

2009

# Meadow Valley Contractors, Inc., v. State of Utah Department of Transportation : Brief of Appellant

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

**MEADOW VALLEY CONTRACTORS,  
INC.,**

Plaintiff, Appellee and Cross-  
Appellant,

vs.

**STATE OF UTAH DEPARTMENT OF  
TRANSPORTATION,**

Defendant, Appellant and  
Cross-Appellee.

Supreme Court No. 20090025-SC

District Court No. 050909139

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### **Jurisdiction**

This court has jurisdiction under Utah Code section 78A-3-102.

### **Statement of Issues**

Before stating the issues, the Utah Department of Transportation (UDOT) provides some context. This appeal involves a breach of contract claim brought by Meadow Valley Contractors, Inc. (MVC) against UDOT under a contract in which MVC agreed to serve as general contractor for a highway construction project on I-215 (“general contract”). (R. 2.) The dispute centers on whether MVC is entitled to additional compensation on the ground that UDOT breached the general contract by altering the project to preclude the use of a less expensive “ribbon paving” method.

MVC entered into two subcontracts with Southwest Asphalt Paving for the paving portion of the project (collectively “subcontract”). (R. 1496-97.) Months before paving began, Southwest requested to ribbon pave the entire project because it would be less expensive, and UDOT informed both MVC and Southwest that certain specifications in the general contract limited the use of ribbon paving. (R. 1500-02.) If MVC believed UDOT had altered the project by limiting ribbon paving, then under the general contract MVC had to provide UDOT written notice within 5 days. (Trial Ex. 103 at 57, attached at Add. B.) And if Southwest believed UDOT had altered the project, then under the subcontract Southwest had to provide MVC written notice in time to permit MVC to comply with its notice deadlines, but in no event longer than 48 hours after discovery. (Trial Ex. 9 at §5.2, attached at Add. C.)

Neither MVC nor Southwest provided timely notice under their respective contracts. (R. 1511.) And under both contracts, the failure to provide timely notice

“constitutes a waiver of any and all claims that may arise as a result of the alleged change.” (Add. B, Trial Ex. 103 at 57; Add. C, Trial Ex. 9 at §5.3.)

After the project was completed, Southwest did not file a claim against MVC for additional compensation, but instead asked MVC to assign to Southwest any claims MVC had against UDOT, which MVC did. (R. 1497.) Southwest then filed this lawsuit on behalf of MVC, alleging that UDOT breached the general contract when it altered the project by limiting ribbon paving. (R. 2-5.) After a bench trial, the trial court ruled that (i) UDOT had breached the general contract by restricting ribbon paving; (ii) Southwest’s “actual verbal notice” to UDOT that Southwest desired to ribbon pave satisfied MVC’s duty to provide written notice that UDOT had altered the project such that MVC was entitled to additional compensation; and (iii) MVC was not required to comply with the notice provisions because UDOT restricted Southwest from ribbon paving even though project specifications permitted ribbon paving. (R. 1518-24.) The trial court then awarded damages to MVC that were incurred by Southwest only. (R. 1525.)

These rulings raise four issues on appeal.

**Issue 1:** Whether the trial court plainly erred in awarding damages to MVC that were incurred by Southwest, where Southwest is the assignee of MVC’s claims.

**Standard of Review:** The court reviews for correctness whether an assignor can recover damages incurred by an assignee. SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, 28 P.3d 669.

**Preservation:** This precise issue is not preserved. The court will reverse if “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is

harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.” State v. Ross, 2007 UT 89, ¶17, 174 P.3d 628.

**Issue 2:** Whether UDOT breached a general contract by altering a highway construction project where the contract expressly permits UDOT to alter the project.

**Standard of Review:** The court reviews a trial court’s interpretation of a contract for correctness. Aquagen Int’l, Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998).

**Preservation:** This issue was preserved at R. 1274-77.

**Issue 3:** Whether Southwest’s verbal notice that it wished to ribbon pave satisfied MVC’s obligation to provide UDOT written notice that MVC believed UDOT had altered the project by prohibiting ribbon paving.

**Standard of Review:** The court reviews a trial court’s interpretation of a contract for correctness. Aquagen Int’l, Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998).

**Preservation:** This issue was preserved at R. 1274-76.

**Issue 4:** Whether UDOT waived, modified, or is estopped from enforcing the notice provisions in the general contract because UDOT directed Southwest to block pave instead of ribbon pave.

**Standard of Review:** Whether a district court “employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations, to which we give a district court deference.” Cedar Surgery Ctr., L.L.C. v. Bonelli, 2004 UT 58, ¶6, 96 P.3d 911. A similar standard of review applies to modification and estoppel. R.T. Nielson Co. v. Cook, 2002 UT 11, 40 P.3d 1119.

**Preservation:** This issue was preserved at R. 1425:971, 983, 991-1011.

## **Determinative Provisions**

None

## **Statement of the Case**

### **I. Nature of the Case**

In this lawsuit, MVC alleges that UDOT breached its contract with MVC (“general contract”) when UDOT forbade MVC’s subcontractor, Southwest, from using a less expensive “ribbon paving” method on portions of a construction project on I-215.<sup>1</sup> (R. 1-5.) While the general contract allowed the UDOT engineer to alter the project, it also entitled MVC to additional compensation as long as MVC provided UDOT timely notice that UDOT had altered the project. After a bench trial, the court ruled that UDOT breached the general contract by altering the project and MVC was excused from complying with the notice provisions because UDOT had altered the project by restricting Southwest from ribbon paving.<sup>2</sup> (R. 1519-25.) The trial court then awarded to MVC damages incurred by Southwest, the assignee of MVC’s claim. (R. 1525.)

This appeal concerns whether (i) MVC may recover damages incurred by Southwest; (ii) UDOT breached the general contract by altering the project where the contract allows UDOT to alter the project; (iii) MVC waived its right to additional compensation by failing to comply with the notice provisions in the general contract; and (iv) UDOT waived, modified, or is estopped from enforcing the notice provisions.

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<sup>1</sup> MVC voluntarily dismissed its original unjust enrichment claim. (R. 300-01.)

<sup>2</sup> This is not a mischaracterization of the trial court’s ruling. The trial court ruled that UDOT waived the right to require MVC to comply with the notice provisions because UDOT “failed to correctly interpret and misapplied the I-215 Project’s asphalt paving specifications in limiting, by his own directives, [Southwest’s] use of the ribbon paving method.” (R. 1522.) In other words, MVC was not required to notify UDOT that UDOT had altered the project because UDOT had altered the project.

## **II. Course of Proceedings**

On September 24, 2004, MVC filed a formal claim with UDOT, alleging that (i) MVC had incurred additional costs of at least \$574,466.06 because UDOT forbade ribbon paving; and (ii) UDOT has assessed an unwarranted “thickness penalty” in the amount of \$178,416.70. (Trial Ex. 25.) On February 11, 2005, a claims review board—a three-member panel including a general contractor and two UDOT representatives—unanimously recommended that the UDOT deputy director deny MVC’s claims because (i) UDOT had correctly interpreted the project specifications as prohibiting ribbon paving and (ii) the thickness tests supported the thickness penalty. (R. 1424:587-88.) The deputy director did not approve additional compensation for MVC. (R. 153.)

On May 19, 2005, MVC filed a complaint in district court, again alleging that UDOT had breached its contract with MVC by (i) prohibiting ribbon paving and (ii) penalizing MVC for the thickness of the pavement. (R. 1-5.) Importantly, even though Southwest has prosecuted this lawsuit as MVC’s assignee, Southwest (i) is not a party to this lawsuit, (ii) has not filed any claims against UDOT or MVC, and (iii) has no contractual relationship with UDOT. (R. 1497.)

After a bench trial, the court ruled in favor of MVC on its breach of contract claim concerning ribbon paving and awarded MVC \$768,365.52 in damages. (R. 1525.) UDOT appeals this ruling. (R. 1533.) The trial court then denied MVC’s breach of contract claim concerning the thickness penalty. (R. 1525.) MVC has cross-appealed this ruling. (R. 1535.) UDOT will not address the thickness penalty claim until it responds to MVC’s opening brief on its cross-appeal.

### **III. Statement of Facts**

In the fall of 2002, UDOT and MVC entered into a general contract which included, among other things, re-paving portions of I-215. (R. 1496.) Before and throughout this litigation, UDOT has maintained that the project specifications in the general contract prohibited the use of a less expensive ribbon paving method for significant portions of the project. After a bench trial, however, the trial court ruled that UDOT had altered the project by prohibiting ribbon paving.<sup>3</sup> (R. 1511.) While UDOT believes that this ruling is incorrect, UDOT does not challenge it on appeal. UDOT instead accepts, for purposes of appeal, that UDOT altered the project by restricting ribbon paving. Because most of the trial court's findings of fact concern whether UDOT altered the project, most of the trial court's findings of fact are irrelevant to this appeal.

#### **A. UDOT's General Contract with MVC**

Under the general contract, UDOT reserved the right to alter the project, and MVC agreed to complete the project as altered. (Add. B, Trial Ex. 103 at 54, 56; R. 1424 at 539.) Because the contract required MVC to complete the project even if UDOT altered it, the contract contained a number of provisions to protect the parties in this scenario. The general contract required MVC to notify the UDOT engineer promptly "of alleged changes to the Contract due to differing site conditions, extra work, altered work beyond the scope of the Contract, or actions taken by [UDOT] that change the Contract terms and conditions." (Add. B, Trial Ex. 103 at 56 (emphasis added).) Once MVC provided this verbal notice, MVC was not to "perform further work or incur further contract item

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<sup>3</sup> The trial court found that UDOT's prohibition on ribbon paving was "equivalent to requiring extra work or a change in work that was not contemplated by M[VC]'s bid to UDOT or Southwest's bid to M[VC]." (R. 1511.)



expense relating to the claimed change after the date the change allegedly occurred, unless directed otherwise in writing by the Engineer.” (Add. B, Trial Ex. 103 at 56.)

MVC then had “5 calendar days of the date of the change or action was noted” to provide in writing to the UDOT engineer the following information:

1. The date of occurrence and nature of the circumstances of the occurrence that constitute a change.
2. Name, title, and activity of each [UDOT] representative knowledgeable of the claimed change.
3. Identity of any documents and the substance of any oral communication involved in the claimed change.
4. Basis for a claim of accelerated schedule performance, if applicable.
5. Basis for a claim that the work is not required by the Contract, if applicable.

(Add. B, Trial Ex. 103 at 56.)

Under the general contract, UDOT then had only 10 days to evaluate the claims and inform MVC whether additional compensation was warranted.<sup>4</sup> During those 10 days, if the change could warrant additional compensation in excess of \$25,000, then the UDOT engineer had to obtain numerous approvals, including approval of the Federal Highway Administration because the project involved federal money. (R. 1424:556-57.) As Lance Harris—MVC’s Project Manager and designated as MVC’s Rule 30(b)(6) most

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<sup>4</sup> The provision provides that UDOT must within 10 days,

1. Confirm that a change occurred and, when necessary, direct the method and manner of further performance; or
2. Deny that a change occurred and, when necessary, direct the method and manner of further performance; or
3. Advise [MVC] that information necessary for deciding to confirm or deny the change has not been submitted, and indicate what information is needed for further review and date by which [MVC] should submit it to the Engineer. The Engineer responds to such additional information within 10 calendar days from receipt from [MVC].

(Add. B, Trial Ex. 103 at 57.)

knowledgeable representative<sup>5</sup>—testified, MVC understood that if MVC had provided UDOT notice that prohibiting ribbon paving constituted a change in the project, then the UDOT engineer would have needed approval from other UDOT officials and the federal government because the claimed additional compensation would have exceeded \$25,000. (R. 1424:556-57.) Absent these approvals, the UDOT engineer could not have required work that triggered such additional compensation.

The importance of the notice provisions is reflected by the fact that MVC’s “failure to provide required notice under this article constitutes a waiver of any and all claims that may arise as a result of the alleged change.” (Add. B, Trial Ex. 103 at 57.) Elsewhere, UDOT “does not grant additional compensation if verbal and/or written notification is not given.” (Add. B, Trial Ex. 103 at 75.) These provisions prevent claims for additional compensation after work has been performed, by which time the UDOT engineer could no longer obtain the required authorizations to spend additional funds.

The trial court found that MVC did not comply with the notice provisions. (R. 1511.) In fact, MVC’s Rule 30(b)(6) representative, Mr. Harris, testified that MVC never provided UDOT notice that it considered UDOT to have altered the project.<sup>6</sup>

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<sup>5</sup> Rule 30(b)(6) permits a party to serve a deposition notice upon an entity requiring the organization to designate one or more officers, directors, managing agents or other persons to testify on its behalf on the matters described with particularity in the notice. In response to such a notice, MVC designated Lance Harris as the person most knowledgeable regarding this construction project. (R. 1424 at 531.)

<sup>6</sup> The trial court found that MVC was excused from providing notice because the UDOT engineer made clear he “would not have changed his mind in applying his interpretation of the contract specifications” to restrict ribbon paving. (R. 1510.) If correct, a new 10-day period for a higher level review would have begun at the time of the engineer’s “denial.” It is undisputed, however, that MVC did not satisfy this new 10-day period to file an appeal with the board of review, as MVC did not file an appeal for another 15 months. (Trial Ex. 25.) And “[f]ailure to submit a request within this 10-day time frame is considered acceptance of the Engineer’s denial action.” (Add. B, Trial Ex. 103 at 78.)

(R. 1424:553-54.) Moreover, after the project MVC verified and approved in writing that UDOT had satisfied its final payment obligations.<sup>7</sup> (Trial Ex. 41; 1424:691.)

The general contract also provides a mechanism for MVC to appeal if the UDOT engineer disagrees that he altered the project. This appeal mechanism is similarly designed to minimize delays in the project while permitting these issues to be resolved before the work at issue is performed: MVC must file any appeal “within 10 calendar days of the Engineer’s denial of a claim.” (Add. B, Trial Ex. 103 at 78.) The appeal would be submitted to the claims board of review, a three member panel with two UDOT representatives and a general contractor. (Add. B, Trial Ex. 103 at 78.) The review board then would make a recommendation to the UDOT deputy director, whose decision would be “administratively final.” (Add. B, Trial Ex. 103 at 79.)

Like MVC’s failure to notify UDOT that the UDOT engineer had altered the project, MVC’s failure to appeal the engineer’s decision within 10 days operates to waive the right to additional compensation: “Failure to submit a request within this 10-day time frame is considered acceptance of the Engineer’s denial action.” (Add. B, Trial Ex. 103 at 78.) And like the 5-day deadline to provide written notice that the UDOT engineer had altered the project, this 10-day deadline was designed to minimize project delays and to ensure that the UDOT engineer could obtain approvals before UDOT incurred obligations in excess of \$25,000. (R. 1424:556-57.) MVC filed an appeal with the review board 11 months after the project was completed. (Trial Ex. 25.) And nearly a year after filing its appeal before the review board, MVC signed a “final estimate”

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<sup>7</sup> If the contractor approves the final payment estimate, or fails to submit an itemized written statement justifying an adjustment within 30 calendar days, “all disputes not itemized in said statement are waived by the contractor.” (Add. B, Trial Ex. 103 at 104.)

verifying that UDOT had paid MVC all that it owed and waiving any right to additional payment. (Trial Ex. 41; 1424:691; Add. B, Trial Ex. 103 at 104.)

**B. MVC's Subcontract with Southwest**

After MVC entered into the general contract with UDOT, MVC entered into subcontracts with Southwest for the paving portions of the project (collectively "subcontract"). (R. 1496-97.) Much like the general contract, the subcontract contains a formal procedure to receive additional compensation if the project was altered. (Add. C, Trial Ex. 9 at §5.2.) Southwest's entitlement to additional compensation under the subcontract was directly tied to whether MVC received additional compensation from UDOT: "No claim for extra time and/or compensation on account of changes, added or deleted work may be made by [Southwest] unless acknowledged by [MVC] in writing and [MVC] is entitled to and actually receives additional time and/or compensation on behalf of [Southwest] under the [general contract with UDOT]." (Add. C, Trial Ex. 9 at §5.1.) Elsewhere, MVC "shall not be liable to [Southwest] for any greater sum than [MVC] received from [UDOT] on behalf of [Southwest]." (Add. C, Trial Ex. 9 at §5.1.)

Because Southwest's additional compensation was tied to the success of MVC's claim with UDOT, the subcontract provided a formal mechanism by which Southwest could obligate MVC to submit a timely claim to UDOT on Southwest's behalf. Southwest first had to provide MVC "written notice of any act, event, condition, or occurrence that would entitle [MVC] to additional compensation or an extension of time under the [general contract] promptly and in sufficient time for [MVC] to notify [UDOT] in accordance with the [general contract]." (Add. C, Trial Ex. 9 at §5.2.) But "[i]n no event shall [Southwest] give written notice to [MVC] more than forty-eight (48) hours

after discovery.” (Add. C, Trial Ex. 9 at §5.2.) And elsewhere, “[u]pon receipt of any written or oral directive that [Southwest] believes involves work beyond its original scope of work or that would otherwise constitute a constructive change to this agreement, [Southwest] agrees to provide [MVC] with written notice that it considers the directive a change prior to performing any such work.” (Add. C, Trial Ex. 9 at §5.3.)

Once Southwest had provided MVC timely notice, then MVC was obligated to submit a claim to UDOT for additional compensation and “to invoke, on behalf of [Southwest], those provisions in the [general contract] for resolving disputes or claims.” (Add. C, Trial Ex. 9 at §5.4.) However, Southwest’s “[f]ailure to so notify [MVC] will constitute a waiver of all such claims.” (Add. C, Trial Ex. 9 at §5.3.) In other words, if Southwest did not notify MVC that Southwest believed UDOT had altered the project, which in turn would permit MVC to satisfy the notice provisions in the general contract, then Southwest waived any claim to additional compensation from MVC, just as MVC waived any claim to additional compensation from UDOT.

Southwest also agreed (i) not to file a claim against MVC until UDOT had fully resolved any claim brought by MVC and (ii) “to be bound by all decisions entered and determinations made through said procedures,” meaning Southwest agreed to be bound by UDOT’s final decision. (Add. C, Trial Ex. 9 at §5.4; R. 1424 at 527-28.) Southwest not only did not provide MVC timely notice to trigger MVC’s obligation to file a claim with UDOT, Southwest has never filed a claim against MVC or UDOT. (R. 1424:512.)

At trial, Mr. Harris, MVC’s designated representative, confirmed that Southwest was required under its subcontract to provide MVC written notice if Southwest believed it was due additional compensation for an alteration in the project and that Southwest did

not comply with the notice provisions in the subcontract. (R. 1424:522.) Mr. Harris also confirmed that under the subcontract, if Southwest failed to provide MVC timely notice of a dispute, then Southwest waived any claim for additional compensation. (R. 1424:523-24.) In other words, if Southwest failed to provide MVC timely notice, then MVC could owe no additional monies to Southwest.

**C. UDOT Prohibits Ribbon Paving and MVC Fails to Provide Notice that It Believes UDOT Has Altered the Project**

On June 12, 2003, two months before paving began, UDOT held a meeting with representatives from MVC and Southwest to discuss the paving portion of the project. (R. 1500.) At this meeting, UDOT's engineer, Brandon Squire, informed Southwest and MVC that ribbon paving would not be permitted on a significant portion of the project. (R. 1500.) While Southwest stated that it had planned to use the less-expensive ribbon paving method, Southwest did not provide MVC notice that, in turn, would have required MVC to utilize the notice provisions in the general contract. (R. 1502; R. 1424 at 522.) Under the subcontract notice provisions, on June 14, 2003—48 hours after the June 12 meeting—Southwest had waived its right to additional compensation by failing to provide notice to MVC that the project had been altered. (Add. C, Trial Ex. 9 at 5.2, 5.3.)

More important, MVC did not notify UDOT that it believed that the prohibition on ribbon paving altered the project. (R. 1502.) To the contrary, Mr. Harris testified that MVC “did not disagree” with UDOT's interpretation of the project specifications and did not consider the restriction on ribbon paving “to be a change in the scope of the work under the contract.” (R. 1424:539-40, 559.) Thus, under the notice provisions in the general contract, on June 17, 2003—5 days after the June 12 meeting—MVC had waived

its right to additional compensation by failing to provide written notice to UDOT that UDOT had altered the project. (Add. B, Trial Ex. 103 at 56, 57.)

On July 31, 2003, UDOT held another pre-paving meeting at which a Southwest representative again indicated that Southwest wished to ribbon pave, and Mr. Squire reiterated that “ribbon paving would not be allowed.” (R. 1502.) Again, (i) MVC did not disagree with UDOT’s interpretation of the project specifications, (ii) Southwest did not provide notice to MVC that the project had been altered, and (iii) MVC did not provide notice to UDOT that UDOT had altered the project. (R. 1424 at 523-28, 539-41, 550-52.)

Between August and September 2003, Southwest employees told Mr. Squire that the block paving was increasing Southwest’s costs. (R. 1503.) In response, UDOT instructed Southwest to pave as directed in the prior meetings, i.e., Southwest could not ribbon pave. (R. 1503.) During this time, UDOT had actual notice that requiring Southwest to ribbon pave would be less expensive for Southwest. (R. 1511.)

