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MEMORANDUM

I. INTRODUCTION

This is a breach of contract case arising out of the construction of a new terminal and renovation of the adjacent terminal at the Philadelphia International Airport (henceforth referred to collectively as the “Philadelphia Airport Project” or “Project”). In July of 2002, plaintiff LBL Skysystems (USA) (“LBL”), a contractor, sued one of its subcontractors, defendant APG-America, Inc. (“APG”) for breach of contract. Also named as a defendant was APG’s surety, Sentry Select Insurance Company (“Sentry”). APG filed several counterclaims against LBL and impleaded LBL’s sureties, XL Specialty Insurance Company (“XL”) and NAC Reinsurance Company (“NAC”).

After a bench trial, the Court ruled that APG materially breached its subcontract with LBL. LBL Skysystems (USA), Inc. v. APG-America, Inc., 2005 WL 2140240 (E.D. Pa. Aug. 31, 2005). The Court deferred ruling on the damages claimed by LBL and APG and the extent of the liability of the sureties, Sentry, XL, and NAC. Id. at *36. Since that ruling, the parties have filed numerous documents on the issue of damages. Upon reviewing those documents, and after a lengthy telephone status conference on March 16, 2006, the Court identified nine separate damages issues contested by the parties, and ordered the parties to jointly identify the evidence in the record relating to each of the issues. See March 17, 2006 Order. The Court has analyzed the identified evidence and the other parts of the record relevant to damages. Its findings of fact and conclusions of law are set forth in this Memorandum.

II. BACKGROUND

A. Facts of the Case

The following facts are an abbreviated account of the Court's factual findings in LBL Skysystems (USA), Inc. v. APG-America, Inc., 2005 WL 2140240, at *2-24 (E.D. Pa. Aug. 31, 2005).

1. The Contract and Subcontract

On December 22, 1999, LBL entered into a contract (the "Prime Contract") with US Airways ("the Owner" or "US Airways") to construct the perimeter wall of the new Philadelphia Airport terminal.¹ This wall consisted of a curtainwall, insulated metal panels, skylights, and louvers. LBL had previously notified APG of its intent to award a subcontract to APG by letter dated October 19, 1999 ("the Letter of Intent"). LBL and APG entered into a subcontract (the "Subcontract") on December 21, 1999. Under the Subcontract, APG was responsible for designing and installing the insulated metal panel system. LBL remained responsible under the Prime Contract for designing and installing the curtainwall, louvers, and skylights. The original amount of the Subcontract was \$9,919,390. On December 10, 1999, APG obtained Performance Bonds for the full amount of the Subcontract from John Deere Insurance Company ("John Deere"), which subsequently sold its surety business to Sentry.²

2. Payments and the Funds Administrator

Pursuant to Article 11 of the Subcontract, progress payments from LBL to APG were to

¹ The original amount of the Prime Contract was \$35,077, 980.

² John Deere was APG's surety during most of the relevant events in this case, including APG's breach of the Subcontract. To avoid confusion, the Court will simply refer to the "the surety" unless it is specifically referring to a position or action by Sentry.

be made within five working days after LBL received payment from the Owner. LBL initially failed to obtain payment bonds required under the Prime Contract, causing delays in payments to APG. As a result, on October 17, 2000, LBL and APG entered into the Funds Agreement under which a third party, the Funds Administrator, received all payments for APG and LBL directly from the Owner and then disbursed those payments to LBL and APG. Under the Funds Agreement, LBL did not receive any funds that US Airways had earmarked for disbursement to APG; those payments were made by the Funds Administrator to APG. Disbursement from the Funds Administrator were anticipated “twice monthly;” the Funds Agreement also provided that “disbursement will be processed as funds are received.”

3. APG’s Termination

On April 4, 2002, APG challenged the scope of its work under the Subcontract, alleging in a letter from its counsel that it was not responsible for support steel in the Recheck Bridge, FIS Soffit, and “miscellaneous other areas,” and stated that it would not supply or install support steel in those areas unless LBL or the Owner issued a change order.³ LBL contested APG’s position, but conveyed it to the Owner, which rejected APG’s position. On April 16, 2002, LBL faxed a Notice to Cure to APG, advising it that LBL considered APG’s decision to not supply or install support steel in specific areas of the Project a breach of the Subcontract, and stating that LBL was holding APG in default. By letter dated April 23, 2002, LBL notified the surety that LBL was considering declaring APG in default of the Subcontract.

Starting around May 6, 2002, APG reduced its workforce on the Project. On May 10,

³ APG affirmed this position in a letter dated April 18, 2002 in which it stated that it was responsible for support steel only in the Arrivals Hall.

2002, LBL sent a letter to the surety and APG entitled “Second Notice of Contractor Default” and “APG Subcontract. On June 27, 2002, LBL served APG and the surety with a Notice of Default and Termination, terminating APG under the Subcontract. LBL then demanded that the surety complete APG’s work or indemnify LBL for the additional cost of completing APG’s work. The surety, however, concluded that APG was not in default and did neither. Through the time of the termination, APR had received \$8,092,031 for work performed on the Project.

4. Change Order Requests

Both LBL and APG submitted numerous change order requests seeking additional money for unanticipated work.⁴ Typically, APG would submit a Change Order Request (“COR”) to LBL, which would then pass along the COR to the Owner in its own Change Request (“CR”). Due to the exceedingly large number of change order requests and change requests submitted by all of the contractors on the Project (3800 over a period of 40 months), both LBL and APG experienced slow processing of their requests.

On December 23, 2002, after APG was terminated, LBL and the Owner agreed to Change Order 98, known as the “Global Settlement.” LBL Ex. 83. Under the Global Settlement, LBL received \$3,300,000 to settle all of the outstanding CORs and CRs submitted by LBL and APG.

B. Procedural History

On July 25, 2002, after APG was terminated, LBL filed suit against APG alleging, inter alia, that support steel in dispute was within APG’s scope of work and that APG’s refusal to

⁴ “[A] change order is a written order to the general contractor authorizing a change in the work to be performed under the contract or an adjustment in the contract sum or contract time. A COR is a document requesting a change order and describing the circumstances requiring the change order, including the costs associated with the change.” Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc., 972 F. Supp. 922, 927 n.5 (E.D. Pa. 1997).

perform this work was a breach of the Subcontract. On that same date, LBL filed a Petition for Preliminary Injunction and Temporary Restraining Order to compel APG to deliver insulated metal panels and related design drawings necessary to complete the Project. LBL contended that it had already paid APG for these panels and drawings. At a conference in Court on August 2, 2002, the parties arrived at a limited settlement under which LBL paid APG \$575,000 for the panels and drawings at issue. This payment is discussed in Section III(I) infra.

In an Amended Complaint, filed August 29, 2002, LBL repeated these allegations, and additionally alleged that the surety breached its obligation under the Performance Bonds by refusing to complete the full scope of APG's work under the Subcontract. In response, APG contended that it was not obligated under the Subcontract to install the disputed support steel and that it was wrongfully terminated by LBL. APG also argued, inter alia, that LBL failed to process APG's CORs and that LBL's failure to process these CORs created serious financial problems for APG.

After extensive discovery, LBL filed a motion for partial summary judgment; APG and Sentry filed a cross-motion for summary judgment. On May 25, 2004, the Court granted summary judgment in favor of APG and Sentry with respect to LBL's claim that APG's alleged breach of contract caused LBL to incur damages in the form of a "lost settlement opportunity" with US Airways, but denied the motions in all other respects. LBL Skysystems (USA), Inc. v. APG-America, Inc., 319 F. Supp. 2d 515 (E.D. Pa. 2004) (hereinafter "LBL (I)").

After a sixteen-day bench trial, the Court issued a Memorandum, Findings of Fact and Conclusions of Law. LBL Skysystems (USA), Inc. v. APG-America, Inc., 2005 WL 2140240 (E.D. Pa. Aug. 31, 2005) (hereinafter "LBL (II)"). The Court held that the support steel at issue

was within APG's scope of work and that APG's failure to furnish and install this support steel was a material breach of the Subcontract. Id. at *36. The Court also concluded that the incorporation of the Prime Contract into the Subcontract required APG to continue its work regardless of its disputes with LBL. Id. Finally, the Court held that LBL's termination of APG complied with the termination provisions of the Subcontract. Id.

In the August 31, 2005 Memorandum and Order, the Court reserved ruling on damages. Id. at *36. However, the Court stated that "in light of the conclusion that the support steel was within APG's scope of work, LBL is entitled to recover its cost of completing APG's work," subject to reduction by any of APG's meritorious CORs that LBL failed to pass on to US Airways. Id. The Court also reserved ruling on the amount of any recovery under the Performance and Payment Bonds. Id.

C. Damages Issues

On the same date the Court issued its Findings of Fact and Conclusions of Law, the Court issued an Order directing the parties to endeavor to reach an agreement on all damages issues and to jointly report to the Court on those discussions. In response, LBL, Sentry, and APG each submitted separate reports on damage-related issues. LBL Skysystem (USA) Inc, XL Specialty Insurance Co., and NAC Reinsurance Corp.'s Report Regarding Damages-Related Issues (Document No. 218, filed September 14, 2005); Sentry Select Insurance Company's Report Regarding Damages-Related Issues (hereinafter "Sentry Report") (Document No. 219, filed September 14, 2005); APG-America, Inc.'s Report on Damages-Related Issues (Document No. 220, filed September 14, 2005). By Order dated September 20, 2005, the Court then directed the parties to submit a joint report identifying all damage-related issues on which they agreed and

disagreed. The parties responded with a Joint Status Report on Damage-Related Issues (“Joint Status Report”) (Document No. 223, filed October 16, 2005).⁵

The Court held a telephone conference with the parties, through counsel, on March 16, 2006, and identified nine separate issues on which the parties disagreed. Those issue are:

1. Can APG recover for CORs 13 and 14?
2. Can APG litigate the CORs included in Global Settlement 98?
3. How much money is APG entitled to receive from the proceeds of Global Settlement 98?
4. Was COR 34 submitted by LBL to US Airways and, if so, was it rejected by US Airways?
5. Can APG recover for CORs that were not submitted to US Airways by LBL?
6. Are the credits/backcharges taken by LBL appropriately reflected in LBL’s damage accounting?
7. Has LBL submitted sufficient evidence of its claim for cost to complete APG’s work?
8. Is Sentry liable on the Performance Bond?
9. Was Sentry released *pro tanto* in the amount of \$575,000?

See March 20, 2006 Order n.1. The Court then ordered the parties to submit a joint report listing all exhibits and trial testimony addressing each of these issues.⁶ The parties did so in a Joint

⁵ In the Joint Status Report, APG and Sentry submitted a separate position report. See APG and Sentry’s Position Report on the Damage-Related Issues, Joint Status Report Tab 4 (hereinafter “APG/Sentry Position Report”). LBL did not include a separate status report in the Joint Status Report, because LBL understood the Court’s September 20, 2005 Order to ask for a “report,” not a “brief.” Joint Status Report at 7. Thereafter, LBL submitted LBL, XL, and NAC’s Response to APG and Sentry’s Position Report on the Damage-Related Issues (hereinafter “LBL Response”) (Document No. 225, filed December 16, 2005). Sentry and APG objected to LBL filing this report as contrary to the Court’s September 20, 2005 Order, untimely, and prejudicial. APG and Sentry filed a Joint Motion to Strike the LBL, XL, and NAC’s Response to APG and Sentry’s Position Report on the Damage-Related Issues (Document No. 227, filed December 28, 2005). The Court denies the Joint Motion to Strike.

⁶ The Court also ordered the parties to identify any issues set forth in the Sentry Report that were not included in the above list of issues. This instruction was requested by counsel for Sentry, who stated during the telephone conference on March 16, 2005 that Sentry had identified issues in its Report in addition to the nine issues identified by the Court.

Memorandum (Document No. 233, filed April 19, 2006). The parties then proceeded to mediation in an effort to resolve the damages issues, but reported to the Court on June 1, 2006 that they were unable to reach agreement.

The Subcontract provides for the calculation of damages as follows:

If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

LBL Ex. 13-A ¶ 7.2.1. Therefore, in order to calculate damages, the Court must determine the final dollar amount of the Subcontract, which will include all approved CORs, including CORs included in Global Settlement 98,⁷ and any meritorious CORs which LBL failed to pass on to US Airways. The amount paid to APG prior to termination will be subtracted from the final Subcontract sum to determine the unpaid balance owed on the Subcontract. The Court will then compare the unpaid balance to LBL's cost to complete.⁸ If LBL's cost to complete is greater than the unpaid balance of the Subcontract, APG will be liable to LBL for that sum. If LBL's cost to complete is less than the unpaid balance of the Subcontract, LBL will be liable to APG for that sum.

The parties agree that the original Subcontract price was \$9,919,390, and that the amount paid to APG prior to termination was \$8,092,031. In the Joint Status Report, the parties reported

⁷ The value of these CORs is determined by the Court in Sections III(B) and (C) infra.

⁸ Whether LBL has sufficiently proven its cost to complete is addressed in Section III(G) infra.

that they had reached agreement on a long list of CORs which total \$694,923.⁹ Joint Status Report at 2-4.

The parties' damage calculations are as follows:

⁹ APG adds this sum to the original Subcontract sum to determine the unpaid Subcontract balance. LBL states that its damage calculation presented during trial (Exhibit 66D) included all but \$63,920 of this amount, and therefore LBL has adjusted its damage calculation by \$63,920.

