IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-TS-00218

TUPELO REDEVELOPMENT AGENCY **APPELLANT**

VS.

THE GRAY CORPORATION, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant, Tupelo Redevelopment Agency, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Tupelo Redevelopment Agency, Appellant
2. Ronald J. Ragland, Sr. d/b/a/ Ragland Engineering and Ragland Construction, Plaintiff in underlying action
3. The Gray Corporation, Inc., Appellee
4. Shawn and Renee Gray, Principals of The Gray Corporation, Inc.
5. Eugene Hill, Principal of The Gray Corporation, Inc.
6. The Hartford Fire and Insurance Company, Co-Defendant in underlying action
7. Thomas W. Prewitt, Attorney for Ronald J. Ragland, Sr., d/b/a Ragland Engineering and Ragland Construction
8. Samuel C. Kelly, Former Attorney for The Gray Corporation, Inc. and The Hartford Fire and Insurance Company (allowed to withdraw as counsel following trial)

9. Ron A. Yarbrough, Former Attorney for The Gray Corporation, Inc. and The Hartford Fire and Insurance Company (allowed to withdraw as counsel following trial)

10. Sean B. Akins, Appellate Attorney for The Gray Corporation, Inc.

11. Guy W. Mitchell, III, Attorney for Tupelo Redevelopment Agency

12. William G. Armistead, Sr., Attorney for Tupelo Redevelopment Agency

13. Kevin B. Smith, Attorney for Tupelo Redevelopment Agency

14. Honorable Thomas J. Gardner, III, Lee County Circuit Court Judge

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STATEMENT OF THE CASE

I. Course of Proceedings and Disposition In the Court Below

This case involves disputes pertaining to construction of the Tupelo Fairgrounds Redevelopment Project (hereinafter "Project"). This suit originated with a Complaint brought by sub-contractor W. G. Construction, Inc., against prime contractor The Gray Corporation, Inc., (hereinafter "Gray") and the Hartford Fire and Insurance Company (hereinafter "Hartford") as the surety on the bond for the project. [R. 10 – 19; RE 6]. Subsequently, Ronald J. Ragland, Sr., d/b/a Ragland Engineering and Ragland Construction (hereinafter "Ragland") intervened as a party Plaintiff against Gray and Hartford for work performed on the project by Ragland which allegedly went unpaid by Gray.[1] [R. 42 – 47]. Thereafter, Gray filed a Third-Party Complaint against The Tupelo Redevelopment Agency (hereinafter "TRA") alleging that TRA was liable to indemnify Gray for Ragland's claim and that TRA was liable to Gray for an equitable adjustment of the contract balance. [R. 120 – 166].

On July 26, 2005, trial began and was concluded on August 5, 2006 with the jury rendering a verdict that Gray and Hartford were liable to Ragland in the amount of $850,551.32. [T. 1305; RE 16][2]. Further, the jury returned a verdict that Gray was entitled to recover on its claims against TRA in the amount of $258,118.00. [T. 1306; RE 16]. An amended final judgment was entered to reflect the jury's verdict on January 12, 2006. [R. 1563 – 1565; RE 2]. TRA timely filed a Notice of Appeal to this Court on February 1, 2006.

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[1] Ragland was the lone Plaintiff at the time of trial as W. G. Construction, Inc., dismissed with prejudice its claims against Gray and Hartford. [R. 192 – 194].

[2] Of the $850,551.32, the jury assigned $231,378.00 as reflective of Ragland's claim for engineering services and $123,016.12 as reflective of Ragland's contract balance. [T. 1305; RE 16].

II. **Statement Of Facts**

On or about October 20, 2000, TRA entered into a general contract with Gray for the construction of the Tupelo Fairgrounds Redevelopment Project ("Project"). The original contract price was $1,725,347.08. [R. 132]. The Project consisted of three components: Component A, Water and Sewer Improvements; Component B, Site Work; and Component C, Electrical, CATV Telephone and Duct System. [Exhibit P-1]. The engineering firm of Alan & Hoshal provided the electrical plans and specifications to TRA for Component C of the project. [T. 889]. TRA retained Jesco Construction to serve as construction management for the project with Jesco employee Steve Brister being the primary construction manager. [T. 944, 945]. The scope of Mr. Brister's function as project manager was to "manage the project, to be the owner's liaison, eyes and ears on the project on a day-to-day basis." [T. 945, 946].

After receiving the contract award, Gray purportedly subcontracted with Ragland to perform the electrical work for Component C of the project.[3] [T. 505].

By agreeing to perform electrical work on Component C of the project as subcontractor to Gray, Ragland only received the plans and specifications for Component C of the project from Gray. [T. 152]. Further, Ragland testified he believed that he was going to have a "green field" on which to perform his work.[4] [T. 450]. Also, Ragland testified that he relied upon Gray to provide him with a "green field" and that he did not feel obligated to check on the existence of other underground utilities. [T. 450].

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[3] A subcontract agreement was drawn up by Gray for Ragland's performance of the electrical work on Component C of the project. [T. 549; Exhibit DG-7C]. However, the subcontract form was never signed by Ragland which led Ragland to advance a theory of quantum meruit as a claim for recovery at the trial of this matter.

[4] In the industry, a green field indicates a clean, open space having no impediments or underground lines to work around or consider when doing work. [T. 910, 911].

On or about February 15, 2001, Ragland presented a narrative to Brister purporting to explain the reason for the need of a Change Order to the Project.[5] [T. 192]. In fact, Change Order No. 1 to the Project was issued and secured by Gray on behalf of its subcontractor Ragland on March 2, 2001. [T. 316; Exhibit P-6]. Change Order No. 1 increased Ragland's subcontract by approximately $100,000. [T. 341; Exhibit P-6].

It is undisputed that Ragland had no contractual relationship with TRA for the project and that Ragland's relationship was solely with Gray Corporation. [T.427]. Accordingly, TRA had no contractual obligations to communicate with Ragland regarding changes to his scope of work for the project.

In addition to Change Order No. 1, Gray requested and received two more Change Orders which were issued by TRA for Gray, following the procedural mechanisms of its contract with TRA. [R. 828-833; Exhibits P-7, P-8]. The three Change Orders resulted in $283,209.20 being added to the original contract sum. [T. 316, 589, 595].

During the life of the Project, project manager Brister would routinely hold Project meetings which would be the perfect opportunity for Gray or its representatives to notify TRA of any needed changes to the Project. [T. 950, 951]. However, following Change Order No. 1 which addressed problems associated with Component C electrical work for the Project, there were no written claims by either Gray or Ragland during the life of the Project delineating the alleged extra work encountered by problems with Component C. It was not until March 1, 2002 when Gray, through its attorney, drafted a demand letter for itself and on behalf of its sub-contractor Ragland making such statements as the "electrical plans and specifications for Component C were utterly defective and unusable"; "Gray and Ragland were forced to perform

[5] A Change Order is a change in the scope of the work from the original contract terms and entails provisions for how to handle procedure and compensation for the change. [T. 956, 957]. The contract between TRA and Gray addressed Change Orders for the Project. [R. 657; RE 13; Exhibit P-1].

design work for which they were not paid"; "the owner refused to pay Gray and Ragland for their extra work, delays and lost time"; and "without a time extension for the extensive electrical delays, Gray and Ragland had no choice but to accelerate the work in an attempt to meet the original schedule." [R. 139-145; RE 8; Exhibit P-19]. The basis for Ragland continuing with performing alleged extra work outside of that originally contemplated was Gray's alleged representation to Ragland that "we had a Change Order to take care of everything." [T. 226]. Even though Ragland claims to have been relying upon a Change Order to cover extra work, he admitted in his testimony that during the life of the Project he did not keep an itemized account of man hours that he claims to be extra work for the Project. [T. 431].

