

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2011-CP-10-5191

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JUL 15 2015

Unpublished Opinion No. 2015-UP-164

Submitted February 1, 2015 – Filed March 25, 2015

Appellate Case No. 2013-002679

S.C. SUPREME COURT

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. *Petitioner*
Appellant.

APPENDIX

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S.C. Supreme Court

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION TO STAY AND COMPEL
ARBITRATION**

Presiding Judge:
Plaintiff's Attorney:
Defendant's Attorney:
Date of Hearing:
Court Reporter:

Deadra L. Jefferson
Edward J. Coyne, Esq.
M. Brent McDonald, Esq.
December 5, 2011
Joyce Huck

This matter came before the Court on December 5, 2011 on Plaintiff's Motion to Stay and Compel Arbitration filed October 7, 2011. Plaintiff's Motion is made pursuant to S.C. Code Ann. § 15-48-20 and the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Appearing on behalf of the Plaintiff was Edward J. Coyne, Esq. Appearing for the Defendant was M. Brent McDonald, Esq. This Court, after reviewing the briefs, the record, and hearing oral argument, grants Plaintiff's Motion to Stay and Compel Arbitration.

STANDARD OF REVIEW

On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

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S.C. Code Ann. § 15-48-20(a). Whether a claim is subject to arbitration is an issue for judicial determination unless the parties provide otherwise. Partain v. Upstate Automotive Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). “The policy of the United States and of South Carolina is to favor arbitration of disputes.” Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). “Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered.” Partain, 386 S.C. at 491, 689 S.E.2d at 603–04. “[W]hen deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause.” Id. at 491–92, 689 S.E.2d at 604 (citing Zabinski, 346 S.C. at 597, 553 S.E.2d at 118). “[A] claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a ‘significant relationship’ exists between the claim and the contract.” Partain, 386 S.C. at 492, 689 S.E.2d at 604.

APPLICABLE FACTS and PROCEDURAL POSTURE¹

Lend Lease (US) Public Partnership, LLC f/k/a Actus Lend Lease, LLC (“Plaintiff”) entered into certain contracts for construction with Tri-Command Managing Member, LLC (“Owner”), under which Plaintiff agreed to demolish and renovate certain existing housing and related facilities at the Beaufort Marine Corps Air Station Paris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital (“Projects”). In connection with its performance of the Projects, Plaintiff entered into four (4) separate contracts with Allsouth Electrical Contractor’s

¹ These facts are taken as true for purposes of this Motion to Compel Arbitration. The Court is not finding these facts as true for the case, because in deciding whether the parties have agreed to submit a particular claim to arbitration, a court is not to rule on the potential merits of the underlying claims. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

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Inc. ("Defendant") to perform a part of the electrical work required by the projects ("Subcontracts"). Defendant undertook to perform all four (4) subcontracts, and subsequently, the Owner notified Plaintiff the electrical work performed by Defendant was defective and contained faulty workmanship. Plaintiff alleges it gave notice to Defendant of the defective work and made demand on Defendant to honor its contracts and warranties. Despite notice and demand, Defendant has allegedly refused to honor its contracts and warranties.

Plaintiff filed a Summons and Complaint in this action on July 22, 2011 in which it alleges, as to each subcontract, causes of action for breach of contract, breach of warranty, indemnity and negligence. Plaintiff alleges the claims are subject to arbitration. (Compl. ¶ 16–19.) Contemporaneous with the filing of this action, Plaintiff served and filed a demand for arbitration of all asserted claims with the American Arbitration Association. Defendant filed an Answer on September 29, 2011 in which Defendant denied Plaintiff's allegation that the claims are subject to arbitration. (Answer ¶ 17–20.) Defendant claims the subcontracts fail to comply with South Carolina law relative to arbitration clauses, and Plaintiff failed to comply with the express terms of the arbitration clause. (*Id.* at ¶ 17.) Plaintiff filed the present Motion to Stay and Compel Arbitration on October 7, 2011, and Defendant filed its Memorandum in Opposition thereto on October 17, 2011.

CONCLUSIONS OF LAW

Each subcontract entered into between Plaintiff and Defendant contains an identical arbitration clause which provides as follows:

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

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Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

(See Ex. 1 to Compl.)

At the hearing before the Court on December 5, 2011, the Defendant conceded that the matter involves interstate commerce. First, Defendant contends the arbitration provision is deficient and unenforceable pursuant to S.C. Code Ann. § 15-48-10(a) in that notice of the arbitration provision does not appear on the first page of the alleged contracts. Section 15-48-10(a) provides in relevant part, "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."

The Defendant is correct that notice of the arbitration provision does not appear on the first page of the alleged subcontracts. Rather, the provision is found in subsection "4.2.1.2 Unresolved Claims," which is one page 22 of each subcontract. However, Section 15-48-10 was

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preempted by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001). Title 9 U.S.C. § 2 of the FAA provides in pertinent part:

[A] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In Munoz, the South Carolina Supreme Court stated, “Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” 343 S.C. at 538, 542 S.E.2d at 363. The transaction in this case in fact involves interstate commerce, as conceded to by the parties; thus the FAA applies.

Second, Defendant contends the letters attached to the affidavit of Mr. Lesesne evidence the fact that the Plaintiff was aware of facts giving rise to its potential claims at least as early as May 21, 2010. The Plaintiff filed a demand for arbitration in this matter on July 25, 2011. Thus, Defendant contends Plaintiff failed to meet the condition precedent provided in the arbitration provision requiring “a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim.”

Plaintiff contends the “180 days” provision does not control in this case, as all of the causes of action fall within the preceding exception, which excludes from the 180 days demand requirement, “claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and . . . claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment”

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("indemnity exception"). Defendant contends that all of the causes of action are not for indemnity because they are not titled as such.

"Regardless of the label the plaintiff uses, when deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause." Partain, 386 S.C. at 491, 689 S.E.2d at 604 (citing Zabinski, 346 S.C. at 597, 553 S.E.2d at 118). Here, the Plaintiff alleges, as to each subcontract, causes of action for breach of contract, breach of warranty, indemnity and negligence. While the causes of action for indemnity obviously come within the indemnity exception, the Court must determine whether the remaining causes of action lie in indemnity. "Indemnity" is defined as follows:

A collateral contract or assurance, by which one person engages to secure another from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person. Term pertains to liability for loss shifted from one person held legally responsible to another person.

Black's Law Dictionary 692 (5th ed. 1979).

In the breach of contract causes of action, Plaintiff alleges Defendant failed to "perform its work in a good and workmanlike manner and failed to comply with the plans and specifications." (Compl. ¶¶ 22, 48, 74, and 100.) In the breach of warranty causes of action, Plaintiff alleges the work performed by Defendant was defective, Defendant refused to correct the work despite demand, and breached its guarantee and warranty as set forth in the subcontracts. (Compl. ¶¶ 29-30, 55-56, 81-82, 107-08.) In the negligence causes of action, Plaintiff alleges Defendant performed the work required by the subcontracts in a negligent manner which caused Defendant damage. (Compl. ¶¶ 41-42, 67-68, 93-94, 119-20.) Under each cause of action, Plaintiff alleges damages to include the cost to repair the defective work, extended overhead and general conditions, and other costs incurred or to be incurred, in making

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[Signature]

the repairs. The Court finds the Plaintiff is requesting to be indemnified for the costs incurred in making the repairs made as a result of Defendant's alleged breach of contract, breach of warranty, and negligence. Therefore, the Court finds the causes of action for breach of contract, breach of warranty, and negligence lie in indemnity and fall within the indemnity exception of the arbitration clause.

For further guidance, the Court also reviewed the Indemnification provision contained in each subcontract at Section 9. Subsection 9.1 "Subcontractor's Performance" provides in relevant part,

. . . Subcontractor shall indemnify and hold harmless . . . Actus Lend Lease, LLC . . . from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of Subcontractor's Work provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . . including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or for anyone for whose acts Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Based on the factual allegations in the Complaint, as well as the Indemnification provision contained in each subcontract, this Court finds that all causes of action lie in indemnity. Therefore, all causes of action fall within the indemnity exception, and Plaintiff was not required to provide 180 days' notice to submit the matter to arbitration. Accordingly, all of the underlying claims in this action are within the scope of the arbitration clause and shall proceed to arbitration.

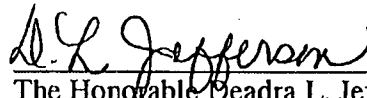
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CONCLUSION

The Court, having considered appropriate matters of record, the briefs and arguments of counsel, and the ends of justice, and having FOUND and CONCLUDED that the Plaintiff's Motion to Stay and Compel Arbitration should be GRANTED;

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED and DECREED that the above-captioned civil action be, and hereby is, STAYED, and the Parties shall proceed to arbitrate the dispute between them.

SO ORDERED, this the 2nd day of Feb., 2012.



The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 
DEPUTY CLERK

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

**ORDER DENYING DEFENDANT'S
RULE 59, SCRPC MOTION**

Presiding Judge:
Plaintiff's Attorney:
Defendant's Attorney:
Date of Hearing:
Court Reporter:

Deadra L. Jefferson
Edward J. Coyne, Esq.
M. Brent McDonald, Esq.
December 5, 2011
Joyce Huck

FILED
2012 MAR -6 AM 11:05
JUDICIAL CIRCUIT
CLEAN OF COURT
BY

THIS MATTER is before the Court on the Defendant's Motion to Alter or Amend Judgment pursuant to Rule 59, SCRPC. On December 5, 2011 this Court held a hearing on Plaintiff's Motion to Stay and Compel Arbitration. The Court's Order granting Plaintiff's Motion was filed February 9, 2012. Defendant's Motion to Alter or Amend was filed February 21, 2012 which was received by the Court on the same day. Plaintiff's Counsel advised the Court he was not inclined to file a written response to Defendant's Motion, as he found the Court's Order to be sufficient.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C.

1 of 4
2012

157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she 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. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

First, Defendant requests the Court to rule upon each and every argument made in its Memorandum in Opposition to the Motion to Stay. The Court need not address all issues where disposition of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). The Court ruled on the dispositive issues in the case, that being whether the Arbitration provision is enforceable and whether the Plaintiff's causes of action are encompassed by the scope of alleged contracts' arbitration provision. Accordingly, Defendant's request is denied.

Additionally, Defendant requests for clarification as to whether the Court ruled as a matter of fact and law that the limitations provision provided in the alleged contract between the parties does not apply to bar any claims of the Plaintiff. In opposition to the Plaintiff's Motion to Stay and Compel Arbitration, Defendant argued 1) the arbitration provision is deficient and unenforceable pursuant to S.C. Code Ann. § 15-48-10(a), and 2) the Plaintiffs filed the demand

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for arbitration more than 180 days after the party knew, or should have known, of facts giving rise to the claim, as provided by the contract. Therefore, the Court had to determine 1) whether the arbitration provision was enforceable under Section 15-48-10(a), and 2) whether the “180 days” demand requirement in the arbitration provision was applicable to the Plaintiff’s causes of action. The demand requirement referred to by the Defendant in provision “4.2.1.2 Unresolved Claims” states,

Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim.

The Plaintiff argued that the 180 days requirement did not apply because the Plaintiff’s claims were for indemnity arising out of defects in the work performed by the subcontractors. Therefore, in order to determine the applicability of the 180 days demand requirement, the Court had to determine whether the Plaintiff’s causes of action fell under “indemnity.”

“[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). To clarify, the Court made the following conclusions of law. First, the Court found that the FAA applies, and, thus, Section 15-48-10 does not apply, as it was preempted by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001). Second, the Court found that all of Plaintiff’s causes of action lie in indemnity. Therefore, the 180 days demand requirement relied on by the Defendant is inapplicable, and the Plaintiff was not required to provide such demand in order to have this matter resolved by arbitration according to the arbitration provision in the alleged contracts. Accordingly, the Court found the underlying claims to be within the scope of the arbitration

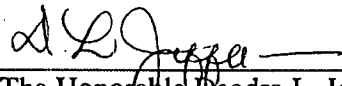
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clause. To clarify further, the Court did not make rulings of fact and law on the potential merits of the underlying claims.

CONCLUSION

Having considered the Defendant's Motion, the timeliness of the Motion, as well as the various interests balanced by the Court at the time of the ruling, the Defendant's Motion to Alter or Amend is hereby denied.¹

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

3/1, 2012
Charleston, South Carolina

¹ This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-10-5191

Lend Lease US Public Partnership, LLC

AllSouth Electrical

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.
- ☐ **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
- ☐ **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: This case came before the Court on Defendant's Motion to Lift Stay. The Court hereby GRANTS Defendant's Motion to Lift Stay in this case.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2151

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows: _____

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

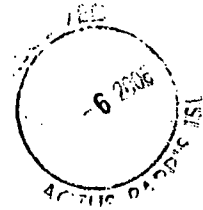
ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



CONSTRUCTION INDUSTRY ARBITRATION RULES
Demand for Arbitration

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box. ☐ There is no additional administrative fee for this service.					
Name of Respondent Allsouth Electrical Contractors, Inc			Name of Representative (if known)		
Address: 2630 Bonds Avenue			Name of Firm (if applicable)		
			Representative's Address:		
City North Charleston	State SC	Zip Code 29405	City	State	Zip Code
Phone No. 843 522 9923		Fax No. 843 767 4463	Phone No.		Fax No.
Email Address: allsblesesne@aol.com			Email Address:		
The named claimant, a party to an arbitration agreement dated 9/30/04;11/22/04;3/1/06;&10/23/07, which provides for arbitration under the Construction Industry Rules of the American Arbitration Association, hereby demands arbitration.					
ARBITRATION CLAUSE: Please indicate whether the contract containing the dispute resolution clause governing this dispute is a standard industry form contract (such as AIA, ConsensusDOCS or AGC) or a customized contract for the specific project. Contract Form: <u>Custom (copy attached)</u>					
THE NATURE OF THE DISPUTE Claim by General Contractor against Electrical Subcontractor for breach of 4 separate but project related subcontracts based on defective workmanship and breach of the contract warranties for the defective work and failure to cure the defective work, as well as negligence and indemnity on a government facility. Subcontract 14958 (200 Officers Phase IV); Subcontract 50701046/02781001 (200 Officers Phase II); Subcontract 50701024/02781001 (Weapons Area) and Subcontractor 13128 (200 Officers Phase III)					
Dollar Amount of Claim \$950,000.00			Other Relief Sought: ☒ Attorneys Fees ☒ Interest ☒ Arbitration Costs ☐ Punitive/ Exemplary ☐ Other		
Amount Enclosed \$ <u>2,500.00</u> In accordance with Fee Schedule: ☒ Flexible Fee Schedule ☐ Standard Fee Schedule					
PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE: Construction Industry Experience particularly including government construction contracts and electrical work.					
Hearing locale requested <u>Beaufort, SC</u>			Project site <u>Parris Island, SC</u>		
Estimated time needed for hearings overall: _____ hours or <u>5.00</u> days			Specify type of business: Claimant <u>General Contractor</u> Respondent <u>Electrical Subcontractor</u>		
You are hereby notified that a copy of our arbitration agreement and this demand are being filed with the American Arbitration Association with a request that it commence administration of the arbitration. The AAA will provide notice of your opportunity to file an answering statement.					
Signature (may be signed by a representative) 		Date: July 21, 2011	Name of Representative Gilbert C. Laite III		
Name of Claimant Lend Lease (US) Public Partnerships LLC f/k/a Actus Lend Lease LLC			Name of Firm (if applicable) Williams Mullen		
Address (to be used in connection with this case) Suite 420 300 North Third Street			Representative's Address Suite 420, 300 N. Third Street		
City Wilmington	State NC	Zip Code 28401	City Wilmington	State NC	Zip Code 28401
Phone No. 910 256 5135		Fax No. 919 981 4300	Phone No. 910 442 2776		Fax No. 910 981 4300
Email Address: glaite@williamsmullen.com			Email Address: glaite@williamsmullen.com		
To begin proceedings, please send a copy of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100 Voorhees, NJ 08043. Send the original Demand to the Respondent.					
Please visit our website at www.adr.org if you would like to file this case online. AAA Case Filing Services can be reached at 877-495-1485.					



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

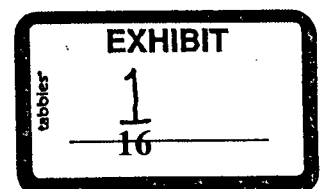
(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

March 1, 2006



4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a 'dispute') between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim-
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration,

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by

Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by change order to the extent obtained by Contractor under the Subcontract Documents and the Schedule of Work shall be revised accordingly.

Contractor shall not be liable to Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless Contractor has first recovered the same on behalf of Subcontractor from said person, it being understood and agreed by Subcontractor that, apart from recovery from said person, Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of Subcontractor's Work.

4.4 Liquidated Damages.

The parties agree that in the event there is a delay by Subcontractor in the completion of Subcontractor's Work, the monetary impact on the contractor will be difficult to ascertain. However, to the extent that the Subcontractor is responsible for delays to the completion of



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

September 30, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

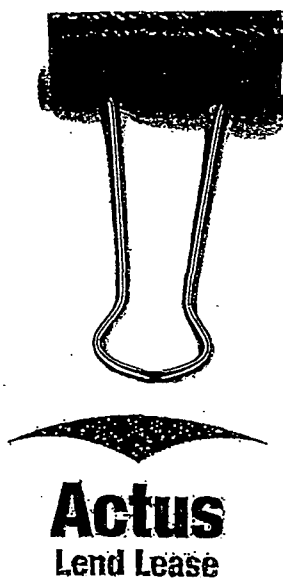
4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

November 22, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

SUBCONTRACT AGREEMENT No. 14958

between

ACTUS LEND LEASE LLC
(Contractor)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.
(Subcontractor)

for the
Actus
Joint Command Military Family Housing

located at

200 OFFICERS PHASE IV

at

Beaufort Military Complex, South Carolina

October 23, 2007

Subcontractor on account of the portion of the work performed. If at the date of such deletion Subcontractor has already properly prepared or fabricated off site any goods for subsequent incorporation in the work, and if Subcontractor delivers such goods to the site or to such other place as the Contractor shall reasonably direct, then Subcontractor shall be paid for such goods or materials.

4.2 Claims.

Subcontractor shall give Contractor written notice of all claims within five (5) days of the beginning of the event for which claim is made; otherwise, such claims shall be deemed waived.

All unresolved claims, disputes and other matters in question between Contractor and Subcontractor shall be resolved as follows:

4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a "dispute") between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim:
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration.

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE GENERAL COURT OF JUSTICE
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 11-CP-_____

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

SUMMONS

2011 JUL 22 PM 4:23
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ALLSOUTH ELECTRICAL CONTRACTORS, INC.
c/o William E. Lesesne, Registered Agent
715 Bradburn Drive
Mt. Pleasant, SC 29464

PLEASE TAKE NOTICE that the Plaintiff, Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC, represented by and through the undersigned counsel, complains of the Defendant, Allsouth Electrical Contractors, Inc., by the Complaint of even date herewith and served along with this Summons. Pursuant to the South Carolina Rules of Civil Procedure, the Defendant shall serve its answer to the Complaint upon the undersigned attorney within thirty (30) days after service of the Complaint on the Defendant. If the Defendant fails to timely answer the Complaint, judgment by default will be rendered against the Defendant for the relief sought in the Complaint.

[INTENTIONALLY LEFT BLANK]

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorneys



Edward James Coyne III
S.C. State Bar No. 78633
WILLIAMS MULLEN
300 N. 3rd Street, Suite 420
Wilmington, NC 28401
Telephone: 910.256.5135
Facsimile: 910.256.6451

Wilmington, North Carolina
July 21, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE GENERAL COURT OF JUSTICE
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 11-CP-_____

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

COMPLAINT

Plaintiff, complaining of Defendant, alleges:

PARTIES

1. Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC ("Lend Lease" or "Plaintiff") is a Delaware Limited Liability Company organized under the laws of the State of Delaware and doing business, among other places, in the State of South Carolina on the Parris Island Military Reservation, and is engaged as a general contractor, particularly in regard to military housing:

2. Allsouth Electrical Contractors, Inc. ("Allsouth") is a South Carolina corporation organized under the laws of the State of South Carolina and authorized to do business and doing business, among other places, in the State of South Carolina and on the Parris Island Military Reservation, and engaged as an electrical subcontractor in regard to military housing. Upon information and belief, Allsouth has a place of business in Charleston County, South Carolina.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper pursuant to, among other things, Sections 15-48-20, 15-48-180 and 15-48-190, South Carolina Code.

FACTUAL BACKGROUND

4. Lend Lease entered into certain contracts for construction ("Contracts") with Tri-Command Managing Member LLC ("Owner"), the owner of certain real property in Beaufort, South Carolina, under the general terms of which Lend Lease was to demolish and renovate certain existing housing units and related facilities located at the Beaufort Marine Corps Air Station Parris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital in Beaufort County, South Carolina ("Projects").

5. In connection with the performance of the Contracts and Projects, Lend Lease, entered into four (4) separate contracts with Allsouth to perform a part or portion of the electrical work required by the Contracts and Projects ("Subcontracts"). Specifically, Lend Lease and Allsouth entered into the following four Subcontracts:

- (a) Subcontract Agreement 13128, for completion of specified electrical work on the portion of the Projects identified as 200 Officers (Marsh Landing) Phase III for the sum of \$62,557.00 ("Subcontract 1");
- (b) Subcontract Agreement 50701024/02781001, for completion of specified electrical work on the portion of the Projects identified as Weapons Area for the sum of \$310,699.00 ("Subcontract 2");
- (c) Subcontract Agreement 50701046/02781001, for the completion of specified electrical work on the portion of the Projects identified as 200 Officers (Marsh Landing) Phase II for the sum of \$82,007.00 ("Subcontract 3"); and

(d) Subcontract Agreement 14958, for the completion of specified electrical work on the portion of the Projects identified as 200 Officers Phase IV for the sum of \$103,800.00 ("Subcontract 4").

6. Allsouth undertook to perform all four Subcontracts.

7. Subsequently, the Owner discovered, and notified Lend Lease, that the electrical work performed by Allsouth was defective and that its workmanship was faulty based on, among other things, the primary and secondary feeders being installed out of compliance with the plans and specifications for reasons including, among other things, that electrical conduit was not buried at the specified depths.

8. The Owner has required that the work be redone to comply with the plans and specifications (the "Repairs").

9. Lend Lease has given notice to Allsouth of the defective work and the Owner's demand and made demand on Allsouth to honor its contracts and warranties by making the Repairs.

10. Despite notice and demand, Allsouth has failed and refused to honor its contracts and warranties and has not made the Repairs.

11. Per the requirements of the Owner, Lend Lease has undertaken, after notice to Allsouth, to enter into a subcontract with a third-party electrical subcontractor, namely Gaylor, Inc., to make the Repairs, with an initial cost estimate in excess of \$700,000.00.

12. Lend Lease, in addition to incurring the cost of the Repairs, will incur other damages including, but not limited to, the costs of extended general conditions and overhead to manage the Repairs (estimated at approximately \$90,000.00), the costs of additional work necessitated by the Repairs, such as the replacement of fencing and landscaping (estimated at

approximately \$90,000.00), and additional damages as may be incurred in connection with the defective work and making the Repairs all as will be shown.

13. Lend Lease has given notice to Allsouth, but Allsouth has failed to resolve the matter.

14. Contemporaneous with the filing of this civil action, Lend Lease has served and filed with the American Arbitration Association a demand for arbitration of the claims asserted herein in accordance with the provisions of the Subcontracts. The cover pages of each of the Subcontracts, along with the respective arbitration provisions, are attached hereto as Exhibit 1

15. Any conditions precedent to the commencement of this action have been met.

MOTION TO STAY AND TO COMPEL ARBITRATION

16. The Claims set forth herein are subject to arbitration pursuant to the express terms of the Subcontracts. See Exhibit 1.

17. The matters herein are in commerce.

18. Lend Lease had made a demand for arbitration.

19. Lend Lease is entitled to entry of an order staying this action pending arbitration and to an order compelling the parties to arbitration pursuant to the terms of the Subcontracts.

FIRST CLAIM FOR RELIEF
(Breach of Subcontract 1)

20. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

21. Pursuant to the terms of Subcontract 1, Allsouth was required to perform its work in a good and workmanlike manner and to comply with the plans and specifications.

22. Allsouth did not perform its work in a good and workmanlike manner and failed to comply with the plans and specifications.

23. Allsouth thereby breached Subcontract 1, and said breach caused Lend Lease damage.

24. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

25. Subcontract 1 includes a provision entitling the prevailing party to recover its fees and costs.

26. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of Subcontract 1, together with an award of all costs and fees, in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF
(Breach of Warranty, Subcontract 1)

27. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

28. Pursuant to the terms of Subcontract 1, Allsouth guaranteed and warranted its work and agreed to correct all defective work.

29. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

30. Allsouth has breached its guarantee and warranty in Subcontract 1, and said breach caused Lend Lease damage.

31. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

32. Subcontract 1 includes a provision entitling the prevailing party to recover its fees and costs.

33. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of its warranty in Subcontract 1, together with an award of all costs and fees, in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Indemnity, Subcontract 1)

34. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

35. Pursuant to the terms of Subcontract 1, Allsouth agreed to indemnify Lend Lease from any and all claims, damages, losses and expenses, including reasonable attorneys' fees and costs arising out of Allsouth work that caused, among other things, injury or destruction of tangible property other than the work itself, including loss of use.

36. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

37. As a result of Allsouth's defective work, underground conduit will need to be relaid resulting in damage to surrounding tangible property other than the work itself, thereby invoking the terms of Allsouth's indemnity.

38. Allsouth has failed and refused to honor its indemnity.

39. Lend Lease is entitled to a judgment against Allsouth for all damages incurred within the scope of Allsouth's indemnity.

FOURTH CLAIM FOR RELIEF
(Negligence, Subcontract 1)

40. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

41. Allsouth performed the work required by Subcontract 1 in a negligent manner.

42. Said negligence caused Lend Lease damage.

43. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

44. Subcontract 1 includes a provision entitling the prevailing party to recover its fees and costs.

45. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's negligence, together with an award of all costs and fees, in an amount to be proven at trial.

FIFTH CLAIM FOR RELIEF
(Breach of Subcontract 2)

46. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

47. Pursuant to the terms of Subcontract 2, Allsouth was required to perform its work in a good and workmanlike manner and to comply with the plans and specifications.

48. Allsouth did not perform its work in a good and workmanlike manner and failed to comply with the plans and specifications.

49. Allsouth has breached Subcontract 2, and said breach caused Lend Lease damage.

50. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

51. Subcontract 2 includes a provision entitling the prevailing party to recover its fees and costs.

52. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of Subcontract 2, together with an award of all costs and fees, in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF
(Breach of Warranty, Subcontract 2)

53. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

54. Pursuant to the terms of Subcontract 2, Allsouth guaranteed and warranted its work and agreed to correct all defective work.

55. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

56. Allsouth has breached its guarantee and warranty in Subcontract 2, and said breach caused Lend Lease damage.

57. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

58. Subcontract 2 includes a provision entitling the prevailing party to recover its fees and costs.

59. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of its warranty in Subcontract 2, together with an award of all costs and fees, in an amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF
(Indemnity, Subcontract 2)

60. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

61. Pursuant to the terms of Subcontract 2, Allsouth agreed to indemnify Lend Lease from any and all claims, damages, losses and expense, including reasonable attorneys' fees and costs, arising out of Allsouth work that caused, among other things, injury or destruction of tangible property other than the work itself, including loss of use.

62. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

63. As a result of Allsouth's defective work, underground conduit will need to be relaid resulting in damage to surrounding tangible property other than the work itself, thereby invoking the terms of Allsouth's indemnity.

64. Allsouth has failed and refused to honor its indemnity.

65. Lend Lease is entitled to a judgment against Allsouth for all damages incurred within the scope of Allsouth's indemnity.

EIGHTH CLAIM FOR RELIEF
(Negligence, Subcontract 2)

66. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

67. Allsouth performed the work required by Subcontract 2 in a negligent manner.

68. Said negligence caused Lend Lease damage.

69. Lend Lease's damages, include but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

70. The Subcontract includes a provision entitling the prevailing party to recover its fees and costs.

71. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's negligence, together with an award of all costs and fees, in an amount to be proven at trial.

NINTH CLAIM FOR RELIEF
(Breach of Subcontract 3)

72. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

73. Pursuant to the terms of Subcontract 3, Allsouth was required to perform its work in a good and workmanlike manner and to comply with the plans and specifications.

74. Allsouth did not perform its work in a good and workmanlike manner and failed to comply with the plans and specifications.

75. Allsouth has breached Subcontract 3, and said breach caused Lend Lease damage.

76. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

77. Subcontract 3 includes a provision entitling the prevailing party to recover its fees and costs.

78. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of Subcontract 3, together with all costs and fees, in an amount to be proven at trial.

TENTH CLAIM FOR RELIEF
(Breach of Warranty, Subcontract 3)

79. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

80. Pursuant to the terms of Subcontract 3, Allsouth guaranteed and warranted its work and agreed to correct all defective work.

81. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

82. Allsouth has breached its guarantee and warranty in Subcontract 3, and said breach caused Lend Lease damage.

83. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

84. Subcontract 3 includes a provision entitling the prevailing party to recover its fees and costs.

85. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of its warranty in Subcontract 3, together with an award of all costs and fees, in an amount to be proven at trial.

ELEVENTH CLAIM FOR RELIEF
(Indemnity, Subcontract 3)

86. The allegations contained in paragraph 1 through 15 above are realleged and incorporated herein by reference.

87. Pursuant to the terms of Subcontract 3, Allsouth agreed to indemnify Lend Lease from any and all claims, damages, losses and expense, including reasonable attorneys fees and costs, arising out of Allsouth work that caused, among other things, injury or destruction of tangible property other than the work itself, including loss of use.

88. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

89. As a result of Allsouth's defective work, underground conduit will need to be relaid resulting in damage to surrounding tangible property other than the work itself, thereby invoking the terms of Allsouth's indemnity.

90. Allsouth has failed and refused to honors its indemnity.

91. Lend Lease is entitled to a judgment against Allsouth for all damages incurred within the scope of Allsouth's indemnity.

TWELTH CLAIM FOR RELIEF
(Negligence, Subcontract 3)

92. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

93. Allsouth performed the work required by Subcontract 3 in a negligent manner.

94. Said negligence caused Lend Lease damage.

95. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

96. Subcontract 4 includes a provision entitling the prevailing party to recover its fees and costs.

97. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's negligence, together with an award of all costs and fees, in an amount to be proven at trial.

THIRTEENTH CLAIM FOR RELIEF
(Breach of Subcontract 4)

98. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

99. Pursuant to the terms of Subcontract 4, Allsouth was required to perform its work in a good and workmanlike manner and to comply with the plans and specifications.

100. Allsouth did not perform its work in a good and workmanlike manner and failed to comply with the plans and specifications.

101. Allsouth has breached Subcontract 4, and said breach caused Lend Lease damage.

102. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

103. Subcontract 4 includes a provision entitling the prevailing party to recover its fees and costs.

104. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of Subcontract 4, together with all costs and fees, in an amount to be proven at trial.

FOURTEENTH CLAIM FOR RELIEF
(Breach of Warranty, Subcontract 4)

105. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

106. Pursuant to the terms of Subcontract 4, Allsouth guaranteed and warranted its work and agreed to correct all defective work.

107. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

108. Allsouth has breached its guarantee and warranty in Subcontract 4, and said breach caused Lend Lease damage.

109. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

110. Subcontract 4 includes a provision entitling the prevailing party to recover its fees and costs.

111. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's breach of its warranty in Subcontract 4, together with an award of all costs and fees, in an amount to be proven at trial.

FIFTEENTH CLAIM FOR RELIEF
(Indemnity, Subcontract 4)

112. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

113. Pursuant to the terms of Subcontract 4, Allsouth agreed to indemnify Lend Lease from any and all claims, damages, losses and expense including reasonable attorneys fees and costs arising out of Allsouth work that caused, among other things, injury or destruction of tangible property other than the work itself, including loss of use.

114. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

115. As a result of Allsouth's defective work, underground conduit will need to be relaid resulting in damage to surrounding tangible property other than the work itself, thereby invoking the terms of Allsouth's indemnity.

116. Allsouth has failed and refused to honors its indemnity.

117. Lend Lease is entitled to a judgment against Allsouth for all damages incurred within the scope of Allsouth's indemnity.

SIXTEENTH CLAIM FOR RELIEF
(Negligence, Subcontract 4)

118. The allegations contained in paragraphs 1 through 15 above are realleged and incorporated herein by reference.

119. Allsouth performed the work required by Subcontract 4 in a negligent manner.

120. Said negligence caused Lend Lease damage.

121. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

122. The Subcontract includes a provision entitling the prevailing party to recover its fees and costs.

123. Lend Lease is entitled to a judgment against Allsouth for all damages incurred as a result of Allsouth's negligence, together with an award of all costs and fees, in an amount to be proven at trial.

WHEREFORE, Plaintiff prays:

(a) For the court to enter an order staying this action pending arbitration of all matters pursuant to the terms of the Subcontracts;

(b) For the court to enter an order compelling Defendant to arbitrate;

(c) In the alternative, and only upon finding any issues herein non-arbitratable, to enter judgment against Defendant on all claims alleged herein in favor of Plaintiff for a sum in excess of \$10,000.00, together with an award of all costs and fees.

(INTENTIONALLY LEFT BLANK)

LEND LEASE (US) PUBLIC
~~PARTNERSHIP~~ LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorneys

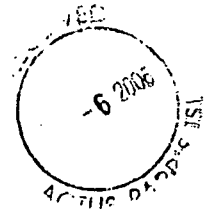


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Wilmington, North Carolina
July 21, 2011



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

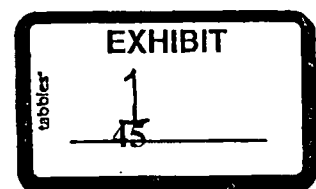
(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

March 1, 2006



4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a 'dispute') between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim-
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration,

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by

Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by change order to the extent obtained by Contractor under the Subcontract Documents and the Schedule of Work shall be revised accordingly.

Contractor shall not be liable to Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless Contractor has first recovered the same on behalf of Subcontractor from said person, it being understood and agreed by Subcontractor that, apart from recovery from said person, Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of Subcontractor's Work.

4.4 Liquidated Damages.

The parties agree that in the event there is a delay by Subcontractor in the completion of Subcontractor's Work, the monetary impact on the contractor will be difficult to ascertain. However, to the extent that the Subcontractor is responsible for delays to the completion of



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

September 30, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

November 22, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

SUBCONTRACT AGREEMENT No. 14958

between

ACTUS LEND LEASE LLC
(Contractor)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.
(Subcontractor)

for the
Tri-Command Military Family Housing

located at

200 OFFICERS PHASE IV

at

Beaufort Military Complex, South Carolina

October 23, 2007

Subcontractor on account of the portion of the work performed. If at the date of such deletion Subcontractor has already properly prepared or fabricated off site any goods for subsequent incorporation in the work, and if Subcontractor delivers such goods to the site or to such other place as the Contractor shall reasonably direct, then Subcontractor shall be paid for such goods or materials.

4.2 Claims.

Subcontractor shall give Contractor written notice of all claims within five (5) days of the beginning of the event for which claim is made; otherwise, such claims shall be deemed waived.

All unresolved claims, disputes and other matters in question between Contractor and Subcontractor shall be resolved as follows:

4.2.1 Dispute Resolution.

If a dispute, or difference (hereafter called a "dispute") between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim:
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration.

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-5191

**ANSWER OF DEFENDANT
ALLSOUTH ELECTRICAL
CONTRACTORS, INC.**

VS.

Defendant.

1. Each and every allegation hereinafter not specifically admitted is denied.
2. With regard to Paragraph 1, upon information and belief it is admitted.
3. With regard to Paragraph 2, upon information and belief it is admitted.
4. With regard to Paragraph 3, to the extent it is a conclusion of law, it is, therefore, denied. If Paragraph 3 is stated for any other purpose or conclusion, it is denied.

In further response, to the extent Paragraph 3 asserts that the Plaintiff is entitled to have this action stayed pending arbitration, this allegation is denied.
5. Paragraph 4 is denied.
6. Paragraph 5 and all its subparts are denied.
7. Paragraph 6 is denied.
8. Paragraph 7 is denied.

9. Paragraph 8 is denied.
10. Paragraph 9 is denied.
11. Paragraph 10 is denied.
12. Paragraph 11 is denied.
13. Paragraph 12 is denied.
14. Paragraph 13 is denied.
15. Paragraph 14 is denied.
16. Paragraph 15 is denied.
17. Paragraph 16 is denied. In further response, the subcontract(s) attached as Exhibit 1 to the Complaint fails to comply with South Carolina law relative to arbitration clauses and the Plaintiff has failed to comply with the express terms of Exhibit 1.
18. Paragraph 17 is denied.
19. Paragraph 18 is denied.
20. Paragraph 19 is denied.
21. With regard to Paragraph 20, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
22. Paragraphs 21, 22, 23, 24, 25, and 26 are denied and strict proof is demanded thereof.
23. With regard to Paragraph 27, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
24. Paragraphs 28, 29, 30, 31, 32, and 33 are denied and strict proof is demanded thereof.

25. With regard to Paragraph 34, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
26. Paragraphs 35, 36, 37, 38, and 39 are denied and strict proof is demanded thereof.
- 27. With regard to Paragraph 40, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
28. Paragraphs 41, 42, 43, 44, and 45 are denied and strict proof is demanded thereof.
29. With regard to Paragraph 46, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
30. Paragraphs 47, 48, 49, 50, 51 and 52 are denied and strict proof is demanded thereof.
31. With regard to Paragraph 53, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
32. Paragraphs 54, 55, 56, 57, 58 and 59 are denied and strict proof is demanded thereof.
33. With regard to Paragraph 60, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
34. Paragraphs 61, 62, 63, 64, and 65 are denied and strict proof is demanded thereof.
35. With regard to Paragraph 66, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
36. Paragraphs 67, 68, 69, 70 and 71 are denied and strict proof is demanded thereof.
37. With regard to Paragraph 72, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.

38. Paragraphs 73, 74, 75, 76, 77, and 78 are denied and strict proof is demanded thereof.
39. With regard to Paragraph 79, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
40. Paragraphs 80, 81, 82, 83, 84, and 85 are denied and strict proof is demanded thereof.
41. With regard to Paragraph 86, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
42. Paragraphs 87, 88, 89, 90, and 91 are denied and strict proof is demanded thereof.
43. With regard to Paragraph 92, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
44. Paragraphs 93, 94, 95, 96, and 97 are denied and strict proof is demanded thereof.
45. With regard to Paragraph 98, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
46. Paragraphs 99, 100, 101, 102, 103, and 104 are denied and strict proof is demanded thereof.
47. With regard to Paragraph 105, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
48. Paragraphs 106, 107, 108, 109, 110, and 111 are denied and strict proof is demanded thereof.
49. With regard to Paragraph 112, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.

50. Paragraphs 113, 114, 115, 116, and 117 are denied and strict proof is demanded thereof.
51. With regard to Paragraph 118, the Answering Defendant repeats and realleges each and every response of this Answer as if fully set forth herein verbatim.
52. Paragraphs 119, 120, 121, 122, 123 are denied and strict proof is demanded thereof.
53. To the extent any response is required from the Answering Defendant to the Plaintiffs' "Wherefore" paragraph, the allegations asserted therein and the relief requested therein are denied.

FOR A FIRST AFFIRMATIVE DEFENSE

54. The Plaintiffs' claims are barred by the relevant statute of limitations and/or laches.

FOR A SECOND AFFIRMATIVE DEFENSE

55. The Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure.

FOR A THIRD AFFIRMATIVE DEFENSE

56. The Plaintiffs' demand for arbitration should be denied for a failure to comply with South Carolina statutory law, a failure to comply with the provisions of the arbitration demand language, because the Answering Defendant does not consent to arbitration and/or such other reasons as to make arbitration of this matter legally unenforceable.

FOR A FOURTH AFFIRMATIVE DEFENSE

57. The Answering Defendant is informed and believes that Plaintiffs' claims are barred by the doctrine of waiver.

FOR A FIFTH AFFIRMATIVE DEFENSE

58. The Answering Defendant is informed and believes that the Plaintiffs' claims are barred by the doctrine of estoppel.

FOR A SIXTH AFFIRMATIVE DEFENSE

59. The Plaintiffs' complaint should be dismissed for a failure to name indispensable parties.

FOR A SEVENTH AFFIRMATIVE DEFENSE

60. The Plaintiffs' claim may be barred due to a failure to mitigate damages, the existence of which is expressly denied.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

61. Any damages sustained by the Plaintiffs as alleged in the Complaint, which are strictly denied, were due to and caused by the actions, inactions, negligence, and/or recklessness of the Plaintiffs or their agents and representatives, and, therefore, Plaintiffs are barred from recovery herein, or in the alternative, any recovery should be reduced proportionately because of their contributory fault.

FOR A NINTH AFFIRMATIVE DEFENSE

62. The Plaintiffs' claims against the Answering Defendant are barred or limited by the contributing, concurring, intervening, superseding or insulating fault and/or breach of persons or entities other than the Answering Defendant, including the Plaintiff itself, and over whom the Answering Defendant had no requisite control. Any fault or breach by the Answering Defendant, the existence of which is denied, was passive and secondary in light of the primary and active fault or breach of others.

FOR A TENTH AFFIRMATIVE DEFENSE

63. That the Plaintiffs' claims are barred due and owing to their breach of the implied warranty of plans and specifications.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

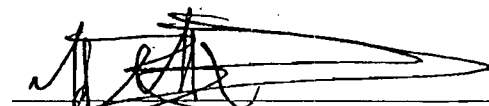
64. The Answering Defendants allege that Plaintiff has alleged its Complaint in conclusory terms and therefore the Answering Defendants cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, the Answering Defendants reserve the right to add additional affirmative defenses, if and to the extent such affirmative defenses are applicable in this action.

WHEREFORE, Defendant All South Electrical Contractors, Inc. having fully answered the complaint of the Plaintiff pray that this Honorable Court:

- (1) Make such investigation of this Complaint as necessary and dismiss the claims of the Plaintiff;

- (2) Deny the Plaintiff's request to compel arbitration.
- (3) Award Costs and Attorney's Fees to the Answering Defendant; and
- (4) Grant such other and further relief as the Court deems just and proper.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



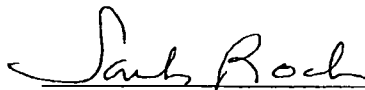
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9/29, 2011

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, an employee of Smith, Bundy, Bybee & Barnett, P.C., hereby certify that true and correct copies of the Answer of Defendant Allsouth Electrical Contractors, Inc. were served on all parties via E-Mail and U. S. Mail this 29th day of September 2011, as follows:

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
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Wilmington, NC 28401
**Attorney for Plaintiff Lend Lease (US) Public Partnerships,
LLV f/k/a Actus Lend Lease, Inc.**
tcoyne@williamsmullen.com



Sarah Foster Rock

2011 SEP 29 PM 1:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LEND LEASE U.S. PUBLIC
PARTNERSHIP, LLC

Plaintiff

vs.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.

Defendant

THE COURT OF COMMON PLEAS
DOCKET NO. 2011-CP-10-5191

TRANSCRIPT OF RECORD

December 5 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

EDWARD J. COYNE, ESQ.
Attorney for the Plaintiff

M. BRENT MCDONALD, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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No exhibits were introduced

PROCEEDINGS

THE COURT: This is Lend Lease quotation mark U.S. Public Partnership, LLC formerly known as Actus A-C-T-U-S Lend Lease, LLC versus Allsouth Electrical Contractors Incorporated; 2011-CP-10-5191. It is before the court on a Motion to Stay and Compel Arbitration filed October 7, 2011 on behalf of the plaintiff by Edward James Coyne, III and then representing the defense is Michael McDonald?

MR. MCDONALD: Brent McDonald. It's good to see you this afternoon, Your Honor.

THE COURT: Brent. I had to look at that close because I'm not used to calling you Michael. Okay. You may proceed.

MR. COYNE: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MCDONALD: Mr. Coyne, I'm not trying to interrupt. For our purposes the pleading referenced the South Carolina Act. I think some of the memos and motion that went back and forth it looks like the argument is going to be under the Federal Act. I don't know that we necessarily have a dispute that this could potentially apply to interstate commerce. And to save the court time that argument doesn't need to be had. We have another argument but if that's the initial argument ---

1 THE COURT: --- you concede ---

2 MR. MCDONALD: --- I just don't want to waste the
3 court's time ---

4 THE COURT: --- you're saying ---

5 MR. MCDONALD: --- on that particular issue ---

6 THE COURT: --- you're saying you concede his
7 argument on interstate commerce and that it would involve
8 interstate commerce?

9 MR. MCDONALD: That it could potentially for the
10 purposes of arbitration could potentially involve
11 interstate commerce. I mean I think all you need is to
12 make a phone call from the job site or something. For
13 practical purposes I just didn't want to spend a lot of
14 time on that. It's his motion and he's more than welcome
15 to say whatever he wants I just wanted to put that out
16 there.

17 THE COURT: Okay. Thank you.

18 MR. COYNE: Thank you. I appreciate that. I
19 believe that will save us some steps. This is sort of a
20 housekeeping matter, Your Honor -- if I may approach -- I
21 have some documents that were filed with the court today
22 that I doubt made it into your file.

23 THE COURT: Okay.

24 [Whereupon, Mr. Coyne proffers documents to the
25 court]

1 MR. COYNE: Here's the memorandum.
2 THE COURT: Oh, I have your memorandum.
3 MR. COYNE: And here's the affidavit.
4 THE COURT: Was that attached to your memorandum?
5 MR. COYNE: The affidavit itself was attached but
6 due to the voluminous ---
7 THE COURT: --- you didn't attached the rest ---
8 MR. COYNE: --- the exhibits they were not.
9 THE COURT: Okay. Then I'll give it back to you.
10 MR. COYNE: Thank you, Your Honor.
11 THE COURT: You're welcome. You may proceed.
12 MR. COYNE: May it please the court? As Your
13 Honor noted my name is Edward James Coyne, III and I
14 represent the plaintiff in this matter. We're here on a
15 motion to stay the civil action to compel the parties to
16 arbitrate --
17 A lot of the general background I believe is
18 unnecessary in light of the concession regarding
19 interstate commerce. But just to give you some flavor of
20 the matter ---
21 THE COURT: --- I've read the file so you can cut
22 to the chase of your argument. I try to read in advance.
23 I figure that's the least I can do for you.
24 MR. COYNE: I appreciate that very much.
25 THE COURT: At least I'll know what you're talking

1 about otherwise I would be in the dark.

