected for operation at the end of each shift.
4. All lamping and re-lamping of burned out light fixtures, including any re-lamping of temporary fixtures AND permanent fixtures used for temporary lighting.
5. Subcontractor shall remove temporary electrical systems in accordance with the Project Schedule.
6. Subcontractor understands and agrees that the permanent electrical system and equipment furnished will be used to temporarily operate the building systems during the

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construction process. The shall provide all labor required to operate the electrical portion of the permanent system as noted above and extended warranties as required for use of electrical items during construction so that they continue from the date of acceptance to the full periods of time required.

7. Provide a cost to furnish and install a 1500Kva temporary service to a spot designated by BBC. Provide all power service the items below. Include removal as directed by Balfour Beatty.
 - a. Buckhoist: One Unit at 400 Amp, 480 Volt, 3 Phase Power
 - b. Tower Crane: One Unit 400 Amp, 480 Volt, 3 Phase Power. Provide three (3) 1,500 Watt mercury vapor 480 Volt along the jib and two (2) additional lights on the mast.
 - c. Dewatering system: multiple pumps 60 Amp 240 Volt, 3 Phase Power
 - d. Fire Proofing: One Service 20 Amp 120V; Two Services 50 Amp, 240 Volt, 3 Phase Power
 - e. Dedicated circuit per floor (or every other floor) 220V, 50 Amp service for steel subs welder.
 - f. Temporary Service for Elevators
 - g. Power for Contractor's trailers and saw service.

3.C. Related Requirements

The following related requirements apply to the work of this Subcontract whether provided by the Subcontractor, Tier Subcontractors or Others:

1. Subcontractor agrees to make every reasonable effort to complete the permanent building electrical systems at the earliest possible date so that the permanent system can be used for temporary electrical purposes, prior to final completion of the buildings. Subcontractor shall also provide the necessary operation/manpower required by the electrical trade to use the permanent system on a temporary basis or provide adequate temporary power requirements for the following:
 - a. Permanent electrical systems and final hookups necessary to operate the permanent building heating and ventilating system for the purpose of temporary heating, ventilation, and conditioned air as required and approved by the Construction Manager.
2. It is understood that the Contractor will obtain approval from Owner prior to allowing Subcontractor to operate the temporary electrical system. Electrical Subcontractor shall maintain equipment during this temporary basis. Upon final acceptance of the systems by the Owner, this Subcontractor shall extend all related warranties so they continue from the date of final acceptance to full period of time stated in the Contract Documents.
3. Subcontractor Team:
 - a. Subcontractor agrees that the following team members or roles will be committed to this subcontract for the duration of the scope of work:
 - i. Project Executive – Billy Brittelli
 - ii. Senior Project Manager – David Pearson
 - iii. Superintendent-Everette Lewis, Jr.
 - iv. Superintendent- Christopher Cumbee
 - v. Foreman | Floors 3-9 – tbd
 - vi. Foreman | Common/Core – tbd
 - vii. Safety Manager – tbd, as required
 - viii. BIM Manager –Tony Santore
 - ix. Project Manager – David Farmer

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- x. Assistant Project Manager - Jason Eacho
- xi. QA/QC – tbd
- xii. Prefabrication Manager-Bob Pharr
- xiii. Prefabrication Supervisor-Julian Rubio

(all field supervisors and superintendents to be OSHA 30 trained)

3.D. Coordination with Other Trades and Authorities

This Subcontractor is responsible for coordinating with the other trades and authorities to ensure the proper installation of the work and to ensure work is not delayed.

1. Subcontractor shall cooperate fully with all building inspection officials with the review and inspection of the work of this Subcontract. Subcontractor shall promptly remedy all rejected or disapproved work by building inspection officials.
2. Subcontractor shall aid the Commissioning Authority and Test & Balance Agency in the execution of the Commissioning Plan.
3. It is understood that the rough-in, sleeving and raceways and pull strings for Telephone (and Data) raceway system, Telecommunications Room Requirements, Horizontal and Backbone Cabling, Security, MATV, AV and IT/MATV/Security including all boxes, back boxes and special back boxes are included within this scope of work. Although the Owner will be providing these systems and other OF systems, this subcontractor shall still be responsible for these systems to:
 - a. Review of all shop drawings and submittals.
 - b. Coordination of schedule and work sequencing.
 - c. Provide manpower necessary to assist in startup of system, as it relates to the all 277/480v and 120/208v power.
4. Fire rated tele/data room plywood backboards.
5. Subcontractor shall provide all permits, plan checks, licenses, business license fee, inspections and associated fees (if necessary) to complete the work of this Subcontract, building permit is by General Contractor.
6. Subcontractor shall cooperate fully with all testing laboratory and inspection personnel with the review and inspection of the work of this Subcontract. Subcontractor shall promptly address remedies required for non-conforming work.
7. Subcontractor shall participate fully with the General Contractors BIM Plan and in conjunction with other Subcontractors, in the development of MEP coordination drawings, and a comprehensive BIM Model.
8. This Subcontractor understands and agrees the permanent Electrical Systems and equipment furnished herein will be used to temporarily operate the building systems during the construction process. The Subcontractor shall extend all related warranties so that they continue from the date of acceptance to the full periods of time required by the Contract Documents.
9. Subcontractor shall cooperate fully with General Contractor and other key trades to ensure obtaining the Certificate of Occupancies in an expeditious manner.

3.E. Field Engineering

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This Subcontractor shall be responsible for all layout and engineering, including horizontal and vertical control which is required to complete this Scope of Work. Subcontractor is further responsible for coordination, layout, and location as applicable of all equipment, piping, conduit sleeves and block outs. The General Contractor will provide:

1. Two control Lines on each level.
2. Bench marks for elevation control on each level.

3.F. Special Schedule Requirements

1. NOT USED

4. EXCLUSIONS:

The Following Items are specifically excluded from the work of this Subcontract.

1. Utility Transformers (by Utility Company)

5. UNIT PRICES:

Balfour Beatty Construction reserves the right to modify the work in accordance with the following Unit Prices at the costs as noted. Unit Prices are good throughout the duration of the project and include all burdens, overhead markups, and profit.

1. N/A

6. ALTERNATES OR OPTIONS:

Balfour Beatty Construction reserves the right to modify the work in accordance with the following alternates or options at the costs as noted. Alternates or Options are good throughout the duration of the project and include all burdens, overhead markups, and profit.

1.	Tele/Com/Data Cabling	\$132,573
2.	MATV Cabling	\$49,530
3.	VE Lighting Fixture Package w/Lutron	<\$397,935>
4.	Security Access Control cabling	\$13,550

7. ALLOWANCES:

Balfour Beatty Construction has included the following allowances within this subcontract for the exclusive use of the General Contractor. They are not intended to allow for or be included for any base bid scope of work required by the Contract Documents, or as indicated in this Contract for this subcontract scope of work. These allowances shall not be used without prior written direction and approval by the Contractor. Allowances are good throughout the duration of the project, and any unused portions of these allowances shall be deducted from the subcontract value and returned 100% to the Contractor.

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N/A

8. **RECAP OF CONTRACT AMOUNT:**

The Total Subcontract Amount is arrived at and recorded as follows:

Base Bid	\$ 3,999,850
Less P&P Bonds	<\$27,058>
Delete bed pilasters wall sconces (RI & Installation)	<\$14,000>
Power to dewatering/well point system	<u>\$5,000</u>
TOTAL SUBCONTRACT AMOUNT	\$ 3,963,792

9. **CLARIFICATIONS:**

The following clarifications apply to this Subcontract:

1. Tower Crane to be furnished by Contractor for Subcontractor's use, as available and scheduled by the Contractor. Certified rigging and riggers shall be used and included by the subcontractor for any lifts or picks required by the subcontractor.
2. All submittals and shop drawings to be submitted no later than 30 days from execution of this subcontract.
3. Coordination study and Arc Flash studies are included.
4. All site exterior light fixtures that are existing are to be removed, stored and reinstalled by this subcontractor. New site lighting is also included as shown.
5. All site lighting, landscape lighting and landscape bollard lighting and power is included. Power to irrigation controller is included.
6. Building mounted light fixtures (lanterns, where shown to be gas lanterns) are included as electrical fixtures. (Special City of Charleston approved to match the gas fixture)
7. Electronic Card Readers
8. Bar Code System for material tracking
9. Back-lighting of resin panels in all millwork units
10. Lutron lighting system controls
11. Off-site mock up is included with all devices and fixtures, 1K and 1-Q plus hallway. Also included is an on-site exterior mockup.
12. Additional warranties as may be required in the Contract Documents.
13. Receiving, handling, inventory, assembly and installation of all owner furnished contractor installed light fixtures (to include but not be limited to all 'DC', 'DW', 'ID', 'J2', 'J4', 'J5' and 'J7' fixtures). Work with the manufacturer as required for coordination of the installation of lobby and ballroom level fixtures, as well as any other OFCI fixtures.
14. Providing all of the light fixtures on the ID drawings that are shown as CFCI
15. Power connections to fireplace equipment for electronic starters.
16. Lightning protection and grounding loop, certified master UL labeled.
17. Colored conduit if requested by Contractor, for certain systems such as fire alarm (red) and security (tbd).
18. E-generator tank to be left full of fuel after all testing for turnover to the Owner. Generator to include marine grade paint with exterior enclosure.
19. ATS's are included.
20. Seismic design for this subcontractor's scope and bracing as required.
21. Emergency circuit connection as required for high rise elevators.

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- 22. Light pole bases.
- 23. Prefabrication to be used extensively by this subcontractor, including but not limited to electrical rooms, guest rooms and repeatable stacked rooms.
- 24. Included as Contract Documents, are the revised drawings issued to Subcontractor during award meeting from WLA, which included 11x17 sheets of LC-801, 802, 162, 161, E101, 102, 103, 104, 105, 106, 107, 108, 109 and DV102 with highlighted and clouded mark-ups.

END OF SCOPE OF WORK

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SUBCONTRACT SPECIAL PROVISIONS

This information must be provided to all parties with which Subcontractor or Supplier contracts directly for labor, services or materials on the project. Further, the obligation to provide all lower tier subcontractors and suppliers with this Lien Agent information must be flowed by Subcontractor or Supplier to those with which it contracts.”

The following exhibits are omitted:
Exhibit L Publically Funded Provisions
Exhibit N Design Build/ Design Assist Rider
Exhibit O State Law Rider

The following exhibits are included:
Exhibit W Stored Materials
Exhibit X Surety letters
Exhibit Y Owner Contract

I. PROJECT PROVISIONS

These provisions shall apply to all Subcontractors on this particular project. The following Special Provisions modify, delete and/or add to the Subcontract Agreement. Where any paragraph or subparagraph in the Subcontract Agreement is supplemented by one of the following paragraphs, the provisions of such paragraph or subparagraph shall remain in effect and the special Provisions shall be considered as added thereto. When any paragraph or subparagraph in the Subcontract Agreement is amended, voided or superseded by any of the following paragraphs, the provisions of such article, paragraph or subparagraph not so amended, voided, or superseded shall remain in effect.

1. In addition to the Standard Form Agreement Subcontractor must comply with paragraphs A through F below:
 - A. Begin submittal of shop drawings, product data, samples, certificates, test reports, etc. no later than 3 calendar days after notice of award of Subcontract (Issuance of subcontract shall not be cause for delay of Submittals) Failure to submit correct or timely submittals does not relieve this subcontractor of material delivery obligations in accordance with the project schedule.
 - B. Complete submittal of shop drawings, certificates, test reports, etc no later than 28 calendar days after Contract Execution.
 - C. Resubmit any items within a maximum of 7 calendar days after being returned for correction (or as required to maintain schedule). Failure to submit correct or timely submittals does not relieve this subcontractor of material delivery obligations in accordance with the project schedule.
 - D. The Trade Payment Breakdown shall include a line item for submittals and as-builts in an amount agreeable by the project team. This dollar amount will be released when all submittals are complete and approved with confirmed shipping dates. Subcontractor shall include with each payment application a material log. The material log must be fully executed and include all major materials and equipment used on the job with confirmed delivery dates noted for each material approved. Subcontractor must furnish from supplier with material log, written evidence of confirmed shipping dates of major materials and equipment.

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- E. All subcontractors shall submit to the Construction Manager's field office all Material safety Data Sheets (MSDS) for all hazardous substances as defined by Government authorities at the time of delivery. This shall be a job specific submittal, not a generic company-wide submittal.
2. **SCHEDULE OF VALUES:** In addition to any other provisions listed herein, Subcontractor hereby agrees to allocate a reasonable and fair share of cost as determined by Contractor in the schedule of values for requisitioning of the following items of work under this Agreement.
 - A. Material Submittals - to be requisitioned as a lump sum amount upon 100% completion.
 - B. Clean up - total clean-up cost allocated to this Project to be requisitioned based upon actual performance of clean up. (see Item #43 requirements)
 - C. Close -Out information - including as-builts, owner manuals, warranties, etc. to be requisitioned as a lump sum amount upon 100% completion of these submittals. (see Item #1E above)
 - D. Punchlist - value shall be 2% of subcontract value to be requisitioned as a lump sum amount upon 100% completion.
3. **SCHEDULE:** Subcontractor is cognizant of the project schedule and has factored all required material expediting requirements, overtime and manpower loading to complete the work within Contractor's Project schedule.
4. **METHOD OF CALCULATING PAYMENT FOR EXTRA WORK:** The cost or credit to Contractor resulting from a change in the Work shall be determined in one or more of the following ways at Contractor's option, in addition to the Standard Form of Agreement.
 - A. Lump Sum - A change order cost or credit may be determined by mutual acceptance of a lump sum proposal properly itemized and supported by sufficient data to permit evaluation.
 - B. Unit Price - A change order cost or credit may be determined by the use of the unit prices stated in the Contract Documents or subsequently agreed upon.
 - C. Time and Materials - A change order cost or credit may be determined on a time and material basis, using agreed upon hourly labor, equipment rates, material costs and applicable markups as indicated in the Standard Form of Agreement.
 - D. Other - A change order cost or credit may be determined by Contractor without any recourse by Subcontractor if mutual terms and acceptable pricing cannot be agreed to by using any of the methods described in Items A, B, or C above.
 - E. No change order work will be undertaken by Subcontractor without prior acknowledgment and approval of Contractor.
 - F. All allowable mark-ups breakdowns shall be per Owner Contract Agreement. This project shall allow a combined profit and overhead of 10% of the sum of the Subcontractor's direct costs for labor (including labor burden) and material (including sales tax). For example: Subcontractors maximum cost for a change = [(Subcontractors direct labor cost including labor burden) + (Subcontractor's direct material cost including sales tax) + (Sub-Subcontractor(s))] x (1.15).
 - G. Back Charges – In the event of back charges between the Contractor and the Subcontractor or the Subcontractor and another Subcontractor, the Contractor and the Subcontractor will be entitled only to the direct cost of the additional work or repairs in question. No percentage mark-ups for indirect costs such as overhead and profit will be allowed.

- H. Pricing - No greater than (10) days of receipt of a change the Subcontractor is required to provide pricing for change in the work to the Contractor.

5. **WORKING HOURS, OVERTIME, WEEKEND WORK & NOISEY WORK:** Unless changed by Contractor and posted at the job site, standard working hours are from 7:00 a.m. to 7:00 p.m. Monday through Friday. All subcontractors shall observe these hours unless otherwise directed. Additionally, it is understood that to meet certain schedule requirements of the project it may be necessary to perform some work tasks during off-hours, and that workdays in excess of eight (8) hours will be required as a normal course of performing the Work. Any additional costs incurred by the Subcontractor, in the performance of this shift work, are the responsibility of the Subcontractor. Work hours must be adhered to; if hours are not met then deductive change order will be written for hours not worked each week (labor to be deducted at same rate as approved additive change orders). 40 hours per week minimum work hours by full crew for work involved that week. It is further understood that due to the urban construction environment and proximity to the Embassy Suites Hotel that working hours for active construction work (exclusive of meetings, general coordination and some deliveries (as determined by city and neighboring properties as acceptable) that work is to be limited to 7:00am to 7:00pm, Monday through Friday, with 7:00 am to 5:00 pm hours governing on Saturdays. No Sunday Work.

It is agreed that the Subcontractor will make up any normal workday (Monday through Friday) time lost by working Saturday and/or extra shifts as necessary to maintain the project schedule at no additional cost to Contractor.

6. **MOBILIZATIONS, CONCURRENT WORK, PHASED TURNOVER:** Subcontractor acknowledges that the Project will have a phased turnover in accordance with the Project Schedule and that multiple mobilizations will be required and are included as part of the Subcontract Agreement. Additionally, Subcontractor acknowledges that the Project has multiple building areas and concurrent work on each building area will be required in order to complete on schedule, and that all costs for doing so including utilizing separate crews, supervision, after hours deliveries, shop drawings, inspections, etc. are included.

Subcontractor shall mobilize within three (3) calendar days of Contractor's notification with complete work force, materials, supervision, labor and equipment available to maintain and complete scheduled activities

Subcontractor also acknowledges that subsequent bid packages and scopes of work will proceed and/or follow work under this agreement. Subcontractor is herein required to schedule and coordinate with such subsequent bid packages to ensure continuity of work.

7. **LIMITATIONS OF OPERATIONS:** Subcontractor hereby agrees to arrange his Work and his material as not to interfere with the operations of other Subcontractors engaged upon adjacent Work and to join his Work to that of others in a proper manner, and in accordance with the intent of the Plans and Specifications and to perform his Work in the proper sequence in relation to that of other Subcontractors, all as may be directed by Contractor.
8. **COORDINATION:** In addition to the Standard Form Agreement, Subcontractor shall coordinate his Work with all of the other Work which must be performed in the Project. To facilitate this coordination, there shall be coordination meetings, the attendance at which shall be mandatory for Subcontractor's coordination responsibility. Daily coordination meetings with Contractor's Superintendents shall be held every work day at Contractor's on-site office at 6:30am until such time as Contractor waives or reinstates this requirement.

All Subcontractors shall have their respective Superintendents attend this meeting. All Subcontractors shall provide daily force reports by 8:00am for the previous day's work and Pre Task Plans (PTP's) by 8:00am for the current days work. All daily force reports and PTP's shall be on Contractor's form.

9. **MEETINGS:** - Subcontractor understands that weekly (or a frequency as otherwise determined by the contractor) project meetings, coordination meetings, subcontractor meetings, superintendent meetings, schedule meetings and separate weekly safety meetings will be held on the job site. Subcontractor agrees to have the necessary and competent personnel attend all required meetings.
10. **PRE-INSTALLATION CONFERENCE:** Subcontractor shall attend a pre-installation conference conducted by Contractor which may be attended by Architect/Engineer, Owner's representative and Contractor's staff as deemed necessary by Contract Documents and scope of work. At this conference, Subcontractor's personnel, including Project Manager, Superintendent and any other key personnel (including those specifically requested to be in attendance by Contractor) will be introduced and the Scope of Work will be discussed along with other key issues such as workmanship, quality control, schedule, safety, etc.
11. **PROJECT SAFETY:** In addition to the Standard Form Agreement, Subcontractor acknowledges Contractor's commitment to providing a safe workplace and will cooperate and participate in establishing a Project Safety Plan. Said plan, at a minimum, will include the formation of a Project Safety Team which will meet regularly to review the status of overall Project Safety, discuss accidents and near-misses, promote training and safety awareness and develop mutual incentive programs that might be applicable. Furthermore, Subcontractor will provide written notice of who their on-site Safety Competent Person will be and forward any and all MSDS related to their Work to Contractor prior to start of any work.
 - a. 100% glove use will be required in all cases other than in instances where manufacturer/OSHA recommendations/standards specifically prohibit the use of gloves due to added risk involved with their use.
 - b. All Subcontractors are required to use platform type step ladders.
12. **DOCUMENTS:** Subcontractor shall be responsible for securing complete sets of Construction Specifications and Drawings. Subcontractor shall procure and pay for all required plans and specifications which shall be on file and available at a local blueprint company designated by Contractor.
13. **UTILITIES VERIFICATION:** Subcontractor shall verify locations of all existing utilities within the Construction Areas prior to commencing the Work. Subcontractor shall abide by the "Underground Facility Damage and Safety Act" which requires anyone doing any type of excavating, tunneling or demolition to call all agencies having jurisdiction. An excavator must call the local utility companies, and the Owner's Facilities and Maintenance Department not less than two or more than five business days before beginning any excavation. Any damage to existing utilities during construction will be repaired immediately as required to minimize disruption of the businesses and residences at the expense of Subcontractor that caused the damage.
14. **"NO CHANGE" AGREEMENT:** It is the intent of this Agreement and consistent with the prior negotiations of this Agreement for Subcontractor to perform the Work under this Agreement without extra Change Orders to the Contract unless specifically requested by Owner, Architect or Contractor. Subcontractor agrees and understands that the Contract Documents as defined in "Exhibit A" of this Agreement may be incomplete in detail or contain inconsistencies. Subcontractor herein further represents and agrees that its Scope of Work is complete and shall be performed to Contractor's and Owner's complete satisfaction without cause for claim of additional cost or change orders. It is further understood and agreed that Contractor has entered into a Guaranteed Maximum Price (GMP) contract with Owner to complete this project based on the Contract Documents identified and described in "Exhibit A". Accordingly, claims for additional cost for inconsistencies in the Contract Documents will not be recognized. Subcontractor shall bear all cost of such claims that may arise as they relate to this Scope of Work. The subcontract lump sum price includes all cost to complete the intended Scope of work as represented by the Contract Documents. Should Owner initiate additional work to the Scope of Work, or upgrades to the Work originally described, a change order will be negotiated for the same between Contractor and Subcontractor.

16. **FIREPROOFING AND INSULATION:** Subcontractor will be responsible for the patching of all fireproofing and insulation materials damaged by the execution of his Work. This shall include any patchwork around hangers and/or supports. Also, subcontractor shall provide all necessary protection materials to prevent the work of other trades from being made dirty due to the fireproofing patchwork for your specific trade.
17. **FUEL STORAGE:** On-site storage of fuel will not be permitted.
18. **GUARDRAILS / SAFETY DEVICES:** Subcontractor shall install, maintain and replace all required guardrails in accordance with OSHA Standards as a minimum for the purpose of safety at all openings and suspended work, created as a part of their scope of work. Subcontractor is responsible for fall protection of all employees.
- Subcontractor is also responsible for all temporary access to facilities, temporary fencing, overhead protection, signs and/or barricades as may be required to perform their Scope of Work, in addition to Contractor's furnished construction fencing.
- Subcontractor agrees that if in the performance of their work it becomes necessary, convenient or advisable to remove, replace or interfere with any safety devices or controls installed by the Contractor or another Subcontractor, the Subcontractor will replace or restore such devices or controls at their own expense. In the event such safety devices or controls are not so replaced or restored, the Subcontractor agrees to reimburse the Contractor or Subcontractor for doing so.
19. **SCAFFOLDING:** Subcontractor shall provide all scaffolding (or other means of access) required for the performance of this Subcontract. All scaffolding shall be erected in complete accordance with the latest OSHA Standards, and Balfour Beatty Exhibit D as a minimum including all handrails, mid-rails, toe-boards, fully decked platforms, entrance and exit points, proper counterweights and anchor points, material landing and staging areas, material hoisting requirements, proper access ladders or stairs, etc.
20. **EXCAVATION:** All excavations must be in compliance with OSHA standards as a minimum. Subcontractor shall adhere to Contractor's Safety Program for excavations which may be more stringent than OSHA requirements. Subcontractor shall complete and submit to Contractor a job hazard analysis prior to commencement of all excavations. All soils for open cut excavations shall be classified as Type C (1.5:1 slope), unless Subcontractor can provide signed and sealed Engineering to Contractor illustrating existing soil conditions are allowed to withstand reduce slope cuts. Contractor Trench Safety Program is initiated in excavations exceeding 4'-0" in depth. Subcontractor shall name Competent Person prior to starting work.
21. **OSHA VIOLATIONS:** In addition to the Standard Form Agreement, In the event Subcontractor is cited for violations of the Occupational Safety and Health Act, he shall be responsible for all penalties assessed against him. In the event Contractor is penalized due to Subcontractor's actions or failures to comply with the Occupational Safety and Health Act, Subcontractor shall hold Contractor harmless. Any penalties assessed against Contractor for violations of Subcontractor shall be deducted from amounts due under this Agreement.
22. **DOCUMENT ORDER OF PRECEDENCE:** In addition to the Standard Form Agreement, In the event of any conflict or discrepancies in the terms of the Contract Documents, this Agreement, attached Exhibits, manual, code or laws, the document order of precedence shall be interpreted as the most stringent requirement within the above as solely determined by Contractor.
23. **FEES:** In reference to the Work in this Agreement, Subcontractor shall obtain and pay for all required Federal, State, City and County Permit Fees, Business License Fees, Right-of-Way Permits and Bonds, Encroachment Bonds, License Fees and Inspection Fees, including all Re-Inspection Fees, for their scope of work unless specifically excluded in Section II (Scope of Work) enclosed.
24. **WARRANTY PROVISIONS:** Warranty provisions as mentioned in the Standard Form of Agreement are enhanced as described below (the words Guarantee and/or Warranty are synonymous):

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- A. Warranty period for this project is 1 year.
- B. Subcontractor warrants to Owner and Contractor that all materials and equipment furnished under this Subcontract will be new, unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. For all Work not conforming to these requirements, including substitutions not properly approved by Architect or Contractor, Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.
- C. All warranties shall be in writing on Warrantor's stationery or official forms as designated by Contractor and signed by an authorized official of the Warrantor's Company. Contractor hereby agrees to provide written assignment to Owner of all warranties. Warranty term shall not commence until all of the following conditions have been satisfied.
 - (1) Certificate of Occupancy for the building areas, or its equivalent
 - (2) Satisfactory completion of item of Work or system by Subcontractor
 - (3) Formal acceptance of the Work by Owner, Architect and Contractor
 - (4) Subcontractor has provided all the specified warranty/guarantee documentation to Contractor.
 - (5) Subcontractor has provided specified training (including video taping) for the operation and maintenance of the system and/or equipment.
 - (6) Subcontractor has provided maintenance manuals for the operation and maintenance of the system and/or equipment.
- B. Failure to respond to warranty Work during the term within forty-eight hours of written notice and/or diligently pursue corrective measures shall be considered a Subcontractor breach of warranty. Subcontractor and his Surety shall be liable for all expenses incurred from such failure to respond.
- C. If within any warranty period, repairs or changes are required in connection with the warranty Work, which in the opinion of Contractor and/or Owner is rendered necessary as a result of the normal use of material, equipment, or workmanship which are defective, or not in accordance with the terms of the Contract Documents, Subcontractor and/or its Surety shall, promptly upon receipt of notice and at his own expense, proceed to:
 - (1) Place in satisfactory condition in every particular all such warranted Work, correct all defects therein.
 - (2) Make good all damages to the structure or site, or equipment or contents which, in the opinion of Contractor or Owner, is the result of the use of materials not in accordance with the terms of the Contract Documents.
 - (3) Make good any Work, materials, equipment, contents of structures or site disturbed in fulfilling any such warranty.
 - (4) In addition to the foregoing warranty, if any more-stringent terms exist in Owner Contract, then those terms shall apply.

24. **PUBLIC CONVENIENCE AND SAFETY:** Subcontractor shall, at all times, so conduct his Work as to ensure the least possible obstruction to traffic. The safety and convenience of the general public, operational service providers, residences and/or businesses located near the Project, and the protection of persons and property shall be provided by Subcontractor.

In addition, Subcontractor understands that the Work is to be constructed near businesses and residences and Subcontractor shall use its best efforts, in conformity with the applicable standards of care, to perform its Work hereunder in a manner which will not interfere with the ongoing business operations including, without limitation:

- A. Controlling noise, dust, insects, vermin and pests,
 - B. Requiring appropriate attire and conduct for Subcontractor's workers and the workers of Subcontractor of every level. Complaints received regarding attire or conduct will be grounds, at Contractor's sole discretion, for demanding removal of the offending parties.
 - C. Maintaining Work hours and noise levels in accordance with the applicable City of Charleston Requirements, County and City Ordinances and Contractor's requests.
 - D. Communication and/or fraternization between Subcontractor's personnel and the general public are strictly prohibited.
 - E. Unapproved Utility shut-downs or damages.
25. **STREET CLEANING:** Special care must be taken to prohibit any accumulation of dirt, dust and debris which might be blown or tracked into public areas or contaminate interior air quality. Subcontractor shall provide prompt and continuous cleaning and maintenance of street and sidewalk areas which might pose potential damage to the public in the vicinity of the Work including, but not limited to, covered walkways, building access areas, public right of ways, etc. Furthermore, Subcontractor is responsible for cleaning all vehicles prior to exiting site. Washing streets with water containing sediment particles into storm water system is prohibited.
26. **VEHICULAR AND PEDESTRIAN TRAFFIC:** Subcontractor shall not block off any public or private street nor use any part thereof for storage of materials unless approved by all applicable governing agencies and Contractor. Where affected by the Work, vehicular and pedestrian traffic shall always be accommodated and maintained in accordance with any special local requirements or in the absence of any such requirements, in accordance with the instructions of Contractor. Proper signage, indicating re-directed traffic shall be placed in appropriate locations throughout the project duration.
27. **BARRICADES AND DANGER/WARNING SIGNS:** Subcontractor shall provide and maintain suitable danger and warning signals, lights, signs, signal devices, barricades, flagman and/or watchman and take all necessary precautions that the barricades are appropriately located so as to give proper and unmistakable warning of hazards, structures or equipment involved under the Contract and shall remove same upon completion of the Work.
28. **SIGNAGE:** No signs will be permitted to be displayed at the jobsite or on trailers without written approval by both Contractor and Owner.
29. **RADIOS:** No radios (music radios, disc man, headset radios, MP3 players and the like.) other than two-way communication type will be allowed on the jobsite. Subcontractor agrees to furnish all his project managers, superintendents, supervisors, foremen, and lead men with two-way Radios with multiple channels to be used to communicate with Contractor and other Subcontractors on site. This requirement shall also be included for all Subcontractor lower tier subcontractors. Radio use and frequencies will be coordinated with the Contractor.
30. **FIRES / FIRE EXTINGUISHERS:** No fires for hand warming, trash disposal, land clearing etc. will be permitted on-site. Subcontractors will provide temporary fire protection system(s) within the immediate area of their work and required by the local Fire Marshall, and the applicable local, state, federal, and insurance underwriter requirements. The Contractor will provide general fire extinguishers in accordance with OSHA requirements.

31. **JOBSITE STORAGE / DELIVERIES:** Subcontractor is aware of the existing Site Conditions, and limited space availability that this urban site provides. On-site storage of materials and equipment will not be allowed except as specifically approved by Contractor's Project Superintendent or Project Manager. Unless specifically approved in writing, Subcontractor shall not assume any space is available for on-site storage.

All deliveries for Subcontractor shall be coordinated through Contractor no less than 24 hours in advance. If scheduled deliveries are not ready at the appointed time or if deliveries arrive without the ability to be unloaded, Contractor may refuse acceptance of materials and require deliveries to be rescheduled. It is understood that if hoisting of material is required for delivery (either via Crane or Buckhoist), or if street closure lane access is required that in order to maintain project schedule and maintain compliance with City Ordinances that these deliveries will need to be conducted after normal business hours as identified in Item 6 above.

All materials and deliveries must be coordinated and scheduled with Contractor prior to coming on site. Contractor will not allow delivery of materials to site without Subcontractor being represented on-site. Contractor will not receive, sign-for, accept or be responsible for materials delivered to the site or site office. Subcontractor has included in his subcontract price all off-site and phased storage as may be required.

Approval by Contractor of material storage locations shall only be construed by Subcontractor as temporary and for limited time duration. Contractor will not allow Subcontractor to procure "bulk deliveries" for Subcontractor convenience or for manufacturer purchase agreements. Each delivery of material shall only be approved for those materials of immediate or near future installations. Subcontractor has included in his subcontract price all off-site and phased storage as may be required. In addition to article 4.6 of the Standard Form Agreement, Contractor will not be responsible for relocation costs of stored materials on-site since utilization of on-site storage for convenience is at Subcontractor's risk.

Subcontractor is also responsible for the removal, consolidation, relocation, securing, etc. of all materials and equipment not permanently secured to building structure to meet design strengths and in case of impending weather condition emergencies at no cost to Contractor including hurricanes, snow storms, etc.

32. **CONSTRUCTION PARKING:** Subcontractor shall advise all of their employees, and tiered trades that NO on-site parking is available. Requirements for supervisor and worker off-site parking, and the costs associated with such shall be the responsibility of the subcontractor. Requirements for worker tools and delivery equipment shall be the responsibility of the subcontract and in accordance with item #32. Unsafe or unauthorized parking or temporary drop offs will result in vehicles being towed at Subcontractor's and/or vehicle owner's expense.
33. **SITE ACCESS:** Access to the site shall be gained only in areas and/or a route as determined by Contractor's Superintendent, and may be modified only to accommodate construction activities. Subcontractor is responsible for all ancillary removal and repairs costs for access points outside the Contractor provided access entrances, as well as any added traffic control or flagmen.
34. **ACCESS PANELS / ACCESS DOORS / COVERS:** Subcontractor shall furnish and install all access panels, access doors, and covers necessary to provide access to the Work of Subcontractor either concealed by Subcontractor's scope of work or by Scope of work of others including walls, soffits, floors, and ceilings. All proposed locations to be submitted for acceptance prior to installation. Subcontractor shall be responsible for coordinating and labeling the location and sizes of the required framed openings with respective trades during construction of walls, soffits, ceilings, and floors. Type of panels shall match architectural and mechanical specifications (as approved by Owner) and match fabrication material to its exposed environment.
35. **BLOCKING AND BACKING:** Subcontractor shall furnish and install blocking and backing as required for installation of this Work. If excluded in Scope of Work, Subcontractor will be responsible for coordinating the blocking and backing as required for its installation of the Work.

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36. **TOUCH-UP PAINTING & CLEANING OF EQUIPMENT:** Subcontractor shall provide all equipment touch-up painting and cleaning of equipment as required for Subcontractor's Work. Owner expects equipment in as new condition at completion of project.
37. **PRECONSTRUCTION ACTIVITY:** Subcontractor shall resolve and include the costs of any and all preconstruction activities in the anticipation of this project including but not limited to manufacturer site visits, mock-ups, attendance to meetings, etc.
38. **STRUCTURAL SUPPORT FRAMING (MISCELLANEOUS):** Subcontractor shall furnish and install all miscellaneous structural support framing not indicated on the Contract Documents required at openings in floors, decks, and walls for this Work. The required supports for this Work includes, but is not limited to, anchor bolts, hangers, isolators, channels, angles, embeds, etc.
39. **FLOOR AND ROOF OPENINGS:** Subcontractor is responsible for initial covering, labeling and maintaining covers of all floor/roof penetrations related to this Scope of Work from time of placement in building structure through 100% completion of penetration concealment on permanent basis.
40. **WELDING MACHINES / FIRE WATCH:** Electrically powered welding machines shall not be allowed for use on this site except when explicit written approval is granted by Contractor where special circumstances of building construction require such machines. If electric welding machines are used, the necessary power source, service and power consumed shall be provided by Subcontractor. It will also be Subcontractor's responsibility to install all subpanels required for his convenience.

When welding, torching or other hot work operation occurs normal fire prevention precautions are not sufficient, Subcontractor shall provide additional personnel assigned to guard against fire while the actual work is being performed, and for a sufficient period of time (minimum 45 minutes) after completion of the work to ensure that on possibility of fire exists.

41. TEMPORARY CONSTRUCTION FACILITIES AND UTILITIES:

A. Furnished By Subcontractor:

Subcontractor field offices will NOT be permitted on site. All cost for offsite office space will be the responsibility of Subcontractor.

Except as expressly set forth elsewhere, Subcontractor shall, as part of the Scope of Work, supply, install, properly maintain, permit and remove all temporary construction facilities and utilities necessary for the complete performance of its Work. Such items shall include, but not necessarily be limited to those listed below. The type of facilities, move-in and move-out dates and locations on Jobsite shall be subject to and in accordance with the review and approval of Contractor's Project Superintendent.

- (1) Maintenance of Subcontractor's laydown, storage and Work area and roads within such areas. Repair costs to existing landscaping, hardscape or roadways damaged by Subcontractor outside construction limits are also included.
- (2) Rigging, Scaffolding and all equipment for erection.
- (3) All Small Tools
- (4) All standard expendable or consumable construction items and supplies
- (5) Drinking water including containers, ice and cups. All to be cleaned, dated, and labeled daily.
- (6) All Storage compounds, security measures, fencing, lighting, etc. as may be required by Subcontractor to protect tools, equipment and materials.



