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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2014-CP-40-007229
Court of Appeals Case No. 2015-002584

GROUP III MANAGEMENT, INC.,
v.

SUNCRETE OF CAROLINA, INC., d/b/a CRYSTAL
POOLS,

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SC Court of Appeals

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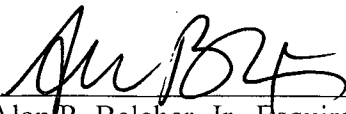
SC Court of Appeals

Respondent,

Appellant.

RECORD ON APPEAL

Respectfully submitted,

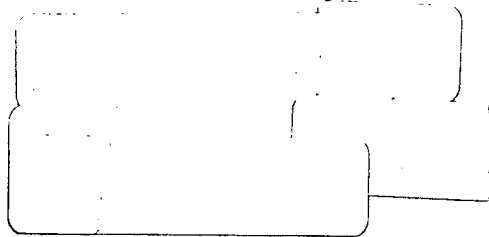

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Dated: September 9, 2016

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AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

ARBITRATION AWARD

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

Pursuant to the Construction Arbitration Rules of the American Arbitration Association, this matter came before the undersigned as the duly appointed Arbitrator for a hearing on the merits. Hearings were held in person on July 8, 9 and 10, 2014 in Columbia, South Carolina. The continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted affidavits regarding attorneys' fees on July 18, 2014. The hearing was declared closed as of July 23, 2014.

Group III Mgt. Inc. ("Group III") was represented by attorneys Everette Wooten and John Bruton. Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") was represented by attorney Alan Belcher. Both parties presented testimony of witnesses, introduced exhibits, and argued their case. Group III asserted a claim against Crystal Pools for \$308,386.52 as more fully explained below. Crystal Pools denied any responsibility to Group III and asserted a counterclaim against Group III in the amount of \$84,671.98 as more fully explained below.



WCSR 32755000v1

The parties agree that the original contract between Group III and Crystal Pools was in the amount of \$339,960.00. The parties also agree that Crystal Pools has been paid \$77,085.00 leaving a balance to earn on the contract of \$262,875.00.

Group III asserts that the cost to repair Crystal Pools' work and to complete Crystal Pools' unfinished scope of work is \$508,933.52. In addition, Group III made a payment to Hardaway Concrete in the amount of \$9,500.00 which it claims was for the benefit of Crystal Pools. Group III also asserts that it incurred \$52,464.00 in Liquidated Damages (\$2,186/day for 24 days) as a result of delays caused by Crystal Pools. The total of these amounts is \$570,897.52. After subtracting the agreed upon balance of contract amount of \$262,875.00, Group III has a remaining claim against Crystal Pools of \$308,022.52.

While Crystal Pools agrees that the contract balance to earn was \$262,875.00, it disputes the cost to repair and the completion costs incurred by Group III and further denies responsibility for the Liquidated Damages. Crystal Pools asserts that the maximum reasonable cost to repair and complete its scope of work was \$178,203.02. When that amount is subtracted from the remaining contract balance it results in a balance due to Crystal Pools of \$84,671.98, which is the amount of its counterclaim. Crystal Pools also asserts that it is entitled to change orders for additional costs it incurred in connection with the work.

After consideration of all of the evidence and arguments of counsel I find as follows:

1. Crystal Pools is entitled to additional costs associated with shoring in the amount of \$13,850.00.
2. Crystal Pools is also entitled to additional costs for undercutting unsuitable soils after proofrolling in the amount of \$1,474.74.

OK
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3. Group III is entitled to recover the \$9,500.00 it paid to Hardaway Concrete for concrete provided for the benefit of Crystal Pools on this project.

4. Group III is entitled to recover the reasonable cost of repairing Crystal Pools' unsatisfactory work in the amount of \$27,473.50.

5. Group III is entitled to recover the reasonable cost of completing Crystal Pools' scope of work after Crystal Pools abandoned the project in the amount of \$287,388.47.

6. Due to delays caused by Crystal Pools, Group III is entitled to recover an appropriate allocation of the Liquidated Damages assessed by the Army Corps of Engineers in the amount of \$34,976.00.

Therefore, I find that Group III is entitled to recover from Crystal Pools the net sum of \$81,138.23 as shown below:

Balance of Contract	\$262,875.00
Plus Shoring	13,850.00
Plus Undercut	1,474.74
Less Hardaway payment	(9,500.00)
Less Cost to Repair	(27,473.50)
Less Cost to Complete	(287,388.47)
Less Liquidated Damages	<u>(34,976.00)</u>
Net Amount Due to Group III	\$81,138.23

The agreement between the parties provides for an award of attorneys' fees and costs to the prevailing party. I find that Group III is the prevailing party in this matter and award \$116,165.86 in reasonable attorneys' fees and costs associated with the prosecution of its claim and defense of the counterclaim, excluding the fees and expenses of the Arbitrator and the AAA.

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The administrative fees of the American Arbitration Association, totaling \$7,475.00, and the fees and expenses of the arbitrator, totaling \$17,090.62, shall be borne as incurred by the parties.

Therefore, I find a TOTAL AWARD in favor of Group III Mgt. Inc. against Suncrete of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09.


C. Allen Gibson, Jr.
Arbitrator

August 18, 2014

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

**ORDER DENYING
REQUEST TO MODIFY AWARD**

Respondent Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") submitted a request that the undersigned Arbitrator modify the Award dated August 18, 2014. This request was submitted to opposing counsel and the Arbitrator on September 8, 2014. Claimant Group III Mgt. Inc. timely filed its Response. Although Rule 48(a) requires that any request for modification of an Award be submitted within twenty (20) calendar days, Rule 48(c) also provides that if applicable law allows for a different procedural timeframe, that procedure shall be followed. Since the twentieth calendar day after transmittal of the Award fell on a Sunday, I find that under the laws and procedure generally applicable to service of motions (see Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure) service of the request on the following Monday was timely.

Nevertheless, the substance of the request by Crystal Pools is beyond the scope of Rule 48 since modification of any Award is only allowed to "correct any clerical, typographical, technical or computational errors in the Award." Rule 48(a) specifically states as follows: "[T]he Arbitrator is not empowered to re-determine the merits of any claim already decided."

CRP
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WCSR 33033789v1

The parties submitted to the Arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorney's fees that should be awarded to that party. That decision was carefully considered and made as set forth in the Award. There is no "clerical, typographical, technical or computational error" in the Award. Therefore, Crystal Pools' request to modify the Award is denied.


C. Allen Gibson, Jr.
Arbitrator

September 25, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	CIVIL ACTION NO.: 2014-CP-40-7229
GROUP III MANAGEMENT, INC.,	)	
	)	
Claimant/Plaintiff,	)	ORDER GRANTING SUNCRETE OF
	)	CAROLINA, INC. d/b/a CRYSTAL
v.	)	POOLS' MOTION TO VACATE
	)	ARBITRATION AWARD
SUNCRETE OF CAROLINA, INC., d/b/a	)	
CRYSTAL POOLS,	)	
	)	
<u>Respondent/Defendant.</u>	)	

2015 MAY 18 PM 12:00

This matter came before me for a hearing on February 6, 2015, on Respondent/Defendant, SunCrete of Carolina, Inc. d/b/a Crystal Pools', Motion to Vacate Arbitration Award or in the Alternative Modify Arbitration Award, and Claimant/Plaintiff's Motion to Confirm Arbitration Award. This Honorable Court having considered the arguments and evidence presented and being otherwise fully advised in the premises, and for the reasons set forth below, finds Respondent/Defendant, SunCrete of Carolina, Inc. d/b/a Crystal Pools', Motion to Vacate Arbitration Award is GRANTED.

BACKGROUND

On November 19, 2012, Claimant/Plaintiff, Group III Management, Inc., ("Group III") and Respondent/Defendant, SunCrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools;" collectively referred to as the "Parties"), entered into a construction contract wherein Crystal Pools was hired as a pool subcontractor for Group III. The contract called for the construction/building of a pool at the Legions Pool Complex at Fort Jackson Army Base in Columbia, South Carolina. Once Crystal Pools commenced building the pool, numerous questions arose as to how the pool was to be built. Problems and disputes continued to arise,

which could not be resolved between the Parties. Ultimately, in March 2013, Crystal Pools' contract with Group III was terminated.

On September 19, 2013, Group III filed a Demand for Arbitration pursuant to the Construction Arbitration Rules of the American Arbitration Association. The Demand was assigned Case No. 31-110-000261-13, and C. Allen Gibson, Jr., was assigned as Arbitrator. Arbitration hearings were held in person on July 8, 9 and 10, 2014, in Columbia, South Carolina, and a continuation of the hearings was held on July 14, 2014 telephonically. Thereafter, on July 18, 2014, the Parties submitted Affidavits regarding attorneys' fees, and the hearing was declared closed on July 23, 2014.

On August 18, 2014, the Arbitrator rendered his Arbitration Award. He determined that Group III was the prevailing party and awarded it attorneys' fees in the amount of ONE HUNDRED SIXTEEN THOUSAND ONE HUNDRED SIXTY-FIVE and 86/100 DOLLARS (\$116,165.86). Thereafter, Crystal Pools moved to vacate the Award arguing the Award was/is in error, because in light of the Award compared to the claim, Group III is not the prevailing party under North Carolina law; and that the Arbitrator erroneously and/or inadvertently applied South Carolina law instead of the agreed upon, contractually binding, application of North Carolina law.

The Arbitrator's Award sets forth the amount of the Parties' claims and counterclaims against one another. The Award indicates that Group III asserted a remaining "claim" against Crystal Pools totaling \$308,022.52. The accounting associated with the remaining amount claimed by Group III consisted of:

Cost to Repair and Complete	\$508,933.52
Liquidated Damages	\$ 52,464.00

Payment to Hardaway Concrete	\$9,500.00
Less Contract Damages	(\$262,875.00)
TOTAL CLAIM	\$308,022.52

Crystal Pools' counterclaim was in the amount of \$84,671.98, in addition to two change orders addressed in the Award.

The Arbitrator found that Group III's damages were considerably less than those claimed, and also found that Crystal Pools was entitled to change orders but was not entitled to any amount of the contract balance. The Arbitrator's calculations associated with the merits of the dispute, and allowing all available offsets to both Parties, determined that Group III was entitled to recover \$81,138.23 from Crystal Pools, which amounted to approximately 26.5% of the total claim Group III brought at the arbitration proceedings. Crystal Pools argued that the awarding of attorneys' fees was inappropriate because under North Carolina law, the Arbitrator cannot determine Group III to be the prevailing party in the arbitration, when it did not recover at least fifty percent (50%) of its claim for damages. This Court agrees.

DISCUSSION

Crystal Pools has moved this Court for an Order vacating the Arbitration Award on three grounds: (1) the Arbitrator incorrectly determined that Group III was the prevailing party; (2) the Arbitrator incorrectly determined that Group III was entitled to attorneys' fees; and (3) the Arbitrator incorrectly applied South Carolina law instead of North Carolina law, the latter of which the Parties designated as the law governing their contract. Based upon S.C. Code Ann. 15-48-130 and 9 U.S.C.S. §§10 and 11, the Arbitrator's errors are such that the Award must be vacated.

I. FEDERAL ARBITRATION ACT

Although Crystal Pools' Motion to Vacate refers to the Uniform Arbitration Act under the South Carolina Code of Laws, Chapter 48, §15-48-130, this Court finds the Federal Arbitration Act ("FAA"), specifically 9 U.S.C.S. §§10 and 11, governs the subject Motion. The equivalent grounds for vacatur are found in both Acts and the application of either the FAA or S.C.C. §15-48-130 yields the same result.

The standard under S.C. Code Ann. 15-48-130(a)(3) is: "Upon application of a party, the court shall vacate an award where: (3) The arbitrators exceeded their powers." Likewise, under the FAA 9 U.S.C.S. §10(a)(4) the standard for vacatur stands as: "In any of the following cases . . . may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Under either standard, this Court finds Crystal Pools is entitled to vacatur of the Arbitration Award.

Crystal Pools argued that the Arbitrator manifestly disregarded North Carolina's specific law concerning "prevailing party" status and the award of attorneys' fees. Manifest disregard continues to exist either "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. §10." Wachovia Sec. LLC v Brand, 671 F.3d 472, 483 (4th Cir. 2012). Furthermore, the Fourth Circuit has adopted a two-part test that a party must meet in order for a reviewing court to vacate and award for manifest disregard: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[] refused to heed that legal principle." Wachovia Sec. LLC v Brand, 671 F.3d 472, 483 (4th Cir. 2012).

In the matter at hand, Crystal Pools has met this two-prong test. North Carolina applicable legal principle, i.e., the Parties' choice of North Carolina law and the statutes upon which the Court relies herein, are clearly defined and not subject to debate; and the Arbitrator either refused to apply North Carolina law, and/or mistakenly or inadvertently applied South Carolina law. The Arbitrator in this matter manifestly disregarded North Carolina's specific law concerning prevailing party status and the award of attorneys' fees, and failed to apply the substantive provisions of the statutes as set-forth in this Order. Group III's argument that Crystal Pools' "did not cite to any provisions of the FAA in its argument" and the "argument is unavailable to Crystal Pools under established federal precedent" accordingly is unfounded.

II. NORTH CAROLINA LAW

The Arbitrator was duty-bound to, and should have, applied North Carolina law in determining the prevailing status in his Award. It is undisputed that Article 15.2 of the contract between the Parties contains a choice of law provision that designates North Carolina law as the law governing the Parties' contract. The result of the "prevailing party" analysis under North Carolina law results in a different calculation and determination from that of South Carolina law.

The North Carolina General Assembly and North Carolina Courts look at the award of attorneys' fees in a stricter fashion than South Carolina. Courts in North Carolina have found, "as a general rule[,] contractual provisions for attorneys' fees are invalid in the absence of statutory authority." Della Env. Consultants of N.C. v. Wyson & Miles Co., 132 N.C. App. 160, 167; 510 S.E.2d 690, 695 (1999); see also Lee Cycle Center Inc. v. Wilson Cycle Center Inc., 143 N.C. App. 1; 545 S.E.2d 745, 752 (2001). "The general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages,

unless such a recovery is expressly authorized by statute." Delta Env. Consultants, 132 N.C. App. at 167, 510 S.E.2d at 695, (quoting Enterprises, Inc. v. Equipment Co., 300 N.C. 286, 289; 266 S.E.2d 812, 814 (1980)). Therefore, North Carolina law requires both a contract and an enabling statute for an attorneys' fee provision to be enforced.

III. N.C. GEN. STAT. § 6-21.6

Until fairly recently, North Carolina's position on attorneys' fees awards yielded harsh results. Even where parties to a contract agreed to a reciprocal provision that entitled the prevailing party to an award of attorneys' fees in the event of a dispute, the Courts refused to enforce the provision. However, on October 1, 2011, the North Carolina General Assembly enacted N.C. Gen. Stat. § 6-21.6. In pertinent part, the Statute provides:

Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.

N.C. Gen. Stat. § 6-21.6(b) (emphasis added).

This statute was the enabling statute that allowed the imposition of attorneys' fees awards in certain, specific business contract disputes that, until that time, were unenforceable. This Court finds that this law governs how attorneys' fees awards are to be calculated in the dispute between Group III and Crystal Pools.

N.C. Gen. Stat. §6-21.6 allows an arbitrator to award a party attorneys' fees, but it specifically limits the amount of attorneys' fees an arbitrator or judge can award. The statute is plain on its face as to the amount of recoverable attorneys' fees that an arbitrator may award. There is no ambiguity in its directive. Here, the Arbitrator's award of attorneys' fees in excess of the monetary damages awarded, alone, is a simple error in computation that should have been

recalculated to reflect, at a minimum, an award consistent with the plain meaning of the statute. The AAA Construction Industry Regular Track Rules under which the Parties operated afforded the Arbitrator an opportunity to address this matter and modify the award appropriately.

In this case, N.C. Gen. Statute §6-21.6 instructs the Arbitrator to make certain baseline determinations in computing the award of attorneys' fees to "the extent to which the party seeking attorneys' fees prevailed in the action." N.C. Gen. Statute §6-21.6(c)(1). Accordingly, under N.C. Gen. Statute §6-21.6, the Arbitrator as a preliminary matter, should not have awarded, and the Statute does not allow, the Arbitrator to award attorneys' fees in excess of \$81,138.23. However, more importantly, this Court finds under N.C. Gen. Statute §6-21.6, the Arbitrator should not have awarded Group III attorneys' fees, in any amount, based upon his finding that Group III was entitled to only 26.5% of its claim. This Court in adopting the same rational and statutory provisions as outlined above and applying same to the matter at hand, finds the Arbitrator's Award of attorneys' fees in the amount of \$116,165.86 to Group III, was in excess of that allowed under N.C. Gen. Statute §6-21.6.

IV. N.C. GEN. STAT. §44A-35

While this Court finds error in the Award in that it has impermissibly awarded attorneys' fees in excess of that allowed by statute, the Arbitrator's Award is actually flawed on a more substantive level in that it awards attorneys' fees despite the finding that Group III was not the prevailing party in the arbitration as defined by N.C. Gen. Statute §6-21.6 and/or N.C. Gen. Stat. §44A-35.

The phrase "[t]he extent to which the party prevailed in the action" in N.C. Gen. Statute §6-21.6, is subject to a specific interpretation under North Carolina law in the realm of

construction contracts on public projects. To determine the North Carolina definition of "prevailing party", this Court looks to N.C. Gen. Stat. §44A-35 for guidance.

Under N.C. Gen. Stat. §44A-35, "a 'prevailing party' is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim...." The phrase "[t]he extent to which the party prevailed in the action" is subject to a specific interpretation under North Carolina law in the realm of construction contracts on public projects. Thus, under this Statute, there is a precise computation that is required in dealing with the contract between Group III and Crystal Pools¹. In North Carolina, judges ruling on construction payment matters refer to North Carolina's Performance and Payment Act, N.C. Gen. Stat. §44A-35, for the computation in arriving at a prevailing party designation. The Arbitrator failed to compute the calculations necessary to determine prevailing party status under North Carolina law.

Group III has argued that N.C. Gen. Stat. §44A-35 has no applicability in this matter because Article 2 of Chapter 44A "pertains to statutory mechanics' and materialmen's liens on real property and the enforcement thereof, and Article 3 of Chapter 44A pertains to performance and payment bonds and the enforcement thereof." This Court finds Group III's argument misplaced. Group III entered into a prime contract with the Army Corps of Engineers, Charleston Division, for the construction of repairs, renovations, and upgrades to the Legion Pool Complex at Fort Jackson in Richland County, South Carolina. The contract was entered into with the federal government or a federal governmental entity. Such a government contract falls under the realm of 40 U.S.C. §§ 3131-3134, commonly known as the Miller Act.

¹ North Carolina law, like South Carolina law and United States Federal Law uses a relaxed standard, similar to the universal South Carolina standard, for "prevailing party" analysis in contexts where the state or an agency of the state is a party, which is not the circumstance in this matter. This relaxed standard is in keeping with the Equal Access to Justice Act 28 U.S.C.S. § 2412.

The Miller Act requires a general contractor contracting with the federal government or a federal governmental entity for a construction project with a general or prime contract in excess of \$100,000.00 to obtain both a performance bond and a payment bond from a surety. The primary public policy purpose of the Miller Act payment bond is to replace the security provided by the lien right that would otherwise be available on a non-public or non-government construction project. The payment bond effectively stands in place of the real property for purposes of security. In short, there are no lien rights available to this governmental contract. The only recourse for a claimant is to make a claim on the payment or performance bond; and consequently, any relief relating thereto comes from N.C. Gen. Stat. §44A-35.

Moreover, N.C. Gen. Stat. §44A-35 is not limited to claims against performance and payment bonds. See Terry's Floor Fashions, Inc. v. Crown Gen. Contrs. Inc., 184 N.C. App. 1; 645 S.E.2d 810 (N.C. App. 2007); Brooks Millwork Co. v. Levine, 2010 N.C. App. LEXIS 959 (N.C. Ct. App. June 15, 2010); Barrett Kays & Assocs. P.A. v. Colonial Bldg. Co., 129 N.C. App. 525 (N.C. Ct. App. 1998); Mainline Supply Co. v. Hillcrest Constr., Inc., 2012 N.C. App. LEXIS 222 (N.C. Ct. App. 2012). Rather, it serves as a guide for determining which party has prevailed in its claim or defense in construction payment disputes. *Id.* It stands to reason therefore, that the Parties agreed to having their Miller Act arguments heard in arbitration and that the determination of prevailing party status must be governed by N.C. Gen. Stat. §44A-35.

Under N.C. Gen. Stat. §44A-35, "a "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim...." As this Court has determined, Group III obtained an award of 26.5% of its claim and, under this computation, Group III cannot be the prevailing party. Thus, this Court finds that N.C. Gen. Stat. §44A-35 is relevant and applicable to this matter.

The "prevailing party" analysis under North Carolina law results in a different calculation and determination from that employed by the Arbitrator, who applied South Carolina law. As a general matter, under South Carolina law, a prevailing party may be entitled to attorneys' fees if a contract allows a fee award or if a fee award is mandated by statute. A party need only prevail by obtaining a verdict or judgment in its favor, regardless of the disparity between the amount claimed and the actual verdict or judgment rendered. Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining "prevailing party" as: "The one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention ... the one in whose favor the decision or verdict is rendered and judgment entered."). Under this analysis, the Arbitrator may have ruled in favor of either party.

However, under the applicable N.C. Gen. Stat. §44A-35, "a "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim...." As the Court has determined, Group III obtained an award of 26.5% of its claim and, thus, under this computation, Group III cannot be the prevailing party. This Court finds that the Arbitrator's award in this matter dictates that neither party can receive "prevailing party" status and therefore, the award of attorneys' fees is modified to zero.

V. MANIFEST DISREGARD

Group III's contention that Crystal Pools' argument regarding the Arbitrator's manifest disregard of applying the contracted for North Carolina law, and mistakenly applying South Carolina law, is unavailable to Crystal Pools "under established federal precedent" is erroneous. As stated, our Fourth Circuit has adopted a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: "(1) the applicable legal principle is clearly

defined and not subject to reasonable debate; and (2) the arbitrator[] refused to heed that legal principle." Wachovia Sec. LLC v Brand, 671 F.3d 472, 483 (4th Cir. 2012). In the matter at hand, Crystal Pools has met this two-prong test. First, the applicable legal principle clearly defined in the contract between the Parties is/was North Carolina law. Second, the Arbitrator either refused to apply North Carolina law, and/or mistakenly or inadvertently applied South Carolina law. See Wachovia Sec. LLC v Brand, 671 F.3d 472, (4th Cir. 2012). Consequently, this Court finds that Crystal Pools has met its burden in showing the Arbitrator in this matter manifestly disregarded North Carolina's specific law concerning prevailing party status and the award of attorneys' fees, and failed to apply the substantive provisions of the Statutes as set-forth in this Order.

CONCLUSION

For the foregoing reasons, Crystal Pools' Motion to Vacate Arbitration Award is GRANTED, and the Arbitrator's award of attorneys' fees in the amount of ONE HUNDRED SIXTEEN THOUSAND ONE HUNDRED SIXTY-FIVE and 86/100 DOLLARS (\$116,165.86) is modified to ZERO (\$0.00) Dollars.

IT IS SO ORDERED

Dated:

4/23/15


HON: J. ERNEST KINARD, JR.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-40-007229

Group III Mgt., Inc.,

Claimant/Plaintiff,

v.

Suncrete of Carolina, Inc. d/b/a Crystal Pools,

Respondent/Defendant.

**ORDER GRANTING GROUP III MGT.,
INC'S MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE 59(e)
S.C.R.C.P. AND GRANTING GROUP III'S
MOTION TO CONFIRM ARBITRATION
AWARD**

RICHLAND COUNTY
FILED
2015 NOV 12 AM 9:53
SUNCRETE OF CAROLINA
C.C.P. & S.

This matter is before the Court on Plaintiff Group III Mgt., Inc.'s ("Group III's") Motion To Alter or Amend Judgment Pursuant to Rule 59(e) SCRC.P.

This matter originated from an arbitration proceeding and subsequent award under the Federal Arbitration Act and came on for hearing before The Honorable J. Ernest Kinard, Jr., Judge for the Fifth Judicial Circuit, on February 6, 2015, on two motions filed by the parties: (1) Suncrete of Carolina, Inc., d/b/a Crystal Pools, (hereinafter referred to as "Crystal Pools") motion to vacate arbitration award or in the alternative to modify arbitration award and, (2) Group III's motion to confirm arbitration award. By an Order signed April 23, 2015, (hereinafter referred to as "the Order"), Judge Kinard granted Crystal Pools' motion and reduced the award of attorney's fees contained in the arbitration award in favor of Group III from the sum of \$116,165.86 to \$0. No Order was entered with respect to Group III's motion to confirm arbitration award. The Order, although apparently signed by Judge Kinard on April 23, 2015, was not filed by the Clerk of Court until May 18, 2015, and May 26, 2015 (there are two filing date stamps on the Order) and was received by Group III's attorney by mail from the Richland County Clerk of Court on June 3, 2015. Group III filed its motion to alter or amend judgment on June 12, 2015. Judge Kinard died on May 19, 2015 and was, obviously, unable to issue a final order in this matter.

1 *JAG*

Dkt: 15-00722 v.2

The undersigned has been assigned as successor judge in the above proceedings due to the death of Judge Kinard pursuant to Rule 63, SCRCP. In that regard, a hearing was held on Group III's Rule 59(e) motion before me on October 2, 2015. The file contained previously submitted legal memoranda, copies of case and statutory law as well as several exhibits from the underlying arbitration. Additional copies of case law and statutory law were provided to the Court at the hearing. I have reviewed the record and determined that I can complete the proceedings in this matter by hearing and ruling on Group III's motion to alter or amend judgment.

Factual and Procedural Background

On October 18, 2012, Group III entered into a construction contract with the Army Corps of Engineers, Charleston Division, for the construction of repairs, renovations, and upgrades to the Legion Pool Complex located at Fort Jackson in Richland County, South Carolina. The work provided for in this contract required removal of an existing swimming pool, the construction of a new swimming pool and deck in its place, and the construction of a building and other improvements in connection therewith. By contract dated November 8, 2012 ("Contract"), Group III subcontracted a portion of its work to Crystal Pools, specifically the construction of the new swimming pool and deck area. A copy of the written Contract was submitted as an Exhibit by both parties. Article 14.1 of the Contract contains an agreement to arbitrate all claims arising out of or related to the Contract in accordance with the construction industry arbitration rules of the American Arbitration Association ("AAA") pursuant to the Federal Arbitration Act ("FAA"). Pursuant to Article 15.2 of the Contract, North Carolina law applies to the Contract.

Subsequent to the aforementioned Contract date and after the work commenced, the parties became entangled in a variety of disputes which could not be resolved.

On September 19, 2013, Group III filed a demand for arbitration with the AAA seeking to recover the excess of Group III's costs to complete Crystal Pools' work over the remaining

2 *Jag*

balance due on the Contract. On November 11, 2013, Crystal Pools responded to Group III's demand for arbitration and asserted a counterclaim against Group III alleging a balance due under the Contract. C. Allen Gibson, Esquire, a Charleston attorney with extensive experience in the field of construction law and practice, as well as experience in conducting arbitrations, was selected by the parties as the arbitrator. Mr. Gibson held hearings in Columbia, South Carolina for three consecutive days, July 8, 9, and 10, 2014, with a follow up hearing via telephone on July 14, 2014. During the course of the 3 ½ days of hearings all parties were provided an opportunity to present testimony and evidence. At the conclusion of the arbitration hearing, Group III and Crystal Pools expressly submitted to the arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorneys' fees that should be awarded to that party pursuant to the Contract. The parties subsequently submitted Affidavits regarding attorneys' fees on July 18, 2014, and the arbitration hearing was declared closed on July 23, 2014.

On or about August 18, 2014, the arbitrator entered an award in favor of Group III against Crystal Pools in the total amount of \$197,304.09, of which amount \$116,165.86 was for attorneys' fees and costs associated with the prosecution of Group III's claim and the defense of Crystal Pools' counterclaim. No amount was awarded to Crystal Pools on its counterclaim. On September 8, 2014, Crystal Pools filed a motion with the arbitrator to modify the award so as to limit or eliminate the attorneys' fees portion of the award. The arbitrator denied the motion in a written order. Crystal Pools then filed a motion with the Circuit Court requesting the same relief, *i.e.*, to vacate or in the alternative modify the arbitration award. On or about the same time Group III filed its motion with the Circuit Court to confirm the arbitration award.

Legal Standard

By the terms of the Contract, and agreement of the parties, the Federal Arbitration Act governs this dispute. Thus, the FAA applies to the standard of review the Court must consider in

3 *Yag*

whether to vacate or modify the arbitration award. "In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted." *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985) (citing 9 U.S.C. §§ 9-11). "Consequently, a court 'may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§ 10 and 11 is found to exist'." *Id.* (quoting *Diapulse Corp. of Am. V. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)). Indeed, "the scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." *Henry M. Jackson Found. for the Advancement of Military Med., Inc. v. Norwell, Inc.*, 596 Fed. Appx. 200, 201 (4th Cir. 2015) (internal quotation and citation omitted).

A request for *vacatur* of an arbitration award under the FAA 9 U.S.C. § 10 requires the movant to show (1) "the award was procured by corruption, fraud, or undue means;" (2) "evident partiality or corruption in the arbitrators;" (3) "misconduct in refusing to postpone the hearing" or "refusing to hear evidence pertinent and material to the controversy;" or (4) "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a). A request for *modification* of an arbitration award under the FAA 9 U.S.C. § 11 requires the movant to show that (1) "there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property;" that (2) "the arbitrators have awarded upon a matter not submitted to them;" or that (3) "the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11.

Although not recognized by some federal circuits, in limited and strictly circumscribed situations, the Fourth Circuit has said a reviewing court may also consider whether the arbitrator

4 *YAG*

"manifestly disregarded" the law as an additional common law ground for vacating an arbitration award. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). However, "[t]he FAA notably does not authorize a district court to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law." *Id.* at 478 n.5.

~~The requested vacatur or modification is not allowed under the FAA or the theory of manifest disregard.~~

The gist of Crystal Pools' argument as contained in the Order of Judge Kinard is the contention that the arbitrator misapplied the law or, stated differently, applied South Carolina law instead of North Carolina law in regard to attorneys' fees, and it appears that the arbitration award was modified by the Order of Judge Kinard on those grounds.

However, with all due respect to the Order of Judge Kinard, there is no indication in the record that the arbitrator did any such thing. Nonetheless, even if the arbitrator misapplied the law, Crystal Pools must point to more than an incorrect application of law because "proving manifest disregard require[s] something beyond showing that the arbitrators misconstrued the law, especially given that arbitrators are not required to explain their reasoning." *Wachovia Sec.*, 671 F.3d at 481; *see also Trident Technical*, 286 S.C. at 109, 333 S.E.2d at 787 ("[T]he nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards ... presuppose[s] something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.") (internal citations and quotations omitted). I see nothing that supports a manifest disregard argument. Instead, the only evidence in the record is that the arbitrator heard all arguments regarding the facts, the appropriate law and its application and thereafter made his decision. It appears that not only did he hear these arguments once, the arbitrator considered the same arguments again in ruling on Crystal Pools' request to modify the arbitration award.

In addition to the state appellate courts and the federal circuit courts, the United States

Supreme Court has addressed the issue of limited judicial review of an arbitrator's decision on several occasions. In one of its more recent decisions on the issue, *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013), the Supreme Court pointed out that "Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" (internal citation omitted). *Id.* at 186 L. Ed. 2d at 119. The Court in *Oxford* goes on to say: "'It is not enough to show that the arbitrator committed an error – or even a serious error.'" *Id.* (internal citation omitted). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial process." *Id.* (internal quotation and citation omitted). The "heavy burden" as required by the U.S. Supreme Court to vacate or modify an arbitration award has simply not been met by Crystal Pools in this matter.

Conclusion

Group III in its legal memoranda and during its presentation to the Court vigorously argues that Crystal Pools and the Order of Judge Kinard misconstrues North Carolina law as to the finding of "prevailing party" and entitlement to attorney's fees. However, I do not need to reach the merits of the correct application of North Carolina case and statutory law in this matter because the standard of review under the provisions of the FAA to include the theory of manifest disregard do not allow the arbitration award in this case to be reviewed and modified by the Circuit Court. The arbitration award outlines the facts and arguments made by the parties, discusses the monetary amounts claimed by each party, and the basis therefore. The arbitrator in his award states that he has considered all of the evidence and arguments of counsel and then makes his findings including who is the prevailing party and the amount of attorney's fees awarded. The arbitrator's findings are clear and unambiguous.

6 July

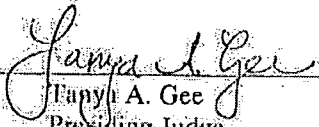
I find that the arbitrator's award was made in accordance with the terms and provisions of the parties' written agreement as well as in accordance with the parties' request to determine who was the prevailing party and the amount of reasonable attorney's fees to be awarded. However, even if there were errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrator, that is insufficient to vacate or modify an arbitration award fairly and honestly made. Courts may vacate an arbitrator's decision only in very unusual circumstances and these circumstances do not exist in this case.

Based on the foregoing, it is herein ORDERED that the Order of Judge Kinard in this matter dated April 23, 2015, is altered and amended such that the Motion of Defendant Crystal Pools to modify or vacate the arbitration award is denied and the Arbitration Award dated August 18, 2014, is hereby confirmed in all respects, and that judgment be entered in conformity therewith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Arbitration Award dated August 18, 2014, in favor of Plaintiff, Group III Mgt., Inc. against Defendant Suncrete of Carolina, Inc. d/b/a Crystal Pools is hereby confirmed and judgment is entered against said Defendant in the amount of \$197,304.09.

The Richland County Clerk of Court is directed to register the arbiter's award of \$197,304.09 as the judgment of this Court in the Richland County Clerk of Court's office.

AND IT SO ORDERED.


Tanya A. Gee
Presiding Judge
Fifth Judicial Circuit

Dated: November 12, 2015
Columbia, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007229

Group III Management Inc

Suncrete Of Carolina Inc

Crystal Pools

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ 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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (With No Fault); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

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
		\$
		\$
		\$

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 _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 12 day of Nov, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 13 November 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Alan Ross Belcher Jr.

John C. Bruton Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McQuide

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

DEC 17 2015

The Honorable Tanya A. Gee, Circuit Court Judge **SC Court of Appeals**

Lower Court Case No. 2014-CP-40-007229
Court of Appeals Case No. 2015-

GROUP III MANAGEMENT, INC.,

Respondent,

v.

SUNCRETE OF CAROLINA, INC., d/b/a
CRYSTAL POOLS,

Appellant.

NOTICE OF APPEAL

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF
APPEALS

NOW COMES the Appellant, Suncrete of Carolina, Inc., d/b/a Crystal Pools, by
and through its undersigned counsel, and pursuant to Rule 203 of the South Carolina
Appellate Court Rules, respectfully hereby appeals this certain Order of the Honorable
Tanya A. Gee, Presiding Judge of the Fifth Judicial Circuit.

(a) Form 4 and accompanying Order Granting Group III Mgt., Inc.'s Motion to
Alter or Amend Judgment Pursuant to Rule 59(e) S.C.R.C.P. and Granting Group III's
Motion to Confirm Arbitration Award filed on November 12, 2015.

Counsel for the Appellant, Suncrete of Carolina, Inc., d/b/a Crystal Pools, received a filed and stamped copy of said Order on November 19, 2015. A copy of the Circuit Court Order appealed from is attached hereto as Exhibit A, and incorporated herein by reference.

Respectfully submitted,



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Telephone: (843) 720-3460
*Attorneys for Appellant, Suncrete Of Carolina,
Inc., d/b/a Crystal Pools*

Dated: December 14th, 2015

OTHER COUNSEL OF RECORD:

John C. Bruton, Jr., Esquire
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
Post Office Box 11889 (2911-1889)
Columbia, South Carolina 29201
(803) 779-3080

Everette L. Wooten, Jr., Esquire
Wooten and Coley
P.O. Box 1555
Kinston, North Carolina 28503
(252) 523-8000
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2014-CP-40-007229
Court of Appeals Case No. 2015-

GROUP III MANAGEMENT, INC.,

Respondent,

v.

SUNCRETE OF CAROLINA, INC., d/b/a
CRYSTAL POOLS,

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Notice of Appeal upon the Respondent by depositing a copy of same in the United States Mail, First Class postage prepaid, on December 17, 2015, addressed to Respondent's attorneys of record, addressed as follows:

John C. Bruton, Jr., Esquire
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
Post Office Box 11889 (2911-1889)
Columbia, South Carolina 29201

Everette L. Wooten, Jr., Esquire
Wooten and Coley
P.O. Box 1555
Kinston, North Carolina 28503

(Signature appears on succeeding page)

RECEIVED

DEC 17 2015

SC Court of Appeals



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Telephone: (843) 720-3460
*Attorneys for Appellant, Suncrete Of Carolina,
Inc., d/b/a Crystal Pools*

Dated: December 24th 2015

EXHIBIT A

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007229

Group III Management Inc

Suncrete Of Carolina Inc

Crystal Pools

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ 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.
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☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
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☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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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:

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Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

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John C. Bruton Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

RECEIVED

DEC 17 2015

SC Court of Appeals

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-40-007229

Group III Mgt., Inc.,

Claimant/Plaintiff,

v.

Suncrete of Carolina, Inc. d/b/a Crystal Pools,

Respondent/Defendant.

**ORDER GRANTING GROUP III MGT.,
INC'S MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE 59(e)
S.C.R.C.P. AND GRANTING GROUP III'S
MOTION TO CONFIRM ARBITRATION
AWARD**

FILED
2015 NOV 12 AM 9:53
RICHLAND COUNTY
CLERK OF COURT
SUNCRETE OF CAROLINA, INC.
C.C.P. & S.C.R.C.P.

This matter is before the Court on Plaintiff Group III Mgt., Inc.'s ("Group III's") Motion
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This matter originated from an arbitration proceeding and subsequent award under the
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Suncrete of Carolina, Inc., d/b/a Crystal Pools, (hereinafter referred to as "Crystal Pools") motion
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RECEIVED

DEC 17 2015

SC Court of Appeals

1 JAG

DM: 4242582 v.2

The undersigned has been assigned as successor judge in the above proceedings due to the death of Judge Kinard pursuant to Rule 63, SCRCF. In that regard, a hearing was held on Group III's Rule 59(e) motion before me on October 2, 2015. The file contained previously submitted legal memoranda, copies of case and statutory law as well as several exhibits from the underlying arbitration. Additional copies of case law and statutory law were provided to the Court at the hearing. I have reviewed the record and determined that I can complete the proceedings in this matter by hearing and ruling on Group III's motion to alter or amend judgment.

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2 *Jag*

FILE 4342982 v.2

balance due on the Contract. On November 11, 2013, Crystal Pools responded to Group III's demand for arbitration and asserted a counterclaim against Group III alleging a balance due under the Contract. C. Allen Gibson, Esquire, a Charleston attorney with extensive experience in the field of construction law and practice, as well as experience in conducting arbitrations, was selected by the parties as the arbitrator. Mr. Gibson held hearings in Columbia, South Carolina for three consecutive days, July 8, 9, and 10, 2014, with a follow up hearing via telephone on July 14, 2014. During the course of the 3 ½ days of hearings all parties were provided an opportunity to present testimony and evidence. At the conclusion of the arbitration hearing, Group III and Crystal Pools expressly submitted to the arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorneys' fees that should be awarded to that party pursuant to the Contract. The parties subsequently submitted Affidavits regarding attorneys' fees on July 18, 2014, and the arbitration hearing was declared closed on July 23, 2014.

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Legal Standard

By the terms of the Contract, and agreement of the parties, the Federal Arbitration Act governs this dispute. Thus, the FAA applies to the standard of review the Court must consider in

3 JRG

DN: 4242551 v.2

whether to vacate or modify the arbitration award. "In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted." *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985) (citing 9 U.S.C. §§ 9-11). "Consequently, a court 'may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§ 10 and 11 is found to exist.'" *Id.* (quoting *Diapulse Corp. of Am. V. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)). Indeed, "the scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." *Henry M. Jackson Found. for the Advancement of Military Med., Inc. v. Norwell, Inc.*, 596 Fed. Appx. 200, 201 (4th Cir. 2015) (internal quotation and citation omitted).

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Although not recognized by some federal circuits, in limited and strictly circumscribed situations, the Fourth Circuit has said a reviewing court may also consider whether the arbitrator

4 *Jne*

Dkt: 4145982 v.2

"manifestly disregarded" the law as an additional common law ground for vacating an arbitration award. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). However, "[t]he FAA notably does not authorize a district court to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law." *Id.* at 478 n.5.

The requested vacatur or modification is not allowed under the FAA or the theory of manifest disregard.

The gist of Crystal Pools' argument as contained in the Order of Judge Kinard is the contention that the arbitrator misapplied the law or, stated differently, applied South Carolina law instead of North Carolina law in regard to attorneys' fees, and it appears that the arbitration award was modified by the Order of Judge Kinard on those grounds.

