CASE #	COURT	Penick's Role	Other Party	CASE TITLE	DATE FILED	CASE TYPE
A-12-655744-C	Clark County Superior Court, Nevada	Plaintiff	Hardy Construction	T.B. Penick & Sons, Inc. v. Hardy Construction	January 1, 2012	Construction & Development
2:2011cv02940	Solano County-CA Eastern Dist.	Defendant	Richard B. Moore	T.B. Penick & Sons, Inc. and Safeco Ins. Co. of America v. Richard B. Moore	November 4, 2011	Miller Act
37-2013-00073028	San Diego Sup. – Division Unknown.	Plaintiff	Arch Specialty Insurance Co.; Timothy L. Anderson; Barney & Barney; Catlin Specialty Insurance Co.; Construction Risk Underwriters, LLC; SDI/HB Insurance Solutions, LLC	T.B. Penick & Sons, Inc. v. Arch Specialty Insurance Company	October 25, 2013	Insurance Coverage
37-2014-00019435	San Diego Sup. - Central Division	Defendant	City of San Diego, et al.. -Total of 37 Interested Parties	City of San Diego v. Black Mountain Ranch, et al..	June 16, 2014	Construction Defect
37-2013-00054158	San Diego Sup. - Central Division	Defendant	Shaw & Sons, Lithocrete, Friends of La Jolla Shores, Friends of the Map	Munk v. Shaw & sons, et al..	June 20, 2013	Breach of Contract

FINCH • THORNTON • BAIRD LLP
ATTORNEYS AT LAW 858.737.3100

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Construction Law

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Finch, Thornton & Baird, LLP was founded to provide legal services to the construction industry. The firm's San Diego attorneys have *extensive experience and continuing involvement in all phases of the construction industry*, providing complete representation of general contractors, subcontractors, suppliers, design professionals, sureties, insurers, public agencies, and private owners in all issues, pre-bid through final claim resolution, on both public and private projects. **The following are examples of construction law issues handled by the firm:**

Licensing Issues

Obtaining and maintenance of individual, partnership, corporation, joint venture, and LLC licenses; prosecution and defense of claims against licenses and license bonds.

Insurance and Bonding

Advice and assistance in obtaining and maintaining bonding and insurance; handling insurance coverage and surety issues.

Contract Negotiation and Drafting

Includes prime contracts, subcontracts, purchase orders, equipment use agreements, construction management agreements, design-build contracts, lease/lease back contracts, joint venture agreements, takeover agreements, completion agreements, and related documents such as releases and change orders.

Bidding Issues

Pre-bid qualifications and interpretations, prosecuting and defending bid protests, writs of mandamus, injunctions, substitutions, etc.

Dispute Avoidance

Resolution of issues which arise during performance; counseling and seminars on techniques which eliminate or assist in early dispute resolution.

General Contractor v. Owner/Lender – Quasi Public Works

Commercial Openings, Inc. v. Southwest General Contractors, Inc. San Diego Superior Court Case No. 37-2012-00052831-CU-BC-NC

General Contractor v. Subcontractor

RQ Construction, LLC v. Gregory P. Luth & Associates, Inc. San Diego Superior Court Case No. 37-2012-00059646

Trade Contractor v. Thomas Jefferson School of Law

Protest of International Airport Electrical Upgrade Project

Settlement Of Federal Termination For Convenience

West Tech Contracting, Inc. v. San Diego County Regional Airport Authority San Diego Superior Court Case No. 37-2010-00106565-CU-BC-CTL

Protest Of Light Rail Transit Upgrade Project – Southern California

Los Angeles Area Community College District v. Construction Management Firm

Resolution of Significant Miller Act Bond Claims - All Day Electric Company, Inc. v. Stronghold Engineering, Inc., et al. US District Court Case No. 11cv1465 JLS (JMA)

Protest Of Municipal Project

Kevcon, Inc. v. L.B. Contracting, LLC (S.D.Cal. January 3, 2013, Civ. A. No. 12-CV-2014 BEN) 2013 WL 78962

Subcontractor Default - Caltrans Highway Facility Rehabilitation

Excavating Engineers, Inc. dba Hillside Retaining Walls Company v. F.J. Willert Contracting Co., Inc.

Hillside Retaining Walls and Engineering v. Development Contractor, Inc.

Infinity Structures, Inc. v. ASR Constructors, Inc., et al. Riverside Superior Court (Indio) Case No. INC 10005575

Protest Of Airport Upgrade Project – Ensley Electric, Inc. County Of San Diego (Borrego Valley Airport)

City of San Diego Subcontractor Substitution Hearing

ProUsys, Inc. v. Taisei-T&K Joint Venture San Bernardino Superior Court Case No. CIVRS 910476 (Lead Case)

Caltrans-Response To Proposed Final Estimate

Community College Subcontractor Substitution Hearing

General Contractor v. Commercial Project Owner/Developer

Protest Of School Modernization Bid – West Coast Air Conditioning, Inc. Cajon Valley Union School District

Barnhart-Balfour Beatty, Inc. v. Oxnard School District Ventura Superior Court Case No. 56-2012-00414736-CU-BC-VTA

Balfour Beatty Infrastructure, Inc. v. State of California, Department of Transportation Office of Administrative Hearings Case No. A-0020-2011

T.B. Penick & Sons, Inc. v. Hardy Construction, Inc. Nevada, Clark County Superior Court Case No. A-12-655744-C

2012: The firm successfully represented T.B. Penick & Sons, Inc., on its claim for payment on the Reunion Trails Project, a public work of improvement located in Henderson, Nevada. Upon completion of its work, the general contractor failed to pay the firm's client citing difficulties in obtaining payment from the City of Henderson. The firm proceeded with a lawsuit against the general contractor and its payment bond. The firm also convinced the City to release the remaining construction funds to expedite final payment. Ultimately, the firm recovered the entire principal balance due the client totaling $463,451.65, plus payment of interest and attorney's fees.

Counsel: David W. Smiley

SBA Office of Hearings and Appeals ("OHA") – Appeal of Size Determination

Barnhart-Balfour Beatty, Inc. v. Roofing Subcontractor, Roofing Manufacturer and Their Insurers

Coverage Counsel On Large Construction Defect Claim

Excavating Engineers, Inc., dba Hillside Retaining Walls Company v. MTM Builders, Inc. Arbitration Of Federal Miller Act Claim

Representation Of Plaintiff In Construction Defect Trial

Richard B. Moore v. T.B. Penick & Sons, Inc. et al

Defendant:	T.B. Penick & Sons, Inc. and Safeco Insurance Company of America
Plaintiff:	Richard B Moore
Case Number:	2:2011cv02940
Filed:	November 4, 2011
Court:	California Eastern District Court
Office:	Sacramento Office
County:	Solano
Referring Judge:	Gregory G. Hollows
Presiding Judge:	Kimberly J. Mueller
Nature of Suit:	Miller Act
Cause of Action:	40:270
Jury Demanded By:	Plaintiff

Available Case Documents

The following documents for this case are available for you to view or download:

Superior Court of California, County of San Diego

Court Index Home Previous Page New Case Number Search

View Case Detail

Case Title:	**TB PENICK & SONS INC VS ARCH SPECIALTY INSURANCE COMPANY INC [IMAGED]**			
Case Number:	**37-2013-00073028-CU-IC-CTL**	Case Location:	**San Diego**	File Location
Case Type:	**Civil**	Date Filed:	**10/25/2013**	
Category:	**CU-IC**		**Insurance Coverage**	

Plaintiff/Petitioner		
Last Name or Business Name	First Name	Primary (P)
TB PENICK & SONS INC		**P**
TRITON STRUCTURAL CONCRETE INC		

Defendant/Respondent		
Last Name or Business Name	First Name	Primary (P)
ARCH SPECIALTY INSURANCE COMPANY INC		**P**
ANDERSON	**TIMOTHY L**	
BARNEY & BARNEY		
CATLIN SPECIALTY INSURANCE COMPANY		
CONSTRUCTION RISK UNDERWRITERS LLC		
SDI/HB INSURANCE SOLUTIONS LLC		

Imaged Case
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Superior Court of California, County of San Diego

Court Index Home Previous Page New Case Number Search

View Case Detail

Case Title: **CITY OF SAN DIEGO VS. BLACK MOUNTAIN RANCH LLC [E-FILE]**

Case Number: **37-2014-00019435-CU-CD-CTL**

Case Location: **San Diego** File Location

Case Type: **Civil**

Date Filed: **06/16/2014**

Category: **CU-CD**

Construction Defect

Plaintiff/Petitioner		
Last Name or Business Name	First Name	Primary (P)
AMERICAN CONCRETE		P
CITY OF SAN DIEGO		P
B&B PAVING SCHILLING CORPORATION		
BMR CONSTRUCTION INC		
DIAMOND LANE CONTRACTORS		
DIAMOND LANE CONTRACTORS		
ERRECA'S INC		
NCC LP		
NEWLAND REAL ESTATE GROUP LLC		
RICK ENGINEERING COMPANY		
ROBINSON	CRAIG T	
SCHILLING CORPORATION		
SIGNS & PINNICK INC		
STEADFAST INSURANCE COMPANY		
TC CONSTRUCTION COMPANY INC		
ZURICH AMERICAN INSURANCE COMPANY		

Defendant/Respondent		
Last Name or Business Name	First Name	Primary (P)
BLACK MOUNTAIN RANCH LLC		P
4S KELWOOD GENERAL PARTNERSHIP		
B&B PAVING		
BLACK MOUNTAIN RANCH INC		
BLACK MOUNTAIN RANCH LLC		

BMR CONSTRUCTION INC		
ERRECAS INC		
GEOCON CONSULTANTS INC		
GEOCON CONSULTANTS INC		
GEOCON INC		
GLENN A RICK ENGINEERING AND DEVELOPMENT CO		
GLENN A RICK ENGINEERING AND DEVELOPMENT CO		
NEWLAND REAL ESTATE GROUP LLC		
NEWLAND REAL ESTATE GROUP, LLC		
PINNICK INC		
PINNICK INC		
RICK ENGINEERING COMPANY		
T B PENICK & SONS INC		
TC CONSTRUCTION CO		
TC CONSTRUCTION COMPANY INC		
WHITSON CONTRACTING & MANAGEMENT INC		

Imaged Case
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Microfilm			
Microfilm ID	Location	Reel Number	Frame Number
This case has not been microfilmed.			

Superior Court of California, County of San Diego

Court Index Home Previous Page New Case Number Search

View Case Detail

Case Title: **MUNK VS. SHAW & SONS INC [IMAGED]**

Case Number: **37-2013-00054158-CU-BC-CTL**

Case Location: **San Diego** File Location

Case Type: **Civil**

Date Filed: **06/20/2013**

Category: **CU-BCW**

Breach of Contract/Warranty

Plaintiff/Petitioner		
Last Name or Business Name	First Name	Primary (P)
MUNK	**MARY COAKLEY**	**P**
FRIENDS OF LA JOLLA SHORES		
FRIENDS OF THE MAP		

Defendant/Respondent		
Last Name or Business Name	First Name	Primary (P)
SHAW & SONS INC		**P**
LITHOCRETE INC		
PENICK & SONS INC		

Imaged Case
Documents are available for viewing online,
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Microfilm			
Microfilm ID	Location	Reel Number	Frame Number
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Triton Structural Concrete, Inc. v. Dep't of Design & Construction

OATH Index Nos. 1183/15, 1185/15, 1187/15, 1188/15 & 1943/15,
mem. dec. (June 17, 2015)

On appeal CDRB denied respondent's motions to dismiss two claims that were reserved in petitioner's request for an extension of time to complete contract. Motions to dismiss three other claims on grounds of waiver granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
TRITON STRUCTURAL CONCRETE, INC.
Petitioner
- against -
CITY OF NEW YORK DEPARTMENT OF DESIGN AND CONSTRUCTION
Respondent

MEMORANDUM DECISION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge/Chair*
ANNE MEREDITH, ESQ., *Mayor's Office of Contract Services*
DONNA MERRIS, ESQ., *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board ("CDRB" or "Board") are five consolidated appeals filed by Triton Structural Concrete, Inc. ("Triton") seeking extra compensation from the City of New York Department of Design and Construction ("City" or "DDC"). These disputes involve the $105,003,443.02 "Phase 3 Beach Front Restoration Project," Contract No. 20131421425, awarded by DDC to Triton in March 2013 to restore and rebuild beach access areas damaged by Hurricane Sandy ("Contract").

