

NORTH CAROLINA COURT OF APPEALS

SOUTHERN SEEDING SERVICE, INC.)

)

Plaintiff-Appellee)

v.)

)

W.C. ENGLISH, INC.; LIBERTY)

From Guilford County

MUTUAL INSURANCE COMPANY; and)

Civil Action No. 12411

TRAVELERS CASUALTY & SURETY)

COMPANY OF AMERICA)

)

Defendants-Appellants)

BRIEF OF PLAINTIFF-APPELLEE
SOUTHERN SEEDING SERVICE, INC.

INDEX

TABLE OF CASES AND AUTHORITIES	iii
ISSUES PRESENTED	1
STATEMENT OF THE FACTS	2
ARGUMENT	7
I. STANDARD OF REVIEW	7
II. THE TRIAL COURT CORRECTLY CALCULATED THE EQUITABLE ADJUSTMENT TO BE SSS'S ACTUAL COST OF WORK PERFORMED AFTER 1 JULY 2007, MINUS PAYMENT FOR THE WORK AT 2003 UNIT PRICES. . .	7
A. There was Competent Evidence to Support SSS's Actual Costs of Subcontract Work after 1 July 2007....	7
1. SSS's 11/08 Invoice for its Revised 2007-2008 Unit Prices Reflected its Actual Costs During 2007-2008.....	8
2. SSS's Unit Prices were Consistent with the Industry.....	16
B. The Equitable Adjustment Was Properly Calculated Using SSS's Actual Costs of Work after 1 July 2007.....	16
1. N.C. Courts Calculate Adjustments using Actual Costs.....	16
2. The Practice of the Project was to Calculate Equitable Adjustments Based on Actual Costs.....	21
3. English's Approach-Baselining Prices on 1 July 2007-Does Not Reflect Actual Costs or Satisfy Subcontract.....	23
4. Actual Costs of a Subset of Work Items, for a Limited Period of Time, is not a Total Cost Claim...	27

III. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES TO SSS.	31
A. English's Obligation Arose Before the Amended Judgment.....	32
B. The Payment Bond Act Does Not Exclude Award of Attorneys' Fees Against a Non-Signatory to the Payment Bond....	33
CONCLUSION	35
CERTIFICATE OF SERVICE	36
APPENDIX:	
<u>Brooks Millwork Co. v. Levine</u> (unpublished opinion)	App. 1
<u>Midland Fire Protection, Inc. v. Clancy & Theys Construction Co.</u> (unpublished opinion)	App. 16
<u>Miller & Long, Inc. v. Intracoastal Living</u> (unpublished opinion)	App. 29
<u>Weaver's Asphalt & Maintenance Co. v. Williams</u> (unpublished opinion) ..	App. 44
N.C. Gen. Stat. § 44A-26 (2011)	App. 54
N.C. Gen. Stat. § 44A-35 (2011)	App. 57
NCDOT Specs § 104-5 (2002)	App. 58
NCDOT Specs § 109-8 (2002)	App. 60
Direct Exam. of Ralph Stout	App. 62-72
Cross Exam. of Ralph Stout	App. 73-75
Cross Exam. of John Jordan	App. 76-84
Direct Exam. of Gary Collie	App. 85
Cross Exam. of Gary Collie	App. 86-87

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317 U.S. 56 (1942) 7,17

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147 N.C. App. 239, 556 S.E.2d 1 (2001)
..... 7,27,28,30

Brooks Millwork Co. v. Levine,
No. COA09-781, 2010 WL 2366541
(N.C. Ct. App. June 15, 2010) 31

Bruning & Federle Mfg. Co. v. Mills,
185 N.C. App. 153, 647 S.E.2d 672, cert.
denied, 362 N.C. 86, 655 S.E.2d 837 (2007)
..... 7

Midland Fire Protection, Inc. v. Clancy & Theys
Construction Co., No. COA05-214,
2006 WL 9526 (N.C. Ct. App. Jan. 3, 2006)
..... 29-30

Miller & Long, Inc. v. Intracoastal Living,
No. 07 CVS 1760, 2011 NCBC 17, 2011 WL
2519545 (N.C. Bus. Ct. June 21, 2011)
..... 31,34

S.J. Groves & Sons and Co. v. State,
50 N.C. App. 1, 273 S.E.2d 465 (1980) .. 17-20

S. Seeding Serv., Inc. v. W.C. English, Inc.,
719 S.E.2d 211 (N.C. Ct. App. 2011)
..... 6,25,32-33

Salvaggio v. New Breed Transfer Corp.,
150 N.C. App. 688, 564 S.E.2d 641 (2002).. 32

Weaver's Asphalt & Maintenance Co. v. Williams,
No. 09-CVS-206, 2009 WL 8593011
(N.C. Super Ct. Nov. 20, 2009) 34

Statutes

N.C. Gen. Stat. § 44A-26 2,33

N.C. Gen. Stat. § 44A-35 31-32,34

Other Authorities

NCDOT Specs § 104-5 (2002) 21

NCDOT Specs § 109-8 (2002) 3

No. COA12-636

EIGHTEENTH JUDICIAL DISTRICT

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BRIEF OF PLAINTIFF-APPELLEE
SOUTHERN SEEDING SERVICE, INC.

ISSUES PRESENTED

- I. WHERE A CONSTRUCTION SUBCONTRACT CALLS FOR AN EQUITABLE ADJUSTMENT TO THE SUBCONTRACT'S UNIT PRICES FOR WORK PERFORMED AFTER A CERTAIN DATE, BUT DOES NOT SPECIFY THE METHOD OF CALCULATING THE EQUITABLE ADJUSTMENT, MAY THE TRIAL COURT CALCULATE THE EQUITABLE ADJUSTMENT AS THE SUBCONTRACTOR'S ACTUAL COST OF THE WORK PERFORMED AFTER THE SPECIFIED DATE, MINUS PAYMENT RECEIVED AT THE ORIGINAL SUBCONTRACT UNIT PRICES FOR SUCH WORK?

- II. IN A CIVIL ACTION BROUGHT UNDER THE NORTH CAROLINA MODEL PAYMENT AND PERFORMANCE BOND ACT, MAY THE TRIAL COURT AWARD ATTORNEYS' FEES AGAINST A PARTY OTHER THAN A SURETY OR PAYMENT BOND PRINCIPAL WHO WAS FOUND TO HAVE UNREASONABLY REFUSED TO SETTLE A DISPUTE INVOLVING A SUBCONTRACT FOR CONSTRUCTION WORK SUBJECT TO SAID PAYMENT BOND?

