

1995

# M&E Construction v. Took Mechanical : Brief of Appellee

Utah Court of Appeals

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Victor Lawrence; Attorney for Defendant.

David K. Smith; Attorney for Plaintiff/Appellee.

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DOCKET NO. 950543-CA

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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|----------------------|---|--------------------|
| M&E CONSTRUCTION,    | ) |                    |
| Plaintiff/Appellee   | ) |                    |
| vs.                  | ) | Case No. 950543-CA |
| TOOK MECHANICAL,     | ) | Priority No. 15    |
| Defendant/Appellant. | ) |                    |

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BRIEF OF THE APPELLEE

APPEAL FROM THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

THE HONORABLE ROBIN REESE PRESIDING

---

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FEB 12 1996

**COURT OF APPEALS**

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### STATEMENT OF JURISDICTION

Rule 3 of the Utah Rules of Appellate Procedure confers jurisdiction upon the Utah Court of Appeals to hear appeals from final decisions of Circuit Courts.

### STATEMENT OF ISSUES

The issues raised by Appellant for evaluation and determination by the appellate court are three:

1. Did the lower court err by allowing judgment for Appellee in the absence of any written three-day notice of Appellant's alleged breach of the applicable subcontract agreement?

Standard of Review: The appellate court will uphold the trial court's findings of fact if they are supported by "substantial evidence when viewed in light of the whole record before the court" Utah Ass'n of Counties v. Tax Commission, (Utah, 1995) 260 Utah Adv. Rep. 27, 28. Substantial evidence is defined as "that quantum and quality of evidence that is adequate to convince a reasonable mind to support a conclusion. Id., at 28. It is not the appellate court's prerogative to reweigh the evidence since it is the trial court's duty to draw inferences and resolve factual conflicts. Grace Drilling Co. v. Board of Review (Utah App., 1993), 776 P.2d 63, 68. It is the obligation of the Appellant to marshal all of the evidence supporting

the findings and show that despite the supporting facts, the court's findings are not supported by substantial evidence. First National Bank v. County Bd. of Equalization, (Utah, 1990), 799 P.2nd 1163, 1165. In this case the Appellant must demonstrate that the court erred by finding for the Appellee under the hold harmless provisions of the contract, as opposed to requiring it to apply the three-day notice provisions.

2. Did the lower court err by finding that the Appellant was not entitled to an offset for work performed per the applicable subcontract agreement under the theory of "unjust enrichment"?

Standard of Review: The same standards of review as set forth in paragraph one above to this particular paragraph. The Appellant must demonstrate, by marshalling all of the evidence, that the court erred by finding the Appellant was not entitled to recover under the theory of unjust enrichment.

3. Did the lower court err by awarding the Appellee its attorney fees where the issue of attorney fees was resolved by the court's ordering the parties to submit to the court affidavits in connection with fees; furthermore, the Appellant is concerned about the "reasonableness" of

said fees in this case.

Standard of Review: Whether attorney fees are recoverable in an action is a question of law, which is reviewed for correctness. Robertson v. Gem Ins. Co. 828 P.2nd 496 (Utah App. 1992). Similarly, whether the trial court's findings of fact in support of an award of attorney fees are sufficient is also a question of law, reviewed for correctness. See State v. Pharris, 846 P.2nd 454, 459, (Utah App.) cert. denied, 857 P.2nd 948 (Utah, 1993) (citing State v. Ramirez, 817 P.2nd 774, 782 (Utah, 1991) However, the trial court has broad discretion in determining what constitutes a reasonable attorney's fee, and the appellate court should determine what is reasonable against an "abuse of discretion" standard. Dixie State Bank v. Bracken, 764 P.2nd 985, 991 (Utah, 1988); Regional Sales Agency v. Reichert, 784 P.2nd 1210, 1215 (Utah App., 1989), vacated on other grounds, 830 P.2nd 252 (Utah, 1992).

#### CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

Section 58-55-501, UCA:

Unlawful conduct includes:

....  
(12) exceeding one's monetary limit as a  
licensed contractor, as the limit is defined by  
statute or rule;....

Section 58-55-503(1):

(1) Any person who violates Subsections  
58-55-501(1) through (14)...is guilty of a class  
A misdemeanor. Any person who violates the  
provisions of Subsections 58-55-501(8) or (13)  
may not be awarded and may not accept a contract  
for the performance of the work. Any licensee  
who submits a notice of intent to request an  
increase in the monetary limit under Subsection  
58-55--309(5), but who is not granted an  
increase sufficient to cover the award of a  
contract upon which he has bid may not be  
awarded and may not accept the contract.

Section 58-55-604, UCA:

No contractor may act as agent or  
commence or maintain any action in any court of  
the state for collection fo compensation for  
performing any act for which a license is  
required by this chapter without alleging and  
proving that he was a properly licensed  
contractor when the contract sued upon was  
entered into, and when the cause of action  
arose. (Emphasis mine.)

STATEMENT OF THE CASE

1. NATURE OF THE CASE:

Took Mechanical, the subcontractor in this case,  
claimed to have monies due from M&E Construction, the  
general contractor as a result of a written subcontract  
agreement between the parties, where the subcontractor

performed heating and air conditioning work on the remodel of certain offices at the United States Attorney's Offices on the fourth floor of the Frank E. Moss United State Courthouse in downtown Salt Lake City, Utah.

The general contractor claims the subcontractor (a) failed to complete its work, and (b) that some of the work performed by Took was not in accordance with the plans and specifications, as as a result the Plaintiff was required to perform additional work for the US Government at no cost to the Government, but having a value to M&E of \$2,742.00, for which it was never reimbursed by Took Mechanical. (Record, 002)

The general contractor further alleges that Took Mechanical failed to perform some work at the Milton Bennion Hall jobsite, for which the general contractor was held liable by the University of Utah, having a value of \$363.66, and for which the general contractor was not reimbursed by the subcontractor.

The general contractor claims the two subcontract agreements were tied together by the language of the subcontract agreements so that the breach of one subcontract constituted a breach of the other. (Record, 260, 261)

The subcontractor claims that because it did some

work on the jobsite, though the amount of the work may be in dispute, the subcontractor nevertheless is entitled to recover the reasonable value of the work performed by it. (Record, 013) The trial court found that the subcontractor was not entitled to any value for the work performed. The issue is whether there is sufficient evidence and case law for the court to have refused to give the Appellants any value for the work they performed.

Both parties agreed that should the subcontract agreement be found to be binding upon the parties, and the court so found, that the prevailing party would be entitled to a reasonable attorney's fee and court costs as damages. (Record, 002, 008) Since the trial court found for the Appellant, the question is whether, taking testimony following the close of the case by both parties via affidavit, is sufficient for the court to make a finding of reasonableness of fees.

## 2. COURSE OF PROCEEDINGS:

M&E Construction filed a complaint seeking damages against the Defendant for faulty workmanship, failure to complete the work, failure to perform work pursuant to plans and specifications, and other relief in the Third Circuit Court for Salt Lake County, State of Utah, Salt Lake

Department, Civil No. 930001171, CV, assigned to Judge Robin Reese on February 1, 1993.

Took Mechanical following service, filed an Answer and Counterclaim on July 30, 1993. In the Counterclaim the Defendant alleged damages for breach of contract, quantum meruit and promissory estoppel against the Plaintiff.

The case eventually came on for non-jury trial on March 10, 1995. Because of the length of the trial, several separate settings were subsequently scheduled in which to take evidence, and the trial finally concluded on Monday, June 19, 1995, at which time the trial court asked for affidavits from counsel concerning attorney fees, and took the matter under advisement.

### 3. DISPOSITION OF THE TRIAL COURT:

The trial court ruled in favor of the Appellee and against the Appellant finding that the Appellant was liable to the Appellee for the sum of \$363.66 in damages incurred by the Appellee on the Milton Bennion Hall remodel project under the hold harmless provisions of the written subcontract agreement between the parties, and further held that the Appellant was liable to the Appellee in the sum of \$2,742.00 plus additional damages under the hold harmless provisions of the written subcontract agreement Frank E.

Moss Courthouse remodel job. Attorney fees of \$6,810.00 were also awarded after a finding by the court that the fees were reasonable taking into consideration the time and complexity of the case.

The Appellant appealed the entire decision of the trial court, claiming the Appellee was not entitled to any damages for repairs since it had failed to provide a three-day written notice to the Appellant to correct the deficiencies, and further claiming that the Appellant was entitled to the benefit it had provided the Appellee under the doctrine of "unjust enrichment". Additionally, the Appellant claimed by way of its appeal, that the trial court took no testimony at trial and made no finding in the findings of fact or conclusions of law as to the reasonableness of Appellee's attorney fees, and that such fees were highly suspect.

4. STATEMENT OF FACTS RELEVANT  
TO ISSUES PRESENTED FOR REVIEW:

A. The Plaintiff, M&E Construction, as the primary contractor on a remodeling contract for two projects, one at Milton Bennion Hall of the University of Utah, and the other at the Frank E. Moss United States Courthouse, United States Attorney's Offices, both in Salt Lake City, Utah, hired the Defendant, as subcontractor to

perform certain heating and air conditioning work.

