

1 Chief Justice Robert E. Rose (Ret.)
2 JAMS
3 2300 W. Sahara Ave., Suite 900
4 Las Vegas, NV 89102
5 Phone: (702) 457-5267
6 Fax: (702) 437-5267

7 Hon. Robert E. May (Ret.)
8 JAMS
9 401 "B" Street, Suite 2100
10 San Diego, CA 92101
11 Telephone: (619) 236-1848
12 Fax: (619) 236-9032

13 Hon. Luis Cardenas (Ret.)
14 JAMS
15 500 N. State College Blvd.
16 Suite 1400
17 Orange, CA 92868
18 Telephone: (714) 939-1300
19 Fax: (714) 939-8710

20 Arbitrators

21 IN THE MATTER OF THE ARBITRATION
22 BETWEEN

23 C & S COMPANY, INC.,
24 Claimant/Counterdefendant,
25 MERCHANTS BONDING COMPANY,
26 Claimant-In-Intervention,
27 vs.
28 SOUTH EDGE, LLC, a Nevada Limited
Liability Company, and BOND SAFE-
GUARD INSURANCE COMPANY,
Respondents/Counterclaimants.)

JAMS Ref. No.: 1260001162

INTERIM AWARD¹

¹ The issues regarding attorney fees, costs and interest will be addressed in a subsequent hearing.

1 I. INTRODUCTION

2 The arbitration involved claims by C&S Company (C&S) and its
3 bonding company, Merchants Bonding Company (Merchants)², against
4 South Edge, LLC (S/E) and its bonding company, Bond Safeguard
5 Company (Bond). S/E and Bond counterclaimed against Claimants. The
6 claims arose from excavation work performed by C&S for S/E.³

7 The arbitration was conducted on June 7, 8, 9, 10, 14, 15 and 16,
8 2010, before a three-judge panel consisting of Panel Chair Robert Rose,
9 retired Chief Justice of the Nevada Supreme Court, and Panelists Luis
10 Cardenas and Robert May, retired Superior Court Judges from California.
11 Representing Merchants were Jay Mann and Robert Berens. Representing
12 C&S was Michael Van. Representing S/E and Bond were Stephen Peek
13 and Sean Thuson. After completion of the evidentiary hearing, the
14 Claimants and Respondents submitted written closing arguments on or
15 about August 11, 2010. The parties have stipulated that the Interim Award
16 may be served no later than September 24, 2010.

17 C&S is an excavation company which, after a competitive bidding
18 process, was awarded the contract for the Executive Airport
19 Road/Volunteer Boulevard Sanitary Sewer Project (Volunteer Project) (Exh.
20 13 - Master Contract; Exh. 14 - General Conditions, and Exh. 34 -
21 Addendum 4). S/E was the owner of the project and Landtek, LLC
22 (Landtek) was the construction manager (CM) for S/E. Merchants issued
23 both performance and payment bonds⁴ on behalf of C&S for the Volunteer
24 Project. Bond became involved when it issued a mechanic's lien release

25
26 ² Merchants was a Claimant-in-Intervention.

27 ³ The work was the "Executive Airport Road/Volunteer Boulevard Sanitary Sewer Project" located in
Henderson, Nevada.

28 ⁴ C&S and Mr. & Mrs. Lindberg executed a General Indemnity Agreement in favor of Merchants.

1 bond to cover C&S's project mechanic liens.

2 C&S and Safeguard brought the instant action against S/E and Bond
3 alleging that C&S encountered unexpected subsurface cementitious material
4 that substantially exceeded that which was within the contractual scope of
5 work. C&S seeks recovery of the extra costs incurred, the balance of
6 contractual fees owed, payments based upon the Nevada Prompt Pay Act as
7 well as interest, fees and costs. C&S also seeks punitive damages.
8 Safeguard seeks recovery of damages claimed by C&S, which Merchants is
9 equitably subrogated, and losses incurred by Merchants in relation to the
10 bonds, interest, fees and costs.

11 S/E alleges that the subsurface conditions were part of C&S's
12 contractual scope of work, that C&S did not complete its work timely, and
13 that C&S permitted subcontractors and suppliers to lien the job. S/E
14 seeks damages for these breaches as well as fees and costs.