However, with all due respect to the Order of Judge Kinard, there is no indication in the record that the arbitrator did any such thing. Nonetheless, even if the arbitrator misapplied the law, Crystal Pools must point to more than an incorrect application of law because "proving manifest disregard require[s] something beyond showing that the arbitrators misconstrued the law, especially given that arbitrators are not required to explain their reasoning." *Wachovia Sec.*, 671 F.3d at 481; *see also Trident Technical*, 286 S.C. at 109, 333 S.E.2d at 787 ("[T]he nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards ... presuppose[s] something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.") (internal citations and quotations omitted). I see nothing that supports a manifest disregard argument. Instead, the only evidence in the record is that the arbitrator heard all arguments regarding the facts, the appropriate law and its application and thereafter made his decision. It appears that not only did he hear these arguments once, the arbitrator considered the same arguments again in ruling on Crystal Pools' request to modify the arbitration award.

In addition to the state appellate courts and the federal circuit courts, the United States

DME 4242982 v.2

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Supreme Court has addressed the issue of limited judicial review of an arbitrator's decision on several occasions. In one of its more recent decisions on the issue, *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013), the Supreme Court pointed out that "Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" (internal citation omitted). *Id.* at 186 L. Ed. 2d at 119. The Court in *Oxford* goes on to say: "It is not enough to show that the arbitrator committed an error – or even a serious error." *Id.* (internal citation omitted). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial process." *Id.* (internal quotation and citation omitted). The "heavy burden" as required by the U.S. Supreme Court to vacate or modify an arbitration award has simply not been met by Crystal Pools in this matter.

Conclusion

Group III in its legal memoranda and during its presentation to the Court vigorously argues that Crystal Pools and the Order of Judge Kinard misconstrues North Carolina law as to the finding of "prevailing party" and entitlement to attorney's fees. However, I do not need to reach the merits of the correct application of North Carolina case and statutory law in this matter because the standard of review under the provisions of the FAA to include the theory of manifest disregard do not allow the arbitration award in this case to be reviewed and modified by the Circuit Court. The arbitration award outlines the facts and arguments made by the parties, discusses the monetary amounts claimed by each party, and the basis therefore. The arbitrator in his award states that he has considered all of the evidence and arguments of counsel and then makes his findings including who is the prevailing party and the amount of attorney's fees awarded. The arbitrator's findings are clear and unambiguous.

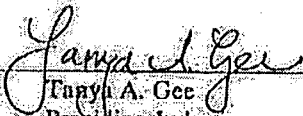
I find that the arbitrator's award was made in accordance with the terms and provisions of the parties' written agreement as well as in accordance with the parties' request to determine who was the prevailing party and the amount of reasonable attorney's fees to be awarded. However, even if there were errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrator, that is insufficient to vacate or modify an arbitration award fairly and honestly made. Courts may vacate an arbitrator's decision only in very unusual circumstances and these circumstances do not exist in this case.

Based on the foregoing, it is herein ORDERED that the Order of Judge Kinard in this matter dated April 23, 2015, is altered and amended such that the Motion of Defendant Crystal Pools to modify or vacate the arbitration award is denied and the Arbitration Award dated August 18, 2014, is hereby confirmed in all respects, and that judgment be entered in conformity therewith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Arbitration Award dated August 18, 2014, in favor of Plaintiff, Group III Mgt., Inc. against Defendant Suncrete of Carolina, Inc. d/b/a Crystal Pools is hereby confirmed and judgment is entered against said Defendant in the amount of \$197,304.09.

The Richland County Clerk of Court is directed to register the arbiter's award of \$197,304.09 as the judgment of this Court in the Richland County Clerk of Court's office.

AND IT SO ORDERED.


Tanya A. Gee
Presiding Judge
Fifth Judicial Circuit

Dated: November 12, 2015
Columbia, South Carolina

COPY**DEMAND FOR ARBITRATION**

NOW COMES Group III Mgt., Inc. ("Claimant"), a North Carolina corporation and hereby demands arbitration against SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. Claimant's Information:

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No: 252-527-3377
- e. E-mail Address: sgreene@group11imgt.com

2. Respondent's Information:

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-865-1200
- d. Fax No: 803-865-0209
- e. E-mail Address: ali@crystalpool.com

3. Claimant's Representative Information:

- a. Name of Representative: Everette L. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No: 252-523-2060
- e. Representative's E-mail Address: ewooten@wootenandcoley.com

4. Respondent's Representative Information: UNKNOWN

5. Statement Of Claimant's Claim: Plaintiff is General Contractor on a

project being done for the U.S. Army Corps of Engineers in Columbia, South Carolina, said project being known as "Legion Pool Complex, W192HP-11-D-0014 (hereinafter referred to as "Project"). Claimant sub-contracted a portion of said work to Respondent pursuant to a subcontract dated November 8, 2012, at a contract price of \$339,960.00.

The work to be done by Respondent pursuant to said subcontract was the construction of a swimming pool and deck.

Immediately after embarking on the project, Respondent submitted to Claimant Payment Application #1 in the sum of \$77,085.00. This application was almost exclusively for materials stored on site when, in fact, no such materials were stored on site nor had such materials been received by Crystal Pools. When this pay request was not paid immediately, Respondent ceased work on the project and on February 14, 2013, indicated it was 'closing the job down' unless it received full payment of its Payment Application #1. In order to entice Respondent to get back on the job, on February 20, 2013, Respondent paid Payment Application #1 even though the materials were not on site and to the best of Claimant's knowledge, most of the materials had not been paid for. Claimant made its payment to Respondent even though Claimant had not and could not bill the owner at that time.

Respondent returned to the job and performed site work, placing forms and placing rebar. The work done by Respondent was not done in a workmanlike manner and on or about March 18, 2013, Respondent again notified Claimant that Respondent would not continue on the project. On March 22, 2013, Petitioner gave Respondent a 3-day notice to cure its failure to prosecute the work. Respondent did not come back on the job; so on March 29, 2013, Claimant notified Respondent that Claimant had determined to complete the work under the subcontract. Claimant took this action not only because Respondent failed to prosecute the work but also because the work that was done was sub-standard and not according to the contract documents as evidenced by notice received by the owner citing Claimant for lack of contractor quality control with respect to the work performed by Respondent.

Claimant completed the work called for by Respondent's subcontract at a cost greatly in excess of the balance remaining on Respondent's subcontract. Claimant contends that pursuant to the terms of the subcontract it is entitled to recover such excess from Respondent. The amount to which Claimant is entitled is computed as follows:

Amount expended by Claimant to to complete Project	\$505,688.71
Amount of Crystal Pools' contract	\$339,960.00
Amount previously paid Crystal Pools	(77,085.00)
Amount previously paid concrete supplier	(9,500.00)
Amount remaining on Crystal Pools' contract	<u>\$253,375.00</u>
Balance owed to Group III Mgt., Inc.	<u>\$252,313.71</u>

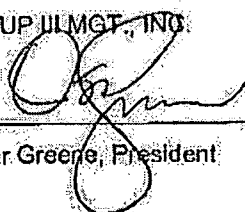
Claimant's claim may be increased in the event of assessment of liquidated damages by the owner since the Project was substantially delayed by the Respondent and all or part of such liquidated damages may be properly back-charged against Respondent. In addition, suppliers of Claimant which are unpaid may assert claims against Claimant or its bonding company and Claimant would be entitled to have its claim hereunder increased by the amount of such claims.

In summary, Claimant requests:

- a. That Claimant recover of Respondent in the sum of \$252,313.71 (plus such additional amounts to which Claimant may be entitled) and be granted an award in that amount.
- b. That Claimant be adjudged not to be indebted to Respondent in any amount on account of work done by Respondent pursuant to its subcontract on the Project.
- c. That any bond claims made by respondent against Claimant on this Project be dismissed.
- d. That Claimant be awarded representative fees and expenses.
6. That the arbitration hearing should be conducted in Columbia, South Carolina.
7. That Claimant is attaching hereto the sum of \$1,000.00 administrative filing fee (flexible schedule).
8. A copy of this demand together with a copy of the arbitration agreement has been provided to the Respondent by mailing a copy of same to it at the address set forth above and faxing a copy of same to the fax number set forth above.

RESPECTFULLY SUBMITTED this the 19th day of September, 2013.

GROUP ILMGT, INC.

BY: 

Oscar Greene, President

Produce and develop if any, in any of the following for or before 10/15/2013



GROUP III MGT., INC.

SUBCONTRACT FOR BUILDING CONSTRUCTION

PROJECT NO.: K1301**CONTRACT NO.:** K1301-002-S**PROJECT:**

Legion Pool Complex W912HP-11-D-0014
2761 Semmes Rd.
Fort Jackson, SC 29207

SUBCONTRACTOR: Crystal Pools

1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209

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4. CONTRACT PRICE
5. PAYMENT
6. CHANGES, CLAIMS AND DELAYS
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9. SUBCONTRACT PROVISIONS
10. RECOURSE BY CONTRACTOR
11. LABOR RELATIONS
12. INDEMNIFICATION
13. INSURANCE
14. ARBITRATION
15. CONTRACT INTERPRETATION
16. SPECIAL PROVISIONS

This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification and particularly when used with other than AIA A201, General Conditions of the Contract for Construction, 1987 edition, or document with identical wording.

WORDING IDENTICAL TO AGC DOCUMENT NO. 800 DATED 1990

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SUBCONTRACT FOR BUILDING CONSTRUCTION**ARTICLE 1****AGREEMENT**

This Agreement is made this 11/8/2012, by and between

Group III Mgt, Inc.

hereinafter called the Contractor and Crystal Pools, Subcontractor, to perform part of the Work on the following Project.

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

OWNER: U.S. Army Corps of Engineers, Charleston
69-A Hagood Ave.
Charleston, SC 29403

ARCHITECT: Davis & Floyd Engineering Architecture
POB 61599
Charleston, SC 29419

CONTRACTOR: Group III Mgt, Inc.
2820 W Vernon Ave
Kinston, NC 28504
(Phone) 252-527-3333 (Fax) 252-527-3377
Erik Barrow

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209

CONTACT: John Rogers

FED TAX ID #:

VENDOR NO.:

COST CODE: Swimming Pool & Deck

CONTRACT PRICE: Three hundred thirty-nine thousand nine hundred sixty dollars
\$339,960.00
(Herein insert a lump sum, unit price or both. Bid schedules must be referenced.)

Notice to the parties shall be given at the above addresses.

WORDING IDENTICAL TO AGC DOCUMENT NO. 500 DATED 1990

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ARTICLE 2 SCOPE OF WORK

2.1 SUBCONTRACTOR'S WORK. The Contractor contracts with the Subcontractor as an independent contractor, to perform the work described in Article 10. The Subcontractor shall perform such work (hereinafter called the "Subcontractor's Work") under the general direction of the Contractor and in accordance with this Agreement and the Contract Documents.

2.2 CONTRACT DOCUMENTS. The Contract Documents which are binding on the Subcontractor are as set forth in Paragraph 18.6. Upon the Subcontractor's request the Contractor shall furnish a copy of any part of these documents. Nothing in the Contract Documents shall be construed to create a contractual relationship between persons or entities other than the Contractor and Subcontractor.

2.3 CONFLICTS. In the event of a conflict between this Agreement and the Contract Documents, this Agreement shall govern.

ARTICLE 3 SCHEDULE OF WORK

3.1 TIME IS OF ESSENCE. Time is of the essence for both parties, and they mutually agree to see to the performance of their respective work and the work of their subcontractors so that the entire Project may be completed in accordance with the Contract Documents and the Schedule of Work. The Contractor shall prepare the Schedule of Work and revise such schedule as the Work progresses.

3.2 DUTY TO BE BOUND. Both the Contractor and the Subcontractor shall be bound by the Schedule of Work. The Subcontractor shall provide the Contractor with any requested scheduling information for the Subcontractor's Work. The Schedule of Work and all subsequent changes thereto shall be submitted to the Subcontractor in advance of the required performance.

3.3 SCHEDULE CHANGES. The Subcontractor recognizes that changes will be made in the Schedule of Work and agrees to comply with such changes.

3.4 PRIORITY OF WORK. The Contractor shall have the right to decide the time, order and priority in which the various portions of the Work shall be performed and all other matters relative to the timely and orderly conduct of the Subcontractor's Work. The Subcontractor shall commence its work within 3 days of notice to proceed from the Contractor and if such work is interrupted for any reason the Subcontractor shall resume such work within two working days from the Contractor's notice to do so.

ARTICLE 4 CONTRACT PRICE

The Contractor agrees to pay to the Subcontractor for the satisfactory performance of the Subcontractor's Work the amount stated in Article 1 subject to additions or deductions per Article 6.

ARTICLE 5 PAYMENT

5.1 GENERAL PROVISIONS

5.1.1 SCHEDULE OF VALUES. The Subcontractor shall provide a schedule of values satisfactory to the Contractor and the Owner no more than fifteen (15) days from the date of execution of this Agreement.

5.1.2 ARCHITECT VERIFICATION. Upon request the Contractor shall give the Subcontractor written authorization to obtain directly from the Architect the percentage of completion certified for the Subcontractor's Work.

5.1.3 PAYMENT USE RESTRICTION. Payment received by the Subcontractor shall be used to satisfy the indebtedness owed by the Subcontractor to any person furnishing labor or materials for use in performing the Subcontractor's work on this project before it is used in any other manner.

5.1.4 PAYMENT USE VERIFICATION. The Contractor shall have the right at all times to contact the Subcontractor's subcontractors and suppliers to ensure that the same are being paid promptly by the Subcontractor for labor or materials furnished for use in performing the Subcontractor's Work.

5.1.5 PARTIAL LIEN WAIVERS AND AFFIDAVITS. As a prerequisite for payment, the Subcontractor shall provide, in a form satisfactory to the Owner and the Contractor, partial lien or claim waivers and affidavits from the Subcontractor, and its subcontractors and suppliers for the completed Subcontractor's Work. Such waivers may be made conditional upon payment.

5.1.6 SUBCONTRACTOR PAYMENT FAILURE. Upon payment by the Contractor, Subcontractor shall promptly pay its lower tier subcontractors and material suppliers the amounts to which they are entitled. In the event the Contractor has reason to believe that labor, material or other obligations incurred in the performance of the Subcontractor's Work are not being paid, the Contractor may give written notice of such claim or lien to the Subcontractor and may take any steps deemed necessary to ensure that progress payments are utilized to pay such obligations including but not limited to the issuance of joint checks. If upon receipt of said notice, the Subcontractor does not (a) supply evidence to the satisfaction of the Contractor that the moneys owing to the claimant(s) have been paid; or (b) post a bond indemnifying the Owner, the Contractor, and the Contractor's surety, if any, and the premises from such claim or lien; then the Contractor shall have the right to withhold from any payments due or to become due to the Subcontractor a reasonable amount to protect the Contractor from any and all loss, damage or expense including attorney's fees arising out of or relating to any such claim or lien until the claim or lien has been satisfied by the Subcontractor.

5.1.7 SUBCONTRACTOR ASSIGNMENT OF PAYMENTS. The Subcontractor shall not assign any moneys due or to become due under this Contract, or under any Change Order thereto, without the written consent of Contractor, unless such assignment is intended to create a new security interest within the scope of Article 9 of the Uniform Commercial Code.

Should Subcontractor assign all or any part of any moneys due or to become due under this Contract, to create a new security interest or for any other purpose, the instrument of assignment shall contain a clause to the effect that the assignee's right in and to any money due or to become due to the Subcontractor shall be subject to the claims of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work under this Subcontract and any Change Orders.

5.1.3. PAYMENT NOT ACCEPTANCE. Payment to the Subcontractor does not constitute or imply acceptance of any portion of the Subcontractor's Work.

5.2 PROGRESS PAYMENTS

5.2.1 APPLICATION. Subcontractor's application for payment shall be itemized and supported by substantiating data as required in the Contract Documents for the Contractor's payment application. Subcontractor's application shall be notarized if required. Subcontract payment applications may include payment requests on account of properly authorized Construction Change Directives. The Subcontractor's progress payment application for work performed in the preceding payment period shall be submitted to the Contractor per the terms of this Agreement and specifically Subparagraphs 5.1.1, 5.2.2, 5.2.3, and 5.2.4 for approval of the Contractor and Architect/Owner/Contractor. The Contractor shall forward, without delay, the approved value to the Owner for payment.

5.2.2 RETAINAGE/SECURITY. The rate of retainage shall be equal to the percentage retained from the Contractor's payment by the Owner for the Subcontractor's Work provided the Subcontractor furnishes a bond or other security to the satisfaction of the Contractor. If the Subcontractor has furnished such bond or security, its work is satisfactory and the Contract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontractor's Work has attained the same percentage of completion and the Contractor's retainage for the Subcontractor's Work has been so reduced by the Owner. However if the Subcontractor does not provide such bond or security, the rate of retainage shall be 10%.

5.2.3 TIME OF APPLICATION. The Subcontractor shall submit progress payment applications to the Contractor no later than the 25 day of each payment period for work performed up to and including the 30 day of the payment period indicating work completed and, to the extent allowed under Subparagraph 5.2.4, materials suitably stored during the preceding payment period.

5.2.4 STORED MATERIALS. Unless otherwise provided in the Contract Documents, and if approved in the advance by the Owner, applications for payment may include materials and equipment not incorporated in the Subcontractor's Work but delivered to and suitably stored at site or at some other location agreed upon in writing. Approval of payment applications for such stored items on or off the site shall be conditioned upon submission by the Subcontractor of bills of sale and applicable Insurance or such other procedures satisfactory to the Owner and

Contractor to establish the Owner's title to such materials and equipment or otherwise protect the Owner's and Contractor's interest therein, including transportation to the site.

5.2.5 TIME OF PAYMENT. Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made no later than seven (7) days after receipt by the Contractor of payment from the Owner for the Subcontractor's Work.

5.2.6 PAYMENT DELAY. If for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Contractor within seven (7) days after the date such payment is due, as defined in Subparagraph 5.2.5, then the Subcontractor, upon giving an additional seven (7) days written notice to the Contractor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. To the extent obtained by the Contractor under the Contract Documents, the contract price shall be increased by the amount of the Subcontractor's reasonable cost of shutdown, delay, and start-up, which shall be effected by appropriate Change Order.

If the Subcontractor's Work has been stopped for thirty (30) days because the Subcontractor has not received progress payments as required hereunder, the Subcontractor may terminate this Agreement upon giving the Contractor an additional seven (7) days written notice.

5.3 FINAL PAYMENT

5.3.1 APPLICATION. Upon acceptance of the Subcontractor's Work by the Owner the Contractor, and if necessary, the Architect, and upon the Subcontractor furnishing evidence of fulfillment of the Subcontractor's obligations in accordance with the Contract Documents and Subparagraph 5.3.2, the Contractor shall forward the Subcontractor's application for final payment without delay.

5.3.2 REQUIREMENTS. Before the Contractor shall be required to forward the subcontractor's application for final payment to the Owner, the Subcontractor shall submit to the Contractor:

- (a) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or its property or the Contractor or the Contractor's surety might in any way be liable, have been paid or otherwise satisfied;
- (b) consent of surety to final payment, if required;
- (c) satisfaction of required closeout procedures;
- (d) certification that insurance required by the Contract Documents to remain in effect beyond final payment pursuant to Paragraph 13.4 is in effect and will not be cancelled or allowed to expire without at least thirty (30) days' written notice to the Contractor unless a longer period is stipulated in the Contract; and
- (e) other data if required by the Contractor or Owner, such as receipts, releases, and waivers of liens to the extent and in such form as may be designated by the Contractor or Owner. Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's Work, but shall in no way relieve the Subcontractor of liability for the

obligations assumed under Paragraph 8.10, or for faulty or defective work appearing after final payment.

5.3.3 TIME OF PAYMENT. Final payment of the balance due of the Contract Price shall be made to the Subcontractor:

- (a) upon receipt of the Owner's waiver of all claims related to the Subcontractor's Work except for unsettled liens, unknown defective work, and noncompliance with the Contract Documents or warranties; and
- (b) within seven (7) days after receipt by the Contractor of final payment from the Owner for such Subcontractor's Work.

5.3.4 FINAL PAYMENT DELAY. If the Owner or its designated agent does not issue a certificate for Final Payment or the Contractor does not receive such payment for any cause which is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of the Subcontractor, the prompt release by the Owner of the final payment due for the Subcontractor's Work. At the Subcontractor's request and expense, to the extent agreed upon in writing, the Contractor shall institute reasonable legal remedies to mitigate the damages and pursue payment of the Subcontractor's final payment including interest thereon.

5.4 LATE PAYMENT INTEREST. To the extent obtained by the Contractor, under the Contract Documents, progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate provided in the Contract Documents, or, in the absence thereof, at the legal rate prevailing at the place of the Project.

ARTICLE 8 CHANGES, CLAIMS AND DELAYS

8.1 CHANGES. When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Work which are within the general scope of this Agreement. Adjustments in the Contract Price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order or a Subcontract Construction Change Directive pursuant to the Contract Documents. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Work, adjustment in the Contract Price or Schedule of Work. A Subcontract Construction Change Directive is a written instrument prepared by the Contractor directing a change in the Work and stating a proposed adjustment, if any, in the Contract Price or Schedule of Work or both. A Subcontract Construction Change Directive shall be used in the absence of agreement on the terms of a Subcontract Change Order.

8.2 CLAIMS RELATING TO OWNER. The Subcontractor agrees to make all claims for which the Owner is or may be liable in the manner and within the time limits provided in the Contract Documents for like claims by the Contractor upon the Owner and in sufficient time for the Contractor to make such

claims against the Owner in accordance with the Contract Documents. The Contractor agrees to permit the Subcontractor to prosecute a claim in the name of the Contractor for the use and benefit of the Subcontractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner.

5.3 CLAIMS RELATING TO CONTRACTOR. The Subcontractor shall give the Contractor written notice of all claims not included in Paragraph 8.2 within five (5) days of the occurrence of the event for which claim is made; otherwise, such claims shall be deemed waived. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor not relating to claims included in Paragraph 8.2 shall be resolved in the manner provided in Article 14.

5.4 ADJUSTMENT IN CONTRACT PRICE. If a Subcontract Change Order or Construction Change Directive requires an adjustment in the Contract Price, the adjustment shall be established by one of the following methods:

1. mutual agreement on a lump sum with sufficient information to substantiate the amount;
2. unit prices already established in the Contract Documents or if not established by the Contract Documents then established by mutual agreement for this adjustment; or
3. a mutually determined cost plus a jointly acceptable allowance for overhead and profit.

8.5 SUBSTANTIATION OF ADJUSTMENT. If the Subcontractor does not respond promptly or disputes the method of adjustment, the method and the adjustment shall be determined by the Contractor on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Contract Price, an allowance for overhead and profit of to be determined by Government requirements. The Subcontractor shall maintain for the Contractor's review and approval an appropriately itemized and substantiated accounting of the following items attributable to the Subcontract Change Order or Subcontract Construction Change Directive:

1. labor costs, including Social Security, health, welfare, retirement and other fringe benefits as normally required, and state workers' compensation insurance;
2. costs of materials, supplies and equipment, whether incorporated in the Work or consumed, including transportation costs;
3. costs of renting, either from the Contractor or from others, of machinery and equipment other than hand tools;
4. costs of bond and insurance premiums, permit fees and taxes attributable to the change; and
5. costs of additional supervision and field office personnel services necessitated by the change.

8.6 DELAY. If the progress of the Subcontractor's Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor's Work shall be extended by Subcontract Change Order or Subcontract Construction Change Directive to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly.

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

8.7 LIQUIDATED DAMAGES. If the Contract Documents provide for liquidated or other damages for delay beyond the completion date set forth in the Contract Documents, and such damages are assessed, then the Contractor may assess same against the Subcontractor in proportion to the Subcontractor's share of the responsibility for such delay. However the amount of such assessment shall not exceed the amount assessed against the Contractor.

Nothing set forth herein shall limit the Subcontractor's liability to the Contractor for the Contractor's actual delay damages caused by the Subcontractor's delay. The Subcontractor shall be liable to the Contractor for the Contractor's actual damages caused by the Subcontractor's delay.

ARTICLE 7 CONTRACTOR'S OBLIGATIONS

7.1 CONTRACT DOCUMENTS. Prior to executing this Subcontract, the Contractor shall make available to the Subcontractor the Contract Documents which are binding on the Subcontractor and set forth in Paragraph 10.5.

7.2 AUTHORIZED REPRESENTATIVE. The Contractor shall designate one or more persons who shall be the Contractor's authorized representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) the Subcontractor shall look to for instructions, orders and/or directions, except in an emergency.

7.3 STORAGE APPLICATIONS. The Contractor shall allocate adequate storage areas, if available, for the Subcontractor's materials and equipment during the course of the Subcontractor's Work.

7.4 TIMELY COMMUNICATIONS. The Contractor shall transmit, with reasonable promptness, all submittals, transmittals, and written approvals relating to the Subcontractor's Work.

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

- (a) prior to furnishing of the services and materials, except in an emergency affecting the safety of persons or property;
- (b) in writing of such claim within three days of first furnishing such services or materials; and

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

ARTICLE 8 SUBCONTRACTOR'S OBLIGATIONS

8.1 OBLIGATIONS DERIVATIVE. The Subcontractor binds itself to the Contractor under this Agreement in the same manner as the Contractor is bound to the Owner under the Contract Documents and will so bind its lower-tier subcontractors. The Subcontractor shall make available to its lower-tier subcontractors the Contract Documents which are binding on the lower-tier subcontractors.

8.2 RESPONSIBILITIES. The Subcontractor shall furnish all of the labor, materials, equipment, and services including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontractor's Work in strict accordance with and reasonably inferable from the Contract Documents. The Subcontractor shall provide a list of proposed subcontractors and suppliers, be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Schedule of Work.

8.3 SHOP DRAWINGS. The Subcontractor shall be responsible to the Contractor for the accuracy and conformity with the Contract Documents and other submittals that pertain to its work in the same manner as the Contractor is responsible therefor to the Owner. Shop drawings or their approval by the Contractor shall not be deemed to authorize deviations or substitutions from the requirements of the Contract Documents.

8.4 TEMPORARY SERVICES. The Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work, except as provided in Article 18. Said article also identifies those common temporary services, if any, which are to be furnished by the Subcontractor.

8.5 COORDINATION. The Subcontractor shall:

- (a) cooperate with the Contractor and all others whose work may interfere with the Subcontractor's Work;
- (b) specifically note and immediately advise the Contractor of any such interference with the Subcontractor's Work; and
- (c) participate in the preparation of coordination drawings and work schedules in areas of congestion.

8.6 AUTHORIZED REPRESENTATIVE. The Subcontractor shall designate one or more persons who shall be the authorized Subcontractor's representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) to whom the Contractor shall issue instructions, orders or directions, except in an emergency.

8.7 PROVISION FOR INSPECTION. The Subcontractor shall notify the Contractor when portions of the Subcontractor's Work are ready for inspection. The Subcontractor shall at all times furnish the Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under this Agreement may be.

in the course of preparation, process, manufacture or treatment.

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

8.8 CLEANUP. The Subcontractor shall follow the Contractor's cleanup and safety directions and

(a) at all times keep the building and premises free from debris and unsafe conditions resulting from the Subcontractor's Work; and

(b) broom clean each work area prior to discontinuing work in the same.

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

8.9 SAFETY. The prevention of accidents on or in the vicinity of its Work is the Subcontractor's responsibility, even if Contractor establishes a safety program for the entire Project. Subcontractor shall establish a safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner, including, but not limited to, requirements imposed by the Contract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Work which Contractor deems unsafe until corrective measures satisfactory to Contractor shall have been taken. Contractor's failure to stop Subcontractor's unsafe practices shall not relieve Subcontractor of the responsibility therefor. Subcontractor shall notify Contractor immediately following any accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor. Subcontractor shall indemnify Contractor for fines, damages or expenses incurred by the Contractor because of the Subcontractor's failure to comply with safety requirements.

8.10 PROTECTION OF THE WORK. The Subcontractor shall take necessary precautions to properly protect the Subcontractor's Work and the work of others from damage caused by the Subcontractor's operations. Should the Subcontractor cause damage to the Work or property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor, or the Contractor may so remedy and deduct the cost thereof from any amounts due or to become due the Subcontractor.

8.11 PERMITS, FEES AND LICENSES. The Subcontractor shall give adequate notices to authorities pertaining to the Subcontractor's Work and secure and pay for all permits, fees, licenses, assessments, inspections and taxes necessary to complete the Subcontractor's Work in accordance with the Contract Documents.

To the extent obtained by the Contractor under the Contract Documents, the Subcontractor shall be compensated for additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of the Agreement.

8.12 SUBCONTRACTOR ASSIGNMENT OF WORK. The Subcontractor shall not assign the whole nor any part of the Subcontractor's Work without prior written approval of the Contractor. The Contractor's approval shall not be unreasonably withheld. Lower-tier subcontractors and suppliers previously approved by the Contractor may be listed at Paragraph 18.4.

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

- (a) prior to furnishing of the services or materials, except in an emergency affecting the safety of persons or property;
- (b) in writing of such claim within three (3) days of first furnishing such services or materials; and
- (c) the written charge for such services or materials no later than the fifteenth (15th) day of the calendar month following that in which the claim originated.

8.14 MATERIALS SAFETY. To the extent that the Contractor is not obligated by the Contract Documents or by law to perform work which involves poisons, hazardous or toxic substances, hazardous waste, asbestos or PCB's, the Subcontractor likewise is not obligated. To the extent that the Contractor has obligations under the Contract Documents or by law regarding such materials within the scope of the Subcontractor's work, the Subcontractor likewise shall have these obligations.

ARTICLE 9

SUBCONTRACT PROVISIONS

9.1 LAYOUT RESPONSIBILITY AND LEVELS. The Contractor shall establish principal axis lines of the building and site whereupon the Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontractor's Work and for any loss or damage to the Contractor or others by reason of the Subcontractor's failure to set out or perform its work correctly. The Subcontractor shall exercise prudence so that the actual final conditions and details shall result in alignment of finish surfaces.

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

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

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

9.5 USE OF CONTRACTOR'S EQUIPMENT. The Subcontractor, its agents, employees, subcontractors or suppliers shall not use the Contractor's equipment without the express written permission of the Contractor's designated representative.

If the Subcontractor or any of its agents, employees, suppliers or lower-tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of the Contractor, the Subcontractor shall defend, indemnify and be liable to the Contractor as provided in Article 12 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have been due solely to the negligence of the Contractor's employees operating such equipment.

9.6 CONTRACT BOND REVIEW. The Contractor's Payment Bond for the Project, if any, may be reviewed and copied by the Subcontractor.

9.7 OWNER ABILITY TO PAY. The Subcontractor shall have the right to receive from the Contractor such information as the Contractor has obtained relative to the Owner's financial ability to pay for the Work.

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

9.9 SUBCONTRACT BOND. If a Performance and Payment Bond is not required of the Subcontractor under Article 18, then within the duration of this Agreement, the Contractor may require such bonds before work is started and the Subcontractor shall provide the same.

Said bonds shall be in the full amount of this Agreement in a form and by a surety satisfactory to the Contractor.

The Subcontractor shall be reimbursed without retainage for cost of same simultaneously with the first progress payment hereunder.

The reimbursement amount for the bonds shall not exceed the manual rate for such subcontractor work.

In the event the Subcontractor shall fail to promptly provide such requested bonds, the Contractor may terminate this Agreement and re-let the work to another subcontractor and all Contractor costs and expenses incurred thereby shall be paid by the Subcontractor.

9.10 WARRANTY. The Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and as called for in the Contract Documents.

The Subcontractor agrees to satisfy such warranty obligations which appear within the warranty period established in the Contract Documents without cost to the Owner or the Contractor.

If no warranty is required of the Contractor in the Contract Documents, then the Subcontractor shall warrant its work as described above for the period of one year from the date(s) of substantial completion of all or a designated portion of the Subcontractor's Work or acceptance or use by the Contractor or Owner of designated equipment, whichever is sooner.

The Subcontractor further agrees to execute any special warranties that shall be required for the Subcontractor's Work prior to final payment.

ARTICLE 10

RECOURSE BY CONTRACTOR

10.1 FAILURE OF PERFORMANCE

10.1.1 NOTICE TO CURE. If the Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule of Work, or it fails to make prompt payment for its workers, lower-tier subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement. If the Subcontractor fails within three (3) working days after written notification to commence and continue satisfactory correction of such default with diligence and promptness, then the Contractor without prejudice to any rights or remedies, shall have the right to any or all of the following remedies:

(a) supply such number of workers and quantity of materials, equipment and other facilities as the Contractor deems necessary for the completion of the Subcontractor's Work; or any part thereof which the Subcontractor has failed to complete or perform after the aforesaid notice, and charge the cost thereof to the Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit and attorney's fees;

(b) contract with one or more additional contractors, to perform such part of the Subcontractor's Work as the Contractor shall determine will provide the most expeditious completion of the total Work and charge the cost thereof to the Subcontractor;

(c) withhold payment of any moneys due the Subcontractor pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of the Contractor and Architect, Owner, Contractor, and

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

10.1.2 TERMINATION BY CONTRACTOR. If the Subcontractor fails to commence and satisfactorily continue correction of a default within three (3) working days after written notification issued under Subparagraph 10.1.1, then the Contractor may, in lieu of or in addition to Subparagraph 10.1.1, issue a second written notification to the Subcontractor and its surety, if any. Such notice shall state that if the Subcontractor fails to commence and continue correction of a default within seven (7) working days of the written notification, the Agreement will be deemed terminated and the Contractor may use any materials, implements, equipment, appliances or tools furnished by or belonging to the Subcontractor to complete the Subcontractor's Work.

The Contractor also may furnish those materials, equipment and/or employ such workers or subcontractors as the Contractor deems necessary to maintain the orderly progress of the Work.

All costs incurred by the Contractor in performing the Subcontractor's Work, including reasonable overhead, profit and attorney's fees, shall be deducted from any moneys due or to become due the Subcontractor. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.1.3 USE OF SUBCONTRACTOR'S EQUIPMENT. If the Contractor performs work under this Article or sublets such work to be so performed, the Contractor and/or the persons to whom work has been sublet shall have the right to take and use any materials, implements, equipment, appliances or tools furnished by, belonging or delivered to the Subcontractor and located at the Project.

10.2 BANKRUPTCY

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

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

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

The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.3 SUSPENSION BY OWNER. Should the Owner suspend its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify

the Subcontractor in writing and upon written notification the Subcontractor shall immediately suspend the Subcontractor's Work.

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

10.4 TERMINATION BY OWNER. Should the Owner terminate its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify the Subcontractor in writing and upon written notification, this Agreement shall be terminated and the Subcontractor shall immediately stop the Subcontractor's Work, follow all of Contractor's instructions, and mitigate all costs.

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

The Contractor agrees to cooperate with the Subcontractor, at the Subcontractor's expense, in the prosecution of any Subcontractor claim arising out of the Owner termination and to permit the Subcontractor to prosecute said claim, in the name of the Contractor, for the use and benefit of the Subcontractor, or assign the claim to the Subcontractor.

10.5 CONTINGENT ASSIGNMENT OF SUBCONTRACT.

The Contractor's contingent assignment of the Subcontract to the Owner, if provided in the Contract Documents, is effective when the Owner (a) has terminated the Contract for cause and (b) has accepted the assignment by notifying the Subcontractor in writing. This contingent assignment is subject to the prior rights of a surety that may be obligated under the Contractor's bond, if any. Subcontractor hereby consents to such assignment and agrees to be bound to the assignee by the terms of this Subcontract.

10.8 SUSPENSION BY CONTRACTOR. The Contractor may order the Subcontractor in writing to suspend, delay, or interrupt all or any part of the Subcontractor's Work for such period of time as may be determined to be appropriate for the convenience of the Contractor. Phased or interrupted Work when required shall not be deemed a suspension of Work.

The Subcontractor shall notify the Contractor in writing within ten (10) working days after receipt of the Contractor's order of the effect of such order upon the Subcontractor's Work. To the extent allowed the Contractor under the Contract Documents, the Contract Price or contract time shall be adjusted by Subcontract Change Order for any increase in the time or cost of performance of this Agreement caused by such suspension, delay, or interruption.

No claim under this Article shall be allowed for any costs incurred more than ten (10) working days prior to the Subcontractor's notice to the Contractor.

Neither the Contract Price nor the contract time shall be adjusted under this Article for any suspension, delay or interruption to the extent that performance would have been so suspended, delayed, or interrupted by the fault

or negligence of the Subcontractor or by a cause for which Subcontractor would have been responsible.

The Contract Price shall not be adjusted under this Article for any suspension, delay or interruption to the extent that performance would have been suspended, delayed or interrupted by a cause for which the Subcontractor would have been entitled only to a time extension under this Agreement.

10.7 WRONGFUL EXERCISE. If the Contractor wrongfully exercises any option under this Article, the Contractor shall be liable to the Subcontractor solely for the reasonable value of work performed by the Subcontractor prior to the Contractor's wrongful action, including reasonable overhead and profit on the Work performed, less prior payments made, and attorney's fees.

ARTICLE 11 LABOR RELATIONS

(Insert here any conditions, obligations or requirements relative to labor relations and their effect on the project. Legal counsel is recommended.)

ARTICLE 12 INDEMNIFICATION

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless, the Contractor (including the affiliates, parents and subsidiaries, their agents and employees) and other contractors and subcontractors and all of their agents and employees and when required of the Contractor by the Contract Documents, the Owner, the Architect, Architect's consultants, agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontract provided that:

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself), including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or for anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder;

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

12.2 NO LIMITATION UPON LIABILITY. In any and all claims against the Owner, the Architect, Architect's consultants, agents and employees, the Contractor (including its affiliates, parents and subsidiaries) and other contractors or subcontractors, or any of their agents or employees, by any employee of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the indemnification obligation under

this Article 12 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by, or for the Subcontractor under worker's or workmen's compensation acts, disability benefit acts or other employee benefit acts.

12.3 ARCHITECT EXCLUSION. Except as provided by the Contract Documents, the obligation of the Subcontractor under this Article 12 shall not extend to the liability of the Architect, the Architect's consultants, agents or employees of any of them, arising out of

(a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or
(b) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents or employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

12.4 COMPLIANCE WITH LAWS. The Subcontractor agrees to be bound by, and at its own cost, comply with all federal, state and local laws, ordinances and regulations (hereinafter collectively referred to as "laws") applicable to the Subcontractor's Work including, but not limited to, equal employment opportunity, minority business enterprise, women's business enterprise, disadvantaged business enterprise, safety and all other laws with which the Contractor must comply according to the Contract Documents.

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

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

ARTICLE 13 INSURANCE

13.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontractor's Work, the Subcontractor shall procure for the Subcontractor's Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, and all insurance required of the Contractor under the Contract Documents.

The Contractor, Owner and other parties as designated in the Contract Documents shall be named as additional insureds on each of these policies except for Workers' Compensation.

This insurance shall include contractual liability insurance covering the Subcontractor's obligations under Article 12.

13.2 MINIMUM LIMITS OF LIABILITY. The Subcontractor's Comprehensive or Commercial Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 13.1, shall be written with limits of liability not less than the following:

A. Comprehensive General Liability Insurance including completed operations

1. Combined Single Limit

Bodily Injury and Property Damage	\$
Each Occurrence	
	\$
Aggregate	

2. Bodily Injury	\$
Each Occurrence	
	\$
Aggregate	

3. Property Damage	\$
Each Occurrence	
	\$
Aggregate	

B. Commercial General Liability Insurance

1. Each Occurrence Limit	\$ 1000000
2. General Aggregate	\$ 2000000
3. Products/Completed Operations Aggregate	\$
4. Personal and Advertising Injury Limit	\$ 1000000

C. Comprehensive Automobile Liability Insurance

1. Combined Single Limit

Bodily Injury and Property Damage	\$ 1000000
Each Occurrence	

2. Bodily Injury	\$
Each Person	
	\$
Each Occurrence	

3. Property Damage	\$
Each Occurrence	

13.3 NUMBER OF POLICIES. Comprehensive or Commercial General Liability Insurance and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

13.4 CANCELLATION, RENEWAL OR MODIFICATION. The Subcontractor shall maintain in effect all insurance coverage required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor.

All insurance policies shall contain a provision that the coverage afforded thereunder shall not be canceled or not renewed, nor restrictive modifications added, until at least thirty (30) days prior written notice has been given to the Contractor unless otherwise specifically required in the Contract Documents.

Certificates of insurance, or certified copies of policies acceptable to the Contractor, shall be filed with the Contractor prior to the commencement of the Subcontractor's Work.

In the event the Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, the Contractor may purchase such coverage and charge the expense thereof to the Subcontractor, or terminate this Agreement.

The Subcontractor shall continue to carry completed operations liability insurance for at least two years after final payment. The Subcontractor shall furnish the Contractor evidence of such insurance at final payment and one year thereafter.