DDC filed motions to dismiss the appeals on the grounds that Triton failed to reserve its claims in its requests for extensions of time to complete the Contract. Triton opposes the motions. Oral argument was held on May 6, 2015. For the reasons below the motions for Index

Numbers 1183/15 and 1188/15 are dismissed and the motions for Index Numbers 1185/15, 1187/15, and 1943/15 are granted.

BACKGROUND

Under the Contract, the scope of work included the construction of prefabricated modular public restrooms, lifeguard units, offices for the Department of Parks and Recreation ("Parks") and work related thereto such as the construction of foundations, ramp systems, grading, paving, and utilities at locations in Queens, Brooklyn, and Staten Island.

The Contract called for work to be completed in 87 days, so that the beaches and associate locations could be open for the summer on May 24, 2013. According to Triton, opening the beaches on time was "a key, high profile component" of the City's recovery from Hurricane Sandy, and the pressure on Triton to meet the deadline was "dire," (Petitions at 2).

On May 16, 2013, DDC wrote Triton (Petitions, Ex. B) that "due to the unique and highly time-sensitive nature of this project" Triton "has performed and continues to perform certain items of work that may be beyond the scope of the contract between DDC and Triton." (Petitions, Ex. B). The letter explained:

> Owing to the City's extremely aggressive delivery schedule, the design documentation issued for the 35 modular units was not fully complete at time of bid, and a number of design changes had to be made during construction, which may have added to Triton's . . . cost and other changed conditions. These changes include, but are not limited to, the addition of a reinforced concrete floor system, and the addition of seismic bracing and reinforcements to the steel frames and the items addressed in the draft change order language attached as Exhibit A.

Exhibit A provides a description of work to be done and reimbursed for various general categories of work including staff, equipment, resources, expenses, and labor (Petitions, Ex. B). The letter ends: "As discussed this afternoon, Triton's change order will be expeditiously reviewed and negotiated and we are committed to a fair and reasonable settlement on the value of the change" (Petitions, Ex. B).

At the time of the letter, Triton had submitted change orders for the claims in Index Numbers 1183/15 and 1188/15. As work progressed, Triton filed change orders for the claims in Index Numbers 1185/15, 1187/15, and 1943/15. All claims were reviewed and denied by the

resident engineer/project manager. Timely Notices of Dispute were filed with the DDC Commissioner. The Commissioner's designee reviewed the claims and denied them. Triton appeals the denial of the following five change orders.

First, Index No. 1183/15 concerns a $38,700.01 change order (number 13) dated April 1, 2013, for the removal of sand under a concrete beach house to provide access to the beach from the side street of the boardwalk (Pet. Ex. C).

Second, Index No. 1188/15 concerns a $213,399.53 change order (number 9) dated March 20, 2013, for the installation of beach mats to aid access to the beaches by persons unable to walk through the sand. The plans called for the beach mats to extend from the boardwalk to the high water line. Since there was no high water line shown on the plans, Triton used Google Maps to estimate the high water line (Pet. Ex. C).

Third, Index No. 1185/15 concerns a $283,867.74 change order (number 6) dated May 31, 2013, for unforeseen costs related to the removal of sand and debris from the Contract site (Pet. Ex. C).

Fourth, Index No. 1187/15 concerns a $271,675 change order (number 8) dated May 30, 2013, for the unforeseen removal of sand beneath a carriage rail which inhibited the repairs required under the Contract (Pet. Ex. C).

Fifth, Index No. 1943/15 concerns a $39,289.97 change order (number 136) dated October 14, 2013, for the unforeseen repair of aluminum handrails. The work was performed, at the direction of Parks, for public safety (Pet. Ex. C).

On November 4, 2013, February 6, 2014, and June 6, 2014, while the Notices of Dispute were pending, Triton filed requests for extensions of time to complete the Contract.[1]

Contract Article 13.8.2(c) requires that an application for an extension of time set forth: "A statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive." Failure to reserve a claim is deemed a waiver.

In the extension requests, Triton stated that the extension was needed due to various delays, access issues, lack of available work, stop work orders, design changes, latent field

[1] In OATH Index No. 1183/15, Triton filed a request for extension of time before and after it filed a Notice of Dispute.

conditions, testing/inspection/reporting issues, utility authority directives, and an increase in the scope of work. Triton agreed to waive all claims except:

- The costs or impacts that may have occurred or that will occur from the ongoing interferences, obstructions, disruptions, etc., as set forth above.
- Any pending change orders tentatively approved but being currently reviewed and negotiated as to a final dollar amount, as summarized in [the] . . . letter dated May 16, 2013. . . .
- Any change order for extra costs incurred for transportation/shipping of the modular units.
- Installation and all costs associated with on-site completion of shipped modular units, on site retrofit of long lead time doors, windows, electrical fixtures, gates, etc.
- Any work that may become the subject of a dispute.

(Petitions, Ex. I).

Triton filed timely Notices of Claim with the Comptroller. After obtaining additional information from Triton, the Comptroller denied the claims finding that Triton failed to specifically reserve the subject claims in their applications for extensions of time to complete the Contract.

Triton filed timely appeals with the CDRB. Because the instant appeals share common issues and facts, they were consolidated on consent of the parties.

ANALYSIS

The Board's authority to resolve contract disputes between the City and a vendor is set forth in the Procurement Policy Board rules ("PPB rules"). The PPB rules were incorporated into Article 27 of the Contract. The PPB rules and Article 27.1.2 of the Contract authorize the Board to hear claims "about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work . . . ." 9 RCNY § 4-09(a)(2) (Lexis 2014).

As a preliminary matter, Triton's argument that the Board should not review the allegations of waiver and timeliness since the Commissioner's determinations did not include them as grounds for denial is without merit. The Contract and PPB Rules require that the

Board's "decision must be consistent with the terms of the Contract." Contract, Art. 27.7.4; 9 RCNY § 4-09(g)(4). Here, the Contract sets forth the waiver requirements for filing a request for an extension of time under Article 13 and the filing deadlines for claims under Article 27. Whether the subject claim is preserved under Article 13 falls squarely within the Board's authority to resolve questions of contract interpretation. Contrary to Triton's assertions, a factual inquiry is unnecessary as the waiver is clear on its face.

DDC argues that Triton waived its claim in its requests for extension of time to complete the Contract because it failed to expressly reserve the subject claim but instead used generally worded claims. Triton argues that its claims were sufficiently delineated, the purported language of the waiver is equivocal and ineffective, and it submitted the extensions of time intending to obtain progress payments, not waive its rights to compensation for extra work.

New York courts have consistently enforced waiver of claims in connection with extensions of time. *See Honeywell, Inc. v. J.P. Maguire Co.*, 1999 U.S. Dist. LEXIS 1872, at *27 (S.D.N.Y. Feb. 22, 1999), *modified in part, adhered to in relevant part*, 2000 U.S. Dist. LEXIS 3699 (S.D.N.Y. Mar. 17, 2000); *Mars Assoc., Inc. v. City of New York*, 53 N.Y.2d 627 (1981), *aff'g*, 70 A.D.2d 839 (1st Dep't 1979); *Herman H. Schwartz, Inc. v. City of New York*, 100 A.D.2d 610 (2d Dep't 1984); *E.M. Substructures, Inc. v. City of New York*, 73 A.D.2d 608 (2d Dep't 1979); *Teller Paving & Contracting Corp. v. City of New York*, 73 A.D.2d 589 (1st Dep't 1979); *see also Commodore Maintenance Corp. v. Dep't of Transportation*, OATH No. 1118/14, mem. dec. at 8-9; *Ferreira Construction Co., Inc. v. Dep't of Transportation*, OATH Index No. 1619/12, mem. dec. at 12-13 (Nov. 16, 2012); *ADC Contracting & Construction, Inc. v. Dep't of Parks & Recreation*, OATH Index No. 1010/04, mem. dec. at 3 (June 24, 2004).

In *Mars Assoc., Inc. v. City of New York*, 53 N.Y.2d 627 (1981), *aff'g*, 70 A.D.2d 839 (1st Dep't 1979), a contractor applied for an extension of time to complete a contract after it commenced a lawsuit on an outstanding delay claim under the contract. In the extension request, it agreed to "waive and release all claims which we may have against the City of New York arising out of the aforesaid contract except the following: various change orders and work under protest." *Mars*, 70 A.D.2d at 839. The contractor argued that the institution of the lawsuit before the execution of the waiver indicated an intent on its part not to waive the delay claim. The Appellate Division rejected that argument. The Court held the City's waiver was clear on its face and that the contractor waived all claims, save only those arising out of change orders and

work done under protest, which the parties understood meant extra work. Since the delay claim had no "underpinning" in the exemptions, it was dismissed. In affirming this decision, the Court of Appeals found that this was a sophisticated contractor and that "the circumstances of the waiver demonstrate as a matter of law that it was designed to cover the claim upon which [the contractor] now sues." 53 N.Y.2d at 629. The Court further held that it was incumbent on the contractor "to state its intentions with clarity" if the exemptions were intended to be broader in scope. *Id.*

Consistent with the court case law, the CDRB has also found that broad reservations are insufficient to preserve claims under the same or similar wording of section 13.8.2(c). *NorthE Group, Inc. v. Dep't of Design & Construction*, OATH Index No. 158/15, mem. dec. at 5 (Dec. 23, 2014) (contractor waived claim for painting and protection work where it broadly reserved in its time extension request "claims asserted by us to the City, but not yet paid by the City" and claims for the "extra costs for labor and material" and "overhead and profit"); *Pavarini McGovern, LLC v. Dep't of Parks & Recreation*, OATH Index No. 1565/14, mem. dec. at 5 (June 20, 2014) (contractor waived its claim denying responsibility for automatic temperature controls in HVAC system where it broadly reserved in its partial time extension request "additional and increased costs of construction" and "payment of all contract monies now due or to become due under the contract"); *LAWS Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1445/14, mem. dec. at 10 (May 28, 2014) (contractor waived its claim for handling of golf course cover material where it broadly reserved in its time extension request "interferences with and construction changes in the work" and "payment of . . . all monies for extra and additional work"); *Commodore Maintenance Corp. v. Dep't of Transportation*, OATH Index No. 1118/14, mem. dec. (Apr. 3, 2014) (contractor waived its claim to install temporary work decks where it broadly reserved in its time extension request "labor escalation" and "extended supervision").

Here, Triton agreed to waive and release all claims against the City except for: (1) costs that may have or may occur from the ongoing interferences, obstructions, disruptions; (2) pending change orders as summarized in the May 16, 2013 letter; (3) any change order for transportation of the modular units; (4) installation and costs associated with on-site completion of shipped modular units, on site retrofit of long lead time doors, windows, electrical fixtures, gates; and (5) any work that may become the subject of a dispute.

We find that the first and fifth reservations are stated too broadly to preserve any of the subject claims. The third and fourth reservations are irrelevant as none of the subject claims appear to relate to the transportation or completion of modular units. However, since the change orders in Index Numbers 1183/15 (removal of sand beneath the boardwalk) and 1188/15 (additional beach mats) were in existence as of the May 16, 2013 letter, and had underpinnings in the "not limited to" language in the letter's introductory paragraph, they are excluded from the waiver.

CONCLUSION

DDC's motions to dismiss Index Numbers 1183/15 and 1188/15 are denied. DDC's motions are granted as to Index Numbers 1185/15, 1187/15, and 1943/15. DDC is directed to file answers to the petitions in Index Numbers 1183/15 and 1188/15. All panel members concur.

