JAMS ARBITRATION CASE REFERENCE NO. 1220067397

PINNER CONSTRUCTION, INC.,

Claimant,

and

LOS ANGELES COMMUNITY COLLEGE DISTRICT,

Respondent,

FINAL AWARD

Counsel

Newton W. Kellam
Kellam Law Corporation
500 N. State College Blvd
Suite 1100
Orange, CA 92868
Tel: 714-490-4000
newt@kellam-law.com

Christopher G. Morrow
Jennifer A. Needs
SMTD Law LLP
17901 Von Karman Ave
Suite 500
Irvine, CA 92614
Tel: 949-537-3800
cm@smtdlaw.com
jneeds@smtdlaw.com

Counsel for Claimant

Jack W. Fleming
Peter J. Diedrich
Musick, Peeler & Garret, LLP
650 Town Center Dr., Suite 1200
Costa Mesa, CA 92626
Tel: 714-668-2400
j.fleming@mpglaw.com
pdiedrich@mpglaw.com

Counsel for Respondent

Arbitrator

Deborah S. Ballati
JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111

Place of Arbitration: Orange County, California
Date of Final Award: April 1, 2022

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration clause in the Contract (identified below) entered into between Pinner Construction Co., Inc. and the Los Angeles Community College District, for construction of a multi-building performing arts and theater complex located at the Los Angeles Valley College Academic and Cultural Center (the "Project"), and by stipulation of the parties, concludes and issues this Final Award as follows.

I. INTRODUCTION AND PROCEDURAL STATEMENT

A. General Background and Procedure.

This arbitration was conducted before the Arbitrator in accordance with the arbitration clause contained in Paragraph 4.5 of Exhibit 7 – General Conditions to Construction Services Agreement (Lease Lease-Back) Valley Academic and Cultural Center between Los Angeles Community College District ("LACCD" or "the District") and Pinner Construction Co., Inc. ("Pinner) dated September 22, 2015 (the "Contract"); the Contract also includes Amendment No. 1 entered into on August 30, 2016, as discussed more fully below (Ex. 37). The JAMS Engineering and Construction Arbitration Rules and Procedures effective November 15, 2014 ("Rules"), and the substantive law of the State of California apply to this matter.

Prior to the arbitration hearing ("Hearing") the Arbitrator entered Scheduling Orders No. 1 (March 20, 2021) and No. 2 (March 30, 2021). The Arbitrator also entered a Final Ruling and Order Regarding Pinner Construction Co., Inc.'s Motion *in Limine* (August 27, 2021). The Arbitrator's Orders established rules and procedures for the arbitration. The parties exchanged information and conducted discovery before the arbitration Hearing began.

B. Scope of the Arbitration

At issue in this arbitration are two time impact analyses ("TIAs" or individually, "TIA") and one Change Order Proposal ("COP"), TIA 6, TIA 7 and COP 292. Through those TIAs and COP 292, Pinner seeks a total time extension of time of 218 days, and compensation of $5,877,291.00 (excluding interest) for it and its subcontractors, as follows:

TIA	Description	Time Requested	Amount
6	Delay to First Lift of Theater Stage and Seating Area	80 days	$2,091.506.00
7	Tall Wall Construction and	138 days	$2,400,853.00

	Rain Delays		
COP 292	Additional Tall Wall Construction Costs		$1,384,932.00
	Total:	**218 days**	**$5,877,291.00**

Of the total amount sought by Pinner for TIA 6, $489,135.00 is for Pinner's alleged actual delay damages, and $1,526,068.00 is for subcontractor pass-through claims. Of the total amount of $2,400,853.00 sought by Pinner for TIA 7, $817,569.00 is for Pinner's alleged actual delay damages, and $1,493,664.00 is for subcontractor pass-through claims. Pinner also added a markup on certain amounts sought for it and the pass-through claims of its subcontractors.

In addition, Pinner seeks prejudgment interest on the TIA 6, TIA 7 and COP 292 amounts, as follows:

Description	**Claim Amount**	**Claim Submission Date**	**Years**	**Interest Claim**
TIA 6	$2,091,506.00	8/22/2019	2.26	$ 472,738.00
TIA 7	$2,400,853.00	7/8/2020	1.38	$ 331,515.00
COP 292	$1,384,932.00	6/8/2020	1.46	$ 202,617.00
Total Interest				**$1,006,870.00**
Total Including Interest				**$6,884.161.00**

Prior to submitting TIAs 6 and 7 to the District, Pinner had submitted earlier TIAs seeking a time extension of 380 calendar days and payment of $10,705,820.00, covering the period from the inception of the Project through May 31, 2018. Those earlier TIAs included claims for rain delays, delays due to routing of conduit and storm drains in basement walls, delays to the rebar splice location in the Tall Walls, and congestion in the concrete walls (Ex. 105, §§ A & B); they were all ultimately resolved in December 2019. The settlement resulted in a 380-day time extension and a $5,000,000 payment to Pinner, and was confirmed in the Settlement Agreement marked as Exhibit 105 in the arbitration.[1]

TIAs 6 and 7 involve the delays that took place once the construction of the Tall Walls in the Main Theater began; claims related to these TIAs were specifically excluded from the scope of the settlement of the earlier TIAs, as was COP 292. TIA 6 involved the period June 1, 2018 to September 24, 2018; TIA 7 involved the period September 25, 2018

[1] Exhibits referenced herein as Ex. __ were exhibits admitted into evidence in this arbitration.

through April 12, 2019. The District has responded to these claims by approving a non-compensable time extension of thirty-three (33) days due to the weather-related delays identified in TIA 7, but otherwise denies the claims.

Pinner first submitted TIA 6 on November 26, 2018; Pinner submitted an updated version on August 22, 2019. The District responded on September 12, 2019, denying the claim. Pinner later submitted its final version of TIA 6 on June 5, 2020. (Ex. 6; R. Boynton, 8/31/21, 164:4-10; 170:6-171:7.)

Pinner submitted TIA 7 to the District on or about August 26, 2019, and a revised version on July 8, 2020. (Ex. 25, 190826 TIA 7 and 2020708; R. Boynton, 8/31/21, 173:21-176:21.) Pinner also provided updated pricing on TIA 7 on June 8, 2020.

Pinner submitted COP 292 for added material and rentals associated with the Tall Walls on or about April 10, 2019, and an updated version on May 23, 2019. Pinner submitted a final version of COP 292 to the District on June 8, 2020. (Exs. 6 and 11; R. Boynton, 8/31/21, 191:7-192:7.)

The parties held the mandatory meetings for TIA 6, TIA 7, and COP 292 required by the Contract; when those meetings were unsuccessful, the parties proceeded to mediation as required by the Contract. The mediation was also unsuccessful. Thereafter, on December 14, 2020, Pinner served the District with its demand for arbitration in this matter.

C. The Evidentiary Hearing.

The evidentiary Hearing was initially conducted at the Westin South Coast Plaza in Costa Mesa, California, and later at the JAMS office in Irvine, California. The hearings were held on April 6-9, 2021; April 12, 2021; June 9-11, 2021; June 14-18, 2021; August 30-31, 2021; September 1-3, 2021; September 15, 2021; and September 20-23, 2021. Numerous percipient and expert witnesses testified during the Hearing. In addition, pursuant to a stipulation of the parties and agreement of the Arbitrator, witnesses Seb Ficcadenti, Justin Davis, Gregg Brandow, Kevin Tyrell and Mark Strauss, all of whom had testified in person during the Hearing, provided written Declarations after the Hearing concluded on September 23, 2021; those Declarations were accepted into evidence by stipulation of the parties. The Hearing was reported by various stenographic reporters, as required by the Contract.[2]

The parties submitted separate pre-marked exhibits to the Arbitrator at the Hearing, and offered additional exhibits which were admitted during the Hearing. Ultimately, all admitted exhibits and the various court reporters' transcripts were provided to the Arbitrator for use in preparing this Final Award. The parties also submitted Closing Briefs on October 18, 2021.

[2] Transcript references herein are to the name of the witness, the date of testimony and the page and sometimes line references of the transcripts prepared by the various stenographic reporters who reported the Hearing.

Finally, on November 24, 2021, Counsel Kellam, Morrow, Fleming and Diedrich and the Arbitrator participated in a telephone conference in which the parties stipulated to the filing of the Partial Final Award no later than November 30, 2021. During that telephone conference, it was determined that to the extent either party contends that the Arbitrator should consider an award of attorneys' fees and/or costs, they should provide support for that position in the separate post-Partial Final Award briefing addressed in Section VI of the Partial Final Award. The Arbitrator noted, and Counsel agreed, that the Contract arbitration clause expressly prohibits the Arbitrator from altering the equal sharing of fees of the Arbitrator and the administration of fees of the arbitration. (Ex. 37, General Conditions, Section 4.5.8.5.)

After considering all the evidence, the record and testimony from the arbitration, and the arguments made, and law offered, during the Hearing and in all the pre-Hearing and post-Hearing briefings, a Partial Final Award was issued on November 30, 2021. The Partial Final Award found that Pinner's interpretation of the splicing requirements and prohibitions in the Contract prevails as supported by the overwhelming weight of the evidence and applicable law, as discussed in detail below. The Partial Final Award further determined that issues regarding Pinner's claim for interest on the claimed amounts would be decided following the separate briefing required as described in Section VI of the Partial Final Award. Specifically, the Partial Final Award provided that Pinner's claim for interest would be decided as part of the Final Award.

The parties were directed to file additional briefing on the interest claim on the schedule established in Section VI of the Partial Final Award; ultimately, that briefing schedule was adjusted at the request of the parties and with the agreement of the Arbitrator. The Partial Final Award also provided that to the extent either party wished to raise any issues regarding a claim for attorneys' fees and/or costs, those issues should also be addressed in the briefing and on the timeline provided in the Partial Final Award. The Partial Final Award also provided that any additional briefing which either party wished to file on the subcontractor claims issues left open in the Partial Final Award should be provided on the same schedule as provided for the other briefing.

Following issuance of the Partial Final Award, the parties filed briefs addressing the issues on which the Partial Final Award directed or invited additional briefing and certain alleged errors or miscalculations included in the Partial Final Award. As part of that briefing, Pinner also filed an Exhibit A to Claimant Pinner Construction Company's Supplemental Closing Brief and Request for Attorneys' Fees and Costs ("Pinner Supplemental Brief") which provided additional analysis regarding the pass-through subcontractor claims for which Pinner seeks to recover. Although the District objected to Pinner's submission of the additional analysis in Exhibit A, the Draft Final Award which the Arbitrator issued on March 7, 2022, included rulings on all the matters raised in the arbitration and in all the post-Partial Final Award briefing, hearings and arguments presented to the Arbitrator as of that date. The Draft Final Award included certain blanks

for amounts awarded; the Arbitrator invited further input from the parties regarding those blanks and held further telephone hearings and considered the parties' further briefing on matters included in the Draft Final Award.

On March 20, 2022, the Arbitrator issued final rulings to the parties by email and directed the parties to meet and confer on all final edits to the Draft Final Award and provide the results to the Arbitrator no later than March 25, 2022. By emails dated March 25, 2022, the parties provided their agreed final numbers for the Final Award including final award amounts, markups, prejudgment interest, and fees and costs to be awarded; the only variance in their numbers was based on the date through which prejudgment interest was calculated. This Final Award accepts Pinner's calculation of prejudgment interest through March 25, 2022, and the agreed daily rate of interest of $378.12 per day; prejudgment interest shall continue to run at the daily rate on the amounts on which prejudgment interest is awarded in this Final Award until the amounts awarded are paid. The amounts awarded to Pinner are discussed below and are included in the attached Exhibit A which is made part of this Final Award.

II. SUMMARY OF CLAIMS

In summary, resolution of Pinner's TIA 6, TIA 7 and COP 292 claims depends primarily on an evaluation of the evidence and analysis regarding whether the Contract Documents, including incorporated standards, regulations and other matters, permitted Pinner to assume during the proposal and bidding process leading up to execution of the Contract that it and its rebar subcontractor would be allowed to splice vertical rebar above the thirty (30) foot level in the Tall Walls in the Main Theater. Pinner claims those Contract Documents, taken as whole, permitted, if not required, Pinner and its subcontractors to assume such splicing would be allowed, especially in light of the failure of the District to expressly state either in the Contract Documents or during the lengthy preconstruction process that such splicing was prohibited.

Pinner also asserts that its interpretation of the Contract Documents that they could splice the Tall Walls rebar was reasonable, and any misinterpretation resulted from it and its subcontractors being "misled by incorrect plans and specifications" issued by the District. Pinner further contends that its reasonable interpretation led it and its subcontractors to submit bids which were lower than they would have otherwise made, and that the District is responsible for the damages associated with the lower bids. (CACI No. 4500; *LAUSD v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 744.)

The District contends that the Contract Documents, taken as a whole and in numerous ways, clearly and unambiguously put Pinner and the subcontractors on notice that splicing would only be permitted as specifically shown on the drawings, including the elevation drawings, which were part of the Contract Documents. The District further contends that multiple additional provisions, drawings and directions in the Contract Documents clearly and unequivocally prohibited splicing in the vertical rebar above the thirty (30) foot level in the Tall Walls, and that those references, as well as applicable

provisions of the California Building Code ("CBC") and other applicable regulatory requirements, support denial of Pinner's claims and the pass-through claims Pinner submitted from its subcontractors.

Pinner bears the burden of proof on its claims and defenses by a preponderance of the evidence. The District bears the same burden on its claims and defenses.

III. STATEMENT OF FACTS AND ANALYSIS OF CLAIMS

The recitation and statements of facts included below include those facts found by the Arbitrator to be true and necessary to this Final Award; the citations to law provide the Arbitrator's conclusions of law related to the claims and defenses in this arbitration. To the extent these recitations and citations, or the analysis of the facts, claims and defenses of the parties, differ from any party's position, that difference is the result of determinations by the Arbitrator as to credibility, relevance, burden of proof considerations, the weighing of evidence, both oral and written, and considerations of applicable law.

A. Background of the Project

This case arises out of the Contract entered into between Pinner and the District for construction of a large, multi-building project to be built on the campus of the Los Angeles Valley College. The Project consists of a 2-story concrete and steel structure with a partial basement, a 430-seat Main Stage Theater, a 143-seat Horseshoe Theater, a 221-seat Screening Theater, a 76-seat smart lecture hall, several classrooms, several shops studios, and a radio station. (Ex. 37, Exhibit 23 - RFP & Addenda, pp. 9-10.)

The District short-listed a few contractors, including Pinner, to submit proposals in response to the Request for Proposal ("RFP") issued by the District. (Ex. 37, Exhibit 23; J.Davis, 4/6/21, 173:24-174:4.) The RFP sought proposals from contractors to perform limited preconstruction services and develop a guaranteed maximum price ("GMP") for construction of the Project. (Ex. 37, Exhibit 23 RFP & Addenda, pp. 10-11.) It informed proposers, among other things, that the District's design team would provide a fully coordinated Building Information Model ("BIM") for the design of the Project for use by the proposers. (Ex. 37, Exhibit 23.)

Pinner submitted its proposal on June 5, 2015 (Ex. 37, Exhibit 1 – Proposal-Pinner, p. 7); the Pinner proposal assumed a notice to proceed ("NTP") being issued on July 9, 2015, and Pinner completing preconstruction on October 6, 2015, with a short 10-day constructability review. (Ex. 37, Exhibit 1 Proposal-Pinner, p. 45, VACC Construction Schedule). The pre-construction process was to be 90-days (J.Davis, 4/6/21, 179:10-180:3), and construction was to start in the fourth quarter of 2015. (J.Davis, 4/6/21, 227:5-13.) Ultimately, the District delayed the NTP until September 2015, for many reasons. (J.Davis, 4/7/21, 223:2-25.)

Based on the RFP, Pinner assumed it would be able to use the BIM prepared pursuant to the District's then existing BIM Standards to develop its pricing. (Ex. 37, Exhibit 18 – District Standards, 10; J.Davis, 4/6/21, 200:9-201:4.) Despite the

representations in the RFP, however, the District never provided a fully coordinated BIM model (J.Davis, 4/6/21, 181:5-6) or a 3D model for the structural or MEPF systems. (J.Davis, 4/7/21, 213:23-214:3.) Notably, the evidence established that because the District had changed from Erlich (its original designer) to QDG Architecture, the District did not have many of the underlying electronic files it anticipated having, including the BIM files. Thus, even though Pinner had identified potential areas of rebar congestion in its proposal, the District failed to provide the critical BIM System and design information, or conduct coordination meetings to resolve spatial conflicts during the preconstruction phase of the Project. (J.Davis, 4/7/21, 217:6-11)

On September 22, 2015, Pinner and the District entered into the Construction Services Agreement ("CSA") requiring Pinner to complete preconstruction in ninety (90) days and achieve substantial completion 720 days after the NTP for construction, with final completion 30 days thereafter. ((Ex. 37, 02A Revised LA Valley Agreement, *Id.* at §§ 3.1.1-3.1.13) Pinner was to be paid $67,000.00 for its preconstruction services; those services expressly did not include peer review of any construction documents. (Ex. 37, 02A Revised LA Valley Agreement, § 4.1.1(a).)

Because Pinner had identified congestion of the rebar and embeds as a potential issue for further investigation during the constructability review with the design team, Pinner requested that the District include the inspector of record ("IOR") for the Project in the constructability review process (J.Davis, 4/6/21, 180:23-181:9); Pinner believed early engagement of the IOR would help address potential elements that could put the schedule at risk, such as the relationship between steel and concrete. (J.Davis, 4/7/21, 234:15–235:14.) Ultimately, the District did not retain the IOR for preconstruction. (J.Davis, 4/7/21, 236:17–237:6.)

Although the RFP provided that Pinner was to develop constructability review opportunities that were to be determined by the District, the constructability review excluded structural, ADA, fire, and life safety. (J.Davis, 4/6/21, 179:10-180:3; 4/7/21, 223:2-25.) Moreover, the District did not ask Pinner to review the constructability of the embeds or the rebar in the Tall Walls. (Ex. 37, Exhibit 1 Proposal-Pinner, p. 36, Coordination of Steel and Embeds; J.Davis, 4/6/21, 180:9-14;199:17- 202:10.)

