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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

SUPERIOR COURT
BRCV2008-1217
Consolidated with
BRCV2008-01114
(Lead Case)
BRCV2008-1198 and
BRCV2009-292

CERTIFIED POWER SYSTEMS, INC.,
Plaintiff

vs.

DOMINION ENERGY BRAYTON POINT, LLC, NICHOLSON & HALL CORP.
and THE HANOVER INSURANCE COMPANY,
Defendants

and CONSOLIDATED ACTIONS

MEMORANDUM OF DECISION AFTER NON-JURY TRIAL

The above-consolidated actions arose from a construction dispute at the Brayton Point power plant in Somerset, Massachusetts. The plaintiff, Certified Power Systems, Inc. ("CPS"), was the piping subcontractor on a project to install certain mercury and sulfur dioxide reduction systems at the plant. The defendant, Nicholson & Hall Corp. ("Nicholson & Hall"), was the general contractor. The defendant, Dominion Energy Brayton Point, LLC ("Dominion"), was, and is, the owner of the power plant. The defendant, Hanover Insurance Company ("Hanover"), issued to Nicholson & Hall the surety bond that was necessary to dissolve CPS's mechanics lien on the power plant.

CPS's complaint, described more fully below, sounds in contract, equity, tort and G.L. c. 93A liability. Nicholson & Hall counterclaimed with similar causes

of action and for indemnification. Dominion brought a third party claim against CPS for indemnification in a consolidated action, which was treated as a counterclaim here. The cross-claims between Nicholson & Hall and Dominion were stayed pending the outcome of the CPS trial.

The undersigned justice was specially assigned to the consolidated actions by order of the Superior Court Chief Justice.

The case was tried to the Court over a period of 14 trial days in March 2011. (CPS had asserted a jury claim, but the Court ruled that CPS's entitlement to a jury had been waived pursuant to its contract with Nicholson & Hall.)

Before the evidence opened, the Court took a view of the project site. 262 exhibits were entered. Final arguments were heard in late June 2011, and supplementary briefing concluded in early July.[1]

The Court finds for the defendant Dominion on all counts of CPS's complaint. The Court finds that while CPS breached its contract with Nicholson & Hall, the breach was not material. The Court further finds that Nicholson & Hall materially breached its contract with CPS and that its conduct violated G.L. c. 93A. The Court awards CPS net damages against Nicholson & Hall in the amount of $5,036,462. Because the Court concludes that while Nicholson & Hall's conduct was unfair and deceptive under G.L. c. 93A, §§ 2 and 11, the conduct was not willful and knowing, and, thus, multiple damages are not

[1] The Court notes the extraordinary quality of the lawyering by counsel for all the parties. This is an extremely complex case. The current limitations of the resources of the Superior Court are such that without the kind of cooperation exhibited between counsel, the planning and execution by counsel that went into the logistics of the three-week trial and without the insightful argument and briefing that followed, the Court would have been at a loss. Inevitably, there are winners and losers after trial, but the expertness of all counsel was uniform.

awarded. Pursuant to the statute, however, CPS is awarded its attorneys fees. The Court also finds for CPS against Hanover on the surety bond. The Court finds for Dominion on its third party claim against CPS but discounts Dominion's damages by 55% due to its substantial failure to mitigate. Net damages due Dominion are $100,000. Dominion is awarded its attorneys fees, but at a similar discount.

## THE PARTIES

CPS is a Massachusetts corporation founded in 1985 with offices located at 612 Wareham Street in Middleboro. CPS is a piping installation contractor to the utility industry. Testimony of Mark Rotunno ("Rotunno") at trial transcript volume 6, page 148.[2] Rotunno has been the president, treasurer, and sole owner of CPS since its inception. Tr. 6:149 (Rotunno). Ex. 155.

Nicholson & Hall is a New York corporation founded in 1922 and headquartered at 41 Columbia Street, Buffalo, New York. Tr. 7:176 (Giarve). Most of its business involves the erection and maintenance of boilers and related equipment for the power generation and utility industries. Tr. 7:176-177 (Giarve). Nicholson & Hall employs approximately 24 persons at its headquarters. Tr. 7:174 (Giarve). Senior management is comprised of President Michael R. Madia ("Madia"), Vice-President/General Manager John Housel ("Housel") and Treasurer Mark Giarve ("Giarve"). Housel oversees five project managers, as well as quality control, safety, warehouse and tool and equipment managers. Tr. 11:179 (Housel). Giarve supervises a staff of approximately seven employees.

[2] The format followed hereafter for citations to the trial testimony will be: "Tr. [transcript volume number]:[page] [(testifying witness)]".

Tr. 7:174 (Giarve). In the field, Nicholson & Hall employs between 150-300 union tradecraft and supervisory personnel, depending upon the number and size of projects underway. Tr. 7:176 (Giarve) and Tr. 11:183 (Housel).

Dominion is a Virginia limited liability company with a principal place of business in Massachusetts located at 1 Brayton Point Road in Somerset. It is part of the national energy company, Dominion Resources, Inc., which is headquartered in Richmond, Virginia.

## CLAIMS AND COUNTERCLAIMS

In its third amended complaint, CPS brings causes of action against Nicholson & Hall for breach of contract, intentional misrepresentation, negligent misrepresentation, rescission, implied contract, quantum meruit and G.L. c. 93A. Its claims against Dominion are for negligent misrepresentation, implied contract, quantum meruit, unjust enrichment and G.L. c. 93A. Its claim against Hanover is exclusively on the mechanics lien bond.

Nicholson & Hall counterclaimed in 93A, contract, fraud, breach of the implied covenant of good faith and fair dealing and indemnity.

Dominion's third party claim rests on claims for indemnification.

## FINDINGS OF FACT

### *THE PLANT*

Brayton Point is an approximately 300-acre peninsula in Somerset, Massachusetts, across the mouth of the Taunton River from the City of Fall River. It extends south into Mt. Hope Bay. On it is located the power plant owned by Dominion. The plant is comprised of four coal fired electric generating

units. Units 1 and 2 are primarily coal fired generators, each capable of generating 250 Mega-Watts (MW) of electricity and have been operating since 1963 and 1964, respectively. Unit 3 is a 630 MW coal fired unit in operation since 1969. Unit 4 is a 475 MW unit that has been operating since 1974. Trial Exhibit ("Ex.") 230. The Brayton Point plant (hereinafter, "Brayton Point" or the "Plant") is the largest fossil-fueled generating power plant in New England.

***THE PROJECT***

As noted, the case arises from a project to reduce mercury and sulfur dioxide emissions from the Plant. In December 2005, Dominion submitted a plan to the Massachusetts Department of Environmental Protection ("DEP") to comply with 310 CMR 7.29, "Emission Standards for Power Plants" (the "7.29 Regulations"). A stepped-up DEP sulfur dioxide ("$SO_2$") compliance requirement was also scheduled to come into effect as of October 1, 2008. Ex. 2, p. 11.

As part of Dominion's plan to meet the 2008 compliance deadline for mercury and sulfur dioxide emissions, it proposed the installation of Spray Dryer Absorbers ("SDAs") for Units 1 and 2 at Brayton Point. The SDAs are sometimes referred to as "scrubbers." It also proposed the installation of a Powder Activated Carbon ("PAC") injection system for Units 1, 2 and 3. Collectively, this scope of work was variously referred to during trial as the "Scrubber Project," the "SDRS/MRS Project"[3] or simply the "Project". Hereinafter, it will be referred to as the "Project" or the "Scrubber Project".

[3] "SDRS" stands for sulfur dioxide reduction system; "MRS" for mercury reduction system.

On March 29, 2006, the DEP approved Dominion's plan to install the SDAs.

Although not a party to the litigation, an important player in the events leading to the underlying dispute was Wheelabrator Air Pollution Control, Inc. ("WAPC" or "Wheelabrator"). At some juncture, Wheelabrator was acquired by Siemens Environmental Systems and Services, Inc. ("SESS"), an affiliate of Siemens Energy, Inc. (collectively referred to as "Siemens"). Siemens is headquartered in Pittsburgh, Pennsylvania, with its multinational parent located in Germany.

In 2005, Dominion entered into a contract with Siemens to "engineer, design, detail, fabricate, deliver[,] assist in system start-up, test and make ready for operation" the SDAs and the PAC system for Units 1 and 2 at Brayton Point. Ex. 1. Siemens' design for the project was similar to an installation that it had designed and constructed at a power plant in Florida referred to as the "JEA Installation." Tr. 10:57 (Cole). Siemens' contract price for the Scrubber Project was $43,833,400. Ex. 1.

On June 12, 2006, Nicholson & Hall entered into a purchase order with Dominion whereby it became the general contractor to construct the SDRS/MRS on Units 1 and 2. That purchase order, together with the General Terms and Conditions, dated February 27, 2002, and the Specification for the Scrubber Project, dated February 1, 2006, constitutes the agreement between Dominion and Nicholson & Hall (the "Prime Contract"). Ex. 87. Pursuant to the Prime Contract, Nicholson & Hall was to: (i) unload, store, erect, and make ready for

operation, equipment, ductwork, piping, and components provided by Dominion or its suppliers; (ii) supply supplemental materials to be used during the erection specified in the Prime Contract; and (iii) supply and install all piping, duct, and equipment insulation. *Id.*

The end product of the Scrubber Project was to be the completed and installed SDAs for Units 1 and 2. In addition, the Project entailed equipment for lime storage and handling, lime slurry preparation and injection systems, fabric filters, waste ash removal and storage systems, fans and their associated silencers and ductwork and miscellaneous other equipment. Ex. 230.[4]

Before the Scrubber Project, Dominion completed, or was in the process of completing, other environmental control and related capital improvement projects of an aggregate dollar value of $1.3 billion. Tr. 14:192-93 (Wright). Before entering into the Prime Contract, Nicholson & Hall had experience

[4] In summary form, the way the sulfur dioxide and mercury reduction systems are designed to work is as follows: Flue gas from the coal fired boilers in Units 1 and 2—rather than being released directly to the atmosphere—are drawn, instead, into the systems. Exhs. 242 and 243. The flue gas first enters the mercury reduction systems, which are located immediately in front of electrostatic precipitators ("ESPs"). The ESPs were already online at Brayton Point before the Scrubber Project began. Their function is to remove particulate matter that is a by-product of the coal combustion that drives the generation of electricity. Ex. 243. Tr. 2:148 (Wright). Mercury content is removed as a result of the injection of the powdered activated carbon ("PAC") into the flue gas. The PAC absorbs the mercury from the flue gas. Tr. 2:149-150 (Wright). The injected flue gas is then drawn into the ESPs (the electrostatic precipitators), which remove the coal particulate as well as the mercury-impregnated PAC. The resulting solid waste is collected and trucked off site for disposal. Ex. 243. Tr. 2:149-150 (Wright). The flue gas is then drawn from the ESPs and further drawn upward through vertical ducts 200 feet to the top of the two SDAs. At that point, atomizers inject a mist of lime slurry into the flue gas. The lime slurry causes the absorption of sulfur dioxide from the flue gas, as it is thereafter is drawn to the bottom of the SDAs. Ex. 243. The impregnated flue gas is then further drawn through ducts into separate fabric filter installations, referred to as "baghouses". At that point, the flue gas is drawn through vertically suspended fabric bags to expose the flue gas to the lime, which bonds with and removes the sulfur dioxide from the flue gas. The resulting particulate is removed and disposed of. The flue gas, which has been cleansed in the foregoing process, is then directed to the preexisting open-ended stacks and released upward into the atmosphere above the Plant. Ex. 243. Tr. 14:134-135 (Wright).

constructing and installing sulfur and mercury reduction systems similar to that on the Scrubber Project on at least three other power plants. Tr. 8:246 (Cole) and Tr. 11:188-190 (Housel).