13.5 WAIVER OF RIGHTS. The Contractor and Subcontractor waive all rights against each other and the Owner, the Architect, the Architect's consultants and agents or employees of any of them, separate contractors, and all other subcontractors for loss or damage to the extent covered by Builder's Risk or any other property or equipment insurance, except such rights as they may have to the proceeds of such insurance, provided, however, that such waiver shall not extend to the acts of the Architect, the Architect's consultants, and the agents or employees of any of them listed in Paragraph 12.3. Upon written request of the Subcontractor, the Contractor shall provide the Subcontractor with a copy of the Builder's Risk policy of insurance or any other equipment insurance in force for the Project and procured by the Contractor. The Subcontractor shall satisfy itself to the existence and extent of such insurance prior to commencement of the Subcontractor's Work.

If the Owner or Contractor have not purchased Builder's Risk insurance for the full insurable value of the Subcontractor's Work less a reasonable deductible, then the Subcontractor may procure such insurance as will protect the interests of the Subcontractor, its subcontractors and their subcontractors in the Work, and, by appropriate Subcontractor Change Order, the cost of such additional insurance shall be reimbursed to the Subcontractor.

If not covered under the Builder's Risk policy of insurance or any other property or equipment insurance required by the Contract Documents, the Subcontractor shall procure and maintain at the Subcontractor's own expense property and equipment insurance for portions of the Subcontractor's Work stored off the site or in transit, when such portions of the Subcontractor's Work are to be included in an application for payment under Article 6.

13.6 ENDORSEMENT. If the policies of insurance referred to in this Article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

ARTICLE 14 ARBITRATION

14.1 AGREEMENT TO ARBITRATE. All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Paragraph 14.2, shall 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. Notwithstanding other provisions in the Agreement, this agreement to arbitrate shall be governed by the Federal Arbitration Act.

14.2 EXCEPTIONS. The agreement to arbitrate shall not apply to any claim:

- (a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto or does not consent to such arbitration; or
- (b) asserted by the Subcontractor against the Contractor if the Contractor asserts said claim, either in whole or part, against the Owner or asserted by the Owner against the Contractor when the contract between the Contractor and Owner does not provide for binding arbitration, or does so provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim. In either case the parties hereto shall notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Paragraph 14.2, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

14.3 INITIAL DISPUTE RESOLUTION. If a dispute arises out of or relates to this Agreement, or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties may endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration. Mediation will be commenced within the time limits for arbitration stipulated in the Contract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus ten (10) days or as otherwise provided in the Contract Documents. Issues to be mediated are subject to the exceptions in Paragraph 14.2 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 14.4.

14.4 NOTICE OF DEMAND. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made as required in

the Contract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made 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, whichever shall first occur. The location of the arbitration proceedings shall be the location of the Project.

14.5 AWARD. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.6 WORK CONTINUATION AND PAYMENT. Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration. If the Subcontractor is continuing to perform, the Contractor shall continue to make payments in accordance with this Agreement.

14.7 NO LIMITATION OF RIGHTS OR REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or payment bonds.

14.8 SAME ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

ARTICLE 15 CONTRACT INTERPRETATION

15.1 INCONSISTENCIES AND OMISSIONS. Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

15.2 LAW AND EFFECT. This Agreement shall be governed by the law of the State of North Carolina.

15.3 SEVERABILITY AND WAIVER. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision. The failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.

15.4 ATTORNEY'S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, to collect damages for the breach of the Agreement, or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

15.6 **TITLES.** The titles given to the Articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

15.8 **ENTIRE AGREEMENT.** This Agreement is solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral.

ARTICLE 16 SPECIAL PROVISIONS

16.1 **PRECEDENCE.** It is understood the work to be performed under this Agreement, including the terms and conditions thereof, is as described in Articles 1 through 18 together with the following Special Provisions, which are intended to complement same. However, in the event of any inconsistency, these Special Provisions shall govern.

16.2 **SCOPE OF WORK.** All work necessary or incidental to complete the swimming pool & deck w/ associated equipment work for the Project in strict accordance with and reasonably inferable from the Contract Documents and as more particularly, though not exclusively, specified in Div 1, Div 3 as applicable, Div 7 as applicable, Div 11, Div 22 as applicable, Div 31 as applicable, Div 32 with the following additions or deletions: See Exhibit A attached

16.3 **COMMON TEMPORARY SERVICES.** The following "Project" common temporary services and/or facilities are for the use of all project personnel and shall be furnished as herein below noted:

By this Subcontractor;

By others: Dumpster & toilet facility provided by contractor for use by subcontractor.

16.4 **OTHER SPECIAL PROVISIONS.** (Insert here any special provisions required by this Agreement.)

16.5 **CONTRACT DOCUMENTS.** (List applicable Contract Documents including specifications, drawings, addenda, modifications and exercised alternatives. Identify with general description, sheet numbers and latest date including revisions.)

Attachment A shall be considered part of the contract. Adhere to all requirements listed in the Preconstruction Conference Outline.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal, the day and year first above written.

SUBCONTRACTOR:

Crystal Pools

By:

Name:

As: President

Date:

11/16/2012

CONTRACTOR:

Group III Mgt, Inc.

By:

Name: Erik Barrow

Title: Project Manager

Date:

11/16/12

WORDING IDENTICAL TO AGC DOCUMENT NO. 600 DATED 1990

PAGE 14



EXHIBIT "A"

PROJECT: Legion Pool Complex W912HP-11-D-0014

CONTRACT NO.: K1301-002

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools
1101 Sparkleberry Lane Ext., Columbia, SC 29223 (Subcontractor), and
Group III Mgt., Inc., 2820 W. Vernon Ave, Kinston, NC 28504 (Contractor):

THE WORK: (Continued) Work under this subcontract is to include all labor/materials/equipment/supervision/taxes and permits necessary to complete this scope of work so that all components will produce a fully functional and operational system in strict conformance with any and all agencies and state, county and local building codes having jurisdiction over this work. Work shall be in accordance with all contract terms and per plans and specifications. The Work shall include but is not limited to the following:

- Div. 1-General Requirements
- Div. 3-Concrete (As applicable)
- Div. 7-Thermal & Moisture Protection (As applicable)
- Div. 11-Equipment
- Div. 22-Plumbing (As applicable)
- Div. 31-Earthwork (As applicable)
- Div. 32-Exterior Improvements (As applicable)

Work to include but not be limited to:

Furnish & install a swimming pool and deck along with all associated equipment.

1. Provide an engineered excavation plan stamped by a Professional Engineer.
2. Forming of pool walls and floors is to be included as necessary.
3. Crystal Pools recognizes that the Demolition Contractor will not grade floors & walls. Crystal to undercut floor of pool compacted soil and backfill with 8" to 8" #57 stone. Group III will furnish sand for the deep end of the pool (approx. 60 yards). Crystal to place sand and compact.
4. Pool plumbing is to be stubbed into the new "Pump Room" constructed by Group III.
5. Attend a coordination meeting with the Electrical Contractor & Demolition Contractor.
6. This is a "Buy American" project.
7. Minor dewatering is to be included. It may well be that at the beginning of each morning water may have to be pumped from the pool. Crystal to provide sumps & pumps for minor pumping.
8. Equipotential Bonding for the pool is to be furnished & installed.
9. Pool coping is to be included.
10. Deck drainage is to be included. It will be taken to points shown on site drawings. To include Nyolplast or equal junction box.
11. If major dewatering is required, it will be added to the contract. Crystal Pools Schedule "A" is a worst case.
12. Work Schedule-12 weeks after the original pool is removed.
13. Furnish ACI certified personnel. Furnish copies of current certifications.
14. All equipment to have wiring run back to panels in the pump room. The Electrical Contractor will make final connections (except auto-shut off). Crystal to leave enough spare wire to make proper connections. The Electrical Contractor will run the power from the "Auto Shut off" back to the panel after making connection into the panel. This will be covered in depth in accordance with Item #5.

JB CONTRACTOR:

Crystal Pools

By: Alison FelschowDate: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: 11/19/12



EXHIBIT "A"

PROJECT: Legion Pool Complex W912HP-11-D-0014

CONTRACT NO.: K1301-002

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools
1101 Sparkleberry Lane Ext., Columbia, SC 29223 (Subcontractor), and
Group III Mgt., Inc., 2820 W Vernon Ave, Kinston, NC 28504 (Contractor):

THE WORK: (Continued)

15. Crystal to backfill pool & install concrete pool deck. Coordinate with Group III on footing for sun shade.
16. Furnish 8 sets of submittals by 11/13/12.
17. Furnish name of bonding company.
18. If bond is required, Group III will pay the cost of the bond.
19. Certified payrolls are to be turned in WEEKLY.
20. Crystal to coordinate concrete for steps, sidewalk and pump house. Group III to pay for this work.
21. Crystal to coordinate with Group III & the Electrical Contractor on the pole light bases for the external lights.

Price= Pool & equipment	\$208,958
Less Pool lights	(\$ 3,000)
Pool Deck w/drainage system	\$ 44,002
TOTAL	\$338,960

SUBCONTRACTOR:

Crystal Pools

By: Alison Felsch Alison FelschDate: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: 11/16/2012

RESPONSE TO DEMAND FOR ARBITRATION

NOW COMES SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") by and through their undersigned counsel, and in response to the Demand for Arbitration by Group III Mgmt., Inc. ("Claimant"), under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. Claimant's Information:

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No.: 252-527-3377
- e. E-mail Address: sgreene@groupiiimgt.com

2. Respondent's Information:

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-865-1200
- d. Fax No.: 803-865-0209
- e. E-mail Address: ali@crystalpool.com

3. Claimant's Representative Information:

- a. Name of Representative: Everette K. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No.: 252-523-2060
- e. Representative's E-mail Address: ewooten@wootenandcoley.com

4. Respondent's Representative Information:

- a. Name of Representative: Alan R. Belcher, Jr.
- b. Address of Representative: 40 Calhoun Street, Suite 550,
Charleston, SC 29401
- c. Representative's Phone: 843-720-3478
- d. Representative's Fax No.: 843-720-3479
- e. Representative's E-mail Address: abelcher@hallboothsmith.com

5. Statement of Respondent's Response to Claimant's Demand: To the extent any of the allegations of the Claimant can be construed to allege liability or claims against Respondent, Respondent denies all allegations of Claimant's Demand.

6. Statement of Respondent's Counterclaims:

- a. Respondent is a swimming pool construction company who entered into a contract with Claimant to furnish and install a swimming pool and deck along with all associated equipment for the US Army Corps of Engineers in Columbia, South Carolina;
- b. Respondent furnished said labor and materials pursuant to its contract with Claimant;
- c. The Claimant has not paid Respondent in full for the labor and materials provided by Respondent;
- d. There is an outstanding balance on the contract due and owing to the Respondent by the Claimant;
- e. The Claimant has been unjustly enriched by Respondent's labor and materials without paying Respondent; and

f. There are damages due and owing to Respondent by the Claimant.

In summary, Respondent requests:

1. That Respondent recover of Claimant its damages (plus such additional amounts to which Respondent may be entitled such as interest, costs, and attorney's fees);
2. That Respondent be adjudged not to be indebted to Claimant in any amount on account of work done by Claimant pursuant to its completion of Respondent's subcontract on the Project.
3. That any bond claims made by Claimant on this Project be dismissed.
4. That Respondent be awarded representative fees and expenses.

RESPECTFULLY SUBMITTED this 11 day of November, 2013.

HALL, BOOTH, SMITH, P.C.

By:



Alan R. Belcher, Esq. S.C. Bar No. 71686
Elizabeth H. Freeman, Esq. S.C. Bar No. 78064
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Charleston, SC 29401
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abelcher@hallboothsmith.com
efreeman@hallboothsmith.com

*Attorneys for Respondent, SunCrete of
Carolina, Inc., d/b/a Crystal Pools*

**The Arbitration Tribunals of the
American Arbitration Association**

In the Matter of the Arbitration between	}	Case # 31-110-000261-13
Group III Mgt.,	}	
Claimant,	}	
vs.	}	Respondent's Request to Modify Award Pursuant to R-48 Construction Industry Rules Regular Track Procedures of the American Arbitration Association
SunCrete of Carolina, Inc. d/b/a Crystal Pools,	}	
Respondent.	}	

PLEASE TAKE NOTICE that Respondent SunCrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") hereby requests that the arbitrator correct technical and/or computational errors contained within the award issued to the parties in these proceedings, dated August 18, 2014.

The award contains an error with regard to the computation of attorney's fees that governing North Carolina law does not support. The award of attorneys' fees in favor of Group III Management, Inc. ("Group III") should be modified to zero because Group III cannot be considered the prevailing party under North Carolina law. Based upon the award of damages to Group III, it stands to recover only 26.5% of its claim against Crystal Pools. For reasons set forth in more detail below, Crystal Pools would direct the arbitrator to N.C. Gen. Stat. §44A-35 (2011) which governs payment disputes in construction projects. In order to recover attorneys' fees on a construction payment claim, Group III must obtain an award of at least 50% of its claim against Crystal Pools. Alternatively, at a minimum, the award must be reduced to \$162,276.46 to comply with N.C. Gen Stat. §6-21.6(b) (2011)(Statute capping attorneys' fee awards at an amount equal to the amount of money damages awarded).

This request for modification is limited solely to the issue of attorneys' fees. However, in making this request for modification, Crystal Pools does not waive any remaining arguments that

it may have with regard to any other aspect of the award that may be raised when Group III moves the South Carolina Court of Common Pleas for an Order confirming the award when it seeks to have the award reduced to a judgment.

Recitation of Pertinent Findings of Fact and Conclusions of Law

The August 18, 2014 award sets forth the amount of the parties' claims and counterclaims against one another. After a brief recitation of Group III's accounting on this matter, the award indicates that Group III asserted a remaining "claim" against Crystal Pools of \$308,022.52. The accounting associated with the remaining amount claimed by Group III in these proceedings is as follows:

Cost to Repair and Complete	\$508,933.52
Liquidated Damages	\$ 52,464.00
Payment to Hardaway Concrete	\$ 9,500.00
Less Contract Damages	(\$262,875.00)
TOTAL CLAIM	\$308,022.52

Crystal Pools' counterclaim was in the amount of \$84,671.98, in addition to two change orders addressed in the award.

The arbitrator determined that Group III's damages were considerably less than those claimed. The arbitrator found that Crystal Pools was entitled to change orders but was not entitled to any amount of the contract balance.

After the arbitrator completed the calculations associated with the merits of the dispute and allowing all available offsets to both parties, the arbitrator determined that Group III was entitled to recover \$81,138.23 from Crystal Pools, approximately 26.5% of the total claim Group III brought at the arbitration proceedings.

The arbitrator then determined that Group III was the prevailing party and awarded attorneys' fees in the amount of \$116,165.86. Crystal Pools would show that the award of attorneys' fees was inappropriate based upon the arbitrator's findings and is evidently the result of a miscalculation or other procedural error that requires correction.

Law and Argument

1. The Parties Designated North Carolina Law as the Law Governing Their Contract and the Determination of Attorneys' Fees Awards Should Be Governed Thereby.

Based upon the award of attorneys' fees in this matter, it would appear as though the arbitrator applied South Carolina law to the "prevailing party" calculations and analysis. Section 15.2 of the contract between the parties contains a choice of law provision that designates North Carolina law as the law governing the parties' contract. The result of the "prevailing party" analysis under North Carolina law results in a different calculation from that employed by the Arbitrator.

Under South Carolina law, a prevailing party can be entitled to attorneys' fees if a contract allows a fee award or if a fee award is mandated by statute. In South Carolina, a party need only prevail by obtaining a verdict or judgment in its favor, regardless of the disparity between the amount claimed and the actual verdict or judgment. See Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining "prevailing party" as: "The one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention ... the one in whose favor the decision or verdict is rendered and judgment entered.") Under this analysis, the arbitrator may have ruled in favor of either party. Regardless, the arbitrator's ruling in favor of Group III, given the amount of the award, appears to coincide with the application of South Carolina law, over North Carolina law.

Crystal Pools would ask that the arbitrator revisit the attorney's fee award and recalculate it based upon North Carolina law. The North Carolina General Assembly and North Carolina Courts look at the award of attorney's fees in a much more strict fashion. In North Carolina, "as a general rule[,] contractual provisions for attorney's fees are invalid in the absence of statutory authority. Delta Env. Consultants of N.C. v. Wysong & Miles Co., 132 N.C. App. 160, 167; 510 S.E.2d 690, 695 (1999); see also Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc., 143 N.C. App. 1; 545 S.E.2d 745, 752 (2001). Moreover, "the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." Delta Env. Consultants, 132 N.C. App. at 167, 510 S.E.2d at 695 (quoting Enterprises, Inc. v. Equipment Co., 300 N.C. 286, 289; 266 S.E.2d 812, 814 (1980))(emphasis added). Therefore, North Carolina law requires both a contract and an enabling statute for an attorneys' fee provision is to be enforced.

Until fairly recently, North Carolina's stance on attorneys' fee awards yielded harsh results. Even where parties to a contract agreed to a reciprocal provision that entitled the prevailing party to an award of attorneys' fees in the event of a dispute, the Courts refused to enforce the provision. However, on October 1, 2011, the North Carolina General Assembly enacted N.C. Gen. Stat. § 6-21.6 (2011). This statute was the enabling statute that allowed the imposition of attorneys' fee awards in certain, specific business contract disputes that, until that time, were unenforceable. This is the law that governs how the attorneys' fee award is to be calculated in the context of the dispute between Group III and Crystal Pools. It is attached for the arbitrator's review.

2. Under N.C. Gen. Statute §6-26.6, as a preliminary matter, the arbitrator cannot award attorneys' fees in excess of \$81,138.23.

N.C. Gen. Stat. §6-26.6 allows the arbitrator to award a party attorneys' fees but it specifically limits the amount of attorneys' fees an arbitrator or judge can award, setting the "prevailing party" analysis aside for the moment. N.C. Gen. Stat. §6-26.6(b) states:

Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.

N.C. Gen. Stat. § 6-21.6(b)(emphasis added).

This statute is plain on its face as to the amount of recoverable attorneys' fees that the arbitrator may award. There is no ambiguity in its directive. The arbitrator's award of attorneys' fees in excess of the monetary damages awarded is a simple error in computation that, at a minimum, should be recalculated to reflect an award consistent with the plain meaning of the statute. The AAA Construction Industry Regular Track Rules under which we are operating affords the arbitrator an opportunity to address this matter and modify the award appropriately. However, Crystal Pools would ask that the arbitrator further consider the computation of its attorneys' fee award to Group III's under subsequent subparts of this statute as set forth below.

3. Under N.C. Gen. Statute §6-26.6, the arbitrator must reduce the award of attorneys' fees to zero based upon his finding that Group III was entitled to only 26.5% of its claim, pursuant to North Carolina's Performance and Payment Act: N.C. Gen. Stat. §44A-35.

N.C. Gen. Statute §6-26.6 instructs the arbitrator in this case to make certain baseline determinations in computing the award of attorneys' fees. Perhaps the most important consideration is found at N.C. Gen. Statute §6-26.6(c)(11) -- "The extent to which the party seeking attorneys' fees prevailed in the action."

The phrase "[t]he extent to which the party prevailed in the action" is subject to a specific interpretation under North Carolina law in the realm of construction contracts. While North Carolina law lowers the bar on the "prevailing party" analysis to the South Carolina standard in certain contexts, it has a precise computation that is required in dealing with the contract between Group III and Crystal Pools.¹ In North Carolina practice, judges and attorneys in construction payment matters refer to North Carolina's Performance and Payment Act: N.C. Gen. Stat. §44A-35 for the computation at arriving at a prevailing party designation. This act, in practice, does not appear to be limited to surety claims. See Terry's Floor Fashions, Inc. v. Crown Gen. Contrs., Inc., 184 N.C. App. 1; 645 S.E.2d 810 (N.C. App. 2007); Brooks Millwork Co. v. Levine, 2010 N.C. App. LEXIS 959 (N.C. Ct. App. June 15, 2010); Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., 129 N.C. App. 525 (N.C. Ct. App. 1998); Mainline Supply Co. v. Hillcrest Constr., Inc., 2012 N.C. App. LEXIS 222 (N.C. Ct. App. 2012). Rather, it serves as a guide for determining which party has prevailed in its claim or defense in construction payment disputes. See id. In the dispute between Crystal Pools and Group III, Crystal Pools did not have lien rights because of the nature of the project. However, it would stand to reason that the "prevailing party" standard under N.C. Gen. Stat. §44A-35 should apply to negate both parties' claim for attorneys' fees based upon the award.

Pursuant to N.C. Gen. Stat. §44A-35, "a "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim...." Again, Group III obtained an award of only 26.5% of its claim. Under this

¹ North Carolina law, like South Carolina law and United States Federal Law uses a relaxed standard, similar to the universal South Carolina standard, for "prevailing party" analysis in contexts where the state or an agency of the state is a party. This relaxed standard is in keeping with the Equal Access to Justice Act 28 U.S.C.S. §2412. For a survey of the prevailing party analysis in government and agency cases, Crystal Pools would direct the arbitrator to ARTICLE: EVENING THE ODDS: THE CASE FOR ATTORNEYS' FEE AWARDS FOR ADMINISTRATIVE RESOLUTION OF TITLE VI AND TITLE VII DISPUTES, 67 N.C.L. Rev. 379 (1989).

computation, Group III cannot be the prevailing party. As such, based upon the award, neither party can receive "prevailing party" status in this matter and the award of attorneys' fees must be modified to zero.

Conclusion

For the reasons set forth herein, Crystal Pools would ask the arbitrator to re-compute the award of attorneys' fees to zero because Group III cannot be the prevailing party under North Carolina law based upon the award as it is written. In the alternative, and at a minimum, Crystal Pools would ask the arbitrator to reduce the attorneys' fees award to \$81,138.23 as mandated by North Carolina law.

Respectfully submitted,

By:


Alan R. Belcher Jr.

Elizabeth H. Freeman

HALL BOOTH SMITH, P.C.

40 Calhoun Street, Suite 550

Charleston, SC 29401

(843) 720-3460

Attorneys for Respondent Crystal Pools

Charleston, SC
September 8, 2014

N.C. Gen. Stat. § 6-21.6

Statutes current through the 2013 Regular Session Annotations Current through June 6, 2014

General Statutes of North Carolina > CHAPTER 6. LIABILITY FOR COURT COSTS > ARTICLE
3. CIVIL ACTIONS AND PROCEEDINGS

§ 6-21.6. Reciprocal attorneys' fees provisions in business contracts

- (a) As used in this section, the following definitions apply:
- (1) **Business contract.** -- A contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this State is a party.
 - (2) **Consumer contract.** -- A contract entered into by one or more individuals primarily for personal, family, or household purposes.
 - (3) **Employment contract.** -- A contract between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor.
 - (4) **Reciprocal attorneys' fees provisions.** -- Provisions in any written business contract by which each party to the contract agrees, in the manner set out in subsection (b) of this section, upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.
- (b) Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.
- (c) If a business contract governed by the laws of this State contains a reciprocal attorneys' fees provision, the court or arbitrator in any suit, action, proceeding, or arbitration involving the business contract may award reasonable attorneys' fees in accordance with the terms of the business contract. In determining reasonable attorneys' fees and expenses under this section, the court or arbitrator may consider all relevant facts and circumstances, including, but not limited to, the following:
- (1) The amount in controversy and the results obtained.
 - (2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
 - (3) The novelty and difficulty of the questions raised in the action.
 - (4) The skill required to perform properly the legal services rendered.
 - (5) The relative economic circumstances of the parties.
 - (6) Settlement offers made prior to the institution of the action.
 - (7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.
 - (8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.
 - (9) The timing of settlement offers.
 - (10) The amounts of settlement offers as compared to the verdict.
 - (11) The extent to which the party seeking attorneys' fees prevailed in the action.
 - (12) The amount of attorneys' fees awarded in similar cases.
 - (13) The terms of the business contract.

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- (d) Reasonable attorneys' fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys' fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys' fees provisions.
- (e) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in consumer contracts or in any note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2. If the business contract is also a note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2, then the parties that are entitled to recover attorneys' fees and expenses may elect to recover attorneys' fees and expenses either under this section or G.S. 6-21.2 but may recover only once for the same attorneys' fees and expenses.
- (f) In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the amount in controversy.
- (g) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in a contract of insurance governed by Chapter 58 of the General Statutes.

History

2011-341, s. 2

Annotations

Notes

DRAFTER'S COMMENT

The requirement in subsection (b) of a signature "by hand" was included to prevent the application of this section to agreements executed without manual signatures including clickwrap agreements (agreements that present the user with a message on his or her computer screen that requires the user to manifest his or her assent to the terms of the agreement by clicking on an icon) and other agreements executed with electronic signatures as defined in G.S. 66-312. The requirement in subsection (b) of a signature "by hand" is not intended to prevent the application of this section to agreements executed with manual signatures that are thereafter delivered by electronic reproductive image thereof.

EDITOR'S NOTE. --

Session Laws 2011-341, s. 3, made this section effective October 1, 2011, and applicable to business contracts entered into on or after that date.

Session Laws 2011-341, s. 1, provides: "The purpose of this act is to validate reciprocal attorneys' fees provisions in business contracts."

Session Laws 2011-299, s. 1, also enacted a section designated as G.S. 6-21.6. That section has been renumbered as G.S. 6-21.7 at the direction of the Revisor of Statutes.

Session Laws 2012-194, s. 44, provides: "The Revisor of Statutes may cause to be printed all explanatory comments of the drafters of S.L. 2011-339 and S.L. 2011-344 as the Revisor deems appropriate."

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this subpart, part, article, or chapter.

General Statutes of North Carolina

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CELESTE SHUMATE

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

GROUP III MANAGEMENT, INC.,

Claimant/Plaintiff,

v.

SUNCRETE OF CAROLINA, INC., d/b/a
CRYSTAL POOLS,

Respondent/Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2014-CP-40-7229

)
) **RESPONDENT/DEFENDANT**
) **SUNCRETE OF CAROLINA, INC. d/b/a**
) **CRYSTAL POOLS' NOTICE OF**
) **MOTION AND MOTION TO VACATE**
) **ARBITRATION AWARD OR IN THE**
) **ALTERNATIVE MODIFY**
) **ARBITRATION AWARD**

**TO: CLAIMANT/PLAINTIFF GROUP III MANAGEMENT, INC., AND ITS
COUNSEL OF RECORD**

NOW COMES the Respondent/Defendant, SunCrete of Carolina, Inc. d/b/a Crystal Pools, (hereinafter referred to as "Crystal Pools"), by and through its undersigned attorneys, and hereby respectfully moves this Honorable Court, on the tenth day after service hereof, or as soon hereafter as counsel may be heard, at such place and time as the court may appoint, to enter an Order pursuant to Sections 15-48-130 and 15-48-140 of the South Carolina Code of Laws, vacating the Arbitration Award dated August 18, 2014, or, in the alternative, modify the Arbitration Award with regard to attorneys' fees awarded in favor of Group III Management, Inc. (hereinafter referred to as "Group III").

In Support of its Motion, the Respondent/Defendant states as follows:

1. That this Honorable Court has jurisdiction over this matter pursuant to Section 15-48-190 of the South Carolina Code of Laws, which specifically states "An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held." In this instance, the Arbitration Hearing was conducted in Columbia, Richland County, South Carolina.

2. That this matter emanates from a contractual construction agreement between the parties entered into on November 19, 2012, wherein the Respondent/Defendant, Crystal Pools, was hired as a pool subcontractor of the Claimant/Respondent, Group III, to construct/build a pool at the Legions Pool Complex at Fort Jackson Army Base in Columbia, South Carolina.

3. That subsequent to the aforementioned contract date, the parties became entangled in a variety of disputes which could not be resolved.

4. That on September 19, 2013, the Claimant/Defendant, Group III, filed a Demand for Arbitration pursuant to the Construction Arbitration Rules of the American Arbitration Association, and was assigned Case No. 31-110-000261-13. (Exhibit A)

5. That on November 11, 2013, the Respondent/Plaintiff, Crystal Pools, filed its Response to Demand for Arbitration. (Exhibit B)

6. That the matter came before C. Allen Gibson, Jr. as the duly appointed Arbitrator.

7. That Hearings were held in person on July 8, 9 and 10, 2014, in Columbia, South Carolina; and, continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted Affidavits regarding attorneys' fees on July 18, 2014, and the Hearing was declared closed on July 23, 2014.

8. That on August 18, 2014, the duly appointed Arbitrator, C. Allen Gibson, rendered his Arbitration Award. (Exhibit C)

9. That in pertinent part of the Arbitration Award, the Arbitrator, C. Allen Gibson, awarded attorneys' fees in favor of the Claimant/Plaintiff in the amount of ONE HUNDRED SIXTEEN THOUSAND ONE HUNDRED SIXTY-FIVE and 86/100 DOLLARS (\$116,165.86).

10. That the parties in this matter designated North Carolina law as the law governing their contract, pursuant to Article 15.2 of the contract between the parties. (Exhibit D)

11. That the Arbitrator, C. Allen Gibson, erroneously and/or inadvertently applied South Carolina Law instead of the agreed upon application of North Carolina law in rendering his decision with regard to attorneys' fees awarded to the Claimant/Plaintiff.

12. That on September 8, 2014, the Respondent/Defendant filed Respondent's Request to Modify Award Pursuant to R-48 Construction Industry Rules Regular Track Procedures of the American Arbitration Association.

13. That on September 25, 2014, Arbitrator, C. Allen Gibson, entered an Order Denying Request to Modify Award. (Exhibit E)

14. That the only dispute before this Honorable Court is the awarding of attorneys' fees, by the Arbitrator, C. Allen Gibson, in favor of the Claimant/Plaintiff. However, Crystal Pools does not waive any remaining arguments that it may have with regard to any other aspect of the award that may be raised if/when Group III moves this Honorable Court for an Order confirming the Award when it seeks to have the award reduced to judgment; or, those arguments which may be raised upon Group III's Response to this Motion; or, those arguments which may be raised on appeal.

WHEREFORE, for the reasons stated herein, the Respondent/Defendant, Crystal Pools, respectfully request this Honorable Court vacate the Arbitration Award dated August 18, 2014, or, in the alternative, modify the Arbitration Award with regard to attorneys' fees awarded in favor of Group III Management, Inc., to Zero Dollars.

[SIGNATURE TO FOLLOW]

Respectfully submitted,

HALL, BOOTH, SMITH, P.C.



Alan Belcher, SC Bar No. 71686
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40 Calhoun Street, Suite 550
Charleston, SC 29401
Phone: (843) 720-3460
Fax: (843) 720-3458
Email: abelcher@hallboothsmith.com
ewieters@hallboothsmith.com

*Attorneys for Respondent/Defendant,
SunCrete of Carolina, Inc., d/b/a Crystal Pools*

This 14th day of November, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

GROUP III MANAGEMENT, INC.,

Claimant/Plaintiff,

v.

SUNCRETE OF CAROLINA, INC., d/b/a
CRYSTAL POOLS,

Respondent/Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 2014-CP-40-7229

)
) **RESPONDENT/DEFENDANT**
) **SUNCRETE OF CAROLINA, INC.,**
) **d/b/a CRYSTAL POOLS' BRIEF IN**
) **SUPPORT OF ITS MOTION TO**
) **VACATE ARBITRATION AWARD OR**
) **IN THE ALTERNATIVE MODIFY**
) **ARBITRATION AWARD**

TO: CLAIMANT/PLAINTIFF GROUP III MANAGEMENT, INC., AND
COUNSEL OF RECORD

NOW COMES Respondent/Defendant, SunCrete of Carolina, Inc. d/b/a Crystal Pools,
(hereinafter referred to as "Crystal Pools"), by and through its undersigned attorneys, and for its
Brief in Support of its Motion to Vacate Arbitration Award or in the Alternative Modify
Arbitration Award, states as follows:

JURISDICTION

Jurisdiction over this matter is imparted upon this Honorable Court pursuant to Section
15-48-190 of the South Carolina Code of Laws, which specifically states "An initial application
shall be made to the court of the county in which the agreement provides the arbitration hearing
shall be held or, if the hearing has been held, in the county in which it was held." In this
instance, the Arbitration Hearing was conducted in Columbia, Richland County, South Carolina.

STATEMENT OF FACTS

By way of very brief background, on November 19, 2012, the parties,
Claimant/Respondent, Group III, and Respondent/Defendant, Crystal Pools, entered into a
construction contract agreement, wherein Crystal Pools was hired as a pool subcontractor for

Group III, to construct/build a pool at the Legions Pool Complex at Fort Jackson Army Base in Columbia, South Carolina.

As Crystal Pools began building the pool, numerous questions arose as to how the pool was to be built. Crystal Pools brought its questions to Group III's attention but Group III refused to coordinate any sort of meaningful response. As such, problems and disputes continually arose, which could not be resolved, and Crystal Pools was ultimately terminated by Group III in March 2013. (As a brief aside, an in-depth history and arguments proposed is irrelevant as the only issue before this Honorable Court is the misapplication of law concerning the Arbitrators award of attorneys' fees to Group III).

Subsequent to the termination of Crystal Pools, on September 19, 2013, the Claimant/Defendant, Group III, filed a Demand for Arbitration pursuant to the Construction Arbitration Rules of the American Arbitration Association. The Demand was assigned Case No. 31-110-000261-13, and the matter came before C. Allen Gibson, Jr., as the duly appointed Arbitrator. (Exhibit A)

Accordingly, on November 11, 2013, the Respondent/Plaintiff, Crystal Pools, filed its Response to Demand for Arbitration. (Exhibit B) Upon completion of the discovery process, Arbitration Hearings were held in person on July 8, 9 and 10, 2014, in Columbia, South Carolina; and, a continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted Affidavits regarding attorneys' fees on July 18, 2014, and the Hearing was declared closed on July 23, 2014.

Thereafter, on August 18, 2014, Arbitrator, C. Allen Gibson, rendered his Arbitration Award. (Exhibit C) Part and parcel of his Award, and which is the crux of this Motion and argument, is the awarding of attorneys' fees in favor of the Claimant's/Plaintiff's in the amount of

ONE HUNDRED SIXTEEN THOUSAND ONE HUNDRED SIXTY-FIVE and 86/100 DOLLARS (\$116,165.86).

The Respondent/Defendant, Crystal Pools, would show that the award of attorneys' fees to the Claimant/Plaintiff is in clear error, because in light of the award compared to the claim, Group III is not the prevailing party under North Carolina law. Undeniably, Arbitrator, C. Allen Gibson, erroneously and/or inadvertently applied South Carolina law instead of the agreed upon, contractually binding, application of North Carolina law (Exhibit D) in rendering his decision with regard to attorneys' fees.

The Arbitrator's Award sets forth the amount of the parties' claims and counterclaims against one another. After a brief recitation of Group III's accounting, the Award indicates that Group III asserted a remaining "claim" against Crystal Pools totaling \$308,022.52. The accounting associated with the remaining amount claimed by Group III is as follows:

Cost to Repair and Complete	\$508,933.52
Liquidated Damages	\$ 52,464.00
Payment to Hardaway Concrete	\$9,500.00
Less Contract Damages	(\$262,875.00)
TOTAL CLAIM	\$308,022.52

Crystal Pools' counterclaim was in the amount of \$84,671.98, in addition to two change orders addressed in the award.

The Arbitrator found that Group III's damages were considerably less than those claimed. The Arbitrator also found that Crystal Pools was entitled to change orders but was not entitled to any amount of the contract balance. After the Arbitrator completed the calculations associated with the merits of the dispute and allowing all available offsets to both parties, he determined

that Group III was entitled to recover \$81,138.23 from Crystal Pools, consisting of approximately 26.5% of the total claim Group III brought at the arbitration proceedings.

The Arbitrator then determined that Group III was the prevailing party and awarded attorneys' fees in the amount of \$116,165.86. Crystal Pools argues that the award of attorneys' fees was inappropriate based upon the Arbitrator's misapplication of law that requires modification.

LAW AND ARGUMENT

A. THE PARTIES DESIGNATED NORTH CAROLINA LAW AS THE LAW GOVERNING THEIR CONTRACT AND THE DETERMINATION OF ATTORNEYS' FEES AWARDS SHOULD BE GOVERNED THEREBY.

In South Carolina, an arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law. *Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. §15-48-130(a). In this matter, the Arbitrator manifestly disregarded North Carolina's specific law concerning "prevailing party" status and the award of attorneys' fees in at least two respects.

The Arbitrator incorrectly applied South Carolina law to the "prevailing party" calculations and analysis. Article 15.2 of the contract between the parties contains a choice of law provision that designates North Carolina law as the law governing the parties' contract. (Exhibit D) The result of the "prevailing party" analysis under North Carolina law results in a different calculation and determination from that employed by the Arbitrator.

Under South Carolina law, a prevailing party can be entitled to attorneys' fees if a contract allows a fee award or if a fee award is mandated by statute. In South Carolina, a party need only prevail by obtaining a verdict or judgment in its favor, regardless of the disparity between the amount claimed and the actual verdict or judgment. See *Heath v. County of Aiken*,

302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining "prevailing party" as: "The one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention ... the one in whose favor the decision or verdict is rendered and judgment entered."). Under this analysis, the Arbitrator may have ruled in favor of either party. Notwithstanding, the Arbitrator's ruling in favor of Group III, given the amount of the award coincides with the application of South Carolina law, over North Carolina law.

Crystal Pools respectfully requests that this Honorable Court revisit the attorney's fee award and recalculate it based upon North Carolina law. The North Carolina General Assembly and North Carolina Courts look at the award of attorney's fees in a much more strict fashion. In North Carolina, "as a general rule[,] contractual provisions for attorney's fees are invalid in the absence of statutory authority. *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 167; 510 S.E.2d 690, 695 (1999); see also *Lee Cycle Center Inc. v. Wilson Cycle Center Inc.*, 143 N.C. App. 1; 545 S.E.2d 745, 752 (2001).

Moreover, "the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Delta Env. Consultants*, 132 N.C. App. at 167, 510 S.E.2d at 695, quoting *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289; 266 S.E.2d 812, 814 (1980) (emphasis added). Therefore, North Carolina law requires both a contract and an enabling statute for an attorneys' fee provision to be enforced.

Until fairly recently, North Carolina's stance on attorneys' fees awards yielded harsh results. Even where parties to a contract agreed to a reciprocal provision that entitled the prevailing party to an award of attorneys' fees in the event of a dispute, the Courts refused to

enforce the provision. However, on October 1, 2011, the North Carolina General Assembly enacted N.C. Gen. Stat. § 6-21.6. This statute was the enabling statute that allowed the imposition of attorneys' fee awards in certain, specific business contract disputes that, until that time, were unenforceable. This is the law that governs how the attorneys' fee award is to be calculated in the context of the dispute between Group III and Crystal Pools. (Exhibit F - N.C. Gen. Stat. § 6-21.6)

B. UNDER N.C. GEN. STATUTE §6-26.6 THE ARBITRATOR CANNOT AWARD ATTORNEYS' FEES IN EXCESS OF \$81,138.23.

N.C. Gen. Stat. § 6-26.6 allows an arbitrator to award a party attorneys' fees, but it specifically limits the amount of attorneys' fees an arbitrator or judge can award, setting the "prevailing party" analysis aside for the moment. N.C. Gen. Stat. § 6-26.6(b) states:

Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.

N.C. Gen. Stat. § 6-21.6(b) (emphasis added).

This statute is plain on its face as to the amount of recoverable attorneys' fees that an arbitrator may award. There is no ambiguity in its directive. The Arbitrator's award of attorneys' fees in excess of the monetary damages awarded is a simple error in computation that, at a minimum, should be recalculated to reflect an award consistent with the plain meaning of the statute. The AAA Construction Industry Regular Track Rules under which we are operating affords the Arbitrator an opportunity to address this matter and modify the award appropriately- but, as stated, the Arbitrator denied Crystal Pools Request to Modify Award. (Exhibit E) As such, Crystal Pools respectfully requests that this Honorable Court further consider the

computation of attorneys' fees awarded to Group III under subsequent subparts of this statute.

C. UNDER N.C. GEN. STATUTE §6-26.6, THE ARBITRATOR MUST REDUCE THE AWARD OF ATTORNEYS' FEES TO ZERO BASED UPON HIS FINDING THAT GROUP III WAS ENTITLED TO ONLY 26.5% OF ITS CLAIM, PURSUANT TO NORTH CAROLINA'S PERFORMANCE AND PAYMENT ACT: N.C. GEN. STAT. §44A-35.

N.C. Gen. Statute §6-26.6 instructs the arbitrator in this case to make certain baseline determinations in computing the award of attorneys' fees. Perhaps the most important consideration is found at N.C. Gen. Statute §6-26.6(c)(1) - "The extent to which the party seeking attorneys' fees prevailed in the action."

