

**AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
AAA Case No. 31 110 Y 00195 10**

In the Matter of the Arbitration Between

KMD Construction, LLC
(Claimant)

-and-

ARBITRATION AWARD

Haywood County, North Carolina
(Respondent)

-and-

Pearce, Brinkley, Cease and Lee, P.A.
(Respondent)

-and-

Kloesel Engineering, P.A.
(Respondent)

We, the undersigned Arbitrators, having been designated in accordance with the Construction Industry Rules of the American Arbitration Association ("Association"), having been duly sworn, having duly heard the proofs and allegations of the parties, arguments of counsel, legal briefs filed by counsel, and having reviewed the evidence and applicable authorities, hereby render the following **AWARD**:

BACKGROUND

This dispute arises from the renovation of a historic courthouse in Waynesville, NC. On January 8, 2007, KMD Construction, LLC ("KMD") and Haywood County entered into a written contract in the amount of \$6,687,707.63 for the renovation of the Haywood County Courthouse in Waynesville, North Carolina ("Project"). The Project Architect was Pearce, Brinkley, Cease and Lee, P.A. ("PBC+L"), whose Project representatives were Chad Roberson and Myles Alexander. The Project Structural Engineer was Kloesel Engineering ("Kloesel") and its Project Representative was Woody Kloesel.

The Project generally consisted of renovations of the existing courthouse, construction of a new stair tower and restrooms which connected ("bridge connector") to the existing courthouse at the right rear, construction of a new walkway between the existing justice center and the new stair tower ("walkway connector"), and construction of a three-tier segmental retaining wall landscaping system on the slope between the new stair tower, the justice center, and the existing parking deck. The Notice to Proceed was issued on February 21, 2007. The duration of the Project was 450 days which resulted in an original anticipated completion date of May 18, 2008. Several executed change orders extended the project completion date until June 18, 2008.

On May 5, 2008, the Owner terminated KMD's contract. Thereafter, pursuant to a takeover agreement, KMD's surety, Fidelity & Deposit Company of Maryland ("Surety"), undertook performance of the project and utilized KMD to complete the project. KMD's Surety has assigned all of its claims against the Respondents in this matter to KMD.

The Panel will first take up KMD's claim of wrongful termination. The Panel will then determine the remaining contract balance including KMD's outstanding change order requests and Haywood County backcharge counterclaims, plus interest, if any, and then take up KMD's claims for lost profits, KMD's additional claims including assigned Surety claims and related claims, and KMD's tort claims.

FINDINGS AND CONCLUSIONS

I. KMD's Claim for Wrongful Termination and for a Declaration that KMD was Wrongfully Terminated. KMD claims that its termination was without just cause and therefore that the termination of KMD's construction contract on May 5, 2008 was wrongful. The Panel finds that cause did not exist under General Conditions Article 14.2.1 and other relevant contract provisions for KMD's termination for cause, and further that Haywood County did not provide an opportunity for KMD to cure the alleged defaults. The Panel finds, therefore, that KMD's termination was wrongful and without

just cause. KMD is entitled to a declaratory award that the termination was wrongful and without just cause.

II. KMD's Claim for Unpaid Change Order Requests. The Panel finds that the Parties agree that the Surety assigned its claims under the Takeover Agreement to KMD, and that KMD has the right to assert the Surety's claims against Haywood County for Unpaid Change Order Requests as well as KMD's own claims for extra work. Haywood County disputes the amounts of many of the outstanding Change Order Requests. KMD's claims are partially GRANTED, as follows:

Scaffolding	\$27,390.00
PR7 Benches	(\$15,000.00)
PR16 Connector mods	\$25,870.00
PR18 Sidewalk cutting	\$1,566.00
PR19 4 th Flr Reinforcing	\$1,738.00
PR20A Decking	\$5,000.00
PR38 Lower Soffits	\$7,434.00
Curtain Wall Tower A	\$0.00
Rain Leaders (B&B and KMD profit)	\$25,255.00
Light fixtures	\$0.00
Paint color change	\$945.00
Steam pipe repairs	\$809.00
Stucco & drywall	\$0.00
CCD2 Framing and soffit	\$982.00
CCD4 Add conduit	\$2,232.00
CCD5 Millwork changes	\$9,901.00
CCD7 Roof curbs	\$377.00
CCD8 Add lighting	\$2,447.00
CCD9 Two hour wall rating at elevators	\$8,894.00
CCD10 Hardware	\$4,425.00
CCD11 Fiber optic extra	\$2,452.00

CO 10 Several PRs

\$34,774.00

Total for Outstanding KMD Change Order Requests: \$147,491.00

III. Haywood County's Backcharge Claims. The Panel Finds that Haywood County has carried its burden of proof as to two of its backcharge claims, and these two claims are GRANTED in the total amount of \$25,579.00, as further described below:

Haywood County's Backcharge Claim for Transfer Switch. The Panel finds that the County has carried its burden on this claim, and it is GRANTED in the amount of \$6,405.00.