2 MR. COYNE: Well, to cut to the chase the
3 relationship between the plaintiff and defendant is
4 governed by four sub contracts; they are attached to that
5 affidavit I just handed you.

6 THE COURT: And they are referenced in your
7 pleadings as well, correct?

8 MR. COYNE: Yes, Your Honor. Those four sub
9 contracts -- I'm sorry so the relationship between the
10 plaintiff and defendant is basically that of prime
11 contractor or general contractor if you will, which is
12 the plaintiff and subcontractor is the defendant.

13 This relates to a large public works contract. The
14 plaintiff was the prime contractor on involving
15 demolition construction renovation in excess of 1,500
16 military housing units and related facilities on the
17 Beaufort Marine Corp Air Station, the Paris Island Marine
18 Corps Recruiting Depot and the Beaufort Naval Hospital.

19 The plaintiff undertook the prior contract, the
20 prime contract, subbed out certain portions of that work
21 to the defendant notably various electrical work. The
22 four subcontracts each contain an arbitration provision.
23 If you would like to reference one exhibit 1 page -- I'm
24 sorry, exhibit 1 the affidavit of Allen Roman [phonetic]
25 that I just handed you, page 21 contains one of the

1 arbitration provisions. I will represent to the court
2 that each of the subcontracts contains an identical
3 arbitration provision. Simply put the Federal
4 Arbitration Act, which is found in Article 9 of the
5 United States Code provides that a written agreement to
6 arbitrate found in any contract affecting commerce --
7 we've already established that these contracts did affect
8 commerce is valid and enforceable save upon such grounds
9 that any contract may be set aside such as duress; we
10 don't have that situation here.

11 It's fairly simple. We'd say that the Federal
12 Arbitration Act requires that this act be -- I'm sorry
13 that this matter be put into arbitration. The
14 plaintiff's complaint initially raised this issue of
15 compelling arbitration staying the civil action. Prior
16 to the filing of the complaint a demand for arbitration
17 was served.

18 The purpose for the filing of the complaint was to
19 toll the statute of limitations. The South Carolina case
20 law is unclear if there is any circumstance as to when an
21 arbitration demand would toll the statute of limitations.
22 There has been no discovery conducted, there has been a
23 complaint filed, an answer filed, and filings in regard
24 to the motion for ---

25 THE COURT: --- and the demand for arbitration was.

1 made within the 180 days provided in the subcontract
2 correct?

3 MR. COYNE: Your Honor, the 180 day provision the
4 defendants relied on in contesting arbitration if you
5 read the provision of the 180 days -- or if you read the
6 sentence of the 180 day provision appears in in its
7 entirety that sentence provides...

8 THE COURT: It's on page 22 and it goes over to
9 page 23 and it reads in part that [Reading] Except for
10 claims by the contractor for express and implied
11 indemnity arising from or relating to claims for patent
12 or latent defects in the work performed by subcontractor
13 and except for those claims waived by subcontractor as a
14 result of acceptance by it of progress and or final
15 payment a demand for arbitration must be made within 180
16 days after the party knew or should have reasonably known
17 the facts giving rise to the claim.

18 Are you claiming that these are latent defects that
19 you could not discover?

20 MR. COYNE: Your Honor, the plaintiff's claim is
21 very much arising from the context of that first clause
22 that excepts out certain claims. By way of some more
23 general background as I said earlier the subcontractor,
24 here the defendant, provided a variety of electrical work
25 on the project. The plaintiff as primary contractor

1 deals with the owner. The owner has raised issues
2 regarding certain of that electrical work and has
3 demanded that the plaintiff make the owner whole for what
4 the owner views as shortcomings in the electrical work.
5 What the plaintiff has now done is turn to the defendant
6 who did the underlying electrical work and is seeking
7 indemnity; indemnity being a claim to make the plaintiff
8 whole for its losses incurred to the owner ---

9 THE COURT: --- so you're saying it comes within
10 the first part of that sentence except for claims by the
11 contractor for express and implied indemnity arising from
12 or relating to claims for patent or latent defects in the
13 work performed by the subcontractor?

14 MR. COYNE: Yes, Your Honor. And if you take it in
15 context of construction contracts it makes sense. You
16 get lots of fast moving things on a job site like change
17 orders or various change outs and in that context 180
18 days may make sense to hold your peace. In the context
19 of something after the fact where someone has come back
20 and raised a defect issue and come after the general or
21 prime contractor it makes good sense that the prime
22 contractor would not turn to the subcontractor until such
23 time as that claim arose.

24 THE COURT: Anything further?

25 MR. COYNE: That's all I have for now, Your Honor.

1 THE COURT: Okay. Would you like to respond Mr.
2 McDonald?

3 MR. MCDONALD: I would indeed. Thank you very
4 much, Your Honor.

5 THE COURT: You're welcome.

6 MR. MCDONALD: May it please the court?

7 THE COURT: Yes, sir.

8 MR. MCDONALD: It's an interesting argument as I
9 hear it. The issue that we have is really straight
10 forward. Arbitration as Your Honor is aware is a matter
11 of contract; it's what parties agree to do. Nobody can
12 force them to go to arbitration. That's not how the
13 system works.

14 So what we have here is we got to look at this
15 contract and see based upon the claim that they brought;
16 their pleadings that they drafted; we didn't draft them,
17 they drafted them. The claims that they brought whether
18 it falls underneath this arbitration provision. And if
19 it doesn't we believe it's within this court's
20 jurisdiction to say that it doesn't have to go to
21 arbitration. And that's where the issue is.

22 The complaint that was brought didn't allege simply
23 implied or expressed indemnity. It alleged a number of
24 causes of action out of the four contracts and there were
25 a number of disputes. But where we are right now alleged

1 breach of contract, breach of warranty, it alleged
2 indemnity and negligence. And each one of those arises
3 out of the four contracts. That's how they drafted it.

4 THE COURT: What about the language that says knew
5 or should have known?

6 MR. MCDONALD: When the plaintiff knew or should
7 have known of the claims brought against him. What we
8 filed is an affidavit by the President, the defendant Mr.
9 LeSesne, and I have that affidavit here. I believe it's
10 in the file as well but I certainly have if Your Honor
11 needs a copy. And what he does is he attaches three
12 separate letters that were sent to him by the plaintiff
13 the first of which was dated May 21, 2010. Basically
14 what it is is it called itself a notice to cure letter.

15 So as of at the latest -- and I don't think this is
16 in dispute, Your Honor. I don't think there is a dispute
17 over whether or not they brought their claim within 180
18 days. To the extent it was we wanted to make sure we
19 filed an affidavit. And May 21, 2010 is the letter. It
20 also references correspondence sent via email dated March
21 4th 2010; so well over a year before they filed their
22 demand for arbitration by their own letters. These are
23 not our letters they're their letters. By their own
24 letters they knew or at the very least should have known
25 of the problems in which they claim. Now we deny those

1 problems but it is what it is as far as what they put in
2 their letters. So our argument is simply this that a
3 condition precedent to the enforcement of this
4 arbitration provision would be that you had to bring the
5 claim within 180 days of when you knew or should have
6 known ---

7 THE COURT: --- would that not be a defense you
8 would raise in arbitration?

9 MR. MCDONALD: Excuse me?

10 THE COURT: Would that not be a defense you would
11 claim in arbitration?

12 MR. MCDONALD: No, Your Honor. I would say that it
13 is a matter of whether or not the claims are arbitrable
14 at all and I'll tell you why. If Your Honor -- I know he
15 drew your attention to the full sentence and Your Honor
16 read it but attached to the complaint is a couple of
17 sections out of a big contract that Your Honor now has
18 copies of that deals with dispute resolution, dispute
19 resolution process and then ultimately unresolved claims.

20 And when the contract is read as a whole you can see
21 what they are trying to do here. What they're trying to
22 do is to the extent something comes up during the
23 contracting period or within 180 days out of the
24 contracting period this is a big project and we've got to
25 have a way to resolve this thing in an expeditious

1 manner. However, after 180 days if you want to bring a
2 claim about something and you knew or reasonably knew or
3 should have known of that claim, then you don't have the
4 right to arbitrate anymore. The parties agree that they
5 would be afforded the protections that this court can
6 provide i.e. full discovery and a full ---

7 THE COURT: --- does it say that ---

8 MR. MCDONALD: --- full hearing on that matter.

9 Read as a whole that's exactly how the process works ---

10 THE COURT: --- but where does that language say
11 that?

12 MR. MCDONALD: Say what?

13 THE COURT: What you just said.

14 MR. MCDONALD: Well, if you read ---

15 THE COURT: --- we're bound by the court ---

16 MR. MCDONALD: --- he attaches a provision of or
17 just a section of the contract, Your Honor, section 4.2.1
18 that deals with dispute resolution and then it drops into
19 4.2.1.1 which is the dispute resolution process. And
20 I'll just draw Your Honor's attention within 10 days of
21 the delivery of a claim notice -- typical things that
22 would go on in a construction project -- you can't just
23 -- one, if you've got a problem let them know. And it
24 says if they cannot agree within such 10 day period
25 either party may elect by written notice to submit the

1 matter to binding arbitration as set forth below. And it
2 talks about these unresolved claims. But when you drop
3 into that section, which is underlined Your Honor -- this
4 is their contract -- which is underlined a demand for
5 arbitration must be made within 180 days after the party
6 knew or reasonably should have known the fact ---

7 THE COURT: --- or you waived it or you deal with
8 the court system. I got that part.

9 MR. MCDONALD: Yes. And our position is this that
10 regardless of the indemnity language that he cites to --
11 the complaint on its face that they drafted brings a
12 number of causes of action; 16 if my math is correct.
13 And there is negligence, breach of warranty, breach of
14 contract; it's not just an indemnity claim. I will say
15 that and I'll draw Your Honor's attention -- I know
16 sometimes you like to have the site but I do have a copy
17 for you...

18 THE COURT: Don't kill trees.

19 MR. MCDONALD: The case is ---

20 THE COURT: --- I'm being honest with you we just
21 put them in the recycle bin. You might as well just give
22 us the citation.

23 MR. MCDONALD: The case is Metal Service
24 Corporation v Industrial Electrical Company [phonetic]
25 and the site is 253 S.C. 507 and if you'd like the

1 Southeastern its 171 S.E.2d 703. And what this case --
2 and it's dated 1970 -- what this case talks about is a
3 payment bond. And they bring an action and under the
4 payment bond they are required to give notice and they
5 didn't give notice. And the court dismissed the case.
6 South Carolina Supreme Court affirmed the decision and
7 dismissed the case because for failing to comply with the
8 notice requirement and basically found as a defect in the
9 pleadings ---

10 THE COURT: --- yeah, but isn't there a whole
11 different set of rules in case interpretation that deals
12 with arbitration doesn't it?

13 MR. MCDONALD: There is indeed, Your Honor. But
14 the reason I bring it to your attention is it deals with
15 what's going on in the pleading. And the pleading that
16 they brought here says doesn't reference that they
17 complied with the 180 day requirement. And the reason I
18 think doesn't reference that is because it's undisputed
19 that they do not.

20 So our argument is simply this. In order to bring
21 the claim within the arbitration provision of the
22 contract even if the Federal law applies, South Carolina
23 law applies, no matter what law applies they had to bring
24 the claim that they brought in this action within 180
25 days of when they knew or should have known. They were

1 drafting letters but we dispute the allegations in the
2 letters but they started drafting those as early as May
3 of 2010. And that's simply more than 180 days to bring
4 their claim for arbitration and therefore it falls into
5 where a normal breach of contract action or a normal
6 negligence action would lie.

7 THE COURT: Why is your -- tell me why would your
8 client would be adverse to it being resolved in
9 arbitration when that was their original agreement? I'm
10 just curious.

11 MR. MCDONALD: Well, I think their original
12 agreement was -- obviously we adamantly deny the
13 allegations that are in this complaint. But I think the
14 original agreement was to the extent there is something
15 going on during the big construction, i.e. -- just as an
16 example Your Honor you're out there and you're the
17 electrical guy and you put in 14 gauge wiring and it
18 should be 16 gauge wiring and they give you the notice of
19 the claim and you switch it out; whatever it may be just
20 as an example.

21 That's a different process. Now if you refuse to do
22 it I think it's in both parties best interest at that
23 stage to perhaps go to arbitration and get what could
24 potentially be a more expeditious resolution though I've
25 recently come to find out that's not always the case.

1 However in this instance what we have is it wasn't what
2 was agreed upon by the parties and I would submit to Your
3 Honor as I indicated earlier that what the parties then
4 wanted as a result of this was the ability to give full
5 discovery, the ability to go through this process as it
6 should be.

7 THE COURT: Why can't you have discovery in
8 arbitration?

9 MR. MCDONALD: Well, you can but you're not
10 entitled to ---

11 THE COURT: --- but is that ---

12 MR. MCDONALD: --- the exact discovery as you ---

13 THE COURT: --- but is that insurmountable? I
14 thought you could agree with -- once you talk with the
15 arbitrator you could agree to the extent of discovery.

16 MR. MCDONALD: Well, sometimes that's not the case
17 and sometimes it's not. I've had situations where I have
18 been able to agree on what the extent of discovery is and
19 I've had situations where I haven't gotten everything I
20 wanted. But the bottom line here is the contract doesn't
21 provide for arbitration and he cannot be forced to go to
22 arbitration without such a provision. And that's all I
23 have unless Your Honor has any questions. I do
24 appreciate the court's time.

25 THE COURT: You're welcome. Mr. Coyne, I need you

1 to address his argument about the 180 days and I need to
2 -- there are several of your causes of action which
3 clearly would come within the sentence those being a
4 provision of the contract, those being for express and
5 implied indemnity. But the others I need to know how
6 they would come within the 180 days from when you knew or
7 should have reasonably known of facts giving rise to the
8 claim.

9 MR. COYNE: Your Honor, I believe I heard two
10 questions in there.

11 THE COURT: I'm sorry; I'd hoped I was clear. I
12 need to know how your causes of action, all 16 of them,
13 other than the ones that clearly come within the sentence
14 are not -- how you have complied with the 180 days.

15 MR. COYNE: I believe that all my causes of action
16 come within the sentence. I'll address that in a moment.
17 To directly address Your Honor's question I would note
18 that the letters attached to the affidavit of William
19 Leslie that Mr. McDonald referred to the first two
20 letters would be the two that mention that there are
21 issues and that the plaintiff is trying to work those out
22 with the owner and precede the 180 days. They really
23 make reference to the owner raising contentions as to an
24 issue and the plaintiff trying to resolve them. It is
25 not until the June 17, 2000 [sic] letter than we find

1 that the owner has taken the step of holding the
2 plaintiff financially liable ---

3 THE COURT: -- but is that the standard? Is that
4 knew or should have known? It's not when a full blown
5 theory develops. It's when you knew or should have known
6 and you were put on notice that there was going to be
7 some litigation or there was going to be some dissention
8 or some disagreement.

9 I mean at some point you knew these homeowners or
10 whomever the owners -- I didn't mean to say homeowners --
11 that these owners were disgruntled and that there were
12 things that needed to be fixed and it wasn't your
13 client's responsibility. It was the person who performed
14 the work.

15 MR. COYNE: I understand as to like a leaky window.
16 The day the window leaks you know it's a problem. As to
17 an indemnity claim I would suggest that there should not
18 be a policy that we want people rushing off and filing
19 indemnity claims before they know whether there is a
20 damage as opposed to doing what my client did which was
21 take a good faith effort to get it resolved before it was
22 ever going to become liquidated and become a claim
23 against my client as to which they would then need to
24 seek indemnity. Indeed indemnity the statute of
25 limitations doesn't ---

1 THE COURT: --- well that's an interesting point of
2 view ---

3 MR. COYNE: --- even begin to run.

4 THE COURT: Yes, that's an interesting point that
5 you raise that you really wouldn't have known or knew you
6 were entitled to indemnification until there was some --
7 yes, that's interesting.

8 MR. COYNE: If I may go back, Your Honor. I would
9 note that the opening clause, the 180 day sentence does
10 say claims for express and implied indemnity arising from
11 or relating to claims for patent or latent defects. And
12 if you go through the claims for relief in my complaint
13 you will see they are under various titles, breach of
14 warranty, breach of contract, indemnity. But I believe
15 if you read the last two numeric paragraphs under --
16 cause you will see that the damages sought all relate to
17 the damages incurred having to make repairs for ---

18 THE COURT: --- you're saying its all indemnity.

19 MR. COYNE: I believe it is, Your Honor.

20 THE COURT: Let me ask another question. Are you
21 claiming -- when are you claiming the 180 days would have
22 run or began to run?

23 MR. COYNE: My position is 180 days is irrelevant.
24 If it began ---

25 THE COURT: --- okay, is it your position ---

1 MR. COYNE: --- as to when it began to run ---

2 THE COURT: --- listen to me carefully. Is it your
3 contention that all of these are indemnity claims and so
4 the 180 days doesn't apply?

5 MR. COYNE: Yes, Your Honor.

6 THE COURT: Okay. Let me interrupt you. I want
7 you to put a point in that thought. Why are these not
8 all indemnity claims, Mr. McDonald?

9 MR. MCDONALD: Well, my initial reaction would be
10 is because he hasn't -- as indemnity claims. I would
11 draw Your Honor's attention to just one of the causes of
12 action entitled negligence. It says Lend Lease is
13 entitled to a judgment against Allsouth for all damages
14 incurred as a result of Allsouth's negligence together
15 with an award of all costs and fees in an amount to be
16 proven at trial.

17 My understanding of indemnity is to the extent you
18 are successful the damages you would have sustained have
19 nothing to do with their negligence. It's not pled that
20 way for one. And two, I would draw your attention ---

21 THE COURT: --- you're saying that your client
22 would have to pay them -- if there is a judgment against
23 them that your client is contractually bound to pay
24 irregardless? Is that what you're saying?

25 MR. MCDONALD: No, that's not what I'm saying at

1 all, Your Honor.

2 THE COURT: Okay, I ---

3 MR. MCDONALD: --- I'm saying the reason I didn't
4 that it doesn't when we received this complaint in the
5 mail that we don't draft and it says the first claim of
6 relief is for breach of contract and the allegation is
7 that Allsouth did not perform its work in a good and
8 workman like manner and failed to comply with the plans
9 and specification then somehow Lend Lease is entitled to
10 damages as a result of that breach of contract, going on
11 talking about breach of warranty, going on talking about
12 a negligence theory that's why we would indicate that
13 what they brought here is not necessarily an indemnity
14 claim.

15 If I hear the argument that is now being asserted is
16 that somehow the 180 days requirement doesn't apply
17 because what they are really doing is they are bringing
18 some express or implied indemnity then I would submit to
19 Your Honor that this claim is completely faulty on how it
20 is pled. There is no allegation in this complaint as to
21 some liquidated sum that they have been forced to incur
22 as a result of...

23 THE COURT: Have you all had to ---

24 MR. MCDONALD: --- that would give rise to an
25 indemnification claim ---

1 THE COURT: --- have you all had to pay out any
2 sums already on these claims?

3 MR. COYNE: Your Honor, to my knowledge money has
4 been spent and money continues to be spent. I would ask
5 that the complaint be taken in its whole. I understand
6 that wanting to some piece meal allegations the argument
7 he made it doesn't appear to be in regard to indemnity
8 but if you take for example paragraph 9 of the complaint
9 talks about -- paragraph 8 and 9 talk about the owner
10 making demand as to the need for repairs. Paragraph 11
11 talks about per the requirements of the owner the
12 plaintiff has undertaken to enter into a subsequent
13 subcontract with a third party to repair and re-do work
14 at the command of the owner ---

15 THE COURT: --- what does the indemnity agreement
16 itself say?

17 MR. COYNE: There are various indemnity provisions
18 throughout this subcontract Your Honor. They...

19 THE COURT: Are those -- those are not attached to
20 the summons and complaint are they?

21 MR. COYNE: The indemnity language?

22 THE COURT: Uh huh.

23 MR. COYNE: No, the only thing attached to the
24 complaint was the arbitration provisions themselves. We
25 just wanted to make it clear that the complaint -- we

1 were seeking arbitration and the complaint was being
2 filed and clocked, the statute of limitations and get
3 everybody to arbitration. We didn't want to be
4 prejudicing anybody in a civil action.

5 I would also offer, Your Honor, the South Carolina
6 Supreme Court in a case entitled Zabinski v Bright Acres
7 Associates regarding the application of the Federal
8 Arbitration Act and compelling parties to arbitrate.

9 As said quote -- I'm sorry at page -- South Carolina
10 597 -- to decide whether an arbitration agreement
11 encompasses a dispute a court must determine whether the
12 factual allegations underlying the claim are within the
13 scope of the broad arbitration clause regardless of the
14 label assigned to the claim.

15 Again, Your Honor, it's our contention that despite
16 what the various titles might be it is clear on the face
17 of our complaint as you read through it the nature of
18 this dispute is the owner has made a demand on the prime
19 contractor. That is going to cause the prime contractor
20 to bear losses that it contends are related to the work
21 of the subcontractor defendant ---

22 THE COURT: --- when do you claim the 180 days
23 started to run?

24 MR. COYNE: As to the claim? As to an indemnity
25 claim?

1 THE COURT: As to all your claims. When did you
2 know or should have reasonably known that there were
3 facts giving rise to the claims?

4 MR. COYNE: Your Honor, I don't believe our
5 indemnity claim is fully liquidated so I contend it
6 hasn't started to run yet. Now as to whether I have
7 indemnity over a dollar I would...

8 THE COURT: But the way you have your other causes
9 of action phrased they are not phrased as indemnity
10 causes of action. They are phrased -- and I went through
11 just -- for example you have breach of subcontract is the
12 first cause of action. Second is breach of warranty,
13 third is breach of indemnity, fourth is negligence, fifth
14 is a breach of subcontract, sixth is breach of a
15 warranty, seventh is indemnity, eighth is negligence,
16 ninth is breach of a subcontract and it goes on that
17 basically repeating that. So for arguments sake when do
18 you claim the negligence cause of actions -- when did the
19 180 days begin to run when you knew or should have known?

20 MR. COYNE: Well, Your Honor, to have -- for any
21 cause of action to be complete you have to have damages
22 and within each of those it contends that the damages
23 include but are not limited to the cost to repair the
24 defective work, the extended overhead and general
25 conditions and other costs incurred in regard to the

1 defective work in making the repairs. So as these costs
2 were incurred the 180 days arguably would begin to run
3 through -- I believe as these costs were liquidated is
4 when the 180 days would run. Now as to when did we know
5 of any contention that there was something wrong with the
6 underlying work the letters ---

7 THE COURT: --- that's what would be controlling.
8 If I followed your logic if a person had a car accident
9 and they didn't reach medical healing for five years
10 after then they wouldn't file their cause of action until
11 five years later. And it's not when a full blown theory
12 is developed. It's when you knew or should have known.

13 MR. COYNE: But indemnity does not arise ---

14 THE COURT: --- but all your things are not
15 couched. All your causes of action are not couched as
16 indemnity. Some of them are couched as negligence. Some
17 of them are couched as breach of subcontract. That's not
18 how you word it.

19 So I need to know when do you content you knew or
20 should have known and when do you contend the 180 days
21 began to run. It's not when your full developed theory
22 on damages evolved. If that's the case we'd have people
23 waiting seven, eight, ten years to file causes of action.

24 MR. COYNE: I understand that, Your Honor, as to
25 other claims. Here again the South Carolina Supreme

1 Court has said that the label is ---

2 THE COURT: --- I'm very familiar with Zabinski.
3 I've read it many times.

4 MR. COYNE: The language of the arbitration
5 provision does say arising from or relating to claims for
6 patent or latent defects. So I believe we are seeking
7 indemnity under claims related to patent or latent
8 defects. The damages sought under the negligence, under
9 the breach of contract all of that is in the nature of
10 indemnity is that the damages to make us whole for our
11 loss incurred.

12 And I hate to avoid questions from the bench, Your
13 Honor, the 180 days as to when it would have run -- at
14 what point did we know of anything possibly wrong with
15 the underlying work the letters attached to Mr. LeSesne's
16 affidavit show up that at some point prior to 180 days
17 there was at least contentions of some wrong doing with
18 the work. As I suggested earlier I believe that it is
19 proper policy and I believe it was what was contemplated
20 by the contract that ---

21 THE COURT: --- how many days after -- how many
22 days after this last letter did you file it?

23 MR. COYNE: Less than 180. The last letter I
24 believe was dated July 17 this year. We filed the
25 complaint -- well, they accepted service of the complaint

1 on August 1. 180 would be approximately six months.

2 THE COURT: Are these your originals? Did you tell
3 me these were your originals?

4 MR. COYNE: That's my only filed stamped copy. The
5 originals are with the clerk. They just weren't filed
6 until today so they haven't made it to your file.

7 THE COURT: If you can approach my clerk will give
8 you your originals.

9 MR. COYNE: Thank you.

10 [Whereupon, documents are returned to Mr. Coyne]

11 MR. MCDONALD: Your Honor, and I would just like to
12 draw your attention, I'm sure you've already seen it, but
13 the first sentence of the June 17, 2011 letter, which
14 would be the last letter that we were discussing reads as
15 indicated in the previously sent notice dated May 21 and
16 May 28th of 2010. They reference the other letters. I
17 don't believe that I can wrap my mind around the idea
18 that somehow the three letters are different. That's the
19 first sentence. Thank you, Your Honor.

20 THE COURT: You're welcome. But even if the first
21 letter was in May that would be within 180 days would it
22 not?

23 MR. MCDONALD: No, Your Honor, May of 2010; May a
24 year ago.

25 THE COURT: Oh, okay.

1 MR. COYNE: Only the last letter would fall in the
2 180 days. The last letter is the one that starts making
3 reference to something closer to a liquidated issue as
4 opposed to an issue that the general was trying to work
5 out with the owner so it would never end up needing to be
6 an indemnity --

7 THE COURT: I'm going to take the matter under
8 advisement. I will be in touch. I have to get those
9 originals from downstairs.

10 MR. MCDONALD: Thank you very much, Your Honor. I
11 really appreciate the court's time.

12 THE COURT: Thank y'all. Have a great day.

13 MR. COYNE: I'm happy to leave these with you if
14 it's easier, Your Honor.

15 THE COURT: You can keep them. I can go downstairs
16 and get them. I don't want you to have to try to track
17 down another filed copy for your records.

18 MR. COYNE: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 *****END OF TRANSCRIPT OF RECORD*****
21
22
23
24
25

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 5th day of December, 2011.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

March 11, 2014


Joyce C. Rueger, CWR-M
Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO.: 11-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

AFFIDAVIT OF ALAN ROMAN

FILED
2011 DEC -5 PM 12:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I, Alan Roman, being duly sworn, say:

1. I am over the age of eighteen, competent to testify and make this affidavit on my own personal knowledge.

2. I am, and at relevant times have been, the Senior Construction Manager of Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC ("Lend Lease").

3. I have personal knowledge as to subcontracts entered by and between Lend Lease and Allsouth Electrical Contractors, Inc. ("Allsouth") relating to construction work regarding projects located at the Beaufort Marine Corps Air Station Parris Island Marine Corps Recruiting Depot and the Beaufort Naval Hospital and more specifically described as:

- a. Subcontract Agreement 13128, for completion of specified electrical work on the portion of the projects identified as 200 Officers (Marsh Landing) Phase III for the initial sum of \$62,557.00 ("Subcontract 1"), a true and correct copy of which is attached hereto as Exhibit 1;
- b. Subcontract Agreement 50701024/02781001, for completion of specified electrical work on the portion of the projects identified as Weapons Area for the

initial sum of \$310,699.00 ("Subcontract 2"), a true and correct copy of which is attached hereto as Exhibit 2;

c. Subcontract Agreement 50701046/02781001, for the completion of specified electrical work on the portion of the projects identified as 200 Officers (Marsh Landing) Phase II for the initial sum of \$82,007.00 ("Subcontract 3"), a true and correct copy of which is attached hereto as Exhibit 3; and

d. Subcontract Agreement 14958, for the completion of specified electrical work on the portion of the projects identified as 200 Officers Phase IV for the initial sum of \$103,800.00 ("Subcontract 4"), a true and correct copy of which is attached hereto as Exhibit 4.

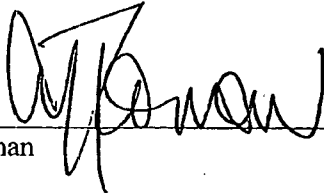
4. Subcontract 1, Subcontract 2, Subcontract 3 and Subcontract 4 (collectively, the "Subcontracts") each affected interstate commerce. For example:

- a. Each of the Subcontracts contemplates construction work on a military base operated by the United States Department of Defense;
- b. Each of the Subcontracts, at Section 3.1.1, references and incorporates various provisions of a Prime Contract, including, but not limited to, various specifications, schedules, addenda, general and special provisions, plans, drawings, reports, maps and other documents, which include and contemplate communications and transactions between several States;
- c. The face of Subcontract 2 and Subcontract 3 reveals that those subcontracts were entered by and between a Napa, California based company and a Charleston, South Carolina based company;

- d. Change Orders regarding at least Subcontract 2 and Subcontract 3 were issued from a Lend Lease office in California; and
- e. The nature of the project contemplated by, and the work to be performed under, the Subcontracts required the use of materials, equipment and supplies from several States.

Further affiant sayeth not.

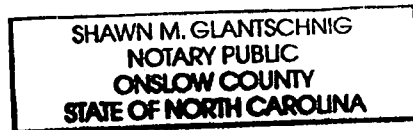
Alan Roman

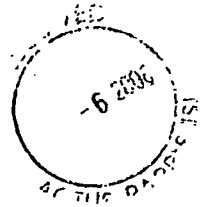


Sworn to and Subscribed before me on this 29th day of November, 2011.

Shawn M Glantschnig
Notary Public

My Commission expires: 9-28-14





SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

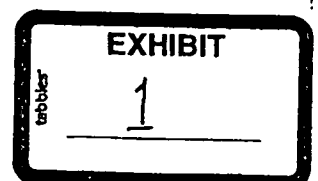
(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

March 1, 2006



This Agreement is made this 1st day of March, 2006 by and between ACTUS LEND LEASE LLC, hereinafter called "Contractor," and ALLSOUTH ELECTRICAL CONTRACTORS, INC., hereinafter called "Subcontractor", and concerns the performance by Subcontractor of a *portion of the work* on the following Project:

OVERALL PROJECT DESCRIPTION:

Demolish or renovate certain existing housing units and related facilities and design and construct certain new housing units and related facilities, in each case located or to be located at the Beaufort Marine Corps Air Station, Parris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital in Beaufort County, South Carolina.

OWNER: Tri-Command Managing Member LLC
600 Laurel Bay Boulevard
Beaufort, SC 29906
Attn: Development Manager

CONTRACTOR: ACTUS LEND LEASE LLC
Behind Bldg. 450 (P.O. Box 5160)
Parris Island, SC 29905
Attn: Senior Construction Manager

SUBCONTRACT
AGREEMENT NO: 13128

SUBCONTRACTOR: ALLSOUTH ELECTRICAL
CONTRACTORS, INC.

LICENSE NO: N/A

ADDRESS: 2630 Bonds Ave.
Charleston, SC 29405

TELEPHONE NO: 843-522-9923 FAX NO: 843-767-4463

SUBCONTRACT PRICE: Sixty-Two Thousand Five Hundred Fifty-Seven and No/100 Dollars (\$62,557.00), after CIP deduction.

All notices required to be given under this Agreement shall be given to the parties at the above addresses; provided, however, that all notices given by Subcontractor to Contractor pursuant to Sections 3.3.8, 4.2, 4.2.1, 4.2.1.1, 5.10 and 7.5 of this Agreement, to be effective, shall be given to Contractor at its above address with copies of such notices given to:

Actus Lend Lease LLC
1801 West End Avenue, Suite 1700
Nashville, TN 37203
Attention: Senior Vice President of Construction

and: Actus Lend Lease LLC
700 Lanidex Plaza
Parsippany, NJ 07054
Attention: General Counsel

In consideration of the mutual covenants and agreements herein contained and intending to be legally bound, the Contractor and the Subcontractor covenant and agree as follows:

1. CONSTRUCTION OF CONTRACT

This Subcontract Agreement, its interpretation and any agreement to arbitrate, are governed by the laws of the State of South Carolina.

Unless otherwise provided, prices are in U.S. Dollars and payments shall be made in U.S. Dollars.

Measurements of physical quantities shall be in the U.S. standards of weights and measures, unless otherwise specified.

Where provisions in these General Conditions of this Subcontract Agreement are expressed to be alternatives and the Subcontract fails to state which alternative applies, the first alternative shall apply.

2. INTERPRETATION AND DEFINITIONS

In this Subcontract Agreement (except where the context otherwise requires) the capitalized terms set forth herein shall have the meanings given them below.

"Agreement" means this specific agreement.

"Bankruptcy Act" means Title 11 of the United States Code and any other Federal insolvency or similar law, now or hereafter in effect.

"Component" means a segment of the Guaranteed Scope of Work.

"Construction Consultant" means the construction consultant retained by the Owner.

"Construction Documents" means those documents, prepared based on the final Design Documents, approved by the Owner, setting forth in detail the requirements for construction of the Guaranteed Scope of Work, and consisting of drawings and specifications that comply with applicable Laws.

"Constructional Plant" means appliances and things used in the execution of the work under the Contract but not forming part of the Works.

"Contract/Prime Contract" means the agreement between the Owner and the Contractor.

"Date of Acceptance" means the date upon which the Contractor is notified of the acceptance by the Construction Consultant for use of any part of a Component or any unit.

"Date of Substantial Completion" means

(a) the date certified by the Construction Consultant in a Certificate of Substantial Completion to be the date upon which Substantial Completion was reached; or

(b) where another date is determined in any arbitration or litigation as the date upon which Substantial Completion was reached, that other date.

"Day" or "day" means calendar day unless otherwise specified as a Business Day.

"Defects Liability Period" means with respect to each Component or portion of a Component, the period that commences on the Substantial Completion Date (for such Component or portion of a Component) and terminates one (1) year from the Substantial Completion Date for such Component or portion of a Component.

"Direction" means an agreement, approval, authorization, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement, whether written or oral.

"Environmental Laws" shall mean and include the Resource Conservation and Recovery Act of 1976, (RCRA) 42 U.S.C. §§ 6901-6987, as amended by the Hazardous and Solid Waste Amendments of 1984, the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9657 (CERCLA), the Hazardous Materials Transportation Act of 1975, 49 U.S.C. §§ 1801-1812, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671, the Clean Air Act, 42 U.S.C. §§ 7401 et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 et seq. and all similar federal, state and local environmental Laws, ordinances, rules, orders, statutes, decrees, judgments, injunctions, codes and regulations, and any other federal, state or local Laws, ordinances, rules, codes and regulations relating to the environment, human health or natural resources or the regulation or control of or imposing liability or standards of conduct concerning Hazardous Materials or the investigation, clean-up or other remediation of Hazardous Materials and which are applicable to Owner, Contractor, Subcontractor or the Property, as the case may be.

"Federal Procurement Provisions" means any federal procurement laws, including the Federal Acquisition Regulation ("FAR") and agency acquisition regulations that implement or supplement the FAR (including FAR 52.215-2 (Audit and Records-Negotiations) and FAR 52.222-8 (Payrolls and Basic Records)).

"Force Majeure Event" means an act of God, fire, earthquake, flood, explosion, excessive or unusual weather, action of the elements resulting in physical loss to the work, war, invasion, insurrection, riot, mob violence, acts of terrorism, sabotage, a general inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strike, lockout, action of labor unions, a taking by eminent domain, condemnation, requisition, laws and orders of governmental authority, ionizing radiations or contamination by radioactivity from any nuclear weapons, nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, or any other cause whether similar to any of the foregoing, to the extent any of the foregoing are not within the reasonable control of either of the parties, including reasonable delays for adjustments of insurance.

"Governmental Authority" means any federal, state, municipal or local government, authority, agency, court or other body, officer or entity, including any zoning authority, building inspector, health or safety inspector or fire marshall, and any governmental regulatory body or commission, and any arbitrator with authority to bind a Party at law.

"Guaranteed Scope of Work" means the scope of work which the Contractor is or may be required to execute under the Prime Contract with Owner or the work which Subcontractor is or may be required to execute under this Subcontract Agreement.

"Month" means calendar month.

"Pre-construction Inspection" means an inspection by the Contractor and the Subcontractor of the areas affected by Subcontractor's work prior to commencement of said work.

"Prime Contract" means the contract between the Owner and the Contractor for the performance of the Guaranteed Scope of Work.

"Procedure Manual" means the manual set forth or referred to in Exhibit 6 attached hereto and made a part hereof.

"Schedule of Values" means Subcontractor's Subcontract Price separated into components of Subcontractor's scope of work as set forth in Exhibit 2 attached hereto and made a part hereof.

"Schedule of Rates" means any schedule included in the Subcontract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment or the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices.

"Site" means the lands and other places to be made available and any other lands and places made available to the Contractor by the Owner for the purpose of the Contract between them, and the Subcontract Agreement between Contractor and Subcontractor.

"Subcontractor Guaranteed Scope of Work" means the scope of work the Subcontractor is or may be required to execute under the Subcontract Agreement as more particularly set forth in Exhibit 1.

"Substantial Completion" means that stage in the execution of the Guaranteed Scope of Work when

- (a) the Works (or any Component or any portion of a Component) have been completed in accordance with the requirements of this agreement, except for the Punch List Item;
- (b) those tests which are required by this agreement to be carried out and passed before the Works reach Substantial Completion, have been carried out and passed;
- (c) documents and other information required under this agreement which are necessary for the use, operation and maintenance of the Works, have been supplied; and
- (d) occupancy of a unit, if applicable, is not prevented due to the ongoing performance of the works.

Substantial Completion shall have been deemed to be achieved if the Subcontractor shall have complied with (a), (b), (c) and (d) above but for the acts, omissions or failure to act of the Owner, the Contractor, Construction Consultant or their respective employees, partners, agents, consultants or contractors, including their failure to provide basic services for the Works (or any Component) as required by this agreement.

"Temporary Works" means works used in the execution of the work under this agreement but not forming part of the Works.

"Work" or "Works" means the whole of the work that constitutes the Scope of Work and to be executed in accordance with this agreement, including approved change orders pursuant to this agreement.

All headings and titles in this agreement are for reference only and shall not be considered as part of this agreement.

Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.

Words importing a gender include every gender.

If the time for giving any notice, issuing any certificate, making any payment or doing any other act required or permitted by this agreement, falls on a day other than a Business Day, then the time for giving the notice, issuing the certificate, making the payment or doing the other act shall be deemed to be on the immediately following Business Day.

3. SCOPE OF WORK, PERFORMANCE, SCHEDULE, AND PAYMENT

3.1 Scope of Work

3.1.1 Incorporation of Prime Contract.

Contractor has entered into a Prime Contract (the "Contract") with the above-named Owner for the construction of the Project according to the terms and conditions of the Contract, including but not limited to, the specifications, schedules, addenda, general and special provisions, change orders, and amendments, plans, drawings, soils reports, maps and other documents made a part of the Contract (all of which are herein collectively referred to as the "Prime Contract"). Said Prime Contract is on file at the project site with Contractor's project representative. Excluding such portions as relate to the business or financial arrangements between Contractor and Owner (which provisions are redacted), the Prime Contract is otherwise hereby incorporated as fully as though set forth herein. Subcontractor consents to the Prime Contract and shall be bound by the Prime Contract and any interpretations, rulings or decisions as to the meaning of the Prime Contract, the scope and propriety of the Work or the payments due, which are made by Owner or his representative. Subcontractor shall strictly comply with the terms of the Prime Contract and such interpretations, and agrees to be bound by any provisions which Contractor is obligated to include or incorporate into subcontracts, and to comply with all requirements which are imposed on subcontractors at all levels of the Project. Subcontractor assumes toward Contractor all liabilities, responsibilities, duties and obligations assumed by Contractor toward Owner under the Prime Contract with respect to the Work to be performed by Subcontractor. All rights and remedies reserved to Owner under the Prime Contract shall be available to and be possessed by Contractor in all dealings with Subcontractor.

3.1.2 Work to be Performed.

Subcontractor agrees to furnish and to be responsible for all labor, supervision, equipment, materials, supplies and taxes and shall do all things necessary or required to perform satisfactorily and completely and in accordance with all applicable laws, permits and regulations, that portion of Project required to be done by Contractor under the Prime Contract described in the referenced plans, specifications or other contract documents, together with all reasonably inferable Work (hereinafter referred to as the "Work").

3.1.3 Subcontractor's Representations.

Subcontractor represents that before signing this Subcontract it:

A. Has examined the location of the Work and is familiar with and has satisfied itself as to the nature, location and amount of the Work, the quality, quantity and availability of labor,

materials, equipment, facilities and other items required for performance of the Work and the physical and other conditions which might be encountered in the performance of the Work.

B. Is fully experienced and properly licensed and qualified as an expert to perform the Work.

C. Is properly equipped, organized and financed to perform the Work.

D. Has satisfied itself as to the location of all utilities that may affect or interfere with the Work. Subcontractor will fully protect all utilities, and keep them operating at all times.

E. Shall perform the work as an independent contractor and not as an agent of Contractor.

F. Has carefully examined and familiarized itself with all of the documents comprising the Prime Contract.

3.1.4 Work to be Performed.

Contractor contracts with Subcontractor as an independent contractor to perform the work described in Exhibit 1. Subcontractor shall perform, execute and complete such work (hereinafter called the "Subcontractor's Work" or "Work") under the general direction of Contractor and in accordance with this Agreement and the Subcontract documents, as well as the overall construction schedule set forth in Exhibit 3.

3.2 Progress and Programming of the Works.

3.2.1 Rate of Progress.

Time is of the Essence in the performance of the mutual obligations of this contract.

3.2.2 Construction Schedule.

Subcontractor shall: (a) submit to Contractor within ten (10) days of the date of transmission of this Subcontract to Subcontractor a detailed, proposed schedule for the Work in accordance with Contractor's Schedule as outlined in Exhibit 3 of this agreement; (b) begin the Work reasonably promptly upon Contractor's order to do so; (c) coordinate and perform the Work, and its several parts, diligently and reasonably promptly and in such order and sequence as will assure its efficient and timely prosecution and will not delay completion of a complete Component, a Phase within a Component or the entire Work and its several parts under the Subcontract Documents; and (d) furnish at all times sufficient, qualified and competent forces and supervision, and adequate, conforming and usable materials, equipment, plants, tools and other necessary things, to achieve satisfactory progress according to Exhibit 3 progress schedule and any revisions thereof mutually agreed upon.

Without limiting the generality of the foregoing, Subcontractor shall: (a) submit, with its proposed schedule, information showing the time required to prepare and approve shop drawings, to fabricate and deliver materials and equipment, and to install the Work, (b) order (for manufacture or purchase and delivery) all materials required for performance of the Work as soon as possible in order to avoid delays caused by strikes, transportation or unavailability; (c) furnish Contractor within thirty (30) days a list of major materials and equipment required for the Work, showing the name(s), address(es) and telephone number(s) of the supplier(s) and the date(s) on which such material and equipment is expected to be delivered to the Project site; (d) cause a qualified home office supervisory representative (while Subcontractor has forces at the Project site and for two weeks prior thereto) to attend weekly progress meetings; and (e) notify Contractor immediately by telephone and confirm in writing within seventy-two (72) hours, if Subcontractor finds that any item cannot be delivered as required to maintain Contractor's progress schedule. Subcontractor also agrees to be bound by such modifications to the Project schedule as are discussed and mutually agreed to at the weekly job progress meetings and are contained in the minutes of those meetings.

Contractor may request acceleration of the Work in order that it may be performed in advance of the schedules, time requirements and Project requirements. If so requested, Contractor and Subcontractor will negotiate in good faith to achieve the acceleration to include increasing its staff or work overtime, or both. Subcontractor will not be entitled to additional compensation for work performed except as authorized and accepted in writing in advance by Contractor.

Written authorization for overtime, in instances other than acceleration, which exceeds \$1,000.00 in any one week shall be invalid unless confirmed in advance in writing by Contractor's on site Project Manager.

Both Contractor and Subcontractor shall be bound by the Schedule of Work. Subcontractor shall provide Contractor with any requested scheduling information for Subcontractor's Work. Subcontractor will stay informed as to revisions in the project schedule, which may affect Subcontractor's Work.

Subcontractor recognizes that changes will be made in the Schedule of Work and agrees to comply with such changes subject to a reservation of rights arising hereunder.

Subcontractor shall commence its work within ten (10) days of verbal or written notice to proceed from Contractor. If such work is interrupted for any reason, Subcontractor shall resume such work reasonably promptly after Contractor's notice to do so.

The Contractor shall furnish to the Subcontractor within a reasonable time so as not to delay the progress of the Works, the information, documents and instructions required to complete the Works.

The Subcontractor shall give the Contractor, if so directed by Contractor, reasonable advance notice of when the Subcontractor requires any other information, documents or instructions from the Contractor.

If compliance with the Direction causes the Subcontractor to incur more or less cost than otherwise would have been incurred had the Subcontractor not been given the Direction, the difference shall be valued under Section 4.1.1(c).

The working hours and working days for work on the Site shall be from 6:30 a.m. to 5:30 p.m. on Monday through Saturday (if work will occur on a Saturday, the Subcontractor shall give Contractor 48 hours prior notice) and, if prior approval is granted, 8:00 a.m. to 5:00 p.m. on Sunday. The working hours and working days shall not be varied without the prior approval of the Contractor except when, in the interests of safety of the Guaranteed Scope of Work or to protect life or property, the Subcontractor finds it necessary to carry out work outside the working hours or on other than the working days stated in the Subcontract. In such cases the Subcontractor shall notify the Contractor in writing of the circumstances as early as possible.

If the progress of the Work or of the Project has been delayed by any fault, neglect, act, or failure to act of Subcontractor or any of its subcontractors or suppliers, Subcontractor shall work such overtime, at Subcontractor's cost and expense without adjustment to the Subcontract price, as Contractor shall deem necessary or desirable to make up for all time lost and to avoid delay in the completion of the Work or the Project. The failure by Contractor to direct Subcontractor to engage in such overtime work shall not relieve Subcontractor of the consequences of its delay.

3.3 Payment.

The Contractor shall pay the Subcontractor an amount, not to exceed the Subcontract Price, as set forth in this Subcontract Agreement, subject to approved additions or deductions.

3.3.1 Schedule of Values.

Subcontractor shall provide a schedule of values satisfactory to Contractor and to Owner, when not included in this Agreement, no more than fifteen (15) days from the date of execution of this Subcontract Agreement and said Schedule will become a part of this Subcontract Agreement as Exhibit 2.

3.3.2 Intentionally Omitted

3.3.3 Payment Use Verification.

Contractor shall have the right at all times to contact Subcontractor's subcontractors and suppliers to ensure that same are being paid promptly by Subcontractor for labor, equipment, or materials furnished for use in performing Subcontractor's Work on this Project.