The phrase "[t]he extent to which the party prevailed in the action" is subject to a specific interpretation under North Carolina law in the realm of construction contracts. While North Carolina law lowers the bar on the "prevailing party" analysis to the South Carolina standard in certain contexts, it has a precise computation that is required in dealing with the contract between Group III and Crystal Pools¹. In North Carolina practice, judges and attorneys in construction payment matters refer to North Carolina's Performance and Payment Act: N.C. Gen. Stat. §44A-35 for the computation at arriving at a prevailing party designation. This act, in practice, does not appear to be limited to surety claims. See *Terry's Floor Fashions, Inc. v. Crown Gen. Contrs. Inc.*, 184 N.C. App. 1; 645 S.E.2d 810 (N.C. App. 2007); *Brooks Millwork Co. v. Levine*, 2010 N.C. App. LEXIS 959 (N.C. Ct. App. June 15, 2010); *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 129 N.C. App. 525 (N.C. Ct. App. 1998); *Mainline Supply Co. v. Hillcrest Constr., Inc.*, 2012 N.C. App. LEXIS 222 (N.C. Ct. App. 2012). Rather, it

¹ North Carolina law, like South Carolina law and United States Federal Law uses a relaxed standard, similar to the universal South Carolina standard, for "prevailing party" analysis in contexts where the state or an agency of the state is a party. This relaxed standard is in keeping with the Equal Access to Justice Act 28 U.S.C.S. § 2412. For a survey of the prevailing party analysis in government and agency cases, Crystal Pools would direct the Court to Article: Evening The Odds: The Case For Attorneys' Fee Awards For Administrative Resolution Of Title VI And Title VII Disputes., 67 N.C.L. Rev. 379 (1989).

serves as a guide for determining which party has prevailed in its claim or defense in construction payment disputes. *id.* In the dispute between Crystal Pools and Group III, Crystal Pools did not have lien rights because of the nature of the project. However, it would stand to reason that the "prevailing party" standard under N.C. Gen. Stat. §44A-35 should apply to negate both parties' claim for attorneys' fees based upon the award.

Pursuant to N.C. Gen. Stat. §44A-35, "a "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim...." (Exhibit G) Again, Group III obtained an award of only 26.5% of its claim. Under this computation, Group III cannot be the prevailing party. As such, based upon the Arbitrators Award, neither party can receive "prevailing party" status in this matter, and the award of attorneys' fees must be modified to zero.

CONCLUSION

The Arbitration Award of August 18, 2014, contains an egregious error in that the Arbitrator, C. Allen Gibson, misapplied the law wherein he erroneously and/or inadvertently applied South Carolina law instead of the agreed upon, contractually binding, application of North Carolina law in rendering his decision with regard to attorneys' fees.

WHEREFORE, for the reasons stated herein, the Respondent/Defendant, Crystal Pools, respectfully request this Honorable Court vacate the Arbitration Award dated August 18, 2014, or, in the alternative, modify the Arbitration Award with regard to attorneys' fees awarded in favor of Group III Management, Inc., to Zero Dollars.

[SIGNATURE TO FOLLOW]

Respectfully submitted,

HALL, BOOTH, SMITH, P.C.



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Elizabeth F. Wieters, SC Bar No. 78064
40 Calhoun Street, Suite 550
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ewieters@hallboothsmith.com

*Attorneys for Respondent/Defendant,
SunCrete of Carolina, Inc., d/b/a Crystal Pools*

**This 14th day of November, 2014
Charleston, South Carolina**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

GROUP III MANAGEMENT, INC.,

Claimant/Plaintiff,

v.

SUNCRETE OF CAROLINA, INC., d/b/a
CRYSTAL POOLS,

Respondent/Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2014-CP-40-

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 14th day of November, 2014, a true and correct copy of the above and foregoing *Respondent/Defendant SunCrete of Carolina, Inc. d/b/a Crystal Pools' Notice of Motion and Motion to Vacate Arbitration Award or in the Alternative Modify Arbitration Award and Respondent/Defendant SunCrete of Carolina, Inc. d/b/a Crystal Pools' Brief in Support of its Motion to Vacate Arbitration Award* for in the *Alternative Modify Arbitration Award* was served upon counsel of record by mailing a copy, properly addressed with sufficient postage affixed thereto as follows:

Everette K. Wooten, Jr., Esq.
Post Office Box 1555
Kinston, NC 28503

-and-

John C. Bruton, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
120 Main Street, Suite 2200
Columbia, SC 29201

Counsel for Group III Management, Inc.

By:


Steven Benson, J.D.
Paralegal for Alan Belcher

RICHLAND COUNTY
FILED
2014 NOV 19 AM 9:04
JANETTE W. MCARDIE
CLERK P. & C.S.

EXHIBIT A

COPY**DEMAND FOR ARBITRATION**

NOW COMES Group III Mgt., Inc. ("Claimant"), a North Carolina corporation and hereby demands arbitration against SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. Claimant's Information:

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No: 252-527-3377
- e. E-mail Address: screen@groupiiimgt.com

2. Respondent's Information:

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-866-1200
- d. Fax No: 803-866-0209
- e. E-mail Address: all@crystalpool.com

3. Claimant's Representative Information:

- a. Name of Representative: Everette L. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No: 252-523-2060
- e. Representative's E-mail Address: ewooten@wootenandcoley.com

4. Respondent's Representative Information: UNKNOWN

5. Statement Of Claimant's Claim: Plaintiff is General Contractor on a project being done for the U.S. Army Corps of Engineers in Columbia, South Carolina, said project being known as "Legion Pool Complex, W192HP-11-D-0014 (hereinafter referred to as "Project"). Claimant sub-contracted a portion of said work to Respondent pursuant to a subcontract dated November 8, 2012, at a contract price of \$339,960.00.

The work to be done by Respondent pursuant to said subcontract was the construction of a swimming pool and deck.

Immediately after embarking on the project, Respondent submitted to Claimant Payment Application #1 in the sum of \$77,085.00. This application was almost exclusively for materials stored on site when, in fact, no such materials were stored on site nor had such materials been received by Crystal Pools. When this pay request was not paid immediately, Respondent ceased work on the project and on February 14, 2013, indicated it was 'closing the job down' unless it received full payment of its Payment Application #1. In order to entice Respondent to get back on the job, on February 20, 2013, Respondent paid Payment Application #1 even though the materials were not on site and to the best of Claimant's knowledge, most of the materials had not been paid for. Claimant made its payment to Respondent even though Claimant had not and could not bill the owner at that time.

Respondent returned to the job and performed site work, placing forms and placing rebar. The work done by Respondent was not done in a workmanlike manner and on or about March 18, 2013, Respondent again notified Claimant that Respondent would not continue on the project. On March 22, 2013, Petitioner gave Respondent a 3-day notice to cure its failure to prosecute the work. Respondent did not come back on the job; so on March 29, 2013, Claimant notified Respondent that Claimant had determined to complete the work under the subcontract. Claimant took this action not only because Respondent failed to prosecute the work but also because the work that was done was sub-standard and not according to the contract documents as evidenced by notice received by the owner citing Claimant for lack of contractor quality control with respect to the work performed by Respondent.

Claimant completed the work called for by Respondent's subcontract at a cost greatly in excess of the balance remaining on Respondent's subcontract. Claimant contends that pursuant to the terms of the subcontract it is entitled to recover such excess from Respondent. The amount to which Claimant is entitled is computed as follows:

Amount expended by Claimant to to complete Project	\$505,688.71
Amount of Crystal Pools' contract	\$339,960.00
Amount previously paid Crystal Pools	(77,085.00)
Amount previously paid concrete supplier	(9,500.00)
Amount remaining on Crystal Pools' contract	<u>\$253,375.00</u>
Balance owed to Group III Mgt., Inc.	<u>\$252,313.71</u>

Claimant's claim may be increased in the event of assessment of liquidated damages by the owner since the Project was substantially delayed by the Respondent and all or part of such liquidated damages may be properly back-charged against Respondent. In addition, suppliers of Claimant which are unpaid may assert claims against Claimant or its bonding company and Claimant would be entitled to have its claim hereunder increased by the amount of such claims.

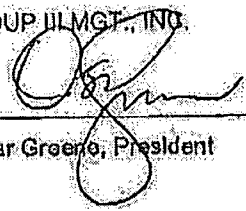
In summary, Claimant requests:

- a. That Claimant recover of Respondent in the sum of \$252,313.71 (plus such additional amounts to which Claimant may be entitled) and be granted an award in that amount.
- b. That Claimant be adjudged not to be indebted to Respondent in any amount on account of work done by Respondent pursuant to its subcontract on the Project.
- c. That any bond claims made by respondent against Claimant on this Project be dismissed.
- d. That Claimant be awarded representative fees and expenses.
6. That the arbitration hearing should be conducted in Columbia, South Carolina.
7. That Claimant is attaching hereto the sum of \$1,000.00 administrative filing fee (flexible schedule).
8. A copy of this demand together with a copy of the arbitration agreement has been provided to the Respondent by mailing a copy of same to it at the address set forth above and faxing a copy of same to the fax number set forth above.

RESPECTFULLY SUBMITTED this the 19th day of September, 2013.

GROUP ULMGT., INC.

BY:


Oscar Greene, President

~~Signature and name of Oscar Greene, President of Group Ulmgt., Inc.~~



GROUP III MGT., INC.

SUBCONTRACT FOR BUILDING CONSTRUCTION

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209

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10. RECOURSE BY CONTRACTOR
11. LABOR RELATIONS
12. INDEMNIFICATION
13. INSURANCE
14. ARBITRATION
15. CONTRACT INTERPRETATION
16. SPECIAL PROVISIONS

This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification and particularly when used with other than AIA A201, General Conditions of the Contract for Construction, 1987 edition, or document with identical wording.

WORDING IDENTICAL TO AGC DOCUMENT NO. 500 DATED 1990

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SUBCONTRACT FOR BUILDING CONSTRUCTION**ARTICLE 1
AGREEMENT**

This Agreement is made this 11/8/2012, by and between

Group III Mgt., Inc.,

hereinafter called the Contractor and Crystal Pools, Subcontractor, to perform part of the Work on the following Project.

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

OWNER: U.S. Army Corps of Engineers, Charleston
69-A Hagood Ave.
Charleston, SC 29403

ARCHITECT: Davis & Floyd Engineering Architecture
POB 61899
Charleston, SC 29419

CONTRACTOR: Group III Mgt., Inc.
2820 W Vernon Ave
Kinston, NC 28504
(Phone) 252-527-3333 (Fax) 252-527-3377
Erik Barrow

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209
John Rogers

CONTACT:

FED TAX ID #:

VENDOR NO.:

COST CODE: Swimming Pool & Deck

CONTRACT PRICE: Three hundred thirty-nine thousand nine hundred sixty dollars
\$339,960.00
(Herein insert a lump sum, unit price or both. Bid schedules must be referenced.)

Notice to the parties shall be given at the above addresses.

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ARTICLE 2 SCOPE OF WORK

2.1 SUBCONTRACTOR'S WORK. The Contractor contracts with the Subcontractor as an independent contractor, to perform the work described in Article 18. The Subcontractor shall perform such work (hereinafter called the "Subcontractor's Work") under the general direction of the Contractor and in accordance with this Agreement and the Contract Documents.

2.2 CONTRACT DOCUMENTS. The Contract Documents which are binding on the Subcontractor are as set forth in Paragraph 18.3. Upon the Subcontractor's request the Contractor shall furnish a copy of any part of these documents. Nothing in the Contract Documents shall be construed to create a contractual relationship between persons or entities other than the Contractor and Subcontractor.

2.3 CONFLICTS. In the event of a conflict between this Agreement and the Contract Documents, this Agreement shall govern.

ARTICLE 3 SCHEDULE OF WORK

3.1 TIME IS OF ESSENCE. Time is of the essence for both parties, and they mutually agree to see to the performance of their respective work and the work of their subcontractors so that the entire Project may be completed in accordance with the Contract Documents and the Schedule of Work. The Contractor shall prepare the Schedule of Work and revise such schedule as the Work progresses.

3.2 DUTY TO BE BOUND. Both the Contractor and the Subcontractor shall be bound by the Schedule of Work. The Subcontractor shall provide the Contractor with any requested scheduling information for the Subcontractor's Work. The Schedule of Work and all subsequent changes thereto shall be submitted to the Subcontractor in advance of the required performance.

3.3 SCHEDULE CHANGES. The Subcontractor recognizes that changes will be made in the Schedule of Work and agrees to comply with such changes.

3.4 PRIORITY OF WORK. The Contractor shall have the right to decide the time, order and priority in which the various portions of the Work shall be performed and all other matters relative to the timely and orderly conduct of the Subcontractor's Work. The Subcontractor shall commence its work within 3 days of notice to proceed from the Contractor and if such work is interrupted for any reason the Subcontractor shall resume such work within two working days from the Contractor's notice to do so.

ARTICLE 4 CONTRACT PRICE

The Contractor agrees to pay to the Subcontractor for the satisfactory performance of the Subcontractor's Work the amount stated in Article 1, subject to additions or deductions per Article 5.

ARTICLE 5 PAYMENT

5.1 GENERAL PROVISIONS

5.1.1 SCHEDULE OF VALUES. The Subcontractor shall provide a schedule of values satisfactory to the Contractor and the Owner no more than fifteen (15) days from the date of execution of this Agreement.

5.1.2 ARCHITECT VERIFICATION. Upon request the Contractor shall give the Subcontractor written authorization to obtain directly from the Architect the percentage of completion certified for the Subcontractor's Work.

5.1.3 PAYMENT USE RESTRICTION. Payment received by the Subcontractor shall be used to satisfy the indebtedness owed by the Subcontractor to any person furnishing labor or materials for use in performing the Subcontractor's work on this project before it is used in any other manner.

5.1.4 PAYMENT USE VERIFICATION. The Contractor shall have the right at all times to contact the Subcontractor's subcontractors and suppliers to ensure that the same are being paid promptly by the Subcontractor for labor or materials furnished for use in performing the Subcontractor's Work.

5.1.5 PARTIAL LIEN WAIVERS AND AFFIDAVITS. As a prerequisite for payment, the Subcontractor shall provide, in a form satisfactory to the Owner and the Contractor, partial lien or claim waivers and affidavits from the Subcontractor, and its subcontractors and suppliers for the completed Subcontractor's Work. Such waivers may be made conditional upon payment.

5.1.6 SUBCONTRACTOR PAYMENT FAILURE. Upon payment by the Contractor, Subcontractor shall promptly pay its lower-tier subcontractors and material suppliers the amounts to which they are entitled. In the event the Contractor has reason to believe that labor, material or other obligations incurred in the performance of the Subcontractor's Work are not being paid, the Contractor may give written notice of such claim or lien to the Subcontractor and may take any steps deemed necessary to ensure that progress payments are utilized to pay such obligations including but not limited to the issuance of joint checks. If upon receipt of said notice, the Subcontractor does not (a) supply evidence to the satisfaction of the Contractor that the moneys owing to the claimant(s) have been paid, or (b) post a bond indemnifying the Owner, the Contractor, and the Contractor's surety, if any, and the premises from such claim or lien, then the Contractor shall have the right to withhold from any payments due or to become due to the Subcontractor a reasonable amount to protect the Contractor from any and all loss, damage or expense including attorney's fees arising out of or relating to any such claim or lien until the claim or lien has been satisfied by the Subcontractor.

5.1.7 SUBCONTRACTOR ASSIGNMENT OF PAYMENTS. The Subcontractor shall not assign any moneys due or to become due under this Contract, or under any Change Order (hereo), without the written consent of Contractor, unless such assignment is intended to create a new security interest within the scope of Article 9 of the Uniform Commercial Code.

Should Subcontractor assign all or any part of any moneys due or to become due under this Contract, to create a new security interest or for any other purpose, the instrument of assignment shall contain a clause to the effect that the assignee's right in and to any money due or to become due to the Subcontractor shall be subject to the claims of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work under this Subcontract and any Change Orders.

5.1.8 PAYMENT NOT ACCEPTANCE. Payment to the Subcontractor does not constitute or imply acceptance of any portion of the Subcontractor's Work.

5.2 PROGRESS PAYMENTS

5.2.1 APPLICATION. Subcontractor's application for payment shall be itemized and supported by substantiating data as required in the Contract Documents for the Contractor's payment application. Subcontractor's application shall be itemized if required. Subcontract payment applications may include payment requests on account of properly authorized Construction Change Directives. The Subcontractor's progress payment application for work performed in the preceding payment period shall be submitted to the Contractor per the terms of this Agreement and specifically Subparagraphs 5.1.1, 5.2.2, 5.2.3, and 5.2.4 for approval of the Contractor and Architect/Owner/Contractor. The Contractor shall forward, without delay, the approved value to the Owner for payment.

5.2.2 RETAINAGE/SECURITY. The rate of retainage shall be equal to the percentage retained from the Contractor's payment by the Owner for the Subcontractor's Work provided the Subcontractor furnishes a bond or other security to the satisfaction of the Contractor. If the Subcontractor has furnished such bond or security, its work is satisfactory and the Contract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontractor's Work has attained the same percentage of completion and the Contractor's retainage for the Subcontractor's Work has been so reduced by the Owner. However if the Subcontractor does not provide such bond or security, the rate of retainage shall be 10%.

5.2.3 TIME OF APPLICATION. The Subcontractor shall submit progress payment applications to the Contractor no later than the 28 day of each payment period for work performed up to and including the 30 day of the payment period indicating work completed and, to the extent allowed under Subparagraph 5.2.4, materials suitably stored during the preceding payment period.

5.2.4 STORED MATERIALS. Unless otherwise provided in the Contract Documents, and if approved in the advance by the Owner, applications for payment may include materials and equipment not incorporated in the Subcontractor's Work but delivered to and suitably stored at site or at some other location agreed upon in writing. Approval of payment applications for such stored items on or off the site shall be conditioned upon submission by the Subcontractor of bills of sale and applicable insurance or such other procedures satisfactory to the Owner and

Contractor to establish the Owner's title to such materials and equipment or otherwise protect the Owner's and Contractor's interest therein, including transportation to the site.

5.2.5 TIME OF PAYMENT. Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made no later than seven (7) days after receipt by the Contractor of payment from the Owner for the Subcontractor's Work.

5.2.6 PAYMENT DELAY. If for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Contractor within seven (7) days after the date such payment is due, as defined in Subparagraph 5.2.5, then the Subcontractor, upon giving an additional seven (7) days written notice to the Contractor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. To the extent obtained by the Contractor under the Contract Documents, the contract price shall be increased by the amount of the Subcontractor's reasonable cost of shutdown, delay, and start-up, which shall be affected by appropriate Change Order.

If the Subcontractor's Work has been stopped for thirty (30) days because the Subcontractor has not received progress payments as required hereunder, the Subcontractor may terminate this Agreement upon giving the Contractor an additional seven (7) days written notice.

5.3 FINAL PAYMENT

5.3.1 APPLICATION. Upon acceptance of the Subcontractor's Work by the Owner, the Contractor, and if necessary, the Architect, and upon the Subcontractor furnishing evidence of fulfillment of the Subcontractor's obligations in accordance with the Contract Documents and Subparagraph 5.3.2, the Contractor shall forward the Subcontractor's application for final payment without delay.

5.3.2 REQUIREMENTS. Before the Contractor shall be required to forward the subcontractor's application for final payment to the Owner, the Subcontractor shall submit to the Contractor:

- (a) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or its property or the Contractor or the Contractor's surety might in any way be liable, have been paid or otherwise satisfied;
- (b) consent of surety to final payment, if required;
- (c) satisfaction of required closeout procedures;
- (d) certification that insurance required by the Contract Documents to remain in effect beyond final payment pursuant to Paragraph 13.4 is in effect and will not be cancelled or allowed to expire without at least thirty (30) days' written notice to the Contractor unless a longer period is stipulated in the Contract; and
- (e) other data if required by the Contractor or Owner, such as receipts, releases, and waivers of liens to the extent and in such form as may be designated by the Contractor or Owner. Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's Work, but shall in no way relieve the Subcontractor of liability for the

obligations assumed under Paragraph 8.10, or for faulty or defective work appearing after final payment.

5.3.3 TIME OF PAYMENT. Final payment of the balance due of the Contract Price shall be made to the Subcontractor:

- (a) upon receipt of the Owner's waiver of all claims related to the Subcontractor's Work except for unsettled liens, unknown defective work, and noncompliance with the Contract Documents or warranties; and
- (b) within seven (7) days after receipt by the Contractor of final payment from the Owner for such Subcontractor's Work.

5.3.4 FINAL PAYMENT DELAY. If the Owner or its designated agent does not issue a certificate for Final Payment or the Contractor does not receive such payment for any cause which is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of the Subcontractor, the prompt release by the Owner of the final payment due for the Subcontractor's Work. At the Subcontractor's request and expense, to the extent agreed upon in writing, the Contractor shall institute reasonable legal remedies to mitigate the damages and pursue payment of the Subcontractor's final payment including interest thereon.

5.4 LATE PAYMENT INTEREST. To the extent obtained by the Contractor under the Contract Documents, progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate provided in the Contract Documents, or in the absence thereof, at the legal rate prevailing at the place of the Project.

ARTICLE 6 CHANGES, CLAIMS AND DELAYS

6.1 CHANGES. When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Work which are within the general scope of this Agreement. Adjustments in the Contract Price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order or a Subcontract Construction Change Directive pursuant to the Contract Documents. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Work, adjustment in the Contract Price or Schedule of Work. A Subcontract Construction Change Directive is a written instrument prepared by the Contractor directing a change in the Work and stating a proposed adjustment, if any, in the Contract Price or Schedule of Work or both. A Subcontract Construction Change Directive shall be used in the absence of agreement on the terms of a Subcontract Change Order.

6.2 CLAIMS RELATING TO OWNER. The Subcontractor agrees to make all claims for which the Owner is or may be liable in the manner and within the time limits provided in the Contract Documents for like claims by the Contractor upon the Owner and in sufficient time for the Contractor to make such

claims against the Owner in accordance with the Contract Documents. The Contractor agrees to permit the Subcontractor to prosecute a claim in the name of the Contractor for the use and benefit of the Subcontractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner.

6.3 CLAIMS RELATING TO CONTRACTOR. The Subcontractor shall give the Contractor written notice of all claims not included in Paragraph 6.2 within five (5) days of the occurrence of the event for which claim is made; otherwise, such claims shall be deemed waived. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor not relating to claims included in Paragraph 6.2 shall be resolved in the manner provided in Article 14.

6.4 ADJUSTMENT IN CONTRACT PRICE. If a Subcontract Change Order or Construction Change Directive requires an adjustment in the Contract Price, the adjustment shall be established by one of the following methods:

1. mutual agreement on a lump sum with sufficient information to substantiate the amount;
2. unit prices already established in the Contract Documents or if not established by the Contract Documents then established by mutual agreement for the adjustment of
3. a mutually determined cost plus a jointly acceptable allowance for overhead and profit.

6.5 SUBSTANTIATION OF ADJUSTMENT. If the Subcontractor does not respond promptly or disputes the method of adjustment, the method and the adjustment shall be determined by the Contractor on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Contract Price, an allowance for overhead and profit of to be determined by Government requirements.

The Subcontractor shall maintain for the Contractor's review and approval an appropriately itemized and substantiated accounting of the following items attributable to the Subcontract Change Order or Subcontract Construction Change Directive:

1. labor costs, including Social Security, health, welfare, retirement and other fringe benefits as normally required, and state workers' compensation insurance;
2. costs of materials, supplies and equipment, whether incorporated in the Work or consumed, including transportation costs;
3. costs of renting, either from the Contractor or from others, of machinery and equipment other than hand tools;
4. costs of bond and insurance premiums, permit fees and taxes attributable to the change; and
5. costs of additional supervision and field office personnel services necessitated by the change.

6.6 DELAY. If the progress of the Subcontractor's Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor's Work shall be extended by Subcontract Change Order or Subcontract Construction Change Directive to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly. The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor's Work.

6.7 LIQUIDATED DAMAGES. If the Contract Documents provide for liquidated or other damages for delay beyond the completion date set forth in the Contract Documents, and such damages are assessed, then the Contractor may assess same against the Subcontractor in proportion to the Subcontractor's share of the responsibility for such delay. However the amount of such assessment shall not exceed the amount assessed against the Contractor. Nothing set forth herein shall limit the Subcontractor's liability to the Contractor for the Contractor's actual delay damages caused by the Subcontractor's delay. The Subcontractor shall be liable to the Contractor for the Contractor's actual damages caused by the Subcontractor's delay.

ARTICLE 7 CONTRACTOR'S OBLIGATIONS

7.1 CONTRACT DOCUMENTS. Prior to executing this Subcontract, the Contractor shall make available to the Subcontractor the Contract Documents which are binding on the Subcontractor and set forth in Paragraph 10.8.

7.2 AUTHORIZED REPRESENTATIVE. The Contractor shall designate one or more persons who shall be the Contractor's authorized representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) the Subcontractor shall look to for instructions, orders and/or directions, except in an emergency.

7.3 STORAGE APPLICATIONS. The Contractor shall allocate adequate storage areas, if available, for the Subcontractor's materials and equipment during the course of the Subcontractor's Work.

7.4 TIMELY COMMUNICATIONS. The Contractor shall transmit, with reasonable promptness, all submittals, transmittals, and written approvals relating to the Subcontractor's Work.

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

- (a) prior to furnishing of the services and materials, except in an emergency affecting the safety of persons or property;
- (b) in writing of such claim within three days of first furnishing such services or materials; and

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

ARTICLE 8 SUBCONTRACTOR'S OBLIGATIONS

8.1 OBLIGATIONS DERIVATIVE. The Subcontractor binds itself to the Contractor under this Agreement in the same manner as the Contractor is bound to the Owner under the Contract Documents and will so bind its lower-tier subcontractors. The Subcontractor shall make available to its lower-tier subcontractors the Contract Documents which are binding on the lower-tier subcontractors.

8.2 RESPONSIBILITIES. The Subcontractor shall furnish all of the labor, materials, equipment, and services including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontractor's Work in strict accordance with and reasonably inferable from the Contract Documents. The Subcontractor shall provide a list of proposed subcontractors and suppliers, be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Schedule of Work.

8.3 SHOP DRAWINGS. The Subcontractor shall be responsible to the Contractor for the accuracy and conformity with the Contract Documents and other submittals that pertain to its work in the same manner as the Contractor is responsible therefor to the Owner. Shop drawings, or their approval by the Contractor, shall not be deemed to authorize deviations or substitutions from the requirements of the Contract Documents.

8.4 TEMPORARY SERVICES. The Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work, except as provided in Article 16. Said article also identifies those common temporary services, if any, which are to be furnished by the Subcontractor.

8.5 COORDINATION. The Subcontractor shall:

- (a) cooperate with the Contractor and all others whose work may interfere with the Subcontractor's Work;
- (b) specifically note and immediately advise the Contractor of any such interference with the Subcontractor's Work; and
- (c) participate in the preparation of coordination drawings and work schedules in areas of congestion.

8.6 AUTHORIZED REPRESENTATIVE. The Subcontractor shall designate one or more persons who shall be the authorized Subcontractor's representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) to whom the Contractor shall issue instructions, orders or directions, except in an emergency.

8.7 PROVISION FOR INSPECTION. The Subcontractor shall notify the Contractor when portions of the Subcontractor's Work are ready for inspection. The Subcontractor shall at all times furnish the Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under this Agreement may be.

In the course of preparation, process, manufacture or treatment.

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

8.8 CLEANUP. The Subcontractor shall follow the Contractor's cleanup and safety directions, and

(a) at all times keep the building and premises free from debris and unsafe conditions resulting from the Subcontractor's Work; and

(b) broom clean each work area prior to discontinuing work in the same.

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

8.9 SAFETY. The prevention of accidents on or in the vicinity of its Work is the Subcontractor's responsibility, even if Contractor establishes a safety program for the entire Project. Subcontractor shall establish a safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner, including, but not limited to, requirements imposed by the Contract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Work when Contractor deems unsafe until corrective measures satisfactory to Contractor shall have been taken. Contractor's failure to stop Subcontractor's unsafe practices shall not relieve Subcontractor of the responsibility therefor. Subcontractor shall notify Contractor immediately following any accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor. Subcontractor shall indemnify Contractor for fines, damages or expenses incurred by the Contractor because of the Subcontractor's failure to comply with safety requirements.

8.10 PROTECTION OF THE WORK. The Subcontractor shall take necessary precautions to properly protect the Subcontractor's Work and the work of others from damage caused by the Subcontractor's operations. Should the Subcontractor cause damage to the Work or property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor, or the Contractor may so remedy and deduct the cost thereof from any amounts due or to become due the Subcontractor.

8.11 PERMITS, FEES AND LICENSES. The Subcontractor shall give adequate notices to authorities pertaining to the Subcontractor's Work and secure and pay for all permits, fees, licenses, assessments, inspections and taxes necessary to complete the Subcontractor's Work in accordance with the Contract Documents.

To the extent obtained by the Contractor under the Contract Documents, the Subcontractor shall be compensated for additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of the Agreement.

8.12 SUBCONTRACTOR ASSIGNMENT OF WORK. The Subcontractor shall not assign the whole nor any part of the Subcontractor's Work without prior written approval of the Contractor. The Contractor's approval shall not be unreasonably withheld. Lower-tier subcontractors and suppliers previously approved by the Contractor may be listed at Paragraph 13.4.

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

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

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

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

8.14 MATERIALS SAFETY. To the extent that the Contractor is not obligated by the Contract Documents or by law to perform work which involves pollutants, hazardous or toxic substances, hazardous waste, asbestos or PCB's, the Subcontractor likewise is not obligated. To the extent that the Contractor has obligations under the Contract Documents or by law regarding such materials within the scope of the Subcontractor's work, the Subcontractor likewise shall have these obligations.

ARTICLE 9 SUBCONTRACT PROVISIONS

9.1 LAYOUT RESPONSIBILITY AND LEVELS. The Contractor shall establish principal axis lines of the building and site whereupon the Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontractor's Work and for any loss or damage to the Contractor or others by reason of the Subcontractor's failure to set out or perform its work correctly. The Subcontractor shall exercise prudence so that the actual final conditions and details shall result in alignment of finish surfaces.

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

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

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

9.6 USE OF CONTRACTOR'S EQUIPMENT. The Subcontractor, its agents, employees, subcontractors or suppliers shall not use the Contractor's equipment without the express written permission of the Contractor's designated representative.

If the Subcontractor or any of its agents, employees, suppliers or lower-tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of the Contractor, the Subcontractor shall defend, indemnify and be liable to the Contractor as provided in Article 12 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have been due solely to the negligence of the Contractor's employees operating such equipment.

9.8 CONTRACT BOND REVIEW. The Contractor's Payment Bond for the Project, if any, may be reviewed and copied by the Subcontractor.

9.7 OWNER ABILITY TO PAY. The Subcontractor shall have the right to receive from the Contractor such information as the Contractor has obtained relative to the Owner's financial ability to pay for the Work.

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

9.9 SUBCONTRACT BOND. If a Performance and Payment Bond is not required of the Subcontractor under Article 18, then within the duration of this Agreement, the Contractor may require such bonds before work is started and the Subcontractor shall provide the same. Said bonds shall be in the full amount of this Agreement in a form and by a surety satisfactory to the Contractor. The Subcontractor shall be reimbursed without retaining for cost of same simultaneously with the first progress payment hereunder. The reimbursement amount for the bonds shall not exceed the annual rate for such subcontractor work. In the event the Subcontractor shall fail to promptly provide such requested bonds, the Contractor may terminate this Agreement and re-let the work to another subcontractor and all Contractor costs and expenses incurred thereby shall be paid by the Subcontractor.

9.10 WARRANTY. The Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and as called for in the Contract Documents.

The Subcontractor agrees to satisfy such warranty obligations which appear within the warranty period established in the Contract Documents without cost to the Owner or the Contractor.

If no warranty is required of the Contractor in the Contract Documents, then the Subcontractor shall warrant its work as described above for the period of one year from the date(s) of substantial completion of all or a designated portion of the Subcontractor's Work or acceptance or use by the Contractor or Owner of designated equipment, whichever is sooner.

The Subcontractor further agrees to execute any special warranties that shall be required for the Subcontractor's Work prior to final payment.

ARTICLE 10

RECOURSE BY CONTRACTOR

10.1 FAILURE OF PERFORMANCE

10.1.1 NOTICE TO CURE. If the Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule of Work, or it fails to make prompt payment for its workers, lower-tier subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement. If the Subcontractor fails within three (3) working days after written notification to commence and continue satisfactory correction of such default with diligence and promptness, then the Contractor without prejudice to any rights or remedies, shall have the right to any or all of the following remedies:

- supply such number of workers and quantity of materials, equipment and other facilities as the Contractor deems necessary for the completion of the Subcontractor's Work; or any part thereof which the Subcontractor has failed to complete or perform after the aforesaid notice, and charge the cost thereof to the Subcontractor who shall be liable for the payment of same including reasonable overhead, profit and attorney's fees;
- contract with one or more additional contractors to perform such part of the Subcontractor's Work as the Contractor shall determine will provide the most expeditious completion of the total Work and charge the cost thereof to the Subcontractor;
- withhold payment of any moneys due the Subcontractor pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of the Contractor and Architect, Owner, Engineer and
- in the event of an emergency affecting the safety of persons or property, the Contractor may proceed as above without notice.

10.1.2 TERMINATION BY CONTRACTOR. If the Subcontractor fails to commence and satisfactorily continue correction of a default within three (3) working days after written notification issued under Subparagraph 10.1.1, then the Contractor may, in lieu of or in addition to Subparagraph 10.1.1, issue a second written notification, to the Subcontractor and its surety, if any. Such notice shall state that if the Subcontractor fails to commence and continue correction of a default within seven (7) working days of the written notification, the Agreement will be deemed terminated and the Contractor may use any materials, implements, equipment, appliances or tools furnished by or belonging to the Subcontractor to complete the Subcontractor's Work.

The Contractor also may furnish those materials, equipment and/or employ such workers or subcontractors as the Contractor deems necessary to maintain the orderly progress of the Work.

All costs incurred by the Contractor in performing the Subcontractor's Work, including reasonable overhead, profit and attorney's fees, shall be deducted from any moneys due or to become due the Subcontractor. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.1.3 USE OF SUBCONTRACTOR'S EQUIPMENT. If the Contractor performs work under this Article or sublets such work to be so performed, the Contractor and/or the persons to whom work has been sublet shall have the right to take and use any materials, implements, equipment, appliances or tools furnished by, belonging or delivered to the Subcontractor and located at the Project.

10.2 BANKRUPTCY

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

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

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

The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.3 SUSPENSION BY OWNER. Should the Owner suspend its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify

the Subcontractor in writing and upon written notification the Subcontractor shall immediately suspend the Subcontractor's Work.

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

10.4 TERMINATION BY OWNER. Should the Owner terminate its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify the Subcontractor in writing and upon written notification, this Agreement shall be terminated and the Subcontractor shall immediately stop the Subcontractor's Work, follow all of Contractor's instructions, and mitigate all costs.

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

The Contractor agrees to cooperate with the Subcontractor, at the Subcontractor's expense, in the prosecution of any Subcontractor claim arising out of the Owner termination and to permit the Subcontractor to prosecute said claim, in the name of the Contractor, for the use and benefit of the Subcontractor, or assign the claim to the Subcontractor.

10.5 CONTINGENT ASSIGNMENT OF SUBCONTRACT. The Contractor's contingent assignment of the Subcontract to the Owner, if provided in the Contract Documents, is effective when the Owner (a) has terminated the Contract for cause and (b) has accepted the assignment by notifying the Subcontractor in writing. The contingent assignment is subject to the prior rights of a surety that may be obligated under the Contractor's bond, if any. Subcontractor hereby consents to such assignment and agrees to be bound to the assignee by the terms of this Subcontract.

10.6 SUSPENSION BY CONTRACTOR. The Contractor may order the Subcontractor in writing to suspend, delay, or interrupt all or any part of the Subcontractor's Work for each period of time as may be determined to be appropriate for the convenience of the Contractor. Phased or interrupted Work when required shall not be deemed a suspension of Work.

The Subcontractor shall notify the Contractor in writing within ten (10) working days after receipt of the Contractor's order of the effect of such order upon the Subcontractor's Work. To the extent allowed the Contractor under the Contract Documents, the Contract Price or contract time shall be adjusted by Subcontract Change Order for any increase in the time or cost of performance of this Agreement caused by such suspension, delay, or interruption.

No claim under this Article shall be allowed for any costs incurred more than ten (10) working days prior to the Subcontractor's notice to the Contractor.

Neither the Contract Price nor the contract time shall be adjusted under this Article for any suspension, delay or interruption to the extent that performance would have been so suspended, delayed, or interrupted by the fault

or negligence of the Subcontractor or by a cause for which Subcontractor would have been responsible.

The Contract Price shall not be adjusted under this Article for any suspension, delay or interruption to the extent that performance would have been suspended, delayed or interrupted by a cause for which the Subcontractor would have been entitled only to a time extension under this Agreement.

10.7 WRONGFUL EXERCISE. If the Contractor wrongfully exercises any option under this Article, the Contractor shall be liable to the Subcontractor solely for the reasonable value of work performed by the Subcontractor prior to the Contractor's wrongful action, including reasonable overhead and profit on the Work performed, loss prior payments made, and attorney's fees.

ARTICLE 11 LABOR RELATIONS

(Insert here any conditions, obligations or requirements relative to labor relations and their effect on the project. Legal counsel is recommended.)

ARTICLE 12 INDEMNIFICATION

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless, the Contractor (including the affiliates, parents and subsidiaries, their agents and employees) and other contractors and subcontractors and all of their agents and employees and when required of the Contractor by the Contract Documents, the Owner, the Architect, Architect's consultants, agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontract provided that:

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or for anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder;

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

12.2 NO LIMITATION UPON LIABILITY. In any and all claims against the Owner, the Architect, Architect's consultants, agents and employees, the Contractor (including its affiliates, parents and subsidiaries) and other contractors or subcontractors, or any of their agents or employees, by any employee of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the Indemnification obligation under

this Article 12 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by, or for the Subcontractor under worker's or workmen's compensation acts, disability benefit acts or other employee benefit acts.

12.3 ARCHITECT EXCLUSION. Except as provided by the Contract Documents, the obligation of the Subcontractor under this Article 12 shall not extend to the liability of the Architect, the Architect's consultants, agents or employees of any of them, arising out of:

- (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications; or
- (b) the giving of or the failure to give directions or instructions by the Architect, the Architect's Consultants, and agents or employees of any of them provided such giving of failure to give is the primary cause of the injury or damage.

12.4 COMPLIANCE WITH LAWS. The Subcontractor agrees to be bound by, and at its own cost, comply with all federal, state and local laws, ordinances and regulations (hereinafter collectively referred to as "laws") applicable to the Subcontractor's Work including, but not limited to, equal employment opportunity, minority business enterprise, women's business enterprise, disadvantaged business enterprise, safety and all other laws with which the Contractor must comply according to the Contract Documents.

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

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

ARTICLE 13 INSURANCE

13.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontractor's Work, the Subcontractor shall procure for the Subcontractor's Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, and all insurance required of the Contractor under the Contract Documents.

The Contractor, Owner and other parties as designated in the Contract Documents shall be named as additional insureds on each of these policies except for Workers' Compensation.

This Insurance shall include contractual liability insurance covering the Subcontractor's obligations under Article 12.

13.2. MINIMUM LIMITS OF LIABILITY. The Subcontractor's Comprehensive or Commercial Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 13.1, shall be written with limits of liability not less than the following:

A. Comprehensive General Liability Insurance Including completed operations

1. Combined Single Limit

Bodily Injury and
Property Damage \$
Each Occurrence

\$
Aggregate

2. Bodily Injury

\$
Each Occurrence

\$
Aggregate

3. Property Damage

\$
Each Occurrence

\$
Aggregate

B. Commercial General Liability Insurance

1. Each Occurrence Limit \$ 1000000

2. General Aggregate \$ 2000000

3. Products/Completed Operations Aggregate \$

4. Personal and Advertising Injury Limit \$ 1000000

C. Comprehensive Automobile Liability Insurance

1. Combined Single Limit

Bodily Injury and
Property Damage \$ 1000000
Each Occurrence

2. Bodily Injury

\$
Each Person

\$
Each Occurrence

3. Property Damage

\$
Each Occurrence

13.3. NUMBER OF POLICIES. Comprehensive or Commercial General Liability Insurance and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

13.4. CANCELLATION, RENEWAL OR MODIFICATION. The Subcontractor shall maintain in effect all insurance coverage required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor.

All insurance policies shall contain a provision that the coverages afforded thereunder shall not be canceled or not renewed, nor restrictive modifications added, until at least thirty (30) days prior written notice has been given to the Contractor unless otherwise specifically required in the Contract Documents.

Certificate of Insurance, or certified copies of policies acceptable to the Contractor, shall be filed with the Contractor prior to the commencement of the Subcontractor's Work.

In the event the Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, the Contractor may purchase such coverage and charge the expense thereof to the Subcontractor, or terminate this Agreement.

The Subcontractor shall continue to carry completed operations liability insurance for at least two years after final payment. The Subcontractor shall furnish the Contractor evidence of such insurance at final payment and one year thereafter.