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- (7) First Aid Supplies, fire extinguishers, personal protective devices, etc.
- (8) Builder's Risk Insurance Deductibles and additional Builder's Risk Insurance;
- (9) Material and Equipment hoisting to elevated floor and roof areas.
- (10) Access roads to work areas, crane pads, etc.
- (11) Employee access to work areas including ladders, scaffolds, lifts, etc.
- (12) Dewatering of natural underground water and rain water conditions
- (13) All Fall Protection Devices including rails, cables, harnesses, etc. and associated engineering, if required.
- (14) All required off-site storage for stored materials
- (15) All off-site parking fees.
- (16) Replacements costs for materials, tools, equipment, etc.
- (17) All equipment and tools brought inside the building and on site must be in accordance with Contractor safety plan (Exhibit D) or OSHA standards whichever is more stringent.

B. Furnished by Contractor:

Contractor shall supply or cause to be supplied the following temporary construction facilities and utilities to Subcontractor, without cost to Subcontractor, for or in connection with performance of the Work:

- (1) Sanitary Facilities - Furnished by Contractor shall consist of portable chemical toilets located at various areas of the jobsite as designated by Contractor based on average weekly manpower requirements.
- (2) Water for construction shall be furnished at points on jobsite as designated by Contractor's Project Superintendent. . Note: Subcontractor is responsible for all costs and/or fines received for water losses attributable to connections or line extensions installed by Subcontractor at Contractor's sole discretion of estimated water losses.
- (3) Accessible space near the construction site for performance of the Work and daily temporary storage of material and equipment at time of that day's installation. (No protective storage facilities, security, or protective coverings of any kind will be furnished by Contractor.) Subcontractor shall assume worst case accessibility and reach to each building structure for hoisting of materials based on present site conditions at time of delivery or installation.
- (4) Temporary Lighting in accordance with OSHA Standards will be provided by the Electrical Subcontractor. However it shall be the responsibility of Subcontractor to ensure that each craftsman on this project has adequate lighting in each room to do a "first class" job. Extension cords and light stands for lighting shall be the responsibility of Subcontractor.
- (5) Temporary Power - 110 volts, single phased, 60 cycle power shall be provided by the Electrical Subcontractor and made available throughout the building for small tools only. Power will not be available for electric welding machines or heavy duty saws. Portable panels or multiple outlets will be located on each floor within 100' of any work area by Electrical Subcontractor. This Subcontractor shall provide all OSHA approved



extension cords as required for the execution of this Subcontract Agreement. All power cords and tools shall be protected by ground fault circuit interrupters (GFCI). Where GFCI outlets are not available or when building permanent power systems become energized and temporary systems removed, in-line GFCI protection shall be supplied by each Subcontractor.

Any equipment requiring temporary 220 volt (or above) power will not be provided by Contractor. It will be Subcontractor's responsibility to coordinate, provide, and pay for 220 volt connection with on-site electrician as required.

- (6) Centrally located dumpster for collection of debris, including hauling off site. Subcontractor shall haul debris from his work area and place it into the dumpster.

42. **DAILY CLEANUP & COMPOSITE CLEANUP:** In addition to the Standard Form Agreement, Daily cleanup of the construction area will be strictly enforced. Subcontractor shall perform cleanup and trash removal (on an ongoing daily basis, not at the end of the day) of all debris generated by Subcontractor to a central site container or truck as directed by Contractor. Exception: Disposal and removal from the site of excess paint materials, residue from equipment cleanup operations, and other hazardous waste in accordance with governmental regulations shall be the responsibility of Subcontractor.

In addition to the daily cleanup each Subcontractor shall include costs for Composite Clean Up in the following fashion: dedicate one (1) person for each ten (10) persons employed by the Subcontractor on site for a composite cleanup crew for clean-up for entire duration of while Subcontractor is on-site performing work or punchlist for forty (40) hours per week to perform general sweeping, wiping, mopping, vacuuming, and the like of general unidentifiable construction debris. If Subcontractor has fewer than ten (10) employees on-site, then Subcontractor shall furnish one (1) person for two (2) eight (8) hour days on days of the week as designated by Contractor unless the cost of the composite clean was deducted from this subs total price. Documentation indicating the individuals working on the composite cleanup crew shall be provided to the Construction Manager weekly. Subcontractor shall provide the above composite clean-up employee(s) with a push broom, floor sweep, trash buggy, square shovel and other equipment and materials required to perform clean-up. Failure to provide the above outlined composite cleanup crew will result in a deductive change order (deducted at rates per approved additive change orders) at the end of each calendar month.

43. **OWNER / CONTRACTOR AGREEMENT:** Subcontractor understands and agrees that this Subcontract is contingent upon Owner/Contractor Agreement being fully executed, and that this Subcontract shall be null and void without restrictions or remedies to either party if said Contract is not executed. No work shall be performed by Subcontractor until Owner/Contractor Agreement is executed. Contractor shall notify Subcontractor when said Agreement is executed.

Subcontractor further understands and agrees that the terms of the Agreement between the Owner and Contractor as regards but not limited to timely notification of delays and/or change requests and resolution of claims at substantial Completions also do apply to this Subcontract Agreement.

44. **MOCK-UPS / PROTOTYPES:** Subcontractor is cognizant of and has included in the Scope of Work multiple "Mock-ups" or "Prototypes" as may be required. Any and all refinishing of walls, floors, finishes, colors, etc. and removal and reinstallation of receptacles, fixtures, trim, furnishings, rails, grilles, etc. as required and associated with the "Mock-ups" or "Prototypes" is included in the Scope of Work.
45. **ENVIRONMENTAL PROTECTION:** Subcontractor is aware that the adjacent areas and properties are a very sensitive subject as it relates to Owner's development order. Subcontractor agrees not to deposit and/or store any liquids, solids, or gases on or near any area that is not designated as "Staging Area" by Contractor and Owner. Failure to comply with this provision shall result in severe consequential damages to Owner for which Subcontractor will be held responsible.

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Subcontractor further agrees not to dispose of heavily chlorinated water utilized for testing of pipes or detergent/chemical water used for cleaning and flushing pipes onto the site, or into the site storm drainage systems. All such testing water shall be neutralized prior to discharging.

46. **ENVIRONMENTAL CONTROLS:** Federal and State regulations require that construction projects obtain various permits so that storm water, dewatering, and other forms of potential pollution can be controlled and regulated. Subcontractor agrees to protect those controls that are put in place and to be responsible for the cost of correcting any damage he may cause to those controls.
47. **STATE SALES and USER TAXES BONDING REQUIREMENTS:** Subcontractor shall be responsible for paying for all sales, consumer, use, and similar taxes arising out of the Work. These include, but are not necessarily limited to, all such taxes required on all materials, equipment, labor, accessories, and services which are part of the Work. Records must be maintained to record payment of required taxes.
48. **FIRE / TRAFFIC LANES:** All fire and traffic lanes must remain clear and accessible throughout the duration of the Contract. No material storage, laydown, or short term parking will be permitted in these areas, unless approved by Contractor. Contractor will supply lane closure areas in accordance with the site utilization plan. Subcontractor requiring additional lane closures, police escorts, road plates, storage, etc. beyond that provided will pay the cost of the same.
49. **LAYOUT:** Contractor will provide property line boundaries, a benchmark and one corner line in each direction on each floor. In addition to the requirement of the Standard Form Agreement, Subcontractor shall provide all layout using Robotic Total Station Technology or equivalent, engineering and survey of existing conditions as required for its work, that is in excess of what Contractor is providing. It shall be the responsibility of the Subcontractor to maintain and preserve all stakes and other marks established by the Contractor and, if such stakes or marks are destroyed by the Subcontractor, they will be replaced at their expense.
50. **TOBACCO RESTRICTIONS:** The use of tobacco products will NOT be allowed within the confines of this project. Each subcontractor shall police its own employees to ensure compliance with this policy.
51. **BREAK AREAS:** Eating will be allowed only in areas so designated by the Contractor. Subcontractor or its employees are not authorized to sell or distribute food or beverages at the jobsite.
52. **CUTTING AND PATCHING:** Subcontractor shall be responsible for the cutting and patching of all penetrations and openings through existing walls and partitions, and all penetrations and openings through existing floors, ceilings, and roofs necessary for the installation of his Work. If the location for a penetration or opening is through an existing structural member, the Subcontractor shall notify Contractor's Superintendent, who, after consultation with the Architect, will instruct the Subcontractor how to proceed. Subcontractor shall be responsible for any cost associated with confirmation of existing conditions prior to proceeding with such work.

Patching of all existing walls, floors, ceilings, etc. is included for all items demolished under this agreement including substrate and finishes to match existing surrounding conditions.

53. **SUBCONTRACTOR SUPERINTENDENT:** In addition to the requirements of the Standard Form Agreement, Subcontractor represents that its superintendent is an expert in the Work, is a competent person as defined by OSHA, and is knowledgeable of all local safety regulations and local codes. The Subcontractor shall be represented at all job meetings by the superintendent and such other persons as Construction Manager from time to time wish to have present at job meetings. The superintendent shall be satisfactory to Construction Manager and shall not be changed except with the consent of Construction Manager, unless the superintendent proves to be unsatisfactory to Subcontractor or ceases to be in its employ. The superintendent shall represent Subcontractor and shall have full authority to make decisions and commitments regarding Subcontractor's Work, and all communications given to the superintendent shall be as

binding as if given to Subcontractor.

54. **EMPLOYEE REMOVAL:** The Subcontractor shall immediately remove from the Project any employee, including the superintendent, who is not satisfactory to the Contractor's Project Manager, Owner, or Owner's authorized representative at no cost to Contractor and with no extension of time.
55. **INSPECTION OF EXISTING CONDITIONS:** Each subcontractor shall check the accuracy of the building structure and/or surface to receive its work and notify the Construction Manager of any deficiencies prior to beginning its work, and incorporate such into their shop drawings for accurate production and installations. Subcontractor shall not proceed with work until unsatisfactory conditions have been corrected and shall not apply work over other subcontractor's uncompleted work. Commencement of installation constitutes acceptance of structure and/or base surfaces and the cost of any corrective work due to faulty base surfaces shall be borne by the installer applying his materials thereon.
56. **SERVICE SHUTDOWNS:** All disruptions of services shall be limited to the maximum time specified by the Contractor and Owner. Proper and timely notifications must be made as required by the Owner. No shutdowns will be permitted. Each Subcontractor must submit a plan of how to maintain utilities to surrounding buildings including demolition requirements, temporary utility methods utilized, repairs, anticipated durations, etc. Subcontractor is responsible for all temporary utility requirements to maintain usage of utilities in the disturbed areas. This could require after hours or overtime work to maintain said utilities.
57. **PROPERTY DAMAGES:** Subcontractor is responsible for all damages to property and work of other trades including materials, tools, and equipment, excluding such property to be incorporated into the Work (as covered by builder's risk policy), subject to any deductibles contained in the builder's risk policy procured by Owner or Contractor.
- Subcontractor is responsible for protection of all existing and new surfaces, materials, until accepted by Contractor/Owner and Architect.
58. **LIQUIDATED DAMAGES:** Subcontractor is responsible for payment of liquidated damages as set-forth in Owner/Contractor Supplementary General Conditions. Liquidated damages will apply to the Project Final Completion date. Contractor will begin deducting and withholding liquidated damages from Subcontractor monthly pay application as delays occur to ensure monies are available at conclusion of phase or Project.
59. **CONCRETE PADS AND CURBS:** Concrete pads, curbs, clean-out and valve rings, concrete equipment grouting, etc. required for equipment but not specifically shown on the construction documents will be the responsibility of the Subcontractor installing the item.
60. **QUALITY CONTROL:** Subcontractor is aware that Contractor has an active and aggressive Quality Control Program. The highest level of Quality Control will be managed by Subcontractor's project managers and will not be delegated to on-site superintendents. In that regard the Contractor will provide a project specific quality control plan that will identify various levels of responsibility by the Subcontractor. The Subcontractor will participate and assist fully with the Contractor's Quality Control Program.
- In addition to the requirements of the Standard Form Agreement, the correction of faulty work not in compliance with the Contract Documents shall be corrected within 48 hours of Contractor notification. Payment will be withheld in the amount of 2 times the cost estimated by Contractor to make the repairs on behalf of Subcontractor until such time work is corrected and accepted by Owner and Architect.
61. **VISITORS:** All visitors must check in at the Contractor's on-site office prior to entering the project site and sign-in. Subcontractor is required to escort all visitors and provide visitors with required personal protection safety devices.



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62. **PHOTOGRAPHS:** No photographs may be taken of the project without prior approval of the Contractor and Owner. Subcontractor acknowledges that there is an active webcam on-site.
63. **UNIT PRICES AND ALLOWANCES:** Subcontractor has responsibility to quantify and obtain appropriate approvals for all allowance expenditures above prior to beginning work under this agreement. Contractor does not have the obligation, authorization, nor did the responsibility to make payment for work execute which has not been approved by Owner/Architect. Subcontractor has responsibility to quantify and obtain appropriate approvals for all unit price expenditures above prior to beginning work under this agreement. Contractor does not have the obligation, authorization, nor the responsibility to make payment for work executed which has not been approved by Owner/Architect
64. **OPERATORS:** Subcontractor shall provide list of all competent and certified operators and welders 10 days prior to beginning work. Subcontractor shall also provide all equipment certifications upon equipment arriving to site, but prior to placing in-use.
65. **WEATHER:** Weather delays are only as approved by the Owner which is in excess of the normal anticipated conditions established by Owner-Contractor Agreement. Subcontractor shall herein anticipate such delays and schedule work as time is of the essence. Subcontractor shall included all necessary means and methods to dewater, aerate and/or hydrate work areas including access to in order to avoid delays in Project schedule at no additional cost to Contractor.

Subcontractor is also responsible for the protection of all materials from thermal (temperature) changes for work schedule to be installed in accordance with current schedule. Delays in material installations which can be protected will not be accepted as a cause for a schedule delay.

66. **BUILDING INFORMATION MODELING (BIM) / DIGITAL DOCUMENTATION**

- Building Information Modeling will be a function of this project for coordination and will require a 3D modeling effort by all trades unless otherwise indicated. Trades will include Mechanical, HVAC, Electrical systems, Plumbing and Fire Protection. Drywall/Framing/Ceilings for coordination with MEP trades only.
- All subcontractors listed above will be required to attend a BIM "kick-off" meeting led by Balfour Beatty where items such as level of model detail, file sharing, and coordination schedule dates are determined. The results of that kick-off meeting will be captured in a BIM "Implementation Plan" which, once agreed upon, will be the team's guide for the coordination efforts.
- Each trade shall allow for one meeting per week led by Balfour Beatty for duration of project upon notice of award.
- An initial 3D coordination model and associated coordination drawings must be complete and submitted to Balfour Beatty within the 1st 60 days of the Project. Any additional costs associated with delays because the coordination was not completed within the allotted time shall be the responsibility of the Subcontractor. No additional coordination cost will be accepted by the Contractor.
- All required shop drawings will be submitted to Balfour Beatty and engineer of record by trades in an approved format.
- All subcontractors requiring embeds in concrete and/or precast will be required to provide layout drawings to the concrete and/or pre-cast subcontractor. Concrete and Pre-cast subcontractor are required to create 3-dimensional drawings to indicate any and all embeds for approval by other trades and to be utilized during installation.
- Each participant, by submitting its proposal, represents that:



A. They understand that his/her scope is required to be modeled in Revit or approved alternate.

B. Has, at a minimum, participated in at least 3 projects in which the subcontractor has created 3D models for the coordination effort.

C. Has, at a minimum, 2 persons on staff who are capable of performing the required 3D modeling responsibilities for this project

D. If required, this subcontractor shall submit model examples from previous experience (model files, graphic images, screen shots, etc...) for evaluation of capabilities to model the required detail.

- Subcontractors agree to provide and utilize Robotic Total Station Technology or equivalent for layout of materials and systems. This is required for all major trades include Mechanical, HVAC, Electrical systems, Plumbing & Fire Protection.
- If Subcontractor cannot meet requirements outlined above, they may hire services of a third-party vendor and must inform Balfour Beatty Construction to such arrangement. Subcontractor will be required to assign a representative as a point of contact and be required to manage the third party vendor to ensure compliance with the BIM implementation plan.
- All Contract Documents will be provided and used in digital format for the project. All subcontractors will have access to digital plans and all Project managers, Superintendents and Foreman are required to have Ipads (or an alternate form of digital document reader) during construction. The Punchlist, Quality Control Checklist, Safety Checklist and final 3D coordination model will be accessed through Autodesk BIM 360 Field on the Ipad (or alternate form of digital document reader).

67. **AS-BUILT DRAWINGS (RECORD DRAWINGS)** : During the progress of the work, all Subcontractors shall update their model and drawings with the exact locations, as installed, of all systems associated with their trade.

Upon completion of the Work, this data shall be recorded to scale into CAD and PDF drawings by a competent draftsman. Subcontractor shall provide preliminary as-built drawings for architect/engineer approval and a final as-built set in accordance with the project specifications. Subcontractor shall provide preliminary as-built drawings for Architect/Engineer approval and a final as-built set in accordance with the project specifications. Each Subcontractors as built drawings will be reviewed on a weekly basis by the Contractor.

68. **ACCESS:** Subcontractor shall be responsible for providing safe access for testing agency and Engineer of Record to the work being fabricated, stored, or installed so that required inspection and testing may be accomplished. It is understood and agreed that any work under this scope found to be in non-compliance shall be corrected and re-tested at no cost to Construction Manager and/or Owner.

69. **HOISTING:** In accordance to our Site Utilization plan and Project Schedule Contractor will supply Tower Crane(s) and Personnel/Material Hoist(s) with operator to the Subcontractor for their use (up to 60 hours/week), subject to change at Contractors sole discretion. The Tower Crane(s) and Personnel/Material Hoist(s) will be erected and removed at Contractors discretion. The schedule and priorities for hoisting will be established solely by the Contractor in accordance with the schedule. Provision of the Tower Crane(s) and Personnel/material Hoist(s) does not relieve the Subcontractor from the requirement referenced in the General Conditions of this Subcontract. The Subcontractor is advised that the hoists will not remain operational throughout the duration of the project. While the hoist is available for use, Subcontractors requiring additional hoisting time, or means of hoisting beyond that provided by the Contractor for will pay the cost of hoisting and/or the operator including all premium time charges.

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All other hoisting and means to get equipment, manpower or materials into place including but not limited to all scaffolding, man lifts, forklifts, outriggers, etc. are to be provided by Subcontractor. Do NOT assume "By Others" or shared use.

Subcontractor will be required to have 3rd party inspections prior to starting work with any/all Cranes and equipment. Subcontractor to provide 3rd party inspection report to Contractor immediately upon completion of inspection. Included are any fees associated with these inspections.

All Subcontractors utilizing lifting equipment will require Certified Riggers. All paperwork must be submitted to Contractor no later than 10 days prior to hoisting/lifting activities.

Equipment will not be allowed to be lifted and suspended by equipment overnight. Subcontractors will be required to secure equipment by other means.

70. **FLAGMEN:** All subcontractors receiving deliveries will require flagmen as traffic control at the construction entrance.
71. **ENGINEERING:** All engineering required as a part of this Scope of Work must be performed by Engineer licensed in the State of South Carolina.
72. **WORK STOPPAGES:** Labor strike or unrest is not an excusable force majeure event under this Subcontract and any related delays the responsibility of the Subcontractor and will be subject to liquidated damages.
73. **PUNCH WORK:** Subcontractor shall complete punch work as required by, and to the complete satisfaction of the Contractor, Architect, Engineer and Owner. Subcontractor shall provide Contractor with a list of punch items to be completed for this scope of work prior to starting punch work.
74. **TESTING:** Subcontractor shall provide all testing, documentation and certifications as required by the Contract Documents other than those performed by the Owner's testing agent. Identification and coordination of all testing procedures required by this Subcontract, whether performed by the Owners' testing agent or the Subcontractor, are the responsibility of the Subcontractor. In the event the Subcontractor's material and/or installation fails, any re-testing costs and lost time will be the responsibility of the Subcontractor.
75. **SECURITY:** Subcontractors understand that no security services will be provided and that neither Contractor nor the Owner is responsible for property loss or damage to materials not yet accepted by the Owner.
76. **OWNER AGREEMENT:** The following paragraphs are flowdowns from the agreement between the Owner and the Contractor.
 - A) Subcontractor acknowledges the agreement between the contractor and the Owner provides that for any delay attributable to the Contractor or any entity for which it is responsible, there is potential recovery of Liquidated Damages as detailed below. Subcontractor further acknowledges and agrees that should Contractor be assessed liquidated damages and any part or all of the delay is attributable to Subcontractor's performance of the work, then Subcontractor will be responsible for its proportionate share of the liquidated damages amount.
 - B. Hotel LD Amount \$9,000 per day

END OF SPECIAL PROVISIONS

Balfour Beatty Addendum to Exhibit D Carolinas Division

Balfour Beatty ascribes the highest priority to the safety and health of personnel assigned to work on our projects. Balfour Beatty is committed to providing a safe and healthy working environment for all workers as well as the general public. These safety policies have been developed to support our overall goal of achieving Zero Harm. The provisions in this Addendum modify the language of the provisions of Exhibit D (Safety Plan) and where the language conflicts, the provisions of this Addendum shall control.

Fall Protection

- All workers who perform work six (6) feet or more above a lower surface shall use guardrails, a fall protection system, or use a site specific fall protection plan where other fall protection systems are not feasible. This will include workers such as, but not limited to, steel erectors who are performing steel erection activities and persons working from scaffolds or elevated platforms.
- Stilts are not allowed on any Balfour Beatty project.
- Balfour Beatty encourages the use of lifts for all work that can be accomplished without heightened risk of damage to the building or surrounding work. All lifts to be used must be approved by Balfour Beatty prior to use. Balfour Beatty reserves the right to require Subcontractor to use lifts to perform work that Balfour Beatty reasonably believes cannot be performed safely without lifts, at no additional cost to Balfour Beatty.

Ladders

- All projects will use platform ladders.
- Extension ladders must be approved by the Balfour Beatty project team and stabilizers are required when in use.
- Ladders may not be used to create an access/egress to buildings or elevated stair levels. Projects are required to use stair towers or structural stairs.

Scaffolds

- Regardless of height, all scaffold systems shall be equipped with guardrail systems.
- All scaffolds three (3) bucks high are required to have a stair tower installed. Ladders are prohibited for access/egress above two bucks. Any deviation from this SOP must be submitted and approved by the Balfour Beatty Loss Prevention Director.

Cranes

- All cranes shall have anti-two blocking devices installed at all times.
- Cranes and rigging will operate under the OSHA 1926.1400 standard.
- All crane operators must be NCCO qualified.
- All cranes shall have a third party inspection performed after erection, prior to their usage.
- All tower cranes shall have a third party inspection every three (3) months and after every addition.
- Tower cranes must be fitted with a device that automatically prevents the hook-block from overflying restricted areas and/or crane to crane contact.
- All Riggers shall be identified with reflective hard hat covers.

Equipment

- All equipment must be inspected daily and the inspection checklist kept on file with subcontractor.
- Forklifts and Bobcats shall be equipped with a proximity alarm which meets the 20' "Field of View" standard.

Excavations

- All excavation procedures require a dig permit as well as Balfour Beatty notification and approval prior to the start of the procedure.
- All excavations of four (4) feet or more in depth are required to have protective systems in place prior to employees entering the excavation. This includes benching, sloping, shoring, or shielding systems that meet or exceed OSHA guidelines.

Pre-Planning

- Subcontractor will prepare JHAs for each major portion of its work.
- Subcontractor shall prepare a Pre Task Plan (PTP) utilizing the form that is attached hereto as Attachment 1. A PTP shall be prepared by Subcontractor prior to the start of every new task or every task that is materially changed. Subcontractor's PTP shall be delivered to Balfour Beatty before the start of the work on that task. Prior to starting work on each new or changed task, Subcontractor's crew shall conduct a pre-task meeting to discuss the task, methods of performing the task safely and risks associated with performance.
- Subcontractor and its subcontractors or vendors shall adhere to Balfour Beatty site Logistics plan.

- Balfour Beatty is committed to a safe work environment. Subcontractor and its vendors shall comply with the safety program implemented by Balfour Beatty for the project, including the Site Logistics Plan. Subcontractor and its vendors acknowledge and accept that the Site Logistics Plan may change as the project changes or conditions at the site change. Subcontractor, its vendors, agents and invitees shall, at all times, comply with the Site Logistics Plan then in effect, together with all instructions, directives and requirements of Balfour Beatty. If requested by Balfour Beatty, Subcontractor shall promptly provide satisfactory details of Subcontractor's compliance with the Site Logistics Plan and/or its plan for assuring compliance with the Site Logistics Plan. Any subcontracts, purchase orders or vendor agreements between Subcontractor and any third party shall require of that third party the same obligation set forth above to which Subcontractor is bound.

Personal Protective Equipment

- Hard hats and eye protection are required at all times.
- Safety vests or high visibility clothing is required at all times.
- All employees are required to wear task specific gloves at all times.

Engineering

- Third party engineering approval on all deck form drawings and all deck forms must be inspected by a third party inspector prior to any concrete pour.
- All steel erection sequence drawings must be received and reviewed by a Balfour Beatty project team prior to any steel erection procedure.

Electrical

- Overhead power lines at all entrances to projects must be properly marked with danger, voltage, and height signage. All utility poles must be protected with hard barricades.
- Fourteen (14) gauge electrical cords or heavier shall be utilized. Sixteen (16) gauge cords will not be permitted.
- All work requiring a Hot Permit require Balfour Beatty notification and approval.
- Working on any energized equipment without the approval of Balfour Beatty's Loss Prevention Director is prohibited.

Training

- Training Requirements for Subcontractor Competent Person
 - OSHA 30 Hour
 - OSHA 10 Hour refresher every four (4) years
 - CPR/First Aid Certification as required by Red Cross
- Training Requirements for Subcontractor Supervisors/Foreman
 - OSHA 10 Hour refresher every four (4) years
 - CPR/First Aid Certification as required by Red Cross
- All workers on site are required to go through a Balfour Beatty orientation process.
- All Riggers shall be identified with reflective hard hat covers

Housekeeping

- Subcontractor is required to pick up their trash and debris on a daily basis. Materials, tools and storage areas shall be kept in a broom clean, neat and orderly fashion. Failure to maintain good housekeeping is a violation of this Exhibit and can result in disciplinary action. For any Subcontractor that fails to maintain good housekeeping practices or clean work areas, Balfour Beatty reserves the right to back charge that subcontractor for expenses incurred to clean the work area.

Regulatory Requirements

- In addition to compliance with all applicable laws, Subcontractors shall comply with all codes and regulations, including all OSHA requirements, applicable to Subcontractor's work.

Reporting Information

- Subcontractor shall report to Balfour Beatty all hours worked by its employees and the employees of all of its Subcontractors, consultants or vendors who worked or are working on the project site, all in accordance with Balfour Beatty's directives.

Environmental Compliance

- Subcontractor shall comply with all environmental laws and regulations. Should Subcontractors create spills, discharge pollutants or cause damage to any environmental best management practices it shall promptly notify Balfour Beatty and shall, at Balfour Beatty's discretion, either repair any and all damage or fully reimburse Balfour Beatty for the cost to repair such damage.

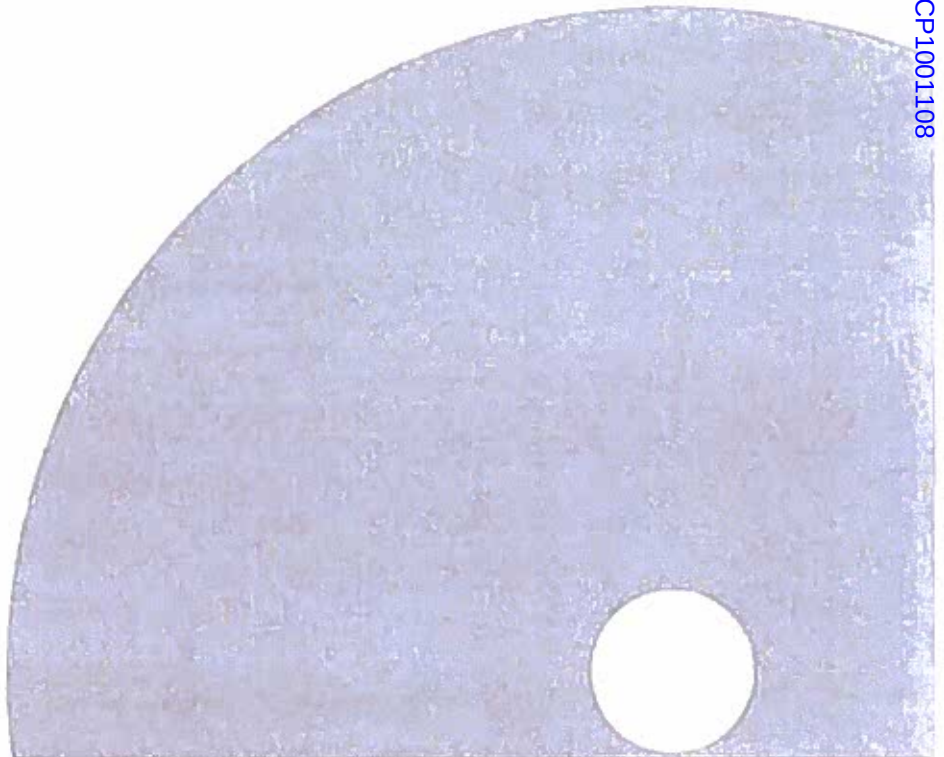


Exhibit D
Safety Plan

1. Purpose

It is the intention of Balfour Beatty, and its subsidiaries (all hereinafter referred to as "BBC" or "Contractor") to achieve our Zero Harm goals by providing a safe and healthy work environment for our subcontractors, our vendors, our customers and our employees. BBC will make every effort to protect the public and our environment from any negative impact associated with our business. BBC will not sacrifice the safety of people for the sake of production or monetary gains.

The requirements identified in this Exhibit D are to be followed on all BBC projects in the US. Each individual project may have additional safety requirements that are attached as an addendum to this Exhibit. Violations of any requirement in this Exhibit or addendum are grounds for disciplinary action up to and including termination or removal from a project. It is the responsibility of any subcontractor who utilizes lower tier contractors to ensure their compliance with the rules and the safety requirements of the project.

2. Regulatory Requirements

This Exhibit is not a total safety program or plan. In addition to the requirements in this Exhibit, Subcontractors are required to comply with all federal, state and local laws. Further, full compliance to manufacturer's instructions are required. Where conflicts in requirements are identified, the more stringent will apply.

3. Cell Phone & Radio Usage within limits of Project

The use of cell phones or 2 way radios (unless being used to guide operation) while operating motor vehicles or equipment of any kind is prohibited within the project's limits.

4. Working Alone

Work is not permitted by an individual without line-of-sight or within ear shot of another unless another plan for maintaining contact/rendering assistance is authorized by BBC.

5. Drugs and Alcohol

Possession or use of illegally obtained and/or illegal drugs or a third person's prescription medication and the possession of alcohol are prohibited on all Contractor projects and properties; all subcontractors must have a drug policy that is substantially similar to that of Contractor. Pursuant to the applicable jurisdictional laws and the BBC Drug and Alcohol Program, Contractor reserves the right to test any worker at any time. The BBC Drug and Alcohol program is available upon request from any Contractor project manager.

6. Injuries / Accidents

All accidents, injuries, utility strikes or near misses must be reported to Contractor at the time that they occur. A complete written report for any major events will be required within three days of the occurrence.

7. Discipline

Contractor reserves the right to suspend or remove any worker or contractor from any projects for failure to comply with safety requirements.

8. Orientations and Training

All workers are required to attend a Contractor safety orientation prior to starting work. Subcontractors must conduct a "Tool Box Safety Meeting" at least once a week and all on site subcontractor employees must attend. Visitors must receive a basic "Visitor Orientation", conducted by BBC, before they will be allowed on site.

9. JSA/JHA /AHA Compliance

All Subcontractors are required to create a JSA/JHA/AHA for each major task or non-routine process associated with their work. The subcontractor shall review these documents with the crew before starting work each morning. AHA's shall be submitted before the activity commences by the subcontractor to the designated Contractor representative.

10. Housekeeping

Subcontractors are required to pick up their trash and debris on a daily basis. Materials, tools and storage areas shall be kept in a neat, orderly fashion. Failure to maintain good housekeeping is a violation of this Exhibit and can result in disciplinary action. Contractor reserves the right to back charge any subcontractor that does not keep the project clean for expenses incurred to clean the work area.

11. Ladders

Ladders that are used on a BBC project must not be rated less than "Type I - Industrial". Trestle ladders shall not be used on a BBC project without the consent of the BBC site SH&E leader or the site superintendent.

12. Excavations

Workers are not allowed to work in an excavation in excess of 4 feet deep unless the excavation is sloped, stepped or shored. End plates are required on trench boxes unless an "acceptable" alternate plan is authorized by the BBC safety manager. Subcontractors working in excavations on a BBC project shall have a trench safety plan.

Balfour Beatty

Construction

13. Fall Protection

Fall protection is required when any worker is exposed to a fall of 6 foot or greater. Ladders may be used without fall protection when no additional fall hazard is present. Monitors are not allowed in lieu of conventional fall protection methods. Fall protection is also required in any mechanically elevated work platforms, such as scissor lifts, if their use is recommended by the manufacturer. Any exceptions to these requirements must be in writing and approved by the BBC site SH&E leader or the site superintendent. On Work Platforms (scaffolds) workers must have fall protection that prevents or arrests a fall where they would otherwise be exposed to a fall of greater than two feet (2'). No one may work if exposed to a fall of greater than six feet (6') without fall protection that prevents or arrests a fall. There are no exceptions. This requirement applies to all work at heights, including from ladders.

14. Electrical

Hot electrical work shall not be permitted. Only three wire extension cords rated for "hard" or "extra hard" usage are permitted. Any exceptions to these requirements must be in writing and approved by the BBC site SH&E leader or the site superintendent.

15. Energized Equipment/Systems

Work on or near exposed energized systems (eg. Electrical, Fluid, Air) is prohibited unless authorized by an officer of Balfour Beatty Construction

16. Lifting Operations

All cranes to be used on a BBC project shall have a third party inspection conducted prior to initially starting work. Suspension lifting by heavy equipment [other than cranes] is prohibited, except when an attachment point and/or lifting device designed and engineered for use with a specific piece of heavy equipment is used in conjunction with the applicable load chart.

Mechanically elevated work platforms shall not be used as a means of transporting materials from floor to floor. Any exceptions to this requirement must be in writing and approved by the BBC site SH&E leader or the site superintendent.

17. Personal Protective Equipment

Safety glasses, hardhats, shirts with sleeves, longs pants, work boots/shoes and hi-visibility vests or shirts are required on all BBC projects. Welding hoods will be worn with hard hats. Chain saw use will require chaps, hearing protection, face shields and gloves. Foot covers will be worn with tamper style soil compactors and jack hammers.

18. HazCom Programs

Subcontractors shall submit copies of their MSDS to Contractor to be stored in a designated location. MSDS shall be added to the inventory as chemicals are brought on site.



19. Environmental Compliance

It is the duty of BBC and our subcontractors to comply with all environmental laws and regulations. Subcontractors that create spills, discharge pollutants or cause damage to any environmental best management practices will be held responsible for their actions.

Any BBC SH&E manager may be contacted for additional information on the requirements in this Exhibit D.

OVERVIEW

The PTP is a Balfour Beatty Construction standard planning and communication tool required for use on every project. The standard PTP document is provided by Balfour Beatty. Any person who undertakes work of any nature at a project is required to complete a PTP. This includes Balfour Beatty self-perform forces, subcontractors at every level, select material delivery involving a labor component such as material movement, select vendor activities and inspection services. Failure to complete an adequately detailed PTP will result in a stoppage of work.

PURPOSE

The PTP is a planning tool that facilitates communication. It is to be utilized at the project at least once a day and prior to the commencement of any work. The PTP is to be used as an element of an overall job safety program within the hierarchy of controls. When used in conjunction with other tools (such as AHAs, site logistics plans, dig authorizations, critical lift plan, etc.) it can help effectively manage risk at the project level. When completed, the PTP will communicate step-by-step, detailed technical planning, hazards and means to mitigate, and ultimately promote safe work practices and accountability.