1. LBL's Damage Calculations

Original Subcontract Price	\$9,919,390
Approved Change Orders Prior to Termination ¹⁰	\$259,661
Change Orders to Finalize ¹¹	\$243,977
Change Orders Included in Global Settlement 98 ¹²	\$792,835
Change Orders Issued by Owner to LBL ¹³	\$225,670
Additional CORs ¹⁴	\$63,920
Additional Adjustments ¹⁵	(\$19,461)
Total APG Subcontract with Changes and Delay Claim	\$11,485,992
Less Amount Paid APG	(\$8,092,031)
Balance of Contract	\$3,393,961
Total Cost to Complete	\$5,762,256
Damages Owed to LBL¹⁶	\$2,368,295

¹⁰ The “Approved Change Orders Prior to Termination” in the total amount of \$259,661 is the total of CORs 4, 10, 12, and 24, as to which there is no dispute. Joint Status Report, Tab 5 Section 1.

¹¹ The “Change Orders to Finalize” include the CORs on which APG and LBL reached agreement and backcharges for several items not agreed upon which are discussed in Section III(E)(2)(k) infra. See Joint Status Report, Tab 5 Section 2.

¹² See Joint Status Report, Tab 5 Section 8.

¹³ The parties do not dispute the value of these Change Orders. See Joint Status Report, Tab 5 Section 4.

¹⁴ See footnote 9 supra.

¹⁵ These “additional adjustments” include COR 8, a \$13,940 backcharge for Sector 12 panels, a \$3,490 credit for COR 23, and a \$9,011 backcharge for COR 94, which LBL states was counted twice in its damage calculation.

¹⁶ This damage calculation does not include any CORs which were not submitted to US Airways.

2. APG's Damage Calculations

APG asserts that it is entitled to recover approximately \$6.8 million under two alternate theories.

a. APG damage theory #1

APG's first damage theory is premised on the assumption that LBL has failed to prove its cost to complete.¹⁷

Amount of work performed under original Subcontract	\$9,394,405
Amount of work performed by APG under agreed CORs	\$437,826
Amount of work performed by APG for CORs in Global Settlement 98	\$4,318,609
Amount of work performed by APG under open CORs ¹⁸	\$799,433
Amount of work performed under APG CORs 13 and 14 ¹⁹	\$444,673
Total Revised Subcontract Sum	\$15,394,946
Less Amount paid to APG	(\$8,092,031)
Less payment to APG for panels after termination	(\$525,427)
Total amount due APG for work performed	\$6,777,488

¹⁷ This damage calculation is found in the APG/Sentry Position Report, Joint Status Report, Tab 4 at 26. The issue of LBL's cost to complete is addressed in Section III(G) infra.

¹⁸ These are the CORs which LBL failed to pass on to US Airways and are addressed in Section III(E) infra.

¹⁹ These CORs are addressed in Section III(A) infra.

b. APG damage theory #2

APG’s second damage theory attempts to adjust LBL’s cost to complete claim by subtracting the cost of work which APG asserts LBL has not proven.²⁰

LBL’s cost to complete claim	\$5,762,256
Less change requests for extra work performed for US Airways	(\$1,721,810)
Change Orders 142 and 147	(\$236,953)
Change Request 358	(\$380,056)
Other extra work LBL failed to segregate	(\$400,000) ²¹
Less payment to APG for panels after termination	(\$525,427)
Total adjusted cost to complete	\$2,498,010
Total unpaid balance of Subcontract sum	\$9,291,137
Excess owed APG	\$6,793,127

²⁰ This damage calculation is found in the APG/Sentry Position Report, Joint Status Report, Tab 4 at 27-28. The issue of LBL’s cost to complete is addressed in Section III(G) infra.

²¹ APG acknowledges that this figure is only an estimate, “made necessary by LBL’s failure to meet its burden of proof.” APG/Sentry Position Report at 27.

III. ANALYSIS

The Court will address each of the nine damages-related issues in turn. Based on the resolution of these issues, the Court will calculate the damages in the case.

A. Can APG Recover for CORs 13 and 14?

1. Background

COR 13, in the amount of \$132,874, was for canopy work in Sector 3. APG Ex. 71. COR 14, in the amount of \$417,910, was for canopy work in Sectors 5 through 7 and the Mezzanine. APG Ex. 72. The total value of this work is \$550,784. However, because APG only performed \$26,763 of the work under COR 13,²² APG only seeks to recover \$444,673 for CORs 13 and 14. Tr. 11/12/04 (Rosenberg) 115:5-7.

The work represented in the CORs was first discussed at a meeting in Montreal, which took place on September 28, 1999, and was attended by representatives of both APG and LBL. The purpose of the Montreal meeting was to review the scope of the insulated metal panel work covered by the Subcontract. Tr. 12/7/04 (Zaucha) 36:9-16. At the meeting, representatives of APG and LBL highlighted the “gray areas” in the scope of the panel work on a set of architectural drawings. Id. at 37:6. As Edward Zaucha (“Zaucha”), APG’s Chief Executive Officer, testified:

When we got to some areas [on the architectural drawings] where now [the architects] had detailed a little – in a little more detail some areas that weren’t part of our bid, we highlighted those in orange and over time they became referred to as the gray areas. It was uncertain as to – in any number of regards, whether it was going to even be done with insulated metal panels, it may have been metal plate, eighth-inch metal plate or some

²² APG did not complete the work for COR 13 because they were terminated by LBL. Tr. 11/12/04 (Rosenberg) 115:3-4. APG did complete all of the work covered by COR 14 prior to termination. Id. at 117:10-12.

other type of material, composite metal, which wasn't part of our scope of work.

Id. at 37:13-21. Marc Rosenberg of APG ("Rosenberg"), who was also present at the meeting, similarly explained that the gray areas "were undefined and LBL would ultimately make a decision as to whether they were going to do them, because they were doing a lot of panel work on the job." Tr. 11/19/04 (Rosenberg) 57:21-23.

The orange highlighting referred to by Zaucha is found on sheets A-203, A-505, A-506, and A-507 of the architectural drawings used at the Montreal meeting. APG Ex. 25. Sheet A-203 depicts the work in the Canopy which was the subject of COR 13. On A-203, portions of the paneling have been shaded orange, as described by Zaucha in his testimony, and labeled "PA5." APG Ex. 25. Sheet A-203 is also initialed "RB" by Ron Brunet, an LBL representative. Id.; Tr. 12/7/04 (Zaucha) 36:20-37:3, 37:6. Sheet A-505 of the architectural drawings depicts the work in Sectors 5 through 7 and the Mezzanine. Sheet A-505, which depicts Sector 5, shows an orange highlighted area from CF to CE and between C12 and T11. APG Ex. 25. This drawing is also initialed "RB." Id. Drawings A-506 and A-507 show this orange highlighting extending through Sectors 6 and 7. Id.

Based on these architectural drawings, the Court finds that, at the time of the September 28, 1999 Montreal meeting, both APG and LBL had not determined who was responsible for the work covered by CORs 13 and 14. This finding is based on the testimony about the meeting, the architectural drawings with the orange highlighting initialed by a representative of LBL, Ron Brunet, and the minutes of the meeting, which state, under the heading of "Scope Review":

APG / LBL reviewed scope by coloring architectural drawing. LBL to respond to APG on some areas / portions which LBL assumes are part of APG's scope.

- a) Drawing A-203
Canopy on grid PA between P22 and P27

b) South wall of Terminal @ Penthouse A-505

LBL Ex. 14.

LBL's "response" to the disputed scope of APG's work was the Letter of Intent, dated October 19, 1999. In addition to confirming that APG had been awarded the Subcontract to design and install the insulated metal panels, the Letter of Intent states that the work in the "gray areas" is part of APG's scope. The Letter of Intent states:

We confirm that, 1) Canopy on grid PA between P22 and P27 on drawing A-203 and 2) North and South walls of Terminal @ Penthouse along grid CF and CE between C12 and T11 on drawing A-505 are part of APG's scope.

LBL Ex. 14.²³ Rosenberg testified that after he received the Letter of Intent, he both called and e-mailed LBL disputing that this work was within APG's scope. Tr. 11/22/04 (Rosenberg) 123:14-124:6.

Despite Rosenberg's response, LBL thereafter drafted a Subcontract that referenced the Letter of Intent. Article 16.1.4 of the Subcontract, entitled "Other Documents," lists documents "that are intended to form part of the Subcontract Documents." LBL Ex. 13A. The first document listed is "LBL's letter of intent dated October 19, 1999." *Id.* APG's representatives admit that they signed the Subcontract without crossing out the Letter of Intent, despite the fact that they carefully edited other parts of the Subcontract. Tr. 12/8/04 (Zaucha) 54:16-55:2 (acknowledging that he corrected typographical errors in the Subcontract but stating that he "overlooked" the inclusion of the Letter of Intent in the incorporated documents section). APG argues that despite the reference in the Subcontract to the Letter of Intent, the Letter of Intent was

²³ The Court notes that the Letter of Intent specifically references the sheets in the architectural drawings, A-203 and A-505, which were marked with the orange highlighting at the Montreal meeting.

not incorporated into the Subcontract by reference.

APG further argues that LBL issued COs for CORs 13 and 14, demonstrating that it agreed that this work was not part of APG's scope of work. In response to APG's initial COR 13 submission, dated July 2, 2001, LBL issued CO 4 to APG, dated September 4, 2001, which added \$91,322 to the total Subcontract sum.²⁴ APG Ex. 71. On February 2, 2002, APG submitted a revised COR 13 in the amount of \$132,874. Id. LBL responded to APG's initial COR 14 submission, dated July 2, 2001, by issuing CO 5, dated September 4, 2001, which added \$127,977 to the total Subcontract sum.²⁵ Id.

On January 14, 2002, APG submitted a revised COR 14 in the amount of \$417,911.²⁶ Id. LBL questioned this significantly higher cost in the revised COR 14. Tr. 12/17/04 (Brais) 160:2-7. Several months after receiving COR 14, Raymond Brais of LBL ("Brais") received a report from APG dated May 1, 2002, which referenced and attached the Letter of Intent. LBL Ex. 549. Upon receipt of this letter, and reading the letter of intent, Brais realized that the work included in CORs 13 and 14 was within the scope of APG's Subcontract. Tr. 12/17/04 (Brais) 161:15-22. LBL then decided to rescind CORs 13 and 14. Id. at 161:25-162:2.

²⁴ APG had requested \$109,719 for this work in COR 13. APG Ex. 71.

²⁵ APG had requested \$194,383 for this work in COR 14.

²⁶ APG explained in the revised COR 14 that the amount of the COR was significantly higher than previous estimates due to several factors, including specially cut panels, special staging to reach the work, and a higher ratio of anchors and welding. APG Ex. 72; Tr. 11/22/04 (Rosenberg) 119:1-9 (explaining that "as we performed the work, because it was so late, we had to perform different rigging because the roof was already on . . . it's in a difficult situation where there is louvers, so we had to create special rigging to hand down and put these panels at the top and the bottom of the louvers as they ran up on the penthouse in these sectors"). LBL disputes that there was any change in conditions justifying the higher amounts. Tr. 12/17/04 (Brais) 163:11-17 (stating that conditions had not changed). However, Brais also testified that the access to the area covered by COR 14 was "difficult." Id. at 163:15-16.

2. Analysis

The Court did not address the incorporation of the Letter of Intent in its August 31, 2005 opinion. However, the Court ruled during trial, based on the evidence presented as of that time, that the Letter of Intent was incorporated into the Subcontract. Tr. 12/7/04 (Court) 49:16-50:2. That ruling was qualified by the statement that it might be reversed based on submission of additional evidence. Id. The Court now concludes that there is no additional evidence to alter the determination at trial that the Letter of Intent was made part of the Subcontract.

A contract may incorporate another document by reference “where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.” Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 (3d Cir. 2003); see also Shadowbox Pictures, LLC v. Global Enterprises, Inc., 2006 WL 120030, at *7 (E.D. Pa. Jan. 11, 2006). In this case, the Subcontract clearly referenced the Letter of Intent, listing it as “Exhibit A – LBL’s letter of intent dated October 19, 1999.” LBL Ex. 13A. The identity of this document was easily ascertainable, as the topic of the letter and its date were given. And incorporating the document did not result in surprise or hardship. Thus, the Court concludes that the Letter of Intent was incorporated by reference into the Subcontract.²⁷

APG argues that even if the Letter of Intent was incorporated by reference into the

²⁷ APG argues that the Letter of Intent was not incorporated because it was not initialed by both APG and LBL. A document need not be initialed in order to incorporate it into a contract by reference. “So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including . . . a separate document which is unsigned.” 11 Williston on Contracts § 30:25 (4th ed. 2003).

Subcontract, LBL's issuance of Change Orders in response to CORs 13 and 14 preclude it from retracting those orders. The Court disagrees, because the LBL COs 4 and 5 did not modify the Subcontract. In order to modify a contract, separate consideration or reliance is required.