3.3.4 Release and Waiver.

As a prerequisite for each progress payment, Subcontractor shall (a) execute and deliver to Contractor a "Release and Waiver of Lien" on a standard form to be approved/provided by Contractor, and (b) provide a Release and Waiver of Lien from each of its subcontractors and suppliers using the same form for the completed Subcontractor's work. Failure to supply the executed Release and Waiver of Lien for itself and its subcontractors and suppliers shall serve as a basis for Contractor to withhold payment. This project is subject to Section 29-5-20 of the South Carolina Code of Laws and any failure to comply will bar liens and void lien rights. Subcontractor shall notify all suppliers and subcontractors of requirement to comply with said Section 29-5-20.

If Subcontractor submits a conditional Release and Waiver of Lien, Contractor reserves the right to pay the Subcontractor's sub-subcontractors, materialmen and/or suppliers directly via joint check to the Subcontractor and Subcontractor's sub-subcontractor(s), materialmen and/or supplier(s), as applicable.

3.3.5 Subcontractor Payment Failure.

Independently and separately from Contractor's rights set forth in Section 3.3.4 hereof, in the event Contractor has reason to believe that labor, material or other obligations incurred in the performance of Subcontractor's Work are not being paid, Contractor may give written notice of such claim to Subcontractor.

If, upon receipt of said notice, Subcontractor does not (a) supply within 48 hours evidence to the reasonable satisfaction of Contractor that monies owing to the claimant have been paid; or (b) provide notice to Contractor that Subcontractor disputes such claim (or portion thereof) in good faith and, if requested by Contractor and the claimant has filed a mechanic's lien or stop notice, post a release bond (in addition to the existing payment and performance bonds in effect for Subcontractor's Work), indemnifying Owner, Contractor, Guarantor and the premises from such claim, then Contractor shall have the right, without incurring an obligation to pay an interest penalty, to withhold out of any payments due, or to become due, to Subcontractor the amount of any such claims, and Contractor may take any steps it deems necessary to ensure that any progress payment shall be utilized to pay such obligations, including without limitation, paying directly monies owed said claimants, and offsetting those amounts paid against sums otherwise due to Subcontractor.

3.3.6 Payment Not Acceptance.

Payment to Subcontractor is specifically agreed not to constitute or imply acceptance by Contractor or Owner of any portion of Subcontractor's Work.

3.3.7 Withholding Payment for Deficiency of Subcontractor Performance.

3.3.7.1 Deficiency Discovered Before Progress Payment Request.

INTENTIONALLY OMITTED. Refer to Article 7, Section 7, Subparagraph 7.1.1 (b)

3.3.7.2 Deficiency Discovered after Submitting Request for Payment.

INTENTIONALLY OMITTED. Refer to Article 7, Section 7, Subparagraph 7.1.1 (b)

Additionally, Subcontractor shall reimburse Contractor for interest penalties incurred by Contractor to Owner and caused in any part by Subcontractor's failure to correct a deficiency described in a notice as required by 3.3.9. (Interest incurred by Contractor to Owner is due from the eighth day after receipt of the amounts withheld from Subcontractor until the day Subcontractor's performance deficiency is corrected or any subsequent payment request is adjusted. Interest shall be computed on the basis of the Federal Cost of Money (Re-negotiation Rate) .)

Upon satisfactory correction of the deficiency, Contractor shall pay the amounts withheld, which remain owing after the satisfactory correction as follows, or incur a late payment interest penalty as provided at 3.6:

- (a) Amounts held in Contractor's possession shall be paid as soon as practicable but no later than seven (7) days after satisfactory correction of the deficiency.
- (b) Amounts held by Owner shall be paid within seven (7) days of receipt from Owner by Contractor.

3.3.8 Notice to Contractor of Claims.

If, after making payment to Subcontractor, Contractor receives written notice from a supplier or any level (i.e., tier) subcontractor who has the legal right to assert a claim directly against Contractor for payment, of a deficiency in Subcontractor's performance, Contractor may, upon good faith investigation of supplier's claim, and complying with the provisions of subparagraph 3.3.5 without incurring an obligation for late payment interest penalty, withhold from Subcontractor's next available payment or deduct from the next payment application an amount sufficient to compel prompt remedial performance. Before withholding or deduction, Contractor shall provide notice to Subcontractor as provided in 3.3.9.

Contractor shall withhold this amount until it accepts satisfactory written notification from the claimant that the Subcontract performance deficiency has been corrected.

After receiving satisfactory written notice, Contractor shall pay the withheld amount due Subcontractor as follows:

(a) Amounts held in Contractor's possession shall be paid as soon as practicable but no later than seven (7) days after receipt of such satisfactory notification.

(b) Amounts held by Owner shall be paid within seven (7) days of receipt from Owner by Contractor.

3.3.9 Written Notice to Subcontractor of Withholding.

Contractor shall provide Subcontractor with written notice of any withholding, specifying:

- (a) the amount to be withheld;
- (b) the specific causes for the withholding under the terms of this Agreement; and
- (c) the remedial actions to be taken by Subcontractor in order to receive payment of the amount withheld.

3.4 Progress Payments.

3.4.1 Certification.

A payment request may not be approved unless the payment application includes substantiation of the amounts requested and certification by Subcontractor that:

- (a) the amounts requested are only for performance in accordance with the specifications, terms and conditions of the Contract;
- (b) payments to Subcontractor's subcontractors and suppliers have been made from previous payments received under this Agreement, that they have been paid in full all sums to which they are entitled, and timely payments will be made from the proceeds of the payment covered by the certification in accordance with their agreements; and
- (c) the application does not include any amounts which Subcontractor intends to withhold or retain from a lower tier Subcontractor or supplier in accordance with the terms and conditions of this Agreement.
- (d) Subcontractor and all lower tier contractors are in compliance with all CIP requirements as stated in the CIP Manual included as Exhibit 7.

Contractor is entitled to rely upon Subcontractor's certification in Contractor's payment requests to Owner concerning Subcontractor's performance.

3.4.2 Application.

Subcontractor's progress payment application for work performed in the preceding payment period shall be submitted to Contractor per the terms of this Subcontract Agreement for approval of Contractor and as allowed by Owner.

Contractor shall forward, without delay, the approved value to Owner for payment.

3.4.3 Retainage/Security.

Contractor will retain (without cause) ten percent (10%) of each progress payment otherwise due to Subcontractor for satisfactory performance under this Agreement without incurring any obligation to pay a late payment interest penalty.

3.4.4 Time of Application.

Subcontractor shall submit progress payment applications to Contractor no later than the twentieth (20th) day of each month for work performed up to and including the 25th day of the payment period indicating work completed and, to the extent allowed under Subparagraph 3.4.5, materials suitably stored during the payment period.

3.4.5 Stored Materials.

Unless otherwise provided in the Subcontract documents and only if approved in advance by Contractor, applications for payment may include materials and equipment not yet incorporated into Subcontractor's Work but delivered to and suitably stored at the site of work or at some other location agreed upon in writing. Approval of payment applications for such stored items shall be conditioned upon submission by Subcontractor of bills of sale and applicable insurance or such other procedures satisfactory to Owner and Contractor to establish Owner's title to such materials and equipment or otherwise protect Owner's and Contractor's interest therein, including transportation to the site. Subcontractor shall be responsible for security of materials stored. Acceptance of, or payment for, Subcontractor's materials delivered to the job site or to an approved off-site storage area shall not relieve Subcontractor of the responsibility for replacement of his material at no cost to Contractor should Subcontractor's materials be lost, damaged or require replacement for any other reason.

3.4.6 Time of Payment.

Progress payments to Subcontractor for satisfactory performance of Subcontractor's Work shall be made no later than seven (7) days after receipt by Contractor of payment from Owner for such Subcontractor's Work. **SUBCONTRACTOR HEREBY SPECIFICALLY AND EXPRESSLY WAIVES THE PROVISIONS OF CODE OF LAWS OF SOUTH CAROLINA, TITLE 29, CHAPTER 6, SECTION 29-6-30 AND SECTION 29-6-50.**

3.5 Final Payment.

3.5.1 Application.

Upon acceptance of Subcontractor's Work by Owner and Contractor, and upon Subcontractor's furnishing evidence of fulfillment of Subcontractor's obligations in accordance with the Subcontract documents, Contractor shall forward Subcontractor's application for final payment without delay.

3.5.2 Requirements.

Before Contractor shall be required to forward Subcontractor's application for final payment to Owner, Subcontractor shall submit to Contractor:

- (a) an Affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with Subcontractor's Work for which Owner or Contractor or Guarantor might in any way be liable have been paid or otherwise satisfied;
- (b) Consent of Surety to final payment, if required;
- (c) satisfaction of required closeout procedures including CIP requirements; and
- (d) other substantiation and certification as required by this agreement, and any other documents reasonably required by Contractor, including but not limited to receipts and a Final Release and Waiver of Lien on a standard form to be approved/provided by Contractor.

Final payment from Owner does not constitute a release of Subcontractor's liability for defective work or noncompliance with the Subcontract Documents or warranties.

3.5.3 Time of Payment.

Final payment of the balance due of the Contract price shall be made to Subcontractor within sixty (60) days after final acceptance of Subcontractor's Work. Final payment from Owner does not constitute a release of liability for unknown defective work or noncompliance with the Subcontract Documents or warranties.

3.6 Late Payment Interest.

Progress payments or final payment due and unpaid under this Subcontract Agreement shall bear interest from the day after the required payment date until the date on which payment of the amount due is made. Interest shall be computed on the basis of the Federal Cost of Money Rate (Renegotiation Rate). Again, **SUBCONTRACTOR HEREBY SPECIFICALLY AND EXPRESSLY WAIVES THE PROVISIONS OF CODE OF LAWS OF SOUTH CAROLINA, TITLE 29, CHAPTER 6, SECTION 29-6-30 AND SECTION 29-6-50.**

3.7 Payment of Lower-Tier Subcontractors and Suppliers.

Subcontractor agrees to incorporate a payment clause and an interest penalty clause, substantially in the form as those contained in this Subcontract Agreement, in its subcontracts with its subcontractors or suppliers and to require them to include such clauses in their subcontracts with lower tier subcontractors or suppliers. The payment clause and interest penalty clause shall not apply to routine commercial transactions that are not the subject of a contract agreement requiring compliance with specifications, terms or conditions applicable to this Agreement or to the Subcontract Documents.

3.8 Offset.

If Subcontractor is indebted to Contractor on any other job within the Overall Project Description of this project, as defined within this Agreement, Contractor may offset such indebtedness against any payment earned under this Agreement.

3.9 General.

As used in this Section 3.9, "records" includes books, documents, accounting procedures and practices, and other data, regardless of whether such items are in written form, in the form of computer data, or in any other form.

3.9.1 Examination of Costs.

INTENTIONALLY OMITTED.

3.9.2 Audit of Records.

The Contractor and Owner, in order to evaluate the accuracy, completeness, and currency of the data, shall have the right to examine and audit Subcontractor's records, including computations and projections, related to:

- (e) the proposal for any Change Order or Work Change Directive or Modification;
- (f) the discussions conducted regarding the proposal(s), including those related to negotiating;
- (g) pricing of a Change Order or Work Change Directive, or Modification; or
- (h) performance of any Change Order, Change Directive, or Modification.

3.9.3 Access to Subcontractor Records.

The Contractor and Owner, shall have access, and the right, to examine any of Subcontractor's records related to the Agreement. The Subcontractor shall make available at its

office, at reasonable times, the information described in this Section 3.9 for examination, audit or reproduction, until four (4) years after the Final Completion Date or for any shorter period agreed to by the Owner.

3.10 Federal Acquisition Regulations Pertaining to Audit Rights; Wage Requirements.

Subcontractor is required through the incorporation of the Prime Contract and this Subcontract Agreement to comply with provisions of the Davis-Bacon Act (Federal Acquisition Regulations ("FAR") 52.222-6 and 52.222-8 (set forth below)), and the applicable Davis-Bacon Act wage decision. Subcontractor shall be required to submit weekly certified payroll reports to the Contractor no later than the 7th day after the date the Subcontractor's employees are paid. Subcontractor shall review weekly certified payroll reports to ensure that employees performing Work on the Project are properly classified and listed on the reports, and minimum wages and fringe benefits required by the wage decision are being paid. Subcontractor shall be responsible for reconciling the Subcontractor's weekly certified payroll reports with its daily reports; conducting interviews, as necessary, with Subcontractor employees to verify actual wages being paid; and identifying discrepancies and possible violations. The Contractor shall notify the Subcontractor of discrepancies and possible violations, and take measures designed to ensure that corrective actions, if required, are taken by the Subcontractor within 30 days. If discrepancies or possible violations cannot be resolved by the Contractor and the Subcontractor, or required corrective actions have not been taken within 30 days, the Contractor shall submit a report in detail to the Owner.

FAR 52.222-6 Davis-Bacon Act.

Davis-Bacon Act (Feb 1995)

"(a) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (d) of this clause; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period. Such laborers and mechanics shall be paid not less than the appropriate

wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in the clause entitled Apprentices and Trainees. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (b) of this clause) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(b) (1) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The Contracting Officer shall approve an additional classification and wage rate and fringe benefits therefore only when all the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination.

(ii) The classification is utilized in the area by the construction industry.

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Contracting Officer agree on the classification and wage rate (including the amount designated for fringe benefits, where appropriate), a report of the action taken shall be sent by the Contracting Officer to the Administrator of the:

Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Washington, DC 20210

The Administrator or an authorized representative will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the Contracting Officer or will notify the Contracting Officer within the 30-day period that additional time is necessary.

(3) In the event the Contractor, the laborers or mechanics to be employed in the classification, or their representatives, and the Contracting Officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the Contracting Officer shall refer the questions, including the views of all interested parties and the recommendation of the Contracting Officer, to the Administrator of the Wage and Hour Division for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the Contracting Officer or will notify the Contracting Officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits, where appropriate) determined pursuant to paragraphs (b)(2) and (b)(3) of this clause shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(c) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(d) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided, That the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program."

(End of clause)

FAR 52.222-8 Payrolls and Basic Records.

Payrolls and Basic Records (Feb 1988)

"(a). Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked,

deductions made, and actual wages paid. Whenever the Secretary of Labor has found, under paragraph (d) of the clause entitled Davis-Bacon Act, that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(b) (1) The Contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Contracting Officer. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause. This information may be submitted in any form desired. Optional Form WH-347 (Federal Stock Number 029-005-00014-1) is available for this purpose and may be purchased from the-

Superintendent of Documents
U.S. Government Printing Office
Washington, DC 20402

The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify-

(i) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR part 3; and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (b)(2) of this clause.

(4) The falsification of any of the certifications in this clause may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

(c) The Contractor or subcontractor shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by the Contracting Officer or authorized representatives of the Contracting Officer or the Department of Labor. The Contractor or subcontractor shall permit the Contracting Officer or representatives of the Contracting Officer or the Department of Labor to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit required records or to make them available, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12."

(End of clause)

4. CHANGES, CLAIMS AND DELAYS

4.1 Changes.

When Contractor so orders in writing, Subcontractor, without nullifying this Agreement, shall make any and all changes in the Work, which are within the general scope of this Agreement.

Adjustments in the Subcontract price or Contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Subcontract Documents.

No such adjustments shall be made for any such changes performed by Subcontractor that have not been so ordered and approved in writing in advance by Contractor. Subcontractor shall not be required to perform change order work unless written direction is issued by Contractor. Otherwise, it shall be conclusively presumed that the Contractor and Subcontractor

have agreed that such work or materials are within the scope of the work and that no additional compensation will be paid for the extra work.

4.1.1 Right to Delete or Suspend Based Upon Owner Change.

In the event of a material change in the scope of work by the Owner, Contractor may, at its option, and separate from its right to terminate or suspend the Work as set forth in this Agreement, by written notice thereof to Subcontractor, delete all of this Agreement, delete any portion thereof, to the extent that the Owner's material change affects Subcontractor's Work. Upon any such deletion or suspension, Subcontractor agrees to waive any claims for damages, including lost profits, on account thereof, and as the sole remedy of Subcontractor, Contractor shall pay Subcontractor in accordance with subparagraph (c), below.

(a) Upon receipt of any such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue, or if it has not yet begun, then cease commencement thereof, the work specified; place no further orders or subcontracts for materials, equipment, services of facilities, except as may be necessary for completion of the work that is not deleted or discontinued; promptly make every reasonable effort to procure cancellation of all orders and subcontracts to the extent they relate to the performance of the discontinued portion of the work and shall thereafter do only such work as may be necessary to protect and preserve work that is already in progress and to protect materials, plants and equipment on site or in transit thereto.

(b) Upon such deletion, the obligations of the Agreement shall continue as to portions of the Agreement already performed, to those not deleted, and to those that are bona fide obligations assumed by Subcontractor prior to the date of the deletion.

(c) Upon deletion, Subcontractor shall be entitled to be paid the full cost of all work properly performed by Subcontractor to the date of deletion not previously paid for, (including reasonable mark-up and profit on completed work) less sums already received by Subcontractor on account of the portion of the work performed. If at the date of such deletion Subcontractor has already properly prepared or fabricated off site any goods for subsequent incorporation in the work, and if Subcontractor delivers such goods to the site or to such other place as the Contractor shall reasonably direct, then Subcontractor shall be paid for such goods or materials.

4.2 Claims.

Subcontractor shall give Contractor written notice of all claims within five (5) days of the beginning of the event for which claim is made; otherwise, such claims shall be deemed waived.

All unresolved claims, disputes and other matters in question between Contractor and Subcontractor shall be resolved as follows:

4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a 'dispute') between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim-
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration,

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by

Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by change order to the extent obtained by Contractor under the Subcontract Documents and the Schedule of Work shall be revised accordingly.

Contractor shall not be liable to Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless Contractor has first recovered the same on behalf of Subcontractor from said person, it being understood and agreed by Subcontractor that, apart from recovery from said person, Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of Subcontractor's Work.

4.4 Liquidated Damages.

The parties agree that in the event there is a delay by Subcontractor in the completion of Subcontractor's Work, the monetary impact on the contractor will be difficult to ascertain. However, to the extent that the Subcontractor is responsible for delays to the completion of

Subcontractor's Work, then the parties agree that the Contractor may assess against Subcontractor the sum of \$24 per calendar day per each unit that the units are not substantially complete pursuant to the Owner's requirements as a consequence of Subcontractor's delay. Nothing in this provision shall be deemed to obligate Subcontractor to pay liquidated damages to Contractor for delays solely caused by the Contractor, the Owner, parallel Subcontractors, and/or events beyond Subcontractor's control.

4.5 Waiver of Right to Assert "Cardinal Change" or "Total Cost Recovery."

INTENTIONALLY OMITTED

5. SUBCONTRACTOR'S OBLIGATIONS

5.1 Responsibilities.

Subcontractor shall furnish all of the labor, materials, equipment and services including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of Subcontractor's Work.

Subcontractor shall provide a list of proposed subcontractors and suppliers to be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Schedule of Work.

5.2 Temporary Services.

Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work, unless specifically excluded in Exhibit 1.

5.3 Coordination.

Subcontractor shall:

(a) cooperate with Contractor and all others whose work may interfere with Subcontractor's Work;

(b) specifically note and immediately advise Contractor of any such interference with Subcontractor's Work; and

(c) participate in the preparation of coordination drawings and work schedules in areas of congestion.

5.4 Authorized Representative.

Subcontractor shall designate one or more persons who shall be the authorized Subcontractor's representative(s) (a) onsite and (b) offsite. Such authorized representatives shall be the only persons to whom Contractor shall issue instructions, orders and/or directions, except

in an emergency. The onsite representative shall be present onsite at all times during Subcontractor's performance of work.

5.5 Provision for Inspection.

Subcontractor shall notify Contractor when portions of Subcontractor's Work are ready for inspection. Subcontractor shall at all times furnish Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under this Agreement may be in the course of preparation, process, manufacture or treatment.

Subcontractor shall furnish to Contractor, in such detail and as often as required, full reports of the progress of Subcontractor's Work, irrespective of the location of such work.

5.6 Safety and Cleanup.

Subcontractor shall follow Contractor's cleanup and safety directions, and

(a) Subcontractor agrees that the prevention of accidents to workers engaged upon or in the vicinity of the Work is its responsibility, even if Contractor establishes a safety program for the entire Project. Subcontractor shall establish and implement safety measures, policies and standards conforming to those required or recommended by governmental or quasi-governmental authorities having jurisdiction and by Contractor and Owner, including, but not limited to, any requirements imposed by the Owner. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project and shall stop any part of the Work that Contractor deems unsafe until corrective measures satisfactory to Contractor have been taken. Contractor's failure to stop Subcontractor's unsafe practices shall not relieve Subcontractor of its responsibility therefore.

(b) Subcontractor shall continuously protect the Work, other work, and the property of Contractor, Owner and others from damage, injury or loss arising in connection with the Subcontractor's performance of the Work. Neither Owner nor Contractor shall be responsible for any loss or damage to the Work or the property of Subcontractor, however caused, until after final acceptance thereof by Owner and final payment therefore. Likewise, neither Owner nor Contractor shall be responsible for loss of or damage (however caused) to materials, tools, equipment, appliances and other personal property of Subcontractor stored and/or used in the performance of the Work. Subcontractor shall remove all snow and ice as may be required or requested for the proper protection and prosecution of the Work. Subcontractor shall provide and maintain adequate protection against weather so as to protect stored materials and the Work from injury or damage.

(c) Subcontractor shall enforce Contractor's instructions regarding signs, advertisements, fires, smoking, alcoholic beverages, and the possession of firearms by any person at the Project site. Subcontractor, as necessary for the Work, shall provide flagmen, erect proper barricades and other safeguards, and post danger signs and other warnings as warranted by hazardous and existing conditions.

(d) Subcontractor shall promptly report in writing to Contractor and Subcontractor's insurance carriers all accidents arising out of, or in connection with, the performance of the Work, whether on or off the Project site, which caused death, bodily injury or property damage, giving full details and statements of witnesses. In addition, if death or serious injuries or serious damages occur, the incident shall be reported to Contractor immediately by telephone or in person.

(e) Subcontractor shall provide to Contractor a written site specific Safety and Health Program prior to the commencement of any Work on the Project. The Safety and Health Program shall address tasks to be performed on the Project with attendant risk analysis and have appropriate controls and safeguards to prevent injury and illness. Contractor will review the Safety and Health Program prior to the start of the work. Any questions, comments or inquiries by Contractor as to the adequacy of this program must be completely addressed by Subcontractor before Work is started.

(f) Subcontractor must have a Safety Orientation Program for all of its new Project workers. Documentation of this orientation is required for the Project. Weekly safety meeting with the workers of Subcontractor and its subcontractors of any tier are also required with evidence of the meeting results being supplied to Contractor.

(g) Hard hats are required on the Project. Subcontractor must have a Safety Disciplinary Program and Contractor will use a safety disciplinary system with the Subcontractor.

(h) Where working places fitted with guardrails cannot be provided at locations where workers or materials could fall more than six (6) feet, suitable fall protection devices such as harnesses, nets, etc. must be provided by Subcontractor and used by Subcontractor.

(i) Freestanding scaffold towers provided by Subcontractor must not exceed three to one ratio height to minimum base dimension unless secured to a substantial structure. For internal use, the height to minimum base may rise 3.5 to 1. Wheels must be locked when the tower is in use and no worker is permitted to ride on a tower platform while the tower is being moved.

(j) Powered cranes, hoists, aerial platforms, and scissors lifts provided by Subcontractor must be certified as safe to use by a third party.

(k) Ground fault circuit interrupters (GFCI) must be provided by Subcontractor and used by Subcontractor on all temporary electrical cord circuits.

(l) Subcontractor shall, at its own expense: (i) keep the premises at all times free from waste materials, packaging and other debris accumulated in connection with the Work by collecting and disposing such debris on a daily or other basis requested by Contractor; (ii) at the completion of the Work in each area, sweep and otherwise make the Work and its immediate vicinity "broom-clean;" (iii) remove all of its tools, equipment, scaffolds, temporary structures

and surplus materials as directed by Contractor at the completion of the Work. Subcontractor agrees to provide all cleaning and cleanup reasonably required by the Owner pertaining to the Work to the extent such requirements are in excess of those contained in this paragraph.

(m) If Subcontractor fails to immediately commence compliance with such safety duties or commence cleanup duties within twenty four (24) hours after receipt from Contractor of written notice of noncompliance, Contractor may implement such safety or cleanup measures without further notice and deduct the cost thereof from any amounts due or to become due Subcontractor.

5.6.1 Incident & Injury Free ("IIF").

Subcontractor is encouraged to make a personal commitment to working towards an Incident & Injury Free workplace. Personal commitment may be demonstrated simply by stopping an unsafe act through a genuine concern for the well-being of another, or it may be evident when near-misses are reported in an effort to prevent incidents and injuries.

(a) If the subcontractor stops work for any safety-related reason, the management of the Contractor will support the subcontractor. If the subcontractor expresses a safety concern, the Contractor will address the concern. If an incident or injury occurs, a full and thorough investigation shall be initiated for the purpose of preventing recurrence or similar events. Incident investigations shall not be conducted for the purpose of assessing blame.

(b) If an activity is found to be unsafe, the subcontractor is encouraged not to do the activity, and do not allow others to do the same activity. If the subcontractor observes an unsafe activity, the subcontractor is encouraged to address the concern to the Contractor.

(c) Through partnering safety and efficiency with personal commitment to an Incident & Injury Free workplace, safety becomes a catalyst, which results in a more detailed planning process towards an Incident & Injury Free workplace. This also ensures that employees are assigned the appropriate work tasks at the right time with the right tools.

5.7 Protection of the People and Property.

Insofar as compliance with the requirements of the Subcontract allows and as more specifically set forth in Exhibit 6, Procedure Manual, the Subcontractor shall -

- (c) provide all things and take all measures necessary to protect people and property;
- (d) avoid unnecessary interference with the passage of people and vehicles; and
- (e) prevent nuisance and unreasonable noise and disturbance.

Without limiting the generality of the Subcontractor's obligations, they include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

If the Subcontractor or the employees or agents of the Subcontractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Subcontractor shall promptly make good the damage and pay any compensation which the law requires the Subcontractor to pay.

If the Subcontractor fails to comply with an obligation under this Section 5.7, in addition to any other remedies of the Contractor, the Contractor may after giving no less than 48 hours notice in writing by facsimile or overnight mail to the Subcontractor, have the subject work carried out by other Persons and the reasonable cost incurred by the Contractor shall be a debt due from the Subcontractor to the Contractor.

The Works shall conform to the Contractor's Business Minimum Requirements for Environment, Health and Safety, as set forth in Exhibit 4.

5.8 Permits, Fees and Licenses.

Subcontractor shall give adequate notices to authorities pertaining to Subcontractor's Work and secure and pay for all permits, fees, licenses, assessments, inspections and taxes, including state and local sales tax, necessary to complete Subcontractor's Work in accordance with the Subcontract Documents, whether such permits, fees, licenses, assessments, inspections and taxes are imposed or charged for labor, material, or other things used by Subcontractor. Subcontractor shall not retain independent contractors to perform any of Subcontractor's work without express written authorization from Contractor.

5.9 Assignment.

Subcontractor shall not assign this Agreement nor its proceeds nor Subcontract the whole nor any part of Subcontractor's Work without prior written approval of Contractor.

5.10 Non-Contracted Services.

Subcontractor agrees, except as otherwise provided in this Agreement, that no claim for non-contracted construction services rendered or materials furnished shall be valid unless Subcontractor provides Contractor notice:

(a) prior to furnishing of the services or materials, except in an emergency affecting the safety of persons or property;

(b) in writing of such claim within three (3) days of first furnishing such services or materials; and

(c) of the written charges for such services or materials no later than the fifteenth (15th) day of the calendar month following that in which the claim originated.

5.11 Alternative Equipment, Material or Method.

Subcontractor shall not deviate from the requirements of the drawings and specifications and Subcontract Documents as to material and equipment to be furnished or the method of performing the work unless prior written approval has been obtained from Contractor. Subcontractor warrants that any alternative equipment, material or method proposed by Subcontractor pursuant to this section will achieve all performance standards reasonably established by the Owner and will perform to Owner's satisfaction.

5.12 Bonds.

If required in Exhibit 1 of this Agreement, Subcontractor, within ten (10) days of date of transmission of this Subcontract to Subcontractor, shall furnish performance, and labor and material payment bonds each for one hundred percent (100%) of the Subcontract Price in favor of Contractor, and said bonds are to be on standard bond forms and with sureties with a Best's Rating of "A" (Excellent) or better. The premiums on such bonds shall be paid by Subcontractor and are included in the Subcontract Price unless noted otherwise within this agreement. Subcontractor agrees to notify its surety or sureties of increases in the Subcontract Price and to take such action as is required to have the penal amount of the bonds furnished pursuant to this paragraph increased correspondingly.

6. SUBCONTRACT PROVISIONS

6.1 Layout Responsibility and Levels.

Contractor shall establish principal axis lines of the building and site whereupon Subcontractor shall, unless noted otherwise in Exhibit 1 to this Agreement, lay out and be strictly responsible for the accuracy of Subcontractor's Work and for any loss or damage to Contractor or others by reason of Subcontractor's failure to set out or perform its work correctly. Subcontractor shall exercise prudence so that the actual final conditions and details shall result in perfect alignment of finish surfaces.

6.2 Workmanship.

Every part of Subcontractor's Work shall be executed in strict accordance with the Subcontract Documents in the most sound, workmanlike and substantial manner. All workmanship shall be of the best of its several kinds, and all materials used in Subcontractor's Work shall be furnished in ample quantities to facilitate the proper and expeditious execution of the work and shall be new except such materials as may be expressly provided in the Subcontract Documents to be otherwise.

6.3 Materials Furnished by Others.

In the event the scope of Subcontractor's Work includes installation of materials or equipment furnished by others, it shall be the responsibility of Subcontractor to examine the items so provided and thereupon handle, store and install the items with such skill and care as to ensure a satisfactory and proper installation. Loss or damage due to acts of Subcontractor shall be deducted from any amounts due or to become due Subcontractor.

6.4 Substitutions.

No substitutions shall be made in Subcontractor's Work unless permitted in the Subcontract documents and only then upon Subcontractor first receiving all approvals required under the Subcontract documents for substitutions. Subcontractor shall indemnify Contractor as a result of such substitutions, whether or not Subcontractor has obtained approval thereof.

6.5 Use of Contractor's Equipment.

Subcontractor, its agents, employees, subcontractors or suppliers shall not use Contractor's equipment without the express written permission of Contractor's designated representative.

If Subcontractor or any of its agents, employees, suppliers or lower-tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of Contractor, Subcontractor shall be liable to Contractor as provided in Section 9 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have been due solely to the negligence of Contractor's employees operating such equipment.

6.6 Privity.

Until final completion of the Project, Subcontractor agrees not to perform any work directly for Owner or any tenants thereof, or deal directly with Owner's representatives in connection with the Project, unless otherwise directed in writing by Contractor. All work for this Project performed by Subcontractor shall be processed and handled exclusively by Subcontractor.

6.7 Warranty.

Subcontractor agrees to satisfy such guarantee and warranty obligations which appear within the guarantee or warranty period without cost to Owner or Contractor.

Subcontractor shall guarantee or warrant its work as described above for the period of one year from the date(s) of substantial completion of all or a designated portion of Subcontractor's Work or acceptance or use by Contractor or Owner or designated equipment, whichever is later. Material or work which becomes defective within the one year period described above shall promptly be replaced at Subcontractor's expense whether or not the failure

or defect is actually discovered within the year. Subcontractor shall guarantee or warrant all corrective material and work for one year after completion of the correction. No inspection, failure of inspection, acceptance or payment by Contractor is a waiver of the foregoing and nothing therein shall exclude or limit any warranties implied by law or otherwise given by Subcontractor. The one (1) year warranty period notwithstanding, Subcontract agrees that if a defect, error, etc. in Subcontractor's Work is found, or becomes manifested, after the Warranty Period expires, and to the extent the applicable legal limitations period has not expired, then Subcontractor will be responsible for the correction of the error, and all related damages.

Subcontractor further agrees to execute any special guarantees or warranties that may be required for Subcontractor's Work prior to final payment.

6.7.1 Written Warranties; Equipment Manuals.

Subcontractor shall provide all written warranties and equipment manuals, deliver them and assign all rights thereto to the Owner promptly following the Final Completion Date or upon any earlier termination date of this Agreement.

6.7.2 Start-Up.

With the assistance of the Owner's maintenance personnel, the Subcontractor shall direct the checkout of utilities and start up operations, and adjusting and balancing of applicable systems and equipment for readiness as needed from time to time prior to turnover of applicable portions of the Work to the Owner.

7. RECOURSE BY CONTRACTOR

7.1 Failure of Performance.

7.1.1 Notice to Cure.

If Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or to maintain the Schedule of Work, or it fails to make prompt payment for its workers, lower-tier subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, Subcontractor shall be deemed in default of this Agreement. If Subcontractor fails within two (2) working days after receipt of written notice to (1) acknowledge in writing its intent to cure said defaults, and (2) commence and continue satisfactory correction of such default with diligence and promptness, then Contractor without prejudice to any rights or remedies shall have the right to any or all of the following remedies:

(a) supply such number of workers and quantity of materials, equipment and other facilities as Contractor deems necessary and attempt to remedy the default by whatever means Contractor may deem necessary or appropriate, including, but not limited to, correcting, furnishing, performing, or otherwise completing the Work, or any part thereof, by itself or through others (utilizing where appropriate any materials and equipment previously purchased

for that purpose by Subcontractor) and deducting the cost thereof (plus an allowance for administrative burden equal to ten percent (10%) of such costs) from any monies due or to become due to Subcontractor hereunder;

(b) withhold from Subcontractor's next available payment or deduct from the next payment application an amount sufficient to cover losses and to compel prompt remedial performance to the satisfaction of the Contractor and Owner, and without obligation on the Contractor's part to pay a late interest penalty; and

(c) in the event of an emergency affecting the safety of persons or property, Contractor may proceed as above without notice.

7.1.2 Termination by Contractor.

In addition, and as an alternative remedy available Contractor under 7.1.1, if Subcontractor fails to commence and satisfactorily continue correction of a default within two (2) days after receipt by Subcontractor of the notice issued under Subparagraph 7.1.1, then the Contractor may issue a second written notice, by facsimile or overnight mail, to Subcontractor and its Surety, if any. Such notice shall state that if Subcontractor fails to notify Contractor within 24 hours of receipt of the second notice that it will commence and continue correction of a default within 24 hours thereafter, the Agreement may be deemed terminated and Contractor may use any materials, implements, equipment, appliances or tools furnished by or belonging to Subcontractor to complete Subcontractor's Work.

In the meantime, Contractor also may furnish those materials, equipment and/or employ such workers or subcontractors as Contractor deems necessary to maintain the orderly progress of the Work. All of the costs incurred by Contractor in so performing Subcontractor's Work, including but not limited to, the direct costs of labor, material, field overhead, home office overhead, profit, interest, consulting fees, and attorney's fees shall be deducted from any monies due or to become due Subcontractor. Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the subcontract price.

7.1.3 Use of Subcontractor's Equipment.

If Contractor performs work under this Section or sublets such work to be so performed, Contractor and/or the persons to whom work has been sublet shall have the right to take and use any materials belonging or delivered to Subcontractor and located at the Project.

7.1.4 Contractor's Right to Terminate If Subcontractor Is In Material Breach of Other Agreement.

If Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or to maintain the Schedule of Work, or it fails to make prompt payment for its workers, lower-tier subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of any other agreement with Contractor pertaining to work performed, or to be

performed, on the Project, Contractor shall have the right, in its sole discretion, to terminate this Subcontract Agreement, effective immediately upon written notice to Subcontractor. Subject to Contractor's other rights and remedies under this Subcontract Agreement, upon such termination, Subcontractor's sole remedy is limited to payment for all work properly performed by Subcontractor under this Subcontract Agreement to the date of termination.

7.2 Bankruptcy.

7.2.1 Termination Absent Cure.

If Subcontractor files a petition under the Bankruptcy Code, this Agreement shall terminate if Subcontractor or Subcontractor's trustee rejects the Agreement or, if there has been a default, Subcontractor is unable to give adequate assurance that Subcontractor will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

7.2.2 Interim Remedies.

If Subcontractor is not performing in accordance with the Schedule of Work at the time a petition in Bankruptcy is filed or at any subsequent time, Contractor, while awaiting the decision of Subcontractor or its trustee to reject or to assume this Agreement and provide adequate assurance of its ability to perform hereunder, may avail itself of such remedies under this Section as are reasonably necessary to maintain the Schedule of Work.

Contractor may offset against any sums due or to become due Subcontractor all costs incurred in pursuing any of the remedies provided hereunder including, but not limited to, reasonable overhead, profit and attorney's fees.

Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the subcontract price as determined by Subparagraph 6.6.1 above.

7.3 Suspension by Owner.

Should Owner suspend the Prime Contract or any part of the Prime Contract which includes Subcontractor's Work, Contractor shall so notify Subcontractor in writing and upon receipt of said notice Subcontractor shall immediately suspend Subcontractor's Work.

In the event of such Owner suspension, Contractor's liability to Subcontractor is limited to the extent of Contractor's recovery on Subcontractor's behalf. Contractor agrees to cooperate with Subcontractor, at Subcontractor's expense, in the prosecution of any Subcontractor claim against Owner arising out of an Owner suspension and to permit Subcontractor to prosecute said claim, in the name of Contractor, for the use and benefit of Subcontractor.

7.4 Termination by Owner.

Should Owner terminate the Prime Contract or any part of the Prime Contract which includes Subcontractor's Work, Contractor shall so notify Subcontractor in writing and upon receipt of said notice this Agreement shall be terminated and Subcontractor shall immediately stop Subcontractor's Work, follow all of Contractor's instructions, and mitigate all costs.

In the event of such Owner termination, Contractor's liability to Subcontractor is limited to the extent of Contractor's recovery on Subcontractor's behalf.

7.5 Suspension by Contractor.

Contractor may order Subcontractor in writing to suspend, delay or interrupt all or any part of Subcontractor's Work for such period of time as may be determined to be appropriate for the convenience of Contractor.

Except as set forth in Subparagraphs 4.1.1 and 4.3, Subcontractor shall notify Contractor in writing within five (5) working days after receipt of Contractor's order of the effect of such order upon Subcontractor's Work, and the Subcontract price or Contract time shall be adjusted by Subcontract Change Order for any increase in the time or cost of performance of this Agreement caused by such suspension, delay or interruption.

No claim under this Section shall be allowed for any costs incurred more than five (5) working days prior to Subcontractor's notice to Contractor.

Neither Subcontract price nor Contract time shall be adjusted under this Section for any suspension, delay or interruption to the extent that performance would have been so suspended, delayed or interrupted by the fault or negligence of Subcontractor.

7.6 Wrongful Termination.

If it is determined by trier of fact that Contractor wrongfully exercised any option under this Section or this Subcontract Agreement related to suspension or termination, Contractor shall be liable to Subcontractor, according to proof, solely for those amounts set forth in 4.1.1 (c), including reasonable overhead and profit on only the work adequately performed plus lost profit on Subcontractor's Work not performed in an amount not to exceed ten percent (10%) of the contract value, excluding such profit, if any, as has already been paid by Contractor *via* each Progress Payment through the date of Subcontractor's termination.

8. LABOR RELATIONS

Before Contractor shall be required to forward Subcontractor's application for final payment to Owner, Subcontractor shall submit to Contractor, in addition to any other documentation that may be required by this Agreement, written evidence to Contractor from appropriate fund offices for its trade or craft that all fringe benefits have been paid for their labor on this Project (these offices include health, welfare, vacation, pension and apprenticeship fund

offices). Subcontractor agrees to hold Owner and Contractor harmless from claims, demands, and liability for union welfare, pension, vacation, apprenticeship, owner/operator, health and welfare, and related type payment obligations connected with this Project, whether or not well founded, when such claims arise from employment by Subcontractor or its subcontractors.

Subcontractor is not excused for any default or delay resulting from a strike or walkout against Subcontractor as a member of an employers association or as a result of area-wide bargaining, except to the extent that such delays are excused under the Contract or by Owner.

9. INDEMNIFICATION

9.1 Subcontractor's Performance.

Unless provided differently in Section 11, hereafter, to the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Tri-Command Military Housing LLC, Tri-Command Managing Member LLC, Actus Lend Lease Holdings LLC, Actus Lend Lease LLC, J.P. Morgan Company, National Association, MBIA Insurance Corporation and the United States of America, Department of the Navy, from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of Subcontractor's Work provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than Subcontractor's Work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or for anyone for whose acts Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity, which would otherwise exist as to any party or person described in this Section 9.

9.2 No Limitation Upon Liability.

In any and all claims against the Owner or the Contractor (including its partners, joint ventures, affiliates, parents and subsidiaries) or any of their agents or employees, by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts or omissions Subcontractor may be liable, the indemnification obligation under this Section 9 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.3 Owner Exclusion.

The obligation of Subcontractor under this Section 9 shall not extend to the liability of Owner, its agents or employees, arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications or (b) the giving of or the

failure to give directions or instructions by Owner, its agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

9.4 Patents.

Except as otherwise provided by the Subcontract Documents, Subcontractor shall pay all royalties and license fees, which may be due on the inclusion of any patented materials in Subcontractor's Work. Subcontractor shall defend all suits for claims for infringement of any patent rights arising out of Subcontractor's Work, which may be brought against Contractor or Owner, and shall be liable to Contractor and Owner for all loss, including all costs, expenses and attorney's fees.

9.5 Plans and Specifications.

Subcontractor acknowledges that it has studied the Plans and Specifications and other Subcontract Documents for the Project and that they are sufficiently complete and adequate for the performance of Subcontractor's Work.

9.6 Familiarity with the Project and Subcontract Documents.

Subcontractor represents that it is familiar with the Project site and has received all information, including all Plans and Specifications it needs concerning the conditions of the Project site. Subcontractor represents that it has inspected the location of the work and has satisfied itself as to the condition thereof, including, without limitation, all structural, surface and subsurface conditions as may be disclosed by the soil investigation. Based upon the foregoing inspections, understandings, agreements and acknowledgments, Subcontractor agrees and acknowledges (i) that the Contract Sum is just and reasonable compensation for all the Work, including all foreseen and foreseeable risks, hazards and difficulties in connection therewith, and (ii) that the Contract Time is adequate for the performance of the Work. Subcontractor shall have no claims for surface or subsurface conditions disclosed by the soil investigation report. Subcontractor shall exercise caution in executing subsurface work in proximity of known subsurface utilities, improvements and easements.

Subcontractor has thoroughly examined all drawings and specifications and has examined the job site and Subcontract Documents and ascertained for itself the conditions to be encountered. Subcontractor enters into this subcontract relying on its review of Subcontract Documents and investigation of the Project site and not on statements or verbal representations if any, that may have been made by Contractor or Owner or any of their respective agents or representatives.

10. APPLICABLE LAWS AND FEDERAL ACQUISITION REGULATIONS

10.1 Compliance with Law.

The Subcontractor shall cause the Work to be performed in compliance with all Applicable Laws including applicable codes referenced in the Contract Documents except those which-

- (a) are specified in writing in advance by Contractor; or
- (b) the Contractor directs are to be satisfied by or on behalf of the Contractor.

If any Applicable Laws are at variance with a provision of the Subcontract, then as soon as the Subcontractor discovers the variance it shall notify the Contractor in writing specifying the difference.

10.2 Changes in Applicable Laws.

If an Applicable Law-

- (a) necessitates-
 - (i) a change to the Works;
 - (ii) a change to the Temporary Works, Constructional Plant or method of working, if any, as may be specified in the Subcontract;
 - (iii) the provision or expansion of services of a municipal, public or statutory authority in connection with the Works or Temporary Works; or
 - (iv) an increase or decrease in a fee or charge or payment of a new fee or charge; and
- (b) become effective after the date of this Agreement, then to the extent that such change causes the Subcontractor to incur more or less cost than otherwise would have been incurred in the performance of the work, the difference shall be valued as a change order under Section 4.1. The Subcontractor assumes that the existing Improvements have been constructed in accordance with all Applicable Laws in existence as of the date of this agreement. If the existing Improvements do not comply with all Applicable Laws in existence prior to the date of this Agreement, then the Subcontractor shall not be obligated to alter the existing Improvements to comply with such Applicable Laws.

10.3 Certificates Required by Law.

Subcontractor shall secure certificates of inspection, testing or approval required under applicable Law and deliver them to Contractor.

10.4 Compliance with Federal Acquisition Regulations.

Subcontractor shall perform all aspects of this Agreement in accordance with the Federal Acquisition Regulations listed in Exhibit 5.

Subcontractor shall be liable to Contractor and Owner for all loss, cost and expense attributable to any acts of commission or omission by Subcontractor, its employees and agents resulting from the failure to comply therewith including, but not limited to, any fines, penalties or corrective measures.

11. CONSOLIDATED INSURANCE PROGRAM (CIP)

Definitions. For the purposes of this Section 11, the following definitions shall apply.

Project Site: Beaufort, South Carolina

Contractor: Actus Lend Lease LLC

Subcontractor: Each person or entity who has a contract with Actus Lend Lease LLC, a subcontractor of Actus Lend Lease LLC, of any tier to perform any of the Work at the Project.

Enrolled Subcontractor: Those Subcontractors indicated in Exhibit 1 as being enrolled and that have submitted all necessary enrollment forms and have been accepted into the CIP as evidenced by a certificate of insurance.

Non-Enrolled Subcontractor: Any Subcontractor that as indicated in Exhibit 1 as not being an Enrolled Subcontractor.

11.1 Builders Risk Insurance.

A Builders Risk policy covering the materials and supplies that are intended for specific installation in the Project while such materials and supplies are located at the Project Site will be provided by Owner for Contractor for all subcontractors.

Coverage will be on an "All Risk" basis (subject to policy exclusions). This insurance includes the interests of the Owner, Contractor and Subcontractors of all tiers in the property described above. Subcontractor shall be responsible for the first \$25,000 of any loss to Subcontractor or any of its lower tier subcontractors under this Builders Risk coverage. Subcontractor shall also be responsible for the first \$25,000 loss incurred by Owner, Contractor or other subcontractor and their lower tier subcontractors which is caused in part or whole by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor.

Tools and equipment (including office trailers, tool sheds, and any other temporary structures) belonging to, rented by or leased by subcontractor and its sub-subcontractors of any tier are excluded from coverage.