PARTICIPATION & MAKING THE PLAN TASK SPECIFIC

To be effective, the PTP must be specific to the particular work activity for which it is prepared. It will list the steps (tasks) associated with the work activity, in addition to the specific means to mitigate the risk. The supervisor/foreman should lead the discussion and promote two-way communication to ultimately arrive at a plan that has buy-in from the entire crew. An effective PTP should recognize unique project circumstances including, but not limited to: site logistics and separation of people and equipment, crew experience, PPE, required equipment, means of communication, signage and barricades, adjacencies, weather (as applicable), access/egress, and lighting. The foreman must convey to the crew that every individual has the authority and obligation to stop the task and seek guidance should he/she feel unsure of the safe method of work.

EXECUTION

The following activities must occur when completing the PTP:

- The PTP must be completed prior to the commencement of an activity. If the task changes, a new PTP form must be completed. The completion of the form should take approximately 15-20 minutes depending on the complexity of the task and other considerations.
- The Job Hazard Analysis (JHA) / Activity Hazard Analysis (AHA) are gross safety planning tools used at the macro level to facilitate the preparatory meeting. They support the PTP, which is utilized as the detailed task planning tool accounting for specific and unique circumstances that arise at the activity location, such as weather conditions, adjacent work, crew experience, etc.
- The attached standard form should be utilized, although subcontractors are permitted to use a custom form if approved by Balfour Beatty.
- The crew foreman/supervisor is charged with completing the PTP, however, crew participation and buy-in is critical.
- The crew will examine the work area(s) prior to preparing the PTP and note any circumstances that may present a hazard.
- Checklists for definable features of work and details included in AHAs should be attached or referred to (as appropriate) ensuring best practices and pre planning materials are being effectively utilized.

- The PTP must be complete and detailed enough to identify the different tasks associated with the activity and the safe plan associated with the elimination or mitigation of any identified hazard. PTPs for work involving a high potential for severe injury (Fatal 5 – caught between, struck by, fall from height, electrocution, run over) including items such as critical lifts, confined space entry and utility shut downs, must be color coded (red) and be accompanied by an appropriate emergency action and strike plan, and owner authority, as appropriate. A pre-activity huddle is also recommended involving all critical parties including Balfour Beatty, the owner representatives (as appropriate) and the actual work crew. The purpose of the huddle is to conduct a dry run to ensure that all safety challenges are recognized, rehearsed, and accounted for.
- The PTP should recognize all adjacent work taking place. Crews must be instructed to be mindful of other trades and look up/down/out for unsafe conditions and actions. PTPs should also identify conditions where workers are exposed to unfavorable weather conditions and communicate a plan to protect workers.
- PTPs involving work in occupied facilities should be completed with a high level of detail consistent with the level of risk to both workers and the public. Contingency plans must be in place for high risk activities involving potential for impacts to the workers, public and critical facilities.
- The foreman should solicit feedback from the work crew to confirm a thorough understanding of the tasks to be completed, address any concerns and confirm safe measures to be undertaken.
- The PTP must be signed by all parties in attendance, posted in (or adjacent to) the work area and made available for review. The project should erect a bulletin board as appropriate. A copy of the PTP must be forwarded to Balfour Beatty at the conclusion of the work day; these forms will be retained for a period not to exceed 30 days.
- The supervisor/foreman should communicate impacts of the plan to other affected parties, such as adjacent crews.
- Balfour Beatty staff should periodically attend select PTP meetings to ensure that the PTPs are being completed in accordance with standard operating procedures. Particular attention should be paid to the level of detail of tasks, applicability of tasks to the actual work and communication between the foreman and crew.
- Balfour Beatty staff and subcontractor staff should review work in progress against the PTP and speak with workers to ensure the appropriate level of detail and applicability are present.
- If assistance is required to complete PTPs, Balfour Beatty site management or loss prevention should be engaged.
- The importance of PTPs will be highlighted by Balfour Beatty during employee orientations.

CORRECTIVE ACTIONS

If work proceeds without a completed and approved PTP or with an insufficiently detailed PTP, it will be suspended immediately until an acceptable PTP is executed. Refer also to Balfour Beatty's Zero Tolerance Policy.

BALFOUR BEATTY CONSTRUCTION PRE TASK PLAN (PTP)

Project Name:	Work area (Building/Floor/Area):		Contractor:
Date:			
Activity/Task:	Resource Applicability:		Supervisor/Foreman:
Supervisor has walked/checked work area in advance of work: (initials) _____	☐ AHA/JHA (Attach as Necessary) ☐ Logistics (People/Equipment) ☐ EAP (Contingency Plan) ☐ Other _____		Emergency Contact: _____
			Phone # : _____
Permit required: Yes _____ No _____	Tools & Equipment (List):	Additional PPE required: Yes _____ No _____	
☐ Confined Space ☐ Hot Work (FPP) ☐ Dig Authorization ☐ Energized Electrical Work ☐ Proximity to Haz Electrical Source ☐ Crane Pick ☐ Fall Protection Plan ☐ Lockout/Tagout ☐ Other _____	1. _____ 2. _____ 3. _____ 4. _____ 5. _____ 6. _____	☐ Hand (Glove Type) _____ ☐ Hearing _____ ☐ Face (Goggle or Shield) ☐ Fall Arrest _____ ☐ Respirator _____ ☐ Other _____	
Weather Conditions: Temperature _____ deg. Precipitation _____ inches Wind Speed (Sustained) _____ MPH (Gust) _____ MPH			
<i>Describe your plan for protecting workers in unfavorable weather conditions on the next page.</i>			
Instructions: 1) No physical work is permitted to take place absent a detailed PTP. The PTP is used in conjunction with other tools (JHA, Site Logistics Plan, Dig Authorization, Crane Pick plan, etc.). 2) The Supervisor/Foreman and crew must complete the PTP. The Supervisor/Foreman must lead the discussion with the work crew soliciting feedback to ensure that all workers are familiar with the PTP. 3) The crew shall walk the work areas prior to starting work to identify hazards. 4) Corrective measures shall be implemented to eliminate or mitigate hazards associated with the task. 5) Each day prior to work commencement, the work task(s) shall be reviewed. 6) All crew members shall sign the PTP. The PTP shall be displayed in the work area. If conditions change, the job changes, a significant hazard presents itself, or a deficiency in plan is noted the work shall STOP and a new plan must be compiled. The foreman must convey to the crew that each individual has the obligation and authority to STOP and seek guidance if he/she is unsure of the task to be carried out.			
Instructions Completing Page 2: Column 1. Write the name of the task. It is critical that the PTP for the particular work task is specific to the task and lists the steps associated with the work task. The PTP should recognize unique project circumstances such as crew experience, PPE, equipment to be used, means of communication, signage and barricades, adjacencies, weather, access, lighting, etc. Column 2. List the potential hazards associated with the task. Column 3. List the activities required to achieve a safe plan to overcome/eliminate the hazard. Column 4. List all physical tools, safety equipment/PPE and documentation such as AHAs, JHAs, Dig Authorizations, etc. needed to carry out the work safely.			

TASK (in sequence):	HAZARD ASSOCIATED WITH THE WORK:	SAFE PLAN TO ELIMINATE/CORRECT HAZARD:	RESOURCES:
Column 1	Column 2	Column 3	Column 4

CREW MEMBER SIGNATURES (Print and Sign)

3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____

WORKER CONCERNS OR IDEAS

List concerns or ideas to help improve safety for future follow-up.

ZERO HARM

Exhibit A

SUBCONTRACT

STOREFRONT

DATE: May 5, 2015

TO: Strong Tower Construction, LLC dba Koch
Corporation
1131 Logan Street
Louisville, KY 40204

PROJECT NAME: Hotel at Marion Square

PROJECT ADDRESS: 404 King Street
Charleston, SC 29403

502-494-7846 (phone)
(fax)

PROJECT #: 13026000
VENDOR #:
CONTRACT#: 023
COST TYPE: 42040

ATTN: Ken Hummel

You are authorized to proceed with furnishing and installing all work specified on the attached Scope of Work and required by this Subcontract:

\$1,255,030.00 (One million two hundred fifty-five thousand thirty dollars)

Retainage: 10.0000 %

The Owner of the Project is: **Library Associates, LLC.**

The "SUBCONTRACT Documents" include this Subcontract form, the Subcontract Terms and Conditions, and all other applicable Exhibits including:

Exhibit A - Contract Documents
Exhibit B - Scope of Work
Exhibit C - Special Provisions
Exhibit D - Safety Plan
Exhibit E - Site Logistics Plan
Exhibit F - Lien Releases

Exhibit G - Pay Application
Exhibit H - Project Schedule
Exhibit I - Quality Control Plan
Exhibit J - Insurance Certificate
Exhibit K - Bond Forms

Exhibit L - Provisions Applicable to Publicly
Funded Projects
Exhibit M - EEO Policy
Exhibit N - Design Build/Design Assist Rider
Exhibit O - State Law Rider

Exhibits may be omitted even if listed above. The Special Provisions will list the omitted exhibits, if any.

Strong Tower Construction, LLC dba Koch Corporation
Subcontractor

By: Benjamin Feinn

Name: Benjamin Feinn

Title: CEO

State Contractor License #: Pending

Federal ID#: 26-2970059

Date: 9/29/15

Balfour Beatty Construction, LLC
Contractor

By: Michael Baumbach

Name: Mike Baumbach

Title: Senior Vice President/BUL

State Contractor License #: 110668

Federal ID#: 20-1627180

Date: 10/2/15

This Subcontract is not binding until accepted
This Subcontract covers the contract amount only
Additional work is to be billed separately

SUBCONTRACT TERMS AND CONDITIONS

Article 1: General

- A. Subcontractor will fully perform and timely complete, as an independent contractor, all work (Work) in accordance with the Subcontract, including the documents identified on **Exhibit A** (Contract Documents), the Scope of Work described in **Exhibit B** and the Special Provisions described in **Exhibit C** for the Subcontract Price as shown on the Subcontract. The Subcontract Price includes all materials, equipment, bonds, labor, sales and use taxes, supervision, insurance, overhead and profit required to perform the Work. If there is any conflict between the Subcontract and a Contract Document, the more strict provision governs. Time is of the essence in performing all Subcontract obligations.
- B. Prior to executing this Subcontract, Subcontractor has carefully determined to its satisfaction all requirements of this Subcontract and the extent and the costs of all aspects of the Work, and has:
- i. ascertained the conditions and requirements of its Work, including: a) the location, accessibility and character of the site and adjacent areas; b) surface conditions and reasonably ascertainable subsurface conditions (including potential water, materials, utilities or obstacles); c) any errors, omissions or conflicts in the Contract Documents that could reasonably be discovered by a Subcontractor experienced in the Work in the area of the Project; d) existing facilities at or near the site; e) transportation, disposal, handling and storage of materials or equipment; f) labor availability; g) location and availability of utilities; h) needed equipment and facilities; i) uncertainties of weather; and j) all federal, state, and local legal requirements, codes and regulations (collectively, Legal Requirements) applicable to any aspect of the Work or to Subcontractor; and
 - ii. reviewed this Subcontract and all information made available by Contractor or others, satisfying itself with the correctness and accuracy of this Subcontract and the Subcontract Price in light of all information and required investigations.
- C. Subcontractor acknowledges the critical importance to the Project and to all Project personnel of Contractor's "Zero Harm" safety initiative and Contractor's safety requirements. Subcontractor will comply with Contractor's safety requirements in **Exhibit D**, all Legal Requirements relating to safety in executing the Work and disposing or handling materials (including any hazardous materials), and all rules of Contractor and Owner regarding the performance of Work and the Project site, including compliance with the Site Logistics Plan attached as **Exhibit E**. Subcontractor at all times maintains primary control of and responsibility for safety for its Work, and will meet or exceed all safety requirements of this Subcontract. Subcontractor will at no time start, continue or resume any Work which Subcontractor or any representative of Contractor or Owner identifies as unsafe, until Subcontractor has taken corrective measures satisfactory to Contractor. Failure of Contractor or others to stop an unsafe practice will not relieve Subcontractor of its responsibilities. If Subcontractor or any person for whom Subcontractor is responsible fails to enforce the Contractor's safety requirements or any safety-related Legal Requirement, Contractor may, in addition to other remedies, bar such party from the site.
- D. With respect to its Work and this Subcontract, and in addition to the other duties specified in this Subcontract, Subcontractor owes to Contractor the duties timely and fully to: (i) comply with all Legal Requirements; (ii) provide within 3 business days any requested written assurances of complete and timely performance, including assurances prompted by any actual or potential insolvency, bankruptcy or failure to continue as a going concern; (iii) be responsible for the acts or omissions of its laborers, and those of its subcontractors and suppliers at all tiers (collectively, Lower Tiers); (iv) ensure that all obligations of this Subcontract and the Contract Documents are included in all agreements involving Lower Tiers as respects their performance of any Work; (v) comply with this Subcontract and the Contract Documents, assuming towards Contractor all obligations that Contractor has assumed towards Owner in the Contract Documents, and being bound to Contractor in the same manner as Contractor is bound to Owner under the Contract Documents, with respect to the Work; (vi) enforce Balfour Beatty's Supplier Code of Conduct (<http://balfourbeattyus.com/Partners/Sub-Contractors/Suppliers--Code-of-Conduct.aspx>), or one just as stringent, and otherwise to insure that no laws are broken in respect of this Subcontract; (vii) promptly provide all financial and performance information required by Contractor as part of Contractor's program for qualifying subcontractors to work on a Project with Contractor; and (viii) allow no bankruptcy or receivership filing to delay or otherwise adversely impact the Work, and consent upon request to any request by Contractor to expedite hearings or other actions by the bankruptcy court to minimize impacts on the Work or the Project.

SUBCONTRACT TERMS AND CONDITIONS

Article 2: Payments to Subcontractor

- A. Unless a shorter time is provided by the Contract Documents or by law, Contractor will make progress payments to Subcontractor within ten (10) days after Contractor's receipt of payment from Owner for Subcontractor's Work (including changes in the Work paid by Owner), to the extent of Subcontractor's interest in that payment. To the extent permitted by law, payment from Owner of amounts due Subcontractor is a condition precedent to the obligation to pay Subcontractor. Unless the Contract Documents or applicable law specify a different amount, 10.0000 % retainage will be withheld, which will be reduced and/or paid to Subcontractor as it is reduced and/or paid to Contractor by Owner, so long as Subcontractor is not in default. Contractor may withhold funds from monthly progress payments to protect Contractor because of any actual or reasonably likely default by Subcontractor. Title to material and Work incorporated into the Project will transfer to Owner as specified in the Contract Documents or if not so specified upon payment to Subcontractor. Neither title transfer nor payment by Contractor or Owner is an acceptance of any Work or stored materials.
- B. Subcontractor must deliver the following as conditions precedent to Contractor's duty to make any progress payment: (i) the documents identified in Article 3.B below; (ii) certified payrolls, if applicable to the Project, in the form and frequency required by the Contract Documents; (iii) monthly, or at intervals as specified in the Contract Documents, Subcontractor's executed Partial Waiver and Release Upon Progress Payment, in the form attached as part of **Exhibit F** and, upon request by Contractor, an executed Partial Waiver and Release Upon Progress Payment from each Lower Tier which may have lien or bond claim rights, in the form also attached as part of **Exhibit F**; (iv) other releases and documents required by the Contract Documents or reasonably required by Contractor; (v) all items listed in Contractor's Stored Material Checklist (payment for materials stored off site is subject to Owner approval); and (vi) at intervals specified in the Contract Documents and at least five (5) business days prior to Contractor's deadline for submitting its partial payment estimate, an acceptable partial payment estimate on the form at **Exhibit G**. After review and any appropriate adjustments, Contractor will include Subcontractor's partial payment estimate in its payment request to Owner.
- C. Subcontractor should send all final payment requests within thirty (30) days of its completion of its Work. As conditions precedent to final payment, Subcontractor must: (i) complete all Work in accordance with the Contract Documents and to the reasonable satisfaction of Owner and Contractor; (ii) deliver all final lien and claim waiver forms from it and from Lower Tiers which might have lien or bond claim rights (in the form at **Exhibit F**), all required warranties and guaranties, all maintenance manuals, all attic stock, certified payrolls, insurance information and all other documents or materials required by the Contract Documents; and (iii) send all final payment requests no later than sixty (60) days after final completion of the Project. Subcontractor's failure to send a payment request within sixty (60) days after final completion of the Project waives any and all claims by the Subcontractor.
- D. Contractor may withhold amounts due under this Subcontract or any other agreement between the parties to cover Contractor's reasonable estimate of any costs or liability Contractor or its surety has incurred or may incur for which Subcontractor may be responsible. The phrase "any other agreement between the parties" includes any agreement between Subcontractor and Contractor or any joint venture or other entity in which Contractor and/or Subcontractor have an ownership interest.
- E. Contractor may issue joint checks to Subcontractor and any laborer, Lower Tier, pension or benefit fund, or labor union if, in Contractor's reasonable judgment, joint checks are necessary to ensure payment to those parties or if those parties have threatened to file or filed liens, suits or demands against Owner, the Project, Contractor or its sureties. Contractor may also pay such party directly in those circumstances. All joint checks or direct payments will be for the account of Subcontractor. No payment under this Article will create a contract with any third party nor any continuing duty to make payments to any party.

Article 3: Operations

- A. Subcontractor will promptly provide all information and documents required by Contractor or the Contract Documents as needed to utilize BIM or similar modeling, or as otherwise as needed to eliminate potential conflicts between areas of work on the Project, including but not limited to conflicts arising from wall openings needed for delivery or construction, conflicting structural and/or MEP requirements, and potential interferences from lifts, cranes and scaffolds.
- B. Subcontractor must deliver the following as conditions precedent to performing any Work on site: (i) a fully executed Subcontract; (ii) insurance certificates satisfying the requirements of Article 8 below; (iii) acceptable, fully executed Performance and Payment Bonds unless waived in this Subcontract; (iv) a schedule of values

SUBCONTRACT TERMS AND CONDITIONS

reflecting the best estimate of the true value of each phase of the Work, in accordance with this Subcontract and the Contract Documents; and (v) a written injury and illness prevention program and its code of safe work.

- C. Subcontractor will at all times be thoroughly familiar with all requirements regarding the Work, and promptly notify Contractor, in writing and before proceeding with affected Work, of any deficiencies, errors, discrepancies, unanticipated site conditions, anticipated conflicts or unusual difficulties not specifically addressed in this Subcontract. Subcontractor will coordinate its Work with that of Contractor and all other subcontractors. Contractor will upon reasonable request provide shop drawings by other subcontractors to Subcontractor. Subcontractor will attend all coordination meetings and project meetings. Subcontractor's superintendent or foreman will represent Subcontractor and will have full authority to make decisions and commitments regarding Subcontractor's Work. All communications and notices given to the superintendent or foreman will be binding. Subcontractor represents that its superintendent or foreman is an expert in the Work, is a competent person as defined by OSHA, and is knowledgeable of all Legal Requirements
- D. Contractor is not responsible for damage to Subcontractor's Work or stored materials or equipment caused by others, but will cooperate with Subcontractor to secure payment for such damage from the responsible party.
- E. Subcontractor will be responsible for, and will use the highest degree of care in regards to, erecting and using scaffolding and all loading/ unloading of materials, tools and equipment from and onto hoists, elevators and/or cranes. During regular working hours and without charge, Subcontractor may share available cranes, temporary elevators and material hoists with Contractor and others; however, equipment use is subject to Contractor's schedule and reasonable construction priorities and Subcontractor's execution of any required release and indemnity agreements. Costs for equipment use on an overtime basis will be paid by Subcontractor. If "leave-out" areas are required by Contractor in the building skin, Subcontractor may be required to return out of sequence at these locations, the costs of which are included in this Subcontract Price.
- F. Subcontractor will employ only laborers who will work in harmony with those employed by Contractor or other subcontractors, or by Owner in its operations. Subcontracts may be awarded and labor employed by Contractor or its other subcontractors without regard to union status. Subcontractor will not allow labor disputes to delay or hinder its Work, that of any other subcontractor, or Owner's operations.
- G. Subcontractor will maintain a lien-free and claim-free Project, and timely and fully pay and/or insure payment of: (i) wages and benefits due to laborers; (ii) taxes, contributions, fees, penalties, and the like in respect of the Work or the Subcontract; and (iii) all amounts due all Lower Tiers and their laborers. Contractor may require satisfactory evidence as to the status of any payments or payment obligations in connection with this Subcontract.
- H. In performing its Work, and in addition to the other duties specified in this Subcontract, Subcontractor owes to Contractor the duties timely and fully to: (i) furnish and pay for all permits, licenses, equipment, labor, materials, supervision, required safety measures, employee parking and transportation, hoisting and scaffolding required for the proper and complete performance of the Work; (ii) perform all Work with no unapproved deviations or substitutions; (iii) provide quality control to ensure that Work is performed in strict accordance with the Contract Documents and as needed to ensure first class quality; (iv) correct/replace any Work identified as defective during construction; (v) comply with Contractor's written directives; (vi) submit proper notices, warranties, change order proposals, shop drawings, as-built drawings, submittals, parts lists, O&M manuals and other documents or materials required by the Contract Documents or by Contractor; (vii) correct defects in the Work which appear within the guaranty or warranty period established in the Contract Documents or by law (if no period is stipulated in the Contract Documents or by law, then the guarantee and/or warranty will be for one (1) year from date of completion and written acceptance of the Work by Owner); (viii) perform all required lay-out accurately and completely from control lines or benchmarks provided by Owner or Contractor; (ix) execute and deliver, and/or deliver from suppliers, any special guaranty or warranty required by the Contract Documents; (x) clean up daily from its operations as required by Owner or Contractor, and/or if requested contribute reasonably to a composite clean-up crew at no additional cost; (xi) prevent any damage to or trespass on adjoining lands or facilities; (xii) reasonably inspect work of other trades to insure that it has been performed properly to accommodate Subcontractor's Work, and advise Contractor in writing of any deficiencies that would prohibit or interfere with the proper performance of the Work; (xiii) pay all royalties and avoid any infringement of patents or copyrights; (xiv) provide daily reports, Safety Data Sheets (or similar sheets as required), job hazard analyses (or similar documents reflecting safe planning for safety risks in the Work), copies of all subcontracts and purchase orders and other reasonable documentation requested by Contractor; (xv) remove any employee for reasonable cause upon written request of Contractor; (xvi) protect its Work and stored materials from damage or destruction until final payment, and avoid damage to the work or materials of other trades; (xvii) provide punch lists and complete all punch list work identified by Contractor or Owner; (xviii) release no hazardous materials, and

SUBCONTRACT TERMS AND CONDITIONS

properly document and dispose of any hazardous materials discovered or used so as not to violate any Legal Requirement; (xix) provide and pay for power, gas, water, trailers, storage, temporary protection, guardrails, overhead protection and other temporary facilities needed for the Work; and (xx) provide such other services, documentation and materials needed to meet the Owner's requirements for the Work.

Article 4: Schedule

- A. Contractor has provided the Project Schedule prior to execution of the Subcontract – an initial draft is attached as **Exhibit H**. Subcontractor will fully comply with the Project Schedule. Subcontractor will, within fifteen (15) days after the date of the Subcontract or within such other time as may be reasonably specified by Contractor, submit its input with respect to the Project Schedule. Subcontractor's input will be consistent with the Project Schedule, and will list Subcontractor's sequence and duration of activities. Contractor may prepare a revised Project Schedule and if so will consider Subcontractor's input in developing that schedule. Subcontractor will proceed with its Work in accordance with the Project Schedule or as otherwise reasonably directed by Contractor, and perform the Work so as to avoid delays or inefficiencies to work of other subcontractors and Contractor so as to permit timely Project completion.
- B. Contractor may change the sequential order and/or duration of any work activities in the Project Schedule, including those of this Subcontract, to account for unanticipated delays, occurrences and other factors which alter Contractor's original Project Schedule, and may provide subsequent Project schedules. Contractor may require Subcontractor to prosecute its Work in such sequence as the progress of other subcontractors and the current Project Schedule dictate, with payment for additional costs and/or grants of additional time only as specified in Articles 4.D through 4.G.
- C. To the extent that any Work delays or inefficiencies are caused by Subcontractor or those for which it is responsible, then Subcontractor will: (i) not be entitled to any additional compensation nor any time extension; (ii) on its own account, or as directed by Contractor, increase shifts, personnel, operations, days of work, equipment and facilities, and work overtime as needed, to overcome any such events at no increase in price; and (iii) if requested, submit within three business days for Contractor's approval a recovery schedule demonstrating how it will meet the current Project Schedule.
- D. To the extent that any Work delays or inefficiencies are caused solely by Contractor or its other subcontractors, then Subcontractor will upon request take reasonable steps at no cost to Contractor or other subcontractors to mitigate the event. If those steps are unsuccessful, Contractor may: (i) grant Subcontractor in writing an equitable time extension, to the extent that Contractor reasonably determines that the time extension does not materially and adversely impact the Project critical path or the work of other subcontractors; or (ii) direct Subcontractor to work overtime, or other steps to accelerate. Where Subcontractor has been granted a time extension due to delays caused by Contractor or other subcontractors, the time extension will be the sole remedy for the delay, and no damages will be payable. Contractor will be liable for overtime or acceleration costs under this Article 4.D only to the extent caused by the gross negligence of Contractor in scheduling the Work with the work of other subcontractors. In that case, Contractor will pay Subcontractor for reasonable and demonstrable overtime wages (plus taxes, benefits, bond and insurance costs on those overtime wages) and increased material and equipment costs. To the extent that Contractor orders acceleration or overtime due to the acts or omissions of another subcontractor, Contractor will present Subcontractor's claims to the responsible party and Subcontractor's costs are recoverable only to the extent that they are paid by other subcontractors.
- E. To the extent that any Work delays or inefficiencies are caused by an event for which Contractor and/or subcontractors are not entitled to a time extension under the Contract Documents (except for delays described in Article 4.D, for which compensation is allowed only as set forth in that Article), or in situations where the Owner has failed to grant a time extension requested by Contractor or directed a compensable acceleration, Subcontractor will, at Contractor's direction, work outside of regular work hours or take other necessary measures to maintain the current Project Schedule, without additional cost or expense to Contractor unless those costs are paid by Owner to Contractor. If Owner orders acceleration, then Subcontractor will be paid those amounts only paid by Owner to Contractor on account of Subcontractor's acceleration. Other impact or inefficiency costs arising from events covered by this Article 4.E are recoverable by Subcontractor only to the extent paid by Owner.
- F. To the extent that any Work delays or inefficiencies are caused by an event for which the Owner provides a time extension, Subcontractor will receive an equitable extension of time but will not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays or related inefficiencies unless Owner pays those costs. Contractor will promptly pay Subcontractor the amount paid by Owner for Subcontractor's delay or inefficiencies.

SUBCONTRACT TERMS AND CONDITIONS

- G. Contractor will use reasonable efforts in presenting Subcontractor's claims for additional costs to Owner in those cases where Owner has accelerated Subcontractor or where the Contract Documents provide for payment for Work delays or inefficiencies and Owner's payment of such claims is a condition precedent to Subcontractor's recovery on its claims.
- H. Within three (3) business days after commencement of any event of delay, disruption, acceleration, or other impact, unless a shorter time is required by the Contract Documents, Subcontractor must notify Contractor in writing of the event, and promptly provide any requested additional information. In all cases, Subcontractor must provide written notice to Contractor in sufficient time and form so that Subcontractor's claim may be reviewed by Contractor and, if appropriate, timely presented to the Owner. Compliance with the notice requirements of this Subcontract and the Contract Documents is a condition precedent to any claim for additional time or compensation arising out of a delay.
- I. The remedies provided by this Article 4 are Subcontractor's exclusive remedies for all delays, impacts, inefficiencies or accelerations of the Work.

Article 5: Default and Damages

- A. If Subcontractor fails to fully or timely comply with any duty imposed by Legal Requirements or this Subcontract, including the Contract Documents, it is in default. Subcontractor will be liable to Contractor for all losses, costs (including attorneys' fees and court costs) damages, claims, suits, fines or penalties incurred by Contractor or its sureties to the extent caused by the default. Subcontractor will remain liable to Contractor for the same period of time, and to the same extent, as Contractor may be liable to Owner, other subcontractors or third parties for any claims against Contractor or its sureties by any such parties arising from a default.
- B. If Subcontractor has failed to cure a default within three (3) business days following written notice of default to Subcontractor (or where cure is not possible in that time, has failed to provide an acceptable plan to do so and to commence and continue to cure), then Contractor may do any or all of the following or take any other action permitted by law, without diminishing Subcontractor's liability for damages or costs arising from the default: (i) terminate this Subcontract for default, in whole or in part; (ii) make demand on Subcontractor's surety to perform the Subcontract and/or to indemnify Contractor for costs arising from the default; (iii) allow Subcontractor to continue to perform in whole or in part, but collect all damages arising as a result of the default; (iv) enter on the premises and take possession of all materials and equipment for the purpose of continuing or correcting the Work; (v) supply additional materials or labor at Subcontractor's cost; (vi) employ other firms or persons at Subcontractor's cost to complete or correct all or any part of the Work; or (vii) accept the conditions arising from the default but collect from Subcontractor the difference in value between the condition as required by this Subcontract and the accepted condition. Notice of a default is not required, and if not provided then Contractor will be deemed to have allowed Subcontractor to continue to perform without waiving the default, and Contractor may collect all damages arising as a result of the default.
- C. Contractor may deduct and withhold from payments otherwise due Subcontractor the costs Contractor has incurred or may reasonably incur as a result of a default. When the default has been cured, or when the Project has been completed by Contractor and accepted by Owner, if the unpaid balance earned under this Subcontract exceeds the expense incurred by Contractor or its sureties as a result of the default and in paying any damages or costs due to Owner or third parties because of Subcontractor's default, such excess will be paid by Contractor to Subcontractor. If those expenses and/or damages exceed the unpaid balance, then Subcontractor will pay the difference to Contractor upon demand.
- D. No failure to enforce terms of this Subcontract, nor any course of conduct by Subcontractor or Contractor, will amount to a waiver of any requirement of this Subcontract nor prohibit Contractor from enforcing its rights.
- E. Subcontractor must timely and fully comply with the terms of the Project Quality Control Plan attached as **Exhibit I**.

Article 6: Electronic Documents

- A. Subcontractor will utilize Contractor's electronic document management system if it is made available to Subcontractor for the Project. This system can accept electronic submission of submittals, applications for payment, proposed change orders and other items. By submitting documents electronically, Subcontractor is

SUBCONTRACT TERMS AND CONDITIONS

affirming that it has the appropriate license to use the documents, and it is not violating any copyright or other rights of owners of original documents.

- B. Subcontractor will utilize an electronic plan room to reference drawings if one is provided for its use. Subcontractor is responsible for updating the electronic plans with electronic as-built drawings as is necessary and required by the Contract Documents.
- C. If Building Information Modeling (BIM) is being used on the Project as referred in Article 3.A., Subcontractor is responsible to comply both timely and completely with all requirements for the successful implementation of BIM on the Project. This includes submitting all necessary information on a timely basis that is required to successfully build the BIM model that will be used during construction.

Article 7: Indemnity

- A. To the full extent permitted by law, Subcontractor will indemnify, protect and hold harmless Contractor and its surety (and any other parties as required by Contract Documents) and each of their respective officers, directors, members, managers, agents or employees, (individually, the "Indemnified Party" and collectively the "Indemnified Parties") from any and all claims, losses, demands, judgments, suits, actions and proceedings, as well as all attorneys' fees and costs which may be asserted against any Indemnified Party, to the extent arising out of or occurring in connection with: (i) any default or failure to timely or fully perform as required by Subcontractor; and/or (ii) any injury, loss, damage or death to any person or persons (including but not limited to any Indemnified Party) or any destruction of or damage to property, but only to the extent caused by the negligence or intentional wrongful acts of Subcontractor, its Lower Tiers, and its and their employees, or any other persons for which Subcontractor is responsible.
- B. To the full extent permitted by law, in addition to the express duties to indemnify, protect and hold harmless, there is a duty, separate from the duties in Article 7.A, to defend each Indemnified Party in connection with a claim, demand or suit described in Article 7.A(i) or 7.A(ii) (collectively, the "Claims"). The duty to defend includes all costs of litigation, attorneys' fees, expert and consultant fees, settlement costs and reasonable expenses in connection with the claim or litigation, regardless of whether the Claims are valid or groundless and regardless of whether the defense of an Indemnified Party is maintained by that party or assumed by Subcontractor, as long as the Claims asserted are causally connected to Subcontractor's alleged or actual default described in Article 7.A(i), or to an alleged or actual negligent act or omission or intentional wrongful act as described in Article 7.A(ii). An Indemnified Party at its option may defend any or all of the Claims (at Subcontractor's expense) or tender to Subcontractor the defense of any or all of the Claims. Upon tender to Subcontractor, Subcontractor will promptly assume the defense of the Claims. If an Indemnified Party tenders the defense of a Claim to Subcontractor and Subcontractor fails to assume the defense, an Indemnified Party facing liability for the Claim may defend, compromise and/or settle any such suit or action, and Subcontractor will be bound and obligated to reimburse each Indemnified Party for the amount expended in settlement, and/or the amount expended in paying any judgment, together with all reasonable attorneys' fees and costs of litigation, so long as the Indemnified Party demonstrates that the settlement or compromise was made in good faith and the Claim was one for which the duty of defense was owed. If a Claim under Article 7.A(i) is tendered and the defense is accepted, uninsured defense costs (if any) incurred by Subcontractor are subject to repayment by Contractor only to the extent that a final judgment in connection with the Claim determines that Contractor rather than Subcontractor is responsible for the Claim.
- C. In addition to the foregoing obligations, where the Contract Documents require either Contractor or Subcontractor to provide an indemnity or defense of Owner or any other party in circumstances beyond those stated in Articles 7.A and/or 7.B, Subcontractor agrees that, in respect of its Work under this Subcontract, it will indemnify, defend and hold harmless: (i) all such parties to the full extent required of Subcontractor by the Contract Documents; and (ii) Contractor, to the full extent that Contractor is required by the Contract Documents to indemnify, defend or hold harmless any such party with respect to Subcontractor's Work.
- D. The obligations of this Article are not limited by insurance limits in policies maintained by Subcontractor. Nothing in this Article will be interpreted to require Subcontractor to indemnify, defend or hold harmless any party to the extent such an obligation is prohibited by law. To the extent that applicable law would invalidate any part of the indemnity and defense obligations of this Article, then this Article will be interpreted and applied only to the extent legally permitted.
- E. Neither termination for any reason, nor final payment by Contractor, nor acceptance of the Work, will waive any obligations of Subcontractor under this Article.

SUBCONTRACT TERMS AND CONDITIONS

- F. The cause of action on a claim for indemnity under this Subcontract or any bond provided by Subcontractor will accrue on the later of: (i) the date of a written demand for indemnity to Subcontractor or its surety; or (ii) the date when Contractor or its surety makes the last payment with respect to which indemnity is sought.