Barnhart v. Dollar Rent A Car Sys., Inc., 595 F.2d 914, 919 (3d Cir. 1979) ("Pennsylvania law requires additional consideration or reliance to support a contractual modification."); Consol. Rail Corp. v. Canada Malting Co., 2000 WL 151160, at *10 (E.D. Pa. Feb. 10, 2000). The promise of a party to carry out work which is already included in an existing contract does not constitute consideration. Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968). Therefore, because APG was only promising to carry out work which was within the original Subcontract's scope, APG did not provide any additional consideration, and there was no modification of the Subcontract.

APG also argues that LBL should be estopped from rescinding COs 4 and 5. This argument is precluded, however, by the existence of the Subcontract. The doctrine of promissory estoppel can only be invoked where the relationship between the parties is not governed by a contract. See Carlson v. Arnot-Ogden Mem. Hosp., 918 F.2d 411, 416 (3d Cir. 1990). "[P]romissory estoppel has no application when parties have entered into an enforceable agreement." Synesiou v. DesignToMarket, Inc., 2002 WL 501494, at *4 (E.D. Pa. Apr. 3, 2002). In this case, not only was the relationship between LBL and APG governed by a contract, the Subcontract, but the work in question was within APG's scope under the Subcontract pursuant to the incorporation of the Letter of Intent.

The Court concludes that the Letter of Intent was incorporated into the Subcontract, and that the work performed by APG as described in CORs 13 and 14 was covered by the Letter of

Intent. As such, this work was within the scope of the Subcontract. Therefore, APG cannot recover for CORs 13 and 14.

B. Can APG Litigate the CORs Included in Global Settlement 98?

1. Background

Before explaining the parties' arguments, the Court will outline the events which preceded Global Settlement 98 and the settlement itself.

a. Timeline

After APG challenged the scope of its work by letter dated April 4, 2002, it began reducing its labor force on the Project on or about May 6, 2002. Tr. 12/17/04 (Brais) 126:19-127:11. LBL was forced to take over APG's work after APG reduced its workforce, causing LBL to incur significant additional costs. LBL Ex. 278. Following APG's reduction in its workforce, the Owner sent a "Notice to Cure" to LBL on May 8, 2002 (and a follow-up letter on May 9, 2002) in which the Owner stated that APG was not proceeding with insulated metal panel work and that APG had "failed to properly man the project." LBL Ex. 478. APG's breach also caused the Owner to stop payments to the Funds Administrator as of March 15, 2002. LBL Ex. 278. As a result, the Funds Administrator ceased disbursing funds to LBL after that date, forcing LBL to fund both its and APG's work. Id. These circumstances placed LBL in a precarious financial situation.²⁸ LBL Ex. 272 (August 5, 2002 letter from LBL to surety describing LBL's "financial burden"); LBL Ex. 278 (August 16, 2002 letter to surety describing the costs incurred

²⁸ In addition to LBL's financial situation, US Airways was preparing to file a bankruptcy petition at this time. Tr. 12/17/04 (Brais) 221:7-10. In the Court's LBL (I) opinion, it found that one of the factors leading to Global Settlement 98 was the fact that U.S. Airways was going into bankruptcy. LBL (I), 319 F. Supp. 2d 515, 523 (E.D. Pa. 2004).

by LBL since APG's breach); see also LBL (I), 319 F. Supp. 2d at 522 (testimony of Brais about LBL's lack of "working capital").

Compounding LBL's financial difficulties, on June 18, 2002, the Owner issued a "Notification of Default" to LBL. LBL Ex. 69. In this Notice, the Owner alleged that LBL had failed to proceed with the furnishing and installation of insulated metal panels in certain sectors of the Project, including Sectors 23 and 24.²⁹ Id. The Notice gave LBL seven days to cure the default. Additionally, at some point during this time, the Owner and Turner Construction Company ("Turner), the construction manager on the project, notified LBL that if it did not meet the Project deadline, it would be assessed liquidated damages in the amount of \$12,000 a day pursuant to Article 7.5.2 of the Prime Contract. LBL Ex. 281; Tr. 11/16/04 (Brais) 83:2-16. The Owner informed LBL that the only way to extend the Project completion deadline was to enter into a global settlement. Id.

On June 24, 2002, LBL and US Airways met to discuss the potential global settlement. APG was not present at this meeting, as the Owner excluded APG from change order meetings after APG challenged the scope of its work under the Subcontract in the April 4, 2002 letter.³⁰ LBL sought to have APG included in the change order meetings after April 4, 2002, but the Owner refused; it believed that APG had "twisted" information disclosed at the meetings. APG

²⁹ Sectors 23 and 24 are significant in later discussion in this opinion. See Sections III(E)(2)(c) and III(F) infra.

³⁰ Under Paragraph 3.2.7, which was added to the Subcontract pursuant to Change Order 2, the contractor was to "endeavor" to obtain permission from the construction manager for representatives of the Subcontract to be present at all meetings if any work relating to the subcontractor was on the agenda. "Subcontractor will be permitted to participate in progress meetings, and to negotiate directly, with Contractor present, their Payment Applications, Change Orders, and Claims."

Ex. 170A; Tr. 12/17/04 (Alibrando) 20:9-14.

Global Settlement 98, also known as Change Order 98, is dated November 20, 2002, and signed on December 23, 2002. LBL Ex. 83. Under Global Settlement 98, the Owner and LBL settled “all issues [of LBL and APG] known to the parties as of August 27, 2002, except for future Owner elected scope changes . . .” *Id.* LBL submitted a total of \$12,000,000 in claims in connection with Global Settlement 98. Approximately \$6,500,000 of those claims were for APG; \$5,500,000 were for LBL. Tr. 12/17/04 (Brais) 238:18-239:2. Under Global Settlement 98, LBL received \$3,300,000 from the Owner in settlement of all claims of LBL and APG through August 27, 2002 as shown in Table 1 of the Global Settlement.³¹ LBL Ex. 83.³²

b. The parties’ arguments

APG argues that under the provisions of the Prime Contract and the Subcontract, it had the right to litigate its disputes regarding CORs, including CORs included in Global Settlement 98, in state or federal court. Article 14.1.4 of the Prime Contract provided that a contractor was entitled to an equitable adjustment in the contract price if the Owner requested a change in the contractor’s work.³³ LBL Ex. 62. That provision of the Prime Contract was incorporated into the

³¹ As discussed in Section III(C) *infra*, APG and LBL dispute how much money APG was credited from Global Settlement 98. According to APG, LBL has credited APG for \$118,620 in its damage calculations. LBL asserts it credited APG \$792,835 in its damage calculations.

³² Global Settlement 98 also postponed the completion date for the project to November 15, 2002.

³³ Under the Prime Contract, the amount of the adjustment was to be determined by mutual agreement on a lump sum, a mutually determined cost plus a jointly acceptable markup for overhead and profit, unit prices already established in the contract documents, the adjustment as directed by Owner on a time and materials basis, or “as may otherwise be required by the Contract Documents.” LBL Ex. 62, Art. 14.1.4.

Subcontract through Paragraph 2.1 of the Subcontract.³⁴ Because the Prime Contract also gave the parties the right to take disputes to the Pennsylvania courts or the federal courts within the Commonwealth of Pennsylvania, LBL Ex 62 Art. 8.2, APG argues that it has the right to present its disputes regarding the CORs included in Global Settlement 98 in this Court.³⁵

According to the parties, the following CORs were included in Global Settlement 98 and

³⁴ Paragraph 2.1 of the Subcontract provides:

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions [of] the US Airways General Conditions apply to this Agreement pursuant to Paragraph 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect . . . Where a provision of such documents [the Prime Contract] is inconsistent with a provision of this Agreement, this Agreement shall govern.

LBL Ex. 13-A. In its August 31, 2005 Memorandum and Order, the Court held that Paragraph 2.1 “expressly incorporates the provisions of the Prime Contract into the Subcontract so long as those Prime Contract provisions are not inconsistent with the Subcontract.” LBL(II), 2005 WL 2140240, at *18 (E.D. Pa. Aug. 31, 2005).

³⁵ APG also bases this argument on the “pass-through” provision in the General Conditions for Contractors, which provides:

By an appropriate agreement . . . the Contractor shall require each Subcontractor to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner, the Construction Manager and the Architect/Engineer under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights, and *shall allow the Subcontractor*, unless specifically provided otherwise in the Contractor Subcontractor agreement, *the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner or Construction Manager.*

APG Ex. 21, ¶ 19.3.1 (emphasis added).

are still in dispute.³⁶ Those CORs marked by an asterik are CORs which APG disputes were included in Global Settlement 98.³⁷ The difference between the value assigned by the Owner and the amount credited to APG by LBL is the result of LBL's deduction of its five percent mark-up from the value assigned by US Airways. Joint Status Report at 10.

³⁶ APG's figures were taken from Tab 1 in the Joint Status Report on Damage-Related Issues. LBL's figures were taken from Tab 5 Section 3 of the Joint Status Report.

³⁷ APG did not assign a value to these CORs because APG does not include these CORs among those included in Global Settlement 98.

APG COR	Value (according to APG)	Value assigned in GS 98 (according to APG) ³⁸	Amount credited to APG (according to APG)	Amount credited to APG (according to LBL)
2R6	\$29,984	\$67,650	\$64,429	\$64,429
5A	\$525,647	\$200,000	\$190,476	\$190,476
5B	\$244,366	\$100,000	\$95,238	\$95,238
5C	\$1,155,000	\$0	\$0	\$0
21*	\$2,439	n/a	n/a	\$2,439
22	\$0	(\$500,000) ³⁹	(\$500,000)	(\$500,000)
32*	\$23,668	n/a	n/a	\$23,668
41*	\$13,251	n/a	n/a	\$13,251
49R1	\$300,257	\$0	\$0	\$0
52	\$180,245	\$0	\$0	\$0
53	\$0	\$125,000	\$119,048	\$119,048
57	\$92,520	\$0	\$0	\$0
59	\$7,137	\$0	\$0	\$0

³⁸ APG asserts that the values were assigned by LBL. However, the Court finds in Section III(C)(2) *infra* that the values were actually assigned by the Owner.

³⁹ This reflects a backcharge taken by the Owner against LBL. Whether LBL can assess this backcharge against APG is discussed in Section III(F) *infra*.

APG COR	Value (according to APG)	Value assigned in GS 98 (according to APG)	Amount credited to APG (according to APG)	Amount credited to APG (according to LBL)
69*	n/a	n/a	n/a	\$5,747
78R1	\$156,194	\$0	\$0	\$0
79	\$7,500	\$125,000	\$119,048	\$119,048
82	\$292,555	\$0	\$0	\$0
83	\$321,859	\$0	\$0	\$0
85*	n/a	n/a	n/a	\$46,048
85B*	n/a	n/a	n/a	\$374,560
86	\$279,956	\$0	\$0	\$0
88	\$131,848	\$0	\$0	\$0
91*	n/a	n/a	n/a	\$11,138
92*	n/a	n/a	n/a	\$8,005
94*	n/a	n/a	n/a	\$9,011
101	\$10,600	\$0	\$0	\$0
143	\$518,527	\$34,000	\$32,381	\$32,381
169	\$0	\$0	\$0	\$0
170	\$8,000	\$0	\$0	\$0
171	\$42,664	\$0	\$0	\$0

APG COR	Value (according to APG)	Value assigned in GS 98 (according to APG)	Amount credited to APG (according to APG)	Amount credited to APG (according to LBL)
172	\$13,750	\$0	\$0	\$0
LBL 356*	n/a	n/a	n/a	\$6,392
LBL 358*	\$380,056	n/a	n/a	\$171,957
Misc.	n/a	n/a	(\$2,000) ⁴⁰	n/a
Total	\$4,318,609	\$151,650	\$118,620	\$792,835

⁴⁰ According to APG, LBL backcharged it \$2,000 for “burned glass at CW-6A.” LBL does not include this backcharge in its list of Global Settlement 98 CORs; instead, it is included in its “Change Orders to Finalize” figure of \$243,977.

2. Analysis

In its Findings of Fact and Conclusions of Law issued on August 31, 2005, the Court stated:

APG argues that it is not bound by any determinations made by US Airways with respect to the value of CORs submitted by APG. The Court disagrees. . . . Under Paragraph 19.16 of the Prime Contract, US Airways had final authority over any payments made to APG and APG was therefore bound by US Airways' valuation of those CORs.

LBL (II), 2005 WL 2140240, at *33. Thus, based on this holding, APG is precluded from arguing that it may litigate CORs included in Global Settlement 98.

APG seeks to avoid this ruling by arguing that it was never given the opportunity to participate in negotiations with the Owner, and that any CORs settled without APG's consent are not binding. However, the evidence establishes that the Owner, and not LBL, was responsible for APG's exclusion from the Global Settlement 98 negotiations. As noted above, US Airways began excluding APG from change order meetings after APG challenged the scope of its work under the Subcontract in the April 4, 2002 letter. Brais, Vice President of Project Management at LBL, testified that "US Airways did not want to meet with APG, refused to meet with APG, despite our numerous requests." Tr. 12/17/04 (Brais) 240:9-10.⁴¹ Tr. 11/12/04 (Wiseman) 44:15-25. Moreover, both the surety and APG were aware that LBL was in the process of negotiating Global Settlement 98. APG had been notified in March 15, 2002 that US Airways wanted to negotiate a global settlement for all outstanding claims. Tr. 12/17/04 (Brais) 221:13-

⁴¹ Similarly, Ken Wiseman, director of facilities for US Airways, testified that LBL requested that US Airways and APG mediate APG's claims, but US Airways refused, as it saw "no benefit" in mediation, as it believed APG's claims were meritless. Tr 11/12/04 (Wiseman) 44:21-45:7.