STATEMENT OF THE FACTS

On 7 August 2003, APAC-Atlantic, Inc. ("APAC") entered into a contract with the North Carolina Department of Transportation ("NCDOT") to construct the Greensboro "Western Loop" highway construction project (the "Project"). (R p 4). The 2002 edition of the NCDOT Standard Specifications for Roads and Structures (the "NCDOT Specs")¹ applied to the Project. (T pp 75-76). On 13 August 2003, in accordance with N.C. Gen. Stat. § 44A-26, APAC obtained a payment bond for the Project from Liberty Mutual Insurance Company and Travelers Casualty & Surety Company of America (collectively, the "Sureties"). (R p 4, Pl. Exh. 15).

On 9 September 2003, APAC entered into a subcontract with Defendant-Appellant W.C. English, Inc. ("English"). (R p 34). English's scope of work under that subcontract included all grading work and erosion control work (including grassing work). (R pp 28-29). On 23 October 2003, English entered into a second-tier subcontract (the "Subcontract") with Plaintiff-Appellee Southern Seeding Service, Inc. ("SSS") to perform the eighteen grassing work items within English's scope of work. (R p 55). The Subcontract stated unit prices, as well as NCDOT's estimated quantities, for each of the grassing work items. (R p 46). The unit prices reflected those in SSS's proposal to English in July 2003. (Pl. Exh. 2). SSS's proposal stated that the unit prices

¹ See NCDOT Specs (2002), available at <http://www.ncdot.org/doh/preconstruct/ps/specifications/dual>.

assumed the grassing work would be performed prior to the Project's specified completion date (1 July 2007), and that if grassing work was ongoing "beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost." (Pl. Exh. 2). This provision (the "Price Escalation Provision") was expressly incorporated into the Subcontract. (R p 47).

SSS's costs increased dramatically during the Project. (R p 329). In September 2005, SSS informed English that its costs were increasing due to fuel prices, and asked English to request from NCDOT an equitable adjustment to the unit prices of grassing work. (Def. Exh. 2). English informed SSS that there was no basis in the NCDOT Specs for an adjustment to the unit prices of grassing work due to fuel price increases.² (T p 94).

At the same time, SSS began to experience increased costs due to English's failure to complete its grading work so that SSS's grassing work could proceed. In August 2005, for instance, SSS had a seeding crew on the Project, but less than one acre was prepared for seeding due to English's failure to

² As described in footnote 12 *infra*, grassing work items were "minor" items to NCDOT, and the prime contract between NCDOT and APAC did not provide for fuel-price equitable adjustments in the unit prices of grassing work. APAC and English, however, did receive fuel-price equitable adjustments in their unit prices for excavation and grading work items beginning in 2005. (T pp 41-42, Pl. Exh. 3, p 12). See also NCDOT Specs § 109-8 (2002) (providing for fuel-price equitable adjustments for so-called "major" work items as specified in the prime contract).

complete its erosion control work. (R p 167). English's inability to complete and maintain its erosion control devices led NCDOT on 29 August 2005 to suspend English's grading operations on the Project. (R pp 81, 166, T pp 155-57). The following season, on 31 May 2006, NCDOT again suspended English's grading for the same reasons. (R pp 177-78).

To recover from the multiple suspensions and avoid liquidated damages that would be assessed against English and APAC for late completion, English asked SSS to accelerate by working overtime in July 2006. (T pp 157-58, 181). SSS complied, but also complained on 13 July 2006 to English about work conditions, specifically that SSS's grassing work could not be performed in a planned, orderly sequence due to English's grading work being suspended and incomplete; and that English's out-of-sequence grading work forced SSS to perform its grassing work in a disrupted and inefficient manner.³ (R p 186).

In July 2007, the project was incomplete and liquidated damages began to accrue at \$10,000 per day. (R p 95). In August 2007, APAC was negotiating with NCDOT to waive liquidated damages for late completion of the Project.⁴ (R pp 139-42, 197).

³ SSS is **not** asking for payment or reimbursement of its increased costs due to delay, disruption, or acceleration in 2005 and 2006 due to English's work being suspended or incomplete.

⁴ On 23 June 2009, NCDOT retroactively extended the Project's completion date from 1 July 2007 to 14 March 2008, effectively forgiving \$2.56 million in liquidated damages that APAC and English otherwise owed to NCDOT. (R p 41, Def. Exh. 4).

SSS asked APAC to include a request for increased costs of subcontractors in those negotiations, but APAC declined. (R p 160). In October 2007, SSS reminded English of the Subcontract's Price Escalation Provision which would adjust SSS's 2003 grassing unit prices for work performed after 1 July 2007 and advised that SSS was keeping records of its actual costs after 1 July 2007. (R p 201). English then told APAC that it intended to ask NCDOT to pay for the increased costs of SSS, but APAC advised English that there was no basis in the NCDOT Specs for English to recover the increased costs of SSS. (R pp 198-99).

SSS completed its grassing work on 21 March 2008. (R p 330). After its work was complete, SSS sought three distinct adjustments to its total compensation under the Subcontract:

1. Compensation for extra grassing work performed by SSS at the direction of English, including "rework" of grassing work items previously performed by SSS and later damaged by English (the "Extra Work Tasks"). (Pl. Exhs. 16, 17).
2. An equitable adjustment to SSS's unit prices for overruns in four grassing work items where NCDOT significantly underestimated the quantities to be performed (the "Overrun Tasks"). (Pl. Exhs. 10, 13).
3. An equitable adjustment to SSS's unit prices for five grassing work items where SSS performed significant quantities of work after 1 July 2007 (the "Late-Term Tasks"). (Pl. Exh. 1).

In July 2008, SSS notified APAC and the Sureties of its right under the Subcontract to an equitable adjustment for the Late-Term Tasks. (R pp 212-13). In November 2008, SSS sent English an invoice for \$194,941.39 for its increased costs on the Late-Term Tasks (the "11/08 Invoice"). (Pl. Exh. 1). In December 2008, SSS sent proof of its claim to APAC and the Sureties. (Pl. Exh. 18).

As discussed in Part II.B.2 *infra*, English paid the equitable adjustments to SSS for the Overrun Tasks and Extra Work Tasks effectively on a time-and-materials basis, at a labor-and-equipment rate of \$45.00 per man-hour. However, for the Late-Term Tasks, English agreed to pay SSS only for material price increases that occurred after 1 July 2007 (which English calculated to be \$2,300). (Pl. Exhs. 20, 22). According to English, SSS could not be compensated for price increases that occurred during the four years between July 2003 and July 2007, even as applied to work occurring after 1 July 2007.