If Owner has not purchased Builder's Risk Insurance for the full insurable value of Subcontractor's Work, less a reasonable deductible, then Subcontractor may procure such insurance as will protect the interest of Subcontractor, its subcontractors and their subcontractors in the Work and, the cost of such additional insurance shall be at no additional cost to Contractor or Owner.

If not covered under the Builder's Risk policy of insurance or any other property or equipment Insurance required by the Contract Documents, Subcontractor shall procure and maintain at Subcontractor's own expense property and equipment insurance for portions of Subcontractor's Work stored off the site or in transit, when such portions of Subcontractor's Work are to be included in an application for payment under Article 3.

The Subcontractor will be responsible for the deductible and/or the sub-limits of the policy on any claim submitted against the Owner's Builder's Risk policy. The policy has a \$25,000 deductible on all perils per occurrence except for the following:

- 1) Windstorm: 3% of the Total Insurable Value (TIV) at each location involved in loss or damage subject to a \$25,000 minimum.
- 2) Flood: 3% of the TIV at each location involved in a loss or damage caused by a named storm subject to a \$250,000 minimum except excess of NFIP flood in 100 year zones, minimum of \$500,000.

Upon written request of Subcontractor, Contractor shall provide Subcontractor with a copy of the Builders Risk policy of insurance in force for the Project and procured by Owner. Subcontractor shall satisfy itself to the existence and extent of such insurance prior to commencement of Subcontractor's Work.

11.2 Consolidated Insurance Program (CIP).

Exhibit 1 shall indicate whether the Subcontractor and/or its subcontractors at any tier are an Enrolled Subcontractor or a Non Enrolled Subcontractor for purposes of the CIP. If the Subcontractor is enrolled in the CIP, it is hereby agreed that the subcontract price does not include any amount or allowance for reimbursement for any premium for the insurance specified herein for on-site exposures, which insurance is being furnished by Contractor. Subcontractor certifies previously provided Insurance Credit Worksheet amount of premium has been excluded from the subcontract price.

Contractor, at its sole expense, will implement a Consolidated Insurance Program (CIP) to furnish certain insurance coverage(s) for on-site activities. The CIP will be for the benefit of Contractor, and the enrolled Subcontractors. Such coverage applies only to work performed under the agreement at the project site and all enrolled subcontractors must provide their own

insurance for off-site activities and during the warranty period at the limits outlined in section 11.6, below. The CIP does not cover consultants, suppliers, vendors, or materials dealers.

11.3 Insurance Provided Under CIP.

Contractor shall procure and maintain at its own expense the following coverage for the Contractor and enrolled Subcontractors:

11.3.1 Workers Compensation.

Provides coverage for the statutory limits required by the Workers' Compensation Laws of the applicable jurisdiction, with Coverage B – Employer's Liability, to limits of not less than One-Million Dollars (\$1,000,000), which will cover operations of the Contractor, the CIP Administrator, Subcontractor and lower tier contractors performing work in connection with the Work at the Project site. Other States coverage is also included. This insurance is primary for all occurrences at the Project site for enrolled contractors.

11.3.2 Commercial General Liability Insurance.

The Contractor shall procure and maintain Commercial General Liability Insurance on an occurrence basis with the following limits: \$2,000,000 per occurrence, \$4,000,000 annual aggregate (Other than Products / Completed Operations) and \$4,000,000 aggregate (Products / Completed Operations) for all insureds combined. The following provisions will be included:

- (a) Personal injury liability.
- (b) Broad form contractual liability
- (c) Employees included as additional insureds (excluding bodily injury to fellow employees only).
- (d) Broad form property damage liability.
- (e) Cross liability coverage with severability of interest.
- (f) Products and Completed Operations coverage for five (5) years after completion of the Project.

11.3.3 Excess Liability Insurance.

The Contractor shall purchase excess liability insurance applying jointly to the Contractor, the Subcontractors and sub-subcontractors of any tier with limits of at least \$35,000,000 per each occurrence and \$35,000,000 aggregate for four (4) year policy term, which limits may be increased or reduced by the Contractor in its sole discretion. The excess liability policy will be in excess of the underlying coverages described in Paragraph (a) of this section.

Any proceeds of the insurance policies maintained by the Contractor shall be adjusted with, and payable to, the Contractor as trustee for all insureds as their interests may appear. Such proceeds may be used for the repair, replacement or rebuilding of the Work, as determined by the Contractor in its sole discretion, and any excess shall be paid over to the Contractor.

The foregoing policies shall contain provisions the Contractor and all subcontractors covered by the Insurance Program each waive all claims against each other, for any and all losses, regardless of the extent of insurance proceeds.

The above insurance will apply to claims arising out of Project operations at the designated Project site and operations necessary or incidental thereto. **Coverage is NOT provided for operations at the permanent location(s) of the Subcontractor.**

The Contractor will furnish certification of coverage, as required hereunder to any subcontractors of any tier. Parties who merely make deliveries or pick-ups to or from the jobsite, and all materialmen, are not covered by the insurance outlined above.

Insurance specified above other than Products / Completed Operations will terminate as to enrolled Subcontractors, at the completion of the Work by any such entity. The Products/Completed Operations coverage will terminate five (5) years after completion of the Project.

The amount of insurance coverage purchased by the Contractor shall in no way serve as a limitation of the enrolled Subcontractor's liability for claims in excess of such amounts.

11.3.4 Subcontractor Responsibilities.

Enrolled Subcontractors are required to cooperate with Contractor and Contractor's Insurance Administrator with regards to administration and operation of the CIP. The enrolled Subcontractor's responsibilities shall include, but are not limited to:

- (a) Provision of necessary contract, operations and insurance information;
- (b) Compliance with payroll audits;
- (c) Inclusions of the CIP provisions in all subcontractors of any tier;
- (d) Written Notification to Insurance Administrator of all subcontracts awarded;
- (e) Maintenance and provision of monthly payroll records and other records as necessary for premium computation; and
- (f) Compliance with the CIP applicable loss control, safety and claims reporting procedures.

Any penalty by the State of South Carolina to the insurance carrier (Zurich) for late enrollment and late issuance of a workers compensation certificate will be the responsibility of the subcontractor.

11.3.5 Assignment of Return Premiums, etc.

As noted above, Contractor will provide the CIP coverages for the benefit of the enrolled Subcontractors at Contractor's sole expense. In consideration of Contractor's provision of said coverages, the Subcontractor agrees that:

- (a) All applicable insurance costs have been removed from subcontract price and any of their sub-subcontractor's prices of any tier;
- (b) They have completed the Insurance Premium Worksheet and submit same to Contractor and information and data supplied in worksheet is accurate and complete; and,
- (c) Does irrevocably assign to and for the benefit of Contractor, all return premiums, premium refunds, premium discounts, dividends, retentions, credits, and any other monies due or to become due Contractor in connection with the insurance which Contractor herein agrees to provide, and agrees to evidence the same by a formal instrument of assignment to be promptly executed in the form prepared by Contractor.

11.3.6 Additional Premiums.

The Subcontractor shall pay to the Contractor any amounts for additional premiums paid by the Contractor which result from either

- (a) a delay in construction caused by or resulting from the fault of the Subcontractor or any of its sub-subcontractors of any tier, and
- (b) any labor overruns in excess of the Subcontractor's budgeted labor included in the Insurance Premium Worksheet.

11.4 Termination/Modification of the CIP.

While it is the intent of Contractor to keep the CIP in force throughout the term of the Project, Contractor reserves the right to terminate or modify the CIP or any portion thereof. To exercise this option, Contractor shall provide 30 days advance written notice to Subcontractor covered under the CIP. Enrolled Subcontractors shall immediately obtain replacement insurance coverage and the reasonable cost of such replacement insurance will be reimbursed by Contractor at the rates indicated in the Insurance Premium Worksheet. Written evidence of such insurance shall be provided to Contractor prior to the actual termination date of the CIP.

11.5 Excluded Contracts.

All subcontracts or lower tier subcontracts involving Hazardous Material Removal, Handling and/or abatement are excluded from the CIP. Also, subcontracts with a value less than \$10,000 and any other contracts and subcontracts as determined by Contractor shall be excluded from the CIP at Contractor's sole discretion. Unless otherwise addressed by Contractor, the Subcontractor and any of its sub-subcontractors of any tier shall be required to carry their own insurances for excluded contracts at its own expense.

11.6 Enrolled Subcontractor-Furnished Insurance.

For any work under this agreement, and until completion and final acceptance of the work, each enrolled Subcontractor, at its own expense, must promptly furnish to Contractor certificates of insurance for itself and any of its sub-subcontractors of any tier, from an underwriter acceptable to Contractor, providing evidence that the following coverages are in force:

(a) **Automobile Liability Insurance** (on-site and off-site).

Comprehensive Automobile Liability insurance covering the use of all owned, non-owned, and hired vehicles used in connection with the project of not less than the following limits of coverage:

Per Person	\$1,000,000
Per Occurrence	\$1,000,000
Property Damage Per Occurrence	\$1,000,000, or combined single limit of \$1,000,000

Parties referenced in 11.6. (d) 1, shall be covered as additional insured.

(b) **Workers' Compensation Insurance.** (Off-site Activities). As required by Federal and State Workers Compensation and occupational disease statutes.

(c) **Employer's Liability Coverage.** (Off-site Activities.) Minimum limit of \$1,000,000.

(d) **Commercial General Liability Insurance.** (Off-site Activities.)

Insurance for operations AWAY FROM THE PROJECT SITE by the Subcontractor, or any tier of subcontractor (including products liability for any product manufactured, assembled or otherwise worked upon away from the Project Site including such manufacturing, assembly or otherwise is called for by the contract documents between the Contractor and Subcontractor), under a form providing coverage not less than that of the Standard Commercial General Liability insurance policy form ("Occurrence Form") for operations of the party required to furnish same,

including hazards of operations (including explosion, collapse and underground coverage), elevators, independent contractors, products and completed operations, for claims arising out of the Work hereunder for personal injury, bodily injury and property damage in policy or policies of insurance such that the total available limits combined shall not be less than One-Million Dollars (\$1,000,000) per occurrence and \$2,000,000 General Aggregate including Products/Completed Operations. Coverage shall also provide and encompass at least the following:

(1) Endorsement naming **OWNER, ACTUS LEND LEASE LLC** and any other entity as required in the Contract as Additional Insureds. ISO Form CG 2010 10 93 (equivalent form) shall be used to provide this coverage.

(2) Waiver of Subrogation in favor of all Additional Insureds.

(3) Policy to be primary as respects the coverage afforded the Additional Insureds.

Contractor and its agents shall be included as additional insureds under the Commercial General Liability policy. Coverage applicable to the additional insureds shall be on a primary basis and not excess of or contributing with any other insurance available to the additional insureds. Certificated of Insurance evidencing these coverages must be furnished to Contractor or Contractor's insurance administrator. Additional insureds are Tri-Command Military Housing LLC, Tri-Command Managing Member LLC, Actus Lend Lease Holdings LLC, Actus Lend Lease LLC, J.P. Morgan Company, National Association, MBIA Insurance Corporation and the United States of America, Department of the Navy.

(e) Where applicable, Environmental/Remediation Liability as per below, with endorsement for transporting hazardous material by auto, and MSC-90 endorsement.

(f) Asbestos Testing/Asbestos Abatement coverage (for contracts involving the Testing/Abatement of Asbestos) in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.6. (d) 1.

(g) Lead paint abatement coverage (where applicable) in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.6. (d) 1 of this Article.

(h) Where applicable, Contractors pollution legal liability insurance in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.6. (d) 1 this Article.

(i) Where applicable, Professional Liability (for Professional Contracts only) errors and omissions coverage with a limit of liability of \$1,000,000 per claim or per occurrence.

11.7 Contractor's Right To Audit:

The Subcontractor hereby warrants to the Contractor the accuracy of the information provided on the CIP Insurance Information Form and agrees that the Contractor, its insurance carriers and/or the CIP Administrator may audit the records of the Subcontractor and its sub-subcontractors to confirm the accuracy of all insurance information provided, including, without limitation, any affect on insurance resulting from changes in the Work. The Subcontractor further warrants and agrees that the Contractor is entitled to all credits in CIP insurance premiums which accrue from the audit of Subcontractor's records related to the coverage. Subcontractor acknowledges that even if the Project described in this specification is included under the CIP, Subcontractor will be required to provide those insurance coverages described in Section 11.6 above. Subcontractor agrees that the Contractor may audit all records related to such policies. Subcontractor agrees that if it is entitled to any return premiums or credits on such Contractor-provided policies resulting from Subcontractor's inaccurate assumptions at time of bid or from changes in the Project, then the Contractor shall be entitled to receive and be paid such return premiums or credits and retain such premiums or credits.

11.8 CIP Claims:

The Subcontractor and its subcontractors of any tier shall assist and cooperate in every manner possible in connection with the adjustment of all claims arising out of the operations conducted under, or in connection with, the Project, and shall cooperate with the insurance carrier or carriers of the Contractor, the Subcontractor and its Subcontractors of any tier in all litigated claims and demands which arise out of said operations which the insurance carrier or carriers are called upon to adjust or resist. Any fines assessed for late claim reporting will be the responsibility of the responsible Subcontractor.

11.9 Cooperation:

The Subcontractor and each of its subcontractors of any tier for whom insurance is provided by the Contractor pursuant to this Article shall:

- (a) Furnish to the CIP Administrator, its designees or the insurance carriers all information and documentation which the CIP Administrator may require from time to time in connection with the issuance of any policies, pursuant to this agreement, in such form and substance as the Administrator may prescribe;
- (b) Furnish to the CIP Administrator, its designees or the insurance carriers certified payroll and accident summary reports as required once a month on the forms provided by the CIP Administrator and any payroll records required to assist the carriers in any audits. The Subcontractor will be required under this subsection to segregate its respective reports relating to the Project from records relating to any other work which it may be performing and for

which insurance is not provided by the Contractor pursuant to this Agreement;

- (c) Promptly comply with the recommendations of the insurance carriers so that said insurance carriers will continue to provide the coverage to be maintained by the Contractor pursuant to this Article at a reasonable premium.
- (d) If the Subcontractor or any of its Subcontractors of any tier should fail to comply with their respective obligations, under this specification, the Contractor may withhold any payments due the Subcontractor until such time as the Subcontractor and its Sub-subcontractors of any tier shall have performed their obligations to the Contractor's reasonable satisfaction.

11.10 Non-Enrolled and/or Excluded Subcontractor-Furnished Insurance.

For any work under this agreement, and until completion and final acceptance of the work, each non-enrolled and /or excluded Subcontractor, at its own expense, must promptly furnish to Contractor certificates of insurance for itself and any of its sub-subcontractors of any tier, from any underwriter acceptable to Contractor, giving evidence that the following coverages are in force:

(a) Automobile Liability Insurance. (On-site and Off-site.)

Comprehensive Automobile Liability insurance covering the use of all owned, non-owned, and hired vehicles used in connection with the project of not less than the following:

Per Person	\$1,000,000
Per Occurrence	\$1,000,000
Property Damage Per Occurrence	\$1,000,000, or a Combined Single Limit of \$1,000,000.

Parties referenced in 11.10. (d), 1 shall be covered as Additional Insured.

(b) Workers' Compensation Insurance

1. **On-Site:** As required by Federal and State Workers' Compensation and occupational disease statutes. **Evidence of Worker's Compensation coverage must be provided.**

2. **Off-Site:** As required by Federal and State Workers' Compensation and occupational disease status.

(c) **Employer's Liability Coverage** (On site and Off-site.)

Minimum limit of \$1,000,000.

(d) **General Liability Coverage**

Insurance for operations by the Subcontractor, or any tier of subcontractor (including products liability for any product manufactured, assembled or otherwise worked upon away from the Project site including such manufacturing, assembly or otherwise is called for by the contract documents between the Contractor and Subcontractor), under a form providing coverage not less than that of the Standard Commercial General Liability insurance policy form ("Occurrence Form") for operations of the party required to furnish same, including hazards of operations (including explosion, collapse and underground coverage), elevators, independent contractors, products and completed operations, for claims arising out of the Work hereunder for personal injury, bodily injury and property damage in policy or policies of insurance such that the total available limits combined shall not be less than One-Million Dollars (\$1,000,000) per occurrence and \$2,000,000 General Aggregate including Products/Completed Operations. Coverage shall also provide and encompass at least the following:

(1) Endorsement naming **OWNER, ACTUS LEND LEASE LLC** and any other entity as required in the Contract as Additional Insureds. ISO Form CG 2010 10 93 (or equivalent form) shall be used to provide this coverage.

(2) Waiver of Subrogation in favor of all Additional Insureds.

(3) Policy to be primary as respects the coverage afforded the Additional Insureds.

Contractor and its agents shall be included as additional insureds under the Commercial General Liability policy. Coverage applicable to the additional insureds shall be on a primary basis and not excess of or contributing with any other insurance available to the additional insureds. Certificated of Insurance evidencing these coverages must be furnished to Contractor or Contractor's insurance administrator. Additional insureds are Tri-Command Military Housing LLC, Tri-Command Managing Member LLC, Actus Lend Lease Holdings LLC, Actus Lend Lease LLC, J.P. Morgan Company, National Association, MBIA Insurance Corporation and the United States of America, Department of the Navy.

(e) Where applicable, Environmental/Remediation Liability as per below, with endorsement for transporting hazardous material by auto, and MSC-90 endorsement.

(f) Asbestos Testing/Asbestos Abatement coverage (for contracts involving the Testing/Abatement of Asbestos) in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.10. (d) 1.

(g) Lead paint abatement coverage (where applicable) in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.10. (d) 1 of this Article.

(h) Where applicable, Contractors pollution legal liability insurance in the amount of \$5,000,000. Such coverage will include as Additional Insureds those entities listed in 11.10. (d) 1 this Article.

(i) Where applicable, Professional Liability (for Professional Contracts only) errors and omissions coverage with a limit of liability of \$1,000,000 per claim or per occurrence.

11.11 Tools.

The Subcontractor shall be responsible for the Subcontractor's or any of its sub-subcontractors of any tier powered and non-powered hand tools, whether owned, leased, rented, borrowed, or used at the Project site and agrees to relieve the Contractor of any responsibility for loss of or damage thereto. Tools and equipment owned by the employees of the Subcontractor and all tools and equipment owned by any sub-subcontractor of any tier or its employees shall be the individual's responsibility.

11.12 Waiver of Claims.

The Contractor and Subcontractor waive any claim against the Owner, each other, and other contractors, the Subcontractors and their sub-subcontractor at any tier for losses to the extent covered by all policies provided by the Contractor or the Subcontractors pursuant to Sections 11.6 (a) - (d), and all policies shall so provide. The Subcontractor shall require similar waivers from all subcontractors and their subcontractors of any tier. If the policies of insurance referred to in Sections 11.6 (a) - (d) herein require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

11.13 Waiver of Subrogation.

To the extent that a loss is covered by insurance in force, and recovery is made for such loss, Contractor and Subcontractor hereby mutually release each other from liability and waive all rights of subrogation and all rights of recovery against each other for any loss insured against under their respective policies (including extended coverage), no matter how caused, it being understood that the damaged party will look solely to its insurer for reimbursement. The Contractor shall require Subcontractor to similarly waive its rights of subrogation in each of their respective sub-subcontracts of any tier with respect to the work.

11.14 No Release.

The carrying of the above-described insurance shall in no way be interpreted as relieving the Subcontractor of any other responsibility or liability under this agreement or any applicable law, statute, regulation or order.

11.15 Other Insurance.

Any type of insurance or any increase of limits of liability not described above which a Subcontractor requires for its own protection or on account of any law or statute shall be at its own responsibility and its own expense.

The CIP Manual and the program requirements are described in Exhibit 7 and are hereby incorporated into this Agreement.

11.16

Certificate of Insurance indicating coverages applicable to the Project and providing for 30 days written notice prior to cancellation, non-renewal or material modification in any policy must be submitted, approved, and available to ACTUS LEND LEASE LLC prior to commencement of work. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the government's interest shall not be effective (1) for such period as the laws of the State in which this Contract is to be performed prescribe, or (2) until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer. Submit certificate to:

ACTUS LEND LEASE LLC
Attn: Lindsay Brooks
P.O. Box 5160
Parris Island, SC 29905-0160

A Certificate of Insurance, when submitted to ACTUS LEND LEASE LLC, constitutes a warranty by Subcontractor that:

- A. The general aggregate limit applies on a per project basis.
- B. Blanket Contractual Liability under the Commercial General Liability Policy has been endorsed to cover the Indemnitees specified in Article 9 of the Subcontract Agreement between the Subcontractor and the Contractor.
- C. The Commercial General Liability Policy names as Additional Insureds **OWNER, LEND LEASE ACTUS, LLC** and any other entity as required in the Contract. ISO Form CG 2010 10 93 (or most common form) shall be used to provide this coverage.
- D. With respect to the Excess Liability Insurance, the following policies are scheduled as primary:

Commercial General
Automobile Liability
Employers Liability

E. The insurance policies for all Subcontractors' insurance shall include a waiver of subrogation as follows:

"It is agreed that in no event shall these insurance companies have any right of recovery against **OWNER**, or ACTUS LEND LEASE LLC, or any other entity as required in the Contract with the **OWNER**."

F. The insurance policies shown are endorsed to be primary as respects any other insurance available to any Additional Insured.

The reverse side of the certificate must list each of the above Items A through F, and the following statement must precede the listing: "This certificate warrants that:"

11.17

All insurance carriers must: (i) be licensed or authorized in the State where the Project is located; and (ii) be rated at least A VII in Best's.

11.18

The Subcontractor shall secure, pay for, and maintain Property Insurance necessary for protection against loss of owned, borrowed, or rented capital equipment and tools, including any tools owned by employees, and any tools, equipment, staging, towers, and forms owned, borrowed or rented by the Subcontractor. The requirement to secure and maintain such insurance is solely for the benefit of the Subcontractor. Failure of the Subcontractor to secure such insurance or to maintain adequate levels of coverage shall not obligate **OWNER**, ACTUS LEND LEASE LLC, or their agents and employees or any other entity as required in Contract with the **OWNER** for any losses, and **OWNER**, ACTUS LEND LEASE LLC, and their agents and employees and any other entity as required in Contract with the **OWNER** shall have no such liability. The property insurance shall include a Waiver of Subrogation in favor of all parties required to be named as additional insureds under the Subcontract Agreement.

11.19

Should the Subcontractor engage a lower tier Subcontractor, the same conditions applicable to the Subcontractor under these Insurance Requirements shall apply to each lower tier Subcontractor.

11.20

All policies shall continue to be in effect for one (1) year after the final substantial Completion Date with respect to the work.

12. EXAMINATION AND TESTING

12.1 Contractor May Order Tests.

At any time before the expiration of the Defects Liability Period, Contractor may direct that any materials or Subcontractor's Work be tested. The Subcontractor shall provide such assistance and samples and make accessible such parts of the Subcontractor's Guaranteed Scope of Work as may be required by Contractor. On completion of the tests, the Subcontractor shall promptly make good the work tested, if found not to be in compliance with the Subcontract, so that it fully complies with the Subcontract.

12.2 Covering Up of Work.

The Contractor may direct that any part of the Subcontractor's Guaranteed Scope of Work shall not be covered up or made inaccessible without the Contractor's prior approval which approval shall be given or withheld within twenty four (24) hours of the Contractor's direction not to cover up or make inaccessible such part of the Works. If approval is withheld, the Contractor shall specify the reasons for such withholding of approval.

12.3 Who Conducts Tests.

Tests shall be conducted as provided in the Subcontract or by the Contractor or a Person (which may include the Subcontractor) designated by the Contractor.

12.4 Notice of Tests.

Before conducting a test under the Subcontract, the party conducting the test, being the Contractor or the Subcontractor, shall give reasonable notice in writing to the other of the time, date and place of the test. If the other does not then attend, the test may nevertheless proceed.

12.5 Results of Tests.

Results of tests shall be promptly made available by each party to the other.

12.6 Costs of Testing.

Such costs shall be borne by the Contractor or paid by the Contractor to the Subcontractor unless:

- (a) the Subcontract provides that the Subcontractor shall bear the costs, or the test is one which the Subcontractor was required to conduct;
- (b) the test shows that the material or work is not in accordance with the Subcontract;
- (c) the test is in respect of Subcontractor's Guaranteed Scope of Work covered up or made inaccessible without the Contractor's prior approval where such approval was required; or

(d) the test is consequent upon a failure of the Subcontractor to comply with a requirement of the Subcontract.

13. MISCELLANEOUS PROVISIONS

13.1 Confidential Information.

Drawings, specifications and other information, samples, models, patterns and the like, supplied by either the Subcontractor or the Contractor and marked or otherwise identified as confidential, shall be regarded as confidential and shall not be disclosed to a third party except with the prior agreement of the other party to the Subcontract, as otherwise necessary to fulfill the obligations set forth in the Subcontract, as otherwise available in the public domain or as required to be disclosed in a legal proceeding.

If required in writing by a party, the other party shall enter into a separate agreement not to disclose to anyone else any confidential matter even after the issue of the Final Payment or the earlier termination of the Subcontract.

13.2 Delivery of Materials to and Work on the Site Before Possession.

Until possession of the Site or part of the Site is given to the Subcontractor, the Subcontractor shall not deliver materials to or perform work on the Site or part of the Site, as the case may be, unless approval in writing is given by the Contractor.

13.3 Finding of Minerals, Fossils and Relics.

The Subcontractor shall not knowingly remove or disturb, or cause or permit to be removed or disturbed, any historical, archeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. Immediately upon the discovery of these things the Subcontractor shall notify the Contractor of the discovery and shall protect the site and the material from further disturbance until the Construction Consultant and the Contractor give clearance to proceed.

If compliance with obligations under this Section causes the Subcontractor to incur a greater cost or delay the Works then adjustment of the Subcontract Price shall be adjusted as provided for hereunder.

13.4 Waiver of Conditions.

Except as provided at law or in equity or elsewhere in the Subcontract, none of the terms of the Subcontract shall be varied, waived, discharged or released, except with the prior consent in writing of the Contractor and the Subcontractor in each instance.

13.5 Severability.

If any provision of the Subcontract is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby, and such remaining provisions shall remain in full force and effect. The invalid, illegal or unenforceable provision shall be replaced by a mutually acceptable provision, which, being valid, legal and enforceable, comes closest to the intention of the parties underlying the invalid, illegal or unenforceable provision.

13.6 Counterparts.

The Subcontract may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same instrument.

13.7 No Third Party Beneficiaries.

Nothing contained in the Subcontract shall be deemed to create a Subcontractual relationship with or a cause of action in favor of any third party against the Contractor or the Subcontractor.

13.8 Attorney's Fees.

Should either party employ an attorney to institute suit to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement or to collect damages for the breach of the Agreement or to recover on a surety bond given by a party under this Agreement, including fees and costs incurred in an arbitration, then the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges and expenses, including consultants and/or expert witness fees, expended or incurred therein.

13.9 Entire Agreement.

This Agreement is solely for the benefit of the signatories hereto and includes the documents incorporated herein by reference, embodies the entire agreement of the parties and supersedes all prior negotiations, agreements and understandings relating to the subject matter hereof. Subcontractor agrees that any claims against Contractor, irrespective of an alleged breach by Contractor of the Subcontract Documents, shall be based, nonetheless, upon this Subcontract and the Price, and shall in no event be based upon an asserted fair and reasonable value of the Work performed.

13.10 Assignment.

Notwithstanding any other provision in this Subcontract to the contrary, Subcontractor agrees that, should Contractor be deemed to be in default of its obligations to the Owner under the separate contract between them, and that, because of such, or if for any other reason available to Owner under the separate contract between them, Owner removes Contractor from the Project (e.g., Contractor defaults and a new Contractor is retained by the Owner, or the contract between

the Contractor and the Owner is otherwise terminated by the Owner), then Subcontractor agrees that this Subcontract has been, and shall be, assigned to the Owner or any successor Contractor retained by the Owner, and Subcontractor consents to such assignment. In such event, Subcontractor agrees to recognize the Owner or such successor Contractor as the "Contractor" under this Subcontract and to continue performance of this Subcontract on behalf of the Owner or such successor Contractor. Subcontractor agrees that the foregoing is for the benefit of, and may be enforced by, the Owner and any successor Contractor retained by the Owner and their respective successors and assigns, all of whom are intended third party beneficiaries hereof.

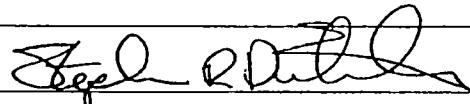
Subcontractor represents and warrants that the execution, delivery and performance of this Agreement hereby (i) are within its authority, (ii) have been duly authorized by all necessary proceedings or corporate action on its part, including that the person signing on behalf of Subcontractor is duly authorized by all necessary proceedings or corporate action and (iii) will not violate any other agreement to which Subcontractor may be a party.

IN WITNESS WHEREOF, the parties hereto have hereby executed the Subcontract as of the date first written above.

Contractor: **ACTUS LEND LEASE LLC**

Signature: _____

By: _____



Joseph R. Demaree - PM
Type / Print Name and Title

Subcontractor: **ALLSOUTH ELECTRICAL
CONTRACTORS, INC.**

Authorized
Signature: _____

By: _____



William E. Lesesne - President
Type / Print Name and Title

PAYMENT AND PERFORMANCE BONDS REQUIRED? YES ____ NO X

Subcontractor Representations:

Subcontractor represents that it is

(☒) a Corporation;

() a Limited Liability Company;

- ☐ a Partnership;
- ☐ a Limited Partnership; or
- ☐ a Sole Proprietorship,

duly formed, validly existing and in good standing under the laws of the State of

S.C., whose Taxpayer Identification Number (TIN) is
57-0888326.

Subcontractor further represents: (IMPORTANT: Please check all that apply).

Subcontractor's Business Concern.

- ☒ Subcontractor is a Small Business Concern.
- ☐ Subcontractor is a Small Disadvantaged Small Business Concern.
- ☐ Subcontractor is a Woman-Owned Small Business Concern.
- ☒ Subcontractor is a HUBZone Small Business Concern.
- ☐ Subcontractor is a Veteran-Owned Small Business Concern.
- ☐ Subcontractor is a Service-Disabled, Veteran-Owned Small Business Concern.
- ☐ Not applicable.

EXHIBIT 1

To Subcontract Agreement No. 13128, dated March 1, 2006 by and between ACTUS LEND LEASE LLC, (Contractor) and ALLSOUTH ELECTRICAL CONTRACTORS, INC., (Subcontractor):

Contract Documents: The Contract Documents which govern this Agreement including all Exhibits and are binding on Subcontractor are as follows:

Plans and Specifications prepared by WARD EDWARDS for Actus Lend Lease LLC for the construction of TRI-COMMAND MILITARY HOUSING, LLC - MCRD PARRIS ISLAND, SOUTH CAROLINA stamped "Approved For Construction" for 200 OFFICER'S CONSTRUCTION PLANS FOR SITE IMPROVEMENTS, and more specifically, Drawing Sheets: Title Sheet, C.02 thru C.55 dated May 8, 2003, E-1, E-2 and E-3 stamped and dated May 16, 2003 and Specification Divisions 1 and 2 stamped and dated May 8, 2004, Geotechnical Evaluation for Parris Island Housing dated January 20, 2003 as pertains to Phase II.

It is Subcontractor's responsibility to review these documents, copies of which are either attached hereto or have been previously made available to Subcontractor. In the event of a conflict between this Agreement and the Contract Documents, this Agreement shall govern, unless otherwise superseded specifically within this Agreement.

In accordance with the above reference Contract Documents, Subcontractor shall perform all work required by the Specification Division and Division Section referenced below and, as shown and required by the drawings including, but not limited to, the following:

Furnish all labor, material, supervision, tools, equipment and Quality Control to complete the following scope of work:

DIVISION 2 – SECTION 02780 – ELECTRICAL SITE WORK: Scope of work shall include all on-site and off-site work including, but not limited to: demolition of existing electrical utilities for installation of new work, surveying, layout including location of equipment, boring at street crossings, excavation, trenching (except at street crossings), bedding, backfill and compaction for underground power, street and area lighting, primary telephone lines, and primary CATV lines to be installed by communications companies in shared trench with electrical supply, sleeving for CATV, sleeving for primary telephone, and electrical lines, installation of conduit for CATV and telephone primary and secondary lines, coordination with telephone and CATV companies, trench marking tape, locate trench spoils in a designated area on-site, accessible to the Grading Subcontractor as specified by Contractor, shoring, dewatering subsurface water and water from the elements by pumping ponded areas, aerating,

and discing for drying as needed to maintain the construction schedule. Subcontractor shall replace unsuitable trench backfill with suitable imported backfill, connections to existing systems, splice enclosures, fuse cabinets, transformers and pads, sectionalizers and pads, conductors including primary and secondary, sweeps at communication conduits, pull boxes, terminators, grounding systems, fuses, street and area lamps with prefinished poles, equipment pads and anchors, lighting service panels, cable markers, name plates, safety labels, sealant, and padlocks. Subcontractor shall be responsible for scheduling of outages, testing, conductor connection, coordination with other trades, to not leave trenches open overnight unless protected, and to measure trench depth for all utility lines crossing streets from bottom of aggregate base, to cut and patch asphalt and replace disturbed general fill and/or aggregate base in pavement areas where damaged from underground boring at street crossings, supplying temporary power for this Subcontractor's scope of work, to include cleanup, disposal of debris and payment of disposal fees.

Construction water, bond, concrete testing, and density testing are specifically **excluded** from this Agreement.

Subcontractor further agrees as follows:

To comply with the Contractor's site specific Safety Plan and Fall Protection Plan.

All secondary power shall be direct burial.

To complete trenching in accordance with Specification Section 02210 Earthwork for Utilities.

To schedule, in advance, and coordinate all required outages with Contractor and Department of Public Works.

To provide separate move-ins in each construction sequence to complete the work.

To coordinate telephone and television new work with Telephone and Television Companies. Contractor shall be advised of all scheduled coordination meetings and coordination scheduling.

To cooperate, coordinate and work in conjunction with other trades, i.e., grading, utility, concrete, paving and framing subcontractors, to ensure Subcontractor's work can progress. Work shall proceed in such a manner to ensure trenches will not hinder mobilization of concrete trucks or forklifts. Any disputes between Subcontractor and other subcontractors will be resolved by Contractor.

To coordinate the location and marking of existing utilities and to furnish Contractor with approved Department of Public Works Digging Permit of all existing underground utilities which transverse Subcontractor's areas of work prior to proceeding with any trenching or excavation.

It is MANDATORY that the Subcontractor's Owner or designated representative with signature authority, the Subcontractor's Accounting Manager or Accounting designee for handling all pay matters pertaining to this Contract, the Subcontractor's Field Superintendent, Quality Control Manager and Safety Competent Person, attend a Preparatory Construction Meeting with the Contractor's Quality Control personnel, Field Superintendent, Safety Manager, Accounting Manager etc, to discuss the Subcontractor's scope of work, Quality Control procedures, Safety procedures, and Accounting procedures. The Subcontractor is reminded that by the scheduled time of this meeting, the following items are to be turned in:

1. All Certifications, Submittals, Catalog cuts, Substitution requests with samples and/or catalog sheets, Samples, Shop Drawings, etc. as required by specifications and plans, for approval prior to commencing work under this Contract. Submittals must be received and approved by Contractor prior to installation of materials.
2. Submit copies of all applicable Subcontractor MSDS sheets, the Subcontractor's Hazcom program, Safety Program (Accident Prevention Plan) with Job Hazard Analysis attached, in accordance with OSHA Standards and the Contractor's Accident Prevention Plan, all in catalog format to the Contractor's Safety Director for maintenance at Contractor's Safety Office.
3. At this meeting, the Contractor will verify correct version of plans are being used by the Subcontractor and will show the location of the Record Set to be maintained and updated weekly by the subcontractors. **FAILURE TO UPDATE TIMELY WILL RESULT IN YOUR PAY APPLICATION AND/OR CHECK ISSUANCE TO BE HELD**

Subcontractor is "enrolled" in Contractor's Consolidated Insurance Program as outlined in Paragraph 11 of this Agreement and shall provide minimum types and amounts of insurance coverage as required in Article 11.6 of this Agreement.

Subcontractor shall submit for payment monthly. Pay request shall be submitted to Contractor no later than the 20th of the month. **Late pay applications will not be considered until the following period.** Contractor reserves the right to withhold payment if all contractual requirements are not current and corrected for submitted pay request period.

To have in attendance a representative from Subcontractor's company for a Pre-Construction walk through to determine existing damaged areas. The Subcontractor shall be responsible for damaged areas not documented prior to commencement of work.

Exhibit 1

Allsouth Electrical Contractors, Inc.

Subcontract Agreement No. 13128

Page 4 of 7

To use care in the performance of this work to protect adjacent areas. Any damage caused by Subcontractor to adjacent areas, areas outside the project limits, areas designated to remain intact or work performed by others will be repaired at Subcontractor's expense by persons selected by Contractor.

To exercise extreme care when utilizing heavy equipment within the project limits to avoid damaging existing streets, sidewalks, parking lots, trees and lawns areas which are indicated to remain. Subcontractor shall repair any areas damaged from equipment. Self-propelled movement of tracked vehicles on streets indicated to remain is strictly prohibited.

To take proper safety and health precautions to protect the work, the workers, the public and the property of others and to prepare, submit, and comply with the requirements of the Contractor's Quality Control Plan, Accident Prevention Plan, Environmental Protection Plan, and Storm Water Pollution Prevention Plan.

To fill out Daily Labor reports on a day-to-day basis for days worked and days not worked. The Subcontractor shall write a Daily Labor report throughout the Subcontractor's entire contract duration.

To allow the Contractor to reserve the right to approve or disapprove the Subcontractor's selection for their field superintendent. The Contractor shall also reserve the right to request the Subcontractor to hire a Quality Control Manager if quality issues persist or are not remedied in a timely manner. The Contractor may express these rights at any time throughout the duration of the Subcontractor's contract.

To police, clean and maintain all roads utilized for transporting materials and heavy equipment or machinery on a daily basis. Subcontractor shall be responsible for any and all costs associated with the cleaning, repairing and/or replacement of roads damaged by Subcontractor.

To protect and perform any and all maintenance of Contractor installed Storm Water Pollution Prevention apparatus and perform all work in compliance with Contractor's approved Storm Water Pollution Prevention Plan. Any apparatus damaged by Subcontractor shall be repaired and/or replaced by Subcontractor.

To take any and all precautions to protect existing trees, utilities and other items designated to remain. Any existing items damaged by Subcontractor during their performance of work will be replaced in like kind at Subcontractor's expense.

To verify and document, prior to start of work, the condition of existing trees indicated to remain. Existing trees indicated to remain shall be protected from damage. Failure of

Subcontractor to verify and document conditions and/or protect trees from damage will not relieve Subcontractor of the responsibility to replace damaged and/or dead trees.

Any staking removed or damaged by Subcontractor will be replaced at Subcontractor's expense.

To perform a preliminary inspection of the areas of work to determine if they are suitably prepared to receive Subcontractor's work: During the preliminary inspection and during the course of the work, unsuitable conditions or variations in conditions will be brought to the immediate attention of Contractor.

To have ~~in-~~ attendance a representative from Subcontractor's company for "Contractor/Subcontractor" final walk through and shall complete punch list items no later than five (5) days from final walk through.

To maintain a valid Contractor's License to perform Subcontractor's specialty throughout Subcontractor's performance of this Contract. Failure to maintain said license, if required, may be grounds for termination of this Agreement.

Not to substitute manufacturers for material where specific manufacturers have been specified or indicated on Drawings unless approved otherwise.

Subcontractor acknowledges this Subcontract Agreement is subject to the Buy American provisions under the clause entitled, "Buy American Act - Balance Of Payments Program - Construction Materials Under Trade Agreements" Alternate 1, (FAR 52.225-11 FEB 2000).

To be responsible for testing as required by the specifications unless specifically excluded above.

To use only Contractor's approved haul routes for access to the site for delivery of materials and equipment and for removal from the site, of all debris created by the performance of Subcontractor's scope of work. All streets shall be kept clean of debris and soil in accordance with Base, Local, State and Federal regulations. Deliveries shall be made at times indicated in the specifications.

To maintain a complete set of As-Built Drawings. As-Built Drawings shall be updated and reviewed with Contractor's CQC Manager at a minimum of once each month, prior to Subcontractor submitting their pay request.

To pay the minimum wages as required by General Decision No. SC010017, dated 03/02/2001, contained in the specifications.

To remove from the site all debris created by the performance of Subcontractor's scope of work on a daily basis, and dispose of such debris in accordance with State and Local regulations, at an approved dump site, and to pay all required disposal fees.

Subcontractor acknowledges the work will be performed adjacent to an occupied housing area and will conduct and confine its operations in such a manner to not disturb or disrupt the tenants of the adjacent occupied housing units.

To erect and maintain all temporary barriers required to protect existing items to remain and to identify hazard areas.

To comply with the mandatory posted speed limits for all job sites and posted speed limits throughout the base.

To abide with all authorities having jurisdiction including but not limited to Base, City, County, State and Federal requirements.

To provide adequate, qualified manpower and supervision during finalization of construction to perform and complete "punch list" work developed by the Contractor's and the Owner's Construction Consultant. If Contractor determines that punch list items are not being corrected in a timely and satisfactory manner, Contractor will give written notice to Subcontractor to remedy this situation within 24 hours; if Subcontractor fails to comply with this request, Contractor has the right to avail itself of any means to accomplish completion of the punch list and to charge Subcontractor for all costs incurred as a result of that action.

Subcontractor shall be bound to and abide to all rules, regulations and requirements contained within Division 1 of the Specification as pertains to scope of work within this Agreement.

Acceptance of work by Contractor's Quality Control or other personnel does not relieve the Subcontractor of responsibility to obtain acceptance of the Site Electrical Scope of Work by the Owner. Non-acceptance by the Owner will be remedied by or for Subcontractor at Subcontractor's expense in the time and manner prescribed by Contractor.

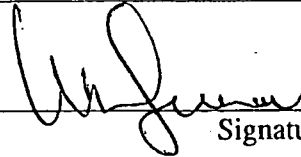
**QUALITY CONTROL, ENVIRONMENTAL PROTECTION AND SAFETY
WILL BE STRICTLY ENFORCED THROUGHOUT THE PERFORMANCE
OF THIS CONTRACT**

Exhibit 1
Allsouth Electrical Contractors, Inc.
Subcontract Agreement No. 13128
Page 7 of 7

SUBCONTRACTOR:

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.

Authorized Signature:



Signature

William E. Lesesne - President

Name/Title

Date: 03/03/06

END EXHIBIT 1

EXHIBIT 2

SUBCONTRACTOR'S SCHEDULE OF VALUES

Dated March 1, 2006

200 Officers Phase III Schedule of Values (10 units)

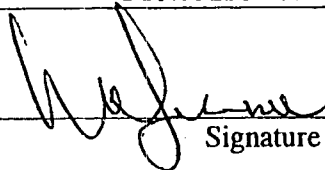
The entire site electrical work to be executed has been negotiated to a total lump sum price of **Sixty-Two Thousand Five Hundred Fifty-Seven and No/100 Dollars (\$62,557.00)**, after CIP deduction and has been derived as follows upon agreement by both Contractor and Subcontractor:

Item #	Cost Code	Description	Job Number	Amount
1	02781001	Site Electric	50701047	\$62,557.00
		Total		\$62,557.00

SUBCONTRACTOR:

**ALLSOUTH ELECTRICAL
CONTRACTORS, INC.**

Authorized Signature:


Signature

William E. Lesesne - President

Name/Title

END EXHIBIT 2

EXHIBIT 3

CONSTRUCTION SCHEDULE

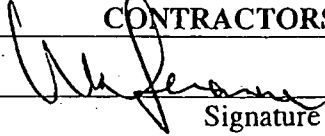
Dated March 1, 2006

As a minimum, Subcontractor shall complete specific scopes of work in specific areas per the following schedule:

AREA	COMMENCEMENT	SUBSTANTIAL COMPLETION DATE
<u>200 Officers Phase III</u>	On or Before March 3, 2006	May 1, 2006

Work in 200 Officers Phase III shall not deviate from this schedule unless approved by Contractor. The above dates are off a detailed production schedule in which Subcontractor shall coordinate rate of production with Contractor's project superintendent to ensure that scheduled completion dates are achieved for each feature of work. The above milestone and completion dates will not be extended due to weather delays, material delays and/or other delays, which are within the control of the Subcontractor. At no cost to Contractor, it is Subcontractor's responsibility to provide all necessary means to adhere to the construction and/or established rate of progress. Progress payments for work performed in excess of Contractor's scheduled and/or established rate of progress will only be considered when Subcontractor has obtained Contractor's approval for exceeding the scheduled and/or established rate of progress. Contractor's construction schedule is available at the Project Office and it shall be Subcontractor's responsibility to review such schedule and provide sufficient manpower, tools, equipment and materials as may be required to maintain Contractor's scheduled and/or established rate of progress. Rate of progress based on one (1) building per day may be decreased or increased at Contractor's discretion.

SUBCONTRACTOR: **ALLSOUTH ELECTRICAL
CONTRACTORS, INC.**

Authorized Signature: 
Signature

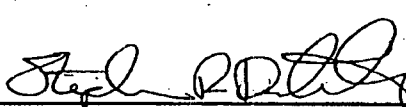
William E. Lesesne - President
Name/Title

END EXHIBIT 3

STATEMENT AND ACKNOWLEDGMENT

FORM APPROVED
OMB NO.
3090-0119

PART 1 - STATEMENT OF PRIME CONTRACTOR

1. PRIME CONTRACT NO. N62467-99-R-0992	2. DATE SUBCONTRACT AWARDED 01-MAR-2006	3. SUBCONTRACT NUMBER 13128
4. PRIME CONTRACTOR (Name, address, and ZIP code) ACTUS LEND LEASE LLC P.O. Box 5160 Parris Island, SC 29905		5. SUBCONTRACTOR (Name, address and ZIP code) ALLSOUTH ELECTRICAL CONTRACTORS, INC. 2630 Bonds Ave. Charleston, SC 29405
6. The prime contractor states that under the contract shown in Item 1, a subcontract was awarded on date shown in Item 2 by (Name of Awarding Firm) <u>ACTUS LEND LEASE LLC</u> , to the subcontractor identified in Item 5, for the following work: Electrical Site Work		
7. PROJECT PRIVATIZATION OF FAMILY HOUSING		8. LOCATION BEAUFORT, SC
9. NAME AND TITLE OF PERSON SIGNING Stephen Detwiler Senior Construction Manager	10. BY (Signature) 	11. DATE SIGNED 3-27-06

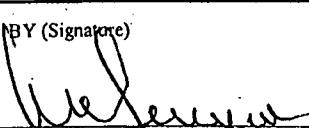
PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

12. The subcontractor acknowledges that the following clauses of the contract shown in Item 1 are included in this subcontract.