17. The surety was notified in a letter dated August 16, 2002, in which LBL stated that due to **its current financial situation**, LBL might be forced to accept a global settlement from US Airways.

LBL Ex. 278. According to Brais, “We asked the surety to get involved, we begged the surety got [sic] involved. Everybody knew, there was no secret here.” Tr. 12/17/04 (Brais) 239:14-15.⁴²

Based on this evidence, the Court concludes that LBL was forced to accept Global Settlement 98 due to its severe financial crisis, which was created, in large part, by APG’s breach. Brais of LBL described the situation at the time as follows:

Well, there were a lot of things happening at the time. If we go back a bit, in April APG gives us – hands me their letter [challenging] the steel scope; in May, they throttle down their labor force and basically halt the job. At that point, US Airways starts sending default letters, and at the same time US Airways – I don’t remember exactly the date, but is going through Chapter 11, has declared – either preparing to or going into bankruptcy. So, the – many issues are at hand. Is there funding for the project? We know there’s guaranteed funding somewhere, we don’t know if it’s enough. At the same time, as we had notified APG in March of – March 15th meeting when they came to Montreal, U.S. Air wants to negotiate global settlement for all outstanding claims, so we’ve started into that process. And so now we go from March into April with the letter, into May with the US Airways Chapter 11, into June with APG doing no work, and we’re basically taking over the work. We’re trying to get the panels. So US Airways, as we have seen, is throwing us a bunch of letters saying we’re not manning the job. This is about every worst thing that could happen is happening at this point.

Tr. 12/17/04 (Brais) 221:3-23; see also LBL (I), 319 F. Supp. 2d at 523 (finding that LBL was forced to accept Global Settlement 98 due to APG’s breach and other financial constraints). If LBL had not entered into Global Settlement 98, it would not have had the financial means to continue its (and APG’s) work on the Project. Had LBL failed to complete its work on the

⁴² In fact, the surety’s failure to take action at this point only exacerbated LBL’s financial situation; had the surety intervened, LBL would have had a source of funding for the work it was performing.

Project by the required completion date, it would have been held in default by the Owner and assessed liquidated damages of \$12,000 a day. LBL had no choice but to enter into Global Settlement 98 and obtain the best resolution of its outstanding claims and the outstanding claims of APG as was possible under the circumstances.

LBL was forced to enter into Global Settlement 98 not only by its financial situation, but by its duty to mitigate its damages after APG breached the Subcontract. See Koppers Co. v. Aetna Cas. and Surety Co., 98 F.3d 1440, 1448 (3d Cir. 1996) (“As a matter of general contract law, the Pennsylvania Supreme Court has held that a plaintiff’s duty to mitigate its damages arises upon the defendant’s breach of contract.”) (citing Bafile v. Borough of Muncy, 588 A.2d 462, 464 (Pa. 1991)). When mitigation is appropriate, the test to be applied is whether “the conduct taken in response to the defendant’s breach was reasonable.” Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat. Bank of Evans City, 611 F.2d 465, 471 (3d Cir. 1979).

The Court concludes that LBL’s conduct in entering into Global Settlement 98 was a more than reasonable attempt to mitigate damages. Not only did Global Settlement 98 allow LBL to obtain funding to continue its work and extend the Project deadline, it also released LBL and APG for all claims due to rippled Thyssen panels provided by APG. Under the terms of Global Settlement 98, the Owner accepted the ripples in the panels. LBL Ex. 83, at 4 ¶ 5 (“Rippled panels will not be replaced or repaired.”). As LBL explained in an August 16, 2002 letter to the surety:

Another incentive in reaching a global settlement is the acceptance by US Airways of the ripples in the Thyssen panels and renouncement of their rights to recover many potential backcharges/damages from third parties to date. The potential damages to LBL resulting from APG’s deficient materials and damages due to delays in the work . . . could well reach into the millions of dollars and outweigh any costs recovered from claims and extras.

LBL Ex. 278.

In conclusion, the exclusion of APG from Global Settlement 98 was a decision made by US Airways, not LBL. Moreover, both APG and the surety were aware of LBL's financial situation and the impending Global Settlement 98. Therefore, APG is not entitled to litigate the CORs included in Global Settlement 98.

C. What is APG Entitled to Receive from the Proceeds of Global Settlement 98?

1. Background

As detailed in the chart in Section III(B)(1)(b) supra, APG is seeking \$4,318,609 for the CORs which were included in Global Settlement 98. In addition to arguing that it is entitled to litigate the CORs included in Global Settlement 98, the argument rejected by the Court supra, APG argues that it is entitled to more money from the CORs included in Global Settlement 98 than the values assigned to the CORs by the Owner and the amount credited to APG by LBL. For example, APG argues that it is entitled to \$1,858,173 for CORs 5A, 5B, and 5C, which represent costs incurred as a result of a nine-month delay on the Project. Under Global Settlement 98 the Owner assigned these CORs a total value of \$300,000; LBL credited APG for \$285,714.⁴³ Finally, the parties dispute how much money LBL credited APG for the CORs included in Global Settlement 98. According to APG, the value of these CORs assigned by the Owner was \$151,650, and the amount credited to APG by LBL in LBL's damage calculations is \$118,620. LBL asserts it credited APG \$792,835 in its damage calculations.

2. Analysis

⁴³ The difference between the value assigned by the Owner and the amount credited to APG by LBL is the result of LBL's deduction of its five percent mark-up from the value assigned by US Airways. Joint Status Report at 10.

The Court's conclusion supra – that APG is not entitled to litigate the CORs included in Global Settlement 98 – precludes APG's argument that it is entitled to more money from Global Settlement 98 than it was allocated by the Owner and credited by LBL. Notwithstanding this conclusion, the Court will briefly address APG's arguments.

APG argues that LBL assigned values to the CORs included in Global Settlement 98 in an "arbitrary nature." While LBL did not perform a detailed analysis of the APG CORs included in Global Settlement 98, Tr. 12/17/04 (Brais) 235:20-22, US Airways closely analyzed and evaluated these CORs. According to Ken Wiseman, director of facilities for US Airways, the change orders included in Global Settlement 98, including APG's CORs, were reviewed by numerous individuals, including the design architects, airport engineering staff, and US Airways' construction management consultants. Tr. 11/12/04 (Wiseman) 37:17-25. Wiseman testified that the \$0 figures assigned to APG's CORs included in Global Settlement 98 reflect an independent investigation performed by US Airways and their consultants. Id. 38:9-12. Wiseman further stated that there was no agreement, discussion, or even request by LBL to treat its subcontractors' claims differently than LBL's claims. Id. 38:1-8. "I mean, in hindsight, at the time I wasn't making any distinction about where a claim would come from We, frankly, we just weren't thinking about who was doing the work. To us LBL was doing all the work." Id. 38:21-22, 39:1-2.

Moreover, LBL was not required to fight for generous reimbursement for APG's CORs included in Global Settlement 98. It is a basic legal principal that a non-breaching party confronted with a material breach of contract is excused from performance under the contract. See, e.g., In re MK Lombard Group, Ltd., 2005 WL 735993, at *10 (E.D. Pa. Mar. 31, 2005); Ott

v. Buehler Lumber Co., 541 A.2d 1143, 1145 (Pa. Super. 1988) (“The general rule is that a party who has materially breached a contract may not complain if the other party refuses to perform his obligations under the contract.”). Once APG breached the Subcontract, LBL was not required to obtain the greatest reimbursement possible for its CORs.

Regarding the issue of how much money LBL actually credited APG for the CORs included in Global Settlement 98, the Court has cross-referenced the additional CORs which APG disputes were included in Global Settlement 98 (those CORs marked with an asterik in the chart in Section III(B)(1)(b) supra) with the Global Settlement 98 document, LBL Exhibit 83. The evidence is to the contrary. Each of the disputed CORs is included in Global Settlement 98.⁴⁴ Therefore, the Court concludes that LBL’s accounting for the CORs included within Global Settlement 98 is correct, with one exception: the \$2,000 backcharge for burned glass. There is no evidence in Global Settlement 98 or anywhere else in the record that LBL was assessed this \$2,000 backcharge.⁴⁵

Therefore, because US Airways evaluated the merit of each APG COR included in Global Settlement 98, and because APG is bound by US Airways’ evaluation of the APG CORs included in Global Settlement 98, APG is entitled to recover \$794,835 from Global Settlement 98.⁴⁶

⁴⁴ For example, APG COR 32 is included in Global Settlement 98 as LBL Change Request 261, panel repair at FIS Soffit. US Airways offered LBL \$25,934 for this work. LBL credited APG \$23,668 for this COR. LBL Ex. 83.

⁴⁵ In Table 1 of Global Settlement 98, LBL CR 248, “Damaged glass by APG at CW 6A,” has an assigned value of \$0 by US Airways. LBL Ex. 83.

⁴⁶ This figure is the total of the CORs in the table in Section III(B)(1)(b) supra minus the \$2,000 backcharge.

D. Was COR 34 Submitted by LBL to US Airways and, if so, Was It Rejected by US Airways?

1. Background

COR 34 in the amount of \$85,625 was submitted by APG to LBL on June 17, 2002. This money was to compensate APG for replacing the originally delivered open joint corner panels with 201 new “hooker” panels. APG Ex. 89. In the explanation section of COR 34, APG states:

At the time of bid, APG had no details or other information that would show the architect’s “intent” for corner panels Given the long lead time for the panels, APG had to place its order not knowing this “intent.” All told, over 200 panels had to be replaced. Given that there was no timely evidence given to APG regarding KPT’s intent, APG is requesting reimbursement for these panels.

Id. APG notified LBL of the need to change the panels by fax on January 17, 2001. Id. In its response to APG’s fax, LBL stated:

LBL acknowledges APG’s situation as explained in your letter #23 dated January 17, 2001. However, it is also understood that the architects have always maintained that the corner panels are to be bent. Thus, APG’s submission should reflect the architects’ design/intent.

Nonetheless, APG should submit a change Request and LBL will assist in whatever capacity to gain its approval by the owner.

Id.

LBL asserts that it submitted “the basis” for COR 34 to the Owner and that it was rejected. APG counters that LBL admitted that they never submitted COR 34 to the Owner, because in LBL interrogatory answers LBL provided a chart of APG’s CORs in which LBL stated that COR 34 was “not submitted.” LBL Ex. 66.

2. Analysis

Based LBL’s interrogatory answer, the Court concludes that LBL did not submit COR 34,

valued by APG at \$85,625, to the Owner.⁴⁷ However, the Court also concludes that LBL is not liable to APG for COR 34 because COR 34 is not meritorious.

The Court has previously held that LBL is liable to APG for CORs “to the extent that it failed to pass any of APG’s CORs on to the Owner *and the CORs are determined to be meritorious.*” LBL (II), 2005 WL 2140240, at *33 (emphasis added). LBL has identified evidence to establish that COR 34 is not meritorious. On October 25, 2000, Kohn Pederson Fox (“KPF”), the Project’s architects, sent a fax to LBL. LBL Ex. 467. In that fax, on which APG was copied, KPF states that it received a fax from APG on October 23, 2000 in which APG asserted that the panel corner detail proposed by KPF goes beyond the scope of APG’s work. Id. KPF goes on to state that APG was aware during the bid process that the panel system would require a “typical return type panel,” and thus KPF does not believe that its proposed panel corner detail exceeds the scope of the original design. Id. Two drawings were included with the October 25, 2000 KPF fax: APG’s proposed corner detail and KPF’s preferred return type panels. Id. at 3-4. APG’s proposed corner detail is the open joint corner panel; KPF’s preferred corner panel detail is the “typical return type panel.” Id. The KPF panels were the “hooker” panels ordered by APG to replace the open joint corner panels and were the basis for COR 34. Salvatore Alibrando (“Alibrando”), an LBL manager assigned to the Philadelphia Airport Project, explained that although LBL originally sided with APG regarding the design of the corner panels so as to assist APG in recovering the cost of the additional hooker panels, they ultimately “lost” the argument because KPF wanted the bent corner panels. Tr. 12/8/04 (Alibrando) 237:22-25.

⁴⁷ LBL has not provided any evidence to the contrary.

The Court finds that all parties, including APG, were aware from the beginning of the Project that the corner panels called for were the “typical return type panels” or “hooker” panels. Based on this finding, COR 34 is without merit, as APG was aware, or should have been aware, that the Project plans required the “hooker” panels, and thus APG should have originally ordered those panels and not the open joint panels.⁴⁸ Because COR 34 is without merit, LBL is not liable for failing to pass it on to the Owner.

E. Can APG Recover for CORs that Were not Submitted to US Airways by LBL?

1. Background

In its Findings of Fact and Conclusions of Law, the Court ruled that LBL was liable to APG “to the extent that it failed to pass any of APG’s CORs on to the Owner and the CORs are determined to be meritorious.” LBL (I), 2005 WL 2140240, at *33. However, the Court deferred decision on whether there was any such failure by LBL. Id. The Court must now determine whether there were CORs submitted by APG which LBL failed to pass on to the Owner and, if so, whether those CORs are meritorious.

