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NEVADA ARBITRATION ASSOCIATION

ASPHALT PRODUCTS CORP., a Nevada Corporation d/b/a APCO CONSTRUCTION, Petitioner. vs. The City of Las Vegas, a political Subdivision of the State of Nevada, Respondent.	Case No.: 05-108 **DECISION AND AWARD**
CITY OF LAS VEGAS, a political subdivision of the State of Nevada, Counter-Claimant, vs. ASPHALT PRODUCTS CORPORATION a Nevada Corporation dba APCO CONSTRUCTION, Counter-Respondent.	

We the undersigned Arbitrators, having been designated in accordance with the arbitration agreement entered into by the above-named parties, dated December 17, 2003, and having duly heard the proofs and allegation of the parties, do hereby award as follows:

Decision on APCO's Claim

This arbitration involves a dispute between the Owner, City of Las Vegas ("the City"), and its Contractor, Asphalt Products Corp. ("APCO"), arising out of a $29,731,321.93 construction contract entered into on December 17, 2003 for the construction of Phases 1A and 1B to the Washington Buffalo Park. In general, APCO seeks an equitable adjustment based on its claim that it was delayed in the performance of its work by defective plans issued by the City and that it and its subcontractors were damaged on account of that delay, which, among other things, caused material escalation and other direct costs for which the City failed to compensate them through change orders. The City has filed a

counterclaim in these proceedings alleging, among other things, deficiencies in APCO's work, liquidated damages for delay, and lack of subcontractor bonding. This Award will first address and make findings of fact and conclusions of law with respect to APCO's claims, the City's defenses, and then the City's counterclaim and APCO's defenses.

Findings of Fact and Conclusions of Law

APCO's Claims and the City's Defenses

The contract between APCO and the City was based on a bid set of plans prepared by Stantec Consulting that had not been fully approved by the City's Building and Safety Department. It was not the standard practice of the City to put plans out for bid until they were finally approved by the Building Department as a permit set of drawings.

It appears, from the testimony and exhibits, that this was a high profile project in Councilman Brown's district and that he and his staff were putting pressure on the City's Public Works Department and the Office of Architectural Service (OAS) to get the project bid as soon as possible so it could have a completion date by the end of 2004.

By September of 2003, because of problems between the City's design architect Stantec and the City's Building and Safety Department, the scheduled completion was anticipated to have slipped to the fall of 2005. Mr. Richard Goecke, Director of the City's Public Works Department, told Stantec that he expected the plans to be out of the Building Department by October 15, 2003. That did not happen. On October 24, 2003, Mr. Goecke directed Mr. McNellis, his Deputy Director and head of OAS, against the latter's advice, to get the plans out for bid. Mr. Goecke recognized that incomplete plans and later amendments would result in problems, both in bidding and in the work in the field that would have to be corrected. Mr. Loge, to whom Mr. McNellis reported, acknowledged that the schedule was very tight and that the City could expect a rash of delay claims due to the schedule. Mr. Loge also noted that because of these problems, it was necessary to have a high level of cooperation with the contractor to avoid delays. The City issued Addendum #3 to the plans and specifications on about November 25, 2003, but Mr. Cary Baird of Stantec confirmed that he did not have time to run all of the design changes through the

Building Department prior to bid, that time was Stantec's enemy, and that the drawings were not the best.

At the time of the bid opening on December 5, 2003, an approved set of permit drawings did not exist. Instead, the drawings were not complete and had errors in them, which would result in delay to the contractor and cause the issuance of change orders. In effect, the City was already on notice that its action would interfere with the contractor's performance and cause delay to the contractor and resulting change orders. APCO, as the successful contract bidder, had no knowledge of this problem which the City did not disclose to the bidders.

On December 17, 2003, when the contract was signed, and on January 5, 2004, when the City issued its notice to proceed, APCO still did not have a full set of permit drawings from which it could build the project. On January 8, 2004, APCO gave its first notice of delay due to the City's failure to provide APCO with approved Building Department plans. APCO did not receive the approved permit set of plans from the City until January 18, 2004, some 13 days after the notice to proceed. Although the City was aware of material design changes between the bid set of plans and the permit set of plans, it never disclosed these differences to APCO. To make matters worse, many of these changes were not reflected on the permit set, by clouding and a delta log, as required by industry standards, although Stantec had been directed by the Building Department to show all changes by clouding and a delta log. Some of these were substantive design changes that the City acknowledges would impact APCO's construction in the field. Stantec acknowledged that plan differences went beyond just structural changes and that these differences would affect APCO's ability to prepare submittals and deferred submittals. It would even affect their ability to order materials. The City never explained why there were so many differences between the bid plans and the permit set that didn't relate to structural. All of this significantly and actively interfered with APCO's ability to timely perform the work.

As the dissent points out in Mr. Pelan's letter of January 8, 2004, a comparison of the plans would be needed, but only as to structural for which building and safety had not

given approval. The magnitude of the changes went far beyond structural.

On January 21, 2004, APCO reported to the City that it had discovered design changes on the permit set of plans that were not identified, *i.e.* were not reflected by clouding or a delta log. Stantec acknowledged that these undocumented changes would impact and delay APCO's ability to put together its submittals and deferred submittals, which were required for portions of the project, which was the key to timely completion of the project. Efforts were undertaken by Stantec to identify the changes which were not reflected on the permit plans or set of drawings. On February 18, 2004, APCO received a preliminary list of design changes identified by Stantec. On February 24, 2004, Stantec identified additional changes to the permit set of drawings. On February 27, 2004, APCO sent the City a summary of 174 changes, which it had identified from its first review of the two plans. At the same time, APCO put the City on written notice that there would be a claim for costs and time needed to perform the work as a result of the differences between the bid set and the approved permit set of plans. APCO's consultant eventually identified some 600 differences between the two sets of plans, although most of those were not substantive impact changes. On March 3, 2004, APCO put the City on notice of their subcontractor's material escalation claims due to the plan problems.

In an effort to resolve this problem, the City's architect, Stantec, and APCO met in early March, 2004 and came up with a "consensus set" of drawings. Unfortunately, neither the City nor its architect delivered a set of drawings to the Building Department for their approval in order that they could be used on the project. A copy of the consensus set of drawings was not given even to APCO, requiring APCO to use the permit set of drawings to get Building Department inspections and approval. Since the architect did not want to cloud the drawings to identify changes, the City and its architect continued to provide APCO with additional delta logs identifying the differences between the bid set and the permit set of drawings. Delta logs were issued to APCO at least into June of 2004. Some of these differences related to the restrooms in Phase 1B that were designed by the City and not Stantec.

During this early part of the project, APCO recognized the problems the unmarked changes were causing the project and requested the City to "partner" so that through partnering they could work out these problems. The City realized the problems when they sent the bidding plans out without final Building Department approval and that those problems would require a need to work closely with the contractor to resolve the problems this would create. However, the City never agreed to partner with APCO until near the end of the project, when it was too late, expressing a lack of cooperation in addressing the problems created by the City. APCO continued throughout most of the project to put the City on notice, both in writing and orally, that these unmarked plan changes and deficiencies were impacting APCO and its subcontractors and causing delay to the project. Mr. Barr and other representatives of the City acknowledged that there was not a time during the project that these problems were not impacting and delaying the project.

Because of other deficiencies in the plans, change orders were being issued by the City. The City gave APCO no extension of time because of these change orders. The City seemed determined to have APCO complete both Phases 1A and 1B at the times specified in the contract. Furthermore, APCO was advised orally by the City's representatives that if any time was requested, the change orders would not be processed and that the time and delay issues would be worked out at the end of the project. The City's extreme position became apparent when the City issued the Contract Change Directive (CCD) to APCO for the installation of artificial turf in lieu of natural turf on most of the soccer fields, when it at the same time refused to give APCO any additional time or acceleration costs to perform this substantial over three million dollar change to the 1B Phase of the contract.

In defense of APCO's Request for Equitable Adjustment (REA), the City argues that APCO did not comply with the contract provisions regarding notice, GC 39(G) Tech. Spec. and 1200 ¶ 1.4, and the claims provision Tech. Spec. and 1200 ¶ 1.4, regarding the need to provide a critical path schedule analysis and to show causation in order to recover delay damages. These arguments are without merit given that APCO did provide written notice as required by the contract, and given the City's conduct in issuing plans that it knew were

defective and which would have a substantial effect on APCO's ability to timely complete the project. In effect, the City, by its conduct, intentionally interfered with APCO's ability to timely perform and was in first material breach of the contract and either waived these provisions or is now estopped to assert them as a defense. The City never cured this breach.

Even if the contract provisions requiring notice had not been in effect, the City had adequate notice of the delay it was causing as a result of the City's actions in delivering to APCO a set of permit drawings that were defective and did not reflect the changes that were made to the bid plans and by addendum 3. In fact, the City on notice of the delay issue undertook to quantify the delay in July of 2004 when it hired Harris and Associates to analyze the impact to the schedule. Under the contract schedule, APCO was to complete Phase 1B by January 5, 2004 and phase 1A by May 3, 2005. On August 6, 2004, Harris issued its preliminary schedule review and concluded that Phase 1B's early finish date was March 25, 2005 and Phase 1A's early finish date was July 26, 2005. APCO also conducted at the City's request, a schedule analysis in July 2005 which showed completion of the project within a few days of Harris' late finish date for the project of November 25, 2005. To make matters worse, Harris, in a September 7, 2004 memo to the City, notes that the City after two months had undertaken no effort to get together with the contractor (APCO) to resolve the issues at hand regarding the scheduling problems. Having acknowledged that the plan issues were impacting APCO's schedule, it is difficult for the Panel to understand why the City was not proactive and cooperative with APCO in resolving the issues the City had created. In effect, the City was continuing to breach its duty of cooperation and was interfering with APCO by not affirmatively addressing the problems it knew it had created with respect to the plans.

Although Mr. Barr, who was basically in charge of the project for the City, believed APCO was entitled to extensions of time, he was instructed to send his letter of January 9, 2005 to APCO advising APCO that the City had determined that APCO was in breach of its contract on Phase 1B for not completing the Phase 1B work by January 5, 2005 and was

reserving its right to access liquidated damages. In the January/February, 2005 time period, Mr. Barr and Mr. Lewis were asked by Mr. McNellis and Mr. Loge to evaluate APCO's claim issues. Mr. McNellis sent a letter to APCO requesting that the City's representatives be allowed to examine APCO's records. Mr. Barr and Mr. Lewis reviewed the claim information and, although it is not clear in the record, made a recommendation to Mr. McNellis. Mr. McNellis authorized Mr. Barr to send his recommendation to APCO which he did on February 15, 2005. APCO rejected the recommendation. This is evidence that the City tries to resolve contractor claims at or near the end of the project. The City thereafter indicated it would not consider APCO's claims absent a formal claim being presented. This resulted in APCO making its formal claim notice on February 23, 2005 in the amount of $6,500,000.00. This claim notice was sufficient and justified in light of the City's prior actions discussed above.

APCO's claim letter precipitated City Manager Doug Selby becoming involved with the claim. Perhaps not being happy with Harris' report, the City in the spring of 2005 hired Larry Hampton of RBF Consulting to review the events that had occurred on the project and to do a schedule analysis. The City Manager reported to APCO that Mr. Hampton indicated that additional compensation could be justified based upon receipt of more objective cost, impact data and a more conventional schedule analysis. Mr. Selby offered suggestions on how to resolve the dispute. No agreement apparently came to pass, because Mr. McNellis was instructed by City Management on about May 5, 2005 that the terms of the contract could not be modified and that a letter should be sent to APCO and its bonding company that APCO was in breach of contract for not completing the project on time. In effect, the City was now deciding to rely on the strict terms of the contract to defeat any claim of APCO and its subcontractors.

In addition to the notice issue, the City points out that APCO failed to comply with the claims and disputes provision of the contract. Tech. Spec §1200 ¶1.4, which requires APCO to give timely notice and to show causation and that there was delay to the critical path of the work. Again, there are a number of problems with this defense, although the

record is replete with written and oral notices. First, as with the notice defense, there is the issue of whether the City waived this requirement or is estopped from asserting it as a defense by reason of its conduct. As previously stated, the testimony of APCO and some of the City employees is that the City took position and advised APCO that the claim issues would be addressed at the end of the project. There was the testimony by APCO and its subcontractor that this had also occurred on other City projects.

There is also evidence that the City interfered with the contractor. The contract required APCO to provide updated schedules showing impacts that affected the critical path of the work. Because the City wanted the work to be completed in accordance with the contract schedules, the City refused to allow APCO to produce a schedule that showed the completion was being delayed by impacts. This was brought home to APCO in July of 2004 when it produced a schedule showing delay of completion of the work with its monthly pay request. The City refused to pay the request until APCO provided a new schedule showing that the work would be completed on time. That appeared to raise a question of whether the City is requiring a false statement as a requirement for presenting a claim for payment by the City. According to the City, once APCO was aware that it did not have the permit set of drawings or became aware of the defects in the plans, APCO had to, within 14 days, provide the City with potential cost impact, potential schedule impact and mitigating actions. It would be impossible for a contractor to provide this information early on in a project, much less when the owner's actions are continuing, and interfering with APCO's performance of the contract. In fact, the City's representatives acknowledged that this information would not be available until the end of the project. It appears to the panel that this notice clause requiring all that information, is impossible to comply with as the information is normally not available at the time a contractor becomes aware of a claim. It appears to be designed to eliminate a contractor from making a claim at all. This is more than likely why the City normally prefers to address these issues at the end of the project so that it can make a fair adjustment to the contract.

Under the facts set forth above, the Panel believes that *Eagle's Nest Limited Partnership v. Brunzell,* 99 Nev. 710, 669, P2d 714 (1983) controls the notice and claim issues raised by the City. While Nevada recognizes that generally the contractor must strictly comply with notice and claim provisions of the contract, specific circumstances may cause the Court, as it did in *Eagle's Nest,* to find that those provisions will not be equitably enforced. The City was clearly aware that the issue regarding the plans would cause, and did cause, the contractor to be delayed which would result in increased costs. APCO advised the City in writing and orally throughout the project that it was being delayed. The City led APCO to believe that its claim would be adjusted by the City at the end of the project. Under the circumstances of this case, the Panel will not strictly enforce the claim and dispute provisions of the contract, as we can find no prejudice to the City by not doing so. *Miller Elevator Co. vs. U.S.,* 30 Fed. Ct. 662 (1994).

The Dissent argues that the facts of Eagles Nest decision do not support the facts of this arbitration. To the contrary, APCO did comply with the notice provisions of the contract as best it could in its letter of February 27, 2004, where it advised the City that there would be a claim for costs and time needed to perform the work (a delay claim) as a result of the difference between the bid and permit set of drawings. By this letter, causation was clearly shown. The City, through its representatives, acknowledged that the effect would not be known until the end of the project. Given the City's prior knowledge of the plan discrepancies, "the special circumstances" of this arbitration requires the panel to give equitable treatment to APCO's claim. The Dissent also argues that there was no equitable consideration in Eagle Nest. Both Eagle Nest and this arbitration involve claims for equitable adjustments to the contract.

Because APCO is entitled to an equitable adjustment for its delay claim, we must next consider the length of the delay period. The City urges that the delay, if any, cannot extend beyond the completion date of the contract, May 3, 2005. The City cites to the contract provision that says "no additional compensation will be allowed to the contractor for delay to an early completion schedule." Division 1, Section 01330. The Panel has

previously ruled on this issue that this clause is contrary to public policy under N.R.S. § 108, 2453, and therefore void and unenforceable. (Order regarding early completion dated July 3, 2008).

It appears that the Dissent wants to urge that this is really a "no damages for delay clause" that is valid and enforceable under Nevada law. *J.A. Jones Construction Co. v. Lehrer*, 120 Nev. 277, 89 P.3d 1009, (2004). Unfortunately the J.A. Jones has no application to the facts of this arbitration. The court in J.A. Jones was construing a contract clause in a contract that appears to have been entered into in 1997. Subsequent to the court's 2004 decision, the Nevada legislature in 2005 did away with "no damages for delay" clauses by making them contrary to public policy. N.R.S. § 108, 2453(2)(e).

But even if J.A. Jones had some applicability, the court recognizes that direct interference is a violation of the implied covenant of good faith and fair dealing and is therefore an exception to the "no damages for delay" clause. The Panel has found that the City actively and intentionally interfered with the contractor's performance, and therefore breached the covenant of good faith and fair dealing and thus acted in bad faith towards APCO. Because of this, and the Nevada statute, the provisions of Division 1, Section 01330 of the contract are unenforceable.

According to APCO's consultant, Mr. Frehner, the City's actions were such that he could not calculate a critical as-built path for the project. He calculated February 10, 2005 as the completion date allowing for some inefficiency on the part of APCO and its subcontractor, even though no inefficiency was noted to APCO by the City during the performance of the contract. The City's expert on the critical path of the project was of little help to the Panel since he did no calculation of the critical path prior to the contract completion date for Phase 1A, May 3, 2005. He assumed that the float had been used up by that date, so there was no delay to the project until the completion date was reached. His assumption was wrong, because float on a project relates to non-critical items and not to work that is on the critical path. The City's expert either could not calculate the critical path prior to the contract completion date or, for his own reasons, chose not to.

Because of the City's continuous interference with APCOs performance of the contract, the Panel finds that it was impossible to calculate the critical path of the project. That however, does not prevent APCO and its subcontractors from proving damages when the City is at fault for the delay. Other methods of computing damages are proper including "Jury Verdict" damages as a last resort. CEMS, Inc. v. Fed. Cl., 59 Fed.Ct. 168, 228 (2003). The Panel believes that another method may be used given the facts of this Arbitration.

It was the testimony of APCO and its subcontractors that they planned to complete the project in one year. As a part of the contract, APCO was required at the beginning of the project to give the City a base line schedule for completing the project. The schedule was to show the completion date set forth in the project and the critical path. The base line schedule submitted by APCO was approved by the City. It was APCO's testimony that the only reason they showed completion on May 3, 2005 was because the City required them to do so, notwithstanding that they intended to complete early.

When one examines the base line schedule approved by the City, it is readily apparent that APCO had in fact intended to complete early. All items in the schedule except for signage, landscaping, inspections, clean-ups and punch list and close out documents were shown being completed by January 1, 2005. Signage was to be done by February 1, 2005 with the balance of the items showing May 3, 2005. These later items would normally be completed at the same time as the others in January of 2005. We agree with Mr. Frehner's conclusions that, given the active interference by the City and its lack of cooperation that at the end of the project, it would have been impossible to come up with an as-built critical path for the project, although causation for the delay was clearly shown.

The City's contract would almost, on the face of it, appear to be iron clad to prevent a contractor from making a delay claim based on oral representations of those in direct charge of the project. The effectiveness of such provisions, however, is only as good as the conduct of its representatives in the field. This issue boils down to whether the oral representations of Mr. Lewis and Mr. Barr that APCO could present its delay claims at the

end of the project. To some extent, this is a creditability issue as Mr. Pelan and Mr. Platt for the contractors testified those statements were made. The Panel resolves these conflicts in favor of APCO.

There were many factors affecting Mr. Lewis' and Mr. Barr's testimony including censure by the City. There was great pressure on these individuals not to admit their oral representations, which resulted in their not answering questions directly and when pressured for an answer to equivocate. But the evidence that really supports this conclusion, is the fact that both City employees admitted that the evidence to support a delay claim wouldn't be available until the end of the project. Notwithstanding the terms of the contract, it appears that on other City projects contractors were allowed to present delay claims at the end of the project. The evidence in this arbitration discloses that their claims were being considered by the City near the end of the project until some one or more in City management (unidentified) decided to enforce the terms of the contract which were clearly waived.

There were other areas in the performance of the work when the City interfered with APCO's operation. One of these relates to the BLM dirt at the West Service Center. The City had designated this dirt for use on the Washington-Buffalo project, but did not disclose this to any of the bidders. From the soils report, APCO had concluded at the time of bid, that there would be no need to import dirt to the project. As it turned out, there was more shrink in the dirt than the soils report indicated and APCO was required to import dirt. The City was aware of this and still did not tell APCO about the BLM dirt that had been designated for the project.

APCO initially tried to obtain dirt from other sources, but the dirt was rejected by the City because it did not meet the contract specifications. In the process, APCO learned about the BLM dirt at the West Service Center and requested that it be allowed to use that dirt. Initially, Mr. McNellis rejected APCOs request but then later agreed if APCO would pay one dollar ($1.00) per cubic yard. This violated the City's agreement with the BLM that did not allow the City to charge others for the use of the dirt. This issue as to the dirt

continued from March 2004 until July 2004 when the City finally agreed to allow APCO to use the dirt without charge. APCO then requested the City to allow it to use its dust permit at the West Service Center yard. The City refused, which delayed APCO about 10 more days in acquiring its own dust permit before it could use the dirt in its earth fill operation.

The Dissent is also confused about the grading permit for the project. The dust control permit resolved in July of 2004 relates to the West Service Center area from which APCO obtained the BLM dirt. The grading permit for the project was issued in January, 2004.

The Dissent appears to argue that APCO's dirt operation was delayed because of caliche which was not the responsibility of the City. APCO initially planned to start its dirt operation at the west end of the project in Phase 1A and work east to the Buffalo end. Because of the caliche problem, APCO started a second dirt operation at the east end of the project so as not to delay the dirt operation. But the dirt operation appears to have been delayed, not only by the City's actions with respect to the BLM dirt, but also due to the City's initial refusal to allow APCO to use the manmade fill and the lack of layout dimensions for the Champion Tennis Court area. By starting two dirt operations, APCO for the most part, overcame any delay with respect to their dirt operations.

Another issue that the Dissent raises with respect to a possible dirt delay relates to the soccer field. When APCO learned of the possible change to artificial turf, it took the risk to modify its dirt operation to accommodate the change even though turf had not been formally approved. Even the City acknowledged that what APCO did benefitted the City cost wise and avoided any additional delay when turf was formally approved.

Finally, it does not appear to the Panel that these dirt issues created a delay that would have been on the critical path of the project, but it certainly complicated the ability to determine the critical path of the project.

Another issue raised by the Dissent relates to CTS Shade Trellises. As designed, these trellises were so large that they could not fit in an oven to be powder coated and were too large to be transported to the site. In lieu of welding the trellises, APCO suggested that

the trellises be bolted so they could be powder coated and transported to the project. Stantec's structural engineer who had designed the footings for the trellises refused to allow his footing design to be used if the trellises were bolted. In order to complete the work, APCO had to assume the design responsibility of Stantec's structural engineer and submit its own engineered drawings to the City's Building and Safety Department. This was just another example of the City's failure to cooperate and its interference with APCO's work.

The Dissent appears to take great exception to the testimony of APCO's expert Gregory Frehner. While the Panel does not agree to how he calculated the days of delay, we believe he was correct in saying that the critical path of the project could not be calculated given the state of the City's plans, their constant interference and failure to cooperate in overcoming the problems they had created.

We will now address the damages claims of APCO and its subcontractors.

APCO's Damage Claims

1. Turf Trenching Claim.

APCO claims it paid RCI $81,000.00 for additional trenching that it did not include in the final CCD amount for the synthetic turf changes. While the City does not address this claim in its closing brief, it appears to the Panel that this is in response to the City's claims relative to the turf CCD. As the Dissent points out, the direct costs of the CCD was settled at that time. The only thing left open was time and acceleration along with any adjustment the City claims, which will be addressed in that portion of this decision. Since the direct costs of the CCD were settled, this claim is therefore disallowed.

2. Price Escalation.

APCO is claiming $137,203.00 for increased costs associated with the chain link fence. Mr. Knopf corrected his initial calculations of this claim in his April 14, 2008 report taking into consideration the more accurate testimony of Mr. Walker. His final calculation is based on the difference between the December 3, 2004 APCO bid for the chain link fence and the final subcontract price of Tiberti. APCO received a revised quote from Tiberti on

February 26, 2005, which appears to be firm if accepted within 30 days. No information is provided as to what price increased prior to that date. RFI-71, as to the tennis court light poles being part of the fence, was resolved on March 26, 2004. The 30 days in the February 26, 2004 quote would not have expired until March 27, 2004. No explanation is given as to why APCO did not accept the quote on March 26 or 27. Instead, the April 30 quote was used as the basis of Tiberti's subcontract price. The Panel finds that APCO has not sustained its burden of proof as to why the City is responsible for this increase.

3. Delay Damages (Direct Field Overhead)

The evidence clearly showed, even by the City's own admission, that APCO was delayed in its anticipated performance of the contract by reason of the plans that the City knew were defective when it issued its notice to proceed on January 5, 2004. APCO anticipated early completion of the project by February 2005. Based on the evidence, the early completion date determined by the Panel is February 10, 2005, with the project being substantially complete on September 2, 2005. No time is allowed after that date as APCO was simply performing what amounts to punch list work or cleaning up/deficiencies in its work. The Panel calculates that there were 204 days of delay. Based on our analysis of Mr. Knopf's and Mr. Haeger's reports on APCO's direct field overhead costs, we find a daily rate of $1,617.00 for a total delay claim of $329,868.00.

4. Mark-up for Subcontractors.

The specifications of § 01200 ¶ 1.5M, allows APCO a 5% mark-upon all work performed by in excess of $50,000, but does not allow the mark-up on subcontractors delay damages. APCO cites N.R.S. § 338.140(1)(c), to the effect that the City cannot draft specification so as to hold the bidder responsible for extra costs as a result of errors and omissions in the contract documents. The Panel finds that the statute has no applicability to the 5% mark-up as this is not a cost that APCO has incurred. It is not a delay damages. The Panel finds that as to all other claims of the subcontractors, the 5% mark-up is applicable. These claims allowed by the Panel total $443,479. APCO is awarded the 5% on these claims which total $22,174.00.

5. Unpaid Pay Application 18 and 19.

The City has agreed that APCO is entitled to $139,711.00 subject to offset on its counterclaim.

6. Retention.

The City acknowledges that APCO is due $1,009,556.00 in retention. Again, this is subject to the offset, if any, the City is entitled to based upon its counterclaim.

Pass-Through Claims of Subcontractors

It is the City's position that APCO cannot pass through the claims of the subcontractors. It appears that the City relies on the indemnity provisions of the General Condition G.C.8 of the contract between APCO and the City's vague argument that the City has not waived its sovereign immunity, and upon the U.S. Court of Claims case of *Severin v. United States*, 99 Ct.Cl. 435 (1943). None of these arguments are well-taken.

Under the indemnity clause cited in the contract, G.C.8, it would appear that the City is requiring APCO to indemnify it for damages arising out of the performance of the contract which were caused by or resulted from the City's own acts or negligence. Therefore, as construed by the City, even if the subcontractor had a claim that arose from the acts of the City, that claim cannot be passed through to the City because APCO agreed to indemnify the City regardless of whether the acts were caused in part by the City.

The clause, as interpreted by the City, does not make any sense when other provisions of the contract allow for claims to be made against the City when the City is at fault. In effect, the clause becomes ambiguous when interpreted as a whole with these other provisions of the contract. The question is how would the Nevada courts construe such a clause. We found no Nevada case on point, however, the withdrawn Nevada case of *Calloway v. City of Reno*, 113 Nev. 564, 577-578, 939 P.2d 1020 (1997) does give us some indication of how the court would construe this clause. That case was withdrawn because the court felt that it should have been decided on the economic loss rule, not because of its interpretation of the indemnity clause was wrong.

The court noted that indemnity clauses are strictly construed particularly when the indemnitee's claim that the indemnitee should be indemnified against its own negligence. Ambiguous indemnity is to be construed against the indemnitor when it is the drafter of the agreement. In addition, when an indemnitee seeks indemnification of its own negligent acts, the clause must clearly and unequivocally express the indemnitor's assumption of liability for the negligent acts of the indemnitee. The reasons cited by the court provide a sound basis for rejecting the City's indemnity claim. If strictly construed, the indemnity clause is ambiguous and does not reflect any clear and unequivocal expression on APCO's part to assume such liability. Additionally, the subcontractor's claims are based on a breach of contract and not negligence, so the indemnity does not apply.

It would appear from the City's citation to *George Hyman Construction Co. v. United States*, 30 Fed.Cl. 170 (1993) and *Interstate Contracting Corp. v. City of Dallas*, 2003 WL 21693466, that the City is arguing that it has a sovereign immunity defense against the pass-through claims of the subcontractors. Again, neither of the cases support the City's position, given the fact that the claims are not being brought directly against the City by the subcontractors. In fact, both cases recognize that subcontractor claims can be brought by the contractor as pass-through claims against the owner when the contractor still has conditional liability to the subcontractor. In *George Hyman*, as in *Severin*, the Courts found that the subcontractors had completely released the contractor for the claims being sought to be passed through to the government. Since the contractors had no liability to the subcontractors, the government had no liability to the contractors.

The City's citation to the *Interstate* case is interesting. The Westlaw citation is to the appellant City of Dallas' reply brief, not to the Court's decision, which is found at 135 S.W.3d 605 (Tex. 2004). Not only did the Court not allow the sovereign immunity defense, it recognized the rule that the owner must prove that the contractor would not be liable to the subcontractor if it is to have a defense to a pass-through claim. The Court refers us to at least 18 state jurisdictions that have adopted the federal rule on pass-through claims. Only one jurisdiction, Connecticut, has used sovereign immunity to reject pass-through claims.

Contrary to the Dissent, the Nevada Federal District Court has recognized the federal rule as the Nevada law in *Frank Brisco Co. v. County of Clark*, 772 F.Supp. 513 (D.Nev. 1991). In fact, the vast majority of the state courts addressing this issue have recognized the Severin doctrine. Basically, the Court held that the clause in the subcontract must completely exonerate the prime contractor from liability before a pass-through claim may be disallowed. In other words, the release must expressly negate any liability of the prime contractor. The City, in its Findings of Fact and Conclusions of Law, has not cited the Panel to any provision of the subcontract where it contends that the subcontractors expressly released the contractor from their direct claims, escalation claims, or delay claims. The Panel has examined the subcontract and have found none. In fact, under the Changes and Claims clauses of the subcontract ¶ 5, it appears, under ¶ 5.4, the subcontractor's rights were preserved so that they could participate with the contractor in presenting their pass-through claim. If the other clauses cited in the Dissent were to have any meaning, there would be no purpose in pass-through language of ¶ 5.4. We resolved this ambiguity in favor of APCO and against the drafter of the agreement, the City. This clause was more clearly announced in the "Claims Presentation Agreement." Basically, the dissent wants to argue the facts which the Panel has resolved in favor of APCO and its subcontractors.

The City has failed to show, by a preponderance of the evidence, that the subcontractors released their claims caused by the City's alleged breach of contract. The Panel, therefore, finds that their claims may be considered and ruled upon by the Panel.

Claims of Subcontractors

Richardson's Construction Claims

1. **Increased Direct Costs**

a) **COR 1.2 - Owner Furnished Equipment** – The Panel, having reviewed both the bid and permit set of plans, finds that the equipment in question was to be provided by Richardson and not the City. The claim is denied.

b) **COR 54 – Shear Wall Windows** – The Panel has inspected the pro shop and does not find any windows in the break room. The window which Richardson

refers to is in the conference room. The installation appears to be in conformance with the plans. The Panel, therefore, denies this claim.

c) **COR 84 – Mop Sink** – The City acknowledges this change and the claim is allowed for $268.00.

d) **COR 87 – Men's Restroom Lights** – The Panel has inspected the men's restroom at the pro shop. There was no gap at the wall where the light fixtures are attached. The fixtures extended out from the wall creating a gap between the light fixtures. Nothing was filled in between the light fixtures. This claim is denied.

e) **COR 88 – Pro-shop Restroom Lights** – The Panel inspected the pro shop restroom and could not observe the type of changes that Richardson described. This claim is denied.

f) **COR 96 – Paper Towel Holders** – The City acknowledges this addition and the claim is allowed for $290.00.

g) **Steel Foreman Supervision** – This claim was not presented to the City until the project was concluded. Richardson has not sustained its burden of proof that the City should be responsible for this claim. The claim is denied.

h) There were other direct claims of Richardson that were addressed by the City in its proposed findings which were not addressed in APCO's closing brief. Those claims, if not already withdrawn, are deemed denied by the Panel.

The Total allowed in Richardson's claim for increased direct costs is $558.00.

2. **Price Escalation** – This claim relates to escalation of steel, concrete and wood incurred by Richardson as the result of the City's defective and insufficient plans. As to concrete and wood, the Panel finds that Richardson failed in its burden of proof on these items and that portion of the claim is denied.

Richardson testified on its steel claim that even if everything had gone without a problem, it would not have expected to get the steel before June 4, 2004. It also appears from the record that it did nothing prior to that date to get a firm quote for the steel. By that date, most of the steel escalation had occurred. The City estimates that by that date,

three-fourths of the increase had occurred. The Panel finds this to be a reasonable estimate. The Panel allows for one-fourth of Richardson's steel escalation claim, or $71,473.00.