15 The following witnesses testified during the course of the arbitration:

- 16 1. Brad Lindberg
- 17 2. Stacey Lindberg
- 18 3. Brooks Cox
- 19 4. Stavros Chrysovergas
- 20 5. Thomas Tomeo
- 21 6. Sean Harron
- 22 7. Barbara Carlos
- 23 8. Larry Bross
- 24 9. Keith Mattecheck
- 25 10. Jack Bassett
- 26 11. Steven Viani

27 In addition, certain deposition transcripts were submitted by counsel
28 and were read by the Panel. These excerpts included testimony from Jack

1 Bassett, Sean Harron, Stacey Lindberg, Brooks Cox, Nathan Wasden,
2 Robert Taxelius, Arne Wagley, John Holden, Chris Morris, Tom Tomeo,
3 Larry Bross, Stavros Chrysovergas and Steve Viani.

4 II. FACTUAL SUMMARY

5 The following discussion is a summary of those facts found by the
6 Arbitration Panel to be true and relevant to the issuance of this Interim
7 Award. Any differences between the recitation and any party's position or
8 contention is the result of the Panel's determination as to witness
9 credibility, relevance, burden of proof considerations and the weighing of
10 evidence, both oral and written.

11 A. Bid Process.

12 In April 2006, S/E solicited excavation bids for the Volunteer
13 Project. C&S did not bid. No contract was awarded at that time. In
14 August 2006, a second round of bids was solicited. C&S submitted a bid in
15 the amount of \$2,785,018.74 (Exh. 28).⁵ This amount was subsequently
16 revised to \$2,558,526.24 (Exh. 34) and C&S received the work.

17 As part of the bid package C&S received various soils reports
18 (Exh. 6, 7, 507 and 526). No soils reports were prepared specifically for the
19 Volunteer Project and no soils report had boring data below 15 to 17 feet.
20 As part of its due diligence before bidding, Mr. Lindberg⁶ also met with the
21 supervisor for Western States, which had excavated for a water line
22 approximately thirty (30) feet from the proposed Volunteer sewer line.
23 Additionally, Mr. Lindberg requested, of Landtek, all soils reports within a
24 one mile radius of the Volunteer Project. C&S was never given a June 7,
25 2006, soils report (Exh. 25) prior to executing the contract.

26 _____
27 ⁵ The next lowest bid was \$4,748,994.35 (Exh. 29).

28 ⁶ Mr. Lindberg was a principal at C&S.

1 B. Contract Provisions.

2 Certain provisions of the contract (Exh. 14) will be considered
3 regarding the claims of C&S. The parties all agreed that the scope of work
4 included a “hard dig.”⁷ In paragraph 1.1.15, C&S acknowledged it had
5 visited the site to review the existing conditions and had done the necessary
6 investigations to properly estimate the costs of its work. The paragraph
7 goes on to state that “unless otherwise provided in this Contract, no
8 additional monies will be paid to the Contractor by Owner because of site
9 conditions that are apparent or are indicated on the plans or other
10 drawings and site conditions as they actually exist.” (Emphasis added.)

11 C&S was to promptly notify Landtek, in writing, if C&S
12 encountered materially changed site conditions (§4.16.4.2). Landtek would
13 then review the conditions to determine whether there was a material
14 difference, whether such condition(s) should have been reasonably expected
15 to be present, and whether C&S would be entitled to a change in contract
16 price (§4.16.5).

17 C. Changed Site Conditions.

18 After commencing its work on the Volunteer Project, C&S
19 encountered rock, which exceeded in scope that described in the S/E
20 provided soils reports. (See testimony of Brad Lindberg, Brooks Cox, Jack
21 Bassett and Stavros Chrysovergas.) Landtek became aware of C&S’s
22 position regarding changed conditions no later than November, 2006 (Exh.
23 52, and testimony of Mr. Bassett).

24 The encountered material was described by Mr. Bassett as
25 prehistoric rock, “about the hardest material on the planet.” Based upon
26 past experience, Mr. Bassett was aware, prior to bidding, that the

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28 ⁷ “Hard dig” is not specifically defined; however, in the excavation field, the term refers to the presence of hard cementitious type material and/or boulders.