Brian Wright ("Wright") was Dominion's designated project manager for the Scrubber Project. His title was Senior Project Manager at Brayton Point. Tr. 1:95 (Wright). Wright reported to Michael Wood ("Wood"), Dominion Resources' Director of Environmental Projects, in Richmond. *Id.*

Housel of Nicholson & Hall assigned William Cole, Jr. ("Cole") to develop the estimate for the Project, including the estimate for the process piping that CPS would eventually be selected as subcontractor to install. Housel personally reviewed the estimate, compared it to the quantity list from Siemens' Jacksonville, Florida JEA plant installation, contrasted it to data in his historical files, and found Cole's estimate of just under $3 million for process piping to be reasonable. Tr. 11:194-196 (Housel).

According to a Nicholson & Hall internal reconciliation of value items, Nicholson & Hall carried $2,318,665.43 for the piping scope of work, which was not inclusive of general conditions (also known as overhead) costs. Ex.168, p. 3.

Cole became Nicholson & Hall's Project Manager for the Project. Tr. 8:226 (Cole).

***PROJECT DELAYS PRECEDING CPS'S ARRIVAL***

Before CPS mobilized on the Project in May 2007, the Project was significantly behind schedule. The primary reason was because of recurrent design and fabrication problems allegedly caused by Siemens. In August 2006,

Dominion notified Siemens that it would backcharge Siemens for additional costs related to late material deliveries. Ex. 258, p. 1.[5]

On January 8, 2007, Wright expressed Dominion's "continuing serious concerns" regarding Siemens' material delivery schedule due to the "ever-changing delivery dates provided by [Siemens]." Wright stated that these items need attention to prevent "additional negative impacts on the construction schedule." As a result of these issues, Wright insisted that Nicholson & Hall implement a recovery plan. Ex. 3, p. 1; Ex. 258, p. 1.

During the course of the Project, Nicholson & Hall issued written reports to Dominion on a monthly basis describing the status of the Project and identifying problems affecting completion of the work (the "Monthly Reports"). The Monthly Reports were drafted by Cole, reviewed by Housel, and communicated to Wright, who also regularly reviewed them. If Wright disputed any item, he usually would send a corrective e-mail. Tr. 2:16-17 (Wright). Copies of certain Monthly Reports were marked as Trial Exhibit 21.

Starting in January 2007, the Monthly Reports documented the construction delays attributed to Siemens. The entries include the following:

> The delivery delays have had a negative impact on the construction schedule from a time standpoint, and have delayed the construction of the project during good building weather. The project would be on track if [Nicholson & Hall] had received the materials as outlined on the 7-11-06 delivery schedule. Ex. 21, Tab 1 (January 2007). See also Ex. 21, Tab 2 (February 2007).

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[5] As will be addressed in detail later, schedule delays and CPS's responsibility for the same are material issues before the Court. However, it is clear to the Court that there were pervasive delays in the Project before CPS undertook work at Brayton Point. This circumstance was convincingly documented in the report of Dominion's expert, Donald Fredlund, and the charts that tracked the recurrent delays. See Exhibit 230 (Fredlund), Figures 4-12. Tr. 13:20-263 (Fredlund).

> A recovery plan must be generated so we may be able to achieve the target finish dates for the project in a timely manner. Ex. 21, Tab 1 (January 2007).
>
> Continuation of late deliveries and the direct negative impact placed on the construction schedule due to these delays could reach a point making it extremely difficult to make recovery possible through traditional ways such as trade stacking, acceleration by use of overtime, and two shift operations. We will work closely with the involved parties to develop a recovery plan in order to minimize any necessary increases to the contract or acceptable schedule delays. Exhs. 21, Tab 3 (March 2007) and 21, Tab 4 (April 2007).

On February 19, 2007, Wright notified Siemens of "continuing issues of inadequate scheduled [sic] updates and materials delivered." Exhs. 5 and 258, p. 2.

Siemens acknowledged some measure of responsibility – "[W]e have experienced engineering issues with building design and quality issues with fabricator's details." Siemens also stated that it made "a change in personnel pertaining to both scheduling and expediting." Ex. 6, p. 1.

By February 2007, Nicholson & Hall had concluded that due to the delays, "[t]he original outage dates[6] cannot be achieved with the continuation of a forty hour schedule." Ex. 21, Tab 2.

Nicholson & Hall's March and April 2007 Monthly Reports indicated that Siemens' deliveries "continue to slip." Exhs 21, Tab 3 and 21, Tab 4.

The driving cause necessitating a recovery plan was Siemens' "late material deliveries, fabrication errors, and incomplete engineering documents[.]" Exhs. 18 and 258.

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[6] "Outage" is a term of art in the power industry to describe a temporary period when a generating unit is taken off-line so that it is no longer generating. Outages routinely occur for purposes of performing maintenance or, as here, for purposes of tying in new systems.

Nicholson & Hall's April Monthly Report noted: "Although a complete schedule recovery plan is still in development, [Nicholson & Hall] under the direction of Dominion has begun to enact some of the plans as discussed in the recovery meetings. These efforts will continue and escalate until a final plan is in place." Ex. 21, Tab 4.

The May 2007 monthly report stated:

> The building steel that requires re-fabrication on site is in process, but more mis-fabrication is discovered daily. This fact in conjunction with the continued late deliveries of the [l]ime slurry prep building steel has the potential to further delay the recovery schedule, as a large portion of the piping, electrical, and lime process installations are contingent on this building being erected.

Ex. 21, Tab 5.

***THE ORIGIN AND IMPLEMENTATON OF THE GAS TIGHT RECOVERY PLAN***

In response to Dominion's insistence, Nicholson & Hall, in the late winter and early spring of 2007, proposed, and thereafter implemented, what became known as the "Gas Tight Recovery Plan" (the "GTRP").

The phrase, "gas tight", was a reference to the requirement that, by the target date, the vents and other structures of the SDRS/MRS, through which the flue gas was to be drawn, would be capable of securely containing the flue gases moving through the systems. The GTRP deadline was not a date for the completion of the larger Project, but rather for the accomplishment of an intermediate milestone, the timely achievement of which had become progressively jeopardized because of the Siemens-caused delays. Tr. 2:158-162 (Wright).

The plan incorporated increased craft labor, supervision, and extended workweeks. Ex. 32, p. 1. The specific components and scope of work of the GTRP were memorialized in a written memorandum. Ex. 7.

Duct work and the fabric filter buildings were the priority areas associated with the GTRP – not the systems and piping which carried the lime materials for the sulfur dioxide extraction. Tr. 1:116 (Wright). The latter would eventually become the responsibility of CPS to install.

Among the subcontractors directly involved in the GTRP was the insulation/lagging subcontractor, Atlantic Contracting & Specialties, Inc. ("Atlantic").

With Wright's approval, Nicholson & Hall began billing for 58-hour workweeks starting in March 2007. Ex. 21, Tab 4 (April 2007). Dominion agreed to pay for the overtime and support costs. Ex. 8, p. 1.

Nicholson & Hall performed its GTRP work on a time and materials basis, as opposed to a fixed price basis. The reason was because of the complex variables involved in the project and the resulting uncertainty as to an estimated cost. Ex. 10. Nicholson & Hall received payments in excess of $900,000 for recovery costs during the months of March 2007 and April 2007. These payments were in addition to what it received in connection with its base scope work done pursuant to its general contract. Ex. 233, p. 2.

***CPS'S ORGANIZATION, SENIOR PERSONNEL AND PREVIOUS BUSINESS***

As noted, CPS's was headquartered in Middleboro and had been in the piping business since 1984. CPS's customers were primarily power plants. CPS

had performed projects with non-union and union employees, although most of its work was with non-union personnel. Tr. 3:84-85 (Flynn).

Rotunno oversaw CPS's operations, finances, and business development. Tr. 6:152 (Rotunno).

Brian Flynn ("Flynn") was CPS's Vice President in charge of operations. Flynn was employed with CPS for 17 years. He was responsible for the preparation of bids and oversaw CPS's project managers and supervisors. Tr. 3:79 (Flynn) and 6:150-151 (Rotunno).

John Gould ("Gould") was CPS's outside accountant and handled CPS's finances for over 20 years prior to the Project. Tr. 5:61-62 (Gould) and Tr. 6:151 (Rotunno).

CPS's work tended to be seasonal. Historically, its business was heavy in the spring and fall months when power plants temporarily shut down operations to perform scheduled maintenance or tie-in new systems. To compensate for the seasonal swings in its cash flow, CPS obtained a substantial line of credit with South Shore Co-Operative Bank ("S-Bank). Tr. 3:92-93 and 97-99 (Flynn).

CPS had previously performed work on a fixed-price contract basis similar to that of its subcontract here. But it also did work on a time and materials basis. Before the Project, approximately 40% of CPS's work involved fixed-price contracts. Tr. 3:81 (Flynn).

From 2004 to 2007, CPS's gross revenues were approximately $10 million per year. Tr. 6:149-50 (Rotunno). In those years, Dominion was CPS's largest customer. CPS performed work at Dominion affiliated power plants in Salem,

Massachusetts ("Salem Harbor") and in Providence ("Manchester Street"), in addition to Brayton Point. Together, the Dominion plants generated $5-6 million in annual revenues for CPS. Tr. 3:86-87 (Flynn).