Alessandra F. Zorgniotti
Administrative Law Judge/Chair

June 17, 2015

APPEARANCES:

DUANE MORRIS, LLP
Attorneys for Petitioner
BY: CHARLES FASTENBERG, ESQ.

ZACARY W. CARTER, ESQ.
CORPORATION COUNSEL
Attorney for Respondent
BY: HARRY MCCLELLAN, ESQ.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SUPERIOR SITE WORK, INC. and
DIVERSIFIED CARTING, INC.,

Plaintiffs,

- against-

TRITON STRUCTURAL CONCRETE, INC.,
and SAFECO INSURANCE COMPANY
OF AMERICA,

Defendants.
----------X

OPINION AND ORDER
12-CV-4335 (SJF)(WDW)

FEUERSTEIN, J.

On July 27, 2012, plaintiffs Superior Site Work, Inc. ("Superior") and Diversified Carting, Inc. ("Diversified") (collectively, "plaintiffs") commenced this action in the Supreme Court of the State of New York, County of Suffolk against defendants Triton Structural Concrete, Inc. ("Triton") and Safeco Insurance Company of America ("Safeco") (collectively, "defendants"), seeking damages for breach of contract, enforcement of liens and payment of bonds. On August 29, 2012, defendants removed the action to this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446(a) on the basis of this Court's diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a). Pending before the Court is defendants' motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction or, in the alternative, to compel mediation. For the reasons set forth below, the motion is denied.

I. Background[1]

A. Factual Background

Superior and Diversified are both New York corporations with their principal places of business in Bay Shore, New York. (Compl., ¶¶ 1-2). Triton is a California corporation with its principal place of business in San Diego, California. (Notice of Removal ["Rem. Not."], ¶ 13). Safeco is a New Hampshire corporation with its principal place of business in Boston, Massachusetts. (Rem. Not., ¶ 14).

In or about 2008 and 2009, Triton entered into a contract with the New York City Department of Parks and Recreation ("the City") for the construction of a new amphitheater at the Pelham Fritz Recreation Center, located at Mount Morris Park West in Marcus Garvey Park ("the Amphitheater Project"). (Compl., ¶ 5; Affidavit of Steve Levan ["Levan Aff."], ¶ 2 and Ex. A ["Subcontract"]).

On or about April 1, 2010, Safeco, as surety, and Triton, as principal, issued a payment bond in the sum of five million two hundred fifty-five thousand thirty dollars and ninety cents ($5,255,030.90) for the benefit of the City, and all subcontractors, materialmen and laborers who performed work in connection with the Amphitheater Project. (Compl., ¶ 12).

On June 11, 2010, Triton entered into a subcontract with Superior to provide labor and materials for various construction, reconstruction and demolition work in furtherance of its contact with the City on the Amphitheater Project. (Compl., ¶ 6). Pursuant to that subcontract, Triton also approved Diversified as a subcontractor. (Compl., ¶ 7; Subcontract, ¶ 8.17 (listing Diversified as a

[1] With the exception of the terms of the parties' subcontract, the following facts are taken from the pleadings and do not constitute findings of fact by the Court.

"[l]ower-tier subcontractor[] approved by [Triton]")).

Article 15 of the subcontract is entitled "Disputes Resolution" and provides, in pertinent part, as follows:

> "15.1 Claims Not Involving Owner– To the extent [Superior] submits a claim which [Triton] determines is one for which [the City] may not be liable, or is one which [Triton] elects to not allow [Superior] to further pursue with [the City], * * *, the following procedures shall apply and begin within 60 days of notification:
>
> (a) If the dispute cannot be settled through direct discussions, the parties shall attempt to settle the dispute by mediation before recourse to any other method of dispute resolution. * * *
>
> (b) If mediation does not resolve the dispute, then the parties may agree to resolve the dispute through binding arbitration. * * *
>
> (c) If mediation does not resolve the dispute and the parties do not agree to resolution by binding arbitration, either party may proceed with any allowable resolution process."

(Levan Aff., Ex. A).

According to plaintiffs, they duly completed all of the work they were required to perform within the scope of the subcontract. (Compl., ¶¶ 8-9).

On or about October 17, 2011, Diversified filed with the New York City Department of Finance ("NYC Department of Finance") a notice of public improvement lien in the sum of forty-four thousand five hundred fifty-five dollars and fifty-seven cents ($44,555.57), against money due, or to become due, to Triton from the Comptroller of the City of New York for the Amphitheater Project, pursuant to Section 12 of the New York Lien Law. (Compl., ¶ 10).

On or about December 14, 2011, Superior filed with the NYC Department of Finance a

notice of public improvement lien in the sum of two hundred ninety-three thousand eight hundred two dollars and fifty cents ($293,802.50), against money due, or to become due, to Triton from the Comptroller of the City of New York for the Amphitheater Project, pursuant to Section 12 of the New York Lien Law. (Compl., ¶ 10).

On or about March 1, 2012, Triton, as principal, and Safeco, as surety, posted two (2) bonds, one (1) in the sum of forty-nine thousand eleven dollars and thirteen cents ($49,011.13) and the other in the sum of three hundred twenty-three thousand one hundred eighty-two dollars and seventy-five cents ($323,182.75) to discharge the liens of Diversified and Superior, respectively, pursuant to Section 21(5) of the New York Lien Law. (Compl., ¶¶ 26-27). The conditions of the bonds are "such that if Triton did not well and truly pay any judgment which may be recovered in an action to enforce the lien in a sum not exceeding [the amount of the respective bond], then Safeco's obligation under the bond would remain in full force and effect." (Compl., ¶¶ 32-33).

B. Procedural Background

On July 27, 2010, plaintiffs commenced this action in the Supreme Court of the State of New York, County of Suffolk against defendants, seeking damages for breach of contract (first cause of action against Triton), enforcement of mechanic's liens (second cause of action against both defendants) and payment under payment bonds (third cause of action against Safeco). Specifically, plaintiffs allege, *inter alia*: (1) that Triton has breached the subcontract by failing to pay them for the work they performed pursuant to the subcontract; (2) that their liens have not been waived, cancelled or discharged, except by defendants' posting of the bonds on March 1, 2012, and that they are entitled to a judgment enforcing their liens; and (3) that in the event Triton does not

pay plaintiffs on account of their liens, they are entitled to recover the amounts of their respective payment bonds from Safeco. Plaintiffs seek, *inter alia*: (1) damages from Triton for breach of contract in the amounts of (a) three hundred twenty-three thousand one hundred eighty-two dollars and seventy-five cents ($323,182.75), plus interest and costs, with respect to Superior, and (b) forty-nine thousand eleven dollars and thirteen cents ($49,011.13) with respect to Diversified; (2) judgment declaring (a) that plaintiffs' liens "are valid and subsisting liens for an amount to be adjudged due, together with interest to the date of payment and the costs and disbursements of this action, upon the monies of the [City] applicable to the construction of the Amphitheater Project to the extent of the amount due on the Contract for the aforesaid project[,]" (b) "that plaintiffs' liens having been discharged upon the filing of bonds pursuant to [New York] Lien Law § 21(5), such judgment be in form only[,]" (c) the amounts due on plaintiffs' liens, plus interest and costs and disbursements, (d) "the equities of the parties and the order of priorities of any and all liens or claims * * *[,]" (e) the amount due to Triton from the City "on account of work performed in connection with the Amphitheater Project * * *[,]" (f) that Safeco "is liable to plaintiffs * * * in an amount that will satisfy plaintiffs' liens plus interest and costs[,]" and (g) that in the event it is determined that plaintiffs do not have valid and subsisting liens, they have judgment against Triton in the sum of three hundred twenty-three thousand one hundred eighty-two dollars and seventy-five cents ($323,182.75), plus interest and costs, with respect to Superior, and forty-nine thousand eleven dollars and thirteen cents ($49,011.13) with respect to Diversified; and (3) judgment against Safeco in the amounts of (a) three hundred twenty-three thousand one hundred eighty-two dollars and seventy-five cents ($323,182.75), plus interest and costs, with respect to Superior, and (b) forty-nine thousand eleven dollars and thirteen cents ($49,011.13) with respect to Diversified.

On August 29, 2012, defendants removed the action to this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446(a) on the basis of this Court's diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a). Defendants now move to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction or, in the alternative, to compel mediation.

II. Discussion

A. Standard of Review

Federal courts are courts of limited jurisdiction, see Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 2d 72 (2013); Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740, 747, 181 L. Ed. 2d 881 (2012), and may not preside over cases absent subject matter jurisdiction. See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L. Ed. 2d 502 (2005) (holding that federal courts may not exercise jurisdiction absent a statutory basis); Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (holding that federal courts "possess only that power authorized by Constitution and statute * * *.") Lack of subject matter jurisdiction cannot be waived or forfeited and may be raised at any time by a party or by the court *sua sponte*. See Gonzalez v. Thaler, 132 S. Ct. 641, 648, 181 L. Ed. 2d 619 (2012); see also Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817, 824, 184 L. Ed. 2d 627 (2013) ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."); Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202, 179 L.Ed.2d 159 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of

their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press. * * * Objections to subject matter jurisdiction * * * may be raised at any time.") If a court lacks subject matter jurisdiction, it must dismiss the action. See Fed. R. Civ. P. 12(h)(3); Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont, 565 F.3d 56, 62-3 (2d Cir. 2009).

"[M]aterials extrinsic to the complaint" may be considered on a Rule 12(b)(1) motion. Moser v. Pollin, 294 F.3d 335, 339 (2d Cir. 2002); see also Phifer v. City of New York, 289 F.3d 49, 55 (2d Cir. 2002).

B. The Federal Arbitration Act

Defendants contend that plaintiffs' claims "are garden variety breach of contracts for which only Triton and not the City may be held liable" and that "Triton has never allowed either [plaintiff] to pursue any claim directly with the City," (Levan Aff., ¶ 6), and, therefore, Article 15 of the subcontract covers plaintiffs' claims. According to defendants, the Federal Arbitration Act ("the FAA" or "the Act"), 9 U.S.C. § 1, *et seq.*, thus, bars plaintiffs' action in this Court.

9 U.S.C. § 2 provides, in relevant part, as follows:

> "A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The FAA is the substantive law applicable to any arbitration agreement within the coverage of the Act, see Vaden v. Discover Bank, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206

(2009); Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004), and "was designed to promote arbitration." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749, 179 L. Ed. 2d 742 (2011); see also McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 830 (2d Cir. 1988) (holding that the Act "reflects a congressional recognition of the desirability of arbitration as an alternative to the complications of litigation." (quotations, alterations and citations omitted)). The Act "requires courts to enforce the bargain of the parties to arbitrate * * * [and] reflects an emphatic federal policy in favor of arbitral dispute resolution." Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d 42 (2012) (quotations and citations omitted); see also CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669, 181 L. Ed. 2d 586 (2012). However, the Act "does not require parties to arbitrate when they have not agreed to do so." Schnabel v. Trilegiant Corp., 697 F.3d 110, 118 (2d Cir. 2012) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

The threshold issue presented on this motion is whether Article 15 of the parties' subcontract constitutes an agreement "to settle by arbitration" that is enforceable under the FAA. Since the Act does not define "arbitration," courts must look to "federal common law [to] provide[] the definition of 'arbitration' under the FAA." Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140, 143 (2d Cir. 2013). The Second Circuit has held that agreements that "manifest[] an intention by the parties to submit certain disputes to a specified third party for *binding resolution*," McDonnell Douglas, 858 F.2d at 830 (emphasis added), constitute "arbitration agreements" within the meaning of the Act, notwithstanding the nomenclature used by the parties to the agreement. See id. ("It is * * * irrelevant that the contract

language in question does not employ the word 'arbitration' as such. Rather, what is important is that the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of certain grievances under the Agreement. * * * Similarly, it is not dispositive that the Agreements fail to term the independent [third party's] conclusions 'final' or 'binding' [so long as] the parties' intent in that regard [is] clear from the language of their contract." (quotations, alterations and citations omitted)).

