

August 25, 2009

Donald E. Coulter, Esquire
7900 Sudley Road, Suite 608
Manassas, Virginia 20109

Jennifer A. Mahar, Esquire
Smith Pachter McWhorter PLC
8000 Towers Crescent Drive, Suite 900
Vienna, Virginia 22182

Re: Abacus Construction Company, Inc.
v.
Milestone Construction Services, Inc.
Civil No. 45629
Circuit Court of Loudoun County

Dear Counsel:

This case was tried without a jury on June 17, 2009. After the presentation of the evidence and argument of counsel I took under advisement the issues raised in the Complaint filed by the Plaintiff, Abacus Construction Company, Inc. ("Abacus") and the Counterclaim filed by the Defendant, Milestone Construction Services, Inc. ("Milestone"). I also requested that counsel provide me with a transcript of the testimony of Mario Orellana, who is the president of Abacus, because I felt that his testimony would be very crucial to my decision. Mr. Coulter very graciously provided the transcript to me on July 21, 2009. I thank him for doing so.

After consideration of the evidence, including the aforesaid transcript, and the argument of counsel, and for the reasons hereinafter set forth, Milestone is granted a judgment against Abacus in the amount of \$24,463.80.

On December 7, 2005, Abacus and Milestone entered into a contract (the "Contract") under which Abacus, as subcontractor, would provide certain concrete work, as described in the Contract in the construction of the Dulles South Safety Center on Loudoun County Parkway in Loudoun County. This litigation arises out of the performance by Abacus on this project.

On May 29, 2007, Abacus filed its Complaint against Milestone alleging that it was owed the sum of \$18,285.97 by Milestone as follows:

Contract Price	\$ 72,365.00
Additions	+ 19,369.00
Deductions	- 28,509.23
Payments	<u>- 44,938.80</u>
Total Allegedly Due	\$ 18,285.97

On June 20, 2007, Milestone filed a Counterclaim against Abacus alleging that Abacus breached the Contract by not completing all the work required thereunder and providing defective work. Milestone seeks damages of \$48,000.00 in the Counterclaim.

At the commencement of the trial the parties reached the following stipulation:

Base (Contract Price)	\$ 72,365.00
Backcharges to Abacus	- 25,371.31
Milestone owes to Abacus	+ 9,409.00
Paid by Milestone to time of trial	<u>- 44,938.80</u>
Amount due from Milestone to Abacus before disputed items are considered	\$ 11,463.89

At trial Abacus offered evidence tending to show that it was owed by Milestone the stipulated amount of \$11,463.89 plus \$9,960.00 for four change orders. The change orders are discussed below.

The first change order dated September 15, 2006, (see Plaintiff's Exhibit 3) is in the amount of \$960.00 for demolition of curbs on September 30 and 31, 2006. The curbs had been improperly installed by other subcontractors. Abacus asserts that this demolition work was not a part of the Contract but extra work authorized by Marty Rinehart, who was Milestone's superintendent for the project. Milestone disputes that Abacus ever performed such work. It has no record of Abacus being on site on September 30. It is obvious that September 31 does not exist. The change order (which treats as a bill) is dated before the work was allegedly done. Abacus provided no other evidence to support this charge. As to this particular claim, Abacus cannot complain that Mr. Rinehart did not testify because Abacus had the burden to prove its claim. Milestone had no burden to disprove it.

Mario Orellana, President of Abacus, testified that when additional work was requested by Mr. Rinehart, he would write a change order and get Mr. Rinehart to sign it authorizing the job. Abacus offered no change order signed by Mr. Rinehart authorizing this additional work.

I find that Abacus has not shown by a preponderance of the evidence that Milestone is indebted to Abacus in the amount of \$960.00 for curb demolition.