During preconstruction, Pinner and the District participated in an open book process for subcontractor selection; Pinner obtained bids from at least three subcontractors with proven track records for each scope, including Mad Steel for rebar, and McGuire Contracting ("McGuire") for concrete. (J.Davis, 4/7/21, 220:2-223:1.) Using these bids and other information, the parties spent many months developing a preliminary GMP. (J.Davis, 4/7/21, 230:13-231:25.) When the GMP developed during that process exceeded the District's budget, Pinner and the District analyzed the differences between the estimate and the budget, and worked with Pinner's subcontractors and the design team to bridge the gap. (J.Davis, 4/7/21, 231:20-25, 232:19-233:3, 258:17-259:7.) The District and Pinner even considered different project delivery options including design build, but ultimately chose

to pursue the lease/lease-back method. (J.Davis, 4/7/21, 259:20-260:15.)

As part of these Project delivery discussions, Pinner had access to the proposal of QDG, the District's Architect of Record. (J.Davis, 4/7/21, 250:5-25.) In that proposal, QDG represented that it had an excellent rapport with the Department of State Architects ("DSA") that had proven to be invaluable in helping resolve issues before they impacted prior projects. (Ex. 15, Contract 1022_Task Order O1VAE, p. 21 § 8). QDG's structural subconsultant, TTG, also had committed in its documentation to responding to RFIs within 48 hours, submittals within 7 calendar days, and critical issues within 24 hours. (*Id.* at p. 23, §§ 2, 3). Ultimately, QDG/TTG did not meet these represented deadlines on a number of occasions during construction; moreover, no persuasive evidence proved any significant Project benefits from QDG's claimed relationship with DSA, especially on the critical rebar splicing issue.

During the preconstruction phase, Pinner developed its Baseline Schedule in consultation with the District, McGuire and Mad Steel. (Ex. 6. 190808; G.Ledezma, 4/7/21, 371:21-372:9, 384:21–257:8; M.Dominguez, 4/9/21, 710:1–711:14.). The Baseline Schedule shows the wall sequences and activities for the Tall Walls (G.Ledezma, 4/7/21, 370:24 – 371:1), and is based on weekly concrete pours of the walls. (G.Ledezma, 4/7/21, 374:13-24.) The Baseline Schedule showed the walls in Area B completed before the walls in Area A, with the forms from Area B being cycled to Area A. (G.Ledezma, 4/7/21, 397:5-22) During the development of the Baseline Schedule, the District never told Pinner that splicing of the vertical rebar above the thirty (30) foot level in the Tall Walls in the Main Theater was prohibited. (G.Ledezma, 4/7/21, 383:2-12.)

Pinner believed the Baseline Schedule durations were achievable because it could splice above the thirty (30) foot level; without rebar splicing, the durations were not achievable. (G.Ledezma, 4/7/21, 387:4-18.) Building the Tall Walls in lifts or cycles, as Pinner and the subcontractors planned, allows for the overlapping of work and creates a rhythm as the contractor becomes more efficient over time. (G.Ledezma, 4/7/21, 386:5-23.) Pinner's Superintendent Ledezma, and McGuire's Project Manager, Isidro Larios, were both very clear and convincing in their testimony that there is no way to interpret work described in the Baseline Schedule as being built without splices because of the durations for the work included. (G.Ledezma, 4/7/21, 384:16 – 285:1; I.Larios, 6/14/21, 136:16-25.)

Had Pinner known that it would not be allowed to splice, the Baseline Schedule would not have included the wall sequences and cycles shown. (G.Ledezma, 4/7/21, 384:10-15.) Even the District's scheduling expert, Daniel Feinblum, admitted that the Baseline Schedule showed the Tall Walls being built in lifts, with no difference in durations for spliced vs. unspliced lifts; that the Baseline Schedule did not reflect the actual sequence which Pinner used to build the Tall Walls after the District imposed its interpretation of the splicing requirements on Pinner. (D.Feinblum, 9/23/21, 41:5-42:14.)

By the end of the preconstruction process, Pinner, its subcontractors, the design

team, and the District had identified enough cost saving measures and price cuts to submit the Contract amount to the District's Board for approval. (J.Davis, 4/7/21, 295:19-299:4.) Pinner signed Amendment 1 to the CSA on August 30, 2016; the CSA and Amendment 1 are collectively referred to herein as the "Contract". Under the Contract, including all documents included as "Contract Documents", the original date of Substantial Completion was December 11, 2018. (Ex. 37, Contract 33894 VACC Pinner Amendment 01 Executed, p. 7.) The GMP for the Project was $78,508,391.00 (§ 4.1.1(b)), and the Project was to be completed 851 days from the notice to proceed (§ 3.1.3). (*Id.* at pp. 2 and 3.) At the time the parties signed the Contract, both parties understood that the DSA had approved the Plans and Specifications, and would need to approve certain changes which might be made later; the testimony on exactly which changes would need DSA was conflicting.

Notably, although the Contract provided that Pinner would be entitled to a change order under certain circumstances (Ex. 37, Exhibit 7), the District Board, without Pinner's knowledge, initially imposed a no-change orders policy for the Project. The District's representative, Mark Strauss, and one of its Project Managers, Robert Tellez, were both aware of this no-change orders policy during the early stages of the Project construction, until it was lifted; Pinner was not. Mr. Tellez testified he had heard of the District's Board not wanting any change orders on the Project (9/3/21 R.Tellez, 63:3-13), and Mr. Strauss confirmed this situation, both in his testimony and in a key email recognizing his desire to get change orders issued quickly now that he could; that email reflects both the fact that the District Board had recently lifted the "no changes" policy, and that there were still Board-imposed limitations, even at that late date, on the amount of change orders which could be issued.

The evidence clearly established that the Board's initial no changes policy delayed the District's issuance and payment of legitimate change orders due to Pinner. The policy violated the Contract and put stress on Pinner, its rebar subcontractor, Mad Steel, and the Project as a whole, and led Pinner to have to advance its own funds and resources to keep the Project going. Mad Steel is a family-owned small business that does approximately $5 million worth of work per year. (D.Dominguez, 6/16/21, 168:12-15, 169:2-7.) The District's failure to process claims and change orders forced Mad Steel to fund approximately $3,000,000.00 in changes, including some over a year old, which was devastating to Mad Steel. (D.Dominguez, 6/17/21, 9:3-10:25.) In response, Pinner advanced Mad Steel half-a-million dollars to pay their vendors and provided man lifts and other equipment for Mad Steel to use to do its work; this was not equipment which Pinner had in its original pricing for the job. (R.Boynton, 6/18/21, 148:14-149:9.)

Pinner also advanced half-a-million dollars to McGuire, including purchasing plywood for additional formwork. (R.Boynton, 6/18/21, 149:14-151:9; 151:25-152:8.) These advances were critical to permitting Mad Steel and McGuire to complete the Project. During the "Clean Slate process" discussed below, Pinner also advanced money to subcontractors Maya Steel, Neubauer, Aragon, and City Commercial Plumbing.

(R.Boynton, 6/18/21, 149:17-18.) As of the Hearing, Pinner had advanced between $3 and $4 million to its subcontractors, including by releasing retention early, to keep the Project moving forward. (R.Boynton, 6/18/21, 152:14-23.)

Although the evidence established a number of normal construction issues which impacted the Project, including missteps involving notices, response times and similar issues, the key problem on the Project involved the parties' substantial and pervasive disagreement regarding whether Pinner and its subcontractors were permitted to splice vertical rebar above the thirty (30) foot level in the Tall Walls in the Main Theater; the evidence established that Pinner and its subcontractors Mad Steel and McGuire assumed such splicing would be allowed, and was even required by the Contract Documents. The District contended the Contract Documents prohibited such splices in numerous ways.

Unfortunately, the evidence also established that the parties' disagreement over the splicing issue was made worse by the parties' failure to manage it and the Project impacts caused by it once it surfaced. Both parties, some of Pinner's subcontractors, and the District's consultants, including QDG, bear responsibility for this worsening. That shared responsibility was supported by overwhelming evidence and justifies the decisions in this Final Award regarding damages and time extensions.

B. Key Provisions of the Contract and the Contract Documents

The Contract between Pinner and the District, and the Plans, Drawings and Specifications included in the Contract as Contract Documents, contained certain key provisions which are relevant to the disputes in this arbitration. Those provisions, many of which are highlighted below, must be interpreted in order to resolve the central issue in the case: whether the Contract Documents led Pinner and its subcontractors to assume they could splice vertical rebar for the Tall Walls in the Main Theater above the thirty (30) foot level, and permitted them to do so.

While witnesses for both parties pointed to the same key provisions and references on drawings to support their positions, those witnesses disagreed over the proper meaning or interpretations of a number of those key provisions. Many of the provisions most relevant to resolution of the claims and defenses in this arbitration include those related to splicing of rebar, scheduling, delay, changes, and damages discussed in this section, and in the balance of this Final Award.

1. Splicing Provisions

The District contends that many references in the Contract Documents clearly and unequivocally told Pinner that it could not splice the vertical rebar above the thirty (30) foot level in the Main Theater Tall Walls. Those references include the following.

Specification Section 03 3000-3.9D states: *"Splicing. Make splices only at those locations showing on the drawings or as accepted by the Architect."* Note 7 to Detail 6 on Drawing S002 further states: "*Reinforcing splices shall be made only where indicated on drawings.*" General Conditions Section 1.3.19- Order of Precedence, Subparagraph .9(3),

states "detailed Plans and/or Drawings shall have precedence over general Plans and/or Drawings."

Additional provisions, notes, details and reference throughout the Contract Documents, many of which are discussed below, were offered by the District, Pinner and their designated experts to support their respective interpretations of the splicing issue. Most notably, the structural experts, Gregg Brandow for the District, and Seb Ficcadenti for Pinner, provided extensive analysis and testimony regarding the various provisions they believe provide guidance and direction on the critical rebar splicing issue.

2. Scheduling Provisions

Contract provisions dealing with scheduling obligations were also important to resolution of the issues in the arbitration. Section 3.9.7 of the General Conditions entitled "Schedule Responsibility" states:

> 3.9.7 Schedule Responsibility. Contractor is and shall remain solely responsible, notwithstanding the District's, Program Manager's or College Project Director's review or approval thereof, for the accuracy, suitability and feasibility of all schedules it prepares for the Project, including, without limitation, the Construction Schedule, Submittal Schedule, "look ahead" schedules, recovery schedules and any updates thereof.

Specification Section 01 32 50, Paragraph 3.5.B.2. further states:

> B. Monthly Schedule Update Format.
>
> 2. Once the schedule is statused and submitted in accordance with Sub Section 3.5.B.1, upon CPT's request, Contractor shall correct all or specifically requested "out-of- sequence" logics that result from the updating process. Prior to submission of the out-of-sequence corrected Revised Schedule, **Contractor shall review and validate that all remaining activities along with their schedule relationships are still accurate based on the actual work flow in the field**. If Contractor wants to modify logic or add activities (other than out-of-sequence corrections), a prior CPT approval is required. If the proposed schedule modification results in the change of the critical or near paths, it shall be done in accordance with Sub Section 3.7. (Emphasis added.)

The District relied heavily on these provisions, and Pinner's alleged failure to comply with them, to support its case. Pinner offered evidence to support its assertion, in essence, that these obligations could not be met once the District imposed the splicing

prohibition and failed to seek relief from it through the DSA.

Finally, Article 8 of the General Conditions to the Contract describes the requirements for seeking and securing an adjustment to the Contract schedule. In general, that Article provides, among other things, that the Contract Time would be extended for "Compensable Delays" and "Excusable Delays" based on compliance with the other requirements of Article 8.

3. Changes Provisions

Various provisions in the Contract defined the parties' rights and obligations with respect to changes which might occur and have time and/or cost implications. Article 7 of the General Conditions to the Contract dealt with Changes in the Work. Under that Article, the District had the "absolute right" to make whatever changes the District "in its sole discretion" determined were "necessary or otherwise desirable" (Ex. 37, Exhibit 7, Section 7.1.16), and Pinner was obligated to continue with the work to "maintain continuous expeditious and uninterrupted performance of the work" even with respect to disputed changes. (*Id.* at Section 7.7.17.) The Article also provides, however, that Pinner was entitled to adjustments as appropriate and based on compliance by Pinner with the notice, allowable costs, markups and other provisions of the Article.

4. Delay Provisions

Certain Contract provisions also define the parties' duties and responsibilities related to delays to the Project completion. Section 1.1.89 of the General Conditions (Ex. 37, Exhibit 7) defines Excusable Delays as follows:

> **Excusable Delay means, other than a Compensable Delay,** to Contractor's ability to achieve Substantial Completion or Final Completion of the Work within the Contract Time that is (1) not caused, in whole or in part, by an act or omission of Contractor or a Subcontractor, of any Tier, constituting negligence, willful misconduct, a violation of an Applicable Law or a failure by Contractor to comply with the Contract Documents; (2) unforeseeable, unavoidable and beyond the control of Contractor and the Subcontractors, of every Tier; and (3) **the result of a Force Majeure Event ... Excusable Delays are not compensable to the Contractor, anyone performing under, by, or through the Contractor, or the District.** [Emphasis added]

Subparagraph 1.1.97 of the General Conditions defines a Force Majeure Event to include an Act of God, which includes, under Section 1.1.2 of the General Conditions, unusually severe natural or weather phenomenon occurring at the Site and causing Delay to performance of the Work at the Site. Thus, the Contract defines delay caused by severe rain as an "excusable", i.e., non-compensable, delay.

Contract General Conditions Section 1.1.44 defines "Compensable Delay" as follows:

> **1.1.44 Compensable Delays. For the Contractor, "Compensable Delay" means a Delay to the critical path of activities affecting Contractor's ability to achieve Substantial Compensation of the entirety of the Work within the Contract Time: (1) that is the result of (a) a Compensable Change, (b) the active negligence of District, Design Consultant, a District Consultant, or a Separate Contractor performing work at the campus, (c) a breach by District of an obligation under the Contract Documents,** or (d) other circumstances involving Delay of which Contractor is given under the Contract Documents a specific and express right to a Contract Adjustment adjusting the Contract Sum Payable; (2) that is not caused, in whole or in party, by (a) an act or omission of Contractor or a Subcontractor, of any Tier, consisting negligence, willful misconduct, or a violation of an Applicable Law or (b) a failure by Contractor to comply with the Contract Documents; and (3) for which a Contract Adjustment to the Contract Time is neither prohibited by nor waived under the terms of the Contract Documents. (Emphasis added.)

"Compensable Change" is defined, in relevant part, as:

> Circumstances involving the performance of Extra Work: (1) that are the result of ... (c) a Change requested by District in the manner required by Article 7, below, for authorization of Compensable Changes, or (d) other circumstances involving a Change in the Work for which Contractor is given under the Contract Documents a specific and express right to a Contract Adjustment; (2) that are not caused, in whole or in part, by (a) an actor omission of Contractor or a Subcontractor, or any Tier, consulting negligence, willful misconduct, or a violation of an Applicable Law, or (b) a failure by Contractor to comply with the Contract Documents; (3) for which a Contract Adjustment is neither prohibited by nor waived under the terms of the Contract Documents; and (4) that if performed would require Contractor to incur additional and unforeseeable Allowable Costs that would not have been required to be incurred in the absence of such circumstances.

5. Damages Provisions

Section 3.3 of the Construction Services Agreement, entitled "Liquidated Damages to Contractor", provides for the payment of liquidated damages to Pinner for a

Compensable Delay that extends the date of Substantial Completion. In particular, Sections 3.3.1 and 3.3.2 of Section 3.3 provide:

> 3.3.1 Contractor's Right. District and Contractor acknowledge and agree that if Contractor is unable, due to Compensable Delay, to Substantially Complete the Work within the Contract Time, the Contractor and its affected Subcontractors will suffer Losses which are both extremely difficult and impracticable to ascertain. On that basis they agree, as a reasonable estimate of those Losses and not a penalty, to the payment by District of liquidated damages as provided in this Section 3.3.
>
> 3.3.2 Per Diem Rate. The Contract Sum Payable shall be increased by Change Order or Unilateral Change Order by the sum of Four Thousand ($4,000.00) Dollars per Calendar Day as liquidated damages for each Day for which the Contractor is entitled under the Contract Documents to a Contract Adjustment extending the Contract Time for Substantial Completion due to Compensable Delay, with no additional amount for Allowable Markup or any other markup for overhead or profit thereon.

Article 1 of the General Conditions defines "Loss" or "Losses" as "any and all economic and non-economic injuries, losses, costs, liabilities, claims, cost escalations, damages, actions, judgments, settlements, expenses, fines and penalties. ..." (Emphasis added).

Section 3.3.4 of the Contract further provides that Liquidated Damages are the Contractor's "exclusive right and remedy" for delay, as follows:

> Liquidated damages payable pursuant to this Section 3.3 constitute the Contractor's sole and exclusive right and remedy for recovery from District of Losses to Contractor and its Subcontractors, of any Tier, due to Delay regardless of the cause, duration or timing, attributable to Compensable Delays.

Additionally, General Conditions Section 7.7.1.2 provides:

> Contract Adjustments that are based on an extension of the Contract Time for Compensable Delay ... shall be calculated exclusively in the manner stated in the provisions of Section 3.3 of the Construction Contract ... with no allowable markup thereon for Contractor or any Subcontractor, of any Tier.

Finally, Section 7.7.7.3 of the General Conditions provides that markups are not permitted on any liquidated damages payable for "Compensable Delay". (Ex. 37, Exhibit 7.)

C. **Tall Wall Splicing Issues**

Substantial evidence was presented by all parties during the Hearing regarding Project events and the causes of delays and extra costs addressed in TIA 6, TIA 7 and COP 292. When evaluated in full, that evidence overwhelmingly established that the major problem causing those costs and delays arose from a dispute over the proper interpretation of the Contract Documents as they relate to whether rebar splices were permitted or prohibited above the thirty (30) foot level in the Tall Walls in the Main Theater; Pinner and its key subcontractors, Mad Steel and McGuire, assert that the Contract permitted such splices, as they properly assumed when they bid the Project and entered into the Contract and subcontracts; the District contends such splices were clearly prohibited by the Contract.

