UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, for the use and benefit of MOUNTAIN UTILITIES, INC., a Washington corporation,

Plaintiff,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, an Illinois corporation; ZURICH AMERICAN INSURANCE COMPANY, a New York corporation; AMERICAN HOME ASSURANCE COMPANY, a New York corporation; WOOD ENVIRONMENT & INFRASTRUCTURE SOLUTIONS, INC., a Nevada corporation; AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC., a Nevada corporation; ANDERSON ENVIRONMENTAL CONTRACTING, LLC, a Washington limited liability company,

Defendants.

Case No. 2:19-cv-00293-RCT

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

ANDERSON ENVIRONMENTAL CONTRACTING, LLC, a Washington limited liability company

Cross Claimant,

v.

AMERICAN HOME ASSURANCE COMPANY, a New York corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, an Illinois corporation; WOOD ENVIRONMENT & INFRASTRUCTURE SOLUTIONS, INC., a Nevada corporation; ZURICH AMERICAN INSURANCE COMPANY, a New York corporation,

Cross Defendants.

WOOD ENVIRONMENT & INFRASTRUCTURE SOLUTIONS, INC., a Nevada corporation; AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC., a Nevada corporation,

Cross Claimants,

v.

ANDERSON ENVIRONMENTAL CONTRACTING, LLC, a Washington limited liability company,

Cross Defendant.

WOOD ENVIRONMENT &
INFRASTRUCTURE SOLUTIONS,
INC., a Nevada corporation,

Third Party Plaintiff,

v.

TRAVELER CASUALTY AND
SURETY COMPANY OF AMERICA,

Third Party Defendant.

I. INTRODUCTION

This case involves the continuing legacy of the Bunker Hill Mine in Kellogg, Idaho. Discovered by Noah S. Kellogg in 1885, the mining complex began production in 1886, and, until the mine closed in 1991, it had produced 42.77 million tons of ore at an average grade per ton of 8.43% lead, 3.52 ounces of silver, and 4.52% zinc. Through its long history, the Bunker Hill mine accounted for nearly 42% of the total lead, 41% of the total zinc, and 15% of the total silver production in the Coeur d'Alene Mining District located in the Silver Valley of North Idaho. Over its existence, more than 40 separate mineralized zones were exploited,

producing 35 million tons of ore concentrate, including a total of 165 million ounces of silver.[1]

An on-site smelter and zinc plant separated the valuable minerals from the ore, leaving mountains of tailings laden with toxic chemicals. It was declared an EPA Superfund Site in 1983, and the United States Army Corps of Engineers ("the Corps") constructed a stormwater treatment plant at the location of the old smelter to try to treat the water runoff from flooded portions of the mine and piles of mine tailings before the contaminated water reached the South Fork of the Coeur d'Alene River, which flows into iconic Lake Coeur d'Alene.

This dispute arises out of the Corps' expansion of the environmental remediation efforts through a construction project known as the Bunker Hill Central Treatment Plant Upgrade Project ("Project"). Because the Corps is the owner or contracting entity for the Project, the Project is a public building or public work of the federal government within the meaning of 40 U.S.C. § 3131 et seq. (hereinafter the "Miller Act").

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[1] Bunker Hill Mine Overview, Bunker Hill Mining Corp. (last visited Aug. 18, 2022), https://www.bunkerhillmining.com/bunker-hill-mine/overview/ (last visited 8/10/2022); Arthur J. Miller, The Legacy of the Bunker Hill Mine, Western Mining History (last visited Aug. 18, 2022) https://westernmininghistory.com/library/7/page1/.

On December 22, 2016, the Corps awarded a nearly $50 million architect/engineering contract ("Prime Contract") for the Project's design and construction work to defendant AMEC Foster Wheeler Environment & Infrastructure, Inc. ("AMEC"). Wood Environment & Infrastructure Solutions, Inc. ("Wood") is the successor-in-interest to AMEC. As required by the Miller Act, Wood obtained a payment and performance bond from American Home Assurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company (collectively "Wood Sureties"), numbered as Bond No. 9238608/931071 in the amount of $48,409,058.47 ("Wood Bond"), in favor of the United States of America as Obligee.

Wood then entered into a smaller subcontract ("Subcontract") with Anderson Environmental Contracting, LLC ("AEC") to furnish certain labor, materials, and equipment for the Project. AEC as principal, and Travelers Casualty and Surety Company of America ("Travelers") as surety, executed a subcontract performance and payment bond denominated as Bond No. 106 909 282 in the penal sum of $3,700,000.00 ("AEC Bond") in favor of Wood as Obligee.

AEC then entered into a lower-tier subcontract ("Sub-Subcontract") with Mountain Utilities, Inc. to furnish certain labor, materials, and equipment for installation of piping and other underground utilities for the Project.

Mountain Utilities was not paid for all of the work it expended under the Sub-Subcontract and it brought this action on July 26, 2019, against Wood and the Wood Sureties for violation of the Miller Act, and against AEC for breach of contract. Wood cross-claimed against AEC for breach of the Subcontract and asserted another cross-claim against AEC and a third-party claim against Travelers for breach of the AEC Bond. AEC also filed its own cross-claim against Wood and the Wood Sureties under the Miller Act and also brought a breach of contract claim against Wood.

The Court bifurcated the two-week trial, and a jury tried the claims of Mountain Utilities against AEC, Wood, and the Wood Sureties. Once the jury retired to deliberate on the Mountain Utilities claims, the Court continued hearing evidence over another five days in a bench trial to resolve the remaining cross-claims and third-party claims among Wood, AEC, and Travelers.

The jury returned its verdict in favor of Mountain Utilities against Wood and the Wood Sureties in the principal amount of $307,537.05, and the Court awarded prejudgment interest at the Idaho statutory rate of 12% per annum.[2]

As to Mountain Utilities' claim against AEC for breach of contract, the jury found that AEC was not in breach and awarded zero damages.

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[2] Still to be determined are the award of costs and reasonable attorney's fees to Mountain Utilities as the prevailing party on its claims.

The Court has now weighed and evaluated all of the evidence presented during the entire trial, including the designated deposition testimony, in the same manner that it would instruct a jury to do, has fully considered the legal arguments of counsel and each party's proposed findings and conclusions, respects and agrees with the jury's verdict as to the claims of Mountain Utilities, and makes the following findings of fact and conclusions of law stated below as to the remaining claims tried to the bench. Any finding of fact that constitutes a conclusion of law also is adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact similarly is adopted as a finding of fact.

In the opinion of the Court, the facts found are all supported by the record, or reasonable inferences to be drawn from the admitted evidence, and with due regard for determinations of credibility of the witnesses, even though the Court might not provide specific record citations or articulate the reasons for credibility decisions. Also, unless otherwise noted, when evidence is subject to an objection and the Court has relied on that evidence, the Court has overruled the objection for the reason or reasons identified either by the Court or, if the Court is silent, by the party offering the evidence in response to the other side's objection. All objections to evidence that the Court has not relied upon, and all procedural objections not expressly addressed, are denied as moot.

For the reasons stated below, the Court finds that AEC is the prevailing party to this action. The Court separately will enter a judgment awarding damages for breach of contract in favor of AEC in the principal amount of $1,158,187.00. AEC is also entitled to prejudgment interest on that award in an amount to be determined by counsel for AEC who shall engage a qualified person to compute simple interest at the Idaho statutory rate of 12% per annum running from the invoice dates of each AEC billing in the manner previously utilized by counsel for Mountain Utilities on its unpaid progress payment and change order invoices.

Because the Court is finding in favor of AEC based on Wood's breach of the contract, judgment in favor of Travelers will also be entered on Wood's third-party claim against the AEC Bond. Wood will take nothing on any of its cross-claims or third-party claims.

II. FINDINGS OF FACT

The Court finds the following facts by a preponderance of the evidence:[3]

A. Jurisdiction & Venue

1. Mountain Utilities and AEC separately alleged claims for relief under the Miller Act, giving this Court subject matter jurisdiction under 28 U.S.C. §

[3] To the extent findings of fact are more appropriately categorized as conclusions of law, or vice versa, each is to be treated as if set forth under the category deemed appropriate. *Tri-Tron Int'l v. A.A. Velto*, 525 F.2d 432, 435–36 (9th Cir. 1975).