Abacus' second claim involves a change order dated June 26, 2006 (see Plaintiff's Exhibit 5), which includes claims for concrete, labor and rebar work on two aprons on June 23 and 26, 2006 for \$3,000.00 and \$2,000.00, respectively. Abacus claims that this work was not a part of the Contract, but that it was additional work authorized by Mr. Rinehart. Milestone takes the position that this work came within the Scope of Work of the Contract. See the Contract Attachment A, starting on Page 17 of 34, Plaintiff's Exhibit 1. In particular, on Page 19 of 34 the "DETAILED SCOPE ITEMS INCLUSIONS" provides, in pertinent part, the following:

- "1) Subcontractor (Abacus) to furnish and Install all Concrete Site Work in accordance with Contract Documents..."
- "2) Subcontractor (Abacus) to furnish and install ...reinforced concrete paving apron slab; ..."
- "6) Subcontractor (Abacus) to furnish and install all incidental materials including but not limited to expansion joint material, wire mesh, and steel dowels at all expansion joints."

Further, Sheets S – 101 and S – 201 show the details of the layout of the apron slabs. I do not accept Abacus' argument that the details for the aprons are not shown on the plans.

I find that Abacus has failed to show by a preponderance of the evidence that the work done on June 23 and 26, 2006, as billed in the Change Order dated June 26, 2006, is outside of the Contract.

The last change order claimed by Abacus is the one dated September 25, 2006 (I think) (see Plaintiff's Exhibit 4) for \$4,000.00 for concrete pavement, dowels and expansion joints on August 25 and 26, 2006. Abacus claims this work is not a part of the contract and was authorized by Mr. Rinehart. Milestone asserts that this work is a part of the Contract citing Section 02752 of the Contract specifications titled "Reinforced Cement Concrete Paving" (See Defendant's Exhibit 22). Specifically, Milestone refers to item 6 of sub-paragraph E on page 4 of Section 02752 concerning expansion joints. Also, Milestone asserts that Sheet 2A of 13 of the Plans (Defendants Exhibit 40) shows the "Apron Slab Detail."

There is no change order for this work signed by Mr. Rinehart.

I find that the above mentioned portions of the Plans and Specifications of the Contract show that the work which Abacus has billed Milestone in the change order dated September 25

(Plaintiff's Exhibit 4) is a part of the Contract. Milestone is not indebted to Abacus for the \$4,000.00 claimed in Plaintiff's Exhibit 4.

I find that Milestone is not liable to Abacus for any of the sums claimed in the three change orders (Plaintiff's Exhibits 3, 4, and 5) as described above.

At trial Milestone offered evidence tending to show that Abacus is indebted to it or should be backcharged for the following:

<u>Change Order No.</u>	<u>For</u>	<u>Amount</u>
3 (Defendant's Exhibit 4)	Concrete ordered by Milestone	\$ 7,625.61
8 (Defendant's Exhibit 9)	Removal of Apparatus Bay slab	845.00
10 (Defendant's Exhibit 11)	Equipment Rental	90.80
15 (Defendant's Exhibit 16)	Concrete for handicap ramps	524.95
17 (Defendant's Exhibit 18)	Concrete purchased by Milestone	562.28
18 (Defendant's Exhibit 19)	Stone purchased for Apparatus Bay Apron Slab	803.57
19 (Defendant's Exhibit 20)	Punchlist completion delay	1,044.00

In addition, Milestone seeks to recover 10% overhead and 10% profit pursuant to the terms of sub-paragraph D of Article 8 of the Contract concerning "Payment," which provides:

Should the Contractor perform any work or incur any cost that is the Subcontractor's responsibility under this Agreement, the Contractor will be entitled to recover from the Subcontractor such expense and cost plus ten percent (10%) overhead and other sums, and ten percent (10%) profit. Should any such charges remain unpaid thirty (30) days after notice is given to the Subcontractor, such change will be deemed accepted by the Subcontractor and may be deducted by the Contractor from any amounts due the Subcontractor.

Also, sub-paragraph F of Article 9 concerning "Failure to Perform," which provides:

In addition to the Subcontractor's liability for the Contractor's cost, as set forth above, it shall also be liable to the Contractor for an additional ten percent (10%) overhead and ten percent (10%) profit.

In the Contract the "Contractor" is Milestone and the "Subcontractor" is Abacus.