Contract Work Hours and Safety
Standards Act - Overtime
Compensation - Construction
Payrolls and Basic Records
Withholding of FundsDavis-Bacon Act
Apprentices and Trainees
Compliance with Copeland Regulations
Subcontracts
Contract Termination - Debarment

13. NAME(S) OF ANY INTERMEDIATE SUBCONTRACTORS, IF ANY

N/A

14. NAME AND TITLE OF PERSON SIGNING William E. Lesesne President	15. BY (Signature) 	16. DATE SIGNED 03/03/06

NSN 7540-01-151-4297
1413-101

U.S. Government Printing Office: 1994-432-200

STANDARD FORM 1413 (10-83)
Prescribed by GSA
FAR (48-CFR) 53.222(e)

SUBCONTRACT AGREEMENT CHECKLIST

SUBCONTRACT DETAILS

Component Name / Project Location: 200 Officers Phase III / Broward Co	Project Number: NC 0467-99-2-0992	Subcontract Number: 03 13128
Subcontractor Name: All South Electrical Contractors, Inc	Contact Name: William Lesesne	Contact Phone No.: 843-522-923

SUBCONTRACT DOCS PREPARED

- ☐ Signed Recap Bid Tab (with Executive Board approval, if applicable)
- ☐ Completed Page 1
- ☐ Completed Exhibit 1 – Scope of Work
- ☐ Completed Exhibit 2 – Schedule of Values (including CIP deduct, if CIP-enrolled sub)
- ☐ Completed Exhibit 3 – Construction Schedule
- ☐ Subcontract entered into JDE

Transmitted to Corporate Contract Admin - _____
(date)

Subcontract Agreement issued by Corporate Contract Admin: _____ FedEx Tracking # _____

SUBCONTRACT REVIEW

Subcontract Agreement returned by Subcontractor

Date: **3/23/04** Reviewed By: **S. Griffin-Smith & Keisha Martinez**

Subcontract Agreement – Pages 1 through _____ Changes/Modifications ☐ Yes ☒ No
Indicate pages: _____

IMPORTANT: Changes to the Subcontract Agreement must be approved in writing by Gary Walton, SVP of Construction and Tom Tether, General Counsel.

Exhibits 1, 2, and 3 Changes/Modifications ☐ Yes ☒ No
Indicate pages: _____

IMPORTANT: Senior Construction Manager must approve/initial Changes to Exhibits 1, 2, or 3.

	Yes/No	Action / Date / Initials
Standard Form 1413 received (Statement and Acknowledgment)	yes	KM 3/27/04
IRS Form W-9 received	yes	KM 3/27/04
☒ CIP Enrolled ☐ Non-Enrolled	yes	KM 3/27/04
If non-enrolled, insurance certificate has been checked for the following (see Article 11 of Subcontract): - GL, AL, WC Excess/Umbrellas etc. - Proper Limits, Additional Insured and Certificate Holders - Cancellation Clause, Exp. Date, Project Description, Waiver of Subrogation etc.	yes	KM 3/27/04
Send copies of Insurance Certificates to		
Duplicate Original Subcontract Agreement sent to Subcontractor	yes	KM 3/27/04
Duplicate Original Subcontract Agreement sent to Corporate Contract Admin	yes	
Department of Labor Letter (mail within 10-days) [refer to sample letter F12.42]	yes	
Affirmative Action Letter sent to Subcontractor [F12.41]	yes	

SUB-SUBCONTRACT (LOWER TIER SUBCONTRACTOR) REVIEW

	Yes/No	Action / Date / Initials
Approved by Construction Project Manager	N/A	
Sent Sub-Subcontractor letter with Information Sheet including, SF1413 etc.	N/A	

Received Sub-Subcontractor Info Sheet, SF1413, and Insurance Certificates NOTE: Sub-subcontractors must be either CIP enrolled or must provide Insurance Certificate in compliance with Article 12 of Subcontract.	D/A	
Sub-sub's SF1413 and Insurance Certificate sent to Corporate Contract Admin		

**Request for Taxpayer
Identification Number and Certification**

Give form to the
requester. Do not
send to the IRS.

Print or type
See Specific instructions on page 2.

Name (as shown on your income tax return) William E. Lesesne	
Business name, if different from above AllSouth Electrical Contractors Inc.	
Check appropriate box: ☐ Individual/ Sole proprietor ☒ Corporation ☐ Partnership ☐ Other ▶ ☐ Exempt from backup withholding	
Address (number, street, and apt. or suite no.) P.O. Box 70159	
City, state, and ZIP code Charleston, SC 29415	
List account number(s) here (optional)	
Requester's name and address (optional)	

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

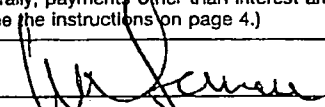
Social security number								
or								
Employer identification number								
5	7	0	8	8	8	3	2	6

Part II Certification

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
- I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
- I am a U.S. person (including a U.S. resident alien).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. (See the instructions on page 4.)

Sign Here	Signature of U.S. person ▶ 	Date ▶ 3/3/06

Purpose of Form

A person who is required to file an information return with the IRS, must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

U.S. person. Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee.

In 3 above, if applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

For federal tax purposes, you are considered a person if you are:

- An individual who is a citizen or resident of the United States,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States, or
- Any estate (other than a foreign estate) or trust. See Regulations sections 301.7701-6(a) and 7(a) for additional information.

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

**CONTRACTOR CERTIFICATION
STORM WATER POLLUTION PREVENTION PLAN**

CONTRACTOR CERTIFICATION
OF STORM WATER POLLUTION PREVENTION PLAN
FOR SEWER EFFLUENT SYSTEM
PRIVATIZATION OF FAMILY HOUSING
BEAUFORT, SOUTH CAROLINA

Each contractor and subcontractor engaged in activities that disturb surface soils must be identified and must sign the following certification statement:

Name of Contractor or Subcontractor: AllSouth Electrical Contractors Inc.

Address: P.O. Box 70159
Charleston, SC 29415

Telephone No.: (843) 552-9923

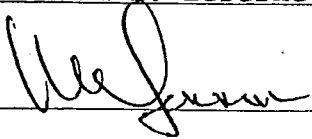
Type of Construction Service to be provided: Electrical Work

Certification Statement: I certify under penalty of law that I understand the terms and conditions of the State of South Carolina State Water Resources Control Board Notice of Intent to Comply with the Terms of the General Permit to Discharge Storm Water Associated with Construction Activity that authorizes the storm water discharges associated with industrial activity from the construction site identified as part of this certification.

This Certification is hereby signed in reference to construction for the Sewer Effluent System, Privatization of Family Housing, Beaufort Military Complex, Beaufort, South Carolina.

Name: William E. Lesesne

Title: President

Signature: 

Date: 03/03/06

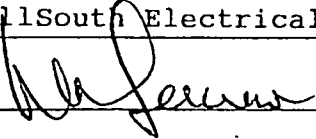
SUBCONTRACT # 13128
VENDOR # 21920

SUPPLIER LIST

List ALL suppliers that will furnish materials to your company for the Beaufort, SC Family Housing project with their address and phone number and supplies that will be used.

SUPPLIER:	PHONE NUMBER:	ADDRESS:	SUPPLIES TO BE USED:
Eck Supply	(843)554-9701	Charleston SC	Transformers
Line Equipment	(800)922-3590	Columbia, SC	Wire
Winnelectric	(843)986-0575	Beaufort SC	Misc.

COMPANY: AllSouth Electrical Contractors Inc.

SIGNATURE: 

PRINT NAME, TITLE: William E. Lesesne - President

DATE: 03/03/06

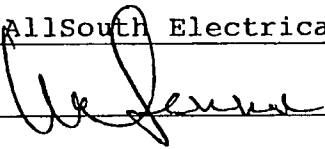
Subcontract # 031368
Subcontract Name: AllSouth

SUB-SUBCONTRACTOR LIST

List ALL subcontractors that you will be using for the Beaufort, SC Family Housing project with their address and phone number.

SUBCONTRACTOR NAME:	PHONE NUMBER:	ADDRESS:	BRIEF DESCRIPTION OF WORK TO BE PERFORMED:
N/A			

COMPANY: AllSouth Electrical Contractors Inc.

SIGNATURE: 

PRINT NAME, TITLE: William E. Lesesne - President

DATE: 03/03/06

TRI-COMMAND MILITARY HOUSING / ACTUS LEND LEASE
Consolidated Insurance Program (C)

ENROLLMENT APPLICATION – INSURANCE PREMIUM WORKSHEET

Project/Site/Village: 200 III Job#: ☐ Original Bid
☐ Change Order No:

1. IDENTIFICATION

Company Name: ALLSOUTH ELECTRICAL CONTRACTORS, INC. Est. Contract Value 60,000
Contact Person: BILL LESENE
Address: PO BOX 70159
City State Zip: CHARLESTON, SC 29415
Phone: 843 - 552 - 9923
Fax: 843 - 767 - 4463
E-mail Address: ALLSBLESENE@AOL.com
Date: 2/24/06



Contract Type:

☒ Fixed Price



2. ESTIMATED WORKERS COMPENSATION PROJECT PAYROLLS AND PREMIUMS (ON-SITE PAYROLLS ONLY)

Classification Description	Class Code	On-Site Payrolls	WC Rates Per \$100/Payroll	Premium Payroll/\$100 x Rate
ELECTRICAL WIRING	5140	13,500	4.82	650.70
POWER LINE CONSTRUCTION	7538	1,000	13.55	135.50
Estimated Total Premium				785.20
Experience Mod. Factor				1.30
=Modified Premium				1021.41
Other Applicable Factors (if any)				
Total Workers' Comp. Cost				1021.41

Insurance Contact: KARLA MARTIN
Phone Number: 843 - 797 - 1774
Fax Number: 843 - 797 - 1703
E-mail Address:

3. ESTIMATED GENERAL LIABILITY PROJECT PAYROLLS AND PREMIUMS (ON-SITE PAYROLLS ONLY)

Classification Description	Class Code	Payrolls/Contract Value (circle one)	Rate Per \$1,000 for \$100	Premium
ELECTRICAL LIGHT OR POWER CONSTRUCTION	92446	14,500	32.535	471.75
Total GL Premium				
Est. Subcontractors Ins. Cost (Include WC & GL)				N/A
and Total of All Insurance Costs (WC & GL Subcontractors)				\$1493.22

IMPORTANT: Attach a copy of your Work Comp and GL rate pages from your current policies.

RECAP BID TABULATION / FINAL APPROVAL

Date: Feb. 24, 2006

(Please Print)

PROJECT DETAILS

Trade / Scope of Work Site Electric - 02781001	Project Name & Location Beaufort Military Housing Complex - N62467-99-R-0992	Component Number 200 Officers Phase III - 50701047
Approved Revised Budget \$ 67,422.00	Target Budget \$ 67,422.00	Commitment Number 13128

PROCUREMENT DOCUMENT

Minor Work Subcontract	Services Order	Standard Subcontract Agreement

Bid Based On

Price and Previous Work Experience

(Recommendation carried forward from Bid Comparison Sheet)

Subcontractor/Supplier	Bus Status	Bid Amount	Bond Cost	Final Negotiated Amount
Allsouth Electrical Contractors, Inc		64,750.00	N/A	64,050.00

REMARKS/TERMS/CONDITIONS

Financial Review Completed?	☒ Yes	☐ No
Bondable?	☐ Yes	☒ No
Bond Required?	☐ Yes	☒ No

RISK MITIGATION STRATEGY

10% retainage will be held on all pay apps and sub will not be allowed to project any billings.

BUDGET VARIANCE DESCRIPTION AND EXPLANATION

The Sub's final bid of \$64,050.00 less the CIP deduction of \$1,493.00 makes this contract's value \$62,557.00. The final forecasted cost to complete this scope is \$87,414.00 with an unflet work amount of \$84,114.00. This contract falls well within our forecasted cost.

Construction Manager's representations:

Actus' procedures for advertising/soliciting the bid, and pre-screening bidders followed?	☒ Yes	☐ No	☐ N/A
Actus' procedures for communication and debriefing unsuccessful bidders followed?	☒ Yes	☐ No	☐ N/A

Submitted by: Luke Asterman <i>LCA</i>	Date: Feb. 24, 2006

FINAL REVIEW AND APPROVALS

Cost Planner	Date:
Sr. Construction Mgr <i>[Signature]</i>	Date: 2-24-06
Business Unit Leader / SVP Construction	Date:
Director of Construction	Date:
Actus Executive Management Board	Date:

REVIEWER'S REMARKS

COST DISPOSITION / JDE INPUT FORM (lump sum, one line per cost code and/or job number)

Vendor No:								
Vendor Name:								
Commitment No:								
Job/Component Number	Cost Code	Cost Type	Line	Description	Budget	Commitment	Variance	
50701047	02781001		1	Site Electric	60,716 67,422	62,557	18,417	-4,866
								0
								0
Total					60,716 67,422	\$62,557	18,417	-4,866

BID COMPARISON SHEET



Date Feb. 24, 2006

PROJECT DETAILS					
Trade	Component Name				Project Location
Site Electric - 02781001	200 Officers Phase III - 50701047				Beaufort, SC
Bidder	Allsouth Electrical Contractors	Power Plus	C.W. Wright		
Business Status (Enter a "1" to Select Bid)					
Inclusions and Exclusions					
Site Electric	64,050.00				
		Declined to Bid	Declined to Bid		
Insurance	INCL	EXCL	EXCL	EXCL	
SUBMITTED BID	\$ 64,050	\$ -	\$ -	\$ -	\$ -
Adjustments					
	\$ -	\$ -	\$ -	\$ -	\$ -
ADJUSTED BID	\$ 64,050	\$ -	\$ -	\$ -	\$ -
Trade Reserves					
	\$ -	\$ -	\$ -	\$ -	\$ -
Low Bid Adjustment (LBA)					
D&C Contingency					
TOTAL BID	\$ 64,050	\$ -	\$ -	\$ -	\$ -
Freight Included	Included				
Taxable/Non Taxable	Included				
Bondable (Yes or No)	No				
Union (Yes or No)	No				

COMPONENT BUDGET

COMPONENT ESTIMATE \$

Standard Agreement
Contracts less than \$250,000
Contract Document Submittal Checklist
Updated: October 17, 2005

Manager issuing contract documents to initial all forms included with contract packet to be reviewed for issuance.

Job/Component #: 50701047 - 200 PHASE III

Subcontractor: ALLSOUTH

	Document	Required Y or N	Mgrs Initials
1	Subcontract Agreement/Service Agreement	Y	LLA
2	Procurement Schedule / Buyout Log - DO NOT HAVE / SERVER	Y	N/A
3	Bid Recap	Y	LLA
4	Bid Comparison	Y	LLA
5	Subcontractor Pre-Qualification Form	Y	N/A
6	CIP Worksheet	Y	LLA

Comments:

- PRE-QUAL ALREADY ON FILE

- SERVER IS DOWN AND WE ARE UNABLE TO ACCESS

BUYOUT LOGS, ONCE SERVER IS UP I WILL UPDATE +

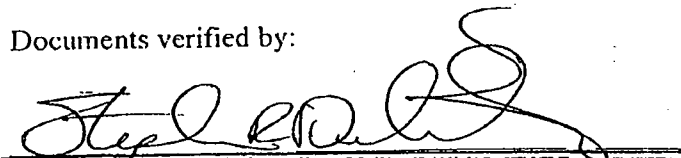
FORWARD ALL CURRENT BUYOUT LOGS. (LLA)

Submitted by:



Name, Title

Documents verified by:



Stephen Detwiler, Senior Construction Manager

RE

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-5191

**AFFIDAVIT OF WILLIAM LESENE of
ALL SOUTH ELECTRICAL
CONTRACTORS, INC.**

vs.

Defendant.

1. I am the President of Allsouth Electrical Contractors, Inc.
2. I am personally familiar with the correspondence attached as Exhibit A, Exhibit B, and Exhibit C.
3. Exhibit A, Exhibit B, and Exhibit C are true and accurate copies of correspondence Allsouth Electrical Contractors, Inc. received from Actus Lend Lease.

William Lesesne, President, Allsouth Electrical Contractors, Inc.

November, 2011.

My Commission Expires: 3/5/14

VIA ELECTRONIC MAIL AND CERTIFIED MAIL



May 21, 2010

Mr. William Lesesne
Allsouth Electrical Contractors, Inc.
2360 Bonds Ave.
North Charleston, SC 29405

Actus Lend Lease LLC
5401 Maryland Avenue
Camp Lejeune, NC 28546

Telephone
910.219.6330
Facsimile
910.219.6334
www.actuslendlease.com
A Lend Lease Limited
Liability Company

Reference: Subcontract Agreements 50701046/02781001, 13128 and 14958

Subject: Notice to Cure #1, Noncompliant Electrical Services at Parris Island

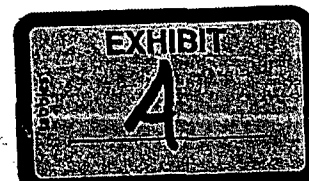
Dear Mr. Lesesne,

Please find attached a report documenting a survey of the Parris Island Officer's Housing Area primary and secondary electrical services installed by Allsouth Electric Contractors, Inc. under the above referenced Subcontract Agreements. Upon review of the attached; Actus Lend Lease is requesting in accordance with Article 7 Section 1.1 of the Subcontract Agreements referenced above, written acknowledgement of Allsouth's intent to remedy the discrepancies found with the site electrical systems. In addition, Actus Lend Lease is requesting a timeline of when this work will take place in order to coordinate the work and necessary outages with both the Owner and the Parris Island regulating authorities. Time is of the essence.

Article 6 section 2, Workmanship, states, "Every part of Subcontractor's work shall be executed in strict accordance with the Subcontract Documents in the most sound, workmanlike and substantial manner."

Article 6 section 7, Warranty, states, "The one (1) year warranty period notwithstanding, Subcontract agrees that if a defect, error, etc. in Subcontractor's Work is found, or becomes manifested, after the Warranty Period expires, and to the extent the applicable legal limitations period has not expired, then Subcontractor will be responsible for the correction of the error and all related damages."

This notice is being sent as a follow up to the correspondence sent via email to Allsouth Electrical Contractors, Inc. on March 4, 2010. All remaining electrical systems on Parris Island, namely Weapons Housing Area, are also in the process of being surveyed for discrepancies and the findings will be forwarded to Allsouth Electrical Contractors, Inc. for action once the reports are in hand.



174South00010

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me directly at (910) 219-6330.



Lucas Asterman
Construction Manager, Actus Lend Lease

cc: Alan Roman – Senior Construction Manager, Actus Lend Lease
Larry Michels – Operations Manager, Actus Lend Lease
Allsouth Electrical Contractors, Inc. Contract File

Encl: Exterior Electrical Inspection Report for Officers Quarters MCRD Parris Island,
April 14, 2010

VIA ELECTRONIC MAIL AND CERTIFIED MAIL



May 28, 2010

Mr. William Lesesne
Allsouth Electrical Contractors, Inc.
2360 Bonds Ave.
North Charleston, SC 29405

Actus Lend Lease LLC
5401 Maryland Avenue
Camp Lejeune, NC 28546

Telephone
910.219.6330
Facsimile
910.219.6334
www.actuslendlease.com

A Lend Lease Limited
Liability Company

Reference: Subcontract Agreement 50701024/02781001

Subject: Notice to Cure #1, Noncompliant Electrical Services at Parris Island

Dear Mr. Lesesne,

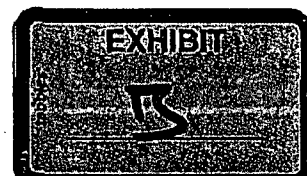
Please find attached a report documenting a survey of the Parris Island Weapons Housing Area primary and secondary electrical services installed by Allsouth Electric Contractors, Inc. under the above referenced Subcontract Agreement. Upon review of the attached; Actus Lend Lease is requesting in accordance with Article 7 Section 1.1 of the Subcontract Agreements referenced above, written acknowledgement of Allsouth's intent to remedy the discrepancies found with the site electrical systems. In addition, Actus Lend Lease is requesting a timeline of when this work will take place in order to coordinate the work and necessary outages with both the Owner and the Parris Island regulating authorities. Time is of the essence.

Article 6 section 2, Workmanship, states, "Every part of Subcontractor's work shall be executed in strict accordance with the Subcontract Documents in the most sound, workmanlike and substantial manner."

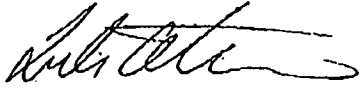
Article 6 section 7, Warranty, states, "The one (1) year warranty period notwithstanding, Subcontract agrees that if a defect, error, etc. in Subcontractor's Work is found, or becomes manifested, after the Warranty Period expires, and to the extent the applicable legal limitations period has not expired, then Subcontractor will be responsible for the correction of the error and all related damages."

This notice is being sent as a follow up to the correspondence sent via email to Allsouth Electrical Contractors, Inc. on March 4, 2010.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me directly at (910) 219-6330.



176South00012



Lucas Asterman
Construction Manager, Actus Lend Lease

cc: Alan Roman – Senior Construction Manager, Actus Lend Lease
Larry Michels – Operations Manager, Actus Lend Lease
Allsouth Electrical Contractors, Inc. Contract File

Encl: Exterior Electrical Inspection Report for Weapons Housing Area MCRD Parris
Island, May 14, 2010

VIA ELECTRONIC MAIL AND CERTIFIED MAIL

Lend Lease

June 17, 2011

Mr. William Lesesne
AllSouth Electrical Contractors, Inc.
2360 Bonds Ave.
North Charleston, SC 29405

Lend Lease (US) Partnerships
LLC

5401 Maryland Avenue
Camp Lejeune, NC 28547

Telephone
910.219.6330
Facsimile
910.219.6336
www.lendlease.com

Reference: Subcontract Agreements 50701046/02781001, 13128, 14958 and 50701024/02781001

Subject: Notice of Lend Lease's Intent to Cure Parris Island Electrical Deficiencies

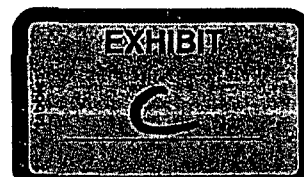
Dear Mr. Lesesne,

As indicated in the previously sent Notices dated May 21st and May 28th of 2010 and pursuant to subsequent site visits, phone conversations and email correspondence, Lend Lease has been directed by MCRD Parris Island to completely replace and/or bring into compliance any electrical primary supply or secondary feeder lines that do not conform with the attached AFC documents and their noted approved depths. In addition, direction has been received to correct the multiple transformer deficiencies noted in the previously provided surveys along with correcting any noncompliant items associated with the neighborhood street lighting found during the execution of this work.

Lend Lease has worked exhaustively for the last year with both MCRD Parris Island and AMCC to broker a resolution that would not require the outright replacement of the entire electrical infrastructure systems in 3 communities on Parris Island. This unsuccessful attempt at mediation led MCRD Parris Island to put Lend Lease on notice to proceed with the repairs immediately. MCRD Parris Island is demanding that all primary services and secondary feeders be installed in compliance with the AFC documents dated 10May03 and stamped "approved for construction" by Lend Lease on 16May03 for the Officers Area homes and the AFC documents dated 26Aug04 and stamped "approved for construction" by Lend Lease on 27Aug04 for the Weapons Area homes.

As AllSouth Electrical Contractors, Inc. was the Contractor of Record for Officer's Phases II, III and IV and also Weapons Area, Lend Lease intends to hold AllSouth financially responsible for all costs incurred and associated with the replacement should AllSouth choose not to comply with the directive issued by MCRD Parris Island. Lend Lease has already solicited pricing in order to complete this work and is anticipating direct trade costs of \$767,195.00, plus bonding costs. In addition to the direct costs, Lend Lease will incur a to be determined amount of indirect general condition costs related to this work for supervision, quality assurance, safety, and office overhead during the execution of the repairs.

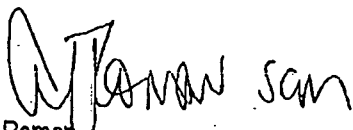
AllSouth's position regarding this issued from past correspondence is known, however Lend Lease will honor the directive issued by MCRD Parris Island and commence with the repairs during the month of July. Naturally, Lend Lease would prefer that AllSouth perform the corrective repairs under the contracts listed above. Please contact me this week at the phone numbers listed below to participate in the base orientation to commence work.



178South00008

Understand that Lend Lease will utilize any and all legal measures necessary to immediately recover any and all costs associated with the execution of this directive.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me directly at (910) 219-6330 or (910) 376-5781.

A handwritten signature in black ink, appearing to read "Alan Roman".

Alan Roman

Sr. Construction Manager, Lend Lease

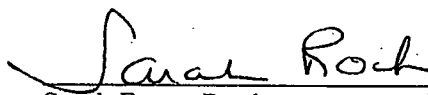
cc: Luke Asterman – Construction Manager, Lend Lease
Larry Michels – Operations Manager, Lend Lease
Allsouth Electrical Contractors, Inc. Contract File

Encl: Notice to Cure dated May 21, 2010
Notice to Cure dated May 28, 2010
Officers Area AFC Documents
Weapons Area AFC Documents
Parris Island Work Directive
Direct Trade Cost Estimate

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, an employee of Smith, Bundy, Bybee & Barnett, P.C., hereby certify that true and correct copies of the Affidavit of William Lesesne of Allsouth Electrical Contractors, Inc. were served on all parties via U. S. Mail and E-mail this 29th day of November, 2011, as follows:

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401
Attorney for Plaintiff Lend Lease (US) Public Partnerships,
LLV f/k/a Actus Lend Lease, Inc.
tcoyne@williamsmullen.com


Sarah Foster Rock

2011 NOV 29 PM 12:37
CLERK OF COURT

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO.: 11-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

**MOTION TO STAY AND COMPEL
ARBITRATION**

FILED
OCT - 7 AM 11:25
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff respectfully moves the Court, pursuant to Section 15-48-20, South Carolina Code, and the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to stay this action pending arbitration and to order the Parties to arbitration, and for cause shows unto the Court as follows:

1. Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC ("Lend Lease" or "Plaintiff") is a Delaware Limited Liability Company organized under the laws of the State of Delaware and doing business, among other places, in the State of South Carolina on the Parris Island Military Reservation, and is engaged as a general contractor, particularly in regard to military housing.

2. Allsouth Electrical Contractors, Inc. ("Allsouth") is a South Carolina corporation organized under the laws of the State of South Carolina and authorized to do business and doing business, among other places, in the State of South Carolina and on the Parris Island Military Reservation, and engaged as an electrical subcontractor in regard to military housing. Upon information and belief, Allsouth has a place of business in Charleston County, South Carolina.

3. Lend Lease entered into certain contracts for construction ("Contracts") with Tri-Command Managing Member LLC ("Owner"), the owner of certain real property in Beaufort,

South Carolina, under the general terms of which Lend Lease was to demolish and renovate certain existing housing units and related facilities located at the Beaufort Marine Corps Air Station Parris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital in Beaufort County, South Carolina ("Projects").

4. In connection with the performance of the Contracts and Projects, Lend Lease, entered into four (4) separate contracts with Allsouth to perform a part or portion of the electrical work required by the Contracts and Projects ("Subcontracts"). Specifically, Lend Lease and Allsouth entered into the following four Subcontracts:

- (a) Subcontract Agreement 13128, for completion of specified electrical work on the portion of the Projects identified as 200 Officers (Marsh Landing) Phase III for the sum of \$62,557.00 ("Subcontract 1");
- (b) Subcontract Agreement 50701024/02781001, for completion of specified electrical work on the portion of the Projects identified as Weapons Area for the sum of \$310,699.00 ("Subcontract 2");
- (c) Subcontract Agreement 50701046/02781001, for the completion of specified electrical work on the portion of the Projects identified as 200 Officers (Marsh Landing) Phase II for the sum of \$82,007.00 ("Subcontract 3"); and
- (d) Subcontract Agreement 14958, for the completion of specified electrical work on the portion of the Projects identified as 200 Officers Phase IV for the sum of \$103,800.00 ("Subcontract 4").

5. Allsouth undertook to perform all four Subcontracts.

6. Subsequently, the Owner discovered, and notified Lend Lease, that the electrical work performed by Allsouth was defective and that its workmanship was faulty.

7. Lend Lease has given notice to Allsouth of the defective work and made demand on Allsouth to honor its contracts and warranties.

8. Despite notice and demand, Allsouth has failed and refused to honor its contracts and warranties.

9. Contemporaneous with the filing of this Civil Action, Lend Lease served and filed with the American Arbitration Association a demand for arbitration of the claims asserted herein in accordance with the provisions of the Subcontracts and paid the initial \$2,500.00 fee to the American Arbitration Association.

10. The cover pages of each of the Subcontracts, along with the respective arbitration provisions, are attached hereto as Exhibit 1.

11. On August 1, 2011, the Defendant was served with the Plaintiff's Complaint in this Civil Action, which indicated that that the Claims in the Civil Action are subject to arbitration.

12. On September 29, 2011, the Defendant served an Answer to the Complaint in the Civil Action, which indicated the Defendant's refusal to arbitrate.

13. The Claims in this Civil Action are subject to arbitration pursuant to the express terms of the Subcontracts. See Exhibit 1.

14. The matters herein are in commerce.

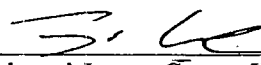
15. Lend Lease had made a demand for arbitration.

16. Lend Lease is entitled to entry of an order staying this action pending arbitration and to an order compelling the parties to arbitration pursuant to the terms of the Subcontracts.

WHEREFORE, Plaintiff prays:

- (a) For the Court to enter an order staying this action pending arbitration of all matters pursuant to the terms of the Subcontracts;
- (b) For the Court to enter an order compelling Defendant to arbitrate; and
- (c) For the Court to provide such other relief as it deems just and proper.

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorney



Edward James Coyne III
S.C. State Bar No. 78633
WILLIAMS MULLEN
300 N. 3rd Street, Suite 420
Wilmington, NC 28401
Telephone: 910.256.5135
Facsimile: 910.256.6451

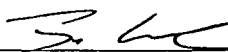
Wilmington, North Carolina
October 5, 2011

11-CP-10-5191

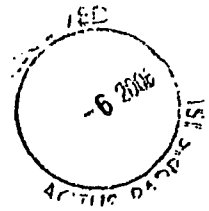
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of October, 2011, he has caused a the foregoing MOTION TO STAY AND COMPEL ARBITRATION to be served upon the other Party to this action by mailing a copy thereof to the below address, which is the last address known to him:

W.H. Bundy, Jr., Esq.
SMITH, BUNDY, BYBEE & BARNETT, P.C.
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Attorney for Defendant


Edward James Coyne III

FILED
2011 OCT -7 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
qy



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR).

March 1, 2006



4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a 'dispute') between the Subcontractor and the Contractor arises in connection with the Subcontract or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim-
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration,

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by

Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by change order to the extent obtained by Contractor under the Subcontract Documents and the Schedule of Work shall be revised accordingly.

Contractor shall not be liable to Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless Contractor has first recovered the same on behalf of Subcontractor from said person, it being understood and agreed by Subcontractor that, apart from recovery from said person, Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of Subcontractor's Work.

4.4 Liquidated Damages.

The parties agree that in the event there is a delay by Subcontractor in the completion of Subcontractor's Work, the monetary impact on the contractor will be difficult to ascertain. However, to the extent that the Subcontractor is responsible for delays to the completion of



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

September 30, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

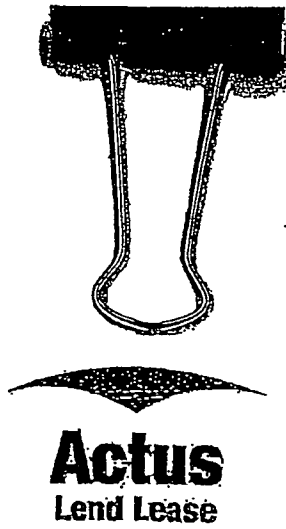
4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.



SUBCONTRACT AGREEMENT

between

ACTUS LEND LEASE LLC

(CONTRACTOR)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.

(SUBCONTRACTOR)

November 22, 2004

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

SUBCONTRACT AGREEMENT No. 14958

between

ACTUS LEND LEASE LLC
(Contractor)

and

ALLSOUTH ELECTRICAL CONTRACTORS, INC.
(Subcontractor)

for the
The Command Military Family Housing
Actus

located at

200 OFFICERS PHASE IV

at

Beaufort Military Complex, South Carolina

October 23, 2007

Subcontractor on account of the portion of the work performed. If at the date of such deletion Subcontractor has already properly prepared or fabricated off site any goods for subsequent incorporation in the work, and if Subcontractor delivers such goods to the site or to such other place as the Contractor shall reasonably direct, then Subcontractor shall be paid for such goods or materials.

4.2 Claims.

Subcontractor shall give Contractor written notice of all claims within five (5) days of the beginning of the event for which claim is made; otherwise, such claims shall be deemed waived.

All unresolved claims, disputes and other matters in question between Contractor and Subcontractor shall be resolved as follows:

4.2.1 Dispute Resolution.

If a dispute or difference (hereafter called a "dispute") between the Subcontractor and the Contractor arises in connection with the Subcontract, or the subject matter thereof, including a dispute concerning -

- (a) a Direction given by the Contractor; or
- (b) a claim:
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration.

then either party shall deliver immediate notice adequately identifying and providing details of the dispute (a "Claim Notice").

Notwithstanding the existence of a dispute, the Subcontractor shall continue to perform the Subcontract.

4.2.1.1 Disputes Resolution Process.

If either the Contractor or the Subcontractor delivers a Claim Notice, then the parties will endeavor in good faith to resolve the dispute within ten (10) days of the delivery of the Claim Notice. If they cannot agree within such ten (10) day period, either party may elect, by written notice (a "Dispute Notice"), to submit the matter to binding arbitration as set forth below.

4.2.1.2 Unresolved Claims.

Claims, disputes or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

All sub-subcontractors and material suppliers to the Subcontractor are bound by this arbitration provision. Subcontractor is required to include in any agreement with any of its sub-subcontractors and material suppliers, as well as specifically notify them of, this arbitration provision.

If a dispute arises between Owner and Contractor which, because of objections of other parties, or because of the dispute resolution structure in the Agreement between the Owner and the Contractor it is not possible for the Subcontractor or its sub-subcontractors and material suppliers to become parties to that dispute resolution process, and if Subcontractor's work becomes an issue in those proceedings, then Subcontractor shall, at its own expense, supply counsel, evidence and witnesses to establish Subcontractor's performance of its obligations to Contractor under this Agreement. Subcontractor shall be bound to Contractor by the award, so far as it applies to Subcontractor's portion of the work, to the same extent that Contractor is bound to Owner by the Award.

The resolution of the dispute shall be based solely upon the law governing the claims in the pleadings, and the arbitrator may not invoke any basis other than such controlling law, including, but not limited to, the notion of "just cause."

4.3 Delay.

If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the time for Subcontractor's Work shall be extended by

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-5191

Lend Lease (US) Public Partnerships, LLC
f/k/a Actus Lend Lease,

Plaintiff,

vs.

Allsouth Electrical Contractors, Inc.,
Defendant.

DEFENDANT ALLSOUTH
ELECTRICAL CONTRACTORS, INC.
MEMORANDUM IN OPPOSITION TO
THE PLAINTIFF'S MOTION TO STAY
AND COMPEL ARBITRATION

FILED
OCT 17 PM 2:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY 2

Defendant Allsouth Electrical Contractors, Inc., (hereinafter referred to as "Allsouth") hereby submits this memorandum in opposition to the Plaintiff's Motion to Stay and Compel Arbitration. For the reasons stated herein, the motion should be denied.

Procedural History

1. The Plaintiff filed this civil action in the Court of Common Pleas for Charleston County.
2. Allsouth answered the Complaint on September 29, 2011 and denied the allegations therein as well as asserted certain affirmative defenses.
3. The Plaintiff has now moved to stay the civil action it filed and to compel arbitration.
4. In apparent support of its motion, the Plaintiff cites to a portion of the contract alleged to have been entered into between the Plaintiff and Allsouth. The portion of the contract reads as follows:

Claims, disputes, or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

Argument

5. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Notice that a contract is subject to arbitration under the Act must be typed in underlined capital letters, or prominently rubber stamped, on the first page of the contract. S.C. Code Ann. Section 15-48-10(a) (1976), as amended. Without such notice, a contract is not subject to arbitration. Id. Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration. Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp., 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993).

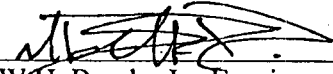
6. In the present case, the alleged arbitration provision is deficient and unenforceable pursuant to S.C. Code Ann. 15-48-10(a) in that notice of the arbitration provision does not appear on the first page of the alleged contract.

7. Moreover, the plain language of the contract requires a demand for arbitration must be made "within 180 days after the [demanding] party knew, or reasonably should have known, of facts giving rise to the claim." Though Allsouth has denied the claims made against it, the Plaintiff first informed Allsouth of the potential claims on May 10, 2010. The Plaintiff filed a demand for arbitration in this matter on July 25, 2011. The Plaintiffs filed the demand too late and have not complied with the express provisions of the contract. Therefore, Allsouth cannot be forced to arbitrate.

Conclusion

8. For the reasons stated herein, the Plaintiff's motion should be denied.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W.H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for the Defendant All South

Mt. Pleasant, South Carolina
October 17, 2011

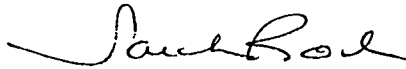
CERTIFICATE OF SERVICE

I, Sarah Foster Rock, an employee of Smith, Bundy, Bybee & Barnett, P.C., hereby
certify that true and correct copies of the Defendant Allsouth Electrical Contractors, Inc.'s
Memorandum in Opposition to the Plaintiff's Motion to Stay and Compel Arbitration were
served on all parties via U.S. Mail this 17th day of October, 2011, as follows:

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401
Attorney for Plaintiff Lend Lease (US) Public Partnerships,
LLV f/k/a Actus Lend Lease, Inc.
tcoyne@williamsmullen.com

2011 OCT 17 PM 2:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FILED



Sarah Foster Rock

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO.: 11-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

**MEMORANDUM IN SUPPORT OF
MOTION TO STAY AND COMPEL
ARBITRATION**

2011 DEC -5 PM 12:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

The Plaintiff Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC (the "Plaintiff") respectfully submits this Memorandum in support of its Motion to Stay and Compel Arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, as a contractor, entered into certain contracts with Tri-Command Managing Member, LLC (the "Owner") for the demolition and renovation of existing housing units and related facilities located at the Beaufort Marine Corps Air Station, Parris Island Marine Corps Recruiting Depot, and the Beaufort Naval Hospital (the "Project").

The Owner has demanded that the Plaintiff repair and/or replace certain portions of the electrical work performed on the Project. The Defendant Allsouth Electrical Contractors, Inc. (the "Defendant"), as a subcontractor, performed a part or portion of such electrical work pursuant to four (4) separate subcontractors it entered with the Plaintiff (the "Subcontracts"). Those Subcontracts are more specifically described as:

- i. Subcontract Agreement 13128, for completion of specified electrical work on the portion of the Project identified as 200 Officers (Marsh Landing) Phase III for the initial sum of \$62,557.00 ("Subcontract 1");
- ii. Subcontract Agreement 50701024/02781001, for completion of specified electrical work on the portion of the Project identified as Weapons Area for the initial sum of \$310,699.00 ("Subcontract 2");
- iii. Subcontract Agreement 50701046/02781001, for the completion of specified electrical work on the portion of the Project identified as 200 Officers (Marsh Landing) Phase II for the initial sum of \$82,007.00 ("Subcontract 3"); and
- iv. Subcontract Agreement 14958, for the completion of specified electrical work on the portion of the Project identified as 200 Officers Phase IV for the initial sum of \$103,800.00 ("Subcontract 4").

(A. Roman Aff. ¶ 3 (attaching Subcontracts).)

Each of the Subcontracts contains the following arbitration provision (collectively, the "Arbitration Provisions"):

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however,

may a claim be brought after the time when the institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

In late July, 2011, the Plaintiff contemporaneously filed an arbitration demand (the "Arbitration Demand") and the above-captioned civil action against the Defendant, both seeking indemnity arising from or relating to claims for patent or latent defects in the work performed by Defendant on the Project. The Plaintiff raised the issue of arbitrability in its Complaint (the civil action was filed for the purposes of tolling the Statute of Limitations)¹ and in the October 5, 2011 Motion to Stay and Compel Arbitration that is now before the Court.

On October 17, 2011, the Defendant filed a Memorandum in Opposition to the Plaintiff's Motion to Stay and Compel Arbitration.

II. ARGUMENT

A. The Federal Arbitration Act requires that this matter be submitted to arbitration.

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, (the "FAA") "declares a liberal policy favoring arbitration." *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 458 (1996) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983)). Indeed, the FAA provides that:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

As used in the FAA, "commerce" means "commerce among the several States . . . , or in any Territory of the United States . . . , or between any such Territory and any State"

9 U.S.C. § 1.

¹ It remains uncertain in what contexts, if any, the filing of an arbitration demand is alone enough to toll the Statute of Limitations. *See Nowlin v. General Telephone Co.*, 314 S.C. 352 (1994).

“The United States Supreme Court has held that the phrase ‘involving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” *Blanton v. Stathos*, 351 S.C. 534, 540 (Ct. App. 2002) (affirming the Circuit Court’s application of the FAA). Similarly, “the requirement of the [FAA] that a contract evidence a transaction involving commerce must be broadly construed to promote arbitration.” *Circle S. Enterp., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 429 (Ct. App. 1986) (citations omitted) (reversing the Circuit Court for failure to apply the FAA).

The conclusion that a contract evidences a transaction involving commerce, and is therefore governed by the FAA, has been upheld on grounds including:

- i. The general nature of the project and the work to be performed being sufficient to give notice that materials, equipment and supplies manufactured or produced outside of South Carolina would be required. *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640 (1977) (reasoning that “[i]t would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.”); *Blanton*, 351 S.C. at 541 (reasoning that, as to the construction of a restaurant, “realistically the project could not be constructed without the use of materials in interstate commerce”); *Circle S. Enterp., Inc.*, 288 S.C. at 431–432 (reasoning that, as to the construction of an auto-truck stop, “anyone who knew what would be required to perform the contract in the instant case would also know that it could not be performed without equipment and materials from outside South Carolina.”).

ii. An affidavit reveals that the contract at issue affected interstate commerce. *See, e.g., Circle S. Enterp., Inc.*, 288 S.C. at 431-432.

iii. The face of the contract references companies located outside of South Carolina that will have some involvement with the project at issue. *See, e.g., Episcopal Housing Corp.*, 269 S.C. at 637-640.

In the instant case, there is strikingly similar support for the conclusion that the Subcontracts evidence a transaction involving commerce, for example:

i. It is apparent on the face of each of the Subcontracts that the nature of the overall Project involved, among other things, the demolition, renovation, design and construction of numerous housing units and related facilities. Similarly, it is apparent on the face of each of the Subcontracts that the actual work to be performed by the Defendant involved, among other things, demolition of electrical utilities, excavation, and installation of conduit, fuse cabinets, pull boxes, terminators, grounding systems, fuses, street and area lamps and transformers. In short, it is apparent on the face of each of the Subcontracts that the nature of the Project and the actual work to be performed under each of the Subcontracts involved extensive construction work and installation of a variety of electrical components. It is near impossible to imagine that such work could be completed without the use of materials in interstate commerce.

ii. The Affidavit of Alan Roman states that each of the Subcontracts affected interstate commerce by, among other things, requiring items that came from several States.

iii. The face of Subcontracts 2 and 3 reveals that the Plaintiff was based in Napa, California, at the time it entered Subcontracts 2 and 3 with the Defendant, who was based

in Charleston, South Carolina, and contemplates numerous transaction between such locations.

iv. Each of the Subcontracts provides that the Defendant enrolled in the Plaintiff's Consolidated Insurance Program in relation to the Subcontracts. Exhibit 7 to Subcontract 4 reveals that this Consolidated Insurance Program was administered by a company based in Boston, Massachusetts and that the associated insurer was based in Charlotte, North Carolina.

Accordingly, considering these grounds and the liberal policy favoring arbitration, it is apparent that the Subcontracts evidence a transaction involving interstate commerce. *See, e.g., Episcopal Housing Corp.*, 269 S.C. 631 (enforcing arbitration clause pursuant to FAA); *Blanton*, 351 S.C. 534 (same); *Circle S. Enterp., Inc.*, 288 S.C. 428 (same).

Moreover, in addition to "commerce among the several States," the FAA defines commerce to include "commerce . . . in any Territory of the United States." 9 U.S.C. § 1. As the Subcontracts contemplate work upon bases of the United States Military, this provision further supports the application of the FAA.

Therefore, the Arbitration Provisions are controlled by the FAA, and must be enforced. 9 U.S.C. § 2.

B. The FAA preempts any inconsistent requirements of South Carolina State Law.

"The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590-591 (2001).

The Defendant, however, argues, in its Memorandum in Opposition to the Plaintiff's Motion to Stay and Compel Arbitration, that the Arbitration Provisions are not enforceable because the first page of the Subcontracts do not state that the Subcontracts are subject to arbitration, as required by Section 15-48-10(a) of the South Carolina Code ("Section 15-48-10(a)").

"This argument is patently without merit." *Godwin v. Stanley Smith & Sons*, 300 S.C. 90, 95 (Ct. App. 1989) (rejecting the exact same 15-48-10(a) argument made by the Defendant, pursuant to the FAA).

Indeed, the South Carolina Supreme Court has clearly stated that "the FAA preempts section 15-48-10(a)." *Zabinski*, 346 S.C. at 593. *See also Soil Remediation Co.*, 323 S.C. at 461 ("The presence of interstate commerce makes the FAA applicable to the present arbitration agreement. Hence . . . the FAA preempts S.C. Code Ann. § 15-48-10(a)."); *Blanton*, 351 S.C. at 540 ("[T]he notice provision in § 15-48-10(a) is preempted by the FAA."); *Circle S.*, 288 S.C. at 429 n.1 (making specific reference to 15-48-10(a) and holding that : "[T]he Federal Arbitration Act, enacted pursuant to the commerce clause of the United States Constitution, if applicable, supersedes state law.").

Therefore, the Defendant's argument that 15-48-10(a) renders the Arbitration Provisions unenforceable is wholly without merit, and the Arbitration Provisions must be enforced. 9 U.S.C. § 2.

C. The 180 day provision on which the Defendant relies is inapplicable.

The Defendant contends, in its Memorandum in Opposition to the Plaintiff's Motion to Stay and Compel Arbitration, that it cannot be compelled to arbitrate because, it contends, the Plaintiff did not comply with "the plain language of the contract [that] requires a demand for

arbitration must be made 'within 180 days after the [demanding] party knew, or reasonably should have known, of facts giving rise to the claim.'"