1331. The Court has jurisdiction over Wood's cross-claims against AEC and Wood's third-party claims against Travelers under 28 U.S.C. § 1332(a)(1) because the matter is between citizens of different States and exceeds the value of $75,000 exclusive of interest and costs. The Court also has jurisdiction over Wood's cross-claims against AEC and third-party claims against Travelers under 28 U.S.C. § 1367(a) on the basis of supplemental jurisdiction because Wood's third-party claims and cross-claims are so related to Mountain Utilities' and AEC's claims that are within the subject matter jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution.

2. This Court has jurisdiction over AEC's cross-claims against Wood and the Wood Sureties pursuant to 28 U.S.C. § 1331 as the claims are for relief under the Miller Act. AEC's cross-claims against Wood for breach of the Subcontract and unjust enrichment are subject to this Court's supplemental jurisdiction under 28 U.S.C. § 1367(a) because the Miller Act claim and the state-law claims arise from the same Project and form part of the same case or controversy.

3. All or a substantial part of the events giving rise to the claims in this action occurred in Kellogg, Shoshone County, in which the Project is situated in the District of Idaho, and the Subcontract and the Sub-Subcontract were substantially performed there. Accordingly, venue is proper in this Court under 28 U.S.C. § 1391(b)(2) and 40 U.S.C. § 3133(b)(3)(B).

B. The Project

4. This action arises out of a project known as the Bunker Hill Central Treatment Plant Upgrade Project. The water treatment plant occupies several acres along Interstate 90 as it passes through Kellogg.

5. Wood contracted with the Corps to serve as the architect and engineers for the Project through Contract W912DW-16-C-0012, entered on or about December 22, 2016.

6. This was a "design/build" project by which the Government was trying to streamline the production process and get the job completed faster. It requires the Prime Contractor to complete the engineering design first, get approval from the Corps, and then construction can begin.

7. The Bunker Hill Project construction plan was broken up into numerous pieces, called Phases. There were several numbered Design Packages ("DP") for all phases through completion.

8. On March 12, 2018, Wood issued a Request for Proposal ("RFP") seeking bids relating to civil, piping, and demolition work related to Design Packages for Phases 4-A and 4-B of the Project.[4] **Jt. Exh. 1, p. 1555; RP 1555–66**.

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[4] AEC was to perform the Phase 4-A work but was terminated by Wood before its work could be completed. AEC performed virtually no work on Phase 4-B because of its early termination by Wood.

9. Wood provided designs for the bidders, but those designs were woefully incomplete and led to substantial underbidding for the work actually required to complete the Project.

10. Design Package Phase 4-A largely required demolition of portions of the existing Central Water Treatment Plant ("CTP"), and some constructing or extending of sludge piping, effluent piping, stormwater piping, and fire protection piping, all within the CTP fence line. But because there could be no interruption in treating contaminated water during construction, it also required building a Temporary Treatment System Plant that would take over the task while the old plant was taken off line and the capacity of the existing CTP was enlarged. Phase 4-A thus also required demolition, site compaction, and grading for new buildings such as a Filtration Plant and holding ponds that AEC and other contractors would construct.

11. Design Package Phase 4-B addressed how the water was to be gathered from both the flooded old mine shafts and the tailing piles. Phase 4-B started on the slope of the Central Impoundment Area ("CIA") and consisted of roadwork, installing some underground utility vaults, groundwater collection piping, sludge and effluent piping, tying in 12 extraction wells, and bringing the pipe back to the CTP.

12. Phase 4-B was divided into subparts I and II. Phase 4-B-I piping ran from the toe of the slope of the CIA to the outfall. Phase 4-B-II required constructing the run of pipe from the outfall to the last extraction well.

13. The Statement of Work included in the RFP for the Phase 4-A and 4-B work stated that the Subcontractor would be responsible for furnishing all required materials, equipment, and labor, except for the high-density polyethylene piping (a very large diameter and expensive pipe that is capable of carrying water under pressure), and associated valves and fittings which were to be supplied by Wood.

C. Bidding on the Subcontract

14. The Court finds that the evidence introduced at trial showed that Wood rushed the Phase 4-A and 4-B work to bid before engineering construction drawings and Project timetables were sufficiently complete to permit reliable estimating. This resulted in continuing revisions to correct errors in Project plans or architectural/engineering decisions that changed both the scope of work required and the costs to complete what became a moving target for contractors and subcontractors.

15. Some of the ongoing changes may well have been the result of changes ordered by the Corps as owner of the Project, but there is a dearth of evidence to permit any conclusion as to what role the Government may have played

in the deficiencies that underlie this construction dispute. Whatever the causes, there is no dispute in the evidence that the ongoing changes to the scope of work also resulted in significant underbidding of the Prime, Sub-, and Sub-Subcontracts at issue.

16. The problems began when, in response to its RFP, Wood received only two bids: one from its own sister company, Swaggart Brothers (also referred to as "Wood Heavy Civil"), and one from AEC.

17. AEC's bid was submitted on April 17, 2018, for $4,090,078, and included a completion schedule of its anticipated scope of work. AEC's schedule, which was never objected to and was the basis of its bid, showed AEC completing all of its work except a small portion of demolition by December 24, 2018.

18. AEC's initial bid was 36.5% lower than the bid from Wood's sister company, Swaggart, which bid the 4-A and 4-B work at $6,441,518. A bid spread of that magnitude when only two bidders are involved is a very large discrepancy.

19. There is no evidence AEC asked questions of Wood regarding the bid form or any other clarifications to the Statement of Work.

20. AEC representatives went on a site walk in May 2018 and met with Wood on at least two occasions about the scope of work and AEC's pricing.

21. AEC provided its bid quantities, indicating a detailed review and prepared a detailed estimate.

22. AEC submitted **Exhibit 7440** showing quantities and prices that Swaggart had estimated for its bid, but at trial no one at AEC or any of AEC's experts testified about this breakdown and how it compared to AEC's estimated quantities in **Exhibit 7024.**

23. AEC did not discover the large spread between the two bids until Wood produced its internal bid offer abstract three months after the close of discovery in this action. The document was buried in the late production (no. 9) of nearly 80,000 additional discovery documents.[5]

24. Instead of disclosing the fact of the large and material bid spread between AEC's bid and Swaggart's bid, Wood negotiated with AEC to get AEC to further lower its bid from $4,090,078 down to $3,700,000.

25. Wood's insistence on AEC lowering its bid was probably influenced by Wood's own internal control estimates compiled in 2015/2016 indicating that it would cost $2,300,000 to complete the Phase 4-A and 4-B work.

[5] Before trial the Court sanctioned Wood for this blatant discovery violation. **Dkt. 185, p. 26**. From the documents admitted at trial, and discussed heavily in the testimony of Travelers' expert witness Mr. McConnell, some of the most damning evidence undercutting Wood's defenses were contained in the late production numbered 9. **Court's Exh. 5, pp. 32–40**.

26. The evidence shows that Wood's pricing estimates were well below what the Project actually cost to build. Unfortunately for Wood, those below market estimates were rolled into Wood's own $48.5 million bid which also later proved to be well below its actual cost.

27. To underscore this finding, a later internal financial audit captioned "Wood Project Questionnaire," **Exh. 7164**, as of October 31, 2018 (and not disclosed until the late production of documents by Wood), revealed that "[t]he Central Treatment Plant was significantly underbid and has had the biggest impact on the difference between the bid and the current estimate." At that time auditors calculated that the current profit margin was a negative 39.8%. ***Id.*, p. 3**. The CTP alone cost $30 million when Wood had estimated it could be built for $16 - $17 million.

28. At the time Wood's RFP was issued in May 2018, Wood was already several million dollars under water as the design-builder for the Project.[6] Former Wood Project Manager & Vice-President Eric Reitter reluctantly admitted that this was a "financially difficult project" for Wood and his company was

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[6] **Exhibit 7365** is an internal audit report dated August 2019, prepared by a corporate team from Wood's parent owner in Scotland. A year later, after AEC was hired by Wood, it was reported that Wood had underbid the Project by $20 million based upon internal deficiencies in reliance on preliminary design documents, commercial planning, and Project execution. The 2019 report reforecast the $48 million Project would to ultimately cost $68.5 million to complete.