APG argues that it is entitled to receive compensation for the following CORs:⁴⁹

⁴⁸ Why APG ordered the open joint corner panels when it should have known they were unacceptable is unclear. Alibrando stated that APG preferred the open joint corner panels to the bent corner panels because they were less expensive. Tr. 12/8/04 (Alibrando) 237:14-16.

⁴⁹ This list of CORs is found in the Joint Status Report. It combines figures found in Section 8 of Tab 5, which was created by LBL, and Tab 2, which was created by APG. At this point in time, LBL has not credited APG for any of these CORs.

COR	Description	APG's valuation (according to LBL)	APG's valuation (according to APG)	LBL's valuation (according to APG)
3	Interest Charges	To be determined		
25	Acceleration - South FIS soffit	\$371,264	\$35,182	\$0
27	Sterile corridor soffit panels	\$250,898	\$0	\$0
61	SEPTA shield impact	\$580,086	\$580,086	\$0
105	Louver changes	\$7,054	\$7,054	\$3,741
134	Sectors 5 & 7 – steel at base of walls	\$31,576	\$31,576	\$15,000
136	Sector 12 – fire egress opening	\$18,804	\$14,729	\$15,525
142	Sector 1 – pier roof steel	\$21,836	\$21,836	\$0
145	Sector 7 – change beam alignment	\$4,618	\$4,618	\$4,618
154	Sector 8 – horizontal roof panels added	\$9,461	\$7,569	\$0
155	Sector 12 – sloped panel alignment	\$7,328	\$4,738	\$5,779
157	Sector 12 – stair tower remobilize	\$2,195	\$2,195	\$1,788
164	Sector 5 – temporary protection	\$4,225	\$4,225	\$4,225
169	Add new panels at Sector 8 north ⁵⁰	\$13,804	\$0	\$0

⁵⁰ APG includes this figure in its list of CORs included in Global Settlement 98 which are still in dispute. Joint Status Report, Tab 2.

COR	Description	APG's valuation (according to LBL)	APG's valuation (according to APG)	LBL's valuation (according to APG)
	Labor escalation (LBL CR 360) ⁵¹	\$79,360		\$0
	Night work – installation of soffit in FIS area ⁵²	\$66,618		\$0
	Project design services ⁵³	\$605,078		\$0
	Project coordination services ⁵⁴	\$333,000		\$0
	Lost profit and overhead for unfinished contract work ⁵⁵	\$87,498		\$0
	Insulation – sector	n/a	\$0	(\$17,850) ⁵⁶

⁵¹ APG includes this figure in its list of CORs included in Global Settlement 98 which are still in dispute.

⁵² APG includes this figure in its list of CORs included in Global Settlement 98 which are still in dispute, and explains that “LBL was entitled to costs for night work in excess of contract allowance of \$20,000. LBL should have claimed an additional \$66,618, which is a cost for which APG is not responsible.” Joint Status Report, Tab 1.

⁵³ APG does not include this item in any of its disputed COR lists, but included it in the chart summarizing APG’s damages used during its closing argument at trial. APG Exhibit 145D at 4.

⁵⁴ APG does not include this item in any of its disputed COR lists, but included it in the chart summarizing APG’s damages used during its closing argument at trial. APG Exhibit 145D at 4.

⁵⁵ APG does not include this item in any of its disputed COR lists, but included it in the chart summarizing APG’s damages used during its closing argument at trial. APG Exhibit 145D at 4.

⁵⁶ LBL includes this backcharge among its “Change Orders to Finalize.” APG included it in its list of open CORs.

COR	Description	APG's valuation (according to LBL)	APG's valuation (according to APG)	LBL's valuation (according to APG)
	Damaged cornice panel @ CW-4	n/a	\$0	(\$9,151) ⁵⁷
	Knee wall at CW-14	n/a	\$0	(\$1,918) ⁵⁸

⁵⁷ LBL includes this backcharge among its "Change Orders to Finalize." APG included it in its list of open CORs.

⁵⁸ LBL includes this backcharge among its "Change Orders to Finalize." APG included it in its list of open CORs.

LBL argues that the above CORs were untimely and should be rejected because, under the terms of the Subcontract, APG was required to give timely notice of claims for extra compensation and it failed to do so. Article 5.3 of the Subcontract provides:

The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time, and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor no less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

LBL Ex. 13A. The corresponding provision in the Prime Contract entitled "Claims" provides:

A claim is a demand or assertion made in writing by the Contractor seeking an adjustment in the Contract Price and/or Contract Time, an adjustment or interpretation of the terms of the Agreement, or other relief arising under or relating to this Agreement, including the resolution of any matters in dispute between the Owner and Contractor in connection with the Project. The Contractor shall give the Owner and Construction Manager written notice of all claims within five (5) Business Days of the date when the Contractor knew of the facts giving rise to the event for which a claim is made. Notwithstanding anything to the contrary contained in this Agreement, any claim by the Contractor for an extension of the Contract Time and/or the Contract Price must be made by proposing a Change Order within five (5) Business Days after the event giving rise to the claim; otherwise, it shall be deemed waived.

LBL Ex. 62 ¶ 14.1. Thus, under the Subcontract and the Prime Contract, APG was required to present written notice of all CORs to LBL within than five business days of the date when it knew of the facts giving rise to the event for which the COR was made. LBL Ex. 62 ¶ 14.1.⁵⁹

LBL's timeliness argument is, in part, that APG's CORs were submitted much more than five days after APG was aware of the facts giving rise to the need for the COR. For example,

⁵⁹ As discussed in Section III(B)(1)(b) *supra* and in the Court's previous opinion, the provisions of the Prime Contract were incorporated into the Subcontract so long as the Prime Contract provisions are not inconsistent with the Subcontract.

Brais at LBL sent a letter to Richard Conly (“Conly”) of APG on June 6, 2002 regarding problems with APG’s CORs. LBL Ex. 89. Brais complained that APG had submitted numerous CORs lacking “proper contractual notification” and went on to explain that the CORs submitted were for work performed long before the CORs were submitted.⁶⁰ Id. In making its timeliness argument LBL also notes that APG’s failure to notify LBL and the Owner of the need for a COR prevented the Owner from taking steps to reduce the cost of the COR or eliminate the need for it altogether. For example, on May 3, 2002, Alibrando of LBL sent a fax to Conly regarding recently submitted CORs. LBL Ex. 284. In that fax, Alibrando stated that “we can tell that some COR [sic] will be very difficult to sell [to US Airways] for the simple reason that Owner/Architect will say that if APG would have told us then that this change would have create additional cost [sic] we would have done things differently.” Id. Similarly, in minutes of a change order meeting which took place on May 22, 2002, there was a general note:

LBL stated that the major issue about many of the COR’s [sic] presented by APG is the timely notification. LBL/TCCo [Turner Construction Company] believe that *had APG advised the Owner about the costs associated with those changes, the Owner would have selected other options that would have mitigated the impacts to the Owner as well as to APG* Furthermore, LBL stated that they were properly notifying the Owner for same, and have advised APG to do so, especially in the case of the soffits. Unfortunately, APG did not do it. In conclusion, LBL stated that the Owner could simply refuse the entitlement based on the issue of timely notification.

APG Ex. 170A (emphasis added).

APG counters that no COR was ever denied by US Airways solely because it was untimely. This assertion is supported by testimony from Christopher Baxter of Burns &

⁶⁰ As an example, Brais cited COR 95, which was for a change requested by the architects on January 30, 2001. APG submitted COR 95 for this change on May 15, 2002.

McDonnell Engineering (“B&M”), which was the project manager for the Project.⁶¹ Tr. 11/17/04 (Baxter) 196:8-197:15. Every change order on the Project was processed through the B&M office. Id. at 220:10-11. According to Baxter, no change order received by B&M was denied as untimely. Id. at 220:12-14.

The timeliness issue was complicated by the fact that, as noted in Section II(A)(4) supra, both LBL and APG experienced slow processing of their change order requests due to the large number of requests submitted on the Project – 3800 in a period of 40 months. On March 15, 2002, LBL and APG met in Montreal to discuss, among other subjects, the slow processing of APG’s CORs. Tr. 12/7/04 (Zaucha) 92:1-3, 93:1-11. Significantly, APG left the meeting with a directive from LBL to price its CORs and submit them to LBL. Id. at 100:10-13. APG did so, and priced and submitted its CORs in the months after the meeting.⁶²

In addition to the timeliness issue, evidence in the record demonstrates that the Owner had problems with some of APG’s CORs because they were poorly documented or simply inappropriate. Alibrando of LBL testified that APG’s CORs were poorly prepared and supported. Tr. 12/17/04 (Alibrando) 20:25-21:15.

⁶¹ As the project manager, B&M was responsible for the day-to-day oversight of the Project, including the processing of claims and change orders.

⁶² It took APG several months to price and submit these CORs after the March 15, 2002 Montreal meeting because it was busy trying to complete FIS soffit work by May 9, 2002. Tr. 12/7/04 (Zaucha) 100:14-23.

And it was a big undertaking, we were really tied up. So we were trying to get change orders priced and at the same time, get everything done up to this May 9th date . . . And then we would have a little bit of a breather and we can catch up on some of this paperwork.

Id. at 100:18-23.

Turner . . . emphasized all the time that, you know, each case had to be well documented and well presented and well argued [sic] verbally. And we had many cases where we argued on behalf of APG, and then we would say, APG, can you add something more to that? And they would say, no more, I have nothing more to say.

Id. at 23:-2-7. Similarly, minutes of a change order meeting on May 22, 2002 include the following general note:

General #2: LBL stated that they have requested at many occasion for APG to come back to the table, however LBL believes APG did not help themselves . . . Some of the cases that were presented have been poorly prepared and defended. Although we have seen improvements in the presentation, unfortunately the confidence and credibility was lost.

APG Ex. 170A.

2. Analysis

The Court finds that, during the course of APG's work, it submitted CORs well-beyond the five-day period required by the Subcontract and Prime Contract. Nevertheless, under the above circumstances, the Court concludes that LBL and US Airways waived the timeliness issue and modified the Prime Contract and Subcontract through their course of conduct. For these reasons, the Court rules that none of APG's CORs will be rejected solely because they were untimely.

“[A]n implied waiver occurs when words or conduct express an intent not to exercise a known contractual right and when the person claiming the waiver was misled and prejudiced by this behavior.” In re MK Lombard Group, Ltd., 2005 WL 735993, at *11 (E.D. Pa. Mar. 31, 2005); see also Brown v. City of Pittsburgh, 186 A.2d 399, 401 (Pa. 1962). As Baxter of Burns testified, no COR was rejected solely by LBL or US Airways because it was untimely. Tr. 11/17/04 (Baxter) 220:12-14. In fact, when Baxter was asked what “the longest period of time that you received a claim late but still honored,” he replied “I received one yesterday that's a year

and a half old.” Id. at 221:27-19.

The Court concludes that the failure of LBL or US Airways to reject CORs as untimely expressed an intent not to enforce the notice requirements of the Prime Contract and Subcontract. This intent was also expressed by LBL’s actions at the March 15, 2002 meeting in Montreal when LBL directed APG to price and submit its CORs after the meeting. APG relied on the implicit waiver by LBL and the Owner by submitting CORs beyond the five-day notice period and by submitting its CORs in the months after the March 15, 2002 Montreal meeting. As a result of APG’s reliance, it was prejudiced by LBL’s refusal to pass those CORs on to the Owner on the sole basis that they were untimely. Therefore, the Court concludes that LBL and the Owner implicitly waived the timeliness requirements of the Prime Contract and Subcontract.

In the alternative, the Court concludes that under these circumstances – the Owner’s failure to reject CORs solely because they were untimely and LBL’s behavior in directing APG to submit CORs after the March 15, 2002 meeting – modified the Subcontract and the Prime Contract through a course of conduct. “It is the well-settled law of Pennsylvania that a contract may be modified by a subsequent oral agreement. The modification may be accomplished by either words or conduct.” First Nat. Bank of Pennsylvania v. Lincoln Nat. Life Ins. Co., 824 F.2d 277, 280 (3d Cir. 1987) (internal citations omitted); see also United States v. LeCroy, 348 F. Supp. 2d 375, 384 (E.D. Pa. 2004) (“[M]odification may be implied from a course of conduct.”).

Based on the above analysis, APG may recover for the following CORs, which LBL objects to as untimely:⁶³

⁶³ These CORs are found in the Joint Status Report, Tab 2 and Tab 5 Section 8.

COR	Description	Date submitted	Amount requested
61	SEPTA shield impact ⁶⁴	n/a	\$580,086
145	Sector 7 – change beam alignment	July 16, 2002	\$4,618 ⁶⁵
154	Sector 8 – horizontal roof panels added	July 17, 2002	\$7,569
155	Sector 12 – sloped panel alignment	July 16, 2002	\$4,738
157	Sector 12 – stair tower remobilize	July 18, 2002	\$2,195
164	Sector 5 – temporary protection	July 22, 2002	\$4,225 ⁶⁶
	Night work – installation of soffit in FIS area ⁶⁷	n/a	\$66,618
TOTAL			\$665,974⁶⁸

The Court will address the remaining CORs below.

a. COR 3

APG argues that it is entitled to interest for the CORs which LBL failed to pass on to the Owner. LBL counters that because APG is the breaching party it is not entitled to interest.