3. **Direct Field Overhead – Delay** – Throughout the project, Richardson put APCO on written notice that Richardson was being delayed due to the defective permit set plans that the City had issued to APCO. With respect to Richardson's work, this was passed on both in writing and orally to the City. Not only did the City's on-site personnel acknowledge this, even their superiors were aware of it and offered to help, particularly when the City's architect was not cooperating in getting information back to APCO so that the differences could be corrected. Although the City reserved its right to impose liquidated damages for failing to complete Phase 1B by January 5, 2005, the City appeared, in its brief to APCO's claim, to have extended that date to May 3, 2005 as the date for completing Phase 1A. This is an apparent effort to get around a lot of delays that the City caused to Phase 1B. The City, in its counterclaim, does appear to be asserting a counterclaim for liquidated damages for Phase 1B. The Panel will address this issue again when it discusses the City's counterclaim. The Panel, however, has determined that the project could have been completed much earlier, except for the City's actions and therefore, does not consider the January 5, 2005 or May 3, 2005 dates as controlling the delay damages incurred by APCO and its subcontractors because of the defective plans, the City's interference and the breach of the City's duty of cooperation. It is true that many of the plan deficiencies in Richardson's scope of the work were corrected by issuances of COR, which reflected no time extensions. However, as we noted earlier, this was because the City would not, if time was requested, process the COR.

Under the base line schedule, Richardson's work was to be completed by December 31, 2004. Although, there was some delay in obtaining inspection which was the fault of the City's retained inspectors, the Panel finds that Richardson was substantially complete on June 30, 2005. This amounts to 181 days of delay. The daily overhead rate by Mr. Knopf was computed at $922.00 per day, while Mr. Haeger for the City computed it at $597.00 per day. Mr. Haeger did not include equipment. We find Mr. Knopf's rate more accurate and

assess Richardson's delay damages at $166,882.00 against the City.

4. **Approved Change Order** – During his testimony, Mr. Walker noted that there were two change orders submitted by APCO for which payment had not been requested and was not included in APCO's claim. Mr. Walker acknowledged that the City owed APCO for the change orders. They were CO-122, pro shop louvered doors in the amount of $3,606.47, and CO-127, sealing wall paint for $2,613.13. The Panel will allow this as a claim for $6,237.60.

<u>CG&B Claims</u>

1. **Increased Direct Costs**

a) **Monument Wall** – CG&B acknowledged that it included in its bid $24,375.00 for the concrete monument wall called for in the Phase 1B plans and alternate 5, but did not include the foundation for the wall because its location was not indentified properly in the plans. Since you don't build a 10' high wall without a foundation, CG&B was under a duty prior to submitting its bid to advise the City of the problem. This obligation is set forth in the contract, 1TB.3. Having failed to do this, the claim is denied.

b) **Light Pole Bases** – CG&B's assumption of the light pole foundations is not based on anything set forth in the plans. All addendum 3 says at 3.14 is that the light poles shall be "direct bury". It says nothing about changing the plan foundation requirements. Sheet SD-15 is not to scale and specifically references light pole footings to the electrical structural plans. The footing details are found on SS-12, detail 5, which requires reinforced footings to a depth of 10'. The Panel can find no basis for CG&B's belief. If they had questions they should have asked. They did not and the claim is denied.

c) **Tennis Court Screen Wall** – City acknowledges that there is sufficient ambiguity to allow this cost at $4,000.00.

2. **Price Escalation Chain** – CG&B makes two price escalation claims, one for steel and the other for concrete.

Steel – CG&B made its bid to APCO in early December 2003 but did not sign its subcontract until March 30, 2004. Steel prices had increased during this period of time.

The price escalation prior to the execution of the subcontract is not the responsibility of the City as CG&B had assumed that risk. Its inability to order steel and its lack of storage and concern for rust is not the responsibility of the City. This claim is denied.

Concrete – CG&B was able to lock in its price for concrete through June 1, 2004. Under the base line schedule, it was to start the tennis court slab on April 19, 2004 and complete the court by July 19, 2004. The same schedule applied to the sidewalks in the tennis court area. The concrete walks in the soccer field area were to start April 1, 2004 and be finished by December 1, 2004. The concrete walks in the parking lot area were to start on May 17, 2004 and finished on August 2, 2004. As can be seen by the base line schedule, a lot of the concrete work would be performed after June 1, 2004, when the price of concrete went up. FTI calculated the escalation cost on applying the differences between the bid cost and the escalated cost to all the concrete which CG&B delivered to the project. Since much of the concrete would have been furnished to the project after June 1st under the base line schedule, FTI's calculation is erroneous. CG&B would only be entitled to escalation on the difference in the amount of concrete it planned to pour before June 1st and what it actually poured before that date. Unfortunately, the Panel does not have those cubic yards and therefore, CG&B has failed in its burden of proof and the claim is therefore denied.

3. **Direct Field overhead** – Delay – Under the base line schedule, the last item to be completed by CG&B was the monument walls on December 31, 2004. Except for repairs to sidewalks, it appears that CG&B's work was substantially completed by April 26, 2005. This amounts to 115 days of delay. The City agrees that CG&B incurred a daily field overhead rate of $579.00 per day. The Panel calculates the delay damages at $66,585.00.

Wheeler Electric Claims

1. **Increased Direct Costs** – Wheeler modified its claims seeking to recover only the cost of the base plates for the light poles required after the RF1-71 changes. Wheeler is not seeking its labor costs. The City does not dispute Wheeler's material cost claim of $35,265.00, which is allowed by the Panel.

2. **Direct Field Overhead** – Delay – It appears under the base line schedule, Wheeler's work was to be complete by September 15, 2004. Except for some minor electrical change orders, inspection problems and punch list items, it appears that Wheeler was substantially complete with its work on May 25, 2005. This period of delay, 252 days, is the result of deficiency in the plans that complicated and delayed Wheeler's work. In calculating the daily overhead rate, the Panel does not consider Ryan Frei as a supervisor. When you deduct out his daily labor rate plus burden from Mr. Knopf, daily rates of $562.00 per day, you have a daily field overhead rate of $280.00. Multiplying this rate times the period of delay, the daily damages total $70,560.00, which the Panel allows.

Northstar's Claims

1. **Increased Direct Costs**

a) **Dimension Scale Conflict** – John Cramption of Northstar reviewed the plans for the championship's tennis stadium (CTS) to prepare Northstar's bid for the project. He used plan sheet SS-2 to prepare his bid that contained a scale of 1/8" = 1'. Mr. Boone of Northstar who built CTS used a 1" = 1' scale, which is shown on plan sheet SD-2. The other SD plan sheets showed a 1/8" = 1' scale. In actuality, Boone built STC per sketches provided by Stantec, SKE 1.2 – SKE 1.4, which had a scale of 1" = 1'. Mr. Boone was unaware that Mr. Crampton's bid was based on the 1/8" = 1' scale found on SS-2. In defending this claim, the City claims that during the bidding process Northstar asked APCO about some dimensions on SD-7 and SS10 and that this somehow relates to the discrepancy between the 1/8" = 1' scale and the 1" = 1' scale. The testimony of Northstar is clear that they did not discover this until after they had completed the CTS. This discrepancy that the City refers to goes to the questions raised by RF1 #1, which related to the layout of the CTS not the dimensions of the structure itself. The City also indicates that plan sheet SS-2 refers to SD-2, and that should have put Northstar on notice of the dimension discrepancy. The Panel could not find such a reference. Given the problems with the plans that the Panel had previously pointed out, this claim is approved by the Panel.

The City does raise some question as to the amount of claim. Northstar used an estimated cost approach since it didn't discover the error until CTS was completed. The Panel finds that this was a reasonable way to calculate the costs under the circumstance, and results in a fair estimate of the damages. *Miller Elevator Co. vs. US,* 30 Fed. Ct. at 702. Accordingly, the claim is allowed for $127,822.00.

b) Expansion Joint – There were no control or expansion joints called out in the plans for the concrete in the CTS. After this was pointed out by one of the City's inspectors, the City in RFI-52 provided the detail where the joints were to be placed. Northstar estimated the cost at $26,645.60. In May of 2004, Northstar indicated that it would not bill the City for these costs and sent a letter to that effect to APCO dated May 13, 2004. Before APCO sent the letter to the City, Northstar, because it was unhappy with some actions by the City, requested APCO not to send the letter to the City because they intended to bill the City for this cost. Northstar apparently forgot to send the City a proposed change order (PCO) for this work. Northstar discovered this when they were putting together the claim for equitable adjustment. The City contends that there was an agreement not to bill for the expansion joints and that under the contract, the claim is barred because it is too late. The Panel finds no merit to these defenses. No written agreement was ever delivered to the City and there was a previously stated understanding by the City that they would consider claims at the end of the project so the claims and dispute provisions have been waived or the City is estopped from asserting them. Furthermore, this was a deficiency in the plans which the City requested be corrected. The City received a benefit and should pay for the cost of the expansion joints in the amount of $26,646.00, which the Panel finds is reasonable.

c) Added Footings, Walls and Steps – The bid set of drawings SS-2, which Mr. Crampton used to prepare Northstar's bid, identified only one set of stairs to the VIP section. The SD sheets showed two sets of stairs. The permit set did not change SS-2. The City acknowledges this discrepancy but defends payment based on the May 13, 2004 letter, which the City did not receive and CG&B's delay in making the claim. The additions

of the second set of stairs included adding additional steps to both sets of stairs. This was clearly additional work which was not included in CG&B's bid. Apparently, CG&B forgot to send a COR to the City for this work when it was performed. There being no prejudice to the City, and for the reasons stated in b) above, the City's defenses are without merit and Northstar's claim is allowed for $6,401.00.

d) Added Work for Footing Elevations – As a result of a discrepancy in the plans that showed the handrail for the ADA ramp embedded in the footing, Northstar questioned whether the footings should be at the top of the ramp or 2' below. Stantec responded that the footing should be 2'0" below the top of the ramp. This resulted in two feet of additional wall along the ramp. This was one of those items which Northstar was originally not going to bill for but for which they decided to bill. Northstar overlooked issuing a COR for this work but realized it when they were preparing the REA. For the reasons set forth above, this claim is allowed for $4,278.00.

e) Added Wall Height/Top of Footings - This was a change requested by Northstar to allow them to put in level or step footings for the ADA ramp rather than sloped footings called for in plans in order to make installation for the footings easier for Northstar. Since a change was requested by Northstar for its convenience, the Panel does not find any merit to the claim and it is denied.

f) Unknown differing Site Condition – Northstar, in digging footings, excluded hard dig and caliche. Under the contract, the City made APCO responsible for caliche. In digging some of the foundation for the CTS, caliche was encountered and removed. This removal, however, resulted in additional over-excavation which caused placement of additional type II (AB). The preconstruction borings did not indicate caliche at the depth of the footings. Northstar seeks recovery for the additional cost of the materials, its placement and large footings. From the Panels' reading of the contract, APCO assumed the cost of removing this caliche but not the additional costs resulting from the removal of the caliche incurred by Northstar. This claim is not one that resulted from deficiencies in the plans. If Northstar believed they had a claim at the time for a differing

site condition, they should have put APCO and the City on notice of the claim as required by the contract and kept track of the costs that were incurred so that the claim could be adjusted at the end of the project, if the City initially contested the claim. Northstar obviously did not keep track of the costs nor considered it a claim until Mr. Hafeez considered it at the end of the project and came up with his estimate. Under the circumstances, the claim was not presented in accordance with the contract requirements, and therefore, the claim is denied.

g) **Weather Related Costs** – This claim is for costs that Northstar incurred because its work was pushed into winter months due to problems with the plans and specifications and the omissions of a waterproofing specification for the stadium walls. The delay in approval of the change order was the result of the City not being responsive to the waterproofing issue. Northstar, in its claim, has not included any days which do not relate to this issue. The City was well aware of these delays which it caused and was not prejudiced by lack of formal notice. The costs in the amount of $48,470.44 are adequately documented as were the additional costs of $1,487.41. No cost for temperature inefficiency is allowed. The Panel approves the claim for $49,958.00.

h) **Waterproofing Delay** – It is clear from the testimony and exhibits that the timing of the requirement of waterproofing the walls severally interrupted Northstar's work on the stadium. This occurred because the City failed to have a waterproofing specification in the contract. As the Panel views the claim, Northstar is not attempting to recover labor or equipment cost for waterproofing, but rather to recover its inefficiency costs that resulted from the requirement that the walls be waterproofed. Given the problems with inefficiency claims, the estimate is a reasonable and fair way to calculate these costs. The claim is approved for $104,644.00.

i) **Material Escalation** – The evidence clearly showed that Northstar's delay in not starting until June 2, 2004 was directly related to the City's decision to put the plans out to bid prior to being finally approved by the Building Department which did not give Stantec time to finish the plans so they could be free of errors. The CTS' plans fall in

this category as there were changes not marked on the drawings and other omissions that made the CTS not buildable without further clarification. This in effect delayed Northstar's work causing it to incur damages due to price escalation of concrete. This claim is allowed for $10,975.00.

j) Costs for SDC & Associates Preparation of REA – This claim is denied as the contract specifically states that these costs are to be borne by the parties.

k) Extended Field Overhead Costs – For the reasons previously set forth in this Award, the Panel finds that Northstar was delayed by the City in the performance of its work on the CTS. The base line schedule showed that the CTS work was to start on March 2, 2004 and be finished by July 1, 2004, or 120 days of construction activity. The construction work did not start until June 2, 2004. There was no field overhead incurred prior to that date. Without incurring additional field overhead, the CTS should have been finished by September 30, 2004. The CTS was not completed until February 18, 2005. The field overhead for which Northstar is entitled to be compensated is 140 days. In reviewing Mr. Hafeez's records for the overhead costs, we find them to be reasonable. The daily rate of $1,117.30 times 140 days equals $156,422.00, which the Panel allows for extended field overhead.

It appears that under this claim, Northstar is seeking a 5% profit on this claim and the costs incurred with SDC & Associates. The owner's contract does not allow for this recovery and that claim is denied.

APCO's Claim Summary

The following is a summary of APCO and its subcontractor's claim which the Panel has approved as set forth above.

APCO

Delay Damages	$329,868.00
Subcontractor Markups	22,174.00
Pay Apps 18 & 19	139,711.00
Retention	1,009,556.00
Total:	**$1,501,309.00**

Richardson		
	Direct Costs	$ 6,795.60
	Price Escalation	71,473.00
	Delay Damages	166,882.00
	Total:	**$245,150.60**
CG&B		
	Direct Costs	$ 4,000.00
	Price Escalation	-0-
	Delay Damages	66,585.00
	Total:	**$ 70,585.00**
Wheeler Electric		
	Direct Costs	$ 35,265.00
	Delay Costs	70,560.00
	Total:	**$105,825.00**
Northstar		
	Direct Costs	$319,749.00
	Price Escalation	10,975.00
	Delay Damages	156,422.00
	Total:	**$487,146.00**
	Grand Total:	**$2,410,015.60**

APCO's claim, on behalf of itself and its subcontractors, is approved for $2,410,015.60 subject to the amounts approved by the Panel on the City's Counterclaim.

Decision on CLV's Counterclaim

The City's Counterclaim consists of 40 Claims, some of which have been withdrawn. Most of the Claims relate to defective work or work that was not installed. The defective work consists primarily of work that the City contends was not installed per the contract plans for which no written modification was made authorizing the deviation. There is an issue over who was authorized to make changes or deviations from the contract. The Panel makes the following findings of facts and conclusions of law with respect to each Claim.

According to the Notice to Proceed issued on December 30, 2003, such changes or deviations would only be valid if directed in writing by Clair Lewis, the project manager. The evidence discloses that in March, 2004, Mr. Lewis' work load was increased by the City to the point that he could no longer give sufficient attention to the project. Because of this, Mr. Lewis orally delegated his authority to his assistant construction representative Gary Barr. This delegation, although never put in writing, was confirmed in writing by Change Orders all of which after March, 2004 were signed by Mr. Barr. The contract does call for modifications to the contract to be in writing, but that provision can be waived by the parties conduct. As the Panel addresses each claim, it will address the waiver issue where applicable.

Claim 1 – Defective Tennis Courts.

A. Cracks in Tennis court Slab.

The contract called for APCO to construct 22 tennis courts plus the championship tennis court. All courts were to be of "post-tension concrete construction". In this case, the phrase "post-tension concrete construction", refers to the tennis court which is constructed within a flat rectangular bed in which concrete is poured and hardened to create a slab with a level and smooth surface. Before the concrete is poured, steel cables are placed within the flat rectangular bed which run in parallel lines from end to end and side to side of the slab. After the concrete is poured and during the curing process, the cables are tightened bringing the concrete into compression. This process minimizes cracking of the concrete.

In order for the post-tensioning of the cables within the concrete slab to effectively prevent cracking, it is important that the slab be free from anchors or barriers, such as vertical edges or poles or other structures which may anchor the slab and impede the concrete from being compressed as the post-tension cables within the slab are tightened.

This type of construction was used to minimize cracking that normally occurs due to shrinkage. It does not mean that post-tension concrete will not crack. In fact, the specifications anticipated some cracking because it specified a repair procedure if cracks exceeded one-quarter of an inch. (Spec. 02796, Sec. 3.282). The City, however, claims that the courts have excess cracking because APCO deviated from the specifications without written approval. The Panel agrees that there is excess cracking but disagrees with the City's conclusion.

The City claims that APCO did not have written authority to delete the sand bed and the foam specified in the plans. The City also contends that as shown on the plans, the tennis court slab was to be a free floating slab not connected to the light pole foundations. However, because of the design requirements, it was not a "free floating" slab. The design requirements called for "perimeter beams", a vertical concrete curb along the edge of and below the slab or tennis court down to a depth of twelve inches around the perimeter of the tennis court concrete slab itself. The effect of the vertical concrete curbing was to "anchor" the tennis court slab, preventing the slab from being "free floating". Moreover, it also was not a "free floating" tennis court slab because the "free floating" slab was also connected with the light pole foundations, which in effect anchored the tennis court slab to the light pole foundations around its perimeter. The anchoring of the slab by the perimeter beams and the light pole foundations prohibited the tennis court from being a "free floating slab", and thus, inhibiting the compression of the concrete. The perimeter beams and the connection of the light pole foundations to the tennis court slab contributed to the excess cracking of the slab.

The plans, however, were modified by RFI-71, at the City's directive not only to delete the sand leveling course, but also to cause the foundation to be joined with the tennis

court slab when it was poured. This was the result of RFI-71. The RFI had its origin in APCO's request of 3-25-04, on how the tennis court type A light pole foundations were to be constructed. The response from Santec on 3-26-04 attached a sketch showing the light pole buried into the foundation with foam and sand.

At that time, there had been ongoing discussions between APCO and Mr. Barr regarding deletion of the sand because of other problems the City had experienced on another tennis court project where the concrete was pumped to the court it displaced the sand which eventually required the concrete slab to be replaced. After receipt of the 3-25-04 response, inquiry was made as to the light pole embedments and the deletion of the sand. On 4-29-04, Santec issued a clarification at Mr. Barr's request that deleted all written reference to sand and foam as a part of the installation. Santec also noted in the clarification, that the reinforcing steel in the foundation bases were to be installed to the height of the footing including the embedments and above grade portion of the footing. This clarification appears to the Panel to have made the light pole bases a part of the tennis court slab. The Dissent points out that, although the clarification deleted all reference to sand and foam, it did reference the post tension slab detail 1 and 4 on SD-17 which does show sand and foam. Detail 4 also shows the monolithic pour connecting the slab to the light pole foundation which is inconsistent with the diagram in RFI-71. This detail and the wording of RFI-71 resulted in the light pole foundation becoming a part of the tennis court slab.

The remaining issue is did the City intend to delete the sand and foam, and if so, did it result in the excess cracks? It was apparent in the field that the forms for the concrete slab had to be notched and adjusted for the light pole bases and that the sand and foam was not being installed. The construction of the 22 tennis courts occurred over a two month period and was readily observable to GES, who inspected the tennis court construction including the forming of the slab, and to everyone else on the project site including Mr. Barr, Santec's representatives and TJ Consulting hired by the City as its on-site representative. No notice of nonconformance (NCN) was issued regarding this change. Clearly, all parties believed

the sand and foam had been removed by RFI-71 or by direction of Mr. Barr. As Mr. Walker explained, no one at the project site knew the consequences of the change authorized by RFI-71.

From the testimony and exhibits, it appears that post-tension concrete slabs are placed over compacted Type II material as much as they are placed over sand beds. The USTA and TBA recommend the slabs be placed over Type II material. Given the problem of having to pump concrete to form the slabs, it was appropriate for the city to delete the sand bed. The Panel finds that the deletion of the sand and foam did not contribute to the excess cracking.

It is interesting to note that there was evidence that notwithstanding the excess cracking, the Washington Buffalo tennis courts are the best tennis courts in Las Vegas. As Santec's post-tension expert noted, these are cosmetic cracks of no more than a one-sixteenth of an inch and under the specifications there is no requirement of repair unless they are one-quarter of an inch or more.

The City also noted that the specifications (Sec. 02755) calls for installation of construction joints between courts or at the net line with a 70' maximum width from the concrete edge. APCO did not follow the specifications or the plans regarding the dimensions required, and instead, put only a construction joint in the middle of the quad courts per the approved shop drawing submittal. This meant that the dimension was 120.5 not 70 feet. On the double court, no construction joint was installed. APCO contends that the submittal prepared by Post-Tension of Nevada did not require these joints, and after several weekly meetings, Mr. Barr orally directed APCO to follow the Post-Tension of Nevada submittal or drawings. While Mr. Barr seems to admit this, the Panel finds this issue to be of no consequence. The excess cracks in the tennis court slab were not shown to be the result of omission of the construction joints, or the removal of the sand and foam, but rather the restraints created by the light pole foundation and the perimeter beam. There was no cost allotted to these missing construction joints, or the sand and foam. Nor was there any credit due the City for the deletion of the sand as the cost of replacing the sand

with compacted Type II (AB) material equaled or exceeded the cost of the sand.

B. Certified Builder Requirement.

Section 1.3 of the specifications specifically requires APCO to complete construction of the post-tension tennis courts in conformance with USTA and TBA standards with the work being performed by a member contractor and with construction being overseen by a USTA and TBA certified tennis court builder. The City alleges, and APCO and CG&B admit, that although CG&B was a member, the construction was not overseen by a certified builder. This issue was brought up during weekly meetings. The issue of CG&B's certification was closed by the City once CG&B obtained its membership in the association. The evidence clearly disclosed that the tennis courts were being constructed in conformance with the USTA and TBA requirements, so it is extremely doubtful that a certified builder would have discovered the deficiencies since the association manual does not require sand and foam, but does permit turn down foundations (perimeter beams) at the edge of the courts. This lack of a certified builder was not the cause of the cracking when all the other experts on-site did not realize the problem.

C. Light Pole Elevation.

The problem originates with the difference between the bid set of drawings which shows the slab separate from the light pole foundation and the permit set. SS-12 detail 5 of the permit set shows the foundation six inches above grade, which is consistent with a monolithic pour. The schematic drawing RFI-71 on 4-29-02 does not show this. The clarification at the bottom of RFI-71 dated 5-4-04 clearly references SS-12 note 5, and that the top of the footing is to be above grade. The base plate for the light pole is shown to be six to eight inches below the top of the slab. Mr. Gilbert of CG&B, testified the foundation rebar was four to five inches above grade, which everyone could see. This is how APCO built it with the complete knowledge of the City and no NCN's were issued. It is only after the fact, when the cosmetic cracks appeared, that the City attempts to blame APCO for the City's mistake.

In conjunction with this issue, there seems to be considerable confusion on the part of the City regarding the height of the light poles. This confusion comes about because the City was measuring to the top of the light pole fixture, that is, the aperture or arm that extends from the pole and holds the light fixture, and not to the top of the light pole as shown on TE 2.1. The height of the light pole was confirmed to be twenty feet as shown on the drawing TE 2.1. Whether there was a variance from the plans as to the height of the fixture, is immaterial as the foot candle requirement was met. The evidence indicates that everyone agreed that the light pole was to be twenty feet, eight inches from the base plate that was imbedded in the concrete. The City's lighting consultant gave this dimension to the manufacturer who fabricated the light pole to that length. The City received what was specified and it conformed to the requirements of RFI-71.

D. Damages.

While there are other claims relating to the tennis courts, which we will discuss later, the City concludes Claim 1 stating that the deficiencies are so great that no remedial fix will cure and the tennis courts need to be removed and replaced, for a total cost of $5,271,424. There are two problems with this claim. First, we do not find that APCO and its subcontractor deviated from the plans and specifications as modified by RFI-71 and other oral directives issued by Mr. Barr. The tennis courts were built in accordance with USTA and TBA standards as required by the specifications (Sec. 1.3). While normally, standards generally referenced in the specifications do not control over the plans, when the references are incorporated in the specific section for construction, they become a part of the specifications and control over the plans. We do not find that APCO is responsible for the excess cracking.

Secondly, the Panel does not believe the tennis courts need to be removed or replaced. It would be an economic waste to replace these tennis courts that have now been played upon satisfactorily for almost four years. The Panel has observed the tennis courts on several occasions, and although there are numerous cracks, they do not appear to interfere with tennis court play, If resurfaced with a coating every three to five years, as

contemplated by Santec, the City will get the use intended for recreational play and local tournaments. If the City were to upgrade the coating, as had been suggested to Plexicushion Prestige 2000, there was testimony that they could eliminate the cracks completely from the playing surface and make the courts suitable even for professional hard court play. This would not change the character of the tennis courts but improve them.

This claim is denied.

Claim 2: Defective net Post Anchors

APCO admits that the net post sleeves and anchors were not constructed according to the City's design, because the City's design conflicted with the contract specifications for a super flat (FF-50) surface. This conflict was never disputed by the City, although, Mr. Walker made reference on direct examination that the design was used on Lorenzi Park with a FF-50 flatness requirement. However, on cross-examination, he acknowledged that the FF-50 requirement was waived on that park. There was no evidence that APCO was aware of this problem when it bid the project.

Although nothing was put in writing, Mr. Barr acknowledged the problem and left it up to APCO's means and methods to come up with a solution. Mr. Barr's statement to Mr. Platt is not hearsay as the Dissent would suggest. The solution was 18 inch sono tubes for the tennis post foundation, which is the basis of the City's complaint. There can be little question that the City clearly approved the method, as it was obvious from the photos that the change was blatantly apparent to everyone, and no NCN's were issued during the two months the courts were under construction. While the post foundations are not in the playing area, there does appear to be some flaking and cracks at the location of some of the sono tubes. This is more of a cosmetic issue which would not justify the cost of the City's desire to tear out all of the posts and anchors for a cost of $126,594.00, which would amount to economic waste. Mr. Pelan testified the cost of repair should only be $11,033.00. The Panel believes this cost should be allowed to the City, as APCO chose the method to fix the 50-50 flatness problem and should be responsible for a satisfactory result. The City is

awarded on this claim $11,033.00.

Claim 3: Concrete Pavers in Plaza Area

The City had two primary concerns about the plaza pavers. There were gaps between each of the pavers (horizontal deviations) and height elevation differences from some pavers to adjoining pavers referred to as "vertical deviations." The City's initial claim to correct these deviations was $101,088.00. After three years of complaining that the vertical deviation violated ADA requirements and constituted a trip hazard, the City, with its own forces, reinstalled the pavers to eliminate the vertical deviation at a cost of $7,979.00, but did not correct the horizontal deviation for which apparently no claim is now being made, as the City recognizes this was a design deficiency for which it is responsible.

APCO contends that the pavers were installed without any vertical deviation that violated the specification or ADA and, at that time, they were not rejected by either Mr. Lewis or Mr. Barr and no NCN was issued. The deviation occurred after the City trucks and service vehicles drove over the plaza pavers. The Wausau pavers, approved for installation along with the manufacturer's recommended installation, called for two inches of sand under the pavers when used for pedestrian traffic and three-quarters of an inch to one inch under the pavers when used for vehicular traffic. Santec requested two inches of sand as required by the contract specifications, which is how the pavers were installed. When the City was moving into the park, APCO noted and brought to Mr. Barr's attention that the pavers moving was causing sand to come up through paver gaps, which the City acknowledged was a design problem. In response to Mr. Barr's concern, CG&B recommended using a sand stabilizing product which would hold the pavers in place. Santec concurred in the recommendations and the City requested a Change Order for pricing for APCO to install the sand stabilizer. The City elected not to use the stabilizer. The vertical as well as the horizontal deviations were the result of the City's design and failure to use sand stabilizer.

This Claim is denied.

Claim 4 & 5: Defective six inch and five inch concrete Phase 1A and 1B

APCO combined its response to Claim 4 with the City's Claim 5, which address primarily the five inch concrete sidewalk. This was done primarily because the City relies upon the City's own in-house GPR testing for both Claims. This testing disclosed deficiencies in the thickness of the concrete, the turn down edges of the concrete, and the placement of rebar in the six inch concrete. The City's concern over these issues rose when they were modifying courts 11 and 12 for the professional tournament put on by the "Tennis Court Channel". When some of the six inch concrete walks were removed to allow the modification, these deficiencies were discovered. Mr. Walker, who was in charge of the modifications and establishing the City's claims appointed Lewis Rinker, who was a Senior Engineering Associate with the City, to perform the ground penetrating radar tests (GPR) not only on the six inch and five inch concrete walks but also on the tennis court slabs. Neither Mr. Walker nor Mr. Rinker had any prior experience in GPR testing. What they did was to rent a GPR testing device, obtain a manual on how to operate it and read articles on its operation and interpretation of the results.

As the parties were aware, the Panel had serious concerns over GPR testing because it requires a great deal of experience in doing the testing, and in particular, interpreting the results. Because of this, the Panel requested the parties to provide expert testimony on GPR testing. Based on the evidence received, Mr. Rinker did not have the qualifications or the experience needed to competently perform and interpret the GPR testing. This was borne out by testing done by Ninyo & Moore on behalf of the City on the tennis courts. Mr. Rinker's test results showed that the court slabs did not have the required thickness nor were the tendons for the post tensioning located in the middle third of the concrete. Ninyo & Moore's testing refuted this and confirmed that slab and tendons were in conformance with the contract requirements. As a result of these findings, the City withdrew the portions of its tennis court claim that related to the thickness of the tennis court slab and the placement of the tendons. Given this, the Panel has no confidence in Mr. Rinker's results to support these Claims.

There was some minimal GPR testing done on five inch and six inch concrete panels by Ninyo & Moore and Western Technology, which disclosed the rebar was in the concrete and that the thickness of the slab was minimally deficient. CG&B calculated the missing concrete at 84.5 cubic yards. Given the price of concrete, CG&B calculated the credit to the City of $5,692.00. The City did, however, provide evidence that some of these five inch and six inch concrete panels had cracked and would require replacement. Concrete, by its very nature, cracks even if it has rebar. Of the seventy-one panels identified by the City, CG&B acknowledged that five of the panels had structural cracks and needed to be replaced. From the evidence, the best the Panel can calculate the cost to remove and replace each of the panels is $1,384.36 ($98,290 ÷ 71) for a total of $6,922.00.

The City also claims, and APCO admits, that it did not install a six inch concrete walk with rebar on the ADA ramp leading to the championship tennis court. APCO installed a five inch walk instead without rebar. This was a design change made in the field as a result of a design deficiency in the plans relating to the location of the footing for the ramp walls. The footings were shown at the level of the ramp and hand rails were placed in the footings. Santec acknowledged that the footings should be located twenty-four inches below the ramp. The soils report required two feet of fill over the footings. This reduced the area for the concrete walk to five inches and did not allow for a six inch walk. The five inch walk was installed with the approval of the City's field personnel and no NCN was issued. The cracks in the concrete walk appear to be cosmetic cracks resulting from normal expansion of concrete. There is no basis for this claim.

During the Arbitration proceedings, the Panel requested the parties visit the site and to determine what panels needed to be replaced. This resulted in the seventy-one panels identified above. APCO offered to replace any panel which the City identified as defective, which offer the City refused. APCO even suggested that the City do it with its own forces and APCO would pay the cost. This likewise was refused. The Panel brings this up because it is concerned that the City's actions could constitute a breach on the part of the City excusing APCO of any liability on the five inch and six inch concrete panels.

The City has argued that under the terms of GC-37, it has no obligation to allow APCO to correct defective work. The City, however, overlooked other provisions of the contract, namely GC-33, which requires the City to give a seven day cure notice before the City can take over the work. The Panel cannot find in the record that such a notice was given with respect to these panels. Even though that is a breach on the part of the City, APCO acknowledges responsibility for these deficiencies. The only damage proven, however, is the deficient concrete and the five defective panels. The City is awarded $12,614.00.

Claim 6: Defective Jogging Trail

It is undisputed that this issue was discussed with Mr. Barr before APCO made the change to delete the asphalt turned down edge for the jogging trail. It appears that APCO was concerned that the turn down edge rested on a dirt base while the rest of the trail was on compacted Type II material and that there could potentially be a crack in the asphalt at the joint of the trail with the turn down edge. APCO proposed that they widen the trail by a foot and extend the Type II material to the edge of the jogging trail. According to APCO, this change was approved by both Mr. Barr and Mr. Lewis, although, the modification was never documented in writing. It is apparent that the City knew of the change because no NCN was issued when this work was performed.

