1987

Peters & Company v. Abco Construction : Brief of Appellant

Utah Court of Appeals

Dale M. Dorius; attorney for appellant.
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IN THE UTAH STATE COURT OF APPEALS

PETERS & COMPANY, INC., Plaintiff and Respondent, vs. ABCO CONSTRUCTION, INC., et al., Defendant and Appellant.	Case No. 870062-CA #13(b)

APPELLANT'S BRIEF

Appeal from the decision dated January 9, 1987, of the Honorable WHITNEY D. HAMMOND, judge, in Seventh Circuit Court of Uintah County, State of Utah.

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THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO VALID OFFSET THAT RESPONDENT SHOULD ABSORB. AMPLE EVIDENCE WAS PRESENTED TO WARRANT AN OFFSET SHOULD A CONTRACT HAVE BEEN FOUND TO EXIST.

TABLE OF AUTHORITIES

CASES CITED

Bennion v. LeGrand Johns Construction Company, 701 P.2d 1078 (Utah 985).

Cannon v. Stevens School of Business, Inc., 260 P.2d 1383 (Utah 1977).

County of Maricopa v. Walsh and Oberg Architects, Inc., 16 Ariz.App. 194 P. 44 (Ariz. 1972).

Interocean Shipping Company v. National Shipping and Trading Corporation (2nd Cir. 1975) 523 R.2d 527.

Krieg v. Union Pacific Land Resources Corporation, 525 P.2d 43 (Or, 1974).

Quealy v. Anderson, 714 P.2d 667 (Utah 1986).

OTHER AUTHORITES CITED

1 Am.Jur.2d, Accord and Satisfaction, Sec. 1, pp. 301-302.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I.

DID THE TRIAL COURT ERR IN FAILING TO RULE ON THE MAJOR ISSUE OF THE TRIAL, NAMELY THE ISSUE OF ACCORD AND SATISFACTION? WAS AMPLE EVIDENCE PRESENTED TO SUPPORT A RULING BY THE TRIAL COURT THAT RESPONDENT WAS BARRED FROM RECOVERY BY THE DOCTRINE OF ACCORD AND SATISFACTION?

II.

DID THE TRIAL COURT ERR IN AWARDING ADDITIONAL AMOUNTS UNDER THE CONTRACT? DID THE TRIAL COURT ERR IN AWARDING ATTORNEY FEES TO RESPONDENT? DOES A FINDING OF ACCORD AND SATISFACTION EXTINGUISH ALL LIABILITY BETWEEN THE PARTIES?

III.

DID THE TRIAL COURT ERR IN DISREGARDING THE EVIDENCE THAT RESPONDENT HAD NOT COMPLIED WITH THE SPECIFICATIONS CONTAINED IN THE CONTRACT? WAS AMPLE EVIDENCE PRESENTED TO SUPPORT THE RULLING THAT THE "EXTRA WORK" FOR WHICH RESPONDENT MADE A CLAIM WAS ACTUALLY WORK CONTAINED IN THE CONTRACT?

IV.

DID THE TRIAL COURT ERR IN FINDING APPELLANT LIABLE FOR THE EXTRA WORK PERFORMED BY RESPONDENT? DOES THE EVIDENCE SUPPORT THE FINDING THAT THERE WAS NO VALID CONTRACT BETWEEN APPELLANT AND RESPONDENT FOR THE EXTRA WORK?

V.

DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS NO VALID OFFSET? WAS THERE AMPLE EVIDENCE TO WARRANT AN OFFSET SHOULD A CONTRACT BEEN FOUND TO EXIST?

STATEMENT OF FACTS

Appellant, Abco Construction, Inc., is a Utah coporation with its principal place of business in Box Elder County, Utah. Through its Secretary-Treasurer, Branson Neff, Appellant entered into a prime contract with the Uintah County School District ("School District") to construct an auditorium addition ("the project") to the West Junior High School in Uintah County.

Respondent, Peters & Company, is a painting contractor. Through its President, Ted Peters, Respondent submitted a bid to provide all labor, equipment, material and services to complete the painting for the project.

T. 10). Respondent's painting bid was accepted. The painting Respondent contracted to do was begun in the first part of February, 1985, (T. 11) under the direction of Respondent's paint foreman, Craig Talbot. (T. 113). Toward the end of February, 1985, the painting had been substantially completed. (T. 4). On or about March 22, 1985, a written subcontract agreement for the painting was signed by Appellant, as general contractor of the project, and by Respondent. (T. 30). The contract price was $9.305. (T. 11). Also as part of the contract was the guarantee that Respondent would complete the work in accordance with the plans and specifications. (T. 11). Respondent further promised to make corrections or fix-ups as required. (T. 29 & 30).

During work on the project, Appellant had trouble with the metal doors and the hardware for the doors. Some of the hardware didn't align with the pre-drilled holes in the doors. Consequently, some of the holes needed to be redrilled to accommodate the hardware, and some of the pre-drilled holes had to be filled with putty and sanded before the doors could be painted. (T. 32, 106). Also, some of the doors were dented and rusting so they needed to be sanded and primed before they could be painted (T. 33). Because of the conditions of the doors, Respondent told Appellant there would be a charge for the additional preparatory work on the doors. In the presence of Mr. Talbot, Respondent's paint foreman, Respondent and Appellant negotiated an agreeable solution: Appellant would furnish the materials and the equipment and Respondent would supply the labor. (T. 107-108). No further discussion about the doors took place, but then, in an invoice dated November 10, 1986, Respondent submitted to Appellant a $2660 claim for the preparatory work on the doors.

On or about February 20, 1985 (T. 14) Respondent received a telephone call from Mr. Randy Green ("the Architect"), senior achitect with

Dana Larson and Roubal & Associates, the architects for the project. The Architect asked that Respondent bid on extra work which consisted of adding a sealer to the interior brick walls in the project and other specified rooms in the school. (T. 13). In the course of the negotiation for the brick sealing (T. 17, 64, 74), Respondent gave the Architect a price of $2,780, and the Architect subsequently accepted Respondent's price. (T. 15). [Note: The Architect testified at trial that the agreed price was "$2641" and indicated that amount on the change order. (T. 65).] The Architect alone negotiated the contract for the extra work (T. 17, 64-65, 74, 146, 162); Appellant had no part in this negotiation and eventual agreement (T. 51) and did not sanction it (T. 162).

The School District policy was that requests for payment outside a contract would not be honored unless and until a change order was completed and approved by the School District. (T. 68 & 69) Consequently, the Architect prepared a change order for the brick sealing and submitted it to the School District for approval. (T. 65). Prior to the change order approval, Respondent returned to the project site and began the brick sealing shortly after the architect's acceptance of Respondent's price.

Earlier in the year, the Architect had asked Appellant when the brick walls were going to be sealed. The Appellant responded that they were not to be sealed. When the Architect asked why not, Appellant explained that the sealing of the bricks was not part of the contract. Therefore, Appellant was surprised when Respondent appeared at the project site and said he was going to begin sealing the bricks; Appellant had no knowledge that Respondent was going to seal the bricks. (T. 145) Apparently, this work was a "late thought" on the architect's part. (T. 110).