During the course of the Project, Ragland encountered numerous problems which changed the nature and extent of his work due to the actions of Gray. First, Gray left several feet of dirt higher than what was supposed to be left which required Ragland to dig deeper than he was originally required. [T. 204]. Next, Ragland testified that the sub-grade work performed by Gray was improperly done, as it was supposed to be firm, but instead, Ragland encountered muddy conditions which made his work more difficult. [T. 204]. Ragland testified that Gray failed in its contractual responsibilities to insure that the finished product of the dirt was maintained to a certain moisture content, thereby making Ragland's work more difficult.
[T. 205]. Ragland testified that Gray failed to properly perform work with regard to Component A work for compaction of ditches, thus preventing Ragland from traveling across the ditches with delivery trucks with material. [T. 205]. Further, Ragland testified that Gray did not place the dirt to grade along the railroad track at a necessary elevation which caused Ragland extra work efforts. [T. 206]. Ragland testified about another subcontractor of Gray placing a water line in Ragland's way just a few days before Ragland was set to begin work on that particular area which caused Ragland to encounter extra work efforts. [T. 213].

In addition to testimony concerning Gray's actions and/or inactions causing extra work and problems for Ragland for the Project, Ragland also testified as to certain acts of misfeasance by Gray with regard to financial matters related to the Project. First, Ragland testified as to Gray wrongfully withholding money due him after pay requests submitted to TRA were paid to Gray. [T. 239]. Other testimony by Ragland concerning acts of impropriety by Gray concerned back charges for equipment owned by Ragland used on the Project, withholdings for worker's compensation insurance, withholdings for taxes and other payroll issues. [T. 247]. Next, Ragland testified that toward the end of the Project TRA insisted that Gray demonstrate that it had paid its subcontractors including Ragland and that Gray called Ragland and asked him to write a letter indicating that he had been paid when in fact, he had not. [T. 260]. Ragland also testified as to Gray improperly profiting from 320 cubic yards of sand with respect to the Project. [T. 268].

On December 16, 2002, a Partial Release and Settlement Agreement was entered into by and between TRA and Gray settling all claims except to the extent set forth in the March 1, 2002 claim letter. [R. 573 – 575; RE 9].

After allowing Gray to sponsor a claim on Ragland's behalf in the March 1, 2002 claim letter for $458,178, Ragland then retained his own counsel resulting in his intervening in this case as a party Plaintiff.[6] From March 1, 2002 to the time of trial, Ragland's claim incrementally increased from $458,178.00 to $1,339,658.63. [See R. 139-145; R. 1116-1132]. Ragland's explanation for the increase was that "we went back and re-valued it after we were finally able to secure all the records."[7] [T. 196]. Gray representative, Shawn Gray, testified that even though

[6] Initially, Gray and its surety, The Hartford Fire and Insurance Company, were sued by WG Construction, Inc. (another sub-contractor for the Tupelo Fairgrounds Project) alleging that Gray failed to pay WG Construction, Inc. $110,739.95 for materials provided to the project. [R. 20 – 23; RE 6].

[7] A component of Ragland's $1,339,658.63 claim was his assertion that he had to dig his trenches to an average depth of ten feet which he claims caused him to incur damages of $500,000. [T. 432]. Interestingly, this claim for a

TRA issued three Change Orders, "time and time again we were promised a final Change Order." [T. 587]. Shawn Gray further testified "We was directed to go to work. Yeah, promised a Change Order, promised a Change Order, go. We took that on faith." [T. 588]. However, after the execution of Change Order No. 1 on March 2, 2001 through the March 1, 2002 claim letter, there is no other documentation in the Project files representing that an additional Change Order would be sought or granted with respect to Component C electrical work.[8]

Gray bases the alleged promise of a final Change Order on language in a July 10, 2001 correspondence from Steve Brister to Shawn Gray wherein it states:

> Note. A Change Order for the time extension will not be issued. A final Change Order will be issued **to reconcile all units for work in place**. The extension of time will be a part of the final Change Order. [R. 1027; RE 10; Exhibit DG-62] [Emphasis added].

Shawn Gray admitted in his trial testimony that the terms of the July 10, 2001 letter regarding the final Change Order were limited to reconciling all units for work in place. [T. 598].

Brister testified regarding what is understood in the industry about a final Change Order being issued to reconcile all units for work in place by stating:

> Once the contract is complete and all - - or all the components of the work are installed and finished, then I would have written a Change Order to reconcile the amount that was billed as agreed to by the owner and the engineer to basically balance the checkbook in order - - for example, as I said earlier, the example of the painter, if Mr. Ragland installed 250 units at $10 per unit, but in actuality the bid sheet or the bid contract or his actual contract had

half million dollars regarding having to dig trenches to an extra depth was nowhere mentioned in Ragland's own fifteen page claim narrative he drafted on January 31, 2002. [T. 432]. The January 31, 2002 claim narrative written by Ragland was done when matters were fresh on his mind and he had a full appreciation of all the work he had done for the Project. [T. 470].

[8] Gray and Ragland were invited to attend and participate in the biweekly Project meetings conducted by Brister wherein items were addressed concerning each activity for the Project. [T. 948-950]. Brister testified that if a matter was discussed in a meeting then it would have been reflected in his Project meeting minutes. [T. 982].

> 300 units in it, then I would have issued him a deductive Change Order for that amount.
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> On the flip side, if he installed 50 units more than what the contract called for, then we would have issued him an additive Change Order. Nothing more, nothing less.[9] [T. 968].

Brister testified that in all of his work experience he had never given an open-ended Change Order promise to a contractor. [T. 967]. He explained that he had no authority to direct or approve any such Change Orders without TRA's endorsement as TRA is a public entity requiring approval of all changes by a majority vote and that everyone involved with the project understood that fact. [T. 967]. In fact, Brister testified that he had a July 2001 meeting with Shawn Gray and Carson Neal from Cook Coggin Engineers, Inc. wherein Shawn Gray agreed with the fact that Change Order No. 1 covered all problems with Component C electrical portion of the project. [T. 971].[10]

Brister testified that paragraph 10.3 of the General Conditions of the contract between TRA and Gray which provides that "additional work" performed by the contractor without authorization of a Change Order would not entitle him to an increase in the contract price is a standard contract provision.[11] [T. 957]. Further, Brister testified that "the purpose of such a contract provision is to guard the owner or protect the owner from frivolous or unnecessary Change Order requests from the contractor and to give the owner the opportunity to deal with

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[9] Brister testified that following Change Order No. 1, he received no correspondence from either Gray or Ragland requesting another Change Order for Component C electrical work. [T. 965, 966].