"significantly under water" on the job so that money was very tight. Mr. Reitter left the Project on July 12, 2019, and no longer works for Wood. The Court observed that Mr. Reitter did not perform well on cross-examination, was sweating, and was evasive and professed a distinct lack of memory on cross, though he had appeared to be more candid and well-rehearsed on direct examination.

29. The Court draws the inference from the financial peril in which Wood found itself during contract negotiations with subcontractors and its subsequent performance in contract administration, that Wood had a powerful motive to lean on its sub-contractors in an effort to staunch the enormous losses it was experiencing in completing the Project. This was confirmed in the testimony of Travelers' expert William McConnell, who has more than 25 years of experience in construction scheduling, cost review, termination reviews, standards of care owed by engineers and contractors, and design review. In his experience, when contractors like Wood are suffering serious financial issues, they take it out on their subcontractors. They will fight change orders harder and pay invoices more slowly. They will fight each and every one.

30. Mr. McConnell's opinion was corroborated in a series of text messages on August 2, 2019, in which Sub-Contracts Administrator Judith Pierce-Wales candidly admitted to other Wood personnel, "we don't pay our subs," and "our invoices take forever to process." **Ct's Exh. 5, p. 39**.

31. AEC ultimately lowered its $4,090,078 bid down to $3,700,000 at the request of Wood, in part because Wood's former Senior Contracts Administrator Piero Ippoliti falsely told AEC that it bid $170,000 more than another bidder from Montana.

32. President Steve Anderson, the founder and owner of AEC, had a sixteen-year history with Wood's predecessor, AMEC Foster Wheeler, and had successfully completed $10 million in previous Pacific Northwest projects for them. Mr. Anderson testified for several hours twice during the trial and was extensively cross-examined. The Court finds him to be a credible witness with regard to the events recounted herein. During negotiations, Mr. Anderson was understandably relying upon a history of existing goodwill between the two companies who had worked so well together in the past. Because of AEC's long history with AMEC, Mr. Anderson accepted Mr. Ippoliti's representation even though this was an unusual request.

33. During Subcontract negotiations, because the plans that AEC bid upon were not final and complete, which are denoted as Issued for Construction ("IFC"), Wood and AEC agreed that AEC would be allowed to re-bid the drawings upon receipt of the IFC drawings. Wood represented to AEC that IFC plans would soon be provided for both Phase 4-A and Phase 4-B scope of work.

34. Only after Wood said it was "eager to have the agreement fully executed" and would provide IFC drawings immediately "upon receipt," did Mr. Anderson sign and return the Subcontract. **Exh. 7036**.

35. On or about June 20, 2018, Mountain Utilities and AEC entered into the Sub-Subcontract, by the terms of which Mountain Utilities agreed to perform certain piping installation and pipe fusion services for the Project.

D. Terms of the Subcontract

36. Wood and AEC entered into the Subcontract, Agreement No. F014300043, dated May 11, 2018, in the amount of $3,700,000.

37. The promised IFC drawings were not provided to AEC upon Wood's receipt of the Subcontract.

38. The Subcontract expressly allowed AEC to re-bid the drawings upon receipt of the IFC drawings, as memorialized in Article 4, which states:

> This is a firm-fixed-price type Agreement in the amount of Three Million Seven Hundred Thousand U.S. dollars ($3,700,000.00) (the "Agreement Amount"), which sum is broken down in accordance with the Price/Fee Schedule attached to and made a part of this Agreement as Exhibit 4. Unless the Agreement Amount is changed in writing by mutual agreement of the parties, Wood is not obligated to compensate Subcontractor beyond the stated Agreement Amount.
>
> Per Anderson Environmental Contracting, LLC proposal dated May 10, 2018 excluding the scope specifically excluded by the contracts design engineer [Wood] Friday, May 11, 2018, which has yet to be shared with the Subcontractor [AEC], attached hereto and incorporated herein, *there remains Scope of Work to be finalized*

> *pending review*. Additional funding will be awarded upon approval of pending revisions to base scope and required design changes, both to be mutually agreed upon under Modification #001. **Exh. 7035, p. 3–4 (emphasis added); Exh. 7039, p. 5–6**.

39. Mr. Anderson explained at trial that the reference to "Modification #001" in the Subcontract was code for a "true-up" of additional costs planned between the Bid Documents and the IFC Documents.

40. The testimony at trial and contemporaneous contract documents clearly establishes the reasonable expectation that additional funding would be required once final IFC documents were in hand and the parties could negotiate necessary modifications to the scope of work AEC would continue to provide on the Project.

41. Wood personnel involved in the effort also expected the work to be changing as more design changes might necessitate.

42. Article 23 of the Subcontract was specifically modified by the parties, striking language that reserved Wood's unilateral authority over change orders and inserted the provision: "All Change Orders will be mutually agreed upon between both parties and a Change Order will be issued prior to any commencement of work." **Exhs. 7035, p. 11; 7039, p. 12**.

43. Article 23 further provides that: "To the extent that a Change Order causes an increase or decrease in the Agreement Amount or an extension or shortening of the Period of Performance, an equitable adjustment will be made as

provided subsequently on the basis of a request for equitable adjustment made by either party." **Exhs. 7035, p. 11; 7039, p. 12**. Article 23 concludes by providing that: "Subcontractor shall diligently proceed with any changes to the services by the Contractual Representative, irrespective of cost or schedule impact, while a request for equitable adjustment is reviewed." **Exhs. 7035, p. 12; 7039, p. 13**.

44. Article 31 of the Subcontract provides, "Notwithstanding any dispute, Subcontractor shall continue to perform its obligations, unless Wood terminates or otherwise suspends performance hereunder." But all of that is contingent upon the proviso in Article 23, insisted upon by AEC, of a fully executed Change Order signed by Wood authorizing the work to proceed. **Exhs. 7035, p. 15; 7039, p. 16**.

45. Article 25 of the Subcontract provides for written notice of any changes prior to the performance of the additional work.

46. Article 10 of the Subcontract provides that if AEC is delayed, AEC must notify Wood within five days of the beginning of the delay. The sole remedy for any and all impacts, delay, disruption, hindrance, interference, inefficiencies, damages or other adverse effects of the delay shall be a time extension to the period of performance. This provision is known as the "no-damages-for-delay" clause.

E. AEC's Evidence of Wood's Breach

1. Wood's Failure to Provide Plans

47. Once the contract was fully signed, AEC mobilized to commence work and arrived on site in mid-June 2018, still awaiting receipt of final IFC Project plans.

48. AEC began working on small scope tasks until final Project plans were complete. To every party's consternation, it took nearly fifteen months to get fully approved plans for Phase 4 of the Project.

49. AEC complained continually that it had never been provided with a project schedule which made it very difficult to plan its work ahead of time. Instead, laborers on site operated from a "Two Week Look Ahead" that was prepared by Wood's on-site Construction Manager Mark Dunn after he arrived on site in July 2018. But that too proved woefully inadequate when other problems recited below were encountered.

50. A project of this magnitude requires complex and voluminous packets of architectural and engineering plans. The principal parties at trial salted the record with copious technical specifications and architectural/engineering drawings that numbered hundreds of pages with very little explanation of the relevancy of the information contained within them.

51. It was anticipated that Wood, as the designer/engineer on the job, would issue plan sets called Design Packets in numbered phases. But Wood failed to provide sufficient project schedules, IFC plans, parts, and other necessary equipment and documents to plan construction work in a timely and efficient fashion.

52. When Wood's on-site Project Engineer Charles Hand sent an email to Steve Anderson on August 1, 2018, claiming he was providing complete and final drawings to AEC, that simply was not true.

53. No change order incorporating the full 4-A IFCs was ever issued or executed by AEC and Wood. Thus, the 4-A IFCs were not incorporated into AEC's Subcontract when they finally became available to Wood during the summer of 2018. In a June 13, 2019, email from Wood Senior Subcontracts Administrator Elizabeth Brown to Ms. Pierce-Wales, Ms. Brown acknowledged that she never issued fully approved Phase 4-A plans to AEC. **Ct's Exh. 5, p. 35**.