Despite the differences in the parties' views of the proper interpretation of the Contract Documents on this issue, a few things were clearly and persuasively established as facts by the persuasive, credible evidence:

- the parties and their consultants did not discuss the Tall Wall splicing issue during the lengthy preconstruction period before executing the Contract;
- Pinner, Mad Steel and McGuire all assumed during the preconstruction period, while they were developing their pricing and scheduling of the work, that they would be allowed to splice vertical rebar above the thirty (30) foot level of the Tall Walls in the Main Theater;
- there was no specific, clear and unequivocal statement in the Contract Documents issued by the District and its consultants stating that Pinner could not splice the vertical rebar above the thirty (30) foot level in the Main Theater Tall Walls;
- during construction, Pinner was allowed to splice rebar in the horizontal direction without DSA approval, even though many of those splices were not shown on the elevations or other drawings in the Contract Documents;
- no laws or regulations offered by either party categorically prohibited vertical splices of the type Pinner and Mad Steel sought to make;
- numerous witnesses had worked on projects where splicing in vertical rebar in Tall Walls had been permitted above the thirty (30) foot level; and
- the District ultimately both refused to permit Pinner/Mad Steel to splice the vertical rebar above the thirty (30) foot level in the Tall Walls in the Main Theater and made the decision for its own reasons not to pursue approval to permit such splicing from the DSA.

Beyond these points of agreement, the parties' positions regarding what the Contract documents permit (and require) with respect to rebar splicing diverged significantly.

Ultimately, after considering all the evidence and testimony on this issue, Pinner

offered the stronger and far more persuasive evidence to support its assertion that, at a minimum, the Contract Documents, taken as a whole and as bolstered by regulatory and statutory guidance and mandates, allowed Pinner, Mad Steel and McGuire to assume Mad Steel would be allowed to splice vertical rebar above the thirty (30) foot level in the Main Theater Tall Walls. To the extent there was some support in the Contract Documents for the District's 17 position that such splices were clearly prohibited, that supporting evidence was not persuasive, and, in fact, at most only created an inconsistency or ambiguity in the Contract Documents for which the District bears responsibility.

The persuasive evidence presented at the Hearings also established that once the disagreement over the interpretation of these splicing requirements surfaced, the District failed to address it in a manner which would have mitigated some of the delays, disruptions and added costs associated with the District's decision to prohibit the vertical splices. Those failures also bear on the responsibility for the added costs and delays.

The law is clear that a contractor who, acting reasonably, is misled by the contract documents produced by a public agency is entitled to damages. (*LAUSD v. Great American Ins. Co., supra* (2010) 49 Cal.4th at 748.) This is true even if the contract documents are technically correct, but simply do not include material information within the public entity's knowledge. (*Id.* at 745.) This is exactly what the evidence established here; the District had the opportunity and the obligation to issue clear and complete Contract documents on this key splicing issue, but it did not do so.

Pinner and its subcontractors reasonably interpreted the Contract Documents to permit the splices in the Tall Walls without additional DSA approval. (G.Ledezma, 4/7/21, 380:18-381:20; M.Dominguez, 4/8/21, 634:15-635:24; I.Larios, 6/14/21, 98:1-98:9, 102:5-105:23.) Moreover, persuasive witnesses testified that splicing at the construction joints in the Tall Walls is the industry standard. Manuel Wilson of McGuire also testified persuasively regarding the kind of notations and directions he had seen on documents on other projects where splicing was intended to be prohibited; such notations were totally absent from the District's Contract Documents. (M. Wilson, 4/21/21.)

Pinner and its key subcontractors persuasively explained why they reasonably interpreted the Contract Documents to not only permit the splices in the Tall Walls without DSA approval, but to require them, and what they did in bidding and scheduling the job as a result of this understanding. (see, e.g., G.Ledezma, 4/7/21, 380:18-381:20; M. Dominguez, 4/8/21, 634:15-635:24; I. Larios, 6/14/21, 98:1-98:9, 102:5-105:23.) Those witnesses testified, in general, that splicing at the construction joints in the Tall Walls is the industry standard, and that there would be construction joints in numerous places not specifically depicted on the drawings. From the beginning of the Project, Mad Steel believed it would be able to splice the Tall Wall rebar. (M.Dominguez, 4/8/21, 635:1-19.) Mad Steel's bid included a takeoff for the weight from ground level to the roof which was approximately 380,000 pounds, and assumed Ironworkers average 1,600 pounds per day. (M.Dominguez, 4/9/21, 709:1-14.) Based upon these rates, Mad Steel estimated that it

could build the Tall Walls in Area A with a four-man crew in 12 weeks. (M.Dominguez, 4/9/21, 710:21-24; 716:18-25.)

Additionally, based on its review of the specifications and, in particular, the construction joint dimensions, McGuire's unrefuted testimony confirmed its bid had sufficient forms to perform the work based upon the as-planned schedule. (I.Larios, 6/14/21, 111:9-15.) McGuire interpreted the plans and specifications as permitting the Tall Walls to be constructed in 20-foot lifts. (M.Wilson, 4/12/21, 24:17-25.)

Perhaps the most persuasive evidence on how the Contract Documents were intended to be interpreted, however, was the testimony of Simon Rees, the original structural engineer of record ("SEOR") who oversaw the design and production of the relevant structural documents issued to bidders to bid, and of Seb Ficcadenti, Pinner's structural expert. Their testimony was clear, persuasive and determinative on these splicing issues.

Mr. Rees testified clearly that he did not intend by the references included in the Contract Documents to prohibit splices in the upper portions of the Tall Walls. (S. Rees, 6/9/21, 19:25-21:7; 25:7-26:3; 28:12-22; 16:7-17:23; 73:1-73:12.) Among other things, he testified as follows:

> Q. Were these vertical lines intended to prohibit the contractor from splicing at that horizontal Construction joint.
>
> A. I recall no intent to prohibit splicing. (Rees, 6/9/21, p. 20.)
>
> Q. Let's talk about this project.
> If your calculations showed that splicing needed to be prohibited, how would you have communicated that to the contractor in the documents? ...
>
> A. If there was an area where we had intended to prohibit splice exclusively, I would hope that our practice in general on projects, at least that I am in charge of, would be to explicitly state a splice would be prohibited in that instance.
>
> Q. so when you use the splice, no splice zone, or splicing prohibited?
>
> A. Something on the wall elevations would do that. (S. Rees, 6/9/21, pp. 16-17.)
>
> Q. Are these vertical lines intended to prohibit the contractor from splicing at those construction joints?
>
> A. So long as they were approved in the shop drawing process, the construction joints, as long as they were approved ... I don't recall any intentional intents to prohibit lap splices to this wall.
>
> Q. Do you see any notes listed here that would prohibit the contractor from splicing approved construction joints between the 15 and 64 foot levels of gridline 5?
>
> A. No, I do not...

Q. What are the horizontal lines intended to describe to this contractor.

A. They represent the horizontal reinforcement in the wall perpendicular to the vertical reinforcement. And again, they represent the size of the reinforcing bar, the spacing of the reinforcing bar, the fact that the bar curves on three phases of the wall or spaces as that abbreviation says.

So this indicates the size, spacing, and extent of the typical horizontal bar being distributed throughout that wall.

Q. Is that bar intended to show all permissible splices?

A. No. …

Q. All right. The same question with – for the horizontal control joints. Were these vertical lines intended to prohibit the contractor from splicing above the 15 foot level?

A. That is not my interpretation.

Q. Based on what you have been shown here today, did your design prohibit splicing at horizontal control joints so long as they were approved in the shop drawing process?

A. I have not seen anything that would prohibit the introduction of splicing in the enforcement approved through the appropriate process.

Q. Did LACCD or its design team contact you and ask you whether the vertical line shown on this drawing was intended to prohibit splicing…

A. I do not recall being contacted during that period. (e.g., S.Rees, 6/9/21, 19:25-21:7; 25:7-26:3; 28:12-22; 16:7-17:23; 73:1-73:12.)

Despite strong, skillful and focused cross examination by Counsel for the District, Mr. Rees remained unshaken in his overall testimony on the key issue in this case: whether the Contract Documents which he drafted and oversaw prohibited the relevant splices. On redirect, he testified:

Q. Despite everything that Mr. Fleming told you, have you been shown anything that prohibits splicing at horizontal construction joints in the upper levels of the theater?

A. Again, my interpretation is splicing is not prohibited. (S. Rees, 6/9/21, 61.)

While Kevin Tyrell, the District's Architect of Record ("AOR"), and other witnesses essentially testified that it is the SEOR during construction whose decisions on what is permitted under the Contract Documents is relevant, that conclusion, even if accurate, does not resolve the issue of whether Pinner, Mad Steel and McGuire reasonably interpreted the Contract Documents to permit the splicing in the Tall Walls, and therefore should be compensated for the delays and extra costs incurred as a result of the District's decision to prohibit splicing in the vertical rebar above the thirty (30) foot level. The evidence, weighed and considered as a whole, establishes that they did and should be,

especially in light of the District's response to the problem once it surfaced.

The District relied on the testimony of a number of witnesses to support its position, but especially the testimony of the District's structural expert, Gregg Brandow. The District's position is that the only permitted vertical splice locations for the Main Theater Tall Walls are shown on the Project drawings in two ways: either on the S311-series Structural Drawings as discontinuous/overlapping lines, or through detail call-outs at specific locations. Mr. Brandow's testimony highlighted the following to support the District's position:

- The California Building Code ("CBC") expressly provides that construction documents for structural concrete construction shall include the "anchorage length of reinforcement and location and length of lap splices." (G. Brandow, 9/22/21, 133:15-134:5; Exhibit 157, p. 5.)

- The Contract Drawings consistently show splices in vertical rebar where the walls are intersected by a floor or roof, and no splices where there is no such intersection. (*Id.*, pp. 135-140; Ex. 157, pp. 8-19.)

- Standards issued by the American Concrete Institute ("ACI") provide that where the structural engineer has determined the location of lap splices is critical to the design, those splice locations will be shown on the construction documents. (G. Brandow, 9/22/21, 142:11-143:3; Ex. 157, pp. 24-25.

- ACI Standards also state that, where not critical to the design, it is proper for the structural engineer of record not to indicate splice locations on ***horizontal*** rebar. (*Id.*, pp. 143-144; Ex. 157, p. 26.)

- The Structural Drawings clearly show the size, spacing, and location of splices in the vertical rebar. (*Id.*, 145:5-20; Ex. 157, pp. 28-29.)

- Robert Liu, the DSA's structural engineer, concurred that the location of rebar splices on the drawings is "crystal clear." (*Id.*, 146:9-147:5; Ex. 157, p. 30.)

- The "General Note" that states "Provide Class B splice at all reinforcement crossing construction joints, typical U.N.O." does ***not*** mean Pinner/Mad Steel could automatically put a splice there. (*Id.*, 150:5-24; Ex. 157, p. 34.)

- Drawing S/002-Structural General Notes, Reinforcing Steel for Concrete, which states at item 7: ("Reinforcing splices shall be made only where indicated on the drawings") applies to all of the S311 plan sheets that show the wall elevations for the Main Theater walls, and especially the vertical reinforcing bars, because those bars have splices shown. (*Id.*, 151:20-152:21; Ex. 157, p. 37.)

- Splices shown on the structural drawings for specific vertical reinforcing bars are the ***only*** splices allowed on those bars, and no notes are required to disallow additional splices. (*Id.*, 154:2-9; Ex. 157, p. 40.)

- Any proposed revision to the number or location of reinforcing splices in the vertical rebar requires the approval of the Architect, Structural Engineer of Record and the DSA. If all those approvals are not obtained, the contractor is required to build the walls per the Drawings. (*Id.*, 157:2-10; Ex. 157, p. 44.)

- There is absolutely no requirement that any of the design professionals whose approval is required must accept a modification to the rebar design proposed by the contractor; rather, the response to the contractor's requests can simply be "build the Project per the approved structural drawings." (*Id.*, 165:12-166:3; Ex. 157, p. 59.)

- It was possible to build the Main Theater Tall Walls exactly as shown in the DSA-approved drawings, and Pinner did so. (*Id.*, 169:19-170:2; Ex. 157, p. 63.)

Despite these positions, however, Mr. Brandow also opined that it was "reasonable for the Contractor to assume that some additional splices will be allowed" in the horizontal rebar in a letter he sent to the District in August of 2020. (Ex. 110, 0 p. 4/11.) While Mr. Brandow and other District witnesses argued that this concession applied only to splicing in horizontal rebar, their attempt failed to counterbalance the evidence which established the reasonableness of the interpretation of the Contract Documents made by Pinner, its subcontractors, other witnesses and evidence.

With respect to Mr. Brandow's reference to the CBC requirements noted above, the Contract Documents satisfy that requirement as it relates to splices in the upper portions of the vertical rebar in the Tall Walls. Specification § 03 3000-3.10-C.2 requires horizontal construction joints at a "maximum 20 feet apart in vertical direction unless otherwise shown." (Ex. 19, Spec – LACCD Vol.1, p. 83/911.) Exceeding this 20-foot limitation would require a Construction Change Directive ("CCD"). (Ex. 17, RFI#633_1-S311C [rejecting proposed location because the pour would exceed 20 feet and require a CCD].) This construction joint spacing is necessary both for constructability purposes and to control cracking of the concrete. (G.Brandow, 9/22/21, 148:24-149:3.)

Additionally, once the construction joint locations are determined, Note 3 on 4/S002 requires Pinner to "[p]rovide Class "B" splice at all reinforcement crossing construction joints, typical U.N.O." (Ex. 22, (0315.00) S002.) "Typical U.N.O." means the default is to install a Class B splice at all reinforcing crossing construction joints unless noted otherwise. (C.Sprecher, 9/20/21, 40:5-20.) Moreover, the CBC, which simply requires the construction documents to include "location and length of lap splices" (Ex. 136, CH 19A), and ACI 315R-2018, do not distinguish between horizontal and vertical rebar. (G.Brandow, 9/22/21, 208:4-15.)

Finally, General Conditions 7.1.6 does not distinguish between horizontal and vertical splices when requiring DSA approval for changes to the structural drawings. (Ex. 37, Exhibit 7 – General Conditions_S, p. 73/136.) Only by reading the word "vertical" into various provisions upon which it relies can the District claim those provisions prohibit splicing of the vertical rebar while still permitting the horizontal splicing that the District

repeatedly permitted throughout the construction of the Tall Walls. This reading in is not supported by the Contract, persuasive testimony or applicable rules of Contract interpretation

The District did not include a typical detail showing a construction joint in the upper portion of the Tall Walls, either with or without splicing. (See C.Sprecher, 9/20/21, 47:15-48:1); the District's failure to do so was a substantial cause of the impacts and attendant extra costs at issue in this arbitration. However, the typical construction joint details the District did include, including the Typical Wall Construction Joint Detail on 4/S101C and the construction joint details at floor levels, did provide what the CBC requires. Because the Contract Documents provided that work "not particularly shown, detailed, marked, or specified," must be built "the same as similar parts that are shown, detailed, marked, or specified." (G.Brandow, 9/22/21, 186:9-22 [citing Ex. 37, Exhibit 7 – General Conditions_S, p. 20/136, §§ 1.3.7, 1.3.8), Pinner was justified in relying on the Construction Joint Detail referenced above.

Despite all these provisions on which the District tries to rely to support its position regarding vertical splices, Pinner was allowed to splice the horizontal rebar in areas not shown on the drawings. As Mr. Tyrell explained it, there was not "any controversy about horizontal rebar and splicing." (K.Tyrell, 9/15/21, 89:17-19.)

Pinner's structural expert, Seb Ficcadenti, explained persuasively that building walls in lifts with splices at the joints is standard practice and is "clearly the most effective way from a cost standpoint to do it." (S.Ficcadenti, 6/16/21, 14:22-5:12.) Mr. Ficcadenti also fully refuted the testimony of Gregg Brandow on the vertical rebar splicing issue; he opined, with numerous references to the Contract Documents, that the Drawings and Specifications do not expressly "prohibit" splices in the vertical reinforcing steel. (See, e.g., S. Ficcadenti Decl., ¶¶4, 6, 9, 10, 12, 13, 19 and 22.) Mr. Ficcadenti's position was bolstered by the undisputed testimony that the District Project personnel permitted numerous splices in the horizontal rebar even though they were not shown on the drawings.

First, Terry Tsaing, the District's SEOR, testified that during the preconstruction period, the District changed multiple splice locations without indicating the need DSA for approval; this testimony undercut the District's position that getting approval to splice above the thirty (30) foot level would have required DSA approval and taken a long time to achieve, even if it could have been achieved. (T.Tsaing, 6/10/21, 120:11-124:6 [discussing Ex. 43, RFCs 70 and 71].) Mr. Tsaing also testified that the Specifications permitted Pinner to make splices at locations other than those shown on the drawings. (T.Tsaing, 6/10/21 , 83:11-84:7.)

Kevin Tyrell also admitted that "the architect really did approve thousands of added horizontal splices that aren't graphically shown on the elevation." (K. Tyrell, 9/15/21, 110:6-15.) In fact, Mr. Tyrell went further and admitted that the architect also likely approved splices in the *vertical rebar* that were not graphically depicted at other walls on the Project. (K.Tyrell, 9/15/21, 110:6-15; 164:12-18.) This testimony was persuasive and

further undercut the District's position.

Both Mr. Brandow and Mr. Ficcadenti confirmed that the wall elevations do not graphically depict all the splices permitted by the District in the Tall Walls. (G.Brandow, 9/22/21, 193:7-17; S.Ficcadenti, 6/16/21, 47:6-49:9, 134:15-25 and Declaration of Seb Ficcadenti dated September 30, 2021.) In fact, the wall elevations include a continuous line indicating horizontal rebar spanning the entire upper portion of the wall along gridline C, (Ex. 22 (0397.00) S311B- Opening GL C), far exceeding the 60-foot maximum length for commercially available rebar. (K.Tyrell, 9/15/21, 107:1-11.) In light of all this testimony, the District's attempts to explain why the same requirements did not apply in the same way to vertical splices as to horizontal splices, including Mr. Brandow's testimony that ACI Standards state that where not critical to design, it is proper for the structural engineer of record not to indicate splice locations on horizontal rebar, were simply not sufficient or persuasive.

Finally, the testimony offered by Craig Sprecher to try to backtrack from the representation which the evidence showed he made during the Project, namely, that Pinner's interpretation of the Contract Documents was reasonable, was simply not persuasive. (S.Gordon, 6/11/21, 18:18-25.) Similarly unpersuasive was Mr. Sprecher's testimony that he did not know what he had meant by indicating that Inspector Sal Torres would not have a problem with splices being approved in the shop drawing process, or that Sal was just "buying time…" (C.Sprecher, 9/20/21, 69-72.)