Respondent completed the brick sealing around the first of March, 985. (T. 16). Then Respondent began submitting separate invoices for the rick sealing to the architect (T. 21 & 73) and to Appellant. (T. 16).

Although Respondent considered the brick sealing completed, the rchitect was dissatisfied with the results (T. 76 & 85) because drywall nud, stains (T. 113), paint drippings (T. 58), and white dust that appeared to ɔe from the sanding of the drywall (T. 77), had been sealed into the brick. (T. 77). Upon close inspection, Respondent's work was rejected by the architect (T. 83-85), by Mr. Mark Trussler, another architect supervising the project (T. 76), and by Dirk Harris, the School District representative on construction projects. (T. 153). On April 4, 1985, Mr. Trussler prepared a punch list itemizing things to be corrected and/or completed on the project, including the unsatisfactory sealing work on the brick walls. (T. 87-88). The punch list read: "Clean brick walls where brick sealer was applied over dirt and dust." (T. 124, 149). Because Craig Talbot, Respondent's paint foreman at the project site (103), refused to strip the sealer and clean the dirty brick walls (T. 150), Appellant telephoned Respondent and requested that Respondent send someone more cooperative to remedy the problems with the sealed bricks. (T. 151).

Almost two weeks passed before Respondent and his crew returned to the project site. (T. 118). By then Appellant and his crew (T. 49) had spent 97-1/2 hours (T. 48 & 152) trying various methods such as acid washes (T. 115) and wire brushes (T. 49) to strip the sealer off the brick. Upon his arrival to the project site, Respondent said he would take over from that point. (T. 49)

On April 20, 1985, Respondent submitted an invoice to Appellant for work completed on the project. This invoice indicated a balance of

$1,013.86, which was the balance owing on the contract. This invoice included no other charge for any "extra work" such as the brick sealing Respondent had negotiated with the architect to do or the additional door preparatory work Respondent resolved with Appellant or the brick stripping and cleaning. (T. 18). Respondent was sending invoices for the brick cleaning directly to the architect (T. 20, 22, 71) and the School District. (T. 5, 16).

Respondent sent subsequent invoices to Appellant. These invoices always separated the amount due for the work completed under the contract from the amount due for the brick cleaning: $1,013.86 for the balance on the contract and $2,780.00 for the brick cleaning. (T. 21). [Note: The charge of $2,780.00 for the brick cleaning and/or stripping did not reflect the amount in the change order which was for $2,640. (T. 22& 23).]

In July or August of 1985, Respondent, with the express intention of settling the matter of the balance due on the contract, telephoned Appellant. (T. 23-25 & 44). Appellant informed Respondent that Appellant would send a check for the balance owing on the contract but that there were some back charges for Appellant's having spent 97-1/2 hours at $20.00 per hour (T. 152 &153) stripping the sealer off and cleaning the dirty brick walls. After some discussion, Appellant and Respondent negotiated a final settlement of $931.00. (T. 26, 45). During the negotiation, Appellant and Respondent also reached the understanding that Appellant owed Respondent nothing for the brick cleaning unless and until the School District made payment to Appellant for this work. (T. 45).

Based on this negotiation, Appellant prepared (with blue ink) the check for the agreed settlement of $931.00 and circled the words "in full" on the back of the check. (T. 46, 53, 157). Appellant's circling of the words

n full" distinguished this particular check from any of the previous checks espondent had received from Appellant (T. 54, 55). Respondent received his check on August 6, 1985 (T. 45), and with red ink, Respondent endorsed he check. (T. 53). Respondent testified at trial that this check for the iegotiated amount of $931.00 was "payment in full under the contract." (T. 176).

Meanwhile, Respondent continued billing the Architect and the School District for the cleaning of the brick walls. (T. 21, 73). However, the School District's policy was that requests for payment of work done outside a contract would not be honored unless and until the change order was completed and approved. (T. 68 & 69).

Maintaining that Respondent was responsible under the contract for cleaning the brick walls (T. 148, 154), the School District ultimately rejected the change order. (T. 148, 153). The explanation for this rejection was that the cleaning of the brick walls before the application of the sealer was the painter's responsibility. (T. 148,154). Consequently, neither Respondent nor Appellant received payment from the School District for the brick cleaning. (T. 157).

In spite of Appellant's payment in full under the contract (T. 176), Respondent submitted an invoice dated November 10, 1986, to Appellant. In the invoice, Respondent made a $2,660 claim for Respondent's preparatory work on the project's metal doors. (T. 36). This invoice was the first notice Appellant had received after paying the settlement check of $931.00 that Respondent considered any further amount owing. (T. 36). This invoice also was the first notice Appellant had received since the solution negotiated for the door preparations. Respondent admitted at trial that this work claimed in the invoice was work Respondent performed under the original

contract work; the claim was not for any of the brick sealing or cleaning. (T. 37, 47). The Architect also testified at trial that these "extras" for which Respondent was billing were not "extras" but, rather, was work that was part of the contract (T. 72). Moreover, Respondent admitted at trial that the billing for work on the doors was made after Respondent had released Appellant on the contract. (T. 47).

SUMMARY OF ARGUMENT

The trial court erred in failing to rule that Respondent was barred from recovery by the doctrine of accord and satisfaction. Although Appellant pled accord and satisfaction, the trial court did not rule on the issue. Ample evidence was presented that Respondent and Appellant negotiated a final settlement for work on the contract and also for the brick sealing. The agreed settlement was for $931.00. Appellant prepared a check for this amount and circled the words "in full" on the back of the check, and Respondent accepted and endorsed the check. Appellant's circling of the words "in full" distinguished this final check from previous checks Respondent had received from Appellant. Furthermore, Respondent testified several times at trial that this final check constituted "a payment in full on the contract" and "a release of Appellant" from all further claims.

The trial court erred in awarding additional amounts under the contract. The "extra work" of preparing the doors for painting was actually work required under the contract. Respondent sent the first invoice for this work more than a year after a release of Appellant from all further claims. As the evidence and testimony given at trial supported a finding of accord and satisfaction with regards to the final settement, Respondent should have been barred from recovery. Likewise, Respondent should have been

barred from claiming attorney fees assessed for litigating an already negotiated and satisfied claim.

Respondent's contract with Appellant contained a provision that required the painter to examine surfaces which were scheduled to be painted, stained, varnished, etc. and to report to the contractor any surfaces which could not be put into proper condition for finishing by customary preparation. The provision further stated that the application of the first coat would "constitute acceptance of surfaces as fit and proper to receive finish." Thus, Respondent had the responsibility to ensure that the brick walls were properly prepared before the application of the sealer, and Respondent's application of the sealer constituted his acceptance of the condition of the walls. Consequently, when the work was inspected and rejected, Respondent had no valid basis upon which to make a claim for the stripping and subsequent cleaning of the dirty brick walls.

