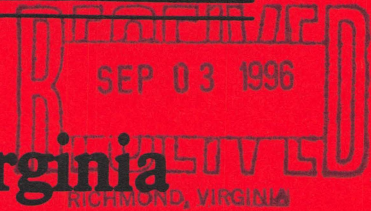


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CLERK  
SUPREME COURT OF VIRGINIA

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND



RECORD NO. 960604

**NAJLA ASSOCIATES, INC.,**

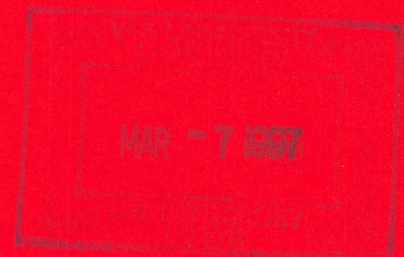
*Appellant,*

v.

**WILLIAM L. GRIFFITH & COMPANY  
OF VIRGINIA, INC.,**

*Appellee.*

**APPENDIX**



**R. Terrence Ney  
Robert R. Vieth  
McGUIRE WOODS BATTLE  
& BOOTHE, L.L.P.  
8280 Greensboro Drive  
Suite 900, Tysons Corner  
McLean, VA 22102  
(703) 712-5000**

*Counsel for Appellant*

**Gerald R. Walsh  
GERALD R.  
WALSH, P.C.  
4020 University Drive  
Suite 200  
Fairfax, VA 22030  
(703) 385-6162**

*Counsel for Appellant*

**S. Scott Morrison  
Gina S. Howard  
HOLLAND & KNIGHT  
2100 Pennsylvania Ave.,  
N.W.  
Washington, D.C. 20037  
(202) 955-3000**

*Counsel for Appellee*



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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY 20021 PM 4:09

WILLIAM L. GRIFFITH & CO, OF VIRGINIA,  
INC., a Virginia corporation,  
2721D Merrilee Drive  
Fairfax, Virginia 22031

Plaintiff,

v.

AT LAW NO. 137523

SAMIR F. GREITEM  
6376 Torrence Street  
Burke, Virginia 22015

or

c/o Black Orchid Restaurant  
7410 Little River Turnpike  
Annandale, Virginia 22003,

and

NAJLA ASSOCIATES, INC., a District of  
Columbia corporation,  
7410 Little River Turnpike  
Annandale, Virginia 22003

SERVE:

SAMIR F. GREITEM  
6376 Torrence Street  
Burke, Virginia 22015

or

c/o Black Orchid Restaurant  
7410 Little River Turnpike  
Annandale, Virginia 22003,

and

JOHN F. PITRELLI  
Eskovitz, Lazarus, Pitrelli  
& Cregger  
Annandale Financial Center, Suite 220  
7010 Little River Turnpike  
Annandale, Virginia 22003

and

HUGH CREGGER, JR.  
3619 North Harrison Street  
Arlington, Virginia 22207

and

ESKOVITZ, LAZARUS, PITRELLI  
& CREGGER  
Annandale Financial Center, Suite 220  
7010 Little River Turnpike  
Annandale, Virginia 22003

SERVE:

JOHN F. PITRELLI  
Eskovitz, Lazarus, Pitrelli  
& Cregger  
Annandale Financial Center, Suite 220  
7010 Little River Turnpike  
Annandale, Virginia 22003

and

E.L. & P. ESCROW & TITLE CO.,  
a Virginia corporation,  
Annandale Financial Center, Suite 220  
7010 Little River Turnpike  
Annandale, Virginia 22003

SERVE:

JOHN F. PITRELLI  
Eskovitz, Lazarus, Pitrelli  
& Cregger  
Annandale Financial Center, Suite 220  
7010 Little River Turnpike  
Annandale, Virginia 22003,

Defendants.

MOTION FOR JUDGMENT

Plaintiff, William L. Griffith & Co. of Virginia, Inc.  
("Griffith"), by and through counsel, hereby moves for Judgment  
against Defendants Samir F. Qreitem, NAJLA Associates, Inc., John  
F. Pitrelli, Hugh Cregger, Jr., Eskovitz, Lazarus, Pitrelli &



Cregger, and E.L. & P. Escrow & Title Co. As grounds therefor, Griffith states upon information and belief as follows:

**I. PARTIES**

1. Griffith is a Virginia corporation with its principal place of business located at 2721D Merrilee Drive, Fairfax, Virginia 22031. At all relevant times, Griffith has been engaged in the business of general contracting.

2. Defendant Samir F. Qreitem ("Qreitem") is an individual residing in the Commonwealth of Virginia and President of Defendant NAJLA Associates, Inc. ("NAJLA Associates"). Qreitem is a prosperous entrepreneur who owns and manages the Black Orchid restaurants and, among other real estate investments, the Willow Run Shopping Center ("Willow Run") located at 6653 Little River Turnpike in Annandale, Virginia. Qreitem uses a number of aliases, including Semir F. Qreitem, Samin F. Oreitem, Samer F. Qreitem, and Samir F. Qureitem.

3. Defendant NAJLA Associates is a District of Columbia corporation whose principal place of business is located at 7410 Little River Turnpike, Annandale, Virginia 22003. NAJLA Associates is a sole asset corporation controlled by Qreitem and managed by Qreitem and his family relatives, Anton Qreitem and George Qreitem. NAJLA Associates is the fee simple owner of Willow Run, which was built by Griffith pursuant to a construction contract entered into between Qreitem, as Owner, and Griffith, as General Contractor. NAJLA Associates executed the Escrow Agreement that is the subject matter of this action, as more particularly described below.

4. Defendant John F. Pitrelli ("Pitrelli") is an individual residing in the Commonwealth of Virginia who is a licensed attorney practicing with the law firm of Eskovitz, Lazarus, Pitrelli & Cregger located at 7010 Little River Turnpike, Annandale, Virginia 22003. Pitrelli assumed responsibility from Defendant Hugh Cregger, Jr. for the management of the escrow account established to benefit Griffith under the Escrow Agreement, as more particularly described below.

5. Defendant Hugh Cregger, Jr. ("Cregger") is an individual residing in the Commonwealth of Virginia who was formerly a law partner of Pitrelli and a member of the law firm of Eskovitz, Lazarus, Pitrelli & Cregger. Cregger assumed initial responsibility for establishing the escrow account under the Escrow Agreement to benefit Griffith and for its management prior to his resignation from Eskovitz, Lazarus, Pitrelli & Cregger.

6. Defendant Eskovitz, Lazarus, Pitrelli & Cregger (the "Firm") is a law firm located at 7010 Little River Turnpike, Annandale, Virginia 22003. It is the successor firm to Cregger & Cregger, established by Defendant Hugh Cregger, Jr. At all relevant times, the Firm controlled and managed as an affiliate Defendant E.L. & P. Title & Escrow Co., a corporation created by the Firm to act as the Firm's escrow agent. The Firm also has served as legal counsel to Defendants Qreitem and NAJLA Associates in connection with the development of Willow Run and possibly other real estate transactions. These representations were handled principally by Defendants Cregger and Pitrelli. Defendant Cregger

introduced Griffith as a potential bidder to Qreitem on the Willow Run project. After Griffith's selection as General Contractor, Defendants Cregger and Pitrelli represented Qreitem and NAJLA Associates in the negotiations leading to the execution of the contract for the construction of Willow Run. Defendants Cregger and Pitrelli were also responsible for establishing the escrow account under the Escrow Agreement to benefit Griffith, which is the subject matter of this action, as more particularly described below.

7. Defendant E.L. & P. Title & Escrow Co. ("E.L. & P.") is a Virginia corporation located at 7010 Little River Turnpike, Annandale, Virginia 22003. The acronym, "E.L. & P.," stands for Eskovitz, Lazarus & Pitrelli, who are members of the Firm. E.L. & P. Title was created for the purpose of serving as escrow agent for various matters handled by the Firm, including the instant matter involving the escrow account established for the benefit of Griffith on the Willow Run project.

## **II. VENUE**

8. Venue is appropriate in this County pursuant to Va. Code § § 8.01-262(1) and 8.01-263(2).

## **III. FACTS COMMON TO ALL COUNTS**

9. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 8 above as if fully set forth herein.

10. Griffith was contacted by Defendant Cregger in 1992 to determine if Griffith would consider bidding on a shopping center project in Annandale, Virginia to be developed by Qreitem.



Griffith agreed to bid the project and was ultimately selected as the General Contractor. The project was to become known as the Willow Run Shopping Center ("Willow Run"). A standard form AIA contract was executed by Qreitem, as Owner, and Griffith, as General Contractor, on or about December 15, 1992 for the construction of Willow Run. The original sum specified to be paid to Griffith in the contract was \$650,000.00.

11. A material term of the construction contract was the furnishing of payment and performance bonds by Griffith. The purpose of the payment bond was to provide collateral for payments to Griffith's subcontractors and suppliers in the event Griffith defaulted in its payment obligations to any one or more of them. The purpose of the performance bond was to provide a guarantee that the scope of work under the construction contract would be completed even if Griffith itself defaulted in its performance obligations.

12. Griffith was a small, start-up company with a relatively short earnings history; as a result, it had not been able to establish a surety relationship with any of the major bonding companies operating in the Commonwealth of Virginia. Although Griffith had been able to obtain surety bonds on other projects prior to Willow Run, it had not been able to procure them from the top tier of companies serving the Virginia market. Such a surety relationship was necessary for Griffith to successfully expand its operations and to position itself to bid on larger commercial projects.

13. Prior to Willow Run, Griffith had successfully completed numerous small commercial projects and was attempting to establish a surety relationship with at least one of the major companies operating in this field. Griffith was able, after much work, to procure the requisite payment and performance bonds on the Willow Run project from Aetna Casualty Insurance Company ("Aetna"). Aetna is one of the most widely recognized surety companies in the construction industry. This was the first project that Aetna had agreed to bond for Griffith. Accordingly, it was critical for Griffith's future that Griffith complete the Willow Run project successfully and earn the full amount of the agreed upon fee.

14. Because Griffith had no prior relationship with either Qreitem or NAJLA Associates, it proposed an escrow arrangement whereby the sum of \$130,000.00 would be set aside to ensure that Griffith would be paid for its work on Willow Run. Under the parties' construction contract, Griffith would submit monthly invoices for payment based on the progress of its work. In turn, Qreitem and NAJLA Associates would be responsible for ensuring payment of each invoice. In the event an invoice was not paid, Griffith had the right to stop work. The escrow, therefore, would ensure that there would always be a funding source to cover the payment of the last monthly invoice due Griffith in the event Qreitem and NAJLA Associates failed to pay.

15. Although Griffith was not represented by legal counsel at the time, Pitrelli and Cregger agreed to draft the Escrow Agreement to satisfy Griffith's concerns. That Agreement is dated January

15, 1993. The Agreement was set forth in letter form on the Firm's letterhead and was signed by Defendant Pitrelli, although Defendant Cregger's name also appears in the signature block. Both Griffith and NAJLA Associates signed an acknowledgement at the end of the Agreement, acknowledging their acceptance of the escrow arrangement and the terms of the Escrow Agreement. The sole purpose of the Escrow Agreement was to protect Griffith from the Owner's breach of its obligations to pay Griffith for its work. Indeed, the Agreement specifically states its purpose as follows: "This is to confirm that \$130,000.00, which represents the escrow amount of the above-referenced project to be developed by NAJLA Associates, Inc., has been set aside with E.L. & P. Title and Escrow Co. to be funded in the event of delayed payment by owner for progress payments to Wm. L. Griffith & Co. of Virginia, Inc., Contractor, under the terms of the Construction Contract." The Agreement further provided that in the event Owner failed to timely pay any progress payment, Griffith would notify the escrow company, who would pay the amount due within five days and "cause the owner to reimburse within ten (10) days the escrow account for the sum paid over to contractor by the escrow company."

16. Griffith satisfactorily progressed with the work, and its monthly invoices were generally timely paid by the Owner. However, after Griffith's submission of the second-to-last invoice in October of 1993 in the approximate amount of \$103,000.00, payment was made to Griffith directly by the escrow company, Defendant E.L. & P., rather than by the Owner. Under the terms of the



parties' construction contract, this payment should have been made to Griffith by the Owner, as had all prior payments. The escrow funds could not be used, under the terms of the Escrow Agreement, until the Owner failed to make timely payment, and Griffith had notified the escrow company of the Owner's default. Notwithstanding these contractual agreements, Defendant Qreitem requested Defendants Cregger and Pitrelli to cause this payment to be made to Griffith directly by E.L. & P. The purpose for Qreitem's request was to deplete most of the escrow account just prior to substantial completion and Griffith's submission of its final invoice. Qreitem's actions were approved by Defendants Pitrelli, Cregger, the Firm and E.L. & P., even though E.L. & P. was not authorized to release the escrow funds in this manner under the express terms of the Escrow Agreement. At no time had Griffith been advised of Qreitem's request or of Defendants' intention to unilaterally revise the parties' contractual arrangements; nor did Griffith ever consent to the payment of the invoice from the escrow funds.

17. By letter dated November 5, 1993, Griffith advised the Firm that the disbursement should not have been made from the escrow account and requested that the account be reimbursed by Qreitem to increase the funding to the original \$130,000.00 amount. Acting on behalf of the Firm and E.L. & P., Defendant Cregger responded by letter dated November 10, 1993, stating that Griffith could "return the check" if it wanted the account replenished. Cregger's response was a gross violation of his obligation as a

partner of the Firm supervising and directing E.L. & P.'s disbursement of funds from the escrow account.

18. Griffith proceeded to retain legal counsel, who wrote a demand letter to Defendant Cregger dated November 23, 1993. That letter advised Cregger that the prior disbursement of funds from the escrow account without Griffith's consent was a breach of the Escrow Agreement as well as of E.L. & P.'s fiduciary duty to Griffith. That letter also demanded that the escrow agent "immediately take all appropriate steps necessary to replenish the funds in the escrow account."

19. By letter dated December 13, 1993, counsel for Griffith notified Cregger that no response to the demand letter had been received and requested Cregger's final position as to whether the Firm intended to have the escrow account reimbursed. Cregger responded by letter of December 16, 1993, on E.L. & P. stationery and purportedly in his capacity as E.L. & P.'s Vice President. In his letter, Cregger stated that, "E.L. & P. is indeed sorry if the payment of the \$103,000.00 has prejudiced Griffith Company in this matter;" however, E.L. & P. would not "suffer the loss" until a court of competent jurisdiction stated otherwise. At no time did Defendants Pitrelli, Cregger, the Firm or E.L. & P. make any requests to Qreitem or NAJLA Associates to replenish the escrow fund, much less take any action against Qreitem or NAJLA Associates to cause such reimbursement to occur.

20. As Griffith had feared, Qreitem and NAJLA Associates refused to pay the final invoice submitted by Griffith after its

completion of the work in late November of 1993. With only approximately \$26,000.00 left in the escrow account, there were inadequate monies available to fund final payment to Griffith. At that time, Griffith was owed in excess of \$100,000.00. To make matters worse, Defendants Pitrelli, Cregger, the Firm and E.L. & P. refused to release any of the remaining funds in the escrow account to Griffith.

21. All Defendants were aware that their actions had immediately injured Griffith by depriving Griffith of the funds necessary to pay its subcontractors and suppliers on the Willow Run project and by jeopardizing its new surety relationship with Aetna.

22. Griffith was sued by one of its subcontractors, General Excavation, and was threatened with litigation by numerous other subcontractors and suppliers. To date, numerous subcontractors and suppliers who worked on the Willow Run project have not been paid.

23. Notwithstanding Griffith's demands for payment, Qreitem and NAJLA Associates refused to pay Griffith the amounts due and threatened E.L. & P. with litigation if it released any of the remaining escrow funds. This threat was used by Pitrelli and Cregger to justify their failure to cause E.L. & P. to release the funds, even though neither Defendant believed the threat was real. Indeed, Pitrelli and Cregger had a longstanding personal and business relationship with Qreitem and were actively and knowingly assisting Qreitem in violating the contractual agreements entered into with Griffith.



24. Because its demands for payment were rejected, Griffith instituted arbitration proceedings against Qreitem and NAJLA Associates as provided for in the parties' construction contract. That arbitration was held under the auspices of the American Arbitration Association in accordance with its Construction Industry Arbitration Rules on May 16, 17 and 18, 1994. On June 10, 1994, the Arbitrator issued an Award in Griffith's favor against Qreitem and NAJLA Associates, jointly and severally, in the amount of \$96,250.00. Although Qreitem and NAJLA Associates challenged that Award in court, it was confirmed in a final judgment order dated November 18, 1994 in Fairfax County Circuit Court Chancery No. 134308. The challenge mounted by Qreitem and NAJLA Associates to the Award was specious and constituted sham litigation. This litigation was carried out in an unlawful attempt to coerce a settlement from Griffith. On numerous occasions, Qreitem and NAJLA Associates made it clear to Griffith that, if it refused to accept far less than the amounts sought and later awarded, they would continue the litigation in an effort to bankrupt Griffith.

25. During the course of the arbitration proceedings, Defendants Pitrelli and Cregger advised Griffith that they would cause the escrow monies to be released to Griffith upon the issuance of an award in its favor. This representation was false when made. After receipt of the Award, Griffith notified Pitrelli and Cregger of the Award and requested that the escrowed funds be released. They refused. Pitrelli and Cregger then represented that the escrow funds would be released when the Award was

confirmed by a court of competent jurisdiction. This representation was also false when made. Upon receipt of the final judgment order confirming the Award, Griffith notified Pitrelli and Cregger of the final judgment and requested that the escrow funds be released. Again, they refused. Pitrelli and Cregger stated that the escrow funds would be released only in the event that Griffith successfully garnished them in post-judgment collection proceedings.

26. To date, Qreitem and NAJLA Associates, Inc. have failed to pay any of the Award to Griffith; and Pitrelli, Cregger, the Firm and E.L. & P. have failed to cause the release of any of the escrow funds to Griffith. As a result of these unlawful actions, Griffith has been seriously harmed in the conduct of its business. Without payment of the funds due, Griffith has been unable to pay its subcontractors and suppliers and, as a result, has been embroiled in litigation that otherwise would not have been instituted. Griffith's business relationships with its subcontractors and suppliers have been materially impaired. In addition, Griffith's profit and loss position on this project has been disastrous since it performed the work, but was never paid; accordingly, Griffith has failed to date to earn the agreed upon fee. These financial problems have undermined Griffith's valuable new surety relationship with Aetna. Because of Defendants' actions, Griffith also has been denied the funds needed to successfully maintain operations and to pursue additional business opportunities. Griffith has incurred, among other damages, injury

to its business reputation, injury to its bonding relationship and loss of future business opportunities.

#### **IV. CLAIMS FOR RELIEF**

##### **A. BREACH OF CONTRACT**

(Against Defendants NAJLA Associates, Inc., Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. Title and Escrow Co.)

27. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 26 as if fully set forth herein.

28. By prematurely releasing funds from the escrow account in contravention of the terms of the Escrow Agreement, by failing to request or cause those funds to be replenished by Owner as required by the Escrow Agreement, and by refusing to release the remaining funds to Griffith when due in accordance with the Escrow Agreement, Defendants NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. materially breached their contract with Griffith.

29. As a result of these material breaches, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

30. Wherefore, Griffith prays that this Court enter judgment against Defendants NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P., jointly and severally, in an amount not less than \$500,000.00, plus interest and costs, and such other and further relief as this Court deems just and appropriate.

**B. BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

(Against Defendants NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. Title and Escrow Co.)

31. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 30 as if fully set forth herein.

32. The Escrow Agreement contains an implied covenant of good faith and fair dealing.

33. By prematurely releasing funds from the escrow account in contravention of the terms of the Escrow Agreement, by failing to request or cause those funds to be replenished by Owner as required by the Escrow Agreement, and by refusing to release the remaining funds to Griffith when due in accordance with the Escrow Agreement, Defendants NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. materially breached the covenant of good faith and fair dealing.

34. Defendants' actions were intentional, outrageous, and motivated by malice and, therefore, in bad faith. Indeed, the sole purpose of such actions was to injure Griffith in the conduct of its business.

35. As a result of this breach of the covenant of good faith and fair dealing, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

36. Wherefore, Griffith prays that this Court enter judgment against Defendants NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P., jointly and severally, in an amount not less than \$500,000.00, plus interest and costs, and an additional amount of \$500,000.00 in punitive damages, plus such other and further relief as this Court deems just and appropriate.

**C. BREACH OF FIDUCIARY DUTY**

(Against Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. Title and Escrow Co.)

37. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 36 as if fully set forth herein.

38. As the escrow agents designated to carry out the obligations set forth in the parties' Escrow Agreement, Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. were fiduciaries to Griffith and, therefore, owed Griffith the highest duty of loyalty, trust, and care.

39. By prematurely releasing funds from the escrow account in contravention of the terms of the Escrow Agreement, by failing to request or cause those funds to be replenished by Owner as required by the Escrow Agreement, and by refusing to release the remaining funds to Griffith when due in accordance with the Escrow Agreement, Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. breached their fiduciary duties to Griffith.

40. Defendants' actions were intentional, outrageous, and motivated by malice, and, therefore, in bad faith. Indeed, the sole purpose of such actions was to injure Griffith in the conduct of its business.

41. As a result of this breach of fiduciary duty, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

42. Wherefore, Griffith prays that this Court enter judgment against Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L.& P., jointly and severally, in an amount not less than \$500,000.00, plus interest and costs, and an additional amount of \$500,000.00 in punitive damages, plus such other and further relief as this Court deems just and appropriate.

**D. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS**

(Against Defendants Qreitem, Pitrelli and Cregger)

43. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 42 as if fully set forth herein.

44. NAJLA Associates, Eskovitz, Lazarus, Pitrelli & Cregger and E.L.& P. Title were required to comply with the express and implied terms of the parties' Escrow Agreement. Defendants Qreitem, Pitrelli and Cregger caused these entities to materially breach their obligations under the Escrow Agreement. Such actions constituted a tortious interference with the Escrow Agreement.

45. Defendants' actions were intentional, outrageous, and motivated by malice and, therefore, in bad faith. Indeed, the sole

purpose of such actions was to injure Griffith in the conduct of its business.

46. As a result of this tortious conduct, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

47. Wherefore, Griffith prays that this Court enter judgment against Defendants Qreitem, Pitrelli and Cregger, jointly and severally, in an amount not less than \$500,000.00, plus interest and costs, and an additional amount of \$500,000.00 in punitive damages, plus such other and further relief as this Court deems just and appropriate.

#### **E. CONVERSION**

(Against Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L.&P. Title and Escrow Co.)

48. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 47 as if fully set forth herein.

49. By refusing to release the remaining funds in the escrow account to Griffith in accordance with the terms of the Escrow Agreement, Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L. & P. have converted those funds to their own use and otherwise have exercised unlawful dominion and control over those funds to the detriment of Griffith.



50. Defendants' actions were intentional, outrageous, and motivated by malice and, therefore, in bad faith. Indeed, the sole purpose of such actions was to injure Griffith in the conduct of its business.

51. As a result of this tortious conduct, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

52. Wherefore, Griffith prays that this Court enter judgment against Defendants Eskovitz, Lazarus, Pitrelli & Cregger and E.L.&P., jointly and severally, in an amount not less than \$500,000.00, plus interest and costs, and an additional amount of \$500,000.00 in punitive damages, plus such other and further relief as this Court deems just and appropriate.

**F. CONSPIRACY TO INJURE GRIFFITH IN ITS TRADE  
OR BUSINESS PURSUANT TO VA. CODE § 18.2-500  
(Against All Defendants)**

53. Griffith realleges and incorporates the allegations set forth in paragraphs 1 through 52 as if fully set forth herein.

54. Defendants conspired for the purpose of willfully and maliciously injuring Griffith in its trade or business. This conspiracy was effected through the unlawful actions set forth above and incorporated herein by reference.

55. Defendants' conspiracy to injure Griffith in its trade or business constitutes a violation of Va. Code § 18.2-500.

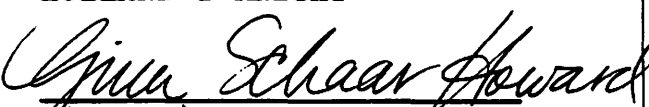
56. As a result of this unlawful conspiracy, Griffith has been damaged in an amount not less than \$500,000.00, the exact amount to be proven at trial. These damages consist of, among other items, injury to its business relationships with its subcontractors and suppliers, injury to its business reputation, injury to its bonding relationship, loss of income, and loss of future business opportunities.

57. Wherefore, Griffith prays that this Court enter judgment against all Defendants, jointly and severally, in an amount not less than \$500,000.00, plus treble damages, interest and costs, including attorney's fees and such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

HOLLAND & KNIGHT

By:

  
Gina Schaar Howard (VA # 29129)  
S. Scott Morrison  
2100 Pennsylvania Ave., N.W.  
Washington, D.C. 20037  
(202) 457-7036

Counsel for William L. Griffith  
& Co. of Virginia, Inc.

WAS-76412

HOLLAND & KNIGHT  
ATTORNEYS AT LAW  
2100 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20037

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**ORIGINAL**

FILED  
95 FEB - 12 35  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

1 VIRGINIA  
2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY  
3  
4 WILLIAM L. GRIFFITH & COMPANY)  
5 OF VIRGINIA, INC., )  
6 Plaintiff, )  
7 vs. )  
8 SAMIR F. GREITEM, et al., )  
9 Defendants. )

SUPREME COURT OF VIRGINIA  
**RECEIVED**  
APR 29 1996  
RICHMOND, VIRGINIA  
Law No. 137523

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REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

TRIAL -- VOL. 1

DECEMBER 11, 1995

BEFORE:

THE HONORABLE GERALD BRUCE LEE

REPORTER:

Susanne Q. Tate, RMR and Notary Public

For The Record, Inc.  
Suburban Maryland (301)870-8025  
Washington, D.C. (202)833-8503

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8 Q. Okay. Now, one of the individuals that  
9 we have talked about in this case is a man  
10 named John Pitrelli, and you know Mr. Pitrelli  
11 very well, do you not?

12 A. Yeah, I know Mr. Pitrelli.

13 Q. Okay. And over the years, you've sent  
14 a lot of business to Mr. Pitrelli, have you  
15 not?

16 A. I sent business to many lawyers.

17 Q. Answer my question, please, sir.

18 A. Yes, sir.

19 Q. Over the years, you have sent Mr.  
20 Pitrelli a lot of business, correct?

21 A. Yes, sir.

22 Q. Now, prior to Willow Run, you have  
23 referred between 10 and 20 automobile accident  
24 cases to Mr. Pitrelli, correct?

25 A. Yes, sir.

1 Q. And that was even before Willow Run --

2 A. I know Mr. Pitrelli for over nine  
3 years, sir.

4 Q. Okay. In addition, you have referred  
5 your friends, your cousins and anybody else  
6 that you know of --

7 A. Yes.

8 Q. -- that's had an automobile accident to  
9 Mr. Pitrelli.

10 A. Yes.

11 Q. Now, your arrangement with Mr. Pitrelli  
12 is that you don't actually pay him for his  
13 services, correct, he gets a third of what he  
14 collects in those automobile accident cases,  
15 correct?

16 A. No, sir. He gets -- may I answer?

17 THE COURT: If you have personal  
18 knowledge.

19 THE WITNESS: Yeah, he collect a third,  
20 plus he get something else when he come to the  
21 restaurant, have dinner with his group, and  
22 that would be deducted as service for certain,  
23 you know --

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Q. With respect to the automobile accident cases that you have given Mr. Pitrelli for you and the members of your family, you have a written agreement with Mr. Pitrelli that he keeps 33 and a third percent, don't you?

A. Only for -- if I was involved. If somebody else involved, that's their business. I don't know what they do.

Q. The accident cases that you've been involved with, your arrangement with Mr. Pitrelli is that he gets 33 and a third percent, right?

A. But then sometimes 25, sometimes 33.



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12           Q. You referred Mr. Pitrelli an automobile  
13 accident case in which you personally were  
14 involved, correct?

15           A. Yes.

16           Q. Would you tell the jury what  
17 arrangement you had with Mr. Pitrelli on that  
18 case.

19           A. Well, are you -- when I have an  
20 accident, some tow truck dragged me down, and I  
21 went to Mr. Pitrelli, I was injured, broke my  
22 finger, and Mr. Pitrelli represent me.

23           Q. And what was your arrangement with  
24 paying him? Did you actually pay him for that  
25 or did he get a percentage of the case?

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1           A. I didn't pay him. I didn't do  
2 nothing. The case is still pending with some  
3 other lawyer.

4           Q. Now, you also referred an automobile  
5 accident case that your wife had to Mr.  
6 Pitrelli, correct?

7           A. It is no longer there, sir.

8           Q. Isn't that true, Mr. Pitrelli -- I mean  
9 Mr. Cregger, that you referred --

10          A. Mr. Who?

11          Q. -- Mr. Qreitem, that you referred your  
12 wife's automobile accident case to Mr.  
13 Pitrelli?

14          A. In the beginning, but we took it out.

15          Q. Okay. Now, we will get to that.

16                 Now, what was the arrangement that you  
17 had with Mr. Pitrelli to represent your wife?  
18 Did you pay Mr. Pitrelli or did he get a third  
19 of whatever he collects?

20          A. Yes, he get percentage.

21          Q. Okay, and was it the same percentage  
22 that he got in your case?

23          A. That's my wife, I don't know what  
24 happened with -- she and him, they make the  
25 deal. I wasn't there. I don't know.

1           Q. You also referred an accident --  
2       automobile accident case involving your cousin  
3       to Mr. Pitrelli, correct?

4           A. Yes, I send a lot of my family there,  
5       because usually he is a good lawyer.

6           Q. Isn't it true that with respect to  
7       those automobile accident cases, that is, your  
8       wife's case, your own case and your cousin's,  
9       that you had a written agreement with Mr.  
10      Pitrelli to represent you? Isn't that true?

11          A. Yes, I have -- me and Mr. Pitrelli, my  
12      case, yes. The other one, I don't know.

13          Q. Okay, and the agreement that you had  
14      with Mr. Pitrelli is that he would take 33 and  
15      a third percent pursuant to --

16          A. Something like that, yes, sir.

17          Q. Okay. Now, Mr. Pitrelli, you  
18      indicated, will frequently come to the Black  
19      Orchid Restaurant and eat for free.

20          A. Not eat -- only when he do me some --  
21      some kind of business, like I -- like collect  
22      -- like some problem I have, he take care of  
23      it. I say how many hours, sir? He say maybe a  
24      couple of hours. They come in and have dinner,  
25      six or seven lawyers or six or seven persons,

1       and that was between me and Mr. Pitrelli.

2           Q.   In exchange for the legal services Mr.  
3       Pitrelli would provide you, you would allow him  
4       to eat at your restaurant for free.

5           A.   Yes, sir.

6           Q.   And the bills on those dinners often  
7       would add up to as much as \$300 or \$400 a meal,  
8       correct?

9           A.   It would depend on how many people.

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Q. Okay. Now, you also had Mr. Pitrelli

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1 represent you in connection with the purchase  
2 of a farm in West Virginia, correct?

3 A. Yes, sir.

4 Q. And what was your payment arrangement  
5 with Mr. Pitrelli on that representation?

6 A. The same as usual.

7 Q. And what is that?

8 A. Come have dinner.

9 Q. Come have dinner at the Black Orchid.

10 A. Yes.

11 Q. Now, you also retained Mr. Pitrelli to  
12 represent you in the Ramada Inn franchise  
13 situation, correct?

14 A. He did some negotiation, me and him and  
15 my manager -- my manager did most of it, but  
16 Mr. Pitrelli was involved on it, yes, sir.

17 Q. And how did you pay Mr. Pitrelli for  
18 those services?

19 A. As usual.

20 Q. Eating at the restaurant?

21 A. Yes. What, you think the food is  
22 free?

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2 Q. Now, the personal accident case that  
3 you gave Mr. Pitrelli for your wife, that was  
4 in the spring of 1994, correct?

5 A. Yes.

6 Q. And the --

7 A. I am not sure, but I think so.

8 Q. That's your best recollection.

9 A. Yes, sir.

10 Q. And the personal accident case that you  
11 gave Mr. Pitrelli for yourself was only a year  
12 ago, correct?

13 A. Well, you're probably right. I'm not  
14 exactly sure of the date.

15 Q. And the Ramada Inn work was at the end  
16 of 1993, correct?

17 A. Yes.

18 Q. And the work that you gave Mr. Pitrelli  
19 in assisting you to buy this farm in West  
20 Virginia, that was also recent, was it not?

21 A. Yes.

22 Q. All of those representations you gave  
23 Mr. Pitrelli after you were no longer using him  
24 on Willow Run, correct?

25 A. Yeah, but I never have problem with Mr.

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1 Pitrelli. Mr. Cregger was the problem.

2 Q. Okay, and you continued to give legal  
3 work to Mr. Pitrelli --

4 A. Yes, he is a good man.

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11 Q. In any event, you and your brother and  
12 whoever got the money together yourself to  
13 build Willow Run, correct?

14 A. Yes.

15 Q. And it was important to you that the  
16 Griffith Company put up a performance bond,  
17 correct?

18 A. Yes.

19 Q. And would you tell the jury why it was  
20 important to you that the Griffith Company put  
21 up a performance bond?

22 A. To make sure the building is finished.

23 Q. And that was a very important concern  
24 of yours, correct?

25 A. Correct.

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Washington, D.C. (202)833-8503

1 Q. Now, you understood that by requiring  
2 the contractor to get a performance bond that  
3 there would be a surety company involved  
4 looking over his shoulder, correct?

5 A. Yes.

6 Q. And you also knew from your experience  
7 that it was important for the Griffith Company  
8 to perform well on the Willow Run project,  
9 because if it didn't, its surety company would  
10 become upset, correct?

11 A. Yes.

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17 Q. You knew early on in the project when  
18 you required the performance bond that in the  
19 event there were disputes down the road, that  
20 you had leverage over the Griffith Company  
21 because he had a bonding company involved in  
22 the project, correct?

23 A. If he didn't finish the project or went  
24 broke or something, the bonding company should  
25 finish it for us.

1 Q. And that gave you leverage over him,  
2 did it not?

3 A. I don't know what leverage mean.

4 Q. You never heard that phrase?

5 A. Un-huh.

6 Q. That means to give you an advantage  
7 over him.

8 A. I'm not -- I don't know what's the --  
9 why we have to have an advantage. All we want  
10 is to be protected, that's all.

11 Q. That never crossed your mind?

12 A. No.

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11 Q. In any event, you ended up either  
12 because people heard about the project and  
13 submitted bids or you had gotten them yourself  
14 with four bidders.

15 A. Right.

16 Q. And you knew from your brother that he  
17 trusted Mr. Pitrelli, right?

18 A. Yes.

19 Q. So, the two of you decided to hire Mr.  
20 Pitrelli to review the bids, right?

21 A. Right.

22 Q. And Mr. Pitrelli said, in effect, look,  
23 I'm not a construction lawyer, I'll let my  
24 partner Hugh Cregger become involved, right?

25 A. Yes, Mr. Cregger, he knows

1 construction.

2 Q. And you retained Mr. Pitrelli and Mr.  
3 Cregger to advise you and represent you as the  
4 attorneys on the Willow Run project, correct?

5 A. Most of the time Mr. Cregger.

6 Q. Well, Mr. Pitrelli attended a number of  
7 the meetings, did he not?

8 A. He stopped by once in a while, yes.

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Q. Now, this letter directs Mr. Pitrelli  
to release the \$103,000 from the escrow,  
correct?

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A. Yes, I got it from my engineers, he  
call and tell me to write to Mr. Pitrelli to  
release money for the builder, because he have  
to get paid.

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Q. Is it your testimony, sir, that the  
idea of releasing the \$103,000 from the escrow  
came from your engineer?

25

A. My engineer told me to go ahead and pay

1 him from the escrow account, because this is  
2 the end of the project.

3 Q. And just so we're clear on this, which  
4 engineer are you claiming told you to get this  
5 money released from the escrow?

6 A. Kaveh and Shakeri.

7 Q. Ali Shakeri?

8 A. And Kaveh.

9 Q. And Jay Kaveh?

10 A. One of them or both of them.

11 Q. And you are certain of that.

12 A. Yes, because they do all the writing  
13 for me, the letters.

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17 Q. Now, as of September 30th, you knew  
18 that the Griffith Company had earned the  
19 \$103,000, correct?

20 A. Yes, when I received the bill, yes.

21 Q. Now, why did you authorize Mr. Pitrelli  
22 to pay that money out of the escrow account  
23 rather than writing the checks as you had  
24 always done from Najla's account?

25 A. I have the money in the other account,

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1 we have to use it.

2 Q. Najla didn't have the money?

3 A. I said the other account has the money,  
4 it is supposed to be used at the end of the  
5 project, because Mr. Peacock, Griffith Company,  
6 he doesn't want to finish the inside of the  
7 building. He want to pull out.

8 Q. Isn't it true, Mr. Greitem, that at the  
9 time you wrote this letter, you knew that there  
10 were \$176,000 outstanding to the Griffith  
11 Company?

12 A. Yes.

13 Q. Not \$130,000, \$176,000.

14 A. Correct, but there is some savings,  
15 over \$50,000 or \$60,000, to be returned to us.  
16 In fact, the windows at the shopping center,  
17 they say Mr. Griffith cost \$23,000 to replace  
18 it.

19 Q. So, your position at the time --

20 A. My position, I have a lot of money  
21 coming to me, yes.

22 Q. Your position at the time, excuse me,  
23 was that even though you had been billed for  
24 \$176,000, that Mr. Peacock was only due  
25 \$103,000, correct?

1           A. That's what the engineer told me to pay  
2       Mr. Peacock.

3           Q. Well --

4           A. There was a punch list supposed to be  
5       taken care of before we finish the rest of the  
6       payment, if there is any payments.

7           Q. You made regular visits to the shopping  
8       center, correct, to see how the construction  
9       was going?

10          A. Yeah, I stopped by once in a while.

11          Q. This was a very important project for  
12       you, was it not?

13          A. Yes.

14          Q. And you're the one that received all of  
15       the pay requests from the Griffith Company.  
16       Isn't that true? They were all addressed to  
17       you.

18          A. I believe so. If not, the engineer  
19       usually get one of the letters.

20          Q. And that's how you knew at the time  
21       that there was \$176,000 --

22          A. No.

23          Q. -- being requested by Mr. Peacock.

24          A. No. We have a meeting at the Walutes  
25       office a couple of weeks before, a week before,

1 and we discussed the issue over there, and we  
2 talked -- because the discovery, the engineer  
3 and the architect was watching the building,  
4 they report their discovery that the glass on  
5 the front windows is not correct. It's  
6 supposed to be double pane.

7 Q. Excuse me, did you tell Mr. Peacock at  
8 this meeting that you were not going to pay the  
9 difference between \$103,000 and \$176,000  
10 because he owed you this -- some \$60,000?

11 A. No, I didn't tell him, because we  
12 supposed to go with the punch list and get the  
13 credit from him, and if there is any money that  
14 goes to him, we will take care of it, no  
15 problem.

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Q. "QUESTION: Prior to directing the  
escrow company to release the \$103,000, did you  
tell Mr. Peacock that you intended to pay his  
company the money from the escrow account?

"ANSWER: No.

"QUESTION: Why not?

"ANSWER: I have no -- he have no  
business to know what I want to pay him from."

Wasn't that your testimony?

A. Yeah.

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CLERK OF CIRCUIT COURT  
FAIRFAX COUNTY  
VA

SUPREME COURT OF VIRGINIA  
APR 29 1996  
RICHMOND, VIRGINIA

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

3

4 WILLIAM L. GRIFFITH & COMPANY)

5 OF VIRGINIA, INC., )

6 Plaintiff, )

7 vs. )

8 SAMIR F. QREITEM, et al., )

9 Defendants. )

10

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13 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

14

15 TRIAL -- VOLUME 2

16

17 December 12, 1995

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19 BEFORE:

20 THE HONORABLE GERALD BRUCE LEE

21

22 REPORTER:

23 Susanne Q. Tate, RMR and Notary Public

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25 - - - - -

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"QUESTION: Who made the decision to  
contact the bonding company?

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"ANSWER: The attorney for the  
corporation and the engineer, the advisor for  
the corporation.

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"QUESTION: Mr. Cottrell?

"ANSWER: Mr. Cottrell and Mr. Ali  
Shakeri and Kaveh.

24

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"QUESTION: Those three individuals  
recommended to you that that be done, correct?

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1 "ANSWER: Yes.

2 A. That's right.

3 Q. "QUESTION: And you accepted that  
4 recommendation and directed that that be done,  
5 correct?

6 "ANSWER: Yes."

7 A. They recommend it and I accept it,  
8 yes.

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11 Q. So, the first time you heard about the  
12 escrow was when Mr. Peacock was complaining  
13 about some withdrawal from it.

14 A. Yes.

15 Q. Did you ever see a copy of the escrow  
16 agreement concerning the terms under which the  
17 escrow was held?

18 A. No.

19 Q. Did you ever know what the terms of the  
20 escrow account were?

21 A. No.

22 Q. Did you ever recommend to Mr. Sam  
23 Qreitem or Mr. Tony Qreitem that a payment to  
24 Griffith, the general contractor on the Willow  
25 Run project, should be made from that escrow



1 account?

2 A. No.

3 Q. Did either of the Qreitems ever ask  
4 your advice on whether they should pay the  
5 general contractor, Griffith, out of the escrow  
6 account or out of some other monies?

7 A. No.

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Q. Did you know what the terms of the  
escrow were?

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A. No.

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Q. Did you ever recommend to Mr. Greitem  
that monies should be released from the escrow  
account to pay Griffith?

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A. No. I wasn't involved -- no, I wasn't  
involved in any release of payment or any  
approval or anything. Jay was.

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Q. Do you know whether or not Jay Kaveh  
ever recommended anything like that?

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A. No.

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Q. Did Mr. Greitem ever ask for your  
advice on whether or not money should be  
released from escrow to pay for -- to pay  
Griffith?

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A. No, no.

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Q. Did you call or otherwise discuss with  
either Tony Qreitem or Samir Qreitem and demand  
that they replenish the escrow account?

A. I did have a conversation with them.

Q. Who did you have the conversation  
with?

A. I believe it was Tony Qreitem.

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1 Q. And what did you tell Mr. Qreitem?

2 A. I told him about the letter that I had  
3 received.

4 Q. This October 8th letter.

5 A. That's correct, and that the -- and I  
6 asked him just generally what was happening,  
7 and he told me -- it became very clear that  
8 they were still feuding. He was very angry  
9 with the contractor.

10 Q. Just like he was on the stand.

11 A. Pretty much, yes, and that there was no  
12 way he was going to replenish any account.  
13 They owed him money.

14 Q. And he made that clear to you?

15 A. It was pretty clear to me, yes.

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Q. Now, Mr. Massaro requests in this letter of June 20 that you call him to talk about the situation, correct?

A. Yes.

Q. And he did call you, did he not?

A. I believe we spoke. I don't recall specifically.

Q. And in that conversation, he requested that you release what was the rest of the

1     escrow money, which was still \$27,000, plus  
2     interest, right?

3             A.   I believe there was that request, yes.

4             Q.   And you denied that request, correct?

5             A.   After discussing it with the owner to  
6     find out whether he would agree to release the  
7     money, they said they wouldn't, it was in the  
8     last \$130,000, so we couldn't release it.

9             Q.   Who at the owner did you have that  
10    conversation with?

11            A.   I believe it was Tony Qreitem.

12            Q.   And he made it clear he still didn't  
13    want to pay.

14            A.   He said that they were still  
15    challenging it, yes.

16            Q.   Now, later on in the year, you received  
17    a letter from me that enclosed the Court's  
18    decision, correct? And I'll show you what has  
19    been marked as Plaintiff's Exhibit 44.

20            A.   It's a letter from the Court, yes.

21            Q.   Well, it is my letter to you dated  
22    November 28th, 1994.

23            A.   Yes, I'm sorry, with a letter from the  
24    Court attached.

25            Q.   Well, it is more than a letter from the

1 Court. It is Judge Kenny's decision dated  
2 October 20th, 1994, correct?

3 A. Well, it's a decision signed by Judge  
4 Kenny. I think it says I am happy to prepare  
5 an order, but it is not a final order.

6 Q. It is his decision on the merits of the  
7 case, correct?

8 A. Right, that's true.

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21           Q.   Now, you received additional requests  
22   after Judge Kenny ruled in favor of the  
23   Griffith Company to release the balance of the  
24   funds, correct?

25           A.   Correct.

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1 Q. But you still didn't release them.

2 A. Well, we responded to you, and we  
3 didn't release them, telling you that we needed  
4 a court-ordered garnishment in order to release  
5 the money.

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1 judgment order entered by this Court a month  
2 later, correct?

3 A. Show it to me, and I'll see.

4 Q. It's Plaintiff's Exhibit 38. Now, that  
5 exhibit is another letter from me to you dated  
6 November 18, 1994, correct?

7 A. That is correct.

8 Q. And I am sending you something called  
9 the Final Judgment Order Confirming  
10 Arbitration, correct?

11 A. That's correct.

12 Q. And you read this letter when you  
13 received it, correct?

14 A. I read it, and there are some  
15 objections written right on it, too.

16 Q. Well, that's customary when you lose,  
17 the losing attorney objects to the entry of the  
18 order, correct?

19 A. Yes, but he has some handwritings --

20 Q. Those are just the grounds for his  
21 objection, correct, and that's the customary  
22 practice in Fairfax County, correct?

23 A. I assume so.

24 MR. MORRISON: We move the admission of  
25 Plaintiff's Exhibit 38.

1 MR. BOCCAROSSE: No objection, Your  
2 Honor.

3 THE COURT: It is received.

4 (Plaintiff's Trial Exhibit Number 38  
5 was admitted into evidence.)