Further, Milestone seeks an award of attorney fees under sub-paragraph C of Article 9 of the Contract, which provides:

The Subcontractor agrees to reimburse the Contractor for any and all liquidated or actual damages that may be assessed against the Contractor which is related to, arise out of, or are caused by, the Subcontractor's failure to perform the Work within the time fixed or in the manner provided for herein, and in addition thereto, the Subcontractor agrees to pay to the

Contractor such other or additional damages as the Contractor may sustain by reason of such failure by the Subcontractor, including but not limited to, extended field and home office overhead costs and any attorney fees incurred by the Contractor, including attorney fees incurred in enforcing this Agreement. Any payment pursuant to the terms of this paragraph 9C will not act as a release of the Subcontractor from the Subcontractor's obligations under this Agreement.

Milestone has incurred attorney fees and costs in the sum of \$22,132.24. See Defendant's Exhibit 39.

Each additional sum claimed by Milestone against Abacus is discussed below.

In Change Order No. 3, Milestone claims that the sum of \$7,625.61 should be deducted from the amount due to Abacus under the Contract for concrete installed on the project by Abacus but ordered and paid for by prior agreement by Milestone. Prior to commencement of the work under the Contract the parties agreed that because Abacus did not have a concrete account in Virginia, Milestone would order and pay for the concrete to be installed by Abacus.

Change Order No. 3 represents the total of the charges by DuBrook Concrete for seven deliveries to the project in May and June 2006. All the deliveries were verified by Milestone project manager, Kathy Hetrick, after consulting Milestone's daily records showing that the concrete was installed by Abacus pursuant to the contract. Mr. Orellana agrees that the first three deliveries were for concrete installed by Abacus, but that the last four deliveries (all in June 2006) were for footings that Mr. Rinehart, Milestone's job superintendent, asked Abacus to do for Milestone outside of the Contract.

Abacus makes no additional claim for installing any footings. However, Milestone did offer into evidence a change order related to footings.

Milestone offered into evidence Change Order No. 5 dated July 18, 2008 (Defendant's Exhibit 6) for the following:

Footings for compressor pad fence	\$ 2,900.00
Sawcut pavement due to overpavement	735.00
Replace 15 lf curb	180.00
F & I 35 s.f. concrete @tirepressure station	<u>210.00</u>
Total	\$ 4,025.00

This change order is based upon a change order submitted by Abacus dated June 20, 2006 (see second page of Defendant's Exhibit 6). Abacus' change order has an item for concrete for the footings in the amount of \$2,000.00 (part of the \$2,900.00 reflected in Milestone's change order).

Third page of Defendant's Exhibit 6 is a change order dated June 16, 2006 prepared by Abacus with work similar to that specified in its change order dated June 20, 2006. However, the change order dated June 16, 2006, appeared to have been signed and accepted by Mr. Rinehart.

I cannot find by a preponderance of the evidence that the last four deliveries in Change Order No. 3 (Defendant's Exhibit 4) were for concrete for footings installed by Abacus outside the Contract whether it was under Abacus' change order dated June 20, 2006, or otherwise.

I find that all seven deliveries in Milestone Change Order No. 3 (Defendant's Exhibit 4) were for concrete installed by Abacus pursuant to the Contract. It represents a valid and legitimate deduction of \$7,625.61 from the amount owed by Milestone under the Contract.

Milestone's Change Order No. 8 (Defendant's Exhibit 9) is in the amount of \$845.00 arising out of the removal of the Apparatus Bay slab, which was installed incorrectly. The plans called for the slab to be reinforced by rebar, but Abacus reinforced it by welded wire mesh. The incorrectly installed slab was demolished by Abacus. The bill for \$845.00 is the charge to Milestone by Seneca Excavating and Landscaping, Inc., to haul the slab away. The incorrectness of the slab as installed by Abacus is verified by the architect's field report dated July 18, 2006. See item 2 of Defendant's Exhibit 24.