B. The Plaintiff provided the Defendant with a written subcontract agreement on both projects, which the Defendant eventually signed and purportedly returned to the Plaintiff. (Record, 356)

C. It was clear that both parties intended to be bound by the written subcontract agreement. (Record, 356)

D. The Defendant proceeded to perform certain work under the subcontract agreement at Milton Bennion Hall, and later on proceeded to perform some work at the United States Courthouse under the subcontract agreement.

E. A dispute arose as to the quantity and quality of the work performed under both subcontract agreements.

F. Both subcontract agreements are tied to one another under the wording of the contracts.

G. While the terms of the subcontract agreements provided that a three-day notice be given by the general contractor in the event of a default by the subcontractor to repair any defect noticed before the general contractor proceeded to complete the work by

another, (Record, 357) the court also found that the subcontract agreement provided that the subcontractor was to hold the general contractor harmless for any damages caused by the subcontractor, for which the general contractor might otherwise become liable. (Record, 357)

H. The court further found that in the event the subcontractor failed to correct the defects for which he was to hold the general contractor harmless, he was to pay the general contractor the reasonable value of making the corrections in damages pursuant to Section VIII of the subcontract agreement. (Record, 358)

I. The court found that the Appellant, in the process of doing its work at the Milton Bennion Hall, damaged a wall while installing pneumatic tubing, and failed to properly repair the wall, causing damages for which the Appellee was required to reimburse the University of Utah in the sum of \$198.66.

J. The court further found that Appellant, in the process of installing a fan and grill, cut a hole in the roof of the Milton Bennion Hall, and failed to properly secure it from the weather. A storm appeared imminent, and Appellant refused to make necessary precautions when informed, causing the Plaintiff to be responsible to the

University of Utah for taking precautions, all to the Appellee's damage in the sum of \$165.00. (Record, 359)

K. With respect to the work performed by the Appellant at the Frank E. Moss Courthouse, the court specifically found that the Appellant failed to complete the work it had contracted to do. (Record, 360)

L. The court found that the Appellee could have given a three day notice to the Appellant during the last three weeks of the project to complete its work in a timely fashion, but failed to do so, and hence the Appellee was not entitled to its costs for work which it had hired out to complete Appellee's work. Therefore, Appellee was not entitled to reimbursement from Appellant for the value of that work. (Record, 361,362)

M. On the other hand, the court found that the Appellee was required to perform extra work at no charge, but having a reasonable value of \$2,742.00. This work was occasioned by the fact that the Appellant failed to install certain duct work in accordance with plans and specifications, and failed to do so. (Record, 360) Appellee was entitled to reimbursement from Appellant under Article VIII of the subcontract, the hold harmless provisions.

N. The subcontract agreement provides for payment of attorney fees to the non-defaulting party in any action brought to enforce the contract.

O. The court found the Appellant to be the prevailing party, and thus entitled to attorney fees and court costs. (Record , 363, 364)

P. On Objection by the Appellant, the Appellant argued that the court never addressed the "reasonableness of said fees" (Record, 381) Upon ruling on that Motion, the court however, found that though the Findings of Fact and Conclusions of Law did not include a finding as to the reasonableness of the attorney fees, the Defendant (Appellant) filed no objection to Appellee's affidavit in support of attorney fees, which provided for a statement of reasonableness, and the court specifically found that the fee request was reasonable given "the length of the trial and its complexity." (Record, 422)

Q. The Appellee was awarded attorney fees, pursuant to the terms and conditions of the subcontract agreement, and the trial judge found the fee both reasonable and appropriate under the circumstances of this case. He requested that the parties supply their request for attorney fees by affidavit, which was done, following the close of

testimony by both sides.

R. The Appellant's Counterclaim for the reasonable value of work performed at the Frank G. Moss Federal Courthouse was denied by the trial Court. (Record, 363)

#### SUMMARY OF ARGUMENTS

Sections VIII and IX of both subcontract agreements provided that the general contractor was to be held harmless from any damages caused by the subcontractor in the performance of the subcontractor's work, for which the general contractor may thereafter become liable. (Exhibits 8 and 10) Under both contracts, the court ruled that despite the three-day remedy provision, the subcontractor was liable to the general contractor under the hold harmless provisions, because the general contractor was held liable for performance or lack of performance on the part of the subcontractor for which the general contractor was held ultimately liable.

There was ample evidence that the subcontractor failed to secure sufficient bonding capacity from the State of Utah to perform the work in question here; and pursuant to Section 58-55-503, UCA, and case law, the trial court

could properly find the Appellant was thus not entitled to receive any monies as an offset for work performed by it.

There were provisions in the subcontract agreement which awarded attorney fees as damages to the prevailing party to any litigation, and clearly in this case the Appellee was the prevailing party. Appellants also requested attorney fees in their counterclaim, but of course were awarded none. At the conclusion of trial, the court suggested that the parties present their claim for attorney fees via affidavit and this was done. While the Findings of Fact and Conclusions of Law did not make a specific finding as to the reasonableness of Appellee's attorney fees and costs, the court made a subsequent finding as to their reasonableness, following a hearing on Appellant's objections to attorney fees. The court has wide discretion in making an award of attorney fees, and its discretion was not abused in this case.

#### DETAIL OF ARGUMENTS

- I. THE APPLICABLE SUBCONTRACT HOLDS THAT THE GENERAL CONTRACTOR MAY RECOVER DAMAGES FROM THE SUBCONTRACTOR, WHETHER OR NOT HE GIVES A THREE DAY NOTICE, WHERE THE GENERAL CONTRACTOR IS HELD LIABLE FOR DAMAGES CAUSED BY THE SUBCONTRACTOR ALL

PURSUANT TO THE HOLD HARMLESS PROVISIONS  
OF ARTICLE VIII OF THE SUBCONTRACT  
AGREEMENT

Article III of the Subcontract agreement provides in  
part:

"Time is of the essence, and Subcontractor recognizes and acknowledges that the Contractor and the Owner will sustain monetary damages if the whole or any part of the job be delayed through the failure of the Subcontractor to perform the work required in accordance with the Principal Contract, Plans and Specifications. In case of such failure by the Subcontractor, the Contractor may, at his option, upon three (3) days written notice to the Subcontractor, take any steps the Contractor deems advisable to see that such job is promptly completed...and the Subcontractor...shall be liable to the Contractor for any liquidated or other damages assessed against the Contractor because of such failure of the Subcontractor and for any costs incurred by the Contractor in the settlement of claims against the Subcontractor or Contractor, including a reasonable attorney's fee."

Appellant argues that Appellee never provided the Appellant with a three-day written notice to repair defects or perform work, and hence, the Appellee is not entitled to any damages for work performed by the Appellee which Appellant should have performed.

While it is true that the trial court found that Appellee did not give a three day written notice to the Appellant to perform any work, and thus was not entitled to

the value of work performed by Appellee for the benefit of the Appellant during the final three weeks of the United States Courthouse remodel (FFC, paragraph 27, Record, 362), the trial court did find that the Appellant was liable to the Appellee under Article VIII of the Subcontract Agreement for the value of work which Appellant was required to provide to the US Government for free, but which had a fair market value of \$2,742.00, when Appellant failed to follow the plans and specifications, and did not remove and replace 7" duct work and diffusers with 8" duct work and diffusers. (FFC, paragraphs 20, 21, 22, 23, 24, Record at 360, 361)

Article VIII, of the Subcontract Agreement provides in part:

"The Subcontractor will remedy immediately upon demand by the Contractor, any defects in the Subcontractor's work. The Subcontractor will be obligated upon demand by the Contractor to remedy any defects in his work or pay any damage to other work resulting from said defects appearing within one (1) year from date of final acceptance of the Principal Contract."

Article IX of the Subcontract Agreement provides in part:

"The Subcontractor shall indemnify and save harmless and defend the Contractor and the Owner ...from all claims, suits, actions of every name, kind and description, brought for or on account ..caused or claimed to be caused by any

act, omission, fault or negligence which the Subcontractor, his employees or agents are legally liable for arising out of the performance of the Subcontract."

...  
"The Subcontractor agrees to hold the Owner, Contractor and other Subcontractors on the above project harmless from any and all accidents, damages, liens, suits, judgments and any and all other matters of action resulting from the Subcontractor's breach of the said Subcontract and from the Subcontractor's negligence or failure fully to perform said subcontract work."