1 suggested equipment to use, which was in the September 19, 2005 soils
2 report (Exh. 11, p. 8), would not be sufficient to do the project. The soils
3 report indicated a D-10 or equivalent could be used for hard cemented
4 layers less than 24-inches thick and a rock saw or hoe-ram could be used
5 for thicker layers. Mr. Bassett raised his concerns regarding the "D-10 or
6 equivalent" equipment with Mr. Worley. Mr. Bassett testified at his
7 deposition that Mr. Worley said the September 19 report was the soils
8 report, so Mr. Bassett did nothing. Mr. Bassett's experience indicated that
9 an H.L. Chapman would be required. He never told this to C&S even
10 though he was aware that the H.L. Chapman was not listed by C&S as
11 equipment to be used.

12 After utilizing various equipment to excavate the encountered
13 rock layers, C&S eventually leased a H.L. Chapman from Texas in
14 December 2006.⁸ This piece of equipment was sufficient to complete the
15 Volunteer Project.⁹

16 D. Extra Work Orders.

17 As a result of what C&S had claimed to be changed
18 circumstances, it requested to be compensated for additional labor,
19 equipment and material costs as well as other costs and fees. There was a
20 meeting between Mr. Lindberg and Mr. Bassett in November 2006 wherein
21 Mr. Lindberg indicated that the "hard dig" material was substantially
22 different than anticipated and as a result the costs were higher. Mr.
23 Bassett told Mr. Lindberg he would need to submit back-up so Mr. Bassett
24 could write a justification letter to the owner's sub-committee. C&S

25 _____
26 ⁸ Mr. Basset had eventually recommended this equipment.

27 ⁹ The completion was approximately 4-5 months after the contractual completion date. However, the
28 overall project had experienced a delay of approximately 5-6 months based upon different issues (Exh. 49,
¶6.a).

1 continued its excavation work after this meeting.

2 On or about December 14, 2006, Mr. Lindberg and Mr. Bassett
3 met again. During this meeting, Mr. Lindberg testified that Mr. Bassett
4 stamped and initialed (signed) an Extra Work Order (Exh. 55). Mr. Bassett
5 agreed that the stamp was his, but the signature was not.¹⁰ Exhibit 55
6 states, "Working on add'l hardrock - CO at completion of contract."¹¹

7 In addition to Exhibits 55 and 61, both Mr. Lindberg and Mr.
8 Cox testified that during December 2006 and the beginning of 2007, C&S
9 was told by Mr. Bassett to keep its head down and get the work done and it
10 would be taken care of at the end of job. At field meetings, Mr. Bassett
11 would say to get the costs together and we will work out at end of job.¹²
12 C&S continued to work until the project was substantially completed.

13 There was testimony from Mr. Lindberg and Mr. Bassett that
14 C&S had delivered a letter and spreadsheet to Landtek for extra work in the
15 amount of \$778,337.50. Mr. Bassett testified that he never received
16 complete documentation requested from C&S and, therefore, never
17 presented C&S's request and spreadsheet (Exh. 66) to the owner's sub-
18 committee for consideration.

19 On March 22, 2007, Mr. Worley, Vice President of Development
20 for Landtek, sent a letter to C&S (Exh. 84). In that letter, he indicated, in
21 part, that he had researched the change order request for \$778,337.50 for
22 hard rock excavation and denied the request.¹³ There is no mention in this
23

24 ¹⁰ S/E requested the Panel compare Mr. Bassett's signatures on Exhibits 72, 174-179 and 527.

25 ¹¹ C&S claims that a second Extra Work Order (Exh. 61) with the exact same verbiage was stamped and
26 signed by Mr. Bassett on January 12, 2007. Again, Mr. Bassett agrees the stamp was his, but not the signature.

27 ¹² Mr. Bassett testified he would not have said this.

28 ¹³ This letter from Mr. Worley supports the allegation that a spreadsheet in the amount of \$778,337.50
had actually been given to Landtek at some point, although Mr. Lindberg was inconsistent in his testimony as
to the date it was given.