[10] This agreement was confirmed by a July 11, 2001 correspondence from Brister to Carson Neal and Shawn Gray. [T. 600 – 601; RE 17; Exhibit P-86].

[11] The "General Conditions" of the contract between TRA and Gray delineate the contractural provisions for changes in the work of the Project which provide, in pertinent part:

> 10.3 Additional work performed by the contractor without authorization of a Change Order will not entitle him to an increase in the contract price or an extension of the contract time, except in the case of an emergency as provided in paragraph 6.25. [R. 657; RE 11; Exhibit P-1].

Shawn Gray admitted that there were no emergencies on this Project as contemplated under paragraph 6.25. [T. 585].

that change, whatever that change may be, and to provide a vehicle for complete knowledge of all participants in the contract and the owner of the contract or any other entities that would be affected by that change." [T. 957, 958].

Additionally, Carson Neal with Cook Coggin Engineers as the engineer for Components A and B of the Project testified concerning **final Change Orders** stating they are for "[m]inor changes in quantities, because anything significant is supposed to be handled during the job with the owner. You know, you don't just do a whole bunch of work and expect to be paid for it on the tail end."[12] [T. 871] [Emphasis added].

Shawn Gray testified that "on 3 occasions we did get issued Change Order, but we never got the final Change Order." [T. 588]. However, a January 17, 2002 letter from Gray Corporation to Carson Neal drafted during the latter stages of the Project's life and just over a month before the March 1, 2002 claim letter reads, in pertinent part:

> Owner requested a change in this item of work during the course of the project, and you stated changes to this work would require a Change Order...now the owner is attempting to have work done that it previously admitted would constitute a change in Gray's scope of work. Therefore, **Gray is not willing to perform the work defined by item No. 8 without a Change Order.**[13]
> [T. 767; RE 12; Exhibit P-115] [Emphasis added].

Renee Gray, the President of Gray Corporation who authored the above mentioned January 17, 2002 letter, admitted that from the beginning of the Project to the end of the project she was aware that there were Change Order requirements in the contract between TRA and

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[12] The customary final Change Order for units of work in place was not issued for this Project due to the preemptive measure of litigation initiated by Gray. As explained by Carson Neal, "A claim was filed by Gray Corporation against TRA on this project. And once that claim was filed, of course, it became - - it was turned over in the hands of the attorneys. Therefore the job was not finished - - as normally a job is finished, when a contractor finishes to substantial completion, there is a preliminary walk through to see what he lacks. After all this is done, then you have a final inspection where you look at the job and you make sure everything is completed in conformance with the plans and specs. Then when its accepted, you release his retainage and do a summary Change Order. In this case, the claim was filed. Therefore, the job did not end as a normal job would." [T. 839].

[13] Shawn Gray testified that Gray was substantially completed with the project in December 2001. [T. 591].

Gray. [T. 768]. Further, Shawn Gray admitted that both he and Gray Corporation's President, Renee Gray, knew how to request a Change Order under Gray's contract with TRA. [T. 595].

Shawn Gray also admitted that Gray, as the prime contractor for the Project, was responsible for directly communicating with the owner regarding claims of its subcontractors: "Being the general or the prime contractor, it's the responsibility of the general or prime contractor. Any claims resolving - - revolving of the project, that arises out of the project, it's the duty of the prime contractor for the subcontractor to prepare its claim and, in return, we take that claim and pass it straight on through to the owner." [T. 546]. Shawn Gray admitted reading the contractual provision at the time he bid on the contract for the subject Project which states that additional work performed by the contractor without authorization of a Change Order will not entitle him to an increase of the contract price or an extension of time. [T. 585].

Part of Gray's claim against TRA is for delay damages in the amount of $158,757.31. [T. 559]. This amount is derived from a claimed 89 days worth of alleged delay associated with problems from the Component C work as described in the March 1, 2002 claim letter. [R. 139 – 145; RE 8; Exhibit P-19]. The 89 days which Gray allegedly claimed they were delayed are within the time period of December 6, 2000 through April 5, 2001. [T. 590]. Thus, a majority of the claimed 89 days worth of alleged delay occurred prior to Change Orders No. 1 and 2, which were both dated March 2, 2001. [T. 590, 591]. Change Orders No. 1 and 2 both executed by Gray Corporation President Renee Gray state plainly on their face that: "It is further understood and agreed that this modification constitutes compensation in full on behalf of the contractor and its subcontractors and suppliers for all costs and mark-ups directly or indirectly attributable to the Change Order herein, **for all delays related thereto**, and for performance of the changes within the time frame stated." [R. 819, 828; RE 7; Exhibits P-6, P-7] [Emphasis added]. Shawn Gray admitted that Gray did not ask TRA for any delay damages before the execution of either Change Order No. 1 or 2. [T. 591].

Further, Shawn Gray admitted that Gray asked for and received three time extensions from TRA during the Project. [T. 591]. Correspondence from Ragland to Gray of June 8, 2001 indicated that the electrical portion of the contract had been substantially delayed as a result of unusually severe **weather** (instead of acts or omissions of TRA). [T. 593; Exhibit P-76]. Steve Brister testified that none of his documentation or records from the Project indicates that Gray was delayed from December 5, 2000 through April 5, 2001, but that instead, certain Project diaries as well as photographs indicate that work was ongoing during that entire time frame. [T. 975, 976].

TRA is a public agency duly constituted by the City of Tupelo and appointed by the Tupelo City Council to oversee the redevelopment of certain properties which entails matters such as land acquisition, review, advertisement for construction and infrastructure. [T. 1071]. Debbie Brangenberg is the Project Coordinator for TRA who handled the Project at issue. [T. 1070, 1071]. Mrs. Brangenberg testified that other than the three executed Change Orders, there were no other requests to TRA for additional Change Orders. [T. 1075]. Mrs. Brangenberg testified that all pay estimates submitted by Gray were paid by TRA. [T. 1079]. Further, Mrs. Brangenberg testified that TRA did not give Jesco, Cook Coggins or any of its agents authority to authorize an open-ended final Change Order to cover extra work. [T. 1080]. TRA's first notice that Gray or Ragland was going to assert a claim for extra work came in the form of the March 1, 2002 claim letter. [T. 1082].

SUMMARY OF THE ARGUMENT

Gray has not carried its legal burden of showing that TRA waived its contractual rights to require Change Orders for alleged extra work and to enforce the no damage for delay provisions.

The entirety of Gray's claims against TRA is based on alleged representations by TRA's Project Manager Steve Brister of a promised final Change Order having no defined limits or scope. These alleged representations were wholly refuted by Brister and shown to be ludicrous in light of the contractual safeguards and mechanisms in place for documenting changes to the work and requiring approval of same by TRA in light of its budgetary constraints.

It is undisputed that the details of this Project were heavily documented as evidenced by the voluminous meeting notes, project diaries, various minutes and correspondence made a part of the record herein. However, Gray has failed to come forward with one piece of documentation showing that there was an agreement or representation by TRA or any of its agents that there would be a final Change Order to cover all the claims asserted in the March 1, 2002 claim letter which was drafted near the Project's completion. Instead, the evidence revealed that Gray, by its own correspondence, fully understood the terms of the contract by requiring a Change Order for certain work as evidenced by Renee Gray's January 17, 2002 letter.