Given this wording in the Subcontract Agreement, the Court found the Appellant had breached its provisions, and Appellee was thus entitled to the damages which Appellee was required to pay or give to both the University of Utah and to the United States. (FFC, Paragraph 15, 359, and Paragraph 24, 361)

## II. APPELLANT WAS NOT ENTITLED TO AN OFFSET FOR WORK HE PERFORMED

The Appellant acknowledged that it had exceeded its bid limits (\$60,000.00), during the period of time it was working on Appellee's jobsite. (Transcript, page 271, lines 21-25)

During the course of its work at the Frank E. Moss Federal Building jobsite, the Appellant took on an additional \$34,000.00 of work at an elementary school in Midvale (Transcript 309, lines 20-25), and Brighton High School. (Transcript 312, lines 8-24) Together the Appellant admitted

they exceeded his \$60,000.00 bid limit in August, 1992. (Transcript 315, lines 2-4) Given this set of circumstances, the Court could easily have determined the Appellant was prevented from making a claim for any offset pursuant to the provision of Section 58-55-503, UCA. See also, George v. Oren Ltd. & Associates, 672 P.2nd 732 (Utah, 1983)

There is additionally adequate case law to support the trial court's finding that the Appellant was not entitled to recover under the theory of "quantum meruit". In Highland Construction Company vs. Union Pacific Railroad Company, 683 Pwnd. 1042 (Utah, 1984) the trial court refused to permit the subcontractor to collect under the theory of quantum meruit where subcontractor failed to show the time and hours spent, failed to show the actual benefit to the Plaintiff, failed to show its costs were reasonable, and failed to show it was not responsible for added expenses to the Plaintiff. (Id. at 1047)

In the instant case there was no showing as to the value of the actual work performed by the Appellee. No man-hours or time sheets were produced, no records of costs of materials were produced, and no showing was made by the Appellant that it was not responsible for and added expenses

to the Appellee as a result of its breach of contract. Under the Highland case, the trial court would thus be justified in refusing to award the Appellant any damages for unjust enrichment.

### III. ATTORNEY FEES WERE PROPERLY AWARDED

Article IV of the Subcontract Agreement provides in part: "Subcontractor shall pay a reasonable attorney's fee, together with any costs incurred by the Contractor in the event of default in or (sic.) breach of any of the terms or provisions of this agreement."

It is clear that the Court found for the Appellee and against the Appellee in the instant action. (See Findings of Fact, Conclusions of Law and Judgment, Record at pages 355-368)

Because the Subcontract Agreement was found binding on both parties, and has a provision for payment of attorney fees to the Contractor in the event of a default by the Subcontractor, the court properly awarded the Appellee its attorney fees and costs.

At the conclusion of Plaintiff's case, Plaintiff was prepared to submit testimony with respect to attorney fees; however, the court determined, probably because of the

length of trial in this case, to have the Plaintiff submit its application for attorney fees, and any evidence with respect to its attorney fees by affidavit. (Transcript, page 952, lines 12-22)

While the Findings of Fact and Conclusions of Law failed to make any specific finding with respect to the "reasonableness" of the attorney fees sought by the Appellee, when the Appellant objected to the award of Appellee's fees (Record, paragraph 9, page 381), it gave the trial court an opportunity to reexamine the issue of the reasonableness of attorney fees. The court subsequently determined in writing that Appellant's fees were reasonable "given the length of the trial and its complexity". (Record, paragraph 4, page 422) An Amended judgment was filed finding the fee of \$6,810.00. was reasonable and awarded to the Plaintiff. (Record, paragraph 5, at page 1033)

#### CONCLUSION

The Appellant misapprehends the findings of the court, when it argues that the court erred by failing to require the Appellee to give three day's notice before commencing and charging work to the Appellant which Appellant allegedly failed to complete. In the case at bar, and under

both projects, the trial court ruled that the Plaintiff was held liable both by the University of Utah and by the United States Government for work which was either improperly performed or which was not performed at all by the Appellant, and for which the Appellee ultimately became liable. The theory of recovery, under Article VIII of the Subcontract Agreement was on the hold harmless provisions. In fact, the court specifically denied a portion of the Appellee's damages sought under the three-day notice provision.


There is adequate case law and statutory law for the trial court to have denied any recovery of damages under the theory of "quantum meruit" for work which the Appellant did perform.

As to attorney fees, both sides agreed that the prevailing party would likely be entitled to an award of attorney fees if the court found the subcontract agreement controlled, and if either party were the prevailing party. The only apparent issue here is whether the court had sufficient basis to make an award of attorney fees, by finding the fees were both reasonable and necessary to the prosecution of the case. Apparently the court had opportunity to review the affidavit presented by Appellant's

Counsel and did in fact make a finding the fees were generally reasonable and necessary given the length and complexity of the case. This ruling should not be disturbed by the appellant court unless it finds the trial court abused its discretion in making such a determination.

The Appellee requests that the Utah Court of Appeals reject each of the arguments set forth by the Appellant, and affirm the findings and judgment of the trial court.

DATED this 9<sup>th</sup> day of February, 1996.



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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the Appellee's Brief in the above-captioned appeal to Counsel for the Appellant this 9<sup>th</sup> day of February, 1996, postage prepaid, and addressed as follows:

VICTOR LAWRENCE, ESQ.  
Attorney for Defendant/Appellant  
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DAVID K. SMITH, ESQ.

CERTIFICATE OF MAILING

I hereby certify that I mailed two a true and correct copies of the Appellee's Brief in the above-captioned appeal to Counsel for the Appellant this 9<sup>th</sup> day of February, 1996, postage prepaid, and addressed as follows:

VICTOR LAWRENCE, ESQ.  
Attorney for Defendant/Appellant  
TOOK MECHANICAL  
10 West Broadway, Suite 211  
Salt Lake City, UT 84101

  
\_\_\_\_\_  
DAVID K. SMITH, ESQ.

## ADDENDUM

Telephone: (801) 566-3373

1

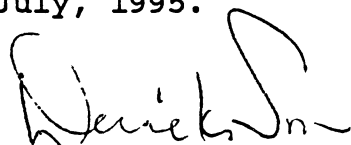
this state and am in good standing with said courts.

3. I have represented the Plaintiff in this action from its inception, and through all stages of discovery, and into trial.

4. In the course of representation I have rendered legal services in connection with the claims of the Plaintiff's claim for breach of contract, requiring expenditure of time and costs as outlined in the attached Exhibit "A".

5. I am familiar with the costs of legal services in this community and the services rendered, taking into consideration the time expended, the complexity and length of the case and other factors, and based thereon it is my opinion that a reasonable fee for services rendered is \$6,810.00.

DATED this 19<sup>th</sup> day of July, 1995.

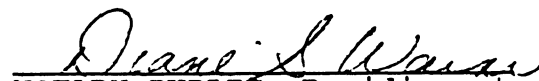
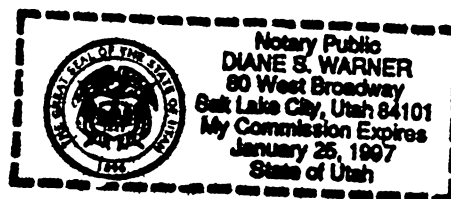


DAVID K. SMITH, ESQ.  
Attorney at Law

SUBSCRIBED and Sworn to before me this 19 day of July, 1995.

My Commission Expires:

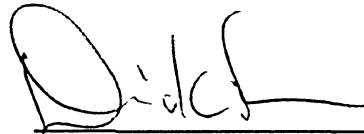
1-25-97

  
NOTARY PUBLIC, Residing at  
Salt Lake City, Utah

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT OF DAVID K. SMITH CONCERNING ATTORNEY FEES AND COSTS to counsel for the Defendant this 19<sup>th</sup> day of July, 1995, addressed as follows:

VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
Attorneys at Law  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "D. K. Smith", written over a horizontal line.

DAVID K. SMITH, ESQ.

EXHIBIT "A"

SUMMARY OF ATTORNEY FEES INCURRED  
IN CONNECTION WITH M&E CONSTRUCTION  
V. TOOK MECHANICAL

| DATE:   | SERIVCE RENDERED                                                                                                                                         | HOURS | AMOUNT     |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------|-------|------------|
| 1/21/93 | Preparation of Motion for Leave to file Counterclaim.                                                                                                    | 1.00  | \$125.00   |
| 2/24/93 | Preparation of Complaint, and filing same with court.                                                                                                    | 1.60  | \$200.00   |
| 2/25/94 | Appearance in court on pre-trial conference.                                                                                                             | 1.00  | \$125.00   |
| 3/01/94 | Review of discovery with Bert, and preparation of revisions.                                                                                             | 3.20  | \$400.00   |
| 3/04/94 | Review of and filing discovery on Took Mechanical.                                                                                                       | 0.30  | \$ 37.50   |
| 5/23/94 | Telephone with Bert regarding Trial Brief on Took Mechanical.                                                                                            | 0.60  | \$ 75.00   |
| 5/28/94 | Preparation of trial brief, and objections to moving forward, due to lack of responses to discovery.                                                     | 1.20  | \$150.00   |
| 6/01/94 | Preparation of Motion to Continue Trial Setting, discussion with client, judge, etc., and delivery of trial brief.                                       | 2.20  | \$275.00   |
| 6/14/94 | Telephone with Victor Lawrence and discussion regarding discovery requests.                                                                              | 0.40  | \$ 50.00   |
| 7/18/94 | Telephone with Bert, and with defense counsel regarding Pre-Trial on Took Mechanical.                                                                    | 1.10  | \$137.50   |
| 3/01/95 | Meeting with client on Took Mechancial case, duscussion on strategy.                                                                                     | 0.60  | \$ 75.00   |
| 3/01/95 | Paralegal time to date on prepartion of trial brief.                                                                                                     | 11.00 | \$385.00   |
| 3/02/95 | Discussion of trial brief and exhibits list, and witness list, with Defense Counsel, setting over trial date, discussion with client regarding strategy. | 3.20  | \$400.00   |
| 3/09/95 | Preparation for trial, meeting with Bert, document preapration                                                                                           | 8.40  | \$1,050.00 |