SSS rejected English's proposed payment of \$2,300 and filed suit. (Pl. Exh. 21, T p 60). In December 2011, this Court held that SSS was entitled to an equitable adjustment for the Late-Term Tasks. S. Seeding Serv., Inc. v. W.C. English, Inc., 719 S.E.2d 211, 216 (N.C. Ct. App. 2011). In February 2012, the trial court on remand awarded SSS an equitable adjustment for the Late-Term Tasks of \$194,941.39, plus costs, interest, and attorneys' fees. (R p 339).

ARGUMENT

I. STANDARD OF REVIEW

A trial court's findings of fact in a bench trial are conclusive on appeal if there is competent evidence to support them. Biemann and Rowell Co. v. Donohoe Cos., Inc., 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). Conclusions of law reached by the trial court are reviewable *de novo*. Id.

A trial court's award of attorneys' fees is reviewed for abuse of discretion. Bruning & Federle Mfg. Co. v. Mills, 185 N.C. App. 153, 155-56, 647 S.E.2d 672, 674, cert. denied, 362 N.C. 86, 655 S.E.2d 837 (2007). Whether an award of attorneys' fees is authorized by statute is reviewable *de novo*. Id.

II. THE TRIAL COURT CORRECTLY CALCULATED THE EQUITABLE ADJUSTMENT TO BE SSS'S ACTUAL COST OF WORK PERFORMED AFTER 1 JULY 2007, MINUS PAYMENT FOR THE WORK AT 2003 UNIT PRICES.

A. There was Competent Evidence to Support SSS's Actual Costs of Subcontract Work after 1 July 2007

Computing an equitable adjustment to a unit price for a specific task within a construction contract involves determining the contractor's actual costs of the contract work item subject to the equitable adjustment. U.S. v. Callahan Walker Construction Co., 317 U.S. 56, 61 (1942). This determination is a finding of fact. Id.

In Findings of Fact 18 and 27, the trial court found that the 11/08 Invoice for \$194,931.39 represented SSS's actual costs of materials, labor, and equipment for the five Late-Term Tasks

performed after 1 July 2007, after giving English credit for its payment to SSS for those work items at SSS's 2003 bid unit prices. (R p 330, 333-34). As there is ample evidence in the record to support these Findings of Fact, they must be upheld.

1. *SSS's 11/08 Invoice for its Adjusted 2007-2008 Unit Prices Reflected its Actual Costs During 2007-2008*

SSS's actual costs are reflected on its 11/08 Invoice. (Pl. Exh. 1). The 11/08 Invoice shows adjusted unit prices, which are simply SSS's actual costs for the work items performed after 1 July 2007 divided by the quantities of work SSS performed after 1 July 2007. For instance, Item 426 ("Seeding and Mulching") was originally bid and paid on a per-hectare basis. (R p 46). As discussed *infra*, for the Seeding and Mulching work performed after 1 July 2007, SSS's actual cost was \$4,909.66 per hectare. This was calculated by taking SSS's actual costs of materials, labor, and equipment for Seeding and Mulching work performed after 1 July 2007 and dividing by the 59.183 hectares of Seeding and Mulching work SSS performed after 1 July 2007. SSS's 11/08 Invoice seeks only to equitably adjust SSS's compensation to reflect SSS's actual costs incurred after 1 July 2007, and only as to quantities of work performed after 1 July 2007, for only five of SSS's eighteen Subcontract work items.⁵

⁵ In its 11/08 Invoice, SSS credited English's payments to SSS (at 2003 bid unit prices) for the quantities of work performed after 1 July 2007. For instance, the 11/08 Invoice shows that for Item 426, SSS's 2003 unit price is subtracted from the unit

The revised unit price for each Late-Term Task on the 11/08 Invoice is generally composed of one rate for materials, and another rate for labor and equipment. (Pl. Exh. 1). These rates reflect SSS's actual costs (for materials, and for labor and equipment) to perform the five Late-Term Tasks. This is supported by ample evidence in the record.

a. Materials

In Finding of Fact No. 15, which is not contested in this Appeal, the trial court found, "During the course of the Project, certain material costs [of SSS] rose dramatically, including the cost of oil." (R p 329). Mr. Ralph Stout, President of SSS, testified at trial that the price of "[a]ll [grassing] materials advanced" as a result of the dramatic increase in fuel prices, including the prices of seed, fertilizer, straw, and asphalt. (T p 36).

In support of its 11/08 Invoice, SSS computed its materials rate for each work item performed after 1 July 2007 based on SSS's actual cost of materials for that work item, divided by the actual quantities of work performed after 1 July 2007. For instance, for Item 426, SSS presented to the trial court tabulations showing that its actual cost for Seeding and Mulching materials (e.g., seed, fertilizer, straw, asphalt) was

price calculated from its actual costs of performing Seeding and Mulching work after 2007. (Pl. Exh. 1).

\$86,338.09 for the 59.183 hectares of Seeding and Mulching work performed after 1 July 2007. (Pl. Exh. 30). English examined SSS's records in April and May 2009 to verify the actual costs. Mr. Garry Collie, the Treasurer of English, testified at trial that the records that he examined supported SSS's calculation of actual costs with only a couple of insignificant discrepancies. (T p 202). There was ample evidence to support, and English did not seriously dispute, the materials portion of SSS's revised unit prices on the Invoice.

In fact, English acknowledged the dramatic increases in SSS's materials and labor prices by paying for them. First, when SSS sought an equitable adjustment for the Overrun Tasks, English certified to NCDOT that SSS had dramatic price increases for such items as seed and fertilizer. (Pl. Exh. 12). For instance, For Item 428, SSS demonstrated that its unit price for repair seeding had more than doubled from its 2003 bid price (from \$10 per kilogram to \$22.79 per kilogram). Likewise, for Item 429, SSS demonstrated that its price for fertilizer had nearly quadrupled from its 2003 bid price (from \$1,000 per MTN to \$3,685 per MTN). English submitted the revised SSS unit prices for the Overrun Tasks to NCDOT. English was then reimbursed for those costs by NCDOT and English itself received a five percent markup for SSS's increased costs. (Pl. Exh. 13). English then paid SSS for the Overrun Tasks. The Subcontract's

Price Escalation Provision is just as binding upon English as is the Overrun Task provision in the NCDOT Specs, and it is English's responsibility to honor both equitable adjustments.

b. Labor and Equipment

The labor-and-equipment portion of each revised unit price on the 11/08 Invoice reflects SSS's actual cost of labor and equipment to perform the five Late-Term Tasks after 1 July 2007. The labor-and-equipment unit price is simply SSS's actual production rate for each work item (the actual number of man-hours performed, divided by the quantities of work actually performed, after 1 July 2007) multiplied by SSS's "all-in" actual labor-and-equipment cost of \$45.00 per man-hour.