Article 8: Insurance and Bonds

- A. Prior to starting Work, Subcontractor will provide a certificate that corresponds, at a minimum, to insurance evidenced on **Exhibit J (Sample Insurance Certificate)** and, if requested by Contractor, certified copies of all insurance policies. All policies will be written through a company authorized to transact that class of insurance in the state of the Project and will be with insurers acceptable to the Contractor with an A.M. Best rating of A- or better. Subcontractor will maintain all insurance for the periods required by the Contract Documents, and in no event less than one year after completion of the Work and for a period equal to any applicable statute of repose years in the case of products-completed operations coverage. Limits and terms shown are the minimum acceptable, and in no way limit available coverage under policies maintained by Subcontractor.
- B. Certificates of insurance for the commercial general liability policies will name Contractor, and others as required by the Contract Documents, as additional insureds for both ongoing and completed operations, as evidenced on Form No. CG 20 10 11 85, CG 20 26 11 85 or equivalent forms (ISO Form B, to be supplied to Contractor together with insurance certificate). The Project/job description and/or description of operations on all certificates, endorsements and other insurance documentation will include the provision "All Work Performed for the Additional Insureds." Commercial general liability policies will:
- i. be written on an "occurrence" basis, with a provision that defense costs are paid in addition to and do not deplete policy limits, provide that the limits apply per project, and contain a severability of interest or separation of insureds provision; and
 - ii. include coverage for broad form property damage coverage, on-going and products-completed operations, bodily injury or property damage, premises operations, blanket contractual liability (for this Subcontract), independent contractor's liability, mobile equipment, elevators, damage from explosion, collapse and underground hazards ("XCU"); and
 - iii. Contain no exclusions for cross-liability or cross suits, soils or earth movement, or residential, condominium, multi-family or multi-unit dwellings.
- C. Subcontractor's insurance will be primary and non-contributory to any insurance maintained by Contractor and/or Owner. Subcontractor will provide thirty (30) days written notice to the Contractor prior to expiration or cancellation of any insurance. Subcontractor is responsible for all deductibles in policies provided by Subcontractor. Renewal certificates and endorsements for commercial general liability will be provided to Contractor, at no expense to Contractor, prior to expiration of such insurance. Subcontractor will insure all material stored off site and all material in transit.
- D. Subcontractor, for itself and on behalf of its insurers, waives claims as to, and releases Contractor, its surety, Owner and any other additional insureds as required by this Subcontract from, liability for loss or damage covered by Subcontractor's policies of insurance, or liabilities or losses that are required to be covered by insurance under this Subcontract. Subcontractor will obtain a waiver of any subrogation right that its insurers may hold or acquire against the Owner, Contractor and any additional insureds by virtue of payment of any such loss covered by such insurance. To the extent permitted by applicable law, Subcontractor waives all rights of its carrier to any statutory workers compensation liens. Subcontractor and its lower-tier subcontractors will submit worker's compensation, commercial general liability, and business auto liability accident reports to their insurance carriers immediately after any accident and will furnish to Contractor copies of such reports.
- E. Subcontractor will require insurance coverage from Lower Tiers identical to that required of Subcontractor. Subcontractor will require Lower Tiers to name Contractor, and others as required by the Contract Documents, as additional insureds on the Lower Tiers' commercial general liability insurance policies and will provide Contractor with a waiver of subrogation from the Lower Tiers' worker's compensation carriers. Subcontractor will require its Lower Tiers to obtain Form No. CG 20 10 11 85, CG 20 26 11 85, or equivalent forms (ISO Form B), for ongoing and completed operations from its commercial general liability carrier, which endorsements will be furnished to Contractor as a condition precedent to Subcontractor's right to be paid for any Work performed by the Lower Tier.

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- F. If Subcontractor or any Lower Tier fails to procure, maintain or pay for the insurance required by this Agreement, Contractor may, in its discretion and at Subcontractor's cost, establish other financial risk transfer mechanisms and/or secure the same or similar insurance coverage.
- G. Subcontractor will immediately notify (or cause its insurers or insurance broker to notify) Contractor of any notice of cancellation or rescission received from an insurance carrier referring to or relating to a policy which names Owner, Contractor, its parent, subsidiary or affiliated companies or their officers, directors or employees as additional insureds or which may otherwise impact the ability of Subcontractor to fully perform its obligations.
- H. The insurance requirements in this Article are independent from all other obligations of Subcontractor under this Agreement, the Contract Documents or at law, including, without limitation, all indemnification provisions. This Article will survive termination for any reason, and will apply regardless of the enforceability of any other provision in this Agreement.
- I. Contractor or Owner will furnish and pay for builder's risk insurance, which will include fire, extended coverage, vandalism, named windstorm, and malicious mischief. Subcontractor's Work performed and materials stored on the jobsite for incorporation into the Work will be covered to the extent of such policy. Proceeds from the policy will be paid to Subcontractor to the extent paid by the insurance company for Subcontractor's loss. Builder's risk insurance does not include temporary buildings, Subcontractor's tools or equipment not incorporated in the Work. If there is a loss insured under the builder's risk policy, Subcontractor will be bound by any adjustment made between Contractor and/or Owner and the insurance company or companies, and Contractor's liability to Subcontractor for such loss will in all cases be limited to amounts actually paid on Subcontractor's claims. If the builder's risk insurance contains any deductible not paid by Owner, the deductible cost will be paid by Subcontractor to the extent that the loss is caused by Subcontractor. If an event not caused by Subcontractor causes loss to Subcontractor and others, any deductible costs will be equitably allocated among all parties suffering damage.
- J. Unless expressly waived in the Special Provisions or in writing by an officer of Contractor, Subcontractor will pay for, furnish to Contractor at the time this Subcontract is delivered by Subcontractor, and maintain in full force and effect an acceptable 100% performance bond and a 100% payment bond on Contractor's standard bond forms (Exhibit K), written by a surety company acceptable to Contractor. The surety must have a Treasury limit of not less than the amount of the Subcontract Price or the sum of \$500,000, whichever is greater, and which will have an AM Best rating of A- or better. The bond cost is included in the Subcontract price unless otherwise provided in the Special Provisions. Upon a default by Subcontractor and notice to the surety, the surety will either indemnify Contractor for losses and costs arising from the default, or timely and fully perform Subcontractor's obligations, or both, all in accordance with the terms of the bond. No change, alteration or modification to or deviations from this Subcontract or the Contract Documents will release in whole or in part any surety on any bond and Contractor will be under no obligation to notify the surety of any such change. Any increase in the Subcontract amount will automatically result in a corresponding increase in the penal amount of the bonds without notice to or consent from the surety, such notice and consent being waived by this Subcontract. Decreases in the Subcontract amount will not, however, reduce the penal amount of the bonds unless specifically provided in any Change Order decreasing the scope of Work.
- K. Contractor may at its option elect to enroll Subcontractor in a Subguard default insurance program in lieu of Subcontractor's providing bonds. If Contractor so notifies Subcontractor in writing, then Subcontractor will provide a letter from its surety confirming that Subcontractor is eligible for and qualified to receive bonds for its Work on the Project and provide other required qualification information. No obligation to provide a bond is excused until Contractor provides a written notice of that waiver. The use of Subguard does not limit Subcontractor's liability.
- L. If required bonds are not timely delivered, Subcontractor is in default. Contractor may either waive such requirement in writing signed by an officer of Contractor, or terminate this Subcontract in whole or in part and seek damages. The insolvency of the surety, the revocation of the surety's right to do business or license to issue bonds in the state of the Project, the removal of the surety from the list of federally approved sureties as indicated by the Federal Register, or the surety's failure to maintain an AM Best rating of A- or better, will each be deemed an act of default of Subcontractor.

Article 9: Changes

- A. Unless a different standard is specified in the Contract Documents or on the Scope of Work or Special Provisions attached, Subcontractor has included in the Subcontract Price all amounts necessary timely to perform all Work

SUBCONTRACT TERMS AND CONDITIONS

shown on and reasonably inferable from the Contract Documents, including all Work needed to obtain Owner's acceptance of the Project. Subcontractor agrees to provide all such Work without additional compensation or time except to the extent that Owner provides a time extension or additional compensation for the Work or unless Contractor specifically requests in writing a change proposal and/or authorizes additional Work in writing. Claims for additional costs or time extensions for errors, inconsistencies or omissions in the Contract Documents will not be recognized unless recognized and paid by Owner. The following apply to all changes or requests for changes:

- i. Subcontractor will be bound by all interpretations of Owner or its authorized representative that, by the Contract Documents, are binding on Contractor.
 - ii. Contractor may at any time, unilaterally or by agreement with Subcontractor, without notice to Subcontractor's sureties, make changes in the Work covered by this Subcontract. Upon written direction by Contractor, Subcontractor will proceed with specified extra work or changes so as not to delay the Work or the current Project Schedule. Any unilateral directive or mutual agreement must be in writing. If a change is ordered in writing by Contractor independent of the Owner or the Contract Documents provided by the Owner, Subcontractor will be entitled to an equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by Contractor other than a formal written change order to be a change, it will so notify Contractor in writing within three (3) business days of the action or inaction, and seek a confirmation in writing from Contractor before proceeding with alleged change.
 - iii. Subcontractor will submit requested or required change order proposals in a form reasonably acceptable to Contractor, within five (5) business days of the request or the event giving rise to the proposal, unless a shorter time period is specified in the Contract Documents. Requests or claims that involve the conduct of the Owner or the Contract Documents must always be submitted in writing in sufficient time to allow Contractor to comply with the applicable provisions of the Contract Documents. The quotation must be supported by a time impact analysis, a cost breakdown, a quantity survey, unit prices and unit labor hours, markup for overhead and profit, and any other information requested by Contractor. The amount to be paid to Subcontractor and/or its Lower Tiers for overhead and/or profit for additive changes will be as allowed by the Contract Documents. If a change in the Work consists of both additions and deletions, any overhead and profit will be computed on the excess of the additive costs over deductive costs. Subcontractor will pay any additional bond and insurance premium associated with any change, and keep its surety informed at all times of changes to the Subcontract.
 - iv. Contractor's liability for costs arising from changes ordered by the Owner, or for deficiencies in the Contract Documents provided by the Owner, is limited to the amounts Contractor recovers from the Owner for those events. Payment on account of pending changes made by the Owner will be made only to the extent that Contractor receives payment from the Owner for Subcontractor's changed Work. Unless the change order as executed by Contractor reserves specific rights, an executed change order is a full and final settlement of all claims for time and compensation arising from the changes and events referenced in the change order.
- B. Work done on a time-and-material basis must be signed for daily by Contractor's authorized representative and invoiced weekly no later than the month in which the Work was done. No payment for time-and-material work will be made unless the Work has been authorized in writing by Contractor's representative, outlining the rates and terms of payment and the appropriate daily approval requirements. A signed ticket is not an acknowledgement that additional compensation is due or an acceptance of any Work.

Article 10: Contract Interpretation and Disputes

- A. Any disputes between Subcontractor and Contractor not involving the conduct of the Owner or the Contract Documents will, at the election of Contractor, be settled by arbitration by the American Arbitration Association under its Construction Arbitration Rules, or by a specified arbitrator or different arbitration service if the parties so agree in writing. The arbitration may include other parties if appropriate. The award rendered by the arbitrator(s) is final and may be entered in and enforced through any court having jurisdiction. Arbitration will be in the county of the Project unless the parties agree otherwise in writing. The arbitrator must apply the laws of the state of the Project and this Subcontract in determining responsibility and liability, and explain in writing the factual and legal basis for the decision. The arbitrator will have the authority to award the prevailing party its share of the arbitration costs. Absent such an award, each party will pay its pro rata share of the arbitration costs. The prevailing party will be entitled to attorneys fees for the arbitration only to the extent that such fees are required by applicable law, or to the extent that the arbitrator finds that it is equitable and just to award some or

SUBCONTRACT TERMS AND CONDITIONS

all such fees because either: (i) the claims or defenses of either party were asserted or maintained without a reasonable basis in fact or law; or (ii) the party seeking its fees had made a written offer of settlement which was rejected (or to which no response was provided) and: (a) if the requesting party is the claimant, then the requesting party recovered as much or more than its offer; or (b) if the requesting party is the defendant, then the requesting party prevailed in the arbitration at least to the extent that the claimant did not recover more than the amount of the written offer. The prevailing party in any litigation required to enforce or vacate an arbitration award will be entitled to recover its attorneys' fees and costs.

- B. If disputes between Contractor and Subcontractor involve the conduct of the Owner or an interpretation or requirement of the Contract Documents, then Subcontractor must follow all claim, notice and disputes procedures and requirements of the Contract Documents, and Subcontractor recognizes that it may be joined into any court or arbitration proceedings required by the Contract Documents. Subcontractor is bound to Contractor to the same extent that Contractor is bound to the Owner by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made by the party, board or court authorized in the Contract Documents or by law, regardless of whether Subcontractor is a party to the proceedings. Subcontractor will, as a condition precedent to its right to prosecute any claim, comply with all notice, claim and dispute resolution provisions of the Contract Documents, including allowing a reasonable time for Contractor to analyze and forward to the Owner any required communications or documentation. Contractor will, at its option: (i) present to the Owner in Contractor's name or (ii) authorize Subcontractor to present to the Owner in Contractor's name, all of Subcontractor's claims, and answer the Owner's claims involving Subcontractor's Work, whenever Contractor is permitted to do so by the terms of the Contract Documents. If the dispute is prosecuted or defended by Contractor, Subcontractor at its expense agrees to furnish all documents, statements, witnesses, and other information required by Contractor and to pay or reimburse Contractor for Subcontractor's allocable share of reasonable costs incurred by Contractor in connection with the dispute, including attorneys' fees. Subcontractor will timely furnish Contractor with any claim certification required by the Contract Documents or by a Legal Requirement, in a form satisfactory to Contractor, and agrees to indemnify, defend, and hold Contractor harmless from any losses, claims, damages or expenses Contractor may incur as a result of Subcontractor's failure or inability to support any part of the claim as required by the certification or by a Legal Requirement. Contractor will not certify a claim when it cannot do so in good faith.
- C. If Contractor or its surety notifies Subcontractor in good faith that any arbitration or lawsuit brought under Article 10.A involves a controversy within the scope of Article 10.B, then dispute process under Article 10.A must be stayed until the procedures under Article 10.B are completed.
- D. If Contractor elects not to invoke the arbitration procedures set forth in Article 10.A, then all claims, disputes and other matters in controversy between Contractor and Subcontractor arising out of or relating to the Subcontract and covered by Article 10.A will be resolved through litigation in the state court in the County of the Project or in the federal court closest to the location of the Project. The prevailing party will be entitled to recover its reasonable attorneys' fees and court costs in connection with any such litigation. **EACH PARTY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS AGREEMENT, UNLESS THE MATTER ARISES UNDER ARTICLE 10.B AND THE CONTRACT DOCUMENTS ALLOW THE OWNER A RIGHT TO TRIAL BY JURY.**
- E. The warranty period specified in the Subcontract or in the Contract Documents is not the exclusive period during which Subcontractor is liable for defects in its Work; that liability will extend to the end of applicable statutes of limitation and/or repose.
- F. Unless otherwise agreed in writing by the parties, Subcontractor will timely and fully perform the Work during any dispute and Contractor will make payments to Subcontractor to the extent required. Subcontractor will make relevant books and records available for inspection and copying if it asserts a claim for additional compensation or if Contractor reasonably contends that Subcontractor is in default under this Agreement.
- G. This Subcontract is governed by the laws of the state of the Project, without regard to any contrary conflicts of laws rules of that state. Both parties waive all claims for their own special, indirect or consequential damages in connection with any dispute or claim related to this Subcontract or the Project. This waiver does not preclude liability for liquidated damages or consequential damages assessed by Owner or payable to third parties.

SUBCONTRACT TERMS AND CONDITIONS

Article 11: Termination

- A. Contractor may terminate this Subcontract for Contractor's convenience and without cause by written notice to Subcontractor. If there has been a termination for convenience of Contractor's contract with the Owner, then Subcontractor will be paid the amount if any paid by Owner to Contractor as termination costs for Subcontractor's Work. In case of termination just for Contractor's convenience, Subcontractor will be paid for Work executed through the date of termination and reasonable demobilization costs. No recovery will be allowed for overhead or profit on any Work not performed by the date of termination.
- B. If Subcontractor is terminated for default in whole or in part due to its failure to cure or commence to cure a default as required by Article 5.C, that termination will not relieve Subcontractor of any liability for damages, claims or suits caused by any default or arising from the termination. If a court or arbitrator determines that Contractor erred in terminating Subcontractor for default, Subcontractor is limited to the damages it would have recovered had it been terminated for convenience.
- C. Subcontractor is not entitled to unabsorbed overhead, anticipatory profits or any similar damages for any termination. Upon receipt of termination payments, the parties will have no further obligation to each other except for Subcontractor's obligations to perform corrective and/or warranty work relating to Work actually performed by Subcontractor, to indemnify, defend, and hold harmless Contractor as provided in this Agreement, and to maintain required insurances regarding its Work in place.

Article 12: Miscellaneous

- A. If the Contract Documents identify certain public procurement clauses, regulations, or laws applicable to this Subcontract and the Project, then **Exhibit L** restates some or all of those clauses as required by the Contract Documents. Subcontractor confirms its obligation to comply with all applicable clauses in **Exhibit L**, the Contract Documents, and all Legal Requirements. Subcontractor will insure that all clauses and obligations of **Exhibit L** and/or the Contract Documents are included in all Lower Tier subcontracts and purchase orders as required by **Exhibit L** or the Contract Documents. On all projects that receive federal, state or local funding, Subcontractor will comply with Contractor's Equal Employment Opportunity Policy set forth on **Exhibit M** attached and in addition will comply with all such policies promulgated by any governmental authority.
- B. To the extent that Subcontractor is obligated by this Subcontract or the Contract Documents to perform any design or design- assist services, Subcontractor will comply with all requirements of **Exhibit N**.
- C. All notices, consents, requests or other communications will be in writing, unless otherwise expressly provided to the contrary and will be deemed to have been made or given on the date sent when e-mailed, hand-delivered, or transmitted as electronic facsimile to the other party, at the address noted in the Subcontract. If notice is sent by first class mail or by overnight or similar services, it will be deemed made three (3) business days after mailing or upon receipt, whichever is first. Either party may designate a different address by written notice given to the other.
- D. **Exhibit O** includes any changes to this form required by the law of the state of the Project. If any provision of this Subcontract is determined to be illegal, invalid or unenforceable under present or future laws, the parties intend the remainder to be unaffected and enforceable. In place of each clause or provision that may be determined to be illegal, invalid or unenforceable, and to the full extent permitted by law, the court or arbitrator is authorized to add a legally permissible clause or provision as similar as possible to that found unenforceable.
- E. This Subcontract has been reviewed, negotiated and accepted voluntarily and after due consideration, with advice from counsel as the parties deemed appropriate, and represents the entire agreement of the parties. This Subcontract may be amended only by change order signed by the parties. No part of this Subcontract may be assigned by Subcontractor without Contractor's written consent.
- F. Except as required by law, Contractor's sureties have no greater or different obligation to pay Subcontractor than does Contractor, and further are entitled to enforce this Agreement if the sureties perform in place of Contractor. Contractor's surety is an express third party beneficiary of this Subcontract. Owner, Architect and Owner's lender are third party beneficiaries to the extent required by the Contract Documents. There are no other third party beneficiaries.

SUBCONTRACT TERMS AND CONDITIONS

- G. Execution of the Prime Contract by Owner and Contractor is a condition precedent to the effectiveness of this Subcontract.
- H. The persons executing this Subcontract, and any change orders, claims, and lien or claim waivers or releases on behalf of Subcontractor, have actual authority to execute those documents.

Special Provisions

ADDENDUM TO BALFOUR BEATTY CONSTRUCTION, LLC ("Contractor")
-STANDARD FORM SUBCONTRACT- WITH
-STRONG TOWER CONSTRUCTION, LLC DBA KOCH CORPORATION -
("Subcontractor")

The following terms are hereby made a part of the Balfour Beatty Construction, LLC -**Standard Form Subcontract**- between Contractor and Subcontractor (the "Agreement"); to the extent any term set forth below is contrary to or inconsistent with any term set forth in the Agreement the term set forth below shall replace such contrary or inconsistent term:

Article 3 Operations paragraph A Delete entirely

Article 3 Operations paragraph H Delete ... "and/or if requested contribute reasonable to a composite cleanup crew at no additional cost;"

Article 6 Electronic Documents paragraph C Delete entirely

Article 11 Termination paragraph A Insert ... "and exit fees for purchase orders previously executed by Subcontractor for materials and labor required for the Scope of this subcontract."
After ..."demobilization costs"

ACCEPTED AND AGREED to this 1st day of Oct, 20 15

STRONG TOWER CONSTRUCTION, LL DBA KOCH CORPORATION

BALFOUR BEATTY CONSTRUCTION, LLC

By: Benjamin Feihn

Benjamin Feihn
CEO

Its: _____

By: Michael Baumgardner

Its: Sr. Vice President

Exhibit B

Subcontract Scope of Work

Hopes Bronze Storefront System

SCOPE OF WORK

1. DEFINITION, CORRELATION AND INTENT:

Subcontractor agrees to make the project complete in every respect insofar as this Subcontract is concerned in strict accordance with **Bid Package No. 08F – Hopes Bronze Storefront System PACKAGE**, the Contract Documents listed on Exhibit "A" and shop drawings and submittals as approved by the Architect and/or Owner. The Subcontractor shall not perform any portion of the work at any time without Contract Documents or, where required, approved Shop Drawings, Product Data, Manufacturer's Instructions or Samples for such portion of the work. The Subcontract includes but is not limited to providing of all submittals, shop drawings (and associated engineering), trade coordination, layout, hoisting, supervision, tools, equipment, scaffolding, supplies, incidentals, plant, labor, materials, services, cutting, cleaning, and any other work or systems required to perform the work as described below:

2. SPECIFICATION REFERENCE:

The organization of the specifications into divisions, sections and articles, and the arrangement of the drawings shall not control the Contractor in dividing the work among the Subcontractors or in establishing the extent of the Work to be performed by any Subcontractor.

Reference is made to the following Divisions of Work and Specification Sections which relate to the Scope of Work, but is in no way intended to limit or alter the intent of the Contract Documents:

<u>SECTION NO.</u>	<u>TITLE and DESCRIPTION</u>
DIVISION 00	BIDDING REQUIREMENTS, complete;
DIVISION 01	GENERAL REQUIREMENTS, complete;
SECTION 07 900	JOINT SEALERS
DIVISION 08	DOORS, WINDOWS, AND GLASS, as it pertains
SECTION 08 411	BRONZE FENESTRATION AND EXIT DOORS, complete;
DIVISION 08	HOPE'S STEEL FENESTRATION AND EXIT DOORS, complete;
SECTION 08 800	GLASS AND GLAZING, as it pertains
SECTION 08 710	FINISH HARDWARE, as it pertains

3. INCLUSIONS:

It is understood and agreed this **Hopes Steel Storefront System** includes all inclusions as described in the following subparagraphs regardless of whether or not they are in the above specifications or any other specification section or shown on the plans:

3.A. Design Intent

1. It is the intent of the Scope of Work to convey to this Subcontractor the total responsibility for the Hopes Steel Storefront Work required for the HOTEL AT MARION SQUARE. This Subcontractor

understands that due to the "Fast Track" nature of this project, Construction Documents may not be 100 percent complete and will develop as the project progresses. However, the Subcontractor shall perform all work required or reasonably inferred under the best practices in the Construction Industry for a complete and fully functional and operational system(s) for the purpose intended.

2. This project will require the Subcontractor to work as a team member with the Contractor and other members of the project team through the completion of construction to assure that all work required by this Scope will be performed in such a manner that it is complete, fully functional, and in accordance with the contract documents within the contract price.
3. References to the term "Contractor" in the Drawings and Specifications shall be interpreted to mean work by this Subcontractor as they relate to this scope of work.

3.B. Hopes Steel Storefront Scope of Work Specific Inclusions

The Subcontractor shall furnish and install the work of this Subcontract in accordance with the Contract Documents, including, but not limited to the following:

1. Subcontractor shall be responsible for all necessary system design and engineering of Storefront, and entrances for the project in accordance with the design intent or criteria established by the Contract Drawings. When required by the Contract Documents, all engineering will be provided by a Professional Engineer.
2. Engineering shall include attachment of all Store Front and other glass and glazing components to the building structure, taking into consideration all wind load and dead load pressures, thermal, seismic and other movements as well as allowable tolerances in the fabrication and installation of adjacent materials such as concrete, steel, or stone work.
3. Ramps and ladders as required for general use, including relocation and maintenance thereof.
4. Any provisions necessary for cold or hot weather work as required including hot water, temporary heat, enclosures, blankets, cooling, etc.
5. Include mock-ups per specifications.
6. Subcontractor must comply with any third party water testing that may be required by the owner. Cost of testing is not included.
7. Work includes all anchors, blocking, bracing, kickers, framing, fasteners, and shims necessary to securely attached systems to the building structure as required for structural attachment, wind-loading requirements, seismic and all governing codes and requirements.
8. Subcontractor shall provide and install all Steel grilles at custom bronze frame extrusions.
9. Subcontractor shall provide and install all channels or supports encapsulated in this work as required. Steel and miscellaneous metals shown and sized on Contract Documents will be provided by the structural steel / miscellaneous metals bid package.
10. Subcontractor shall provide and install all flashing at Steel fenestration with finish, pattern, texture, color, manufacturer, and products as per exterior finish materials schedule, drawing A201 and specifications.
11. Subcontractor shall provide and install all coping, flashing, counter-flashing, end dams, thresholds, sills and other trim pieces in contact with work in this package.
12. Submit blocking and backing requirements and location drawings in accordance with Balfour Beatty's schedule. Blocking and backing that is not submitted will be the responsibility of this subcontractor.
13. Subcontractor shall provide and install all caulking, sealants, and insulation in contact with or adjacent to work in this package.

14. Subcontractor shall provide cleaning and label removal for all exposed surfaces furnished under this package.
15. Subcontractor shall furnish and install all BRZ rolled steel glass doors and Transoms required by the Contract Documents.
16. Subcontractor shall furnish and install all hardware for all entrances complete as indicated by the door schedule and specifications. Subcontractor shall be responsible for furnishing and installing all door hardware required for a fully operational (reasonable) system whether fully detailed or not, including thresholds, weather stripping and other sweeps or devices for moisture or air infiltration. All steel and glass entrance doors shall be pre-fit, pre-mortised, and pre-machined.
17. Subcontractor shall be responsible for all caulking and sealants both interior and exterior for a watertight installation, including specifically all exterior joints between the work of this Subcontract and adjacent materials such as steel, cast-in-place concrete, masonry and stone as indicated as specified. Sealants include all joint preparation, primers and backer rods.
18. Subcontractor shall furnish and install all metal flashings integral to glass and glazing systems to maintain a water tight installation.
19. Subcontractor shall provide all permits, plan checks, licenses, inspections and associated fees (if necessary) to complete the work of this Subcontract. Building permit is by General Contractor.
20. Subcontractor, if applicable, shall cooperate fully with all building inspection officials with the review and inspection of the work of this Subcontract. Subcontractor shall promptly remedy all rejected or disapproved work by building inspection officials.
21. Subcontractor, if applicable shall cooperate fully with all testing laboratory and inspection personnel with the review and inspection of the work of this Subcontract. Subcontractor shall promptly address remedies required for non-conforming work.
22. Subcontractor shall cooperate fully with General Contractor and other key trades to ensure obtaining the Certificate of Occupancies in an expeditious manner.
- 23.

3.C. Related Requirements

The following related requirements apply to the work of this Subcontract whether provided by the Subcontractor, Tier Subcontractors or Others:

1. Man lift and/or Lull-Forklift

3.D. Coordination with Other Trades and Authorities

This Subcontractor is responsible for coordinating with the other trades and authorities to ensure the proper installation of the work and to ensure work is not delayed.

1. Subcontractor shall cooperate fully with all building inspection officials, 3rd party inspectors and testing agencies regarding the review and inspection of the work of this Subcontract. Subcontractor shall promptly remedy all rejected or disapproved work.

3.E. Field Engineering

This Subcontractor shall be responsible for all layout and engineering, including horizontal and vertical control which is required to complete this Scope of Work. Subcontractor is further responsible for coordination, layout, and location as applicable of all equipment, piping, conduit sleeves and block outs. The General Contractor will provide:

1. Two control Lines on each level and in each structure.

Balfour Beatty Construction

2. Bench marks for elevation control on each level and in each structure.
3. One permanent bench mark for elevation control as necessary to complete work below grade.

3.F. Special Schedule Requirements

1. N/A

4. EXCLUSIONS:

- A. No Post applied profile trim
- B. Pre-order measuring- see clarifications
- C. Hardware per sets 21,24,36, 39,40,41,42,77, 79

5. UNIT PRICES:

Balfour Beatty Construction reserves the right to modify the work in accordance with the following Unit Prices at the costs as noted. Unit Prices are good throughout the duration of the project and include all burdens, overhead markups, and profit.

- A. Foreman Labor Rate \$54.77 Per Hour
- B. Carpenter \$47.63 Per Hour

6. ALTERNATES OR OPTIONS:

Balfour Beatty Construction reserves the right to modify the work in accordance with the following alternates or options at the costs as noted. Alternates or Options are good throughout the duration of the project and include all burdens, overhead markups, and profit.

- A. N/A

7. ALLOWANCES:

Balfour Beatty Construction has included the following allowances within this subcontract for the exclusive use of the Contractor. They are not intended to allow for or be included for any base bid scope of work required by the Contract Documents, or as indicated in this Contract for this subcontract scope of work. These allowances shall not be used without prior written direction and approval by the Contractor. Allowances are good throughout the duration of the project, and any unused portions of these allowances shall be deducted from the subcontract value and returned 100% to the Contractor

- A. N/A

8. RECAP OF CONTRACT AMOUNT:

The Total Subcontract Amount is arrived at and recorded as follows:

Balfour Beatty Construction

SUBCONTRACT AMOUNT	\$ 1,236,745.00
Bond	\$ 18,285.00
Total	\$ 1,255,030.00

8. CLARIFICATIONS:

The following clarifications apply to this Subcontract:

- A. Based on Hopes Jamestown 175 Series hot rolled steel, factory painted finish, no post applied profile trim included.
- B. All Type Q Radius Windows are included
- C. One Exterior Mock-up is included
- D. Balfour Beatty will be responsible for maintaining all building opening dimensions per the shop drawings.
- E. All Hardware listed in spec section 08 710 will be supplied by others.
- F. Hopes price Includes doors to be prepared to receive door hardware supplied by others, pivots, door seals and bronze lock box per spec section 08 411 pat 2.4

END OF SCOPE OF WORK



SUBCONTRACT SPECIAL PROVISIONS

This information must be provided to all parties with which Subcontractor or Supplier contracts directly for labor, services or materials on the project. Further, the obligation to provide all lower tier subcontractors and suppliers with this Lien Agent information must be flowed by Subcontractor or Supplier to those with which it contracts.”

The following exhibits are omitted:
Exhibit L Publically Funded Provisions
Exhibit N Design Build/ Design Assist Rider
Exhibit O State Law Rider

The following exhibits are Included:
Exhibit W Stored Materials
Exhibit X Surety letters
Exhibit Y Owner Contract
Exhibit E Site Logistics
Exhibit H Project Schedule
Exhibit I Quality Control

I. PROJECT PROVISIONS

These provisions shall apply to all Subcontractors on this particular project. The following Special Provisions modify, delete and/or add to the Subcontract Agreement. Where any paragraph or subparagraph in the Subcontract Agreement is supplemented by one of the following paragraphs, the provisions of such paragraph or subparagraph shall remain in effect and the special Provisions shall be considered as added thereto. When any paragraph or subparagraph in the Subcontract Agreement is amended, voided or superseded by any of the following paragraphs, the provisions of such article, paragraph or subparagraph not so amended, voided, or superseded shall remain in effect.

1. In addition to the Standard Form Agreement Subcontractor must comply with paragraphs A through F below:
 - A. Begin submittal of shop drawings, product data, samples, certificates, test reports, etc. **no later than 3 calendar days after notice of award of Subcontract.** (Issuance of subcontract shall not be cause for delay of Submittals.) Failure to submit correct or timely submittals does not relieve this subcontractor of material delivery obligations in accordance with the project schedule.
 - B. Complete submittal of shop drawings, certificates, test reports, etc. no later than 60 calendar days after Contract Execution.
 - C. Resubmit any items within a maximum of 14 calendar days after being returned for correction (or as required to maintain schedule). Failure to submit correct or timely submittals does not relieve this subcontractor of material delivery obligations in accordance with the project schedule.
 - D. The Trade Payment Breakdown shall include a line item for submittals and as-builts in an amount agreeable by the project team. This dollar amount will be released when all submittals are complete and approved with confirmed shipping dates. Subcontractor shall include with each payment application a material log. The material log must be fully executed and include all major materials and equipment used on the job with confirmed delivery dates noted for each

material approved. Subcontractor must furnish from supplier with material log, written evidence of confirmed shipping dates of major materials and equipment.

- E. All subcontractors shall submit to the Construction Manager's field office all Material safety Data Sheets (MSDS) for all hazardous substances as defined by Government authorities at the time of delivery. This shall be a job specific submittal, not a generic company-wide submittal.

2. SCHEDULE OF VALUES: In addition to any other provisions listed herein, Subcontractor hereby agrees to allocate a reasonable and fair share of cost as determined by Contractor in the schedule of values for requisitioning of the following items of work under this Agreement.

- A. Material Submittals - to be requisitioned as progress billing .
- B. Clean up - total clean-up cost allocated to this Project to be requisitioned based upon actual performance of clean up. (see Item #43 requirements)
- C. Close -Out information - including as-builts, owner manuals, warranties, etc. to be requisitioned as a lump sum amount upon 100% completion of these submittals. (see Item #1E above)
- D. Punchlist - value shall be 2% of subcontract value to be requisitioned as a lump sum amount upon 100% completion.

3. SCHEDULE: Subcontractor is cognizant of the project schedule and has factored all required material expediting requirements, overtime and manpower loading to complete the work within Contractor's Project schedule.

4. METHOD OF CALCULATING PAYMENT FOR EXTRA WORK: The cost or credit to Contractor resulting from a change in the Work shall be determined in one or more of the following ways at Contractor's option, in addition to the Standard Form of Agreement.

- A. Lump Sum - A change order cost or credit may be determined by mutual acceptance of a lump sum proposal properly itemized and supported by sufficient data to permit evaluation.
- B. Unit Price - A change order cost or credit may be determined by the use of the unit prices stated in the Contract Documents or subsequently agreed upon.
- C. Time and Materials - A change order cost or credit may be determined on a time and material basis, using agreed upon hourly labor, equipment rates, material costs and applicable markups as indicated in the Standard Form of Agreement.
- D. Other - A change order cost or credit may be determined by Contractor without any recourse by Subcontractor if mutual terms and acceptable pricing cannot be agreed to by using any of the methods described in Items A, B, or C above.
- E. No change order work will be undertaken by Subcontractor without prior acknowledgment and approval of Contractor.
- F. All allowable mark-ups breakdowns shall be per Owner Contract Agreement. This project shall allow a combined profit and overhead of 15% of the sum of the Subcontractor's direct costs for labor (including labor burden) and material (including sales tax). For example: Subcontractors maximum cost for a change = [(Subcontractors direct labor cost including labor burden) + (Subcontractor's direct material cost including sales tax) + (Sub-Subcontractor(s))] x (1.15).
- G. Back Charges – In the event of back charges between the Contractor and the Subcontractor or the Subcontractor and another Subcontractor, the Contractor and the Subcontractor will be

entitled only to the direct cost of the additional work or repairs in question. No percentage mark-ups for indirect costs such as overhead and profit will be allowed.

- H. Pricing - No greater than (10) days of receipt of a change the Subcontractor is required to provide pricing for change in the work to the Contractor.

5. **WORKING HOURS, OVERTIME, WEEKEND WORK & NOISEY WORK:** Unless changed by Contractor and posted at the job site, standard working hours are from 7:00 a.m. to 7:00 p.m. Monday through Friday. All subcontractors shall observe these hours unless otherwise directed. Additionally, it is understood that to meet certain schedule requirements of the project it may be necessary to perform some work tasks during off-hours, and that workdays in excess of eight (8) hours will be required as a normal course of performing the Work. Any additional costs incurred by the Subcontractor, in the performance of this shift work, are the responsibility of the Subcontractor. Work hours must be adhered to; if hours are not met then deductive change order will be written for hours not worked each week (labor to be deducted at same rate as approved additive change orders). 40 hours per week **minimum** work hours by full crew for work involved that week. It is further understood that due to the urban working environment and proximity to the Embassy Suites Hotel that working hours for active construction work (exclusive of meetings, general coordination and some deliveries (as determined by city and neighboring properties as acceptable) that work is to be limited to 7:00am to 7:00pm, Monday through Friday, with 7:00 am to 5:00 pm hours governing on Saturdays. No Sunday Work.

It is agreed that the Subcontractor will make up any normal workday (Monday through Friday) time lost by working Saturday and/or extra shifts as necessary to maintain the project schedule at no additional cost to Contractor.

6. **MOBILIZATIONS, CONCURRENT WORK, PHASED TURNOVER:** Subcontractor acknowledges that the Project will have a phased turnover in accordance with the Project Schedule and that multiple mobilizations will be required and are included as part of the Subcontract Agreement. Additionally, Subcontractor acknowledges that the Project has multiple building areas and concurrent work on each building area will be required in order to complete on schedule, and that all costs for doing so including utilizing separate crews, supervision, after hours deliveries, shop drawings, inspections, etc. are included.

Subcontractor shall mobilize within three (3) calendar days of Contractor's notification with complete work force, materials, supervision, labor and equipment available to maintain and complete scheduled activities

Subcontractor also acknowledges that subsequent bid packages and scopes of work will proceed and/or follow work under this agreement. Subcontractor is herein required to schedule and coordinate with such subsequent bid packages to ensure continuity of work.