The "extra work" of sealing and cleaning the brick walls was work Respondent negotiated with the Architect to do. The Architect telephoned Respondent asking that Respondent bid on "extra work" which consisted of adding a sealer to the interior brick walls in the project and other specified rooms in the school. During the course of the negotiation, Respondent gave the Architect a bid of $2641.00, and the Architect accepted the bid. At no time was Appellant party to the negotiations, nor did Appellant sanction them or the contract. Consequently, Appellant cannot be held liable for payments under a contract the Architect instigated and finalized with Respondent.

Even if the trial court were correct in ruling that Respondent was entitled to payments for the extra work, Appellant was entitled to a ruling that there was an offset. This offset resulted because Respondent was

almost two weeks in returning to the project to strip and clean the dirty brick walls and the delay was stopping other subcontractors from continuing their work. Consequently, Appellant and his crew had to spend 97-1/2 hours at a cost of $20.00 attempting to remedy Respondent's poor workmanship. The total cost to Appellant was $1950 00. This cost should have been deducted from any award to Respondent.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE MAJOR ISSUE OF THE TRIAL, NAMELY THE ISSUE OF ACCORD AND SATISFACTION. AMPLE EVIDENCE OF ACCORD AND SATISFACTION WAS PRESENTED, AND THE TRIAL COURT SHOULD HAVE RULED THAT RESPONDENT WAS BARRED FROM RECOVERY BY THE DOCTRINE OF ACCORD AND SATISFACTION.

The Court in Bennion v. LeGrand Johnson Construction Company, 701 P.2d 1078 (Utah 1985) indicated that accord and satisfaction arises when:

> . . .the parties to a contract mutually agree that a different performance than that required by the original contract will be made in substitution of the performance originally agreed upon and that the substituted agreement calling for the different performance will discharge the obligation created under the original agreement. Id. at 1082.

A similar definition is that "(a)n accord and satisfaction is a method of discharging a contract or settling a claim arising from a contract by substituting for such contract or claim an agreement for the satisfaction thereof, and the execution of the substituted agreement." Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1386 (Utah 1977).

Another definition is as follows:

> To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed. . . . The accord is the agreement and the satisfaction is the execution or performance of such agreement. . . . 1 Am.Jur.2d, Accord and Satisfaction, Sec. 1, pp. 301-302.

Appellant's advocacy of an accord and satisfaction in the present case is based on four propositions: Respondent's contacting of Appellant in July or August of 1985, the actual negotiation which resulted in a settlement agreement, Respondent's endorsement of Appellant's final $931.00 check, and Respondent's repeated admissions during cross-examination at trial.

In July or August of 1985, Respondent telephoned Appellant with the express intent of settling the balance on the contract work and also the work of sealing and cleaning the brick walls. Appellant informed Respondent that there were some back charges for Appellant's time spent trying to strip the sealer off the dirty brick walls. Respondent responded by indicating that he had not yet been paid for the brick sealing to which Appellant replied that if and when the School District made payment to Appellant for this work, Appellant would pay Respondent. The negotiation of claims and offsets resulted in a mutual determination that $931.00 was owing to Respondent.

Appellant prepared a check for the negotiated amount and then circled the words "in full" on the back of the check. Respondent admitted at trial that Appellant's circling of the words "in full" distinguished this final check from any of the previous checks Respondent had received from Appellant.

With the circled words "in full" appearing on the back of the check, Respondent accepted and endorsed it.

Besides Respondent's endorsement of the final check, Respondent repeatedly admitted during cross-examination at trial that the $931.00 represented "payment in full on the contract" and a "release of Appellant" from all further claims. Respondent's admissions should have been given considerable weight by the trial court since these admissions contradicted Respondent's claim that payment was still owing for work Respondent admitted was performed under the contract.

Besides the above propositions supporting a finding of accord and satisfaction, there was the traditional contract element: a meeting of the minds on this negotiated agreement between Appellant and Respondent. Moreover, Respondent's endorsement of Appellant's final check itself constituted an accord and satisfaction. Therefore, it is of no legal consequence that Respondent may have later regarded the check as something short of "full payment." The court in Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985) considered a similar situation. In that case, Marton received a check from Jensen that he did not regard as payment in full even though the check contained a condition that "endorsement hereof constitutes full and final satisfaction." As he endorsed the check, Marton added the words "not full payment" below the condition. The court ruled that ". . . the creditor may not disregard the condition attached." Id. at 609. Applying this to the present case: Appellant's check contained the Respondent words "in full" circled on the back; consequently, Respondent cannot now refute the condition for acceptance of that check.

Based upon the above definitions of accord and satisfactionand based upon the evidence and the testimony presented at trial, it would be safe to

conclude that an accord and satisfaction did arise and that the trial court erred in failing to rule that Respondent was barred from recovery by the doctrine of accord and satisfaction.

POINT II

THE TRIAL COURT ERRED IN AWARDING RESPONDENT ADDITIONAL AMOUNTS UNDER THE CONTRACT AND IN AWARDING ATTORNEY FEES. AMPLE EVIDENCE WAS PRESENTED TO SUPPORT THE FINDING THAT IT WAS THE INTENTION OF THE PARTIES IN MAKING ACCORD AND SATISFACTION TO FULLY EXTINGUISH ALL LIABILITY TO EACH OTHER.

The trial court awarded Respondent $2641.00 for the preparatory work done to the metal doors. Testimony given at trial by the Architect supported Appellant's contention that this work was work under the contract and as such was not "extra work." Even so, Appellant made concessions when Respondent made a claim in anticipation of having to do additional preparatory work on some of the doors: Appellant would furnish the materials and the equipment and the Respondent would supply the labor. Then, over a year later, Appellant received notice in the form of an invoice that Respondent considered some further amount owing. In an invoice dated November 10, 1986, Respondent submitted to Appellant a $2660 claim for the preparatory work done to the doors. Given the fact that this was contract work and given the fact that Respondent admitted at trial that the billing for work on the doors was after the release of Appellant of any further liability on the contract, this claim never should have been honored by the trial court.

Furthermore, accord and satisfaction would have extinguished all liability between the parties, including attorney fees Evidence and

testimony presented at trial support the conclusion that it was the intention of Appellant and Respondent to fully extinguish all liability to each other arising out of their contract. This extinguishment of liability included liability for attorney fees assessed for litigation prusued on the contract. See, eg., Quealy v. Anderson, 714 P.2d 667 (Utah 1986).

Had the court properly ruled that there was an accord and satisfaction, neither the award for preparatory work to the doors nor the award for attorney fees would have been granted.

POINT III

THE TRIAL COURT ERRED IN DISREGARDING EVIDENCE THAT RESPONDENT HAD NOT COMPLIED WITH THE SPECIFICATIONS CONTAINED IN THE CONTRACT. AMPLE EVIDENCE WAS PRESENTED AT TRIAL THAT THE "EXTRA WORK" FOR WHICH RESPONDENT MADE A CLAIM WAS ACTUALLY WORK CONTAINED IN THE CONTRACT.