13.5. WAIVER OF RIGHTS. The Contractor and Subcontractor waive all rights against each other and the Owner, the Architect, the Architect's consultants and agents or employees of any of them, separate contractors, and all other subcontractors for loss or damage to the extent covered by Builder's Risk or any other property or equipment insurance, except such rights as they may have to the proceeds of such insurance; provided, however, that such waiver shall not extend to the acts of the Architect, the Architect's consultants, and the agents or employees of any of them listed in Paragraph 12.3.

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

If the Owner or Contractor have not purchased Builder's Risk Insurance for the full insurable value of the Subcontractor's Work less a reasonable deductible, then the Subcontractor may procure such insurance as will protect the interests of the Subcontractor, its subcontractors and their subcontractors in the Work, and, by appropriate Subcontractor Change Order, the cost of such additional insurance shall be reimbursed to the Subcontractor.

If not covered under the Builder's Risk policy of insurance or any other property or equipment insurance required by the Contract Documents, the Subcontractor shall procure and maintain at the Subcontractor's own expense property and equipment insurance for portions of the Subcontractor's Work stored off the site or in transit, when such portions of the Subcontractor's Work are to be included in an application for payment under Article 8.

13.8 ENDORSEMENT. If the policies of insurance referred to in this Article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

ARTICLE 14 ARBITRATION

14.1 AGREEMENT TO ARBITRATE. All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Paragraph 14.2, shall 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. Notwithstanding other provisions in this Agreement, this agreement to arbitrate shall be governed by the Federal Arbitration Act.

14.2 EXCEPTIONS. The agreement to arbitrate shall not apply to any claim:

- (a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto or does not consent to such arbitration; or
- (b) asserted by the Subcontractor against the Contractor if the Contractor accepts said claim, either in whole or part against the Owner, or asserted by the Owner against the Contractor, when the contract between the Contractor and Owner does not provide for binding arbitration, or does so provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim. In either case the parties hereto shall notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Paragraph 14.2, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

14.3 INITIAL DISPUTE RESOLUTION. If a dispute arises out of or relates to this Agreement, or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties may endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration. Mediation will be commenced within the time limits for arbitration stipulated in the Contract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus ten (10) days or as otherwise provided in the Contract Documents. Issues to be mediated are subject to the exceptions in Paragraph 14.2 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 14.4.

14.4 NOTICE OF DEMAND. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made as required in

the Contract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made 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, whichever shall first occur. The location of the arbitration proceedings shall be the location of the Project.

14.5 AWARD. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.6 WORK CONTINUATION AND PAYMENT. Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration. If the Subcontractor is continuing to perform, the Contractor shall continue to make payments in accordance with this Agreement.

14.7 NO LIMITATION OF RIGHTS OR REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under law or payment bonds.

14.8 SAME ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

ARTICLE 15 CONTRACT INTERPRETATION

15.1 INCONSISTENCIES AND OMISSIONS. Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

15.2 LAW AND EFFECT. This Agreement shall be governed by the law of the State of North Carolina.

15.3 SEVERABILITY AND WAIVER. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision. The failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.

15.4 ATTORNEY'S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, to collect damages for the breach of the Agreement, or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

15.6 TITLES. The titles given to the Articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

15.8 ENTIRE AGREEMENT. This Agreement is solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral.

ARTICLE 18 SPECIAL PROVISIONS

18.1 PRECEDENCE. It is understood the work to be performed under this Agreement including the terms and conditions thereof, is as described in Articles 1 through 10 together with the following Special Provisions, which are intended to complement same. However, in the event of any inconsistency, these Special Provisions shall govern.

18.2 SCOPE OF WORK. All work necessary or incidental to complete the swimming pool & dock w/ associated equipment work for the Project in strict accordance with and reasonably inferable from the Contract Documents and as more particularly, though not exclusively, specified in DIV 1, DIV 3 as applicable, DIV 7 as applicable, DIV 11, DIV 22 as applicable, DIV 31 as applicable, DIV 32 with the following additions or deletions: See Exhibit A attached

16.3 COMMON TEMPORARY SERVICES. The following "Project" common temporary services and/or facilities are for the use of all project personnel and shall be furnished as herein below noted:

By this Subcontractor;

By others: Dumpster & toilet facility provided by contractor for use by subcontractor.

10.4 OTHER SPECIAL PROVISIONS. (Insert here any special provisions required by this Agreement.)

10.8 CONTRACT DOCUMENTS. (List applicable Contract Documents including specifications, drawings, Addenda, modifications and executed alternates. Identify with general description, sheet numbers and latest date including revisions.)

Attachment A shall be considered part of the contract. Adhere to all requirements listed in the Preconstruction Conference Outline.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal, the day and year first above written.

SUBCONTRACTOR:

Crystal Pools

By:

Name:

Title:

Date:

Alison Felschaw
President
11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By:

Name: Eric Burrow

Title: Project Manager

Date:

11/16/12



EXHIBIT "A"

CONTRACT NO.: K1301-002

PROJECT: Legion Pool Complex W912HP-11-D-0014

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools (Subcontractor), and
1101 Sparkleberry Lane Ext., Columbia, SC 29223 (Contractor):
Group III Mgt., Inc., 2820 W Vernon Ave, Kinston, NC 28504

THE WORK: (Continued) Work under this subcontract is to include all labor/material/equipment/supervision/taxes and permits necessary to complete this scope of work so that all components will produce a fully functional and operational system in strict conformance with any and all agendas and state, county and local building codes having jurisdiction over this work. Work shall be in accordance with all contract terms and per plans and specifications. The Work shall include but is not limited to the following:

- Div. 1-General Requirements
- Div. 3-Concrete (As applicable)
- Div. 7-Thermal & Moisture Protection (As applicable)
- Div. 11-Equipment
- Div. 22-Plumbing (As applicable)
- Div. 31--Earthwork (As applicable)
- Div. 32-Exterior Improvements (As applicable)

Work to include but not be limited to:

Furnish & install a swimming pool and deck along with all associated equipment.

1. Provide an engineered excavation plan stamped by a Professional Engineer.
2. Forming of pool walls and floors is to be included as necessary.
3. Crystal Pools recognizes that the Demolition Contractor will not grade floors & walls. Crystal to undercut floor of pool compacted soil and backfill with 6" to 8" #57 stone. Group III will furnish sand for the deep end of the pool (approx. 60 yards). Crystal to place sand and compact.
4. Pool plumbing is to be stubbed into the new "Pump Room" constructed by Group III.
5. Attend a coordination meeting with the Electrical Contractor & Demolition Contractor.
6. This is a "Buy American" project.
7. Minor dewatering is to be included. It may well be that at the beginning of each morning water may have to be pumped from the pool. Crystal to provide sumps & pumps for minor pumping.
8. Equipotential Bonding for the pool is to be furnished & installed.
9. Pool coping is to be included.
10. Deck drainage is to be included. It will be taken to points shown on site drawings. To include Nycolplast or equal junction box.
11. If major dewatering is required, it will be added to the contract. Crystal Pools Schedule "A" is a worst case.
12. Work Schedule-12 weeks after the original pool is removed.
13. Furnish AGI certified personnel. Furnish copies of current certifications.
14. All equipment to have wiring run back to panels in the pump room. The Electrical Contractor will make final connections (except auto-shut off). Crystal to leave enough spare wire to make proper connections. The Electrical Contractor will run the power from the "Auto Shut off" back to the panel after making connection into the panel. This will be covered in depth in accordance with Item #5.

JB CONTRACTOR:

Crystal Pools

By: Alison FeltschewDate: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: 11/19/12



EXHIBIT "A"

PROJECT: Legion Pool Complex W912HP-11-D-0014

CONTRACT NO.: K1301-002

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools
1101 Sparkleberry Lane Ext. Columbia, SC 29223 (Subcontractor), and
 Group III Mgt., Inc., 2820 W Vernon Ave, Kinston, NC 28504 (Contractor):

THE WORK: (Continued)

16. Crystal to backfill pool & install concrete pool deck. Coordinate with Group III on footing for sun shade.
18. Furnish 8 sets of submittals by 11/13/12.
17. Furnish name of bonding company.
18. If bond is required, Group III will pay the cost of the bond.
19. Certified payrolls are to be turned in WEEKLY.
20. Crystal to coordinate concrete for steps, sidewalk and pump house. Group III to pay for this work.
21. Crystal to coordinate with Group III & the Electrical Contractor on the pole light bases for the external lights.

Price= Pool & equipment	\$298,958
Less Pool lights	(\$ 3,000)
Pool Deck w/drainage system	\$ 44,002
TOTAL	\$339,960

SUBCONTRACTOR:

Crystal Pools

By: Alison Felsch Alison FelschDate: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: [Signature]

EXHIBIT B

RESPONSE TO DEMAND FOR ARBITRATION

NOW COMES SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") by and through their undersigned counsel, and in response to the Demand for Arbitration by Group III Mgmt., Inc. ("Claimant"), under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. Claimant's Information:

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No.: 252-527-3377
- e. E-mail Address: sgreene@groupilllmt.com

2. Respondent's Information:

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-865-1200
- d. Fax No.: 803-865-0209
- e. E-mail Address: all@crystalpool.com

3. Claimant's Representative Information:

- a. Name of Representative: Everette K. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No.: 252-523-2060
- e. Representative's E-mail Address: ewooten@wootenandcoley.com

4. Respondent's Representative Information:

- a. Name of Representative: Alan R. Belcher, Jr.
- b. Address of Representative: 40 Calhoun Street, Suite 550,
Charleston, SC 29401
- c. Representative's Phone: 843-720-3478
- d. Representative's Fax No.: 843-720-3479
- e. Representative's E-mail Address: abelcher@hallboothsmith.com

5. Statement of Respondent's Response to Claimant's Demand: To the extent any of the allegations of the Claimant can be construed to allege liability or claims against Respondent, Respondent denies all allegations of Claimant's Demand.

6. Statement of Respondent's Counterclaims:

- a. Respondent is a swimming pool construction company who entered into a contract with Claimant to furnish and install a swimming pool and deck along with all associated equipment for the US Army Corps of Engineers in Columbia, South Carolina;
- b. Respondent furnished said labor and materials pursuant to its contract with Claimant;
- c. The Claimant has not paid Respondent in full for the labor and materials provided by Respondent;
- d. There is an outstanding balance on the contract due and owing to the Respondent by the Claimant;
- e. The Claimant has been unjustly enriched by Respondent's labor and materials without paying Respondent; and

f. There are damages due and owing to Respondent by the Claimant.

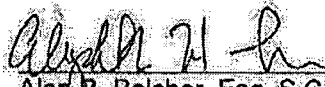
In summary, Respondent requests:

1. That Respondent recover of Claimant its damages (plus such additional amounts to which Respondent may be entitled such as interest, costs, and attorney's fees);
2. That Respondent be adjudged not to be indebted to Claimant in any amount on account of work done by Claimant pursuant to its completion of Respondent's subcontract on the Project.
3. That any bond claims made by Claimant on this Project be dismissed.
4. That Respondent be awarded representative fees and expenses.

RESPECTFULLY SUBMITTED this 11 day of November, 2013.

HALL, BOOTH, SMITH, P.C.

By:


Alan R. Belcher, Esq. S.C. Bar No. 71686
Elizabeth H. Freeman, Esq. S.C. Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, SC 29401
Phone: (843) 720-3460
Fax: (843) 720-3458
abelcher@hallboothsmith.com
efreeman@hallboothsmith.com

*Attorneys for Respondent, SunCrete of
Carolina, Inc., d/b/a Crystal Pools*

EXHIBIT C

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

ARBITRATION AWARD

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

Pursuant to the Construction Arbitration Rules of the American Arbitration Association, this matter came before the undersigned as the duly appointed Arbitrator for a hearing on the merits. Hearings were held in person on July 8, 9 and 10, 2014 in Columbia, South Carolina. The continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted affidavits regarding attorneys' fees on July 18, 2014. The hearing was declared closed as of July 23, 2014.

Group III Mgt. Inc. ("Group III") was represented by attorneys Everett Wooten and John Bruton. Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") was represented by attorney Alan Belcher. Both parties presented testimony of witnesses, introduced exhibits, and argued their case. Group III asserted a claim against Crystal Pools for \$308,386.52 as more fully explained below. Crystal Pools denied any responsibility to Group III and asserted a counterclaim against Group III in the amount of \$84,671.98 as more fully explained below.

CRB
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WCSR 32753000v1

The parties agree that the original contract between Group III and Crystal Pools was in the amount of \$339,960.00. The parties also agree that Crystal Pools has been paid \$77,085.00 leaving a balance to earn on the contract of \$262,875.00.

Group III asserts that the cost to repair Crystal Pools' work and to complete Crystal Pools' unfinished scope of work is \$508,933.52. In addition, Group III made a payment to Hardaway Concrete in the amount of \$9,500.00 which it claims was for the benefit of Crystal Pools. Group III also asserts that it incurred \$52,464.00 in Liquidated Damages (\$2,186/day for 24 days) as a result of delays caused by Crystal Pools. The total of these amounts is \$570,897.52. After subtracting the agreed upon balance of contract amount of \$262,875.00, Group III has a remaining claim against Crystal Pools of \$308,022.52.

While Crystal Pools agrees that the contract balance to earn was \$262,875.00, it disputes the cost to repair and the completion costs incurred by Group III and further denies responsibility for the Liquidated Damages. Crystal Pools asserts that the maximum reasonable cost to repair and complete its scope of work was \$178,203.02. When that amount is subtracted from the remaining contract balance it results in a balance due to Crystal Pools of \$84,671.98, which is the amount of its counterclaim. Crystal Pools also asserts that it is entitled to change orders for additional costs it incurred in connection with the work.

After consideration of all of the evidence and arguments of counsel I find as follows:

1. Crystal Pools is entitled to additional costs associated with shoring in the amount of \$13,850.00.
2. Crystal Pools is also entitled to additional costs for undercutting unsuitable soils after proofrolling in the amount of \$1,474.74.

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3. Group III is entitled to recover the \$9,500.00 it paid to Hardaway Concrete for concrete provided for the benefit of Crystal Pools on this project.

4. Group III is entitled to recover the reasonable cost of repairing Crystal Pools' unsatisfactory work in the amount of \$27,473.50.

5. Group III is entitled to recover the reasonable cost of completing Crystal Pools' scope of work after Crystal Pools abandoned the project in the amount of \$287,388.47.

6. Due to delays caused by Crystal Pools, Group III is entitled to recover an appropriate allocation of the Liquidated Damages assessed by the Army Corps of Engineers in the amount of \$34,976.00.

Therefore, I find that Group III is entitled to recover from Crystal Pools the net sum of \$81,138.23 as shown below:

Balance of Contract	\$262,875.00
Plus Shoring	13,850.00
Plus Undercut	1,474.74
Less Hardaway payment	(9,500.00)
Less Cost to Repair	(27,473.50)
Less Cost to Complete	(287,388.47)
Less Liquidated Damages	(34,976.00)
Net Amount Due to Group III	\$81,138.23

The agreement between the parties provides for an award of attorneys' fees and costs to the prevailing party. I find that Group III is the prevailing party in this matter and award \$116,165.86 in reasonable attorneys' fees and costs associated with the prosecution of its claim and defense of the counterclaim, excluding the fees and expenses of the Arbitrator and the AAA.

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The administrative fees of the American Arbitration Association, totaling \$7,475.00, and the fees and expenses of the arbitrator, totaling \$17,090.62, shall be borne as incurred by the parties.

Therefore, I find a TOTAL AWARD in favor of Group III Mgt. Inc. against Suncrete of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09.


C. Allen Gibson, Jr.
Arbitrator

August 18, 2014

EXHIBIT D



GROUP III MGT., INC.

SUBCONTRACT FOR BUILDING CONSTRUCTION

PROJECT NO.: K1301 **CONTRACT NO.:** K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209

TABLE OF ARTICLES

1. AGREEMENT
2. SCOPE OF WORK
3. SCHEDULE OF WORK
4. CONTRACT PRICE
5. PAYMENT
6. CHANGES, CLAIMS AND DELAYS
7. CONTRACTOR'S OBLIGATIONS
8. SUBCONTRACTOR'S OBLIGATIONS
9. SUBCONTRACT PROVISIONS
10. RECOURSE BY CONTRACTOR
11. LABOR RELATIONS
12. INDEMNIFICATION
13. INSURANCE
14. ARBITRATION
15. CONTRACT INTERPRETATION
16. SPECIAL PROVISIONS

This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification and particularly when used with other than AIA A201, General Conditions of the Contract for Construction, 1987 edition, or document with identical wording.

WORDING IDENTICAL TO AGC DOCUMENT NO. 600 DATED 1990

PAGE 1

SUBCONTRACT FOR BUILDING CONSTRUCTION**ARTICLE 1****AGREEMENT**

This Agreement is made this 11/8/2012, by and between

Group III Mgt, Inc.

hereinafter called the Contractor and Crystal Pools, Subcontractor, to perform part of the Work on the following Project.

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2761 Semmes Rd.
Fort Jackson, SC 29207

OWNER: U.S. Army Corps of Engineers, Charleston
89-A Hagood Ave.
Charleston, SC 29403

ARCHITECT: Davis & Floyd Engineering Architecture
POB 61599
Charleston, SC 29419

CONTRACTOR: Group III Mgt, Inc.
2820 W. Vernon Ave.
Kinston, NC 28504
(Phone) 252-527-3333 (Fax) 252-527-3377
Erik Barrow

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-866-1200 (Fax) 803-866-0209
John Rogers

CONTACT:

FED TAX ID #:

VENDOR NO.:

COST CODE: Swimming Pool & Deck

CONTRACT PRICE: Three hundred thirty-nine thousand nine hundred sixty dollars
\$339,960.00
(Herein Insert a lump sum, unit price or both. Bid schedules must be referenced.)

Notice to the parties shall be given at the above addresses.

13.8 **ENDORSEMENT.** If the policies of insurance referred to in this Article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

ARTICLE 14 ARBITRATION

14.1 **AGREEMENT TO ARBITRATE.** All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Paragraph 14.2, shall 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. Notwithstanding other provisions in the Agreement, this agreement to arbitrate shall be governed by the Federal Arbitration Act.

14.2 **EXCEPTIONS.** The agreement to arbitrate shall not apply to any claim:

- (a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto or does not consent to such arbitration; or
- (b) asserted by the Subcontractor against the Contractor if the Contractor asserts said claim, either in whole or part against the Owner, or asserted by the Owner against the Contractor, when the contract between the Contractor and Owner does not provide for binding arbitration, or does so provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim. In either case the parties hereto shall notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Paragraph 14.2, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

14.3 **INITIAL DISPUTE RESOLUTION.** If a dispute arises out of or relates to this Agreement, or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties may endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration. Mediation will be commenced within the time limits for arbitration stipulated in the Contract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus ten (10) days or as otherwise provided in the Contract Documents. Issues to be mediated are subject to the exceptions in Paragraph 14.2 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 14.4.

14.4 **NOTICE OF DEMAND.** Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made as required in

the Contract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made 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, whichever shall first occur. The location of the arbitration proceedings shall be the location of the Project.

14.5 **AWARD.** The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.6 **WORK CONTINUATION AND PAYMENT.** Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration. If the Subcontractor is continuing to perform, the Contractor shall continue to make payments in accordance with this Agreement.

14.7 **NO LIMITATION OF RIGHTS OR REMEDIES.** Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under its laws or payment bonds.

14.8 **SAME ARBITRATORS.** To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other Subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

ARTICLE 15 CONTRACT INTERPRETATION

15.1 **INCONSISTENCIES AND OMISSIONS.** Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

15.2 **LAW AND EFFECT.** This Agreement shall be governed by the law of the State of North Carolina.

15.3 **SEVERABILITY AND WAIVER.** The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision. The failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.

15.4 **ATTORNEY'S FEES.** Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, to collect damages for the breach of the Agreement, or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

10.6 TITLES. The titles given to the Articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

10.9 ENTIRE AGREEMENT. This Agreement is solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral.

ARTICLE 10 SPECIAL PROVISIONS

10.1 PRECEDENCE. It is understood the work to be performed under this Agreement, including the terms and conditions thereof, is as described in Articles 1 through 10 together with the following Special Provisions, which are intended to complement same. However, in the event of any inconsistency, these Special Provisions shall govern.

10.2 SCOPE OF WORK. All work necessary or incidental to complete the swimming pool & deck w/ associated equipment work for the Project in strict accordance with and reasonably inferable from the Contract Documents and as more particularly, though not exclusively, specified in Div 1, Div 9 as applicable, Div 7 as applicable, Div 11, Div 22 as applicable, Div 31 as applicable, Div 32 with the following additions or deletions: See Exhibit A attached

10.3 COMMON TEMPORARY SERVICES. The following "Project" common temporary services and/or facilities are for the use of all project personnel and shall be furnished as herein below noted:

By this Subcontractor;

By others: Dumster & toilet facility provided by contractor for use by subcontractor.

10.4 OTHER SPECIAL PROVISIONS. (Insert here any special provisions required by this Agreement.)

10.5 CONTRACT DOCUMENTS. (List applicable Contract Documents including specifications, drawings, addenda, modifications and awarded alternates. Identify with general description, sheet numbers and latest date including revisions.)

Attachment A shall be considered part of the contract. Adhere to all requirements listed in the Preconstruction Conference Outline.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal, the day and year first above written.

SUBCONTRACTOR:

Crystal Pools

By:

Name: Alison Felschewski
Title: President
Date: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By:

Name: Erik Barrow

Title: Project Manager

Date:

WORDING IDENTICAL TO AGC DOCUMENT NO. 600 DATED 1990

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EXHIBIT E

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

**ORDER DENYING
REQUEST TO MODIFY AWARD**

Respondent Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") submitted a request that the undersigned Arbitrator modify the Award dated August 18, 2014. This request was submitted to opposing counsel and the Arbitrator on September 8, 2014. Claimant Group III Mgt. Inc. timely filed its Response. Although Rule 48(a) requires that any request for modification of an Award be submitted within twenty (20) calendar days, Rule 48(c) also provides that if applicable law allows for a different procedural timeframe, that procedure shall be followed. Since the twentieth calendar day after transmittal of the Award fell on a Sunday, I find that under the laws and procedure generally applicable to service of motions (see Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure) service of the request on the following Monday was timely.

Nevertheless, the substance of the request by Crystal Pools is beyond the scope of Rule 48 since modification of any Award is only allowed to "correct any clerical, typographical, technical or computational errors in the Award." Rule 48(a) specifically states as follows: "[T]he Arbitrator is not empowered to re-determine the merits of any claim already decided."

CRP
11-1

WCSR 3303.3782v1

The parties submitted to the Arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorney's fees that should be awarded to that party. That decision was carefully considered and made as set forth in the Award. There is no "clerical, typographical, technical or computational error" in the Award. Therefore, Crystal Pools' request to modify the Award is denied.


C. Allen Gibson, Jr.
Arbitrator

September 25, 2014

EXHIBIT F

N.C. Gen. Stat. § 6-21.6

Statutes current through the 2013 Regular Session Annotations Current through June 6, 2014

General Statutes of North Carolina > CHAPTER 6. LIABILITY FOR COURT COSTS > ARTICLE 1. CIVIL ACTIONS AND PROCEEDINGS

§ 6-21.6. Reciprocal attorneys' fees provisions in business contracts

(a) As used in this section, the following definitions apply:

- (1) **Business contract.** -- A contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this State is a party.
- (2) **Consumer contract.** -- A contract entered into by one or more individuals primarily for personal, family, or household purposes.
- (3) **Employment contract.** -- A contract between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor.
- (4) **Reciprocal attorneys' fees provisions.** -- Provisions in any written business contract by which each party to the contract agrees, in the manner set out in subsection (b) of this section, upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.

(b) Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.

(c) If a business contract governed by the laws of this State contains a reciprocal attorneys' fees provision, the court or arbitrator in any suit, action, proceeding, or arbitration involving the business contract may award reasonable attorneys' fees in accordance with the terms of the business contract. In determining reasonable attorneys' fees and expenses under this section, the court or arbitrator may consider all relevant facts and circumstances, including, but not limited to, the following:

- (1) The amount in controversy and the results obtained.
- (2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
- (3) The novelty and difficulty of the questions raised in the action.
- (4) The skill required to perform properly the legal services rendered.
- (5) The relative economic circumstances of the parties.
- (6) Settlement offers made prior to the institution of the action.
- (7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.
- (8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.
- (9) The timing of settlement offers.
- (10) The amounts of settlement offers as compared to the verdict.
- (11) The extent to which the party seeking attorneys' fees prevailed in the action.
- (12) The amount of attorneys' fees awarded in similar cases.
- (13) The terms of the business contract.

- (d) Reasonable attorneys' fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys' fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys' fees provisions.
- (e) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in consumer contracts or in any note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2. If the business contract is also a note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2, then the parties that are entitled to recover attorneys' fees and expenses may elect to recover attorneys' fees and expenses either under this section or G.S. 6-21.2 but may recover only once for the same attorneys' fees and expenses.
- (f) In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the amount in controversy.
- (g) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in a contract of insurance governed by Chapter 58 of the General Statutes.

History

2011-341, s. 2

Annotations

Notes

DRAFTER'S COMMENT

The requirement in subsection (b) of a signature "by hand" was included to prevent the application of this section to agreements executed without manual signatures including clickwrap agreements (agreements that present the user with a message on his or her computer screen that requires the user to manifest his or her assent to the terms of the agreement by clicking on an icon) and other agreements executed with electronic signatures as defined in G.S. 66-312. The requirement in subsection (b) of a signature "by hand" is not intended to prevent the application of this section to agreements executed with manual signatures that are thereafter delivered by electronic reproductive image thereof.

EDITOR'S NOTE. --

Session Laws 2011-341, s. 3, made this section effective October 1, 2011, and applicable to business contracts entered into on or after that date.

Session Laws 2011-341, s. 1, provides: "The purpose of this act is to validate reciprocal attorneys' fees provisions in business contracts."

Session Laws 2011-292, s. 1, also enacted a section designated as G.S. 6-21.6. That section has been renumbered as G.S. 6-21.7 at the direction of the Revisor of Statutes.

Session Laws 2012-194, s. 44, provides: "The Revisor of Statutes may cause to be printed all explanatory comments of the drafters of S.L. 2011-339 and S.L. 2011-344 as the Revisor deems appropriate."

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this subpart, part, article, or chapter.

General Statutes of North Carolina

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EXHIBIT G

North Carolina General Statutes § 44A-35 Attorneys' fees

Article 3.

Model Payment and Performance Bond.

§ 44A-35. Attorneys' fees.

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer. (1991 (Reg. Sess., 1992), c. 1010, s. 3; 1993 (Reg. Sess., 1994), c. 763, s. 1.)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Group III Mgt., Inc.,

Claimant/Plaintiff

v.

Suncrete of Carolina, Inc. d/b/a Crystal
Pools

Respondent/Defendant

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-CP-40-07229

**CLAIMANT/PLAINTIFF GROUP III
MGT., INC.'S MOTION TO
CONFIRM ARBITRATION AWARD**

The Claimant/Plaintiff, Group III Mgt., Inc., (hereinafter referred to as "Group III") by and through its undersigned attorneys hereby respectfully moves the Court, pursuant to The Federal Arbitration Act, 9 USC § 9 (2000) and Rule 51 (c) of the AAA Construction Arbitration Rules to confirm as the judgment of this Court the Arbitration Award rendered in favor of Group III and against Respondent/Defendant, Suncrete of Carolina, Inc. d/b/a Crystal Pools, (hereinafter referred to as "Crystal Pools"). In support of its motion, Group III shows the Court as follows:

1.

This Court has jurisdiction over this matter pursuant to Title 9, Section 9 of the Federal Arbitration Act which specifically states "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title" and Rule 51(c) of the AAA Construction Arbitration rules which states "Parties to these Rules shall be deemed to have consented that

judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."

2.

Group III was the General Contractor on a project being done for the U.S. Army Corps of Engineers at the Fort Jackson Army Base in Columbia, South Carolina. The project was known as the "Legion Pool Complex". Group III sub-contracted a portion of the work to Respondent/Defendant Crystal Pools pursuant to a Subcontract for Building Construction dated November 8, 2012, at a contract price of \$339,960.00 (the "Subcontract"). The work to be done by Crystal Pools pursuant to the Contract was the construction of a swimming pool and deck.

3.

Subsequent to the aforementioned contract date and after the work commenced, the parties became entangled in a variety of disputes which could not be resolved.

4.

The parties, in their Subcontract, agreed that all claims, disputes, etc. arising out of the work under the Subcontract would be submitted to arbitration with the award of the arbitrator to be final. The Subcontract between the parties set forth, in pertinent part:

14.1 **Agreement to Arbitrate.** All claims, disputes and matters in question arising out of or relating to this Agreement or the breach thereof ... shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ... Notwithstanding other provisions in the Agreement this agreement to arbitrate shall be governed by the Federal Arbitration Act.

14.5 **Award.** The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction.

5.

In light of arbitration provisions of the Subcontract, on September 19, 2013, Group III filed a Demand for Arbitration pursuant to the Construction Arbitration Rules of the American Arbitration Association, and was assigned Case No. 31-110-000261-13 (Exhibit A).

6.

On November 11, 2013, the Respondent/Defendant, Crystal Pools, filed its Response to Demand for Arbitration and asserted a counterclaim (Exhibit B).

7.

Under the procedures of the Construction Arbitration Rules of the American Arbitration Association, C. Allen Gibson, Esquire, a Charleston attorney with extensive experience in the field of construction law and practice, and was selected as the arbitrator. Mr. Gibson has served as an arbitrator and a mediator of construction disputes for over 30 years and is president-elect of the American College of Construction Lawyers.

8.

Mr. Gibson held hearings in Columbia, South Carolina for three consecutive days, July 8, 9 and 10, 2014, with a follow up hearing via telephone on July 14, 2014. During the course of the 3 ½ days of hearings all parties were provided an opportunity to present testimony and evidence. The parties subsequently submitted Affidavits regarding attorneys' fees on July 18, 2014, and the Hearing was declared closed on July 23, 2014.

9.

On August 18, 2014, the duly appointed Arbitrator, C. Allen Gibson, rendered his Arbitration Award (Exhibit C) finding a total award in favor of Group III Mgt., Inc. against Suncrete of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09 and no amount was awarded as to the counterclaim of Crystal Pools.

10.

On September 8, 2014, Crystal Pools filed Respondent's Request to Modify Award pursuant to R-48 of the AAA Construction Arbitration Rules requesting the Arbitrator to reduce the amount of attorneys' fees awarded to Group III.

11.

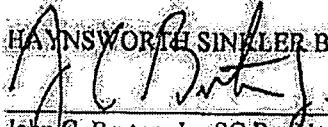
On September 25, 2014, Arbitrator, C. Allen Gibson, entered an Order Denying Request to Modify Award. The Arbitrator pointed out that the parties submitted to the Arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorneys' fees that should be awarded to that party. The Arbitrator pointed out that his decision was carefully considered and there was no "clerical, typographical, technical or computational error" in the award. Therefore, Crystal Pools' request to modify the Award was denied (Exhibit D).

WHEREFORE, the Claimant/Plaintiff, Group III, respectfully requests this Court enter an order confirming the Arbitration Award attached as Exhibit C as the judgment of the Court and entering judgment in favor of Claimant/Plaintiff Group III Mgt., Inc. and against Respondent/Defendant Suncrete of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09.

Respectfully submitted this 19 day of December, 2014.

By:

HAYNSWORTH SINKLER BOYD, P.A.


John C. Bruton, Jr., SC Bar No. 975
120 Main Street, Suite 2200
Post Office Box 11889 (2911-1889)
Columbia, South Carolina 29201
(803) 779.3080 - telephone
(803) 765.1243 - fax
jbruton@hsblawfirm.com

WOOTEN AND COLEY
Everette L. Wooten, Jr.
P O Box 1555
Kinston, North Carolina 28503
(252) 523.8000 - telephone
(252) 523.2060 - fax
ewooten@wootenandcoley.com

Attorneys for Claimant/Plaintiff
Group III Mgt., Inc.

DM 3903218v1

EXHIBIT A

DEMAND FOR ARBITRATION

NOW COMES Group III Mgt., Inc. ("Claimant"), a North Carolina corporation and hereby demands arbitration against SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. Claimant's Information:

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No: 252-527-3377
- e. E-mail Address: sgreene@groupiiimgt.com

2. Respondent's Information:

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-865-1200
- d. Fax No: 803-865-0209
- e. E-mail Address: all@crystalpool.com

3. Claimant's Representative Information:

- a. Name of Representative: Everette L. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No: 252-523-2060
- e. Representative's E-mail Address: ewooten@wootenandcoley.com

4. Respondent's Representative Information: UNKNOWN

5. Statement Of Claimant's Claim: Plaintiff is General Contractor on a project being done for the U.S. Army Corps of Engineers in Columbia, South Carolina, said project being known as "Legion Pool Complex, W192HP-11-D-0014 (hereinafter referred to as "Project"). Claimant sub-contracted a portion of said work to Respondent pursuant to a subcontract dated November 8, 2012, at a contract price of \$339,960.00.

The work to be done by Respondent pursuant to said subcontract was the construction of a swimming pool and deck.

Immediately after embarking on the project, Respondent submitted to Claimant Payment Application #1 in the sum of \$77,085.00. This application was almost exclusively for materials stored on site when, in fact, no such materials were stored on site nor had such materials been received by Crystal Pools. When this pay request was not paid immediately, Respondent ceased work on the project and on February 14, 2013, indicated it was 'closing the job down' unless it received full payment of its Payment Application #1. In order to entice Respondent to get back on the job, on February 20, 2013, Respondent paid Payment Application #1 even though the materials were not on site and to the best of Claimant's knowledge, most of the materials had not been paid for. Claimant made its payment to Respondent even though Claimant had not and could not bill the owner at that time.

Respondent returned to the job and performed site work, placing forms and placing rebar. The work done by Respondent was not done in a workmanlike manner and on or about March 18, 2013, Respondent again notified Claimant that Respondent would not continue on the project. On March 22, 2013, Petitioner gave Respondent a 3-day notice to cure its failure to prosecute the work. Respondent did not come back on the job; so on March 29, 2013, Claimant notified Respondent that Claimant had determined to complete the work under the subcontract. Claimant took this action not only because Respondent failed to prosecute the work but also because the work that was done was sub-standard and not according to the contract documents as evidenced by notice received by the owner citing Claimant for lack of contractor quality control with respect to the work performed by Respondent.

Claimant completed the work called for by Respondent's subcontract at a cost greatly in excess of the balance remaining on Respondent's subcontract. Claimant contends that pursuant to the terms of the subcontract it is entitled to recover such excess from Respondent. The amount to which Claimant is entitled is computed as follows:

Amount expended by Claimant to to complete Project	\$505,688.71
Amount of Crystal Pools' contract	\$339,960.00
Amount previously paid Crystal Pools	(77,085.00)
Amount previously paid concrete supplier	(9,500.00)
Amount remaining on Crystal Pools' contract	<u>\$253,375.00</u>
Balance owed to Group III Mgt., Inc.	<u>\$252,313.71</u>

Claimant's claim may be increased in the event of assessment of liquidated damages by the owner since the Project was substantially delayed by the Respondent and all or part of such liquidated damages may be properly back-charged against Respondent. In addition, suppliers of Claimant which are unpaid may assert claims against Claimant or its bonding company and Claimant would be entitled to have its claim hereunder increased by the amount of such claims.

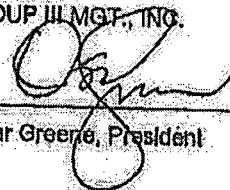
In summary, Claimant requests:

- a. That Claimant recover of Respondent in the sum of \$252,313.71 (plus such additional amounts to which Claimant may be entitled) and be granted an award in that amount.
 - b. That Claimant be adjudged not to be indebted to Respondent in any amount on account of work done by Respondent pursuant to its subcontract on the Project.
 - c. That any bond claims made by respondent against Claimant on this Project be dismissed.
 - d. That Claimant be awarded representative fees and expenses.
6. That the arbitration hearing should be conducted in Columbia, South Carolina.
 7. That Claimant is attaching hereto the sum of \$1,000.00 administrative filing fee (flexible schedule).
 8. A copy of this demand together with a copy of the arbitration agreement has been provided to the Respondent by mailing a copy of same to it at the address set forth above and faxing a copy of same to the fax number set forth above.

RESPECTFULLY SUBMITTED this the 19th day of September, 2013.

GROUP III MGT., INC.

BY:


Oscar Greene, President

Michael J. Greene, Jr., Esq., is a member of the New York State Bar Association and is admitted to practice law in the State of New York.

EXHIBIT B

RESPONSE TO DEMAND FOR ARBITRATION

NOW COMES SunCrete of Carolina, Inc., d/b/a Crystal Pools ("Respondent") by and through their undersigned counsel, and in response to the Demand for Arbitration by Group III Mgmt., Inc. ("Claimant"), under the Construction Arbitration Rules of the American Arbitration Association and does hereby set forth the following:

1. **Claimant's Information:**

- a. Name: Group III Mgt., Inc.
- b. Address: 2820 West Vernon Avenue, Kinston, NC 28504
- c. Phone: 252-527-3333
- d. Fax No.: 252-527-3377
- e. E-mail Address: sgreene@group11lmgmt.com

2. **Respondent's Information**

- a. Name: SunCrete of Carolina, Inc., d/b/a Crystal Pools
- b. Address: 1101 Sparkleberry Lane Extension, Columbia, SC 29223
- c. Phone: 803-865-1200
- d. Fax No.: 803-865-0209
- e. E-mail Address: all@crystalpool.com

3. **Claimant's Representative Information:**

- a. Name of Representative: Everett K. Wooten, Jr.
- b. Address of Representative: P O Box 1555, Kinston, NC 28503
- c. Representative's Phone: 252-523-8000
- d. Representative's Fax No.: 252-523-2060
- e. Representative's E-mail Address: ewooten@woolenandcolay.com

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6213-0001

4. Respondent's Representative Information:

- a. Name of Representative: Alan R. Belcher, Jr.
- b. Address of Representative: 40 Calhoun Street, Suite 550,
Charleston, SC 29401
- c. Representative's Phone: 843-720-3478
- d. Representative's Fax No.: 843-720-3479
- e. Representative's E-mail Address: abelcher@hallboothsmith.com

5. Statement of Respondent's Response to Claimant's Demand: To the extent any of the allegations of the Claimant can be construed to allege liability or claims against Respondent, Respondent denies all allegations of Claimant's Demand.

6. Statement of Respondent's Counterclaims:

- a. Respondent is a swimming pool construction company who entered into a contract with Claimant to furnish and install a swimming pool and deck along with all associated equipment for the US Army Corps of Engineers in Columbia, South Carolina;
- b. Respondent furnished said labor and materials pursuant to its contract with Claimant;
- c. The Claimant has not paid Respondent in full for the labor and materials provided by Respondent;
- d. There is an outstanding balance on the contract due and owing to the Respondent by the Claimant;
- e. The Claimant has been unjustly enriched by Respondent's labor and materials without paying Respondent; and

f. There are damages due and owing to Respondent by the Claimant.

In summary, Respondent requests:

1. That Respondent recover of Claimant its damages (plus such additional amounts to which Respondent may be entitled such as interest, costs, and attorney's fees);
2. That Respondent be adjudged not to be indebted to Claimant in any amount on account of work done by Claimant pursuant to its completion of Respondent's subcontract on the Project.
3. That any bond claims made by Claimant on this Project be dismissed.
4. That Respondent be awarded representative fees and expenses.

RESPECTFULLY SUBMITTED this 11 day of November, 2013.

HALL, BOOTH, SMITH, P.C.

By:


Alan R. Belcher, Esq. S.C. Bar No. 71688
Elizabeth H. Freeman, Esq. S.C. Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, SC 29401
Phone: (843) 720-3460
Fax: (843) 720-3458
abelcher@hallboothsmith.com
efreeman@hallboothsmith.com

*Attorneys for Respondent, SunCrate of
Carolina, Inc., d/b/a Crystal Pools*

EXHIBIT C

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

ARBITRATION AWARD

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

Pursuant to the Construction Arbitration Rules of the American Arbitration Association, this matter came before the undersigned as the duly appointed Arbitrator for a hearing on the merits. Hearings were held in person on July 8, 9 and 10, 2014 in Columbia, South Carolina. The continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted affidavits regarding attorneys' fees on July 18, 2014. The hearing was declared closed as of July 23, 2014.

Group III Mgt. Inc. ("Group III") was represented by attorneys Everett Wooten and John Bruton. Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") was represented by attorney Alan Belcher. Both parties presented testimony of witnesses, introduced exhibits, and argued their case. Group III asserted a claim against Crystal Pools for \$308,386.52 as more fully explained below. Crystal Pools denied any responsibility to Group III and asserted a counterclaim against Group III in the amount of \$84,671.98 as more fully explained below.

CLB
#1

WCSR 32755000v1

The parties agree that the original contract between Group III and Crystal Pools was in the amount of \$339,960.00. The parties also agree that Crystal Pools has been paid \$77,085.00 leaving a balance to earn on the contract of \$262,875.00.