1 letter that C&S had failed to provide details for Mr. Worley's analysis.

2 The contract contains various provisions relating to change
3 orders (Exh. 14, ¶9.2 and 9.3). However, there is no specific provision that
4 states Landtek, the construction manager, cannot authorize change
5 orders.¹⁴ Under paragraph 9.2.5, even if no agreement has been made
6 regarding contract price or time, C&S was required to proceed with the
7 changed work if so ordered in writing by Landtek. There was a separate
8 CM Agreement (Exh. 5) between S/E and Landtek, which indicated that
9 Landtek did not have the authority to approve change orders. This CM
10 Agreement was not given to C&S, nor incorporated by reference in C&S's
11 contract. C&S had prior projects where Landtek operated as the CM. In
12 those projects, Landtek did have authority to sign off on change orders.
13 (See uncontradicted testimony of Sean Harron.)

14 The parties presented testimony and documentation from
15 percipient as well as expert witnesses regarding the existence or non-
16 existence of changed subsurface soil conditions. As part of the expert
17 investigations, various soils reports, site photographs and discussions with
18 percipients were considered by the experts before rendering their opinions.

19 Claimant expert Stavros Chrysovergas opined regarding the
20 significance of the boring log results in various soil reports (Exh. 6, 7, 10,
21 11 and 25) when compared to site photographs and industry standards.
22 He also performed calculations to arrive at an opinion regarding the volume
23 of overexcavation of soil required to be done as a result of the changed
24 conditions encountered.

25 Respondent expert Steven Viani opined regarding the boring
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28 ¹⁴ In fact, Tom Worley of Landtek approved a C&S change order on January 9, 2007, in the amount of \$16,164.70 (Exh. 60).

1 logs as to whether they sufficiently informed the nature and extent of the
2 “hard dig.” He also opined that overexcavation would be required, even
3 without any changed conditions, based upon the soils reports and
4 photographs he reviewed and certain OSHA requirements.

5
6 E. Findings Regarding Changed Conditions.

7 Based upon all evidence received, the Panel makes the
8 following findings:

9 a) C&S’s contractual scope of work included a “hard dig.”

10 b) C&S’s due diligence, before contracting, was reasonable.

11 C&S considered the soils reports provided by S/E, visited the site,
12 discussed the general site area with another excavation contractor,
13 requested other reports, if any, from Landtek and relied upon its own
14 experience in other local excavation projects.

15 c) Landtek, the CM for S/E, did not provide the June 7,
16 2006 report (Exh. 25) that reflected more hard cemented materials than the
17 provided reports.

18 d) Mr. Bassett, Landtek’s supervisor, knew that the
19 equipment referenced in the September 19, 2005, soils report would not be
20 sufficient for the Volunteer Project. He did not notify C&S of this
21 knowledge, even though C&S submitted an equipment list as part of its bid.
22 It was not until December 2006 that Mr. Bassett referenced the H.L.
23 Chapman. Once this equipment was brought to the site, it was able to cut
24 the harder encountered cementitious material.

25 e) Mr. Bassett identified the encountered rock as “about the
26 hardest material on the planet.” He personally agreed that a change order
27 was warranted, as he believed this was the “hardest job any contractor
28 would have to do.” He also based this opinion upon the soils reports he

1 compared to that which was actually encountered and his twenty-eight
2 years of experience.

3 f) The totality of testimony and documentation convinces
4 the Panel that C&S encountered a substantially changed subsurface
5 condition than what was reasonably believed to be present. This
6 encountered condition was not included within the "hard dig" scope of work
7 in the Volunteer contract.

8 g) Although not technically compliant with the notice
9 provision of the contract (§9.2.3), C&S gave sufficient written and oral
10 notice to Landtek on several occasions during November 2006 through
11 January 2007 that C&S had encountered changed conditions, which
12 necessitated increased costs. Landtek was aware of this issue and acted on
13 this issue.

14 h) The evidence supports that C&S was being told to
15 continue working and the compensation would be resolved at a later time.
16 This conclusion is reasonable in that S/E, through Landtek, was interested
17 in pushing the project along and that it would be difficult to quantify the
18 time and cost for the future unknown conditions. The quantity could be
19 less or more based upon these encountered conditions.