Even though the modification was not put in writing, the Panel finds that the City suffered no damage as a result of the change. In order to make the change, APCO provided compacted Type II material to the full extent of the trail, twenty-four feet, thus providing a solid base under were the turned down edge was located. Therefore, there was no material savings on APCO's part. The City's alleged cost savings did not take into consideration the compacted Type II material. The evidence discloses that as installed, there has been no failure in the performance of the edge of the asphalt in over three years of performance, thus the City received a final product that appears to be better than what was specified.

This Claim is denied.

Claim 7: Incorrect Tennis Court Dimensions

The Panel will give consideration to this Claim since it has denied any relief to the City on Claim One relating to the tennis courts. The City claims that the perimeter light poles around the tennis courts were mislocated, the result of which it did not give the appropriate playing surface called for on the plans, 60 x 120 on single court, 120 x 120 on double courts, and 240 x 120 on the quad courts.

This distance was to be measured from the fabric which was attached to the inside of the fence and light poles per addendum 3.

The problem arose because of conflicts in the plans. The detail 4 on SD-17 applies to both fence and light poles. While it shows a four inch fence pole set back from the edge of the concrete of three and one-half inches, this applied also to the six inch light poles. In order to meet the requirements of the playing surface, this would require the six inch poles to be placed at or near the edge of the concrete surface. This raised concern about the photometric requirement for the tennis courts shown on plan TE-2.1. The record is clear that this was discussed with Mr. Lewis and confirmed by Mr. Baird who obtained the photometric disk from the City's electrical consultant. APCO was directed to place the poles in accordance with the disk, which it did. Given the conflict between SD-14, SD-15 and TE-2.1, it is not surprising that this Claim came about. There appears to have been no coordination between the layout design of the SD drawings and the photometric design of the TE drawings which led to this problem. The City chose to follow the photometric design to resolve the conflict and must live with the consequences of its choice.

This Claim is denied.

Claim 8 and 9: Defective Tubular Steel Fence

The City, with respect to both Claims 8 and 9, is claiming damages resulting from excessive picket spacing, missing picket caps, defective painting, defective structural welding and footing deviations. Because of these defects, the City is seeking damages for the total removal and replacement of the fences. The Panel will discuss each Claim in that order.

A. Excessive Picket Spacing.

Since the drawings for this fence was not stamped or engineered, this item was treated as a deferred submittal. As such, it had to be submitted to Santec for comment and then to Building and Safety for final approval. The plans required picket spacing to be measured at 4.5 inches, center to center. The City measured the as-built field picked to be 4.875 inches, center to center. With a one inch picket, the space between the picket is 3.875 inches, which meet the requirements of the code.

While the picket spacing may meet the code requirements, the City contends that APCO saved two pickets for every ten feet of the fence. The plan sheet SD-35 reads, "10'-0" max spacing per panel." The City, for the purpose of its calculation, assumes every fence panel is ten feet. There is no evidence in the record to support that conclusion since the panels could have been shorter than ten feet. The savings of the amount of pickets is unsupported by competent evidence, and since the amount is not quantified in the City's findings, the Panel finds no basis for this part of the City's Claim.

B. Missing Picket Caps.

The missing picket caps were not on any punch list and were not discovered to be missing for about nine months or more after the park had opened. Mr. Richardson testified that all the caps were installed when they finished the fence. Mr. Walker admitted that a person on the ground could observe the caps were missing. Given the evidence, the City has not sustained its burden of proof that the caps were not there when the park was turned over to the City. There is no basis for this part of the City's Claim.

C. Defective Painting.

The issue regarding the paint has its origin in how the fence was to be installed. The specifications allowed the members of the fence to be attached by welds or bolts. Sec. 5515. It also provided that all fencing was to have powder coated paint. The testimony discloses that this issue was discussed with the City who wanted all connecting members to be welded. This meant that when the panels were connected in the field, the welding of the panel to the member (fence to the picket posts) that the powder coat at the area of the weld

would be destroyed and that the area would have to be repainted but not with a powder coat that is electrically applied in an oven when fabrication takes place. APCO warned the City that field painting would not match the powder coat in terms of finish and that rust could appear at the weld when field painting was done.

By the end of the project, APCO's prediction had occurred and the City was requesting that the welds be repainted. To make matters worse, the City apparently was not satisfied with the powder coat on portions of the fence and required areas of the fence to be repainted in the field. Powder coat reacts better to sunlight exposure than field applied paint. The Panel had several occasions to visit the park and to observe the fence and could see the differences between the colors of the two paint applications. The field applied paint had faded remarkably. In effect, it appears that the City, in requesting the fence to be repainted in the field, had violated its own specification for powder coat and had made the situation worse. According to the City's expert Dr. Moncarz, at the City's request, he tested a sample of the powder coat from the fence and found that it complied with the specifications. There is no evidence that the powder coat was improperly applied. There was some complaint from the City that some paint was pealing but it appears that this was at the welds that had been field painted several times.

The problem with the paint relates directly to the City's decision to field weld rather than use clips with bolts. This decision prevented the City from getting a completely powder coated fence as called for in the specifications. APCO complied with the City's direction so the condition of the fence paint is the City's responsibility.

D. Defective Structural Welds.

The City, by its claims, is seeking to remove and replace the tubular steel fence in Phase 1A and 1B. With respect to the welds, the issue is whether the deficient welds are of a structural nature which would require that the fence be replaced, or are they cosmetic and would only require repair? The testimony and expert reports of both parties conclude that the fence is structurally sound and does not need to be replaced. The testimony of the City's welding expert George Salas pointed out the many deficiencies in the welds that

needed to be fixed. Mr. Salas could not and did not testify that the fence was structurally unsound. Mr. Richardson who installed the fence admitted that many of the welds were deficient and needed further work to bring them into conformance with the plans and specifications. Based on the foregoing, the City will be allowed the cost to repair the welds which necessarily includes repainting the entire fence. The costs will be discussed under the damages section to this claim.

E. Footing Deviations.

The City, in inspecting the footings of the tubular steel fence posts as a part of its claims, ascertained that four to ten of these footings were not to the depth required for pier footings as required by the plans. They were more like spread type footings. Mr. Fineberg of the City was unaware that spread footings had been approved for the fence posts when obstruction prevented going to the depth required for pier footings. Mr. Platt, for APCO, testified that there were eighteen conflicts or obstructions in 1A and eighteen in 1B where APCO used spread footings. While there was some question on the City's part that conflicts existed, the use of spread footings still provided a sound structural base for the fence posts. The City has not sustained its burden of proof that the foundation needs to be replaced or repaired.

F. Tubular Steel Fence Damages.

From the testimony and Exhibits, the Panel finds that the tubular steel fence in 1A and 1B is structurally sound and does not need to be removed and replaced. The fence is in need of repairs to the welds which will necessitate that the fence be completely repainted. Mr. Richardson acknowledged responsibility and provided a cost of $65,920.00, which was broken down by item with hours and labor cost. This included repainting the entire fence. Mr. Fineberg, for the City, gave a cost of $970,000.00 to repair the fence without any breakdown of what that cost included. Mr. Walker, for the City, admitted that there was no support for Mr. Fineberg's estimate which amounted to two-thirds the cost of the City's estimate to remove and replace the fence. The Panel, having examined the fence on several occasions, believes that the cost to repair the welds properly is considerably more than Mr.

Richardson's estimate. The Panel believes that the cost of repairs will be about $131,840.00 and will allow that amount to the City on its Counterclaims 8 & 9.

Claim 10: Defective Storm Drain

In examining this Claim, it appears that the storm drain was inspected by the City Building Department as it was being installed during construction of the Park. At the end of the project, Mr. Lewis noticed that some concrete collars around inlets had not been installed. Although APCO corrected this deficiency, the City decided to inspect the entire storm drain system. This and a subsequent inspection led to this Claim. The Claim has basically four components, the upper headwall and forty-two inch pipe, the twin forty-two inch pipe and valley gutter, manhole and trash racks.

With respect to the first two items, the deficiencies relate to the disk that APCO received from the City's designer Santec. The City seeks to strike this testimony since APCO did not produce the disk. APCO testified that the disk was lost. There is no dispute that such a disk was produced, that Santec was advised of a difference in elevations between the disk and the plans and that APCO was directed to use the disk to establish elevations. That testimony is not hearsay as the Dissent suggests. Given the testimony, it was the City's obligation to produce a copy of the disk from its designer Santec to rebut this testimony to show that APCO was incorrect. The City failed to do this or explain why they could not provide a copy of the disk. The Panel will consider and weigh the evidence.

A. Upper Headwall and Forty-Two Inch Pipes.

The primary problem with the upper headwall and the forty-two inch pipe and the rest of the storm drain, appears to relate to a conflict in the elevation shown on the permit set of drawings and the survey disk given to APCO by Santec, which provided the survey in an electronic format so APCO could do its survey based on satellite readings. Mr. Lewis confirmed that APCO received a survey disk from Santec. According to APCO, they noticed a difference between elevations obtained from the disk and those shown on the permit plans. They advised Mr. Baird, of Santec, of the differences and were told to use the disk. This resulted in headwall being about a foot higher than shown on the permit plans.

This caused a deflection angle in the joint of the pipe to be greater than called for on the plans. At the defection joint, Mr. Jackson first said it was not sealed and was allowing dirt and debris to enter the pipe. Later, he acknowledged that there was no dirt entering from this connection. While there may be a connection problem, it appears that the headwall and pipe was inspected by the building department during construction and passed inspection. The building inspector's signature and initials, as testified by Mr. Platt, are on Exhibit 3507. GES did inspect the headwalls and signed off on the permit for the storm drain, which led to the building department closing the permit. While the City did initially object to Exhibit 3507, the objection was withdrawn and Mr. Jackson's affidavit supplemented the record on this exhibit. The City also indicated that they would have Mr. Baird testify on this subject but did not do so. The City may not, after the fact, like this condition, but it appears to have risen because the plans did not accurately reflect the proper elevations. The lack of cover over the pipe resulted from this problem. This is not a construction problem but a design deficiency. This portion of the Claim is denied.

B. Valley Gutter and Twins Forty-two Inch Pipes.

There appears to be about one and one-half to three inches of water ponding at the entrance of twin forty-two inch pipes that runs approximately fifteen feet into the pipes. This problem appears to have resulted from the elevation of the headwall. The City surveyed the headwall and determined that it was not put in at the elevation shown on the permit set of drawings. APCO installed the headwall at the elevation shown on the disk. Again, this section of the storm drain appears to have been inspected and passed by the building department inspectors. The depression will not affect the operation of the system. The City's concern simply appears to be the ponding of the water and mosquitoes which is a summer-time problem. Given the climatic conditions of Las Vegas, this ponding water should not present a problem and does not justify the repairs the City seeks.

This portion of the Claim is denied.

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C. Broken Manhole.

The City's claim relates to manhole #4, which the City initially claimed that part of the cone lip when it sets on the segment below it was broken off. Mr. Jackson, who inspected the pipe initially, did not observe the hole at the bottom of the manhole until he went out again near the end of these proceedings. How the broken lip and hole came about may be subject to some question. Nonetheless, they exist and should be repaired as was acknowledged by Mr. Richardson who provided an estimate of repair of $775.00. The City would prefer to remove and replace the manhole in its entirety for $32,687.00. Having reviewed the photos, the Panel believes that the manhole can be adequately repaired without the necessity of removal. Removal of the manhole would constitute economic wastes. Mr. Richardson's cost of repair is reasonable and will result in a fix that will not lessen the utility of the manhole. The City is awarded $750.00 on its claim.

D. Trash Racks.

There is no dispute that the trash racks were not installed pursuant to the detail on plan sheet CE-D2 for the forty-two inch pipes. APCO contends that as long as they met the requirements in Change Order 96 for the added trash rack for the forty-eight inch pipe, they complied with the specifications. That might be true, but the problem is that the eye bolts are failing and the hinges are pulling away from the headwall. This condition needs to be corrected. The City's estimate of the cost to correct appears to be excessive as only eight eye bolts would have to be replaced. This would require digging down in four locations and drilling through the headwall to install the new eye bolts.

The City's Claim is allowed for $2,000.00.

E. Broken Pipe.

There is a break in the pipe located near the down-stream end of the storm drain system. APCO has attempted a repair but it does not meet the manufacturer's requirements. A concrete collar is required, the cost of which would be approximately $400.00.

The City's Claim is allowed for $400.00.

Claim 11: Defective Chain Link Fence – Phases 1A and 1B

Under this Claim, the City is seeking compensation not constructing the fence pole foundation in accordance with the plan design, the pole-in-pole condition and for the fence not delivered in Phase 1B.

With respect to the first portion of this Claim, the City claims that the fence pole foundation was not built to the dimensions shown on the plans. APCO appears to take the position that this was a deferred submittal which allowed them to engineer the design. The City did some excavation of the fence posts on a couple of the courts, which disclosed that they did not get the full thirty-six inch depth or the eighteen inches diameter. The deferred submittal for the three foot fence post foundation prepared by Mr. Chen shows a depth of thirty inches. While this submittal may not have been presented to the Building Department, Mr. Chen's signature indicates that the design met the building code requirements. Mr. Platt reviewed the City's photograph with the site location and found they were consistent with the details for the short and tall fence post foundation.

The City's claim is that the foundation still did not fully meet the dimension requirements for the foundation. The City basically requests $2,000.00 for each of the 22 tennis courts. There is really no quantification to justify these amounts. It's just speculation. The City has not sustained its burden of proof as to damages, even assuming APCO hadn't complied, which may be subject to debate if this was a deferred submittal.

As to the pole-in-pole condition, the City basically agreed that if APCO's engineer, Mr. Chen, accepted this condition, the City would have no right to object if it was structurally sound. The engineer provided the letter which the City requested that the condition was structurally sound. The City may still not like the condition but that doesn't mean they are entitled to damages.

As to the chain link fence in Phase 1B that wasn't delivered, the City has no claim. The City claims that Alternate #3 deleted the chain link fence on the south side of the soccer field for a tubular steel fence, but that it was still included in APCO's bid. Whether that was the case or not, the City accepted APCO's bid. It's sort of the counter, if APCO omitted

something from its bid and must eat the cost of the omitted item, and if they inadvertently include something not required, it is to their benefit. The City is not entitled to renegotiate the bid once it has been accepted.

This Claim is denied.

Claim 12: Missing Thickened Edge at Tennis Courts

The plans SD-17 shows the thickened edge to be twelve inches deep and twenty-four inches wide. The edge APCO constructed was 15.4 inches wide. This is the basis of the City's Claim. APCO, however, built the tennis courts in compliance with the USTA manual, which calls for a twelve inch width for the thickened edge. The specifications which control over the plans, specifically required APCO to build to USTA standards. Although standards do not normally have control over the plans, the specifications established how the courts were to be built, namely to USTA standards. As to the missing dowels, the dowels were required for four inch concrete. There was no four inch concrete on the project.

This Claim is denied.

Claim 13: Missing Playground Equipment

This Claim raises serious questions as to who has the authority to approve submittals and the pressure being put on the City's representatives in the field by higher ups to make them comply with the party line. It also points up to something that seems to permeate the City's claims, which is an apparent lack of investigation with the City's field personnel as to the reason why changes were made and items deleted. The revised submittal was not only approved by Mr. Lewis and Mr. Barr but also by Mrs. Ridenour of Santec, the designer. After the playground equipment was installed, Santec, Mr. Lewis and Mr. Barr met with representatives from the City's Leisure Service Division, who then inspected and accepted the playground equipment.

What Mr. Walker was unaware of was that there was more to the acceptance of the submittal than just playground equipment. In engineering the shade structures for the central playground area, it was determined that six additional poles would be required to

support the shade sails that the City wanted. This required a redesign of the playground layout, which APCO coordinated with Santec and Sunports. APCO never sought additional compensation for the additional poles or the redesign of the playground. All of this was considered when the revised submittal for the playground equipment was approved.

When Mr. Walker presented this Claim, both Mr. Lewis and Mr. Barr objected to it believing that there were substitutions made for some of the missing playground equipment, all of which had been addressed with Santec's approval. Most of these were equal to what was specified and, that with the redesign and the additional pole, justified approval of the revised submittal. Toward the end of the hearing, Mr. Lewis succumbed to the pressure and equivocated on his initial position.

This Claim is denied.

Claim 14: Missing Perimeter Tendon

The plan sheet SD-17 shows two perimeter tendons around each of the tennis courts. APCO acknowledges that it had only installed one perimeter tendon per approved Post Tension of Nevada approved shop drawings. This was because the tennis court light poles extended into the court area. As mentioned earlier, this occurred because APCO was directed to install the light poles in accordance with a photometric disk given to them by Santec. GES inspected the tendon placement and no NCN was issued because the tendons were being placed in accordance with the shop drawings.

The issue is whether the City is entitled to a credit for the tendon shown on SD-17 that was not placed. The City relied on GC-42 C of the audit provisions of the General Conditions to the contract, which says in part, if "the dollar liability is less than the payments made by the City to the contractor", contractor agrees to immediately pay the difference to the City. This is a very strained interpretation when applied here to a fixed price contract where the City approved the change because of a conflict in the plans. Normally, this type of provision applies to unit price contracts and allows the items paid to be adjusted when the final quantities are known. However, there was a savings to APCO

that should be passed onto the City.

On this Claim, the Panel finds the City is entitled to a credit of $7,544.00.

Claim 15: Tennis Court – Tensioning Test Results

Under section 3.2 of the specification 02755, APCO was to provide to the City dual stage testing of the tennis court tendons and elongation records. APCO apparently did not initially provide this information because the City contracted with GES to provide this same information. GES did in fact record this information on all but perhaps one tennis court. APCO did not record the result because the City had presumably received those from GES. GES never gave the test results to APCO. If APCO had recorded the results, they would have gotten them from GES. Unfortunately, when the City requested the results from GES, they could only find them for three courts. Although, GES' records indicate that the testing and measurements occurred on all but one court. Once the testing is done and the cables are cut, you cannot go back and retest or measure.

APCO should have recorded the information as required by the specifications, but the Panel cannot see where the City has been damaged by this omission. The City's damage should be based upon APCO's cost to summarize the results to which the City claims a credit. The City's damages claim is clearly overstated. While the Panel has some questions as to the City's entitlement under section 02755, Mr. Pelan did estimate the credit at less than $1,000.00, and the Panel will allow a credit for that amount.

Claim 16: Missing Flatness Tests for Tennis Courts

The City claims, that section 3.4 of the specifications 02755 requires APCO to provide flatness test results to the City. All the section requires is that APCO measure for F(F) tolerance. Nothing in that section requires APCO to provide the results to the city. The dispute here is that APCO only believed that it had to meet the tolerance and the City had the obligation to perform the tests if they wanted to see that APCO had met the F(F) tolerance. APCO wanted a Change Order for the costs it incurred to determine it had met the tolerance, which the City would not give. APCO refused to give the test results to the City without a Change Order. While the Panel believes APCO should have provided its

test results to the City and submit a Change Order request (COR) for reimbursement, which could have been a part of its claim in its proceeding, the Panel does not find any basis for this Claim when the specifications are reviewed.

This Claim is denied.

Claim 17: Court Storage Areas

This Claim is the result of confusion on the City's part which results from the confusing terminology in the plans and specifications. In specification 2830, chain link fencing is referred to as "fabric" or "fence fabric". When one looks at the plans SD-16 detail 4, it's called "roof fabric" or "fence". In section 2831, windscreen is referred to as fabric. Note 1 for the storage area refers to roof fabric, which is the windscreeen mesh and indicates that it is to be attached with hog rings around the perimeter. APCO did comply with Note 1. Note 3, requires the fencing to be welded to the fence rails. Welding would not have worked given that the fence was PVC coated. Section 2830, page 2. The specification 2830 at page 2.11, requires the fence to be attached with bands or clips. Specifications control over plans. Note 2 related to brackets and both which were ground smooth. APCO took care of this as a punch list item.

The remaining item of this Claim deals with the fabric mesh (windscreen) that was to be installed under the roof fence and on the outside of the fence walls facing the tennis courts. APCO acknowledged that it did not install the fabric mesh under the roof fence at the request of Mr. Barr and Ms. Foley, and that the City is entitled to a credit. Mr. Platt's testimony on this subject is not hearsay. Capstone for the City calls this roof fabric and not fabric mesh. Its price per unit is $2.00, where his price per unit for windscreen is $1.50. Since both items are fabric mesh, there should not be a difference in cost. The Panel finds Mr. Pelan's analysis of the cost more persuasive and finds the City is entitled to a credit of $1,096.00, plus markup.

While APCO did install fabric mesh on the outside of the storage area, detail 4 on SD-16 indicates fabric mesh on the inside where the storage area faces away from the tennis court. The photos produced by the City as well as APCO clearly show that this fabric was

not installed. Capstone calculates this area at 2079 square feet and applying APCO's cost per square feet which gives a credit of $1,850.00, plus markup. The City is entitled to a total credit of $3,447.00.

Claim 18: Missing Perimeter Windscreen

The issue here is whether there was to be windscreen on the perimeter fence where indicated on GP-1 plan sheet. GP-1 clearly points to the perimeter fence and calls for a ten foot fence with windscreens. While there is a reference to detail 2 on SD-16 for the ten foot fence at tennis courts that does not override the description of the fence called for on GP-1.

Apparently, this omission was overlooked in the field and on the punch list and only came to light when the City was trying to establish its counterclaim. It is, however, an omission from what was called for in the plans. Even if it was overlooked by the City staff and Santec, the City is entitled to a deduction credit. The Panel finds that Mr. Pelan's analysis of the cost with supporting documentation is far more accurate than what the City is claiming.

Accordingly, the City is allowed a credit of $15,687.00 on Claim 18.

Claim 19: Turf Deletion Credit

The City initially asserted a claim of $1,500,000.00 for the change from natural sod to artificial turf on fields 1 through 7. By the time of the hearing, the claim had been reduced to $520,237.00. This Claim was calculated by Mr. Walker who had nothing to do with the negotiations, the proposed Change Order or the CCD which the City issued to APCO to perform this change to the contract. As the Panel will explain, it finds no basis for this Claim.

The record reflects that there was extensive negotiations between Mr. Lewis and Mr. Barr, with APCO regarding the additions and deletions resulting from the change. In fact, each of the parties came up with their own documentation. They negotiated their respective figures and came up with what they believe was a reasonable cost for this change, and the reasonable credit to which the City was entitled for the deletion of the work called for in the plans. Having reached an agreement on the cost for the change to

artificial turf, the City issued a Change Order to APCO for the work.

APCO refused to sign the Change Order, not because it disagreed with what the parties had agreed to, but because no additional time was provided for in the Change Order for the additional time required to perform the work. The City said no and issued the CCD which required APCO to go forward with the artificial turf work. The City points to language in the CCD where the parties have not reached an agreement on cost and/or time to justify its current claim.

When you look at the facts and what went on surrounding the CCD, it is clear to the Panel that the word "cost" applies to acceleration and not to the costs that the parties had agreed to and was reflected in the proposed Change Order. Even though what we are really looking at is the "time" the City refused to give. Again, it was not the costs which the parties had negotiated and agreed upon.

Even when you look at the items making up the City's claim, there is little or no basis for them. By way of examples, the evidence clearly shows that APCO did over-excavate the turf areas to a depth of twelve inches. The minus two inch material was installed. The sub soil finish work was done. The top soil credit was a negotiated item where APCO wanted the credit to be $150,000.00, but agreed to the City's figure of $179,306.00. The City got what it wanted. On the type II placement, Mr. Walker did not take into account all the work contemplated for that item.

Here there has been an accord and satisfaction of the actual cost the parties agreed to. It was a compromised agreement whereby the parties settled their differences and agreed upon an amount for each item. It was an amicable settlement based upon mutual concessions. This is why the Panel denied APCO's claim regarding turf trenching. All costs were resolved by the Change Order, except for time, thus the City waived this Claim and is estopped from making it at this time.

Claim 20: Diminished Concrete Pavement, Phase 1B

This Claim related to the owner's claim that fiber mesh specified for the concrete was not included in all of the concrete. Apparently, the City employees, in observing a couple

of five inch concrete sidewalks that had been removed, did not observe any fiber mesh. The City's damages assume that there was no fiber mesh in any of the five inch walks. There is literally no basis for this assumption. GES' inspector for the City reviewed the batch tickets for all concrete poured in the site. That included the five inch walks and confirmed that there was fiber mesh in the concrete. The GES inspection reports confirm the presence of fiber mesh. Under the circumstances, the Panel finds no basis for this Claim.

This Claim is denied.

Claim 21: Missing Concrete Header – Phase 1B

The CE plan sheets show two notes 6 and 7. Note 6 says construct mow curb per landscape plans. Note 7 says construct mow curb at fence per landscape plans. Note 6 on the plans is at the line separating the soccer field from the decomposed granite outside the field. Note 7 on the plans is located at the tubular steel fence that surrounds the soccer field. Although, there are no plan sheets that are designated "landscape plans" it appears that the site sheets designated as SD contains the landscape details. SD-2 Detail 4 sets forth the mow curb design. The Detail illustrates the area next to the soccer field. That there is to be a mow curb under the fence is further reinforced by SD-35, details 2 and 4 which show concrete under the fence.

Mr. Pelan testified that this issue was discussed in weekly meetings and was resolved and that no curb was necessary. A deletion of this magnitude should be in the weekly minutes. Unfortunately, Mr. Pelan did not tell the Panel where to look and the Panels' search of the minutes came up with no mention of the fence mow curb. Since the mow curb is clearly designated on the plans, it appears that the parties simply overlooked this requirement. Notwithstanding that, the City is entitled to a credit for this deletion, APCO acknowledged that the City's claim amount was a reasonable credit for the deleted work if the Panel found it was required. The City is entitled to a credit of $80,145.00. The Claim is approved.

Claim 22: Credit For Deleted Soil Over-Excavation

This "man-made fill" claim is a "made up" claim by the City for which no real basis exists. While the contract required that all man-made debris/trash on-site had to be removed from the project, Las Vegas Paving was aware that some of the fill on the project was controlled fill which it had placed under a prior contract with the City. Because of the cost involved, Las Vegas Paving raised a question as to whether the City really wanted this controlled fill removed since they did not consider it to be in the category of a man-made fill. As a result of the question, the City, as a part of addendum 3 stated, "There is no certification on file with the City for the existing 'City controlled fill' area." Whether they were right or wrong in their interpretation of addendum 3, Las Vegas Paving believes the City's controlled fill would not have to be replaced and did not include that cost in its bid. Mr. Lewis confirmed that if the pre-existing fill was controlled, it did not have to be removed.

After the notice to proceed was issued, the City decided that all man-made fill, including the controlled fill, had to be removed. Las Vegas Paving protested this decision in writing noting that the issue involved about 500,000 cubic feet of material at a cost of somewhere between two and three million dollars. There does not appear to be any dispute that the controlled fill was omitted from its bid. APCO advised the City that if directed, it would remove the existing fill under claim. Multiple meetings were held to resolve its dispute and an agreement was reached to resolve the dispute. Mr. McNellis, on behalf of the City, agreed that if APCO/Las Vegas Paving would excavate exploratory pits where directed by the City and if the material was sound the controlled fill would be acceptable. Under this agreement, APCO agreed to and did pay for the costs in digging the exploratory pits.

Without deciding by arbitration who was right or wrong, the parties entered into a compromised settlement to resolve the dispute. The parties by an accord had settled the dispute. Now by way of a back door, without adequate investigation the City is back peddling on its agreement without any legitimate basis. The Panel truly wonders what the

City's motives are behind this and many of its exaggerated claims.

This Claim is denied.

Claim 23: Tennis Court Slab Thickness

This Claim was originally based on the City's own GPR testing, which the Panel found was not reliable. Subsequently, the City had Ninyo & Moore do GPR testing and found that the slab thickness met the requirements of the contract.

The City has withdrawn this Claim.

Claim 24: Misc. On-Site Improvements

The parties have resolved all six of the permit issues related to this Claim, at the considerable urging of the Panel. The Claim was withdrawn.

Claim 25: Off-Site Improvements

This Claim was originally for off-site punch list items and a pavement deviation fee assessment. All items under the punch list have been completed and accepted. The only matter remaining is the fee assessment. Mr. Walker testified that he was the author of the pavement deviation fee clause in the regional standard specification for Clark County, which was incorporated in the notes on plan sheet GN-1. He also testified that the deviation where located would not have any effect on its useful life. Given that comment, the City has not been damaged by the deviation, and in the Panels' judgment, no fee should be assessed. This claim is denied.

Claim 26: Facility and Structural Improvements

The parties have resolved all eight of the permit issues related to this claim, at the considerable urging of the Panel. The claim was withdrawn.

Claim 27: Tennis Court Cabanas

Although, the City has withdrawn this Claim, it asks for an order reminding APCO of its obligation for final closure of permit requirements. Although APCO gave a submittal to Santec for the cabana foundation, which they reviewed without objection, it was not submitted to the Building Department for approval as a deferred submittal. After this Claim arose, APCO obtained plan check and permit approval from the Building

Department. In August, 2005, GES had inspected the cabana foundations and certified that the cabana foundations were put in per the approval plans. The Building Department won't accept this because the GES' certification was made before its plan check and permit approval. This is a distinction without a difference. The Building Department's request for an updated special inspection report is arbitrary and unreasonable. The parties to the contract know that the foundations were put in per plans.

The Building Department can accept GES's certification. This Claim is denied.

Claim 28: Misc. Electrical Improvements

This Claim, like the previous, relates to closing out permits for which the City is now making no claim. To the extent necessary, APCO is reminded of its obligation to assist the City in closing out its permits.

Claim 29: Walls and Fencing

This Claim relates to six permits for the wrought iron fence (tubular steel fence), five of which have been closed. The City is not requesting any financial consideration for this Claim, and the Panel finds there is nothing for APCO to do, in that the City's Claim with respect to this fence has been previously addressed under Claim 8 and 9.

Claim 30 and 31: Liquidated Damages Phases 1A and 1B

The Panel has previously found that the City delayed APCO in the performance of its work and has awarded delay damages to APCO and its subcontractor. The City has been somewhat inconsistent in its approach to this Claim as to Phase 1B. In the City's initial brief to APCO's Claims, it appeared to take the position that it had extended the completion date to May 3, 2006. In presenting its Counterclaim, the City argues that the Phase 1B completion date was January 5, 2005. The Panel finds that the City extended the completion date to May 3, 2007, which is the completion date for Phase 1A. All delay after that date, until substantial completion on September 2, 2005, was the result of the City's actions.

APCO never contested the liquidated damages set forth under GC 39(B), it disputed the City's entitlement to assert them. The Dissent agrees with the City on its calculation of

the delay damages, but the majority of the Panel disagrees for the reasons set forth in its opinions on APCO and its subcontractor delay claims.

This Claim is denied.

Claim 32: Investigation Costs – Tennis Courts

The City is seeking to recover the costs associated with uncovering defective construction relating to the post-tension concrete tennis courts. The Panel has previously found that the post-tension problem related to RFI-71, which was the responsibility of the City, not APCO. Additionally, the Claim appears to relate to the City's GPR testing, which the Panel found was worthless in light of Ninyo & Moore's GPR results. If the City incurred other costs of investigation, it has failed in its burden of proof to identify or segregate those costs.

This Claim is denied.

Claim 33: Investigative Costs – Six Inch Concrete

The City provided no back-up documentation to support this Claim. Additionally, as with all the investigative claims, the City wants reimbursement for its own in-house GPR testing, which the Panel found to be worthless. Some of the costs may relate to the six inch concrete panels that had to be removed for two courts to be enlarged for professional play not because they were defective. The Panel finds that the City has not sustained its burden of proof, on what if any, was the responsibility of APCO.

This Claim is denied.

Claim 34: Investigative Costs – Five Inch Concrete

For the reasons set forth in Claims 32 and 33, the Panel denies this Claim.

Claim 35: Investigative Costs – Pavers

The plaza pavers to which this Claim relates was the subject of the City's Claim 3. The Panel found that the deviations were the result of the City's design and failure to use sand stabilizer and not the responsibility of APCO. Under G.C. 37, the city is responsible for these costs as the defects were not the responsibility of APCO. Additionally, there were costs incurred for claims which the City found were not the responsibility of APCO. The

City has failed in its burden of proof on this Claim.

This Claim is denied.

Claim 36: Investigative Costs – tubular Steel and Chain Link Fence

This Claim is difficult to understand because the only thing that had to be uncovered was the foundation for fence posts. The tubular steel fence posts that were uncovered were spread footings for which the Panel found the City had no claim. The other defects were readily apparent and did not require uncovering. There might have been some uncovering with the chain link fence poles and foundation, but the City failed to provide back-up documentation from which the Panel could make some allocations. The City has not sustained its burden of proof on this Claim.

This Claim is denied.