Further, the evidence repeatedly showed that Gray acted improperly in various regards to its subcontractor Ragland. Acts of wrongfully withholding payment due Ragland, misfeasance with Ragland's payroll, and wrongful back charges for equipment usage are highly relevant to the credibility and trustworthiness of Gray's claims of an undocumented promised final Change Order by TRA's agent Steve Brister. Also, it is noteworthy that the underlying litigation originated from a different sub-contractor having brought suit against Gray for failing to pay for it for materials related to the subject Project.

In addition, Gray is not entitled to alleged delay damages because of the clear contractual provisions in the General Conditions of the contract between TRA and Gray and the language on Change Order No. 1 regarding modifications to Component C electrical work. Because Gray bases its claim for 89 days worth of delay damages on alleged problems with Component C electrical work, it is now estopped from arguing delay damages after executing Change Order No. 1. Furthermore, "no damage for delay" clauses in contracts are recognized as valid provisions under Mississippi law, and Gray failed to come forward with any evidence to satisfy any one of the exceptions for enforcement of the "no damage for delay" provision.

Gray's claim for indemnification from TRA for the claim asserted against it by Ragland fails in light of the evidence adduced at trial. Gray's claim for indemnification is premised upon an implied contractual relation. In order to advance this theory, Mississippi law requires a showing by a preponderance of the evidence that the claimant [Gray] did not actively or affirmatively participate in a wrong. In the case *sub judice*, the evidence clearly establishes that Gray not only failed to properly insure that any alleged extra work or problems encountered by its subcontractor Ragland would be taken care of under the terms of the contract, but also personally caused Ragland to suffer extra work efforts and unanticipated problems due to Gray's own faulty work and wrongdoings.

ARGUMENTS AND AUTHORITIES

A. TRA DID NOT WAIVE ENFORCEMENT OF ITS CONTRACTUAL RIGHTS WITH GRAY.

Under Mississippi contract law:

> Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.

Union Planters Bank, Nat'l Ass'n v. Rogers, 912 So. 2d 116, 119 (Miss. 2005).

In Titan Indem. Co. v. Hood, 895 So. 2d 138, 149-50 (Miss. 2005), the Appellee argued that the Appellant waived and abandoned its right to enforce an arbitration clause when its counsel stated to the trial court that the Appellant would be willing to change venue to another Mississippi county. Hood, 895 So. 2d at 149. The Court in Hood observed that "the statement made by counsel during oral argument before the trial court does not closely resemble a waiver or abandonment of the forum selection clause." Id. In fact, the Court was unable to find any language in the record "which suggests a waiver." Id.

Similarly, in the case *sub judice,* the unsubstantiated allegations by Gray that TRA's representative Brister waived its rights to enforce the contract provisions by promising a final Change Order is a meritless attempt to manipulate and distort the industry recognized term "final Change Order" which is meant only to reconcile work units actually in place. Brister's testimony at trial was clear that he never promised Gray an open-ended final Change Order and that it was "explained many times during the course of the meetings, that if any contractor had a reason that a Change Order request needed to be issued to reflect any change in costs or time, that it had to be substantiated in the form of a written request and presented to the owner for their approval. If a contractor - - and it says so in the documents, if a contractor proceeds without that written approval, he does so at his own risk." [T. 967 – 968]. This contractual provision is in accord with well-settled Mississippi law that "a contractor who proceeds with work without procuring a written Change Order proceeds at his peril." City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354, 1358 (Miss. 1986). Moreover, Brister did not designedly or knowingly waive TRA's rights to enforce the Change Order provisions, as he acknowledged he had "no authority to direct or approve any Change Order without TRA's endorsement." [T. 967]. Further, Brister testified that he was unaware of Gray ever requesting a final Change Order for the electrical portion of the Project. [T. 968].

The case most compellingly similar to the one *sub judice* is Citizens Nat'l Bank of Meridian v. L. L. Glasscock, Inc., 243 So. 2d 67 (Miss. 1971) wherein the Mississippi Supreme

Court refused to allow a contractor compensation for alleged extra work which was not approved by the project owner via a written Change Order. Glasscock, 243 So. 2d at 67. In Glasscock, a contractor was hired to demolish and remove an existing building and construct a new bank on the site. Id. Subsequent to the demolition and while testing the site for placement of the new foundation, the contractor discovered the existing concrete piling foundation of the building which had not been discovered in previous tests and was unknown to the parties. Id. at 68. The contractor determined that the location of the existing pilings obstructed the placement of the new foundation and asked the structural engineer whether some of the old foundations could be used as foundations for the new structure, but was advised that it was not feasible. Id. at 68. The contractor removed the foundations which entailed much labor and expense, but did so without the benefit of an executed Change Order per the terms of the contract with the owner. Id. at 68. Similar to the case at bar, there was a dispute between the engineer and the contractor as to whether the extra work was performed at the direction of the engineer. However, unlike the case at hand, in Glasscock there was no dispute that "extra work" was performed by the contractor and known by the owner's agent and the contractor advised the owner's agent that he considered his extra labor to be supplementary to the contract for which payment in excess of the contract price would be expected. Id. at 68. In the case *sub judice*, Ragland's alleged extra work for which Gray seeks indemnification from TRA is heavily disputed by TRA's agent Brister. [14]

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[14] Brister emphatically denied knowledge of Ragland allegedly being instructed to always dig underneath existing utilities. [T. 982]. Other than a $2,500 line item in Change Order No. 1, Brister was unaware of any requests for a Change Order or extra compensation for Ragland's benefit regarding extra survey, CAD work or computer work. [T. 983]. Brister testified there was no record or documentation in his project files or the daily diaries from Gray or Ragland that Ragland's crew spent 1,280 hours doing survey and/or computer assisted design work from April 5, 2001 through November 15, 2001. [T. 984]. Brister testified that he was not made aware by either Gray or Ragland that Ragland was purportedly incurring a fee for professional services of $326,400. [T. 984]. Brister testified that Ragland's claim of $145,920 for electrical conduit costs is not reflected in his records. [T. 985]. Ragland admitted that during the life of the Project he did not keep an itemized account of man hours that he or his crew put in on what he claims to be extra work. [T. 431].

Like the case at bar, the contract in Glasscock included within its general conditions a provision for "changes in the work" clearly enunciating that no claim for an addition to the contract sum shall be valid unless so ordered by a written order from the owner or a written order from the owner's agent indicating that the owner had authorized the extra work or charge.[15] Id. at 69.

In Glasscock, the lower court ruled in favor of the contractor based upon a quantum meruit basis.[16] Id. at 68. In its reversal of the lower court and finding in favor of the owner, the Mississippi Supreme Court held:

> The written contract anticipated every contingency upon which this suit was based. Its very purpose was to forestall imposition of vague claims derivative of custom within the trade with which laymen are often unfamiliar. The owner being desirous of limiting its financial obligation, should not have its pocketbook exposed to the custom of architects and contractors unless it agrees thereto. In this instance the owner agreed to pay for extra work only if it was authorized in writing prior to its execution. Having contracted directly upon the point, there was no leeway for an award on a quantum meruit basis.