20 i) The evidence supports Mr. Lindberg's testimony that Mr.
21 Bassett stamped and signed Exhibits 55 and 61. Even Mr. Bassett testified
22 that the stamp was his and was kept in his desk drawer. A comparison of
23 Mr. Bassett's signature on these two exhibits and Exhibits 72, 174-179 and
24 527 do not necessarily assist the Panel. There are noted differences even
25 with the S/E proffered exemplars.

26 j) It was reasonable for C&S to understand that Landtek
27 had the authority to discuss and to approve extra work requests as well as
28 directing C&S to continue work. This is based upon past experiences

1 between the entities, the absence of contrary language in the Volunteer
2 contract, not having the CM Agreement to review, the signing by Landtek's
3 Tom Worley of Exhibit 60 and the stamping and signing by Landtek's Jack
4 Bassett of Exhibits 55 and 61.

5 k) Landtek was S/E's agent in the field and based upon
6 C&S's contract it was reasonable for C&S to deal directly with Landtek's
7 personnel and rely upon direction given by Landtek. Even though C&S was
8 aware that the owner was S/E and that there was a consortium involved,
9 this knowledge does not negate Landtek's authority, in the eyes of C&S, to
10 act for the owner.

11 F. Compensation For Changed Conditions and Retention
12 Amounts.¹⁵

13 Having found that C&S encountered material changed
14 conditions during the excavation, the Panel will address whether C&S
15 should be compensated for any increased time and costs to complete the
16 Volunteer Project.

17 As previously discussed, C&S submitted a spreadsheet to
18 Landtek, dated January 26, 2007, requesting \$778,337.50. This
19 spreadsheet was purportedly for a portion of the increased scope of work.
20 Several emails were exchanged between C&S and Landtek regarding the
21 increased costs (Exh. 78, 81 and 82). On March 22, 2007, Landtek denied
22 the extra change order (Exh. 84). C&S followed with a letter dated March
23 28, 2007, to Landtek, attention Larry Bross (Exh. 85). However, the issue
24 of increased compensation was not resolved between the parties. On April
25 25, 2007, C&S sent a notice of intent to lien in the amount of
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27
28 ¹⁵ C&S also has claims for violations of the Prompt Payment Act.

1 \$1,404,803.60 (Exh. 87).¹⁶

2 In regards to the unpaid contractual retention amount of
3 \$621,614.48, S/E, in May 2007, paid pay application 6 (Exh. 637, BS SE
4 000151 and 000161) and in September and October 2007 paid C&S and its
5 subcontractors and suppliers (Exh. 709 and 710) for all but \$50,300 of the
6 retained amount.¹⁷

7 In addition to the claim for \$778,337.50 for increased costs
8 and the \$50,300 retained contractual amount, C&S also claims a violation
9 under the Nevada Prompt Pay Act and under the contract for pay
10 applications 5-11. Pay application 10 (Exh. 688) is for \$1,430,522.84 and
11 pay application 11 (Exh. 689) is for \$515,809.08.

12 S/E purportedly terminated C&S from the project by a letter
13 dated June 7, 2007 (Exh. 679). By this date C&S had substantially
14 completed the Volunteer Project. Only after this termination notice did
15 C&S submit pay applications 10 and 11 on June 30, 2007. This was the
16 first occasion that a request for extra pay exceeded the amount of
17 \$778,337.50.

18 While examining the notice requirements of the Prompt Pay
19 Act, the Panel requested additional briefing from the parties. These
20 supplemental briefs were received on September 20, 2010, and have been
21 read. Having considered the respective positions of Claimants and
22 Respondents, the Panel makes the following findings:

23 1. NRS 624.609 is applicable to situations where (a) the
24

25 ¹⁶ This amount includes an unpaid amount of \$621,614.48 owed on the original contract and the
26 approved change orders. The balance of \$783,189.12 is relatively close to the January 26, 2007, requested
amount of \$778,337.50.