Respondent's painting contract with Appellant contained the following provisions:

> 3.1 Inspection
>
> 3.1.1 Condition of Surfaces. The painter shall examine surfaces which are scheduled to receive paint, stain, varnish or other coatings and report to the contrator any surfaces which cannot be put into proper condition for finishing by customary cleaning, sanding, puttying, or other similar preparation operation. Application of the first coat shall constitute acceptance of surfaces as fit and proper to receive finish.
>
> 3.2 Surface Preparation
>
> 3.2.1. Remove hardware, machine surfaces, plates, lighting fixtures and similar items wehich are not to be painted, or apply protective coverings before commencing surface preparation. Re-install these items in each room after painting is complete and dry.
>
> 3.2.2 Clean surfaces free of dirt, rust, scale, grease and moisture. (T. 85-86).

Before Respondent began sealing the brick walls, he had the 'esponsibility to ensure that the surfaces were clean and properly prepared 'or the sealer application; this surface preparation was part of the work Respondent contracted to do. By failing to so prepare the brick walls, Respondent breached a condition of his contract.

Because of the poor workmanship, the work was rejected by the architects and by the School District construction project representative. Subsequently, the sealer had to be stripped and the brick walls cleaned before the sealer could be reapplied. Because Respondent's painting foreman refused to do the work and because it was almost two weeks before Respondent returned to the project site, much of this work was completed by Appellent and his crews.

As with the wall preparation, Respondent likewise had the contractual duty to prepare the doors for painting. All surface preparation to the doors was contract work. However, Appellant conceeded that some of the doors required additional preparation, so Appellant proposed an agreeable solution with Appellant providing the materials and the equipment and Respondent furnishing the labor.

Appellant had already paid Respondent in the final $931.00 payment for the work completed under the contract; this payment constituted a payment in full. By ignoring this payment and the specifications contained in the contract, the trial court's award to Respondent of $2,641.00 for the brick cleaning and sealing and/or the door preparation constituted, in essence, a double payment for the same work.

POINT IV

THE TRIAL COURT ERRED IN FINDING FOR RESPONDENT ON THE ISSUE OF THE "EXTRA WORK." THERE WAS NO EVIDENCE TO SUPPORT THE COURT'S FINDING OF APPELLANT'S LIABILITY SINCE THERE WAS NO VALID CONTRACT BETWEEN APPELLANT AND RESPONDENT FOR THE "EXTRA WORK".

The evidence presented at trial supported Appellant's contention that preparatory work on the doors was work under the contract. As work under the contract, it was paid for in full when Appellant tendered the final check on August 8, 1985.

The other work described during the trial as "extra work" was the sealing and/or cleaning of the brick walls. Testimony at trial revealed that on or about February 20, 1985, Respondent received a telephone call from Mr. Randy Green ("the Architect"). The Architect asked that Respondent bid on extra work which consisted of adding a sealer to the interior brick walls in the project and other specified rooms in the school. (T. 13). In the course of the negotiation (T. 17, 64, 74) for the extra work, Respondent quoted a price which the Architect accepted. [The trial records indicate that Respondent testified that the price was "$2780.00" (T. 15) whereas the Architect testified that the price was "$2,641.00" (T. 65).] At no time during the negotiation between Respondent and the Architect did Appellant become a party. (T. 51). Neither did Appellant sanction the negotiation nor the resulting contract. (T. 162).

Earlier in the project, the Architect had asked Appellant when he was going to seal the brick walls and was told by Appellant that he was not going to seal them. When the Architect asked why not, Appellant explained that the contract did not provide for the sealing of the bricks. Consequently, Appellant was surprised when Respondent, having completed

he contracted work and left the project site, appeared again and announced hat he was to seal the bricks. (T. 145).

Respondent initially billed only the Architect (T. 20, 22, 71) and the School District (T. 5, 16) for the brick sealing. Only later did he begin including this work on invoices to Appellant. Then, the invoices separated this work from work completed under the contract.

It is well established in Utah as elsewhere that whether there is a binding contract depends on the intent of the parties. The Supreme Court of Wisconsin formulated it thus: "There is no meeting of the minds where the parties do not to contract. . . ." Interocean Shipping Company v National Shipping and Trading Corporation (2nd Cir. 1975) 523 F.2d 527.

Furthermore, the general rule is that ". . . no recovery can be had for extra work or materials unless performed or supplied with the knowledge and consent of the party to be held liable." Krieg v. Union Pacific Land Resources Corporation, 525 P.2d 48, 54 (Or. 1974).

The evidence and the testimony presented at trial did not support a finding of a valid contract between Appellant and Respondent for the "extra work." Consequently, the trial court erred in founding Appellant liable for extra work for which he did not contract.

Point V

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO VALID OFFSET THAT RESPONDENT SHOULD ABSORB. AMPLE EVIDENCE WAS PRESENTED TO WARRANT AN OFFSET SHOULD A CONTRACT BE FOUND TO EXIST.

Evidence was presented at trial that Respondent had applied sealer on bricks that were stained, splattered with paint and drywall mud, and coated with white dust that appeared to be from the sanding of the drywall.

Upon inspection by the architects and School District representative, the work was rejected. This situation never would have occurred had Respondent not breached the condition of his contract dealing with preparation of surfaces before painting.

As a result of Respondent's poor workmanship and delay in returning to re-do the work, Appellant and his crew spent 97-1/2 hours at a cost of $20.00 per hour stripping the sealer off and cleaning dirty brick walls. The total cost of their labor was $1950.

There is a well-established "cost of repair" rule. This rule relates to damages applicable to breach of construction contracts: "... damages are awarded based upon the reasonable cost of construction and completion in accordance with the contract." County of Maricopa v. Walsh and Oberg Architects, Inc., 16 Ariz.App 439, 494 P.2d 44, 46 (Ariz. 1972)

If a valid accord and satisfaction did not arise and if Appellant was liable under aa valid contract for the extra work, then the trial court should have reduced Respondent's award by the $1950 it cost Appellant to remedy Respondent's poor workmanship

CONCLUSION

The trial court's award to Respondent of $2,641 plus interest and attorney fees should be set aside

The case should be remanded for a resolution of the following issues:

Did an accord and satisfaction arise?

In the alternative:

Was a valid contract for the extra work made between Appellant and Repondent? If so, What amount of offset against the contract price should Respondent absorb?

ADDENDUM

ONTENTS

indings of Fact and Conclusions of Law

udgment

)rder Amending Judgment dated January 9, 1987

Change Orders

DATED this 18th day of May, 1987.

DALE M. DORIUS
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CERTIFICATE OF MAILING

Served the foregoing Brief of Appellant by mailing four copies thereof, postage prepaid, to E. H. FANKHAUSER, Attorney for Respondent, 660 South 200 East, Suite 100, Salt Lake City, UT 84111 this 18th day of May, 1987.