54. AEC performed some of the 4-A work by incorporating such work through limited change orders.

55. When Wood finally completed the IFC plans the parties referred to in Article 4 of the Subcontract, Wood was unable to successfully negotiate with AEC to obtain a mutually agreed upon global Change Order as described in Articles 4 or 23 of the Subcontract for either 4-A or 4-B phases.

56. The Phase 4-B IFC plans were not received until late October or November of 2018. Wood issued proposed Change Order Request 11 to AEC, as a no cost change order, along with the IFC plans for the Phase 4-B work scope only. A satisfactory price was never agreed upon between the parties for Change Order 11 and it was never executed. Wood rescinded it on January 21, 2019, and the 4-B IFC plans were never incorporated into AEC's Subcontract.

57. On February 1, 2019, AEC submitted pricing for the Phase 4-B-I Architect's Supplemental Instructions ("ASI") IFC drawings in the amount of $3,530,622.52. But Wood failed to allow AEC to complete its promised opportunity to re-bid for what was significantly changed work based on the final IFC plans because the parties could not come to terms on a price.

58. Wood instead issued a unilateral change order associated with ASI IFC plans for Phase 4-B on June 14, 2019.

59. AEC billed for its work performed on Design Package 4-A on the line items where it was included in AEC's bid.

60. Wood's field personnel agreed that work performed by AEC could be billed against Phase 4-B line items, but Wood's corporate personnel, including Mr. Reitter, rejected that billing allocation and it went unpaid.

61. Wood also failed to pay AEC for some of the 4-A work completed by AEC and its subcontractors, like Mountain Utilities.

2. Wood's Failure to Properly Manage the Project

62. AEC's expert on delay issues, Dr. Hendrik Prinsloo, credibly offered his opinion that there was very poor coordination of inventory and parts delivery and planning for the work of Wood's sub-contractors. Missing was the high level of supervision Wood was required to supply as the Prime Contractor on the Project.

63. When AEC's Michael Boffing arrived on the site in August 2018 to oversee safety/quality of AEC's work there, he was surprised to discover that Wood had no project schedule for the job. Wood seemed to be allowing the subcontractors to do whatever they wanted so long as the main access road was kept open. Mr. Boffing was surprised by this because it impeded the completion of necessary work that had to be done in correct order, so AEC or Mountain Utilities did not have to re-work anything.

64. Because of a lack of planning on the part of Wood, AEC was being directed to jump from one small work area to another within the site that was absorbing time and further delaying the Project.

65. Travelers' expert Mr. McConnell, who the Court deemed a credible and persuasive witness, opined that AEC was not responsible for any delays on the Project since Wood provided AEC with an untimely IFC set of plans for Phase 4-B nearly 15 months later than required by the Subcontract.

66. AEC's expert Dr. Prinsloo also observed that not having a proper overall construction schedule was a big problem. The schedules Wood used were not really suited for construction. They were at too high a level of generalization and that too created delays and coordination problems.

67. As late as November 2018, Wood corporate officials were still not approving the monthly schedule updates based on work in progress. But since Wood never provided any project schedules to AEC, AEC could not determine how actions it took might be impacting the overall Project's completion.

68. Delays were also caused by the fact that Wood had ten to fifteen subcontractors working on the site at various times. This led to enormous challenges in supervising and coordinating the work to be done, and in finding enough space for each trade's work area.

69. The evidence at trial established that Wood's management of that work as the Prime Contractor was seriously deficient. The testimony from several witnesses who contributed "boots on the ground" effort to the ongoing work corroborated the opinion of mismanagement and the Court finds that the problems encountered on the Project were created in large part by Wood.

70. Dr. Prinsloo cited delay factors that were not the fault of AEC: inadequacies in the conceptual design that adversely influenced bidding; insufficient materials and disorganized warehousing; poor planning by Wood and lack of a

project schedule; survey mistakes by Wood's surveyors in locating hidden utilities; weather; unforeseen site conditions; unusually large numbers of change orders reflecting additional scope of work; design-related delays; poor coordination of work to implement design changes (many of which were significant and impacted resource allocations); failure to complete necessary predecessor work; a major oversight by Wood in failing to include pre-loading activities to prepare the site for construction of heavy new buildings by reinforcing soil conditions to support them; and failure to timely construct placement pads and supporting walls, much of which needed to be done before AEC could start piping construction.

71. Mr. Dunn, Wood's Construction Manager who has years of experience in the construction industry, was not effectively managing the Project on site. Incredibly, he claimed that he was unfamiliar with the "Critical Path Method" ("CPM")[7] of scheduling complex construction projects which requires completion of essential work in order that subsequent work can then commence.

72. Other evidence shows that such a CPM schedule existed elsewhere within Wood, but the evidence is undisputed that a CPM schedule was never shared with AEC or Mountain Utilities, despite AEC's continuing requests for a copy.

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[7] According to AEC's delay expert, Dr. Prinsloo, the Critical Path Method of scheduling timelines for major projects must include any critical activity, which if delayed, will cause a delay in completion of the project.

73. Moreover, many of the delays were caused by Wood's failure to procure necessary parts and equipment. Wood was not supplying piping, valves, and fittings for the use of its pipefitters as required by the Subcontract with AEC.

74. As of August 7, 2018, AEC's Senior Project Manager Mr. Boffing had raised this issue of lack of supply with Wood on more than one occasion.

75. Cameron Burchett, a Mountain Utilities supervisor and the son of Mountain Utilities owner Lloyd Burchett, testified convincingly at length during the jury trial about the lack of necessary materials, materials that did not meet the Corps' specifications, and inadequate staging of required material.[8]

76. AEC's on-site Project Manager Mr. Boffing testified that he tried to explain to Wood's Senior Contracts Administrator Mr. Ippoliti that the sub-contractors could not work without the necessary parts.

77. Despite Wood's breach of these critical contractual obligations, AEC attempted to continue the work by providing the materials it was not contractually obligated to provide.

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[8] Mountain Utilities' owner, Lloyd Burchett, also presented as a candid, believable witness and corroborated much of what his son, Cameron, had said. Wood's Construction Manager Mr. Dunn contradicted much of what Cameron and Lloyd Burchett stated, but the Court does not find Mr. Dunn to be credible as his own testimony contradicted that of many credible witnesses and contemporaneously prepared documentary evidence, and the Court found him to be evasive on cross-examination and prone to exaggeration.

78. Wood also failed to provide plans that accommodated actual site conditions. Hidden utilities and mismarking of locations by surveyors also contributed to unanticipated delays not fairly attributable to AEC, which caused delay and additional costs to everyone.

79. **Exhibit 7433** is an email chain initiated on July 31, 2018, from Steve Anderson to Wood Vice-President and Project Manager Eric Reitter, complaining: "Everywhere we dig the material is unsuitable, full of trash, wood, concrete, old railroad ties, and other misc. debris." When Mr. Reitter queried Mr. Dunn as to whether that was true, Mr. Dunn replied on August 1, 2018, it was accurate.

80. Mr. Boffing told Mr. Ippoliti that Mountain Utilities was facing changing site conditions and Wood needed to engineer a fix. But even if Wood had come up with a design solution, there were insufficient parts on hand to implement the fix.

81. When Wood tried to get the Corps to pay for such unforeseen construction costs by issuing its own change order requests, the Government denied Wood's claims, increasing its losses on the job. ***See, e.g.*, Exh. 7160**.

82. The Court also concludes that Wood's poor performance on this Project resulted in the loss of key employees since many of Wood's employees who testified at trial are no longer employed by that firm. Others who should have been

called were neither present nor deposed. The Court infers from this fact that there was plenty of blame laid internally within Wood that adversely impacted their careers and employee longevity with the firm. In listening to the testimony of these former employees and watching their demeanor on the witness stand, it was clear to the Court that substantial amounts of their testimony were embellished to minimize their own and their former employer's culpability for cost and project delays, further exacerbating the problems visited by Wood on the contractors working on the Project.

3. Wood's Failure to Process Change Orders

83. The additional costs for these impacts were submitted to Wood after the fact based upon the actions and directions of Wood personnel at the site. But Wood failed to pay AEC's and Mountain Utilities' change order requests, and instead believed the work should just be performed and the paperwork would catch up later.

84. These varied problems resulted in the presentation in less than six months of twenty Change Order invoices by Mountain Utilities alone for increased costs in labor, standby time, and equipment rental expenses that Mountain Utilities presented to AEC for payment. AEC submitted nearly triple that amount—57 in total.

