



**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

THE SCHOOL DISTRICT OF PHILADELPHIA	:	
	:	May Term 2001
	:	
Plaintiff,	:	No. 02183
v.	:	
	:	Commerce Program
TRI-COUNTY ASSOCIATES BUILDERS, INC., and COMMONWEALTH INSURANCE COMPANY	:	
	:	
Defendants.	:	

**TRIAL OPINION**

Plaintiff The School District of Philadelphia (“School District”) instituted a complaint in confession of judgment against Defendants Tri-County Associates Builders, Inc. (“Tri-County”), and Commonwealth Insurance Company (“Commonwealth”). Defendants filed petitions to open or strike the judgment. On March 21, 2002, Judge Sheppard of this Court granted the petitions to open the confessed judgment.

A bench trial was held before the Court on December 22, 2003 and January 12, February 10 and 24, May 10, 11, and 18, and June 16, 2004. The Court submits the following findings of fact, discussion, and conclusions of law in support of its finding that Defendants owe the School District \$272,383.00.

**FINDINGS OF FACT**

1. Plaintiff School District is the owner of the Alexander Bache School and the W.E. Martin School located at 22<sup>nd</sup> and Brown Streets in the Fairmount section of the City of Philadelphia. Stipulated.

2. At all relevant times, Theodore Skierski (“Skierski”) was the chief administrator for the School District’s Department of Design, Construction, and Capital Projects (the “Department”). Skierski Test., 2/10/04, at 6; Exhibit 79.

3. Skierski administered contracts within the Department by designation of the Board of Education. Skierski Test., 2/10/04, at 78.

4. At all relevant times, Patrick Henwood (“Henwood”) was the operations manager for the Department. Henwood Test., 12/22/03, at 71; Exhibit 78.

5. Defendant Tri-County is a Pennsylvania corporation. Tri-County’s Petition to Open Judgment, ¶1.

6. Defendant Commonwealth is a bonding company that issues payment and performance bonds for public projects in Pennsylvania. Stipulated

7. The Alexander Bache School building (the “Bache School”) was constructed around 1906. Stipulated.

8. The W.E. Martin School (the “Martin School”) building was constructed around 1939. Stipulated.

9. Together, Bache-Martin acts as a desegregation magnet school for students in kindergarten through 8<sup>th</sup> grade. Stipulated.

10. Starting in approximately 1999, the School District began a program that entailed the planned toilet room modernization of the existing toilet rooms for both the Bache School and the Martin School (the “Modernization Program”). Stipulated.

11. The Modernization Program was usually designed in two phases to allow for the continued use of the buildings by the School District while approximately half of the toilet rooms in the buildings are under reconstruction at any given time. Stipulated.

12. The designer of the Modernization Program for the Bache-Martin Schools was the architectural firm of Polatnick Zacharjasz Architects (the “Architect”). Stipulated.

13. The Architect prepared plans and specifications for the Modernization Program for the Bache-Martin Schools (the “Project”). Stipulated.

14. The plans and specifications for the Project contemplated separate prime contractors bidding for the following areas of work: general construction, plumbing, mechanical and HVAC and electrical. Stipulated.

15. The School District had entered into a contract with Granary Inc. to provide construction management service and personnel for ongoing School District construction projects. Stipulated.

16. George Reicherter (“Reicherter”) was assigned by the School District to act as the Project Manager on behalf of the School District on the Project. Stipulated.

17. Harry Camm (“Camm”) was assigned by the School District to act as the Project Inspector on behalf of the School District on the Project. Stipulated.

18. One of the duties of Camm on the Project was to fill out “Daily Field Inspection Reports” for each of the various prime contractors on the Project. Exhibits 9, 10 and 11. Stipulated.

19. In the fall of 1999, the School District placed the plans and specifications for the Project out for public bid on the four separate prime contracts for the work. Stipulated.

20. The bid documents for the general construction portion of the Project included the Specifications for Alterations and Improvements (the “Specifications”). Exhibit 6.

21. David Ali (“Ali”) was president of Tri-County at the time of the Project. Ali Test., 12/22/03, at 51.

22. Ali prepared the bid for general construction work on the Project on behalf of Tri-County. Ali Test., 12/22/03 at 52.

23. The Specifications required the contractor for general construction to provide at least one full-time, on-site superintendent. Exhibit 6, at General Conditions §00700-11(a).

24. The Specifications required the superintendent to oversee the contractor for general construction, other prime contractors, and the subcontractors on the Project. Exhibit 6, at Summary of Work §01010-1.5(A).