This argument, however, misconstrues the sentence on which it relies and partially quotes. In its entirety, that sentence reads:

Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim.

(bold emphasis added.) What is plain is that the 180 day provision has no bearing on "claims by the Contractor [i.e. the Plaintiff] for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by the Subcontractor [i.e. the Defendant]." These are exactly the type of claims the Plaintiff brings. The face of the Complaint reveals that the Plaintiff seeks to recover from the Defendant for the loss or damage the Plaintiff has incurred and will incur to the Owner due to the Owner's dissatisfaction with the work the Defendant performed under the Subcontracts. *Cf. First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442 (1994) ("Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.")²

Moreover, to the extent that the Defendant's argument is based on a waiver of the right to demand arbitration, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at

² Further, the Arbitration Demand explains the nature of the dispute as:

Claim by General Contractor against Electrical Subcontractor for breach of 4 separate but related subcontracts based on defective workmanship and breach of the contract warranties for the defective work and failure to cure the defective work, as well as negligence and indemnity on a government facility.

hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem. Hosp*, 460 U.S. at 25.

Therefore, the Defendant’s contention regarding the 180 day provision is wholly without merit, and the Arbitration Provisions must be enforced. 9 U.S.C. § 2.

III. CONCLUSION

The Plaintiff and the Defendant negotiated agreements that include an agreement to arbitrate. The Defendant should not be allowed to now deprive the Plaintiff of the benefit of its bargain by avoiding arbitration. The Federal Arbitration Act mandates that the Defendant be compelled to arbitrate. Accordingly, the Plaintiff respectfully request that its Motion to Stay and Compel Arbitration be granted.

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorney


Edward James Coyne III
S.C. State Bar No. 78633
WILLIAMS MULLEN
300 N. 3rd Street, Suite 420
Wilmington, NC 28401
Telephone: 910.256.5135
Facsimile: 910.256.6451

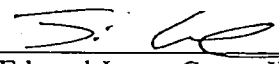
Wilmington, North Carolina
December 1, 2011

11-CR-10-5191

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of December, 2011, he has caused a the foregoing MEMORANDUM IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION to be served upon the other Party to this action by mailing a copy thereof to the below address, which is the last address known to him:

W.H. Bundy, Jr., Esq.
SMITH, BUNDY, BYBEE & BARNETT, P.C.
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Attorney for Defendant

BY 
Edward James Coyne III

JULIE J. ARMSTRONG
CLERK OF COURT

2011 DEC -5 PM 12:23

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-5191

Lend Lease (US) Public Partnerships, LLC
f/k/a Actus Lend Lease,

Plaintiff,

Defendant Allsouth Electrical Contractors,
Inc.'s Rule 59 Motion

vs.

Allsouth Electrical Contractors, Inc.,

Defendant.

FILED
20 FEB 21 PM 2:50
LIE J. ARMSTRONG
CLERK OF COURT

Defendant AllSouth Electrical Contractors, Inc. ("Defendant") will move before this Court within ten days of notice hereof or at the earliest possible time thereafter for an Order altering and amending its Order of February 9, 2012 pursuant to Rule 59, SCRPC. The Defendant incorporates herein each and every factual contention and legal position in its Memorandum in Opposition to the Motion to Stay filed with the Court and respectfully requests the Court to rule upon each and every argument made therein and amend its Order of February 9, 2012 accordingly and deny the Motion to Stay this action and Compel Arbitration. Additionally, the Defendant states as follows:

- (1) The Defendant is unclear as to whether or not the Court is ruling as a matter of fact and law in its Order of February 9, 2012 that the limitations provision provided in the alleged contract between the parties to this action does not apply to bar any claims of the Plaintiff pursuant to the terms of the contract. It would be improper for the Court to rule upon the meaning of the contractual terms of the contract in dispute between the parties and then compel arbitration. The February 9, 2012 Order should be amended to state that the arbitrators will make rulings of fact and law relative to the

terms of the contract documents without regard to any findings of fact or law made by this Court.

- (2) The Court erred in making any findings of fact or law relative to the terms of the contract in dispute between the parties.
- (3) The Court erred in compelling arbitration and staying this matter.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W.H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for the Defendant All South

Mt. Pleasant, South Carolina
2/10, 2012

2011-CP-10-5191

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, an employee of Smith, Bundy, Bybee & Barnett, P.C., hereby certify that true and correct copies of the Defendant Allsouth Electrical Contractors, Inc.'s Rule 59 Motion were served on all parties via U. S. Mail and hand Delivery this 21st day of February, 2012, as follows:

Via U.S. Mail

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401
**Attorney for Plaintiff Lend Lease (US) Public Partnerships,
LLV f/k/a Actus Lend Lease, Inc.**
tcoyne@williamsmullen.com

Via Hand Delivery:

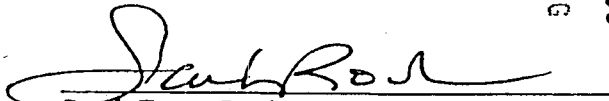
The Honorable Deadra L. Jefferson
Charleston County Judicial Center
100 Broad Street, Ste 336
Charleston, SC 29401

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2012 FEB 21 PM 2:50

FILED


Sarah Foster Rock

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-5191

**Defendant Allsouth Electrical Contractors,
Inc.'s Motion to Lift the Stay**

Plaintiff,

VS.

Allsouth Electrical Contractors, Inc.,

Defendant.

Defendant Allsouth Electrical Contractors, Inc. ("Defendant") will move before this Court within ten days of notice hereof or at the earliest possible time thereafter for an Order Lifting the Stay in this Action. Additionally, the Defendant states as follows:

- (1) The Court granted a motion to stay this matter pending arbitration on February 9, 2012.
- (2) An arbitration award has now been entered.
- (3) The Defendant now seeks that the stay in this action be lifted.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

[Signature Page Follows]

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W. H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for the Defendant Allsouth

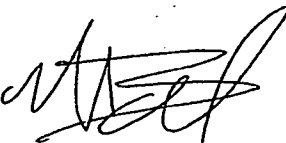
Mt. Pleasant, South Carolina
8/16, 2013

CERTIFICATE OF SERVICE

I, M. Brent McDonald of Smith, Bundy, Bybee & Barnett, P.C., hereby certify that true and correct copies of the Defendant Allsouth Electrical Contractors, Inc.'s Motion to Lift the were served on all parties via U. S. Mail this 26th day of August, 2013, as follows:

Edward James "Trip" Coyne, III, Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401

Attorney for Plaintiff Lend Lease (US) Public Partnerships
LLV f/k/a Actus Lend Lease, Inc.



M. Brent McDonald

2013 AUG 26 PM 4:37
JULIE A. STRONG
CLERK OF COURT

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO.: 11-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

NOTICE OF FILING

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CLERK OF COURT
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The Plaintiff respectfully submits this Notice of Filing in order to enter of record the following and attached:

1. On November 29, 2012, an Arbitration Award was entered in the arbitration styled "*Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC v. Allsouth Electrical Contractors, Inc.*," (American Arbitration Association Case No. 31 110 00193 11), (the "Award" entered in the "Arbitration"). A true and correct copy of the Award is attached hereto as Exhibit A.
2. On December 18, 2012, Defendant served Respondent's Motion for Modification of Award or Rehearing, which sought "modification of the award and/or . . . a rehearing." The Arbitrator entered a Disposition for Application of Modification of Award, dated March 4, 2013, which denied Allsouth's December 18, 2012 motion. A true and correct copy of the Disposition for Application of Modification of Award is attached hereto as Exhibit B.
3. On February 27, 2013, Defendant filed with the United States District Court for the District of South Carolina Allsouth Electrical Contractors, Inc.'s Notice and Petition to Vacate an Arbitration Award pursuant to 9 U.S.C. § 10 (the "Petition to Vacate"), which sought

to have the Award vacated. On June 13, 2013, the United States District Court for the District of South Carolina entered an Order that dismissed the Petition to Vacate and confirmed the Award. A true and correct (and certified) copy of that Order is attached hereto as Exhibit C.

4. Also on June 13, 2013, the United States District Court for the District of South Carolina also entered Judgment in a Civil Action confirming the Award. A true and correct (and certified) copy of that Judgment in a Civil Action is attached hereto as Exhibit D.

5. On July 9, 2013, Defendant filed with the United States District Court for the District of South Carolina Allsouth Electrical Contractors, Inc.'s Rule 59(e), FRCP, Notice of Motion and Motion to Alter or Amend the Order and Judgment of June 13, 2013 (the "Rule 59 Motion"), which again sought to have the Award vacated. On July 19, 2013, the United States District Court for the District of South Carolina entered an Order that denied the Rule 59 Motion. A true and correct (and certified) copy of that Order is attached hereto as Exhibit E.

6. The Defendant did not appeal the June 13, 2013 Order (Exhibit C), the June 13, 2013 Judgment in a Civil Action (Exhibit D) or the July 19, 2013 Order (Exhibit E).

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorney


Edward James Coyne III
S.C. State Bar No. 78633
WILLIAMS MULLEN
300 N. 3rd Street, Suite 420
Wilmington, NC 28401
Telephone: 910.256.5135
Facsimile: 910.256.6451

Wilmington, North Carolina
November 11th, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of November, 2013, he has caused a the foregoing Notice of Filing to be served upon the other Party to this action by mailing a copy thereof to the below address, which is the last address known to him:

M. Brent McDonald
SMITH, BUNDY, BYBEE & BARNETT, P.C.
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Attorney for Defendant



Edward James Coyne III

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JULIE J. ARMSTRONG
CLERK OF COURT

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
CASE NO. 31 110 00193 11

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Claimant,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

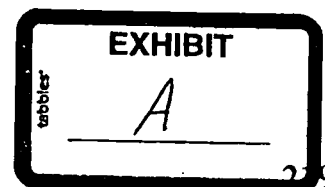
Respondent.

ARBITRATION AWARD

THIS MATTER was heard by me on October 30 through November 1, 2012, in Mt. Pleasant, South Carolina (the "Hearing"). Based on the oral testimony, claimant's exhibits 1-47 and 55 including all subparts, respondent's exhibits 1-5 and the parties post hearing briefs, I make the following FINDINGS OF FACT:

1. Claimant, Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC (Lend Lease), a Delaware limited liability company, entered into a Design Build Agreement dated March 1, 2003, under which Lend Lease was the "Design/Builder" and Tri-Command Managing Member LLC was the "Owner" (the "Prime Contract"). (Actus Lend Lease LLC changed its name to Lend Lease (US) Public Partnership LLC in or around July 2011) This contract was part of a public-private enterprise where the Owner was constructing facilities for the Department of the Navy.

2. The work to be performed under the Prime Contract included the demolition of existing houses and the construction of 256 new houses in neighborhoods known as Wake



Village, Weapons and Officers on the Department of the Navy's Marine Corps base commonly known as Parris Island. The sequence of the work in each area generally included the demolition of existing housing, bulk grading of the land, construction of roads and site infrastructure, construction of new housing units, and landscaping.

3. Even though the Owner was Tri-Command Managing Member LLC, pursuant to paragraph 3.16 of the Prime Contract the Department of the Navy had authority to require the Design Builder to correct defective work. Pursuant to Article 12 of the Prime Contract, the Design Builder had a right to contest any directive from the Navy or the Owner.

4. The Prime Contract incorporated plans that were 90 percent complete, and which subsequently were brought to 100 percent completion, approved for construction, and became the plans that Lend Lease agreed to build for the Owner. The site electrical plans for all areas were prepared by Power Plus.

5. On August 1, 2005, the Prime Contract was amended. The only material change was the name of the owner. Tri-Command Military Housing LLC became the owner. As the result of a merger in 2007, Tri-Command Military Housing LLC is now known as Atlantic Marine Corps Communities, LLC (hereinafter "Owner").

6. This dispute only involves the Weapons area and Phases 2, 3 and 4 of the Officers area. Phase I of the Officers area and Wake Village were performed by another subcontractor.

7. Lend Lease contracted with Allsouth Electrical Contractors, Inc. ("Allsouth") for the construction of the respective site electrical work (including the installation of underground primary electrical lines from riser poles to sectionalizing cabinets and transformers, the installation of underground secondary electrical lines from transformers to the general area of

house sites, the installation of underground low-voltage electrical lines to street lights, and the wiring of transformers and sectionalizing cabinets) in the Weapons neighborhood (subcontract dated September 30, 2004) and in Phases II (subcontract dated November 22, 2004), III (subcontract dated March 1, 2006) and IV (subcontract dated October 23, 2007) of the Officers neighborhood (collectively, the "Subcontracts").

8. Except as to the neighborhood or phase in which the work is to be performed, the Subcontracts are materially similar. The subcontracts provide that the subcontractor is bound by the Prime Contract and by any directives or rulings of the Owner. The Prime Contract provides that the Department of the Navy may direct correction of defective work. Therefore, it follows that the subcontractor will be bound by a Department of the Navy directive to correct defective work performed by the subcontractor. (paragraph 3.1.1) The subcontract also provides that the subcontractor is responsible for defective work even if discovered after the warranty period. (paragraph 6.7)

9. Each of Allsouth's contracts generally required the installation of electrical poles, primary lines to transformers, wiring of the transformers and secondary lines from the transformers to within 5-10 feet of the planned location for the houses. The Officers subcontract required that the primary lines be buried no less than 48" deep, and the secondary lines be buried no less than 36" deep. The Weapons subcontract required that the primary lines be buried no less than 48" deep and that the secondary lines be buried no less than 30" deep.

10. On all of Allsouth's subcontracts it was only required to install the secondary lines up to 5-10 feet of the house. Installation of the secondary line to the house was performed by others when the house was completed.

11. The Subcontracts incorporated specifications requiring, among other things, that warning tape be installed above the underground electrical lines and that transformers be tagged and wired in a workmanlike manner.

12. Based on the Prime Contract and the subcontracts, Allsouth was liable for any of its work found to be defective; Allsouth was required to correct the defective work if directed by the Owner or the Navy subject to the Design Builder's and Allsouth's rights to contest the directive through the dispute resolution processes in the Prime Contract and the subcontract.

13. Allsouth's work was performed over a non-consecutive period totaling approximately ten months. In all areas where Allsouth installed secondary lines, the lines were terminated approximately ten feet from the anticipated location of the house's meter box. The secondary lines were buried that last distance and connected to the house by another subcontractor after Allsouth had left the site. Allsouth completed all work under its contracts and was paid in full for all work.

14. Lend Lease completed its contract with the owner in April 2008. Lend Lease was issued a Certificate of Final Completion by the owner in 2008. Lend Lease was not notified of any defects in the work until February 18, 2010.

15. Lend Lease received a February 18, 2010 letter from the Owner regarding site electrical issues at the Marsh Landing (Officers), Wake Village and Weapons areas. The letter included a letter from the Public Works Officer for the US Marine Corps at Parris Island. The Public Works Officer noted deficiencies which included transformer installation and line depth deficiencies. This letter directed Lend Lease to investigate the site electrical work in all areas and submit a plan to correct any deficiencies.

16. The photographs provided by the Public Works Officer showed transformer code violations at the Weapons and Officer areas and improper depth of secondary lines in one location in the Weapons area and two locations in the Officer's area. The photographs did not show the locations of the test areas for the secondary lines; therefore, it is not clear whether any of the secondary lines shown in the photos were buried by Allsouth. At least some of the transformer deficiencies were in transformers installed by Allsouth.

17. On March 4, 2010, Lend Lease provided Allsouth the information that Lend Lease received from the Owner and the Public Works Officer and told Allsouth that Lend Lease was in the process of an investigation, and that Allsouth may be called upon to repair any of its work found to be deficient.

18. Steve Hammett of Hammett Electrical Contractors, Inc. was retained by Lend Lease to review the existing site electrical work in all areas. Hammett is an experienced electrical contractor who has performed work on Parris Island; however he is not a trained forensic investigator. Hammett conducted an inspection and submitted a report regarding his findings in the Officers neighborhood on or about April 14, 2010, and a report regarding his findings in the Weapons neighborhood on or about May 14, 2010. Both reports fell below the standard expected for forensic investigation reports. Notwithstanding this, both reports provided credible evidence of deficiencies in the site electrical work.

19. Steve Hammett's reports regarding the Weapons and Officers neighborhoods showed transformer code violations and installation deficiencies. They also showed primary and secondary lines not installed at proper depths. The primary line depths were determined by a Dynatel locator. Allsouth provided testimony that the Dynatel locator is not accurate for determining the depth of buried lines. However, Hammett testified that the accuracy of the

locator was checked several times by digging down to the line and every time the actual depth confirmed by digging was consistent with the depth provided by the locator. Therefore, despite the inadequacies of Hammett's reports, I find by the preponderance of the evidence that the primary lines in the Weapons and the Officers areas were not installed at the required depth in many locations. The secondary line depth was determined by digging down to the line. Based on Hammett's testimony and the photographs taken by Hammett I find that all of the secondary lines were checked at areas within 10 feet of the house. The undisputed testimony is that Allsouth did not install the secondary lines within 10 feet of the houses.

20. By letter dated May 21, 2010, Lend Lease forwarded Allsouth the Officers Report and requested that Allsouth confirm its intent to remedy the deficiencies in its work in the Officers neighborhood.

21. By letter dated May 28, 2010, Lend Lease forwarded Allsouth the Weapons Report and requested that Allsouth confirm its intent to remedy the deficiencies in its work in the Weapons neighborhood.

22. Allsouth responded to Lend Lease on June 22 and contended that the work had been done per the plans and specifications. Representatives of Allsouth and Lend Lease met on the site on June 23 to review the work.

23. Lend Lease encouraged Allsouth to provide its written comments prior to Lend Lease's official responses to the Owner and Department of the Navy.

24. Allsouth responded on July 1, 2010 and again denied liability for any of the alleged defects. Allsouth generally asserted that the deficiencies were the fault of others or were not deficiencies. Allsouth correctly noted that all secondary lines near the houses were installed

by others. Allsouth did not conduct or request Lend Lease to conduct further investigations to demonstrate that its work relating to the primary lines and transformers was not deficient.

25. Lend Lease continued corresponding with the Owner and the Facilities Maintenance & Engineering Office for almost a year requesting the Owner to accept Lend Lease's proposed corrective action plan. Lend Lease's corrective action plan provided, among other items, for repair of the transformer deficiencies and correction of the secondary line depths by splicing in new lines in the shallow areas near the houses. The Owner, based on the Navy's position, refused to accept the proposed corrective action plan and continued to demand that all primary and secondary lines and transformers be replaced in all areas.

26. Lend Lease eventually agreed to replace all primary and secondary lines, replace lines running to street lights, and rewiring and labeling all transformers in all areas (the "Repair Work"). The secondary lines had to be replaced primarily because the lines were very shallow near the houses, some lines were under buildings and the Navy would not allow splicing of the secondary lines even though splicing is allowed by the National Electrical Code.

27. Lend Lease did not pursue any contractual remedies available to it to contest the Owner's directive. Lend Lease did not conduct any further investigations of the work to determine if Allsouth's work was performed per the plans and specifications.

28. On May 3, 2011, Lend Lease notified Allsouth that after almost a year of negotiations with the Owner and the Department of the Navy Lend Lease will have to make repairs and the repairs will include the primary and secondary lines and the transformers. Lend Lease advised Allsouth that if Allsouth did not address the issues then it would be held responsible for the repair costs. Allsouth did not request Lend Lease to conduct further

investigations and did not take any actions to prove that the Hammett reports were incorrect. Allsouth responded by asking "what exactly are you expecting from Allsouth Electrical?"

29. By letter dated June 17, 2011, Lend Lease again requested that Allsouth participate in the Repair Work, and notified Allsouth that, whether or not Allsouth chose to participate, Lend Lease would proceed with the Repair Work in the next month.

30. Allsouth did not respond to Lend Lease's June 17, 2011 notice of intent to cure letter. Allsouth took no action to verify that its work was performed per the plans and specifications. Allsouth did not request Lend Lease to contest the Owner's directive nor to allow Allsouth to contest the directive.

31. Lend Lease subcontracted the Repair Work to Gaylor Electrical Contractors, Inc. ("Gaylor").

32. The Repair Work was performed by, among other things, establishing a new location for the transformers, digging a hole from which to bore, boring conduit for new primaries, secondaries and street light lines at the proper depths, relocating the transformers and sectionalizing cabinets to where the new lines exited the ground, wiring the relocated transformers and sectionalizing cabinets, and reconnecting to the houses.

33. The boring approach required the replacement of every line connected to a given transformer because once the transformer was relocated, none of the previously existing lines could be utilized. Even though some of the existing lines may have been at the proper depth, it was reasonable to bore all the new lines and relocate all the transformers because this was less expensive than attempting to save the lines at proper depth and it reduced the inconvenience to the residents.

34. In addition to the cost of Gaylor's work, Lend Lease incurred costs in performing the Repair Work related to engineering, equipment rental, site supervision, and landscaping.

35. During the performance of the Repair Work, William Devers of Lend Lease checked the depth of some of the primary and secondary lines and confirmed that they were not as deep as required. Even though Devers testified that some of the secondary lines were not deep enough in areas installed by Allsouth, the initial concern of the Navy was based on the shallow secondary lines near the houses and some secondary lines being under buildings. Based on this and the Navy's refusal to allow splicing of the secondary lines to remedy the shallow lines near the houses which required the replacement of the entire secondary line, I find by the preponderance of the evidence that the secondary lines had to be replaced due to the deficiencies not caused by Allsouth.

36. Lend Lease paid Gaylor \$769,992.32 to perform the Repair Work. (Claimant's Exhibit 45A). \$301,642 of this amount was for the installation of secondary lines. This amount was calculated as follows: Based on the plans (Claimant's exhibit 4), Hammett's testimony and Respondent's exhibits 4 and 5, Phase I of the Officers area had 2782 feet of secondary lines. Gaylor's schedule of labor and material costs showed a total of 8500 feet of secondary lines for the entire Officers area. (Claimant's exhibit 40- Gaylor's subcontractor exhibit 3) Therefore, the secondary lines for Phases II, III and IV are 5718 feet. Based on Gaylor's unit price of \$30.11 per foot the costs for the secondary lines in Phases II, III and IV is \$172,169. The amount for secondary lines in the Weapons area is \$129,473. (Claimant's exhibit 40- Gaylor's subcontract exhibit 3): \$172,169 plus \$129,473 equals \$301,642. Therefore, the amount Lend Lease paid to Gaylor to correct defective work for which Allsouth is responsible is \$468,350. (\$769,992-\$301,642)

37. Lend Lease paid \$70,902 for engineering, equipment rental, site supervision, and landscaping. All of this was necessary to complete the Repair Work. Since Allsouth is responsible for 60% of the direct costs for repair, I find that Allsouth is responsible for 60% of these indirect costs which is \$42,541.

38. I find that Lend Lease is not entitled to recover for general conditions, a construction fee, an incentive fee nor interest.

Based on the foregoing FINDINGS OF FACT, the preponderance of the evidence, South Carolina law and my authority as arbitrator I make the following CONCLUSIONS OF LAW:

1. Lend Lease was obligated to follow the Owner's and/or the Department of the Navy's direction regarding the Repair Work pursuant to paragraph 3.16 of the Prime Contract.

2. Allsouth was obligated to correct any defective work and was bound by the directive of the Owner and/or the Department of the Navy regarding the correction of defective work pursuant to paragraphs 3.1.1, 6.2 and 6.7 of the subcontract.

3. While Lend Lease did not formally contest the Navy's directive to replace the entire electrical site infrastructure, Lend Lease made a reasonable effort to convince the Navy to accept a reduced scope of repair.

4. Allsouth contends that Lend Lease should have formally contested the directive. Even if Lend Lease had contested the directive there is no assurance that it would have been successful. Further, Allsouth had reasonable opportunity to further investigate and prove that its primary lines were deep enough and that the transformers were installed per code and the contract documents. Allsouth was notified of the deficiencies in 2010 and was given a notice to cure in April 2011. Allsouth could have contested the directive or requested Lend Lease to contest it and perform the work under protest. It chose not to do so. Allsouth did not make any

effort to prove that its work was compliant with the contract documents. Allsouth chose to not take any action and I conclude that Lend Lease's decision to not contest the Navy's directive did not prejudice Allsouth.

5. Allsouth chose not to investigate further in response to Lend Lease's notices in 2010 and chose not to respond in any way to Lend Lease's June 17, 2011 notice to cure letter. Given Allsouth's refusal to perform the repairs as directed by the Navy, it was reasonable for Lend Lease to hire Gaylor to perform the repair work.

6. Allsouth was obligated to correct its defective work relating to the primary lines and the transformers. Allsouth breached its contract by not correcting the defective work after receiving proper notice from Lend Lease.

7. Lend Lease paid \$847,893 in replacing the electrical site infrastructure and Allsouth is responsible for \$510,891 of these costs for the correction of Allsouth's defective work.

8. Allsouth contends that it should be relieved of liability for its defective work because Lend Lease failed to perform its quality control inspections properly. There is conflicting evidence regarding Lend Lease's inspections of Allsouth's work. Based on the deficiencies in Allsouth's primary lines and transformers there is no doubt that to the extent quality control inspections were conducted they were inadequate or negligent. However, regardless of the quality of Lend Lease's inspections, Allsouth cannot avoid liability for its defective work because of Lend Lease's quality control efforts. The last paragraph of Exhibit 1 of the subcontract provides that:

Acceptance of work by Contractor's Quality Control or other personnel does not relieve the Subcontractor of responsibility to obtain acceptance of the Site Electrical Scope of Work by the Owner. Non-acceptance by the Owner will be remedied by or for

Subcontractor at Subcontractor's expense in the time and manner prescribed by Contractor.
Based on this provision, Lend Lease's quality control efforts do not relieve Allsouth of its obligation to perform the work properly.

The "duty to inspect" argument was rejected by the US District Court in *Tetra Tech EC/Tesoro Joint Venture v Sam Temples Masonry, Inc. et. al.*, 2012 U.S. Dist. LEXIS 13098 (D.S.C. Feb. 3, 2012). In *Tetra Tech* there were similar contractual provisions as in this case relating to the general contractor's duty to inspect the subcontractor's work. The contractual provisions in this case, like those in *Tetra Tech*, make it clear that Lend Lease owed no duty to Allsouth to inspect its work. To the extent that Allsouth assumed its work was correct based on Lend Lease's inspections, Allsouth was not relieved of its liability if the work was later found to be defective as portions of it were in this case.

9. Allsouth also contends that based on paragraph 6.10.3 of the Prime Contract, there is *prima facie* evidence that the work was performed per the contract documents since a certificate of final completion was issued. I find that Lend Lease provided sufficient evidence to overcome this presumption of compliance with the contract documents. The preponderance of the evidence is that Allsouth's primary lines were not installed 48" deep in many areas and that there were code violations and installation deficiencies in the transformers. While Allsouth presented some testimony that the transformers had been altered after Allsouth completed its work, I find that no credible evidence was presented that would suggest that the transformer deficiencies were caused by maintenance or any other activities after Allsouth completed its work.

10. Allsouth contends that Lend Lease's claim is for indemnity only and is therefore barred based on the contractual indemnity language and the principles of equitable indemnity. I

find that Allsouth's view of its indemnity obligations is too narrow. While it is true that the Court's February 9, 2012 order found that Lend Lease's action was in the nature of indemnity and was therefore subject to arbitration, Allsouth's contractual indemnity obligations are not limited to those set out in paragraph 9.1 of the subcontract. Allsouth also owes indemnity obligations to Lend Lease as set out in paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2, 6.7 and others.

By the nature of the contractual arrangement between the Owner, Lend Lease and Allsouth, any claim that Lend Lease has against Allsouth for defects that the Owner asserted against Lend Lease is by definition an indemnity claim. It was in this broad sense that the Court found that Lend Lease's claims against Allsouth were in the nature of indemnity.

11. Paragraph 13.8 of the subcontract provides:

Attorney's Fees. Should either party employ an attorney to institute suit to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement or to collect damages for the breach of the Agreement or to recover on a surety bond given by a party under this Agreement, including fees and costs incurred in arbitration, then the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges and expenses, including consultants and/or expert witness fees, expended or incurred therein.

I find that Lend Lease is the prevailing party and is entitled to recover arbitration administrative fees and expenses and reasonable attorneys fees and costs. Based on the affidavit of Edward James Coyne, III, Lend Lease incurred \$185,006 in fees and costs. Based on Coyne's affidavit, the evidence presented and South Carolina law I find that reasonable attorney fees and costs are 60% of the fees and costs incurred which is \$111,003.

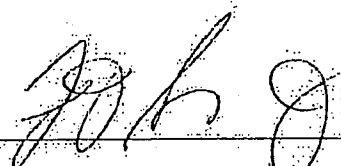
12. To the extent any claim or defense was asserted by either party and not specifically addressed in this award it is hereby denied.

Accordingly, Lend Lease is AWARDED as follows:

1. Lend Lease is awarded as against Allsouth the amount of \$510,891 for the cost incurred in correcting Allsouth's defective work.
2. Lend Lease is awarded as against Allsouth the amount of \$111,003 for the attorney fees and costs.
3. The administrative fees and case service fees of the AAA totaling \$9,500.00 and the compensation and expenses of the arbitrator totaling \$17,265.68 shall be borne by Allsouth. Therefore, Allsouth shall reimburse Lend Lease the additional sum of \$18,132.84 representing that portion of the fees and expenses in excess of the apportioned costs previously incurred by Lend Lease.

This Award is in full settlement of all claims submitted to this arbitration. The award shall be paid within 45 days of the date of the award. All claims not expressly granted herein are hereby, denied.

This the 29th day of November, 2012.



Franklin J. Smith, Jr., Arbitrator

AMERICAN ARBITRATION ASSOCIATION
Construction Industry Arbitration Tribunal

In the Matter of the Arbitration between:

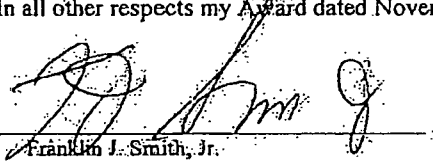
Re: 31 110 00193 11

Lend Lease (US) Public Partnerships LLC
f/k/a Actus Lend Lease LLC ("Claimant")
and
Allsouth Electrical Contractors, Inc. ("Respondent")

DISPOSITION FOR APPLICATION OF MODIFICATION OF AWARD

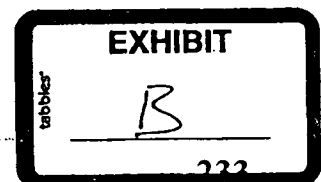
I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated March 1, 2003, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated November 29, 2012, and Respondent having filed an application for modification dated December 18, 2012, and Claimant having responded by e-mail dated December 31, 2012, do hereby, DECIDE, as follows: The Respondent's Motion for Modification of Award or Rehearing is DENIED. There were no computational errors in the calculation of the damages and the damages awarded are supported by the evidence presented as set out in the Award dated November 29, 2012.

In all other respects my Award dated November 29, 2012, is reaffirmed and remains in full force and effect.



Franklin J. Smith, Jr.

DATE: 3/4/13



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
U.S. DISTRICT COURT, CHARLESTON, SC

2013 JUN 13 A 9 29

Allsouth Electrical Contractors, Inc.,)

Petitioner,)

v.)

Lend Lease (US) Public Partnerships,)
LLC f/k/a Actus Lend Lease,)

Respondent.)

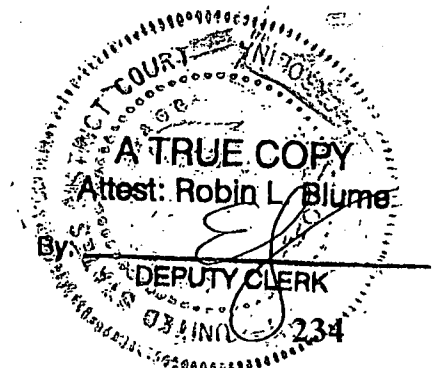
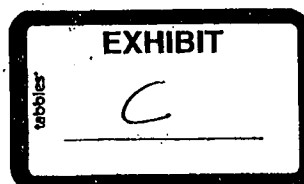
2:13-cv-514-RMG

ORDER

This matter is before the Court on Petitioner's petition to vacate an arbitration award pursuant to 9 U.S.C. § 10 (Dkt. No. 1) and Respondent's motion to dismiss the petition and confirm the award (Dkt. No. 10). For the reasons set forth below, the Court grants Respondent's motion and dismisses the petition to vacate the arbitration award.

Background

Respondent Lend Lease (US) Public Partnerships, LLC f/k/a Actus Lend Lease, ("Lend Lease") and Petitioner Allsouth Electrical Contractors, Inc. ("Allsouth") entered into contracts regarding certain electrical work at a construction project at Parris Island, South Carolina. Each of the contracts had an arbitration provision. Problems arose concerning the electrical work, and on July 22, 2011, Lend Lease filed a complaint in state court instituting a civil action against Allsouth alleging faulty workmanship at the construction project. In its complaint and subsequent motion to stay and compel arbitration, Lend Lease sought to compel arbitration of its dispute with Allsouth. Allsouth opposed the motion to compel arbitration, but the state court ordered the parties to arbitration by order dated February 2, 2012. (Dkt. No. 1-2). On October 30 through November 1, 2012, a hearing was held before an arbitrator and licensed stenographer.



The arbitrator then issued his findings of fact and conclusions of law on November 29, 2012, awarding damages and attorneys' fees to Lend Lease. (Dkt. No. 1-4). Allsouth then filed with this Court a petition to vacate the arbitration award on February 27, 2013. (Dkt. No. 1). Lend Lease, in response, filed a motion to dismiss the petition and confirm the award. (Dkt. No. 10). Allsouth then filed a response opposing Lend Lease's motion (Dkt. No. 16) and Lend Lease filed a reply (Dkt. No. 17).

Legal Standard

The Federal Arbitration Act ("FAA") provides four specific grounds by which a court can vacate an arbitration award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Further, a court may vacate an arbitration award under common law where the arbitrator acted in manifest disregard of the law. *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012). To vacate for manifest disregard, the moving party must show: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[] refused to heed that legal principle." *Id.* (quoting *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008)).

The Court's scope of review of an arbitrator's decision is "substantially circumscribed" and is "among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the

avoidance of the expense and delay associated with litigation.” *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010). Thus, the party challenging an arbitration award “must clear a high hurdle. It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable under § 10(a)(4).” *Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 272 (4th Cir. 2011) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010)).

Discussion

Allsouth contends the arbitrator in this case exceeded his powers in violation of 9 U.S.C. § 10(a)(4) because the award was not consistent with terms of Allsouth’s contractual indemnity obligations. Allsouth argues that the indemnification provision of the contract, Section 9.1, expressly excludes indemnification for damages to “the Subcontractor’s [i.e. Allsouth’s] work.” (Dkt. No. 16 at 7-8; 10-2 at 36-37). Thus, the arbitrator must have exceeded his authority by awarding damages for expenses incurred by Lend Lease to correct Allsouth’s work. (Dkt. No. 16 at 7-8).

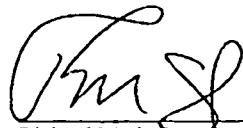
The arbitrator, however, found that several other sections of the contract contained provisions which imposed indemnity obligations on Allsouth. Specifically, the arbitrator held that paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2, 6.7 and others set out indemnity obligations. (Dkt. No. 1-4 at 14). Allsouth argues that these sections “have nothing to do with indemnification” and therefore provide no basis for the arbitrator’s award. (Dkt. No. 16 at 8). However, “neither misinterpretation of a contract nor an error of law constitutes a ground on which an award can be vacated.” *MCI*, 610 F.3d at 862 (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*,

142 F.3d 188, 193-94 (4th Cir. 1998)). “As long as the arbitrator[] [is] even arguably construing or applying the contract,’ . . . [his] award[] will not be disturbed.” *MCI*, 610 F.3d at 862 (quoting *Norfolk & W. Ry. Co. v. Transp. Commc’ns Int’l Union*, 17 F.3d 696, 700 (4th Cir. 1994)). Here, the Court finds that the arbitrator was interpreting and applying the contract, and therefore denies Allsouth’s petition to vacate the award.

Conclusion

For the reasons set forth above, the Court GRANTS Respondent’s motion to dismiss the petition and to confirm the arbitration award. (Dkt. No. 10). Accordingly, the Court DISMISSES Petitioner’s petition to vacate the arbitration award. (Dkt. No. 1).

AND IT IS SO ORDERED.


Richard Mark Gerge
United States District Court Judge

June 13, 2013
Charleston, South Carolina

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Allsouth Electrical Contractors Inc

Petitioner

v.

Lend Lease US Public Partnerships LLC

formerly known as

Actus Lend Lease

Respondent

Civil Action No. 2:13-cv-00514-RMG

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

☐ the plaintiff (name) _____ recover from the defendant (name) _____ the amount of _____ dollars (\$ _____), which includes prejudgment interest at the rate of _____%, plus postjudgment interest at the rate of _____%, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____ recover costs from the plaintiff (name) _____.

☒ other: the Respondent's motion to dismiss the petition and to confirm the arbitration award is GRANTED; Petitioner's petition to vacate the arbitration award is DISMISSED.

This action was (check one):

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

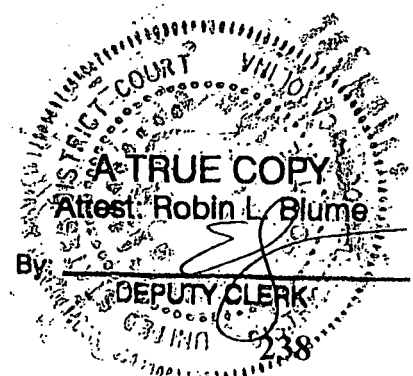
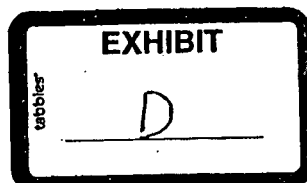
☒ decided by the Honorable Richard M. Gergel, United States District Judge, presiding.

Date: June 13, 2013

CLERK OF COURT LARRY W. PROPE

s/ S. Shealy

Signature of Clerk or Deputy Clerk



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

2013 JUL 19 A 9:11

Allsouth Electrical Contractors, Inc.,)
)
 Petitioner,)
)
 v.)
)
 Lend Lease (US) Public Partnerships,)
 LLC f/k/a Actus Lend Lease,)
)
 Respondent.)

2:13-cv-514-RMG

ORDER

A TRUE COPY

Attest: Robin L. Blume

By

DEPUTY CLERK

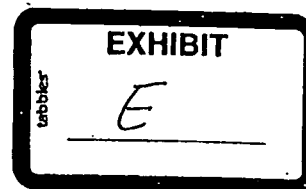
This matter is before the Court on Petitioner's motion to alter or amend a judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Dkt. No. 20). For the reasons set forth below, this motion is denied.

Background

On February 27, 2013, Petitioner filed a petition with this Court to vacate an arbitration award. (Dkt. No. 1). Respondent subsequently filed a motion to dismiss the petition and confirm the award. (Dkt. No. 10). On June 13, 2013, the Court issued an order granting Respondent's motion and judgment was entered confirming the arbitration award and dismissing the petition. (Dkt. Nos. 18, 19). Petitioner then timely filed the present motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Dkt. No. 20). Respondent then filed a response in opposition to the motion. (Dkt. No. 21).

Legal Standard

Federal Rule of Civil Procedure 59(e) governs motions to alter or amend a judgment; however, the rule does not provide a standard courts may use to grant such motions. The Fourth Circuit has articulated "three grounds for amending an earlier judgment: (1) to accommodate an



intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). “Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.” *Pac. Ins. Co.*, 148 F.3d at 403 (internal citations omitted). Nor are Rule 59 motions opportunities to rehash issues already ruled upon because a litigant is displeased with the result. See *Tran v. Tran*, 166 F. Supp. 2d 793, 798 (S.D.N.Y. 2001). Rule 59(e) provides an “extraordinary remedy that should be used sparingly.” *Pac. Ins. Co.*, 148 F.3d at 403.

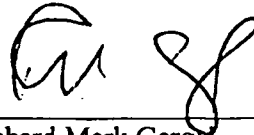
Discussion

By this motion, Petitioner asserts the Court’s order contains a clear error of law because the arbitrator was not interpreting the contract, but rather ruled on claims not submitted to him and therefore exceeded his authority. (Dkt. No. 20). Petitioner essentially reiterates the arguments it raised in its opposition to Respondent’s motion to dismiss and notes its disagreement with the Court’s ruling. Mere disagreement, however, does not support a Rule 59(e) motion. *Hutchinson*, 994 F.2d at 1082. The Court finds Petitioner has not identified a clear error of law or established manifest injustice.

Conclusion

For the reasons set forth above, the Court DENIES Petitioner’s motion to alter or amend a judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Dkt. No. 20).

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'RM Gergel', written over a horizontal line.

Richard Mark Gergel
United States District Court Judge

July 18, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Lend Lease (US) Public Partnership, LLC f/k/a Actus

Lend Lease,

☒ Plaintiff

v.

Allsouth Electrical Contractors, Inc.,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-10-5191

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Edward James Coyne III, Bar No. 78633

Address:

300 N. Third Street, Suite 420; Wilmington, NC
28401

phone: 910-256-5135 fax: 910-256-6451

e-mail: tcoyne@williamsmullen.com other:

Defendant's Attorney:

W.H. Bundy, Jr., Bar No. 1012

Address:

P.O. Box 1542; Mt. Pleasant, SC 29465-1542

phone: 843-881-1623 fax: 843-881-4406

e-mail: bundyw@bellsouth.net other:

bmcDonald@S3Blaw.com

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO.: 11-CP-10-5191

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Plaintiff,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Defendant.

PLAINTIFF'S RULE 59 MOTION

BY
JULIE J. ARMSTRONG
CLERK OF COURT
2013 DEC 12 PM 4:29

FILED

The Plaintiff respectfully moves the Court, pursuant to Rule 59, South Carolina Rules of Civil Procedure, to enter an order altering or amending its Order of November 27, 2013 granting Defendant Allsouth Electrical Contractors, Inc.'s Motion to Lift the Stay (the "Motion to Lift Stay") so as to deny the Motion to Lift Stay. In support hereof, the Plaintiff incorporates herein its November 14, 2013 Notice of Filing and further shows unto the Court as follows:

1. Defendant presented no authority supporting the relief it sought in the Motion to Lift Stay.
2. At the point that this Court ordered the Parties to arbitrate, "the circuit court was divested of jurisdiction over the case." Main Corp. v. Black, 357 S.C. 179, 181, 592 S.E.2d 300, 302 (2004). The Circuit Court does not resume jurisdiction over a case ordered to arbitration unless and until the parties choose to have the award ruled upon in some way by the Circuit Court. As explained by the Supreme Court:

Under the Uniform Arbitration Act, a party may move the circuit court to confirm an award, vacate an award, or modify or correct an award. Neither the petitioners nor the respondents have moved before the circuit court pursuant to any of these statutory provisions.

Therefore, the circuit court has not *resumed* jurisdiction over the case. In essence, the case has not reentered the judicial system until the parties choose to have the award ruled upon in some way by the circuit court.

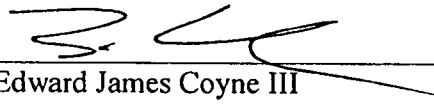
Id. (internal citation omitted).

3. Here, the Parties have not chosen to have the Arbitration Award ruled upon in some way by this Court. Rather, by the Defendant's election, the United States District Court for the District of South Carolina was asked to rule upon the Award. The Defendant has not filed a motion with this Court seeking any of the orders enumerated in Section 15-48-200 of the Code of Laws. Rather, without moving for anything more, Defendant moved that the stay be lifted.

4. At this juncture, the United States District Court for the District of South Carolina has entered judgment confirming the Award.

5. There is no motion for any substantive relief pending or apparent and no reason appears at this juncture for this Court to lift the stay and resume its jurisdiction over this matter.

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC, f/k/a ACTUS LEND
LEASE LLC,
by and through its attorney



Edward James Coyne III
S.C. State Bar No. 78633
WILLIAMS MULLEN
300 N. 3rd Street, Suite 420
Wilmington, NC 28401
Telephone: 910.256.5135
Facsimile: 910.256.6451

Wilmington, North Carolina
December 9, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of December, 2013, he has caused a the foregoing PLAINTIFF'S RULE 59 MOTION to be served upon the other Party to this action by mailing a copy thereof to the below address, which is the last address known to him:

M. Brent McDonald
SMITH, BUNDY, BYBEE & BARNETT, P.C.
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Attorney for Defendant


Edward James Coyne III

FILED
2013 DEC 12 PM 4:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
CASE NO. 31 110 00193 11

LEND LEASE (US) PUBLIC
PARTNERSHIP LLC f/k/a ACTUS
LEND LEASE LLC,

Claimant,

v.

ALLSOUTH ELECTRICAL
CONTRACTORS, INC.,

Respondent.

ARBITRATION AWARD

THIS MATTER was heard by me on October 30 through November 1, 2012, in Mt. Pleasant, South Carolina (the "Hearing"). Based on the oral testimony, claimant's exhibits 1-47 and 55 including all subparts, respondent's exhibits 1-5 and the parties post hearing briefs, I make the following FINDINGS OF FACT:

1. Claimant, Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC (Lend Lease), a Delaware limited liability company, entered into a Design Build Agreement dated March 1, 2003, under which Lend Lease was the "Design/Builder" and Tri-Command Managing Member LLC was the "Owner" (the "Prime Contract"). (Actus Lend Lease LLC changed its name to Lend Lease (US) Public Partnership LLC in or around July 2011) This contract was part of a public-private enterprise where the Owner was constructing facilities for the Department of the Navy.

2. The work to be performed under the Prime Contract included the demolition of existing houses and the construction of 256 new houses in neighborhoods known as Wake

Village, Weapons and Officers on the Department of the Navy's Marine Corps base commonly known as Parris Island. The sequence of the work in each area generally included the demolition of existing housing, bulk grading of the land, construction of roads and site infrastructure, construction of new housing units, and landscaping.

3. Even though the Owner was Tri-Command Managing Member LLC, pursuant to paragraph 3.16 of the Prime Contract the Department of the Navy had authority to require the Design Builder to correct defective work. Pursuant to Article 12 of the Prime Contract, the Design Builder had a right to contest any directive from the Navy or the Owner.

4. The Prime Contract incorporated plans that were 90 percent complete, and which subsequently were brought to 100 percent completion, approved for construction, and became the plans that Lend Lease agreed to build for the Owner. The site electrical plans for all areas were prepared by Power Plus.

5. On August 1, 2005, the Prime Contract was amended. The only material change was the name of the owner. Tri-Command Military Housing LLC became the owner. As the result of a merger in 2007, Tri-Command Military Housing LLC is now known as Atlantic Marine Corps Communities, LLC (hereinafter "Owner").