Id. at 70-71.

In Delta Constr. Co. of Jackson v. City of Jackson, 198 So. 2d 592, 598 (Miss. 1967), pertinent contractual provisions authorized the construction project engineer to make certain

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[15] Paragraph 10.1 in the general conditions of the contract between TRA and Gray states as follows:

> Without invalidating the agreement, the owner may, at any time or from time to time, order additions, deletions or revisions in the works; these will be authorized by Change Orders. Upon receipt of a Change Order, the contractor will proceed with the work involved. All such work shall be executed under the applicable conditions of the contract documents. If any Change Order causes an increase or decrease in the contract price or an extension or shortening of the contract time, an equitable adjustment will be made as provided in Article 11 or Article 12. A Change Order signed by the contractor indicates his agreement therewith.

Further, Section 10.3 of the general conditions states, "Additional work performed by the contractor without authorization of a Change Order will not entitle him to an increase in the contract price or an extension of the contract time ...." [R. 657; RE 11; Exhibit P-1].

[16] The contractor in Glasscock's theory of liability (quantum meruit) is the same asserted by Ragland herein.

changes of a minor nature in the operation of the project provided that the changes did not affect the cost of the project to more than 25% of the total cost of any major item. Delta Constr., 198 So. 2d at 599. Accordingly, the Mississippi Supreme Court allowed a claim for recovery by the contractor to go forward against the owner for such alleged extra work up to 25% of the quantity (in this case excavation work) at the contract price of $.24 per cubic yard. Id. at 601.

In Delta Construction, the contractor insisted that the owner waived part of the contract requiring a supplemental agreement for extra work over and above the 25% amount because "[t]he contractors gave the owners notice that the work would exceed the volume mentioned in the contract and because the engineers directed the contractor to proceed, the owners are estopped to set up the defense that the contract required a supplemental agreement."[17] Id. at 599-600.

In rejecting this argument, the Mississippi Supreme Court held:

> The contract in the instant case requiring a supplemental agreement for extra work over minor changes is essential, because municipalities and other governmental agencies obtained funds with which to build public improvements from bond issues based upon estimates furnished to them, and municipalities must reserve the right to stop a project if they determine the extra work will exceed the amount of money allocated to any given phase of a project.

Id. at 600; see also Mallett v. City of Brookhaven, 217 Miss. 491, 64 So. 2d 641 (1953). Like the owner in Delta Construction, TRA is a duly constituted agency of the City of Tupelo which used earmarked funds from urban renewal bonds for the project at issue. [T. 6-7].

In City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354 (Miss. 1986), the Mississippi Supreme Court made a limited exception to the written Change Order requirement. In Mound Bayou, the Mayor of the city gave oral orders for various additional items of work not

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[17] A key similarity between Delta Construction and the matter at bar is the claim by the contractor that the owner's agent directed the contractor to perform certain extra work. [T. 587].

within the scope of the contract. 499 So. 2d at 1356. The contract required that all changes be in writing and signed by the project engineer. Id. at1355. Although some oral instructions of the Mayor were memorialized by a written Change Order, there were other changes the Court determined had not been made part of a written Change Order. The Court held:

> The contractors should recover in the instant case because Barrett [the engineer] and Mound Bayou by a persistent pattern of conduct waived the contractual provision regarding changes to be executed in writing, and moreover Barrett and Mound Bayou failed to act in good faith in performing their contractual obligation.

Id. at 1360.

The case *sub judice* is wholly distinguishable from the City of Mound Bayou case for several reasons. First, there is no documentation, correspondence, project note or otherwise by Gray during the life of the Project requesting a Change Order (other than those embodied in Change Order No. 1) for the alleged extra work and delays set forth in the March 1, 2002 claim letter. Next, there has been absolutely no showing of a lack of good faith on the part of TRA or any of its representatives including Brister in the direction of work for the Project. In fact, TRA never refused the three requests for extensions for time by Gray. [T. 591].

In the City of Mound Bayou case, the City failed to pay a pay request from the contractor telling him that "instead, if they [contractor] paved the parking lot at City Hall, installed more pipe around the Mayor's house, and paved the street where the pipe had been, the City would finally pay the contractors the amount they claimed was due."[18] City of Mound Bayou, 499 So. 2d at 1356. Unlike the tactic used by the Owner (City) in the City of Mound Bayou case, Renee Gray admitted in her testimony that TRA paid the entire contract price plus the amount of the three Change Orders all in accord with the contract terms. [T. 763]. If anything, Gray is the

[18] In arguments for directed verdict in the case *sub judice*, the lower court aptly noted that the City of Mound Bayou case was an instance "where the Mayor became involved in the negotiations. He became the project manager." [T. 1142; RE 5]. Such was not the case here.

only party to this matter demonstrating acts of bad faith by wrongfully withholding monies due to subcontractor Ragland, acts of misfeasance in handling Ragland's payroll, causing problems by not giving Ragland Components A and B plans and specifications when bidding for his work, wrongfully back charging Ragland for certain items of equipment and asking Ragland to make untruthful assertions to TRA that he had been paid by Gray when in fact, he had not. [T. 191, 204, 213, 217, 239, 247, 258, 260, 268].

In the City of Mound Bayou opinion, there is no indication that the Mayor disputed having orally requested more work from the contractor without the benefit of a Change Order. In fact, the City of Mound Bayou Court observed that after a meeting between the Mayor, contractors and engineering firm hired by the City to oversee the project, the Mayor directed the engineer and the contractors to work out their differences and he would "cut a check" for the amount due the contractors. City of Mound Bayou, 499 So. 2d at 1356. Conversely, Mr. Brister was unaware that either Gray or Ragland was incurring any alleged extra work efforts as shown by the following testimony:

> Q. Mr. Brister, let me ask you this question: Did your having merely used the word change in project meeting notes, did that mean that Ragland and Gray were experiencing extra work outside the scope of the work that they signed off on to do?
>
> A. No. I could have easily used the word revision. I could have used the word - - there are several words I could have used. That didn't express problems on the job. It was up to the contractor to tell us if he had problems on the job. All we tried to do - - in some cases we used the contractor's words in the meetings. I tried to quote and assist the contractor any way we could in those meetings. If he had come up to us and asked for help in that regard, we would have - - we would have given it to him. In the absence of a request, then, as far as I'm concerned, there was no problem. [T. 1066, 1067].

Furthermore, there is no credible proof of any "persistent pattern of conduct" waiving the contractual provisions for Change Orders in this matter. The self-serving statement by Shawn Gray that "time and time again we were promised a final Change Order" is not supported by any file materials or documentation by either TRA or Gray during the time frames of these alleged representations by Brister. [T. 587]. Gray would have this Court believe that TRA blindly promised an open-ended final Change Order for Gray's subcontractor Ragland without having: a.) the scope of changes and/or extra work formally acknowledged and approved by TRA; b.) any accounting or itemization of the costs involved with the proposed extra work; or c.) any form of confirmation in writing.