25. The Specifications required the contractor for general construction to allocate sufficient funds for the superintendent. Exhibit 6, at Summary of Work §§01010-1.5(A)(5), (B)(2).

26. The Specifications required the Project to be completed within three hundred sixty-five (365) days of receipt of the “Notice to Proceed.” Exhibit 6, at Supplementary Conditions §00800-1.01.

27. The Specifications established an eight (8) hour workday for the Project. Exhibit 6, at Supplementary Conditions §00800-1.02.

28. The School District would not have considered less than ten (10) hours per week of supervision of the Project to be full-time. Henwood Test., 1/12/04, at 169.

29. At the time Ali bid the general construction work on the Project, he knew the Specifications required the contractor for general construction to provide a full-time, on-site supervisor to the Project. Ali Test., 12/22/03, at 53-54.

30. Prior to the Project, Tri-County worked on one bathroom renovation project for the School District, at the Houston school, under an agreement containing the same

supervision language as in the Specifications and with both Henwood and Skierski taking an active role. Exhibit TC-1; Ali Test., 5/18/04, at 68-71.

31. Ali did not intend to provide a full-time, on-site supervisor during the Houston school bathroom renovation project. Ali Test., 5/10/04, at 37.

32. The School District did not enforce the supervision provision during the Houston school bathroom renovation project. Colloquy, 2/24/04, at 34.

33. At the time Ali bid the general construction work on the Project, he intended to provide a full-time, on-site superintendent to the Project, including when subcontractors and the other prime contractors were working on the Project. Ali Test., 12/22/03, at 57-58.

34. Ali intended Jack Layne (“Layne”) to be the full-time superintendent for the Project. Ali Test., 12/22/03, at 56.

35. Ali included five hundred (500) hours of supervision for the Project in Tri-County’s bid. Exhibit SD-1; Ali Test., 2/10/04, at 95.

36. Ali allocated \$10,185.00 to fund the cost of supervision for the Project in Tri-County’s bid. Exhibit SD-1; Ali Test., 2/10/04, at 95.

37. During the Project, Layne’s salary exceeded \$20.00 per hour and Tri-County incurred additional costs for Layne’s medical expenses, vehicle expenses, FICA and other administrative expenses. Ali Test., 12/22/03, at 62-63; Exhibit 8, at 1.

38. In November of 1999, Defendant Tri-County submitted a bid for the general construction portion of the work on the Project in the amount of \$508,400.00. Stipulated.

39. The School District would not have accepted Tri-County's bid on the Project as a responsible bidder had it known that Tri-County was going to supply five hundred (500) hours of supervision for the Project. Henwood Test., 1/12/04, at 166.

40. When all the bids for the general construction portion of the work on the Project were opened in November of 1999, it was determined that Defendant Tri-County was the lowest responsible bidder for such work. Exhibit 2. Stipulated.

41. The lowest responsible bidder for the electrical construction portion of the work on the Project was Jack Cohen & Co., Inc. (the "Electrical Contractor"). Stipulated.

42. The lowest responsible bidder for the plumbing and mechanical portions of the work on the Project was Allstates Mechanical, Inc. (the "Mechanical Contractor"). Stipulated.

43. By letter dated January 10, 2000, the School District notified Tri-County that it had been awarded the general construction portion of the work on the Project. Exhibit 12. Stipulated.

44. In connection with the award for the general construction portion of the work on the Project, Tri-County was to provide to the School District copies of payment and performance bonds in the form set forth in the specifications for the Project. Stipulated.

45. Tri-County obtained a payment bond covering labor and materials used in the work on the general construction portion of the Project in the amount of \$508,400.00 from Defendant Commonwealth (the "Payment Bond"). Exhibit 3. Stipulated.

46. Tri-County obtained a performance bond for the work on the general construction portion of the Project in the amount of \$508,400.00 from Defendant Commonwealth (the "Performance Bond"). Exhibit 3. Stipulated.

47. On January 10, 2000, the School District and Tri-County entered into an agreement (the “Contract”) to perform the general construction portion of the work on the Project. Tri-County’s Petition to Open Judgment, at ¶4; Commonwealth’s Amended Petition to Open Judgment, at ¶3; Exhibit 3.