6 BY MR. MORRISON:

7 Q. Now, at that point in time, you were  
8 still refusing to release the balance of the  
9 escrow, correct? Yes or no.

10 A. Yes.

11 Q. And instead, what you felt should be  
12 done is that a new action, a garnishment  
13 action, had to be filed and instituted in order  
14 to get that money, correct?

15 A. Under the advice of counsel, yeah, we  
16 decided that we needed -- since we weren't  
17 ordered in the order to do anything and the  
18 owner still wouldn't agree, we felt that the  
19 account needed to be garnished, and we offered  
20 to give the information for the garnishment to  
21 you to be cooperative.

22 Q. Now, the advice of counsel that you  
23 received, that was advice from Mr. Cregger,  
24 correct?

25 A. Yes, as counsel to --

1 Q. You didn't go to an outside firm to  
2 that get that advice.

3 A. He was counsel to the title company at  
4 that point in time, yes.

5 Q. And he was your law partner in  
6 Eskovitz, et cetera, correct?

7 A. At that time, he was in his own firm.

8 Q. Let me show you the two garnishment  
9 actions or the garnishment pleadings that the  
10 Griffith Company filed. The first one of those  
11 is Plaintiff's Exhibit 94, and that's the  
12 notice of lien, and the second one is  
13 Plaintiff's Exhibit 95, and that's the  
14 garnishment summons, correct?

15 A. Yes, I guess so.

16 Q. Now, you received copies of these, did  
17 you not?

18 A. I believe I did, yes.

19 Q. And what did you do after you received  
20 copies of these? With the money I'm referring  
21 to.

22 A. We paid it into the Fairfax Circuit  
23 Court.

24 Q. You paid it into the Court.

25 A. Right.

1           Q. Now, there is available in Virginia  
2 something called an interpleader action,  
3 correct?

4           A. I believe so.

5           Q. And in an interpleader action where  
6 parties are alleging that they are both  
7 entitled to the same amount of money, you can  
8 just file a complaint with the Court and  
9 deposit that money with the Court to hold until  
10 the parties' issues are resolved, correct?

11          A. That's one way it can be done, yes.

12          Q. Well, that's what we're talking about.  
13 Now, you didn't do that. Neither the law firm  
14 nor the escrow company ever did that, correct?

15          A. We didn't do that, no.

16          Q. Because to file an interpleader action  
17 would have cost you time and money, right?

18          A. I don't know if that was the reason,  
19 but we never did it.

20          Q. If you had chosen to file the  
21 interpleader action, that would have cost you  
22 time and money, correct?

23          A. I assume, yes.

24          Q. So, instead, what you did is you held  
25 the money and required a garnishment action to

1 be filed, which cost the Griffith Company time  
2 and money, correct?

3 A. We were in a position where we were  
4 holding money, and we wanted to act  
5 appropriately. Both parties were fighting over  
6 it, and what we recommended was that it -- the  
7 account just be garnished, and we gave the  
8 account information over to Mr. Peacock to  
9 garnish the account.

10 Q. Isn't it true, though, when there was a  
11 dispute between the parties and Mr. Qreitem  
12 directed you to pay money out of the escrow,  
13 you paid the money, right?

14 A. Because there was an initial agreement  
15 to do that, yes.

16 Q. But when there was a continuing dispute  
17 and Griffith wanted you to pay him the money,  
18 you didn't do it.

19 A. Because the owner wouldn't agree.

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Q. When there was a dispute between the parties and Mr. Qreitem wanted you to release the money from the escrow, you did, right?

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A. I didn't know there was a dispute at the time.

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Q. Well, you just assumed from his letter that the dispute was resolved, but you had no facts for that.

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A. Well, he was asking me to pay the contractor, who was going to get the money, so, I mean, the contractor was getting the money. I didn't look at that as a dispute. I looked at that as the end of the dispute.

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Q. But then when you called Mr. Qreitem you learned that you were dead wrong and that there was a very real dispute, correct?

23

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A. I learned that after I got David's letter that said you shouldn't have given it to us, and then I found out that there was still a

1     dispute, yes.

2           Q.   But when Mr. Peacock wanted you to  
3     release the \$27,000 from the escrow, you  
4     claimed there was a dispute and you refused.

5           A.   It's not a claim.   The escrow  
6     agreement, which we now had again, clearly said  
7     we couldn't do it without the owner's consent.  
8     The owner wouldn't consent.

9           Q.   Well, isn't it true that at that point,  
10    when courts and the arbitrators had all ruled,  
11    that that made that provision irrelevant to  
12    what was going on?

13          A.   I don't think so.

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10           You told us that you weren't going to  
11   release the money to anybody until Mr. Peacock  
12   filed a garnishment action, correct?

13           A.   I said until the Court ordered us to do  
14   it, and one proper way to do it was with a  
15   garnishment, yes.

16           Q.   Isn't it true that throughout this  
17   entire period of time, Mr. Pitrelli, by your  
18   actions, you were helping the Qreitems and  
19   Najla fight the Griffith Company?

20           A.   No.

21           Q.   By siding with the Qreitems and Najla,  
22   by releasing the money from the escrow and by  
23   refusing to release the balance to the Griffith  
24   Company, weren't you siding with the Qreitems,  
25   sir?

1           A. I think that's inaccurate.

2           Q. Throughout that period of time, the  
3           Qreitems were giving law business to your law  
4           firm, correct?

5           A. We had very few cases that we were  
6           referred.

7           Q. And are you telling this jury that  
8           there was no connection whatsoever between the  
9           Qreitems continuing to give your law firm  
10          business and the fact that you did what you did  
11          with respect to the escrow?

12          A. Yes, I am telling you there was no  
13          connection.

14          Q. You were completely neutral on that.

15          A. That's true.

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18           Q. Let's go back to the earlier subject.  
19       Approximately when was the consideration  
20       process for the construction contractor on the  
21       Clopper's Mill job?

22           A. It would have been in '93 and '94,  
23       that's what I wanted to correct. I actually  
24       think our construction start was in '94, the  
25       more I'm -- I'm confused. We are in '95 now.

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1 We started construction in late '94, I  
2 apologize.

3 Q. And that would have made the selection  
4 process at what period of time?

5 A. It would have been in the middle to --  
6 middle of 1994, shall we say.

7 Q. Can you be a little more specific?

8 A. Summer of '94.

9 Q. Okay. At that time, what was the  
10 reason why you could not recommend Griffith to  
11 be the contractor on the Clopper's Mill  
12 Center?

13 A. Our lender, the First National Bank of  
14 Maryland, required that the contractor be  
15 bondable.

16 Q. And was there any other reason why you  
17 did not recommend Griffith to be the contractor  
18 on the Clopper's Mill job?

19 A. No.

20 Q. Were you prepared to recommend them if  
21 they could have been bonded?

22 A. Absolutely.

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Q. I'd like to now show you what's been  
marked as Plaintiff's Exhibit 52. Do you  
recognize that exhibit?

6

A. Yes, it's a copy of a check paying  
applications 7 and 8 for Willow Run.

8

Q. What's the date of the check?

9

A. October 1st, 1993.

10

Q. Did you receive that check on or about  
October 1st, 1993?

12

A. Yes.

13

Q. How did the check, Exhibit 52, come in  
to your possession?

15

A. It was picked up.

16

Q. How did that come about?

17

A. We received a phone call saying that  
the check was ready to be picked up.

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Q. When the check arrived in your office,

1     what did you do with it? '

2             A.   I made two copies, gave a copy of the  
3     check to Kevin Kennedy, kept a copy for my  
4     files and deposited the check in the bank.

5             Q.   And did you deposit the check on the  
6     same day that you received it?

7             A.   Yes.

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Q. At the time that you received and deposited this check, Exhibit 52, for payment requisitions 7 and 8, were you aware that an escrow account existed for the Willow Run project?

A. No, I was not.

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22           Q. I'd like to ask you about a couple of  
23 the statements that appear here. First, in the  
24 first sentence it states, "The Willow Run  
25 project was Griffith's first job bonded by

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1     Aetna Casualty Insurance Company, also called  
2     Aetna for short."

3             Is that a correct statement?

4             A.   Yes.

5             Q.   Why did Aetna agree to furnish the bond  
6     for the Willow Run project to Griffith?

7             A.   I'm not real sure.  We had a  
8     relationship with William L. Griffith, they had  
9     a need to secure this bond.  Their prior  
10    surety, Ohio Casualty, could not do it, and we  
11    went to Aetna and were able to negotiate their  
12    providing this bond, and it was a -- basically  
13    a business venture for them.

14            Q.   The next sentence there in Exhibit 62  
15    states, "There is a small number of surety  
16    companies serving this market, and Aetna is a  
17    dominant player in it."  Is that a correct  
18    statement?

19            A.   Yes.

20            Q.   It then goes on to say that it was  
21    especially important for Griffith to  
22    successfully perform this project.  Was it  
23    important for Griffith to successfully perform  
24    the Willow Run project if it wanted to continue  
25    bonding with Aetna?

1           A. I think that any time you start a new  
2 relationship, bonding has often been referred  
3 to as a marriage. It's a developing  
4 relationship, and we felt that Aetna was doing  
5 more than they might have done to provide this  
6 bond for Dave Peacock. So, it was important  
7 that he perform the job and financially meet  
8 his expectations. One of the things bonding  
9 carriers do is look at what your estimated  
10 profit was on every job.

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23           Q. You can continue with that sentence.

24           A. All right, one of the things the

25 bonding carriers do is look at what your

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1     estimated profit was on every job, whether it's  
2     bonded or non-bonded, and see how closely you  
3     adhere to that, because at some point, you are  
4     going to ask them to go out on a limb for you,  
5     and they want to see that you have a history of  
6     being able to reach your profit margins. In  
7     this case, you know, it was the first job, it  
8     was sort of a new start. We actually took  
9     Kathy Boyle, who at the time was the head of  
10    the bonding department, out to the job in its  
11    early stages to see it, and, you know, there  
12    was a lot of interest in how the job was going  
13    to work out.

14           Q. So, you actually took someone from  
15    Aetna to see the Willow Run project?

16           A. Yes, which is not, I might add, a  
17    normal occurrence, okay?

18           Q. Okay.

19           A. Because it was a new relationship. She  
20    wanted to see the type of jobs David was doing,  
21    and that's why we went out there to do that.

22           Q. In determining whether it would bond  
23    the Willow Run project for Griffith, did Aetna  
24    evaluate Griffith's capital base?

25           A. Yes.

1 Q. And did Aetna in determining Griffith's  
2 maximum work program, did it use a liquidity  
3 factor of approximately 10 percent?

4 A. Yes. Actually, it was a little lower  
5 than that.

6 Q. And in evaluating Griffith's capital  
7 base for purposes of determining Griffith's  
8 maximum work program, did it consider accounts  
9 receivable on Griffith's books to be liquid,  
10 unless they had remained outstanding for more  
11 than 90 days or were disputed or otherwise  
12 subject to litigation proceedings?

13 A. Yeah, it's hard for me to say exactly,  
14 but that is a consistent principle with the way  
15 that bonding companies evaluate contractors.

16 Q. And do you have any reason to believe  
17 that Aetna would have behaved differently with  
18 respect to Griffith and the Willow Run project  
19 bond?

20 A. No.

21 Q. The last sentence on page 2 of Exhibit  
22 62 says, "Such accounts receivable are not  
23 treated as liquid assets and therefore are not  
24 considered to be part of the contractor's  
25 capital base for purposes of establishing the

1 contractor's maximum work program."

2 Was that true of Aetna's evaluation of  
3 Griffith Company?

4 A. Yes.

5 Q. And is it a correct statement as to the  
6 companies that you represent as an agent in  
7 general?

8 A. Yes.

9 Q. Okay, there was no problem with  
10 non-liquid assets at the time the Willow Run  
11 bond was approved?

12 A. Right.

13 Q. Okay.

14 A. Or if there were, they were incidental,  
15 I mean \$5,000, \$2,000. There is always a small  
16 amount.

17 Q. Did you become aware that there was an  
18 approximate \$100,000 receivable from the Willow  
19 Run job at some point in time?

20 A. Yes.

21 Q. And was Aetna made aware of that?

22 A. Yes.

23 Q. All right, if you would turn to page 3  
24 of Exhibit 62, please, and go down to the  
25 middle of the first paragraph there, it states,

1 "Because this approximate \$100,000 account  
2 receivable was not viewed as a liquid asset of  
3 the company, Griffith's work program was  
4 reduced by approximately \$1 million."

5 Is it correct that Aetna did not view  
6 the approximately \$100,000 account receivable  
7 from Willow Run as a liquid asset on Griffith's  
8 books?

9 A. Yes.

10 Q. And was Griffith's work program with  
11 Aetna reduced by approximately \$1 million as a  
12 result of that outstanding receivable?

13 A. Yes.

14 Q. Were there any other factors besides  
15 the Willow Run receivable that caused that  
16 million dollar reduction?

17 A. No.

18 Q. The next sentence reads, "This  
19 reduction, in turn, adversely affected  
20 Griffith's abilities to bid on larger, more  
21 profitable jobs which requires the posting of  
22 performance and payment bonds in excess of  
23 Griffith's bonding capacity."

24 Do you recall any requests by Griffith  
25 for bonding large jobs that were turned down

1 while the Willow Run receivable remained on  
2 Griffith's books?

3 A. I can't tell you that I recall any  
4 specifics. The -- with bonding relationships,  
5 there is a lot of dialogue, you know --

6 Q. You mean verbal communications?

7 A. Verbal communication between the  
8 contractor and myself and then, depending on  
9 the nature of that, possibly with the surety,  
10 in this case Aetna, so that there are a lot of  
11 jobs that the contractor may be looking at,  
12 saying we're pursuing this, it's -- we think  
13 it's going to be in this price range, what are  
14 our chances of getting this bond, okay?

15 So, as larger jobs came up that were  
16 outside of the scope of his work program with  
17 Aetna, we would talk about them, and depending  
18 on how close they were to maybe the scope of  
19 his work program, I would either tell Dave --  
20 say David, that's not going to fly or let me  
21 call the Aetna and see where they stand on  
22 this, but as far as remembering specifics, it's  
23 hard, because there is just so much  
24 interaction.

25 Q. So, are you saying that that did happen

1 on occasion, you just don't remember the  
2 specific names of the jobs?

3 A. Right, yes.

4 Q. Did the fact that there was this  
5 \$100,000 receivable on Willow Run that was not  
6 considered a liquid asset, did that affect  
7 Griffith's relationship with Aetna in any other  
8 way?

9 A. It was primarily a financial detriment  
10 from his total bonding capacity. It certainly,  
11 the fact that the job went bad, while there is  
12 no concrete -- it did not have a concrete  
13 detrimental effect to them, it was certainly  
14 something that they noticed and, you know, were  
15 aware of it, and I can't say it was -- had a  
16 positive impact.

17 Q. You mean no concrete effect other than  
18 the financial.

19 A. Right. There was definite financial.  
20 It affected them definitely from a financial  
21 standpoint in his ability to pursue the larger  
22 jobs. I can only think that had the job gone  
23 well, you know, then it goes sort of in the  
24 plus column. At some point, they get to, you  
25 know, which way they are going to lean on



1     certain situations.  When the job went bad, you  
2     know, I think that that stays in their mind,  
3     that that was a problem.

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1           Q.   From your 20 years of experience  
2   representing Aetna or representing clients to  
3   Aetna, do you have a feel for what they will  
4   and won't accept as a project on bonding?

5           A.   That's really sort of individually  
6   developed. Bonding, you know, a lot of  
7   insurance is a commodity. Bonding isn't.  
8   There is a relationship that's developed  
9   between the surety, the client and the broker,  
10   and you sort of develop a working  
11   relationship.

12          Q.   And based on your working relationship  
13   with Griffith and with Aetna, did you have a  
14   sense of whether Aetna would or would not  
15   accept particular bond requests from Griffith?

16          A.   Yes.

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22 Q. Now, at the time that L. F. Jennings  
23 first contacted you about Willow Run, had you  
24 ever heard of Mr. Pitrelli?

25 A. No, sir, I had not.

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1 Q. What about Mr. Cregger?

2 A. No, sir, I had not.

3 Q. What about Samir Qreitem?

4 A. No, sir.

5 Q. What about Tony Qreitem?

6 A. No, sir.

7 Q. What about Najla Associates?

8 A. No, sir, no.

9 Q. You had not had any dealings of any  
10 kind with any of those people.

11 A. No, sir, I had not.

12 Q. Now, after L. F. Jennings contacted  
13 you, I think you testified they sent you a bid  
14 package?

15 A. Yes, sir. They sent a set of plans.

16 Q. A set of plans, and why did they do  
17 that, do you know?

18 A. They explained the situation, that it  
19 was a job that they knew Mr. Cregger from  
20 another -- through -- knew Mr. Cregger's son,  
21 and so we were -- we then were able to get the  
22 plans, and we started asking questions on it  
23 and confirming that the job would be a pretty  
24 good one for us to bid on.

25 Q. And did you submit a bid?

1           A.   Yes, sir, we did. .

2           Q.   Let me show you what has been marked as  
3   Plaintiff's Exhibit 45.   Would you tell the  
4   jury what that exhibit is, please.

5           A.   Yes, sir, it's a -- let me make sure of  
6   something.   Yes, this is our proposal dated  
7   July the 30th, 1992 to Mr. Cregger with  
8   reference to the Willow Run Shopping Center.

9           Q.   Okay, the first page, is that your  
10   signature?

11          A.   Yes, sir, it is.

12          Q.   Okay.   And why are you writing to Mr.  
13   Cregger?

14          A.   After talking with Mike Killia of L. F.  
15   Jennings, he had given us the name of Mr.  
16   Cregger, and we contacted him and discussed the  
17   fact that we would be putting a proposal  
18   together as a basis of introducing ourselves to  
19   him.

20          Q.   So, your company took the plans and  
21   formulated a price.

22          A.   Yes, sir.

23          Q.   And then you were submitting this price  
24   to Mr. Cregger?

25          A.   Yes, sir.

1           Q. Now, attached to Exhibit 45 is a  
2 document entitled Qualifications. What are  
3 those?

4           A. These are -- it's pretty self-  
5 explanatory. They are the following  
6 qualifications and exclusions for this specific  
7 bid to be put to -- to be attached to the  
8 price, to the proposal.

9           Q. Who prepared the qualifications? Did  
10 that come from the people supplying you the  
11 plans or did it come from you?

12          A. No, sir, it comes from me.

13          Q. These, in effect, qualify your bid?

14          A. Yes, sir.

15          Q. Is that a fair way to explain it?

16          A. Yes -- they -- yes, they are conditions  
17 that we don't see as clear on the plan or clear  
18 within some contract provision that we would  
19 like to be sure, work on and get in the  
20 contract.

21          Q. So that there is no misunderstanding  
22 between the parties later on.

23          A. That's correct.

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Q. Mr. Peacock, would you explain to the jury what qualification W is?

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A. This is specifically our request or our qualification that an escrow agreement or a set-aside agreement be established for the funding of the project.

13

Q. And you asked for this back in July of 1992?

15

A. Yes, sir.

16

Q. And how much of an escrow were you requesting to be set aside under this subparagraph W of your qualifications?

19

A. At least the total of the proposed base bid sum.

21

Q. And how much was that?

22

A. \$650,000 -- \$650,574.

23

Q. Now, why were you asking for or qualifying your bid with a provision that would require the owner to put the full amount of the

25

1 contract into an escrow?

2 A. Well, it was not fully evident to us  
3 where the source of funding was coming from,  
4 and it is very important that the money be  
5 available to be paid so that you don't -- we  
6 perform the work before we're paid, and so that  
7 we're not performing work and then not having  
8 the money available.

9 Q. Were you told by Mr. Cregger that the  
10 shopping center was going to be financed  
11 without a bank involved or did you otherwise  
12 learn that?

13 A. We were told by Mr. Cregger during --

14 Q. That the --

15 A. -- during the bid process or very  
16 shortly thereafter.

17 Q. And so you understood at this time that  
18 the Qreitems would be putting up the money to  
19 build the center themselves?

20 A. Yes, sir, that is correct.

21 Q. Rather than borrowing it from some  
22 bank.

23 A. That is correct.

24 Q. Did that cause you any concern?

25 A. Only the fact that we don't have any



1 way to attach our rights. 'It's much more  
2 difficult to collect your money from an owner  
3 than it would be to -- directly than it would  
4 be to collect it from a bank, because there is  
5 -- typically there is a construction  
6 transaction that takes place. This was not a  
7 construction loan. A permanent loan would be  
8 similar to this same thing as an owner paying  
9 you.

10 Q. Did the Qreitems or Najla ever divulge  
11 to you the source of the funding that they were  
12 to use to pay the \$650,000?

13 A. No, sir, not specifically. They  
14 indicated that it would be from one of their  
15 bank accounts.

16 Q. But they didn't show you any documents  
17 that they had the financial wherewithal to  
18 build the center?

19 A. Well, we contacted their bank, and they  
20 would not give us specifics about his -- about  
21 how much money was in the account.

22 Q. And did that cause you concern?

23 A. It caused us a great deal of concern,  
24 but the banker was very assuring that there was  
25 -- that they had plenty of money to pay for

1 this size contract.

2 Q. Okay. Well, when you heard that, did  
3 you just drop the idea of having an escrow?

4 A. No, sir, we did not.

5 Q. There was a construction contract  
6 ultimately negotiated, correct?

7 A. Yes, sir.

8 Q. Okay. And did you participate in those  
9 negotiations?

10 A. Yes, sir, I did.

11 Q. Were you represented by an attorney?

12 A. No, sir, I was not.

13 Q. Who were you negotiating with?

14 A. I was negotiating with Mr. Cregger, Mr.  
15 Pitrelli and Mr. Qreitem -- Samir Qreitem  
16 predominantly.

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7 Q. Now, did there come a point in time in  
8 the process where you were advised that you  
9 would be required to obtain a performance  
10 bond?

11 A. Yes, sir, there did.

12 Q. Who imposed that requirement?

13 A. Mr. Pitrelli.

14 Q. And is that a requirement under the  
15 contract?

16 A. I don't recall it being a requirement  
17 under the contract. In the AIA contract, it  
18 allows for it to be done.

19 Q. Well, let me direct your attention, if  
20 I may, to Plaintiff's Exhibit 48, which are  
21 those two revised pages. And turn to page 3A,  
22 if you would.

23 A. Yes, sir.

24 Q. And specifically to Article 5.1.4. Do  
25 you see that?

1           A.   Yes, sir, I do.

2           Q.   It refers to the cost of the  
3 performance and payment bond as included in  
4 your fee.

5           A.   Yes, sir, that would make it a specific  
6 provision.

7           Q.   Does that refresh your recollection  
8 that the performance bond requirement is set  
9 forth in the contract?

10          A.   Yes, sir.

11          Q.   And who was to pay for that?

12          A.   We were as the contractor.

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23          Q.   Did your bonding company convey to you  
24 any concerns about the fact that the project  
25 was self-financed by the Qreitems?

1           A. Yes, sir, they expressed concerns  
2 specifically that -- that they wanted to know  
3 where the source of the financing was, and when  
4 it was self-funded, they were very interested  
5 in where the funding -- where the money would  
6 come from.

7           Q. And what did you tell them?

8           A. I had explained to them that we were  
9 trying to negotiate an escrow agreement to  
10 cover the -- the event of non-payment.

11          Q. Let me show you what has been marked as  
12 Plaintiff's Exhibit 7. Would you tell the jury  
13 what that is, please?

14          A. Yes, sir, it's a letter of November  
15 24th, 1992 from myself to Mr. Cregger, and it  
16 is letting him know that the bond -- that the  
17 bonding company is preparing a performance and  
18 payment bond, and it's requesting that for  
19 finalization of the bond, that confirmation of  
20 financing or escrowed funds be set aside, and  
21 attached to it is a -- is a confirmation of an  
22 escrow -- of an escrow format letter that we  
23 were requesting.

24          Q. And did you forward this letter to Mr.  
25 Cregger?

1 A. Yes, sir, we did.

2 Q. And do you know whether he received  
3 it?

4 A. Yes, sir, he did.

5 Q. Page 2 of your letter is the first  
6 draft of the escrow agreement?

7 A. Yes, sir.

8 Q. So, you proposed the original draft to  
9 Mr. Cregger.

10 A. Yes, sir, I did.

11 Q. Now, in this draft, the amount to be  
12 set aside is \$130,000.

13 A. Yes, sir.

14 Q. Could you tell the jury how you got  
15 from your qualifications, where you wanted  
16 \$650,000 to be set aside, now in November of  
17 '92 to only having \$130,000 set aside?

18 A. We -- it had been negotiated that it  
19 would be unreasonable to put the \$650,000  
20 completely aside in an agreement due to the  
21 fact that the Qreitems had the money to pay for  
22 the project, and they would pay specifically --  
23 they would pay their payments from a -- from  
24 their specific accounts, and we did a cash flow  
25 analysis and determined that the -- that the --

1 with the exception of one month, the maximum  
2 amount of money we would draw would be just  
3 under \$130,000.

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Q. Now, did you receive any concessions during your negotiations with Mr. Cregger in return for dropping the amount to be put into escrow from \$650,000 to \$130,000?

A. Yes, sir, we felt we had in the fact that Mr. Cregger's law firm would hold the escrows so that we would be able to draw -- so that we had a reason for the owner or a way, a mechanism, if you will, for the owner to replenish the escrow in the event that it got paid, that the funds got paid out of the



1 escrow.

2 Q. Let me show you what's been marked as  
3 Plaintiff's Exhibit 12. What is Exhibit 12?

4 A. It's a -- it's the January 15th -- it  
5 is the escrow agreement, the January 15th,  
6 1993 --

7 Q. The final escrow agreement?

8 A. It is the final escrow agreement with  
9 all of the signatures, yes, sir.

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16 Q. What I would like you to do, Mr.  
17 Peacock, is if you will grab Plaintiff's  
18 Exhibit 7, which has your draft escrow  
19 agreement, and compare that to the first page  
20 of the final escrow agreement marked as Exhibit  
21 12. Do you have that?

22 A. Yes, sir, I do.

23 Q. On page 1 of the final escrow  
24 agreement, there are a series of conditions  
25 marked with (i), (ii) and (iii). Do you see

1 that?

2 A. Yes, sir, I do.

3 Q. Were those provisions included in the  
4 draft that you initially forwarded to Mr.  
5 Cregger?

6 A. No, sir, they were not.

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19 Q. And I would like to focus your  
20 attention on those provisions, Mr. Peacock.  
21 Did you propose these changes or did they come  
22 from Mr. Cregger?

23 A. No, sir, these provisions came from Mr.  
24 Cregger.

25 Q. In return for you dropping the amount

1 to be funded?

2 A. Yes, sir.

3 Q. Let's focus first on paragraph (ii),  
4 which says, "Cause the owner to reimburse  
5 within 10 days the escrow account for the sum  
6 paid over to contractor by the escrow  
7 company."

8 Did I read that correctly?

9 A. Yes, sir.

10 Q. Was that an important provision for  
11 you, Mr. Peacock?

12 A. Yes, sir, we would have to have some  
13 mechanism in case he funded -- in case the  
14 owner funded the project in a very early phase  
15 and we still had some outstanding payments due,  
16 that there was some way to get the money back  
17 into the escrow.

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Q. Did Mr. Cregger discuss with you and tell you how the mechanism of causing the owner to reimburse the account would work?

A. Mr. Pitrelli had the better relationship with the Qreitems, and Mr. Cregger explained to me that Mr. Pitrelli would have the money put into the -- put into the escrow in the event that they did not pay it. At the time, we did not expect them not to pay.

Q. And what, if anything, did Mr. Cregger tell you as to how it would be -- how they

1     could cause the owner to reimburse the  
2     account?

3           A.   They were the lawyers for the -- for  
4     the project.   So, I didn't really go into that  
5     detail.   I expected them to handle that.

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18           Q.   What did you and Mr. Cregger discuss  
19   about subparagraph (ii) about causing the owner  
20   to reimburse the account?

21           A.   We discussed that Mr. Cregger would be  
22   able to go with Mr. Pitrelli to get the  
23   Qreitems to put money back into the account.

24           Q.   Did Mr. Cregger tell you that?

25           A.   Yes, sir, he did.

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1 Q. Did you rely on that?

2 A. Yes, sir, I did.

3 Q. Now, just above subparagraph (i) there  
4 is a statement that says, "Should owner fail to  
5 pay the contractor any progress payment in a  
6 timely manner, contractor shall notify this  
7 escrow company, and it is hereby agreed by the  
8 parties hereto as follows."

9 Whose language was that? Was that in  
10 your draft?

11 A. No, sir, I don't believe it is, but if  
12 you will give me just a second, I will check  
13 it. I don't -- no, sir, it was not.

14 Q. Would that have been added by Mr.  
15 Cregger, then?

16 A. Yes, sir, it would have.

17 Q. Was anybody else involved in this  
18 negotiation besides you and Mr. Cregger?

19 A. No, sir.

20 Q. At any time during the course of your  
21 company's work on Willow Run, did you ever  
22 notify the escrow company that the owner had  
23 not timely paid a requisition that was due?

24 A. No, sir, I had not.

25 Q. Let me show you what has been admitted

1     into evidence as Plaintiff's Exhibit 13. For  
2     the record, Your Honor, that's Mr. Samir  
3     Qreitem's letter to Mr. Pitrelli dated  
4     September 30, 1993 authorizing the release of  
5     the money from the escrow.

6             Did anybody send you or your company a  
7     copy of that letter?

8             A. No, sir, they did not.

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17             Q. Did Mr. Qreitem ever notify you that he  
18     had authorized Mr. Pitrelli to release the  
19     \$103,000 from the escrow?

20             A. No, sir, he did not.

21             Q. Did Tony Qreitem do that?

22             A. No, sir, he did not.

23             Q. Did Mr. Pitrelli contact you after he  
24     received this letter and tell you that he had  
25     been notified to release the money?



1           A.   No, sir.

2           Q.   Did Mr. Cregger do that?

3           A.   No, sir.

4           Q.   To your knowledge, did anybody do that  
5 with respect to anyone in your company?

6           A.   No, sir.

7           Q.   When was the first time that you  
8 learned that the \$103,000 referenced in Mr.  
9 Qreitem's letter of September 30 had been  
10 released from the escrow account?

11          A.   Mr. Kennedy in my office came in to --  
12 came in with a copy of a check that had been --  
13 that was on a title company letterhead instead  
14 of the -- of the typical Najla check and asked  
15 me did I know anything about it, and we went --  
16 we went and dug up the escrow agreement to find  
17 out why had it been released from the escrow,  
18 and that was -- it was after a Wednesday  
19 morning meeting.

20          Q.   How had Mr. Kennedy come into  
21 possession of the copy of the check, if you  
22 know?

23          A.   It's very standard that Kevin puts in  
24 -- once Debbie Stewart deposits checks, and  
25 it's very standard for him to go through on

1 Wednesday morning to check' with the different  
2 -- check on the different jobs, see which  
3 one's payments come in, then he clears the  
4 check, throws the copy away. In this  
5 particular case, it was a different check. It  
6 wasn't -- it was not a Najla Associates check  
7 or a Sam Qreitem check. So, we were somewhat  
8 concerned, and that's when we looked at the  
9 escrow agreement.

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14 Q. Let me digress just for a minute. You  
15 were present when Ms. Stewart was asked did she  
16 ever take monies from other jobs and use them  
17 to pay subcontractors on Willow Run. Do you  
18 remember that?

19 A. Specifically today there has been a lot  
20 of information, sir, I don't know, but it's a  
21 very common practice for us that we don't pay  
22 money from one job to the next.

23 Q. Now, would you -- and why is that?  
24 Tell the jury why you don't do that.

25 A. Well, I mean, you want to make sure

1    that you're paying for the work that you're --  
2    that you're performing on someone's job, so  
3    that you don't create a problem with -- if you  
4    were to pay -- if you were to put out more  
5    money than you had and you were not able to pay  
6    for another job, you could get yourself in  
7    trouble with -- with a lot of subcontractor  
8    disputes or a lot of liens.

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21           Q. After you learned that this money had  
22 been released from the escrow account, did  
23 anybody call you or otherwise contact you and  
24 say, in effect, David, if you give the money  
25 back and put it back in escrow, we will cut you

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1 another check from a different account, don't  
2 worry about it? Did that ever happen?

3 A. No, sir. I was the one that called and  
4 asked about getting the escrow replenished, and  
5 I followed it up with a letter.

6 Q. Who did you call?

7 A. I contacted Mr. Cregger, and I  
8 contacted Mr. Pitrelli.

9 Q. By phone?

10 A. By phone and followed it up with a  
11 letter.

12 Q. And did you do that on the Wednesday  
13 that you learned about the check from Mr.  
14 Kennedy?

15 A. No, sir, I'm pretty sure it took me a  
16 couple of days. I mean, I've got other things  
17 going on, but I was trying to write the letter,  
18 and I wanted to make sure I wrote it real  
19 specific, because it was very -- I mean, I was  
20 very concerned at this point.

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Q. What did you tell Mr. Pitrelli? We can take them in any order, I don't know who you talked to first, but let's start with Mr. Pitrelli.

THE COURT: Can you give us some time frame, also, these conversations with Mr. Pitrelli and Mr. Cregger, can you give us a time frame?

THE WITNESS: Oh, like the afternoon after I understood the escrow was out or it may have been the following morning or afternoon. It was before this letter. I don't write letters without first making phone calls. That's just a typical habit.

BY MR. MORRISON:

Q. So, this would be between October 6th and October 8th.

A. Yes, sir.

Q. Okay. And what did Mr. -- what did you tell Mr. Pitrelli?

A. I asked specifically to have the escrow replenished so that -- basically because I was, as you can see, the letter is copied to Mr.

1 Gilmore, and we were arguing about some  
2 savings, some money that I owed the Qreitems  
3 about some savings, and then they didn't -- we  
4 were trying to also change up some tenant work  
5 that they didn't have plans for. And so we  
6 were under that, and I felt that this payment  
7 had been taken out of the escrow so that it  
8 would cut us off and not have the access to the  
9 final funds that we also needed.

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2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

**3**

5 OF VIRGINIA, INC.,

**6 Plaintiff,**

**7 vs.**

8 SAMIR F. GREITEM, et al.,

**9 Defendants.**

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13 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

**14**

15 TRIAL -- VOL. 3

16

17 DECEMBER 13, 1995

**18**

**19      BEFORE:**

20 THE HONORABLE GERALD BRUCE LEE

21

**22      REPORTER:**

23 Debra L. Maheux Notary Public

24

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THE COURT: I'm sure you'll stop him if  
he tries to go beyond that but I think that it

1 is a given that a business is going to make  
2 financial projections. It happens all the  
3 time, forecasting. It happens all the time  
4 based on historical business. This is not a  
5 new business as I understand, not a start up.

6 If this were a start up I think you  
7 would be making up out of whole cloth. We  
8 don't have that. This case has been around  
9 more than five years.

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Washington, D.C. (202)833-8503

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15           Q. Now, let me show you what has been  
16 marked as Plaintiff's Exhibit 88. Would you  
17 please identify what this exhibit is.

18           A. This is the arbitration final statement  
19 of claim of our claim to the arbitrator  
20 appealing to try to get our money paid.

21           Q. And would you tell the jury, please,  
22 what the amount of the claim was that you had  
23 submitted in the arbitration?

24           A. I believe it was about \$115,000. Let  
25 me confirm it. It was \$115,245.

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Q. After the payment problem arose on Willow Run did your company attempt to secure a banking line of credit?

A. Yes, sir, we did.



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3           Q. Did Horizon Bank extend a line of  
4 credit to you?

5           A. No, sir.

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Q. After your loan application did your  
company receive a line of credit from Signet  
Bank?

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A. No, sir, we did not.

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8           Q.   After Qreitems and Najla paid you the  
9       \$100,000 that you were due were you able to  
10      secure a line of credit?

11           A.   Yes, sir, we did secure a line of  
12      credit after with Commercial Bank.

13           Q.   Approximately how long after you  
14      received the hundred thousand dollars payment  
15      on this job were you able to get a line of  
16      credit?

17           A.   We cleaned it up like within the  
18      month.

19           Q.   Within a month?

20           A.   Yes, sir, we had our full credit line.

21           Q.   What was the amount of the line of  
22      credit that you obtained after the Qreitems and  
23      Najla paid you the \$100,000?

24           A.   \$150,000.

25           Q.   Okay. Now, after the payment problem

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1     arose on Willow Run did you make any effort to  
2     increase the amount of the work program that  
3     you could use from your bonding company?

4           A.   We are pretty much constantly trying to  
5     increase our work program with a bonding  
6     company and we've made a lot of different  
7     efforts.

8           Q.   Who was your bonding company?

9           A.   Aetna.

10          Q.   In your experience do contractors  
11     typically deal with more than one surety or  
12     have more than one surety relationship at a  
13     time?

14          A.   You really can't because of the way --  
15     I mean, I think Mr. Warfield said it best it's  
16     like a marriage. You're kind of there. You  
17     have one wife. You deal with one and you  
18     don't -- some things you get. You don't get  
19     other things and most all of our conversations  
20     are with David Warfield. We met additionally  
21     with Aetna's people and we meet with them on a  
22     quarterly basis but we don't meet specifically  
23     with --

24          Q.   At the time of the Willow Run problems  
25     what was the amount of the work program



1 extended to you by Aetna?

2 A. Two and a half million dollars.

3 Q. Would you explain to the jury what the  
4 work program is? What does that mean?

5 A. Basically a work program is what Aetna  
6 allows you to do in volume of bonded business  
7 and they look at your business -- your total  
8 business and they give you advise or I  
9 shouldn't say Aetna.

10 David Warfield and I talk weekly,  
11 sometimes biweekly, sometimes weekly depending  
12 on how much activity there is as to where we're  
13 going and whether or not we can increase that  
14 work program or whether or not this work  
15 program needs to be throttled back, and when  
16 you have a situation like Willow Run, you have  
17 to have a lot more conversation about the 2.5  
18 million.

19 If you're -- if you have all your  
20 payments and your total job is in pretty good  
21 working order then sometimes you can get like  
22 a -- you maybe can get a \$3 million work  
23 program instead of a \$2.5 million work program.

24 Q. What was the effect of the nonpayment  
25 of the \$100,000 receivable on Willow Run to

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1     your efforts to increase your work program  
2     above 2.5?

3           A.   We absolutely were not allowed an  
4     increase and we also were questioned if we were  
5     to get very close to 2.5.

6           Q.   Did there come a point in time during  
7     the Willow Run problems that you learned that  
8     the Qreitems or their attorneys had contacted  
9     your bonding company?

10          A.   Yes, sir, we did.

11          Q.   Had anyone representing the Qreitems or  
12     Najla or the Qreitems and Najla themselves told  
13     you in advance that they were going to go and  
14     contact your bonding company?

15          A.   No, sir, they did it when we didn't  
16     accept one of their offers and basically they  
17     went around us and were trying to put pressure  
18     through Aetna.  As I understood it it was  
19     pressuring us to try to do more things for  
20     them.

21          Q.   How did you find out that they had gone  
22     to Aetna?

23          A.   Because I got a call from David  
24     Warfield wanting to know -- you're telling me  
25     one thing, why is this not a fact.  And I was

1     trying to explain and he was aware of what was  
2     going on in arbitration.

3           Q.   Was it your understanding that they had  
4     contacted Mr. Warfield?

5           A.   Absolutely not.   This came from like a  
6     home office of Aetna.

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9           Between October 1 of 1993 and January  
10    of 1995 when you finally received \$100,000  
11    payment, in that time period did you attempt to  
12    have your bonding or your work program  
13    increased above 2.5 million?

14          A.   We tried several times, yes, sir.

15          Q.   Were you successful?

16          A.   No, sir, we were not.

17          Q.   Did the bonding company increase your  
18    work program above 2.5 million dollars at any  
19    time between October of 1993 and January of  
20    1995?

21          A.   No, sir.

22          Q.   After you received the \$100,000 payment  
23    in January of 1995 was your bonding work  
24    program increased?

25          A.   Yes, sir.

1 Q. From what to what?

2 A. We were increased to \$4 million.

3 Q. And how soon after this receivable was  
4 taken care of was your work program increased  
5 from 2.5 million to 4 million?

6 A. Within the quarter.

7 Q. Within the three-month period of time?

8 A. Yes, sir.

9 Q. Did your inability to have your work  
10 program increased to the \$4 million interfere  
11 with your company's ability to bid for other  
12 work?

13 A. Yes, sir. I mean, it's like Mr.  
14 Donegan said yesterday, we definitely -- it  
15 was -- his project there was some work with  
16 Food Lion. There was a number of different  
17 jobs that we could not -- we could not meet  
18 their bid qualifications.

19 Q. Let's start with Food Lion. What is  
20 Food Lion?

21 A. Food Lion is a grocery chain I think as  
22 most people know and it was somebody we were  
23 trying to get on their bid program..

24 Q. Did you receive a bid package from Food  
25 Lion during this time to bid on a job?

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1           A. We were reviewing the one for -- they  
2           had one at Prince William County on a site that  
3           we had done other work on, and we were trying  
4           to get -- get to be able to bid that job.

5           Q. Did the bid package that you received  
6           from Food Lion indicate the level of bonding  
7           that would be required in order to bid the job?

8           A. It would require that you have to put a  
9           performance payment bond for the total amount  
10          of work.

11          Q. Okay. And in order to bid that job at  
12          that time did you have the bonding -- was your  
13          work program at 2.5 million large enough for  
14          you to submit a bid on that job?

15          A. No, sir, it was not. I talked it over  
16          with David Warfield and he said that we would  
17          not be able to procure the bond so we didn't  
18          approach it beyond that.

19          Q. After your work program was increased  
20          to \$4 million were you able to bid on Food Lion  
21          jobs?

22          A. Yes, sir, we've done several since  
23          then.

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24 Q. Now, how many jobs have you bid on and

25 received from Food Lion since this problem was

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1       cleared up, the Willow Run problem?

2           A.   Four.

3           Q.   Four?  Were those jobs successful?

4           A.   Yes, sir, they're successful.  One of  
5       them is the same size as the job that we did  
6       for -- that we didn't bid on.  One of them is  
7       \$200,000 less and one is a \$600,000 job.

8           Q.   When you said the job that we couldn't  
9       bid on, that was the Food Lion job that you had  
10      received the bids package for when your work  
11      program was only 2.5 million?

12          A.   Yes.

13          Q.   Did you during the period of time  
14      when -- strike that.

15                During the Willow Run payment problems  
16      when your work program was 2.5 million did you  
17      have the opportunity to bid on a job for TJ  
18      Maxx?

19          A.   We didn't -- we were not able to bid on  
20      it.  We tried to go to talk to them and sell  
21      it, and we discussed our situation.  They are  
22      very thorough in their asking you questions,  
23      and when we discussed the project it was  
24      determined that they wouldn't allow us to bid  
25      on it.

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18           Q.   Were you in a position with a 2.5  
19 million work program to bid on that job?

20           A.   No, sir, we were not.

21           Q.   Did you meet the qualifications in the  
22 bid package with respect to the amount of the  
23 bond that you would have to put up front to bid  
24 the job?

25           A.   No, sir, we didn't.

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1 Q. Prior to the Willow Run payment problem  
2 had you bid and received work from TJ Maxx  
3 before?

4 A. Yes, we done about three before then,  
5 and we've done a number of projects with --

6 Q. After your work program was increased  
7 from 2.5 million to 4 million, how many TJ Maxx  
8 stores did you bid and obtain?

9 A. We have done approximately 24 I think.

10 Q. 24?

11 A. Yes, sir.

12 Q. What is TJ Maxx?

13 A. They're a department store, clothing  
14 department store.

15 Q. Now, I would like to address this  
16 project that Jay Donegan testified to yesterday  
17 which was Clopper Mill Village Center?

18 A. Yes.

19 Q. You were present when Mr. Donegan  
20 testified?

21 A. Yes.

22 Q. Did you receive a bid package with  
23 respect to the Clopper Mill Village Center  
24 package?

25 A. Yes, sir. We reviewed it and talked to

1 Mr. Donegan and determined that with the  
2 phase -- if we broke it apart in phases that  
3 one of the phases was still too large for us to  
4 bond under our program.

5 Q. What was the or what is the Clopper  
6 Mill Village Center?

7 A. It's a shopping center. It has a  
8 grocery store with some shops and parking lots.

9 Q. Do you recall approximately how large  
10 it is?

11 A. Yes, sir. It was roughly 7 million 4  
12 roughly.

13 Q. Did you know Mr. Donegan before you  
14 were in discussions about bidding this job?

15 A. Yes, sir, I did.

16 Q. How did you know Mr. Donegan?

17 A. We had worked together before and I had  
18 done other work. I consulted with him on other  
19 work, and I had done -- provided construction  
20 management services for him before.

21 Q. Where had you and Mr. Donegan worked  
22 before?

23 A. Trammell Crow Company.

24 Q. Did you and Mr. Donegan discuss your  
25 company's ability to bond the Clopper Mill

1 Village Center job?

2 A. Yes, sir, we did.

3 Q. Would you tell the jury your side of  
4 that discussion?

5 A. When we reviewed the bid package we  
6 determined that one of the components was -- it  
7 was about 3 million. A little over 3 million,  
8 maybe 3 million 2 that -- with a 2 million 5  
9 bonding limit we were not able to be able to  
10 participate in that job, and we couldn't break  
11 any of the components down any smaller than  
12 that.

13 Q. So even if the company had broken it  
14 down into phases with a 2.5 million work  
15 program you still couldn't bid it?

16 A. No, sir, we could not.

17 Q. After your work program was increased  
18 to \$4 million have you bid other jobs and  
19 obtained them in projects involving Mr.  
20 Donegan?

21 A. Yes, sir.

22 Q. Would you tell the jury what those are?

23 A. We're doing a project very similar to  
24 the Clopper that we put together in I believe  
25 it was May of this year. It's 7 million 3, 7

1 million 2.