7. **LIMITATIONS OF OPERATIONS:** Subcontractor hereby agrees to arrange his Work and his material as not to interfere with the operations of other Subcontractors engaged upon adjacent Work and to join his Work to that of others in a proper manner, and in accordance with the intent of the Plans and Specifications and to perform his Work in the proper sequence in relation to that of other Subcontractors, all as may be directed by Contractor.
8. **COORDINATION:** In addition to the Standard Form Agreement, Subcontractor shall coordinate his Work with all of the other Work which must be performed in the Project. To facilitate this coordination, there shall be coordination meetings, the attendance at which shall be mandatory for Subcontractor's coordination responsibility. Daily coordination meetings with Contractor's Superintendents shall be held every work day at Contractor's on-site office at 6:30am until such time as Contractor waives or reinstates this requirement.

All Subcontractors shall have their respective Superintendents attend this meeting. All Subcontractors shall provide daily force reports by 8:00am for the previous day's work and Pre Task Plans (PTP's) by 8:00am for the current days work. All daily force reports and PTP's shall be on Contractor's form.

9. **MEETINGS:** - Subcontractor understands that weekly (or a frequency as otherwise determined by the contractor) project meetings, coordination meetings, subcontractor meetings, superintendent meetings, schedule meetings and separate weekly safety meetings will be held on the job site. Subcontractor agrees to have the necessary and competent personnel attend all required meetings.
10. **PRE-INSTALLATION CONFERENCE:** Subcontractor shall attend a pre-installation conference conducted by Contractor which may be attended by Architect/Engineer, Owner's representative and Contractor's staff as deemed necessary by Contract Documents and scope of work. At this conference, Subcontractor's personnel, including Project Manager, Superintendent and any other key personnel (including those specifically requested to be in attendance by Contractor) will be introduced and the Scope of Work will be discussed along with other key issues such as workmanship, quality control, schedule, safety, etc.
11. **PROJECT SAFETY:** In addition to the Standard Form Agreement, Subcontractor acknowledges Contractor's commitment to providing a safe workplace and will cooperate and participate in establishing a Project Safety Plan. Said plan, at a minimum, will include the formation of a Project Safety Team which will meet regularly to review the status of overall Project Safety, discuss accidents and near-misses, promote training and safety awareness and develop mutual incentive programs that might be applicable. Furthermore, Subcontractor will provide written notice of who their on-site Safety Competent Person will be and forward any and all MSDS related to their Work to Contractor prior to start of any work.
 - a. 100% glove use will be required in all cases other than in instances where manufacturer/OSHA recommendations/standards specifically prohibit the use of gloves due to added risk involved with their use. This scope of work is allowed to have finger cutouts.
 - b. All Subcontractors are required to use platform type step ladders.
12. **DOCUMENTS:** Subcontractor shall be responsible for securing complete sets of Construction Specifications and Drawings. Subcontractor shall procure and pay for all required plans and specifications which shall be on file and available at a local blueprint company designated by Contractor.
13. **UTILITIES VERIFICATION:** Subcontractor shall verify locations of all existing utilities within the Construction Areas prior to commencing the Work. Subcontractor shall abide by the "Underground Facility Damage and Safety Act" which requires anyone doing any type of excavating, tunneling or demolition to call all agencies having jurisdiction. An excavator must call the local utility companies, and the Owner's Facilities and Maintenance Department not less than two or more than five business days before beginning any excavation. Any damage to existing utilities during construction will be repaired immediately as required to minimize disruption of the businesses and residences at the expense of Subcontractor that caused the damage.
14. **"NO CHANGE" AGREEMENT:** It is the intent of this Agreement and consistent with the prior negotiations of this Agreement for Subcontractor to perform the Work under this Agreement without extra Change Orders to the Contract unless specifically requested by Owner, Architect or Contractor. Subcontractor agrees and understands that the Contract Documents as defined in "Exhibit A" of this Agreement may be incomplete in detail or contain inconsistencies. Therefore, during the bid process, subcontractor should have received clarification in details via RFI to understand how to perform its scope of work. Subcontractor herein further represents and agrees that its Scope of Work is complete and shall be performed to Contractor's and Owner's complete satisfaction without cause for claim of additional cost or change orders unless additional scope is added by the owner or Architect. It is further understood and agreed that Contractor has entered into a Guaranteed Maximum Price (GMP) contract with Owner to complete this project based on the Contract Documents identified and described in "Exhibit A". Accordingly, claims for additional cost for inconsistencies in the Contract Documents will not be recognized. The

subcontract lump sum price includes all cost to complete the intended Scope of work as represented by the Contract Documents. Should Owner initiate additional work to the Scope of Work, or upgrades to the Work originally described, a change order will be negotiated for the same between Contractor and Subcontractor.

16. **FIREPROOFING AND INSULATION:** Subcontractor will be responsible for the patching of all fireproofing and insulation materials damaged by the execution of his Work. This shall include any patchwork around hangers and/or supports. Also, subcontractor shall provide all necessary protection materials to prevent the work of other trades from being made dirty due to the fireproofing patchwork for your specific trade.

17. **FUEL STORAGE:** On-site storage of fuel will not be permitted.

18. **GUARDRAILS / SAFETY DEVICES:** Subcontractor shall install, maintain and replace all required guardrails in accordance with OSHA Standards as a minimum for the purpose of safety at all openings and suspended work, created as a part of their scope of work. Subcontractor is responsible for fall protection of all employees

Subcontractor is also responsible for all temporary access to facilities, temporary fencing, overhead protection, signs and/or barricades as may be required to perform their Scope of Work, in addition to Contractor's furnished construction fencing.

Subcontractor agrees that if in the performance of their work it becomes necessary, convenient or advisable to remove, replace or interfere with any safety devices or controls installed by the Contractor or another Subcontractor, the Subcontractor will replace or restore such devices or controls at their own expense. In the event such safety devices or controls are not so replaced or restored, the Subcontractor agrees to reimburse the Contractor or Subcontractor for doing so.

19. **SCAFFOLDING:** Subcontractor shall provide all scaffolding (or other means of access) required for the performance of this Subcontract. All scaffolding shall be erected in complete accordance with the latest OSHA Standards, and Balfour Beatty Exhibit D as a minimum including all handrails, mid-rails, toe-boards, fully decked platforms, entrance and exit points, proper counterweights and anchor points, material landing and staging areas, material hoisting requirements, proper access ladders or stairs, etc.

20. **EXCAVATION:** All excavations must be in compliance with OSHA standards as a minimum. Subcontractor shall adhere to Contractor's Safety Program for excavations which may be more stringent than OSHA requirements. Subcontractor shall complete and submit to Contractor a job hazard analysis prior to commencement of all excavations. All soils for open cut excavations shall be classified as Type C (1.5:1 slope), unless Subcontractor can provide signed and sealed Engineering to Contractor illustrating existing soil conditions are allowed to withstand reduce slope cuts. Contractor Trench Safety Program is initiated in excavations exceeding 4'-0" in depth. Subcontractor shall name Competent Person prior to starting work.

21. **OSHA VIOLATIONS:** In addition to the Standard Form Agreement, In the event Subcontractor is cited for violations of the Occupational Safety and Health Act, he shall be responsible for all penalties assessed against him. In the event Contractor is penalized due to Subcontractor's actions or failures to comply with the Occupational Safety and Health Act, Subcontractor shall hold Contractor harmless. Any penalties assessed against Contractor for violations of Subcontractor shall be deducted from amounts due under this Agreement.

22. **DOCUMENT ORDER OF PRECEDENCE:** In addition to the Standard Form Agreement, In the event of any conflict or discrepancies in the terms of the Contract Documents, this Agreement, attached Exhibits, manual, code or laws, the document order of precedence shall be interpreted as the most stringent requirement within the above as solely determined by Contractor.

23. **FEES:** In reference to the Work in this Agreement, Subcontractor shall obtain and pay for all required Federal, State, City and County Permit Fees, Business License Fees, Right-of-Way Permits and Bonds,

Encroachment Bonds, License Fees and Inspection Fees, including all Re-Inspection Fees, for their scope of work unless specifically excluded in Section II (Scope of Work) enclosed.

24. WARRANTY PROVISIONS: Warranty provisions as mentioned in the Standard Form of Agreement are enhanced as described below (the words Guarantee and/or Warranty are synonymous):

- A. Warranty period for this project is 1 year.
- B. Subcontractor warrants to Owner and Contractor that all materials and equipment furnished under this Subcontract will be new, unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. For all Work not conforming to these requirements, including substitutions not properly approved by Architect or Contractor, Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.
- C. All warranties shall be in writing on Warrantor's stationery or official forms as designated by Contractor and signed by an authorized official of the Warrantor's Company. Contractor hereby agrees to provide written assignment to Owner of all warranties. Warranty term shall not commence until all of the following conditions have been satisfied.
 - (1) Certificate of Occupancy for the building areas, or its equivalent
 - (2) Satisfactory completion of item of Work or system by Subcontractor
 - (3) Formal acceptance of the Work by Owner, Architect and Contractor
 - (4) Subcontractor has provided all the specified warranty/guarantee documentation to Contractor.
 - (5) Subcontractor has provided specified training for the operation and maintenance of the system and/or equipment.
 - (6) Subcontractor has provided maintenance manuals for the operation and maintenance of the system and/or equipment.
- B. Failure to respond to warranty Work during the term within forty-eight hours of written notice and/or diligently pursue corrective measures shall be considered a Subcontractor breach of warranty. Subcontractor and his Surety shall be liable for all expenses incurred from such failure to respond.
- C. If within any warranty period, repairs or changes are required in connection with the warranty Work, which in the opinion of Contractor and/or Owner is rendered necessary as a result of the normal use of material, equipment, or workmanship which are defective, or not in accordance with the terms of the Contract Documents, Subcontractor and/or its Surety shall, promptly upon receipt of notice and at his own expense, proceed to:
 - (1) Place in satisfactory condition in every particular all such warranted Work, correct all defects therein.
 - (2) Make good all damages to the structure or site, or equipment or contents which, in the opinion of Contractor or Owner, is the result of the use of materials not in accordance with the terms of the Contract Documents.
 - (3) Make good any Work, materials, equipment, contents of structures or site disturbed in fulfilling any such warranty.
 - (4) In addition to the foregoing warranty, if any more-stringent terms exist in Owner Contract, then those terms shall apply.

24. **PUBLIC CONVENIENCE AND SAFETY:** Subcontractor shall, at all times, so conduct his Work as to ensure the least possible obstruction to traffic. The safety and convenience of the general public, operational service providers, residences and/or businesses located near the Project, and the protection of persons and property shall be provided by Subcontractor.

In addition, Subcontractor understands that the Work is to be constructed near businesses and residences and Subcontractor shall use its best efforts, in conformity with the applicable standards of care, to perform its Work hereunder in a manner which will not interfere with the ongoing business operations including, without limitation:

- A. Controlling noise, dust, insects, vermin and pests,
 - B. Requiring appropriate attire and conduct for Subcontractor's workers and the workers of Subcontractor of every level. Complaints received regarding attire or conduct will be grounds, at Contractor's sole discretion, for demanding removal of the offending parties.
 - C. Maintaining Work hours and noise levels in accordance with the applicable City of Charleston Requirements, County and City Ordinances and Contractor's requests.
 - D. Communication and/or fraternization between Subcontractor's personnel and the general public are strictly prohibited.
 - E. Unapproved Utility shut-downs or damages.
25. **STREET CLEANING:** Special care must be taken to prohibit any accumulation of dirt, dust and debris which might be blown or tracked into public areas or contaminate interior air quality. Subcontractor shall provide prompt and continuous cleaning and maintenance of street and sidewalk areas which might pose potential damage to the public in the vicinity of the Work including, but not limited to, covered walkways, building access areas, public right of ways, etc. Furthermore, Subcontractor is responsible for cleaning all vehicles prior to exiting site. Washing streets with water containing sediment particles into storm water system is prohibited.
26. **VEHICULAR AND PEDESTRIAN TRAFFIC:** Subcontractor shall not block off any public or private street nor use any part thereof for storage of materials unless approved by all applicable governing agencies and Contractor. Where affected by the Work, vehicular and pedestrian traffic shall always be accommodated and maintained in accordance with any special local requirements or in the absence of any such requirements, in accordance with the instructions of Contractor. Proper signage, indicating re-directed traffic shall be placed in appropriate locations throughout the project duration.
27. **BARRICADES AND DANGER/WARNING SIGNS:** Subcontractor shall provide and maintain suitable danger and warning signals, lights, signs, signal devices, barricades, flagman and/or watchman and take all necessary precautions that the barricades are appropriately located so as to give proper and unmistakable warning of hazards, structures or equipment involved under the Contract and shall remove same upon completion of the Work.
28. **SIGNAGE:** No signs will be permitted to be displayed at the jobsite or on trailers without written approval by both Contractor and Owner.
29. **RADIOS:** No radios (music radios, disc man, headset radios, MP3 players and the like.) other than two-way communication type will be allowed on the jobsite. Subcontractor agrees to furnish all his project managers, superintendents, supervisors, foremen, and lead men with two-way Radios with multiple channels to be used to communicate with Contractor and other Subcontractors on site. This requirement shall also be included for all Subcontractor lower tier subcontractors. Radio use and frequencies will be coordinated with the Contractor.

30. **FIRES / FIRE EXTINGUISHERS:** No fires for hand warming, trash disposal, land clearing etc. will be permitted on-site. Subcontractors will provide temporary fire protection system(s) within the immediate area of their work and required by the local Fire Marshall, and the applicable local, state, federal, and insurance underwriter requirements. The Contractor will provide general fire extinguishers in accordance with OSHA requirements.

31. **JOBSITE STORAGE / DELIVERIES:** Subcontractor is aware of the existing Site Conditions, and limited space availability that this urban site provides. On-site storage of materials and equipment will not be allowed except as specifically approved by Contractor's Project Superintendent or Project Manager. Unless specifically approved in writing, Subcontractor shall not assume any space is available for on-site storage.

All deliveries for Subcontractor shall be coordinated through Contractor no less than 24 hours in advance. If scheduled deliveries are not ready at the appointed time or if deliveries arrive without the ability to be unloaded, Contractor may refuse acceptance of materials and require deliveries to be rescheduled. It is understood that if hoisting of material is required for delivery (either via Crane or Buckhoist), or if street closure lane access is required that in order to maintain project schedule and maintain compliance with City Ordinances that these deliveries will need to be conducted after normal business hours as identified in Item 6 above.

All materials and deliveries must be coordinated and scheduled with Contractor prior to coming on site. Contractor will not allow delivery of materials to site without Subcontractor being represented on-site. Contractor will not receive, sign-for, accept or be responsible for materials delivered to the site or site office. Subcontractor has included in his subcontract price all off-site and phased storage as may be required.

Approval by Contractor of material storage locations shall only be construed by Subcontractor as temporary and for limited time duration. Contractor will not allow Subcontractor to procure "bulk deliveries" for Subcontractor convenience or for manufacturer purchase agreements. Each delivery of material shall only be approved for those materials of immediate or near future installations. Subcontractor has included in his subcontract price all off-site and phased storage as may be required. In addition to article 4.6 of the Standard Form Agreement, Contractor will not be responsible for relocation costs of stored materials on-site since utilization of on-site storage for convenience is at Subcontractor's risk.

Subcontractor is also responsible for the removal, consolidation, relocation, securing, etc. of all materials and equipment not permanently secured to building structure to meet design strengths and in case of impending weather condition emergencies at no cost to Contractor including hurricanes, snow storms, etc.

32. **CONSTRUCTION PARKING:** Subcontractor shall advise all of their employees, and tiered trades that NO on-site parking is available. Requirements for supervisor and worker off-site parking, and the costs associated with such shall be the responsibility of the subcontractor. Requirements for worker tools and delivery equipment shall be the responsibility of the subcontract and in accordance with item #32. Unsafe or unauthorized parking or temporary drop offs will result in vehicles being towed at Subcontractor's and/or vehicle owner's expense.
33. **SITE ACCESS:** Access to the site shall be gained only in areas and/or a route as determined by Contractor's Superintendent, and may be modified only to accommodate construction activities. Subcontractor is responsible for all ancillary removal and repairs costs for access points outside the Contractor provided access entrances, as well as any added traffic control or flagmen.
34. **ACCESS PANELS / ACCESS DOORS / COVERS:** Subcontractor shall furnish and install all access panels, access doors, and covers necessary to provide access to the Work of Subcontractor either concealed by Subcontractor's scope of work or by Scope of work of others including walls, soffits, floors, and ceilings. All proposed locations to be submitted for acceptance prior to installation. Subcontractor shall be responsible for coordinating and labeling the location and sizes of the required framed openings with respective trades during construction of walls, soffits, ceilings, and floors. Type of panels shall

match architectural and mechanical specifications (as approved by Owner) and match fabrication material to its exposed environment.

35. **BLOCKING AND BACKING:** Subcontractor shall furnish and install blocking and backing as required for installation of this Work. If excluded in Scope of Work, Subcontractor will be responsible for coordinating the blocking and backing as required for its installation of the Work. Blocking is excluded.
36. **TOUCH-UP PAINTING & CLEANING OF EQUIPMENT:** Subcontractor shall provide all equipment touch-up painting and cleaning of equipment as required for Subcontractor's Work. Owner expects equipment in as new condition at completion of project.
37. **PRECONSTRUCTION ACTIVITY:** Subcontractor shall resolve and include the costs of any and all preconstruction activities in the anticipation of this project including but not limited to manufacturer site visits, mock-ups, attendance to meetings, etc.
38. **STRUCTURAL SUPPORT FRAMING (MISCELLANEOUS):** All miscellaneous structural support framing not indicated on the Contract Documents required at openings in floors, decks, and walls for this Work are by others.
39. **FLOOR AND ROOF OPENINGS:** Subcontractor is responsible for initial covering, labeling and maintaining covers of all floor/roof penetrations related to this Scope of Work from time of placement in building structure through 100% completion of penetration concealment on permanent basis.
40. **WELDING MACHINES / FIRE WATCH:** Electrically powered welding machines shall not be allowed for use on this site except when explicit written approval is granted by Contractor where special circumstances of building construction require such machines. If electric welding machines are used, the necessary power *source*, service and power consumed shall be provided by Subcontractor. It will also be Subcontractor's responsibility to install all subpanels required for his convenience.

When welding, torching or other hot work operation occurs normal fire prevention precautions are not sufficient, Subcontractor shall provide additional personnel assigned to guard against fire while the actual work is being performed, and for a sufficient period of time (minimum 45 minutes) after completion of the work to ensure that on possibility of fire exists.

41. **TEMPORARY CONSTRUCTION FACILITIES AND UTILITIES:**

A. **Furnished By Subcontractor:**

Subcontractor field offices will NOT be permitted on site. All cost for offsite office space will be the responsibility of Subcontractor.

Except as expressly set forth elsewhere, Subcontractor shall, as part of the Scope of Work, supply, install, properly maintain, permit and remove all temporary construction facilities and utilities necessary for the complete performance of its Work. Such items shall include, but not necessarily be limited to those listed below. The type of facilities, move-in and move-out dates and locations on Jobsite shall be subject to and in accordance with the review and approval of Contractor's Project Superintendent.

- (1) Maintenance of Subcontractor's laydown, storage and Work area and roads within such areas. Repair costs to existing landscaping, hardscape or roadways damaged by Subcontractor outside construction limits are also included.
- (2) Rigging, Scaffolding and all equipment for erection.
- (3) All Small Tools
- (4) All standard expendable or consumable construction items and supplies

- (5) Drinking water including containers, ice and cups. All to be cleaned, dated, and labeled daily.
- (6) All Storage compounds, security measures, fencing, lighting, etc. as may be required by Subcontractor to protect tools, equipment and materials.
- (7) First Aid Supplies, fire extinguishers, personal protective devices, etc.
- (8) Builder's Risk Insurance Deductibles and additional Builder's Risk Insurance;
- (9) Material and Equipment hoisting to elevated floor and roof areas.
- (10) Access roads to work areas, crane pads, etc.
- (11) Employee access to work areas including ladders, scaffolds, lifts, etc.
- (12) Dewatering of natural underground water and rain water conditions
- (13) All Fall Protection Devices including rails, cables, harnesses, etc. and associated engineering, if required.
- (14) All required off-site storage for stored materials
- (15) All off-site parking fees.
- (16) Replacements costs for materials, tools, equipment, etc.
- (17) All equipment and tools brought inside the building and on site must be in accordance with Contractor safety plan (Exhibit D) or OSHA standards whichever is more stringent.

B. Furnished by Contractor:

Contractor shall supply or cause to be supplied the following temporary construction facilities and utilities to Subcontractor, without cost to Subcontractor, for or in connection with performance of the Work:

- (1) Sanitary Facilities - Furnished by Contractor shall consist of portable chemical toilets located at various areas of the jobsite as designated by Contractor based on average weekly manpower requirements.
- (2) Water for construction shall be furnished at points on jobsite as designated by Contractor's Project Superintendent. . Note: Subcontractor is responsible for all costs and/or fines received for water losses attributable to connections or line extensions installed by Subcontractor at Contractor's sole discretion of estimated water losses.
- (3) Accessible space near the construction site for performance of the Work and daily temporary storage of material and equipment at time of that day's installation. (No protective storage facilities, security, or protective coverings of any kind will be furnished by Contractor.). Subcontractor shall assume worst case accessibility and reach to each building structure for hoisting of materials based on present site conditions at time of delivery or installation.
- (4) Temporary Lighting in accordance with OSHA Standards will be provided by the Electrical Subcontractor. However it shall be the responsibility of Subcontractor to ensure that each craftsman on this project has adequate lighting in each room to do a "first class" job. Extension cords and light stands for lighting shall be the responsibility of Subcontractor.

- (5) Temporary Power - 110 volts, single phased, 60 cycle power shall be provided by the Electrical Subcontractor and made available throughout the building for small tools only. Power will not be available for electric welding machines or heavy duty saws. Portable panels or multiple outlets will be located on each floor within 100' of any work area by Electrical Subcontractor. This Subcontractor shall provide all OSHA approved extension cords as required for the execution of this Subcontract Agreement. All power cords and tools shall be protected by ground fault circuit interrupters (GFCI). Where GFCI outlets are not available or when building permanent power systems become energized and temporary systems removed, in-line GFCI protection shall be supplied by each Subcontractor.

Any equipment requiring temporary 220 volt (or above) power will not be provided by Contractor. It will be Subcontractor's responsibility to coordinate, provide, and pay for 220 volt connection with on-site electrician as required.

- (6) Centrally located dumpster for collection of debris, including hauling off site. Subcontractor shall haul debris from his work area and place it into the dumpster.

42. **DAILY CLEANUP & COMPOSITE CLEANUP:** In addition to the Standard Form Agreement, Daily cleanup of the construction area will be strictly enforced. Subcontractor shall perform cleanup and trash removal (on an ongoing daily basis, not at the end of the day) of all debris generated by Subcontractor to a central site container or truck as directed by Contractor. **Exception: Disposal and removal from the site of excess paint materials, residue from equipment cleanup operations, and other hazardous waste in accordance with governmental regulations shall be the responsibility of Subcontractor.**

43. **OWNER / CONTRACTOR AGREEMENT:** Subcontractor understands and agrees that this Subcontract is contingent upon Owner/Contractor Agreement being fully executed, and that this Subcontract shall be null and void without restrictions or remedies to either party if said Contract is not executed. No work shall be performed by Subcontractor until Owner/Contractor Agreement is executed. Contractor shall notify Subcontractor when said Agreement is executed.

Subcontractor further understands and agrees that the terms of the Agreement between the Owner and Contractor as regards but not limited to timely notification of delays and/or change requests and resolution of claims at substantial Completions also do apply to this Subcontract Agreement.

44. **MOCK-UPS / PROTOTYPES:** Subcontractor is cognizant of and has included in the Scope of Work multiple "Mock-ups" or "Prototypes" as may be required. Any and all refinishing of walls, floors, finishes, colors, etc. and removal and reinstallation of receptacles, fixtures, trim, furnishings, rails, grilles, etc. as required and associated with the "Mock-ups" or "Prototypes" is included in the Scope of Work.

45. **ENVIRONMENTAL PROTECTION:** Subcontractor is aware that the adjacent areas and properties are a very sensitive subject as it relates to Owner's development order. Subcontractor agrees not to deposit and/or store any liquids, solids, or gases on or near any area that is not designated as "Staging Area" by Contractor and Owner. Failure to comply with this provision shall result in severe consequential damages to Owner for which Subcontractor will be held responsible.

Subcontractor further agrees not to dispose of heavily chlorinated water utilized for testing of pipes or detergent/chemical water used for cleaning and flushing pipes onto the site, or into the site storm drainage systems. All such testing water shall be neutralized prior to discharging.

46. **ENVIRONMENTAL CONTROLS:** Federal and State regulations require that construction projects obtain various permits so that storm water, dewatering, and other forms of potential pollution can be controlled and regulated. Subcontractor agrees to protect those controls that are put in place and to be responsible for the cost of correcting any damage he may cause to those controls.

47. **STATE SALES and USER TAXES BONDING REQUIREMENTS:** Subcontractor shall be responsible for paying for all sales, consumer, use, and similar taxes arising out of the Work. These include, but are not necessarily limited to, all such taxes required on all materials, equipment, labor, accessories, and services which are part of the Work. Records must be maintained to record payment of required taxes.
48. **FIRE / TRAFFIC LANES:** All fire and traffic lanes must remain clear and accessible throughout the duration of the Contract. No material storage, laydown, or short term parking will be permitted in these areas, unless approved by Contractor. Contractor will supply lane closure areas in accordance with the site utilization plan. Subcontractor requiring additional lane closures, police escorts, road plates, storage, etc. beyond that provided will pay the cost of the same.
49. **LAYOUT:** Contractor will provide property line boundaries, a benchmark and one column line in each direction on each floor. In addition to the requirement of the Standard Form Agreement, Subcontractor shall provide all layout using Robotic Total Station Technology or equivalent, engineering and survey of existing conditions as required for its work, that is in excess of what Contractor is providing. It shall be the responsibility of the Subcontractor to maintain and preserve all stakes and other marks established by the Contractor and, if such stakes or marks are destroyed by the Subcontractor, they will be replaced at their expense.
50. **TOBACCO RESTRICTIONS:** The use of tobacco products will NOT be allowed within the confines of this project. Each subcontractor shall police its own employees to ensure compliance with this policy.
51. **BREAK AREAS:** Eating will be allowed only in areas so designated by the Contractor. Subcontractor or its employees are not authorized to sell or distribute food or beverages at the jobsite.
52. **CUTTING AND PATCHING:** Subcontractor shall be responsible for the cutting and patching of all penetrations and openings through existing walls and partitions, and all penetrations and openings through existing floors, ceilings, and roofs necessary for the installation of his Work. If the location for a penetration or opening is through an existing structural member, the Subcontractor shall notify Contractor's Superintendent, who, after consultation with the Architect, will instruct the Subcontractor how to proceed. Subcontractor shall be responsible for any cost associated with confirmation of existing conditions prior to proceeding with such work.
- Patching of all existing walls, floors, ceilings, etc. is included for all items demolished under this agreement including substrate and finishes to match existing surrounding conditions.
53. **SUBCONTRACTOR SUPERINTENDENT:** In addition to the requirements of the Standard Form Agreement, Subcontractor represents that its superintendent is an expert in the Work, is a competent person as defined by OSHA, and is knowledgeable of all local safety regulations and local codes. The Subcontractor shall be represented at all job meetings by the superintendent and such other persons as Construction Manager from time to time wish to have present at job meetings. The superintendent shall be satisfactory to Construction Manager and shall not be changed except with the consent of Construction Manager, unless the superintendent proves to be unsatisfactory to Subcontractor or ceases to be in its employ. The superintendent shall represent Subcontractor and shall have full authority to make decisions and commitments regarding Subcontractor's Work; and all communications given to the superintendent shall be as binding as if given to Subcontractor.
54. **EMPLOYEE REMOVAL:** The Subcontractor shall immediately remove from the Project any employee, including the superintendent, who is not satisfactory to the Contractor's Project Manager, Owner, or Owner's authorized representative at no cost to Contractor and with no extension of time.
55. **INSPECTION OF EXISTING CONDITIONS:** Each subcontractor shall check the accuracy of the building structure and/or surface to receive its work and notify the Construction Manager of any

deficiencies prior to beginning it work, and incorporate such into their shop drawings for accurate production and installations. Subcontractor shall not proceed with work until unsatisfactory conditions have been corrected and shall not apply work over other subcontractor's uncompleted work. Commencement of installation constitutes acceptance of structure and/or base surfaces and the cost of any corrective work due to faulty base surfaces shall be borne by the installer applying his materials thereon.

56. **SERVICE SHUTDOWNS:** All disruptions of services shall be limited to the maximum time specified by the Contractor and Owner. Proper and timely notifications must be made as required by the Owner. No shutdowns will be permitted. Each Subcontractor must submit a plan of how to maintain utilities to surrounding buildings including demolition requirements, temporary utility methods utilized, repairs, anticipated durations, etc. Subcontractor is responsible for all temporary utility requirements to maintain usage of utilities in the disturbed areas. This could require after hours or overtime work to maintain said utilities.
57. **PROPERTY DAMAGES:** Subcontractor is responsible for all damages to property and work of other trades including materials, tools, and equipment, excluding such property to be incorporated into the Work (as covered by builder's risk policy), subject to any deductibles contained in the builder's risk policy procured by Owner or Contractor.

Subcontractor is responsible for protection of all existing and new surfaces, materials, until accepted by Contractor/Owner and Architect.

58. **LIQUIDATED DAMAGES:** Subcontractor is responsible for payment of liquidated damages as set-forth in Owner/Contractor Supplementary General Conditions for all delays attributed to this subcontractor for their scope of work. Liquidated damages will apply to the Project Final Completion date. Contractor will begin deducting and withholding liquidated damages from Subcontractor monthly pay application as delays occur to ensure monies are available at conclusion of phase or Project.
59. **CONCRETE PADS AND CURBS:** Concrete pads, curbs, clean-out and valve rings, concrete equipment grouting, etc. required for equipment but not specifically shown on the construction documents will be the responsibility of the Subcontractor installing the item.
60. **QUALITY CONTROL:** Subcontractor is aware that Contractor has an active and aggressive Quality Control Program. The highest level of Quality Control will be managed by Subcontractor's project managers and will not be delegated to on-site superintendents. In that regard the Contractor will provide a project specific quality control plan that will identify various levels of responsibility by the Subcontractor. The Subcontractor will participate and assist fully with the Contractor's Quality Control Program.

In addition to the requirements of the Standard Form Agreement, the correction of faulty work not in compliance with the Contract Documents shall be corrected within 48 hours of Contractor notification. Payment will be withheld in the amount of 2 times the cost estimated by Contractor to make the repairs on behalf of Subcontractor until such time work is corrected and accepted by Owner and Architect.

61. **VISITORS:** All visitors must check in at the Contractor's on-site office prior to entering the project site and sign-in. Subcontractor is required to escort all visitors and provide visitors with required personal protection safety devices.
62. **PHOTOGRAPHS:** No photographs may be taken of the project without prior approval of the Contractor and Owner. Subcontractor acknowledges that there is an active webcam on-site.
63. **UNIT PRICES AND ALLOWANCES:** Subcontractor has responsibility to quantify and obtain appropriate approvals for all allowance expenditures above prior to beginning work under this agreement. Contractor does not have the obligation, authorization, nor did the responsibility to make payment for work execute which has not been approved by Owner/Architect. Subcontractor has responsibility to quantify and obtain appropriate approvals for all unit price expenditures above prior to

beginning work under this agreement. Contractor does not have the obligation, authorization, nor the responsibility to make payment for work executed which has not been approved by Owner/Architect

64. **OPERATORS:** Subcontractor shall provide list of all competent and certified operators and welders 10 days prior to beginning work. Subcontractor shall also provide all equipment certifications upon equipment arriving to site, but prior to placing in-use.
65. **WEATHER:** Weather delays are only as approved by the Owner which is in excess of the normal anticipated conditions established by Owner-Contractor Agreement. Subcontractor shall herein anticipate such delays and schedule work as time is of the essence. Subcontractor shall include all necessary means and methods to dewater, aerate and/or hydrate work areas including access to in order to avoid delays in Project schedule at no additional cost to Contractor.

Subcontractor is also responsible for the protection of all materials from thermal (temperature) changes for work schedule to be installed in accordance with current schedule. Delays in material installations which can be protected will not be accepted as a cause for a schedule delay.

66. **BUILDING INFORMATION MODELING (BIM) / DIGITAL DOCUMENTATION**

- Building Information Modeling will be a function of this project for coordination and will require a 3D modeling effort by all trades unless otherwise indicated. Trades will include Mechanical, HVAC, Electrical systems, Plumbing and Fire Protection. Drywall/Framing/Ceilings for coordination with MEP trades only.
- All subcontractors listed above will be required to attend a BIM "kick-off" meeting led by Balfour Beatty where items such as level of model detail, file sharing, and coordination schedule dates are determined. The results of that kick-off meeting will be captured in a BIM "Implementation Plan" which, once agreed upon, will be the team's guide for the coordination efforts.
- Each trade shall allow for one meeting per week led by Balfour Beatty for duration of project upon notice of award.
- An initial 3D coordination model and associated coordination drawings must be complete and submitted to Balfour Beatty within the 1st 60 days of the Project. Any additional costs associated with delays because the coordination was not completed within the allotted time shall be the responsibility of the Subcontractor. No additional coordination cost will be accepted by the Contractor.
- All required shop drawings will be submitted to Balfour Beatty and engineer of record by trades in an approved format.
- All subcontractors requiring embeds in concrete and/or precast will be required to provide layout drawings to the concrete and/or pre-cast subcontractor. Concrete and Pre-cast subcontractor are required to create 3-dimensional drawings to indicate any and all embeds for approval by other trades and to be utilized during installation.
- Each participant, by submitting its proposal, represents that:
 - A. They understand that his/her scope is required to be modeled in Revit or approved alternate.
 - B. Has, at a minimum, participated in at least 3 projects in which the subcontractor has created 3D models for the coordination effort.
 - C. Has, at a minimum, 2 persons on staff who are capable of performing the required 3D modeling responsibilities for this project

D. If required, this subcontractor shall submit model examples from previous experience (model files, graphic images, screen shots, etc...) for evaluation of capabilities to model the required detail.

- Subcontractors agree to provide and utilize Robotic Total Station Technology or equivalent for layout of materials and systems. This is required for all major trades include Mechanical, HVAC, Electrical systems, Plumbing & Fire Protection.
- If Subcontractor cannot meet requirements outlined above, they may hire services of a third-party vendor and must inform Balfour Beatty Construction to such arrangement. Subcontractor will be required to assign a representative as a point of contact and be required to manage the third party vendor to ensure compliance with the BIM implementation plan.
- All Contract Documents will be provided and used in digital format for the project. All subcontractors will have access to digital plans and all Project managers, Superintendents and Foreman are required to have Ipads (or an alternate form of digital document reader) during construction. The Punchlist, Quality Control Checklist, Safety Checklist and final 3D coordination model will be accessed through Autodesk BIM 360 Field on the Ipad (or alternate form of digital document reader).

67. **AS-BUILT DRAWINGS (RECORD DRAWINGS)** : During the progress of the work, all Subcontractors shall update their model and drawings with the exact locations, as installed, of all systems associated with their trade.

Upon completion of the Work, this data shall be recorded to scale into CAD and PDF drawings by a competent draftsman. Subcontractor shall provide preliminary as-built drawings for architect/engineer approval and a final as-built set in accordance with the project specifications. Subcontractor shall provide preliminary as-built drawings for Architect/Engineer approval and a final as-built set in accordance with the project specifications. Each Subcontractors as built drawings will be reviewed on a weekly basis by the Contractor.

68. **ACCESS:** Subcontractor shall be responsible for providing safe access for testing agency and Engineer of Record to the work being fabricated, stored, or installed so that required inspection and testing may be accomplished. It is understood and agreed that any work under this scope found to be in non-compliance shall be corrected and re-tested at no cost to Construction Manager and/or Owner.

69. **HOISTING:** In accordance to our Site Utilization plan and Project Schedule Contractor will supply Tower Crane(s) and Personnel/Material Hoist(s) with operator to the Subcontractor for their use (up to 60 hours/week), subject to change at Contractors sole discretion. The Tower Crane(s) and Personnel/Material Hoist(s) will be erected and removed at Contractors discretion. The schedule and priorities for hoisting will be established solely by the Contractor in accordance with the schedule. Provision of the Tower Crane(s) and Personnel/material Hoist(s) does not relieve the Subcontractor from the requirement referenced in the General Conditions of this Subcontract. The Subcontractor is advised that the hoists will not remain operational throughout the duration of the project. While the hoist is available for use, Subcontractors requiring additional hoisting time, or means of hoisting beyond that provided by the Contractor for will pay the cost of hoisting and/or the operator including all premium time charges.