48. The Contract incorporated the Specifications. Exhibit 3.

49. The Contract provided two mechanisms for termination. Exhibit 3, at 1, ¶4, at General Conditions §00700-31.

50. Termination in accordance with the first page of the Contract requires forty-eight (48) hours notice and enables the School District to rebid the Contract and collect damages pursuant to the Performance Bond. Exhibit 3, at 1, ¶4.<sup>1</sup>

51. Termination in accordance with Paragraph 31 of the General Conditions of the Specifications requires five (5) days notice and enables the School District to rebid the Contract and collect losses, expenses, costs or damages pursuant to the Performance Bond. Exhibit 3, at General Conditions §00700-31.<sup>2</sup>

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<sup>1</sup> It is further agreed that shall the Contractor, in the opinion of The Board of Education, be prosecuting the said work with an insufficient stock of material or insufficient number of skilled workmen for the prompt completion thereof within the specified time, or be improperly performing the said work, or shall neglect or abandon it before its completion or unreasonably delay the same, so that the terms of the contract are being violated or executed in an unworkmanlike manner or in bad faith, or shall neglect or refuse to renew or again perform such work as may be rejected by The Board of Education or otherwise default in the performance of this contract, then and in any such case the SCHOOL DISTRICT may notify the said Contractor in writing of such neglect or default; if such notification be without effect for 48 hours after the delivery thereof, then and in that case the SCHOOL DISTRICT may notify the Contractor to discontinue all work under this contract, and the SCHOOL DISTRICT shall thereupon have full authority and power immediately to do any or all of the following: to let a new contract or contracts for the completion of said work to such person or persons as it may select and for such price or prices as to it may seem proper, to purchase such material, tools and machinery and to employ such workmen as in its opinion shall be required for the proper completion of said work at the cost and expense of the Contractor or the said SCHOOL DISTRICT may hold said Contractor liable for any and all damages suffered, and in such event the performance bond and retained percentage or bond field thereof, and the material delivered and used in, on or about the said work shall then become the property of the SCHOOL DISTRICT for such use and/or application as it may deem proper.

<sup>2</sup> The School District shall have the right to terminate the whole or any part of the Contractor’s Work under the Contract, upon five (5) working days’ prior written notice to the Contractor, in any one of the following circumstances: (1) If the Contractor abandons the Work, or refuses or fails to prosecute the Work or any

52. By letter dated January 12, 2000, the School District requested that Tri-County return four (4) copies of the executed Contract, Performance Bond, Payment Bond, and insurance certificates, plus the original estimate of work performed with four (4) copies and Tri-County's list of suppliers and subcontractors, to the School District within five (5) days. Exhibit 12.

53. On February 11, 2000, Tri-County sent the materials requested by the School District in its letter of January 12, 2000 to the School District. Exhibit 14.

54. On March 2, 2000, the School District issued a formal "Notice to Proceed" to Tri-County under the terms of its contract with the School District. Stipulated.

55. Tri-County was obligated under the Contract to finish the Project by March 5, 2001 (365 calendar days following issuance of the "Notice to Proceed"). Exhibit 3, at Supplementary Conditions §00800-1.01.

56. Ali knew that Tri-County could not begin work on the Project until it obtained a building permit for the Project (the "Building Permit"). Ali Test., 2/24/04, at 56; Exhibit 3, at General Conditions §00700-21.

57. Ali knew that it could take several weeks or a month or more to receive the Building Permit from the Philadelphia Department of Licenses and Inspections ("L&I"). Ali Test., 2/24/04, at 56.

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separable part thereof with such diligence as will ensure its completion within the time specified in the Contract or any authorized extension thereof, or refuses or fails to complete the Work within such time; (2) If the Contractor refuses or fails to supply a sufficient number of properly skilled workers or proper or necessary materials or equipment; . . . (6) If the Contractor violates or defaults in the performance of any of the terms, conditions and provisions of the Contract[.] Upon such termination, the School District may take over and complete the Work, by Contract or otherwise, and may take possession of and use any materials, equipment, supplies and plant on the Work site. After such termination, the Contractor shall not be entitled to receive any further payments from the School District for the Work terminated under the Contract. The Contractor and/or its performance bond surety shall be liable to the School District for any losses, expenses, costs or damages resulting from such termination, including but not limited to any increased costs incurred by the School District in remedying defects in the Work or completing the Work.

58. On March 7, 2000, Tri-County submitted its application for the Building Permit to L&I, but it was rejected. Estelle Ruchniewski (“Ruchniewski”) Test., 5/10/04, at 50-52; Exhibit 19.

59. On March 9 and 10, 2000, Tri-County submitted invoices to the School District for payment pursuant to the Project. Exhibit 117.

60. On March 15, 2000, Tri-County resubmitted its application for the Building Permit to L&I. Ruchniewski Test., 5/10/04, at 51-52; Exhibit 19.