Some of CPS's business with Dominion involved CPS supplying union laborers for non-project-specific tasks to Dominion's power plants. Under this arrangement, Dominion hired and supervised the laborers, despite the fact that the workers were on CPS's payroll. Tr. 6:169-71 (Rotunno).

***CPS AND THE PROCESS PIPING SUBCONTRACT***

On January 4, 2007, Nicholson & Hall issued a request for quotation ("RFQ") to CPS and other bidders for the process piping scope of work. Ex. 66.

Included with the RFQ, were the plans, specifications, drawings, and general arrangements of the work to be bid by CPS, Ex. 86, as well as the then-most recent Project schedule. The latter was dated December 4, 2007 (the "December Schedule"). Ex. 85.

Nicholson & Hall conducted a pre-bid meeting in late February 2007. After the meeting, Nicholson & Hall circulated minutes from the meeting. The meeting notes became Exhibit H to the Subcontract entered into between CPS and Nicholson & Hall. Ex. 71, Bates p. CPS00309-312.

From January 2007 through April 2007, the Project site was available to Flynn and other CPS personnel for inspection. Tr. 4:34 (Flynn). Flynn was at the Plant "quite often" during that period, "sometimes . . . as often as once or twice a week." Tr. 4:6 (Flynn). In addition, Flynn walked the Project site with Cole "a couple of times" during February and March of 2007. Tr. 4:34 and 38 (Flynn).

To respond to the RFQ, CPS retained the services of Keith Hummer ("Hummer") of Hummer Construction Resources to prepare its bid. Tr. 4:33 (Flynn); Tr. 6:191 (Rotunno). CPS had successfully worked with Hummer on previous projects.

To carry out that task, Hummer visited the Project site "at least twice" before preparing CPS's bid. Tr. 4:33 (Flynn). In addition, during March 2007, Rotunno, Hummer, and Flynn all visited the site with the RFQ in hand, Tr. 6:190-193 (Rotunno), and spent about four hours viewing the site's various locations and access areas. Tr. 6:194 (Rotunno). Rotunno and Flynn were already generally familiar with the Plant on account of CPS's previous work there. Tr. 3:82 (Flynn).

At the time of their site visits, Rotunno, Flynn and Hummer could observe that the Project had not progressed to the extent anticipated in the December Schedule. For example, the December Schedule provided that by mid-March 2007, the steel frame of the prominent compressor building—one of the locations where CPS intended to start working—should have been erected. Exhs. 85 and 87; Tr. 9:85-86 (Cole). The erection had not begun by late March. Tr. 9:86 (Cole); Ex. 189. Similarly, what would be the four-story lime slurry preparation building was to have been complete by late March 2007. Tr. 9:96 (Cole). However, photographs show that as of March 26, 2007, only a couple of days' worth of steel erection had been installed. Ex. 189. Tr. 9:98-99 (Cole).

After his March 2007 inspection, Hummer reviewed the bid materials, performed a material takeoff from the RFQ from project drawings and related

materials, and he employed an estimating software program. He recommended a bid in the amount of $ 3,193,984.00. Neither Rotunno nor Flynn made adjustments. Tr. 6:197-198 (Rotunno). CPS adopted and submitted Hummer's bid to Nicholson & Hall. Ex. 127. Tr. 6:196-198 (Rotunno).

Flynn was primarily responsible for the bid and independently reviewed Hummer's estimates. Tr. 3:103 (Flynn). Rotunno reviewed the bid with Flynn to understand the work and the proposal. Tr. 6:156-57 (Rotunno). Rotunno saw Flynn as a "crackerjack estimator" based on Rotunno's 17 years of having worked with him on construction projects. Tr. 6:157 (Rotunno).

Because the Project involved installation of piping in new construction, the Rotunno viewed it as "a pretty cut and dry job" based upon the bid information provided to CPS. *Id.* at 157-58.

CPS received a more complete set of drawings after its initial quote. Tr. 3:115 (Flynn).

Nicholson & Hall intended that CPS perform the work as rendered in the drawings and install the materials, prefabricated and otherwise, in accordance with the bid documents.

***CPS's Initial Bid***

CPS's first bid was in the amount of $3,193,984. Ex. 68.

CPS bid the Project assuming a seven-month duration. This was based upon the pre-bid notes and the December Schedule. The project was to be complete before the onset of winter. Tr. 3:113 and 118-119 (Flynn).

CPS's as-bid "general conditions" (an item reflecting projected supervision costs) was $768,600, approximately $110,000 per month. Ex. 68.

The remainder of CPS's bid relied upon industry labor production rates generated from material quantities.

CPS applied an inefficiency factor of 15% against the total estimated labor hours. "Inefficiency" is an item in a bid package that reflects an estimate of adverse impacts from site conditions that affect the quality and reliability of the work to be performed. Tr. 3:106-107 (Flynn). The 15% inefficiency figure was on the low end of industry practice, but Flynn felt comfortable using it because he viewed the job as relatively straight-forward and because he expected to be employing a "very good union" labor force. Tr. 3:105-106 (Flynn).

CPS included a 10% markup for overhead expenses and a 15% mark-up for profit, both of which accorded with industry norms. Tr. 3:109 (Flynn).

***CPS's Amended Bids***

On March 23, 2007, CPS submitted its second proposal for the piping scope of work. Ex. 69. After doing so, Flynn met with Cole on site and observed the level of completion of the Project. Flynn observed that certain milestones in the project schedule had substantially slipped; however, Cole described that there was work immediately available to be done. Tr. 3:125-126 (Flynn).

CPS planned to start its work within the SDA towers to get it finished during the good weather months. CPS planned an average crew size of 16 pipe fitters, recognizing that there would be periods with fewer and periods with more workers. Given the relatively unimpeded duration CPS had to complete the

work, CPS's goal was to avoid peaks and valleys in crew sizes. CPS also bid the job with the understanding that the two SDAs were mirror images of each other. CPS planned to transition the same crew that installed the piping in Unit 2 to Unit 1 assuming there would be a learning curve productivity gain in the performance of the mirror image Unit 1 work. Flynn told Cole of his manpower assumptions to which Cole took no exception. Tr. 3:117-120 (Flynn).

CPS submitted its third and final proposal on April 12, 2007. Ex. 70. It became incorporated as Exhibit A to the CPS/Nicholson & Hall Subcontract. Ex. 71.

Based upon the information provided to CPS during the bidding phase, CPS's proposal to Nicholson & Hall was fair and reasonable. Ex. 151, pp 24-28 (Report of CPS's expert, Andrew Engelhart ("Engelhart")). The proposal was in line with Nicholson & Hall's own estimate and was viewed at the time as realistic by both Cole and Housel. Tr. 10:79-80 (Cole) and 11:194-198 (Housel).

***CPS Executes the Subcontract***

On April 26, 2007 Flynn, on behalf of CPS, executed the Subcontract. Giarve countersigned the Subcontract on May 16, 2007 for Nicholson & Hall. Ex. 71.

The total contract package was comprised of: (i) the Subcontract document; (ii) Exhibits A through H to the Subcontract; (iii) the Project drawings and specifications; and (iv) the Prime Contract. Exhs. 71 and Ex. 87 at Art. 1. Exhibit 81 is the total contract package.

In substance, the Subcontract stated that CPS would provide all labor, supervision, required materials, tools, and equipment needed to install and make ready for use all piping, instrumentation, valves, pipe supports, and equipment as shown on the Project drawings and specifications, and specifically to perform the work enumerated in the Pipe Fitter Scope of Work annexed to the Subcontract as Exhibit A, and all changes and additions thereto (the "CPS Work"). Ex. 87. The CPS Work was to be performed in the lime slurry preparation building, the recycle lime slurry building, the compressor building, and the SDA penthouses. Tr. 9:27 (Cole). 70% of CPS's projected work was to be concentrated in the lime slurry preparation building and the SDA penthouses. Tr. 9:126-127 (Cole)

Among the provisions of the subcontract, which became material to the dispute as the Project unfolded, are the following:

- Art. 1: "It is understood that in the event of conflict or inconsistencies between the provisions of the Subcontract and the other Contract Documents, including the Owner-General Contractor Agreement, the Subcontract shall govern." Ex. 87.

- Art. 2: Subcontract price is $3,193,983. *Id.*

- Art. 8: CPS represented "that it [was] fully qualified to perform [the] Subcontract and acknowledge[d] that prior to the execution of the Subcontract, it [had] by its own independent investigation ascertained and fully evaluated the work required by [the] Subcontract, the conditions and difficulties involved in performing the Work, the obligations of [the] Subcontract and the Contract Documents and the nature, locality and site of the Work." *Id.*

- Art. 10: CPS agreed it would "employ . . . properly trained tradesmen and laborers in sufficient quantity as may be necessary and acceptable to the Contractor to maintain the Construction Schedule, the quality of the work and the requirements of authorities having jurisdiction over this Project." *Id.*

- Art. 2.C: "[Nicholson & Hall] reserves the right to issue joint checks to Subcontractor and its sub-subcontractors and suppliers if, in the [its] sole judgment, it is necessary to do so to ensure payment to the above-named parties or if above named parties have filed a notice of nonpayment, lien or intent to lien, stop notice, etc." *Id.*

- Art. 9: Nicholson & Hall's "[s]uperintendent shall have primary on-site authority and responsibility to manage the Work and to coordinate the activities of all subcontractors and suppliers." *Id.*

- Art. 10: "[Nicholson & Hall], without nullifying this Subcontract, may direct [CPS] in writing to make changes to Subcontractor's Work. . . . No change shall be based on actual or verbal notice." *Id.*

- Exhibit A: Union labor, normal business hours Monday through Friday, Nicholson & Hall supplying all fiberglass reinforced plastic ("FRP") piping, Nicholson & Hall supplying all large bore piping (3" and larger), Nicholson & Hall providing crane service, and piping supplied as spooled on as-bid drawings. *Id.*

- Exhibit C, § 3.34.3: Laydown areas on the Project are setup ". . . to provide for the most expeditious and economical construction." *Id.*

- Exhibit C, § 3.34.4: Nicholson & Hall will maintain a critical path method ("CPM") schedule using Primavera software at a level III detail. Nicholson & Hall will update and issue 4-Week Look-Ahead CPM schedules on a weekly basis during construction. *Id.*

- Exhibit F: Seven-month duration. Flexibility accorded CPS to sequence its work. *Id.*

- Exhibit F: The construction was to be complete before winter. *Id.*

- Exhibit H (Pre-Bid Notes): "Piping for Unit 2 must be completed by August 25, 2007 and Unit 1 shall be complete by October 27, 2007." *Id.*

- Exhibit H (Pre-Bid Notes): "All communication with Dominion shall be through Nicholson & Hall, exclusively." *Id.*

- Exhibit H (Pre-Bid Notes): "The bids shall be based on a 40 hour work week, 8 hours per day, Monday through Friday." *Id.*

***PRE-CONTRACT DISCLOSURES AS TO PROJECT DELAYS AND THE STATE OF THE PROJECT SCHEDULE***

Prior to the execution of the Subcontract, CPS was not advised of the recurring problems with Siemens' design, fabrication and supply of materials issues. Tr. 3:134-35 (Flynn). Cole, however, was acutely aware of them. Ex. 4, p. 3. Ex. 21, Tabs 1-4 (Nicholson & Hall's January-April 2007 Monthly Reports).