One of the major problems with the District's position is that it relies on changing the meaning of symbols, Specification provisions, notes on the Contract Documents, and even the California Building Code depending on what is needed to support the argument as to particular splices. The District's witnesses interpreted the same provisions differently depending on whether the rebar in issue is horizontal or rebar, and gave an entirely different effect to the same wording used in different provisions, even though there was no clear guidance in the respective provisions which justified them doing so. For example, the Specifications for both rebar splices and construction joints require approval by the Architect, but not the DSA, for elements that are not indicated on the drawings. (K.Tyrell, 9/15/21, 82:18-25.) Similarly, the General Conditions require DSA approval for all changes to the structural drawings, not just changes to rebar splices. (Ex. 37, Exhibit 7 – General Conditions, p. 73/136.) Despite these identical requirements, however, the District did not submit the location of the construction joint locations to the DSA for approval.

Moreover, evidence regarding the District's conduct during construction supported different conclusions on what splices required DSA approval. According to the District's structural expert, Gregg Brandow, the District needed DSA approval for splices in the horizontal rebar on S311D other than the two locations graphically depicted on the elevation. (G.Brandow, 9/22/21, 239:9-241:3.) The evidence established clearly, however, that the District approved splices in the horizontal rebar at additional locations along the wall without seeking DSA approval.

The evidence Included other examples of these varying interpretations of the same language by the District which provide overwhelming support for Pinner's position that, at a minimum, it was led by the District's Contract Documents to assume that rebar subcontractor Mad Steel and concrete subcontractor McGuire would be permitted to use a widely-accepted, and not expressly-prohibited, approach to building the Tall Walls in the Main Theater, splicing in the vertical (and horizontal) rebar above the thirty (30) foot level. If the SEOR who was instrumental in preparing or overseeing the production the Project documents did not intend to prohibit splicing by those documents, it was not unreasonable for Pinner, Mad Steel and McGuire to assume, as they clearly and indisputably did that, such splicing would be allowed. Accordingly, that interpretation prevails here.

Despite the fact that at least under one interpretation of the Contract Documents used by the District to allow many splices not shown on the elevations, the District did not need to seek DSA approval for the vertical splices because the plans are clear that Pinner was required to splice at the construction joints (S.Ficcadenti, 6/16/21, 90:10-24), the District did so initially through the submission of CCD 19. Unfortunately, the original CCD 19 package was poorly put together and incomplete, and the DSA sent it back rejected, but with notes indicating what was needed for the DSA to consider it. (S.Ficcadenti, 6/16/21, 98:4-99:4.). (Ex. 26, LAVC CCD 19 Rejected.) Whether the DSA would have accepted a complete and coordinated package on its initial submission is unknowable; the evidence established that the DSA repeatedly rejected the first submission of a CCD on this Project, but later approved the CCD. (Ex. 26 Updated CCDs, CCD Log_As of 8-19-2020.)

Additionally, despite the conclusion of Mr. Tyrell, there was no persuasive evidence to support the view that the DSA's rejection of the initial submission of CCD 19 suggested pursuing CCD 19 would be like dropping a nuclear bomb on the Project. Nor was the District's claim that proceeding with CCD 19 was not feasible because of the amount of work required to respond to the DSA's request for additional information persuasive. (M.Strauss, 9/20/21, 86:12-17.) The District's SEOR at the time, Mr. Tsaing, testified that he had no doubt that they could complete the necessary revisions and the resubmittal could have been completed within a week with four people working on it. (T.Tsaing, 6/10/21,118:18-120:2.) The District's original SEOR and Pinner's structural engineering expert testified to similar estimates. (S.Rees, 6/9/21, 52:8-17; S.Ficcadenti, 6/16/21, 97:6-98:3.) And there was persuasive evidence that the cost to complete the resubmission would be less than $22,000.00. (M.Strauss, 9/20/21, 145:2-19.)

The District's decision to present CCD 26, the couplers option, to the DSA (M.Strauss, 9/20/21, 140:13-14), was also not reasonable. The District's design team admitted the alternative was not viable even before seeking DSA approval for it (C.Sprecher, 9/20/21, 85:12-85 [citing congestion]); the District's own minutes for the weekly construction meeting on July 19, 2021, which both Mr. Strauss and Mr. Tyrell, but not Mr. Tsaing, attended, explain that "[a] structural meeting with R. Liu is scheduled for tomorrow. CCD #19 will present to R. Lui with the couplers details and they will discuss

that the ***couplers will not work on this project and the design team recommendation to go with the splicing***." (Ex. 101, WCM #026-050, Weekly Construction Meeting 044 07 26 17, Weekly Construction Meeting #044R 071217, Item 032-002 [emphasis added].)

Although the District had sufficient input from its consultants and its own staff both that the coupler option would not work, and that the vertical splicing was viable and might be approved by the DSA if properly presented, the District decided to forgo that route and force Pinner either to use the coupler system – at Pinner's own expense – or to build the Tall Walls without vertical splices. The overwhelming persuasive evidence proved that these decisions resulted in further delays, disruptions and added costs. While no evidence established that it was a certainty that the DSA would approve the vertical splicing approach, having created the problem, the District had the obligation to either solve it, or bear the consequences.

Based on all the evidence and numerous other exhibits and evidence offered in the arbitration, this Final Award finds on the facts and concludes on applicable law that the interpretation of Pinner and its subcontractors of the Contract Documents regarding splicing was fully supported by overwhelming, persuasive evidence and that Pinner and its subcontractor were justified in concluding from the Contract Documents and things said and not said in the pre-Contract period – and did conclude – that splicing would be permitted in the vertical rebar above the thirty (30) foot level in the Tall Walls in the Main Theater. Applicable law finds that a contractor who, acting reasonably, is misled by the contract documents produced by a public agency is entitled to damages. (*LAUSD v. Great American Ins. Co., supra* (2010) 49 Cal.4th at 748.) This is true even if the contract documents are technically correct, but simply do not include material information within the public entity's knowledge. (*Id.* at 745.)

D. Schedule Analysis

The District offered substantial evidence to support its claim that Pinner failed to meet its scheduling obligations under the Contract, and used that evidence to try to prove that all delays in the TIA 6 and TIA 7 period were the fault of Pinner, not the fault of the splicing interpretation by the District. The District's case largely relied on a premise which the overall weight of the evidence simply did not support: that it was solely the incompetence, mismanagement and poor planning and scheduling of Pinner and its subcontractors, not the District's splicing prohibition and related conduct and decisions, which caused virtually all of the delay, disruption and added costs in the TIA 6 and TIA 7 time periods.

Specifically, the District offered evidence to try to prove that the true reasons for the delays during the TIA 6 and TIA 7 time periods were: (1) Pinner's failure to properly manage and coordinate the placement and installation of the formwork, embeds and rebar; (2) a steep learning curve with resulting slow progress by Mad Steel; (3) slow progress by formwork subcontractor McGuire prevented Mad Steel from performing its work in an uninterrupted manner; and (4) the diversion of critical resources to other areas of the Project

when they should have been completing other critical work. While there was evidence offered to support some of these criticisms, that evidence was countered by other, more persuasive evidence which established that the District has the major responsibility for the problems which arose from the Tall Walls splicing issue.

For example, while the District offered evidence to show that Pinner changed its approach to work on the Project early on in response to a period of heavy rain, when some areas of the basement dried out more quickly than others, and then characterized Pinner's actions as essentially "abandoning" its previous plan to proceed roughly clockwise, instead proceeding in a "hopscotch" pattern (M. Strauss, 9/20/21, 179:7-180:11), the evidence actually showed that Pinner's actions were prudent and an example of good Project management. When planned work in one area is delayed for whatever reason, it is prudent for a contractor to move to other areas to progress the job, as Pinner did here.

The evidence also established that many design changes and issues for which Pinner was not responsible caused delays to the Project. Many of those design issues, impacting many portions of the entire Project, forced Pinner to redirect crews to different areas to do unaffected work and keep the Project moving. (R.Boynton, 6/18/21, 132:25-134:11.) Moreover, the District's responses to RFIs were often late and incomplete, further exacerbating the design issues. (R.Boynton, 6/18/21, 141:8-142:9.)

Beginning in late 2017, and continuing through the start of the Clean Slate Meetings discussed below and thereafter, Pinner sent multiple notices asking for the District's help in resolving the outstanding design issues. (R.Boynton, 6/18/21, 135:17-141:7; Ex. 39, 171018 RFI & CCD Delay Letter, 171018 RFIs 249, 293 & 537; R.Boynton, 8/30/21, 97:7-116:16; Ex. 6 , 171018 Delay Notification, 171114 delay letter; Ex. 13, RE Horizontal Wall CJ at GLC, Area A is Stopped Due to CCDs; Ex. 39, 180117 Letter of Delay; 180221 Delay Notice.) Robert Tellez, one of the District's Assistant Construction Managers and then Project Manager on the Project, testified that he did not recall disagreeing with many of the delay letters sent by Pinner, including Pinner's notice involving the District's delay in approving the construction joint locations. (R.Tellez, 9/3/21, 33:17-24) Moreover, when questioned about the issue, Mr. Tellez was unable to explain how Pinner could submit a shop drawing (which the District alleged was late or not provided) without knowing where the splicing was going, or a formwork submittal without knowing where the construction joints would be located. (R.Tellez, 9/3/21, 33:25-34:-13.).

Moreover, as early as September 2017, Pinner's rebar subcontractor, Mad Steel, began notifying Pinner, who then notified the District, of its growing frustration with the various delays and impacts on the Project, and its concerns about the longer-term implications of those delays and disruptions. On September 7, 2017, Mad Steel sent Pinner a letter expressing its frustration regarding the outstanding RFIs (Requests for Information) and CCDs (Construction Change Directives), and asserting that design issues were significantly impacting Mad Steel's work. (Ex. 112, 02; M.Dominguez, 4/9/21, 717:4-719:12.) Mad Steel advised that due to the number of CCDs and RFIs, if everything came

back at once, Mad Steel would have to dramatically increase its crew sizes to deal with the new changes. (M.Dominguez, 4/9/21, 719:13-720:13.)

Matt Dominguez testified persuasively and extensively regarding the impact of missing formwork on Mad Steel's work, as well as the overall impact of the splicing prohibition. (M. Dominguez, 6/10/21, 40:22-43:1.) He also testified about how he had anticipated doing the rebar work on the Project during bidding, and the impacts on Mad Steel's work when he could not do the work as planned because of the no-splice decision and other delays:

> ...When we go out of the sequence, not only does it hinder the rebar, it hinders the manpower. Out of sequence work requires me to bring out multiple truckloads of steel.
>
> If I'm planning to work on one wall, sir, and I pull off that wall, delay. What do we now? We are looking for another area to attack. We are looking for another area to go to. So potentially that rebar is no good to me no more until I can get to it. So I'm storing rebar and I'm doing other things because of the delays. (M. Dominguez, 4/9/21, 721:4-17.)

Recognizing the problems that were plaguing the Project, and the need to resolve them in order to avoid more delay, disruption and added costs, in February 2018, the District and Pinner agreed to participate in meetings which came to be called the "Clean Slate Meetings" to address the various issues on the Project and come up with a road map to completion. (R.Boynton, 8/30/21, 120:3-23.) As Mark Strauss characterized those meetings, they were intended to find a path to resolution on a number of issues that had arisen between the District and Pinner, including the accuracy of Pinner's schedule. (M. Strauss, 9/20/21, 180:24-181:7.)

During the Clean Slate Meetings, Pinner projected that the ongoing design issues would result in $16 million dollars in claims, including outstanding claims which were causing tremendous difficulty for subcontractors like Mad Steel, who were completely out of money and unable to obtain materials from their vendors, jeopardizing their ability to complete the Project. (R.Boynton, 6/18/21, 146:23-147:22.) The Clean Slate discussions continued throughout much of 2018. The evidence established that both the District and Pinner put substantial effort into the process; that effort produced better clarity regarding what needed to be done to get the Project back on track. Unfortunately, even with that clarity, Pinner and the District both failed to move the Project forward as effectively as they could have.

On November 27, 2018, Pinner sent the District a revised version of what was referred to as the "Clean Slate Schedule." (Ex. 137, item 8.) Despite Mr. Strauss recognizing that this Clean Slate Schedule finally provided a more accurate depiction of the sequence of work as Pinner was actually performing it in the field (M. Strauss, 9/20/21, 182:21-183:2), the District refused to accept it because it reflected a 7-month extension of

the Substantial Completion Date, and was followed by a Clean Slate settlement amount of $13 million to cover this extended Project duration. (Ex. 109, District letter to Pinner dated 12/4/2018; M. Strauss, 9/20/21, 183:3-185:16; R. Tellez, 9/3/21, 93:24-18; 116:6-14.)

On December 4, 2018, Mr. Tellez wrote Pinner stating that the District did not "accept" the Clean Slate Schedule and the proposed extension of the Substantial Completion date, but that Pinner could use the schedule "to provide accurate updates in the future". (Ex. 109, item 4.) The District took this position despite Pinner's agreement in its letter that by accepting the schedule, the District would not be committing to the legitimacy of the additional amount claimed. (Ex. 151, VACC_Response to CS Schedule 11-12-18; R.Tellez, 9/3/21, 93:24-98:18.)

On December 27, 2018, Pinner responded to the District's position, stating that although the latest version of the Clean Slate Schedule was the closest thing to a schedule reflecting the actual sequence of work, it remained "privileged," with the result that the District "may not use the 'clean slate' schedule or any electronic version thereof for any purpose..." (Ex. 137, item 10.) This response by Pinner was unfortunate and not productive of moving the Project forward; moreover, Mr. Tellez testified that it was unclear from the evidence whether Pinner actually did follow the schedule after December 2018, and that the Project was continuing to fall further behind the schedule. (R. Tellez, 9/2/21 734:13-17.)

The evidence regarding exactly what schedule Pinner was pursuing after December 2018 was unclear. What was, however, established by clear, convincing evidence is that all the effort the parties put into the Clean Slate process did not resolve responsibility for the costs and time extension sought in this arbitration. And while the evidence did establish some responsibility on Pinner's part for the problems for which Pinner seeks recovery through TIA 6, TIA 7 and COP 292, that contribution by Pinner was limited. The overwhelming weight of the persuasive evidence offered by the parties, the witnesses and the evidence established that the District's decision to enforce its interpretation of the Tall Walls splicing requirements and to refuse to seek what it asserted was necessary DSA approval to permit such splices was the major reason for the delays, disruptions and extra costs sought by Pinner and many of its subcontractors.

Neither of the parties' cost and scheduling experts based their opinions on the conclusions on responsibility supported by the evidence as found in this Final Award. While they are obviously both qualified and competent to perform the cost and scheduling analyses they undertook in this case, the testimony of both Denny Lee and Daniel Feinblum suffered from the failure to consider certain key facts and circumstances established by overwhelming and convincing evidence which impact the allocation of delays and disruptions to the Project. Both experts in essence held the party by whom they were not retained virtually completely responsible for the delays caused by the vertical rebar splicing position taken by the District and the other design and related problems; neither gave sufficient consideration to certain key facts and circumstances established by

overwhelming and convincing evidence which impacts the allocation of delays and disruptions to the Project. For that reason, neither of their conclusions is fully accepted in this Final Award.

For example, Mr. Feinblum's assertion that the only potential District-caused delay to Lift 2 for the no-splice interpretation would have been the need to install soldier beams and braces, together with certain work associated with CCD 51 and CCD 63, which together would total 12 days of work, ignores the overall impact of the timing of the imposition of the District's no-splicing interpretation, and the substantial evidence that Pinner, Mad Steel and McGuire reasonably assumed during the pre-Contract period that Mad Steel would be permitted to splice the vertical rebar in the Main Theater Tall Walls above the thirty (30) foot level. If the Project had commenced with all participants having a clear understanding based on the Contract Documents that no vertical rebar splicing would be allowed above the thirty (30) foot level, Mr. Feinblum's testimony would have been more persuasive. In light of the overwhelming and persuasive evidence, however, from numerous witnesses, including Matt Dominguez, Isidro Larios of McGuire and Pinner's structural expert Seb Ficcadenti, regarding the impact to Pinner's, Mad Steel's and McGuire's intended approach for performing the work which was completely disrupted due to the no-splicing direction of the District, Mr. Feinblum's testimony was not fully persuasive.

Mr. Feinblum's analysis also failed to give adequate weight to the District's overall response to the splicing interpretation disagreement. The District's position that any costs related to addressing the problem, including costs to implement the flawed coupler alternative or to secure additional forms which were needed to address the fact that McGuire could not reuse forms through the "jumping" process it had intended to employ, coupled with the "no change orders" direction by the District Board at the outset of the Project, contributed to both cash flow problems on the Project and further delays. (R.Boynton, 8/31/21, 137:17-139:20; Ex. 6, 180910 letter.)

Moreover, Mr. Feinblum's analysis failed to recognize the fact that the District, having created the problem by its inconsistent Contract Documents, then further exacerbated it by refusing to present Pinner's request to splice above the thirty (30) foot level to the DSA who the District contended needed to approve this particular splicing approach. Moreover, the District took that position even though the evidence established that the District did not seek DSA approval before permitting numerous other splices that the District's interpretation logically suggested needed DSA approval.

Finally, the District's refusal to accept the Clean Slate Schedule even after Pinner made clear that it would be doing so without accepting responsibility for the additional time extension or costs caused further disruption to the Project, with attendant delays. And while Pinner's response to that position, stating that the District could not use the schedule and Pinner would not build to it, was not productive in mitigating and avoiding further Project delays and disruptions, that response was not a significant contributor to delays and

added costs.

California law clearly provides that every construction contract includes an implied covenant of good faith and fair dealing, whereby the parties are prohibited from doing anything to impair the other party from obtaining the benefit of its bargain. (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 406.) This covenant prevents a party to a contract from using the discretion afforded by the contract to interfere with the performance of other party without a good-faith belief that the interference is necessary. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 482.) The District's overall conduct here violated this covenant.

While Pinner's failures at times to respond appropriately and fully to manage the impact of the imposition of the splicing prohibition also contributed to delays in solving the impacts, Mr. Lee's analysis failed to account for that fact. For example, once the disagreement over the splicing requirements surfaced, Pinner failed to present the District with a plan setting forth the proposed location of additional splices (through RFI 349) until nine months after the issuance of the Notice to Proceed in September 2016.

Additionally, it took Pinner a long time to prepare its request for additional rebar splices once Pinner realized there could be a problem obtaining approval of this request. When Pinner submitted RFI 210 to the District on February 13, 2017, it was aware of this issue; when Pinner received the Architect's response to RFI 210 sent that same day, indicating that any structural deviations would be frowned upon due to the requirement to obtain DSA approval "which may cause a construction delay," (Ex. 114), Pinner should have known that there was a need to act expeditiously. However, it was not until three months later that Pinner submitted RFI No. 349, which proposed one additional level of rebar splices above the 30 foot elevation in the walls around the Main Theater.