Nothing in Article 15 of the parties' subcontract manifests an intent by the parties to require the submission of any disputes arising thereunder to "a specified third party for binding resolution." McDonnell Douglas, 858 F.2d at 830. The only binding ADR procedure contemplated under the subcontract is binding arbitration if the contemplated mediation fails, and then only upon the mutual consent of the parties.

The Second Circuit has not yet determined whether the FAA applies to agreements to submit disputes to nonbinding alternative dispute resolution ("ADR") procedures, such as mediation, although district courts in this Circuit have found the FAA to be applicable to such provisions. See American Center for Law and Justice-Northeast, Inc. v. American Center for Law and Justice, Inc. ("ACLJ-Northeast"), No. 3:12cv730, 2012 WL 2374728, at * 5 (D. Conn. June 22, 2012) (citing cases). The first of those cases, AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985), was decided prior to McDonnell Douglas and involved an agreement requiring the parties to submit their disputes to the National Advertising Division of the Council of Better Business Bureaus ("NAD") "to obtain a non-binding advisory opinion in a dispute over the propriety of advertising claims." Id. at 457. The district court in that case held that "[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration." Id.

However, that case is inapposite because, *inter alia*, the district court found that "[v]oluntary compliance with NAD's decisions has been universal," id. at 458; that "[r]eportedly no advertiser who has participated in the complete process of a NAD investigation and NARB [National Advertising Review Board] appeal has declined to abide by the [NAD] decision," id.; and, thus, the ADR procedure at issue in that case "provide[d] an effective alternative to litigation." Id. at 467. This case, to the contrary, involves a typical mediation utilized by parties in an attempt to settle their disputes short of litigation. The "decisions" of such mediators do not have universal, or even near-universal, compliance and often the parties thereto decline to abide by them and proceed with litigation. Although the nonbinding mediation contemplated by the parties' subcontract could potentially settle plaintiffs' claims, it is just as likely that it would not. Thus, unlike the ADR procedure at issue in AMF, the mediation at issue in this case is not an effective alternative to litigation.

In the unreported case, ACLJ-Northeast, 2012 WL 2374728, the district court, relying upon AMF, Allied Sanitation[2] and CB Richard Ellis, Inc. v. American Environmental Waste Mangement, No. 98-CV-4183, 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998), found the FAA

[2] Allied Sanitation, Inc. v. Waste Management Holdings, Inc, 97 F. Supp. 2d 320, 322, (E.D.N.Y. 2000), involved an agreement to submit disputes to an ADR negotiation procedure and, if that proved unsuccessful, to binding arbitration. In ruling upon the issue of whether the petition to stay arbitration or other ADR procedures between the parties was ripe for review, the district court held that "[c]ommon sense dictates that the conditional nature of the arbitration clause does not preclude litigation challenging the clause's enforceability." Id. at 327. In dicta, and relying upon the holdings in AMF and CB Richard Ellis, without making any reference to McDonnell Douglas, the court stated that "[t]he concept of arbitration plausibly embraces all contractual dispute resolution mechanisms, consistent with Congress's design to foster alternative means to resolving litigation." Id. Moreover, that case involved the issue of ripeness, not whether an agreement to submit disputes to a nonbinding ADR procedure constitutes an agreement to arbitrate that is enforceable under the FAA. Accordingly, that case is inapposite and its dicta unpersuasive.

applicable to a provision requiring the parties to submit their disputes to nonbinding arbitration in accordance with the rules of the Christian Conciliation Service. The court disagreed with the plaintiff's reasoning that arbitration cannot be compelled under the FAA because the arbitration clause at issue did not require the parties to reach a definitive resolution on the grounds: (1) that "the parties are two organizations that share a common mission and have worked together to advance their shared view of constitutional law since 1997[;]" (2) that it was "evident that the parties specifically included [the arbitration provision] in their Agreement because they contemplated a private adjudication to guide resolution of the merits of their dispute[;]" and (3) that "[a]ssuming the good faith of the parties, a neutral third party may well help to resolve this dispute in a conciliatory, rather then adversarial, manner." Id., at * 6. For the reasons set forth herein, the cases upon which the district court in ACLJ-Northeast relied are either inapposite or unpersuasive. Furthermore, ACLJ-Northeast makes no reference to McDonnell Douglas. In any event, no such solidarity or commonality of purpose, suggesting a greater chance of success by a conciliatory ADR procedure and thereby rendering the ADR procedure a more effective alternative to litigation, is present in this case. Accordingly, that case is both inapposite and unpersuasive.

The unreported case, CB Richard Ellis, Inc. v. American Environmental Waste Mangement, No. 98-CV-4183, 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998), appears to contain a similar ADR provision as contained in this case, i.e., "a general mediation clause." Id. at * 1. The district court, relying solely upon AMF and without making any reference to McDonnell Douglas, held that "[b]ecause the mediation clause in th[at] case * * * manifest[ed] the parties' intent to provide an alternative method to 'settle' controversies arising under the parties' * * * agreement, th[e] mediation clause fit[] within the Act's definition of arbitration." Id. at * 2. However, I

respectfully decline to follow the holding in that unreported decision, since, *inter alia*, it would render as superfluous the Second Circuit's reliance upon the binding nature of the ADR procedure at issue in McDonnell Douglas, 858 F.2d at 830-31, in its analysis of what constitutes an enforceable arbitration clause. The Second Circuit did not hold that an enforceable arbitration clause exists where language clearly manifests an intention by the parties to submit certain disputes to a specified third party to attempt to settle them. Rather, it held that an enforceable arbitration clause exists where the parties' "language clearly manifests an intention by the parties to submit certain disputes to a specified third party *for binding resolution*," id. at 830 (emphasis added), and that "what is important is that the parties clearly intended to submit some disputes to their chosen instrument *for the definitive settlement* of certain grievances under the Agreement." Id. at 830-31 (emphasis added; alteration, quotations and citations omitted). Although the Second Circuit indicated that an arbitration provision need not contain the words "final" or "binding" to be enforceable, it held that "the parties' intent in that regard [must] seem[] clear from the language of their contract." Id. at 831.

Other Circuit Courts have also held that agreements to submit disputes to nonbinding ADR procedures were not enforceable under the FAA. See, e.g. Evanston Ins. Co. v. Cogswell Properties, LLC, 683 F.3d 684, 693-94 (6th Cir. 2012) (holding that an appraisal procedure was not an arbitration because it did not "provide for a final and binding remedy by a neutral third party"); Advanced Bodycare Solutions, LLC v. Thione International, Inc., 524 F.3d 1235, 1239 (11th Cir. 2008) (holding that a provision requiring mediation was not enforceable under the FAA); Salt Lake Tribune Publishing Co., LLC v. Management Planning, Inc., 390 F.3d 684, 689-90 (10th Cir. 2004) (holding that an appraisal procedure did not constitute an arbitration because it did not "empower[]

a third party to render a decision settling [the parties'] dispute"); Harrison v. Nissan Motor Corp. in U.S.A., 111 F.3d 343, 350 (3d Cir. 1997) (holding that a nonbinding ADR procedure did not constitute an arbitration because "the essence of arbitration * * * is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate th[o]se disputes through to completion, i.e. to an award made by a third-party arbitrator."); cf. Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 7 (1st Cir. 2004) (holding that a procedure that required the parties to an agreement to submit their dispute to an independent adjudicator, i.e., an accountant, for a final decision in accordance with substantive standards following an opportunity for each side to present its case constituted an "arbitration in everything but name.") As held by the Eleventh Circuit:

> "[T]he laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. * * * When * * * a party has contractually preserved all its rights and remedies in court and is unwilling to undertake mediation voluntarily, the FAA's goal of minimizing the time and cost of litigation is ill-served by a prefatory round of motions practice. Unlike submitting a dispute to a private adjudicator, which the FAA contemplates, compelling a party to submit to settlement talks it does not wish to enter and which cannot resolve the dispute of their own force may well increase the time and treasure spent in litigation.
>
> * * * [M]ediation is not within the FAA's scope. * * * Mediation, as that term is commonly understood[] is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution * * * or a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. * * * Simply stated, mediation does not resolve a dispute, it merely helps the parties do so. In contrast, the FAA presumes that the arbitration process itself will produce a resolution independent of the parties' acquiescence- an award which declares the parties' rights and which may be confirmed with the force of a judgment. * * * Parties to a mediation contract have not agreed to submit a dispute for decision by a third party * * * because the third party makes no decision.
>
> In short, because the mediation process does not purport to adjudicate or resolve a case in any way, it is not 'arbitration' within the meaning of the FAA."

Advanced Bodycare, 524 F.3d at 1240 (alteration, quotations, footnote and citations omitted).

Since there is no language in the parties' subcontract manifesting an intent to submit any disputes arising thereunder to "a specified third party for binding resolution," McDonnell Douglas, 858 F.2d at 830, at the first instance, the mediation procedure contemplated therein does not constitute an agreement to "settle by arbitration" within the meaning of the Act. Accordingly, defendants' motion is denied.[3]

III. Conclusion

For the reasons stated herein, defendants' motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, to compel mediation is denied in its entirety. The parties are directed to appear, with authority or with individuals with authority to settle this matter, before me in Room 1010 of the Central Islip Courthouse, located at 100 Federal Plaza, Central Islip, New York, for an initial conference in this matter on **September 18, 2013 at 11:15 a.m.**

SO ORDERED.

s/ Sandra J. Feuerstein

SANDRA J. FEUERSTEIN
United States District Judge

Dated: July 24 2013
Central Islip, N.Y.

[3] In light of this determination, it is not necessary to consider the parties' remaining contentions.

Prevailing Wage News

NEW YORK CITY COMPTROLLER
JOHN C. LIU

MAY 2013
Municipal Building, One Centre Street
New York, NY 10007

COMPTROLLER LIU LAUNCHES WEBSITE ENABLING CHEATED WORKERS TO SEARCH FOR MONEY THEY ARE OWED

Approximately $2 Million Remains Unclaimed From Prevailing Wage Settlements; Search at www.comptroller.nyc.gov/KnowYourRights

Comptroller Liu has launched a website that will enable workers who were paid less than the prevailing wage on City public works projects to search online for the money they are owed. The Comptroller's office routinely collects funds from settlements with offending contractors. Currently, approximately $2 million remains unclaimed.

The new website features a confidential search tool accessible to the public. Investigations by the Comptroller's Bureau of Labor Law indicated that some workers didn't file claims with the Comptroller's office because of the misapprehension that doing so would subject them to immigration enforcement. According to New York State law, workers employed on public works projects are entitled to prevailing wages regardless of immigration status.

Labor law data shows that immigrant Latino workers are some of the most exploited in terms of substandard wages and a lack of occupational safety. A great many of the underpaid workers for whom money has been collected have been Latinos.

Past practices to locate workers consisted of publishing names in newspapers in hopes that the workers would see their names and contact the Comptroller's office. The website simplifies the claims process, allowing workers to conveniently search an online, user-friendly database.

Since January 2010, the Comptroller's office has collected over $15 million in underpayments with interest for workers and civil penalties for the City of New York, a record high for the Comptroller's Office. Over 700 workers have failed to claim their unpaid wages – over 500 of whom have last known addresses in the five boroughs. Most payouts are for more than $1,000, with the upper range at $59,000. Prevailing wage settlements that are not claimed by workers within six years revert to the City's treasury.

Prevailing wage violations involving kickback schemes are the most difficult to uncover and prove, and they have become more common as unscrupulous employers search for new ways to evade labor law enforcement.