All other hoisting and means to get equipment, manpower or materials into place including but not limited to all scaffolding, man lifts, forklifts, outriggers, etc. are to be provided by Subcontractor. Do NOT assume "By Others" or shared use.

Subcontractor will be required to have 3rd party inspections prior to starting work with any/all Cranes and equipment. Subcontractor to provide 3rd party inspection report to Contractor immediately upon completion of inspection. Included are any fees associated with these inspections.

All Subcontractors utilizing lifting equipment will require Certified Riggers. All paperwork must be submitted to Contractor no later than 10 days prior to hoisting/lifting activities.

Equipment will not be allowed to be lifted and suspended by equipment overnight. Subcontractors will be required to secure equipment by other means.

70. **FLAGMEN:** All subcontractors receiving deliveries will require flagmen as traffic control at the construction entrance.
71. **ENGINEERING:** All engineering required as a part of this Scope of Work must be performed by Engineer licensed in the State of South Carolina.
72. **WORK STOPPAGES:** Labor strike or unrest is not an excusable force majeure event under this Subcontract and any related delays the responsibility of the Subcontractor and will be subject to liquidated damages.
73. **PUNCH WORK:** Subcontractor shall complete punch work as required by, and to the complete satisfaction of the Contractor, Architect, Engineer and Owner. Subcontractor shall provide Contractor with a list of punch items to be completed for this scope of work prior to starting punch work
74. **TESTING:** Subcontractor shall provide all testing, documentation and certifications as required by the Contract Documents other than those performed by the Owner's testing agent. Identification and coordination of all testing procedures required by this Subcontract, whether performed by the Owners' testing agent or the Subcontractor, are the responsibility of the Subcontractor. In the event the Subcontractor's material and/or installation fails, any re-testing costs and lost time will be the responsibility of the Subcontractor.
75. **SECURITY:** Subcontractors understand that no security services will be provided and that neither Contractor nor the Owner is responsible for property loss or damage to materials not yet accepted by the Owner.
76. **OWNER AGREEMENT:** The following paragraphs are flowdowns from the agreement between the Owner and the Contractor.
- A) Subcontractor acknowledges the agreement between the contractor and the Owner provides that for any delay attributable to the Contractor or any entity for which it is responsible, there is potential recovery of Liquidated Damages as detailed below. Subcontractor further acknowledges and agrees that should Contractor be assessed liquidated damages and any part or all of the delay is attributable to Subcontractor's performance of the work, then Subcontractor will be responsible for its proportionate share of the liquidated damages amount.
- B. Hotel LD Amount \$9,000 per day

END OF SPECIAL PROVISIONS



Deposition of:
Kimberly Bennett Brown

August 6, 2020

In the Matter of:
Balfour, Beatty v. Library Associates

[A. William Roberts, Jr & Assoc.](#)
800-743-3376 | calendar-awr@veritext.com | www.veritext.com

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON
4 BALFOUR BEATTY CONSTRUCTION, LLC,
5 Plaintiff,
6 vs. CASE NO. 2019-CP-10-01108
7 LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE
8 INSURANCE COMPANY, A NEW YORK CORPORATION,
9
10 Defendants.
11 -----
12 Library Associates, LLC,
13
14 Third-Party Plaintiff,
15
16 vs.
17

18 LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,
19 BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,
20 INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC
21 SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC,
22 1st CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION,
23 LLC d/b/a KOCH CORPORATION, WATSON ELECTRICAL
24 CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,
25 PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,
PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,
LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE
MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a
SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,
LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM
COATINGS, LLC, BALIFOUR BEATTY CONSTRUCTION GROUP,
INC.

Third-Party Defendants.

20 DEPOSITION OF: KIMBERLY BENNETT BROWN, VOLUME III
21 DATE: August 6, 2020
22 TIME: 9:04 AM
23
24 LOCATION: Parker Poe Adams & Bernstein, LLP
25 200 Meeting Street, Suite 301
Charleston, SC

TAKEN BY: Counsel for the Plaintiff
REPORTED BY: TERRI L. BRUSSEAU

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(843) 760-0220
swheeler@scnlaw.com

ALSO PRESENT:

Jodi Loup (appearing remotely)
Dale Winovich

1 critical path is delayed, the project will be
2 delayed?

3 A. Correct.

4 Q. Okay. When the repainting was
5 occurring, was it a critical path activity?

6 And maybe I can ask that a little
7 better way. Was the repainting -- was the
8 completion of the repainting would have allowed you
9 to open the hotel?

10 MR. TIMBES: Object to the form.

11 THE WITNESS: Balfour Beatty received a
12 TCO in November. I would say that the delay from
13 middle of December to January to the opening of the
14 hotel was caused by the repainting of the rooms.

15 MR. TERRY: That's all the questions I
16 have.

17 THE WITNESS: Thank you.

18 MR. HILDEBRAND: Anyone else on the
19 phone?

20 MR. WHEELER: Yeah, I've got a few
21 questions.

22 EXAMINATION

23 BY MR. WHEELER:

24 Q. This is Sam Wheeler. I represent
25 Strong Tower Construction, LLC. Thanks for being

1 here the last couple of days, Kim. I appreciate
2 it. Can you hear me all right?

3 A. Yes, I can.

4 Q. Okay. Are you familiar with Strong
5 Tower Construction?

6 A. I believe so. Can you refresh my
7 memory?

8 Q. Sure. They would have done the -- it
9 was labeled as a Hope's bronze or steel doorfront
10 system. It would have been the doors and windows,
11 the bronze doors and windows that are on the
12 exterior of the first floor for the street level
13 floor.

14 A. Yes.

15 Q. Okay. Do you recall having any direct
16 communications with any representatives or any
17 employees or trades of Strong Tower?

18 A. I specifically did not. I remember
19 that prior to the job starting that Mike Bennett
20 and I believe some employees from Balfour Beatty
21 actually went to the Hope's manufacturing facility
22 up north somewhere to look at these Hope's windows
23 and doors.

24 Q. Okay. As it relates to the
25 installation of the doors, did you have

1 communications with Strong Tower?

2 A. I specifically did not.

3 Q. Okay. Are you aware of any issues or
4 defects with Strong Tower's scope of work?

5 A. Not necessarily. I do know that there
6 was some leaking in the dining area doors off of
7 the patio. I believe that Strong Tower or Coach
8 had to come out to look at that on several
9 occasions. And I think it -- the issue is due to
10 the -- how the flashing was installed. And as I
11 testified earlier, I'm not sure who the responsible
12 party was to install the flashing in the area
13 between the block and the frames of the Hope's
14 windows and doors.

15 Q. Okay. I got some discovery responses
16 from Balfour Beatty and they indicated that Library
17 Associates did identify a leak in one of the doors.
18 To your knowledge is the only area leaking that
19 area isolated to the patio -- the entrance to the
20 patio and dining area?

21 A. Yes, at this time.

22 Q. Okay. And were those issues corrected
23 before opening or at any point after opening the
24 hotel?

25 A. No. I -- I'd have to check with our

1 general manager in the operations to find out if
2 there's still any issues with that leaking. I do
3 know someone has been out to try to repair it.
4 Again, those -- it would probably be e-mails from
5 the chief engineer, maintenance engineer at the
6 hotel, Ryan Quinlan. I believe he's had some
7 conversations or e-mails regarding some leaking
8 issues with those doors due to the flashing.

9 Q. Do you know if it's still leaking?

10 A. I do not -- I do not recall if it is
11 still leaking or not, but it is something that I
12 can find out.

13 Q. Okay. Who would know?

14 A. Like I said, our general manager, Marty
15 Wall, and our chief engineer, Ryan Quinlan, would
16 know. Again, they would -- they have been in
17 discussions with Coach on those issues.

18 Q. Okay. So I guess if you don't know if
19 it's been corrected, suffice to say you don't know
20 any particular level of damage that might be
21 associated with that leak, is that right?

22 A. That's correct.

23 Q. Okay. Are you -- do you have any
24 knowledge of any delays that were caused by Strong
25 Tower's work?

1 A. Not that I'm aware of.

2 Q. Okay. So the only thing potentially
3 that you could be charging Balfour Beatty for that
4 Strong Tower charges you -- or back charges you,
5 Strong Tower is correcting any leak to the patio
6 and dining area door, is that correct?

7 A. I would say that's a fair assessment.

8 Q. Okay. And I understand the issue, I
9 believe, that Library Associates is going to claim
10 that it's more than paid Balfour Beatty in full.
11 But setting aside the issue with release of the
12 payment in full, again outside of the one issue
13 with the leaking doors, the patio and is that
14 properly deducted, is there any reason in Library
15 Associates' estimation that Strong Tower should not
16 be compensated by Balfour Beatty under its contract
17 with Balfour Beatty?

18 MR. McDONALD: Object to the form.

19 BY MR. WHEELER:

20 Q. I can ask it a different way. If the
21 leak is properly charged back to Strong Tower, does
22 Library Associates have any objection to Strong
23 Tower collecting the remainder of its balance from
24 Balfour Beatty under its contract with Balfour
25 Beatty?

1 A. I'm sorry, can you repeat the question?

2 Q. I can try. If you take into account
3 the leaks and any damages associated with leaks to
4 the patio door and that figure is properly back
5 charged to Strong Tower, are there any other
6 damages that Library Associates would be claiming
7 that would prevent Strong Tower from collecting the
8 remainder of its contract balance from Balfour
9 Beatty under its contract with Balfour Beatty?

10 A. As I sit here today, I don't think that
11 there would be any reason.

12 Q. Okay. So effectively then, Strong
13 Tower needs to determine any damages associated
14 with that one leak, deduct that from its balance,
15 and then it can go about collecting its balance
16 from Balfour Beatty, is that Library Associates'
17 position?

18 A. I would think that would be fine.

19 MR. WHEELER: Okay. Thank you very
20 much, Kim. I appreciate your time.

21 THE WITNESS: Thank you.

22 EXAMINATION

23 BY MR. FREEMAN:

24 Q. Hi. This is Ian Freeman. I can go.
25 Can you hear me, Miss Brown?



Deposition of:
James M Clements , Volume II

August 26, 2020

In the Matter of:
Balfour, Beatty v. Library Associates

[A. William Roberts, Jr & Assoc.](#)

800-743-3376 | calendar-awr@veritext.com | www.veritext.com

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON
4 BALFOUR BEATTY CONSTRUCTION, LLC,
5 Plaintiff,
6 vs. CASE NO. 2019-CP-10-01108
7 LIBRARY ASSOCIATES, LLC; AND METROPOLITAN LIFE
8 INSURANCE COMPANY, A NEW YORK CORPORATION,
9 Defendants.
10 -----
11 LIBRARY ASSOCIATES, LLC,
12 Third-Party Plaintiff,

13 vs.

14 LITHKO CONTRACTING, LLC, GUY M. BEATY, INC.,
15 BERNARD MMC, LLC, GULF STREAM CONSTRUCTION COMPANY,
16 INC., PRECISION WALLS, INC., PALMETTO AUTOMATIC
17 SPRINKLER COMPANY, INC., COOK & BOARDMAN, LLC,
18 1st CHOICE GLASS, INC., STRONG TOWER CONSTRUCTION,
19 LLC d/b/a KOCH CORPORATION, WATSON ELECTRICAL
20 CONSTRUCTION CO., LLC, TRIMARK FOODCRAFT, LLC,
21 PLEASANT PLACES, INC., DAVID ALLEN COMPANY, INC.,
22 PREMIER EXTERIORS, LLC, ROBERT THOMAS IRON DESIGN,
23 LLC, WARCO CONSTRUCTION, INC., OLD NORTH STATE
24 MASONRY, LLC, TOM ROCHESTER & ASSOCIATES d/b/a
25 SOUTHEASTERN ARCHITECTURAL SYSTEMS, FORTON COMPANY,
LLC, LOWCOUNTRY CASE & MILLWORK, INC., QUANTUM
COATINGS, LLC, BALFOUR BEATTY CONSTRUCTION GROUP,
INC.

Third-Party Defendants.

20 DEPOSITION OF: JAMES M. CLEMENTS - VOLUME II
21 DATE: August 26, 2020
22 TIME: 9:07 AM
23 LOCATION: Parker Poe Adams & Bernstein, LLP
24 200 Meeting Street, Suite 301
25 Charleston, SC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: TERRI L. BRUSSEAU

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ALSO PRESENT:

John Heuer - in-house counsel for
Balfour Beatty Construction, LLC
(appearing via virtual zoom)

(INDEX AT REAR OF TRANSCRIPT)

1 for tomorrow. And I represent Watson Electrical
2 Construction, Lithko and Old North State Masonry,
3 so I will schedule your -- I'll send you a new
4 notice and subpoena for the 5th as long as that
5 works for Tom and his office there.

6 MR. HILDEBRAND: Sure.

7 THE WITNESS: That's fine.

8 MR. TERRY: Great. Thank you.

9 MR. HILDEBRAND: So everybody just mark
10 your calendars for October 5 and we'll get that on
11 the books. Otherwise, any subs who want to ask
12 questions up until 4:30, go ahead and just don't be
13 bashful.

14 EXAMINATION

15 BY MR. WHEELER:

16 Q. Tom and Jim, can you hear me all right?

17 A. Yes.

18 Q. Okay. My name is Sam Wheeler. I
19 represent Strong Tower Construction, LLC doing
20 business as Koch Corporation. I just have a few
21 minutes of questions for you.

22 Are you familiar with this company and
23 its role in the construction of Hotel Bennett?

24 A. I believe we contracted with your firm
25 to provide the storefront doors and systems, is

1 that right?

2 Q. That's correct. I'll represent to you
3 it was called a Hope's bronze and steel door front
4 system. Does that ring a bell?

5 A. Right. I spoke with your CEO at
6 various times after the project was over.

7 Q. Okay. Thank you. In taking Kim
8 Brown's deposition, she -- I'll represent to you
9 she testified that Library Associates had no claims
10 for delays associated with Strong Tower's work.
11 Are you aware of any delays that would have been
12 associated with Strong Tower's work?

13 A. No.

14 Q. Okay. Again, Kim Brown testified that
15 the only issue to Strong Tower's work related to
16 some flashing on a patio door. And I believe that
17 patio door also goes into the restaurant area that
18 would be on Marion Square. She said there was a
19 leak in the flashing -- or I believe in the door
20 associated with the flashing. Are you aware of
21 that issue?

22 A. I think what she's referring to is
23 Balfour Beatty. Or, actually, your firm never
24 installed the weatherstripping on those doors and
25 it was only after until they started leaking was it

1 discovered that the weatherstripping was missing.

2 Q. Do you know if weatherstripping was
3 later installed on those doors to correct that
4 issue?

5 A. No, I do -- I want to say yes, but
6 don't hold me to it. I believe that work was
7 completed. Because Hope's did come back in. Yeah,
8 I'm 99 percent sure that work was completed because
9 Hope's came back in for final adjustments and I
10 seem to recall them working in that restaurant area
11 on those doors or Koch Company.

12 Q. So Strong Tower completed the fix with
13 that issue or the manufacturer completed the fix
14 with that issue?

15 A. Yeah, I'm not aware of the difference.
16 I just saw people working there, whether it was
17 Koch or -- I don't recognize the name Strong Tower
18 at all. I mean, we dealt -- I do remember Koch.

19 Q. Okay. They're one and the same. I
20 said Strong Tower. I'll use Koch if that's easier
21 for you.

22 A. Yeah, because Koch was the labor side
23 of the Hope's doors and windows installation. As I
24 recall, you held the contract and Hope's provided
25 you the materials, right?

1 Q. Right. So either way, whether it's
2 Koch or Hope's, the weatherstripping issue, you're
3 99 percent sure that issue was corrected?

4 A. Yeah, I seem to recall that being done
5 before I left. Either it is or it isn't, so...

6 Q. To the extent it wasn't done by Strong
7 Tower -- or, excuse me, Koch or Hope's, do you have
8 any idea what the cost associated with that fix
9 might be? Sounds like a pretty cheap fix to me,
10 but maybe I'm wrong.

11 A. No. No. And the reason I say
12 weatherstripping, because it was the gap between
13 the doors when I was there prior to the hotel
14 opening that was letting the water in. And I seem
15 to recall Tim Spano telling me that they had
16 forgotten the weatherstripping and I thought that
17 was installed.

18 Q. Okay. So Kim said flashing, you're
19 saying weatherstripping. Either way it sounds like
20 in your estimation the issue was resolved, is that
21 right?

22 A. That's what I recall.

23 Q. Okay. Are you aware of any other
24 issues associated with Koch's work on the project?

25 A. Well, there were issues with the main

1 doors, hardware adjustment issues, while I was
2 still there. I believe repairs were made, but not
3 by Koch, but by a local company that your -- I
4 spoke with your -- some person in your company.
5 They referred me to a company in Charleston who
6 actually came out and did door adjustments because
7 they were dragging or they were hard to open and
8 those type of things. I'm trying to look up the
9 guy's name right now. You probably know who I'm
10 talking about.

11 Q. I do not, but that would be helpful.
12 Do you have any idea what that might
13 have cost to fix?

14 A. Oh, no, I wouldn't have any idea on
15 cost.

16 Q. But that issue has also been fixed, is
17 that right?

18 A. Jeff Slater. Does that ring a bell?

19 Q. Not with me, but that doesn't mean a
20 whole lot.

21 A. As far as I know, adjustments were made
22 on the main entrance doors. Whether that's --
23 there's been work done since then, I don't recall,
24 but prior to the hotel's opening I know that there
25 were issues with the doors dragging or something

1 like that, but I thought the work was corrected.

2 Q. Okay. Any other issues with Koch's
3 work that you can recall?

4 A. No. No. When you say issues, you mean
5 open issues, unresolved issues?

6 Q. Unresolved issues.

7 A. No, I don't recall anything else.

8 Q. Okay. Were there any issues that went
9 on during the project that Koch did not resolve
10 during the course of the project?

11 A. No. They were a pleasure to do
12 business with.

13 Q. Okay. I asked Kim the same thing. To
14 the extent that someone helped pay for the
15 weatherstripping and the adjustment to the front
16 door, is there any other cost or damages that would
17 prevent Koch from being compensated by Balfour
18 Beatty under its contract with Balfour Beatty?

19 A. Nothing that I am aware of.

20 Q. And you're not aware of any delay
21 claims or claims for liquidated damages associated
22 with Koch's work, right?

23 A. I am not aware of any.

24 MR. WHEELER: Okay. Thank you very
25 much. That's all I have for you.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
C.A. NO. 2019-CP-10-01108

BALFOUR BEATTY CONSTRUCTION, LLC,
Plaintiff,

vs.

LIBRARY ASSOCIATES, LLC; and METROPOLITAN
LIFE INSURANCE COMPANY, a New York Corporation
Defendants.

LIBRARY ASSOCIATES, LLC,

Third-Party Plaintiff

vs.

LITHKO CONTRACTING, LLC, et al.

**CERTIFIED
TRANSCRIPT**

ZOOM VIDEO DEPOSITION OF TIMOTHY SPANO

December 17, 2020

9:03 a.m.

* * *

Taken By the Defendant Library Associates
remotely By
Zoom Video Conferencing

Reported By:

Taura J. Vulcano, CSR, RPR

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VIDEOGRAPHER:

Elisheva Galiley

ALSO PRESENT:

Kelly Guion

Kim Brown

I N D E X

EXAMINATION

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E X H I B I T S

(No exhibits were marked.)

* * *

1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: Good morning. We
3 are now on the record. The time is now 9:03 a.m.
4 on December 17, 2020. This begins the videotape
5 deposition of Timothy Spano, taken in the matter
6 of Balfour Beatty Construction, LLC, versus
7 Library Associates, LLC, et al., filed in the
8 Court of Common Pleas, Ninth Judicial Circuit.
9 Case number of which is 2019-CP-1001108.

10 My name is Elisheva Galiley. I am your
11 remote videographer today. The court reporter is
12 Taura Vulcano. We are representing AdvancedONE
13 Legal. As a courtesy, will everyone who is not
14 speaking please mute your audio and please
15 remember to unmute your audio when you are ready
16 to speak.

17 Counsel, will you please state your
18 name and whom you represent after which the court
19 reporter will swear in the witness.

20 MR. BUNDY: This is Bill Bundy. I
21 represent Library Associates, LLC.

22 Did I unmute it? Did you hear me?

23 THE VIDEOGRAPHER: I did, yes.

24 MR. LINTON: This John Linton. I
25 represent Bernhard MCC, LLC.

1 MR. RANNIK: This is Jaan Rannik. I
2 represent Lowcountry Case & Millwork.

3 MS. IGDAL: This is Rachel Igdal. I
4 represent Pleasant -- Pleasant Places, Inc.

5 MR. TERRY: This is Don Terry.

6 MS. DiFRANCO: This is --

7 MR. TERRY: I represent -- this is Don
8 Terry. I represent Watson Electrical
9 Construction, Lithko Contracting, and Old North
10 State Masonry together with my partner Al Windle.

11 MR. TIMBES: This is Michael --

12 MS. DiFRANCO: This is --

13 MR. TIMBES: -- Timbes. I represent
14 Quantum Coatings, LLC.

15 MS. DiFRANCO: This is Sarah DiFranco.
16 I represent Cook and Boardman, LLC. I have my
17 associate Sarah Fritsch here today too, so she's
18 also logged in.

19 THE VIDEOGRAPHER: If all counsel has
20 identified themselves, the court reporter may now
21 swear in the witness.

22 MR. BUNDY: Did Mr. Hildebrand
23 represent himself? I didn't hear him.

24 THE COURT REPORTER: He did not.

25 MR. BUNDY: I don't want to start

1 without his lawyer there.

2 THE VIDEOGRAPHER: I see him on mute.

3 Would you like to go off the record until we --

4 MR. HILDEBRAND: No, I think we are
5 good. Yes. Tom Hildebrand for Balfour Beatty.
6 Acknowledge it was muted.

7 Whereupon,

8 TIMOTHY SPANO,
9 having been first duly sworn was examined and
10 testified as follows:

11 EXAMINATION BY MR. BUNDY

12 Q. Good morning, Mr. Spano. How are you this
13 morning?

14 A. I'm great. How are you?

15 Q. Good. My name is Bill Bundy. I represent
16 Library Associates, the owner of the hotel. We're
17 going to probably be here most of the day. So there's
18 no rush, okay. And I want you to take all the time
19 you need to answer the questions, to think about the
20 answers, whatever you need to do, okay? This isn't
21 a -- this is not a test, and it's not a road race,
22 okay?

23 A. Sure.

24 Q. Okay. Have you ever had your deposition
25 taken before?

1 A. I have not.

2 Q. Okay. I'm sure that you've probably
3 discussed it with others at Balfour Beatty, but I'm
4 obligated to give you a little bit of a talk so to
5 speak under our rules. Once you have been sworn,
6 which you now have been sworn to the tell the truth,
7 the whole truth, and nothing but the truth, you're
8 only to discuss this matter with me, okay, until you
9 are finished, we're finished with the deposition,
10 okay? So during a break, you're not -- it's not
11 proper for you to discuss your testimony with anyone,
12 including Mr. Hildebrand, okay?

13 A. Okay.

14 Q. If you have a question about a question that
15 I ask you or about a document we might be looking at,
16 those questions should be directed to me, not to
17 anyone else, okay, unless you're told otherwise, all
18 right?

19 A. Understood.

20 Q. The purpose of your deposition from my
21 standpoint is to find out what you know, okay, what
22 your firsthand knowledge is about the facts of this
23 case. I'm just a lawyer, okay. I don't care. I
24 wasn't there. I don't have any way of knowing what
25 happened, and it doesn't behoove me to argue with you

1 about something that happened on a job I was never on,
2 okay? So that's not what I'm about here, okay?
3 Argument comes at trial, and, you know, this is
4 probably the only time you and I will ever get a
5 chance to talk to each other until we get ready to try
6 this case in the courtroom, okay?

7 A. Sure.

8 Q. So I just want to know what you know, okay?

9 A. Sure.

10 Q. So if you answer a question that I ask you,
11 I'm going to assume you understood it, unless you tell
12 me otherwise. Fair enough?

13 A. Fair enough.

14 Q. Okay. What have you done without -- just
15 tell me what have you done to prepare for your
16 deposition today.

17 A. Basically just conversed with Tom and John
18 Heuer a little bit about kind of what to expect.

19 Q. Okay.

20 A. You know what I mean. And --

21 Q. I don't want to know -- yeah, I don't need
22 to know what they've told you, okay, because they're
23 your lawyer, okay.

24 A. Right.

25 Q. Have you reviewed any documents in

1 preparation for your deposition?

2 A. Not hardly any. Basically just went through
3 some e-mails, stuff like that.

4 Q. Okay.

5 A. Just kind of in general.

6 Q. Okay. And you went through those e-mails in
7 the presence of your lawyers?

8 A. No. Just kind of at the house looking
9 around, yeah.

10 Q. Oh, okay. So you went back on your own --
11 you went back --

12 A. Yeah, I just -- I just kind of refreshed my
13 memory on a couple of things, just kind of more --
14 it's been so long.

15 Q. Right.

16 A. I'm just kind of -- to refresh my memory on
17 timing of when the job started, when the job finished,
18 that kind of stuff.

19 Q. Sure, sure, sure. Okay. Good. And when
20 did you do that? Do you mind if I call you Tim?

21 A. No, that's fine. That's what most people
22 call me.

23 Q. Okay. Good.

24 A. Just in the last probably couple weeks, once
25 I knew I was getting deposed, just minor --

1 Q. Okay.

2 A. -- e-mails to get a -- get a rough idea.

3 Q. I got you. And were those documents in your
4 home, or did you review them in your office at Balfour
5 Beatty?

6 A. Office.

7 Q. Okay. Do you have any documents at home
8 that wouldn't be at the office? Do you keep any
9 documents --

10 A. I don't.

11 Q. Okay. So you don't keep separate records
12 that would not be Balfour Beatty, right?

13 A. No, no.

14 Q. And do you have any photographs or anything
15 else at home that wouldn't be at Balfour Beatty and
16 would have been produced under a request for Balfour
17 Beatty?

18 A. I do not.

19 Q. Okay. Fair enough. Speaking of records,
20 what kind of records did you keep or create or however
21 you want to describe it during the hotel job?

22 A. I mean, most records are me -- I should say
23 kind of meetings where I -- you know, definitely taken
24 meeting minutes that was probably taken by like one of
25 my engineers, assistant PMs, stuff like that. Our

1 job, of course, notes down, and then, of course, put
2 it in an e-mail or put it, you know, if there was
3 anything I need to do, just kind of tasks of, you
4 know, for the day, type thing.

5 Q. Sure. Sure. And those notes, I assume,
6 once they found their way to an electronic format
7 would have been thrown away, you don't keep your paper
8 notes at all, do you?

9 A. I don't. I'd need a big room for that just
10 for -- and I don't think anybody could read them but
11 me because I'm a chicken scratch guy but.

12 Q. I know where you're coming from.

13 A. Yeah.

14 Q. Did you take any photographs? Do you have a
15 camera you took photographs with, or did you use your
16 phone to take photographs?

17 A. We'd use -- just use the phone, yeah, to
18 take photographs.

19 Q. And you took some on the job?

20 A. I took some, yeah.

21 Q. And would those be in the files of Balfour
22 Beatty?

23 A. They would. They would.

24 Q. Okay. Do you know whether Balfour Beatty
25 hired a professional photographer or videographer

1 **during this job to photograph the work?**

2 A. Well, like at the beginning -- I'm trying to
3 remember their name. But one thing we do, like,
4 before we start a job especially if we're going to
5 do -- drive piles or anything like that and then the
6 area that job was in, with the Lutheran church across
7 the street, we definitely -- I hired a company to come
8 in and do photographs of the surrounding buildings,
9 cracks in the outside --

10 **Q. Right.**

11 A. -- just so if something came up later, we
12 had surface documentation of any vibrations, stuff
13 like that. That was something we always do. We do --
14 we typically -- if something comes up, we would bring
15 them back, you know what I mean, to take photographs
16 again to do a comparison.

17 **Q. Sure.**

18 A. That kind of thing. I think the only
19 professional photography we did after that, I think,
20 was just we did a video walkthrough of the job later
21 on at the end that was done kind of with Tom. Tom and
22 I walked and did a video.

23 **Q. A video, who did?**

24 A. I don't know the person that did it.

25 **Q. Okay.**

1 A. But Tom and I had walked the job.

2 Q. Tom who?

3 A. Hildebrand.

4 Q. Okay. All right. So -- and when did you
5 and Tom Hildebrand walk the job and produce a video or
6 have a video produced?

7 A. Well, we walked the job, I want to say it
8 was probably the beginning of 2019, right at the --
9 right at the very end of it.

10 Q. Okay. So it was just you and
11 Mr. Hildebrand?

12 A. And the -- and the person videoing. Nick
13 Starcevic was in part of it at the beginning, and then
14 he had to leave, and then I took it from there and
15 finished up.

16 Q. Is the video narrated?

17 A. With Nick and I talking, yes.

18 Q. Okay. And do you know where that video is
19 today?

20 A. I have no idea.

21 Q. Okay. Did you keep a copy?

22 A. I did not.

23 Q. Okay. And what was your understanding of
24 the purpose of the video?

25 A. Just to document the kind of multitude of

1 changes throughout the job, just kind of walked each
2 phase, talked about what was contracted originally and
3 then what ended up changing, just kind of walking
4 through the areas, speaking to it.

5 Q. Okay. And do you know what use, if any, has
6 been made of that video in this case?

7 A. I have no recollection of anything. I
8 haven't seen it again. I haven't heard about it
9 again.

10 Q. All right. Was it your -- and you tell me
11 if I'm wrong. Was it your understanding the primary
12 purpose of the video was to educate Mr. Hildebrand?

13 A. I think so.

14 Q. Okay.

15 A. Yeah, yeah.

16 Q. Have you seen the video since it was
17 created?

18 A. I haven't. I haven't seen it. I haven't
19 looked at it.

20 Q. Okay. All right. Any other photographs or
21 videography that you're aware of?

22 A. Not that I'm aware of, no.

23 Q. Okay. All right. All right. Let's
24 start -- how old are you, Tim?

25 A. 54.

1 Q. Okay. Where were you born?

2 A. Tampa, Florida.

3 Q. Tampa, all right. Where did you graduate
4 from high school, Tim?

5 A. Brandon High School.

6 Q. In?

7 A. In 1984.

8 Q. And where is that located?

9 A. Brandon, Florida. Brandon, Florida.

10 Just --

11 Q. Brandon?

12 A. -- eastern side of Tampa Bay.

13 Q. Right.

14 A. Yeah.

15 Q. All right. And did you go to college?

16 A. I went to some college, Dalton College in
17 Georgia, north Georgia.

18 Q. Okay.

19 A. About a year and a half. Did not graduate.

20 Q. All right. And did you go right out of high
21 school?

22 A. I did.

23 Q. Okay. So roughly you -- you stopped at
24 Dalton around 1985, '86?

25 A. Yep.

1 Q. Is that about right?

2 A. Yes, sir.

3 Q. Okay. If you would then, give me your --
4 have you -- let me -- strike that.

5 After Dalton, Georgia, have you been -- have
6 you had any close -- any education or any courses
7 subsequent to that? After --

8 A. No. Just general -- you know, I -- general
9 contract -- I have a general contractor's license in
10 Georgia, and then, of course, in -- it was later,
11 probably '07, I took the general contractor's exam at
12 Florida for Balfour, passed that, didn't use it. It
13 was something that some jobs were coming up and
14 Balfour asked me to take it, so I took it. But ended
15 up not using it because we had other GCs in our
16 company that we were able to utilize on some of those
17 jobs, so ...

18 Q. Do you know who holds -- who holds a general
19 contractor's license for Balfour in South Carolina?

20 A. I'm pretty sure Tony Stoneking --

21 Q. All right.

22 A. -- is one of them. I think we have about
23 three guys that do. Tony is the vice president for
24 us. He holds one and I believe Johnny Rankin also
25 holds one.

1 Q. Johnny Rankin?

2 A. Johnny Rankin, yes.

3 Q. Are you -- do you hold a general
4 contractor's license in South Carolina?

5 A. I do not.

6 Q. Okay. But you hold one in Florida and
7 Georgia?

8 A. I don't hold one in Florida anymore, and I
9 don't hold one in Georgia anymore. Just back then --

10 Q. I got you.

11 A. Yeah, I had one in Georgia, and I took the
12 test in Florida but did not activate. Didn't need to.

13 Q. Okay. But you've let them expire. They
14 weren't rescinded or anything. You just don't use
15 them?

16 A. Correct.

17 Q. All right. Do you hold any other licenses
18 other than a driver's license, like professional
19 engineer or anything like that?

20 A. No, no.

21 Q. Okay. No real estate broker license, none
22 of that kind of stuff?

23 A. No.

24 Q. Okay. What is your -- how often was
25 Mr. Stoneking on this job?

1 A. I believe maybe -- twice maybe throughout
2 the job.

3 Q. Okay.

4 A. He probably showed up more toward the --
5 probably the first half of it, you know, more
6 structure, that type of thing.

7 Q. Did he have any duties specific to this job,
8 or was he just showing up as an employee -- or an
9 officer in Balfour Beatty?

10 A. Well, he showed up. He's a very intelligent
11 guy, and he'd show up and just kind of do plan flips
12 and, you know, ask what are you doing here, what are
13 you doing there, you know, you thinking about
14 waterproofing, you thinking -- when are you thinking
15 dried in, you know, just kind of specific questions
16 like that.

17 Q. Sure. Was he responsible for this job in
18 any way?

19 A. No.

20 Q. Okay. How about Mr. Rankin, what did he do
21 on this job?

22 A. Nothing. Never saw Johnny. Johnny was --
23 Johnny's just a high-level officer in our company.
24 Retired now, but ...

25 Q. Okay. So -- and you think -- and you there

1 may be others at Balfour Beatty who at the time
2 were -- held a license in South Carolina, but you
3 can't recall --

4 A. I think there was -- I think there was one
5 other that I've seen.

6 Q. Okay.

7 A. But I can't recall the name.

8 Q. Okay. Putting aside being able to recall
9 their name, do you know that person, that nameless
10 person, whether that nameless person was responsible
11 for anything on this job?

12 A. No, they're not.

13 Q. Okay. They would not be?

14 A. Would not be, no.

15 Q. Do you know of -- do you have any knowledge
16 of the requirements of South Carolina law as it
17 relates to the presence of the license holder on a job
18 in South Carolina with regard to the license holder of
19 the South Carolina general contractor's license?

20 A. I do not.

21 Q. Okay. Do you -- are you aware of any --
22 your knowledge of the Georgia licensing requirements,
23 you did have a license there at one time, right?

24 A. Many moons ago so no, I'm not.

25 Q. I get it. I get it. Do you recall whether

1 or not in Georgia there were any requirements that the
2 license holder actually be involved in the job or be
3 on the job?

4 A. I don't recall.

5 Q. Okay. And I assume the same answer would be
6 true for Florida?

7 A. Correct.

8 Q. Okay. Fair enough. All right. So let's go
9 back then to 1985 and begin with your work history,
10 Tim. Can you tell -- until today?

11 A. Starting at 1985 or prior?

12 Q. Sir?

13 A. Prior to '85 -- the reason I'm saying
14 that --

15 Q. Okay. Go ahead.

16 A. I'm sorry. The reason I'm saying that is my
17 dad was a general contractor, so I grew up in the
18 business. I grew up around the business. My
19 grandfather was a contractor. So it was just
20 something our family did.

21 Q. It's in your blood.

22 A. Yep, I would say so, it is. So yeah, it was
23 kind of something that, you know, I guess I kind of
24 carried on, you know, the tradition, but I was around
25 it.

1 So 1985, when I graduated high school, prior
2 to that I had just worked for my dad, you know, on the
3 side doing whatever, doing framing, trimming. I did
4 whatever he needed done. And then when -- 1985 when I
5 moved to Georgia, my dad had actually moved up there
6 toward the end of '85 and was running a construction
7 company up there. So when I moved up there to go to
8 school, that was one of the reasons I moved up there,
9 knowing I could work for my dad while I was going to
10 school, so ...