Claim 37: Project Record Documents

This Claim relates to the as-built plans, which should reflect all changes made to the permit set of plans as the park was built. The plans were updated weekly to reflect the as-built changes by Mr. Platt, Mr. Barr and T.J. Consulting. When APCO delivered the final set of as-builts to the City at the end of the project, they were rejected. Initially, T.J. Consulting, on behalf of the City, rejected the as-built as not accurately reflecting the changes and returned them to APCO. Eventually, Mr. Lewis confirmed that a second set of as-builts were provided to the City, which was turned over to Santec so they could prepare the final as-built. Even though he did not review APCO's final submission, he believed it still contained inaccuracies. It does appear that Santec was able to prepare a final set of as-builts with what it received from APCO, which the City accepted. APCO's final set of as-builts were accepted by the City so there is no basis for this Claim even if there might have been a few inaccuracies.

This Claim is denied.

Claim 38: Outstanding Punch List

The issue here is primarily over the owner's refusal to allow APCO and its subcontractor to complete the remaining punch list items. The City claims that GC 39(d)

controls this issue. This provision requires that APCO shall complete the work on the punch list within the time specified on the certificate of substantial completion or as otherwise directed. If APCO fails to satisfactorily complete the punch list, the City has the option to complete the work with its own forces or retain another contractor to complete the punch list. The costs of completing can then be deducted from the retainage or other monies due APCO. Except for perhaps two items, the City has not in over three in a half years undertaken any efforts to complete any of the items remaining on the punch list.

The certificates of completion do not set forth any specific deadline but references a "reasonable time" when the punch lists are provided. The City points to the ITB definition of reasonable time, which means ten days. That definition was clearly waived. The initial Phase 1B punch list was issued on or about July 29, 2005 and the initial Phase 1A was issued on or about September 1, 2005. On or about November 10, 2005, the City prepared a combined punch list for Phase 1A and 1B. Up to this time, APCO had been working for more than two months on the punch lists, thus the 10 day reasonable time of the ITB had been waived by the City.

At some point in time, the City, without any prior notice to APCO, made a decision that it would no longer allow APCO and the subcontractor on the project to complete any remaining punch list items. The items for which the City contends are remaining are set forth in Exhibit 3509. Most of these items APCO and its subcontractors would complete if they were allowed back on the site. The City has made it clear to the Panel that it will not allow APCO and its subcontractors back on this site to correct punch list items. Since no specific deadline was set for the completion of the punch list, this refusal to permit them on the site and the City's failure to incur any costs to fix the punch list except for two items, APCO's argument has some merit.

Particularly, since no specific time was set for completion of the punch list by the City, it appears that it is the City who breached its contract with APCO. Under GC-33, the City is required to give APCO seven (7) days written notice before they can take over the punch list work. That provision, states in part, that if the contractor (APCO) neglects to

carry out work in accordance with the contract and fails within a seven day period after receipt of written notice from the owner to commence and continue correction of such default or neglect with diligence and promptness, the owner may after such seven day period, and without prejudice to other remedies, correct such deficiencies. In such a case, the owner may perform the work with its own forces or contract with others to perform the work.

This appears to be a clear condition precedent to the City's right to take over the punch list work without giving a seven day notice to APCO. The Panel cannot find in the record any such notice being given to APCO. In addition, except for maybe two items on the punch list, the City at this point, has not suffered any damage because it has not undertaken to complete the work with its own force or arranged for completion by others. The City, by virtue of its breach, is not entitled to any damages from APCO for the punch list items except as to where APCO has waived the breach and has stipulated to liability.

One such item or items on the punch list related to landscape planting, items 199-215, where APCO has stipulated and agreed that the City is entitled to a credit of $5,200.00. Other items for which the City made claims were punch list items for costs the City incurred in doing the work with their own forces. One of these was the ADA shower in the pro-shop, which work was done without any notice to APCO by the City's own force. Although the City had records as to what the actual cost was, it relied on estimates from Mr. Lewis and Mr. Barr. Those estimates were not the best evidence for proving the cost. The actual records are the best evidence of the cost, but the City did not produce them. For that reason, the claim would have been denied even if the Panel had not found the City in breach for not giving the seven day notice.

In December of 2008, the Panel requested that the parties get together at the job site to see if they could agree on what items remained on the punch list. The items on Exhibit 3509, tab 26, and on Exhibit 2890, disclose the items being broken down as completed, agreed and disputed. As to the disputed items, the City still needed to give the seven day notice if they wanted to make a claim against APCO. Having not done so, the City has

forfeited its rights to damages on the disputed items.

Based on the foregoing, Claim 38 is denied, except as to the $5,200.00 stipulated to by APCO.

Claim 39: Arbitration Costs

The City preliminarily sought $1,500,000.00 for this Claim. It now recognizes that G.C. 3B does not allow for recovery of these costs and has withdrawn the Claim.

Claim 40: Subcontractor Bonding – Liquidated Damages

The Panel finds no merit to this Claim. The City misconstrues the wording of ITB-18. The wording of ITB-18 is absolutely clear and unambiguous. The "required bonds and insurance" is what the successful bidder (APCO) is required to provide to the City within five days after notification of the award. If the "bonds and insurance" are not submitted within the time specified (five days) then the contractor (successful bidder) is subject to the liquidated damages (LD) provision.

The City then attempts to incorporate this LD provision into ITB-18 A.9. Under this provision, it is the subcontractor who is required to provide bonds but no insurance. Upon request, the contractor is to show proof that the bonds have been provided. The timing provision for providing subcontractor bonds is not within five days of the notice of award to the contractor, but prior to the subcontractor commencing work, and even then, only when the City requests. If the subcontractor does not provide the bond, the City interprets this as requiring it to assess the LD's against the contactor for not requiring the subcontractor to provide the bond. This is a strained interpretation of a provision which is to the Panel clear on its face.

Under the City's interpretation, the term "required bonds" would include the subcontractor bonds in the LD provision of the section. The City's disagreement with the Panel would at the most, make that section ambiguous as to whether the LD provision was applicable to subcontractor bonds. Ambiguities are construed against the drafter and thus against the City. While the Dissent may agree with the City's interpretation of ITB.18, the acting City engineer, Ms. Cheri Edelman, agreed that the provision was not clear as to

whether the LD provision applied to subcontractor bonds. Even the Dissent, apparently, agrees that it would not be appropriate to assess this penalty.

Whether the liquidated damages constitute a penalty or whether the City maybe stopped from enforcing the LD's in connection with subcontractor bonding is moot in light of the Panels holding.

This Claim is denied.

In addition to LD's, the City's Claim #40 included several other items of damage. The first was an unjust enrichment claim for the premium that should have been included in APCO's bid that was not paid because the subcontractor did not obtain the required amount of bonding. This claim was $404,058.00. Because the City had a past practice of not requesting the subcontractor bonds, the subcontractor did not include in their bids the cost of obtaining the bonds. The City received a benefit in a lower bid from APCO because those premium costs were not included in the bid. APCO and the subcontractors have not been unjustly enriched.

This Claim is denied.

Under the second additional claim, the City seeks reimbursement of bond on premiums that were paid to the subcontractors on Change Orders. The subcontractors did in fact provide bonds for portion of the work. As to the portion that were bonded, the sureties will conduct an audit when these claims are settled and will assess against the subcontractor an additional premium change since the ultimate premium is based on the final adjusted contract price of the bonded portion of the subcontract.

The only premiums that were paid to the subcontractor were to Richardson, CG&B and Geneva. Richardson's bonded subcontract related to site utilities. CG&B's bonded subcontract related to the Phase 1A contract. The Panel cannot find any evidence in the record regarding Geneva, and it appears from the City's findings and conclusions of law that no premiums claim is asserted as to Geneva. In reviewing the Change Orders involving Richardson and CG&B for which premiums were charged, that were not on the bonded subcontracts, the City is entitled to a credit. As to Richardson, the credit is $4,410.

As to CG&B, the credit is $4,700.00. The City is awarded $9,110.00 on this Claim.

The third Claim seeks to recover the amount of Change Order 26 paid to APCO to waterproof the stadium walls. This Claim is simply based on conjecture that the bid for waterproofing included in the plans for the stadium planters also included the stadium walls. There is nothing in the record to support this. Everyone agrees that waterproofing of the stadium walls were omitted from the plans and specifications and that a Change Order was appropriate.

This Claim is denied.

The fourth and fifth Claim relating to Change Order 109 and 113 for payment to APCO to maintain the landscaping which the City seeks to receive. The City cites section 2900 as controlling this issue. Actually, it is controlled by section 2913. Under section 1.3, all turf sodded areas (soccer fields) had to be in by August 15, 2004 or liquidated damage (L.D.) would be assessed at $3,000.00 per day. APCO had substantially completed the turf installation on field 8-11 by that date and no LD's were assessed. Under section 3.11 of section 2913, APCO was required to maintain the turf a minimum of 90 days after project completion. The Change Orders for maintenance covered costs after April 5, 2005. The Panel has already determined that except of the conduct of the City, both Phase 1A and 1B should have been completed in February of 2005. The City is responsible for these Change Orders.

This Claim is denied.

The City's final Claim under Claim 40, seeks reimbursement of interest on retention that the City alleges it inadvertently paid to APCO. Because the City's claims exceeded the amount being withheld, the City argues the retention became withheld funds upon which no interest was due. Under this award, APCO's claims, exclusive of retention, exceeds the amount awarded to the City and therefore the retention never became withheld funds. This Claim is denied.

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Summary of CLV's Counterclaim

The following is a summary of all of the City's Counterclaim on which the Panel has heretofore found the City was entitled to some recovery. As to all claims not listed, the Panel has found no entitlement or the claims were withdrawn.

CLV Counterclaim

Claim 2:	Defective net post anchors	$11,033.00
Claims 4 & 5:	Five and six inch concrete	12,614.00
Claims 8 & 9:	Tubular steel fences	131,840.00
Claim 10:	Storm Drains	3,150.00
Claim 14:	Perimeter tendons	7,544.00
Claim 15:	Tensioning results	1,000.00
Claim 17:	Court storage area	3,447.00
Claim 18:	Perimeter wind screen	15,687.00
Claim 21:	Concrete header, 1B	80,145.00
Claim 38:	Punch list	5,200.00
Claim 40:	Subcontractor bonding, etc.	9,110.00
Total:		**$280,770.00**

The City's Counterclaim is approved for $280,770.00.

INTEREST ON AWARD

It is the position of APCO that interest on the award should be calculated under NRS § 99.040, as there is no provision in the contract that expressly addresses prejudgment interest. The city argues that G.C. 15 in the contract provides for interest under NRS § 338.515. Both parties are partly right and partly wrong. The provision of NRS § 338.515 apply to the progress billings and the final retention. NRS § 99.040 would apply to APCO's

claim for equitable adjustment.

Under NRS § 338.515, the interest is to the paid quarterly, which means that the interest is to be compounded on a quarterly basis until the award covering the progress payments and retention is paid by the City. The basis that the City used for not paying was that their claim exceeded the retention and progress billing so nothing was due APCO. Since APCO's award on its claim for equitable adjustment exceeds the amount awarded to the City, the retention and progress billings were at all times due.

From the evidence and APCO's brief, it is difficult to determine when APCO's claim for interest started to accrue on the retention and progress payment. APCO, in its brief, states that the final billing for both was issued to the City on April 15, 2006, although the City acknowledged an earlier date. Interest under NRS § 338.515 commences to run thirty (30) days thereafter if the billing is not paid. Therefore, the Panel finds that APCO is entitled to recover interest from May 15, 2006 on $1,148,827.00 from the City at the rates set forth in NRS § 338.515 until this award is paid. The City is entitled to a credit for the interest payments made in July and October, 2006, of $12,010.95.

On APCO's equitable adjustment claims, we do not find any interest provision set forth in the contract that would apply to these claims. Therefore, we find that NRS § 99.040 applies to these claims. We further find that these claims, for the most part, were unliquidated claims. Therefore, interest on the equitable adjustment claim will be calculated under NRS § 99.040 and will continue to accrue from the date of this award until paid.

APCO'S CLAIM FOR SANCTIONS

APCO, in its closing briefs, is seeking to recover its attorney's fees either by way of sanctions under NRS § 18.010 or through a claim of bad faith on its claim and the City's Counterclaim. The contract between the parties clearly indicates that each party is to be responsible for their own costs, expenses, witness fees and counsel fees associated in the preparation and presentation of all claims and disputes. The contract does not provide for the recovery of attorneys' fees or related costs. If APCO is to recover on this claim, it must

be authorized under NRS § 18.010 or through a claim of bad faith.

Before addressing the legal issues, the Panel will address the City's conduct both as it relates to APCO's claim and the City's Counterclaim. From the Panel's decision on APCO's claim, it is clear that the City actively interfered and failed to cooperate with APCO in overcoming the problems created by the plans, which they knew from the beginning were defective and would interfere with APCO's performance. This interference and lack of cooperation was not on the part of the City's field personnel but on the part of the City's management. Even though the field personnel advised City management of the problems with performance and the need to grant time extensions, management refused to give any extensions and required Mr. Barr to declare APCO in default. The City even hired outside consultants who recognized the delay being caused to APCO because of the plans and change orders. Their advice to the City to get together with APCO to resolve these problems were ignored by City management.

As a result of the plan's deficiencies, many change orders were issued. APCO wanted to include requests for time extensions in the change orders. APCO was told that because the City wanted the project completed on time, any request for a time extension would result in the change order being rejected. This issue was resolved by Mr. Lewis and Mr. Barr assuring APCO that the final impact of the delays would be dealt with fairly on completion. This was apparently the practice on other City projects which APCO had with the City. An attempt was made near the end of the project to resolve the claims and delay issues which did not bring about a resolution. Instead, the City management decided to rely upon the contract provisions and ignore the commitments made by its authorized field personnel.

The City's Counterclaim is the result of a disconnect between the contract and the City's field personnel in administering the contract in the field. Mr. Barr, who became the one administering the contract in the field with APCO, is a licensed architect. When problems arose in the field due to the plans and specifications, he would authorize changes if no cost or credit was involved so that the work could proceed without delay.

Apparently, neither he nor APCO would reduce these changes to writing. This appears from the testimony to have been Mr. Barr's practice on other projects with APCO.

This practice on the part of Mr. Barr, created a problem with Mr. Walker's investigation of the City's Counterclaim. Mr. Walker was not an independent and unbiased consultant. He was an employee of the City. Although, we thing his testimony was, for the most part, factually correct as to what deficiencies existed in the project or was not installed, he did not undertake to determine the cause of these deficiencies. As far as Mr. Walker was concerned, if the changes or deletions were not in writing, it was APCO's fault. At no time during the preparation of the City's claims did he consult with Mr. Barr or APCO to determine why changes were made. Nor did he consult with Santec's personnel in investigating the claims, and to the extent he talked to Mr. Lewis, it was not to determine the cause. In an attempt to be fair, he presented claims that were overstated or did not exist.

Examples of this are the net post anchors, the concrete pavers, the turn down edge of the jogging trail, the tennis court dimensions, the missing playground equipment, and the tennis court perimeter tendons. There were at least three claims the City probably should not have brought. They are the credit for deleted soil over-excavations, the turf deletion, and the subcontractor bonding. These claims were probably asserted by others in the City management.

The Panel does find that there were some claims the City was justified in bringing, such as the excess cracking of the tennis courts, the five inch and six inch concrete walks, part of the tubular steel fence as it relates to welds, the defective storm drain, the missing perimeter windscreen, the court storage areas, and the missing concrete header.

It appears to the Panel that since many of the changes were so open and obvious, that Mr. Walker should have wondered why there were no NCN's being issued in light of the large number of inspectors the City had on the project. An open discussion with Mr. Barr, other City inspectors and its architect, right up front, the Panel believes would have prevented a lot of the City's claims from being made and would have reduced the City's

claimed costs.

By not properly investigating the claims initially, pressure was brought by City management on the City field personnel to support the claims. This was evident when Mr. Barr and Mr. Lewis objected to the missing playground equipment. Mr. Lewis gave into the pressure and supported the claim at the hearing. Mr. Barr's testimony was not altogether truthful on critical issues. While his testimony was generally clear on direct-examination by the City, his answers on cross-examination were not. He consistently did not answer the questions, and when directed to answer, he would equivocate. This was undoubtedly due to the pressure put upon him by the disciplinary proceeding brought against him that resulted in an informal oral censor. These charges primarily related to the oral changes he had permitted that did not comply with the drawings and specifications. Whether these oral changes violated the specifications is questionable as GC-1200 at ¶ 1.5A authorizes the owner to make minor changes to the work that does not involve time or money. There is nothing in GC-1200 that requires these supplemental instructions to be in writing.

The Panel believes that the action of the City in not properly investigating and overstating the claim could justify an award of attorneys' fees if permitted by statute or law. However, the Panel does not believe that under Nevada law that it can make such an award. The Nevada statute NRS § 18.010, cited by both parties, specifically says that "compensation of an attorney or counselor for his services is governed by the agreement ... which is not restrained by law." The parties' agreement, as we pointed out earlier, provides that each party is responsible for its attorneys' fees and costs. APCO cites to paragraph 2(b), which authorizes Rule 11 sanctions to the prevailing party in cases where there is no statute authorizing attorneys' fees. There is no statute that authorizes attorneys' fees in this matter. So the question is can this Panel award attorneys' fees as a sanction under NRS § 18.010 and when the agreement specifically says each party is responsible for its attorneys' fees and costs? Although, the Panel believes that many of the City's claims were maintained without reasonable grounds, and were frivolous and vexatious, we cannot

award attorneys' fees under this statute as we cannot shift the attorneys' fees and costs from the manner specified in the parties' agreement. In reaching this conclusion, we have relied upon three Nevada cases, *First Interstate Bank of Nevada v. Green,* 101 Nev. 113, 694 P.2d 496 (1985); *Farmers Home Mutual Ins. Co. v. Fiscus,* 102 Nev. 371, 725 P.2d 234 (1986), and *Merrick v. Paul Revere Life Ins. Co.,* 500 F.3d 1007 (2007). It appears from these cases that when the agreement between the parties specifies how attorneys' fees are to be addressed, NRS § 18.010. 2(b) no longer applies in that Nevada law prohibits courts from expanding or altering legislature rules for fee-shifting.

This rule also applies to bad faith claims. Although, damages are recoverable for breach of the duty of good faith and fair dealing, legal fees cannot be shifted from the parties' agreement. As the City points out, APCO never asserted a cause of action for breach of the covenant of good faith and fair dealing until its closing briefs. APCO's statement of affirmative claims did not contain such a claim. Raising the issue in its closing briefs comes too late.

APCO's claim for its attorneys' fees and costs is denied.

AWARD

1. Asphalt Products Corporation, dba APCO Construction is awarded against City of Las Vegas on its claim the sum of $2,410,015.60.

2. The City of Las Vegas is awarded against Asphalt Products Corporation, dba APCO Construction on its Counterclaim the sum of $280,770.00.

3. The net award is in favor of Asphalt Products Corporation and shall be paid as follows:

The City of Las Vegas should pay to Asphalt Products Corporation, dba APCO Construction the sum of $1,148,827.00, retention and progress billings, which sum shall bear interest at the rate provided for in NRS § 338.515 from May 15, 2006 until paid, less a credit of $12,010.95.

The City of Las Vegas shall pay to Asphalt Products Corporation, dba APCO Construction the sum of $980,361.60, equitable adjustment claim, which sum shall be

interest at the rate set forth in NRS § 99.040 from the date of this award until paid.

4. Asphalt Products Corporation, dba APCO Construction's claim for attorneys' fees and costs is denied.

5. To the extent that either party has paid more than one-half of the fees and expense of the arbitration, the party shall be reimbursed by the other party for the excess paid.

6. Any Motion submitted by the parties and not ruled upon by the Panel shall be deemed denied.

7. The award herein includes all matters submitted to the Panel and is in full settlement of all claims and counterclaims submitted to the Panel. All claims not expressly granted herein are denied.

DATED this 9th day of OCTOBER, 2009.

By: _____
Thomas R.C. Wilson, Arbitrator

By: _____
William F. Haug, Arbitrtator

DISSENT

APCO's Claims

I. BACKGROUND

This case begins long before any actual construction. In the past, David Loge ("Loge") testified that the City had experienced problems with contractors saving delay claims until the end of projects as a way to mitigate any claims for liquidated damages. In order to curb such behavior by contractors, the contract between the City and APCO was stricter to help enforcement of such claims against the City. APCO and its expert read and signed the contract, including the claims enforcement requirements. The City never

waived these requirements, and instructed APCO to follow these provisions. Interestingly, APCO's Joe Pelan ("Pelan") sent an RFI requesting the City documents necessary for such a claim.

During the planning phase, the City initially wanted to construct the Project within one year. However, during a pre-bid conference with potential bidders, including APCO and RCI, Lou Richardson expressed concerns regarding the time line for the Project. Subsequently, but before bidding, the City extended Phase 1-A of the Project by 120 days. This extended the contract time to one-year and four months. This time was continually reflected in change orders signed by APCO as well as representations made by APCO's representative, Pelan, in letters to the City and subcontractors' sureties. It was also included in APCO's baseline schedule submitted to the City on January 5, 2004. As late as April 27, 2005, Pelan sent a letter noting that the contract time expired on May 05, 2005. Adding the additional time also relieved the City's previous fears that there would be a rash of delay claims based on the previous schedule of one year.

Also during the design phase, councilman Brown requested changes to the Project and was generally interested in the time-line for the Project. Changes were suggested in October 2003, after Stantec had met the 100% deliverable requirement, but well before the plans went out to bid. According to Clair Lewis ("Lewis"), there was sufficient time for Stantec to make the design plans and incorporate any changes by the Building Department. In fact, by November 2003, all disciplines were approved, and only issues with structural components were remaining.

APCO was awarded the contract and a Notice to Proceed was issued on December 30, 2003, with an initial start date of January 5, 2004. The Notice to Proceed stated that Phase 1B was to be completed in 365 calendar days, while Phase 1A was to be completed in 485 calendar days. Furthermore, the Notice provided changes or deviations to the plans were valid only if in writing and directed by Lewis. A delay notice was issued by APCO on January 8, 2004, and the plans and permits for the Project were picked up by Pelan on January 13, 2004.

Differences were noted between the bid set of plans and permits set of plans, and APCO knew that there would be differences between these plans, as Pelan recognized in his letter to the City on January 08, 2004: "APCO construction has not been able to copy the approved plans for our subcontractors as well as review the approved set in order to make a comparison with the bid set for the purpose of providing a final schedule for submission to the City." (Emphases added). Pelan went on, stating "[o]nce reviewed, APCO Construction will review the plans to determine the actual impact; we will then present our evaluation." No such evaluation was ever completed but APCO was paid for this review through a change order. In this same letter, Pelan admitted the physical progress of the Project was not being impacted due to the lack of plans. Eventually numbers for the amount of differences ranged between 180 to 600, although APCO's expert stated that many of the differences were not material. Tim Blond testified that there are always differences between the bid plans and permit plans.

A conformed set of plans was made by Billy Platt ("Platt"), Tim Blond ("Blond") and Cassie Ridenour ("Ridenour"). Tim Blond also testified that numerous copies were made of the conformed set of plans and issued by the City. APCO claims such a conformed set was never provided; yet a letter dated May 27, 2004 by Gary Barr ("Barr") to Pelan indicated that such a set was in fact given to APCO. However, the contractor was to build according to the permit set of plans, and any differences between the permit set and conformed set would result in an RFI or change order.

Concurrent with the resolution of plan differences was APCO's grading of the Project. Pelan testified that APCO bid the Project as no import, and assumed that the BLM dirt would be available if necessary. After the proper fill material was not attainable at the site, APCO was forced to try and find fill from other sources, even though it had assumed from the beginning to use the BLM dirt. It was not until the end of April that APCO stated it would use the BLM dirt. APCO tried to circumvent the contract requirement that it have its own dust permit, and used back channels to obtain the City's dust permit. Once the City found out, it told APCO not to use its permit. In fact, the issue of the dust permit has been

a problem from the beginning of the Contract. In an e-mail from Barr to Lewis on January 12, 2004, Barr noted that APCO's grading permit had been ready since January 08, 2004, but APCO could not get the permit because it did not have a complete dust control permit. This issue was finally resolved in July 2004. Further delays were experienced because of caliche located at the Project site which, under the contract, was APCO's responsibility.

During this time, there was also discussion to change some of the soccer fields to artificial turf. APCO again found this out with off-the-record conversations between Councilman Brown and Pelan. Eventually APCO was formally made aware that such a decision was in the works, however the City continued to advise APCO install the soccer fields according to the contract. Yet APCO, on its own and disregarding the City's directive, decided to resequence its work to accommodate any later changes to the soccer fields. Eventually, the City made a decision to change some of the soccer fields to artificial turf. APCO was told to submit a proposal that included all costs, including any delay and acceleration costs. Eventually CCD 1 was issued for $3.4 million. APCO finished installation of all the fields before the contractual time of January 5, 2005. According to arbitration testimony, APCO was already behind schedule due to its grading efforts, and the City's change to synthetic turf on some of the soccer fields actually provided relief in regards to time.

Another point of contention was the shade trellises. Lewis testified APCO was originally only responsible for the shade trellises, and not the structures. But APCO wanted to redesign the structures and took over as engineer of record. This change also resulted in the shade trellises becoming APCO's contractual responsibility.

Another concurrent delay was APCO's lack of bonding for its subcontractors. Bonding was due by January 12, 2004. On April 15, 2004, the City assessed liquidated damages against APCO for the lack of bonding. However, by April 27, the City stated APCO had fulfilled the requirement for bonding, and withdrew the liquidated damages claim. However, the City stated it reserved the right to assess such damages should any future subcontractor on the Project fail to meet this requirement.

Furthermore, APCO was not providing proper schedules, and submitted pay applications without the required as-built schedules. The City brought in its own schedule analyst Harris and Associates to determine if the synthetic turf change had caused any delays. Harris found that the synthetic turf change did not delay APCO. Furthermore, Harris did find that APCO was not providing the required schedules, which made it difficult to complete a thorough analysis. When schedules were provided, items were marked as complete that in fact were not.

Other problems in the Project included alleged delays with RFIs, deferred submittals, and change orders. APCO alleges the City was often late in responding to RFI's, however Tim Blond's analysis during arbitration showed that the City answered most RFIs in a timely manner. APCO also claimed problems with the deferred submittals. Lilian Beltran ("Beltran") provided a thorough analysis, noting deferred submittals marked by APCO that were in fact not even deferred submittals. Beltran established that in fact all deferred submittals were marked on the plans, or by code incorporated into the contract, and were handled in a timely manner. Finally, Loge testified that the number of change orders in this case were not unusual for a project this size.

Eventually APCO made a claim for delay on February 23, 2005, in the amount of $6,500,000.00. Interestingly, APCO asserts that the total damages would exceed the amount claimed, though it did not provide the City with any documentation supporting this claim.

A. <u>Equitable Adjustment Claim</u>

APCO is seeking an equitable adjustment for over six million dollars. In support of its claim, APCO has noted problems in the following areas:

1. Conflicts between the bid and permit set of plans;
2. Excessive RFIs;
3. Problems with deferred submittals;
4. Change in the soccer field turf; and
5. Changes regarding the Pro Shop.

APCO's expert, Gregory Frehner ("Frehner"), was initially hired by APCO to assist in resolving claims during construction. However, APCO then continued to use Frehner as

their scheduling expert and to develop support for its claims against the City.

During his direct testimony, Frehner provided insight into how he calculated the 244 delay days APCO was now claiming. Frehner testified that the plan changes affected the overall completion of the Project, noting 600 differences between the bid set and permit set of plans. He also stated that it was impossible to accurately detail how these deficiencies were delaying the Project, but noted the City never stated how APCO was delaying the Project. Additionally, deferred submittals had an average delay of 173 days per submittal.

Other delay events Frehner testified to included the turf change (240 days), delays from problems with Nevada Power (totaling 597 days), delays with the Tennis Court Stadium (204 days), and delays with the Pro Shop (totaling 260 days, not including inspection delays). Frehner testified that many of the delays ran concurrently, and he found it impossible to separate out the different delays. To calculate the 244 delay days APCO now claims, Frehner took the difference between October 12, 2005, when the certificate of occupancy was issued, and February 10, 2005. In choosing February 10, 2005, Frehner stated that everyone agreed that the Project could have been completed within one year. Frehner added a 40 day "cushion" for APCO "inefficiencies." He admitted this decision was arbitrary.

APCO was aware that no one above Barr had stated time considerations would be made at the end of the Project. Furthermore, Frehner was aware of the contract requirements for delay claims, but felt that providing schedules with negative float was sufficient. Submitted schedules showed change in activity start and end dates, as well as activity duration, but did not provide explanations for the change nor contain contractually obligated causation explanations, mitigation efforts, and impacts to the overall schedule. However, Frehner testified he provided supplemental letters to explain delay issues and, when read in conjunction with the submitted schedules, provided sufficient notice.

Frehner recognized that it was the contractor's responsibility to provide support through a schedule analysis for any delay claim. Frehner's analysis amounted to taking the difference between the early completion date plus 40 days and October 12, 2005. Frehner

testified that all responsibilities for delay should be assigned to the City. However, even Pelan signed numerous change orders, all indicating the Project completion date of May, 2005.

In Frehner's analysis, no work product was produced to (1) show how float was used; (2) take into account APCO's responsibility for submitting RFIs; (3) show the time it took APCO to process deferred submittals or how they affected the critical path; (4) show how change orders impacted APCO's delay days calculation; (5) indicate whether resources were diverted from critical path activities to non-critical path activities; and (6) support the argument that the "no early completion" clause was prohibited. Furthermore, the analysis did not take into account concurrent delays.

B. Early Completion Claim

In support of its early completion claim, APCO cites to this Panel's decision to deny enforcement of the no damages for delay clause. Furthermore, APCO claims that all parties involved in the Project anticipated or believed that the Project could be finished within one year. APCO indicates that the volume of work, as compared to the Contract price, indicates APCO substantially completed most work by February 2005, and the remaining work was related to change orders. Finally, APCO states is expert, Frehner, opined the Project could have been completed within 12 to 13 months. To be "conservative," Frehner added 40 days to the claimed year completion date to calculate the delay days. Frehner calculated 244 delay days attributable to the City.

The City states it did have a completion deadline of one year; however, due to concerns by contractors at the pre-bid conference, including APCO and RCI, the City added an additional 4 months to Phase 1-A. Furthermore, the City asserts APCO contractually promised to use the entire time for Project completion and not base on an early completion schedule. Early completion damages violate the public policy for public works contracts under NRS 338, et seq. Additionally, APCO's baseline schedule does not indicate that APCO intended to finish early. APCO, the City asserts, has presented no evidence to show a promise that it would be compensated for an early completion. Furthermore, change

order issues, as well as APCO's Project Manager's "status inquiry" for a surety bond, indicate Project completion between May 3-5, 2005. No delay claim based on an "early completion" date was ever submitted by APCO.

Finally, the City asserts Frehner's opinion was arbitrary and failed to support APCO's claim. Frehner failed to calculate which party used the schedule's float days, failed to support his opinions with a critical path analysis, and failed to assign fault for concurrent delays. Additionally, Frehner was a claims consultant from the beginning of the project, but was unable to comply with contractual claims requirements. Frehner's analysis lacks credibility because he assumes that all subcontractor's work from the beginning of the Project to the end, disregarding their different work scopes. I agree with the criticisms leveled against the Frehner testimony and analysis by the City.

II. EQUITABLE ADJUSTMENT CLAIM

A. Equitable Adjustment Standard in Nevada

The Nevada Supreme Court has recognized a contractor's right to an equitable adjustment when (1) the owner is at fault for the delay and (2) when the contractor has given proper contractual notice. See Eagle's Nest Ltd. P'ship v. Brunzell, 99 Nev. 710 (1983). However, delay claims based on work completed within the scope of the contract, and that were subject to approved change orders, become part of the contract. See California Commercial Enters. v. Amedeo Vegas I, Inc., 119 Nev. 143, 145 (2003). Delay-related damages properly addressed by change orders prevent a contractor from recovering such delay damages. Id. at 147-48.

In Eagle's Nest, a contractor was contracted to build condominiums using a new technique using pre-cast concrete molds. 99 Nev. at 712. A certain number were required for construction, and it was the contractual responsibility of the owner to provide them. Id. Delays in construction resulted from the owner's failure to provide the correct number of molds as well as difficulties with the molds provided. Id. The contractor provided notice to the owner of the delays, as required under the contract. Id. at 713. The contractor sought an equitable adjustment for the costs associated with the delays. Id. at 712. The district

court found the owner had failed to provide a sufficient number of molds, causing substantial delays. Id. The district court found in favor of the contractor, and the owner appealed. Id.

The Nevada Supreme Court affirmed the district court. Id. The Court noted that neither party contested there was a delay nor that it was caused by the owner. Id. at 712-13. Furthermore, the Court noted that the contractor had provided sufficient notice to the owner as required under the contract. Id. at 714. The contract required the contractor to provide notice "within a reasonable time after delay . . . ." Id. at 713. The court stated "[Contractor's] letter that he was having trouble with the molds clearly provided appellant with the warning that the contractor was experiencing overruns and additional costs, and gave [Owner] the opportunity to take appropriate remedial measures." Id. at 715. Therefore, where fault has been determined for a delay and contractually required notice has been given, an equitable adjustment claim is valid.