NYPD/FDNY PAINTING CONTRACTOR DEBARRED FOR KICKBACK SCHEME

In July 2012, after an intensive investigation by the Bureau of Labor Law and a six day trial at the NYC Office of Administrative Trials and Hearings, the Comptroller determined that Abbey Painting Corp. underpaid six Latino immigrant workers by almost $140,000 on several public works projects by using a kickback scheme. Abbey Painting had several City contracts for painting at various police precincts, fire stations, and administrative offices and paid its workers only $100 to $130 per day in cash, instead of the prevailing rate of wage and benefits of over $50.00 per hour. The owner of Abbey Painting, Shahzad Alam, issued weekly checks in the name of his employees in face amounts equaling prevailing wage rates. However, instead of giving his employees the paychecks, Alam made them endorse the back of the checks without seeing the face, took back the checks and later cashed them himself, to make it look like the employees cashed the checks. Alam then paid them in cash, telling them that if they did not like his payment method, they could find new jobs.

The Bureau of Labor Law's investigation included video evidence and subpoenaed bank records. The NYC Office of Administrative Trials and Hearing agreed with the Bureau of Labor Law that Abbey Painting's payment method constituted an illegal kickback scheme. The Comptroller's determination on Abbey Painting was the first to interpret the prohibition

continued on page 3

INSIDE...

There is a lot to report since our last newsletter!!!

PLUMBING CONTRACTOR PLEADS GUILTY TO CRIMINAL CHARGES AND ACCEPTS DEBARMENT

In August 2012, the Bureau of Labor Law, working in partnership with the NYC Health and Hospitals Corporation, the NYC Department of Housing Preservation and Development, the NYC School Construction Authority and the Manhattan District Attorney's Office, entered into an agreement on behalf of twenty underpaid workers who performed plumbing work for DeWaters Plumbing and Heating, LLC on twenty one public works projects throughout the City of New York. DeWaters Plumbing and Heating cheated these workers out of $818,898.07 in wages and benefits. DeWaters Plumbing and Heating plead guilty to one count of petit larceny, an A misdemeanor in violation of New York State Penal Law § 155.25. As part of the plea agreement, DeWaters Plumbing and Heating acknowledged that it willfully violated prevailing wage law and falsified payroll records. DeWaters Plumbing and Heating and its owners Jerry DeWaters and Peter Lustig also agreed to be barred from bidding on public projects in New York for the next five years.

SCA/DOE CONTRACTOR PAYS $700,000 AND ACCEPTS A WILLFUL VIOLATION

In March 2013, the Bureau of Labor Law entered into a $700,000.00 settlement with Homeric Contracting Co. Inc. on behalf of workers who were cheated out of wages and benefits for work on City public works projects. Of that amount, $63,636.66 is payment to the City's general fund as a civil penalty. Homeric Contracting had dozens of contracts with the Department of Education and School Construction Authority for painting, replacing and repairing floors, windows and doors, and installing air ventilation systems at public schools throughout New York City. Seven workers filed claims against Homeric Contracting when they were not paid prevailing wages on these projects. As part of the settlement, Homeric Contracting acknowledged that it willfully failed to pay prevailing wages. Thus, if Homeric Contracting receives a second willful violation within the next six years, it will be barred from bidding on public projects in New York for five years.

DOE/HHC ELECTRICAL CONTRACTOR DEBARRED FOR FALSIFYING CERTIFIED PAYROLL REPORTS

The Bureau of Labor Law recently entered into five settlements on behalf of electricians that were employed by Thunder Brothers Corp. for a total violation, including underpayment to 14 employees with interest and civil penalty, of $321,036.28. Over the course of two years, Thunder Brothers performed electrical work at New York City public schools and public hospitals. Thunder Brothers largely employed Polish immigrant workers and underpaid them by as much as $77.40 per hour. Thunder Brothers attempted to conceal its violations of prevailing wage law from the Department of Education and the Health and Hospitals Corporation by submitting fraudulent certified payroll records, which reported false rates of pay for some workers and omitted other workers entirely. The case, which was referred by the Labor Law compliance unit of the NYC Department of Education, involved payment from the four prime contractors that hired Thunder Brothers and provided for the debarment of Thunder Brothers and its owner, Andrzej Wrobel, for five years.

Other Recent Bureau of Labor Law Enforcement Highlights:

- The Bureau of Labor Law reached a $50,000 settlement with **Empire Air Conditioning & Heating Corp.**, notwithstanding that the contractor was out of business and its owner had been declared personally bankrupt. The settlement was funded by Empire's bonding company, and concerned one worker who performed HVAC work at public hospitals. As part of the settlement, Empire Air Conditioning & Heating and its owner, Roy Antonoff were debarred for five years.
- **S&N Builders Inc.** agreed to pay $330,550.01 to six Latino immigrant workers who performed renovations, painting and maintenance at the St. Agnes branch of the New York Public Library pursuant to a contract with the Department of Design and Construction. As part of the settlement, S&N Builders acknowledged that it willfully violated prevailing wage law and agreed to pay a $31,263.26 civil penalty to the City of New York.
- **Fibrenetics, Inc.** agreed to pay $168,956.79 to ten workers who repaired tanks and piping at Water Pollution Control Plants pursuant to six contracts with the Department of Environmental Protection. Fibrenetics paid $16,895.68 to the City of New York as a civil penalty for its violation of prevailing wage law.
- **Schlesinger Building Restoration, Inc.** and prime contractor Eastco Building Services, Inc. settled with the Bureau of Labor Law on behalf of eighteen workers who were employed by Schlesinger Building Restoration and performed exterior restoration work at a building operated by the Department of Homeless Services. Schlesinger Building Restoration and Eastco Building Services agreed to pay $290,909.10 to the workers and $29,090.90 to the City of New York as a civil penalty. As part of the settlement, Schlesinger Building Restoration acknowledged that they willfully violated prevailing wage law.
- **TEKsystems, Inc.** agreed to pay $222,055.93 to thirteen workers who installed telephone and internet wiring at Jacobi Medical Center. TEKsystems paid $22,205.59 to the City of New York as a civil penalty for its violation of prevailing wage law.
- The Bureau of Labor Law settled with Triton Structural Concrete, Inc. for $145,729 on behalf of forty two workers who were underpaid by its subcontractors **Elite Demolition Contracting Corporation** and **Prestige Builder & Management**. The workers reconstructed the Coney Island Boardwalk and Marcus Garvey Park pursuant to a contract with the Department of Parks and Recreation.
- **Scott Electrical Service, LLC** agreed to pay $40,790.51 to four electricians who worked in New York City public schools. As part of the settlement, Scott Electrical Service acknowledged that they willfully violated prevailing wage law and paid $4,079.05 as a civil penalty to the City of New York.
- **PMJ Electrical Corp.** agreed to pay $36,704.56 to four electricians who worked in New York City public schools. As part of the settlement, PMJ Electrical acknowledged that they willfully violated prevailing wage law and paid $3,670.46 as a civil penalty to the City of New York.
- **A&S Electric, Inc.** agreed to pay three electricians $8,107.10 for work performed at various public schools pursuant to three contracts with the Department of Education. A&S Electric paid $2,026.78 as a civil penalty to the City of New York. A&S Electric also acknowledged that it willfully violated prevailing wage law by paying an "apprentice" rate to a worker who had never been registered in an apprentice program approved by the New York State Department of Labor.
- The Bureau of Labor Law settled with Liro Program and Construction Management on behalf of thirty-four workers employed by subcontractor **High Tower Construction Group, Inc.**, who were misclassified and paid an "apprentice" rate without being in a registered apprentice program. Liro agreed to pay $45,585.51 to workers who performed masonry work at various Emergency Medical Services facilities. High Tower acknowledged that they willfully violated prevailing wage law and paid a civil penalty of $10,000.00.

UPDATE:

MAYOR BLOOMBERG'S ACTIONS AGAINST PREVAILING WAGE

City Council Lawsuit

- Last year, the Mayor vetoed new prevailing wage and living wage laws passed by the City Council. After the Council overrode the Mayor's vetoes, he sued the Council in State and Federal court to overturn the new laws.
- The Mayor claims that the new prevailing wage and living wage laws passed by the City Council are pre-empted by State and Federal laws. The City Council, Service Employees International Union Local 32BJ and the Retail Workers & Department Store Union have asked both courts to dismiss the cases on the basis that the Mayor does not have legal standing to challenge the laws on behalf of the State and Federal governments. The parties are awaiting the decision of the courts.
- The new prevailing wage law – NYC Administrative Code Section 6-130 – extends existing prevailing wage protection for building service employees to certain businesses receiving at least $1 million in financial assistance from the City and certain landlords that lease space to City agencies. This bill was supported by SEIU Local 32BJ.
- The new living wage law – NYC Admin Code Section 6-134 – extends living wage protection (Wage = $10/hour, Benefit =$1.50/hour) with annual cost-of-living increases to certain businesses that receive at least $1 million in financial assistance from the City and their tenants or sub-tenants. This bill was supported by RWDSU.
- Comptroller Liu has honored his obligations under the two new laws by incorporating Admin Code 6-130 into the Labor Law 230 Prevailing Wage Schedule for building services and publishing a new Living Wage Schedule for Admin. Code 6-134.

Part 38 Personnel Order

- Last year, the Mayor also issued an executive order attempting to eliminate prevailing wage protection for all City employees, who were classified in what is known as Part 38 of the Civil Service. A coalition of civil service employee unions, including District Council 37, Plumbers Local 1, District Council of Carpenters, Electricians Local 3, Steamfitters Local 638, Operating Engineers Local 15 and Local 30, Painters District Council 9, SEIU Local 246, Ironworkers Local 40, and Teamsters Local 237 took the Mayor to court and succeeding in getting his order overturned, on the basis that it was arbitrary and capricious and would have deprived City employees of substantial rights without the due process protections of notice and a hearing.
- The Court did not accept the Mayor's claim that Comptroller Liu and his predecessors set inflated wage rates for City employees and stated: "The [Comptroller's] Consent Orders were valid based on hearings, investigations and negotiations between the Comptroller and representative unions, that evaluated prevailing wages in both the private and public sector."
- The Mayor is appealing that Order and the oral argument on that appeal is currently scheduled for May 7, 2013 at 2:00 p.m. at the courthouse of the Supreme Court, Appellate Division, First Department at 27 Madison Avenue in Manhattan.
- In announcing his Personnel Order seeking to abolish prevailing wage for City employees, the Mayor falsely claimed that the Comptroller had traditionally set inflated wage rates for City employees pursuant to his authority under the Labor Law which were not reflective of private sector wage rates.
- In the last three prevailing wage hearings held for City employees, Comptroller Liu determined that:
  - o City-employed Sewage Treatment Workers, who were out of contract for almost 8 years, should receive the same wages and benefits that Con Edison employees receive for working in power plants that have similar water treatment functions;
  - o City-employed Laborers, who were out of contract for almost 10 years, should receive the same wages and benefits that Local 79 Mason Tenders receive for doing similar construction work;
  - o City-employed Locksmiths should receive an average wage and benefit rate based on what their private-sector counterparts make, since there is no prevailing union representing locksmiths in the private sector.
  - o The determinations for Sewage Treatment Workers and City Laborers involved large back-pay awards since they had been out of contract for so long due to the City's lack of willingness to negotiate.
- The Mayor's own record of settling contracts with municipal unions speaks for itself. Through the end of the Mayor's second term in 2009, many of the contracts for City employees were settled by Consent Determination. In 2009, 74 City titles were settled this way, a 7-year high.
- In 2010, the first year of the Mayor's 3rd term, the City settled with only 2 City titles, for employees working in Sewage Treatment Plants, a settlement driven by the result of the hearing and determination for Sewage Treatment Workers.
- In 2011, only one City title settled. In 2012, not a single City title settled. The Comptroller's Office is now proceeding under the assumption that every single Part 38 City title will have to go through an administrative hearing rather than reach a settlement agreement with the City.

DID YOU KNOW?