DALE M. DORIUS

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CIRCUIT COURT, STATE OF UTAH

UINTAH COUNTY, VERNAL DEPARTMENT

PETERS & COMPANY, INC., a Utah Corporation,	*	FINDINGS OF FACTS AND CONCLUSIONS OF LAW
Plaintiff,	*	Civil No. 86 CV 067
vs.	*	
ABCO CONSTRUCTION, INC., BRANSON G. NEFF, FRED A. MORTON & COMPANY, AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA, DANA LARSON ROUBAL & ASSOCIATES, INC.	*	
Defendants.	*	

Trial of this action was held at a regular term of the above entitled Court, pursuant to notice, November 24, 1986 without jury, before the Honorable Whitney D. Hammond. Plaintiff corporation was represented by its attorney, E. H. Fankhauser. Defendants' ABCO Construction, Inc., Branson G. Neff, Fred A. Morton & Company, American Casualty Company of Reading Pennsylvania and Dana Larson Roubal & Associates were represented by their attorney, Dale M.

Dorius. Each of the parties presented witnesses that were duly sworn and testified; and each of the parties presented evidence to the Court which was received and adduced by the Court; and the matter having been argued and submitted to the Court for its determination and decision; and the Court, having considered the testimony and evidence presented, being fully advised in the premises and for good cause appearing finds as follows:

FINDINGS OF FACT

1. Defendant, ABCO Construction Company, is a Utah Corporation and as such entered into a contract with the Uintah County School District to construct improvements at the West Valley Jr. High School located in Uintah County, State of Utah.

2. Peters & Company entered into a subcontract agreement in writing with Defendant, ABCO Construction Company, to provide labor and material for the painting required to be done in connection with the construction of the auditorium addition at the West Jr. High School under ABCO's contract with Uintah County School District.

3. Plaintiff, Peters & Company, performed services, labor and furnished material to do the painting under its subcontract at the agreed price of $9,305.00.

4. Peters & Company, at the time the work was performed, was a licensed painting contractor with the State

of Utah.

5. The work performed by Plaintiff under its original subcontract was completed on or about April 9, 1985 and met the standards in the industry.

6. Plaintiff, at the request of Randy Green, the supervising architect, submitted a bid to do extra work consisting of sealing brick walls, which bid was accepted by the architects, ABCO Construction, the contractor and the owner, Uintah County School District.

7. The labor performed and material furnished in applying sealer to the auditorium side walls, halls, rooms 101, 102, 103, 104, 108 and 109, the music room and sorting room, amounted to $2,641.00. The work was substantially completed on or about March 5, 1985.

8. A portion of the work was unacceptable to the architect. Plaintiff performed the required corrective work, which was approved and accepted by the architect, and the extra of sealing the walls was completed on or about April 1, 1985.

9. Defendants have the burden of showing what work, if any, did not meet standards in the industry and present evidence of any claimed off sets.

10. Plaintiff has been paid for the labor performed and materials furnished except for the extra of sealing the walls. There remains due and owing to Plaintiff the sum of $2,641.00 as of August 1, 1985.

11. ABCO Construction, and the owner, Uintah County School District, signed the change order for the extra of sealing the walls on or about July 12, 1985. Payment for the extra to Plaintiff became due and payable on or about August 1, 1985.

12. Defendant, Fred A. Morton Company, as agent for American Casualty Company, provided a payment and performance bond as required by Title 14-1-14, Utah Code Annotated, as amended, to insure payment for all labor and materials in connection with the construction of the auditorium addition at the West Jr. High School, Uintah County, Utah, under the contract between ABCO Construction Company and the Uintah County School District.

13. Plaintiff sent several statements to Defendant, ABCO Construction Company and Dana Larson Roubal & Associates for payment of the extra owing to Plaintiff. Demand was made upon ABCO Construction on or about August 26, 1985 and on or about November 29, 1985. Plaintiff has incurred costs and attorney's fees in connection with the bringing and prosecution of this action. A reasonable sum to be awarded Plaintiff as attorney's fees is $800.00.

14. Defendants', Branson G. Neff, individually and Dana Larson Rouball & Associates were not parties to the said contract between Plaintiff and ABCO Construction for the painting and the extra of sealing the walls.

From the foregoing Findings of Fact the Court concludes

as follows:

CONCLUSIONS OF LAW

1. Defendant, ABCO Construction, Inc., contracted with Plaintiff to perform labor and furnish materials in doing painting work in connection with the construction of the auditorium addition at the West Jr. High School.

2. There is due and owing to Plaintiff for labor and materials for the extra work of sealing the walls the sum of $2,641.00, with accrued interest at the legal rate of 10% per annum from August 1, 1985.

3. Judgment should be entered against Defendants, ABCO Construction Company, Inc., Fred A. Morton Company and American Casaulty Company, in favor of Plaintiff in the sum of $2,641.00 plus accrued interest from August 1, 1985 to November 30, 1986 at the rate of 10% per annum in the amount of $352.50.

4. Plaintiff should be awarded judgment for attorney's fees against Defendants, ABCO Construction Company, Fred A. Morton Company and American Casualty Company, in the sum of $800.00.

5. Plaintiff should be awarded judgment for its costs, together with post judgment interest at the rate of 12% per annum from the date of judgment until the judgment is

paid in full.

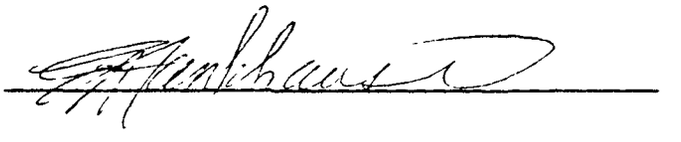
DONE IN OPEN COURT this _____ day of December, 1986.

BY THE COURT:

_____
WHITNEY D. HAMMOND
CIRCUIT JUDGE

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Dale M. Dorius, Attorney for Defendants, P.O. Box U Brigham City, Utah 84302 in accordance with Rule 2.9, Rules of Practice, on this 2nd day of December, 1986.



E. H. FANKHAUSER
Bar No. 1032
Attorney for Plaintiff
660 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1148

CIRCUIT COURT, STATE OF UTAH

UINTAH COUNTY, VERNAL DEPARTMENT

PETERS & COMPANY, INC., a Utah Corporation,	*	
Plaintiff,	*	JUDGMENT
vs.	*	Civil No. 86 CV 067
ABCO CONSTRUCTION, INC., BRANSON G. NEFF, FRED A. MORTON & COMPANY, AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA, DANA LARSON ROUBAL & ASSOCIATES, INC.	*	
Defendants.	*	

This cause came on for trial at a regular term of the above entitled Court, pursuant to notice, without jury, on November 24, 1986, the Honorable Whitney D. Hammond presiding. Plaintiff was represented by its attorney, E. H. Fankhauser. Defendants were represented by their attorney, Dale M. Dorius. Each of the parties presented witnesses that were duly sworn and testified; and presented evidence that was received and adduced by the Court; and the

matter having been argued and submitted to the Court for its determination and decision; and the Court, after consideration of the testimony and evidence presented made and entered its Findings of Facts and Conclusions of Law, now, therefore, in accordance therewith:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Plaintiff be and is hereby awarded judgment against Defendants, ABCO Construction Company, Inc., Fred A. Morton Company and American Casualty Company for the sum of $2,641.00, together with accrued interest from August 1, 1985 to November 30, 1986 at the rate of 10% per annum in the amount of $352.50.

