IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-24-00574
Appellate Case No. 2014-002749

Miller Construction Company, LLC.....Respondent/Appellant

v.

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America..... Appellants/Respondents

---

RECORD ON APPEAL

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012CP2400574

Miller Construction Company, LLC

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court	Attorney for : Plaintiff Defendant or ☐ Self-Represented Litigant

FILED COMMON PLEAS 8TH JUDICIAL CIRCUIT GREENWOOD, S.C.

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC 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)
Miller Construction Comp	PC Construction of Greenwood	$51,270.88
		$
		$

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 | 2154 **Judge Code** | 7-1-14 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of July, 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of July, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

David Brousseau	Wade Mullins III
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	Angela Woodhurst
	CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
EIGHTH (8TH) JUDICIAL CIRCUIT

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2014 JUL -9 PM 2:52

Miller Construction Company, LLC,)
)
Plaintiff,)
)
vs.)
)
PC Construction of Greenwood, Inc.)
and Safeco Insurance Company of)
America,)
)
Defendants.)
)

FINAL ORDER & JUDGMENT

Ca No: 2012-CP-24-574

THIS MATTER was before the Court for a final hearing on the merits of the claims presented by the parties in this action. Plaintiff [hereinafter Miller or Miller Construction] is represented by David J. Brousseau of the law firm McIntosh, Sherard, Sullivan & Brousseau. Defendants[1] [hereinafter collectively referred to as PC or PC Construction] are represented by E. Wade Mullins, III, of the law firm Bruner, Powell, Wall & Mullins.

Miller initiated this action by filing its Summons and Complaint on May 25, 2012, seeking damages for breach of contract and suit on the payment bond pursuant to SC Code Ann. § 29-5-440. PC timely filed its Answer generally denying the allegations and offering affirmative defenses. Subsequently, PC was permitted to file an Amended Answer and Counterclaim alleging, *inter alia*, breach of contract on the part of Miller. Additionally, PC was permitted to amend its Answer before trial to assert an affirmative defense that Miller was not properly licensed to perform its work. Trial in this matter occurred on November 4, 5, and 6, 2013. All parties and their respective attorneys were present and ready to proceed. Reference is invited to the court file for further particulars thereof.

The Court allowed for the submission of post-trial briefs, and then took this matter under advisement. Based upon the testimony and evidence introduced at trial, the Court issues the following findings of fact and conclusions of law in support of this Order.

[1] Defendant Safeco Insurance Company of America was named by virtue of holding the payment bond in this matter.

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C. 003

 SCM 1/7

Findings of Facts & Conclusions of Law

Background

PC Construction was the general prime contractor for the Lander University Jeff May Sports Complex. PC hired Miller Construction as a subcontractor on the project to perform, *inter alia*, grading and site prep work. The subcontract called for Miller to perform these services for a price of $492,424.

Early on into the project asbestos laden materials were discovered on site. Miller successfully bid on the removal of the asbestos laden materials. All witnesses agree that this issue was much more widespread than anticipated. It caused significant delays to the project as well as significantly increased the overall costs by way of change order.

Throughout the project, Miller was paid by PC upon making pay applications. Further, witnesses for PC Construction admit that at no time during the project did it withhold payment from Miller due to delays or allegations that the work was not performed in a workmanlike manner.

Upon Miller making its final pay application, PC withheld payment to Miller. At that time, PC had not yet been paid its final payment from the owner, Lander University. A dispute arose between Lander and PC regarding how much was owed to PC. In the spring of 2013, an agreement was reached between PC and Lander regarding final payment. PC then received final payment from Lander. However, PC still withheld final payment to Miller.

Miller alleges that PC breached the subcontract by failing to pay the amount due to Miller upon Miller making final pay application. PC alleges that:

a) Miller is not properly licensed; and, therefore, cannot bring this lawsuit;

b) Miller owes PC for damages due to delay;

c) Miller owes PC $3,921.82 for correction of a sinkhole; and

d) The amount Miller claims is owed is not correct.

A) Licensing Issue

PC asserts that Miller is not entitled to recovery because it is not properly licensed pursuant to S.C. Code Ann. § 40-11-370(C). It is undisputed that Miller holds a license with the classification of "grading." PC holds a license of "general contractors – highway."

PC contends that Miller acted outside the scope of its license by performing work on the storm sewer system. Prior to construction, there was an existing old storm sewer system under

 SCB 2/7

the site. The work performed by Miller was to fix the existing system into a workable system given the use for the site.

S.C. Code Ann. § 40-11-370(C) states that, "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contact." S.C. Code Ann. § 40-11-410(2)(d) provides as follows:

> "General Contractors-Highway" which *includes* work under these subclassifications:
>
> .
>
> .
>
> .
>
> (d) Grading- which includes the soil preparation and rehabilitation of streets, roads, highways, railroad beds, building sites, parking lots, <u>and storm sewers</u>. This subclassification also includes work under the subclassification of Highway Incidental.
>
> (e) Highway Incidental- which includes highway work for grooving, milling, rehabilitating, and installing guardrails, gutters, highway signs, pavement mark, and painting.

S.C. Code Ann. § 40-11-410(2)(d)(Emphasis added).

PC contends that by performing work on the storm sewer system, Miller was required to hold a license in "Water and Sewer Lines" as defined by S.C. Code Ann. § 40-11-410(3)(c). PC does not hold a license of "general contractors – public utility." [1]

At the outset of this analysis, the Court notes that "It is unlawful for an owner, a construction manager, a prime contractor, or another entity with contracting or hiring authority on a construction project to divide work into portions so as to avoid the financial or other requirement of this chapter as it relates to license classifications or subclassifications or license groups, or both." S.C. Code Ann. § 40-11-300 (1998) (see also S.C. Code Ann. § 40-11-270 (1998) which states, "[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.") In other words, if PC hired unlicensed subcontractors to perform work on this project it would be in violation of the law.

---

[1] S.C. Code Ann. § 40-11-270 states, "[l]icensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee."

"[S]tatutes in derogation of the common law are to be strictly construed. Under this rule, a statute restricting the common law will not be extended beyond the clear intent of the legislature. Statutes subject to this rule include those which limit a claimant's right to bring suit." *Grier v. AMISUB of SC*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* "There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of the a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced." *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 432, 137 S.E.2d 608, 611 (1964).

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and the court had no right to impose another meaning." *Bostic v. Am. Home Mortg. Servicing, Inc.,* 375 S.C. 143, 149, 650 S.E.2d 479, 482 (Ct. App. 2007). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Id.*

"The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits." *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 65, 744 S.E.2d 547, 551 (2013).

Webster's Dictionary defines the word "rehabilitat[ion]" as follows: "to restore or bring to a condition of health or useful and constructive activity." *Merriam-Webster's Collegiate Dictionary* 985-86 (10th ed. 1998).

Rehabilitation of an old storm system into a working system would include, in certain instances, demolition and installation of storm sewer lines. In this case, old lines were torn out, some old lines stayed, and the newly installed lines tied into existing catch basins. Additionally, this was a state funded job, and no one ever claimed that Miller was not licensed to perform this work. Further, there was no evidence that any permitting agency ever attempted to stop work on the project due to 'licensing' issues.

PC contends that, because a section of S.C. Code Ann. § 40-11-410(3)(c) states that water and sewer lines licensing references the installation and repair of storm drains and sewer lines,

this excludes Miller from doing rehabilitative work on the storm sewer system that would include the installation and demolition of storm sewer lines.

Inclusion of a definition in a different licensing sub-section of the statute does not mean it excludes such work in regards to defining the word rehabilitation. Had the legislature intended to exclude installation and demolition of storm sewer lines from the 'grading' licensing sub-section, it would have specifically excluded it. However, such work was not excluded. Instead the legislature included the very broad term of 'rehabilitation' without any exclusionary language. As the statute inhibits a fundamental right (filing a lawsuit for breach of contract), one must assume that the legislature intended to keep such a broad term like rehabilitation within the context of the statute.

PC agreed with the above analysis and interpretation of the statute at the time of signing the subcontract agreement. Otherwise, PC would be in violation of Sections 40-11-300 and 40-11-270 by knowingly hiring Miller to perform work on the storm sewer system. PC was aware of Miller's licensing status at the outset of the project as well as the scope of work Miller would be performing under the subcontract.

As such, I find that Miller was properly licensed to perform the work it was contracted to perform on this project. The Defendant's motion for involuntary non-suit / direct verdict on this issue is denied.

B) PC Construction's claim for damages from Miller for delay

PC contends it is entitled to damages for delays it states Miller caused. Regarding this issue the subcontract provides, in relevant part, as follows:

> If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.

After completion of the project, Lander and PC became involved in a dispute regarding final payment. PC agreed to accept from Lander additional payment of approximately $120,000

for "extended general conditions" or "overhead" due to delays not caused by PC[2]. According to testimony, this amount was roughly equal to 120 days of delay. Further, no liquidated damages for delays were assessed against PC by Lander.

Gary Piontek and Randy Piontek of PC testified that they were essentially assessed what they considered to be liquidated damages by not receiving the full amount they were seeking from Lander for delays not caused by PC. They testified that PC was entitled to approximately $120,000 from Miller due to delays it asserts were caused by Miller.

Article 6, paragraph 7 of the subcontract allowed PC to join Miller as a party to the action against Lander. PC chose not to join Miller as a party to that case. PC accepted and agreed to a final payment amount from Lander without any input from Miller. If PC felt it was entitled to more damages from Lander for "extended general conditions" it had every right to have a contested hearing to decide that issue in that case. However, it voluntarily chose to accept the agreement with Lander as the amount it was due.

Pursuant to the subcontract, PC cannot recover any type of liquidated damages against Miller as PC was never assessed with any liquidated damages or damages for delay from the owner. As such, taking the evidence in a light most favorable to PC, it is unable to sustain its cause of action for breach of contract against Miller for delay damages. Miller's motion for involuntary non-suit / directed verdict as to this cause of action is hereby granted.[3]

C) PC Construction's Claim for reimbursement for fixing a sinkhole

PC contends that it is entitled to reimbursement from Miller in the amount of $3,921.82 for fixing a sinkhole that PC contends was caused by Miller. No evidence was presented to show that Miller in fact caused the sinkhole. Additionally, testimony reflects that PC fixed this issue on its own, at minimal cost, and without giving Miller an opportunity to cure any alleged defect. Lastly, representatives for PC agreed on cross-examination that PC owed Miller $51,270.08 subject to its counterclaim for delay damages.

D) Amount Owed to Miller

The subcontract, in relevant part, provides that "Final payment of the balance of the Subcontract Price shall be made to Subcontractor: . . . after receipt by PC Construction of

---

2 This would mean that Miller, as a subcontractor for PC, did not cause any delays.

3 This court would additionally have found that PC did not meet its burden of proof on this issue. The evidence was clear that Miller did not cause any delays on this project.

Greenwood, Inc. of final payment from Owner, such receipt being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to make final payment to Subcontractor."

The evidence presented reflects that PC received final payment from Lander in the spring of 2013. Miller made its application for final payment in accordance with the subcontract, and prior to the filing of this lawsuit in May of 2012. Based upon the above rulings on the issue of licensing and damages for delay, I find that Miller is entitled to and hereby granted a directed verdict on the issue of PC's breach of contract.

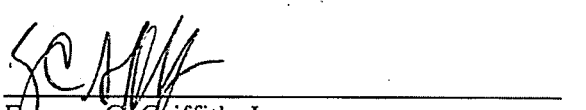
Miller filed this action alleging it is owed a principal balance of $53,695.08. The difference of the above amounts is two change orders totaling $2,425.00. PC rejected these change orders because a) they were not submitted and approved before the work occurred and b) it was warranty work covered by the subcontract. During testimony, PC agreed that it owed Miller $51,270.08, subject to its counterclaim for damages for delay. This Court has granted Plaintiff's motion for involuntary non-suit / directed verdict on Defendant's counterclaim for delay damages. Accordingly, taking the evidence in a light most favorable to Defendant, Plaintiff is entitled to and hereby granted $51,270.08 for Defendant's breach of contract and suit on the payment bond.

ACCORDINGLY, based upon the above findings as applied to the law of this State, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Judgment is hereby entered against PC Construction of Greenwood, Inc., in favor of Miller Construction Company, LLC, in the principal amount of $51,270.08 for breach of contract.

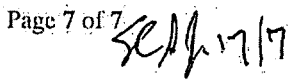
2. Defendant Safeco Insurance Company of America is hereby ordered to immediately pay this amount to Miller Construction Company, LLC from the payment bond it holds on behalf of PC Construction of Greenwood, Inc., on this project.

IT IS SO ORDERED this 1 day of July, 2014.



Eugene C. Griffith, Jr.
Presiding Circuit Court Judge

This 1st day of July 2014
Newberry, South Carolina.



FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP2400574

Miller Construction Company LLC	PC Construction of Greenwood Inc	Safeco Insurance Company of America
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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

FILED COMMON PLEAS 8TH JUDICIAL CIRCUIT GREENWOOD, S.C. 2014 NOV 26 PM 4:52

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)

DEC - 3 2014

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	2154 Judge Code	11/26/2014 Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **November 26, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **November 26, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

David James Brousseau PO Box 197 Anderson, SC 29622

ATTORNEY(S) FOR THE PLAINTIFF(S)

Edward Wade Mullins III PO Box 61110 Columbia, SC 29260-1110

ATTORNEY(S) FOR THE DEFENDANT(S)

Angela Woodhurst

Court Reporter

Angela Woodhurst - Clerk of Court

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.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
EIGHTH (8TH) JUDICIAL CIRCUIT

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2014 NOV 26 PM 4:32

Miller Construction Company, LLC,)
)
Plaintiff,)
)
vs.)
)
PC Construction of Greenwood, Inc.)
and Safeco Insurance Company of)
America,)
)
Defendants.)
)

ORDER

Ca No :: 2012-CP-24-574

THIS MATTER is before the Court upon the respective post-trial motions filed by both the Plaintiff and the Defendants. This is a non-jury matter. Following a 3 day trial, a Final Order & Judgment was issued by this Court on July 8, 2014.

Plaintiff timely filed a Motion to Alter or Amend pursuant to Rule 59(e) of the SCRCP. In its Motion, Plaintiff alleges, *inter alia*, that this Court erred in not awarding pre-judgment interest on the amount awarded to Plaintiff by this Court.

Defendants timely filed a Motion to Alter or Amend pursuant to Rule 59(e) of the SCRCP. The Defendants raised a number of issues in the Motion. They are as follows:

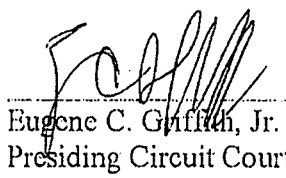
1. The Court erred as a matter of law in granting involuntary non-suit finding that pursuant to the Subcontract, PC could not recover any type of liquidated damages against Miller because PC was never assessed liquidated damages from the owner.
2. The Court failed to consider significant relevant evidence in finding that the evidence was clear that Miller did not cause any delays on this Project.
3. The Court's determination that Miller was properly licensed to perform the work was erroneous as a matter of law and failed to consider pertinent and relevant facts in the record.
4. The Final Order erroneously finds that PC holds a license of "general contractors-highway."

5. The Final Order erroneously orders immediate payment from the payment bond to Miller Construction Company, LLC.

6. The Final Order erroneously references that the action on the payment bond was brought pursuant to S.C. Code Ann. § 29-5-440.

This Court has reviewed the respective Rule 59 motions. This was a three (3) day trial, and the Court carefully reviewed the testimony and evidence presented when arriving at its decision outlined in the Final Order & Judgment. The Court finds no reason to alter, amend or reconsider the Final Order & Judgment. Accordingly, the respective motions filed by the parties pursuant to Rule 59 are denied. To the extent that the issues raised in the parties' respective Rule 59(e) motions were raised at trial and not ruled upon in the Final Oder, they are preserved for appellate review.

IT IS SO ORDERED this 13 **day of** November**, 2014.**



Eugene C. Griffith, Jr.
Presiding Circuit Court Judge

Newberry, South Carolina.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 MAY 25 PM 2 45

Miller Construction Company, LLC) CIVIL ACTION COVERSHEET
Plaintiff(s))

vs.) 2012-CP - 04- _____
) 12CP24 00574
PC Construction of Greenwood, Inc. et al)
Defendant(s))

(Please Print)
Submitted By: David J. Brousseau
Address: Post Office Box Anderson SC 29622

SC Bar #: 71150
Telephone #: 864-225-0001
Fax #: 864-225-0004
Other:
E-mail: daveb@msslawfirm.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☒ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 5/25/12

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

014

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)

Miller Construction Company, LLC,)
)
Plaintiff,)
)
-vs-) **SUMMONS**
)
PC Construction of Greenwood, Inc., and) 2012-CP-04-_____
Safeco Insurance Company of America,)
) 12CP24 00574
Defendants.)
_____)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 MAY 25 PM 2 45

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to make a written Answer to the Complaint in this action, a copy of which Complaint is herewith served upon you, and to serve a copy of your written Answer to the said Complaint upon the undersigned attorney, of the law firm of McIntosh, Sherard, Sullivan & Brousseau, at 138 North Main Street, in Anderson, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to Answer in writing the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for a judgment by default granting the relief as prayed for in the Complaint.

TO INFANT(S) OVER FOURTEEN YEARS OF AGE (AN IMPRISONED PERSON):

YOU ARE FURTHER SUMMONED and notified to apply for the appointment of a guardian ad litem to represent you in this action within thirty days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff herein.

TO INFANT(S) UNDER FOURTEEN YEARS OF AGE (INCOMPETENT OR INSANE) AND TO _____, (GENERAL OR TESTAMENTARY GUARDIAN) (COMMITTEE) WITH WHOM (S)HE (THEY) RESIDE(S):

YOU ARE FURTHER SUMMONED and notified to apply for the appointment of a guardian ad litem within thirty days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff herein.

Dated at Anderson, South Carolina on the 25 day of May, 2012

DAVID J. BROUSSEAU
McINTOSH, SHERARD, SULLIVAN & BROUSSEAU
Post Office Box 197
Anderson, South Carolina 29622-0197
(864) 225-0001
ATTORNEYS FOR THE PLAINTIFF

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
EIGHTH (8TH) JUDICIAL CIRCUIT

Miller Construction Company, LLC,

Plaintiff,

vs.

PC Construction of Greenwood, Inc., and Safeco Insurance Company of America,

Defendants.

COMPLAINT

C/A No :: 2012-CP-24-_____

12CP24 00574

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 MAY 25 PM 2 45

The Plaintiff, complaining of the above-named Defendants, would respectfully allege and show unto the Court that:

FACTS APPLICABLE TO ALL CAUSES OF ACTION

I

Plaintiff is a South Carolina limited liability company, organized and existing under the laws of the State of South Carolina with its principal place of business in the County of Anderson. At all times during construction of the below alleged project, Plaintiff was properly licensed to perform the construction services it provided on the project.

II

Upon information and belief, Defendant PC Construction of Greenwood, Inc., [hereinafter PC CONSTRUCTION] is corporation, organized and existing under the laws of the State of South Carolina with its principal place of business in the County of Greenwood.

III

Upon information and belief, Safeco Insurance Company of America [hereinafter SAFECO] is an insurance company organized and existing pursuant to the laws of one of the states of United States of America. As further alleged herein, SAFECO provided the payment bond on the below alleged project.

IV

The real property upon which Plaintiff performed its construction services is located in the County of Greenwood, State of South Carolina.

V

Upon information and belief, this Court has jurisdiction and proper venue over all parties, matters and things alleged herein.

VI

Plaintiff would show unto the Court that it did enter into a contract with PC CONSTRUCTION in order to provide subcontract construction services; including but not limited, grading, paving and other horizontal construction matters.

VII

Defendant PC CONSTRUCTION was the general contractor providing construction services for the Jeff May Sports Complex for Lander University.

VIII

Plaintiff would show that its last date of work on the project was November 28, 2011. Plaintiff timely filed and served a Statement of Account and Certificate of Claim on Payment Bond. Plaintiff is filing this action pursuant to S.C. Code Ann. §29-5-440 (as amended).

IX

Plaintiff would show that it is still owed Fifty Three Thousand Six Hundred Ninety Five and 08/100 ($53,695.08) Dollars for work performed and construction services provided on this project.

X

Plaintiff is informed and believes that SAFECO holds a payment bond on this project for the guarantee of payment to subcontractors who have provided work in conformity with their obligations but have not been paid for such work. Said bond number is 6615861 attached and incorporated herein.

FOR A FIRST (1ST) CAUSE OF ACTION

(Breach of Contract)

XI

All of the allegations set forth above are re-alleged and incorporated herein as fully and completely as if set forth verbatim.

XII

Plaintiff would show unto the Court that it was hired by PC CONSTRUCTION to provide subcontracting construction services on the aforementioned project. As consideration for said services, PC CONSTRUCTION agreed to provide timely payment to the Plaintiff.

XIII

Plaintiff is informed and believes that it has a binding contract with PC CONSTRUCTION.

XIV

Plaintiff would show that it provided said subcontracting construction services in conformity with its obligations as provided in the aforementioned contract. However, Plaintiff has not been paid and is owed Fifty Three Thousand Six Hundred Ninety Five and 08/100 ($53,695.08) Dollars for unpaid invoices and retainage submitted to PC CONSTRUCTION.

XV

Plaintiff is informed and believes that PC CONSTRUCTION'S actions constitute a breach of contract.

XVI

As a direct and proximate result of the breach of contract, Plaintiff has incurred actual, incidental and consequential damages, including but not limited to the aforementioned amount owed on the contract.

XVII

Plaintiff is informed and believes that SAFECO holds a payment bond guaranteeing payment to subcontractors who have not been paid for work performed on the project.

FOR A SECOND (2ND) CAUSE OF ACTION

(Suit on Payment Bond)

XVIII

All of the allegations set forth above are re-alleged and incorporated herein as fully and completely as if set forth verbatim.

XIX

As reference herein, SAFECO holds a payment bond on the project.

XX

As further referenced herein, Plaintiff did furnish labor, materials and/or other type of construction services on the Jeff May Sports Complex project at the request of and with the express and/or implied permission or consent of Defendants, their agents, servants and/or employees. As a result of Defendants' failure and refusal to pay monies due Plaintiff, it timely filed and served a Statement of Account and Certificate of Claim on Payment Bond attached and incorporated herein. Since the filing of aforementioned Statement of Account on Payment Bond, the Plaintiff has been paid certain monies to reduce its claim by the amount stated herein.

XXI

Plaintiff would show that the amount it is owed is a liquidated sum capable ascertained and/or calculated, and that Plaintiff is due prejudgment interest at the statutory rate.

XXII

Plaintiff would show that it has incurred attorney's fees and costs as a result of the Defendants' non-payment, and pursuant to statute it is entitled to its attorney's fees and costs should it be determined to be the prevailing party in this matter.

XXIII

As such, Plaintiff requests that the Court require SAFECO to pay unto it Fifty Three Thousand Six Hundred Ninety Five and 08/100 ($53,695.08) Dollars, as well as its prejudgment interest and attorney's fees and costs from the aforementioned payment bond.

WHEREFORE, Plaintiff prays as follows:

1. For judgment against the Defendants, jointly and severally, for Plaintiff's actual, consequential and incidental damages for the breach of contract to be determined by the Court;
2. For judgment against the Defendants, jointly and severally, for the principal balance owed, prejudgment interest and attorney's fees and costs as provided by statute;
3. For the Court to require Defendant Safeco Insurance Company of America to immediately pay the proper amount of damages to Plaintiff, said amount to be determined by the Court; and
4. For such other and further relief as to this Court is deemed just and proper.

David J. Brousseau, Bar No 71150
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622
(864) 225-0001 | 225-0004 (fax)
Attorney for Plaintiff

May 25, 2012.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD) Case No.: 2012-CP-24-00574

FILED COPY
6TH JUDICIAL CIRCUIT
GREENWOOD, SC
2012 JUL 27 AM 10 19

Miller Construction Company,

Plaintiff,

vs.

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,

Defendants.

ANSWER OF SAFECO INSURANCE COMPANY OF AMERICA

COMES NOW Defendant Safeco Insurance Company of America ("Safeco") answering Plaintiff's Complaint and would respectfully show unto this Court as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of Plaintiffs' Complaint not hereinafter expressly admitted, denied or otherwise explained by Safeco is denied and strict proof demanded thereof.

2. Safeco admits so much of the allegations of Paragraph I of Plaintiff's Complaint as allege Plaintiff is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Anderson County. Safeco denies the remaining allegations of Paragraph I of Plaintiff's Complaint and demands strict proof thereof.

3. Safeco admits the allegations of Paragraphs II, III, IV, and V of Plaintiff's Complaint.

4. In response to the allegations of Paragraph VI of Plaintiff's Complaint, Safeco would show that the contract between PC Construction of Greenwood, Inc. ("PC Construction") and Plaintiff was a written contract. Safeco craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

5. Safeco admits the allegations of Paragraph VII of Plaintiff's Complaint.

6. In responding to the allegations of Paragraph VIII of Plaintiff's Complaint, Safeco is without sufficient information to admit or deny that Plaintiff's last day of work on the Project was November 28, 2011, and, therefore, denies the same and demands strict proof thereof. Safeco admits so much of the allegations of Paragraph VIII that allege Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond. The remaining allegations of Paragraph VIII contain legal conclusions to which no response from Safeco is required, but to the extent a response is required, those allegations are denied.

7. Safeco denies the allegations of Paragraph IX of Plaintiff's Complaint.

8. Safeco admits so much of the allegations of Paragraph X of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph X are denied and Safeco craves reference to the bond for its terms and conditions.

9. In response to the allegations of Paragraph XI of Plaintiff's Complaint, Safeco realleges its responses to the foregoing paragraphs as if repeated verbatim.

10. In response to the allegations of Paragraphs XII and XIII of Plaintiff's Complaint, Safeco would show that the contract between PC Construction and Plaintiff was a written contract. Safeco craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

11. Safeco denies the allegations of Paragraphs XIV, XV, and XVI of Plaintiff's Complaint.

12. Safeco admits so much of the allegations of Paragraph XVII of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph XVII are denied and Safeco craves reference to the bond for its terms and conditions.

13. In response to the allegations of Paragraph XVIII of Plaintiff's Complaint, Safeco realleges its responses to the foregoing paragraphs as if repeated verbatim.

14. Safeco admits so much of the allegations of Paragraph XIX of Plaintiff's Complaint that Safeco issued a payment bond for the project.

15. In responding to the allegations of Paragraph XX of Plaintiff's Complaint, Safeco admits Plaintiff contracted directly with PC Construction for work on the project, Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond, and that PC Construction has paid certain monies to Plaintiff since Plaintiff filed its Statement of Account and Certificate of Claim on Payment Bond. All remaining allegations of Paragraph XX are denied.

16. Safeco denies the allegations of Paragraphs XXI, XXII, and XXIII of Plaintiff's Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP)

17. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

18. Safeco would show the Court that the Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCP, because Plaintiff has failed to state a claim upon which relief may be granted on any of its causes of action.

FOR A THIRD DEFENSE
(Equitable Defenses)

19. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

20. Safeco asserts and alleges Plaintiff may not recover on one or more of its causes of action based on equitable defenses including, but not limited to, the doctrines of laches, unclean hands, and estoppel.

FOR A FOURTH DEFENSE
(Failure to Mitigate Damages)

21. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

22. Plaintiff has failed to mitigate its damages and is therefore barred from recovering any monies from Safeco.

FOR A FIFTH DEFENSE
(Waiver)

23. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

24. Plaintiff's recovery is barred because it has waived any right to recover for the causes of action asserted in the Complaint.

FOR A SIXTH DEFENSE
(Credit for Settlement)

25. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

26. Safeco affirmatively pleads S.C. Code §15-38-50 and states that if Plaintiff releases any other party from liability for the damages sought herein, then any damages awarded Plaintiff against Safeco, liability for which Safeco denies, the same must by statute be reduced by the amount stipulated by the release.

FOR A SEVENTH DEFENSE
(Set Off)

27. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

28. Plaintiff failed to complete its work in a timely, good, and workmanlike manner.

29. As a result, there remains incomplete work and work that PC Construction must remedy and correct.

30. Plaintiff is liable for any and all costs incurred by PC Construction to complete and remedy its work.

31. Safeco asserts that if it is found liable for damages sought in the Complaint which Safeco expressly denies, it is entitled to an offset against said liability.

FOR AN EIGHTH DEFENSE
(Payment and Discharge)

32. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

33. PC Construction has paid Plaintiff in full and in accordance with the terms and conditions of the subcontract.

FOR A NINTH DEFENSE
(Material Breach)

34. Safeco reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

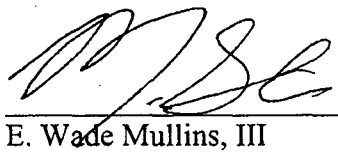
35. Plaintiff materially breach its subcontract with PC Construction and failed to complete its work in a good and workmanlike manner, in a timely manner, and in accordance with the subcontract. Plaintiff is therefore barred from recovery.

WHEREFORE, Safeco, having fully answered the Summons and Complaint, prays for relief as follows:

A. That the Complaint be dismissed with costs; and,

B. For such other and further relief as This Honorable Court deems just and proper.

BRUNER, POWELL, WALL,
& MULLINS, LLC



E. Wade Mullins, III
Matthew H. Stabler
Post Office Box 61110
Columbia, South Carolina 29260-1110
803-252-7693
wmullins@brunerpowell.com
Attorneys for Safeco Insurance Company of America

July 24, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC	)	
Plaintiff,	)	
vs.	)	**ANSWER OF PC CONSTRUCTION OF GREENWOOD, INC.**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

8TH JUDIC... GREENWOOD, SC
2012 JUL 27 AM 10 20

COMES NOW Defendant PC Construction of Greenwood, Inc. ("PC Construction") answering Plaintiff's Complaint and would respectfully show unto this Court as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of Plaintiffs' Complaint not hereinafter expressly admitted, denied or otherwise explained by PC Construction is denied and strict proof demanded thereof.

2. PC Construction admits so much of the allegations of Paragraph I of Plaintiff's Complaint as allege Plaintiff is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Anderson County. PC Construction denies the remaining allegations of Paragraph I of Plaintiff's Complaint and demands strict proof thereof.

3. PC Construction admits the allegations of Paragraphs II, III, IV, and V of Plaintiff's Complaint.

4. In response to the allegations of Paragraph VI of Plaintiff's Complaint, PC Construction would show that the contract between PC Construction and Plaintiff was a written contract. PC

Construction craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

5. PC Construction admits the allegations of Paragraph VII of Plaintiff's Complaint.

6. In responding to the allegations of Paragraph VIII of Plaintiff's Complaint, PC Construction is without sufficient information to admit or deny that Plaintiff's last day of work on the Project was November 28, 2011, and, therefore, denies the same and demands strict proof thereof. PC Construction admits so much of the allegations of Paragraph VIII that allege Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond. The remaining allegations of Paragraph VIII contain legal conclusions to which no response from PC Construction is required, but to the extent a response is required, those allegations are denied.

7. PC Construction denies the allegations of Paragraph IX of Plaintiff's Complaint.

8. PC Construction admits so much of the allegations of Paragraph X of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph X are denied and PC Construction craves reference to the bond for its terms and conditions.

9. In response to the allegations of Paragraph XI of Plaintiff's Complaint, PC Construction realleges its responses to the foregoing paragraphs as if repeated verbatim.

10. In response to the allegations of Paragraphs XII and XIII of Plaintiff's Complaint, PC Construction would show that the contract between PC Construction and Plaintiff was a written contract. PC Construction craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

11. PC Construction denies the allegations of Paragraphs XIV, XV, and XVI of Plaintiff's Complaint.

12. PC Construction admits so much of the allegations of Paragraph XVII of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph XVII are denied and PC Construction craves reference to the bond for its terms and conditions.

13. In response to the allegations of Paragraph XVIII of Plaintiff's Complaint, PC Construction realleges its responses to the foregoing paragraphs as if repeated verbatim.

14. PC Construction admits so much of the allegations of Paragraph XIX of Plaintiff's Complaint that Safeco issued a payment bond for the project.

15. In responding to the allegations of Paragraph XX of Plaintiff's Complaint, PC Construction admits Plaintiff contracted directly with PC Construction for work on the project, Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond, and that PC Construction has paid certain monies to Plaintiff since Plaintiff filed its Statement of Account and Certificate of Claim on Payment Bond. All remaining allegations of Paragraph XX are denied.

16. PC Construction denies the allegations of Paragraphs XXI, XXII, and XXIII of Plaintiff's Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP)

17. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

18. PC Construction would show the Court that the Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCP, because Plaintiff has failed to state a claim upon which relief may be granted on any of its causes of action.

FOR A THIRD DEFENSE
(Equitable Defenses)

19. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

20. PC Construction asserts and alleges Plaintiff may not recover on one or more of its causes of action based on equitable defenses including, but not limited to, the doctrines of laches, unclean hands, and estoppel.

FOR A FOURTH DEFENSE
(Failure to Mitigate Damages)

21. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

22. Plaintiff has failed to mitigate its damages and is therefore barred from recovering any monies from PC Construction.

FOR A FIFTH DEFENSE
(Waiver)

23. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

24. Plaintiff's recovery is barred because it has waived any right to recover for the causes of action asserted in the Complaint.

FOR A SIXTH DEFENSE
(Credit for Settlement)

25. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

26. PC Construction affirmatively pleads S.C. Code §15-38-50 and states that if Plaintiff releases any other party from liability for the damages sought herein, then any damages awarded

Plaintiff against PC Construction, liability for which PC Construction denies, the same must by statute be reduced by the amount stipulated by the release.

FOR A SEVENTH DEFENSE
(Set Off)

27. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

28. Plaintiff failed to complete its work in a timely, good, and workmanlike manner.

29. As a result, there remains incomplete work and work that PC Construction must remedy and correct.

30. Plaintiff is liable for any and all costs incurred by PC Construction to complete and remedy its work.

31. PC Construction asserts that if it is found liable for damages sought in the Complaint which PC Construction expressly denies, it is entitled to an offset against said liability.

FOR AN EIGHTH DEFENSE
(Payment and Discharge)

32. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

33. PC Construction has paid Plaintiff in full and in accordance with the terms and conditions of the subcontract.

FOR A NINTH DEFENSE
(Material Breach)

34. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

35. Plaintiff materially breached its subcontract with PC Construction and failed to complete its work in a good and workmanlike manner, in a timely manner, and in accordance with the subcontract. Plaintiff is therefore barred from recovery.

WHEREFORE, PC Construction, having fully answered the Summons and Complaint, prays for relief as follows:

A. That the Complaint be dismissed with costs; and

B. For such other and further relief as This Honorable Court deems just and proper.

BRUNER, POWELL, WALL,
& MULLINS, LLC

E. Wade Mullins, III
Matthew H. Stabler
Post Office Box 61110
Columbia, South Carolina 29260-1110
803-252-7693
wmullins@brunerpowell.com
Attorneys for PC Construction of Greenwood, Inc.

July 24, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
vs.	)	
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

I, Rita D. DeCarlis, a legal assistant with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Defendants, do hereby certify that on this 24th day of July 2012, I served the **Answer of Safeco Insurance Company of America** and **Answer and Counterclaim of PC Construction of Greenwood, Inc.** upon opposing counsel by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

David J. Brousseau, Esquire
McIntosh, Sherard Sullivan & Brousseau
PO Box 197
Anderson, SC 29622-0197
Attorney for the Plaintiff

2012 JUL 27 AM 10 19
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

Rita D. DeCarlis

Rita D. DeCarlis

Columbia, South Carolina
July 24, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	
vs.	)	**AMENDED ANSWER AND COUNTERCLAIM OF PC CONSTRUCTION OF GREENWOOD, INC.**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

COMES NOW Defendant PC Construction of Greenwood, Inc. ("PC Construction") answering Plaintiff's Complaint and would respectfully show unto this Court as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of Plaintiffs' Complaint not hereinafter expressly admitted, denied or otherwise explained by PC Construction is denied and strict proof demanded thereof.

2. PC Construction admits so much of the allegations of Paragraph I of Plaintiff's Complaint as allege Plaintiff is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Anderson County. PC Construction denies the remaining allegations of Paragraph I of Plaintiff's Complaint and demands strict proof thereof.

3. PC Construction admits the allegations of Paragraphs II, III, IV, and V of Plaintiff's Complaint.

4. In response to the allegations of Paragraph VI of Plaintiff's Complaint, PC Construction would show that the contract between PC Construction and Plaintiff was a written contract. PC

Construction craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

5. PC Construction admits the allegations of Paragraph VII of Plaintiff's Complaint.

6. In responding to the allegations of Paragraph VIII of Plaintiff's Complaint, PC Construction is without sufficient information to admit or deny that Plaintiff's last day of work on the Project was November 28, 2011, and, therefore, denies the same and demands strict proof thereof. PC Construction admits so much of the allegations of Paragraph VIII that allege Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond. The remaining allegations of Paragraph VIII contain legal conclusions to which no response from PC Construction is required, but to the extent a response is required, those allegations are denied.

7. PC Construction denies the allegations of Paragraph IX of Plaintiff's Complaint.

8. PC Construction admits so much of the allegations of Paragraph X of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph X are denied and PC Construction craves reference to the bond for its terms and conditions.

9. In response to the allegations of Paragraph XI of Plaintiff's Complaint, PC Construction realleges its responses to the foregoing paragraphs as if repeated verbatim.

10. In response to the allegations of Paragraphs XII and XIII of Plaintiff's Complaint, PC Construction would show that the contract between PC Construction and Plaintiff was a written contract. PC Construction craves reference to the written contract between PC Construction and Plaintiff and denies any allegations of Paragraph VI inconsistent with the provisions of the contract.

11. PC Construction denies the allegations of Paragraphs XIV, XV, and XVI of Plaintiff's Complaint.

12. PC Construction admits so much of the allegations of Paragraph XVII of Plaintiff's Complaint that Safeco issued a payment bond for the project. All other allegations of Paragraph XVII are denied and PC Construction craves reference to the bond for its terms and conditions.

13. In response to the allegations of Paragraph XVIII of Plaintiff's Complaint, PC Construction realleges its responses to the foregoing paragraphs as if repeated verbatim.

14. PC Construction admits so much of the allegations of Paragraph XIX of Plaintiff's Complaint that Safeco issued a payment bond for the project.

15. In responding to the allegations of Paragraph XX of Plaintiff's Complaint, PC Construction admits Plaintiff contracted directly with PC Construction for work on the project, Plaintiff filed and served a Statement of Account and Certificate of Claim on Payment Bond, and that PC Construction has paid certain monies to Plaintiff since Plaintiff filed its Statement of Account and Certificate of Claim on Payment Bond. All remaining allegations of Paragraph XX are denied.

16. PC Construction denies the allegations of Paragraphs XXI, XXII, and XXIII of Plaintiff's Complaint.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP)

17. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

18. PC Construction would show the Court that the Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCP, because Plaintiff has failed to state a claim upon which relief may be granted on any of its causes of action.

FOR A THIRD DEFENSE
(Equitable Defenses)

19. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

20. PC Construction asserts and alleges Plaintiff may not recover on one or more of its causes of action based on equitable defenses including, but not limited to, the doctrines of laches, unclean hands, and estoppel.

FOR A FOURTH DEFENSE
(Failure to Mitigate Damages)

21. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

22. Plaintiff has failed to mitigate its damages and is therefore barred from recovering any monies from PC Construction.

FOR A FIFTH DEFENSE
(Waiver)

23. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

24. Plaintiff's recovery is barred because it has waived any right to recover for the causes of action asserted in the Complaint.

FOR A SIXTH DEFENSE
(Credit for Settlement)

25. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

26. PC Construction affirmatively pleads S.C. Code §15-38-50 and states that if Plaintiff releases any other party from liability for the damages sought herein, then any damages awarded

Plaintiff against PC Construction, liability for which PC Construction denies, the same must by statute be reduced by the amount stipulated by the release.

FOR A SEVENTH DEFENSE
(Set Off)

27. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

28. Plaintiff failed to complete its work in a timely, good, and workmanlike manner.

29. As a result, there remains incomplete work and work that PC Construction must remedy and correct.

30. Plaintiff is liable for any and all costs incurred by PC Construction to complete and remedy its work.

31. PC Construction asserts that if it is found liable for damages sought in the Complaint which PC Construction expressly denies, it is entitled to an offset against said liability.

FOR AN EIGHTH DEFENSE
(Payment and Discharge)

32. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

33. PC Construction has paid Plaintiff in full and in accordance with the terms and conditions of the subcontract.

FOR A NINTH DEFENSE
(Material Breach)

34. PC Construction reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

35. Plaintiff materially breached its subcontract with PC Construction and failed to complete its work in a good and workmanlike manner, in a timely manner, and in accordance with the subcontract. Plaintiff is therefore barred from recovery.

FOR A TENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach of Contract)

36. PC Construction reiterates and reallages all of the allegations contained herein above as if set forth herein verbatim to the extent required by, but not inconsistent with, the following allegations.

37. PC construction entered into a subcontract with Plaintiff whereby Plaintiff was to perform construction services, including but not limited to sitework, grading, paving and other horizontal construction services on the Lander RWS Complex Initiative Field Construction, State Project No. H21-N0190MJ-A in Greenwood, South Carolina (the 'Project").

38. PC Construction has performed all of its contractual obligations regarding the subcontract with Plaintiff and the Project.

39. Plaintiff breached its subcontract with PC Construction and failed to complete its work in a good and workmanlike manner, in a timely manner and in accordance with the subcontract.

40. As a direct and proximate result of Plaintiff's breach of its subcontract with PC Construction, PC Construction has been damaged in an amount to be determined at the trial of this matter.

41. PC Construction is entitled to damages against Plaintiff as a result of Plaintiff's breach of the subcontract and subsequent damages suffered by PC Construction.

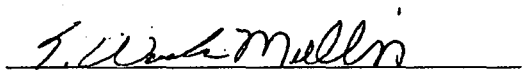
WHEREFORE, PC Construction, having fully answered the Summons and Complaint, prays for relief as follows:

A. That the Complaint be dismissed with costs;

B. For judgment on PC Construction's counterclaim in an amount to be determined at the trial of this matter; and

C. For such other and further relief as This Honorable Court deems just and proper.

BRUNER, POWELL, WALL,
& MULLINS, LLC



E. Wade Mullins III
Matthew H. Stabler
Post Office Box 61110
Columbia, South Carolina 29260-1110
803-252-7693
wmullins@brunerpowell.com
Attorneys for PC Construction of Greenwood, Inc.

April 23, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
vs.	)	
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2013 APR 23 AM 10: 2

I, Rita D. DeCarlis, a legal assistant with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Defendants, do hereby certify that on this 23rd day of April 2013, I served the **Amended Answer and Counterclaim of PC Construction of Greenwood, Inc.** upon opposing counsel by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

David J. Brousseau, Esquire
McIntosh, Sherard Sullivan & Brousseau
PO Box 197
Anderson, SC 29622-0197
Attorney for the Plaintiff

Rita D. DeCarlis

Rita D. DeCarlis

Columbia, South Carolina
April 23, 2013

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

2012 JAN 26 PM 12 45

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF GREENWOOD)	
Miller Construction Company, LLC,)	2012-ML-24 (001)
)	
Claimant,)	**STATEMENT OF ACCOUNT AND CERTIFICATE OF CLAIM ON PAYMENT BOND**
)	
vs.)	
)	
PC Construction of Greenwood, Inc.,)	
Safeco Insurance Company of America,)	Book No. _____ at Page _____
and the Lander Foundation,)	
)	
Respondents.)	
)	

TO: WHOMSOEVER THESE PRESENTS MAY CONCERN:

PERSONALLY appeared before me G. Michael Miller of Miller Construction Company, LLC, who first being duly sworn states that "he is an officer of Miller Construction Company, LLC, a South Carolina limited liability company with its principal place of business in Anderson County, South Carolina; that at the request of PC Construction Company, Inc., a South Carolina Corporation, and under contract with same; and further with the express and/or implied permission and knowledge of owner and/or Respondents; did furnish labor, materials and/or services and improvements for the Lander Foundation also known as Lander University, a political subdivision of the State of South Carolina, for construction services performed at the Lander RWS Complex Initiative Field Construction, State Project No. H21-N019-MJ-A, 501 Montague Avenue, Greenwood, South Carolina 29649. This project is generally referred to in the local community as the Lander Sports Complex. The Lander Foundation and/or Lander University are the owners of the real property on which this construction was performed. Petitioner's last date of work on the job site was November 28, 2011.

The labor, services and materials were furnished and actually used for the improvement of the property above described and the Petitioner herein has notified the Respondents of the labor,

materials and services and the value thereof; that the actual value of said labor, materials and services furnished by Plaintiff to Defendants herein and not paid for is the sum of Seventy Eight Thousand Three Hundred Sixty Three and 03/100 ($78,363.03) Dollars, together with attorney's fees, interest and costs as provided for by law, with all just credits given.

Deponent further states that for the balance due upon said contract, to-wit, Seventy Eight Thousand Three Hundred Sixty Three and 03/100 ($78,363.03) Dollars, together with attorney's fees, interest and costs as provided for by law, the said Miller Construction Company, LLC, claims a lien upon the payment bond of PC Construction Company, Inc., given for construction of improvements on the real property above described and hereby gives notice of such claim. Said bond being held by Safeco Insurance Company of America, as described as bond number 6615861and attached hereto as Exhibit B.

A verified statement of account in the amount due thereon for materials and services actually furnished to the Defendants is attached hereto as Exhibit A, and is incorporated herein by reference."

Dated: 1/24, 2012.

MILLER CONSTRUCTION COMPANY, LLC

By: _____
G. Michael Miller
Its: VP

License No: 96772

SWORN TO ME before this the 24th day of January, 2012.

_____
Notary Public for South Carolina

My Commission expires: 4/7/2012

Please Return to Attorney for Petitioner:

David J. Brousseau, Esq.
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, SC 29622-0197

EXHIBIT "A"

STATE OF SOUTH CAROLINA)
) **VERIFIED STATEMENT OF ACCOUNT**
COUNTY OF ANDERSON)

PERSONALLY APPEARED before me the undersigned, who being duly sworn states,

1. "That he is an agent and officer of Miller Construction Company, LLC.

2. That he is familiar with the books and records of Miller Construction Company.

3. That at present, PC Construction Company, Inc., has not paid the amount due and owing Miller Construction Company, LLC, for materials and labor furnished under contract at the real property above described, said amount being Seventy Eight Thousand Three Hundred Sixty Three and 03/100 ($78,363.03) Dollars.

4. That at present there is due and owing to Miller Construction Company, LLC, the sum of Seventy Eight Thousand Three Hundred Sixty Three and 03/100 ($78,363.03) Dollars.

5. That credit has been given for all payments and all lawful efforts to which said account is entitled. Miller Construction Company, LLC's last date of work on the real property was November 28, 2011."

MILLER CONSTRUCTION COMPANY,LLC

By: _____
G. Michael Miller
Its: VP

SWORN TO ME before this the
24th day of January, 2012.

_____
Notary Public for South Carolina

My Commission expires: 4/7/2012

EXHIBIT
B

2008 Edition
Revised 10/27/08

SE-357
Labor and Material Payment Bond

KNOW ALL MEN BY THESE PRESENTS, that

PC Construction of Greenwood, Inc., 108 Enterprise Court, Greenwood, SC 29649
(Insert full name or legal title and address of Contractor)

hereinafter referred to as "Contractor", and
Safeco Insurance Company of America, 1001 4th Avenue, Suite 1700, Seattle, WA 98154
(Insert full name and address of principal place of business of Surety)

a corporation duly organized and existing under the laws of the State of WA, with its principal office in the City of Seattle, and authorized to transact business in this State, hereinafter called the "surety", are jointly and severally held and firmly bound unto

The Lander Foundation, 320 Stanley Avenue, Greenwood, SC 29649
(Insert full name and address of Agency)

Hereinafter referred to as "Agency", or its successors or assigns, the sum of $7,005,310.00, being the sum of the Bond to which payment to be well and truly made, the Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS,

Contractor has by written agreement dated December 15, 2009 entered into a contract with Agency to construct Lander RWS Complex Initiative Field Construction, State Project No. H21-N019-MJ-A, 501 Montague Avenue, Greenwood, SC 29649

(Insert project Name and Number and Brief Description of Awarded Work, as found on the SE-330, Bid Form)

in accordance with Drawings and Specifications prepared by
Neal Prince + Partners Architects, Inc., 110 West North Street, Suite 300, Greenville, SC 29601
(Insert full name and address of A/E)

which agreement is by reference made a part hereof, and is hereinafter referred to as the Contract.

IN WITNESS WHEREOF, Surety and Contractor, intending to be legally bound hereby, subject to the terms stated herein, do each cause this Labor and Material Payment Bond to be duly executed on its behalf by its authorized officer, agent or representative.

DATED this 15th day of December, 2009 BOND NUMBER 6615861
(shall be no earlier than Date of Contract)

CONTRACTOR

PC Construction of Greenwood, Inc.
(Contractor's Name)

BY: [signature] Pres.
(Signature and Title)

ATTEST: [signature] off mgr.
(Signature and Title)

SURETY

Safeco Insurance Company of America
(Surety's Name)

BY: [signature]
W. D. Morris, Jr *(Signature and Title)* Attorney-in-Fact

ATTEST: [signature], CSR
(Signature and Title)

Labor and Material Payment Bond

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT:

1. The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Agency to pay for all labor, materials and equipment required for use in the performance of the Contract, which is incorporated herein by reference.

2. With respect to the Agency, this obligation shall be null and void if the Contractor:

2.1 Promptly makes payment, directly or indirectly, for all sums due Claimants; and

2.2 Defends, indemnifies and holds harmless the Agency from all claims, demands, liens or suits by any person or entity who furnished labor, materials or equipment for use in the performance of the Contract.

3. With respect to Claimants, this obligation shall be null and void if the Contractor promptly makes payment, directly or indirectly, for all sums due.

4. With respect to Claimants, and subject to the provisions of Title 29, Chapter 5 and the provisions of §11-35-3020(2)(c) of the SC Code of Laws, as amended, the Surety's obligation under this Bond shall arise as follows:

4.1 Every person who has furnished labor, material or rental equipment to the Contractor or its subcontractors for the work specified in the Contract, and who has not been paid in full therefore before the expiration of a period of ninety (90) days after the date on which the last of the labor was done or performed by him or material or rental equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action for the sum or sums justly due him.

4.2 A remote claimant shall have a right of action on the payment bond upon giving written notice by certified or registered mail to the Contractor within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which such claim is made.

4.3 Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or circuit in which the construction contract was to be performed, but no such suit shall be commenced after the expiration of o ne year after the day on which the last of the labor was performed or material or rental equipment was supplied by the person bringing suit.

5. When the Claimant has satisfied the conditions of paragraph 4, the Surety shall promptly and at the Surety's expense take the following actions:

5.1 Send an answer to the Claimant, with a copy to the Agency, within forty-five (45) days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

5.2 Pay or arrange for payment of any undisputed amounts.

6. Amounts owed by the Agency to the Contractor under the Contract shall be used for the performance of the Contract and to satisfy claims, if any, under any Performance Bond. By the Contractor furnishing and the Agency accepting this Bond, they agree that all funds earned by the contractor in the performance of the Contract are dedicated to satisfy obligations of the Contractor and the Surety under this Bond, subject to the Agency's prior right to use the funds for the completion of the Work.

7. The Surety shall not be liable to the Agency, Claimants or others for obligations of the Contractor that are unrelated to the Contract. The Agency shall not be liable for payment of any costs or expenses of any claimant under this bond, and shall have under this Bond no obligations to make payments to, give notices on behalf of, or otherwise have obligations to Claimants under this Bond.

8. The Surety hereby waives notice of any change, including changes of time, to the Contract or to related Subcontracts, purchase orders and other obligations.

9. Notice to the Surety, the Agency or the Contractor shall be mailed or delivered to the addresses shown on the signature page. Actual receipt of notice by Surety, the Agency or the contractor, however accomplished, shall be sufficient compliance as of the date received at the address shown on the signature page.

10. By the Contractor furnishing and the Agency accepting this Bond, they agree that this Bond has been furnished to comply with the statutory requirements of the South Carolina Code of Laws, as amended, and further, that any provision in this Bond conflicting with said statutory requirements shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory Bond and not as a common law bond.

11. Upon request of any person or entity appearing to be a potential beneficiary of this bond, the Contractor shall promptly furnish a copy of this Bond or shall permit a copy to be made.

12. Any dispute, suit, action or proceeding arising out of or relating to this Bond shall be governed by the laws of the State of South Carolina.

13. **DEFINITIONS**

13.1 Claimant: An individual or entity having a direct contract with the Contractor or with a Subcontractor of the Contractor to furnish labor, materials, or equipment for use in the performance of the Contract. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Contract, architectural and engineering services required for performance of the Work of the Contractor and the Contractor's Subcontractors, and all other items for which a mechanic's lien might otherwise be asserted.

13.2 Remote Claimant: A person having a direct contractual relationship with a subcontractor of the Contractor or subcontractor, but no contractual relationship expressed or implied with the Contractor.

13.3 Contract: The agreement between the Agency and the Contractor identified on the signature page, including all Contract Documents and changes thereto.

Liberty Mutual

POWER OF ATTORNEY

Safeco Insurance Company of America
General Insurance Company of America
1001 4th Avenue
Suite 1700
Seattle, WA 98154

No. 13277

KNOW ALL BY THESE PRESENTS:

That **SAFECO INSURANCE COMPANY OF AMERICA** and **GENERAL INSURANCE COMPANY OF AMERICA**, each a Washington corporation, does each hereby appoint

**********FRANK W. HAFNER, III; W.D. MORRIS JR.; Columbia, South Carolina**********

its true and lawful attorney(s)-in-fact, with full authority to execute on its behalf fidelity and surety bonds or undertakings and other documents of a similar character issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, SAFECO INSURANCE COMPANY OF AMERICA and GENERAL INSURANCE COMPANY OF AMERICA have each executed and attested these presents

this 21st day of March, 2009

Dexter R. Legg — Dexter R. Legg, Secretary

T A Mikolajewski — Timothy A. Mikolajewski, Vice President

CERTIFICATE

Extract from the By-Laws of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA:**

"Article V, Section 13. - FIDELITY AND SURETY BONDS ... the President, any Vice President, the Secretary, and any Assistant Vice President appointed for that purpose by the officer in charge of surety operations, shall each have authority to appoint individuals as attorneys-in-fact or under other appropriate titles with authority to execute on behalf of the company fidelity and surety bonds and other documents of similar character issued by the company in the course of its business... On any instrument making or evidencing such appointment, the signatures may be affixed by facsimile. On any instrument conferring such authority or on any bond or undertaking of the company, the seal, or a facsimile thereof, may be impressed or affixed or in any other manner reproduced; provided, however, that the seal shall not be necessary to the validity of any such instrument or undertaking."

Extract from a Resolution of the Board of Directors of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA** adopted July 28, 1970.

"On any certificate executed by the Secretary or an assistant secretary of the Company setting out,
(i) The provisions of Article V, Section 13 of the By-Laws, and
(ii) A copy of the power-of-attorney appointment, executed pursuant thereto, and
(iii) Certifying that said power-of-attorney appointment is in full force and effect,
the signature of the certifying officer may be by facsimile, and the seal of the Company may be a facsimile thereof."

I, Dexter R. Legg, Secretary of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA**, do hereby certify that the foregoing extracts of the By-Laws and of a Resolution of the Board of Directors of these corporations, and of a Power of Attorney issued pursuant thereto, are true and correct, and that both the By-Laws, the Resolution and the Power of Attorney are still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of said corporation

this 15th day of December, 2009

SAFECO INSURANCE COMPANY OF AMERICA — CORPORATE SEAL 1953 — STATE OF WASHINGTON

GENERAL INSURANCE COMPANY OF AMERICA — CORPORATE SEAL 1923 — State of Washington

Dexter R. Legg

Dexter R. Legg, Secretary

S-0974/DS 3/09

WEB PDF

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 FEB 14 PM 1 55

Miller Construction Company, LLC,

Claimant,

vs.

PC Construction of Greenwood, Inc., Safeco Insurance Company of America, and The Lander Foundation,

Respondents.

AFFIDAVIT OF SERVICE BY MAIL

Ca. No: 2012-ML-24-0001

PERSONALLY appeared before me Tonya L. Crawford, who being first duly sworn, states that she is an employee of the firm of McINTOSH, SHERARD, SULLIVAN & BROUSSEAU, attorneys for the Claimant in this action, and that she did cause the **STATEMENT OF ACCOUNT AND CERTIFICATE OF CLAIM ON PAYMENT BOND** in this matter to be served on the Respondents by placing the same in the United States Mail with sufficient postage affixed thereto for regular, First Class and Certified delivery with Return Receipt Requested on the 10th Day of February 2012, addressed to the Respondents at their address as follows:

The Lander Foundation
320 Stanley Avenue
Greenwood, South Carolina 29649

Safeco Insurance Company of America
1001 4th Avenue, Suite 1700
Seattle Washington 98154

Tonya L Crawford

SWORN to before me this 10th
Day of February A.D., 2012

Ruthy M. Bramlett (SEAL)
Notary Public for South Carolina.

My Commission Expires: 11-27-21

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

2012 FEB 14 PM 1 55

Miller Construction Company, LLC,)
)
Claimant,)
)
vs.) **AFFIDAVIT OF SERVICE BY MAIL**
)
PC Construction of Greenwood, Inc.,) Ca. No: 2012-ML-24-0001
Safeco Insurance Company of America,)
and The Lander Foundation,)
)
Respondents.)
)

PERSONALLY appeared before me Tonya L. Crawford, who being first duly sworn, states that she is an employee of the firm of McINTOSH, SHERARD, SULLIVAN & BROUSSEAU, attorneys for the Claimant in this action, and that she did cause the **STATEMENT OF ACCOUNT AND CERTIFICATE OF CLAIM ON PAYMENT BOND** in this matter to be served on the Respondents and/or their Registered Agent by placing the same in the United States Mail with sufficient postage affixed thereto for regular, First Class, Certified, and Restricted delivery with Return Receipt Requested on the 10th Day of February 2012, addressed to the Respondents and/or their Registered Agent at their address as follows:

Stephen Baggett, Sr., Esq.
Registered Agent for The Lander Foundation
414 Main Street
Greenwood, South Carolina 29649

Charles R. Piontek, Sr.
Registered Agent for PC Construction of Greenwood, Inc.
108 Enterprise Ct.
Greenwood, South Carolina 29649

Tonya L Crawford

SWORN to before me this 10th
Day of February A.D., 2012

Kathy M. Bramlett (SEAL)
Notary Public for South Carolina.

My Commission Expires: 4-27-21

Miller Construction Company, LLC v PC Construction of Greenwood, Inc, Safeco Insurance Company of America, and the Lander Foundation

Case No.: 2012-ML-24-0001

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Charles R. Piontek, Sr.
Registered Agent for PC Construction of Greenwood, Inc.
108 Enterprise Ct.
Greenwood, South Carolina 29649

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Charles Piontek C. Date of Delivery 2/13/12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☒ Yes

2. Article Number (Transfer from service label) 7006 2150 0002 0098 4330

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

2012 FEB 15 P 2:00 GREENWOOD

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

The Lander Foundation
320 Stanley Avenue
Greenwood, South Carolina 29649

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Scott Pilgrim ☐ Agent ☐ Addressee

B. Received by (Printed Name) Scott Pilgrim C. Date of Delivery 2-13

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 3230 0001 8189 7971

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

Miller Construction Company, LLC,

Plaintiff,

vs

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,

Defendant.

ACCEPTANCE OF SERVICE

Ca No.: 2012-~~DR-04-1185~~ ML-24-0001

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 JUL 10 AM 9 54

Due and legal service of the **Civil Action Cover Sheet, Summons and Complaint** in the foregoing captioned action is hereby accepted and retention of a copy thereof is hereby acknowledged at the Office of Bruner, Powell, Robbins, Wall & Mullins at Columbia South Carolina, this 21st day of June, 2012 by the Defendant Safeco Insurance Company of America.'s Attorney, Edward Wade Mullins, III.

E. Wade Mullins
Edward Wade Mullins, III
Attorney of Record for Defendant
~~PC Construction of Greenwood, Inc.~~
Safeco Insurance Company of America

SWORN to before me this 21st
Day of June, A.D., 2012

Rita D. DeCarlo (SEAL)
Notary Public for South Carolina.

My Commission Expires: October 18, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2012 JUL 10 AM 9 54

Miller Construction Company, LLC,

Plaintiff,

vs

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America,

Defendant.

ACCEPTANCE OF SERVICE

ML-24-0001

Ca No.: 2012-~~DR-04-1185~~

Due and legal service of the **Civil Action Cover Sheet, Summons and Complaint** in the foregoing captioned action is hereby accepted and retention of a copy thereof is hereby acknowledged at the Office of Bruner, Powell, Robbins, Wall & Mullins at Columbia, South Carolina, this 21st day of June, 2012 by the Defendant PC Construction of Greenwood, Inc.'s Attorney, Edward Wade Mullins, III.

Edward Wade Mullins, III
Attorney of Record for Defendant
PC Construction of Greenwood, Inc.

SWORN to before me this 21st
Day of June, A.D., 2012

Rita N. McCarter (SEAL)
Notary Public for South Carolina.

My Commission Expires: October 18, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
Miller Construction Company, LLC,)
☐ Plaintiff)
)
v.)
)
Pc Construction Of Greenwood, Inc. And Safeco)
Insurance Company Of America,
☒ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-24-00574

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
, Bar No.	E. Wade Mullins Iii, Bar No. 3525
Address:	Address:
	Bruner, Powell, Wall & Mullins, LLC
phone: fax:	PO Box 61110, Columbia, SC 29260
e-mail: other:	phone: 803-252-7693 fax: 1-888-465-8015
	e-mail: wmullins@brunerpowell.com other:

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

☒ **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: Motion for Summary Judgment
Estimated Time Needed:20 Minutes 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.

E. Wade Mullins — October 25, 2013
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

Collected by: KH 28th — Date Filed: 11/4/13

☐ MOTION FEE COLLECTED:

SCCA/233 (11-03)

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	
vs.	)	**PC CONSTRUCTION OF GREENWOOD, INC. AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION FOR SUMMARY JUDGMENT (Rule 56, SCRCP)**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

TO: DAVID J. BROUSSEAU, ESQUIRE, ATTORNEY FOR PLAINTIFF MILLER CONSTRUCTION COMPANY, LLC:

YOU WILL PLEASE TAKE NOTICE that Defendants PC Construction of Greenwood, Inc. ("PC Construction") and Safeco Insurance Company of America ("Safeco"), by and through their undersigned counsel, will move before the before the Presiding Judge of the Greenwood County Court of Common Pleas in Greenwood, South Carolina on the 10th day following service hereof or as soon thereafter as Counsel can be heard for an Order, pursuant to Rule 56, SCRCP, granting PC Construction and Safeco judgment as to all causes of action asserted by Miller Construction Company, LLC ("Miller"). The grounds for this Motion are that there is no genuine issue of material fact as to the following:

1. PC Construction entered into a subcontract with Miller whereby Miller was to perform construction services, including but not limited to sitework, grading, paving, installation of storm sewer, and other horizontal construction services on the Lander RWS Complex Initiative Field Construction, State Project No. H21-N0190MJ-A in Greenwood, South Carolina (the "Project").
2. The original subcontract amount was $492,424.00.

3. Through change orders, Miller's subcontract amount increased to over $1.4 million.

4. Miller holds a Group 4 General Contractor's License ***in the Grading subclassification*** with the South Carolina Department of Labor, Licensing, and Regulation ("LLR"). *See* Exhibit A, Certification of Licensure, attached hereto and incorporated by reference.

5. Miller does not hold any other contractor licenses with LLR.

6. A general contractor's license in the grading subclassifcation allows a licensee to perform the following work: "'Grading' which includes the ***soil preparation and rehabilitation*** of streets, roads, highways, railroad beds, building sites, parking lots, and storm sewers. This subclassification also includes work under the subclassification of Highway Incidental."[1] S.C. Code Ann. § 40-11-410(2)(d) (emphasis added).

7. A general contractor's license in the grading subclassifcation does NOT allow a license to install storm sewer. *See id.*

8. For a contractor to install storm sewer, it must possess a General Contractor's License ***in the Water and Sewer Lines subclassification***. S.C. Code Ann. § 40-11-410(3)(c) ("'Water and Sewer Lines' which includes construction work on water mains, water service lines, water storage tanks, sewer mains, sewer lines, . . . and which includes connection at the building of all lines to the appropriate lines contained in commercial structures, installation and repair of a project involving manholes, the laying of pipe for storm drains and sewer mains, all necessary connections, and excavation and backfilling, and concrete work incidental thereto.")

9. A Group 4 general contractor's license allows a licensee to perform work on a job not to exceed $750,000.00. S.C. Code Ann. § 40-11-260(A)(4)(a).

---

[1] A Highway Incidental license allows a contractor to perform the following work: "'Highway Incidental' which includes highway work for grooving, milling, rehabilitating, and installing guardrails, gutters, highway signs, pavement marking, and painting." S.C. Code Ann. § 40-11-410(2)(e).

10. Pursuant to S.C. Code Ann. § 40-11-370(C):

> *An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.* An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

(Emphasis added).

11. Miller does not have a valid license as required by Chapter 11 of Title 40, and thus cannot enforce its contract with PC Construction either in law or in equity, for the following reasons:

    a. Miller did not possess the requisite license to perform its scope of work. Specifically, Miller was not licensed to storm sewer on the Project.

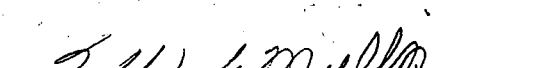
    b. Miller's work on the Project exceeded its Group 4 license classification. A contractor performing work that exceeds the maximum allowed for its license group, does not possess a valid license and cannot enforce its contract. *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013).

12. As Miller cannot enforce its contract with PC Construction either in law or in equity, PC Construction and Safeco are entitled to summary judgment as to all of Miller's claims as a matter of law.

WHEREFORE, PC Construction and Safeco are entitled to an Order pursuant to Rule 56, SCRCP granting judgment in their favor as all claims asserted by Miller and for such other and further relief as This Honorable Court deems just and proper.

This Motion may be further supported by a Memorandum of Law to be filed with the Court prior to a hearing.

BRUNER, POWELL, WALL & MULLINS, LLC



E. Wade Mullins, III
Matthew H. Stabler
Post Office Box 61110
Columbia, South Carolina 29260-1110
(803) 252-7693
Attorneys for Plaintiff PC Construction of Greenwood, Inc. and Safeco Insurance Company of America

October 25, 2013
Columbia, South Carolina

Exhibit A

Nikki R. Haley
Governor

Holly G. Pisarik
Director

South Carolina
Department of Labor, Licensing and Regulation

South Carolina Contractors' Licensing Board

110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
(803) 896-4686
FAX: (803) 896-4814
www.llronline.com

October 24, 2013

CERTIFICATION OF LICENSURE

Licensee: ..... **MILLER'S CONSTRUCTION COMPANY**
225 THOMPSON ROAD
ANDERSON SC 29624

Licensee#: ..... **CLG . 96772**
Expiration Date: **10/31/2014**
Examined Qualifier: ..... **G. MICHAEL MILLER**
License Classification(s): ..... **GRADING 4**
Examination Date(s): **04/05/1997**

LICENSED BY:
☒ Examination (score of 70% or higher).
☐ Reciprocity/Waiver Agreement with the State of ___.
☐ S.C. Grandfather provision; no technical exam taken.
☐ Work experience; a technical exam not required for above classification(s).

LICENSEE STATUS:
☒ The **licensee** is currently **ACTIVE** in good standing with the S. C. Contractors' Licensing Board.
☐ The license is EXPIRED. The **qualifier** was associated with this license from _____ to _____.

DISCIPLINARY ACTION:
☒ No ☐ Yes - Explanation:

OTHER:
☒ Notes: **Active and in good standing**

If I can be of further assistance, please contact me at brenda.dunn@llr.sc.gov or (803) 896-5158.

Sincerely,

Brenda Dunn
Administrative Assistant

SOUTH CAROLINA CONTRACTORS LICENSING BOARD

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	
vs.	)	**CERTIFICATE OF SERVICE**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

I, Rita D. DeCarlis, a legal assistant with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Defendants, do hereby certify that on this 25th day October of 2013, I served the **Motion and Order Information Form and Cover Sheet and PC Construction of Greenwood, Inc. and Safeco Insurance Company of America's Motion for Summary Judgment** upon opposing counsel by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

David J. Brousseau, Esquire
McIntosh, Sherard Sullivan & Brousseau
PO Box 197
Anderson, SC 29622-0197
Attorney for the Plaintiff

Rita D. DeCarlis

Rita D. DeCarlis

Columbia, South Carolina
October 25, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	
Miller Construction Company, LLC ☒ Plaintiff	)	CASE NO. 2012-CP-24-00574
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
Pc Construction Of Greenwood, Inc. And Safeco Insurance Company Of America ☐ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
David J. Brousseau, Bar No. 71150 Address: Post Office Box 197 Anderson, SC 29622 phone: 864-225-001 fax: 864-225-0004 e-mail: daveb@msslawfirm.net other:	E. Wade Mullins, Bar No. Address: Post Office Box 61110 Columbia, SC 29260-1110 phone: 803-252-7693 fax: e-mail: wmullins@brunerpowell.com other:

☒ **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: Notice of Motion and Motion for Summary Judgment
Estimated Time Needed: 15 minutes 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 — October 25, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ 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: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS TENTH (10TH) JUDICIAL CIRCUIT
Miller Construction Company, LLC, Plaintiff, vs. PC Construction of Greenwood, Inc. and Safeco Insurance Company of America, Defendants.	)))))))))))	**NOTICE OF MOTION & MOTION FOR SUMMARY JUDGMENT** (Rule 56, SCRCP) Case No.: 2012-CP-24-00574

TO: THE DEFENDANT AND ITS ATTORNEY EDWARD WADE MULLINS, III

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Miller Construction Company, LLC, by and through its undersigned attorney, will, ten (10) days after the date of service hereof, exclusive of date of service, or as soon as this matter may properly be heard, move before the presiding Judge of the Tenth (10th) Judicial Circuit, pursuant to Rule 56, South Carolina Rules of Civil Procedure specifically in the South Carolina Rules of Civil Procedure, for this Court's Order granting Summary Judgment as to Defendant's counterclaims.

Plaintiff bases its Motion, *inter alia*, upon the following non-exclusive list of grounds:

1. This action was filed by the Plaintiff to recover moneys still owed for work performed and services provided on a construction project.
2. The underlying facts taken in a light most favorable to the Plaintiff are as follows:
   a) Defendant was the general contractor providing construction services for the Jeff May Sports Complex for Lander University;
   b) The parties entered into a Subcontract Agreement on December 17, 2009 in order to provide subcontract construction services, including, but not limited to, grading, paving and other horizontal construction services;
   c) Plaintiff provided aforementioned subcontracting construction services, completing work on the project on November 28, 2011;
   d) Plaintiff filed a Statement of Account and Certificate of Claim on Payment bond but has not been paid for its work on the above project;

d) Plaintiff filed this action as way to recover Fifty Three Thousand Six Hundred Ninety Five and 08/100 ($53,695.08) Dollars for unpaid invoices and retainage submitted to Defendant;

e) Defendant filed a counterclaim for breach of contract and, in essence, liquidated damages as a result of an alleged delay on the part of the Plaintiff.

3. The Subcontract Agreement between the parties provides in Article 6(e),

> "If the Contract Documents provide for liquidated or other damages for delay **and such damages are so assessed against PC Construction of Greenwood, Inc.**, then PC Construction of Greenwood, Inc. May assess the same against the Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc."

4. Lander University never asserted liquidated damages against Defendant, as is required under the aforementioned excerpt from the Subcontract Agreement.

5. As such, Miller Construction Company, LLC is informed and believes that it is entitled to summary judgment on all causes of action relating to Defendant's counterclaim for liquidated damages.