Again, it should be noted that Gray (not TRA) was the party in privity with Ragland. [T. 427-28]. At trial, Ragland acknowledged that he did not have any contractual relation with TRA and that "it would be improper for them to promise me a change order." [T. 428].

The contract between TRA and Gray was not abandoned after Change Order No. 1 addressed changes to Component C as evidenced by the fact that two more Change Orders requested by Gray **per the terms of the contract** were issued by TRA along with Change Order No. 1.[19]

Gray's assertions that TRA waived its rights to enforce the contractual provisions by alleged promises by Brister of a final Change Order are certainly disingenuous in light of the January 17, 2002 correspondence from Renee Gray to TRA's agent Carson Neal. [T. 766; RE 12; Exhibit P-115]. Specifically, the January 17, 2002 correspondence drafted by Renee Gray reads, "Owner requested a change in this item of work during the course of the project and you stated changes to this work would require a Change Order...Now the owner is attempting to

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[19] Change Order No. 1 added $195,329.10 to the price of Component C. [T. 583; RE 7; Exhibit P-6]. Change Order No. 2 added $20,557 to the contract price. [T. 589; Exhibit P-7]. Change Order No. 3 added $67,826.75. [T. 595; Exhibit P-8].

have work done that it previously admitted would constitute a change in Gray's scope of work. Therefore, Gray is not willing to perform the work defined by item No. 8 without a Change Order." [T. 767; RE 12; Exhibit P-115]. This letter drafted by Renee Gray toward the end of the Project clearly demonstrates that Gray acknowledged use of the Change Order requirements pursuant to the General Conditions of the contract throughout the life of the Project and would **not** do "**extra work**" **without** a Change Order. This evidence wholly refutes Gray's alleged reliance on a prior "promise" of a final Change Order to cover "extra work".

The issue of whether TRA waived its contractual rights is germane to both of Gray's claims for recovery against TRA as there are contractual provisions speaking to each claim asserted by Gray. First, under the terms of the General Conditions of the contract between TRA and Gray, there are clearly enunciated mechanisms calling for Change Orders when there are modifications needed to the work. [R. 657; RE 13; Exhibit P-1]. Specifically, Article 10.1 of the General Conditions of the contract reads, in pertinent part:

> Without invalidating the agreement, the owner may, at any time or from time to time, order additions, deletions, or revisions in the work; **these will be authorized by Change Orders**. Upon receipt of a Change Order, the contractor will proceed with the work involved. [R. 657; RE 13; Exhibit P-1]. [Emphasis added].

Next, Gray's claim for delay damages addressed *infra* hinges upon Gray's allegation of a waiver of the express language in Article 11.9 of the General Conditions in the contract between TRA and Gray which reads:

> Claims for delay due to change: No claim for delay damages will be allowed the contractor on account of Change Orders executed by him. [R. 660; RE 14; Exhibit P-1].

In sum, there are unambiguous contractual provisions addressing each of the claims asserted by Gray against TRA which Gray seeks to evade via its unsubstantiated assertions that

Brister promised a final Change Order to cover everything now claimed by Gray. This position comports neither with the weight nor sufficiency of the evidence adduced at trial.

B. TRA IS ENTITLED TO STATUTORY AND COMMON LAW SAFEGUARDS PERTAINING TO GOVERNMENTAL ENTITIES.

The competitive bidding laws place limitations on a state agency's authority to direct changes or modifications in construction contracts. Specifically, Section 31-7-13 of the Mississippi Code 2004 provides, in pertinent part:

> All agencies and governing authorities shall...contract for public construction...as herein provided.
>
> ***
>
> (g) **Construction Contract Change Authorization**. In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the necessity of further public bids; provided that such change shall be made in a commercially reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract without the necessity of prior approval of the agency or governing authority when any such change or modification is less than 1% of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

Miss. Code Ann. § 31-7-13 (g) (Supp. 2004).

Certainly, extra work and delays allegedly totalling over $1,339,658.63 as claimed by Ragland for Component C of the Project is not a "commercially reasonable" change to the Project for which TRA should bear any responsibility. Further, the verdict awarding Gray

$258,118 against TRA is much more than 1% of the contract amount of $1,725,347.08 as referenced in Miss. Code Ann. § 31-7-13 (g).

A further illustration of the safeguards in place for agencies and governing authorities such as TRA is Mississippi's statutory provision which provides that a municipality has no ability to negotiate a construction contract where the lowest bid received is more than 10% above the amount of funds allocated to the project. Miss. Code Ann. § 31-7-13(d)(ii) (Supp. 2004). Simply put, governmental entities are required to stay within budget for construction projects and that is exactly why TRA relied upon change order provisions in its contract with Gray.

Mississippi Attorney General opinion Baker, January 26, 1995 states in pertinent part:

> "We have also long held the view that when there has been no official action approving in advance additional work by a contractor, the Board of Supervisors is without authority to make payment for that additional work." We stand by that statement today. However, for clarification purposes, we hope today that reasonable variations from estimated quantities in the unit price contract setting, do not constitute "additional work" or a change in the terms of the contract...
>
> ***
>
> Of course, where the plans and specifications of the original contract are modified or the scope of the work changed, the governing authority must approve a Change Order prior to the additional work being done. Otherwise, payment for the additional work cannot be authorized.

The Baker Attorney General opinion sets forth two critical points bearing on the case at issue. First, the contract between TRA and Gray was a "unit price" contract as stated by Steve Brister in his July 10, 2001 letter referencing a final Change Order to cover in place quantity units. [T. 968; RE 10; Exhibit DG-62]. Accordingly, quantity units such as conduit, yards of concrete, electrical wiring, etc., are separate and distinct from "additional work".

The next point to be gleaned from the Baker opinion is that where there has been no official action approving in advance additional work by a contractor, a governing authority is not permitted to pay for the additional work. See also Butler v. Bd. of Supervisors for Hinds County, 659 So. 2d 578 (Miss. 1995) (County not liable for extra work which was never approved by Board).

In Farrish Gravel Co. v. Mississippi State Highway Comm'n, 458 So. 2d 1066, 1070 (Miss. 1984), the Mississippi Supreme Court stated:

> When the State opens a project for bids, a contractor decides what the project is worth. If he cannot make money on it, he does not have to bid on it and good business judgment would dictate that he not enter a bid...while sympathy may be extended to the contractors who lost large sums of money in failing to perform those contracts, the blame must fall upon them. Id.

The Farrish Court went on to state:

> Apparently, before submitting their bids, neither these contractors nor any other contractors contacted or approached the commission about modifying the restrictive provision. Only after the contracts had overrun and the contractors had incurred losses did they approach the commission for help. The time was too late. Id.