Pennsylvania has traditionally followed the Restatement rule on awarding interest in contract damages cases. Fiat Motors of North America, Inc. v. Mellon Bank, N.A., 827 F.2d 924, 931 (3d Cir. 1987); John Hancock Healthplan of Pennsylvania, Inc. v. Lexington Ins. Co.,

⁶⁴ In the Joint Status Report, Tab 5 Section 8, LBL objects to COR 61 as “no entitlement.” However, in LBL’s Response, it argues that APG cannot recover for this work because COR 61 was not priced until trial. LBL’s Response at 44.

⁶⁵ The parties stipulated to this value. Joint Status Report, Tab 6.

⁶⁶ The parties stipulated to this value. Joint Status Report, Tab 6.

⁶⁷ Like COR 61, LBL objects to APG recovering for this work because it was not submitted until trial. Joint Status Report, Tab 5 Section 8.

⁶⁸ The Court will increase the total amount of APG’s Subcontract in its damage calculation accordingly.

1991 WL 63854, at *2-3 (E.D. Pa. Apr. 17, 1991). The Restatement (Second) of Contracts § 354(1) provides that:

If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable money value, interest is recoverable from the time for performance on the amount due less all deductions to which the party is entitled.

APG is entitled to interest on the meritorious CORs which LBL failed to pass on to the Owner, and LBL is entitled to interest on the costs it incurred in completing APG's work. In effect, these interest costs cancel each other out because these obligations were incurred at approximately the same time, the summer of 2002. Because LBL's cost to complete exceeds the value of these CORs, LBL is awarded interest on the net amount of its recovery from APG.⁶⁹

b. COR 25

COR 25, valued at \$371,264, is for acceleration of work on the FIS Soffit. APG Ex. 81. LBL argues that COR 25 was only an estimation of the costs APG would incur, and that there is no evidence that APG actually accelerated its work in the FIS Soffit area. However, Rosenberg of APG testified that APG performed \$35,192 worth of work under this COR.⁷⁰ Tr. 11/22/04 (Rosenberg) 166:10-167:10. The Court credits Rosenberg's testimony and, based on that testimony, APG may recover \$35,192 for COR 25.

c. COR 27

COR 27 is for insulated panel work in Sectors 23 and 24. APG Ex. 83. The value of the

⁶⁹ LBL is entitled to interest from the time when it informed APG of its final damage calculation. The legal rate of interest in Pennsylvania is fixed at six percent. 41 Pa. Cons. Stat. Ann. § 202; Fiat Motors of North America, Inc. v. Mellon Bank, N.A., 827 F.2d 924, 931 (3d Cir. 1987).

⁷⁰ The \$35,192 figure was based on APG's payroll records. Tr. 11/22/04 (Rosenberg) 167:9-10.

COR submitted is \$250,898. Id. APG is not actually seeking to recover for this COR. Instead, APG argues that LBL included this cost in its total cost claim despite the fact that LBL is now asserting that neither APG nor LBL performed this work.⁷¹ Thus, APG argues, LBL's inclusion of this work in its cost to complete figure requires that the subcontract price be increased by \$250,898 to reflect this work.⁷²

The Court finds that neither LBL nor APG performed the work covered by COR 27. As discussed in Section III(F) infra, LBL was eventually assessed a \$500,000 backcharge in Global Settlement 98 because it failed to perform the work in Sectors 23 and 24, requiring the Owner to hire another contractor to perform it. Also, as discussed in Section III(B)(1)(a) supra, LBL's failure to prosecute work in Sectors 23 and 24 was one of the reasons the Owner threatened to hold LBL in default in June of 2002. Based on these facts, the Court finds that neither APG nor LBL performed the work in Sectors 23 and 24, and APG's subcontract price will not be increased by \$250,898.⁷³

d. COR 105

COR 105 covered installing framing for louvers in Sector 12, and was priced at \$7,054. APG Ex. 115. LBL objects to the COR on the basis that this work was not performed by APG.

⁷¹ This argument is based on the fact that in LBL's interrogatory answers, it stated that this COR was included in COR 2. LBL Ex. 66.

⁷² In other words, LBL's inclusion of this figure in its cost to complete means that this work was part of APG's Subcontract, and the Subcontract price must be adjusted accordingly to prevent LBL from realizing a windfall for this work.

⁷³ Regarding APG's argument that LBL included COR 27 in COR 2 based on LBL's interrogatory answers, the Court finds that LBL's interrogatory answer regarding COR 27 was erroneous. COR 2 was for Sector 14 recheck Bridge Pilaster Cladding, which was completely different than the work described in COR 27 – panel work in Sectors 23 and 24. APG Ex. 63.

The Court disagrees. Based on the supporting documents submitted with COR 105, the Court finds that APG performed this work. Therefore, APG may recover \$7,054 for COR 105.

e. COR 134

COR 134, priced at \$31,576, was for additional steel required at the Sector 5 and Sector 7 mechanical penthouses. APG Ex. 126. LBL objects to this COR as both untimely and overvalued. As discussed supra, LBL's timeliness argument is precluded. The Court also rejects the argument that COR 134 was overvalued, and finds that APG's documentation attached to the COR supports its price of \$31,576. Therefore APG may recover that amount for COR 134.

f. COR 136

COR 136 was for installing a fire egress opening in Sector 12. APG Ex. 127. The COR was priced at \$20,373, but APG states that it only performed \$14,729 of this work prior to termination. Id.; Joint Status Report, Tab 2. Like COR 134, LBL objects to COR 136 as both untimely and overvalued. The Court rejects these arguments for the same reason it rejected LBL's arguments regarding COR 134. Therefore APG may recover \$14,729 for COR 136.

g. COR 142

COR 142, priced at \$21,836, was for engineering, furnishing, and installing steel angles to support roofing between the panel walls on the roof at Sector 1. APG Ex. 128. LBL argues that APG cannot recover for this work because it was "traded with LBL for other work." Joint Status Report, Tab 5 Section 8. There is no evidence that this work was traded, however. Therefore, because APG documented these costs in its COR submission, APG may recover \$21,836 for COR 142.

h. COR 169

While LBL includes COR 169 in its list of remaining CORs in dispute, Joint Status Report, Tab 5 Section 8, APG includes COR 169 in its list of CORs included in Global Settlement 98. Joint Status Report, Tab 1. Specifically, APG's COR 169, LBL's CR 274, was listed among the CORs in Table 9 of Global Settlement 98, a list of LBL CRs "that were not formally submitted, but identified by LBL as either potential costs or costs that were in the process of being formulated." LBL Ex. 83. According to Global Settlement 98, "it was agreed the work described in these change requests would be included in Global Settlement at a value of zero dollars (\$0.00)." Id. The Court concludes that COR 169 was included in Global Settlement 98 and that APG is bound by the Owner's valuation of COR 169, which was \$0. See Section III(C) supra.

i. Labor escalation, LBL CR 360

Like COR 169, APG includes this item in its list of CORs included in Global Settlement 98. Joint Status Report, Tab 1. This item was included in Global Settlement 98, and assigned a value of \$0 by the Owner. APG is bound by this valuation, and cannot recover for this work.

j. Project design services, project coordination services, lost profit and overhead

While LBL includes these three items among its list of disputed CORs, Joint Status Report, Tab 5 Section 8, APG does not include them on any of its COR lists. However, APG included these items in a trial exhibit which summarized APG's alleged damages, APG Exhibit 145D at 4. Based on APG's damages-related submissions, the Court concludes that APG is not seeking recovery for these items. To the extent that APG is claiming such damages, recovery is denied on the ground that there is no evidence to support these costs.

k. LBL backcharges: insulation, damaged cornice panel, knee wall

In its list of open CORs, APG includes several backcharges taken by LBL. Joint Status Report, Tab 2. These backcharges are \$17,850 for insulation, \$9,151 for “damaged cornice panel @ CW-4,” and \$1,918 for “knee wall at CW-14 (TCCo backcharge)”. Because there is no evidence in the record supporting the amount or assessment of these backcharges, the Court finds that LBL cannot assess these backcharges against APG.

1. Conclusion

The Court will increase the amount of APG’s Subcontract in its final damage calculation as follows:

COR	Description	Amount requested by APG
25	Acceleration – South FIS soffit	\$35,182
61	SEPTA shield impact	\$580,086
105	Louver changes	\$7,054
134	Sectors 5 & 7 – steel at base of walls	\$31,576
136	Sector 12 – fire egress opening	\$14,729
142	Sector 1 – pier roof steel	\$21,863
145	Sector 7 – change beam alignment	\$4,618
154	Sector 8 – horizontal roof panels added	\$7,569
155	Sector 12 – sloped panel alignment	\$4,738
157	Sector 12 – stair tower remobilize	\$2,195
164	Sector 5 – temporary protection	\$4,225
	Night work – installation of soffit in FIS area	\$66,618
TOTAL		\$780,453

F. Are the Credits/Backcharges Taken by LBL Appropriately Reflected in LBL's Damage Accounting?

1. Background

In negotiating Global Settlement 98, the Owner assessed a \$500,000 “backcharge” against LBL for metal panel work in Sectors 23 and 24 of Terminal A. Both APG and LBL asserted that these panels were not within APG’s original scope of work, and APG submitted COR 22 in the amount of \$554,741. Tr. 12/16/05 (Alibrando) 7:20-8:14. The Owner rejected that position, however, and instead reduced the amount LBL received in Global Settlement 98 by \$500,000.⁷⁴ LBL Ex. 83; Tr. 11/16/04 (Alibrando) 17:23-18:1.

APG seeks to recover \$554,741 for COR 22, and argues that LBL agreed to accept the \$500,000 backcharge for Sectors 23 and 24 knowing that this work was outside of APG’s scope. LBL asserts that APG is responsible for this \$500,000 backcharge as part of Global Settlement 98.

2. Analysis

Because the Owner determined that the metal panel work in Sectors 23 and 24 was the responsibility of LBL and its subcontractor APG, APG is bound by this determination, just as APG is bound by the Owner’s valuation of the CORs included in Global Settlement 98. See Section III(C) supra. US Airways rejected COR 22 “outright,” Tr. 11/16/04 (Alibrando) 11:7-8, and did so prior to APG’s termination by LBL. Id. 13:24-14:4. Simply because LBL sided with APG in trying to obtain reimbursement for this work does not mean that LBL is liable for an adverse decision by the Owner. As Alibrando explained, “we always sided with our

⁷⁴ The metal panel work in Sectors 23 and 24 was performed by another contractor, Crown Core. Tr. 11/12/04 (Wiseman) 40:4-41:2.

subcontractors in the eyes of the owner all the time.” Tr. 11/16/04 (Alibrando) 13:11-12. LBL had no choice but to accept the \$500,000 backcharge.⁷⁵ The work in Sectors 23 and 24, which was panel installation, was within the scope of APG’s Subcontract. “APG was responsible for designing and installing the insulated metal panel system.” LBL (I), 2005 WL 2140240, at *6. Therefore, because this work was within the scope of APG’s subcontract, LBL may include this backcharge in its damages accounting.

G. Has LBL Submitted Sufficient Evidence of its Claim for Cost to Complete APG’s Work?

1. Background

In the event of termination by the Contractor (LBL), the Subcontract provides that the Contractor may

finish the Subcontractor’s Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing Subcontractor’s Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

LBL Ex. 13, Art. 7.2.1. The Court has already ruled that LBL is entitled recover its cost to complete APG’s work. LBL (I), 2005 WL 2140240, at *36. Thus, the issue is whether LBL has provided adequate proof of that cost.

At trial, LBL presented two cost to complete figures: \$5,457,404, which was the cost to complete figure in LBL Exhibit 201, and \$5,762,256, which was the cost to complete figure in LBL Exhibit 201-A. During the trial, Martin Laprise, vice-president of finance for LBL, testified

⁷⁵ In fact, one of the reasons that the Owner was threatening to hold LBL in default on June 18, 2002 was because LBL had failed to perform the work on Sectors 23 and 24. LBL Ex. 69; Tr. 11/12/04 (Wiseman) 126:4-15.Tr. 11/16/04 (Alibrando) 3:22-4:4.

that LBL Exhibit 201 was created in June 2003.⁷⁶ Tr. 11/12/04 (Laprise) 202:3-8. LBL Ex. 201-A was the “final version” of the cost to complete figures and was prepared in May 2004. Id. at 203:17-204:2. After Laprise testified about how the cost to complete was calculated, LBL’s counsel moved all of the cost to complete exhibits into evidence. Id. at 284:2-3. When the Court questioned counsel about the difference between Exhibits 201 and 201-A, LBL’s counsel responded “we’ll stand on 201, to solve the problem, we’ll stand on 201.” Id. at 283:25-284:1. APG argues that this statement should limit LBL to the cost to complete figures in Exhibit 201. APG further argues that LBL failed to adequately track its cost to complete figures, and that LBL has failed to meet its burden of establishing both that APG’s breach caused it to incur additional costs and the amount of those costs.⁷⁷

2. Analysis

In determining damages based on cost to complete, the amount expended by a contractor in completing the work is “presumed to be reasonable absent a showing to the contrary.” 24 Williston on Contracts, § 66:17 (4th ed. 1999); see also Fetzer v. Vishneski, 582 A.2d 23, 26-27 (Pa. Super. 1990). “The amount actually paid by the owner . . . is strong and reliable evidence in determining the time and amount of damages.” Fetzer, 582 A.2d at 27; see also Huskey Mfg. Co. v. Friel-McLeister Co., 84 Pa. Super. 328 (1924) (“[W]here there is no other evidence on the subject the actual cost to the owner is some evidence of the reasonable cost of completion.”).