Respectfully Submitted,

David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622-0197
(864) 225-0001 | Fax: (864) 225-0004
Attorney for Miller Construction Company, LLC

October 28, 2013

STATE OF SOUTH CAROLINA)		
)		IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)		EIGHTH (8TH) JUDICIAL CIRCUIT
Miller Construction Company, LLC,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S**
vs.	)	**POST-TRIAL MEMORANDUM**
	)	
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	**Ca No :: 2012-CP-24-574**
	)	
Defendants.	)	
	)	

The above captioned matter was tried before this Court on November 4, 5 and 6, 2013. Following the conclusion of the case, the Court allowed for the submission of post-trial briefs to be submitted no later than November 20, 2013.

PC Construction of Greenwood, Inc. [hereinafter PC] was the general or prime contractor on the Lander Sports Complex. PC Construction entered into a subcontract with Miller Construction Company, LLC [hereinafter Miller]. The subcontract called for Miller to perform grading construction services on the project for the price of $492,424.

Early on into the project, asbestos laden materials were discovered. Miller successfully bid on the removal and hauling of the asbestos materials. This issue caused delays to the project as well as significantly increased the overall costs by way of change order.

Throughout the project, Miller was paid by PC upon making pay applications. At no time during the project did PC withhold payment due to delays it believed were caused by Miller or by work PC felt was not performed in an workmanlike manner.

Upon making its final pay application, PC withheld payment to Miller. PC had not yet been paid its final payment from Lander University [hereinafter Lander](the owner). However, after receiving final payment from Lander in the spring of 2013, PC still withheld final payment to Miller.

Miller claims it is owed $53,695.08 plus prejudgment interest at the statutory rate on said amount. PC admits that it owes Miller $51,270.08. However, PC alleges that it is entitled to a back

charge of $3,921.82 for the costs to fix a sinkhole PC alleges Miller caused to the project. Further, PC alleges that it is entitled to $137,035.15 in damages from Miller due to delays Miller allegedly caused to the project. Lastly, PC alleges that Miller was not properly licensed to perform the scope of the work that Miller performed on the project. As such, PC contends that Miller is barred from bringing this lawsuit to enforce the contract.

Amount Owed to Miller

Of the $53,695.08 owed to Miller, PC agrees that it owes $51,270.08.[1] The difference amounts to two change orders totaling $2,425.00 for Miller fixing a silt fence. [Tab 6 of Defendant's Exhibit 3].

Gary Piontek testified that these change orders were rejected because a) they were not submitted and approved before the work occurred and b) it was warranty work covered by the subcontract. Nonetheless, Mike Miller and Robert "Buck" Sisk testified that the silt fence was damaged by other contractors on site. Further, they testified that they were told by Gary Piontek to fix the fence in order to stay in DHEC compliance, and that they would be paid by subsequent change order.

Sinkhole

PC contends that it is entitled to damages from Miller in the amount of $3,921.82 for fixing a sinkhole that PC believed was caused by Miller. [Tabs 9 and 20 of Defendant's Exhibit 3]. Gary Piontek testified that he believed the storm sewer pipes were improperly installed at that location, thus causing the sinkhole. This conflicts with the testimony of Mike Miller who testified that the base from the light pole or electrical conduit not being dug deep enough caused the sinkhole.

Of particular note on this issue, the dirt in the area where the sinkhole occurred was fully compacted. Mike Miller testified that, in his prior experience, he had never heard of a sinkhole occurring on properly compacted dirt. Further, the sand in the second photo of tab 8 of Defendant's exhibit 3 was white. According to testimony, if there was a breach in the pipe, the sand would have been a dark orange.

Damages for Delay

PC asserts that it is entitled to damages from Miller for 'extended general conditions' allegedly caused by delays that PC contends Miller caused. Gary Piontek testified that he 'begged'

---

1 Subject to its counterclaim for damages.

and 'pleaded' with Miller to have more people on site. He added that on most occasions Miller only had three (3) to four (4) employees on site. He further noted that Miller would often wait for approval from other subcontractors or engineers before performing its tasks. This testimony greatly conflicts with the testimony of Buck Sisk, Mike Miller, Steve Grogan, Frank Sells and Jeff Beaver.

Buck Sisk, Miller's Superintendent, testified that he was on site every day and that Miller routinely had eight (8) to nine (9) employees on site. Additionally, all Lander representatives testified that Miller did not cause delays to the project. On cross exam, Frank Sells, Ground's Department Superintendent for Lander, was asked how he knew what delays were specifically caused by Miller. He responded, "they couldn't have caused delays; they were always on site asking what else they could do." Steve Grogan, the assistant athletic director and complex manager, was noted to have experience in construction through his family's business. Mr. Grogan testified on cross exam that Miller was the best subcontractor on the project, and that it was impossible that Miller caused any delays. Lastly, Jeff Beaver, Director of Engineering Services, testified that Miller was a team player, that the delays were caused by the inexperience of PC, and that Miller did not cause any delays on the project.

After completion of the project, Lander and PC became involved in a dispute regarding final payment. PC agreed to accept from Lander payment of approximately $120,000 for damages for 'extended general conditions.' According to testimony, this amount was roughly equal to 120 days of delay. Further no liquidated damages were ever assessed against PC by Lander.

PC testified that they were entitled to approximately the same amount of damages from Miller. PC has already recovered payment from Lander for the same delays. In other words, PC is attempting to collect from Miller what it already recovered from Lander.

Article 6, paragraph 7 of the subcontract allowed PC to join Miller as a party to the action against Lander. PC did not do so. PC accepted and agreed to a final payment amount from Lander. If PC felt it was entitled to more damages from Lander for 'extended general conditions' it had every right to have a contested hearing to decide that issue. However, it voluntarily chose not to do so and accepted the amount that it did absent any input from Miller, and absent any assessment by Lander of liquidated damages. Additionally, PC never withheld payment to Miller during the project due to alleged non-compliance with the schedule. As such, Miller contends that PC has received all monies for damages for 'extended general conditions' from Lander.

Licensing Issue

Lastly, PC asserts that Miller is not entitled to recovery because it is not properly licensed pursuant to S.C. Code Ann. § 40-11-370(C).[2] PC contends that Miller acted outside the scope of its license by fixing the storm sewer system into a working system. Such fix included removing old drains and replacing with new drains.

S.C. Code Ann. § 40-11-370(C) states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contact." S.C. Code Ann. § 40-11-410(2)(d) provides as follows:

> "General Contractors-Highway" which *includes* work under these subclassifications:
>
> .
>
> .
>
> .
>
> (d) "Grading" which includes the soil preparation and *rehabilitation* of streets, roads, highways, railroad beds, building sites, parking lots, <u>and storm sewers</u>. This subclassification also includes work under the subclassification of Highway Incidental.
>
> (e) "Highway Incidental" which includes highway work for grooving, milling rehabilitating, and installing guardrails, gutters, highway signs, pavement mark, and painting.

S.C. Code Ann. §40-11-410(2)(d)(Emphasis added).

"[S]tatutes in derogation of the common law are to be strictly construed. Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.' Statutes subject to this rule include those which 'limit a claimant's right to bring suit.'" *Grier v. AMISUB of SC*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* "There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of the a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced." *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 423, 137 S.E.2d 608, 611 (1964).

---

[2] PC originally contended that Miller classification as class 4 prohibited recovery because its classification is for $750,000. Halfway through trial, PC abandoned this argument.

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then 'the rules of statutory interpretation are not needed and the court had no right to impose another meaning." *Bostic v. Am. Home Mortg. Servicing, Inc.*, 375 S.C. 143, 149, 650 S.E.2d 479, 482 (Ct. App. 2007). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Id.*

"The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits." *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 65, 744 S.E.2d 547, 551 (2013) (Emphasis added).

Webster's Dictionary defines the word 'rehabilitat[ion]' as follows: "to restore or bring to a condition of health or useful and constructive activity." Mirriam-Webster's Collegiate Dictionary 985-86 (10th ed. 1998).

Rehabilitation of an old storm system into a working system would include, in certain instances, demolition and installation of storm sewer lines. In this case, old lines were torn out, some old lines stayed, and the newly installed lines tied into existing catch basins. Additionally, this was a state funded job, and no one ever claimed that Miller was not licensed to perform this work. Further, there was no evidence that any agency ever attempted to stop work on the project due to 'licensing' issues.

Defendants contend that, because a section of S.C. Code Ann. § 40-11-410 (3)(c) states that 'water and sewer lines' licensing references the installation and repair of storm drains and sewer lines, this excludes Miller from doing rehabilitative work on the storm sewer system that would include the installation and demolition of storm sewer lines in this particular case.

Although a definition is included in a different licensing sub-section of a statute, does not mean it excludes such work in regards to defining the word 'rehabilitation'. Had the legislature intended to exclude installation and demolition of storm sewer lines from the 'grading' licensing sub-section, It would have specifically excluded it. However, such work was not excluded. Instead the legislature included the very broad term of 'rehabilitation' without any exclusionary language. As the statute inhibits a fundamental right (filing a lawsuit for breach of contract), one must assume that the legislature intended to keep such a broad term like 'rehabilitation' in the context of the statute.

Arguably, PC agreed with this interpretation of the statute at the time of signing the agreement. PC was well aware of Miller's licensing status at the outset of the project as well as the

scope of work Miller would be performing. In fact, had Miller been engaging in unlicensed work, PC would be liable pursuant to S.C. Code Ann. §40-11-300, which makes it unlawful for the 'prime contractor' or 'general contractor' or another entity 'with contracting or hiring authority' to engage in such activities. It is only now[3] that monies are owed on the subcontract that PC attempts to utilize this statute, intended to protect the general public from unlicensed contractors, as a sword to thwart the collection of amounts that it agrees are owed.

Conclusion

PC agrees that it owes Miller at least $51,270.08. PC is seeking recovery from Miller of damages for delay for which it has already received payment from Lander. Now, PC is attempting to thwart recovery of said monies by invoking, at the eleventh (11th) hour, a statutory bar due to licensing issues that PC originally agreed by way of contract that Miller could perform. Miller contends that a) it was properly licensed to perform said work b) that said work resulted in an unpaid balance from PC of $53,695.08 and c) it should receive prejudgment interest on said amount.

Respectfully Submitted,

David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622
(864) 225-0001 | 225-0004 (fax)
Attorney for Plaintiff

3 This issue was not raised until ten (10) days before trial over the objection of Miller.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	
vs.	)	**DEFENDANTS PC CONSTRUCTION OF GREENWOOD, INC. and SAFECO INSURANCE COMPANY OF AMERICA POST TRIAL BRIEF**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

This case arises out of a construction project known as the Lander RWS Complex Initiative Field Construction, State Project No. H21-N0190MJ-A in Greenwood, South Carolina (the "Project"). PC Construction of Greenwood, Inc. ("PC") entered into a contract to perform the work for the Owner, Lander RWS (Def. Exh. 3, Tab 2). PC, in turn, entered into a subcontract with Miller (the "Subcontract") whereby Miller was to perform construction services, including but not limited to sitework, grading, and installation of storm sewer on the Project. **Def. Exh. 3, Tab 4.** The portions of the Subcontract which are relevant to this action are as follows:

> **ARTICLE 4**
>
> a. Subcontractor recognizes PC Construction of Greenwood, Inc.'s obligations to the Owner for timely progress upon and completion of the Work and each part thereof and that **TIME IS OF THE ESSENCE** in the performance of the Work under this Subcontract. Subcontractor agrees to perform Subcontractor's Work so that the entire Project and every portion thereof will be completed in accordance with the Contract Documents, including any scheduling requirements contained in this Subcontract. ...
>
> b. **JOB SCHEDULE.** PC Construction of Greenwood, Inc. shall furnish and publish a progress schedule for the Project. This will constitute the basis for starting and finishing of the Subcontractor's Work....PC Construction of Greenwood, Inc. will seek and use information from the Subcontractor regarding durations of tasks, sequences, etc. in formulating the progress schedule. The Subcontractor shall take whatever measures necessary to ensure completion within the framework of the schedule.
>
> .1 The Subcontractor is solely responsible for scheduling his manpower and equipment to meet the needs of the Project and maintain the flow of construction as required by the job schedule. PC Construction of Greenwood, Inc. will not perform required coordination or supervision of the Subcontractor's work force.

ARTICLE 5

d. **COORDINATION OF ITS WORK WITH OTHERS.** Subcontractor agrees as follows:

.4 Subcontractor shall be responsible for taking all field measurements necessary to ensure the proper fitting of Subcontractor's Work with the Work of PC Construction of Greenwood, Inc. and others. Field measurements shall be taken and coordinated in a timely manner to avoid delaying the Job Schedule;

j. **JOB SITE CONDITIONS.** The Subcontractor shall perform his work in accordance with the following conditions:

.1 ... Should the Subcontractor, in the sole judgment of PC Construction of Greenwood, Inc., delay the progress of the Work, the Subcontractor shall, at his own expense and cost, work such overtime as may be necessary to finish the Work within the Schedule.

ARTICLE 6

a. **CHANGES.** Without nullifying this Subcontract or any bond given pursuant to this Subcontract, PC Construction of Greenwood, Inc. may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of PC Construction of Greenwood, Inc.'s directive or if the Contract Documents require notice to be given by PC Construction of Greenwood, Inc. to the Owner is less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give notice to the Owner or to comply with any other notice requirements of the Contract Documents. **FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY THE OWNER, ARCHITECT AND/OR PC Construction of Greenwood, Inc.** Any adjustments to Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. ...

... THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY PC Construction of Greenwood, Inc. AND SIGNED BY THE PROJECT MANGAER, Gary Piontek...

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived. ...

... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.** (emphasis added).

ARTICLE 9

c. **COMPLIANCE WITH LAWS.** Subcontractor is bound by, at its own cost and shall comply with all applicable Federal, State and local codes, laws, ordinances, and regulations (herein "laws")....

ARTICLE 12

Subcontract shall, at its own expense:

(a) obtain all necessary permits and licenses and comply with all statutes, ordinances, rules, regulations and orders of any governmental or quasigovernmental authority applicable to the performance of the Work...

ARTICLE 18

The Subcontractor's Work shall consist of (to include but not limited to) all components necessary to furnish and install a complete and functional system for the following:

Section 31-1000 Site Clearing and Demo, Erosion Control to include seeding, Filtrex Silt Sediment Traps, and Temp Drainage Swale, 31-2000 Earth Moving to include backfilling of walls and Final grade to a 1/10 and Section 33-4100 Site Storm Drainage.

Miller filed this action alleging breach of contract for failure to pay the balance due on the Subcontract. Miller also asserts a claim on the payment bond against Safeco who issued a payment bond on the Project. PC has asserted that Miller is barred from recovery on any claims relating to the Subcontract based on the fact that it was not properly licensed to perform the scope of work set forth in the Subcontract. PC has also asserted counterclaims for contract damages based on Miller's failure to timely perform its obligations in accordance with the Subcontract and the Project Schedule.

I. Miller's Claims are barred by S.C. Code Ann. § 40-11-370(C) in that Miller's scope of work included work performed outside of the limits of its license classification.

There is no dispute that Miller holds a Group 4 General Contractor's License ***in the Grading subclassification*** with the South Carolina Department of Labor, Licensing, and Regulation ("LLR"). Miller does not hold any other contractor licenses with LLR. S.C. Code Ann. 40-11-270 provides that a licensee is confined to those limitations set forth in the licensee's subclassification. A contractor's license in the grading subclassification allows a licensee to perform "the ***soil preparation and rehabilitation*** of streets, roads, highways, railroad beds, building sites, parking lots, and storm sewers". S.C. Code Ann. § 40-11-410(2)(d) (emphasis added). A contractor's license in the grading subclassification does NOT allow a license to install storm sewer. *See id.* For a contractor to install storm sewer, it must possess a General Contractor's License ***in the Water and Sewer Lines subclassification***. S.C. Code Ann. § 40-11-

410(3)(c). A license in the water and sewer lines subclassification allows a licensee to perform "**installation and repair of a project involving manholes, the laying of pipe for storm drains and sewer mains**, all necessary connections, and excavation and backfilling, and concrete work incidental thereto."

There is no question that this Project involved the installation of manholes and the laying of pipe for storm drains. **Def. Exh. 2**. Miller argues that it was properly licensed to perform this scope of work because it involved the rehabilitation of a storm drain. In support of its argument, Miller testified that the Project had an existing storm drain system and its scope of work involved the rehabilitation of that system.

PC denies that the scope of work involved storm drain rehabilitation as contemplated in the grading classification. PC argues that a storm drain rehabilitation involves the "in place" repair or restoration of an existing storm drain system. Indeed, the term "rehabilitation" is defined in Webster's Dictionary as: "to restore to a former capacity; reinstate or to restore to a former state". The testimony and evidence reflects that there was a small existing storm sewer system that was to be demolished and removed. The Project included the design and installation of a comprehensive new storm drain system to service the athletic facilities. No part of the new storm drain system was installed in the areas where the demolished system had been removed. The Site Clearing and Erosion Control specification provided for the demolition of the existing system along with all other below grade site improvements. **Def. Exh. 1**. In contrast, the Project had a separate and specific specification that set forth the installation of the storm drain pipes and manholes. **Def. Exh. 2**.

PC presented expert testimony of John Bahr, who was qualified as an expert in Construction Management, Contract Administration and Scheduling. Bahr is a member of the

Construction Specifications Institute. Bahr testified that Miller's scope of work did not involve rehabilitation of storm drain as contemplated in the grading classification. Rather, Bahr testified that Miller's scope of work involved the installation of a project involving manholes and the laying of pipe for storm drains. Bahr testified that the specifications supported this opinion in that the demolition of the existing storm drain was in a separate specification from the installation of the new storm drain. Bahr testified that the Construction Specifications Institute was responsible for establishing standard specifications that were used in the construction industry and that there was a separate standard specification for storm drainage rehabilitation that would have been included in the scope of work had this been a "rehabilitation" of a storm drain system. Bahr presented an example of a standard storm drain rehabilitation specification that would have been included had this been a rehabilitation project. **Def. Exh. 3, Tab 21.**

The overwhelming evidence reflects that Miller does not have a valid license as required by Chapter 11 of Title 40, and thus cannot enforce its contract with PC either in law or in equity. Specifically, Miller did not possess the requisite license to perform its scope of work, which included the laying of pipe for storm drains and installation of manholes.[1]

Pursuant to S.C. Code Ann. § 40-11-370(C), "*An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.*" As Miller cannot enforce its contract with PC either in law or in equity, Miller's claims against PC and Safeco must fail.

II. Miller is liable to PC for delay damages as a result of its failure to complete its work in accordance with the Job Schedule.

[1] S.C. Code Ann 40-11-270(c) does not apply in this case. While PC possesses a General Contractors – Building classification, that classification does not allow PC to perform water and sewer line work. Water and Sewer line work must be performed by a contractor licensed in the water and sewer line subclassification. S.C. Code Ann. 40-11-410(1).

The Subcontract is clear and unambiguous with respect to Miller's obligations to timely perform its scope of work and there are repeated references to the fact that TIME IS OF THE ESSENCE in regard to performance and completion of the work. Article 4 provides that PC would establish a Project Schedule which would serve as the basis for starting and finishing Miller's work and that Miller agreed to perform the work such that each portion of the work would be performed within the Scheduling requirements. Furthermore, Miller was required to schedule its manpower and equipment to meet the needs of the Project and maintain the flow of the Schedule.

At trial, Miller acknowledged that his company was obligated under the Subcontract to comply with the Schedule and the Schedule durations for Miller's scope of work. PC presented evidence of the Project Schedule and the durations Miller was expected to perform and complete each activity. **Def. Exh. 3, Tabs 5 & 10**. The testimony and evidence is uncontroverted that Miller did not comply with the Project Schedule and the assigned durations for the individual activities and that this failure to comply with the Schedule delayed performance of the Work. The evidence further reflects that there were 87 change orders issued with regards to the Subcontract. Article 6a sets forth the process by which Miller could obtain an adjustment to the Project Schedule for any change order. There is no dispute that of the 87 change orders Miller sought an adjustment to the Schedule in only 1 change order – Change Order 40. **Def. Exh. 3, Tabs 11 & 12.** Change Order 40 reflected changes required by the delays and redesign of the Softball Field necessitated by the discovery of the asbestos. Indeed, the testimony and evidence reflects that PC modified the Schedule to reflect Miller's requested adjustment to the Schedule. **Def. Exh. 3, Tab 13**. As such, Miller was fully aware of the process by which to seek

adjustment to the Schedule. No other adjustments to the Schedule were made as none were requested.

While Miller curiously testified on direct that PC did not communicate any concerns with Miller's performance and compliance with the Schedule until after its work was completed, the evidence reflects that PC communicated its frustrations with Miller's performance failures on numerous occasions but Miller's made no effort to recover the schedule and avoid delays. **Def. Exh. 3, Tab 14.**[2] PC presented a detailed accounting of the delays caused by Miller and the impact of those delays on PC's ability to complete the Project. In support of those claims, PC introduced its Activity Duration Schedule Analysis reflecting Miller's failure to comply with the Subcontract required Project Schedule. **Def. Exh. 3, Tab 15**. PC's Delay Damage Summary reflects a conservative approach to quantifying its delay damages. In an effort to eliminate any questions or confusion raised by the asbestos issues, PC only included delays encountered in activities associated with the site clearing and demolition, the Soccer venue and the Tennis venue. The total delays associated with these activities were claimed to be 145 days. PC multiplied those days by its daily rate of $945.07 to arrive at a delay damage claim of $137,035.15 for extended overhead. In other words, it costs PC $945.07 per day to serve as the general contractor on the site; and, but for the delays attributed to Miller, PC would have completed the work earlier; demobilized from the site; and would not have incurred those daily costs. **Def. Exh. 3, Tab 16**. Article 6.e of the Subcontract expressly provides that Miller shall be liable for all direct costs and extended overhead incurred by PC as a result of Miller's failure to complete its work or any portion thereof in accordance with the Job Schedule.

[2] Miller presented testimony from Lander personnel presumably to attempt to refute that Miller delayed the project but none of the Lander witnesses could testify as to what Miller's schedule obligations were to PC or whether Miller did or did not comply with the Schedule. Furthermore, it was readily apparent from the testimony of the Lander witnesses that there was a bias against PC which existed as a result of PC's claims against Lander relating to the Project. The Lander witness testimony is irrelevant to the issues in this case and should be discounted.

In support of its claim, PC presented testimony from John Bahr, a scheduling expert. Bahr testified that he was intimately familiar with the Project as his company had been retained to assist in establishing the Schedule. He testified that he believed the Schedule was accurate and that the durations set forth for the Miller activities were reasonable. In Bahr's opinion, Miller failed to comply with its contract obligations to perform and complete its activities in accordance with the Schedule and its durations. Furthermore, Bahr testified that Miller's lack of timely performance impacted PC's completion of the work which resulted in damages incurred by PC.

In rendering his opinion, Bahr indicated that he had reviewed the Project File, including but not limited to the Contract Documents, plans and specifications, original and all revised Project Schedules; the daily reports of both Miller and PC; email and other communications between PC and Miller and the damages analysis performed by PC. Bahr testified that he had reviewed the Activity Duration Schedule Analysis performed by PC and the Delay Damages Summary. Bahr indicated that this analysis was a common approach in the construction industry to present delay claims and resulting damages. Bahr testified that the daily rate used to calculate PC's damages was a reasonable rate given the size of the Project.

Bahr also presented an analysis as to unexcused delays by Miller. He testified that his analysis was based on a review of the daily reports of Miller and PC. **Def. Exh. 3, Tab 19**. Bahr stated that this analysis was presented to support the reasonableness of the Delay Damages Summary and did not take into account lack of productivity on non-conforming work performed by Miller.[3] Bahr indicated that the claim presented by PC was reasonable and conservative and

[3] While Miller attempted to refute some of the conclusions made by Bahr on unexcused delays, this is not relevant to the ultimate issue of Miller's failure to comply with the Project Schedule durations which were acknowledged by Miller.

provided a realistic approach to quantifying the damages incurred by PC as a result of Miller's delay.

Miller provided little, if any, evidence whatsoever to refute PC's claims for delay damages. Miller acknowledged its obligation to comply with all of the applicable contract provisions. Miller further acknowledged that it failed to comply with the Schedule and the durations set forth therein. Miller's defense to the claim was limited to unsubstantiated and confusing testimony that attempted to lay blame on everyone but Miller for its failure to comply with the Schedule durations set forth in the Delay Damages Summary. Most importantly, Miller acknowledged that, pursuant to Article 6 of the Subcontract, it was obligated to present such claims to PC in the form of a request for adjustment to the Schedule or that such claims would be waived and that Miller failed to do so. As such, Miller has failed to present any probative evidence to refute PC's claims for delay damages. A Court must enforce an unambiguous contract according to its terms regardless of its wisdom or follow, unreasonableness, or the parties' failure to guard their rights carefully. *Laser Supply and Services, Inc. v. Orchard Park Associates,* 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).

Miller also appears to suggest that because PC made certain progress payments during performance of the work that it somehow reflected satisfaction with performance of the work and barred PC from asserting its delay claims. This position completely ignores the last sentence of Article 3.e that states that no determination concerning payment of a progress payment relieves Miller from performing its obligations nor prevents PC from asserting that Miller had failed to satisfy its obligations, including compliance with the Project Schedule.

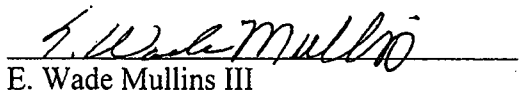
Miller also attempts to confuse the issue by repeated reference to PC's attempts to recover liquidated damages against Miller. PC is not seeking a "pass through" of liquidated damages assessed by the Owner. Rather, PC is seeking delay damages for extended overhead as a result of Miller's failure to comply with the Project Schedule as specifically contemplated in the last sentence of Article 6.e of the Subcontract. Whether Lander assessed liquidated damages against PC or not is irrelevant to this matter.

PC has presented specific unrefuted evidence of Miller's failure to comply with the Project Schedule and the resulting damages from said delay. The damages are reasonable and conservative and must be assessed in accordance with the Subcontract.

III. The Contract and Damages Accounting reflects that Judgment should be entered awarding PC Construction damages in the amount of $89,686.89.

The parties are in agreement as to the contract balance remaining on Miller's Subcontract, before backcharges and delay damages, with one exception. Miller claims it is due an additional $2,425 necessitated by the resetting of silt fences due to damage caused by other subcontractors. PC asserts that the maintaining of silt fences are within Miller's scope of work. In addition, pursuant to Article 6.f, Miller agreed that its sole remedy for claims relating to other subcontractors was to pursue such claims directly against the other subcontractor. Furthermore, Miller also failed to follow the change order procedure for this claim as well. As such, Miller is not entitled to recover these charges against PC. PC has also asserted a backcharge for Miller's failure to correct nonconforming work that resulted in a sinkhole. The only reliable probative evidence presented reflects that this work, in the amount of $3,921.82, was incurred by PC as a result of Miller's failure to honor its obligations to correct nonconforming work. When applying this backcharge along with the delay damages incurred by PC, the evidence reflects PC incurred a total amount of Contract Damages of $89,686.89. **Def. Exh. 3, Tab 20.**

BRUNER, POWELL, WALL,
& MULLINS, LLC



E. Wade Mullins III
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wmullins@brunerpowell.com
Attorneys for Defendants PC Construction of Greenwood, Inc. and Safeco Insurance Company of America

November 20, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	**CERTIFICATE OF SERVICE**
vs.	)	
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

I, Rita D. DeCarlis, a legal assistant with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Defendants, do hereby certify that on this 20th day November of 2013, I served the **Defendants PC Construction of Greenwood, Inc. and Safeco Insurance Company of America Post Trial Brief** upon opposing counsel via Electronic Mail and addressed as follows:

David J. Brousseau, Esquire
daveb@msslawfirm.net
tonya@msslawfirm.net
McIntosh, Sherard Sullivan & Brousseau
PO Box 197
Anderson, SC 29622-0197
Attorney for the Plaintiff

Rita D. DeCarlis

Rita D. DeCarlis

Columbia, South Carolina
November 20, 2013

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)
)
Miller Construction Company, LLC) CASE NO.
☒ Plaintiff) 2012-CP-24-00574
)
v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
Pc Construction Of Greenwood, Inc. And Safeco)
Insurance Company Of America
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
David J. Brousseau, Bar No. 71150	E. Wade Mullins, Bar No.
Address:	Address:
Post Office Box 197 Anderson, SC 29622	Post Office Box 61110 Columbia, SC 29260-1110
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e-mail: daveb@msslawfirm.net other:	e-mail: wmullins@brunerpowell.com other:

☒ **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: Notice of Motion and Motion to Alter or Amend
Estimated Time Needed: 15 minutes 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 — July 21, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ 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

Collected by: K Hey

Date Filed:

☐ MOTION FEE COLLECTED: 7/21/14
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	8th JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
Miller Construction Company, LLC,	)	
	)	
Plaintiff,	)	
	)	**NOTICE OF MOTION & MOTION**
vs.	)	**TO ALTER OR AMEND**
	)	(Rule 59, SCRCP)
PC Construction of Greenwood, Inc. and	)	
Safeco Insurance Company of America,	)	Case No.: 2012-CP-24-00574
	)	
Defendants.	)	
	)	

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

TO: THE HONORABLE EUGENE C. GRIFFITH, JR., PRESIDING JUDGE; AND THE DEFENDANT AND ITS ATTORNEY EDWARD WADE MULLINS, III, ESQ:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Miller Construction Company, LLC, by and through its undersigned attorney, will, ten (10) days after the date of service hereof, exclusive of date of service, or as soon as this matter may properly be heard, move before the presiding Judge of the Eighth (8th) Judicial Circuit, pursuant to Rule 59, South Carolina Rules of Civil Procedure specifically in the South Carolina Rules of Civil Procedure, for this Court's Order altering and/or amending the Final Order & Judgment filed with this Court on July 8, 2014, and received by counsel on July 11, 2014.

More specifically, Plaintiff asks this Court to award pre-judgment interest to the Plaintiff. Testimony was presented regarding Plaintiff's plead request for pre-judgment interest, and the principal amount was a sum certain capable of calculation. A representative from Defendant testified to owing Plaintiff the principal amount stated in the Order subject to its counterclaim (which was denied). Plaintiff attaches and incorporates Exhibit A, which is an up-to-date calculation of pre-judgment interest in this matter.

Respectfully Submitted,

David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622
(864) 225-0001 | 225-0004 (fax)
Attorney for Plaintiff

EXHIBIT A

Date of last payment by Defendant to Plaintiff	**March 29, 2012**		
Principal Balance as found due by Court & Admitted by Defendant to be due to Plaintiff		**$**	**51,270.88**
Accrued Interest from March 29, 2012 through March 29, 2013 at 8.75% per annum	+	$	4,486.20
Sub-Total		$	55,757.08
Accrued Interest from March 29, 2013 through March 29, 2014 at 8.75% per annum	+	$	4,878.74
Sub-Total		$	60,635.82
Accrued Interest from March 29, 2014 through July 1, 2014 at 8.75% per annum	+	$	1,326.41
Total Principal & Interest		**$**	**61,962.23**

(Total Pre-Judgment Interest since March 29, 2012 is $10,691.35)

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	EIGHTH (8TH) JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	
Miller Construction Company, LLC,	)	
Plaintiff,	)	**AFFIDAVIT OF MAILING**
	)	
vs.	)	
	)	
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America	)	
Defendant.	)	Docket No. 2012-CP-24-00574

Personally appeared Suzanne Aldridge who states that (s)he served the Defendants with a copy of the Notice of Motion and Motion to Alter or Amend (Rule 59, SCRCP) by mailing:

(Check one)

☒ First class mail

☐ Certified mail

☐ restricted delivery

☐ return receipt requested

in the United States Mail, with proper postage attached and receipt attached (if applicable);

☐ by commercial delivery service pursuant to Rule 4(d)(9), SCRCP and delivery record attached;

on July 21, 2014 (date) addressed as follows:

The Honorable Eugene C. Griffith	Edward Wade Mullins, III, Esq.
Post Office Box 375	Post Office Box 61110
Newberry, South Carolina 29108	Columbia, South Carolina 29260

Sworn to before me this

21st day of July, 2014

Notary Public of South Carolina

Suzanne Aldridge

Affiant

My Commission expires: 02-07-2024

SCCA 406 (5/2013)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
Miller Construction Company, LLC,)
☐ Plaintiff)
)
v.)
)
PC Construction Of Greenwood, Inc. And Safeco)
Insurance Company Of America,
☒ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-24-00574

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
, Bar No.	E. Wade Mullins Iii, Bar No. 3525
Address:	Address:
	Bruner, Powell, Wall & Mullins, LLC
phone: fax:	PO Box 61110, Columbia, SC 29260
e-mail: other:	phone: 803-252-7693 fax: 1-888-465-8015
	e-mail: wmullins@brunerpowell.com other:

☒ **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: Motion to Alter or Amend Judgmentl
Estimated Time Needed:30 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.

E. Wade Mullins July 25, 2013
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:

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD S.C.
2013 JUL -5 PM 2:17

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: K Glenn Date Filed: 25.00

☐ MOTION FEE COLLECTED: 8/6/14

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	Case No.: 2012-CP-24-00574
Miller Construction Company, LLC,	)	
Plaintiff,	)	
vs.	)	**MOTION TO ALTER OR AMEND JUDGMENT (Rule 59(e), SCRCP)**
PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,	)	
Defendants.	)	

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2014 AUG -6 PM 3:17

TO: THE HONORABLE EUGENE C. GRIFFETH, JR. and DAVID J. BROUSSEAU, COUNSEL FOR THE PLAINTIFF:

You will please take notice that Defendants PC Construction of Greenwood, Inc. and Safeco Insurance Company of America will move before the Presiding Judge of the Greenwood County Court of Common Pleas in Greenwood, South Carolina, on the tenth day after service hereof, or at such time as the Court may schedule, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, for an Order altering and/or amending the Final Order & Judgment filed with this Court on July 8, 2014 and received by counsel on July 18, 2014. The Defendants seek reconsideration, pursuant to Rule 59(e), SCRCP, of the Court's Final Order entering Judgment for the Plaintiff Miller Construction Company, LLC ("Miller") in the amount of $51,270.08, on the grounds that the Final Order contain findings of fact not supported by the evidence and errors of law which, if not corrected, will cause manifest injustice.

The grounds for this motion are set forth below and may be further supplemented by memorandum of law filed in support of this motion.

1. **The Court erred as a matter of Law in granting involuntary non-suit finding that pursuant to the Subcontract, PC could not recover any type of liquidated damages against Miller because PC was never assessed liquidated damages from the owner.**

The operable provision in the Subcontract is Article 6.e, Delay. It provides:

> ... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.** (emphasis added).

Article 6.e provides PC may recover damages against Miller under two circumstances. First, PC could pass along or assess liquidated damages to Miller if they were assessed by the Owner against PC. Second, PC could recover all other damages incurred by PC as a result of Miller's failure to comply with the Project Schedule (ie., direct costs and extended overhead, See bold above). At trial, PC contended it was entitled to recover damages based on the damages it incurred under the second scenario contemplated by Article 6.e. It never contended that it was entitled to liquidated damages. This is not a liquidated damages case. Whether the Owner ever assessed liquidated damages against PC is not relevant to PC's ability to recover delay damages under Article 6.e. In this case there is significant evidence in the Record regarding Miller's failure to comply with the Project Schedule and the direct costs and extended overhead that PC incurred as a result of Miller's failure to comply with the Project Schedule. The Court's determination that as a matter of law PC could not recover any type of liquidated damages against Miller is erroneous in this case as PC was not seeking liquidated damages.

2. **The Court failed to consider significant relevant evidence in finding that the evidence was clear that Miller did not cause any delays on this Project.**

The Subcontract provides for what responsibilities and obligations Miller has with regards to timely performance of the work and the repercussions that may occur for Miller's failure to timely perform the work. The operative provisions are as follows:

ARTICLE 4

a. Subcontractor recognizes PC Construction of Greenwood, Inc.'s obligations to the Owner for timely progress upon and completion of the Work and each part thereof and that **TIME IS OF THE ESSENCE** in the performance of the Work under this Subcontract. Subcontractor agrees to perform Subcontractor's Work so that the entire Project and every portion thereof will be completed in accordance with the Contract Documents, including any scheduling requirements contained in this Subcontract. ...

b. **JOB SCHEDULE.** PC Construction of Greenwood, Inc. shall furnish and publish a progress schedule for the Project. This will constitute the basis for starting and finishing of the Subcontractor's Work....PC Construction of Greenwood, Inc. will seek and use information from the Subcontractor regarding durations of tasks, sequences, etc. in formulating the progress schedule. The Subcontractor shall take whatever measures necessary to ensure completion within the framework of the schedule.

.1 The Subcontractor is solely responsible for scheduling his manpower and equipment to meet the needs of the Project and maintain the flow of construction as required by the job schedule. PC Construction of Greenwood, Inc. will not perform required coordination or supervision of the Subcontractor's work force.

ARTICLE 5

d. **COORDINATION OF ITS WORK WITH OTHERS.** Subcontractor agrees as follows:

.4 Subcontractor shall be responsible for taking all field measurements necessary to ensure the proper fitting of Subcontractor's Work with the Work of PC Construction of Greenwood, Inc. and others. Field measurements shall be taken and coordinated in a timely manner to avoid delaying the Job Schedule;

j. **JOB SITE CONDITIONS.** The Subcontractor shall perform his work in accordance with the following conditions:

.1 ... Should the Subcontractor, in the sole judgment of PC Construction of Greenwood, Inc., delay the progress of the Work, the Subcontractor shall, at his own expense and cost, work such overtime as may be necessary to finish the Work within the Schedule.

ARTICLE 6

a. **CHANGES.** Without nullifying this Subcontract or any bond given pursuant to this Subcontract, PC Construction of Greenwood, Inc. may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of PC Construction of Greenwood, Inc.'s directive or if the Contract Documents require notice to be given by PC Construction of Greenwood, Inc. to the Owner is less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give notice to the Owner or to comply with any other notice requirements of the Contract Documents. **FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY THE OWNER, ARCHITECT AND/OR PC Construction of Greenwood, Inc.** Any adjustments to Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. ...

... THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY PC Construction of Greenwood, Inc. AND SIGNED BY THE PROJECT MANGAER, Gary Piontek...

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from

> Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived. ...
> ... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.** (emphasis added).

The Subcontract is clear and unambiguous with respect to Miller's obligations to timely perform its scope of work and there are repeated references to the fact that TIME IS OF THE ESSENCE in regard to performance and completion of the work. Article 4 provides that PC would establish a Project Schedule which would serve as the basis for starting and finishing Miller's work and that Miller agreed to perform the work such that each portion of the work would be performed within the Scheduling requirements. Furthermore, Miller was required to schedule its manpower and equipment to meet the needs of the Project and maintain the flow of the Schedule.

At trial, Miller acknowledged that his company was obligated under the Subcontract to comply with the Schedule and the Schedule durations for Miller's scope of work. PC presented evidence of the Project Schedule and the durations Miller was expected to perform and complete each activity. **Def. Exh. 3, Tabs 5 & 10**. The testimony and evidence is uncontroverted that Miller did not comply with the Project Schedule and the assigned durations for the individual activities and that this failure to comply with the Schedule delayed performance of the Work. The evidence further reflects that there were 87 change orders issued with regards to the Subcontract. Article 6a sets forth the process by which Miller could obtain an adjustment to the Project Schedule for any change order. There is no dispute that of the 87 change orders Miller

sought an adjustment to the Schedule in only 1 change order – Change Order 40. **Def. Exh. 3, Tabs 11 & 12.** Change Order 40 reflected changes required by the delays and redesign of the Softball Field necessitated by the discovery of the asbestos. Indeed, the testimony and evidence reflects that PC modified the Schedule to reflect Miller's requested adjustment to the Schedule. **Def. Exh. 3, Tab 13.** As such, Miller was fully aware of the process by which to seek adjustment to the Schedule. No other adjustments to the Schedule were made as none were requested.

While Miller testified on direct that PC did not communicate any concerns with Miller's performance and compliance with the Schedule until after its work was completed, the evidence reflects that PC communicated its frustrations with Miller's performance failures on numerous occasions but Miller's made no effort to recover the schedule and avoid delays. **Def. Exh. 3, Tab 14.**[1] PC presented a detailed accounting of the delays caused by Miller and the impact of those delays on PC's ability to complete the Project. In support of those claims, PC introduced its Activity Duration Schedule Analysis reflecting Miller's failure to comply with the Subcontract required Project Schedule. **Def. Exh. 3, Tab 15.** PC's Delay Damage Summary reflects a conservative approach to quantifying its delay damages. In an effort to eliminate any questions or confusion raised by the asbestos issues, PC only included delays encountered in activities associated with the site clearing and demolition, the Soccer venue and the Tennis venue. The total delays associated with these activities were claimed to be 145 days. PC multiplied those days by its daily rate of $945.07 to arrive at a delay damage claim of $137,035.15 for extended overhead. In other words, it costs PC $945.07 per day to serve as the general contractor on the

[1] Miller presented testimony from Lander personnel presumably to attempt to refute that Miller delayed the project but none of the Lander witnesses could testify as to what Miller's schedule obligations were to PC or whether Miller did or did not comply with the Schedule. Furthermore, it was readily apparent from the testimony of the Lander witnesses that there was a bias against PC which existed as a result of PC's claims against Lander relating to the Project. The Lander witness testimony is irrelevant to the issues in this case and should be discounted.

site; and, but for the delays attributed to Miller, PC would have completed the work earlier; demobilized from the site; and would not have incurred those daily costs. **Def. Exh. 3, Tab 16.** Article 6.e of the Subcontract expressly provides that Miller shall be liable for all direct costs and extended overhead incurred by PC as a result of Miller's failure to complete its work or any portion thereof in accordance with the Job Schedule.

In support of its claim, PC presented testimony from John Bahr, a scheduling expert. Bahr testified that he was intimately familiar with the Project as his company had been retained to assist in establishing the Schedule. He testified that he believed the Schedule was accurate and that the durations set forth for the Miller activities were reasonable. In Bahr's opinion, Miller failed to comply with its contract obligations to perform and complete its activities in accordance with the Schedule and its durations. Furthermore, Bahr testified that Miller's lack of timely performance impacted PC's completion of the work which resulted in damages incurred by PC.

In rendering his opinion, Bahr indicated that he had reviewed the Project File, including but not limited to the Contract Documents, plans and specifications, original and all revised Project Schedules; the daily reports of both Miller and PC; email and other communications between PC and Miller and the damages analysis performed by PC. Bahr testified that he had reviewed the Activity Duration Schedule Analysis performed by PC and the Delay Damages Summary. Bahr indicated that this analysis was a common approach in the construction industry to present delay claims and resulting damages. Bahr testified that the daily rate used to calculate PC's damages was a reasonable rate given the size of the Project.

Bahr also presented an analysis as to unexcused delays by Miller. He testified that his analysis was based on a review of the daily reports of Miller and PC. **Def. Exh. 3, Tab 19.** Bahr

stated that this analysis was presented to support the reasonableness of the Delay Damages Summary and did not take into account lack of productivity on non-conforming work performed by Miller.[2] Bahr indicated that the claim presented by PC was reasonable and conservative and provided a realistic approach to quantifying the damages incurred by PC as a result of Miller's delay.

Miller provided little, if any, evidence whatsoever to refute PC's claims for delay damages. Miller acknowledged its obligation to comply with all of the applicable contract provisions. Miller further acknowledged that it failed to comply with the Schedule and the durations set forth therein. Miller's defense to the claim was limited to unsubstantiated and confusing testimony that attempted to lay blame on everyone but Miller for its failure to comply with the Schedule durations set forth in the Delay Damages Summary. Most importantly, Miller acknowledged that, pursuant to Article 6 of the Subcontract, it was obligated to present such claims to PC in the form of a request for adjustment to the Schedule or that such claims would be waived and that Miller failed to do so. As such, Miller has failed to present any probative evidence to refute PC's claims for delay damages. A Court must enforce an unambiguous contract according to its terms regardless of its wisdom or follow, unreasonableness, or the parties' failure to guard their rights carefully. *Laser Supply and Services, Inc. v. Orchard Park Associates,* 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).

Miller also appears to suggest that because PC made certain progress payments during performance of the work that it somehow reflected satisfaction with performance of the work and barred PC from asserting its delay claims. This position completely ignores the last sentence of

[2] While Miller attempted to refute some of the conclusions made by Bahr on unexcused delays, this is not relevant to the ultimate issue of Miller's failure to comply with the Project Schedule durations which were acknowledged by Miller.

Article 3.e that states that no determination concerning payment of a progress payment relieves Miller from performing its obligations nor prevents PC from asserting that Miller had failed to satisfy its obligations, including compliance with the Project Schedule.

As set forth above, Miller also attempted to confuse the issue by repeated reference to PC's attempts to recover liquidated damages against Miller. PC is not seeking a "pass through" of liquidated damages assessed by the Owner. Rather, PC is seeking delay damages for extended overhead as a result of Miller's failure to comply with the Project Schedule as specifically contemplated in the last sentence of Article 6.e of the Subcontract. Whether Lander assessed liquidated damages against PC or not is irrelevant to this matter.

PC has presented specific unrefuted evidence of Miller's failure to comply with the Project Schedule and the resulting damages from said delay. The damages are reasonable and conservative and must be assessed in accordance with the Subcontract. It was error for the Court to determine that the evidence was clear that Miller did not cause any delays on this Project. The evidence in the Record necessitates a finding that Miller breached the Contract and that PC is entitled to damages in the amount of $89,686.89.

3. The Court's determination that Miller was properly licensed to perform the work was erroneous as a matter of law and failed to consider pertinent and relevant facts in the Record.

There is no dispute that Miller holds a Group 4 General Contractor's License ***in the Grading subclassification*** with the South Carolina Department of Labor, Licensing, and Regulation ("LLR"). Miller does not hold any other contractor licenses with LLR. S.C. Code Ann. 40-11-270 provides that a licensee is confined to those limitations set forth in the licensee's subclassification. A contractor's license in the grading subclassification allows a licensee to perform "the ***soil preparation and rehabilitation*** of streets, roads, highways, railroad beds,

building sites, parking lots, and storm sewers". S.C. Code Ann. § 40-11-410(2)(d) (emphasis added). A contractor's license in the grading subclassification does NOT allow a license to install storm sewer. *See id.* For a contractor to install storm sewer, it must possess a General Contractor's License ***in the Water and Sewer Lines subclassification***. S.C. Code Ann. § 40-11-410(3)(c). A license in the water and sewer lines subclassification allows a licensee to perform **"installation and repair of a project involving manholes, the laying of pipe for storm drains and sewer mains**, all necessary connections, and excavation and backfilling, and concrete work incidental thereto."

There is no question that this Project involved the installation of manholes and the laying of pipe for storm drains. **Def. Exh. 2.** Miller argues and the Court found that it was properly licensed to perform this scope of work because it involved the rehabilitation of a storm drain.

PC asserts that the evidence reflects that the scope of work did not involve storm drain rehabilitation as contemplated in the grading classification. PC argues that a storm drain rehabilitation involves the "in place" repair or restoration of an existing storm drain system. Indeed, the term "rehabilitation" is defined in Webster's Dictionary as: "to restore to a former capacity; reinstate or to restore to a former state". The testimony and evidence reflects that there was a small existing storm sewer system that was to be demolished and removed. The Project included the design and installation of a comprehensive new storm drain system to service the athletic facilities. No part of the new storm drain system was installed in the areas where the demolished system had been removed. The Site Clearing and Erosion Control specification provided for the demolition of the existing system along with all other below grade site improvements. **Def. Exh. 1.** In contrast, the Project had a separate and specific specification that set forth the installation of the storm drain pipes and manholes. **Def. Exh. 2.**

PC presented expert testimony of John Bahr, who was qualified as an expert in Construction Management, Contract Administration and Scheduling. Bahr is a member of the Construction Specifications Institute. Bahr testified that Miller's scope of work did not involve rehabilitation of storm drain as contemplated in the grading classification. Rather, Bahr testified that Miller's scope of work involved the installation of a project involving manholes and the laying of pipe for storm drains. Bahr testified that the specifications supported this opinion in that the demolition of the existing storm drain was in a separate specification from the installation of the new storm drain. Bahr testified that the Construction Specifications Institute was responsible for establishing standard specifications that were used in the construction industry and that there was a separate standard specification for storm drainage rehabilitation that would have been included in the scope of work had this been a "rehabilitation" of a storm drain system. Bahr presented an example of a standard storm drain rehabilitation specification that would have been included had this been a rehabilitation project. **Def. Exh. 3, Tab 21.**

The overwhelming evidence reflects that Miller does not have a valid license as required by Chapter 11 of Title 40, and thus cannot enforce its contract with PC either in law or in equity. Specifically, Miller did not possess the requisite license to perform its scope of work, which included the laying of pipe for storm drains and installation of manholes.[3]

Pursuant to S.C. Code Ann. § 40-11-370(C), "*An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.*" As Miller cannot enforce its contract with PC either in law or in equity, Miller's claims against PC and Safeco must fail.

[3] S.C. Code Ann 40-11-270(c) does not apply in this case. While PC possesses a General Contractors – Building classification, that classification does not allow PC to perform water and sewer line work. Water and Sewer line work must be performed by a contractor licensed in the water and sewer line subclassification. S.C. Code Ann. 40-11-410(1).

4. **The Final Order erroneously finds that PC holds a license of "general contractors-highway."**

PC is a licensed general contractor. It does not perform highway work and is not licensed to do so. The evidence in the record reflects that PC holds a license of "general contractors – building."

5. **The Final Order erroneously orders immediate payment from the payment bond to Miller Construction Company, LLC.**

The Final Order does order judgment entered against PC in favor of Miller in the amount of $51,270.08. It then goes on to order Safeco "to immediately pay this amount to Miller Construction Company, LLC from the payment bond it holds on behalf of PC Construction of Greenwood..." The payment bond issued pursuant to the South Carolina Consolidated Procurement Code is nothing more than a contract to which Miller may be a third party beneficiary. The bond is not an equity or account from which immediate payment can be ordered. First, a potential claimant under the bond must establish that it is entitled to recovery under the bond pursuant to its terms. In this case, there is insufficient evidence in the Record to determine that Miller has established its claim on the payment bond. Moreover, even if the Court were to conclude that Miller has established its claim on the payment bond, the proper remedy is to order judgment against Safeco on the claim on the bond rather than payment "from the payment bond" as that mischaracterizes the nature of the payment bond and would be inappropriate.

6. **The Final Order erroneously references that the action on the payment bond was brought pursuant to S.C. Code Ann. § 29-5-440.**

The evidence reflects that this project was solicited and awarded pursuant to the South Carolina Consolidated Procurement Code, S.C. Code § 11-35-10, *et. seq.* As such, the action on the payment bond must be considered by this Court pursuant to S.C. Code Ann. § 11-35-3030.

CONCLUSION

For the reasons set forth above, PC requests that this Court reconsider its findings of fact and conclusions of law set forth in its Final Order dated July 1, 2014 and issue an Order finding that Miller is not entitled to any recovery on its claim and further finding that PC is entitled to recover on its breach of contract claim for delay damages in the amount of $89,686.89. PC would also request an opportunity for a hearing on the issues contained in this motion.

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July 25, 2014
Columbia, South Carolina

State of South Carolina)
) Court of Common Pleas
County of Greenwood) 2012-CP-24-00574

Miller Construction Company,)
LLC)
vs.) Transcript of Record
)
PC Construction of Greenwood,)
Inc., et al)
DEFENDANT)

November 4, 2013
Greenwood, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Jr., Judge

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

David J. Brousseau, Esq.
Attorney for the Plaintiff

Edward W. Mullins, III, Esq.
Attorney for the Defendant

Joy E. Holston
Official Court Reporter

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1 THE COURT: Let's have a brief status conference to
2 know where we're going, do a summary judgment motion and
3 we're ready to go on trial. Tell me what issues we have
4 got, this is a construction case.
5 MR. BROUSSEAU: That's correct, Your Honor. My
6 understanding is, is mainly the issues are and the
7 defenses that they intend to put up is, I guess, what we
8 want to call in the nature of liquidated damages or
9 extended general conditions. I think there is one issue
10 of a workmanlike performance on a counterclaim but other
11 than that that's pretty much it. Me and Mr. Mullins had
12 previously talked and what we intended to do was, is call
13 my client as a witness to establish the contract claim.
14 And then what's going to happen is, is he's going to put
15 up his counterclaims on those two issues and then we'll
16 have our reply. So my client, to start out with, should
17 be very quick, and then I don't know how long they're
18 going to be but that's my understanding of what we're
19 going to do. I'm still trying to see if there's a, if I'm
20 going to be able to, or either side for that matter,
21 whoever is successful on the merits to be able to make a
22 claim for attorney's fees. And if that is the case, we'll
23 do that via post-trial motion.
24 THE COURT: Okay.
25 MR. BROUSSEAU: And me and Mr. Mullins already talked

1 about that.
2 THE COURT: Now, how long is it going to take.
3 Because the reason is, I didn't promise the jury, but I
4 hinted strongly this is a good week to a juror in
5 Greenwood County because we're going to have something to
6 do for the next couple of days. Is that about right?
7 MR. BROUSSEAU: Yes, sir. I hope that we'll be done
8 by the end the day, end of the day tomorrow. But my
9 understanding from talking to Mr. Mullins is, is that I
10 may be, that probably might not be the case. It's
11 probably more like Wednesday, don't you think?
12 MR. MULLINS: Well, I tend to agree. I think there's
13 a chance we can get finished by tomorrow night. I don't
14 know what he's going to put up in response to our
15 affirmative claims.
16 THE COURT: That fits good. That fits good for me
17 because here's my plan so y'all know. I'm going to
18 Savannah this weekend, leaving Thursday lunchtime-ish. My
19 wife teaches school, so she wants to work the better part
20 of the day and then we're leaving. So if we have
21 something to do into Thursday morning, that's fine because
22 I've also got a bond matter for the Solicitor's Office to
23 come here and do, too. So if we have to come back a
24 little bit Thursday morning, that's fine. And if we don't
25 have to call the jury back, that pleases the Clerk of

1 Court, because then they don't have to pay them for
2 another appearance, you know, that kind of thing. So that
3 suits me fine.
4 MR. MULLINS: All right.
5 THE COURT: I have two things in the morning, a SVP,
6 20-minute, 30-minute hearing at 9:00 or 9:30? We'll work
7 them in then, we'll keep right on going, because it'll
8 just be us.
9 MR. BROUSSEAU: Yes, sir.
10 THE COURT: And whatever y'all got to put up, so
11 that's kind of where I'm coming from. Is that consistent
12 with your thinking of the length that we might be into
13 Wednesday?
14 MR. BROUSSEAU: Yeah. I think we could go into
15 Wednesday. Obviously, you could solve all of that by
16 ruling on the dispositive motions today. But if we move
17 forward after the motions, I think that we may, if we
18 begin our case today, it's going to go into tomorrow and
19 then depending on what they put up on reply.
20 THE COURT: Okay.
21 MR. BROUSSEAU: The only procedural thing that, I
22 guess, we have not discussed is, you're putting up your
23 contract claim. We would put up our case on the
24 counterclaim. I understand you'd want to put up reply
25 and, I guess, it's a reply to your claim but certainly,

1 not knowing what he's going to put up, I mean, I ought to
2 be able to have a reply on my counterclaims.
3 MR. MULLINS: It's non-jury, I don't have a problem
4 with that.
5 THE COURT: That sounds good to me.
6 MR. BROUSSEAU: I just didn't want to make it look
7 like that that was kind of---
8 THE COURT: When the jury is not here, I need to hear
9 a little closer.
10 MR. BROUSSEAU: And, hopefully, you know, obviously,
11 the way these things work, hopefully we believe that
12 you've got enough of the issues at the time with, you
13 know, obviously only bring up anything that was brought up
14 on their case that needs to be addressed.
15 THE COURT: Okay.
16 MR. BROUSSEAU: As far as the motions, Your Honor, I
17 think we've filed a motion for summary judgment. We've
18 also filed a motion to amend. You've got a motion for
19 summary judgment. All of that you should have and we got
20 copies if you need it. And then there may be a couple of
21 motions in limine if we get to that, but I don't know how
22 you intend to deal with this. Probably won't know until
23 you hear it but, obviously, I don't think we need to get
24 into that unless and until you rule on the substantive
25 motions.

1 THE COURT: Okay.
2 MR. BROUSSEAU: But did want you to know that I got a
3 motion in limine that if we need to, we need to bring
4 before you.
5 THE COURT: Okay. All right. I like that. Now, I
6 kind of know where you are and what y'all got out there.
7 That's good. All right. The summary judgment motion is
8 what we'll deal with first.
9 MR. MULLINS: That's fine.
10 THE COURT: Y'all got any inclination of who needs to
11 go first?
12 MR. MULLINS: Well, we filed first.
13 THE COURT: Then you go first.
14 MR. MULLINS: All right. And I've got a notebook
15 that's got some exhibits and case law in it for Your
16 Honor. And that includes exhibits and case law for both
17 the motion for summary judgment and the motion to amend,
18 Your Honor. And I guess before we get too far into it,
19 the motion for summary judgment that we filed was based on
20 improper licensure and the allegation that as a matter of
21 law, Miller cannot pursue its affirmative claims pursuant
22 to the statute which is 40-11-370. Miller has raised in
23 response initially a timeliness of I think to clarify that
24 the position is that that was in the nature of an
25 affirmative defense, Your Honor, that was not raised. Our

1 position is that we did raise the issue in our pleadings
2 but out of an abundance of caution, we have filed a motion
3 to amend. So, I think, Your Honor, I was trying to think
4 this through. What makes sense to me is to argue or
5 address the motion to amend for Your Honor, and then, you
6 know, then we can proceed into the motion for summary
7 judgment. Again, our position is, we raised it, but we'd
8 like to go ahead and present the motion to amend.
9 THE COURT: Okay. Let's hear it.
10 MR. MULLINS: Okay. All right. Your Honor, as I
11 mentioned, our position initially is that we've raised the
12 licensure issue and just to be clear so you understand the
13 issues, the motion for summary judgment that we filed
14 alleges that my client, PC Construction, was the general
15 contractor on a project that was performed at Lander.
16 This was what was known as the Lander RWS Complex
17 Initiative Field Construction. Basically, Your Honor, it
18 was a pretty significant athletic complex project:
19 Baseball field, soccer field, softball field. Lot of dirt
20 work involved, a lot of infrastructure involved. PC
21 subcontracted the grading and storm sewer work to Miller.
22 And as part of the contract they were required to be
23 properly licensed to perform the work that they did. The
24 allegations that we have raised in our motion for summary
25 judgment are that they were not properly licensed to

1 perform the work in that their license which was a Grading
2 4, a GD 4 license did not cover the installation and
3 laying of the storm sewer and the manholes. We also have
4 alleged that the work they've performed exceeded their
5 license limit for their group. Their group was a four and
6 a group four limits their work to $750,000.00 dollars.
7 I'll come back and talk about that in a little bit more
8 specifics. But I just wanted to summarize the claims
9 relating to the licensure. 40-11-370 says that if you
10 don't have a valid license you can't sue at law or in
11 equity to enforce a contract. So that's the statute that
12 we rely on. Now, as a jump-off matter, I want to point
13 out to you and this is in Tab F of your notebook and what
14 I did was just took the first page of the complaint and
15 the amended answer and counterclaim. Paragraph 1 in the
16 complaint alleges, at all times during construction of the
17 below-alleged project, Plaintiff was properly licensed to
18 perform the construction services as provided on the
19 project. So they allege in their, in this action, they
20 allege that they were properly licensed. And that was
21 two-fold, because they are required to be licensed to
22 pursue a claim and because the contracts specifically
23 provides that they were to be properly licensed. The
24 response to that and, again, I just took the first page of
25 the pleading is one page over and this is PC's admitted

1 answer and counterclaim. Paragraph 2 there, we admit so
2 much of paragraph 1 as that Plaintiff is a Limited
3 Liability Company. The next sentence says, PC
4 Construction denies the remaining allegations of paragraph
5 1 of Plaintiff's complaint and demands strict proof
6 thereof. So we had denied in our pleadings that Miller
7 was properly licensed to perform the work and we demanded
8 strict proof thereof. Now again, our position is that
9 that sufficiently raised the defense. But, Your Honor,
10 let me move to the motion to amend, okay, because that's
11 important in consideration of the motion to amend. I
12 think you have the, we filed a brief in support of our
13 motion to amend. I don't have that in the notebook. I
14 didn't put the brief in the notebook. It's entitled,
15 Defendant's memorandum in support of motion to amend
16 answer.
17 THE COURT: I thought I had seen it. I can't put my
18 hands on it directly right now.
19 MR. MULLINS: Your Honor, I've gone over what we've
20 laid out in the brief essentially under the facts. Under
21 the law section stating what, I think, we all know the
22 general law is regarding Rule 15(A) and that is that leave
23 shall be freely given when justice so requires and doesn't
24 prejudice any other party. There are numerous cases that
25 state that leave to amend shall be liberally and freely

1 given when justice so requires and does not prejudice any
2 other party. We cite the Parker decision which is in Tab
3 G to your notebook there as the case law. And the Parker
4 decision basically lays out a two-prong approach to
5 looking at a motion to amend. And the prejudice, you
6 know, that is envisioned in the Court's consideration.
7 Essentially, what the case law says is that the amendment
8 ought to always be granted unless you can show prejudice
9 and that burden is on the party opposing the motion to
10 show. But the Parker case says looking at prejudice you
11 have to show, the party opposing the motion has to show a
12 lack of notice that the new issue is going to be tried and
13 a lack of opportunity to refute it. Our position is that
14 the fact that this issue was raised, the facts and
15 circumstances surrounding licensure was put at issue,
16 actually was raised by the Plaintiff in his complaint and
17 they were clearly put on notice when the response in the
18 affirmative pleading was that they denied that allegation
19 and demanded strict proof thereof. They came into court
20 today. Should have known since that filing that the issue
21 of licensure was going to be at issue at the trial of the
22 case. It's a contract requirement that they be licensed,
23 so they were well-prepared or should have been
24 well-prepared to deal with the issue coming in. So we
25 believe that the pleading itself reflects that there was

1 no, could not be any lack of notice regarding the issue.
2 Now, the issue of the timeliness of the motion. I think
3 that you're going to hear from Plaintiff's counsel that
4 the filing of this motion the week before trial reflects
5 an untimely motion and that that ought to be considered by
6 the Court in the motion to amend. Your Honor, I think the
7 cases that are cited in our brief and that are in your
8 notebook reflect that any type of delay or alleged delay
9 is not an issue that should be considered when determining
10 whether there's prejudice. Again, the prejudice is what's
11 laid forth in Parker and that is a lack of notice that the
12 issue is going to be an issue. And the Weaver case,
13 Weaver v. Lentz, looking at the timeliness, that was a
14 statute of limitations issue. The motion to amend was
15 made, I believe, on the day before trial. That was an
16 issue concerning, I think the Weaver case was an issue
17 concerning a statute of limitations issue which the motion
18 to amend was filed essentially the day before trial. And
19 they found that the timeliness of it was not an issue in
20 that case. In the Forester case, the Court of Appeals
21 cited a Ninth Circuit case, Howey v. U.S., both of those
22 are in the notebook. And in that case, a denial of a
23 motion to amend offered five years after the action was
24 commenced and it was actually on the second day of trial.
25 The Court found that denying that was improper, was an

1 abuse of discretion absent a showing of prejudice. And if
2 you look at the Forester case, the Forester case points
3 out that Rule 15 events is a bias in favor of granting
4 amendments unless there is a substantial reason to deny
5 leave to amend. But if you look at the Howey case which
6 is the case cited in Forester, the lower court had denied
7 it based on timeliness and essentially stated that this
8 was a personal injury action by a subcontractor employee
9 that involved an indemnification claim. But on page 1190,
10 footnote, I'm sorry, the headnote 3, the Government's
11 motion to amend should have been granted as there was no
12 showing that RCA would have been prejudiced thereby.
13 While it is true that the motion was made five years after
14 the third-party complaint had been filed, we know of no
15 case where delay alone was deemed sufficient grounds to
16 deny a Rule 15 motion to amend. So, Your Honor, these
17 cases point out that really the timeliness is not an issue
18 or any type of delay. The issue is whether there is
19 prejudice. We don't think there's any refuting the fact
20 that they were going to have to prove the issue of whether
21 there was a breach of contract. We put that at issue. We
22 did assert affirmative defense and material breach and
23 alleged that they didn't comply with the terms of the
24 contract, licensure being one of those. And secondly,
25 they specifically pled it that they were properly licensed

1 and we denied it and demanded strict proof thereof. So
2 our contention is there isn't anything different. This is
3 a legal issue. I don't think there's going to be any
4 dispute as to the scope of work they performed and what
5 laws apply. It's really the Court's determination to
6 determine whether the licensing statutes have been
7 violated or not. There's nothing new that's going to have
8 to be done. So the issues have been before Miller before
9 and we think that motion ought to be granted. And, Your
10 Honor, that's our position on the motion to amend. And I
11 don't know if you want to hear from them on that and then
12 we can get back to the motion for summary judgment. That
13 might be the way to go.
14 THE COURT: I think it's easier to take them both
15 together, so I'd rather you stop here and let me hear from
16 Mr. Brousseau.
17 MR. BROUSSEAU: Thank you, Your Honor. First of all,
18 Your Honor, on the issue of the timeliness and I believe I
19 cited it in our brief. Just one second. Your Honor, do
20 you have a copy of my brief?
21 THE COURT: I do not see it.
22 MR. BROUSSEAU: Okay. Go ahead and just and hand you
23 our brief, as well as the amended return and that is my
24 client's affidavit as well which opposing counsel has
25 that. As far as the timeliness, Your Honor, we had cited

1 in our brief, there's two cases, Madren vs. Bradford and
2 Earthscapes Unlimited vs. Ulbrich. Your Honor, Madren,
3 there was a motion to dismiss based upon the licensing
4 statutes filed in that action a month before trial. And
5 in that case the Court of Appeals is pretty clear
6 regarding a prejudice that such a late filing such as that
7 put upon the alleged unlicensed party. Earthscapes talks
8 about the exact same thing. This case has been set for a
9 date certain under a scheduling order since the end of
10 July. In fact, Mr. Mullins had previously filed a motion
11 to amend. I consented to it and that's back during this
12 past spring. My understanding has always been that it's
13 whether or not leave should be freely granted unless it
14 prejudices me or if I try to file the same motion it could
15 prejudice him. To file a motion raising this new issue
16 and it was not asserted as an affirmative defense, which
17 Madren and Earthscapes both talk about it is an
18 affirmative defense that must be pled, otherwise it's
19 waived. In those particular circumstances when you're
20 talking about filing a motion for summary judgment based
21 upon that wasn't even affirmatively pled a week-and-a-half
22 or two weeks before a trial date that has been set as a
23 date certain, I firmly believe that it does prejudice us.
24 It prejudices us significantly. My clients, his
25 classification and the type of his licensure is, number

1 one, turned over to them when they did all the contractual
2 documents as far as the bid process. Number two, is a
3 public record and has been a public record from day one.
4 For them not to file it as an affirmative defense, you
5 know, quite frankly until here at the last minute on the
6 eve of trial certainly does prejudice not only my client,
7 but I wouldn't necessarily say it prejudices us in terms
8 of preparation for trial. But it certainly prejudices our
9 position and it's something that should have been raised a
10 long time ago if it had been dealt with it. More
11 importantly though, Your Honor, and getting to the merits
12 of the motion itself, if we skip over whether or not
13 there's prejudice, I hand to the Court South Carolina code
14 40-11-270.
15 MR. MULLINS: Your Honor, I haven't gotten into my
16 motion for summary judgment. It looks like he's going
17 into the motion for summary judgment. I just want to make
18 sure we're clear.
19 MR. BROUSSEAU: I mean, I can stop at this stage if
20 you want me to. I mean, the fact of the matter is is that
21 we're talking, as far as the amendments go, we're talking
22 about significant prejudice.
23 THE COURT: The amendment is, name his affirmative
24 defense.
25 MR. MULLINS: That's correct, Your Honor.