|         |                                                           |       |            |
|---------|-----------------------------------------------------------|-------|------------|
| 3/10/95 | Preparation for and appearance<br>at trial.               | 5.00  | \$625.00   |
| 3/13/95 | Preparation for and appearance<br>at trial.               | 6.80  | \$850.00   |
| 5/19/95 | Preparation for and appearance<br>at trial.               | 6.00  | \$750.00   |
| 6/16/95 | Preparation for and appearance<br>at trial.               | 4.60  | \$575.00   |
| 6/19/95 | Preparation for and appearance<br>at trial.               | 1.80  | \$225.00   |
| 7/18/95 | Preparation of Findings of Fact<br>and Conclusions of Law | 2.40  | \$300.00   |
|         | TOTALS:                                                   | 62.40 | \$6,810.00 |

FILED  
95 AUG 10 PM 4:09  
CLERK OF THE CIRCUIT COURT  
SALT LAKE DEPARTMENT

Victor Lawrence, Esq., #4492  
Attorney for Defendant  
10 West Broadway, Suite 311  
Salt Lake City, Utah 84101  
Telephone: (801) 359-0600  
Telefax: (801) 359-1859

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IN THE THIRD CIRCUIT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH, SALT LAKE DEPARTMENT

---

|                   |   |                        |
|-------------------|---|------------------------|
| M&E CONSTRUCTION, | : | OBJECTION TO PROPOSED  |
|                   | : | FINDINGS OF FACT AND   |
| Plaintiff,        | : | CONCLUSIONS OF LAW and |
|                   | : | JUDGMENT               |
| vs.               | : |                        |
| TOOK MECHANICAL,  | : |                        |
|                   | : | Civil No. 930001171 CV |
| Defendant.        | : | Hon. Robin W. Reese    |

---

Defendant, TOOK MECHANICAL, by and through legal counsel, does hereby object to the proposed Findings Of Fact And Conclusions Of Law and Judgment, hereafter Findings, Conclusions and Judgment, submitted by Plaintiff's counsel in regard to the above-entitled matter.<sup>1</sup>

This objection is based on Rule 4-504 of the Code of Judicial Administration, the Utah Rules of Civil Procedure, and the following grounds.

---

<sup>1</sup> Counsel has in fact received two (2) versions of the proposed documents. This objection is to the latest version received.

1. The proposed Findings, Conclusions, and Judgment are mistakenly captioned in the "Third District Court" rather than the "Third Circuit Court".

2. The proposed Findings, Conclusions, and Judgment purport to award Judgment in the amount of \$3,160.66 re the "Moss remodeling project"; however, said figure does not comport with the Judge's notes as to his ruling. Counsel feels the Court needs to verify which amount is accurate.

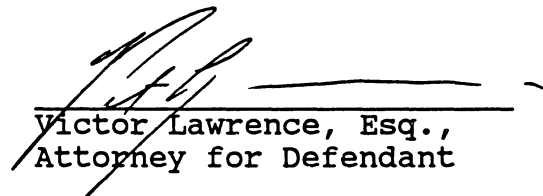
3. The proposed Findings, Conclusions, and Judgment are devoid of any ruling by the Court in regard to Defendant's second cause of action for quantum meruit or unjust enrichment for the work that Defendant actually did do and for which Plaintiff's witness(es) acknowledged. There is also no ruling in regard to Defendant's third cause of action for promissory estoppel. In other words, the proposed Findings, Conclusions, and Judgment are devoid of any offset between the parties.

4. The proposed Findings, Conclusions, and Judgment (see paragraph 34 of said Findings and paragraph 4 of said Judgment) award Plaintiff \$6,810.00 as reasonable attorney fees. The Court specifically did not have either party address the "incurred" attorney fees during the trial. Although the "prevailing" party may in fact be entitled to an award of attorney fees, the same must

be reasonable. Defendant does herein object to the Affidavit Of David K. Smith Concerning Attorney Fees And costs submitted herein.

WHEREFORE, the Court is respectfully requested to acknowledge the proper forum of this case, to modify the proposed Findings, Conclusions, and Judgment to address Defendant's offset, if any, or to rule on the same by supplemental order, and to schedule a hearing to address the reasonableness of Plaintiff's attorney fees incurred.

DATED this 10<sup>th</sup> day of August, 19 85.

  
\_\_\_\_\_  
Victor Lawrence, Esq.,  
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed first class, postage prepaid, to the following on this 10<sup>th</sup> day of August, 1995:

David K. Smith, Esq.,  
Attorney for Plaintiff  
6925 Union Park Center, Suite 600  
Midvale, Utah 84047

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

- - -\*\*\*-----\*\*\*- -

DAVID K. SMITH, ESQ.  
Utah State Bar No. 2993  
Attorney for Plaintiff  
M&E CONSTRUCTION  
Suite 600  
6925 Union Park Center  
Midvale, UT 84047  
Telephone: (801) 566-3373

FILED  
AUG 10 1995  
Third Circuit Court  
Salt Lake Department

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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|                   |   |                                            |
|-------------------|---|--------------------------------------------|
| M&E CONSTRUCTION, | ) |                                            |
|                   | ) |                                            |
| Plaintiff,        | ) |                                            |
| vs.               | ) | FINDINGS OF FACT AND<br>CONCLUSIONS OF LAW |
| TOOK MECHANICAL,  | ) | Civil No. 930001171 CV                     |
|                   | ) |                                            |
| Defendant.        | ) | Honorable Robin W. Reese                   |
|                   | ) |                                            |

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The above captioned matter having come for regularly scheduled non-jury trial before the above court commencing Friday, March 10, 1995 at 9:00 a.m., and continued thereafter for further hearing on Monday, March 13, 1995 at 10:30 a.m., Friday, May 21, 1995 at 10:00 a.m., Friday, June 16, 1995 at 9:00 a.m. and finally until Monday, June 19, 1995 at 9:00 a.m. At trial were present the Plaintiff's

representative, Bert P. Van Komen, and his counsel, David K. Smith, and the Defendant's representative, and his counsel, Victor Lawrence. The court having taken testimony from the respective parties, and their witnesses, and having received exhibits in this case, and having heard the argument of counsel, and now being fully advised in the premises, does now make the following:

FINDINGS OF FACT

1. The court finds that there was a valid and binding written subcontract agreement between the Plaintiff, M&E Construction and the Defendant, Took Mechanical for remodeling jobs to be performed at both the Milton Bennion Hall site at the University of Utah and at the Frank E. Moss Federal Courthouse Building (Plaintiff's Exhibits 8 and 10).

2. The court finds that the Defendant received the written subcontract agreements which were a form agreement prepared by the Plaintiff, that he subsequently signed them and that he that he returned them to the Plaintiff, expecting to be bound by them.

3. The court finds that the Plaintiff also expected to be bound by the subcontract agreements. (Plaintiff's Exhibits 8 and 10)

4. The court finds that the subcontract agreement

provides for the payment of attorney fees in the event a lawsuit became necessary to settle the claims between the parties to be awarded to the prevailing party.

5. The court finds that the subcontract agreement specifically provides that the Plaintiff give the Defendant a three-day written notice outlining the breaches claimed to have been incurred and a demand to complete or correct work to be performed by the Defendant prior to the time the Plaintiff is permitted under the subcontract agreement to step in and take over Defendant's work.

6. The court finds that the subcontract agreement provides that the Defendant is to hold the Plaintiff harmless from any damage caused by the Defendant in the performance of Defendant's work, and for which the Plaintiff may thereafter become liable.

7. The court finds that the subcontract agreement provides that the Defendant must hold the Plaintiff harmless for defects in work or workmanship from any and all claims brought against the Plaintiff by the property owner or others which causes the Plaintiff to be placed at risk, and the Defendant must either correct said defects or pay Plaintiff any damages sustained by the Plaintiff as a result.

8. the court finds that in the event of a breach by the Defendant under Section VIII of the subcontract agreements, the Defendant must either correct said defects in his workmanship or pay the reasonable value of making the corrections in damages to the Plaintiff.

9. The court finds that the Defendant, in the process of doing its work at the Milton Bennion Hall project, damaged a portion of the wall while installing pneumatic tubing, and that said wall had to be repaired.

10. The court finds that the Defendant refused to properly repair the wall in question when asked by the Plaintiff.

11. As a direct result thereof, the Plaintiff was back-charged the sum of \$198.66 by the University of Utah for repair of the wall, for which the Defendant should be liable.