11 **Q. Tell me a little bit about his company in**
12 **Georgia. What size was it? Just give me some idea of**
13 **what kind of company it was.**

14 A. Oh, gosh, it was probably -- my uncle from
15 my mother's side had sold a trucking company for, I
16 guess, multiple millions and had over the years
17 accumulated property he wanted to develop. So I would
18 say -- it's hard to -- it's hard to say a number. It
19 was so long ago. But we would have several jobs going
20 at a time from -- from residential to commercial,
21 terminal and offices, things like that. So it's kind
22 of a little diversified between commercial,
23 industrial, residential, but size --

24 **Q. What was --**

25 A. (Unintelligible due to cross-talk.)

1 Q. What was the name of that company -- what
2 was the name of the company?

3 A. Gosh.

4 Q. That's okay. That's all right.

5 A. I don't recall.

6 Q. That's fine. That's fine. All right.

7 Let's go -- okay -- let's keep going forward then.

8 You went to Dalton and you worked for your dad while
9 you were going to Dalton College. And then what --
10 then how did that progress?

11 A. When -- let's see, I went to school and then
12 in 1987, I guess I was kind of back and forth. I
13 worked there for a little while, I went to Florida for
14 about a year, didn't do construction for about a year,
15 worked for another company in Tampa, kind of a
16 wholesale warehouse with some friends of mine, and
17 then Dad called me, I need you -- I need you. So I
18 moved back up, went back to work for him.

19 At that point I started kind of -- I got the
20 license. I had been kind of subbing, you know what I
21 mean? We'd have jobs doing. I put framing crews
22 together, trimming crews. I did whatever to make
23 money.

24 Q. Right.

25 A. And started making good money at that time

1 and was kind of probably one of the decisions I ended
2 up not finishing school was, you know, I was doing
3 well and engaged. I ended up getting married in 1987.
4 At that point I recall interest rates were up around
5 21 percent, the construction industry almost came to a
6 halt, it hit north Georgia probably more than it --
7 first before it hit more places.

8 **Q. That's because it was Jimmy Carter's**
9 **problem?**

10 A. Right. You're right. I remember that.

11 So got married, went -- basically moved
12 immediately back to Florida and was doing kind of
13 small jobs, construction-wise, and then went to --
14 became superintendent for Chadwell Homes at the time,
15 which was around, yeah, end of '87 I guess, right in
16 there, '88.

17 **Q. Okay. And how long did you work for them?**

18 A. It was probably about two, three years,
19 something like that.

20 **Q. Residential construction?**

21 A. It was residential, yeah.

22 **Q. Okay. All right. Tim, how about after**
23 **that?**

24 A. Oh, gosh. Let me think where I went after
25 that. That was '87 and then I guess -- I'll say

1 beginning around 2000, somewhere in there, I went to
2 work for RCS Incorporated. We basically did
3 commercial, industrial refrigeration construction all
4 over the Tampa, Lakeland, you know, kind of
5 surrounding counties area.

6 **Q. Okay. And how long were you with RCS?**

7 A. Till -- probably about three years.

8 **Q. Okay. And when you left them, what was your**
9 **position with RCS?**

10 A. I was a project manager.

11 **Q. All right. After RCS what did you do?**

12 A. I ended up -- Centex Construction, which was
13 formally bought out by Balfour Beatty. I hired on
14 with Centex, was basically hired on as a
15 superintendent at the time and was working in the --
16 I'm trying to think what we called it. We basically
17 had contracts with Bank of America, Fifth Third Bank.
18 We were building banks kind of all over the state of
19 Florida is what I was doing, so I was building ground
20 up banks for them.

21 **Q. Sort of freestanding branch banks?**

22 A. Oh, yeah, clearing the lot to handing them
23 the keys, yeah.

24 **Q. So how long were you with Centex doing that**
25 **work?**

1 A. I was doing that work till '07. I had in
2 the meantime about halfway through probably around '05
3 after building a few banks on the superintendent side,
4 because I originally went there for project manager
5 position, and they had asked me to be a super knowing
6 my super background to start with, so I rolled into a
7 project management position. And then I ended up kind
8 of taking over BB&T banks for Florida when they came
9 in, so was heading up the BB&T branch banking
10 expansion into Florida. '07, again that's when -- I
11 guess right before the crash when things kind of came
12 to a halt with new branch banking. I had basically
13 positioned -- I changed to kind of our Atlanta
14 division. We had a military -- huge military contract
15 coming about at the end of '07 for the southeast
16 United States, and a lot of that was in Florida. So
17 there was work going on on naval bases in about, I
18 think it was five or six locations around from Key
19 West, the Gulf Coast over to Mississippi, panhandle,
20 there were several bases we were going to be doing
21 work on. So I handled the Gulf Coast region from a
22 project management side and would basically -- was
23 based out of Tampa but would travel.

24 **Q. Was this some -- was this military housing?**

25 A. It was -- it was called military housing,

1 yep. We did apartments, we did clubhouses, parks, you
2 know what I mean. It was kind of whatever the
3 military needed on a base.

4 Q. Was part of this, if you know, work done by
5 Balfour Beatty to -- to maintain this housing for the
6 military after they completed it? Did they have
7 anything to do in a maintenance or landlord type of
8 position, if you know?

9 A. Not -- no, not what we did, no. We were
10 just construction, new construction.

11 Q. Okay. So y'all were working directly for
12 the government, building a product. You finished the
13 products, you got paid, and you left?

14 A. Yeah, yeah.

15 Q. Okay. And so the maintenance, upkeep and
16 dealing with that thereafter, y'all weren't involved
17 in that?

18 A. No, we were not.

19 Q. Okay. All right. Okay. And you say the
20 Gulf Coast region. When you were in charge of the
21 Gulf Coast region, were you an officer or a project
22 manager?

23 A. Project manager.

24 Q. Okay.

25 A. Project manager. I answered to a project

1 executive based out of Jacksonville.

2 **Q. Okay.**

3 A. And then -- but, yeah, I would travel from,
4 you know, base to base just overseeing the work. I
5 had a -- you know, managers and teams on each site
6 but ...

7 **Q. Sure. Okay. And the government, I presume,**
8 **provided the documents, or was it a design and build**
9 **situation?**

10 A. Government provided the documents.

11 **Q. Okay. Can you give -- just give me a rough**
12 **idea the total amount of construction you were**
13 **overseeing in the Gulf area?**

14 A. Probably I think the total contract was
15 right at half a billion. I think my portion was
16 probably -- it was close to two -- it was just under
17 200 million, somewhere in there.

18 **Q. Okay. And how long of a period did you work**
19 **on Gulf Coast military projects?**

20 A. About four years.

21 **Q. Okay. When did you actually start -- when**
22 **did you actually become an employee of what is now**
23 **Balfour Beatty of the Carolinas?**

24 A. In '07. I want to say, memory serves me
25 correct, August of '07 I think is when the contract

1 was signed on that job. Right before that contract
2 was signed, Balfour Beatty bought Centex because we
3 originally had bid everything through Centex. So I
4 knew there was a slight delay because going through
5 the government, and we had to let them know of the
6 acquisition and all that stuff.

7 **Q. Sure.**

8 A. So it was the end of '07 when Balfour
9 purchased Centex commercial.

10 **Q. Okay. And you were hired on at that time**
11 **for Balfour Beatty in 2007, 2008 as an executive**
12 **project manager?**

13 A. As a -- as a project manager, yeah.

14 **Q. What was -- what was your salary, your pay**
15 **rate at that time; do you recall?**

16 A. Probably 90 maybe, 80, 90. I don't recall
17 exactly.

18 **Q. That's fine. I'm just trying to get a sort**
19 **of, you know, range of things. That's fine.**

20 A. Sure.

21 **Q. Okay. So you -- how -- when did you**
22 **leave -- was that your -- strike that.**

23 **When did you leave that project to move on**
24 **to another one for Balfour Beatty?**

25 A. In -- I guess it was about 2011 when I

1 finished up. The last project was down in Key West.
2 It was kind of the end of it. We ended up -- they
3 asked me to kind of keep staying on it for maintenance
4 and some of the issues for close to another year.

5 **Q. You didn't complain about -- you didn't**
6 **complain about being in Key West?**

7 A. It wasn't bad, wasn't bad. I was down there
8 a couple days, you know, at least every other week, so
9 it wasn't bad. It's nice to visit, wouldn't want to
10 live there though unless you're on a boat all the
11 time, but --

12 **Q. Are you a fisherman?**

13 A. A little bit, not too much, though.

14 **Q. All right. So after Key West what -- where**
15 **did you go?**

16 A. After Key West, I -- actually, I left for --
17 I left Balfour for about six months and was doing my
18 own thing, doing maintenance for Taco Bells, things
19 like that for about six months. Got a call from
20 friends up in Charlotte that had asked me to please
21 come back, please relocate to Charlotte. At the time
22 when I left Balfour for those six months I -- they
23 asked me to relocate then. I didn't because my
24 daughter -- my last child was an athlete in high
25 school. We weren't sure where she was going to

1 college. There just was a lot going on that I didn't
2 want to uproot my family at that point.

3 **Q. Sure.**

4 A. About six months -- about six months later
5 when they asked me to come, she had signed with a
6 college and kind of had -- had moved into college, so
7 it kind of made a little more sense. So I ended up
8 really moving to Charlotte for about 11 months.

9 **Q. What was her -- what athletics was she**
10 **involved in?**

11 A. She actually played softball, basketball,
12 and volleyball in college.

13 **Q. Where did she go to college?**

14 A. She went to -- first two years she went to
15 South Florida State College, a junior college, and
16 then finished her last two years at Florida College in
17 the Tampa area.

18 **Q. Good. So you were living in the Tampa area**
19 **during that six-month hiatus when you did --**

20 A. I was.

21 **Q. Okay. And you were doing maintenance for**
22 **Taco Bell, you were looking out for their various**
23 **stores or whatever?**

24 A. Yep, yep.

25 **Q. All right. So then you were -- you were**

1 recruited to come to Charlotte?

2 A. I was.

3 Q. All right. And did you move your family to
4 Charlotte?

5 A. For the 11 months I was there, no. I got an
6 apartment up there, said -- told the wife, let me go
7 get my feet wet, figure out, you know, where we're
8 going to settle down or find a house, that kind of
9 thing. So I moved up there, was basically running a
10 seven-story mixed-use project in downtown Charlotte.
11 Also apartment complex on Daniel Island down here, so
12 I was working out of the Charlotte office. I would
13 cover jobs in Charlotte and also make trips down here
14 to oversee Simmon Park -- Simmons Park Apartments.

15 Q. Simmons Apartments?

16 A. Yeah, Simmons Park.

17 Q. Simmons Park, that's on Daniel Island?

18 A. It is.

19 Q. Okay. Good. When -- did you ever move to
20 Charlotte, eventually move to Charlotte?

21 A. I had an apartment there for about 11 months
22 and actually we had located a home, we lined up the
23 moving trucks to get our house, get everything out of
24 our house in Tampa, had a date set, and I was asked
25 to -- I was asked if I would relocate to Charleston to

1 work on the Bennett, to oversee the Bennett, or I
2 should say Marion Square Hotel at the time.

3 **Q. Right.**

4 A. So at that time I made arrangements to kind
5 of -- because I was in Charleston with Simmons Park,
6 kind of checked out the area, ended up finding a house
7 here and relocate -- switching gears and ended up
8 moving to Charleston. I guess it was -- I think we
9 officially moved the house like March of '15 I think
10 is when we officially moved into our house in
11 Charleston on Johns Island.

12 **Q. Okay. So March of 2015 you moved to Johns**
13 **Island?**

14 A. Yeah.

15 **Q. I notice you still maintain a Florida's**
16 **driver's license.**

17 A. I do. I have a -- I have a house there,
18 yeah. So we -- my wife spends about -- and you may
19 understand this, I've got two granddaughter's now, but
20 with all the kids and the family, our parents, all
21 that, so yeah, we've maintained a place there. So
22 she's back and forth about half and half, but I've
23 maintained that as my primary.

24 **Q. And state income tax -- state income taxes**
25 **are much better in Florida, right?**

1 A. They are absolutely, yeah.

2 Q. Got to keep that Florida license, you know.

3 A. Yeah, yeah.

4 Q. All right. So when you -- so when you moved
5 to Johns Island, had you already started work on the
6 Hotel Bennett or Marion Square Hotel, whatever you --
7 let's just call it the Hotel Bennett, is that all
8 okay?

9 A. Sure, sure. I got -- I think I came into
10 the picture on that job it was around January, I guess
11 of '15, somewhere in that point when I got involved.
12 So I basically had come down and was looking at kind
13 of where the permitting process was, everything was in
14 for permitting. Basically kind of helped with that
15 phase. Kind of taking civil drawings and carrying
16 them over to the permit office, figuring out, you
17 know, processes here in Charleston as far as, you
18 know, SWIP inspections, things that you need to get
19 started, in other words.

20 Q. Okay.

21 A. I just recall at the time, you know, there
22 wasn't a building there. I guess there formally was a
23 library that was demoed and there was just a chain
24 link fence up and some debris at the time kind of the
25 first time I saw the site.

1 Q. All right. And your job title in January of
2 2015 when you first saw the job site for Hotel Bennett
3 was what?

4 A. Senior project manager.

5 Q. Okay. And can you tell me what the duties
6 of the senior project manager at Balfour Beatty was at
7 that time, generally?

8 A. Kind of overseeing the project I guess as a
9 whole from -- from overseeing, you know, field
10 operations, office operations.

11 Q. And you -- as a senior project manager for
12 this type of project, you would have been expected to
13 be on the site every day?

14 A. Typically your management, it kind of
15 depends. Sometimes your office is on-site, sometimes
16 your management office is off-site. In this
17 particular case, I just remember -- because -- and
18 you're probably very aware of the site size, the
19 building based on the footprint. So there wasn't
20 really room to put an office on-site with the
21 exception of a small conex for superintendents. So we
22 ended up -- I ended up finding an office across Marion
23 Square, about 1100-square foot space, and we ended up
24 making that our office. So I would be between the
25 office and walking across the square to the job. So,

1 yeah --

2 Q. Yeah.

3 A. -- I would -- (unintelligible due to
4 cross-talk.)

5 Q. Yeah. I guess I didn't ask the question
6 very well. This wouldn't be -- a senior project
7 manager building the Hotel Bennett wouldn't be working
8 out of Charlotte. They'd be working out of
9 Charleston, right?

10 A. Yeah, on -- yeah.

11 Q. That's what -- when I'm talking about
12 on-site, I don't mean --

13 A. I'm sorry.

14 Q. You know what I'm saying. I didn't ask the
15 question very well. I --

16 A. So as a -- as a senior, you would -- you
17 typically have project managers on-site and a
18 senior -- it depends on the job size. You may be over
19 one job, you may be over three.

20 Q. Right.

21 A. You know what I mean? So you're roaming
22 from one to one.

23 Q. Right.

24 A. With a job of this size, it was primarily --
25 I was designated just to this job. Simmons Park at

1 the beginning because it was kind of in a state of
2 finishing up. So I was kind of between -- I did a
3 little bit of time at Simmons Park checking on it
4 while in town, you know, while working on the Bennett.

5 Q. Okay. So maybe let me ask the question a
6 little bit better. On a job of this size, Balfour
7 Beatty would typically have a senior project manager
8 designated to a particular -- this particular job and
9 this particular job only?

10 A. Typically, yeah.

11 Q. Okay. And that's what happened here?

12 A. Yeah, yeah.

13 Q. All right. And you were on that job from
14 chain link fence and a hole all the way to the end?

15 A. All the way to the -- all the way to the end
16 to --

17 Q. All the way --

18 A. -- right now because we're still talking
19 about it.

20 Q. All -- all the way to taking a video of the
21 final product with Mr. Hildebrand?

22 A. That's correct.

23 Q. Was the job over when you -- were y'all done
24 with the job when you took that video with
25 Mr. Hildebrand, or did you all do any work after that?

1 A. I think there was probably a couple --
2 there's a couple things still lingering like, you
3 know, some of the CCD things that had to do with the
4 exterior. I think mechanical yards and gates, things
5 like that. So there were still, I think, a couple
6 open items, but it was for the most part complete.

7 Q. Okay. So after, after the video with
8 Mr. Hildebrand, you actually sent subcontractors or
9 tradesmen out to the job to do some things on the job?

10 A. I don't recall exactly, but if it was a, you
11 know, changed directive, yeah, and there was something
12 outstanding, absolutely, we'd send someone out there.

13 Q. All right. The Daniel Island job, so tell
14 me what your involvement with the Daniel Island job
15 was. Right -- that was right before the Hotel
16 Bennett, right?

17 A. Yeah, senior project manager. So I had
18 project manager assistant or senior PE,
19 superintendents on that job. So I oversaw it kind of
20 from a high level. Would, you know, check on it, deal
21 with, you know, finances or I should say oversee
22 the -- watch the pay outs, things like that. So I had
23 a project manager there day-to-day but would oversee
24 them on a high level.

25 Q. Were you -- did you -- were you on the

1 Daniel Island job from beginning to end, or were
2 you -- did you come in after the job started?

3 A. Beginning to end.

4 Q. Okay. All right. So you -- and was that
5 the only job you were working on Daniel Island, or did
6 you have other jobs during that period?

7 A. During the -- during the period of Daniel
8 Island, I was also building a seven-story mixed-use in
9 Charlotte.

10 Q. Okay. All right. So prior to Hotel Bennett
11 you were the senior project manager on two jobs, the
12 Daniel Island job and the seven-story project in
13 Charlotte. Those ended and then you go to Bennett
14 Hotel and direct all your energies to Bennett Hotel
15 until it's finished.

16 A. Yeah. So let me rephrase a little here. So
17 the Mint -- the job I was on in downtown Charlotte was
18 not completely done, but when they asked me to come
19 down here, then they basically took over -- took me
20 off that job and said just focus in Charleston, help,
21 you know, help button up Simmons Park and get Hotel
22 Bennett off the ground.

23 Q. Okay. But your responsibility on those jobs
24 was over once you got to Bennett hotel?

25 A. That's correct.

1 **Q. Your sole responsibility was Hotel Bennett?**

2 A. Yeah, except for the first probably six
3 months I still was, you know, keeping an eye on
4 Simmons Park, finishing up.

5 **Q. Okay. How much -- how much before**
6 **January 2015 when you went to go to work on the Hotel**
7 **Bennett were you aware of the existence of that job,**
8 **the Hotel Bennett or the Marion Square Hotel, whatever**
9 **it was called at that time?**

10 A. Not -- not really any. I knew there was --
11 I knew there was a job -- a potential job in
12 Charleston. That's all I had heard.

13 **Q. So just -- just office gossip basically?**

14 A. Yeah, yeah, yeah. I had no -- no details or
15 anything like that about it.

16 **Q. Nobody came to you and asked you about the**
17 **job or told you anything about the job or told you you**
18 **might be involved in the job?**

19 A. No.

20 **Q. Okay. Do you recall when you were told**
21 **Balfour Beatty wants you to be the senior project**
22 **manager for the Hotel Bennett?**

23 A. My recollection is around January '16.

24 **Q. January of '15, okay.**

25 A. I mean '15. I'm sorry.

1 Q. Okay. '15. Once you -- so am I correct
2 that you were not involved in any preconstruction or
3 any of that type of stuff?

4 A. I was not.

5 Q. Okay. Had the contract for construction
6 already been signed when you started?

7 A. I think that there was a precon contract
8 that was in place, and then the actual contract for
9 the remainder of the work or the actual work was like
10 change ordered in if I remember correctly or, you
11 know, a different document, but ...

12 Q. Okay. What role, if any, did you play in
13 the contract negotiations of the precon contract?

14 A. None.

15 Q. What role, if any, did you play in the
16 negotiation, ultimate execution of the final contract
17 with that change order you discussed?

18 A. None.

19 Q. What role did you play, if any, with the
20 review or preparation of the contract documents prior
21 to your coming on to the job?

22 A. Just getting, of course, immediately, if I'm
23 told I'm involved in a job, I asked for just copies of
24 the documents, so I can start review them -- reviewing
25 them and getting familiarized with them. So that was

1 about it, just getting copies of the prints and
2 starting to do some plan flips and just dig through
3 and see what I'm dealing with.

4 Q. Well, that was going to be my next question,
5 which is: What was provided to you when you realized
6 you were going to be the senior project manager?

7 Before I get to that question, whatever was
8 provided to you at that time, would -- would there be
9 a list of those documents or a transmittal of sorts
10 transmitting to you, you know, Dear Tim, here --
11 attached please find all the following documents that
12 you're going to need to be the senior project manager,
13 as an example? Is there any -- is there such a
14 document as that?

15 A. Not that I'm aware of, no. I can't remember
16 if they handed me a roll of plans or it was
17 electronically in a file, you know what I mean. I
18 don't recall.

19 Q. All right. Who was your immediate superior
20 in January of '15 on this project?

21 A. Mike Baumbach was basically my boss. Jeff
22 Sandeen was my boss on Simmons Park. Mike Baumbach
23 was the executive on the hotel. So when I came to the
24 hotel, I was dealing basically with Mike on
25 everything.

1 Q. Had -- had you worked with Mike before?

2 A. I had not.

3 Q. Okay. And do you know, is he the one that
4 picked you to be the senior project manager or do you
5 know?

6 A. I honestly don't know.

7 Q. Okay. Had you worked with Jeff Sandeen
8 before Simmons Park?

9 A. Jeff was the -- my executive on the Mint
10 project and I think Simmons Park also.

11 Q. Okay. Was Sandeen under or equal to
12 Baumbach in terms of the hierarchy of the -- of the
13 business?

14 A. I think at the time he was under.

15 Q. Okay.

16 A. I know -- I think Mike was the senior vice
17 president and Jeff at the time was a project
18 executive, I believe.

19 Q. Okay. What -- when you -- when you started
20 as a senior project manager for Balfour Beatty on the
21 Bennett Hotel, what were your -- what did you
22 understand your authorization was to do or say on
23 behalf of Balfour Beatty? And let me give you an
24 example. Check writing authority, okay. That's the
25 kind of thing I'm interested in knowing. Were you

1 authorized to sign checks on behalf of Balfour Beatty?

2 A. No.

3 Q. Were you authorized to direct someone in the
4 accounting office to send a check?

5 A. Direct, no. Request, yes. And everything
6 needed executive approval if I asked for a check,
7 yeah.

8 Q. Okay. All right. Did you sign pay
9 requests?

10 A. Yes.

11 Q. All right. Did you have to receive
12 executive authorization to sign a pay request?

13 A. No.

14 Q. Okay. So you had the authorization to
15 request fairly large sums of money on behalf of
16 Balfour Beatty?

17 A. Authorization for that, authorization for,
18 say, signing change orders up to a certain value.
19 Each position kind of the value increased on what your
20 authority was.

21 Q. Okay. Can you tell me what your -- what you
22 recollect your authority was on change orders?

23 A. I want to say maybe a hundred thousand,
24 something like that. It wasn't --

25 Q. What about signing subcontracts or contracts

1 or purchase orders on behalf of Balfour Beatty, did
2 you have any authorization to do that?

3 A. No, no.

4 Q. Okay. So you would have needed approval?

5 A. Uh-huh.

6 Q. Okay. Did you negotiate any of the
7 subcontracts on this job?

8 A. Yeah, yeah.

9 Q. All right. And -- okay. When you became
10 the senior project manager, would that been one of
11 your tasks to negotiate the major subcontracts or to
12 make sure they got executed or whatever?

13 A. Absolutely.

14 Q. Okay. Let's start -- and, in fact, you did
15 do that, right?

16 A. Yeah, I sat with contractors, absolutely.

17 Q. All right. So --

18 A. Post bids I guess you call them. Post bid
19 meetings and go through, checking scope, things like
20 that.

21 Q. Okay. So in January of '15, tell me what
22 documents you recall receiving to review to begin your
23 job as the senior project manager on this project
24 for -- let's start there. What would you -- what do
25 you specifically recollect and to the extent you don't

1 specifically recollect it, what can you assume you got
2 just based on your custom and usage and having been
3 done -- having done it for quite a while? What would
4 you have looked at?

5 A. Well, when a -- when the -- when a job is, I
6 guess contracted or awarded, it's based off an amount.
7 It's based off a schedule of values and bids, right --

8 **Q. Right.**

9 A. -- from whatever subs were selected type of
10 thing. So when I get a copy of that, basically
11 everyone's bid forms, schedule of values, what their
12 amount is for their bid, what we're carrying in the
13 job, then I would get those documents, I'd dig through
14 their proposals, you know what I mean, dig through the
15 plans, I'd have meetings to talk about it.

16 So you're basically making sure -- you're
17 trying to look for -- make sure there's no loopholes
18 or holes that are missing or they may be missing
19 scope, scope gaps, things like that, so while you're
20 going through the project, going through the plans
21 with them, going through their bid, making sure
22 everything is covered.

23 **Q. Now is it correct that a lot of this work at**
24 **least had begun well before you got on the job?**

25 A. Well, yeah. I mean, typically in precon

1 process, they'll sit with subs, usually you're getting
2 at least three bids on any scope of work, you sit with
3 them, you get -- figure out who's got what, who's
4 missing what, you try to get apples for apples from
5 everybody, and then you make selections based on not
6 just number but size, you know, where they're located.
7 You know, there's a lot of factors on -- you pick the
8 best choice based on a lot of things. And then that
9 decision is made and all that is presented to the
10 owner and it's agreed upon. And I grab the guy -- I
11 basically took it from getting the guys that -- that
12 were selected for the job based on the contract and
13 ran with them to get them contracted.

14 **Q. So the basketball team -- the players had**
15 **already been selected; you were just going to be the**
16 **coach?**

17 A. That's correct.

18 **Q. Okay. Did you ever see the Balfour Beatty's**
19 **response to the request for proposal?**

20 A. Say that again. I didn't quite understand
21 that.

22 **Q. Did you understand this job was obtained by**
23 **Balfour Beatty through a request for proposal process?**

24 A. That's my understanding, yeah.

25 **Q. Okay. And that understanding -- was that**

1 the understanding you had when you started the job as
2 senior project manager?

3 A. Yeah.

4 Q. Okay. Did you ever review the document
5 created by Balfour Beatty and submitted to the Bennett
6 Hotel people, which was entitled Balfour Beatty's
7 response to the request for proposal? Did you ever
8 see that document to review it?

9 A. I don't recall exactly.

10 Q. Would that have been something you would
11 have typically asked for?

12 A. I think you're -- are you referring to, say,
13 a schedule of values, a breakdown of the cost, and who
14 it is?

15 Q. No, sir. It's a -- and we can pull it up --
16 Madam -- it's about a 150 page document that was
17 presented to Bal- -- Bennett Hotel as part of the
18 request for proposal process basically. Okay. It was
19 a document in which Balfour Beatty was trying to,
20 along with other general contractors, convince Mike
21 Bennett to hire Balfour Beatty as opposed to somebody
22 else, right?

23 A. Got you. I don't -- I don't recall seeing
24 that.

25 Q. Okay. All right.

1 THE VIDEOGRAPHER: Mr. Bundy, would you
2 like me to pull that up?

3 MR. BUNDY: Do -- do -- well, let me
4 ask the witness.

5 Q. (By Mr. Bundy) Do you -- Tim, would you --
6 would it help you to look at it? If you hadn't seen
7 it, I don't know that you need to see it now unless
8 you just want to look at it.

9 A. I mean, I don't think I've seen it but ...

10 Q. Okay. If you haven't seen it, there's
11 really not much --

12 A. Yeah, yeah.

13 Q. I don't want to discuss something for the
14 sake of discussing it, okay, and I don't think you do
15 either.

16 So were you aware that the -- that Balfour
17 Beatty provided, you know, somewhere between 12 and
18 16 months' worth of preconstruction services to Hotel
19 Bennett prior to your coming on to the job in
20 January of 2015?

21 A. Prior, no.

22 Q. Yeah.

23 A. No. I knew when I came on that there was a
24 long precon process that had happened.

25 Q. Okay. And what discussions, if any, did you

1 have with the individuals at Balfour Beatty involved
2 in that precon process to educate you about where you
3 were at that point, if any?

4 A. I don't -- I don't recall.

5 Q. Okay.

6 A. I really don't.

7 Q. Did you spend any time talking to the
8 estimators who worked on the precon process to see how
9 they had arrived at the figures which you were now
10 being used -- which you were now being given to use?

11 A. Not -- not at that point, but when I start
12 digging through the information as far as plans, and
13 I'm sitting with subs, and there may be a gray area
14 that I don't understand, I would -- I would call the
15 precon guys and just ask them if they can explain the
16 situation or something like that, so that would
17 happen, yeah.

18 Q. Okay. Can you give me any -- do you have
19 any recollection of who precon -- which precon guy or
20 lady you would have called and the items you would
21 have discussed generally, whatever you can recall?

22 A. For the most part it was Manny Teodoro, was
23 the precon guy that I think dealt with most of the
24 precon from our precon department. So I would call
25 Manny. Specifics, I -- I don't recall any specifics,

1 but ...

2 Q. And Manny was an estimator, right?

3 A. He was.

4 Q. Okay. What about -- were you provided any
5 scheduling or preliminary schedules that was a result
6 of the work during precon?

7 A. During precon?

8 Q. Construction schedules, yeah.

9 A. No. I got the schedule, you know, based on
10 what the contract schedule was based on.

11 Q. Okay. So when you would -- the schedule you
12 got was the contract schedule when you first started,
13 right?

14 A. Right.

15 Q. And that was -- was that already part of the
16 contract documents or was that --

17 A. I think that it was -- it became once the
18 contract was executed for that change order, yes, it
19 became part of the contract.

20 Q. And did you review that schedule for
21 completeness, accuracy, suitability, busts or anything
22 like that?

23 A. Yeah, I kind of went through it to look at
24 kind of durations on certain things and stuff like
25 that. So yeah, not in too much -- I mean crazy detail

1 but yeah, I always do.

2 Q. Okay. Do you recall having any questions
3 about the adequacy of the schedule or its difficulty
4 in terms of the total duration or the sequence of
5 operations?

6 A. No, I don't. I just -- I mean, you know the
7 first thing that jumps out at you is -- is an
8 underground parking deck.

9 Q. Right.

10 A. Being from the state of Florida --

11 Q. Right. I get it.

12 A. -- with the water table at four feet, and
13 it's not too much higher here.

14 Q. Right.

15 A. So you know, that was the kind of the thing
16 because the durations on that, you know, just looking
17 at that. You know, worried about having enough time,
18 things like that.

19 Q. All right. Did you think there was enough
20 time from your standpoint?

21 A. I think that it was definitely doable, yeah.

22 Q. When you first looked at the job and were
23 becoming familiar with it, was this underground
24 parking garage, in your mind, the biggest challenge
25 that you were going to be facing?

1 A. I'd say so. That and getting the dry-in is
2 always -- your biggest feats on a job are, you know,
3 getting your structure up and getting dried in, you
4 know, is your biggest challenge usually and your
5 biggest milestone.

6 Q. Did you find that the town or the city of
7 Charleston's business and specifically architectural
8 review board was a challenge?

9 A. The BAR, yes, they were -- they were a
10 challenge, yes.

11 Q. Okay. Did you -- had you anticipated the
12 challenge that you got from them at the beginning of
13 the job, or did you come to realize the challenge you
14 were facing as the job progressed?

15 A. I didn't know. I mean, I heard -- you know,
16 heard from locals they're tough, you know, but that
17 was it, and -- and I came to realize, yeah --

18 Q. Okay.

19 A. -- in my dealings.

20 Q. Did you -- did they cause any problems on
21 the job from your standpoint?

22 A. Problems? I wouldn't say problems. They
23 were just difficult in what they wanted and what they
24 wanted to see, you know, to make sure we met their
25 expectation.

1 Q. Did they cause any delays on the job?

2 A. No.

3 Q. Okay. As far as you know, were you able to
4 suit the BAR or satisfy the BAR without any particular
5 problem?

6 A. We were. We had some difficulty on the
7 mockup panel, getting it approved by them. So in that
8 case it kind of -- you need that approval just to
9 release some of the materials.

10 Q. Sure. And -- and were those problems a
11 result of the subcontractors or people creating the
12 panels or the cause of the architect in whatever input
13 it may have had in it, or was it just the unreasonable
14 nature of the BAR? I mean, what was the nature of the
15 problems and the cause of those problems?

16 A. I guess it was probably, my recollection, on
17 the original because there ended up being about three
18 phases of the mockup that BAR wanted to see, so they
19 kind of added parts to it as we went on. But I think
20 the original mockup, one of the problems was they
21 specified stucco in the plans. Mr. Bennett had
22 decided he didn't -- he was wanting more of a
23 limestone look, so he mentioned a hotel. I ran with
24 my stucco guys -- not a hotel but another building in
25 Charleston that he liked. I took -- grabbed the

1 stucco guys. We went over there. We're figuring out
2 what it was. So we ended up doing mockup panels for
3 Mr. Bennett and getting him to come and look at them,
4 try to figure out which stucco material he wanted to
5 use. So that was kind of a change on the mockup that
6 we did that the BAR, of course, had to approve because
7 it was changed from the original submittal documents.

8 **Q. Did -- did that delay the job?**

9 A. The job, no.

10 **Q. Okay.**

11 A. No.

12 **Q. Did you find Mr. Bennett's request and**
13 **interest in that area to be unreasonable on the part**
14 **of a developer building a hotel?**

15 A. I would say no.

16 **Q. Okay. Is that sort of the normal -- one of**
17 **the normal things that occurs on a job like this. The**
18 **developer, the builder, owner wants to see different**
19 **things?**

20 A. Well, I mean on a skin standpoint, normally
21 your exterior is pretty much set. You don't get much
22 changes on your exterior typically, so ...

23 **Q. Okay.**

24 A. The documents were a hundred plus when we
25 got them.

1 **Q. Right.**

2 A. So -- so changing the stucco, which is the
3 majority of the -- the building, you know, I wouldn't
4 say is typical --

5 **Q. Okay.**

6 A. -- on an exterior standpoint.

7 **Q. Okay.**

8 A. So and I think I recall on the mockup, there
9 was supposed to be a bronze canopy, which was a mockup
10 of original marquee canopy that was decided, and I
11 don't know if it was Mr. Bennett or if it was the BAR,
12 but they wanted to change to copper, so we ended up
13 changing that to copper, which is a little bit of long
14 lead time to get that thing out there. And I recall
15 we put it up, some of the soffit. The BAR came out to
16 look at it, thought the soffit needed to be a thicker
17 gauge, so we ended up replacing the copper with a
18 thicker gauge. So there were things like that between
19 BAR, I guess, and Mr. Bennett as far as changes on
20 mockup.

21 **Q. I got you. You mentioned a hundred-plus**
22 **documents. What is -- what is -- what are you**
23 **describing to me there?**

24 A. The drawings that we received that were
25 contracted to were specified as construction documents

1 100 percent plus.

2 **Q. What does that mean? Had you ever had a set**
3 **of 100 percent plus construction documents before?**

4 A. No. I've only seen a hundred percent. I
5 didn't know if you could go over -- I didn't know you
6 could go over that, but ...

7 **Q. All right. And what did that mean? What**
8 **did you take that hundred-plus to mean as the senior**
9 **project manager?**

10 A. That everything was decided. I mean, that
11 that's what we're building. You know, we've got
12 everything covered. There's no -- no -- nothing
13 missing.

14 **Q. Okay. So there -- so your anticipation was**
15 **there would be no changes on this job at all?**

16 A. Oh, no, there's always changes. I mean --

17 **Q. Okay.**

18 A. -- there's always changes on a job. And so
19 no, my anticipation wasn't there wouldn't be any no --
20 any changes, no.

21 **Q. Because even though the documents say a**
22 **hundred-plus drawings, if that's what they say, the**
23 **agreement and general conditions still provided for**
24 **change orders, right?**

25 A. Sure.

1 Q. Okay. So if -- if hundred plus truly meant
2 there will be no changes on this job, then there would
3 have been no reason in the contract documents to have
4 provisions for change orders, CCDs, or any of the rest
5 of it, right?

6 A. Correct.

7 Q. Okay. But that's not the case, everybody
8 knew there would be change orders on a \$60 million
9 job?

10 A. Absolutely, absolutely, absolutely.

11 Q. All right. The -- let's go back to
12 January '15 -- of 2015 when you started the job. I'm
13 trying to get my head around what you were trying to
14 get your head around, okay, which is something you had
15 not been involved with prior to that time. And you're
16 now asked -- and you've been asked this before. This
17 wasn't something that was out of your wheelhouse to be
18 brought to a job of this size to say you the captain,
19 get it done, right?