2 Q. That's the contract value?

3 A. Yes, sir.

4 Q. What is the name of that project?

5 A. It's Ashburn Farm and Village.

6 Q. Where is that located?

7 A. In Ashburn, Virginia.

8 Q. How are you able to -- strike that.

9 Did the bid package on that job require a  
10 performance bond?

11 A. Yes, sir, it does.

12 Q. With a work program of 4 million how  
13 are you able to bond the project in excess of 7  
14 million? Would you explain to the jury how  
15 that works?

16 A. Yes. We established a very similar  
17 structure so that we're bonding the site work  
18 as one package. We're bonding the building as  
19 another package and we're actually -- we  
20 actually have the tenant work -- in this  
21 particular case we have negotiated to exclude  
22 it from the bonding package.

23 Q. What is Mr. Donegan's role at Ashburn  
24 farms?

25 A. He is -- he leases the project and he's

1     one of the owners.

2           Q.   Now, what was the other project that  
3     you've done with Mr. Donegan since your work  
4     program was increased to \$4 million?

5           A.   We're working on a project called Kings  
6     Town Village or Kings Town Center down in  
7     Alexandria.

8           Q.   What is the nature of that project?

9           A.   It's a shopping center.

10          Q.   About how large?

11          A.   It will be about 5 million 2.   We're  
12     closing -- we've done one section.   We have not  
13     gone into the total 5 million 2.

14          Q.   Would you explain how you were able to  
15     bond that job with a work program of \$4  
16     million?

17          A.   Again we're bonding it within phases,  
18     within relative phases.

19          Q.   Now, would you explain to the jury how  
20     the bonding in phases works in terms of what  
21     happens to your bond capacity as you complete  
22     one phase and begin another phase?

23          A.   We discussed with David Warfield  
24     basically as to where the exposures are to not  
25     being able to include different work, and in

1 the cases of where payments are going very  
2 smoothly and where the work is going smoothly  
3 and being performed timely, then we end up  
4 with -- you make assessments.

5 Although you have a million dollars  
6 bond, I'm going to use round terms, but if you  
7 have a million dollars bond out and you've  
8 completed 80 percent of the work, your work  
9 program can vacillate over so contracts may add  
10 up to more than the work program, but the  
11 amount of work to perform --

12 Q. Contract work in each of the phases  
13 overlap?

14 A. Yes, sir, they can.

15 Q. Why is that?

16 A. Because obviously you're performing --  
17 some of the work gets performed so that it  
18 reduces the amount of completion exposure. I  
19 mean, the bonding company secures against  
20 completion and payment of your subcontractors.

21 And so when you're showing you're  
22 paying and you're showing you're getting paid  
23 and you show the completion then they see that  
24 you don't have as much exposure.

25 Q. Let's turn now to PetSmart. What is

1     PetSmart?

2           A.   PetSmart is a project that we were  
3     looking at.

4           Q.   What is PetSmart?   What kind of  
5     business is it?

6           A.   I'm sorry.   It's an animal food store,  
7     supply store, veterinarian clinic.

8           Q.   Generally or typically how large are  
9     their stores?

10          A.   They're about a million and a half  
11     dollars.

12          Q.   Prior to Willow Run had you bid and  
13     received jobs from PetSmart?

14          A.   Yes, we had done two.

15          Q.   Two jobs?

16          A.   Yes, sir.

17          Q.   During the Willow Run payment problem  
18     did you receive a bid package to build another  
19     PetSmart project?

20          A.   Yes, sir, we did.

21          Q.   Did that bid package require the  
22     posting of a performance bond in order to bid  
23     the job?

24          A.   Yes, sir, it did.

25          Q.   Were you able to meet that requirement

1 of the bid package during that time?

2 A. No, sir, we were not.

3 Q. After your work program was increased  
4 from 2.5 million to 4 million, have you bid on  
5 other PetSmart projects?

6 A. Yes, sir, we have.

7 Q. And have you won those bids?

8 A. We've done four or five.

9 Q. Of roughly the same value, larger,  
10 smaller, what?

11 A. Two are smaller. Most of these are  
12 smaller in this particular case.

13 Q. Let me direct your attention to Super  
14 Fresh. During the Willow Run payment problem  
15 were you afforded an opportunity to bid on a  
16 Super Fresh project?

17 A. Yes, sir, we discussed with one of the  
18 Super Fresh representatives about bidding.

19 Q. And would you tell the jury your side  
20 of that discussion, please.

21 A. Yes, sir, it was talking with Tom  
22 O'Neil, and he was -- we had done four or five  
23 Super Freshes over the years with Tom and I was  
24 trying to get on his bid list and wanted to get  
25 on his bid program and he explained to me that



1 he would --

2 THE COURT: Don't tell us what he  
3 said.

4 THE WITNESS: Okay. I'm sorry, sir.

5 THE COURT: Save us a little time.

6 THE WITNESS: How do I do this?

7 BY MR. MORRISON:

8 Q. During the Willow Run were you able to  
9 get on Super Fresh's bid list?

10 A. No, sir, we were not.

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23 Q. What was your understanding of why you  
24 could not get on the bid list at Super Fresh  
25 while the Willow Run problems existed?

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1           A.   Because we couldn't bond past 2.5 and  
2   on Willow Run we had bonds outstanding.

3           Q.   What other companies were you unable to  
4   bid for during the Willow Run project?

5           A.   We were unable to bid specifically  
6   large projects that we were trying to get on to  
7   was the Fried Companies -- was a shopping  
8   center and again in Alexandria down in the  
9   Springfield area that had a Best Buy store in  
10   it and we also had --

11          Q.   Do you recall how large the job was or  
12   would have been?

13          A.   It was about 4.5 million.

14          Q.   This bid opportunity came up during the  
15   Willow Run situation?

16          A.   Yes, sir, it was in the late fall  
17   of '94.

18          Q.   With a work program of 2.5 million were  
19   you in a position to submit a bid on that job?

20          A.   No, sir, we were not able to.

21          Q.   If your work program had been \$4  
22   million at that time would you have been able  
23   to qualify to submit a bid?

24          A.   Yes, sir, we would have.

25          Q.   You were going to mention another

1 project.

2 A. Yes, sir, and we also talked to Tom  
3 Bundy with Manekin in Columbia to try to work  
4 on a shopping center with a Marshal's that  
5 about -- I believe it was about a million one.

6 Q. Would you explain your side of the  
7 conversation on that job?

8 A. We explained to -- I explained to Tom  
9 Bundy -- we had done two projects with him and  
10 I explained to him our situation and so that in  
11 the event that his company required a bond  
12 specifically out of us or required other  
13 financial obligations such as a letter of  
14 credit from a bank that we would not be able to  
15 do that and so we ended up that we were not  
16 able to bid the job.

17 Q. Was your company's inability to obtain  
18 a line of credit during the Willow Run payment  
19 problems -- did that in any way hurt or help  
20 your efforts to be in a position to bid these  
21 jobs?

22 A. It would not allow us to look for other  
23 substitutes such as the letter of credit or to  
24 take a line of credit to substitute for a bond,  
25 and it would not allow us to let's say make a

1     hard pleading case to the different owners  
2     that -- to show additional financial stability  
3     and capability.

4           Q.   In your experience have you been able  
5     to substitute a line of credit for a portion of  
6     the contract value otherwise to be covered by a  
7     bond?

8           A.   Yes, sir, we have.

9           Q.   Is that standard in the industry?

10          A.   We have done it, yes, sir.  I have done  
11     it.

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Q. Mr. Peacock, before the break we were

22

discussing page 5 of Plaintiff's Exhibit Number

23

112. Do you have that in front of you, sir?

24

A. Yes, I do.

25

Q. Does that describe all of the jobs that

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1     you've indicated to the jury that you couldn't  
2     bid on?

3             A.   Yes, sir.

4             Q.   Next to the listing of the jobs  
5     themselves is a column entitled "value of  
6     jobs." Do you see that?

7             A.   Yes.

8             Q.   What do those numbers mean?

9             A.   Those were the contract values or the  
10    proposed contract values of the different jobs.

11            Q.   Then you've got a total there for all  
12    those added up?

13            A.   That is correct.

14            Q.   Now, the next column is entitled gross  
15    profit at 7.94 percent. Would you tell the  
16    jury what means, please?

17            A.   Yes, sir. We took the records that we  
18    compiled over -- we do it monthly, quarterly,  
19    sometimes annually and basically took  
20    everything. Our gross profit since we started  
21    the company averaged to be just under 8 percent  
22    or in this case 7.94 percent.

23            Q.   And what were the records that you used  
24    to calculate the 7.94 percent?

25            A.   These are -- are work papers that we

1 put together and then converted into the  
2 financial statements.

3 Q. Where does the accounting information  
4 come from? Where in your company?

5 A. From me in work papers.

6 Q. These are from your books of  
7 accounting?

8 A. Yes, sir.

9 Q. Does your bonding company require you  
10 to generate financial statements?

11 A. Yes, sir, they do.

12 Q. And do you know the purpose for that  
13 requirement?

14 A. They review that as a critical  
15 component that somebody besides myself has  
16 looked at the information that I'm providing  
17 and they give it and the accountant certifies  
18 to the -- to the -- to anyone but specifically  
19 to the bonding company that they've reviewed  
20 the records, in some cases audited the records.

21 Q. How often are the financial statements  
22 prepared?

23 A. They're reviewed on a quarterly basis  
24 but they're compiled and/or audited on an  
25 annual basis.

1           Q. Now, would you do the math for the  
2 jury? If you apply the gross profit toward the  
3 value of those jobs what figure did you come  
4 out with?

5           A. For instance, on the Food Lion we had  
6 value of the job as 1 million 4. It would have  
7 led to a gross profit of \$111,160.

8           Q. That's a calculation all the way down  
9 the page?

10          A. Yes, sir, that goes to each number.

11          Q. Let me direct you to historical bid  
12 ratio. What is that? Do you see that?

13          A. Yes.

14          Q. What is that?

15          A. That's when we take -- in this case we  
16 looked at all of the jobs off of our jobs bid  
17 list and jobs we had performed which have  
18 obviously been done and we divided the bids,  
19 the jobs performed over the total amount and  
20 determined that we get approximately -- I think  
21 it was about 47 percent and we rounded it to 45  
22 percent in this particular calculation.

23          Q. Let me show you what has been marked as  
24 Plaintiff's Exhibit Number 120. Would you  
25 explain to the jury what that exhibit is,



1     please?

2           A.   Yes.   This is a list -- we keep a list  
3     because we refer into -- the jobs that we have  
4     bid, we keep a list of where we've catalogued  
5     them and in this particular case we ended up  
6     going back and taking this list and it's called  
7     a job bid file in the superintendent's room.  
8     It's not very legible at the top but it's the  
9     report of all the jobs that we bid.

10          Q.   And you use all that information to  
11     calculate the 45 percent?

12          A.   Yes, sir.

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Q. Would you explain to the jury how you  
calculated -- what your damages are from not  
being able to bid these jobs? Would you  
explain how -- what the number is and how you  
arrived at that, sir?

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1           A.   Okay.   We took the cost of the -- the  
2   value of each job and we multiplied it times  
3   our average gross profit and that gives you  
4   like I spoke on Food Lion 111,000, TJ Maxx was  
5   55,000, these are rounded numbers, down through  
6   the Clopper Mill for instance is 590,000, and  
7   that totals to \$1,500,000.

8           Obviously we didn't do all of the  
9   jobs.   We wouldn't have gotten all of the jobs,  
10   but we would have successfully -- typically we  
11   are successful on 45 percent of the jobs, so we  
12   multiplied the 1.5 million times the 45  
13   percent, and --

14          Q.   What is that number?

15          A.   That number is \$675,297.

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2 Q. Now, you were present in the courtroom  
3 yesterday when the Horton Drywall  
4 representative testified?

5 A. Yes, sir, I did.

6 Q. Who was that?

7 A. Jeff Martinson.

8 Q. How do you know Jeff Martinson?

9 A. Jeff and I have been working together  
10 since 1991.

11 Q. What is the business of Horton drywall?

12 A. They do drywall ceilings and  
13 exterior -- what's called exterior insulated  
14 finish, the skin for it.

15 Q. You heard Mr. Martinson testify that  
16 his company could no longer do business with  
17 your company?

18 A. Yes, sir.

19 Q. And did you and Mr. Martinson discuss  
20 that problem during the course of Willow Run?

21 A. Yes, sir, specifically related to  
22 Willow Run. We tried really hard for him to  
23 get to do some more work with us because he's  
24 done a lot of work in the past and he's a very,  
25 very competitive subcontractor for us.

1           Q.   Would you explain to the jury how  
2   you've been injured by Horton Drywall's refusal  
3   to do any work with you?

4           A.   As we bid these projects they are one  
5   of the very competitive components of the  
6   projects and they bid very favorably to us and  
7   typically their bids are greater than 10  
8   percent, sometimes up to like 18 percent more  
9   competitive, and so when we can't have them  
10   bidding the work in effect we lose a great deal  
11   of value from them not bidding the work and  
12   lose a great deal of profit as well we have to  
13   utilize more expensive subcontractors.

14          Q.   Would you turn to page 3 of Exhibit  
15   112, please, and tell the jury what that  
16   document is?

17          A.   Yes, sir.   It's a calculation that we  
18   performed to confirm how much damage that it  
19   did by not being able to use Horton Drywall.

20          Q.   Would you explain the analysis to the  
21   jury, please?

22          A.   Yes.   What we did was we determined the  
23   percentage of cost for all the drywall  
24   acoustical and efface work that we had done  
25   throughout the entire -- since our company was

1 conceived.

2 And that turned out to be that the  
3 drywall was 7.7 percent of our title volume of  
4 work.

5 Q. The portion of all of the work that you  
6 do as a general contractor, the drywall and  
7 acoustical portion is 7.7 percent?

8 A. Yes, sir. We've done about \$26 million  
9 worth of work, so it equaled approximately \$2  
10 million, and then we basically -- we estimated  
11 that the time -- we looked at the time that  
12 Horton Drywall was not doing work with us since  
13 Willow Run, and since we had completed some  
14 projects that they had also -- were in the  
15 process of performing or had bid and we were  
16 getting started.

17 And we reviewed specifically bids that  
18 we had comparisons for. Horton sometimes they  
19 will be the only one to give -- that gives us a  
20 price, and we took the comparative two projects  
21 that we had that had other drywall contractors  
22 and found them to be greater than 10 percent  
23 competitive, and so we used -- we estimated the  
24 savings to be with Horton of 10 percent.

25 Q. Over other drywall subcontractors?

1           A. Over other drywall subs, and then we  
2 also looked at how much work that we performed  
3 through '94 and '95 through the 18-month period  
4 of time that we didn't use Horton, and that was  
5 11 million dollars, and then we took out  
6 Horton's.

7           Horton later in this year provided us  
8 with a job and they gave us a small job that  
9 they had bid previously and it was contracted  
10 well late, so they were still obligated to  
11 perform it for us.

12          Q. Did they bid and obtain the contract  
13 prior to the Willow Run payment problem?

14          A. Prior to the problems, and it was not  
15 awarded until I think maybe 12, maybe even 14  
16 months later.

17          Q. Is it typical in this business that a  
18 general contractor like yourself can hold a sub  
19 to his bid?

20          A. Yes, sir, very definitely, and we took  
21 away -- that was 259,225, so we took that away  
22 from the work that was performed, was in our  
23 total amount of work performed, and we -- which  
24 ended up being 10,773,404, and we multiplied it  
25 times 7.7 percent, which is the drywall and

1       acoustical cost that we had performed were  
2       829,552 dollars, and if you take a savings, if  
3       we had been able to use Horton we feel like we  
4       would have been 10 percent less expensive on  
5       our drywall, acoustical, 82,955.

6           Q.   And historically when you've used  
7       Horton your total cost for that portion of the  
8       work 10 percent less than it otherwise would  
9       be?

10          A.   It's actually greater than 10 percent,  
11       yes, sir. We put 10 percent as a rounded  
12       number. It went from 12 to 22 percent. There  
13       was one case where it was 6 percent, so we took  
14       the lower in terms of trying to be fair to  
15       calculate the damages.

16          Q.   And how many jobs approximately have  
17       you done with Horton Drywall before the Willow  
18       Run payment problem arose?

19          A.   We've done 12 with Horton and with  
20       Martinson we had done probably another 20 or  
21       30.

22          Q.   Martinson before he joined Horton  
23       Drywall?

24          A.   Correct, he has been our key contact  
25       with these companies.



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22           Q.   And the 82,000 is the amount of damages  
23   that you've incurred to date?

24           A.   Yes, sir.

25           Q.   Now, let me direct your attention to

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1 the last two pages of the exhibit, and for the  
2 record I'm referring to Exhibit 112. Would you  
3 please explain to the jury what that exhibit  
4 represents?

5 A. Yes, sir. It's a project -- American  
6 Printing was a project that we did and this is  
7 the calculation of the expenses that we  
8 incurred that were delayed expenses or  
9 attributable to being delayed because we  
10 couldn't pay the building -- we could not  
11 receive the building because we could not pay  
12 COD at the time.

13 Q. What project were you involved with  
14 American printing on?

15 A. Willow Run. This was during the time  
16 of Willow Run when we were trying to get our  
17 payment and trying to be able -- this was one  
18 unusual condition where we had to pay COD for  
19 the building.

20 Q. What was the project that involved  
21 American printing? That was not Willow Run?

22 A. No, sir, that was not. I'm sorry, it  
23 is American Printing Company.

24 Q. What was the project that you were  
25 building for them?

1           A. It was about a 10,000 square foot  
2 building that they office and do some of their  
3 manufacturing in.

4           Q. What was the item that you had to pay  
5 cash on delivery for?

6           A. We had to pay for the steel and the  
7 metal decking in the building skin.

8           Q. And what amount -- what was the cost of  
9 the delivery to you of that steel for that  
10 project?

11          A. It was approximately \$52,000.

12          Q. Now, how did the Willow Run payment  
13 problem impact that project?

14          A. Because we were having a lot of costs  
15 tied up into the Willow Run and because we were  
16 having -- we were in a -- that's the reason --  
17 busy times for us in terms of cash flow  
18 crunch. We were not able to take a profit from  
19 another job to pay for this, and we didn't have  
20 a line of credit because we couldn't get the  
21 line of credit from the discussions that we've  
22 had earlier, and so we weren't able to have the  
23 building physically delivered to the American  
24 Printing.

25          Q. On time?

1           A.   On time.

2           Q.   Let me ask you this:  You just referred  
3   in your testimony to this period of time where  
4   your cash flow is down.  What period were you  
5   referring to?

6           A.   Referring to -- this was like in the  
7   summer of '94 into December of '94, January.

8           Q.   Latter half of the year?

9           A.   Yes, up into January.

10          Q.   Why is that a -- how does that time  
11   period impact on your cash flow?

12          A.   Because we do a lot of retail business,  
13   that's a very busy time of our year, and so  
14   that we have a lot of work that is out and  
15   things that are paid for, a lot of labor that  
16   we're expending so that we're reasonably down.  
17   We're substantially down in terms of cash.

18          Q.   If you had been able to obtain the line  
19   of credit from any of those banks that you  
20   talked about would you have been able to make  
21   that payment on time?

22          A.   Yes, sir.

23          Q.   Would you explain to the jury what the  
24   last two pages of Exhibit 112 consist of?

25          A.   Basically we have what the different

1 categories and the different specific -- it  
2 says employee/vendor. Some are people that we  
3 had to pay for that owned this American  
4 Printing job that were basically helping to try  
5 to circumvent the delay or in terms doing  
6 work -- not doing work but they were on the  
7 project.

8 They were assigned to the project but  
9 were not able to be productive because we  
10 didn't have the building there.

11 Q. Could you give some examples?

12 A. For instance the superintendent was  
13 assigned to this project and Mark Haggs was  
14 signed as one of the project managers to the  
15 project, and they were already there and were  
16 to be on the job, and there was no way to take  
17 them and move them to another job because we're  
18 trying to work out the problem and trying to  
19 get the problem on to the site to do productive  
20 work.

21 There's other things that --  
22 specifically we had to go -- he made a trip to  
23 Atlanta to an American building to specifically  
24 try to negotiate with them to release and try  
25 to give me credit versus COD issue.

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1           Q.   And what is the total amount of the  
2   additional expense that you incurred on this  
3   project as a result of Willow Run?

4           A.   It's 5,002.36.

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Q. One last thing, Mr. Peacock. You were present in the courtroom when I questioned Tony Greitem.

A. Yes, sir.

Q. Was there a time on the Willow Run project where Mr. Greitem threatened you?

A. Yes, sir.

Q. Would you explain to the jury about that circumstance, what that circumstance involved?

A. There were times he threatened us not to pay and there was a time he specifically threatened me after a meeting with Mr. Cregger and Mr. Pitrelli where he made a statement of, We -- in my country we do not settle our differences with all these attorneys. We just simply settle our difference by going (indicating) and he was very specific.



1           When did you get in touch with Aetna to  
2    try to do the bond for this job?

3           A.   Talked to David Warfield probably in  
4    October, maybe in August.

5           Q.   Of '92?

6           A.   Of '92, yes, sir.

7           Q.   So you've got the -- you got the  
8    package, you got the plans, you know that  
9    that's going to require a bond so you start  
10   working on that process; is that fair?

11          A.   No.   I had already been working with  
12   Aetna to try to develop a bonding relationship  
13   prior to this.   This gave us an opportunity to  
14   specifically discuss it.

15          Q.   All right.   Okay.   And the relationship  
16   you were trying to develop was in fact one  
17   where they would not rely upon the financial  
18   stability of Mr. Griffith but would look at  
19   Griffith of Virginia and yourself only; is that  
20   fair?

21          A.   We were trying to get them to look at  
22   Griffith Virginia.

23          Q.   And because you had to provide personal  
24   information?

25          A.   We had hoped not to but, yes, that's

1     what it ended up.

2           Q.   Ultimately you reached an agreement  
3     with Aetna to do that, did you not?

4           A.   Yes, sir.

5           Q.   In the early part of '93?

6           A.   Yes, sir, we did, we provided a bond.

7           Q.   And when they gave you the initial bond  
8     you went through Mr. Warfield?

9           A.   Yes.

10          Q.   What information did you have to  
11     provide Aetna at that time?  It would have been  
12     financial information I assume of the  
13     corporation?

14          A.   Yes, sir.

15          Q.   Tax returns?

16          A.   Yes, sir.

17          Q.   Financial statements?

18          A.   Yes, sir.

19          Q.   Personal tax returns of yourself?

20          A.   Yes, sir.

21          Q.   Personal financial statement of  
22     yourself?

23          A.   Yes, sir.

24          Q.   Anything else?

25          A.   Our accounts receivable and accounts

1 payable are a very specific request.

2 Q. Now, after that was provided -- when  
3 would that have been provided in this scenario?

4 A. Reasonably early -- I mean, like  
5 probably within a month or two of contacting  
6 Aetna.

7 Q. All right. And when do you come up for  
8 bond review as to the amount of bond authority  
9 that they'll grant you for capacity?

10 A. We ask every quarter. We discuss every  
11 quarter but we end up actual bond review is by  
12 job. In other words, they increase or change  
13 per job.

14 Q. How often do you have to provide them  
15 updated financial information?

16 A. Annually.

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Q. When did the problems begin between your company and Najla Associates regarding billings and work that was performed on the job?

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A. When the original geotech left the job and then they had another geotech.

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Q. You better stop and tell us what a geotech is?

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A. The geotechnical engineer who reviews the -- who basically makes sure that your materials and your foundations are placed properly in accordance to plan and then they actually replaced ECS or ECS quit working on the project and Jay Kaveh and Ali Shakeri, specifically Jay Kaveh was put in place by the owner, and also reviewed the bills beyond just being a geotechnical engineer.

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Q. Did the owner have the right to do that under the contract, to have somebody review

1     this stuff, or in your experience did they have  
2     the right to do that?

3             A.   You have the ability to have an owner's  
4     representative, yes, sir.

5             Q.   So there was nothing unusual about this  
6     process to you when it started to occur?

7             A.   Only that we never were able to agree  
8     with Mr. Kaveh as to many issues.

9             Q.   I understand that but the fact that  
10    there was an owner's representative looking  
11    over the bills --

12            A.   No, sir, that's not unusual to the  
13    business.

14            Q.   I take it that perhaps Mr. Kaveh and  
15    you did not agree, is that fair?

16            A.   When he got our draw requisitions,  
17    takes money out of what work we performed, yes,  
18    we disagreed.

19            Q.   When did all this start?

20            A.   In June.

21            Q.   And he cut portions of the draws?

22            A.   Yes, sir.

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16           Q.   How much of your bonding capability did  
17   you have left in November of 1994?

18           A.   We had just recently added a bond I  
19   believe in December with the -- one of the Pet  
20   Smarts and we also, our work program at that  
21   point was probably pushing around -- at a  
22   million five, million four as I recall.

23           Q.   So that I understand and I sometimes  
24   get confused with the terms, but the work  
25   program that you had would be bonds already in

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1 place; is that what you mean?

2 A. No. Work programs and bonds in place  
3 are two different issues. Work program is  
4 amount of work that you're performing.

5 Q. That would have been one --

6 A. That was around 1 million 4, it may  
7 have been 1 million 6. I would have to check  
8 some things.

9 Q. Does this include this new PetSmart  
10 bond?

11 A. Yes, sir.

12 Q. And your bonding authority at that  
13 point or the work program that was established  
14 was 2.5 million still?

15 A. Yes, sir.

16 Q. On the Food Lion job, that job was  
17 going to be 1.4 million?

18 A. Yes, sir.

19 Q. So with the work program you had in  
20 effect at that time and that job that would  
21 take you over your bonding capacity, would it  
22 not?

23 A. Yes.

24 Q. Did you go to Aetna and ask them  
25 whether or not they would -- strike that.

1           Did you go to Mr. Warfield and ask him  
2           to submit an application to Aetna?

3           A. We discussed the situation and talked  
4           about the job and he said that they would not  
5           be -- they would not approve it.

6           Q. Because of your 2.5 million beyond  
7           limit?

8           A. No. It was basically at that point in  
9           time we're looking at a situation where our  
10          receivables are not that good. It would have  
11          exceeded the 2.5, and he said that we should  
12          not try to take that to them.

13          Q. Did you submit a bid on the Food Lion  
14          job?

15          A. No, sir, we did not. That was one of  
16          the requirements -- I mean, the qualification  
17          of the bond was in the bid package, so we don't  
18          spend that kind of money it takes to bid a job  
19          if we're not going to get it or be considered.

20          Q. All right. In order to have even  
21          submitted a bid on that job then you would have  
22          needed your work program to be increased to at  
23          least include the 1.4 to 1.6 million work  
24          program you had in effect plus the anticipated  
25          value of this job, correct, of 1.4 million?



1           A.   Yes, sir.

2           Q.   So you had to get Aetna to agree to  
3   raise it to at least 3 million?

4           A.   Which they had done in a previous case.

5           Q.   In which case?

6           A.   In a case where the B.J. Wholesale Club  
7   several months before Willow Run.

8           Q.   Well, in fact during this period of  
9   time you were still submitting bond  
10   applications to Aetna, weren't you?

11          A.   We were discussing bonds with Mr.  
12   Warfield, yes, sir.

13          Q.   And on occasion Mr. Warfield would in  
14   fact submit bond applications to Aetna for  
15   jobs, correct?

16          A.   That is correct.

17          Q.   And in fact you continued to get  
18   bonding from Aetna even after this event took  
19   place, did you not?

20          A.   Yes, sir, we did.

21          Q.   When was the TJ Maxx job?

22          A.   About February or March of '94 as I  
23   recall, it may have been April.

24          Q.   All right. Would the work in progress  
25   or work program that you had in effect in

1 February or March of '94 have been about the  
2 same number, 1.4 to 1.6 million?

3 A. No. I think we were probably at about  
4 a million eight, million seven maybe.

5 Q. By when, by March?

6 A. By March.

7 Q. If you were at a million seven and a  
8 million eight and -- strike that.

9 Did you submit a bid -- submit a  
10 request for bonding on the TJ Maxx job?

11 A. No. We discussed the situation with TJ  
12 Maxx, with the representative for TJ Maxx.

13 Q. My question is -- did you ask Mr.  
14 Warfield with regard to whether or not you  
15 should submit a bond application for 700,000  
16 which is the value of the TJ Maxx job?

17 A. No, sir, we did not.

18 Q. If you had not been able to do the Food  
19 Lion job in February because of your  
20 constraints and you had \$1.8 million in March  
21 and the TJ Maxx job was going to require a  
22 \$700,000 bond that would have fallen within  
23 your \$2.5 million limit, wouldn't it?

24 A. That's correct.

25 Q. Did you apply -- did you ask for a

1     bond?

2           A.   We had been discussing with Mr.  
3   Warfield as to what the restrictions might be,  
4   and so we were trying to talk with the  
5   representatives of TJ Maxx to see if they would  
6   alternatively allow us to put up a letter of  
7   credit.

8           Q.   And you understood they wouldn't?

9           A.   That's correct.

10          Q.   All right.  So if you still had this  
11   \$700,000 or so in bonding authority available  
12   in light of your work program why didn't you  
13   submit a bond application on TJ Maxx?

14          A.   Because our discussion with TJ Maxx's  
15   representative and also discussions with Dave  
16   Warfield didn't make sense for us to argue with  
17   a client that we're trying to keep and maintain  
18   because they made an independent assessment  
19   that we should not do the work.

20          Q.   When was the Super Fresh job?

21          A.   About June.

22          Q.   '94?

23          A.   Yes.

24          Q.   What was your work program at the end  
25   in June of '94?

1           A.   It was approximately a million two.

2           Q.   Did you ever get to the bid process  
3 with Super Fresh?

4           A.   No, sir, we did not.

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19           Q.   Did you submit a bid on any one of  
20 these seven jobs?

21           A.   No, sir.

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Q. In the end of '93, December of '93,  
January '94, Griffith & Company had liquid  
assets of about \$350,000?

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A. Liquid. Part of that was in a trust  
fund that I had borrowed from my wife that --  
in the function of being liquid relative to the  
accounting world, yes. In terms of being  
liquid relative to my marriage, no, sir. My  
wife is kind of threatening me not to use that  
money here.

17

18

Q. That was money that was shown as part  
of the company, right?

19

A. Yes, sir.

20

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22

Q. It's there specifically to try to  
maintain the lending line. All your financial  
statements refer to that money, do they not?

23

A. Yes, they do.

24

25

Q. You're submitting these financial  
statements to banks, Aetna whoever --

1           A.   Only to the bank and to the bank.

2           Q.   Let's leave it to them.  When you give  
3   these things to Aetna and the bank your  
4   financial statement doesn't show your wife's  
5   restriction on it?

6           A.   No, sir.

7           Q.   It shows that the money is there?

8           A.   No, sir, that has been discussed, but  
9   it is not -- I don't have a formal -- that is  
10   why the bonding company has it attached so he  
11   can use it if I don't perform.

12          Q.   And in fact this money was there in  
13   December '93, January '94?

14          A.   Yes, sir.

15          Q.   And at least at your deposition you  
16   said it was very liquid?

17          A.   It is very liquid.

18          Q.   At the end of this job Horton -- you  
19   owed Horton five or \$6,000?

20          A.   Yes, sir.

21          Q.   And you knew that they saved you 12 to  
22   22 percent on every job?

23          A.   You have to understand I have a number  
24   of subcontractors that I owed small amounts,  
25   but over all of those I can't treat any of the

1 subs --

2 THE COURT: Answer his question.

3 Listen to his question and answer his  
4 questions.

5 THE WITNESS: I'm sorry, Judge.

6 BY MR. BOCCAROSSE:

7 Q. You owed Horton \$6,000?

8 A. I would have to check. I heard him say  
9 it and --

10 Q. You have no reason to disbelieve his --

11 A. No, sir, I don't.

12 Q. You're sitting there with \$350,000 of  
13 liquid assets by your terms, correct?

14 A. Yes.

15 Q. You've called them liquid assets?

16 A. Yes, sir.

17 Q. And you're looking at a contractor that  
18 you're fearful of losing and know that he's  
19 saving you money. Why didn't you pay him?

20 A. Because you have -- you have payroll  
21 money that you're holding in that account so  
22 that you can make payroll. You have other  
23 accounts. We're doing this business. May I,  
24 sir?

25 THE COURT: He wants an answer, uh-huh.

1           THE WITNESS: Your issue is that you've  
2     got several different accounts that -- you have  
3     ongoing responsibilities, and with this money  
4     you have to determine where all it's going to  
5     get paid, and we try to pay each job as the  
6     money comes in to the different subcontractors  
7     as was stated before.

8           And we also have payroll that occurs  
9     every week whether we get paid or not. We have  
10    certain suppliers that we have to pay as the  
11    materials are delivered, typically small, and  
12    we also have a number of different other  
13    subcontractors that we are having -- that we  
14    need to be treating.

15           We can't treat one differently than the  
16    other, and Horton was not paid 100 percent as  
17    Mr. Fagan has stated. He was paid the same  
18    percentage amount as Mr. Vilotti, and we were  
19    discussing this with all of them, and it was  
20    their choice not to bid us anymore.

21           BY MR. BOCCAROSSE:

22           Q. So did you actually pay them less than  
23    the 5 or 6?

24           A. Yes. Yes, sir, we did.

25           Q. 75 percent or whatever?



1           A.   Approximately the same amount, I think  
2   it was 78 if my recollection is right, but I  
3   would have to check it.

4           Q.   My question is: You've got these  
5   records in front of you, you've got a good  
6   subcontractor that you're really happy with  
7   that's saving you money. You know from your  
8   past experience of three or four years in this  
9   thing exactly what percentage of your  
10   drywall -- of your projects are drywall, don't  
11   you? You have a pretty good estimate?

12          A.   Yes, sir.

13          Q.   In fact for your damage testimony here  
14   you've said that the portion of drywall for 18  
15   months is 829,000. That's in your review of  
16   the records, correct?

17          A.   Yes, sir.

18          Q.   And you're sitting there knowing that  
19   he's going to save you 12 to 22 percent of that  
20   amount, correct?

21          A.   And I have a bonding company that's  
22   sitting there demanding my time, demanding that  
23   I keep a certain asset base and as I told you I  
24   have payroll that I'm making every week in  
25   order to continue producing the work that is

1     being paid for.

2             And there is no way that I can take  
3     that 3 -- that \$350,000 is being used almost  
4     as -- that's my own credit line, if you will.  
5     It's my own revolving credit line that I have  
6     to draw in and draw out from and I cannot at  
7     that point this time -- we did not have the  
8     cash flow to pay Horton nor did we have it to  
9     pay John Vilotti or Engineered Glass.

10            Q.   You had \$350,000 sitting there and if  
11     you had paid Horton 5 or 6,000 of that you  
12     wouldn't be here asking the defendants for  
13     \$83,000 today, would you?

14            A.   Sir, if I would have paid 5 or \$6,000  
15     to Beacon Masonry they wouldn't be out of  
16     business today.

17                   MR. BOCCAROSSE:   Thank you.

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1           Q. Let me go to the projects. If I  
2 understood you correctly, Mr. Peacock, I think  
3 it was seven projects that you told the jury  
4 that you have lost money because you didn't  
5 receive. Did I understand you correctly?

6           A. No, sir, I said I lost the ability to  
7 make money on those projects.

8           Q. But you're claiming the profit that you  
9 might have made in this lawsuit, aren't you,  
10 that you might have made on those projects?

11          A. Yes, sir.

12          Q. And the first one that you listed was  
13 Food Lion, correct?

14          A. Yes, sir.

15          Q. Did you prepare a bid package for Food  
16 Lion?

17          A. Do you want to define the -- give a  
18 definition of bid package? There's been a lot  
19 of confusion about that today.

20          Q. What I mean by a bid package are the  
21 necessary documents that you submit -- or let  
22 me strike that.

23                 Did you receive the bid package on that  
24 project?

25          A. Yes, sir, we did.

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1 Q. Did your company do a work up  
2 sufficient to make a bid on the project?

3 A. No, sir, we did not.

4 Q. So you didn't even go through the work  
5 up to determine what your bid would be on that  
6 project, correct?

7 A. We looked at it. We determined that it  
8 would require a bond. At that time I talked  
9 with Mr. Warfield and we decided that it was  
10 not worth spending that amount of money.

11 Q. Who were the other bidders on the Food  
12 Lion project, Mr. Peacock?

13 A. I would have to try to recall. R. E.  
14 Clark I believe was one. A group out of  
15 Nashville, Tennessee was another I believe that  
16 bid.

17 Q. You're talking a lot of bidders on the  
18 project?

19 A. Three bidders.

20 Q. What did the other bidders bid on that  
21 projects?

22 A. I don't know.

23 Q. Mr. Peacock, will you tell me how you  
24 knew that even if you bid on that project you  
25 would have been the low bidder and won the job?

1           A.   Because we were told, sir, that -- by  
2   the owner of the project that the job cost a  
3   million four and we had also worked it up and  
4   we had also performed Food Lion projects very  
5   similar to that.

6           Q.   Mr. Peacock, let's assume you had  
7   sufficient bonding for the job, for that job.  
8   My question is: How do you know you would have  
9   won the bid, that you would have been the low  
10   bid and those other three companies wouldn't  
11   have beat you? How do you know that?

12          A.   We would -- we did not ask for 100  
13   percent. We get about a half, 45 percent of  
14   the jobs that we bid.

15          Q.   I'm asking you about this job, Mr.  
16   Peacock.

17          A.   So we look at that job and take a 45  
18   percent chance that we would have that job.

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Q. On any of the projects, these seven jobs that you listed here, Mr. Peacock, would your answer be any different that you think -- basically you've looked at historically some other jobs and you've looked at some later jobs and you think that because you have a 45 percent chance of winning, that's the basis on all -- I won't go through every one, but that's the basis on all seven of those jobs is you think you have a 45 percent chance of winning them; is that correct?

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A. We believe we had better than a 45 percent chance of winning them. We showed the statistics because that's what the statistics do on a piece of paper.

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Q. On all the jobs?

22

A. On at least four of those for sure.

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Q. Didn't you tell us in your deposition you thought you had -- didn't you just tell the jury you thought you had about a 45 percent

1 chance of prevailing on this job?

2 A. We showed we would get 45 percent of  
3 that work, yes, sir.

4 Q. So it's your testimony that you believe  
5 that you would have gotten all seven of those  
6 based upon those statistics that you looked at?

7 A. Yes, sir.

8 Q. And you don't really have any specifics  
9 about those jobs, what the bid was and what  
10 they entail?

11 A. Yes, sir, I have some specifics.

12 Q. On all the jobs?

13 A. Yes. Not on all of them but there are  
14 four specifically that I do.

15 Q. How many of these seven jobs did your  
16 company do a work up on so you could prepare  
17 the bids?

18 A. We did a work up on everything except  
19 the Manekin project, and the work up on the TJ  
20 Maxx we did a work up but not to the detail  
21 that you're asking for earlier. I was making  
22 the assumption on your work up you asked for  
23 earlier.

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12 Q. In fact Aetna has never turned either  
13 you or your agent down for a bond, have they?

14 A. Yes, sir. My agent -- I do all of my  
15 bonding through my agent.

16 Q. Let me ask your agent.

17 A. Never turned me down. He's suggested  
18 to me not to go further with the job.

19 Q. Has Aetna ever turned your agent down  
20 for a bond for your company to your knowledge?

21 A. Not to my knowledge.

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Q. Thank you. Was there any other accounts receivable on your books in February of '94?

A. Yes, sir, there was a number of them. I can't even recall. It was a long list.

Q. Do you recall one in particular that was about \$134,000?

A. That's probably an aged receivable. \$134,000 sounds probably like an outstanding on my -- on the house I was remodeling at the time.

Q. Do you know how long the \$134,000 accounts receivable for that house stayed on your books?

A. As I recall approximately six months.

1           Q.   So that would be six months from  
2   February of '94?

3           A.   I believe that's correct, sir. I would  
4   have to check that. I don't remember about the  
5   time frame.

6           Q.   So that would cover the time frame in  
7   which you would have submitted -- had you done  
8   so you would have submitted bond requests to  
9   Aetna had you chosen to take the next step and  
10   actually go to Aetna during that time frame?

11          A.   We actually discussed that with David  
12   Warfield. He knew what that was. We discussed  
13   it with the banks and he knew -- basically we  
14   knew we would have the opportunity to pay it  
15   off.

16          Q.   However it was on your accounts  
17   receivable at the time?

18          A.   Correct, everything on there is on our  
19   receivables.

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I'm going to let the other two

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defendants handle the damages and I join in

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their objections or their positions on the

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damages that there are no damages in this case

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but I wanted to address each of the causes of

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1 action as to my clients.

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Mr. Morrison spent a lot of time the last couple days getting the Qreitems to talk about each and every lawyer that they went to, the fact that they spent money and didn't pay their lawyers to prolong this litigation, the fact that Mr. Qreitem made this gesture indicating that he was going to -- how they took care of problems in his native country.

There is no suggestion and there cannot be any inference nor can you let this jury start to speculate as to what would have happened had the money been there.

I mean, we've got evidence that these folks were pretty motivated in their opposition to having to pay this, and I don't think that any reasonable inference can be made in this case that their actions would have changed otherwise.

If they wanted that reasonable inference they probably would have had to back off a little bit from the testimony they were eliciting from the Qreitems in this case, but that paragraph is unambiguous, and if you read that paragraph and in light of this testimony

1 as far as damages, these damages simply are not  
2 related to any potential breach of this  
3 agreement.

4 There is no suggestion in this case,  
5 and I don't think that the Court can impose any  
6 suggestion. You've got an arbitration award  
7 that comes down in May, this action in Fairfax  
8 County which culminates in Judge Kenney's  
9 letter opinion which we all know is in a final  
10 decision.

11 And in fact even the letter opinion  
12 says I'm waiting for an order, the order that  
13 was entered in that case did not call for --  
14 did not order the escrow monies to be paid out,  
15 even the amounts that were in there.

16 And for whatever reason and I don't  
17 know what those reasons were and as a result  
18 they had to go to the next step and the only  
19 testimony you have in this case is that there  
20 were continuous indications from the Qreitems  
21 that they were fighting this, might appeal it,  
22 might not appeal it.

23 You've even got testimony that as late  
24 as December and a couple of days before the  
25 actual garnishment hearing was to take place

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1     that Mr. Qreitem I think finally went to the  
2     member of the Lewis law firm to try to  
3     negotiate one last attempt.

4             There is no indication that Mr.  
5     Qreitem, either one of Qreitem's or Najla  
6     Associates at any time consented or would have  
7     consented to the distribution of the last  
8     amounts.

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1                   MR. FAGAN: Your Honor, if I may  
2       because I join in Mr. Boccarosse's points and I  
3       haven't gotten the chance to speak on behalf of  
4       my clients.

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22 allow it to go to the jury and to speculate on  
23 that would be improper so I ask the Court on  
24 behalf of the law firm to strike the entire  
25 case, Your Honor.

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CLERK  
F. L. VA. COURT

1 VIRGINIA

2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

3

4 WILLIAM L. GRIFFITH & COMPANY)

5 OF VIRGINIA, INC., )

6 Plaintiff, )

7 vs. )

8 SAMIR F. QREITEM, et al., )

9 Defendants. )

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13 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

14

15 TRIAL -- VOL. 4

16

17 DECEMBER 14, 1995

18

19 BEFORE:

20 THE HONORABLE GERALD BRUCE LEE

21

22 REPORTER:

23 Susanne Q. Tate, RMR and Notary Public

24

25 - - - - -

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With respect to the breach of contract claim, all defendants have claimed there is no damages stemming from the alleged breach of the escrow agreement, and EL&P, the title company, contends that -- and the law firm contends that even if there were a breach of the escrow agreement, which they deny, that they claim the plaintiff has failed to establish any damages flowing from the breach of the agreement.

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The defendants say the plaintiff has not offered evidence of damages sufficient to withstand a motion to strike, because one, he received the evidence -- received the check, used it to pay his subcontractors; that he knew after the funds had been taken and used by him that the account would not be replenished because of the contractual dispute between the owners, that is the defendants, Najla and him;

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1     and that -- that he was -- that he claims he  
2     was due funds after taking the \$103,000 of  
3     about \$75,000 or \$73,000; and that his claim  
4     would have to be asserted in arbitration.

5             And they say, the defendants, that the  
6     last paragraph makes it clear that he was not  
7     entitled to receive the balance of the escrow  
8     funds without the consent of the owner and that  
9     based on the way the contractual relations were  
10    proceeding through September and October of '93  
11    and beyond, there is no way to infer, given the  
12    light most favorable to the plaintiff, that the  
13    owner was going to consent to release of the  
14    escrow funds, much less the remaining \$27,000,  
15    even if the \$130,000 were in place.

16            The defendants further contend that the  
17    escrow agent was not required to disburse the  
18    funds until at least January of '95 upon order  
19    of the court or consent of the owner, and  
20    therefore, they contend that there were no  
21    damages from this alleged breach of contract,  
22    even if there were a breach, and that the  
23    plaintiff could not have reasonably looked to  
24    the escrow fund as a source to pay the  
25    subcontractors at the time, because the owner

1 did not consent to release of the funds, and  
2 the escrow agent nor the law firm had any  
3 independent basis to release these funds.

4           They further contend that the  
5 plaintiff's damages, if there were any, were  
6 incurred much later, that would be February  
7 through October of '94 when plaintiff claims he  
8 could not bid on or secure work he was  
9 qualified for, he contends because of the aged  
10 account receivable and the escrow agent's  
11 failure to pay over the funds, is not a breach  
12 of contract which caused damages. And further,  
13 that the bonding problem that the plaintiff  
14 contends, if there was one, was not a damage  
15 flowing from this alleged breach of contract.