Moreover, Pinner's submission of its proposal in the form of an RFI, rather than through the shop drawing process, was not in conformance with the Contract requirements. If Pinner had presented the locations in shop drawings, as the Contract required, the process might have proceeded more expeditiously.

In summary, despite Mr. Lee's testimony, the evidence simply does not support allocation of the full 218 days of delays for the TIA 6 and TIA 7 time periods to the District. While persuasive evidence certainly established that the District improperly held Pinner to an interpretation regarding splicing that was not supported by the Contract, and failed to pursue relief through the DSA, Pinner had an obligation to better manage the work of it and its subcontractors once the District made its decision. If Pinner had done so, the evidence established that the delays might have been reduced. Thus, Mr. Lee's assignment of all the days of delay to the District is not supported by persuasive, credible evidence and is rejected. (D. Lee, 9/2/21, 569:6-14.)

When taken as a whole and giving due weight to all the evidence and testimony, a fair and reasonable allocation of the delay supported by the evidence is to assign ninety

percent (90%) of the Compensable Delay for the time periods included in TIA 6 and TIA 7 to the District and ten percent (10%) to Pinner. That allocation is adopted in this Final Award.

IV. RULING ON CLAIMS

After careful consideration of all the evidence and testimony offered in the arbitration, the applicable law, and all briefing, analysis and argument of the parties, this Final Award addresses all the claims asserted by the parties. The Final Award is based on the statements of fact, conclusions of law, analyses and other conclusions contained herein; it is also based on conclusions regarding the credibility of witnesses, the oral and written arguments and stipulations of the parties, the Contract, and the law applicable to this arbitration.

This Final Award finds and concludes that the delays and extra costs incurred on the Project in the TIA 6 and TIA 7 time periods are primarily the responsibility of the District based on its decisions first, to enforce an interpretation of the Contract Documents which was not supported by persuasive evidence, and was contradicted by the structural engineer responsible for those documents as they were put out to bid to Pinner, and the testimony of other credible witnesses, and second, to forego seeking DSA approval to permit the vertical rebar splicing even though the estimated costs and time to do so were not excessive. While the evidence also established some limited responsibility on Pinner's fault for failing to take sufficient actions to mitigate the impact of the no-splice directive from the District, that responsibility, based on the clear and convincing evidence, was far less. These findings and conclusions are applied to determine the amount of damages due from the District to Pinner for its TIA 6, TIA 7 and COP 292 claims, and in allocating responsibility between Pinner and the District for the 218 days of delay claimed by Pinner for TIA 6 and TIA 7.

Pinner also seeks to pass through claims of the subcontractors in the amount of $3,019,732.00. Those claims are discussed in Sections IV.C. and D. below. They are granted in part, and denied in part, based on the evidence and the law.

In making an award of damages, this Final Award is based on:

- The evidence offered to support Pinner's direct damages for the categories of work sought through COP 292;
- The Contract provisions and applicable law related to Pinner's claim for delay damages and/or reverse liquidated damages;
- The proof, or lack of proof, regarding the pass-through claims of various subcontractors which were presented by Pinner and/or subcontractor representatives and evaluated in detail by the District's damages and scheduling expert, Daniel Feinblum; and
- the arguments of the parties.

These factors support the awards included below.

A. Pinner's Claims for Its Own Damages

Pinner asserts various facts, law and arguments in seeking to recover its own damages. First, in seeking to recover its delay damages in the amount of $489,135.00 for TIA 6 and $1,526,068.00 for TIA 7, Pinner asserts that the reverse liquidated damages provision included in the Contract is unenforceable under the facts and applicable law. That assertion fails, as discussed more fully in Section IV.A.1 below.

Additionally, Pinner seeks to recover for rain delays as a Compensable Delay, contrary to the Contract requirements, arguing that the District's actions delayed the Project into the rainy season. After full consideration of the Contract, and the evidence regarding the delays on the Project, that claim fails.

Pinner also sought to recover $1,384,932.00 for direct costs and markup captured in COP 292 for bracing and soldier beams, form material, equipment and related costs necessitated by the District's imposition of the no-splicing interpretation discussed above. That claim is discussed in Section IV.A.2 below.

Finally, Pinner also seeks prejudgment interest on the amounts it recovers for TIA 6, TIA 7 and COP 292. A decision on the claim for prejudgment interest was deferred until addressed in the post-Partial Final Award briefing by the parties. It is address below in Section V; for the reasons addressed below, Pinner's claim for prejudgment interest is denied.

1. The Contract Reverse Liquidated Damages Provision is Enforceable, and Prohibits Pinner from Recovering Certain Damages It Seeks

The Contract clearly imposes a limit on delay damages Pinner can recover for delays determined to be caused by the District or those for whom the District is responsible; those delay damages payable to Pinner are set at the agreed amount of $4,000.00 per day. Accordingly, unless Pinner can invalidate the liquidated damages provisions, its recovery for delay damages is limited by those provisions. Pinner's efforts to invalidate the provisions fail, as discussed below.

Section 3.3 of the Construction Services Agreement, entitled "Liquidated Damages to Contractor", covers the payment of liquidated damages to Pinner for a Compensable Delay that extends the date of Substantial Completion. Sections 3.3.1 of that Section provides:

> 3.3.1 Contractor's Right. District and Contractor acknowledge and agree that if Contractor is unable, due to Compensable Delay, to Substantially Complete the Work within the Contract Time, the Contractor and its affected Subcontractors will suffer Losses which are both extremely difficult and impracticable to ascertain. On that basis they

> agree, as a reasonable estimate of those Losses and not a penalty, to the payment by District of liquidated damages as provided in this Section 3.3.

Article 1 of the General Conditions in the Contract defines "Loss" or "Losses" in Section 3.3.1 as "any and all economic and non-economic injuries, losses, costs, liabilities, claims, cost escalations, damages, actions, judgments, settlements, expenses, fines and penalties. ..."

Section 3.3.2 of Article 3 provides:

> 3.3.2 Per Diem Rate. The Contract Sum Payable shall be increased by Change Order or Unilateral Change Order by the sum of Four Thousand ($4,000.00) Dollars per Calendar Day as liquidated damages for each Day for which the Contractor is entitled under the Contract Documents to a Contract Adjustment extending the Contract Time for Substantial Completion due to Compensable Delay, with no additional amount for Allowable Markup or any other markup for overhead or profit thereon.

Section 3.3.4 of the General Conditions to the Contract further provides that Liquidated Damages are Pinner's sole remedy for delay, as follows:

> Liquidated damages payable pursuant to this Section 3.3 constitute the Contractor's sole and exclusive right and remedy for recovery from District of Losses to Contractor and its Subcontractors, of any Tier, due to Delay regardless of the cause, duration or timing, attributable to Compensable Delays. (Emphasis added.)

Finally, General Conditions Section 7.7.1.2 provides:

> Contract Adjustments that are based on an extension of the Contract Time for Compensable Delay ... shall be calculated exclusively in the manner stated in the provisions of Section 3.3 of the Construction Contract ... with no allowable markup thereon for Contractor or any Subcontractor, of any Tier.

Based on all these provisions, although this Final Award finds and concludes that the Contract Time for Substantial Completion was extended due to a Compensable Delay, Pinner is only entitled to the Liquidated Damages per diem rate for each day for which Pinner is permitted a Contract Adjustment, and cannot recover additional amounts for cost escalations, extended overhead costs, general conditions, labor or material escalation costs, and other losses relating to the delay, or any other markup for overhead or profit.

A liquidated damage provision is presumed valid unless the party challenging it can show that the damage amount is manifestly unreasonable under the circumstances existing

at the time the contract was made. Civil Code Section 1671(b); *Vrgoa v. Los Angeles Unified School District* (1984) 152 Cal.App.3d 1178. The burden of proving that a liquidated damages clause is unreasonable is on the party challenging the provision, Pinner here. *EastWest Bank v. Altadena Lincoln Crossing, LLC* (2019) 598 B.R. 633(C.D. Cal.)

Strong and persuasive testimony and documentary evidence presented by the District demonstrated that it undertook a collaborative process, involving Mark Strauss, Craig Sprecher, and members of the District's estimating team, which spanned a period between February and May of 2015, to decide upon the liquidated damages amount to be included in the Contract. (M. Strauss, 9/15/21 183:2-190:1; Exhibit 111.) The legal standard for evaluating the reasonableness of a liquidated damages provision turns upon the circumstances at the time the contract was made, not the circumstances of the Project viewed in hindsight.

In challenging the enforceability of the Contract's liquidated damages provision, Pinner argues that the District's $4,000.00 per day estimate was made based on assumptions about Project completion which did not occur, and that there have been significant price escalations in the extended period of construction. That evidence was not persuasive, nor does it state the right standard to apply in attempting to invalidate a liquidated damages provision.

The evidence, including the Declaration of Mark Strauss dated October 7, 2021, in response to the Declaration of Justin Davis dated September 30, 2021, supported the District's position that the District made a good faith estimate of Pinner's daily costs for purposes of creating a liquidated damages figure in 2015, when the Contract was formed. While evidence established that the District established this rate without consulting Pinner or giving Pinner an opportunity to negotiate it at any point during the preconstruction process (Ex. 37, Exhibit 23 - RFP & Addenda, p. 13; 02A Revised LA Valley Agreement; J.Davis, 4/7/21, 42:17-44:4, 241:20-25, 232:19-233:3, 308:2-9), the evidence did not establish persuasively that the estimate was unreasonable under the circumstances at the time. Additionally, there was no evidence offered that Pinner objected to the amount at any time during the "Business Points" negotiations between the parties in March of 2016. (M. Strauss, Declaration, ¶7.)

Mr. Strauss testified extensively regarding his efforts and analysis resulting in the determination of the liquidated damages rate. (M.Strauss, 9/15/21, 183:2-190:1.) Moreover, Mr. Strauss's testimony and analysis regarding the amounts Pinner seeks to include in its actual daily costs, which Pinner estimated exceeded $19,000.00, was persuasive to counter the testimony offered by Pinner's Justin Davis to support that number.

Based on the most persuasive evidence, the Contract's liquidated damages provision is reasonable and enforceable; Pinner failed to meet its burden to show otherwise. Accordingly, the amounts Pinner seeks for its own costs for TIA 6 and TIA 7 in the amounts of $489,135.00 plus markup for TIA 6, and $817,569.00 plus markup for TIA 7, are not

recoverable. Since this Final Award finds and concludes that the District is responsible for 166 days (90%) of the 185 days of Compensable Delay, Pinner is awarded $664,000.00 for Compensable Delay ($4,000.00 x 166 days). Pinner is not entitled to any markup on this amount, as Section 7.7.1.2 prohibits a markup on liquidated damages.

2. COP 292 Claim

Both parties asserted in their post-Partial Final Award briefing that an adjustment should be made to the base amount awarded for COP 292 in the Partial Final Award, but they disagreed as to the amount of that base amount. The District asserted it should be $1,291,394.00; Pinner asserted it should be $1,302,462.00. The difference is accounted for in part by the District's assertion that the amount to be awarded for COP 292 should be reduced for the ten percent (10%) allocation to Pinner for its fault for delay, and for non-compensable weather days. After full consideration of all the evidence and analysis of both parties, this Final Award finds and concludes that Pinner's position is supported by the more persuasive evidence and analysis, and the base amount awarded for COP 292 is $1,302,462.00.

Pinner's COP 292 claim included direct costs for bracing and soldier beams, wall panels and formwork, change orders to install beams and formwork, crane rental costs not anticipated in the Pinner estimate, and mark up. (Ex. 150, Slide 97; Ex. 7, COP 292_PC 411_411_Tall Wall & Crane Claim.) The evidence established that these formwork-related costs were not included in Pinner's original budget because they were intended to be subcontractor costs; Pinner only incurred them as a result of the District's decision to impose its interpretation of the splicing requirements. (R.Boynton, 8/31/21, 185:19-22.)

Pinner provided all the invoices to support the wall bracing costs, except for charges for $13,949.00; it also provided backup for the purchase of wall panels and formwork, the three change orders that were issued to McGuire for the installation of the Tall Wall support beams and the construction of the form panels, and the crane costs incurred after removal of the monthly crane costs multiplied by the anticipated duration for the cranes. The bracing costs with no back up in the amount $13,949.00 were properly challenged by the District. They are disallowed.

The District's proposed reductions for Pinner's COP 292 claimed amount in COR 71 ($13,640.00) for what the District claimed was base contract work was supported by persuasive evidence, including Mr. Feinblum's analysis; that reduction is appropriate. Conversely, although some of the costs in COP 292 were incurred to build the Tall Wall forms prior to the start of the TIA 6 time period, the evidence established that Pinner directed McGuire to build the forms ahead of time so they would be ready to install once the TIA 5 delays were over the first wall lift could be poured. (R.Boynton, 9/1/21, 426:21-427:11); these costs were excluded from the TIA 1-5 settlement and are recoverable here.

The District also initially challenged costs for the materials incurred one week after the end of TIA 7 the time period. (9/23/21, D.Feinblum 209:19-210:7.) Mr. Feinblum later

conceded that a significant portion of the post-TIA 7 costs to take down the forms should be recoverable as part of the TIA 7 costs, and they are allowed here. (D.Feinblum, 9/23/21, 223:13-225:21.)

The District also objected to the inclusion of costs related to the 0-line in COP 292. Pinner's evidence to support its position that it was imperative that the 0-line be installed before the steel in that area could be installed, so the forms remained on site while the 0-line was constructed, was persuasive. Similarly, the form anchors had to remain in place on the 0-line wall until the steel could be attached to support the wall. Equipment maintenance is a valid cost for Pinner to seek in the claim, as it is part of the extra work. Small tools and formwork are also part of the extra effort, and are therefore recoverable here.

The District challenged the bond costs included in COP 292 on grounds which were not persuasive. Pinner confirmed that all changed work increased its bond cost, so the bond charge on the COP 292 costs is appropriate. (Ex. 37, Exhibit 7 General Conditions, p. 81 § 7.7.3.) That amount of $13,676.00 is awarded to Pinner.

The District also removed the Pinner mark up from COP 292 on the ground that the markup was already captured in the request for overhead for TIA 6 and TIA 7. Pinner objected to this adjustment, asserting that because it only requested a 5% markup on its direct cost items that it has had to bear since 2018, it is entitled to the further markup. Pinner seeks a markup on the amount awarded for COP 292 of fifteen percent (15%) on its own costs, and 5% on costs incurred by McGuire. (Pinner Supplemental Brief, p.2.)

As with the issue of markups on the subcontractor claim amounts, this issue was reserved for decision after the post-Partial Final Award briefing provided for in Section VI of the Partial Final Award. Based on consideration of all issues addressed in the post-Partial Final Award briefing and arguments, this Final Award concludes that Pinner is not due a further fifteen percent (15%) markup on the COP 292 claim amount awarded, but is due the five percent (5%) markup. Pinner cites General Conditions Section 7.7.5(1) in support of its claim for 15% markup on "its own costs." Section 7.7.5(1) applies only to "Self-Performed Work," a term defined in General Conditions Section 1.1.156 as "Work related to a Compensable Change or Deleted Work *that is performed or to be performed by Contractors' own laborers who are employed by Contractor, rather than by the employees of a Subcontractor,* using materials and equipment purchased by Contractor directly from a supplier or manufacturer." (Emphasis added.)

Three of the four costs categories in COP 292 (bracing and soldier beam rentals, form material purchases, and crane and other equipment costs) were incurred directly by Pinner; only one of those categories – McGuire's labor used to build forms – was a subcontractor cost. As to the first three categories, Pinner argues: "Because Pinner paid for these bracing and soldier beam costs directly, Pinner is entitled to 15% for these expenditures. Pinner also paid for directly [*sic*] the 90-ton crane and operator and other equipment used to complete the tall walls." (Pinner Supplemental Brief, p. 3.)

Pinner's argument ignores the requirement under the Contract that to claim a fifteen (15%) markup on contractor material and equipment purchases, those costs must be incurred in connection with "Self-Performed Work," as that term is defined in the Contract. The COP 292 work was not performed by Pinner's own employees; the evidence established that "Pinner's crane and operator, along with the other equipment it rented, provided support to McGuire, Mad Steel, and the other subcontractors, involved in building the Tall Walls." (Pinner Supplemental Brief, p. 3.) Because the work under COP 292 does not meet the definition of Self-Performed Work, Pinner is only entitled to a 5% markup on that work, including the amounts it expended for materials and equipment. (See discussion at District Opening Brief, pp. 11-12.) McGuire is entitled to a 15% markup, and Pinner to another 5%, for the form work labor actually performed by McGuire.

The District also challenged equipment costs included in COP 292 which were for periods outside the TIA 6 and 7 timeframe ($88,451.00). Pinner agreed that $23,641.00 of the costs should be removed, including the boom lift costs in early 2018, and the crane costs in 2019, but objected to the District's removal of costs for the compact crawler which was used specifically for the removal of formwork in the seating area. Pinner's position on this issue was the more persuasive based on the evidence, so only $23,641.00 of these costs is rejected.

Finally, the District objected to the bracing costs incurred outside of the delay period of $136,479.00 even though Pinner asserted those costs were related to mitigation efforts throughout the building. Some of the early bracing was for support beams that were required so the area south of A could be backfilled and equipment could be moved into the area. The bracing was being brought to the site in early December in order to build the first lift of Tall Walls, but that work was stopped while Pinner waited for CCD delays. (R.Boynton, 9/1/21, 360:8-362:12.) Pinner's position on this issue was persuasive and credible; as such, it prevails here.

Based on all the evidence, the Contract and applicable law, Pinner is awarded all the amounts it seeks in costs, before markup, except the items for which reductions were taken as explained above. After these reductions, Pinner is entitled to recover $1,302,462.00 for COP 292, plus a five percent (5%) markup of $65,123.00, and the one percent bond markup of $13,676.00 noted above. Since these costs are not time related, contrary to the District's position, the Final Award makes no reduction in the award for Pinner's ten percent (10%) responsibility for the delays related to the Tall Walls splicing issue.

The District also argues that since the Partial Final Award found, and this Final Award finds, that Pinner is not entitled to be paid for the costs incurred during the 33 days of non-compensable weather delays, Pinner should not be paid for the bracing/soldier beam and equipment rental costs during this delay. This argument was not persuasive as applied to the COP 292 claim, and no reduction is made for noncompensable weather days.