85. Mr. Boffing testified that AEC's process in handling the Mountain Utilities Change Orders or Project billing invoices was to promptly hand them to Construction Manager Phil McQuiston at Wood's on-site field office.[9] What Mr. McQuiston did with those documents remains one of the unanswered questions in this case. But the Court is convinced by a preponderance of the evidence that Wood had possession of all of the Mountain Utilities and AEC billings within a reasonable time of the dates shown on each invoice or Change Order.

86. Both Mountain Utilities and AEC had to look to Wood for payment of Project invoices and change order requests. Contrary to contract requirements, Wood and AEC would not issue written change orders contemplated in the contracts and requested by Mountain Utilities before additional work was authorized, but Mountain Utilities and AEC were nonetheless ordered to do additional work anyway on threat of termination for abandonment.

87. The necessary paperwork and procedure for change orders, though it may have been contemplated in the contract, was simply less important to Wood as Project delay and increased costs.

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[9] The Court fully credits Mr. Boffing's testimony on this point notwithstanding the lack of any contemporaneous written confirmation of such deliveries.

88. AEC's Mr. Boffing testified that when unexpected impediments were encountered, Wood was not willing to stop work so the contract review and approval process could play out.

89. As of February 11, 2019, AEC had submitted 57 Change Orders and Mr. McQuiston had approved many of them. But AEC had not yet received a "billable change order" form authorizing payment and no funds were forthcoming from Wood.

90. When the payments stopped, Wood insisted on elevating paperwork requirements over getting the actual work done or paying its debts to contractors.

91. David Walker, AEC's initial Project Manager, was trying to document everything to put Wood on notice of problems contractors faced. Then Mr. Ippoliti ordered AEC to remove Mr. Walker from the Project because Mr. Ippoliti was irritated by Mr. Walker's insistence on creating this documentation and his continuing written confirmation of the problems being encountered that were not the contractors' fault.

92. Despite his admission that he was brought in by Wood to get the Project back on track, Mr. Dunn unconvincingly denied that he ever reviewed or approved any AEC invoices. Impeaching this statement is **Exhibit 7131**, an internal email chain in early October 2018 among Wood office administrators transmitting

AEC invoices to Mr. Dunn for review. Conspicuous by its absence is any response from Mr. Dunn to internal queries from Wood staff as to what was holding up his approval of the invoices so they could be paid.

93. Around September 24, 2018, Lloyd Burchett walked AEC's Mr. Boffing through each Mountain Utilities invoice that had not been paid. Mr. Boffing, in an attempt to get money from Wood, met frequently with Wood's Project Manager on site, Mr. McQuiston, to discuss the lack of payment, assuring Mr. McQuiston that the work was being done and Wood needed to pay for it. The two men discussed the payment issues weekly. Those discussions left Mr. Boffing with the impression that paying contractors was not a high priority for Mr. McQuiston, who was more focused on finding missing material and falling further behind schedule.

94. The Court finds that when Wood realized it was seriously "under water" on the Project, it stopped signing change orders and stopped paying both Mountain Utilities and AEC for months. This action further delayed work and required the principals to engage in several meetings and a lengthy letter writing campaign to try to get money out of Wood and authorization to proceed with change order work.

95. On January 15, 2019, a meeting among the principals was convened at the Silver Mountain Lodge in Kellogg to discuss the need for payment

of contractors and subcontractors. Attending that meeting for Wood were former Vice-President & Project Manager Phil McQuiston (now deceased), Vice-President Eric Reitter, Engineer Charles Hand, Construction Manager Mark Dunn, and Subcontracts Administrator Judith Pierce-Wales; and present for AEC were Steve Anderson, Michael Boffing, and Justin Krueger. Although the unpaid invoices and change orders of AEC and Mountain Utilities were discussed, no witness established when Mountain Utilities' invoices were actually transmitted to Wood for payment. AEC was apparently not including Mountain Utilities' invoices in its own prior billings since AEC Change Order 37, dated March 7, 2019, shows this was the first time AEC had formally submitted Mountain Utilities' Change Order 1, dated July 17, 2018, to Wood for payment. **Exh. 7395, pp. 90–91**.

96. When Wood representatives insisted at the January 15, 2019, Kellogg meeting that they did not have Mountain Utilities' invoices before that date, Mr. Boffing testified that was untrue. There were electronic records in the Project Dropbox that confirmed Wood's previous receipt of those documents. The Court credits Mr. Boffing's testimony on that point.

97. Wood Sub-contracts Administrator Ms. Pierce-Wales' insistence that she was unaware of the existence of these change orders and that no one at Wood had ever looked at them before January 2019 is disingenuous in light of Mr. Boffing's testimony that he gave them regularly to Mr. McQuiston close to the time

after the work was done as reflected in the Mountain Utilities' invoices and Change Orders.

98. Ms. Pierce-Wales had the temerity to claim that Wood was not responsible to pay them because Wood had not received timely notice as required in the contract with AEC. Raising technical defenses like "waiver" angered the AEC personnel in attendance at the January 15, 2019, meeting. And AEC had never been told prior to this meeting that Wood refused to pay Mountain Utilities' invoices because the pipefitters had failed to obtain written approval prior to performing the changed work that they were directed to do. AEC attendees thought the excuse was "ridiculous."

99. The evidence also shows that Wood engaged AEC in a "back and forth game" over unpaid invoices throughout the first half of 2019. At the January 15, 2019, meeting in Kellogg, Wood began insisting on different methods of presentation of invoices, adjustments, etc., promising that this would get some money flowing to AEC. But in reality, Wood was simply dragging its feet and exhibiting a "show of force" control over the much smaller company. Wood also asked AEC to resubmit its Change Orders on multiple occasions, and AEC made some Project management concessions in an effort to appease Wood and get paid. But nothing seemed to work.

100. Mr. Anderson and Mr. Boffing flew to Atlanta, Georgia, in July 2019 to meet with Wood's President James Worcester, Chief Executive Officer Ann Massey, and Vice-President & Bunker Hill Project Manager Eric Reitter. Another high-level meeting of the principals was held in Seattle, Washington. Mr. Worcester urged AEC to nonetheless return to work and "we'll pay you." Mr. Worcester promised to follow up on the unpaid claims and issue the necessary change order requests to get AEC its money. But Wood never paid as promised. Mr. Anderson concluded that Wood was just trying to strangle AEC. AEC was no longer willing to work for free. And despite months of back-and-forth communications over further revisions to Project drawings and changes in scope of work, the parties were unable to come to terms over AEC employment on Phase 4-B of the Project.

101. AEC demobilized from the Project on June 24, 2019, and removed its trailers, equipment, and personnel. There was still remaining work to be done on Phase 4-A, including roof drains, detention basins, storm drain piping, configuration of the lined pond tie-in, removal of existing pipe, fencing, and site grading.

102. Wood issued a formal Notice of Termination of AEC on July 10, 2019. **Jt. Exh. 122**. Thereafter, the parties engaged in a lengthy letter-writing campaign pointing fingers at one another and staking out legal positions. But the die was cast, and they ultimately ended up before this Court.

103. The only reason that Mountain Utilities was not paid by AEC was because Wood stopped paying AEC too. When Wood stopped making payments to AEC, everyone downstream suffered.

104. In the end, Wood did not pay for much of the work that was provided in the AEC Subcontract, nor that Mountain Utilities performed under its Sub-Subcontract.

105. It is undisputed that neither AEC nor Mountain Utilities performed any of the DP Phase 4-B work.

F. AEC's Damages Caused by Wood's Breach

106. At trial, the Court heard testimony from AEC's damages expert, Gary Moorhead, a certified public accountant who frequently serves in the role of forensic accountant on construction cases. Mr. Moorhead is a 30-year employee of the Sutor Group and specializes in analyzing and evaluating project costs and project claims for construction projects. The Court found him to be a credible witness who presents as earnest and believable. His testimony was clear, direct, logical, and easy to understand. He answered questions with equal candor to whoever was examining him.