16           The plaintiff responds that the  
17 defendant escrow agent breached the escrow  
18 agreement by disbursing the funds and failing  
19 to require the owner to replenish the account.  
20 This was a material breach excusing the escrow  
21 agent and law firm's duty under the escrow  
22 agreement.

23           Plaintiff contends that since the  
24 escrow agent improperly responded to Mr.  
25 Greitem's direction on behalf of Najla to pay

1 plaintiff from the escrow account that the  
2 escrow agent and the law firm ought to go  
3 forward in response to his request for payment  
4 of the balance of the escrow funds, and that  
5 plaintiff contends that it was damaged because  
6 it did not have use of the escrow funds, that  
7 would have been a security, that would have  
8 afforded a basis to secure other bonds, because  
9 the accounts receivable would have then been  
10 secured by a fund which would have been viewed  
11 differently by the bonding company and the  
12 bank, perhaps, and that the defendants, that is  
13 Najla, had the use of these escrow funds  
14 without having to replace them, and this gave  
15 them a financial advantage and leverage to  
16 force a settlement and delay payment by  
17 engaging in litigation under the construction  
18 contract.

19 Plaintiff contends that this breach of  
20 contract caused it to suffer an adverse account  
21 receivable to -- on this job, his work program  
22 -- which impacted his financial statement.  
23 His work program was geared toward the  
24 financial viability of the company, and the  
25 accounts receivable were a factor in that

1 according to Mr. Warfield's testimony, and that  
2 his ability to secure bonding affected his  
3 ability to compete for jobs that he may have  
4 won, and he contends that his evidence shows or  
5 at least creates a jury issue, he says, that  
6 several jobs occurring during the time from the  
7 breach in September of '92 to January of '95,  
8 that had there been no breach, he had a  
9 substantial chance of winning bids and earning  
10 profits.

11 He contends that his evidence shows  
12 damaged relations with subcontractors,  
13 including Horton and others, which limited his  
14 ability to compete for work. Additionally,  
15 plaintiff contends his ability to secure a line  
16 of credit was a damage flowing from the escrow  
17 agreement breached by the defendants.

18 The Court is of the opinion that  
19 plaintiff has presented sufficient evidence to  
20 withstand a motion to strike on damages as to  
21 all defendants. The evidence viewed in a light  
22 most favorable to plaintiff would be a jury  
23 issue on this question of causation and  
24 damages, and the defendants' argument that  
25 plaintiff was not entitled to the funds in

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1     September of '93 I think goes to the issue of  
2     proximate cause, because it is arguable, I  
3     think, viewed in the light -- viewing the  
4     evidence in the light most favorable to the  
5     plaintiff, that had the escrow fund remained  
6     intact, that the bonding company as well as the  
7     line of credit application would have been  
8     handled differently, and the defendant has, I  
9     think, perhaps an argument, but it does not  
10    sufficiently -- it is not sufficient to require  
11    me to grant the motion to strike about  
12    proximate cause.

13               But the evidence has shown, I think,  
14    enough for the plaintiff to -- it has shown  
15    that the plaintiff has suffered a negative  
16    economic impact and creates a jury issue and an  
17    issue of damages.

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Q. Now, did you receive a document that's  
already into evidence, I believe, it was the  
conditions that were sent to you by Mr.  
Peacock?

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A. Yes.

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Q. And did you have discussions with Mr.  
Peacock about those conditions?

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A. Only one that I remember, and that was

1 W under the conditions that counsel has  
2 referred to.

3 Q. And tell me about those discussions  
4 regarding W of the conditions. What was that  
5 about?

6 A. It is how the job was going to be  
7 funded. It says the job is to be funded, and  
8 it says to be supplied by owner, and then it  
9 says something about an escrow, an escrow to be  
10 agreed upon, about that fact, it never came  
11 into being, because I had explained to David up  
12 front that this was not going to be a mortgage  
13 construction or a bank construction, that it  
14 was going to be funded by Najla themselves.

15 Q. And at some point in time there was  
16 discussion about an escrow account?

17 A. That came about very late in the game.  
18 What happened was that we had required that the  
19 job -- that a performance and payment bond be  
20 secured by William L. Griffith Company of  
21 Virginia, and David came to me and said that he  
22 had applied to his bonding company, and the  
23 bonding company was a little uncomfortable  
24 because it was not a usual transaction. The  
25 bank wasn't making the loan, the owner himself

1 was making the loan, and would we agree to a  
2 \$130,000 set-aside, escrow, and I said I'll  
3 recommend it to them, and yes, I think we can  
4 deal with that.

5 Q. Okay, sir. And the \$130,000 was  
6 eventually established. Is that right?

7 A. Yes, it was.

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Q. I understand, we will get there. It says, "The owner confirms the contract amount shall be funded by," and then you are going to put a name in, correct?

A. Well, it says, "To be supplied by owner."

Q. "The owner confirms the contract amount shall be funded by," and the funds are to be supplied to the owner, and --

1           A. It says it shall be funded by, and then  
2 it says it's to be supplied by owner --

3           Q. What did you understand that to mean?  
4 Tell the jury.

5           A. To tell him where the money was coming  
6 from, and I told him it would be funded by  
7 Najla themselves, that there was no loan.

8           Q. And this funding agreement sets aside  
9 by escrow or other acceptable method at least  
10 the total of this proposed base bid sum. Isn't  
11 that what it says?

12          A. What it says.

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Q. Now, you testified that this provision, the parties just forgot about it, because you explained to David at this time in July of 1992 that the project would be self-financed. Is that your testimony?

A. They didn't forget about it. We -- he was told that this was the way it would be funded. We never discussed any other acceptable method of putting up any escrow. The question of escrow never came about until he went to the bonding company, and the bonding company felt uncomfortable, not David, the bonding company.

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16           Q. Now, you did understand that the escrow  
17 would serve as a source of security for payment  
18 of monies due the Griffith Company, correct?

19           A. No question.

20           Q. That was understood.

21           A. Understood.

22           Q. All right.

23           A. It was to -- it was to make the bonding  
24 company --

25           Q. Well --

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1 A. -- satisfied.

2 Q. -- well, it also served as security for  
3 payment to the Griffith Company, as well,  
4 correct?

5 A. Well, that was a -- that was not the  
6 purpose of it, but it was --

7 Q. Well, okay. Now, the bonding company,  
8 like David Peacock, was uncomfortable because  
9 the project was being self-financed, correct?

10 A. Unusual.

11 Q. And that is an unusual situation.

12 A. Yes, it is.

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11           Q. Now, you've indicated that the bid  
12 qualification that Mr. Peacock forwarded to you  
13 on July 30th, 1992, that that was just -- it  
14 went by the wayside, correct?

15           A. No, it didn't go by the wayside. It  
16 just was not part of a contract. It was a  
17 proposal. It became part of the contract at  
18 the time the contract was signed.

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25           Q. Let me show you a copy of that c

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1 identified by Mr. Qreitem.

2 For the record, Your Honor, that's  
3 Plaintiff's Exhibit 3. You can use my copy.

4 Please turn to Exhibit D of the  
5 contract, sir. Do you have that, sir?

6 A. Yes.

7 Q. Now, that's the same statement of  
8 qualifications that was submitted to you in  
9 July by Mr. Peacock, correct?

10 A. Yes, it is.

11 Q. So, this statement of qualifications  
12 was not only not discarded, it was actually  
13 incorporated as part of the contract, correct?

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21 THE WITNESS: Yes, it became part of  
22 the contract.

23 BY MR. MORRISON:

24 Q. Okay. Now --

25 A. But by that time we had the escrow

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1     agreement in effect and had agreed on the  
2     amount of the escrow.

3           Q.   Well, the escrow agreement wasn't  
4     signed until February of '93, correct?

5           A.   It was transmitted to David, and he had  
6     indicated it was acceptable and the \$130,000  
7     figure was in the escrow agreement.

8           Q.   Tony Greitem didn't sign it until  
9     January 26th of '93, correct?

10          A.   In my opinion, the contract didn't come  
11     into existence until we had the bond, and the  
12     bond couldn't come into existence until the  
13     bonding company had the escrow agreement. So,  
14     the whole contract was contingent on the escrow  
15     agreement.

16          Q.   Well, we are just talking about when  
17     people signed the documents.

18          A.   That's true.

19          Q.   The construction contract was signed  
20     prior to the escrow agreement, correct?

21          A.   I'm not sure, because there is no date  
22     on the contract.

23          Q.   Well, do you remember given your  
24     involvement as the lawyer in negotiating the  
25     contract?

1           A. The contract was agreed upon, was  
2       setting on the table waiting for the bond, and  
3       the bond wouldn't be issued until the escrow  
4       agreement was signed.

5           Q. And as you sit here today, you don't  
6       recall that the construction contract was  
7       signed prior to the signing of the escrow  
8       agreement, sir?

9           A. If it were, it still would not have

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14           Q. Let me direct your attention to  
15       Plaintiff's Exhibit 7, please, which for the  
16       record is the letter from David Peacock to Mr.  
17       Cregger dated November 24, 1992, correct?

18           A. Right.

19           Q. And attached to Mr. Peacock's letter is  
20       the initial draft of the escrow agreement. Is  
21       that correct?

22           A. It is an escrow agreement that David  
23       sent to me saying it is a form that he had used  
24       in other projects as a sample.

25           Q. And this was the first draft of the

1 escrow agreement, correct? '

2 A. Right.

3 Q. Is that right?

4 A. Yes.

5 Q. So, he took an agreement and he sent it  
6 to you, and then you changed his draft,  
7 correct?

8 A. Yes.

9 Q. And you changed his draft rather  
10 substantially, did you not?

11 A. I added some things which I thought  
12 clarified the obligation of how soon if monies  
13 were paid out, some time limits in it mostly.  
14 I thought it was necessary.

15 Q. Let me show you what has been marked as  
16 Plaintiff's Exhibit 12. That is the final  
17 escrow agreement, is it not?

18 A. It is.

19 Q. Let me direct your attention to the  
20 bottom of page 1. All of those provisions,  
21 that is, the (i), (ii) and (iii), you added all  
22 of those provisions, correct?

23 A. Yes.

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MR. FAGAN: Plaintiff rests? Then,  
Your Honor, I would renew my motion to strike  
at this time.

THE COURT: For the grounds previously  
stated?

MR. FAGAN: Well, Your Honor, based  
upon the Court's ruling, Your Honor, I would  
like to be heard on the record.

THE COURT: All right.

MR. FAGAN: Clearly against Najla  
Associates, Incorporated, their only  
contractual -- there is only a contract claim.  
Therefore, the only damages have to come from  
that contract, and I think the Virginia law --  
I know the Virginia law is clear that  
contractual damages have to be a direct and  
proximal result of the breach of contract and  
they also have to be foreseeable at the time  
that the parties entered into the contract.

This escrow agreement, which the  
contract was entered into in -- I believe it

1 was January of '93, but the document will speak  
2 for itself on that, and there has been  
3 absolutely no evidence put on that Najla was  
4 aware of all of these lost profits, aware of  
5 the jobs, aware of the bonding relationship  
6 with Aetna or anything like that that would  
7 indicate that the plaintiff has foreseeable  
8 damages to take to the jury.

9 Now, it was -- it was different when we  
10 had all of the torts, because tort damages, as  
11 the Court knows, are much broader than  
12 contractual damages. So, I think that in light  
13 of the Court's ruling and the fact that my  
14 client is only now in on the breach of  
15 contract, I think that my motion to strike the  
16 damages is even stronger, and I would renew the  
17 motion to strike the damages on the grounds  
18 previously stated, that the failure to  
19 replenish, if that was the only breach, put Mr.  
20 Peacock and Griffith in no worse shape than it  
21 would have had the monies been put back in the  
22 escrow, because he would have had to sue for  
23 the money anyway.

24 All right, thank you.

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12 THE COURT: Well, at this point the  
13 defendant Najla Associates has renewed its  
14 motion to strike and added additional grounds  
15 to the motion to strike, and that is that the  
16 damages evidence that has been established on  
17 the consequential damages was not within the  
18 contemplation of the parties at the time the  
19 escrow agreement was made in January of '93 and  
20 that the types of damages sought are not  
21 natural or direct damages that would stem from  
22 the alleged breach of contract.

23 The Court having considered the  
24 arguments of both parties with respect to this  
25 matter is of the opinion that the motion to

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1 strike should be overruled and the issue of the  
2 foreseeability as it relates to the damages --  
3 there is evidence that the performance bond was  
4 required at the beginning of this. It's clear  
5 that the bond had some impact on and was  
6 related to this contractor doing business.  
7 Certainly it was in contemplation of the owners  
8 that they wanted assurance that the project  
9 would be built in the event the contract  
10 defaulted, and that's the purpose of a  
11 performance bond, and therefore, it seems to me  
12 that these damages -- that they do flow  
13 directly from the contract and do not exceed or  
14 they are not at least at this stage  
15 consequential damages. So, they -- the motion  
16 to strike will be overruled, exceptions  
17 preserved for both Najla and the law firm.

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15           If you find your verdict for the  
16 plaintiff, then he is entitled to recover as  
17 damages all of the losses he sustained,  
18 including gains prevented which are a direct  
19 and natural result of the breach and which he  
20 has proved by a greater weight of the  
21 evidence. The losses must have been reasonably  
22 foreseeable by the parties when they entered  
23 into the contract.

24           Consequential damages are indirect  
25 damages resulting from breach of contract. If

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1 the parties, when they made the contract,  
2 understood that because of circumstances then  
3 known to them a breach of contract might cause  
4 consequential damages, then if you find your  
5 verdict in favor of Griffith, in addition to  
6 awarding them direct damages, you may award  
7 them such consequential damages as you believe  
8 by the greater weight of the evidence that  
9 Griffith sustained as an indirect result of the  
10 breach.

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You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely

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The other portions of his damages, he says that for the want of \$5,000, he wouldn't have lost \$82,000 with Horton Drywall. Well, I am sure and the evidence was that Mr. Peacock knows of at least 20 drywall companies, but in Northern Virginia, he couldn't find another drywall company to do his work for about the same price? I think that's speculative.

22

He also -- also, the \$5,000. He testified that he had \$350,000 in liquid working capital. He testified his wife wouldn't let him touch it and that it was a

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1 trust fund, but he put it on his books when he  
2 applied for credit. It was on his books as an  
3 asset of the company. It was on his books when  
4 he went to Aetna and tried to get bonds -- went  
5 to Warfield and tried to get bonds from Aetna,  
6 but he couldn't use it to pay \$5,000 to get his  
7 best buddy, Jeff Martinson, paid so he could  
8 keep from losing \$82,000.

9 Then he's got \$5,000 in damages from an  
10 American Printing job, because he couldn't  
11 pre-order steel to the tune of \$50,000 on that  
12 job. Now, he testified -- he sat here and  
13 testified that one of the reasons why he  
14 couldn't pay Horton Drywall was because you  
15 can't mix and match jobs. If you don't have  
16 the money on the job to pay your subs, you  
17 can't pay them. So, what he's trying to say  
18 here is that had he had this \$75,000, he would  
19 have taken \$50,000 of it and gone and  
20 pre-ordered this steel on another job. Well,  
21 that's inconsistent, and by his own testimony,  
22 you can't believe that. So, that \$5,000 can't  
23 be recovered.

24 I think one of the most important  
25 points on why these damages are speculative is

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1     that they are based upon the premise -- and I'm  
2     talking about the seven jobs, the \$675,000 that  
3     we're talking about, why he couldn't get these  
4     seven jobs just because he couldn't get a bond  
5     to cover those jobs from Aetna. The testimony  
6     from Mr. Warfield and from Mr. Peacock is that  
7     no one ever approached Aetna to get a bond.  
8     Mr. Peacock didn't call Aetna up and say got  
9     this job, it's great, you've increased my work  
10    product in the past before when I've needed it,  
11    you know, just a little bit, I really want this  
12    job, I think I'm going to make a lot of money,  
13    can you give me a bond, you know, I -- we have  
14    been doing a lot of business together, and you  
15    have never turned me down before, can you give  
16    me a bond. He didn't do that. He met with Mr.  
17    Warfield, and in their "professional opinion,"  
18    he wouldn't have qualified anyway so he wasn't  
19    going to do it. He's got a job on here for  
20    \$700,000 that he didn't even ask for a bond  
21    for.

22                So, how do we know and how do you know  
23    as jurors that he wouldn't have gotten bonded  
24    on these jobs? It's speculative. He never  
25    asked. He never asked the people that he



1 needed to ask. He relied on Mr. Warfield, who  
2 doesn't work for Aetna. He's a broker. He  
3 doesn't have any position in Aetna. He has no  
4 authority to grant bonds on behalf of Aetna.  
5 Aetna was never asked.

6 The third reason why the damages can't  
7 be awarded is that these are contractual  
8 damages. They have to be a direct and proximal  
9 result of the breach of contract, which I  
10 allege there is no breach of contract, but  
11 let's assume there's a breach of contract. The  
12 damages have to be direct and proximate, which  
13 means they have to arise out of the contract.  
14 They also have to be foreseeable by the parties  
15 at the time they entered into the contract.

16 The escrow agreement, which is a  
17 contract, was entered into in January of 1993.  
18 Now, particularly with respect to Najla and the  
19 Qreitems, it is far-fetched, I put forth, based  
20 on the evidence that's in front of you, that  
21 Najla could have foreseen that Mr. Peacock  
22 doesn't get these seven jobs because he can't  
23 get bonded because he can't get -- because he  
24 has this accounts receivable and because he  
25 won't go from Warfield-Dorsey to Aetna to ask

1     for bonds.

2             I mean, this case is hard enough to  
3     understand, but back in January of 1993, to  
4     foresee all of these damages, to foresee that  
5     because of \$5,000 he doesn't get \$82,000 worth  
6     of savings from Horton Drywall, and to foresee  
7     that in January of 1993, that later on, he  
8     wouldn't be able to pre-order steel, and he  
9     would be out \$5,000 because of that? These  
10    damages are clearly not foreseeable, and there  
11    is a jury instruction that you will get to take  
12    back with you and the Judge has already read to  
13    you on foreseeability, and I suggest that you  
14    take particular -- pay particular attention to  
15    the burden on the plaintiff regarding damages.  
16    He's got to prove that those damages were  
17    foreseeable. He didn't even address it.

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RICHMOND, VIRGINIA  
Law No. 137529

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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4 WILLIAM L. GRIFFITH & COMPANY)

5 OF VIRGINIA, INC., )

6 Plaintiff, )

7 vs. )

8 SAMIR F. GREITEM, et al., )

9 Defendants. )

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12 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

13

14 TRIAL -- VOLUME 5

15

16 December 15, 1995

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18 BEFORE:

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20 THE HONORABLE GERALD BRUCE LEE

21

22 REPORTER:

23 Mario A. Rodriguez, Notary Public

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Counsel, I received the following questions from the jury. I'll read the question to you, and I'll also let Mr. Burke see the question and the instruction that the jury has sent to me. I'll read it twice.

"Under jury instruction A, we respectfully request further clarification on the last sentence that reads, 'The losses must have been reasonably foreseeable by the parties when they entered into the contract.' Please clarify the foreseeable clause. We believe it is too vague for decision at this time."



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THE COURT: Here's the answer I'm going to give the jury.

"You must consider all of the instructions. Response to your question is as follows: The test for awarding damages for breach of contract is whether the damage is natural or was within the actual or potential contemplation of the parties at the time the contract was created."

That's it. Exceptions presumed. The time is 12:32.



INSTRUCTION NO. 13


Consequential damages are indirect damages resulting from the breach of the contract. If the parties, when they made the contract, understood that, because of circumstances then known to them, a breach of the contract might cause consequential damages, then, if you find your verdict in favor of Griffith, in addition to awarding him direct damages, you may award him such consequential damages as you believe by the greater weight of the evidence that he sustained as an indirect result of the breach.

9/1/12  
12-14-95  
JHE

JURY INSTRUCTION

A

If you find your verdict for the plaintiff, then he is entitled to recover as damages all of the losses he sustained, including gains prevented, which are a direct and natural result of the breach and which he has proved by the greater weight of the evidence. The losses must have been reasonably foreseeable by the parties when they entered into the contract.

*instructions  
are ok* 

*grmk*  
*12-14-95*  
*gpk*

JURY INSTRUCTION B

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the court.

9/10/61  
JL  
12-14-61



under my instruction I am responsible  
request further clarification of last  
sentence that reads:

"The above must have been reasonably well  
by the person who they entered into the school"

Please clarify the sentence above -  
we believe it is too vague for action  
at this time.

Sincerely,  
Joseph W. [Signature]  
FOURPERSON.

ANSWER:

You must consider all of the instructions.

The response to your question is as follows:

The test for awarding damages for breach of contract is whether the damage is natural or <sup>was</sup> within the actual or potential contemplation of the parties at the time the contract was created.

C. J. B. L. A.  
Judge 12:32p.

In his opening statement, Mr. Walsh referred to a belief by Mr. Greitem that he was not personally liable as an Owner under the construction contract. I instruct you that that issue was finally decided by the previous arbitration and court proceedings between the parties, and you are to take it as an established fact that Mr. Greitem is one of the owners of the Willow Run shopping center and is personally liable under the construction contract.

We, the Jury, on issue of breach of contract in the case of  
WILLIAM L. GRIFFITH & CO., OF VIRGINIA, INC., Plaintiff, versus  
NAJLA ASSOCIATES, INC., Defendant, find our verdict in favor of the  
Plaintiff and assess his damages in the amount of  
\$175,000  $\frac{00}{100}$ .

  
FOREMAN

We, the Jury, on issue of breach of contract in the case of WILLIAM L. GRIFFITH & CO., OF VIRGINIA, INC., Plaintiff, versus ESKOVITZ, LAZARUS, PITRELLI & CREGGER, Defendant, find our verdict in favor of the Plaintiff and assess his damages in the amount of \$50,000 <sup>00</sup>/<sub>100</sub>.

  
FOREMAN

We, the Jury, on issue of breach of contract in the case of  
WILLIAM L. GRIFFITH & CO., OF VIRGINIA, INC., Plaintiff, versus  
E.L. & P. ESCROW & TITLE, CO., Defendant, find our verdict in favor  
of the Plaintiff and assess his damages in the amount of  
\$200,000 <sup>00</sup>/<sub>100</sub>.

  
FOREMAN

We, the Jury, on the issue of breach of fiduciary duty in the case of WILLIAM L. GRIFFITH & CO., OF VIRGINIA, INC., Plaintiff, versus E.L.&P. TITLE AND ESCROW COMPANY, Defendant, find our verdict in favor of the plaintiff and assess damages in the amount of \$200,000  $\frac{00}{100}$  and punitive damages in the amount of \$164,285  $\frac{71}{100}$

  
FOREMAN

✓C

16

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WM. L. GRIFFITH & CO. OF VIRGINIA,  
INC., a Virginia corporation,

Plaintiff,

v.

SAMIR F. QREITEM, et al.,

Defendants.

Law No. 137523

FINAL JUDGMENT ORDER

The parties in the captioned action appeared before the Court on December 11, 1995 for trial by jury on the Plaintiff's Motion for Judgment against Defendants Samir F. Qreitem ("Qreitem"), Najla Associates, Inc. ("Najla"), Eskovitz, Lazarus, Pitrelli & Cregger (the "Law Firm"), and McLean Title Agency, Inc. t/a E.L. & P. Title and Escrow Co. (the "Escrow Company").

The Court heard preliminary motions and conducted voir dire of the jury panel. Seven jurors were sworn by the Court. The trial of the matter was conducted on December 11 through 14, 1995. After hearing arguments on the Defendants' Motions to Strike the Plaintiff's Evidence, the Court ruled on December 14, 1995 that the Motions to Strike would be granted, and the Plaintiff's claims dismissed, except as to the Plaintiff's claims for Breach of Contract (Count A of the Motion for Judgment) against the Law Firm, the Escrow Company and Najla, and for Breach of Fiduciary Duty (Count C of the Motion for Judgment) against the Escrow Company.



The Defendants presented their evidence and rested. The Defendants renewed their respective Motions to Strike the Plaintiff's Evidence, and the Court denied those Motions.

The jury was given the instructions granted by the Court and closing argument by counsel for each of the parties occurred on December 14, 1995. After deliberations on December 15, 1995, the jury returned its verdict in favor of the Plaintiff on both Counts. The jury awarded compensatory damages for breach of contract against Najla in the amount of \$175,000; against the Law Firm in the amount of \$50,000; and against the Escrow Company in the amount of \$200,000. The jury awarded compensatory damages for breach of fiduciary duty against the Escrow Company in the amount of \$200,000, and punitive damages of \$164,285.71. The Court overruled an objection by counsel for the Escrow Company to the form of the verdict, and discharged the jury on December 15, 1995.

After the rendering of the verdict by the jury, the Plaintiff, the Law Firm and the Escrow Company reached a settlement resolving the claims as between them in accordance with the terms of a written settlement agreement;

Therefore, it is hereby ORDERED that final judgment is entered in favor of Plaintiff Wm. L. Griffith & Co. of Virginia, Inc. against Defendant Najla Associates, Inc. in the amount of \$175,000 plus costs and post-judgment interest at the statutory rate from December 15, 1995 until satisfied; and it is further

ORDERED that the exceptions of all parties to the rulings and Orders of the Court prior to, during and after the trial of this matter are preserved.

ENTERED this 22nd day of December, 1995.

  
Judge Gerald B. Lee

NASLA ASSOCIATES INC OBJECTING:

Without waiving any objections made to pretrial rulings adverse to NASLA ASSOCIATES INC, or objections made during trial which are recorded by the Court Reporter who attended trial, this defendant further objects to the Court entering this order without this defendant having proper notice of the contents of the order, particularly that not without limitation, the provision of the order regarding the settlement between one defendant pursuant to a written agreement which has not been provided to counsel, and also because the jury's verdicts are against the weight of the law and the evidence, and the verdicts should not be approved by the court since the verdicts are not proper in their amount and allocation, and for such other matters as counsel would have presented to the Court on 12/22/95 had he been given proper notice and an opportunity to prepare to argue new matters which arise from the event of the last minute settlement by co-defendants. The Defendant reserves its right to raise all such matters in post-trial motions or on appeal as he be so advised.

242 


SEEN AND OBJECTED AS TO ADVERSE MATTERS:

HOLLAND & KNIGHT



Gina Schaar Howard (VB #29129)  
S. Scott Morrison  
2100 Pennsylvania Ave., N.W., Suite 400  
Washington, D.C. 20037  
202/955-3000  
Counsel for Plaintiff

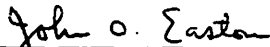
*Seen and objected to for the reasons set forth on page 3.*  
GERALD R. WALSH, P.C.



~~James E. Fagan, III, VA Bar #34379~~  
4020 University Drive, Suite 200  
Fairfax, Virginia 22030  
(703) 385-6162  
Counsel for Defendants Samir F. Qreitem  
and Najla Associates, Inc.

*Gerald R. Walsh #2157*

JORDAN, COYNE & SAVITZ<sup>§</sup>



John O. Easton, VA Bar #17302  
10486 Armstrong Street  
Fairfax, Virginia 22050  
(703) 246-0900  
Counsel for Defendant Eskovitz,  
Lazarus, Pitrelli & Cregger

SICILIANO, ELLIS, DYER & BOCCAROSSE



Ralph Boccarosse, Jr., VA Bar #14230  
10521 Judicial Drive, Suite 300  
Fairfax, Virginia 22030  
(703) 385-6692  
Counsel for Defendant McLean Title Agency, Inc.  
t/a Key Title (f/n/a E.L.&P. Title and Escrow Co.)

FILED  
COURT  
95 DEC 22 PM 3:35  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WILLIAM L. GRIFFITH & CO, OF VIRGINIA, :  
INC., a Virginia corporation, :

Plaintiff, :

v. :

At Law No. 137523

SAMIR F. QREITEM, :  
et al., :

Defendants. :

DEFENDANT NAJLA ASSOCIATES, INC.'S  
MOTION TO SET ASIDE THE VERDICT

COMES NOW, defendant Najla Associates, Inc., by counsel,  
pursuant to Virginia Code § 8.01-430 and moves this Court to set  
aside the verdict returned against it on the following grounds  
and those more fully stated in the accompanying Memorandum which  
is hereby incorporated by reference.

1. The jury in this case rendered the following verdict  
on December 15, 1995:

Count A - Breach of Contract

\$175,000 against Najla Associates, Inc. ("Najla")

\$200,000 against E.L.&P. Title and Escrow ("Title  
Co.")

\$50,000 against Eskovitz, Lazarus, Pitrelli &  
Cregger ("Law Firm")

Count B. - Breach of Fiduciary Duty

\$200,000 against the Title Co.

\$164,285 punitive damages

This verdict is objected to by Najla as it is inconsistent, irregular and defective. There was only one cause of action for the Breach of the Contract and the damages presented by the plaintiff were not subject to apportionment. There can be no verdict in favor of the plaintiff for more than \$200,000, as in Contract damages and therefore, the total amount of Contract damages cannot exceed \$200,000. The amount allowed by the jury verdict should be reformed to reflect the damages the jury determined were warranted by the evidence.

2. The Title Co. and the Law Firm settled Griffith's claims against them for the sum of \$325,000 on or before December 22, 1995. The exact details remain unclear and this defendant is currently unaware of terms of the written agreement referred to in the Final Order.

3. This Court entered Judgment against Najla for \$175,000 on December 22, 1995, and Najla duly noted its objections.

4. The verdict against Najla should be set aside or reduced to zero because the \$325,000 is an accord and satisfaction of the compensatory damages awarded by the jury on the breach of contract in Count A.

5. The verdict against Najla should be set aside as contrary to the law and the evidence. The evidence properly before the jury clearly indicated the alleged Breach of contract by Najla did not proximately cause damage to the plaintiff.

6. The verdict against Najla should be set aside as contrary to the law and evidence. There was no evidence

properly before the jury that the damages alleged by the plaintiff were foreseeable at the time the contract in question was executed.


7. The Court erred in granting instructions that permitted the jury to consider the speculative and unforeseeable damages which were the basis of the plaintiff's claims.

WHEREFORE, defendant Najla Associates, Inc. requests that this Court set aside the verdict as against Najla Associates, Inc. and/or enter Judgment for no damages.

NAJLA ASSOCIATES, INC.  
By Counsel

GERALD R. WALSH, P.C.  
4020 University Drive  
Suite 200  
Fairfax, Virginia 22030  
(703) 385-6162

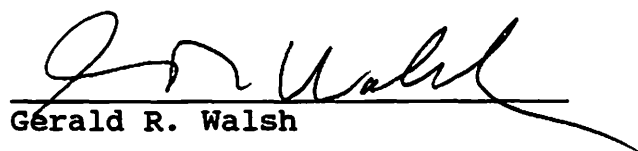
By:

  
Gerald R. Walsh  
Va. State Bar No. 8157  
Counsel for Najla Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant Najla Associates, Inc.'s Motion to Set Aside the Verdict was mailed, postage prepaid, this 22<sup>th</sup> day of December, 1995, to Gina S. Howard, Esq., Law Offices of Holland and Knight, 2100 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20037, counsel for plaintiff; and was mailed, postage prepaid to Ralph Boccarosse, Jr., Esq., Siciliano, Ellis, Dyer & Boccarosse, 10521 Judicial Drive, Suite 300, Fairfax, Virginia 22030,

counsel for McLean Title Agency, Inc, t/a E.L. & P. Title and Escrow Co.; and John O. Easton, Esq., Jordan, Coyne & Savits, 10486 Armstrong Street, Fairfax, Virginia 22030-3616, counsel for Eskovitz, Lazarus, Pitrelli & Cregger.

  
Gerald R. Walsh

V I R G I N I A :

FILED  
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IN THE CIRCUIT COURT OF FAIRFAX COUNTY 29 PM 3:35

WILLIAM L. GRIFFITH & CO, OF VIRGINIA, :  
INC., a Virginia corporation, :

CLERK OF COURT  
FAIRFAX COUNTY  
VIRGINIA

Plaintiff, :

v. :

At Law No. 137523

SAMIR F. QREITEM, :  
et al., :

Defendants. :

MEMORANDUM IN SUPPORT OF  
DEFENDANT NAJLA ASSOCIATES, INC.'S  
MOTION TO SET ASIDE THE VERDICT

I. Introduction

This Court is empowered by Virginia Code § 8.01-430 to set aside a verdict that is contrary to the great weight of the law or the evidence. The Court's discretion is to be exercised when the verdict before it is plainly wrong or without credible evidence to support it. Lane v. Scott, 220 Va. 578 (1979); Sampson v. Sampson, 221 Va. 876 (1981). The Court also has the discretion to enter Judgment rather than grant a new trial when it has before it the evidence to enable it to render a decision on the merits. Id.

The verdict of \$175,000 against Najla Associates, Inc. ("Najla") is against the great weight of the evidence and should be set aside in favor of a Judgment of no damages against Najla.

II. The Verdict

The plaintiff presented the following theory of liability to the jury on both its Breach of Contract claim and its Breach



of Fiduciary Duty claim<sup>1</sup>: all defendants, that is, Najla, E.L.&P. Title Co. ("Title Co.") and Eskovitz, Lazarus, Pitrelli and Cregger ("Law Firm"), breached the Escrow Agreement, and the Title Co. breached its fiduciary obligations under the Escrow Agreement, by (1) wrongfully disbursing the \$103,000 to Wm. L. Griffith & Co. of Virginia, Inc. ("Griffith") and by (2) failing to place the \$103,000 back into the Escrow Account.

On the issue of damages, Griffith presented three areas of damage<sup>2</sup> all of which were claimed to have resulted from the \$103,000 not being put back into the Escrow Account. Griffith conceded at trial that no damages flowed from the alleged wrongful disbursement.

The limit of damages returned by the jury is \$200,000. The amount returned against the Title Co. on both the Breach of Contract and the Fiduciary claim<sup>3</sup> represents the maximum for which the obligors (Najla, the Title Co. and the Law Firm) under the Contract could be liable. The verdicts of \$175,000 and \$50,000 against Najla and the Law Firm respectively must have resulted from the jury's mistaken impression that the were required to apportion liability between the obligors on the same

---

<sup>1</sup> The Motion for Judgment recites the same set of facts as a predicate for both the Breach of Contract claim and the Breach of Fiduciary Duty claim.

<sup>2</sup> The loss of Horton Drywall as a subcontractor, lost profits on seven jobs and delay damages on the American Printing Job.

<sup>3</sup> The Fiduciary Duty claim is clearly contractual and therefore the \$200,000 cannot be recovered twice and represents the maximum damage award.

breach. Griffith cannot contend that the Breach of Contract damages of \$425,000 in the aggregate is consistent with the Breach of Fiduciary Duty award of \$200,000, based upon the same damage testimony.

### III. Accord and Satisfaction

By settling its claim against the Title Co. and the Law Firm for \$325,000, Griffith has reached an accord and satisfaction and can recover no more from Najla. Atkins v. Boatwright, 204 Va. 450 (1963). The damages for Breach of Contract were set by the jury at \$200,000. The settlement sum easily eclipsed the \$200,000 damage figure and extinguishes Griffith's claim against Najla.

There are no damages remaining on which to predicate a judgment against Najla for \$175,000. On this ground alone, the verdict of \$175,000 should be set aside or proper credit given so that a Judgment of no damages is entered.

### IV. There Was No Proof of Proximate Cause.

Griffith's theory of proximate cause presented at trial was that it was damaged by Najla's failure to replenish the Escrow Account. The damage was the result of a \$75,000 accounts receivable on its books which prevented it from increasing its bondable work program and gaining credit at lending institutions. However, Griffith put on no evidence that it would have been in a better position had Najla replenished the Escrow Account. In fact, all of the evidence properly before the jury proved that Griffith would have suffered the same

"damage" even if Najla would not have "breached" the Escrow Agreement by failing to replenish the account.

When Griffith submitted applications for payment 7 and 8, it was in a heated dispute with Najla over the scope of work and Griffith's performance under the Construction Contract. Anton Qreitem, Samir Qreitem, David Peacock, Javed Kaveh, John Pitrelli and Hugh Cregger all testified that Najla was not prepared to pay Griffith any additional money once the \$103,000 had been dispersed from the Escrow Account until the Contract dispute was reached. The parties had reached a stalemate which would not end until January, 1995, when Najla paid the Arbitration Award.

The Title Company needed the approval of the owner to disperse funds from the Escrow Account. This contractual obligation is precisely why the Title Co. did not release the \$27,000 that remained in the Escrow Account following the dispersal of the \$103,000. If Najla replenished the Escrow Account in the amount of \$103,000, the only thing that would change is the amount withheld by the Title Co. Najla would not have consented to a further dispersal, and the Title Co. would have required a Court Order before turning over the money. Griffith would have suffered the same "damages".

V. Lack of Foreseeability

Griffith presented its case to the jury with the confidence that it would have a conspiracy argument for the jury at closing. However, following the Court's rulings at the

Defendant's Motion to Strike, Griffith was left with two Contract claims, both based upon the same Contract supported by the same damage testimony, but each one against different defendants. As a result, the element of foreseeability was injected into the case.

Griffith put on absolutely no evidence that the profits it lost as a result of Najla's Breach of Contract were foreseeable by Najla at the time the Escrow Agreement was executed in January of 1993. Contract damages are those that are in the reasonable contemplation of the parties at the time they made the Contract. Sinclair v. Hamilton & Dotson, 164 Va. 203 (1935). They must be the natural and logical result of a breach. Smith v. Wright, 207 Va. 482 (1966). The defendant reserves the right to present at oral argument additional matters and authorities in support of its motion.

The foregoing considered, this Court should set aside the verdict in this case and/or enter a Judgment of no damages against Najla.

NAJLA ASSOCIATES, INC.  
By Counsel

GERALD R. WALSH, P.C.  
4020 University Drive  
Suite 200  
Fairfax, Virginia 22030  
(703) 385-6162

By:



Gerald R. Walsh  
Va. State Bar No. 8157  
Counsel for Najla Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Defendant Najla Associates, Inc.'s Motion to Set Aside the Verdict was mailed, postage prepaid, this 29<sup>th</sup> day of December, 1995, to Gina S. Howard, Esq., Law Offices of Holland and Knight, 2100 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20037, counsel for plaintiff; and was mailed, postage prepaid to Ralph Boccarosse, Jr., Esq., Siciliano, Ellis, Dyer & Boccarosse, 10521 Judicial Drive, Suite 300, Fairfax, Virginia 22030, counsel for McLean Title Agency, Inc, t/a E.L. & P. Title and Escrow Co.; and John O. Easton, Esq., Jordan, Coyne & Savits, 10486 Armstrong Street, Fairfax, Virginia 22030-3616, counsel for Eskovitz, Lazarus, Pitrelli & Cregger.

  
Gerald R. Walsh

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WM. L. GRIFFITH & CO. OF VIRGINIA,  
INC., a Virginia corporation,

Plaintiff,

v.

SAMIR F. QREITEM, et al.,

Defendants.

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CIRCUIT COURT  
FAIRFAX, VA  
DOHN L. TERRY  
LAW NO. 131

**PLAINTIFF'S OPPOSITION TO DEFENDANT NAJLA  
ASSOCIATES, INC.'S MOTION TO SET ASIDE THE VERDICT<sup>1</sup>**

**I. Applicable Standard**

A trial court may set aside a verdict under Va. Code § 8.01-430 only when, considering all the evidence, "the verdict is plainly wrong or without credible evidence to support it." Rogers v. Marrow, 243 Va. 162, 166 (1993), quoting Lane v. Scott, 220 Va. 578, 581 (1979); see also T.M. Graves Construction, Inc. v. National Cellulose Corp., 226 Va. 164, 169 (1983). If reasonable persons may differ in the conclusions they draw from the evidence, a verdict cannot be set aside. 243 Va. at 166.<sup>2</sup>

<sup>1</sup> Defendant's Motion is untimely, since the Court already has entered a Final Order. We assume that the Defendant's Motion to Suspend, Modify or Vacate the Final Order, filed on Friday, January 5, 1996, is an attempt to correct this error. This memorandum addresses the substance of Defendant's arguments on that basis.

<sup>2</sup> On appeal, the reviewing court will give the recipient of the verdict "the benefit of all substantial conflict in the evidence, as well as all inferences which may be reasonably drawn from the evidence," and will uphold the verdict if there is credible evidence to support it. Rogers v. Marrow, 243 Va. at 166.

**II. Najla's Attempt to Rewrite the Jury Verdict Is Unfounded.**

Although the verdict clearly awarded Griffith \$175,000 in damages against Najla separately from the other defendants, Najla now argues that the verdict must be read to award a total of only \$200,000 against all defendants. Najla, however, has waived its right to raise objections to the verdict. The jury rendered its verdict on verdict forms prepared by this Court. These forms required the jury to return separate verdicts against the various defendants. Najla raised no objection to the verdict forms at trial. After the jury returned its verdict, counsel for E.L. & P. Title objected to the form of the verdict. Najla raised no such objection, and the jury was dismissed. By failing to object to the verdict forms and by failing to raise any objection to the verdict prior to dismissal of the jury, Najla has waived its right to object to the jury verdict now. See Daniels v. Morris, 199 Va. 205 (1957).

There is no evidence that the jury did not intend to award separate damages against the separate defendants. Najla neither requested an instruction on joint and several liability nor objected to the instructions given by the Court on contract damages. Najla cannot now question the verdict rendered pursuant to these instructions. See Spitzli v. Minson, 231 Va. 12, 17-18 (1986).

Even if Najla had timely objected, however, under Virginia law, multiple parties to one contract may have separate and several obligations. See 4B Michie's Jurisprudence, Contracts, § 6. The Escrow Agreement here imposed differing obligations on Najla and the other parties. (See P.Ex. 12.) A verdict awarding separate damages is consistent with the differing nature of the parties' obligations. Further, there is no basis for Najla's argument that the \$200,000 awarded against E.L. & P. Title under the breach of fiduciary duty claim

represents the maximum allowable award. Griffith's evidence demonstrated approximately \$762,000 in damages. This is consistent with the \$625,000 in damages awarded by the jury in the aggregate, not with the \$200,000 total claimed by Najla.

**III. This Court Has Already Rejected Najla's Arguments  
Regarding Causation, Which Are Unavailing in Any Event.**

At the close of Griffith's case, Najla moved to strike the evidence, arguing that Griffith had failed to prove that Najla's actions proximately caused Griffith's damages. Najla raises the same arguments in its motion to set aside the verdict. In ruling on the motion to strike, this Court expressly found that there was sufficient evidence to support a verdict for Griffith on the issue of proximate causation. (See excerpt of trial transcript, Ex. A, at 15-16.) Since the standards for decision on the two motions are so similar, see Newton v. Veney, 220 Va. 947, 951 (1980), the Court's prior ruling has already decided this issue. Nothing in the evidence offered by defendants at trial supports a different result. Indeed, two of the three witnesses called by defendants -- Sue Gunnerson and Hugh Cregger -- failed to address Griffith's damages at all. The third -- David Warfield (by deposition) -- was also called by Griffith to support its case for damages and causation. His testimony, therefore, plainly created a jury issue.

Griffith's damages arose from its inability to pay subcontractors and to pursue additional projects. The evidence demonstrated that Griffith needed an increase in the value of the performance bonds it could obtain (its "work program") in order to obtain further work, but failed to obtain such an increase because of the depletion of the escrow account.

It was undisputed that Griffith's surety company required the escrow account as a condition of providing Griffith with a performance bond. (See P. Exs. 7, 8.) That bond was



required by Najla. Najla authorized its attorneys and engineers to contact Griffith's surety without Griffith's knowledge or consent in order to pressure Griffith into acquiescing to Najla's demands. (See P. Exs. 4, 5.) Najla's blatant attempt to interfere with Griffith's surety relationship resulted in, among other problems, the surety becoming aware of the shortfall in the escrow account. Thus, the evidence creates the strong inference that if Najla had replenished the escrow account, the presence of a source of funds for the full amount due Griffith would have affected the surety company's decision regarding Griffith's work program. Indeed, this Court so found in overruling defendants' motions to strike. (See Ex. A at 15-16.) Najla's argument, that it did not cause any damages because the money could not have been disbursed without its approval, fails because (1) the presence of funds in the account represented the protection sought by the surety company, and (2) since the escrow agreement had already been materially breached at that point, its conditions were no longer enforceable.

In addition, the evidence demonstrated that Griffith was unable to obtain a line of credit from any bank during the time the escrow account was wrongfully depleted. As this Court also previously found, see Ex. A at 15-16, this evidence creates the strong inference that Griffith's credit application would have been handled differently had the full amount due Griffith been available in the escrow account. Further, the evidence demonstrated that if Najla had replenished the escrow account when it was obligated to do so, it would not have been in a position to fund the sham litigation against Griffith and thereby deprive Griffith of the sums necessary to pay its subcontractors and obtain increased bonding and

credit.<sup>3</sup> Causation of damages is a jury issue, Brown v. Koulizakis, 229 Va. 524 (1985), and the jury, which was properly given the standard instructions on damages, reasonably found for Griffith here.

**IV. The Evidence Showed That Griffith's Damages Were Foreseeable.**

Najla's assertion that Griffith put on no evidence that its damages were foreseeable is inaccurate. The evidence demonstrated that Najla required a payment and performance bond from Griffith as a condition of the construction contract. (See P. Ex. 3.) Najla was aware that the escrow agreement was entered to satisfy the surety who was providing the bond. (See P. Exs. 7, 8.) Thus, it was foreseeable that non-compliance with the escrow agreement would harm Griffith's relationship with the surety company. Further, the portion of Griffith's damages that arose from its inability to pay subcontractors was clearly foreseeable to the parties to the escrow agreement, whose only purpose was to collateralize the Owner's funding obligations during the construction of Willow Run.