12. The court finds that the Defendant cut a hole in the roof of the Milton Bennion Hall for the purpose of installing a fan and grill.

13. The court finds that the defendant failed to properly secure said hole from the elements, and that there was sufficient concern about a pending storm, that the University of Utah personnel asked the Defendant to make

necessary precautions, and the Defendant refused, forcing University of Utah personnel to protect the building from possible water damage by securing the hole.

14. The court finds that the Plaintiff was back-charged by the University of Utah for the sum of \$165.00 to repair the hole, and that there was sufficient urgency to repair of the hole that the three-day waiting period was waived, and the Defendant is liable to the Plaintiff under the hold harmless provisions of the contract.

15. As a result the court finds that the Defendant should be liable to the Plaintiff for repairs at Milton Bennion Hall for which the Plaintiff was back-charged by the University of Utah in the total sum of \$363.66.

16. The court finds that the Plaintiff did not show by a preponderance of the evidence the amount, if any, of damages sustained by it for cleaning up the ceiling tiles, or water damage, or otherwise cleaning up after the Defendant at the Milton Bennion Hall, and is thus not entitled to any damages for this work.

17. With respect to the work performed under the subcontract agreement at the Frank E. Moss building, the court finds that the contract (Plaintiff's Exhibit 10) required that the Defendant complete all work in accordance

with the plans and specifications provided to it by the Plaintiff (Defendant's Exhibit D2)

18. The plans and specifications provide that the Defendant install new 8" diffusers as well as new 8" round duct work, as well as connecting the new ducting to the existing mixing boxes and the new diffusers. (See paragraphs 6A and 6D of Defendant's Exhibit D2)

19. The court finds that before work under the subcontract agreement began, the property owner requested the Plaintiff to make certain changes to the original contract. The Plaintiff agreed to these changes and provided a bid to the property owner. Estimates given the Plaintiff by the Defendant were used in making the that portion of the bid dealing with HVAC work.

20. The court finds that the Defendant failed to install the 8" duct work into new 8" diffusers as provided under the plans and specifications, but instead, left the 7" duct work in place. The Defendant was not told by anyone that he could make these modifications to the plans and specifications. Furthermore, no written permission was obtained by the Defendant to do so, and such amounts to a breach of the subcontract agreement.

21. Once the mistake was noticed by the property

owner, it insisted that the 7" ducts be removed.

22. Instead of removing the 7" duct work, the Plaintiff was able to negotiate with the government to allow the 7" duct work to remain in place and to perform other work at no charge to the government.

23. The Plaintiff then entered into an agreement with Bowen Electric, one of its other subcontractors, to perform the additional work, including electrical work, required by the government at no additional charge.

24. The Plaintiff's subcontractor performed the work at no charge to the Plaintiff; however, the subcontractor owed the Plaintiff a debt and discharged the debt by doing this work for the Plaintiff at no charge; the work was determined to have a fair market value of \$2,742.00.

25. The court finds that the Defendant is liable to the Plaintiff for the fair market value of the extra work performed by Plaintiff's other subcontractor in the amount of \$2,742.00.

26. During the course of the remodeling work on the Frank E. Moss building, the Plaintiff hired third parties to perform some of the work the Defendant was required to perform under his subcontract agreement with the Plaintiff, to enable the entire job to be completed within the time

frame of the general contract agreement with the government.

27. The Plaintiff was forced to removed the refrigeration system and peform other work, but the court finds that the Plaintiff could have given the Defendant three-days' notice to perform the work within the three week period prior to the deadline, but failed to do so. There is nothing in the testimony or exhibits which tends to show that a written three day notice was given to the defendant to complete the work prior to the Plaintiff's having hired Mr. Hoopes and Mr. Jeff Van Komen, third parties, to do that work; hence the Plaintiff is found to forfeit any recovery from monies paid to third parties to perform work the Defendant was otherwise required to perform under the Frank E. Moss subcontract, except as outlined above in paragraph 24.

28. The court finds that the Defendant failed to report to complete the work and to complete the HVAC work in a timely manner. The Defendant, therefore, cannot recover for work he did not perform (making the duct corrections and removing the refigeration system) which the Plaintiff was forced to perform because of the Defendant's delinquency.

29. The court finds that the Defendant was required under his subcontract agreement to level the air

conditioning system, but failed to do so, and that the Plaintiff was required to hire a third party to level the system at a cost to the Plaintiff of \$55.00. The court finds that the Defendant is liable to the Plaintiff for the cost of this work.

30. The court finds that the Plaintiff has not provided sufficient testimony concerning any other damages, such as clean up, etc., and it thus not entitled to additional damages.

#### CONCLUSIONS OF LAW

31. The court finds that the Plaintiff should be entitled to a judgment from the Defendant for the costs of repairs to the Milton Bennion Hall which Plaintiff was back-charged by the University of Utah, in the sum of \$363.66.

32. The court finds that the Plaintiff should be entitled to a judgment from the Defendant for work not completed by it on the subcontract agreement on the Frank E. Moss remodeling project in the sum of \$3,160.66.

33. The court finds that the Defendant should be awarded "no cause of action" on his counterclaim against the Plaintiff.

34. The court finds that the Plaintiff should be entitled to interest on the said sums at the legal rate from

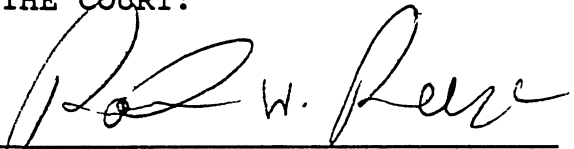
August 27, 1992 to the date of entry of judgment herein.

35. The court finds that the Plaintiff is entitled to a reasonable attorney's fee in prosecuting this claim, and that a reasonable fee is \$6,810.00.

36. The court find that the Plaintiff is entitled to its costs of \$60.00, incurred in this action.

DATED this 7 day of August, 1995.

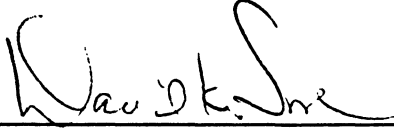
BY THE COURT:

  
\_\_\_\_\_  
ROBYN W. REESE  
Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to counsel for the Defendant this 3rd day of August, 1995, addressed as follows:

VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
Attorneys at Law  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101

  
DAVID K. SMITH, ESQ.

DAVID K. SMITH, ESQ.  
Utah State Bar No. 2993  
Attorney for Plaintiff  
M&E CONSTRUCTION  
Suite 600  
6925 Union Park Center  
Midvale, UT 84047  
Telephone: (801) 566-3373

FILED  
AUG 10 1995  
District Court  
Salt Lake County

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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|                   |   |                          |
|-------------------|---|--------------------------|
| M&E CONSTRUCTION, | ) |                          |
|                   | ) |                          |
| Plaintiff,        | ) | JUDGMENT                 |
| vs.               | ) |                          |
| TOOK MECHANICAL,  | ) | Civil No. 930001171 CV   |
|                   | ) |                          |
| Defendant.        | ) | Honorable Robin W. Reese |
|                   | ) |                          |

---

Pursuant to the Findings of Fact and Conclusions of  
Law heretofore entered in the above-captioned proceedings,  
and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff, M&E Construction, is awarded a  
personal money judgment against the Defendant, TOOK  
MECHANICAL, in the sum of \$363.66, representing the costs of

repairs to the Milton Bennion Hall for which Plaintiff was back-charged by the University of Utah.

2. The Plaintiff, M&E CONSTRUCTION, is awarded a judgment from the Defendant, TOOK MECHANICAL, in the sum of \$2,742.00 for work not completed by it on the subcontract agreement on the Frank E. Moss remodeling project and for an additional \$50.00 in leveling the air conditioning system.

3. The Defendant, TOOK MECHANICAL, is awarded "no cause of action" on any of the causes stated in his Counterclaim against the Plaintiff, M&E CONSTRUCTION.

4. The Plaintiff is awarded interest on the sums stated in paragraphs one and two above at the legal rate from August 27, 1992 to the date of entry of judgment herein.

5. The Plaintiff, M&E CONSTRUCTION, is entitled to a reasonable attorney's fee from the Defendant, TOOK MECHANICAL, in prosecuting this claim, in the sum of \$6,810.00.


6. The court find that the Plaintiff is entitled to its costs of \$60.00 incurred this action.

7. It is further ordered, pursuant to Rule 4-505, Utah Rules of Judicial Administration, that this judgment shall be augmented in the amount of reasonable costs and

attorneys fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

DATED this 7 day of August, 1995.

BY THE COURT:

  
\_\_\_\_\_  
ROBIN W. REESE  
Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT to counsel for the Defendant this 3rd day of August, 1995, addressed as follows:

VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
Attorneys at Law  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101

  
\_\_\_\_\_  
DAVID K. SMITH, ESQ.