Mr. Orellana testified that Mr. Rinehart authorized Abacus to construct the Apparatus Bay slab using welded wire mesh. However, using wire mesh is contrary to the Contract, which required rebar. The architect, HughesGroup, pointed this out to Milestone who, in turn, advised Abacus. See Defendant's Exhibit 24. See also the detail on Section 15/S – 201 of "Foundation Sections," Defendant's Exhibit 40. There is no evidence that Mr. Rinehart had the authority to vary the contract requirements. I conclude that the Apparatus Bay slab was improperly installed by Abacus.

I find that this is a proper backcharge of \$845.00 to Abacus. It was caused by Abacus' incorrect installation of the Apparatus Bay slab.

Milestone's Change Order No. 10 (Defendant's Exhibit 11) is, according to Milestone, a backcharge of \$90.80 for equipment rented to remove sidewalk concrete incorrectly installed by Abacus. Abacus did not dispute this. Hence, I find this to be a legitimate backcharge to Abacus.

Milestone's Change Order No. 15 (Defendant's Exhibit 16) is for concrete for handicap ramps that were a part of the work required to be done by Abacus under the Contract. I find it to be a legitimate backcharge to Abacus under the Contract of \$524.95.

Milestone Change Order No. 17 (Defendant's Exhibit 18) is for concrete used to replace concrete, which cracked or was damaged by Abacus. I find it to be a legitimate backcharge to Abacus under the Contract of \$562.28.

Milestone Change Order No. 18 (Defendant's Exhibit 19) is for new stone required when the Apparatus Bay slab was redone. The original stone was contaminated by the jack hammering to remove the concrete. Hence, new stone was required. It is a legitimate backcharge to Abacus under the Contract for \$803.57.

Milestone Change Order No. 19 (Defendant's Exhibit 20) is a charge for punchlist delay completion in the amount of \$1,044.00. Despite many requests by Milestone, I find that Abacus did not respond to the punchlist items. Eventually, Milestone performed the punchlist items, but did not charge Abacus for it. Under sub-paragraph A of Article 43 of the Contract, the sum of \$50.00 per day per punchlist may be deducted from the sums due under the Contract until the date of final completion. The sum of \$1,044.00 only represents a little under 21 days at \$50.00 per day. The evidence clearly showed that Abacus did not complete the punchlist items within 21 days of notice to it. I find this to be a proper backcharge to Abacus under the Contract.

I find that Milestone has legitimate backcharges to Abacus in the total amount of \$11,496.21 as described above. Additionally, under sub-paragraph D of Article 8 and sub-paragraph F of Article 9 of the Contract, Milestone is entitled to overhead of 10% of \$11,496.21 and profit of 10% of \$11,496.21. Finally, Milestone is entitled to its attorney fees in enforcing the Contract of \$22,132.24.

Abacus is indebted to Milestone for the following:

Backcharges as described above:	\$ 11,496.21
10% overhead	1,149.62
10% profit	1,149.62
Attorney fees	<u>22,132.24</u>
Sub-Total	\$ 35,927.69
 Amount Milestone owes Abacus per stipulation	 <u>- 11,463.89</u>
 Amount owed by Abacus to Milestone	 \$ 24,463.80

Accordingly, Milestone is granted a judgment on its Counterclaim against Abacus in the amount of \$24,463.80, and Abacus' Complaint against Milestone is dismissed with prejudice.

In final argument counsel for Abacus pointed out that a part of Milestone Change Order No. 1 (Defendant's Exhibit 2) (a backcharge of \$6,677.05 for concrete ordered by Milestone) is an invoice from DuBrook Concrete dated April 13, 2005, for concrete delivered to a project at Lovettsville Elementary School. Including this charge was clearly an error on the part of Milestone. However, in the final argument counsel for Milestone did not include Change Order No. 1 as a disputed item for which it was claiming a backcharge over and above the stipulation. Counsel for Abacus never explained how this error benefited Abacus.

Let Ms. Mahar prepare a final judgment order consistent herewith to which she and Mr. Coulter may note any exceptions.

Very truly yours,

James H. Chamblin
Judge