Group III asserts that the cost to repair Crystal Pools' work and to complete Crystal Pools' unfinished scope of work is \$508,933.52. In addition, Group III made a payment to Hardaway Concrete in the amount of \$9,500.00 which it claims was for the benefit of Crystal Pools. Group III also asserts that it incurred \$52,464.00 in Liquidated Damages (\$2,186/day for 24 days) as a result of delays caused by Crystal Pools. The total of these amounts is \$570,897.52. After subtracting the agreed upon balance of contract amount of \$262,875.00, Group III has a remaining claim against Crystal Pools of \$308,022.52.

While Crystal Pools agrees that the contract balance to earn was \$262,875.00, it disputes the cost to repair and the completion costs incurred by Group III and further denies responsibility for the Liquidated Damages. Crystal Pools asserts that the maximum reasonable cost to repair and complete its scope of work was \$178,203.02. When that amount is subtracted from the remaining contract balance it results in a balance due to Crystal Pools of \$84,671.98, which is the amount of its counterclaim. Crystal Pools also asserts that it is entitled to change orders for additional costs it incurred in connection with the work.

After consideration of all of the evidence and arguments of counsel I find as follows:

1. Crystal Pools is entitled to additional costs associated with shoring in the amount of \$13,850.00.
2. Crystal Pools is also entitled to additional costs for undercutting unsuitable soils after proofrolling in the amount of \$1,474.74.

3. Group III is entitled to recover the \$9,500.00 it paid to Hardaway Concrete for concrete provided for the benefit of Crystal Pools on this project.

4. Group III is entitled to recover the reasonable cost of repairing Crystal Pools' unsatisfactory work in the amount of \$27,473.50.

5. Group III is entitled to recover the reasonable cost of completing Crystal Pools' scope of work after Crystal Pools abandoned the project in the amount of \$287,388.47.

6. Due to delays caused by Crystal Pools, Group III is entitled to recover an appropriate allocation of the Liquidated Damages assessed by the Army Corps of Engineers in the amount of \$34,976.00.

Therefore, I find that Group III is entitled to recover from Crystal Pools the net sum of \$81,138.23 as shown below:

Balance of Contract	\$262,875.00
Plus Shoring	13,850.00
Plus Undercut	1,474.74
Less Hardaway payment	(9,500.00)
Less Cost to Repair	(27,473.50)
Less Cost to Complete	(287,388.47)
Less Liquidated Damages	<u>(34,976.00)</u>
Net Amount Due to Group III	\$81,138.23

The agreement between the parties provides for an award of attorneys' fees and costs to the prevailing party. I find that Group III is the prevailing party in this matter and award \$116,165.86 in reasonable attorneys' fees and costs associated with the prosecution of its claim and defense of the counterclaim, excluding the fees and expenses of the Arbitrator and the AAA.

CLB
3

The administrative fees of the American Arbitration Association, totaling \$7,475.00, and the fees and expenses of the arbitrator, totaling \$17,090.62, shall be borne as incurred by the parties.

Therefore, I find a TOTAL AWARD in favor of Group III Mgt. Inc. against Suncrete of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09.


C. Allen Gibson, Jr.
Arbitrator

August 18, 2014

EXHIBIT D

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

**ORDER DENYING
REQUEST TO MODIFY AWARD**

Respondent Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") submitted a request that the undersigned Arbitrator modify the Award dated August 18, 2014. This request was submitted to opposing counsel and the Arbitrator on September 8, 2014. Claimant Group III Mgt. Inc. timely filed its Response. Although Rule 48(a) requires that any request for modification of an Award be submitted within twenty (20) calendar days, Rule 48(c) also provides that if applicable law allows for a different procedural timeframe, that procedure shall be followed. Since the twentieth calendar day after transmittal of the Award fell on a Sunday, I find that under the laws and procedure generally applicable to service of motions (see Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure) service of the request on the following Monday was timely.

Nevertheless, the substance of the request by Crystal Pools is beyond the scope of Rule 48 since modification of any Award is only allowed to "correct any clerical, typographical, technical or computational errors in the Award." Rule 48(n) specifically states as follows: "[T]he Arbitrator is not empowered to re-determine the merits of any claim already decided."

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The parties submitted to the Arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorney's fees that should be awarded to that party. That decision was carefully considered and made as set forth in the Award. There is no "clerical, typographical, technical or computational error" in the Award. Therefore, Crystal Pools' request to modify the Award is denied.


C. Allen Gibson, Jr.
Arbitrator

September 25, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Group III Mgt., Inc.,

Claimant/Plaintiff

V.

Suncrete of Carolina, Inc. d/b/a Crystal
Pools

Respondent/Defendant

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2014-cp-40-07229

Certificate of Service

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, or by some other means, to all parties of record at the addresses shown below.

1. Claimant/Plaintiff Group III Mgt., Inc.'s Motion to Confirm
Arbitration Award

HAYNSWORTH SINKLER BOYD, P.A.

By: Pamela G. Ledbetter
Pamela G. Ledbetter

Date: December 17, 2014

Parties of Record

Alan R. Belcher, Esq.
Elizabeth H. Freeman, Esq.
40 Calhoun Street, Suite 550
Charleston, SC 29401
Attorneys for Respondent/Defendant

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Group III Mgt., Inc.

Claimant/Plaintiffs,

vs.

Suncrete of Carolina, Inc. d/b/a Crystal Pools

Respondent/Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-40-07229

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

John C. Bruton, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889, Columbia, SC 29211-1889
(803) 779-3080 - phone; (803) 765-1243 - fax
Email: jbruton@hsblawfirm.com

And

Everette L. Wooten, Jr.
Wooten and Coley
P.O. Box 1555
Kinston, North Carolina 28503
(252) 523-8000 - phone
(252) 523-2060 - fax
ewooten@wootenandcoley.com

Defendant's Attorney:

Alan R. Belcher, Esq.
Elizabeth H. Freeman, Esq.
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
(843) 720-3460 - phone
(843) 720-3458 - fax
abelcher@hallboothsmith.com

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Claimant/Plaintiff Group III Mgt., Inc.'s Motion to Confirm Arbitration Award
Estimated Time Needed: 30 Min 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

December 17, 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, SCRPC)
☐ 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: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____		

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-40-007229

Group III Mgt., Inc.,

Claimant/Plaintiff,

v.

Suncrete of Carolina, Inc. d/b/a Crystal Pools,

Respondent/Defendant.

**GROUP III MGT., INC.'S
MEMORANDUM IN OPPOSITION TO
MOTION OF SUNCRETE OF
CAROLINA, INC. TO VACATE
ARBITRATION AWARD OR IN THE
ALTERNATIVE MODIFY
ARBITRATION AWARD**

Claimant/Plaintiff Group III Mgt., Inc. ("Group III") herein responds to Respondent/Defendant Suncrete of Carolina, Inc. d/b/a Crystal Pools' ("Crystal Pools") motion to vacate arbitration award or in the alternative modify arbitration award. For the reasons that follow, Crystal Pools' motion should be denied, and as further discussed in Group III's motion to confirm the arbitration award filed on December 19, 2014, the arbitration award should be confirmed and enforced as a judgment in this Court against Crystal Pools.

Pertinent Factual and Procedural Background

On October 18, 2012, Group III entered into a construction contract with the Army Corps of Engineers, Charleston Division, for the construction of repairs, renovations, and upgrades to the Legion Pool Complex located at Fort Jackson in Richland County, South Carolina. The work provided for in this contract required removal of an existing swimming pool, the construction of a new swimming pool and deck in its place, and the construction of a building and other improvements in connection therewith. By contract dated November 8, 2012 ("Contract"), Group III subcontracted a portion of its work to Crystal Pools, specifically the construction of the new swimming pool and deck area. A copy of the written Contract is attached as Exhibit A to Crystal Pools' motion. Article 14.1 of the Contract contains an agreement to arbitrate all claims arising

out of or related to the Contract in accordance with the construction industry arbitration rules of the American Arbitration Association ("AAA") pursuant to the Federal Arbitration Act ("FAA"). Pursuant to Article 15.2 of the Contract, North Carolina law applies to the Contract.

Crystal Pools almost immediately began having trouble with complying with the requirements of the Contract and specifications and failed in many respects to do so. Finally on March 14, 2013, after a disastrous attempt at applying shotcrete to the pool walls, Crystal Pools abandoned the job. On March 22, 2013, Group III gave Crystal Pools a three day notice to return to the job, and Crystal Pools failed to do so. Thereafter, without terminating the Contract, Group III hired a new contractor and otherwise proceeded to finish the work required of Crystal Pools in the Contract.

On September 19, 2013, Group III filed a demand for arbitration with the AAA seeking to recover the excess of Group III's costs to complete Crystal Pools' work over the remaining balance due on the Contract. On November 11, 2013, Crystal Pools responded to Group III's demand for arbitration and asserted a counterclaim against Group III alleging a balance due under the Contract. C. Allen Gibson, Jr., Esq. was duly appointed as arbitrator and held arbitration hearings in person on July 8-10, 2014, in Columbia, South Carolina, and a further telephone hearing on July 14, 2014. At the conclusion of the arbitration hearing, Group III and Crystal Pools expressly submitted to the arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorneys' fees that should be awarded to that party pursuant to the Contract.

On or about August 18, 2014, the arbitrator entered an award in favor of Group III against Crystal Pools in the total amount of \$197,304.09, of which amount \$116,165.86 was for attorneys' fees and costs associated with the prosecution of Group III's claim and defense of Crystal Pools' counterclaim. No amount was awarded to Crystal Pools on its counterclaim in the amount of \$84,671.98. On September 8, 2014, Crystal Pools filed a motion with the arbitrator to modify the

award so as to limit or eliminate the attorneys' fees portion of the award upon essentially the same grounds as set forth in the present motion of Crystal Pools before this Court. The Arbitrator denied such motion.

Legal Standard

Crystal Pools asks this Court to apply the standards of the South Carolina Uniform Arbitration Act in deciding its motion. Crystal Pools' Motion p. 1. This is error because by the terms of the Contract, the FAA—not the South Carolina Uniform Arbitration Act—governs Crystal Pools' request to vacate or modify the arbitration award. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 5387-38, 542 S.E.2d 360, 363 (2001) (finding that when the FAA applies to an agreement, such application "preempts our state Arbitration Act"); *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985) (South Carolina "state law is supplanted by federal substantive law with respect to disputes in which the [FAA] is applicable").¹ "In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted." *Trident Technical*, 286 S.C. at 104, 333 S.E.2d at 785 (citing 9 U.S.C. §§ 9-11). "Consequently, a court 'may vacate or modify an arbitration award only if one of the

¹ Crystal Pools' position that this Court should apply the substantive law of the South Carolina Uniform Arbitration Act to its motion is also in conflict with its argument in its Brief that the arbitrator improperly applied South Carolina law regarding attorneys' fees instead of North Carolina law regarding attorneys' fees. Crystal Pools is confusing the applicable law to the issues before the Court here. The FAA applies to the standards the Court must consider in whether to vacate or modify the arbitration award. The underlying attorneys' fee and prevailing party determination was undertaken under North Carolina law, pursuant to the terms of the Contract. To the extent that Crystal Pools would seek to apply North Carolina arbitration review standards here, North Carolina courts, like South Carolina courts, hold that the FAA preempts the application of the North Carolina Uniform Arbitration Act to the extent inconsistent with the FAA. *Sillins v. Ness*, 596 S.E.2d 874, 876 (N.C. Ct. App. 2004); see also *Cornelius v. Lipscomb*, 734 S.E.2d 870, 872 (N.C. Ct. App. 2012) (finding that the FAA applies to any arbitration undertaken in a case involving interstate commerce). Thus, the FAA governs the standards for vacatur or modification regardless of whether the substantive law of North Carolina or South Carolina applies to the underlying dispute.

grounds specified in 9 U.S.C. §§ 10 and 11 is found to exist.” *Id.* (quoting *Dlapulse Corp. of Am. V. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)). Indeed, “the scope of judicial review for an arbitrator’s decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.” *Henry M. Jackson Found. for the Advancement of Military Med., Inc. v. Norwell, Inc.*, 2015 U.S. App. LEXIS 280, *1-2 (4th Cir. Jan. 8, 2015) (internal quotation and citation omitted).

A request for *vacatur* of an arbitration award under the FAA requires the movant to show that “the award was procured by corruption, fraud, or undue means,” “evident partiality or corruption in the arbitrators,” “misconduct in refusing to postpone the hearing” or “refusing to hear evidence pertinent and material to the controversy,” or “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a). A request for *modification* of an arbitration award under the FAA requires the movant to show that “there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property,” that “the arbitrators have awarded upon a matter not submitted to them,” or that “the award is imperfect in matter of form not affecting the merits of the controversy.” 9 U.S.C. § 11. In limited and strictly circumscribed situations, a reviewing court may also consider whether the arbitrator “manifestly disregarded” the law as an additional common law ground for vacating an arbitration award. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). However, “[t]he FAA notably *does not authorize* a district court to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law.” *Id.* at 478 n.5 (emphasis added).

Argument

I. The requested vacatur or modification is not allowed under the FAA. The gist of Crystal Pools' argument is the contention that the arbitrator misapplied the law (or, stated differently, applied South Carolina law instead of North Carolina law) in regard to attorneys' fees, and that the arbitration award should be set aside or modified on that ground. Crystal Pools cited as authority for this proposition *Trident Technical College v. Lucas and Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985).² Actually, that case stands for just the opposite. Like the present case, *Trident Technical* involved a governmental project and was subject to the FAA. One of the parties was seeking to vacate the arbitration award on various grounds including "manifest disregard of law and facts." *Id.* at 107, 333 S.E.2d at 787. The court in *Trident Tech.* held that the case was controlled by the FAA and that the Court could only modify or vacate the award if one of the grounds contained in 9 U.S.C. §§ 10 or 11 was found to exist. *Id.* Crystal Pools does not cite to any provision of the FAA in its argument, but refers obliquely to an alleged "incorrect" application of law, thus *seemingly* amounting to some sort of manifest disregard argument. This argument is unavailable to Crystal Pools under established federal precedent.³

Here, Crystal Pools argues only that "[t]he Arbitrator incorrectly applied South Carolina law to the 'prevailing party' calculations and analysis," which it claims was error in the face of the Contract's statement that North Carolina law applies to the Contract. Crystal Pools' Mem. in

² Crystal Pools also cites to S.C. Code Ann. § 15-48-130(a) for authority. This section does not apply, as it is undisputed that the FAA—not South Carolina's Uniform Arbitration Act—governs this matter. See *Trident Technical*, 286 S.C. at 103, 333 S.E.2d at 785.

³ Although the continuing validity of "manifest disregard" as a basis to vacate an arbitration award is in dispute among the federal circuits, the Fourth Circuit's position is that manifest disregard continues to exist, but is only available "where the arbitrator understands and correctly states the law, but proceeds to disregard the same." *Henry M. Jackson Found.*, 2015 U.S. App. LEXIS at *2-3 & n.* (internal citations and quotations omitted).

Support at 5. There is no indication in the record that the arbitrator did any such thing. Further, Crystal Pools must point to more than a simple alleged and speculated incorrect application of law because "proving manifest disregard require[s] something beyond showing that the arbitrators misconstrued the law, especially given that arbitrators are not required to explain their reasoning." *Wachovia Sec.*, 671 F.3d at 481; *see also Trident Technical*, 286 S.C. at 109, 333 S.E.2d at 787 ("[T]he nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards ... presuppose[s] something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.") (internal citations and quotations omitted). Crystal Pools can point to nothing. Instead, the only evidence in the record is that the arbitrator heard all arguments regarding the appropriate law and its application and thereafter made his decision. Not only did he hear these arguments once (*see* Ex. C to Crystal Pools' Motion), the arbitrator considered the same arguments again in ruling on Crystal Pools' request to modify the arbitration award. *See* Ex. E to Crystal Pools' Motion. Quite simply, the relief of vacatur or modification that Crystal Pools seeks is unavailable to it.⁴

II. Crystal Pools' motion violates the agreement of the parties. Group

III and Crystal Pools both agreed at the conclusion of the arbitration hearing, after specific

⁴ North Carolina state law is in accord. *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 255 S.E.2d 414, 417-18 (N.C. Ct. App. 1979) ("The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made."); *see also Vanhoy v. Duncan Contractors, Inc.*, 569 S.E.2d 715, 716 (N.C. Ct. App. 2002) (finding that a failure to include an award of attorneys' fees in an arbitration award was unchangeable by a court and stating "[i]f an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise decisions of 'judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied parties. Thus arbitration, instead of ending would tend to increase litigation.")

inquiry by the arbitrator, that the determination as to the prevailing party would be made by the arbitrator in his discretion and that the amount of attorneys' fees allowed would also be at the arbitrator's discretion. As the arbitrator stated: "The parties submitted to the Arbitrator the issue of determining the 'prevailing party' and the amount of reasonable attorney's fees that should be awarded to that party." Ex. E to Crystal Pools' Motion at 2. For Crystal Pools to come now and question the determination by the arbitrator as to the prevailing party and the amount of attorneys' fees determined by the arbitrator is disingenuous especially because no defense was ever raised with respect to attorneys' fees or limits thereon by either party, and both parties requested attorneys' fees.

III. Crystal Pools misconstrues North Carolina law. Addressing the merits of Crystal Pools' argument and assuming that the statutes of the state of North Carolina apply with respect to the recovery of attorneys' fees in this case, Crystal Pools misconstrues these statutes.

A. Crystal Pools is incorrect in claiming that N.C. Gen. Stat. § 44A-35 applies to determine whether Group III is a prevailing party.

N.C. Gen. Stat. § 44A-35, as cited by Crystal Pools, is not applicable because it allows for "reasonable attorneys' fees" in cases "brought or defended under the provisions of Article 2 or Article 3 of this Chapter." By its own terms, Article 2 of Chapter 44A pertains to statutory mechanics' and materialmen's liens on real property and the enforcement thereof, and Article 3 of Chapter 44A pertains to performance and payment bonds and the enforcement thereof. Because neither mechanics' and materialmen's liens nor bond claims are involved in this arbitration, N.C. Gen. Stat. § 44A-35 has absolutely no applicability.

Further, Crystal Pools' contention that North Carolina law look to the provisions of N.C. Gen. Stat. § 44A to determine the prevailing party is completely unfounded. This statute is referred to only in lien cases and bond claims. All cases cited in Crystal Pools' brief are lien cases

and have no applicability here. See *Mainline Supply Co. v. Hillcrest Construction, Inc.*, 721 S.E.2d 765 (N.C. Ct. App. 2012); *Brooks Millwork Co. v. Levine*, 2010 N.C. App. LEXIS 959 (N.C. Ct. App. 2010); *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 645 S.E.2d 810 (N.C. Ct. App. 2007); *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 500 S.E.2d 108 (1998).

In contexts outside the mechanics' or materialmen's lien and bond claims statute, North Carolina courts have recognized a "prevailing party" as "one in whose favor the decision or verdict is rendered and judgment entered; ... the one in whose favor the verdict compels a judgment, or who in the end secures the most points." *House v. Hillhaven, Inc.*, 412 S.E.2d 893, 896 (N.C. Ct. App. 1992) (quoting 67A C.J.S. *Parties* § 6 (1979)); see also *H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ.*, 468 S.E.2d 517, 522-23 (N.C. Ct. App. 1996) (noting that in the merits test to determine prevailing party status as adopted in North Carolina, "a party must prevail on the merits of at least some of his claims") (emphasis in original) (quoting *Smith v. Univ. of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980)). North Carolina law thus does not require recovery of any particular portion of the amount claimed (or defended against) in order to be awarded prevailing party status. The arbitrator's finding that Group III is the prevailing party is well supported in North Carolina law as Group III successfully prosecuted some of its claims for relief and, in addition, defeated almost all of Crystal Pools' counterclaim.

B. Crystal Pools' claim that the attorneys' fees allowed to Group III was in excess of the amount allowed under North Carolina law is in error.

An instructive statute here is the North Carolina Revised Uniform Arbitration Act, which provides that "[a]n arbitrator may award reasonable attorneys' fees if: (1) The arbitration agreement provides for an award of attorneys' fees; and (2) An award of attorneys' fees is authorized by law in a civil action involving the same claim." N.C. Gen. Stat. § 1-569.21(b). Both prongs are met here.

Paragraph 15.4 of the parties' Contract specifically provides that "the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses," thus satisfying the first prong of N.C. Gen. Stat. § 1-569.21(b). Ex. A. to Crystal Pools' Motion. The second prong of § 1-569.21(b) is satisfied by reference to N.C. Gen. Stat. § 6-21.6, which allows for the recovery of attorneys' fees for business contracts where there is a reciprocal attorneys' fees provision. With respect to attorneys' fees under N.C. Gen. Stat. § 6-21.6, Crystal Pools argues that recovery of fees is limited to the amount of damages recovered, citing N.C. Gen. Stat. § 6-21.6(b). However, Crystal Pools ignores the clear language of the statute, which states, in pertinent part, that "[i]n any suit, action, proceeding, or arbitration *primarily for the recovery of monetary damages*, the award of reasonable attorneys' fees may not exceed the monetary damages awarded." N.C. Gen. Stat. § 6-21.6(b) (emphasis added). The underlying arbitration proceeding here is partially for the recovery of money damages by Group III from Crystal Pools, but is also for Group III's successful defense against the \$84,671.98 counterclaim asserted by Crystal Pools. Defending a counterclaim is not an endeavor undertaken in order to recover monetary damages. In the situation of both pursuing claims and also defending against claims, the relevant statute is, instead, N.C. Gen. Stat. § 6-21.6(f), which states that "the award of reasonable attorneys' fees may not exceed the amount in controversy." This limitation would include both the amount of monetary damages claimed by Group III in its claim plus the amount claimed in Crystal Pools' counterclaim. This would be a total sum greatly in excess of the award actually made, and the attorneys' fees allowed would clearly be within that amount.

The foregoing notwithstanding, Group III submits that the limitations contained in subparagraphs (f) or (b) of N.C. Gen. Stat. § 6-21.6 would not apply to limit the attorneys' fees that could be awarded under § 1-569.21(b), as § 1-569.21(b) simply limits the award of

attorneys' fees to those that are "reasonable" and contains no restrictions on the arbitrator's ability to so rule as to reasonableness. The simple fact that fees are allowable under § 6-21.6 satisfies the requirements of the second prong of N.C. Gen. Stat. § 1-569.21(b).

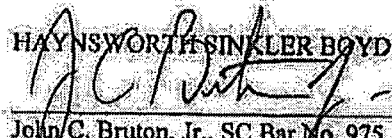
Conclusion

For the reasons discussed above, Group III respectfully moves that the Motion of Crystal Pools to modify or vacate the arbitration award be denied.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By:


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*Attorneys for Claimant/Plaintiff
Group III Mgt., Inc.*

February 6, 2015
Columbia, SC

DM: 3968341 v.1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Group III Mgt., Inc.,

Claimant/Plaintiff

v.

Suncrete of Carolina, Inc. d/b/a Crystal
Pools

Respondent/Defendant

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-CP-40-07229

**CLAIMANT/PLAINTIFF'S
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO
RULE 59(e) S.C.R.C.P.**

The Claimant/Plaintiff, Group III Mgt., Inc., (hereinafter referred to as "Group III") by and through its undersigned attorneys, hereby respectfully moves the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to alter and/or amend the Order (as hereinafter described) previously entered in this matter and respectfully shows the Court:

1. This matter originated from an arbitration proceeding and subsequent award under the Federal Arbitration Act and came on for hearing before The Honorable J. Ernest Kinard, Jr., Judge for the Fifth Judicial Circuit, on February 6, 2015, on two motions filed by the parties: (1) Suncrete of Carolina, Inc., d/b/a Crystal Pools, (hereinafter referred to as "Crystal Pools") motion to vacate arbitration award or in the alternative to modify arbitration award and, (2) Group III's motion to confirm arbitration award. By an Order signed April 23, 2015, (hereinafter referred to as "the Order"), Judge Kinard granted Crystal Pools' motion and reduced the award of attorney's fees contained in the arbitration award in favor of Group III from the sum of \$116,165.86 to \$0. No Order was entered with respect to Group III's motion to confirm arbitration award. The Order, although apparently signed by Judge Kinard on April 23, 2015, was not filed by the Clerk of Court until May 18, 2015, and May 26, 2015 (there are two filing

DM: 4099982 v.1

date stamps on the Order) and was received by Group III's attorney by mail from the Richland County Clerk of Court on June 3, 2015. Judge Kinard died on May 19, 2015.

2. Group III's Motion to confirm arbitration award and Crystal Pools' Motion to vacate arbitration award or in the alternative modify same, pertains to an arbitration award issued by C. Allen Gibson, Jr., Arbitrator, dated August 8, 2014, which rendered a total award in favor of Group III in the amount of \$197,304.09, of which amount the sum of \$81,138.23 was damages awarded to Group III and the sum of \$116,165.86 was awarded as reasonable attorney's fees. (A copy of the Arbitration Award dated August 8, 2014 and a copy of an Order Denying Crystal Pool's Request to Modify Award dated September 25, 2014, are attached hereto.)

3. The Order of Judge Kinard should be vacated, altered or amended for the following reasons:

a. The Court failed to follow or properly apply the provisions of the Federal Arbitration Act, specifically 9 USC § 10 and 11, which does not allow an arbitration award to be vacated under the facts of this case or under the facts set forth in the Order.

b. In its application of North Carolina General Statutes § 6-21.6 (Order, page 6), the Court failed to consider the provisions of subparagraph (f) of said section which provides that reasonable attorney's fees may not exceed "the amount in controversy" as the award of attorney's fees contained in the Arbitration Award was clearly within that limit as "the amount in controversy" in the arbitration was \$392,694.50, when considering the claim of Group III and the counterclaim of Crystal Pools.

c. In applying the limitation contained in North Carolina General Statutes 6-21.6(b), the Court failed to take into consideration that the Arbitration Award actually awarded \$96,462.07 on Group III's claim against Crystal Pools, change orders of \$15,324.00 in favor of

Crystal Pools having been deducted from or netted with the award to Group III as shown in the award.

d. In applying North Carolina General Statutes 6-21.6, the Court did not take into consideration that the limitation on amount of an attorney's fee award contained in said statute applies only "in any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages" as that the arbitration proceeding in question involved more than just seeking the recovery of money but also involved the defense by Group III of a counterclaim by Crystal Pools in the sum of \$84,671.98. (See previously referenced copy of Arbitration Award attached hereto).

e. The Court incorrectly interpreted North Carolina General Statutes 6-21.6 as mandating that attorney's fees could only be awarded under that section "to a prevailing party", when the language cited as setting forth such requirement is North Carolina General Statutes 6-21.6(c) and is one of 13 different factors which may be considered in the awarding of attorney's fees under North Carolina General Statutes 6-21.6, but such is not contained as a requirement of such statute.

f. The Court erroneously determined that attorney's fees could only be awarded to a "prevailing party" as defined by North Carolina General Statutes 44(a)-35 when that statute by its terms applies only to suits brought or defended to enforce labor or materialmen's liens or North Carolina public contract payment or performance bond claims, neither of which were involved in this proceeding.

g. The Court erred in determining that North Carolina General Statutes 44(a)-35 applies to Miller Act claims when, in fact, it does not; it only applies to "performance and payment bonds for construction contracts with the State of North Carolina or its political subdivisions" and does not apply to Miller Act claims.

h. That the Court's determination that the arbitrator applied South Carolina law rather than North Carolina law to the computation of attorney's fees is totally unsupported by any evidence whatsoever.

i. That the Court erred in determining that the "prevailing party" analysis under North Carolina laws results in a different calculation from the same analysis under South Carolina law, when in fact, aside from the limited cases that do fall within the coverage of North Carolina General Statutes 44(a)-36, the laws of the two states on such question are consistent; that is, the prevailing party is one in whose favor a decision or verdict is rendered.

j. The Court failed to find as a fact and to take into account that the determination of prevailing party and amount of attorney's fees was expressly submitted to the arbitrator by the parties. (See attached Arbitrator's Order Denying Request to Modify Award dated September 25, 2014.)

For the foregoing reasons, Group III moves the Court that the Order of The Honorable J. Ernest Kinard, Jr., dated April 23, 2015, and received by counsel on June 3, 2015 be altered and amended such that the modification of attorney's fees found in the Order which reduced Group III's attorney's fees award to \$0, be altered and amended such that the award of attorney's fees to Group III by the Arbitrator be granted and to further confirm the Arbitration Award of the Arbitrator and to enter judgment in favor of Group III against Crystal Pools in the amount of \$197,304.09

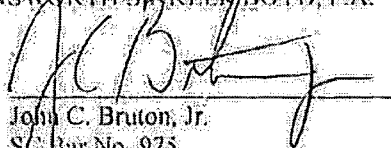
Respectfully Submitted,

[Signature Block on Following Page]

June 12, 2015

HAYNSWORTH SINKLER BOYD, P.A.

By:


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*Attorneys for Claimant/Plaintiff
Group III Mgmt., Inc*

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

ARBITRATION AWARD

v.

Suncrete of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

Pursuant to the Construction Arbitration Rules of the American Arbitration Association, this matter came before the undersigned as the duly appointed Arbitrator for a hearing on the merits. Hearings were held in person on July 8, 9 and 10, 2014 in Columbia, South Carolina. The continuation of the hearing was held on July 14, 2014 by telephone. The parties subsequently submitted affidavits regarding attorneys' fees on July 18, 2014. The hearing was declared closed as of July 23, 2014.

Group III Mgt. Inc. ("Group III") was represented by attorneys Everett Wooten and John Bruton. Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") was represented by attorney Alan Belcher. Both parties presented testimony of witnesses, introduced exhibits, and argued their case. Group III asserted a claim against Crystal Pools for \$308,386.52 as more fully explained below. Crystal Pools denied any responsibility to Group III and asserted a counterclaim against Group III in the amount of \$84,671.98 as more fully explained below.

CRB
#1

WCSR 32753000v1

The parties agree that the original contract between Group III and Crystal Pools was in the amount of \$339,960.00. The parties also agree that Crystal Pools has been paid \$77,085.00 leaving a balance to earn on the contract of \$262,875.00.

Group III asserts that the cost to repair Crystal Pools' work and to complete Crystal Pools' unfinished scope of work is \$508,933.52. In addition, Group III made a payment to Hardaway Concrete in the amount of \$9,500.00 which it claims was for the benefit of Crystal Pools. Group III also asserts that it incurred \$52,464.00 in Liquidated Damages (\$2,186/day for 24 days) as a result of delays caused by Crystal Pools. The total of these amounts is \$570,897.52. After subtracting the agreed upon balance of contract amount of \$262,875.00, Group III has a remaining claim against Crystal Pools of \$308,022.52.

While Crystal Pools agrees that the contract balance to earn was \$262,875.00, it disputes the cost to repair and the completion costs incurred by Group III and further denies responsibility for the Liquidated Damages. Crystal Pools asserts that the maximum reasonable cost to repair and complete its scope of work was \$178,203.02. When that amount is subtracted from the remaining contract balance it results in a balance due to Crystal Pools of \$84,671.98, which is the amount of its counterclaim. Crystal Pools also asserts that it is entitled to change orders for additional costs it incurred in connection with the work.

After consideration of all of the evidence and arguments of counsel I find as follows:

1. Crystal Pools is entitled to additional costs associated with shoring in the amount of \$13,850.00.
2. Crystal Pools is also entitled to additional costs for undercutting unsuitable soils after proofrolling in the amount of \$1,474.74.

Handwritten signature and initials
#2

3. Group III is entitled to recover the \$9,500.00 it paid to Hardaway Concrete for concrete provided for the benefit of Crystal Pools on this project.

4. Group III is entitled to recover the reasonable cost of repairing Crystal Pools' unsatisfactory work in the amount of \$27,473.50.

5. Group III is entitled to recover the reasonable cost of completing Crystal Pools' scope of work after Crystal Pools abandoned the project in the amount of \$287,388.47.

6. Due to delays caused by Crystal Pools, Group III is entitled to recover an appropriate allocation of the Liquidated Damages assessed by the Army Corps of Engineers in the amount of \$34,976.00.

Therefore, I find that Group III is entitled to recover from Crystal Pools the net sum of \$81,138.23 as shown below:

Balance of Contract	\$262,875.00
Plus Shoring	13,850.00
Plus Undercut	1,474.74
Less Hardaway payment	(9,500.00)
Less Cost to Repair	(27,473.50)
Less Cost to Complete	(287,388.47)
Less Liquidated Damages	<u>(34,976.00)</u>
Net Amount Due to Group III	\$81,138.23

The agreement between the parties provides for an award of attorneys' fees and costs to the prevailing party. I find that Group III is the prevailing party in this matter and award \$116,165.86 in reasonable attorneys' fees and costs associated with the prosecution of its claim and defense of the counterclaim, excluding the fees and expenses of the Arbitrator and the AAA.

CLG
#3

The administrative fees of the American Arbitration Association, totaling \$7,475.00, and the fees and expenses of the arbitrator, totaling \$17,090.62, shall be borne as incurred by the parties.

Therefore, I find a TOTAL AWARD in favor of Group III Mgt. Inc. against Suncrute of Carolina, Inc. d/b/a Crystal Pools in the amount of \$197,304.09.


C. Allen Gibson, Jr.
Arbitrator

August 18, 2014

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
Case No. 31-20-1300-0261

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant,

v.

Suncrute of Carolina, Inc. d/b/a
Crystal Pools,

Respondent.

ORDER DENYING
REQUEST TO MODIFY AWARD

Respondent Suncrute of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") submitted a request that the undersigned Arbitrator modify the Award dated August 18, 2014. This request was submitted to opposing counsel and the Arbitrator on September 8, 2014. Claimant Group III Mgt. Inc. timely filed its Response. Although Rule 48(a) requires that any request for modification of an Award be submitted within twenty (20) calendar days, Rule 48(c) also provides that if applicable law allows for a different procedural timeframe, that procedure shall be followed. Since the twentieth calendar day after transmittal of the Award fell on a Sunday, I find that under the laws and procedure generally applicable to service of motions (see Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure) service of the request on the following Monday was timely.

Nevertheless, the substance of the request by Crystal Pools is beyond the scope of Rule 48 since modification of any Award is only allowed to "correct any clerical, typographical, technical or computational errors in the Award." Rule 48(a) specifically states as follows: "[T]he Arbitrator is not empowered to re-determine the merits of any claim already decided."

CRP
14

WCSR 33033789v1

The parties submitted to the Arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorney's fees that should be awarded to that party. That decision was carefully considered and made as set forth in the Award. There is no "clerical, typographical, technical or computational error" in the Award. Therefore, Crystal Pools' request to modify the Award is denied.


C. Allen Gibson, Jr.
Arbitrator

September 25, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-ep-40-07229

Group III Mgt., Inc.,

Claimant/Plaintiff

Certificate of Service

v.

Suncrete of Carolina, Inc. d/b/a Crystal
Pools

Respondent/Defendant

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, or by some other means, to all parties of record at the addresses shown below.

1. Claimant/Plaintiff Group III Mgt., Inc.'s Motion to Alter or Amend Judgment Pursuant to Rule 59(e) S.C.R.C.P

HAYNSWORTH SINKLER BOYD, P.A.

By:


Dawn J. Loyd

Date: June 12, 2015

Parties of Record

Alan R. Belcher, Esq.
Elizabeth H. Freeman, Esq.
40 Calhoun Street, Suite 550
Charleston, SC 29401
Attorneys for Respondent/Defendant

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Group III Mgt., Inc.,
☒ Claimant/Plaintiff

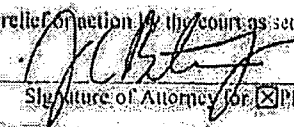
Sincrete of Carolina, Inc. d/b/a Crystal Pools.

☐ Respondent/Defendant.

IN THE COURT OF COMMON PLEAS

2014-CP-40-07229

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Claimant/Plaintiff's Attorney: John C. Bruton, Jr. (SC Bar No. 975) Haynsworth Sinkler Boyd, P.A. Post Office Box 1189 Columbia, SC 29201 (803) 779-3080—telephone (803) 765-1243—fax jbruton@hishlawfirm.com	Respondent/Defendant's Attorney: Alan R. Belcher, Esq. Elizabeth H. Freeman, Esq. 40 Calhoun Street, Suite 550 Charleston, SC 29401 (843) 720-3460 telephone (843) 720-3458—fax
☒ 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 Judgment Pursuant to Rule 59(e) S.C.R.P. Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☐ Written motion attached. ☐ Form Motion/Order I hereby move for relief on action by the court as set forth in the attached proposed order.  Signature of Attorney for ☒ Plaintiff / ☐ Defendant 6/12/15 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, S.C.R.P.) ☐ 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: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

DSE 4102249 v.1

1 State of South Carolina

Court of Common Pleas

2 County of Richland

Fifth Judicial Circuit

3

4 Group III Management, Inc.,)

Transcript of Record

5 Plaintiff,)

2014-CP-40-07229

6 vs.)

7 Suncrete of Carolina, Inc.,)
8 d/b/a Crystal Pools)

Defendant.)

9

10

October 2, 2015
Columbia, South Carolina

11

12 B E F O R E:

13 The Honorable Tanya A. Gee, Judge

14

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

16 John C. Bruton, Jr., Esquire
Attorney for the Plaintiff

17

18 Alan R. Belcher, Esquire
Attorneys for the Defendant

ORIGINAL

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STACY S. JOHNSON
CIRCUIT COURT REPORTER

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I N D E X

WITNESS

PAGE

Certificate of Reporter

30

E X H I B I T S

NUMBER

DESCRIPTION

ID. EVD.

(No exhibits marked.)

P R O C E E D I N G S

THE COURT: All right. We are here this morning on the case of Group III Management versus Suncrete and -- can I call Suncrete Crystal Pools?

MR. BRUTON: Absolutely, Your Honor.

THE COURT: All right. Can you each state your name for the record? Or have they already told you their names?

THE COURT REPORTER: Yes, I've got them.

THE COURT: Okay. Perfect. Well, go ahead and state your name for the record.

MR. BRUTON: Your Honor, I'm John Bruton, and I represent Group III Management.

THE COURT: Okay.

MR. BELCHER: Alan Belcher on behalf of Crystal Pools.

THE COURT: All right. And just to give a little background of this case, this originally came to Judge Kinard on the Defendant's motion -- Defendant's slash Respondent's motion to vacate or modify the arbitration award. This case had been arbitrated by Allen Gibson and Mr. Gibson awarded attorneys fees to Plaintiff in the amount of about \$116,000, and that's really the crux of the motion to vacate. Defendant argues that this was manifest disregard for the law and Judge Kinard agreed and vacated the arbitration award.

1 Shortly after issuing that order, Judge Kinard
2 passed away and Group III Management filed a Rule 59(E)
3 motion. I was assigned to the case as successor judge
4 and as successor judge I have the authority to rule on a
5 Rule 59(E) motion and had the possibility of doing so
6 without having a hearing if I could certify that I was
7 familiar with the record. I had a conference call with
8 the attorneys some time back to discuss the matter to see
9 what their position was on whether we needed a hearing on
10 this matter or not and at that time both attorneys agreed
11 that a hearing would be beneficial because the transcript
12 that I had suggested that I order to rely upon they both
13 agreed would be very scant. Is that a proper recap of
14 where we are up till today?

15 **MR. BRUTON:** Yes, ma'am. I would say it is. One
16 thing, you said that Judge Kinard vacated the award.
17 He vacated a portion of the award related to attorneys
18 fees.

19 **THE COURT:** Okay. Thank you for that clarification.

20 **MR. BRUTON:** Yes, ma'am.

21 **THE COURT:** All right. So we are here on Group III
22 Management's Rule 59(E) motion, so I'll hear from you.

23 **MR. BRUTON:** Thank you, Your Honor. May it please
24 the Court? I'm John Bruton. As I said earlier, I
25 represent Group III Management, and this is a matter in

1 which we assert that Judge Kinard mistakenly vacated part
2 of an arbitration award.

3 Your Honor, when we met in chambers last week,
4 you and I and Mr. Belcher, I gave you a little bit of
5 background on the case. I handed up a copy of the
6 contract --

7 **THE COURT:** I still have it, yes.

8 **MR. BRUTON:** All right. Thank you. And as we said
9 earlier, Group III had entered into a contract with the
10 Army Corps of Engineers to build a new swimming pool out
11 at Fort Jackson, which included taking out an old pool,
12 building a new pool and deck pool, a pool house and so
13 forth, and Group III subcontracted with Crystal Pools
14 just to do the part of building the new swimming pool,
15 and then that -- that subcontract is what, Your Honor, we
16 handed up earlier to Your Honor last week. And the --
17 the subcontract had these specific provisions on Page 13
18 relating to arbitration, which, you know, say that
19 arbitration will be governed by the Federal Arbitration
20 Act, the FAA, which I don't think there's any dispute
21 about that.

22 **THE COURT:** Right.

23 **MR. BELCHER:** And then the contract says that the
24 arbitrator's award shall be final and the contract says
25 that the prevailing party shall be entitled to recover

1 reasonable attorneys fees and expenses.