FILED

95 SEP -7 PM 12:15

CLERK OF DISTRICT COURT  
SALT LAKE COUNTY

Victor Lawrence, Esq., #4492  
Attorney for Defendant  
10 West Broadway, Suite 311  
Salt Lake City, Utah 84101  
Telephone: (801) 359-0600  
Telefax: (801) 359-1859

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IN THE THIRD CIRCUIT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH, SALT LAKE DEPARTMENT

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|                   |   |                                               |
|-------------------|---|-----------------------------------------------|
| M&E CONSTRUCTION, | : | <b>MOTION FOR RELIEF</b>                      |
|                   | : | <b>UNDER RULE 60(B)</b>                       |
| Plaintiff,        | : |                                               |
| vs.               | : |                                               |
| TOOK MECHANICAL,  | : |                                               |
| Defendant.        | : | Civil No. 930001171 CV<br>Hon. Robin W. Reese |

---

Defendant, TOOK MECHANICAL, by and through legal counsel, does hereby petition the Court for relief under Rule 60(b)(1)(3)&(7) of the Utah Rules of Civil Procedure. Specifically the Court is asked to reconsider its "docket" denial of Defendant's Objection To Proposed Findings Of Fact And Conclusions Of Law and Judgment. This motion is based upon the following facts.

1. The Court rendered its decision in regard to this matter telephonically on or about 06/30/95.

2. The Court requested Plaintiff's counsel to prepare the necessary final documents, as always though, the Court instructed counsel to submit such documents to opposing counsel before

submission to the Court, all in accordance with Rule 4-504 of the Code of Judicial Administration.

3. Plaintiff's counsel did in fact submit proposed final documents to Attorney Victor Lawrence via mail dated 07/19/95.

4. Attorney Victor Lawrence, rather than filing a formal objection, simply called Plaintiff's counsel to discuss several concerns.

5. Plaintiff's counsel, rather than adopting all of attorney Victor Lawrence's proposed changes, modified his original documents and submitted via mail this "new" set of final documents on or about 08/03/95.

6. Unfortunately, on the day **before** he submitted these final documents to attorney Victor Lawrence, he submitted the same set, **not the original version supplied to attorney Victor Lawrence on 07/19/95**, to the Court for signature.

7. In his letter filed with the Court dated 08/02/95, he states, **actually misrepresents**, that the submitted documents were ". . . sent to Mr. Victor Lawrence on July 18, 1995 . . . ." **The version that was submitted to the Court was never submitted to attorney Victor Lawrence on July 18, 1995.**

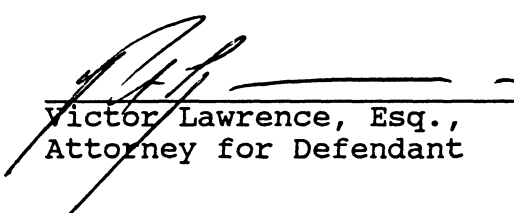
8. The Court stated in its "docket" entry that it denied Defendant's Objection for two reasons, first, because it was not filed in a timely manner. This is wrong, it was filed in a timely

manner if the Court hadn't been "defrauded" by Plaintiff's counsel's letter. The Court only needs to look at the mailing certificate on the documents that it signed and it will see that the version that was submitted for signature was the version that was mailed on 08/03/95, **not the earlier version**. Attorney Victor Lawrence addressed this very fact in a footnote in his Objection.

9. The second reason the Court denied the Objection was because it claimed that the proposed documents did in fact comport with the Court's ruling. The Court is respectfully asked to re-read the Objection. The documents are under the **wrong** court heading. The judgment amount re the "Moss remodeling project" is **different than the Judge's notes**. The Court **never addressed the "reasonableness"** of the claim for attorney fees.

WHEREFORE, the Court is respectfully asked to set aside its findings and judgment entered heretofore, to reconsider Defendant's Objection, to sanction, if deemed appropriate, Plaintiff's counsel's fraud perpetrated upon the Court, and for such other and further relief as it deems just and proper.

DATED this 6<sup>th</sup> day of Sept, 1995.

  
\_\_\_\_\_  
Victor Lawrence, Esq.,  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed first class, postage prepaid, to the following on this 7 day of SEP, 1995:

David K. Smith, Esq.,  
Attorney for Plaintiff  
6925 Union Park Center, Suite 600  
Midvale, Utah 84047



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**FILED**

**THIRD CIRCUIT COURT FOR SALT LAKE COUNTY**

**NOV 1 1995**

**STATE OF UTAH, SALT LAKE DEPARTMENT**

Third Circuit Court  
Salt Lake Department

|                   |   |                               |
|-------------------|---|-------------------------------|
| M&E CONSTRUCTION, | ) |                               |
|                   | ) |                               |
| Plaintiff,        | ) | ORDER DENYING IN PART AND     |
|                   | ) | GRANTING IN PART THE          |
| VS.               | ) | DEFENDANT'S MOTION FOR RELIEF |
|                   | ) | FROM FINAL JUDGMENT           |
|                   | ) |                               |
| TOOK MECHANICAL,  | ) | Civil No. 930001171           |
|                   | ) |                               |
| Defendant.        | ) | Honorable Robin W. Reese      |

The court, having reviewed the motion of the defendant for relief from final judgment, and having reviewed again the defendant's objections to proposed Findings of Fact and Conclusions of Law, does hereby sustain the objections in part and overrule in part as follows:

1. In paragraph 1 of its objections the defendant points out that the court is mistakenly captioned as the Third District Court rather than the Third Circuit Court. This objection is sustained and the plaintiff is ordered to prepare Amended Findings of Fact and Conclusions of Law referencing the proper court.

2. In paragraph 2 of its objections the defendant argues that the award set forth in the plaintiff's proposed Findings of Fact for \$3,160.66 regarding work on the Federal Building remodeling project is an error. The court however, after reviewing its own notes, has determined that this award is consistent with its original finding, and this objection is therefore overruled.

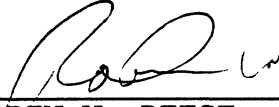
3. In paragraph 3 of its objections the defendant points out that the proposed Findings of Fact prepared by the plaintiff are devoid of any finding regarding the defendant's claimed offsets for quantum meruit and promissory estoppel. This objection is well taken and the same is hereby sustained. In its original findings which the court delivered telephonically to counsel it found that the defendant had proven no damages at the trial. The defendant is therefore entitled to no offsets against the plaintiff's damages and the plaintiff is ordered to include this finding in its Amended Findings of Fact and Conclusions of Law.

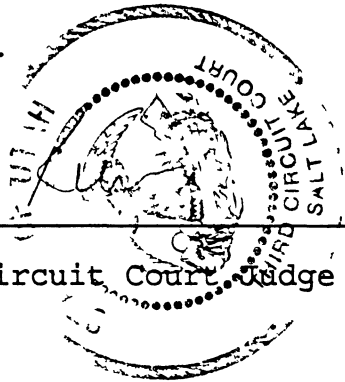
4. In its fourth objection the defendant objects to the reasonableness of the attorney's fee set forth in the affidavit of plaintiff's counsel. The defendant is correct in that the proposed Findings of Fact and Conclusions of Law did not specifically include a finding as to the reasonableness of the plaintiff's attorney's fee. The defendant however has stated no specific objection to any part of Mr. Smith's affidavit, and the court does hereby find that the amount requested is a reasonable fee given the length of the trial and its complexity.

The plaintiff is ordered to prepare Amended Findings of Fact and Conclusions of Law consistent with those changes articulated

in this order and submit the same to counsel for the defendant as required.

Dated this 11 day of October, 1995.

  
ROBIN W. REESE  
Presiding Third Circuit Court Judge



### CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order this 11th day of October, 1995 to the following:

David K. Smith  
Attorney for Plaintiff  
6925 Union Park Center, Suite 600  
Midvale, Utah 84047

Victor Lawrence, Esq.  
Attorney for Defendant  
10 West Broadway, Suite 311  
Salt Lake City, Utah 84101

  
DEPUTY COURT CLERK

DAVID K. SMITH, ESQ.  
Utah State Bar No. 2993  
Attorney for Plaintiff  
M&E CONSTRUCTION  
Suite 600  
6925 Union Park Center  
Midvale, Utah 84047  
Telephone: (801) 566-3373

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IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH, SALT LAKE DEPARTMENT

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|                   |   |                          |
|-------------------|---|--------------------------|
| M&E CONSTRUCTION, | ) |                          |
|                   | ) |                          |
| Plaintiff,        | ) | AMENDED JUDGMENT         |
| vs.               | ) |                          |
|                   | ) | Civil No. 930001171 CV   |
| TOOK MECHANICAL,  | ) | Honorable Robin W. Reese |
|                   | ) |                          |
| Defendant.        | ) |                          |
|                   | ) |                          |

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Pursuant to the Findings of Fact and Conclusions of Law heretofore entered in the above-captioned proceedings, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff, M&E CONSTRUCTION, is awarded a personal money judgment against the Defendant, TOOK MECHANICAL, in the sum of \$363.66, representing the costs of

repairs to the Milton Bennion Hall for which Plaintiff was back-charged by the University of Utah.