Based on these findings and conclusions, the total amount due to Pinner for the COP

292 is $1,381,261.00, plus prejudgment interest in the amount of $247,870.00 calculated through March 25, 2022, at the daily rate of $378.12; including the interest, the total amount awarded to Pinner for COP 292 is $1,627,996.00; interest shall continue to accrue at the daily rate until the amount awarded is paid.

B. Analysis of The Subcontractor Claims for TIA 6 and TIA 7

Pinner presented a claim for $3,019,732.00 in pass-through damages for its subcontractors for TIA 6 and TIA 7; this amount includes both subcontractor and Pinner markups. Pinner and the District each provided summaries and analysis in their Closing Briefs (Attachment C in Pinner's Closing Brief, and Exhibits B and C in the District's Closing Brief) regarding the subcontractor claims; those summaries provided substantial references to evidence and testimony which were useful in evaluating the damages. In addition, the parties provided further input on these issues in their final briefs on these issues filed in December 2021 and January 2022.

The evidence offered to support the various subcontractor claims ranged widely in detail, quality, persuasiveness and volume. Some subcontractor claims included extensive backup support and were bolstered by testimony from knowledgeable witnesses; others were supported only by summaries on a single sheet, or a few sheets, of paper, and no testimony.

The most complete, persuasive and thorough evidence offered by the District regarding the backup and support for the subcontractor pass-through claims was offered by the District's damages and scheduling expert, Daniel Feinblum. Mr. Feinblum prepared and presented a summary of Pinner's subcontractor claims for TIA 6 and TIA 7, and the District's position with respect to each. In summary, the District's position, as presented by Mr. Feinblum, was as follows:

TIA 6

Subcontractor	Pinner Claim Amount	TIA 6 Supported Claim Amount (80 days)	TIA 6 Supported Claim Amount (8 days)
Aragon	$24,304	$4,711	$ 471
City Commercial Plumbing	0	4,187	419
Elljay	16,612	11,815	1,181
Hoover	12,579	12,579	1,258
Mad Steel	271,692	83,622	8,362
Maya Steel	113,099	0	0
McGuire	372,167	13,400	1,340
Mech Tech	193,779	17,367	1,737
Neubauer	328,252	54,272	5,169
Norko FS	20,789	5,192	519

RJ Sheet	16,550	0	0
Schmitt	248,405	78,136	7,814
Subtotal	$1,618,228	$285,280	$28,270
Overhead & Profit (5%)	80,911	14,264	1,413
Total	**$1,699,139**	**$299,544**	**$29,683**

TIA 7

Subcontractor	**Pinner Claim Amount**	**TIA 7 Supported Claim Amount (138 days)**	**TIA 7 Supported Claim Amount (9 days)**
City Commercial Plumbing	$231,592	$ 5,917	$ 386
Hoover	21,227	21,227	1,384
K&Z	12,908	0	0
Maya Steel	205,235	0	0
Mech Tech	107,460	1,937	126
Mitsubishi Electric	35,445	4,772	311
Neubauer	506,774	129,243	8,429
Norko FS	18,314	7,628	498
RJ Sheet	27,928	0	0
Schmitt	409,239	105,109	6,855
Subtotal	$1,576,122	$275,833	$17,989
Overhead & Profit (5%)	78,806	13,792	899
Total	**$1,654,928**	**$289,625**	**$18,889**

Mr. Feinblum's conclusions regarding the extent and adequacy of the backup for the subcontractor claim amounts was for the most part clear, thorough and persuasive, but it sometimes relied on conclusions regarding responsibility for delays and disruption which were ultimately not supported by the evidence and law stated and found in this Final Award; to the extent those conclusions vary from what is found by this Final Award, they are rejected as discussed below.

Pinner also offered some evidence and analysis to support the subcontractor claims which was not persuasive based on the facts stated and the law concluded in this Final Award. For example, although Pinner accurately quotes the California law which holds that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (*Speegle v. Brd. of Fire Underwriters* (1946) 29 Cal.2d 34, 46), and that Pinner is not required to prove its damages with exactness (*Cal. ex rel. Dep't of Transp. v. Guy F. Atkinson Co.* (1986) 187 Cal.App.3d 25, 33), this law does not excuse Pinner and the subcontractors from the requirement to provide some persuasive support for their claims.

Similarly, however, the District cannot rely on General Conditions Section 7.7.15 to deny compensation to Pinner or its subcontractors just because the subcontractors

submitted something that could be considered a total cost claim. Although total cost claims may be disfavored, they are nonetheless appropriate where significant changes to the scope of work make any assessment of the as-planned costs too difficult to ascertain. (*Cal. ex rel. Dep't of Transp*, *supra*, (1986) 187 Cal.App.3d at 32.) That is exactly what happened here: the District's decision to prohibit splicing in the upper levels of the Tall Walls completely changed Pinner's means and methods and the character of the Project and was not justified by the Contract.

Because Mr. Feinblum's analysis was the most extensive and thorough, it provides a good starting point for the award of damages. In analyzing the subcontractor claims, Mr. Feinblum took a consistent approach to certain issues to support his opinions and calculations. Some of those approaches were supported by the evidence and the law; others were not, and they are rejected in this Final Award. Each of Mr. Feinblum's conceptual approaches, and Pinner's conceptual approaches regarding the subcontractor claims, are discussed below.

1. Reduction of Escalation Claimed to Only One Year

Mr. Feinblum's opinion with respect to escalation was that it should only be allowed for a single year. To the extent the support offered for the claim established that the subcontractor in question experienced escalation for more than one year by the time of the relevant time periods of TIA 6 and TIA 7, the persuasive evidence established the subcontractor is entitled to the two years of escalation claimed on the portions of its claim on which it proved two years of escalation. If the work had not been delayed, the subcontractor would have done the work at the lower rates the subcontractor assumed for its Project scope.

2. Attacks on Allocations by Pinner of Subcontractor Claim Amounts to TIA 6 and TIA 7

For subcontractor claims that included costs for more than the TIA 6 and TIA 7 time periods, Pinner prepared an allocation of the amounts claimed by the subcontractors to the earlier, settled TIAs; in this arbitration, Pinner used its allocation, adjusted for adjustments made by the subcontractors after the settlement and/or in preparation for the arbitration, to assign amounts to TIA 6 and TIA 7. Mr. Feinblum sometimes rejected those allocations based on his own analysis; because the allocations done by Pinner, as adjusted, were reasonable and supported by the persuasive evidence, the Pinner allocations are generally accepted as the starting point for the purposes of this Final Award, unless specifically discussed below.

3. Calculation of Subcontractor Amounts Based on Scheduling Analysis

Mr. Feinblum's calculation of the damages due to each subcontractor if Pinner's position regarding the Tall Walls splicing is accepted in this Final Award, as it is, is based on his allocation of the days of Compensable Delay to Pinner and the District. Since that allocation is rejected in this Final Award, it is also rejected in allocating damages.

Instead, based on a careful weighing of all the evidence, an evaluation of the actual delays, disruptions and impacts supported by the evidence and the law, this Final Award finds and concludes that the District is responsible for ninety percent (90%) of the days of Compensable Delay (166 days), and Pinner is responsible for ten percent (10%) (19 days) of the Compensable Delay. Accordingly, the amounts awarded to Pinner for the pass-through claims of the subcontractors are to be calculated based on the ninety percent (90%) / ten percent (10%) allocation.

4. Evaluation and Analysis of Backup for Subcontractor Claims

Relying on *Cal ex rel. Dept of Transportation v. Guy F. Atkinson Co.* (1986) 187 Cal.App.3d 25, 32, Pinner in essence takes the position that the subcontractors should be relieved of the obligation under Section 7.7.15 of the General Conditions to provide backup to support their claimed amounts for the TIA 6 and TIA 7 time periods because significant changes to the scope of work make any assessment of the as-planned costs too difficult to ascertain. While the law and the facts established by the evidence lend some support to this position, they do not provide a complete defense to the subcontractors (through Pinner) which would allow them to recover amounts which are without any reliable support in the record. To the extent that the subcontractors' claims in issue here are not supported by any documentary support or testimony, they are denied, as discussed with respect to each claim below.

5. Markup

The amount to be awarded to Pinner for the markups on the subcontractor claims were addressed in the further briefing provided for in Section VI of the Partial Final Award. Based on consideration of that briefing, the arguments of the parties and further analysis of the evidence, law and Rules, this Final Award concludes the subcontractors are entitled to fifteen percent (15%) on the amounts awarded by this Final Award, and Pinner is entitled to five percent (5%) markup on those amounts.

6. Home Office Overhead ("HOOH")

Many of Pinner's subcontractors improperly included home office overhead in their claims; that overhead is not recoverable by the subcontractors based on the evidence and the applicable law. The recovery of unabsorbed home office overhead is governed by the rule established in *Appeal of Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶2688, 1960 WL 538, and the cases following it. Under those cases, a contractor's *prima facie* case for *Eichleay* damages must include two elements: (1) the government caused a suspension or delay of uncertain duration, and (2) the contractor was on standby during the suspension or delay. *Mech-Con Corp.*, 61 F.3d at 886 (citing *Interstate Gen. Gov't. Contractors v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993)). A suspension is of uncertain duration if the contractor lacks definitive information as to when the suspension will end. *Oak Envtl. Consultants, Inc. v. United States*, 77 Fed. Cl. 688, 700 (2007). The standby element requires not only an uncertain delay, but also a showing that the contractor must be ready

to resume work "immediately or on short notice." *P.J. Dick v. Principi*, 325 F.3d 1364 (Fed. Cir. 2003) (citing *Interstate*, 12 F.3d at 1055, 1057 n. 4.).

The *Eichleay* approach is the only accepted method to calculate unabsorbed home office overhead. *Nicon, Inc. v. United States*, 331 F.3d 878, 888 (Fed. Cir. 2003). In 2015, the California Court of Appeal for the Sixth District held that the *Eichleay* formula is a "legally permissible method of determining [a contractor]'s home office overhead damages ... [as] an element of delay damages." *JMR Construction Corp. v. Environmental Assessment and Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 587.

Neither Pinner, nor its subcontractors established either element necessary to support their claims for unabsorbed home office overhead; Pinner, in fact, withdrew its own claim for home office overhead. The evidence clearly established that the District never imposed a suspension or delay of the Project of uncertain duration, or any duration, so the first element of a home office overhead claim was not met; to the contrary, the evidence established that the District regularly urged Pinner to devote more, not fewer, resources to the Project. (See, e.g., R.Tellez, 9/2/21 transcript, pp. 735:23-740:11; Exhibit 109, item 5.)

Second, it was also undisputed that no Pinner subcontractor was ever on "standby," as that term is defined in the relevant cases. Pinner and the subcontractor personnel were on site continuously throughout the period of delay claimed by Pinner in TIAs 6 and 7. Therefore, the evidence failed to establish the second element necessary to an award of extended home office overhead costs, and the claims must be denied.

C. Awards on Subcontractor Pass-Through Claims

Based on all the evidence, analysis, argument and law regarding the subcontractor pass-through claims, this Final Award finds and concludes that the amounts discussed below are due to be paid to Pinner by the District for those claims. Moreover, after considering the further briefing from the parties invited by the Partial Final Award on the issue of whether the amounts awarded to Pinner should be reduced by the ten percent (10%) allocated to Pinner for the delay, as well as the evidence and law, this Final Award finds and concludes that the amounts awarded to Pinner for the pass-through subcontractor claims should be reduced by the ten percent (10%) allocation of the delay to Pinner.

Pinner also seeks prejudgment interest on the amounts awarded for the subcontractor pass-through claims. After full consideration of the law, evidence, analysis and argument offered by both parties with respect to this issue, this Final Award finds and concludes that prejudgment interest on the pass-through claims is not appropriate. The amounts due on these claims were not sufficiently certain or capable of being made certain prior to issuance of this Final Award to support an award of prejudgment interest.

1. Aragon Construction ("Aragon")

The evidence established that the Aragon claim for TIA 6 should be granted for the Labor Escalation and Material Escalation, but denied for HOOH and Inefficiency. The

escalation claims were supported by persuasive evidence and are awarded in the amount of $8,193.00 based on Pinner's allocation of those amounts to TIA 6 ($3,707.00 for Labor Escalation and $4,486.00 for Material Escalation). Reducing this amount by ten percent (10%) results in a final award to Pinner of $7,374.00 for Aragon's Labor Escalation and Material Escalation claims; after applying the fifteen percent (15%) subcontractor markup, the five percent (5%) Pinner markup, and the one percent (1%) bond markup, the total amount awarded is $8,993.00.

2. City Commercial Plumbing ("City Commercial")

City Commercial sought additional amounts for Labor Escalation, Material Escalation, Extended Site and Overhead Costs, and Inefficiency. After considering all the evidence, analysis, argument and applicable law, including all post-Partial Final Award briefing and argument, this Final Award finds and concludes as follows.

The City Commercial claims for TIA 6 and TIA 7 for Labor Escalation are granted as supported by the evidence, and based on the amounts allocated by Pinner for the TIA 6 and TIA 7, but subject to the ten percent (10%) reduction for Pinner fault.

The Partial Final Award granted City Commercial's claim for $221.00 for Extended Site and Overhead Costs for TIA 6. After a further review of the evidence, analysis and applicable law, this Final Award finds and concludes that the City Commercial claim for additional amounts for additional storage ($221.00) and for additional storage container costs ($612.00) for the TIA 6 and TIA 7 periods are also supported by persuasive evidence. Accordingly, those claims totaling $833.00 are granted. After applying the ten percent (10%) allocation for Pinner fault, Pinner is awarded $750.00 for the City Commercial pass-through claim for Extended Site and Overhead Costs.

City Commercial's claim for Material Escalation is denied. The evidence offered to support that claim was not persuasive on the issue of the actual amount of escalation City Commercial may have experienced

The City Commercial claim for HOOH is denied as not supported by reliable persuasive evidence, the Contract or the law. Additionally, even after full consideration of all the post-Partial Final Award briefing and analysis offered by Pinner with respect to City Commercial's Inefficiency claim, this Final Award concludes that claim should be denied as not supported by persuasive evidence or analysis.

Based on the findings and conclusions in this Final Award, and the meet and confer efforts of the parties as reflected on the attached Exhibit A, Pinner is awarded the total amount of $18,877.00 on the City Commercial pass through claim, including the fifteen percent (15%) subcontractor markup, the five percent (5%) Pinner markup, and the one percent (1%) bond markup.

3. Elljay Acoustics ("Elljay")

As with some other subcontractor claims, no testimony was offered at the arbitration

to support this claim except Pinner's allocation of $14,445.00 of Elljay's total claim to TIA 6. Based on the District's evidence regarding the backup for this claim offered through Mr. Feinblum, however, and further analysis from Pinner, the amount of $14,445.00 is awarded for Labor Escalation and Material Escalation. After applying the ten percent (10%) allocation for Pinner fault, and adding the subcontractor, Pinner and bond markups, Pinner is awarded $15,855.00 for the Elljay pass-through claim.

4. Hoover Company ("Hoover")

The Hoover claims for Labor Escalation ($4,207.00 for TIA 6 and $7,099.00 for TIA 7) and Material Escalation ($8,372.00 for TIA 6 and $14,128.00 for TIA 7) are granted in the amounts allocated to TIA 6 and TIA 7 by Pinner. Those claims were supported by the evidence cited in Attachment B to Pinner's Closing Brief, and are awarded to Pinner in the total amount of $33,806.00. After applying the ten percent (10%) allocation to the amounts awarded, and adding all markups, Pinner is awarded $30,730.00 for the Hoover pass-through claim, as reflected on the attached Exhibit A.

5. K & Z

K & Z's claim for $12,908.00 related only to TIA 7. The Partial Final Award held that because the evidence offered to support this claim for Extended Site and Overhead, Labor Escalation and Material Escalation was either based on forecasted amounts relying on insufficient evidence, in the case of the claims for Labor Escalation and Material Escalation, or not justified under the Contract requirements or applicable law, the claim should be denied.

In its post-Partial Final Award briefing, Pinner argued that because K & Z had not begun its work on the Project during the arbitration, it properly based its claim on its projected shop labor for building the cabinets and field labor and material costs for installing them. Although K & Z could not provide payroll records to support its claim because it had not done any work, Pinner argued that K& Z's documentation of the labor rate increases in both its updated and original claims should suffice to support the claim. (Ex. 46, K & Z Updated Claim, p. 3-24; Ex. 47, K&Z/190710 K&Z Escalations, p. 2.)

The District asserts, and this Final Award finds and concludes, that K & Z is not entitled to its Labor Escalation and Material Escalation yet because it did not incur any costs during the TIA 7 delay period. Although K & Z's work has been pushed back to a later time period, and K & Z provided documentation that its labor and material costs will be higher during the later time period than they would have been without the TIA 6 and 7 delays, K & Z did not suffer those costs increases yet. Accordingly, they are not properly awarded in this arbitration.

Pinner's position that without being compensated for the TIA 6 and 7 delays as part of this arbitration, K & Z will not have any other way to recover its Labor Escalation and Material Escalation is not accurate. When and if K & Z completes its work, nothing in this Final Award is intended to foreclose K & Z's right to seek those costs.

6. Mad Steel, Inc. ("Mad Steel")

Mad Steel's $271,692.00 claim for TIA 6 was based on the allocation done by Pinner which was not disputed by Mad Steel, and the District's minor adjustment related to the claimed days of delay. Mr. Feinblum reviewed all support offered by Mad Steel for the claim and determined that $83,622.00 of it was supported by acceptable backup; Mad Steel and Pinner offered analysis and references to the evidence to refute this position in the post-Partial Final Award briefing. Upon further consideration of all the evidence this Final Award finds and concludes as follows.

a. Mad Steel is Entitled to Its Actual Burdened Rate for Extended Supervision.

Mad Steel and Pinner assert that the award of Extended Site Costs for the time of Matthew Dominguez improperly used an hourly rate of only $48.95, his base rate, instead of a rate including the $28.46 burden for an ironworker. (Ex. 47/Mad Steel/190726 Revised Summary & Backup per LACCD Comments/Labor Reports Summary/Union Wage Fringe Benefit Packages, p. 1.) The Pinner/Mad Steel position is supported by persuasive evidence, the Contract and applicable law; accordingly, Mad Steel is entitled to recover the fully burdened rate for its additional labor hours for Mr. Dominguez. (Ex. 37, Exhibit 7 – General Conditions_S, § 7.7.3.2, p. 81-82.) At the rate of the fully-burdened rate of $77.41 per hour, the 646 hours of additional supervision provided during the TIA 6 Delay Period equals $50,003.63 before the ten percent (10%) reduction for Pinner responsibility. After the ten percent reduction, the amount awarded is $45,003.00.

b. Costs for Gloves and Deliveries.