Since Comptroller Liu took office in January 2010, the Comptroller's Bureau of Labor Law has collected over $15 million in underpayments with interest for workers and civil penalties for the City of New York, a record high for the Comptroller's Office. Over $14.2 million of that money has gone to workers and over $860,000 has gone to the City treasury. In that time the Bureau of Labor Law also debarred 16 contractors for prevailing wage violations and issued warnings for willful violations to 14 contractors.

In the wake of Tropical Storm Sandy, there has been a need for remediation and restoration work by contractors on an emergency basis to address the damage caused by the storm. There is no exception from the prevailing wage requirement in Labor Law §§ 220 and 230 for emergency work. Work that is normally covered by prevailing wage laws is still covered when the work is procured on an emergency basis. This includes New York City public works and building service contracts which are funded or reimbursed by the Federal Emergency Management Agency.

NYPD/FDNY Painting Contractor Debarred for Kickback Scheme

continued from front page

of "kickbacks" under the New York prevailing wage law. The Comptroller further determined that Abbey Painting and Alam owed six workers $139,474.52 in wages and interest and owed the City of New York a civil penalty of $34,868.63. Not only were Abbey Painting and Alam barred from bidding on public works contracts for the next five years, but the Comptroller held Alam personally liable for the violation.

NEW YORK CITY COMPTROLLER
JOHN C. LIU

PREVAILING WAGE NEWS MAY 2013

UPDATE:

COMPTROLLER LIU'S INITIATIVES INVOLVING PUBLIC WORKS

Comptroller Liu has supported several initiatives that would increase the number of public works projects and jobs in New York City over the course of the next few years and improve transparency and accountability for those projects and jobs:

Comptroller Liu and Mayor Bloomberg Announce Sweeping Reforms to City Subcontracting Requirements

Comptroller John C. Liu and Mayor Michael R. Bloomberg have announced that New York City will become the first municipality in the country to establish a comprehensive subcontracting database and publicly report payments made by prime contractors to subcontractors, which will greatly enhance the City's – and the public's – ability to monitor billions of dollars worth of contract activity. The new reforms will also strengthen the City's capacity to detect and address potentially fraudulent billing practices, further ensure the timeliness of payments from contractors to subcontractors and more seamlessly track the utilization of minority- and women-owned businesses on subcontracted City work. The Mayor's Office of Contract Services and the Comptroller's Office have been working on this subcontracting initiative for more than a year, and recently began a pilot program with vendors serving as initial testers.

Beginning March 2013, on any new contract valued over $1 million, all prime vendors will have to disclose information on the City's Payee Information Portal, including the names of subcontractors hired as well as each and every payment to them. In June, the ceiling is lowered to contracts above $250,000, which will ensure approximately 96 percent of all dollars spent on City contracts are captured in this new database. The work to design and develop this new tracking system was completed by CGI, based on a fixed-price deliverable contract for a cost of $1.6 million. In the event a prime vendor fails to carry out their responsibility, the City has the right to withhold payment until all requirements have been met.

The City's new requirements will create a central infrastructure to improve oversight, further reduce the possibility of fraudulent billing and ensure that the City is meeting its minority and women-owned business enterprise goals. Since Local Law 129 was first enacted in December 2005, certified minority and women-owned businesses have won thousands of contracts – worth billions of dollars in total aggregate value – in prime and subcontracts with the City of New York.

Once these new protocols are established, each payment and data set will be fully integrated with the Comptroller's Checkbook NYC fiscal transparency website – which was launched with the assistance from the Mayor's Office of Contract Services – placing never-before-seen subcontract data in the public domain.

Capital Acceleration Program

This program was designed to address the City's infrastructure challenges, create real jobs and save taxpayer money. This accelerates already-approved City construction, like repairs to schools and repaving of roads. It will save taxpayers $200 million in debt service by taking advantage of historically low interest rates and construction costs. And, it creates 8,000 jobs! Comptroller Liu is pleased that the Mayor has embraced this idea and has committed to accelerating $1 billion of the City's construction plan.

$1 Billion TRS Pledge for Investment in Post-Sandy Reconstruction and Critical Infrastructure

The Teachers Retirement System has pledged, as part of the Clinton Global Initiative, to invest $1 billion to restore infrastructure damaged by Superstorm Sandy. These investments will help rebuild housing and strengthen New York's coastline, and earn a solid return for the pension funds. And once again, thousands of jobs would be created.

Green Apple Bonds Proposal

These bonds provide money that the City would borrow to environmentally upgrade buildings such as our schools. The debt service on these bonds would be more than made up for by the savings we gain from lowering energy bills. We would issue the first set of Green Apple Bonds to eliminate the source of dangerous PCBs in 700 schools by 2015, six years ahead of the Administration's current schedule and at savings of $339 million.. This would protect students and teachers from toxic waste and save taxpayers $339 million from lower electric bills. With Green Apple Bonds, we would save green by going green! And, it would create 3,000 jobs.

UPDATE: New York Court of Appeals Decides Prevailing Wage Coverage Issue

In February 2013, the New York Court of Appeals decided the prevailing wage case of **M.G.M. Insulation v. Gardner**, 20 N.Y.3d 469 (2013). In this case, the Bath Volunteer Fire Department, a not-for-profit corporation funded by the Village of Bath to provide fire protection, acquired its own property and entered into a contract to build a new firehouse after the Village declined to do so. The New York State Department of Labor concluded that New York prevailing wage law applied to the project and the contractor took the DOL to court to challenge that determination. The Appellate Division, Third Department, agreed with the DOL and found that prevailing wage requirements applied to the project. The contractor appealed.

The Court of Appeals reversed the Appellate Division's decision, and ruled that prevailing wage requirements did not apply, on the grounds that the volunteer fire department was not a public agency as defined in the statute. Although the Court of Appeals noted that the 2007 Pyramid amendment to Labor Law §220 extended prevailing wage coverage to public works contracts entered into by third parties acting on behalf of public agencies, the Court did not apply the Pyramid amendment because the contract in the case predated the 2007 Pyramid amendment, and the Court declined to apply the amendment retroactively. However, the Court of Appeals left open the possibility that "certain volunteer fire department contracts may fall under the prevailing wage law based on the [Pyramid] amendment language."

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T.B. PENICK & SONS, INC.

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VIA EMAIL AND OVERNIGHT MAIL

August 3, 2015

Morad Fakhrai
Director of Public Works – Engineering & Transportation
City of Hayward
777 "B" Street, 2nd Floor
Hayward, CA 94541-5007

Re: T.B. Penick & Sons, Inc.' Response to Bid Protest of Alten Construction
Project: 21st Century Library – Project #06992

Dear Sir:

Please consider this T.B. Penick & Sons, Inc.'s ("Penick") response to the bid protest filed by Alten Construction ("Alten") on July 30, 2015, related to the award by the City of Hayward (the "City") of the 21st Century and Community Learning Center and Heritage Plaza Arboretum Project ("Project").

1. Factual Background

On July 21, 2015, sealed bids were submitted for construction of the Project. Penick submitted a bid of $49,290,598.80 and was the apparent low bidder. Alten submitted a bid of $51,398,971 and was the apparent second low bidder. Thus, Penick's offer to construct the Project would save the taxpayers more than $2,100,000 relative to Alten's bid. Penick submitted all its bidding documents in a timely manner and received no competitive bidding advantage in its submission. Being disappointed in not being the apparent low bidder, Alten is now grasping at straws to try and backdoor its way into an award of this Project by arguing that Penick failed to disclose certain litigation. As will be shown below, this inadvertent oversight by Penick is not material and is a minor irregularity that did not provide Penick with a competitive advantage over other bidders and did not affect the price of Penick's bid. Alten's "form over substance" protest, if granted, will provide Alten an unfair advantage and sizeable profit from this Project to the taxpayers' detriment of over $2,100,000.

2. The City Has the Right to Waive Any Minor Irregularities in Bid

In accordance with Section 2-1.01 "Bidding" of the City's Special Provisions as well as Section 2-1.46 "Bid Rejection" of the Standard Specification, the City has expressly **reserved the**

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right to waive any informalities irregularities in any bids received should it deem this necessary for the public good.

Additionally, the City has telegraphed in its Qualification Statement ("QS") portion of its bid documents as to what it considers material or not. For example, at Section 1.9 (c) of the QS, the City has chosen to put in **bold letters** the request for Penick to list any claims filed in the past five years against project owners of one million dollars or more. No other litigation related request for information is in bold letters and this is telling as to what is important to the City.

A second example of materiality is contained in Section 1.10 of the QS. Therein, the City states a "Bidder will be disqualified if any of his responses to this QS is found to have any material untruths, discrepancies or omissions." (Emphasis added.)

Section 1.2 E of the QS is equally telling on this issue. Per this Section, the City allows bidders to provide additional information as requested by the City within two (2) working days of the City's request. This is important because it goes to the heart of California law on this subject. Under California law, it is well established that "a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential." (*Konica Business Machines U.S.A. Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 454.) Simply stated, the City has the right to accept Penick's bid if the irregularity with the bid: (1) does not provide Penick with a competitive advantage over other bidders; and (2) does not affect the price of Penick's bid. This Section 1.2 E makes it clear that all bidders would have additional time, after the bid, to provide additional information left out on the QS as requested by the City, which would include further information of litigation inadvertently left out by Penick. This proves that the omitted litigation did not provide Penick with a competitive advantage over the other bidders and did not affect its bid price because the City is willing, via its own bid documents, to allow the bidder to supplement its responses within two working days.

3. The Triton Litigation Mentioned By Alten Is Not In Play

Alten's bid protest contains an assertion that Penick was supposed to list two cases related to Triton Structural Concrete, Inc. ("Triton") because Triton is, in Alten's words, a **subsidiary** of Penick. However, this is an incorrect assertion and should be denied for several reasons.

A. Triton Is Not a Subsidiary of Penick:

Triton is a stand-alone and separate corporation from Penick. While it is true that Penick and Triton have common ownership, Triton is not a subsidiary of Penick and the two are not joint venturers, partners or connected in any recognized legal form. Occasionally, one is a subcontractor of the other if their sub bid prices are more favorable than the prices of other bidders for that same specialty work.

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Most importantly, nowhere in Alten's bid protest is there any support for its statement that Triton is a legally recognized "subsidiary" of Penick. Alten simply slips in this bold "subsidiary" assertion without any independent verification or evidence of any kind. Ultimately, this Project was bid by Penick, and Penick only; thus, there was no need for Penick to list Triton related litigation.

B. The QS Do Not Require Listing of Litigations Of A Subsidiary Any Way:

Even if Triton can somehow be construed to be a "subsidiary" of Penick, as Alten incorrectly argues, nowhere in the QS is there a requirement for a listing of litigation of a bidder's subsidiaries. The only place where the concept of an "affiliated company" (not a "subsidiary") is mentioned is in Section 10 of Part 2, which does not relate to litigations (other than in subsection H. related to mediations or arbitrations, and which is addressed below related to the Arch Insurance Arbitration).

4. Penick's Inadvertent Mistake In Failure To List Certain Litigation Did Not Provide It With A Competitive Advantage Over Other Bidders And Did Not Affect Its Price

Penick inadvertently omitted certain litigation because, as explained below, they were dismissed some time ago, were not major issues, related to other divisions in the company and/or related to non-construction contract related issues. Regardless, their omissions were not material and this error should be waived as a minor irregularity.

A. The Omissions of the Litigations and Arbitration Were Inadvertent:

Alten argues the following five cases were omitted by Penick:

1) Munk v. Shaw & Sons, Inc.: This relates to a small, non-public works 2008 Project in the approximate value of $115,000. Penick works through three divisions, i.e. Division 1 (which bids prime contracts for public entities and churches), Division 3 (which bids prime contracts and structural concrete subcontracts for public works projects) and Division 5 (which bids smaller, decorative concrete work primarily for private and commercial projects). This Library Project for the City was bid on and will be performed by Penick's Division 3, which is managed by Greg Lee, Penick's Executive Vice President. The Munk case listed by Alten relates to a Project for Division 5, which is being managed by Byron Klemanske, a Vice President of Penick. The Munk work was a smaller decorative concrete private project and Munk Litigation was formally dismissed on January 6, 2015 (i.e. Tab 1) Penick did not pay Ms. Munk one dollar in exchange for the dismissal. Penick's Division 3 estimators inadvertently omitted the Munk litigation because it was a case that was handled by the Division 5 folks. Also, and more importantly, the omission of this case, due to the fact that Penick did not pay anything

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to Ms. Munk and it was dismissed, is a minor irregularity placing Penick in no bidding advantage.