2 Construction started on the job, disputes arose that
3 couldn't be worked out, and so Group III ended up having
4 to get another subcontractor to finish the job. Soon
5 thereafter, Group III filed its demand for arbitration
6 pursuant to the contract provisions. Group III's demand
7 was \$308,000. Crystal Pools filed a response denying of
8 anything and asserted a counterclaim for \$84,671.

9 As Your Honor mentioned -- as Your Honor had
10 mentioned, the case was -- we jointly selected through
11 a list given to us by the AAA and the parties jointly
12 selected Allen Gibson, a very experienced construction
13 law attorney, and a very experienced arbitrator out of
14 Charleston. We arbitrated the case here in Columbia for
15 three and a half days. A lot of documents, a lot of
16 witnesses, et cetera. After the arbitration was concluded,
17 the -- several days later the arbitrator, Mr. Gibson,
18 called us and set up a conference call with the attorneys,
19 which the exclusive -- or particular reason for that
20 conference call was to, as he said, to specifically talk
21 about the attorneys fees and prevailing party, and he
22 zeroed in on that. And he said I don't know how I'm gonna
23 rule. This is right after the hearing. There are
24 different ways to do this. Do you want me to determine
25 the, quote, prevailing party, un quote, for attorneys fees

1 consideration and do you want me to determine the amount
2 of the attorneys fees, and he put that specific question
3 to us and we said yes. I mean, nobody knew how he was
4 gonna rule, but we said yes, that's the way we want you
5 to go with it. Both sides submitted affidavits for their
6 -- of their attorneys fees.

7 Soon thereafter, Mr. Gibson, the arbitrator, issued
8 an award awarding Group III \$81,138. He did not award
9 anything on Crystal Pools' eighty-four thousand six hundred
10 seventy-one dollar counterclaim; thus, the net benefit to
11 Group III was approximately \$165,000.

12 In addition, the arbitrator in this award declared
13 Group III to be the prevailing party and awarded \$116,000
14 and some change in attorneys fees. And we submitted an
15 affidavit asking for more than that, you know, but -- we
16 didn't -- you know, he didn't award that, and the other
17 side asked for attorneys fees, too.

18 As you pointed out, Crystal -- well, before we got
19 to circuit court, Crystal Pools then filed a motion with
20 the arbitrator, again, a second motion, asking it to be
21 reconsidered and particularly relating to the attorneys
22 fee award to be reduced or eliminated. The arbitrator
23 issued another order where he denied Crystal Pools' motion
24 and said I've carefully considered, you know, the issues
25 that you're -- that you're raising and I've denied your

1 motion.

2 So then we went to the circuit court on Crystal Pools'
3 motion to vacate or partially vacate the award. Meanwhile,
4 we, Group III, filed a motion that the order be confirmed
5 so that we could get -- then get it entered as a judgment
6 here in Richland County.

7 As Your Honor pointed out, we discussed earlier,
8 Judge Kinard -- we had a hearing scheduled, we went before
9 Judge Kinard, and before we really launched into our
10 arguments and so forth he said I haven't read anything of
11 what you've got submitted or whatever, your proposed --
12 he said -- or your motions. He said if y'all would just
13 submit proposed orders to me and whatever else you want me
14 to read, I'm a speed reader, send it to me in Camden, and
15 he said -- I had a lot of cases in front of Judge Kinard
16 and he was a speed reader --

17 **THE COURT:** He sure was.

18 **MR. BRUTON:** He was ~~was~~ but ~~was~~ and I'll, you know,
19 look at everything and so forth. And then that was in
20 March, I guess, of -- I guess of 2015. And so we didn't
21 hear anything else and then we saw ~~at~~ at least from my
22 office, from my perspective, we saw that Judge Kinard --
23 we knew he was sick; unfortunately, he died. At that point
24 we didn't know an order had even been issued. We weren't
25 really sure what to do. We were kind of studying, you

1 know, kind of what to do next when the order -- when we
2 received the order in the mail from the clerk about a month
3 later and so at that point that's when we reviewed that
4 and we filed our motion under Rule 59(E).

5 So that's -- that's where we are today, Your Honor,
6 and so if I could just give you a brief kind of argument
7 on our -- our position.

8 **THE COURT:** Sure.

9 **MR. BRUTON:** And I've got a little -- it's not much,
10 but I wanted to talk about the FAA that governs the
11 arbitration.

12 **THE COURT:** And Judge Kinard did agree that the FAA
13 governed in his order. He acknowledged that Crystal Pools
14 had mentioned the Uniform Arbitration Act, but the FAA
15 standard applied, so he did apply the FAA standard.

16 **MR. BRUTON:** Yes, ma'am. And I think Mr. Belcher
17 and I agree with that. I wanted to hand up a -- it's not
18 much. It's just a copy of the FAA -- a section from the
19 FAA, a couple of sections from the North Carolina Code,
20 which was cited in Judge Kinard's order and submitted by
21 Crystal Pools, and then a couple of North Carolina cases
22 that were cited. And, Your Honor, as you'll hear from the
23 argument, we don't think that you even -- the Court even
24 gets to that stage.

25 **THE COURT:** Right. When looking at an arbitration

1 award, a circuit court standard isn't looking for error,
2 right? It's something much, much more burdensome and a
3 higher hurdle to come -- to overcome.

4 **MR. BRUTON:** That's exactly right. That's exactly
5 right, Your Honor, and all the Federal law, state law
6 case law says that. If I could hand this up to Your
7 Honor and approach the bench. I just handed the same to
8 Mr. Belcher. These are things that we have already gone
9 over earlier. But, Your Honor, that -- I mean, that is
10 the -- the crux of our argument is that under the FAA you
11 have got to show -- under Section 10 you've got to show --
12 the main things are like if there's corruption or fraud or
13 something, you know, really bad. We don't have that here
14 as we all know.

15 **THE COURT:** Right.

16 **MR. BRUTON:** Under Section 11, which is on the
17 second page of what I handed up to you, of 9 USC Section
18 11, it says you've got to show there's a miscalculation of
19 figures or the arbitrator made an award based on matters
20 not in front of him. We don't have that here. So what
21 ends up being the -- you know, the leg that they're
22 attempting to stand on is Section (a)(4), which says where
23 arbitrators had exceeded their powers or -- in other words,
24 you can look into grounds for vacation of all or part of
25 an award where arbitrators had exceeded their powers, or

1 so imperfectly executed them that a mutual, final, and
2 definite award upon the subject matter submitted to them
3 was not made, and so that's really what -- what was left
4 for Crystal Pools in their order they submitted to
5 Judge Kinard in our view, as you've already alluded to,
6 is that is a very, very, very high bar to reach.

7 **THE COURT:** Well, and you're saying that at
8 arbitration you had this phone call with the arbitrator
9 discussing attorneys fees and both sides submitted
10 attorney fee affidavits, so the issue of attorneys fees
11 was squarely before the arbitrator and Crystal Pools is
12 just arguing that he got the law wrong -- he applied the
13 law incorrectly.

14 **MR. BRUTON:** Yes, ma'am.

15 **THE COURT:** What about manifest disregard? Doesn't
16 that still play into whether a circuit court can vacate an
17 award?

18 **MR. BRUTON:** Well -- well, on manifest disregard,
19 and, Your Honor, the second -- there are a lot of cases out
20 there. A lot of circuits don't even recognize manifest
21 disregard, but the second attachment to the little package
22 I handed up to you is a United States Supreme Court case,
23 and there are several of them out there. This is a 2013
24 case that involved a physician that sued a healthcare plan
25 because -- you know, over some sort of payment issues and

1 the case went to arbitration and within the arbitration
2 the arbitrator decided that it could be -- that it could
3 be turned into a class action. Well, the healthcare
4 company -- the healthcare insurance company, you know,
5 didn't like that and so they moved to -- to vacate the
6 award. And the Supreme Court talks about, you know, what
7 the standard is even under manifest disregard and that is
8 -- as you can see there, I've highlighted a few sections,
9 and I've highlighted them all -- to what I've handed to
10 Mr. Belcher, but, you know, it says a party seeking relief
11 under that provision, the provision being the so-called
12 manifest disregard provision, bears a heavy burden, and
13 this is a quote right from the United States Supreme
14 Court. It's not enough to show that the arbitrator
15 committed error, or even serious error, in -- again, in a
16 minute I'm just gonna talk briefly about the North Carolina
17 cases he did cite. We don't think he committed error on
18 that, but even if he did, Your Honor, under the United
19 States Supreme Court that's not enough to overturn an
20 arbitration award or vacate an arbitration award.

21 The second case attached right behind the Supreme
22 Court case, a Fourth Circuit case that was submitted less
23 than a year ago -- or decided less than a year ago, it was
24 in January of 2015, and -- and that case says that -- it
25 says under this Court's precedent, a manifest disregard

1 of the law is established only where the arbitrator
2 understands and correctly states the law but proceeds to
3 disregard the same. In other words, the arbitrator has
4 got to say I know what the law is, but I'm not gonna
5 follow it. I mean, it's that -- in our view it's that
6 difficult of a standard.

7 So, Your Honor, moving on -- so I guess our point is
8 that, of course, as I've already said two or three times,
9 under the United States Supreme Court, under the FAA
10 standards, the standard review the court -- the court
11 looks at should never even get to the North Carolina
12 statutes and cases that Crystal Pools cites. But even
13 if you do go beyond the FAA standard of review, Crystal
14 Pools and with their order submitted to Judge Kinard,
15 misconstrued North Carolina law in regard to recovery of
16 attorneys fees.

17 Well, one of the statutes they cite is Section --
18 is Section 44 -- North Carolina Code 44A-35, and if you
19 look at that code section it talks about being able to
20 recover attorneys fees and it says that -- and this is
21 what they're relying on. It says for the purposes of
22 prevailing party, a plaintiff or third-party plaintiff
23 who obtains a judgement of at least 50 percent of the
24 monetary amount sought on a claim could be considered the
25 prevailing party. Well, what is overlooked is the very

1 first sentence of that statute which says in any suit
2 brought or defended under the provisions of Article II
3 or Article III of this chapter. And then, Your Honor,
4 I attached behind that -- that initial statutory -- I
5 attached Article II and Article III and Article II and
6 Article III only relate to mechanics lien claims and
7 payment and performance bonds. It does not relate to
8 just your basic, you know, construction case or commercial
9 litigation case as what we have here, so they misunderstood
10 what that chapter is because their argument was well, you
11 didn't get -- you didn't get 50 percent of the amount
12 you sought, because we were seeking three hundred and
13 something thousand dollars, and so you're not entitled to
14 be considered the prevailing party. But as Your Honor
15 just saw and heard what I said there, that the statute
16 they're citing to that provision does not apply to this
17 type of case, it only applies to mechanics liens and
18 payment and performance bonds.

19 And so then if you look at what -- and I've attached
20 this to -- to the little package I handed up, but if you
21 look at the North Carolina cases that -- I didn't copy all
22 of them, but if you look at the North Carolina cases in
23 the context outside of mechanics liens or performance
24 bonds, there's a different standard on who the prevailing
25 party is under North Carolina law. And under that standard

1 the first case I handed up there is Frank House versus --
2 versus Hill -- Hillhaven -- Hillhaven, Inc., and in that
3 case the North Carolina court said -- it says they
4 recognize the prevailing party is one who -- in whose
5 favor a decision or verdict is rendered or who in the end
6 secures the most points.

7 In this case, the award was rendered in favor of
8 Group III. It wasn't as much as we wanted, but there's no
9 like if you get 50 percent of what you ask for, you know,
10 you're the prevailing party; if you don't, you're not. It
11 means if you prevail at all or -- or secure a decision
12 that's, you know, in your favor, which we did, you're the
13 prevailing party.

14 Another case we handed up, Your Honor, is HBS
15 Contractors versus Cumberland County Board of Education.
16 And, again, this is discussing who the prevailing party
17 is just in a general context outside -- general context
18 of litigation outside of performance bonds and mechanics
19 liens, and that case says to receive attorneys fees
20 allowed by statute to the prevailing party a party must
21 prevail on the merits of at least some of its claims. In
22 other words, North Carolina law doesn't require recovery
23 of a particular portion of an amount, like you've got to
24 get 50 percent of the claim that you're requesting, they
25 don't require that to be awarded attorneys fees for the

1 prevailing party.

2 There was one other statute that was in Judge Kinard's
3 order that I'll call your attention to, Your Honor, that
4 I handed up, and then I'll sit down, but in -- that order
5 was also -- excuse me, that statute was also submitted
6 as part of support for Crystal Pools' motion to vacate,
7 but if you look at -- if you look at that statute, it
8 actually supports our position. If you go down to 6-21.6,
9 reciprocal attorneys fees provisions in business contracts,
10 if you look down in Paragraph F, Paragraph F says in any
11 suit preceding arbitration primarily for the recovery of
12 monetary damages, the award of reasonable attorneys fees
13 may not exceed the amount in controversy.

14 Well, Your Honor, the amount in controversy in this
15 case was about \$308,000. We were requesting eighty-four
16 some odd thousand dollars available that was part of the
17 counterclaim, so --

18 **THE COURT:** So the 116 was well within the amount in
19 controversy?

20 **MR. BRUTON:** Yes, ma'am, the amount in controversy was
21 close to \$400,000.

22 **THE COURT:** Uh-huh.

23 **MR. BRUTON:** So, Your Honor, I guess in conclusion I
24 would say, as I've already kind of, I guess, pointed out,
25 but if you go to -- the only -- the only provision of the

1 FAA that you can -- that the Court would look at in this
2 situation is manifest disregard, which comes out of -- I
3 think it's Section 10(a)(4), and under that theory, even
4 if the arbitrator got the law or the facts wrong, which I
5 just -- I think Your Honor tried to point out that he
6 didn't, all the case law, all the Federal law and state
7 law, says that that is not grounds to vacate or modify
8 the award.

9 THE COURT: All right. Thank you.

10 MR. BRUTON: Thank you, Your Honor.

11 THE COURT: Mr. Belcher, I'll hear from you.

12 MR. BELCHER: Yes, Your Honor. This is admittedly
13 the first time I've ever dealt with a situation where
14 we're before a different judge hearing it a second time
15 would be the first for everybody in the courtroom, but
16 one of the things I was thinking about on the ride up here
17 this morning is we need to be careful between a review and
18 a reconsideration here. I mean, I think Judge Kinard --
19 I knew him, tried cases in front of him, knew him to be
20 a scholar of the law, sometimes a lot more so than the
21 attorneys in his courtroom.

22 THE COURT: Absolutely.

23 MR. BELCHER: A speed reader of bedside reading
24 materials.

25 THE COURT: A judge's judge not doubt. Always

1 prepared. Absolutely. I respect him very much.

2 **MR. BELCHER:** And so when we heard -- and when we
3 heard that he was the judge in this case and he was not
4 versed with the facts in the case, we both agreed to
5 submit it to him on briefs with proposed orders knowing
6 that he would read the law and that he was going to come
7 up with a learned decision, whatever it was. He wasn't
8 going to sign one of the competing orders without making
9 sure that it was accurate.

10 So I have looked at this and what I need to, I guess,
11 convey to the Court here is sort of what Judge Kinard
12 decided, I would assume based on my knowledge of him as a
13 judge, was well thought out and well considered, and I
14 don't know what the Court's review here is other than it's
15 just another bite of the apple, which is what the Supreme
16 Court says a motion for reconsideration is. It's just
17 another opportunity to try to talk to the judge who issued
18 the order the first time around.

19 **THE COURT:** Well, we're in an interesting situation
20 because there's no final order that's been issued from
21 Judge Kinard. He had certainly issued a formal order --

22 **MR. BELCHER:** Right.

23 **THE COURT:** -- and then passed away before he could
24 issue what would be considered a final order that would
25 be appealable to the court of appeals. So I agree it's

1 an interesting situation to be put in as a successor
2 judge. You're -- certainly one circuit court judge
3 under normal circumstances can't overturn another circuit
4 court judge. There's no sort of super circuit court judge
5 role that anybody plays; however, Judge Kinard certainly
6 would have had an opportunity to reconsider his decision
7 and so that's just the kind of awkward situation we're in
8 here.

9 **MR. BELCHER:** Well, with that said I'll -- sort of
10 approaching it in the same order as Mr. Bruton, I think
11 we all agree and Judge Kinard has ordered that the FAA
12 applies and I think that the manifest disregard standard
13 here is what we're dealing with and unfortunately --
14 I respect Mr. Gibson, and I don't think of him any
15 differently for issuing the order that he issued in this
16 case because we'll probably use him again in our next
17 arbitration, but I think that here the standard for
18 manifest disregard is clearly met. Manifest disregard,
19 which is cited in Judge Kinard's order is -- is looking at
20 it from the arbitrator's eyes where the arbitrator sees
21 that the applicable legal principle is clearly defined
22 and not subject to reasonable debate and the arbitrator
23 refused to heed that legal principle. If that two-prong
24 test is met in the Fourth Circuit since the FAA applies,
25 then the court can find that there was a manifest

1 disregard.

2 **THE COURT:** But Group III is arguing that there
3 is room for disagreement on whether Group III is the
4 prevailing party or not.

5 **MR. BELCHER:** Room for disagreement as to whether --

6 **THE COURT:** As to whether the arbitrator was correct,
7 that it's not such clearcut law that everybody has to
8 say, well, you know, this -- they're obviously not the
9 prevailing party, but I should still confirm the -- the
10 arbitrator's award. They're arguing actually the
11 arbitrator got it right, if we even get that far.

12 **MR. BELCHER:** Right, and I'm not that far yet.

13 **THE COURT:** Okay.

14 **MR. BELCHER:** But with the manifest disregard
15 standard, if the arbitrator knew what the legal principle
16 was and it was clearly defined and he just flat out
17 disregarded it and said he's not paying attention to it,
18 then that could be a manifest disregard of the law that
19 would allow --

20 **THE COURT:** Right.

21 **MR. BELCHER:** -- this court to review his order so
22 that it at least meets the threshold of is what the
23 arbitrator did right or wrong even reviewable in this
24 court, and I think that Mr. Gibson's second order where he
25 says -- after we put this issue in front of him, we said

1 Mr. Gibson, we did leave it to your charge to determine
2 prevailing party status, there was a contract that was in
3 evidence, the contract required that North Carolina law
4 apply, you did not apply North Carolina law, you applied
5 South Carolina law, which is a completely different
6 standard, North Carolina law should apply, please review
7 your order, recalculate the award of attorneys fees based
8 on the application of the applicable correct law. In his
9 order back to us, he says I don't care what the law is;
10 my ruling was my ruling.

11 **THE COURT:** Well, that's not what he said.

12 **MR. BELCHER:** He said that the parties left it to me
13 to determine prevailing party status and that's what I've
14 done and I'm not changing my order, I guess, is a better
15 paraphrase of what he said.

16 **THE COURT:** Well, doesn't he say the standard for me
17 to reconsider my order is something along the lines of a
18 miscalculation, a scrivener's error or a clerical error,
19 and that's not what's being asserted to me today, so I'm
20 not going to reconsider this order, and then he goes on to
21 say and I also carefully considered the issue of prevailing
22 party and I stand by my order.

23 **MR. BELCHER:** Right, but he doesn't -- the standard
24 that he uses is clearly the South Carolina standard for
25 prevailing party, which is --

1 **THE COURT:** How can you say that? How do we know?
2 I mean, that's part of the problem when we look over the
3 shoulder of an arbitrator. They don't have to issue an
4 order like a circuit court judge does with specific
5 findings. He never says anywhere that I can see, and we
6 don't have a transcript, where he is applying South
7 Carolina law.

8 **MR. BELCHER:** I can -- we can assume from his
9 conclusion that he applied South Carolina law because
10 under North Carolina law there were a couple of things
11 that were problematic with the award. One, which is not
12 what Judge Kinard actually ordered on, but one is a less
13 critical error to Group III and that is that under 6.21-6
14 North Carolina statute and it's -- and it's right -- once
15 you get past the definitions and you get into the bulk of
16 that statute it says in no case can an award be entered or
17 ordered -- the award of reasonable attorneys fees may not
18 exceed the monetary damages awarded. So if he had applied
19 North Carolina law, just applied it in a way that we
20 disagreed with it, then the cap on the attorneys fees
21 would have been the \$81,000 that was awarded to Group III,
22 so eighty-one thousand times two, and that statute is
23 clear on its face that in no case can an amount of
24 attorneys fees be in excess of the amount awarded.

25 **THE COURT:** It's not the amount in controversy?

1 **MR. BELCHER:** Later on in the statute it addresses
2 amount in controversy in a different context, I think,
3 but the very first paragraph says the award of reasonable
4 attorneys fees may not exceed the monetary damages awarded.
5 That's North Carolina General Statute Section 6-21.6.

6 **THE COURT:** Okay.

7 **MR. BELCHER:** And it's the one that is the enabling
8 statute of the state of North Carolina. Prior to this
9 statute being enacted in October, I think, of 2011 or '12,
10 prior to this statute being enacted it didn't matter if
11 parties had a reciprocal attorneys fees agreement in a
12 business contract. The State of North Carolina, the
13 General Assembly and the Supreme Court of North Carolina,
14 didn't allow you to have attorneys fees unless the statute
15 -- unless the statute enabled them. 6.21-6 says we will
16 allow reasonable attorneys fees. This is here now the
17 enacting statute that allows people in business contracts,
18 a special kind of contract like the contract that we're
19 dealing with here, to now be awarded attorneys fees in
20 accordance with their contracts. So you have to have a
21 signed contract that gives the reciprocal right to
22 attorneys fees, which we have in this case, and now the
23 General Assembly will enforce those types of contracts.
24 So that's the enabling language of that statute allowing
25 attorneys fees to even be part of damages in North Carolina

1 and the language there is very clear that at the maximum
2 it's eighty-one thousand or whatever the actual award was,
3 the eighty-one thousand and change.

4 Now that's -- I say all that because that's how we
5 can assume with a high level of probability that the
6 arbitrator in this case did not apply North Carolina
7 statute because if he'd applied the applicable law knowing
8 that it existed, knowing that we had chosen North Carolina
9 law, and just refused to -- and refused to regard it, if
10 he applied it, he's absolutely capped at the \$81,000. He
11 couldn't have awarded more. But instead he awarded, I
12 guess, a reasonable attorneys fee over and above that
13 amount but less than what they were asking for. So
14 that's sort of the threshold at a bare minimum and this
15 is what we, you know, talked to the arbitrator about, and
16 to some extent Judge Kinard about, but at a bare minimum
17 the award had to be reduced to the amount actually awarded
18 -- the attorneys fee awarded, the amount actually awarded,
19 okay?

20 Then we took it a step further and we said that under
21 44A-35 -- I think that's the statute -- yeah, 44A-35, you
22 have to look at the prevailing party status different in
23 North Carolina than you do in South Carolina. South
24 Carolina uses -- so we're past the first two thresholds
25 here and we're getting into if the arbitrator is going to

1 look at the right law and he's going to apply it right,
2 what law does he need to look at, and that would be the
3 44A-35, and that's our position, that that statute does,
4 in fact, apply here. It is applied in other cases not
5 involving sureties that are cited in Judge Kinard's order
6 that is part of the order that we presented to him. There
7 are cases that cite that statute being used outside of the
8 context that is specifically called for. The difference
9 between North Carolina and South Carolina is actually a
10 pretty stark one.

11 In South Carolina -- well, first of all, you have
12 attorneys fees in the government actions that you'll see
13 out here, the actions against the government, the actions
14 for whether proper public hearings are held and all those
15 things, all the things that the general public can go and
16 sue the government for to try to find some regress. In
17 all of those cases there's a prevailing party -- or in
18 many of those cases where attorneys fees are allowed, there
19 is a prevailing party analysis where if the complaining
20 party is correct, they're awarded their attorneys fees,
21 and I think there's a public policy understanding going on
22 there that if a citizen has -- has disagreements against
23 its government and it needs to file a suit to force its
24 government to do something, it shouldn't have to do so at
25 the time and expense of the prevailing party, so attorneys

1 fees are awarded. And in that circumstance, even if they
2 just -- they don't have to substantially prevail, they
3 don't have to -- they don't have to prevail to any real
4 degree, but if they prevail to any degree, then they're
5 entitled to their attorneys fees.

6 Now South Carolina and the lien statute in a lot of
7 respects is very similar to that in their -- in their lien
8 and contract law, construction payment issues. I mean, I
9 think that South Carolina has come a long way to define
10 what a prevailing party is better now than it was, but
11 when you get to North Carolina law they have a very clear
12 understanding of what the prevailing party is and that's
13 whatever your claim is you've got to do at least half as
14 good as what you say your claim is or you don't get your
15 attorneys fees. That was the law that Judge Kinard relied
16 on, that was the law that we expected would apply in this
17 case; that you're gonna need 50 percent or better to get
18 your attorneys fees. Crystal Pools was not 50 percent or
19 better on its counterclaim. It was, however, awarded some
20 credits as part of its claim so it didn't not prevail at
21 all, it was at least to some degree a prevailing party in
22 that there were some change orders that were addressed by
23 the arbitrator reducing the amount of -- the net amount
24 back to Group III, so. To say that that was, you know,
25 substantially prevailing or anything I would say is a long

1 shot, we didn't prevail --

2 THE COURT: Right.

3 MR. BELCHER: -- we didn't expect to have to pay
4 \$81,000 as a result of this contract, but now we do.

5 THE COURT: And you really didn't expect to have to
6 pay \$116,000 on top of that.

7 MR. BELCHER: Exactly. That -- that was significantly
8 different than the attorneys fees that Crystal Pool --
9 Crystal Pools agreed in this case, but in any event if --
10 if the law stands here, the North Carolina law is applied
11 and applied correctly, then if you look at the percentages,
12 which Judge Kinard's order lays out here, and Group III
13 prevailed to about 26.5 percent of its original claim,
14 that is well below the 50 percent threshold contemplated
15 by the statute.

16 THE COURT: All right. Thank you. Well, y'all, as
17 I think I told you in the -- when we were in chambers to
18 hear this case and we were supposed to have a court
19 reporter and we didn't have a court reporter and so we
20 had to, again, reschedule for y'all, this case I know
21 has had a long, difficult history and I have carefully
22 reviewed the file before coming to listen to your arguments
23 today. I've listened to your arguments again carefully
24 just now and I'm prepared to rule from the bench on this
25 motion.

1 The motion to alter or amend Judge Kinard's order is
2 granted. Under the FAA, our United States Supreme Court
3 has been very clear that courts may vacate an arbitrator's
4 decision only in very unusual circumstances and it is the
5 party who is moving for a vacation of the arbitration
6 award who bears that heavy burden. It's not enough to
7 show that the arbitrator committed an error, even if that
8 error is a serious error, and here I find that there's no
9 manifest disregard of the law, there's no indication that
10 the arbitrator understood the law, stated it correctly and
11 then manifestly disregarded it, which is the standard. Any
12 sort of misinterpretation of the law or misunderstanding
13 of the law, misapplication of the law, that's not enough,
14 and so for that reason the motion to reconsider is granted.
15 And I would ask Mr. Bruton to prepare an order for me.

16 **MR. BRUTON:** Yes, ma'am.

17 **THE COURT:** How long do you think it will take you
18 to prepare that order? And give yourself enough time. I
19 just have to have an idea of when to expect it.

20 **MR. BRUTON:** Ten days, Your Honor.

21 **THE COURT:** Okay. Let's go ahead and mark that. And
22 send it to Mr. Belcher at the same time or first or however
23 y'all want to deal with that.

24 **MR. BRUTON:** Yes, ma'am.

25 **THE COURT:** Thank you.

1 **MR. BRUTON:** Yes, ma'am. Thank you.

2 **MR. BELCHER:** Thank you, Your Honor.

3 **THE COURT:** Thank you.

4 (Whereupon, the proceedings were concluded at

5 9:42 AM.)

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C E R T I F I C A T E

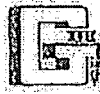
I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 2nd day of October, 2015.

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

February 23, 2016


STACY S. JOHNSON
CIRCUIT COURT REPORTER



GROUP III MGT., INC.

SUBCONTRACT FOR BUILDING CONSTRUCTION

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT:

Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

SUBCONTRACTOR:

Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209

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15. CONTRACT INTERPRETATION
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This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification and particularly when used with other than AIA A201, General Conditions of the Contract for Construction, 1987 edition, or document with identical wording.

WORDING IDENTICAL TO AGC DOCUMENT NO. 800 DATED 1990

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SUBCONTRACT FOR BUILDING CONSTRUCTION**ARTICLE 1****AGREEMENT**

This Agreement is made this 11/8/2012, by and between

Group III Mgt, Inc.

hereinafter called the Contractor and Crystal Pools, Subcontractor, to perform part of the Work on the following Project.

PROJECT NO.: K1301

CONTRACT NO.: K1301-002-S

PROJECT: Legion Pool Complex W912HP-11-D-0014
2781 Semmes Rd.
Fort Jackson, SC 29207

OWNER: U.S. Army Corps of Engineers, Charleston
89-A Hagood Ave.
Charleston, SC 29403

ARCHITECT: Davis & Floyd Engineering Architecture
POB 61599
Charleston, SC 29419

CONTRACTOR: Group III Mgt, Inc.
2820 W Vernon Ave
Kinston, NC 28504
(Phone) 252-527-3333 (Fax) 252-527-3377
Erik Barrow

SUBCONTRACTOR: Crystal Pools
1101 Sparkleberry Lane Ext.
Columbia, SC 29223
(Phone) 803-865-1200 (Fax) 803-865-0209
John Rogers

CONTACT:

FED TAX ID #:

VENDOR NO.:

COST CODE: Swimming Pool & Deck

CONTRACT PRICE: Three hundred thirty-nine thousand nine hundred sixty dollars
\$339,960.00

(Herein insert a lump sum, unit price or both. Bid schedules must be referenced.)

Notice to the parties shall be given at the above addresses.

ARTICLE 2 SCOPE OF WORK

2.1 SUBCONTRACTOR'S WORK. The Contractor contracts with the Subcontractor as an independent contractor, to perform the work described in Article 16. The Subcontractor shall perform such work (hereinafter called the "Subcontractor's Work") under the general direction of the Contractor and in accordance with this Agreement and the Contract Documents.

2.2 CONTRACT DOCUMENTS. The Contract Documents which are binding on the Subcontractor are as set forth in Paragraph 18.5. Upon the Subcontractor's request, the Contractor shall furnish a copy of any part of these documents. Nothing in the Contract Documents shall be construed to create a contractual relationship between persons or entities other than the Contractor and Subcontractor.

2.3 CONFLICTS. In the event of a conflict between this Agreement and the Contract Documents, this Agreement shall govern.

ARTICLE 3 SCHEDULE OF WORK

3.1 TIME IS OF ESSENCE. Time is of the essence for both parties, and they mutually agree to see to the performance of their respective work and the work of their subcontractors so that the entire Project may be completed in accordance with the Contract Documents and the Schedule of Work. The Contractor shall prepare the Schedule of Work and revise such schedule as the Work progresses.

3.2 DUTY TO BE BOUND. Both the Contractor and the Subcontractor shall be bound by this Schedule of Work. The Subcontractor shall provide the Contractor with any requested scheduling information for the Subcontractor's Work. The Schedule of Work and all subsequent changes thereto shall be submitted to the Subcontractor in advance of the required performance.

3.3 SCHEDULE CHANGES. The Subcontractor recognizes that changes will be made in the Schedule of Work and agrees to comply with such changes.

3.4 PRIORITY OF WORK. The Contractor shall have the right to decide the time, order and priority in which the various portions of the Work shall be performed and all other matters relative to the timely and orderly conduct of the Subcontractor's Work. The Subcontractor shall commence its work within 3 days of notice to proceed from the Contractor and if such work is interrupted for any reason the Subcontractor shall resume such work within two working days from the Contractor's notice to do so.

ARTICLE 4 CONTRACT PRICE

The Contractor agrees to pay to the Subcontractor for the satisfactory performance of the Subcontractor's Work the amount stated in Article 1 subject to additions or deductions per Article 6.

ARTICLE 5 PAYMENT

5.1 GENERAL PROVISIONS

5.1.1 SCHEDULE OF VALUES. The Subcontractor shall provide a schedule of values satisfactory to the Contractor and the Owner no more than fifteen (15) days from the date of execution of this Agreement.

5.1.2 ARCHITECT VERIFICATION. Upon request the Contractor shall give the Subcontractor written authorization to obtain directly from the Architect the percentage of completion certified for the Subcontractor's Work.

5.1.3 PAYMENT USE RESTRICTION. Payment received by the Subcontractor shall be used to satisfy the indebtedness owed by the Subcontractor to any person furnishing labor or materials for use in performing the Subcontractor's work on this project before it is used in any other manner.

5.1.4 PAYMENT USE VERIFICATION. The Contractor shall have the right at all times to contact the Subcontractor's subcontractors and suppliers to ensure that the same are being paid promptly by the Subcontractor for labor or materials furnished for use in performing the Subcontractor's Work.

5.1.5 PARTIAL LIEN WAIVERS AND AFFIDAVITS. As a prerequisite for payment, the Subcontractor shall provide, in a form satisfactory to the Owner and the Contractor, partial lien or claim waivers and affidavits from the Subcontractor, and its subcontractors and suppliers for the completed Subcontractor's Work. Such waivers may be made conditional upon payment.

5.1.6 SUBCONTRACTOR PAYMENT FAILURE. Upon payment by the Contractor, Subcontractor shall promptly pay to lower-tier subcontractors and material suppliers the amounts to which they are entitled. In the event the Contractor has reason to believe that labor, material or other obligations incurred in the performance of the Subcontractor's Work are not being paid, the Contractor may give written notice of such claim or lien to the Subcontractor and may take any steps deemed necessary to ensure that progress payments are utilized to pay such obligations including but not limited to the issuance of joint checks. If upon receipt of said notice, the Subcontractor does not (a) supply evidence to the satisfaction of the Contractor that the moneys owing to the claimant(s) have been paid; or (b) post a bond indemnifying the Owner, the Contractor, and the Contractor's surety, if any, and the premises from such claim or lien; then the Contractor shall have the right to withhold from any payments due or to become due to the Subcontractor a reasonable amount to protect the Contractor from any and all loss, damage or expense including attorney's fees arising out of or relating to any such claim or lien until the claim or lien has been satisfied by the Subcontractor.

5.1.7 SUBCONTRACTOR ASSIGNMENT OF PAYMENTS. The Subcontractor shall not assign any moneys due or to become due under this Contract, or under any Change Order thereto, without the written consent of Contractor, unless such assignment is intended to create a new security interest within the scope of Article 9 of the Uniform Commercial Code.

Should Subcontractor assign all or any part of any moneys due or to become due under this Contract, to create a new security interest or for any other purpose, the instrument of assignment shall contain a clause to the effect that the assignee's right in and to any money due or to become due to the Subcontractor shall be subject to the claims of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work under this Subcontract and any Change Orders.

6.1.8. PAYMENT NOT ACCEPTANCE. Payment to the Subcontractor does not constitute or imply acceptance of any portion of the Subcontractor's Work.

6.2 PROGRESS PAYMENTS

6.2.1 APPLICATION. Subcontractor's application for payment shall be itemized and supported by substantiating data as required in the Contract Documents for the Contractor's payment application. Subcontractor's application shall be notarized if required. Subcontract payment applications may include payment requests on account of properly authorized Construction Change Directives. The Subcontractor's progress payment application for work performed in the preceding payment period shall be submitted to the Contractor per the terms of this Agreement and specifically Subparagraphs 6.1.1, 6.2.2, 6.2.3 and 6.2.4 for approval of the Contractor and Architect/Owner/Contractor. The Contractor shall forward, without delay, the approved value to the Owner for payment.

6.2.2. RETAINAGE/SECURITY. The rate of retainage shall be equal to the percentage retained from the Contractor's payment by the Owner for the Subcontractor's Work provided the Subcontractor furnishes a bond or other security to the satisfaction of the Contractor.

If the Subcontractor has furnished such bond or security, its work is satisfactory and the Contract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontractor's Work has attained the same percentage of completion and the Contractor's retainage for the Subcontractor's Work has been so reduced by the Owner. However if the Subcontractor does not provide such bond or security, the rate of retainage shall be 10%.

6.2.3 TIME OF APPLICATION. The Subcontractor shall submit progress payment applications to the Contractor no later than the 25 day of each payment period for work performed up to and including the 30 day of the payment period indicating work completed and, to the extent allowed under Subparagraph 6.2.4, materials suitably stored during the preceding payment period.

6.2.4 STORED MATERIALS. Unless otherwise provided in the Contract Documents, and if approved in the advance by the Owner, applications for payment may include materials and equipment not incorporated in the Subcontractor's Work but delivered to and suitably stored at site or at some other location agreed upon in writing. Approval of payment applications for such stored items on or off the site shall be conditioned upon submission by the Subcontractor of bills of sale and applicable insurance or such other procedures satisfactory to the Owner and

Contractor to establish the Owner's title to such materials and equipment or otherwise protect the Owner's and Contractor's interest therein, including transportation to the site.

6.2.5 TIME OF PAYMENT. Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made no later than seven (7) days after receipt by the Contractor of payment from the Owner for the Subcontractor's Work.

6.2.6 PAYMENT DELAY. If for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Contractor within seven (7) days after the date such payment is due, as defined in Subparagraph 6.2.5, then the Subcontractor, upon giving an additional seven (7) days written notice to the Contractor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. To the extent obtained by the Contractor under the Contract Documents, the contract price shall be increased by the amount of the Subcontractor's reasonable cost of shutdown, delay, and start-up, which shall be effected by appropriate Change Order.

If the Subcontractor's Work has been stopped for thirty (30) days because the Subcontractor has not received progress payments as required hereunder, the Subcontractor may terminate this Agreement upon giving the Contractor an additional seven (7) days written notice.

6.3 FINAL PAYMENT

6.3.1 APPLICATION. Upon acceptance of the Subcontractor's Work by the Owner the Contractor, and if necessary, the Architect, and upon the Subcontractor furnishing evidence of fulfillment of the Subcontractor's obligations in accordance with the Contract Documents and Subparagraph 6.3.2, the Contractor shall forward the Subcontractor's application for final payment without delay.

6.3.2 REQUIREMENTS. Before the Contractor shall be required to forward the subcontractor's application for final payment to the Owner, the Subcontractor shall submit to the Contractor:

- (a) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or its property or the Contractor or the Contractor's surety might in any way be liable, have been paid or otherwise satisfied;
- (b) consent of surety to final payment, if required;
- (c) satisfaction of required closeout procedures;
- (d) certification that insurance required by the Contract Documents to remain in effect beyond final payment pursuant to Paragraph 13.4 is in effect and will not be cancelled or allowed to expire without at least thirty (30) days' written notice to the Contractor unless a longer period is stipulated in the Contract; and
- (e) other data if required by the Contractor or Owner, such as receipts, releases, and waivers of liens to the extent and in such form as may be designated by the Contractor or Owner. Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's Work, but shall in no way relieve the Subcontractor of liability for the

obligations assumed under Paragraph 9.10, or for faulty or defective work appearing after final payment.

5.3.3 TIME OF PAYMENT. Final payment of the balance due of the Contract Price shall be made to the Subcontractor:

- (a) upon receipt of the Owner's waiver of all claims related to the Subcontractor's Work except for unsatisfied liens, unknown defective work, and noncompliance with the Contract Documents or warranties; and
- (b) within seven (7) days after receipt by the Contractor of final payment from the Owner for such Subcontractor's Work.

5.3.4 FINAL PAYMENT DELAY. If the Owner or its designated agent does not issue a certificate for Final Payment or the Contractor does not receive such payment for any cause which is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of the Subcontractor, the prompt release by the Owner of the final payment due for the Subcontractor's Work. At the Subcontractor's request and expense, to the extent agreed upon in writing, the Contractor shall institute reasonable legal remedies to mitigate the damages and pursue payment of the Subcontractor's final payment including interest thereon.

5.4 LATE PAYMENT INTEREST. To the extent obtained by the Contractor, under the Contract Documents, progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate provided in the Contract Documents, or, in the absence thereof, at the legal rate prevailing at the place of the Project.

ARTICLE 8 CHANGES, CLAIMS AND DELAYS

8.1 CHANGES. When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Work which are within the general scope of this Agreement. Adjustments in the Contract Price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order or a Subcontract Construction Change Directive pursuant to the Contract Documents. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Work, adjustment in the Contract Price or Schedule of Work. A Subcontract Construction Change Directive is a written instrument prepared by the Contractor directing a change in the Work and stating a proposed adjustment, if any, in the Contract Price or Schedule of Work or both. A Subcontract Construction Change Directive shall be used in the absence of agreement on the terms of a Subcontract Change Order.

8.2 CLAIMS RELATING TO OWNER. The Subcontractor agrees to make all claims for which the Owner is or may be liable in the manner and within the time limits provided in the Contract Documents for like claims by the Contractor upon the Owner and in sufficient time for the Contractor to make such

claims against the Owner in accordance with the Contract Documents. The Contractor agrees to permit the Subcontractor to prosecute a claim in the name of the Contractor for the use and benefit of the Subcontractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner.