1 THE COURT: Okay. That's what I thought.
2 MR. BROUSSEAU: Yeah.
3 THE COURT: And it's been pled but not as an
4 affirmative defense. That's kind of distinguishing.
5 MR. MULLINS: That's correct, Your Honor.
6 THE COURT: Okay.
7 MR. MULLINS: Well, we think we've raised but and to
8 the extent there is a question as to whether there is an
9 affirmative defense, we'd move to amend to clarify that.
10 And I've got a proposed amended answer that, you know, has
11 it in the form that everyone is expected to see that I'm
12 not sure is entirely required, but clarifies that it is an
13 affirmative defense.
14 MR. BROUSSEAU: And, of course, Your Honor, our
15 argument against the amendment is the fact that it is
16 prejudice, to have this come up 10 days before trial.
17 THE COURT: All right. Since we're sitting here
18 informally, can I go read these cases real quick?
19 MR. BROUSSEAU: Yes, sir.
20 MR. MULLINS: Yes. If I could make one point, Your
21 Honor?
22 THE COURT: Sure.
23 MR. MULLINS: And if you do that, just the two cases
24 that Mr. Brousseau has handed up or the three cases, I
25 want to make sure you understand and if you read them I

1 think you'll see. Those cases don't say that filing, it
2 was too late to file a motion to amend. Those cases look
3 at whether licensure is an affirmative defense and no
4 motion to amend was ever filed. In fact, they actually
5 say that and there's also another case. I hate to
6 inundate you, but the Costa and Sons, which is another
7 licensing case. I mean it basically states that, you
8 know, that they've filed, pointed out that they didn't
9 file a motion to amend. That they could have discovered
10 during the pretrial stages or during the three-day trial.
11 So in this case, they actually seemed to be inviting the
12 notion that a motion to amend would have solved the
13 problem but there was no motion to amend ever filed. So I
14 think that's the important factor to consider.
15 MR. BROUSSEAU: And in response to that, Your Honor,
16 there's also the C-Sculptures case as well where the party
17 opposing the licensure issue attempting to amend their
18 pleadings the day before the motion hearing. And the
19 Court denied that as prejudicing the other side. So, I
20 mean, it all gets to the prejudice issue.
21 THE COURT: Okay. All right. Let me read these
22 cases real quick.
23 MR. MULLINS: Yes, sir.
24 (Whereupon, a short break was taken.)
25 THE COURT: All right. Y'all tell me, answer the

1 question either one of you. Is the original agreement,
2 and I don't know whether what a GD-4 versus, what limit is
3 that of, a limit of a matter of contractual building or
4 something?
5 MR. BROUSSEAU: Well, we get into that, Your Honor,
6 in the statute. It's in your notebook. The statute
7 clarifies a GD grading is a sub-classification. It's
8 defined in the statutes. Four is the financial
9 limitations. There is one, two, three, four and five.
10 Five is unlimited and four is $750.
11 THE COURT: And now I think just, I read what y'all
12 presented. I didn't read that whole notebook. I think I
13 want to hear the summary judgment motion, too. Because I
14 think it's all, is kind of part and parcel. It's
15 altogether.
16 MR. BROUSSEAU: Right.
17 THE COURT: I think you've raised the issue. I'm not
18 certain it's affirmative defense. It seems to be and so
19 y'all seem to have pled it, but I want to hear more.
20 MR. MULLINS: All right.
21 THE COURT: So let's go on to summary judgment
22 motion.
23 MR. MULLINS: I'll proceed with the summary judgment,
24 Your Honor. The actual summary judgment motion, again I
25 don't have that in the notebook. Let me see if I can get

1 another copy.
2 THE COURT: Yes, I have it right here.
3 MR. MULLINS: Okay. All right. Your Honor, and if
4 you would refer to or I will just direct your attention to
5 Tab A is the statute of, the contractors licensing statute
6 in our notebook. The summary judgment motion is fairly
7 simple and that is that under 40-11-370 that a contractor
8 cannot pursue, and this is 370(c). A contractor cannot
9 pursue, a contractor who does not have a valid license
10 cannot pursue an action at law or in equity to enforce the
11 provisions of a contract. And the 40-11-270 that actually
12 Mr. Brousseau had handed up to you, but that's also in our
13 notebook. 40-11-270(a), a licensee is confined to the
14 limitations of the licensee's licensed group and license
15 classification or sub-classifications. And as we just
16 discussed, Your Honor, the group is the financial
17 limitation. That's the one, two, three, four or five.
18 The classification is, in this case, GD which stands for
19 grading. If you will look at 40-11-410, those are the
20 classifications. Your Honor, 40-11-2(d) defines grading
21 and grading is defined as the soil preparation and
22 rehabilitation of streets, roads, highways, railroad beds,
23 building sites, parking lots and storm sewers. I'm going
24 to point to you in a second, Your Honor, the specifics for
25 it. But our position is that Miller's contract, his scope

1 of work involved the laying of pipe and installation of
2 storm sewer or storm drainage. It also involved the
3 installation of manholes. If you will look at
4 40-11-410(3)(c) under public, under General Contract and
5 Utilities, that's a sub-classification for water and sewer
6 lines. Okay. And, Your Honor, if you look at the
7 definition, there is a number of things that that
8 involves. But the second to the last line, one of the
9 defined definitions for scope of work that falls under
10 water and sewer line is the installation and repair of a
11 project involving manholes. That's what we have here,
12 Your Honor. Secondly, the laying of pipe for storm drains
13 and sewer mains. Your Honor, that is exactly what we have
14 here. We don't think there's any question that that is
15 what we have here. Grading involves the soil preparation
16 and rehabilitation and the statute is pretty clear. It
17 does not involve the installation of the sewer mains. It
18 does not involve the installation of manholes. That
19 requires a general contractor public utility contract with
20 a sub-classification water and sewer line. Again, Your
21 Honor, we think the statute is clear. Now, just by virtue
22 well, Your Honor, point number two on our summary judgment
23 motion is that Miller by virtue of change orders, their
24 original contract amount was $492,000.00 dollars. There
25 were, I don't have it in front of me, but about a million

1 dollars in change orders, nine-hundred-and-something
2 thousand dollars in change orders. So the total amount of
3 the contract was 1.4 million dollars which exceeds the
4 license group of $750,000.00 dollars. All right. Those
5 are two separate and distinct issues. We think the first
6 issue is clear on its face. We think the second issue is
7 clear on its face. Let's look at, Your Honor, some of the
8 exhibits that I've handed up to you. Tab B, and I think
9 this was included in our motion. The first page there is
10 the licensure certification from LLR supporting the fact
11 that Miller had a grading, a GD 4. I don't think there's
12 any dispute to that. The second page is a reflection of
13 PC Construction of Greenwood's licensure which is a
14 general contractor BD 5, Building 5. And the next page is
15 a cheat sheet for you that spells out what the
16 abbreviations stand for and what the group financial
17 limitations are.
18 THE COURT: All right. I need that.
19 MR. MULLINS: Your Honor, Tab C, the first document
20 there is the proposal submitted by Millers and I don't
21 think this is going to be an issue that their scope of
22 work involved the installation of storm drainage. If you
23 look on page three, storm drainage. Significant amount of
24 storm drainage, permanent piping, temporary piping. And
25 if there is any doubt then we can look at this. I did not

1 hand up the contract. Now, actually, I think that was
2 part of Mr. Brousseau's motion. So it should be up there,
3 but the contract incorporates the specifications. The
4 next document is the spec, Your Honor. 33-4100, the storm
5 drainage spec. And if there is any doubt, again, I don't
6 think there is. But if you go through this spec, clearly
7 it provided, the first part of the spec are the materials
8 including piping, manholes. And if you go to page 11 of
9 the spec and the last number at the bottom is the page
10 numbering of it, it's 33-4111, execution, part 3,
11 execution. Of course, there's earth work, but there's
12 piping installation. 3.2, the piping installation. 3.3,
13 pipe joint construction. 3.4, drain installation. 3.5,
14 manhole installation. 3.8, pipe inlet and outlet
15 installation. I don't think there's any question, but I
16 just wanted you to have the spec. I don't think there's
17 any question that the work that Miller was required to
18 perform was installation of the storm sewer system and the
19 laying of pipe associated with that and the installation
20 of manholes associated with the work, all of which require
21 a water and sewer line classification. Now, I think in
22 looking at the return filed by Mr. Brousseau in his brief
23 and the statute that was handed up to you, and again, if
24 we go back to my Tab A that has the entirety of the
25 statute. Again, 40-11-270(a) clearly provides that a

1 licensee is confined to the limitations in the group,
2 license group and license classifications. Mr. Brousseau
3 would point to sub-section (c) which states that,
4 licensees may utilize the services of unlicensed
5 subcontractors to perform work within the limitations of
6 the licensee's license group and license classification or
7 subclassification provided the licensee provided the
8 supervision. Your Honor, I would submit to you, first of
9 all, and let's actually, we probably need to refer to
10 that. Let's look at what PC is. PC is a general
11 contractor building and that's 410-1. I'm sorry for the
12 small print on the statutes that I provided to you. But
13 page 10 of 13, 4011-4010-1, General Contracting Building.
14 Includes commercial, industrial, institutional, modular
15 and all other types of building construction including
16 residential structures. The license classification
17 includes all work under the sub-classification of wood
18 frame, interior renovation, masonry, pre-engineered,
19 general roof construction. The next sentence, licensees
20 under this classification may perform ancillary work
21 including grading associated with the building or
22 structures which the licensee has been engaged. Now, we
23 would contend that the work was not ancillary, so we don't
24 think that the grading would fall. But we don't even
25 think you need to get to that because if you look at the

1 next sentence, however, if a project includes work
2 performed under a mechanical sub-classification or any of
3 these licensed sub-classifications, the licensee must have
4 a license for this work or used a contractor licensed in
5 that. And that includes water and sewer, I'm sorry, that
6 includes water and sewer lines. Okay. PC was not
7 licensed to do that. That's what that says. I think it
8 clearly says that. PC as the general contractor building
9 was not licensed to do that. So it needed to subcontract
10 with a contractor that was licensed to perform that work.
11 So 40-11-270(c) doesn't apply. 40-11-270(c) applies in
12 situations where a general contractor has the appropriate
13 license could perform that work. It can subcontract to an
14 unlicensed subcontractor assuming that it supervises the
15 work if it was allowed to perform the work. This statute
16 does not allow PC who could not have performed this work
17 to subcontract it to someone else and take advantage of
18 this statute. I mean it's common sense and it, you know,
19 clearly if PC had the ability to do it, you know, they as
20 a general contractor did agree to supervise Miller, that's
21 not the issue. They couldn't have performed the work so
22 that statute provision doesn't apply. So, Your Honor, you
23 know, this issue of a bar to a subcontractor on a case
24 like this, and there are a lot of cases out there and
25 there are a lot of reporting cases dealing with it. The

1 C-Sculptures case which is in Tab E. I have a few of the
2 cases, are in Tab E. The C-Sculptures, and this is pretty
3 interesting. It just recently came down. It was a
4 residential case but in a house. But it actually, the
5 contractor had a contractor's license, so it was analyzed
6 under the statutes that are at issue here. It was a case
7 that went to arbitration. And the arbitrator, it wasn't
8 raised as a defense and the arbitrator denied the motion
9 to dismiss. And found, in that case the contractor had
10 performed work beyond its group. They had a, I think a
11 $500,000.00 dollar limit. It was an $800,000.00 dollar
12 project. And the arbitrator denied the motion to admit,
13 to dismiss and actually entered an award in favor of the
14 contractor. It went up on appeal. And, you know, this is
15 you know, binding arbitration standard where the appellant
16 had to show a manifest disregard of the law by the
17 arbitrator. And the Court, and if you'll look on page
18 four of the opinion, they walked through the same statutes
19 that we just walked through, 40-11-370. And the Supreme
20 Court has determined that the term, valid, is clear and
21 unambiguous and leaves no room for statutory construction.
22 What they said in this case was, well, they were under
23 licensed. You know, so that doesn't necessarily, we have
24 a valid license, we're just not fully licensed to do all
25 the work we did. The Supreme Court said, no. You're

1 either, you're licensed to perform the work or you're not
2 licensed to perform the work. And they went so far to
3 say, it's so clear that we think the arbitrator manifestly
4 disregarded the law. And they reversed it and they barred
5 the claim from the contractor. So that's a good example,
6 Your Honor, of how the courts have interpreted this
7 statute. Is it a harsh statute? It's a, some may say
8 it's a harsh statute, but it's the law. And, Your Honor,
9 I think that if you read the statute and understand, you
10 know, the progression of the statutes that, as we've just
11 gone through that I don't think there is any conclusion to
12 reach. But as a matter of law that Miller was not, did
13 not hold a valid license. The definition of water and
14 sewer line is the only classification that provides for
15 the installation of storm sewer and of manholes. And, you
16 know, it makes sense. The and the grading classification
17 talks about the soil preparation and rehabilitation,
18 because that's really the gist of what a grader does.
19 Now, you may hear and I'm not sure I think the, I'm not
20 sure what the affidavit from Mr. Miller says. But, you
21 know, the argument that well this is the way it's done. I
22 would, first of all, request that the Court refine its
23 review to what the statute says. If there's any ambiguity
24 maybe there would be some consideration. But I don't
25 think there's any ambiguity and I think that the Court

1 needs to grant the motion for summary judgment. The issue
2 has been raised. If it has not been raised we would ask
3 the Court to allow it to amend its answer. And we're
4 asking the Court to grant the summary judgment. Thank
5 you.
6 THE COURT: Mr. Brousseau.
7 MR. BROUSSEAU: Thank you, Your Honor. I think I've
8 already handed up to you 40-11-270. And I believe, let's
9 make sure that I handed everything over to Mr. Mullins. I
10 hand to the Court 40-11-300, as well as a couple of other
11 statutes. And a couple of things on this, Your Honor, and
12 I think they are undisputed is the type of licensing that
13 both of these parties have. PC holds an unlimited
14 building license which according to 40-11-410, includes
15 grading work up to and it's an unlimited amount. Miller
16 Construction holds a Grade 4 up to $750,000.00 dollar
17 classification and everybody knows that. Now, first of
18 all, under the contract, this contract was originally bid
19 and at $492,424.00 dollars. You heard Mr. Mullins refer
20 to the fact that there was about $900,000.00 dollars in
21 change orders that occurred on this project. The main
22 reason for that is, is there was, and the testimony would
23 bear out this, and of course, it's in my client's
24 affidavit as well, significant amounts of asbestos. When
25 they started digging in, they discovered asbestos. Now,

1 they've figured it's just a small pocket. It ended up
2 being a very large, large amount. Miller successfully bid
3 through another contractor in order to be able to remove
4 that asbestos-laden material. That's one of the reasons
5 that caused the delay on this project was the asbestos.
6 That in and of itself really is what put this contract
7 over $750,000.00 dollars. Now, number one on that,
8 40-11-270 says that PC may utilize the services of
9 unlicensed subcontractors. And according to the
10 C-Sculptures case, under licensed also means unlicensed.
11 Now, to perform work within the limitations of PC's
12 license group provided that the licensee provides
13 supervision. Your Honor, I want to hand you a copy of the
14 party's subcontract. I'm trying to find, it's on page 7
15 and it's paragraph J. Let me see if I can find it. It's
16 under job site conditions. In paragraphs 1 and 2, it's
17 clear that number one, no overtime is allowed to happen
18 unless PC Construction says it's okay, that no work shall
19 occur unless PC Construction is on-site in order to
20 supervise. In fact, there is even a provision in there
21 that says they can't take breaks or lunch breaks unless PC
22 Construction says that's the case. So clearly the
23 supervision aspect that's contemplated under 40-11-270(c)
24 took place. Now, what Mr. Mullins is arguing is, is that
25 one of the aspects that he's arguing is, is that my client

1 provided installation of storm sewers. Now, first of all,
2 we dispute that claim. There was already storm sewers
3 underneath this property. My client went in, and as
4 clearly in that bid, rehabilitated them. Removed,
5 installed in order to fix what was going on for the
6 construction project itself. It's our position it's
7 rehabilitation. Regardless of that, the last sentence of
8 40-11-270 is telling. It says the licensee, in other
9 words, PC Construction is fully responsible for any
10 violations of this chapter resulting from the actions of
11 my client, Miller Construction, of unlicensed or under
12 licensed subcontractors performing work for the licensee.
13 So if they were allowing him to do things that were
14 outside the scope of his license and outside the scope of
15 their own license, under 270(c) that's their issue, not
16 ours. 40-11-370 is also telling and in regards to that is
17 the first sentence that everybody is arguing about here.
18 It says, an entity which does not have a valid license as
19 required by this chapter may not bring an action either at
20 law or in equity to enforce the provisions of a contract.
21 Well, first of all, we did have a valid license as
22 required by this chapter. Both, they have their own
23 license up to the $750 of which they had a contract for
24 $492. It's just these change orders, and I'll get to that
25 point in just a second, put it is well over that

1 $750,000.00 dollar amount. But also as required by this
2 chapter, they were doing work under PC Construction's
3 unlimited license. I mean, the thing that's interesting
4 and the C-Sculptures case talks about this, most of Title
5 40, Chapter 11 talks in terms of the prime contractor or
6 the general contractor. In fact, I've handed up for the
7 Court 40-11-300 which says that a prime contractor or an
8 owner can't split up contracts on a job. It's the total
9 construction price that is, goes to the issue of
10 classifications for a group. In C-Sculptures case is a
11 general contractor. Now C-Sculptures case is also
12 extremely distinguishable from this particular set of
13 circumstances because number one, that contractor, the
14 general contractor on that job only had a license up to
15 $100,000.00 dollars and he bid on a $800,000.00 dollar
16 home that he knew was an $800,000.00 dollar home. In this
17 case, my client bid on a project that was $490,000.00
18 dollars never expecting that he would ever hit $750, which
19 goes to the second issue and that is these change orders.
20 Number one, a significant portion of the change orders
21 that put this over $750 was the asbestos removal. My
22 client had to bid on it, who is completely, in fact, he
23 kind of anticipated that it would be a separate contract
24 as opposed to a change order. Now, he had no control over
25 that. But that's, that's what that was. It was a

1 separate contract. It was completely outside the scope of
2 the original contract. They had to hire a construction
3 outfit called Triple R who is DHEC regulated, DHEC
4 licensed in order to remove this asbestos. So, quite
5 frankly, it's our position on twofold. Number one, if you
6 take the asbestos removal out of the equation, the total
7 construction cost in this case was within my client's
8 sub-classification, the $750,000.00 dollars. Number two,
9 they provided rehabilitation of storm sewers. They didn't
10 install, they provided rehabilitation, they were already
11 there in place, they fixed them. Number three, they were
12 working under the license of PC Construction who was
13 unlimited. Now, if PC Construction allowed them to do
14 things that PC Construction wasn't licensed to do, under
15 the statute, that's PC Construction's issue, not ours.
16 That's our position on the merits of it. I think that's
17 really what gets to the heart of it in regards to this
18 issue.
19 THE COURT: He worked under the change order of the
20 original contract. This sounds like a question of fact to
21 me.
22 MR. BROUSSEAU: I would agree with that.
23 MR. MULLINS: Your Honor, that may be a question of
24 fact on exceeding the group. I don't think there's any
25 question of fact on the classification. I mean the

1 definitions say what they say. The spec says what it
2 says. The spec spells out what the work is. And, you
3 know, in terms of whether it's a change order or not, I
4 mean, they talk about per job, total cost of construction
5 is the total cost of the job. The definition for the
6 Group 4 section under 410, I am sorry, under--
7 THE COURT: Let me look at what that spec order
8 provision is again. You were going through the contract--
9 MR. MULLINS: Spec is Tab C, it was the second
10 document in Tab C. I mean, the issue of whether there was
11 a change order or whether, you know, what this work was
12 and it doesn't really relate at all to that issue, Your
13 Honor. Whether they had a valid license to perform the
14 installation of sewer lines and the installation of
15 manholes which are spelled out in the water and sewer line
16 classification. I don't believe there's any issue of fact
17 relative to that. And I would also, Your Honor, the
18 argument that somehow since we allowed them to perform
19 outside of their license, that that's our problem. Well,
20 there's no, you know, maybe that's an issue as to our
21 affirmative claims against them. We're talking about
22 their affirmative claims against us. And if you look in
23 the Weaver Lentz case which I cited for you, Your Honor,
24 kind of one of the fallback positions or arguments in that
25 case was, well, the owner knew that we weren't properly

1 licensed. And the Court, you know, the Court in that case
2 said look we, I'm sorry, it's not Weaver v. Lentz. It's
3 Wagner vs. Graham in Tab E. The court said, if one might
4 avoid the impact of the statute by applying the law of
5 estoppel, one could, by similar reasoning, avoid the act
6 by agreement between the contractor and home owner
7 contracting around what the law is. And the Court said,
8 we're not going to do that, we're just going to look to
9 the clear language of the statute. So, Your Honor, I just
10 want to bring the Court's attention back to the fact that
11 we've got, you know, there are two grounds for the summary
12 judgment. One is the classification which we think the
13 spec is clear on and we think the statute is clear on.
14 And then second, is whether they exceeded their group.
15 And I don't think there's any issue and I appreciate Mr.
16 Brousseau. He's correct. It was a $100,000.00 dollar
17 contract or a $100,000.00 dollar license limitation and
18 they entered into a contract for $800,000.00 in
19 C-Sculpture. But I don't think there is any intent,
20 whether there was lack of intent or intent with regards to
21 whether you complied with the statute. I think the issue
22 is whether you've exceeded your limitation or not. But,
23 again, and that's kind of why I started my argument that
24 way saying that I thought that the, you know, the clear
25 issue in terms of compliance with the statute and whether

1 they had a valid license was looking at whether they,
2 pursuant to their classification, were allowed to perform
3 the work.
4 MR. BROUSSEAU: And, Your Honor, if I could address
5 the argument about contracting around the statute. Those
6 cases all deal with homeowners or residential context or
7 an owner contracting with a contractor that they clearly
8 know is not licensed. This is a licensed contractor
9 dealing with another licensed contractor. PC construction
10 is well aware of what it's allowed to do and what it is
11 not allowed to do. And as far as the storm sewers go or
12 whatever it is, there was existing sewer lines on the
13 project at that time. Part of that was, is to fix them or
14 to rehabilitate them in order, once they grade the
15 property, in order for the runoff water to run off in a
16 proper manner.
17 MR. MULLINS: All right. Your Honor, and maybe I'm
18 creating an issue of fact, but I think the spec clears it
19 up. There wasn't any repair -- it was a brand-new system,
20 storm sewer system that was put in. I think the spec is
21 clear on that. Was there some demo work involved? Yes,
22 there was and the spec spells it out. So, I mean, I think
23 if you take the time to review the spec, it will show what
24 the scope of work was.
25 MR. BROUSSEAU: Well, on the spec it clearly said

1 removal, so there was storm sewers there in place.
2 THE COURT: All right. And the spec is the second
3 document in Tab C?
4 MR. MULLINS: Tab C. And, Your Honor, again the way
5 the spec is laid out, there's a number of sections that
6 refer to the materials. When you get to page 10, they
7 talk about the execution of the, I'm sorry, page 11 of the
8 spec, it talks about the execution of the work.
9 THE COURT: There was another contractor brought in
10 that helped with the asbestos abatement, wasn't there?
11 Did you say that? Did you tell me that?
12 MR. BROUSSEAU: That's correct, Your Honor. Triple R
13 Construction.
14 MR. MULLINS: The change order was with Miller. PC's
15 contract was with Miller to perform the work. They may
16 have sub'd out some portion of it.
17 THE COURT: The way it was said, and I shouldn't have
18 assumed, but with asbestos there's some heightened safety
19 requiring that they handle the materials and somebody's
20 got to have the license to touch it and move and Triple R
21 must have that license.
22 MR. BROUSSEAU: That's correct.
23 THE COURT: For that specific dangerous material,
24 they didn't expect to find it.
25 MR. BROUSSEAU: Triple R has it.

1 THE COURT: Right. All right.
2 MR. BROUSSEAU: And my contract, and my client
3 subcontracted with them.
4 THE COURT: But this contract did not envision
5 finding asbestos. I mean once they did, that's a surprise
6 to everybody.
7 MR. BROUSSEAU: Exactly.
8 THE COURT: All right. So what you're telling me is
9 since he's only a grading four, he can't do anything other
10 than what the statute specifies in that subparts or
11 subpart D, the sentence about preparation of rehab of
12 streets, roads, highways, railroad beds, building sites,
13 parking lots and storm sewers. And what you're saying is
14 he can do that plus, under the supervision of him, he can
15 do more than that.
16 MR. MULLINS: Well, kind of.
17 THE COURT: Okay. Is that right, my question?
18 MR. MULLINS: Well, I guess that's what, I'm not sure
19 what he's saying but our position is when you look at the
20 two definitions, I mean they, you know, grading is the
21 soil preparation and rehab of storm sewers. There was
22 some abandoned storm sewer stuff that wasn't any part of,
23 it was a brand new system that was put in. But if you
24 look at the water and sewer line definition, the laying of
25 pipe for storm drains and sewer mains, okay. And before

1 that, the installation and repair of a project involving
2 manholes. And that's exactly what we have here. I don't
3 think there were any removal, at least a spec that had
4 reflected there were any removal of manholes. But it says
5 installation and repair of a project involving manholes.
6 So I think if you read that, I don't think there's any
7 question now. If Mr. Brousseau and Miller is arguing that
8 they can perform that work under PC's license, I say no.
9 THE COURT: All right. Well, in the first page of a
10 letter back from Miller, the bottom of the first page,
11 demolition of sanitary sewer, removal of two grease traps,
12 removal of two manholes.
13 MR. MULLINS: Okay. Well, maybe there was. I did
14 not see that in the spec.
15 THE COURT: Rehabilitation seems to be kind of broad.
16 MR. MULLINS: Well, how can you rehabilitate a system
17 that has been abandoned and you, that was taken out. It
18 was not in any relation to the new system that was put in.
19 THE COURT: I think that's what y'all are going to
20 present. I don't know.
21 MR. BROUSSEAU: Well, and you can, you know, getting
22 into an athletic standpoint, you can rehabilitate one's
23 rotator cuff by removing, you know, portions of it and
24 putting in something new. And then you rehab it back into
25 place. Here we had a, what everybody agrees wasn't a very

1 good system in place. My client goes in and fixes that
2 system which would fall right into the definition of
3 rehabilitation.
4 THE COURT: All right. Now, tell me why he can't do
5 work under your client's license? Why can't he do that?
6 MR. MULLINS: Because PC was not licensed to do the
7 water and sewer line work. Your Honor, if you determine
8 that was purely grading work, I guess I've got two
9 arguments with that. Number one, the grading has to be
10 ancillary to a building. We don't say that. And number
11 two, if you determine that it was purely grading and that
12 it was ancillary to a building or structure, then Miller
13 could perform work under, which exceeded its
14 classification. I mean, it exceeded this license group.
15 But it does not allow a licensee to perform work that
16 would not be ancillary to grading because that's all PC
17 can perform. And it does not allow Miller to perform work
18 that PC cannot perform, which is the laying of pipe, of
19 storm drains and the installation and repair of a project
20 involving manholes.
21 THE COURT: All right. Mr. Brousseau, what you got
22 to say about that?
23 MR. BROUSSEAU: If, in regards to the, and, I'm
24 sorry, are you talking about the classification issue---
25 THE COURT: Yeah.

1 MR. BROUSSEAU: As far as going above $750?
2 THE COURT: No.
3 MR. BROUSSEAU: Oh, okay. Your Honor, PC
4 Construction has an unlimited licensed and it assumes, of
5 course, and there's the statute, I don't have it in front
6 of me, that says grading work, ancillary grading to a
7 construction project. Well, in this project, there was
8 certainly grading that was ancillary to the project
9 itself. Number two, what that means then is that PC
10 Construction is licensed to perform everything that you
11 see in, I think it's D4, the grading classification that
12 we've been talking about that they're allowed to do all
13 those things that we just talked about. Quite frankly, if
14 they allowed somebody to go outside the scope of what
15 they're not licensed for as clearly stated in
16 40-11-270(c), they're the ones that are responsible for
17 the violations. I hope that answered your question and if
18 I need to clarify, certainly.
19 THE COURT: All right. Say it again.
20 MR. BROUSSEAU: PC Construction has an unlimited
21 building license and I don't have--
22 THE COURT: I'm reading, I think I'm reading 410. I
23 have got two copies of it now.
24 MR. BROUSSEAU: I don't, okay. Good. Good. Good.
25 Good. I don't have a copy of it in front of me but---

1 THE COURT: Here you go.
2 MR. BROUSSEAU: Thank you.
3 THE COURT: This is your copy and Mr. Mullins has
4 already given you this notebook with a copy in it. And
5 it's the second paragraph under paragraph one, is that
6 right?
7 MR. BROUSSEAU: That's correct. And it says,
8 licensees under this classification may perform ancillary
9 work including grading associated with the building or
10 structure which the licensee has been engaged to
11 construct. Well, clearly there was grading work that was
12 ancillary to this construction project. Quite frankly, I
13 can't think of too many projects where there wouldn't be
14 grading work ancillary to construction. However, then
15 that means that we go back to 410-2-D which defines
16 grading as including the soil preparation and
17 rehabilitation of streets, roads, highways, railroad beds,
18 etc. Of course, we're arguing that rehabilitation
19 includes, of the sewer lines, includes exactly what we did
20 in this project. There was an old sewer line in place.
21 We fixed it. We tore it out, put in a new one. Now,
22 irregardless of that, as I stated earlier, 40-11-270 says
23 that the licensee is fully responsible for, and that would
24 be PC Construction, is fully responsible for any
25 violations of this chapter resulting from the actions of

1 an unlicensed or under-licensed subcontractor. So if PC
2 construction's argument is, is that we were actually
3 involved in the installation of sewer lines, which we
4 don't say we were. We were involved in the rehabilitation
5 of them, they themselves are saying that they violated the
6 chapter itself because their license doesn't allow them to
7 do that either.
8 THE COURT: I thought what he said was, he was trying
9 to hire a subcontractor who was so licensed?
10 MR. MULLINS: Correct.
11 THE COURT: So specifically licensed.
12 MR. MULLINS: And our knowledge, if he wants to raise
13 an issue on our affirmative claims, that's fine on the
14 illegality or whatever. The issue is Miller.
15 THE COURT: Well, here's what I've got, they've got
16 the problem is. Y'all have a lot of work out there.
17 There was removal of some manholes. There was some new
18 manholes put out there and whether it's rehab or new
19 construction or this, how do I know that without hearing
20 the case first?
21 MR. MULLINS: Because the spec tells you that it's
22 all, I mean it's a whole new system. Now, Your Honor,
23 this issue of rehab and I admire Mr. Brousseau for trying
24 to leap onto that and use that to try to get past summary
25 judgment. But let's look at grading. Grading is a 410-2,

1 right?
2 THE COURT: 410-2.
3 MR. MULLINS: That's general contractor's highway,
4 right?
5 THE COURT: 410-D.
6 MR. MULLINS: And there are four sections, bridges,
7 concrete paving, asphalt paving, grading and highway
8 incidental. Well, if Miller is saying that rehab involves
9 the installation, okay, then what he's saying is basically
10 Miller can perform the installation of streets and roads
11 which clearly you've got to be licensed as an asphalt or
12 concrete paver. Because the rehabilitation of a street,
13 if your're interpreting it the way that we're talking
14 about, well, you can install a new one, well then that
15 essentially eviscerates those two classifications. And I
16 would submit to you that it does not. I would submit to
17 you that soil preparation and rehabilitation is, you know,
18 rehabilitation has got to be some existing system where
19 they may be, you know, something incidental thereto.
20 THE COURT: I know but isn't it documented where
21 Miller says that he was removing some manholes and some
22 sewerage or, where did I read that.
23 MR. BROUSSEAU: Yes, sir. And it's on Tab C.
24 THE COURT: Tab C.
25 MR. BROUSSEAU: The first page of Tab C there.

1 THE COURT: And what is that, what is that document?
2 MR. MULLINS: That's their proposal, but that's not
3 part of the contract. The spec is part of the contract.
4 But removing, look at manholes and manholes is not in the
5 grading definition. It doesn't say rehabilitation of a
6 manhole. And look down there and it says, installation
7 and repair of a project involving manholes under water and
8 sewer lines. The installation of the storm sewer requires
9 a water and sewer line license, classification. The
10 installation and repair of a project involving manholes
11 requires a water and sewer line classification.
12 MR. BROUSSEAU: And, Your Honor, my point to that,
13 too, would be if PC Construction truly believed that they
14 were installing water lines or sewer lines or anything
15 like that, they know the law. They should have hired a
16 licensed subcontractor under that particular, if that's
17 what, in fact, what they were doing. They were installing
18 as opposed to rehabilitating. They should have hired
19 somebody that was licensed under those, that subcategory.
20 THE COURT: But was there some removal or rehab of
21 storm sewers?
22 MR. MULLINS: Yes.
23 MR. BROUSSEAU: Yes, sir.
24 MR. MULLINS: There was not rehabilitation. There
25 was an abandoned storm sewer that was taken out. There

1 was a new system, functioning system that was put in.
2 MR. BROUSSEAU: Which by definition means that we
3 were fixing it which is, fixing is rehab.
4 THE COURT: I think to whatever extent the storm
5 sewers were being rehabilitated, one of them was being
6 removed, moved, put over there. Rehabilitation is a very
7 broad noun and verb. I think they were within their
8 license to do some of what y'all described to me. I don't
9 think I know what else to say, that it absolutely was or
10 absolutely was not. Now, I've heard, I think I've heard
11 enough to say there is a question of fact as to what was
12 rehab and what was brand-new and it may be a huge mix of
13 both. I don't know, that's what I'm hearing. So I don't,
14 with just what y'all have presented to me, it would seem
15 to be a question of fact. I don't think it has to be a
16 big question of fact to get by summary judgment if my
17 reading of Hancock is right.
18 MR. MULLINS: And is your ruling finding that there
19 is an issue of fact with regards to the installation and
20 repair of a project involving manholes?
21 THE COURT: Well, I want to defer that. I want to
22 hear the case and then if you want to make a directed
23 verdict motion let's hear it then. There is a question of
24 fact here to get by summary judgment, and I don't think I
25 have enough. I mean, it appears to me there has been some

1 presentation that there was an expectation that, I don't
2 know y'all's names yet. All right. PC's the general, sub
3 is Miller. There was an expectation of removal of
4 something, perhaps two manholes. I don't know. I mean, I
5 think I've heard enough of scintilla of the question of
6 fact to deny summary judgment. I am not precluding the
7 renewal of a directed verdict motion down the road at all.
8 That's where I, y'all dropped a line at me real fast and I
9 hear a question of fact, I've identified a question of
10 fact and that gets it by summary judgment. I think we
11 need to have some testimony and let me start filling in.
12 Y'all gave me a very, very scant skeleton of the case. We
13 need to put some meat on those bones and let me see what's
14 not covered after we get this further down the road. All
15 right.
16 MR. MULLINS: All right. Thank you, Your Honor.
17 THE COURT: All right. Let's take a break.
18 (WHEREUPON, a short break was taken.)
19 THE COURT: All right. Mr. Brousseau, let's hear
20 your summary judgment motion.
21 MR. BROUSSEAU: Thank you, Your Honor. Now, I think
22 I had handed up a brief earlier that outlines our position
23 on our summary judgment motion. Ours is a little bit more
24 specific, Your Honor, and one of the defenses that has
25 been offered in this case has been the defense of time

1 delays or liquidated damages offered by the Defendants in
2 this case against my client in the form of set-off. Your
3 Honor, I handed up a copy of the parties subcontract and
4 it's undisputed at this stage, if I'm not mistaken, that
5 what we're talking about is final payment on this job.
6 The principal amount owed by my client is $53,695.00.
7 Final payment is governed on page three and four of the
8 parties contract and more specifically, I'm looking at
9 page four where it says, conditions of final payment.
10 THE COURT: And that's Tab C, the second document?
11 MR. BROUSSEAU: I handed up a--
12 THE COURT: Yeah, I had a copy of it a minute ago.
13 Here we go.
14 MR. BROUSSEAU: There you go.
15 THE COURT: Marked as Exhibit A, maybe?
16 MR. BROUSSEAU: That's correct, Your Honor.
17 THE COURT: I got it.
18 MR. BROUSSEAU: It was attached to my brief. Page
19 four of that sets conditions of final payment and
20 specifically it says, final payment of the balance of the
21 subcontract price shall be made to subcontractor. And
22 then if you skip to number two it says, after received by
23 PC Construction a final payment from owner, such receipt
24 being expressed condition precedent to PC Construction's
25 obligation to make final payment to subcontractor. Your

1 Honor, I don't think there's any question in this case.
2 Now, and just by way of background, after we had filed our
3 action, PC Construction and Lander also got into a
4 contractual dispute about amounts that Lander said that it
5 owed to PC Construction. Ultimately, I believe those
6 parties filed arbitration action and ultimately before
7 they went to a final hearing, PC Construction and Lander
8 reached an agreement as to the amount that Lander would
9 give for final payment. Under this contract, that then
10 requires PC Construction to pay our client. Now, getting
11 back to the liquidated damages. Number one, it is
12 stipulated that in that agreement there is no express
13 liquidated damages that Lander ever asserted against PC
14 Construction. Your Honor, on page 10 of the subcontract,
15 there is a specific clause regarding LD's or liquidated
16 damages where it says, if the contract documents provide
17 for liquidated or other damages for delay and such damages
18 are so assessed against PC Construction, then PC
19 Construction of Greenwood may assess the same against the
20 subcontractor in proportion to subcontractor's share of
21 responsibility for such delays. Well, it's undisputed
22 that Lander never assessed any type of liquidated damages
23 against PC Construction, therefore, they're not allowed to
24 pass such liquidated damages onto us. Additionally, Your
25 Honor, on page three of this subcontract, it talks about

1 conditions of payment and these are partial payments while
2 the work is in progress. And both paragraphs E and
3 paragraph F talk about the fact that once Miller has
4 submitted a partial pay request to PC Construction, it
5 says, when such determinations have been made to PC
6 Construction's satisfaction, they will make payment in
7 accordance with the subcontract. And more specifically it
8 says, so long as the work is being prosecuted in
9 accordance with the provisions of the subcontract and that
10 the progress is satisfactory to PC Construction of
11 Greenwood and owner, less 10 percent retains thereof.
12 What's important, of course, about that is is that if PC
13 Construction felt that there were delays or damages due to
14 delays during the partial payments, then they had a remedy
15 during the course of this project not to pay my client.
16 They didn't do that. Quite frankly, it's a waiver type
17 argument. But more importantly, they never assessed any,
18 Lander never assessed any kind of liquidated damages
19 against PC Construction. That's stipulated and so by
20 token, PC Construction certainly can't assess any type of
21 liquidated damages against my client. Now, what I
22 anticipate you may hear from the other side is, well,
23 they're not necessarily liquidated damages anymore.
24 They're what's called damages for extended general
25 conditions. Extended general conditions generally in the

1 construction context, of course, is that a project goes on
2 longer than anticipated and you have lost overhead or
3 profits due to the length of time that you've been on a
4 project. Now, those are typically types of damages that a
5 contractor asserts against an owner. In fact, there's
6 nothing in this contract between the two parties that says
7 PC Construction can assess damages for extended general
8 conditions against my client. That's a damage
9 specifically reserved for an owner. And I would
10 anticipate and I'm sure in the parties contract with
11 Lander, there was some type of provision for extended
12 general conditions. Now, in their case that they had with
13 Lander, PC Construction's case that they had with Lander,
14 that was the main issue that was going on in that, was
15 this argument about extended general conditions. And,
16 eventually, what ended up occurring is, is that PC
17 Construction reached an agreement with Lander. My client
18 wasn't a party to that action. My client wasn't even
19 asked, do you consent to this agreement that we made in
20 regards to how much we're going to get from Lander. The
21 fact of the matter is is that PC Construction had the
22 ability, had the right to go to a contested arbitration
23 hearing where then the arbitrator could then decide, okay,
24 this is how much your damages are for extended general
25 conditions. What's happening is, is that they've reached

1 an agreement with Lander for a final payment which under
2 the terms of this contract obligates them to pay my
3 client. And they then now are saying no, we didn't get
4 everything we wanted from Lander on extended general
5 conditions, therefore, we're going to come after you for
6 the delays that we believe that you caused. And, quite
7 frankly, I don't think that they're allowed to do that.
8 And I think as a matter of law and, quite frankly,
9 pursuant to the contract, you know, it's my position that
10 summary judgment is appropriate as to the issue of
11 liquidated damages or extended general conditions,
12 whatever you want to call it. I don't really believe that
13 there's any type of issues of fact on some of the things,
14 really, everything that I just told you. I mean the
15 contract says what it says. The outcome of the litigation
16 between PC and Lander is what it is, and I believe it's
17 all stipulated.
18 THE COURT: This litigation started first and the
19 Lander litigation dispute started second but was resolved
20 before this one was resolved.
21 MR. BROUSSEAU: That's correct.
22 THE COURT: So we got the start and Lander in between
23 and now this.
24 MR. BROUSSEAU: That's correct.
25 THE COURT: All right. Mr. Mullins.

1 MR. MULLINS: All right. Your Honor, where should I
2 start. We asserted defenses of set-off and material
3 breach. Our position is some of what Mr. Brousseau says I
4 agree with it. Most of it I flatly don't agree with it
5 and I'll show you that it's factually inaccurate. And we
6 are asserting a counterclaim and our counterclaim is that
7 Miller delayed the project. And as a result of, and
8 Miller was required to comply with the schedule set forth
9 and the contract was rife with instruction and obligations
10 to comply with the schedule. The evidence is going to
11 show that they clearly did not do that. And that the
12 damages that were incurred by PC far exceed what was the
13 balance of the contract that Miller had. There is going
14 to be a very small dispute on what that contract balance
15 is. There's a couple of back-charge invoices and a
16 performance issue, you know, the amount that would have
17 been done or would have been due but for, I don't think is
18 much in dispute.
19 THE COURT: And so this is a million, several hundred
20 thousand dollar working arrangement and now we're down to
21 $160,000.00 dollars left in dispute?
22 MR. MULLINS: Right. Essentially, their claim is for
23 around $60,000.00 dollars and we say our damages offset
24 that and that we're due $90,000.00.
25 THE COURT: Okay. Okay. Well, in the big scheme of

1 things that is not a large part of the contract.
2 MR. MULLINS: Right.
3 THE COURT: That's ten percent roughly.
4 MR. MULLINS: And maybe this will end the hearing
5 here. But let me take you back to that, I mean I don't
6 think that Mr. Brousseau is suggesting that the contract
7 requires us to pay money that's not due. I don't think
8 that's what he's saying on the payment which is, if
9 nothing's due, we're not required to pay it. But let me
10 ask you to look at that delay provision and mine isn't
11 numbered so it's Article 6.
12 THE COURT: I numbered mine.
13 MR. MULLINS: 6E and it's over the next page. It's
14 not stipulated that liquidated damages with the owner were
15 not assessed. It's not stipulated. In fact, they were
16 assessed. We will acknowledge that we pursued what's
17 called a request for resolution of contract controversy
18 with the state engineer's office under our prime contract
19 and it was resolved. We asserted claims against the owner
20 and it was resolved. Mr. Brousseau is correct. We
21 settled for far less than what we were entitled to because
22 Lander's position was that we had delayed the project.
23 But we believe that liquidated, the liquidated damages
24 were assessed. But, Your Honor, that's not our claim.
25 And that sentence that he cited to you, if contract

1 documents provide for liquidated damages and such damages
2 are so assessed, then PC may assess same against
3 subcontract. Are you with me on that for that?
4 THE COURT: Yes.
5 MR. MULLINS: Look at the next sentence, Your Honor.
6 That's what our case is, okay? Subcontractor shall also
7 be liable for all additional damages PC Construction of
8 Greenwood may incur as a result of subcontractor's failure
9 to complete subcontractor's work or any portion thereof in
10 accordance with the schedule including direct costs,
11 liquidated damages and/or extended overhead or extended
12 general conditions. Your Honor, I would submit that it is
13 very common in the construction industry for general
14 contractors to pursue delay claims against subcontractors
15 because if a subcontractor delays the project, the general
16 contractor incurs costs. And they write them into their
17 contract and that's exactly what was done here and that's
18 exactly what we're going to present. And there clearly is
19 an issue of fact as to whether there were claims that
20 exceeded the contract balance such that we have
21 affirmative claims against Miller and that's what we're
22 going to present. That's what we've alleged in our
23 pleading. I'm just not real sure what the basis of the
24 motion is in light of that sentence unless there is
25 another way to construe what the import of that sentence

1 is. But, you know, the issue of final payment somehow or
2 progress payment somehow being a waiver. There is no
3 notice provision with regards to this, with this sentence.
4 It says, the subcontractor shall be liable. Shall be
5 liable for all damages associated with their failure to
6 comply with the schedule. So at a minimum we got a issue
7 of fact here, Your Honor.
8 THE COURT: All right. Mr. Brousseau.
9 MR. BROUSSEAU: And, Your Honor, as far as their
10 position in regards to these LD's and additional damages,
11 they claimed that against Lander. They settled. They had
12 their final payment. This is not an issue of partial
13 payment during the course of this, of the project itself.
14 If my client had been delaying the project, they had a
15 duty under the contract to say no, we're not paying you
16 because you have caused these delays. They didn't do
17 that. They paid my client. This is now down to final
18 application, final pay. And for them to come back and say
19 no, we should have assessed LD's, we should have assessed
20 liquidated damages when we were paying you all along.
21 And, quite frankly, I don't think that's what's called for
22 in the contract. I mean, the final payment application is
23 what governs this. And the final payment application
24 says, that's on page four of the contract says, once they
25 receive final pay from Lander, then they are to pay the

1 subcontractor. Well, Lander wouldn't pay us. We
2 ultimately went to an arbitration type thing. But we
3 reached a resolution. In other words, they reached an
4 agreement as to how much PC Construction was owed. They
5 had every right to go forward as to, if Lander was
6 asserting liquidated damages against them. They had every
7 right to pursue that through the arbitrator or the dispute
8 resolution. But they didn't. And then there was no
9 liquidated damages assessed. They agreed on the number.
10 That was their agreement. That was their final pay and
11 once they received that final pay from Lander, they have a
12 duty to pay the subcontractors under this agreement, under
13 this contract. That the amount that is owed by my client,
14 Your Honor, is retainage essentially. There is no issue
15 about the prior payments or anything like that. And
16 essentially what they've done is, is they've tried to hold
17 this liquidated damage over our heads in order to get us
18 to come to a lower number than what's actually owed.
19 MR. MULLINS: Your Honor, I'm sorry. I've got to
20 respond to that. First of all, this case isn't about
21 liquidated damages. What happened with Lander is totally
22 separate and apart. We're not claiming liquidated
23 damages. The sentence is very clear. We're pursuing the
24 claim for failure to comply with the scheduling and that's
25 what we're going to present. And to present to you that

1 somehow this case is because we're trying to posture to
2 get them to accept a lower number, I'm not going to, you
3 know, stay seated when he's taking those positions. We
4 got a case that we're going to present. We're going to
5 show they significantly delayed the project. We're going
6 to show they owe us $90,000.00 dollars. And there's no
7 notice provision, there's no waiver and the statute or the
8 contract provision clearly provides for what we're
9 seeking.
10 MR. BROUSSEAU: But, Your Honor, if Lander didn't
11 assess those damages against them, the contract is clear,
12 they can't come back after us.
13 MR. MULLINS: I'm at a loss on that.
14 THE COURT: It seems to me y'all brought the action
15 first saying, pay us what we believe is our contract.
16 They had not paid to that point. Then an issue arose with
17 Lander and that's been resolved. What they resolved it
18 for may be a component of numerous things. This number or
19 that number or another number. Don't know. I think
20 that's a question of fact right there. If you're right,
21 the money they settled with Lander for is composed of what
22 components? If none of them are liquidated damages you
23 may be right. If some of them are, then you may be wrong.
24 I think I just got to know more.
25 MR. BROUSSEAU: Yes, sir.

1 THE COURT: Respectfully I think that the answer is
2 summary judgment should be denied. Because I've heard
3 enough that y'all got a lot out there component-wise as to
4 what these numbers represent and totals. And so I can't
5 make that determination at this time that that's not
6 there. I think it may be and it depends on what's
7 presented in the testimony.
8 MR. BROUSSEAU: Yes, sir.
9 THE COURT: All right. Now, those are your motions
10 except for your motion to amend the affirmative defense?
11 MR. MULLINS: Correct, Your Honor.
12 THE COURT: All right. Here's what I want to do. If
13 we were starting the testimony today, who would want to go
14 first in this case. There was a clock back there at one
15 time, what time is it?
16 MR. MULLINS: 3:36.
17 MR. BROUSSEAU: I had kind of anticipated he would be
18 able to get done. But now that we've got this licensing
19 issue that I would imagine that Mr. Mullins is going to
20 really cross-examine him pretty hard on that.
21 THE COURT: All right. Here's what I want to do. I
22 want to study the motion to amend a little bit more. I've
23 eaten something for lunch that doesn't agree with me. I
24 want to start back in the morning.
25 MR. BROUSSEAU: Yes, sir.

1 THE COURT: Is that going to create an inconvenience
2 for any of y'all or any of y'all's witnesses y'all have
3 rounded up?
4 MR. MULLINS: No, we will line it up. We will figure
5 it out.
6 THE COURT: Okay.
7 MR. MULLINS: Your Honor, we've got one witness that
8 I don't anticipate a problem, you know, if Mr. Miller
9 goes. He would probably be our first one up after that.
10 THE COURT: Okay.
11 MR. BROUSSEAU: But we need to get him, we need to
12 get him done tomorrow.
13 THE COURT: And we should be able to do that, you
14 think?
15 MR. BROUSSEAU: Oh, yes. Yeah. Oh, gosh, I'd hope
16 so.
17 THE COURT: All right. Well, that's what I want to
18 do. We're going to stand down today and come back. What
19 time y'all want to start tomorrow morning.
20 MR. BROUSSEAU: 9:00 or 9:30 is fine with me.
21 Whatever you want to do.
22 THE COURT: 9:00 o'clock Tuesday. You come from
23 Columbia?
24 MR. MULLINS: I'm going to stay here tonight.
25 THE COURT: Y'all want to start at 9:00, we'll start

1 at 9:00. That way we'll get the witnesses done.
2 MR. MULLINS: All right.
3 THE COURT: All right. That suits me good. All
4 right. See y'all at 9:00.
5 (Whereupon, the trial will resume the next morning at
6 9:00 a.m.)
7 NOVEMBER 5, 2015
8 THE COURT: All right. I went back and reviewed all
9 of the cases y'all presented to me about the affirmative
10 defense, amendment to complaint, the original pleadings,
11 the lack of license, the under-license. It seems to me
12 we're somewhere in the middle of all that. We've got a
13 grading license of Class 4, a general contractor's
14 license, unlimited, a contract that fits under the Class 4
15 limit that then got modified in the performance and went
16 up because of changes and asbestos. And I don't believe
17 the parties contemplated that and another contract of some
18 type brought in to help with the asbestos abatement in the
19 property. And the rehabilitation of some storm sewers and
20 some other type water infrastructure, whether they be
21 sewer lines, water or what, but a lot going on. Here's
22 what I think my ruling is, is that all the cases or the
23 three cases I read or four cases I read, one was not
24 licensed at all and never was. He was out of the
25 foreclosure mechanic's lien. One was not licensed and

1 then became licensed during the performance of the
2 contract. He was out. And the other one was licensed to
3 a hundred and bid on eighty-hundred and so he was
4 under-licensed from the initiation. This is kind of the
5 opposite. This is licensed properly for an amount under
6 your limit and it went over the limit during the
7 performance. So I'm going to let it stand. I think he's
8 properly licensed, properly entered the contract, properly
9 under his limit, everybody's okay. I also believe that
10 the licensing requirement and what not was pled and
11 raised, but all the licensing affirmative defense cases,
12 they weren't pled. They weren't pled. They were raised
13 late. This one was pled. I believe that the pleadings
14 show that they denied it. And I mean admitted part of it
15 and denied the rest. And that their presentation of the
16 affirmative defense has been properly done. So I'm going
17 to allow that amendment to be an affirmative defense and
18 hear the case so we can forward. So, we're kind of in the
19 middle. So, your pleadings are amended to show that
20 affirmative defense.
21 MR. MULLINS: I actually have, I have an amended
22 answer.
23 THE COURT: Well, as long as we got it on the record.
24 MR. MULLINS: Okay.
25 THE COURT: You're pleading that statute

1 affirmatively.
2 MR. MULLINS: Right.
3 THE COURT: As a defense to his counterclaim? All
4 right. And that is so ruled. So those rulings are made.
5 Let's go.
6 MR. MULLINS: All right. Yes, sir. Your Honor, and
7 just hearing what you said I just want to make sure that
8 you understand our position on the licensing. And I know
9 that we're going forward and maybe I need to make sure I
10 understand what your ruling was.
11 THE COURT: I read these cases at 5:00 o'clock this
12 morning, that's when I got them straight, because I was
13 fresh.
14 MR. MULLINS: Let's put the amount of the project
15 aside. That's a backup argument down, you know, that's an
16 alternative argument. Our position is that you are
17 required to be, perform works within your license
18 limitation. A licensee has to perform work in the
19 classification that it is licensed for. And our position
20 is that his work involved work outside of that
21 classification. Therefore, he did not have a valid
22 license, therefore, he cannot enforce the contract.
23 THE COURT: All right. You're distinguishing two
24 things, I think, and one is the amount of the contract and
25 the other one is what he did under the contract.

1 MR. MULLINS: Exactly.
2 THE COURT: And your argument is rehabilitation of
3 storm sewers, he was licensed for, but he did more than
4 that. He installed new storm sewers.
5 MR. MULLINS: Right. What I will say, what we
6 believe as a matter of law, but I think you've determined
7 that that's, you disagree with that. We believe as a
8 matter of law that he did not perform storm sewer
9 rehabilitation. We are going to put up, we believe that
10 there is a vast difference between a rehabilitation of a
11 storm sewer and the laying of pipes and the installation
12 of a storm sewer system. And we think that's the critical
13 issue on the licensing.
14 THE COURT: Now, would you agree that's a factual
15 question yet to be determined?
16 MR. MULLINS: I'm sorry, Judge, I'm going to have to
17 disagree. I think that rehabilitation of, this was not a
18 rehabilitation, but I understand your ruling on that.
19 THE COURT: Okay.
20 MR. BROUSSEAU: Just so I understand, I mean, that
21 you're just denying the motion for summary judgment. So
22 the licensing issue is in play, and I want to understand
23 what you just said. Are we putting up anything about the,
24 are you guys waiving the monetary amount?
25 MR. MULLINS: I'm not waiving it.

1 THE COURT: We can see it both ways.
2 MR. MULLINS: That's an alternative argument. But
3 our primary argument is what I just described. Our
4 secondary argument is the exceeding the limit.
5 MR. BROUSSEAU: I just wanted to make sure on that.
6 THE COURT: You're saying rehabilitation included
7 what you did, he's saying it did not.
8 MR. BROUSSEAU: Yes, sir.
9 THE COURT: I'm with you. I understand both y'all's
10 postures.
11 MR. MULLINS: All right.
12 MR. BROUSSEAU: For a housekeeping issue, Your Honor,
13 I have put together an exhibit notebook for the Court and
14 Mr. Mullins has a copy of it. I didn't know how we
15 wanted, I was talking to the court reporter before we got
16 started. I intended just to do it as a group exhibit.
17 It's got tabs. I've got one for Your Honor, one for the
18 Court and one for Mr. Mullins, of course. I don't know
19 how you want to do that.
20 THE COURT: How do y'all want to do it?
21 MR. MULLINS: Well, we might want to take up, Your
22 Honor, remember I had a motion in limine that I wanted to
23 argue before we started. I mean, I will tell you with the
24 notebook, I think what you were suggesting to do is kind
25 of what I do in many situations, just put the notebook in

1 and have, you know, have that in as an exhibit and have
2 tabs. But our, we're not stipulating to the
3 admissibility, in fact, the motion in limine is going to
4 seek to exclude most of what's in the notebook. And I do
5 believe even if you deny this motion, I'm probably going
6 to, Your Honor, I think he needs to lay a foundation on
7 some of those documents.
8 MR. BROUSSEAU: I intend to lay a foundation on
9 everything.
10 THE COURT: All right. So let's do this. We'll take
11 the notebook in itself and then each subpart will be
12 admitted if, if admitted, then it will become part of the
13 notebook record.
14 (Whereupon, Plaintiff's Exhibit 1 was admitted into
15 evidence.)
16 MR. MULLINS: Right.
17 THE COURT: And what I'd like Ms. Holston probably to
18 do would be, the notebook will be an exhibit and each
19 subpart will be a subpart admitted and which part is not
20 admitted will then not be part of the record.
21 MR. BROUSSEAU: Sounds good to me.
22 MR. MULLINS: That's fine. That's right and then we
23 can get together and pull out of the notebooks whatever.
24 THE COURT: Exhibit 1, each subpart will be
25 alphabetized and what doesn't come in will be exhibit;

1 what does come in will be Plaintiff's 1D, 1A or so forth
2 as y'all deal with it. So now, do we need, when we get
3 close to that, do you want to argue the admissibility on
4 foundation then, because I mean if we're not letting it
5 in---
6 MR. MULLINS: Well, I really have a motion in limine
7 based on, I mean, the notebook as a whole regarding
8 compliance with discovery and would seek a ruling from the
9 Court on whether they ought to be excluded on that basis.
10 THE COURT: All right. Let's hear it then.
11 MR. MULLINS: Your Honor, in this case, a consent
12 scheduling order was entered on December 7, 2013, I'm
13 sorry, that's 2012. The scheduling order provided that
14 the discovery should be completed by May 1, 2013. On
15 March, we served Plaintiff with discovery requests,
16 interrogatories and requests for production. There was
17 not a timely response. We filed a motion to compel. A
18 consent order was issued on the motion to compel on May 29
19 requiring the Plaintiff to respond to the discovery by May
20 30th. That, in fact, did occur. They responded on May
21 30th. Within our discovery request, we had requested any
22 and all documents and/or tangible things you intend to
23 introduce as evidence at the trial of the case and the
24 answer was, see attached. Your Honor, what was provided
25 in response or attached to the discovery responses were

1 documents in three groupings, and I've got listed in the
2 motion there. There were a set of documents:
3 Miller-Contract which was Bates 1-30; Miller-Pay Requests,
4 Bates 1-92; Miller-SinkHole, Bates 1-12. Last week I got
5 a copy of the notebook that we've just been talking about
6 or an earlier version of the notebook. I think there is
7 one exhibit difference. But at the time, it was I believe
8 represented that this was going to be the proposed
9 exhibits for the trial. There were 13 proposed exhibits
10 and I think there are now 12. With the exception of one
11 exhibit, Your Honor, which would be Exhibit A of the
12 current exhibit notebook which is the subcontract, none of
13 the other exhibits were provided in response to the
14 discovery requests and attached to the responses that were
15 identified as those exhibits that were going to be used at
16 the trial. Your Honor, I understand that you've got broad
17 discretion in excluding evidence as a sanction for not
18 complying with discovery procedures. There was a clear
19 request that was made. There was a very clear response
20 that was made and, again, not until October 30th were we
21 given any indication and given a set of new documents that
22 the Plaintiff intended to rely on this case. So we
23 believe the documents or Exhibits B through J should be
24 excluded on that basis.
25 THE COURT: All right. Mr. Brousseau?

1 MR. BROUSSEAU: Thank you, Your Honor. First of all,
2 as the Court can probably tell by both sides here it, that
3 this file is pretty extensive. We've got a number of
4 boxes and one of the things that we ended up doing on
5 this, Your Honor, is that after it became determined the
6 complete file was extremely voluminous, Mr. Mullins came
7 to my office, went through the file in its entirety. In
8 addition to what I gave him, also requested a number of
9 different documents from the file, as well, which on our
10 time, we went ahead and made all the copies, did all that
11 kind of stuff. My understanding is is that everything I
12 put in here, number one, was in the file that he got to
13 see. Number two, copies were made of it and he got them
14 at his own request. Number three, and this is where Mr.
15 Mullins and I have a bit of a disagreement about what was
16 turned over and what wasn't turned over was back in July,
17 were up on the roster, on the trial roster early July and
18 at that stage, my recollection is that I gave him this
19 notebook minus three of the documents that I've already
20 taken out. I've taken out three of the documents that I
21 originally had proposed. Two weeks ago I got an email
22 from Mr. Mullins saying what do you intend to turn in at
23 trial. Of course my response was is, you should have
24 gotten my exhibit notebook back at the trial. He then
25 stated that he didn't get that. I swear I did it but

1 irregardless. Number one, the contract, and this is what
2 we intend to put into evidence through my client is the
3 subcontract which they agree comes in, the summary of the
4 principal balanced owed which is Tab B was attached to the
5 pleadings in this case. It was attached to the notice on
6 the payment bond. It was attached in our documents. In
7 fact, I think it was part of Miller contract, one of the
8 Bates stamps that he was mentioning. The emails that go
9 C, D, E, F, G and H, those will all potentially be
10 admitted depending upon what is testified to. Those are
11 potentially rely-type cross-examination questions. The
12 request for resolution for contract controversy, the same
13 thing. J, Plaintiff's damages, there is an email. I went
14 back through my emails after Mr. Mullins asked me about
15 this and two weeks before we were up for trial back in
16 July, I gave Mr. Mullins a summary of our damages which is
17 the principal amount which everybody knows that's been in
18 place. In fact, there's letters between Mr. Mullins and I
19 back when they made a partial payment on this early on and
20 really all it was is just a calculation of prejudgment
21 interest. And I sent him an email about that, I think on
22 July 2nd or July 1st or something like that. Quite
23 frankly, and this just came up, he mentioned this to me
24 last week. I think I've complied with the discovery, that
25 the entire file was at Mr. Mullins' disposal. I turned

1 over what I intend to produce during my case-in-chief. If
2 if his clients are going to testify to something
3 completely different, then I have a right to do reply
4 evidence on some of these emails that not only his client
5 should have but were available at my office as well. So
6 that's our position on it.
7 THE COURT: So, I mean, one of your contentions is
8 you think you gave him this notebook in July?
9 MR. BROUSSEAU: I do believe so and the reason why I
10 say that is, I always do enough for everybody, the Judge,
11 the court reporter, each party, you know, myself and them
12 and then my staff always does what they call a burn copy,
13 the extra one that in case you lose it or something like
14 that. And I only had four copies at my office so
15 somewhere, there was a fifth one that went somewhere.
16 Now, I mean, Mr. Mullins says he didn't get it, so I mean
17 I understand. But number one, that's number one
18 contention. Number two is, is I think I did also comply
19 with discovery. I mean, that we provided extensive
20 documents to Mr. Mullins. Number three, he had full
21 opportunity and came to my office and exerted that
22 opportunity after he tab'd out numerous, numerous,
23 numerous documents, my staff went through and on our own
24 time, took the time to make copies for him and do
25 everything that he asked us to do and what he wanted from

1 the file. Everything in here was in the file. In fact,
2 he requested a number of emails and I believe he had
3 requested the emails that are in here. I'm not sure.
4 But, I mean, that's number two. And, of course number
5 three, when it comes to the damages, I mean, I provided
6 that via email before trial even started that, before we
7 were up on the roster back in July. So that's my position
8 on it.
9 MR. MULLINS: Your Honor, I know Mr. Brousseau when
10 he says that he believes that he gave me the notebook, I
11 presume that he believes that he gave me the notebook. He
12 did not give me the notebook. I'm not saying it's
13 absolutely impossible, but I don't have anything in the
14 file and I think I would have recalled if someone had
15 handed me an exhibit notebook. And I've got zero
16 recollection of that. I mean, I do take issue with one
17 thing that Mr. Brousseau just said, though, and I did send
18 an email last week making sure that what he had identified
19 in Exhibit 7 was what he intended to offer at trial and
20 hoping that we could isolate that down further and his
21 response was not, I already gave you the notebook. His
22 response was to email me a copy of the notebook for the
23 first time. He did not say until, you know, we had
24 several conversations that he thought he'd gave it to me.
25 So I do take issue with that one point. I don't take

1 issue with the fact that he believes that he may have
2 given it to me. Now, you know, I have been looking at
3 this. Now, Exhibit J is just a summary of their claim for
4 damages. I mean, you know, can testify to that.
5 THE COURT: Yeah, that's a summary.
6 MR. MULLINS: I'm not really worried about that.
7 But, you know, honestly, I know there were some emails and
8 I did review the file. I do not, you know, most of this
9 stuff which deals with Lander which is documents, I really
10 don't know how they got. I presume they got them from
11 Lander. I don't recall seeing them in the file, you know,
12 which is why you ask the request. What do you intend to
13 use at trial. And, you know, it wasn't until last week
14 that I got this. Again, there was a lot of stuff. I
15 don't know if it was in there or not. I don't recall
16 seeing those documents that relate to communications. You
17 know, that would be everything but the emails and I'm not
18 sure I saw all the emails. I mean this is what I
19 requested. You know, mostly what we got were a copy of
20 some schedules and some daily's from Miller is what we
21 requested. I think that's your call to make. I don't
22 think there's been compliance with the discovery process.
23 So, I'll leave it to you to make the decision. I quoted
24 the request in my motion in limine, but I certainly can
25 give you the actual response if you need that.

1 THE COURT: All right. So I understand, after y'all
2 signed the scheduling order and gave your discovery, you
3 were allowed the ability to copy or inspection of the file
4 more or less of Mr. Brousseau?
5 MR. MULLINS: Well, he served his responses within
6 the time limit and within, this is the actual and I've got
7 it in a notebook. And it's a little bit out of order but,
8 you know, these are the documents that were attached to
9 the discovery responses.
10 THE COURT: That's number seven?
11 MR. MULLINS: Well, yes number seven.
12 THE COURT: Okay.
13 MR. MULLINS: And in response to another request
14 relating to daily's or I got it right here, some other
15 request, he said that the file is voluminous. You can
16 come look and see what's in my file. And I did go to Mr.
17 Brousseau's office and I did look at what he had there and
18 I did tag some schedules and some emails and all of the
19 daily's that were in the file. But there was never any
20 supplement, never any indication other than what was
21 specifically referred to in response number seven. And
22 that is these are the documents that they intend to use at
23 trial.
24 THE COURT: And these emails, Mr. Brousseau, you're
25 telling me that these emails would be more like a reply

1 testimony depending on what the case put up by Mr.
2 Mullins?
3 MR. BROUSSEAU: That's correct.
4 THE COURT: It's difficult to get acclimated to this,
5 as detailed that y'all are with the file, y'all are so
6 acclimated to it and I'm not. It's hard to figure out
7 exactly where y'all are. Sometimes it's easier to take
8 them as they come in. This is what I was talking about so
9 I'll tell you what, I'm going to reserve, when you see
10 them coming in, I want to hear it again. It's so much
11 easier for me to catch it in context. It's out of context
12 for me. I don't quite understand what happened when and
13 in the flow of the trial. It's a lot easier for me to
14 rule on.
15 MR. MULLINS: Yes, sir.
16 THE COURT: So you got your foot in the door, but
17 just raise your hand when he has one of these documents
18 you do not believe was properly presented to you in
19 discovery and I'll consider it right then. So I'm not
20 going to rule on it yet. I'm going to take and hold it.
21 As they come, you'll know because you're familiar with it,
22 and we'll argue them as they come each, each one, okay?
23 MR. MULLINS: Yes, sir.
24 MR. BROUSSEAU: Thank you, Your Honor.
25 THE COURT: All right. Y'all need a break or

1 anything yet, because I want a cup of coffee.
2 (WHEREUPON, a short break was taken.)
3 THE COURT: All right, are you ready, Mr. Brousseau?
4 MR. BROUSSEAU: We call Mike Miller.
5 THE COURT: Come to the center to be sworn, then come
6 around.
7 MIKE MILLER, being
8 first duly sworn, testified as follows:
9 DIRECT EXAMINATION
10 BY MR. BROUSSEAU:
11 Q Mr. Miller, can you state your name for the record,
12 please?
13 A My full name is George Michael Miller.
14 Q And, Mr. Miller, what do you do for a living, sir?
15 A I am Vice-President of Miller Construction. We are a
16 grading contractor.
17 Q All right. And you just stated what Miller does,
18 they're a grading contractor. How long has Miller
19 Construction been in business?
20 A Since 1950's.
21 Q All right. And that was a company that was started
22 by your father?
23 A That was a company started by my granddad.
24 Q All right. And you've heard us talk about this.
25 Before we get into this particular contract, what type of

1 license does Miller Construction hold?
2 A Miller Construction carries two. One, we still have
3 a residential building contractor's license. And also,
4 two, a general contractor's license under grading.
5 Q All right. And what is your classification for
6 grading?
7 A It is a GD4.
8 Q And what does that classification mean?
9 A It means that you are, can exceed up to $750,000.00
10 dollars in work.
11 Q Okay. Mr. Miller, how many times have you handled a
12 job such as the size of this Lander project?
13 A Numerous times.
14 Q All right. I'm going to show you---
15 MR. BROUSSEAU: Approach the witness real quick, Your
16 Honor, with this.
17 THE COURT: Sure.
18 Q This is a group exhibit number 4, or number 1, sorry.
19 And if you'd flip over to Tab A, what is that document,
20 sir?
21 A That is a document, a contract between PC
22 Construction and Miller Construction.
23 Q All right. And was this the result of a successful
24 bid under a subcontract for this project?
25 A That is correct.

1 Q All right. And how did that process come about, the
2 bidding process?
3 A We received a set of plans. There were numerous
4 bidders on the project and once we tallied our numbers
5 together, then we sent our quote out to numerous bidders
6 that were bidding the project.
7 Q All right. And, obviously, ultimately you guys were
8 successful in obtaining the bid, correct?
9 A We were low bidder, yeah.
10 Q All right. And what was the total contract price for
11 this particular project?
12 A $900, I mean, $492,000.00 and some change.
13 Q And we'll get into the, some of the change orders and
14 stuff like that here in just a second but who drafted this
15 contract?
16 A PC Construction.
17 Q All right. Now, one of the things that you ended up
18 having to do on this was the storm water, is that correct?
19 A That is correct.
20 Q All right. Describe for me exactly what y'all's role
21 was and what y'all were supposed to do in regards to this
22 storm water?
23 A We went in and demo'd the existing storm drainage
24 that was a parking lot. This site was one time a shopping
25 center, so we removed it. We went back in, installed new

1 storm drainage. We tied to some of the existing boxes
2 that was there and also ran new piping from there to some
3 existing boxes.
4 Q Okay. So there was an old existing storm water sewer
5 system underneath the ground there?
6 A That is correct.
7 Q And how common is that, whenever you do jobs, grading
8 jobs, how common is it for you to come in and fix the
9 existing storm sewer system?
10 A Most of the time when we bid a job, that's what we
11 do.
12 Q All right. And explain for the Court why it's
13 important to go ahead and rehabilitate or fix those storm
14 sewer systems?
15 A Because a lot of times they're not in the proper
16 position or a proper place. And then, too, they may be a
17 smaller than what's designed to go in for the new. So
18 you're tying in existing plus the new changes so a lot of
19 times you have to upsize.
20 Q Now, Mike, if you could briefly describe for the
21 Court exactly what was going on with this project? I
22 mean, and what was this project about, what were you guys
23 doing?
24 A We were building, we were grading a sports complex
25 for Lander University.

1 Q All right. Now, first of all and we'll get into this
2 a little bit later in more detail, you guys ran into a
3 number of issues and a number of problems, correct?
4 A That is correct.
5 Q All right. Tell me about some of these issues that
6 you guys came about?
7 A One is when we started grading we found footers that
8 were left from the demolition of the shopping center that
9 had to be removed. We started grading and started
10 building detention ponds. And then later found when we
11 moved to the softball field, DHEC stated that we could not
12 remove a detention pond until the site was roughly 75
13 percent stabilized. So that threw us behind. We found
14 other material on-site, you know, buried pipe and
15 different things that was not there. We had a house that
16 was not in our contract that had to be removed. We went
17 back and then later found asbestos and then it was just
18 numerous problems that we ran into with this job.
19 Q Okay. And tell me a little bit about the asbestos
20 issue. I mean, when it, who discovered that, first of
21 all?
22 A We were moving dirt in the area of the softball field
23 when we found the asbestos and we stopped the project and
24 notified PC Construction.
25 Q And then what happened?

1 A PC Construction was under supervision of BLE which
2 was the soil tech for Lander University. PC then notified
3 BLE and BLE came out on-site to evaluate what we had
4 found.
5 Q And ultimately the asbestos needed to be removed,
6 correct?
7 A That's correct.
8 Q How much asbestos ended up being out there?
9 A When we first started, we started digging test holes.
10 And then they brought in a machine used that was actually
11 like a radar that would show how much material was
12 underneath the ground. But when we first initially
13 started this, you know, we didn't know how much was there.
14 You know, it could have been a ton, it could have been 500
15 tons, it could have been a 1,000 tons, but I never dreamed
16 that it was going to wind up being almost 10,000 tons.
17 Q Okay. Well, tell me about the process of the removal
18 of the asbestos, what happened with that? How did y'all
19 come about removing it?
20 A We have guys that are certified to work under a
21 asbestos, an abatement contractor. So when the test holes
22 were done, my operators actually worked for either BLE or
23 Triple R. And we digged it, we dug the test holes and at
24 that point in time to determine that they wanted to get
25 bids on it so they could figure out how much was there to

1 remove.
2 Q All right. And was it a separate bidding process
3 similar to when you bid on this contract originally?
4 A Well, it's outside of my scope of work. So it
5 becomes hazard material and one thing with asbestos being
6 an asbestos contractor which we are not, the asbestos
7 contractor in the State of South Carolina does not have to
8 be a licensed general contractor. He can bid from one
9 dollar to twenty million dollars without having a GC
10 license.
11 Q All right. And that's a license that, it's Triple
12 R---
13 A Triple R.
14 Q ---correct, and that's who you subcontracted?
15 A That's who I subcontracted to.
16 Q And Triple R is licensed through DHEC?
17 A That is correct.
18 Q All right. And what was your understanding once,
19 ultimately you guys won the bidding process on the removal
20 of the asbestos, correct?
21 A That is correct.
22 Q All right. What was your understanding of how that
23 would be treated as far as payment goes?
24 A I felt like that we would be paid for it and we
25 removed it by the ton. We initially did a breakdown to

1 move it as cost-plus or time and material. And then the
2 college, what I was told, did not want to deal with it
3 that way. That they wanted a lump sum which was based on
4 per tonnage. So what I did was got Triple R's numbers,
5 took my numbers of using our equipment to move it, using
6 our trucks to move it, which my drivers were HAZMAT
7 certified. And we removed the material and carried it to
8 Greenwood Landfill which we didn't know at that time we
9 were going to credit Lander back for $40.00 dollars a ton
10 on the dumping fees.
11 Q Okay. Now, was this by way of a change order under
12 the contract or was this a new contract drawn up by PC
13 Construction or Miller?
14 A It became a change order but with it being outside of
15 the scope of our work, with it being hazard material, it
16 should have been a separate contract from what our
17 original contract was.
18 Q Okay. Mike, if you could and flip to Tab B and what
19 is this document?
20 A That is a document that we did showing the original
21 contract amount change orders 1 through 86.
22 Q And was this a summary you provided to PC
23 Construction for a final pay application?
24 A That is correct.
25 Q Okay. If you'd flip to page two, how much was the

1 total change order amount on this particular job?
2 A The total change order amount was $979.00 dollars, I
3 mean, $979,840.00 dollars.
4 Q All right. And how much, at that stage, how much had
5 you been paid?
6 A With the change orders and total contract, I'd been
7 paid $1,393,901.000 dollars.
8 Q Okay. So in November of 2011, what were you owed at
9 that stage?
10 A $26,833.00 dollars and some change, plus the
11 retainage.
12 Q Mike, if you could flip to the next page and what is
13 that document, sir?
14 MR. MULLINS: Your Honor, I'm going to object to this
15 document. This is a letter from me. I'll tell you the
16 basis for the objection when you've read it.
17 THE COURT: All right. Go ahead.
18 MR. MULLINS: Basis for the objection is as raised in
19 the motion in limine that this was not a document that was
20 indicated that it was going to be used as a trial exhibit.
21 Secondly, Your Honor, some background on this document.
22 Miller filed a Mechanic's Lien on this job. This was a---
23 MR. BROUSSEAU: No, he didn't. He filed a payment
24 bond.
25 MR. MULLINS: They filed the, they filed a document,

1 whatever you want to call it. They filed a claim, I'm not
2 sure what the title of it was, but it was filed with the
3 Register of Deeds Office. Lander presumed that that
4 clouded the title. They believed it was a Mechanic's
5 Lien. A payment was made. This document reflects a
6 payment that was made in essence as a condition for the
7 release of that, because Lander's position was this was a
8 public job and there shouldn't be any cloud on the title.
9 The bank was given, agreed. So, you know, this in essence
10 is just an agreement reached so we could move the project
11 forward. You know, I don't have any problem with him
12 testifying that he received additional payment from PC
13 that would have reduced their claim amount. But I just
14 don't think it's proper to have this as an exhibit.
15 MR. BROUSSEAU: And, Your Honor, actually, number
16 one, we never filed a Mechanic's Lien and there was
17 another case where another subcontractor had actually
18 filed a Mechanic's Lien on this project. We filed this as
19 a suit on the payment bond, filing our notice with the
20 Clerk of Court here in Greenwood County. My understanding
21 is is that Lander never treated it as a clouded title.
22 What happened on this particular instance was is, after we
23 had filed this, there was an additional payment made and
24 we wanted to make sure that this wasn't, I guess, treated
25 as a final payment or anything like that. And so that's

1 why this letter was written was to establish that this is
2 a partial payment on this particular matter. And if I'm
3 not mistaken, too, Your Honor, and I believe this letter
4 may actually be attached to the pleadings. I'm not sure.
5 But in either event, I mean, it is what it is. I mean
6 they wrote the letter to us.
7 MR. MULLINS: Well, Your Honor, we don't need to
8 belabor it. That's my position on it. I, you know, you
9 can rule on it and we can move on. We kind of need to get
10 this thing rolling. So I just felt like I needed to raise
11 the objection. You know, lawyers are always hesitant when
12 their letters are introduced as exhibits.
13 THE COURT: I understand.
14 MR. MULLINS: You know, the facts that are set forth
15 in the letter, there was a payment made, they did agree to
16 reduce the amount.
17 THE COURT: And that's not being defended as a final
18 and full payment?
19 MR. BROUSSEAU: That's correct.
20 THE COURT: Is that right?
21 MR. MULLINS: That's right.
22 THE COURT: All right. Well, then I understand what
23 it is. It's not going to be misconstrued. It shows a
24 partial payment made reducing the amount of the claim.
25 MR. MULLINS: And I think we clarify in the letter

1 that there are liquidated damages. We also have other
2 back, you know, delay-related back charges.
3 THE COURT: All right. It's been identified and I
4 understand your clarification on it. It shows the payment
5 history on a claim made under the payment bond.
6 MR. BROUSSEAU: That's correct.
7 Q And, Mike, obviously you received the payment that's
8 referenced in this correspondence, correct?
9 A That's correct.
10 Q And that reduced your principal balance to what?
11 A Total?
12 Q Yes, sir.
13 A $53,695.08.
14 Q Thank you. Up until the time that you had sent this
15 final pay application in November of 2011, had there been
16 any complaints made by PC Construction regarding your work
17 on this project?
18 A No, they had not.
19 Q What about time delays, had there been any type of
20 complaints from PC Construction regarding delays on this
21 project?
22 A No, they have not.
23 Q Do you believe that you did everything, that Miller
24 did everything that it was supposed to do under the terms
25 of the contract?