6. This dispute only involves the Weapons area and Phases 2, 3 and 4 of the Officers area. Phase I of the Officers area and Wake Village were performed by another subcontractor.

7. Lend Lease contracted with Allsouth Electrical Contractors, Inc. ("Allsouth") for the construction of the respective site electrical work (including the installation of underground primary electrical lines from riser poles to sectionalizing cabinets and transformers, the installation of underground secondary electrical lines from transformers to the general area of

house sites, the installation of underground low-voltage electrical lines to street lights, and the wiring of transformers and sectionalizing cabinets) in the Weapons neighborhood (subcontract dated September 30, 2004) and in Phases II (subcontract dated November 22, 2004), III (subcontract dated March 1, 2006) and IV (subcontract dated October 23, 2007) of the Officers neighborhood (collectively, the "Subcontracts").

8. Except as to the neighborhood or phase in which the work is to be performed, the Subcontracts are materially similar. The subcontracts provide that the subcontractor is bound by the Prime Contract and by any directives or rulings of the Owner. The Prime Contract provides that the Department of the Navy may direct correction of defective work. Therefore, it follows that the subcontractor will be bound by a Department of the Navy directive to correct defective work performed by the subcontractor. (paragraph 3.1.1) The subcontract also provides that the subcontractor is responsible for defective work even if discovered after the warranty period. (paragraph 6.7)

9. Each of Allsouth's contracts generally required the installation of electrical poles, primary lines to transformers, wiring of the transformers and secondary lines from the transformers to within 5-10 feet of the planned location for the houses. The Officers subcontract required that the primary lines be buried no less than 48" deep, and the secondary lines be buried no less than 36" deep. The Weapons subcontract required that the primary lines be buried no less than 48" deep and that the secondary lines be buried no less than 30" deep.

10. On all of Allsouth's subcontracts it was only required to install the secondary lines up to 5-10 feet of the house. Installation of the secondary line to the house was performed by others when the house was completed.

11. The Subcontracts incorporated specifications requiring, among other things, that warning tape be installed above the underground electrical lines and that transformers be tagged and wired in a workmanlike manner.

12. Based on the Prime Contract and the subcontracts, Allsouth was liable for any of its work found to be defective; Allsouth was required to correct the defective work if directed by the Owner or the Navy subject to the Design Builder's and Allsouth's rights to contest the directive through the dispute resolution processes in the Prime Contract and the subcontract.

13. Allsouth's work was performed over a non-consecutive period totaling approximately ten months. In all areas where Allsouth installed secondary lines, the lines were terminated approximately ten feet from the anticipated location of the house's meter box. The secondary lines were buried that last distance and connected to the house by another subcontractor after Allsouth had left the site. Allsouth completed all work under its contracts and was paid in full for all work.

14. Lend Lease completed its contract with the owner in April 2008. Lend Lease was issued a Certificate of Final Completion by the owner in 2008. Lend Lease was not notified of any defects in the work until February 18, 2010.

15. Lend Lease received a February 18, 2010 letter from the Owner regarding site electrical issues at the Marsh Landing (Officers), Wake Village and Weapons areas. The letter included a letter from the Public Works Officer for the US Marine Corps at Parris Island. The Public Works Officer noted deficiencies which included transformer installation and line depth deficiencies. This letter directed Lend Lease to investigate the site electrical work in all areas and submit a plan to correct any deficiencies.

16. The photographs provided by the Public Works Officer showed transformer code violations at the Weapons and Officer areas and improper depth of secondary lines in one location in the Weapons area and two locations in the Officer's area. The photographs did not show the locations of the test areas for the secondary lines; therefore, it is not clear whether any of the secondary lines shown in the photos were buried by Allsouth. At least some of the transformer deficiencies were in transformers installed by Allsouth.

17. On March 4, 2010, Lend Lease provided Allsouth the information that Lend Lease received from the Owner and the Public Works Officer and told Allsouth that Lend Lease was in the process of an investigation, and that Allsouth may be called upon to repair any of its work found to be deficient.

18. Steve Hammett of Hammett Electrical Contractors, Inc. was retained by Lend Lease to review the existing site electrical work in all areas. Hammett is an experienced electrical contractor who has performed work on Parris Island; however he is not a trained forensic investigator. Hammett conducted an inspection and submitted a report regarding his findings in the Officers neighborhood on or about April 14, 2010, and a report regarding his findings in the Weapons neighborhood on or about May 14, 2010. Both reports fell below the standard expected for forensic investigation reports. Notwithstanding this, both reports provided credible evidence of deficiencies in the site electrical work.

19. Steve Hammett's reports regarding the Weapons and Officers neighborhoods showed transformer code violations and installation deficiencies. They also showed primary and secondary lines not installed at proper depths. The primary line depths were determined by a Dynatel locator. Allsouth provided testimony that the Dynatel locator is not accurate for determining the depth of buried lines. However, Hammett testified that the accuracy of the

locator was checked several times by digging down to the line and every time the actual depth confirmed by digging was consistent with the depth provided by the locator. Therefore, despite the inadequacies of Hammett's reports, I find by the preponderance of the evidence that the primary lines in the Weapons and the Officers areas were not installed at the required depth in many locations. The secondary line depth was determined by digging down to the line. Based on Hammett's testimony and the photographs taken by Hammett I find that all of the secondary lines were checked at areas within 10 feet of the house. The undisputed testimony is that Allsouth did not install the secondary lines within 10 feet of the houses.

20. By letter dated May 21, 2010, Lend Lease forwarded Allsouth the Officers Report and requested that Allsouth confirm its intent to remedy the deficiencies in its work in the Officers neighborhood.

21. By letter dated May 28, 2010, Lend Lease forwarded Allsouth the Weapons Report and requested that Allsouth confirm its intent to remedy the deficiencies in its work in the Weapons neighborhood.

22. Allsouth responded to Lend Lease on June 22 and contended that the work had been done per the plans and specifications. Representatives of Allsouth and Lend Lease met on the site on June 23 to review the work.

23. Lend Lease encouraged Allsouth to provide its written comments prior to Lend Lease's official responses to the Owner and Department of the Navy.

24. Allsouth responded on July 1, 2010 and again denied liability for any of the alleged defects. Allsouth generally asserted that the deficiencies were the fault of others or were not deficiencies. Allsouth correctly noted that all secondary lines near the houses were installed

by others. Allsouth did not conduct or request Lend Lease to conduct further investigations to demonstrate that its work relating to the primary lines and transformers was not deficient.

25. Lend Lease continued corresponding with the Owner and the Facilities Maintenance & Engineering Office for almost a year requesting the Owner to accept Lend Lease's proposed corrective action plan. Lend Lease's corrective action plan provided, among other items, for repair of the transformer deficiencies and correction of the secondary line depths by splicing in new lines in the shallow areas near the houses. The Owner, based on the Navy's position, refused to accept the proposed corrective action plan and continued to demand that all primary and secondary lines and transformers be replaced in all areas.

26. Lend Lease eventually agreed to replace all primary and secondary lines, replace lines running to street lights, and rewiring and labeling all transformers in all areas (the "Repair Work"). The secondary lines had to be replaced primarily because the lines were very shallow near the houses, some lines were under buildings and the Navy would not allow splicing of the secondary lines even though splicing is allowed by the National Electrical Code.

27. Lend Lease did not pursue any contractual remedies available to it to contest the Owner's directive. Lend Lease did not conduct any further investigations of the work to determine if Allsouth's work was performed per the plans and specifications.

28. On May 3, 2011, Lend Lease notified Allsouth that after almost a year of negotiations with the Owner and the Department of the Navy Lend Lease will have to make repairs and the repairs will include the primary and secondary lines and the transformers. Lend Lease advised Allsouth that if Allsouth did not address the issues then it would be held responsible for the repair costs. Allsouth did not request Lend Lease to conduct further

investigations and did not take any actions to prove that the Hammett reports were incorrect. Allsouth responded by asking "what exactly are you expecting from Allsouth Electrical?"

29. By letter dated June 17, 2011, Lend Lease again requested that Allsouth participate in the Repair Work, and notified Allsouth that, whether or not Allsouth chose to participate, Lend Lease would proceed with the Repair Work in the next month.

30. Allsouth did not respond to Lend Lease's June 17, 2011 notice of intent to cure letter. Allsouth took no action to verify that its work was performed per the plans and specifications. Allsouth did not request Lend Lease to contest the Owner's directive nor to allow Allsouth to contest the directive.

31. Lend Lease subcontracted the Repair Work to Gaylor Electrical Contractors, Inc. ("Gaylor").

32. The Repair Work was performed by, among other things, establishing a new location for the transformers, digging a hole from which to bore, boring conduit for new primaries, secondaries and street light lines at the proper depths, relocating the transformers and sectionalizing cabinets to where the new lines exited the ground, wiring the relocated transformers and sectionalizing cabinets, and reconnecting to the houses.

33. The boring approach required the replacement of every line connected to a given transformer because once the transformer was relocated, none of the previously existing lines could be utilized. Even though some of the existing lines may have been at the proper depth, it was reasonable to bore all the new lines and relocate all the transformers because this was less expensive than attempting to save the lines at proper depth and it reduced the inconvenience to the residents.

34. In addition to the cost of Gaylor's work, Lend Lease incurred costs in performing the Repair Work related to engineering, equipment rental, site supervision, and landscaping.

35. During the performance of the Repair Work, William Devers of Lend Lease checked the depth of some of the primary and secondary lines and confirmed that they were not as deep as required. Even though Devers testified that some of the secondary lines were not deep enough in areas installed by Allsouth, the initial concern of the Navy was based on the shallow secondary lines near the houses and some secondary lines being under buildings. Based on this and the Navy's refusal to allow splicing of the secondary lines to remedy the shallow lines near the houses which required the replacement of the entire secondary line, I find by the preponderance of the evidence that the secondary lines had to be replaced due to the deficiencies not caused by Allsouth.

36. Lend Lease paid Gaylor \$769,992.32 to perform the Repair Work. (Claimant's Exhibit 45A). \$301,642 of this amount was for the installation of secondary lines. This amount was calculated as follows: Based on the plans (Claimant's exhibit 4), Hammett's testimony and Respondent's exhibits 4 and 5, Phase I of the Officers area had 2782 feet of secondary lines. Gaylor's schedule of labor and material costs showed a total of 8500 feet of secondary lines for the entire Officers area. (Claimant's exhibit 40- Gaylor's subcontractor exhibit 3) Therefore, the secondary lines for Phases II, III and IV are 5718 feet. Based on Gaylor's unit price of \$30.11 per foot the costs for the secondary lines in Phases II, III and IV is \$172,169. The amount for secondary lines in the Weapons area is \$129,473. (Claimant's exhibit 40- Gaylor's subcontract exhibit 3). \$172,169 plus \$129,473 equals \$301,642. Therefore, the amount Lend Lease paid to Gaylor to correct defective work for which Allsouth is responsible is \$468,350. (\$769,992- \$301,642)

37. Lend Lease paid \$70,902 for engineering, equipment rental, site supervision, and landscaping. All of this was necessary to complete the Repair Work. Since Allsouth is responsible for 60% of the direct costs for repair, I find that Allsouth is responsible for 60% of these indirect costs which is \$42,541.

38. I find that Lend Lease is not entitled to recover for general conditions, a construction fee, an incentive fee nor interest.

Based on the foregoing FINDINGS OF FACT, the preponderance of the evidence, South Carolina law and my authority as arbitrator I make the following CONCLUSIONS OF LAW:

1. Lend Lease was obligated to follow the Owner's and/or the Department of the Navy's direction regarding the Repair Work pursuant to paragraph 3.16 of the Prime Contract.

2. Allsouth was obligated to correct any defective work and was bound by the directive of the Owner and/or the Department of the Navy regarding the correction of defective work pursuant to paragraphs 3.1.1, 6.2 and 6.7 of the subcontract.

3. While Lend Lease did not formally contest the Navy's directive to replace the entire electrical site infrastructure, Lend Lease made a reasonable effort to convince the Navy to accept a reduced scope of repair.

4. Allsouth contends that Lend Lease should have formally contested the directive. Even if Lend Lease had contested the directive there is no assurance that it would have been successful. Further, Allsouth had reasonable opportunity to further investigate and prove that its primary lines were deep enough and that the transformers were installed per code and the contract documents. Allsouth was notified of the deficiencies in 2010 and was given a notice to cure in April 2011. Allsouth could have contested the directive or requested Lend Lease to contest it and perform the work under protest. It chose not to do so. Allsouth did not make any

effort to prove that its work was compliant with the contract documents. Allsouth chose to not take any action and I conclude that Lend Lease's decision to not contest the Navy's directive did not prejudice Allsouth.

5. Allsouth chose not to investigate further in response to Lend Lease's notices in 2010 and chose not to respond in any way to Lend Lease's June 17, 2011 notice to cure letter. Given Allsouth's refusal to perform the repairs as directed by the Navy, it was reasonable for Lend Lease to hire Gaylor to perform the repair work.

6. Allsouth was obligated to correct its defective work relating to the primary lines and the transformers. Allsouth breached its contract by not correcting the defective work after receiving proper notice from Lend Lease.

7. Lend Lease paid \$847,893 in replacing the electrical site infrastructure and Allsouth is responsible for \$510,891 of these costs for the correction of Allsouth's defective work.

8. Allsouth contends that it should be relieved of liability for its defective work because Lend Lease failed to perform its quality control inspections properly. There is conflicting evidence regarding Lend Lease's inspections of Allsouth's work. Based on the deficiencies in Allsouth's primary lines and transformers there is no doubt that to the extent quality control inspections were conducted they were inadequate or negligent. However, regardless of the quality of Lend Lease's inspections, Allsouth cannot avoid liability for its defective work because of Lend Lease's quality control efforts. The last paragraph of Exhibit 1 of the subcontract provides that:

Acceptance of work by Contractor's Quality Control or other personnel does not relieve the Subcontractor of responsibility to obtain acceptance of the Site Electrical Scope of Work by the Owner. Non-acceptance by the Owner will be remedied by or for

Subcontractor at Subcontractor's expense in the time and manner prescribed by Contractor. Based on this provision, Lend Lease's quality control efforts do not relieve Allsouth of its obligation to perform the work properly.

The "duty to inspect" argument was rejected by the US District Court in *Tetra Tech EC/Tesoro Joint Venture v Sam Temples Masonry, Inc. et. al.*, 2012 U.S. Dist. LEXIS 13098 (D.S.C. Feb. 3, 2012). In *Tetra Tech* there were similar contractual provisions as in this case relating to the general contractor's duty to inspect the subcontractor's work. The contractual provisions in this case, like those in *Tetra Tech*, make it clear that Lend Lease owed no duty to Allsouth to inspect its work. To the extent that Allsouth assumed its work was correct based on Lend Lease's inspections, Allsouth was not relieved of its liability if the work was later found to be defective as portions of it were in this case.

9. Allsouth also contends that based on paragraph 6.10.3 of the Prime Contract, there is *prima facie* evidence that the work was performed per the contract documents since a certificate of final completion was issued. I find that Lend Lease provided sufficient evidence to overcome this presumption of compliance with the contract documents. The preponderance of the evidence is that Allsouth's primary lines were not installed 48" deep in many areas and that there were code violations and installation deficiencies in the transformers. While Allsouth presented some testimony that the transformers had been altered after Allsouth completed its work, I find that no credible evidence was presented that would suggest that the transformer deficiencies were caused by maintenance or any other activities after Allsouth completed its work.

10. Allsouth contends that Lend Lease's claim is for indemnity only and is therefore barred based on the contractual indemnity language and the principles of equitable indemnity. I

find that Allsouth's view of its indemnity obligations is too narrow. While it is true that the Court's February 9, 2012 order found that Lend Lease's action was in the nature of indemnity and was therefore subject to arbitration, Allsouth's contractual indemnity obligations are not limited to those set out in paragraph 9.1 of the subcontract. Allsouth also owes indemnity obligations to Lend Lease as set out in paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2, 6.7 and others.

By the nature of the contractual arrangement between the Owner, Lend Lease and Allsouth, any claim that Lend Lease has against Allsouth for defects that the Owner asserted against Lend Lease is by definition an indemnity claim. It was in this broad sense that the Court found that Lend Lease's claims against Allsouth were in the nature of indemnity.

11. Paragraph 13.8 of the subcontract provides:

Attorney's Fees. Should either party employ an attorney to institute suit to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement or to collect damages for the breach of the Agreement or to recover on a surety bond given by a party under this Agreement, including fees and costs incurred in arbitration, then the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges and expenses, including consultants and/or expert witness fees, expended or incurred therein.

I find that Lend Lease is the prevailing party and is entitled to recover arbitration administrative fees and expenses and reasonable attorneys fees and costs. Based on the affidavit of Edward James Coyne, III, Lend Lease incurred \$185,006 in fees and costs. Based on Coyne's affidavit, the evidence presented and South Carolina law I find that reasonable attorney fees and costs are 60% of the fees and costs incurred which is \$111,003.

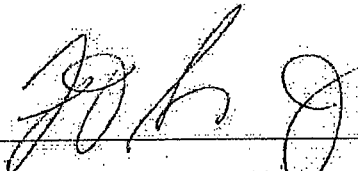
12. To the extent any claim or defense was asserted by either party and not specifically addressed in this award it is hereby denied.

Accordingly, Lend Lease is AWARDED as follows:

1. Lend Lease is awarded as against Allsouth the amount of \$510,891 for the cost incurred in correcting Allsouth's defective work.
2. Lend Lease is awarded as against Allsouth the amount of \$111,003 for the attorney fees and costs.
3. The administrative fees and case service fees of the AAA totaling \$9,500.00 and the compensation and expenses of the arbitrator totaling \$17,265.68 shall be borne by Allsouth. Therefore, Allsouth shall reimburse Lend Lease the additional sum of \$18,132.84 representing that portion of the fees and expenses in excess of the apportioned costs previously incurred by Lend Lease.

This Award is in full settlement of all claims submitted to this arbitration. The award shall be paid within 45 days of the date of the award. All claims not expressly granted herein are hereby, denied.

This the 29th day of November, 2012.



Franklin J. Smith, Jr., Arbitrator

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

MEMORANDUM ON APPEALABILITY IN THIS MATTER

On December 11, 2013, the Appellant Allsouth Electrical Contractors, Inc. ("Appellant") served and filed a Notice of Appeal regarding two orders issued by the lower court in which the lower court compelled the Appellant to arbitrate the claims of Respondent Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease ("Respondent"). On January 6, 2014, the clerk for the South Carolina Court of Appeals sent a letter to counsel for the Appellant requesting a memorandum on the "issue of appealability" of the orders challenged on appeal. The Appellant hereby submits the following:

Procedural History

The Respondent filed a civil action in the Court of Common Pleas for Charleston County on July 22, 2011. In the Complaint, the Respondent alleged that the claims made in its complaint were subject to arbitration. The Appellant answered the Complaint on September 29, 2011 and denied the allegations therein, including the allegations that this

action was subject to arbitration. The Respondent moved to stay the civil action it filed and to compel arbitration pursuant to S.C. Code Ann. Section 15-48-20 and Federal Arbitration Act, 9 U.S.C. Sections 1, *et seq.* ("FAA") on October 5, 2011. The Appellant responded to the motion and objected to arbitration.

The Honorable Deadra Jefferson entered an order staying the civil action and compelling arbitration on February 9, 2012, pursuant to Section 15-48-20 and the FAA.¹ The lower court found that whether or not to compel arbitration was an issue "for judicial determination." *See* February 9, 2012 Order, p. 2.

Importantly, the lower court did not dismiss the action, but stayed the civil action pending arbitration. The Appellant filed a Rule 59(e) on February 21, 2012 and the lower court denied the motion on March 6, 2012. As will be discussed below, the orders compelling arbitration were not immediately appealable.

An arbitration hearing was held on October 30, 2012 through November 1, 2012. The Arbitrator entered his award on November 29, 2012. Subsequent to the entry of the Arbitration Award, on December 18, 2012, Appellant served a Motion for Modification of the Award to the Arbitrator. This Motion was denied.

On February 27, 2013, Respondent filed a Notice and Petition to Vacate Award in the United States District Court for the District of South Carolina. The Appellant sought to vacate the arbitration award in federal court based upon the FAA and the issues in that action were as follows: (1) whether the arbitrator exceeded the authority provided to him under the alleged arbitration agreement and exceeded the authority granted to him pursuant to the order compelling arbitration; (2) whether the arbitrator manifestly disregarded the law; (3) whether the arbitrator prejudiced the rights of Allsouth; (4) whether the arbitrator so

¹ The lower court found that pursuant to Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) that the requirement of the South Carolina Arbitration Act, S.C. Code Ann. Section 15-48-10, to have the arbitration provision on the first page was preempted by the FAA.

imperfectly executed his obligations that a final, definite and mutual award upon the subject matter submitted was never made; (5) whether the arbitrator acted on information and material outside of the record; and (6) whether the arbitrator issued a contradictory and incomplete award. All of these issues arise out of 9 U.S.C. § 10 of the FAA and were brought in federal court as it was federal law that was to be applied. Importantly, the issue of whether or not the action was subject to arbitration in the first instance as ordered by the state lower court was not before the federal court, nor could it have been, and the Appellant expressly reserved its right to appeal the state court order(s) compelling arbitration.

On June 13, 2013, the United States District Court for the District of South Carolina entered an order dismissing the Petition to Vacate the Arbitration Award and confirming the Arbitration Award.

On August 26, 2013, the Appellant filed a Motion to Lift the Stay in the state court action. On November 27, 2013, the circuit granted the motion to lift the stay. It was only at this time that the Appellant had the right to appeal the orders which are the subject of this appeal and did so by filing the Notice of Appeal on December 11, 2013.

Legal Argument

An order “which stays [an] action and compels arbitration is not immediately appealable under S.C. Code Ann. Section 15-48-200.” Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995) *see also* Toler’s Cove Homeowners Ass’n v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003)(“[A] court’s order compelling arbitration is not immediately appealable under South Carolina law.”) This is true even if the actual arbitration will be conducted pursuant to the FAA because the procedural rules of the South Carolina Arbitration Act still apply. *See* Toler’s Cove, 586 S.E.2d at 584.

In the present case, once the lower court entered the Order staying the case and compelling arbitration, the Appellant did not have the right to appeal the order until after the arbitration of the matter and until after the stay was lifted. The fact that the Appellant chose to have the federal court review the arbitration award under federal law has no bearing on whether or not the action was subject to arbitration in the first instance—a judicial issue decided by the state court. The sole issue in this appeal is whether or not the lower court erred in compelling arbitration.

At the hearing on the motion to stay, the Respondent presented two South Carolina cases and argued that the South Carolina Court of Appeals would not have jurisdiction over any appeal of the orders compelling arbitration even if the stay were to be lifted. The cases cited, however, are inapposite to the present situation. First, in both cases, Main Corporation v. Black, 357 S.C. 179, 592 S.E.2d 300 (2004) and Steinmetz v. American Media Services, LLC, 393 S.C. 72, 709 S.E.2d 708 (2011), the parties consented to refer the actions to binding arbitration and, as such, an order compelling arbitration was not appealed. The issues in those cases were related to the findings in the arbitration award rather than an actual order from the state court. Second, if this Court were to read those cases in the manner argued by Respondent and in conjunction with Toler's Cove Homeowners Ass'n, 586 S.E.2d 581, then a party aggrieved by an order compelling arbitration would never be entitled to appellate review of the order compelling arbitration because it is not specifically enumerated in Section 15-48-200 which would preclude immediate appellate review and appellate review after the stay is lifted. Third, one circuit court judge cannot overrule the order of another circuit court judge. Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979). Accordingly, other than the motion to lift the stay, there is no other motion that could be ruled upon by the lower

court related to the order compelling arbitration. The sole issue on this appeal is whether the action was subject to arbitration in the first instance—a matter already ruled upon by the lower court prior to the arbitration.

Conclusion

In sum, the present appeal is proper because this is the only time the order of the lower court could be appealed to this court. Any other procedural construction by this Court would necessarily result in the prevention of a party aggrieved by an order compelling arbitration from access to the appellate courts.



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2011-CP-10-5191

RECEIVED

JAN 16 2014

Appellate Case No.: 2013-002679

SC Court of Appeals

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease is the ... Respondent,

vs.

Allsouth Electrical Contractors, Inc. is the Appellant.

PROOF OF SERVICE

I certify that I have served the Memorandum of Appealability in this matter on Lend Lease (US) Public Partnership, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on January 15, 2014, addressed to its attorney of record, Edward James "Trip" Coyne, III, Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420 , Wilmington, NC 28401


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January 15, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Lend Lease (US) Public Partnership LLC f/k/a Actus
Lend Lease LLC, Respondent,

v.

Allsouth Electrical Contractors, Inc., Appellant.

Appellate Case No. 2013-002679

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2015-UP-164
Submitted February 1, 2015 – Filed March 25, 2015

DISMISSED

Walter Henry Bundy, Jr., and Michael Brent McDonald,
both of Smith Bundy Bybee & Barnett, PC, of Mount
Pleasant, for Appellant.

Edward James Coyne, III, of Williams Mullen, of
Wilmington, NC, for Respondent.

PER CURIAM: Allsouth Electrical Contractors, Inc. (Allsouth) appeals the
circuit court's order granting Lend Lease (US) Public Partnership LLC f/k/a Actus

Lend Lease LLC's (Lend Lease's) motion to stay and compel arbitration. On appeal, Allsouth argues the circuit court erred in (1) compelling arbitration when the parties did not contractually agree to arbitrate all of Lend Lease's claims, (2) ignoring the plain language of the contracts and finding all of Lend Lease's causes of action were for indemnification, and (3) ruling on the merits of the claim.

We dismiss this appeal because this court lacks jurisdiction over an appeal from an order granting a motion to stay and compel arbitration. See *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 75, 709 S.E.2d 708, 710 (Ct. App. 2011) ("[I]n arbitration cases, this court only has jurisdiction over appeals from orders of the circuit court enumerated in section 15-48-200[(a)] of the South Carolina Code (2005)"). An order compelling arbitration is not appealable under section 15-48-200(a). See *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004) ("Section 15-48-200[(a)] does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration."). Thus, when the circuit court issued its order compelling arbitration, it was divested of jurisdiction over the case. See *Steinmetz*, 393 S.C. at 74; 709 S.E.2d at 709 ("When a case is sent to arbitration, the circuit court is divested of jurisdiction over the case."). Although the parties completed arbitration and the circuit court lifted the stay, the circuit court did not resume jurisdiction over the case because it did not issue an order to confirm, vacate, modify, or correct the arbitrator's award. See *id.* ("[U]pon motion of either party to confirm, vacate, modify, or correct the arbitrator's award, the circuit court resumes jurisdiction over the case."). Accordingly, because Allsouth did not appeal from an order enumerated in section 15-48-200(a), this court's jurisdiction has not been triggered and Allsouth's appeal has not been properly perfected. See *Main Corp. v. Black*, 357 S.C. 179, 182, 592 S.E.2d 300, 302 (2004) ("If the circuit court has not resumed jurisdiction and issued one of the orders enumerated in [s]ection 15-48-200[(a)], there is no court order that can be the subject of an appeal."); *Steinmetz*, 393 S.C. at 75, 709 S.E.2d at 710 ("[T]he type of order appealed from triggers this court's jurisdiction, not the fact that the circuit court has resumed jurisdiction and issued an order enumerated in section 15-48-200[(a)]."); *id.* at 76, 709 S.E.2d at 710 ("The post-arbitration motions allowed by statute in circuit court are more than a mere formality; they provide the basis for a properly perfected appeal of an arbitration award to this court."). Therefore, this appeal is dismissed.

DISMISSED.¹

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2011-CP-10-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Allsouth Electrical Contractors, Inc. (hereinafter sometime called "Petitioner" or "Allsouth") petitions this Court for Rehearing and Reconsideration of its Opinion filed March 25, 2015, on the grounds that this Court's dismissal of the appeal pursuant to the terms of S.C. Code Ann. Section 15-48-200(a) would result in the application of the statute authorizing access to the appellate courts for the party who is seeking arbitration and denying access to the appellate courts to the party opposing arbitration. This would make the statute unconstitutional as applied and result in the denial of equal protection and due process to the Petitioner.

Statement of the Case

On July 21, 2011, Respondent Lend Lease (US) Public Partnerships, LLC f/k/a Actus Lend Lease (hereinafter "Lend Lease" or "Respondent") served an arbitration demand in the amount of \$950,000 Allsouth. See Arbitration Demand (R. pp. 15-25). The majority of the demand was for the replacement of alleged defective work by Allsouth. Lend Lease stated in the arbitration demand that various causes of action against Allsouth were subject to arbitration. Lend Lease stated as follows:

"Claim by General Contractor against Electrical Subcontractor for breach of 4 separate but project related subcontracts based on defective workmanship and breach of the contract warranties for the defective work and failure to cure the defective work, as well as negligence and indemnity on a government facility."

See Arbitration Demand (R. pp. 15-25). On July 22, 2011, Lend Lease also filed a civil action in the South Carolina Court of Common Pleas for Charleston County. See Complaint¹ (R. pp. 26-54). The same legal causes of action alleged in the Arbitration Demand were

¹ The Complaint alleges causes of action relating to four separate subcontracts. As will be explained below, the terms of the four subcontracts relevant to the present appeal are substantially the same. Therefore, the cases of action related to Subcontract 1 will be discussed herein as representative.

alleged in the Complaint, though Lend Lease alleged it was entitled to arbitrate all of its causes of action against Allsouth. On September 29, 2011, Allsouth filed an Answer to Lend Lease's Complaint and alleged, in part, that Lend Lease was not entitled to arbitration because it failed to comply with the provisions of the Subcontracts related to arbitration. See Answer (R. pp. 55-63). On October 5, 2011, Lend Lease moved the circuit court in Charleston County for an Order compelling arbitration of its entire action and staying the matter. See Lend Lease Motion to Stay and Compel Arbitration (R. pp. 181-195). Allsouth once again objected to the arbitration of this matter pursuant to the plain terms of the Subcontract. On October 17, 2011, Allsouth filed a written objection to the motion to compel arbitration. See Allsouth Memorandum in Opposition to Motion to Compel Arbitration (R. pp. 196-199). Allsouth argued that Lend Lease failed to comply with the South Carolina Uniform Arbitration Act, and, therefore, its claim for arbitration was barred. Allsouth also argued that Lend Lease waived its right to bring its claims because it failed to bring the claims or suit within 180 days of the date it knew or should have known it had a potential cause of action against Allsouth. The contracts between the parties read, in pertinent part, as follows:

Claims, disputes, or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Except for claims by the Contractor for express

and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of legal or equitable proceedings would be barred by the applicable statute of limitations.

See Section 4.2.1.2 of Exhibit 1 to the Affidavit of Alan Roman² (R. pp. 119-120). Prior to the hearing, Allsouth served the affidavit of William Lesesne, President of Allsouth, which authenticated correspondence sent by Lend Lease regarding Lend Lease's knowledge of facts giving rise to its alleged claims against Allsouth. See Affidavit of William Lesesne with attachments (R. pp. 173-180). Lend Lease began sending the letters to Allsouth alleging that it had claims against it on May 21, 2010. This date is more than 180 days prior to Lend Lease's arbitration demand and its civil action.

At the hearing on the motion to compel arbitration, Lend Lease argued that the South Carolina Uniform Arbitration Act did not apply as it was bringing its claim pursuant to the Federal Arbitration Act. Lend Lease also argued that the foregoing section on the limitation of any rights to arbitration did not bar its claims as all of its causes of action are actually for indemnity, and, as such, the time limitations of the Subcontract do not apply. The Court ruled that though Lend Lease styled some of its causes of action under a heading for various other causes of action (including breach of contract, negligence, and breach of warranty), all of its claims actually "lie in indemnity." See Order filed 2/9/12 (R. p. 7). The Court ruled that the "180 day waiver deadline" did

² As noted in the Designation of Matter, the four Subcontracts are the same with regard to the provisions cited herein. For ease of reference, Allsouth will refer to Exhibit 1 of the Affidavit of Alan Roman, which is a Subcontract dated March 1, 2006, as representative of the other Subcontracts.

not apply to Lend Lease's demand for arbitration for any of its causes of action and the Court compelled the entire matter to arbitration. The Court necessarily ruled that the parties contractually agreed to arbitrate all of the claims brought by Lend Lease against Allsouth. On February 21, 2012, Allsouth filed a Motion to Alter or Amend the Order. See Motion to Alter or Amend (R. pp. 210-212). On March 6, 2012, the Court once again ruled that all of Lend Lease's causes of action were subject to arbitration because all of the claims "were in the scope of indemnity." See Order dated March 6, 2012, pp.3-4 (R. pp. 11-13).

Subsequent to the Arbitration of this action, on August 26, 2013, Allsouth filed a Motion to Lift the Stay in the state court action. On November 27, 2013, the circuit court granted the motion to lift the stay. See Order Lifting Stay (R. p. 13-14). Allsouth filed the Notice of Appeal on December 11, 2013.³

On March 25, 2015, this Court issued an unpublished Opinion which dismissed the appeal finding that the Court of Appeals did not have jurisdiction over the appeal and concluded:

"We dismiss the appeal because this court lacks jurisdiction over an appeal from an order granting a motion to stay and compel arbitration."

Opinion, p. 2. The Court went on to conclude as follows:

"An order compelling arbitration is not appealable under Section 15-48-200(a)."

Id.

³ This Court directed Allsouth to file a Memorandum on Appealability of this matter on January 6, 2014. Allsouth filed its memorandum on January 15, 2014. This court agreed to hear this appeal on March 17, 2014. That memorandum is incorporated herein to the extent it is necessary. (R.pp. 261-266).

Argument

I. The Court of Appeals erred in applying Section 15-48-200(a) in a manner that denies a party who is compelled to arbitrate by an order of the Circuit Court the right to ever appeal that order.

The Opinion of the Court of Appeals in this case clearly presents a violation of the Petitioner's right to equal protection and due process under the law. The Opinion expressly states that a party seeking to compel arbitration from the circuit court has the statutory right to appeal that decision while a party who is compelled to arbitrate has no right to appellate review. This cannot be the law.

A. The Court of Appeals' Opinion and their application and interpretation of Section 15-48-200(a) violates the Petitioner's right to equal protection under the laws.

South Carolina courts have indeed held that an order compelling arbitration is not immediately appealable. Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995) *see also* Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003)("[A] court's order compelling arbitration is not immediately appealable under South Carolina law."). As such, a party who argues that it is not required to arbitrate a dispute must first go through the arbitration process prior to appealing the order. In contrast, an order denying a motion to compel arbitration is immediately appealable. *See* S.C. Code. Therefore, a legal distinction already exists for some reason between a party seeking to compel arbitration and a party arguing it did not contractually agree to arbitration.

Whether or not that distinction is constitutional, however, is not at issue in the present case because the Opinion of the Court of Appeals expressly extends that legal distinction by ruling that a party compelled to arbitrate can never directly appeal the order

compelling arbitration because the statute does not give them jurisdiction to hear an appeal of such an order. The Court held as follows:

"We dismiss the appeal because this court lacks jurisdiction over an appeal from an order granting a motion to stay and compel arbitration."

Opinion, p. 2. This interpretation and application of the statute is wrong for at least three reasons.

First, it amounts to a statutory interpretation and application that an order compelling arbitration cannot ever be appealed while an order denying arbitration can be appealed. Such distinction is a violation of the equal protection clauses of the United States' Constitution (*See* U.S. Const. Amend. XIV) and South Carolina Constitution (*See* S.C. Const. art. I, Section 3.) The United States Supreme Court held in Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876 31 L. Ed. 2d 36 (1972) as follows:

"This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, and the continuing validity of these cases is not at issue here. **When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.**"

(emphasis supplied). The Court of Appeals' Opinion does not apply a procedural restraint on the right to appeal an order compelling arbitration, as has previously been applied by the Courts of this state, but it applies an absolute and outright restraint on any appeal of an order compelling arbitration. There is no basis for this distinction and as such is it violative of the Petitioner's right to equal protection. Perhaps the most compelling case on point by the South Carolina Supreme Court is the case of City of Spartanburg v. Cudd, 132 S.C. 264, 128 S.E. 360 (1925). In Cudd, the municipality in a condemnation case attempted to appeal a decision from the commissioners. 128 S.E. at 360. The landowner took that position that, though it had the right to appeal, the city did

not have any appeal rights under the governing statute. Id. The Circuit Court agreed with the Landowner and found that the “the Legislature had the right to deny the right of appeal if it chose to do so, and having made no provision for such appeal, none exists, in my opinion,...” Id. The Supreme Court reversed and held that the Circuit Court erred and stated as follows:

“The circuit court erred:

- (1) In holding that “the Legislature had the right to deny the right of appeal if it chose to do so, and having made no provision for such appeal, none exists, in my opinion,” the error being that in view of the provisions of section 15 of Article 5 of the Constitution, to the effect that the courts of common pleas “shall have appellate jurisdiction in all cases within the jurisdiction of inferior courts,” the Legislature has not the power to deny the right of appeal.
- (2) In not holding that, the right of appeal being conferred on the property owner, the attempted denial of that right to the municipality denies the equal protection of the law to the municipality in the discharge of its right and duty to adequately provide for the public necessity.
- (3) In not holding that the statute construed as denying the right to appeal to the city, while conferring such right on the property owner was unconstitutional, as offending against the equal protection clause of the Constitution, in so far as it attempts to deny the right of appeal to the city, but was valid and constitutional to the extent of providing a convenient means for initiating proceedings to acquire needed property for street purposes, and that therefore the court had jurisdiction, and it was its right and duty to entertain the appeal and try the case de novo, according to custom and to the statutes governing appeals in similar proceedings instituted by municipalities to condemn for other purposes.
- (4) In not holding that the proceeding here is a proceeding affecting property rights, and that the right of appeal is secured by the constitutional guarantee of due process.”

128 S.E. at 360-361 (emphasis supplied).

Second, the Court of Appeals impliedly stated in its opinion that in order to have jurisdiction a party must first have a legal right to appeal some other issue related to the arbitration prior to being able to appeal the order compelling arbitration. However, the standard applied to the appeal other issues related to the conduct of the arbitration itself (e.g. modification and vacation) is different from mere contract interpretation as is required for a Court to determine arbitrability in the first instance. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp., 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In essence, the Court of Appeals' holding that an aggrieved party forced to arbitrate would first have to meet the "narrow" and "limited" grounds for overturning an arbitration award (See C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances, inter alia, when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.")) prior to any appeal would also be a violation of the equal protection clause because the heightened standard for the appeal of an order compelling arbitration would, of course, be different from the standard to be applied to any appeal of an order refusing to compel arbitration which is immediately appealable (i.e. contract interpretation as a matter of law v. manifest disregard of the law). The present appeal is not an appeal from the arbitration award. It is an appeal from the Circuit Court's Order compelling arbitration. In South Carolina, the preliminary issue of arbitrability is for the Court to

decide. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) “The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise.”). Therefore, there would be nothing on any issue that was even decided by the arbitrator for which a modification or vacation would be appropriate. This gives rise to the third issue, discussed below, in that a Circuit Judge ruled that this case was subject to arbitration not the arbitrator.

Third, a Circuit Court order compelling arbitration entered prior to arbitration would not be subject to review by another Circuit Court Judge after arbitration. See Rule 43, SCRCP (“If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.”) *see also* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial). Therefore, the Petitioner could not even have made a “new” motion to the court after the Circuit Court’s original order that is the subject of this appeal.

Accordingly, the Court of Appeals’ Opinion holding that an order compelling arbitration simply cannot *ever* be directly appealed is in violation of the Petitioner’s right to equal protection and the Opinion should be reversed. The Petitioner is entitled to appeal the Circuit Court Order compelling arbitration just as a party who has been denied arbitration has the right to appeal.

B. The Court of Appeals’ Opinion and their application and interpretation of Section 15-48-200(a) violates the Petitioner’s right to due process under the law.

The Petitioner argues that it was not required to arbitrate a complaint/action that was brought against it alleging that Petitioner must pay to the Respondent money damages.

The Circuit Court ruled, incorrectly as argued by Petitioner, that the claim for money damages was subject to arbitration and this order forced the Petitioner into an arbitration that resulted in the award of money damages to the Respondent from the Petitioner. Therefore, this action involves the property (i.e. money) of the Petitioner. As the Supreme Court found in Cudd, when “a proceeding affecting property rights, and that the right of appeal is secured by the constitutional guarantee of due process.” 128 S.E. 361. The Court of Appeals’ Opinion that holds that the Petitioner has no right to appeal is a denial of its due process.

Moreover, because the Court of Appeals’ Opinion refuses to address the merits of the Petitioner’s arguments it necessarily denies the Petitioner Due Process. “Procedural due process requires notice and the opportunity to be heard.” Cameron & Barkley Co. v. South Carolina Procurement Review Panel, 317 S.C. 437, 454 S.E.2d 892, 98 Ed. Law Rep. 474 (S.C. 1995); U.S. Const. Amend. 14. The Petitioner has been denied an opportunity to be heard.

II. The Court of Appeals erred in finding that it did not have jurisdiction and in failing to rule on the merits of the Petitioner’s appeal.

Based upon the foregoing, the Court of Appeals erred in failing to reach the merits of the Petitioner’s appeal. The Court of Appeals should have found that its application and interpretation of the S.C. Code ann. Section 15-48-200(a) violated the equal protection and due process requirements of the United States and South Carolina Constitutions and exercised jurisdiction over this appeal.

Conclusion

For the aforementioned reasons, the Petitioner respectfully asks this Court to rehear and reconsider its ruling in light of the fact that its interpretation and application of S.C. Code Ann. Section 15-48-200(a) violates the due process and equal protection rights of the Petitioner. This Court should exercise jurisdiction over the appeal and hear the case on the merits.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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Attorneys for Petitioner Allsouth Electrical
Contractors, Inc.

Mt. Pleasant, South Carolina
April 7, 2015.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

Appellate Case No. 2013-002679

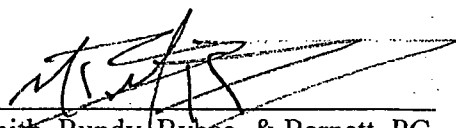
Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Respondent Lend Lease (US) Public Partnership, LLC, by depositing a copy with Federal Express Service shipping, pre-paid for overnight service, on April 7, 2015, addressed to its attorney of record, Edward James "Trip" Coyne, III, Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420, Wilmington, North Carolina 28401.



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Electrical Contractors, Inc.

Mt. Pleasant, South Carolina
April 7, 2015

The South Carolina Court of Appeals

Lend Lease (US) Public Partnership LLC f/k/a Actus
Lend Lease LLC, Respondent,

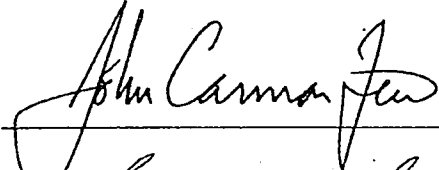
v.

Allsouth Electrical Contractors, Inc., Appellant.

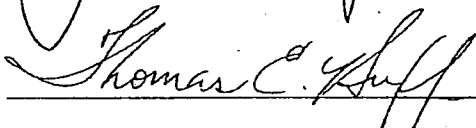
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ORDER

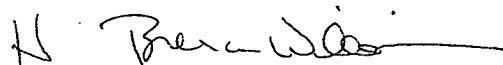
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Walter Henry Bundy, Jr., Esquire
Michael Brent McDonald, Esquire
Edward James Coyne, III, Esquire
The Honorable Deadra L. Jefferson

FILED

June 18, 2015

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No.: 2011-CP-10-5191

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Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

FINAL BRIEF OF APPELLANT

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STATUTES

United States Arbitration Act , 9 U.S.C. Section 1 et. seq.	
South Carolina Uniform Arbitration Act, S.C. Code Ann. Section 15-48-10 et. seq.	

Statement of Issues on Appeal

The Circuit Court erred in compelling arbitration in this action because the parties did not contractually agree to arbitrate all of the claims alleged by the Respondent. The Circuit Court erred in ignoring the plain language of the contracts and finding that all of the causes of action alleged by the Respondent were for indemnification. The Circuit Court erred in ruling on the merits of the claim.

Statement of the Case

On July 21, 2011, Respondent Lend Lease (US) Public Partnerships, LLC f/k/a Actus Lend Lease (hereinafter “Lend Lease”) served an arbitration demand in the amount of \$950,000 on Appellant Allsouth Electrical Contractors, Inc. (hereinafter “Allsouth”). See Arbitration Demand (R. pp. 15-25). The majority of the demand was for the replacement of alleged defective work by Allsouth. Lend Lease stated in the arbitration demand that various causes of action against Allsouth were subject to arbitration. Lend Lease stated as follows:

“Claim by General Contractor against Electrical Subcontractor for breach of 4 separate but project related subcontracts based on defective workmanship and breach of the contract warranties for the defective work and failure to cure the defective work, as well as negligence and indemnity on a government facility.”

See Arbitration Demand (R. pp. 15-25). On July 22, 2011, Lend Lease also filed a civil action in the South Carolina Court of Common Pleas for Charleston County. See Complaint¹ (R. pp. 26-54). The same legal causes of action alleged in the Arbitration Demand were alleged in the Complaint, though Lend Lease alleged it was entitled to arbitrate all of its causes of action against Allsouth. On September 29, 2011, Allsouth filed an Answer to Lend Lease’s Complaint and alleged, in part, that Lend Lease was not entitled to arbitration because it failed to comply with the provisions of the Subcontracts related to arbitration.

¹ The Complaint alleges causes of action relating to four separate subcontracts. As will be explained below, the terms of the four subcontracts relevant to the present appeal are substantially the same. Therefore, the cases of action related to Subcontract 1 will be discussed herein as representative.

See Answer (R. pp. 55-63). On October 5, 2011, Lend Lease moved the circuit court in Charleston County for an Order compelling arbitration of its entire action and staying the matter. See Lend Lease Motion to Stay and Compel Arbitration (R. pp. 181-195). Allsouth once again objected to the arbitration of this matter pursuant to the plain terms of the Subcontract. On October 17, 2011, Allsouth filed a written objection to the motion to compel arbitration. See Allsouth Memorandum in Opposition to Motion to Compel Arbitration (R. pp. 196-199). Allsouth argued that Lend Lease failed to comply with the South Carolina Uniform Arbitration Act, and, therefore, its claim for arbitration was barred. Allsouth also argued that Lend Lease waived its right to bring its claims because it failed to bring the claims or suit within 180 days of the date it knew or should have known it had a potential cause of action against Allsouth. The contracts between the parties read, in pertinent part, as follows:

Claims, disputes, or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. **Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims.** In no event, however, may a claim be brought after the time when institution of

legal or equitable proceedings would be barred by the applicable statute of limitations.