107. Mr. Moorhead interviewed several employees at AEC and other expert witnesses, and inspected several source documents to calculate AEC's damages. The Court also finds that Mr. Moorhead relied on reliable and accurate

information in making his cost calculations, and the numbers given to Mr. Moorhead representing AEC's job costs were reasonable. He illustrated his testimony with helpful exhibits explaining his calculations. **Exhs. 7400–06**.

108. To calculate AEC's damages for breach of contract, the Court must determine AEC's expectation damages. This would include the sum of the contract balance, AEC's field office costs, and any unpaid change order amounts to which AEC is entitled to compensation. The Court finds that Mr. Moorhead followed Generally Accepted Accounting Principles in computing these amounts.

109. Here, the contract balance amount that is due AEC is equal to the amount of the earned value of the contract less payments made by Wood. The earned value of the work done by AEC under the contract, which is the 4-A contract value—i.e., the portion of the overall Subcontract amount that was allocated only to 4-A work—plus any approved change orders for the 4-A work. AEC calculated the earned value to be $1,619,734. **Exh. 7402; RP 1499–1500**. Based on the evidence presented at trial, the Court finds this amount to be reasonable and accurate. AEC also calculated the value of its approved change orders to be $757,571. **Exhs. 7401, 7403; RP 1500.** The Court also finds this amount to be reasonable and accurate. Thus, the Court finds that the earned value of the contract was $2,377,305. **Exh. 7401; RP 1496–1501**. Subtracting this number by the undisputed amount Wood

paid AEC on the Subcontract, which is $1,851,995, **Exh. 7404**, the Court finds that the contract balance due AEC equals $525,311. **RP 1496–97**.

110. Field overhead costs are costs incurred at the job site incident to performing the work such as the cost of supervision, clerical work, engineering, utility costs, supplies, material handling, cleanup, etc. AEC calculated its field office overhead costs to be $238,827. **Exh. 7405; RP 1503–04**. Having reviewed the evidence admitted at trial including Mr. Moorhead's presentation and supporting testimony, the Court also finds this amount to be reasonable and accurate.

111. Finally, AEC asserts that it is entitled to $394,049 for change order requests, not including the $205,127 it had previously sought on behalf of Mountain Utilities. **Exh. 7406; RP 1507**. As discussed above, the Court finds that AEC is entitled to compensation for its change order requests. And having reviewed the evidence admitted at trial, the Court also finds this amount to be reasonable and accurate. Since the Court has already issued a final Judgment in favor of Mountain Utilities against Wood and the Wood Sureties, any recovery by AEC should not include the sums awarded for unpaid change orders of Mountain Utilities assuming Mountain Utilities will have been paid by the time AEC satisfies its own Judgment.

112. The Court therefore finds that AEC suffered $1,158,187.00 in monetary damages ($525,311 + $238,827 + $394,049). **Exh. 7400; RP 1507**.

113. Wood argues that AEC is not entitled to compensation for many of its Change Order requests because AEC presented Wood with Change Order requests long after the alleged extra work had been performed; AEC had not followed the Subcontract provisions to timely notify Wood of changes; AEC invoiced Wood for more work than actually performed; and Wood was not obligated to pay for these change orders because they were within the scope of AEC's work under the Subcontract. The Court disagrees. The Court finds that AEC's change order requests in carrying out this additional work were reasonable and benefitted the overall Project, Wood's representatives on site had knowledge of the work performed and approved it. To the extent that approval was not formally documented, the Court finds that by its conduct in the administration of the contract, and because it is in default of its timely payment obligations, Wood is deemed to have waived all contractual or legal defenses to AEC's recovery.

114. The Court finds that the record amply supports by a preponderance of the evidence that Wood breached the implied covenant of good faith and fair dealing with AEC that inheres in every contract and is in breach of the Subcontract as a result.

III. CONCLUSIONS OF LAW

A. AEC's Claims for Recovery in *Quantum Meruit*

115. AEC has asserted a *quantum meruit* claim. AEC's right to a *quantum meruit* claim is entirely dependent on whether AEC is entitled to rescind the Subcontract. AEC is not entitled to do so.

116. "Rescission is an equitable remedy that totally abrogates the contract and seeks to restore the parties to their original positions." *Primary Health Network, Inc. v. State, Dept. of Admin.*, 52 P.3d 307, 312 (Idaho 2002).

117. "[Recission] is normally granted only in those circumstances in which one of the parties has committed a breach so material that it destroys or vitiates the entire purpose for entering the contract." *Id.*

118. '"[A] mistake is an unintentional act or omission arising from ignorance, surprise, or misplaced confidence. The mistake must be material, that is, so substantial and fundamental as to defeat the object of the parties. A unilateral mistake usually does not offer grounds for relief, although it may in certain circumstances."' *Belk v. Martin*, 39 P.3d 592, 597 (Idaho 2001) (quoting *Leydet v. City of Mountain Home*, 812 P.2d 755, 758 (Idaho Ct. App. 1991)).

119. "A party to a contract who makes a mistake unilaterally cannot rescind or modify the agreement absent misrepresentation or knowledge of the mistake by the other party." *Cline v. Hoyle & Assocs. Ins., Inc.*, 697 P.2d 1176, 1178

(Idaho 1985) (simplified).

120. Unconscionability alone is not grounds for rescission. Idaho courts have not adopted the view of the Restatement (Second) of Contracts § 153(a), which allows a party to avoid a contract for unilateral mistake not only when there was a misrepresentation or knowledge of the mistake by the other party, but also when the court determines that the consequences of the mistake are such that enforcement of the contract would be unconscionable. *Dennett v. Kuenzli*, 936 P.2d 219, 226 (Idaho Ct. App. 1997).

121. The Court finds that AEC has not identified or articulated any unintentional act or omission made in the submission of its bid. AEC neither claimed nor put on any actual evidence of a bid error. *Compare* **Dkt. 134-1, pp. 5–7** (arguing for rescission based upon a unilateral mistake but not identifying any mistake) *with Sulzer Bingham Pumps, Inc. v. Lockheed Missiles & Space Co., Inc.*, 947 F.2d 1362, 1364 (9th Cir. 1991) (detailing the various specific mistakes and errors made by a bidder in crafting its bid).

122. AEC presupposes that because its total bid amount and certain line items in its bid were lower than one other bidder, it must have made a mistake, albeit one that it has yet to identify. That is insufficient under Idaho law.

123. "The mere disparity between bids does not automatically lead to the conclusion that the test for constructive notice has been satisfied." *Aydin Corp.*

v. United States, 669 F.2d 681, 683 (Ct. Cl. 1982).

124. Although Wood negotiated with AEC to get AEC to lower its bid from $4,090,078.93 down to $3,700,000.00, and part of that negotiation included false representations to AEC by Wood's former employee Mr. Ippoliti, these misrepresentations do not establish that AEC's bid was based on a mistake of fact.

125. Because AEC does not identify any specific mistake that it purportedly made in preparing its bid, AEC cannot rescind the contract and recover damages in *quantum meruit*.

B. AEC's Claims for Breach of Contract and Recovery Under the Miller Act

1. Contract Interpretation

126. "A contract must be construed to give effect to the intention of the parties." *U.S. Welding, Inc. v. Battelle Energy All., LLC*, 728 F. Supp. 2d 1110, 1124 (D. Idaho 2010) (citing *Wing v. Martin*, 688 P.2d 1172, 1178 (Idaho 1984)).

127. "In determining the parties' intent, the contract must be viewed as a whole and considered in its entirety." *Id.* (citing *Kessler v. Tortoise Dev., Inc.*, 937 P.2d 417, 419 (Idaho 1997)).

128. "When interpreting a contract, the Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Buku Properties, LLC v. Clark*, 291 P.3d 1027,

1031 (Idaho 2012) (simplified).

129. "When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law." *Bakker v. Thunder Spring-Wareham, LLC*, 108 P.3d 332, 337 (Idaho 2005).

130. The Court credits the testimony of Mr. Anderson, the owner of AEC, who explained the chronology of the negotiations that led to execution of the Wood-AEC contract. Mr. Anderson's explanation made sense from a businessman's perspective when attempting to negotiate with a much larger company. However, Wood called none of its principal witnesses who were involved in those negotiations, apparently choosing to rely solely on contemporaneous documents such as email exchanges introduced in a hurried fashion at trial with very little explanation. In the Court's view the documents do not speak for themselves.