**V. Griffith's Settlement Does Not Constitute an Accord and Satisfaction of its Claim Against Najla.**

Griffith has agreed to accept a payment of \$325,000 to dismiss its claims against the remaining defendants. (See Settlement Letter and Settlement Agreement, Ex. B.) Both the December 21 Settlement Letter and the Settlement Agreement provide that the payment is being made to settle only the breach of fiduciary duty damages awarded against E.L. &


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<sup>3</sup> Both Anton Qreitem and Samir Qreitem testified that Najla was prepared to reimburse Griffith for the \$103,000 it had earned for construction of the project, if Griffith had returned the \$103,000 check paid from the escrow account. They claimed, however, that they did not do so because neither Pitrelli nor Cregger asked them. The jury was free to conclude, reasonably, that the availability of that \$103,000 to Najla and the Qreitem was a benefit to them and a detriment to Griffith.

P. The parties made express their intention that the settlement would not affect or release Griffith's breach of contract claims against Najla. (See Settlement Agreement, Ex. B, ¶¶ 3, 6.) To constitute an accord and satisfaction, both parties involved must expressly intend that the payment be made and accepted in satisfaction of the claim. See Atkins v. Boatwright, 204 Va. 450 (1963). No such intent is present here with respect to Griffith's claims against Najla.

Respectfully submitted,

HOLLAND & KNIGHT

By:   
S. Scott Morrison  
Gina Schaar Howard (VB# 29129)  
2100 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
(202) 457-7036  
Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 1996, a true and correct copy of the foregoing Plaintiff's Opposition to Defendant Najla Associates, Inc.'s Motion to Set Aside the Verdict was served via hand delivery on:

Gerald R. Walsh  
James E. Fagan, III  
GERALD R. WALSH, P.C.  
4020 University Drive, Suite 200  
Fairfax, Virginia 22030  
Counsel for Defendants Samir Qreitem  
and Najla Associates, Inc.

  
Gina Schaar Howard

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

3

4 WILLIAM L. GRIFFITH & )

5 COMPANY OF VIRGINIA, INC. )

6 Plaintiff, )

7 vs. ) Law No. 137523

8 SAMIR F. QREITEM, et al., )

9 Defendants. )

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13 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

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15 (TRIAL -- VOLUME 4 -- EXCERPT)

16

17 BEFORE:

18 THE HONORABLE HAROLD BRUCE LEE

19

20 REPORTER:

21 SUSANNE Q. TATE, RMR and NOTARY PUBLIC

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1                                    A P P E A R A N C E S

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3        ON BEHALF OF THE PLAINTIFF:

4                    S. SCOTT MORRISON, ESQ.  
5                    GINA SCHAAH HOWARD, ESQ.  
6                    Holland & Knight  
7                    2100 Pennsylvania Avenue, N.W.  
8                    Washington, D.C. 20037  
9                    (202)955-3000

10        ON BEHALF OF THE DEFENDANTS (Qreitem and Najla  
11        Associates):

12                    JAMES E. FAGAN, ESQ.  
13                    Attorney at Law  
14                    4020 University Drive, Suite 200  
15                    Fairfax, Virginia 22030  
16                    (703)385-6162

17        ON BEHALF OF THE DEFENDANTS (Eskovitz, Lazarus,  
18        Pitrelli & Cregger):

19                    JOHN O. EASTON, ESQ.  
20                    Jordan, Coyne & Savitz  
21                    10486 Armstrong Street  
22                    Fairfax, Virginia 22030  
23                    (703)246-0900

24        ON BEHALF OF THE DEFENDANTS (EL&P Escrow &  
25        Title):

                    RALPH BOCCAROSSE, ESQ.  
                    Siciliano, Ellis, Dyer & Boccarosse  
                    10521 Judicial Drive, Suite 300  
                    Fairfax, Virginia 22030  
                    (703)385-6692

(Index appears following the transcript.)

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## 1 P R O C E E D I N G S

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3 (Beginning of requested excerpt.)

4 (Jury not present.)

5 THE COURT: Good morning, Counsel.

6 ALL COUNSEL: Good morning, Your  
7 Honor.

8 THE COURT: All right, on the matter  
9 before the Court on the defendants' motion to  
10 strike the evidence with respect to the motion  
11 for judgment, I am going to address the motion  
12 to strike by individual party, and we will be  
13 clear -- at least at the end I intend to  
14 summarize for counsel the ruling that I have  
15 made with respect to each defendant and each  
16 count.

17 I am going to start with the motion to  
18 strike of Mr. Samir Qreitem with respect to  
19 tortious interference with contract. In this  
20 case, the defendant Mr. Qreitem contends that  
21 he cannot be held liable under this contract in  
22 this action for tortious interference with  
23 contract because the evidence is -- viewed in a  
24 light most favorable to the plaintiff -- that  
25 in his connection with this matter of the

1 contract of William L. Griffith & Company of  
2 Virginia that he was acting as an agent for  
3 Najla Associates at all material times.

4 The testimony of Mr. Samir Qreitem and  
5 Mr. Anton Qreitem is that Mr. Samir Qreitem was  
6 acting entirely on behalf of Najla in dealing  
7 with the construction contract, and it is  
8 further contended that Mr. Qreitem did not  
9 tortiously interfere with Najla's contract with  
10 William L. Griffith.

11 The plaintiff responds that he has  
12 produced sufficient evidence on the elements of  
13 tortious interference with contract to  
14 withstand the motion to strike and it raises a  
15 jury question on Mr. Qreitem's action. They  
16 contend that obviously there was a contract,  
17 that Mr. Qreitem, in addition to being a  
18 shareholder in Najla, is also an owner of the  
19 building, knew the terms of the escrow  
20 agreement. And they referred me to the  
21 transcript of trial, page 131, and they say  
22 that Mr. Samir Qreitem induced the escrow agent  
23 to breach the escrow agreement by sending a  
24 letter which has been identified by Counsel to  
25 the escrow agent, Mr. Pitrelli, telling him to

1 release the \$103,000 to the plaintiff in  
2 violation of the terms of the escrow  
3 agreement.

4 Plaintiff contends that the company was  
5 damaged because the escrow account was now  
6 short \$103,000 and the escrow agent failed to  
7 direct the owner to replenish the escrow  
8 account and that if the escrow account were  
9 available to the company, they would have had a  
10 ready source to collect the final payment under  
11 the contract.

12 The plaintiff also claims that the  
13 company was damaged to the extent that the  
14 failure to have the escrow account caused the  
15 receivable that was derived from this project  
16 to age, which had a ripple impact on his work  
17 program and his ability to secure bonds for  
18 future work.

19 Plaintiff contends that Mr. Samir  
20 Qreitem was not acting within the scope of his  
21 employment to the extent he intended to harm  
22 plaintiff in his business, that he acted with  
23 malice or that he acted with -- for his own  
24 benefit or that he acted with ill will to  
25 plaintiff to defer his personal gain. And they

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1 say that the plaintiff lost the use of the  
2 final funds in the escrow account, the ability  
3 to earn interest on the escrow account and the  
4 bondability.

5 In considering this matter, I have  
6 looked at Childhead v. Johnson, 230 Virginia  
7 112, and Foxx v. Deitz, 234 Virginia 412, and  
8 viewing the evidence in a light most favorable  
9 to the plaintiff, the Court finds that  
10 reasonable minds cannot differ that Mr. Samir  
11 Qreitem acted on behalf of Najla Associates,  
12 and the law is that one may not interfere with  
13 his own contract. The construction contract,  
14 the escrow agreement, indeed, the very letter  
15 to the plaintiff contending they induced the  
16 escrow company to breach the escrow agreement  
17 is signed by him in his representative capacity  
18 as an agent of Najla, not individually.

19 Accordingly, the motion to strike Samir  
20 Qreitem on the tortious interference with  
21 contract will be sustained.

22 With respect to the count against --  
23 Count B, breach of implied duty, of good faith  
24 and fair dealing against Najla, the law firm  
25 and the title company, I have been provided

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1 with several cases by plaintiff, and  
2 essentially the argument is that the actions of  
3 Najla, the law firm and the title company  
4 breached their duty of good faith and fair  
5 dealing under the escrow agreement, and the  
6 plaintiff contends that this creates tort  
7 liability and a separate tort for breach of  
8 duty, of good faith and fair dealing, and the  
9 instruction proposed, which is jury instruction  
10 number 11, contains this statement, "Under  
11 Virginia law, every contract contains an  
12 implied covenant of good faith and fair  
13 dealing. This imposes a duty on the party to  
14 carry out the terms of the contract in good  
15 faith. If the party then engaged in conduct  
16 that constitutes bad faith, then that would  
17 breach his duty."

18 I have reviewed the cases, including  
19 Timeshare v. Coleville, 1144 F.2d 35, and A&E  
20 Supply v. National Mutual Fire Insurance, 789  
21 Fed 2d 669, and it is my view, having reviewed  
22 this and considering the evidence, that what  
23 the essence of this motion for judgment,  
24 particularly the count alleging breach of  
25 implied duty, of good faith and fair dealing,

1     what it does is it incorporates all of the  
2     allegations described in the formation of the  
3     agreement, the escrow agreement, and paragraph  
4     33 contends that by prematurely releasing the  
5     funds from the escrow agreement in  
6     contravention of the terms of the escrow, that  
7     is, by releasing these funds and failing to  
8     cause the funds to be replenished and failing  
9     to release the remaining funds to Griffith when  
10    due under the escrow agreement, it materially  
11    breached the covenant of good faith and fair  
12    dealing.

13               Paragraph 34 alleges that these actions  
14    were intentional, outrageous, motivated by  
15    malice and bad faith, were intended to injure  
16    Griffith in his business and have caused  
17    damages, and in reviewing this matter, I have  
18    considered the case of Camalaw Corporation v.  
19    Haley, 222 Virginia 669, as well as the case  
20    provided to me, A&E Supply, which I have just  
21    referred to, and it is my reading of the case  
22    law that -- and I will quote, "It would --"  
23    this is from page -- I guess it is 671. "It  
24    would skew the predictability necessary for  
25    stable contractual relations if a breaching

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1 party was suddenly subject to more open and  
2 unanticipated duties and damages imposed by law  
3 of tort. Most courts and certainly Virginia  
4 courts have thus not recognized an exception to  
5 the general rule of damages, even when the  
6 breaching party acts with an alleged malicious  
7 motive. The circumstances surrounding  
8 dissolution of contractual relations are so  
9 frequently beset by strain and suspicion that  
10 perceptions of improper motive on the part of  
11 an opposing party are commonplace."

12 Breach of contract which does routinely  
13 give rise to an action in tort and which is  
14 intended in the sense of a punitive damage  
15 award, the Virginia Supreme Court has noted  
16 that the overwhelming weight of the authority  
17 contained a resistive tenancy and that  
18 generally the -- that the breach of contract,  
19 no matter what the -- the motivation of the  
20 parties or even the bad feelings that might  
21 have been generated -- and obviously whenever a  
22 contract is breached, there may be damages --  
23 does not give rise to separate liability in  
24 tort.

25 So, for those reasons, the Court will

1     sustain the motion to strike as to Count B,  
2     breach of duty, of good faith and fair dealing  
3     with respect to all defendants, Najla, Qreitem  
4     and others.

5             With respect to the breach of contract  
6     claim, all defendants have claimed there is no  
7     damages stemming from the alleged breach of the  
8     escrow agreement, and EL&P, the title company,  
9     contends that -- and the law firm contends that  
10    even if there were a breach of the escrow  
11    agreement, which they deny, that they claim the  
12    plaintiff has failed to establish any damages  
13    flowing from the breach of the agreement.

14            It further contends that the Court must  
15    construe the plain words of the escrow  
16    agreement and to review particularly page 2,  
17    the last paragraph, wherein it is stated that,  
18    "Notwithstanding any other agreement contained  
19    herein, it is understood and agreed that at  
20    such time as the total amount of the unpaid  
21    work to be performed under the contract  
22    documents, together with any retention owed the  
23    contractor, totals \$130,000 or less, all  
24    applications for payment shall be submitted to  
25    the escrow company and paid by the escrow

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1 company with the approval of the owner," and  
2 this is part of Plaintiff's Number 12.

3 They also contend that -- this is  
4 defendants contend -- that under paragraphs 28,  
5 33 and 39 of the motion for judgment, that the  
6 defendants allege basically that three things  
7 were done: Premature release of escrow funds  
8 in contravention of the escrow agreement; two,  
9 that they failed to request that the owner --  
10 or to cause the owner to replenish the funds as  
11 required by the escrow agreement; and third,  
12 that they refused to release to plaintiff the  
13 remaining funds, that is the \$27,000 that  
14 remained, when due in accordance with the  
15 escrow agreement, and it is alleged that Najla,  
16 the law firm and the title company breached  
17 their contract with plaintiff in that respect.

18 The defendants say the plaintiff has  
19 not offered evidence of damages sufficient to  
20 withstand a motion to strike, because one, he  
21 received the evidence -- received the check,  
22 used it to pay his subcontractors; that he knew  
23 after the funds had been taken and used by him  
24 that the account would not be replenished  
25 because of the contractual dispute between the

1 owners, that is the defendants, Najla and him;  
2 and that -- that he was -- that he claims he  
3 was due funds after taking the \$103,000 of  
4 about \$75,000 or \$73,000; and that his claim  
5 would have to be asserted in arbitration.

6 And they say, the defendants, that the  
7 last paragraph makes it clear that he was not  
8 entitled to receive the balance of the escrow  
9 funds without the consent of the owner and that  
10 based on the way the contractual relations were  
11 proceeding through September and October of '93  
12 and beyond, there is no way to infer, given the  
13 light most favorable to the plaintiff, that the  
14 owner was going to consent to release of the  
15 escrow funds, much less the remaining \$27,000,  
16 even if the \$130,000 were in place.

17 The defendants further contend that the  
18 escrow agent was not required to disburse the  
19 funds until at least January of '95 upon order  
20 of the Court or consent of the owner, and  
21 therefore, they contend that there were no  
22 damages from this alleged breach of contract,  
23 even if there were a breach, and that the  
24 plaintiff could not have reasonably looked to  
25 the escrow fund as a source to pay the

1 subcontractors at the time, because the owner  
2 did not consent to release of the funds, and  
3 the escrow agent nor the law firm had any  
4 independent basis to release these funds.

5 They further contend that the  
6 plaintiff's damages, if there were any, were  
7 incurred much later, that would be February  
8 through October of '94 when plaintiff claims he  
9 could not bid on or secure work he was  
10 qualified for, he contends because of the aged  
11 account receivable and the escrow agent's  
12 failure to pay over the funds, is not a breach  
13 of contract which caused damages. And further,  
14 that the bonding problem that the plaintiff  
15 contends, if there was one, was not a damage  
16 flowing from this alleged breach of contract.

17 The plaintiff responds that the  
18 defendant escrow agent breached the escrow  
19 agreement by disbursing the funds and failing  
20 to require the owner to replenish the account.  
21 This was a material breach excusing the escrow  
22 agent and law firm's duty under the escrow  
23 agreement.

24 Plaintiff contends that since the  
25 escrow agent improperly responded to Mr.

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1    Qreitem's direction on behalf of Najla to pay  
2    plaintiff from the escrow account that the  
3    escrow agent and the law firm ought to go  
4    forward in response to his request for payment  
5    of the balance of the escrow funds, and that  
6    plaintiff contends that it was damaged because  
7    it did not have use of the escrow funds, that  
8    would have been a security, that would have  
9    afforded a basis to secure other bonds, because  
10   the accounts receivable would have then been  
11   secured by a fund which would have been viewed  
12   differently by the bonding company and the  
13   bank, perhaps, and that the defendants, that is  
14   Najla, had the use of these escrow funds  
15   without having to replace them, and this gave  
16   them a financial advantage and leverage to  
17   force a settlement and delay payment by  
18   engaging in litigation under the construction  
19   contract.

20                    Plaintiff contends that this breach of  
21   contract caused it to suffer an adverse account  
22   receivable to -- on this job, his work program  
23   -- which impacted his financial statement.  
24   His work program was geared toward the  
25   financial viability of the company, and the

1 accounts receivable were a factor in that  
2 according to Mr. Warfield's testimony, and that.  
3 his ability to secure bonding affected his  
4 ability to compete for jobs that he may have  
5 won, and he contends that his evidence shows or  
6 at least creates a jury issue, he says, that  
7 several jobs occurring during the time from the  
8 breach in September of '92 to January of '95,  
9 that had there been no breach, he had a  
10 substantial chance of winning bids and earning  
11 profits.

12 He contends that his evidence shows  
13 damaged relations with subcontractors,  
14 including Horton and others, which limited his  
15 ability to compete for work. Additionally,  
16 plaintiff contends his ability to secure a line  
17 of credit was a damage flowing from the escrow  
18 agreement breached by the defendants.

19 The Court is of the opinion that  
20 plaintiff has presented sufficient evidence to  
21 withstand a motion to strike on damages as to  
22 all defendants. The evidence viewed in a light  
23 most favorable to plaintiff would be a jury  
24 issue on this question of causation and  
25 damages, and the defendants' argument that

1 plaintiff was not entitled to the funds in  
2 September of '93 I think goes to the issue of  
3 proximate cause, because it is arguable, I  
4 think, viewed in the light -- viewing the  
5 evidence in the light most favorable to the  
6 plaintiff, that had the escrow fund remained  
7 intact, that the bonding company as well as the  
8 line of credit application would have been  
9 handled differently, and the defendant has, I  
10 think, perhaps an argument, but it does not  
11 sufficiently -- it is not sufficient to require  
12 me to grant the motion to strike about  
13 proximate cause.

14 But the evidence has shown, I think,  
15 enough for the plaintiff to -- it has shown  
16 that the plaintiff has suffered a negative  
17 economic impact and creates a jury issue and an  
18 issue of damages.

19 With respect to the law firm's motion  
20 to strike, and this is the law firm Eskovitz,  
21 Lazarus, Pitrelli & Cregger, the law firm moves  
22 to strike all counts of the motion for judgment  
23 on the grounds, one, that the law firm owed no  
24 duty under common law or contract to  
25 plaintiff. Defendant contends that the escrow

1     agreement read as an unambiguous document  
2     places no duties on the law firm, but it does  
3     place duties on the escrow agent and that a  
4     review of Plaintiff's Number 12, particularly  
5     subparagraphs (i) and (ii) refer to the escrow  
6     agent, which is referred to in paragraph 1 as  
7     EL&P Title & Escrow.

8             The law firm further contends that  
9     parol evidence is not admissible in varying the  
10    terms of the agreement, and, in fact, the  
11    agreement is on law firm stationery, shows that  
12    the law firm is acting in a representative  
13    capacity for the title company. Defendant  
14    contends that reasonable minds cannot differ,  
15    that the law firm is not a party to the escrow  
16    agreement, that the duties, if any, are on the  
17    title company.

18            They contend that the November letter  
19    of Mr. Cregger, which refers to this firm's  
20    check, meaning the escrow company's check, does  
21    not give rise to an inference of liability on  
22    the law firm, because all of the obligations  
23    remain under this agreement on the escrow  
24    agent. And the defendant contends that if the  
25    law firm is not a party to the escrow

1     agreement, then the plaintiff's evidence on  
2     Count 8 for breach of contract must be  
3     stricken.

4             The defendant further contends that  
5     ratification would apply, because plaintiff was  
6     not damaged by taking the \$103,000, that he  
7     retained them knowing a disbursement made  
8     violates the escrow agreement. He therefore  
9     cannot be heard to complain of the wrongful  
10    disbursement of them. He adopts the argument  
11    about good faith and fair dealing, I already  
12    ruled on that, and the same on the breach of  
13    fiduciary duty.

14            He also says that with respect to  
15    conversion, that the funds were never in the  
16    law firm, they did not control them and they  
17    could under the evidence convert them, and they  
18    can't contend that plaintiff's receiving the  
19    funds was conversion by the law firm, nor is  
20    there any evidence that the law firm or the  
21    escrow agent, for that matter -- and I will  
22    address the escrow agent in this count, as well  
23    -- took the \$27,000, which is the balance of  
24    the escrow funds, and converted them to their  
25    own use.

1           With respect to the conversion count,  
2   and then I will have to go back to the law firm  
3   and the other defendants, it seems to me that  
4   viewing the evidence in a light most favorable  
5   to the plaintiff that there is no evidence that  
6   the law firm or the escrow agent took the  
7   balance of funds and converted them to their  
8   own use sufficient to raise a jury issue on the  
9   balance of the escrow funds.

10           Viewing the evidence in a light most  
11   favorable to the plaintiff, these funds, the  
12   \$27,000, there is no evidence about what  
13   happened to them at all, and the fact is that  
14   plaintiff did take the \$103,000 and did use it  
15   to pay subcontractors. I don't think this  
16   raises a jury issue or is sufficient to  
17   overcome the motion to strike. So, the motion  
18   to strike on the conversion as to the law firm  
19   and the title company will be sustained.

20           With respect to the plaintiff's  
21   response to the law firm's motion to strike on  
22   the breach of contract claim, the plaintiff  
23   contends that a jury issue is raised by the use  
24   of the letterhead by the -- Mr. Pitrelli and  
25   Mr. Cregger in connection with this -- with

1 Plaintiff's Exhibit Number 12. It is not clear  
2 that they contend from reading the letter  
3 whether Mr. Cregger or Pitrelli were acting for  
4 the firm, that is the law firm, or the title  
5 company, that reasonable minds could differ  
6 about the capacity in which Mr. Cregger and  
7 Pitrelli were acting, that the construction  
8 contract, which I believe is Plaintiff's  
9 Exhibit Number 3, refers to Cregger, this law  
10 firm, as owner's counsel, and the law firm, by  
11 signing this agreement, were binding Mr.  
12 Pitrelli and Cregger to act in connection with  
13 the escrow agent.

14 They further contend that the evidence  
15 raises a question that either Pitrelli or  
16 Cregger told the plaintiff that as the owner's  
17 lawyers, we will be able to control their  
18 payment into the escrow account and that we  
19 will ensure that those payments -- that the  
20 account is kept full and that the firm received  
21 copies of the contractor's bills under the  
22 construction agreement.

23 Plaintiff claims the escrow agent was  
24 not bound by this escrow agreement, because it  
25 is not signed by a representative of the escrow

1 company, whereas the letter is signed by the  
2 attorney, Pitrelli, for Hugh Cregger, and the  
3 question is what is the effect of that. That  
4 is, does Pitrelli's signature for Cregger bind  
5 the title company or does it bind the law  
6 firm?

7 Further, they contend that Plaintiff's  
8 Exhibit 24, the Cregger letter, remains on the  
9 law firm stationery, not title company  
10 stationery, and the letter does not say he was  
11 acting for the title company but refers to the  
12 law -- the title company check. Plaintiff says  
13 all of these are questions of fact for the  
14 jury, and the Court, having considered the  
15 evidence and viewed it in a light most  
16 favorable to the plaintiff, is of the opinion  
17 that plaintiff has produced sufficient evidence  
18 to overcome the motion to strike and that a  
19 jury issue is presented by the ambiguities  
20 raised by the lack of clarity of the  
21 correspondence on behalf of -- who was this  
22 agreement signed by Mr. Cregger for, is it  
23 signed for EL&P Title or is it signed for the  
24 law firm?

25 It's on law firm stationery, and EL&P



1 is the escrow agent according to all parties  
2 here, but there is no signature here by them,  
3 and the argument advanced is how could the  
4 escrow agent be bound to do anything without  
5 there being some document signed by the escrow  
6 agent or its representative, and then the jury  
7 question is presented with respect to that.

8           Plaintiff contends that with respect to  
9 the motion to strike on the grounds of  
10 ratification as an affirmative defense which  
11 must be pled or it's waived and that plaintiff  
12 claims he preserved this issue and that  
13 returning the check was not an option, because  
14 he needed to pay subs. I am of the opinion  
15 that the motion to strike with respect to  
16 ratification should be overruled, that the  
17 plaintiff's action of accepting the check does  
18 not as a matter of law entitle the defendant to  
19 strike the evidence on breach of contract with  
20 respect to the law firm on the grounds of  
21 ratification.

22           Finally, with respect to the conspiracy  
23 count, which is against all defendants, under  
24 18.2-500, the argument is that -- by the  
25 defense is that all parties to this contract

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1 and to this transaction are either principals  
2 or agents of principals, that is, that the  
3 title company is an agent of both parties, that  
4 is the plaintiff and the defendant, that Mr.  
5 Qreitem acted for Najla, and that in order to  
6 withstand a motion to strike, at least one  
7 party to the conspiracy must be a non-party to  
8 the contract, and then an agent may not  
9 conspire with the principals sufficient to give  
10 rise to a cause of action of conspiracy as a  
11 matter of law, and the Court has considered a  
12 number of cases, foxx v. Deitz, 234 Virginia  
13 412, Greenspan v. Archerhoff, and my ruling is  
14 that -- that there is -- there was another case  
15 cited to me, too.

16 In any event, that I -- my ruling is  
17 that the -- there is no non-party to this  
18 agreement who was a participant in this  
19 so-called conspiracy which would, as a matter  
20 of law, entitle this to be a jury question. I  
21 think that all of the parties here involved in  
22 this contract are agents of each other and that  
23 agents cannot conspire with the principal and  
24 that the motion to strike with respect to  
25 conspiracy will be granted as to all of the

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1 defendants.

2 So, to sum up for Counsel the Court's  
3 ruling, with respect to the breach of contract  
4 claim as to Najla, the law firm and the title  
5 company, the motion to strike is overruled.  
6 So, they are in on breach of contract, all  
7 three of the defendants.

8 With respect to the breach of implied  
9 duty, of good faith and fair dealing, Count B,  
10 the motion to strike is sustained as to Najla,  
11 the law firm and the title company.

12 With respect to breach of fiduciary  
13 duty as it relates to the law firm, the Court  
14 has considered the allegations of the motion  
15 for judgment. Let me just refer to them --  
16 basically we are dealing with this paragraph 39  
17 as it relates to the law firm, the law firm  
18 here, there is a question as to who they were  
19 acting for, but it is my ruling that with  
20 respect to releasing the funds from the escrow  
21 account, failing to have the owner replenish  
22 them or releasing the balance, that the law  
23 firm didn't have any fiduciary duty with  
24 respect to those funds, at least not in that  
25 way, sufficient to overcome the motion to

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1     strike.  The -- the law firm didn't owe a duty  
2     to the plaintiff.  So, I'll sustain the motion  
3     to strike as to the law firm on the breach of  
4     fiduciary duty.

5             With respect to the title company, it  
6     is evident that they did respond to Mr.  
7     Qreitem's direction to release the funds.  The  
8     escrow agent owed a duty to both the owner and  
9     the contractor, and I think that that is  
10    sufficient to create a jury question on the  
11    breach of fiduciary duty to the plaintiff, in  
12    part because it may have been being the title  
13    company influenced by Mr. Pitrelli, who  
14    according to the evidence is one of the -- one  
15    of Najla's former attorneys or was their  
16    attorney.  So, I will overrule the motion to  
17    strike as to the title company on the breach of  
18    fiduciary duty.

19            As it relates to Count D, tortious  
20    interference with contract of Samir Qreitem,  
21    the motion to strike is sustained.  As it  
22    relates to conversion against the law firm and  
23    the title company, the motion to strike is  
24    sustained.  And with respect to Count F,  
25    conspiracy to injure plaintiff in trade or

1 business, sustained as to all -- all  
2 defendants. And all of the parties' exceptions  
3 to the Court's ruling will be preserved.

4 MR. MORRISON: Thank you, Your Honor.  
5 May we take five minutes?

6 THE COURT: Yes, I want to see if we  
7 have all of our jurors.

8 We have a problem, Counsel. One juror  
9 could not get out of his driveway, at least  
10 that's what I'm told. I have the sheriff going  
11 to get that person hopefully. So, we will take  
12 a recess. Thank you.

13 (A brief recess was taken.)

14 (End of requested excerpt.)

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CERTIFICATE OF REPORTER

I, Susanne Q. Tate, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



Susanne Q. Tate

Notary Public

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into effective as of the 21st day of December, 1995, by and between Wm. L. Griffith & Co. of Virginia, Inc. ("Griffith"), a Virginia corporation, on the one hand, and Eskovitz, Lazarus, Pitrelli & Cregger (the "Law Firm"), a Virginia law partnership, and McLean Title Agency, Inc., t/a E.L. & P. Title and Escrow Company ("E.L. & P. Title"), a Virginia corporation, on the other hand.

WHEREAS, there was an Escrow Agreement dated as of January 15, 1993;

WHEREAS, pursuant to the Escrow Agreement, funds were deposited for disbursement to Griffith in connection with Griffith's construction of a shopping center in Annandale, Virginia known as Willow Run;

WHEREAS, on or about December 22, 1994, Griffith commenced a civil action in the Circuit Court of Fairfax County, Virginia captioned Wm. L. Griffith & Co. of Virginia, Inc. v. Samir F. Oreitem, et al., Law No. 137523 (the "Litigation");

WHEREAS, on December 15, 1995, at the conclusion of the trial of the Litigation, the jury awarded Griffith compensatory damages for breach of contract against the Law Firm in the amount of \$50,000, against E.L. & P. Title in the amount of \$200,000, and against NAJLA Associates, Inc. in the amount of \$175,000; and compensatory damages for breach of fiduciary duty against E.L. & P. Title in the amount of \$200,000 and punitive damages for breach of fiduciary duty against E.L. & P. Title in the amount of \$164,285.71;

WHEREAS, Griffith, the Law Firm and E.L. & P. Title reached a settlement in principle of the claims involving them as set forth in a letter agreement dated December 21, 1995;

WHEREAS, a Final Judgment Order was entered against NAJLA Associates, Inc. on December 22, 1995, in the amount of \$175,000 plus costs and post-judgment interest at the statutory rate; and

WHEREAS, Griffith, the Law Firm and E.L. & P. Title desire to finalize their settlement in principle in a written settlement agreement and thereby to resolve the claims involving them in the Litigation, to reach a complete and final settlement of their disputes, and to effect a release of all claims between them.

NOW, THEREFORE, in consideration of the covenants and agreements contained herein, Griffith, the Law Firm and E.L. & P. Title agree as follows:

1. The above recitals are hereby incorporated by reference as if fully set forth herein.

2. The Law Firm and E.L. & P. Title shall cause to be paid to Griffith the sum of Three Hundred and Twenty Five Thousand Dollars (\$325,000) in U.S. currency. This sum shall be paid to Griffith in the form of a certified check (or other mutually agreeable manner) no later than ten (10) business days after the execution of this Agreement by the parties. The parties agree that this Agreement shall be promptly executed by each of them without delay.



3. The Law Firm and E.L. & P. Title acknowledge and agree that the \$325,000 payment referred to in Paragraph 2 above is being made solely to satisfy the award of compensatory and punitive damages rendered by the jury against E.L. & P. Title on Griffith's breach of fiduciary duty claim (Count C of the Motion for Judgment). The Law Firm and E.L. & P. Title further acknowledge and agree that no amount of the \$325,000 payment referred to in Paragraph 2 above is being made to settle the breach of contract claims (Count A of the Motion for Judgment) asserted severally against them. Finally, it is the intention of the parties that no portion of the \$325,000 payment referred to in Paragraph 2 above shall constitute a set-off against, be allocated to, or otherwise be deemed to be in satisfaction of the breach of contract damages, or any portion thereof, awarded by the jury against NAJLA Associates, Inc.

4. Except for the obligations set forth in this Agreement, John F. Pitrelli, Hugh C. Cregger, Jr., the Law Firm and E.L. & P. Title on behalf of themselves and any parent, subsidiary, affiliate or related entity and its or their general partners, limited partners, stockholders, officers, directors, employees and other representatives, successors, assigns, agents and attorneys (collectively referred to as the "Law Firm and Escrow Company Releasing Parties") hereby forever release Griffith and any parent, subsidiary, affiliate or related entity and its or their general partners, limited partners, stockholders, officers, directors, employees, lenders, sureties

or other representatives, successors, assigns, agents and attorneys (collectively referred to as the "Griffith Released Parties") from any and all claims, demands, actions, causes of action, suits, debts, dues, offsets, recoupment, counterclaims, liens, charges, accounts, accountings, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, violations, liabilities, obligations, costs, expenses, setoffs, warranties or any other claims of any nature whatsoever, whether known or unknown and whether presently ascertainable or not, that the Law Firm and Escrow Company Releasing Parties had, have, or may hereafter have at any time against the Griffith Released Parties arising out of or relating to the Litigation, Willow Run Shopping Center, or any other event or transaction from the beginning of the world until the date hereof. The scope of the release set forth in this Paragraph 4 is intended to include a covenant not to sue the Griffith Released Parties by the Law Firm and Escrow Company Releasing Parties.

5. Except for the obligations set forth in Paragraphs 2 and 13 of this Agreement, Griffith on behalf of itself and any parent, subsidiary, affiliate or related entity and its or their general partners, limited partners, stockholders, officers, directors, employees and other representatives, successors, assigns, agents and attorneys (collectively referred to as the "Griffith Releasing Parties") hereby forever release John F. Pitrelli, Hugh C. Cregger, Jr., the Law Firm and E.L. & P. Title

and any parent, subsidiary, affiliate or related entity and its or their general partners, limited partners, stockholders, officers, directors, employees, lenders, sureties or other representatives, successors, assigns, agents and attorneys (collectively referred to as the "Law Firm and Escrow Company Released Parties") from any and all claims, demands, actions, causes of action, suits, debts, dues, offsets, recoupment, counterclaims, liens, charges, accounts, accountings, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, violations, liabilities, obligations, costs, expenses, setoffs, warranties or any other claims of any nature whatsoever, whether known or unknown and whether presently ascertainable or not, that the Griffith Releasing Parties had, have, or may hereafter have at any time against the Law Firm and Escrow Company Released Parties arising out of or relating to the Litigation, the Willow Run Shopping Center, or any other event or transaction from the beginning of the world until the date hereof. The scope of the release set forth in this Paragraph 5 is intended to include a covenant not to sue the Law Firm and Escrow Company Released Parties by the Griffith Releasing Parties.

6. Nothing in this Agreement is intended by the parties hereto to release or otherwise alter or affect in any manner (a) Griffith's claims against Samir F. Qreitem or NAJLA Associates, Inc. as set forth in the Litigation or (b) the final judgment (including Griffith's right to collect in full the

\$175,000 award, plus interest and costs) set forth in the Final Judgment Order entered against NAJLA Associates, Inc. on December 22, 1995.

7. The parties hereto agree that each shall bear its own attorney's fees with respect to the claims asserted by Griffith in the Litigation and that Griffith shall pursue the recovery of its judgment, including costs and interest, solely against NAJLA Associates, Inc.

8. This Agreement shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Virginia (without resort to its choice of laws or other conflicts of laws principles).

9. This Agreement shall inure to the benefit of and be binding upon the respective heirs, executors, administrators, personal representatives, successors, and assigns of the parties hereto.

10. This Agreement embodies all of the terms of the settlement by and among the parties hereto and supersedes all prior agreements and negotiations, whether written or oral, by and among them or by and among or between any of them with respect to the subject matter hereof. In this regard, no prior or contemporaneous statement, promise or conduct by any party hereto shall have any legal force or effect or be used in any way to vary, explain, modify, abrogate or supplement any of the terms of this Agreement. Each of the parties hereto acknowledges that he or it has obtained the advice of experienced legal counsel of

his or its own choosing in connection with the negotiation and execution of this Agreement and is not relying in any way upon any agreement, statement, promise or conduct (whether written or oral) by another in determining to enter into this Agreement. Finally, the parties hereto acknowledge that they have mutually contributed to the drafting of this Agreement and, therefore, that no provision of this Agreement shall be construed against any party on the ground that such party or its counsel drafted the provision.

11. There are no third-party beneficiaries of or to this Agreement.

12. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original, and it will not be necessary in making proof of this Agreement to produce or account for more than one of such counterparts.

13. In the event Griffith is not paid the \$325,000 referred to in Paragraph 2 above, it may (in addition to any other remedies it may have at law or in equity) have entered a final judgment order reflecting the jury's verdict in the Litigation against both the Law Firm and E.L. & P. Title.

14. The undersigned individuals each represent and warrant that they are authorized to enter into this Agreement on behalf of the parties and to bind the parties hereto and that the Agreement has been approved in accordance with all applicable corporate formalities and procedures.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above written.

Wm. L. Griffith & Co. of Virginia, Inc.,  
a Virginia corporation

By:   
David Peacock, its President

Eskovitz, Lazarus, Pitrelli & Cregger,  
a Virginia law partnership

By: \_\_\_\_\_  
Hugh C. Cregger, Jr.

McLean Title Agency, Inc. t/a  
E.L. & P. Title and Escrow Co.,  
a Virginia corporation

By: \_\_\_\_\_  
Ronald Lazarus, its President

As to Paragraph 4 only:

\_\_\_\_\_  
Hugh C. Cregger, Jr.

\_\_\_\_\_  
John F. Pitrelli

Law Offices

# HOLLAND & KNIGHT

A Partnership Including Professional Corporations

2100 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20037-3202  
202-955-3000  
FAX 202-955-5564

Atlanta	Orlando
Fort Lauderdale	St. Petersburg
Jacksonville	Tallahassee
Lakeland	Tampa
Miami	West Palm Beach

S. SCOTT MORRISON, CHARTERED  
Partner

Writer's Direct Dial  
(202) 457-7036

December 21, 1995

**VIA TELECOPY/FIRST CLASS MAIL**

Ralph N. Boccarosse, Jr., Esquire  
Siciliano, Ellis, Dyer & Boccarosse  
10521 Judicial Drive  
Fairfax, Virginia 22030

John O. Easton, Esquire  
Jordan Coyne & Savits  
10486 Armstrong Street  
Fairfax, Virginia 22030

Re: Wm. L. Griffith & Co. of Virginia, Inc. v.  
Samir F. Oreitem, et al.; Law No. 137523

Dear Ralph and John:

This letter will confirm the terms of the settlement reached this afternoon between me, on behalf of the plaintiff, and the two of you, on behalf of Eskovitz, Lazarus, Pitrelli & Cregger (the "Law Firm") and McLean Title Agency, Inc. t/a E.L. & P. Title and Escrow Company ("E.L. & P. Title"). The terms of the settlement are as follows:

1. The Law Firm and E.L. & P. Title agree to pay \$325,000 to Wm. L. Griffith & Co. of Virginia, Inc. ("Griffith") immediately upon execution of the settlement agreement, which shall incorporate the terms hereof;
2. The \$325,000 payment shall be made in full satisfaction of the breach of fiduciary duty damages awarded by the jury, including the \$200,000 in compensatory damages and the \$164,285.71 in punitive damages. No amount of the settlement shall be allocated to, or otherwise be deemed to be in satisfaction of, the breach of contract damages awarded by the jury against either the Law Firm or E.L. & P. Title;

3. No final judgment order will be entered against either the Law Firm or E.L. & P. Title, unless either party fails to comply with the terms hereof, in which case plaintiff shall have the right to seek entry of a final judgment order reflecting the jury's verdict against both the Law Firm and E.L. & P. Title;
4. The parties agree that, subject to the provisions of Paragraph 3, the final judgment order will be entered only against NAJLA Associates, Inc. ("NAJLA") in accordance with the jury's verdict awarding several damages against NAJLA for breach of contract, and the claims against the Law Firm and E.L. & P. Title will be dismissed;
5. The settlement agreement shall include mutual releases and mutual covenants not to sue covering claims by or against Griffith, the Law Firm, E.L. & P. Title, John Pitrelli, and Hugh Cregger. All claims against NAJLA and the Qreitems shall be expressly reserved. The claims covered by the mutual releases and mutual covenants not to sue shall include, but not be limited to, the parties' dealings concerning Willow Run;
6. The parties shall bear their own attorneys fees with respect to the claims asserted by Griffith against the Law Firm and E.L. & P. Title. It is agreed that Griffith shall pursue the recovery of its costs solely against NAJLA; and
7. The parties and their counsel shall use their respective best efforts to incorporate these terms into a settlement agreement, which shall be finalized no later than December 31, 1995.



Ralph N. Boccarosse, Jr., Esquire  
John O. Easton, Esquire  
December 21, 1995  
Page 3

By countersigning below, you bind your respective clients to the settlement terms set forth above.

Sincerely,

  
S. Scott Morrison

SSM:kby  
cc: Mr. David Peacock

SEEN AND AGREED TO BY:

---

Ralph N. Boccarosse, Jr.  
on Behalf of McLean Title Agency, Inc.,  
trading as E.L. & P. Title & Escrow Co.

---

John O. Easton  
on Behalf of Eskovitz, Lazarus, Pitrelli  
& Cregger

WAS-140867

Ralph N. Bocarosse, Jr., Esquire  
John O. Easton, Esquire  
December 21, 1995  
Page 3

By countersigning below, you bind your respective clients to the settlement terms set forth above.


Sincerely,

  
S. Scott Morrison

SSM:kby

cc: Mr. David Peacock

SEEN AND AGREED TO BY:

  
Ralph N. Bocarosse, Jr.  
on Behalf of Nolan Title Agency, Inc.,  
trading as E.L. & P. Title & Escrow Co.

\_\_\_\_\_  
John O. Easton  
on Behalf of Sakovits, Lazarus, Pitrelli  
& Cregger

WP-140867

Law Offices  
HOLLAND & KNIGHT

298

Ralph W. Bocciaresse, Jr., Esquire  
John O. Easton, Esquire  
December 21, 1995  
Page 3

By countersigning below, you bind your respective clients to the settlement terms set forth above.

Sincerely,

  
S. Scott Morrison

SSM:kby  
cc: Mr. David Peacock

SEEN AND AGREED TO BY:

Ralph W. Bocciaresse, Jr.  
on Behalf of Mofeen Title Agency, Inc.,  
trading as E.L. & P. Title & Escrow Co.

John O. Easton  
John O. Easton  
on Behalf of Rakovitz, Lazarus, Pitrelli  
& Cragger

12-21-1995

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WM. L. GRIFFITH & Co. of VA, INC;

CASE NO. 137523

Plaintiff(s)

VERSUS

SAMIR F. GREITEM, ET AL.

Defendant(s)

This cause came on to be heard on JANUARY 12, 1996, on <sup>NAJLA ASSOCIATES, INC.'S</sup> ~~the Plaintiff's/Defendants's motions for~~ (1) TO SET ASIDE THE VERDICT, and  
(2) TO SUSPEND, MODIFY OR VACATE THE ORDER ENTERED ON DEC. 22, 1995;

Upon the matters presented to the Court <sup>ON THE PARTIES' BRIEFS</sup> ~~at the hearing~~, it is  
ADJUDGED, ORDERED and DECREED as follows:

MOTIONS DENIED.

Entered on 12th January, 1996.

JH [Signature]  
JUDGE

SEEN:

[Signature]  
Counsel for Plaintiff(s)

DULY NOTICED BUT NOT PRESENT  
Counsel for Defendant(s)

### ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying NAJLA's motion to strike the evidence because NAJLA did not breach the escrow agreement among the escrow company, NAJLA and Griffith.

2. The Circuit Court erred by denying NAJLA's motion to strike the evidence because the alleged breach of the escrow agreement did not cause the damages sought by Griffith.

3. The Circuit Court erred by denying NAJLA's motion to strike the evidence because the damages sought were speculative and beyond the parties' contemplation when they entered into the escrow agreement.



AIA Document A111

# Standard Form of Agreement Between Owner and Contractor

where the basis of payment is the  
COST OF THE WORK PLUS A FEE  
with or without a Guaranteed Maximum Price

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH  
AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

The 1987 Edition of AIA Document A201, General Conditions of the Contract for Construction, is adopted  
in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by The Associated General Contractors of America.

## AGREEMENT

made as of the  
Nineteen Hundred and Ninety-Two

day of

in the year of

**BETWEEN** the Owner:  
(Name and address)

Mr. Samir F. Oueitem  
7410 Little River Turnpike  
Annandale, VA 22003

and the Contractor:  
(Name and address)

William L. Griffith & Co. of Virginia, Inc.  
3541 Chain Bridge Road, Suite 5A  
Fairfax, VA 22030

the Project is:  
(Name and address)

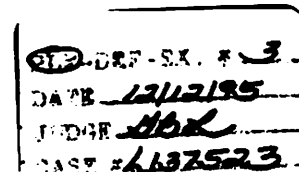
Willow Run Shopping Center  
6653/6667 Little River Turnpike (Rte. 236)  
Mason District  
Fairfax, VA

the Architect is:  
(Name and address)

Vertrans Design Associates  
8027 Leesburg Pike, Suite 409  
Vienna, VA

The Owner and Contractor agree as set forth below.

Copyright 1920, 1925, 1951, 1958, 1961, 1963, 1967, 1974, 1978, ©1987 by The American Institute of Architects, 1735 New  
York Avenue, N.W., Washington, D.C. 20006. Reproduction of the material herein or substantial quotation of its provisions  
without written permission of the AIA violates the copyright laws of the United States and will be subject to legal prosecution.



## ARTICLE 1

### THE CONTRACT DOCUMENTS

**1.1** The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 16. If anything in the other Contract Documents is inconsistent with this Agreement, this Agreement shall govern.

## ARTICLE 2

### THE WORK OF THIS CONTRACT

**2.1** The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

**2.1.1:** The Contract sum shall be per plans listed in Article 16.1.5 of which specifications are incorporated.

**2.1.2:** The Contract sum establishes certain foundation and earthwork modifications are contemplated provided the modifications meet the performance criteria to be established by Engineering Consulting Services, Ltd. (ECS, Ltd).

**2.1.3:** All interior work is to be excluded. The interior work is stated as an allowance pending final plan revision.

**2.1.4:** The Contract sum excludes all revisions to plans other than for foundation work and earthwork modification. The Contractor, with the Owner's consent, will endeavor to minimize the Owner's expense regarding plans. Both parties, however, understand certain revisions are required.

## ARTICLE 3

### RELATIONSHIP OF THE PARTIES

**3.1** The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and utilize the Contractor's best skill, efforts and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to make best efforts to furnish at all times an adequate supply of workers and materials; and to perform the Work in the best way and most expeditious and economical manner consistent with the interests of the Owner. The Owner agrees to exercise best efforts to enable the Contractor to perform the Work in the best way and most expeditious manner by furnishing and approving in a timely way information required by the Contractor and making payments to the Contractor in accordance with requirements of the Contract Documents.