See Section 4.2.1.2 of Exhibit 1 to the Affidavit of Alan Roman² (R. pp. 119-120). Prior to the hearing, Allsouth served the affidavit of William Lesesne, President of Allsouth, which authenticated correspondence sent by Lend Lease regarding Lend Lease's knowledge of facts giving rise to its alleged claims against Allsouth. See Affidavit of William Lesesne with attachments (R. pp. 173-180). Lend Lease began sending the letters to Allsouth alleging that it had claims against it on May 21, 2010. This date is more than 180 days prior to Lend Lease's arbitration demand and its civil action.

At the hearing on the motion to compel arbitration, Lend Lease argued that the South Carolina Uniform Arbitration Act did not apply as it was bringing its claim pursuant to the Federal Arbitration Act. Lend Lease also argued that the foregoing section on the limitation of any rights to arbitration did not bar its claims as all of its causes of action are actually for indemnity, and, as such, the time limitations of the Subcontract do not apply. The Court ruled that though Lend Lease styled some of its causes of action under a heading for various other causes of action (including breach of contract, negligence, and breach of warranty), all of its claims actually "lie in indemnity." See Order filed 2/9/12 (R. p. 7). The Court ruled that the "180 day waiver deadline" did not apply to Lend Lease's demand for arbitration for any of its causes of action and the Court compelled the entire matter to arbitration. The Court necessarily ruled that the parties contractually agreed to arbitrate all of the claims brought by Lend Lease against Allsouth. On February 21, 2012, Allsouth filed a Motion to Alter or Amend the Order.

² As noted in the Designation of Matter, the four Subcontracts are the same with regard to the provisions cited herein. For ease of reference, Allsouth will refer to Exhibit 1 of the Affidavit of Alan Roman, which is a Subcontract dated March 1, 2006, as representative of the other Subcontracts.

See Motion to Alter or Amend (R. pp. 210-212). On March 6, 2012, the Court once again ruled that all of Lend Lease's causes of action were subject to arbitration because all of the claims "were in the scope of indemnity." See Order dated March 6, 2012, pp.3-4 (R. pp. 11-13).

Subsequent to the Arbitration of this action, on August 26, 2013, Allsouth filed a Motion to Lift the Stay in the state court action. On November 27, 2013, the circuit court granted the motion to lift the stay. See Order Lifting Stay (R. p. 13-14). Allsouth filed the Notice of Appeal on December 11, 2013.³

Statement of the Facts

Allsouth subcontracted with Lend Lease for the performance of electrical infrastructure work related to the construction of military housing on Parris Island in South Carolina. See Exhibit 1 to the Affidavit of Alan Roman (R. pp. 97-172). Beginning on May 21, 2010, Lend Lease sent correspondence to Allsouth stating that it claimed Allsouth's work was not in accordance with the Subcontract documents and that Allsouth was required to correct Allsouth's own work as a result of various warranties contained in the Subcontract documents. See Affidavit of William Lesesne with attachments (R. pp. 173-180). Allsouth denied that it was required to perform any repairs to its work. See Complaint, ¶ 13 (R. p. 31).

As stated above, on July 22, 2011, Lend Lease brought a civil action against Allsouth. Lend Lease alleged, in pertinent part, as follows⁴:

³ This Court directed Allsouth to file a Memorandum on Appealability of this matter on January 6, 2014. Allsouth filed its memorandum on January 15, 2014. This court agreed to hear this appeal on March 17, 2014. That memorandum is incorporated herein to the extent it is necessary. (R. pp. 261-266).

⁴ See Footnote 1, above.

4. Lend Lease entered into certain contracts for construction ("Contracts") with Tri- Command Managing Member LLC ("Owner"), the owner of certain real property in Beaufort, South Carolina, under the general terms of which Lend Lease was to demolish and renovate certain existing housing units and related facilities located at the Beaufort Marine Corps Air Station Parris Island Marine Corps Recruiting Depot or the Beaufort Naval Hospital in Beaufort County, South Carolina ("Projects").

5. In connection with the performance of the Contracts and Projects, Lend Lease, entered into four (4) separate contracts with Allsouth to perform a part or portion of the electrical work required by the Contracts and Projects ("Subcontracts"). Specifically, Lend Lease and Allsouth entered into the following four Subcontracts:

6. Allsouth undertook to perform all four Subcontracts.

7. Subsequently, the Owner discovered, and notified Lend Lease, **that the electrical work performed by Allsouth was defective and that its workmanship was faulty based on, among other things, the primary and secondary feeders being installed out of compliance with the plans and specifications for reasons including, among other things, that electrical conduit was not buried at the specified depths.**

8. **The Owner has required that the work be redone to comply with the plans and specifications (the "Repairs").**

9. Lend Lease has given notice to Allsouth of the defective work and the Owner's demand and made demand on Allsouth **to honor its contracts and warranties by making the Repairs.**

10. **Despite notice and demand, Allsouth has failed and refused to honor its contracts and warranties and has not made the Repairs.**

11. Per the requirements of the Owner, Lend Lease has undertaken, after notice to Allsouth, to enter into subcontract with a third-party electrical subcontractor, namely Gaylor, Inc., to make the Repairs, with an initial cost estimate in excess of \$700,000.00.

12. Lend Lease, in addition to incurring the cost of the Repairs, will incur other damages including, but not limited to, the costs of extended general conditions and overhead to manage the Repairs (estimated at approximately \$90,000.00), the costs of additional work necessitated by the Repairs, such as the replacement of fencing and landscaping (estimated at approximately \$90,000.00), and additional damages as may be incurred in connection with the defective work and making the Repairs all as will be shown.

13. Lend Lease has given notice to Allsouth, but Allsouth has failed to resolve the matter.

14. Contemporaneous with the filing of this civil action, Lend Lease has served and filed with the American Arbitration Association a demand for arbitration of the claims asserted herein in accordance with the provisions of the Subcontracts. The cover pages of each of the Subcontracts, along with the respective arbitration provisions, are attached hereto as Exhibit 1.

15. Any conditions precedent to the commencement of this action have been met.

MOTION TO STAY AND TO COMPEL ARBITRATION

16. The Claims set forth herein are subject to arbitration pursuant to the express terms of the Subcontracts. See Exhibit 1.

17. The matters herein are in commerce.

18. Lend Lease had made a demand for arbitration.

19. Lend Lease is entitled to entry of an order staying this action pending arbitration and to an order compelling the parties to arbitration pursuant to the terms of the Subcontracts.

FIRST CLAIM FOR RELIEF (Breach of Subcontract 1)

21. Pursuant to the terms of Subcontract 1, Allsouth was required to perform its work in a good and workmanlike manner and to comply with the plans and specifications.

22. Allsouth did not perform its work in a good and workmanlike manner and failed to comply with the plans and specifications.

23. Allsouth thereby breached Subcontract 1, and said breach caused Lend Lease damage.

24. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

SECOND CLAIM FOR RELIEF (Breach of Warranty, Subcontract 1)

28. Pursuant to the terms of Subcontract 1, Allsouth guaranteed and warranted its work and agreed to correct all defective work.

29. The work performed by Allsouth was defective, but, despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

30. Allsouth has breached its guarantee and warranty in Subcontract 1, and said breach caused Lend Lease damage. 31. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

FOURTH CLAIM FOR RELIEF (Negligence, Subcontract 1)

41. Allsouth performed the work required by Subcontract 1 in a negligent manner.

42. Said negligence caused Lend Lease damage.

43. Lend Lease's damages include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.

See Complaint, (Emphasis Supplied) (R. pp. 29-34). With regard to its indemnity cause of action against Allsouth, Lend Lease alleged as follows:

“35. Pursuant to the terms of Subcontract 1, Allsouth agreed to indemnify Lend Lease from any and all claims, damages, losses, and expenses, including reasonable attorneys’ fees and costs arising out of Allsouth work that caused, among other things, injury or destruction of tangible property **other than the work itself**, including loss of use.

36. The work performed by Allsouth was defective, but despite demand, Allsouth has failed and refused to correct the work or to otherwise honor its guarantee and warranty.

37. As a result of Allsouth’s defective work underground conduit will need to be relaid resulting in damage to surrounding tangible property **other than the work itself**, thereby invoking the terms of Allsouth’s indemnity.

38. Allsouth has failed to and refused to honors [sic] its indemnity.

39. Lend Lease is entitled to a judgment against Allsouth for all damages incurred **within the scope of Allsouth’s indemnity.**”

See Complaint, (emphasis supplied) (R. p. 33). The indemnification claim in the Complaint alleged language from Section 9.1 which states as follows:

9.1 Subcontractor's Performance

Unless provided differently in Section 11, hereafter, to the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Tri-Command Military Housing LLC, Tri-Command Managing Member, LLC, Actus Lend Lease Holdings, LLC, Actus Lend Lease, LLC, J.P. Morgan Company, National Association, MBIA Insurance Corporation, and the United States of America, Department of Navy from and against all claims, damages losses and expenses, including but not limited to attorneys' fees arising out of or resulting from the performance of the Subcontractor's Work **provided that any such claim, damage, loss or expense is attributable to** bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property **(other than the Subcontractor's Work)...**"

Notwithstanding the plain language of the Complaint and the Subcontract, the circuit court compelled arbitration of the entire matter for all causes of action and for all of the alleged damages. Section 4.2.1.2 states as follows:

Claims, disputes, or other matters in question between the parties arising out of or related to the Subcontract, not finally resolved pursuant to the above Section, shall be subject to and decided by binding arbitration as follows:

Any controversy or claim arising out of, or in any way related to this Agreement shall be decided by binding arbitration, pursuant to the United States Arbitration Act (Title 9, U.S. Code), under the supervision of the American Arbitration Association ("AAA"), or privately before an arbitrator unaffiliated with AAA if the parties mutually agree, and in accordance with the Construction Industry Dispute Resolution Procedures of AAA in effect at the time the demand for arbitration is filed. A single arbitrator shall decide the dispute or claim, and he/she shall be selected pursuant to the AAA rules. Any award rendered by the arbitrator may be entered in any court of competent jurisdiction. **Except for claims by the Contractor for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by Subcontractor, and except for those claims waived by Subcontractor as a result of acceptance by it of progress and/or final payment, a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim. If a claim is not brought within that time period, the party shall be deemed to have waived any such claims. In no event, however, may a claim be brought after the time when institution of**

legal or equitable proceedings would be barred by the applicable statute of limitations.

It is undisputed that Lend Lease had actual knowledge of the facts giving rise to the claims the circuit court compelled to arbitration more than 180 days prior to demanding arbitration. It is undisputed that this is not a “broad” arbitration provision. This provision is limited by the parties’ contractual agreement.

Standard of Review

“[T]he construction of a clear and unambiguous contract is a matter of law for the court, [and the Appellate Court will] review the trial court’s findings of law *de novo*.” Lee v. University of South Carolina, Op. No. 27372 (S.C.Sup.Ct. filed April 2, 2014)(Shearouse Adv.Sh. No. 13) *citing* Watts v. Monarch Builders, Inc., 272 S.C. 517, 520, 252 S.E.2d 889, 891 (1979). “The determination of whether a claim is subject to arbitration is subject to *de novo* review.” Landers v. Federal Deposit Insurance Corporation, 402 S.C. 100, 739 S.E.2d 209 (2013).

Argument

The Circuit Court erred in compelling arbitration in this action because the parties did not contractually agree to arbitrate all of the claims alleged by the Respondent. The Circuit Court erred in ignoring the plain language of the contracts and finding that all of the causes of action alleged by the Respondent were for indemnification. The Circuit Court erred in ruling on the merits of the claim.

Lend Lease moved the circuit court to compel arbitration for all of its causes of action. The causes of action were distinct in their claims of liability and damages. As explained below, the indemnification cause of action was distinct in the type of damages alleged. Specifically, the indemnification cause of action was limited to property damage “other than the work itself.” The Circuit Court was in error in sending all of the claims to

arbitration because Allsouth did not contractually agree to arbitrate all of the causes of action brought by Lend Lease.

“Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration. Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp., 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993). “When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary state-law principles that govern the formation of contracts.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

“The law in this state regarding the construction and interpretation of contracts is well settled.” Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). “In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.” *Id.* at 46, 747 S.E.2d at 184. “Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” *Id.* “If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.” *Id.* Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.” S.C. Dep't. of Transp. v. M & T Enters. of Mt. Pleasant, 379 S.C. 645, 655,

667 S.E.2d 7, 13 (Ct.App.2008) (citations omitted).

The parties to the Subcontract did not agree to submit any claims for damages other than express or implied indemnification to arbitration after the passage of 180 days from when the party seeking arbitration knew or should have known of facts giving rise to the claim. Allsouth acknowledges that when there is a doubt regarding arbitration, that it is the policy of this state and the federal courts to resolve the doubt in favor of arbitration. Landers, 739 S.E.2d at 213. However, here, there is no doubt. It is undisputed that Lend Lease had actual knowledge of the facts giving rise to its claim more than 180 days prior to demanding arbitration. The plain and express language of the subcontract does not allow for arbitration for any claims other than express or implied indemnity because of the “180 day provision.” Therefore, the only claims subject to arbitration were for express or implied indemnity. The Circuit Court, however, compelled arbitration for all of the claims. This was in error. A plain reading of Lend Lease’s Complaint and Arbitration Demand shows that Lend Lease sought to bring claims that were outside of any contractual indemnity⁵ claim. The indemnity provision of the contract reads as follows:

9.1 Subcontractor’s Performance

Unless provided differently in Section 11, hereafter, to the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Tri-Command Military Housing LLC, Tri-Command Managing Member, LLC, Actus Lend Lease Holdings, LLC, Actus Lend Lease, LLC, J.P. Morgan Company, National Association, MBIA Insurance Corporation, and the United States of America, Department of Navy from and against all claims, damages losses and expenses, including but not limited to attorneys’ fees arising out of or resulting from the performance of the Subcontractor’s Work **provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor’s Work)...**”

⁵ The complaint does not allege a cause of action for equitable indemnity.

Lend Lease acknowledged this limited right of contractual indemnity when it made its indemnity claim, and alleged as follows:

37. As a result of Allsouth's defective work underground conduit will need to be relaid resulting in damage to surrounding tangible property **other than the work itself, thereby invoking the terms of Allsouth's indemnity.**

Importantly, the remaining causes of action, in addition to having different elements of proof⁶, alleged claims for different types of damages. The breach of contract, negligence and breach of express warranty claims alleged damages for the "cost to repair the defective work." These claims are not covered by the contractual indemnification provision, and, thus, are not subject to arbitration. See Sherlock Homes Pub, Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct.App. 2010)(wherein the Court noted that a contractual indemnification claim is "subject to strict construction."). There is no claim that the indemnification provision was ambiguous. Indeed, in its complaint, Lend Lease recognized that the contractual indemnification was limited to damage to "tangible property other than the work itself."

The United States Supreme Court in KPMG, LLP v. Cocchi, 132 S.Ct. 23 (2011) held as follows:

"Agreements to arbitrate that fall within the scope and coverage of the Federal Arbitration Act (Act), 9 U.S.C. § 1 et seq., must be enforced in state and federal courts. State courts, then, "have a prominent role to play as enforcers of agreements to arbitrate." Vaden v. Discover Bank, 556 U.S. 49, 59, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009). The Act has been interpreted to require that if a dispute presents multiple claims, some

⁶ The elements of negligence are : (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The elements for a breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id.

arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). **From this it follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from nonarbitrable claims. A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration.**”

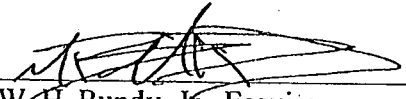
Though KPMG, LLP was dealing with the refusal to grant arbitration, the holding remains that a Court must decipher which claims are arbitrable and which claims are nonarbitrable. As explained above, this analysis is centered directly on what the parties agreed in their contract. Here, the Circuit Court erred in compelling arbitration of all of the claims and in ignoring the plain language of the Subcontract.

The circuit Court also erred in ruling that all of the claims were “lie in indemnity and fall within the indemnity exception of the arbitration clause.” See Order dated 2/9/2012 (R. p. 7). By making this ruling the Court necessarily ruled on the merits of the claims by expanding the contractual indemnification provided for in the Subcontract. Essentially, by expanding the terms of the Subcontract into a right to arbitrate all of the claims because of all of the claims were for “indemnification,” the Court expanded the scope of the indemnification agreed upon by the parties. This was in error. See Zabinski, 553 S.E.2d at 118 (“in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.”).

Conclusion

For the aforementioned reasons, the Orders of the Circuit Court compelling arbitration should be reversed.

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July 11, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No. 2011-CP-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC.....Respondent,

v.

Allsouth Electrical Contractors, Inc.....Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. This Appeal must be dismissed because it is an improper attempt to appeal directly from an order compelling arbitration.
- II. This Appeal must be dismissed because, under South Carolina Law and the Federal Arbitration Act, it amounts to an untimely effort to have an arbitration award vacated.
- III. This Appeal must be dismissed because it raises only a non-justiciable question in light of the Federal Court having entered Judgment confirming the Arbitration Award.
- IV. The Trial Court did not err in entering the order compelling arbitration.

STATEMENT OF THE CASE

On July 22, 2010, Respondent filed a Complaint instituting a civil action in the South Carolina Court of Common Pleas for Charleston County (the “State Court”) against Appellant. (R. pp. 28–54). Contemporaneously, Respondent served an arbitration demand on Appellant. Among other things, the Complaint alleged that the dispute between the Parties was subject to arbitration. (R. pp. 31, 43). The Appellant filed an Answer, which, among other things, denied that the dispute was subject to arbitration. (R. p. 59).

On October 7, 2011, the Respondent filed a Motion to Stay and Compel Arbitration. (R. pp. 181–195). On October 17, 2011, the Appellant filed Defendant Allsouth Electrical Contractors, Inc. Memorandum in Opposition to the Plaintiff’s Motion to Stay and Compel Arbitration. (R. pp. 196–198). On December 5, 2011, Respondent filed its Memorandum in Support of Motion to Stay and Compel Arbitration. (R. pp. 200–208). On December 5, 2011, the Respondent’s Motion to Stay and Compel Arbitration came on for hearing, and was heard, before the State Court, the Honorable Deadra L. Jefferson presiding. Tr. (R. pp. 64–93).

On February 9, 2012, Judge Jefferson entered an Order Granting Plaintiff's Motion to Stay and Compel Arbitration, which ordered the State Court Action be stayed and the Parties proceed to arbitrate the dispute between them. (R. p. 8). Subsequently, on March 6, 2012, Judge Jefferson denied Appellant's Rule 59 Motion. Def. R. 59 Motion (R. pp. 210–211); Order Den. Def.'s Rule 59, SCRCF Mot. (R. pp. 9–12).

The Parties proceeded to arbitrate, and on November 29, 2012, an Arbitration Award was entered in the arbitration styled "*Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC v. Allsouth Electrical Contractors, Inc.*," (American Arbitration Association Case No. 31 110 00193 11), (the "Award" entered in the "Arbitration"). (R. pp. 219–232). Subsequently, the Arbitrator denied Appellant's request for modification of the Award or rehearing. (R. p. 233).

On February 27, 2013, Appellant filed with the United States District Court for the District of South Carolina (the "Federal Court") Allsouth Electrical Contractors, Inc.'s Notice and Petition to Vacate an Arbitration Award pursuant to 9 U.S.C. § 10 (the "Petition to Vacate"), which sought to have the Award vacated. On June 13, 2013, the Federal Court entered an Order that dismissed the Petition to Vacate and confirmed the Award. (R. pp. 234–237). Also on June 13, 2013, the Federal Court entered a Judgment in a Civil Action, reducing the Award to judgment. (R. p. 238). Subsequently, on July 19, 2013, the Federal Court denied Appellant's request that it alter or amend its Order and Judgment. (R. pp. 239–241).

The Appellant did not appeal the Federal Court's June 13, 2013 Order, June 13, 2013 Judgment in a Civil Action, or July 19, 2013 Order.

The Appellant did not file any motion with the State Court seeking any of the orders enumerated in *Section 15-48-200 of the South Carolina Code of Laws*, nor did the Appellant file any motion with the State Court seeking to vacate, correct, or modify the Award pursuant to the Federal Arbitration Act.

On August 26, 2013—almost nine months after the entry of the Award and more than two months after the entry of Judgment by the Federal Court—Appellant filed Defendant Allsouth Electrical Contractors, Inc.’s Motion to Lift the Stay, seeking to have the State Court lift the stay that had been entered by Judge Jefferson at the time she compelled the Parties to arbitrate on February 9, 2012. (R. p. 213). This was the first action of either Party before the State Court since Judge Jefferson’s March 6, 2012 Order Denying Defendant’s Rule 59, SCRC Motion. On November 14, 2013, Respondent filed a Notice of Filing, providing the State Court with copies of, among other things, the Award and the Judgment in a Civil Action. (R. pp. 216–241).

On November 27, 2013, the State Court, the Honorable Kristi L. Harrington presiding, granted Defendant Allsouth Electrical Contractors, Inc.’s Motion to Lift the Stay. (R. p. 13). On December 9, 2013, Respondent served Plaintiff’s Rule 59 Motion, seeking to have Judge Harrington alter or amend her November 27, 2013 ruling. (R. pp. 244–245). This Motion was never ruled upon due to the immediate appeal.

Appellant filed a Notice of Appeal on December 11, 2013, and, per this Court’s direction, a Memorandum on Appealability in this Matter on January 15, 2014.

ARGUMENT

I. This Appeal must be dismissed because it is an improper attempt to appeal directly from an order compelling arbitration.

Even when, as here, the Federal Arbitration Act is applicable, South Carolina's procedural rule on the appealability of arbitration orders applies. See Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 610–12, 586 S.E.2d 581, 584–85 (2003).¹ In this regard, a South Carolina State Court's order compelling arbitration is not immediately appealable as it is not one of the grounds stated in *Section 15-48-200 of the South Carolina Code of Laws. Id.*

In Main Corp. v. Black, the South Carolina Supreme Court ruled that:

South Carolina Code Ann. § 15-48-180 (Supp. 2002) states that making an agreement providing for arbitration in South Carolina confers jurisdiction on the court to “enforce the agreement under this chapter and to enter judgment on an award thereunder.” The only appeals that may be taken under the Uniform Arbitration Act are from orders issued by the circuit court pursuant to *S.C. Code Ann. § 15-48-200* (Supp. 2002). If the circuit court has not resumed jurisdiction and issued one of the orders enumerated in *Section 15-48-200*, there is no court order that can be the subject of an appeal. Since the circuit court did not resume jurisdiction over the case, the Court of Appeals cannot have jurisdiction over the case. *S.C. Code Ann. § 14-8-200 (a)* (Supp. 2002) (The Court of Appeals “shall have jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit or family court”) (emphasis supplied).

357 S.C. 179, 181–82, 592 S.E.2d 300, 301–302 (2004) (explaining that at the time the trial judge sent the case to an arbitrator, the circuit court was divested of jurisdiction and that neither the appellants nor the respondents had filed a motion with the circuit court to

¹ The suggestion in the Initial Brief of the Appellant, p. 3, that Respondent argued to the State Court at the hearing on the Motion to Stay and Compel Arbitration that the South Carolina Uniform Arbitration Act did not apply is simply baseless. Tr. (R. pp. 64–93).

confirm, vacate, modify or correct the award as would be necessary to cause the trial court to resume jurisdiction). *Section 15-48-200(a)* enumerates the orders of the Circuit Court that may be appealed in an arbitration case as follows:

An appeal may be taken from:

- (1) An order denying an application to compel arbitration made under § 15-48-20;
- (2) An order granting an application to stay arbitration made under § 15-48-20(b);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this chapter.

S.C. Code Ann. § 15-48-200(a) (2005). In this regard, it is plain that in an arbitration case, any party hoping to eventually bring its arguments before this Court must first seek (or be subject to) an order enumerated in *Section 15-48-200* from the Circuit Court, and then appeal from that order. Indeed, this was recently clarified when this Court explained that:

The basis of the court's holding in *Main Corporation* is that in arbitration cases, this court only has jurisdiction over appeals from orders of the circuit court enumerated in *section 15-48-200*. In other words, the type of order appealed from triggers this court's jurisdiction, not the fact that the circuit court has resumed jurisdiction and issued an order enumerated in *section 15-48-200*. The post-arbitration motions allowed by statute in circuit court are more than a mere formality; they provide the basis for a properly perfected appeal of an arbitration award in this court.

Steinmetz v. Am. Media Serv., LLC, 393 S.C. 72, 75–76, 709 S.E.2d 708, 710 (Ct. App. 2011) (internal citation omitted).

Here, neither the Appellant nor the Respondent sought any order enumerated in *Section 15-48-200* from the State Court (and the State Court entered no such orders). Rather, the Appellant attempts to appeal directly from the Order Granting Plaintiff's Motion to Stay and Compel Arbitration. As this is plainly an arbitration case, and appeal is not taken from an order enumerated in *Section 15-48-200*, this Court lacks jurisdiction over this Appeal and the Appeal must be dismissed. *S.C. Code Ann. § 15-48-200 (2005)*; Main Corp. (affirming dismissal of appeal by Court of Appeals for lack of jurisdiction); Steinmetz (dismissing appeal for lack of jurisdiction).

The Appellant should not be heard to complain that it must necessarily be able to appeal from the Order Granting Plaintiff's Motion to Stay and Compel Arbitration at some point. *Cf. Memo. Appealability* p. 4 (R. p. 264). The Appellant could have properly raised any valid arguments it had before this Court by seeking to have the Circuit Court vacate, correct or modify the Award (including upon the contention that the Award exceeded the scope of matters properly referable to arbitration). *See Sentry Eng'g and Const. Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 350, 338 S.E.2d 631, 634 (1985) (explaining that "S.C. Code Ann. Sections 15-48-130 (Supp. 1984) and 15-48-140 (Supp. 1984) provide the exclusive procedures for vacating or modifying awards where arbitrators exceed their powers or award upon a matter not properly submitted to them.") Rather, the Appellant chose to seek redress solely in the Federal Court, where the Award was confirmed and reduced to judgment. (R. pp. 234–241).

Regarding the Appellant's Memorandum on Appealability in this Matter, which addresses some of this issues raised in this argument, it is notable that:

- The Memorandum on Appealability argues that the Appellant went to Federal Court because it sought to apply the Federal Arbitration Act (R. p. 263); it is, however, plain that the Federal Arbitration Act “does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise,” (Am. Health and Life Ins. Co. v. Heyward, 272 F. Supp. 2d 578, 580 (D.S.C. 2003)), and that the South Carolina Court of Common Pleas has the ability to interpret and enforce the Federal Arbitration Act, (*see, e.g. Circle S. Enterp., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986) (reversing the circuit court for failure to apply the Federal Arbitration Act)). Indeed, absent diversity of citizenship, the Federal Court would not have had jurisdiction.
- The Memorandum on Appealability states that the Appellant, before the Federal Court, “expressly reserved its right to appeal the state court order(s) compelling arbitration.” (R. p. 263). What actually happened was that the Appellant stated, in a footnote to Allsouth Electrical Contractors, Inc.’s Notice and Petition to Vacate and Arbitration Award Pursuant to Rule 9 U.S.C. § 10, which was filed with the Federal Court,² that:

Allsouth does not waive its right to appeal the state court’s order(s) compelling arbitration. However, for the purpose of this action, even if the Court was correct in ordering arbitration of the indemnity cause

² Docket Entry 1 in Allsouth Electrical Contractors Inc. v. Lend Lease US Public Partnership LLC (D.S.C. 2:13-cv-00514-RMG).

of action, which is expressly denied by Allsouth, the arbitrator exceeded his authority in issuing an award that [sic] on grounds other than indemnification.

There was no agreement or court approval regarding any such reservation.

Nor is it apparent from where such right arose or how it existed.

The Appeal must be dismissed.

II. **This Appeal must be dismissed because, under South Carolina Law and the Federal Arbitration Act, it amounts to an untimely effort to have an arbitration award vacated.**

The question of arbitrability now raised by the Appellant was put before the Arbitrator, who, among other things, found and concluded:

Allsouth contends that Lend Lease's claim is for indemnity only and is therefore barred based on the contractual indemnity language and the principles of equitable indemnity. I find that Allsouth's view of its indemnity obligations is too narrow. While it is true that the [State] Court's February 9, 2012 order found that Lend Lease's action was in the nature of indemnity and was therefore subject to arbitration, Allsouth's contractual indemnity obligations are not limited to those set out in paragraph 9.1 of the subcontract. Allsouth also owes indemnity obligations to Lend Lease as set out in paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2, 6.7 and others. By nature of the contractual arrangement between the Owner, Lend Lease and Allsouth, any claim that Lend Lease has against Allsouth for defects that the Owner asserted against Lend Lease is by definition an indemnity claim.

(R. pp. 230–231).

Under either the Federal Arbitration Act or the Uniform Arbitration Act a party displeased with an arbitration award must attack the award—by seeking to modify or vacate—within either three (3) months or ninety (90) days. 9 U.S.C. § 12 (requiring that notice of motion to vacate or modify under the Federal Arbitration Act be served within

three months after the award is delivered or filed); *S.C. Code Ann. § 15-48-130(b) (2005)* (requiring that application under Uniform Arbitration Act to vacate an award be made within ninety days of delivery of copy of the award); *S.C. Code § 15-48-140 (2005)* (requiring same regarding application to modify). No motion to vacate or modify was filed with the State Court, at any time.

For this Court to now rule, as the Appellant requests, that no claims should have been before the Arbitrator would be wholly inconsistent with the Award and amount to an untimely vacatur or modification of the Award. See *Sentry Eng'g and Const. Inc.*, 287 S.C. at 350–51, 338 S.E.2d at 634 (holding that award becomes law of case where no motion to vacate or modify is filed within 90 days of delivery of a copy of the award).³

Accordingly, the Appeal must be dismissed.

III. This Appeal must be dismissed because it raises only a non-justiciable question in light of the Federal Court having entered Judgment confirming the Arbitration Award.

The Appellant chose to pursue vacatur in the Federal Court. (R. p. 234). On June 13, 2013, the Federal Court entered an Order that, among other things, dismissed Appellant's Petition to Vacate and confirmed the Award. (R. pp. 234, 237). On even date, the Federal Court also entered a Judgment in a Civil Action, confirming the Award. (R. p. 238).

Even if this Appeal were otherwise proper, any result would necessarily be purely academic or amount to an attack on the Order and Judgment in a Civil Action of the Federal Court. Neither objective is permissible, and, accordingly, this appeal must be

³ Notably, even in the instance where a party seeks to vacate an arbitration award on the grounds that there was in fact no arbitration agreement, that party must make application for vacatur within 90 days of delivery of the award. *S.C. Code Ann. §§ 15-48-130(a)(5) and (b)(2005)*.

dismissed. *See, e.g., Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (explaining “[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.”) (citations omitted) (some alterations in original); *G.C. and K.B. Inv., Inc. v. Wilson*, 326 F.3d 1096, 1106–1110 (9th Cir. 2003) (affirming district court’s enjoining party from further pursuing state court orders the effect of which was to attempt to have declared invalid an arbitration as the same amounted to an attempt to circumvent the district court’s judgment confirming the award entered in that arbitration).

Notably, to the extent the Memorandum on Appealability argues that “the issue of whether or not the action was subject to arbitration in the first instance as ordered by the state lower court was not before the federal court,” (R. p. 263), such argument is belied by the language of the Federal Court’s Order, which provides:

Allsouth contends the arbitrator in this case exceeded his powers in violation of 9 U.S.C § 10(a)(4) because the award was not consistent with terms of Allsouth’s contractual indemnity obligations. Allsouth argues that the indemnification provision of the contract, Section 9.1, expressly excludes indemnification for damages to “the Subcontractor’s [i.e. Allsouth’s] work.” (Dkt. No. 16 at 7-8; 10-2 at 36-37). Thus, the arbitrator must have exceeded his authority by awarding damages for expenses incurred by Lend Lease to correct Allsouth’s work. (Dkt. No. 16 at 7-8).

The arbitrator, however, found that several other sections of the contract contained provisions which imposed indemnity obligations on Allsouth. Specifically, the arbitrator held that paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2,

6.7 and others set out indemnity obligations. (Dkt. No. 1-4 at 14). Allsouth argues that these sections “have nothing to do with indemnification” and therefore provide no basis for the arbitrator’s award. (Dkt. 16 at 8) However, “neither misinterpretation of a contract nor an error of law constitutes a ground on which an award can be vacated.” *MCI*, 610 F.3d at 862 (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193-194 (4th Cir. 1998)). “‘As long as the arbitrator[] [is] even arguably construing or applying the contract,’...[his] award [] will not be disturbed.” *MCI*, 610 F.3d at 862 (quoting *Norfolk & W. Ry Co. v. Transp. Commc’ns Int’l Union*, 17 F.3d 696, 700 (4th Cir. 1994)). Here the Court finds that the arbitrator was interpreting and applying the contract, and therefore denies Allsouth’s petition to vacate the award.

(R. pp. 236–237). In this regard, however the Appellant may attempt to couch its argument, the objective is identical to that before both the Arbitrator and the Federal Court—to avoid compliance with any award pursuant to an argument that the Appellant was no longer obligated to arbitrate any claim. *Cf. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 7–12 (1983) (explaining that a proceeding in state court to stay arbitration and a proceeding in federal court to compel arbitration involved “the identical issue of arbitrability of the claims” such that the determination by either court would amount to *res judicata* as to the other).

Appellant chose to go to Federal Court. Appellant chose not to appeal the Order and Judgment in a Civil Action of the Federal Court. Whether or not these decisions were wise, they resulted in a final adjudication that precludes this Appeal. Interestingly, taken to its logical conclusion, Appellant’s position would allow it to return to this Court in an effort to circumvent the Award even if the United States Supreme Court had affirmed its final adjudication (i.e. confirmation by the Federal District Court). Principles

of comity, res judicata, estoppel, waiver, good faith and equity prohibit such a wasteful approach to judicial resources.

As it would be improper for this Court to pass on a purely academic question or to undercut the Order and Judgment in a Civil Action of the Federal Court, this appeal presents no justiciable issue and must be dismissed.

IV. The Trial Court did not err in entering the order compelling arbitration.

The arbitration provisions at issue here provide in pertinent part that:

Except for claims by [Respondent] for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by [Appellant], . . . a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim.

(R. pp. 119–120 (emphasis in original)). In essence, the Appellant now urges that it was error for the State Court to have compelled it to arbitrate any claims because it does not believe any part of the dispute between the Parties to encompass claims that either (a) came within the exception “for express or implied indemnity arising from or relating to claims for patent or latent defects” or (b) were first known to Respondent within the 180 days prior to it demanding arbitration.

First, this argument is incomplete in that it fails to acknowledge that, even if the Appellant’s argument was otherwise wholly correct, which it is not, it would leave the result that the State Court was correct to compel some claims to arbitration. *Compare* (R. p. 84, line 9–p. 85, line 22) (counsel for Appellant arguing that the label on claims in the Complaint is determinative as to whether they seek express or implied indemnity arising from or relating to claims for patent or latent defects) *and* Initial Br. Appellant p. 10–11 (conceding that the Parties agreed to submit any claims for damages for express or

implied indemnification to arbitration, regardless of the passage of 180 days), *with* (R. pp. 33, 36, 39, and 42) (stating claims for relief entitled “Indemnity”), *and* (R. pp. 30–43) (making plain that even as to claims not entitled “Indemnity,” Respondent was seeking to be made whole for the cost of correcting patent or latent defects in Appellant’s work as demanded by the owner of the subject project). *See First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994) (“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.”) *See also Gissel v. Hart*, 382 S.C. 235, 242, 676 S.E.2d 320, 324 (2009) (explaining that it is error to look to the complaint to determine whether the award was proper). *See also S.C. Code Ann. §§ 15-48-20 (d) and (e)* (2005) (explaining that: “Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be made with respect thereto only. . . .” and “[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides . . .”).

Second, even setting the indemnity exception aside, the Appellant does not dispute that it was proper for the State Court to order to arbitration any claim that arose in the prior 180 days. Rather, the Appellant attempted to argue that certain letters exchanged between the Parties evidenced that the Respondent knew of any claims more than 180 days prior to demanding arbitration. *See Def. Mem. Opp’n Pl.’s Mot. Stay Compel Arbitration* p. 3 (R. p. 198) (arguing that Respondent first informed Appellant “of the potential claims on May 10, 2010”); (R. pp. 174–179) (providing the letters on which Appellant relied in arguing that Respondent knew of claims). The Appellant’s

argument wholly ignores that the letters evidence only a series of negotiations and demands for performance of various contractual obligations by the Appellant, and do not foreclose the possibility that some or all of the Appellant's breaches in failing to correct its work could have or did occur within 180 days of the arbitration demand. Said differently, the Appellant's argument ignores that breach of contract, warranty, and negligence claims may (and, here, often did) arise out of the Appellant's failure to meet its obligations, warranties and duties to indemnify the Respondent for certain repairs and replacements ordered by the owner of the project. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (providing that "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

Third, when read as a whole, it is apparent that the Complaint was filed for the purposes of tolling the statute of limitations while arbitrating claims for express and implied indemnity arising from claims arising out of or relating to patent or latent defects.⁴ See *Rule 8 (f), SCRCP* ("All pleadings shall be so construed as to do substantial

⁴ See, e.g., Complaint ¶¶ 9–12, alleging that:

[Respondent] has given notice to [Appellant] of the defective work and the Owner's demand and made demand on [Appellant] to honor its contracts and warranties by making the Repairs. . . . Despite notice and demand, [Appellant] has failed and refused to honor its contracts and warranties and has not made the repairs. . . . Per the requirements of the Owner, [Respondent] has undertaken, after notice to [Appellant], to enter into a subcontract with a third-party electrical subcontractor . . . to make the Repairs . . . [Respondent], in addition to incurring the cost of the Repairs, will incur other damages including, but not limited to, the costs of extended general conditions and overhead to manage the Repairs . . . , the cost of additional work necessitated by the Repairs, such as the replacement

justice to all parties.”); Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 520 (Ct. App. 2006) (“In construing a complaint . . . the court must review the entire pleading.”). *See also* (R. p. 231) (concluding in Award that: “By the nature of the contractual arrangement between the Owner, [Respondent] and [Appellant], any claim that [Respondent] has against [Appellant] for defects that the Owner asserted against [Respondent] is by definition an indemnity claim.”).

Boiled down, the Appellant’s argument is only that the State Court should have compelled the Parties to arbitrate less than the entire dispute between them. Even ignoring its fundamental lack of merit, this argument does not lead to the conclusion that the State Court erred in compelling arbitration at all. There is no dispute that those claims either falling within the indemnity exception or that came to light within the prior 180 days were properly referable to arbitration.

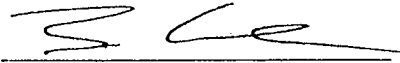
Any contention by the Appellant that the actual Award ruled upon claims beyond those properly referable to arbitration is now time barred and, moreover, has been finally adjudicated by the Federal Court.

The Order Granting Plaintiff’s Motion to Stay and Compel Arbitration should be affirmed.

of fencing and landscaping . . . , and additional damages as may be incurred in connection with the defective work and making the Repairs all as will be shown. . . .
and Complaint ¶¶ 24, 31 and 43 (alleging, under causes of action entitled “Breach of Subcontract,” “Breach of Warranty” and “Negligence,” that the damages for which Respondent sought to recover “include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs.”). (R. pp. 30–31, 32 and 34).

CONCLUSION

This Appeal is an improper attack on a Federal Judgment and an Arbitration Award that lacks any good faith basis, and should be dismissed. Alternatively, the Order Granting Plaintiff's Motion to Stay and Compel Arbitration should be affirmed.



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
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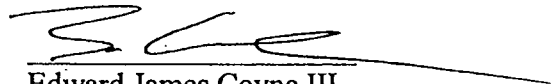
Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC.....Respondent,

v.

Allsouth Electrical Contractors, Inc.....Appellant

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent filed in this action by Respondent
Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC complies with
Rule 211(b), South Carolina Appellate Court Rules.


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Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. Appellant.

FINAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. The order compelling arbitration is subject to appeal.

Respondent Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease, LLC (hereinafter “Lend Lease”) argues that Appellant Allsouth Electrical Contractors, Inc. (“Allsouth”) simply cannot ever “directly” appeal an order compelling arbitration. Lend Lease argues that such an order cannot be immediately appealed at the time the order is entered (Respondent’s Final Brief p. 4), and Lend Lease argues that the order compelling arbitration can never be appealed thereafter unless there exists some other ground for appeal unrelated to the Order compelling arbitration (Respondent’s Final Brief, p. 5). This is not and cannot be the law.¹

South Carolina courts have indeed held that an order compelling arbitration is not immediately appealable. Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995) *see also* Toler’s Cove Homeowners Ass’n v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003)(“[A] court’s order compelling arbitration is not immediately appealable under South Carolina law.”). As such, a party who argues that it is not required to arbitrate a dispute must first go through the arbitration process prior to appealing the order. In contrast, an order denying a motion to compel arbitration is immediately appealable. Therefore, a legal distinction already exists for some reason between a party seeking to compel arbitration and a party arguing it did not contractually agree to arbitration. Lend Lease seeks to extend this legal distinction and take the position that a party compelled to arbitrate can never directly appeal the order compelling arbitration. Lend Lease argues that in order for this Court to have jurisdiction, a party

¹ Allsouth filed a Memorandum on Appealability with this Court at the Court’s request. Allsouth incorporates that memorandum as if fully restated herein verbatim. (R. pp.261-266).

aggrieved by an order compelling arbitration must first have a different ground for appeal upon which to piggy-back any appeal of the order compelling arbitration in the first instance. This argument fails for at least three reasons. First, it amounts to a legal conclusion that an order compelling arbitration cannot be appealed while an order denying arbitration can be appealed. Such a legal distinction with no basis would be a violation of the equal protection clauses of the United States' Constitution (*See* U.S. Const. Amend. XIV) and South Carolina Constitution (*See* S.C. Const. art. I, Section 3.)

Second, if a party must first have a legal right to appeal some other issue related to the arbitration prior to being able to appeal the order compelling arbitration, then the standard applied to the appeal of other issues related to the conduct of the arbitration (e.g. modification and vacation) would necessarily first be applied to the order compelling arbitration. In essence, an aggrieved party forced to arbitrate would first have to meet the "narrow" and "limited" grounds for overturning an arbitration award. *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances, inter alia, when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law."). The applicable standard to compelling arbitration is merely a matter of contract interpretation. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.") *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ... courts

generally ... should apply ordinary state-law principles that govern the formation of contracts.”). Any heightened standard for the appeal of an order compelling arbitration would, of course, be different from the standard to be applied to any appeal of an order refusing to compel arbitration which is immediately appealable (i.e. contract interpretation as a matter of law v. manifest disregard of the law). This too would violate the equal protection clauses of the United States and South Carolina Constitutions. Indeed, Lend Lease confirms that this heightened standard of review exists if its position is adopted by arguing that this appeal is simply an appeal seeking to vacate an arbitration award. (Respondent’s Final Brief, pp. 8-9). This is not an appeal from the arbitration award. This is an appeal from the Circuit Court’s Order compelling arbitration.

Third, a Circuit Court order compelling arbitration entered prior to arbitration would not be subject to review by another Circuit Court Judge after arbitration. *See* Rule 43, SCRCP (“If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.”) *see also* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial). Therefore, Allsouth could not have even made a “new” motion to the court after the Circuit Court’s original order that is the subject of this appeal.

Accordingly, Lend Lease’s argument that an order compelling arbitration simply cannot *ever* be directly appealed should be rejected. As stated in Allsouth’s Memorandum on Appealability and in Allsouth’s Initial Brief, Allsouth is entitled to

appeal the Circuit Court Order compelling arbitration, and Allsouth is entitled to have that Order reviewed pursuant to contract law.

II. The Appellate Courts of South Carolina must determine whether or not the South Carolina Circuit Court erred in compelling arbitration.

Lend Lease argues that this appeal presents a “non-justiciable” question before this Court because the Federal Court entered an order confirming the arbitration award. Allsouth does not, however, seek review of the Federal Court order in this appeal. Allsouth does not seek review of the Arbitration Award in this appeal. Allsouth seeks review of the South Carolina Circuit Court Order compelling arbitration. This is a justiciable issue, and, if Allsouth was not required to arbitrate the entire action brought against it and was still compelled to do so, then Allsouth is prejudiced.² Indeed, the Federal Court could not have overruled the State Court order granting arbitration as a matter of comity. Adkins v. Rumsfeld, 464 F.3d 456, 463-64 (4th Cir.2006)(Discussing the Rooker-Feldman doctrine and stating “In other words, the doctrine applies where a party in effect seeks to take an appeal of an unfavorable state court decision to a lower federal court”). This is the proper court to determine whether or not the decision of the South Carolina Circuit Court compelling arbitration was in error.

III. The Circuit Court erred in compelling arbitration.

Allsouth’s relies on its Final Brief on the substantive issue in this appeal; however, Allsouth responds to Lend Lease’s arguments in Section IV of its Brief as follows:
The Circuit Court sent the entire action to arbitration. It did not send some of the claims. It sent all of the claims. This was in error. The legal and equitable causes of action pled

² The portion of the Federal Court order cited by Lend Lease once again highlights Lend Lease’s argument that it seeks to have the standard applied to vacation of arbitration awards applied to whether or not compelling arbitration, as a matter of contract, was appropriate in the first instance.

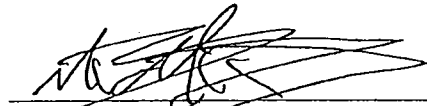
by Lend Lease had different elements and were subject to different defenses. Most importantly, the causes of action alleged different types of damages. By sending the entire action to arbitration, the claims of Lend Lease that were plainly not claims for contractual or equitable indemnification (*See Allsouth Final Brief*, pp. 4-8) were subject to the arbitration and Lend Lease was allowed to seek damages based upon causes of action not subject to arbitration. S.C. Code Ann. Section 15-48-20(e) plainly states that when only some of the issues are subject to arbitration, the Court should stay the case with regard to those issues only and the remaining issues not subject to arbitration proceed in the Court where filed. The Circuit Court in this case erred by sending the entire matter to arbitration.

The letters attached to the affidavit of William Lesesne are undisputed evidence that Lend Lease knew, or should have reasonably known, of facts giving rise to the claim more than 180 days prior to filing the claim. As such any cause of action brought after that time must have been for express or implied indemnity. The Circuit Court in this case erred by sending the entire matter to arbitration.

Conclusion

For the aforementioned reasons, the Orders of the Circuit Court compelling arbitration should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that the Final Reply Brief of Appellant Allsouth Electrical Contractors, Inc.
complies with Rule 211(b), South Carolina Appellate Court Rules.

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