20 A. Right.

21 Q. Okay. So you were -- you were given work
22 product from other people to work from, for instance,
23 the hundred-plus drawings created by the architect.
24 You were given that. You would get a set -- you were
25 given a set of contract documents, which it would have

1 included the agreement, the general conditions, the
2 specifications, none of which you negotiated either.
3 This is just you're being handed this information to
4 use, right?

5 A. That's correct.

6 Q. You were given a schedule of values, a
7 schedule, estimates and names of subcontractors that
8 you were told to use on this job, right?

9 A. Uh-huh. Yeah.

10 Q. Sort of back to my basketball analogy, you
11 know, you're going to be the coach, okay, but here are
12 your players and here are the rules, so you going --
13 you're going to play this basketball game with these
14 players according to these rules and you're in charge,
15 right? Fair enough?

16 A. Fair enough.

17 Q. Okay. So I'd like to talk to you a minute
18 about your interaction with these major subcontractors
19 at the very beginning of your job, which as I
20 understand it, correct me if I'm wrong, there were no
21 signed subcontracts or very few signed subcontracts
22 when you took over as a senior -- senior project
23 manager, correct?

24 A. Correct.

25 Q. Is that correct?

1 A. Yes.

2 Q. Would you have had the authorization to go
3 let's say to your boss and say, look, I know that
4 you've given me a -- subcontractor, you know, Triple A
5 Plus plumber as the plumber you want me to use on this
6 job, but I'm the senior project manager, I've met with
7 this guy, okay, and he's a clown, okay? I'm not using
8 that plumber on my job, okay? Would you have had the
9 authority to say: We're getting somebody else?

10 A. I'd say so. It would be -- it'd be a
11 discussion involved, you know, but absolutely.

12 Q. Sure.

13 A. Yeah, I would bring that up.

14 Q. Because ultimately, you know, like Truman,
15 the buck's going to stop with you on this job, right?

16 A. Sure.

17 Q. And -- and if you were given all this
18 information and somehow it goes south, they're going
19 to come back to you and go, well, why didn't you tell
20 us that the schedule was backwards, why didn't you
21 tell us that it was -- you know, that we couldn't do
22 this in this period of time, that's what we were
23 looking for you to do, right?

24 A. Right.

25 Q. Okay. So you, like a trained professional,

1 did all those things, right, and concluded after you
2 did your work and did your review and met with these
3 subcontractors that, in fact, you could -- assuming
4 everything went generally like it was supposed to --
5 construct this hotel within the price given for the
6 time allowed with the subcontractors you were
7 provided. You believed that to be the case?

8 A. Yeah. And I -- I met with -- like in other
9 words, when I was given a list of contracts, given a
10 list of, you know, pricing that we would carry, so
11 there -- there wouldn't be just one specific
12 contractor. There might be two that I would meet
13 with. There might be three. So I would sit in
14 meetings and just try to dig through and make sure.
15 So I had choice in some of the contractors as far as
16 which one I want to use.

17 For instance, glass, I met with a couple
18 different guys. And so I would, I guess, have that
19 authority to make that decision as long as it met
20 within our budget and all that stuff. And, of course,
21 Mike was involved in a lot of those meetings.

22 Q. But -- and to use a sports analogy, sort of
23 like a sports draft, you had one or two or three
24 different players to choose from for your --

25 A. Yeah.

1 Q. -- for your guard, let's say, okay. You --
2 you didn't have to take their guard. You could pick
3 one of the three they offered to you?

4 A. Right.

5 Q. Okay. All right. All right. Let's talk
6 then about your -- who -- who do you -- or did you
7 consider to be the -- strike that question.

8 How much work, physical work, in the
9 construction of this job was Balfour Beatty actually
10 going to do with its own forces?

11 MR. HILDEBRAND: Bill, is there a good
12 time -- just let me know after -- maybe he can
13 answer this question, then maybe we can take
14 five. Been going a little over --

15 Q. (By Mr. Bundy) If you just answer this
16 question, it would be a good time to stop.

17 A. Sure. Could you repeat it? Sorry.

18 Q. Sure. Sure.

19 A. Appreciate it.

20 Q. Balfour Beatty was going to be the
21 construction manager at risk on this job, right?

22 A. Yeah. Yeah. We didn't start performing any
23 work, if that's what your --

24 Q. That's what I was getting at. Zero amount
25 of work.

1 A. Correct.

2 MR. BUNDY: Okay. That's a good place
3 to stop. Let's come back -- it's -- let's come
4 back in, say, ten minutes. Does that suit you,
5 Tom?

6 MR. HILDEBRAND: Sure.

7 MR. BUNDY: 10:25. I'll see you then.
8 Okay.

9 THE WITNESS: Sounds good.

10 MR. BUNDY: Thank you, Tim.

11 THE WITNESS: Thank you.

12 THE VIDEOGRAPHER: We're going off
13 video record at 10:12 a.m.

14 (Recess from 10:12 a.m. to 10:22 a.m.)

15 THE VIDEOGRAPHER: We are back on video
16 record at 10:22 a.m.

17 Q. (By Mr. Bundy) All right. Tim, I'd like to
18 talk to you now -- we're still in January of 2015, job
19 hasn't even started yet. We've got a ways to go.
20 Tell me who you considered to be your major -- strike
21 that.

22 I think when we -- when we stopped, Balfour
23 Beatty is doing zero work on the job in terms of
24 actual construction, right? So all the work, a
25 hundred percent of it was being done by

1 **subcontractors, correct?**

2 A. Correct.

3 **Q. In -- in direct contract with Balfour**
4 **Beatty?**

5 A. Correct.

6 **Q. We got a construction manager at risk with a**
7 **guaranteed maximum sum and directly contracting with**
8 **all subcontractors?**

9 A. Correct.

10 **Q. Okay. So was one of your jobs, as I**
11 **understand it, early on to finalize and negotiate the**
12 **subcontracts with the subcontractors?**

13 A. Yes.

14 **Q. And that would have been done not only to**
15 **determine and pin down price but also scope of work,**
16 **schedules, manpower requirements, on and on and on.**
17 **Coordination and all the rest of it, right?**

18 A. Yeah. The -- yeah, so as far as -- yes,
19 schedule, we had -- we have a -- basically a schedule
20 that went with the contracts, you know, that was
21 basically the overall schedule that we spoke about
22 earlier, 28-month schedule kind of showing the -- the
23 durations of each floor, et cetera. And then we have
24 a -- I should say like a boilerplate contract that
25 Balfour Beatty has, you know, that we use that the

1 contractors sign. So there was -- it was a more of
2 a -- it was more of a going through their scope of
3 work, you know what I mean, their bid process, what
4 they were doing. So it was more -- I should say any
5 adjustments that we do is more of kind of just making
6 sure the scope of work is clarified. The contract's
7 pretty much set as far as the boilerplate.

8 Q. Okay. So you -- the legalese and the
9 subcontracts and all that, that's not your job; that's
10 somebody else's job?

11 A. Right.

12 Q. Your job is, however, to make sure that
13 whatever they're legally required to do, that it's
14 within a scope of work that you set out that gets the
15 job done. That's -- the scope of work is your job?

16 A. Yeah. Yes.

17 Q. Okay. And how that work is going to be
18 divided up among subcontractors is your job, right?

19 A. Right.

20 Q. So things like motor controls don't fall
21 through the cracks and nobody's got the motor controls
22 because they're not in anybody's scope of work as an
23 example, right?

24 A. Correct.

25 Q. Okay.

1 A. Yeah, correct.

2 Q. I mean, that -- that's part of the job or
3 the coordination is to make sure that somewhere in
4 this job somebody is going to be doing a little --
5 everything gets done, right?

6 A. Right.

7 Q. Okay. Did the subcontract -- are the sub --
8 is the schedule, the overall job schedule dictated by
9 Balfour Beatty or do the subcontractors get some
10 chance to become involved in the schedule, if you
11 know?

12 A. I mean typically during like a precon or
13 post-bid meeting, you discuss durations with subs, so
14 you kind of get an understanding of what they're
15 thinking. And then that's kind of part of the
16 decision, you know what I mean. If a sub tells you,
17 you know, I've only got -- I'm thinking it's 20 weeks,
18 and I've got 10 weeks in there, and I'm going to say
19 you're sandbagging, there's no way, you know, you
20 need -- that's just part of it, yeah.

21 Q. Okay. And had that work already been done
22 by the time you got involved?

23 A. I guess some of it would have probably
24 happened during precon. And then it definitely
25 happens again, I mean, as we're talking through scopes

1 and stuff, we're talking through the schedule, yeah.
2 And if anybody has any concerns, we'd have, I think
3 meetings with -- with subs. In other words, you may
4 go to a concrete sub and he says he has 12 weeks and
5 then your MEP sub, he says he has this much time to
6 say prep before you pour a floor, you know, stuff like
7 that. So you're kind of -- you would do that
8 individually, but then we'd also have some meetings
9 with guys so we're talking, communicating across the
10 board to make sure no one has any issues with things
11 of that so, yeah.

12 **Q. I got it, okay. So you would expect the**
13 **subs to not only talk to you but talk to each other?**

14 A. Yeah, we -- we try to definitely make sure
15 that happens.

16 **Q. Okay. Did you have the authorization to**
17 **change the schedule?**

18 A. Sure. Not -- so yeah, what we do is --
19 yeah, I wouldn't say -- kind of -- you kind of stick
20 within your overall duration, but there's always
21 moving parts within the schedule. There's always
22 adjustments to be made.

23 **Q. Okay. So you -- so if -- if as an example,**
24 **the master schedule you were provided showed a**
25 **particular floor was going to be -- was going to have**

1 a specific duration or a particular activity or a
2 particular sequence. After you, as a senior project
3 manager, sit down with the subcontractors involved,
4 you determine that's not really how you want to have
5 it done; you would have had the ability to make that
6 change in the sequence of construction in order to get
7 it built, right?

8 A. Yeah, with a consolidated effort and
9 communication, yeah.

10 Q. Okay. And is that part of what you did
11 in -- beginning in January 2015, that process?

12 A. Yeah, talking through the schedule, making
13 sure we're good. If we needed to tweak something, we
14 did.

15 Q. All right. Let's go through the major subs
16 then, the subs you would have dealt with in January, I
17 guess, in February and March, I guess. How long did
18 this process last, do you think, before you actually
19 pinned the subcontract with -- with durations and
20 scope and all the rest of it?

21 A. Well, of course, you start with your first
22 sub on-site, so you know you start with division one,
23 division two. You start with guys that are going to
24 be in the dirt, they're going to, you know, come in,
25 demo, grade.

1 **Q. Right.**

2 A. Those are kind of your first guys so you can
3 get them contracted on the dotted line, get them out
4 there and get the work going. So yeah, you just kind
5 of move, you know, up the divisions kind of as needed
6 on-site. Of course you're going to have, you know,
7 the painter that's down the line that you're going to
8 negotiate with later --

9 **Q. Right.**

10 A. -- but you just got to make sure your
11 structural guys are -- assigned first, so ...

12 **Q. Okay. Well, let's -- to the best you can**
13 **recall, let's walk through that -- walk through that**
14 **process with me. Teach me how to -- what you would**
15 **have done, who you would have dealt with first, and if**
16 **you know the name of that subcontractor, who that**
17 **subcontractor was.**

18 A. I mean you're -- so like I said before, the
19 demo was pretty much done, it was basically a site
20 with some debris still on it. So I recall that was
21 kind of part of -- I think there was allowance that I
22 recall for getting some, I guess, unforeseen debris
23 under the ground that we couldn't really tell that the
24 demo contractor left.

25 So first -- first guy you're doing, of

1 course, is your surveyor, right? Your surveyor is
2 going to come out make sure he's pinning the corners
3 and the locations of the building, things like that.
4 We get him. We get our site work guy, so he can get
5 in there and start grading and clearing to get us a
6 workable site. Get silt fence up, you know, as part
7 of a SWIP inspection. So one -- really the first
8 thing we do is get our silt fence up around the
9 perimeter that basically is -- is a sediment
10 protection for the water runoff. We get that up. We
11 have an inspection, and the they release us to kind of
12 go ahead and start off work.

13 So I would go from my site work guy. I
14 would go to my pile guy, you know, that's putting in
15 structural piles, sheet pile, which is part of the
16 first process before we can even excavate the, you
17 know, the underground parking, and of course your
18 MEPs, your mechanical, electrical, plumbing, because
19 they're going to be in there getting you temporary
20 power, so you can work, getting you temporary water,
21 things like that.

22 **Q. Okay. Let's talk about the MEP real**
23 **quickly. Who was your -- who was your mechanical,**
24 **plumbing subcontractor?**

25 A. MCC did our mechanical and our plumbing.

1 BM -- they became BMCC later, Bernhard MCC, but ...

2 Q. Had you ever work with them before?

3 A. I had not.

4 Q. Okay. And by name, if you can recall, who
5 did you deal with?

6 A. Plumbing-wise?

7 Q. BMCC, yeah, the mechanical plumber who --

8 A. Who I dealt with?

9 Q. Yeah.

10 A. I'm drawing a blank on the project manager's
11 name.

12 Q. Okay. Was he --

13 A. Eric. I just can't think of his last name.

14 Q. That's fine. Was Eric the project manager
15 the entire time you were there?

16 A. Not the entire time. He I think -- I want
17 to say he left MCC -- he probably wasn't there the
18 last eight months to a year maybe, something like that
19 of the job.

20 Q. Did that cause any problems for you?

21 A. No, not -- I mean not at that point, no.

22 Q. Okay. Did -- who did you negotiate the
23 scope and price of that subcontract with? Was it
24 Eric?

25 A. Eric. It was Eric, yeah.

1 **Q. Okay. And was Eric there all the time or**
2 **was he -- did he have somebody on-site all the time**
3 **other than himself?**

4 A. He had a superintendent on-site all the
5 time. If I recall, his office was down the road, so
6 he was there frequently, but and then some --

7 **Q. What was --**

8 A. -- some of the meetings of course, some of
9 his peer -- bosses or whatever would come into some of
10 them, but he was the main contact.

11 **Q. Who was the superintendent; do you recall?**

12 A. Keith. I don't recall his last name.

13 **Q. That's fine. And was he -- was he there the**
14 **whole time?**

15 A. He was not. He was not. Which they had --
16 they had a few superintendents, of course, on a job
17 that size, but ...

18 **Q. Did the change of superintendents cause you**
19 **any problems?**

20 A. No, not that I recall.

21 **Q. Did you have any problems at MCC on Bernhard**
22 **on the job at all?**

23 A. No, I don't think so. I mean, nothing that
24 isn't typical construction --

25 **Q. Okay. So from your perspective MCC Bernhard**

1 caused no delay on this job?

2 A. No.

3 Q. Okay. And as such there wouldn't be any
4 records in Balfour Beatty's file which reflects that
5 MCC Bernhard was causing any problems on the job?

6 A. Oh, I don't recall, but I may have -- yeah,
7 we may have pushed them or sent e-mails saying, hey,
8 you're falling behind. You need to get here, you
9 know. I don't recall exactly, but to say no one's
10 causing any problems, no, there's always -- there's
11 always, you know, problems going on in construction
12 that we have to stay on top of and push subs and
13 things like that so ...

14 Q. Sure.

15 A. But end result, I would say no.

16 Q. Okay. But surely we wouldn't find any
17 e-mails or letters threatening to default on them or
18 giving them a notice to cure for lack of labor? We
19 wouldn't find anything like that in the file?

20 A. I don't -- I don't recall exactly. I really
21 don't.

22 Q. And clearly if they didn't delay the job,
23 there wouldn't be any allegations during the job that
24 they were delaying the job?

25 A. If they didn't delay the job?

1 **Q. Right.**

2 A. So like putting them on notice that you're
3 behind or --

4 **Q. Right.**

5 A. -- possible notice? There were notices that
6 went out to different subs. I just don't recall who
7 and when.

8 **Q. I got you.**

9 A. Yeah.

10 **Q. Okay. But whether or not there were notices**
11 **to different subs, as it relates to MCC, regardless of**
12 **what's in the file, they didn't cause any delay on the**
13 **job?**

14 A. No, I wouldn't say. Not to any scope, you
15 know what I mean. There were, of course, issues with
16 changes, you know, and pricing and things like that
17 that we would push them on to try to get the answers,
18 try to get numbers, things like that to get the owner
19 and stuff like that.

20 **Q. Sure. But no critical path delay in your**
21 **opinion was caused by MCC Bernhard on this job?**

22 A. No, I don't think so.

23 **Q. Do you know what I mean when I say critical**
24 **path delay?**

25 A. Absolutely.

1 **Q. Okay. Can you explain it to the judge, if**
2 **the judge watches this video, what that means?**

3 A. Yeah. I mean critical path is basically
4 from beginning to end something that would hinder you
5 meeting that completion date. So it is the most
6 critical thing to stay on the complete schedule and
7 meet the end date.

8 **Q. Is another -- is another definition the**
9 **longest path through the job?**

10 A. Yeah. I mean, yeah, I guess so. The
11 problem is critical paths change at times from one --
12 one thing to another.

13 **Q. Sure. Sure.**

14 A. It can definitely move depending on the
15 circumstance, the phase of the job you're in, things
16 like that.

17 **Q. Sure. All right. And do you know whether**
18 **there was any contract requirement for a time**
19 **extension that the delay be on the critical path?**

20 A. If there was a -- say it again.

21 **Q. Do you know whether there was any contract**
22 **requirement between the owner and Balfour Beatty that**
23 **in order to be entitled to a time extension, any delay**
24 **had to be on the critical path of the job?**

25 A. I think so, usually.

1 **Q. That's standard in the industry, isn't it?**

2 A. Yeah. Usually it's -- it's a critical path
3 delay, and that was something that came up at times
4 because I think I -- if -- early on if the owner was
5 holding me up on something or if there was a change
6 that happened or that was kind of out of our control,
7 I might send a potential delay e-mail and that was
8 pretty much clarified, you know, by Clemens [sic]
9 unless you show it's a critical path, it's not a delay
10 type thing.

11 **Q. Did you agree or disagree with Clement [sic]**
12 **on that issue?**

13 A. I'd agree.

14 **Q. Okay.**

15 A. I'd agree.

16 **Q. It was in the contract, right?**

17 A. If it was executed, it was in the contract,
18 yes.

19 **Q. Okay. And that's the -- and that really is**
20 **the final place you look to determine what the rights**
21 **are between -- or the obligations and duties of these**
22 **parties are is the contract, right?**

23 MR. HILDEBRAND: Object to form.

24 **Q. (By Mr. Bundy) You can answer.**

25 A. That you look to the contract?

1 Q. Yeah. If you're trying to figure out who
2 owes who what duty, who owes who -- who agreed to do
3 what, right?

4 A. Yeah.

5 Q. How much you're going to pay, when you're
6 going to finish, what you're going to build, you'll go
7 look at the contract, that's -- that's why you have
8 the contract, right?

9 A. Contract, plans, submittals --

10 Q. Yeah, so --

11 A. -- change orders, the whole ball of wax.

12 Q. Right. So if there was a dispute about
13 whether or not you were entitled to a time extension,
14 whether it had to be on the critical path or not, the
15 place to look would be well, let's go look at the
16 contract and see what it says, right?

17 A. Well, I guess I'd say critical path -- so
18 when you're dealing with changes that may affect the
19 critical path, it's hard to determine it's a critical
20 path at that time.

21 Q. Uh-huh.

22 A. With change orders there's a lot of you're
23 pricing the exercise, you're going back and forth.
24 Once you get the change approved, you're getting a
25 submittal in on it to -- to make sure you can procure

1 the material, you know what I mean? So -- so yeah, if
2 there's multiple changes going on, it's very hard to
3 determine -- you can't look at a contract and say,
4 there's the critical path. You've got to look at the
5 situation and the change orders or -- and usually it
6 takes time for them to develop, to figure out it is a
7 critical path, especially when there's multiple.

8 Q. Okay. And I guess it takes a couple of
9 years after the job is over to make that
10 determination?

11 A. It depends.

12 Q. Okay.

13 A. It depends.

14 Q. Okay. So it's reasonable to wait for a
15 couple of years after a job is over for a contractor
16 to sit down and decide where the critical path was and
17 how these changes affected the job?

18 A. Is that typical?

19 Q. No. First off let me ask you is it
20 reasonable in your opinion for an owner to be
21 subjected to claims and analysis about the delay on a
22 job two years after the job is over?

23 A. Two years seems like a while, but I know
24 that changes were -- right to extension of time and
25 costs kind of was stipulated in changes that we had

1 the right to come back later, so I knew that was part
2 of this deal.

3 Q. All right. And did the owner agree to that?
4 Or was that just something y'all put -- y'all put in
5 the document?

6 A. It was put in the change orders and they
7 signed them.

8 Q. Okay.

9 A. To my recollection, I mean, that was in --

10 Q. Okay.

11 A. -- most of the change orders. And it was --
12 if a change order wasn't executed by them and us, you
13 know what I mean, that's what had to happen for us to
14 proceed.

15 Q. Okay. All right. So it's your recollection
16 the owner agreed that y'all could come back after the
17 job was over and tell the owner then how much the
18 changes were and how the delay -- how much the delay
19 was?

20 A. Well, we felt that -- I know that early on
21 that we requested time or costs on changes that were
22 pretty much rejected for the most part --

23 Q. Right.

24 A. -- so that's kind of why we started saying,
25 hey, we -- right now we're going to basically hold our

1 rights to figure this out because it -- from the
2 get-go it was -- it was obvious there was just so many
3 changes to the original docs that it was just hard to
4 keep control of to know what was critical, what the
5 exact costs were, how one change affected another
6 change. It was just so much going on to figure out
7 that exact out, so it was reasonable to defer that,
8 yes. Two years sounds like a long time to me, but ...

9 **Q. Okay. And was any -- was anything put in**
10 **place by Balfour Beatty to try to document these**
11 **issues, the changes, the delays at the time those**
12 **changes and delays were occurring?**

13 A. You mean like a change order log, issues
14 log, things like that? We had all of that.

15 **Q. Daily reports?**

16 A. Yeah, there was daily -- there was daily
17 reports, which -- daily reports were more kind of
18 what's going on on the job type of thing. We did more
19 of the, I guess, change order -- or sorry, change
20 order log or issues log or outstanding RCOs or
21 requests for pricing. We kept those on logs and would
22 submit those, of course, every month with pay
23 applications, et cetera, so it was informing
24 everybody.

25 **Q. What about updated schedules, was there an**

1 attempt to make updated schedules when these changes
2 would occur?

3 A. There was. There's -- to put every change
4 that happened on this job on the schedule was just --
5 would be unreasonable. There was just -- there was
6 just so many changes. So more of the schedule updates
7 as far as changes or more of the, I guess, the larger
8 ones that we felt could or would affect critical path
9 or may affect critical path, we tried to put them in
10 as fragnet.

11 Q. Okay. Do you know if there were any
12 contract requirements with regard to providing delay
13 analysis on a critical path basis for requested time
14 extensions?

15 A. Critical path. I mean, I know there was
16 stipulations in there as far as -- as far as a
17 critical path on the schedule, I don't recall that.

18 Q. Okay. All right. Okay. The -- are you --
19 do you know what the claims procedure was on the job?
20 Do you recall what the contract required for -- in
21 terms of change orders, disputes over changes and how
22 that process was to work?

23 A. I don't recall the specific details, but I
24 know, you know, there's typically -- there's typically
25 parameters set in a contract or timing set, things

1 like that. I just don't recall the exact parameters.

2 Q. All right. So your recollection is
3 generally there usually is a time limitation within
4 which you have to make the claim and that's fine. But
5 I'm more interested in the review process for a claim.
6 Was the architect involved in that process?

7 A. For a claim or a change order? What are we
8 talking about?

9 Q. Either one, change order, claim, whatever
10 you want to call it.

11 A. Yeah --

12 Q. Let's put it this way. Any request for
13 additional time or money, whether you want to call it
14 a claim, a change order. It doesn't matter to me what
15 name you give to it.

16 A. Yeah, the architect, yeah, yeah.

17 Q. Okay. And what was --

18 A. The architect was part of that process,
19 yeah, sure.

20 Q. And what was his role in that process?

21 A. I'd say she --

22 Q. She, okay.

23 A. Jennifer Falkenberry was our main point of
24 contact, and I know Buck Lindsay was the --

25 Q. Sure.

1 A. -- overall architect. But you said what was
2 her process in that?

3 Q. Yeah.

4 A. Typically we would present I think change
5 orders or whatever to Jennifer usually would copy Jim
6 and in most cases copy Kim, you know, kind of --

7 Q. Okay.

8 A. -- send it -- send it to them. But I know
9 she -- typically they would have Jennifer look at it
10 first or the architect look at it, and then to my
11 recollection, Jim would check it, and then it would go
12 to Kim. It was kind of a process that they -- I think
13 Kim relied on the input from the architect and the
14 input from the construction manager and then, you
15 know, to execute something.

16 Q. Okay. And if there was a disagreement or
17 dispute between Balfour Beatty and the owner regarding
18 the entitlement to additional time or money, what
19 role, if any, would the architect play in trying to
20 resolve that dispute initially?

21 A. They would sometimes respond and, you know,
22 say disagree or come back with a rebuttal or ask a
23 question, things like that before I think it moved on.
24 You know, I think they were first, I guess, line of
25 defense on things like that to -- so yeah, sometimes

1 they would come back and ask us questions or say I
2 disagree with this. But sometimes it would go beyond
3 that before it came back as a disagreement.

4 Q. Okay. And they might ask you for more
5 information or whatever it was before they -- but --
6 but did you understand that they were supposed to make
7 an initial decision on any request for time or money
8 and tell the owner either, you know, you ought to pay
9 some of this, part of this, or all of this?

10 A. I think, yeah, they were the initial decider
11 on that.

12 Q. Okay. And in making that initial decision,
13 the contract documents -- just take my word for
14 this -- require that the architect is to be
15 essentially neutral and detached. They're not
16 supposed to be looking out for anybody over -- over
17 the other person. Is that your general recollection
18 of the language in that document?

19 A. Yeah, I think so.

20 Q. And do you believe that Jennifer and Buck
21 were neutral and detached in making these decisions?
22 Whether you agreed with them or not, do you think that
23 they were honestly giving a neutral decision?

24 A. I think -- I think early on, yeah. I think
25 toward the end, their, you know -- it felt like there

1 was some pressure, you know what I mean, it felt like
2 maybe not.

3 **Q. Okay. And what -- pressure from whom and**
4 **why did you feel that way?**

5 A. I -- I would have -- I mean, I would have --
6 you know, assume who's -- who's paying their check but
7 as far as pressure goes. Because I mean, any decision
8 they made affected -- affected the owner's pocketbook.
9 If they said yes, it was charged to the owner, right?

10 **Q. Right.**

11 A. So -- so yeah, any decision they made, when
12 things -- when the person paying you --

13 **Q. Okay.**

14 A. -- is the person that you make the decision
15 and it affects them --

16 **Q. Right.**

17 A. -- it'd be probably hard not to be
18 influenced some. But as things got I guess a little
19 more heated toward the end with all the changes and
20 trying to finish the job, things like that, I think
21 there was probably pressure. Just my -- my opinion.

22 **Q. Okay. Do you have any -- is that just a --**
23 **your opinion based on human nature, or do you actually**
24 **have any evidence of that?**

25 A. I know that there was -- there was a piece

1 of paper I remember left in a copier that had to do
2 with a change order, and it had EOR written on it,
3 that's errors and -- basically errors and omissions
4 or -- which means typically you're going after an
5 architect's insurance for maybe design issues, things
6 like that. So I saw that and felt like they -- there
7 was probably some kind of dispute between the owner
8 and the architect from just seeing that piece of
9 paper.

10 **Q. All right. Let's drill down on that. Do**
11 **you know who wrote E&O -- what was it? E&O, did it**
12 **say E&R?**

13 A. Errors and omissions, so ...

14 **Q. What was it -- was that written out, errors**
15 **and omissions?**

16 A. No, it just was an acronym. Just was an
17 acronym.

18 **Q. So E&O?**

19 A. Errors and omissions, yeah.

20 **Q. And whose handwriting was it?**

21 A. I have no -- I don't know. I don't know.
22 It -- it may have been Jim. I don't know. Jim and --
23 would come to our office. Sometimes he'd make copies.
24 I just -- I don't know for sure. I just know I was
25 going through the copier later, found a copy of the

1 change order, and it had it written on it with like a
2 sticky note. So I don't know who --

3 **Q. Had -- I'm sorry. I didn't mean to**
4 **interrupt you. It had it written on it on a sticky**
5 **note?**

6 A. There was a sticky note on it and a
7 photocopy of it made and -- and the copy was
8 sitting in the copier.

9 **Q. Okay. And that was --**

10 A. In our shelf in our office.

11 **Q. That was in your office?**

12 A. Yeah, yeah.

13 **Q. Did -- did Jim work out of your office?**

14 A. He would come to meetings. Sometimes he
15 would work out of our office.

16 **Q. Okay. So you -- your -- so you saw Jim put**
17 **E&O on a sticky note and stick it in your office?**

18 A. I didn't see Jim put it on a sticky note.

19 **Q. Okay.**

20 A. I'm just saying a change order that was
21 presented was in the copier with that acronym on it.
22 And just from being in the industry, knowing what
23 errors and omissions are from a design standpoint,
24 that probably influences -- when I say they probably
25 had some pressure on them.

1 Q. Okay. All right. Well, I'm trying to drill
2 down here. It doesn't matter to me. I'm just trying
3 to drill -- understand it. You're in your office --
4 who prepared the change order that you're talking
5 about?

6 A. I don't recall. I don't even recall exactly
7 the phase or timing of it. I just recall seeing it
8 and thinking, you know, it looks like there's some
9 conflict between the owner and architect basically was
10 my, I guess, thought, when I saw it.

11 Q. I guess what I'm trying to figure out is
12 what led you to believe that that note was put on
13 there by anyone representing the owner or anyone
14 representing Balfour Beatty. I mean what -- what -- I
15 mean from a -- a mystery stand --

16 A. I mean --

17 Q. -- from a mystery -- murder mystery
18 standpoint, how would you stick that note on anybody?

19 A. How would I stick it on anybody?

20 Q. In other words, how would you -- how would
21 you determine it was Jim as opposed to Falkenberry as
22 opposed to me as opposed to you as opposed to anybody
23 else? I mean, I don't know.

24 A. Just from him being in our office. Just
25 from him being in our office and meetings and -- is

1 probably the only reason.

2 **Q. Okay. But were there other people in your**
3 **office in meetings?**

4 A. Sure. Our whole team.

5 **Q. Okay. And -- and what leads you to believe**
6 **that one of them didn't put it on there?**

7 A. I don't -- I don't have -- so in other
8 words, from a contractor, we wouldn't have an error
9 and omissions against someone that -- a designer that
10 doesn't work for us, that would -- that just would
11 never happen, you know what I mean. If the -- if the
12 designer worked for us and we felt they had designed
13 something wrong, then it may be an errors and
14 omissions claim, right, to go after.

15 **Q. All right. Okay.**

16 A. So no designer worked for us, no change
17 order, so we would have not have put an errors and
18 omissions on anything.

19 **Q. Okay. So the only person left who would**
20 **have done that would have been Jim Clement?**

21 A. I just remember at the time knowing he was
22 in there, you know what I mean, in our office that day
23 when I found it.

24 **Q. I got you.**

25 A. So I saw it. That was my assumption.

1 **Q. I got you. Okay. Did that discovery on**
2 **your part influence your subsequent trust in the**
3 **architect?**

4 A. Trust? I wouldn't go that far. I mean, it
5 was -- as far as a decision-making standpoint from
6 therein?

7 **Q. Yeah.**

8 A. I just think that -- I mean maybe a little
9 bit, yeah, maybe a little bit, you know.

10 **Q. Okay. All right. All right. Let's talk**
11 **about -- let's see. Let's go back to the major subs.**
12 **We've talked about MCC and the -- and the plumbing and**
13 **mechanical. Who were your other major subs that you**
14 **would have been dealing with when you started in**
15 **January of 2015?**

16 A. Lithko Concrete would be one of them.

17 **Q. Let's start with Lethko [sic]. Did you --**
18 **who did you negotiate with or deal with at Lethko or**
19 **Lithko, whatever it is?**

20 A. Mike Rohrer was one of their executives that
21 I dealt with. Josh Beech was the project manager for
22 them, that were basically is who I would kind of
23 negotiate with as far as --

24 **Q. Were those gentlemen there during the job?**

25 A. Josh -- Mike Rohrer was an executive from --

1 I think he lived in North Carolina. Josh Beech,
2 though, was here in Charleston. And he was a project
3 manager, I think over that job and probably another
4 one. He was not there full time. They had a
5 superintendent running the job full time on-site.

6 **Q. And who was that -- do you recall the**
7 **superintendent?**

8 A. You're getting me, man.

9 **Q. Okay. That's fine.**

10 A. I'm bad with names. So that's -- that's --

11 **Q. That's fine. I am too, so -- but we can --**
12 **we can find that out through records. It's basically**
13 **the superintendents who you dealt with?**

14 A. Yeah.

15 **Q. Was it the same superintendent the whole --**
16 **generally the whole time that they -- Lithko was**
17 **there?**

18 A. I think he -- I don't know if he was there
19 all the way through the structure, but he was -- I
20 think -- I think he was right up toward the end. I
21 don't think he was there for kind of some of the punch
22 work and stuff like that, but ...

23 **Q. Are you the one who negotiated the price and**
24 **scope of work with Lithko?**

25 A. Yeah.

1 Q. Okay.

2 A. I was one of them.

3 Q. Okay. And for the record, for whoever is
4 watching this, can you explain in some detail what the
5 Lithko scope of work was for -- let's say a lay -- if
6 a laymen were watching this like a judge, what were
7 they supposed to?

8 A. So they were the concrete contractor. So
9 from the structural skeleton -- so this was a post
10 tension slab, structural columns was the shell that
11 took the floors up basically to the ninth floor roof.
12 So they would have all the slabs, the structural grade
13 beams, columns, PT slabs. They also did a little bit
14 of, you know, normal concrete sidewalk, things like
15 that, you know, on the -- on the exterior. But they
16 were the main concrete structural subcontractor.

17 Q. Could we refer to them as the people who
18 built the bones of this building?

19 A. I'd say so, yeah.

20 Q. Okay. And can you -- do you recall
21 generally what their contract amount was?

22 A. I don't even remember. It was -- it was --
23 it was in the millions. I just -- I just don't recall
24 exactly.

25 Q. Would you consider him to be a major

1 subcontractor on this job?

2 A. Sure.

3 Q. Would you consider that their work, for
4 periods of time, was the driving force behind the
5 project.

6 A. Absolutely. Like I said before, getting --
7 getting to -- getting to rooftop or dry-in is -- is
8 very critical to finishing jobs, so yes, absolutely.

9 Q. So if you had to pick one sub who was on the
10 critical path more than anyone else, would it be the
11 concrete subcontractor?

12 A. I wouldn't say more than anyone else, but
13 for the -- probably the first third to -- to -- you
14 know, of that job, they definitely were.

15 Q. Okay. Did you negotiate your sequence of
16 work with them or was that a collaboration between you
17 and Lithko to determine the duration and order of
18 their work?

19 A. It was -- it was a collaboration because
20 you're -- as far as, you know, putting columns,
21 putting tables up to be able to prep slabs, things
22 like that, that was pretty typical. I think the
23 biggest conversation of any adjustments were made down
24 in the -- basically in the bottom of that pit, how we
25 were going to pour those slabs and the sequencing

1 moving up the building.

2 **Q. Okay. Did Lithko's work delay the project**
3 **any on this job? Did it result in a delay in the**
4 **critical path?**

5 A. No. They definitely -- I'll tell you I put
6 them on notice I recall during the process. They fell
7 behind toward the beginning, and I think it was more
8 kind of columns, how many columns we were getting up,
9 you know what I mean, in a day or a week. So one of
10 the things -- when that happens, when we put them on
11 notice, I guess there's -- there's also a benefit to
12 that. It lets everyone know within their company,
13 even their higher-ups, that we've got an issue. But
14 it brings us together to the table, so we put a game
15 plan together to make up that time so -- and that's
16 what happens. So no, we had made up that time
17 basically till we hit a larger delay.

18 **Q. Okay. So there was -- is it correct that**
19 **there was time lost on the critical path, but that**
20 **time was regained?**

21 A. That's correct.

22 **Q. Okay. So was it a loss of float or was it a**
23 **loss -- was it an actual delay that was regained?**

24 A. I don't recall the float amounts on certain
25 scope, but --