1 A We went beyond our contract.
2 Q When you say you went beyond the contract, what do
3 you mean by that?
4 A I had guys -- well one, the asbestos slowed this
5 project down for almost six months. And I kept sending
6 full crews down of trying to keep other subcontracts that
7 were to PC working. I got documentations in my folders
8 and files where Gary, PR tech, and I responded back and
9 forwards of when are we going to get started back? What's
10 holding up the progress? What's happening here? When are
11 we going to do this? And see, it was costing me money. I
12 mean we were going down if it rains. Even trying to run
13 on Saturday. We'd go down and send a full crew which
14 would be 10 and 12 guys and work a hour or two and then
15 come back to Anderson, so I lost money on the project
16 myself. Plus we had numerous subs that they had problems
17 with. I think we went through four or five different
18 subcontractors just under the concrete part of stuff that
19 was there. Changes with architect and engineer and, you
20 know, it became a problem job.
21 Q Okay. If you'd flip, Mike, if you'd would, flip to
22 Tab, I think it's, J. What is the amount that you claim
23 Miller is owed for the work that it performed on this
24 project?
25 A $53,695.08, plus the prejudgment interest of

1 $9,152.19. Total amount owed, $62,847.27.
2 Q And the calculation of that prejudgment interest is
3 on the following page, correct?
4 A That is correct.
5 Q Once you made your final pay application, what was
6 the response from PC Construction?
7 A That they have not been paid by Lander University.
8 Q All right. Now, eventually, were they paid by
9 Lander?
10 A I found out later, at a later date that they were
11 paid.
12 MR. MULLINS: Objection, Your Honor, to the extent,
13 it calls for hearsay.
14 THE COURT: Well, he knows.
15 MR. BROUSSEAU: Yes, sir.
16 THE COURT: Rephrase it.
17 Q Ultimately, Mike, did you discover that Lander had
18 been paid?
19 A Yes, I did. I went and met with Jeff Beaver with
20 Lander University.
21 Q Now, don't tell me what Mr. Beaver said. He's going
22 to be able to testify.
23 A Okay. All right.
24 Q Okay. But at that stage, you knew that they had been
25 paid, correct?

1 A That is correct.
2 Q All right. And PC Construction hasn't paid you since
3 then, correct?
4 A That is correct.
5 Q All right. Back to the storm water issue, if I
6 could, Mr. Miller, do you believe that what you were doing
7 was, that that was an installation of storm water or do
8 you believe it was rehabilitation of storm water system?
9 A Well, if you take that old site that was
10 pre-existing, had asphalt, it was a parking lot, had catch
11 basins in it that was actually working. You go in and put
12 a new site or a new facility on it, you dig those out. We
13 removed almost 1,100 foot of existing storm drainage,
14 installed new storm drainage and tied into the existing
15 catch basins that were left on site. Then it's
16 rehabilitation of a site.
17 Q What would have happened had that storm sewer system
18 stayed in place?
19 A Then it would not have handled or worked per the
20 drawings, the new drawings.
21 Q PC Construction didn't hire out anybody that was
22 licensed to do water and sewer work, did they?
23 A They had a guy there to lay the water and sewer for
24 the project.
25 Q Okay. So what is your understanding, if PC believed

1 that this was installation that you were doing, what could
2 have PC done if they had that subcontractor there?
3 MR. MULLINS: Objection, Your Honor, calls for
4 speculation.
5 THE COURT: I'll sustain that.
6 MR. BROUSSEAU: One second, Your Honor. Would you
7 answer any questions Mr. Mullins has, please?
8 MR. MULLINS: Your Honor, I may have Mr. Miller refer
9 to some plans, so I was going to go get this easel so we
10 can set it up.
11 THE COURT: Sure.
12 CROSS-EXAMINATION
13 BY MR. MULLINS:
14 Q All right. Mr. Miller, I'm going to ask you some
15 questions about that in a second. I just want to make
16 sure I understand a couple of points that you made in your
17 direct. I think you've testified in direct that you are
18 licensed as a grading four, correct?
19 A That is correct.
20 Q You acknowledge that that has a, the group limitation
21 is $750,000.00 dollars, right?
22 A That is correct.
23 Q That's the "four" in your, in the designation,
24 correct?
25 A That is correct.

1 Q All right. And the grading is your classification,
2 correct?
3 A That is correct.
4 Q All right. And you acknowledge that you would be
5 limited to whatever is in that classification?
6 A That is correct.
7 Q Okay. All right. And not surprisingly, I heard in
8 your direct your reference to the work that you performed
9 on the storm sewer as rehabilitation. That's your
10 testimony that this was a storm sewer rehabilitation
11 project?
12 A That is correct.
13 Q Mr. Miller, let me, well, let's do this. Let's look
14 at the subcontract. Mr. Brousseau had you looking at Tab
15 A and let's look at the -- and you agree this is a
16 subcontract that you signed, right?
17 A Yes, that is.
18 Q All right. You freely signed this, right?
19 A Yes.
20 Q Okay. You understand that when you sign a contract
21 that you agree to be bound by your obligations under the
22 contract and PC has to comply with its obligations under
23 the contract?
24 A That is correct.
25 Q Okay. And this particular subcontract and under

1 Article 18, your contract with PC outlines the scope of
2 work, is that right?
3 A Which page is that?
4 Q Well, mine is not numbered.
5 A Well, mine is not either.
6 Q Article 18 is towards the end.
7 A Article 18.
8 Q Okay. And you agree that defines, that lays out the
9 scope of work, correct?
10 A That's correct.
11 Q All right. And there's a site to the specification
12 sections, correct?
13 A Sir?
14 Q There's a site to specification sections there under
15 Article 18, is that correct?
16 A That's correct.
17 Q Okay. All right. One of those references, 33-1000,
18 correct? I'm sorry, 31-1000, site clearing?
19 A I hadn't got anything in front of me that says that.
20 Q What does it say there?
21 A Well, it's, yeah, 31-1000?
22 Q Yes.
23 A Okay.
24 Q And is that the specification section?
25 A I assume it is.

1 Q Well, you don't know if that's the specification that
2 you were required to follow?
3 A Yeah, but it was bound in one book and this has been
4 taken out of contents.
5 Q All right. Well, it's got a contract number and a
6 date at the top. Does that equate to the date on the
7 specification that you have?
8 A Whose contract number is it? That's not mine. And I
9 don't know what PC's contract number is to Lander.
10 Q All right.
11 A Because normally these State jobs, everything is
12 bound and stays in one book. It's never taken out so I
13 can't testify that these are the correct specs for that
14 project.
15 Q All right. Mr. Miller, we can walk it through, okay.
16 Let's look at Article 18. Scope of work, read that for
17 me.
18 A Which part?
19 Q Start under scope of work. Please read that for me.
20 A The subcontract work shall consist of the following,
21 but not limited to. Is that the part you're after?
22 Q That's the part I'm after.
23 A All components necessary to finish and install
24 complete and functional systems of the following.
25 Q All right. And the first one is what, listed in

1 that?
2 A Section 31-1000.
3 Q Okay.
4 A Site clearing and demo.
5 Q All right. And so you agree you were obligated to
6 perform all components necessary to furnishing and
7 installing complete functional system for that
8 specification?
9 A That is correct.
10 Q All right. So it would behoove you to become
11 familiar with that specification since you were going to
12 be required to comply with that?
13 A That was correct.
14 Q All right. And it's your testimony looking at that
15 document that I just handed you that you are not familiar
16 with that and you do not know whether that is the spec?
17 A I do know what that is.
18 Q Is that the specification for this project?
19 A By what you handed me, yes, it could be. But it not
20 being bound by State contents then I can't verify that.
21 Q Well, take a minute to review it and let me know
22 whether it looks familiar to you.
23 A Yes, it is.
24 Q That is the specification for this project for
25 erosion control?

1 A That's correct.
2 MR. MULLINS: Your Honor, we'd move to admit that as
3 Defendant's Exhibit 1.
4 MR. BROUSSEAU: I haven't seen that paper.
5 MR. MULLINS: Oh, I'm sorry.
6 MR. BROUSSEAU: Without objection.
7 THE COURT: All right. It's admitted Defense 1.
8 (Whereupon, Defendant's Exhibit 1 was admitted into
9 evidence.)
10 MR. MULLINS: All right. Your Honor, if I may
11 approach?
12 THE COURT: Sure. And y'all have leave to approach
13 the witness at your best.
14 MR. MULLINS: Okay. Thank you, Your Honor.
15 THE COURT: I tell young lawyers that when we get a
16 case that look, once you've asked the first time, you've
17 got leave to do it from there on with that same witness
18 and some of them ask me every single time.
19 Q All right. Mr. Miller, I'm handing you a document at
20 the top that it reads Section 33-4100 Storm Drainage
21 System. You see that?
22 A Yes, sir.
23 Q Okay. Now, do you agree with me that this is the, if
24 you look at the section in Article 18 that this is the
25 specification section that's referenced in Article 18 of

1 the subcontract?
2 A Yes, sir.
3 Q Okay. This is the storm drain specification for the
4 contract, is that right?
5 A Yes, sir.
6 Q Okay. All right. So we've got a site clearing spec,
7 site clearing and erosion control and a storm drainage
8 section, correct?
9 A That's correct.
10 Q Okay. And if you look at the site clearing
11 specification and look at 1.2 summary. You see that on
12 the first page?
13 A Yes, sir.
14 Q All right. 1.2.5, A5, do you see that?
15 A Yes, sir.
16 Q All right. This section includes the following and
17 what is five?
18 A Removal above and below grade site improvements.
19 Q Okay. And that would include the storm sewer section
20 that you were talking about earlier that you pulled out of
21 it?
22 A That's correct.
23 Q Okay. And if you turn to the last page of this
24 document, this is the execution section of the
25 specification, right? I mean, this latter part of the

1 spec. We can go back to page four if you need to look.
2 Part three is the execution section.
3 A You're on part three?
4 Q Right, execution and if you turn to the last page,
5 it's telling you site improvements?
6 A Yes, sir.
7 Q All right. Remove existing above and below grade
8 improvements as indicated and as necessary to facilitate
9 new construction, right?
10 A That's correct.
11 Q That's 3.7A?
12 A That's correct.
13 Q Okay.
14 MR. MULLINS: And, Your Honor, I don't know if I can
15 bring this up to him or if you need to come down out of
16 the witness chair.
17 THE COURT: It's just us. He can do whatever he
18 wants. I might be able to move around.
19 Q All right. These notes that have been marked in
20 yellow there, the spec says remove as indicated. Are
21 those notes that indicate where you---
22 THE COURT: Well, can we mark those as Court's
23 exhibits, those two big ones so we can know what to call
24 them?
25 MR. MULLINS: Yeah. We just can tape these on so

1 when we're done, we can take it off the board and fold
2 them up as an exhibit.
3 THE COURT: And they can be Court's exhibits, is that
4 okay?
5 MR. BROUSSEAU: That's fine.
6 THE COURT: Okay. We'll mark that one, the smaller
7 one as 1 and the bigger one as 2. It will make a cleaner
8 record if she does that.
9 (Whereupon, Court's Exhibits 1 and 2 were marked for
10 identification only.)
11 MR. BROUSSEAU: This is the demolition; that's the
12 installation.
13 THE COURT: That's what was there and that's what is
14 there or that's what it looks like to me.
15 MR. MULLINS: And, Your Honor, you reminded me the
16 storm sewer specification, I didn't move that into
17 evidence.
18 THE COURT: 4100?
19 MR. MULLINS: Right.
20 THE COURT: Will be number two and that's right here.
21 (WHEREUPON, Defendant's Exhibit 2 was admitted into
22 evidence.)
23 Q All right. Mr. Miller, we were looking at Court's
24 Exhibit 1. It referenced the Defendant's Exhibit 1 which
25 indicate to remove all structures below grade, all

1 improvements below grade as indicated. And my question is
2 are these notes that are highlighted, is that an example
3 of what the spec is referring to in terms of structures
4 below grade that should be removed?
5 A That is correct and it says, remove existing storm
6 sewer pipe and structures to this point leaving the
7 existing storm drainage on site. That is existing storm
8 drainage that we actually tied into. Right here. That's
9 a catch basin.
10 Q I didn't ask you a question, but I appreciate that.
11 The blue reflects the sections of the storm drain system
12 that was removed, is that correct?
13 A That's correct.
14 Q All right. And if we step over here to Court's
15 Exhibit 2. And if you want to look at the spec, the storm
16 drainage spec, what's been marked in orange is all of the
17 areas that the new storm drainage system that was
18 installed, is that correct?
19 A And may I ask one question?
20 Q Well, let me correct myself. This is prior to the
21 softball change?
22 A That is correct. But there are no drawings that
23 shows no dates, no addendums, no revisions or anything off
24 of this set of drawings. And that was what I was going
25 back to. This is not the last and greatest revisions to

1 that set of drawings.
2 Q I understand that. I understand that. There was
3 still and there may have been some adjustments to the
4 storm drainage lay out.
5 A Okay.
6 Q On the softball field, is that a fair statement?
7 A That's correct.
8 Q All right. By and large, does that represent the
9 storm drainage system that was installed by you in
10 connection with the work you performed on this project?
11 A That's correct.
12 Q Okay. Thank you. You can get back in the witness
13 box. All right. So you agree with me there's two
14 separate specifications, one governs your removal of the
15 existing storm sewer system and one that governs the
16 installation of the storm sewer system that's depicted in
17 general terms in Court's Exhibit 2?
18 A That's correct.
19 Q Okay. All right. Now, you agree and you can refer
20 to Defendant's Exhibit 2 if you need to, 4100. You agree
21 that the project included the installation of manholes?
22 A That's correct.
23 Q Okay. And you agree that the project included the
24 laying of pipe for storm sewer, you agree with that?
25 A That's correct.

1 Q Okay. All right. You had mentioned in your direct
2 testimony that you put together a bid for this project?
3 Talking about the front end of the job where you put
4 together a bid that you submitted to the contractors that
5 were bidding on the job, correct?
6 A That's correct.
7 Q And that's what subcontractors do, if there's a big
8 job, all the general contractors would communicate with
9 the subs and you would submit proposals or bids to
10 multiple general contractors?
11 A That's correct.
12 Q Okay. And let me ask you this. I think what you
13 said is that in describing what you did, you tallied the
14 numbers and sent the bid out. Let's just talk a little
15 bit more specifically about that. What do you do,
16 specifically, what do you do when you're putting a
17 proposal together?
18 A I do a spreadsheet.
19 Q Okay. And what's included on the spreadsheet?
20 A I don't understand what you're asking.
21 Q Well, what's on the spreadsheet?
22 A I take a set of plans. I go in great detail of what
23 we are going to tear out. On my proposal that went to PC
24 shows in great detail of how much cleared, how much
25 erosion control, how many check-downs, how much

1 demolition, even down to the linear feet of curb and
2 gutter. And then it specifies how much dirt we are
3 removing or replace, installation of storm drainage and
4 everything on it.
5 Q All right. And you said you look at the plans.
6 You'd also look at the specs to make sure---
7 A That's correct.
8 Q ---the plans and specs are what drives the project,
9 correct?
10 A That's correct.
11 Q And what you just describe some people refer to as a
12 take-off. You did a take-off on the project to determine
13 what the estimate would be?
14 A That's correct.
15 Q Okay. And once you've arrived at what you think the
16 project is going to cost, your costs, then you add profit
17 onto it, right?
18 A That's correct.
19 Q Okay. Some people refer to it differently whether
20 it's overhead and profit as one number. Some people refer
21 to overhead as a percentage and profit as a percentage.
22 What do you do?
23 A I mean that's overhead and profit is what we do.
24 Q Okay. And what percentage do you put on your bid?
25 A This project had only five percent.

1 Q You put five percent overhead and profit?
2 A That's correct.
3 Q What do you normally put on it?
4 A Five to seven percent.
5 Q For your overhead and profit?
6 A That's correct.
7 Q Okay. All right. Let's look at the subcontract, Tab
8 B. I want to look at some of the provisions and we've
9 already established you agree by signing this, you've
10 agreed to be bound by the terms of this subcontract,
11 correct?
12 A That's correct.
13 Q Okay. I want to look at Article 2 of the
14 subcontract. You with me?
15 A I am working my way that way.
16 Q Okay.
17 A You said Article 2?
18 Q Yes. It's the second page of the exhibit.
19 A All right. I have it.
20 Q All right. I presume you've read the subcontract, is
21 that correct?
22 A That's correct.
23 Q Okay. And this provision defines the, your
24 requirement in terms of the work on the project, correct?
25 A That's correct.

1 Q Okay. Subcontractor shall furnish all supervision,
2 labor, tools, requirements and supplies necessary to
3 perform and complete in all respects the work. And then
4 it references Article 18 that we've already talked about,
5 correct?
6 A That's correct.
7 Q All right. And the last sentence in that section,
8 what does it say?
9 A Time is of essence in regarding the performance and
10 completion of work.
11 Q Okay. Time was going to be important in this job,
12 right?
13 A That's correct.
14 Q Okay. That's why it's in bold and all caps, right?
15 A That's correct.
16 Q Schedule was important, right?
17 A That's correct.
18 Q Okay. All right. Article 4, and this was a typed
19 scheduled project, wasn't it?
20 A We should have been offsite in six months.
21 Q The contract period was a typed period for the work
22 performed, correct?
23 A That's correct.
24 Q Okay. Let's look at Article 4. You with me there?
25 A Yes, sir.

1 Q What's the title of that article?
2 A Time and Performance.
3 Q Okay. Read that first sentence there for me, out
4 loud if you could.
5 A I mean, where are we going with this, to see if I can
6 read. I'm not trying to be disrespectful, but I know it's
7 time, is of the essence to be done with it. I mean, I
8 can't ask that question?
9 MR. MULLINS: Your Honor.
10 THE COURT: Answer the question he's asking.
11 A Subcontractor recognizes PC Construction of
12 Greenwood, Incorporated, obligation to the owner of a
13 timely progress upon the completion of the work of each
14 part thereof and that time is of the essence in the
15 performance of the work under the subcontract agreement to
16 perform subcontractor's work.
17 Q All right. So there it is again, right, time is of
18 the essence?
19 A That's correct.
20 Q All right. I won't make you read it since you don't
21 particularly seem to want to read it. But the next
22 sentence, I'll summarize. You tell me if you agree with
23 it. It says that you're required to perform the work so
24 that the project and every portion thereof are going to be
25 completed in accordance with the contract documents

1 including the scheduling, right?
2 A That's correct.
3 Q Okay. And then the next paragraph there, paragraph B
4 is job schedule, right?
5 A That's correct.
6 Q Okay. And it tells you and you tell me if you
7 disagree. I won't make you read it. It tells you that PC
8 is going to furnish a schedule, right?
9 A That's correct.
10 Q And that that's going to be what the GC and the
11 subcontractor uses for the basis for starting and
12 finishing the work, correct?
13 A That's correct.
14 Q All right. And that PC can change the schedule as
15 the project proceeds?
16 A That's correct.
17 Q Okay. And that you are responsible, you as the
18 subcontractor are responsible for maintaining your work
19 within the confines of the schedule. You're supposed to
20 maintain the schedule?
21 A That's correct.
22 Q Okay. And B1, the paragraph below that, you see
23 that?
24 A That's correct.
25 Q Well, you see it?

1 A Yes, sir.
2 Q Okay. That paragraph provides that you are
3 responsible for providing the manpower and equipment to
4 meet the schedule, right?
5 A That's correct.
6 Q Okay. And it's not PC's job to coordinate your
7 people, that's your responsibility?
8 A That's correct.
9 Q Okay. All right. And let's turn over to the next
10 section, .2, there's the word again, time is of the
11 essence. This paragraph allows PC to request that you
12 provide additional work or equipment if you're behind
13 schedule, correct?
14 A That's correct.
15 Q All right. And let's look at .4, .4 gives you the
16 opportunity to, it actually says shall cooperate. But
17 you're provided the opportunity to provide input on the
18 schedule. You agree with that, right?
19 A That's correct.
20 Q Okay. All right. Let's look at, flip over a couple
21 of pages. It's in Article 5. We should have numbered
22 this exhibit. Article 5J, job site conditions. You with
23 me?
24 A Yes, sir.
25 Q All right. .1, all right, the second sentence there

1 and if you need to read it, I'll give you a minute to read
2 it. But you are agreeing that if PC determines that you
3 are delaying the progress of the work that you shall work
4 such overtime as may be necessary to finish the work
5 within the schedule?
6 A That's correct.
7 Q Okay. All right. Let's look at Article 6. I'm not
8 going to have you read it, but let me just ask you if you
9 agree with this. Article 6 is the changes provision. The
10 first 6A, right?
11 A Yes.
12 Q All right. And it provides you the opportunity if
13 you are either directed by PC or if you see that there is
14 a change in conditions, it gives you the opportunity to
15 present a proposal, a change order proposal, correct?
16 A That's correct.
17 Q Okay. And within that change order proposal, you are
18 provided the opportunity to provide price, correct?
19 A That's correct.
20 Q And you are provided the opportunity to provide what
21 impact it will have on the schedule, how many more days
22 you need, correct?
23 A That's correct.
24 Q Okay. And there's a time limit for you to do that,
25 right?

1 A That's correct.
2 Q Okay. And it says down here at the bottom, in bold,
3 there it says that if you don't submit that proposal
4 within the time then you've waived that right, correct?
5 A That's correct.
6 Q Okay. And then at the bottom of that paragraph in
7 all bold it says, no adjustments to the price or schedule
8 not ordered in-writing by PC. And signed by the project
9 manager. And that's an effort for the parties, for there
10 to be documentation to reflect what the parties agree to,
11 right?
12 A Yes.
13 Q Okay. All right. Now, in this particular case,
14 there were a lot of change orders, right?
15 A That's correct.
16 Q And of all of the change orders that were submitted,
17 you only asked for additional days on one change order,
18 isn't that right?
19 A That's correct.
20 Q All right. And that was change order 40, right?
21 A That's correct.
22 Q All right. And that came about after the asbestos
23 issue was, the fix was determined and the softball field
24 was rotated and there was a change order submitted related
25 to that. And you asked for additional days?

1 A That's correct.
2 Q Okay.
3 THE COURT: Let's take a couple minute break.
4 MR. MULLINS: Okay.
5 (WHEREUPON, a short break was taken.)
6 THE COURT: All right. Mr. Mullins.
7 MR. MULLINS: We ready?
8 THE COURT: Yes, sir.
9 MR. MULLINS: Okay. Sorry.
10 CONTINUE CROSS-EXAMINATION
11 BY MR. MULLINS:
12 Q Mr. Miller, we were talking about the change orders
13 and I think you had a knowledge of the 87 change orders
14 that were issued, there was only one where you requested
15 an adjustment to the schedule?
16 A That's correct.
17 Q Okay. And as we went over that, certainly was your,
18 you certainly had under the changes provision to request
19 an adjustment to the scheduling on any of these change
20 orders, isn't that right?
21 A That's correct.
22 Q Okay. All right. I want to look at, turn over to
23 the next page. Still in Article 6. Actually, two pages.
24 I'm looking at delay, which is at the bottom E and I want
25 to go to the top of the next page. All right. And I want

1 to look at the last sentence in E, subcontractor. Do you
2 see where I am?
3 A On delay?
4 Q Yes.
5 A In the last sentence?
6 Q Right before F.
7 A On E?
8 Q Yes. Yes, sir.
9 A Okay.
10 Q About four lines up over on the right-hand side it
11 begins, subcontractor shall. You see that?
12 A Yes, sir.
13 Q All right. And that reads, subcontractor shall also
14 be liable for all additional damages PC may incur as a
15 result of subcontractor's failure to complete your work or
16 any portion thereof in accordance with the schedule,
17 right?
18 A That's correct.
19 Q All right. So you're agreeing that if you don't
20 comply with the schedule, you recognize that you shall be
21 liable for additional damages and the sentence before
22 refers to liquidated damages, right?
23 A That's correct.
24 Q Okay. But you agree that this sentence says that you
25 are, will be liable for any additional damages that PC

1 could show as a result of delay?
2 A That's correct.
3 Q As a result of failure to comply with the schedule?
4 A That's correct.
5 Q Okay. All right. Flip over to Article 12 if you
6 will? You with me?
7 A Yes, sir.
8 Q Okay. And 12A and you can read it if you want, but
9 12A recognizes that you are required to obtain all
10 necessary licenses to comply with all statutes,
11 ordinances, rules and regulations. You agree with that?
12 A That's correct.
13 Q Okay. So that would include you're required to have
14 all licenses necessary to perform whatever was in your
15 scope of work, correct?
16 A That's correct.
17 Q Okay. And if you, and I'm sorry, back up to Article
18 9. 9C at the bottom of the very bottom of the page there,
19 compliance with laws. That's a pretty standard provision
20 that requires you to comply with all applicable state,
21 federal, local laws, right?
22 A That's correct.
23 Q Okay. All right. The number that you testified to
24 on direct that you are due, let me make sure I understand.
25 You claim you are due $53,695.08, right? Is that right?

1 Did I get that number right?
2 A I haven't got that number in front of me.
3 Q Okay. All right. Well, let's just look at Exhibit
4 B, Plaintiff's Exhibit B or Tab B. I'm not sure how we
5 are referring to this. Tab B. All right. Tab B.
6 Whatever you're claiming includes invoices, 22756 and
7 22755 there at the bottom, right?
8 A That's correct.
9 Q Okay. Now, I didn't see in that list of the, the
10 back up for that. I've handed you a document that's
11 stapled together that are invoice numbers. You recognize
12 what those are?
13 A That's the billing for our company.
14 Q Specifically, are those the two invoices that are
15 referenced in Tab B there?
16 A Yes, it is.
17 Q Okay. And your claim for those amounts were for a
18 charge for silt fencing that you had to put up, put new
19 silt fencing on the project, correct?
20 A That is damaged silt fence that was damaged by others
21 that we had to reinstall on the project.
22 Q Right. I mean, it says, I'm just reading it,
23 replaced silt fence that was damaged and taken down by
24 other contractors around the soccer field. Right?
25 A That's correct.

1 Q Okay. And that was, I'm looking at 22756 which is
2 the first page. That one was rejected by PC, correct?
3 A What was the rejected date on it?
4 Q That was not paid. Are you saying that PC
5 acknowledged that they owe that?
6 A I never got anything from them saying it was even
7 rejected.
8 Q Okay. So your position is, you don't know?
9 A I do not know.
10 Q Okay. And would the same thing hold true for the
11 second invoice?
12 A That's correct.
13 Q Okay. We went through some of the contract
14 provisions. We went through the changes provision and you
15 can refer back to it if you need to. But you will
16 acknowledge for me that you performed this work before you
17 submitted or without submitting any proposal. Do you
18 agree with that?
19 A No.
20 Q You do not agree with that?
21 A I do not.
22 Q Okay.
23 A May I explain?
24 Q Sure, you can explain.
25 A PC Construction had Environmental Services doing the

1 inspection of this site which was being paid by PC. He
2 cited them numerous times in reference that he was fixing
3 to turn the project over to DHEC. And the superintendent
4 on the site, which was Chris Piontek, actually gave me a
5 verbal to go ahead and install the silt fence before this
6 was turned over to DHEC in Greenwood.
7 Q He gave you a verb, well, what specifically did he
8 say?
9 A He said, Mike, install it before we wind up in court.
10 Q Okay. You do agree that the contract provides that
11 Gary Piontek is the one with authority on this project?
12 A That is correct.
13 Q Okay. And you did not receive a directive from Gary
14 Piontek?
15 A I did not.
16 Q Okay. And this particular invoice is dated after the
17 work was performed, right?
18 A That's correct.
19 Q Okay. And you will acknowledge for me that within
20 your scope, you are required to maintain silt fences,
21 correct?
22 A Yes, can I explain?
23 Q Sure.
24 A If I install it and put it up and a subcontractor
25 goes out and damages it, then am I responsible for the

1 subcontractor's damage? It would be the same thing if me
2 building a building and going out and knocking the
3 building down and not being liable for it.
4 Q All right. Well, that, you asked the question. So
5 let's look back at the contract and see what the contract
6 says, because you're holding PC responsible, right?
7 A That's correct.
8 Q All right. Let's look at Article 6F and if you need
9 a minute to read it, but 6F would provide that in a
10 circumstance just like this, that you would look to the
11 contractors that created the damage and not to PC. You
12 agree with that?
13 A No.
14 Q Okay. You do not believe that this provision
15 requires you to look to the other contractor that you
16 claim caused this and not to PC?
17 A No.
18 Q Okay. Fair enough. How much silt fencing did you
19 have in the project? You do agree silt fences get knocked
20 down all the time, doesn't it?
21 A But to go out and remove it because you got to put in
22 a water line and not put it up, then that's being
23 disrespectful. I mean, that's what it was there for.
24 Q Silt fencing gets knocked, it's common for that to
25 occur on a construction project?

1 A And normally if you damage it, then someone else
2 repairs it.
3 Q But you billed-in in your, when you do your take-off
4 you're building in a linear foot of silt fence, right?
5 A That's correct.
6 Q And you billed-in something in excess of what is
7 required to initially be installed, don't you?
8 A I put the amount that was there to be installed.
9 Q Okay. So you don't expect any, you don't include any
10 excess silt fencing in your take-off?
11 A If I damage my silt fence, I fix my silt fence.
12 Q Okay. All right. Fair enough. So you're looking to
13 PC for these two invoices and those are included in your
14 claim, correct?
15 A That's correct.
16 Q Okay. All right. Are you aware of a issue, well,
17 let me ask you this. Do you agree that if there is work
18 that you perform that is defective or otherwise does not
19 comply with the plans and specifications that you got to
20 fix it, right?
21 A That's correct.
22 Q Okay. And are you familiar with an issue regarding a
23 sinkhole?
24 A Yes. That's correct.
25 Q A sinkhole that occurred at the end of the project?

1 A That's correct.
2 Q Okay. And you were called directly by Lander to come
3 fix this, weren't you?
4 A Yes, I was.
5 Q Okay. And you said it wasn't your work, right?
6 A That's correct.
7 Q You said it was an electrical conduit causing the
8 sinkhole, right?
9 A That's correct.
10 Q Okay. And even though the sinkhole went below the
11 electrical conduit, right? You agree with that, don't
12 you?
13 A That's correct.
14 Q Okay. But somehow the conduit was causing the
15 sinkhole?
16 A Can I explain?
17 Q Sure, you can explain.
18 A That berm was compacted and tested by BLE which was
19 Lander's soil tech. That berm exceeded 97 percent
20 compaction. And the only ones that dug in that berm was
21 the electrical contractor, the water and sewer guys and we
22 did not dig into it.
23 Q Okay. That's your explanation as to how the sinkhole
24 went below the electrical conduit?
25 A Yes, sir.

1 Q Okay. All right. Everything else around that was
2 your work except for the electrical conduit?
3 A Our storm drainage line was put in before the berm
4 was built and we came over top of our storm drainage line.
5 Q All right. The storm drain, was there, there was
6 a---
7 A There was a jack and bore on the project that we
8 actually jacked and bored underneath all of that and tied
9 back into existing catch basin.
10 Q All right. There was a conduit box as well?
11 A I didn't have anything to do with conduit box.
12 Q Okay.
13 A Also too, there were footers that was actually found
14 in that area that we removed that was a change order.
15 Q There was not a junction box that you built?
16 A There a catch basin on the outside. I mean, I'll be
17 glad to show you where it's on the drawings.
18 Q Okay. But that was your work, right?
19 A That's correct.
20 Q Okay. And your testimony is none of that caused the
21 sinkhole, it was the electrical conduit?
22 A That's correct.
23 Q Okay. And you were asked to correct the sinkhole and
24 you didn't do it, right?
25 A That's correct.

1 Q Okay. All right. Let me make sure I understood you
2 in direct. You were, Mr. Brousseau referred you to, and
3 this is Tab B, the letter that we were discussing, my
4 letter. Did I understand Mr. Brousseau or you to respond
5 to Mr. Brousseau and say that was the first time that you
6 are aware of any complaints from PC concerning your work?
7 A I don't understand what you're asking.
8 Q I thought I understood you to say that at this period
9 of time, this was the end of the job, this letter was
10 dated March of 2012. But that was the first time that you
11 knew that PC had any complaints with regards to your work?
12 A What letter, it's dated?
13 Q I'm sorry. I'd refer you to Tab B. I think he just
14 said after we talked about this letter, I think you said
15 this was the first time.
16 A Tab B has our breakdown.
17 Q It's my letter.
18 A I mean, I don't understand what you're asking me,
19 because I ain't got a letter in front of me to see what
20 you're asking about.
21 Q You don't have a letter in Tab B? Let me ask it this
22 way, Mr. Miller, so we can move on.
23 A Are you asking about this letter?
24 Q I use that, my recollection of the direct testimony
25 was that after, we discussed a payment that was made which

1 was around the time of this letter, that you indicated
2 that this was the first time that you were aware of any
3 complaints by PC. I wrote down, no complaints. Not aware
4 of delays. Now, maybe I misheard it and you can clarify
5 that.
6 A That's correct.
7 Q Is timeframe the first time that you became aware
8 that PC had any complaints regarding your delay on the
9 project?
10 A That's correct.
11 Q That's your testimony. Okay. Your testimony is that
12 PC never communicated with you verbally or via email or
13 via text concerning your non-compliance with the schedule?
14 A That's correct.
15 Q Okay. The asbestos change order, you were talking
16 about the asbestos and actually there were a couple of
17 different change orders, significant change orders that
18 related to the asbestos, right?
19 A And that's correct.
20 Q Okay. I think you'd mentioned that on your bid you
21 had five percent of profit in your bid. You had more than
22 that in your change order, didn't you?
23 A I had, I think, seven or nine in it.
24 Q Are you sure about that?
25 A I am not positive. I hadn't got that information in

1 front of me.
2 Q All right. You had a higher profit in your change
3 orders, right?
4 A That's correct.
5 Q Well, was that all of your change orders?
6 A No, sir.
7 Q Just certain change orders you added a higher profit
8 on?
9 A That's correct.
10 Q Okay. For the asbestos you had a higher profit?
11 A We were allowed 15 percent, but we were, I was giving
12 Lander a break.
13 Q Okay. All right. You were giving them a break.
14 Okay. All right. Let me just make sure that we're clear.
15 We've obviously went over the contractual requirements
16 concerning the schedule. And you agree with me that you
17 were provided a schedule, right?
18 A That's correct.
19 Q Okay. And you agree with me that there were weekly
20 meetings that took place with subcontractors?
21 A That's correct.
22 Q All right. And you agree that the schedule was
23 discussed during those weekly meetings?
24 A That's correct.
25 Q Okay. And so your testimony is you were never told

1 you weren't performing in compliance with the schedule
2 during those meetings?
3 A That was correct.
4 Q Okay. After the softball redesign, after the, let me
5 ask you this. What was your role in the job?
6 A Grading contractor.
7 Q No, you personally.
8 A I was project manager, Vice-President,
9 superintendent, whatever I needed to be on the job.
10 Q All right. You were the lead guy on the job, right?
11 A I was not the lead guy on the job. I had a full-time
12 superintendent on the job.
13 Q Okay. You just said project manager. I assume
14 normally the project manager is the lead supervisor. What
15 was your intention concerning performance of the job in
16 terms of oversight?
17 A I've got numerous emails that I sent back to Gary
18 that we were not, we were behind schedule and we were not
19 going to make the deadline.
20 MR. MULLINS: I move to strike, Your Honor. I'm not
21 sure what that had to do with my question.
22 THE COURT: Rephrase the question, Mr. Mullins.
23 MR. MULLINS: All right.
24 THE COURT: Answer the question he asked.
25 Q What would, you personally, I'm talking about your

1 role in the project. What was your intention with regards
2 to your involvement in the project?
3 A I don't understand what you're asking.
4 Q What were you going to do? You personally, what was
5 going to be your involvement in the job? Were you going
6 to be there every day?
7 A I was project manager.
8 Q Were you going to be there every day that Miller was
9 on the job?
10 A I had a superintendent on site.
11 Q So you were not going to be there every day?
12 A No, I was not.
13 Q Okay. But you were there a good bit on the front
14 end?
15 A I was there average three to four times a week.
16 Q Okay. After the asbestos, you were not there as
17 much, were you?
18 A I was in there at least once or twice a week.
19 Q All right. But you dropped off, your attendance on
20 site dropped off after the asbestos issue, the redesign
21 occurred?
22 A You are asking company attendance or are you asking
23 my personal attendance?
24 Q I'm talking about you personally.
25 A I quit going there as much as I did.

1 Q Okay. All right. And you kept, you and your
2 superintendent kept daily's?
3 A That's correct.
4 Q All right. And I guess for the benefit of the Court,
5 what is a daily?
6 A A daily is something that my guys keep that tells
7 what their schedule is and what they've done on site, any
8 rain delays, any things that's becomes problems or
9 whatever, that's what they keep.
10 Q Okay. All right. And you kept them pretty good,
11 right?
12 A I think they did.
13 Q Yeah. Okay. Now, your daily's don't have your
14 manpower on them, do they?
15 A No, they do not.
16 Q Okay. And you will agree with me that you had in
17 most cases three or four men on the job, maximum of six
18 men on the job, do you agree with that?
19 A I had more than that at times.
20 Q For the most part you had between three and six men?
21 A I had more than that most of the time.
22 Q You did?
23 A I did.
24 Q You did. Okay. All right. That's your testimony?
25 A That is correct.

1 Q All right. How do you know that?
2 A Payroll, certified, we have to do a lot of certified
3 payroll. And I know it didn't have anything to do with
4 this, but I had to put where every employee was working.
5 Q All right. And you were working other jobs during
6 this time, weren't you?
7 A That's correct. I had 120 employees.
8 Q All right. Now oftentimes you were sending crews
9 that would sometimes be at Lander, you were sending them
10 over to another job, weren't you?
11 A Those, that crew stayed at that job.
12 Q The whole time?
13 A The whole time.
14 Q Okay. All right. Just one more point of
15 clarification, back to the storm sewer. I just want to
16 make sure I understand. The blue lines over here---
17 A Yes, sir.
18 Q ---was the existing that was removed, correct?
19 A That's correct.
20 Q All right. And there was no pipe that was laid back
21 in the, where this blue line was, were there?
22 A Yes, it was.
23 Q There is pipe that was laid where this blue is?
24 A Yes, sir.
25 Q Where it, show me where?

1 A Right beside the, right on the other side of the
2 soccer field.
3 Q Come down.
4 (WHEREUPON, witness approaches the easel.)
5 Q Show me on this drawing.
6 A The blue line here and you stopped here. You had
7 existing pipe that was here. We tied back into the
8 existing pipe here and ran this back around.
9 Q All right. This blue line right here, okay, I want
10 to make sure you listen to my question and answer it.
11 This blue line right here is pipe you took out, right?
12 Where on this blue line did you put pipe back in?
13 A It was not placed back in the same position.
14 Q Okay. All right. That's what I want to make sure we
15 were clear on. All right.
16 MR. MULLINS: Thank you, Your Honor.
17 THE COURT: Redirect.
18 MR. BROUSSEAU: Thank you, Your Honor.
19 REDIRECT EXAMINATION
20 BY MR. BROUSSEAU:
21 Q Mike, I'm going to get to these maps here. This
22 first one, this is, the blue line represents, if I
23 understand you correctly, the blue line represents what
24 you actually tore out or what Miller tore out on this,
25 right?

1 A That's correct.
2 Q Was there additional piping that is not referenced as
3 with the blue line that stayed in place?
4 A Yes.
5 Q Okay. And was that utilized over here with the
6 orange? I think you talked about that earlier.
7 A This was existing pipe that was here that we tied
8 back into.
9 Q Okay. Let me ask you this in regards to the, in
10 regards to the storm sewer. Have you ever received any
11 complaints about doing storm sewer work on any other job
12 ever?
13 A Never.
14 Q Is this the first time you've ever received any type
15 of complaint about you doing storm sewer work?
16 A That's correct.
17 Q How common is it within the industry itself that a
18 sub who is licensed for water and sewer will do the work
19 that's referenced right here on all these maps?
20 MR. MULLINS: Objection, Your Honor. He hasn't been
21 qualified as an expert and he can't testify as to what, he
22 can testify as to what he does.
23 MR. BROUSSEAU: He's a licensed contractor and he's
24 previously testified. The company has been around since
25 1950, in his experience. I can rephrase it.

1 THE COURT: In his experience he can answer the
2 question. Not what's generally done. So to the extent an
3 expert opinion, I sustain the objection.
4 MR. MULLINS: All right.
5 THE COURT: His experience within his knowledge.
6 MR. BROUSSEAU: I'll rephrase it, Your Honor.
7 Q Mr. Miller, in your experience, how common is it that
8 a subcontractor licensed for water and sewer will do the
9 work that is referenced here on these two maps?
10 A Very rarely.
11 Q And how many jobs a year do you guys typically do,
12 Miller?
13 A Until the economy slowed down, somewhere between 15
14 to 50 jobs a year.
15 Q Okay. PC Construction was aware of your license
16 classification, correct?
17 A That's correct.
18 Q And they accepted your bid and reached this contract
19 agreement for you to do the storm, to redo the storm sewer
20 system on this particular project, right?
21 A That's correct.
22 Q All right. Did you ever think this job would ever
23 get to a point where it would be $1.4 million dollars?
24 A No.
25 Q In your experience on a job where you have a contract

1 for $492,000.00, how often would you get to $750.
2 A Very rarely, because most the jobs you may get 20
3 percent on change order work.
4 Q So in your experience, did you feel like by having a
5 contract for $492, you were going to stay well below the
6 $750?
7 A That's correct.
8 Q All right. Mr. Mullins was asking you about
9 overtime. Did Miller Construction ever go out and work
10 overtime on this project?
11 A We worked a lot of Saturdays down there trying to
12 bring up delays.
13 Q All right. And so when you say that you guys were
14 working on Saturdays or overtime, that had to be under the
15 terms of the contract by their request, correct?
16 A That was correct.
17 Q All right. Was there ever any times, to your
18 knowledge was there ever any times where they asked y'all
19 to work overtime or work a Saturday and you didn't show
20 up?
21 A No.
22 Q All right. How often would you help get the other
23 subs in line?
24 A My superintendent, you know, helped a lot down there
25 with everything that was going on.

1 Q All right. And what do you mean by that? Now,
2 explain for that a little bit.
3 A There was so much going on that, you know, we had a
4 lot of stuff. They had problems with concrete guys,
5 retaining wall guys. The front gazebo, they rebuilt the
6 wall like three times in the front. And my superintendent
7 was out there helping, helping do a lot of stuff that was
8 there. You know, they tore out concrete and we did a lot
9 of other extra that my superintendent did with trying to
10 help with their superintendent to keep the project going
11 on.
12 Q So you feel like Miller was being a team player in
13 this project?
14 A Miller was more than a team player.
15 Q All right. Mr. Mullins is also talking to you about
16 liquidated damages. Has PC ever given you any type of
17 notice of the assessment of liquidated damages?
18 A No.
19 Q Has PC ever given you notice of any type of
20 additional damages for delay?
21 A No.
22 Q Have you ever seen a number that they say that you
23 owe them for liquidated damages?
24 A No.
25 Q Have you ever seen a number for, that they say for

1 additional damages due to delay?
2 A No.
3 Q I want to make sure that we're clear about this. Of
4 the $900 and something thousand dollars in change orders,
5 the majority of that was for what, sir?
6 A Was for the asbestos. It was approximately, I think
7 it was $80-$81,000.00 dollars in regular change orders.
8 The rest of it was asbestos.
9 Q Okay. So but for the asbestos, you wouldn't have
10 gone over your $750 classification?
11 A That's correct.
12 Q Okay.
13 MR. BROUSSEAU: Nothing further from this witness,
14 Your Honor.
15 THE COURT: Anything else?
16 MR. MULLINS: Just two quick things. I know I'm
17 limited.
18 RECROSS-EXAMINATION
19 BY MR. MULLINS:
20 Q You testified as to, based on your experience what
21 licenses or what other contractors performed what work in
22 terms of storm sewer?
23 A Yes, sir.
24 Q What other graders do? Your testimony is they
25 performed the storm sewer work?

1 A That's correct.
2 Q Okay. But you can have more than one classification,
3 can't you?
4 A That's correct.
5 Q And you don't know what every, what your competitors,
6 what they're all licensed in, do you?
7 A Yes, I do.
8 Q You do? You know what they're all licensed in?
9 A That's correct.
10 Q Okay. All right. And as far as working Saturdays,
11 you were told up front that if it rained you were expected
12 to work on Saturdays, right?
13 A That's correct.
14 Q Okay. And so that was established at the front end
15 of the job, right?
16 A That's correct.
17 Q Okay. And that was an expectation of PC, correct?
18 A That was correct.
19 Q Okay. All right.
20 MR. MULLINS: Thanks, Your Honor.
21 THE COURT: That's it. You can step down. Y'all
22 want to go a little bit further and go to lunch at 12:30?
23 Or do y'all want to stop between witnesses? That way we
24 don't have the issue of talking about testimony?
25 MR. MULLINS: Do you have, is that your case?

1 MR. BROUSSEAU: Yeah, that's probably my case. I
2 want to talk to him real quick, but yeah. I mean, because
3 you got your counterclaims and stuff so.
4 MR. MULLINS: Yeah. I mean, I guess what we could do
5 is, if he wants to confer and decide. If he's completed
6 his case,---
7 THE COURT: Well, do that. Talk and see then.
8 MR. MULLINS: I'd like to move for, maybe we could
9 move for, I'd like to make a motion.
10 THE COURT: All right. Then we'll hear the motion
11 and then we'll go eat.
12 MR. MULLINS: Yeah.
13 THE COURT: Okay. All right. You talk. We'll stand
14 at ease for a few minutes.
15 (Whereupon, a short break was taken.)
16 THE COURT: All right. Mr. Brousseau, you are,
17 that's your case?
18 MR. BROUSSEAU: That's correct, Your Honor.
19 THE COURT: Very well. Okay. Mr. Mullins.
20 MR. MULLINS: Your Honor, I'm going to renew our or
21 assert a motion for non-suit under Rule 41 on the basis of
22 the licensing argument that we had raised in our motion
23 for summary judgment. And, Your Honor, I got another
24 blowup here. It's kind of hard to read that. That's what
25 it is. And you got the, you have the specifications. The

1 parts you can't read is really the cite to the
2 specifications. And I've just got sections of the statute
3 there just for ease of reference. Point number one which
4 we argued before the case began is really what I contend
5 and continue to maintain, what PC continues to maintain is
6 a simple reading of the statute reflects that as a matter
7 of law they were not properly licensed to perform the work
8 and I'm talking about the classification. That's what
9 we're talking about. I'm not talking about the financial
10 limit. And I'll tell you what my position is on the
11 financial limit in a minute. We really think that is
12 absolutely irrelevant to this point. The issue is, did
13 they perform work beyond their license classification?
14 And their license classification is grading and grading is
15 defined, which is on the sheet here and it's under section
16 410, as the soil preparation and rehabilitation of storm
17 sewers. And our position is that a application of
18 commonsense that stretches the bounds of reasonableness to
19 interpret that that is what was going on here, that this
20 was a rehabilitation. So what is it? When you look to
21 the section of water and sewer lines, it's much more
22 specific and it's much clearer and that is the
23 installation and repair of a project involving manholes,
24 the laying of storm pipe drains, the laying of pipe for
25 storm drains and sewer mains. And that is exactly what we

1 had here. There's no question about it. Mr. Miller
2 acknowledge, I've quoted from the statute when I asked
3 him. I said, did this project involve the installation,
4 was this an installation and repair of a project involving
5 manholes. And he said, yes. I said, did this project
6 involve the laying of pipe for storm drains. He said,
7 yes. Okay. So there's no question that it falls under
8 that classification. Now, one of the arguments that has
9 been raised or the argument that's being raised by Miller
10 is that this was a rehab. And there's no question that
11 this was a tear-out of an existing system and installation
12 of a new system and these Court's Exhibits 1 and 2 reflect
13 that. Was there a small section where they may have left
14 a piece that they tied into? Sure. I don't think that
15 matters. I mean and all you have to do is look at it.
16 The idea that that is a rehabilitation, and I would ask
17 you, I mentioned this yesterday, but I want to ask the
18 Court to think about this in terms of the reasonableness
19 of the interpretation. I mean if you take that position
20 and you look at, and let's look at it in terms of the
21 rehabilitation of streets, roads and highways. If you
22 take that position then you in essence are saying that a
23 grader can come in and tear out a road and pave the road
24 under the paving, asphalt paving or concrete paving
25 classification because that is a rehabilitation of a

1 street or road or highway. That is not a rational
2 interpretation of the statute. It's not. You got to be
3 licensed as an asphalt paver, licensed as a concrete
4 paver. Now, the handout I gave you and this is
5 essentially, I guess, the same argument but looking at it
6 in a different way or really just using the specs. Your
7 Honor, we would contend that a rehabilitation, a storm
8 sewer rehabilitation project is when you are repairing an
9 existing system. And we've got in here the definition of
10 rehabilitation and I think we took that from Webster's.
11 I've got the actual Webster's dictionary here. To restore
12 to a former capacity. To restore or bring to a condition
13 of constructive activity. This is not a restoration of a
14 storm sewer system. This is a demolition and that's
15 important, Your Honor. That work Mr. Miller acknowledged,
16 this work here was performed under the site clearing and
17 demolition specification. There's a totally different
18 specification that's under utilities for the installation
19 of the system. A grader can do this under the statute.
20 And I would submit to you that whatever testimony about
21 what other contractors may do or whether you've been, this
22 question has been raised before or not is irrelevant to
23 your review. This Court should review the statute.
24 Should take into account the facts that have been
25 presented and should make a determination that the statute

1 reflects or that the facts reflect that Mr. Miller and
2 Miller Construction, by performing this work under the
3 storm drainage specification, exceeded his license
4 classification, exceeded the limit of his license
5 classification which is prohibited under 270. And I think
6 270, did I get that right?
7 THE COURT: Yes. Under 410?
8 MR. MULLINS: Prohibited under 410. But 270A, A
9 licensee is confined to the limitation of the licensee's
10 license classification. Because that's what we're talking
11 about. Okay? A grader cannot go out and perform HVAC
12 work. Even if it's just some small amount, they can't do
13 that. A grader cannot go out and perform water and line,
14 waterline and sewer work. That's what that statute says.
15 They're not, their license is not valid to perform that
16 work. And that, therefore, 370 kicks in which reflects
17 that as a matter of law that they cannot enforce the
18 contract. So, Your Honor, I understand this has been a
19 struggle. And I appreciate that, you know, this is an
20 important issue. But I believe the evidence that has been
21 presented now clarifies that the demolition work
22 associated with this existing section of work was under a
23 completely different specification. It was not a
24 rehabilitation of a system. It did not repair, restore to
25 a former capacity. I mean, you can look and see what it

1 is. I mean it, rehabilitation in essence would involve
2 work relating to an existing system. Rehabilitation would
3 be correcting, you know, maybe a crushed, in preparing
4 soil there's a crushed piece of pipe that you want to fix.
5 Rehabilitation may be some, you know, using all types of
6 technology, which there is.
7 THE COURT: So what you're saying he should have both
8 the water, water and sewer license and a grading license?
9 MR. MULLINS: That's correct.
10 THE COURT: He couldn't do, he couldn't just put the,
11 I'm going to call it sewerage in or he could only put the
12 sewerage in if he were a water and sewer contractor. And
13 then he had to get a grader to come help remove all this
14 other.
15 MR. MULLINS: But it's not uncommon, Your Honor, for
16 contractors to be licensed in different classifications.
17 So that's our position. Now, I want to make sure, Your
18 Honor, that we're clear on our position with regards to
19 PC's license and the impact on that, okay. The fact that
20 PC is a general contractor with an unlimited builder's
21 license does not allow Miller to perform water and sewer
22 line work, okay. And 270, I'm sorry, 410 is clear on
23 that. That second paragraph where it talks about that the
24 licensee under a building classification can perform
25 ancillary work including grading. Maybe some question

1 about that, but I don't think it relates to this motion.
2 But one thing is very clear by virtue of this paragraph,
3 the licensee must have a license for this work or use a
4 contractor licensed in the appropriate classification and
5 the list of the subclassifications includes water and
6 sewer lines. PC couldn't perform that work. PC couldn't
7 perform that work. So, therefore, Miller cannot perform
8 the work. So you can't rely on that statute. Okay? You
9 cannot rely on that statute for this argument which is the
10 argument. I'll tell you what I think about the group, the
11 busting the amount. I've gone back and read the statute a
12 million times as you might expect trying to figure this
13 out and I'll tell you what I think. I think that if you
14 determine, if you determine that they are performing
15 grading work, okay, if you determine that my argument is
16 not right in terms of their performing work outside of
17 their classification, then they can exceed their amount.
18 But if you determine that this work is water and sewer
19 line work, we're not licensed to do that and it makes
20 sense if you think about it. I mean, because the general
21 contractor, if he's licensed to perform the work, just
22 because they have a limitation doesn't mean that they
23 ought to be confined to that as long as he's got the
24 ability to do that and as long as he agrees to be
25 responsible and that's kind of what the statute says. But

1 if we're not licensed to do water and sewer line work,
2 then first of all they can't perform that work. But even
3 if they were require, if they could perform that work,
4 then they could not exceed that amount because we're
5 relying on a licensed subcontractor to perform that work.
6 You can't use our unlimited amount. And we can't be, you
7 know, responsible for that because we're not licensed to
8 do that work. The statute that I just read, we can't do
9 water and sewer line work. So I think that if you
10 determine that we're all wrong and that somehow they were
11 performing grading work pursuant to the definition, then
12 the argument of exceeding the $750,000.00 probably does
13 not fly. I'll concede that.
14 THE COURT: Okay.
15 MR. MULLINS: I think it can be read both ways, but
16 I'll acknowledge that.
17 THE COURT: Okay. Let me hear from Mr. Brousseau
18 about this.
19 MR. BROUSSEAU: Thank you, Your Honor.
20 THE COURT: The scope of the work done issue rather
21 than the amount of the work done.
22 MR. BROUSSEAU: Yes. First of all, I wanted to point
23 out in Mr. Mullins' argument, he continues to go back to
24 the definition of water and sewer lines and talks about,
25 that includes installation and demolition of waterlines

1 and sewer mains, sewer lines and pump stations and all
2 that. Just because that is the definition under water and
3 sewer classification that does not mean that that would
4 exclude that definition from the words, rehabilitation of
5 storm sewers. That the statute that we're talking about
6 is, is 410-11-410, 40-11-410, 2D. And what it says in
7 relevant part is, is that it includes the soil preparation
8 and rehabilitation of storm sewers. Mr. Mullins handed up
9 a document that has the definition, Webster's definition
10 of rehabilitation. And I would point out that one of the
11 definitions in Webster's is, is to restore or bring to a
12 condition of health or useful and constructive activity.
13 Well, my client testified to and taken in a light most
14 favorable to him is, is that the system that was in place
15 prior to construction taking place was of no use
16 considering what they were going to do the construction
17 for and what the project was going to end up being. So
18 they had to go in and fix it and fix the system itself.
19 You heard him testify that they tied into existing catch
20 basins. They tied into an old existing line. And sure,
21 they demo'd out old parts and installed new things,
22 commensurate with what the project was about. But that
23 was to rehabilitate the old system and to make it a new
24 system and to make it a useful and constructive activity
25 of the system itself. It's the very definition of

1 rehabilitation. And, quite frankly, to say that just
2 because water and sewer classification says that those
3 people can demo and install those types of lines doesn't
4 mean that that excludes that from the grading definition
5 of rehabilitation. The other thing, too, that is very
6 important to point out is the same thing in taking the
7 evidence in a light most favorable to my client, PC
8 Construction knew what my client's classification was.
9 They knew he was a grading only, Class 4. They knew that
10 going into it. Yet they reached this agreement and have a
11 contract with him where part of the contract provides for
12 fixing the storm drainage system. They, themselves, by
13 reaching this agreement unless they are going on record of
14 saying, yeah, we're fine using unlicensed contractors on
15 state jobs, they themselves by reaching this agreement are
16 saying this is a rehabilitation project of the existing
17 storm sewer at that time. They reached that agreement
18 with him. They knew the scope of the work. They knew
19 what it was. You also heard my client testify as to, in
20 his opinion and in his experience what the industry
21 standard is and how they normally do that, all of which I
22 think is very relevant in taken in a light most favorable
23 to us means that the directed verdict motion or a motion
24 for a non-suit should be denied at this time.
25 THE COURT: Any other? I can see your position.

1 Yeah, I'm starting to understand the whole case now.
2 MR. MULLINS: The only thing I would say, Your Honor,
3 you know, there are a couple of cases on the licensing.
4 The issue of what PC knew and when about the licensing is
5 not relevant to this analysis and the application of
6 40-11-370. You know, if they want to pursue that, some
7 type of claim relating to the affirmative claims of PC,
8 but it doesn't, it's not relevant to the argument.
9 MR. BROUSSEAU: I think it's relevant to the extent
10 that it's essentially an agreement that he's properly
11 licensed to do the work. I mean, they're not going to
12 hire an unlicensed contractor knowing that there's going
13 to be storm drainage work done on this particular system.
14 I think it just shows an acquiescence in the agreement
15 between the parties that what he's doing was
16 rehabilitation of the storm sewer system. That's where I
17 think it's relevant.
18 THE COURT: All right. I want to take about an hour.
19 I think I know what I'm going to do, but I want to stand
20 up. I think I better stand up and we'll stand at ease for
21 a couple of minutes, then we'll go eat.
22 MR. MULLINS: All right.
23 (Whereupon, a short break was taken.)
24 THE COURT: In a light most favorable to the
25 Plaintiff, this definition of rehab is tough. I'm going

1 to respectfully deny your motion for non-suit at this time
2 and now I want to go off the record.
3 (WHEREUPON, a lunch break was taken at approximately
4 12:28 p.m.)
5 MR. MULLINS: Thank you, Your Honor. At this time,
6 PC would call Gary, well, Your Honor, I guess two points
7 before we get started.
8 THE COURT: Okay.
9 MR. MULLINS: One is I have a notebook. I don't know
10 how we did this. Did you mark the notebook and you want a
11 separate one for the witness stand?
12 REPORTER: I marked the notebook, and then used it at
13 the stand.
14 MR. MULLINS: Okay.
15 THE COURT: We'll do the same way. This will be
16 Defendant's what, 2 or 3?
17 MR. MULLINS: 3.
18 REPORTER: Defendant's number 3.
19 MR. MULLINS: I realize that I had not moved for
20 admission of the sinkhole invoices, but it's contained in
21 the notebook.
22 MR. BROUSSEAU: And a housekeeping matter. I don't
23 think I moved my A, B and J on my tabs then either. I was
24 just thinking about that. A, B and J were the only ones
25 that we had any testimony about, at this time.

1 THE COURT: Any objection on A, B and J?
2 MR. MULLINS: Just the same objection would be that
3 we've already dealt with them.
4 THE COURT: Okay. So Plaintiff's 1A, B and J will be
5 admitted subject to the objections we ruled on.
6 (Whereupon, Plaintiff's Exhibits 1A, 1B and 1J were
7 admitted into evidence.)
8 (Whereupon, Defendant's Exhibit 3 was admitted into
9 evidence.)
10 MR. BROUSSEAU: Okay.
11 THE COURT: And these, not marked and identified, but
12 they're part of the notebook?
13 MR. MULLINS: They're part of my notebook.
14 THE COURT: All right. Fair enough. Okay. We'll
15 get them in. Without objection.
16 MR. MULLINS: All right. And at this time, PC would
17 call Gary Piontek the stand.
18 GARY PIONTEK, being
19 first duly sworn, testified as follows:
20 DIRECT EXAMINATION
21 BY MR. MULLINS:
22 Q Mr. Piontek, if you could state your full name for
23 the record here?
24 A Gary Lawrence Piontek.
25 Q All right. Mr. Piontek, for the benefit of the

1 Court, could you just tell us a little bit about yourself,
2 where you're from, what your educational background is
3 briefly?
4 A Okay. I am from Greenwood, South Carolina. I
5 attended Greenwood High School here in Greenwood. I went
6 to Lander University. I graduated in 1989. From there, I
7 took a position with Milliken Company in Manufacturing
8 Management for 10 years. After that, I joined PC
9 Construction of Greenwood. There, we grew that firm into
10 a sizable, formable, general construction firm
11 specializing in secondary schools. We have done a lot of
12 school work in Ware Shoals; Honea Path; Greenville;
13 Columbia; South Carolina; Spartanburg; Columbia and
14 Newberry. And then more recently, we did some work here
15 in Greenwood, South Carolina at Greenwood High School,
16 Lander University and Myrtle Beach in Conway with Coastal
17 Carolina University.
18 Q Okay. So a large part of your work or your
19 involvement with PC has been with public work, mainly
20 school-type work?
21 A That is correct.
22 Q All right. And I'm sorry, you may have stated this.
23 You went to work for PC in?
24 A In 1999.
25 Q Okay. And what roles do you play with or what's your

1 job with PC Construction?
2 A It was Vice-President.
3 Q Okay. And as Vice-President what, particularly with
4 the projects, explain to the Court what role you play?
5 A Okay. I would supervise basically all aspects of the
6 construction process from estimating to project
7 management, to contract writing, to hiring of
8 subcontractors, to overseeing the superintendents out in
9 the field and being the liaison between PC Construction
10 and the owners.
11 Q Okay. And is that the role that you played in the
12 Lander University job that's the subject of this case?
13 A Yes, it is.
14 Q Okay. And you are listed in the subcontract as the
15 project manager, is that the role you were describing?
16 A That is correct.
17 Q Okay.
18 A I got my promotion after the Lander job.
19 Q All right. Let's talk about this. So you were the
20 project manager throughout this project, is that correct?
21 A That is correct.
22 Q And you were involved with reviewing the project and
23 preparing the bid for PC?
24 A That's correct. I was the one that worked on the
25 estimate. I was the one that submitted the estimate on

1 bid day. I am the one that looked at all of the
2 subcontractors bids to be on that day. I helped formulate
3 the total cost to the owner and submitted that cost to the
4 owner.
5 Q Okay. And I believe, I guess, you've still got, is
6 Defendant's Exhibit 1 and 2 still up there?
7 THE COURT: Yes, sir. Ms. Holston put them up there
8 also.
9 MR. BROUSSEAU: Okay.
10 THE COURT: She has got them.
11 Q In connection with your work in preparing the bid,
12 would you have reviewed the plans and specifications?
13 A Yes, I did.
14 Q Okay. And Defendant's Exhibit 1, was that the site
15 clearing specification for the project?
16 A Yes, it is.
17 Q Okay. And Defendant's Exhibit 2 is the storm
18 drainage specification, correct?
19 A That's correct.
20 Q Okay. Just quickly, you were here for the earlier
21 testimony. The Court's Exhibit 1, the blue lines. Did
22 you mark those blue lines?
23 A Yes, I did.
24 Q Okay. What do those blue lines depict?
25 A Those depict the demolition of the existing storm

1 drain sewer system.
2 Q Okay. All right. And was any, along these areas,
3 was any pipe ever reinstalled in those areas?
4 A Any old pipe?
5 Q Any new pipe. In this blue trench, in this blue area
6 here, was there ever any new pipe installed?
7 A No, there was not.
8 Q You didn't take any pipe out and put any pipe in
9 there?
10 A No.
11 Q Okay. All right. And there's some notes here,
12 right?
13 A That is correct.
14 Q And is that what directed, dictated that that sewer
15 system needed to be removed?
16 A That is correct.
17 Q Okay. And the specification that applies to this?
18 A Is 31-1000, which is Site Clearing and Erosion
19 Control where it says to remove all the items of site
20 utilities below or above grade.
21 Q All right. So this was part of the demolition work?
22 A That is correct.
23 Q Okay. And explain for the Court, I know we've
24 touched on this, this particular, did you do this? Did
25 you make the orange part?

1 A I made the orange comments, yes.
2 Q Okay. What does the orange depict?
3 A That outlines the intent of the civil engineer's
4 scope for the new sanitary storm drain system.
5 Q Okay. And is the storm drainage specification, does
6 that apply to this Court's Exhibit 2?
7 A This does, 33-4100, Storm Drainage System.
8 Q Okay. All right. Now, is this the as-built, is this
9 the actual installation of the storm drain system?
10 A No, the softball field did get turned around. There
11 was still an exterior, like it has out in the outfield, we
12 still had that in the outfield. It just rotated 180
13 degrees.
14 Q This just rotated like that?
15 A That is correct.
16 Q Okay. And actually if you look in Defendant's, the
17 notebook in Defendant's Exhibit 3, Tab 1.
18 A This is not ours, this is ours.
19 Q Right. Tab 1. Just for the Court's benefit, does
20 that reflect the rotation of the softball field?
21 A Yes, it does.
22 Q Okay. That being the plan that's in Tab 1?
23 A Yes, it does.
24 Q Okay. So but generally the storm sewer system, as
25 depicted here with the exception of the rotation?

1 A That is correct.
2 Q All right. And this is a new system that was put in?
3 A That is correct.
4 Q Okay. And was there ever any restoration of the
5 existing system?
6 A The section in the Wellness parking lot was by change
7 order added on to our system. It was not the original
8 plan.
9 Q You've got to come down and talk about.
10 (WHEREUPON, witness steps down from witness stand.)
11 A This existing, that was not a part of the scope of
12 the project. This is off the scope of the project. It
13 was not intended to be a service and by change order after
14 reconsideration towards the end of the project, it was
15 added and joined into our system.
16 Q All right. Is that the only part of this project
17 where there was an existing piece of storm sewer pipe that
18 was connected to this new system?
19 A Yes.
20 Q All right. And actually if you want to, why don't
21 you stay down. I'm going to ask you something else just
22 about the project as a whole. Can you give the Court just
23 a general understanding, because we're going to start
24 talking about the project, a general understanding. And
25 I'll tell you, actually, why don't we use the, we can mark

1 this, I guess Court's Exhibit 3, because this is a
2 blow-up, Your Honor, of Tab 1.
3 THE COURT: Is there any objection to Tab 1?
4 MR. BROUSSEAU: No, sir.
5 THE COURT: So we can add that as, do want to change
6 the numbers. All right. Number 1 is no objection to it?
7 MR. BROUSSEAU: No, sir.
8 THE COURT: All right. So that's Court's Exhibit 3
9 which is the same as Defendant's 3-1.
10 (WHEREUPON, Court's Exhibit 3 was marked for
11 identification only.)
12 Q Mr. Piontek, will you describe for the Court in
13 general terms what the project was and how PC envisioned
14 approaching and progressing through the project?
15 A In the specifications that go along with this project
16 which is a athletic sports complex. There's not many
17 buildings and it's more so grounds, ground work. However,
18 in the specifications, the soccer field was noted by the
19 owner to go first. They wanted to play on that at the end
20 of the contract that year, so they put a special
21 stipulation that we wanted this field alone to finish 30
22 days ahead of the rest of the complex. So that told us
23 that we were going to start there. And, obviously, if
24 they're going to have events here, they would need a place
25 to park their cars. So we made the parking lot phase, not

1 phase two, but we would go there next. Then, baseball,
2 softball and finish up with the tennis.
3 Q Now, it's not, it's not sequential, there is overlap?
4 A No, I was just about to get to that.
5 Q Okay. Sorry.
6 A This whole project was starting in January and was
7 going to be completed by August and then September for the
8 rest of it. To do this 25 acre site, that's a pretty
9 aggressive schedule. So we had designed our schedule to
10 start this one, and then immediately move guys over to the
11 next grouping prior to the previous grouping being
12 completed, which that would require all of our
13 subcontractors to have multiple people at multiple
14 locations on this site at the same time to keep up with
15 it. And that's how our schedules developed.
16 Q All right. And we'll talk more about the schedule. I
17 think you can have a seat now unless the Judge has any
18 questions about that. Your prime contract, contract with
19 Lander. If you'll look at Tab 2.
20 A Yes.
21 Q Is that the prime contract?
22 A It is.
23 Q Okay. And if you turn to, this is about the second
24 to the last page. You were talking about the tight
25 schedule, right?