2. The Plaintiff, M&E CONSTRUCTION, is awarded a judgment from the Defendant, TOOK MECHANICAL, in the sum of \$2,742.00 for work not completed by it on the subcontract agreement on the Frank E. Moss remodeling project and for an additional \$50.00 in leveling the air conditioning system.

3. The Defendant, TOOK MECHANICAL, is awarded "No Cause of Action" against the Plaintiff, M&E CONSTRUCTION on its Counterclaim for offsets on the various theories presented, including unjust enrichment and/or promissory estoppel.

4. The Plaintiff is awarded interest on the sums stated in paragraphs one and two above at the legal rate from August 27, 1992 to the date of entry of judgment herein.

5. The Plaintiff, M&E CONSTRUCTION, is entitled to a reasonable attorney's fee from the Defendant, TOOK MECHANICAL, in prosecuting this claim, in the sum of \$6,810.00.

6. The Court finds that the Plaintiff is entitled to its costs of \$60.00 incurred in this action.

7. It is further ordered, pursuant to Rule 4-505,

Utah Rules of Judicial Administration, that this judgment shall be augmented in the amount of reasonable costs and attorney fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

DATED this 3 day of ~~October~~<sup>Nov.</sup>, 1995.

BY THE COURT:

  
ROBIN W. REESE  
Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AMENDED JUDGMENT to counsel for the Defendant this 17th day of October, 1995, postage prepaid, addressed as follows:

VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101



2 been interested that all the offices that--that they can be  
3 occupied. They had all--

4 Q And you did it?

5 A Huh?

6 Q You did it?

7 A Yeah, we did it.

8 MR. LAWRENCE: That's all I have.

9 THE WITNESS: Yeah.

10 THE COURT; Okay. You can step down, sir.

11 THE WITNESS: Okay.

12 THE COURT: Plaintiff rests?

13 MR. SMITH: No. I need to respond in respect to  
14 attorney fees, your Honor.

15 THE COURT: Counsel, what I'll do is this, unless--  
16 unless either of you object, the prevailing party may or may  
17 not be entitled to an attorney's fee. I'm going to let you  
18 submit--

19 MR. SMITH: Affidavits?

20 THE COURT: --affidavits.

21 MR. SMITH: Be happy to do so.

22 THE COURT: Plaintiff rests?

23 MR. SMITH: Rest.

24 THE COURT; Okay. Any other witnesses for the

25 defence?

# SUBCONTRACT

JOB NO. 3HVAC  
TRADENAME Moss U. S. Courthouse

THIS SUBCONTRACT entered into this 12th day of May, 19 92 by and between M & E Construction,  
a Utah corporation, 4792 Oak Terrace, Salt Lake City, Utah 84124, hereinafter known as

"Contractor" and William Lee, d.b.a. Took Mechanical Company, 1733 N. 725 W., W. Bountiful hereinafter known as "Subcontractor"

WHEREAS, the Contractor has entered into a contract, hereinafter called the "Principal Contract" with General Services Administration hereinafter called the "Owner" for the construction of space modification at Frank E. Moss U. S. Courthouse - Project ~~XXXX~~ #7PX2UT04-92 and;

WHEREAS, it is to the mutual advantage of the parties hereto that certain phases of the work provided for in said Contract be performed by a Subcontractor:

NOW, THEREFORE, in consideration of the premises and the mutual promises, agreements and conditions hereinafter set forth, the parties hereto do mutually agree as follows:

ARTICLE I: The Subcontractor shall, for and on behalf of the Contractor, timely fulfill and perform such part of the work of said principal contract as is hereinafter set forth. The Subcontractor shall furnish at his expense all labor, materials, equipment, services, permits, licenses, assessments, fees, supervision, transportation, freight, repairs, supplies, taxes, insurances and everything else of any nature whatsoever necessary to complete his work under this Subcontract in accordance with the terms of the Principal Contract, Specifications, General Conditions and Supplemental General Conditions prepared by General Services Administration Space Management Division, Region 8, Denver, Colorado and in accordance with good construction practices, the following:

1. Hvac work must be completed in accordance with the plans dated 1/14/92; the specifications, with specific reference to WORK REQUIREMENTS #6 HVAC.
2. Subcontractor shall complete its work per the superintendent's schedule.
3. Only the Project Manager, Bert P. Van Komen, is authorized to negotiate change orders with the owner and the subcontractor.
4. Subcontractor shall haul away its own debris weekly.
5. All on site storage shall be coordinated with the superintendent and the owner.
6. Subcontractor shall coordinate final placement of all finish items in its work with other trades, to avoid conflict.
7. Subcontractor shall comply with applicable provisions of General Conditions.

The Subcontractor shall receive for the performance of the above work the sum of Three Thousand Four Hundred Twenty and no/100---- Dollars (\$ 3,420.00 ).

ARTICLE II: The Subcontractor shall commence the work to be performed hereunder on May 17, 1991, and shall thereafter prosecute the same diligently and shall complete the work required in coordination with the other Subcontractors and good construction procedures, and strictly in accordance with the Contractor's construction schedule.

Without relieving Subcontractor of the above time requirements and responsibilities, and only upon prior written approval of the Contractor, Subcontractor may commence the work sooner than the above beginning date for its own convenience.

The Subcontractor shall keep himself informed at all times not only of the progress of his own work, but of the progress of the job as a whole and of the work of others which may affect or be affected by his own progress.

The Subcontractor shall have available a qualified representative on the project to coordinate the work of the Contractor and other Subcontractors and himself at all times, and any instructions given to said representative shall have the same force and effect as if given to the Subcontractor. That representative is Bill Lee, 292-8075 or 560-0823 (Mobile), and any substitution for him shall be given by the Subcontractor in writing.

For the work covered by this Subcontract, the Subcontractor is bound by and will comply with the terms and conditions of the labor agreements to which the General Contractor is a party, in so far as said labor agreements lawfully required Subcontractors to be so bound.

No "breaks" or stoppages of work shall be allowed, including, but not limited to stoppages due to strikes, picketing authorized or not, or any other labor problems. Shop practices detrimental to job-site work are prohibited.

ARTICLE III: Time is the essence of this contract, and Subcontractor recognizes and acknowledges that the Contractor and the Owner will sustain monetary damages if the whole or any part of the job be delayed through the failure of the Subcontractor to perform the work required in accordance with the Principal Contract, Plans and Specifications. In case of such failure by the Subcontractor, the Contractor may, at his option, upon three (3) days written notice to the Subcontractor, take any steps the Contractor deems advisable to see that such job is promptly completed, including the right to secure necessary substitute labor, materials, appliances, or to utilize any of the same and other equipment belonging to the Subcontractor, wherever located, which the Contractor believes necessary to protect his interests in completing this portion of the Subcontractor's work, without, by so doing, waiving any right of action which the Contractor may have against the Subcontractor or his surety, and the Subcontractor or his sureties shall be liable to the Contractor for any liquidated or other damages assessed against the Contractor because of such failure of the Subcontractor and for any costs incurred by the Contractor in the settlement of claims against the Subcontractor or the Contractor, including a reasonable attorney's fee.

The Contractor shall have the right at any time to delay or suspend the whole or any part of the work therein contracted to be done without compensation to the Subcontractor, provided that additional time commensurate with the delay shall be allowed the Subcontractor for completing his work.

ARTICLE IV: The Subcontractor agrees that in making his bid, he has examined the Principal Contract, Plans and Specifications and the project site, and has not relied upon any representations by the Contractor.

The Subcontractor agrees to be bound to the Contractor by the terms of the Principal Contract, the General Conditions, the Plans and Specifications, and to assume toward the Contractor all of the obligations and responsibilities that the Contractor, by those documents, assumed toward the Owner.

The Subcontractor having thoroughly reviewed the Plans and Specifications is aware of no omissions and errors which might affect the costs of the work and/or materials to be performed. Should there be any claim by the Subcontractor for extras from alleged errors or omissions, the cost of the performance of such extra work or materials shall be borne by the Subcontractor, unless such cost is recognized and agreed to by the architect and/or the Owner in writing as a bona fide extra, and only then shall the costs of said extra work or material be borne by the Contractor; provided, however, the Subcontractor has complied with the following paragraph.

The Subcontractor agrees to make all claims for extras, for extensions of time, and for damages, delays or otherwise, if any, to the Contractor in the manner provided for in the General Conditions of the Principal Contract governing like claims by the Contractor upon the Owner; excepting that the time within which the Subcontractor shall make said claims shall be ten days. The Contractor shall not be liable to the Subcontractor for any change, modification or extra to the Subcontractor's work resulting from the Owner's actions or directions, unless and until the Owner pays the Contractor for said change, modification or extra.