On August 14, 2003, when Southwest first complained in writing to MVC about the limitations on ribbon paving, MVC did not make a claim to UDOT because MVC did not consider Southwest’s letter to be a request that MVC make a claim with UDOT. (R. 1424:589; Trial Ex. 15.) Instead, MVC responded by letter dated August 18, 2003, informing Southwest that “contractual requirements” included a limitation on ribbon paving.<sup>8</sup> (Trial Ex. 16 at 1.) In fact, Southwest did not request that MVC make a claim on its behalf until October 2003, after the project was completed. (R. 1424:593.)

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<sup>8</sup> The specific language is: “The reason that you have been required to back up and pave in ‘blocks’ is to meet the contract requirements concerning vertical grade separation not due to MVC’s direction. If this is slowing down the project, then a second crew may be required to eliminate any time lost while backing up.” (Trial Ex. 16 at 1.)

Consistent with this, while MVC submitted to UDOT numerous change orders during the project, MVC never submitted a change order with regard to the method of paving. (R. 1424:527.) And even when Southwest did complain to MVC in writing about ribbon paving, MVC merely forwarded the letter to UDOT “without taking any position on whether the claim was valid or whether [MVC] agreed with it.” (R. 1424:525.) Nearly two years later, MVC signed a “final estimate” in which MVC agreed that what UDOT paid MVC is all that UDOT owed MVC. (Trial Ex. 41; 1424:691; Add B., Trial Ex. 103 at 104.) In other words, MVC did not indicate to UDOT that MVC considered the limitation on ribbon paving to be an alteration of the project, let alone an alteration warranting additional compensation. (R. 1424:539-40.)

**D. The Trial Court’s Findings of Fact and Conclusions of Law**

As noted previously, the bulk of the trial court’s findings are irrelevant because UDOT does not challenge on appeal that UDOT’s limitation on ribbon paving was “equivalent to requiring extra work or a change in work that was not contemplated by M[VC]’s bid to UDOT or Southwest’s bid to M[VC].” (R. 1511.) Specifically, UDOT does not challenge that it altered the project on June 12, 2003, when the UDOT engineer announced to MVC and Southwest that ribbon paving would not be permitted on significant portions of the paving project. (R. 1500.)

The remaining findings are relevant on appeal. UDOT sets forth these findings to reveal the trial court’s logic, even though doing so is somewhat repetitive. UDOT will divide the findings into sections that correspond to the issues raised in this brief.



### **1. MVC Is the Plaintiff, Southwest Is Not**

The trial court first recognized that MVC “assigned and granted Southwest the right to prosecute the claims asserted in this matter in [MVC’s] name [in] the Claims Prosecution and Tolling Agreement” between MVC and Southwest. (R. 1497.)

Southwest is not a party to this lawsuit. The findings obscure this point by employing the short cite “Meadow Valley/Southwest” for “purposes of convenience” whenever the trial court refers either to MVC or to Southwest. (R. 1497.) UDOT will be precise and separate MVC and Southwest to make clear to which entity the finding refers.

Untangling the trial court’s use of the short cite is important because the findings are misleading when, for example, they suggest that both MVC and Southwest incurred increased costs as a result of the prohibition on ribbon paving, where the costs were incurred by Southwest alone. (R. 1497.) The specific finding is that it was “clear to UDOT that requiring Meadow Valley/Southwest to block pave rather than ribbon pave made increased costs a very serious issue for Meadow Valley/Southwest.” (R. 1504.)

The evidence cited by the trial court in support of its damage award, however, refers only to additional costs to Southwest that resulted from the prohibition on ribbon paving. (R. 1513-14, 1525; Trial Ex. 24; 1412:120; 1424:522.) The trial court cites no evidence, and there is none, that MVC incurred these additional costs. In fact, MVC’s Rule 30(b)(6) representative testified that, under the subcontract, Southwest is entirely responsible for any reduction in payments from UDOT, or additional costs to Southwest, related to Southwest’s performance, i.e., paving. (R. 1424:521-22.)

## **2. The Breach of Contract Rulings**

The trial court also ruled that UDOT breached the general contract by prohibiting ribbon paving. The three specific rulings are as follows:

UDOT's decision to prohibit ribbon paving where it would result in a greater than two inch vertical separation grade interfered with the method and means by which the asphalt paving should have been allowed to be performed by Meadow Valley/Southwest and constitutes a material breach of the contract by UDOT.

UDOT breached its contract with Meadow Valley in directing Meadow Valley/Southwest not to use the ribbon style method on portions of the Project.

UDOT breached its contract with Meadow Valley in misinterpreting and misapplying the asphalt paving specifications.

(R. 1519 (emphasis added).) These rulings make clear that the only basis for the breach of contract claim is that UDOT altered the project by limiting ribbon paving. The trial court does not mention the provisions in the general contract that expressly allow UDOT to alter the project. (Add. B, Trial Ex. 103 at 54, 56.)

## **3. Failure to Satisfy the Notice Provisions**

The trial court ruled that Southwest's oral statement that the limitation on ribbon paving would be more expensive for Southwest satisfied MVC's obligation to provide written notice that UDOT altered the project such that MVC was entitled to additional compensation. (R. 1521.) There are several trial court findings relevant to this ruling.

On June 12, 2003, Brandon Squire, the UDOT project engineer, notified MVC and Southwest "that Southwest would not be allowed to ribbon pave a significant portion of the Project." (R. 1500, 1501.) Specifically, as "part of the pre-pave meeting on June 12, 2003, Brandon Squire directed [MVC and Southwest] to not ribbon pave portions of the Project where a greater than two inch vertical grade separation would result." (R. 1502.)

In response, Southwest stated that the prohibition would result in Southwest's incurring costs greater than Southwest had anticipated because Southwest had assumed it could ribbon pave when it bid the subcontract. (R. 1497, 1502.)

At a second pre-pave meeting on July 31, 2003, Brandon Squire again informed "Ken Schmidt, Tim Sisneros, and Ben Lujan, all employees of Southwest, that ribbon paving would not be allowed" on a significant portion of the project. (R. 1502.) Then, "[f]rom early August 2003, until the Project was completed in late September 2003, Ken Schmidt, Ben Lujan, and Shawn Hammer (all Southwest employees) had several conversations at the project site with UDOT personnel, including Brandon Squire and a UDOT Inspector, Ronnie Bair (at least twice per week), where Southwest personnel told Brandon Squire and Ronnie Bair that not being allowed to ribbon pave was affecting Southwest's production output, costs, quality of product, and scheduling of work." (R. 1503.) An MVC representative "witnessed" some of these conversations. (R. 1503.)

The trial court concluded that MVC "did not strictly comply with the written contractual notice provisions, [but that] UDOT had actual repeated verbal notice of the impacts suffered by [Southwest] as a result of not being able to ribbon pave." (R. 1511.) UDOT does not dispute that it had notice the project was costing Southwest more than Southwest had anticipated when Southwest bid the subcontract. (R. 1502.)

The trial court did not find that MVC provided UDOT any verbal, let alone written, notice that MVC considered UDOT's prohibition on ribbon paving to be an alteration of the project. As MVC's Rule 30(b)(6) representative conceded at trial, MVC did not disagree with UDOT's interpretation of the project specifications and did not comply with the notice provisions. (R. 1424:539-40; 553-54.)

#### 4. Waiver of the Notice Provisions

The trial court also ruled that “[w]hile UDOT did not expressly waive the contractual notice provisions, UDOT’s waiver was implied by its conduct.” (R. 1511.) The trial court found four separate grounds for this “implied waiver” ruling.

First, the trial court ruled that UDOT waived the notice provisions when “UDOT’s Project Engineer, Brandon Squire, failed to correctly interpret and misapplied the I-215 Project’s asphalt paving specifications in limiting, by his own directives [Southwest’s] use of the ribbon paving method.” (R. 1522.) The court does not explain how altering the project, something that triggered MVC’s obligation to comply with the notice provisions, waived the obligation to comply with the notice provisions.

Second, the court ruled that UDOT waived the notice provisions when the UDOT engineer “misrepresented to Southwest’s personnel the use and application of the I-215 contract specifications, including the TC-2A Flowchart on other UDOT highway and interstate projects with similar specifications and requirements.” (R. 1523 (emphasis added).) The trial court does not explain how a misrepresentation to Southwest about a different paving project operated to excuse MVC from providing UDOT notice on this project that UDOT had altered this project.

Third, the trial court ruled that UDOT waived the notice provisions by creating “an atmosphere of informality on this Project and other projects.” (R. 1522.) The trial court described the atmosphere thus: “By dealing directly with Southwest personnel on paving issues, including methods of paving, and verbally directing Southwest on what methods of paving to utilize on the Project, UDOT created an informal, nonthreatening atmosphere on the I-215 Project in that it attempted to informally resolve paving disputes

directly with Southwest without requiring strict compliance with contractual notice provisions (i.e., verbally directing Southwest to continue block paving when notified of the impacts instead of requiring that a written claim be made).” (R. 1512.) The trial court then concludes that UDOT led MVC “to reasonably believe that UDOT had waived strict compliance with the contractual notice provisions.”<sup>9</sup> (R. 1512.)

The trial court does not explain how UDOT’s consistently rejecting Southwest’s requests to ribbon pave waived MVC’s need to comply with notice provisions. More important, the trial court does not cite the general contract provision encouraging UDOT and MVC to create a “strong partnership” with the subcontractor, but stating that “[v]oluntary partnering’ does not change the legal relationship of the parties to this Contract, and does not relieve either party from any of the terms of the Contract.” (Add. B, Trial Ex. 103 at 52 (emphasis added).) Finally, the court does not explain how an “informal atmosphere” after June 17, 2003—the date MVC had to comply with the notice provisions—retroactively waived MVC’s need to comply with any notice provisions.

Fourth, the trial court ruled that UDOT waived the notice provisions after the project when “UDOT reached the merits of [MVC’s] claim regarding the paving method and thereby waived and is estopped from asserting that [MVC] must strictly comply with the contractual notice provision.” (R. 1523-24.) Specifically, “[b]ecause UDOT’s project engineer and the UDOT Claims Board of Review addressed the merits of [MVC’s] claim, it can be inferred that UDOT waived [MVC’s] obligation to strictly

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<sup>9</sup> Because the notice provisions the trial court is referring to are in the general contract between UDOT and MVC, the trial court can be referring only to MVC when it states that “Meadow Valley/Southwest” reasonably believed that UDOT had waived strict compliance with the contractual notice provisions. Plainly, UDOT could not waive MVC’s rights to enforce the notice provisions in the subcontract.

comply with the contract's notice provision.” (R. 1524.) Further, while the UDOT's engineer's response to MVC's claim “addressed the lack of strict compliance with the contract's notice requirements, the decision of the UDOT Claims Board of Review makes no mention of lack of notice but addresses only the merits of [MVC's] claims.”

(R. 1513.) The court does not explain how the review board's recommendation to the UDOT deputy director could operate as a waiver of UDOT's defense in this lawsuit.

## **5. Modification of the Notice Provisions**

The trial court also ruled that UDOT orally modified the general contract “as it relates to the written contract's notice provisions,” when UDOT “verbally directed [Southwest] to proceed with block paving . . . in response to [Southwest's] request to ribbon pave the entire Project.” (R. 1513.) The trial court does not explain how UDOT modified the notice provisions in its contract with MVC by verbally directing Southwest to block pave, especially where MVC agreed that UDOT's limitation on ribbon paving was not “a change in the scope of the work under the contract.” (R. 1424:539-40.)

## **6. Estoppel From Enforcing the Notice Provisions**

Finally, the trial court ruled that UDOT was estopped from enforcing the notice provisions. (R. 1522.) The only distinct estoppel ruling is that “UDOT is estopped from asserting that Meadow Valley and its asphalt paving contractor, Southwest, must strictly comply with the contractual notice provisions as UDOT failed to follow the same asphalt paving specifications on both the I-215 Project and the Point of the Mountain I-15 Project.” (R. 1522.) The court does not explain how UDOT's interpreting specifications in a different project involving different contractors after MVC failed to comply with the notice provisions estops UDOT from enforcing the notice provisions here.

### **Summary of Argument**

Under Utah law, an assignee of a breach of contract claim acquires no rights superior to those held by the assignor. The assignee simply stands in the shoes of the assignor. Here, Southwest is the assignee and MVC is the assignor, which explains why MVC is the only plaintiff in this lawsuit. Yet the damages awarded by the trial court were incurred by Southwest, not by MVC. While this issue is not preserved, it qualifies as plain error. This court should vacate the damage award.

Utah law also provides that a party cannot breach a contract by doing what is expressly permitted by the contract. Here, the only breach of contract allegation and only breach of contract ruling is that UDOT breached the general contract when it altered the project by limiting ribbon paving. Yet the general contract expressly reserves to UDOT the right to alter the project. UDOT therefore could not have breached the general contract by altering the project. This court should reverse and vacate the entire judgment.

Assuming (i) MVC had incurred damages; (ii) MVC had alleged a breach of contract theory consistent with the language in the contract; and (iii) the UDOT engineer altered the project by prohibiting ribbon paving, then MVC waived any claim to additional compensation when MVC failed to notify UDOT that MVC believed UDOT had altered the project such that MVC was entitled to additional compensation. Under the contract, “failure to provide required notice . . . constitutes a waiver of any and all claims that may arise as a result of the alleged change.” (Add. B, Trial Ex. 103 at 57.) MVC waived any claim to additional compensation.

In addressing this third ground for reversal on appeal, the trial court ruled that MVC did satisfy the notice provisions when Southwest verbally notified UDOT that the

prohibition on ribbon paving made the project more expensive than Southwest had anticipated. (R. 1502.) Yet MVC's Rule 30(b)(6) representative testified that MVC "did not disagree" with UDOT's interpretation of the project specifications and did not consider the prohibition on ribbon paving "to be a change in the scope of the work under the contract." (R. 1424:539-40.) It is difficult to understand how MVC could have satisfied its obligation to notify UDOT that MVC believed the UDOT engineer had altered the project when MVC did not believe the UDOT engineer had altered the project.

Perhaps recognizing this, the trial court alternatively ruled that UDOT waived, modified, or is estopped from enforcing the notice provisions in the general contract. The trial court's primary basis for these rulings is that by altering the project, UDOT waived MVC's need to notify UDOT that UDOT had altered the project.<sup>10</sup> This ruling makes no sense, as the notice requirement is triggered, not waived, by UDOT's altering the project.

The trial court's other alternative rulings are similarly flawed. For example, the trial court found that UDOT created an informal atmosphere by verbally resolving "disputes" over paving methods with Southwest. The findings show that UDOT was not resolving any dispute, but consistently directing Southwest to block pave instead of ribbon pave, an interpretation of the project with which MVC did not disagree. Regardless, MVC's Rule 30(b)(6) representative testified that MVC understood that it had to provide written notice that UDOT had altered the project before MVC could be entitled to additional compensation. (R. 1424:552-55.) Moreover, the general contract

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<sup>10</sup> Again, this does not mischaracterize the trial court's ruling: UDOT waived the right to enforce the notice provisions when it "failed to correctly interpret and misapplied the I-215 Project's asphalt paving specifications by limiting, by its own directives, [Southwest's] use of the ribbon paving method." (R. 1522.) That is, MVC did not need to notify UDOT that UDOT altered the project because UDOT altered the project.



expressly provides that the creation of an informal “partnership” among UDOT, MVC, and Southwest “does not change the legal relationship of the parties to this Contract, and does not relieve either party from any of the terms of the Contract.” (Ex. B, Trial Ex. 103 at 52.) Thus, assuming UDOT did create an “informal atmosphere,” this atmosphere could not relieve MVC of its obligation to comply with the notice provisions.

The trial court’s final alternative ruling is that when MVC filed a claim for additional compensation after the project had been completed, “UDOT reached the merits of [MVC’s] claim regarding the paving method and thereby waived and is estopped from asserting that [MVC] must strictly comply with the contractual notice provision.”

(R. 1523-24.) The trial court’s theory appears to be that even though the UDOT engineer opposed MVC’s belated claim on the ground that MVC had failed to comply with the notice provisions, the claims review board—a panel comprised of a general contractor and two UDOT employees—nonetheless waived UDOT’s defense that MVC had failed to comply with the notice provisions when the board recommended to UDOT’s deputy director that he deny MVC’s claim because it lacked merit. Because the board is a creature of contract akin to a non-binding arbitration panel, its recommendation cannot bind a party, let alone waive a party’s defense in subsequent litigation.

The court should reject the trial court’s various alternative theories, all of which address only the third ground for reversal in this brief. MVC suffered no damages, its breach of contract claim is undermined by the plain language of the contract, and MVC admitted that it had to comply, but did not comply, with the notice provisions in the general contract to receive additional compensation. The court should reverse and remand with instructions to enter judgment in favor of UDOT.

## **Argument**

This court should reverse on three separate grounds. First, the only plaintiff in this lawsuit, MVC, incurred no damages, and therefore, cannot recover damages. Second, the only breach of contract ruling is that UDOT breached the general contract by altering the project; but the general contract expressly permits UDOT to alter the project. Third, MVC waived any right to additional compensation by failing to comply with the notice provisions in the general contract. And because MVC's Rule 30(b)(6) representative testified that MVC understood that it had to comply with the notice provisions, and failed to do so, the trial court's various rulings that UDOT waived MVC's need to comply fail as a matter of law. (R. 1424:539-55.)

Any of these three grounds is sufficient to reverse the trial court's various rulings, vacate the judgment, and remand with instructions to enter judgment in favor of UDOT.

### **I. MVC's Breach of Contract Claim Fails Because MVC Incurred No Damages**

The first flaw in the trial court's findings of fact and conclusions of law is that it awarded MVC \$768,365.52 in damages for losses that were suffered by another entity, Southwest. (R. 1525.) The confusion on this point stems from the fact that Southwest prosecuted this lawsuit as the assignee of MVC claims against UDOT. (R. 1497.) It is black letter law, however, that an assignee such as Southwest does not possess the ability to recover damages it incurred under the assignor's breach of contract claim.<sup>11</sup>

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<sup>11</sup> As some indication of the trial court's confusion on this point, the trial court found that witnesses for UDOT and MVC, even MVC's Rule 30(b)(6) representative, "were not knowledgeable witnesses as it relates to . . . contract interpretation issues pertaining to the placement of asphalt paving." (R. 1508.) In other words, the two parties to the contract were not credible as to what the contract provisions mean, but witnesses of a non-party to the contract were credible as to what the contract means.

While this issue is not squarely preserved, the error is plain and warrants reversal. Under Utah law, an error is plain where “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome. State v. Ross, 2007 UT 89, ¶17, 174 P.3d 628. Here, all three elements are satisfied.

First, it was error to award MVC damages that only Southwest incurred. Under Utah law, an assignee of a claim merely steps into the shoes of the assignor. As this court has explained, an assignee “may not recover the damages it suffered as a result of [a] breach [of contract].” SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, ¶30, 28 P.3d 669 (emphasis added) (“because SME’s implied warranty claim is an assigned claim, SME may not recover the damages it suffered”). Instead, an assignee’s recovery is limited to those damages the assignor suffered as a result of a breach of contract. Id. (“SME’s recovery, if any, is limited to those damages the County suffered as a result of TVSA’s alleged breach of the implied warranty to exercise reasonable and customary care.”). Simply put, “an assignee can acquire no right superior to those held by the assignor, and ‘simply stands in the shoes of the assignor.’” Id. (quoting 6 Am. Jur. 2d Assignments § 144 (1999)).

Therefore, Southwest, as assignee, can recover only those damages incurred by MVC, not those incurred by Southwest. Here, the subcontract provides that MVC had to pay Southwest additional compensation only if MVC received additional compensation from UDOT: “No claim for extra time and/or compensation on account of changes, added or deleted work may be made by [Southwest] unless acknowledged by [MVC] in writing and [MVC] is entitled to and actually receives additional time and/or

compensation on behalf of [Southwest] under the [general contract with UDOT].”<sup>12</sup>

(Add. C, Trial Ex. 9 at 5.1.) Under the subcontract, Southwest could obligate MVC to make a claim with UDOT for additional compensation, but Southwest had to provide MVC timely written notice to do so, something Southwest undisputedly did not do in this case. (Ex. C, Trial Ex. 9 at 5.2, 5.4; R. 1424:512.)

Thus, under the subcontract, MVC had no obligation to pay Southwest additional compensation: “Failure to so notify [MVC] will constitute a waiver of all such claims.” (Ex. C, Trial Ex. 9 at 5.3.) At trial, MVC’s Rule 30(b)(6) representative confirmed that Southwest had to comply with the notice provisions to be entitled to additional compensation, and Southwest failed to comply. (R. 1424:522.) MVC’s Rule 30(b)(6) representative also confirmed that when Southwest failed to provide MVC timely notice of a dispute, Southwest waived any claim for additional compensation. (R. 1424:523-24.) Finally, he confirmed that Southwest has not maintained any claims against MVC arising out of the contract, nor has MVC maintained any claims against Southwest. (R. 1424: 512-13.) In other words, MVC has not been harmed and has no legal obligation to anyone, including Southwest, as a result of UDOT’s restriction of ribbon paving.<sup>13</sup> (R. 1424:568.)

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<sup>12</sup> Elsewhere, the subcontract more specifically provides that MVC “shall not be liable to [Southwest] for any greater sum than [MVC] received from [UDOT] on behalf of [Southwest].” (Ex. C, Trial Ex. 9 at 5.1.)