8.3 CLAIMS RELATING TO CONTRACTOR. The Subcontractor shall give the Contractor written notice of all claims not included in Paragraph 6.2 within five (5) days of the occurrence of the event for which claim is made; otherwise, such claims shall be deemed waived. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor not relating to claims included in Paragraph 6.2 shall be resolved in the manner provided in Article 14.

6.4 ADJUSTMENT IN CONTRACT PRICE. If a Subcontract Change Order or Construction Change Directive requires an adjustment in the Contract Price, the adjustment shall be established by one of the following methods:

1. mutual agreement on a lump sum with sufficient information to substantiate the amount;
2. unit prices already established in the Contract Documents or if not established by the Contract Documents then established by mutual agreement for this adjustment; or
3. a mutually determined cost plus a jointly acceptable allowance for overhead and profit.

6.5 SUBSTANTIATION OF ADJUSTMENT. If the Subcontractor does not respond promptly or disputes the method of adjustment, the method and the adjustment shall be determined by the Contractor on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Contract Price, an allowance for overhead and profit of ~~to be determined by Government requirements~~.

The Subcontractor shall maintain for the Contractor's review and approval an appropriately itemized and substantiated accounting of the following items attributable to the Subcontract Change Order or Subcontract Construction Change Directive:

1. labor costs, including Social Security, health, welfare, retirement and other fringe benefits as normally required, and state workers' compensation insurance;
2. costs of materials, supplies and equipment, whether incorporated in the Work or consumed, including transportation costs;
3. costs of renting, either from the Contractor or from others, of machinery and equipment other than hand tools;
4. costs of bond and insurance premiums, permit fees and taxes attributable to the change; and
5. costs of additional supervision and field office personnel services necessitated by the change.

6.6 **DELAY.** If the progress of the Subcontractor's Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor's Work shall be extended by Subcontract Change Order or Subcontract Construction Change Directive to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly. The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays caused by any person not a party to this Agreement unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor's Work.

6.7 **LIQUIDATED DAMAGES.** If the Contract Documents provide for liquidated or other damages for delay beyond the completion date set forth in the Contract Documents, and such damages are assessed, then the Contractor may assess same against the Subcontractor in proportion to the Subcontractor's share of the responsibility for such delay. However the amount of such assessment shall not exceed the amount assessed against the Contractor. Nothing set forth herein shall limit the Subcontractor's liability to the Contractor for the Contractor's actual delay damages caused by the Subcontractor's delay. The Subcontractor shall be liable to the Contractor for the Contractor's actual damages caused by the Subcontractor's delay.

ARTICLE 7 CONTRACTOR'S OBLIGATIONS

7.1 **CONTRACT DOCUMENTS.** Prior to executing this Subcontract, the Contractor shall make available to the Subcontractor the Contract Documents which are binding on the Subcontractor and set forth in Paragraph 10.6.

7.2 **AUTHORIZED REPRESENTATIVE.** The Contractor shall designate one or more persons who shall be the Contractor's authorized representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) the Subcontractor shall look to for instructions, orders and/or directions, except in an emergency.

7.3 **STORAGE APPLICATIONS.** The Contractor shall allocate adequate storage areas, if available, for the Subcontractor's materials and equipment during the course of the Subcontractor's Work.

7.4 **TIMELY COMMUNICATIONS.** The Contractor shall transmit, with reasonable promptness, all submittals, transmittals, and written approvals relating to the Subcontractor's Work.

7.5 **NON-CONTRACTED SERVICES.** The Contractor agrees, except as otherwise provided in this Agreement, that no claim for non-contracted construction services rendered or materials furnished shall be valid unless the Contractor provides the Subcontractor notice:

- (a) prior to furnishing of the services and materials, except in an emergency affecting the safety of persons or property;
- (b) in writing of such claim within three days of first furnishing such services or materials; and

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

ARTICLE 8 SUBCONTRACTOR'S OBLIGATIONS

8.1 **OBLIGATIONS DERIVATIVE.** The Subcontractor binds itself to the Contractor under this Agreement in the same manner as the Contractor is bound to the Owner under the Contract Documents and will so bind its lower-tier subcontractors. The Subcontractor shall make available to its lower-tier subcontractors the Contract Documents which are binding on the lower-tier subcontractors.

8.2 **RESPONSIBILITIES.** The Subcontractor shall furnish all of the labor, materials, equipment, and services including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontractor's Work in strict accordance with and reasonably inferable from the Contract Documents. The Subcontractor shall provide a list of proposed subcontractors and suppliers, be responsible for taking field dimensions, providing tests, ordering of materials and all other actions as required to meet the Schedule of Work.

8.3 **SHOP DRAWINGS.** The Subcontractor shall be responsible to the Contractor for the accuracy and conformity with the Contract Documents and other submittals that pertain to the work in the same manner as the Contractor is responsible therefor to the Owner. Shop drawings, or their approval by the Contractor, shall not be deemed to authorize deviations or substitutions from the requirements of the Contract Documents.

8.4 **TEMPORARY SERVICES.** The Subcontractor shall furnish all temporary services and/or facilities necessary to perform its work, except as provided in Article 16. Said article also identifies those common temporary services, if any, which are to be furnished by the Subcontractor.

8.5 **COORDINATION.** The Subcontractor shall:

- (a) cooperate with the Contractor and all others whose work may interfere with the Subcontractor's Work;
- (b) specifically note and immediately advise the Contractor of any such interference with the Subcontractor's Work; and
- (c) participate in the preparation of coordination drawings and work schedules in areas of congestion.

8.6 **AUTHORIZED REPRESENTATIVE.** The Subcontractor shall designate one or more persons who shall be the authorized Subcontractor's representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) to whom the Contractor shall issue instructions, orders or directions, except in an emergency.

8.7 **PROVISION FOR INSPECTION.** The Subcontractor shall notify the Contractor when portions of the Subcontractor's Work are ready for inspection. The Subcontractor shall at all times furnish the Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under this Agreement may be

In the course of preparation, process, manufacture or treatment.

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

8.8 CLEANUP. The Subcontractor shall follow the Contractor's cleanup and safety directions, and

- (a) at all times keep the building and premises free from debris and unsafe conditions resulting from the Subcontractor's Work; and
- (b) broom clean each work area prior to discontinuing work in the same.

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

8.9 SAFETY. The prevention of accidents on or in the vicinity of its Work is the Subcontractor's responsibility, even if Contractor establishes a safety program for the entire Project. Subcontractor shall establish a safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner, including, but not limited to, requirements imposed by the Contract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Work which Contractor deems unsafe until corrective measures satisfactory to Contractor shall have been taken. Contractor's failure to stop Subcontractor's unsafe practices shall not relieve Subcontractor of the responsibility therefor. Subcontractor shall notify Contractor immediately following any accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor. Subcontractor shall indemnify Contractor for fines, damages or expenses incurred by the Contractor because of the Subcontractor's failure to comply with safety requirements.

8.10 PROTECTION OF THE WORK. The Subcontractor shall take necessary precautions to properly protect the Subcontractor's Work and the work of others from damage caused by the Subcontractor's operations. Should the Subcontractor cause damage to the Work or property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor, or the Contractor may so remedy and deduct the cost thereof from any amounts due or to become due the Subcontractor.

8.11 PERMITS, FEES AND LICENSES. The Subcontractor shall give adequate notices to authorities pertaining to the Subcontractor's Work and secure and pay for all permits, fees, licenses, assessments, inspections and taxes necessary to complete the Subcontractor's Work in accordance with the Contract Documents.

To the extent obtained by the Contractor under the Contract Documents, the Subcontractor shall be compensated for additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of the Agreement.

8.12 SUBCONTRACTOR ASSIGNMENT OF WORK. The Subcontractor shall not assign the whole nor any part of the Subcontractor's Work without prior written approval of the Contractor. The Contractor's approval shall not be unreasonably withheld. Lower-tier subcontractors and suppliers previously approved by the Contractor may be listed at Paragraph 18.4.

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

- (a) prior to furnishing of the services or materials, except in an emergency affecting the safety of persons or property;
- (b) in writing of such claim within three (3) days of first furnishing such services or materials; and
- (c) the written charge for such services or materials no later than the fifteenth (15th) day of the calendar month following that in which the claim originated.

8.14 MATERIALS SAFETY. To the extent that the Contractor is not obligated by the Contract Documents or by law to perform work which involves pollutants, hazardous or toxic substances, hazardous waste, asbestos or PCB's, the Subcontractor likewise is not obligated. To the extent that the Contractor has obligations under the Contract Documents or by law regarding such materials within the scope of the Subcontractor's work, the Subcontractor likewise shall have these obligations.

ARTICLE 9 SUBCONTRACT PROVISIONS

9.1 LAYOUT RESPONSIBILITY AND LEVELS. The Contractor shall establish principal axis lines of the building and site whereupon the Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontractor's Work and for any loss or damage to the Contractor or others by reason of the Subcontractor's failure to set out or perform its work correctly. The Subcontractor shall exercise prudence so that the actual final conditions and details shall result in alignment of finish surfaces.

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

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

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

9.5. USE OF CONTRACTOR'S EQUIPMENT. The Subcontractor, its agents, employees, subcontractors or suppliers shall not use the Contractor's equipment without the express written permission of the Contractor's designated representative.

If the Subcontractor or any of its agents, employees, suppliers or lower-tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of the Contractor, the Subcontractor shall defend, indemnify and be liable to the Contractor as provided in Article 12 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have been due solely to the negligence of the Contractor's employees operating such equipment.

9.6. CONTRACT BOND REVIEW. The Contractor's Payment Bond for the Project, if any, may be reviewed and copied by the Subcontractor.

9.7. OWNER ABILITY TO PAY. The Subcontractor shall have the right to receive from the Contractor such information as the Contractor has obtained relative to the Owner's financial ability to pay for the Work.

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

9.9. SUBCONTRACT BOND. If a Performance and Payment Bond is not required of the Subcontractor under Article 18, then within the duration of this Agreement, the Contractor may require such bonds before work is started and the Subcontractor shall provide the same. Said bonds shall be in the full amount of this Agreement in a form and by a surety satisfactory to the Contractor. The Subcontractor shall be reimbursed without retainer for cost of same simultaneously with the first progress payment hereunder.

The reimbursement amount for the bonds shall not exceed the manual rate for such subcontractor work. In the event the Subcontractor shall fail to promptly provide such requested bonds, the Contractor may terminate this Agreement and re-let the work to another subcontractor and all Contractor costs and expenses incurred thereby shall be paid by the Subcontractor.

9.10. WARRANTY. The Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and as called for in the Contract Documents.

The Subcontractor agrees to satisfy such warranty obligations which appear within the warranty period established in the Contract Documents without cost to the Owner or the Contractor.

If no warranty is required of the Contractor in the Contract Documents, then the Subcontractor shall warrant its work as described above for the period of one year from the date(s) of substantial completion of all or a designated portion of the Subcontractor's Work or acceptance or use by the Contractor or Owner of designated equipment, whichever is sooner.

The Subcontractor further agrees to execute any special warranties that shall be required for the Subcontractor's Work prior to final payment.

ARTICLE 10

RECOURSE BY CONTRACTOR

10.1 FAILURE OF PERFORMANCE

10.1.1 NOTICE TO CURE. If the Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule of Work, or it fails to make prompt payment for its workers, lower-tier subcontractors or suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement. If the Subcontractor fails within three (3) working days after written notification to commence and continue satisfactory correction of such default with diligence and promptness, then the Contractor without prejudice to any rights or remedies, shall have the right to any or all of the following remedies:

(a) supply such number of workers and quantity of materials, equipment and other facilities as the Contractor deems necessary for the completion of the Subcontractor's Work; or any part thereof which the Subcontractor has failed to complete or perform after the aforesaid notice, and charge the cost thereof to the Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit and attorney's fees;

(b) contract with one or more additional contractors, to perform such part of the Subcontractor's Work as the Contractor shall determine will provide the most expeditious completion of the total Work and charge the cost thereof to the Subcontractor;

(c) withhold payment of any moneys due the Subcontractor pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of the Contractor and Architect, Owner, Contractor; and

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

10.1.2 TERMINATION BY CONTRACTOR. If the Subcontractor fails to commence and satisfactorily continue correction of a default within three (3) working days after written notification issued under Subparagraph 10.1.1, then the Contractor may, in lieu of or in addition to Subparagraph 10.1.1, issue a second written notification, to the Subcontractor and its surety, if any. Such notice shall state that if the Subcontractor fails to commence and continue correction of a default within seven (7) working days of the written notification, the Agreement will be deemed terminated and the Contractor may use any materials, implements, equipment, appliances or tools furnished by or belonging to the Subcontractor to complete the Subcontractor's Work.

The Contractor also may furnish those materials, equipment and/or employ such workers or subcontractors as the Contractor deems necessary to maintain the orderly progress of the Work.

All costs incurred by the Contractor in performing the Subcontractor's Work, including reasonable overhead, profit and attorney's fees, shall be deducted from any moneys due or to become due the Subcontractor. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.1.3 USE OF SUBCONTRACTOR'S EQUIPMENT. If the Contractor performs work under this Article or sublets such work to be so performed, the Contractor and/or the persons to whom work has been sublet shall have the right to take and use any materials, implements, equipment, appliances or tools furnished by, belonging or delivered to the Subcontractor and located at the Project.

10.2 BANKRUPTCY

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

10.2.2 INTERIM REMEDIES. If the Subcontractor is not performing in accordance with the Schedule of Work at the time a petition in bankruptcy is filed, or at any subsequent time, the Contractor, while awaiting the decision of the Subcontractor or its trustee to reject or to assume this Agreement and provide adequate assurance of its ability to perform hereunder, may avail itself of such remedies under this Article as are reasonably necessary to maintain the Schedule of Work. The Contractor may offset against any sums due or to become due the Subcontractor all costs incurred in pursuing any of the remedies provided hereunder, including, but not limited to, reasonable overhead, profit and attorney's fees. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

10.3 SUSPENSION BY OWNER. Should the Owner suspend its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify

the Subcontractor in writing and upon written notification the Subcontractor shall immediately suspend the Subcontractor's Work.

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

10.4 TERMINATION BY OWNER. Should the Owner terminate its contract with the Contractor or any part which includes the Subcontractor's Work, the Contractor shall so notify the Subcontractor in writing and upon written notification, this Agreement shall be terminated and the Subcontractor shall immediately stop the Subcontractor's Work, follow all of Contractor's instructions, and mitigate all costs.

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

The Contractor agrees to cooperate with the Subcontractor at the Subcontractor's expense, in the prosecution of any Subcontractor claim arising out of the Owner termination and to permit the Subcontractor to prosecute said claim, in the name of the Contractor, for the use and benefit of the Subcontractor, or assign the claim to the Subcontractor.

10.5 CONTINGENT ASSIGNMENT OF SUBCONTRACT

The Contractor's contingent assignment of the Subcontract to the Owner, if provided in the Contract Documents, is effective when the Owner (a) has terminated the Contract for cause and (b) has accepted the assignment by notifying the Subcontractor in writing. This contingent assignment is subject to the prior rights of a surety that may be obligated under the Contractor's bond, if any. Subcontractor hereby consents to such assignment and agrees to be bound to the assignee by the terms of this Subcontract.

10.6 SUSPENSION BY CONTRACTOR. The Contractor may order the Subcontractor in writing to suspend, delay, or interrupt all or any part of the Subcontractor's Work for such period of time as may be determined to be appropriate for the convenience of the Contractor. Phased or Interrupted Work when required shall not be deemed a suspension of Work.

The Subcontractor shall notify the Contractor in writing within ten (10) working days after receipt of the Contractor's order of the effect of such order upon the Subcontractor's Work. To the extent allowed the Contractor under the Contract Documents, the Contract Price or contract time shall be adjusted by Subcontract Change Order for any increase in the time or cost of performance of this Agreement caused by such suspension, delay, or interruption.

No claim under this Article shall be allowed for any costs incurred more than ten (10) working days prior to the Subcontractor's notice to the Contractor.

Neither the Contract Price nor the contract time shall be adjusted under this Article for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by the fault

or negligence of the Subcontractor or by a cause for which Subcontractor would have been responsible.

The Contract Price shall not be adjusted under this Article for any suspension, delay or interruption to the extent that performance would have been suspended, delayed or interrupted by a cause for which the Subcontractor would have been entitled only to a time extension under this Agreement.

10.7 WRONGFUL EXERCISE. If the Contractor wrongfully exercises any option under this Article, the Contractor shall be liable to the Subcontractor solely for the reasonable value of work performed by the Subcontractor prior to the Contractor's wrongful action, including reasonable overhead and profit on the work performed, less prior payments made, and attorney's fees.

ARTICLE 11 LABOR RELATIONS

(Insert here any conditions, obligations or requirements relative to labor relations and their effect on the project. Legal counsel is recommended.)

ARTICLE 12 INDEMNIFICATION

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless, the Contractor (including its affiliates, parents and subsidiaries, their agents and employees) and other contractors and subcontractors and all of their agents and employees and when required of the Contractor by the Contract Documents, the Owner, the Architect, Architect's consultants, agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontract provided that:

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself), including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or for anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder;

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

12.2 NO LIMITATION UPON LIABILITY. In any and all claims against the Owner, the Architect, Architect's consultants, agents and employees, the Contractor (including its affiliates, parents and subsidiaries) and other contractors or subcontractors, or any of their agents or employees, by any employee of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the indemnification obligation under

this Article 12 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under worker's or workmen's compensation acts, disability benefit acts or other employee benefit acts.

12.3 ARCHITECT EXCLUSION. Except as provided by the Contract Documents, the obligation of the Subcontractor under this Article 12 shall not extend to the liability of the Architect, the Architect's consultants, agents or employees of any of them, arising out of

(a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications; or

(b) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents or employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

12.4 COMPLIANCE WITH LAWS. The Subcontractor agrees to be bound by, and at its own cost, comply with all federal, state and local laws, ordinances and regulations (hereinafter collectively referred to as "laws") applicable to the Subcontractor's Work including, but not limited to, equal employment opportunity, minority business enterprise, women's business enterprise, disadvantaged business enterprise, safety and all other laws with which the Contractor must comply according to the Contract Documents.

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

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

ARTICLE 13 INSURANCE

13.1 SUBCONTRACTOR'S INSURANCE. Prior to start of the Subcontractor's Work, the Subcontractor shall procure for the Subcontractor's Work and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, and all insurance required of the Contractor under the Contract Documents.

The Contractor, Owner and other parties as designated in the Contract Documents shall be named as additional Insureds on each of these policies except for Workers' Compensation.

This Insurance shall include contractual liability insurance covering the Subcontractor's obligations under Article 12.

13.2 MINIMUM LIMITS OF LIABILITY. The Subcontractor's Comprehensive or Commercial Liability Insurance and Comprehensive Automobile Liability Insurance, as required by Paragraph 13.1, shall be written with limits of liability not less than the following:

A. Comprehensive General Liability Insurance including completed operations

1. Combined Single Limit

Bodily Injury and Property Damage	\$
Each Occurrence	
	\$
Aggregate	

2. Bodily Injury	\$
Each Occurrence	
	\$
Aggregate	

3. Property Damage	\$
Each Occurrence	
	\$
Aggregate	

B. Commercial General Liability Insurance

1. Each Occurrence Limit	\$ 1000000
2. General Aggregate	\$ 2000000
3. Products/Completed Operations Aggregate	\$
4. Personal and Advertising Injury Limit	\$ 1000000

C. Comprehensive Automobile Liability Insurance

1. Combined Single Limit

Bodily Injury and Property Damage	\$ 1000000
Each Occurrence	

2. Bodily Injury	\$
Each Person	
	\$
Each Occurrence	

3. Property Damage	\$
Each Occurrence	

13.3 NUMBER OF POLICIES. Comprehensive or Commercial General Liability Insurance and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

13.4 CANCELLATION, RENEWAL OR MODIFICATION. The Subcontractor shall maintain in effect all insurance coverage required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor.

All insurance policies shall contain a provision that the coverages afforded thereunder shall not be canceled or not renewed, nor restrictive modifications added, until at least thirty (30) days prior written notice has been given to the Contractor unless otherwise specifically required in the Contract Documents.

Certificates of Insurance, or certified copies of policies acceptable to the Contractor, shall be filed with the Contractor prior to the commencement of the Subcontractor's Work. In the event the Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, the Contractor may purchase such coverage and charge the expense thereof to the Subcontractor, or terminate this Agreement.

The Subcontractor shall continue to carry completed operations liability insurance for at least two years after final payment. The Subcontractor shall furnish the Contractor evidence of such insurance at final payment and one year thereafter.

13.5 WAIVER OF RIGHTS. The Contractor and Subcontractor waive all rights against each other and the Owner, the Architect, the Architect's consultants and agents or employees of any of them, separate contractors, and all other subcontractors for loss or damage to the extent covered by Builder's Risk or any other property or equipment insurance, except such rights as they may have to the proceeds of such insurance; provided, however, that such waiver shall not extend to the acts of the Architect, the Architect's consultants, and the agents or employees of any of them listed in Paragraph 12.3. Upon written request of the Subcontractor, the Contractor shall provide the Subcontractor with a copy of the Builder's Risk policy of insurance or any other equipment insurance in force for the Project and procured by the Contractor. The Subcontractor shall satisfy itself to the existence and extent of such insurance prior to commencement of the Subcontractor's Work.

If the Owner or Contractor have not purchased Builder's Risk Insurance for the full insurable value of the Subcontractor's Work less a reasonable deductible, then the Subcontractor may procure such insurance as will protect the interests of the Subcontractor, its subcontractors and their subcontractors in the Work, and, by appropriate Subcontractor Change Order, the cost of such additional insurance shall be reimbursed to the Subcontractor.

If not covered under the Builder's Risk policy of insurance or any other property or equipment insurance required by the Contract Documents, the Subcontractor shall procure and maintain at the Subcontractor's own expense property and equipment insurance for portions of the Subcontractor's Work stored off the site or in transit, when such portions of the Subcontractor's Work are to be included in an application for payment under Article 6.

13.8 ENDORSEMENT. If the policies of insurance referred to in this Article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

ARTICLE 14 ARBITRATION

14.1 AGREEMENT TO ARBITRATE. All claims, disputes and matters in question arising out of or relating to this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Paragraph 14.2, shall 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. Notwithstanding other provisions in the Agreement, this agreement to arbitrate shall be governed by the Federal Arbitration Act.

14.2 EXCEPTIONS. The agreement to arbitrate shall not apply to any claim:

- (a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto or does not consent to such arbitration; or
- (b) asserted by the Subcontractor against the Contractor if the Contractor asserts said claim, either in whole or part against the Owner, or asserted by the Owner against the Contractor when the contract between the Contractor and Owner does not provide for binding arbitration, or does so provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim. In either case the parties hereto shall notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Paragraph 14.2, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

14.3 INITIAL DISPUTE RESOLUTION. If a dispute arises out of or relates to this Agreement or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties may endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration. Mediation will be commenced within the time limits for arbitration stipulated in the Contract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus ten (10) days or as otherwise provided in the Contract Documents. Issues to be mediated are subject to the exceptions in Paragraph 14.2 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 14.1.

14.4 NOTICE OF DEMAND. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made as required in

the Contract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made 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, whichever shall first occur. The location of the arbitration proceedings shall be the location of the Project.

14.5 AWARD. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.6 WORK CONTINUATION AND PAYMENT. Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration. If the Subcontractor is continuing to perform, the Contractor shall continue to make payments in accordance with this Agreement.

14.7 NO LIMITATION OF RIGHTS OR REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or payment bonds.

14.8 SAME ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

ARTICLE 15 CONTRACT INTERPRETATION

15.1 INCONSISTENCIES AND OMISSIONS. Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

15.2 LAW AND EFFECT. This Agreement shall be governed by the law of the State of North Carolina.

15.3 SEVERABILITY AND WAIVER. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision. The failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.

15.4 ATTORNEY'S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, to collect damages for the breach of the Agreement, or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges, and expenses expended or incurred therein.

15.6 TITLES. The titles given to the Articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

15.8 ENTIRE AGREEMENT. This Agreement is solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties hereto and supercedes all prior negotiations, representations, or agreements, either written or oral.

ARTICLE 16 SPECIAL PROVISIONS

16.1 PRECEDENCE. It is understood the work to be performed under this Agreement, including the terms and conditions thereof, is as described in Articles 1 through 16 together with the following Special Provisions, which are intended to complement same. However, in the event of any inconsistency, these Special Provisions shall govern.

16.2 SCOPE OF WORK. All work necessary or incidental to complete the swimming pool & deck w/ associated equipment work for the Project in strict accordance with and reasonably inferable from the Contract Documents and as more particularly, though not exclusively, specified in Div 1, Div 3 as applicable, Div 7 as applicable, Div 11, Div 22 as applicable, Div 31 as applicable, Div 32 with the following additions or deletions: See Exhibit A attached.

16.3 COMMON TEMPORARY SERVICES. The following "Project" common temporary services and/or facilities are for the use of all project personnel and shall be furnished as herein below noted:

By this Subcontractor;

By others; Dumpster & toilet facility provided by contractor for use by subcontractor.

16.4 OTHER SPECIAL PROVISIONS. (Insert here any special provisions required by this Agreement.)

16.5 CONTRACT DOCUMENTS. (List applicable Contract Documents, including specifications, drawings, addenda, modifications and exercised alternates. Identify with general description, sheet numbers and latest date including revisions.)

Attachment A shall be considered part of the contract. Adhere to all requirements listed in the Preconstruction Conference Outline.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal, the day and year first above written.

SUBCONTRACTOR:

Crystal Pools

By:

Name:

Title:

Date:

Alison Felschow
President
11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By:

Name:

Title:

Date:

[Signature]

Erik Barrow

Project Manager

11/16/12

WORDING IDENTICAL TO AGC DOCUMENT NO. 600 DATED 1990

PAGE 14



EXHIBIT "A"

PROJECT: Legion Pool Complex W912HP-11-D-0014

CONTRACT NO.: K1301-002

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools
1101 Sparkleberry Lane Ext., Columbia, SC 29223 (Subcontractor), and
Group III Mgt., Inc., 2820 W Vernon Ave, Kinston, NC 28504 (Contractor):

THE WORK: (Continued) Work under this subcontract is to include all labor/materials/equipment/supervision/taxes and permits necessary to complete this scope of work so that all components will produce a fully functional and operational system in strict conformance with any and all agencies and state, county and local building codes having jurisdiction over this work. Work shall be in accordance with all contract terms and per plans and specifications. The Work shall include but is not limited to the following:

- Div. 1-General Requirements
- Div. 3-Concrete (As applicable)
- Div. 7-Thermal & Moisture Protection (As applicable)
- Div. 11-Equipment
- Div. 22-Plumbing (As applicable)
- Div. 31-Earthwork (As applicable)
- Div. 32-Exterior Improvements (As applicable)

Work to include but not be limited to:

Furnish & install a swimming pool and deck along with all associated equipment.

1. Provide an engineered excavation plan stamped by a Professional Engineer.
2. Forming of pool walls and floors is to be included as necessary.
3. Crystal Pools recognizes that the Demolition Contractor will not grade floors & walls. Crystal to undercut floor of pool compacted soil and backfill with 6" to 8" #57 stone. Group III will furnish sand for the deep end of the pool (approx. 60 yards). Crystal to place sand and compact.
4. Pool plumbing is to be stubbed into the new "Pump Room" constructed by Group III.
5. Attend a coordination meeting with the Electrical Contractor & Demolition Contractor.
6. This is a "Buy American" project.
7. Minor dewatering is to be included. It may well be that at the beginning of each morning water may have to be pumped from the pool. Crystal to provide sumps & pumps for minor pumping.
8. Equipotential Bonding for the pool is to be furnished & installed.
9. Pool coping is to be included.
10. Deck drainage is to be included. It will be taken to points shown on site drawings. To include Nyolplast or equal junction box.
11. If major dewatering is required, it will be added to the contract. Crystal Pools Schedule "A" is a worst case.
12. Work Schedule-12 weeks after the original pool is removed.
13. Furnish ACI certified personnel. Furnish copies of current certifications.
14. All equipment to have wiring run back to panels in the pump room. The Electrical Contractor will make final connections (except auto-shut off). Crystal to leave enough spare wire to make proper connections. The Electrical Contractor will run the power from the "Auto Shut off" back to the panel after making connection into the panel. This will be covered in depth in accordance with Item #5.

JB CONTRACTOR:

Crystal Pools

By: Alison FelschDate: 11/16/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: 11/19/12



EXHIBIT "A"

PROJECT: Legion Pool Complex W912HP-11-D-0014

CONTRACT NO.: K1301-002

This EXHIBIT "A" dated November 08, 2012, by and between Crystal Pools
1101 Sparkleberry Lane Ext, Columbia, SC 29223 (Subcontractor), and
Group III Mgt., Inc., 2820 W Vernon Ave, Kinston, NC 28504 (Contractor):

THE WORK: (Continued)

15. Crystal to backfill pool & install concrete pool deck. Coordinate with Group III on footing for sun shade.
16. Furnish 8 sets of submittals by 11/13/12.
17. Furnish name of bonding company.
18. If bond is required, Group III will pay the cost of the bond.
19. Certified payrolls are to be turned in WEEKLY.
20. Crystal to coordinate concrete for steps, sidewalk and pump house. Group III to pay for this work.
21. Crystal to coordinate with Group III & the Electrical Contractor on the pole light bases for the external lights.

Price= Pool & equipment	\$208,958
Less Pool lights	(\$ 3,000)
Pool Deck w/drainage system	\$ 44,002
TOTAL	\$330,860

SUBCONTRACTOR:

Crystal Pools

By: Allison Felschen Allison FelschenDate: 11/10/2012

CONTRACTOR:

Group III Mgt., Inc.

By: [Signature]Date: 11/10/2012

ARBITRATION TRIBUNALS OF THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration
between:

Group III Mgt., Inc.,
Claimant

v.

Suncrete of Carolina, Inc., d/b/a
Crystal Pools,
Respondent

Case #31-110-000261-13

Affidavit in Support of Award of
Attorneys' Fees and Costs

1. Group III Mgt., Inc., Claimant in the above-entitled action, was represented by the law firm of Wooten and Coley, Attorneys at Law, Kinston, North Carolina, and by Haynsworth Sinkler Boyd, P.A., Attorneys at Law, Columbia, South Carolina.

2. The attorneys providing legal services in the prosecution of this matter are as follows:

a. Everette L. Wooten, Jr., Attorney at Law, Kinston, North Carolina, a partner in the firm of Wooten and Coley, Attorneys at Law, is licensed to practice law in the state of North Carolina with approximately 47 years' experience including significant experience in construction law matters. All services provided by Everette L. Wooten, Jr., Attorney at Law, have been billed to Group III Mgt., Inc., at the rate of \$275.00 per hour except for approximately 2.75 hours that was erroneously billed at the rate of \$250.00 per hour.

b. William C. Coley III, attorney at law, is licensed to practice law in the state of North Carolina with approximately 34 years experience including significant experience in construction law matters. All services provided by William C. Coley III, Attorney at law, have been billed to Group III Mgt., Inc., at the rate of \$275.00 per hour.

c. John C. Bruton, Jr., a partner and shareholder in Haynsworth Sinkler Boyd, P.A., is licensed to practice law in the state of South Carolina and has more than 30 years' experience including significant experience in construction law matters. Mr. Bruton's time is billed at his agreed hourly rate of \$275.00 per hour.

d. Ross Shealy, an associate in the law firm of Haynsworth Sinkler Boyd, P.A., whose time is billed at \$225.00 per hour

e. Legal Assistants furnished by Haynsworth Sinkler Boyd, P.A., are billed at the rate of \$100.00 per hour.

3. Group III Mgt., Inc., claimant in this action, has paid and/or incurred attorneys' fees as follows:

Attorney	Hours	Rate	Amount
Everette L. Wooten, Jr.	311.50	\$275.00	\$ 85,662.50
Everette L. Wooten, Jr.	2.75	\$250.00	\$ 687.50
William C. Coley III	14.25	\$275.00	\$ 3,918.75
John C. Bruton, Jr.	130.90	\$275.00	\$ 35,997.50
Ross Shealy	.70	\$225.00	\$ 157.50
Barry Wheeler	1.50	\$100.00	\$ 150.00
TOTAL	461.60		\$126,573.75

Group III Mgt., Inc., also reimbursed the above-described attorneys for expenses as follows:

Attorney	Expense	Amount
Hayworth Sinkler Boyd	Costs of outside copying	\$ 547.75
Wooten and Coley	Reimbursement of expenses for copying exhibit reproductions, overnight carrier bills, and hotel accommodations for depositions & hearing	\$2,345.14
Total		\$2,892.89

In addition to the foregoing costs for attorneys' fees and costs reimbursed to attorneys set forth in the preceding paragraphs, Group III Mgt., Inc., incurred and/or paid directly for expenses as follows:

Paid To	Expense	Amount
American Arbitration Assoc.	Costs	\$14,575.00
Sinclair & Associates	Expert witness fees	\$ 7,302.40
Court Reporter fees	Deposition: John Rogers	\$ 352.00
Court Reporter fees	Deposition: Alison Felschow	\$ 1,051.60
Court Reporter fees	Deposition: Tim Posey	\$ 912.55
David Howard	Travel & time reimbursement	\$ 508.30
Tim Posey	Travel & time reimbursement (for deposition in Kinston, N.C.)	\$ 2,145.32
David Deaton	Travel & time reimbursement	\$ 1,000.80
Total		\$27,847.97

Original time and invoice records maintained in this case will be made available to the Arbitrator upon request.

The undersigned does hereby state that the foregoing attorneys' fees, costs, and the related expenses are fair and reasonable for the services rendered in this case and incurred by Group III Mgt., Inc., due to the complexity of the issues and the large volume of documentary evidence.

This the 17 day of July, 2014.

WOOTEN & COLEY

BY:


 Everette L. Wooten, Jr.
 Attorney for Claimant
 Post Office Box 1555
 Kinston, NC 28503-1555
 Telephone: (252) 523-8000
 NC State Bar No: 4844

Sworn to and subscribed before me this 17 day of July, 2014..


 Notary Public

 Typed or Printed Name of Notary Public

My Commission Expires:

11-19-17

American Arbitration Association

In the Matter of Arbitration between:

Group III Mgt. Inc.,

Claimant

v.

Suncrete of Carolina, Inc. d/b/a Crystal Pools

Respondent

RESPONDENT'S AFFIDAVIT OF
ATTORNEYS' FEES AND COSTS

PERSONALLY APPEARED before me, Alan Belcher, who being duly sworn deposes and says:

1. I am an attorney for the Respondent in the above referenced matter. I am a licensed member of the South Carolina bar in good standing at all times relevant hereto. I am a shareholder in Hall Booth Smith, P.C.

2. This case is an action seeking collection of a debt owed for materials and labor provided by Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools") to the Claimant, above-named. My firm and I were retained by the Crystal Pools to assist in collecting this past due debt and to defend claims associated with Crystal Pools' alleged breach of its contract with Claimant.

3. As of the date of this Affidavit, the attorney's fees actually incurred in connection with this action amount to \$59,097.50. The hourly rates charged were \$200.00 per hour for Alan Belcher as Partner, \$175.00 for Elizabeth H. Freeman as Associate, and \$100.00 per hour for Paralegal work. These rates are reasonable and customary for the services provided in this area of law. The time expended and fees associated with that time are as follows:

a. Time

Number	Name	Title	Hours Worked
0635	Belcher, Alan	Partner	218.40
0700	Freeman, Elizabeth	Associate	44.10
0681	LeGare, Consuelo	Paralegal	37.60
0578	Shumate, Cheleste	Paralegal	2.10
1132	Stovall, William	Summer Clerk	35.60
0643	Tata, Andrea	Paralegal	1.7

b. Fees

Number	Name	Title	Worked Amount
0635	Belcher, Alan	Partner	43,680.00
0700	Freeman, Elizabeth	Associate	7,717.50
0681	LeGare, Consuelo	Paralegal	3,760.00
0578	Shumate, Cheleste	Paralegal	210.00
1132	Stovall, William	Summer Clerk	3,560.00
0643	Tata, Andrea	Paralegal	170.00

4. As of the date of this Affidavit, costs incurred in connection with this action amount to \$15,785.17. These costs include filing fees, travel expenses, service costs, and other costs associated with the claims and defenses in this matter. The costs are reasonable and necessary to pursue this action and are not, I believe, excessive given the nature, extent and difficulty of the legal services in this case, the time and labor devoted to this case, and the beneficial result sought to be obtained. The costs are as follows:

Date	Vendor	Amount
1/19/13	American Arbitration Association	\$850.00
12/31/13	American Arbitration Association	\$1,250.00
1/30/14	Mileage – Mtg with client in Cola.	\$142.63
3/25/14	Filing fee – Federal court	\$350.00
6/12/14	Mileage – deposition in Cola on 6/4/14	\$126.67
6/12/14	Mileage – deposition in Kinston, NC on 5/28/14	\$348.99
6/12/14	Mileage – deposition in Cola 6/11/14	\$126.67
6/12/14	Mileage – deposition in Cola 6/10/14	\$126.67
6/25/14	Hotel expense – deposition in Kinston, NC 6/27/14	\$125.15
7/9/14	FedEx to Wooten & Coley	\$62.32
7/9/14	FedEx to Womble Carrlyle	\$32.85
7/14/14	Mileage – arbitration – Cola	\$127.57
7/14/14	Mileage – deposition – Kinston, NC 7/1/14	\$348.99
7/14/14	Mileage – meeting w/ client in Cola	\$15.12
7/14/14	Mileage – arbitration – Adam Stoval	\$127.57
7/14/14	Meals during arbitration – Adam Stoval	\$43.72
	AWR – Felschow deposition	\$481.00
	AWR – Rogers deposition	\$158.00
	Clark & Associates – Sinclair deposition	\$587.95
	New Born Court Reporters – Posey deposition	\$286.15
3/25/14	American Arbitration Association – arbitrator expense deposit	\$600.00
3/25/14	American Arbitration Association – Neutral Comp deposit	\$7,875.00
6/30-7/1/14	Hampton Inn Kinston – deposition of Posey	\$122.90
7/8-9/14	Courtyard Marriott – arbitration	\$201.48

	Meals during arbitration	\$131.01
	Meals during Posey deposition	\$10.01
	Clark & Associates – Barrow deposition	\$1,001.60
5/27-28/14	Hampton Inn – deposition of Barrow	\$125.15
	Total	\$15,785.17

5. The total of attorney's fees and costs actually incurred are \$74, 882.67.

6. After due consideration of the nature, extent, and difficulty of the legal services rendered, the time and labor necessarily devoted to the case, the professional standing of counsel, and the customary fee charged in the locality for similar services, I respectfully submit that an award of attorney's fees and costs to the full extent set forth in this Affidavit is appropriate; therefore, Crystal Pools is entitled to recover \$74, 882.67 in attorney's fees and costs.

FURTHER THIS AFFIANT SAYETH NOT.


Alan Belcher

Sworn to and subscribed before me
this 17th day of July, 2014.


Notary Public

My commission expires: 5/20/16

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2014-CP-40-007229
Court of Appeals Case No. 2015-002584

GROUP III MANAGEMENT, INC.,
v.

Respondent,

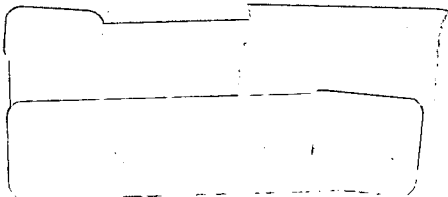
SUNCRETE OF CAROLINA, INC., d/b/a CRYSTAL
POOLS,

Appellant.

PROOF OF SERVICE

I certify that I have served the **Record on Appeal** upon the Respondent by way of Federal Express Priority Overnight on September 9, 2016, addressed to Respondent's attorneys of record, addressed as follows:

John C. Bruton, Jr., Esquire
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
Columbia, South Carolina 29201



Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
c/o John C. Bruton, Jr., Esquire
1201 Main Street, Suite 2200
Columbia, South Carolina 29201
(864) 240-3200

(Signature appears on succeeding page)



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Telephone: (843) 720-3460

*Attorneys for Appellant, Suncrete Of Carolina, Inc., d/b/a
Crystal Pools*

Dated: September 9, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2014-CP-40-007229
Court of Appeals Case No. 2015-002584

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SC Court of Appeals

GROUP III MANAGEMENT, INC.,
v.

Respondent,

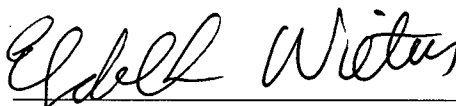
SUNCRETE OF CAROLINA, INC., d/b/a CRYSTAL
POOLS,

Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal contains all material proposed to be included
by both parties and not any other material.

Respectfully submitted,



Alan R. Belcher, Jr., Esquire, Bar No. 71686
Elizabeth F. Wieters, Esquire, Bar No. 78064
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Telephone: (843) 720-3460

*Attorneys for Appellant, Suncrete Of Carolina, Inc., d/b/a
Crystal Pools*

Dated: September 28, 2016