Despite the entry in its March 2007 Monthly Report that "[t]he original outage dates cannot be achieved with the continuation of a forty hour schedule," Ex. 21.3., Nicholson & Hall did not alert CPS of the unreliability of those dates or the prospective requirement of substantial overtime. Tr. 3:120 (Flynn).

The Gas Tight Recovery Plan was not disclosed to CPS prior to the execution of the Subcontract. Tr. 3:120-121 and 134 (Flynn). There were no discussions with CPS regarding sequencing the work to make the systems "gas tight" prior to installing the lime-related process piping. Tr. 3:120 and 134-35 (Flynn).

Other bidders on the piping subcontract were also not informed. In an exchange dated March 28-29, 2007, a prospective bidder posed the question:

- "Please confirm job schedule from April to August (or October)."
- Nicholson & Hall's answer was: "Refer to pipe fitter bid note #4. Unit 2 complete by August 25, 2007. Unit 1 complete by October 27, 2007."

Ex. 198, pp. 1-2.

It is customary in the construction industry (and reasonably to be expected by a fixed-price bidder in CPS's position) to be presented with accurate information from the party seeking a bid, including information relating to scope,

schedule, pertinent project conditions, and relevant key construction management related issues. Ex. 151, (Engelhart) p. 20. Tr. 7:42-43 (Engelhart).

Where material information develops after an RFQ is issued but before a bid is received, it is standard industry practice for the party soliciting bids to issue addenda. Ex.151, (Engelhart) p. 21. Tr. 11:146-47 (Collins).

***NICHOLSON & HALL'S AFFIRMATIVE DECISION NOT TO DISCLOSE***

As noted, the GTRP went into effect in March 2007. Nicholson & Hall billed in excess of $900,000 for recovery costs during March 2007 and April 2007. Ex. 233, p. 2.

In late April 2007, Atlantic, the insulation/lagging subcontractor, submitted a change order request for substantial additional compensation on account of the impact of the GTRP on its contract assumptions. Tr. 1:136-137 (Wright).

On Sunday, April 29, 2007 at 8:05 PM, Wright of Dominion wrote an email to Cole, which stated:

> Bill - what do you need from me to prevent having the same conversation with CPS that we did last week with Atlantic [about its GTRP related claim]? I want to avoid the "jumping on the band wagon" scenario. Brian.

Ex. 9.

At the trial, Wright explained his intention in sending this email as being to make sure that CPS had all of the necessary information to avoid the scenario of CPS later submitting a large change order. Tr. 2:150-151 (Wright).

The next morning, Cole responded to Wright:

> Brian,
>
> In preliminary conversations with [Brian Flynn] it has been discussed and does not seem to be an Issue, but ***I am not going to give him the latest copy of the schedule or the marked up PID's [Process and Instrumentation Diagrams] until I have a signed contract.*** I am expecting that early this week. We may have to talk about 10 hr shifts till the end of may, like the rest of the job, but I will try to avoid that also.

Ex. 9 (emphasis added; spelling and punctuation as in the original).

Implicit in the Cole email was his recognition that the Project was significantly behind schedule and that CPS would likely be required to perform 10 hour shifts through the end of May.

Wright did not respond to Cole's e-mail. At trial, he explained that he was satisfied that there had been "discussions." Ex. 9. Tr. 1:139-140 and 153 (Wright). In substance, Wright acquiesced to Cole's proposed course of action and its rationale. Tr. 2:156-57 (Wright).

Cole did not want to discuss the prospect of overtime and 10-hour days with CPS in the pre-contract timeframe for "cost containment reasons". Tr. 10:84 (Cole).

Cole's decision to not disclose the amended schedule and the background to and the details of the GTRP to CPS was intentional. However, it does not appear to have been made in bad faith. Rather, in keeping with Cole's experience on similar past projects, Cole expected that any adjustments in the cost structure due to conditions that were not described in the bid documents would be addressed through the routine change order process. In response to

questions on the point by Nicholson & Hall's counsel at trial, Cole explained his reasoning and intentions:

> Q: In [Exhibit 9, the subject April 29-April 30 email exchange with Wright] you inform Mr. Wright that you're not going to provide CPS with an update of the schedule until you have a signed subcontract with CPS to do the pipefitting scope of work; is that correct?
>
> A: Yes....
>
> Q: Explain to the Court, if you will, Mr. Cole, precisely why it is that you didn't feel it necessary to provide CPS with the updated schedule on the scrubber job.
>
> A: They were going to be provided with the updated schedule as it existed when they showed up onsite, and any changes to the RFQ we were going to deal with as a change order....
>
> Q: So when CPS signed this subcontract, Mr. Cole, you expected that a change order might arise out of it as a result of gas-tight recovery?
>
> A: They always do.
>
> Q: Pardon?
>
> A: Not as a result of gas-tight recovery, specifically, but there are always change orders, yes.
>
> Q: Some of them are often early on, aren't they?
>
> A: Yes.
>
> Q: You didn't have any ill intent by withholding the schedule from them?
>
> A: Earlier in my testimony today, I referenced the job in Astoria, Queens. It was the exact same situation: They handed me a new schedule the day after we signed the contract, and I gave them an extra that was worth $600,000.
>
> Q: Was it your intention by not providing CPS with a schedule update at the time that it signed the subcontract to conceal anything from CPS?
>
> A: No.

Tr: 9:151-153.

The Court accepts Cole's testimony at face value: Namely, that it was Nicholson & Hall's intention at the time the contract was executed to accommodate any significant discrepancy between the terms and conditions as described in the bid documents and what CPS would confront once onsite in the field via the change order process. This intention included making reasonable adjustments in the contract price for delay-impacted changes in the Project schedule and the need for overtime.[7]

***CPS UNDERTAKES ITS WORK***

CPS mobilized at the Project on May 5, 2007. Tr. 9:113 (Rotunno). Although it did not matter to Nicholson & Hall where CPS began its work, Tr. 11:12 (Cole), CPS intended to start in the compressor building and then move to the lime slurry prep building. Tr. 6:206-207 (Rotunno). Yet, by May 5, 2007, the construction of both was significantly behind the December Schedule. Exhs. 85 and 87; Tr. 11:12 (Cole). The lime slurry prep building—which should have been complete by late March, Tr.9:96 (Cole)—was only 40% complete. Tr.9:112-113 (Cole). Ex. 189. Its concrete floors were not poured until May 9, 2007. Tr. 9:117 (Cole).

The structural steel for the compressor building was just beginning to be installed in mid-June. Tr. 9:118 (Cole). Ex. 189, Bates p. NH451. Those conditions, Rotunno acknowledged, prevented CPS from starting in the locations

[7] Interestingly, Wright's articulated concern (noted above) suggests that Dominion would have preferred the full information as to the status of the Project be communicated to CPS *before* the contract was signed. In that way, the pricing of the conditions that CPS may not have been aware of could be incorporated into the contract's financial terms from the outset.

as planned. Tr. 6:207 (Rotunno). However, the Court concludes that there was sufficient available work for CPS to do as directed by Nicholson & Hall in furtherance of its contractual scope of work and, incidentally, to assist in connection with the GTRP.

In addition, CPS agreed to perform significant additional work beyond the Subcontract on the so-called "Fly Ash" and "Anchor Bolt" systems. Tr. 4:48-49 (Flynn). Change orders were issued by Nicholson & Hall and approved by Dominion for CPS to cover this work. The new undertakings added approximately $1 million to CPS's budget on the Project.

Through the early Fall, CPS did not express any concern with regard to the schedule and the progress of the Project. Exhs. 85 and 87. Tr. 9:114 and 119-120 (Cole).

***EXTENSION OF THE UNIT ONE OUTAGE TO MARCH 2008***

Notwithstanding the near-term acceleration of the Project through the implementation of the GTRP, in late September 2007, Dominion concluded that the December project deadline could not be met. Accordingly, it decided to move the Unit 1 tie-in outage to March 2008. Exhs. 21.10 and 17. Wright was involved in the decision, and in making it, he considered financial implications for Dominion and safety issues on account of the required extended periods of overtime. Tr. 1:154-156 (Wright). Wright did not discuss the extension beforehand with subcontractors because it is "not typical [for an owner] to communicate directly" with subcontractors. *Id.* at 159.

Siemens objected to Dominion's decision. Ex. 17. Siemens had been told that the Unit 1 outage was "solid", and the SDAs would be in service by December 2007. Ex. 258, p. 4.

Siemens warned Dominion that the construction schedule could be delayed if the work was performed in winter months. On October 16, 2007, Siemens' project manager wrote:

> Finally, as you continue to revise your construction schedule, may we suggest that the enclosure of the PJFF penthouse be a top priority to complete while the weather is favorable. Similarly, the FRP piping that could be delayed if joints must be heated outside in unfavorable temperatures. ***This needs to become the priority, our experience recommends investing the necessary hours including overtime to beat the weather.***

Ex.17, p. 3 (emphasis added).

The Project extension was significant to all Project participants because it meant that Nicholson & Hall and its subcontractors would incur additional field supervision (general conditions) costs for working three months longer than expected and additional costs associated with performing the work during the winter.

## *FALL 2007 "RE-BASELINING" OF THE SCHEDULE AND CPS'S INPUT AND FORECASTS RE TIME OF COMPLETION*

In response to the changed condition of the extension of the Unit 1 outage to March, Dominion required that a new schedule be prepared. Nicholson & Hall's October 2007 Monthly Report recorded that Nicholson & Hall was working with Dominion ". . . to formulate a new schedule that supports the project needs." Ex. 21.10. David Johnston ("Johnston"), a Dominion employee, came to be

tasked with the responsibility. He solicited input from each of the subcontractors, including CPS.