131. The Subcontract memorialized both parties' understanding about the lack of plans Issued for Construction in Article 4, which explicitly provided the $3,700,000 Subcontract "exclude[ed] the scope specifically excluded by the contracts design engineer [Wood] Friday, May 11, 2018, which has yet to be shared with the Subcontractor [AEC], attached hereto and incorporated herein there remains Scope of Work to be finalized pending review." **Exh. 7035, p. 3–4; Exh. 7039, p. 5–6**. That is in reference to the missing Phase 4 IFC plans.

132. To reflect Mr. Anderson's concerns as a result of that fact,

Article 23 was modified by the parties by striking language that reserved Wood's unilateral authority over change orders and by inserting the provision: "All Change Orders will be mutually agreed upon between both parties and a Change Order will be issued prior to any commencement of work." **Exhs. 7035, p. 11; 7039, p. 12.**

133. The Court finds that Article 23 of the Subcontract provides that where any scope of work defined in the Subcontract was added or changed, Wood was not entitled to force AEC to perform changes without an agreed upon Change Order. In other words, without a mutually agreed upon Change Order, signed by Wood, AEC was not obligated to begin work.

134. Article 23 also provides, however, that AEC must "proceed with any changes . . . irrespective of cost or schedule impact, while a request for equitable adjustment is reviewed." **Exhs. 7035, p. 12; 7039, p. 13.**

135. The Court resolves this potential ambiguity between the two provisions of Article 23 above by interpreting the contract to state that although AEC was not required to proceed with additional work until an agreed upon change order was issued, Article 23 also provides that once a change order was issued, AEC was obligated to diligently proceed with any changes while a request for equitable adjustment is reviewed if the parties were unable to reach agreement on the cost of extra work.

136. To the extent that counsel for Wood now attempts to raise as legal arguments potentially conflicting language in the contract document, it comes without any credible witness who testified in contradiction to Mr. Anderson's understanding. And because Wood never raised these defenses until litigation commenced or was contemplated, the Court holds that the actual conduct of the contracting parties at the time of these events amounted to a waiver by Wood of any conflicting provisions in the contract. The Court reads the revised contract language consistently with Mr. Anderson's testimony.

2. Merits of Breach of Contract and Miller Act Claims

137. The elements for a claim for breach of contract are: "(a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Ridenour v. Bank of Am., N.A.*, 23 F. Supp. 3d 1201, 1207 (D. Idaho 2014) (quoting *Mosell Equities, LLC v. Berryhill & Co., Inc.*, 297 P.3d 232, 241 (Idaho 2013)).

138. A material breach by one party to a contract excuses the other party's performance subsequent to the breach. *See J.P. Stravens Plan. Assocs., Inc. v. City of Wallace*, 928 P.2d 46, 49 (Idaho Ct. App. 1996).

139. "'In every contract there is an implied covenant of good faith and fair dealing, which requires the parties to perform, in good faith, the obligations *required by their agreement*.'" *Silicon Int'l Ore, LLC v. Monsanto Co.*, 314 P.3d

593, 607 (Idaho 2013) (simplified).

140. "A violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract." *Drug Testing Compliance Grp., LLC v. DOT Compliance Serv.*, 383 P.3d 1263, 1273 (Idaho 2016).

141. "A violation of the implied covenant is a breach of contract." *Saint Alphonsus Diversified Care, Inc. v. MRI Assoc*s., *LLP*, 334 P.3d 780, 794 (Idaho 2014) (quoting *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 864 (Idaho 1991)).

142. A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due. *Steiner v. Ziegler Tamura Ltd., Co.*, 61 P.3d 595, 599 (Idaho 2002). A condition precedent may be expressed in the parties' agreement. *Id*.

143. Where a party is the cause of the failure of a condition precedent, he cannot take advantage of the failure. *Fish v. Fleishman*, 391 P.2d 344, 348 (Idaho 1964).

144. Where a party has control over the happening of a condition precedent, he must make a reasonable effort to cause the condition to happen. *Schlueter v. Nelson*, 263 P.2d 386, 387 (Idaho 1953).

145. The Findings of Fact demonstrate that Wood was in breach of

the Subcontract. Based on the facts recounted herein, the Court concludes that Wood did not administer the Project in good faith. Nor did it fairly deal with its contractors and sub-contractors. In short, Wood breached the implied covenant of good faith and fair dealing.

146. At the time Wood's RFP was issued in May 2018, Wood was several million dollars under water as the design-builder for the Project. This gave Wood a powerful motive to squeeze its contractors and sub-contractors in an effort to staunch the enormous losses it faced in completing the Project. This included not paying them in a timely fashion and holding onto invoices for months without disputing or providing any explanation to the unpaid contractors for the holdup in payments.

147. Although the jury's verdict resolved only the claims of Mountain Utilities for breach of its Sub-Subcontract, the fact that the jury absolved AEC and held Wood responsible for AEC's subcontractor's damages is notable when evaluating who is the legally culpable party in this action.

148. By its conduct, the Court holds that Wood waived, modified, rescinded, or abandoned any provisions of the Subcontract and approved the work that was done without signed change orders in advance of the work being performed by AEC and Mountain Utilities.

149. Wood also rushed the DP 4-A and 4-B work to bid without a workable schedule to plan construction work. This inevitably resulted in delays to AEC and additional work required of its subcontractors.

150. Wood failed to provide plans that accommodated actual site conditions.

151. Wood failed to procure necessary parts and equipment.

152. Wood failed to timely issue the IFC plans and allow AEC to intelligently re-bid and re-price the Subcontract, which was a condition precedent to AEC's performance of all work contemplated in Design Packages 4-A and 4-B as eventually called for in the IFC plans. Wood had control over, and caused the failure of, this condition precedent.

153. Wood never incorporated the IFC drawings into the Subcontract by failing to timely deliver them to AEC; thus, AEC reasonably and in good faith performed all available work within the scope of work it understood to have committed itself to perform and did not breach or abandon the Subcontract. Even if AEC's inability to complete the work could be viewed as a breach, its performance is excused due to Wood's failure to fulfill conditions precedent, Wood's prior material breaches, and bad faith behavior.

154. AEC performed with due diligence to the extent that it was able, and any material delays were not the fault of AEC. *See, Seubert Excavators, Inc. v.*

Eucon Corp., 871 P.2d 826, 831 (Idaho 1994) (finding even when both parties' actions contributed to delays, due diligence excuses a party from liability for its own role).

155. Wood's breaches hindered, delayed, and ultimately excused AEC's completion of its full performance under the Subcontract.

156. AEC was not obligated to perform work according to Change Orders that were not agreed upon because Wood's failure to reach an agreed upon Change Order breached a material term of the Subcontract.

157. Wood's termination of AEC was wrongful because Wood's actions hindered and delayed AEC's performance and AEC was not required to perform any IFC work without a mutually agreed upon change order.

158. AEC is entitled to payment for all extra work it did as identified in Change Order Requests that AEC submitted to Wood and all work performed by AEC and its Subcontractors; Wood waived any objections to extra work done by AEC or its Subcontractors without fully executed Change Orders by its words and/or untimely actions.

159. AEC is entitled to damages pursuant to the Subcontract under the Miller Act. The two basic elements of a Miller Act claim are: (1) the plaintiff "furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131"; and (2) they have "not been paid

in full within 90 days." *United States ex rel. Precision Air Conditioning of Brevard, Inc. v. Cincinnati Ins. Co.*, 533 F.Supp.3d 290, 294 (E.D. Va. 2021) (quoting *United States ex rel. Tenn. Valley Marble Holding Co. v. Grunley Constr.*, 433 F.Supp.2d 104, 114 (D.D.C. 2006) (quoting 40 U.S.C. § 3133(b)(1))). The damages recoverable under the Miller Act are based on "the law of the state of the performance of the contract." *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 599 (9th Cir. 1984).

160. As described in this Court's Findings of Fact, Wood did not pay AEC for a number of items specified in the Subcontract and for extra work directed by Wood.

161. Contract provisions limiting liability are generally enforceable under Idaho law. "[I]f parties to a contract have provided the measure of damages to be recovered for breach of the duties imposed by the contract, they are bound by such provision and liability thereunder is restricted to the terms of the contract." *Idaho State Univ. v. Mitchell*, 552 P.2d 776, 780 (Idaho 1976).