In Pinner's post-Partial Final Award briefing, it sought reconsideration of the Partial Final Award's denial of costs Mad Steel's claim for additional costs for for gloves and deliveries as well. After further consideration of Mad Steel's position, this Final Award again denies those costs.

c. Mad Steel's Claim for Detailing Costs

Mad Steel also claimed additional detailing costs based on General Conditions Section 7.7.3.1; that section allows Pinner to "include[e] wages for employees of Subcontractors performing engineering or fabrication detailing at locations other that at the Site" in its change order requests. (Ex. 37, Exhibit 7 – General Conditions_S, § 7.7.3.1, p. 81.) The changes to the Tall Walls led Mad Steel to incur additional costs from their rebar detailer. (D. Dominguez, 6/17/21, p. 47:6-49:4.) Mad Steel submitted the invoice for these costs from its detailer as part of COP 233, and the evidence justifies an award of them to Pinner. (*Id.* at 46:16-47:14; Ex. 148, COP 233, p. 7.)

This Final Award finds and concludes that Pinner is entitled to an amount for Mad Steel's Extended Site Overhead claim for TIA 6 based on the findings and conclusions herein. That award is subject to the ten percent (10%) allocation for Pinner fault.

d. Mad Steel Labor Escalation

Mad Steel's claim for Labor Escalation during TIAs 1 through 6 totaled $36,092.00. (Ex. 46, Mad Steel Updated Claim, p. 1.) Mad Steel supported its Labor Escalation claim with the very persuasive testimony of Deonna Dominguez; the evidence she provided regarding Mad Steel's labor hours and union wage rate increases supports Mad Steel's full claim for TIA 6 Labor Escalation in the amount of $7,328.32 before the ten percent (10%) reduction for Pinner fault. After the reduction, the amount awarded is $6,595.00.

e. Mad Steel Material Escalation

Mad Steel's claim for Material Escalation during TIAs 1 through 6 totaled $343,552.43. (D. Dominguez, 6/17/21, p. 19:20-20:12; Ex. 47, Mad Steel/190726 Revised Summary & Backup per LACCD Comments/MAD Steel Summary of Claim_Revised, p. 2.) Using the Pinner-proposed allocation rate, which this Final Award accepts as the most persuasive, $69,756.84 of this amount is properly allocated to TIA 6. (See Pinner Supplemental Brief, § III.A.)

To support its Material Escalation claim, Mad Steel provided its initial estimate and documentation of the rebar price increases it experienced, including a spreadsheet summarizing the various price increases, along with the weight of materials affected by the price, and other supporting documentation. (Ex. 47, Mad Steel/190726 Revised Summary & Backup per LACCD Comments/MAD Steel Summary of Claim_Revised, p. 2.) While the evidence established the District paid a portion of Mad Steel's rebar escalation costs, those payments were made during the TIA 1 through 5 portion of the Project and are accounted for in the claim amounts that were released as part of the Settlement Agreement. (D. Lee, 9/23/21, 299:12-300:24.) This Final Award therefore finds and concludes that Pinner is entitled to the remaining Mad Steel Material Escalation in the amount of $69,757.00 for TIA 6, before taking the ten percent (10%) reduction for Pinner fault; after the ten percent (10%) reduction, the total amount awarded is $62,781.00.

f. Mad Steel Inefficiency

Although Mad Steel offered substantial persuasive evidence to confirm the disruption of its work from District-caused problems, including evidence offered in the further analysis included in Pinner's post-Partial Final Award briefing, that evidence was not sufficient as a matter of required proof to support the amount sought by Pinner/Mad Steel for Inefficiency ($117,802.00). Accordingly, the amount claimed for that Inefficiency is denied.

Based on all of these findings and conclusions, Pinner is awarded the total amount of $154,062.00 for the Mad Steel pass-through claim, including the subcontractor, Pinner and bond markups.

7. Maya Steel ("Maya")

Maya's claims for TIA 6 and TIA 7 were totally unsupported by acceptable backup

and analysis, as Mr. Feinblum confirmed after his review. (D. Feinblum, 9/22/21, pp. 41, 79, 80.) A single page summary of forecasted costs is simply not sufficient to support an award against the District for these claimed amounts. Accordingly, the claims are denied.

8. McGuire Contracting ("McGuire")

McGuire sought additional amounts for Extended Site Costs ($184,127.00), Labor Escalation ($19,365.00), Material Escalation ($35,835.00), and Labor Inefficiency ($28,263.00). The Partial Final Award found and concluded that only $12,762.00 of that amount (for Labor Escalation) should be awarded.

Based on a further review and consideration of the evidence, analysis and law, this Final Award finds and concludes that Pinner is due some additional amounts for the McGuire pass-through claims. In addition, as with the other pass-through claims, the amount awarded is reduced by the ten percent (10%) allocation to Pinner discussed in this Final Award, after markups.

a. McGuire Extended Site Costs

McGuire requested $184,127.83 in Extended Site Costs for the TIA 6 period. None of this amount was awarded in the Partial Final Award.

In its post-Partial Final Award briefing, Pinner provided specific references to evidence to support McGuire's claim for extended deck rental costs, additional wall rental costs, additional forklift rental costs, survey station costs, and safety costs to support the McGuire claim for Extended Site Costs. After full consideration of all evidence, testimony and analysis, this Final Award finds and concludes that McGuire provided sufficiently persuasive evidence and documentation to support the additional costs claimed for deck rental, forklift rental, and safety materials and consumables due to its extended period on the job.[3] Because McGuire performed its work later than planned, the evidence supported its assertion that it incurred these costs much longer and later than originally anticipated. Accordingly, Pinner should be awarded $31,999 for its additional deck rental, $21,237 for additional forklift rental, and $2,861.00 for increased safety materials and consumables for a total of $56,097.00; all these costs were reasonably supported and justified. After the ten percent (10%) reduction for Pinner fault, the total amount awarded is $50,487.00.

McGuire's claims for additional wall rental costs and survey costs were not persuasively supported, even by the additional analysis Pinner provided in its post-Partial Final Award briefing. McGuire's citation to costs it had to incur on other jobs because it could not move materials and equipment to those jobs from this Project was not sufficient to support is claim. Accordingly, those amounts are rejected.

b. McGuire Labor Escalation and Material Escalation

Pinner sought amounts for McGuire's Labor Escalation ($19,465.00) and Material Escalation ($5,304.00). The analysis by Mr. Feinblum for the District concluded that

[3] Ex. 46, McGuire Updated Claim R1, p. 66-68.

Pinner had only supported an award of $12,762.00 to Pinner for McGuire's Labor Escalation, and no amount for Material Escalation. In the post-Partial Final Award briefing, Pinner offered additional analysis and citations to evidence to support the claims for Material Escalation and Labor Escalation.

After further review of all the testimony and evidence, this Final Award finds and concludes that Pinner is due additional amounts with respect to the pass-through claim of McGuire for both Labor Escalation and Material Escalation. Pinner allocated McGuire's claim of $95,396 in Labor Escalation between TIAs 1 - 5 ($76,031) and TIA 6 ($19,365) using the allocation approach developed from application of the Settlement Agreement. After the ten percent (10%) reduction, the amount awarded is $17,429.00.

With respect to McGuires claim for Material Escalation, McGuire's evidence was less persuasive. The District challenged McGuire's inclusion of Material Escalation costs unrelated to the construction of the Tall Walls. (District CB, Ex. B., p. 20.) While Pinner contended McGuire's claim for Material Escalation is not limited to the costs of the Tall Walls, any more than were the costs of any of Pinner's other subcontractors, Pinner agreed that the McGuire material costs included some costs that were not a result of escalation and should be removed. Pinner's assertion that there are definite Material Escalation costs that are "easily identifiable" in the supporting documentation that McGuire provided was not sufficiently persuasive to support the Material Escalation of $5,304.00 sought; accordingly, that claim and all other amounts sought for the McGuire pass-through claim are denied.

Based on all of these findings and conclusions, Pinner is awarded the total amount of $82,828.00 for the McGuire pass-through claim, including the subcontractor, Pinner and bond markups.

9. Mechanical Technologies ("Mech Tech")

The claims of Mech Tech for TIA 6 and TIA 7, including the claims of Mech Tech's subcontractors, were described in testimony by George Ossman, based on various forms of backup and support. The Mech Tech claims for Labor Escalation, Material Escalation, and Extended Site Overhead Costs are granted in part, as supported by persuasive, reliable evidence and analysis, including but not limited to the citation to evidence and analysis referenced in the parties' post-Partial Final Award briefing invited by the Partial Final Award. The claims for Inefficiency and Warranty Escalation are denied as not supported by reliable, persuasive evidence and analysis. After reviewing all the evidence and analysis offered both in the arbitration and the post-arbitration briefing, this Final Award finds and concludes as follows with respect to Mech Tech's pass-through claim.

a. Mech Tech Claim Approach

Mech Tech provided a claim for TIAs 1 through 6, and Pinner then allocated a portion of the claimed amounts to TIA 6 using the percentage calculated based on Pinner's interpretation of the Settlement Agreement which resolved TIAs 1 through 5. That approach is accepted in this Final Award as supported by the most persuasive evidence and

analysis. Mech Tech also provided a separate claim for TIA 7.[4]

For TIA 6, Mech Tech claimed a total of $104,124.00, calculated as follows:

- Extended Site Costs $23,154.00
- Material Escalation $18,572.00
- Sheet Metal Escalation $44,522.00
- Subcontractor Claims $17,876.00
    - ACCS $10,065.00
    - Pro Mechanical $ 4,616.00
    - P&E Insulation $ 2,566.00
    - LA Air Balance $ 629.00

For TIA 7, Mech Tech claimed a total of $93,164.00, calculated as follows:

- Extended Site Costs $32,544.00
- Labor Escalation $20,569.00
- Storage Costs $13,500.00
- Subcontractor Claims $26,551.00
    - ACCS $18,013.00
    - Pro Mechanical $ 3,638.00
    - P&E Insulation $ 3,400.00
    - LA Air Balance $ 1,500.00

In summary, as discussed more fully below, this Final Award finds and concludes Pinner is due the amounts addressed below for the Mech Tech claims for TIA 6 and TIA 7, after the ten percent (10%) reduction for Pinner fault.

b. Mech Tech TIA 6 Claim

i. Mech Tech's TIA 6 Extended Site Costs Claim

Mech Tech originally sought Extended Site and Overhead Costs of $23,154.00 for TIA 6. In the post-Partial Final Award briefing, Pinner and Mech Tech reduced that amount to $16,722.00; this amount includes a fifteen percent (15%) markup. (Ex. 46, p. 68.)

Having reviewed and considered all the evidence, this Final Award finds and concludes that Pinner is entitled to the following amounts (before the ten percent (10%) reduction) for the following categories of TIA 6 Extended Site Costs based on the backup

[4] Ex. 25, 2020708 TIA 7 Claim Complete, p. 613–616.

Mech Tech provided from its Project records:

- Protect HVAC Equipment: $3,615.00
- Storage (Yard Rental): $9,336.00
- Unload AHU: $1,188.00
- Delivery to Job Site: $1,919.00
- Yard Crane: $664.00

These amounts total $16,722.00; after the ten percent (10%) reduction for the allocation to Pinner, the amount awarded is $15,050.00.

ii. Mech Tech Material Escalation

Mech Tech provided persuasive support for its own Material Escalation claims in its original claim submittal package,[5] including quotes for the air distribution devices, smoke fire dampers, sound traps and vibration isolation equipment from 2016; Mech Tech then compared the quotes to revised quotes for these items which Mech Tech received in 2018. The District challenged these quotes because they were received prior to the start of the TIA 6 time period; this challenge was not persuasive.

The evidence established that only the portion of Material Escalation related to TIAs 1-5 was paid under the Settlement Agreement. Accordingly, the additional amount allocated to TIA 6 is due; that amount is $18,572.00. After the ten percent (10%) reduction for Pinner fault, the amount awarded is $16,715.00.

iii. Sheet Metal Material and Labor Escalation

Mech Tech also sought Sheet Metal Material and Labor Escalation for TIA 6 in the amount of $44,552.00, based on its costs through March 2021, and then a forecasting of the remaining sheet metal costs to be installed through the end of the project.[6] In its post-Partial Final Award briefing, Pinner reduced this claim to $38,715.00.

The District challenged Mech Tech's claim for these costs as not supported by sufficient backup for Mech Tech's original bid and the forecasted costs to complete work on the Project; the District's objections are well taken. This Final Award finds and concludes that Pinner should recover nothing for this category of the Mech Tech pass-through claim.

iv. Mech Tech Subcontractor Claim

Mech Tech also sought $17,876.00 for additional costs in the TIA 6 period for the claims of its subcontractors ACCS, Pro Mechanical, P&E Insulation and LA Air Balance. Each of these subcontractor claims was based on independent support and analysis. Having reviewed all the evidence and analysis, this Final Award finds and concludes the following

[5] Ex. 46, Mech Tech Updated Claim, p. 14-29.
[6] Ex. 46, Mech Tech Updated Claim, p. 146-173.

with respect to Mech Tech subcontractor claims.

1. Air Conditioning Control Systems (ACCS) Claims

a. Extended Site Costs

The ACCS claim included the following items for TIA 6 for Extended Site Costs, after allocation for amounts resolved for TIAs 1-5 in the Settlement Agreement:

- Added Project Management - $5,095.00
- Escalation - $2,714.00
- Labor Inefficiency - $6,062

After full review of all evidence and analysis offered by parties, this Final Award finds and concludes that the ACCS claim for additional Project Management costs,[7] as supported by the printout showing additional costs in the amount of $5,095.00 for the Project Management under Cost Code 1800-01, should be awarded to Pinner, reduced by the ten percent (10%) allocation to $4,586.00.

With respect to the ACCS claim for Labor Escalation in the amount of $2,714.00 for TIA 6, Mr. Ossman's testimony for Mech Tech/ACCS was not sufficiently persuasive to support any award. As such, this claim is denied.

Similarly, the ACCS claim for Labor Inefficiency for the TIA 6 period in the amount of $2,256.00 fails. The District challenged the ACCS Labor Inefficiency claim because it failed to include a cause and effect analysis, and because the work being completed during the inefficiency period was in an area unrelated to the theater walls.[8] Pinner asserts that the District's position failed to take into consideration was the impact of delay to the work, as well as stacking of trades and out of sequence work was all due to the tall wall delays. After full review of all the evidence and analysis, this Final Award finds and concludes that this ACCS Inefficiency claim was not supported by persuasive evidence, and it is therefore denied.

Accordingly, Pinner is awarded $4,586.00 for the ACCS Extended Site Costs claim, and nothing for ACCS's Material Escalation and Inefficiency claims.

2. Pro Mechanical

Mech Tech sought $4,616.00 for Pro Mechanical claims for the TIA 6 period, with supporting documentation. These claims are discussed below.

a. Labor Escalation

To support its Labor Escalation claim of $2,848.00, Pro Mechanical provided the rate sheets which showed the increased labor rates from the planned work period (7/1/16 –

[7] Ex. 149, ACCS Breakdown for TIA 06 & 07, 4-30-21, p. 8-9.
[8] Ex. 155, Slide 84.

6/30/17) to the actual work period (9/1/18 – 8/31/19);[9] the increase reflected is $5.01 per hour. Pro Mechanical then multiplied its estimated manhours by the $5.01 rate increase and allocated using the 20.30% for TIA 6 established by Pinner's interpretation of the Settlement Agreement. Although the allocation percentage is accepted for purposes of this Final Award, the other evidence offered was simply not persuasive. Accordingly, this portion of the claim is denied.

b. Pro Mechanical Material Escalation Claim

To support its Material Escalation claim of $1,768.00, Pro Mechanical provided a material take off from its estimate and then supported the current costs for the same material to show the increase of $1768.00 due to the delays.[10] The evidence to support the Material Escalation was persuasive, and the claim is granted. After reducing the amount awarded by the ten percent (10%) allocated to Pinner, the amount awarded is $1,591.00.

3. P&E Insulation

Mech Tech sought $2,256.00 for Material Escalation and Labor Escalation for P & E Insulation ("P&E"). Based on persuasive evidence and analysis, this Final Award accepts that amount as supported by persuasive evidence and analysis. After reduction for the ten percent (10%) allocation for Pinner fault, the amount awarded is $2,030.00.

4. LA Air Balance

Mech Tech sought $629.00 for a change order issued to LA Air Balance for the TIA 6 period for the increased costs due to the delays on the Project, based on the Pinner-proposed allocation percentage addressed above. The District did not counter entitlement to this amount by any persuasive evidence; accordingly, that amount is granted. After the ten percent (10%) reduction, the amount awarded is $566.00.

Based on all available evidence, analysis, argument and applicable law, this Final Award finds and concludes that Pinner shall recover the following amounts from the District for the Mech Tech claim for TIA 6 after applying the ten percent (10%) reduction for Pinner responsibility:

- Mech Tech Claims
  - Extended Site Overhead $15,050.00
  - Material Escalation $16,715.00
- Mech Tech Subcontractor Claims
  - ACCS $4,586.00
  - Pro Mechanical $1,591.00
  - P&E Insulation $2,030.00

[9] Ex. 47, Mech Tech Updated Claim, p. 42–43.
[10] Ex. 47, Mech Tech Updated Claim, p. 40-41.

- LA Air Balance $566.00

c. ***Mech Tech - TIA 7 Claim***

Mech Tech's claim for TIA 7 included claims for Labor Escalation, Extended Site Overhead, Labor Escalation, Storage Costs and claims from its subcontractors, all based on similar backup, supporting documents and analysis as that used to support Mech Tech's TIA 6 claim. Based on the same reasons, analysis and conclusions discussed above with respect to Mech Tech's TIA 6 claim for Extended Site Overhead, Labor Escalation and Subcontractor claims, this Final Award finds and concludes that Pinner is entitled to recover the following amounts from the District for the Mech Tech claim for TIA 7, after the ten percent (10%) reduction for Pinner fault:

- Storage Costs - $12,150.00
- Subcontractor Claims
  - ACCS - $8,663.00 (Project Management)

Based on all of these findings and conclusions, Pinner is awarded the total amount of $74,822.00 for the Mech Tech pass-through claim, including the subcontractor, Pinner and bond markups.