2) City of San Diego v. Black Mountain Ranch: This is a construction defect case in which the City of San Diego mistakenly sued Penick when it meant to sue another company called Pinnick, Inc. As shown in Tab 2, once the City of San Diego realized its error, it substituted Pinnick, Inc. in and dismissed Penick out of the lawsuit. Thus, Penick's omission of this case is appropriate and also a minor irregularity.
3) Moore v. TB Penick: This case that belongs to Penick's Division 1, which is managed by Marc Penick. After being terminated as a subcontractor on a Federal Project at Travis Air Force Base, on November 4, 2011, Moore filed an $88,000 collection suit. As shown in Tab 3, the case was settled and dismissed on October 18, 2012. Penick's Division 3 estimators inadvertently omitted this case because it was handled by the Division 1 folks. Also, and more importantly, the omission of this case, due to the fact that it was settled and dismissed almost three years ago, is a minor irregularity placing Penick in no bidding advantage.
4) Penick v. Arch: This is a New York arbitration related to a coverage dispute of an insurance contract resulting from a project contracted and performed by Triton, not Penick. The project is located in New York City. Penick is only named in the arbitration case because it is a separate insured under the same insurance policy for its own projects. However, the dispute and the claim belong to Triton, not Penick; Penick should not, in substance, be involved at all in that arbitration. Penick's Division 3 estimators inadvertently omitted listing this arbitration because it is not a construction contract dispute and it relates to a Triton project in New York; it is an insurance contract dispute and does not relate to any Penick project. Therefore, the omission of this case is a minor irregularity placing Penick in no bidding advantage.
5) TB Penick v. Hardy construction: This case also belongs to Division 5, which is the decorative concrete division managed by Mr. Klemaske. It was a collection case filed by Division 5 in Nevada against a general contractor named Hardy Construction. As shown in Tab 4, the case was settled on March 22, 2012, resulting in a payment to Penick's Division 5 in a sum of $468,451.55. The case was dismissed in late March-April of 2012. Penick's Division 3 estimators inadvertently omitted this case because it was handled by the Division 5 folks. Also, and more importantly, the omission of this case, due to the fact that it was settled in Penick's favor and dismissed more than three years ago, is a minor irregularity placing Penick in no bidding advantage.

B. Penick's Inadvertent Omission To List the Above Five Cases Is a Minor Irregularity That Can Be Waived By The City

As detailed above, Penick's Division 3 estimators made an inadvertent omission of five cases for a variety of reasons. However, Alten must still prove that this error was material to the outcome of the bids on July 21, 2015. As stated above, the specification telegraph that the City considers a material omission "civil actions or claims that [Penick] has filed against project

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owners -- excluding stop notices -- in the past five (5) years where the amount or damages claimed was one million dollars ($1,000,00) or more (excluding subcontractor claims)." (See Section 1.9 (c) of the QS.) [Emphasis added.] Alten's allegations do not relate to any cases related to project owners.

In fact, Penick's omission amounts to no more than a minor irregularity that can be waived by the City (pursuant to its own specifications) because Alten has not shown or proven that the omission: (1) provided Penick with a competitive advantage over other bidders; and (2) affected the price of Penick's bid. Neither of these two thing occurred and the City has the discretion to waive the omission as a minor irregularity.

5. Conclusion

Alten's protest is a transparent attempt to obtain a windfall profit at the expense of the City's taxpayers. As was succinctly stated by the California Court of Appeal in *Ghilotti Construction Co. v. City of Richmond*:

> It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, and cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.

(*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 908-09.) This is precisely what Alten is attempting to do with Penick's bid to the detriment of the City and its taxpayers in the amount of over $2,100,000. Penick respectfully submits it is in the best interest of the City to waive the inconsequential irregularity and award Penick the Project.

Sincerely,

Greg Lee
Executive Vice President
T.B. Penick & Sons, Inc.

GL/sac
cc:

CIV-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Mary Munk, In Pro Per 9530 La Jolla Shores Drive La Jolla, California 92037 TELEPHONE NO.: (619) 840-0250 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Mary Munk	FILED CIVIL BUSINESS OFFICE CENTRAL DIVISION 15 JAN 06 PM 2:17 CLERK-SUPERIOR COURT SAN DIEGO COUNTY, CA
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 West Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, California 92112-2724 BRANCH NAME: Central Division	
PLAINTIFF/PETITIONER: Mary Coakley Munk, et al. DEFENDANT/RESPONDENT: Shaw & Sons, Inc., et al.	
REQUEST FOR DISMISSAL – IMAGED FILE	CASE NUMBER: 37-2013-00054158-CU-BC-CTL

A conformed copy will not be returned by the clerk unless a method of return is provided with the document.

This form may not be used for dismissal of a derivative action or a class action or of any party or cause of action in a class action. (Cal. Rules of Court, rules 3.760 and 3.770.)

1. TO THE CLERK: Please **dismiss** this action as follows:
   a. (1) ☒ With prejudice (2) ☐ Without prejudice
   b. (1) ☐ Complaint (2) ☐ Petition
      (3) ☐ Cross-complaint filed by *(name)*: on *(date)*:
      (4) ☐ Cross-complaint filed by *(name)*: on *(date)*:
      (5) ☒ Entire action of all parties and all causes of action
      (6) ☐ Other *(specify)*:*
2. *(Complete in all cases except family law cases.)*
   The court ☐ did ☒ did not waive court fees and costs for a party in this case. *(This information may be obtained from the clerk. If court fees and costs were waived, the declaration on the back of this form must be completed).*

Date: 1/5/15

Mark Munk
(TYPE OR PRINT NAME OF ☐ ATTORNEY ☒ PARTY WITHOUT ATTORNEY)

▶ Mary Munk
(SIGNATURE)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:
☒ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross–Complainant

TO THE CLERK: Consent to the above dismissal is hereby given.**
Date:

▶
(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)
(SIGNATURE)

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

Attorney or party without attorney for:
☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross–Complainant

(To be completed by clerk)

4. ☒ Dismissal entered as requested on *(date)*: JAN 06 2015
5. ☐ Dismissal entered on *(date)*: as to only *(name)*:
6. ☐ Dismissal **not entered** as requested for the following reasons *(specify)*:
7. a. ☒ Attorney or party without attorney notified on *(date)*: FEB 04 2015
   b. ☐ Attorney or party without attorney not notified. Filing party failed to provide
      ☐ a copy to be conformed ☐ means to return conformed copy

Date: FEB 04 2015 Clerk, by J. Jones, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-110 [Rev. Jan. 1, 2013]

REQUEST FOR DISMISSAL

Code of Civil Procedure, § 581 et seq.;
Gov. Code, § 68637(c); Cal. Rules of Court, rule 3.1390
www.courts.ca.gov

TAB "1"

CIV-110

PLAINTIFF/PETITIONER: Mary Coakley Munk DEFENDANT/RESPONDENT: T.B. Penick & Sons, Inc.	CASE NUMBER: 37-2013-00054158-CU-BC-CTL

COURT'S RECOVERY OF WAIVED COURT FEES AND COSTS

If a party whose court fees and costs were initially waived has recovered or will recover $10,000 or more in value by way of settlement, compromise, arbitration award, mediation settlement, or other means, the court has a statutory lien on that recovery. The court may refuse to dismiss the case until the lien is satisfied. (Gov. Code, § 68637.)

Declaration Concerning Waived Court Fees

1. The court waived court fees and costs in this action for *(name)*:
2. The person named in item 1 is *(check one below)*:
   a. ☐ not recovering anything of value by this action.
   b. ☐ recovering less than $10,000 in value by this action.
   c. ☐ recovering $10,000 or more in value by this action. *(If item 2c is checked, item 3 must be completed.)*
3. ☐ All court fees and court costs that were waived in this action have been paid to the court *(check one)*: ☐ Yes ☐ No

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY MAKING DECLARATION) (SIGNATURE)

Dave Golia

Subject: City of San Diego vs. Black Mountain Ranch, LLC, San Diego Superior Court Case No. 37-2014-00019435-CU-CD-CTL

From: Taylor, Jon [mailto:TaylorJ@sandiego.gov]
Sent: Thursday, July 17, 2014 12:47 PM
To: Dave Golia
Cc: John Boyd; Mary Anne Wilson; Carla French
Subject: RE: City of San Diego vs. Black Mountain Ranch, LLC, San Diego Superior Court Case No. 37-2014-00019435-CU-CD-CTL

Dave – Attached is a copy of the Amendment to the complaint substituting Pinnick, Inc. into the complaint wherever T.B. Penick & Sons appears. It was signed by the court on 7/15/2014. It is my understanding that with this court order, your company is no longer named as a party in this lawsuit. Thank you for your help and information in this matter.

Jon

Jon E. Taylor
Deputy City Attorney
Office of the San Diego City Attorney
1200 Third Ave. Suite 1100
San Diego, CA 92101
619.235.5898 (direct)
619.533.5800 (office)
619.533.5856 (fax)
TaylorJ@sandiego.gov

From: Dave Golia [mailto:DaveG@tbpenick.com]
Sent: Monday, June 30, 2014 11:10 AM
To: Taylor, Jon
Cc: John Boyd; Mary Anne Wilson; Carla French; Dave Golia
Subject: City of San Diego vs. Black Mountain Ranch, LLC, San Diego Superior Court Case No. 37-2014-00019435-CU-CD-CTL

Jon:

This will confirm our phone conversation of earlier today. We agreed that in the attached lawsuit, the City of San Diego erroneously sued T.B. Penick & Sons, Inc. instead of its intended target of Signs & Pennick (who now is named Penick, Inc.). In light of this revelation, you agreed, on behalf of the City of Attorney's Office and the City of San Diego, to dismiss T.B. Penick & Sons, Inc. from this lawsuit and you will email me a conformed copy of that dismissal as soon as it is available. In the meantime, you have agreed that we (T.B. Penick & Sons, Inc.) do not have to enter an appearance or

TAB "2"

file a response in this litigation pending your dismissal of T.B. Penick & Sons, Inc. and that T.B. Penick & Sons, Inc. will not be defaulted in this matter.

I appreciate your research into this matter and professional cooperation.

Sincerely,
Dave

T.B. PENICK & SONS, INC.

GENERAL CONTRACTING, DESIGN-BUILD, CONSTRUCTION MANAGEMENT, STRUCTURAL AND ARCHITECTURAL CONCRETE SINCE 1905

DAVE GOLIA
VICE PRESIDENT
(w) 858-558-1800 253
(c) 858-204-3424
TBPenick.com

15435 INNOVATION DRIVE, SUITE 100
SAN DIEGO, CA 92128

LEONIDOU & ROSIN
Professional Corporation
Janette G. Leonidou (No. 155257)
Patricia Walsh (No. 121098)
Jennifer Y. Leung (No. 260786)
777 Cuesta Drive, Suite 200
Mountain View, CA 94040
Telephone: (650) 691-2888
Facsimile: (650) 691-2889

Attorneys for Use-Plaintiff
Richard B. Moore, an individual and doing business as
Richard B. Moore, General Contractor

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED STATES OF AMERICA, for the Use and Benefit of RICHARD B. MOORE, an individual and doing business as RICHARD B. MOORE, GENERAL CONTRACTOR, Plaintiff, vs. T.B. PENICK AND SONS, INC., a purported California corporation; SAFECO INSURANCE COMPANY OF AMERICA, a Surety; DOES 1 through 50, inclusive, Defendants.	Case No.: 2:11-CV-02940-KJM-GGH STIPULATION FOR DISMISSAL OF ACTION AND ORDER DISMISSING ACTION

TAB "3"

Having settled their disputes, the parties respectfully request that the Court dismiss this action, with prejudice, each party to bear its own costs and fees. This stipulation is made pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

Dated: 10/18, 2012

LEONIDOU & ROSIN
Professional Corporation

By _____
Janette G. Leonidou
Patricia Walsh
Jennifer Y. Leung
Attorneys for Use-Plaintiff
Richard B. Moore, an individual and doing business as Richard B. Moore, General Contractor

Dated: 10/19, 2012

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By _____
Katherine M. Knudsen
Attorney for Defendants
T.B. Penick and Sons, Inc. and
Safeco Insurance Company of America

ORDER

IT IS SO ORDERED that this action be voluntarily dismissed with prejudice, with each party to bear its own fees and costs.