## ARTICLE 4

### DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

**4.1** The date of commencement is the date from which the Contract Time of Subparagraph 4.2 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

*(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)*

The date of commencement shall be within 10 days of receipt of reinstated permits and confirmation of funding escrow. Receipt of this executed Agreement is required for the Contractor to perform tasks necessary to reinstate the permit. ~~Once the date of commencement is established by a notice to proceed issued by the Architect, the Contractor shall notify the Owner in writing not less than five days before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.~~

2/5 started Clearing

150 Days to  
Substantial Completion.

23 Feb

31 March

30 April

31 May

30 June

---

145 Days

July 5



**4.2** The Contractor shall achieve Substantial Completion of the entire Work not later than

*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

One Hundred Fifty calendar days after commencement of the work.

, subject to adjustments of this Contract Time as provided in the Contract Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

N/A

## **ARTICLE 5**

### **CONTRACT SUM**

**5.1** The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Contractor's Fee determined as follows:

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee, and explain how the Contractor's Fee is to be adjusted for changes in the Work.)*

See Page 3-A

### **5.2 GUARANTEED MAXIMUM PRICE (IF APPLICABLE)**

**5.2.1** The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed Six Hundred Fifty Thousand Five Hundred Seventy-Four (see 3-A for breakdown) Dollars (\$ 650,574.00 ). subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.

*(Insert specific provisions if the Contractor is to participate in any savings.)*

Should savings be gained by the change from the foundation method and paving subgrade preparation indicated in the Contract Documents to an alternate method, the Owner acknowledges in exchange for reduction of Contractor's fees, the Contractor shall receive sixty percent (60%) of the savings, not to exceed \$24,000. Should the Contractor choose to use an alternate foundation method and paving subgrade preparation, the cost to the Owner shall not exceed the cost stated in Article 5.2.1.

### **Contract Sum Breakdown**

**5.1.1:** Base building (base building defined as work indicated by the plans enumerated in Article 16.1.5 exclusive of any interior work such as drywall, light gage framing, bathrooms, mechanical, electrical or ceiling installation or materials) for the sum of Two Hundred Eighty-Eight Thousand Sixty-Four Dollars (\$288,064.00);

**5.1.2:** Earthwork, paving, foundation, site electrical and site concrete for the sum of Two Hundred Fifty-Five Thousand Four Hundred Two Dollars (\$255,402.00);

**5.1.3:** Allowance for interior finish (interior finish is the work indicated by the plans enumerated in Article 16.1.5 and excluded from the base building) for the sum of One Hundred Seven Thousand One Hundred Eight Dollars (\$107,108.00);

**5.1.4:** Contractor fee (included in 5.1.1, 5.1.2 and 5.1.3) is established as 7.5% of the cost of the work included in 5.1.1, 5.1.2 and 5.1.3 not to exceed Forty-Five Thousand Three Hundred Eighty-Nine Dollars (\$45,389.00), the cost of the Performance and Payment Bond is included in the Contractor's fee;

**5.1.4.1:** Should the scope of this work increase due to unforeseen circumstances or from additions in the work, the Contractor shall be entitled to a fee of 7.5% above the cost of the change.

**5.2.2** The Guaranteed Maximum Price is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

*(State the numbers or other identification of accepted alternates, but only if a Guaranteed Maximum Price is inserted in Subparagraph 5.2.1. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)*

**5.2.2.1:** Owner shall allow the Contractor to utilize an alternate foundation method, alternate to the recommendation provided by PHR&A 9/7/89, provided ECS, Ltd. has reviewed and deemed the methods utilized as acceptable regional commercial practices and methods acceptable to the local governing authorities.

**5.2.3** The amounts agreed to for unit prices, if any, are as follows:

*(State unit prices only if a Guaranteed Maximum Price is inserted in Subparagraph 5.2.1.)*

**5.2.3.1:** Unit prices are established per cost set forth below for work described as interior finish

- |    |   |              |
|----|---|--------------|
| A. | Installation of single restroom along rear wall (minimum compliance to appropriate codes and ordinances)      | \$5,800      |
| B. | Installation of wall board and framing  |              |
| 1. | Demising walls; 2 sides ½" gypsum board on 3 5/8" 25 gage metal stud, 2' o.c.                                 | \$30.30/l.f. |
| 2. | Perimeter walls; 1 side ½" gypsum board on 2½" 25 gage metal stud, 2' o.c. 12' high                           | \$17/lf      |
| C. | Acoustical Ceiling (2x4 layin 5/8" mineral fiber board)   | \$1.00/sf    |
| D. | Vinyl composition base  | \$.95/lf     |
| E. | Relocate fire sprinkler head  | \$95/ea.     |
| F. | Heating, ventilation & air conditioning system and electrical system & lights to be priced per lease promise. |              |

## **ARTICLE 6**

### **CHANGES IN THE WORK**

#### **6.1 CONTRACTS WITH A GUARANTEED MAXIMUM PRICE**

**6.1.1** Adjustments to the Guaranteed Maximum Price on account of changes in the Work may be determined by any of the methods listed in Subparagraph 7.3.3 of the General Conditions.

**6.1.2** In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Clause 7.3.3.3 of the General Conditions and the terms "costs" and "a reasonable allowance for overhead and profit" as used in Subparagraph 7.3.6 of the General Conditions shall have the meanings assigned to them in the General Conditions and shall not be modified by Articles 5, 7 and 8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

**6.1.3** In calculating adjustments to this Contract, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Article 7 of this Agreement and the terms "fee" and "a reasonable allowance for overhead and profit" shall mean the Contractor's Fee as defined in Paragraph 5.1 of this Agreement.

## 6.2 CONTRACTS WITHOUT A GUARANTEED MAXIMUM PRICE

6.2.1 Increased costs for the items set forth in Article 7 which result from changes in the Work shall become part of the Cost of the Work, and the Contractor's Fee shall be adjusted as provided in Paragraph 5.1.

## 6.3 ALL CONTRACTS

6.3.1 If no specific provision is made in Paragraph 5.1 for adjustment of the Contractor's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Paragraph 5.1 will cause substantial inequity to the Owner or Contractor, the Contractor's Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

## ARTICLE 7 COSTS TO BE REIMBURSED

7.1 The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 7.

### 7.1.1 LABOR COSTS

7.1.1.1 Wages of construction workers directly employed by the Contractor to perform the construction of the Work at the site or, with the Owner's agreement, at off-site workshops.

7.1.1.2 Wages or salaries of the Contractor's supervisory and administrative personnel when stationed at the site with the Owner's agreement.

*(If it is intended that the wages or salaries of certain personnel stationed at the Contractor's principal or other offices shall be included in the Cost of the Work, identify in Article 14 the personnel to be included and whether for all or only part of their time.)*

7.1.1.3 Wages and salaries of the Contractor's supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

7.1.1.4 Costs paid or incurred by the Contractor for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Clauses 7.1.1.1 through 7.1.1.3.

### 7.1.2 SUBCONTRACT COSTS

Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts.

### 7.1.3 COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION

7.1.3.1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.

7.1.3.2 Costs of materials described in the preceding Clause 7.1.3.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Contractor; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### 7.1.4 COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS

7.1.4.1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools ~~not customarily owned by the construction workers~~, which are provided by the Contractor at the site and fully consumed in the performance of the Work; and cost ~~less salvage value~~ on such items if not fully consumed, whether sold to others or retained by the Contractor. Cost for items previously used by the Contractor shall mean fair market value.

7.1.4.2 Rental charges for temporary facilities, machinery, equipment, and hand tools ~~not customarily owned by the construction workers~~, which are provided by the Contractor at the site, whether rented from the Contractor or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be ~~subject to the Owner's prior approval~~ based on rates charged by local rental suppliers normally used by the Contractor.

7.1.4.3 Costs of removal of debris from the site.

7.1.4.4 Costs of telegrams and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the ~~site office~~ Contractor's office.

7.1.4.5 That portion of the reasonable travel and subsistence expenses of the Contractor's personnel incurred while traveling in discharge of duties connected with the Work.

### **7.1.5 MISCELLANEOUS COSTS**

**7.1.5.1** That portion directly attributable to this Contract of premiums for insurance and bonds.

**7.1.5.2** Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Contractor is liable.

**7.1.5.3** Fees and assessments for the building permit and for other permits, licenses and inspections for which the Contractor is required by the Contract Documents to pay.

**7.1.5.4** Fees of testing laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Subparagraph 13.5.3 of the General Conditions or other provisions of the Contract Documents and which do not fall within the scope of Subparagraphs 7.2.2 through 7.2.4 below.

**7.1.5.5** Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Contractor resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Contractor's Fee or of a Guaranteed Maximum Price, if any, and provided that such royalties, fees and costs are not excluded by the last sentence of Subparagraph 3.17.1 of the General Conditions or other provisions of the Contract Documents.

**7.1.5.6** Deposits lost for causes other than the Contractor's fault or negligence.

### **7.1.6 OTHER COSTS**

**7.1.6.1** Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

### **7.2 EMERGENCIES: REPAIRS TO DAMAGED, DEFECTIVE OR NONCONFORMING WORK**

The Cost of the Work shall also include costs described in Paragraph 7.1 which are incurred by the Contractor:

**7.2.1** In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Paragraph 10.3 of the General Conditions.

**7.2.2** In repairing or correcting Work damaged or improperly executed by construction workers in the employ of the Contractor, provided such damage or improper execution did not result from the fault or negligence of the Contractor or the Contractor's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Contractor.

**7.2.3** In repairing damaged Work other than that described in Subparagraph 7.2.2, provided such damage did not result from the fault or negligence of the Contractor or the Contractor's personnel, and only to the extent that the cost of such repairs is not recoverable by the Contractor from others and the Contractor is not compensated therefor by insurance or otherwise.

**7.2.4** In correcting defective or nonconforming Work performed or supplied by a Subcontractor or material supplier and not corrected by them, provided such defective or nonconforming Work did not result from the fault or neglect of the Contractor or the Contractor's personnel adequately to supervise and direct the Work of the Subcontractor or material supplier, and only to the extent that the cost of correcting the defective or nonconforming Work is not recoverable by the Contractor from the Subcontractor or material supplier.

## **ARTICLE 8**

### **COSTS NOT TO BE REIMBURSED**

**8.1** The Cost of the Work shall not include:

**8.1.1** Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office, except as specifically provided in Clauses 7.1.1.2 and 7.1.1.3 or as may be provided in Article 14.

**8.1.2** Expenses of the Contractor's principal office and offices other than the site office.

**8.1.3** Overhead and general expenses, except as may be expressly included in Article 7.

**8.1.4** The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work, provided the progress payments are funded in accordance with provisions set forth in Article 12.

~~**8.1.5** Rental costs of machinery and equipment, except as specifically provided in Clause 7.1.4.2.~~

**8.1.6** Except as provided in Subparagraphs 7.2.2 through 7.2.4 and Paragraph 13.5 of this Agreement, costs due to the fault or negligence of the Contractor, Subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the Work.

**8.1.7** Any cost not specifically and expressly described in Article 7.

**8.1.8** Costs which would cause the Guaranteed Maximum Price, if any, to be exceeded.

**ARTICLE 9**  
**DISCOUNTS, REBATES AND REFUNDS**

~~9.1 Cash discounts obtained on payments made by the Contractor shall accrue to the Owner if (1) before making the payment, the Contractor included them in an Application for Payment and received payment therefor from the Owner, or (2) the Owner has deposited funds with the Contractor with which to make payments; otherwise, cash discounts shall accrue to the Contractor. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Contractor shall make provisions so that they can be secured.~~

~~9.2 Amounts which accrue to the Owner in accordance with the provisions of Paragraph 9.1 shall be credited to the Owner as a deduction from the Cost of the Work.~~

**ARTICLE 10**  
**SUBCONTRACTS AND OTHER AGREEMENTS**

1 ~~10.1 Those portions of the Work that the Contractor does not customarily perform with the Contractor's own personnel shall be performed under subcontracts or by other appropriate agreements with the Contractor. The Contractor shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Architect. The Owner will then determine, with the advice of the Contractor and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner may designate specific persons or entities from whom the Contractor shall obtain bids; however, if a Guaranteed Maximum Price has been established, the Owner may not prohibit the Contractor from obtaining bids from others. The Contractor shall not be required to contract with anyone to whom the Contractor has reasonable objection.~~ 2

~~10.2 If a Guaranteed Maximum Price has been established and a specific bidder among those whose bids are delivered by the Contractor to the Architect (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.~~

4 ~~10.3 Subcontracts or other agreements shall conform to the payment provisions of Paragraphs 12.7 and 12.8, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.~~

**ARTICLE 11**  
**ACCOUNTING RECORDS**

11.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be ~~satisfactory to the Owner~~. The Owner and the Owner's accountants shall be afforded access to the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract, and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law. 5 6

**ARTICLE 12**  
**PROGRESS PAYMENTS**

8 ~~12.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.~~ 7

12.2 The period covered by each Application for Payment shall be one calendar month ending on the ~~last~~ day of the month, or as follows:

7 ~~12.3 Provided an Application for Payment is received by the Architect not later than the last day of a month, the Owner shall make payment to the Contractor not later than the twenty (20th) day of the month following. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than thirty-five (35) days after the Architect receives the Application for Payment.~~ 7  
immediately following month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than thirty-five (35) days after the Architect receives the Application for Payment. 7

~~12.4 With each Application for Payment the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed (1) progress payments already received by the Contractor; less (2) that portion of those payments attributable to the Contractor's Fee; plus (3) payrolls for the period covered by the present Application for Payment; plus (4) retainage provided in Subparagraph 12.5.4, if any, applicable to prior progress payments.~~ 11

1. Contractor
2. Owner's counsel
3. or Owner
4. only with notification to the Owner.
5. via a "Solomon Job Costing" program.
6. The Owner shall reimburse the Contractor's personnel and reproduction costs associated with the review of such information.
7. Owner's counsel
8. Contractor
9. twenty-fifth (25th)
10. partial lien releases

## 12.5 CONTRACTS WITH A GUARANTEED MAXIMUM PRICE

12.5.1 Each Application for Payment shall be based upon the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Contractor's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

12.5.2 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Contractor on account of that portion of the Work for which the Contractor has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

12.5.3 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

12.5.3.1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Subparagraph 7.3.7 of the General Conditions, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.

12.5.3.2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.

12.5.3.3 Add the Contractor's Fee, less retainage of \_\_\_\_\_ ten percent ( 10 %). The Contractor's Fee shall be computed upon the Cost of the Work described in the two preceding Clauses at the rate stated in Paragraph 5.1 or, if the Contractor's Fee is stated as a fixed sum in that Paragraph, shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the two preceding Clauses bears to a reasonable estimate of the probable Cost of the Work upon its completion.

12.5.3.4 Subtract the aggregate of previous payments made by the Owner.

12.5.3.5 Subtract the shortfall, if any, indicated by the Contractor in the documentation required by Paragraph 12.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation.

12.5.3.6 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Paragraph 9.5 of the General Conditions.

12.5.4 Additional retainage, if any, shall be as follows:

*(If it is intended to retain additional amounts from progress payments to the Contractor beyond (1) the retainage from the Contractor's Fee provided in Clause 12.5.3.3, (2) the retainage from Subcontractors provided in Paragraph 12.7 below, and (3) the retainage, if any, provided by other provisions of the Contract, insert provision for such additional retainage here. Such provision, if made, should also describe any arrangement for limiting or reducing the amount retained after the Work reaches a certain state of completion.)*

12.5.4.1: Upon completion of fifty percent (50%) of the work, the Owner shall not withhold any further retainage unless warranted by defective work.

## ~~12.6 CONTRACTS WITHOUT A GUARANTEED MAXIMUM PRICE~~

12.6.1 Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment and for which the Contractor has made or intends to make actual payment prior to the next Application for Payment.

12.6.2 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

12.6.2.1 Take the Cost of the Work as described in Subparagraph 12.6.1.

12.6.2.2 Add the Contractor's Fee, less retainage of \_\_\_\_\_ percent ( \_\_\_\_\_ %). The Contractor's Fee shall be computed upon the Cost of the Work described in the preceding Clause 12.6.2.1 at the rate stated in Paragraph 5.1 or, if the Contractor's Fee is stated as a fixed sum in that Paragraph, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in the preceding Clause bears to a reasonable estimate of the probable Cost of the Work upon its completion.

12.6.2.3 Subtract the aggregate of previous payments made by the Owner.

12.6.2.4 Subtract the shortfall, if any, indicated by the Contractor in the documentation required by Paragraph 12.4 or to substantiate prior Applications for Payment or resulting from errors subsequently discovered by the Owner's accountants in such documentation.



(1) Owner's counsel

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~~12.6.2.5 Subtract amounts, if any, for which the Architect has withheld or withdrawn a Certificate for Payment as provided in the Contract Documents.~~

12.6.3 Additional retainage, if any, shall be as follows:

12.7 Except with the Owner's prior approval, payments to Subcontractors included in the Contractor's Applications for Payment shall not exceed an amount for each Subcontractor calculated as follows:

12.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion in the Subcontractor's schedule of values, less retainage of \_\_\_\_\_ percent ( \_\_\_\_\_ %). Pending final determination of amounts to be paid to the Subcontractor for changes in the Work, amounts not in dispute may be included as provided in Subparagraph 7.3.7 of the General Conditions even though the Subcontract Sum has not yet been adjusted by Change Order.

12.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing, less retainage of \_\_\_\_\_ percent ( \_\_\_\_\_ %).

12.7.3 Subtract the aggregate of previous payments made by the Contractor to the Subcontractor.

12.7.4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment by the Owner to the Contractor for reasons which are the fault of the Subcontractor.

12.7.5 Add, upon Substantial Completion of the entire Work of the Contractor, a sum sufficient to increase the total payments to the Subcontractor to \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the Subcontract Sum, less amounts, if any, for incomplete Work and unsettled claims; and, if final completion of the entire Work is thereafter materially delayed through no fault of the Subcontractor, add any additional amounts payable on account of Work of the Subcontractor in accordance with Subparagraph 9.10.3 of the General Conditions.

*(If it is intended, prior to Substantial Completion of the entire Work of the Contractor, to reduce or limit the retainage from Subcontractors resulting from the percentages inserted in Subparagraphs 12.7.1 and 12.7.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)*

~~The Subcontract Sum is the total amount stipulated in the subcontract to be paid by the Contractor to the Subcontractor for the Subcontractor's performance of the subcontract.~~

12.8 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

12.9 In taking action on the Contractor's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Contractor and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Paragraph 12.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections or that the Architect has made examinations to ascertain how or for what purposes the Contractor has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

## ARTICLE 13 FINAL PAYMENT

13.1 Final payment shall be made by the Owner to the Contractor when (1) the Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct defective or nonconforming Work, as provided in Subparagraph 12.2.2 of the General Conditions, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Pay-

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→ Pay

ment and a final accounting for the Cost of the Work have been submitted by the Contractor and reviewed by the Owner's accountants; and (3) a final Certificate for Payment has then been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

Intentionally blank.

**13.2** The amount of the final payment shall be calculated as follows:

**13.2.1** Take the sum of the Cost of the Work substantiated by the Contractor's final accounting and the Contractor's Fee; but not more than the Guaranteed Maximum Price, if any.

**13.2.2** Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Subparagraph 9.5.1 of the General Conditions or other provisions of the Contract Documents.

**13.2.3** Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Contractor, the Contractor shall reimburse the difference to the Owner.

**13.3** The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Architect by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Paragraph 13.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Contractor, or notify the Contractor and Owner in writing of the Architect's reasons for withholding a certificate as provided in Subparagraph 9.5.1 of the General Conditions. The time periods stated in this Paragraph 13.3 supersede those stated in Subparagraph 9.4.1 of the General Conditions.

**13.4** If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, the Contractor shall be entitled to demand arbitration of the disputed amount without a further decision of the Architect. Such demand for arbitration shall be made by the Contractor within 30 days after the Contractor's receipt of a copy of the Architect's final Certificate for Payment; failure to demand arbitration within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Pending a final resolution by arbitration, the Owner shall pay the Contractor the amount certified in the Architect's final Certificate for Payment.

**13.5** If, subsequent to final payment and at the Owner's request, the Contractor incurs costs described in Article 7 and not excluded by Article 8 to correct defective or nonconforming Work, the Owner shall reimburse the Contractor such costs and the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price, if any. If the Contractor has participated in savings as provided in Paragraph 5.2, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

## ARTICLE 14

### MISCELLANEOUS PROVISIONS

**14.1** Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

**14.2** Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

**14.2.1:** The Contractor shall be entitled to include as a part of the cost of the work, a project manager stationed at the Contractor's principal office.

**14.2.2:** All material testing to be paid for by the Owner; the Contractor shall coordinate and schedule testing personnel to minimize the cost to Owner and maintain County required results.

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

(1) Owner's counsel

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**14.3 Other provisions:**

**14.3.1:** All permits, fees, assessments, bonds (exclusive of Performance and Payment Bond) or other required sureties shall be reimbursed to the Contractor including any costs to procure such permits, fees, assessments, bonds or sureties, except specifically permit and inspection fees for mechanical, electrical and plumbing work.

**14.3.2:** The word "Architect" used in this Agreement may be substituted with "Owner's Representative" or "Owner's Counsel" provided the substitution of firm or person is consistently maintained.

**14.3.3:** Unit prices are effective until substantial completion of the base building, at which time the Contractor shall evaluate and adjust accordingly the costs relative to extended general conditions, additional mobilization and effected quantities.

## **ARTICLE 15**

### **TERMINATION OR SUSPENSION**

**15.1** The Contract may be terminated by the Contractor as provided in Article 14 of the General Conditions; however, the amount to be paid to the Contractor under Subparagraph 14.1.2 of the General Conditions shall not exceed the amount the Contractor would be entitled to receive under Paragraph 15.3 below, except that the Contractor's Fee shall be calculated as if the Work had been fully completed by the Contractor, including a reasonable estimate of the Cost of the Work for Work not actually completed.

**15.2** If a Guaranteed Maximum Price is established in Article 5, the Contract may be terminated by the Owner for cause as provided in Article 14 of the General Conditions; however, the amount, if any, to be paid to the Contractor under Subparagraph 14.2.4 of the General Conditions shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed the amount the Contractor would be entitled to receive under Paragraph 15.3 below.

**15.3** If no Guaranteed Maximum Price is established in Article 5, the Contract may be terminated by the Owner for cause as provided in Article 14 of the General Conditions; however, the Owner shall then pay the Contractor an amount calculated as follows:

**15.3.1** Take the Cost of the Work incurred by the Contractor to the date of termination.

**15.3.2** Add the Contractor's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Paragraph 5.1 or, if the Contractor's Fee is stated as a fixed sum in that Paragraph, an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.

**15.3.3** Subtract the aggregate of previous payments made by the Owner.

The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Subparagraph 15.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 15, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

**15.4** The Work may be suspended by the Owner as provided in Article 14 of the General Conditions; in such case, the Guaranteed Maximum Price, if any, shall be increased as provided in Subparagraph 14.3.2 of the General Conditions except that the term "cost of performance of the Contract" in that Subparagraph shall be understood to mean the Cost of the Work and the term "profit" shall be understood to mean the Contractor's Fee as described in Paragraphs 5.1 and 6.3 of this Agreement.

## **ARTICLE 16**

### **ENUMERATION OF CONTRACT DOCUMENTS**

**16.1** The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

**16.1.1** The Agreement is this executed Standard Form of Agreement Between Owner and Contractor, AIA Document A111, 1987 Edition.

**16.1.2** The General Conditions are the General Conditions of the Contract for Construction, AIA Document A201, 1987 Edition.

*Handwritten signature*

~~16.1.3~~ The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated , and are as follows:

Document

Title

Pages

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16.1.4 The Specifications are those contained in the Project Manual dated as in Paragraph 16.1.3, and are as follows:  
(Either list the Specifications here or refer to an exhibit attached to this Agreement )

Section

Title

Pages

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DP

16.1.5 The Drawings are as follows, and are dated  
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

unless a different date is shown below:

Number	Title	Date
Site Drawings by PHR&A dated July 1988		
1 of 9	Cover sheet	
2 of 9	Site Plan	
2a of 9	Fire Lane Plan	
3 of 9	Phase I Erosion Control Plan	
4 of 9	Drainage Divides and Phase II Erosion Siltation Control Plan	
4a of 9	Offsite Outfall Analysis and Cross Sections	
5 of 9	Sanitary Sewer Waterline and Storm Sewer Profiles and Computations	
6 of 9	Site Distance and Typical Sections	
7 of 9	Geotechnical Notes	
8 of 9	Landscape Plan	
9 of 9	Landscape Notes & Details	
Building Drawings *		
T-1	Title Sheet - 8/16/90	
A-1	Floor Plan - 1/16/91	
A-2	Roof Plan - 1/16/91	
A-3	Elevations - 1/16/91	
A-4	Elevations, Sections - 8/16/90	
A-5	Wall Sections - 1/16/91	
A-6	Miscellaneous Details - 8/16/90	
S-1	Foundation Plan - 8/16/90	
S-2	Roof Framing Plan - 8/16/90	
S-3	Structural Details/Notes - 8/16/90	
P-1	Plumbing Plan - 1/16/90	
M-1	Mechanical Plan - 3/28/91	
E-1	Site Plan - Electrical	
E-2	Electrical Plan - Lighting - 3/28/91	
E-3	Electrical Plan (Power) - 3/28/91	
SP-1	Specifications - 8/16/90	

\*Modified to exclude interior finish work.

16.1.6 The addenda, if any, are as follows:

Number	Date	Pages
--------	------	-------

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 16.

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8

*(List here any additional documents which are intended to form part of the contract Documents. The General Conditions provide that building requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the contract form, but are not part of the contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the contract Documents.)*

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CONSTRUCTION AGREEMENT

INSURANCE

Version.VA.9/90

A. Contractor shall provide and maintain in force the insurance coverage described below with the companies satisfactory to Owner. The cost of such coverage is included in the Contract Sum.

1. Worker's Compensation and Employers' Liability

Insurance in compliance with Worker's Compensation and Occupational Disease Laws of the Commonwealth of Virginia and all amendments thereto for all of Contractor's employees engaged in the performance of the Work. Contractor agrees to keep in force during the entire period of construction of the Project such liability insurance as will protect Contractor from claims, under workers' compensation and other employee benefit laws, for bodily injury and death that may arise during the performance of the Work, whether directly or indirectly by the Contractor, or directly or indirectly by a Subcontractor or a Sub-Subcontractor, including necessary Workmen's Compensation insurance for asbestos related work.

2. General Liability Insurance on an "occurrence" basis and shall include coverage for:

- a. Comprehensive Form,
- b. Premises - Operations, (including X, C & U) as applicable)
- c. Products/Completed Operations Hazard
- d. Contractual Insurance including specified provision for contractors obligation under paragraph 4.18 of AIA General Conditions,
- e. Broad Form Property Damage, including completed operations
- f. Personal Injury, with employment exclusion deleted
- g. Motor vehicle, owned, non-owner, and hired,
- h. Independent Contractor's Protective
- i. Asbestos Abatement which includes the transportation of and disposal of the asbestos.

Coverage shall be for an amount not less than \$500,000 bodily injury each occurrence and aggregate, for an amount not less than \$250,000 property damage each occurrence and aggregate, and for an amount not less than \$500,000 personal injury aggregate.

3. Automobile Liability Insurance on an "occurrence" basis and shall include coverage for:

- a. Comprehensive Form, and
- b. Owned,
- c. Hired, and
- d. Non-owned vehicles.

Coverage shall be for an amount not less than \$250,000 to cover injury or death of one person and not less than \$500,000 to cover all persons injured or killed as a result of one occurrence, and for an amount not less than \$100,000 to cover loss or damage to property resulting from one occurrence.

4. Excess Liability Insurance, Umbrella Form for an amount not less than \$2,000,000 to cover injury or death of persons and loss or damage to property resulting from one occurrence in excess of that provided under 1, 2 and 3 above. Coverage must have the standard Asbestos Exclusion deleted.

#### B. Subcontractor's Insurance

1. The following forms of insurance are required to be furnished by all subcontractors:

a. Workers' Compensation Insurance to cover full liability under Workers' Compensation Laws of the State where the Work is performed and Employer's Liability coverage with \$100,000 limit and including coverage for asbestos related work.

b. Comprehensive General Liability Insurance. Coverage shall be on an "occurrence" basis and shall insure subcontractor for Work performed under the Contract against claims for Bodily Injury, including death of any person other than subcontractors employees, and Property Damage for injury to or destruction of tangible property, other than the Work itself. The policy shall contain the Personal Injury and Broad Form Property Damage Endorsements modified as set forth below, and the policy shall be endorsed to remove any Property Damage Liability exclusions pertaining to loss by explosion, collapse or underground damage. The policy shall include coverage for:

- 1) Completed Operations Liability
- 2) Contractors Protective Liability to cover subcontractor's liability arising out of work performed by its sub-subcontractors.

- 3) Blanket Contractual Liability insuring the Indemnification AGreement contained in the subcontract.
- 4) Personal Injury Liability with employee exclusion deleted.
- 5) Broad Form Property Damage extended to apply to Completed Operations.
6. Automobile Liability insuring subcontractor for operations of all owned, hired and non-owned vehicles.
7. Limits of Liability shall not be less than:
- (a) Bodily Injury, except automobile  
\$1,000,000 each occurrence  
\$1,000,000 aggregate Completed Operations
  - (b) Property Damage, except automobile  
\$100,000 each occurrence  
\$500,000 aggregate
  - (c) Bodily Injury, Automobile  
\$100,000 each person  
\$500,000 each occurrence
  - (d) Property Damage, Automobile  
\$100,000 each occurrence

However, either Contractor or Owner has the option to require higher Limits of Liability from designated contractors.

Certificates of Insurance shall be filed with the Contractor prior to commencement of subcontractor's work.

- C. Owner shall provide All Risk Builders' Risk Insurance in completed value form in an amount no less than the Contract Sum, insuring the interests of Lender, Owner, Contractor, and Subcontractors. Losses under such insurance will be adjusted with and made payable to Owner as trustee for all other parties.

1. The Contractor acknowledges the Owner's All Risk Builder's Risk Insurance is maintained with a \$10,000 deductible per occurrence. The Contractor is responsible for any amounts to the deductible limits for claims made..

- D. Owner and Contractor hereby waive all claims against each other covered by insurance provided in this Exhibit to

the extent made whole by such insurance. Contractor agrees to obtain waivers of such claims by all Subcontractors.

All insurance coverage provided by Owner, Contractor and Subcontractors shall contain the following waiver of subrogation clause:

1. "It is further understood and agreed that this Company waives all rights to which it may have acquired by payment of loss hereunder against Contractor, and all Owners, their agents and employees."
  2. "It is further understood and agreed that as respects to the perils of fire, lighting, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, smoke, vandalism and malicious mischief, and all other insured perils if required by contract, the Company hereby waives all rights they may have acquired by payment of a claim under this policy to recover the amount so paid from the subcontractors or sub-subcontractors of Contractor, Agents and Employees of each."
  3. "It is further understood and agreed that this policy is amended to waive all rights of recovery against architects, their agents and employees shall not extend to the liability of the Architects, his agents or his employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications; of (2) the giving of or the failure to give directions or instruction by the architects, his agents or employees providing such giving or failure to give is a primary cause of the injury or damage."
  4. "This endorsement shall continue in full force and effect until all Work to be performed by Contractor, its subcontractors and all tiers of sub-subcontractors is determined to be One Hundred Percent (100%) complete, accepted by the property Owner, and the Contractor has been paid in full for Work performed under Construction Agreement dated December 14, 1990."
- E. Contractor shall have his insurance carrier or carriers furnish to Owner certificates that all insurance required under this Agreement is in full force and effect, reciting the expiration date of each policy and that the

insurance will not be cancelled prior to completion of the Work herein specified without thirty (30) days prior written notice by registered mail to Owner. Certificate holder and additional insured shall be the Owner and Interim Lender. On request, Contractor shall permit Owner, or his designated representative, to examine original insurance policies, or, at Owner's option, furnish Owner certified copies of any or all insurance policies issued in compliance with the requirements hereof.

## Exhibit "D"

### QUALIFICATIONS

The following qualifications and exclusions are proposed for specific incorporation to the Base Bid sum.

#### I. QUALIFICATIONS

- A. The earthwork to be performed is assumed to be within  $\pm 0.2'$  of the grades indicated on the plans.
- B. In the event the plans are not specific nor coordinated, this proposal is based on the least expensive alternatives.
- C. The masonry is included with split face block on the front and side areas only.
- D. Any insulation provided shall be provided as shown on the drawings at the specified thickness.
- E. The exterior finish insulation system is provided over a gypsum lath attached directly to the building component. The designers drawings is to be adhered to regardless of performance.
- F. The metal roofing system is provided with the standing seam panel of a standard color Kynar finish.
- G. The hardware for the door is considered with the allowance stated in the plans.
- H. Unless otherwise specified on the drawings, the acoustical ceiling system is provided as a non-fissured mineral fiber.
- I. The building is proposed with engineering as provided by the Owner. Any changes or adjustments will be at the Owner's expense.
- J. The mechanical, plumbing, fire protection and electrical utilize the least expensive materials in the situations the drawings are unclear.
- K. Control joints only are considered for exterior concrete walks.
- L. The power company is assumed to supply adequate power for the space within 5' of the building. Any charges, costs, fees or assessments outside this point are the Owner's responsibility.
- M. Only electrical fixtures shown are included.
- N. Mechanical, electrical and plumbing information not detailed nor specified on the correlating plans sheets is not included.
- O. All permit fees are to be provided by Owner except mechanical, electrical, fire protection and plumbing.
- P. All testing, engineering inspections, and certification of materials is to be performed by others at the Owner's expense.
- Q. This proposed bid is valid for a period of thirty days from submittals, and if not accepted within that period, we reserve the right to review and revise it as required.
- R. The proposed bid does not include any governmental or public utility fees or charges.

- S. No removal or handling of unsuitable excavations nor replacement of unsuitable soils or unsuitable materials exposed during construction have been included in this proposal. No excavation is included below 5' from building finish floor nor 1' below paving grade.
- T. Any subsurface water encountered will be removed at the Owner's expense on a time and material basis plus a 10% fee.
- U. This proposed bid is for work shown on the drawings and does not include any work not specifically shown; nor any work not shown but which might be required of public utilities or government agencies. (We as Contractors have competitively prepared this proposal based on the drawings supplied by your design professionals, and we cannot accept any responsibility for compliance of the drawings with any governmental or public utility codes or requirements.)
- V. Prior to occupancy of the Building, a final punchlist of uncompleted items shall be made with a mutually agreed upon value of each uncompleted item to be withheld as retention. No occupancy shall take place until final payments, including retention, except for the agreed-upon uncompleted item value is made to the Contractor. Partial occupancy of the Building shall not constitute a waiver of any of the Contractor's rights under this clause.
- W. By execution of the Contract Agreement, the Owner confirms the contract amount shall be funded by (to be supplied by Owner) and his funding agreement sets aside by escrow or other acceptable method, at least the total of this proposed base bid sum to be funded to the Contractor per the payment provisions of the Contract Agreement.
- X. The site utility connections are considered to be within 5' of the proximity indicated on the drawings.
- Y. Should the Owner or his employees occupy any portion of the facility prior to completion, he or his employees are responsible for any communications, trash collection or cleanup, power and/or security.

## II. Specific Exclusions of the Base Bid Sum

- A. Utility relocations or <sup>additionally</sup> ~~new~~ installation of utilities are not included.
- B. Repaving or modifications of Route 236 beyond the existing edge is not included.
- C. Water meter fees or assessments are not included.
- D. Future sewer escrows are not included.
- E. No foundation drain requirements of the foundation is considered.
- F. This proposal does not include any bond requirements. These cost would be extra to the project.
- G. No sealer coat nor product is applied over the exterior of the split face CMU units.
- H. Public street lighting is not considered a part of the base bid sum.
- I. No fixturing, finishes nor Owner supplied items are included in this proposal.
- J. No gas service is considered.
- K. Pest control is excluded from this project as the building is built entirely of concrete, CMU or metal products.
- L. Any temporary public barriers such as fencing of work area or security is not considered.

## III. Cost Saving Alternatives

We propose a meeting with you, the Owner and ourselves to discuss cost savings suggestions by applying certain modifications similar to projects we have performed in the past. We also believe alternatives should be reviewed to reduce the cost of the site excavation and certain elements of the building to prevent unneeded future remodeling. More details will be provided if requested.





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*AIA Document A201*

# **General Conditions of the Contract for Construction**

*THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES. CONSULTATION  
WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS MODIFICATION*

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This document has been approved and endorsed by the Associated General Contractors of America.

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# GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

## ARTICLE 1

### GENERAL PROVISIONS

#### 1.1 BASIC DEFINITIONS

##### 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of addenda relating to bidding requirements).

##### 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

##### 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

##### 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

##### 1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

##### 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equip-

ment, construction systems, standards and workmanship for the Work, and performance of related services.

##### 1.1.7 THE PROJECT MANUAL

The Project Manual is the volume usually assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

#### 1.2 EXECUTION, CORRELATION AND INTENT

1.2.1 The Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.2.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.2.3 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

1.2.4 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.5 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

#### 1.3 OWNERSHIP AND USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's service through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect, and unless otherwise indicated the Architect shall be deemed the author of them and will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the

Work without the specific written consent of the Owner and Architect. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's copyright or other reserved rights.

#### 1.4 CAPITALIZATION

1.4.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Paragraphs and Clauses in the document or (3) the title of other documents published by the American Institute of Architects.

#### 1.5 INTERPRETATION

1.5.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### ARTICLE 2

#### OWNER

##### 2.1 DEFINITION

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner upon reasonable written request shall furnish to the Contractor in writing information which is necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein at the time of execution of the Agreement and, within five days after any change, information of such change in title, recorded or unrecorded.

##### 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the request of the Contractor, prior to execution of the Agreement and promptly from time to time thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. *[Note: Unless such reasonable evidence were furnished on request prior to the execution of the Agreement, the prospective contractor would not be required to execute the Agreement or to commence the Work.]*

2.2.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site.

2.2.3 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assess-

ments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.4 Information or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the Work.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.2.6 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Article 6 (Construction by Owner or by Separate Contractors), Article 9 (Payments and Completion) and Article 11 (Insurance and Bonds).

##### 2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner, by written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

##### 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a second seven-day period. If the Contractor within such second seven-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the Architect's additional services and expenses made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

### ARTICLE 3

#### CONTRACTOR

##### 3.1 DEFINITION

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

## **3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR**

**3.2.1** The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Architect errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

**3.2.2** The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before commencing activities. Errors, inconsistencies or omissions discovered shall be reported to the Architect at once.

**3.2.3** The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.12.

## **3.3 SUPERVISION AND CONSTRUCTION PROCEDURES**

**3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

**3.3.2** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

**3.3.3** The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

**3.3.4** The Contractor shall be responsible for inspection of portions of Work already performed under this Contract to determine that such portions are in proper condition to receive subsequent Work.

## **3.4 LABOR AND MATERIALS**

**3.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**3.4.2** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

## **3.5 WARRANTY**

**3.5.1** The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

## **3.6 TAXES**

**3.6.1** The Contractor shall pay sales, consumer, use and similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

## **3.7 PERMITS, FEES AND NOTICES**

**3.7.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

**3.7.2** The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work.

**3.7.3** It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

**3.7.4** If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs.

## **3.8 ALLOWANCES**

**3.8.1** The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities against which the Contractor makes reasonable objection.

**3.8.2** Unless otherwise provided in the Contract Documents:

- .1** materials and equipment under an allowance shall be selected promptly by the Owner to avoid delay in the Work;
- .2** allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;



- 3 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum and not in the allowances;
- 4 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.2 and (2) changes in Contractor's costs under Clause 3.8.2.3.

### 3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

### 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall conform to the most recent schedules.

### 3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

### 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for

which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7.

3.12.5 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals made by the Contractor which are not required by the Contract Documents may be returned without action.

3.12.6 The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect. Such Work shall be in accordance with approved submittals.

3.12.7 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.8 The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and the Architect has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals.

3.12.10 Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents.

3.12.11 When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

### 3.13 USE OF SITE

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

### 3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the

Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

### **3.15 CLEANING UP**

**3.15.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

**3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

### **3.16 ACCESS TO WORK**

**3.16.1** The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

### **3.17 ROYALTIES AND PATENTS**

**3.17.1** The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

### **3.18 INDEMNIFICATION**

**3.18.1** To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that 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 Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

**3.18.2** In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 3.18 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**3.18.3** The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Archi-

tect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

## **ARTICLE 4**

### **ADMINISTRATION OF THE CONTRACT**

#### **4.1 ARCHITECT**

**4.1.1** The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

**4.1.2** Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

**4.1.3** In case of termination of employment of the Architect, the Owner shall appoint an architect against whom the Contractor makes no reasonable objection and whose status under the Contract Documents shall be that of the former architect.

**4.1.4** Disputes arising under Subparagraphs 4.1.2 and 4.1.3 shall be subject to arbitration.

#### **4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT**

**4.2.1** The Architect will provide administration of the Contract as described in the Contract Documents, and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will advise and consult with the Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

**4.2.2** The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

**4.2.3** The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraph 3.3. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Con-

tractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

**4.2.4 Communications Facilitating Contract Administration.** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate through the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

**4.2.5** Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

**4.2.6** The Architect will have authority to reject Work which does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing portions of the Work.

**4.2.7** The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**4.2.8** The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

**4.2.9** The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner for the Owner's review and records written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

**4.2.10** If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying

out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

**4.2.11** The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made with reasonable promptness and within any time limits agreed upon. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

**4.2.12** Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

**4.2.13** The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

### **4.3 CLAIMS AND DISPUTES**

**4.3.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.3.2 Decision of Architect.** Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

**4.3.3 Time Limits on Claims.** Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

**4.3.4 Continuing Contract Performance.** Pending final resolution of a Claim including arbitration, unless otherwise agreed in writing the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**4.3.5 Waiver of Claims: Final Payment.** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

1. liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
2. failure of the Work to comply with the requirements of the Contract Documents; or
3. terms of special warranties required by the Contract Documents.

**4.3.6 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.7 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

**4.3.8 Claims for Additional Time**

**4.3.8.1** If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

**4.3.8.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data

substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

**4.3.9 Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, of any of the other party's employees or agents, or of others for whose acts such party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after first observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in Subparagraphs 4.3.7 or 4.3.8.

**4.4 RESOLUTION OF CLAIMS AND DISPUTES**

**4.4.1** The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

**4.4.2** If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

**4.4.3** If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

**4.4.4** If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

**4.5 ARBITRATION**

**4.5.1 Controversies and Claims Subject to Arbitration.** Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 1.3.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 14 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.

**4.5.2 Rules and Notices for Arbitration.** Claims between the Owner and Contractor not resolved under Paragraph 4.4 shall, subject to arbitration under Subparagraph 4.5.1, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party to the Agreement between the Owner and Contractor and with the American Arbitration Association, and a copy shall be filed with the Architect.

**4.5.3 Contract Performance During Arbitration.** During arbitration proceedings, the Owner and Contractor shall comply with Subparagraph 4.3.4.

**4.5.4 When Arbitration May Be Demanded.** Demand for arbitration of any Claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final written decision by that date, or (3) any of the five events described in Subparagraph 4.3.2.

**4.5.4.1** When a written decision of the Architect states that (1) the decision is final but subject to arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

**4.5.4.2** A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.5.1 and 4.5.4 and Clause 4.5.4.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

**4.5.5 Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**4.5.6 Claims and Timely Assertion of Claims.** A party who files a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a Claim through oversight, inadvertence or excusable neglect, or when a Claim has matured or been acquired subsequently, the arbitrator or arbitrators may permit amendment.

**4.5.7 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## **ARTICLE 5**

### **SUBCONTRACTORS**

#### **5.1 DEFINITIONS**

**5.1.1** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

**5.1.2** A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

#### **5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK**

**5.2.1** Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

**5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.2.3** If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. The Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and an appropriate Change Order shall be issued. However, no increase in the Contract Sum shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**5.2.4** The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such change.

### 5.3 SUBCONTRACTUAL RELATIONS

**5.3.1** By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

### 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

**5.4.1** Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

1. assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor in writing; and
2. assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

**5.4.2** If the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted.

## ARTICLE 6

### CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

#### 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

**6.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided elsewhere in the Contract Documents.

**6.1.2** When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

**6.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule and Contract Sum deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

**6.1.4** Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

#### 6.2 MUTUAL RESPONSIBILITY

**6.2.1** The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

**6.2.2** If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

**6.2.3** Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor.

**6.2.4** The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

**6.2.5** Claims and other disputes and matters in question between the Contractor and a separate contractor shall be subject to the provisions of Paragraph 4.3 provided the separate contractor has reciprocal obligations.

**6.2.6** The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Paragraph 3.14.

#### 6.3 OWNER'S RIGHT TO CLEAN UP

**6.3.1** If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish as described in Paragraph 3.15, the Owner may clean up and allocate the cost among those responsible as the Architect determines to be just.

## ARTICLE 7

### CHANGES IN THE WORK

#### 7.1 CHANGES

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

7.1.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

#### 7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment in the Contract Sum, if any; and
- .3 the extent of the adjustment in the Contract Time, if any.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

#### 7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;

.3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

.4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' or workmen's compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 Pending final determination of cost to the Owner, amounts not in dispute may be included in Applications for Payment. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 If the Owner and Contractor do not agree with the adjustment in Contract Time or the method for determining it, the adjustment or the method shall be referred to the Architect for determination.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.