27 ¹⁷ S/E had received pay application 5 (Exh. 626) dated 1/31/07; pay application 6 (Exh. 636) dated
28 2/22/07; pay application 7 (Exh. 659) dated 3/31/07; pay application 8 (Exh. 668) dated 4/30/07; and pay
application 9 (Exh. 675) dated 5/31/07. These five (5) pay applications totaled \$621,614.48.

1 owner intends to withhold payment application funds; (b) the contractor
2 responds to an owner withholding funds; and (c) the contractor notices its
3 intent to abandon the project when funds are withheld. There is no notice
4 requirement, in this statute, placed on the contractor when submitting pay
5 applications or change orders. The burden is placed on the owner to
6 comply with NRS 624.609, if the owner withholds payment from the
7 contractor.

8 2. NRS 624.610 is applicable to situations where (a) the
9 owner fails to comply with NRS 624.609.1, .3 or .4; (b) the owner fails to
10 issue a change order within 30 days after the date a written request for a
11 change order was submitted; (c) the owner fails to give written notice to the
12 contractor of the reasons why the change order is unreasonable; or (d) the
13 owner fails to explain additional information and time are necessary to
14 make a determination. If such failure occurs by the owner, NRS 624.610.3
15 sets forth the consequences to owner. There is no notice requirement
16 placed on the contractor when submitting pay applications or change
17 orders.

18 3. NRS 624.622 sets forth certain notice requirements
19 under NRS 624.609 to 624.622. None of these requirements appear
20 applicable to a contractor that submits pay applications and/or change
21 orders.¹⁸

22 4. S/E has failed to comply with the Prompt Pay Act in that
23 it withheld contractual funds (pay applications 5-9) without giving written
24 notice of any amount that will be withheld (NRS 624.609.1 and .3). The
25 fact that the bulk of these amounts were paid several months after
26

27 ¹⁸ C&S did comply substantially with the contractual notice requirements in the scope and delivery of
28 pay applications 5-11. (See uncontradicted testimony of Stacey Lindberg.) There is no evidence that S/E did
not receive pay applications 5-11 and/or that these applications were not in conformity with the contract.

1 submission by C&S does not cure the statutory time obligation under NRS
2 624.609.1(a) or (b). (Exh. C of Exh. 13 allows 30 days.)

3 5. In regards to pay applications 10 and 11, these were
4 submitted for extra work and retention, in addition to the \$778,337.50 that
5 had been requested in January 2007. The Panel finds no violation of the
6 Prompt Pay Act as to S/E, as there was no contractual relationship as of
7 June 30, 2007.

8 6. In regards to the extra work order for \$778,337.50, the
9 Panel finds that Landtek timely requested additional backup information
10 from C&S in February 2007 (see testimony of Mr. Bassett). C&S never
11 provided this additional information (see testimony of Mr. Bassett and Mr.
12 Lindberg). The extra work order was denied in March, 2007 (Exh. 84).
13 There was no violation by S/E of the Prompt Pay Act for this amount.

14 7. Fees, costs and interest will be the subject of a
15 subsequent hearing.

16 Having made the findings regarding the Prompt Pay Act claims,
17 the Panel then analyzed the evidence to determine whether C&S has
18 satisfied its burden to prove it has incurred the costs sought in those
19 applications. Mr. Tomeo has testified that his investigation led him to the
20 opinion that C&S incurred \$3,699,175.17¹⁹ in extra costs for the work on
21 the Volunteer Project (Exh. 134 and 135). This total is higher than that
22 sought by C&S in its pay applications and change orders. Those figures
23 were \$778,337.50, \$1,430,552.84, \$515,809.08 and \$50,300 for a total of
24 \$2,774,999.42.

25 Having considered the testimony of percipient and expert
26 witnesses as well as relevant exhibits on the issue of damages, the Panel

27 _____
28 ¹⁹ C&S had withdrawn a claim of \$189,827.94 for the Losee and Galleria Projects.