While TRA disputes that Gray or Ragland lost any sums of money in performance of their respective work for the Project, the sound reasoning from the Farrish opinion dictates that a contractor cannot redirect blame for his failure to properly bid a project or, as in the case at hand, Gray's failure to provide Ragland with complete materials for his bid. Ragland testified that when bidding on this Project, he was only given the Component C plans and specifications and not Component A and B plans and specifications. [T. 449]. Even Ragland acknowledged the importance of the contractor exercising due diligence in investigation of the Project prior to bidding as demonstrated by the following testimony:

> Q. Okay. This contract provision, which is part of Plaintiff's exhibit, I believe No. 1, which has already been introduced into evidence, Section 4.3 right here, it reads that the - - starting right here at this line, the contractor further acknowledges he has satisfied himself as to the character, quality, quantity of service and subsurface materials or obstacles to be encountered from an investigation of the

> site. Failure by the contractor to acquaint himself with the project site will not relieve him from responsibility for estimating properly the difficulty of cost or successfully performing the work.
>
> Now, is this part of the contract document that you read that Gray had between TRA?
>
> A. Between Gray and TRA. I didn't have this handed to me to be tied to.
>
> ********
>
> Q. Regardless, my question is, its fair for the owner to require the contractor to do his homework before he bids on a project?
>
> A. I'd say so, yes, sir.

[T. 450 – 452]. Only after the alleged losses were incurred did Gray and Ragland approach TRA. The time was too late. Action should have been taken earlier and in accord with the clear contractual provisions.

Ultimately, Mississippi jurisprudence acknowledges the need for controlling the scope of work on public construction projects in order to insure fiscal responsibility. In the case at bar, there is no record or documentation evidencing that TRA or its agents knew of (much less authorized) additional work to the Project totaling over $1,300,000. Further, there is nothing in the record showing that any of Gray's or Ragland's claims of alleged extra work and/or time delays were being incurred during the alleged time frames. Moreover, these after-the-fact assertions via a March 1, 2002 claim letter are particularly untenable in light of the numerous instances of misconduct, misfeasance, and untrustworthy actions of Gray.

C. GRAY IS NOT ENTITLED TO ANY DELAY DAMAGES

A component of Gray's claim against TRA is for alleged delay damages. Specifically, Gray seeks compensation for what it calls "89 days of delay from December 5, 2000 through

April 5, 2001." [R. 139-145; RE 8; Exhibit P-19]. Claims for delay due to change are covered by paragraph 11.9 of the contract documents, which reads as follows:

> 11.9 claims for delay due to change: No claim for delay damages will be allowed the contractor on account of Change Orders executed by him. In support of this stipulation the following language will be set out on the face of each Change Order:
>
> > "It is further understood and agreed that this modification constitutes payment in full on behalf of the contractor and its subcontractors and suppliers for all costs and mark-ups directly or indirectly attributable to the Change Order herein, for all delays related thereto, and for performance of the changes within the time frame stated."

[R. 660; RE 14; Exhibit P-1].

All three Change Orders issued for the project in question contained language indicating that said Change Order constituted payment in full for any delays related thereto. [R. 819 – 832; RE 7; Exhibits P-6, P-7,P-8].

With respect to a no damage for delay provision, the Mississippi Supreme Court in Mississippi Transp. Comm'n v. SCI, Inc., 717 So. 2d 332, 338 (Miss. 1998), acknowledged:

> Despite the apparent commonness of them, this Court has only once addressed and upheld the validity of a "no damage for delay" provision in a construction contract. Edward E. Morgan Co. v. State Highway Comm'n, 212 Miss. 504, 54 So. 2d 742 (1951). Contractual no-damage-for-delay clauses are enforceable... Id.

Mississippi law recognizes only four exceptions to enforcing a "no damage for delay" clause; (1) When there is a delay that was not intended or contemplated by the parties to be within the purview of the provision; (2) Delays that resulted from fraud, misrepresentation or other bad faith on the part of the one seeking the benefit of the provision; (3) Delays that have extended to such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; and (4) Delays not within the specifically enumerated delays to which the clause applies. SCI, 717 So. 2d at 338. See also E.C. Ernst, Inc. v. Manhattan Constr.

Co. of Texas, 551 F. 2d 1026, 1029 (5^{th} Cir. 1977). (held that "no damages for delay" clauses will generally be enforced absent delay not contemplated by the parties, amounting to abandonment of the contract, caused by bad faith, or amounting to active interference). None of the exceptions apply to the case at bar.

As is clearly seen in Gray's March 1, 2002 claim letter, the claim for 89 days worth of delay damages are allegedly attributable to problems with Component C electrical portion of the Project. [R. 139 – 145; RE 8; Exhibit P-19]. As a result of needed modifications to Component C electrical work, Gray requested and received Change Order No. 1 which added $195,329.10 to Gray's contract and entailed the explicit provision that the modifications in Change Order No. 1 constitute full compensation for all delays related thereto. [R. 819; RE 7; Exhibit P-6]. As such, Gray should be estopped from double recovery for matters which were compensated under Change Order No. 1.[20]

In addition, there is an utter lack of correspondence or documentation from Gray or any notes from Brister's Project materials indicating that Gray or any of its subcontractors were delayed because of problems with Component C electrical work until the March 1, 2002 claim letter. Instead, a June 18, 2001 letter from Renee Gray to Carrson Neal at Cook Coggin Engineers drafted **after** the alleged delays makes no mention of delay damages incurred for its laborers or equipment due to alleged defective electrical designs as proclaimed in the March 1, 2002 claim letter, but instead focuses on **weather** conditions. [R. 861; RE 15; P-78]. The June 18, 2001 letter from Renee Gray states, in pertinent part:

> Please be advised that the <u>electrical portion of the contract has been substantially delayed as a result of unusually severe weather.</u>

[20] During arguments for TRA's Motion for Directed Verdict at trial, Judge Gardner stated "I perceive that - - what is it? - - 11.9 to be a provision that says if you ask for a Change Order, you can't go back later and say, in addition to that, whatever changes might have been made by that Change Order, now you owe me some delay time. In other words, you've got to bring it all forward as you come, and you can't have two bites of the apple by asking for a Change Order that increases or decreases the total contract price and then come back later and say we're claiming delay time, delay damages." [T. 823]

> When the Change Order attempting to correct the defective quantities was issued, it was estimated that six weeks of work would be required to get the ducts in place so that the Water and Light Department could install cables for power to the new City Hall building. Production was impeded by working under muddy site conditions, but it was still anticipated that the ducts could be installed by May 30, 2001.
>
> <u>Because of the weather delays, we are experiencing extended overhead costs by keeping equipment on a project that should have been moved out by now.</u>

<u>Id.</u> [Emphasis added].

In the <u>SCI</u> case, the Court noted that the "Commission's refusal to grant extensions on a timely basis can reasonably be interpreted as active interference or bad faith and would justify a damages award. Therefore, the 'no damages for delay' provision does not preclude a damages award in this case." <u>SCI</u>, 717 So. 2d at 338. Conversely, in the case at bar, TRA granted all three requests for time extensions made by Gray. [T. 591]. Moreover, a Change Order addressing changes in the scope of work for Component C was in fact issued; namely Change Order No. 1. [R. 819 – 827; RE 7]. Finally, there were no documented claims for delay damages associated with Component C work by Gray until its March 1, 2002 claim letter drafted by an attorney well after the fact.