#### **7.4 MINOR CHANGES IN THE WORK**

**7.4.1** The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

### **ARTICLE 8**

#### **TIME**

##### **8.1 DEFINITIONS**

**8.1.1** Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

**8.1.2** The date of commencement of the Work is the date established in the Agreement. The date shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible.

**8.1.3** The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

**8.1.4** The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

##### **8.2 PROGRESS AND COMPLETION**

**8.2.1** Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

**8.2.2** The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

**8.2.3** The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

##### **8.3 DELAYS AND EXTENSIONS OF TIME**

**8.3.1** If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

**8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Paragraph 1.3.

**8.3.3** This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

### **ARTICLE 9**

#### **PAYMENTS AND COMPLETION**

##### **9.1 CONTRACT SUM**

**9.1.1** The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

##### **9.2 SCHEDULE OF VALUES**

**9.2.1** Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

##### **9.3 APPLICATIONS FOR PAYMENT**

**9.3.1** At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for elsewhere in the Contract Documents.

**9.3.1.1** Such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives but not yet included in Change Orders.

**9.3.1.2** Such applications may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or material supplier because of a dispute or other reason.

**9.3.2** Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

**9.3.3** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

##### **9.4 CERTIFICATES FOR PAYMENT**

**9.4.1** The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the



nated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not in accordance with the requirements of the Contract Documents, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. The Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

**9.8.3** Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the Architect, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion thereof as provided in the Contract Documents.

## **9.9 PARTIAL OCCUPANCY OR USE**

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Subparagraph 11.3.11 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

**9.9.2** Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

## **9.10 FINAL COMPLETION AND FINAL PAYMENT**

**9.10.1** Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make

such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's observations and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in said final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims. The making of final payment shall constitute a waiver of claims by the Owner as provided in Subparagraph 4.3.5.

**9.10.4** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. Such waivers shall be in addition to the waiver described in Subparagraph 4.3.5.

## **ARTICLE 10**

### **PROTECTION OF PERSONS AND PROPERTY**

#### **10.1 SAFETY PRECAUTIONS AND PROGRAMS**

**10.1.1** The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

**10.1.2** In the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner and Architect in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the Owner and Contractor if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of asbestos or polychlorinated biphenyl (PCB), or when it has been rendered harmless, by written agreement of the Owner and Contractor, or in accordance with final determination by the Architect on which arbitration has not been demanded, or by arbitration under Article 4.

**10.1.3** The Contractor shall not be required pursuant to Article 7 to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

**10.1.4** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless, provided that 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 Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Owner, anyone directly or indirectly employed by the Owner or anyone for whose acts the Owner may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Subparagraph 10.1.4.

#### **10.2 SAFETY OF PERSONS AND PROPERTY**

**10.2.1** The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

1. employees on the Work and other persons who may be affected thereby;
2. the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
3. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

**10.2.2** The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

**10.2.3** The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

**10.2.4** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

**10.2.5** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

**10.2.6** The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

**10.2.7** The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

#### **10.3 EMERGENCIES**

**10.3.1** In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

## **ARTICLE 11**

### **INSURANCE AND BONDS**

#### **11.1 CONTRACTOR'S LIABILITY INSURANCE**

**11.1.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

1. claims under workers' or workmen's compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by usual personal injury liability coverage which are sustained (1) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (2) by another person;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; and
- .7 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

**11.1.2** The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

**11.1.3** Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These Certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

## **11.2 OWNER'S LIABILITY INSURANCE**

**11.2.1** The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

## **11.3 PROPERTY INSURANCE**

**11.3.1** Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity

other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

**11.3.1.1** Property insurance shall be on an all-risk policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false-work, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

**11.3.1.2** If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto.

**11.3.1.3** If the property insurance requires minimum deductibles and such deductibles are identified in the Contract Documents, the Contractor shall pay costs not covered because of such deductibles. If the Owner or insurer increases the required minimum deductibles above the amounts so identified or if the Owner elects to purchase this insurance with voluntary deductible amounts, the Owner shall be responsible for payment of the additional costs not covered because of such increased or voluntary deductibles. If deductibles are not identified in the Contract Documents, the Owner shall pay costs not covered because of deductibles.

**11.3.1.4** Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site after written approval of the Owner at the value established in the approval, and also portions of the Work in transit.

**11.3.2 Boiler and Machinery Insurance.** The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

**11.3.3 Loss of Use Insurance.** The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

**11.3.4** If the Contractor requests in writing that insurance for risks other than those described herein or for other special hazards be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

**11.3.5** If during the Project construction period the Owner insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

**11.3.6** Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

**11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**11.3.8** A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

**11.3.9** If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.5. If after such loss no other special agreement is made, replacement of damaged property shall be covered by appropriate Change Order.

**11.3.10** The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection be made, arbitrators shall be chosen as provided in Paragraph 4.5. The Owner as fiduciary shall, in that case, make settlement with insurers in accordance with directions of such arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

**11.3.11** Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

#### **11.4 PERFORMANCE BOND AND PAYMENT BOND**

**11.4.1** The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

**11.4.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

### **ARTICLE 12**

#### **UNCOVERING AND CORRECTION OF WORK**

##### **12.1 - UNCOVERING OF WORK**

**12.1.1** If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's observation and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2** If a portion of the Work has been covered which the Architect has not specifically requested to observe prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work is not in accordance with the Contract Documents, the Contractor shall pay such costs unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

##### **12.2 CORRECTION OF WORK**

**12.2.1** The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby.

**12.2.2** If, within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date

for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This period of one year shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This obligation under this Subparagraph 12.2.2 shall survive acceptance of the Work under the Contract and termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.

**12.2.3** The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

**12.2.4** If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Paragraph 2.4. If the Contractor does not proceed with correction of such nonconforming Work within a reasonable time fixed by written notice from the Architect, the Owner may remove it and store the salvage materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage within ten days after written notice, the Owner may upon ten additional days' written notice sell such materials and equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including compensation for the Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

**12.2.5** The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

**12.2.6** Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

### **12.3 ACCEPTANCE OF NONCONFORMING WORK**

**12.3.1** If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## **ARTICLE 13**

### **MISCELLANEOUS PROVISIONS**

#### **13.1 GOVERNING LAW**

**13.1.1** The Contract shall be governed by the law of the place where the Project is located.

#### **13.2 SUCCESSORS AND ASSIGNS**

**13.2.1** The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

#### **13.3 WRITTEN NOTICE**

**13.3.1** Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

#### **13.4 RIGHTS AND REMEDIES**

**13.4.1** Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

**13.4.2** No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

#### **13.5 TESTS AND INSPECTIONS**

**13.5.1** Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so the Architect may observe such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

**13.5.2** If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so the Architect may observe such procedures.

The Owner shall bear such costs except as provided in Subparagraph 13.5.3.

**13.5.3** If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses.

**13.5.4** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

**13.5.5** If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

**13.5.6** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

### **13.6 INTEREST**

**13.6.1** Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

### **13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD**

**13.7.1** As between the Owner and Contractor:

- 1 Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- 2 Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- 3 After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any warranty provided under Paragraph 5.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

## **ARTICLE 14**

### **TERMINATION OR SUSPENSION OF THE CONTRACT**

#### **14.1 TERMINATION BY THE CONTRACTOR**

**14.1.1** The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons:

- 1** issuance of an order of a court or other public authority having jurisdiction;
- 2** an act of government, such as a declaration of national emergency, making material unavailable;
- 3** because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;
- 4** if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less; or
- 5** the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

**14.1.2** If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

**14.1.3** If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.2.

#### **14.2 TERMINATION BY THE OWNER FOR CAUSE**

**14.2.1** The Owner may terminate the Contract if the Contractor:

- 1** persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- 2** fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- 3** persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- 4** otherwise is guilty of substantial breach of a provision of the Contract Documents.

**14.2.2** When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify termination, may terminate the Contract.

tify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient.

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the

Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

#### **14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

**14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**14.3.2** An adjustment shall be made for increases in the cost of performance of the Contract, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of this Contract.

**14.3.3** Adjustments made in the cost of performance may have a mutually agreed fixed or percentage fee.

3/7/94

LAW OFFICES  
GANNON, COTTRELL & WARD, P.C.

415 N. WASHINGTON STREET  
P.O. BOX 1280  
ALEXANDRIA, VIRGINIA 22304-1280

MARTIN A. GANNON  
JAMES RAY COTTRELL  
MICHAEL ALAN WARD  
  
DAVID H. FEECHER  
MARGARET GANNON SAKISKA  
D. SCOTT WASH

(703) 836-2770  
FAX: (703) 836-9080

RICHARD J. DWYER, III  
OF COUNSEL  
  
REPLY TO P.O. BOX 1280  
ALEXANDRIA, VIRGINIA 22304-1280

March 3, 1994

VIA FAX 354-6833  
AND FIRST CLASS MAIL

Hugh C. Cregger, Jr., Esquire  
7010 Little River Turnpike  
Suite 201  
Annandale, VA 22003

In re: Willow Run Shopping Center  
Sam & Tony Qreitem

Dear Hugh:

I cannot find a reference to the bonding company in the file I have of this case. Would you be so kind as to let me know which bonding company was used so we can file an appropriate claim.

Thank you for your kind professional courtesy in this matter.

Sincerely yours,

GANNON, COTTRELL & WARD, P.C.

  
James Ray Cottrell

JRC/lls  
cc: Samir Qreitem



352

CLP-DEF-EX # 4  
DATE 12/12/85  
JUDGE ABX  
CASE # 6137523



JAY N. ESKOVITZ  
RONALD H. LAZARUS  
JOHN F. PITRELLI  
GREGGER & CREGGER P.C.  
HUGH C. CREGGER JR.  
RICHARD TODD CREGGER

VIENNA (703) 255 6408  
RESTON (703) 860-5643

**L. KOVITZ, LAZARUS, PITRELLI & CREGGER**

ANNANDALE FINANCIAL CENTER  
SUITE 250  
7010 LITTLE RIVER TURNPIKE  
PO BOX 830  
ANNANDALE VIRGINIA 22003  
(703) 354 1052  
FAX (703) 354 6833

CHARLES A. PRICE  
R. ROBERT RUSHE  
ANDREA B. THOMPSON  
WILLARD H. SAUNDERS  
THOMAS M. WILTSHIRE  
MAUREEN T. WALSH  
HIENT VO  
ALSO ADMITTED IN FLORIDA  
ALSO ADMITTED IN DC STATE

March 4, 1994

**VIA FAX 836-9086**  
**AND FIRST CLASS MAIL**

James Ray Cottrell  
Gannon, Cottrell & Ward, P.C.  
411 N. Washington Street  
Alexandria, Virginia 22313

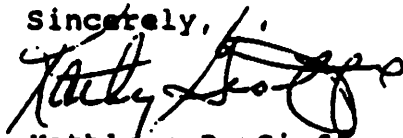
Re: Willow Run Shopping Center  
Sam and Tony Qreitem

Dear Mr. Cottrell:

In response to your letter of March 3, 1994, requesting information as to the bonding company used, the performance bond is in the possession of NAJLA Associates. However, in the Contractor's Qualification Statement the bonding company named is Ohio Casualty and the agent is David Warfield (301-585-7600), Warfield-Dorsey Co., 11031 McCormick Road, Hunt Valley, Maryland 21031.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Kathleen D. Gioffre  
Paralegal for  
Hugh C. Cregger, Jr.



353

CLERK DEF-EX. # 5  
DATE 12/12/95  
JUDGE HAK  
CASE # 137523

# WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

3541 CHAIN BRIDGE ROAD SUITE 5A FAIRFAX, VIRGINIA 22030  
(703) 591-4788

November 24, 1992

Mr. Hugh C. Cregger, Jr., Esq.  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center  
7010 Little River Turnpike  
Suite 200  
P.O. Box 830  
Annandale, VA 22003

RE: Willow Run Shopping Center

Dear Mr. Cregger:

My bonding company is preparing the Performance and Payment Bond (Bond) for the Willow Run Shopping Center.

One of the requests necessary for finalization of the Bond is confirmation of financing or escrowed funds.

The attached is a recommended form we have used for other projects with modifications to accommodate the absence of a lender.

I am basing the amount of the escrow on the cashflow projection submitted to you on October 26, 1992.

Should you have any questions, please contact me at your earliest convenience.

Sincerely,

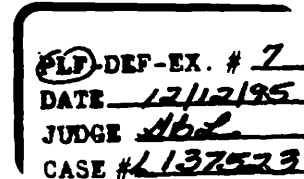


David Peacock

DP/dfs

cc: Mr. Samir Quietman  
c/o Mr. John Pitrelli, Esq.

354



(Escrow Agent's Letterhead)

November \_\_\_\_\_, 1992

Wm. L. Griffith & Co. of VA, Inc.  
3541 Chain Bridge Road  
Suite 5A  
Fairfax, VA 22030

RE: Willow Run Shopping Center

Gentlemen:

This is to confirm that \$130,000, which represents the Escrow amount of the above referenced project to be owned by Mr. Samir Quietman has been set aside with \_\_\_\_\_ (Escrow Agent) to be funded in the event of delayed payment by Owner for progress payments to William L. Griffith & Co. of VA, Inc., Contractor, under the terms of the Construction Contract. No brokerage fees, inspection fees, taxes, insurance, interest, or any other costs or fees incurred by Owner or Owner's Agents will be removed from the Escrow amount.

It is understood by all, the progress payment is to take place within 30 days of the date of the Application for Payment submitted by the Contractor from Owner's funds. Should it be necessary for the Contractor to draw progress payments from the Escrow Account, the Contractor will cease work. Cessation of work, in the event of Owner's failure to make timely progress payment, in no way relieves the Owner from its payment obligations to the Contractor and specifically allows the Contractor to immediately draw funds from the Escrow amount.

Sincerely,

(ESCROW AGENT)

By: \_\_\_\_\_

Title: \_\_\_\_\_

Owner: \_\_\_\_\_

**PLAINTIFF'S  
EXPERT  
WITNESS**

\_\_\_\_\_

ALL-STATE LEAD, SUPPLY CO.

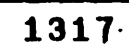
356

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE  
RESERVED FOR FINANCIAL INSTITUTION USE \*

**FEB 16 1983**

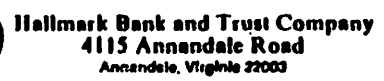
7(23) 6-12-3900  
 ▲ ABA 4256073428 ▲

FEDERAL RESERVE BOARD OF GOVERNORS REG. CC



JOHN F. PITRELLI, TRUSTEE.

ONE HUNDRED THIRTY-THOUSAND AND NO/100 DOLLARS



FOR Will 93-0049

*John R. Ford*

"00001317" : "056004885": 21091.203" 13 "0013000000"

# WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

3541 CHAIN BRIDGE ROAD SUITE 5A FAIRFAX, VIRGINIA 22030  
(703) 591 4788

January 19, 1993

Mr. Hugh C. Cregger, Jr., Esq.  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center  
7010 Little River Turnpike  
Suite 200  
Annandale, VA 22003

RE: Willow Run Shopping Center

Dear Mr. Cregger:

Enclosed please find an accepted copy of the redraft of the escrow agreement.

Thank you for your prompt handling of this matter.

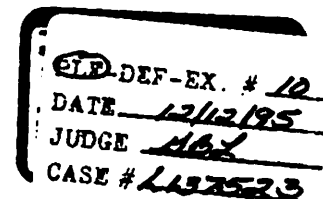
Sincerely,



David Peacock

DP/dfs

Enclosure



**DRAFT**

LAW OFFICES  
OF

**DRAFT**

**ESKOVITZ, LAZARUS, PITRELLI & CREGGER**

JAY N. ESKOVITZ  
RONALD H. LAZARUS  
DAN F. PITRELLI  
CREGGER & CREGGER P.C.  
HUGH C. CREGGER JR.  
RICHARD TODD CREGGER

ANNANDALE FINANCIAL CENTER  
SUITE 200  
1010 LEE HIGHWAY  
PO BOX 430  
ANNANDALE VIRGINIA 22003  
(703) 354-0561  
FAX (703) 354-6833

VIENNA OFFICE  
SUITE 201  
100 EAST STREET SE  
VIENNA VIRGINIA 22180  
17031 255 6408  
FAX (703) 255 6137

W. LAMAR MASON JR.  
CHARLES A. PRICE  
ROBERT RUSHE  
MARIA DEL GORGIO  
MARK GOETTMAN

January 15, 1993

Wm. L. Griffith & Co. of Virginia, Inc.  
3541 Chain Bridge Road, Suite 5A  
Fairfax, Virginia 22030

Re: Willow Run Shopping Center

Gentlemen:

This is to confirm that \$130,000, which represents the escrow amount of the above-referenced project to be developed by Najla Associates, Inc., has been set aside with E.L. & P. Title and Escrow Co. to be funded in the event of delayed payment by owner for progress payments to Wm. L. Griffith & Co. of Virginia, Inc., Contractor, under the terms of the Construction Contract. No brokerage fees, inspection fees, taxes, insurance, interest, or any other costs or fees incurred by owner or owner's agents will be removed from the escrow amount.

It is understood that progress payments are to be made by the owner within thirty (30) days of the date that owner receives the application for payment submitted by the contractor. Should owner fail to pay to contractor any progress payment(s) in a timely manner, contractor shall notify this escrow company, and it is hereby agreed by the parties hereto as follows:

- (i) escrow company shall pay within five (5) days of receipt of notice of owner's default the amount of the application for payment not paid by owner;
- (ii) cause the owner to reimburse within ten (10) days the escrow account for the sum paid over to contractor by the escrow company; and
- (iii) if either (i) or (ii) above are not accomplished in a timely manner, contractor may, as its option, cease work on the project

Wm. L. Griffith & Co. of Virginia, Inc.  
January \_\_\_\_\_, 1993  
Page Two

(Willow Run Shopping Center), but in any event owner is not relieved from its payment obligations under the contract.

Notwithstanding any other agreement contained herein or in the contract documents, it is understood and agreed that at such time as the total amount of the unpaid work to be performed under the contract documents, together with any retention owed the contractor, totals \$130,000.00 or less, all applications for payment shall be submitted to the escrow company and paid by the escrow company with the approval of the owner.

Very truly yours,


Hugh C. Cregger, Jr.

HCC/lbw

SEEN AND AGREED THIS 15 DAY OF January, 1993.

WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

By:

  
Wm. L. Griffith President

with connection noted  
BN (i)

SEEN AND AGREED THIS 26<sup>th</sup> DAY OF January, 1993.

NAJLA ASSOCIATES, INC. - OWNER

By:

  
President

LAW OFFICES  
OF

**ESKOVITZ, LAZARUS, PITRELLI & CREGGER**

JAY N. ESKOVITZ  
RONALD H. LAZARUS  
JOHN F. PITRELLI  
CREGGER & CREGGER P.C.  
HUGH C. CREGGER JR.  
RICHARD TODD CREGGER

ANNANDALE FINANCIAL CENTER  
SUITE 200  
7010 LITTLE RIVER TURNPIKE  
P.O. BOX 830  
ANNANDALE, VIRGINIA 22003  
(703) 354-0561  
FAX (703) 354-6833

VIENNA OFFICE  
SUITE 201  
100 EAST STREET SE  
VIENNA, VIRGINIA 22180  
(703) 255-6408  
FAX (703) 255-6137

WILLIAM B. MASON, JR.  
CHARLES A. PRICE  
ROBERT RUSHE  
MARIA DELIGIORGIS  
MARK GOETZMAN

January 15<sup>th</sup>, 1993

Wm. L. Griffith & Co. of Virginia, Inc.  
3541 Chain Bridge Road, Suite 5A  
Fairfax, Virginia 22030

Re: Willow Run Shopping Center

Gentlemen:

This is to confirm that \$130,000, which represents the escrow amount of the above-referenced project to be developed by Najla Associates, Inc., has been set aside with E.L. & P. Title and Escrow Co. to be funded in the event of delayed payment by owner for progress payments to Wm. L. Griffith & Co. of Virginia, Inc., Contractor, under the terms of the Construction Contract. No brokerage fees, inspection fees, taxes, insurance, interest, or any other costs or fees incurred by owner or owner's agents will be removed from the escrow amount.

It is understood that progress payments are to be made by the owner within thirty (30) days of the date that owner receives the application for payment submitted by the contractor. Should owner fail to pay to contractor any progress payment(s) in a timely manner, contractor shall notify this escrow company, and it is hereby agreed by the parties hereto as follows:

- (i) escrow company shall pay within five (5) days of receipt of notice of owner's default the amount of the application for payment not paid by owner;
- (ii) cause the owner to reimburse within ten (10) days the escrow account for the sum paid over to contractor by the escrow company; and
- (iii) if either (i) or (ii) above are not accomplished in a timely manner, contractor may, as its option, cease work on the project

**PLAINTIFF'S**  
**EXHIBIT**  
**1**  
ALL-STATE TITLE SUPPLY CO.

360

FILED DEF-EX. # 1  
DATE 12/12/95  
JUDGE 262  
CASE # 413752



Wm. L. Griffith & Co. of Virginia, Inc.  
January 15th, 1993  
Page Two

(Willow Run Shopping Center), but in any event owner is not relieved from its payment obligations under the contract.

Notwithstanding any other agreement contained herein or in the contract documents, it is understood and agreed that at such time as the total amount of the unpaid work to be performed under the contract documents, together with any retention owed the contractor, totals \$130,000.00 or less, all applications for payment shall be submitted to the escrow company and paid by the escrow company with the approval of the owner.

Very truly yours,

Hugh C. Cregger, Jr.

HCC/lbw


SEEN AND AGREED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 1993.

WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

By: \_\_\_\_\_  
President

SEEN AND AGREED THIS 26<sup>th</sup> DAY OF Thursday, 1993.

NAJLA ASSOCIATES, INC. - OWNER

By:   
President

LAW OFFICES  
OF

**ESKOVITZ, LAZARUS, PITRELLI & CREGGER**

JAY N. ESKOVITZ  
RONALD H. LAZARUS  
JOHN F. PITRELLI  
CREGGER & CREGGER P.C.  
HUGH C. CREGGER JR.  
RICHARD TODD CREGGER

ANNANDALE FINANCIAL CENTER  
SUITE 200  
2010 LITTLE RIVER TURNPIKE  
PO BOX 830  
ANNANDALE, VIRGINIA 22003  
(703) 354-0561  
FAX (703) 354-6833

VIENNA OFFICE  
SUITE 201  
100 EAST STREET, SE  
VIENNA, VIRGINIA 22180  
~~(703) 255-6408~~  
FAX (703) 255-6137

WILLIAM B. MASON JR.  
CHARLES A. PRICE  
R. ROBERT RUSHE  
MARIA DELIGORGIS  
H. MARK GOETZMAN

\* ALSO OFFICE - F1306  
\* ALSO OFFICE - DC 44

January 15<sup>th</sup>, 1993

Wm. L. Griffith & Co. of Virginia, Inc.  
3541 Chain Bridge Road, Suite 5A  
Fairfax, Virginia 22030

Re: Willow Run Shopping Center

Gentlemen:

This is to confirm that \$130,000, which represents the escrow amount of the above-referenced project to be developed by Najla Associates, Inc., has been set aside with E.L. & P. Title and Escrow Co. to be funded in the event of delayed payment by owner for progress payments to Wm. L. Griffith & Co. of Virginia, Inc., Contractor, under the terms of the Construction Contract. No brokerage fees, inspection-fees, taxes, insurance, interest, or any other costs or fees incurred by owner or owner's agents will be removed from the escrow amount.

It is understood that progress payments are to be made by the owner within thirty (30) days of the date that owner receives the application for payment submitted by the contractor. Should owner fail to pay to contractor any progress payment(s) in a timely manner, contractor shall notify this escrow company, and it is hereby agreed by the parties hereto as follows:

- (i) escrow company shall pay within five (5) days of receipt of notice of owner's default the amount of the application for payment not paid by owner;
- (ii) cause the owner to reimburse within ten (10) days the escrow account for the sum paid over to contractor by the escrow company; and
- (iii) if either (i) or (ii) above are not accomplished in a timely manner, contractor may, as its option, cease work on the project

362



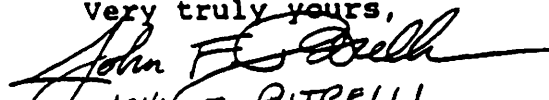
FILED DEF-EX. # 12  
DATE 12/12/95  
JUDGE ABZ  
CASE # 6137523

Wm. L. Griffith & Co. of Virginia, Inc.  
January 15th, 1993  
Page Two

(Willow Run Shopping Center), but in any event owner is not relieved from its payment obligations under the contract.

Notwithstanding any other agreement contained herein or in the contract documents, it is understood and agreed that at such time as the total amount of the unpaid work to be performed under the contract documents, together with any retention owed the contractor, totals \$130,000.00 or less, all applications for payment shall be submitted to the escrow company and paid by the escrow company with the approval of the owner.

Very truly yours,

  
JOHN F. PITRELLI  
Hugh C. Cregger, Jr.

HCC/lbw

SEEN AND AGREED THIS 12<sup>th</sup> DAY OF February, 1993.

WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

By:

  
DAVID R. COGG President

SEEN AND AGREED THIS 26<sup>th</sup> DAY OF January, 1993.

NAJLA ASSOCIATES, INC. - OWNER

By:

  
President

**Black Orchid Restaurant**

7410 Little River Turnpike  
Annandale, Virginia 22003

September 30, 1993

John Pitrelli, Esquire  
Eskovitz, Lazarus, Pitrelli & Cregger  
7010 Little River Turnpike  
Suite 250  
Annandale, VA 22003

Re: Wm. L. Griffith & Co. of Virginia  
Payment Application #7 & 8

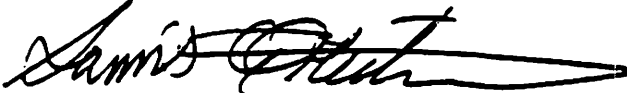
Dear Mr. Pitrelli,

This letter is to authorize you to release payment(s)  
regarding the Willow Run Shopping Center as follows:

Application # 7, invoice #0480	\$79,106.00
Application # 8, invoice #0481	\$24,156.00

If you should have any questions, please feel free to  
contact me at any time.

Sincerely,



Samir Greiten  
President  
NAJLA Associates

SQ/clm



PLD-DEF-EX. # 13  
DATE 12/11/95  
JUDGE 102  
CASE # 182523

FAX TRANSMISSION

CARRADOC HALL HOTEL  
AND THE  
BLACK ORCHID II  
RESTAURANT

1500 East Market Street  
LEESBURG, VIRGINIA 22075  
703-771-9200

FROM: Sam Kreitem

\*\*\*\*\*

TO: John Pitrelli, Esq.

ATTN: \_\_\_\_\_

FAX #: \_\_\_\_\_

DATE SENT 9-30-93  
NUMBER OF PAGES FAXED 2  
(including this page)

# ***AAJ & Associates, Inc. Consulting Engineers***

---

September 30, 1993

Mr. Samir Qreitem  
Najla Associates  
7410 Little River Turnpike  
Annandale, Virginia 22003

Subject: Griffith Payment Application # 7 & 8

Dear Mr. Qreitem:

The application # 7 for invoice No. 0480 in the amount of \$79,106.00, and application # 8 for invoice No. 0481 in the amount of \$24,156.00 are approved for payment.

If you have any questions or need additional information, please do not hesitate to call us.

Very truly yours,

***AAJ and Associates, Inc.***



***Ali Shakeri, P.E.***  
***President***

AS/c

---

***5417 Nibud Ct., Rockville, MD 20852 Tel: (301)-530-1710***

**COFFIT**

& CO. OF VIRGINIA

3541 CHAIN BRIDGE ROAD • SUITE 2 • FAIRFAX, VIRGINIA 22030 • (703)591-4788 • FAX (703)591-4776

October 8, 1993

E. L. & P. Title and Escrow Co.  
Suite 200  
7010 Little River Turnpike  
P.O. Box 830  
Annadale, VA 22003

Gentlemen:

We received \$103,262.00 for payment of our application for payment numbers 7 & 8. The funds for these payments appear to have been released from the escrow. It is my understanding that these funds were not appropriately released from the escrow because the escrow agreement permits release of funds only if the owner fails to make timely payment and contractor notifies title company of same. Accordingly, pursuant to paragraph (ii) please "cause the owner to reimburse within ten days the escrow account for the sum paid over to contractor by the escrow company".

Your prompt attention to this matter is appreciated.

Sincerely,



David Peacock

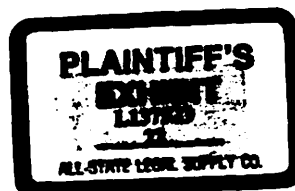
CC: Mr. Samir Qrietman  
Mr. Anthony Qrietman  
Jeffrey Gilmore, Esq.  
John Pitrelli, Esq.  
Hugh Cregger, Esq.

DP/dfs

790-8750  
~~8750~~

OCT 14 1993

367



PLD DEF-EX. #22  
DATE 12/12/95  
JUDGE ~~102~~  
CASE #6132523

**ORICITU**

& CO. OF VIRGINIA

3541 CHAIN BRIDGE ROAD • SUITE 2 • FAIRFAX, VIRGINIA 22030 • (703)591-4788 / FAX (703)591-4776

November 5, 1993

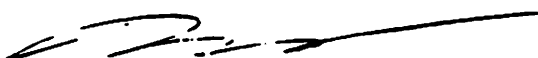
E. L. & P. Title and Escrow Co.  
Suite 200  
7010 Little River Turnpike  
P.O. Box 830  
Arlington, VA 22202

Gentlemen:

Please allow this letter to serve as written notice that the Owner has failed to make timely payment for the above referenced project in the amount of \$73,666.00 copies of invoices attached. We therefore make the demand of immediate release of all escrow funds in this amount.

We assume, although you have failed to notify us, that the escrow funds previously released in contravention of the Escrow Agreement have been replenished (refer to previous correspondence dated October 8, 1993, copy attached). We expect full payment of the attached invoices.

Sincerely,



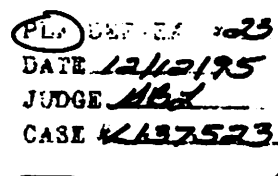
David Peacock

DP/dfs

Attachment

cc: Samir Qreitem  
Anthony Qreitem  
John Pitrelli  
Hugh Cregger  
Jeff Gilmore

368





DAYTON, OHIO  
DONALD L. LAZARUS  
JOHN J. PITRELLI  
THOMAS M. WILTSORE  
RICHARD L. CREGGER, JR.  
RICHARD L. CREGGER, JR.

TELEPHONE (603) 255-4404  
FAX (603) 255-4404

ESKOVITZ, LAZARUS, PITRELLI & CREGGER

ANNANDALE FINANCIAL CENTER  
SUITE 250  
1000 LITTLE RIVER TURNPIKE  
PO BOX 830  
ANNANDALE, VIRGINIA 22033  
(703) 354-1052  
FAX (703) 354-1052

CHARLES A. PRICE  
R. ROBERT RUSHE  
ANDREA B. THOMPSON  
WILLARD H. SAUNDERS  
THOMAS M. WILTSORE

November 10, 1993

William L. Griffith & Co. of Virginia  
3541 Chain Bridge Road, Suite 2  
Fairfax, Virginia 22030

Attn: David Peacock

Re: Willow Run Shopping Center

Gentlemen:

Reference is made to your letter of November 5, 1993.

As you ascertained by the face of this firm's check, the \$103,262.00 payment you recently received was paid from the escrow account held by this firm. That disbursement was authorized by the owner, and we believed authorized by your firm. If you wish to return the check, we will then be able to acknowledge that we are holding the entire \$130,000.00 in escrow. At the present time, the escrow account contains only \$26,738.00.

We have received written instructions from the owner that we are not to disburse any sum from the escrow account.

As you know, the owner has retained Jeffrey Gilmore as their attorney, and a copy of this letter is being forwarded to him for his information.

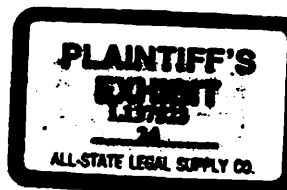
Very truly yours,

*Hugh C. Cregger, Jr.*  
Hugh C. Cregger, Jr.

HCC/lbw

cc: Jeffrey Gilmore, Esq.

369

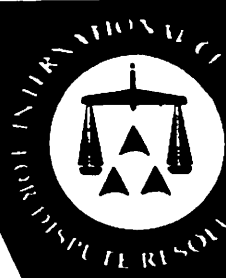


PLF-DEF-EX. 24  
DATE 12/12/93  
JUDGE HAK  
CASE # 4137523

# American Arbitration Association

1150 Connecticut Avenue, N.W., 6th Floor, Washington, D.C. 20036-4104

Telephone: (202) 296-8510 • Fax: (202) 972-9574



Garnette Cox  
Regional Director  
Washington, D.C. Office  
Lisa Garmen  
Regional Manager

June 13, 1994

S. Scott Morrison, Esq.  
Holland & Knight  
2100 Pennsylvania Ave., N.W.  
Suite 400  
Washington, DC 20037

James Ray Cottrell  
Gannon, Cottrell & Ward  
411 N. Washington Street  
Alexandria, VA 22314

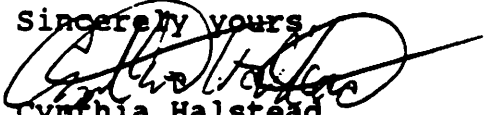
Re: 16 110 00493 93  
William L. Griffith & Co. of Virginia, Inc.  
and  
Samir F. Qreitem and Najla Associates, Inc.

To the parties:

By direction of the Arbitrator, we hereby transmit to you the duly executed Award in this matter.

If either party has left exhibits in this office, or with the Arbitrator, please advise this office within thirty (30) days if you wish to have them returned. Otherwise, they will be destroyed.

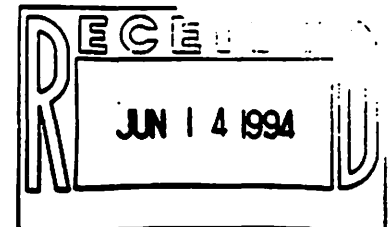
Any outstanding fees still due the Association remain due and payable. This file is now closed.

Sincerely yours,  
  
Cynthia Halstead  
Case Administrator

Enclosure(s): a/s

cc: Kevin P. Gallen, Esq.  
AAA, New York

PLF-DEF-EX. # 32  
DATE 12-13-95  
JUDGE GBL  
CASE # 6137523



Negotiation • Mediation • Arbitration • Elections • Education & Training

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Headquarters: 140 West 51st Street, New York, NY 10020-1203

AMERICAN ARBITRATION ASSOCIATION  
Washington, D.C. .

WILLIAM L. GRIFFITH & CO. )  
OF VIRGINIA, INC. )  
Claimant and )  
Counter-Respondent )

v. )

AAA No. 16 110 00493 93

SAMIR F. QREITEM )  
and )  
NAJLA ASSOCIATES, INC. )  
Respondents and )  
Counter-Claimants )

**AWARD OF ARBITRATOR**

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by and between the above-named parties, and having been duly sworn and having fully heard, reviewed, and considered the allegations, proofs, evidence, arguments, and written submissions of such parties, AWARDS as follows:


1. Respondents, Samir F. Qreitem and Najla Associates, Inc., shall pay to Claimant, William L. Griffith & Co. of Virginia, Inc., the sum of NINETY-SIX THOUSAND TWO HUNDRED FIFTY-SIX DOLLARS AND ZERO CENTS (\$96,256.00). Respondents are jointly and severally liable for the payment of such sum to Claimant.

2. Upon receipt of this payment, Claimant shall (a) release all mechanic's liens filed against Respondents with respect to the Willow Run Shopping Center and (b) turn over to the Respondents all warranties and permits which Claimant has in its possession with respect to this project, and (c) provide

Respondents with copies of any project-related design or construction documents requested by Respondents which Claimant has in its possession.

3. Each party shall bear its own costs in connection with the arbitration, including attorneys' fees and expert witness fees. The administrative fees and expenses of the American Arbitration Association, including the administrative expenses and fees for remuneration of the Arbitrator, shall be shared equally by the Claimant and the Respondents, and shall be paid as directed by the Association.

4. This award is in full settlement of all claims and counterclaims submitted to this Arbitration.

  
KEVIN P. GALLEN, ESQ.  
ARBITRATOR

Dated: June 10, 1994

WM. L.  
**GRIFFITH**  
& CO. OF VIRGINIA

3541 CHAIN BRIDGE ROAD • SUITE 2 • FAIRFAX, VIRGINIA 22030 • (703)591-4788 / FAX (703)591-4776

Fax: 703-591-4776

\*\*\*\*\*FACSIMILE\*\*\*\*\*

Date: 11/26/94

To: ESKOVITZ LANGAUZ,  
PITRELLI + CROGER

Subject: WILLIAM KIM  
SHOPPING CTR.

Attn: John Pitrelli

From: David Pearson

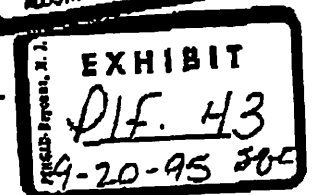
We are sending you via facsimile the following items:

2 pages including cover.

Comments:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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372A



# GRIFFITH

& CO. OF VIRGINIA

3541 CHAIN BRIDGE ROAD • SUITE 2 • FAIRFAX, VIRGINIA 22030 • (703)591-4788 / FAX (703)591-4776

November 2, 1994

Mr. John Pitrelli  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center  
7010 Little River Turnpike  
Suite 200  
Annandale, VA 22003

Via Facsimile &  
Certified Mail

RE: Willow Run Escrow

Dear John:

I was unable to reach you by telephone. We have received the Confirmation of Award for the arbitration judgement at Willow Run Shopping Center.

I would appreciate your immediate release of the escrow funds. If there is any further information needed, please contact us.

Please contact us when the funds are available for pick up.

Sincerely,

*David Peacock*  
David Peacock  
President.

DP/dfs

# HOLLAND & KNIGHT

WASHINGTON, D.C.  
FORT LAUDERDALE  
JACKSONVILLE  
MIAMI  
ORLANDO  
ST. PETERSBURG  
TALLAHASSEE  
TAMPA  
WEST PALM BEACH

2100 PENNSYLVANIA AVENUE, N.W.

Suite 400

WASHINGTON, D.C. 20037-3202

TELEPHONE (202) 955-8000

FAX (202) 955-5504

SPECIAL COUNSEL

SHAW, LIGHEA,  
PARENTE, ESTERIO  
& SCHWARTZ, P.C.

GARDEN CITY, NY  
NEW YORK, NY

S. SCOTT MORRISON, CHARTERED  
Partner

Writer's Direct Dial  
(202) 457-7036

November 18, 1994

VIA TELECOPY/REGULAR MAIL

John F. Pitrelli, Esquire  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center, Suite 200  
7010 Little River Turnpike  
P.O. Box 830  
Annandale, Virginia 22003

Re: Willow Run Shopping Center

Dear Mr. Pitrelli:

Enclosed please find a copy of the Final Judgment entered today by Judge Kenny against Samir Qreitem and NAJLA Associates, Inc., jointly and severally, in the amount of \$96,256.00 plus interest and costs.

You have until the close of business on Tuesday, November 22, 1994, to tender the full amount of the escrow funds and a complete accounting of the escrow account to William L. Griffith & Co. of Virginia, Inc. ("Griffith"). You have willfully delayed this action as long as possible in dereliction of your obligations to Griffith under the escrow agreement. Further delay will not be tolerated.

Our position is non-negotiable. If you have not complied with this demand within the deadline set forth above, we will proceed with litigation against you and your firm.

Sincerely,

  
S. Scott Morrison

SSM/lac

cc: David Peacock (w/encl.)

373



DEF-EX. # 38  
DATE 12/12/95  
JUDGE 462  
CASE # L137523

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GENERAL EXCAVATION, INC., a Virginia  
corporation,

Complainant,

v.

NAJLA ASSOCIATES, INC., a District of  
Columbia corporation, et al.,

Defendants.

Chancery No. 134308

*Copy of arbitration  
transcript in  
file? No*

WILLIAM L. GRIFFITH & CO. OF VA, INC.,

Cross-Complainant,

v.

SAMIR F. QREITEM, NAJLA  
ASSOCIATES, INC., et al.,

Cross-Defendants.

**FINAL JUDGMENT ORDER CONFIRMING ARBITRATION  
AWARD UNDER COUNT II OF AMENDED CROSS-BILL**

THIS CAUSE came to be heard on motion by Cross-Complainant William L. Griffith & Co. of Virginia, Inc. to Confirm Arbitration Award Pursuant to Count II of Amended Cross-Bill, and

IT APPEARING TO THE COURT after consideration of the pleadings filed by the parties and arguments at a hearing on September 30, 1994 that good cause exists therefor, as set forth in the Court's letter ruling dated October 20, 1994; it is hereby

ORDERED, that the motion is GRANTED, and the Award of Arbitrator is hereby confirmed; and it is further



ORDERED, that final judgment in the specific amount of Ninety Six Thousand Two Hundred Fifty Six Dollars (\$96,256.00), plus costs and interest at the rate of nine percent (9%) from June 10, 1994 until paid, is entered against SAMIR F. QREITEM, whose address is 7410 Little River Turnpike, Annandale, Virginia 22003, and NAJLA ASSOCIATES, INC., whose address is 7410 Little River Turnpike, Annandale, Virginia 22003, jointly and severally, in favor of William L. Griffith & Co. of Virginia, Inc. on Count II of its Amended Cross-Bill.

ENTERED this 18 day of November, 1994.

*Thomas S. Kenny*  
Judge Thomas S. Kenny

WE ASK FOR THIS:

*Gina Schaar Howard*  
S. Scott Morrison  
Gina Schaar Howard (VSB #29129)  
Holland & Knight  
2100 Pennsylvania Ave., N.W.  
Washington, D.C. 20037

Counsel for William L. Griffith  
& Co. of Virginia, Inc.

SEEN AND OBJECTED TO:

*[Signature]*  
James Ray Cottrell  
Gannon, Cottrell & Ward, P.C.  
411 North Washington Street  
Post Office Box 1286  
Alexandria, VA 22313-1286

Counsel for Cross-Defendants Samir F.  
Qreitem and Najla Associates, Inc.

*for all reasons stated in  
argument to the court and  
including court's granting  
of judgment without an  
evidentiary hearing and  
refusal to allow  
amendment of cross-bill  
against Griffith to  
overturn arbitration  
award.*

WAS-63922

LAW OFFICES  
GERALD R. WALSH, P.C.

SUITE 200  
4020 UNIVERSITY DRIVE  
FAIRFAX, VIRGINIA 22030 6802

TELEPHONE 703.385.6162  
FACSIMILE 703.385.0176

January 11, 1995

Wm. L. Griffith & Co. of  
Virginia, Inc.  
2721D Merrilee Drive  
Fairfax, Virginia 22031

Attention: Mr. David Peacock

Re: General Excavation, Inc. and  
Wm. L. Griffith & Co. of  
Virginia, Inc. v.  
NAJLA Associates, Inc.,  
et al. Chancery No. 134308  
Circuit Court of Fairfax County

Dear Mr. Peacock:

In accordance with Mr. Scott Morrison's January 9, 1995 letter, I have enclosed a Cashier's Check in the amount of \$101,382.62 in full payment of the judgment affirmed in Chancery No. 134308 and the related mechanics liens that were placed on NAJLA Associates, Inc.'s property.

I enclose a copy of my letter to Mr. Morrison advising him of the transmission of this check to you.

Very truly yours,

  
Gerald R. Walsh

GRW/rk  
Enclosure

cc: S. Scott Morrison, Esq.



376

PL DEF-EX. #3  
DATE 12/12/95  
JUDGE [Signature]  
CASE # 13352

LAW OFFICES  
GERALD R. WALSH, P.C.

SUITE 200  
4020 UNIVERSITY DRIVE  
FAIRFAX, VIRGINIA 22030-6802  
TELEPHONE 703 385-6162  
FACSIMILE 703 385-0176

January 11, 1995

S. Scott Morrison, Esq.  
Holland & Knight  
2100 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20037

Re: General Excavation, Inc. and  
Wm. L. Griffith & Co. of  
Virginia, Inc. v.  
NAJLA Associates, Inc.,  
et al. Chancery No. 134308  
Circuit Court of Fairfax County

Dear Mr. Morrison:

I have hand-delivered to David Peacock this date a Cashier's Check in the amount of \$101,382.62, which represents payment of the amount of the arbitration award and interest in the amount of \$5,126.62, calculated at the rate of 9% per annum. A copy of the check is enclosed.

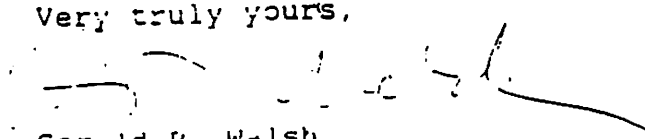
With the delivery of this check, I request that you promptly file a satisfaction of judgment and releases of all mechanics liens of the shopping center. Please send me copies of all documents you file in the Clerk's Office to accomplish this purpose.

Since full payment is being made, Mr. Samir Qreitem is not going to appear before the Commissioner and I expect you will notify him. Please take the necessary steps to dismiss all the garnishment proceedings and provide me copies of the pleadings which accomplish this.

Before I proceed to prepare and file responsive pleadings for my clients in Law No. 137523, I would appreciate knowing if your client is going to pursue that matter against NAJLA and Mr.

Breitem. I look forward to hearing from you at your earliest convenience on this point.