Haywood County's Backcharge Claim for Mactec Charges. The Panel finds that the County has carried its burden on this claim, and it is partially GRANTED in the amount of \$19,174.00.

Haywood County's Backcharge Claim for Liquidated Damages. The Panel finds that although the Project was completed after the stated date of completion, KMD and the Surety adduced evidence which extended the date of completion and which excused late completion. The Panel finds that from the greater weight of all the evidence on this issue, the County's claim fails, and it is DENIED.

Haywood County's Backcharge Claim for Utility Costs due to Contractor Delay. The Panel finds that the County has failed to carry its burden of proof on this issue, and this claim is DENIED.

Haywood County's Backcharge Claim for Additional Architectural Fees. The Panel finds that these claimed additional fees are not due and owing by Haywood County to the Architect, PCB+L, and have not been paid, and this claim is DENIED.

Haywood County's Backcharge Claim for Noland Consulting Fees. The Panel finds that the County has failed to carry its burden of proof on this issue, and this claim is DENIED.

Haywood County's Backcharge Claim for Smoke Damage Remediation Costs. The Panel finds that the County's entitlement to these asserted costs was waived against KMD by the terms of the construction contract, without prejudice to the County's rights to pursue the Builders Risk carrier, and the County's backcharge claim

against KMD is therefore DENIED; provided, however, that the Panel orders KMD to endorse the Builders Risk insurance carrier's previously-issued smoke damage check in the amount of \$7,709.25 and deliver the same to the County within 15 days of the date of this AWARD, and further orders KMD to reasonably cooperate with the County in the event of a future claim by the County against the Builders Risk carrier for smoke damage remediation costs incurred that exceed \$7,709.25.

IV. Contract Balance and Interest Due. The Parties have stipulated that the Base Contract Price plus executed Change Orders equals: \$7,032,411.69

To this amount, the Panel adds and subtracts as follows:

KMD Change Order Requests Granted:	\$ 147,491.00
County Backcharge Claims Granted:	(\$ 25,579.00)

Revised Contract Balance	\$7,154,323.69
Payments by County to or for benefit of KMD/Surety	(\$6,672,100.55)
Net Principal Contract Balance Due KMD	\$ 482,223.14

The Panel further awards interest on the Net Principal Contract Balance due KMD pursuant to NCGS § 143-134.1, at the rate of 1% per month for twenty-three months, in the total sum of \$110,911.32.

Net Contract Balance including Interest Due KMD \$ 593,134.46

V. KMD's Claim for Lost Profits. The Panel finds that KMD has carried its burden on this issue, and the Panel finds that KMD's claim for lost profits is partially GRANTED in the amount of \$71,090.00. KMD is not entitled to interest on this amount.

VI. KMD's Additional Claims (including assigned Surety Claims). KMD asserts five additional claims against Haywood County, one of which is partially GRANTED in the amount of \$17,750.00, as follows:

KMD's Assertion of the Surety's Claim for Takeover Subcontractor Costs. The Panel finds that the Parties agree that the Surety assigned its claims under the Takeover Agreement to KMD, and that KMD has the right to assert the Surety's claims against Haywood County for additional costs due to hiring takeover subcontractors. The Panel finds that KMD has carried its burden of proof in this issue, and its claim is partially GRANTED in the amount of \$17,750.00.

KMD's Claim for Extended Time of Performance. The Panel finds that KMD has failed to carry its burden of proof to establish compensable delays, and this claim against the County is DENIED.

KMD's Claim for Owner-Required Additional Construction Management Services. The Panel finds that KMD failed to carry its burden of proof on this issue, and this claim against the County is DENIED.

KMD's Claim for Additional Scheduler Fees. The Panel finds that KMD has failed to carry its burden of proof on this issue, and this claim against the County is DENIED.

KMD's Claim for Interest Payments on Post-Termination Loan. The Panel finds that KMD has failed to carry its burden of proof on this issue, and this claim against the County is DENIED.

VII. KMD's Professional Negligence Claim against Kloesel Engineering, P.A. KMD asserts that Kloesel was professionally negligent in its performance of engineering services in connection with the Project, damaging KMD. The Panel finds that KMD failed to carry its burden of proving (i) that Kloesel's professional services were performed in a negligent fashion, and (ii) that KMD was damaged by the manner in which Kloesel rendered its professional services. KMD's claim against Kloesel is DENIED.

VIII. KMD's Tort Claims against Pearce, Brinkley, Cease + Lee, P.A. KMD asserts two claims against PCB+L, each sounding in tort.