In November, CPS's superintendents, Stanley Poole ("Poole") and Douglas Dill, responded to Johnston's questions regarding the remaining piping tasks. Tr. 5:158-61 (Poole). The "re-baseline schedule" thereafter circulated by Johnston forecasted that CPS's base scope work would be complete by mid-January 2008. Tr. 9:197 (Cole).

On a weekly basis, Johnston led project-scheduling meetings and circulated a two-week "look-ahead" schedule to CPS and the other subcontractors. Tr. 5:124 and 160-62 (Poole).

Notwithstanding the new schedule and the emphasis placed by Dominion and Nicholson & Hall upon keeping to it, the schedule for all trades continued to slip. Tr. 6:21-22 (Poole).

The Court finds that CPS's fall of 2007 prediction (via Poole) that its base scope of work would be complete in January was unrealistic. To the extent that Nicholson & Hall relied on CPS's forecasts, some adverse impact on the progress of the Project occurred. However, that impact was not significant for two reasons.

First, as reflected in Dominion's expert, Fredlund's, charts, there were pervasive delays affecting the Project at the time. Ex. 230 (Fredlund), Figs. 4 – 12. Second, Nicholson & Hall's experienced project management team was onsite throughout the period. As noted, Nicholson & Hall had seriously considered self-performing the process piping work on the Project and had

incorporated an allowance for the work in its own bid to Dominion.

The Brayton Point Project was not a Big Dig order-of-magnitude project.

Housel and Cole were contemporaneously aware of the status of CPS's base scope work and what remained to be done. Thus, they knew that CPS's forecasts were unrealistic, and there is no credible evidence that they relied upon such forecasts to Nicholson & Hall's or to Dominion's detriment.

***ONSET OF OVERTIME***

As noted, the subcontract provided for a forty hour workweek, Monday to Friday. However, beginning in late July 2007, CPS was required increasingly to work overtime. By September, almost all of its employees were working in excess of 40 hours on extended schedules. Ex. 151, p. 32. Tr. 7:57-58 (Engelhart). Dominion's expert, Fredlund's, report confirmed this. Exhibit 230 (Fredlund), Figure 3.

The amount of overtime decreased in the October-December; however, it then sharply increased in January 2008 and remained high through May 2008. Ex. 230 (Fredlund), Figure 3. At the end of the Project, in total, CPS was required to work 19,500 hours of overtime or 18% of its total hours worked. Ex. 151 (Engelhart), p. 32.

Combined with the increased headcount of CPS tradecraft that began in November, Ex. 230 (Fredlund), Figures 2 and 3, the magnitude of the overtime caused an increasingly serious cash flow strain on CPS in the late winter and early spring of 2008. CPS's financial condition led to the events of late April-May 2008 when the CPS, Nicholson & Hall and Dominion relationship unraveled, as

will be described later.

## *RFI'S AND THE CHANGE ORDER PROCESS*

### *Contract Provisions Regarding Change Orders*

Under the Subcontract, Nicholson & Hall could direct that changes be made to what was defined as "CPS Work". All conditions precedent to payment to CPS for its base scope of work on the Project applied to additional compensation through change orders.[8] Ex. 87 at Art. 10.

The Subcontract also provided that CPS would not be entitled to compensation, or damages for any delay, obstruction, hindrance or interference to the CPS Work, unless (a) CPS gave timely and proper written notice in accordance with the terms of the Prime Contract (incorporated into the Subcontract by reference) and (b) Nicholson & Hall were entitled to a

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[8] The Subcontract provision dealing with changes to the CPS Work states that:

> Contractor, without nullifying this Subcontract, may direct Subcontractor in writing to make changes to Subcontractor's Work. Adjustment, if any, in the contract price or contract time resulting from such changes shall be set forth by the Contractor in a Subcontract Change Order (Exhibit D) pursuant to the issuance of a Field Order and/or Request for Information by the Contractor for modifications in the Work all subject to the terms of the Contract Documents. . . . Payments for changes are subject to all the conditions set forth in these Contract Documents, specifically Article 2 which makes Contractor's receipt of payment from Owner for the changed Work a condition precedent to Subcontractor's right to payment for performance of the changed Work. No alteration or change shall be made except upon Contractor's written order signed by an officer of Contractor. . . . Subcontractor fully understands and agrees that the written change order requirements and/or written notice requirements are express conditions precedent to Subcontractor's right of any recovery for changes. No change shall be based on actual or verbal notice.

Ex. 87 at Art. 10.

The Subcontract further states that the "[w]ritten notice requirements hereunder are to be strictly construed and may not be waived [and that] [n]otice shall not be based upon actual, or verbal notice or lack of prejudice to the Owner or Contractor." Ex. 87 at Art. 24.

corresponding reimbursement, increase in compensation, or damages from Dominion under the Prime Contract.[9] Ex. 87 at Arts. 1 and 15.

The notice requirements of the Prime Contract for delay claims required that Nicholson & Hall and its subcontractors "identify all delay time on its standard time sheet," which do not themselves constitute official notice of delays or requests for adjustment. Ex. 87, Prime Contract, Art. 12.E. By extension, CPS was also obligated to separate out its delay time from its non-delay time, and to give Nicholson & Hall timely notice of claims it asserted for any equitable compensation adjustment that it contended arose from Dominion-caused delays.

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[9] The relevant contractual provisions on this issue state:

> [CPS] shall under no circumstances be entitled to nor claim any cost reimbursement, compensation for damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Contractor is entitled to corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference and then only to the extent of the amount, if any, which Contractor on behalf of the Subcontractor, actually receives from the Owner on account of such delay, obstruction, hindrance or interference.

Ex, 87 at Art. 15.

The Prime Contract states that if Dominion delays the performance of the Scrubber Project, then:

> Contractor shall give [Owner] prompt written notice of [a] delay and shall submit a written request for any equitable adjustment in Compensation, . . . within ten (10) days after the end of the delay and shall provide supporting documentation pursuant to the Article entitled Changes. Failure to submit a timely notice of delay and a request for an equitable adjustment shall be deemed a waiver of [any] right to an equitable adjustment. Except as provided in this Article, [Owner] shall not be liable for any increased costs incurred by Contractor due to any delay in Contractor's performance.

Ex. 87, Prime Contract at Art. 12.B.

***Change Order Frequency and Order of Magnitude***

Dominion's expert, Fredlund, convincingly presented the content and course of the change orders ("RFI's") on the Project. Ex. 230 (Fredlund), pp. 18-25. [10] Using Nicholson & Hall's data, Fredlund calculated that the dollar value of the total approved RFIs was $1,411,494. The total disputed RFIs' value is $692,433. The value of the total pending RFIs is $600,619. Thus, the total value of all RFIs is $2,704,547. Against CPS's original subcontract amount of $3,193,983, change order claims represent an 85% increase.

However, it must be noted that approximately $1 million of the RFI total was for work associated with the Fly Ash System and Anchor Bolt work. As noted before, CPS voluntarily agreed to add this work to its base scope. Nevertheless, even having subtracted out the Fly Ash and Anchor Bolt work change order, RFIs represented a 53% increase in the budget of CPS's subcontract.

As tracked and presented by Fredlund in Figure 1 of his report and in his testimony, CPS began submitting change orders in late June 2007, its second month on the job. The volume sharply increased in late July 2007, which pattern continued through September 2007. There was then a moderate decline in the amounts of new change orders until a resumption of the high frequency in February 2008, which extended through April 2008. Change orders continued to be generated, however, through the life of the Project up to July 2008.

Although the Project did not reach substantial completion until July 2008,

[10] The Court does not, however, adopt Fredlund's conclusions, except where expressly noted.

the original dollar amount of CPS's subcontract had already been billed as of December 2007.[11]

***NATURE OF "BUSTS" ENCOUNTERED BY CPS***

In the course of the Project, the colloquial term, "bust", was used to describe problems encountered as a result of design or fabrication errors by Siemens. When CPS encountered a "bust", it suspended work, pending a resolution of the issue.

Bruce Richards ("Richards"), a Dominion employee, described himself, without challenge, as Dominion's "eyes and ears" on the Project.[12] Tr. 12:223 (Richards). Richards prepared detailed daily and weekly reports for Dominion on the state of the Project and priority areas to be addressed. He observed and noted numerous "busts" and "interferences" from the beginning of the Project through September 2008. Richards attributed many of the busts to mistakes by Siemens. Ex. 226. Tr. 13:36 (Richards).

The majority of the extra work performed by CPS involved correcting these "busts" as opposed to CPS having assumed work outside of its original scope. Dominion's expert, Fredlund, explained:

> The majority of the approved changes, excluding the additional or extra work associated with the Fly Ash System, were required to deal with either design routing conflicts found in the field with other

[11] Although the parties' RFI logs do not match up in all instances, there was no dispute that the number of CPS RFIs exceeded 200 and the value is in the millions of dollars. CPS assembled eight volumes of RFI's that were summarized in Exhibit 78. Exhibit 81 is a Stipulation agreeing that CPS is entitled to an additional $1.4 million. Exhibit 215 is Nicholson & Hall's log of approved CPS change orders with the total of $2.6 million. Exhibit 238, pp. 3-7, is Nicholson & Hall's log of CPS's rejected change orders, totaling over $4 million. See also Ex. 238, pp. 9-10, Nicholson & Hall's log of CPS approved but not billed change orders and Tr. 10:158 (Cole's testimony as to CPS's 235 change orders, 152 of which were generated after April 1, 2008).

[12] Richard's formal title was "Construction Coordinator". Tr. 12:221 (Richards).

> elements of the Project (e.g., structural steel, electrical conduit/trays, ductwork, etc.) or defective material, and did not involve significant increases in quantities to be installed as much as re-routing of the previously design routing for piping and/or reconfiguration of fittings and valves to avoid the conflicts or clashes. In other words, it was not so much 'new' or 'additional' scope of work being added, as it had to make the previously designed scope of work and routing of such fit to resolve routing conflicts between different elements of the Project. This was the result of the fact that the degree of constructability reviews and coordination of the design documents prior to issuance for construction did not occur to the extent anticipated.

Ex 230 (Fredlund), pp. 19-20.

The busts included misfabrications, field obstructions, and deficient design/materials.