61. By letter dated March 16, 2000, L&I indicated that Tri-County’s application for the Building Permit was insufficient and requested additional materials, including a copy of the executed Contract. Exhibit 21.

62. The additional materials requested by L&I were the responsibility of the School District or its agents. Ali Test., 2/24/04, at 59-61.

63. By letter dated March 23, 2000, Tri-County informed the School District of L&I’s request and included a “Sample Letter for Contract, Not Awarded at Time of Application” to be used in lieu of the executed Contract. Exhibit 22.

64. On March 23, 2000, Tri-County acknowledged that it reviewed and understood the General Conditions. Exh. 23, at ¶4.

65. On April 26, 2000, Tri-County again forwarded the “Sample Letter for Contract, Not Awarded at Time of Application” to the School District. Exhibit 26.

66. In May of 2000, Tri-County received payment for its March 9 and 10, 2000 invoices. Henwood Test., 12/22/04, at 90-91.

67. By facsimile dated May 8, 2000, Tri-County informed the School District it had not received a signed Contract. Exhibit 27.

68. By letter dated May 8, 2000, the School District informed L&I that the Contract had been awarded to Tri-County. Exhibit 28.

69. On May 11, Tri-County submitted corrected insurance certificates to the School District. Exhibit 3; Exhibit 29.

70. On May 16, 2000, Tri-County submitted to L&I the remaining materials sought by L&I in its letter of March 16, 2000. Exhibit 30.

71. On May 18, 2000, Tri-County's application for the Building Permit was approved. Exhibit 36.

72. On June 8, 2000, Tri-County obtained the Building Permit from L&I, enabling it to perform work on the Project. Ali Test., 2/24/04, at 68; Exhibit 41.

73. On June 15, 2000, Tri-County checked on the progress of the Mechanical Contractor's demolition work on the Project. Layne Test., 5/11/04, at 19; Exhibit 7.

74. Layne was Tri-County's sole on-site supervisor on the Project, but did not work on the Project full-time. Layne Test., 5/11/04, at 30-31; Exhibit 7; Ali Test., 2/24/04, at 41.

75. Layne prepared a daily job report as part of his duties on the Project. Layne Test., 5/11/04, at 10; Exhibit 7.

76. Layne did not visit the Project daily. Ali Test., 2/24/04, at 78.

77. Layne did not provide full-time supervision to Tri-County's subcontractors on the Project. Layne Test., 5/11/04, at 30; Exhibit 7.

78. Layne did not supervise the Mechanical Contractor and the Electrical Contractor on the Project. Layne Test., 5/11/04, at 30; Exhibit 7.

79. Tri-County had to wait for the Electrical Contractor and the Mechanical Contractor to remove electricity and plumbing prior to starting its demolition work on the Project. Ali Test., 5/18/04, at 74-77.

80. On June 21, 2000, Tri-County ordered specialized doors for the Project. Exhibit 42; Ali Test., 2/24/04, at 70-71.

81. On June 22, 2000, 5-Star, a subcontractor of Tri-County, began demolition on the Project. Exhibit 7.

82. Layne provided thirteen (13) hours of on-site supervision to the Project in June 2000. Exhibit 7.

83. By letter dated July 5, 2000, the School District provided Tri-County with written notice that its July 5<sup>th</sup> construction schedule was rejected, and notified Tri-County of its failure to provide workers and supervisory personnel at the Project. Exhibit 49.

84. By letter dated July 19, 2000, the School District provided Tri-County with written notice that its July 18<sup>th</sup> construction schedule was rejected for not properly showing the work to be performed on the Project. Exhibit 57.

85. By letter dated July 19, 2000, the School District provided Tri-County with written notice that its lack of progress on the Project was a “serious concern” to the School District and that Tri-County was not providing an adequate workforce to the Project. Exhibit 58.

86. On July 19, 2000, Tri-County received an executed Contract from the School District. Ruchniewski Test., 5/10/04, at 49.

87. By letter dated July 25, 2000, the School District provided Tri-County with written notice of its failure to provide a full-time superintendent for the Project and

indicated that Tri-County's "abandoning the project for over a month [was] not acceptable." Exhibit 66.

88. By letter dated July 27, 2000, the School District provided Tri-County with written notice of its failure to provide a full-time, on-site superintendent and an adequate workforce for the Project. Exhibit 67.