The Court concludes that LBL has presented sufficient evidence of its cost to complete

⁷⁶ As Laprise explained, “I had a deposition on the [sic] July 8 and I was asked to bring some financial information to that deposition, so that was prepared just before the deposition.” Tr. 11/12/04 (Laprise) 202:15-17.

⁷⁷ Because APG asserts that LBL has not proved its cost to complete, it provides the alternative damage allocations found in Section II(C)(2).

APG's work, and that APG has not rebutted the presumption that these costs were reasonable. Martin Laprise, vice-president of finance for LBL, testified at great length as to how LBL recorded its costs to complete APG's work. LBL had a "project number" of 9908 for the Philadelphia Airport Project. Tr. 11/12/04 (Laprise) 200:21. Once Laprise learned that APG had been terminated, he created a separate code (9908-1) to denote costs expended on APG's work. Id. at 200:19-22. LBL employees who worked on both LBL and APG's portion of the contract recorded their time separately. Id. at 200:23-201:1. Purchases were similarly allocated and recorded. Id. at 201:1-4. LBL had numerous employees tracking the separate costs and ensuring they were recorded as accurately as possible. Id. at 263:5-21, 276:1-13. APG quibbles that LBL did not properly segregate costs to complete APG's original scope of work from costs to perform changes issued by the Owner after APG was terminated. However, where, as in this case, a contractor in LBL's position completes the work of a subcontractor which breached the subcontract, "the amount of damages need not be ascertained with mathematical certainty to sustain an award in the [contractor's] favor." John F. Harkins Co. v. Sch. Dist. of Philadelphia, 460 A.2d 260, 263 (Pa. Super. 1983) (internal quotation omitted). Therefore, the Court concludes that LBL has adequately proved its cost to complete APG's work.

Next, the Court must determine which cost to complete figure to apply, the figure in LBL Exhibit 201, \$5,457,404, or the figure in LBL Exhibit 201-A, \$5,762,256. Although LBL's counsel stated that it would "stand on 201," Tr. 11/12/04 (Laprise) 284:1, the Court did not rule that LBL was limited to Exhibit 201. The Court accepted both Exhibits 201 and 201-A into evidence, and stated that it would "sort out those figures, if there's any objection based on the comparison between the two, we'll work that out." Id. at 284:6-13. The Court finds that there is

sufficient evidence in the record to demonstrate that Exhibit 201-A is accurate, since LBL used the same accounting procedures to create both Exhibits 201 and 201-A. The reason the cost to complete figure in Exhibit 201-A is higher than the cost to complete figure in Exhibit 201 is, as Laprise explained in his testimony, that LBL was still incurring costs at the time that Exhibit 201 was prepared. *Id.* at 202:18-20. Therefore, the Court concludes that the \$5,762,256 figure is the most accurate and complete account of LBL's cost to complete APG's work, and it will use this figure in its final damages calculation.⁷⁸

H. Is Sentry Liable on the Performance Bond?

1. Background

Under the Performance Bonds,⁷⁹ the surety's obligation under the bonds arose:

3. If there is no Owner⁸⁰ default, the Surety's obligations under this bond shall arise after:
 - 3.1 The Owner has notified the Contractor and the Surety . . . that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and
 - 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor default shall not be declared earlier than twenty days after the Contractor and the Surety

⁷⁸ The Court notes that allowing LBL to use the cost to complete figure in Exhibit 201-A, which was not prepared until May 2004, a few months before trial, Tr. 11/12/04 (Laprise) 204:1-2, is akin to its decision to allow APG to recover for COR 61, the SEPTA shield impact, despite the fact that the amount of COR 61 was not presented until trial. See Section III(E)(2) supra.

⁷⁹ The Performance Bonds were issued by John Deere, which then sold its surety business to Sentry.

⁸⁰ The Performance Bonds named LBL as the Owner and APG as the Contractor.

have received notice as provided in Subparagraph 3.1; and

- 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a Contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.

LBL Ex. 238, 240.

The “owner default” referenced in Paragraph 3 of the Performance Bonds is defined as follows:

- 12.4 Failure of the Owner, which has neither been remedied or waived, to pay the Contractor as required by the Construction Contract or to perform and complete or comply with the other terms hereof.

LBL Ex. 238, 240.

Sentry first argues that LBL did not pay APG as required by the Subcontract, and thus, because LBL was in default, LBL cannot recover from Sentry. Sentry further argues that LBL has not met the conditions precedent in Paragraph 3 of the Performance Bond and thus cannot recover under the Performance Bond.

2. Analysis

Sentry asserts that the Court’s August 31, 2005 decision found “as a matter of fact” that LBL did not pay APG all amounts required by the Subcontract. Sentry Report at 32-33. To the contrary, the Court did not find anything of the sort.⁸¹ The Court did note in its opinion that

⁸¹ In the parties’ Joint Memorandum, Sentry identifies the following two statements in support of this position. “The Court reserves ruling on the amount of any recovery under the Performance and Payment Bonds;” and, “The Court defers ruling on the damages claimed by LBL and APG and the extent of liability of the sureties, Sentry, XL, and NAC, under the Payment and Performance Bonds.” LBL(I), 2005 WL 2140240, at *36. These statements say nothing about Sentry’s liability on the performance bonds or LBL’s supposed failure to pay APG as required by the Subcontract.

“LBL initially failed to obtain payment bonds required under the Prime Contract, causing delays in payments to APG.” LBL (I), 2005 WL 2140240, at *15. As a result of this delay, LBL and APG entered into the Funds Agreement under which a third party, the Funds Administrator, received all payments for APG and LBL directly from the Owner and then disbursed those payments to LBL and APG. Because payments to APG were conditioned on the receipt of those funds by the Funds Administrator, the Court concluded that LBL was not liable to APG for any nonpayment by the Funds Administrator. Id. at *32. Therefore, contrary to Sentry’s position, LBL cannot be held in default for any late or non-payments to APG.⁸² To the extent there was an initial default by LBL as a result of the delay in obtaining payment bonds, the Court concludes the default was cured by the Funds Agreement.

Next, the Court must determine whether LBL complied with the procedures for declaring default under the Performance Bond,⁸³ because the language of Paragraph 3 of the Performance

⁸² Sentry has also directed the Court to trial testimony of Wayne Lambert, a representative of Forcon International (“Forcon”), the firm used by the surety to assist in handling claims. Lambert testified that, based upon Forcon’s evaluation, which it conducted at the time of APG’s breach, Forcon and the surety believed that LBL was in default on the Subcontract. Tr. 11/12/04 (Lambert) 234:7-9.

There were a variety of breaches by LBL in the LBL APG subcontract. And taken in their totality, you know, the insistence upon work outside the scope, the insistence to perform work, upgrade manpower to areas there were conflicts, there were inabilities to work in various areas that weren’t signed, shop drawings that weren’t signed, change orders and a variety of other areas to include the fact that a request for a mediation had been advanced by APG and it had not been – it had not been honored by LBL.

Id. at 234:15-23. However, the Court has already found that the work which LBL “insisted” APG perform was within APG’s scope. LBL (I), 2005 WL 2140240, at *25. Therefore, Forcon’s opinion – that LBL had breached by insisting that APG perform work outside of its scope – is moot.

⁸³ In its Findings of Fact and Conclusions of Law, the Court concluded that LBL complied with the termination provisions of the Subcontract found in Paragraph 7.2.1. LBL (I),

Bond, that “the Surety’s obligations under this bond shall arise after . . . ,” creates conditions precedent to the duty of the surety. See North Am. Specialty Ins. Co. v. Chichester Sch. Dist., 2000 WL 1052055, at *16 (E.D. Pa. July 20, 2000) (interpreting similar language to create a condition precedent on a performance bond).

The first condition precedent under the Performance Bond required LBL to notify APG and the surety that it was considering declaring APG in default “and has requested and attempted to arrange a conference with the Contractor and Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract.” LBL Ex. 238 ¶ 3.1. LBL sent the three-day notice to cure to APG on April 16, 2002 which stated that, as a result of APG’s April 4, 2002 letter challenging the scope of APG’s work, LBL considered APG to be in default. APG Ex. 803. Dan Giblin of John Deere, APG’s surety at the time, was copied on this letter, as was Luc Gauvin of Forcon International (“Forcon”), the firm used by John Deere to assist in handling surety claims. Id. On April 23, 2002, LBL sent a letter directly to Dan

2005 WL 2140240, at *28-29. That paragraph provides, in relevant part:

If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within three days after receipt of a written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may after three days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontractor and finish the Subcontractor’s Work by whatever method the Contractor may deem expedient.

Because the conditions precedent of the Performance Bond are different than the termination requirements under the Subcontract, the Court’s previous finding – that LBL complied with the termination provisions of the Subcontract – does not mean that LBL complied with the conditions precedent of the Performance Bond. Therefore, the Court must separately analyze whether LBL met the Performance Bond requirements.

Giblin and the surety, stating that LBL had sent APG a three-day notice to cure on April 16, 2002. APG. Ex. 814. In this letter, LBL stated that it was attempting to arrange a conference with APG and the surety pursuant to Paragraph 3.1 of the Performance Bonds “within 15 days of receipt of this notice, to discuss methods of performing this subcontract.” Id. The Court finds that these two letters – the April 16 and the April 23 letters – satisfied the first condition precedent of the Performance Bond.

The second condition precedent under the Performance Bond required LBL to declare APG in default and formally terminate APG no earlier than twenty days after APG and the surety received the notice required by Paragraph 3.1. LBL Ex. 238 ¶ 3.2. On May 10, 2002, LBL sent another letter to the surety. LBL Ex. 861. That letter states that the meeting requested by LBL in the April 23 letter took place on May 2, 2002, and that at the meeting both APG and the surety’s representative assured LBL that APG would continue its work on the Project. Id. Shortly thereafter, however, LBL notified APG by letter dated May 9, 2002, that APG had reduced its workforce on the project.⁸⁴ Id. LBL stated in the May 10, 2002 letter that it considered the reduction in workforce a breach of the Subcontract, and it was notifying the surety of APG’s default pursuant to Paragraph 3.2 of the Performance Bond. Id.

The Court finds that the May 10, 2002 letter, which declared APG in default, satisfied the second condition precedent of the Performance Bond despite the fact that this letter was sent before expiration of the twenty day period following receipt by APG and the surety of the notice required by Paragraph 3.1 of the Performance Bond.⁸⁵ LBL itself acknowledged in the May 10,

⁸⁴ This workforce reduction occurred on May 6, 2002.

⁸⁵ The notice required by Paragraph 3.1 was fulfilled by the April 23, 2002 letter sent to Dan Giblin and the surety.

2002 that the twenty-day period had not yet expired. “Please consider this letter as a formal notice of Contractor [APG] default as per articles 3.2 . . . as the 20 day delay period expires on Sunday, May 12, 2002.” Id. LBL did not fail to comply with the twenty-day requirement because it sent the notice on the last business day, May 10, 2002, before the twenty-day period expired.⁸⁶

The third and final condition precedent under the Performance Bond required LBL to agree “to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a Contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.” LBL Ex. 238 ¶ 3.3. On June 27, 2002, counsel for LBL sent a letter to APG and the surety, discussing the April 23, 2002 and May 10, 2002 letters sent by LBL to the surety. APG Ex. 925. LBL stated in this June 27, 2002 letter that since the May 10, 2002 letter, it had met with APG and the surety three more times without reaching any resolution. Id. Therefore, LBL stated, LBL declared APG in default and terminated its right to complete the Subcontract. Id. LBL went on to state:

Please be advised that the Owner (LBL) shall comply with Paragraph 3.3 of the Performance Bonds, specifically, the Owner (LBL) agrees to pay the balance of the contract price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the Contract with the Owner (LBL) and agrees to comply with all other provisions of the Performance Bonds required to be performed by Owner (LBL).

⁸⁶ In a letter dated May 14, 2002, Forcon disputed that the May 10, 2002 letter complied with Paragraph 3.2. LBL Ex. 245. In that letter, Forcon asserted that while LBL declared APG in default in the May 10, 2002 letter, it stopped short of terminating APG’s contract, as required under Paragraph 3.2 of the Performance Bond. Id. However, this dispute is moot, because LBL notified John Deere on June 27, 2002 that it was terminating APG. APG Ex. 925. The Performance Bond did not require LBL to declare APG in default and terminate APG in the same letter.

Id. The Court concludes that the June 27, 2002 complied with the third condition precedent of the Performance Bond.

In addition to the three conditions precedent of the Performance Bond, Sentry argues that mediation was a condition precedent of the Performance Bond, and that LBL's failure to do so absolves it from liability under the bond. See Tr. 11/12/04 (Lambert) 234:22-23, 235:25-236:9 (describing LBL's failure to mediate). This argument is moot for two reasons. First, there was no requirement to mediate under the Performance Bond. Second, insofar as Sentry interprets LBL's failure to mediate as a default under the Subcontract which obviates the surety's responsibility, this argument is foreclosed by the Court's August 31, 2005 opinion. In that opinion, the Court ruled that LBL was not required to mediate its disputes with APG because APG waived its right to mediation. LBL(I), 2005 WL 2140240, at *30-31.