*Misfabrications.* CPS was supplied with prefabricated piping along with drawings depicting how the prefabricated pieces were intended to connect. Siemens supplied all FRP piping. But FRP piping spools supplied to CPS were oriented in the wrong direction (e.g. pointing east instead of north). Exhibit 113. CPS invoiced Nicholson & Hall nearly $200,000 for one RFI that dealt with multiple failures in the FRP piping. Exhs. 91 and 78, p. 16. In addition, other non-FRP materials supplied to CPS were incorrectly fabricated. Ex. 114 (comparing properly versus improperly fabricated materials). Tr. 5:187-191 (Poole).

*Field Obstructions/Interferences.* Examples of field obstructions included a 6-inch carbon steel pipe that exited from the Unit 1 penthouse. Ex. 65. Tr. 3: 20-22 (Walker). The intended design was for the pipe to exit the building and proceed through the pipe support. Rework had to be performed to field route the pipe through the support. Tr. 3:25 (Walker) (describing that he proposed "[t]o roll

a 90-degree elbow on a 45-degree angle that would be coming out of the pipe . . . [a]nd then you would hit another 45 to straighten it out ... [a]nd then you could proceed into the hanger."). Busts to the stainless steel and FRP piping traveling underneath the 200-foot elevation catwalk between the two SDA penthouses were field obstructions encountered by CPS that had to be remedied under difficult conditions. Ex. 59 (stainless steel piping interference); Ex. 109 (FRP interference); Ex. 110 (FRP interference). Tr. 2:182-191 (Walker) and 5:146-152 (Poole). Resolving the field obstructions at the 200-foot elevation in March 2008 was dangerous and difficult. See also Ex. 112 (product failing to line up). Tr. 5:184 (Poole).

*Deficient Design/Materials.* Other busts arose from defective materials and incomplete design. Because the so-called Clarkson valves were incompatible with the FRP flanges, leaks resulted during testing of the FRP lines. CPS was required to install gaskets on the Clarkson valves and then re-test the FRP lines due to this error. Tr. 5:186 (Poole). The SDA penthouse pipe bridge was a design bust. It was originally erected with the pipe supports, then taken down, replaced with a new bridge, and reassembled. There were other instances where valves or supplies were missing from the Project. Exhs. 192 and 226. Siemens continued to issue revised construction drawings throughout the spring of 2008. Ex. 92.

## *THE CHANGE ORDER PROCESS IN PRACTICE*

The change order process prescribed in the subcontract was replaced, in practice, by a less formal regime that was adopted by each of Dominion,

Nicholson & Hall and CPS. The amended process reflected the practical conclusion and agreement of the parties that the Project could not be timely concluded if the provisions of the Subcontract were strictly followed as the parties confronted the magnitude of the design and fabrication problems in the field. [13]

CPS was directed to "fix the busts" based upon verbal authorization of Dominion, Siemens, and/or Nicholson & Hall. Tr. I:112 and 174-176 (Wright) and Tr. 4:84-85 (Bravo). Exhs. 15, 20, 21.18 and 176.

Verbal authorization came mostly from Charles Bell ("Bell") or Barry Neal from Siemens or Richards from Dominion. Tr. 3:25-26 (Walker); Tr. 5:156 (Poole) and 6:45-46 (Poole). Exhs. 254 and 255.

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[13] In summary form, the process for the approval of a change order after the extra work was begun was as follows:

- Nicholson & Hall and/or CPS generated a written request for information. After April 1, CPS assigned its own RFI number. CPS assigned an estimate for direct time and materials work on the RFI. Tr. 5:139 (Poole).
- Nicholson & Hall would cut and paste CPS's RFI and issue to Dominion a written request for information. Nicholson & Hall assigned its own RFI number. (Tr. 5:140 (Poole).
- Dominion sent the RFI first to Siemens.
- Siemens responded.
- Dominion issued a field change request ("FCR") to Nicholson & Hall. The FCR had a separate number.
- Dominion sent a backcharge notification ("BCN") to Siemens. The BCN had a separate number.
- Nicholson & Hall issued to CPS a signed change order ("CO"). The CO was assigned a separate number.
- CPS invoiced Nicholson & Hall for the out of scope work referencing the CO number.

Dominion and Nicholson & Hall assured CPS that it would be paid for the extra work based upon verbal authorizations. Tr. I:194-96 (Wright).

Wright testified that Dominion would "absolutely" pay for out-of-scope work on a time and materials basis if Dominion or Siemens provided verbal authorization. Tr. I:175 (Wright).

Although the project budget and the fixed price nature of the Subcontract were different from most of CPS's prior work for Dominion, CPS had a long-standing and mutually satisfactory relationship with the Brayton Point plant and Dominion staff. Tr. 3:86-87 (Flynn). Based on that experience, CPS reasonably relied upon Dominion's assurances of payment in deciding to perform out-of-scope work based upon verbal authorizations. Tr. 3:159 (Flynn) and Tr. 4:84 (Bravo).

As noted, the extra-contractual practice adopted in the field was driven by the recognition that compliance with the formal change order process would further jeopardize the timely completion of the Project. Cole expressed this in a November 13, 2007 e-mail:

> Through the entire course of the project [Nicholson & Hall] has been pushing the job to maintain schedule along with making the requested changes as the project progressed, knowing full well that we would be reimbursed by a client that was cooperative and appreciative that [Nicholson & Hall] had the foresight and trust in the client to overcome these obstacles without holding the job up for paperwork. With the number of changes on steel, grating and piping, [Nicholson & Hall] and its sub contractors will be forced to wait for written RFI responses, followed by return of FCR requests ["Field Change Requests"], followed by approved FCR amounts, followed by issuance of change orders to subcontractors. The schedule will severely suffer and we will be forced to reduce work force, as we will not be able to continue on multiple tasks.

Ex. 20.

The design and fabrication problems materially impacted the schedule and CPS's base scope work in an adverse way.

As the volume of change orders increased, along with increased CPS manpower, overtime and pressures on its supervisors, CPS found it difficult to document consistently the costs associated with the change orders. The Court finds, however, that it was not "impossible" as submitted by CPS's expert. Tr. 7:76-77 (Engelhart). CPS failed in certain instances to oversee effectively the process.

The Court found Flynn, CPS's project manager, to be qualified and competent and his testimony in all material respects to be credible. Flynn described the RFIs as "far from normal" and "beyond belief." He had "never seen anything in [his] entire history of such bad engineering and bad design." Tr. 3:163 (Flynn).

The Court found credible, as well, that portion of the testimony of Robert Walker ("Walker") in which Walker responded to the Court's inquiry as to his perspective on this aspect of the Project. Walker was one of the senior union foremen on the piping job and had been a pipefitter for over 32 years.

> Q: Was there anything that was unusual or, say, unique about the experience which you and your pipefitter colleagues were dealing with in the Scrubber Project, as compared to your experience -- your prior experience in similar scale projects?
>
> A: If anything, it's the sheer amount of busts. The amount of breaks that you incur -- you know, bad fabrication -- it gets to the point where it becomes a critical mass. You can't go here, you can't go there, you can't fix this, you can't fix that, I need an answer on this, I need an answer on that.

> And it gets to the point where you can't be productive. This was referred to as a "train wreck." It's a train wreck. I don't think I've ever been at [a project] that was as challenging as this was.
>
> Every job has its problems. I mean, it's construction. It never works right. It's very, very rare that it goes the way it's supposed to go. But there are some that just don't go at all. This was certainly one of them.
>
> Q: So using your phrase "critical mass," it was a critical mass of dysfunctionality?
>
> A: Absolutely, yeah.

Tr. 3:65-66.

Consistent with this perspective, Dominion and Nicholson & Hall noted the high frequency in which the "busts" were encountered throughout of the Project.

In July 2007, Cole wrote to Dominion:

> The reason that both [Nicholson & Hall] and [the subcontractor State Electric], along with CPS continue to caution Dominion about "Guaranteed success" is the state of the engineering and equipment supply from [Siemens]: If there are more unforeseen issues technically, or with availability of equipment, or parts, beyond the control of those of us doing the installation, it may be more difficult to make the goals that we set than we can anticipate. These conditions are beyond our control and have been historically occurring, with high frequency.

Ex. 11.

Wright recognized the impact that Siemens' incomplete design and deficient supply was having on the Project. Tr. 1:105-106 and 173 (Wright). In October 2007, Wright wrote an e-mail to Siemens stating:

> [Dominion] can do nothing about the quantity [of RFIs] that is driven solely by the magnitude of the field rework. Again, ~ 70% of the current list is related to miss [sic] fabrication issues.

Ex.16, p. 1.

In October 2007, CPS notified Nicholson & Hall that its work was being impacted because of the design, scope, and preceding work issues. Exhibit 13.

Nicholson &Hall's November 2007 Monthly Report confirmed the situation:

> As October comes to a close the major components of the SDRS/MRS are in place with some ductwork left to complete. Most of the remaining work is the process equipment and piping installations. As we progress to install the equipment it is becoming apparent that the design and fabrication of the product is *substandard*. *Most* of the piping supports installed to date have had to be modified to fit the application. A ***large percentage*** of the pipe spools installed had to be modified. There is ***constant interference*** between piping and electrical installations and interference between duct and support steel for the duct.

Exhibit 21.11 (emphasis added).

And the condition continued for the life of the Project. In Nicholson & Hall's April 2008 Monthly Report, it recorded that "[t]he process piping is still challenging due to the frequency of the field modifications necessary to install the supplied piping assemblies."

Ex. 21.16 , p. 2.

As CPS's cash flow problems became more acute, the delays and added costs of addressing the busts had a correspondingly adverse impact.

***RFI PAPER WORK DELAYS***

During the gap in time between the dates CPS performed the extra work and the return of the RFI paperwork, CPS was forced to incur the direct costs of the work.

Nicholson & Hall and Dominion would not release payment to CPS for the actual work performed unless and until paperwork was processed and approved.

Ex. 21.18. Tr. 8:67 (Giarve); Tr. 8:169 (Penna). Such a policy was reasonable in theory, but in practice became dysfunctional.

First, there was the ongoing pressure to recapture schedule and to get work done, even at the expense of what would otherwise be administratively required for reasonable documentation. The requirement of Siemens' input on all change orders arising out of its alleged misfabrication or design issues led to progressive unresponsiveness to CPS's submissions.[14]

Further, in March 2008 Dominion's project manager in the field, Roger Huffman ("Huffman"), was functionally replaced by Thomas Penna ("Penna"). Penna adopted a much stricter "by the book" practice of processing change orders. The latter substantially further delayed action on CPS's submissions. Tr. 8:107 (Penna).