89. Layne provided twenty-six (26) hours of on-site supervision to the Project in July. Exhibit 7.

90. By letter dated August 10, 2000, the School District provided Tri-County with a "Final Notice of Contract Deficiency" concerning Tri-County's failure to acceptably respond to prior letters, its lack of a schedule, and its inability to identify when full-time, on-site supervision of the Project would begin. Exhibit 71.

91. The letter dated August 10, 2000 stated that the School District was prepared to default Tri-County. Exhibit 71.

92. By letter dated August 23, 2000, the School District provided a "Notice to Terminate" to Tri-County for failing to honor its commitments to remedy deficiencies on several School District construction projects. Exhibit 79; Skierski Test., 2/10/04, at 17-18.

93. The letter dated August 23, 2000 stated that the School District was terminating Tri-County from the Project and gave Tri-County five (5) days to remove materials and equipment that were unnecessary to completion of the Project. Exhibit 79.

94. On August 25, 2000, a meeting (the "Default Meeting") between School District personnel, including Skierski, Henwood and Reichert, and Ali of Tri-County established minimum requirements for several School District construction projects

involving Tri-County, including the Project. Exhibit 80; Henwood Test., 12/22/03, at 121-22; Skierski Test., 2/10/04, at 18-19.

95. At the Default Meeting, Ali represented that Tri-County would gear up staffing, provide full-time, on-site supervision, and conform to the School District's request for scheduling and staffing on the Project. Exhibit 80; Henwood Test., 12/22/03, at 119-22; Skierski Test., 2/10/04, at 18-19.

96. As a result of the Default Meeting, the School District stayed its declaration of default on the Contract and indicated there would be a reassessment of its decision on September 5<sup>th</sup>. Exhibit 81.

97. On September 5, 2000, a meeting was held in which Ali conceded that work was not done on the Project during the summer. Exhibit 38.

98. Tri-County did not supply a superintendent or workers to the Project on September 1, 5, 7, 8, 11, 12, 13, 14, 15, 18, 19, 21, 22, 25, 26, 27, 28, and 29, 2000. Exhibit 7.

99. Layne provided supervision on September 6, 2000 for two hours and on September 20, 2000 for one and a half hours. Exhibit 7.

100. Tri-County subcontractors worked on the Project on September 6 and 8, 2000. Exhibit 7.

101. By letter dated September 6, 2000, the School District provided Tri-County with written notice that it failed to provide full-time, on-site supervision and workers to the Project. Exhibit 83.

102. By letter dated September 11, 2000, the School District provided Tri-County with written notice that it failed to provide full-time, on-site supervision and a sufficient workforce to the Project. Exhibit 87.

103. By letter dated September 12, 2000, the School District provided Tri-County with written notice that it failed to provide full-time, on-site supervision and workers to the Project. Exhibit 88.

104. By letter dated September 13, 2000, the School District provided Tri-County with written notice that it failed to provide full-time, on-site supervision and workers to the Project. Exhibit 89.

105. By letter dated September 14, 2000, the School District provided Tri-County with written notice that it failed to provide full-time, on-site supervision and workers to the Project. Exhibit 90.

106. By letter dated September 15, 2000, Tri-County informed the School District that it was interviewing candidates for the full-time supervisor position to start work the first week of October 2000. Ali Test., 2/24/04, at 116; Exhibit 91.

107. By memorandum dated September 20, 2000, Reicherter requested that the School District initiate default proceedings against Tri-County. Exhibit 92.

108. Senior staff members of the Department, including Henwood and Skierski but not Reicherter, discussed whether to default Tri-County. Henwood Test., 12/22/03, at 129-30.

109. Henwood relied, in part, on information provided by Reicherter in recommending to Skierski that Tri-County be terminated from the Project. Henwood Test., 1/12/04, at 62-65.

110. Skierski relied on information provided by Reicherter, but not his opinion, in determining whether to declare Tri-County in default of the Contract. Skierski Test., 2/10/04, at 23-24.

111. Skierski did not accept that Tri-County was entitled to additional time to complete the Project. Skierski Test., 2/10/04, at 39-42.

112. As of September 26, 2000, Skierski thought the Project could not be salvaged. Skierski Test., 2/10/04, at 24.

113. By letter dated September 26, 2000, the School District notified Tri-County that it was being terminated from the Project and had five (5) days to remove equipment and materials not essential to completion of the Project because the Project was behind schedule and Tri-County did not maintain an adequate workforce, including a full-time, on-site supervisor. Exhibit 94.

114. Skierski decided to terminate Tri-County based upon the deficiencies set forth in the letter of September 26, 2000 and Tri-County's failure to live up to the promises made at the Default Meeting. Exhibit 94; Skierski Test., 2/10/04, at 24.