The quantities of work performed for each work item, both for the entire Project and after 1 July 2007, are not in dispute. SSS reported its quantities of work on a monthly basis, and these were verified against NCDOT's measurements at the end of the Project, so SSS was able to demonstrate how much work was performed after 1 July 2007.⁶ For example, SSS's detailed monthly records for Item 426 show that SSS performed roughly one-third (59.183 hectares) of that work after 1 July 2007. (Pl.

⁶ Where there was any discrepancy between the records of SSS and NCDOT, SSS billed for the quantities of work as measured by NCDOT. (T p 11). For instance, for Item 426 ("Seeding and Mulching"), SSS reported 158.882 hectares, and NCDOT calculated that SSS performed 158.491 hectares, for the entire Project. (Pl. Exh. 26). Accordingly, SSS was paid for 158.491 hectares.

Exh. 26). SSS's detailed monthly records for Item 426 also show that SSS expended 4,538.5 man-hours on Item 426 after 1 July 2007. (Pl. Exh. 26). This equates to a production rate of 31.034 man-hours per acre after June 2007,⁷ which is the production rate that appears on the 11/08 Invoice. (Pl. Exh. 1).

SSS's labor summary reports the actual man-hours expended by SSS per work item and date. SSS's certified payrolls were provided to English and NCDOT throughout the Project. (T pp 52, 189). The labor summary also includes man-hours expended by SSS's subcontractors and day laborers who are not on SSS's payroll. (T p 216). English does not dispute the number of man-hours expended, and English does not dispute the quantities of work performed, for the Late-Term Tasks. The production rates on the 11/08 Invoice are derived from these undisputed numbers.

SSS presented ample evidence of its \$45.00 per man-hour actual "all-in" labor-and-equipment cost to support the trial court's Findings of Fact. The \$45.00 per man-hour cost represents \$35.00 per man-hour for labor (including overhead, social security, unemployment, and liability insurance), and \$10.00 per man-hour for equipment. (T p 65). In fact, it is rounded down from SSS's actual costs on the Project. (T p 65, Pl. Exh. 11). The \$35.00 per man-hour labor cost is supported

⁷ 4,538.5 man-hours ÷ 59.183 hectares ÷ 2.471 acres per hectare = 31.034 man-hours per acre.

by the certified payrolls that were submitted to English throughout the Project, and by other SSS Project cost records examined by English. The \$10 per man-hour equipment cost is based on the actual expense of equipment used, divided by the total number of man-hours on the Project. (T p 65). Thus, the \$10 equipment rate does not result in English being charged for time that the equipment was onsite but unproductive. (T p 65).

SSS presented ample evidence that its composite \$45.00 per man-hour rate for labor and equipment was not only its actual cost for this Project, but compared favorably to its actual costs across all projects for 2007 and 2008. Mr. Stout testified that SSS's equipment cost varies across projects from \$8 per man-hour to \$13 per man-hour. (T p 49). SSS's calculation of its composite labor-and-equipment costs across all projects showed actual labor-and-equipment costs of \$41.77 per man-hour in fiscal year 2008⁸ and \$47.06 per man-hour in fiscal year 2007.⁹ (Pl. Exh. 25). SSS also presented a letter and testimony from its accountant certifying that SSS's actual costs across all projects (excluding materials and profit) were \$39.25 per man-hour in 2008 and \$45.12 per man-hour in 2007. (Pl. Exh. 27).

⁸ \$59.09 (actual costs per man-hour in 2008) minus \$17.32 (materials costs per man-hour) = \$41.77 per man-hour in 2008.

⁹ \$63.49 (actual costs per man-hour in 2007) minus \$16.43 (materials costs per man-hour) = \$47.06 per man-hour in 2007.

Contrary to English's assertion, this evidence was not to justify SSS's use of "its average cost of jobs during this time period." (Def's Br. at 7). The 11/08 Invoice does *not* use these average costs but rather SSS's tabulated actual Project costs per work item, which are supported by its certified payrolls submitted to English, and by other Project cost records examined by English. In fact, the evidence showed that SSS's actual labor costs were higher than average on this Project in part because of the additional subcontractors or day laborers hired after 1 July 2007 to accelerate completion and help APAC and English avoid further liquidated damages. (Def. Exh. 3).

English, APAC, and NCDOT all acknowledged during the course of the Project that SSS's actual labor-and-equipment costs were \$45.00 per man-hour, by signing change orders and paying SSS the \$45.00 per man-hour rate. In March 2008, English authorized SSS to negotiate directly with NCDOT to quantify an equitable adjustment to SSS's unit prices for the Overrun Tasks.¹⁰ (Pl. Exh. 10). SSS presented evidence to NCDOT of SSS's actual costs of performing the Overrun Tasks, at an actual labor-and-equipment rate of \$46.03 per man-hour. (Pl. Exh. 11). In June

¹⁰ SSS's Overrun Tasks are four grassing work items where NCDOT significantly underestimated the quantities to be performed. (Item 2, p. 5 *supra*). NCDOT was contractually obligated to pay an equitable adjustment on these four work items once the estimated quantities overran by 100%. (See note 12 *infra*). NCDOT's payment for the Overrun Tasks went through APAC and English, and both of them marked up SSS's adjusted unit prices by 5%, and received their markup funds prior to paying SSS. (Pl. Exh. 13).

2008, NCDOT agreed to adjust SSS's unit prices for the overrun quantities of those Overrun Tasks, at a rate of \$45.00 per man-hour. (R pp 204-06, Pl. Exhs. 12, 13).

For the Extra Work Tasks,¹¹ SSS's invoice to English reflected a labor rate of \$35 per man-hour. (Pl. Exh. 16). The Extra Work invoice also showed SSS's actual costs of equipment and materials for the Extra Work. The equipment cost, expressed as an hourly rate, equated to \$10.97 per man-hour. (T p 49). English later negotiated with SSS to reduce the "rework" price from \$37,296.92 to \$35,424.44. (Pl. Exh. 21). The negotiated payment reflected ninety-five percent of the original Extra Work invoice, which in turn reflected a composite labor-and-equipment rate of \$45.97 per man-hour.