1 A I did mention that, yes sir.
2 Q Do you see a description of contract time?
3 A I do.
4 Q All right. What does this reflect with regards to
5 what Lander was looking for in this project?
6 A This indicates that the date of substantial
7 completion for the soccer field, which was considered
8 phase one be completed by August the 15th of 2010. And
9 then it goes on to say that the rest of the site work,
10 phase two, would be 240 calendar days or thereabouts
11 another month after phase one completing.
12 Q And then there's a third paragraph.
13 A The third paragraph is basically final completion.
14 Once you have obtained substantial completion, we are
15 given 30 days to complete any punch lists, there are minor
16 items that will wrap up the project.
17 Q Okay. All right. So it's this schedule you refer to
18 when you say this was a tight schedule?
19 A It is. 240 days is less than a year and that's
20 pretty tight.
21 Q Okay. All right. And if you turn to, back within
22 Tab 2, the prime contract. Turn to the second page.
23 A The second page of the contract?
24 Q Yes. 3.3 there, what does that reflect?
25 A 3.3 represents the liquidated damages or the penalty

1 that the general contractor, and the way we write our
2 contracts, our subcontractor would incur if we do not meet
3 those deadlines. For phase one, there was a $500.00
4 dollar a day penalty for not reaching substantial
5 completion. And then for phase two, not getting your
6 punch list done in 30 days, they had a $250.00 dollar a
7 day damage. And then the same two-tiered step process for
8 the rest of the complex at $500.00 and $350.00,
9 respectively.
10 Q All right. So there's pressure for you to get the
11 project done on time, right?
12 A And, yes sir, there is.
13 Q All right. And I want to talk about Miller and if
14 you would turn to, you awarded the subcontract to Miller,
15 correct?
16 A That is correct.
17 Q All right. Turn to Tab 4 of Defendant's Exhibit 3
18 and I know we've already got in evidence, but this one has
19 been marked. Is this Miller's subcontract?
20 A Yes, it is.
21 Q Okay. And we're going to go through a couple of the
22 items in the subcontract. But there are a number of
23 provisions that deal with schedule in this contract,
24 right?
25 A That is correct. Because we have learned and we have

1 molded this particular contract based on some past
2 failures and we have kept adding over this, over the years
3 to make sure that our subcontractors knew what we expect
4 of them.
5 Q And that would be particularly important if you've
6 got a prime contract with a tight schedule on it?
7 A Absolutely.
8 Q Okay. All right. Tell me, tell the Court what in
9 terms of this project or any project that PC is involved
10 in, what is PC's role and that of its subcontractors?
11 A Okay. PC's role in managing the contract, managing
12 the projects for the owner is to understand what the
13 owner's expectations are. And this one is critical
14 timeframe, what it was that we are building. Understand
15 that. Make PC Construction aware of what the, the plans
16 and the specification is telling us. Select the
17 subcontractors. Develop a schedule around their needs and
18 what they, what they've set out before us, the
19 specifications. And then see to it that our
20 subcontractors adhere to those same things and we do that
21 by creating a schedule. As I alluded to over there, we
22 thought through the best way to complete the project and
23 the best amount of time that meets the owner's needs.
24 Then we develop our schedule around that and we ask our
25 subcontractors to follow that schedule.

1 Q Look at Tab 5, we're not finished talking about the
2 subcontract. But look at Tab 5 real quick.
3 A Okay.
4 Q What is that?
5 A Tab 5 is the overall schedule for this project that
6 was created from day-one. We then posted this schedule in
7 the job trailer. We had a pre-construction meeting with
8 the key subs in that job trailer and the owner. And we
9 went over this and made sure that they understood what was
10 expected and everybody agreed.
11 Q All right. How do you arrive at a schedule? Tell
12 the Court what goes into producing a document like Tab 5?
13 And by the way, is there a software program that produces
14 this schedule?
15 A We do have a software scheduling system. It's called
16 Sure-Track. It was introduced to us by a professional
17 scheduling company that links one task to the next task to
18 the next task to the next task until you build your
19 objective goal.
20 Q All right. And there are a number of things that
21 this schedule can be in various formats, is that right?
22 A We have the ability to, after we load this particular
23 schedule with the dates and durations we can assign
24 ownership to them. So we can, therefore, instead of
25 sending out a schedule to a subcontractor that has 150

1 lines, we can send it to the one with 60 or 30 depending
2 on their role in the contract. That allows the
3 subcontractor to know when they're going to be up to bat,
4 if you will, when we expect them to do their portion of
5 the scope of work and how long it's going to take them,
6 how long we expect them to take to do their work. That
7 would be under their means and methods as to how they're
8 going to do that, how many people they're going to bring.
9 We don't tell them how to do that.
10 Q All right. You were getting ready to tell me how you
11 came about, how you got this schedule and this is what
12 we're looking at. Tab 5 is just the original kind of
13 barebones baseline schedule, right?
14 A I'm sorry, repeat the question.
15 Q I asked, it was a complex question. Sorry. Tab 5 is
16 just a barebones baseline schedule, is that what you said?
17 A It's the baseline schedule. It's what was created to
18 work off of from day-one.
19 Q Okay. All right. How did you go about getting this
20 information, getting this document produced?
21 A I hired a professional scheduling company. I
22 solicited input from the subcontractors. I looked at the
23 duration at the end of the, for the end of the project.
24 Made sure that the durations that, like I said, from one
25 task to the next task to the next task and made sure that

1 it was within the 240 days. And then assigned ownership
2 as far as subcontractors to these particular tasks.
3 Q Okay. And flip back to the contract, and I'm looking
4 at Article 4. And we're going to skip over but even prior
5 to Article 4, there are references to timely performance.
6 A I mean, the number of times that we put in here, time
7 is of the essence, is to strictly keep ourselves out of
8 liquidated damages with the owner and also so PC
9 Construction and all the subcontractors can get off the
10 project as fast as possible. Just because they give us
11 240, even though I think that's aggressive, if it can be
12 done in 230 days, then that's 10 extra days that, you
13 know, we didn't need that we can move on.
14 Q All right. And let me ask you that, what does that
15 mean? I mean, an extra day, what does that mean to PC?
16 A Because we have cost of a job trailer, Porta-John's,
17 dumpsters, clean up, supervisor, superintendent, foreman,
18 myself. Those daily costs add up for us and for every day
19 that we can get off the job site, there is a savings for
20 our company.
21 Q Right.
22 A I would imagine that would be the same for everyone
23 else.
24 Q All right. And back to Article 4, subsection B,
25 that's the specific provision relating to the schedule, is

1 that right?
2 A That is correct.
3 Q Okay. And I think you stated, but I want to make
4 sure that we're clear on this. When you're putting the
5 schedule together, you get input from the subcontractors?
6 A I do.
7 Q Okay. And once the schedule is established, if a
8 subcontractor is not meeting the schedule, what do you do?
9 A I have an obligation to notify them that they're
10 behind schedule. I do that either through face-to-face
11 communication, I do that in the weekly meetings on site.
12 My superintendent would certainly do that, and we would
13 ask that they either pick up the pace or add additional
14 manpower to the job so they can compensate in another area
15 down the road.
16 Q All right. And you have the right to do that under
17 the subcontract, ask them to add manpower?
18 A Absolutely.
19 Q Do you have the right to ask them to work overtime?
20 A I do. If they're falling behind through no fault of
21 anyone else, yes.
22 Q All right. Let me ask you that. On this particular
23 project what was the situation with working on weekends?
24 A And this particular project perceived some rain
25 dates. And if it rains one day, Monday through Friday,

1 then we expect that Saturday is used for a work day to
2 make up for that.
3 Q When you say, any perceived rain days, what does that
4 mean?
5 A In the specifications and for this particular job,
6 the specs called for us, all people who are bidding it, to
7 expect that five days of rain was going to happen. So,
8 therefore, if five days of rain came, we would not be able
9 to claim additional time to complete the project, because
10 we were told to expect at least five days of rain. So if
11 we can't work because it rained and it stays within those
12 five days, then we're not going to get any extra time. So
13 the only way to make up that lost day would be to work on
14 a Saturday or a Sunday.
15 Q All right. Let me ask you to look at Article 5-D4,
16 next page, Article 5-D4.
17 A Okay. Section on Responsibility for Field Layout and
18 Measurements?
19 Q Yes, and if you need to take a minute to read it to
20 familiarize yourself, explain to the Court what this
21 provides for.
22 A Okay. Well, this is to all subcontractors. But in
23 Miller's particular instance, this is a massive site work
24 grading project. This particular section of him taking
25 all his field measurements and shots. Every venue had a

1 separate elevation, whether it's five feet lower than the
2 previous one or six feet lower or three feet lower. The
3 berms have certain elevations. The storm drain sewer has
4 certain elevations so water flows properly. This section
5 here we'd say that it'd be Miller's responsibility to
6 shoot all of his own grades and to pair his work for the
7 next subcontractor that follows him.
8 Q All right. And since you've been talking about
9 Miller, I guess let's just go ahead, were there any issues
10 with regards to Miller's compliance with this provision?
11 A There were several instances where Miller and
12 Construction, Miller Construction Company would wait on
13 the concrete finisher to arrive before they would actually
14 put it to the proper grade, because they wanted input from
15 the concrete contractor before they did their work. And
16 that was sort of a contention for me.
17 Q Why did they need input from the contractor?
18 A In my opinion there is no valid reason why he would
19 want an opinion, but I think he wanted, the other
20 subcontractor so in case there was a mistake made, he
21 could say well so and so told me to put it there. Whereas
22 on these documents, it's clearly states where it should
23 be. And if Miller would put it there, there would be no
24 need for second guessing.
25 Q All right. Did Miller have an obligation to perform

1 those verifications of the elevations on their own?
2 A Yes, they did.
3 Q All right. Okay. All right. Let's look at the
4 changes provision, Article 6. You there?
5 A Yes, sir.
6 Q Okay. All right. With respect to Miller, there were
7 a number of change orders, correct?
8 A That's correct.
9 Q All right.
10 A 87 to be precisely.
11 Q Of any of those, were there any requests for any
12 adjustment to the schedule?
13 A They asked for a day's per adjustment to schedule in
14 change order number 40.
15 Q Okay. Any of the other change orders did they ask
16 for adjustment to the schedule?
17 A No, they did not.
18 Q All right. If you look at Article 6A in bold, what
19 does your contract provide for if you fail to ask for any
20 additional day?
21 A This subcontractor waives his right to receive any
22 additional days.
23 Q Okay. All right. Let's look at the delay provision,
24 the next page. And look at the, I guess, the next page
25 over, the last two provisions of E, the last two

1 sentences. You with me?
2 A Yes.
3 Q Okay. The first sentence, what does that provide
4 for?
5 A The first sentence basically says that if the
6 subcontractor delays the schedule, that he is possibly
7 subjecting himself to liquidated damages and even if the
8 owner does not charge liquidated damages, the
9 subcontractor is subjecting himself to PC Construction's
10 extended overhead that I alluded to earlier.
11 Q That's the second sentence or is that the second
12 sentence?
13 A My latter part was the second sentence, but the first
14 sentence basically says that if the subcontractor delays
15 the project, he is subjecting himself to liquidated
16 damages---
17 Q Okay.
18 A ---and that PC Construction then has the right to
19 access liquidated damages to the subcontractor.
20 Q All right. What are your expectations with regards
21 to your subcontractors or, in particular, Miller's
22 compliance with licensing laws?
23 A I expect the subcontractors to obtain all the
24 licensing, have all the licensing that they did on.
25 Q All right. And that's, if you look at Article 12, is

1 that included in your subcontract?
2 A Yes, it is. Obtain all necessary permits and
3 licenses and comply with all statutes and ordinances.
4 Q All right. Let's talk quickly about silt fencing,
5 Tab 6. You are aware that Miller is seeking, as part of
6 its claim, payment for the two invoices set forth in
7 Exhibit 6?
8 A Yes, I am.
9 Q Okay. These two documents have rejected written on
10 them. Where did that come from?
11 A That is correct. I wrote that. Mike and I have sat
12 down several times throughout the project on the 87 change
13 orders. He was always asking about the status of
14 particular change orders, as he should. I looked at this
15 one here and told him that I needed to reject this because
16 one, I didn't damage it; two, he did not give me a
17 proposal before he did the work which is something that I
18 always expect; and third, there's an erosion control line
19 on the schedule of items. I think it was in the sum of
20 like $53,000.00 dollars. After he had put up the initial
21 silt fence, he drew upon that line some $23 or $32,000 but
22 not the full thing. So I definitely feel like that the
23 balance of that silt fence line was for repairs as needed
24 throughout the project. It's unrealistic that you think
25 you can move equipment on site this large and not knock

1 over some silt fence every now and then.
2 Q Okay. And that was communicated to Miller?
3 A Absolutely.
4 Q How many times was that communicated?
5 A At least three times.
6 Q And when I say that, I mean your decision on whether
7 this was---
8 A That we were not going to pay that.
9 Q Right. Not going to pay the two invoices in Tab 6?
10 A That is correct.
11 Q All right. Let's talk about sinkholes. Did you have
12 a situation with a sinkhole?
13 A We did, towards the end of the project.
14 Q All right. Tell the Court what the situation was and
15 I'll tell you if you look at Tab 7, there's some email --
16 if you go to the fourth page of Tab 7, there is an email
17 from you. You see that?
18 A Page four?
19 Q I think so. They're not numbered. If you just go
20 over one, two, three, four, there's an email from you.
21 A Okay.
22 Q Do you see it?
23 A Yes.
24 Q Dated September 25?
25 A Yes.

1 Q All right. And if you want a minute to review and
2 I'll just direct your attention to Tab 8. There's some
3 photographs. If that helps you tell the story for the
4 Court. Maybe you could just take a minute to review and
5 tell us what the situation was.
6 A Okay. The sinkhole in question was at the corner of
7 the, it was the left bottom corner on this particular map.
8 It's directly above an area where Miller and Construction
9 install a catch basin or actually it's a manhole.
10 Q All right. Tab A has the information, if that's
11 going to help you in the discussion.
12 A Okay. Yeah. That dark line is the manhole. And you
13 can see that it has one, two, three, four, five different
14 penetrations into this manhole. The bottom of this
15 manhole which is where these penetrations enter into this
16 manhole was some 25 feet deep based on my recollection.
17 The sinkhole was directly over one of these crossing
18 lines. And I have some photographs of the construction of
19 this manhole and I believe that -- well, first of all what
20 I did when I was notified by Lander is I contacted Miller
21 and Company to come out and take a look and help
22 understand what was going on here. Their response was
23 that it was the electrical duct main and if I will go to
24 another manhole, I could see how much water was in that
25 manhole. And they thought rain, natural rainwater was

1 going into the sinkhole and then chasing that electrical
2 duct main to another manhole. So I followed up with the
3 civil engineer and the architect on the project and asked
4 them their professional opinion about whether or not they
5 thought water could do that.
6 Q And let me ask you--
7 MR. BROUSSEAU: And, Your Honor, yeah, I was about to
8 object to the hearsay.
9 Q And let me ask you to turn back to Tab 7, the email
10 that we were looking at.
11 A Okay. Here's my notes to Joe Bryant after that phone
12 conversation. Spoke to Joe Bryant on the phone at length
13 on Friday, October 5th and Monday, October 8th about PNS
14 findings, that it was their opinion that the joint---
15 MR. BROUSSEAU: Your Honor, I would object to the
16 hearsay as well on this.
17 MR. MULLINS: It's a business record, Your Honor.
18 MR. BROUSSEAU: It's not a business record. These
19 are notes that he, and basically he's testifying to what
20 Joe Bryant is telling him. Joe Bryant's not a party to
21 this case. If Joe Bryant wants to testify, that's fine.
22 THE COURT: All right.
23 MR. MULLINS: I'll rephrase.
24 THE COURT: All right. Rephrase it.
25 Q Mr. Piontek, what was determined, after multiple

1 reviews of the situation, what was determined concerning
2 the situation with the sinkhole?
3 A This was a settling issue.
4 Q And please be more---
5 A Which was resulted from poor compaction.
6 Q Okay. And the fourth page of Exhibit 7 outlines what
7 you intended to do to try to deal with that. Is that
8 correct, the last part of that email? Or why don't you
9 just tell the Court what--
10 A What did we do to fix the problem?
11 Q -- right.
12 A We excavated the loose soils in that area until we
13 got down to a firm foundation, if you will. We dug out
14 all those loose soils. We put in flowable fill mix on top
15 of firm ground and then put a lawyer of soil on top of the
16 flowable fill and resodded the area. And we have not
17 heard back from the client that there's any more issue.
18 Q All right. What did you do before that?
19 A We had--
20 Q Did you do anything with the storm sewer?
21 A We scoped the storm sewer lines and looked for any
22 evidence of break. We did not see any evidence of a break
23 in the line with the photograph that I had alluded to
24 earlier when they were installing it. You have so many
25 storm drain lines crossing each other that there was a

1 void in that area. And I believe that the soil was not
2 compacted there properly.
3 Q All right. What do the photographs on Tab A depict?
4 A This is the bottom of the manhole that I alluded to
5 with the sanitary or the storm drain lines entering into
6 it. The associate that's down in this, bottom of his pit,
7 his right leg is in between two pipes that create a void,
8 in my opinion. There's where we got our settling. I mean
9 this just was not compacted properly.
10 Q All right. And flip over. Just tell the Court
11 briefly what the rest of these photographs reflect?
12 A This was the amount of silt that was left in the
13 storm sewer.
14 Q All right.
15 A This other one, this picture here, the next picture
16 is, it's the bottom of a fence post where the soil just
17 kept dropping until it reached its firm compaction area.
18 And the white portion above that black post there is the
19 concrete that wrapped around that fence post. And then
20 you can see the fence post is just hanging in midair
21 there.
22 Q All right. And the next page is just kind of a top
23 view of that?
24 A That is correct.
25 Q All right. Anything else significant or these just

1 other views of the sinkhole?
2 A The significant thing here is that you can actually
3 stick a -- and before we did our work here, you could
4 stick a hand shovel which is approximately five-and-a-half
5 feet deep. You can put it all the way in this hole which
6 surpasses the electrical conduit area.
7 Q How deep was the electrical conduit?
8 A No more than three feet.
9 Q Okay. All right. And PC incurred cost in correcting
10 this, correct?
11 A Absolutely.
12 Q All right. Did you ever ask Miller to correct this
13 work?
14 A Yes, we did.
15 Q What did they do?
16 A Told us that it was not their issue.
17 Q All right. Look at Tab 9. Take a minute to review
18 these and tell the Court what they are.
19 A All right. This first one is costs incurred by PC
20 Construction for videoing the storm drain lines. Lander
21 was adamant that they thought there was a break in the
22 storm drain lines. We videoed the storm drain lines and
23 received this bill and such. The camera actually could
24 not make a one-hundred percent way through because of so
25 much silt that was in the lines.

1 Q All right. What's the next one?
2 A It's the cost from a local subcontractor that came
3 out and dug down to solid ground and installed the
4 flowable fill.
5 Q All right. What's the next one?
6 A The material cost for the flowable fill.
7 Q Okay. What's the next one?
8 A We hired BLE on our own expense to watch over us to
9 make sure that we got down to a firm foundation of ground
10 before we did all of our repairs.
11 Q All right. And these costs are costs that you
12 maintain should be borne by Miller?
13 A That is correct.
14 Q All right. Let's move on and let's look at Tab 10.
15 Tell the Court, I think you testified was a full baseline
16 schedule. Explain for the Court what Tab 10 is.
17 A Tab 10 is a snapshot on February the 10th of 2010 of
18 just Miller responsibility task items. It also has a
19 brief description of what their task item was. The
20 original duration that was set forth in the baseline
21 schedule, the actual duration it took them to do that work
22 and then the actual start date and the actual finish date
23 of that particular task.
24 Q All right. So this is at the very beginning of the,
25 essentially towards the beginning of the job?

1 A That's right. That's why if they had not started a
2 certain project you will see with a early start and early
3 finish date that would supersede in its place. Once they
4 actually started the work then the actual start and the
5 actual finish override the early start/early finish.
6 Q Okay. And I think you testified to this, but there
7 are different activity categories. I see clearing and
8 demolition.
9 A Yeah. We also broke down our schedule by venue, if
10 you will.
11 Q Okay. All right.
12 A And that way the subcontractor can see whether or not
13 he needed to be in two places at the same time.
14 Q Okay.
15 A It's a helpful tool.
16 Q What happens, I'm just talking about the schedule
17 kind of in general. What happens if there are changes to
18 a project that may affect the schedule or that is
19 determined to affect the schedule?
20 A If the subcontractor notifies me that he needs
21 additional days as a result of the change order, I'd put
22 those additional days into the schedule.
23 Q Okay. And a revised schedule is issued?
24 A That is correct.
25 Q Okay. All right. Turn over to Tab 11. What is

1 this?
2 A This is a spreadsheet that I created to try to keep
3 up and help communicate with Mike Miller on the status of
4 change orders.
5 Q Okay. This has all of the change orders that were
6 presented in this?
7 A That is correct.
8 Q Okay. This is for Miller's change order?
9 A Yes, this is only for Miller's subcontract.
10 Q Okay. All right. And I think Mr. Miller had
11 testified that, that Miller did not ask for any additional
12 days for any of these change orders with the exception of
13 one, is that correct?
14 A That is correct, number 40.
15 Q Change order 40. Okay. Change order 40, softball
16 remediation, DHEC changes. Now, flip over to Tab 12. Is
17 that change order 40?
18 A Yes, it is.
19 Q All right. Tell us about change order 40.
20 A Change order 40 is the remediation plan that Lander
21 had come up with. Rather than continue to escalate
22 remaining asbestos, they decided that they could bridge it
23 with some geotechnical fabric and apply additional dirt on
24 top of that and basically contain it. And at the same
25 time they made a decision that they can put more of the

1 containment out in the outfield as opposed to underneath
2 home plate by rotating the position of the field.
3 Q All right. So that's what generated the rotation of
4 the softball field to whatever direction upwards is?
5 A So the batter can face the sun.
6 Q Yeah.
7 THE COURT: What's that question again? I want to
8 hear it again, rather than that technical stuff, answer
9 you gave. The same question, but what'd you just say?
10 A What change order 40 was for?
11 Q Yes.
12 A Change order 40 was, rather than continue to remove
13 asbestos that was already in the ground like they did
14 underneath the parking lot, they also had it underneath
15 the softball field. Rather than continue to take it out
16 at a unit price rate, they decided they were going to
17 contain it or encapsulate it by putting special fabric
18 that is used to bridge bad soils. And then they added
19 additional soils on top of that dirt because that weight
20 of the extra new good dirt on top of the bad dirt with
21 this bridge material would encapsulate it. And that was a
22 plan that DHEC did come up with that Lander felt was more
23 acceptable to them than to continue to take out unknown
24 amounts of asbestos.
25 Q All right. And how did that relate to the rotation

1 of the softball field?
2 A In this photograph over here, they thought through
3 the radar that Mr. Miller alluded to in his testimony,
4 that it continued on out to the wetlands area. And that
5 would mean that the concrete press box at home plate would
6 have to be built on top of this bridging surface. And I
7 don't think that they were comfortable with putting a
8 structure over this bridging. But they were comfortable
9 putting an outfield over the poor soil.
10 Q The Court's Exhibit 2 is what you were just referring
11 to, Court's Exhibit 3 plus?
12 A Plus the change.
13 Q Post-rotation.
14 A And this little area right here was where the press
15 box was and they thought that the vein of asbestos-laden
16 trash just went all the way through there like that.
17 Since this was shown to be good, if they moved that press
18 box over to here they can build their structure there
19 safely.
20 Q Okay. All right. And we're in Tab 12. The first
21 page of Tab 12 was a submission made by Miller relating to
22 that change order?
23 A That is correct. That is the days associated with
24 the changes that he wanted made.
25 Q No, I'm sorry. I'm on the first page.

1 A Oh. That is the change, that is the dollar amount
2 proposal that he requested.
3 Q Now, the second and third page.
4 A Those are the days that he wanted to do that extra
5 work.
6 Q Okay. And was the schedule revised to include
7 additional days as a result of this change order?
8 A Yes, it was.
9 Q Flip over.
10 THE COURT: I am wanting to write a couple of things
11 down and you are getting ahead of me.
12 MR. MULLINS: Okay. I'm sorry.
13 THE COURT: Right.
14 Q Okay. Mr. Piontek, flipping over to Tab 13. Tell
15 the Court what this reflects?
16 A This is another snapshot of the scheduling time,
17 April 14th of 2013, which was after the softball
18 remediation plan. Again, if you look at the venues: A
19 soccer complex, baseball complex, concessions, softball.
20 So page two of this, you can see where the activity ID
21 which is the very first column. The CH in that number,
22 that reflects the change of inserting the additional days
23 that Miller Construction requested.
24 Q All right. Explain for the Court just to make sure
25 we've, where on this document are you referring to?

1 A On page two, activity ID, the very first column. The
2 difference between CH-075 and then SB, FN. SB was the
3 original schedule for the softball.
4 Q All right. So the CH are activities that were added
5 as a result of the change order?
6 A That's correct.
7 Q Okay. Where else were there changes?
8 A In the main parking area. If you look at main
9 parking, we initially referred to those activity IDs as
10 MP, and then we changed it with CH and we inserted for the
11 other days there.
12 Q All right. And is this the remainder of the project?
13 Did they operate under these durations depicted here in
14 Schedule 13, Miller's---
15 A That is correct. That's correct.
16 Q ---and Miller's obligations for the remainder of the
17 project?
18 A There were no more schedule changes to this schedule
19 after that.
20 Q Okay.
21 A Just updates.
22 Q All right. Did Miller maintain this schedule?
23 A No, they did not.
24 Q All right. Tell the Court what were some of the
25 problems that you had with Miller and the schedule?

1 A Miller and Company would repeatedly, during our
2 weekly meetings we would ask for our advice to be
3 addressed prior to a particular task coming up. And they
4 would come up with a valid reason sometimes that prevented
5 them from starting when they were supposed to start. So,
6 therefore, it ended up delaying the project. That used to
7 frustrate me a good bit. Second, that if it rained, they
8 would never work on Saturday or Sunday. I heard testimony
9 this morning that said that they'd worked several. I just
10 do not see that. Our daily notes did not reflect that.
11 They waited for the next subcontractor to help them
12 establish the grades for the concrete. I thought that was
13 very frustrating. Miller and Company was the site grading
14 contractor that, they could have come in here and put the
15 whole thing on grade and then left, let the other sub that
16 followed perform their work. And then after they
17 performed their work, they could have come back and did a
18 final grade.
19 Q But what did they do?
20 A They waited. They asked questions, they didn't plan
21 properly for each task when they came up by writing down
22 prior to it. They would wait until their task was
23 supposed to start. Second, with the other subcontractors
24 involved, they would look for the other subcontractors
25 involved as opposed to just shooting, you know, hiring a

1 surveyor, putting it on grade and following those
2 benchmarks. And with rain days, they just wouldn't come.
3 They actually even sent out a letter that said if it rains
4 Monday, Tuesday and a Wednesday, at a minimum, we have to
5 work Saturday and Sunday to make up for it. Because this
6 job requires at a minimum 40 hours a week work.
7 Q All right. I want to make sure the record is clear.
8 Maybe I misheard. Are these reasons, valid reasons for
9 delay?
10 A No.
11 Q Okay.
12 A Asking questions at the inappropriate time, no matter
13 how appropriate the question might have been done, should
14 have been two, three weeks ahead of that schedule. You
15 can't expect an architect or a civil engineer to come up
16 with an answer that day.
17 Q What about manpower and resources?
18 A Three people, four people seemed to be the MO for
19 Miller. A job this size, they should had at least four to
20 five people in each venue in order to keep up with these
21 durations. There is no way that three to four men can
22 keep up the durations of a 240-day project of this size,
23 25 acres.
24 Q All right. Was this communicated to Miller?
25 A Absolutely.

1 Q Were all of these problems communicated to Miller?
2 A Yes, they were. I would actually, in some cases, I
3 would beg him.
4 Q All right. Let's look at Tab 14 or some emails. And
5 I'm not going to go through all these emails, Mr. Piontek.
6 Let's skip over but just for purposes of making sure that
7 we're clear, the first email that's from you, is that
8 right?
9 A That is correct.
10 Q All right. To Chris Piontek, who's Chris Piontek?
11 A Chris is the, was the site superintendent.
12 Q Okay. And again, I'm going to skip over these. But
13 the second email, and these are number at the, you see the
14 numbers at the bottom?
15 A Yes, this is Exhibit 2 or something, page two. Do
16 you want me to read these or comment?
17 Q We'll skip over that. How about look at page three.
18 Let's just start at page three.
19 A Okay. This is an example of Miller doing what I said
20 that they would ask a question when they were supposed to
21 start installing a catch basin. They asked for a certain
22 elevation for this drain and the drain elevation was
23 already on the documents. But as you see here, I had to
24 wait a day just to get the answer and that was already on
25 the documents.

1 Q Okay. Next, page four, does that reflect, you've
2 talked about the Saturdays. And does this email reflect
3 kind of the policy that was in place or expectation for
4 the subcontract?
5 A This email kind of supports the way that the schedule
6 was created. We put the schedule around basically a
7 40-hour work week which is typically Monday through
8 Friday. And PC Construction needed to be at the site when
9 the subcontractors were there. And we got there every day
10 at 7:30 and we would stay there till 5:30. This email had
11 to go out to subcontractors who would get there at 9:30 or
12 10:00 o'clock and who would want to stay later than that.
13 So we established the working hours. We wanted to be
14 there. And then we also tell them that listen, hey, we'll
15 work Saturday. If you want to work Saturday just let us
16 know, because we want to be there to supervise. But you
17 have to let us know. And also we're indicating in this
18 email again that should it rain, you are expected to make
19 up that day because it's a 40-hour a week job.
20 Q All right. Turn to the next page, page five. This
21 is an email from you February 4, 2011 to Miller.
22 A All right. Here's a change to the project. This is
23 the time that, again, Mike Miller and his company are
24 supposed to be in multiple areas. They are actually
25 supposed to be on the softball. And he's been awarded a

1 change order from the owner to install a catch basin where
2 we're talking about adding from the existing wellness
3 parking lot.
4 Q Right.
5 A And I tell him, listen, since we're not, we didn't
6 get any extra days for this because you didn't ask for
7 any, you need to bring additional manpower. These men
8 that are putting in this catch basin is, whether it's
9 needed or not, is important, but so is the other line work
10 that you are supposed to be doing.
11 Q All right. What was the result?
12 A And no additional men were brought.
13 Q Okay. All right. Email, I'm looking at pages 6
14 through 10. Briefly, just tell the Court, this relates to
15 kind of a situation regarding wet soils. Briefly tell the
16 Court what that related to.
17 A It hasn't rained for two or three days, but the soil
18 has retained some moisture content in it. The moisture
19 content needs to be at an optimum dryness in order for
20 compaction to occur. This site is already standing at no
21 activities going on. And it was suggested by the testing
22 firm that the dirt be disked up instead of in its
23 compacted form. By disking it up, we would let the sun
24 dry out the earth so it could be compacted. Miller and
25 Company requested a change order to do so. I sent the

1 request up to the architect for this review. The
2 architect responded back that it was in, the testing
3 company and the architect responded back that it was in
4 Miller's contract and specifications to do this work all
5 along.
6 Q All right. That was something they should have been
7 doing all along?
8 A Yes.
9 Q All right. Turn to page 11, and I think there is a,
10 12 and 13, go with 11. I think that's right.
11 A This is a list, you know, where this kind of supports
12 my theory that three and four people can't do the job.
13 Behind this or included with this email is this attachment
14 that lists multiple areas that Miller had work to do in
15 order to complete his scope of work and it was across
16 several venues. It was in the front entrance. It was in
17 the softball. It was in baseball. It was in the track.
18 It was around the tennis. It's everywhere and just the
19 three or four people that he was sending was not getting
20 it done.
21 Q All right. This is dated March 21, correct?
22 A That is correct.
23 Q All right. Is there any doubt in your mind at this
24 point that you have not expressed your concern about
25 Miller's maintaining the schedule?

1 A Oh, no. I'm frustrated now.
2 Q Okay. All right. Look at the next, page 14. You're
3 copied on this. This is from the superintendent working.
4 Page 14.
5 A Yeah. Okay. This here is an indication that the
6 owner has planned to access liquidated damages on the
7 soccer field. The soccer field is still not done yet.
8 Chris is sending a note to Matt Miller or actually to Mike
9 to inform him that he has spoken with Matt. And that Matt
10 and Chris are, that Matt is going to, told Chris that he's
11 going to focus his attention on getting the soccer field
12 completed.
13 Q Okay. All right. Turn to page 17. So there's been
14 mention about liquidated damages from the owner at the
15 point?
16 A Yeah.
17 Q All right. And all of that is being expressed to
18 Miller?
19 A That's correct.
20 Q All right. Turn to page 17. Why don't you read this
21 one out loud.
22 A Just not 17?
23 Q Read the email from Chris Piontek to Miller. Page
24 17.
25 A Oh, we got two 17's here. I'm sorry.

1 Q You're right.
2 A The one from Chris is labeled 17.
3 MR. MULLINS: Your Honor, can we make that 17-A?
4 THE COURT: Make the first one 17-A and the second
5 one 17-B.
6 MR. MULLINS: Okay.
7 Q Why don't you mark---
8 A Yeah.
9 MR. MULLINS: Is it all right if the witness marks
10 that?
11 THE COURT: Let's hold them and let Ms. Holston do
12 it.
13 MR. MULLINS: Yeah, mark that A and the next one B.
14 A You asked me to read 17-B?
15 Q Yes, please.
16 A Mike, we are getting further and further behind
17 schedule. PC gave Miller's Construction the okay to
18 proceed with the parking lot, softball, intramural field
19 areas well over a month ago. Since then, there has been
20 little to no work done to these areas. In the attachment,
21 you will notice I have marked up the schedule and plugged
22 in dates for which these items were to have been
23 completed. This has now become a serious issue as we are
24 already being charged liquidated damages for the soccer
25 venue. I am confident that we will be facing LD charges

1 for the other venues if we continue with the lack of
2 concern for the schedule. Please let PC know in-writing
3 how your company plans to recover the schedule.
4 Q All right. And then there's attachments to that or
5 some form of the schedule, correct?
6 A Correct, it is another schedule update.
7 Q All right. And then page 20, May 6, what's this
8 about?
9 A This is another plea for Miller Construction company
10 to be on site getting these particular tasks done. It has
11 gotten to the point now that where my superintendent and
12 myself have been trying to communicate the importance of
13 the schedule that we've asked for our division president,
14 Randy Piontek, to meet with Mike Miller, the president of
15 their company.
16 Q Now, you're on page 20 or 21?
17 A 20.
18 Q Okay. You're right. I'm sorry.
19 A Okay.
20 Q All right. 21? This is a letter, an email to you
21 from your superintendent, right?
22 A From my superintendent to myself.
23 Q Yeah. Does that refer to the same thing? I'm
24 looking at the first sentence. That's what?
25 A The superintendent is basically indicating to me that

1 he does not have the manpower to get the footings in for
2 the soccer press box and he's been having difficulty
3 getting Miller to cooperate with manning. And he has
4 requested that the president of our company, Chris, is
5 referring to Dad, Chris is the son of Randy Piontek.
6 Q Okay. All right. And the next page 22 and 23,
7 there's 22. It's just an email. 23 is an attachment.
8 A Correct.
9 Q What is it?
10 A Chris is again identifying additional things that
11 still need to be done by Miller's and Company.
12 Q All right. 24, June 18th. This is from Chris to
13 Mike Miller?
14 A That is correct.
15 Q What is it saying?
16 A He's asking that he fully expects to see a full crew
17 in the areas that he's needing putting the soccer field on
18 grade and starting yard units and back building the
19 retaining walls in the baseball field. So again multiple
20 areas, and he's looking for proper manning in each area.
21 Q All right. And just flip to 30. This is getting
22 towards the end of the project?
23 A That is correct.
24 Q Tell me what this is?
25 A This is an area, this is what is referred to on that

1 exhibit there as the intramural, east intramural field
2 near the front entrance. And this is the bright white
3 lights, in this black and white photograph, is basically
4 an indication of water flooding on top of the rubberized
5 walking trail. So it's an indication that it's not graded
6 properly.
7 Q All right. And that was a Miller problem?
8 A Yes, it was.
9 Q All right. The email communications in exhibit 14,
10 as a whole, what do they reflect?
11 A They reflect the problems that PC Construction was
12 having with Miller's Construction with manning and
13 quality.
14 Q All right. And were there additional communications
15 made to Miller?
16 A If you look at our phone log records, we were on the
17 phone with them three or four times a week.
18 Q All right. Did Miller's failure to comply with the
19 schedule, did their delay impact PC?
20 A Their delay did impact PC. As I alluded to earlier,
21 if Miller had completed their tasks in the durations that
22 were assigned to them, we could have been off this job at
23 least 137 days earlier.
24 Q All right. Well, let's look at that. Let's look at
25 Tab 15.

1 A All right.
2 Q Tell the Court, well, let me ask you this. Have you
3 made an effort to try to determine how Miller's delays
4 impact PC from a financial standpoint?
5 A Yes, I have.
6 Q Okay. Tell the Court what you've done.
7 A I took the schedule for Miller and Company only, took
8 their original duration dates.
9 Q All right. Let's walk through carefully this
10 exhibit.
11 A All right. The activity ID is the first column and
12 then the second column is the description. The third
13 column represents the original duration, the duration that
14 we gave him to do that pass. The fourth column is the
15 actual duration dates that it took them. So looking at
16 the clearing and the demolition, this very first section
17 after the red bar there, they took 23 additional days to
18 do clearing and demolition. Now, you got to understand
19 that Miller and Company is the first subcontractor on
20 site. Nobody else is involved in clearing, and it took
21 them 23 extra days to do that set of tasks. So before
22 anybody else can get on board these 23 days put us behind.
23 Those are 23 days that we could have used at the end of
24 the project to save money. The soccer complex, they took
25 30 additional days if you look at the original versus the

1 actual. And again, the very first task that they blew out
2 of the water there was the rough grading of the soccer
3 field. So the landscaper who is going to put underground
4 drains in the system to take the water away from the field
5 so the ball players can play on the field even in the
6 event if it was raining. They can't get on this field
7 until this rough grading is completed. So here again,
8 nobody else is in Miller Construction's way. They're just
9 delaying the schedule, because they're working on one
10 venue at a time, one thing at a time. And they got a
11 limited manpower that's spread too thin.
12 Q All right. So with each of these venues, the number
13 plus within that venue are the total number of days for
14 that particular activity, then what?
15 A That they took longer than they needed.
16 Q Okay.
17 A So when I was looking at putting what I thought was a
18 reasonable delay claim together, I didn't take the
19 baseball or the softball even though I could have.
20 Q All right. Let's go through this exhibit. The next
21 exhibit I think will be helpful for you to look at that.
22 Just to be clear, you've done that with every activity---
23 A Every stage that Miller was supposed to be performing
24 work.
25 Q Okay. And the right side, handwritten on the right

1 side just converts those, what is the right side?
2 A The right side indicates the number of weeks, just
3 kind of putting it in a different perspective. Instead of
4 23 days, it basically equates to four-and-a-half weeks.
5 Q Okay. All right. I guess you can flip back and
6 forth if you need to, but Tab 16. And I've interrupted
7 you, but I just thought it would be more helpful.
8 A No, this is where I was going. This was the delay
9 claim that when you look at Miller Construction being not
10 interfered on those particular venues. The clearing, the
11 soccer and the tennis, I came up with 137 days that I
12 thought there is no way that they can say that somebody
13 else held them up.
14 Q Well, look at the second page. Look at the bottom.
15 You might be getting your money and your days mixed up.
16 A Okay. Yeah. I'm sorry. Well, those days from those
17 venues. Site demolition, site clearing, construction
18 entrances, rough grading the soccer field, storm drain
19 installation. I mean, again, you can put all the storm
20 drain in before any other subcontractor gets to that area.
21 Tennis, the grading for the tennis courts. All of these
22 are areas that were not skewed by another subcontractor.
23 Q All right. We're going to back up just to make sure
24 the Court understands. What are the total number of days
25 that you--

1 A The total number of days that I put together here is
2 145 days.
3 Q Okay. All right. And we're going to get to the
4 number. But I want to make sure you understand for the
5 Court what this document, how does this document tie to
6 the document we were just looking at?
7 A I took each one of these task items that Miller
8 Construction missed. For example, ES-015, Site
9 Demolition.
10 Q Okay.
11 A They're scheduled duration was five days. It took
12 them eight days.
13 Q All right.
14 A So that was a total of three days. And repeat that
15 process for each one of these items that I felt was solely
16 the responsibility of Miller Construction.
17 Q All right. And the three bullet points at the top of
18 exhibit 16, what is that?
19 A Those are the three venues that had absolutely no
20 other interference, no owner interference, no asbestos
21 interference, no other subcontract interference.
22 Q All right. The ES is what, looking at the bullet
23 points up there?
24 A It stands for the, it's site-work.
25 Q Look at the bullet points up at the top.

1 A Clearing, demolition and initial erosion control.
2 Q All right. And the SC is what?
3 A It's for the soccer complex.
4 Q All right. And the next page, SC, and then you have
5 TN activities?
6 A That is tennis complex.
7 Q Okay. And there are other activities that are not
8 included in this analysis, softball?
9 A I could have included the softball because there were
10 delays on that. We experienced delays with Miller
11 Construction on softball as well like our emails referred
12 to. But what I'm trying to do is, I really am just trying
13 to be fair. They cannot say that any one of these
14 particular three instances, that they were held up by
15 anyone else. Even though with the softball, when I say
16 I'm trying to be fair, I was fair by interjecting into my
17 schedule the additional days that they requested. So if
18 they miss those, I can add those on here too, which is
19 exactly what they did.
20 Q All right. So the three venues that you included,
21 you don't believe there was any issue that could be raised
22 related to those three issues?
23 A None whatsoever.
24 Q Which is why you determined to select those three
25 things?

1 A That is correct.
2 Q Now, at the bottom of page, of Tab 16, the delay
3 damage summary, you've got 900, well, explain what you've
4 done there?
5 A The 945 days, dollars per day is our cost to be out
6 there on site for the supervision, for the job trailer and
7 the electricity for the job trailer, so forth. I have
8 that summarized.
9 Q Tab 17.
10 A I broke down our expenditures. That would be the
11 field office, office trailer, telephone, site power,
12 trailer's power, janitorial work being done on the
13 trailer, the Builder's Risk insurance, then we got into
14 supervision. You got myself, the project manager, the
15 scheduler that was making changes anytime we had updates
16 to the schedule. We have our superintendent, our general
17 foreman and, of course, the labor burden, the cost of
18 doing business. We got extended field labor for cleanup
19 crews and we got the extended equipment, storage trailers,
20 portable toilets, field and maintenance and so forth. Add
21 up all of those and our 10 percent overhead and profit, it
22 equates to $945.00 dollars a day.
23 Q So that's what it cost PC per day to be on site?
24 A That is correct.
25 Q All right. And that's referred to at the top that's

1 the Lander Extended Overhead?
2 A That is correct.
3 Q All right. And that's the number that you have
4 multiplied the number of days delay, what you arrive at?
5 A That is correct.
6 Q What number do you arrive at?
7 A That $137,035.
8 Q And, .15 cents?
9 A And, .15 cents.
10 Q Okay. And that's what you believe the, or that's
11 what PC is claiming with regards to the delay damages in
12 Miller's failure to comply with the schedule on this
13 project?
14 A That is correct.
15 Q All right. Mr. Piontek, answer any questions that
16 Mr. Brousseau may have.
17 MR. BROUSSEAU: Can we have a break?
18 MR. MULLINS: Yeah, that was what I was going to say.
19 (WHEREUPON, a short break was taken.)
20 THE COURT: All right. Go ahead, Mr. Brousseau.
21 MR. BROUSSEAU: Thank you, Your Honor.
22 CROSS-EXAMINATION
23 BY MR. BROUSSEAU:
24 Q Mr. Piontek, when Miller made its original bid on
25 this project, you were aware of their licensing status,

1 correct? In other words, you were aware that they were a
2 license contract or a licensed grader?
3 A A licensed grader, yes sir.
4 Q Okay. I'm going to ask you to look through, I'm
5 going to address some of the delays and kind of go
6 backwards on this. But, first of all, I do want you to go
7 to, which notebook do you have in front of you, the
8 Defendant's?
9 A Yes, sir.
10 Q Okay. Go to Tab, I believe it's, three, try four,
11 sorry, which is the contract that PC had with Miller,
12 correct?
13 A Yes, it is.
14 Q Okay. I want you to flip to page three of that
15 contract. And there is a paragraphs E and F of that
16 contract. Are you familiar with those paragraphs?
17 A Yes.
18 Q All right. And these paragraphs or these provisions
19 have to do with conditions of payment while the project is
20 ongoing. Is that correct?
21 A Correct.
22 Q All right. And I want you to look at paragraph F and
23 if you go halfway through the first sentence it says, so
24 long as the work is being prosecuted in accordance with
25 the provisions of this subcontract and that the progress

1 is satisfactory to PC Construction of Greenwood and owner,
2 that you guys are supposed to make payments. Correct?
3 A Correct.
4 Q All right. You made all the payments to Miller up
5 until he made this final pay application, is that not
6 correct?
7 A Correct.
8 Q So for each payment that you had made up until that
9 point, you would agree with me that pursuant to the
10 contract, both you and the owner had agreed that, number
11 one, their work was satisfactory. And, number two, it was
12 being done on time. Is that not true?
13 A No.
14 Q It's not?
15 A No.
16 Q That's not what the contract says?
17 A You just said on time, the work on time.
18 Q Excuse me?
19 A Did you say the work was being done on time?
20 Q Yes, sir.
21 A No, that does not reflect that.
22 Q Okay. So you agree with me, though, you would agree
23 with that this paragraph right here says that if the work
24 wasn't being done on a timely basis, you had every right
25 to withhold payment from Miller. Isn't that what it says?

1 A In F?
2 Q E and F.
3 A Again, I see that for when payment is requested and
4 has been properly performed and is in place. It doesn't
5 necessarily say whether or not it was on time or on
6 schedule.
7 Q Would you agree with me in paragraph F, the first
8 sentence. It says, partial payment shall be made, be paid
9 monthly by PC Construction to the subcontractor as the
10 work progresses so long as the work is being prosecuted in
11 accordance with the provisions of this subcontract and
12 that the progress is satisfactory to PC Construction of
13 Greenwood, Inc. Would you agree that that's what it says?
14 A Exactly. Yes.
15 Q Okay. And you already testified to this earlier, so
16 I'm not going to ask the questions. I'm sorry. Strike
17 that. Now, if you could flip to the next page and it
18 states, conditions of final payment. Are you familiar
19 with these provisions?
20 A Yes.
21 Q Okay. Now, you agree that the issue of whether or
22 not Miller was going to get paid didn't come up until his
23 final pay application, correct?
24 A Correct.
25 Q All right. Under this provision, states that, you

1 would agree that it states that final payment of the
2 balance of the subcontract price due shall be made to
3 subcontractor. And if you skip to number two it says,
4 after receipt by PC Construction of Greenwood, a final
5 payment from owner, such receipt being express condition
6 precedent to PC Constructions of Greenwood's obligation to
7 make final payment to subcontract. You agree that's what
8 it says, correct?
9 A That's what this particular paragraph says.
10 Q Okay. PC Construction has been made the final
11 payment from Lander, is that not true?
12 A Yes, it has.
13 Q How much is that?
14 A The final payment?
15 Q Yes, sir.
16 A I don't recall.
17 Q Would around $300,000.00 dollars sound about right?
18 A No, I think it's less than that. I don't, actually I
19 don't remember.
20 Q Okay.
21 A If it is $300 and you have something to that effect,
22 it probably was.
23 Q Okay. I want you to skip over to page 10 of the
24 contract, well, actually, before you do that, let's just
25 go in sequential order in the contract. Why don't you

1 actually skip to the next page real quick and paragraph
2 number 3 at the top. Do you see that, the second sentence
3 of paragraph number 3?
4 A Regarding mobilization?
5 Q Yes.
6 A Yes.
7 Q And in that particular provision, that would keep my
8 client, Miller, if I'm reading that correctly from
9 charging or assessing damages to you, to PC Construction,
10 for extended general conditions, correct? In other words,
11 Miller can't sue y'all for delay damages or mobilization
12 fees or anything like that due to delays on the project?
13 A I don't get that same reading out of that as you do.
14 Q Okay. I want you to skip over. Go three pages over
15 and it's a section called Jobsite Conditions.
16 A I have that.
17 Q All right. You would agree with me that under the
18 terms of this contract no work was ever to be performed by
19 Miller or any other sub for that matter if the contracts
20 were similar to this without a representative of PC
21 Construction being on site. Correct.
22 A That is correct.
23 Q All right. In fact, they couldn't work overtime
24 unless y'all approved it, right?
25 A No, they can work overtime. How they run their job

1 is not up to us.
2 Q Okay. I want you to look at paragraph J1, the first
3 sentence. No overtime will be allowed unless approved by
4 PC Construction in-writing. So they can't do overtime
5 unless y'all approve it, correct?
6 A Right. If they want us there, they have to notify us
7 that they're going to be there.
8 Q I want you to go to, I think, it's about two pages or
9 it's actually three pages after that page. I think it's
10 actually page 10 and it's the section that starts on the
11 page before that of delay. Go forward. I'm sorry, seven,
12 eight, nine, ten. Page ten.
13 A Well, I'm looking at the bottom of this particular
14 one that says page 12.
15 Q Okay.
16 A Okay. 14.
17 Q Thank you. I'm sorry. I'm looking at the wrong one.
18 And if you go to the middle of that page, hold on just one
19 second. Let me make sure I'm on the same page as you.
20 Yes. If you skip over to page 15 on that, that's the
21 delay damages and it carries over onto page 15. If the
22 contract, and it states there, if the contract documents
23 provide for liquidated or other damages and they are so
24 assessed by PC Construction, then PC Construction can pass
25 those along to Miller. Correct?

1 A Yes, sir.
2 Q All right. Now, you talked a lot about delays and
3 liquidated damages. In fact, I believe you referenced in
4 one of these emails that PC Construction had been charged
5 liquidated damages for the soccer complex. PC
6 Construction was never charged liquidated damages on this
7 job, were they?
8 A Oh, I think we were.
9 Q You were?
10 A Yes, sir. I do believe we were.
11 Q You specifically got something from Lander University
12 that said you were charged liquidated damages?
13 A No, they used it as a negotiating tool to cut my
14 extended overhead cost in half.
15 Q Okay. You were never charged liquidated damages,
16 though, were you?
17 A Not in that sense of the word, but they utilized that
18 as a negotiating tool for me to accept less.
19 Q Let's talk about that. You went to dispute
20 resolution on that particular contract with Lander,
21 correct?
22 A Yes, we did.
23 Q All right. And that happened after we had started
24 our stuff. But you completed it before we came to trial,
25 right? In other words, this lawsuit had already been

1 filed by the time you guys got started on yours with
2 Lander?
3 A I don't mean to be disrespectful, go over that again,
4 please.
5 Q I'm sorry. I fumbled that question up. We had
6 already started the lawsuit process in the Miller
7 Construction vs. PC Construction prior to Lander and PC
8 Construction going into their dispute, correct?
9 A Thereabouts, I'll, for the sake of the time, I'll go
10 with what you're saying.
11 Q Okay. And you resolved that dispute sometime in the
12 spring of this year, correct? Does that sound about
13 right?
14 A Yes.
15 Q Do you remember how much you were claiming from
16 Lander as extended damages or overhead damages or whatever
17 you were calling it, extended general conditions?
18 A I recall, $330,000.00 dollars.
19 Q Okay. And of that $330,000.00 dollars, your final
20 payment was for roundabouts $300,000.00, correct?
21 A Yes.
22 Q Okay. And that was a negotiated price that you came
23 up with Lander, correct?
24 A No. And what we agreed on with our, with our dispute
25 with Lander, we were asking for $330, we received $120.

1 And those are rough figures.
2 Q Okay. Now, you stated earlier that it was some sort
3 of tool or leverage that Lander was using against you on
4 these liquidated damages. You agree you had a right to a
5 contested hearing in that matter, did you not?
6 A I think that particular question is a little bit
7 above my paygrade.
8 Q Do you understand that you had a right to a contested
9 trial in that matter just the same as you do in this case?
10 A I'm still not familiar with that term. I'm sorry.
11 Q Do you understand you have a right to a contested
12 trial in any case?
13 MR. MULLINS: Your Honor, this is a project manager
14 who's testifying as to the work performed on the job. You
15 know, if he wants to ask a lawyer that question or
16 somebody else.
17 THE COURT: If you want to rephrase it, rephrase it.
18 MR. BROUSSEAU: Thank you, Your Honor.
19 Q Sir, you filed counterclaims in this case and have
20 filed a defense in this case, correct, in this particular
21 case, versus Miller?
22 A Yes, sir.
23 Q And you also, you understand, like we're doing today,
24 that you had a right to come up here and contest exactly
25 what Miller is claiming as being true. Correct?

1 A Correct.
2 Q All right. In the same token, you had that very same
3 right in the case that you brought against Lander
4 University, is that not true?
5 A Okay. Yes, sir.
6 Q Okay. But you didn't exercise that right, you
7 reached a negotiated agreement with them. Is that not
8 true?
9 MR. MULLINS: Your Honor, I'm going to object again.
10 There is no evidence in the record that he's the owner of
11 the company or anything other than the project manager.
12 THE COURT: I understand. I agree with him.
13 Sustained. I understand what you're doing.
14 MR. BROUSSEAU: Yes, sir.
15 THE COURT: It got resolved prior to the suit.
16 Q Now sir, if I'm not mistaken, you're asking for, let
17 me get this straight here. Actually, let me move to the
18 schedule and it's Tab 15 in Defendant's folder there. Are
19 you there?
20 A Yes, sir.
21 Q Okay. And this is really just more for clarification
22 for me. I wasn't necessarily understanding what you were
23 saying about the schedule. Early start and early finish,
24 that's the target dates. That's when they were suppose to
25 start and finish?

1 A The early start and early finish dates get overridden
2 by the actual starts and the actual finish, not this
3 schedule that we're looking at here.
4 Q Okay. So on the schedule that we're looking at right
5 here, there is no target start and target finish, would
6 you agree with that?
7 A Yes.
8 Q Okay. So then where did these numbers of plus 30 and
9 plus 244 and plus 15, if we don't have the target dates,
10 where are they coming from?
11 A They're coming from the excessive durations. For
12 example, in soccer complex, line SC, site 000. The rough
13 grading activity. The original duration was supposed to
14 take five days. The actual duration took 26.
15 Q Okay. And PC Construction set that schedule,
16 correct?
17 A With the help of the subcontractors.
18 Q Okay. This document that we have as Tab number 15.
19 This is created on November 3rd of 2013, is that not
20 right?
21 A That's the day that it was printed.
22 Q Okay.
23 A The date it was created was August the 24th.
24 Q I want to take you to the daily rate for extended
25 general conditions. You have a charge on here for

1 $945.07, correct?
2 A Yes, sir.
3 Q That's the exact same amount you claim against
4 Lander, correct?
5 A Well, it would stand to reason, it was the same job.
6 Q Okay. There were other subcontractors on this job,
7 right?
8 A Yes, sir.
9 Q How many?
10 A 32.
11 Q Okay. And a lot of them delayed the project too. Is
12 that not true?
13 A No, sir.
14 Q No, sir?
15 A Not a lot of them, I wouldn't say that, no.
16 Q Okay. I want to take you to the email. I think it's
17 all in Tab 14. It may take a minute to find the actual
18 email. I think it is the one, two, three, it's number
19 four and it's dated Friday of January 28th of 2011. Do
20 you have that in front of you?
21 A Yes sir, I do.
22 Q Okay. You sent this out to all of the
23 subcontractors, right?
24 A That is correct.
25 Q All right. And this email was sent out for what

1 purpose?
2 A To advise them of the working hours on the job, what
3 we should do if it's raining and if you want to work on
4 weekends, we want to be there. And we need to know prior
5 to you being there that we need to make plans to be there.
6 Q And were having issues with the schedule at that
7 time, is that not correct?
8 A No, this is the time that the, we were delayed by the
9 asbestos on the softball field, I mean, the parking lot.
10 Q Okay. I want you to actually take this notebook.
11 This is Plaintiff's exhibit 1. And if you could flip to
12 Tab F. And are you there?
13 A Yes sir, I am.
14 Q Okay. If you flip back three pages, you have your
15 email here about the working hours, correct?
16 A Yes.
17 Q Okay. And then you work your way left on the, let's
18 see here, the day before that is this a email that you had
19 sent out to all of the subcontractors regarding people not
20 being on the job?
21 A Which email?
22 Q It's the one right before the one I just showed.
23 A In the Plaintiff's book?
24 Q Yes, sir. This was the same email there as the one
25 we just referenced, correct?

1 A Yes.
2 Q Okay. And that one's dated January 28th. The day
3 before that, if you flip forward and go back one more
4 page. There you go. That's an email that you sent out to
5 all the project managers and company owners the day before
6 about delays on the project and nobody working and all
7 that kind of stuff, correct?
8 A Yes, sir.
9 Q All right. And Mike Miller responded to that email
10 later that morning, did he not, or later that afternoon?
11 If you'll flip to the next page.
12 A Yes, he did.
13 Q And, in fact, he said that they were on site until
14 10:45 with a full crew and that the prior email about
15 nobody else being there just wasn't true. Correct?
16 A Based on Mike's email here, he's saying he was there.
17 And based on my prior email, I was saying that he wasn't
18 there.
19 Q Well, actually if you keep going all the way up till
20 later that same evening on Thursday, January 27th.
21 A Okay.
22 Q And that's an email from you to Mike in response to
23 his email that he had a crew there. Correct?
24 A This is his response saying that he had a crew there.
25 Q And specifically at the very top you say, yes, Miller

1 had folks on site today and did some work despite the poor
2 weather. Thanks. And if you keep going, your next
3 statement is, Miller has been a great sub which I would
4 gladly recommend. Correct?
5 A That is what I said here.
6 Q All right. I want you to flip to Tab G in
7 Plaintiff's exhibit 1. And this is a string of emails in
8 April regarding wet weather that you were sending to
9 Miller Construction. Do you remember this string?
10 A Yes.
11 Q All right. At the very top there, one of your
12 response is it's the owner and the state engineer that
13 you're worried about to make sure that they understand
14 that Miller is doing what is necessary. Correct?
15 A Yeah, that is correct.
16 Q All right. I want you to go to Tab H. I believe you
17 testified about this email earlier. You sent it on April
18 22nd of 2011. Do you remember Mike calling you later that
19 or actually later on Monday asking about whether or not
20 Lander had actually charged liquidated damages?
21 A I do not recall that at this time.
22 Q Okay. So you wouldn't recall if you told him no,
23 they didn't?
24 A No, at this particular date, I would say that they
25 had not.

1 Q Okay.
2 A But they had not actually assessed at this particular
3 time.
4 Q Okay. I want you to flip to Tab C in Plaintiff's
5 exhibit 1. And this is around about the same time that
6 Miller had made its final pay application, correct?
7 A Okay. Yes.
8 Q All right. And in that email, you admit that at
9 least under your, under y'all's calculations that Miller
10 was owed about $15,000.00 dollars plus or less it's
11 retainage of $51,000.00, does that sound about right?
12 A That sounds about right.
13 Q All right. No mention in this email whatsoever about
14 liquidated damages or extended general conditions,
15 correct?
16 A Not in this particular email.
17 Q If you flip to Tab E, do you recall receiving this
18 letter from Miller early on during the project?
19 A Yes.
20 Q Okay. And, in fact, Miller was also concerned about
21 the delays on this project, was it not?
22 A With regards to the asbestos, yes, and moving
23 forward.
24 Q All right. I want to talk about some of these
25 alleged delays that you have on your schedule here. Hold

1 on just one second. On these alleged delays, first of
2 all, talk about the delays, that's for the total, each
3 little project itself? In other words, soccer field,
4 that's how you broke it down, correct?
5 A Yes.
6 Q Now, describe for the Court if you could. Well,
7 actually isn't it true that the way these projects are,
8 would go down is, first of all you would have the rough
9 grade, correct, on each little part, whether it's the
10 baseball field, parking lot, anything like that?
11 A That is correct.
12 Q All right. And, for instance, on the baseball field,
13 they actually, you moved the dirt from the baseball field
14 to the softball field or vice-versa, correct? Isn't that
15 what ended up happening?
16 A Yes.
17 Q Okay. So, in other words, there is a huge stockpile
18 of dirt in the baseball field?
19 A Yes, sir.
20 Q All right. And Miller couldn't move that dirt until
21 other subs such as the electrical and all those other
22 people were done with their jobs, correct?
23 A No, they couldn't move that dirt until Lander came up
24 with a plan for the softball field.
25 Q Okay. So that delay wasn't due to anything Miller

1 did, right?
2 A I would agree.
3 Q Okay. Rain days, that's not due to Miller, right?
4 A I'm not charging him rain-day delays.
5 Q Okay.
6 A I'm not charging him asbestos delays.
7 Q Okay.
8 A That is partly why I didn't select the softball
9 field.
10 Q You were talking earlier about that you felt like
11 Miller should go forward. Let me ask you this and you
12 were talking about the concrete subcontractor. How many
13 concrete subcontractors did you go through on this
14 particular job?
15 A Three.
16 Q Okay. And would you agree with the general statement
17 that at least the first two didn't do a very good job,
18 correct?
19 A I think they were average.
20 Q Okay. I mean, there is a reason why they were let
21 go, is that not true?
22 A To appease the owner, correct.
23 Q And, in fact, one of the main reasons for delay, a
24 lot of this was, is that some of those concrete
25 contractors were coming in and damaging the work that

1 Miller had already previously done, correct?
2 A No, sir. I don't recall it like that.
3 Q You also think that Miller only had three to four
4 guys on the job on a daily basis, right?
5 A That is an affirmative, yes sir.
6 Q Okay. On the sinkhole issue, you did not give Miller
7 an opportunity to fix that, did you?
8 A Oh, I certainly did.
9 Q And you still assert to this day that it was his
10 fault or their fault for the sinkhole?
11 A It was a compaction issue. Yes, sir.
12 MR. BROUSSEAU: One second, Your Honor. Nothing
13 further, Your Honor.
14 THE COURT: Mr. Mullins.
15 MR. MULLINS: I really just have a couple follow-up.
16 REDIRECT EXAMINATION
17 BY MR. MULLINS:
18 Q You were talking about your job as a general
19 contractor. I think you used the term that or you said
20 that it's to manage the subcontractors. Is that one of
21 your jobs?
22 A That is correct.
23 Q All right. And sometimes that involves giving them
24 words of encouragement?
25 A Absolutely.

1 Q All right.
2 A I have to remain positive at all times, so we
3 encourage them.
4 Q Okay. Tab F you were referred to in the Plaintiff's
5 exhibit, Plaintiff's exhibit which I think is in front of
6 you.
7 A Okay.
8 Q Is that one of those emails?
9 A Yes sir, it is.
10 Q Tell me what you mean.
11 A Well, here's an example of my struggles to have him
12 on site during, after poor weather events had occurred. I
13 was encouraging Mike to work the extra days that are
14 necessary to make up for the lost days. There is no
15 reason for me to be confrontational to get under his skin
16 to get a negative result. I'm looking for positive
17 results so I entered this comment.
18 Q All right. There are plenty of other communications
19 that reflect otherwise.
20 A To the issues that we were having.
21 Q Right. Tab C, this email, I think Mr. Brousseau said
22 that you were admitting that it was owed. Does this email
23 relate just to the progress payments?
24 A This email just relates to the progress payments.
25 Whether or not it's owed or not is not what I said.

1 Q And does this email address---
2 A -- this would just take care of Miller's version of
3 what he was owed.
4 Q All right. But it doesn't address the issues with
5 regards to the delay?
6 A No.
7 Q Right. Tab E, Mr. Brousseau asked you about this
8 letter.
9 A Yes, he did.
10 Q All right. What's the date of the letter?
11 A April 19th, 2010.
12 Q Okay. Is that on the front end of the discovery of
13 the asbestos?
14 A That is correct.
15 Q Okay.
16 A In February, early March when we found it.
17 Q All right. And did we already discuss the change
18 orders and the adjustments to the schedule that were given
19 to Miller as a result of the asbestos issue?
20 A Yes, we did.
21 Q Okay. All right. Thank you.
22 THE COURT: You may step down.
23 MR. PIONTEK: All right.
24 MR. MULLINS: Your Honor, we'd call John Bahr as our
25 next witness.

1 THE COURT: Okay.
2 MR. MULLINS: Been lurking in the back of the
3 courtroom.
4 THE COURT: I've seen him lurking.
5 JOHN BAHR, being
6 first duly sworn, testified as follows:
7 DIRECT EXAMINATION
8 BY MR. MULLINS:
9 Q Mr. Bahr, state your full name for the court reporter
10 here, please.
11 A John M. Bahr, B-A-H-R.
12 Q B-A-H-R?
13 A Correct.
14 Q All right. And tell the Court a little bit about who
15 you are.
16 A I'm president and owner of Construction Interface
17 Services. It's a general construction consultant firm
18 that provides construction management services usually on
19 an individual or modular basis. I'm a Georgia Tech
20 graduate with a Bachelor's of Science in Civil
21 Engineering.
22 Q All right. Let me just stop you right there and for
23 the Court's benefit, you've got Defendant's exhibit 3, the
24 notebook up there somewhere.
25 A I do not. Thank you.

1 Q Tab 18.
2 A Okay.
3 Q Is that your CV, as we say?
4 A I term it a personal profile that summarizes my
5 background history.
6 Q All right. And I just wanted the Court to have this
7 in front before we move through. What type of services
8 does, Construction Interface is the company that you are
9 the principal of?
10 A Yes.
11 Q All right. What kind of services do you provide?
12 A For the last 23 years, Construction Interface has
13 been providing a variety of services to owners,
14 contractors, subcontractors, sometimes engineers, surety
15 companies. And we provide project management services
16 that can include project scheduling, cost control, project
17 administration, usually on a piecemeal or periodic basis,
18 cost estimating, productivity studies, project
19 assessments. For surety companies, I've done project
20 takeovers and completions. Those kind of services. We
21 also do a lot of construction change order analysis and
22 presentation and negotiations. And on occasion, I do
23 expert witness testimony.
24 Q All right. You mentioned Georgia Tech. You're a
25 Tech graduate. When did you graduate?

1 A 1979.
2 Q All right. You graduated with a BS in Civil
3 Engineering?
4 A Correct.
5 Q All right. You are a Professional Engineer?
6 A I'm a registered Professional Engineer in North
7 Carolina and in California.
8 Q Okay. And you have been licensed as a general
9 contractor?
10 A I have.
11 Q All right. And the services that you provide include
12 construction management and contract administration?
13 A Correct.
14 Q And includes scheduling?
15 A It does.
16 Q Okay. And how long have you been performing those
17 type of functions?
18 A For approximately, as a consultant for about 28
19 years.
20 Q Okay. All right. And you had mentioned that you
21 had, well, your personal profile here, you've got, what is
22 a sample endeavor?
23 A It's a sampling of projects that I have been involved
24 in over the years.
25 Q Okay. All right. And you've got your education,

1 you've got your license and you are a member of the AGC
2 which is the Associated General Contractors?
3 A Correct.
4 Q You're a member of the Construction Specifications
5 Institute?
6 A Yes.
7 Q What is that?
8 A That is an organization that primarily focuses on the
9 preparation and writing if you will of contract
10 specifications. And it had, it has over the years
11 standardized that where say a couple of years ago they
12 were not necessarily standard. Architects and engineers
13 tend to, tended to develop their own. The Construction
14 Specifications Institute by and large has standardized
15 that.
16 Q Okay. All right. And you are a member of the
17 American Society of Civil Engineers?
18 A Yes.
19 Q American Association of Cost Engineers?
20 A Yes.
21 Q And Natural Society of Professional Engineers and
22 you've had articles published?
23 A Yes.
24 Q And you are fluent in Spanish?
25 A Yes, I am.

1 Q And you had mentioned expert witness testimony. How
2 many times have you, just approximately how many times
3 have you testified as an expert?
4 A I would say in actual proceedings, because I think I
5 did this the first time probably 27 years ago. I have
6 probably testified in proceedings 40 to 50 times perhaps
7 and, of course, many, many more depositions.
8 Q Okay. All right. But you do a lot of practical work
9 as well?
10 A Yes, that's the bulk of my business.
11 Q Okay. All right.
12 MR. MULLINS: And, Your Honor, at this time, we would
13 ask that Mr. Bahr be qualified as an expert in
14 construction management, contract administration and
15 scheduling.
16 MR. BROUSSEAU: That's fine. Without objection.
17 THE COURT: So stipulated.
18 MR. MULLINS: All right.
19 Q Mr. Bahr, let's talk initially about, you were
20 talking about the Specifications Institute?
21 A Yes.
22 Q First of all, you've been involved with, when did you
23 become involved with this particular project, you or your
24 company?
25 A It would have been, as a company, it would have been

1 in late 2009 or very early 2010.
2 Q Okay. You were involved with the scheduling aspect
3 of the project?
4 A Correct. The preparation of the project schedule.
5 Q Okay. All right. And in your capacity in reviewing
6 and providing assistance on this project, have you had an
7 opportunity to review the specifications?
8 A I have.
9 Q Okay. And I don't know if we've got Defendant's
10 exhibit 1 and 2 up there.
11 A I do.
12 Q All right. You see Defendant's exhibit 1 is the site
13 clearing and erosion control specification?
14 A Yes.
15 Q And exhibit 2 is the storm drainage system?
16 A Yes.
17 Q All right. And you've heard the testimony
18 surrounding, and I want to focus on the storm sewer issue.
19 A Okay.
20 Q You've heard the testimony surrounding which
21 specification applies with which?
22 A Yes.
23 Q All right. First of all, let me ask you, based on
24 your review of the specifications and the drawings and
25 your understanding of the facts of this case, do you

1 believe that this project involves the rehabilitation of a
2 storm sewer?
3 A No.
4 Q All right. Explain to the Court why.
5 A Rehabilitation of a storm sewer system would be, I
6 hate to use the word over and over, rehabilitating an
7 existing system. And that would be existing pipes,
8 existing catch basins, existing manholes. Typically, that
9 happens in a situation where the system is very old or has
10 undergone some sort of an abuse. When I say very old,
11 typically, the drainage system either leaks or has cracks
12 or over years has been silted in or has reduced its pipe
13 diameter size, or sometimes it's caved in and the
14 rehabilitation calls for certain techniques to bring that
15 back to its intended size and purpose and standards.
16 Likewise, with manholes, for example, the grout may have
17 ceased to function and it's caving in or breaking in or
18 elevations are changed or they have been damaged due to
19 traffic and use and that sort of thing. They get rebuilt,
20 put in place and the system continues to be used as it was
21 originally installed.
22 Q All right. So this is a restoration --
23 rehabilitation is a restoration of a system in place?
24 A Yes, I would agree to that.
25 Q All right. And Defendant's exhibit 1 and 2, I want

1 to talk specifically about them. You were talking about
2 standard specifications?
3 A Yes.
4 Q Are these, explain what you mean and what, you know,
5 what would a standard specification look like. And then
6 is this a standard specification or some variation
7 thereof?
8 A Sure. As I mentioned---
9 Q And, this, I mean Defendant's 1 and 2.
10 A 1 and 2, sure. As I mentioned earlier, you know, 30,
11 40 years ago, engineers and architects used their own
12 specifications. And over the years they became
13 standardized and the Construction Specifications Institute
14 is really the one that took the lead in this. And they
15 created what they call, I'm going to use this term,
16 boilerplate set of specifications and it's called master
17 format. And the numbering systems that you see here
18 pretty much match that master format. It has undergone a
19 couple of iterations over the years, but it still follows
20 this general outline. Engineers and architects may modify
21 these slightly, but they still fall under the categories
22 and you'll always see pretty much that the general, the
23 materials, the execution itself.
24 Q All right. And the two specifications we're talking
25 about, Defendant's exhibit 1, site clearing and

1 Defendant's exhibit 1, the storm drainage, you heard that
2 Defendant's exhibit 1 relates to the work performed and
3 depicted in Court's exhibit 1. And that the storm
4 drainage system specification relates to the work depicted
5 in Court's exhibit 2. Do you recall that?
6 A That's correct.
7 Q All right. Now, do you agree with that? Does that
8 surprise you?
9 A I agree with that. And no, it does not surprise me.
10 Q All right. Explain what you mean by that.
11 A Well, that first drawing on the left there which
12 shows the demolition of that particular drawing has the
13 drainage highlighted. But there's also demolition of
14 peating areas and curbing gutter and it's basically
15 removing all the old work. It does not address new work
16 and that falls under grading, site clearing, getting the
17 project ready for new work. Whereas the drawing to the
18 right shows the new construction which is that particular
19 one has highlighted the drainage system which is
20 excavating trenches, laying pipe and installing, I think,
21 new drainage system.
22 Q All right. We were talking about rehabilitation.
23 A Yes.
24 Q And storm sewer rehabilitation, if there was going to
25 be rehabilitation performed on a storm sewer what would

1 you expect to see, if that were happening in this project?
2 A I would expect to see a specification that addressed
3 just that. Because there are specialty techniques for
4 that. And, in fact, that is an industry term,
5 rehabilitation of storm drainage systems. Similarly,
6 rehabilitation of water and sewer systems.
7 Q Okay. When you say that is an industry term, what do
8 you mean?
9 A That it's commonly used in the industry and there's
10 specifications that accompany those.
11 Q All right. Let's turn to Tab 22 in Defendant's
12 exhibit 3.
13 A Tab 21.
14 Q Tab, I'm sorry 21.
15 A Okay. I'm there.
16 Q All right. What is this?
17 A This is a readily available typical specification
18 that addresses storm drain rehabilitation.
19 Q What does it say at the top?
20 A It says, Section 02540 Storm Drain Rehabilitation.
21 This is something that you can find readily on the
22 Internet, because it is an industry term.
23 Q Okay. When you say it's readily available on the
24 Internet, is this a standard spec that you would find if a
25 project involved storm drain rehabilitation?