<sup>13</sup> The only damages arguably incurred by MVC were traffic control costs—a reduction in the amount UDOT paid to MVC—related to delays caused by Southwest not being permitted to ribbon pave. (R. 1525.) Under the subcontract, MVC merely passed these costs to Southwest because they were related to Southwest’s work under the subcontract. The subcontract allowed MVC to reduce the amount it paid Southwest by “any retainage withheld by [UDOT] under the [general contract] for the Subcontract Work.” (Add. C, Trial Ex. 9 at 2.)

Second, this error should have been obvious to the trial court. At times, the trial court itself distinguished between Southwest and MVC, recognizing that MVC “did not have a dog in this fight,” something MVC’s Rule 30(b)(6) witness confirmed.

(R. 1425:993; 1424:574.) The problem is that MVC is the only plaintiff “in this fight.” Throughout this lawsuit, UDOT objected that MVC is the only other party to the general contract and this lawsuit, but the trial court’s findings blur the distinction between MVC and Southwest. (R. 1272; 1390-98, 1555:22, 25.)

At trial, MVC’s primary witness regarding the nature and amount of damages was Michael Moen, Vice President of the New Mexico Paving Division for Southwest.

(R. 1421 at 2-3.) Mr. Moen prepared Southwest’s subcontract bid to MVC, and eventually prepared MVC’s formal claim to UDOT seeking Southwest’s additional costs for the paving project. (Add. C, Trial Ex. 25; R. 1421: 95, 151-52.) To calculate damages, Mr. Moen essentially compared Southwest’s initial subcontractor bid against its actual final costs, and then prepared a summary of the difference. (R. 1421: 266-67.) Thus, these losses were incurred by Southwest, not MVC.

During cross-examination of MVC’s Rule 30(b)(6) witness, it became obvious that MVC did not incur any damages, and instead passed on any loss to Southwest:

Q Do you understand that this Paragraph 3.3 means that if UDOT doesn’t pay Meadow Valley for a particular item that the subcontractor is performing then Meadow Valley does not have to pay the subcontractor?

A Yes.

Q And did UDOT pay Meadow Valley for additional compensation as a result of the block paving on this project?

A No.

Q So under the subcontract, Meadow Valley is not responsible to pay Southwest for that; is that right?

A Yes.

Q And as a matter of fact Meadow Valley reduced the cost of the price of the subcontract by the amount it was reduced in payment by UDOT; is that right?

A Yes.

Q Basically passed along the loss to Southwest?

A Yes.

(R. 1424 at 521-22, 531.) Under the subcontract, Southwest is entirely responsible for any reduction in payments from UDOT, or additional costs to Southwest, related to Southwest's performance, i.e., paving. (R. 1424:521-22.)

During closing argument, the trial court acknowledged that MVC was not concerned about the outcome of this case. "Whatever the outcome, they were covered. They didn't care." (R. 1425: 993-94.) The trial court understood that Southwest incurred all claimed damages. (R. 1425: 993.) The trial court stated that MVC "didn't care one way or the other. If they cared at all it would be with respect to the next time there's a job bid sent out, they want to be on the list." (R. 1425: 994.) Thus, the trial court understood that the case was being prosecuted by Southwest, in MVC's name, to recover Southwest's paving costs exceeding its subcontractor bid. (R. 1421 at 95.) Notably, the only evidence cited by the trial court in support of its damage award relates to Southwest's additional costs resulting from the restriction on ribbon paving. (R. 1513-14, 1525; Trial Ex. 24; 1412:120; 1424:522.) It should have been obvious to the trial court that it could not award damages to MVC that it did not suffer.

Third, absent the error, there is a reasonable likelihood of a more favorable outcome for UDOT. Because damages awarded to MVC were incurred by Southwest, absent the error, UDOT would have prevailed at trial. All of the elements of plain error are present here. This court should vacate the trial court's damage award.

## **II. UDOT Could Not Have Breached the General Contract by Altering the Project Because the Contract Provides that UDOT Can Alter the Project**

In addition to MVC incurring no damages, its only legal theory—breach of contract—fails as a matter of law. The trial court entered three rulings that UDOT breached the general contract. Each ruling states differently that UDOT breached the contract by altering the project to prohibit ribbon paving, and presuppose that UDOT could not alter the project under the general contract.<sup>14</sup> This assumption is incorrect.

The general contract allowed UDOT to alter the project either through written changes or by ordering MVC (or Southwest) to perform additional work. In a section of the general contract titled “Significant Changes in the Character of Work,” the UDOT engineer “reserves the right at any time during the work to make written changes in quantities and alterations in the work that are necessary to satisfactorily complete the project.” (Add. C, Trial Ex. 103 at 54.) MVC, in turn, agreed “to perform the work as

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<sup>14</sup> The conclusions of law are as follows:

UDOT's decision to prohibit ribbon paving where it would result in a greater than two inch vertical separation grade interfered with the method and means by which the asphalt paving should have been allowed to be performed by Meadow Valley/Southwest and constitutes a material breach of the contract by UDOT.

UDOT breached its contract with Meadow Valley in directing Meadow Valley/Southwest not to use the ribbon style method on portions of the Project.

UDOT breached its contract with Meadow Valley in misinterpreting and misapplying the asphalt paving specifications.

(R. 1519.)

altered.” (Id.) And in a section of the general contract titled “Notification of Differing Site Conditions, Changes and Extra Work,” MVC agreed to notify the UDOT engineer if MVC believed UDOT had ordered any “altered work beyond the scope of the Contract, or actions taken by [UDOT had] change[d] the Contract terms and conditions.”<sup>15</sup> (Add. B, Trial Ex. 103 at 56 (emphasis added).) Consistent with this, MVC’s Rule 30(b)(6) representative testified that MVC understood that UDOT could ask MVC “to perform work that was beyond the scope of what the original contract required,” and MVC “agreed to perform that extra work with the understanding that they could make a claim for compensation for additional work.” (R. 1424:539.)

Because the general contract allows UDOT to alter the project, UDOT could not have breached the contract by altering the project. Under Utah law, the implied covenant of good faith and fair dealing—let alone a contract itself—does not prevent a contracting party from “exercis[ing] its expressly granted contractual rights.” Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶46, 104 P.3d 1226. Therefore, the trial court erred as a matter of law in its breach of contract rulings. The court should reverse the trial court’s rulings that UDOT breached the general contract by altering the project—the only legal theory alleged by MVC—and vacate the entire judgment.

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<sup>15</sup> The subcontract also recognizes that UDOT can require additional work and alter the project: Southwest “shall provide written notice to [MVC] within forty-eight (48) hours after the discovery of any act, event, condition, or occurrence that would entitle [MVC] to an extension of time or additional compensation from [UDOT] under the terms of the [general contract].” (Add. C, Trial Ex. 9 at 4.3.)



### **III. MVC Waived Any Right to Additional Compensation When It Failed to Comply with the Notice Provisions in the General Contract**

This court should also reverse because after UDOT altered the project—as was UDOT’s right—MVC waived any claim to additional compensation by failing to comply with the notice provisions. Under the general contract, MVC was required to notify the UDOT engineer immediately of “alleged changes to the Contract due to differing site conditions, extra work, altered work beyond the scope of the Contract, or actions taken by [UDOT] that change the [general contract] terms and conditions.” (Add. B, Trial Ex. 103 at 56 (emphasis added).) Then, within 5 days, MVC had to provide UDOT written notice about the alteration and additional compensation. (Add. B, Trial Ex. 103 at 56.)

The trial court found that MVC failed to comply with the notice provisions in the general contract. (R. 1511.) This is correct. On June 12, 2003—when the UDOT engineer informed both MVC and Southwest that ribbon paving was not allowed for significant portions of the project—not only did MVC fail to notify UDOT that it believed UDOT had altered the project, but, as MVC’s Rule 30(b)(6) representative testified, MVC also “did not disagree” with UDOT’s interpretation and did not consider the limitation on ribbon paving “to be a change in the scope of the work under the contract.” (R. 1424:540, 559.) On June 17, 2003, the date the 5-day deadline for written notification expired, MVC waived any right it had to additional compensation.

Consistent with this, on August 18, 2003, MVC sent a letter to Southwest stating that the general contract restricted Southwest from ribbon paving.<sup>16</sup> (Trial Ex. 16 at 1.)

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<sup>16</sup> In the letter, MVC indicated that “UDOT specifications also dictate the vertical grade separation that will be allowed. The reason that you have been required to backup and pave in ‘blocks’ is to meet the contract requirements concerning vertical grade separation” and was “not due to [MVC’s] direction.” (Trial Ex. 16 at 1.)

After the project was completed, Southwest sent a letter to MVC claiming that UDOT had altered the project, MVC simply forwarded the letter “without taking any position on whether the claim was valid or whether [MVC] agreed with it.” (R. 1424:525.) And after filing this lawsuit, MVC signed a “final estimate” in which MVC agreed that what UDOT paid MVC is all that UDOT owed MVC. (Trial Ex. 41; 1424:691.)

Therefore, throughout the project, after the project, and after this lawsuit was filed, MVC and UDOT—the parties to the general contract and this lawsuit—did not disagree that the contract specifications restricted ribbon paving. (R. 1424: 539-40.) This explains why to rule in MVC’s favor, the trial court paradoxically had to find that UDOT and MVC witnesses “were not knowledgeable witnesses as it relates to . . . contract interpretation issues pertaining to the placement of asphalt paving.” (R. 1508.) In other words, the two parties to the contract and this lawsuit were not credible as to what the general contract means, but employees of Southwest were credible on this topic.

In the end, the trial court’s odd credibility finding is beside the point. Whether UDOT and MVC interpreted their own contract correctly does not change the fact that UDOT and MVC believed that ribbon paving was prohibited on portions of the project. (R. 1424; 539-40.) And the fact that MVC did not believe UDOT had altered the project demonstrates that, and explains why, MVC failed to comply with the notice provisions. Therefore, there is no question that MVC failed to comply with the notice provisions.

There also is no question that the general contract provides that MVC’s “failure to provide required notice under this article constitutes a waiver of any and all claims that may arise as a result of the alleged change” and UDOT “does not grant additional compensation if verbal and/or written notification is not given.” (Add. B, Trial Ex. 103

at 57, 75.) In fact, full compliance with the notification requirements “is a contractual condition precedent to the right to seek judicial relief.” (Add. B, Trial Ex. 103 at 78.) These waiver provisions are important. The complexity of roadway construction and unforeseen engineering issues and site conditions frequently arise and require on-site solutions. For this reason, the general contract permits the UDOT engineer to direct contractors to do what needs to be done and allows the general contractor to receive additional compensation by notifying UDOT that what the UDOT engineer has asked them to do will alter the project and increase costs. (Add. B, Trial Ex. 103 at 54, 56.) The notice provisions allow UDOT to consider significant additional financial obligations on behalf of the public before—not after—the work is performed.<sup>17</sup> And the waiver provisions allow UDOT to operate without fear that a party who fails to comply with the notice provisions can later assert claims for significant additional compensation.

Utah law recognizes the importance of such notice and waiver provisions: Where a contract requires written notice, compliance with the notice provision is a condition precedent to maintaining a breach of that contract claim. Geisdorf v. Doughty, 972 P.2d 67, 72 (Utah 1998). Other jurisdictions are in accord.<sup>18</sup> MVC therefore waived any claim it may have had to additional compensation.

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<sup>17</sup> As the New York Court of Appeals stated, notice provisions in public contracts play an important role by providing “public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds. Such provisions are important both to the public fisc and to the integrity of the bidding process.” A.H.A. General Constr., Inc. v. New York City Hous. Auth., 699 N.E.2d 368, 376 (N.Y. 1998).

<sup>18</sup> Interstate Contracting Corp. v. City of Dallas, 407 F.3d 708, 727 (5th Cir. 2005) (to maintain breach of contract claim, contractor must have “strictly complied with all requirements relating to the giving of notice and information with respect to such claim”); A.H.A. Gen. Constr., Inc. v. New York City Housing Authority, 699 N.E.2d 368

Perhaps recognizing this, the trial court makes a number of alternative rulings that MVC was not required to comply with the notice provisions: (i) Southwest verbally satisfied the notice provisions on behalf of MVC; (ii) UDOT waived its right to enforce the provisions; (iii) UDOT and MVC modified the provisions; and (iv) UDOT is estopped from enforcing the provisions. UDOT will address each ruling in turn.

**A. Southwest’s Verbal Notice That It Expected to Ribbon Pave Did Not Satisfy MVC’s Notice Obligations Under the General Contract**

The trial court’s first alternative ruling is that “[w]hile [MVC] did not strictly comply with the written contractual notice provisions, UDOT had actual repeated verbal notice of the impacts suffered by [Southwest] as a result of not being able to ribbon pave in areas involving a greater than two inch vertical grade separation.” (R. 1511, 1521.) The trial court appears to reason Southwest’s verbal statement that block paving would be more expensive constituted written notice from MVC that the prohibition on ribbon paving was an alteration in the project. On its face, this ruling makes no sense.<sup>19</sup>

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(N.Y. 1998) (contractor’s claim waived for failing to comply with notice and reporting provisions); State v. Omega Painting, Inc., 463 N.E.2d 287 (Ind. Ct. App. 1984) (“Absent the requisite written notification, the contractor is without recourse.”); RBFC One, LLC v. Zeeks, Inc., 367 F. Supp. 2d 604, 611 (S.D.N.Y. 2005) (oral notice of breach insufficient where contract required written notice and an opportunity to cure); Convergent Group Corp. v. County of Kent, 266 F. Supp. 2d 647, 657-58 (W.D. Mich. 2003) (the “County’s failure to comply with the notice and cure requirements under the agreements precludes the County from maintaining its breach of contract claim”); Pillar Dev., Inc. v. Fuqua Constr. Co., 645 S.E.2d 64, 66 (Ga. Ct. App. 2007) (“failure to give notice as required or to show waiver by the party entitled to notice is an independent bar to the maintenance of a successful cause of action on the contract”); Kingsley Arms, Inc. v. Sano Rubin Constr. Co., 791 N.Y.S.2d 196, 197 (N.Y. App. Div. 2005) (because “compliance with the notice provisions of this construction contract was a condition precedent to plaintiff’s claim, its failure to strictly comply is a waiver of its claim”).

<sup>19</sup> Another problem with this ruling is that the subcontract forbade Southwest from dealing directly with UDOT with regard to changes in the contract price unless MVC expressly authorized Southwest to do so in writing, which MVC did not do. (R. 1424:528.) Southwest’s representations had no legal effect under the subcontract.

In support, the trial court cites Thorn Construction Co. v. Utah Dept. of Transp., 598 P.2d 365 (Utah 1979). (R. 1521.) In Thorn, UDOT and Thorn entered into a contract to construct an access road. Id. at 366. During the project, the UDOT engineer directed Thorn to perform additional work and, importantly, “agreed to pay [Thorn] for the extra expenses.” Id. at 369. This court upheld a damage award for these extra expenses because the notice provision in the contract applied only to claims for additional compensation that were “not clearly covered in the contract or not ordered by the engineer as extra work as defined herein.” Id. (emphasis added). The court held that the notice provision did “not contemplate the necessity of a written order in a case such as this, where the project engineer, not the contractor, causes extra work to be performed,” and UDOT was “on notice that additional compensation will be required.” Id. at 370.

Thorn bears little resemblance to this case. Here, while UDOT entered into a contract with MVC much like it did with Thorn, this is where the similarities end. MVC did not inform UDOT that the work was “additional work.” The UDOT engineer did not agree “to pay for extra expenses.” The notice provisions in the general contract here did apply when the UDOT engineer altered the project. And UDOT was not on notice that “additional compensation would be required,” but instead on notice only that the limitation on block paving would cause Southwest greater expenses than Southwest had anticipated when it bid for the subcontract. (R. 1502.) If Southwest had made a mistake when it bid, that was an issue between MVC and Southwest.

In short, Thorn does not support the trial court’s ruling that Southwest’s verbal notice to UDOT that the prohibition on ribbon paving would be more expensive for Southwest satisfied MVC’s notice requirements under the general contract. Therefore,

the trial court erred as a matter of law in its first alternative ruling that MVC satisfied the notice provisions in the general contract when Southwest complained about the prohibition on ribbon paving and added expense of block paving.

**B. UDOT Did Not Waive the Need For MVC to Comply with the Notice Provisions in the General Contract**

The trial court's second alternative ruling is that UDOT waived MVC's need to comply with the notice provisions. (R. 1522-23.) "A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993). Further, "the intent to relinquish a right must be distinct. Under this legal standard, a fact finder need only determine whether the totality of the circumstances 'warrants the inference of relinquishment.'" Id. Under this standard, the trial court found that "[w]hile UDOT did not expressly waive the contractual notice provisions, UDOT's waiver was implied by its conduct." (R. 1511.) The trial court found four separate grounds for implied waiver.

UDOT will address each of these four grounds in turn, but before doing so, UDOT reiterates the timeline relevant to the trial court's waiver rulings. On June 12, 2003, the UDOT engineer informed both MVC and Southwest that ribbon paving was not permitted on portions of the project, which altered the project. Under the subcontract, Southwest had to provide MVC written notice of the alteration within 48 hours—by June 14, 2003—to obligate MVC to file a claim for additional compensation with UDOT. There is no dispute that Southwest did not comply with the subcontract's notice

provisions, and there is no allegation, or finding, that UDOT waived, or could waive, Southwest's obligation to comply with the notice requirements in the subcontract.

Under the general contract, MVC had to provide UDOT written notice of the alteration within 5 days—by June 17, 2003—or waive any right to additional compensation. Thus, any waiver either had to occur prior to June 17, 2003, or operate retroactively. Here, the trial court's rulings and findings do not satisfy either alternative.

**1. UDOT Did Not Waive the Need for MVC to Comply with the Notice Provisions by Ordering Southwest to Block Pave**

The trial court's first alternative waiver ruling is that UDOT waived MVC's requirement to comply with the notice provisions when "UDOT's Project Engineer, Brandon Squire, failed to correctly interpret and misapplied the I-215 Project's asphalt paving specifications in limiting, by his own directives [Southwest's] use of the ribbon paving method." (R. 1522.) In other words, UDOT waived the notice requirements by altering the project. While this waiver ruling is based upon UDOT's conduct prior to June 17, 2003, it frankly makes no sense.

Under the general contract, MVC agreed to notify the UDOT engineer if MVC believed UDOT had ordered any "altered work beyond the scope of the Contract, or actions taken by [UDOT had] change[d] the Contract terms and conditions." (Add. B, Trial Ex. 103 at 56.) In other words, the notice requirements were triggered when the UDOT engineer altered the project. UDOT could not waive the notice requirements by engaging in the very conduct that triggered MVC's notice obligations. Put differently, MVC could not be relieved of its obligation to notify UDOT that UDOT had altered the project simply because UDOT altered the project.

This court should hold that an act triggering a condition precedent to receive additional compensation cannot operate as an “intentional relinquishment” of the condition precedent. To hold otherwise would render conditions precedent meaningless, as they would be waived at the very moment they become relevant under a contract.

**2. UDOT Did Not Waive the Need for MVC to Comply with the Notice Requirements By Stating That Ribbon Paving Was Prohibited on Other Projects**

The trial court’s second alternative waiver ruling is that UDOT waived the notice requirements when the UDOT engineer “misrepresented to Southwest’s personnel the use and application of the I-215 contract specifications, including the TC-2A Flowchart on other UDOT highway and interstate projects with similar specifications and requirements.” (R. 1523 (emphasis added).) The trial court found that this representation was a misrepresentation because UDOT permitted ribbon paving on two other projects: “the I-15 Point of the Mountain Project” and “the Nephi I-15 Project.” (R. 1506.) UDOT’s misrepresentation to Southwest, the trial court ruled, operated to waive MVC’s need to comply with the notice provisions.<sup>20</sup>

Permitting ribbon paving on the Nephi and Point of the Mountain projects could not turn the representation into a misrepresentation because the nature of the Nephi project differed significantly and the Point of the Mountain<sup>21</sup> project took place after the

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<sup>20</sup> As an initial matter, it is worth noting that allowing ribbon paving on the Nephi and Point of the Mountain projects does not make the representation that UDOT did not permit ribbon paving on other projects inaccurate. The Nephi and Point of the Mountain projects were not UDOT’s only other projects. Thus, the trial court’s own findings do not support its conclusion that UDOT made a misrepresentation to Southwest.

<sup>21</sup> The trial court found that this project took place “during and after” this project. (R. 1499.) However, it is undisputed that Southwest, and not MVC, first learned about UDOT the Point of the Mountain project on October 7, 2003, well after the June 17, 2003 notice deadline and after this project had completed. (R. 1421:77.)



paving project here. (R. 1435-37.) The Nephi project included only two lanes, one of which was closed the entire time the other lane was used, meaning that traffic would not have to traverse the area being paved during the project. (R. 1435-37.) Thus, at the time UDOT was found to have made the representation to Southwest neither the Nephi project nor the Point of the Mountain project qualified as “interstate projects with similar specifications and requirements.” (R. 1523 (emphasis added).)