2. Judgment for attorney's fees for the use and benefit of Plaintiff's attorney against Defendants, ABCO Construction, Fred A. Morton Company and American Casualty Company in the sum of $800.00.

3. For Plaintiff's costs of Court assessed at $218.75, said judgments to bear interest from the date hereof until paid in full at the judgment rate of 12% per annum.

DONE IN OPEN COURT this _____ day of December, 1986.

BY THE COURT:

_____
WHITNEY D. HAMMOND
CIRCUIT JUDGE

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Dale M. Dorius, Attorney for Defendants, P.O. Box U, Brigham City, Utah 84302, in accordance with Rule 2.9, Rules of Practice, on this 2nd day of December, 1986.

E. H. FANKHAUSER
Bar No. 1032
Attorney for Plaintiff
660 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1148

CIRCUIT COURT, STATE OF UTAH

UINTAH COUNTY, VERNAL DEPARTMENT

PETERS & COMPANY, INC., a Utah Corporation,	*	ORDER AMENDING JUDGMENT
Plaintiff,	*	Civil No. 86 CV 067
vs.	*	
ABCO CONSTRUCTION, INC., BRANSON G. NEFF, FRED A. MORTON & COMPANY, AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA, DANA LARSON ROUBAL & ASSOCIATES, INC.,	*	
Defendants.	*	

Defendants' Motion for New Trial, having been denied by Order of the Court dated December 30, 1986; and said Order having provided that the Judgment, in favor of Plaintiff against Defendants should be amended by Order to specifically provide that Plaintiff had no cause of action against Defendants, Branson G. Neff, as an individual or Dana, Larson, Roubal & Associates, Inc.; and that Plaintiff's action against said Defendants should be dismissed with prejudice; now, in accordance therewith:

IT IS HEREBY ORDERED AND ADJUDGED that the action of laintiff against Defendants, Branson G. Neff, individually and efendant, Dana, Larson, Roubal & Associates, Inc., be dismissed ith prejudice for no cause of action in that said Defendants ere not parties to the contract between Plaintiff and ABCO onstruction, Inc., for the painting and extra of sealing the alls.

The Judgment in favor of Plaintiff, Peters & Company, Inc., against ABCO Construction, Inc., Fred A. Morton & Company, and American Casualty Company of Reading Pennsylvania heretofore entered by this Court shall remain in full force and effect until satisfied.

DONE IN OPEN COURT this 6th day of January, 1987.

BY THE COURT:

/s/
WHITNEY D. HAMMOND
CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Dale M. Dorius, Attorney for Defendants, 29 South Main Street, Brigham City, Utah 84302 on this 7th day of January, 1987.

ORDER

AIA DOCUMENT G701

Distribution to:
OWNER ☐
ARCHITECT ☐
CONTRACTOR ☐
FIELD ☐
OTHER ☐

PROJECT: WEST JR. HIGH SCHOOL
(name, address) East U.S. HIGHWAY
Roosevelt, Utah
TO (Contractor):

ABCO CONSTRUCTION
Route 1, Box 116
Corrine, Utah 84307

CHANGE ORDER NUMBER: G-5
INITIATION DATE: March 6, 1985
ARCHITECT'S PROJECT NO: 4510283
CONTRACT FOR: General Constructio
CONTRACT DATE: March 5, 1984

You are directed to make the following changes in this Contract:

1. Add one coat of Chem-Stop brick sealer to interior brick walls:

   a. To ceiling height in rooms 101, 102, 103, 104 (new brick), 108, 109, 119 and 122.
   b. To elevation 107'-4" in Rooms 110, 113, 114 and 115.

   Price as approved by telephone conversation between Randy Green (DLRA) and Ted Peters (Peters & Co.) 2/22/84 and authorized by Dirk Harris (Uintah School District) 2/22/85.

   Add $2,641.

SUMMARY:

Finish Allowance	$ 10,000.00
Less Previous Changes	- 3,351.15
Less This Change	- 2,641.00
REMAINING ALLOWANCE	$ 4,007.85

Not valid until signed by both the Owner and Architect.
Signature of the Contractor indicates his agreement herewith, including any adjustment in the Contract Sum or Contract Time.

The original (Contract Sum) (Guaranteed Maximum Cost) was	$	1,009,233 .0
Net change by previously authorized Change Orders	$	(308,495 .6
The (Contract Sum) (Guaranteed Maximum Cost) prior to this Change Order was	$	700,737 .3
The (Contract Sum) (Guaranteed Maximum Cost) will be (increased) (decreased) (unchanged) by this Change Order	$	0(.
The new (Contract Sum) (Guaranteed Maximum Cost) including this Change Order will be	$	700,737 .3
The Contract Time will be (increased) (decreased) (unchanged) by		(0) Days.
The Date of Substantial Completion as of the date of this Change Order therefore is		

		Authorized:
DANA LARSON ROUBAL & ASSOC.	ABCO CONSTRUCTION	UINTAH HIGH SCHOOL
ARCHITECT	CONTRACTOR	OWNER
19 West So. Temple	Route 1, Box 116	635 West 200 South
Address	Address	Address
SLC, UT 84101	Roosevelt, Utah	Vernal, Utah 84078
BY	BY	BY
DATE 3/8/85	DATE 7-12-85	DATE

TERS & CO. PAINTING & DECORATING
outh Richards Street • Salt Lake City Utah 84101 • 801-355-2500

As of this date we are ☐ are not ☐ bondable for an amount in excess of the enclosed bid We will ☐ will not ☐ bond this project (premium by general contractor)
Our bondman is Kiser-Lord , Phone # _____
State License # 35852-8 State Bid Limit $500,000
We acknowledge seeing addenda # ___ none ___ ___ ___
(No acknowledgement means "None")

Proposal
February 25, 1985

Dana Larson Roubal & Assoc. Inc.
19 West South Temple
Suite 600
Salt Lake City, Utah 84101

Re: West Jr. High School
Roosevelt, Utah
Interior Brick Seal

Gentlemen:

We will apply one coat of DEM-STOP to the Auditorium side walls at a level of 7'4"(from the rear) platform, stairs and vestibule, and rooms 101, 102, 103, 104, 108, 109, the music room and the sorting room for the price indicated below:

E PROPOSE to furnish labor and material — complete in accordance with above specifications, and subject to conditions ıund on both sides of this agreement, for the sum of

Two thousand seven hundred eighty and no/100---------- dollars ($2,780.00)

Payment to be made as follows: In full upon completion.

PETERS & CO.
By Ted Peters

ACCEPTED The above prices, specifications and conditions are satisfactory and are hereby accepted You are authorized to do the work as specified Payment will be made as outlined above No interest charge if paid within 30 days 1½% interest per month or 18% per year charged on all past due accounts

Date of Acceptance _____

By _____

Note This proposal may be withdrawn by us if not accepted within days
All material is guaranteed to be as specified All work to be completed in a workmanlike manner according to standard practices Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate All agreements contingent upon strikes, accidents or delays beyond our control Owner to carry fire tornado and other necessary insurance Our workers are fully covered by Workmen's

PETERS & CO. PAINTING & DECORATING
1124 South Richards Street • Salt Lake City, Utah 84101 • 801-355-2500

February 25, 1985

Mr. Randy Green
DANA LARSON ROUBAL & ASSOC. INC.
19 West South Temple
Suite 600
Salt Lake City, Utah 84101

Dear Randy:

Attached please find our proposal on the Interior Brick Sealing at the West Jr. High School in Roosevelt, Utah.