115. By letter dated October 5, 2000, Tri-County sought approval from the School District to continue work on the Project on October 9, 2000. Exhibit 95.

116. By letter dated October 10, 2000, the School District informed Tri-County that it would not approve Tri-County's offer to remediate its default. Exhibits 95, 98.

117. By letter dated October 13, 2000, the School District declared Tri-County in default of the Contract, terminated the Contract for default, and reserved its rights under the Contract and Performance Bond to complete the Project and to recover losses,

costs, expenses, and damages via indemnification from Tri-County and Commonwealth. Exhibit 101.

118. Following the termination of Tri-County, the School District initiated an emergency bid process (the “Process”) for the uncompleted work remaining on the Project. Henwood Test., 12/22/03, at 132.

119. The Process was governed by the Public School Code, 24 P.S. §7-751. Henwood Test., 12/22/03, at 133.

120. The Process required the School District to research and choose contractors capable of performing the work left on the Project, the Architect to clarify the work needed to be performed on the Project and prepare bid packages for the contractors, and the contractors to examine the Project site and to bid on the remainder of the Project. Henwood Test., 1/12/04, at 30.

121. On October 20, 2000, the School District solicited bids from five (5) contractors to complete the Project by March 5, 2001 (the original completion date). Exhibit 102; Henwood Test., 1/12/04, at 112.

122. The bids were due October 31, 2000. Exhibit 102.

123. By telephone on October 27, 2000, Commonwealth suggested a contractor to the School District, but did not submit information necessary to determine whether the contractor was a responsible bidder until November 10, 2000. Exhibit 105.

124. On October 27, 2000, the School District issued a bulletin identifying modifications to the bid packages for the completion of the Project. Exhibit 103.

125. On October 31, 2000, the bids for the completion of the Project were opened and it was determined that the lowest submitted bid was for \$720,000 by L & B Contractors, Inc. Exhibit 106.

126. By letter dated November 15, 2000, the School District notified Commonwealth that its suggested contractor was not a responsible bidder. Exhibit 105.

127. On November 20, 2000, the Board of Education confirmed the School District's declaration of Contract default and awarded the contract to complete the work on the Project to L & B Contractors, Inc. Exhibit 106; Henwood Test., 1/12/04, at 35-36.

128. The cost of the contract awarded to L & B Contractors, Inc. for the completion of the work on the Project was \$720,000.00. Exhibit 106.

129. Tri-County received payments of \$24,985.00 for invoices it submitted pursuant to its work on the Project. Exhibit 117; Henwood Test., 1/12/04, at 43-45.

130. During the Process, modifications made to ceiling work on the Project resulted in a reduction to the cost of the Project of \$120.00. Exhibit 119; Henwood Test., 1/12/04, at 45-46.

131. During the Process, an additional door was added to the work on the Project resulting in an increase to the cost of the Project of \$1,050.00. Exhibit 119; Henwood Test., 1/12/04, at 47.

132. Due to delays caused by Tri-County, the School District was required to issue a change order for remobilization of the Mechanical Contractor that resulted in an increase to the cost of the Project of \$1,668.00. Henwood Test., 1/12/04, at 47-50.

133. During the Process, the Architect incurred costs of \$2,230.00 to produce documents for the bid packages. Henwood Test., 1/12/04, at 50-51.

134. The School District saved \$508,400.00, the original cost of the Project, by awarding the remainder of the work on the Project to L & B Contractors, Inc. Henwood Test., 1/12/04, at 52.

135. The Performance Bond states that attorney's fees of five percent (5%) shall be paid on the penal sum, which equals \$25,420. Exhibit 4.

136. The School District paid Tri-County \$7,410.00 for permit fees that were not incurred by Tri-County. Exhibit 117; Exhibit 33; Henwood Test., 1/12/04, at 54-58.

## **DISCUSSION**

The central issue in this case is whether Tri-County breached the Contract. At trial, and in their submissions following trial, the parties focused on the Contract provisions governing staffing, supervision, and scheduling on the Project.

To establish an action for breach of contract, a party must demonstrate the existence of a contract, a breach of a duty imposed by the contract, and damages. J.F. Walker Co. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002). The first element was clearly established. Finding of Fact ("FF") No. 47.