Very truly yours,



Gerald R. Walsh

GRW/rk  
Inclosure



**Community Bank**

A Trust Company of Virginia

STERLING, VIRGINIA

1-10-95

No. 33183

PAY TO THE  
ORDER OF

\*\*\*\*\* WM. L. GRIFFITH & CO OF VIRGINIA, INC. \*\*\*\*\*

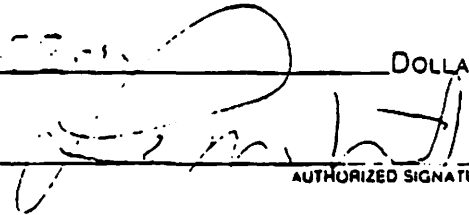
\$ \*101,382.62\*

THE SUM OF 101,382 AND 62/100

DOLLARS

REMITTER Wm L Griffith & Co

**CASHIER'S CHECK**

  
AUTHORIZED SIGNATURE

⑆033183⑆ ⑆056004720⑆

⑆2001004⑆

HOLLAND & KNIGHT

2100 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20037-3202  
TELEPHONE (202) 955-3000  
FAX (202) 955-3701

SPECIAL COUNSEL  
NEW YORK  
PAID BY THE  
SOUTHWEST  
GARDEN CITY, NY  
NEW YORK, NY

June 17, 1994

JOSEPH A. MASSARO III  
NOT ADMITTED IN D.C.

Direct Dial (202) 457-7031

VIA FAX AND REGULAR MAIL

John F. Pitrelli, Esquire  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center, Suite 200  
7010 Little River Turnpike  
P.O. Box 830  
Annandale, Virginia 22003

Re: Willow Run Shopping Center Escrow Agreement

Dear Mr. Pitrelli:

I have enclosed a copy of the award rendered in the arbitration proceeding between William L. Griffith & Co. of Va., Inc. ("Griffith") and Samir Oreitem and NAJLA Associates, Inc. On behalf of Griffith, I hereby demand that you release the remaining funds in the escrow account, including accrued interest, to Griffith immediately.

Your cooperation is appreciated.

Sincerely,

*Joseph A. Massaro III*

Joseph A. Massaro III

Enclosure

cc: David L. Peacock

WAS-47748

PLAINTIFF'S  
EXHIBIT

L137523

ALL-STATE LEGAL SUPPLY CO.

EXHIBIT

LIF 48

10-10-95

379A

# HOLLAND & KNIGHT

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PORTLAND, ME  
BOSTON, MA  
CHICAGO, IL  
DENVER, CO  
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LOS ANGELES, CA  
MIAMI, FL  
NEW YORK, NY  
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SAN FRANCISCO, CA  
WASHINGTON, D.C.

2100 PENNSYLVANIA AVENUE, N.W.  
SUITE 400  
WASHINGTON, D.C. 20037-3202  
TELEPHONE (202) 955-3000  
FAX (202) 955-5504

SPECIAL COUNSEL

SHAW LICHTHA  
PARENTE, KENNEDY  
& SCHWARTZ, P.C.

GARDEN CITY, NY  
NEW YORK, NY

S. SCOTT MORRISON, CHARTERED  
Partner

Writer's Direct Dial  
(202) 457-7036

October 28, 1994

VIA TELECOPY/REGULAR MAIL

John F. Pitrelli, Esquire  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center, Suite 200  
7010 Little River Turnpike  
P.O. Box 830  
Annandale, Virginia 22003

Re: Willow Run Shopping Center

Dear Mr. Pitrelli:

Enclosed please find a copy of Judge Kenny's order of October 20 granting the Motion to Confirm Arbitration Award filed by William L. Griffith and Co. of Virginia, Inc. ("Griffith").

In accordance with your repeated representations to me, we expect you to immediately forward the balance of the escrow funds with interest directly to David Peacock along with a complete accounting of the escrow account. We will, of course, credit this amount against the amount of the arbitration award.

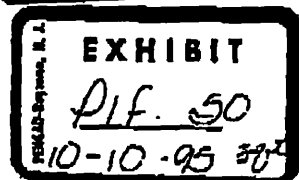
Please call me with any questions.

Very truly yours,

*[Signature]*  
S. Scott Morrison

SSM/lac  
Enclosure

cc: David Peacock  
WAS-68976



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009  
(703) 246-2721 Fax (703) 263-4432

COUNTY OF FAIRFAX

CITY OF FAIRFAX

DR MARK A. ZAFFARANO  
DIRECTOR JUDICIAL OPERATIONS

JAMES KEITH  
LEWIS D. MORRIS  
BURCH MILLSAP  
BARNARD F. JENNINGS  
LEWIS H. GRIFFITH  
WILLIAM G. PLUMMER  
THOMAS J. MIDDLETON  
RETIRED JUDGES

October 20, 1994

RICHARD J. JAMBORSKY  
F. BRUCE BACH  
QUINLAN H. HANCOCK  
J. HOWE BROWN  
JACK B. STEVENS  
THOMAS A. PORTKORT  
MICHAEL P. MCWEENEY  
ROSEMARIE ANNUNZIATA  
THOMAS S. KENNY  
MARCUS D. WILLIAMS  
GERALD BRUCE LEE  
STANLEY P. KLEIN  
ALBERT W. WOODBRIDGE JR.  
ARTHUR H. VIERHUGEL JR.  
JANE MARUM ROUSH  
JUDGES

James Ray Cottrell, Esq.  
Gannon, Cottrell & Ward, P.C.  
411 N. Washington Street  
P. O. Box 1286  
Alexandria, VA 22313-1286

S. Scott Morrison, Esq.  
Holland & Knight  
2100 Pennsylvania Ave., N.W.  
Washington, D.C. 20037

Re: General Excavation Inc. v. Najla Associates Inc., et  
al.  
In Chancery No. 134308

Dear Counsel:

This matter is before the Court upon the defendant and cross-complainant Griffith's Motion to Confirm Arbitration Award. This Court heard oral argument on September 30, 1994.

Griffith is a commercial construction developer that contracted to build a shopping center for defendant-Najla Associates Inc., or Najla's President Samir Qreitem, or both.<sup>1</sup> The contract called for submitting all contract disputes to arbitration. A dispute arose between the parties, they submitted it to arbitration and a hearing took place on May 16-18, 1994. On June 10, 1994, the arbitrator issued an award against Qreitem and Najla "jointly and severally" for \$96,256, which Griffith seeks to confirm here. Najla and Qreitem oppose such confirmation, based in part on the following chain of events:

<sup>1</sup>The front page of the contract identifies the "Owner" as "Mr. Samir F. Qreitem" (sic), but the signature on page 14 is "NAJLA ASSC. (sic) INC. by Samir F. Qreitem."



Before the arbitration hearing took place, this suit was filed against Griffith, Najla, Qreitem, and another party by General Excavation, Inc. (GEI), a subcontractor on the shopping center project. The suit, arising out of the same dispute covered in the arbitration hearing, alleges that Griffith owes GEI for work performed and asks for enforcement of a mechanics lien. On May 19, the day after the subject arbitration hearing but before the award, Griffith filed a cross-bill against GEI, Najla and Qreitem alleging, among other things, that Najla and Qreitem owed Griffith for work performed and asking for enforcement of mechanics liens against them. On June 3, Najla and Qreitem filed their own cross-claim against Griffith, stating that they had performed all their contractual duties, that disputes between them and Griffith were subject to a pending arbitration, and that Griffith was liable for any amounts owed to GEI. Najla and Qreitem assert that they were not served with Griffith's cross-bill and had no knowledge of it until after the arbitrator's award on June 10. Following the arbitrator's award, Griffith successfully moved to amend its cross-bill, substituting a request to confirm the arbitrator's award for its prior breach of contract claims. Najla and Qreitem then filed another cross-bill against Griffith, requesting that the arbitrator's award be vacated on the grounds that it was obtained "by fraud and other undue means," and that the arbitrator had exceeded his powers.

In their cross-bill, response to this motion, and oral argument, Najla and Qreitem explained their grounds of objection as follows: They argue that the fraud consists of Griffith's filing the cross-bill against them while the arbitration was pending and without their knowledge; they claim that they would not have proceeded with the arbitration had they known Griffith was pursuing non-contractual remedies. They argue that the arbitrator exceeded his powers, first, by miscalculating the amount due Griffith under the contract, and second, by failing to apply Virginia law. Qreitem also argues that the arbitrator exceeded his powers by making a material mistake of law in holding Qreitem personally liable on the contract. Finally, Qreitem and Najla assert that Griffith is improperly seeking to insert the award confirmation issue into this mechanics lien suit, and that confirmation would amount to "substituting" the award for the strict requirements of a perfected mechanics lien.

This Court has jurisdiction to entertain this motion because, having obtained jurisdiction over these parties and this dispute in the mechanics lien action, the Court may proceed to adjudicate other matters that arise out of the same dispute.

See, for example, Erlach v. Hendrick Construction Co., 217 Va. 108, 115 (1976), citing Johnston Bros. v. Bunn, 108 Va. 490, 493 (1908). Accord: Carter v. Keeton and Coleman, 112 Va. 307, 310 (1911).

Under Va. Code § 8.01-581.09, -581.010, and -581.011, the Court shall confirm an arbitration award unless, within ninety days, grounds are urged for vacating, modifying or correcting it. The party urging such grounds bears the heavy burden of conclusively proving the award's invalidity. Howerin Residential Sales v. Century Realty, 235 Va. 174, 179 (1988). Accord: Bandas v. Bandas, 16 Va. App. 427 (1993). Among the statutory grounds for vacating the award is that the award was procured by "corruption, fraud or other undue means."

The evidence advanced by Qreitem and Najla here does not support their claim of fraud. Under Rules 2:4 and 2:14 of the Rules of the Supreme Court of Virginia, Griffith had one year to serve its cross-bill. Lawfully delaying service of a properly filed pleading, without more, does not amount to misrepresentation. Moreover, Qreitem and Najla have not shown that the existence of the cross-bill was a material fact. Thus, they point to no contract provision or case law that would have given them the right to withdraw from the arbitration had they known that Griffith had filed a cross-bill to protect its rights under the mechanics lien statute. That statute provides a mechanism for achieving priority in the collection of claims; the mere compliance with its provisions here did not undercut the pending arbitration of the facts of that claim.

The statute does not list "material mistake of law or fact" as grounds for vacating the award. In raising these challenges, Qreitem and Najla rely on § 8.01-581.010(3), which requires vacating the award where the arbitrator has exceeded his powers. The prior arbitration statute, repealed in 1986, allowed awards to be set aside for only serious mistakes apparent on the award's face. Wyatt Realty v. Bob Jones Realty, 222 Va. 365, 367 (1981). One of the few cases construing the current statute (which adopts the Uniform Arbitration Act) holds that it is beyond the power of a reviewing court to decide whether an arbitrator was "mistaken" in rulings of fact or law, unless it is shown that the mistake thwarted the intention of the arbitrator. Rosenstiel v. Fair, 23 Va. Cir. 331, 342 (1991). And the Virginia Court of Appeals has held that "arbitration agreements and the awards embodied in them shall not be set aside on appeal unless there exist grounds to set aside a contract in equity, such as unconscionability or as

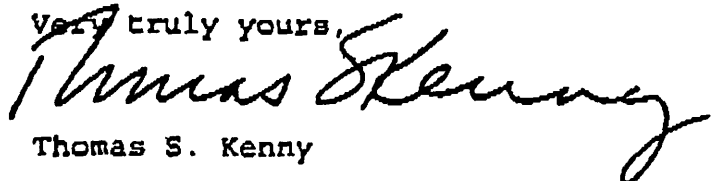
contrary to public policy." Bandas v. Bandas, supra, at 431.

Even assuming that a material mistake of law or fact would support vacating the award under the current statute, none has been proved here. The award states only its conclusions and does not discuss the arbitrator's reasoning about Qreitem's personal liability or about any other issue in the case; thus, the face of the award reveals no obvious misinterpretation of law. Whether Qreitem had bound himself personally to the contract is a mixed question of law and fact depending, in part, on an examination of the contract. The contract states on its first page that it was made between "the Owner," Samir F. Qreitem, and "the Contractor," Griffith. Najla's name does not appear in the contract until the final page, where it was handwritten above Qreitem's signature, which is preceded by the word "by." On this evidence alone, it cannot be said that the arbitrator clearly erred in finding Qreitem personally liable. Similarly, the arbitrator's calculation of the amount due Griffith depended upon his consideration of the factual evidence presented at the hearing; Qreitem and Najla point to nothing on the face of the award and no extrinsic evidence that conclusively proves that the arbitrator made any mistake in this matter, much less that he exceeded his powers in doing so. Finally, Qreitem and Najla have failed to support by either evidence or argument the last objection in their cross-bill, that the arbitrator failed, "in some unspecified manner, "to apply Virginia law to determine the obligations and rights of the parties."

Because Qreitem and Najla have not carried their burden of proving statutory grounds for vacating the award, Griffith's Motion to Confirm Arbitration Award is granted. This confirmed award will constitute evidence of the amount due against the property in the mechanics lien action, without prejudice to Qreitem and Najla's presentation of evidence that the liens themselves, or the cross-bill to enforce them, are defective under the strict requirements of the mechanics lien statute.

Counsel for Griffith will please draft an appropriate order, submitting it to counsel for Qreitem and Najla for approval as to form and endorsement.

Very truly yours,

  
Thomas S. Kenny

OCT 27 1994

# WM. L. GRIFFITH & CO. OF VIRGINIA, INC.

3541 CHAIN BRIDGE ROAD SUITE 5A FAIRFAX, VIRGINIA 22030  
(703) 591-4788

July 30, 1992

Mr. Hugh C. Cregger, Jr., Esq.  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center  
7010 Little River Turnpike  
Suite 200  
P.O. Box 830  
Annandale, VA 22003

RE: Willow Run Shopping Center

Dear Mr. Cregger:

We visited the site and studied the local conditions affecting the cost of the work, your proposed work, and the documents provided by you, including (i) drawings, (ii) soils study, and (iii) site plan. We hereby propose to provide and furnish all labor, materials, necessary tools, expendable equipment and transportation services necessary to perform and complete in a workmanlike manner, all of the work indicated by the same.

For the work set forth in the aforementioned Documents, and the attached Qualifications, we propose the sum of

Six Hundred Fifty Thousand Five Hundred Seventy-Four Dollars

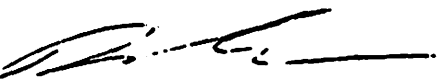
(\$650,574.00)

The attached Qualifications are to be incorporated into the Contract. The Contract is understood to be a standard AIA A201 Contract Document.

We further offer our services to provide alternative cost savings, prudent development practices, and coordination with utility and governmental agencies to reinstate your permit and maintain order and appropriate timing to your tenants.

Thank you for the opportunity to be of service to you and your client.

Sincerely,



David Peacock

DP/dfs

Attachment

380



FILE DEF-EX. # 45  
DATE 12/12/95  
JUDGE 402  
CASE # 137523

## QUALIFICATIONS

The following qualifications and exclusions are proposed for specific incorporation to the Base Bid sum.

### I. QUALIFICATIONS

- A. The earthwork to be performed is assumed to be within  $\pm 0.2'$  of the grades indicated on the plans.
- B. In the event the plans are not specific nor coordinated, this proposal is based on the least expensive alternatives.
- C. The masonry is included with split face block on the front and side areas only.
- D. Any insulation provided shall be provided as shown on the drawings at the specified thickness.
- E. The exterior finish insulation system is provided over a gypsum lath attached directly to the building component. The designers drawings is to be adhered to regardless of performance.
- F. The metal roofing system is provided with the standing seam panel of a standard color Kynar finish.
- G. The hardware for the door is considered with the allowance stated in the plans.
- H. Unless otherwise specified on the drawings, the acoustical ceiling system is provided as a non-fissured mineral fiber.
- I. The building is proposed with engineering as provided by the Owner. Any changes or adjustments will be at the Owner's expense.
- J. The mechanical, plumbing, fire protection and electrical utilize the least expensive materials in the situations the drawings are unclear.
- K. Control joints only are considered for exterior concrete walks.
- L. The power company is assumed to supply adequate power for the space within 5' of the building. Any charges, costs, fees or assessments outside this point are the Owner's responsibility.
- M. Only electrical fixtures shown are included.
- N. Mechanical, electrical and plumbing information not detailed nor specified on the correlating plans sheets is not included.
- O. All permit fees are to be provided by Owner except mechanical, electrical, fire protection and plumbing.
- P. All testing, engineering inspections, and certification of materials is to be performed by others at the Owner's expense.
- Q. This proposed bid is valid for a period of thirty days from submittals, and if not accepted within that period, we reserve the right to review and revise it as required.
- R. The proposed bid does not include any governmental or public utility fees or charges.

- S. No removal or handling of unsuitable excavations nor replacement of unsuitable soils or unsuitable materials exposed during construction have been included in this proposal. No excavation is included below 5' from building finish floor nor 1' below paving grade.
- T. Any subsurface water encountered will be removed at the Owner's expense on a time and material basis plus a 10% fee.
- U. This proposed bid is for work shown on the drawings and does not include any work not specifically shown; nor any work not shown but which might be required of public utilities or government agencies. (We as Contractors have competitively prepared this proposal based on the drawings supplied by your design professionals, and we cannot accept any responsibility for compliance of the drawings with any governmental or public utility codes or requirements.)
- V. Prior to occupancy of the Building, a final punchlist of uncompleted items shall be made with a mutually agreed upon value of each uncompleted item to be withheld as retention. No occupancy shall take place until final payments, including retention, except for the agreed upon uncompleted item value is made to the Contractor. Partial occupancy of the Building shall not constitute a waiver of any of the Contractor's rights under this clause.
- W. By execution of the Contract Agreement, the Owner confirms the contract amount shall be funded by (to be supplied by Owner) and his funding agreement sets aside by escrow or other acceptable method, at least the total of this proposed base bid sum to be funded to the Contractor per the payment provisions of the Contract Agreement.
- X. The site utility connections are considered to be within 5' of the proximity indicated on the drawings.
- Y. Should the Owner or his employees occupy any portion of the facility prior to completion, he or his employees are responsible for any communications, trash collection or cleanup, power and/or security.

## II. Specific Exclusions of the Base Bid Sum

- A. Utility relocations or new installation of utilities are not included.
- B. Repaving or modifications of Route 236 beyond the existing edge is not included.
- C. Water meter fees or assessments are not included.
- D. Future sewer escrows are not included.
- E. No foundation drain requirements of the foundation is considered.
- F. This proposal does not include any bond requirements. These cost would be extra to the project.
- G. No sealer coat nor product is applied over the exterior of the split face CMU units.
- H. Public street lighting is not considered a part of the base bid sum.
- I. No fixturing, finishes nor Owner supplied items are included in this proposal.
- J. No gas service is considered.
- K. Pest control is excluded from this project as the building is built entirely of concrete, CMU or metal products.
- L. Any temporary public barriers such as fencing of work area or security is not considered.

## III. Cost Saving Alternatives

We propose a meeting with you, the Owner and ourselves to discuss cost savings suggestions by applying certain modifications similar to projects we have performed in the past. We also believe alternatives should be reviewed to reduce the cost of the site excavation and certain elements of the building to prevent unneeded future remodeling. More details will be provided if requested.

WM. GRIFFITH & CO. OF VIRGINIA, INC.  
3541 Chain Bridge Road Suite 5A  
FAIRFAX, VIRGINIA 22030

LETTER OF TRANSMITTAL

(703) 591-4788

TO Eskovitz, Lazarus, Pitrelli & Cregger

DATE Oct. 9, 1992	JOB NO.
ATTENTION Hugh Cregger	
RE: Willow Run Shopping Center	

WE ARE SENDING YOU ☒ Attached ☐ Under separate cover via hand delivery the following items:

- ☐ Shop drawings    ☐ Prints    ☐ Plans    ☐ Samples    ☐ Specifications  
☐ Copy of letter    ☐ Change order    ☐ \_\_\_\_\_

COPIES	DATE	NO.	DESCRIPTION
3			Page 3 and 3A revised for the above referenced project.

THESE ARE TRANSMITTED as checked below:

- ☐ For approval    ☐ Approved as submitted    ☐ Resubmit \_\_\_\_\_ copies for approval  
☐ For your use    ☐ Approved as noted    ☐ Submit \_\_\_\_\_ copies for distribution  
☐ As requested    ☐ Returned for corrections    ☐ Return \_\_\_\_\_ corrected prints  
☐ For review and comment    ☐ \_\_\_\_\_  
☐ FOR BIDS DUE \_\_\_\_\_ 19 \_\_\_\_\_ ☐ PRINTS RETURNED AFTER LOAN TO US

REMARKS Please substitute these pages for pages 3 and 3A of the contracts which were previously forwarded to you. Please contact David Peacock should you have any questions.



PLD-DEF-EX. # 48  
DATE 12/12/95  
JUDGE D.D.  
CASE # 1137523

COPY TO

384

SIGNED: *D. Stewart*



**4.2 The Contractor shall achieve Substantial Completion of the entire Work not later than**

*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

**One Hundred Fifty calendar days after commencement of the work.**

**, subject to adjustments of this Contract Time as provided in the Contract Documents.**

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

**N/A**

**ARTICLE 5  
CONTRACT SUM**

**5.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Contractor's Fee determined as follows:**

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee, and explain how the Contractor's Fee is to be adjusted for changes in the Work.)*

**See Page 3-A**

**5.2 GUARANTEED MAXIMUM PRICE (IF APPLICABLE)**

**5.2.1 The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed**

**See Page 3-A**

**Dollars (\$ \_\_\_\_\_),**

**subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.**

*(Insert specific provisions if the Contractor is to participate in any savings.)*

**Should savings be gained by the change from the foundation method and paving subgrade preparation indicated in the Contract Documents to an alternate method, the Owner acknowledges in exchange for reduction of Contractor's fees, the Contractor shall receive sixty percent (60%) of the savings, not to exceed \$24,000. Should the Contractor choose to use an alternate foundation method and paving subgrade preparation, the cost to the Owner shall not exceed the cost stated in Article 5.2.1.**

**385**

5.1.1: Base building (base building defined as work indicated by the plans enumerated in Article 16.1.5 exclusive of any interior work such as drywall, light gage framing, bathrooms, mechanical, electrical or ceiling installation or materials) for the sum of Two Hundred Eighty-Eight Thousand Sixty-Four Dollars (\$288,064.00);

5.1.2: Earthwork, paving, foundation, site electrical and site concrete for the sum of Two Hundred Fifty-Five Thousand Four Hundred Two Dollars (\$255,402.00);

5.1.3: Allowance for interior finish (interior finish is the work indicated by the plans enumerated in Article 16.1.5 and excluded from the base building) for the sum of One Hundred Seven Thousand One Hundred Eight Dollars (\$107,108.00);

5.1.4: Contractor fee is established as 7.5% of the cost of the work included in 5.1.1, 5.1.2 and 5.1.3 not to exceed Forty-Five Thousand Three Hundred Eighty-Nine Dollars (\$45,389.00), the cost of the Performance and Payment Bond is included in the Contractor's fee;

5.1.4.1: Should the scope of this work increase due to unforeseen circumstances or from additions in the work, the Contractor shall be entitled to a fee of 7.5% above the cost of the change.

**4.2** The Contractor shall achieve Substantial Completion of the entire Work not later than  
*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

One Hundred Fifty calendar days after commencement of the work.

, subject to adjustments of this Contract Time as provided in the Contract Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

N/A

## **ARTICLE 5**

### **CONTRACT SUM**

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See Page 3-A

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See Page 3-A

Dollars (\$ \_\_\_\_\_),

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*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

One Hundred Fifty calendar days after commencement of the work.

, subject to adjustments of this Contract Time as provided in the Contract Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

N/A

## **ARTICLE 5**

### **CONTRACT SUM**

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*(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee, and explain how the Contractor's Fee is to be adjusted for changes in the Work.)*

See Page 3-A

### **5.2 GUARANTEED MAXIMUM PRICE (IF APPLICABLE)**

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See Page 3-A

Dollars (\$ ),

subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.

*(Insert specific provisions if the Contractor is to participate in any savings.)*

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5.1.4: Contractor fee is established as 7.5% of the cost of the work included in 5.1.1, 5.1.2 and 5.1.3 not to exceed Forty-Five Thousand Three Hundred Eighty-Nine Dollars (\$45,389.00), the cost of the Performance and Payment Bond is included in the Contractor's fee;

5.1.4.1: Should the scope of this work increase due to unforeseen circumstances or from additions in the work, the Contractor shall be entitled to a fee of 7.5% above the cost of the change.

Date 10/5 Hour 5:35  
To Mr. C.  
**WHILE YOU WERE OUT**  
From Ed Peacock  
Of \_\_\_\_\_  
Phone ( ) 591-4788

Telephoned	Returned Call	Please Call
Please See Me	Will Call Again	Important



PERFORMANCE AND  
PAYMENT BOND

THE AETNA CASUALTY AND SURETY COMPANY  
Hartford, Connecticut 06115

KNOW ALL MEN BY THESE PRESENTS, THAT, WILLIAM L. GRIFFITH & CO. OF VIRGINIA, INC.

(hereinafter called the Principal), as Principal, and THE AETNA CASUALTY AND SURETY COMPANY, a corporation organized and existing under the laws of the State of Connecticut with its principal office in the City of Hartford, Connecticut (hereinafter called the Surety), as Surety, are held and firmly bound unto

NAJLA ASSOCIATES, INC.

(hereinafter called the Owner), and to all persons who furnish labor or material directly to the Principal for use in the prosecution of the work hereinafter named, in the just and full sum of \$650,574.00

SIX HUNDRED FIFTY THOUSAND FIVE HUNDRED SEVENTY-FOUR AND ----- 00/100 Dollars,  
to the payment of which sum, well and truly to be made, the said Principal and Surety bind themselves, and their respective heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract with the Owner, dated the 15TH day of DECEMBER, 1992, to CONSTRUCT WILLOW RUN SHOPPING CENTER AT 6653 - 6667 LITTLE RIVER TURNPIKE, FAIRFAX, VIRGINIA

which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall fully indemnify the Owner from and against any failure on his part faithfully to perform the obligations imposed upon him under the terms of said contract free and clear of all liens arising out of claims for labor and material entering into the work, and if the said Principal shall pay all persons who shall have furnished labor or material directly to the Principal for use in the prosecution of the aforesaid work, each of which said persons shall have a direct right of action on this instrument in his own name and for his own benefit, subject, however, to the Owner's priority, then this obligation to be void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, that no action, suit or proceeding shall be had or maintained against the Surety on this instrument unless the same be brought or instituted and process served upon the Surety within two years after completion of the work mentioned in said contract, whether such work be completed by the Principal, Surety or Owner; but if there is any maintenance period provided in the contract for which said Surety is liable, an action for maintenance may be brought within two years from the expiration of the maintenance period, but not afterwards.

IN WITNESS WHEREOF, the said Principal and Surety have signed and sealed this instrument this 31ST day of MARCH, 1993.



PLF-DEF-EX. # 68  
DATE 12-13-95  
JUDGE GBL  
CASE # L137523

\_\_\_\_\_  
(SEAL)  
\_\_\_\_\_  
(SEAL)  
\_\_\_\_\_  
(SEAL)

THE AETNA CASUALTY AND SURETY COMPANY

By Regina L. Katchmark  
Attorney-in-Fact

392 REGINA L. KATCHMARK





# POWER OF ATTORNEY AND CERTIFICATE OF AUTHORITY OF ATTORNEY(S)-IN-FACT

KNOW ALL MEN BY THESE PRESENTS, THAT THE AETNA CASUALTY AND SURETY COMPANY, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint **Michael A. Spier, Kathleen S. Boyle, Kent M. Pagoota, R. Kenneth Hartman, Beverly K. Schroeder or Regina L. Katchmark** - -

of **Baltimore, Maryland**, its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated, the following instrument(s):  
by his/her sole signature and act, any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any and all consents incident thereto

and to bind THE AETNA CASUALTY AND SURETY COMPANY, thereby as fully and to the same extent as if the same were signed by the duly authorized officers of THE AETNA CASUALTY AND SURETY COMPANY, and all the acts of said Attorney(s)-in-Fact, pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following Standing Resolutions of said Company which Resolutions are now in full force and effect:

VOTED: That each of the following officers: Chairman, Vice Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, Any Assistant Secretary, may from time to time appoint Resident Vice Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

VOTED: That any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the Chairman, the Vice Chairman, the President, an Executive Vice President, a Senior Vice President, a Vice President, an Assistant Vice President or by a Resident Vice President, pursuant to the power prescribed in the certificate of authority of such Resident Vice President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following Standing Resolution voted by the Board of Directors of THE AETNA CASUALTY AND SURETY COMPANY which Resolution is now in full force and effect:

VOTED: That the signature of each of the following officers: Chairman, Vice Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, Any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached.

IN WITNESS WHEREOF, THE AETNA CASUALTY AND SURETY COMPANY has caused this instrument to be signed by its  
**Senior Vice President**  
day of **February** 19 **92** and its corporate seal to be hereto affixed this **11th**



THE AETNA CASUALTY AND SURETY COMPANY

By **Joseph P. Kiernan**  
**Joseph P. Kiernan**  
Senior Vice President

State of Connecticut }  
County of Hartford } ss. Hartford

On this **11th** day of **February**, 19 **92**, before me personally came **JOSEPH P. KIERNAN** to me known, who, being by me duly sworn, did depose and say: that he/she is **Senior Vice President** of THE AETNA CASUALTY AND SURETY COMPANY, the corporation described in and which executed the above instrument; that he/she knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he/she executed the said instrument on behalf of the corporation by authority of his/her office under the Standing Resolutions thereof.



**Dorothy L. Marti**  
My commission expires **March 31, 1993**  
**Dorothy L. Marti** Notary Public

## CERTIFICATE

I, the undersigned, **Secretary** of THE AETNA CASUALTY AND SURETY COMPANY, a stock corporation of the State of Connecticut, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full force and has not been revoked; and furthermore, that the Standing Resolutions of the Board of Directors, as set forth in the Certificate of Authority, are now in force.

Signed and Sealed at the Home Office of the Company, in the City of Hartford, State of Connecticut, Dated this **31ST** day of **MARCH** 19 **93**



By **John W. Welch**  
**John W. Welch**  
Secretary

## In the Circuit Court of Fairfax County, Virginia

JUDGMENT CREDITOR: William L. Griffith & Co. of Virginia, IncorporatedAddress: 3541 Chain Bridge Road, Suite 2  
Fairfax, VA 22030Phone: 703-591-4788

54 DEC 12 PM 1:36

JUDGMENT CREDITOR'S ATTORNEY: Gina Schaar Howard, VSB29129Address: Holland & Knight

CLERK, CIRCUIT COURT

Phone: 202-955-30002100 Pennsylvania Ave., NW, #400, Washington, DC 20037

Versus

JUDGMENT DEBTOR: Najla Associates, Inc.SSN: F118293Address: c/o Anton F. Oreitem, Registered AgentDC Corporate ID No.: 127/957410 Little River Turnpike, Annandale, VA 22003Return Date: 12/27/95  
at 9:00 a.m.GARNISHEE: E.L. & P. Title and Escrow Co.Address: c/o Cregger & Cregger, Registered AgentReview Date: 2-24-957010 Little River Turnpike, Suite 220, Annandale, VA 22003

## STATEMENT

Judgment Principal \$ 96,256.00Credits noneInterest 9% per annumJudgment Costs undefinedAttorney's Fees noneGarnishment Costs undefinedTotal Balance Due \$ 96,256.00 plusJudgment Number: 259742Place of Judgment: Fairfax Circuit Court, Chancery No. 134308

Maximum Portion of Disposable Earnings Subject to Garnishment

☐ Support☐ 50% ☐ 60% ☐ 65% (If not specified, then 50%)☐ State Taxes, 100%

If none of the above are checked, then §34-29 (a) (printed on the reverse side of this summons) applies.

The Garnishee shall rely on this amount.

Date of Judgment: 11/18/94

TO ANY AUTHORIZED OFFICER: You are hereby commanded to serve this summons on the judgment debtor and the garnishee.

TO THE GARNISHEE: You are hereby commanded to:

(1) file a written answer with: Circuit Court of Fairfax County, 4110 Chain Bridge Road, Fairfax, VA 22030

OR (2) deliver payment to this court payable to "CLERK, CIRCUIT COURT,"

OR (3) appear before this court on the return date and time shown on this summons to answer the Suggestion for Summons in Garnishment of the judgment creditor that, by reason of the lien of writ of fieri facias, there is a liability as shown in the statement upon the garnishee.

As garnishee, you shall withhold from the judgment debtor any sums of money to which the judgment debtor is or may be entitled from you during the period between the date of service of this summons on you and the date for appearance in court, subject to the following limitations:

(1) the maximum amount which may be garnished is the "Total Balance Due" as shown on this summons.

(2) If the sums of money being garnished are earnings of the judgment debtor, then the provision of "Maximum Portion of Disposable Earnings Subject to Garnishment" shall apply.

If a garnishment summons is served on an employer having one thousand or more employees, then money to which the judgment debtor is or may be entitled from his or her employer shall be considered those wages, salaries, commissions or other earnings which, following service on the employer, are determined and are payable to the judgment debtor under the employer's normal payroll procedure with a reasonable time allowance for making a timely return by mail to this court.

If a Judgment Debtor requests a hearing on an Exemption Claim, such claim should be filed with the Clerk of the Court within ten days of service upon you. (See attached Exemption Claim Form.)

Date of Issuance of Summons: 12-19-94Date of Delivery of Writ of Fieri Facias to Sheriff  
different from Date of Issuance of this Summons: 12-19-94

John T. Frey, Clerk

By: Gina Schaar Howard

Deputy Clerk

Creditor/Creditor's Attorney

Gina Schaar Howard, VSB29129



PLD DEF-EX. #25  
DATE 12/12/95  
JUDGE ABD  
CASE # 1137523

394

November 9, 1993

E. L. & P. Title and Escrow Co.  
Suite 200  
7010 Little River Turnpike  
P. O. Box 830  
Annandale, Va. 22003

Enclosed is a copy of my engineer's letter to Wm. L. Griffith & Co.  
of Virginia that informs them why the final invoices are not paid.

We have informed Wm. L. Griffith until they take care of punchlist items  
their invoices will not be processed.

If you have any questions, please do not hesitate to call.

Sincerely,

Tony Oreitem

CC: Hugh Cregger, Esq.  
Jeffrey Gilmore, Esq.

Return Address

7410 Little River Turnpike  
Annandale, Virginia 22003

11 - 9/93

LAW FIRM OF  
ESKOWITZ ETC  
DATE 12-14-93  
JUDGE GBL  
CASE # 137523

NOV 15 1993

LAW OFFICES  
GANNON, COTTRELL & WARD, P.C.

411 N. WASHINGTON STREET  
P.O. BOX 1286  
ALEXANDRIA, VIRGINIA 22313-1286

MARTIN A. GANNON  
JAMES RAY COTTRELL  
MICHAEL ALAN WARD

(703) 836-2770  
FAX: (703) 836-0086

RICHARD J. DWYER, III  
OF COUNSEL

DAVID H. FLEETTER  
MARGARET GANNON SARISKY  
H. SCOTT WASH

REPLY TO: P.O. BOX 1286  
ALEXANDRIA, VIRGINIA 22313-1286

November 12, 1993

VIA FAX - 591-4776  
AND FIRST CLASS MAIL

E.L. & P. Title and Escrow Company  
7010 Little River Turnpike, Suite 200  
P.O. Box 830  
Annandale, Virginia 22003

Re: Samir F. Qreitem v. William L. Griffith, et al.

Dear Sir/Madam:

Please be advised that this law firm represents Samir F. Qreitem regarding a dispute over his contract with William L. Griffith & Company of Virginia, Inc.

By certified letter, return receipt requested, dated November 8, 1993, Mr. Ali Shakeri, P.E., notified your organization of certain problems encountered by Mr. Qreitem in the completion of the contract for the project known as Willow Run Shopping Center, 6653/6667 Little River Turnpike, Fairfax, Virginia.

It is our understanding that David Peacock from William L. Griffith & Company of Virginia has served written notice on you that the owner, who they do not name, has failed to make a timely payment on this project in the amount of \$73,666.00.

You are hereby notified that you are not to release any monies that you are holding in escrow concerning this project. Any authority heretofore given to you to do so is hereby rescinded.

Samir Qreitem will send you today further written notification to this effect.

There will certainly be litigation in this case, and I am now in the process of obtaining expert opinions as the quality of workmanship for various unauthorized changes in the contract, the manner in which the contract was signed, and other items, and I will, of course, keep you informed of my progress concerning the same, assuming that you are truly an uninterested party.

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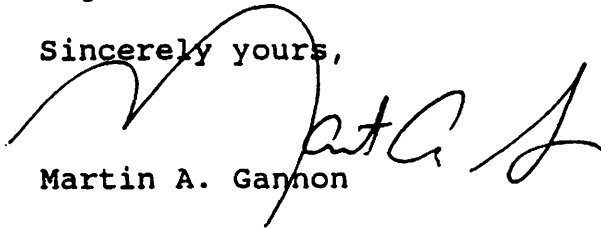
LAW FIRM ETC  
ES/KUMH  
PLP-DEP-EX # 25  
DATE 12-14-93  
JUDGE GBL  
CASE # 4137523

E.L. & P. Title and Escrow Company  
November 12, 1993  
Page Two  
Re: Willow Run

If for any reason you disburse any monies pursuant to any escrow or other agreement that is alleged to exist, then and in that event, Mr. Qreitem will hold you personally liable.

If you have any questions, I would appreciate your getting in touch with me or my law partner, James Ray Cottrell, Esquire, who will be working on this case with me.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'MAG', is written over the typed name 'Martin A. Gannon'.

Martin A. Gannon

MAG/jsb  
cc: Mr. Samir Qreitem  
Mr. Tony Qreitem

DUNNELLS & DUVALL  
ATTORNEYS AT LAW  
2100 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20037-3202

(202) 861-1400

S. SCOTT MORRISON  
(202) 861-1036

FACSIMILE  
(202) 861-1417  
(202) 861-1416

November 23, 1993

Mr. Hugh C. Cregger, Jr.  
Eskovitz, Lazarus, Pitrelli & Cregger  
Annandale Financial Center, Suite 200  
7010 Little River Turnpike  
Annandale, Virginia 22003

Re: Willow Run Shopping Center

Dear Mr. Cregger:

This firm represents William L. Griffith & Co. of Virginia, Inc. ("Griffith"). Your letter to David Peacock dated November 10, 1993 has been forwarded to this office for response.

As you know, by the terms of that certain letter agreement dated January 15, 1993 between Griffith and NAJLA Associates, Inc., E. L. & P. Escrow and Title Co. ("EL&P") was appointed escrow agent responsible for holding \$130,000.00 as security for Griffith in the event of nonpayment by NAJLA. You are hereby notified that the disbursement of funds from the escrow account on October 1, 1993 without my client's consent, and your failure to seek reimbursement of the full amount disbursed from NAJLA Associates, constitute a breach of the terms of the January 15, 1993 escrow agreement as well as a breach EL&P's fiduciary duty to Griffith, the intended beneficiary of the escrow arrangement.

In accordance with the terms of the escrow agreement, EL&P was authorized to disburse funds only upon receipt of notice from Griffith of the Owner's default under the construction contract. Further, upon disbursement of the funds in the escrow account, EL&P is obligated to:

- (ii) cause the Owner to reimburse within ten (10) days the escrow account for the sum paid over to contractor by the escrow company;

SAW FILED OF  
ESKOVITZ & C. # 26  
PLP CORP. EX. #  
DATE 12-14-95  
JUDGE GBL  
CASE # 4137523


DUNNELLS & DUVAL

Hugh C. Cregger, Esq.  
November 23, 1993  
Page 2

Not only did my client not notify you that the Owner was in default prior to EL&P's disbursement of the funds, but EL&P has made no effort to cause the Owner to reimburse the account. Rather, in your November 10 letter, you cavalierly place the burden of replacing the funds on my client. The position taken in your November 10 letter is directly contrary to the express language of the escrow agreement.

Accordingly, Griffith demands that EL&P immediately take all appropriate steps necessary to replenish the funds in the escrow account. Griffith intends to hold EL&P responsible for all damages it incurs as a result of EL&P's breach of the escrow agreement.

Sincerely,

  
S. Scott Morrison

cc: David Peacock

MCLEAN TITLE AGENCY, Inc. Va

**E.L. & P. TITLE AND ESCROW CO.**

SUITE 220  
7010 LITTLE RIVER TURNPIKE  
ANNANDALE, VA 22003  
(703) 354 6242  
Fax (703) 354 6843

VIENNA OFFICE  
SUITE 200  
100 EAST STREET, SE  
VIENNA, VIRGINIA 22180  
(703) 255 6133  
FAX (703) 255 6137

December 16, 1993

S. Scott Morrison, Esquire  
Dunnells & Duvall  
Attorneys at Law  
2100 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037-3202

Re: Willow Run Shopping Center

Dear Mr. Morrison:

Reference is made to your letters of November 23 and December 13, 1993.

First, let me say that I did not understand that you expected a reply to your letter of November 23rd and secondly I did not receive notice that you and David Peacock had called. If I had received such notice I can assure you that I would have returned your call. My direct line is 941-5707.

By way of history, let me state that at the time E.L. & P. Title and Escrow received notice from the owner (copy enclosed) E.L. & P. did not have the escrow agreement, its entire file having been turned over to Jeffrey Gilmore, Esquire. At this time the file still has not been returned to E.L. & P. However my recollection of the Agreement was that the \$130,000.00 escrowed sum was to be paid to the General Contractor once all of the contract price except the last \$130,000.00 had been paid by the owner.

E.L. & P. is indeed sorry if the payment of the \$103,000.00 has prejudiced Griffith Company in this matter. That was not the intent. It was believed that since the payment was going to Griffith that the payments made by the owner had brought the total payments due down to the last \$130,000.00 and that the payment from the escrow was proper. E.L. & P. still believes that your client was not prejudiced by the disbursement and until a court of competent jurisdiction states otherwise we will not suffer the loss.

400

LAW FIRM OF  
ESCROW CO.  
PLACED IN # 27  
DATE 12-14-95  
BY GBL  
-4137523

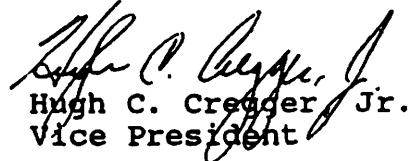


S. Scott Morrison, Esquire  
December 16, 1993  
Page 2

I believe this is the first time I have ever been involved in a matter where both the client and the contractor are threatening suit. I am now in receipt of a letter from Martin Gannon, Esquire representing the owner in essence questioning my representation of the owner as to my agreeing to an inequitable contract and referring to the contractor that "I chose".

If you desire to further discuss this matter please do not hesitate to call me.

Very truly yours,

  
Hugh C. Creager, Jr.  
Vice President

HCC/jsr  
Enc.  
h:\shared\c\hcc\morrison.ltr

FEB 28 1994

3541 CHAIN BRIDGE ROAD • SUITE 2 • FAIRFAX, VIRGINIA 22030 • (703)591-4788 / FAX (703)591-4776

February 16, 1994

Mr. John Pitrelli  
EL&P Title Company  
7010 Little River Turnpike  
Suite 200  
Annandale, VA 22003

RE: Willow Run Shopping Center  
Escrow

Dear John:

We have not received any correspondence indicating EL&P has performed its duty under the Escrow Agreement dated January 15, 1993 to demand reinstatement of funds improperly released from the escrow.

We have completed our work contracted by the Owner, Mr. Samir Oreitem and Najla Associates, but have not been paid for this work. We, therefore, make specific demand of any and all balances remaining in the escrow account not exceeding \$126,174 to be released immediately to Wm. L. Griffith & Co. of Virginia, Inc.

The sum requested represents services provided and recorded as Memorandum of Mechanic's Lien by General Contractor properly filed 12/17/93.

Your prompt attention to this matter is appreciated.

Sincerely,



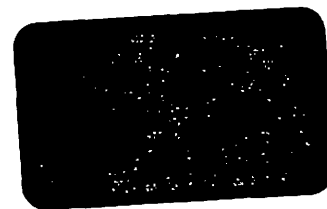
David Peacock

DP/dfs

*For*  
*Mr. C...*

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LAW FIRM OF  
ESKOWITZ & C  
PLF DEF EX. # 29  
DATE 12/14/93  
JUDGE GBL  
CASE # LL37523



McLean Title Agency, Inc.

# *E.L. & P. Title and Escrow Co.*

Reston Office  
Suite 250  
11400 Commerce Park Drive  
Reston, Virginia 22091  
(703) 648-9800  
FAX (703) 648-3119

Annapondale Office  
Suite 220  
7010 Little River Turnpike  
Annapondale, Virginia 22003  
(703) 354-0561  
FAX (703) 354-6833

Vienna Office  
Suite 200  
100 East Street, S.E.  
Vienna, Virginia 22180  
(703) 255-6133  
FAX (703) 255-6137

February 28, 1994

Mr. David Peacock, President  
Wm. L. Griffith & Co. of Virginia  
3541 Chain Bridge Road, Suite 2  
Fairfax, Virginia 22030

Re: Willow Run Shopping Center Escrow

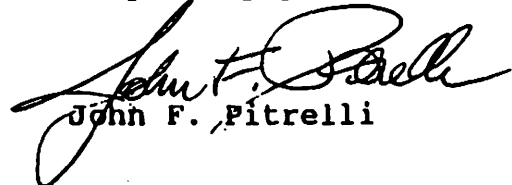
Dear David:

I received your letter of February 16, 1994 asking E.L. & P. Title and Escrow Co., as Escrow Agent, to disburse to your company as general contractor remaining sums it holds in escrow in regard to the construction contract for Willow Run Shopping Center.

Under date of November 11, 1993, E.L. & P. was notified in writing by the owner NAJLA ASSOCIATES, INC. that no further disbursements should be made from this account.

Under conflicting demands and instructions from the parties this firm has no choice but to retain the escrowed funds subject to the order of a court having proper jurisdiction.

Very truly yours,

  
John F. Pitrelli

JFP/mm

H:\SHARED\C\JFP\PEACOCK

403

30  
DATE 12/14/95  
FIRM GBL  
# 137523  
LAW FIRM OF  
ESKOVITZ ETZ