ARTICLE V Should the Subcontractor fail promptly pay those furnishing materials and/or labor at his direction on this project - Should the Subcontractor fail to perform promptly and adequately the Subcontract work, the Contractor may notify the Subcontractor in writing of any such failure, request the Subcontractor to remedy such failure within three (3) days. If the Subcontractor fails to remedy such failure within three (3) days, the Contractor may withhold all monies presently owing or to become due the Subcontractor thereafter, and may use said monies to pay the unpaid laborers, materials, suppliers and subcontractors, if any. The Contractor may also complete or have completed any unfinished Subcontract work and may withhold monies owing to the Subcontractor or to be due the Subcontractor thereafter, and may apply said monies toward payment for said unfinished work. The Contractor may charge to the Subcontractor all costs, including overhead, and profit necessary to complete the Subcontract work. The foregoing shall be in addition to any other remedies for breach of contract which the Contractor may have by reason of any failure of Subcontractor.

The Contractor shall have a lien upon all of the Subcontractor's materials and equipment on the job to secure payment of all of the Subcontractor's unpaid labor, materials, or his subcontractors. Subcontractor shall pay a reasonable attorney's fee, together with any costs incurred by the Contractor in the event of default in or breach of any of the terms or provisions of this agreement.

ARTICLE V(a) In the event the parties hereto have one or more other subcontracts between them the Contractor may withhold monies owing on any subcontract as an offset against any breach by the subcontractor of any other subcontract between them.

ARTICLE VI Payment by the Contractor to the Subcontractor shall be made out of funds received by the Contractor from the Owner as the work progresses and pursuant to requests for payment received from the Subcontractor at the end of each month. Said application for payment shall be accompanied by properly executed lien waivers or other evidence satisfactory to the Contractor that all labor and materials furnished by or through the Subcontractor to that date have been paid for. Payment shall then be made by the Contractor for work covered in said application as it is approved by the Contractor within ten (10) days after receipt of payment for said work from the Owner. However, the Contractor shall not be liable to pay the Subcontractor for any work performed pursuant to the Subcontract for which the Contractor has not been paid by the Owner. The Subcontractor's application for payment shall be submitted on the last day of each month. The payments made pursuant to said requests shall be deemed partial payments, but shall not include 10% which shall be retained out of each payment until final completion, acceptance and payment by the Owner. Until such final payment by the Owner the work and contract of the Subcontractor shall not be deemed completed. At final payment the Subcontractor shall furnish a full release, releasing the Contractor and the Owner from any and all claims whatsoever arising out of and in connection with the performance of the work covered under this Subcontract and indemnifying and agreeing to save the Contractor and Owner harmless from any such claims.

ARTICLE VII No additions, deletions to or modification of the Subcontract shall be valid unless in writing and signed by the Contractor. No extra compensations shall be paid to nor credits allowed the Subcontractor, except as may be agreed upon in writing by the Contractor and Subcontractor prior to the performance of the work for which the extras or credits are claimed.

The Subcontractor, notwithstanding any disagreement as to the amount of payment for any additional work or change in the Plans and Specifications properly ordered by the Contractor or by the Owner through the Contractor, shall proceed with the performance of the work required, and may make a claim for extra compensation in accordance with the appropriate Article set forth above. The Contractor shall not be liable for any such work or materials rendered in good faith by the Subcontractor, unless it has been properly authorized in writing in accordance with the above provisions by authorized officers of the contracting corporation and in accordance with the above provisions. A list of the authorized officers shall be submitted to the Subcontractor with the fully executed Subcontract.

ARTICLE VIII The Subcontractor will remedy immediately upon demand by the Contractor, any defects in the Subcontractor's work. The Subcontractor will be obligated upon demand by the Contractor to remedy any defects in his work or pay any damage to other work resulting from said defects appearing within one (1) year from date of final acceptance of the Principal Contract. However, it is understood and agreed that where the Plans, Specifications or General Conditions require a longer period of guarantee, said longer guarantee shall continue for such longer period.

ARTICLE IX The Subcontractor will comply with all applicable safety laws and regulations, with all federal, state and local laws applicable to the work hereunder, including Workmen's Compensation Insurance, Unemployment, Social Security Laws, tax requirements and all permits and requirements. The Subcontractor will furnish to the Contractor immediately upon execution of this Contract, certificates from the Subcontractor's insurance carrier, showing that the Subcontractor is covered by Workmen's Compensation Insurance, as required by law, Public Liability Insurance and Property Damage Insurance, all insurance to be in accordance with the attached transmittal letter and within the limits as stated in this attachment and/or specifications. Subcontractor's Certificate of Insurance shall include a 10 day notice of cancellation clause. If the Subcontractor fails to submit such documents, the Contractor may, in its discretion, take such steps as it deems necessary to provide the proper protection and charge all costs incurred thereby to the Subcontractor.

The Subcontractor shall indemnify and save harmless, and defend the Contractor and the Owner (including their agents and employees while acting in the course of their employment or scope of their duties as such) from all claims, suits, actions or every name, kind and description brought for or on account of injuries to or death of any person or for damage to property during the progress of the work or at any time before the completion and final acceptance resulting from the construction of the work, or by or in consequence of any negligence in guarding the work, or use of improper materials in construction of the work, caused or claimed to be caused by any act, omission, fault or negligence which the Subcontractor, his employees or agents, are legally liable for arising out of the performance of the Subcontract.

The Subcontractor shall indemnify and save harmless, and defend the Contractor from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent right arising in connection with this Subcontract and anything done thereunder.

The Subcontractor agrees to hold the Owner, Contractor and other Subcontractors on the above project harmless from any and all accidents, damages, liens, suits, judgments and any and all matters of action resulting from the Subcontractor's breach of the said Subcontract, and from the Subcontractor's negligence or failure fully to perform said Subcontract work.

ARTICLE X During the performance of this Subcontract, the Subcontractor agrees to not discriminate against any employee because of race, color, creed or national origin, as outlined in the Equal Opportunity Clause of the Regulations of Executive Order 11246 of September 24, 1965, as amended by subsequent Executive Order. These executive orders and their regulations are hereby made a part of this Subcontract by reference. However, if any employee discriminates against another or conducts himself in such a manner as to interfere with or harass the program at the job site or uses words to the detriment of the success of this contract, he shall promptly be removed from the job.

ARTICLE XI Shop drawings shall be furnished strictly in accordance with the applicable Sections of the General Conditions and Special Conditions, the first submittal to be made on or before July 15, 1992 and thereafter in sufficient advance time so as to permit submittal to the Owner, approval by the Owner and return to the Subcontractor in order that the Subcontractor's work shall proceed according to the requirements of this Subcontract. All submittals of shop drawings together with all other correspondence relating to the job shall be made to the Contractor and in no event shall be made directly to the Architect or Owner.

ARTICLE XII Subcontractor within seven (7) days after the date of this contract, as shown on the face hereof, shall order all materials required to complete this contract and submit complete material list to Contractor, including the following information: Date each item ordered, names, addresses, amounts of each order, telephone numbers of suppliers, and names and routing of carriers and promised delivery dates. The Subcontractor agrees to air freight at his own expense, any item which regular freight would deliver too late to meet the General Contractor's construction schedule if said Subcontractor failed to order materials promptly.

ARTICLE XIII Any incidental work which is necessary to complete this Contract and is not explicitly covered in any other craft will be promptly executed by this Subcontractor at his own expense so as not to delay the job.

ARTICLE XIV The Subcontractor agrees that he will not pledge, assign or otherwise transfer any part or all of this Subcontract, or any monies payable to Subcontractor hereunder, without advance written permissions and approval of the Contractor, and the approval of such assignment shall in no way relieve or release this Subcontractor from full compliance and responsibility for execution of all the obligations and requirements of this Subcontract.

ARTICLE XV The Subcontractor agrees to do all cleaning up, policing and housekeeping in the area of his Subcontract work and in connection with all Subcontract work performed hereunder. He agrees to protect said work from the work of other subcontractors and third parties, and should his work be damaged before final acceptance by the Owner, said Subcontractor agrees to repair said damage at no cost to the Contractor, provided that if said damage is caused by the Contractor said Subcontractor shall not be obligated to repair such damage.

The foregoing shall also attach to tailgate merchandise supplied by others and delivered to Subcontractor. The Subcontractor shall make a record of such merchandise received by him, both as to the condition and the quantity, and shall advise the Contractor of this information promptly.

ARTICLE XVI The Subcontractor agrees to furnish a Performance and/or Payment Bond in such amounts as the Contractor may require and with an acceptable surety to the Contractor. The cost of any bond so required by the Contractor will be paid by the Contractor, providing it does not exceed the rates published by the Surety Association of America at the time the bonds are requested.

It is agreed that Subcontractor is an independent contractor and is not the agent of Contractor. Subcontractor agrees that he will not pledge, or attempt to pledge, the credit of Contractor or in any way bind or obligate Contractor in any way whatsoever.

IN WITNESS WHEREOF, the parties hereto have executed this Subcontract as of the day and year first above written.

Witness or Attest

CONTRACTOR

(Secretary if Corporation)

By \_\_\_\_\_  
Its

SUBCONTRACTOR.

(Secretary if Corporation)

By \_\_\_\_\_  
Its