APCO and the Majority Opinion rely on Eagle's Nest for the proposition that strict contractual compliance is not required when there are other methods of notice available to the owner. However, the Nevada Supreme Court made clear in its decision that the contractor had first complied with the contractual notice requirement. Only thereafter did the court look to the "specific circumstances in the case." 99 Nev. at 715. This is what distinguishes Eagle's Nest from the present case - there, the contractor complied with the contract requirement whereas, here, APCO has failed to abide by the contract.

Furthermore, the Majority Opinion seems to believe that there were some equitable considerations the *Eagle's Nest* court made in reaching its decision. However, a reading of the case finds no such support. The court looked at both the contractor's notice and "specific circumstances" because the contract merely required notice "within a reasonable time after delay." Here, the contract was specific as to when notice was required and what was required. Therefore, no equitable principles apply. APCO tries to point to the numerous other ways in which the City had notice of delays or problems. However, the Contract between the City and APCO specifically provided the following:

1.4(A) CLAIMS AND DISPUTES

Contractor claims for modification of the Contract Time and Contract Amount shall meet the requirements for Timely Notice, Allowed Causation and Schedule Impact . . .

[r]egardless of whether the Owner has constructive or actual knowledge of the dispute, event or other question, a timely written notice shall be provided or the clam shall be denied.

The purpose of the written notice to place the Owner on notice of the impact and

consequences of the dispute, event or other

question on the Project. . . .

b. **Notice Format.** Contractor shall provide the written notice using the Owner's Notice of Claim form or similar document that specifically indicates to the Owner that the notice relates to a single claim and no other issues or questions. Should the Contractor provide the notice in a change order request, letter, meeting minutes or other document, or commingled with other issues, the Owner shall have no responsibility to respond to the claim in a timely manner. (Emphasis added).

Furthermore, inherent in the Nevada Supreme Court's reasoning is an opportunity for the owner to take the necessary remedial steps for any delay impacting the construction. Here, by not providing the required notice, the City was not given the opportunity, as required under the contract, to appraise the alleged delay event. The City also explained during arbitration the importance of these contract provisions. Previously, contractors would hold delay claims until the end of the contract and then present them to avoid liquidated damages, just as APCO has done in this case. Furthermore, APCO and Frehner both stated they read and understood the contract. APCO and the City are not neophytes, but professionals that understand contracts. It would be patently unfair to follow APCO's argument because the City clearly established its guidelines and requirements. The contract is clear and unambiguous as to the notice requirements, as such APCO's failure to follow it was to their detriment. Absent proof of fault by the City, APCO has no claim for an equitable adjustment.

B. **Fault for Delays**

APCO has failed to show the City was at fault for the alleged delaying events. In support of its argument, APCO states problems with plan differences, RFIs, change orders, and deferred submittals as evidence of City-caused delays. APCO was given notice to proceed on January 5, 2004, and received the Project plans and permits on January 13, 2004. APCO provided a notice of delay on January 8, 2004. Interestingly on May 5, 2004, Pelan sent a letter to Barr, and no other City personnel, stating APCO was being delayed. Pelan stated APCO would track individual delays and would give the City proper notice. Yet APCO never did this and on February 23, 2005, sent its official Notice of Delay Claim. In this alleged notice, APCO asserts what it believes are delays, but does not follow the proper contractual proof that the delays were caused by the City or the exact impact of the delays to APCO. Additionally, APCO states the alleged delay events were ongoing, and their full impact unknown. Neither the May 5 letter nor the February 23 letter meets the contractual notice requirements set forth in the Contract. Furthermore, APCO admits that neither it nor Frehner were able to provide any critical path analysis or mitigation due to concurrent delays.

The City admits that its own critical path analysis indicates APCO had "cause for claiming 76 calendar days of non-compensable time extensions for Phase 1-A, and 61 calendar days of non-compensable time extensions for Phase 1-B." However, the City argues it is APCO's burden to prove that the City caused delays and effected the critical path. Furthermore, Pelan's testimony demonstrates APCO knew it was to build from the permit set of plans, and discussion regarding a consensus set is irrelevant. Regarding RFIs, the City states its evidence showed that the City responded to all RFIs in a timely manner, contrary to Platt's testimony.

APCO's further reliance on deferred submittals was also rebutted by City testimony. Instead, it was APCO who caused delays regarding the deferred submittal process by failing to respond timely, failing to submit deferred submittals as contractually required, and submitting claims for items that were not deferred submittals. Frehner was unable to

show that any deferred submittal affected critical path activities, while Beltran was able to show that the City did not delay in processing deferred submittals.

It is a well established rule that a contractor seeking an equitable adjustment must prove "the fundamental facts of liability, causation, and resultant injury." CEMS, Inc. v. U.S., 59 Fed.Cl. 168, 228 (2003) (citing Miller Elevator Co., Inc. v. U.S., 30 Fed. Cl. 662, 702 (1994)); see also G.M. Shupe, Inc. v. U.S., 5 Cl.Ct. 662, 737 (1984); cf. Clark County School Dist. v. Richardson Constr., Inc., 123 Nev. 39, 168 P.3d 87, 96 (2007) (stating an essential element in breach of contract cases is causation). Plaintiff must show that defendant was the "sole proximate cause" of the delay, and that no concurrent cause would have equally delayed the contract regardless of the City's action or inaction. Mega Constr. Co., Inc. v. U.S., 29 Fed.Cl. 396, 424 (1993). In this case, the critical path method was specified as the proper method to calculate delay damages.

In Haney v. U.S., 676 F.2d 584,595 (Cl. Ct. 1982), the court described the Critical Path Method (CPM) as follows:

Essentially, the critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work . . . The date is then analyzed, usually by a computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion fo the entire project. However, some items for work are given no leeway and must be performed on schedule, otherwise, the entire project will be delayed. These latter items of work are on the "critical path." A delay, or acceleration, of work along the critical path will affect the entire project.

"The reason that the determination of the critical path is crucial to the calculation of delay damages is that only work on the critical path had an impact upon the time in which the project was completed." Fortec Constructors v. U.S., 8 Cl.Ct. 490, 505 (1985) (citing G.M. Shupe, Inc. v. U.S., 5 Cl.Ct. 662, 728 (1984)). The critical path is not static, however, and delays can change non-critical path activities into critical path activities. Id. Using the

CPM method requires continual updating to reflect delays as they occur. Id.

Where there are multiple delays, it is essential to determine "the concurrency . . . to analyze the impact of each cause of delay upon the critical path . . . . With proper use of modern CPM scheduling and time impacts analysis which is properly and regularly updated, it is possible to determine criticality of work activities and time impacts to this level of detail." Bruner, Philip L., O'Connor, Patrick J., 5 Bruner & O'Conner Construction Law § 15:68, Risks of Construction Time: Delay, Suspension, Acceleration and Disruption (2008).

It is the contractor's responsibility to show that the government is solely responsible for the delay, and that no other concurrent delay could have contributed. Mega Construction, 29 Fed.Cl. at 424. "[T]he general rule is that '[w]here both parties contribute to the delay, neither can recover damage[s], unless there is in the proof a clear apportionment of the delay and expense attributable to each.'" Id. (citations omitted) (change in original and added). Failure to apportion concurrent delays is sufficient to deny a claim. Id. (citation omitted).

Use of other methods for computing damages is proper only when the contractor has proved the owner is at fault for the delays. See CEMS, Inc. v. U.S., Fed.Cl. 168, 228 (2003) (stating the "jury verdict" method is a last resort when the plaintiff has proved "(1) that clear proof of injury exists; (2) that there is no more reliable method for calculating damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages.") (citing Raytheon Co. v. White, 305 F.3d 1354, 1367 (Fed. Cir. 2002)). Although mathematical precision is not required in calculating damages, see G.M. Shupe, 5 Cl.Ct. at 737, it must first be established that the contractor was in fact damaged by the owner's delay.

1. Construction Plans

In support of its equitable adjustment claim, APCO points to differences between the bid set of plans and permit set used to build from. Frehner testified that he identified over 600 plan differences, resulting in a delay to APCO. In support of its claim, APCO cites U.S.

v. Spearin, 248 U.S. 132, 39 S.Ct. 59 (1918) and its progeny, as well as Home Furniture v. Brunzell Const. Co., 84 Nev. 309 (1968).

It is true that in Nevada, bid documents are construed against the drafter. American Fire & Safety, Inc. v. City of North Las Vegas, 109 Nev. 357, 360 (1993). Furthermore, a contractor that follows plans and specifications, and does not deviate from them, will not be liable, absent negligence, for damage or loss resulting solely from defects in plans and specifications. Home Furniture, 84 Nev. at 313. However, where a contractor fails to prove that plan defects directly caused delays, no breach of an implied warranty for construction plans exists. See Wunderlich Contracting Co. v. U.S., 173 Ct.Cl. 180, 351 F.2d 956, 964-65 (1965); see also Hardwick Brothers Co. II v. U.S., 36 Fed.Cl. 347, 413 (1996) (stating plaintiff had failed to prove it was misled by defects and omissions in specifications).

APCO's claim fails for three reasons. First, APCO's reliance on differences between the two plans never demonstrates concretely how such plan differences resulted in delays. Frehner even admitted that not all plan differences were material. For material differences, APCO is not only required to show that such differences were on the critical path, but is also required to meet the necessary elements of fault, causation and injury. However, APCO fails to do so, relying merely on the amount of plan differences as somehow an indication that it was delayed by the City. If all plans were required to be perfect before construction began, nothing would get built.

Second, APCO relies on the fact that the City failed to get proper approval from the City Building Department, in violation of Nevada Administrative Code ("N.A.C.) § 341.065 as well as a lack of clouding on the drawings. However, APCO fails to show that violation of the administrative code resulted in over six million dollars of damages. Furthermore, APCO also makes a claim that the lack of clouding also affected the Project's timely completion. APCO was issued change order No. 7 to compensate it for reviewing the plan differences. Once a change order is issued, it becomes part of the contract and the responsibility of the contractor. See California Commercial Enters. v. Amedeo Vegas I, Inc., 119 Nev. 143, 147-48 (2003); see also J.D. Hedin Constr. Co. v. U.S., 347 F.2d 235, 248 (Cl.Ct.

1965), overruled on other grounds by statute, ("A change order or proceed order which would assure plaintiff compensation is necessary before defendant can impose this obligation . . . .).

Finally, APCO's case law argument is distinguishable. Spearin holds that "if a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. 132, 136, 39 S.Ct. 59, 61 (1918). Spearin has not been recognized by the Nevada Supreme Court and is not applicable in this instance because APCO has not shown that the plans were defective; in many cases, APCO or its subcontractors were responsible for designing the finished product. Both Spearin and Brunzell absolve a contractor from liability when a defective product has been built due to faulty owner-made plans; neither case stands for the proposition that errors in owner-plans are sufficient to excuse contractor delays. The City provided an onsite representative to handle plan differences which could not await a change order or RFI. The City issued numerous change orders to compensate APCO for differences which changes its work scope. However, at no time during the Project did APCO submit a notice of delay claim based on a plan error. Therefore, APCO has failed to support its argument by the necessary evidentiary standard.

2. RFIs and Deferred Submittals

In furtherance of its claim, APCO argues both the RFI process and Deferred Submittal requirements resulted in delays. APCO's expert calculated an average deferred submittal delay to be 173 days. However, as required, APCO failed to demonstrate that a delay with an RFI or a deferred submittal resulted in a delay to the Project. Furthermore, the City presented ample evidence that the City in fact answered RFI's in the contractually required time and that APCO was at fault for the delays regarding both RFIs and deferred submittals. Therefore, APCO's reliance on such processes for its delay claim is without merit.

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3. Change Orders

The contract between APCO and the City was clear and unambiguous - any delay requests submitted through a change order did not require the City to respond in a timely manner. Therefore, when APCO was told that no issues regarding time would be handled through change orders, it was on notice that the only way it would receive compensation for delays was for it to follow the notice of delay requirement under the contract. Pelan even received an RFI response in regards to the City's claim form.

However, APCO further states that oral statements and past City practice on other Projects indicated that time issues would be handled at Project completion. This, in effect, amounts to a change in the contract requirements. As noted above, the contract could only be changed with a written notice by Lewis. Therefore, APCO could not justifiably rely on any oral statements of City employees to abrogate its contractually required duty to follow the notice of delay claim provisions. Past practice is also insufficient, and no law is cited by APCO in support of this position. Therefore, APCO's argument is without merit.

The Majority Opinion does not sufficiently consider who has the burden of proof in this case. Relying solely on Brunzell, the Majority Opinion finds it acceptable that an experienced contractor, after reading, signing, and having an expert read and sign a construction contract, could blatantly and repeatedly disregard its contractual requirements and be awarded for such behavior. The case law cited above provides a clear understanding of what burden of proof is required for a contractor making an equitable adjustment claim. APCO has completely failed on this point. For all the above reasons, I find that APCO's equitable adjustment claim is without merit.

C. Material Breach and Waiver

APCO's expert failed to provide any meaningful calculation of delay damages attributable to the City. Even the number of delay days calculated does not follow the standards noted above. An arbitrary date was set to begin counting delay days and an arbitrary ending date was chosen, and fault for the difference was wholly assigned to the City without analysis as to how each delay affected the critical path or by whom.

Furthermore, APCO's expert failed to account for concurrent delays and attribute fault and costs. Therefore, I cannot reasonably accept APCO's alleged delay days calculation.

APCO argues the City materially breached the contract for putting the contract out to bid before plans were finalized. APCO further asserts the City waived the notice of delay requirements by: (1) putting out the bid documents prematurely; (2) relying on oral statements of City employees; and (3) the City's unwillingness to grant time extensions in change orders.

The Majority Opinion states, without any citation to supporting legal authority, that the City was in first material breach of the contract by issuing the bid plans and is estopped from using APCO's failure to follow the notice claims requirement. Yet the testimony during the arbitration proved the City did not release the bid documents prematurely. Even if the plans were premature, APCO's evidence failed to show that the plan differences were any greater than what an average City project experiences and thus amounted to a material breach.

The definition of material breach is flexible, requiring a "determination depend[ing] on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." Stone Forest Indus., Inc. v. U.S., 973 F.2d 1548, 1551-52 (1993), cited with approval by, J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 294 n.37 (2004). A party may waive a material breach through its own actions. See Williston on Contracts, §63:3: Degree of Breach; "Material breach" or "total breach." "Continued acceptance of benefits under the contract is the most common and clearest case of election by conduct." Cities Serv. Helex, Inc. v. U.S., 211 Ct.Cl 222, 543 F.2d 1306, 1314 (1976) (citations omitted).

After receiving the plans, a change order was issued for APCO to note the differences between the bid set and permit set of plans, and compensation was given. This was early on in the construction project and APCO always had the benefit of using its scheduling consultant, Frehner. APCO never stated that the differences were so great, that it was prevented from continuing with construction. Construction continued, without any

delay claim, as well as further change orders to compensate APCO to compensate for plan differences. Furthermore, the City presented evidence during arbitration that in fact the plans were not put out prematurely. Lewis testified by November 2003, all disciplines had been approved and the only issues being reviewed by the Building Department were regarding structural components. Therefore, the City was not in material breach of the contract.

APCO claims the City waived the notice of claims provision based on an alleged understanding that time issues would be handled at the end of the contract. The Nevada Supreme Court defines waiver as "'the voluntary and intentional relinquishment of a known right'" that may either be express or implied. "[W]aiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing . . . Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition." Udevco, Inc. v. Wagner, 100 Nev. 185, 189 (1984) (citations omitted); see also Gramanz v. T-Shirts and Souvenirs, Inc., 111 Nev. 478, 483 (1995) ("the party asserting waiver [] prove[s] that there has been an intentional relinquishment of a known right.").

In this case, the only person who could waive the contractual notice requirements was Lewis. Such a change to the contract was required to be in writing. By putting such requirements in writing, the City has removed any reliance by APCO on verbal statements by any other City employee which amounts to a change in the contract. APCO was aware of these contract requirements. Furthermore, arbitration testimony by the City indicated that APCO was told numerous times to follow the contract requirements for delay claims. Thus, any reliance that did not meet with the contract requirements was unjustified. Therefore, APCO's waiver argument fails as a matter of law.

III. EARLY COMPLETION DAMAGES

A. Panel's Prior Decision

The Contract between the City and APCO contains the following:

Within 10 days following notification of Award, Submit to the Owner a preliminary

Guaranteed Progress Schedule which illustrates how Contractor intends to complete the Work *within the contract time.* The Contractor's schedule shall be based on the Contract Time and *shall not be based on an early completion schedule.* No additional compensation will be allowed to the Contractor for delays to an early completion schedule.

On July 3, 2008, this Panel ruled that the "no damage for delay" clause in the prime contract between APCO and the City violated NRS 108.2453(2)(e) and was therefore unenforceable under Nevada public policy. However, APCO's reliance on this decision as the Panel's green light to begin early completion calculation damages is without merit.

The Majority's decision was erroneous and found no support under Nevada law. The Nevada Supreme Court has expressly upheld such clauses as valid and enforceable. J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 285 (2004). The Majority's opinion was based on the mechanic's lien statute, which I believed had no application. As I noted in that decision, as well as a later decision, Nevada does not recognize a *per se* bar against mechanic lien waivers, and consequently, no *per se* bar can be implied against the no damage for delay clause. See Bovis, Inc. v. Bullock Insulation, Inc., 197 P.3d 1032, 1041 (Nev. 2008) (holding mechanic-lien waiver clauses are subject to a public policy analysis), *overruling in part,* Dayside, Inc. v. First Judicial Dist. Ct., 119 Nev. 404 (2003)(holding mechanic-lien waiver clause valid and enforceable). Therefore, no justification existed to support APCO's argument that the prime contract's "no damage for delay" clause was unenforceable.

It should be noted that the contract does not prevent any damages - it only prevents APCO from starting such damage calculation from a point in time which was not in the contemplation of the parties at the time of contracting. Furthermore, as the Majority's decision noted, the pleadings did not help resolve the factual issue of early delay damages. As noted below, there is no factual basis to APCO's claim, nor any legal basis. Therefore, I believe APCO's early completion claim lacks merit.

For a delay claim to be valid, the Contract required APCO to give the Owner's Designated Representative written notice thereof within seven calendar days after the

Contractor encounters the event. (Ex. 3, handwritten pg. 45, GC.39(G)). Any claim for modification of contract time or Contract Amount had to meet the requirements of Timely Notice, Allowed Causation and Schedule Impact. (Id. at handwritten pp. 65, 66, and 69.) Additionally, the Contract provided that regardless of any constructive or actual notice, failure to provide the written notice was sufficient to deny a claim. (Id. at handwritten 64, 1.4). This failure also constituted "prima facie evidence that either the delay did not occur or it did not impact the Project completion date." (Id. at handwritten pp. 70-71.) By its own admission, APCO failed to abide by the contract requirements.

Finally, APCO's expert testified to the fact that contractors often put float in the schedule so that, when they fail to finish early, a delay claim can be made. However, when APCO tried to submit such a schedule, the City denied it and APCO submitted a new schedule showing the completion date of May, 2005. Furthermore, I find APCO's argument highly disingenuous considering the fact that, before contract bid, APCO claimed the Project could not be finished within one year. This necessitated the City to add four months to Phase 1-A.

In a logical leap, the Majority Opinion finds an exception to J.A. Jones premised on active and intentional interference by the City. Exceptions to the enforcement of a "no damage for delay" clause will be construed as a violation of the implied covenant of good faith and fair dealing, including:

1. Delays so unreasonable in length as to amount to project abandonment;
2. Delays caused by the other party's fraud, misrepresentation, concealment or other bad faith; and
3. Delays caused by the other party's active interference.

See 120 Nev. at 288. The Majority alleges the City intentionally interfered with APCO's ability to timely perform by issuing plans it knew were defective and would result in untimely project completion. Majority Opinion at 5. The Majority further argues "the City actively and intentionally interfered with the contractor's performance and therefore breached the covenant of good faith and fair dealing and thus acted in bad faith towards APCO." Id. at 8. Therefore, under J.A. Jones, this intentional interference acts as an

exception to enforcement of the no damage for delay clause.

The Majority's argument makes two assumptions. First, that because the plans were not completely reviewed by the Building Department, such plans were knowingly defective. Second, that by giving such plans to APCO, the City's action amounted to an active interference. However, the Majority is in error regarding what is "active interference."

The Nevada Supreme Court states in J.A. Jones that *delays caused by the other party's active interference* amounts to violation of the covenant of good faith and fair dealing. However, APCO did no analysis to show that the delays it encountered were the fault of the City, APCO or its subcontractors. APCO merely assigns all blame to the City without any analysis by its experts. Therefore, the Majority relies on a faulty assumption which undermines its argument in favor of an exception to the no damage for delay clause. In order for APCO to prevail under this view, it would have to actually prove that such delays were caused by the City. However, APCO failed to do so, and therefore no exception is warranted.

The Supreme Court did not define "active interference" in the J.A. Jones decision. Yet the court relied on a decision by the South Carolina Supreme Court in adopting the exception. See J.A. Jones, 120 Nev. at 286 n. 4 (citing Williams Electric Co. Inc. v. Metric Constructors, Inc., 480 S.E.2d 447 (S.C. 1997). In that case, the South Carolina Supreme Court noted that the United States District Court for the Southern District of Iowa defined "active interference" as:

> commit[ing] some affirmative, wilful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms of the construction contract . . . [U]se of the term "active" to modify "interference" . . . clearly implies more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence . . . .

480 S.E.2d at 449 n.3 (citing Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., 355 F.Supp. 376, 399 (S.D. Iowa 1973)). The South Carolina Supreme Court partially adopted this definition, see id., stating that because the court had already adopted a bad faith

exception, no showing of bad faith was required under the "active interference" exception. Id. Similarly, Nevada has adopted both the bad faith and active interference exceptions. See J.A. Jones, 120 Nev. at 288. Therefore in all probability, the Nevada courts would follow suit and not require a showing of bad faith, but otherwise would require some affirmative or willful act.

Furthermore, "active interference" requires something out of the normal experience of delays contractors experience during construction. Interference must be "reprehensible conduct" that is "in collision with or runs at cross purposes to the work of the contractor." See Mauric T. Brunner, Annotation, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construct Contract*, 74 A.L.R.3d 187, § 7[e] (1976) (§ 2[a] was cited favorably in J.A. Jones, 120 Nev. at 285 n.3). Furthermore, "active interference" does not obviate a no damage clause when the "alleged interference involved nothing more than the ordinary and usual types of delay with which most contractors are frequently involved, or delays which clearly were in the contemplation of the parties." Id.

The flaw in both APCO and the Majority's argument is that no evidence has been produced that the changes between the bid drawings and the permit drawings were of such a nature that the City could be considered actively interfering. The Majority and APCO continually rely on the number of differences and the fact that the plans were not 100% reviewed by the Building Department. However, if the City was always required to have perfect plans, contractors would always have claims against the City. Yet the Contract clearly provided ways in which to deal with differences in plans, changes to the plans, and proper compensation for APCO and its subcontractors. APCO has not shown that any of the delays alleged to be caused by the City were different from delays at other projects. Indeed, APCO could not even agree to the number of differences in the plans, which ranged from 180 to 600. Even at the 600 mark, however, APCO's own expert agreed that many of the differences were not material.

The Majority's argument relies on a showing that the plans were knowingly faulty. However, simply because plans have differences do not make them faulty. Furthermore,

no showing was made that the plans were defective. Therefore, the Majority's reliance on an exception to enforcement of the "no damage for delay" clause is without merit.

The Majority Opinion argues that Frehner "calculated" February 10, 2005 as the early completion date. But even Frehner noted this date was arbitrary. Amazingly, the Majority Opinion faults the City's expert for not correctly identifying float on critical and non-critical path activities. This is ironic considering Frehner's analysis lacked the necessary detail to support any claim. In fact, the Majority Opinion in this regard is glaringly absent of any real analysis of Frehner's testimony, and decides to entirely fault the City without sufficient analysis.

In further finding that APCO intended to finish early, the Majority Opinion again disregards any burden of proof standards and the evidence presented at arbitration. Whether it was at the pre-bid conference, the Notice to Proceed, change orders, or representations made by Pelan, it was obvious that the contract finish date was May 5, 2005. The Majority Opinion relies on the base line schedule as evidence of an early completion date. However, the City rejected any schedules that showed a completion date before May 2005.

B. Early Completion Damage Requirements

APCO cites Weaver-Baily Contractors, Inc. v. U.S., 19 Cl. Ct. 474 (1990) for the proposition that a contractor is entitled to early completion damages even though the contract requires the use of all contract time. In opposition, the City contends that APCO, in order to have support for an early completion damage claim, must prove: (1) it intended to finish early; (2) it was capable of finishing early; and (3) it would have finished early but for the government's actions. Interstate Gen. Gov't Contractors v. West, 12 F.3d 1053, 1059 (Fed.Cir. 1993). For reasons below, I agree with the City that APCO failed to prove a case for early completion damages.

Here, APCO has not proved that it intended to finish early. Even APCO's suggestion that it could seems highly incredulous considering it, along with RCI, balked during the pre-bid conference at the one year deadline imposed on the Project. Because of

the bidder protestations, the City added an additional 4 months to Phase 1-A. Even without such evidence, APCO still failed to show it intended to finish early. If it had planned to do so, then a delay damage claim should have been made, as required under the contract. However, APCO failed to do so. Self-serving beliefs after-the-fact are not sufficient to support a claim. West, 12 F.3d at 1060. Therefore, APCO has failed to show that it intended to finish early.

APCO has also failed to offer any evidence that it was capable of finishing early. APCO signed numerous change orders, all with the completion date of May 4, 2005. Furthermore, as a late as August 2004, Pelan signed a "Status Inquiry" form for CGB's bond surety. On that form, which Pelan represented as true, a completion date of May 5, 2005 was assigned to the Project. Because change orders become part of the contract, and the Project date was extended to 485 days for completion of Phase 1-B, the proper completion date for the Project is May 4, 2005. APCO tried to submit early completion schedules with a finish date other than the contract completion date, but as APCO's expert testified, the City rejected any such early completion schedules.

Finally, APCO failed to show but-for the City, it would have finished on time. Frehner testified that his early completion damage calculation was based on (1) everyone's belief that the contract could be completed in a year and (2) arbitrarily adding 40 days for contractor inefficiencies. Frehner points to "everyone's belief" as a fact to support his calculation of early completion damages; however, the contract and change orders say otherwise. Furthermore, unless it was a written statement by Lewis, Frehner, and thus APCO, had no basis to rely on a one-year completion schedule. Furthermore, Frehner even stated his decision to start from February 10 was arbitrary. This testimony alone is sufficient to deny APCO's claim because it fails to be grounded in fact and logic. Testimony such as Frehner's, based on conjecture and speculation rather than facts, cannot support APCO's claim. APCO cannot rely on Weaver-Baily because it did not meet the causation requirement. See 19 Cl.Ct. at 479 ("[T]he focus should be on whether [contractor] would have completed the project early, but for the government-caused delay.") For these

reasons, I would deny APCO's early completion damage claim.

IV. APCO'S DAMAGES

A. Turf Trenching Claim

APCO seeks to receive $81,000 for additional trenching on the mainline. However, in the City's RFP, it stated that APCO should include all additional costs associated with the turf change. The City later approved a change order for over three million dollars. Therefore, this claim was settled at that time. Therefore, I find that turf trenching claim is unwarranted.

B. Price Escalation

In his testimony, Pelan admitted two things. First, that the bid price from Tiberti was only good for 30 days from bid, which meant the bid price expired on January 5, 2004. Second, Pelan realized that the City was not responsible for any price escalation claims, but felt it had to be passed on to the Owner. However, the contract clearly eliminated any price escalation claims and APCO's bid included any potential material price escalation. Furthermore, APCO was unable to show that any of the price escalation now claimed was due to any City delay.

The Majority cites to a letter APCO sent the City on March 03, 2004 regarding escalation of material prices. However, this letter clearly admits that APCO recognizes price increases are not the fault of the City's. APCO had failed to show the necessary causation and fault to support a claim for price escalation. Therefore the claim is without merit.

C. Delay Damages and Direct Field Overhead

Based on my previous analysis, I find that this claim lacks merit, as APCO failed to show by a preponderance of the evidence that it was entitled to any delay damages. Therefore, any direct field overhead is moot.

D. Mark-Up for Subcontractors

Because I find that APCO is not entitled to pass through the claims of its subcontractors, no mark-up is warranted. Furthermore, such markups are barred under the

contract when markup is sought for delay damages. Therefore, no such award has merit.

E. Pay Applications

The City acknowledges APCO is owed $55, 086.00 for Pay Application 18 and $84,625.00 for Pay Application 19. However, this amount is subject to the City's counter-claims against APCO.

F. Retention

The City has retained $1,009,556.00 as its right under the contract. The City states such retention is subject to the set-offs by the City's counter-claims against APCO.

G. APCO's Claim for Attorney's Fees

The Arbitration Agreement clearly prevents this Panel from awarding attorney's fees. It was clear that each party was to bear the costs of litigation. Therefore, I join with the Majority in denying this claim.

IV. SUBCONTRACTOR PASS-THROUGH CLAIMS

APCO states that it can pass-through the claims of its subcontractors based on an exception to the Severin Doctrine. The exception is based on the premise that a prime contractor who remains conditionally liable to its subcontractor can assert the claims of the subcontractors against the owner. APCO argues this doctrine, and its exception, have been recognized in Nevada. APCO asserts the Claims Prosecution Agreement is the controlling document to determine its liability to the subcontractors, and as such, it shows APCO is liable to its subcontractors. Even assuming the subcontract language is controlling, APCO argues it shows APCO is still liable to the subcontractors. Finally, APCO argues the City's interpretation of the subcontract violates Nevada public policy, by requiring APCO and subcontractors to waive claims for delay damages they are rightfully entitled.

However, the City has argued the *Severin* doctrine has not been recognized by the Nevada Supreme Court and, even if the Panel were to apply the *Severin* doctrine, it would bar APCO from asserting the claims of its subcontractors. The City argues that the subcontract between the prime contractor and subcontractor is the controlling document. APCO, the City asserts, has failed to show that it is liable to the subcontractors, and

therefore has no right to pass-through the claims of the subcontractors. Regardless of the subcontract provisions, the City also asserts that APCO indemnified the City against any subcontractor claims in the prime contract.

A. The City's Interpretation of the Subcontract and Claim Agreement is not Contrary to Nevada Public Policy.

In a prior ruling by this Panel, from which I dissented, the Majority denied the City's motion regarding Early Completion damages. The Majority acknowledged the prime contract contained a "no damage for delay clause" and supported APCO's argument that it was against public policy pursuant to NRS 108, *et seq.*, the mechanic's lien statute. The Majority denied the City's motion on this basis. In my dissent, I stated that the contract terms were not ambiguous, thus public policy considerations were not appropriate. Additionally, I stated that the statute did not help in construing damage calculations for early completion damages in a contract with a public entity. Finally, I believed there was no credible evidence to support APCO's application of the statute to their claim. I reaffirm that decision today and find APCO's argument lacks merit.

The Majority failed to adhere to established case law in Nevada. "No damages for delay" clauses are indeed valid and enforceable in Nevada. See J.A. Jones. Construction Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 285 (2004) ("Preliminarily, we not that the contract's 'no damages for delay' provision is valid and enforceable."); cf. Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial Dist., 118 Nev. 92, 100 (2002) ("Contractual jury trial waivers are enforceable when they are entered into knowingly, voluntarily and intentionally."). Furthermore, the Nevada Supreme does not recognize a *per se* rule barring waiver of mechanic's liens. See Bovis, Inc. v. Bullock Insulation, Inc., 197 P.3d 1032, 1041 (Nev. 2008), *overruling in part,* Dayside, Inc. v. First Judicial Dist. Ct., 119 Nev. 404 (2003)). The court held lien waiver clauses were not barred, but subject to a public policy analysis:

> [W]e emphasize that not every lien waiver provision violates public policy. The enforceability of each lien waiver clause must be resolved on a case-by-case basis by considering whether the form of

> the lien waiver clause violates Nevada's public policy to secure payment for contractors.

Bovis, 197 P.3d at 1041. Although the Nevada Legislature proscribed the ability to use contractual lien-waiver clauses, see Dayside, 119 Nev. at 408 n.12, there was not a complete prohibition of them. Additionally, if we look at the decision of the Nevada legislature to exempt incorporated cities from the definition of "owner" under the lien statute, see NRS 108.22148(2)(d) (2005), we can conclude not all lien-waiver clauses are against the public policy of the State.

However, the majority limited its decision to the statute enforced at the time of the contract signing. As we see from the Nevada Supreme Court's decisions in Dayside and Bovis, there has never been a *per se* bar against contractual lien-waivers. Furthermore, APCO's citation to NRS 108, *et seq.* as a bar to interpreting the subcontract and claims agreement as a waiver for delay damages is also unsupported. "No damage for delay" clauses are valid in Nevada. APCO merely cites the statute, but provides no public policy argument in support of its position. Finally, APCO's position is contrary to long held rules regarding contract construction. See Reno Club v. Young Inv. Co., 64 Nev. 312, 325 (1947) (stating the court's job is to "uphold [the contract] and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used."). Therefore, I believe APCO's argument is without merit and contrary to Nevada law.