The trial court’s other findings also do not support waiver. The trial court found that at a meeting on “October 7, 2003, a representative of UDOT stated to Southwest personnel that the TC-2A Flowchart [of specifications relevant to the method of paving] was uniformly used, interpreted, and applied on all UDOT highway and interstate projects in the same manner that it was being used, interpreted, and applied on the I-215 Project.”<sup>22</sup> (R. 1507.) Apart from the lack of a finding that the “representative of UDOT” was a person who could waive contractual provisions on behalf of UDOT, the finding cannot support the waiver ruling because the October 7, 2003 meeting took place after the project had been completed. An unspecified UDOT representative telling Southwest, after the project, that UDOT always limits ribbon paving cannot retroactively constitute an “intentional relinquishment” of UDOT’s right to require MVC to comply with the notice provisions by June 17, 2003. Had UDOT promised to pay MVC additional compensation knowing that MVC had failed to satisfy the notice requirements,

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<sup>22</sup> It is worth noting that the initial proposed findings of fact stated that the UDOT engineer made this statement, but the trial court amended the finding when UDOT pointed out that there was no evidence in support. (R. 1435-36.) After amending the finding to “a representative of UDOT,” the trial court added the following: “Brandon Squire[,] was present at the meeting on October 7, 2003, and did not say anything that would contradict this representation.” (R. 1507.) Without a finding that Mr. Squire even heard this representation, his failure “to contradict” the representation has no basis.

then UDOT may have waived the need for MVC to comply with the notice requirements. This, however, did not happen. Therefore, this finding is irrelevant to the waiver ruling.

In an attempt to bootstrap the UDOT engineer—who could waive contract provisions on behalf of UDOT—back into the misrepresentation finding, the trial court added a finding that the October 7, 2003 misrepresentation “was consistent with similar prior statements made by Brandon Squire during the course of the I-215 Project.” (R. 1507-08 (emphasis added).) The only “consistent statement” identified, however, is that Mr. Squire represented to Southwest “that UDOT did not accept a 5:1 taper on jobs with 3/4 inch and 1/2 inch aggregates due to the inability to properly compact the taper when in fact a 6:1 or flatter taper was used on the I-215 Project and the I-15 Nephi Project.” (R. 1509, 1506.) There is no indication when Mr. Squire made this statement, but its timing is irrelevant. Southwest was the paving subcontractor on the Nephi project, and Mr. Squire was not the UDOT engineer on the Nephi project, so Southwest could not have been misled by Mr. Squire about what was required on that project. (R. 1499.)

More important, it is unclear, and the trial court never explains, how Mr. Squire’s statement to Southwest could have operated as an “intentional relinquishment” of MVC’s need to comply with the notice provisions. The original project specifications either permitted ribbon paving or they did not. For purposes of this appeal, UDOT assumes that they permitted ribbon paving. If so, then UDOT altered the project when it prohibited ribbon paving on June 12, 2003, thereby triggering Southwest’s obligation under the subcontract to provide MVC notice, which, in turn, obligated MVC to comply with the notice provisions in the general contract. The most Mr. Squire’s statement about the Nephi project demonstrates is that the UDOT engineer was confident in his interpretation

of the project specifications. In fact, the trial court specifically found that the UDOT engineer would not have agreed that he altered the project. (R. 1510.)

Yet the likelihood of whether the UDOT engineer would deny he had altered the project does not impact MVC's duty to comply with the notice provisions, especially where compliance with these provisions is a condition precedent to (i) appealing to the claims review board, (ii) obtaining a final determination by the UDOT deputy director, and (iii) if necessary, filing a claim in district court. In light of the importance of these review procedures, the fact that the engineer was likely to deny he altered the project makes it more important to comply with notice provisions. Mr. Squire's confidence in his interpretation of the project specifications did not relieve MVC of its notice obligations.

In the end, the trial court's findings regarding other projects are beside the point. MVC's Rule 30(b)(6) representative testified that (i) MVC did not disagree with UDOT that ribbon paving was prohibited and (ii) Southwest never asked MVC to request additional compensation from UDOT until the project was completed. (R. 1424: 539-40, 593.) This, not a conversation Mr. Squire had with a Southwest representative, explains why MVC failed to comply with the notice provisions. (R. 1424: 539.) Regardless, MVC's Rule 30(b)(6) representative explained that MVC understood that to receive additional compensation, it had to comply with the notice provisions. (R. 1424: 552-55.) MVC, therefore, did not consider UDOT to have waived the notice provisions. The trial court's ruling that UDOT waived MVC's need to comply with the notice provision therefore fails as a matter of law for a number of reasons.

**3. UDOT Did Not Waive the Need for MVC to Comply with the Notice Requirements by Creating an Informal Atmosphere**

The trial court's third alternative waiver ruling is that UDOT waived compliance with the notice provisions by creating "an atmosphere of informality on this Project and other projects." (R. 1522.) The trial court describes the informal atmosphere as follows:

By dealing directly with Southwest personnel on paving issues, including methods of paving, and verbally directing Southwest on what methods of paving to utilize on the Project, UDOT created an informal, nonthreatening atmosphere on the I-215 Project in that it attempted to informally resolve paving disputes directly with Southwest without requiring strict compliance with contractual notice provisions (i.e., verbally directing Southwest to continue block paving when notified of the impacts instead of requiring that a written claim be made).

(R. 1512.) From this, court concludes UDOT induced MVC "to reasonably believe that UDOT had waived strict compliance with the contractual notice provisions." (R. 1512.)

Ignoring the fact that MVC's Rule 30(b)(6) representative testified that MVC knew it had to comply with the notice provisions, it is unclear how UDOT consistently directing Southwest to block pave in response to Southwest's request to ribbon pave—where MVC never indicated that it considered the prohibition on ribbon paving to be an alteration in the project—waived MVC's requirement to comply with the notice provisions. UDOT was not resolving a "dispute" with regard to the method of paving; it was directing Southwest to block pave, a determination MVC asserted in its August 18 letter to Southwest stating that the contractual requirements prohibited ribbon paving. (Trial Ex. 25.) UDOT did not promise to compensate Southwest or to permit MVC to use a claim procedure other than that outlined in the general contract. If UDOT's

directing a contractor to perform additional work waives the contractor's need to comply with the notice provisions, then the notice provisions are pointless.

Perhaps more important, the general contract contemplates an “informal atmosphere.” Specifically, the general contract encourages the creation of a “strong partnership” among UDOT, MVC, and the subcontractor, but expressly states that such a “[v]oluntary partnering’ [relationship] does not change the legal relationship of the parties to this Contract, and does not relieve either party from any of the terms of the Contract.” (Add. B, Trial Ex. 103 at 52 (emphasis added).) In other words, the creation of an informal atmosphere could not waive MVC's contractual obligations.

Moreover, for any “informal atmosphere” to operate as a waiver, it had to exist on June 12, 2003—the date of the initial pre-pave meeting—because this is the only time UDOT directed Southwest to block pave before MVC failed to comply with the notice provisions. Yet there is no evidence that UDOT did anything “informal” at the June 12 meeting. The court's waiver ruling concerning informal atmosphere not only contradicts the testimony of MVC's Rule 30(b)(6) representative and an express provision of the general contract, but it also lacks factual support in the trial court's findings of fact.

**4. UDOT Did Not Waive the Need for MVC to Comply with the Notice Requirements When the Review Board Recommended That UDOT Deny MVC's Belated Claim on the Merits**

The trial court's fourth alternative waiver ruling is that UDOT waived compliance with the notice provisions by reaching “the merits of [MVC's] claim regarding the paving method and thereby waived and is estopped from asserting that [MVC] must strictly comply with the contractual notice provision.” (R. 1523-24.) The court explained that “[b]ecause UDOT's project engineer and the UDOT Claims Board of Review addressed

the merits of [MVC's] claim, it can be inferred that UDOT waived [MVC's] obligation to strictly comply with the contract's notice provision." (R. 1524.) In the findings, the trial court explains that while the UDOT engineer's response to MVC's claim "addressed the lack of strict compliance with the contract's notice requirements, the decision of the UDOT Claims Board of Review makes no mention of lack of notice but addresses only the merits of [MVC's] claims." (R. 1513.) The trial court does not explain how the recommendation of the review board—a panel of one general contractor and two UDOT employees—to the UDOT deputy director constitutes a waiver on the part of UDOT.<sup>23</sup> The review board's recommendation was not an act of UDOT.

In addition, when MVC submitted its belated claim to the review board, the UDOT engineer submitted UDOT's formal response, in which UDOT argued that MVC had waived any claim to additional compensation because MVC had failed to comply with the notice provisions. (R. 1513.) The board recommended that the deputy director deny MVC claim because the UDOT engineer had correctly interpreted the project specifications. (R. 1424: 587-88.) The UDOT deputy director then refused to approve any additional compensation. (R. 153.) It is difficult to understand how UDOT waived defenses in this lawsuit during this process, as it made the very argument it makes here: MVC waived its right to additional compensation for failure to comply with the notice provisions. UDOT did not act inconsistently with its asserting a waiver defense here.

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<sup>23</sup> The review board is not a formal administrative adjudicative proceeding under the Utah Administrative Procedures Act, Utah Code sections 63-46b-6 through 10. Instead, the review board is a creature of contract, a layer of the general contract's dispute resolution procedure. Regardless, the UDOT engineer squarely raised MVC's lack of compliance with the notice requirements before the review board. (R. 1513.) Thus, UDOT did not act inconsistently with UDOT's asserting its contractual rights.

To sidestep these problems, the trial court cites a footnote in a court of appeals opinion that suggests UDOT may waive defenses by reviewing the merits of a contractor's claim. Procon Corp. v. Utah Dep't. of Transp., 876 P.2d 890 (Utah Ct. App. 1994). Procon, however, does not carve out a UDOT exception to Utah waiver law. In Procon, the court of appeals held that a letter Procon had sent to UDOT was admissible and sufficient to satisfy the notice requirement under its contract with UDOT. In a footnote, the court of appeals stated that "UDOT's review of the possible merits of Procon's claim arguably waived Procon's obligation to conform to the Contract's strict notice procedures." Procon, 876 P.2d at 892 n.3 (emphasis added).

As support for this dicta, the court of appeals cited an Arizona case holding that a school district had waived a 7-day notice requirement by ignoring it for one request and then invoking it for another request. Chaney Bldg. Co. v. Sunnyside Sch. Dist. No. 12, 709 P.2d 904 (Ariz. Ct. App. 1985). Specifically, the contractor asked for an extension to complete a project because of delays related to wind damage and an extension because of its inability to get technical data from a supplier. Id. at 905. The contractor did not comply with a 7-day written notice provision in either instance. The school district granted an extension for the wind damage but not for the inability to obtain technical data. Later, the district tried to justify its denial of the extension concerning the technical data because the contractor had failed to comply with the written notice provision. The court held that "once [the school district] undertook to determine and decide the merits of the claim [regarding the first extension] a jury could infer they waived strict compliance with the 7-day written notice provision." Id. at 907. Thus, the rule articulated in Chaney, and cited in Procon, has nothing to do with the circumstances here.

Instead, UDOT had to act “in a manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party.” In re Estate of Flake, 2003 UT 17, ¶31, 71 P.3d 589. As demonstrated above, the review board’s recommendation did not constitute an act of UDOT, and UDOT did not act inconsistently with asserting its waiver defense. Moreover, MVC suffered no prejudice, despite the court’s conclusion of law to the contrary. (R. 1520.) The court concluded that MVC would suffer prejudice if UDOT were permitted to enforce the notice and waiver provisions because MVC would be denied additional compensation. (R. 1520.) This, however, cannot be the sort of prejudice required for waiver; otherwise, the prejudice requirement would be superfluous.

There is no evidence, or finding, that MVC changed its position as a result of the review board’s recommendation. More specifically, the review board’s recommendation did not induce MVC to believe that UDOT did not intend to enforce terms of the contract. Cooper v. Foresters Underwriters, Inc., 275 P.2d 675, 677 (Utah 1954). Thus, MVC suffered no prejudice as a result of the review board’s recommendation that the UDOT deputy director deny MVC’s claim on the merits.

Moreover, the review board’s recommendation could not waive UDOT’s defense in this litigation because the trial court’s review of MVC’s claim was de novo. Utah Code Ann. § 63G-4-402 (formerly § 63-46b-15). The reasoning of the federal court of claims in a similar case is persuasive. In Schnip Bldg. Co. v. United States, a government official rejected on the merits Schnip’s claim that site conditions differed from those represented in original project specifications. 645 F.2d 950, 960 (Cl. Ct. 1981). On appeal, Schnip argued that the “contracting officer’s action in considering the plaintiff’s claim on the merits was somehow a waiver on the Government’s behalf of any



defense based upon the lack of notice.” Id. The court rejected this argument, noting that the officer’s decision was not binding because subsequent proceedings were de novo. Id. Because the contracting officer’s conclusions were legally irrelevant in the subsequent appeal, the contracting officer’s consideration of the merits of plaintiff’s claim was not a waiver. Id. Similarly, the trial court here reviewed the facts de novo under Utah Code section 63G-4-402 and therefore was not limited by the review board’s recommendation.

For all of these reasons, the trial court erred in ruling that the review board waived UDOT’s right to enforce the notice and waiver provisions.

**C. UDOT Did Not Modify the Notice Provisions in the General Contract by Forbidding Southwest From Using Ribbon Paving**

The trial court’s third alternative ruling is that UDOT and MVC modified the general contract. This ruling is largely irrelevant because UDOT accepts on appeal that UDOT altered the project by limiting ribbon paving. Thus, the typical modification issue—whether the parties orally modified one party’s performance where written modification was required under the contract—is not present here. R.T. Nielson Co. v. Cook, 2002 UT 11, ¶13 n.4, 40 P.3d 1119 (“Parties to a written contract are free to modify that contract by oral or verbal agreement, even though the written contract may prohibit oral or verbal modifications or require that modifications be in writing.”) UDOT accepts on appeal that it altered the project by directing MVC to block pave. (R. 1524.)

The only modification ruling that remains relevant is that UDOT modified the general “contract’s notice provisions when UDOT verbally directed [Southwest] to proceed with the block paving in areas where it would result in greater than two inch vertical grade separation.” (R. 1524.) This ruling is in error for the same reasons the trial

court's waiver rulings are in error. There is no finding that UDOT or MVC expressly agreed to modify these notice provisions. Thus, the trial court had to find that UDOT's direction to block pave constituted a modification of not only the project, but also the notice provisions, despite the fact that MVC's Rule 30(b)(6) representative testified that MVC understood it had to comply with the notice provisions. (R. 1424: 552-55.)

The trial court did not find that UDOT agreed to pay MVC additional compensation, which arguably could have resulted in a modification in the amount MVC was due under the general contract. Instead, the only conduct that could have accomplished a modification is the same conduct relevant to the trial court's various waiver rulings, none of which involve UDOT acting inconsistently with enforcing the notice or waiver provisions in the general contract. Therefore, the trial court erred in ruling that UDOT modified the general contract for all the same reasons it erred in its waiver rulings. This court should reverse the trial court's modification ruling.

**D. UDOT Is Not Estopped from Enforcing the Notice Provisions in the General Contract**

The trial court's final alternative ruling is that UDOT was estopped from enforcing the notice provisions. Only one estoppel ruling is distinct from the waiver rulings and requires separate analysis: "UDOT is estopped from asserting that Meadow Valley and its asphalt paving contractor, Southwest, must strictly comply with the contractual notice provisions as UDOT failed to follow the same asphalt paving specifications on both the I-215 Project and the Point of the Mountain I-15 Project." (R. 1522.)

Under Utah law, estoppel requires "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted" that induces "reasonable action or

inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act," and a resulting "injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act." Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶14, 158 P.3d 1088. If the inconsistent statement concerns a present fact, then the doctrine of equitable estoppel applies; and if it concerns a promise about future conduct, then the doctrine of promissory estoppel applies. Id. at ¶17. Here, regardless of which doctrine the trial court was relying upon, the trial court erred because none of the three elements are satisfied.

Because the Point of the Mountain project occurred after MVC failed to comply with the notice provisions on June 17, 2003, the trial court's ruling involves promissory estoppel.<sup>24</sup> (R. 1499.) If so, then the ruling makes no sense. If MVC had (i) been the contractor on the Point of the Mountain project, (ii) relied upon a prior statement of UDOT that MVC would not be permitted to ribbon pave on the Point of the Mountain project, and (iii) been harmed as a result, then the doctrine might apply to claim MVC might bring under the contract in the Point of the Mountain project, not this project.

As it stands, the trial court's ruling states that the mere fact that MVC allowed ribbon paving on the Point of the Mountain project retroactively waived MVC's need to comply with the notice provisions, even though MVC was not involved in the Point of the Mountain project. Thus, MVC could not have relied upon the misrepresentation when MVC failed to comply with the notice provisions on June 17, 2003. Regardless,

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<sup>24</sup> The trial court found that the Point of the Mountain project took place "during and after" this project. (R. 1499.) However, it is undisputed that Southwest, not MVC, first learned that UDOT allowed ribbon paving on the Point of the Mountain project on October 7, 2003, after the project had been completed. (R. 1421:77.)

and more to the point at issue here, there is no evidence, let alone a finding, that UDOT misrepresented to MVC that the written notice requirements for alterations to the contract need not be followed. There was no misrepresentation, there was no reliance, and there was no resulting damage. For all of these reasons, the trial court erred in ruling that UDOT was estopped from enforcing the notice provisions.

### **Conclusion**

This court should reverse on three separate grounds. First, the only plaintiff in this lawsuit, MVC, incurred no damages, and therefore, cannot recover damages. Second, the only breach of contract ruling is that UDOT breached the general contract by altering the project; but the general contract expressly permits UDOT to alter the project. Third, MVC waived any right to additional compensation by failing to comply with the notice provisions in the general contract. And because MVC's Rule 30(b)(6) representative testified that MVC understood that it had to comply with the notice provisions, and failed to do so, the trial court's various rulings that UDOT waived, modified, or is estopped from enforcing the notice provisions fail as a matter of law.

If the court reverses on the ground that MVC cannot recover Southwest's damages, the court should vacate the damage award. If the court reverses on the ground that UDOT did not breach the general contract or MVC waived its right to additional compensation, then the court should vacate the entire judgment.

DATED this 16<sup>th</sup> day of June, 2009.

Snell & Wilmer L.L.P.



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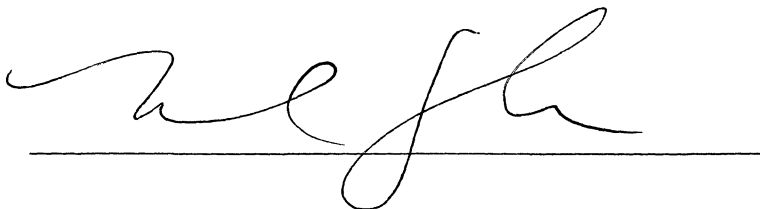
Troy L. Booher  
Attorney for Utah Department of Transportation

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of June, 2009, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was served via U.S. Mail, postage prepaid, upon the following:

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Attorney for Defendant

A handwritten signature in black ink, appearing to read 'rsh', is written over a horizontal line.

Tab A

**FILED DISTRICT COURT**  
Third Judicial District

DEC 08 2008

SALT LAKE COUNTY

By                       
Deputy Clerk

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**THIRD JUDICIAL DISTRICT COURT**

SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE CITY DEPARTMENT

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**MEADOW VALLEY CONTRACTORS,  
INC.,** a Nevada corporation,

Plaintiff,

vs.

**STATE OF UTAH DEPARTMENT OF  
TRANSPORTATION,**

Defendant.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Case No. 050909139

Judge John Paul Kennedy

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This matter came before the Court for a five-day bench trial on March 4-6 and March 18-19, 2008. The Plaintiff was represented by Kent B. Scott, Justin E. Scott, and Cody W. Wilson of Babcott Scott & Babcock. The Defendant was represented by Dan R. Larsen of Snell & Wilmer and Randy S. Hunter of the Utah Attorney General's Office. Both sets of attorneys have reviewed and commented on the proposed findings and conclusions prior to the finalization of the same by the Court. Based upon the evidence presented at the trial, the Court enters the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Meadow Valley Contractors, Inc. ("Meadow Valley") furnished the low bid in response to the Utah Department of Transportation's ("UDOT") Notice to Contractors dated July 20,

2002, and revised August 5, 2002, for the building of the IM-NH-215-9(102)10, I-215; Redwood Road to 300 East, Crack & Seal, Overlay, Widening, Structures & Noise Walls Project (“I-215 Project” or “Project”).

2. Meadow Valley’s overall bid of \$16,127,628.75 was within 4% of the engineer’s estimate and was within 5.2% of the next three higher bidders. The asphalt paving component of Meadow Valley’s bid was within 7% of the next five higher bidders.
3. There was no evidence that refuted the reasonableness of Meadow Valley’s bid, including their bid on the asphalt paving component and the price quote that subcontractor Fisher Sand and Gravel Company d/b/a Fisher Industries later gave to Meadow Valley to provide the asphalt materials and labor for the I-215 Project.
4. In the fall of 2002, Meadow Valley entered into a written contract with UDOT to perform the work on the I-215 Project.
5. Part of the I-215 Project included the paving of multiple lanes, exits, entries and shoulders along the I-215 interstate freeway in the segment between Redwood Rd. and 300 East.
6. Meadow Valley entered into two subcontracts (one entitled “Purchase Agreement Meadow Valley Contractors, Inc.” and the other entitled “Meadow Valley Subcontractors, Inc Subcontract Agreement”) with Fisher Sand and Gravel Company d/b/a Fisher Industries (“Fisher”), wherein Fisher agreed to perform all paving operations on the I-215 Project, including furnishing all materials, labor, and equipment necessary to perform the paving.