10. Mitsubishi Electric ("Mitsubishi")

Mitsubishi's claim for TIA 7, as allocated by Pinner, was $35,445.00. The District, through Mr. Feinblum, asserted that only $4,772.00 of this amount was supported by adequate backup for the additional storage costs claimed.

Based on further review of all the evidence and analysis offered by Pinner and the District, including that in the parties' post-Partial Final Award briefing, this Final Award finds and concludes that Mitsubishi's total claim of $17,140.00 for TIA 7 additional costs for storage was supported by persuasive evidence and should be awarded to Pinner, as further reduced by the ten percent (10%) reduction for Pinner fault. After the ten percent (10%) reduction for the allocation of delay to Pinner, the amount awarded is $15,426.00; after applying the subcontractor, Pinner and bond markups, the total amount awarded to Pinner on the Mitsubishi pass-through claim is $18,813.00.

Because Mitsubishi's work on the Project was largely not done up to the end of the TIA 7 period which is the end date for this arbitration, Mitsubishi's claim for Labor Escalation is denied. As with the K&Z claims, however, as addressed above, nothing in this Final Award is intended to limit Pinner's or Mitsubishi's right to seek these costs in the future as the Mitsubishi work is completed.

11. Neubauer Electric ("Neubauer")

Neubauer's claims for TIA 6 and TIA 7, as allocated by Pinner to those TIAs, were $328,252.00 for TIA 6 and $506,774.00 for TIA 7. Mr. Feinblum offered analysis which

asserted that $2,831.00 for Labor Escalation, and $2,360.00 were supported by the evidence. The Partial Final Award granted a recovery by Pinner for the Neubauer costs (before markup) of $42,314.00 for Extended Site and Overhead for TIA 6, $9,374.00 for Labor Escalation for TIA 6, $96,774.00 for Extended Site and Overhead for TIA 7, and $32,469.00 for Labor Escalation for TIA 7; these amounts total $180,931.00 before markups and before the ten percent (10%) reduction for Pinner fault and before markups; the total was inadvertently listed as $190,305.00 on page 43 of the Partial Final Award. After reduction for the (10%) allocation, the amount awarded is $162,838.00.

Through its post-Partial Final Award briefing, Pinner seeks additional amounts for the nonproductive labor of Neubauer's foreman, Vinny Ramirez, while accepting the $35,671 granted in the Partial Final Award for the Neubauer general foreman for TIA 6 and the $57,442 of the $63,547 requested for TIA 7. Pinner also sought amounts not awarded in the Partial Final Award for Neubauer's claim for equipment costs and Material Escalation. The evidence offered by Pinner to seek additional amounts for the Neubauer claim, including for Mr. Ramirez's asserted unproductive time equipment costs and Material Escalation, was not persuasive' accordingly, those claims are denied.

The claim for Labor Escalation for ACS is denied on the same basis and with the same qualification as included in this Final Award with respect to the similar escalation claims of K&Z and Mitsubishi. Nothing in this Final Award is intended to hold or conclude that such amounts cannot be sought by Neubauer/ACS in the future, once the escalation has been incurred for specific work performed.

After review of all the evidence and analysis, including that offered by Pinner in its post-Partial Final Award briefing, this Final Award finds and concludes that the amount to be awarded to Pinner for the Neubauer pass-through claim, after the ten percent (10%) reduction for Pinner fault, is $162,838.00 after applying the subcontractor, Pinner and bond markups to that amount, the total amount awarded to Pinner on the Neubauer pass-through claim is $198,593.00.

12. Norko Enterprises ("Norko")

Norko's claims for TIA 6 and TIA 7, as allocated persuasively by Pinner to those TIAs, were $20,789.00 for TIA 6 and $18,314.00 for TIA 7. The District, through the testimony and analysis of Mr. Feinblum, concluded that for TIA 6, $2,831.00 (for Labor Escalation) and $2,360.00 (for Material Escalation) were supported by the evidence; for TIA 7, Mr. Feinblum concluded that $3,557.00 (for Labor Escalation) and $4,072.00 (for Material Escalation) was supported.

In its post-Partial Final Award briefing, Pinner argued, with reference, in part, to the testimony of Fred Krayndler, that additional amounts should be awarded to Norko for fittings and miscellaneous materials based on a calculation using twenty-five percent (25%) of the total pipe material costs. Pinner also argues Norko should be entitled to two years of escalation, and that the District's allocation of costs between TIAs 1 through 5 and TIA 6

should not be adopted.

After further consideration of the evidence and analysis, this Final Award finds and concludes that Norko is entitled to two years of escalation, but no additional amounts for fittings and miscellaneous materials. Thus, before the ten percent (10%) reduction for Pinner fault, Pinner shall recover the total amount of $22,118.00 for the TIA 6 and TIA 7 Norko pass-through claim, after the ten percent (10%) reduction; after applying the subcontractor, Pinner and bond markups, the total amount awarded to Pinner on the Norko pass-through claim is $26,974.00.

13. Schmitt Drywall ("Schmitt")

Schmitt's claims for Inefficiency and for its Project Manager (included in Extended Site and Overhead) are denied as not supported by persuasive, reliable evidence or analysis, nor authorized by the Contract. Mr. Feinblum validated the support for Schmitt's claims for Labor Escalation ($21,820.00 for TIA 6 and $32,538.00 for TIA 7) and Material Escalation ($10,720.00 for TIA 6 and $12,273.00 for TIA 7) and the remaining portion of the Extended Site and Overhead ($41,876.00 for TIA 6 and $55,294.00 for TIA 7); those amounts, totaling $174,521.00 before the ten percent (10%) reduction for Pinner fault, are awarded as supported by reliable, persuasive and credible evidence. After the ten percent (10%) reduction, the amount awarded is $168,992.00; after applying the subcontractor, Pinner and bond markups, the total amount awarded to Pinner on the Schmitt pass-through claim is $191,577.00.

C. Award on Subcontractor Pass-Through Claims

Based on all the findings and conclusions in this Final Award, Pinner is awarded the total amount of $822,104.00 for the subcontractor pass-through claims, including all markups and the applicable ten percent (10%) reduction for Pinner fault.

V. CLAIMS FOR PREJUDGMENT INTEREST, ATTORNEYS' FEES, AND COSTS

Pinner seeks pre-judgment interest on the damages awarded in this Final Award. For the reasons discussed below, Pinner's claim for prejudgment interest is denied except as to the COP 292 claim pursuant to the findings and conclusions included above in this Final Award.

Additionally, Pinner seeks attorneys' fees and costs. After full consideration of the Contract, the evidence and applicable law, this Final Award finds and concludes that Pinner is not entitled to recover its attorneys' fees, but is entitled to recover a portion of its costs, as discussed below.

A. Claim for Prejudgment Interest

The overwhelming evidence in this arbitration refuted Pinner's assertion in support of its claim to recover prejudgment interest that there was "essentially no dispute concerning the basis of imposition of damages," with respect to the damages ultimately

awarded here. The District contested ***both*** liability for, and the quantum of, the damages awarded.

The facts in *Stein v. Southern California* Edison (1992) 7 Cal.App.4th 565, cited by Pinner in support of its claim, were quite different. In *Stein,* as the court noted:

> [Defendant] Edison did not dispute the amount of damages at any point in the litigation. It merely asked for proof of claims.... Here, ... the amount claimed in the complaint was the amount awarded by the jury. Ascertainment of the amount did not require an accounting from conflicting evidence.... **Since there was no dispute in the amount claimed and no disparity in the amount claimed and the final judgment, the trial court did not err in allowing prejudgment interest from date of notice to Edison of the various losses. 7 Cal.App.4th at 572-573.** (Emphasis added.)

In this case, the damages ultimately awarded were inherently uncertain until, at the earliest, the issuance of the Partial Final Award. Moreover, Pinner and its subcontractors were adjusting amounts claimed even during the arbitration. Based on all the evidence and applicable law, Pinner is not entitled to recover prejudgment interest on any amounts awarded except the amount awarded for COP 292 as noted above.

B. Claim for Attorneys' Fees

Pinner seeks an award of attorney fees on two grounds: first, for the District's breach of the covenant of good faith and fair dealing (Pinner Supplemental Brief, p. 15), and second, under a theory of implied contractual indemnity (Pinner Supplemental Brief, p. 17.) Pinner's claim fails on both bases. Neither the authorities Pinner cites for these propositions, nor the Contract or applicable law, support Pinner's claim to recover attorneys' fees; accordingly, Pinner's claim is denied.

On the issue of the breach of covenant of good faith and fair dealing, Pinner relies on two cases, *Celador International Ltd., v. The Walt Disney Co.* (2004) 347 F.Supp.2nd 846, 852 and *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, to argue that a party may be awarded damages for the breach of covenant of good faith and fair dealing, including that party's attorney's fees and expert's fees, where one contracting party's conduct unfairly frustrates the other contracting party's right to receive the benefits of the agreement actually made. Based on these citations, Pinner argues that it should be awarded a total of $1,619,316.84 for attorney fees and expert fees. (Pinner Supplemental Brief, p. 17.)

Neither *Celador*, nor *Auerbach* hold that a breach of the covenant of good faith gives rises to a claim for attorney fees in a case like this one. The primary holding in *Celador* (a District Court ruling on a motion to dismiss) dealt with the circumstances under which a plaintiff could plead a claim for breach of the covenant of good faith and for breach of contract without the claims being duplicative. *Celador, supra*, 347 F. Supp.2nd at 851;

nothing in the decision provides support for Pinner's claim for attorneys' fees.

Auerbach is similarly unhelpful to Pinner. In *Auerbach*, the owners of a distressed commercial property began debt restructuring negotiations with their lender. In connection with those negotiations, they executed what the parties called a "Preworkout Agreement;" as part of that agreement, the owners bound themselves to pay certain costs of the lender associated with modification of the loan documents, including attorney fees. 74 Cal.App.4th at 1178. Negotiations fell apart, and the owners sued the lender for breach of the covenant of good faith, breach of contract, declaratory relief, and promissory fraud. *Auerbach* held that the attorneys' fees paid by the owner under the Preworkout Agreement were potentially recoverable as damages under a fraud (not a breach of covenant) theory. *Id.* at 1189. Although Pinner correctly summarizes what *Auerbach* says about the measure of contract damages (Pinner Supplemental Brief, p. 15), that language is not the case's holding; *Auerbach* does not establish a party's right to an award of attorney fees for breach of the covenant of good faith.

Pinner's attempt to claim attorney's fees under a theory of implied contractual indemnity fares no better. Pinner quotes *Prince v. Pacific Gas & Electric* for its general description of what implied contractual indemnity is. (Pinner Supplemental Brief, p. 17.) Pinner does not explain persuasively, however, how that concept applies to this case. Instead, it merely asserts that it incurred $1.6 million in attorney fees associated with its subcontractor pass-through claims, and should recover those fees, for reasons which are not explained to the satisfaction of the Arbitrator.

Prince deals with the interplay between a claim for personal injury, statutory immunity for that claim under Civil Code § 846, and a related cross-complaint based on implied contractual indemnity. The case does ***not*** hold that such an indemnity theory creates an extra-contractual right to recovery of attorney fees.

Finally, it should be noted that Pinner, through the Declaration of Newt Kellam, offered support for the attorneys' fees claim based on purported facts intended to support an allegation of "bad faith conduct" on the District's part; these new facts relate to the attempts of the parties to negotiate a settlement of TIAs 6 and 7. The District refuted these facts in a Declaration by Jack Fleming, the District's Counsel. Neither of these Declarations were persuasive on the Pinner claim for attorneys' fees. The claim is denied.

C. Claim for Costs

Pinner properly claims entitlement to statutory costs as the prevailing party under California Code of Civil Procedure Section 1284.2. That section, however, limits the recoverable costs as follows:

> Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro-rata share of the expenses of the arbitration incurred or approved by the neutral arbitrator, **not**

> **including counsel fees or witness fees, or other expenses incurred by a party for his own benefit.** (Emphasis added.)

While Pinner is the prevailing party under this Final Award, certain categories of costs Pinner claims are barred either by the terms of the Contract or by governing law. First, Pinner claims $255,008.00 in arbitration-related costs paid to JAMS. Kellam Decl. ¶¶ 12-13. However, General Conditions Section 4.5.8.7.5 of the Contract provides:

> The fees of the Arbitrator and the administrative costs of the Arbitration shall be shared equally between the Parties, and the Arbitrator has no power whatsoever to alter that sharing arrangement.

Since the fees paid by Pinner to JAMS can only be either arbitrator fees or "administrative costs of the arbitration", the Contract requires the parties to split these costs equally, and the Arbitrator is not permitted to re-allocate them, regardless of the outcome of the arbitration.

Second, Pinner claims costs of $485,941.00 paid to damages expert witness Denny Lee/C2G, $76,597.00 paid to engineering expert witness Seb Ficcadenti, and $28,150.00 paid to graphics firm Z Axis to produce an arbitration exhibit. See Kellam Decl. ¶¶ 14(a)-(d); 19; and 20-21. Fees paid to testifying experts Lee and Ficcadenti are witness fees excluded from recovery by CCP Section 1284.2.

Contrary to the District's position, however, fees paid for the production of arbitration exhibits are not witness fees or "expenses incurred by a party for his own benefit," as the District contends. Accordingly, those fees in the amount of $28,150.00 are recoverable by Pinner under Section 2184.2.

The only other non-attorney fee costs addressed in Pinner's request are court reporter fees totaling $29,227.00. See Kellam Decl. ¶¶ 22-24. At the outset of the arbitration, the parties agreed to split those fees evenly, and each party has in fact been paying 50% of the court reporter fees as they have arisen throughout these proceedings. The Arbitrator concludes, however, that these fees can be allocated to be paid by the District in favor of Pinner as the prevailing party. This Final Award so finds and concludes, and Pinner is awarded the amount of $29,227.00 for the court reporter fees.

VI. AWARD ON CLAIMS

For all the reasons addressed herein, Pinner is the prevailing party and is entitled to recover on its claims as follows:

COP 292:	$1,381,261.00
Delay Damages:	$ 664,000.00
Subcontractor Claims:	
Aragon:	$ 8,993.00

City Commercial Plumbing:	$ 18,877.00
Elljay Acoustics:	$ 15,855.00
Hoover Company	$ 30,730.00
Mad Steel, Inc.	$ 154,062.00
McGuire Contracting:	$ 82,828.00
Mechanical Technologies:	$ 74,822.00
Mitsubishi Electric:	$ 18,813.00
Neubauer Electric:	$ 198,593.00
Norko Enterprises:	$ 26,974.00
Schmitt Drywall:	$ 191,557.00

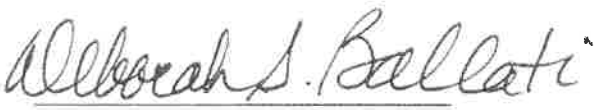
These amounts include bond costs in the total amount of $21,815.00. Finally, Pinner is entitled to recover costs for Arbitration Exhibits in the amount of $28,150.00, and costs for court reporter fees in the amount of $29,227.00. Pinner's claims for prejudgment interest on the amounts awarded, except for prejudgment interest on the COP 292 award, and for attorneys' fees are denied.

VII. FINAL AWARD

Claimant Pinner Construction, Inc. is entitled to an award of $3,172,612.00 to be paid by Respondent Los Angeles Community College District.

This Final Award resolves all claims between the parties submitted for decision in this arbitration proceeding.

Date: April 1, 2022



Deborah S. Ballati, Esq.
Arbitrator

EXHIBIT A

Total Final Arbitration Award

Subcontractor	Final Award Amount	15% Markup (Sub)	5% Markup (Pinner)	1% Markup (Bond)	Total
Aragon	$7,374	$1,106	$424	$89	$8,993
City Commercial	17,800	0	890	187	18,877
Elljay	13,001	1,950	748	157	15,855
Hoover	30,425	0	0	304	30,730
Mad Steel	126,324	18,949	7,264	1,525	154,062
McGuire	67,916	10,187	3,905	820	82,828
Mech Tech	61,351	9,203	3,528	741	74,822
Mitsubishi	15,426	2,314	887	186	18,813
Neubauer	162,838	24,426	9,363	1,966	198,593
Norko FS	22,118	3,318	1,272	267	26,974
Schmitt	157,069	23,560	9,031	1,897	191,557
Total	**$681,641**	**$95,012**	**$37,311**	**$8,140**	**$822,104**

Pinner Delay Damages	**$664,000**				**$664,000**

COP 292	**$1,302,462**		**$65,123**	**$13,676**	**$1,381,261**
				Prejudgment Interest 6/8/2020 – 3/25/22	**247,870**
				Subtotal COP 292	**$1,627,996**

Arbitration Exhibits					**$28,150**
Court Reporter Fees					**$29,227**

Total Award	**$2,648,103**	**$95,012**	**$102,435**	**$21,815**	**$3,172,612**

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Pinner Construction Company, Inc. vs. Los Angeles Community College District
Reference No. 1220067397

I, Julie McCool, not a party to the within action, hereby declare that on April 1, 2022, I served the attached FINAL AWARD on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Francisco, CALIFORNIA, addressed as follows:

Christopher G. Morrow Esq.
Jennifer A Needs Esq.
Mr. Josh Hardy
SMTD Law LLP
17901 Von Karman Ave.
Suite 500
Irvine, CA 92614
Phone: 949-537-3800
cm@smtdlaw.com
jneeds@smtdlaw.com
jhardy@smtdlaw.com
Parties Represented:
Pinner Construction Company Inc.

Newton W. Kellam Esq.
Kellam Law Corporation
500 North State College Boulevard
Ste 1100
Orange, CA 92868
Phone: 714-490-4000
newt@kellam-law.com
Parties Represented:
Pinner Construction Company Inc.

Jack W. Fleming Esq.
Musick, Peeler & Garrett, LLP
650 Town Center Dr.
Suite 1200
Costa Mesa, CA 92626
Phone: 714-668-2400
j.fleming@mpglaw.com
Parties Represented:
Los Angeles Community College District

Peter J. Diedrich Esq.
Musick, Peeler & Garrett, LLP
650 Town Center Drive
Suite 1200
Costa Mesa, CA 92626
Phone: 714-668-2421
p.diedrich@mpglaw.com
Parties Represented:
Los Angeles Community College District

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on April 1, 2022.

Julie McCool
jMcCool@jamsadr.com