For all practical purposes, in the later months of the Project, the RFI paperwork process failed to function. Tr. 5:192-193 (Poole). Penna acknowledged as much when he testified that it was not his priority to respond to the RFI paperwork issued prior to April 1, 2008. Tr. 8:150-151 (Penna). Penna's overriding objective was to get the Project done.

Cole's notes from April 2008 express Nicholson & Hall's frustration:

> There are approx. 135 open FCRs that are in progress or not billed. Value is approx. $500,000 (+/-) not including the other disputed RFIs

[14] At a January 29, 2008 meeting between Dominion and Siemens, Dominion agreed to "table commercial issues (back-charges for Nicholson & Hall)." Exhibit 258. They agreed in substance to deal later with the repercussions. It appears that this business decision had a ripple effect on the RFI paperwork process. While CPS continued to perform extra work based upon the expectation of payment, there was a general displacement of responsibility by Dominion, Nicholson & Hall, and Siemens as to who was ultimately responsible to pay for the extra work. At this juncture, Siemens had neither an incentive for nor was it facing a disincentive for not timely processing RFIs.

> on this list. How is the "new management" of Dominion [i.e., Penna's project supervision] going to manage these changes that were previously agreed to? Do we need to revisit every one? Moving forward do we need to have all of the conditions of the contract met for extra work? Written approved change orders before work can begin?

Ex. 204, p. 7.

With the change in Dominion project management, Cole directed CPS's Bravo to include overhead and supervision costs in its RFI paperwork. Ex 96. Previously, Dominion and Nicholson & Hall had refused to pay for those costs. Tr. 3: 153 and 155-156 (Flynn).

In a *cri de creur,* on April 24, 2008, Bravo sent an RFI to Cole that was distributed to Penna, Richards, Bell and Fink. The narrative portion of the RFI stated:

> To date, CPS Construction has proceeded with field changes ie; repairs / refabrication / material acquisition / associated labor, with verbal approval to do so from Brian Wright (Dominion) and Bill Cole Jr. [Nicholson & Hall] [.] Due to numerous rejections of submitted billings, how do you expect CPS Construction to proceed without guarantee of payment for work performed without prior approvals ie; FCR's / CO's[?].

Exhibit 43, p. 4.[15]

Penna rejected the RFI, stating to Cole: "the proper forum for this issue is not an RFI." He further stated, "CPS payment issues are solely between CPS and the general contractor, Nicholson & Hall, with whom they have a contract." Penna concluded, "If we need to institute some method of formal approval to avoid this in the future, we can discuss." Exhibit 43, p. 1.

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[15] In his handwritten daily log that covers the period March 31, 2008 to July 4, 2008, Ex. 96, Bravo included the following in his April 24, 2008 entry: "I worked on RFIs all Day—Sent RFI to Bill Cole Re: Dominion Not Paying for work done w/o a C/O—not what agreed on!" Ex. 96, Bates p. CPS26310.

Penna continued his strict RFI approval policy. In May 2008, he refused to process certain RFI paperwork ". . . until all work is successfully completed by the milestone dates." Ex. 49. Nicholson & Hall recorded in its monthly report:

> [Nicholson & Hall], from the onset of the project has worked with Dominion to resolve all issues of the project from a schedule and cost control standpoint. We are requesting that Dominion be fair in their response to all open issues regarding compensation for work already performed on this project. Some of the issues that need to be resolved occurred prior to the replacement of the original Dominion project manager. [Nicholson & Hall] would like to make sure that we are not at a disadvantage during the consideration process due to unfamiliarity with the history of some of the work that was completed at Dominion's request.

Ex. 21.18, p. 1.

On May 15, 2008, Bravo learned that the electrical subcontractor, State Electric, was in the "...same boat as CPS..." because it was "...not getting CO's for their RFI's and are not being paid for any extra work[.]" Ex. 96, Bates p. CPS26332.

As of July 23, 2008, Dominion still had not responded to 32 written RFIs dated between February 21, 2008 and July 10, 2008. Ex. 176, p. 1. Cole noted that ". . . the majority of this work has already been completed, as was agreed, to keep the project moving forward." *Id.* Dominion did not pay for the majority of the RFIs identified in Trial Exhibit 176 until September 27, 2010. Tr. 14:121 (O'Toole). Ex. 231.

In other instances, Nicholson & Hall refused to forward CPS's submissions to Dominion. For example, O'Toole testified CPS's RFI (Tab 238 of Ex. 78), which included invoices for a lost productivity claim, extended general conditions,

PPOT, consumables, and additional site supervision during calendar year 2007, dated April 24, 2008, was not submitted. Tr. 14:46-49 (O'Toole).

The end result was that CPS was uncompensated for the extra work.

In the Court's view, the RFI process worked reasonably well, with the additional work having been fairly approved by Nicholson & Hall and Dominion through March 2008. It broke down in April for several reasons. First, Penna, Dominion's onsite project manager, abruptly changed the informal rules that had earlier driven the process. Second, by March and April, Bravo of CPS had taken the initiative aggressively to seek payment for costs that had not been captured in earlier RFIs. And third, by the end of April-beginning of May, Nicholson & Hall and Dominion became adversarial toward CPS on account of their discovery of CPS's failure to have remained current with its sub-subcontractors and with its obligation to pay the union benefit funds. Shortly thereafter, mechanics liens were filed on the Brayton Point plant, and Nicholson & Hall suspended all further payments to CPS. The circumstances of the latter will be addressed shortly.

### *A SPECIAL PROBLEM: FIBERGLASS REINFORCED PLASTIC (FRP) DESIGN AND INSTALLATION*

As noted earlier, except for small-bore piping, CPS had no responsibility to deliver the piping product. Exhibit 71. A significant portion of the piping that CPS installed was composed of fiberglass reinforced plastic ("FRP"). All FRP piping, components, and accessories (e.g., adhesive, wraps and resin) were supplied to CPS. As will be discussed, FRP piping poses special challenges for an installer, and the impact of any errors in design or fabrication have more repercussions than with ordinary copper or steel pipes. When in April 2008 it came time to test

("hydrotest") the FRP piping that had been installed by CPS, there was a rash of failures. The result was a further setback to the Project's completion. Dominion and Nicholson & Hall in large part blame CPS for the FRP failures.

The Court concludes that while appreciable failures were caused by CPS's faulty installation (on account of insufficient training and supervision), the core FRP failures due to design and fabrication defects. The Court found CPS's expert on the issue, Richard Lewandowski ("Lewandowski"), essentially credible. Exhibit 116. Accordingly, the Court makes the following detailed findings:

The FRP piping on the Project was fabricated in "spools" before being delivered to the Project. Exhibit 111 (photo of spools as delivered). Tr. 6:177-178 (Poole).

The spools supplied to CPS were designed and fabricated by Siemens pursuant to subcontracts to two specialty FRP vendors—Industrial Controls & Equipment, Inc. ("ICE") and Power Pipe & Plastics, LLC ("PPP") (collectively, the "FRP Vendors"). Exhibit 116, p. 2. Tr. 10:26 (Bell) and Tr. 6:33 (Poole).

There were three types of FRP joining methods specified for the installation. They were flange-to-flange joints, butt wrap joints, and socket joints:

> *Flange-to-Flange*[16] *Joint.* This method involved bringing two flanges together and using a torquing wrench to tighten them in a systematic method per the manufacturer's recommendations. Tr. 2:197-198 (Walker). Ex. 61.
>
> *Butt Wrap Joint.* This method involved taking woven fiberglass and resin supplied in a "FRP Wrap Kit" and wrapping them around two butted-up pieces of pipe. Tr. 3:7-8 (Walker). Ex. 63.

[16] A flange is a round device that fits on the end of two pipe spools and is used to bolt the spools together. Tr. 2:195 (Wright).

*Socket Joint.* Socket welds are slip-on joints. They are attached through use of a bead of adhesive applied around the circumference of the joint. Ex. 62.

Installation of FRP piping in the winter poses special problems due to the need for heat in the fitting process. Because of the substantial delay in the Project schedule, CPS was unable to install the FRP piping in the fall, as CPS had reasonably assumed in its bid. Instead, CPS had to do a major portion of the installation in the winter and early spring. To adjust to the changed weather conditions, CPS created a fabrication room in the fabric filter building to prepare some of the butt wrap joints. CPS was able to maintain temperatures in that area. Tr. 2:201-203 (Walker). Heat guns and heat blankets were also used to offset the cold. Tr. 3:9 (Walker).

Proper "promotion" of the resin used in the fastening process is necessary; otherwise, sags and loss of adhesion occurs. Tr. 12:186-187 (Sousa) and Tr. 6:124-125 (Lewandowski). Ex. 116 (Lewandowski), p. 3.

On April 3, 2007, before CPS signed the Subcontract, Nicholson & Hall requested that Siemens provide FRP installation training "... for its pipe fitter contractor as well as its quality assurance department to prevent damage to, and the proper installation of, the FRP pipe." Ex. 193.

Richards of Dominion coordinated the FRP installation training for the Project, which occurred in late October 2007. Ex. 226. Tr. 5:163 (Poole). CPS, Nicholson & Hall, and Dominion shared equally in the cost of the FRP training. Tr. 4:51 (Flynn).[17]

[17] While training should not have been necessary, given CPS's Subcontract obligations, Nicholson & Hall approached CPS about providing additional FRP Piping training to its pipefitters.

In referring to the FRP materials, the Nicholson & Hall's Monthly Report dated November 5, 2007 stated, "... it is becoming apparent that the design and fabrication of the product is substandard." Ex. 21, p. 1. See also Ex. 226.

Dominion confirmed through independent testing that the FRP failures experienced by CPS during hydro testing of "factory flanges" were on account of defective assembly. Tr. 8:145-146 (Penna).

The FRP system as designed lacked an appropriate support system with the type of guides, anchors, and supports one would customarily find on a process piping system such as the one installed by CPS on the Project. Ex. 116 (Lewandowski), p. 2. Tr. 6:76-81 (Lewandowski).

"The lack of anchors, inadequate guides and orientation detail resulted in misalignment and numerous corrections by CPS in the field." Ex. 116 (Lewandowski), p. 2.

The "U-bolt" guides specified by Siemens and supplied for installation to CPS should not have been used. U-bolts are not recommended for FRP pipe and may lead to potential stress problems. Tr. 6:72 and 77-79 (Lewandowski).