Please sign indicating your acceptance and mail the original back to me.

Very truly yours,

PETERS & CO.

Ted Peters

TP:we
Enclosure

...ument G701

ARCHITECT ☐
CONTRACTOR ☐
FIELD ☐
OTHER ☐

approve
Charge painter
✓ spec

EXHIBIT B

JECT: West Jr. High School Addition
e, address) Roosevelt, UT

Contractor):

ABCO Construction
2485 North 7600 West
Corinne, UT 84307

CHANGE ORDER NUMBER: 48-W

INITIATION DATE: 4-20-85

ARCHITECT'S PROJECT NO: 451028300

CONTRACTOR: General Construction

CONTRACT DATE: March 5, 1984

e directed to make the following changes in this Contract:

Clean brick after it had been sealed.

Material	63.85
97.5 hr @ 20/hr	1,950.00
	2,013.80
Overhead & Profit 15%	302.07
	$2,315.87

signed by both the Owner and Architect
e Contractor indicates his agreement herewith, including any adjustment in the Contract Sum or Contract Time

Contract Sum) (Guaranteed Maximum Cost) was ..... $
y previously authorized Change Orders ..... $
Sum) (Guaranteed Maximum Cost) prior to this Change Order was ..... $
Sum) (Guaranteed Maximum Cost) will be (increased) (decreased) (unchanged)
hange Order ..... $
ract Sum) (Guaranteed Maximum Cost) including this Change Order will be ... $
ime will be (increased) (decreased) (unchanged) by (12) Days
bstantial Completion as of the date of this Change Order therefore is

on, Roubal & Assoc.	ABCO Construction	Authorized. Uintah School District
h Temple, Suite 600	CONTRACTOR 2465 North 7600 West	OWNER 623 West 200 South
City, UT 84101	Address Corinne, UT 84307	Address Vernal, Utah
	BY	BY
	DATE	DATE

01 • CHANGE ORDER • APRIL 1978 EDITION • AIA® • ©1978
INSTITUTE OF ARCHITECTS, 1735 NEW YORK AVE., N.W. WASHINGTON D.C. 20006

G701 — 1978

CHANGE ORDER

AIA DOCUMENT G701

OWNER ☐
ARCHITECT ☐
CONTRACTOR ☐
FIELD ☐
OTHER ☐

EXHIBIT

PROJECT:
(name, address)

CHANGE ORDER NUMBER:

INITIATION DATE:

TO (Contractor):

ARCHITECT'S PROJECT NO:

CONTRACT FOR:

CONTRACT DATE:

You are directed to make the following changes in this Contract:

Help painter w/ scaffolding.

2 hrs @ 90^{00} = 40.^{0}

We left the painters on the scaffolding all during the project & have not charged their rental.

Not valid until signed by both the Owner and Architect.
Signature of the Contractor indicates his agreement herewith, including any adjustment in the Contract Sum or Co

The original (Contract Sum) (Guaranteed Maximum Cost) was ..... $
Net change by previously authorized Change Orders ..... $
The (Contract Sum) (Guaranteed Maximum Cost) prior to this Change Order was ..... $
The (Contract Sum) (Guaranteed Maximum Cost) will be (increased) (decreased) (unchanged) by this Change Order ..... $
The new (Contract Sum) (Guaranteed Maximum Cost) including this Change Order will be ... $
The Contract Time will be (increased) (decreased) (unchanged) by
The Date of Substantial Completion as of the date of this Change Order therefore is

Authorized:

ARCHITECT	CONTRACTOR	OWNER
Address	Address	Address
BY	BY	BY
DATE	DATE	DATE

EXHIBIT "B"

Any damages to the General Contractor for delay caused by the Subcontractor shall be deducted by the General Contractor from the agreed price for said work, subj however, to the option of the General Contractor to terminate said Subcontract for default as herein elsewhere provided.

The General Contractor shall not be liable to the Subcontractor for delay to the Subcontractor's work by the act, neglect or default of the Owner, General Contractor or Architect, or by reason of fire or other casualty, or on account of riots or of strikes, or other combined action of the workmen or others, or on account of any acts of God, any other cause beyond General Contractor's control or on account of any circumstances caused or contributed to by the Subcontractor; provided, however, notwithstandi anything else contained herein, the General Contractor will be liable to the Subcontractor for damages he incurs as a result of any acts or failures to act by the Owner whi delays or suspends the Subcontractor's work only to the extent the Owner is liable for such damages and actually pays the General Contractor for such damages, it bei expressly understood that the only obligation the General Contractor has to Subcontractor under this proviso is to pass on to the Owner any claim Subcontractor has f damages or delays caused by Owner and to pay to Subcontractor as a result of the Subcontractor's claim for delays caused by the Owner.

The Subcontractor expressly agrees that an extension of time shall constitute the Subcontractor's sole and exclusive remedy should the Subcontractor be delayed, interfer with, disrupted, or hindered in his work by the General Contractor, in which case the General Contractor shall owe the Subcontractor therefore only an extension of time f completion equal to the delay caused and then only if a written notice of delay is made to the contractor within forty-eight (48) hours from the time of the beginning of th delay, interference, disruption, or hindrance; and under no circumstances shall the General Contractor be liable to pay to the Subcontractor any compensation for suc General Contractor-caused delays. The Subcontractor acknowledges and agrees that the Subcontractor's failure to give a written notice of delay as prescribed here constitutes a waiver by the Subcontractor to any extension of time for such delay, disruption, interference or hindrance.

The Subcontractor's written notice of delay must be by certified mail and on a form provided by or suitable to the General Contractor and contain evidence establishing th the delay in completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Subcontract The General Contract shall ascertain the facts and the extent of the delay and extend the time for completing the Subcontract, when in his sole judgment and discretion an extension appropriate. The General Contractor's findings shall be final and conclusive as to the Subcontractor's entitlement for time extensions.

THE GENERAL CONTRACTOR, may, at any time, on written order, without notice to the surety and without invalidating this Subcontract, make changes in the work here contracted for and the Subcontractor agrees to proceed with the work as directed by the General Contractor's written order. Any claim for an extension of time fo completion or for adjustment of the Subcontract price shall be resolved at the time the General Contractor directs performance of the extra or changed work and, in absenc of a written confirmation given by the General Contractor of the amount of such an extension or adjustment at the time such extra or changed work is ordered, it i expressly understood that no such extension or adjustment is due the Subcontractor for performance of the changed or extra work. If the changed or extra work causes an increase or decrease in the Subcontractor's cost of performence of the Subcontract work, or in the time required for performance, within a reasonable time after the General Contractor's written order, the Subcontractor shall submit to the General Contractor an estimate showing what effect the proposed extra work or change is estimated to have on the Subcontractor price; and, if after receipt of such estimate the General Contractor gives the Subcontractor written authority for such extra work and for the adjustment of the Subcontract price in accordance with such estimate, the Subcontractor shall perform such extra work and the Subcontract price shall be adjusted by the amount set forth in such estimate, provided that no payment shall be due the Subcontractor for such changed or extra work until the General Contractor has received payment from the Owner for said changed or extra work performed by the Subcontractor.