English does not seriously dispute SSS's \$45.00 per man-hour labor-and-equipment cost for work performed after 1 July 2007. Apparently, English simply does not want to equitably adjust SSS's unit prices for the Late-Term Tasks unless English can be reimbursed by someone higher in the contractual chain (*i.e.*, APAC or NCDOT). However, the Price Escalation Provision is a term of the Subcontract between English and SSS, and it is English's responsibility to pay.

¹¹ SSS's Extra Work Tasks were grassing work items outside of the Subcontract scope performed by SSS at the direction of English or APAC. (Item 1, p. 5 *supra*). These included "rework" of Subcontract work items previously performed by SSS and later damaged by English. (Pl. Exhs. 16, 17).

2. *SSS's Unit Prices were Consistent with the Industry*

At trial, English admitted that SSS's 2003 bid prices were consistent with industry costs at the time and consistent with the bids of SSS's competitors. (T pp 173-74). There was also evidence that SSS's revised unit prices were reasonable in comparison to other bidders for grassing work in 2007. For instance, the average industry cost for Seeding and Mulching in 2007 exceeded \$4000 per hectare. (T p 168, Pl. Exh. 28). The equitable adjustment sought by SSS for work performed after 1 July 2007 reflects the increase in market prices for grassing work over the four years of the Project.

B. The Equitable Adjustment Was Properly Calculated Using SSS's Actual Costs of Work after 1 July 2007.

1. *N.C. Courts Calculate Adjustments using Actual Costs*

In Finding of Fact No. 27, the trial court found that SSS's uncompensated actual costs for the five Late-Term Tasks represented a reasonable equitable adjustment under the Subcontract. (R pp 333-34). Even if the trial court's method of calculating the equitable adjustment could be deemed a legal conclusion, it should be upheld. The method used by North Carolina courts to calculate an equitable adjustment is to compensate the contractor for actual costs incurred as a result of unexpected or changed conditions giving rise to the equitable adjustment, as measured by the contractor's job cost records, provided that the records are sufficiently detailed to support a

reasonably accurate calculation of the contractor's actual costs. S.J. Groves & Sons and Co. v. State, 50 N.C. App. 1, 63, 65, 273 S.E.2d 465, 497, 499 (1980). See also U.S. v. Callahan Walker Construction Co., 317 U.S. 56, 61 (1942) (holding that an equitable adjustment on a construction contract involves ascertaining the contractor's actual cost of performing the task subject to adjustment, plus a reasonable and customary profit).

In Groves, a contractor entered into a unit-price highway construction contract with the State Highway Commission (the predecessor of NCDOT) on 26 June 1972. Groves, 50 N.C. App. at 8, 273 S.E.2d at 469. The NCDOT Specs at the time provided that "an equitable adjustment will be made" where the contractor encountered "work conditions at the site differing materially from those indicated in the contract." Id. at 12, 273 S.E.2d at 471. The contractor originally agreed to perform its main contract work item (unclassified excavation) for a unit price of \$0.79 per cubic yard. Id. at 16, 273 S.E.2d at 473. The contract documents showed that there would be sufficient quantities of soil excavated on the project to satisfy the contractor's fill requirements under another contract work item. Id. In fact, the contractor discovered during construction that the excavated soil was not satisfactory for use as fill, and instead the contractor had to quarry rock from off site to satisfy the project fill requirements. Id. at 15, 273 S.E.2d at 472-73.

Furthermore, the cut-and-fill work was less efficient than originally estimated, because the contractor had to dispose of excavated soil, and travel off site to quarry rock and bring it back on site to use as fill. Id. at 40, 273 S.E.2d at 485.

On 15 August 1973, the Groves contractor notified the Commission in writing of the changed condition, and requested an equitable adjustment. Id. at 6, 273 S.E.2d at 468. On 18 September 1973, the Commission denied the contractor's request for an equitable adjustment to its unit prices. Id. However, in October 1973, in recognition of the changed conditions, the Commission ordered the contractor to stop excavation. Id. at 31-32, 273 S.E.2d at 481. The Commission later rebid the work, and contracted with another party to perform the excavation for \$1.70 per cubic yard, more than double the contractor's original unit price bid. Id. at 26-27, 273 S.E.2d at 478.

The Commission paid the Groves contractor for the units of excavation performed at the bid unit price of \$0.79 per cubic yard. After the contractor filed suit, this Court upheld an equitable adjustment for the contractor's additional unexpected *actual costs* that resulted from the changed condition. For its unclassified excavation work item, the adjustment was the contractor's actual costs of soil excavation, minus a credit for the amount paid at the contract unit prices, and a second adjustment to account for underrun quantities. Id. at 44-45, 273

S.E.2d at 487-88. The contractor was also compensated for extra work resulting from the changed condition, including the actual costs of rock excavation (including transportation costs) and other efficiency-related costs (such as the contractor's unexpected termination costs). Id. at 51, 273 S.E.2d at 491.

The equitable adjustment was based on the Groves contractor's project records of actual labor hours and actual equipment hours per task. Id. at 38-39, 273 S.E.2d at 484-85. Labor hours were converted into actual costs based on payrolls submitted to the Commission. Id. at 42-43, 273 S.E.2d at 486-87. Equipment hours were converted into costs based on industry rental rates for the equipment used on the job. Id. at 43, 273 S.E.2d at 487. The labor and equipment costs were added to materials costs to calculate actual costs on a monthly basis. Id. at 64, 273 S.E.2d at 498. The adjustment awarded to the contractor included its actual costs plus a fifteen percent markup for material costs, a thirty percent markup for labor costs, plus additional markup for social security, unemployment, and liability insurance. Id. at 43, 64, 273 S.E.2d at 487, 498.

Although the Commission complained that the contractor's cost records were inadequate, the Commission never complained during the course of the project and never asked the contractor to alter its method of recordkeeping. Id. at 65, 273 S.E.2d at 498-99. This Court held that the trial court did not err in

awarding the equitable adjustment to the contractor based on the contractor's actual cost records. Id. at 69, 273 S.E.2d at 501.