7. Southwest Asphalt Paving (“Southwest”), a division of Fisher, was delegated the task of performing the paving operations.
8. Pursuant to a Claims Prosecution and Tolling Agreement entered into between Meadow Valley and Fisher Industries, Southwest’s parent company, Meadow Valley assigned and granted Southwest the right to prosecute the claims asserted in this matter in Meadow Valley’s name. While Meadow Valley is the Judgment Creditor in this matter, Meadow Valley’s rights are subject to the rights assigned to Southwest in the Claims Prosecution and Tolling Agreement. For purposes of convenience, Plaintiff will be referred to as Meadow Valley/Southwest in many of the Findings set forth below.
9. Prior to entering into the two subcontracts with Meadow Valley, Mike Moehn, Vice-President of Southwest, reviewed the I-215 Project Specifications.
10. The Project Specifications contained no restrictions as to the method or means of asphalt paving to be used on the I-215 Project.
11. Southwest, in preparing its bid to Meadow Valley, planned on utilizing a ribbon style method of paving and based its bid on the premise that ribbon paving would be allowed for the entire I-215 Project.
12. Ribbon paving is the most common form of paving used in highway and interstate construction improvement projects.
13. Ribbon paving is the most cost effective method of paving because it results in the fewest amount of stops, downtime, and resets of the paving equipment and asphalt plant. Ribbon

paving also results in higher productivity of the paving equipment, paving crew, truckers, and asphalt plant.

14. Production rates are decreased any time the paver and other paving equipment and crews are forced to stop, pick up and move back to a new location within a given shift.
15. A more costly and less efficient alternative to ribbon paving is full width paving. Full width paving on the I-215 Project would require the use of multiple pavers and crews to pave the full width of the roadway path in one passing. Full closure of the road would need to be maintained while performing the full width operations. Full width paving was not possible on the I-215 Project as the contract specifications required that one or more of the lanes needed to remain open throughout most of the time the I-215 Project was being constructed.
16. Block paving is a modified form of full width paving. Block paving is more costly than ribbon paving because of the loss of production time associated with the multiple start-ups and shut downs of the asphalt plant and the multiple movements and downtime of the paving equipment, trucks, and paving crews.
17. Echelon paving, a modified form of full width paving, is the process whereby two pavers are run, side by side, down the roadway path to be paved in one or more passes.
18. Echelon paving is more costly due to the use of two pavers and crews. In addition, echelon paving was impractical to use on the I-215 Project due to the variances in width of the roadway path, exits, entries and shoulder areas that were required to be paved.

19. Southwest utilized the ribbon style paving method in all of its highway and interstate paving projects prior to the I-215 Project and has utilized the ribbon style paving method in all of its projects since the I-215 Project.
20. In the vast majority of its highway and interstate construction improvement projects, UDOT has allowed the ribbon style paving method to be utilized. There was no evidence presented where block paving had been required on any other UDOT interstate projects.
21. UDOT allowed Southwest to utilize the ribbon style paving method on an interstate project in Nephi, UT, on I-15, in the weeks preceding the I-215 Project, using the same equipment that it used on the I-215 Project.
22. The I-15 Nephi project involved similar specifications to those utilized in the I-215 Project.
23. UDOT also allowed Staker & Parsons, another paving contractor, to utilize the ribbon style paving method in a similar interstate project along the I-15 interstate corridor near the Point of the Mountain in Salt Lake and Utah Counties. This project took place during and after the I-215 Project, and the project engineer for that project (I-15 Point of the Mountain) allowed a greater than two inch vertical grade separation between traffic lanes.
24. The I-15 Point of the Mountain Project also included similar specifications as were used in the I-215 Project, including the TC-2A Hazard Mitigation Flowchart and the 3.5 Surface Placement provision.
25. The paving portion of the I-215 Project began in July 2003.

26. Prior to paving beginning, from the fall of 2002 to June 12, 2003, UDOT never notified Meadow Valley or Southwest that ribbon paving would not be allowed on the portions of the project where there would be a greater than two inch vertical grade separation.
27. Brandon Squire was UDOT's Project Engineer over the I-215 Project. Mr. Squire was a recent graduate from the University of Utah, receiving a degree in civil engineering in 1997, and later became a licensed engineer in June 2000, only two and one-half years prior to the signing of the contract for the subject Project. Mr. Squire began working for UDOT following his graduation in 1997. He spent less than six months working in UDOT's research division, and then he moved to a position as a field engineer for UDOT. Thereafter Mr. Squire spent about two years as a roadway design engineer before becoming a resident engineer for UDOT, a position he held at the time of the I-215 Project. By the time paving began on the I-215 Project, Mr. Squire had approximately six years of experience in various capacities with UDOT.
28. On June 12, 2003, at a pre-pave meeting, Brandon Squire, UDOT's young and relatively inexperienced Project Engineer, notified Meadow Valley and Southwest personnel for the first time that Southwest would not be allowed to ribbon pave a significant portion of the Project.
29. In support of his position directing Meadow Valley and Southwest not to use the ribbon paving method, Brandon Squire relied on his own interpretation of the TC-2A Hazard

Mitigation Flowchart (“TC-2A Flowchart”), which was part of the Contract’s Standard Specifications for the I-215 Project.

30. The TC-2A Flowchart is a UDOT standard drawing and is a part of all UDOT highway and interstate construction improvement projects, including the I-15 Point of the Mountain project and the Nephi I-15 project.
31. While at the pre-pave meeting on June 12, 2003, Brandon Squire specifically represented to Meadow Valley and Southwest that ribbon paving would not be allowed in areas of the Project where it would result in a greater than two inch vertical grade separation between traffic lanes because he claimed that the TC-2A Flowchart did not allow for traffic to traverse a vertical grade separation greater than two inches.
32. David Olson, Southwest’s Project Manager, responded by informing Brandon Squire that Southwest could mitigate the greater than two inch vertical grade separation by providing a 5:1 or flatter taper on the vertical edges between traffic edges, which was allowed by the TC-2A Flowchart and which practice had been used successfully by Southwest on all of its prior projects.
33. Brandon Squire denied Southwest’s request to use the ribbon paving method to pave the Project using a 5:1 or flatter taper to mitigate the vertical grade separation, claiming that Southwest would not be able to achieve adequate compaction with anything flatter than a 3:1 slope.

34. As part of the pre-pave meeting on June 12, 2003, Brandon Squire directed Meadow Valley/Southwest to not ribbon pave portions of the Project where a greater than two inch vertical grade separation would result.
35. In response to that directive, David Olson, Southwest's Project Manager, told Brandon Squire that Southwest had planned on ribbon paving the entire Project, and that not allowing Meadow Valley/Southwest to ribbon pave the entire Project would result in increased costs, production inefficiencies, and scheduling problems.
36. At the conclusion of the pre-pave meeting on June 12, 2003, Brandon Squire re-iterated his position that Meadow Valley/Southwest could not ribbon pave the entire Project and directed Meadow Valley/Southwest not to use ribbon paving on the portion of the Project where a greater than two inch vertical grade separation would result.
37. On July 31, 2003, at another pre-pave meeting, the issue of ribbon paving and block paving again came up between Meadow Valley, Southwest, and UDOT. Echelon paving was never discussed in connection with the I-215 Project.
38. At the meeting on July 31, 2003, Ken Schmidt, Southwest's Project Superintendent, again informed Brandon Squire that Southwest wanted to ribbon pave the entire Project.
39. In response, Brandon Squire informed Ken Schmidt, Tim Sisneros, and Ben Lujan, all employees of Southwest, that ribbon paving would not be allowed on the Project where it would result in a greater than two inch vertical grade separation

40. Brandon Squire again referred to the TC-2A Flowchart as the basis for refusing Southwest's plan for using the ribbon style method of paving on the entire Project.
41. While at the pre-pave meeting on July 31, 2003, Ken Schmidt expressed to Brandon Squire the same concerns that had been raised previously regarding the decision to not allow Meadow Valley/Southwest to ribbon pave, including negative effects on Southwest's production output and scheduling.
42. Brandon Squire responded by stating that the TC-2A Flowchart would not allow Meadow Valley/Southwest to use the ribbon paving method on any asphalt lift that would cause a greater than two inch vertical grade separation.
43. From early August 2003, until the Project was completed in late September 2003, Ken Schmidt, Tim Sisneros, Ben Lujan, and Shawn Hammer (all Southwest employees) had several conversations at the project site with UDOT personnel, including Brandon Squire and a UDOT Inspector, Ronnie Bair (at least twice per week), where Southwest personnel told Brandon Squire and Ronnie Bair that not being allowed to ribbon pave was affecting Southwest's production output, costs, quality of product, and scheduling of work.
44. Richard Jessop, Meadow Valley's Project Superintendent, witnessed some of these conversations.
45. Brandon Squire and Ronnie Bair responded by directing the work to continue, and they directed Meadow Valley/Southwest to supply more work crews.

46. As the result of UDOT's directive that ribbon style paving could not be used in areas in which there was a greater than two inch vertical grade slope, Meadow Valley/ Southwest had to pave in blocks on a significant portion of the Project.
47. Without the ability to use the ribbon paving method, the block paving method was the most practical and economical method to use, as echelon paving and traditional full width paving were either not possible or practical paving methods for this Project.
48. Meadow Valley/Southwest's use of the block paving method for a substantial portion of this Project resulted in increased production costs and operating costs. It was also clear to UDOT that requiring Meadow Valley/Southwest to block pave rather than ribbon pave made increased costs a very serious issue for Meadow Valley/Southwest.
49. The impacts experienced resulted in increased wastage and down time for paving crews, trucks, paving equipment, and the asphalt plant because paving equipment had to stop and move back 3 to 5 times per night.
50. Contrary to representations by and testimony of Brandon Squire, Meadow Valley/Southwest could have provided a properly compacted 5:1 taper between traffic lanes using the ribbon style paving method as it had on prior projects, which would have mitigated the vertical grade separation hazard consistent with the criteria set out in the TC-2A Flowchart and consistent with other requirements of the Contract Specifications. UDOT did not allow Meadow Valley/Southwest to use their preferred ribbon paving method despite numerous requests to do so.



51. UDOT allowed ribbon paving in areas where there was not a greater than two inch vertical grade separation and allowed Meadow Valley/Southwest to place a 5:1 or flatter taper between traffic lanes throughout the duration of the Project.
52. UDOT claims that a 3:1 slope was required by contract for compaction purposes, but did not consistently require such on the I-215 Project or on some other UDOT interstate projects.
53. The evidence reflects that Meadow Valley/Southwest used a properly compacted 6:1 taper (for 3 inch lifts) and a 9:1 taper (for 2 inch lifts) throughout virtually the entire project. There is no credible testimony presented that would refute such. The unrefuted testimony was that the equipment used on this project included “tag-alongs,” which necessitated such tapers.
54. Southwest, Meadow Valley’s paving subcontractor, does not own equipment that would enable it to provide a 3:1 taper. Southwest’s equipment is only capable of providing a 6:1 or flatter vertical taper.
55. Allowing Meadow Valley/Southwest to provide a properly compacted 5:1 or flatter longitudinal vertical grade slope would be consistent with the feasibility recommendations of respected academic studies (Pennsylvania and Wisconsin Departments of Transportation Reports), both of which studies used the criteria established by the National Center of Asphalt Technology at Auburn University. A properly compacted 5:1 or flatter slope was also consistent with Meadow Valley/Southwest’s evidence that such a procedure could be accomplished without creating “unraveling” problems on the completed road surface.

56. The testimony and evidence presented showed that better compaction is achieved by a flatter than 3:1 slope. Specifically, a 5:1 or 6:1 tapered slope provides for better compaction than a 3:1 slope.
57. The testimony of Mike Moehn showed that a paver placed taper followed by a tag along roller, the method used by Southwest on the I-215 Project, was the best method for compacting a longitudinal vertical slope taper of 5:1 or flatter.
58. On the I-15 Point of the Mountain Project, which involved the paving of multiple lanes, entries, exits, and shoulders, UDOT allowed the paving contractor, Staker & Parsons, to pave the entire project in ribbon style, and traffic was allowed to travel across the greater than two inch vertical grade separation.
59. The Point of the Mountain Project Specifications included the TC-2A Flowchart and the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the Hot Mixed Asphalt Specifications (02741S).
60. UDOT allowed Southwest to provide a 5:1 or flatter slope on the Nephi I-15 project that occurred in the weeks preceding the I-215 Project. UDOT offered no evidence that the procedure used on the Nephi I-15 project created compaction problems.
61. The Nephi I-15 project also included the TC-2A Flowchart and the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the Hot Mixed Asphalt Specifications (02741S).

62. Brandon Squire was neither a knowledgeable nor credible witness on matters dealing with methods and means of asphalt paving, compaction, and contract interpretation issues relating thereto.
63. Brandon Squire's interpretation and use of the TC-2A Flowchart was in conflict with the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the of the Hot Mixed Asphalt Specifications (02741S).
64. Brandon Squire also ignored that portion of the TC-2A Flowchart that would allow for a mitigation of a greater than two inch vertical grade separation by providing a 5:1 or flatter taper.
65. Brandon Squire's testimony that a 5:1 taper could not be adequately compacted due to the size of the aggregates used on this job is not credible in view of the other testimony and academic studies presented, specifically the testimony of Mike Moehn and the compaction studies conducted by the Pennsylvania and Wisconsin Departments of Transportation using criteria established by the National Center for Asphalt Technology at Auburn University.
66. During a meeting with Mike Moehn on October 7, 2003, a representative of UDOT stated to Southwest personnel that the TC-2A Flowchart was uniformly used, interpreted, and applied on all UDOT highway and interstate projects in the same manner that it was being used, interpreted, and applied on the I-215 Project. Brandon Squire was present at the meeting on October 7, 2003, and did not say anything that would contradict this representation. The representation was consistent with similar prior statements made by

Brandon Squire during the course of the I-215 Project. The Court finds those statements to be in conflict with facts found in these Findings.

67. At the meeting on October 7, 2003, Brandon Squire allowed a UDOT representative to misrepresent and mislead Meadow Valley/Southwest when the UDOT representative stated that UDOT uniformly prohibited ribbon paving where there was a greater than two inch vertical grade separation when, in fact, UDOT did allow ribbon paving in areas where there was a greater than two inch vertical grade separation at the I-15 Point of the Mountain project.
68. Brandon Squire misrepresented and misled Meadow Valley/Southwest by stating that UDOT did not accept a 5:1 taper on jobs with  $\frac{3}{4}$  inch and  $\frac{1}{2}$  inch aggregates due to the inability to properly compact the taper when in fact a 6:1 or flatter taper was used on the I-215 Project and the I-15 Nephi Project.
69. The Court finds that Lance Harris and Richard Jessop were not knowledgeable witnesses as it relates to paving issues, compaction issues, and contract interpretation issues pertaining to the placement of asphalt paving.
70. The Court finds that Mike Moehn, Dave Olson, Tim Sisneros, Ken Schmidt, Ben Lujan, and Shawn Hammer were the more credible witnesses and more knowledgeable in the area of paving and plant operations than Brandon Squire, Lance Harris, and Richard Jessop.
71. The Court also finds that according to the weight of the evidence from Ken Schmidt, Dave Olson, Tim Sisneros, Shawn Hammer, and Richard Jessop, the 3:1 Surface Placement

provision as set out in paragraph 3.5, page 17, of the of the Hot Mixed Asphalt Specifications (02741S) was not enforced on the I-215 Project and that in fact a 6:1 or flatter taper was installed and accepted throughout the I-215 Project, which taper, according to testimony presented by Mike Moehn, was placed by Southwest's paver and compacted by a tag along roller resulting in no unraveling.

72. According to Greg Searle, UDOT's Project Engineer for the I-15 Point of the Mountain project, the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the Hot Mixed Asphalt Specifications (02741S) was not enforced on that project.
73. According to the testimony of Mike Moehn, the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the of the Hot Mixed Asphalt Specifications (02741S) was not enforced on the I-15 Nephi project. This testimony was not refuted.
74. According to the testimony of Lance Harris and Richard Jessop, the 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the Hot Mixed Asphalt Specifications (02741S) was not enforced on any other UDOT related interstate highway or interstate job they have been involved with. This testimony was not refuted.
75. By flattening the drop off to a 5:1 or flatter slope, Meadow Valley/Southwest could have achieved compliance with the TC-2A Flowchart, which was provided to permit the public to travel safely over a greater than two inch vertical grade separation.
76. With the traffic being able to travel safely over the vertical separation grade slope using a 5:1 or flatter taper, Meadow Valley/Southwest would have been able to pave the entire I-215

Project using the ribbon style paving method. While UDOT presented evidence of one instance where a 5:1 or flatter taper unraveled on the I-215 Project and caused conditions that were unsafe for traffic, that instance is distinguishable due to different methods and equipment used in constructing the taper on that portion of the Project.

77. The Court finds that as of June 12, 2003, UDOT was on notice that prohibiting Meadow Valley/Southwest from ribbon paving the entire Project would result in increased costs, production inefficiencies, downtime, scheduling problems, and other impacts to Meadow Valley/Southwest. However, due to the rapid construction schedule, methods, and the nature of the costs, the amount of increased costs was not determinable until the Project was nearly complete.
78. The testimony of Dave Olson, Ken Schmidt, Tim Sisneros, Shawn Hammer, Ben Lujan, and Richard Jessop evidences that UDOT had an ongoing knowledge of the generally adverse impacts being experienced by Meadow Valley/Southwest as a direct result of not being able to use the ribbon paving method to pave all portions of the I-215 Project.
79. The testimony of Brandon Squire established that any formal written or further notice of adverse impacts from Meadow Valley/Southwest would not have changed his mind in applying his interpretation of the contract specifications and the TC-2A Flowchart the way he did, which erroneously prohibited Meadow Valley/Southwest from using the ribbon paving method where it would result in a vertical grade separation greater than two inches.

80. Despite knowing of these impacts, and the foreseeability thereof, UDOT directed Meadow Valley/Southwest to proceed with the Project while restricting ribbon paving in areas with greater than a two inch vertical grade separation. The block style method of paving was the only reasonable alternative left to Meadow Valley/Southwest when paving in areas involving a greater than two inch vertical grade separation.
81. UDOT's prohibition on ribbon paving for portions of the Project was equivalent to requiring extra work or a change in work that was not contemplated by Meadow Valley's bid to UDOT or by Southwest's bid to Meadow Valley.
82. While Meadow Valley/Southwest did not strictly comply with the written contractual notice provisions, UDOT had actual repeated verbal notice of the impacts suffered by Meadow Valley/Southwest as a result of not being able to ribbon pave in areas involving a greater than two inch vertical grade separation.
83. UDOT waived strict compliance with the contractual notice provisions by not following the contractual requirements on the I-215 Project in that UDOT intentionally acted in a manner inconsistent with its contractual rights by orally responding to Meadow Valley/Southwest's complaints regarding paving methods and by dealing informally and directly with Southwest personnel on paving issues. While UDOT did not expressly waive the contractual notice provisions, UDOT's waiver was implied from its conduct.
84. Based on the testimony of the Southwest witnesses (Dave Olsen, Ken Schmidt, Tim Sisneros, Ben Lujan, and Shawn Hammer), all of whom testified that UDOT personnel,

including Brandon Squire and Ronnie Bair, verbally directed them to proceed with block paving in areas where it would result in a greater than two inch vertical grade separation even though Brandon Squire and Ronnie Bair were aware that block paving would significantly and adversely impact Meadow Valley/Southwest, the Court finds that UDOT waived strict compliance with the contractual notice provisions. By dealing directly with Southwest personnel on paving issues, including methods of paving, and verbally directing Southwest on what methods of paving to utilize on the Project, UDOT created an informal, non-threatening atmosphere on the I-215 Project in that it attempted to informally resolve paving disputes directly with Southwest without requiring strict compliance with contractual notice provisions (*i.e.*, verbally directing Southwest to continue block paving when notified of the impacts instead of requiring that a written claim be made). UDOT's conduct led Meadow Valley/Southwest to reasonably believe that UDOT had waived strict compliance with the contractual notice provisions.

85. When UDOT was unable to resolve its disputes with Meadow Valley/Southwest regarding paving methods following completion of the Project and submission of a formal claim by Meadow Valley/Southwest, UDOT denied Meadow Valley/Southwest's claim. Both Brandon Squire's response to Meadow Valley/Southwest's claim (Trial Exhibit 76) and the decision of the UDOT Claims Review Board (Trial Exhibit 29) addressed the merits of Meadow Valley/Southwest's claim regarding the paving restrictions. While Brandon Squire's response also addressed lack of strict compliance with the contract's notice



requirements, the decision of the UDOT Claims Board of Review makes no mention of lack of notice but addresses only the merits of the Meadow Valley/Southwest claims.