KMD first asserts that PCB+L intentionally interfered with KMD's construction contract with Haywood County. The Panel finds that KMD has failed to carry its burden of proof on this tort claim, and it is DENIED.

KMD also asserts that PCB+L was professionally negligent in its performance of architectural services in connection with the Project, damaging KMD. The Panel finds that KMD has failed to carry its burden of proof on the KMD allegations that PCB+L was professionally negligent in its investigation and initial design, but that KMD carried its burden of proof on its allegations that PCB+L fell short of the standard of care of an architect under similar circumstances in the community and was professionally negligent in responding to unforeseen project conditions requiring redesign and in PCB+L administration of the KMD construction contract for the Project, financially damaging KMD. This claim of KMD against PCB+L is GRANTED in the amount of \$200,000.00.

IX. KMD's Affidavit of Costs and Motion for Expert Travel Expenses. The Panel finds that KMD has carried its burden on the issue of its allowable costs, and KMD's application is partially GRANTED in the amounts of \$13,808.00 for court reporter costs and fees and \$14,232.00 for bulk reproduction costs, for a total of \$28,040.00. The Panel finds that this amount should be charged equally to Haywood County and PCB+L, and therefore \$14,020.00 is awarded to KMD against Haywood County and \$14,020.00 is awarded to KMD against PCB+L.

During the evidentiary hearing, KMD filed a Motion for Payment of Expert Witness Travel Expenses against PCB+L. The Panel heard argument from counsel on this motion, but deferred ruling until the conclusion of the evidentiary hearing, to be incorporated into the Award. The Panel finds in favor of KMD on its motion and KMD's motion is GRANTED and the sum of \$3,342.62 is awarded to KMD against PCB+L.

X. Allocation of Association Filing Fees and Panel Fees, Costs, and Expenses. The administrative fees of the Association, totaling \$12,775.00 shall be borne as incurred.

The fees and expenses of the arbitrators, totaling \$136,500.66, shall be borne as follows: \$0.0 by KMD, \$51,187.79 by Haywood County, \$51,187.78 by PCB+L and \$34,125.09 by Kloesel. Fees and expenses advanced by KMD shall be reimbursed to KMD, and are charged to, and shall be shared equally (50/50) by, Haywood County and PCB+L. Therefore, Haywood County shall reimburse KMD the additional sum of \$17,062.60 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by KMD. PCB+L shall reimburse KMD the additional sum of \$17,062.59 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by KMD.

Haywood County, PCB+L, and Kloesel shall be responsible for the Panel's fees, costs and expenses previously advanced by each of them.

XI. SUMMARY OF AWARD

KMD is AWARDED as follows against Haywood County:

Net Contract Balance including Interest Due KMD	\$ 593,134.46
KMD's Claim for Lost Profits	\$ 71,090.00
KMD's Additional Claims (Including assigned Surety Claims)	\$ 17,750.00
KMD's Affidavit of Costs (1/2)	\$ 14,020.00
KMD's Association and Panel Fees, Costs, and Expenses (1/2)	\$ 17,062.60
TOTAL KMD AWARD AGAINST HAYWOOD COUNTY	\$ 713,057.06

KMD is awarded as follows against Pearce, Brinkley, Cease + Lee, P.A.:

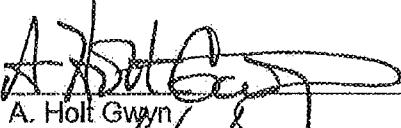
KMD's Tort Claims against PCB+L	\$ 200,000.00
KMD's Affidavit of Costs (1/2)	\$ 14,020.00
KMD's Motion for Payment of Expert Witness Travel Expenses	\$ 3,342.62
KMD's Association and Panel Fees, Costs, and Expenses (1/2)	\$ 17,062.59
TOTAL KMD AWARD AGAINST PCB+L	\$ 234,425.21

All parties shall bear their own attorneys fees.

The sums awarded against Haywood County and Pearce, Brinkley, Cease + Lee, P.A. shall be paid on or before September 6, 2011, and if not sooner paid, shall bear interest beginning September 7, 2011 at the rate of 8% per annum, until paid.

This Award resolves all Claims and Counterclaims asserted by the parties in this arbitration proceeding whether or not submitted to the Panel. All Claims and Counterclaims of each party not granted above and not otherwise discussed herein are DENIED.

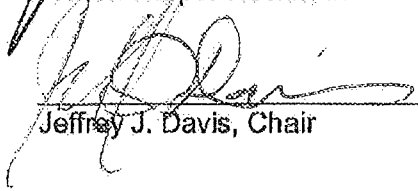
ORDERED and AWARDED this 22 day of August, 2011.



A. Holt Gwyn



Robert Harper Heckman



Jeffrey J. Davis, Chair