The Court concludes that LBL was not in default as defined in the Performance Bond, and that LBL complied with the conditions precedent under the Performance Bond. Therefore Sentry is liable on the Performance Bond.⁸⁷

⁸⁷ Once LBL complied with the conditions precedent of the Performance Bond as set forth in Paragraph 3, the surety had the following options:

- 4.1 Arrange for the Contractor [APG], with consent of the Owner [LBL], to perform and complete the Construction Contract; or
- 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or
- 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and Contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from [sic] the Contractor's default; or
- 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new

I. Was Sentry Released *Pro Tanto* in the Amount of \$575,000?

1. Background

On July 25, 2002, the same date LBL filed its Complaint against APG, LBL also filed a Petition for Preliminary Injunction and Temporary Restraining Order which sought to compel APG to deliver insulated metal panels and related design drawings which were necessary to complete the Project. At a conference in Court on August 2, 2002, the parties arrived at a limited settlement under which LBL paid APG \$575,000 for the panels and drawings at issue, even though LBL asserted that it had already paid APG for these panels and drawings. Sentry now seeks to be released pro tanto for this \$575,000 because the payment was made without Sentry's knowledge or consent. LBL, on the other hand, contends that Sentry is not discharged, because the \$575,000 payment was made with Sentry's full knowledge and tacit consent.

This issue requires the Court to determine whether LBL paid APG for the panels at issue prior to the August 2, 2002 conference. LBL argues that it paid APG twice for these panels; APG argues that, although it billed LBL for the panels, and those bills were paid, the payments

contractor and with reasonable promptness under the circumstances:

.1 After investigation, determine the amount for which it may be liable to the Owner and as soon as practicable after the amount is determined, tender payment therefor to the Owner; or

.2 Deny liability in whole or in part and notify the Owner citing reasons therefor.

LBL Ex. 238. The surety took option 4.4.2 by denying liability. As Lambert testified:

Based on our analysis of the facts that we understood them and the investigation . . . the surety believed that the termination of APG was wrongful and, therefore, the surety had no responsibilities to respond to the bond demand, I mean, in terms of acting to complete the job or pay for the completion of the job, had no further responsibilities under the bond with respect to LBL.

Tr. 11/23/04 (Lambert) 133:15-21.

were not actually for the panels, but for other work and materials. During the trial, Zaucha, APG's Chief Executive Officer, testified that APG billed "against" work categories for work that was not actually performed within that category. "[W]e were incurring costs, that we were billing against anything we could bill against." Tr. 12/8/04 (Zaucha) 177:25-178:1. APG apparently did this because the speed of the Project resulted in the Owner's inability to keep up with the paperwork and CORs.⁸⁸ Id. at 177:1-4. "We had, in essence, a bucket of \$ 9 million⁸⁹ that we're billing against to keep cash flowing. We couldn't keep up with the amount of cash that we're outlaying." Id. at 177:4-7. According to Zaucha, "everyone knew" that APG was billing for change order work even though the change order had not yet been processed.⁹⁰ Id. at 177:20-178:3. Conly, president of APG, testified that before APG challenged the scope of its work on April 4, 2002, APG had already billed LBL for one hundred percent of the panels in the base contract, even though not all of those panels had been installed. Tr. 11/10/04 (Conly) 136:8-24. The panels which had not yet been installed were being stored in different locations, and it was these panels which were the subject of LBL's temporary injunction and the \$575,000 payment. Id. at 137:9-22; Tr. 8/2/02 (Sobel) 5:14-18 (describing delivery of panels); 9:16-18 (naming price of \$575,000).

2. Analysis

⁸⁸ As stated in Section (II)(A)(4) supra, 3800 CORs were submitted to the Owner over a period of 40 months.

⁸⁹ The total Subcontract price was \$9,919,390.

⁹⁰ The required procedure was that a contractor or subcontractor had to have a written change order before the change order work could be billed. Tr. 12/8/04 (Zaucha) 178:21-22. According to Zaucha, "[t]hat was not the way the contract was originally envisioned." Id. at 178:22-23.

The Court concludes that LBL paid APG twice for the metal panels and drawings. APG's previous bills for metal panels may have well been for other work, as Zaucha testified that this was a common practice. However, the fact of the matter is that APG submitted bills to the Owner for these panels, not for other work, the bills were paid, and then APG demanded payment for the same panels after it breached the Subcontract. Moreover, APG refused to release the panels to LBL until it received this payment. Regardless of whether the \$575,000 payment was a double payment, LBL was forced to pay \$575,000 to obtain these panels in order to prosecute APG's work on the Project. Therefore, LBL may include this cost in its cost to complete figure.

The Court finds Sentry's argument – that it was released pro tanto for this \$575,000 – inapposite for two reasons. The pro tanto rule states that “[w]here there has been a material departure from contractual provisions relating to payments and the security of retained funds, a compensated surety is discharged from its obligations on the performance bond to the extent that such unauthorized payments result in prejudice or injury.” Nat'l Union Indem. Co. v. G. E. Bass & Co., 369 F.2d 75, 77 (5th Cir. 1966); see also 17 Am. Jur. 2d Contractors' Bonds § 20 (“A compensated surety will be released by an unauthorized payment only pro tanto to the extent of the injury or prejudice suffered by the surety and not necessarily to the full extent of the surety's obligation.”).⁹¹ The pro tanto rule only applies where there is a “material departure from contractual provisions relating to payments.” Nat'l Union Indem. Co., 369 F.2d at 77. The

⁹¹ Previously, courts completely discharged sureties from their obligations for unauthorized payments by the insured, including overpayments. Nat'l Union Indem. Co. v. G. E. Bass & Co., 369 F.2d 75, 77 (5th Cir. 1966); North Am. Specialty Ins. Co. v. Chichester Sch. Dist., 2000 WL 1052055, at *12 (E.D. Pa. July 20, 2000).

Performance Bond in the instant case contain no provisions relating to any such payments; therefore, LBL's payment of \$575,000 to APG for the panels cannot be a material departure from a contractual provision. Moreover, under the circumstances at the time of the payment, LBL had to pay APG for the panels because without those panels LBL would have been unable to prosecute work on the Project. Sentry's liability to LBL for this double payment is not attributable to LBL's actions, but to APG's actions. Therefore Sentry is not released from liability to LBL for the \$575,000 payment.

J. Additional Issues Identified by Sentry

In the parties' Joint Memorandum, Sentry identified four additional damages-related issues in addition to the nine issues identified by the Court supra. The Court will address each issue in turn, albeit briefly, as all are without merit.

1. Limiting the cost to complete to the figure in Exhibit 201

The Court has already addressed this issue in Section III(G)(2) supra, and found that LBL is not limited to the cost to complete figure in LBL Exhibit 201

2. Reducing costs by overhead

Sentry argues that LBL should not be allowed to include overhead costs in its cost to complete accounting, because the damages provision of the Subcontract do not provide for recovering overhead.⁹² In his testimony, Martin Laprise, vice-president of finance for LBL,

⁹² The Subcontract provides:

If the unpaid balance of the Subcontract Sum exceeds the expense of finishing Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

LBL Ex. 13, Art. 7.2.1.

testified that LBL's cost to complete figures included ten percent in "indirect costs" incurred by LBL, or, in other words, overhead. Tr. 11/12/04 (Laprise) 204:24-205:10.

Simply because the Subcontract does not expressly provide for recovery of indirect costs or overhead does not mean that LBL is precluded from recovering for those costs. Laprise testified that LBL included a ten percent mark-up for indirect costs on all change orders it submitted to the Owner on the Philadelphia Airport Project. Tr. 11/12/04 (Laprise) 205:8-10. Had LBL hired another subcontractor to replace APG and complete APG's work, that subcontractor would have been entitled to include overhead costs in its charges to LBL, and LBL's cost to complete would have included the overhead of the replacement subcontractor. Therefore, the Court concludes that LBL properly included its standard ten percent mark-up for overhead in its cost to complete figures.

3. Reducing costs by pre-termination expenses

LBL began tracking its costs to complete APG's work on May 1, 2002. LBL Ex. 201 (describing cost figure as spanning 05-01-02 to 06-30-03). Sentry argues that the choice of May 1 as the beginning date for cost tracking is "arbitrary" and that LBL should not be allowed to recover for costs incurred prior to APG's official termination on June 27, 2002. However, the date of APG's termination is not the date of APG's breach of the Subcontract. The Court has already determined that APG's refusal to supply and install support steel that was within its scope of work, as well as its reduction of its work force on the Project, was a material breach of the Subcontract. LBL (I), 2005 WL 2140240, at *27. APG notified LBL that it would not perform this work in a letter dated April 4, 2002; it began reducing its workforce on May 6, 2002. Therefore, the Court concludes that LBL's decision to begin recording costs spent

completing APG's work on May 1, 2002, is not an arbitrary choice, and costs recorded prior to APG's official termination on June 27, 2002 are properly included in LBL's cost to complete figure.

4. Reducing costs by items counted as both indirect and direct costs

Sentry argues that LBL billed items as direct costs which should have been included as overhead or "indirect" costs, and that these costs add up to "at least" \$102,079.⁹³ Sentry Report at 49. In support of this assertion, Sentry directs the Court to Laprise's testimony regarding LBL's calculation of the cost to complete figure in LBL Exhibit 201-A. "[W]e arrived at that sum by taking all the costs directly applied to the project, so all the labor, all the subcontractors, all the material, all the direct costs applied to the job. And then I added a ten percent indirect cost to it." Tr. 11/12/04 (Laprise) 204:14-18. Nothing in this testimony supports Sentry's assertion that LBL double-billed costs as both direct and indirect costs. To the extent that there is some evidence of overbilling of certain expenses such as "flights" or "travel expenses," APG has not provided sufficient evidence for the Court to quantify that amount. Therefore the Court rejects this argument.

IV. FINAL DAMAGE CALCULATION

The Court's damage calculation is as follows:

⁹³ As examples of such costs, Sentry lists "flights, hotels, travel expenses, etc." Sentry Report at 49.

Original Subcontract Price	\$9,919,390⁹⁴
CORs approved prior to APG's termination	\$259,661 ⁹⁵
Additional CORs	\$1,088,350 ⁹⁶
CORs Included in Global Settlement 98	\$794,835 ⁹⁷
COs Between the Owner and LBL	\$225,670 ⁹⁸
Total APG Subcontract	\$12,287,906
Less Amount Paid APG	(\$8,092,031)
Balance of Subcontract	\$4,195,875
Total Cost to Complete	\$5,762,256 ⁹⁹
Damages Owed to LBL	\$1,566,381

An appropriate Order follows.

⁹⁴ The parties agree on this figure.

⁹⁵ This figure is the total of CORs 4, 10, 12 and 24, as to which there is no dispute.

⁹⁶ This figure is the total of CORs agreed upon by APG and LBL in the Joint Status Report (\$307,897) and APG's meritorious CORs which LBL failed to pass on to the Owner (\$780,453).

⁹⁷ See Section III(C)(2) supra.

⁹⁸ The parties agree on this figure.

⁹⁹ This is the figure from LBL Exhibit 201-A. See Section III(G) supra.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LBL SKYSYSTEMS (USA), INC.	:	CIVIL ACTION
Plaintiff/	:	
Defendant on Counterclaim,	:	
	:	
v.	:	
	:	
APG-AMERICA, INC., and	:	
SENTRY SELECT INSURANCE	:	
COMPANY	:	
Defendants,	:	
	:	
APG-AMERICA, INC.	:	
Plaintiff on Counterclaim,	:	NO. 02-5379
	:	
v.	:	
	:	
XL SPECIALTY INSURANCE	:	
COMPANY and	:	
NAC REINSURANCE CORPORATION	:	

Defendants on Counterclaim. :

_____:

ORDER

AND NOW, this 6th day of September, following a non-jury trial, based on the Findings of Fact and Conclusions of Law in the Court's August 31, 2005 Memorandum and Order, and the attached Findings of Fact and Conclusions of Law and Memorandum, the Court **ENTERS JUDGMENT** in **FAVOR** of plaintiff LBL Skysystems (USA), Inc. and **AGAINST** defendants APG-America, Inc. and Sentry Select Insurance Company in the total amount of \$1,566,381.00, plus interest from the time when plaintiff informed defendants of its final damage calculation.

IT IS FURTHER ORDERED that upon consideration of Defendants' Joint Motion to Strike the LBL, XL, and NAC's Response to APG and Sentry's Position Report on the Damage-Related Issues (Document No. 227, filed December 28, 2005), LBL, XL, and NAC's Response to Defendants' Joint Motion to Strike and for Sanctions (Document No. 228, filed January 4, 2006), Sentry Select Insurance Company's Reply In Opposition to LBL/XL/NAC's Response, and In Further Support to Strike and Have Sanctions Assessed Against LBL/XL/NAC, Jointly and Severally (Document No. 229, filed January 6, 2006), and APG's Reply to LBL, XL and NAC's Response to Defendants' Joint Motion to Strike and for Sanctions (Document No. 230, filed January 11, 2006), Defendants' Joint Motion to Strike the LBL, XL, and NAC's Response to APG and Sentry's Position Report on the Damage-Related Issues is **DENIED**.

BY THE COURT:

/s/ Jan E. Dubois

JAN E. DUBOIS, J.