1 A Yes, it would follow this format and it would address
2 the scope of work, type of material. If you were to flip
3 the pages, you would get, basically dealing in
4 rehabilitation with lining, cleaning, rebuilding, that
5 sort of thing.
6 Q Okay. Now, were you involved in this particular
7 project? I'm talking about with the spec that's here on
8 Tab 21?
9 A No. No, this is not my project.
10 Q But you're familiar with the standard storm drain
11 rehabilitation spec that exists?
12 A Yeah, but this frequently occurs on rehab buildings.
13 Q Okay.
14 A Where there's storm drain rehabilitation.
15 Q All right. How does this relate to your opinion as
16 to whether this particular project involved a
17 rehabilitation of storm sewer?
18 A This project most definitely did not include
19 rehabilitation of storm drains. They are completely
20 distinct things.
21 Q All right. Okay. Let's talk about scheduling. You
22 had mentioned that you were involved in the establishment
23 of the schedule in this project. Correct?
24 A Correct.
25 Q All right. What normally is your involvement and

1 kind of describe what the process is for establishing a
2 schedule. And just for reference sake, Tab 5 of
3 Defendant's exhibit 3 is one example of a baseline
4 schedule. And you don't necessarily need to use this
5 unless you want to. But just give the Court kind of a
6 summary of how a schedule is established.
7 A Well, sure. I'm the owner and principal of the
8 company and I do get involved in some projects developing
9 them directly. On the Lander University project I had
10 another professional engineer work on this project. But
11 we always follow the same format and they work under my
12 direction and the format is to get the plans and
13 specifications, talk with the contractor as to how he did
14 the job, what his organizational structure is with regards
15 to subcontractors and scope of work. And then find out if
16 any of the subcontractors have provided schedules or if
17 the GC, as well, has prepared initial bar charts that show
18 general phasing of the work, start and finish dates and
19 certain goals or milestones are going to be met. We then
20 take that and add a lot of detail to that and determine
21 activities, how long those activities will take and how
22 they relate to one another and we use software programs.
23 The one that Mr. Gary Piontek mentioned, Sure-Track, is
24 one that we are very familiar with. It's a family of
25 software products made by a company called Primavera. We

1 input that based on information that we receive from the
2 contractor and subcontractors. We code those as to
3 responsibility. And this particular job, we further coded
4 it to areas of work and it's a database. It's a software
5 driven database of information that can be sorted many
6 different ways and that's how we kick the project off.
7 And then periodically during the project, we get
8 information as to start dates, actual finish dates and
9 project changes that may occur and the project gets
10 revised periodically.
11 Q Okay. And Tab 13 and you heard the testimony. I
12 think you're familiar with the, well, let me ask you.
13 You've reviewed this schedule?
14 A Yes, I have.
15 Q All right. And does this reflect, is this an example
16 of what you were just discussing where schedule changes
17 may occur in there are revisions to the schedule?
18 A That's correct.
19 Q Okay.
20 A This particular one has been sorted for the site
21 work, scope of work. This particular schedule has not
22 only the initial activities but then it also incorporates
23 the changes that were added to the schedule as a result of
24 a change order.
25 Q All right. And that's what Mr. Piontek was referring

1 to earlier, those activity ID numbers that have the CH
2 next to it?
3 A CH for change, correct.
4 Q Okay. All right. And you've had an opportunity,
5 well, first of all, what is your opinion with regards to
6 the durations contained, let's just talk about Miller, for
7 the durations contained in the schedule for Miller, for
8 the Miller-related activities?
9 A Well, I mean, in the initial schedule, one, and I'm
10 going to call it a collaborative effort. Certainly
11 Construction Interface and I believe that they're
12 reasonable durations in relationships. But the processes
13 at the beginning of the job to get what I'll call a buy-in
14 from all the subcontractors to that schedule, and then
15 that schedule becomes the tool that everyone uses to
16 prosecute the work. And, in fact, you know, it gets
17 posted up on the job trailer and becomes the daily,
18 weekly, monthly, call it target, call it plan of execution
19 to get this project done.
20 Q Okay. All right. Well, let's just look at Tab 16.
21 Let me just ask you this. You have reviewed the
22 information that was put together by PC concerning the
23 delay impacts. Correct?
24 A Yes.
25 Q All right. Explain to the Court what you have

1 reviewed.
2 A With regards to the scheduling?
3 Q Yes.
4 A I reviewed the schedule analysis and the, over the
5 course of this project there are many iterations of the
6 schedule but they all start with the baseline. So I
7 reviewed the original project baseline and I went through
8 the entire schedule. I actually opened up the software
9 and reviewed that and compared it to the as-billed
10 schedule. And that's to basically check and verify the
11 dates that Gary Piontek had used to match the archive or
12 historical information that I had of the project and they
13 did.
14 Q Okay. All right. And with respect specifically to
15 the Tab 16, the Delay Damage Summary?
16 A Yes.
17 Q What is your opinion with regards to the delays that
18 are depicted in this exhibit and claimed by PC?
19 A Well, I think the delays that are claimed are not
20 excusable delays by Miller Construction and that PC is
21 entitled to those delay days. I also thought it was a
22 very reasonable approach. It's an approach that normally
23 I would take and compare the original baseline, the plan,
24 to what the subcontractor actually achieved. And then I
25 also thought it was a very fair approach because it only

1 addressed the upfront work that was totally dependent on
2 Miller Construction. It addressed the soccer complex and
3 it addressed the tennis area. It didn't address other
4 areas on the job, that although Miller did not, most of
5 the time, meet their target dates, PC Construction did not
6 include in their claim.
7 Q Okay. All right. And if you look at the total
8 calculations for delay is 145 days?
9 A Correct.
10 Q Is it your opinion that that's reasonable?
11 A I thought it was fair and reasonable.
12 Q All right. Let's talk about the daily rate, $945.07.
13 Can you explain for the Court, based on your experience as
14 a consultant, what is the daily rate and what is PC
15 attempting to do here in using that rate?
16 A That daily rate represents generally on an average
17 basis what it costs for PC to be on the project daily.
18 And, in fact, I assisted them in preparing this.
19 Q All right.
20 A And the methodology I used is one that I have used
21 many, many times, over my experience of taking the actual
22 project costs and determining what they are in various
23 different categories.
24 Q And Tab 17, just for your benefit, that's the
25 breakdown. Is that what you're referring to?

1 A That's correct.
2 Q Okay. Go ahead. I'm sorry. I interrupted you.
3 A And determining on an average basis what is the field
4 overhead costs for the project and that's the methodology
5 and it's one that I routinely use.
6 Q All right. And so you would agree that the $945.07,
7 is that a reasonable daily rate based on the expenses or
8 the costs for PC to be on the job?
9 A It is.
10 Q All right. And you would expect that claim, that
11 that daily rate would be the same whether you were
12 pursuing a claim downstream against a subcontractor or
13 upstream against an owner. The daily rate is going to be
14 the same, right?
15 A Correct.
16 Q Okay. All right. So your testimony is that the
17 delay damage calculation is a reasonable one. Have you
18 done any additional work in connection with your review of
19 this matter?
20 A Yes, I was aware the project activity duration
21 slippage. And I also was aware of some of the
22 communications that had occurred on the project. So I
23 took a look at the project from the perspective of, was
24 Miller Construction diligently prosecuting the work and
25 were they providing a sufficient amount of resources.

1 Q Okay.
2 A So I performed, you know, an analysis and I selected
3 a period of time. An analysis of what the by and large,
4 the labor loading, the labor resources were that were
5 assigned and utilized on this project by Miller
6 Construction. And I picked the period from January 4th,
7 2010. Miller Construction actually performed like, I
8 think it was like maybe four or five days of work prior to
9 that in the very latter part of 2009. But it occurred
10 over the two holiday periods. So I started that period
11 from January 4th, 2010.
12 Q All right. And maybe if you want to, Tab 19. You
13 want to turn to Tab 19. Will that help in your
14 discussion? Does this reflect the work that you did?
15 A That reflects the findings of my analysis.
16 Q Okay. All right. So I interrupted you. I just
17 wanted this, us to be on this page if you needed it.
18 A Okay. Well, I went on a day-by-day basis and
19 determined whether they were working, whether there was
20 rain issues, whether the site was too wet. If they were
21 not working could they have been working or was it a
22 holiday.
23 Q All right. What did you review in order to?
24 A I reviewed daily's and diaries.
25 Q Whose daily's and diaries?

1 A Both PC's and Miller Construction's.
2 Q Okay.
3 A And actually I prepared a holiday, bar chart, if you
4 will, in a spreadsheet format, a graph.
5 Q All right.
6 A That shows that and then what is behind Tab 19 is
7 actually a summary of that.
8 Q All right. Why don't you walk us through what you've
9 got here in Tab 19.
10 A Sure. On Tab 19, for that period of time, and we're
11 looking at this, it kind of looks like a flowchart.
12 Q Right.
13 A For that period of time from January 4th till August
14 31st, 2011, there are 604 calendar days. And 604 calendar
15 days is made up of 432 work days versus 172 weekend days.
16 And the reason I wanted to make that distinction is, for
17 example, Gary Piontek mentioned earlier that 23 days is a
18 four-and-a-half week delaying. Well, that's the
19 distinction between work days and calendar days. So
20 counting every Monday, Tuesday, Wednesday, Thursday,
21 Friday, Saturday and Sunday, between that period, we have
22 604 days. The project plan was to work only Monday
23 through Fridays. So immediately to the right of where I
24 have 604 calendar days, I break that out into 432 work
25 days which is Monday through Fridays and 172 weekend days

1 which are the Saturdays and Sundays. So then I took those
2 432 work days, the Monday through Fridays, and I literally
3 tallied them all up and I found that there were nine
4 holidays that were not worked. One would not expect
5 contractors to work those holidays. So there were
6 remaining 423 work days that were available to perform
7 work. So then of those 423, I tallied those as well. And
8 I found that there were only 280 days actually worked of
9 the 423. There were 79 work days that were simply not
10 worked. Contractor wasn't on the job, didn't show up. And
11 there was no, that I could identify, reason, excusable
12 reason for the contractor not being there. And then there
13 were 64 weather days. And this is 64 Monday through
14 Friday weather days, not counting weekends that were lost
15 due to weather. So I then went one step further on the
16 weather days because the specification does say that a
17 contractor has to anticipate up to five days per month.
18 If it exceeds that, by contract can be entitled to
19 additional days. So for those 64 weather days, I went to
20 all the change orders that were received by the project.
21 And 47 of those were excused by the owner. But that left
22 17 weather days that the contractor couldn't work because
23 of weather. But the anticipation was, the expectation
24 from the very beginning of the job was that those would be
25 made up on Saturdays. So not the very last part on the

1 right side of that page, the last column, but immediately
2 prior to that it says 47 of those weathers are excused.
3 17 should have been made up on Saturdays. So then we drop
4 to the bottom of the lower part of that flowchart. I went
5 back to the weekends. And I said, okay, how many
6 Saturdays do the records show were actually worked. And
7 there were only four that I identified. So I gave Miller
8 Construction credit for those four days. And, basically,
9 my opinion is that if we jump up, there were 79 workdays
10 that Miller Construction could have and should have been
11 working. And there were 13 days lost due to weather that
12 should have been made up on Saturdays. So I identified 92
13 workdays that I would say Miller Construction is
14 responsible for not performing and when they should have
15 and that's Monday through Fridays. This is really a
16 calendar day contract. The field overhead rate was
17 determined on a calendar day basis. So I identified 129
18 calendar days. And I also determined, as part of my
19 analysis, that many of those days occurred in the early
20 part of the contract of 2010 when there is good weather
21 and the project is getting underway. And the contractor
22 simply is not staffing the job with sufficient people and
23 all too often is not even at the project. And his daily
24 records reflect that he was pulling resources off of this
25 project and going to other projects. So this page is kind

1 of a conclusion of my analysis. I was surprised to hear
2 during the testimony, because I had been sitting here the
3 last couple of days, that Mr. Miller was claiming that he
4 had on a regular basis six to eight people or more on
5 almost a daily basis and was at the job daily. Because my
6 analysis showed that by and large for the, much of the
7 project when he was there he had three to four people. And
8 sure, at times, there were six or eight. There's a graph
9 that shows it. And then towards the latter part, towards
10 2011 when the project started to heat up in terms of it
11 really falling behind schedule on a regular basis had five
12 people. But there was a lot of inconsistencies.
13 Q Now, let's look at the third page of your Tab. Is
14 that the bar chart you were referring to?
15 A That's correct. That's the bar chart.
16 Q All right.
17 A To the very right, there is a color coding system.
18 Well, let me explain what the chart is. First on the
19 left, there's a series of numbers 0-2-4-6-8-10-12. That
20 represents the number of men on the job on a daily basis.
21 And the number of men is reflected by the black bar and
22 the black bar only. And you can see what I was just
23 describing about the three, four. And, sure, every now
24 and then there's five, there's six, there's eight. There
25 was a period of time for three days in a row in the, looks

1 like the March timeframe, late February time where they
2 had ten guys. And it repeated that again the following
3 week for a single day. But this chart clearly shows that
4 there was inconsistency and there was not that high level
5 of manpower that was being indicated earlier. The other
6 colors depicted on the right are bars that go from zero up
7 to twelve and that does not indicate labor. It just
8 indicates weekends. Red for no work when the records
9 indicate they could have been working. Blue for weather
10 and that's both weather that the owner acknowledged as
11 well as the weather that the owner did not acknowledge as
12 exceeding specification amount. And it's not just rain
13 days, it also includes days that were recorded for wet
14 conditions and unable to work. And then there's the green
15 represents the holidays.
16 Q Okay. So this bar chart is a reflection of your
17 analysis of the manpower, as well as the resources or the
18 appearance on site for the period of time that Miller was
19 on the job?
20 A Correct.
21 Q All right. And that was used in this flowchart that
22 we were talking about here?
23 A Correct.
24 Q All right. And the chart in between, just explain
25 for the Court what that is, calendar day?

1 A Sure. That chart is calendar days. It shows the
2 years, the months, the days allowed by the contractor.
3 The contract says you won't get any days in excess of five
4 per month. And then it shows the actual weather days.
5 And we can see that the winter of 2010-2011 was very bad.
6 The early part of 2010 though, there were no excessive
7 weather days. And it's unfortunate, but if you go back to
8 the page after that and you look at the number of days
9 marked in red, at the beginning of the project, that's a
10 bad sign. Because it means for every day not worked and
11 the upfront critical site work, the job is getting pushed
12 into the latter part of that year, when you run the risk
13 of experiencing bad weather and, in fact, this project
14 did.
15 Q So the analysis that you performed that's depicted in
16 Exhibit 19, what impact does that have on your review and
17 determination concerning the delay claim that's being
18 submitted to the Court here today?
19 A Well, it certainly supports my opinion that the
20 analysis that PC performed was a fair and reasonable
21 analysis.
22 Q Okay. All right.
23 A And it also helps explain why, in fact, Miller
24 Construction missed so many of their durations.
25 MR. MULLINS: Thank you, Mr. Bahr. Answer any

1 questions that Mr. Brousseau may have, please.
2 CROSS-EXAMINATION
3 BY MR. BROUSSEAU:
4 Q Mr. Bahr, you were never on site on this project,
5 were you not?
6 A Correct.
7 Q Your analysis and your data is based upon reviewing
8 documents and running computer software. But you were
9 never on site?
10 A That's correct.
11 Q Okay. You would also agree with me that, and if I'm
12 not mistaken, you got the days when Miller was on site and
13 how many employees they had on site, you got that from
14 where, now?
15 A I got that from information from PC Construction and
16 then diary's that were also provided by Miller
17 Construction.
18 Q Yeah. So and daily logs?
19 A Correct.
20 Q All right. Made by humans, right?
21 A Well, certainly, we depend on that.
22 Q And certainly subject to error? Maybe somebody
23 missed a day. Maybe somebody doesn't put the full amount
24 of employees on those logs. Correct?
25 A Yeah, and my experience that does occur. I mean, and

1 sometimes a job may get miscoded. But it's the, on a job
2 of this duration with the number of records, it's a very
3 rare occasion.
4 Q Sir, I want you to flip to Tab number 16.
5 A The same notebook?
6 Q Yeah. Yes, sir. Defense notebook, I guess, it's
7 three. And I want you to, and this is that Delay Damage
8 Summary that you had previously testified you thought was
9 a fair and accurate representation of what the damages
10 should be in this matter due to Miller's own actions.
11 Correct?
12 A Correct.
13 Q All right. I want you to go all the way to the
14 second page at the very last one. And it says final
15 grading in tennis court area; scheduled duration, five
16 days; actual duration, 84. And the delay is 79 days.
17 That's a significant delay, is it not?
18 A It is.
19 Q All right. There is no analysis in there as to
20 whether or not that delay was due to the fault of Miller,
21 is there?
22 A I would disagree with that. I think the project
23 schedule shows that when Miller Construction started that
24 work, that they just simply failed to complete it within
25 that allotted time.

1 Q Okay. You're talking about the project schedule and
2 what I want to talk about now is actualities and what was
3 happening out in the field. Okay. And you understand, of
4 course, that phase one on any kind of grading job is a
5 rough grade. Correct?
6 A That's an initial activity, yes.
7 Q Okay. And then a lot of times what ends up happening
8 is that certain other subcontractors come in like on
9 tennis courts to pave the court, then you have your final
10 grade. Right?
11 A Correct.
12 Q Okay. So if I told you that after, when Miller was
13 getting ready to do its final grade, that the engineers
14 had messed it up on a one percent elevation. That would
15 certainly be a delay that would not be caused by Miller.
16 Correct?
17 A I'm not aware of any such thing.
18 Q So you didn't review those documents?
19 A I reviewed a lot of project documents. And I don't
20 recall that the engineer is responsible for messing up a
21 grade that affects the final grading by seven whole days.
22 Q Okay. And additionally you also don't recall then, I
23 guess if you didn't see that document, you also don't
24 recall that the pavers didn't come in and pave the tennis
25 courts on a timely basis. And that caused a significant

1 delay to my client doing the final grading on the tennis
2 courts. Correct?
3 A I reviewed the project documents and I don't recall
4 the scenario that you're describing.
5 MR. BROUSSEAU: One second, your Honor.
6 Q You also have on here a delay of three days on the
7 soccer field final grading. You didn't see any documents
8 to indicate that Sod Fathers, the subcontractor who is
9 responsible for the landscaping and laying down the grass,
10 that they came in a little bit late on that one?
11 A I recall issues associated with Sod Fathers, an issue
12 of call it contention between subcontractors as to the
13 adequacy of the condition of that Miller Construction left
14 the Sod Fathers.
15 Q I want to talk to you about Tab 21 briefly. And
16 you've got these, I don't know what you called them, some
17 sort of specifications or what did you call those?
18 A I called them a boilerplate type of specification
19 that follows the formats of constructed specifications and
20 considered master format.
21 Q Okay. And you previously, well, exactly where did
22 you get these? You said you got them off the Internet.
23 They're readily available on the Internet?
24 A This was a sample on the Internet for storm drain
25 rehabilitation.

1 Q Okay. So you didn't get them from any kind of
2 engineering website or anything like that. This is just
3 something that you found off Google?
4 A Correct. Correct.
5 Q You also talked about that rehabilitation is an
6 industry term and you think that that term is different
7 than what happened on this particular project?
8 A Most definitely.
9 Q You heard Mr. Miller previously testify that this
10 type of work is very common for grading contractors do on
11 most jobs. That what happened on these two Court
12 documents, the Court's 1 and 2. You disagree with his
13 assertion that that would be considered rehabilitation?
14 A Most definitely. Most definitely. And just to
15 clarify. I heard what Mr. Miller discussed and there's
16 really two issues that I see. One is semantics-related,
17 if you will. One is the term, grading contractor. And
18 the other is a license to perform grading. Grading
19 contractors oftentimes do not, only movement of earth and
20 achievement of compaction. But they also install drainage
21 systems, they also install water/sewer, and others might
22 even do other things. So a grading contractor, that's a
23 term and, of course, it's restricted by the licenses that
24 they do hold.
25 Q Sir, you also talked about the amount, the daily

1 amount $945.07. And I think you testified previously that
2 you felt like that was a fair and reasonable amount.
3 Correct?
4 A Yes.
5 Q You are aware, sir, that that amount is almost double
6 what the liquidated damages are from Lander to PC under
7 their contract? You're aware of that, right?
8 A I'm aware of that and they're totally unrelated.
9 Q I understand they're unrelated. But you're telling
10 me that a reasonable and fair number is two times the
11 amount of what a liquidated damage sum would be on a daily
12 basis?
13 A They're totally unrelated. One has nothing to do
14 with the other and this represents just the actual cost of
15 delay. It does not, and I know there was some testimony
16 with regards to liquidated damages. I think Gary Piontek
17 discussed that they were one of the factors in the
18 negotiating. But liquidated damages pertain to some
19 estimation that the owner or his engineer or architect may
20 have been, may have made as it pertains to the owner, not
21 as it pertains to the contractor.
22 Q I understand. And, in fact, typically the amount
23 that is asserted by the owner to the GC is punitive in
24 aspect in the sense to get the general contractor to
25 finish on time. Correct?

1 A Absolutely not.
2 Q No?
3 A Liquidated damages are not punitive. Liquidated
4 damages, and this is in the industry. Liquidated damages
5 are by and large intended to cover the cost of the owner's
6 expenses in a job that is being extended. And typically
7 it pertains to the engineer's cost and perhaps the owner's
8 rep. The federal government, especially on Corps of
9 Engineer jobs takes it one step further and they add a
10 component for public impact. But they're not punitive in
11 nature. They're intended to cover some aspect of actual
12 damages that the owner envisions ahead of time and
13 basically liquidates them to a single daily rate.
14 Q For a delay, right?
15 A For a delay.
16 Q Okay.
17 A A non-excusable delay.
18 Q And so if I understand you correctly, you are stating
19 that PC Construction's damages on this particular case,
20 being two times more than the liquidated damage amount
21 that the owner was asserting, that that's a fair and
22 reasonable number. That's what you're stating?
23 A Most definitely. As I mentioned, they're unrelated.
24 Q Okay.
25 MR. BROUSSEAU: Nothing further, Your Honor.

1 THE COURT: Any further redirect?
2 MR. MULLINS: No, Your Honor.
3 THE COURT: All right. You can step down.
4 MR. BAHR: Thank you, sir.
5 THE COURT: All right. How much more you got?
6 MR. MULLINS: Your Honor, I---
7 THE COURT: We'll come back tomorrow. We're coming
8 back tomorrow so, I mean, that's.
9 MR. MULLINS: Well and, you know, that'd be up to Mr.
10 Brousseau. But I've got Mr. Randy Piontek here. It's
11 going to be very short. I mean, we've covered our case.
12 I just got the total damages to put up. So it won't take
13 us, direct should not take very long.
14 THE COURT: And then you got a reply?
15 MR. MULLINS: Oh, yes. Yes, sir.
16 THE COURT: All right. I want to come back tomorrow
17 and I've had enough today.
18 MR. MULLINS: Okay.
19 (Whereupon, the case will resume the next morning at
20 9:00 a.m.)
21 NOVEMBER 6, 2015
22 THE COURT: All right. Y'all ready to go?
23 MR. BROUSSEAU: Yes, sir.
24 MR. MULLINS: Yes, Your Honor.
25 THE COURT: All right. Mr. Mullins, it's still your

1 case.
2 MR. MULLINS: All right. Your Honor, we'd call Randy
3 Piontek to the stand.
4 THE COURT: Come forward to be sworn and come around
5 and be seated.
6 RANDY PIONTEK, being
7 first duly sworn, testified as follows:
8 DIRECT EXAMINATION
9 BY MR. MULLINS:
10 Q Mr. Piontek, full name for the record, please?
11 A Charles R. Piontek, Jr.
12 Q All right. Just briefly, tell the Court who you are
13 and why you're here?
14 A I'm the President of PC Construction. Here today to
15 try to resolve issues that we have with Miller
16 Construction.
17 Q And just give us a little more background about your
18 involvement with PC Construction.
19 A Well, I'm the president of the company and I do the
20 day-to-day management of the company. I would be involved
21 with each project as they're being conducted. I worked
22 with Gary as the project manager on the Lander project. I
23 also was involved in important meetings at Lander, key
24 discussions with subcontractors. So I was involved quite
25 heavily with this particular project.

1 Q All right. And you referenced Gary. That's Gary
2 Piontek?
3 A Yes, Gary Piontek.
4 Q Who's the project manager on the job?
5 A Yes, he was.
6 Q Okay. All right. And you mentioned being involved
7 with discussions with subcontractors. Were you involved
8 with any discussions with Miller?
9 A Yes, I was.
10 Q Okay. And describe kind of what the purpose for
11 those discussions would be?
12 A Well, in general, we would talk about the progress of
13 the job. We talked about manpower issues. We talked
14 about delays. What he could do to help get back on
15 schedule and just help the project move along quicker.
16 Q All right. If you are, are those ordinary
17 discussions that you have or are those discussions that
18 are ordinarily had by the project manager?
19 A Those would normally be held by, with the project
20 manager, yes.
21 Q For what purpose would you be having those
22 discussions?
23 A Gary would have at that point be asking me for some
24 help and I would try to step in and see what I could do to
25 get the subcontractor to get more folks out or take the

1 schedule more serious.
2 Q All right. Why would your project manager need help?
3 What do you mean by that?
4 A He wasn't getting the kind of responses that he was
5 looking for.
6 Q Okay. All right. Defendant's exhibit 3 in the
7 notebook.
8 A Yes. Yeah.
9 Q All right. Ask you to turn to Tab 4 in Defendant's
10 exhibit 3.
11 A All right.
12 Q Is that your, what is that?
13 A That's our subcontract with Miller Construction.
14 Q All right. And what is PC attempting to do in terms
15 of its subcontract?
16 A Our subcontract does a number of things. One thing
17 it does is it outlines the scope of work for the project,
18 who the contractor is that we're entering into the
19 contract with, what the conditions of disputes resolutions
20 would be, how we would deal with delays, how we deal with
21 schedules, the total cost of the project and those types
22 of things.
23 Q All right. And you expect that PC has to comply with
24 the subcontract?
25 A Absolutely. We would expect that our subcontractors

1 would be familiar with it, that they would comply with it,
2 and we would do so also.
3 Q All right. And that includes the schedule
4 obligations?
5 A Yes, most importantly, the schedule obligations.
6 Q All right. And there are, this is a provision. You
7 may have mentioned this, but that also deals with changes
8 to the project as well. Correct?
9 A Yes. It's clearly spelled out how change orders are
10 to be handled.
11 Q All right. And what do you expect from a
12 subcontractor if a change situation arises?
13 A We expect that they would bring that to our
14 attention, either whether it's something that they're
15 introducing as a change order or the owner. And they
16 would propose a price. Our project manager, in this case,
17 Gary Piontek would review it. He would decide whether he
18 would send it to the owner for their approval or whether
19 he would approve it. And, if so, he would sign it, send
20 it back to them and then they would do the work.
21 Q All right. And you mentioned price. What else would
22 a change situation involve?
23 A It could involve additional time required to perform
24 the change order.
25 Q And if there is additional time, must that be

1 included in a change proposal?
2 A Yes. We need to have that included in the change
3 proposal so that we could add that to the schedule and
4 adjust the schedule.
5 Q All right. And in this case, you did have a
6 schedule?
7 A Yes, we had a schedule.
8 Q All right. And that included, and there's been
9 testimony already in evidence introduced in the notebook,
10 a schedule where Miller's scope of work was scheduled.
11 Correct?
12 A Yes, that is correct.
13 Q Okay. And what is your position with regards to
14 Miller's compliance with the schedule?
15 A After reviewing the schedule, we determined that
16 there were a lot of durations that were missed that
17 exceeded the allotted amount of time for that particular
18 duration. Miller consistently actually missed durations
19 on the project.
20 Q All right. And what are you seeking in this case?
21 A We are seeking relief and damages for the delays that
22 Miller caused.
23 Q Okay. Well, let me ask you this. Did you have any
24 issues with other subs on the project?
25 A We did. Not unusual for problems to happen with subs

1 on the project. We had a problem with, particularly with
2 our concrete subcontractor. We did end up relieving him
3 and bringing on another contractor. But those issues did
4 not have any effect on the work that Miller did.
5 Q All right. And when you say that, what do you mean
6 by that?
7 A Well, the work that Miller did was work that would
8 have come before in most cases, other subcontractors and
9 specifically the concrete subcontractor. Miller would be
10 the one to go in first, do the grading, put in the storm
11 sewer and they'd be first up in all areas.
12 Q All right. Now, but part of Miller's scope of work
13 included fine grading as well?
14 A That's correct, yes.
15 Q Okay. Now, issues with regards to fine grading,
16 would that have been impacted by any other subs?
17 A Yes. If Miller didn't fine grade the site timely,
18 then it would greatly impact the next subcontractor which
19 would have been the landscape subcontractor. And that, in
20 fact, happened on a number of occasions.
21 Q Okay. Let me ask you to turn to Tab 20 in
22 Defendant's exhibit 3.
23 A All right.
24 Q All right. Tell the Court what this is?
25 A This is an accounting of our damages.

1 Q All right. If you could, can you walk us through
2 what its doing?
3 A Well, the first line here talks about the original
4 contract and all, $492,424.00 dollars.
5 THE COURT: What Tab?
6 MR. MULLINS: Tab 20.
7 A The next section outlines the total amount of change
8 orders on the project, $972,435.35. The next line totals
9 that as to a revised contract amount total, $1,464,859.35.
10 The next line talks about payments that PC had made,
11 $1,413,589.27. Leaving a contract balance of $51,270.08.
12 Q All right. Keep your finger on that because we're
13 walking through that, but I just want to reference Tab 11.
14 A All right.
15 Q The number at the bottom there?
16 A $51,270.08.
17 Q All right. So that tracks, this is what, I think
18 what we call the change order accounting with the
19 contract?
20 A Right. Yes, it is.
21 Q Okay. Now, $51,270 and, I guess, just for ease maybe
22 we could have you reference the Plaintiff's exhibit 1 in
23 their notebook and turn to the last Tab on that.
24 A All right.
25 Q That would be Tab J. And that reflects $53,000, that

1 Miller maintains that the balance is $53,695.08. What's
2 the difference between the two?
3 A I believe that the difference represents the silt
4 fence change order.
5 Q Well, turn to Tab 6 in our notebook, PC's notebook.
6 You mean the two invoices here?
7 A Yes. $1,785.00 dollars and $640.00 dollars.
8 Q Okay. So that's the difference between what PC is
9 contending the contract balance would be and Miller is
10 contending the contract balance would be?
11 A Yes, it is.
12 Q All right. Now, there's some additional, let's go
13 back to Tab 20 and explain for the Court what you do from
14 there?
15 A Okay. Well, there's some back charges that PC had
16 for Miller. And the one here listed as a sinkhole for
17 $3,921.82 and were also seeking some delay damage here.
18 Q All right. Let's talk about the sinkhole.
19 A All right.
20 Q That is Tab 9, tell us what Tab 9 is.
21 A All right.
22 Q Is that the backup for the sinkhole?
23 A Yes, it is.
24 Q All right. I'm looking at the back of the sinkhole
25 in Tab 9. What is this invoice? I just handed you a

1 document. What is that invoice?
2 A This is an invoice from the rental center for the
3 rental of a jumping jack used to compact soil.
4 Q All right. And that was used in the repair work for
5 the sinkholes?
6 A Yes, Gary signed for it and they used it for that
7 repair.
8 Q Okay. So that should be included in Tab 9, that was
9 omitted from Tab 9?
10 A Yes, it should be.
11 Q All right.
12 MR. MULLINS: Your Honor, rather than marking that as
13 an additional exhibit, that was just an error that we
14 noted that we had omitted that one invoice. Unless there
15 is an issue, we'd just ask to add that to Tab 9.
16 MR. BROUSSEAU: I don't have a problem with us just
17 putting it in the notebook, Your Honor.
18 THE COURT: There's an invoice, formerly the front
19 page of Tab 9 that has handwriting, $3,921.82. That $50
20 is a component of that?
21 MR. MULLINS: Correct.
22 Q And so those invoices add up to the $3,921.82 that's
23 on your damages accounting?
24 A Yes, they do.
25 Q Okay. All right. And the next number is the delay

1 damages that are set forth that we've already discussed
2 and set forth in?
3 A Right. The next number is $137,035.15 which
4 represent our delay damages.
5 Q Okay. And that's reflected in Tab 16 with the delay
6 damages?
7 A Yes, it is.
8 Q Okay. All right. So the total back charge and delay
9 damages are $140,956.00?
10 A Yes, that's correct.
11 Q All right. Where do you get your, what are you
12 claiming?
13 A Well, PC's damages would be $89,686.89.
14 Q All right. Well, how do you get that number?
15 A The current balance due to Miller, subtract that from
16 $140,956.97 and that's how you get it.
17 Q Subtract $51,270.08 from $140,956.97?
18 A That's right.
19 Q All right. So PC is seeking $89,686.89?
20 A That's correct.
21 Q And is it PC's contention that it, after this
22 calculation, that there is any money owed to Miller?
23 A No, there's not.
24 MR. MULLINS: All right. Thank you. Answer any
25 questions Mr. Brousseau may have.

1 CROSS-EXAMINATION
2 BY MR. BROUSSEAU:
3 Q Mr. Piontek, I want you to flip over to Tab 4 of the
4 Defendant's exhibit and it's the subcontract agreement
5 between Miller and PC Construction.
6 A Okay.
7 Q If you could, sir, if you could please flip to page,
8 it says on the bottom. It will say Miller-Contract and it
9 says number nine. Do you see that? It's a Bates stamp
10 number.
11 A Yes, I do.
12 Q Okay. And up at the top it talks about conditions of
13 final payment. And you're familiar with this provision,
14 correct?
15 A I am.
16 Q And essentially what it says is once PC gets their
17 final payment from Lander, then they're obligated to make
18 final payment to Miller. Correct?
19 A That is not correct.
20 Q It's not correct?
21 A No. There's a provision in the contract that allows
22 for us to collect damages from a subcontractor, in this
23 case, Miller.
24 Q Okay. Up until that time, and you're familiar with
25 the partial payment provisions in this contract, correct?

1 It would be the page beforehand.
2 A Yes, I am.
3 Q Okay. And partial payments are to be made to Miller
4 by PC provided that the work is sufficient and done in a
5 timely manner. Correct?
6 A Correct.
7 Q All right. At no point in time during the partial
8 payments on this project did y'all withhold payment from
9 Miller because they were not doing their work in a, not
10 progressing their work under the schedule. Correct?
11 A There were times that we withheld payment from
12 Miller. But, eventually, we had to pay them due to Lander
13 and outside forces in terms of asking us to do that.
14 Q Okay. After you received your final payment, first
15 of all, how much did y'all get from Lander on the final
16 payment?
17 A On the final payment, I don't know the exact number.
18 Around $300,000,00 dollars, I believe.
19 Q Okay. And how much were you claiming that you were
20 owed from Lander, was it $330?
21 A Yeah, $330. I think that $300,000.00 dollar number
22 broke down into, there was a balance, undisputed balance
23 of $200,000.00 and then there was a settlement for about
24 $100,000.00.
25 Q So of the $330 that you were claiming, you guys were

1 shorted apparently about $30,000.00 dollars from Lander.
2 Is that correct?
3 A About $200,000.00.
4 Q $200,000.00?
5 A That's correct.
6 Q After you received that payment from Lander, there
7 were other subs who were being owed money, correct?
8 A I don't understand your question.
9 Q Was there other subs owed money at the time that you
10 received your final payment from Lander?
11 A Yes.
12 Q Okay. And after you received that payment from
13 Lander, you paid a number of these subs, is that correct?
14 A That's correct.
15 Q In fact, Miller is the only one who hasn't been paid
16 yet, correct?
17 A To my knowledge, that's correct.
18 Q All right. Of those subs, how many did you pay the
19 full amount to?
20 A I don't, I don't know.
21 Q Okay. The majority of those subs took less than what
22 the full amount was that they were claiming, correct?
23 A I don't think that's true, no.
24 Q Sir, you agree that liquidated damages were never
25 assessed by Lander against PC Construction, right?

1 A I disagree with that.
2 Q Do you have any documents, whatsoever, that say that
3 liquidated damages were assessed by Lander University or
4 Lander Foundation against PC Construction?
5 A There was a letter that was sent by Lander that
6 indicated that they expected liquidated damages to be
7 assessed against the first phase of the project. As a
8 part of our settlement, the liquidated damages were
9 included.
10 Q My question though, sir, was were they ever actually
11 assessed? You stated that you expected them to be or
12 Lander expected them to be assessed. My question was,
13 were they actually ever assessed?
14 A I guess, technically no.
15 Q And under your contract you can only assess
16 liquidated damages against Miller if they're assessed by
17 Lander, correct?
18 A Correct.
19 Q Can you flip to Tab 20 of the Defendant's Exhibit
20 number 3. That folder you're in?
21 A Okay.
22 Q Okay. And this is your summary of damages that you
23 just went through. And if I'm not mistaken, if I
24 understood your testimony correctly with the exception of
25 the sinkhole and the two change orders for the silt

1 fencing, PC admits that it owes Miller Construction
2 $51,270.08, correct?
3 A That's incorrect.
4 Q It's not correct?
5 A No. It says that PC is owed $89,686.89.
6 Q But you admit that the contract balance owed; in
7 other words, you're subtracting the amount from your total
8 damages. You admit that the total contract that is owed
9 to Miller is $51,270.08, correct?
10 A It's the balance, but it is not owed.
11 Q Okay. You subtracted that, though, from PC's
12 damages, right?
13 A I did.
14 Q Sir, what is a, well, let me ask you this question.
15 How often were you on site?
16 A Quite a bit.
17 Q Okay. You heard testimony yesterday from Gary
18 Piontek. I assume he's your brother, correct?
19 A He is.
20 Q Okay. We heard testimony from him and Mr. Bahr
21 regarding the amount of employees that Miller had on this
22 project?
23 A Yes, we did.
24 Q All right. What is a tailgate toolbox safety meeting
25 for?

1 A I believe it's a form that subcontractors use to have
2 a weekly discussion about safety.
3 Q Okay. And this was something that PC Construction
4 required on this particular job, correct?
5 A I can't remember.
6 Q Now, do you recall whether or not PC Construction
7 received these forms on a weekly basis from the
8 subcontractors?
9 A I really don't know about that. That would be at the
10 superintendent's level.
11 Q Okay. If I showed you a form, would it refresh your
12 memory? I want to show you what I've been referring to.
13 Does that refresh your memory as to those types of forms?
14 A This tailgate form looks familiar, but I don't recall
15 seeing these forms specifically from Miller.
16 Q And there is a fax transmission there at the very
17 back, if you could flip. Do you see that?
18 A Yes, I do.
19 Q And that confirms that Miller Construction faxed it
20 to PC, correct?
21 A Yes, it does.
22 Q That form is signed by the employees of Miller, is
23 that not correct?
24 A Yes.
25 Q All right. How many?

1 A Eleven.
2 Q Okay. And that was for, what was dated on there?
3 What's the date at the very top?
4 A 2/28/09.
5 Q Okay. I want you to flip to Tab 19 of Defendant's
6 exhibit number 3 and go to the third page if you could,
7 sir.
8 A Okay.
9 Q All right. And this is a graph created by Mr. Bahr,
10 is that correct?
11 A That's correct.
12 Q All right. And you heard testimony yesterday that he
13 created this graph based upon the records of PC
14 Construction and Miller Construction, right?
15 A That's correct.
16 Q And if PC Construction had in its possession these
17 tailgate and toolbox safety meetings, these would be some
18 of the forms that he would rely upon in creating this
19 document, is that not true?
20 A I think he relied on the daily notes.
21 Q Okay. But he could have relied on this as well,
22 right, if it was in the file?
23 A I don't know if he used that or not.
24 Q If you look to the tail end of February which would
25 correspond with February 28th on this, or on this

1 particular job, how many employees does Mr. Bahr say on
2 average were there during the month of February?
3 A February of 2010?
4 Q Yes, sir. Does it appear to say 4?
5 A Yeah, that looks like a 4.
6 Q Okay. And you would agree with me that this form
7 right here, you just indicated that there was 11 that
8 signed, correct?
9 A Can I see that again?
10 Q Sure.
11 A This form says 2/28/09. Confused a little bit about
12 the date.
13 Q I may have given you the wrong one. I'm sorry, that
14 was 12/28/09 and that's not on there, but look at those
15 other ones. Those are all January. See those?
16 A Okay. January 4th, 2010, there's 5 people.
17 Q Keep going.
18 A January 19th, 2010, there is 8. And January 26,
19 2010, there is 6.
20 Q Okay. Now, if you look at the same graph that I was
21 showing you before throughout the month of January, it's
22 basically showing 3 employees there, correct?
23 A Correct.
24 Q And that wouldn't line up with those forms, right?
25 A That's correct. Although it does indicate in one

1 area here there was 4.
2 Q Take you back to the removal of the asbestos on this
3 job. That was a huge delay. I think everybody agrees
4 with that, correct?
5 A Yes.
6 Q Yeah, unexpected by all parties, right?
7 A Correct.
8 Q Let me ask you this question. Isn't it true that
9 Miller Construction went to PC asking to work on other
10 portions of the project that were not affected by the
11 asbestos to keep this on a timely basis?
12 A I don't understand the question.
13 Q Certainly. I kind of fumbled through it. I'm sorry.
14 During the asbestos removal, around that time, do you
15 recall, specifically to your knowledge, do you recall
16 Miller desiring to work on other portions of the project
17 not affected by the asbestos?
18 A I believe they did work on other areas.
19 Q Okay. In fact, there was certain areas that they
20 wanted to work on in order to keep this on a timely basis,
21 correct?
22 A I think that's true.
23 Q Okay. And according to emails, Miller was a good sub
24 on this project, correct?
25 A He wasn't a good sub at all times. I know the email

1 you're referring to or the emails you're referring to, and
2 I think that's a balance act between trying to get
3 performance versus trying not to alienate a sub.
4 Q Let me ask you about the asbestos removal. How much
5 were y'all paid for that?
6 A I do not recall.
7 Q Okay. And isn't it true that there ended up being
8 issues between PC Construction and Lander regarding
9 overcharges from PC regarding the asbestos removal?
10 A There was a change order, a corrective change order
11 issued, yes.
12 Q For approximately $300,000.00 dollars, correct?
13 A That's correct. I think Miller issued a corrective
14 change order, and we did also.
15 Q Okay. Y'all blamed Miller for that, is that not
16 right?
17 A No.
18 Q Okay.
19 MR. BROUSSEAU: Nothing further.
20 THE COURT: Redirect.
21 MR. MULLINS: Just a couple, Your Honor.
22 REDIRECT EXAMINATION
23 BY MR. MULLINS:
24 Q Mr. Piontek, PC Construction is not seeking
25 liquidated damages in this case?

1 A That is correct.
2 Q What are you seeking, are you seeking actual damages?
3 A Actual damages for delays.
4 Q All right. Let me ask you to turn to Tab 4 in the
5 notebook, your subcontract.
6 A All right.
7 Q Defendant's exhibit 3 and turn to page nine. Mr.
8 Brousseau was asking you some questions about payment to
9 Miller?
10 A Yes, he did.
11 Q And you on page nine?
12 A I'm on page nine.
13 Q All right. Look at paragraph I right before the
14 payment section.
15 A Yes.
16 Q What does it say?
17 A It says, Acceptance.
18 Q That's the title of it?
19 A That's the title.
20 Q Okay. Read that for me.
21 A It says, it is mutually agreed between the parties
22 hereto that no payment made hereunder shall be conclusive
23 evidence of the performance of this subcontractor, either
24 in whole or in part. And that no payment shall be
25 construed to be an acceptance of defective work or

1 improper materials.
2 Q All right. Turn to the page before.
3 A Page what?
4 Q The page before, page eight.
5 A All right.
6 Q And E.
7 A Yes.
8 Q Conditions of payment. And Mr. Brousseau kind of
9 asked you or told you, asked you a question about the
10 conditions of payment. And is that your determination as
11 to whether the performance is satisfactory. Do you recall
12 that?
13 A Yes, he did.
14 Q Okay. Read the last sentence of that.
15 A No such determination or payment shall relieve a
16 subcontractor from its obligation under this subcontract
17 nor stop PC Construction of Greenwood from subsequently
18 asserted some subcontractor's failure to satisfactory set
19 obligations.
20 Q Okay. All right. Thank you.
21 MR. BROUSSEAU: One question.
22 THE COURT: All right.
23 RECROSS-EXAMINATION
24 BY MR. BROUSSEAU:
25 Q There were numerous change orders on this project

1 through all kinds of subs, correct?
2 A Yes, there were.
3 Q Not just Miller, I mean a number of other subs had
4 change orders as well, right?
5 A There were a lot of change orders on the project and
6 especially from Miller.
7 Q Okay. And those all, a lot of that covers work in
8 part due to delays and stuff like that, correct?
9 A I don't know.
10 MR. MULLINS: Your Honor, I think his question is
11 going beyond my redirect.
12 MR. BROUSSEAU: He asked about change orders, Your
13 Honor. I'm getting into it.
14 MR. MULLINS: I didn't ask about change orders.
15 MR. BROUSSEAU: It's only three questions. He also
16 asked about damages in regards to that.
17 THE COURT: I think his question was, his first
18 question was, are you seeking liquidated damages and the
19 answer to that was no. Are you seeking actual damages,
20 are you seeking actual damages. That was about it. So
21 that's what I understood him to ask.
22 MR. MULLINS: That's correct.
23 MR. BROUSSEAU: Well, and this goes to that. I guess
24 I can speed it up and get to that very point. It goes to
25 that very point about the actual damages.

1 THE COURT: All right. Well, ask that. Rephrase
2 your question.
3 MR. BROUSSEAU: All right. Thank you.
4 Q Sir, change orders cover costs and expenses for PC
5 due to delays or other changes in work, correct?
6 A Yes, they do. And we're not alleging that we didn't
7 get paid for some of the delays.
8 Q Okay.
9 MR. BROUSSEAU: Nothing further.
10 THE COURT: Okay. You can step down.
11 MR. MULLINS: Your Honor, that's the conclusion of
12 our case. I would just move for admission of Defendant's
13 exhibit 3 in its entirety which include Tabs 1 through 21.
14 THE COURT: Any objection to that, Mr. Brousseau?
15 MR. BROUSSEAU: I think the only objection I had
16 previously stated was that one email in there, on the
17 basis of hearsay. But other than that, I mean, it is what
18 it is. I'm sure Your Honor is going to take it all back
19 and look through it all.
20 THE COURT: Now, I'm going to take it all in.
21 MR. BROUSSEAU: Yes, sir.
22 THE COURT: I understand your objection, it is noted.
23 (Whereupon, Defendant's Exhibit 3 was admitted into
24 evidence.)
25 MR. MULLINS: And, Your Honor, I guess, I think we

1 talked about this at the outset of the case. My
2 understanding is that Mr. Brousseau is going to put up, I
3 guess, we're calling it reply.
4 THE COURT: To the counterclaim.
5 MR. MULLINS: To the counterclaim or a defense to the
6 counterclaim. I just want to be able to put, if I need to
7 reserve the right to put up a reply witness.
8 MR. BROUSSEAU: Yes, and I agree to that.
9 THE COURT: We are going to give it both ways.
10 MR. MULLINS: Just making sure. Thank you, Your
11 Honor.
12 THE COURT: All right. Let's take a break.
13 (WHEREUPON, a short break was taken.)
14 THE COURT: All right, Mr. Brousseau.
15 MR. BROUSSEAU: Your Honor, we call Robert Sisk to
16 the stand.
17 ROBERT SISK, being
18 first duly sworn, testified as follows:
19 DIRECT EXAMINATION
20 BY MR. BROUSSEAU:
21 Q Can you state your name.
22 A Robert Sisk.
23 Q Now, Robert, you go by Buck, correct?
24 A Yes, sir.
25 Q What do you do for a living?

1 A I am a superintendent for Miller's Construction.
2 Q And how long have you been doing that?
3 A Eleven, twelve years.
4 Q Did you work in the construction industry before you
5 went to Miller's?
6 A Yes sir, I have always been in construction.
7 Q All right. And when did you start, how old were you?
8 A Nineteen years old.
9 Q How old are you now?
10 A 41.
11 Q What was your role on the Lander project, Mr. Sisk?
12 A I was the superintendent for Miller's.
13 Q How often were you on the site?
14 A Daily.
15 Q And how long did this job last?
16 A Right at two years.
17 Q Now, it has been testified to earlier in this case
18 that there was, on average, about three or four employees
19 on this job. You were on this project every single day?
20 A Yes, sir.
21 Q How many employees on average did Miller's
22 Construction have on this particular project?
23 A On average we run between six to eleven employees.
24 It depended on the spec of the work we was doing.
25 Q And so if you had lessor employees, why would that be

1 the case?
2 A The lessor employees would be when we would be fine
3 grading forms and stuff, we didn't need that many guys to
4 fine grade the forms.
5 Q And if you had more what kind of stuff were you guys
6 working on?
7 A The more guys we had would be more back filing of the
8 walls and the grading of the ball fields and stuff.
9 Q You heard me talk to or ask Mr. Piontek about these
10 tailgate tool box safety meetings?
11 A Yes, sir.
12 Q Were you present for these meetings?
13 A Yes, sir.
14 Q And what was the purpose of these meetings?
15 A Just to give the guys a general safety guideline to
16 go by.
17 Q I am going to show you--
18 MR. MULLINS: Your Honor, I am going to object to
19 this, it is okay him using it to refresh somebody's
20 recollection. But those have not been produced so I am
21 going to object to those.
22 MR. BROUSSEAU: Your Honor, it is in reply testimony,
23 the expert yesterday said they had relied on the documents
24 that were provided from PC Construction and Miller
25 Construction in regards to how many employees on that

1 graft that has been entered into evidence.
2 MR. MULLINS: I have never seen those documents in my
3 life.
4 THE COURT: Where are these from?
5 MR. MULLINS: I would like to have a copy of it at
6 least. I don't think it is appropriate, we object to it,
7 it hasn't been identified, hadn't been produced to me,
8 never seen it before.
9 MR. BROUSSEAU: Of course, we also didn't realize
10 that they were only going to testify that there was two to
11 three employees on the job site. Mr. Piontek testified
12 that these were forms that were often used in this. I
13 just want to show one example, that is all.
14 THE COURT: Let's make a copy of that. Y'all
15 produced so much, how did that not get produced. Y'all
16 have relayed to me that y'all have exchanged tons of
17 documents. How did that get left out.
18 MR. MULLINS: I have went and looked at the file, I
19 don't recall ever seeing it before.
20 THE COURT: Give that copy of Mr. Mullins. We will
21 mark that as Court's 4.
22 (Whereupon, Court's Exhibit 4 was marked for
23 identification only.)
24 THE COURT: I hear you further but if it hasn't been
25 produced I don't know that it comes in. But if he needs

1 to help refresh your recollection from memory the
2 testimony will be consistent with what the testimony is.
3 That is kind of how I think it should go. I will hear you
4 further if you want to argue further.
5 MR. BROUSSEAU: Your Honor, the file was really big,
6 I mean Mr. Mullins came by my office, like he talked about
7 before, not to mention the fact that he has even, they
8 testified that they admitted that they received these,
9 that the confirmation, fax confirmation.
10 MR. MULLINS: Your Honor, he acknowledged there was a
11 fax confirmation on the document that he showed us, that
12 is about it. Keep it moving, I think he can testify to
13 it.
14 THE COURT: He can testify to it but there is no
15 reason to put it into evidence.
16 Q Mr. Sisk, does that look like tailgate toolbox safety
17 form that Mr. Piontek was previously testifying to during
18 cross?
19 A Yes, sir.
20 Q All right, and what is the date on that one, sir?
21 A 2/8 of 2010.
22 Q All right. And how many employees signed that form?
23 A Nine.
24 Q Now, does that typically reflect the amount of
25 employees that were on site for that week?

1 A Yes sir, give or take one or two.
2 Q Now, if you could, there should be, look at, are you
3 there?
4 A Yes, sir.
5 Q Look at the third page that looks like a graft that
6 has got really thin lines on it, do you see that?
7 A Yes, sir.
8 Q And what this is, there was testimony earlier that
9 this is what--
10 MR. MULLINS: Your Honor, I am going to object to
11 leading.
12 THE COURT: Okay. Rephrase your question.
13 MR. BROUSSEAU: Yes, sir.
14 Q Let me ask you this. On average was there typically
15 three to four employees on this job?
16 A No, sir.
17 Q Mr. Sisk, if you could, look to Tab 16, and if it
18 helps Tab 25 corresponds to Tab 16. First of all, let me
19 ask you this, what kind of problems did y'all run into on
20 this particular job, the Lander job?
21 A We run into footers that were up under asphalt we
22 didn't know about, concrete pipe that wasn't located, it
23 was marked on the demolition drawings. We run into
24 asbestos, trash, debris.
25 Q Well, if you look to the second page of Tab 16, the

1 very last one, it says that there was a 79 day delay on
2 the final grading in the tennis court area. What would
3 have been the reason for that delay?
4 A Well, when we run into the asbestos it shut the job
5 down. I tried to get them to start at the tennis courts
6 and grade everything across. I was told they couldn't do
7 that because they didn't know who was going to do the
8 paving, for one. And the other would be that the dust
9 would get on the asphalt and stain the asphalt.
10 Q So, if the tennis courts were delayed because of
11 something Miller did or was it because of something that
12 somebody else did?
13 A It was because of Gary with PC Construction.
14 Q All right. Describe his ability to manage this
15 project, if you could.
16 A I mean, Gary was there, he wasn't at the beginning.
17 He knowed more than the superintendent they had on the job
18 site.
19 Q And who was their superintendent?
20 A Chris Piontek.
21 Q And when we are talking about scheduling different
22 contractors on different areas what types of problems
23 would you run into with either Chris or Gary?
24 A Well, it was just, they would schedule people to go
25 in and do their work and then we hadn't even gotten ours

1 in to subgrade to.
2 Q And you mentioned before during the asbestos removal,
3 what types of suggestions did you make in order to move
4 this project along a little bit quicker?
5 A To start up at the far corner of the tennis courts.
6 I think it is the Northeast corner of the job and come
7 completely across while the asbestos was being removed, to
8 back up and come all the way across the job so everything
9 would be to that point.
10 Q So in other words, what were you hoping to accomplish
11 by doing that work while the asbestos removal was going
12 on?
13 A To be finished with that side.
14 Q And when did the, that side, and if you could, when
15 you say that side, look at Court's exhibit number 3 here.
16 Can you see it?
17 A Yes, sir.
18 Q When you say that side what are you referring to?
19 A The Northeast corner up here where the tennis courts
20 are.
21 Q Down here?
22 A Come on down, yes sir, right there.
23 Q And so when were the tennis courts actually finished
24 in relation to the asbestos removal?
25 A It was after the asbestos removal.

1 Q And in your, could they had been finished beforehand?
2 A Yes, sir.
3 Q I want you to flip to Tab 6, please, sir. Are you
4 there?
5 A Yes, sir.
6 Q All right. What are those, are you familiar with
7 these two documents?
8 A Yes, sir.
9 Q And what were these invoices for, do you remember
10 that?
11 A One was for the damaged poles against the wellness
12 work, where they had to take down the silt fence to come
13 through and out with the trucks. And the other one was
14 around the boxes and all where they kept turning the silt
15 fence down around the boxes.
16 Q And do you recall having a discussion with Gary
17 Piontek about these particular change orders?
18 A Yes, sir.
19 Q And what was that about?
20 A Gary wanted me to repair the silt fence and I told
21 him it would be an additional cost, it would be a change
22 order. And he told me to go ahead with it and it would be
23 done.
24 Q So, you didn't get a written acceptance but he told
25 you to go ahead and do it?

1 A Yes, sir.
2 Q What about the other, you mentioned the silt fence
3 but there was also something else about, what was the
4 other change order about?
5 A This was also about, the silt fence around the hitch
6 basin.
7 Q On both of these you got the okay from Gary to go
8 forward with it?
9 A Yes, sir.
10 Q After you told him it would be a change order?
11 A Yes, sir.
12 Q What was your level of cooperation with PC
13 Construction on this project?
14 A I was at one-hundred percent with them, I mean I had
15 done everything I could to do what I had to do to help get
16 done.
17 Q Did you at any point and time feel like you crew was
18 under manned for any type of tasks that were going on?
19 A No, sir.
20 Q In regards to, what other type of delays besides the
21 asbestos did Miller Construction run into?
22 A I mean, we had footers, we had to wait on change
23 orders to be approved, rain delays, snow. I mean if it
24 rains one day then, if it rains pretty much most of the
25 day you are out, I mean they put you out of work two days.

1 Q How often do you recall working on Saturdays on this
2 project?
3 A There was quite a few Saturdays, I don't recall exact
4 number of days. I know we worked a lot of Saturdays.
5 Q Was it more than four?
6 A Yes, sir.
7 Q Please answer any questions that Mr. Mullins or the
8 Court has.
9 CROSS-EXAMINATION
10 BY MR. MULLINS:
11 Q Mr. Sisk, you were the superintendent on the job?
12 A Yes, sir.
13 Q You were kind of, you were the main, you said you
14 were there every day?
15 A Yes, sir.
16 Q You were the main guy?
17 A Yes, sir.
18 Q When you say every day, you mean every day that
19 Miller was there, right?
20 A I was there five days a week. When it rained I had
21 to drive down to verify that it was too wet.
22 Q Is it your testimony that you were there every day
23 with the exception of the days that it was raining?
24 A Yes sir, I lost vacation time during this job.
25 Q Okay. So, if your daily's reflect that you weren't

1 there, you are saying the daily's aren't correct?
2 A As far as I know, I drove down every day. Whether I
3 stayed, if I didn't stay I didn't write it down. But even
4 when it rained I drove to the job site.
5 Q Every calendar day that Miller was on this job, if it
6 was not raining you were at the site. That is your
7 testimony?
8 A Yes, sir.
9 Q Do you understand the contract provisions, is that
10 part of your work or is that Mr. Miller's?
11 A No sir, I don't deal with the contracts.
12 Q So you don't know what the contract may be required
13 with regards to change orders?
14 A No sir, I tell, if we come into a problem I call Mike
15 and give Mike, tell Mike the problem. He normally issues
16 the change orders. I told Gary, you know, I went to Gary
17 before with change orders and he told me to go ahead and
18 do it.
19 Q All right. You are familiar with the schedules
20 though, right?
21 A Yes, sir.
22 Q And you would expect change order, there were, after
23 the asbestos there was an adjustment to the schedule,
24 wasn't it?
25 A Yes, sir.

1 Q You would expect any other change order, if it
2 affected time it ought, that should have been addressed in
3 the change order and the schedule should have been
4 adjusted?
5 A Yes, sir.
6 Q You mentioned the tennis court. Mr. Brousseau had
7 you look at the tennis court delay. You do agree that
8 the, and that one activity that we were looking at, the
9 fine grading for the tennis courts. I think you had
10 mentioned that the asbestos had impacted that. You do
11 admit that that activity didn't even start until after the
12 asbestos. Do you agree with that?
13 A Well, the fine grading of it didn't. The road
14 grading was going on. But when you get to a certain point
15 that you ain't got no where to put the dirt then you have
16 to stop.
17 Q Right. Well, flip to Tab 16 if you will because I
18 just want to make sure we are clear. The second page
19 there, I think he had directed your attention to the
20 bottom of that page where the 79 day delay.
21 A Yes, sir.
22 Q That is for the fine grading, right, final grading.
23 That activity was for the final grading?
24 A I would say it was, yes sir, for the final grading.
25 Q And that activity would have begun after the

1 asbestos, correct?
2 A Yes, sir.
3 Q Per the schedule it was scheduled to start after--
4 A --yes, sir.
5 Q You did say you are familiar with the schedule?
6 A Yes, sir.
7 Q That is part of your job to, you communicated with
8 Mr. Piontek about the scheduling during the project?
9 A Yes, sir.
10 Q And you understood that the schedule, in the schedule
11 there are durations for certain activities, right?
12 A Yes, sir.
13 Q And you agree with me that Miller did not meet all of
14 the durations that are set forth in the schedule, you
15 agree with that, don't you?
16 A There was some jobs, yeah, there was some we were
17 late on.
18 Q Okay. All right. Thank you.
19 REDIRECT EXAMINATION
20 BY MR. BROUSSEAU:
21 Q Mr. Sisk, had PC taken your advice on doing the
22 tennis courts earlier, would there had been a 79 day delay
23 on the bottom grade?
24 A No, sir.
25 Q Nothing further.

1 THE COURT: You can step down.
2 MR. BROUSSEAU: We call Jeff Beaver to the stand.
3 JEFF BEAVER, being
4 first duly sworn, testified as follows:
5 DIRECT EXAMINATION
6 BY MR. BROUSSEAU:
7 Q Mr. Beaver, can you state your name for the record,
8 please?
9 A My full name is Jeffrey Scott Beaver, B-E-A-V-E-R.
10 Q Mr. Beaver, what do you do for a living, sir?
11 A I am an employee of Lander University, the Director
12 of Engineering Services for the University.
13 Q How long have you been in that position, sir?
14 A Nine and one-half years.
15 Q Mr. Beaver, are you familiar with the construction
16 project known as the Jeff May Sports Complex?
17 A Yes, I am.
18 Q What was your role on this project?
19 A The project was actually a Lander Foundation project
20 but the State insisted, because we were using public funds
21 that the University would oversee the construction and the
22 proper procurement for the project.
23 Q At the very start of this project what was your role?
24 A I was to oversee the project from the beginning,
25 through the selection of the architects and engineering

1 firm, to the progression of the design documents, to the
2 bidding for a contractor, and to follow the project
3 through to completion.
4 Q How often were you on site?
5 A I was on site probably three days a week.
6 Q And were you familiar of how this job was
7 progressing?
8 A I was, yes.
9 Q What were some of the issues that these outfits ran
10 into on this project?
11 A The construction actually started in January. And
12 the project was broken down into, big picture, the project
13 was broken into two phases of this construction. One was
14 the development and the completion of the soccer, phase
15 one. And then the remaining portion of the site,
16 excluding the field house, was going to be phase two. And
17 the initial project started with the rough grading and the
18 smooth grading for the soccer field, the implementation of
19 the drains, the irrigation and the sodding. And I want to
20 say that went flawlessly. And I believe it was in March
21 of that same year that upon grading, which is now the
22 softball field and the parking lot, Miller Construction
23 made it known that they had found some suspicious building
24 debris and it required some professionals to come in to
25 analyze the source of the debris.

1 Q Now, so up until, up until the asbestos had been
2 found, this project was going flawlessly, was that your
3 testimony?
4 A That is correct.
5 Q What, how did the discovery of this asbestos, how did
6 that delay this project, sir?
7 A Miller had come to the construction meeting,
8 notifying everybody they had found the debris. Relying on
9 his past experience with the like situation he recommended
10 we get DHEC personnel out there as soon as we can, that he
11 was not going to proceed with any digging up or disturbing
12 of that field until it was properly analyzed. So we
13 brought in the DHEC person and being optimistic we thought
14 this was perhaps a small little truck load of stuff that
15 was off loaded years ago. And we roped off a fifty by
16 fifty foot section and we excavated that out until we
17 could find, hopefully, the end of the debris pile.
18 However, upon digging here and digging this way we found,
19 Easterly we had found the edge. But it appeared to us
20 that the debris became more, became deeper and more
21 widespread if we went North or if we went South, and if we
22 proceeded West towards which is now the parking lot.
23 Q Now, eventually, let me ask you this. How much
24 construction was going on while the asbestos was being
25 removed?

1 A The soccer field was graded and irrigation was going
2 in and they had started the construction of the tiered
3 concrete spectator seating areas.
4 Q But nothing else was going on like at the tennis
5 courts or anything like that?
6 A Yes, there was rough grading going on over there,
7 like the previous witness said, the Northern side we were
8 trying to get all of that finished and moved towards the
9 baseball field, towards the field of the debris.
10 Q Now, after the asbestos had been removed what types
11 of delays hit the project after that?
12 A The actual excavation of the debris field lasted
13 about a week and a half. And at that time the pricing
14 that we had been given, we were reaching one million
15 dollars worth of excavation cost, proper licensing over
16 site cost, transportation cost and land field cost. And
17 after about a week and a half we stopped excavation right
18 then. And we said, we engaged in a letter writing
19 campaign with the DHEC people in Columbia, the Bureau of
20 Air and Water, and there was an extensive back and forth
21 with them for months. And finally DHEC approached us and
22 said, that after receiving sufficient push back from
23 Lander University that they thought our case required a
24 second opinion. And that they had initially wanted us to
25 do was continue to dig, continue to excavate and continue

1 to landfill at our cost. Well, it became prohibited
2 because we didn't have that kind of money to continue to
3 do that, unknown to the size of the field. So we stopped
4 excavation, DHEC, again the letter rating campaign went on
5 for, let's say, six months. Finally they came to Lander
6 and said, our case is unique, we have had sufficient push
7 back from Lander. They are going to review our case. And
8 what they decided to do was, implement some procedures,
9 some ground penetrating radar to determine the edges of
10 this debris field, have that recorded by the County in a
11 building plot, have a statement from Lander saying that we
12 will never build a dormitory on that project. We were
13 allowed to keep all known debris field, that we found a
14 ground penetrating radar in place. We had to cover that
15 with a two foot thickness of clean field dirt and then
16 continue to construct the top of that.
17 Q And after that was all completed what other types of
18 delays did you guys have on this project, after the
19 asbestos, take the asbestos out of the equation.
20 Obviously you had a new job schedule to put in place at
21 that time?
22 A We had a new schedule. I have to say though, in our
23 opinion by the time the schedule was proposed to Lander it
24 was already out of date. There was a large accumulation
25 of dirt that sat on the baseball field, that supposedly

1 was slowing that entity down, that venue. And we had
2 permission from DHEC that once we had excavated what we
3 had done, we were allowed to take that pile of dirt, put
4 it in the hole we had dug where we excavated and continued
5 to finish our project.
6 Q Now, you were out on this project, you said three to
7 four times a week?
8 A Yes, sir. I had, this was not my only focus. I had
9 a University to run. So we had people on the job every
10 day and I was there two or three days a week for over site
11 and during the construction weeks.
12 Q How often would you see Miller out there when you
13 were out there?
14 A Every day I was there they were there, or they had
15 come and it wad determined the weather was such a, was
16 prohibited to work and they went home.
17 Q And as best as you can recall how many employees did
18 they typically have out there?
19 A Well, again, depending on the job of the day, you are
20 not going to staff a four man job with ten people standing
21 around watching. So, I didn't get involved with their
22 manning schedule, that was his responsibility. But I have
23 to say, I am not aware where they were undermanned that
24 prohibited progress on the project.
25 Q Do you believe that Miller caused any delays on this

1 project?
2 MR. MULLINS: Your Honor, I am going to object to
3 that. I don't think he is in a position to testify as to
4 whether--
5 THE COURT: Rephrase that question.
6 MR. BROUSSEAU: I am going to rephrase it, I am
7 sorry.
8 THE COURT: I sustain, it was leading.
9 Q What types of delays do you believe Miller caused,
10 based upon your experience in your role on this project?
11 A As part of the construction management and the way
12 the State writes these projects, the University is
13 required to go out on a State approved list and hire what
14 they call third party independent inspectors for both
15 general construction inspections as well as special
16 inspections. Anything that was graded that would be a
17 loan bearing aspect for concrete or whatever would not be
18 allowed to construct on until the grading was done, proper
19 compaction was performed and that was tested. So, if an
20 area was graded on Monday and the inspector couldn't get
21 there until Tuesday to confirm proper compaction then no
22 work proceeded on that particular spot until the testing
23 was complete which then they got a green light that
24 afternoon or the next day. So, I am sure those
25 situations, in the normal course of the inspectors out on

1 site every minute of every day, so at times you do have to
2 stop and get the inspector there. But everybody bears the
3 responsibility of notifying the inspector when you think
4 you need them and then depending on how that person is
5 assigned to get there as quickly as possible.
6 Q Lander and PC Construction ended up having a dispute
7 over the final payment, correct?
8 A That is correct.
9 Q And what was the nature of that dispute, do you
10 recall?
11 A Well, the nature of the dispute was actually the
12 completion time and to, before I allowed that to get to
13 that point we had a special construction meeting set up
14 where I am responsible for the University. We, through
15 the State Engineer's office, we have a project manager on
16 staff, her name is Margaret Jordan. We set up a
17 construction meeting to where Margaret Jordan would be
18 there to see the completion of the project, compare that
19 against our schedule and try to help the contractor put on
20 track the project to a final completion. And we had that
21 meeting, I remember that meeting well because I sat there
22 and I listened to such a rosy picture of this project
23 being painted and everything was in order, everything
24 being taken care of. And the only reason we had this
25 meeting because we had had, we had had enough of the

1 frustration, we had enough of delays, we did not trust
2 what PC said as far as their progress and/or their intent,
3 and/or their completion. And I brought Margaret to hear
4 it and see it for herself. And I sat at that meeting and
5 listened to such a rosy picture of how everything on the
6 job is just wonderful. And I got mad and I stood up and I
7 told them just what I thought of the situation, that this
8 is, what they have just told Margaret does not depict the
9 state and I went through venue by venue how things are not
10 complete. And that meeting Margaret said, as we analyze
11 the whole history of the excavation and as before, if
12 soccer was the first venue to be scheduled to be
13 completed, that is phase one, why at this point and time
14 was it not complete. Looking across the site, if
15 excavation is over here in the Southwest corner, why is
16 the Northeast corner where the tennis courts are not
17 complete and disarray. And we were told basically, don't
18 worry about the tennis courts, they could have been done a
19 year ago, we didn't want dust to settle on the new courts.
20 And it was things like that that just made us get more
21 frustrated.
22 Q And how much of that was due to Miller's actions?
23 A I can't contribute any of those delays to Miller's
24 actions. As a matter of fact, if came known throughout
25 the site that PC could not make a decision without first

1 consulting Buck who was just here representing Miller.
2 Q Ultimately after this project was ended PC requested
3 final payment from Lander, correct?
4 A Well, there are things that happened before then that
5 required us to go back to the contract documents and to
6 educate them on the state system and to interject some
7 sense of fairness. Because it became obvious, I was
8 beginning to get overrun with phone calls and emails from
9 contractors on the job or subcontractors, who were seeking
10 payment. And they would approach me and I would get a
11 message or a phone call or email to the extent that they
12 were wondering when PC, when Lander University was going
13 to pay the general contractor because it was only through
14 once we paid PC could they then get paid. That was the
15 story they were being told. And I began to tell people
16 that we had paid up to, it was the responsibility of GC to
17 pay the subcontractors. I could make their complaint
18 known but I could not pay them directly.
19 Q Did you ever receive any of those types of complaints
20 from Miller?
21 A Yes, I did.
22 Q How often?
23 A After a certain, again, from the University aspect I
24 don't, we pay the GC. I don't ever see how they pay their
25 subcontractors. This project required a third party

1 financing called Regions Bank. And on their pay
2 application Regions, through their construction
3 methodology, wanted a statement from the general
4 contractor that all subs had been paid for the latest pay
5 application before they would pay in again which is good
6 common sense. And I think it became known through then
7 that subcontractors were not getting paid. And Mr. Miller
8 approached me several times about, I have just talked to
9 Randy, I have just talked to Gary. They tell me that
10 Lander is not paying but once Lander does pay they will be
11 glad to pay Miller. And we sat down one afternoon and he
12 started showing me pay applications that he had submitted
13 and I took the liberty of looking through those and
14 something startling caught my eye. Based on the, related
15 to the excavation of the asbestos.
16 Q What was that?
17 A Again, going back, this deposit of asbestos material
18 was just a finite quantity. We were given a price, I
19 can't remember, if is $104 or $107.00 dollars a ton to
20 have it excavated, transported, landfilled, that was our
21 cost per ton. We had inquired multiple times could we
22 have a breakdown of that cost so we could make it known to
23 the administration how this cost was derived and trying to
24 forecast our total cost if we continue to dig. I was
25 never given an explanation of that. But a review of the

1 pay applications Mr. Miller provided me, just casually
2 flipping pages I saw where excavation cost was listed that
3 something like $87.00 dollars a ton. And I thought--
4 MR. MULLINS: Your Honor, I am going to object to
5 this testimony and this line of questioning based on
6 relevancy. It has nothing to do with the issue of
7 Miller's performance or the delay claims that have been
8 asserted by PC. So, I just don't think it is relevant.
9 MR. BROUSSEAU: I think it goes to credibility of PC.
10 THE COURT: I understand your objection. As
11 addressing the credibility issue, ask and answer your
12 question but I don't want to stick on it too long.
13 Q Mr. Beaver, you were just talking about the
14 differences and the prices that you were paying.
15 Ultimately how much of a difference did that end up being?
16 A Once we calculated the lines of debris, excavated the
17 land field, we came up with a sum that appeared that we
18 had been purposely overcharged $300,000.00 dollars.
19 Q Okay. Mr. Beaver, ultimately Lander and PC
20 Construction got into a dispute over the final payment,
21 right?
22 A There was, yes.
23 Q And what was, what was PC Construction asking for in
24 regards to the final payment from Lander?
25 A As I can recall there was roughly $200,000.00 dollars

1 left on retainers that was due to PC Construction. There
2 was a small invoice from a subcontractor that did not get
3 paid previously to that because there was a lien issue
4 that they were unable to clear. So we held that to a
5 $1,000.00 dollars back. And then I believe they were
6 looking at in the neighborhood of 430 days of extended
7 conditions with the cost somewhere around $1,000.00
8 dollars per day for each day of extended conditions.
9 Q And how much did Lander end up paying PC in regards
10 to the extended general conditions?
11 A I was not involved in those negotiations. As a
12 matter of fact, I think it got turned over to the lawyer
13 representing the foundation. However, I was on the
14 periphery trying to stay in touch and they would keep me
15 informed. I wanted to say the total, the final total
16 payment to include, $200,000.00 dollar retainage,
17 $12,000.00 for previous subcontractor. I think it was
18 like $120,000.00 dollars in extended conditions awarded PC
19 Construction.
20 Q And from a daily basis how much would that break out
21 to on how much they were requesting on a daily basis?
22 A I think it was in the neighborhood of $950.00 to
23 $1,000.00 dollars per day.
24 Q Was there any kind of liquidated damages ever
25 asserted against PC?