As in Groves, there was a changed condition on this Project that SSS and English did not expect at the time of the making of the Subcontract—namely, that grassing work would be ongoing after 1 July 2007. As in Groves, SSS's grassing work was more costly as a result of the changed condition (as evidenced by the difference in industry grassing prices between 2003 and 2007). Also as in Groves, the Subcontract here provided for an equitable adjustment should that changed condition take place.

SSS recorded the actual units of work performed on each work item, recorded the actual labor hours spent on each work item, submitted certified payrolls to English throughout the Project, and opened its Project records to English after completion. SSS thus supported its actual labor costs per work item, including overhead, social security, unemployment, and liability insurance. SSS also recorded its actual equipment and materials costs on each work item, and provided English access to its records to verify those costs.

English does not seriously dispute that the amounts shown on the 11/08 Invoice reflect SSS's actual costs to perform the five Late-Term Tasks (after crediting English for the amount paid at the 2003 bid unit prices). English has presented no

legal authority or precedent to support calculating the equitable adjustment any other way.

2. *The Practice of the Project was to Calculate Equitable Adjustments Based on Actual Costs*

Even if there were no legal precedent supporting the calculation of equitable adjustment as SSS's actual costs, that is the method used consistently to compute equitable adjustments in the course of dealing between SSS and English on the Project.

In August 2008, English approved an equitable adjustment for SSS for the four Overrun Tasks using this method. For the Overrun Tasks, SSS was paid at the 2003 bid prices for the first 200% of NCDOT estimated quantities, and at revised unit prices for the overruns (beyond 200% of estimated quantities).¹² For instance, for Item 428 ("Repair Seeding"), NCDOT estimated in 2003 that SSS would perform 600 kg of Repair Seeding work. (Pl. Exh. 4). At the end of the Project, NCDOT measured 3,434.411 kg of Repair Seeding work performed. (Pl. Exh. 26). SSS was paid for the first 200% (1,200 kg of repair seeding) at the 2003 bid price of \$10/kg. For the remaining 2,234.411 kg of Repair Seeding, SSS referred to its detailed project records to

¹² NCDOT allows contractors to equitably adjust their unit prices for work items when the quantities estimated at the start of the Project by NCDOT are significantly overrun during the Project. For "minor" work items, the unit prices are equitably adjusted after the quantities overrun by 100% (*i.e.*, actual quantities exceed 200% of NCDOT's original estimates). (T pp 40-41). See also NCDOT Specs § 104-5(B) (2002).

determine the number of man-hours expended on the overrun work. (Pl. Exh. 26). Then, using the approved labor-and-equipment rate of \$45 per man-hour, SSS expressed its actual costs of materials, labor, and equipment for performing the 2,234.411 kg of overrun work in Item 428 as a "new unit price" of \$22.79/kg for Repair Seeding. (Pl. Exh. 12). NCDOT then paid APAC for the 2,234.411 kg of overrun quantities at the revised unit price of \$22.79/kg, adding five percent markups for APAC and English. (R pp 149-50, 209-10, Pl. Exh. 13.) Likewise, for the Extra Work Tasks, SSS recorded its actual man-hours of labor, plus materials and equipment costs, (Pl. Exh. 16), and English paid SSS for its actual costs per man-hour plus materials, after negotiating a five percent reduction of SSS's actual labor-and-equipment cost of \$45.97 per man-hour. (Pl. Exhs. 20, 21).

The 11/08 Invoice for the five Late-Term Tasks reflects the identical method used to calculate the other, paid-for equitable adjustments on the Project. For each work item after 1 July 2007, SSS recorded in detail the quantities of work performed, its actual labor costs to perform those work quantities (reflected in man-hours per work item and payroll costs plus day labor/subcontractor costs), and its actual equipment and materials costs.

English does not seriously dispute that these are the actual costs to SSS for performing this work after 1 July 2007-

English merely asserts that a unique approach should be used to compute the equitable adjustment for Late-Term Tasks. However, the method used by SSS to compute the equitable adjustment for Late-Term Tasks is the method used for the other SSS equitable adjustments on the Project (which were accepted and paid by English), and is practically the only legally-accepted method of computing an equitable adjustment.

3. *English's Approach—Baselining Prices on 1 July 2007—Does Not Reflect Actual Costs or Satisfy Subcontract*

English argues that SSS should receive an equitable adjustment only if SSS's actual costs increased *after* 1 July 2007. English would calculate new baseline unit prices as of 1 July 2007, but under its approach, English's payments to SSS would never reflect the new baseline unit prices. Instead, under English's approach, SSS would continue to be paid at the 2003 bid prices, even for work performed after 1 July 2007, unless SSS's actual costs thereafter increased further. Even then, English would only adjust SSS's compensation to reflect the increase above the new baseline prices. (Def's Br. at 9-10).

Using English's approach, even if SSS's costs did increase after 1 July 2007, SSS would not be paid for its increased costs from 2003-2007, but at the 2003 bid prices with an "adjustment" equal to the difference between SSS's post-July 2007 costs and the new July 2007 baseline price. Clearly, English's approach

would ignore the increase in SSS's costs from 2003 to 2007, and would amount to practically no equitable adjustment at all.

The Subcontract language does not call for such a convoluted, unintuitive approach. The Price Escalation Provision merely states that the 2003 bid prices were "based upon the assumption that the contract will be completed" before 1 July 2007. (R p 337). If SSS was still performing Subcontract work after 1 July 2007 through no fault of its own, "unit prices herein quoted [the 2003 unit prices] shall be equitably adjusted to compensate us for increased costs." (R p 335). It is the 2003 unit prices that are to be equitably adjusted, not a new, non-referenced baseline unit price as of 1 July 2007.

The Subcontract provides, in essence, that SSS working on 1 July 2007 is a changed condition triggering an equitable adjustment to SSS's 2003 grassing unit prices. The 2007 date otherwise plays no role in calculation of the equitable adjustment. The express purpose of the equitable adjustment is to compensate SSS for its actual costs of performing work after 1 July 2007. English's approach would not compensate SSS for performing Project work after 1 July 2007. Instead, English's approach would ensure that SSS continued to lose money on work performed after 1 July 2007. English's approach converts the Subcontract's equitable adjustment to an inequitable provision.

Contrary to English's next assertion, SSS is not seeking to "adjust its prices from day one of the [Sub]contract." (Def's Br. at 14). SSS accepted and did in fact incur the risk of increased prices through 1 July 2007. SSS honored its 2003 bid unit prices for all work through 1 July 2007, despite the fact that its actual costs dramatically increased between 2003 and 2007. SSS is not seeking an increase in the cost of grassing work performed prior to 1 July 2007.¹³ SSS acknowledges that the Price Escalation Provision in the Subcontract calls for an adjustment to the unit prices only for work performed afterward.