86. The Court finds that UDOT and Meadow Valley modified their original written agreement as it relates to the written contract's notice provisions. The original contract provided that Meadow Valley give UDOT written notice if there was a change in the contract, including methods of performing the paving work. The contract's requirement that written notice should be given was orally modified and waived when UDOT verbally directed Meadow Valley/Southwest to proceed with block paving in areas where it would result in a greater than two inch vertical grade separation in response to Meadow Valley/Southwest's request to ribbon pave the entire Project.
87. The Court finds that Mike Moehn's methods in determining Meadow Valley/Southwest's damages that occurred due to UDOT'S requirement that Meadow Valley/Southwest not ribbon pave portions of the Project were reliable, credible, accurate, and reasonable.
88. UDOT failed to present any evidence suggesting that Mr. Moehn's methods in determining damages relating to Meadow Valley/Southwest not being allowed to ribbon pave portions of the Project were anything but reliable, credible, accurate, and reasonable.
89. Meadow Valley/Southwest's claim of actual additional costs of \$1,261,319.00, which includes damages due to not being allowed to employ ribbon paving on portions of the Project, is comprised of the following elements:

1.	LOSS OF PRODUCTION	\$568,731.00
	A. Paving Method	\$383,472.00
	B. Plant Waste	\$ 49,104.00
	C. Supervision	\$ 17,248.00
	D. Grinding	\$ 42,365.00
	E. Testing	\$ 12,302.00
	F. Trucking	\$ 43,875.00
	G. ½" Material	\$ 20,365.00
2.	ASPHALT THICKNESS	\$166,416.00
3.	PROFIT/OVERHEAD AT 15%	\$110,272.00
4.	TRAFFIC CONTROL	\$ 32,000.00
5.	INTEREST AT 10% (11/3/03 – 03/18/08) (per diem rate of \$240.39)	\$383,900.00
	<b>TOTAL</b>	<b>\$1,261,319.00</b>

90. As to the Loss of Production Damages, which total \$568,731.00, the Court finds that Meadow Valley/Southwest is entitled to 80% of those damages, which amounts to \$454,984.80. The Court has reduced Meadow Valley/Southwest's claimed Loss of Production Damages by 20% due to evidence presented by UDOT showing that 20% of the Loss of Production Damages was caused by Meadow Valley and/or Southwest through the construction practices and methods they employed.
91. As to asphalt thickness reduction damages in the amount of \$166,416.00, the Court finds that Meadow Valley/Southwest is not entitled to those damages.

92. Paragraph 1.4 (A) of the Contract Specifications relating to thickness states that “A lot equals the number of tons of HMA (hot mix asphalt) placed during each production day.”
93. Paragraph 1.4 (E) states that UDOT is to “Base acceptance on the average thickness of a lot. A thickness lot equals a density lot.”
94. On the Project, density and thickness were measured each day.
95. UDOT and Meadow Valley/Southwest agreed that the TLA (Trinidad Lake Asphalt, a type of asphalt commonly used in paving roads) would be laid in two lifts, the first a 3 inch lift and the second a 2 inch lift.
96. Paragraph 1.4 (E )(2) provides that “The same core samples taken for density may be used for thickness verification.”
97. Paragraph 1.4 (E)(3) states that “The Department accepts a lot when: (a) The average thickness of all sublots is not more than ½ inch greater nor ¼ inch less than the total thickness specified.” Subsection (b) of Paragraph 1.4 (E) 3 states that “no individual subplot can show a deficient thickness of more than 3/8 inch.”
98. In this Project, Meadow Valley/Southwest was penalized by UDOT for thickness deficiencies based upon 1.4 (E)(3)(b).
99. The Court finds the total thickness specified for the TLA pavement was 5 inches, which was laid in two lifts.
100. While the Contract Specifications relating to allowable deviations in the paving thickness are less than clear, the Court finds that UDOT’s interpretation that the allowable deviation

applies to the total thickness and not to each individual layer or lift, is the more reasonable interpretation, as otherwise the potential total deviation in thickness could be multiplied by the number of layers or lifts and could result in a substantial deviation from the contract requirements. Thus, the Court finds that Meadow Valley/Southwest was only entitled to a deviation of 3/8" from the total 5 inches specified for the TLA pavement under the contract. Therefore, the Court finds that since the thickness of the pavement laid by Meadow Valley/Southwest deviated by an amount greater than 3/8", UDOT's thickness penalty was justified.

101. The Court finds that Meadow Valley is entitled to 15% Profit/Overhead on its awarded Loss of Production Damages (\$454,984.80), which Profit/Overhead amounts to \$68,247.72.
102. The Court finds that Meadow Valley/Southwest is entitled to 80% of its Traffic Control costs, which equal \$25,600.00. The 20% reduction is due to evidence presented by UDOT showing that 20% of the Loss of Production Damages was caused by the construction practices and methods of Meadow Valley and/or Southwest. Meadow Valley/Southwest's Traffic Control costs are linked to its Loss of Production damages.
103. The Court finds that, pursuant to Utah Code Ann. § 15-1-1, Meadow Valley is entitled to 10% per annum interest on its awarded damages of \$548,832.52 starting from 11/1/2004 (when Meadow Valley submitted its formal claim to UDOT's Claims Review Board, approximately one year after the Project was completed). From 11/1/2004 to 10/31/2008,

that interest totals \$219,533.00. A per diem interest rate of \$150.37 will apply from 10/31/2008 until Judgment is entered.

104. The Court therefore awards total damages to Meadow Valley in the amount of \$768,365.52 through October 31, 2008, together with post judgment interest at the legal rate as defined by Utah Code Ann. § 15-1-4 on the amount of \$548,832.52.

### CONCLUSIONS OF LAW

1. The I-215 Project Specifications allow for ribbon style paving for the entire Project.
2. The Hot Mix Asphalt Surface Placement Specification paragraph 3.5, page 17, (02741S) and the TC-2A Flowchart are not in conflict. When read together, they are harmonious and allow the paving contractor to mitigate a steeper than 4:1 vertical drop off hazard by flattening the drop off slope by using a 5:1 or flatter taper with respect to the I-215 Project.
3. UDOT's directive that ribbon style paving not be used was not consistent with the contractual requirements. The TC-2A Flowchart does not restrict methods of paving. The TC-2A Flowchart provides that a vertical grade separation in excess of two inches can be mitigated by providing a 5:1 taper between traffic lanes.
4. The Contract Specifications for the Project did not require Meadow Valley/Southwest to provide a 3:1 slope between traffic lanes if Southwest could provide a properly compacted 5:1 or flatter taper to the vertical grade separation between the traffic lanes.
5. The Contract Specifications allowed Meadow Valley/Southwest to provide a properly compacted 5:1 or flatter longitudinal vertical grade slope, which is consistent with the criteria set out in Hot Mix Asphalt Contract Specifications paragraph 3.5 at page 4 (02741S) and the criteria set out in the TC-2A Flowchart.
6. The surface placement requirement of a 3:1 Surface Placement provision as set out in paragraph 3.5, page 17, of the of the Hot Mixed Asphalt Specifications (02741S) created a

traffic hazard under the TC-2A Flowchart, which hazard could be mitigated as provided for in the TC-2A Flowchart by providing a 5:1 or flatter taper to the vertical edge slope.

7. Meadow Valley/Southwest should have been permitted to mitigate the 3:1 slope by flattening that vertical grade slope through use of a 5:1 or flatter taper.
8. UDOT's decision to prohibit ribbon paving where it would result in a greater than two inch vertical separation grade interfered with the method and means by which the asphalt paving should have been allowed to be performed by Meadow Valley/Southwest and constituted a material breach of the contract by UDOT.
9. UDOT breached its contract with Meadow Valley in directing Meadow Valley/Southwest not to use the ribbon style method on portions of the Project.
10. UDOT breached its contract with Meadow Valley in misinterpreting and misapplying the asphalt paving specifications.
11. UDOT misrepresented the manner in which the asphalt paving specifications were interpreted, used, and applied on other UDOT highway and interstate projects.
12. UDOT was aware, and it was foreseeable to UDOT, that UDOT's decision to disallow ribbon paving throughout the Project would prejudice Meadow Valley/Southwest by resulting in substantial additional costs for materials, labor, downtime, equipment, testing, grinding, trucking traffic control, plant operations, and other miscellaneous costs to Meadow Valley/Southwest.

13. UDOT's breach of the contract resulted in substantial added costs for materials, labor, downtime, equipment, testing, grinding, trucking, traffic control, plant operations, and other miscellaneous costs to Meadow Valley/Southwest.
14. UDOT was given actual notice, beginning at the pre-pave meeting on June 12, 2003, and continuing throughout the course of the I-215 Project, and thereafter, that UDOT's directive prohibiting Meadow Valley/Southwest from using the ribbon paving method would result in increased costs, production inefficiencies, downtime, scheduling problems, and other impacts to Meadow Valley/Southwest.
15. UDOT's breach of contract was continuous and ongoing throughout the course of the asphalt paving phase of the I-215 Project.
16. Meadow Valley/Southwest did not strictly comply with the written contractual notice provisions regarding extra work. Nevertheless, UDOT had actual verbal notice of the impacts suffered by Meadow Valley/Southwest as a result of not being able to ribbon pave the entire Project.
17. UDOT was not prejudiced by any lack of formal written notice from Meadow Valley as set out in the contract terms.
18. Meadow Valley/Southwest would be prejudiced by requiring compliance with the contractual notice provisions, as it would not be able to recover damages suffered as a result of UDOT's unjustified prohibition of ribbon paving on a portion of the Project.



19. The legal principles of *Thorn Construction Co. Inc. v. Utah Department of Transportation*, 598 P.2d 365, 369-370 (Utah 1979), are applicable to this case; *i.e.* where the project engineer orally furnishes a work directive to the contractor in the midst of construction for work not contemplated in the contractor's original bid, and where the project engineer is given notice of the adverse impacts of the directive in the form of the need for additional compensation, formal notice under the terms of the contract is not required because the project engineer is obviously on notice that extra compensation will be required. Although the facts of the *Thorn Construction* case are not completely on point with what occurred in this case, the situations are analogous and the same principles apply. While the project engineer in *Thorn Construction* requested that the contractor perform extra work outside the scope of the contract, UDOT's project engineer on this Project restricted the manner and method of contract performance as relating to the paving method. Because the restriction prohibiting ribbon paving on a portion of the Project caused Meadow Valley/Southwest to block pave, a method the project engineer knew was less efficient, and despite no written contractual terms requiring such a restriction, the project engineer's restriction in essence was an oral request and requirement by UDOT that Meadow Valley/Southwest perform extra work. Thus, as in the *Thorn Construction* case, because Meadow Valley/Southwest gave oral notice of the adverse impacts of UDOT's directive that it not ribbon pave portions of the Project, Meadow Valley/Southwest is not required to give formal written notice as required by the contract.

20. In this case, Meadow Valley/Southwest, was not required to strictly comply with the written notice requirements of the contract because UDOT's Project Engineer, Brandon Squire, continuously and throughout the asphalt paving phase for the I-215 Project, orally directed Meadow Valley/Southwest not to use the ribbon paving method on portions of the paving work and was given actual notice of the objections by Meadow Valley/Southwest resulting from the impacts which followed because of the change imposed by UDOT.
21. UDOT waived and is estopped from asserting that Meadow Valley and its asphalt paving subcontractor, Southwest, must strictly comply with the contractual notice provisions as UDOT created an atmosphere of informality on this Project and other projects which is inconsistent with UDOT's position in this case that strict compliance with contractual notice provisions was required.
22. UDOT is estopped from asserting that Meadow Valley and its asphalt paving subcontractor, Southwest, must strictly comply with the contractual notice provisions as UDOT failed to follow the same asphalt paving specifications on both the I-215 Project and the Point of the Mountain I-15 Project.
23. UDOT waived and is estopped from asserting that Meadow Valley and its asphalt paving subcontractor, Southwest, must strictly comply with the contractual notice provisions as UDOT's Project Engineer, Brandon Squire, failed to correctly interpret and misapplied the I-215 Project's asphalt paving specifications in limiting, by his own directives, Meadow Valley/Southwest's use of the ribbon paving method.

24. UDOT waived and is estopped from asserting that Meadow Valley and its asphalt paving subcontractor, Southwest, must strictly comply with the contractual notice provisions as UDOT's Project Engineer, Brandon Squire, misrepresented to Southwest's personnel the use and application of the I-215 contract specifications, including the TC-2A Flowchart on other UDOT highway and interstate projects with similar specifications and requirements.
25. The legal principles of *Procon Corp. v. Utah Department of Transportation* also apply to this case. 876 P.2d 890 (Utah Ct. App. 1994). In *Procon*, the contractor relied on UDOT's plans and specifications in submitting its initial bid, but UDOT later changed some of the project specifications after construction had commenced that caused the contractor to incur additional expenses. *Id.* at 891. UDOT denied the contractor's claim on the merits, but later at trial argued that the contractor failed to comply with the contractual notice provision. *Id.* at 892. The trial court and the Court of Appeals found that the contractor had provided a letter of notice to UDOT, and the trial court also concluded that UDOT had sufficient notice even without the letter. *Id.* at 891-893. While the Court of Appeals did not reach the merits of the failure to provide notice issue, as it found the contractor's letter was valid notice under the contract, the Court of Appeals observed that "UDOT's review of the possible merits of Procon's claim arguably waived Procon's obligation to conform to the Contract's strict notice procedures." *Id.* at 893 n.3. The principles of the *Procon* case provide a further and alternative basis for finding waiver and estoppel in this case. As in *Procon*, in this case UDOT reached the merits of Meadow Valley/Southwest's claim regarding the paving

method and thereby waived and is estopped from asserting that Meadow Valley/Southwest must strictly comply with the contractual notice provisions. Because UDOT's project engineer and the UDOT Claims Board of Review addressed the merits of Meadow Valley/Southwest's claim, it can be inferred that UDOT waived Meadow Valley/Southwest's obligation to strictly comply with the contract's notice provisions.

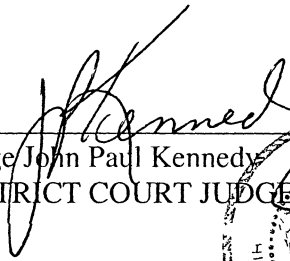
26. The legal principles of *R.T. Nielson Co. v. Cook*, 2002 UT 11 ¶ 13; 40 P.3d 1119, 1124 (Utah 2002), are applicable to this case, *i.e.*, UDOT and Meadow Valley/Southwest orally modified their written agreement as it relates to the written contract's notice provisions when UDOT verbally directed Meadow Valley/Southwest to proceed with the block paving in areas where it would result in a greater than two inch vertical grade separation. UDOT was made aware verbally by Meadow Valley/Southwest that block paving would significantly and adversely impact Meadow Valley/Southwest's costs, production and efficiency.
27. Meadow Valley's bid and the subsequent price quote furnished to Meadow Valley by its asphalt paving contractor, Southwest, is reasonable.
28. The method by which Meadow Valley and its asphalt paving subcontractor, Southwest, calculated the damages is reasonably accurate and reliable.
29. Meadow Valley/Southwest's damages are to be reduced by 20% as the result of their own production deficiencies apart from UDOT's directive prohibiting use of the ribbon paving method on portions of the I-215 Project.

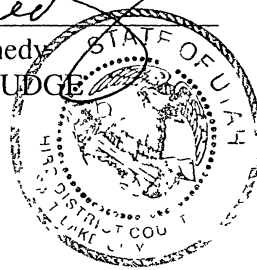
30. Meadow Valley's total production loss claim is \$568,731 and its increased traffic control claim is \$32,000. Meadow Valley is entitled to Judgment, after deducting the 20% amount of its inefficiencies, of \$454,984.80 in Loss of Production damages, \$25,600.00 in Traffic Control costs and \$68,247.72 for 15% Profit/Overhead, for a total of \$548,832.52.
31. Pursuant to Utah Code Ann. § 15-1-1, Meadow Valley is entitled to 10% per annum interest on its awarded damages of \$548,832.52 starting from 11/1/2004 (when Meadow Valley submitted its formal claim to UDOT's Claims Review Board, approximately one year after the Project was completed). From 11/1/2004 to 10/31/2008, that interest totals \$219,533.00. A per diem interest rate of \$150.37 will apply from 10/31/2008 until Judgment is entered.
32. Meadow Valley is entitled to a total judgment in the amount of \$768,365.52, together with post-judgment interest at the legal rate as defined by Utah Code Ann. § 15-1-4 on the amount of \$548,832.52.
33. UDOT's thickness penalties were based upon Hot Mix Asphalt Specification paragraph 1.4 (E)(3)(b), page 4, (02741S). The Court agrees with UDOT's interpretation of that contract specification in that the average thickness of all sublots making up a TLA pavement lot cannot show a deficient thickness of more than 3/8" from the 5" total thickness specified for the TLA pavement.
34. The Court denies Meadow Valley's \$166,416.00 asphalt thickness claim.
35. The Court denies all other claims or defenses asserted by the parties not specifically addressed herein.

## ORDER

Therefore, it is ORDERED that final judgment be entered in accord with these Findings and Conclusions.

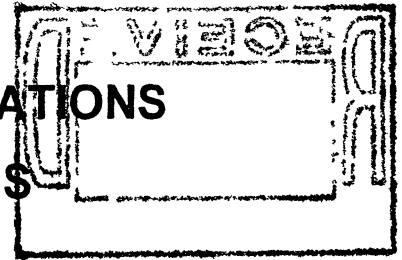
DATED this 8 day of December, 2008.

  
\_\_\_\_\_  
Judge John Paul Kennedy  
DISTRICT COURT JUDGE



Tab B

**CONTRACT**  
**SUPPLEMENTAL SPECIFICATIONS**  
**SPECIAL PROVISIONS**  
**CSI**



Name: I-215; REDWOOD ROAD TO 300 EAST  
CRACK & SEAT, OVERLAY, WIDENING, STRUCTURES & NOISE  
WALLS

Project No: \*IM-NH-215-9(102)10

County: Salt Lake

Contractor: Meadow Valley Contractors, Inc.

Bid Opening: August 27, 2002  
Date

Imperial marked on upper right hand corner of Title Plan Sheet is considered English.

*OFFICE  
COPY*



Revised Date: August 05, 2002



July 5, 2002

**SPECIAL PROVISION**

**\*IM-NH-215-9(102)10**

**SECTION 00120S**

**INSTRUCTIONS TO BIDDERS**

**PART 1 GENERAL**

**1.1 PREQUALIFICATION OF BIDDERS**

- A. Applies to all projects where the Department Engineer's Estimate is greater than or equal to \$500,000.
- B. Provide experience information on the "Contractor's Application for Prequalification" form and a confidential financial statement certified by a certified public accountant.
  - 1. Include a complete report of the bidder's financial resources and liabilities, equipment, past record, and personnel. Department establishes prequalification amount and classification.
  - 2. Allow a minimum of 10 days for Department approval of the "Contractor's Application for Prequalification."
- C. Prequalify at least once a year.
  - 1. The Department may change the prequalification amount during that period upon the submission of additional favorable reports or upon evidence of unsatisfactory performance.
  - 2. The prequalification amount limits bidding to individual contracts of a given size or for a particular type of work.
- D. If bid exceeds prequalification amount, including work in progress, Contract may not be awarded.

**1.2 REQUEST FOR BIDDING DOCUMENTS**

- A. Prequalified bidders must purchase and submit all proposals in the identical name used on their prequalification statement, or in accordance with a filed affidavit of change in firm name or personnel.
- B. Bidders must make a written or verbal request to the Construction Division to

July 5, 2002

**SPECIAL PROVISION**

**\*IM-NH-215-9(102)10**

**SECTION 00725S**

**SCOPE OF WORK**

**PART 1 GENERAL**

**1.1 RELATED SECTIONS**

- A. Section 00555: Prosecution and Progress.
- B. Section 01282 Payment.
- C. Section 01355: Environmental Protection.
- D. Section 01741: Final Cleanup

**1.2 INTENT OF CONTRACT**

- A. Complete all work and furnish all resources and other incidentals required to complete the specified work.

**1.3 VOLUNTARY PARTNERING**

- A. "Voluntary partnering" does not change the legal relationship of the parties to the Contract, and does not relieve either party from any of the terms of the Contract.
- B. The Department encourages the formation of a strong partnership among the Department, the Contractor, and the Contractor's principal subcontractors. This partnership draws on the strengths of each organization to identify and achieve mutual goals.
- C. To implement the partner initiative, the Contractor should contact the Department's Engineer within 30 days of Notice of Award and before the preconstruction conference. The Engineer facilitates a planning meeting to determine attendees, agenda, duration, and location of a partnering workshop.

4. Modify the Contract in writing accordingly.
- C. Department does not allow adjustments to the Contract that benefit the Contractor unless the Contractor has provided the required written notice as specified in this Section, article, "Notification of Differing Site Conditions, Changes and Extra Work."

## **1.5 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK**

- A. The Engineer reserves the right at any time during the work to make written changes in quantities and alterations in the work that are necessary to satisfactorily complete the project.
- B. Such changes in quantities and alterations do not invalidate the Contract or release the surety, and the Contractor agrees to perform the work as altered.
- C. Department adjusts the Contract, excluding anticipated profits, if the alterations or changes in quantities significantly change the character of the work under the Contract.
  1. Such alterations or changes can be in themselves significant changes to the character of the work, or by their effect, can cause other work to become significantly different in character.
  2. The Department initiates and the Contractor agrees to the basis for the adjustment before the performance of the work.
  3. If a basis cannot be agreed upon, then the Engineer adjusts the contract either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.
  4. Department pays for the alterations in the work or changed quantities as provided in Section 01282, articles:
    - a. Altered Quantities
    - b. Differing Site Conditions, Changes, Extra Work
    - c. Force Account Work (General, Labor, Materials, Contractor-Owned Equipment, Rented or Leased Equipment, Subcontracts, Compensation).
  5. If the directed changes require additional time to complete the Contract, Department adjusts the contract time in accordance with Section 00555, articles, "Determining Contract Time," and "Extending Contract Time."
- D. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the Contract, the Department pays for the altered work as provided elsewhere in the Contract.
- E. The term "significant change" applies only to the following circumstances:

- b. Department adjusts contract time in accordance with Section 00555, articles, "Determining Contract Time," and "Extending Contract Time."
- C. Department does not allow adjustment to the Contract unless the Contractor has submitted the request for adjustment within the time prescribed as specified in this Section, article, "Notification of Differing Site Conditions, Changes and Extra Work."
- D. Department does not allow adjustments to the Contract under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this Contract.