1 A Originally the intent was to make PC Construction
2 aware that there were damages associated with phase one
3 which was the soccer venue for being late. There was
4 damages on phase two for being late. And I believe I was
5 tasked in writing a letter in early June of that year and
6 I think that all damages that we could have applied was in
7 the neighborhood of $69,000.00 dollars. When the
8 settlement was finalized I was told that Lander University
9 and the Foundation took the position that we would not
10 apply any damages to the general contractor with the
11 intent that they would never be penalized by Lander and
12 that they would be at full responsibility to pay their
13 sub's in full. That was our intent of not pursuing the
14 $69,000.00 dollars in liquidated damages.
15 Q And based upon your experience of being out of the
16 field and your overall experience on this particular
17 project, describe if you could for the Court, what type of
18 subcontractor Miller Construction was?
19 A I thought he came across as very professional, he had
20 the best interest of the agency, the owner in mind. His
21 frustration, our frustration led us to the capability of
22 the PC team to actually manage the problem, I mean the
23 project. Frustration levels were high on the agency's
24 part because we questioned the ability of the staff of PC
25 to actually adequately manage this project and see it to

1 completion. We personally questioned the capability of
2 each person assigned to PC on the job. It grew from
3 Randy's son, Chris, being the supervisor who I don't think
4 had any prior, I am not aware of any part of construction
5 knowledge. When things started falling apart rather
6 rapidly he brought in brother, Gary. Gary became the
7 supervisor. When it became that Lander University assumed
8 the role as quality inspector on this job they then
9 brought in another brother to be the quality manager. And
10 shortly after that a decree was set across the job that
11 said, there is not a subcontractor on this job allowed by
12 the decree passed by PC to talk to the owner. So they
13 shut us down, tried to talk to the subcontractors because
14 we were forever seeing quality issues that severely
15 concerned us.
16 Q Would you please answer any questions that Mr.
17 Mullins or the Court may have for you.
18 CROSS-EXAMINATION
19 BY MR. MULLINS:
20 Q Mr. Beaver, you are the Director of Engineering
21 Services, is that right?
22 A That is correct.
23 Q And I think you said it, I think it is apparent from
24 your testimony, but there was a point and time where you
25 said you got mad, right.

1 A At a particular meeting that I was wanting my OSE,
2 Office State Engineer's representative to see the project,
3 to compare the schedules and to see the problems that lay
4 ahead of us, thus that is why I felt warranted to bring
5 her into a construction meeting. Up to that point and
6 time she had not attended.
7 Q But you were upset, weren't you?
8 A At that meeting, as I testified, things that I heard
9 did not accurately portray the state of our project.
10 Q You were upset about the status of the project,
11 weren't you?
12 A What I relayed to them was, I was not happy with what
13 they said, it did not depict the truth.
14 Q You were not happy with the project, with the
15 progress of the job at that time, were you?
16 A I was not happy with the progress of the job, that is
17 why I felt warranted to schedule the meeting.
18 Q And you did write a letter, didn't you, you talked
19 about that. You wrote a letter?
20 A Sir, I had to write several letters. Some were
21 received by PC, some were refused by the post office to be
22 picked up.
23 Q You wrote a letter June 11, 2012, didn't you, to PC
24 Construction?
25 A I am not sure of that date, I would have to see the

1 letter.
2 Q It was in June, you testified on direct?
3 A I had to write a letter summarizing the liquidated
4 damages, some of the issues that PC had alleged that
5 Lander was responsible for. And I had to write a letter
6 basically bringing everybody up to speed on the progress
7 of the project through the eyes of Lander University.
8 Q Right. You wrote a letter indicated that the
9 University was going to access liquidated damages, didn't
10 that letter say that?
11 A I said there was $69,000.00 dollars of damages that
12 could be applied. Now, I don't know what sentence you are
13 looking at but that would be the intent of the letter. It
14 has been several years ago.
15 Q With each, let's see if this refreshes your
16 recollection. This is, and you have underlined it. Look
17 at the underline, is that the letter that you wrote?
18 A I was stating for then--
19 Q If you could read the sentence for us.
20 A Starting where.
21 Q The underlined sentence.
22 A Therefore, the liquidated damages for phase one
23 substantial completion is 69 days, calculated at $300.00
24 dollars per day equals $34,500.00 dollars.
25 Q Turn the page. Is there another underline?

1 A I think I took the, I think I wrote the letter to
2 Randy--
3 Q Is there an underline?
4 A Yes, there is an underline text throughout the
5 letter.
6 Q What does that underlined sentence say?
7 A This next underlined sentence is, therefore, 170 days
8 X $100.00 dollars a day equals $17,000.00 dollars.
9 Q So you were, this letter was assessing liquidated
10 damages, wasn't it?
11 A This letter was notifying of the ability for Lander
12 to access the damages based under construction time table
13 and the contract.
14 Q Yes or no, was this letter reflect that Lander was
15 accessing liquidated damages at this point and time or
16 not?
17 MR. BROUSSEAU: Your Honor, it has been asked and
18 answered, he says the ability to access.
19 THE COURT: Let me hear it one more time.
20 Q I was just asking, yes or no, did this letter reflect
21 at this time on June 11th of 2012 that Lander was
22 accessing liquidated damages?
23 A Your Honor, I would like an explanation to an answer
24 there, if I may.
25 THE COURT: Just answer his question. But ask it

1 again. I think it has been asked several times.
2 Q Yes or no, does this letter reflect on June 11th of
3 2012--
4 A --the intent that we had--
5 COURT REPORTER: Please don't talk over each other.
6 A The letter was attempting to communicate the
7 damages--
8 MR. MULLINS: Your Honor, I would ask you to instruct
9 the witness to only answer my questions, I think that will
10 make it easier and to allow me to finish my questions.
11 THE COURT: Okay. Fair enough. Please answer his
12 questions.
13 Q And, I think you testified that, this letter, you
14 were offering a compromise, weren't you. You did indicate
15 later that you may not access some of the liquidated
16 damages but you were, you wanted to access the soccer
17 field, do you recall that?
18 A It has been several years. I don't know the exact
19 content of all paragraphs or sentences but I think at the
20 time the mindset was, let's forego this and let's move on
21 with the project in the best interest of the University.
22 Q But at the end of the letter you wanted to propose a
23 solution that would involve the assessment of liquidated
24 damages for the soccer field and move on?
25 A I don't make those decisions. I follow the advice of

1 my administration. That was the intent of the
2 Administration, that is what I communicated.
3 Q Look at the middle of the page there, there is a
4 discussion of the summary of the liquidated damages and
5 then at the end you indicate that you would forego the
6 phase two and step two liquidated damages but you believed
7 that it was appropriate to access liquidated damages for
8 the soccer venue, right?
9 A I believe at this point and time that was the intent
10 of the University to do so.
11 Q All right. And then you talked about subsequent to
12 that, there was actually a claim field for, actually it
13 was before that, but a claim that was filed by PC relating
14 to delay, correct, and for a contract balance, right?
15 A There was substantial discussion outside of my
16 observance between the architect and with PC Construction.
17 Q All right. But at that time based on your letter you
18 believed that there needed to be a credit due for damages,
19 in looking at final payment. And ultimately it didn't
20 turn out that way, did it. It actually, Lander, somebody
21 took it out of your hands and they ended up paying PC
22 $100,000.00 dollars for delay, correct?
23 A As I said, the negotiations with the final settlement
24 was outside of my realm of authority.
25 Q And that didn't make you very happy, I imagine, did

1 it?
2 A A lot of things in the course of my job don't make me
3 happy, I don't run the University. I am an employee
4 there, I do as I am told by the administration who are my
5 authorities, my boss.
6 Q Right. Your Honor, I am going to ask it again, just
7 ask you to answer the question. The fact that it was
8 taken out of your hands and Lander ended up paying PC some
9 portion of their claim did not make you very happy, did
10 it?
11 A I was not happy with the settlement.
12 Q Okay. All right. You talked about, sitting here
13 today you are not prepared to discus the specifics of
14 Miller's obligations under its schedule, are you?
15 A I don't understand the question.
16 Q Are you aware that there was a schedule that Miller
17 was required to follow in connection with its subcontract
18 with PC?
19 A I do not get involved between the subcontractor and
20 the GC's agreements or contracts or whatever they do
21 privately, I do not have access to that.
22 Q All right. So, you really aren't in a position to
23 state whether Miller complied with its schedule or not,
24 are you?
25 A I am in a position to measure the progress of the

1 project based on the contract document and I refer to the
2 general contractor who we have contracted with. The
3 University does not privately contract with each sub.
4 Q So, my question was, you are not in a position to
5 state whether Miller complied with its schedule, its
6 scheduled obligations that it had with PC. You are not in
7 a position to testify to that?
8 A I can only measure the progress of the overall
9 project and the phases dictated in the contract documents.
10 Q Fair enough. Did Lander ever ask Miller to do some
11 work when they were at the site, where they asked to do
12 some work that was outside of this scope on some other
13 pieces of University, other areas to the University?
14 A Unrelated to this project?
15 Q Yes.
16 A There may have been a storm water issue behind Old
17 Main which may have required, was to get three quotes, I
18 believe. But other than that, I have a maintenance
19 manager, if there is a remedial repair somewhere I don't
20 get involved in those daily.
21 Q So you are not sure?
22 A I can't recall any specifics.
23 Q In your position as a Director of Engineering
24 Services and you have been doing this for nine years, you
25 said?

1 A I have been with the University nine years, I
2 graduated with an Engineering Degree in 1982, 1990, excuse
3 me.
4 Q So you are familiar with what the, in most, many
5 contracts, the change order process, correct?
6 A Yes, I am aware of what a change order is.
7 Q And you agree that if a contractor or subcontractor
8 has a change situation with the owner in the case of a
9 general contractor or with a general contractor in the
10 case of the subcontractor, that they have an opportunity
11 to present a proposal relating to that change, correct?
12 A Yes, I believe that PC, I think they refer to them as
13 potential changeovers.
14 Q Correct. And in the industry that is an opportunity
15 for the contractor to present what the price for
16 performing that extra contractual work, correct?
17 A Yes, it would provide the agency the cost of doing
18 what, above and beyond the scope of the project, that is
19 extra.
20 Q And also the impact on the schedule, how many days,
21 if there is going to be an add--
22 A If there were delays associated with the work,
23 remediation or weather, yes.
24 Q Right. And if you don't ask for those days the
25 expectation is you are not getting those days, right? In

1 your position, if a contractor is submitted a PCO to you,
2 if they don't ask days they don't get days, right?
3 A We have been very, we have been very understanding of
4 cases where things have been omitted from a change order.
5 I can refer you to incidents where I actually contacted PC
6 because they left off their ten or fifteen percent that I
7 reminded Randy and Gary about. So I review the documents,
8 yes.
9 Q Well, okay. And the standard change order situation,
10 the PCO is the opportunity to request an adjustment to the
11 schedule, is that a fair statement?
12 A That would be the opportunity to do so, yes.
13 Q Thank you. That is all I have. We would move to
14 admit that. We can mark that as a Court's exhibit.
15 THE COURT: We will move it in. Defendant's 4
16 without objection.
17 (Whereupon, Defendant Exhibit 4 was admitted into
18 evidence.)
19 REDIRECT EXAMINATION
20 BY MR. BROUSSEAU:
21 Q Mr. Beaver, I wanted to make sure I had your
22 testimony right on the amount of delay damages that y'all
23 paid to PC Construction. It amounted to a little bit over
24 100 days, is that right?
25 A Yes, like 120 days, something like that.

1 Q Okay. I just wanted to make sure about that. Thank
2 you.
3 THE COURT: Can y'all explain something to me. Delay
4 damages, is that a mischaracterization, is it paying for
5 work during the delayed period. Lander didn't owe anybody
6 money for damages, did they. You call them damages.
7 MR. MULLINS: Your Honor, I really don't think this
8 is relevant to the case but I will tell you my position.
9 THE COURT: Am I missing the characterization of it?
10 MR. MULLINS: I am not sure it is appropriate to,
11 well, I guess it is your, it is. That claim related to
12 the asbestos, to all of that time period where there was,
13 there was a time period where PC was idle in not being
14 able to perform the work and still incurring cost. And so
15 they were in fact a claim to Lander, the asbestos was not
16 PC'S fault. It was what we would call an owner cause
17 delay or a delay beyond the control of PC. So those, the
18 claims, it related to a lot of different things. But a
19 chunk of it was that Lander had never given PC credit even
20 though the change had been granted relating to the
21 asbestos. They had never been given credit for the
22 expenses they incurred because of the delay.
23 MR. BROUSSEAU: Extended general conditions is
24 probably a better word for it than delayed damages. Often
25 times it is in most contracts where there is some sort of

1 delay that is not anticipated by the contractor then the
2 owner could be liable for the cost of the overhead
3 overruns I guess is what they call. In other words, you
4 are going to have machinery out there, your fuel expenses,
5 whatever it may be that is out there.
6 THE COURT: Porta-John's, things like that.
7 MR. MULLINS: And if you look at our breakdown, the
8 extended overhead breakdown, those costs, Tab 17. And the
9 same thing would apply going up the stream to Lander.
10 MR. BROUSSEAU: Does that answer your question.
11 THE COURT: I guess what I don't understand is, I
12 understand the hard cost but there is some cost with
13 employees and supervisors. But once the project is down
14 and something else is going on why are we still paying
15 supervisors. That doesn't make sense to me. I understand
16 extended overhead. But supervisors can, you only deal
17 with one client at a time.
18 MR. MULLINS: That is taking into account, I mean,
19 these days we are asking are days that PC is on the job
20 working and they said they could have been off the job
21 with no cost incurred. So the daily rate includes all of
22 that and those are days where they are on the job.
23 MR. BROUSSEAU: We call Bradley Grogan.
24 BRADLEY GROGAN, being
25 first duly sworn, testified as follows:

1 DIRECT EXAMINATION
2 BY MR. BROUSSEAU:
3 Q Mr. Grogan, state your name.
4 A Bradley Steven Grogan.
5 Q Spell your last name.
6 A G-R-O-G-A-N.
7 Q Mr. Grogan, what do you do for a living, sir?
8 A I am the Assistant Athletic Director for the Jeff May
9 Complex for Lander University.
10 Q And how long have you worked for Lander University?
11 A 18 years.
12 Q And has it always been in that role?
13 A No, I have been in my current role for the last four
14 years.
15 Q During, are you familiar with the sports complex
16 project?
17 A Yes, I am.
18 Q Was your job title the same at that time as it is
19 what you just said it is now?
20 A Yes.
21 Q How often were you out on the job site, on this
22 particular project?
23 A I was on the job site every day.
24 Q All right. And you obviously know Miller
25 Construction, correct?

1 A I do.
2 Q And what was your understanding of their role in this
3 project?
4 A Miller's role, they were doing all of the grading
5 work, you know, for the entire complex.
6 Q Now, prior to the asbestos being discovered on this
7 project, how would you describe Miller's progress on this
8 job?
9 A I thought Miller did an excellent job.
10 Q After the asbestos was discovered how would you
11 describe their progress on this job with the other phases
12 of the project?
13 A They were there every day to, whatever the scope of
14 the day was, they were there to do that job. So, there
15 were never any problems with their performance before or
16 after or during the asbestos.
17 Q Well, obviously there were problems after the
18 asbestos. I mean, there were some delays after the
19 asbestos too, correct?
20 A Yes.
21 Q And who do you attribute those problems to if it is
22 not Miller?
23 A Well, we had weather delays. And as Mr. Beaver said,
24 you know, if there were compaction tests to be done and
25 the testing company could not be there at that time, you

1 know, it may be delayed until the next morning or the next
2 afternoon. You know, when you are doing construction work
3 in the wintertime with drying times and compacting and
4 those kind of things the weather would play a role--
5 MR. MULLINS: Your Honor, I am going to object. I
6 mean, he is an assistance athletic director. If he wants
7 to talk about specific instances on this project that is
8 fine but I am going to object to any testimony concerning
9 what is normally encountered in the industry.
10 MR. BROUSSEAU: I think he was just testifying to
11 his experience on this.
12 MR. MULLINS: There has been no foundation laid for
13 him as a construction expert or any experience in
14 construction.
15 Q Mr. Grogan, what other, were there delay issues on
16 other areas of this project that did not include the
17 asbestos issue?
18 A I am sure there were specifics. I don't know if I
19 can recall any specifics. Over the two to three years
20 there were a lot of issues that we encountered.
21 Q And you said you were on site every single day. How
22 many employees on a regular basis do you recall seeing
23 with Miller Construction on this project?
24 A They would always have six, seven, eight people, you
25 know, it really depending on what was going on that day as

1 to how many people were there. I never was ever concerned
2 that Miller didn't have enough people on the job to do
3 what they were suppose to do.
4 Q And in your experience were there other contractors
5 that were causing delays on this project based upon what
6 you saw?
7 A Yes.
8 Q And who were they?
9 A We had an issue with the landscaping company that was
10 doing a lot of the trees and the shrubs. They would get
11 to the job at 9:30, 10:00 o'clock, take an hour for lunch,
12 leave at 4:00 o'clock. They were getting behind.
13 Q Any others that you recall?
14 A That one was the one that I remembered most of all.
15 There were times when other subcontractors would not show
16 up during the day. For what reasons I was not sure. I
17 was not told, you know, why they were not there, whether
18 they were painters or whoever, concrete people. You know,
19 we did have some issues early on especially with the
20 concrete subcontractors with the quality of the work.
21 Q And in your experience what type of, I guess you want
22 to call it, team player was Miller in this overall
23 project?
24 A They were a good team player.
25 Q Describe that, if you could.

1 A They were there every day ready to work with whatever
2 was going on. If there were ever any issues, concerns
3 that they may have had they would come to us and state
4 what concerns that they may have. And usually my role
5 would be, if there was a concern I would contact Mr.
6 Beaver and let him know, if he were not there that day
7 that we did have an issue. They were always trying to
8 look out for the owner in trying to do whatever was in the
9 best interest of the owner.
10 Q Please answer any questions that Mr. Mullins or the
11 Court has.
12 CROSS-EXAMINATION
13 BY MR. MULLINS:
14 Q Mr. Grogan, you are the Assistant Athletic Director?
15 A That is correct.
16 Q You spend most of your time managing the, somewhat
17 difficult task of intercollegiate athletics?
18 A My main role is to oversee and manage the facility.
19 I really don't have anything to do with the athletic
20 teams.
21 Q All right. But you don't have any, have you ever
22 worked for a construction company?
23 A Yes.
24 Q What was your position before becoming athletic
25 director at Lander?

1 A I was the Alumni Director.
2 Q Your construction experience is working where?
3 A My family was in the construction business. I worked
4 with my family, worked on various construction jobs in the
5 summertime.
6 Q In this particular case, are you familiar with the
7 scheduling obligations that Miller had with regards to PC?
8 A Not directly, no. But I was aware that there was a
9 schedule.
10 Q You were aware there was a schedule and you were
11 aware that that schedule was typically a schedule assigned
12 durations for performance of certain work?
13 A Yes.
14 Q But you are not aware of what those specifics are?
15 A No.
16 Q You are not aware, it stands to reason then you would
17 not be aware of whether Miller met those durations or not?
18 A Every day--
19 Q If you don't know what the schedule was you can't
20 state whether they met the durations, is that a fair
21 statement, is that a fair statement?
22 A I had conversations with Gary and Chris about the
23 scheduling, that was the extent of it.
24 Q In fact you complained to Gary and Chris about
25 Miller, didn't you?

1 A I don't ever recall complaining.
2 Q You don't recall complaining about their arriving
3 late in the morning and leaving early in the day, you
4 don't recall that?
5 A No.
6 Q You don't recall complaining about some of Miller's
7 employees standing around and not working?
8 A No.
9 Q Okay. You have zero complaints with Miller?
10 A Zero complaints. They were one of the best ones we
11 had.
12 Q Thank you.
13 THE COURT: You can step down.
14 MR. BROUSSEAU: We call Frank Sells to the stand.
15 FRANK SELLS, being
16 first duly sworn, testified as follows:
17 DIRECT EXAMINATION
18 BY MR. BROUSSEAU:
19 Q State your name for the record.
20 A Frank Sells, II.
21 Q Can you spell your last name.
22 A S-E-L-L-S.
23 Q Mr. Sells, what do you do for a living, sir?
24 A I am a ground superintendent at Lander.
25 Q How long have you been at that position?

1 A Eight years.
2 Q And you are familiar with the Lander sports complex
3 project?
4 A Yes, sir.
5 Q How often were you at the project?
6 A Daily with Mr. Grogan.
7 Q And you are familiar with Miller Construction,
8 correct?
9 A Yes, sir.
10 Q Prior to the asbestos being discovered what, if any,
11 complaints did you have about Miller's work on this
12 project?
13 A None.
14 Q And what do you mean by that?
15 A When they got there and started that soccer field
16 they went right on with it and everything went fine.
17 Q Now, after the asbestos issue had been taken care of
18 do you recall ever running into any issues with Miller
19 Construction whatsoever?
20 A None.
21 Q Any type of scheduling problems or anything like
22 that?
23 A None.
24 Q You said you were out there on a daily basis, how
25 many employees do you remember seeing on a regular basis

1 out there at Miller?
2 A Seven or eight, sometimes more.
3 Q How would you describe, based upon your experience
4 out there, how would you describe Miller as a
5 subcontractor on this project?
6 A I thought they were very knowledgeable and brought up
7 some good points. We had some design issues and drainage
8 issues that were brought to our attention. Architect
9 messed up with some drainage stuff and they brought it to
10 our attention and we had to get it corrected. I thought
11 they were very good.
12 Q Do you recall any suggestions they had made to speed
13 up the project at all?
14 A I can't put my finger on it but there were some
15 suggestions like, basically the tennis courts were one of
16 them. That side of the property and move over and try to
17 get some stuff done so the landscapers could get in there.
18 They had some grading issues that PC would want the
19 landscapers in and one, they would say, hey, we are not
20 ready for them yet. But, you know, they pushed through.
21 Q Would you describe, based upon your experience,
22 Miller as a team player on this project for Lander?
23 A Oh, yes.
24 Q In your opinion, based upon your experience being out
25 there, do you believe Miller caused any of these delays on

1 this project?
2 A No, sir.
3 Q Answer any questions that Mr. Mullins may have for
4 you.
5 CROSS-EXAMINATION
6 BY MR. MULLINS:
7 Q Any of what delays, specifically what are you
8 talking? He asked you did Miller cause any of these
9 delays and you said, no sir. What delays?
10 A There was some grading issues, that the architect
11 made some grade changes on the tennis courts. And that
12 was a delay.
13 Q But do you even know what PC is claiming in this
14 case? Do you know what the basis for their claim is?
15 A They held the project up and they didn't own the
16 project.
17 Q Do you know, do you understand what the schedule,
18 have you reviewed the schedule?
19 A Not, I was in contact with, just like Grogan with
20 Chris and Derrick.
21 Q Do you understand that PC is alleging that Miller did
22 not comply with the duration requirements for the
23 activities in the schedule. Do you understand that? Do
24 you know specifically what they are claiming, what
25 durations they didn't comply with?

1 A I didn't.
2 Q How can you say that you don't believe that they
3 caused those delays if you don't even know what delays
4 that they are claiming?
5 A Because they were always looking for something to do.
6 I mean, when there was work to be done they were doing it.
7 Q Okay.
8 A Some of the stuff, some of them were change orders
9 that could have held some of them up. But, you know, we
10 took note of that.
11 Q All right. Thank you.
12 THE COURT: You may step down.
13 MR. BROUSSEAU: Call Mike Miller.
14 THE COURT: You are still under oath.
15 DIRECT EXAMINATION
16 BY MR. BROUSSEAU:
17 Q Mr. Miller, I wanted to go through a couple of these
18 items that they claim as damages. First of all, I want
19 you to talk about the sinkhole, what happened with the
20 sinkhole, sir?
21 A That I really could not tell you. I was notified by
22 PC that there was a sinkhole there beside the walking
23 track. And we went out, my brother which is Matt Miller
24 and I went out on the site and looked at the sinkhole.
25 Q And if you go to Tab number 8 in that Defense exhibit

1 notebook there. Are you there?
2 A Yes, sir.
3 Q First of all, on that map, where exactly is your
4 understanding of where the sinkhole was located?
5 A The sinkhole, if you are looking at the map shows the
6 outside boundary of brick against the sidewalk. And if
7 you look at the drawings, I mean look at the pictures that
8 is shown then you will see the fence is within a foot to
9 eighteen inches of the brick ban.
10 Q And is that reflected in about the fourth picture
11 back in Tab 8?
12 A That is correct.
13 Q And I see what appears to be a manhole cover there,
14 is that the manhole cover that was being referred to
15 earlier during earlier testimony?
16 A That's correct.
17 Q Now, go to that first picture, what is that first
18 picture of there?
19 A This is where we had to jack and bore the berm due to
20 a engineer design flaw.
21 Q And I don't know what jack and bore means. Can you
22 tell me what that means?
23 A What that means is you go out and dig a hole, sit a
24 boring machine in the ground, take a drill and drill
25 underneath the berm. And you are pushing a steel casing

1 with you when you do that.
2 Q Now, this photograph, was this photographs taken
3 before or after the sinkhole is discovered?
4 A This photograph was taken before.
5 Q And this is just reflective of the work that y'all
6 were doing at that time?
7 A That is correct.
8 Q All right. Flip over to the next picture right
9 there. What is that picture of?
10 A That is sand that we had encountered that came from
11 the drain system that ties into this line that has come
12 off of the baseball field.
13 Q And who constructed the drain system over at the
14 baseball field?
15 A Sod Fathers was the landscaper that installed the
16 drain system.
17 Q What kind of effect would that silt have in regards
18 to a sinkhole or anything like that?
19 A This material is sand, if the sinkhole and we had a
20 breach in the pipe then it should have been red, it would
21 not have been yellowish, white is indicated in this photo.
22 Q So, that photo is important because of the coloring
23 of the sand?
24 A That is correct.
25 Q Sir, if you flip over to the fourth photo, yes, it is

1 the same photo that was mentioned before where the fence
2 is there. What is that fold there with the yellow tape
3 tied around to it?
4 A That is a light pole.
5 Q And you have previously given your opinion as to what
6 caused the sinkhole problem, correct?
7 A That is correct.
8 Q And remind me again what that was.
9 A My superintendent stated to me that they missed
10 drilling a base to a light pole.
11 Q What do you mean by that?
12 A Most of these light poles have from an 18 inch to a
13 24 inch diameter concrete base that is drilled in the
14 ground.
15 Q And how far down typically?
16 A Normally it depends on the size of the poles, they
17 could be a foot, they could be five foot, they could be
18 eight foot depending on the engineers drawings.
19 Q And what is your recollection about that based on
20 this one?
21 MR. MULLINS: Your Honor, I am going to object, this
22 line of questioning. He just, this entire basis of his
23 opinion is based on what his superintendent told him. So,
24 objection based on hearsay.
25 THE COURT: I will sustain to hearsay.

1 Q In your personal experience you went out to this
2 sinkhole site, correct?
3 A Yes.
4 Q And your personal experience, based upon what you
5 viewed out there, was there a proper stand as you stated
6 on the light pole or cement fixture or whatever you call
7 it?
8 A By looking I do not know if there is a base under it
9 but it should be.
10 Q And based upon your prior experience on other jobs,
11 first of all, at what level had this, had this soil
12 compacted?
13 A As you look in the photo, you can see everything as
14 to finished grade. You can see that manhole that we were
15 talking about in the prior photos is approximately 22 feet
16 away from the fence. And as you look you can see that
17 there is no disturbance between a manhole and the concrete
18 ban that is against the brick. That area was compacted.
19 BLE did the testing reports on it. There are numerous
20 testing reports that are in our files. And also they were
21 water on the opposite of a water line that blew out.
22 There are sewer lines that are in place in there. There
23 are power lines that is in place. There is a duct bank,
24 and when I speak of a duct bank that is pipe that is dug
25 in place with concrete port around them that is in that

1 area also.
2 Q And how long have you been doing grading work, I am
3 sorry?
4 A I started running the business for my dad in 1986.
5 Q And based upon your prior experience have you ever
6 experienced a sinkhole when the soil had been compacted
7 properly?
8 A No.
9 Q I want you to flip over to Tab 16. And if you
10 recall, this is the delay damage summary that Mr. Piontek
11 testified to yesterday, correct?
12 A That is correct.
13 Q The first one, ES015 site demolition. What is going
14 on there?
15 A It is the removal of the concrete and paving that
16 they are only giving me a five day schedule. As noted on
17 the schedule form we have above ground, below ground and
18 asphalt removal. And that is a total of 15 days. They
19 are only giving me allowance of 5.
20 Q So, it was actually finished on time?
21 A Yes. I do have field notes that I took yesterday
22 while I was here. Can I see my notes.
23 Q If it would help you remember how each one of these--
24 MR. MULLINS: Your Honor, I am going to object to
25 that. I mean we are, again, this is the same basis as

1 before. These are documents that weren't produced. I
2 haven't seen them.
3 MR. BROUSSEAU: This is proper reply, Your Honor.
4 MR. MULLINS: The fact that it is in reply doesn't
5 impact those issues.
6 MR. BROUSSEAU: As hearing the testimony yesterday,
7 you went back and reviewed the entire file, he made notes
8 last night.
9 THE COURT: He has his notes?
10 MR. BROUSSEAU: Yes, it is only to help him to
11 remember what he, about each and every single one of these
12 particular damages that they are talking about for delay.
13 MR. MULLINS: I object to that. That is not the
14 way--
15 THE COURT: I think he can testify of his memory.
16 The notes from last night, certainly haven't been
17 discovered.
18 MR. BROUSSEAU: No.
19 THE COURT: This isn't notes from the field during
20 the project?
21 MR. BROUSSEAU: No, Your Honor, this is, he sat down
22 last night after hearing the testimony and went through
23 each and every single one of these delays that they
24 alleged in their summary here, taking the entire file and
25 tried to piece mill, go by one by one through each one.

1 Now, it is only to help him remember when he is up there
2 testifying. I mean, if he gets to a point where he gets
3 flustered and he can't exactly remember, I mean I think he
4 is allowed to use them.
5 MR. MULLINS: Your Honor, I absolutely object to
6 that, that is not the way the rules of evidence and
7 witnesses are not allowed to note, to outline their
8 testimony and take the stand and testify to it. That is
9 absolutely objectionable.
10 THE COURT: I agree with Mr. Mullins.
11 MR. BROUSSEAU: That is fine.
12 Q Well, Mr. Miller, is there anything else that you
13 remember about OS15 that would have caused delays on that
14 particular area?
15 A As noted there shows site demolition, concrete and
16 payment, they do not show storm drainage removal. If you
17 go back to the scheduling, then they are 15 days allowance
18 to remove those and they are only allowed me 5.
19 Q So you actually finished in 8 and you would have been
20 on time?
21 A That is correct.
22 Q Site clearing, they say you delayed on that 3 days.
23 What do you remember about that?
24 A That clearing was against a Federal Wetlands. My
25 engineer laid out the Federal Wetlands, it had to be

1 reevaluated by a Federal employee to come out and make
2 sure we were in the tolerance of the Wetlands.
3 Q So, did Miller cause that delay?
4 A That is not our fault.
5 Q ES035, construction entrances. It says here you had
6 a duration of one day and that you delayed it 8 days.
7 What do you recall about that?
8 A Recall that, one construction entrance went in at the
9 main entrance of the complex which Wellness Works was
10 actually using that entrance. We were delayed on removal
11 of the asphalt paving due to, we being directed that they
12 didn't know where the traffic to Wellness Center was going
13 to go or how they were going to direct the traffic so we
14 could not put that construction entrance in. The rear
15 construction entrance on the project, the engineer missed
16 the storm drainage pipe which we requested a change order
17 and had to wait approximately three to four days for the
18 engineer to release a change order to install the pipe due
19 to it being missed by the engineer.
20 Q Okay. ES040, it says here that you had 5 days to
21 complete it and that you actually did it in 14?
22 A That is correct.
23 Q Explain to the Court that.
24 A If you look at the weather delay and schedule on the
25 water that we received on the project, also with the snow,

1 we were trying to gain compaction on the bottom of a pond
2 that was permanent. BLE, their records in our notes that
3 is here with us, that BLE held up the project on the
4 compaction of the berm and the bottom of the pond due to
5 the soil being above optimum moisture which was 19
6 percent. Our content was from 27 to 30 percent and BLE
7 would not let us place that down its compaction.
8 Q It says here, the next one is SE site 00, rough
9 grading and soccer field. You had a schedule duration of
10 5 days. It says you delayed 21 days. What do you recall
11 about that?
12 A On rough grading it, we ran into several problems.
13 One, Lander wanted to place a berm against the Snead
14 Lumber Company. We were held up due to a change order or
15 our RFI for trees to be removed all over the property
16 line. Later we were told that we needed to go ahead and
17 start grading on it, that they were not going to put in
18 the berm, that they were going to put in a wind barrier
19 fence. And that was some of the holdup on that. Also, we
20 ran into a problem outside the clearing limits of the
21 project which would be the Northeast corner of the soccer
22 field. That area we had to go beyond our scope of work to
23 get a positive drainage to get the water to run away from
24 the soccer field because that was another engineer's flaw.
25 Q The next one, SE site 005, storm drains, detention

1 pond number one.
2 A That we issued submittals, there are submittals with
3 us here with our information. Those submittals was
4 issued, we had a holdup with the submittals being approved
5 in a timely manner. Also, too, once we got in the big
6 junction box we found out that the submittals, that the
7 engineer approved, the pipe sizes were wrong in this box.
8 This box was approximately an 8 foot x 8 foot square box
9 that we had to set, the engineer held us up on installing
10 this until he reevaluated his submittal package.
11 Q The next one is SE site 010, drainage. That one you
12 had a scheduled duration of 5 days, it took actually 8.
13 What was going on there?
14 A I really cannot recall with what I come up, being
15 honest because I can't remember where the storm drainage,
16 may I look at the exhibit to see where it is located. I
17 cannot remember where that storm drainage line was at.
18 Q Yes, sir.
19 A There were no delays on that because the main truck
20 line from the big outlet structure that we were talking
21 about all the way through the project was installed and we
22 showed that there were no delays.
23 Q SE site 040, the soccer field final grading. It says
24 you delayed that by 3 days. Can you explain that?
25 A One, as we started the final grading we were notified

1 that the catch basins and I cannot remember which numbers
2 they are. But the catch basin boxes had to be removed and
3 slid inward toward the field due to one, they installed
4 the wind screen and it was in the proper location. Two,
5 they had to redrill and reinstall the wind screen. And
6 three, in the Northwest corner toward the property line
7 there was a change order issued for PC to install a soccer
8 board.
9 Q The next one, TS SITE 00, drainage, what was the
10 delay there, what was that all about?
11 A May I look back and see where it is located?
12 Q Yes.
13 A I think we are showing that there were no delays.
14 Q Okay. 005, another one day delay. Do you remember
15 anything about that?
16 A That is the piping that is going through the soccer
17 venue or through the, excuse me, through the tennis
18 courts. The tennis courts elevation was placed on a .83
19 percent slope after we final graded it. The asphalt
20 contractor came in and said he would not pave it on a .83
21 percent slope due to it would be ponded water or bird
22 baths. So the tennis court area was then placed on a one
23 percent slope and we had to go back due to a tennis court
24 being flat to lower catch basins and remodify catch basins
25 below the specified elevations of the engineers. So there

1 was some areas in there that had to be hand worked and
2 regarded by hand to finish that area up.
3 Q And does that apply for the last two on here, the
4 grading for the tennis courts and the final grading for
5 tennis courts?
6 A The tennis courts, going to the tennis courts, yes.
7 I mean, they had to be, it had to be lowered but our
8 biggest thing with the tennis courts that we then rough
9 graded. We wanted to finish them but we were told by Gary
10 and I was told by Gary to my face that they wanted to hold
11 on the tennis courts due to one, they did not know who
12 they were paving them, when we were grading them. And
13 two, that we wound up that, they did not want to wind up
14 with dust being on the tennis courts and changing the
15 color of them.
16 Q When you say dust on the tennis courts, dust from
17 what?
18 A Dust from the construction site because there was
19 still stuff that was being graded and moved around. And
20 even if you had a water truck on site you could not keep
21 all the dust down on the site.
22 Q So, you don't believe that these delays and their
23 delay damage summary, that they are associated with Miller
24 Construction, correct?
25 A That is correct.

1 Q All right. Would you answer any questions that Mr.
2 Mullins may have for you.
3 CROSS-EXAMINATION
4 BY MR. MULLINS:
5 Q Mr. Miller, on yesterday when you and I talked, we
6 went through the subcontract, do you remember that?
7 A That is correct.
8 Q And you acknowledged during that discussion that
9 there is a process that is laid out in the subcontract
10 that deals with any type of a change situation?
11 A That is correct.
12 Q And that would relate to changes that would affect
13 price and scheduling?
14 A That is correct.
15 Q And you just went through with Mr. Brousseau, let me
16 back up. We also talked yesterday about the change orders
17 that were established by and between Miller and PC during
18 this project, change orders 1 through 87, 86, whatever it
19 was. Do you recall that?
20 A That is correct.
21 Q Okay. And you acknowledged at that point that of all
22 of the 87 change orders, there was one where you had asked
23 for an adjustment to the scheduling, correct?
24 A That is correct.
25 Q That was change order 40?

1 A That is correct.
2 Q And you, Mr. Brousseau had you go through the
3 activities that, that is for the basis for PC's delay
4 damages. And it sounded to me like you had an explanation
5 for each one of these, right, for why the durations were
6 what they were?
7 A I don't recall that.
8 Q Well, we just walked through. You had an explanation
9 as to what was delaying you on each one of these
10 activities?
11 A You are talking about--
12 Q Talking about what you just talked about Mr.
13 Brousseau about?
14 A Yes, sir.
15 Q And none of those issues that you raised were
16 incorporated into any kind of a request for change order
17 or request to alter the schedule that was presented to PC.
18 Is that a fair statement?
19 A That is correct.
20 Q And that is how the subcontract dictates it should
21 have occurred. Is that a fair statement?
22 A That is correct.
23 Q Okay. The sinkhole issue, I think you just responded
24 to Mr. Brousseau and indicated that you know of no
25 situation where a sinkhole would have occurred that wasn't

1 caused by lack of compaction. Lack of compaction is what
2 causes sinkholes?
3 A That is correct.
4 Q And your position is that your work was compacted,
5 right?
6 A That is correct.
7 Q And the basis for that is that you say BLE came in
8 and tested?
9 A That is correct?
10 Q They don't test every square inch, do they?
11 A They test, it depends on how many square feet, I
12 don't know how they set up on their testing.
13 Q And you can't state for certain--
14 A Anything by the spec's, anything over six inches is
15 suppose to be compacted and tested.
16 Q Every square inch?
17 A Not every square inch.
18 Q No. That wouldn't make sense, would it. I mean,
19 testing company can't test every square inch, right?
20 A They could.
21 Q There are different, how do you do compaction test?
22 A You can do it with a nuclear test, you can do it with
23 a cone test, sand cone test. You can do it with a
24 penetration rod that actually tells the PSI's that is on
25 it.

1 Q Right. And all of those are done in isolated areas,
2 right?
3 A That is correct.
4 Q And a soil engineer will take it, if they are testing
5 for an area they will plot out enough spots where they
6 believe that they are covering the entire area?
7 A That is correct.
8 Q But they are not testing every spot?
9 A That is correct.
10 Q And sometimes they miss, sometimes there is a spot,
11 right?
12 A That is correct.
13 Q Okay. When bad soil comes up on a project, before a
14 project starts an engineer has gone through and done soil
15 test, right?
16 A That is correct.
17 Q And they have tested in plots to try to make sure
18 that they cover the entirety of the area, right?
19 A That is correct.
20 Q And sometimes even with a soil report like that you
21 get started and you find bad soil in between the plots,
22 right?
23 A That is correct.
24 Q And you can't say for certain that this exact spot
25 where this sinkhole was was tested by BLE?

1 A If I could look at my testing reports that we have
2 then I could.
3 Q All right. But sitting here right now you cannot
4 state with certainty that BLE tested the spot where this
5 sinkhole occurred?
6 A They tested it in lifts in areas. They don't test
7 the same area coming up. And if we raise the berm that
8 was 15 foot tall and we did it in 2 foot lifts then they
9 are not testing the same area as they come up, they are
10 moving around.
11 Q All right. Fair enough. Thank you.
12 REDIRECT EXAMINATION
13 BY MR. BROUSSEAU:
14 Q He asked you about a change order modifying a
15 schedule. And you testified, besides that number 40,
16 there wasn't one done?
17 A One, I always thought we could manage it and finish
18 it. But as we ran into problems and as we progressed
19 through it and I am going to be point blank. Lack of
20 management. My superintendent knew more than the
21 superintendent that was there. We went through a lot of
22 sub's. We have gone through, Gary said we had went
23 through three concrete sub's. We can recall five concrete
24 sub's and it is noted in our daily's. Every time we
25 changed sub's, and you know we ran into a lot of problems

1 and I am not throwing off on PC. But we found and they,
2 we ran into a lot of problems that was beyond their scope
3 of work, my scope of work. And it became just more
4 problems. And I always thought and I thought a lot of
5 them, that I felt like if we could all work it out, you
6 know, there was some verbal things that was said between
7 me and Gary about time, don't worry about it. Well, you
8 know, it doesn't match what is there. And even change
9 orders, I have done change orders that if you go back and
10 look at my change orders, from the time they were approved
11 to when we actually got approval, I went 20 and 30 and 40
12 days before actually I got approval. So I always took
13 them on their word. And that is why, you know, even on
14 the silt fence, that is the reason why is because normally
15 if we did it then, you know, we went back. And I know
16 what a contract says. Nobody hasn't got to read it. But,
17 you know, I always thought they were of their word.
18 Q Nothing further.
19 THE COURT: You can step down.
20 MR. BROUSSEAU: That is it, Your Honor. Housekeeping
21 matters. We need to go through the exhibits.
22 MR. MULLINS: I will tell you what my position is on
23 their exhibits. I just like the record to be clear that I
24 am maintaining my objection, based on the grounds already
25 raised, I am aware of the fact that we have referred to A,

1 B, C, E, F, G, H and J. I am going to object to their
2 admissibility again based on the issues, the grounds that
3 we have already raised. But I am certainly aware of that.
4 I don't believe that Exhibit D or I was referred to. I am
5 not sure you are going to pull those.
6 MR. BROUSSEAU: I was going to say D and I come out,
7 there was no testimony about those.
8 MR. MULLINS: Okay.
9 THE COURT: Through the objection of PC will place
10 all exhibits in except for D and I. They weren't referred
11 to and therefore will be irrelevant.
12 (Whereupon, Plaintiff's Exhibit A, B, C, E, F, G, H
13 and J were admitted into evidence.)
14 THE COURT: Any reply.
15 MR. MULLINS: If I can just have a moment.
16 THE COURT: Sure.
17 MR. MULLINS: Your Honor, we are not going to put up
18 any reply.
19 THE COURT: Anything else y'all want to put on the
20 record. Everybody is renewing their motions?
21 MR. BROUSSEAU: Yes, all motions are being renewed.
22 MR. MULLINS: I want to renew the motion for
23 non-suit.
24 THE COURT: Okay. That motion is renewed as well as
25 your original motion for a directed verdict against the

1 defendants. And your motion for summary judgment against
2 the, for your counterclaim and your motion for non-suit
3 for their claim against your client?
4 MR. MULLINS: Right.
5 THE COURT: Those motions are preserved. Y'all want
6 to talk anymore you can, but I understand y'all's
7 positions, y'all have been very clear on them and
8 consistent. I am good.
9 MR. MULLINS: I am going to just explore on how we
10 proceed from here. We are going to do closing?
11 THE COURT: If y'all want to summarize y'all can or
12 if y'all want to do something in writing.
13 MR. BROUSSEAU: I was going to suggest just a short
14 posttrial brief.
15 THE COURT: If I limit you to a certain number of
16 pages would that be appropriate?
17 MR. BROUSSEAU: Yes.
18 THE COURT: How many do y'all want, five or ten?
19 MR. BROUSSEAU: Five should be plenty.
20 THE COURT: Five pages, triple space, margin of six
21 inches.
22 MR. BROUSSEAU: How about a note card.
23 THE COURT: Now we are getting somewhere. Is five
24 pages enough?
25 MR. MULLINS: I would feel better with ten.

1 MR. BROUSSEAU: That is fine.
2 THE COURT: Ten and ten days to do it?
3 MR. BROUSSEAU: Sounds great.
4 THE COURT: And that will give me time to digest this
5 and I will be waiting to see what y'all's respectful
6 positions are. I think that is fair. All right. Good
7 deal.
8 MR. BROUSSEAU: Thank you, Judge.
9 MR. MULLINS: Thank you.
10 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 CERTIFICATE OF REPORTER

2

3

4 State of South Carolina)
)
5 County of Newberry)

6

7

8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Greenwood, South
14 Carolina on the 4th day of November, 2013.
15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.

17

18

19 May 5, 2015

20

21 Joy E. Holston

22 Joy E. Holston, Court Reporter
23 My Commission expires: March 13, 2016

24

25

PC CONSTRUCTION OF GREENWOOD, INC. **SUBCONTRACT AGREEMENT**

This Subcontract Agreement (hereinafter "Subcontract"), made this Thursday, December 17, 2009 , by and between:

JOB NUMBER: 13

CONTRACTOR: PC Construction of Greenwood, Inc.
108 Enterprise Court
Greenwood, SC 29649

FILE COPY
MCC

PHONE: (864) 223-6274
FAX: (864) 223-9183

-and-

SUBCONTRACTOR: Miller's Construction Company, LLC
ADDRESS: 225 Thompson Rd.
Anderson, SC 29624

(hereinafter "Subcontractor")

to perform part of the work on the following Project:

PROJECT: Lander Sports Complex

(hereinafter "Project")

OWNER: Lander University

(hereinafter "Owner")

DESIGNER/ARCHITECT: Neal Prince

(hereinafter "Architect")

GENERAL CONTRACT: (DATED)

PERFORMANCE BOND AND PAYMENT BOND:$_____ ____BOND REQUIRED
__X__BOND NOT REQUIRED

(THE FOREGOING TERMS ARE INCORPORATED INTO AND MORE FULLY EXPLAINED IN THE PROVISIONS THAT FOLLOW)

ARTICLE 1

CONTRACT DOCUMENTS

The term "Contract Documents" as used herein refers to this Subcontract and to the General and Special Provisions, Drawings, Specifications, Addendas Amendments, Modifications and all other Documents forming or by reference made a part of the Contract between PC Construction of Greenwood, Inc. and Owner dated . The Contract Documents include all Attachments hereto, and all documents which are listed in Attachment "C" which are considered to be fully incorporated herein. By executing this Subcontract, Subcontractor warrants and represents that it has read and understands the Contract Documents and is bound by their terms. PC Construction of Greenwood, Inc., upon reasonable request, shall furnish to Subcontractor a copy of any part of the Owner/PC Construction of Greenwood, Inc. Agreement, although PC Construction of Greenwood, Inc. retains the right to delete information which it considers to be confidential.

ARTICLE 2

SCOPE OF WORK

SUBCONTRACTOR'S WORK. Subcontractor shall furnish all supervision, labor, tools, equipment, services, materials, and supplies necessary to perform and complete in all respects the Work, which is specified in Article 18 below, which is a portion of the entire Work required by Owner/PC Construction of Greenwood, Inc. Agreement. Subcontractor agrees that it will perform the Work in accordance with this Subcontract and the Contract Documents and as described further in Article 18. Subcontractor shall assume all responsibility of Contractor to Owner in relation to performance of the Work. **TIME IS OF THE ESSENCE IN REGARD TO PERFORMANCE AND COMPLETION OF THE WORK.**

ARTICLE 3

SUBCONTRACT PRICE AND PAYMENT

a. **SUBCONTRACT PRICE.** PC Construction of Greenwood, Inc. hereby agrees to pay Subcontractor for all Work performed pursuant to this Subcontract, the fixed sum, if a "Lump Sum" Subcontract of **$492,424.00 or Four hundred Ninety-two thousand Four hundred Twenty-four dollars and zero cents**, subject to additions and deductions as herein after provided, or at the following unit prices:

Base Bid:	$492,424.00
TOTAL	**$492,424.00**

b. **PROGRESS PAYMENTS.**

i. **SCHEDULE OF VALUES.** Subcontractor shall prepare and submit to PC Construction of Greenwood, Inc. a Schedule of Values for all components of the Subcontractor's Work, in such detail as PC Construction of Greenwood, Inc. may require. This Schedule of Values, when approved by PC Construction of Greenwood, Inc. shall be used as the basis of payment to Subcontractor. The Schedule of Values must be prepared and submitted to PC Construction of Greenwood, Inc. prior to submission of the first application for payment. The Schedule of Values is subject to reasonable adjustment by PC Construction of Greenwood, Inc., should the Schedule of Values be found in error at any time during the course of the Project.

ii. **APPLICATION FOR PAYMENT.** Subcontractor shall make Application for Payment for such portion of the Subcontractor's Work which is performed, in place, approved and accepted by the Owner. The Application for Payment shall be made in such form as required by PC Construction of Greenwood, Inc. and the Contract Documents. The Subcontractor shall certify the percentages of completion in accordance with the Contract Documents. The Application will reflect that PC Construction of Greenwood, Inc. may retain from the Application 10% of each Progress Payment until Final Payment is due in accordance with this Subcontract and the Contract Documents. Subcontractor shall submit his Application for Payment, properly completed and in time to be submitted by PC Construction of Greenwood, Inc. in PC Construction of Greenwood, Inc.'s Application for Payment to the Owner. Failure of the Subcontractor to timely and properly submit its Application for Payment will relieve PC Construction of Greenwood, Inc. of any obligation to include them in PC Construction of Greenwood, Inc.'s Application to the Owner.

iii. **PARTIAL LIEN WAIVERS AND AFFIDAVITS.** As a condition precedent for each progress payment, Subcontractor shall provide, in a form satisfactory to Owner and PC Construction of Greenwood, Inc., partial waivers of lien or claim and affidavits of payment from Subcontractor and, if required by PC Construction of Greenwood, Inc., from its subcontractors and suppliers. Subcontractor shall, as often as required by PC Construction of Greenwood, Inc., furnish an affidavit setting forth all parties who furnish labor or materials to Subcontractor in the performance of Subcontractor's Work, with their names, addresses and the amount due or to become due to each.

c. **SUBCONTRACTOR'S PAYMENT OBLIGATIONS.** Subcontractor agrees that payment received by the Subcontractor in connection with the Project will be used first to pay any indebtedness or

obligation owed by the Subcontractor for labor or materials utilized in performing Subcontractor's Work on this Project. If PC Construction of Greenwood, Inc. has reason to believe that Subcontractor is not making payment for indebtedness or obligations for labor, services, materials and equipment incurred by the Subcontractor in performing its Work, PC Construction of Greenwood, Inc., after giving the Subcontractor written notice, may take such steps as it deems necessary to ensure payments under this Subcontract are used to satisfy and discharge obligations incurred by the Subcontractor in performing Work on this Project. PC Construction of Greenwood, Inc. specifically and expressly has the right to retain from the Application for Payment such amount as it deems reasonable to protect PC Construction of Greenwood, Inc. and the Owner from any loss, damage or expense which PC Construction of Greenwood, Inc., in its sole discretion and in good faith, anticipates will arise as a result of the Subcontractor's failure to satisfy its payment obligations.

d. **STORED MATERIALS.** Subcontractor's applications for payment may include materials required but not yet incorporated in Subcontractor's Work but delivered and stored at the site or at some other locations agreed upon in writing, if allowed by the Contract Documents and if approved in advance by Owner. Subcontractor must submit bills of sale, evidence of adequate insurance and such other documents and procedures as are required by the Contract Documents, PC Construction of Greenwood, Inc. or the Owner and as are necessary to vest title to the Owner for such stored materials and equipment. Where materials or equipment are stored off site, Subcontractor shall make arrangements for and pay the cost incurred by PC Construction of Greenwood, Inc. and Owner in making any reasonable inspection requested by PC Construction of Greenwood, Inc..

e. **CONDITIONS OF PAYMENT.** Within ten (10) days after receipt by PC Construction of Greenwood, Inc. from Owner of monies in payment of Subcontractor's application for payment, receipt of such payment from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor, PC Construction of Greenwood, Inc. shall pay the same over to Subcontractor, less retainage. Notwithstanding any contrary provision elsewhere in this Subcontract, PC Construction of Greenwood, Inc. may delay payment of all or any portion of Subcontractor's application for payment in order to reasonably determine that Subcontractor's Work for which payment is requested has been properly performed and is in place, that sufficient funds remain available to complete Subcontractor's Work, that Subcontractor's Work will be completed as required by the Job Schedule, that Subcontractor's application for payment and accompanying affidavits and waivers are true and correct in fact, and that all other requirements of this Subcontract have been satisfied relative to Subcontractor's Work for which payment is sought. When such determinations have been made to PC Construction of Greenwood, Inc.'s satisfaction, PC Construction of Greenwood, Inc. will make payment in accordance with Subcontractors application, as provided for in this Subcontract. No such determination or payment shall relieve Subcontractor from its obligations under this Subcontract, nor stop PC Construction of Greenwood, Inc. from subsequently asserting Subcontractor's failure to satisfy said obligations.

f. **ACCEPTANCE OF PAYMENT.** Partial payments shall be paid monthly by PC Construction of Greenwood, Inc. to the Subcontractor as the work progresses, so long as the Work is being prosecuted in accordance with the provisions of this Subcontract and that the progress is satisfactory to PC Construction of Greenwood, Inc. and Owner, less 10% retainage thereof and all previous payments by PC Construction of Greenwood, Inc., all charges for materials and/or services furnished by PC Construction of Greenwood, Inc. to the Subcontractor, as well as any and all expenses and disbursements chargeable to the Subcontractor, subject to audit and proper correction by PC Construction of Greenwood, Inc., and shall be due and payable within 30 days of the succeeding month, provided the Subcontractor otherwise is not in default hereunder.

g. **FINAL PAYMENT.**

i. **APPLICATION.** Upon completion of Subcontractor's Work and acceptance by Owner, PC Construction of Greenwood, Inc., and any other party whose acceptance is required under the Contract Documents, and upon Subcontractor furnishing evidence of fulfillment of all of Subcontractor's obligations in accordance with the Contract Documents and this Subcontract, PC Construction of Greenwood, Inc. shall forward Subcontractor's application for final payment to Owner.

ii. **REQUIREMENTS.** Before PC Construction of Greenwood, Inc. shall be required to forward Subcontractor's application for final payment to Owner, Subcontractor shall submit to PC Construction of Greenwood, Inc.:

.1 an affidavit that all payrolls, bills for materials, services, equipment and taxes, and other indebtedness connected with Subcontractor's Work for which Owner or its property or PC Construction of Greenwood, Inc. or PC Construction of Greenwood, Inc.'s surety might in any way be liable, have

been paid or otherwise satisfied; and

.2 consent of surety to final payment, if required; and

.3 all required operating instructions, submittals, shop drawings, as-built drawings, inspection and test results, and similar items; and

.4 any and all other data such as guarantees, warranties, receipts, releases, and waivers of liens to the extent and in such as may be required by PC Construction of Greenwood, Inc., Owner or Contract Documents.

iii. **CONDITIONS OF FINAL PAYMENT.** Final payment of the balance of the Subcontract Price due shall be made to Subcontractor:

.1 when appropriate certification and final approval thereof have been received as provided in the Contract Documents; and

.2 after receipt by PC Construction of Greenwood, Inc. of final payment from Owner, such receipt being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to make final payment to Subcontractor. Subcontractor's acceptance of final payment shall constitute a waiver by Subcontractor of all claims relating to Subcontractor's Work except such claims as have been previously identified and made in writing and fully and properly preserved and pursued pursuant to the terms of this Subcontract.

h. **CONDITION PRECEDENT.** Notwithstanding any contrary provision of the Contract Documents, receipt by PC Construction of Greenwood, Inc. of payment from Owner shall be a condition precedent to any payment obligation by PC Construction of Greenwood, Inc. (or its surety) to Subcontractor under this Subcontract. Subcontractor warrants and represents that it relies for such payment for work performed on the credit and on the ability to pay of Owner, and not of PC Construction of Greenwood, Inc., and that Subcontractor undertakes the risk that it shall not be paid for work performed under this Subcontract in the event that PC Construction of Greenwood, Inc., for whatever reason, is not paid by Owner for such work. Furthermore, Subcontractor understands and agrees that it will not, under any circumstance, claim against the principal or surety on any payment bond furnished by PC Construction of Greenwood, Inc. regarding the Project for payment of amounts not due to Subcontractor under this Subcontract.

i. **ACCEPTANCE.** It is mutually agreed between the parties hereto that no payment made hereunder shall be conclusive evidence of the performance of this Subcontract, either in whole or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ARTICLE 4

TIME OF PERFORMANCE

a. Subcontractor recognizes PC Construction of Greenwood, Inc.'s obligations to the Owner for timely progress upon and completion of the Work and each part thereof and that **TIME IS OF THE ESSENCE** in the performance of the Work under this Subcontract. Subcontractor agrees to perform Subcontractor's Work so that the entire Project and every portion thereof will be completed in accordance with the Contract Documents, including any scheduling requirements contained in this Subcontract. Subcontractor shall begin work as soon as instructed by PC Construction of Greenwood, Inc. and shall prosecute its Work in such manner as to avoid any delay or disruption to the progress or completion of the Project.

b. **JOB SCHEDULE.** PC Construction of Greenwood, Inc. shall furnish and publish a progress schedule for the Project. This will constitute the basis for starting and finishing of the Subcontractor's Work. PC Construction of Greenwood, Inc. reserves the right to alter this schedule, as needed, and the Subcontractor is responsible for maintaining his portion of the Work within the confines of the progress schedule. PC Construction of Greenwood, Inc. will seek and use information from the Subcontractor regarding durations of tasks, sequences, etc. in formulating the progress schedule. The Subcontractor shall take whatever measures necessary to ensure completion within the framework of the schedule.

.1 The Subcontractor is solely responsible for scheduling his manpower and equipment to meet the needs of the Project and maintain the flow of construction as required by the job schedule. PC Construction of Greenwood, Inc. will not perform required coordination or supervision of the Subcontractor's work force.

.2 TIME IS OF THE ESSENCE, and job schedule durations for any given task within the job schedule will not preclude PC Construction of Greenwood, Inc. from requiring the Subcontractor to furnish additional workmen and/or equipment to the Project if, in the opinion of PC Construction of Greenwood, Inc., some tasks are slipping in duration and insufficient workmen are assigned to the job to finish each task on time or early. The job schedule is a tool of PC Construction of Greenwood, Inc. for coordination purposes, and the directions of PC Construction of Greenwood, Inc.'s Project Manager shall prevail as to determination of the sufficiency of the Subcontractor's work force and/or his job schedule compliance.

.3 The Subcontractor shall make as many mobilizations to the Project site as are necessary to complete his portion of the Work in accordance with the job schedule. No claims for additional time and/or additions to the Subcontract sum will be accepted for more than one (1) mobilization, regardless of the causes or reasons, unless otherwise agreed to in writing by PC Construction of Greenwood, Inc..

.4 The Subcontractor shall cooperate with PC Construction of Greenwood, Inc. and the Owner in furnishing any required information (i.e., quantities, durations, etc.) required for scheduling, schedule tracking and/or confirming Work in place for billing purposes.

ARTICLE 5

SUBCONTRACTOR'S OBLIGATIONS

a. **Review of Contract Documents and Examination of Job Site.** Subcontractor represents that it has examined the Contract Documents and has satisfied itself of its adequacy for the complete performance of the Work; and that the Subcontractor is fully aware of work to be performed by other subcontractors in connection with Subcontractor's Work. Subcontractor represents it is experienced and competent to perform and complete the Work. Subcontractor has visited the Job Site and has made all investigations of the Job Site, the surrounding area and all conditions relative to the Work which are necessary for full understanding of the difficulties which may be encountered. Subcontractor further represents that it is aware that portions of its work are dependent upon the past and future progress of work performed by others. Subcontractor assumes all the risk and hazards in connection with the foregoing conditions, regardless of such risks, hazards and conditions, and notwithstanding any variances between the actual condition as shown or represented in the Contract Documents, Subcontractor agrees that he will complete the work for the Subcontract Price.

b. PERFORMANCE RESPONSIBILITIES. ***PC Construction of Greenwood, Inc. will not be held liable for any changes made to the plans or specifications including those directed by PC Construction's Superintendent without prior written authorization from PC Construction of Greenwood's Project Manager and/or the Owners Representative.*** Subcontractor binds itself to PC Construction of Greenwood, Inc. under this Subcontract in the same manner as PC Construction of Greenwood, Inc. is bound to Owner under the Contract Documents. Subcontractor shall furnish and pay for all of the labor, materials and equipment, including, but not limited to, competent supervision and project management, shop drawings, samples, tools, scaffolding, temporary facilities and services as are necessary for the proper performance of Subcontractor's Work. Subcontractor shall provide a list of proposed sub-subcontractors and suppliers, be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Job Schedule. Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work.

c. **LAYOUT RESPONSIBILITY AND LEVELS.** Unless otherwise provided herein, Contractor will establish only principal base lines and benchmarks of the site, and Subcontractor, shall, at its own expense, lay out and be strictly responsible for the accuracy of Subcontractor's Work. Subcontractor shall verify drawing dimensions and actual field conditions which affect Subcontractor's Work and shall be responsible for any loss or damage to the Contractor or to others, due to Subcontractor's failure to properly lay out or perform Subcontractor's Work. Should Subcontractor disturb or destroy any controls, survey lines, or layout performed by Contractor or others, Subcontractor shall be responsible for reestablishing or restoring same at its own expense.

d. **COORDINATION OF ITS WORK WITH OTHERS.** Subcontractor agrees as follows:

.1 Subcontractor shall cooperate with PC Construction of Greenwood, Inc. and all others whose work may interface or interfere with Subcontractor's Work;

.2 Before proceeding with Subcontractors Work, or any portion thereof, Subcontractor shall review all job conditions and thoroughly inspect all prior Work of PC Construction of Greenwood, Inc. and others. Subcontractor shall notify PC Construction of Greenwood, Inc., in writing, of any unacceptable conditions, interferences or defective prior Work that would affect the proper and timely execution of Subcontractor's Work. Unless such notice is given, Subcontractor shall be deemed to have fully accepted the conditions as they exist and shall be fully responsible for any and all expenses, losses or damages resulting from said conditions;

.3 Subcontractor recognizes that the Job Schedule requires coordination with other trades, and agrees to coordinate Subcontractor's Work with the work of PC Construction of Greenwood, Inc. and others. Subcontractor recognizes that Subcontractor's Work may not always be performed as a continuous operation. Subcontractor, at PC Construction of Greenwood, Inc.'s election, shall participate in and cooperate with the preparation of coordination drawings in order to properly coordinate interrelated and interfacing work of PC Construction of Greenwood, Inc. and the various subcontractors. Should Subcontractor install any portion of Subcontractor's Work prior to coordination or in such a manner as to cause interference with the Work of PC Construction of Greenwood, Inc. or others, Subcontractor shall, at its own expense, arrange for its removal or modification, or cutting and patching;

.4 Subcontractor shall be responsible for taking all field measurements necessary to ensure the proper fitting of Subcontractor's Work with the Work of PC Construction of Greenwood, Inc. and others. Field measurements shall be taken and coordinated in a timely manner to avoid delaying the Job Schedule;

.5 Subcontractor shall schedule delivery of all materials and equipment to coincide with installation dates established by PC Construction of Greenwood, Inc. in accordance with the Job Schedule. Subcontractor shall immediately notify PC Construction of Greenwood, Inc., in writing, of any change in the delivery status of any of Subcontractor's materials or equipment; however, such change does not relieve Subcontractor of its obligations to perform it work in accordance with this Subcontract; and

.6 Subcontractor shall promptly submit shop drawings, drawings, data, and samples in such detail as required in order to carry on Subcontractor's Work efficiently and at a speed that will avoid delay to the Job Schedule and permit coordination of Subcontractor's Work with the work of PC Construction of Greenwood, Inc. and others.

e. **SAFETY.** Subcontractor shall, at its own expense, conform to the basic safety policy of PC Construction of Greenwood, Inc., and shall comply with all applicable Federal, State or Local safety rules, standards, regulations and record keeping requirements, including, but not limited to, the Occupational Safety and Health Act of 1970. Subcontractor shall inform all of his employees of PC Construction of Greenwood, Inc.'s policy on safety and that all safety-related policies and regulations should be implemented. Subcontractor agrees to defend and to be solely responsible for all citations, assessments, fines or penalties which may be received or incurred by reason of Subcontractor's failure or the failure of the Subcontractor's agents, employees, suppliers or subcontractors to comply with safety standards, rules, regulations and requirements.

f. **CLEAN UP.** During the course of construction, the Subcontractor shall maintain the Project in a clean and orderly condition and shall remove waste materials from the Project as directed by PC Construction of Greenwood, Inc.. In addition to any specific directions from PC Construction of Greenwood, Inc., a daily clean up is a mandatory requirement throughout the course of the Project. If the Subcontractor fails to clean-up daily, after being warned by the Project Superintendent, and after the passage of twenty-four (24) hours, PC Construction of Greenwood, Inc. will perform the necessary clean-up and the cost of the same will be deducted from future payments due the Subcontractor at the rate of $35.00 per man hour.

g. **ENVIRONMENTAL PROTECTION.** Subcontractor shall be responsible for all applicable environmental protection requirements, codes and regulations. In addition, the Subcontractor shall:

.1 not bring upon or prepare on the Project site, nor shall any of its subcontractors or suppliers bring upon or prepare on the Project site, any products or materials that are considered hazardous substances by EPA, CERCLA, or comparable state or local regulatory agencies. Upon notice from the Owner, Architect or PC Construction of Greenwood, Inc., the Subcontractor shall remove any such material at its sole responsibility and expense;

.2 notify PC Construction of Greenwood, Inc., in writing, prior to delivery, of any such materials on site if they are included in the specifications or are in any specified materials or products and provide proper handling, control, removal and disposal of the same off site as required by the Owner, Architect or PC Construction of Greenwood, Inc.;

.3 notify PC Construction of Greenwood, Inc., in writing, of any such materials encountered on the Project and provide proper handling, control, removal and disposal of the same off site as required by the Owner, Architect or PC Construction of Greenwood, Inc.; and

.4 comply with all federal, state or local environmental and natural resource regulations and laws applicable to the Subcontractor's Work.

h. **PROTECTION OF WORK.** The Subcontractor will take all necessary precautions to protect Subcontractor's work and any other existing work from any damage caused by Subcontractor or persons or entities for whom the Subcontractor is responsible. Should Subcontractor cause damage to any work or property of the Owner, PC Construction of Greenwood, Inc. or others, Subcontractor shall repair such work or property either in conformance with the Contract Documents or to the satisfaction of the party whose property was injured. Should the Subcontractor fail to remedy such damage, PC Construction of Greenwood, Inc., on behalf of the Subcontractor, can deduct the cost from any payment due or to become due to the Subcontractor.

i. **WORKMANSHIP.** Every portion of Subcontractor's Work shall be executed in strict accordance with the Contract Documents in the most sound, workman like, and substantial manner. All materials used in Subcontractor's Work shall be new, except such materials as may be expressly provided in the Contract Documents to be otherwise. Subcontractor shall, within forty-eight (48) hours after written notice from PC Construction of Greenwood, Inc., proceed promptly to take down all portions of Subcontractor's Work and remove from the Project site all materials which PC Construction of Greenwood, Inc., Architect or Owner have rejected.

j. **JOB SITE CONDITIONS.** The Subcontractor shall perform his work in accordance with the following conditions:

.1 No overtime will be allowed unless approved by PC Construction of Greenwood, Inc. in writing, and no work will be allowed on the job site without a representative of PC Construction of Greenwood, Inc. on the job site at all times. Should the Subcontractor, in the sole judgment of PC Construction of Greenwood, Inc., delay the progress of the Work, the Subcontractor shall, at his own expense and cost, work such overtime as may be necessary to finish the Work within the Schedule.

.2 Subcontractor shall work the established working hours set by the Project Superintendent. Lunch breaks will be as established by the Project Superintendent and Subcontractor's employees shall abide by these requirements.

.3 Subcontractor is to furnish hard hats for each and every employee working on the job site. All hard hats deemed to be unsuitable by the Project Manager, Project Superintendent, and/or Safety Director of PC Construction of Greenwood, Inc. shall be replaced with a suitable hard hat by the Subcontractor.

.4 Subcontractor shall have on the job site at all time an employee who is familiar with first aid administration and an approved first aid kit for the use of his employees. PC Construction of Greenwood, Inc.'s employees shall not be responsible for administering first aid to any employees, agents or representatives of the Subcontractor and PC Construction of Greenwood, Inc.'s first aid supplies are not accessible to employees other than its own.