B. Application of the Severin Doctrine

The application of the *Severin* doctrine to the present case has several questions which must be answered. First, is the *Severin* doctrine controlling in Nevada. Second, what is the controlling document to determine liability under the doctrine. Finally, does the subcontractor have a claim which can be passed through to the City under an exception to the Severin doctrine. For the reasons stated below, I believe APCO has no basis to support pass-through claims of its subcontractors.

1. The Severin Doctrine in Nevada

APCO has argued that the *Severin* doctrine is applicable in Nevada, citing Briscoe Co. Inc. v. County of Clark, 772 F.Supp. 513 (D.Nev. 1991). The City argues that *Severin* has not been recognized in the state, and it not controlling law. I agree with the City.

APCO points to the Briscoe decision as controlling. However, the court clearly stated in its decision that Nevada has not yet adopted *Severin*. "Nevada courts have yet to address the applicability of the *Severin* doctrine to breach of contract claims against Nevada counties." Briscoe, 772 F.Supp. at 517 n.7. APCO provides no further Nevada case law to support its position. A review of the case law still finds the State has not adopted the doctrine.

In its argument opposing the application of *Severin*, the City incorrectly cited Interstate Contracting Corp. v. City of Dallas, 2003 WL 21693466 as support from the Texas Supreme Court against the doctrine. However, the Texas Supreme Court actually adopted *Severin* in a certified question from the Fifth Circuit. Interstate Contracting Corp. v. City of Dallas, 135 S.W.3d 605, 619 (Tex. 2004). Furthermore, in its decision, the Texas Supreme Court noted all the states which have adopted the *Severin* doctrine. Id. at 614 n.5. However, not all the decisions are those of state supreme courts. The Court lists Nevada as one state which has adopted the doctrine, but cited to the Federal Court decision in Briscoe, but no Nevada state court decision. Id.

Additionally, in their certification to the Texas Supreme Court, the Fifth Circuit noted the application of the *Severin* doctrine varies:

> [T]he specific contours and requirements for pass-through claims vary from jurisdiction to jurisdiction. For example, some states permit pass-through claims only when there is a liquidating agreement in place that meets certain requirements, while others [sic] states permit pass-through claims when the prime contractor pleads the suit on behalf of the subcontractor and has an obligation to render the recover to the subcontractor. The burden of proof also varies among jurisdictions.

Interstate Contracting Corp. v. City of Dallas, 320 F.3d 539, 544 (5th Cir. 2003).

As noted by the Texas Supreme Court, Connecticut does not allow pass-through

claims based on various theories, including Sovereign Immunity. Interstate Contracting Corp., 135 S.W.3d at 614 n. 6 (citing FDIC v. Peabody, N.E., Inc., 239 Conn. 93, 680 A.2d 1321 (1996) (sovereign immunity); Wexler Constr. Co. v. Housing Auth. of Norwich, 149 Conn. 602, 183 A.2d 262 (1962) (rejecting pass-through claim because subcontractor could recover under implied contract theory); Walter Kidde Constructors, Inc. v. State, 37 Conn.Supp. 50, 434 A.2d 962 (1981) (liquidating agreement not sufficient to hold owner liable to subcontractor)).

Furthermore, implicit in the Texas Supreme Court's citation of the 19 states which have published opinions regarding pass-through claims is the admission that 31 states either have no published opinion or do not accept pass-through claims. A close reading of Brisco reveals that the district court assumed *Severin* applied, and proceeded to render a decision based on Federal case law, not Nevada case law. See 772 F.Supp. at 517. However, the Contract between the City and APCO clearly states that Nevada law is applicable. APCO now asks this Panel to adopt a doctrine that is not recognized by a majority of state courts, and clearly has not been recognized in Nevada. I disagree, and believe any decision should be based on established rules regarding contract construction and interpretation.

2. Controlling Document for Liability

However, even if we assume, as the *Briscoe* court did, that *Severin* is applicable, the question becomes which document is controlling. APCO asserts that the claims agreement between it and its subcontractors controls liability, while the City argues that the subcontract is controlling; both, however, are incorrect. Courts have looked at all documents - prime contract, subcontract, and liquidating agreements - to determine if sufficient liability exists for a prime contractor to pass-through the claims of a subcontractor to the owner. See Umpqua River Navigation Co. v. Crescent City Harbor Dist., 618 F.2d 588, 593-94 (9th Cir. 1980) (looking at the subcontract and general contract); J.L. Simmons Co. v. U.S., 304 F.2d 886, 889-90 (Cl. Ct. 1962) (looking at subcontract and release); Donovan Construction Co. v. U.S., 138 Ct.Cl. 97, 149 F.Supp. 898, 900-01 (1957) (looking at prime

contract, contract specifications, and subcontract); see also Briscoe, 772 F.Supp. at 517 ("Therefore, 'a prime contractor is precluded from maintaining a suit on behalf of its subcontractor only when a contract clause or release completely exonerates the prime contractor . . . .'" (citing Folk Constr. Co. v. United States, 2 Cl.Ct. 681, 685 (1983) (emphasis added)).

a. The Prime Contract Indemnifies the City from subcontractor claims

The prime contract contains the following indemnification clause:

> The Contractor shall protect, indemnify, and hold harmless the Owner, its officer, employees, agents, and consultants (collectively herein the "Owner") harmless from any and all claims, liabilities, damages, losses, suits, action s decrees, and judgments including, attorney's fees, court costs or other expenses of any and every kind or character (collectively herein the "Liabilities") which may be recovered from or sought against the Owner as a result of, by reason of, or as a consequence of, any act or omission, negligent or otherwise, on the part of the Contractor, its Officers, employees, agents or suppliers (a) in the manufacturing or supplying (including transportation) of any materials, supplies or other products to the Owner, or (b) in the performance of the terms, conditions and covenants of the Contract, regardless of whether the Liabilities were caused in part by the Owner.

Ex. 3, GC.8 (emphasis added). Thus, I believe APCO has a contractual duty to indemnify the City against claims by the subcontractors, and would hold the above clause enforceable against any pass-through claims.

b. The Subcontract relieves APCO from liability to the subcontractors and therefore doesn't support an exception to the Severin doctrine.

A reading of the subcontract also supports my conclusion that APCO cannot assert the claims of its subcontractors. The Subcontract states the following:

> § 3.2. In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the Work in accordance with the Contract Documents, Contractor agrees to pay, and the Subcontractor agrees to receive and accept as full compensation for doing all Work and furnishing all materials and equipment contemplated and embraced in this Subcontract,

and for all loss or damage arising out of the nature of said Work, or from all actions of the elements or from any unforeseen difficulties or obstacles which may arise or be encountered in the performance of the Work, and for all risks of every description connected with the Work, and for all expense incurred by or in consequence of the suspension, interruption or discontinuance of the Work, and for well and faithfully completing the Work and the whole thereof in a manner and according to the requirements and instructions of Contractor and Owner or Owner's agents in charge of the Work, if any, payment in the amount of the Subcontract Price.

. . .

§ 4.4. Subcontractor, in undertaking to complete the Subcontract Work within the time specified, avows that it has considered ordinary delays incident to such work including, but not limited to delays in securing materials, equipment or workmen, and minor changes, omissions or addition, unavoidable casualties, normal weather conditions, strikes or lockouts. If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect, or by agents or representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties, national emergency, or by any cause other than the intentional interference of Contractor, Subcontractor shall be entitled, as Subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, but only if Subcontractor shall notify Contractor in writing within forty-eight (48) hours after such occurrence, and only if Contractor shall be granted such time extension by Owner. No time extension will be allowed for delays or suspensions of work caused or contributed to by the Subcontractor, and no time extension will be granted Subcontractor that will render Contractor liable for liquidated damages or other loss under the Contract Documents.

. . .

§5.2. Subcontractor, prior to the commencement of such changed or revised work, shall submit, within 72 hours, to Contractor, written copies of cost or credit proposal, including work schedule revisions, for changes, additions, deletions or other revisions in a manner consistent with Contract Documents. Contractor shall not be liable to Subcontractor for a greater sum, or additional time extensions, than Contractor obtains from Owner for such additional work, less reasonable overhead and profit due Contractor, and also less professional and attorney's fees, costs and other expenses incurred by Contractor in the collection of any such sum or time extension. Payment to Subcontractor for such work shall be conditioned upon Contractor's actual receipt of payment from the Owner and such payment by Owner to Contractor with whatever documentation or support, as Contractor may deem necessary to negotiate with Owner.

. . .

§5.4. Contractor may dispute, appeal resist, litigate or arbitrate any decision of Owner, *without being deemed to have admitted any obligation or liability to Subcontractor*, and if the decision shall be against Contractor, then Subcontractor shall be bound thereby. Subcontractor may, at its own expense, participate with Contractor in arbitration or legal proceedings. Subcontractor shall bear part or all costs, including attorneys' fees and legal expenses, incurred by Contractor in any such proceeding involving a claim, which, if allowed, would result in one or more payments to Subcontractor. Subcontractor's costs shall bear to the total amount sought in the proceeding. Prosecution of any such claim or proceeding shall be at the sole risk of Subcontractor, and Contractor shall have no liability for or in relation to the outcome.

City Ex. 875 (emphasis added). APCO argues that section 5.2 of the subcontract creates conditional liability. APCO further asserts the plan defects, unmarked changes, and numerous change orders amounted to additional work under 5.2 for which APCO is liable to its subcontractors. However, this argument is without merit.

APCO, in its citation to Subcontract Section 5.2, ignores the sentence preceding the beginning of its citation, requiring the subcontractor to provide documentation for any changed work. This is a condition for APCO's liability to the subcontractor. APCO has not presented evidence to show that subcontractors provided the proper documentation for changed work. Therefore, APCO is not liable and cannot pass-through such claims. See Donovan, 138 Ct.Cl. 97, 149 F.Supp. at 900 (subcontract's negation of liability prevents pass-through claim of subcontractor under *Severin*).

APCO further ignores controlling Nevada jurisprudence which supports the City's argument. The Nevada Supreme Court has held change orders are part of the contract, and delay-related claims that were subject to change orders are within the scope of the contract. See California Commercial Enterprises v. Amedeo Vegas I, Inc., 119 Nev. 143, 144 (2003). In that case, the court noted the fact that even though the scope of work under the change orders increased the original contract price, the subcontractor was fully compensated "under the original contract price plus the approved change orders." Id. at 145. The subcontractor submitted a claim for alleged delay damages, and the court again stated "[i]t appears from the record that these delay-related costs were within the scope of the contract

in the form of approved change orders." Id. The court then turned to decide whether the alleged delay damages were incurred outside of the contract, and thus proper under a mechanic's lien. Id.

The Court, in construing the lien statute under which the subcontractor had asserted its alleged delays damages, held that a subcontractor is limited to the contract price when a contract exists, and the lien holder may not recover more than that. Id. at 146. The court did not allow the subcontractor to recover more than the contract price because "the extra materials, labor and delay-related compensation that [subcontractor] now seeks should have been addressed by [subcontractor] when the parties were bargaining over the amounts of the change orders. Once *those change orders were approved, they became part of the contract price.*" Id. at 147-48 (emphasis added).

Furthermore, at least one court has held that *Severin* bars a subcontractor's claim for a breach of warranty when the subcontract contains exculpatory language. Umpqua, 618 F.2d at 593-94. In that case, the subcontract contained exculpatory language almost exactly like Section 3.2 of the APCO subcontract. Id. at 593 n.2. The court found the language was sufficient to exempt the prime contractor from liability and bar the claim under *Severin*:

> Under the *Severin* doctrine, [prime contractor] does not have standing to assert a breach of warranty claim on [subcontractor's] behalf. The exculpatory language of subcontract Article 19 thoroughly insulates [prime contractor] from any liability to [subcontractor] for breach of warranty. Consequently, [prime contractor] may not raise a parallel claim against w [owner].

Id. at 593-94. Thus, as far as the subcontractor's claims are based on a breach of warranty action, *Severin* bars any recovery. Therefore, APCO's argument regarding breach of warranty fails.

Furthermore, where there is an iron-clad "no damages for delay clause", a contractor will be barred from asserting the claims of its subcontractors. Harper/Nielsen-Dillingham, Builder, Inc. v. U.S., 81 Fed.Cl. 667, 676 (2008); Donovan, 138 Ct.Cl 97, 149 F.Supp. at 900; J.L. Simmons, 158 Ct.Cl. 393, 304 F.2d at 888-89; see also George Hyman Construction Co. v. U.S., 30 Fed.Cl. 170, 174 (1993) ("The same result will follow when the subcontract provides

for a complete release of the prime contractor's liability to the subcontractor or upon the granting of additional time for the latter's performance, or the acceptance of final payment by the latter."). "No damage for delay" clauses are enforceable in Nevada. J.A. Jones Construction Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 285 (2004).

In this case, section 4.4 of the subcontract is just such a clause. APCO argues this clause contemplates a suspension by the Owner and granting of a time extension. APCO, citing the clause, states it in this way:

> If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect . . . Subcontractor shall be entitled, as subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, **but only if** Subcontractor shall notice Contractor in writing . . . **and only if** Contractor shall be granted such time extension by Owner.

(APCO Brief, p. 287) (emphasis in citation). However, in selectively citing the clause, APCO has edited two important parts. First, the subcontract not only provides for delays caused by the Owner, but also *by any cause other than the intentional interference of Contractor.* Thus, the subcontract provision not only contemplated City caused delays, but also APCO caused delays except for direct interference.[1] Furthermore, as a precondition to even asserting a claim for delay, the subcontract requires the Subcontractor to notify contractor in writing *within 48 hours.* Thus, any delay claim must be made within 2 days of the delay, otherwise APCO is not liable. APCO has failed to cite any written notice of delay made within two days of any delay occurrence. Therefore, section 4.4, read in conjunction with section 5.4, demonstrates that APCO is not responsible for any delays to the subcontractors' work. An "iron-clad" release which absolves the liability of the contractor to the subcontractor prevents a pass-through claim under *Severin.* See Harper/Nielsen, 81 Fed.Cl. at 676.

Finally, APCO's assertion of the claims agreement as conditional liability must fail. "Permitting the parties subsequently to 'revive' . . . liability by mutual agreement would

[1] Under Lehrer, direct interference is a violation of the implied covenant of good faith and fair dealing, and therefore an exception to "no damage for delay" clauses. 120 Nev. At 286.

essentially nullify the *Severin* doctrine in every action . . . ." George Hyman, 30 Fed.Cl. at 177. Here, the prime contract indemnified the City, and the subcontract acted to prevent subcontractor claims for delay damages. Because APCO's claims agreement with its subcontractors acts to revive claims for which APCO was never liable, a pass-through claim based on that agreement cannot prevail.

3. **Subcontractors do not have a claim that supports an exception to *Severin*.**

Finally, even if it is assumed that APCO could pass through the claims of its subcontractors, a decision on the merits must be reached as to whether there is a claim. Donovan, 138 Ct.Cl. 97, 149 F.Supp. at 900-02 (where the court reached a conclusion on application of the *Severin* doctrine and proceeded to render a judgment on the merits). Failure to provide contractually required notice is a sufficient justification to deny a claim. International Technology Corp. v. Winter, 523 F.3d 1341, 1347 (Fed.Cir. 2008); cf. L-M Architects, Inc. v. City of Sparks, 100 Nev. 334, 335 (1984) (holding failure to present a timely notice as required by statute bars recovery); Charlie Brown Const. Co., Inc. v. City of Boulder City, 106 Nev. 497, 500 (1990) (denying a subcontractor's claim on a third-party beneficiary theory because such claims are contractual claims, and failure to follow statutory presentment requirements was sufficient to bar contractual recovery), *overruled on other grounds by,* Calloway v. City of Reno, 116 Nev. 250 (2000); Eagle's Nest Limited Partnership v. Brunzell, 99 Nev. 710, 712-14 (1983) (holding that where owner was at fault and contractor gave contractually required notice, a claim for equitable adjustment would be sustained).

In Winter, the Government entered into a contract for the removal of contaminated soil. 523 F.3d at 1344. The prime contract had a "Limitation of Cost" clause which included a notice provision. Id. The provision required "'that the contractor notify the government in writing when it anticipates that within the next sixty days it will exceed seventy-five percent of the estimated cost and provide a revised estimate.'" Id. During the performance of the contract there were cost overruns which the contractor tried to recover for its subcontractor through an equitable adjustment. Id. at 1346. The government denied the

claim because the Limitation of Cost provision would have been violated, and no notice had been given as required. Id.

The contractor appealed to the Board, which also denied the claim because "[Contractor] had not met its burden to prove either that it complied with the clause's requirement to notify the government before exceeding the cost ceiling, or that [Contractor] was excused from doing so because the cost was unforeseeable." Id. Although this was not challenged on appeal, the court stated "[i]n any event, the Board was correct that [Contractor] cannot recover under a cost theory because of [Contractor's] failure to comply with the notice provisions of the Cost clause." Id. at 1347.

I believe the Nevada Supreme Court would follow the same theory in this case. As noted above, the Nevada Supreme Court has denied recovery in cases where the contractor or subcontractor failed to comply with statutory notice requirements. In doing so, the court has stated "[i]ndividuals or corporations that voluntarily contract with government units assume the burdens of complying with its procedures for satisfying claims." L-M Architects, 100 Nev. at 336. Here, APCO admits that it failed to comply with the notice requirements under the prime contract. Additionally, APCO failed to meet its burden, and prove that the subcontractors gave the contractually required notice to sustain a delay for damages claim. Because APCO was not liable to its subcontractors, there is not valid claim, and any pass through would be barred under *Severin*.

The City has provided that subcontractors are entitled to the following amounts for changed work:

1.	RCI	$558.00
2.	CG&B	$4,400.00
3.	Northstar	$6,401.00

As I have indicated under Section C, the subcontractors are due the above amounts. However, subcontractors claims are otherwise unsupported by the facts and evidence, and therefore are denied.

C. SUBCONTRACTOR'S CLAIMS

Although I find that the subcontractor's do not have claims against the City, the Majority's opinion requires that I refute its findings where there has been such an award.

1. Richardson Construction Claims

a) Increased Direct Costs

The City as already agreed that Richardson is due $558.00 for change order request numbers 84 and 96. I agree with the Majority in its denial of all other increased direct costs to Richardson. Therefore, an amount is due Richardson of $558.00

b) Price Escalation Claim

Richardson is claiming price escalation for material alleging the City caused the delays because of delays in receiving RFIs and deferred submittals. The City argues under the subcontract and prime contract do not allow for price escalations. Furthermore, the City argues RCI is claiming material prices increases for items that were not the responsibility of the City.

I partially agree with the Majority - Richardson failed its burden of proof. But I do not stop with the price escalation claim for wood and concrete because steel should also be included. Richardson's burden of proof was to show that but for City-caused delays, it would not have experienced the material price increases. As the evidence showed, material price increases were happening before the contract between APCO and Richardson signed their subcontract agreement. As the Majority aptly notes, Richardson testified that he would not have received steel before June 2004. Therefore, Richardson's burden of proof required it to demonstrate that the material price increases after June 2004 were caused by a City-delay, and no other. Through trial testimony, it was shown that mistakes with deferred submittals were often made by APCO and its subcontractors, such that claims for items that were not even deferred submittals were made. Additionally, the City showed that it responded to RFIs in a timely manner. Because Richardson has failed to show City-based fault, the claim is without merit.

c) Direct Field Overhead

Richardson cites its expert's analysis of this claim. As APCO's brief stated, Mr. Knopf stated Richardson "should have finished in November or December." Knopf used December 01, 2004, as the anticipated completion date to calculate damages. The City argues no claim exists because no claim was made to the City regarding any delay experienced by Richardson. Furthermore, the City asserts Richardson failed to provide a critical path analysis regarding any delays, and that many of what Richardson claims as delays were actually subject to change orders which covered all costs for time and expenses.

Knopf's analysis again resembled Frehner's, in seeming to pick the arbitrary date of December 01, 2004 as the anticipated completion date. This is further evidenced by choosing November 29, 2005, as the completion date based on charges which ceased to be consistent. Even though Majority notes that the baseline schedule shows a completion date of December 31, 2004. Therefore, how can any trust be placed in such an obviously arbitrary analysis? The proper analysis required Richardson to show that the City caused delays, such delays were on the critical path and that no concurrent delays existed. However, no such analysis was provided, and therefore no legal basis exists to support Richardson's claim.

The Majority seems to rely on the fact that Richardson put APCO on notice of delays. However, APCO failed to pass such delay claims to the City as required under the prime contract. Thus, any claim lies with APCO, not the City. Additionally, the Majority relies on its own artificial early completion date. However, as I have strenuously noted, no such early completion date is available for damage calculations. As the Majority also notes, many of the supposed plan deficiencies were corrected through change orders. These change order become part of the contract, and did not allow for any further time. If Richardson felt this was incorrect, it had a contractual obligation to provide a timely and well-supported delay damage claim. However, neither Richardson nor APCO achieved this. Richardson's claim fails to provide for the contractually required notice of delay

under the contract and therefore it without merit.

2. **CG&B**

I agree with the Majority as far as denying CG&B's claim for increased direct costs and price overhead claims. However, the Majority again makes a mistake by giving CG&B delay damages. The Majority Opinion seems to deny many of CG&B's claims based on a lack of documentation, but does not follow suit regarding the delay claim. Instead, the Majority merely cites the difference between the base-line schedule and the substantial completion date, multiplied by $579.00/day, and awards the subcontractor $73,532.00.

However, CG&B's owner Mike McComb testified during arbitration that he never did a critical path analysis. Furthermore, CG&B never submitted a timely claim as required by both the subcontract with APCO and the Prime Contract. In fact, McComb stated he never looked at the prime contract's claims provision. Finally, no concurrent delays were analyzed for fault even though McComb recognized that such delays existed. The Majority's opinion simply glides over this, ignoring established case law and the burden of proof required of APCO and CG&B.

In making CG&B's award, the Majority has followed the "rigorous" calculation standard established by Frehner. However, in a case like this, the Majority's award to CG&B requires more than just addition, subtraction and multiplication. Analysis of the critical path and concurrent delays is a requirement, not a request which can be overridden for convenience. Because no such analysis supports CG&B's claim, I cannot support the Majority's award in this instance and find the claim has no merit.

3. **Wheeler Electric**

Wheeler is asserting a claim for a change in design fo the tennis court light poles from direct bury to placement in concrete with rebar cages and base plates added. Although the City does not directly dispute this cost in their brief, the pass-through claims of the subcontractors are disputed. Furthermore, evidence was presented that showed this change was made at the direction of APCO. Memorandum 10, dated June 24, 2004, was issued regarding the tennis court light poles. This indicates that APCO wanted to change

the placement of poles because the current contract requirements were cumbersome (even though this is how APCO bid the Project). Alternatives were made on the basis that such alternatives would provide cost savings and convenience to APCO. Thereafter, APCO sent a change order requesting additional time and money for the alternative which it asked for. The City directed APCO that if such a change order was going to be requested, APCO was to return to the normal installation directed on the plans. By making this claim, both APCO and Wheeler are stating that they failed to follow the City's request. Therefore, they alone are responsible for the "additional" costs - and I couch the term because APCO indicated that the alternatives would actually save time and money. For these reasons, I find the claim has no merit.

Regarding the Majority's award for delay to Wheeler, I must object. Again, there is no serious argument whether Wheeler met its burden of proof by demonstrating that there were actual delays to the critical path by the City. Therefore, the award to Wheeler for $98,000.00 is without any proper support, and therefore should be denied.

4. **Northstar**

a) Scale Dimensions

Northstar claims that the City provided inaccurate plans with different scales which resulted in Northstar pouring more concrete than was bid. Northstar claims it was further impacted because it was required to build off horizontal control plans, rather than City-provided specifications.

The City states that Northstar made its bid off improperly obtained drawings. Furthermore, the City alleges APCO failed to alert the City, as required under the prime contract, of errors in the bid documents, which Northstar had expressed to APCO. Additionally, the City argues this claim is APCO's responsibility, as APCO is the one which failed to alert the City to errors, failed to pass on the correct dimensional information, and directed Northstar to build according to the horizontal control plans. Finally, the City asserts Northstar presented an untimely claim that was supported by estimations of costs, not actual costs. I agree with the City.

During arbitration, John Crampton ("Crampton") testified that Northstar received its bidding documents either from American Asphalt or APCO. He further testified that there were questions during the bidding process which he expressed to APCO. However, APCO failed to pass such questions to the City, as required under the prime contract. Even so, Northstar sent RFI #1, seeking dimensions for the Stadium. Stantec responded by sending a disc with all the necessary information. APCO admitted it did not pass this disc on to Northstar, nor could APCO find the disc. Furthermore, it was APCO who directed Northstar to build according to the horizontal control plans (which contained the wrong scale), not the City. Therefore, responsibility for this claim lies with APCO, not the City.

Even if the City was responsible for this claim, Northstar still failed to provide the proper contractual notice. Northstar did not file a claim until one year after the end of construction. Furthermore, the evidence shows that Northstar's claim is based on estimated costs, not actual costs. Therefore, Northstar's claim against the City has not merit; fault lies with APCO.

b) Expansion Joints

Northstar claims increased costs arose due to the installation of expansion joints not detailed on the Project Plans. The City argues that Nortstar agreed not to charge the City for these joints and, even if it had a claim, Northstar contractually only had seven days to present a claim for this cost. Because the claim was made two years after construction ended, the claim is untimely.

The Majority asserts Nortstar told APCO not to send this letter to the City because Northstar was unhappy with some City actions. Furthermore, the Majority seems to overlook Northstar's failure to send a proposed change order as an excuse to bill the City. The Majority is in error in this case because the letter of May 13, 2004, was actually a memorialization of a meeting with the City in which APCO verbally agreed not to charge for the joints. The City therefore relied on this verbal agreement, as memorialized in the May 13th letter, and relied thereon. Northstar did not notify the City that it was retracting this verbal agreement, and therefore the claim is without merit.

Even taking the Majority's view, the claim is late. Northstar, if it really did not agree with some City actions, was then on notice that it was required to send a change order requesting the additional costs. However, Northstar failed to abide by the contract requirements for a claim. Therefore, it is without merit and barred under the prime contract as untimely.

c) Added Footings, Walls and Steps

Although the City makes protestations regarding this claim, it has noted that APCO is entitled to recover $6,401.00 for changed work completed by Northstar. Northstar is claiming $6,401.00 for the addition of two steps at the stadium VIP seating. Therefore, I believe this claim is with merit, and should be allowed.

d) Added Work for Footing Elevations

Again, this was one of the items for which Northstar verbally agreed to not charge the City, as memorialized in the May 13, 2004, letter. The Majority again states Northstar "overlooked" issuing a request for change order. However, when Nortstar reneged on its verbal agreement not to charge the City, a change order should have been forthcoming. The claim is now barred under the contract as untimely.

e) Added Wall Height/Top of Footings

Northstar seeks additional costs for changing footing from sloped to stepped. The City argues Northstar never presented a claim for his, and is now contractually barred. The Majority denies this claim on the basis that this was a change requested by Northstar. I agree with the Majority, but would also add that Northstar's claim is barred for failure to contractually notify the City in a timely manner.

f) Unknown Differing Site Conditions

Northstar claims the boring samples did not show caliche at the depths found in the stadium. APCO removed this caliche, but Northstar was required to pour additional footing materials due to the amount of caliche removed. The City argues that under the contract, caliche was the responsibility of the Contractor and, anyways, it was not APCO who removed the caliche, but F&F. Furthermore, the costs for removal were based on

estimated costs for removal, not actual costs. Finally, the City asserts this claim is untimely and therefore barred under the contract.

I agree with the Majority and the City, that this claim is barred under the contract. Northstar failed to properly notify the City when the extra footing material was installed. Northstar was required to make a claim and keeping track of the costs. Because Northstar failed to do this, the claim is denied.

g) Weather Related Costs

This claim is related to alleged delays in construction caused by plan deficiencies and specifications. Northstar claims its construction was pushed into the latter part of the year, when weather conditions unaccounted for in its bid increased the costs of construction. However, as noted above, Crampton of Northstar admitted that a concurrent delay in beginning construction was its failure to obtain the proper bonding. Furthermore, Northstar failed to make a delay claim as required under the prime contract. Interestingly, Northstar made claims for weather related costs on days which it was not even on the Project. The evidence shows that this claim is without merit and therefore denied.

h) Waterproofing Delay

Northstar claims waterproofing was not called for in the Project plans and was not in the scope of its work. Furthermore, Northstar asserts it could not backfill the stadium walls until the waterproofing change order was approved. It is alleged the City delayed in approving this change order, resulting in delays, resequencing of work and inclimate weather disruptions. The City claims on July 21, 2004, the City sent a request for pricing regarding adding waterproofing to the stadium walls. However, APCO delayed in this, and did not send the proposal until September 22, 2004. APCO was responsible for coordinating this and was aware from July 21 of this requirement. Although Northstar alerted APCO do this delay, APCO failed to pass the claim on to the City. Regardless, the City argues Northstar failed to make a timely claim based on actual, not estimated, costs and the claim is therefore barred.

This claim again lies at the feet of APCO. APCO was responsible for coordinating with its subcontractors and failed to timely submit a request for waterproofing pricing. As the evidence shows, it was APCO who delayed. Additionally, it was not Northstar who provided the waterproofing work, but Sierra Waterproofing. Furthermore, APCO did not pass on the notice of delay to the City, as it is contractually required to do. Under the prime contract, the claim is barred against the City as untimely, and therefore is without merit.

i) Material Escalation

Northstar claims its material prices increased due to delays caused by the City. The City argues that Northstar's expert failed to show how the City was responsible for the price escalation, but merely claims that concrete prices were rising from June 2004 until January 05, 2005.

Again, as noted above, a concurrent delay in this was Northstar's failure to obtain bonding until June 02, 2004. Because there was a concurrent delay with the alleged City delays, Northstar is required to show how the City is responsible for the increased costs. However, Northstar failed to provided such an analysis. Therefore, the claim is without merit.

j) Costs for SDC & Associates

As the Majority stated, and I agree, under the contract such costs are to be borne by the parties. Therefore, the claim is denied.

k) Extended Field Overhead and Costs

Northstar claims it is entitled to 140 delays days at a cost of $1,248,891.69. Northstar supports its claim by getting the total days on the job based on the difference between the planned start date and the actual completion date. 122 days, the planned construction time is subtracted to get to 140 days. Furthermore, Northstar provided a job cost detail for the Project, indicating the above stated cost per day. The City argues Northstar's claim is inaccurate because it was not based on certified payrolls, double bills for employees, failed to properly document the time Mike Boone and Ron Hannold spent on the project, and

includes unsubstantiated equipment costs.

The Majority buys into Northstar's calculation of delay days, which seems conspicuously similar to Frehner. However, both Northstar and the Majority's analysis fails to take into account delays to the critical path, concurrent delays, and fault for such delays. If Northstar was truly delayed by the City, it had a contractual responsibility to make such a claim. However, like APCO and other subcontractor, no such delay claim was made. Furthermore, the Majority wholly ignores Northstar's own culpability in failing to obtain bonding until June 02, 2004. Because no proper analysis has been completed to show fault, cause and actual damages, the claim is without merit.

V. CONCLUSION

In this case, APCO failed to properly support its claim for an equitable adjustment by demonstrating the necessary factors of liability, causation, and injury. Although APCO claims it was delayed by the construction plans, RFIs, deferred submittals, and change orders, its reliance on Frehner is without merit. Frehner failed to demonstrate that any events were the fault of the City's, delayed activities on the critical path, and were not concurrent with other delays. APCO's assertion that the City waived any notification requirements is also without merit. The contract was very specific regarding the claims requirements, and APCO relied on oral representations by City employees who had no authority to change the contract. Additionally, any notice which did not comply with the contractual requirements was specifically barred under the contract. Therefore, APCO's equitable adjustment claim fails as a matter of law.

In addition, APCO failed to meet the requirements necessary to establish an early completion date. APCO based its early completion damages on a date that was unsupported by the evidence and was arbitrary, as its own expert stated. There was no credible evidence that demonstrated APCO intended to finish early, it was capable of finishing early, and that it would have finished early but for the City's actions. Additionally, for the reasons stated above, I find APCO's individual damage claims without support or merit in this case.

The Majority Opinion regarding APCO's equitable adjustment claim and early completion damages find no support in the facts of this case nor in any legal precedent. Regarding the equitable adjustment claim, the Majority Opinion simply voided the contract, and granted APCO's equitable adjustment claim without any regard to the necessary proof of such claims. The Majority Opinion was equally flawed regarding APCO's early completion damages, considering it relied on an expert whose analysis amounted to picking, by the experts own admission, an arbitrary beginning date, count days, and assign all fault to the City without any sufficient basis in the facts.