It is expressly agreed that except in an emergency endangering life or property no additions or changes to the work shall be made except upon written order of the General Contractor, and the General Contractor shall not be liable to the Subcontractor for any extra labor, materials, or equipment furnished without such written order No officer employee or agent of the General Contractor is authorized to direct any extra work or changed work by oral order.

Nothing herein contained shall excuse the Subcontractor from proceeding promptly with the prosecution of the work as ordered in writing by the General Contractor, and failure to do so shall constitute a breach of this Subcontract.

THE SUBCONTRACTOR AGREES to indemnify the General Contractor against and hold the Contractor harmless for any and all claims, demands, liabilities, losses expenses, suits, and actions (including attorney's fees) for or on account of any injury to any person, or any death at any time resulting from such injury, or any damage to any property, which may arise (or which may be alleged to have arisen) out of or in connection with the work covered by this Subcontract even though such injury, death damage may be (or may be alleged to be) attributable in part to negligence or other fault on the part of the General Contractor or his officers, agents or employees The obligation of the Subcontractor to indemnify and hold the General Contractor harmless shall not be enforceable if and only if it be determined by arbitration or judicial proceeding that the injury, death or damages complained of was attributable solely to the fault or negligence of the General Contractor or his officers, agents, or employees and not in any manner in any part attributable to the Subcontractor The Subcontractor agrees to reimburse the General Contractor for all sums which the General Contractor may pay or be compelled to pay in settlement of any claim hereunder, including any claim under the provisions of any workmen's compensation law or any plan or employees benefits which the General Contractor may adopt The General Contractor shall be entitled to withhold from any payment otherwise due pursuant to this subcontract such amount or amounts as may be reasonably necessary to protect it against liability for any personal injury, death or property damage resulting from the performance of the work hereunder.

THE SUBCONTRACTOR SHALL KEEP HIMSELF and the General Contractor fully advised as to all pertinent local and regional labor agreements and practices, including any local labor union contract negotiations occurring during the term of this Subcontract. In the event the Subcontractor has a collective bargaining agreement, either locally nationally, with a labor union engaged in local negotiations or if the Subcontractor will be affected, either directly or indirectly, by the outcome of said local negotiations the Subcontractor agrees to join said negotiations, if legally permissible, and participate or associate itself with the local contractor or contractors involved in said negotiations in an endeavor to resolve the labor dispute.

All labor used throughout the work shall be acceptable to the Owner and the General Contractor and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay, and that will in no case or under any circumstances cause any disturbance, interference or delay to the progress of the building, structures facilities, or any other work being carried on by the Owner or the General Contractor in any other town or city in the United States.

The Subcontractor agrees that where his work or the General Contractor's work is stopped or delayed or interferred with by strikes, slow downs, or work interruptions resulting from the acts or failure to act of the employee of the Subcontractor in concert, or by any breach of the provisions above, then the General Contractor, at his option may terminate this Subcontract and proceed in accordance with the provisions of the Subcontract. The General Contractor shall have the remedies provided for herein even though the Subcontractor's employees may be engaging in work stoppage solely as a result of a labor dispute involving the General Contractor or others and not in any manner involving the Subcontractor.

IN CASE OF ANY DISPUTE between the Subcontractor and General Contractor, the Subcontractor agrees to be bound to the General Contractor to the same extent that the General Contractor is bound to the Owner by the terms of the General Contract and by any and all decisions or determinations made thereunder by the party or board authorized in the General Contract. The Subcontractor also agrees to be bound to General Contractor to the same extent the General Contractor is bound to Owner by the decision of a court of competent jurisdiction, whether or not Subcontractor is a party to such proceeding If such a dispute is prosecuted or defended by the General Contractor against Owner under the terms of the General Contract or in court action, the Subcontractor agrees to furnish all documents, statements, witnesses, and other information required by the General Contractor for such purpose and to pay or reimburse General Contractor for all expenses and costs, if any, incurred in connection with. It is expressly understood that as to any and all work done and agreed to be done by the Subcontractor and as to any and all materials, equipment or services furnished or agreed to be furnished by Subcontractor, as to any and all damages, if any, incurred by Subcontractor, in connection with this project, the General Contractor never be liable to the Subcontractor to any greater extent than the Owner is liable to General Contractor No dispute shall interfere with the progress of construction the Subcontractor agrees to proceed with his work as directed, despite disputes he may have against the General Contractor, the Owner, or other parties

...NG & DECORATING
1124 SOUTH RICHARDS STREET • SALT LAKE CITY, UTAH 84101
TED G. PETERS • 801-355-2500 • VERA C. PETERS

EXHIBIT

ABCO CONSTRUCTION
Route 1 Box 116
Corinne, Utah 84307

REPLY

DATE

MESSAGE DATE July 5, 1984

Please find enclosed the contract on the WEST JR. HIGH SCHOOL AUDITORIUM ADDITION. I ammended the contract to read as it was stated on the depository bid sheet. The alternates should not change the contract. We estimate approx. 65 man days of labor. The number of days depends on how much is ready for us. A 5 man crew would be about two weeks.

Ted Peters Ted Peters

SENDER KEEP YELLOW COPY FOR YOUR FILE MAIL WHITE AND PINK COPIES

EXH. 317

ATE Dec Ct. 87101

ATE	INV NO OR REF	JOB NO	A ACCOUNTS PAYABLE DR	B MATERIALS	C SUB CONTRACT	D	OTHER CHARGES ACCT	OTHER CHARGES AMOUNT	F ACCOUNTS PAYABLE BALANCE
			ACCOUNTS PAYABLE CR						
NCE FORWARD →									
8/84	1397	8404			2500 -				2500 -
8/84			2500 -						0
8/84	1425	8404			702 20				702 20
8/84			702 20						0
8/84		8404			535 80				535 80
8/84			535 80						0
9/85		8405			4000 00				4000 00
9/85			4000 00						0
9/85		8405			1174 30				1174 30
9/85			1174 30						0
9/85	BGain	8405			931 00				931 00
9/85			931 00						0

Take off Hardware to accommodate the painter.

12 ea - 3' Exterior doors. w/panic
2 ea 4' " " "
16 ea 3' doors "
1 ea 4' " " "
1 ea 4' w/knob
1 ea 3' w/panic
8 ea 3' w/closer
4 ea 3' w/closer-panic

Remove Hardware - 18.5 hr @ 16.03/hr = 296.

Re-install Hardware 22.5 hr @ 25.25/hr = 568.
" " " 55.5 hr @ 16.03/hr 889.
1 754.

This should be Charged to painters - They do not finish painting over work and as promised.