162. The Subcontract states AEC's "sole and exclusive remedy for any and all impact, delay, disruption, hindrance, interference, inefficiencies, damages, or other adverse effects of the delay upon the performance of the Services shall be a time extension to the Period of Performance." **Exhs. 7035, p. 6; 7039, p. 7.** For the reasons set forth below, the Court holds that Wood is not entitled to

invoke this "no-damages-for-delay" clause.

163. Because the Miller Act is highly remedial in nature, it is entitled to a liberal construction and application in order to properly effectuate the congressional intent to protect those whose labor and materials go into public projects. This also avoids the threat to the United States of clouding title with materialman or construction liens on federal projects. *United States ex rel Sherman v. Carter*, 353 U.S. 210, 217 (1957).

164. In light of the remedial nature of the Miller Act, courts have consistently held that the Miller Act trumps contract terms or conditions which purport to limit or waive a claimant's right to recover under the Act. The Ninth Circuit looks to the underlying contract only so far as necessary to determine the measure of "sums justly due." *United States ex rel. Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1207 (9th Cir. 2002). A subcontract can define or alter the measure of the payments due under the subcontract. *Id.* Where the subcontract terms affect the timing of recovery or the right of recovery under the Miller Act, however, enforcement of such terms contradict the express terms of the Miller Act and its remedial purpose. *Id*.

165. In this vein, a no-damages-for-delay-clause is trumped by the Miller Act unless the plaintiff is at fault for causing the delay. *See Mai Steel Serv., Inc. v. Blake Const. Co.*, 981 F.2d 414, 419 n.8 (9th Cir. 1992); *United States ex rel.*

Kitchens To Go v. John C. Grimberg Co., 283 F. Supp. 3d 476, 481–85 (E.D. Va. 2017); *United States ex rel. of McCullough Plumbing, Inc. v. Halbert Constr. Co., Inc.*, 2018 WL 6601844, at *4 (S.D. Cal. Dec. 17, 2018). This is because a no-damages-for-delay clause affects the subcontractor's very right to recovery, not simply the measure or manner of payment.

166. Recognizing there is a split of authority on this point, the Court applies the liberal construction principles of the Miller Act to make sure that subcontractors are paid for the value they add to federal projects. Wood therefore cannot assert the no-damages-for-delay clause as a defense to liability under the Miller Act.

3. Amount of Damages Awarded to AEC

167. To support an award, AEC must provide sufficient evidence that proves damages with reasonable certainty. *Inland Group of Cos. v. Providence Washington Ins. Co.*, 985 P.2d 674, 682 (Idaho 1999).

168. Reasonable certainty does not require "absolute assurance nor mathematical exactitude," and instead, "the evidence need only be sufficient to remove the existence of damages from the realm of speculation." *Griffith v. Clear Lakes Trout Co.*, 152 P.3d 604, 611 (Idaho 2007).

169. The Court finds the evidence AEC submitted at trial, as explained and summarized in the opinions of the experts who testified on its behalf

and on behalf of its surety Travelers, is sufficient to render a reasonable computation of AEC's damages. The Court rejects the contrary opinions of Wood's experts on all material points in contention.

170. The Court's Findings of Fact establish that AEC suffered $1,158,187.00 in damages with reasonable certainty.

171. AEC's total damages for breach of contract and under the Miller Act is $1,158,187.00 plus prejudgment interest. AEC shall engage a qualified person to compute simple interest at the Idaho statutory rate of 12% per annum running from the invoice dates of each AEC billing in the manner previously utilized by counsel for Mountain Utilities on its unpaid progress payment and change order invoices to be included in the final AEC judgment. Wood is also entitled to prejudgment interest for overhead and equipment standby costs from the date those were provided to Wood.

172. AEC is entitled to reasonable attorneys' fees and costs incurred in this litigation. The prevailing party in any dispute arising from a commercial transaction is entitled to recover costs, including attorneys' fees. I.C. § 12-120(3). Attorneys' fees are recoverable under the Miller Act if they are recoverable under state law. *United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1185–86 (9th Cir. 1989) (awarding Miller Act claimant attorneys' fees based on contract right and California statute); *United States ex rel. Weyerhaeuser Co. v. Bucon Const. Co.*, 430

F.2d 420, 425 (5th Cir. 1970).

C. Wood's Claim for Breach of Contract by AEC

173. The Court holds that Wood's claims for breach of contract against AEC and Travelers are barred by Wood's prior material breaches of any and all agreements upon which Wood bases its claims against AEC and Travelers, and such breach discharges AEC and Travelers in whole or in part. *See, J.P. Stravens Plan. Assocs., Inc.*, 928 P.2d at 49 ("If a breach of contract is material, the other party's performance is excused.").

174. The Court rejects Wood's claims to avoid liability under the Subcontract including Wood's defenses that AEC has not proved that Wood breached the Subcontract.

175. Wood's claims that safety and quality concerns from the summer of 2018 justified AEC's termination in July of 2019 are not credible, particularly because Wood elected to continue employing AEC under the Subcontract for eight months after those concerns were first raised. After AEC assigned Mr. Boffing to the Project in August 2018 as it's Project Manager, the evidence established that AEC promptly addressed the safety concerns to the satisfaction of Wood personnel on site as well.

176. Wood's claims that non-performance justified AEC's termination are not credible because Wood's failure to perform under the

Subcontract, not any actions by AEC, rendered AEC unable to perform.

177. Wood's claim that AEC abandoned the Project is not credible. The evidence was that AEC planned a winter shutdown as reflected in its project schedule submitted contemporaneously with signing the contract in May 2018. Even after disputes arose over unpaid work and inability to reach agreement on Phase 4-B activities, AEC returned to the site in the Spring of 2019 and completed available remaining 4-A work on the site until June of 2019.

D. Wood's Claim Against Travelers

178. "The secondary liability of a surety derives from the liability of its principal; thus, the discharge of the principal discharges the surety." *Twin Falls Livestock Comm'n Co. v. Mid-Century Ins. Co.*, 786 P.2d 567, 571 (Idaho Ct. App. 1989) (citing *Epperson v. Texas–Owyhee Mining & Dev. Co.*, 118 P.2d 745 (Idaho 1941)).

179. Because the Court finds that AEC is not liable under the Subcontract, the Court also holds that Traveler's cannot be held liable as its surety.

E. Wood's Claim Against AEC for Indemnification

180. The Subcontract contains multiple indemnification provisions in which Wood and AEC agreed that AEC would indemnify Wood for certain damages or expenses incurred by Wood.

181. "Under Idaho indemnification law, a party seeking

indemnification must show or prove three elements of indemnity: '(1) an indemnity relationship, (2) actual liability of an indemnitee to the third party, and (3) a reasonable settlement amount,' or the payment of damages." *Emp. Mut. Cas. Co. v. Plastic Welding and Fabrication, Ltd.*, 2020 WL 3510912, at *7 (D. Idaho Jun. 29, 2020) (quoting *Chenery v. Agri-Lines Corp.*, 766 P.2d 751, 754 (Idaho 1988)).

182. Mountain Utilities brought a lawsuit against AEC, Wood, and the Wood Sureties for non-payment of invoices for alleged changed work, as well as for claims for extended overhead and equipment stand-by time.

183. The jury returned its verdict in favor of Mountain Utilities against Wood and the Wood Sureties in the principal amount of $307,537.05.

184. Wood seeks indemnification from AEC and Travelers for breach of the AEC Bond in the amount of $307,537.05, plus any interest and attorneys' fees awarded by the Court.

185. Wood is not entitled to indemnification from AEC or Travelers, as Wood was responsible for the damages Mountain Utilities suffered. Based on the facts recounted herein, the Court concludes that Wood did not administer the Project in good faith. Wood did not provide necessary project documents or materials, nor did it fairly deal with its contractors and sub-contractors, including AEC and Mountain Utilities. These actions by Wood were the actual cause of Mountain Utilities' damages.

IV. CONCLUSION

The Clerk of the Court is instructed to enter Judgment in favor of AEC and Travelers and against Wood in the form attached to this decision.

IT IS SO ORDERED.

DATED: August 19, 2022

Richard C. Tallman
United States Circuit Judge