Finally, regarding the subcontractors' pass-through claims, the *Severin* doctrine is not a controlling doctrine in Nevada legal jurisprudence. Because both the prime contract and subcontract calls for the application of Nevada law, any decisions should be based on contractual principles established under Nevada law. However, even under the assumption that *Severin* and its exceptions are applicable in this case, APCO has failed to prove that it remains liable to its subcontractors. The Subcontract provides a clear "no damage for delay" clause, which courts have found operate to bar claims under *Severin*. Furthermore, APCO's subcontract specifically states that it can present a claim without admitting liability to the subcontractor. Therefore, APCO has failed to prove that it remains liable so that an exception to the *Severin* doctrine could be upheld.

Even if I were to assume that Severin and its exceptions apply, there are no grounds on which APCO or its subcontractors may base their claims. APCO failed to prove that its subcontractors submitted any delay claim within the subcontract requirement. Thus, there was no claim sufficient to hold APCO liable to its subcontractors. Even if the subcontractor did provide the proper notice, APCO did not provide the City with the notice as required under the prime contract. Therefore, any claim that a subcontractor has is for breach of contract with APCO for failing to abide by the subcontractor provisions. APCO's attempt to revive any claims through its claims agreement also finds no support in the law. For these reasons, I would not allow the pass through claims of subcontractors.

City's Counter Claims

Claim I: Defective Tennis Court Issues

GC.6(A), *Governing Order of Bidding & Contract Documents*, states where there is a discrepancy within the contract documents, the following precedential weight is to be given:

1) Contract Summary
2) Addenda
3) Instructions to Bidder
4) General Conditions
5) Technical Specifications
6) Drawings
7) Referenced Standards.

Technical Specification 02305, Part 2.B.2 notes that the sand leveling course shall be clean mortar sand. The USTA standards, which have been given so much weight in the Majority's decision, is a referenced standard. Furthermore, SD-17, Detail 4 on all sets of drawings indicate a sand leveling course. Although not in the permit set of plans, SD-17, Detail 2 in the bid and consensus set of drawings indicate a 2" medium density foam around all posts. Therefore, reliance completely on the USTA standards was a direct conflict to the actual precedential order given to the contract documents. Both the sand and foam were clearly indicated in contract documents which overrode any authority APCO placed in the referenced standards of the USTA. The City only indicated the USTA standard, but did not in any way compel APCO to build the courts exactly as indicated in the USTA drawings. Obviously, the City modified the designs indicated by the USTA to fit its needs.

On October 11, 2004, APCO construction sent APCO RFI No. 00236, asking to remove the I" of sand from the Stadium Concrete Post Tension Slab because, APCO asserts, the sand would mix with the concrete and weaken the strength of the slab. On October 19, 2004, Stantec sent the following response:

> The purpose of the sand layer is to create a fluid action between the concrete layer and Type II layer. When they begin their tightening of the cables, the slab will shrink the most towards the edge. The amount of shrinkage will vary depending on the length of the court. The sand allows the slab to uniformly move thus minimizing the cracking potential. If they don't install the sand, the slab bottom (when poured) will not be smooth, as it will interlock with the Type

II surface thus creating inconsistent movement.

We will not tell the Contractor what to do; our only concern is that the end result is achieved. This is their risk.

Thus, APCO had no authority to delete the sand layer.

Furthermore, any reliance on RFI 71 as support for deletion of the sand or foam is misplaced, as RFI 71 was a clarification for the light pole burial and not a clarification on the construction of the tennis courts. APCO sent RFI 71 claiming that per the Addendum, Type "A" poles were changed to direct burial pole, but no detail was provided for installation. The manufacturer suggested 4' deep of compacted Type II material.

Stantec responded on March 26, 2004, stating that this was not an approved solution, and told APCO to refer to an attached detail. The attached detail showed a 1" sand layer (the black space) between the 6" Type II Aggregate and the Perimeter Post Tension Beam. Furthermore, because the sand layer is seen between the top of the light pole foundation and the perimeter post tension beam, it is obvious that the tennis court slabs and the light pole foundations are supposed to be separate entities.

Thereafter, Cassie Redinour sent a clarification to RFI 71, indicating that the direct bury for light poles would not work, and changed the light poles to a base plate with anchor bolt design. Ms. Ridenour included a detail indicating installation. The clarification has two different specifications that are the cause of this problem. However, a proper reading of it shows that even with the base plate installation, the light pole foundations are separate from the post tension slab.

The clarification says "BASE PLATE & ANCHOR BOLTS PER MFR. RECOMENDATIONS [SIC] - SEE ATTACHED." Attached to this clarification is bates stamp numbers CLV-B3-000026 and 27. CLV-B3-000026 is fuzzy, but does not indicate any information regarding the relationship between the light pole bases and the tennis court slab. However, 27 shows a more detailed view. In this view we again see the black layer between the top of the light pole foundations and the tennis court slab. Furthermore, the clarification indicates POST TENSION SLAB - SEE DTL. I & 4, SHT. SD-17. SD-17 details I

and 4 must be read in conjunction with the clarification for RFI 71. Although the pole is now a base plate with anchor bolts, in all three we see the sand layer called out. In the clarification, this layer appears ABOVE the base plate and anchor bolts called out in the specifications. This indicates that indeed the light pole foundations were separate from the tennis court slabs.

APCO cites the USTA manual and RFI 71 as its reasons for deleting both the sand and foam layer. Although APCO relies on revisions of RFI 71 as the basis for its defense, it cannot rely on one detail. Many of the Project documents indicated sand and foam as requirements. APCO was required to produce shop drawings that were consistent with the City's plans, and therefore APCO is not relieved from building courts accordingly. Furthermore, although there may have been differences between the City's plans and the USTA manual, the logical assumption is that the City knew these differences, but wanted to customize the courts as it saw fit. Any deletion of sand or foam should have been through a written order, as this was a design change, and not a design conflict. Again, any work deleted by APCO for which it bid should result in a credit to the City.

The cracking that the City has experienced will continue due to APCO's construction of the courts. RFI 71 was clear that the tennis court slabs were not monolithic with the pole foundations. Furthermore, APCO's alleged fix, using Plexicushion Prestige 2000, changes the character of the tennis courts which the City paid for. In order to fix this problem, the court will need to be replaced and built according to the City's plans. The City's expert, Dr. Moncraz, testified to the fact that simply putting the Plexicushion over the courts will not fix the actual cracks. Dr. Moncraz noted that the cracks indicate that the tennis court slab has come apart and thus the courts are broken into independent pieces. Overlaying the court will not fix the independent movement that was noted on the courts. Indeed, the USTA manual does not address the structural problems which the cracks represent.

The Majority relies heavily on APCO's argument that RFI 71 was responsible for the deletion of the sand and foam. However, there are numerous problems with this. First, Mr. Walker testified that APCO had an approved submittal for sand in May 2004, well

before the time of RFI 71. Additionally on April 30, 2004, APCO submitted structural calculations for chain link fence foundations. In completing these calculations, APCO relied on bid drawings, marked as CLV-B1-000350, which clearly showed both foam and sand requirements.

Mr. Walker testified that RFI 71 did not change these requirements. Furthermore, Mr. Walker specifically stated that RFI 71 had nothing to do with the sand layer, but was clearly identified as a response to changing the light pole foundations. Finally, RFI 71 and subsequent responses clearly indicated the sand line. Mr. Walker admitted that the line is a solid black line, instead of dotted (which is the schematic representation for sand) because photocopying and faxing degraded the quality of the drawings. However, neither the sand nor the foam requirements were ever deleted by RFI 71. Mr. Walker's testimony clearly refuted APCO's argument regarding RFI 71.

Two straw man arguments are made by the Majority to further support its position. First, GES is faulted for failing to note the deletion of the sand and the light pole bases' intrusion into the slab. However, GES was a special inspector who was only responsible for structural issues on the tennis court, such as light pole and fence foundations. This meant that GES had to ensure that rebar was present, the concrete was properly installed, and that the correct slump was present. GES was not responsible for ensuring that the sand layer was present or to ensure that the light pole foundations did not intrude into the tennis court slab. In fact the Majority has relied quit frequently on the fact that the City did not catch certain "obvious" problems. However, as Arland Anderson testified, it is the subcontractor and contractor's job to first note discrepancies. Furthermore, it was APCO's responsibility to call for inspection of the tennis courts during pouring of the foundations and slabs. However, Mr. Andersen could not remember APCO calling for the appropriate inspections. Therefore, the fact that GES and the City did not catch APCO's mistake does not relieve APCO from the responsibility of building the tennis courts properly.

Second, the Majority conclusory states that all parties believed the sand and foam was removed by RFI 71 and that no one could have known the consequences of the changes

authorized by RFI 71. However, the Majority's statement relies on the faulty premise that RFI 71 was intended to remove the sand and foam. This premise has no basis in the facts presented. When APCO first tried to delete the sand layer, Stantec clearly identified why the sand layer was needed and cautioned APCO that if it failed to place the sand, it did so at its own risk.

The Majority has also failed to trust its own eyes when reading the contract documents. APCO RFI 00236 was sent by APCO to remove the sand from the Stadium Concrete Post Tension Slab - it did not ask to remove the sand (or foam) from all the tennis courts. RFI 71 ONLY dealt with changing the light pole foundations from direct bury to base plate with anchor bolts. It had nothing whatsoever to do with the sand and foam requirements. This shows that the Majority's findings has no basis in the evidence to support APCO's defense.

For complete removal of the tennis courts, the City has an estimated cost of $5,271,424; however, the City has asserted that a slab-on-slab repair method could be done at an estimated $3,300,000. APCO had indicated a cost to remove and replace at $1,700,000. I would grant the City's claim in the amount of $3,300,000.00.

Claim 2: Defective Net Post Anchors

I address the following tennis court issues because the Majority has not seen it necessary to replace all the tennis courts.

APCO's analysis is erroneous in this case because it relies on the assumption that the tennis net posts were to be poured monolithically with the tennis court slab. Furthermore, APCO asserts that the FF50 requirements and the dual tilt of the court made it impossible to properly place the net post sleeves. In support of its position to change to the sonotube method, APCO relies on the hearsay testimony of Billy Platt.

SD-17, Detail 2, of the bid set drawings clearly shows a sand layer between the footing and the court pavement. Although the permit set of plans show the tennis court pole footings as monolithic with the tennis court slab, Addendum 3 changed the plan back to the original requirements of the bid set. APCO relies on the USTA drawings as evidence

that the City did not provide clear direction for installation of the net posts. However, this argument is without merit, as the USTA drawings were not the controlling documents for construction. Furthermore, if there was any confusion, APCO had the RFI-process available to get direction from the City.

APCO also asserts that both the net posts and dual slope of the tennis courts made it more difficult to achieve the FF50 requirement. This is obfuscation - APCO is a general contractor and knew what was required when it bid this project. If somehow complying with these conditions was impossible, then APCO had a responsibility to alert the City to any design change necessary to accomplish the Project's objectives. Here, all we have is the hearsay testimony of Billy Platt, indicating he discussed the sonotube method with Mr. Barr. Interestingly, APCO failed to ask Mr. Barr about this situation.

Furthermore, APCO relies on the fact that the City never raised objections during construction, indicating that the City had plenty of time and inspections to notify APCO of the incorrect installation of the tennis poles. In a contradiction that demonstrates APCO's disingenuous argument, it claims the City never expressed concerns with use of the sonotube during the construction phase or on the punch list, while simultaneously citing to NCN 33, dated September 13, 2005, indicating problems with APCO's installation of the net posts. Finally, as far as APCO relies on approval from Gary Barr, APCO is in error. Mr. Barr testified that he never had the authority to make material changes to the contract, and continually related this to APCO. Furthermore, APCO was aware that any changes required the written direction of Clair Lewis, as directed in the Contract. Therefore, any reliance on Mr. Barr's authority is obviously asserted to cover APCO's mistakes, not as a genuine issue of reliance on Mr. Barr's authority.

The Majority blames APCO under a theory of improper means and methods. Noting that the problems are only cosmetic because there is merely flaking, however, the Majority feels that the City is not entitled have the anchors it designed and paid for. The Majority ignores the fact that sonotubes are an inferior quality product that will result in non-cosmetic problems later. As the evidence showed, there was not only an issue of

flaking, but also depressions in the tennis courts surrounding the areas where the tennis net posts were installed.

Furthermore, an issue was raised regarding inspection of the sonotubes. Although the championship tennis court was built during March 2005, the other courts were completed earlier. As Mr. Walker noted, Jerry Belt of TJ Consulting should have caught the sonotubes - the same Jerry Belt who went to work for APCO. This issue was raised during APCO's case-in-chief, and should be something the Majority keeps in mind. However, GC 30 states that the Contractor is still liable to build according to the Contract even when the City commits errors and mistakes. The evidence shows that APCO never received written permission to deviate from the contractually required construction of net posts and anchors. Therefore, APCO should have to pay for the cost of removal and replacement of the net post so that the City receives the product it designed and paid for. This is reflected in the amount awarded under Claim I.

Claim 3: Concrete Pavers in Plaza Area

Billy Platt testified the City verbally directed APCO to lay the pavers according to the plans and therefore consented to a deviation from the 1/8" requirement. Thus, APCO admitted that it deviated from the plan requirements. If APCO was unable to install the square pavers in a circular pattern within the plan requirements and without a deviation greater than 1/8" horizontally, then an RFI should have been issued for direction. However, no such RFI was forthcoming.

APCO points to numerous design problems which are responsible for the paver problems, including the sand bed and radial design. APCO did show that the City instructed it to place the pavers with a 2" sand bed, according to the plans. The City does not refute this. However, APCO does not show how placing the pavers on a 2" sand bed, rather than a 1" sand bed, resulted in the deviations.

APCO was made aware of the paver-problems in a punch list from November 2005. However, APCO never fixed the pavers and the City had to remove the offending pavers. The City spent $7,979 to reset the pavers according to the Contract and should be allowed

to recover this amount.

Claims 4 and 5: Defective Concrete in Phases IA and IB

I concur with the Majority's position that APCO should reimburse the City in the amount of $5,692.00 for concrete deficiencies. I also agree that APCO should be required to replace offending concrete panels. However, I would not limit it to the 5 panels with structural cracks. 71 panels were identified during the Panel's walkthrough of the Project and I believe all of these panels should be replaced.

The evidence shows APCO's failure to provide a quality product. For instance, when retrofitting the tennis courts, Mr. Walker testified that numerous concrete panels removed showed that the rebar was misplaced within the sidewalk concrete, often under the concrete itself. It is true that concrete cracks, but APCO obviously failed to construct some concrete panels in accordance with the plans. Further evidence of APCO's liability is the fact that deficiencies in thickness were discovered. 71 panels have been identified for removal and replacement. The evidence clearly shows APCO built an inferior product. Therefore, I would grant the City's request for $98,290.00 to replace the 71 offending panels.

Claim 6: Defective Jogging Track

In arguing support for its position, APCO cites the testimony of Mr. Barr. APCO claims Mr. Barr and the City were apprised of the plan to widen the jogging path instead of building the thickened edge. Although Mr. Barr did admit that he was apprised of the situation, he clearly stated that no final agreement was reached. Indeed, APCO points to Mr. Platt's testimony, hearsay in itself, to prove its point. However, this is not sufficient to support its position.

SD-2, Detail 4, requires a thickened edge to be 12"x6" on a Type II aggregate base. APCO did field measurements which allegedly show an average width of the jogging path to be 23.96', supporting its position that it widened the path instead of adding the thickened edge. The City put forth the testimony of Clair Lewis, indicating that he along with Mr. Randall, measured the jogging path and did not find it to be the proper width. However, no evidence of this was cited to by the City in its brief. Although APCO did deviate from

the plans, the City has failed to show that APCO did not in fact give it the amount of asphalt required when it widened the track. However, according to the City, APCO did have cost savings for widening the track instead of building the thickened edge. Therefore, I would grant the City the $29,000 in cost savings, but deny the rest of the claim.

Claim 7: Incorrect Tennis Court Dimensions

The Majority and APCO try and confuse this issue by noting the conflicts between SD- 14, SD-17 and the photometric drawings as well as raising the issue regarding the ATP tournament. APCO argues that the City chose to resolve the conflicts by using the photometric drawings, which then established the tennis court dimensions. The Majority agrees, adding that this mistake is the City's fault which it has to live with.

However, shouldn't the question be - did APCO build the courts to the proper dimensions? However unclear the placement of the poles were in the drawings, it was clearly noted that the playing surface was to be 60' x 120' for single courts. Thus, the dimensions for the playing surface was not set by pole placement, but by the plans. APCO had a responsibility to ensure that the proper dimensions were met for the playing surface.

Interestingly, the Majority and APCO are silent regarding the USTA standards which is so ardently followed regarding the City's first claim. The USTA standards required a minimum playing surface of 60'x 120' for a single court. The argument regarding the ATP tournament is a red herring. The minimum court surface playing area for the ATP was the same area defined in the City's plans. Had APCO built the court correctly, this issue would not have arisen during the City's planning for this event. APCO should have ensured that the proper playing surface was built as well properly placing the light poles. Therefore, I would grant the City's claim 7, which is included in the amount awarded under Claim 1.

Claims 8 and 9: Defective Tubular Steel Fence Phases IA and IB

A. Picket Spacing

The City has argued the required spacing between pickets was 4.5" on-center and that by having further spacing between the pickets, APCO reaped cost savings. APCO

claims there is no merit to this allegation as the as-built conditions show a spacing on-center of 4.875" on average, which results in a spacing between the pickets face-to-face of 3.875" on average. Therefore, this is below the distance stated in the approved submittals.

The confusion in this area is based on where the measurements are taken from - the City is measuring center to center, whereas APCO measures from center-to-center, then subtracts 1" to meet the max 4" requirement in its shop drawings. It is agreed that this was a deferred submittal, and APCO noted that Stantec made notes to these drawings. Looking at Bates No. CLV-B8-000048, APCO has stated a 4" maximum spacing from picket face-to-face. This is highlighted, and a note at the bottom of the drawing refers to SD-29, Details 1 and 2.

SD-29, Detail 1 shows a measurement of 4.5" from picket center-to-center. Thus, using a 1" picket, the maximum spacing would be 3.5" face-to-face. Stantec clearly referred to the required spacing in the City's drawings, however RCI either failed to notice or, as the City has proposed, tried to get cost savings by following its own design. Even APCO's engineering noted completed calculations with a measurement of 4.5" center-to-center. See CLV-BS-00003S.

The Majority supports APCO's version of events, but fails to refer to the other relevant drawings in this case. The correct place for measurement is from center-to-center of each picket, not from face-to-face. From center-to-center, we see that both the Majority and APCO admit that the spacing is 4.875"; this is greater than 4.5" maximum required on SD-29, Detail 1. As this fence is around many parts of the Project, there is no doubt that APCO in some way reaped material savings. APCO may have had to do a deferred submittal, but they were contractually required to follow the City's design. Therefore, APCO has breached the Contract and any unjust enrichment must be disgorged. Therefore, I would grant this portion of the City's claim for both Phase 1A and 1B.

B. Picket Caps

The City argues that the missing picket caps were never installed by APCO. The caps were meant to prevent water intrusion and rust development. APCO's defense

amounts to a failure on the City's part to timely notice the missing picket caps. Furthermore, APCO claims the City has not specified a dollar amount for the missing caps, and therefore has not met its burden of proof.

The City has noted 418 picket caps missing. The argument that the City didn't discover this until 9 months after the park opened, or has no before and after photographs, and thus the City has waived any claim, is without merit. Many problems with the Project were not discovered until this arbitration was started, yet the Majority has not hesitated in resolving the problems. The City has a right to these picket caps and therefore I would grant this portion of the City's claim.

C. Defective Painting

I agree with the Majority that the problem with the defective painting is a result of welding the fence. Technical Specification 05515, section 3.3 states:

> All fencing shall be zinc enriched primer powder coated and then applied with a "Mar resistant" ultra polyester powder coating and applied per the manufacturer's recommendations. The minimum coat thickness shall be 5 mils. Contractor shall take all necessary precautions to insure no damage to the finish during shipping and handling. *If necessary, after the handrails have been field erected, contractor shall wire brush field welds, dry-wipe off all loose residue, spot prime with specified primer all bare spots, chips and scratches, then point to match the powder coat finish and color using a paint type recommended by manufacturer ....*

As noted below, there were obvious defects by RCI in failing to properly weld the fence. It is obvious in the evidence that RCI failed to do this in the field and this helps explain the numerous painting problems experienced. Therefore, I would grant this portion of the City's claim.

D. Defective Structural Welds

I agree with the Majority. The evidence shows that many of the welds were inadequate. Although the fence is sound structurally at this point, the defective welds have resulted in rusting. This rust could be a structural issue for the City in time. Therefore, I would grant this portion of the City's claim.

E. Footing Deviations

The City's claim is hard to understand. The City notes that 4 of the footing were not at the proper depth, but then proceeds to argue that APCO was aware of paint and welding deficiencies. I agree with the Majority that spread-footings were a reasonable alternative to the post-pier footings. Therefore, I would deny this portion of the City's claim.

F. Damages

The City has estimated damages total $1,684,016.00 to repair and replace the fence. An important point to remember is that the rusting can cause structural issue with the fence at a later time so that, even though not an issue now, it could become one in the future. This rusting was due in large part by APCO and RCI's failure to properly weld the fence. APCO argues that the City paid $500,000.00 for building the fence. Therefore, I would award the City damages in the amount of $500,000.

Claim 10: Storm Drain

A. City's motion to strike evidence

After the City's case-in-chief, APCO introduced evidence of alleged inspection by City inspectors of the drain pipe. The City argues APCO cannot rely on Billy Platt's testimony regarding the data survey contained on a disc provided by Stantec. APCO, the City asserts, failed to produce this disc during discovery. The disc contains elevation information relevant to claim 10. Additionally, during arbitration, APCO asserted that the City would inspect the storm drain and then highlight and initial the inspected area. In rebuttal to APCO's claims, the City produced an affidavit of Peter Jackson, a Senior Engineer Associate with the City of Las Vegas. Mr. Jackson's affidavit states it was highly unusual for a Building Inspector to simply highlight and initial portions of a plan that were inspected. Additionally, the inspector was not identified nor could Billy Platt remember which City inspector inspected the drain pipe. Finally, APCO's Exhibit 3519 lacks the signature and initials of an inspector on Plan Sheet CE-82 (pipe between the headwall entrance and manhole 1) and CE-71 (the pipe between the headwall the twin culvert location). Thus, these two areas, even under APCO's own evidence, show that no inspection

was made.

Regarding the disc referred to by APCO, the City seeks to have all references to it struck because APCO failed to provide the disc during discovery. As Billy Platt testified, the disc was lost. Mr. Platt stated that the disc showed the deviations from the permitted set of plans. However, the City cannot verify this now due to the lost disc.

APCO contends that not only did the City inspectors sign the plan sheets, but that GES repeatedly inspected the storm drain. Furthermore, APCO points to the fact that the City has accepted the work by closing out the permit No. 04-000665.

Regarding the disc, APCO asserts Stantec provided it, so the City should get a copy from Stantec. Furthermore, APCO argues the City has a responsibility under the Clark County Regional Flood Control District's regulation to keep as-built information for three years. Therefore, APCO argues there is no reason to strike references to the disc.

The City's Motion should be granted. APCO's argument against Mr. Jackson is that he was not involved in the Project and did not know what happened. This is unpersuasive. Mr. Jackson is familiar with Building Department inspection guidelines. Mr. Jackson testified that an inspector would not simply highlight and initial the part of the drain he inspected. If this was indeed Building Department procedure, to highlight and initial approval of inspection, then this would have been consistent with inspections throughout the Project. However, APCO failed to produce such evidence. To further counter Mr. Jackson, APCO relies on the GES inspections. This is the same argument APCO has used throughout the Project to avoid its responsibility for improper construction methods. The GES reports APCO refers to deals only with the headwalls and retaining walls, but not the actual pipe. Inspection of the pipe was not within GES's scope, and required an inspector from the Building Department to approve. Additionally, the City showed that even under APCO's asserted evidence of inspection, highlighting and initialing, at least two sections of the pipe were never inspected. Therefore, any reliance on Mr. Platt's testimony regarding inspection of the drain pipe is without merit and unreliable.

Regarding the disc which contained important elevation materials, APCO tries to pass off the responsibility of production to the City. First, APCO cannot rely on the fact that the City has to maintain as-built information. APCO relied on Mr. Platt's testimony, which specifically referenced as disc produced by Stantec. APCO's argument here is a red herring. Second, APCO states the City should get the information from Stantec because Stan tee produced the disc. Again, it is APCO relying on the disc for its defense, and therefore APCO has the burden to provide all evidence upon which it relies. If APCO is unable to do so, then any testimony regarding the disc is based on hearsay testimony and inadmissible into evidence. Therefore, Mr. Platt's testimony regarding the disc should be stricken from the record.

B. Storm drain pipe

1. Deflection Angle

The Majority's decision relies entirely on APCO's evidence which I believe should be stricken. Nothing supports APCO's position except hearsay testimony of Billy Platt. Furthermore, the question regarding this angle is not simply a question of incorrect elevation, but also a failure of APCO to take into consideration the manufacturer's instructions. The manufacturer of the pipe states that there should be no more than a 3 degree angle. APCO should have known this and caught the obvious inconsistency between the plans and the manufacturer's instructions. This was exacerbated by the fact that APCO failed to get Building Department inspections on this part of the drain pipe, if the drain pipe was in fact inspected at all. (NEED TO KNOW IF CE-82 contains this angle. If so, even under APCO's theory of inspection, this portion of the pipe was not inspected).

Even more damning for APCO is the fact that it failed to conduct a deflection test as required by specification. If APCO had conducted the required test, the defect would have been revealed and corrected at that time. The result is water running under the pipe, accumulation of debris and garbage and, possibly, sinking of the road above the pipe. The evidence supports the City's claim; the pipe should be repaired to prevent any further damages.

2. Insufficient Cover over the Storm Drain

APCO tries to fault the City for not investigating why there was insufficient cover over the storm drain. However, APCO knew that there was insufficient cover but did not raise this issue with the City during construction. One foot of dirt cover is required under the plans and specifications. APCO obviously knew of this deficiency and therefore is required to insure that its product meets the City's requirements. APCO has raised no other issue to show that there was a change to this requirement during the Project construction. Therefore, I would grant the City's claim.

3. Ponding Issue

This issue is related to APCD's failure to build the headwall with the proper grade. The result is ponding which is in violation of the Southern Nevada Health District regulations. The Majority relies on whether conditions to deny this claim; however, the Majority cannot dismiss the regulations of the Nevada Health District. Therefore, I would grant the City's claim to fix this condition.

4. Broken Manhole

I agree with the Majority that this condition needs fixed. However, I disagree that merely because an NCN was not issued during construction that somehow this allows APCO to its repair costs. As noted above, there is a question as to whether the pipe was actually inspected during construction. Furthermore, because APCO has admitted to this defect, the City should be able to repair it as it deems necessary. Therefore, I would grant this portion of the City's claim, included the costs it seeks for repair.

5. Trash Racks

I agree with the Majority, however, I would grant the City its proposed costs.

6. Broken Pipe

Again, I agree with the Majority here. However, the City's repair needs to follow the manufacturer's recommendations for such repairs. Therefore, I would grant the City the necessary costs.

7. Damages

I would grant the City an award of $179,448.18 to cover construction problems associated with the storm drain.

Claim 11: Defective Chain Link Fence

The City acknowledges that it may not have a claim because the fence foundations were a deferred submittal. However, the City excavated fence foundations in tennis courts C-13/E-10 and C-14/E-11, and found that in numerous instances, the courts did not have the required 36" pole footing, 18" required diameter, or 33" pole embedment. Therefore, the City asserts that it received an inferior product and APCO reaped material cost savings and reduced concrete expenditures.

APCO asserts there were two submittals for fence pole foundations. First, small chain link fence poles only required a 30" embedment. Second, the larger 10' posts required a 48" embedment. Mr. Platt testified that the footing the City submitted as defective were in fact consistent with both APCO submittals, and that there had been no failure of the fencing.

Referring to Bates No. APCO052423, which shows that for the shorter fence post foundations, only 18" footing were required, as measured from the bottom of the tennis court slab (30" if measured from the top of the tennis court surface). The evidence produced fails to distinguish between the two different footing requirements. Reviewing the City's photos of post foundations (Bates No. CLV-B9-000075-102) also fails to differentiate between the two requirements. The City admitted that its claim is shaky; however the City asserts that it has not received the updated deferred submittal necessary to complete its evaluation of this claim.

APCO should be required to update any deferred submittal so that the City can properly evaluate this claim. However, there was testimony that two different footing foundations were required. Mr. Walker was unaware of this requirement and the City's claim obviously would not reflect this reality. Yet APCO's evidence supported its claim that it built the foundations according to the submittals. Therefore, I would deny the City's

claim.

Regarding the pole-in-pole issue, the City identified areas where APCO placed a 4" pole over a 3" pole to cover up what APCO that was a construction defect. The result is that some of these poles do not have foundational Support. The City has suggested a fix that would cost $1,500 per court in 15 different locations.

APCO admits to its mistake, but states Mr. Walker testified the City would accept an engineer's letter stating that the pole-in-pole condition did not present a structural issue. On September 9, 2008, APCO's Mr. Chen sent a letter to the City stating the condition was structurally sound. However, Mr. Chen is not exactly a neutral party, and therefore I would grant the City's request for $22,500.

Claim 12: Missing Thickened Edge at Tennis Court Concrete

The City is claiming that APCO failed to build the thickened edge to the required 24" thickness, failed to install required dowels without approval for the deletion, and failed to install 9 construction joints. The City asserts damages of $44,912.

A. Thickened Edge

APCO claims the City's plans were in conflict with the USTA requirements for a thickened edge. Mr. Barr, APCO asserts, directed it to have Tension Courts of Nevada design the tennis courts to resolve these conflicts. Therefore, the shop drawings produced, built upon, and inspected from, had a thickened edge of 12" x 12" at a 45-degree angle, rather than the City's 12" x 24" with a 90-degree angle. Furthermore, the new designs included the deletion of construction joints on the courts. Finally, APCO states the dowels were only required in areas where there was 4" of concrete. Dowels were installed, however, were certain construction joints were required because of a conflict in the plans. This was inspected and an NCN was never issued, APCO asserts. APCO bid the Project based on the City's drawings, which had a larger thickened edge than was actually built. Therefore, the City should receive a credit.

B. Missing Dowels

I agree with the Majority. No 4-inch concrete was constructed on the Project, and

therefore no dowels were required. This portion of the City's claim is denied.

C. Missing Thickened Edge at Construction Joints

APCO claims that the tennis courts were built according to Post Tension Court of Nevada's shop drawings. However, the evidence presented by the City shows that a construction joint was indeed placed between two courts, however 9 other such joints are missing. APCO obviously failed to construct these joints and thickened edges. Therefore, I would grant the City's claim in the amount of $37,902.00.

Claim 13: Missing Playground Equipment

The City asserts plan sheets SD-9, SD-10, SD-11 and Technical Specification 02865, Recreational Equipment specified the playground equipment required on the Project. The City argues APCO failed to install the required equipment when APCO substituted certain pieces that were not available from what APCO claimed was the required manufacturer. However, the City asserts there were only suggested manufacturers, and that APCO was required under the contact to provide "approved or-equal" equipment from another manufacturer which met the City's requirements. The City further claims merely because it accepted the as-built playground through Mr. Lewis or Mr. Barr, APCO was not relieved of its obligation to install the equipment per contract requirements. Finally, the City rejects the letter from Evan Recreation Installation, which the City alleges tries to show that certain equipment called for in the Technical Specification was not drawn in the bid document. According to the City, GC 6 states that the Technical Specifications take precedence over the bid documents. Therefore, APCO was required to build the playgrounds with every piece of equipment listed in Technical Specification 02865. The City claims APCO has been unjustly enriched by the changes, and seeks damages in the amount of $70,668.

APCO claims it tried to use GameTime, which resulted in differences from the items suggested by Miracle Playground Equipment, which the City used in its plans. Initially APCO prepared a submittal on the playground equipment using GameTime, which the City rejected. However, when tile shade structures in the playground area required the addition of 6 poles for the shade structures, APCO had to redesign the playground area.

APCO submitted a supplemental playground submittal, and eventually, APCO asserts, the City accepted the playground equipment. APCO argues Mr. Lewis, during testimony, admitted that the different/missing playground equipment he identified on July 14,2008, was not on the final punch list. Additionally, APCO claims the City's expert, Mr. Sikorski, has failed in proving the City's damages because he did not solicit bids or quotes from playground equipment suppliers, but only talked to Miracle Playground Equipment. APCO argues its letter from Evans Recreational shows that the City actually received a deal on the playground equipment. Finally, APCO argues the City should have raised any issues during the final walk through and the City is not entitled to any recovery. GC.6(A) states:

> The Bidding and Contract Documents include various divisions, section, and conditions, which are essential parts of the work to be provided by the Contractor. A requirement OCCUlTing in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, the following order precedence will govern:
>
> 1) Contract Summary
> 2) Addenda
> 3) Instructions to Bidder
> 4) General Conditions
> 5) Technical Specifications
> 6) Drawings
> 7) Reference Standards

The City has asserted 31 items which it claims APCO failed to install. In a March 17, 2004 email to Cassie Ridenour, Henry Sudweeks of Miracle Playground wrote about whether a submittal had been made yet. "The contractor is looking to push another manufacturer on the submittal. There are many items on the plan that they cannot match with an equal or will provide something that is not the same height or configuration." See APCO-SCI006215.