English misleadingly cites the parties' earlier appeal before this Court to suggest that this Court somehow limited SSS's recovery to that portion of the cost *increase* that occurred after 1 July 2007. In the previous appeal, this Court was concerned only with whether SSS was entitled to an equitable adjustment for work performed on the five Late-Term Tasks after 1 July 2007. S. Seeding Serv., Inc. v. W.C. English, Inc., 719 S.E.2d 211, 216 (N.C. Ct. App. 2011). After determining that SSS was entitled to an equitable adjustment, this Court declined to compute the equitable adjustment, and remanded back to the trial court for that purpose. Id.

¹³ For instance, SSS performed two-thirds of the Seeding and Mulching work prior to 1 July 2007, much of it below SSS's actual costs. (T pp 31-32, 159, Pl. Exh. 26). SSS is **not** seeking an adjustment of its 2003 bid unit prices for this work.

In the earlier appeal, this Court was fully aware of English's proposed method of calculating the equitable adjustment, "which would cover [SSS]'s unit price increases incurred after 1 July 2007 but would not account for unit price increases incurred between the time [SSS] commenced its work on the Project and 1 July 2007." Id. at 214. Yet this Court did not rule that English's method is the proper method of calculating the equitable adjustment. In fact, this Court distinguished between English's method and the equitable adjustment sought by SSS, to which it ruled that SSS was entitled. This Court understood that the \$194,941.39 equitable adjustment sought by SSS was "for the increases in its unit cost of *labor and materials furnished for the Project after 1 July 2007.*" Id. (emphasis added). Likewise, this Court understood that the \$194,941.39 equitable adjustment sought by SSS was "to recover for market driven cost increases associated with *material and labor costs incurred after 1 July 2007.*" Id. at 216 (emphasis added). The adjective "after 1 July 2007" in each sentence clearly refers to *services furnished* and *costs incurred* by SSS, not when the *increases* occurred. In other words, the 1 July 2007 date is the trigger for whether SSS is entitled to an adjustment, not a baseline for measuring the price increase.

Under the plain language of the Subcontract, SSS is entitled to an equitable adjustment for work performed after

1 July 2007 if SSS's actual costs are higher than the 2003 unit prices in the Subcontract, even if no further price increase takes place after 1 July 2007.

4. *Actual Costs of a Subset of Work Items, for a Limited Period of Time, is not a Total Cost Claim*

English next incorrectly suggests that SSS's method of calculating an equitable adjustment is a "total cost claim," which is disfavored by North Carolina courts. Biemann & Rowell Co. v. Donohoe Cos., Inc., 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001). The Biemann rule has no bearing on this appeal. In Biemann, the defendant (general contractor) and plaintiff (ventilating contractor) did not have contracts with one another; they were both prime contractors with the State. Id. at 241, 556 S.E.2d at 3. Under the statutory requirements for multi-prime contracts, all prime contractors had a duty to not delay the work of the other prime contractors. Id. The plaintiff sought to recover damages from the defendant for delays on the project. Id. at 240, 556 S.E.2d at 3. However, the delays were at least partially attributable to the other prime contractors, the owner, and even the plaintiff. Id. at 241-42, 556 S.E.2d at 3. The plaintiff sought to recover from the defendant the total costs incurred by the plaintiff in performance of the project, with a credit given for the amount paid by the State at the plaintiff's bid price. Id. at 245, 556 S.E.2d at 5. This Court

rejected that "total cost" approach because the plaintiff failed "to tie the extra labor costs to any specific delay" and failed to "isolate the nature and extent of specific delays and connect them to an act or omission by defendant." Id. at 246, 556 S.E.2d at 6. Specifically, the plaintiff failed to show that it was not responsible for the delays. Id. Furthermore, the plaintiff failed to establish that its bid prices and actual costs were reasonable in comparison to other bids. Id.

The Biemann rule is inapplicable here. First of all, as this Court held in the previous appeal, SSS does not seek delay damages. Unlike Biemann, the adjustment sought by SSS is provided by the Subcontract between the parties. By the express terms of the Price Escalation Provision, SSS only needed to show that it was performing Subcontract work after 1 July 2007 due to no fault of its own. Unlike Biemann, SSS did not have to prove that no other parties except English might have contributed to the increased costs. Furthermore, unlike Biemann, SSS showed that its unit prices at bid time in 2003 and also in 2007 were reasonable in comparison to other bids. Most importantly, unlike Biemann, SSS *did* isolate its actual costs by work item and by date, so that English is only required to make an adjustment for Project work performed *after 1 July 2007*.

English also misstates the equitable adjustment sought by SSS when it says that SSS is trying "to get price increases for

all of its work, not just the additional work." (Def's Br. at 5). As discussed in detail *supra*, this assertion by English is simply not true. SSS has not made a "total cost" claim, because SSS is not seeking additional compensation for Project work that SSS performed before 1 July 2007.

English has confused a "total cost" claim, which is disfavored by this Court, with a claim for actual costs attributable to specific work items which warrant an equitable adjustment, which is the preferred method for North Carolina courts calculating damages in this situation. Midland Fire Protection, Inc. v. Clancy & Theys Construction Co., No. COA05-214, 2006 WL 9526 (N.C. Ct. App. Jan. 3, 2006).

In Midland, a general contractor subcontracted with a fire protection subcontractor to install sprinklers in construction of a department store. Id., at *2. The subcontractor's bid estimated that fifty man-hours would be required to install sprinkler heads in the shoe department. Id. However, due to several changes and delays in the project that were not the subcontractor's fault, the shoe department was not ready for the subcontractor to install sprinkler heads until the end of construction. Id. The subcontractor informed the general contractor that the sprinkler head installation tasks "would be much more time-consuming, difficult, and expensive than performing these tasks in the building during an earlier stage

of construction." Id., at *3. The subcontractor performed the work, which took two hundred ninety-three man-hours to complete. Id. The subcontractor submitted an invoice to the general contractor for its additional labor and materials costs, and the general contractor applied its own markup to the invoice and forwarded the invoice to the owner. Id. However, the owner refused to pay the general contractor for the cost of work in the shoe department above the original bid, and the general contractor likewise refused to pay the subcontractor, arguing that extra payment was barred by the rule in Biemann. Id., at *11-*12. This Court held that Biemann was inapplicable where the parties had a contract with each other, and said contract:

. . . contemplated that [the subcontractor] would be compensated for the total cost of performing the additional work. Under this arrangement, the only feasible way of calculating the amount owed was to reduce the total amount due [the subcontractor] for the additional work by the amount which [the subcontractor] had already been paid for work

Id., at *12. The proper amount of the contract adjustment "was the remaining amount of time and materials spent. There was no other way to calculate damages." Id., at *13.