Dated: _____, 2012

_____
JUDGE OF THE UNITED STATES DISTRICT COURT

MARKS, FINCH, THORNTON & BAIRD, LLP
ATTORNEYS AT LAW
4747 EXECUTIVE DRIVE – SUITE 700
SAN DIEGO, CALIFORNIA 92121-3107
TELEPHONE (858) 737-3100
FACSIMILE (858) 737-3101
INTERNET www.mftb.com
E-MAIL dsmiley@mftb.com

ROBERT J. MARKS, APC *
P. RANDOLPH FINCH JR.
JASON R. THORNTON
JEFFREY B. BAIRD
CHAD T. WISHCHUK
LOUIS J. BLUM
DAVID S. DEMIAN
STEPHEN J. SCHULTZ +
MARK T. BENNETT +
DAVID W. SMILEY
BERNARD F. KING III
NOWELL A. LANTZ
JUSTIN M. STOGER
ALLISON N. COOPER
ANDREA L. PETRAY

+ OF COUNSEL via MERRILL, SCHULTZ & BENNETT, LTD.

JON F. GAUTHIER, APC *
DANIELLE C. HUMPHRIES
CHRISTOPHER R. SILLARI
DUSTIN R. JONES
LAURA B. MACNEEL
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DANIEL P. SCHOLZ
RYAN P. KENNEDY
ADAM C. WITT
BRETT T. WALKER
M. KATY ROSS
ROSS M. MATTESON
ANDREW A. MULLEN
J. PATRICK HICKS

* OF COUNSEL

April 11, 2012

OUR FILE NUMBER
666.102

VIA ELECTRONIC MAIL

Mr. Davide Golia
Risk Manager
T.B. Penick & Sons, Inc.
15435 Innovation Drive, Suite 100
San Diego, California 92128-3443

Re: *T.B. Penick & Sons, Inc. v. Hardy Construction, Inc., et al.*
Nevada District Court Case No. A12655744C

Dear Dave:

Enclosed are:

(1) letter agreement between T.B. Penick & Sons, Inc., and Hardy Construction, Inc., regarding final payment; and

(2) conformed stipulation and order to dismiss with prejudice.

This confirms conclusion of our representation of T.B. Penick & Sons, Inc., in the above matter. Our policy is to store files for five years and then destroy them. Please notify us if you would like to review or copy some or all of your files. Otherwise, all files maintained by us will be destroyed in accordance with our document retention policy. Thank you for the opportunity to have been of service.

Very truly yours,

David W. Smiley, of
MARKS, FINCH,
THORNTON & BAIRD, LLP

Enclosures

DWS:mfk/3360727

TAB "4"

TAB 1

MARKS, FINCH, THORNTON & BAIRD, LLP
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JUSTIN M. STOGER
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+ OF COUNSEL via MERRILL SCHULTZ & BENNETT LTD.

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ROSS M. MATTESON
ANDREW A. MULLEN
J. PATRICK HICKS

* OF COUNSEL

March 22, 2012

OUR FILE NUMBER
666.102

VIA ELECTRONIC MAIL

Ronald H. Reynolds, Esq.
Reynolds & Associates
823 Las Vegas Boulevard South
Suite 280
Las Vegas, Nevada 89101

Re: *T.B. Penick & Sons, Inc. v. Hardy Construction, Inc., et al.*
Nevada District Court Case No. A-12-655744-C

Dear Mr. Reynolds:

This confirms the parties' agreement to settle the above referenced action on the following terms:

1. In exchange for payments totaling $468,451.65 (the "Settlement Sum"), T.B. Penick & Sons, Inc. ("TBP"), will provide Hardy Construction, Inc. ("Hardy"), with an Unconditional Waiver and Release Upon Final Payment (NRS § 108.2457(5)(d) (the "Release"). It is understood and agreed by TBP, Hardy and Great American Insurance Company ("GAIC") that the Release will not be effective until the checks for the Settlement Sum clear the bank upon which they are drawn.

2. Within three (3) days of the checks for the Settlement Sum clearing the bank upon which they are drawn, TBP will file a dismissal, with prejudice, of the above referenced action against Hardy and GAIC. Pursuant to the terms of the dismissal, TBP, Hardy and GAIC are to bear their own fees and costs. Counsel for Hardy will prepare and forward to David W. Smiley, Esq., counsel for TBP, the form of dismissal to be filed by TBP.

Please confirm the above terms of the parties' settlement on behalf of Hardy and GAIC by signing below. Thank you and Hardy for your professional courtesy and timely resolution of this payment dispute.

Very truly yours,

David W. Smiley, of
MARKS, FINCH,
THORNTON & BAIRD, LLP

DWS:mfk/3349614

cc: T.B. Penick & Sons, Inc.
Attn: Davide Golia, Esq. (via e-mail only)
Mr. Byron A. Klemaske III (via e-mail only)
Mr. Victor Klemaske (via e-mail only)
Mr. Justin Klemaske (via e-mail only)
Mr. Andrew Weber (via e-mail only)
Ms. Carla French (via e-mail only)
Law Office of Hayes & Welsh
Attn: Garry Hayes, Esq. (via e-mail only)
Marks, Finch, Thornton & Baird, LLP
Attn: Robert J. Marks, Esq. (via e-mail only)

SO STIPULATED AND AGREED BY HARDY CONSTRUCTION, INC. AND GREAT AMERICAN INSURANCE COMPANY.

Date: 3/26/12 Signature:

Ronald H. Reynolds, Esq.
Attorney for Hardy Construction, Inc.
and Great American Insurance Company

TAB 2

SAO
RONALD H. REYNOLDS
Nevada Bar No. 827
MATTHEW M. REYNOLDS
Nevada Bar No. 12268
REYNOLDS & ASSOCIATES
823 Las Vegas Blvd. So., Suite 280
Las Vegas, NV 89101
(702) 445-7000
(702) 385-7743 FAX
Attorneys for Defendants HARDY CONSTRUCTION, INC., and GREAT AMERICAN INSURANCE COMPANY

DISTRICT COURT

CLARK COUNTY, NEVADA

T.B. PENICK & SONS, INC., a California corporation, Plaintiff, vs. HARDY CONSTRUCTION, INC., a Nevada corporation; GREAT AMERICAN INSURANCE COMPANY, an Ohio corporation., et al., Defendants.	CASE NO. A-12-655744-C DEPT NO. XXI **STIPULATION TO DISMISS WITH PREJUDICE; ORDER THEREON**

IT IS HEREBY STIPULATED by and between the parties hereto, through their attorneys of record, that the within proceeding is to be dismissed with prejudice as to all Defendants, all parties to bear their own fees and costs.

There are no hearing or trial dates pending in this matter.

Dated: 3/14/12

Reynolds & Associates

RONALD H. REYNOLDS, ESQ.
State Bar No. 827, #280
823 Las Vegas Blvd. So., 5th Fl.
Las Vegas, NV 89101
Attorney for Defendants

Dated: 3-30-12

Hayes & Welsh

GARRY HAYES, ESQ.
State Bar No. 1540
199 North Arroyo Grande Blvd., Suite 200
Henderson, NV 89074
Attorney for Plaintiff

ORDER

The parties having so stipulated and good cause appearing.

IT IS HEREBY ORDERED that this matter is dismissed with prejudice as to Defendants herein. all parties to bear their own attorney's fees and costs.

Dated: _____

_____
DISTRICT COURT JUDGE

SUBMITTED BY:
REYNOLDS & ASSOCIATES

_____
RONALD H. REYNOLDS
STATE BAR NO. 827
823 Las Vegas Blvd. So., Suite 280
Las Vegas, NV 89101
Attorney for Defendants
(702) 445-7000
(702) 385-7743

CITY OF
HAYWARD
HEART OF THE BAY

August 13, 2015

Mr. Erik Andresen, Chief Estimator
Alten Construction
720 12th Street
Richmond, CA 94801

Re: 21st Century Library and Community Learning Center and Heritage Plaza Arboretum, Protest of T.B. Penick & Sons, Inc. Bid

Mr. Andresen:

This letter is in response to your letter dated July 30, 2015 referenced above. Your letter was received by the Hayward City Clerk on July 31, 2015. In your letter you called the City's attention to several lawsuits involving T.B. Penick & Sons, Inc. which were not included in T.B. Penick & Sons' responses to the Qualification Statement for this Project. You assert that the omissions are material and render the T.B. Penick & Sons' bid non-responsive.

To the extent that your bid protest is based on errors or omissions in the Qualification Statement, which is a tool for evaluating the qualifications and responsibility of the bidders, the City has considered your protest on the basis of both non-responsiveness and non-responsibility.

Non-Responsiveness

The QS required bidders to provide litigation information regarding the following categories: (1) claims/litigation history within the past five (5) years; (2) list of projects within the last five (5) years where change orders exceeded 10% of the total contract price; and (3) any civil actions filed against project owners within the last five (5) years where the damages claimed exceeded $1 million.

T.B. Penick & Sons' response to the QS identified four (4) projects where change orders exceeded 10% of the total contract price and six (6) projects which resulted in mediation or arbitration. T.B. Penick & Sons provided a written response to your bid protest explaining the omission of the lawsuits you identified. T.B. Penick & Sons explained that the omitted lawsuits involved other divisions of the company and the estimators inadvertently neglected to identify those lawsuits in the QS responses. T.B. Penick & Sons has substantially complied with the requirements of the QS. Their omissions did not provide them with an advantage not afforded to other bidders and the omissions did not affect the bid price.

Non-Responsibility

Pursuant to section 1.10 of the QS, a Bidder will be disqualified if any of his responses to the QS is found to have any material untruths, discrepancies, or omissions. As referenced above, T.B. Penick & Sons has stated that their failure to list the cases identified in the bid protest was inadvertent and due to the fact that the cases involved other divisions of the company. This explanation is reasonable and there is no evidence that T.B. Penick & Sons sought to deliberately mislead the City such that they would be deemed untrustworthy, lacking in integrity and therefore not responsible.

DEPARTMENT OF PUBLIC WORKS
ENGINEERING & TRANSPORTATION
777 B STREET, HAYWARD, CA 94541-5007
TEL: 510/583-4730 • FAX: 510/583-3620 • TDD: 510/247-3340

For the reasons stated above, I will recommend that the City Council deny the bid protest of Alten Construction. I will further recommend that the City Council waive any irregularities in T.B. Penick & Sons' responses to the QS as non-material and proceed with award of the contract to T.B. Penick & Sons, Inc. as the lowest responsible bidder.

Sincerely,

MORAD FAKHRAI, P.E.
Director of Public Works - Engineering & Transportation

cc: Michael Vigilia, Assistant City Attorney, City of Hayward
Yaw Owusu, Assistant City Engineer, City of Hayward
Kevin Briggs, Senior Civil Engineer, City of Hayward
Stacey Coughlan, Director of Estimating and Proposals, T.B. Penick & Sons, Inc.
Greg Lee, Executive Vice President, T.B. Penick & Sons, Inc.