**1.7 NOTIFICATION OF DIFFERING SITE CONDITIONS, CHANGES AND EXTRA WORK**

- A. Promptly notify the Engineer of alleged changes to the Contract due to differing site conditions, extra work, altered work beyond the scope of the Contract, or actions taken by the Department that change the Contract terms and conditions.
- B. Do not perform further work or incur further contract item expense relating to the claimed change after the date the change allegedly occurred, unless directed otherwise in writing by the Engineer.
- C. Immediately notify the Engineer verbally of the alleged change or extra work occasioned by differing site conditions or actions by the Department. Provide the following applicable information to the Engineer in writing within 5 calendar days of the date the change or action was noted:
  - 1. The date of occurrence and the nature and circumstances of the occurrence that constitute a change.
  - 2. Name, title, and activity of each Department representative knowledgeable of the claimed change.
  - 3. Identity of any documents and the substance of any oral communication involved in the claimed change.
  - 4. Basis for a claim of accelerated schedule performance, if applicable.
  - 5. Basis for a claim that the work is not required by the Contract, if applicable.
- D. Particular elements of contract performance for which additional compensation may be sought under this article include:
  - 1. Pay item(s) that has (have) been or may be affected by the claimed change.
  - 2. Labor or materials, or both, that are added, deleted or wasted by the claimed change and what equipment is idled or required.

3. Delay and disruption in the manner and sequence of performance that has been or will be caused.
  4. Adjustments to contract prices, delivery schedules, staging, and contract time estimated due to the claimed change.
  5. Estimate of the time within which the Department must respond to the notice to minimize cost, delay, or disruption of performance.
- E. The failure to provide required notice under this article constitutes a waiver of any and all claims that may arise as a result of the alleged change.
- F. After notifying the Engineer, and in the absence of directions received to the contrary from an authorized representative of the Department, continue diligent prosecution of the work under the Contract to the maximum extent possible under the contract provisions.
- G. Within 10 calendar days after receipt of notice, the Engineer responds in writing to the Contractor to:
1. Confirm that a change occurred and, when necessary, direct the method and manner of further performance, or
  2. Deny that a change occurred and, when necessary, direct the method and manner of further performance, or
  3. Advise the Contractor that information necessary for deciding to confirm or deny the change has not been submitted, and indicate what information is needed for further review and date by which the Contractor should submit it to the Engineer. The Engineer responds to such additional information within 10 calendar days of receipt from the Contractor.
- H. Any adjustments made to the Contract do not include increased costs or time extensions for delay resulting from the Contractor's failure to provide requested additional information under requirements of this article.

## **1.8 MAINTAINING TRAFFIC - GENERAL**

- A. Keep road(s) open to traffic during the work or provide and maintain detour roads as specified or directed.
1. Keep publicly and privately used roadways in a condition that safely and adequately accommodates traffic 24 hours a day and 7 days a week.
  2. Provide traffic control in compliance with the current edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), the Traffic Control provisions of the Specifications, and the Traffic Control Plans.
  3. Maintain the sections of road undergoing improvement.

before beginning or continuing the affected work, if additional compensation is considered due for work or material not covered in the Contract.

B. The Engineer responds as described under Section 00725, article, "Notification of Differing Site Conditions, Changes and Extra Work," following notification, indicates whether or not a change has occurred, and provides further information concerning the method and manner of further performance of the work.

C. Provide cooperation and information to the Engineer during the period of notification review and evaluation.

X D. Department does not grant additional compensation if verbal and or written notification is not given, or if the Engineer is not given proper facilities for keeping strict account of actual costs.

1. Department does not construe notice by the Contractor, and the Engineer's accounting of costs as substantiating the validity of the claim.
2. Department equitably adjusts the Contract if the dispute is found to have merit.

## X 1.21 PROCEDURES FOR RESOLUTION OF CLAIMS

A. Disputes that are not resolved are escalated to the claims procedure.

1. Provide written notification of the intent to make a claim under Section 00725, article, "Notification of Differing Site Conditions, Changes and Extra Work."
2. Submit the formal claim in writing and with sufficient detail to enable the Engineer to ascertain the basis and amount of the claim.

B. As a minimum, include the following information with each claim submitted:

- X
1. A detailed factual statement of the claim for additional compensation and time, providing all necessary dates, locations, and items of work affected by the claim.
  2. The date actions resulting in the claim occurred or conditions resulting in the claim became evident.
  3. The name, title, and activity of each Department employee knowledgeable about facts that gave rise to the claim.
  4. The name, title, and activity of each Contractor employee knowledgeable about facts that gave rise to the claim.
  5. The specific provisions of the Contract that support the claim and a statement of the reasons why such provisions support the claim.
  6. All detailed facts which support positions related to a decision that the Contract leaves to the Engineer's discretion or provides that the Engineer's decision is final.

7. Material invoices and requisitions.
8. Material cost distribution work sheet.
9. Equipment records (list of company equipment, rates, etc.).
10. Vendors', rental agencies', subcontractors', and agents' invoices.
11. Subcontractors' and agents' payment certificates.
12. Canceled checks (payroll and vendors).
13. Job cost report.
14. Job payroll ledger.
15. General ledger.
16. Cash disbursements journal.
17. All documents that relate to each and every claim together with all documents that support the amount of damages as to each claim.
18. Work sheets used to prepare the claim establishing the cost components for items of the claim including but not limited to labor, benefits and insurance, materials, equipment, subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.

- F. Full compliance with the provisions of this article is a contractual condition precedent to the right to seek judicial relief.

#### \* 1.24 HIGHER LEVEL REVIEW FOR RESOLUTION OF CLAIMS

- 10 days*
- A. Submit all claims for higher level review to the Engineer in writing within 10 calendar days of the Engineer's denial of a claim.
  - B. Failure to submit a request within this 10-day time frame is considered acceptance of the Engineer's denial action.

#### \* 1.25 CLAIMS BOARD OF REVIEW

- A. Pursue administrative resolution of any claim with the Engineer or the designee of the Engineer.
- B. If no agreement is reached, at the Contractor's written request to the Engineer, the Engineer for Construction and Materials schedules a hearing before a Department "Claims Board of Review" when deemed to be in the best interest of both the Contractor and the Department.
- C. The Board makes recommendations and outlines their reasoning to the UDOT Deputy Director within 30 calendar days after the claim hearing.

D. The UDOT Deputy Director makes offer of settlement within 45 calendar days after the claim hearing.

E. The decision of the UDOT Deputy Director is administratively final.

**PART 2 PRODUCTS** Not used.

**PART 3 EXECUTION** Not used.

END OF SECTION



- H. Department pays for material accepted on an agreed price basis, which price is normally the Contractor's production cost. In addition, the Department pays the cost to haul the materials to the stockpile site and place in pile at the rate of 9 cents per ton mile or 20 cents per cubic yard mile.

#### **1.15 ACCEPTANCE AND FINAL PAYMENT**

- A. When the project has been accepted as provided in Section 00727, articles, "Project Acceptance - Partial," and "Project Acceptance - Final," the Engineer prepares the final estimate of work performed.
  - 1. If the Contractor approves the final estimate or does not object to the quantities within 30 calendar days of receiving the final estimate, the Department processes the estimate for final payment.
  - 2. After approval of the final estimate by the Contractor, Department pays for the entire sum due after deducting all previous payments and all amounts to be retained or deducted under the provisions of the Contract.
- B. If additional payment is due from the Department, file with the Department a full, complete, and itemized written statement justifying the adjustment within 30 calendar days after the final estimate is submitted for approval.
  - 1. All disputes not itemized in said statement are waived by the Contractor.
  - 2. Submission of disputes by the Contractor will not be reason for withholding full payment of the total value of work shown on the Engineer's final estimate.
  - 3. The Department evaluates the dispute. If it is determined that additional payment is due, the final estimate is revised accordingly, under the terms of the Contract. If not, the estimate as submitted is final.
- C. All prior partial estimates and payments is subject to correction in the final estimate and payment.
- D. The Department has the final estimate complete and to the Contractor within six months of when the Contractor meets substantial completion of the project and has supplied the Engineer with all project certifications.

#### **1.16 ADJUSTMENTS FOR FUEL COST**

- A. This price adjustment provision is intended to minimize risk to the Contractor due to potential volatile price fluctuations for fuel that might occur throughout the duration of the Contract.
  - 1. The Contractor may invoke this provision at any time during the Contract by written notification to the Engineer.
  - 2. Adjustments are then made on all prior and future partial estimates. When

Tab C

**MEADOW VALLEY CONTRACTORS, INC.  
SUBCONTRACT AGREEMENT**

**SUBCONTRACTOR:** Fisher Industries  
P.O. Box 1034  
Dickinson, North Dakota 58602  
(701) 225-9184 Fax (701) 225-2745

**PROJECT:** I-215; 300 East to Redwood Road

**SUBCONTRACTORS' UTAH CONTRACTORS LICENSE NO.** \_\_\_\_\_

**OWNER:** Utah Department of Transportation

In consideration of the mutual promises made herein this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, Meadow Valley Contractors, Inc. ("Contractor"), and Fisher Industries ("Subcontractor"), a \_\_\_\_\_ (corporation, partnership, sole proprietorship) enter into this agreement (the "Subcontract") and agree as follows:

1. Contract Documents.

1.1 As used herein, the term "Contract Documents" shall refer to and include this Subcontract and its exhibits, the terms and conditions of the contract between the Contractor and the Owner (the "Prime Contract") along with the drawings, standard specifications, supplementary and special provisions, Contractor's Project schedule, and all addenda, amendments or modifications thereto, the invitation and instruction to bidders, and all other exhibits or documents that form or are made a part of the Prime Contract. The parties agree that the Contract Documents are incorporated herein by reference.

1.2 Subcontractor represents and warrants that it (1) has carefully examined and understands the Contract Documents, (2) is familiar with the conditions and circumstances under which its work will be performed, and (3) is in no way relying upon any opinion or representation of Contractor.

1.3 Subcontractor agrees to comply with and be bound to Contractor by the terms of the Contract Documents and to assume toward Contractor all the duties and obligations that Contractor assumes in the Contract Documents toward the Owner. In case of conflicts or inconsistencies between this Subcontract and the other Contract Documents, the Subcontract shall control. Subcontractor shall bind lower tier subcontractors and suppliers to full compliance with the Contract Documents.

2. Scope of Work.

2.1 Subcontractor agrees to furnish and pay for all labor, materials, supplies, tools, equipment, scaffolding, supervision, services, permits, licenses, field measurements, shop drawings, engineering and incidental items necessary to complete all of the work reasonably required by or inferred from the following items of work (the "Subcontract Work").

All materials furnished but not installed by Subcontractor shall be delivered F.O.B. jobsite unless otherwise provided herein.

2.2 All work by Subcontractor shall be performed (1) as an independent contractor, (2) in strict conformance with the Contract Documents, (3) in a good and workmanlike manner, and (4) to the satisfaction of Contractor and the Owner.

3. Contract Price and Payments.

3.1 Subject to the following conditions, and so long as Subcontractor is performing in a timely manner and is not in default, Contractor agrees to pay Subcontractor for completed and accepted quantities at the unit

prices set forth in Attachment . . . The amount due to Subcontractor shall be based upon the quantities and measurements determined and accepted by Contractor and the Owner, or its representatives, less any retainage withheld by the Owner under the Prime Contract for the Subcontract Work. The amount of retention withheld by Contractor shall be the same percentage as the Owner withholds from Contractor under the Prime Contract. All payments made to Subcontractor shall first be used to pay any person or entity providing labor, materials or equipment in connection with the Subcontract Work or to otherwise satisfy any obligation that could lead to a claim against any bond provided by Contractor. Payment to Subcontractor does not constitute or imply acceptance of the Subcontract Work.

3.2 By the 20th day of each month, Subcontractor shall submit to Contractor a monthly billing in a form acceptable to Contractor showing the estimated percentage of Subcontract Work that has been satisfactorily completed in the preceding month together with the original release forms described below. Subcontractor further agrees to provide all EEO reports, certified payroll, and/or other reports or information as may be required by the Contract Documents.

3.3 Contractor will pay the Subcontractor within ten working days after Contractor receives payment for the Subcontract Work from the Owner. The parties agree that Contractor's actual receipt of any progress, change order, claim, retention or final payment from Owner shall be a condition precedent to Contractor's obligation to make any such payment to Subcontractor for the Subcontract Work. Subcontractor agrees that its recovery against Contractor for payments due hereunder is limited exclusively to the specific fund created by Owner actually making such payments to Contractor. Subcontractor assumes the risk of the Owner's nonpayment.

Contractor's obligation to pay Subcontractor is further conditioned upon Subcontractor's timely and prior submittal of conditional lien and bond releases, in a form acceptable to Contractor, for Subcontractor and its lower tier subcontractors or suppliers that performed work for or supplied materials or equipment to Subcontractor during the preceding month. After Contractor has made the initial progress payment, Subcontractor's right to subsequent progress payments also is conditioned upon Subcontractor providing unconditional waivers from all individuals or entities who executed conditional waivers for the prior period.

In addition to the foregoing, final payment shall be made to Subcontractor only after conditional final lien releases are provided to Contractor from Subcontractor and all parties that filed a preliminary lien notice. Each waiver must show that there are no outstanding amounts due. Contractor shall have the right to withhold an amount equal to the total amounts shown on the conditional final releases as being outstanding. Acceptance of final payment shall constitute a waiver of all claims by Subcontractor relating to Subcontract Work except as may be otherwise expressly provided in Subcontractor's final release. Final payment shall not relieve Subcontractor from liability for warranty, guaranty, or indemnity obligations, for faulty or defective work, or any other obligation imposed by this agreement.

3.4 When requested by Contractor, Subcontractor shall provide the names and addresses of all entities who have furnished or may furnish labor, materials, and/or equipment for the Subcontract Work, together with the amount due or to become due for such work. Contractor shall have the right to contact these subcontractors and suppliers at any time to verify payment or amounts due. Contractor retains the right to take whatever steps it deems necessary to ensure that progress and final payments will be utilized to pay potential lien or bond claimants, including, but not limited to, the issuance of joint checks or making payment directly to any claimant after notice to Subcontractor. All such payments will reduce the amounts otherwise due to Subcontractor under this agreement. If such payments exceed the balance due or to become due under this agreement, then Subcontractor shall be liable for the difference. Assuming Contractor has made the payments required by this agreement, Subcontractor shall defend and indemnify Contractor and the Owner from any and all claims of Subcontractor's employees, and lower tier subcontractors, laborers, employees, or suppliers.

3.5 If Contractor is notified or informed of a deficiency in the Subcontract Work, any actual or potential third party claim against Subcontractor, Contractor, or the Owner as a result of the Subcontract Work, or it appears that Contractor could sustain any loss or damage as a result of labor or materials furnished to the Project or any action or omission by Subcontractor in the performance of the Subcontract Work or any other project where the parties are working together, Contractor may, without penalty, withhold from any payment due Subcontractor an amount that Contractor reasonably determines is required to cover said claims or damages. The exercise of this right shall not bar or waive any other rights or remedies that Contractor may have.

4. Prosecution of Work.

4.1 TIME IS OF THE ESSENCE OF THIS SUBCONTRACT. Subcontractor agrees to commence the Subcontract Work within 5 calendar days after receiving written notification to proceed from Contractor and to proceed at such times, in such order and in such places as Contractor may designate. Subcontractor shall diligently perform the Subcontract Work in accordance with the Contractor's project schedule, as it may be revised from time to time, and in a manner that will cause no delay in the progress of Contractor's or other subcontractors' work on the Project.

4.2 Upon request, Subcontractor shall promptly provide Contractor with any information relating to the order or nature of the Subcontract Work. Subcontractor acknowledges that Contractor's project schedule may be revised by Contractor as work progresses. Subcontractor agrees to take the steps required to stay informed of and comply with Contractor's schedule and progress. Contractor may require Subcontractor to prosecute segments of the Subcontract Work in phases. Subcontractor shall comply with instructions given by Contractor, including any instructions to suspend, delay or accelerate the Subcontract Work. Subcontractor shall not be entitled to any extra compensation from Contractor for any suspension, delay or acceleration, regardless of who is responsible for same, unless specifically agreed to in writing by the Contractor and the Contractor actually receives payment from the Owner for any additional costs incurred by Subcontractor. The Owner's payment to Contractor of extra compensation for any such suspension, delay, or acceleration shall be a condition precedent to Subcontractor's right, if any, to receive such extra compensation from Contractor. Otherwise, Subcontractor warrants that the unit prices set forth herein include all costs necessary for Subcontractor to adhere to the Contractor's schedule, as it may be revised throughout the Project.

4.3 Unless a shorter period is otherwise required by the Contract Documents, Subcontractor shall provide written notice to Contractor within forty-eight (48) hours after the discovery of any act, event, condition, or occurrence that would entitle the Contractor to an extension of time or additional compensation from Owner under the terms of the Contract Documents. Unless payment is actually received from the Owner to cover any damages sustained or additional costs incurred by Subcontractor as a result of any such act, event, condition, or occurrence, Subcontractor shall only be allowed a time extension to complete the Subcontract Work if additional time is granted to Contractor by the Owner. Subcontractor shall not be entitled to any additional compensation. No time extension will be allowed for delays or suspensions of work caused or contributed to by Subcontractor, and no time extension will be granted Subcontractor that will render Contractor liable for liquidated damages or other loss under the Prime Contract.

If the Contractor delays or suspends Subcontractor's progress for any reason then Subcontractor's sole remedy will be an extension of the time allowed to complete the Subcontract Work. Contractor will not be responsible for any damages sustained or costs incurred by Subcontractor as a result of any such delay.

4.4 Subcontractor shall be responsible for the preparation, submittal and accuracy of all shop drawings or other technical information, or approvals that relate to the Subcontract Work that must be prepared and submitted to Owner or its representatives pursuant to the Contract Documents. All documents and information shall be submitted to Contractor in a form and manner required by Contractor and in sufficient time to allow Contractor to review and send it to Owner in a timely manner. Contractor's review or approval of shop drawings or technical submittals shall not be deemed to authorize deviations from the requirements of the Contract Documents.

4.5 Subcontractor shall be liable for any and all damages caused by its failure to perform in accordance with Contractor's schedule, as it may be revised throughout the Project, including, but not limited to, any liquidated or other damages assessed against Contractor under the Prime Contract as well as any additional costs incurred or damages sustained by Contractor.

4.6 Subcontractor agrees to cooperate fully with Contractor and with other subcontractors performing work on the Project and to not interfere with the performance of work by others. In the event Subcontractor and any other subcontractor cannot agree on the extent of cooperation or the work to be done by any of them, such disagreement shall be resolved by Contractor so as to ensure the orderly and timely completion of the Project.

5. Changes and Claims.

5.1 Subcontractor shall perform additional work or omit items of work which the Contractor shall have the right to order in writing without invalidating this agreement. No claim for extra time and/or compensation on account of changed, added or deleted work may be made by Subcontractor unless acknowledged by Contractor in writing and Contractor is entitled to and actually receives additional time and/or compensation on behalf of Subcontractor under the Contract Documents from the Owner. Contractor shall not be liable to Subcontractor for any greater sum than Contractor receives from the Owner on behalf of Subcontractor, less reasonable overhead and profit due to Contractor, and any professional or attorney's fees, costs, or other expenses incurred by Contractor in obtaining said time and/or compensation.

5.2 Subcontractor shall give Contractor written notice of any act, event, condition, or occurrence that would entitle the Contractor to additional compensation or an extension of time under the Contract Documents promptly and in sufficient time for Contractor to notify Owner in accordance with the Contract Documents. In no event shall Subcontractor give written notice to the Contractor more than forty-eight (48) hours after discovery.

5.3 Upon receipt of any written or oral directive that Subcontractor believes involves work beyond its original scope of work or that would otherwise constitute a constructive change to this agreement, Subcontractor agrees to provide Contractor with written notice that it considers the directive a change prior to performing any such work. Failure to so notify Contractor will constitute a waiver of all such claims. Subcontractor shall be entitled to additional compensation and/or time only if the asserted change is actually recognized by the Owner and additional time and/or compensation is received by Contractor on Subcontractor's behalf.

5.4 Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to Owner both by the terms and procedures of the Contract Documents, and by any and all decisions or determinations made there under by the party, board, court or body authorized to hear or resolve claims or disputes in the Contract Documents. All claims or disputes asserted by Subcontractor concerning the acts or omissions of Owner or its representatives, changes initiated by the Owner, the quality or acceptability of Subcontractor's work, if rejected by Owner, the sufficiency or adequacy of or representations contained in the Contract Documents, or any other basis or event that could entitle Contractor to additional time and/or compensation under the Contract Documents shall be subject to the procedures set forth in the Contract Documents. Contractor agrees to present to the Owner, in Contractor's name, Subcontractor's claims for additional time and/or money and to invoke, on behalf of Subcontractor, those provisions in the Contract Documents for resolving disputes or claims. No invocation of these procedures nor any action or position taken in such proceeding by Contractor shall be deemed to constitute an admission of any obligation or liability to Subcontractor. Subcontractor agrees that it will not take any other action against Contractor with respect to any such claims and will not pursue independent litigation with respect thereto, pending a final determination under the procedures set forth in the Contract Documents. Subcontractor agrees to be bound by all decisions entered and determinations made through said procedures. The presentation or prosecution of any claim for or on behalf of Subcontractor shall not affect Subcontractor's obligation to proceed diligently with the Subcontract Work.