According to Defendants, the School District cannot support the second element of this cause of action because Tri-County fulfilled its responsibilities under the relevant provisions of the Contract. In particular, although Defendants concede Tri-County failed to comply with the supervision provisions in the Contract, FF 76, 77, and 78, they assert that a waiver of these provisions by the School District or, in the alternative, that any breach of these provisions is immaterial, prevents the School District from relying on the

supervision provisions to establish Tri-County's breach of the Contract. The School District contends that no waiver occurred and the supervision provisions are material.

Contract provisions may be waived either expressly or through implication. Trumpp v. Trumpp, 351 Pa. Super. 205, 209, 505 A.2d 601, 603 (1985). No evidence of an express waiver exists in this instance. To establish an implied waiver requires a demonstration that "there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived." Den-Tal-Ex, Inc. v. Siemens Capital Corp., 389 Pa. Super. 219, 238, 566 A.2d 1214, 1223 (1989). Defendants assert the School District failed to enforce the supervision provisions during other, similar construction projects involving Tri-County. Thus, as a result of this prior conduct by the School District, Defendants conclude that Tri-County reasonably believed the supervision provisions to be waived.

The supervision provisions required Tri-County to have a full-time, on-site supervisor throughout the Project. FF 23, 24. Despite Defendants' contention of multiple comparable projects to the Project, Tri-County only worked on one similar project for the School District that required the same level of supervision and received the same level of involvement from the same School District personnel as the Project, FF 30. The School District did not enforce the supervision requirements during the prior project. FF 32.

Assuming *arguendo* that one similar undertaking could establish waiver on the part of the School District, the evidence undercuts Defendants' waiver argument. Tri-County intended to comply with the supervision requirements when bidding on the

Project. FF 33, 34. On March 23, 2000, Tri-County acknowledged the General Conditions of the Contract, which included one of the supervision provisions. FF 64. On July 5, 2000, less than one month after Tri-County received the Building Permit which enabled it to begin work on the Project, it received notice from the School District that it needed a supervisor. FF 56, 72, and 83. Tri-County received additional notice of its lack of a supervisor on July 25 and 27, August 10 and 25, and September 6, 11, 12, 13, and 14, 2000. FF 87, 88, 90, 94, 95, 101, 102, 103, 104, and 105. To find a waiver of the supervision requirements, Tri-County must demonstrate that the waiver occurred between the final time Tri-County acknowledged its responsibilities under the Contract and the time it received notice that the supervision provisions would be enforced. The record lacks such evidence.

In addition, as a matter of law, the supervision provisions could not be waived through the School District's prior conduct. "Public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body." Nether Providence Township Sch. Auth. v. Thomas M. Durkin & Sons, Inc., 505 Pa. 42, 48-49, 476 A.2d 904, 907 (1984). Defendants challenge the application of Nether to the current matter from two perspectives.

First, Defendants narrowly construe Nether's holding, arguing the case applies solely to change orders and other situations requiring additional public expenditures during an ongoing public construction project. As this reading of Nether disregards the court's underlying concern with upholding "the integrity of the bidding process," id., at 48, at 907, it is incorrect.

Second, Defendants argue Nether cannot be literally followed as minor deviations from the language of a public construction contract are acceptable during performance. Even if true, this interpretation does not apply to the current matter because the supervision provisions are material. When Tri-County incorporated the alleged waiver of the supervision provisions in its bid, FF 35, 36, and 37, it “adversely affect[ed] competitive bidding [on the Project] by placing [it] in a position of advantage over other bidders,” Gaeta v. Ridley Sch. Dist., 567 Pa. 500, 508, 788 A.2d 363, 368 (2002), which establishes their materiality. Furthermore, the School District informed Tri-County on multiple occasions that it considered its failure to comply with the supervision provisions of the Contract to be significant. FF 83, 87, 88, 90, 92, 94, 95, 101, 102, 103, 104, and 105. Since the supervision provisions were material to the Contract, and were not waived, they were breached and the second element of a breach of contract claim has been established.

Defendants argue that the School District cannot support the third element of its breach of contract claim because it failed to mitigate any damages resulting from Tri-County’s breach and to properly establish its damages. At the core of Defendants’ position is a three month delay in the acquisition of the Building Permit, allegedly caused by the School District. As a result of this delay, Defendants argue, the School District needed to extend the deadline for the completion of the Project upon its rebid.