1 concludes there is insufficient evidence to support Mr. Tomeo's total of
2 \$3,699,175.17.²⁰ However, when his opinions are considered with the
3 balance of the evidence, the Panel concludes the following extra costs were
4 incurred by C&S and remain unpaid:

- | | | |
|---|--------|--------------------------|
| 5 | 1. | \$ 778,337.50 |
| 6 | 2. | 1,430,552.84 |
| 7 | 3. | 486,846.16 ²¹ |
| 8 | 4. | <u>50,300.00</u> |
| 9 | Total: | \$2,746,036.50 |

10 G. Lien Claims.

11 C&S filed three liens (Exh. 702, 711 and 716). The amounts of
12 the liens changed, with the final lien (Exh. 716) alleging \$2,743,789.11
13 owed to C&S by S/E. The Panel has found that S/E owed C&S
14 \$2,746,036.50. C&S is the prevailing lien claimant. Fees, costs and
15 interest will be the subject of a subsequent hearing. (See NRS 108,237,
16 108.238 and 108.239.)

17 H. Claimants' Additional Claims.

18 C&S has alleged that the Respondent breached the implied
19 covenant of good faith and fair dealing implied in the contract and allege
20 C&S is entitled to punitive damages. The Panel finds there is insufficient
21 evidence to establish S/E's liability for such a breach and for punitives. In
22 addition, the General Conditions of the contract (Exh. 14) disallows
23 punitives.

24 Merchants' Complaint-In-Intervention seeks to recover, based

25 _____
26 ²⁰ The Panel considered and accepted many of S/E's concerns set forth by Mr. Viani in his testimony
27 and discussed by counsel in their closing brief and attached Exhibit A.

28 ²¹ This represents 10% of the total contract and extra work which totaled \$4,868,461.65. This is in place
of \$515,809.08 submitted in pay application 11.

1 upon subrogation rights, those payments made in its Performance Bond to
2 subcontractors and material suppliers utilized by C&S on the Project. The
3 payments (excluding attorney fees and cost) were established by the
4 testimony of Barbara Carlos and Exhibit 110. The Panel finds that
5 Merchants suffered these losses as a result of S/E's failure to pay C&S
6 money under their contract. As a result of this failure, Merchants provided
7 payments to subcontractors and suppliers when C&S was financially
8 unable to do so. The award in the arbitration will be in favor of both C&S
9 and Merchants based upon their contractual relationship.

10 I. S/E Counterclaim.

11 In a counterclaim, S/E alleged a breach of contract and breach
12 of the implied covenant of good faith and fair dealing against C&S.
13 Specifically the counterclaim alleged C&S did not complete its work timely
14 and it failed to pay its subcontractors and suppliers, which permitted liens
15 to be filed against the property.

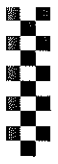
16 The Panel finds that S/E first breached the contract with C&S,
17 by S/E's failure to timely pay C&S pursuant to the terms of the contract.²²
18 This resulted in C&S not having sufficient funds to pay its creditors and
19 this failure to pay resulted in liens being filed. It is a general rule of
20 contract law that a material breach by one party to a contract excuses
21 further performance by the other party. (See, e.g., Martin Bloom Assoc.,
22 Inc. v. Manzie, 389 F.Supp. 848, 853 (D.Nev. 1975); Young v. Elec. Sign Co.
23 v. Fohrman (1970) 86 Nev. 185, 188; Bradley v. Nevada-Cal-Or.Ry (1919)
24 42 Nev. 411, 421.)

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28 ²² Pay applications 5-9.



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D. C&S and Merchants' reply to be filed/served no later than November 1, 2010.

Dated: 9/23/2010

HON. ROBERT E. ROSE (Ret.),
Arbitrator

Dated: 9/23/2010

HON. LUIS CARDENAS (Ret.),
Arbitrator

Dated: _____

HON. ROBERT E. MAY (Ret.),
Arbitrator

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D. C&S and Merchants' reply to be filed/served no later than
November 1, 2010.

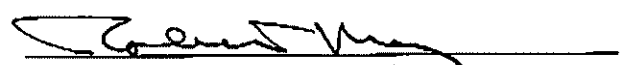
Dated: _____

HON. ROBERT E. ROSE (Ret.),
Arbitrator

Dated: _____

HON. LUIS CARDENAS (Ret.),
Arbitrator

Dated: 9-23-10



HON. ROBERT E. MAY (Ret.)
Arbitrator