Mr. Lewis reviewed the playground equipment before he testified on July 17, 2008, and indicated missing equipment or equipment he felt was cheaper than what the specifications called for. Mr. Barr testified that APCO did additional work in the playground area, including the installation of roughly 6 poles. APCO submitted evidence

that the playground had to be redesigned due to the Sunport sunshades and the addition of these poles. Therefore, Mr. Lewis' review of the playground equipment as-built would naturally differ from the conditions specified. As Mr. Barr stated in his testimony, there were trade-offs in this area, and he felt everyone came out even. Mr. Barr admitted that APCO did use an approved playground equipment manufacturer to complete its work. Due to the re-design that was necessitated by the shade ports, the testimony of Mr. Barr and Mr. Lewis, and the letter of Evans indicating the City had received what was called out for in the specifications, I would deny this claim.

Claim 14: Missing Perimeter Tendons at Tennis Courts

I agree with the Majority that APCO should reimburse the City for failing to install another perimeter tendon. However, the City estimated a cost of $42,252 which I find reasonable. Therefore, I would grant the City an award of $42,252.00.

Claim 15: Missing Post-Tension Test Results

I agree with the Majority that APCO was required to provide these test results under the Contract. APCO would have included an estimate for this in its bid, and therefore should be required to return the money for work never completed. Therefore, I would grant the City's claim of $15,064.00.

Claim 16: Missing Flatness Tests for Tennis Courts

Technical Specification 02755, *Post-Tension Concrete for Tennis Court Construction,* section 3.4, specified APCO had to meet F(F) 50 tolerance for flatness on all tennis courts. Section 3.4(A) requires APCO to measure the F(F) tolerance to ensure compliance. Somehow the Majority believes APCO had no responsibility to provide the results of these tests to the City, thus requiring the City to spend additional money to complete its own check. This is a City project, and APCO would have budgeted for such tolerance measurements and the City would have paid for such work. Therefore, such measurements belong to the City and APCO should have turned them over accordingly. APCO had no right to demand a change order, as this was called for in the specifications. Because the City had to duplicate work which it already paid for, I would grant the City's

claim for $2,000.00.

Claim 17: Court Storage Areas

The City claims APCO failed to construct 11 court storage areas in compliance with SD-16, Detail 4. The City asserts APCO has been unjustly enriched and asserts damages in the amount of $11,268.

APCO claims the City, through Mr. Barr, directed APCO not to install the fabric on the stop of the storage areas. APCO notes that this issue never made it on the punchlist. Finally, APCO asserts that the actual cost for purchase and installation would only be $1,850.31, but considering the City's field directive and failure to request a deductive change order, the claim should be denied.

SD-16, Detail 4, notes that fabric is to be installed on the top of the storage areas and the inside. APCO provides no citation to Ms. Foley's testimony that she expressed a concern regarding trash collecting on the top of the storage areas if the fabric was installed. Indeed, the only person APCO can cite to that a field directive was ever issued was Mr. Platt relaying a hearsay statement of Mr. Barr. The fact that the City did not bring this up during the walk through or seek a deductive change order does not excuse the fact that APCO was paid for the installation of the fabric inside these storage units. However, I disagree with the Majority's reliance on Mr. Pelan. The City's expert calculated $11,268.00 and I would, therefore, grant the City's claim in that amount.

Claim 18: Missing Perimeter Wind Screen

I agree with the Panel's conclusion regarding the oversight on both the City and APCO's part. However, I find the City's estimate of cost reasonable, and would grant the claim in the amount of $30,911.00.

Claim 19: Turf Deletion Credit

I would deny this claim because the City has failed its burden of proof. The City argues the contractor: (1) failed to provide credit for over-excavation; (2) failed to provide credit to prepare and place 2" minus; (3) failed to provide credit for subsoil finish preparation; (4) failed to provide adequate placement of amended topsoil; (5) overcharged

for Type II aggregate base; (6) failed to provide markup on the deduction credit; and (7) improperly charged the City for bond premiums. Although the City cited technical specifications, it did not cite any evidence to support its position that APCO failed to provide the respective work or credits. Therefore, I would deny the City's claim.

Claim 20: Diminished Concrete Pavement - Phase IB

I agree with the Majority and would deny the claim. GES was responsible for ensuring the concrete on the Project complied with specifications. No issue was raised during construction and the evidence proved fiber mesh was present.

Claim 21: Missing Concrete Headcr - Phase IB

I agree with the Majority on this claim, and would award the City $80,145.00.

Claim 22: Credit for Delcted Soil Over-Excavation

Although I agree with the City that APCO's actions are worrisome, the meeting minutes reflect the reality that APCO's scope of work was changed by the City. Additionally, the City has failed to point to any change order which sought a deductive credit for this change in work scope. Therefore, I would deny the City's claim.

Claim 23: Tennis Court Slab Thickness

This claim was removed by the City.

Claim 24: Miscellaneous On-Site Improvements

This claim has been resolved by the parties and withdrawn.

Claim 25: Off-Site Improvements

Considering Mr. Walker's testimony regarding this matter, I agree with the Majority and do not believe APCO is responsible for this fee assessment.

Claim 26: Facility and Structural Improvements

This claim has been withdrawn.

Claim 27: Tennis Court Cabanas

I agree with the Majority regarding this claim.

Claim 28: Miscellaneous Electrical Improvements

I agree with the Majority, APCO has an obligation to assist the City in closing

permits.

Claim 29: Walls and Fencing

The City is not considering financial costs in this claim, but wants the panel to remind APCO of its obligations to close permits. As far as permits regarding this claim have not been closed, I would urge APCO to work with the City to achieve this.

Claims 30 and 31: Liquidated Damages in Phases IA and IB

See Claim 40.

Claim 32: Investigative Costs - Tennis Courts

I disagreed with the Majority's finding that the City was at fault for the tennis court construction because of RFI 71. As far as the Panel finding that GPR testing completed by the City was not credible, I would deny the City's claim for those costs. However, the evidence shows APCO improperly constructed the tennis courts, and the City is going to have to correct those deficiencies. Therefore, I would grant the City $12,558.00 for the time spent inspecting APCO's faulty construction.

Claim 33: Investigative Costs - 6 inch Panels

Again, the City has asserted this claim due to APCO's deficient construction. Therefore, I would grant the City $11,770 for the costs associated with investigating this claim.

Claim 34: Investigative Costs - 5 inch Panels

Along the lines of Claims 32 and 33, I would grant the City's cost of $3,939.00 in investigative costs only.

Claim 35: Investigative Costs - Pavers

I disagree with the Majority's reasoning regarding the City's Pavers Claim. I would grant the City's costs for investigating for this claim in the amount of $1,000.00.

Claim 36: Investigative Costs - Tubular Steel Fencing

The Majority finds this claim hard to understand, citing the fact that only the foundations had to be uncovered. However, this does not account for the time inspecting the fence for other deficiencies. Therefore, I would grant the City's claim for $8,000.

Claim 37: Project Record Documents

APCO claims that it provided the City As-Built drawings on September 14, 2005. However, the City cited the weekly meeting minutes dated September 24, 2005, stating APCO remained in custody of the As-Built drawings. Mr. Lewis testified that the drawings submitted by APCO did not reflect the as-built condition of the Project. APCO submitted drawings a second time, still with deficiencies, but the City accepted them because it felt those were the best it would receive from APCO.

The City has the drawings, although they may not reflect the as-built condition. Therefore, I don't find the City's damage claim reasonable. However, I would urge APCO to work with the City to ensure that a final As-Built set of drawings are presented that reflect the product APCO produced.

Claim 38: Outstanding Punch List

Interestingly, the Majority now believes it is proper for the City to give written notice to APCO, even though during APCO's claims the Majority found the City had waived any written notice requirements. This is unfair to adopt two different standards for the parties. Following the Majority's reasoning in APCO's claims, I believe that APCO had sufficient notice of punch list items and ample time to complete the work. The City produced three punch-lists along in 2005: July 29, 2005 for Phase 1B; September 1, 2005 for Phase 1A; and November 10, 2005 for a combined punch list. APCO was on sufficient notice that punch list items needed to be corrected. Therefore, any notice required APCO was waived when the City produced the punch lists.

The Majority couches this claim in terms of the City refusing to allow APCO to finish punch list items well into the arbitration. Although the parties continued to resolve punch list issues, this did not waive the City's right to preserve evidence that may be necessary for its claim. Although a "reasonable time" to finish the punch list items is not defined, 3 years is certainly beyond a reasonable time. Because I believe any notice requirement was waived by the City issuing the three punch lists in 2005, the City was well within its rights to prevent APCO from completing any further items on the punch list.

APCO argues under GC 39(D) requires some failure on APCO's part to complete punch item lists and the City incurs actual costs completing such work. However, nothing in GC 39(D) requires the City to actually complete the work; it states *"all costs for completing those remaining items may be deducted by the Owner .... "* No precondition exists for the City to complete the work before seeking reimbursement. Therefore, I would allow the City's claim of $125,450.00.

Claim 39: Arbitration Costs

The Contract does not allow for arbitration costs. Therefore, I agree with the Majority regarding this claim.

Claim 40: Subcontractor Bonding - Liquidated Damages

The City has asserted that it did not take occupancy of Phase 1A until September 2, 2005, 122 days past the overall contract completion date of May 5, 2005. Subtracting 76 days of non-compensable time extensions, the City asserts liquidated damages for Phase 1A for 46 days of delay. In Phase 1B, the City asserts the date for completion was January 3, 2005, and APCO finished 192 days late, on July 17, 2005. The City asserts there were 134 days of non-excusable days for which the City seeks liquidated damages. The City is asking for liquidated damages regarding APCO's alleged failure to obtain subcontractor bonding (Claim 40) and APCO's untimely completion of the Washing/Buffalo Project ("The Project") (Claims 30, 31).

The City argues the liquidated damage provisions are valid and enforceable. Specifically, the City asserts no actual damages are necessary and that a liquidated damage provision may be an estimate of potential damages. Additionally, public policy favors imposition of liquidated damages in public works contracts, and such damages are uniformly upheld by the courts. Finally, the City argues that a liquidated damages provision must look to the reasonableness of the damage forecast in light of the facts known to the parties at the time of contracting.

Arguing against liquidated damages for Phases 1A and 1B, APCO argues the City failed to perform any delay analysis to determine if in fact there was an excusable delay on

the Project. Furthermore, the City merely relied on Mr. Haeger's report for liquidated damages, which was reduced from $1,470,000 to $808,000. However, APCO argues that it was entitled to excusable and compensable delays, and thus the City may not assert liquidated damages.

APCO argues the liquidated damage provision is an unenforceable penalty and cannot be awarded where there is no possibility of actual damages. However, APCO asserts if actual damages exist, the liquidated damages must be proportionate to the actual damages in order to be enforceable. However, liquidated damages should not apply to the subcontractor bonding issue

In determining the basis for the City's other claims, APCO states the Panel must interpret the parties' obligations according to the parties' intent prior to the dispute. Furthermore, the Panel must make a reasonable interpretation of the contract, where reasonableness is determined by trade custom and industry practices.

APCO argues the City has waived strict compliance with the Contract. Specifically, APCO argues City personnel waived the requirement for written changes by making oral changes. Therefore, APCO argues the City is estopped from asserting breach of contract based on the City personnel's oral directions. No material breach exists, APCO asserts, because it has substantially performed under the Contract. Furthermore, APCO has a right to repair any nonconforming conditions based on (I) General Condition ¶¶ 19 and 39 of the Contract; (2) a common-law right to repair construction defects; and (3) the covenant of Good Faith allows contractors to repair before the owner assert a claim for damages. APCO argues the City's claims for $21,000,000 for repair and removal amount to economic waste. Finally, APCO claims there is a negative inference against the City for failure to call specific witnesses that had the most knowledge regarding certain City claims. Therefore, APCO argues the City's claims fail as a matter of law.

A. Liquidated Damages - Delays in Phases IA and IB

The City first asserts liquidated damages regarding their claims 30 and 31. The City argues the liquidated damage provision is enforceable under Nevada law without evidence

of actual damages, so long as the parties have stipulated to a liquidated damage provision that is a reasonable estimate of potential damages. The City claims public policy favors imposition of such damages in public works contracts, and are uniformly upheld by courts. APCO argues no liquidated damages are allowed because it has been previously determined that APCO was not late in performance, due to excusable and compensable delays.

Nevada recognizes the freedom to contract includes the right to make a contract which provides for liquidated damages or forfeiture clauses. See Loomis v. Lange Financial Corp., 109 Nev. 1121, 1125, 865 P.2d 1161, 1163 (1993) (noting non-enforceability of liquidated damages is a limitation on the freedom to contract based on public policy in courts of equity.) The question of enforcement is one of law, and for the courts to decide. See id. at 1125-26, 865 P.2d at 1163.

Under Nevada law, liquidated damages are prima facie valid, and the onus is on the challenging party to prove otherwise. Id. at 1156, 865 P.2d at 335 (citing Haromy v. Sawyer, 98 Nev. 544, 546-47, 654 P.2d 1022, 1023 (1982)); see also Loomis, 109 Nev. at 1126, 865 P.2d at 1164. This burden still rests on the challenging party even where there has been no evidence presented of actual damages. See *id.*, 865 P.2d at 1164 (where both sides failed to present evidence of actual damages, the court held the challenging party had not proved the liquidated damage clause was an unenforceable penalty.).

Whether a liquidated damage clause is enforceable or deemed a penalty, and therefore unenforceable, is determined by what the liquidated damage clause tries to achieve. "[T]he distinction between a penalty and liquidated damages is that a penalty is for the purpose of securing performance, while liquidated damages is the sum to be paid in the event of nonperformance." Mason v. Fakhimi, 109 Nev. 1153, 1156, 865 P.2d 333, 335 (1993). A liquidated damages clause is enforceable if (1) the estimated damages are reasonable in light of the actual or anticipated loss caused by the breach party; and (2) at the time of contracting, it was difficult to ascertain actual damages. See R.2d Contracts § 356(1). "[T]he challenging party must persuade the court that the liquidated damages are

disproportionate to the actual damages sustained by the injured party." Id. at 1156-57, 865 P.2d at 335.

However in construction contracts, the liquidated damages are not the sole amount recoverable by the non-breaching party. Where a liquidated damage clause provides it is solely for a delay in performance, actual damages are still recoverable. See Spinella v. B-Neva. Inc., 94 Nev. 373, 376, 580 P.2d 945, 947 (1978); cf. Mason, 109 Nev. at 1157, 865 P.2d at 336 (holding a non-breaching seller was entitled to both liquidated damages and the forfeiture of a deposit due to a seller's breach of a sales contract) see also Pacific Emplovers Ins. Co. v. City of Berkeley, 158 Cal.App.3d 145, 156 n.6 (Cal. App. Ct. 1984) (listing cases from other jurisdiction which hold that in cases of contractor abandonment, both actual and liquidated damages are recoverable.).

General Condition 39(B) states:

> Liquidated Damages. Time is an essential elements of this Contract. The Contractor needs to vigorously proceed with the Work to completion. The parties recognize that in the event the Contractor does not meet the deadline for completion, the Owner will suffer damages resulting from additional architectural and engineering services, inspection, supervisors and contract administration and that the amount of such damages are uncertain at this time. For that reason, in the event of failure on the part of the Contractor to complete the Work within the time(s) specified in the Contract, or with such additional time(s) as may be granted by written authorization by the Owner, or failure to prosecute the Work, or any separable part thereof, with such diligence as will insure its completion within the time(s) specific in the contract or any extensions thereof. The Contractor shall pay to the Owner, as liquidated damages, the sum of five thousand dollars ($5,000) for each calendar day of delay for work related to Phase lB, and the sum of three thousand dollars ($3,000) for work related to Phase 1A until such reasonable time as may be required for substantial completion of the Work, together any increased costs incurred by the Owner in completing the Work. The signing of the Bid Proposal by the Bidder shall be prima facie evidence that he agrees that the amount of liquidated damages is fair and reasonable ... The Owner permitting the Contractor to continue and finish the work or any part of it after the time fixed for its completion, or after the date to which the time for completion may have been extended, will in no way operate as a waiver on the part of the Owner of any of its rights under the Contract. The Owner may waive such portions of the liquidated damages as may accrue after all work is completed, except final clean-up at the site.

The Contract between the City and APCO is clear and unambiguous regarding the liquidated damages. GC 39 provided for liquidated damages for APCO's delay in failing to

complete the project within the Contract period. The City was unable to reasonably calculate actual damages that would result from APCO's failure to timely complete the Project. Therefore, the liquidated damage clause was not unreasonable.

Furthermore, the burden was on APCO to prove that the liquidated damages clause was a penalty and therefore unenforceable. See Mason, 109 Nev. at 1156, 865 P.2d at 335. In Mason, the Nevada Supreme held that a challenging party must show the disproportionality between the liquidated damages asserted and the actual damages suffered. Id. at 1156-57, 654 P.2d at 335 (citation omitted). There, the court upheld a liquidated damages provision because the challenging party failed to meet this requirement by putting forth any evidence. See id. at 1157, 865 P.2d at 336.

APCO's defense fails. APCO has not put forth sufficient evidence to rebut the presumption of validity. APCO relies on its arguments that it was entitled to excusable and compensable delay days. However, APCO's burden was to prove the actual damages suffered was disproportional to the liquidated damages asserted. APCO failed to do so, and merely relied on its case-in-chief arguments. However, as I held, APCO had failed its burden of proof regarding its claims for delay damages. Therefore the liquidated damages provision is enforceable. See Loomis, 109 Nev. at 1126, 865 P.2d at 1164. The City is claiming that APCO had 46 days of delay during Phase 1-A at a rate of $3,000 per day. Thus, the City seeks liquidated damages for delay during Phase 1-A in the amount of $138,000. During Phase 1-B, APCO had 136 delay days at a rate of $5,000 per day. Therefore the City seeks liquidated damage for delay in Phase 1-B totaling $670.000.

The City completed a delay analysis to support its findings of delays during the Project. Therefore, I would grant the City's claim for $808,000 for liquidated damages.

B. Liquidated damages - subcontractor bonding

The City asserts that there were numerous subcontractors who violated the bonding requirement during construction. The City continually stated it would impose liquidated damages for failure to meet the bonding requirements. The City asserts that it paid for bonding of the subcontractors, but some remained unbonded. The City asserts this

amounted to $404,058. The City also asserts that it is due liquidated damages for failure to have subcontractor bonding in the amount of $4,484,000. However, in lieu of the liquidated damages, the City asserts it is at least due the $404,058. Furthermore, the City asserts that although numerous subcontractors were not bonded during the project, the City paid in change order for bonding premiums. The City claims the total amount due for such false premiums amounts to $23,159.81.

APCO argues the City's assertion here is a misreading of the contract. Furthermore, APCO urges rejection of this claim, as the City has not sustained any damages and the City has never enforced this provision on prior projects.

APCO argues that even if this provision was enforceable, the timing only relates to the prime contractor's performance bond and does not clearly identify the bonds required. APCO asserts that this provision was only triggered five days after the Notice to Proceed on APCO's bond, and that subcontractor bonds were only due upon request. Furthermore, APCO claims the City has sustained no damages because only APCO's bond indemnified the City, as the City was not required to be an obligee on the subcontractor bonds. Only APCO was at risk if it did not get all of the subcontractors' bonding. Without actual damages, APCO argues the City has no claim.

Additionally, APCO asserts the City has not historically enforced this provision. Ms. Edelman testified that she was not aware of the City assessing liquidated damages for a prime contractor's failure to obtain proof of subcontractor bonding. Because the City did not have a consistent policy, APCO claims that no bond premiums were included in subcontractors' bids. APCO admitted on one project, an electrical subcontractor was required to prove bonding, but such proof has not been required, according to Mr. Pelan's testimony, on other City projects.

Mr. Richardson, CG&B, and Las Vegas Paving all presented testimony identifying projects in which they were either general contractors or subcontractors. In all instances, they testified that the City never required proof of subcontractor bonding, nor assessed liquidated damages. Furthermore, APCO claims no subcontractor bonding premium was

included in the bid prices because of the City's practice of not requiring such proof.

Finally, APCO argues that the City had access to information to confirm bonding of subcontractors from the beginning of the Project. APCO states it gave the City the required proof of subcontractor bonding after construction began. Furthermore, APCO asserts the City was aware that subcontractors were performing work worth more than the face value of their performance bonds. APCO points to Ms. Eldemans' testimony that it was the City's responsibility during construction to object and make inquiries regarding subcontractor bonding. Lastly, APCO argues the City waived the subcontractor bonding requirements for those subcontractors providing synthetic turf work. As evidence of the City's bad faith, APCO points to Mr. Walker's testimony that he will recommend discontinuing use of the provision.

ITB. I 8, *Bonds and Insurance,* states:

> Prior to execution of the Contract, and not later than five (5) working days after the notification of award, the successful Bidder shall furnish the required bonds and insurance to the Owner.
>
> If the bonds and insurance are not submitted within the time specified or are not kept in effect during the Contract Term, the Contractor will pay the Owner the amount of eight thousand dollars ($8,000) per calendar day as liquidated damages.
>
> IF Contractor does not maintain the coverages required throughout the entire Contract Term, Owner may, at any time the coverage is not maintained by the Contractor, order the Contractor to stop work, assess liquidated damages as set forth herein, suspend or terminate the Contract.
>
> A. Bonds
>
> . . .
>
> 9. The Contractor shall require each Subcontractor who will perform work in excess of $50,000.00, or one percent (1 %) of the Contract Amount, whichever is greater, to furnish the following bonds:
>
> a. Labor and Material Payment Bond in an amount equal to the amount of the subcontract ensuring payment of all the obligation of the Subcontractor under the subcontract.
>
> b. Performance Bond in an amount equal to the amount of the subcontract ensuring performance of all the obligations of the Subcontractor under the

subcontract.

> Such bonds shall comply with the requirements of Subsections 6, 7, and 8 of this Section. The Subcontractor shall provide such bonds prior to the commencement of any work in on the Project. The General Contractor shall submit proof of the Subcontractor's bonds to the Owner upon request.

(See City's Bates No. CL V-B 1-000026, pp. 19-20.)

A plain reading of the Contract shows that subcontractor bonds, though they were not required to be produced in the same time frame, were required during the Contract Term.

(See id. at pg. 19, ¶ 15) ("If the bonds ... are not kept in effect during the Contract Term, the Contractor will pay the Owner [liquidated damages]."). This section precedes Section A, which details the bonds required of both the General Contractor and the Subcontractor. Furthermore, the City noted in Ex. 666-A that APCO was required to submit copies of all subcontractor bonds.

One of the City's remedies for failure to perform was to assert liquidated damages. The City showed that numerous subcontractors at one time failed to post bonds or failed to post bonds which adequately covered its costs during the Project. The City asserts APCO obtained an unfair bid advantage through these tactics. APCO argues that the bonding requirement is not clearly identified and any timing issue was related to APCO's bond, not to subcontractors. Additionally, APCO argues the City cannot prove actual damages for APCO's failure to have subcontractor bonding.

As noted above, a liquidated damages clause is enforceable if (1) the estimated damages are reasonable in light of the actual or anticipated loss caused by the breaching party; and (2) at the time of contracting, it was difficult to ascertain actual damages. See R.2d **Contracts** § 356(1). Where the purposes of the liquidated damages clause is deemed to act as a penalty to secure performance, it will be invalid. Mason, 109 Nev. at 1156, 865 P.2d at 335.

Here, the City's calculated a per day cost of the Contract to be $61,660.00. However, if instead of assessing liquidated damages, the City terminated the Contract, the actual

damages suffered by the City would have been difficult to ascertain at the time of contracting. The City's liquidated damage of $8,000 is reasonable in light of the actual or anticipated loss (at least $61,660 per day). Therefore, the City's liquidated damage clause is not a penalty and thus enforceable.

The City's evidence details the number of days each subcontractor failed to meet the bonding requirement:

1. Noorda Sheet Metal - Never submitted a record of bonding;

2. Wheeler's Electric, Inc. - Wheeler's was required to post a bond equal to its subcontract ($5,512,342) but only posted a bond of $1,707,118. Therefore, APCO and Wheeler's breached the contract requirements.

3. CG&B Enterprises - CG&B had four subcontracts with a total value of $4,285,067, but only a bond for $1,401,418 was submitted for the Phase I-A subcontract. Therefore, APCO and CG&B breached the contract requirements.

4. Richardson Construction - Richardson's subcontract was for $5,609,373, but only submitted a bond of $1,259,000. Therefore, APCO and Richardson breached the contract requirements.

5. Geneva Landscaping - Geneva's subcontract totaled $4,542,381 but posted a bond for $1,000,000, well below its subcontract value. Therefore, APCO and Geneva breached the contract requirements.

6. Northstar Concrete. Inc. - Northstar had a subcontract for $766,000 but failed to post a bond, in violation of the contract.

The City asserts APCO and its subcontractors violated the bonding requirement for a total of 606 days, at $8,000 per day. Thus, the City is seeking liquidated damages for the bonding issue totaling $4,848,000. The City argues at a minimum, it is entitled to $404,058, as this is the difference between the required bonding and what was actually bonded at bonding premium rate of 2.5%. The City's Contract with APCO was clear that subcontract bonding was required. As the evidence shows, the City enforced this provision throughout the contract period. However, APCO either failed to submit the required bonds or failed to provide sufficient bonding. Therefore, I would grant the City's claim for liquidated damages in the amount of $ 404,058.00.

C. Improper Bond Billings in Change Orders

The City has proved that throughout the Project, numerous subcontractors failed to properly bond their work, yet the City was charged bond premiums. Therefore, I would

grant the City's claim for reimbursement of bond premiums in the amount of $23,159.81.

D. Reimbursement for Change Orders

1. *Change Order 26*

The City notes waterproofing was a line item in APCO's bid sheet, identified as "Waterproofing @ Stadium Planters/Sealant/Caulking." However, the change order in issue was for additional waterproofing around the stadium walls. This change order was correctly issued, and I would deny the City's claim.

2. *Change Orders I09 and II3*

The Majority denies this claim based on its erroneous finding that Project completion was February 2005. However, I disagreed with this finding, and believed that the proper Project completion date was May 2005. Therefore, I would grant the City's request for reimbursement in the amount of $110,103.00, as this was a contractual requirement for APCO.

E. Reimbursement on Interest on Retention

The Majority denies this claim because it has found that the APCO's claim exceed the City's the amount awarded to the City. Because I have come to the opposite conclusion, I believe the City is due a credit for this in the amount of$16,845.76.

Summary of the City's Claims

Below is my final award to the City of $5,859,142.75. Where I agreed with the Majority on the merits, but disagreed on the award amount, I entered the amount I would have awarded the City.

CLAIM NUMBER	CLAIM SUBJECT	AWARD
1	Tennis Courts	$3,300,000.00
2	Defective Net Post Anchors	Covered under Claim 1
3	Concrete Plaza Pavers	$7,979.00
4 and 5	Defective Concrete: Phases 1A and 1B	$98,290.00
6	Defective Jogging Track	$29,000.00
7	Tennis Court Dimensions	Covered under Claim 1
8 and 9	Defective Tubular Steel Fence: Phases 1A and 1B	$500,000.00

10	Storm Drain	$179,448.18
11	Defective Chain Link Fence	$22,500.00
12	Missing Thickened Edge	$37,902.00
13	Playground Equipment	Denied
14	Missing Perimeter Tendon	$42,252.00
15	Missing Post-Tension Results	$15,064.00
16	Missing Flatness Test	$2,000.00
17	Court Storage Areas	$11,268.00
18	Missing Perimeter Wind Screen	$30,911.00
19	Turf Deletion Credit	Denied
20	Diminished Concrete Pavement: Phase 1B	Denied
21	Missing Concrete Header: Phase 1B	$80,145.00
22	Deleted Soil	Denied
32	Investigative Costs: Tennis Courts	$12,558.00
33	Investigative Costs: 6" Panels	$11,770.00
34	Investigative Costs: 5" Panels	$3,939.00
35	Investigative Costs: Pavers	$1,000.00
36	Investigative Costs: Steel Fencing	$8,000.00
38	Outstanding Punch List Items	$125,450.00
30	Liquidated Damages - Phase 1A	$138,000.00
31	Liquidated Damages - Phase 1B	$670,000.00
40	Liquidated Damages - Subcontractor Bonding	$404,058
40	Reimbursement for Bond Premiums	$23,159.81
40	Reimbursement for Change Orders	$110,103.00
40	Reimbursement for Interest on Retention	$16,845.76
TOTAL		**$5,859,142.75**

The City withheld $1,009,556.00 in retention. This amount should be deducted from the award as the City's award is larger than the retention withheld. Therefore, the City's award would be **$4,849,586.75**. As the Majority stated, no pre-judgment interest was stated in the Contract, therefore the rate is governed by NRS 99.040. Because the City was expected to have a finished product when it took official occupancy of the park, pre-judgment interest would accrue from the date of occupancy of the Project on September 02, 2005 until the judgment it paid.

SANCTIONS CLAIM

Although I agree with the Majority's conclusion to deny APCO's claim for attorney fees and costs as a sanction, the Majority takes one more opportunity to fault the City entirely for the project while simultaneously absolving APCO of any liability. Thus, I must respond to the Majority's *dicta* to ensure a proper record.

Nevada law states that attorneys' fees are available only if based on agreement, statute or rule or as part of foreseeable consequential damages. See Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n, 117 Nev. 948, 955-56 (2001). The Majority is correct that the Contract between APCO and the City clearly prevents any award of attorney fees or costs associated with the presentation of claims. APCO did not argue that the fees were foreseeable damages available for breach of contract, and therefore, only a statute in support of the fees would be sufficient to justify an award. NRS 18.010(1) states "[t]he compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law." Because there was an agreement that each party would bear its own costs, there is no justification to award APCO attorney fees under NRS 18.010(1). I also agree with the Majority that APCO failed to properly plead a breach of the covenant of good faith and fair dealing, and therefore no bad faith exists to justify an award of attorney fees. Cf. Sandy Valley, 117 Nev. at 959 (failure to properly plead attorney fees under NRCP 9(g) or litigate the fees at trial sufficient justification to deny attorneys' fees.)

However, the Majority has chosen to single out for all responsibility the City's management. Generally, the Majority asserts the City provided deficient plans and failed to cooperate with APCO in overcoming such deficiencies. In support of its argument, the Majority has relied on hearsay of APCO employees, alleged past City practices, and bias of City employees' testimony.

For instance, we heard Platt and Pelan time and time again refer to verbal directives of Barr as the basis for APCO's delay and equitable adjustment claims. The Majority ignores Barr's own testimony that he did not have authority to change the Project in any way. Mr. Barr's testimony was further supported by the actual contract, which stated that all changes had to be in writing and approved by Clair Lewis. These contract provisions were known to APCO, Barr and even APCO's expert and project consultant Frehner. Furthermore, the Majority and APCO cites past City practice of resolving delay claims at the end of the a project. However, City witnesses testified that contractors often waited to present delay claims to offset any liquidated damages claims the City might have. On this Project, the City was specific in what was required from a contractor in order to recover for any delay claims. However, the Majority ignored this testimony and the contract provisions and relies on evidence that in a court of law would not be admissible.

Amazingly, the Majority also faults the City for Walker's investigation of the City's counter-claims, stating "Mr. Walker was not an independent and unbiased consultant." However, the Majority saw no problem with Frehner's involvement in the beginning of the Project and with his analysis of APCO's delay claims. The double standard in the Majority's opinion is glaring on this point.

Finally, the Majority faults the City for bringing what it thought were unsubstantiated claims. However, in my opinion, APCO's entire equitable adjustment and delay claims were unsubstantiated and cost the City millions to litigate. APCO failed to abide by the contractual requirements for delay claims, and thus any claims it brought against the City which were not supported contractually were unwarranted and unsustainable. Furthermore, the City had its own issues with the Project that obviously

were not settled between the parties before arbitration. Therefore, the Majority should not scold the City for bringing forward proper claims that went unresolved before this arbitration.

INTEREST ON AWARD

As I stated in my dissent, APCO failed to show that it was entitled to any award in this case. Therefore, no decision is required regarding interest on the claim. Furthermore, because the award to the City was larger than the amount retained, there is no issue regarding interest on amounts properly retained by the City.

ARBITRATOR'S FEES AND COSTS

I agree with the Majority's decision regarding the arbitrators' fees and costs. The Contract clearly provided that the arbitrator's fees shall be assessed equally. Therefore, in accord with the Majority, the parties must account for their payments to each arbitrator to ensure neither has paid more than contractually required.

JAMES R. OLSON, Arbitrator

1784-26 slc