The School District had no duty to mitigate damages stemming from Tri-County’s termination when it rebid the remainder of the work on the Project. Defendants are correct that, in general, a party who suffers a loss due to a breach of contract has a duty to make a reasonable effort to mitigate its losses. Bafile v. Borough of Muncy, 527 Pa. 25,

30, 588 A.2d 462, 464 (1991). In this case, however, the bidding process was controlled by statute and 24 P.S. §7-751 subjects emergency bids or bids to repair unusable portions of schools to a truncated bidding process to enable school authorities to commence needed repairs as quickly as possible. The Contract reflects this goal because it allows the School District to “let a new contract or contracts for the completion of [the Project] to such person or persons as it may select and for such price or prices as to it may seem proper.” FF 50. Also, the mitigation sought by Defendants would defeat the School District’s expectations that the Project be completed by March 5, 2001. The School District used to rebid to “put [itself] in as good a position as [it] would have been had the contract been performed.” Ferrer v. Trustees of the Univ. of Pa., 573 Pa. 310, 341, 825 A.2d 591, 609 (2002). The School District was not seeking profit, but completion of the Project.

Furthermore, the record does not support Defendants’ conclusion that the School District should be held responsible for a three month delay in the Project. Although not specified by Defendants, the relevant period must run from the School District’s issuance of the “Notice to Proceed” on March 2, 2000, FF 54, to L&I’s issuance of the Building Permit on June 8, 2000, FF 71. Much of this particular period, however, cannot be attributed to the School District. Tri-County was responsible for obtaining the Building Permit. FF 56. Tri-County submitted its original application for the Building Permit on March 7, 2000, FF 58, but waited until March 23, 2000 to notify the School District that L&I required certain additional materials within the School District’s control, FF 62 and 63. In other words, Tri-County allowed three weeks to lapse following receipt of the “Notice to Proceed” despite knowing that L&I could take several weeks to approve the

Building Permit, FF 57. In fact, L&I required three weeks to issue the Building Permit, FF 70 and 72. This evidence demonstrates that the School District is not wholly responsible for the delay in acquiring the Building Permit. In addition, while working on the Project, Tri-County demonstrated no sense of urgency about the lost time. As Ali conceded, FF 97, Tri-County failed to provide workers for portions of June, July, and August, FF 83, 85, 87, 88, 90, 94, and 95, and performed only two (2) days of work in September, FF 98 and 100. Thus, Defendants' assertion that the School District needed to extend, by three months, the date of Project completion is unwarranted.

The School District presented evidence to support its damages. Following termination of Tri-County, the School District proceeded to find a replacement contractor for the remaining work on the Project in accordance with the Contract and governing law. FF 50, 51, 118, 119, 120, 121, 122, 124, 125, and 127. The lowest submitted bid for the remainder of the Project was \$720,000.00, FF 125, and the School Board awarded the contract for the work in this amount, FF 127 and 128. Tri-County received payments of \$24,985.00 for invoices it submitted pursuant to the Project. FF 129. Minor modifications to the scope of the work on the Project following Tri-County's termination resulted in an increased cost of \$930.00. FF 130 and 131. Remobilization costs occasioned by the cessation of work on the Project due to Tri-County's termination totaled \$1,668.00. FF 132. To put together certain components of the bid packages, costs of \$2,230.00 were accrued. FF 133. Tri-County received \$7,410.00 for permit fees that it did not incur. FF 136. The original cost of the Project was \$508,400.00. FF 38, 40, 43, 47, and 134. Under the Performance Bond, the School District receives attorney's fees of five percent (5%) of the penal sum, which equals \$25,420.00. FF 135. The

School District's damages in this matter total \$272,383.00. Therefore, the third element of a cause of action for breach of contract has been established.

Defendants contend the School District's declaration of default and subsequent termination did not accord with the Contract because the Board of Education did not meet prior to their occurrence. In general, judicial review of discretionary government acts is deferential. Gaeta, at 507, at 366. The Board of Education enabled Skierski to make decisions on contracts such as the Contract, FF 3, and confirmed the decision to terminate Tri-County, FF 127. The record contains no evidence that the Board of Education, the School District, or any of their agents acted in bad faith in terminating Tri-County from the Project. Therefore, the declaration of default complied with the Contract.

#### **CONCLUSIONS OF LAW**

1. The School District and Tri-County entered into the Contract.
2. Tri-County breached the Contract.
3. The School District suffered damages of \$272,383.00 as a result of Tri-County's breach of the Contract.
4. The School District complied with the Contract in declaring Tri-County in default of the Contract and terminating Tri-County from the Project.
5. The School District acted in conformity with 24 P.S. §7-751 in placing the remaining work on the Project out for bid following Tri-County's termination from the Project.
6. Under the Performance Bond, Tri-County and Commonwealth are jointly and severally liable for the School District's damages.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**