In no event will Subcontractor be entitled to receive any greater amount from Contractor than Contractor is entitled to and actually does receive from the Owner on account of Subcontractor's work or claims, less any markups due to Contractor or costs or professional fees incurred by Contractor in obtaining such recovery. Subcontractor agrees that it will accept such amount, if any, received by Contractor from the Owner as full satisfaction of all claims. Subcontractor's only claim against Contractor will be for payment of any amounts awarded to and actually received by Contractor from the Owner on Subcontractor's behalf.

At its option, Contractor may give Subcontractor the authority to pursue any of its claims against Owner in the name of Contractor if suitable arrangements are made with Contractor. Subcontractor shall have full responsibility for preparation and presentation of such claims and shall bear all expenses thereof, including attorneys' fees and costs.

Should a dispute arise between Contractor and Subcontractor as to the proper interpretation of this Subcontract or Subcontractor's Work that concerns only the parties hereto or other subcontractors on the Project, Subcontractor shall give Contractor written notice within three days after the occurrence of the event giving rise to said claims. Otherwise, such claims will be deemed waived. Contractor will have the option of having said dispute resolved through arbitration in accordance with the Construction Industry Rules of the American Arbitration Association or litigation in the state or federal court of the place where the Project is located. If

Contractor selects arbitration, it shall have the option of joining any other party with whom it has contracted who in Contractor's judgment may be liable for any damages claimed by Subcontractor. In any arbitration, action, or proceeding regarding this agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs and to have final judgment entered in any court having jurisdiction over the parties based upon the final award.

6. Assignments.

6.1 Subcontractor shall not assign the Subcontract or any payments due hereunder or sublet any part of the Subcontract Work without the prior written consent of Contractor. The only exception will be if an assignment is intended to create a new security interest within the scope of Article 9 of the UCC. If so, the instrument of assignment shall expressly confirm that the assignee's rights shall be subject to the rights and claims of all persons or entities providing labor, services, materials, or equipment in connection with the Subcontract Work.

7. Taxes & Licenses.

7.1 Subcontractor agrees to pay all taxes, license fees, contributions, interest and/or penalties due under any federal, state, or municipal statute or regulation arising from or relating to Subcontractor's Work or the amounts earned under this agreement. Subcontractor warrants that the prices set forth herein include an allowance to cover all such obligations. Subcontractor shall indemnify, defend, and save Contractor and the Owner harmless from all liability, loss, and expense resulting from Subcontractor's failure to satisfy any such obligation. Subcontractor shall provide proof that all taxes and other charges are being properly paid upon receiving a written request from Contractor.

7.2 If Contractor directly pays, or is assessed or charged for any taxes, contributions, interest or penalties concerning the Subcontract Work or Subcontractor, Contractor shall have the right to withhold such amount from funds due or to become due to Subcontractor.

8. Default and Termination.

8.1 Subcontractor shall be in default on its obligations imposed by this agreement if, in the opinion of Contractor, Subcontractor (1) fails at any time to supply a sufficient number of properly skilled workmen or materials satisfactory to complete the Subcontract Work; (2) fails to adequately or timely perform the Subcontract Work to the satisfaction of Contractor or the Owner or in accordance with Contractor's schedule; (3) becomes insolvent or makes any filing under the Acts of Congress relating to bankruptcy; (4) fails, neglects and/or refuses to comply with the Contract Documents; (5) fails to perform the Subcontract Work in a good and workmanlike manner; (6) causes any stoppage of the work of Contractor or the other trades on the Project; (7) fails to correct defective work; (8) fails to maintain the insurance required by this agreement; (9) fails to pay its employees, suppliers, or subcontractors; (10) disregards laws, rules, regulations, or orders of any public authority having jurisdiction; or (11) fails to comply in any other respect with the terms, conditions and obligations of this agreement.

8.2 Contractor shall provide written notice of default to Subcontractor by regular mail or by any means that will provide notice to Subcontractor at the address identified above. Such notice shall be complete upon deposit at a regular receptacle of the U.S. mail or upon actual receipt by Subcontractor, whichever occurs first.

Subcontractor shall cure or otherwise correct the default within three calendar days after written notice by Contractor. If after three days Subcontractor has failed to cure and correct the default in the opinion of Contractor, Contractor may, at its sole discretion, provide or contract for any labor, materials or equipment as may be necessary to complete that portion of the Subcontract Work at issue and deduct the cost thereof from any money then due or to become due to Subcontractor. The cost of said work shall include Contractor's direct cost to complete or remedy the default, plus a 20% mark-up for Contractor's general conditions. In addition, Contractor may terminate this agreement for default. The termination shall become effective upon mailing or actual receipt of a second written notice to Subcontractor confirming the failure to cure and Contractor's decision to terminate this agreement.

Upon termination of this agreement, Contractor or its replacement subcontractor(s) may enter upon the premises and take control of all materials, tools, equipment, and appliances of Subcontractor, and may employ

any other person or entity to finish the Subcontract Work. Subcontractor hereby assigns and transfers to Contractor all sub-subcontracts, material contracts, or orders, bills of lading for material en route, and any other necessary rights, data or information that may be necessary for the completion of the Subcontract Work. Subcontractor agrees to take whatever steps Contractor deems necessary to transfer or deliver any information or documentation requested by Contractor. Following completion of the Subcontract Work, Contractor shall return to Subcontractor or lawful owner all unused materials, tools, equipment and/or appliances. Subcontractor shall not be entitled to rent or payment of any kind for the use of Subcontractor's equipment or materials, nor shall Contractor be liable for any damages arising from said use unless resulting from gross negligence, or willful destruction by Contractor.

In the event Subcontractor has provided a payment or performance bond in connection with this agreement, Contractor shall send Subcontractor's surety a copy of the three day cure notice and Contractor's notice of termination. If the surety does not provide Contractor with written assurance within five days after receipt of the termination notice that it will make the arrangements necessary to complete the Subcontract Work in accordance with Contractor's schedule, then the surety will be deemed to have waived its rights to complete the Subcontract Work.

8.3. Future Payments. If this agreement is terminated for default, Subcontractor shall not be entitled to receive any further payment until Contractor has received final payment from the Owner. At that time, if the amounts owed for work actually completed by Subcontractor exceed the expenses incurred by Contractor in finishing Subcontractor's Work and all other damages sustained by Contractor as a result of the default, such excess shall be paid by Contractor to Subcontractor with the consent of Subcontractor's surety, if any. If the costs incurred or damages sustained by Contractor exceed any amounts due to Subcontractor, then Subcontractor and/or its surety shall promptly pay the difference to Contractor. Until any deficiency is satisfied, Contractor may hold, sell or otherwise realize upon any of Subcontractor's materials or equipment, or take any other step to collect the deficiency, including making a claim against Subcontractor's surety.

In determining the costs incurred by Contractor to complete the Subcontract Work, Contractor shall be entitled to recover all direct and indirect costs incurred by Contractor, all subcontractor costs, an allowance for the Contractor's owned equipment at the force account rates specified in the Contract Documents, plus a markup of 20% on all costs to cover Contractor's general conditions. Contractor also shall be entitled to recover any expenses, attorneys fees, and costs incurred and any and all other damages sustained by Contractor by reason of Subcontractor's default.

## 9. Termination for Convenience.

9.1 In addition to any rights the Owner may have under the Contract Documents and Contractor's right to terminate this Subcontract for default, Contractor reserves the right to terminate this agreement for its convenience upon giving Subcontractor fifteen (15) days written notice of its intention to do so. Such notice shall specify the effective date of the termination. Subcontractor's sole recovery shall be the payment for work completed prior to the date of termination at the unit prices specified herein. Payment for partially completed work shall be based upon the costs incurred by Subcontractor in partially performing said items of work, plus a mark-up of 15% for overhead and profit. Subcontractor shall not be entitled to recover any anticipated profits or unallocated overhead on unperformed work or additional compensation or damages in the event of such termination. The termination of this agreement shall not relieve Subcontractor from any responsibilities for the work that it completed prior to the date of termination.

If a court or arbitrator determines that any termination of this agreement was wrongful or that Subcontractor was not in default, the prior termination of this agreement will be deemed to be a termination for Contractor's convenience under this section and Subcontractor's remedies and recovery shall be as specified in this section.

In the event the Prime Contract is terminated prior to its completion by the Owner, then this agreement will be terminated as well. The termination settlement under this agreement shall be as provided in the Contract Documents. Subcontractor shall not be entitled to receive any greater amount than Contractor actually receives from the Owner on Subcontractor's behalf for such termination.



10. Bonds.

10.1 Concurrently with the execution of this agreement, Subcontractor shall provide Contractor with a Labor and Material Bond and Performance Bond in an amount equal to 100% of the Subcontract price. Said bonds shall be executed by a corporate surety acceptable to Contractor, shall name as obligees Contractor, its surety, the Owner, and any other party that Contractor is required to defend or indemnify under the terms of the Prime Contract and shall further name and protect all persons and entities providing labor, materials, or equipment in connection with the Subcontract Work to the same extent as may be required of Contractor pursuant to the Prime Contract and applicable law (e.g., 40 U.S.C. § 270a, 270b; A.R.S. § 34-220, et seq.). The terms of this agreement are incorporated by reference into the bonds provided by Subcontractor and shall govern and prevail over any terms contained in said bonds. The cost of said bonds shall be paid by Subcontractor.

11. Indemnity and Insurance.

11.1 Subcontractor agrees to procure and maintain at its sole cost and expense, the minimum insurance coverages for the amounts, times, and durations contained in the Contract Documents, but in no event less than the following:

A. Worker's Compensation: Coverage A. Statutory policy form; Coverage B. Employer's liability; Bodily injury by accident - \$1,000,000 each accident; Bodily injury by disease - \$1,000,000 policy limit; Bodily injury by disease - \$1,000,00 each employee.

B Commercial Auto Coverage: Auto liability limits of not less than \$1,000,000 each accident combined bodily injury and property damage liability insurance including, but not limited to, owned autos, hired or non-owned autos.

C. Comprehensive General Liability or Commercial General Liability: The limits of liability shall not be less than

a) Comprehensive General Liability: \$1,000,000 combined single limit bodily/property damage per occurrence or,

b) Commercial General Liability: The limits of liability shall not be less than: Each Occurrence limit - \$1,000,000; Personal advertising injury limit - \$1,000,000; Products Completed Operations Aggregate Limit - \$1,000,000 General Aggregate Limit - \$1,000,000 (other than products-completed operations).

Unless otherwise required by the Contract Documents, all policy forms where available must include: a) Premises and operation with no X,C or U exclusions; b) Products and completed operations coverage (for a minimum of 1 year following completion of the Subcontract Work); c) Full blanket contractual coverage; d) Broad form property damage including completed operations or its equivalent; e) An endorsement naming as additional insureds Contractor, the Owner, and any other required person or entity that Contractor is required to defend or indemnify under the Contract Documents. Additional insureds should be provided by the use of ISO Form CG 20 10 1185 version or comparable; f) An endorsement stating: "Such coverage as is afforded by this policy for the benefit of the additional insured(s) is primary and any other coverage maintained by such additional insured(s) shall be noncontributing with the coverage provided under this policy."

D. Other Requirements: a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation or any material change to the coverages provided to the additional insured(s) in the event of cancellation or reduction in coverage unless otherwise required by the Contract Documents. b) All policies must be written by insurance companies whose rating in the most recent Best's rating guide, is not less than A.V. c) Certificates of insurance with the required endorsement evidencing the coverage must be delivered to Contractor prior to commencement of any work under this contract. d) In addition to Subcontractor's right to terminate the agreement for default, if the Subcontractor fails to secure and maintain the required insurance, Contractor shall have the right (without obligation to do so, however) to secure same in the name and for the account of the Subcontractor in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith.

E. Builder's Risk. Contractor and Subcontractor waive all rights against each other, the Owner, separate contractors and all other subcontractors for loss or damage to the extent covered by Builder's Risk or

any other property or equipment insurance, except such rights as they may have to the proceeds of such insurance.

#### 11.2. Indemnification.

a. General Indemnity: All work covered by this agreement that is performed at the project site, or performed in preparing or delivering materials or equipment to the project site—or in providing any service for the Project—shall be at the sole risk of the Subcontractor. To the fullest extent permitted by law, Subcontractor shall indemnify, defend, and save harmless Contractor, its surety, the Owner, and any other person or entity that Contractor is required to defend and/or indemnify pursuant to the Contract Documents, or as may otherwise be designated by Contractor, and their agents, employees or representatives (collectively referred to as "Indemnitees") from any and all claims, demands, suits, actions, proceedings, loss, cost and damage of every kind and description, including any attorneys' fees and/or litigation expenses, which may be brought or made against or incurred by the Indemnitees on account of loss or damage to any property or for injuries to or death of any person, caused by, arising out of, or contributed to, in whole or in part, by reason of any alleged act, omission, professional error, fault, mistake, or negligence of Subcontractor, its employees, agents, subcontractors, or representatives in connection with or incident to the performance of the Subcontract Work. The Subcontractor's obligation under this provision shall not extend to any liability caused by the sole negligence of the Indemnitees.

Subcontractor's indemnification obligations will survive the expiration or termination of this agreement. The insurance maintained by Subcontractor in accordance with Section 11.1 shall insure but not limit the performance of Subcontractor's indemnification obligations set forth herein.

#### 12. Warranty and Guarantee.

12.1 In addition to all requirements and obligations contained in the Contract Documents, Subcontractor warrants and guarantees that all material and equipment furnished and incorporated by it into the Project shall be new, unless otherwise specified or allowed in the Contract Documents, and that the completed Subcontract Work and related materials shall be of good quality, free from faults and defects, and in conformance with the Contract Documents.

12.2 Subcontractor agrees to promptly repair, rebuild, replace or make good, without cost to Contractor or the Owner, any defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period established in the Contract Documents at no additional cost to Contractor or the Owner. If no such period is stipulated in the Contract Documents, then Subcontractor's guarantee shall be for a period of one year from the date of final acceptance of the Project by Owner. Subcontractor shall require similar guarantees from all vendors or lower tier subcontractors. Subcontractor's obligation to repair and replace shall not absolve it of any liability to Contractor for any damages caused by any defective or unacceptable work or materials.

#### 13. Patents.

13.1 Subcontractor agrees to pay all applicable patent royalties and license fees and to defend all suits or claims made for infringement of any patent rights involved in the Subcontract Work.

#### 14. Compliance with Regulations, Applicable Law and Safety.

14.1 All work, labor, equipment, services and materials to be furnished by Subcontractor must strictly comply with the Contract Documents, all applicable federal, state, and local laws, rules, regulations, statutes, ordinances, building codes, and directive now in force or hereafter in effect or as may otherwise be required by the Contract Documents. Subcontractor shall satisfy and comply with the foregoing as part of this agreement without any additional compensation.

14.2 Subcontractor agrees that the prevention of accidents to workmen engaged in the Subcontract Work is solely its responsibility. If requested, Subcontractor shall submit a safety plan for review by Contractor. Contractor's review and/or approval of any safety plan shall not be deemed to release Subcontractor or in any

way diminish its indemnity or other liability as assumed under this agreement, nor shall it constitute an assumption of risk or liability by Contractor.

14.3 When so ordered, Subcontractor shall stop any part of the work which Contractor deems unsafe until corrective safety measures satisfactory to Contractor have been taken. In addition to any right to terminate this agreement for default, should Subcontractor neglect to adopt such corrective measures, Contractor may do so and deduct the cost from payments due or to become due to Subcontractor. Upon request, Subcontractor shall timely submit copies of all accident or injury reports to Contractor.

15. Damage to Work.

15.1 In addition to any requirement or obligation imposed under the Contract Documents, all loss or damage to the Subcontract Work resulting from any cause whatsoever shall be borne and sustained by Subcontractor and shall be solely at its risk until the time period specified in the Contract Documents has expired. Subcontractor shall at all times and at its sole expense fully secure and protect against any damage, injury, destruction, theft or loss to all work, labor, materials, supplies, tools and equipment furnished by Subcontractor or its sub-subcontractors, laborers and material men. Subcontractor shall at its sole expense promptly repair or replace damage to the work of others, or to any part of the Project, resulting from its activities.

16. Inspection and Approvals.

16.1 At all times, Contractor and/or the Owner shall have the right to inspect Subcontractor's materials, workmanship and equipment. Subcontractor shall provide facilities necessary to effect such inspection, whether at the place of manufacture, the Project site, or any intermediate point.

16.2 Any Subcontract Work or material furnished that fails to meet the requirements or specifications of the Contract Documents or the Subcontract shall be promptly removed and replaced by Subcontractor at its own cost and expense. If, in the opinion of Contractor or the Owner, it would not be economical or expedient to correct or remedy all or any part of the rejected Subcontract Work or materials, then Contractor at its option may deduct from payments due or to become due to Subcontractor either: (a) such amount as in Contractor's sole judgement represents the difference between the fair value of the rejected Subcontract Work and materials and its value had it been performed in full compliance with the Contract Documents; or (b) such reductions in price as are provided for or determined for this purpose under the Contract Documents by the Owner.

17. Miscellaneous.

17.1 In the event Subcontractor rents, borrows, or otherwise uses any of Contractor's equipment, scaffolding, or other appliances, Subcontractor agrees to accept such items "as is." Any such use shall be at the sole risk of Subcontractor, who hereby agrees to defend, hold harmless and indemnify Contractor against any and all claims, losses, or damages arising from such use.

17.2 Subcontractor shall have available at the job site a supervisory and authorized representative whose qualifications and attendance at the Project site shall be subject to review by the Contractor. Failure to comply with this requirement shall be sufficient grounds for withholding monies due Subcontractor until a qualified supervisor is made available.

17.3 At no time prior to the expiration of any warranty period required by the Contract Documents shall Subcontractor perform any work directly for or deal directly with the Owner or its representatives concerning the Project unless otherwise directed in writing by Contractor.

17.4 Contractor's waiver of any of the provisions of the Subcontract, or Contractor's failure to exercise any options or legal remedies provided herein, shall not be construed as a general waiver of its right thereafter to require such compliance or to exercise such option or remedy.

17.5 This Subcontract constitutes the entire agreement between the parties and supersedes all prior proposals, negotiations and agreements. If any provision of this agreement is found to be invalid or otherwise unenforceable, then the remaining provisions shall remain in full force and effect.

17.6 To be effective, all modifications or amendments to the Subcontract must be in writing.

17.7 This agreement is not effective until signed by the Contractor and delivered or mailed to Subcontractor.

17.8 The Subcontract shall be construed and interpreted according to the laws of the state where the Project is located.

DATE: \_\_\_\_\_

MEADOW VALLEY CONTRACTORS

By Bradley C. Olson  
President  
\_\_\_\_\_

Title

DATE: \_\_\_\_\_

SUBCONTRACTOR

By Jon J. Jil  
PRESIDENT  
\_\_\_\_\_

Title

Tab D

FILED DISTRICT COURT  
Third Judicial District

DEC 08 2008

SALT LAKE COUNTY

ENTERED IN REGISTRY  
OF JUDGMENTS

by [Signature]  
Deputy Clerk

DATE 12/09/08

**THIRD JUDICIAL DISTRICT COURT**  
SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE CITY DEPARTMENT

**IMAGED**

**MEADOW VALLEY CONTRACTORS,  
INC.,** a Nevada corporation,

Plaintiff,

vs.

**STATE OF UTAH DEPARTMENT OF  
TRANSPORTATION,**

Defendant.

**FINAL JUDGMENT**

Case No. 050909139

Judge John Paul Kennedy

Based on the Findings of Fact and Conclusions of Law issued by the Court, the Court enters Final Judgment in favor of Plaintiff Meadow Valley Contractors, Inc., and against Defendant State of Utah Department of Transportation, as follows:

Loss of Production Damages	\$454,984.80
Profit/Overhead on Loss of Production Damages	\$ 68,247.72
Traffic Control Damages	\$ 25,600.00
Pre-Judgment Interest from 11/1/2004 to 10/31/2008	\$219,533.00
Per diem interest rate of \$150.37 from 10/31/2008 until date Final Judgment entered (12/8/2008)	\$ 5,714.06
<b>Total Judgment</b>	<b>\$774,079.58</b>

Final Judgment @J



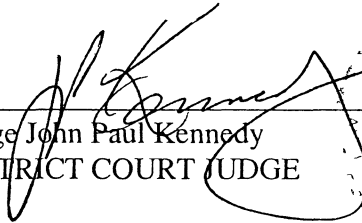
JD27609852

pages: 3

050909139 STATE OF UTAH DEPARTMENT

This Final Judgment shall bear interest at the federal post-judgment interest rate of 5.42 percent per annum, pursuant to Section 15-1-4 of the Utah Code, until satisfied in full

DATED this 8 day of December, 2008

  
\_\_\_\_\_  
Judge John Paul Kennedy  
DISTRICT COURT JUDGE