.5 PC Construction of Greenwood, Inc. shall not be responsible for and will not receive any materials, supplies, etc on behalf of the Subcontractor. Subcontractor shall schedule deliveries during normal working hours and only when a representative of the Subcontractor is on the job site.

k. **SHOP DRAWINGS & SUBMITTALS.** Subcontractor is to submit to PC Construction of Greenwood, Inc. all shop drawings and submittals required by the plans & specifications within fifteen (15) days of the date of their letter of intent issued by PC Construction of Greenwood, Inc.. Such shop drawings shall be rolled, and not folded, and Subcontractor shall further submit to PC Construction of Greenwood, Inc. at least four (4) of required samples. Shop drawings shall be submitted with twelve sets (12) of bond paper of each plan on minimum 36" x 42" sheets. Shop drawings submitted not in accordance with this section will be returned for correction. PC Construction of Greenwood, Inc., at its sole discretion, may require earlier submission of Shop Drawings and submittals, if required by the terms of the Contract Documents or necessary to maintain the Job Schedule.

l. **SUBSTITUTIONS AND ALTERNATES.** No substitutions or alternates shall be allowed in Subcontractor's Work unless allowed by the Contract Documents, and only then upon Subcontractor first receiving all approvals required under the Contract Documents for substitutions or alternates. If Subcontractor obtains approval of any substitute or alternate materials or method of operation which will in any way make changes in or add to the Work or cost thereof, Subcontractor shall be

responsible for all additional costs resulting therefrom, including costs incurred by PC Construction of Greenwood, Inc. or others. Shop drawings and other submittals from Subcontractor shall clearly identify, by specific reference, any substitutions, alternates, changes or deviations from the requirements of the Contract Documents. It is expressly understood that the review and approval of Subcontractor's shop drawings and other submittals is general only, and such review and approval shall not relieve Subcontractor from responsibility for any deviation from the requirements of the Contract Documents unless such deviation was clearly identified by specific reference in Subcontractor's submittal and was expressly approved.

m. **USE OF CONTRACTOR'S EQUIPMENT.** Subcontractor, its agents, employees, subcontractors or suppliers shall not use PC Construction of Greenwood, Inc.'s labor or equipment without the written permission of PC Construction of Greenwood, Inc.. By using any labor, machinery, equipment, tools, scaffolding, hoists, lifts or similar items (collectively "equipment") owned, leased, or under the control of PC Construction of Greenwood, Inc., Subcontractor shall be deemed to have assumed all risks in connection therewith, including the risk of defects in said equipment.

n. **LIENS.** If any person or entity employed directly or indirectly by subcontractor should file any lien against the real property upon which the Project is being constructed, or improvements thereon, or funds due Contractor from Owner, or Lien Claimant from Subcontractor, Subcontractor shall cause said lien to be removed or shall post a bond acceptable to Contractor to remove said lien. If any such lien is made or filed, Subcontractor shall immediately pay, bond off, or otherwise discharge said lien and furnish proof of same to PC Construction of Greenwood, Inc.. Upon Subcontractor's failure to do so within three (3) days after receipt of demand from PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may take any action it deems appropriate to discharge such lien on Subcontractor's behalf. The Subcontractor shall be responsible and liable for all damages and expenses, including bond premiums and attorney's fees, incurred by PC Construction of Greenwood, Inc. to discharge and/or defend against said liens. The existence of any encumbrance shall preclude the Subcontractor's right to receive payment until such encumbrance has been satisfied and removed. This is in no way a waiver by Subcontractor of any of his statutory lien rights, or other rights, which the Subcontractor possesses to file and enforce a lien claim per the laws of the State in which the Project is located against the Owner in the event of nonpayment by PC Construction of Greenwood, Inc..

ARTICLE 6

CHANGES, FIELD ORDERS, CLAIMS AND DELAYS

a. **CHANGES.** Without nullifying this Subcontract or any bond given pursuant to this Subcontract, PC Construction of Greenwood, Inc. may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of PC Construction of Greenwood, Inc.'s directive or if the Contract Documents require notice to be given by PC Construction of Greenwood, Inc. to the Owner in less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give notice to the Owner or to comply with any other notice requirements of the Contract Documents. **FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY THE OWNER, ARCHITECT AND/OR PC Construction of Greenwood, Inc..** Any adjustments to Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. Under no circumstances shall the Subcontractor be entitled to receive a change order for self performed work in excess of the cost to perform the work plus fifteen percent **(15%) which includes overhead and profit.** Likewise, under no circumstances shall the Subcontractor be entitled to receive a change order for sub-subcontractor performed work in excess of the cost to perform the work plus seven percent **(7%) which includes overhead and profit.** Should PC Construction of Greenwood, Inc. and the Subcontractor be unable to agree upon the provisions of the Change Orders, the Subcontractor will nevertheless proceed with the Work and shall maintain daily cost records (including detailed descriptions and locations of the Work performed) of such Work on a time and materials basis and submit the same to PC Construction of Greenwood, Inc. daily. **THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY PC Construction of Greenwood, Inc. AND SIGNED BY THE PROJECT MANAGER, Gary Piontek .** Subcontractor shall only be entitled to an adjustment to the Subcontract Price or Job Schedule in connection with any change initiated by Owner upon the same terms and conditions as

any extension of time or additional compensation is allowable to PC Construction of Greenwood, Inc. under the Contract Documents, and only to the extent actually allowed and paid to PC Construction of Greenwood, Inc. by Owner, receipt of payment from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor.

b. **FIELD ORDERS.** A "Field Order" is a written order from PC Construction of Greenwood, Inc. to Subcontractor which orders minor changes to or clarifies the scope of Subcontractor's Work, but does not involve an adjustment to the Subcontract Price or Job Schedule. Subcontractor shall carry out such Field Orders promptly. If Subcontractor believes a Field Order justifies an adjustment to the Subcontract Price or Job Schedule, Subcontractor shall so notify PC Construction of Greenwood, Inc. in writing prior to performing that portion of Subcontractor's Work affected by the Field Order. Subcontractor shall also present to PC Construction of Greenwood, Inc., on a daily basis, work tickets and other evidence of costs incurred in performing Subcontractor's Work affected by the Field Order. Failure to give written notice and present cost records daily as Subcontractor's Work affected by the Field Order is performed shall be a waiver of any claim by Subcontractor for an adjustment to the Subcontract Price or Job Schedule in connection with the Field Order. Within five (5) days after issuance of a Field Order which Subcontractor believes justifies an adjustment to the Subcontract Price or Job Schedule, Subcontractor shall submit to PC Construction of Greenwood, Inc., in writing, all evidence which Subcontractor believes substantiates its claim. If PC Construction of Greenwood, Inc. agrees, a Subcontract Change Order will be issued by the project manager, Gary Piontek . In the event that an agreement cannot be reached, Subcontractor shall nevertheless proceed in accordance with PC Construction of Greenwood, Inc.'s Field Order, and any dispute shall be resolved under Article 10 hereof.

c. **CLAIMS RELATING TO PC Construction of Greenwood, Inc..** Subcontractor shall give PC Construction of Greenwood, Inc. written notice of any claim within five (5) days of the occurrence of the event for which the claim is made, or if Subcontractor is then aware of the condition giving rise to the claim, prior to performance of the affected portion of Subcontractor's Work, whichever is earlier; otherwise, such claims shall be deemed waived. The written notice shall include a description of the event giving rise to the claim, a description of the work to be performed, an estimate of the cost of performing the work and, if any additional time is necessary, a request for additional time. **FAILURE TO REQUEST TIME IN THE WRITTEN NOTICE SHALL BE DEEMED A WAIVER OF ANY REQUEST OR CLAIM FOR TIME EXTENSION.**

d. **CLAIMS RELATING TO OWNER.** Subcontractor agrees to make all claims for which the Owner is or may be liable in the manner and within the time provided in the Contract Documents for like claims by PC Construction of Greenwood, Inc. upon Owner. Notice of such claims shall be given by Subcontractor within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents; but, in any event, no later than five (5) days after the occurrence of the event for which such claim is made or, if Subcontractor is then aware of the condition giving rise to the claim, prior to performance of the affected portion of Subcontractor's Work, whichever is earlier; otherwise, such claims shall be deemed waived. Subcontractor shall only be entitled to an adjustment to the Subcontract Price or Job Schedule, for performing and completing that portion of Subcontractor's Work associated with any claim for which Owner is or may be liable, upon the same terms and conditions as any extension of time or additional compensation is allowable to PC Construction of Greenwood, Inc. under the Contract Documents, and only to the extent actually allowed and paid to PC Construction of Greenwood, Inc. by Owner, receipt of payment from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor. Any decision of Owner or Architect with respect to such claims which, under the terms of the Contract Documents, is binding on PC Construction of Greenwood, Inc., and any decision in arbitration or litigation between Owner and PC Construction of Greenwood, Inc. which becomes final and binding on PC Construction of Greenwood, Inc. shall likewise be final and binding on Subcontractor. If any claim is prosecuted or defended by PC Construction of Greenwood, Inc., Subcontractor agrees to cooperate fully with PC Construction of Greenwood, Inc. and to furnish all documents, statements, witnesses and other information required by PC Construction of Greenwood, Inc. for such purpose and shall pay or reimburse PC Construction of Greenwood, Inc. for all expenses and costs, including reasonable attorneys' fees, incurred in connection therewith to the extent of Subcontractor's interest in such claim.

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be a substantial delay, otherwise the right to such an

adjustment to the Job Schedule is waived. It is expressly understood that Subcontractor's sole and exclusive remedy for delay, disruption, interference, inefficiencies, hindrance or any other adverse affect to the performance of Subcontractor's Work shall be by adjustment to the Job Schedule, as provided above, except to the extent that an adjustment to the Subcontract Price corresponds to an adjustment obtained on Subcontractor's behalf by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents, receipt of payment therefore from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor any such adjustment. If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc.. Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.

f. **CLAIMS RELATING TO OTHER SUBCONTRACTORS OR SUPPLIERS.** Subcontractor agrees that it will not hold PC Construction of Greenwood, Inc. liable for any damages, costs, losses or expenses, including but not limited to delays, disruption and interference, resulting from any acts or omissions, failure to perform, delays in performance, or defaults of any other subcontractor or any supplier in connection with the performance of the Work. Subcontractor agrees that its sole remedy shall be directly against the other subcontractor or supplier, and the Subcontractor further agrees to make no claim against the Owner or PC Construction of Greenwood, Inc. nor to make the Owner or PC Construction of Greenwood, Inc. a party to any such claim or action. Subcontractor expressly agrees to confer upon other subcontractors and suppliers on the Project a direct right of action against the Subcontractor for any damages, costs, losses or expenses claimed to result from any acts or omissions, failure to perform, delays in performance, or defaults of the Subcontractor. Subcontractor expressly agrees that, should a claim be made against PC Construction of Greenwood, Inc. by other subcontractors, suppliers or third parties for which the Subcontractor is or might be liable, and such claims are asserted in an arbitration proceeding, then the Subcontractor agrees that PC Construction of Greenwood, Inc., at its election, may require and the Subcontractor will consent to joinder in such arbitration proceeding. Subcontractor further agrees that direct claims may be asserted by other parties to the arbitration against the Subcontractor and that such claims will be consolidated into a single arbitration proceeding.

g. **CLAIMS DOCUMENTATION AND SUPPORT.** Subcontractor agrees to provide within fifteen (15) days from receipt of written notice from PC Construction of Greenwood, Inc. any documentation requested by PC Construction of Greenwood, Inc. including, but not limited to, bid take offs, detailed job cost reports, labor records, man hour records, job diaries or other documents as may be identified. Subcontractor shall maintain specifically and separately all costs associated with the claim including supervision, man hours and materials. **FAILURE OF SUBCONTRACTOR TO MAINTAIN SEPARATELY AND CONCURRENTLY THE COSTS AND DAMAGES ASSOCIATED WITH ANY CLAIM BY SUBCONTRACTOR AGAINST PC CONSTRUCTION OF GREENWOOD, INC. SHALL BE DEEMED A WAIVER OF ANY DAMAGES OR COSTS ASSOCIATED OR ARISING OUT OF ANY SUCH CLAIM MADE BY SUBCONTRACTOR AGAINST PC CONSTRUCTION OF GREENWOOD, INC.**

ARTICLE 7

DEFAULT

a. Should the Subcontractor at any time refuse or neglect to supply a sufficient number of properly skilled workmen, or a sufficient quantity of materials of proper quality, or fail in any respect to execute the Work covered by this Subcontract with promptness and diligence, or fail in the performance of any of the agreements herein contained, PC Construction of Greenwood, Inc. may, at its option, after twenty-four (24) hours written notice to the Subcontractor, (i) provide any such labor and materials and deduct the costs thereof from any money then due or thereafter to become due the Subcontractor under this Subcontract or (ii) without process of law or further notice to the Subcontractor take the prosecution of the Work out of the hands of the Subcontractor and take possession for the purpose of completing the Work included under this Subcontract, of all the materials, tools and appliances thereon, and may employ any other person or persons to finish the Work and provide the materials therefor; and in case of such discontinuance of the employment of the Subcontractor by PC Construction of Greenwood, Inc., the Subcontractor shall not be entitled to receive any further payments under this Subcontract until the Work shall be wholly finished. At that time, if the unpaid

balance of the amount to be paid under this Subcontract exceeds the expenses incurred by PC Construction of Greenwood, Inc. in finishing the Work, such excess shall be paid by PC Construction of Greenwood, Inc. to the Subcontractor, but, if such expenses shall exceed the unpaid balance, the Subcontractor shall pay the difference to PC Construction of Greenwood, Inc.. The expense incurred by PC Construction of Greenwood, Inc., as herein provided, either for furnishing materials or for finishing the Work, and in addition thereto, any and all damages incurred as a result of a default by Subcontractor, whether or not PC Construction of Greenwood, Inc. elects to terminate the Subcontract, shall be chargeable to and paid by the Subcontractor, and PC Construction of Greenwood, Inc. shall have a lien upon all materials, tools and appliances taken possession of as aforesaid to secure the payment thereof. In addition, PC Construction of Greenwood, Inc. may terminate all or any part of the work of this Subcontract, without cause, by giving notice to the Subcontractor and reimbursing the Subcontractor for the Work executed to the date of notification by PC Construction of Greenwood, Inc., plus the reasonable cost of demobilization. Under no circumstances, however, shall PC Construction of Greenwood, Inc. be liable for anticipated profits on Work not performed. In the event a termination of this Subcontract for default, as set out above, is found by a court of competent jurisdiction to be unjustified, then such termination shall be deemed to have been a termination by PC Construction of Greenwood, Inc. without cause, mentioned above, and the Subcontractor shall be reimbursed accordingly.

b. **BANKRUPTCY - INTERIM REMEDIES.** If a petition in bankruptcy is filed by or against Subcontractor pursuant to the U.S. Bankruptcy Code, or any similar state statute or code, and at the time of such filing or at any subsequent time Subcontractor is not performing in accordance with the Job Schedule, PC Construction of Greenwood, Inc. may, while awaiting the decision of Subcontractor or its trustee or the Court to reject this Subcontract, or to affirm this Subcontract and provide adequate assurance of Subcontractor's ability to perform hereunder, avail itself of such remedies under this Article 7 as are reasonable necessary to maintain the Job Schedule.

ARTICLE 8

SUSPENSION OR TERMINATION BY OWNER

Should Owner suspend or terminate the Contract between Owner and PC Construction of Greenwood, Inc., or any portion of said Contract which includes all or part of Subcontractor's Work, PC Construction of Greenwood, Inc. shall so notify Subcontractor in writing and, upon receipt of said notice, Subcontractor's performance under this Subcontract, or affected portion thereof, shall also be suspended or terminated and Subcontractor shall immediately stop work on any affected portion of Subcontractor's Work. In the event of Owner suspension or termination, PC Construction of Greenwood, Inc.'s liability to Subcontractor is limited to the extent of recovery by PC Construction of Greenwood, Inc. from Owner, on Subcontractor's behalf, for such suspension or termination, and provided further that Subcontractor shall only be entitled to an adjustment of the Subcontract Price or Job Schedule actually allowed and paid to PC Construction of Greenwood, Inc. by Owner, receipt of payment of allowance from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to similarly adjust the Subcontract Price or Job Schedule.

ARTICLE 9

INDEMNIFICATION

a. **SUBCONTRACTOR'S PERFORMANCE.** Subcontractor shall defend, indemnify, hold harmless PC Construction of Greenwood, Inc. and Owner, and their agents and employees, from and against any claim, cost, expense, damage, loss or liability (including attorney's fees) due to bodily injury (including death) or property damage arising out of or resulting from performance of this Subcontract, or in any manner due to Subcontractor's failure or refusal to perform any of the terms and provisions of this Subcontract, except that Subcontractor shall not be liable hereunder for the consequences of negligence on the part of PC Construction of Greenwood, Inc..

b. **NO LIMITATION UPON LIABILITY.** In any and all claims against Owner, Architect, PC Construction of Greenwood, Inc. and other contractors or subcontractors, or any of their agents, officers, directors or employees, and their successors and assigns, by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor, or anyone for whose acts Subcontractor may be liable, the indemnification obligations under this Article shall not be limited in any way by any limitation on the amount of damages, compensation, or benefits payable by or for Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

c. **COMPLIANCE WITH LAWS.** Subcontractor is bound by, at its own cost and shall comply with all applicable Federal, State and local codes, laws, ordinances, and regulations (herein "laws"), including,

but not limited to, laws pertaining to equal employment opportunity, Davis-Bacon Act, Federal Acquisition Regulation, Code of Federal Regulations, Cost Accounting Standards, social security, unemployment compensation, workers' compensation, tax, safety, and building codes. Subcontractor shall indemnify, defend and hold harmless PC Construction of Greenwood, Inc. and Owner with respect to all claims, damages, losses, costs and expenses attributable to the failure or claimed failure of Subcontractor, or its employees, agents, subcontractors or suppliers, to comply with such laws, including, but not limited to, any fines or penalties incurred by PC Construction of Greenwood, Inc. or Owner in connection therewith.

ARTICLE 10

DISPUTE RESOLUTION

a. **AGREEMENT TO ARBITRATE.** All claims, disputes and other matters in question arising out of or relating to this Subcontract or the performance or breach thereof, except for claims which have been waived by the acceptance of final payment, claims which are subject to a final and binding determination under Article 6, Paragraph "d" and the claims described in Article 10, Paragraph "e" shall, at the option of PC Construction of Greenwood, Inc. and upon PC Construction of Greenwood, Inc.'s written request or demand therefore, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect, unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. All arbitration proceedings between PC Construction of Greenwood, Inc. and Subcontractor shall be conducted in Greenwood, South Carolina or at such other location as PC Construction of Greenwood, Inc., in its sole discretion, may designate. Demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question arises, but in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitation.

b. **AGREEMENT TO MEDIATE.** Prior to arbitration, at the option of PC Construction of Greenwood, Inc. and upon PC Construction of Greenwood, Inc.'s written request or demand therefore, the parties shall endeavor to resolve disputes by mediation. Any such mediation shall be conducted in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then in effect, unless the parties mutually agree otherwise. A request or demand for mediation may be made either before or after the filing of the demand for arbitration but, in any event, mediation, when demanded, shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

c. **WORK CONTINUATION.** Unless otherwise agreed in writing, Subcontractor shall carry on Subcontractor's Work and maintain the Job Schedule during or pending any arbitration, and conversely, PC Construction of Greenwood, Inc. shall continue to perform its obligations under this Subcontract.

d. **NO LIMITATION OF RIGHTS OR REMEDIES.** Nothing in this Article 10 shall limit any rights or remedies, not otherwise expressly waived by Subcontractor, which Subcontractor may have under lien laws or payment bonds; provided, that arbitration under this Article 10 is a condition precedent to Subcontractor's right to institute an action in any court against PC Construction of Greenwood, Inc. or its surety or Owner, and if such action is instituted, Subcontractor agrees that it shall be stayed pending arbitration.

e. **EXCEPTIONS.** This agreement to arbitrate shall not apply to any claim:

.1 of contribution of indemnity asserted by one party to this Subcontract against the other party and arising out of an action brought in a State of Federal court, or brought in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto and who does not consent to such arbitration; or

.2 asserted by Subcontractor against PC Construction of Greenwood, Inc. if PC Construction of Greenwood, Inc. asserts said claim, either in whole or part, against Owner, and the Contract between PC Construction of Greenwood, Inc. and Owner does not provide for binding arbitration and PC Construction of Greenwood, Inc. and Owner do not subsequently agree to arbitration, or the Contract does so provide but the two arbitration proceedings cannot be consolidated. If PC Construction of Greenwood, Inc. contends this exception applies, he shall so notify Subcontractor either before or

after demand for arbitration is made; or .3 for punitive damages or injunctive relief.

f. **ARBITRABILITY.** In any dispute arising out of the application of this Article 10, questions of arbitrability or consolidation of proceedings shall be decided by the appropriate court and not by arbitration.

g. **RECOVERY OF COSTS.** PC Construction of Greenwood, Inc. is entitled to recover all costs incurred, including attorney's fees, in the resolution of any claim or dispute.

ARTICLE 11

INSURANCE

Before commencing the Work, the Subcontractor shall furnish PC Construction of Greenwood, Inc. with an insurance certificate showing at least the following coverages: Workmen's Compensation--Statutory Limits, Comprehensive General Liability (Bodily Injury$ 1,000,000, Property Damage$ 1,000,000), Comprehensive Automobile Liability (Bodily Injury$ 1,000,000). The Subcontractor shall obtain and maintain the insurance at its expense for the duration of its Work. When the Subcontractor is responsible for any part of the design for any component of the structure for the Project, he shall, at his expense, provide Errors & Omissions insurance, with PC Construction of Greenwood, Inc. being named an additional insured and a Certificate bearing proof of this insurance. Receipt by PC Construction of Greenwood, Inc. of any required certificate of insurance or performance or payment bond shall be a condition precedent to Subcontractor's entitlement to any payment under this Subcontract. Failure to provide any required certificates of insurance or bonds before a commencing work shall constitute a material breach of this Subcontract.

ARTICLE 12

MISCELLANEOUS

Subcontractor shall, at its own expense:

(a) obtain all necessary permits and licenses and comply with all statutes, ordinances, rules, regulations and orders of any governmental or quasigovernmental authority applicable to the performance of the Work and be responsible for and correct any violations thereof; and

(b) conform to the basic safety policy of PC Construction of Greenwood, Inc. and comply with all specific safety requirements promulgated by the Owner or PC Construction of Greenwood, Inc., including the Occupational Safety and Health Act of 1970.

ARTICLE 13

GUARANTEE

The Subcontractor guarantees that the Work shall be free from defects and shall conform to and meet the requirements of this Subcontract and the Contract Documents and shall furnish any separate guarantee for the Work, or portions thereof, required under this Subcontract or the Contract Documents. The Subcontractor agrees to make good, to the satisfaction of PC Construction of Greenwood, Inc. and the Owner, any portion or portions of the Work which prove defective within one (1) year (or such longer period as may be specified in this Subcontract or the Contract Documents) from the date of acceptance of the Project by the Owner.

ARTICLE 14

ASSIGNMENT

The Subcontractor will not sublet, assign or transfer this Subcontract or any part thereof without the prior written consent of PC Construction of Greenwood, Inc., nor will the Subcontractor assign any monies to become due him hereunder without the prior written consent of PC Construction of Greenwood, Inc..

ARTICLE 15

TAXES

It is hereby specifically and expressly agreed that with respect to labor requirements and wage scales, the Subcontractor will comply with all statutory and Specifications requirements, will pay all taxes assessed against his labor and material, and will also comply with all statutory or Specification requirements as to labor reports, payroll, taxes, and the like. Subcontractor agrees to conform with all state and federal labor laws. The Subcontractor agrees to pay any fines assessed against PC Construction of Greenwood, Inc. because of labor violation by the Subcontractor or his subcontractors.

ARTICLE 16

CORRESPONDENCE

All correspondence relating to the Project, including without limitation, invoices and Applications for Payment, shall be sent to the following address:

FOR U.S. MAIL: ATTN: Project Manager
PC Construction of Greenwood, Inc.
108 Enterprise Crt.
Greenwood, S.C. 29649

FOR FED/EX, UPS, etc.: ATTN: Project Manager
PC Construction of Greenwood, Inc.
108 Enterprise Crt.
Greenwood, S.C. 29649

Shop drawings and submittals shall be forwarded to the Project Manager for processing.

ARTICLE 17

ATTACHMENTS

The following additions, deletions and modifications constitute a part of this Subcontract:

Attachment "A" Letter of Intent review statement

Attachment "B" Standard Requirements Attachment

Attachment "C" *Drawing List and Specifications*

ARTICLE 18

SCOPE OF WORK

The Subcontractor's Work shall consist of (to include but not limited to) all components necessary to furnish and install a complete and functional system for the following:

Sections 31-1000 Site Clearing and Demo, Erosion Control to include seeding, Filtrex Silt Sediment Traps, and Temp Drainage Swale, 31-2000 Earth Moving to include backfilling of walls and Final grade to a 1/10 and Section 33-4100 Site Storm Drainage. Layout work for your scopeto be included for all areas, in accordance with Neal Prince Contract Drawings and Specifications to Include Alternate number 1. Please note there were two Addendas on this project prior to bid which must be included in your scope as necessary.

Included are all accessories, materials, labor, supervision, equipment and items of an incidental nature, etc. required to furnish a complete and functional system, whether or not shown, detailed and/or implied on the plans and specifications.

ARTICLE 19

ENTIRE AGREEMENT

This Subcontract is solely for the benefit of the signatories hereto, represents the entire and integrated agreement

between the parties hereto, and supersedes all prior negotiations, representations, or agreements, either written or oral. No other agreements or understanding of any nature concerning the same has been entered into or will be recognized. PC Construction of Greenwood, Inc. has made no inducements or representations to Subcontractor whatsoever except as expressly stated in this Subcontract. No oral modification of this Subcontract shall have any force or effect.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first written above, this instrument being executed in duplicate, each party retaining a copy.

Nilen's Construction Co, LLC	PC CONSTRUCTION OF GREENWOOD, INC.
Subcontractor	Contractor
By:	By:
Date: 30 Dec 2008	Date: 1/6/00
Title:	Title: ~~Project~~ Office Manager

LETTER OF INTENT CONTRACT ATTACHMENT "A"
for Lander Sports Complex

1. Acknowledge receipt of this Letter of Intent and verify the listed Contract Value as soon as possible, but no later than (5) working days following receipt of this letter.

2. Review the Owners specification Manual for submittal requirements for submission:
   a. Note that all sections requiring submittals will be required.
   b. Indicate Fabrication lead times / Delivery Schedules of any long lead items needing to be incorporated into the schedule.

3. Forward 7 (Seven) copies of your submittals in accordance with the Contract Documents as soon as possible. You will need to submit the anticipated turnover date for Submittals, to PC Constrcution of Greenwood, Inc, for approval

4. Identify and list any *priority submittals by other trades* required by you to complete your work to avoid delays. Any notification past 30 days from this letter will not be the responsibility of PC Construction.

5. Any current issues or conflicts to be resolved prior to contract execution.

6. A schedule of Values to be used for payment purposes. Lines items for closeout documents must be included on your schedule of values submitted for approval.

7. A copy of your General Liability and Workman Comp Certificate of Insurance is required before work may commence on site.

8. We need a copy of your Tax Payers ID # and Certification. W-9

9. We will require an affidavit that pre-employment drug testing has been done.

STANDARD REQUIREMENTS CONTRACT ATTACHMENT "B"
for Lander Sports Complex

Please forward the following items as indicated:

ITEM	REQUIREMENTS
1 . Current Certificate of Liability Insurance & Workmen's Comp.with specified coverages. -	1.) Must be received before commencement of work. 2.) PC Construction of Greenwood, Inc. must be added as Additional Insured
2. Schedule of Values -	Must be received and approval 15 working days prior to initial Application for Payment.
3. Material Safety and Data sheets as required -	Must be received before commencement of work.
4. Application for Payment -	All applications for payment must be received no later than the **15th of the month** for the previous pay period. ALL APPLICATIONS FOR PAYMENT MUST BE SUBMITTED IN AN AIA FORMAT, AND IN ACCORDANCE WITH THE REQUIREMNTS OF ARTICLE 3, " SUBCONTRACT PRICE AND PAYMENTS".
5. Subcontractor Personnel Directory -	Listing of key personnel for project (project manager, superintendent, foreman) along with job / office / emergency phone numbers. Must be received before commencement of work.

6. Submittals / Material Deliveries / Schedule -	(As noted in Letter of Intent to Award). Forward a listing of the following submittal requirements: a. Anticipated Submittals due date for Approval b. Fabrication, delivery and projected installation time(s) for each work item.(Work Schedule) c. Master list of required submittals as listed in the contract specifications.
7. Locator Service Request Form	Noting that job sites consist of multiple acerage, it is imperative that you request locator service for the areas in which you plan to dig, using the form provided.

In addition to the requirements listed, ALL items listed are required before processing of the first Application for Payment.

Attachment 'C'

Lander University RWS Complex Initiative – Field Construction
Exhibit A to the Contract For Construction
List of Specifications

All specification sections are dated October 6, 2009 unless otherwise noted.

DIVISION 00 - PROCUREMENT AND CONTRACTING REQUIREMENTS		
00 5200	AGREEMENT FORM	1
00 7200	GENERAL CONDITIONS	1
DIVISION 01 - GENERAL REQUIREMENTS		
01 1000	SUMMARY	6
01 2100	ALLOWANCES	2
01 2200	UNIT PRICES	3
01 2300	ALTERNATES	2
01 2500	SUBSTITUTION PROCEDURES	4
01 2600	CONTRACT MODIFICATION PROCEDURES	3
01 2900	PAYMENT PROCEDURES	4
01 3100	PROJECT MANAGEMENT AND COORDINATION	5
01 3120	PROJECT COMMUNICATIONS	3
01 3200	CONSTRUCTION PROGRESS DOCUMENTATION	7
01 3300	SUBMITTAL PROCEDURES	10
01 3550	CONSTRUCTION WASTE MANAGEMENT	5
01 4200	REFERENCES	9
01 4300	QUALITY ASSURANCE	3
01 4339	VISUAL MOCK-UP REQUIREMENTS	3
01 4500	QUALITY CONTROL	6
01 5000	TEMPORARY FACILITIES AND CONTROLS	5
01 5100	TEMPORARY UTILITIES	6
01 5600	TEMPORARY BARRIERS AND ENCLOSURES	2
01 6000	PRODUCT REQUIREMENTS	7
01 6400	OWNER FURNISHED PRODUCTS	3
01 7000	EXECUTION REQUIREMENTS	7
01 7700	CLOSEOUT PROCEDURES	7
DIVISION 02 - EXISTING CONDITIONS		
02 4116	STRUCTURE DEMOLITION	6
02 8320	SEGMENTAL BLOCK RETAINING WALLS	3
02 8350	FENCE AND WALL PADDING	5
DIVISION 03 - CONCRETE		
03 1000	CONCRETE FORMWORK	21
03 2000	CONCRETE REINFORCEMENT	4
03 3000	CAST-IN-PLACE CONCRETE	6
DIVISION 04 - MASONRY		
04 2100	REINFORCED MASONRY	10

Lander University RWS Complex Initiative – Field Construction
Exhibit A to the Contract For Construction
List of Specifications

04 2113	BRICK MASONRY	10
04 7200	CAST STONE MASONRY	6
DIVISION 05 - METALS		
05 1200	STRUCTURAL STEEL	16
05 2100	STEEL JOISTS	8
05 3100	STEEL DECK	6
05 4000	COLD-FORMED METAL FRAMING	9
05 5000	METAL FABRICATIONS	8
05 5213	PIPE AND TUBE RAILINGS	8
DIVISION 06 - WOOD, PLASTICS, AND COMPOSITES		
06 1063	EXTERIOR ROUGH CARPENTRY	8
06 1800	GLUED-LAMINATED CONSTRUCTION	6
DIVISION 07 - THERMAL AND MOISTURE PROTECTION		
07 1114	ASPHALT MASTIC DAMPPROOFING	6
07 1326	SELF-ADHERING SHEET WATERPROOFING	5
07 2100	THERMAL INSULATION	4
07 2617	BELOW SLAB VAPOR RETARDERS	5
07 4243	COMPOSITE WALL PANELS	6
07 5423	THERMOPLASTIC POLYOLEFIN (TPO) ROOFING	5
07 6113	STANDING SEAM METAL ROOF PANELS	12
07 6200	SHEET METAL FLASHING AND TRIM	7
07 7200	ROOF ACCESSORIES	5
07 9200	JOINT SEALANTS	9
DIVISION 08 - OPENINGS		
08 2113	HOLLOW METAL DOORS AND FRAMES	7
08 3113	ACCESS DOORS AND FRAMES	5
08 3323	OVERHEAD COILING DOORS	4
08 5123	STEEL WINDOWS	8
08 7100	DOOR HARDWARE	17
08 8010	EXTERIOR GLAZING	8
08 9100	WALL LOUVERS	7
DIVISION 09 - FINISHES		
09 2116	GYPSUM BOARD ASSEMBLIES	16
09 5113	ACOUSTICAL PANEL CEILINGS	6
09 6513	RESILIENT BASE AND ACCESSORIES	3
09 6700	POLYMER FLOORING SYSTEM	4
09 7730	IMPACT RESISTANT WALL COVERINGS	4
09 9100	PAINTING	12
09 9300	STAINING AND TRANSPARENT FINISHING	5
09 9700	COATINGS FOR STEEL	6
DIVISION 10 - SPECIALTIES		

Lander University RWS Complex Initiative – Field Construction
Exhibit A to the Contract For Construction
List of Specifications

10 1453	TRAFFIC SIGNAGE	4
10 2113	TOILET COMPARTMENTS	4
10 2813	TOILET ACCESSORIES	8
10 3500	FLAGPOLES	3
10 4400	FIRE-PROTECTION SPECIALTIES	4
DIVISION 11 - EQUIPMENT		
11 4580	DISAPPEARING STAIR	3
11 4850	NETTING	9
DIVISION 12 - FURNISHINGS		
12 3200	MODULAR MILLWORK	5
12 3661	SIMULATED STONE COUNTERTOPS	3
12 6300	STADIUM SEATING	8
12 9313	BICYCLE RACKS	2
DIVISION 22 PLUMBING		
22 0001	PLUMBING GENERAL PROVISIONS	1
22 0116	DOMESTIC WATER PIPING SYSTEMS	4
22 1300	SOIL AND WASTE PIPING SYSTEMS	3
22 1400	ROOF DRAINAGE SYSTEMS	2
22 4000	PLUMBING FIXTURES	5
DIVISION 23 HEATING & VENTILATION		
23 0001	MECHANICAL GENERAL PROVISIONS	9
23 0514	PIPE, TUBE AND FITTINGS	4
23 0515	PIPING ACCESSORIES	3
23 0523	VALVES	2
23 0529	HANGERS, SUPPORTS AND ANCHORS	4
23 0548	SEISMIC PROTECTIN FOR MECHANICAL SYSTEMS	3
23 0700	SYSTEMS INSULTAION	3
23 0924	CONTROLS AND INSTRUMENTATION	2
23 3000	AIR DISTRIBUTION	5
23 8113	THRU THE WALL HEAT PUMPS	4
23 8127	DUCTLESS MINI SPLIT HEAT PUMP	5
DIVISION 26-28 – ELECTRICAL & COMMUNICATIONS		
26 0500	BASIC MATERIALS	8
26 0501	GENERAL PROVISIONS	3
26 0519	CONDUCTORS	3
26 0539	ELECTRICAL RACEWAYS	3
26 0548	VIBRATION AND SEISMIC CONTROLS FOR ELECTRICAL SYSTEMS	8
26 0575	ELECTRICAL TESTING	3
26 2600	SERVICE AND DISTRIBUTION	2
26 5100	LIGHTING	3
26 5110	SPORTS LIGHTING	10
27 0500	TELEPHONE RACEWAY SYSTEM	2
28 3111	VOICE FIRE ALARM SYSTEM	7
DIVISION 31 – EARTHWORK		
31 1000	SITE CLEARING AND EROSION CONTROL	7
31 2000	EARTH MOVING	16

31 2319	DEWATERING	4	
DIVISION 32 - EXTERIOR IMPROVEMENTS			
32 1216	ASPHALT PAVING	8	
32 1220	RUNNING TRAIL SYNTHETIC SURFACE	5	
32 1313	CONCRETE PAVING	13	
32 1400	UNIT PAVING	7	
32 1410	ADA DETECTABLE WARNING PAVERS	6	
32 1823	CUSHIONED ACRYLIC TENNIS COURT SYSTEMS	8	
32 3113	CHAIN LINK FENCES AND GATES	8	
32 3114	TENNIS COURT FENCING	10	
32 3119	DECORATIVE METAL FENCES AND GATES	4	
32 8400	PLANTING IRRIGATION	22	11/12/09
32 9200	TURF AND GRASSES	13	
32 9300	PLANTS	18	
DIVISION 33 - UTILITIES			
33 1100	WATER DISTRIBUTION SYSTEM	15	
33 3100	GRAVITY FLOW SANITARY SEWERAGE SYSTEM	13	
33 4100	STORM DRAINAGE SYSTEM	15	
33 4600	SUBDRAINAGE	6	

Lander University RWS Complex Initiative – Field Construction
Exhibit B to the Contract For Construction
List of Drawings

All drawings are dated October 6, 2009 unless otherwise noted.

A 0.00	COVERSHEET
A 0.01	INDEX AND PROJECT INFORMATION
	CIVIL
C-000	COVERSHEET
C-001	PROJECT LEGEND AND NOTES
C-002	SURVEY
C-100	EXISTING CONDITIONS AND DEMOLITION PLAN
C-200	EROSION AND SEDIMENT CONTROL PLAN
C-300	EROSION AND SEDIMENT CONTROL DETAILS
C-400	OVERALL SITE PLAN
C-401	SITE PLAN (1 OF 4)
C-402	SITE PLAN (2 OF 4)
C-403	SITE PLAN (3 OF 4)
C-404	SITE PLAN (4 OF 4)
C-500	OVERALL GRADING AND DRAINAGE PLAN
C-501	GRADING AND DRAINAGE PLAN (1 OF 4)
C-502	GRADING AND DRAINAGE PLAN (2 OF 4)
C-503	GRADING AND DRAINAGE PLAN (3 OF 4)
C-504	GRADING AND DRAINAGE PLAN (4 OF 4)
C-601	SITE AND DRAINAGE DETAILS (1 OF 3)
C-602	SITE AND DRAINAGE DETAILS (2 OF 3)
C-603	SITE AND DRAINAGE DETAILS (3 OF 3)
C-700	UTILITY PLAN AND PROFILE
C-801	UTILITY DETAILS (1 OF 2)
C-802	UTILITY DETAILS (2 OF 2)
	LANDSCAPE
L-100	SITE MATERIALS PLAN
L-101	SITE MATERIALS ENLARGEMENTS
L-200	OVERALL LANDSCAPE PLAN
L-201	LANDSCAPE PLAN
L-202	LANDSCAPE PLAN
L-203	LANDSCAPE PLAN
L-204	LANDSCAPE SCHEDULE
L-205	LANDSCAPE SCHEDULE
	ARCHITECTURAL
A1.01	ARCHITECTURAL SITE PLAN
A1.02	FENCING SITE PLAN
A1.03	FENCING DETAILS
A1.04	DIMENSION CONTROL PLANS
A2.01	SOFTBALL STADIUM SEATING PLAN
A2.02	BASEBALL STADIUM SEATING PLAN

Lander University RWS Complex Initiative – Field Construction
Exhibit B to the Contract For Construction
List of Drawings

A2.03	SOCCER SEATING PLAN AND FIELD LAYOUT
A2.10	SOFTBALL STADIUM FLOOR PLANS
A2.11	CONCESSIONS FLOOR PLAN
A2.12	BASEBALL STADIUM FLOOR PLAN
A2.13	MISCELLANEOUS FLOOR PLANS
A2.14	TENNIS PAVILION IN TENNIS COURT PLAN (TYPICAL)
A2.15	ENLARGED TERRACE PLAN AND DETAILS
A2.21	ROOF PLANS
A2.22	ROOFING DETAILS
A3.31	BATHROOM AND INTERIOR FINISHES
A3.32	DOOR AND WINDOW SCHEDULE / WALL TYPES
A4.01	REFLECTED CEILING PLAN
A5.01	EXTERIOR BUILDING ELEVATIONS
A5.02	EXTERIOR BUILDING ELEVATIONS
A6.01	BUILDING SECTIONS
A6.02	WALL SECTIONS
A6.03	WALL SECTIONS
A6.04	WALL SECTIONS
A6.05	WALL SECTIONS
A7.01	SEATING BOWL DETAILS
A7.02	SECTION DETAILS
A7.03	EXTERIOR SECTION DETAILS (CONCESSIONS)
A7.10	EXTERIOR PLAN DETAILS
A8.01	ALT. #1 - TENNIS PAVILION AND ALTERNATE PLATFORM
	STRUCTURAL
S0.01	STRUCTURAL NOTES
S1.01	REFERENCE PLAN
S1.02	ROOF WIND PRESSURE DIAGRAM
S1.03	WALL WIND PRESSURE DIAGRAM
S2.10	SOFTBALL STADIUM FOUNDATION IN FLOOR PLAN
S2.11	CONCESSIONS AND DECK FOUNDATION AND FLOOR PLAN
S2.12	BASEBALL STADIUM FOUNDATION AND FLOOR PLAN
S2.13	SOCCER PRESS BOX AND BATTER'S EYE FOUNDATION IN FLOOR PLAN
S2.14	TENNIS PAVILION AND TENNIS COURT FOUNDATION IN FLOOR PLAN
S2.21	ROOF FRAMING PLANS
S2.22	BACKSTOP NETTING PLANS
S3.01	SCHEDULES
S4.01	BUILDING SECTIONS
S4.02	BUILDING ELEVATIONS
S5.01	FOUNDATION DETAILS
S5.02	MASONRY DETAILS
S5.03	CONCRETE DETAILS
S5.04	CONCRETE DETAILS
S6.01	ROOF DETAILS
S6.02	STEEL DETAILS

Lander University RWS Complex Initiative – Field Construction
Exhibit B to the Contract For Construction
List of Drawings

S6.03	STEEL DETAILS
S7.01	GLULAM BEAMS AND CONNECTION DETAILS
S7.02	GLULAM BEAMS AND CONNECTION DETAILS
S7.03	GLULAM BEAMS AND CONNECTION DETAILS
S8.01	SPORTS SPECIFIC DETAILS
	MECHANICAL
M-1	MECHANICAL SITE / KEY PLAN
M-2	ENLARGED HVAC FLOOR PLANS & SCHEDULES
M-3	KITCHEN HOOD DETAIL
M-4	KITCHEN HOOD DETAIL
	ELECTRICAL
E0.01	ELECTRICAL LEGEND AND SCHEDULE
E0.02	ELECTRICAL RISER DIAGRAMS
E0.03	ELECTRICAL PANEL SCHEDULES
E0.04	ELECTRICAL SPORTS LIGHTING RISER DIAGRAMS (CONSTANT WATTAGE)
E0.04A	ELECTRICAL SPORTS LIGHTING RISER DIAGRAM (ALTERNATE WATTAGE)
E0.05	ELECTRICAL FIBER RISER
E0.06	ELECTRICAL DETAILS
E1.01	ELECTRICAL OVERALL SITE PLAN
E1.02	ELECTRICAL AREA LIGHTING PLAN
E1.03	ELECTRICAL SPORTS LIGHTING (CONSTANT WATTAGE)
E1.03A	ELECTRICAL SPORTS LIGHTING (ALTERNATE WATTAGE)
E2.10	ELECTRICAL SOFTBALL STADIUM FLOOR PLANS
E2.11	ELECTRICAL CONCESSIONS FLOOR PLAN
E2.12	ELECTRICAL BASEBALL STADIUM FLOOR PLAN
E2.13	ELECTRICAL FLOOR PLANS
E2.14	ELECTRICAL TENNIS PAVILION AND TENNIS COURT
E3.01	ELECTRICAL LIGHTING PLANS
	PLUMBING
P-1	PLUMBING SITE / KEY PLAN
P-2	ENLARGED PLUMBING FLOOR PLAN
P-3	PLUMBING RISERS
P-4	PLUMBING SCHEDULES AND DETAILS

Lander University RWS Complex Initiative – Field Construction
Exhibit C to the Contract For Construction
Description of Contract Time

The **DATE OF SUBSTANTIAL COMPLETION**, to be documented on Form SE-550A, *Certificate of Substantial Completion*, for Phase I – Soccer Stadium shall be August 15, 2010, subject to adjustments as provided in the Contract Documents.

The **DATE OF SUBSTANTIAL COMPLETION**, to be documented on Form SE-550A, *Certificate of Substantial Completion*, for Phase II – All work of this project except the Soccer Stadium shall be Two Hundred and Forty (240) **CALENDAR DAYS** from the **DATE OF COMMENCEMENT** set forth in the SE-390, subject to adjustments as provided in the Contract Documents.

The **DATE OF FINAL COMPLETION**, to be documented on Form SE-560C, *Certificate of Final Completion,* for Phases I & II shall be Thirty (30) **CALENDAR DAYS** from the **DATE OF SUBSTANTIAL COMPLETION** of each phase, subject to adjustments as provided in the Contract Documents.

Miller's Construction Company, LLC
225 Thompson Road
Anderson, SC 29624

Phone (864) 296-3301
Fax (864) 296-8700

November 28, 2011

PC Construction of Greenwood, Inc.
108 Enterprise Court
Greenwood, SC 29649

Job Name: Lander University Sports Complex

Original Contract Amount	$492,424.00
Change Orders 1-86	$967,225.35
CO # 77 Removal of Asphalt Add $500.00 Total Change Order Amount is $1,000.00 PC # 64 / MC # 77	Add $500.00 $967,725.35
Invoice # 22921 Dated 4-21-2011 Amount Due Credit MC 72 / PC 53	$4,957.50 < $247.50> $4,710.00
Invoice # 22756 Dated 6-24-2010 Back Charge Silt Fence (by other contractors)	$1,785.00
Invoice # 22755 Dated 6-24-2010 Back Charge (by other contractors)	$640.00

Civil Engineer Request:

MC # 32	Jack & Bore	$6,085.00
MC # 32 A	Add jack bore	$600.00
Credit to West (check by engineer)		<$3,600.00>
MC # 25 Bulletin Drawing C8		$1,895.00
		$4,980.00
Total Change Order Amount		$979,840.35
New Contract Amount		$1,472,264.35
Less 3.5% Retainage		$51,529.25
		$1,420,735.10
Total Payments		$1,393,901.32
Net Due		$26,833.78
Retainage Due		~~$51,529.25~~

Total → 78,363.03

BRUNER, POWELL, WALL & MULLINS, LLC
ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
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JAMES L. BRUNER, P.A.
WARREN C. POWELL, JR., P.A.*
HENRY P. WALL
E. WADE MULLINS, III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.

* Also Admitted in District of Columbia

JOEY R. FLOYD, P.A.
WILLIAM D. BRITT, JR., P.A.

BENJAMIN C. BRUNER
MATTHEW H. STABLER

AUTHOR'S E-MAIL:
WMULLINS@brunerpowell.com

March 29, 2012

David James Brousseau, Esquire
McIntosh Sherard & Sullivan
PO Box 197
Anderson, South Carolina 29621

Re: Project: Lander RWS Complex
Bond Claimant: Miller Construction
BrunerPowell File No.: 7-931.123

Dear David:

I am writing you to confirm our discussions regarding status of the subcontract between PC Construction of Greenwood ("PC") and Miller Construction Co., LLC ("Miller"). Miller has asserted a claim on PC payment bond in the amount of $78,363.03. PC's position on this matter is that the Owner has alleged it intends to assess liquidated damages against PC on this Project. PC has indicated that the assessment of liquidated damages are not warranted and are in negotiations with the Owner. However, should the Owner assess liquidated damages, PC contends that Miller bears responsibility for such delay. Furthermore, PC contends that there are certain additional unresolved issues relating to backcharges. As such, until these matters are resolved, PC is withholding final payment to Miller.

As discussed, Miller acknowledges that it received payment in the amount of $4,980.00 from the engineer on the Project. This payment reflects monies claimed in your payment bond claim. Furthermore, PC has determined that an additional payment to Miller is warranted. It intends to issue payment to Miller in the amount of $19,687.95. As a precondition of payment, it is my understanding that Miller has agreed that these payments will effectively reduce Miller's payment bond claim by the corresponding amount. In other words, Miller has agreed that it will notify the bonding company that it is reducing its claim by $24,667.95 and its amended claim will be $53,695.08.

If you will signify your agreement to these terms by executing where indicated below, PC will proceed with forwarding a check to Miller in the amount of $19,687.95.

With my kindest regards, I am

Sincerely,

E. Wade Mullins, III

EWM/rdd
Enclosures
cc: PC Construction of Greenwood, Inc.

I consent to this agreement:

see below

David James Brousseau, Esquire
Attorney for Millers Construction

- Miller agrees to reduce the bond claim by the above amounts. Miller does not agree that it is liable for liquidated damages.

1/3/12

Miller Construction Company

From: Gary Piontek [gary.p@pcconst.net]
Sent: Monday, November 14, 2011 3:09 PM
To: 'Miller Construction Company'
Subject: RE: Lander Job
Attachments: Miller Change Order Log.pdf; Back up info.pdf

Mike,

Please review the attachments. It shows you what PC has approved for your change orders on the Lander Job. It totals $967,225.35 Dollars in Change orders. Add that to your base contract of $492,424.00 brings your revised contract to date at 1,459,649.35.

You have already billed PC for $ 1,444,457.33 leaving a balance to bill us at 15,192.02 less retainage. (send me a Bill)

To date we have paid $1,393,901.32

No retainage has been paid out yet on this job yet.

Sincerely,

Gary Piontek
Vice President
[illegible] Construction of [illegible]
[illegible] Enterprise [illegible]
[illegible]
864.223.6274 (office)
864.223.9189 (fax)
864.577.0242 (cell)

From: Miller Construction Company [mailto:mconstco@bellsouth.net]
Sent: Friday, November 04, 2011 10:01 AM
To: 'Gary Piontek'
Subject: Lander Job

I have called your cell phone several times and left you messages. I have not received any return calls from you. I am requesting that you get all change orders and payments up to date that we were ordered to do by you. We have several outstanding change orders that we have completed work for that I am still waiting on paper work for from PC Construction. Thanks, Mike Miller

Miller's Construction Company, LLC
225 Thompson Road
Anderson, SC 29624

Phone (864) 296-3301
Fax (864) 296-8700

April 19, 2010

PC Construction of Greenwood, Inc.
108 Enterprise Court
Greenwood, SC 29649

Attn: Gary Piontek

Job Name: Lander University Sport Complex

Dear Gentleman,

Miller's Construction Company, LLC has been on hold for several weeks after removing a portion of the asbestos and C&D materials. This hold up has been from when we found this material in February to where we removed and were asked to stop removing this material as of 3-19-2010. As of 3-19-2010, this project has come to a standstill of our company working on this project.

1.) We could not work on this project due to not being able to move dirt in the parking lot area or the soft ball field area. So our company started stockpiling dirt on the baseball field.

2.) This stockpiling or dirt has cost our company money to try to keep this project moving else where.

3.) The layout work on this project due to our company not working full time is taking a toll on our cost on this project. This is due to our company laying out one item at a time rather that several at a time.

4.) Running up and down the road to this project to complete an hour or two worth of work to keep this project working, for other sub-contractors has also taken a toll to our company.

Miller's Construction Company, LLC wants to know when this project will be able to be completed in a timely manner. I also would like to know if our company will be paid for work where we have worked to help other keep working on this project. If we will be paid for our equipment setting on this project for over one month waiting on your decisions. Due to this equipment setting and not working, our company could not complete other projects and were not able to bid other projects. This project has cost our company lost revenue.

Sincerely,
G. Michael Miller

Miller Construction Company

From: Gary Piontek [gary.p@pcconst.net]
Sent: Thursday, January 27, 2011 5:37 PM
To: 'Miller Construction Company'
Subject: RE: Lander Project Urgency

No . I want you to do what I asked in the email below. Yes Miller Had folks on site today and did some work dispite the poor weather Thanks. But I need the info requested below. Lets walk the site tomorrow just you and I and make a plan.

Miller has been a great sub, Which I will gladly recommend.

Sincerely,

Gary Piontek
Project Manager
PC Construction of Greenwood, Inc.
108 Enterprise Ct.
Greenwood SC, 29649
864.223.6274 (office)
864.223.9183 (fax)
864.377.0242 (cell)

From: Miller Construction Company [mailto:mconstco@bellsouth.net]
Sent: Thursday, January 27, 2011 4:47 PM
To: 'Gary Piontek'
ubject: FW: Lander Project Urgency

From: Miller Construction Company [mailto:mconstco@bellsouth.net]
Sent: Thursday, January 27, 2011 4:46 PM
To: 'Miller Construction Company'
Subject: RE: Lander Project Urgency

We have not heard any response from you or BLE concerning the matter of working on site. I am sending a crew down in the morning to try and work like I did this morning, but be advised that if site is too wet for us to work, somebody will be paying for trucks and labor traveling up and down the road. Thanks, Mike Miller

From: Miller Construction Company [mailto:mconstco@bellsouth.net]
Sent: Thursday, January 27, 2011 12:44 PM
To: 'Gary Piontek'
Subject: RE: Lander Project Urgency

Miller's Construction Company was on site today until 10:45 am with a full crew and you saying that we were not on site is not true. Miller's Construction Company quoted this job for a 6 month project and the hold ups from the civil engineer and architect, has created havoc on us being able to complete this job in a timely manner. The decision about the softball field, parking lot, asbestos and etc. has been going on since April of 2010. This has been nine months of trying to figure out what is going on with this project. Change Order # 40 needs to be approved ASAP so we can omplete this project immediately. I need BLE on site every day to determine the optimum moisture in the dirt, to determine if my crew can work on site. This keeps me from sending my crew up and down the road unnecessarily when they are unable to perform work. Thanks, Mike Miller

From: Gary Piontek [illegible]
Sent: Thursday, January 27, 2011 12:25 PM
To: Gary Piontek
ubject: FW: Lander Project Urgency

Attention Project Managers and Company owners.

The Lander Project has no one working on site today. This is completely unacceptable. I will now demand that you make yourself available to be on site either Friday, Saturday and or Monday and make a detailed list of what you think is holding you up by venue, building, or specifically related to your scope area. (I want you to be specific, general statements do me no good) Present this to me no later than Monday by 3:00pm.

Once I have this list from you I will either turn this list over to the design team and get you the assistance you need or I will pass your list off to the appropriate sub contractor who is holding you up,(I will give that sub contractor a short period of time to respond or I get someone else to do his or her work for them) or lastly I will agree with you that weather is the cause for your crews not to be here. If it is weather related only, then your foreman needs to call everyday and notify us daily that weather continues to be an issue.(864-377-1076) If we do not hear from him or her daily we will assume weather is not a factor and mark your firm absent. If it is a change order decision holding you up I want a detailed explanation of which change order, as there are many, along with the reason why you think the change order is holding you up, and how it affects you in detail. The project is past its completion date and if you want to avoid LD's then I suggest you man this project accordingly to your scope of work.

This is for all subcontractors not just those who have the biggest contracts.

As another note, if your firm needs to write a "request for Information" they you should do so prior to your crews being on site along with an email sent to [illegible]. This email goes directly to our Document Control department and will immediately be sent to the architect for review.

Sincerely,

Gary Piontek
Project Manager
[illegible]

Miller Construction Company

From: Chris Piontek [chris.p@pcconst.net]
Sent: Friday, January 28, 2011 1:40 PM
o: charrison@ohdog.com; cothranllc@bellsouth.net; diane@girasteel.com; grace@simplepc.net; info@timbersystems.com; jgorney@charter.net; ljbullard@charter.net; mconstco@bellsouth.net; PaulJustice@Bonitz.com; psumner@charter.net; quality_electric@bellsouth.net; sburnett@sodfather.net; 'April'; 'Ben Powell'; 'Bruce M. Harris'; 'Cee Hawkins'; 'David'; Guy Roofing; 'Jeanne Kelley'; 'Ken McGinnis'; 'Lane Wofford'; 'Miriam Pittman'; Raymond Curtis; 'Richard Dorn'; 'Robert Cox'
Cc: 'Gary Piontek'
Subject: Lander Sports Complex - Working Hours

Team

Please be advised of the working hours for the Lander Sports Complex:

Working hours are Monday – Friday 7:30AM – 5:30PM. **NO WORK** is permitted to take place before or after these hours. If your company wishes to work longer hours or weekends then a written requested must be submitted to PC Construction 48 hours in advanced for our consideration.

As you know PC Construction will work 7:30AM – 5:30PM on Saturday should it rain one or more days during the week. However you should still call to make your intentions to work known.

Thank You

Chris Piontek

Miller Construction Company

To: Gary Piontek
Subject: Lander University

Gary,
Our company needs to be advised as to when your company is hiring a new concrete finisher to finish the concrete work. As of 7/12/11 we have understood that your hired concrete finisher has abandoned this project. We need to be kept in the loop as to when there will be a new finisher on the job. We are NOT able to finish the work necessary on a timely matter due to PC Construction not being able to keep a concrete finisher on the job site. Please advise so our company will know how to schedule the work that we need to finish. Thank you.
Mike Miller

Miller Construction Company

From: Miller Construction Company [mconstco@bellsouth.net]
Sent: Monday, April 11, 2011 9:24 AM
To: 'Gary Piontek'
Subject: RE: Help Needed

I am on site walking with Buck this morning. Is there any way you can be on site before 10:00am? Thanks, Mike

From: Gary Piontek [mailto:gary.p@pcconst.net]
Sent: Monday, April 11, 2011 9:07 AM
To: 'Miller Construction Company'
Subject: RE: Help Needed

Miller gets Credit from PC, It is the owner and the State Engineer I am worried about to make sure they understand Miller is doing what is necessary. 4/9/11 was dry enough to answer your other question.

Buck is on site this morning and he has a great attitude and it appears we are going to have a very productive week.

Thank you

Sincerely,

Gary Piontek
Project Manager
PC Construction of Greenwood, Inc.
08 Enterprise Ct.
Greenwood SC, 29649
864.223.6274 (office)
864.223.9183 (fax)
864.377.0242 (cell)

From: Miller Construction Company [mailto:mconstco@bellsouth.net]
Sent: Monday, April 11, 2011 8:52 AM
To: 'Gary Piontek'
Subject: RE: Help Needed

If it rained Tuesday, Wednesday, and Thursday, then it was wet on Friday. Did you have BLE on site to determine if the site was not too wet to work on April 2, 2011. A lot of our time has been placed on change orders and changes that have been done to the civil drawings. All these change orders that have been completed such as running track, taking out sidewalk, demolition of curb, and sidewalk not installed correctly has added to our time frame and I guess that we did not get credit for this.
Thanks, Mike

From: Gary Piontek [mailto:gary.p@pcconst.net]
Sent: Saturday, April 09, 2011 9:13 AM
To: 'Miller Construction Company'
Subject: Help Needed

Two weeks ago when this site had rain on Tuesday, 3/29, then too wet to work on Wed 3/30 then rained again on 3/31 and too wet again on Friday, we all were only able to work on one day that week.

Where did the rest of the man hours go that is supposed to be allocated to this project? We did not work the weekend of April 2 and 3rd to make up these lost days on the schedule.

But we certainly could have worked this Sat to attempt to recover one day against the 4 we lost that week. This is what we are expected to do per our contract with each other and the contract with the owner.

I myself made special arrangements with my family to be here and Chris and Scott have made arrangements with theirs over the last two months worth of Sat's. Each of these missed Sat make up days is being recorded who is or is not here making up those lost days.

I would like for Miller to be one of those subs recorded as having been here on Sat's making up lost days. Which is why PC started communicating that to you on Wed , thrus and Friday only to be told sorry, were are not coming. Next week again looks like rain approaching which will mean we gave up on sunny perfect day to get further ahead.

Sincerely,

Gary Piontek
Project Manager

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	EIGHTH (8TH) JUDICIAL CIRCUIT
Miller Construction Company, LLC,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S DAMAGES**
vs.	)	
	)	
	)	**Ca No :: 2012-CP-24-00574**
PC Construction of Greenwood, Inc. and	)	
Safeco Insurance Company of America,	)	
	)	
Defendants.	)	
	)	

Principal Amount Owed:	**$**	**53,695.08**
Pre-Judgment Interest (see attached calculation)	**$**	**9,152.19**
TOTAL AMOUNT OWED	**$**	**62,847.27**

Calculation of Pre-Judgment Interest

Original Principal Balance Owed		$	78,363.08
• This amount came 30 days after last date of work 12/28/11 Partial Payment reducing principal balance received on 3/29/12			
1) Accrued Interest under this amount (78,363.08 x .0875 / 12 x 3 months)	=	$	**1,713.19**
Revised Principal Balance Owed after partial payment on 3/29/12		$	53,695.08
2) Accrued Interest under this amount (53,695.08 x .0875 / 12 x 19 months)	=	$	**7,439.00**
TOTAL ACCRUED PRE-JUDGMENT INTEREST		$	**9,152.19**

Def. 1

SECTION 311000 - SITE CLEARING AND EROSION CONTROL

PART 1 - GENERAL

1.1 RELATED DOCUMENTS

A. Drawings and general provisions of the Contract, including General and Supplementary Conditions and Division 01 Specification Sections, apply to this Section.

1.2 SUMMARY

A. This Section includes the following:

1. Protecting existing vegetation to remain.
2. Removing existing vegetation.
3. Clearing and grubbing.
4. Stripping and stockpiling topsoil.
5. Removing above- and below-grade site improvements.
6. Disconnecting, capping or sealing, and removing site utilities.
7. Temporary erosion and sedimentation control measures.

1.3 DEFINITIONS

A. Topsoil: Natural or cultivated surface-soil layer containing organic matter and sand, silt, and clay particles; friable, pervious, and black or a darker shade of brown, gray, or red than underlying subsoil; reasonably free of subsoil, clay lumps, gravel, and other objects more than 2 inches in diameter; and free of subsoil and weeds, roots, toxic materials, or other nonsoil materials.

B. Tree Protection Zone: Area surrounding individual trees or groups of trees to be protected during construction, and defined by the drip line of individual trees or the perimeter drip line of groups of trees, unless otherwise indicated.

1.4 MATERIAL OWNERSHIP

A. Except for stripped topsoil to be stockpiled on site or other materials indicated to remain Owner's property, cleared materials shall become Contractor's property and shall be removed from Project site.

1.5 SUBMITTALS

A. Photographs or videotape, sufficiently detailed, of existing conditions of trees and plantings, adjoining construction, and site improvements that might be misconstrued as damage caused by site clearing.

B. Record drawings, according to Division 01 Section "Project Record Documents," identifying and accurately locating capped utilities and other subsurface structural, electrical, and mechanical conditions.

C. Minutes of preinstallation conference.

1.6 QUALITY ASSURANCE

A. Preinstallation Conference: Conduct conference at Project site to comply with requirements in Division 01 Section "Project Management and Coordination."

B. Authorities Having Jurisdiction: Conform to requirements of all authorities having jurisdiction.

1. Where conflicts exist between the requirements of the Contract Documents and those of authorities having jurisdiction, the higher quality or more restrictive requirement shall apply.

1.7 PROJECT CONDITIONS

A. Traffic: Minimize interference with adjoining roads, streets, walks, and other adjacent occupied or used facilities during site-clearing operations.

1. Do not close or obstruct streets, walks, or other adjacent occupied or used facilities without permission from Owner and authorities having jurisdiction.
2. Provide alternate routes around closed or obstructed traffic ways if required by authorities having jurisdiction.

B. Salvable Improvements: Carefully remove items indicated to be salvaged and store on Owner's premises where indicated.

C. Utility Locator Service: Notify utility locator service for area where Project is located before site clearing. Do not proceed with operations until existing utilities are located and clearly marked.

D. Do not commence site clearing operations until temporary erosion and sedimentation control measures are in place.

E. Suspend clearing operations during wet conditions unless otherwise directed by Architect.

PART 2 - PRODUCTS

2.1 SOIL MATERIALS

A. Satisfactory Soils: ASTM D 2487 Soil Classification Groups GW, GP, GM, SW, SP, and SM, AASHTO M 145 Soil Classification Groups A-1, A-2-4, A-2-5, and A-3, or a

combination of these groups; free of rock or gravel larger than 3 inches in any dimension, debris, waste, frozen materials, vegetation, and other deleterious matter.

1. Obtain approved borrow soil materials off-site when satisfactory soil materials are not available on-site.

2.2 EROSION CONTROL MATERIALS

A. Silt Fence Geotextile: Woven geotextile fabric, manufactured for silt fence applications, made from polyolefins or polyesters; with elongation less than 20 percent; complying with AASHTO M 288 and the following, measured per test methods referenced:

1. Grab Tensile Strength: 500 lbf; ASTM D 4632.
2. Tear Strength: 275 lbf; ASTM D 4533.
3. Permittivity: 0.10 per second, minimum; ASTM D 4491.
4. UV Stability: 70 percent after 500 hours' exposure; ASTM D 4355.

B. Separation Geotextile: Woven geotextile fabric, manufactured for separation applications, made from polyolefins or polyesters; with elongation less than 50 percent; complying with AASHTO M 288 and the following, measured per test methods referenced:

1. Survivability: Class 2; AASHTO M 288.
2. Grab Tensile Strength: 247 lbf; ASTM D 4632.
3. Sewn Seam Strength: 222 lbf; ASTM D 4632.
4. Tear Strength: 90 lbf; ASTM D 4533.
5. Puncture Strength: 90 lbf; ASTM D 4833.
6. Apparent Opening Size: No. 60 sieve, maximum; ASTM D 4751.
7. Permittivity: 0.02 per second, minimum; ASTM D 4491.
8. UV Stability: 50 percent after 500 hours' exposure; ASTM D 4355.

C. Silt Fence Post: Steel, either integrally manufactured with the silt fence as part of a complete system or separately provided. Where separately provided, the following shall apply:

1. Steel posts: T or U cross-sectional shape. Minimum weight 1.3 pounds per foot. Minimum length 5 feet. Shall have projections to aid in fastening wire of fabric. Shall have a metal plate welded near the bottom such that, when driven to proper depth, it will be below ground and will aid stability.
2. Fasteners: Galvanized wire or other fasteners as required for a secure installation.
3. Maximum Spacing: 6 feet on center.

D. Woven Wire Fabric: ASTM A 116, Class1, wire and opening sizes as indicated.

E. Erosion Control Aggregate: Naturally or artificially graded mixture of crushed gravel or stone, in accordance with the gradation requirements for Coarse Aggregate #57 as defined by the South Carolina Department of Transportation Standard Specifications for Highway Construction.

1. Material shall be free of shale, clay, friable material, debris, waste, frozen materials, vegetation, organic material, or other deleterious matter.

F. Riprap: Broken, irregular size and shape, graded stone conforming to Section 804 of the South Carolina Department of Transportation Standard Specifications for Highway Construction

1. Gradation: Class B.

2.3 TREE PROTECTION MATERIALS

A. Fence Material: As indicated. Orange polypropylene safety mesh, as indicated. Minimum weight 16 lbs per 4 foot x 100 foot roll.

B. Metal Posts and Rails: As indicated. Round cold-formed, electric-resistance-welded, steel pipe or tubing, with minimum yield strength of 45,000 psi and with outside dimension, minimum wall thickness, and weight complying with ASTM F 761 for the following fence height and strength and stiffness requirements:

1. Fence Height: 4 feet.
2. Duty Rating: Medium.
3. Tube or Pipe Diameter and Thickness: According to ASTM F 761.

C. PVC Rails: As indicated. 1" diameter Schedule 40 with solvent cement joints.

PART 3 - EXECUTION

3.1 PREPARATION

A. Protect and maintain benchmarks and survey control points from disturbance during construction.

B. Locate and clearly flag trees and vegetation to remain or to be relocated.

C. Protect existing site improvements to remain from damage during construction.

1. Restore damaged improvements to their original condition, as acceptable to Owner.

3.2 TEMPORARY EROSION AND SEDIMENTATION CONTROL

A. Provide temporary erosion and sedimentation control measures to prevent soil erosion and discharge of soil-bearing water runoff or airborne dust to adjacent properties and walkways, according to a Stormwater Pollution Prevention Plan (SWPPP), specific to the site, that complies with EPA 832/R-92-005 or the requirements of authorities having jurisdiction, whichever is more stringent.

B. Inspect, repair, and maintain erosion and sedimentation control measures during construction until permanent vegetation has been established.

C. When directed by Architect, remove erosion and sedimentation controls and restore and stabilize areas disturbed during removal.

3.3 TREE PROTECTION

A. Erect and maintain temporary fencing around tree protection zones before starting site clearing. Remove fence when construction is complete.

1. Do not store construction materials, debris, or excavated material within fenced area.
2. Do not permit vehicles, equipment, or foot traffic within fenced area.
3. Maintain fenced area free of weeds and trash.

B. Do not excavate within tree protection zones, unless otherwise indicated.

C. Where excavation for new construction is required within tree protection zones, hand clear and excavate to minimize damage to root systems. Use narrow-tine spading forks, comb soil to expose roots, and cleanly cut roots as close to excavation as possible.

1. Cover exposed roots with burlap and water regularly.
2. Temporarily support and protect roots from damage until they are permanently redirected and covered with soil.
3. Coat cut faces of roots more than 1-1/2 inchesin diameter with an emulsified asphalt or other approved coating formulated for use on damaged plant tissues.
4. Backfill with soil as soon as possible.

D. Repair or replace trees and vegetation indicated to remain that are damaged by construction operations, in a manner approved by Architect.

1. Employ an arborist, licensed in jurisdiction where Project is located, to submit details of proposed repairs and to repair damage to trees and shrubs.
2. Replace trees that cannot be repaired and restored to full-growth status, as determined by Architect.

3.4 UTILITIES

A. Locate, identify, disconnect, and seal or cap off utilities indicated to be removed.

1. Arrange with utility companies to shut off indicated utilities.

B. Existing Utilities: Do not interrupt utilities serving facilities occupied by Owner or others unless permitted under the following conditions and then only after arranging to provide temporary utility services according to requirements indicated:

1. Notify Owner, Architect and operating utility not less than two days in advance of proposed utility interruptions.
2. Do not proceed with utility interruptions without the permission of all of the parties noted above.

C. Excavate for and remove underground utilities indicated to be removed.

D. Fill depressions caused by utility removal operations with satisfactory soil material unless further excavation or earthwork is indicated and is to be performed immediately. Do not leave depressions overnight.

1. Place fill material in horizontal layers not exceeding a loose depth of 8 inches, and compact each layer to a density equal to adjacent original ground.

3.5 CLEARING AND GRUBBING

A. Remove obstructions, trees, shrubs, grass, and other vegetation to permit installation of new construction.

1. Do not remove trees, shrubs, and other vegetation indicated to remain or to be relocated.
2. Cut minor roots and branches of trees indicated to remain in a clean and careful manner where such roots and branches obstruct installation of new construction.
3. Completely remove stumps and roots greater than 1" in diameter, obstructions, and debris extending to a depth of 24 inches below exposed subgrade.
4. Use only hand methods for grubbing within tree protection zone.

B. Fill depressions caused by clearing and grubbing operations with satisfactory soil material unless further excavation or earthwork is indicated and is to be performed immediately. Do not leave depressions overnight.

1. Place fill material in horizontal layers not exceeding a loose depth of 8 inches, and compact each layer to a density equal to adjacent original ground.

3.6 TOPSOIL STRIPPING

A. Remove sod and grass before stripping topsoil.

B. Strip topsoil to whatever depths are encountered in a manner to prevent intermingling with underlying subsoil or other waste materials.

1. Remove subsoil and nonsoil materials from topsoil, including trash, debris, weeds, roots, and other waste materials.

C. Stockpile topsoil materials away from edge of excavations without intermixing with subsoil. Grade and shape stockpiles to drain surface water. Cover to prevent windblown dust.

1. Limit height of topsoil stockpiles to 10 feet..