As in Midland, SSS isolated its extra costs by work items, and is only requesting to be compensated for its actual costs in performing a subset of work items for which the Subcontract provides an equitable adjustment. There is no feasible way to calculate SSS's damages for performing Project work after 1 July

2007 other than to compensate SSS for the difference between its cost to perform that work after 1 July 2007 and the amount it was paid for that work at 2003 bid prices. This is not a total cost claim, but a narrow, targeted equitable adjustment.

III. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES TO SSS.

The decision to award attorneys' fees under N.C. Gen. Stat. § 44A-35 is solely within the trial court's discretion. Miller & Long, Inc. v. Intracoastal Living, LLC, No. 07 CVS 1760, 2011 NCBC 17, 2011 WL 2519545, ¶ 39 (N.C. Bus. Ct. June 21, 2011) (citing Brooks Millwork Co. v. Levine, No. COA09-781, 2010 WL 2366541, at *8 (N.C. Ct. App. June 15, 2010)). N.C. Gen. Stat. § 44A-35 states in relevant part:

In any suit brought or defended under the provisions of Article 2 [statutory lien] or Article 3 [payment bond] of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim

SSS brought the underlying suit, in part, under the provisions of N.C. Gen. Stat. Chapter 44, Article 3. (R p 334). SSS was the prevailing party, as it obtained a judgment of one hundred percent of the monetary amount sought against both

English and the Sureties. (R p 338). Therefore, English was a losing party. The trial court found that English unreasonably refused to settle. (R p 338). All the statutory requirements are satisfied for the award of attorneys' fees to SSS under N.C. Gen. Stat. § 44A-35. Therefore, it was within the trial court's discretion to award attorneys' fees. The award was supported by evidence that English unreasonably refused to settle with SSS.

A. English's Obligation Arose Before the Amended Judgment

English argues that it could not unreasonably refuse to settle because it had no "obligation to pay additional funds" until the trial court entered the Amended Judgment, so English did not fail "to make a contractually obligated payment to" SSS. (Def's Br. at 17). This contradicts the holding of this Court in the previous appeal, which was that English breached its contract with SSS by failing to pay an equitable adjustment in response to the 11/08 Invoice. S. Seeding Serv., Inc. v. W.C. English, Inc., 719 S.E.2d 211, 216 (N.C. Ct. App. 2011).

Furthermore, English's logic contradicts North Carolina law, which is that the obligation to pay arises when the contract is breached, not when the judgment is entered. Salvaggio v. New Breed Transfer Corp., 150 N.C. App. 688, 692, 564 S.E.2d 641, 644 (2002). English's argument that there was no default under the payment bond, because the Sureties had no obligation absent a default by the payment bond principal APAC,

is likewise contrary to North Carolina law, the law of this case, and the language of the payment bond itself. As this Court found in the previous appeal, "The payment bond states that it applies to 'all persons supplying labor and materials in the prosecution of the [Project][.]'" S. Seeding Serv., Inc. v. W.C. English, Inc., 719 S.E.2d 211, 217 (N.C. Ct. App. 2011).

B. The Payment Bond Act Does Not Exclude Award of Attorneys' Fees Against a Non-Signatory to the Payment Bond

English suggests that it was error to award attorneys' fees because English was not a party to the payment bond. English suggests that attorneys' fees are only properly awarded against "a surety or contractor who has entered into a construction contract with a public body." (Def's Br. at 19). This is incompatible with the text of the Payment Bond Act itself, which clearly extends the obligation of prompt payment to subcontractors such as English, who are not parties to the payment bond. The payment bond is to be:

. . . conditioned upon the prompt payment for all labor or materials for which a contractor or *subcontractor* is liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, *subcontractor*, or construction manager at risk is liable. N.C. Gen. Stat. § 44A-26(a)(2) (2012) (emphasis added).

English further states that attorneys' fees could only be awarded against the Sureties, because SSS's cause of action on the payment bond was only applicable against the Sureties.

(Def's Br. at 16). English asks this Court to construe the Payment Bond Act much more narrowly than is the practice by North Carolina courts. In Miller & Long, the subcontractor was awarded attorneys' fees against the general contractor under N.C. Gen. Stat. § 44A-35, even after the subcontractor dismissed its claim against the payment bond surety. Miller & Long, Inc. v. Intracoastal Living, LLC, No. 07 CVS 1760, 2011 NCBC 17, 2011 WL 2519545, ¶¶ 19, 26 (N.C. Bus. Ct. June 21, 2011). While that case involves several claims, one claim involved a \$5,825,000 subcontract to perform all concrete frame construction for two buildings. Id. ¶ 9. The general contractor failed to pay \$510,263.90 of the total. Id. ¶ 16. The subcontractor sued the general contractor for breach of contract for the unpaid amount, and also sued the payment bond surety for recovery on the payment bond. Id. ¶¶ 2-3. The surety paid the \$510,263.90 balance, and the subcontractor dismissed its claim against the surety, leaving the breach of contract action against the subcontractor. Id. ¶ 21. However, the N.C. Business Court granted the subcontractor "interest and attorneys fees as to said breach," pursuant to N.C. Gen. Stat. 44A-35. Id. ¶ 26. See also Weaver's Asphalt & Maintenance Co. v. Williams, No. 09-CVS-206, 2009 WL 8593011 (N.C. Super Ct. Nov. 20, 2009) (awarding attorneys' fees to second-tier subcontractor due to the first-tier subcontractor's breach of subcontract and unreasonable

refusal to settle, where the first-tier subcontractor was not a party to the payment bond). English has cited no authority supporting its interpretation that attorneys' fees are not available against a subcontractor under the Payment Bond Act.

CONCLUSION

For the reasons stated herein, Plaintiff-Appellee Southern Seeding Service, Inc. asks this Court to uphold the Superior Court's Amended Judgment awarding it an equitable adjustment of its actual costs for the Late-Term Tasks plus interest, costs, and attorneys' fees.

Respectfully submitted this 31st day of July 2012.

Electronically submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing brief was served on counsel for the Appellee by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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