TRA submits that there was no evidence of any bad faith or active interference on TRA's part to overcome the "no damages for delay" provisions embodied in Change Order Nos. 1, 2, and 3 or paragraph 11.9 of the General Conditions of the contract between TRA and Gray. Moreover, the credible testimony of Brister was that his file records for the project did not indicate that Gray was delayed for the time periods alleged (December 5, 2000 through April 5, 2001) but rather that work was progressing during that entire time frame. [T. 975 – 976]. Accordingly, the trial court erred in refusing to grant TRA's motion for directed verdict as to Gray's claim for delay damages. [T. 812-827; RE 3].

D. THE TRIAL COURT ERRED IN REFUSING TO GRANT TRA'S MOTION FOR DIRECTED VERDICT AS TO GRAY'S CLAIM FOR INDEMNIFICATION.

Under well-established Mississippi law, an obligation to indemnify may arise from "a contractual relation, from an implied contractual relation, or out of liability imposed by law." Bush v. City of Laurel, 215 So. 2d 256, 259 (Miss. 1968).[21] Because Gray's claim for indemnification is premised upon non-contractual implied indemnity, there are two "critical" prerequisites which must be met:

> 1. The damages which the claimant [Gray] seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and
>
> 2. It must appear that the claimant [Gray] did not actively or affirmatively participate in the wrong.

Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549, 551 (Miss. 1970) (citing Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968)) [Emphasis added]. Gray utterly failed to provide any proof whatsoever of the first critical prerequisite of showing there was a "legal obligation" it had to pay Ragland for damages during the course of litigation and trial of this matter. Therefore, the trial court clearly erred in refusing to grant TRA's Motion for Directed Verdict. See Certain Underwriters of Lloyds of London v. Knostman, 783 So. 2d 694, 698 (Miss. 2001). Indeed, the trial court acknowledged, "There is no showing of any compulsion that is as a result of a judgment rendered by a Court that would require Gray to do anything." [T. 816].

Of equal importance, Gray failed to meet the second prerequisite of showing that "the claimant [Gray] did not actively or affirmatively participate in a wrong." T&S Express v. Liberty Mut., 847 So. 2d 270, 272 (Miss. App. 2003). Simply stated, Gray cannot now claim that it did not actively or affirmatively participate in the wrong resulting in the damages to

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[21] There was no evidence adduced at trial showing any contractual relation or liability imposed by law calling upon TRA to indemnify Gray for any of Ragland's claims. Counsel for Gray designated its indemnification claim against TRA as a "pass-through, the so-called pass-through or the non-contract balance claim of Ragland against Gray." [T. 1101].

Ragland as the jury in this case assessed the overwhelming amount of fault to Gray by way of its verdict against Gray totaling $850,551.32. [T. 1305].

Moreover, the proof adduced at trial showed that Gray delayed Ragland by failing to properly coordinate the work with other subcontractors; hampered Ragland's ability to bid on and work the subject project by only giving him a portion of the project documents (Component C specifications) without the benefit of the other component specifications which indicated the location of other underground utilities; failing to document changes to the work allegedly encountered by Ragland; failing to secure written Change Orders from TRA to cover alleged extra work incurred by Ragland; failing to properly perform its own work in the subgrade of the site; having other work performed timely to be out of Ragland's way; and failing to handle Ragland's payroll properly. [T. 191, 204, 213, 217, 239, 247, 258, 260, 268].

The benchmark for an obligation to indemnify is well-settled under Mississippi law: "[w]hen one person is required to pay money which another person in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid, **provided the person making the payment has not conducted himself in a wrongful manner so as to bar his recovery**." Bush v. City of Laurel, 215 So. 2d at 259. (Emphasis added). Because of the above enumerated wrongdoings of Gray and the jury's finding that Gray conducted itself in a wrongful manner, TRA has no obligation under the law to indemnify Gray for any sums owing to Ragland per the jury's verdict.

In sum, Gray was charged with satisfying **both** critical prerequisites to be entitled to indemnity. However, Gray failed to meet either. Further, Gray cannot legally maintain a claim for indemnification against TRA because it cannot prove that it "paid under compulsion" which is required for an indemnitee to recover. Keys v. Rehab. Ctrs., Inc., 574 So. 2d 579, 584 (Miss.

1990). This is shown by the fact that Gray still has not paid any of the verdict award of $850,551.32 against it. [R. 1590 – 1592].

In light of the foregoing, it is clear that the lower court erred in refusing to grant TRA's motion for directed verdict as to Gray's claim for indemnification. [T. 812-827; RE 3] and [T. 1126-1157; RE 5].

CONCLUSION

Gray advanced only two theories of recovery against TRA at trial. First, Gray made a claim for extra-contractual damages in the form of delay damages allegedly incurred due to problems with Component C electrical work for the Project. However, the evidence clearly demonstrates that Change Order No. 1 specifically addressing problems with Component C electrical work was executed by Gray and included the clear provision that it satisfied any delays related thereto. Further, the majority of the 89 days worth of alleged time delays by Gray occurred prior to the March 2, 2001 Change Order No. 1 executed by Gray.

Additionally, Gray's claim for time delays is meritless due to the fact that they were not raised in correspondence or documentation from any party until a March 2, 2002 claim letter drafted by legal counsel for Gray. Instead, the correspondence from the file for the Project indicates that Gray's concerns were primarily related to weather delays during the course of the Project. Ultimately, Gray was awarded an additional $195,000 to the contract price pursuant to Change Order No. 1 related to Component C electrical work. Yet now, Gray seeks a second bite at the apple by an untimely and unsubstantiated claim for delay damages.

Mississippi law recognizes the validity of "no damage for delay" provisions such as the one in the General Conditions of the contract between TRA and Gray and printed on the face of all three Change Orders given by TRA to Gray for the subject Project. There is absolutely no evidence demonstrating that TRA should not be able to rely upon its "no damage for delay" contractual provisions.

Secondly, Gray attempts to "pass through" to TRA a claim for indemnification for alleged extra work efforts by Gray's sub-contractor Ragland. However, controlling Mississippi law mandates that two critical perquisites must be met before indemnification can be had. Clearly, Gray could not show that at the time of trial it had a legal obligation imposed upon it to pay Ragland anything for his quantum meruit claim. Further, Gray cannot argue that it did not actively or affirmatively participate in the wrong giving rise to Ragland's claims. Accordingly, Gray cannot seek to shift any of Ragland's quantum meruit claim toward TRA via indemnification. Also, Gray cannot show that it has paid under compulsion as is required for an indemnitee to recover.

Both of Gray's theories of recovery (delay damages and indemnification) are premised upon a claim that TRA waived enforcement of its contractual rights. The evidence presented at trial overwhelmingly demonstrates otherwise.

In addition, whereas there was an utter lack of proof or evidence demonstrating that TRA acted improperly with regard to the Project, there were numerous instances of wrongdoing, misfeasance and dereliction in job performance by Gray. Accordingly, TRA should be afforded every protection available to it as a city governmental entity.

In conclusion, the verdict and judgment rendered in the trial below were not supported by well-settled Mississippi law along with the clear provisions in the contract between TRA and Gray. The lower court judgment against TRA should, therefore, be reversed and rendered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Smith, one of the attorneys for the Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellant, by placing said copy in the United States Mail, postage prepaid, addressed to the following:

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DATED, this the 30 day of June, 2006.

KEVIN SMITH