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CPS initially rejected the suggestion as too costly. Tr. 11:121 (Collins) and Tr. 12:102 (Housel). CPS only agreed to the training for its pipefitters when Nicholson & Hall and Dominion agreed to share the cost. *Id.* When the four-day training commenced in October 2007, CPS sent eight pipefitters, declining the manufacturer's offer to train more. Tr. 12:245 (Richards). CPS planned, instead, to have half its FRP Piping crew receive training, with the other half to receive "kind of an on-the-job type of thing." Tr. 5:166 (Poole); Tr. 14:175-176 (Wright); Tr. 11:25-26 (Cole); Tr. 12:103 (Housel). CPS pipefitters who attended were instructed on "the whole process," including the importance of environmental controls and not stressing FRP Piping joints. Tr. 12:242-244 (Richards); Tr. 13:9-11 (Richards). CPS expressed no dissatisfaction with the training. Tr. 14:175-76 (Wright). Poole of CPS testified that he had second thoughts about the training and concluded that additional training would have helped. Tr. 5:165 (Poole). CPS did not request it. Tr. 11:125-26 (Collins); Tr. 14:176 (Wright); Tr. 10:47 (Bell).

The quality of the adhesive provided to CPS by Nicholson & Hall to join the socket welds was irregular, as a result of "mispromotion", for which CPS was not responsible. Ex. 116 (Lewandowski), pp. 2-3.

The resin supplied to CPS for the butt wrap joints also failed to function reliably. The decision to supply CPS with resin that was not pre-promoted in the lab caused installation difficulties for CPS. The resin promoted on-site by Nicholson & Hall's painter did not work as well as pre-promoted resin that was earlier supplied to CPS. Tr. 5:168-169 and 174-175 (Poole).

In most instances, the Court also found credible Jose´ Sousa ("Sousa"). Sousa was an FRP piping specialist who was retained by Dominion during the Project to advise Dominion and to provide training, if needed, to the CPS installation crews. Sousa testified to multiple installation errors by CPS personnel, such as improperly stretching the FRP Piping into place, Tr. 12:167-169 and 175 (Sousa). Sousa also observed "delamination" conditions, which he recognized as being caused by improper rolling around joints, Tr. 12:172-74 (Sousa). On site Sousa's son, who assisted Sousa in the engagement, attempted "to train [CPS's workers] about the proper way to roll it." Tr. 12:180 (Sousa). He also found CPS's use of spacers as improper. Tr. 12:210 (Sousa).

Other CPS FRP Piping installation errors observed by Nicholson & Hall in 2008 were documented in emails and progress reports. Exhs. 173 and 21 at Bates p. DOM0037094. Tr. 12:41 (Housel); Tr. 6:110 (Lewandowski). Dominion, too, observed and provided written confirmation of CPS FRP installation errors.

Tr. 8:134 (Penna) and Tr. 13:10 (Richards). Ex. 96 at Bates p. CPS 26333; Ex. 174.

CPS's installation errors on the FRP piping were also noted in a Dominion report prepared in the spring of 2008. Ex. 117.

The Court concludes that CPS's workers did not have significant FRP experience before the Project. The Court also finds that CPS's FRP training and supervision were weak. As a result, CPS was responsible for some of the FRP failures. However, the Court found Lewandowski's conclusions persuasive, as recorded in his testimony:

> Q [CPS counsel]: Mr. Lewandowski, have you arrived at an opinion, based upon a reasonable degree of professional certainty, regarding the causes of he failures that occurred to the FRP piping on the Scrubber Project?
>
> A: Yes.
>
> Q: And what is that opinion?
>
> A: High stress due to improper support, high stress in the flanges due to misalignment in fitting, and problems with the resin materials that would yield lower than optimum strength.

Tr. 6:75-76.

> Q [Dominion counsel]: [S]ir, essentially it's your testimony—its your opinion that CPS didn't do anything wrong here; is that right?
>
> A: That's a big question...big hypothetical.
>
> Q: Let me put it this way: Even if CPS did anything wring, you have no way, standing here, to tell us what the impact of its errors was.
>
> A: I'll try to answer that as distinct as possible. CPS probably made errors to it, partly because they didn't know and didn't have enough knowledge and partly, who knows.

> However I think that first obligation is the engineering that goes in the front. The problems are in the spooling, the misalignment of the spooling, the choice of the flanges...the U-bolts, the supports. And I think these all lead to stresses that would break, even if they did a 100 percent job, in some cases—in many cases.
>
> Now, were there errors that contributed to a percentage? Probably—looking at the butt and straps, I would say no. I don't know how well they did their work on the flanges, but I would say their work on the flanges would be minimal compared to the problem of the stresses.

Tr. 6:140-141 (Lewandowski).

***WORKFORCE DEPLOYMENT AND QUALITY***

The Court finds unpersuasive Nicholson & Hall's argument that CPS consistently failed to man work areas that were available to it. In hindsight, a plausible case can be made that CPS could have, for example, worked earlier in the stair tower and the SDA penthouses in order to install the nine vertical lines of FRP piping that ran nearly the full height of the tower. However, the contemporary record was absent of any complaints or directives by Nicholson & Hall or Dominion with regard to them.

Rather, what that record reflects is ongoing frustration with the failure of the team generally to meet the Project's milestones, interspersed with occasional critiques as to the slippage of the piping installation. What is absent is evidence, whether in Nicholson & Hall detailed monthly reports or Dominion's detailed record generated by Richards, of either defendant having fundamental concerns *at the time* as to the quality with which CPS was performing.

Notwithstanding the Court's conclusion in this regard, the Court notes that there was substantial absenteeism among the CPS workforce and inefficiency in its day-to-day performance. However, on the basis of the documentary record as

a whole and the favorable impression made upon the Court by Flynn, Bravo and Poole as to their professional competence, the Court finds that the CPS performed its work consistently with the standard of the reasonably competent industrial pipefitting concern. The occasional incidents suggesting an unmotivated and unsupervised workforce appear to be a reflection of limitations of the union workforce available to CPS, and the impact of the staffing levels insisted upon by Dominion and Nicholson & Hall under conditions of a limited labor pool from which CPS could obtain its workers.

***WORKFORCE LEVELS***

CPS's workforce levels were essentially a function of the availability of piping worksites, equipment and Nicholson & Hall's project management priorities. Tr. 5:204-205 and Tr. 6:52-53 (Poole).

Nicholson & Hall's Monthly Report for January 2008 noted:

> We are experiencing schedule slip for a variety of reasons including: incomplete/substandard engineering, weather, incorrect fabrication from suppliers, and unanswered technical questions from the equipment supplier. . . . CPS will add 2 additional crews (12-14) men to maximize areas, which are now available for work.

Ex. 21.13

Nicholson & Hall recorded subcontractor labor hours in its Monthly Reports. Ex. 21. The following represents a listing of monthly / job total labor hours recorded for the subcontractors CPS, State Electric, and Atlantic in the monthly reports issued from November 2007 to August 2008:

| N&H Monthly Report | CPS (monthly / total hrs) | State (monthly / total hrs) | Atlantic (monthly / total hrs) |
|---|---|---|---|
| Nov. 2007 | 5,722 / 32,826 | 4,086 / 27,809 | 4,345 / 32,630 |

| | | | |
|---|---|---|---|
| Dec. 2007 | 7,068 / 39,894 | 4,322 / 32,131 | 4,876 / 37,506 |
| Jan. 2008 | 7,282 / 47,176 | 3,722 / 35,853 | 3,546 / 41,052 |
| Feb. 2008 | 12,879 / 60,055 | 4,568 / 40,421 | 4,622 / 45,674 |
| March 2008 | 11,227 / 71,282 | 3,376 / 43,797 | 3,448 / 49,122 |
| April 2008 | 9,735 / 81,017 | 3,752 / 47,549 | 4,471 / 53,538 |
| June 2008 | 8,917 / 101,873 | 3,117 / 55,220 | 3,360 / 61,874 |
| July 2008 | 2,446 / 104,319 | 3,248 / 58,468 | 2,800 / 64,674 |
| August 2008 | 1,000 / 105,319 | 3,300 / 61,768 | 2,200 / 66,874 |

Ex. 21.13. See also Dominion's expert's Figures 2 and 3 in Ex. 230 (Fredlund).

The above chart reflects the enormous increase in CPS's manhours beginning in February 2008, with the levels reduced in April but still remaining high through June 2008. This activity is significant because of the circumstance, to be addressed in detail shortly, that Nicholson & Hall suspended all payments to CPS with regard to work performed by CPS after February.

As can be seen from the chart, from March through June 2008, CPS was providing nearly three times the labor hours of the other subcontractors.

***THE WINTER WORK ENVIRONMENT***

As noted earlier, the Project schedule incorporated in the Subcontract anticipated that the Project would be completed in December 2007. The final tie-ins and outages were to occur then. The postponement of the Unit 1 Outage to March and subsequent further erosion of the schedule resulted in CPS having to perform a significant portion of its work in the winter. The above chart shows that 37% of CPS's man-hours were spent in the December 2007-March period 2008.[18]

[18] From December 2007 to March 2008, the average maximum/minimum temperatures were approximately 41 degrees/24 degrees. Ex. 151(Engelhart), Tab N.

The overall Project delay comprised a significant change of condition for CPS. This was because of the impact of cold temperatures on piping installations, especially those involving FRP piping. Furthermore, the location of the plant on the Brayton Point peninsula, fully exposed to the coastal winds coming off of Narragansett and Mt. Hope Bays, combined with the worksite comprised of 200-foot vertical towers, aggravated the adverse impact of the winter weather conditions.[19]

The Court inquired of Walker, the union foreman, as to the impact of the winter weather conditions on his and his crews' work. Tr. 3:19-24 (Walker). Walker credibly testified that working on the Project in winter was "very difficult". He elaborated:

> A: Well, you know, safety's first. When you get to the point where you have to take a weed burner and burn the ice off the plywood in the morning, just so you can stand on it, or you need to wait until the sun's gone up enough that it's going to melt the frost off the I-beams so you can walk out to the stair tower, because it's wide open; you know, there's no siding on the building and the wind's coming it at 100 miles an hour, it's challenging to every aspect of construction, I don't care what you do.
>
> Q: But now I'm asking you to focus specifically on pipefitting, the tasks that you and others were doing in pipefitting. Did the circumstance of this work that was being done [in] the winter period -- did that affect in any way the nature of the work, the complexity of the work that you were doing as a pipefitter?
>
> A: Yes, sir.
>
> Q: In what way?

[19] On March 7, 2011, the Court took an on-the-record view of the Scrubber Project worksite with counsel and various principals of the parties. The view included inspection of the SDA towers and the penthouses and also of the course of the piping installed by CPS. The Court takes judicial notice that strong winds are a regular feature of winter on the Massachusetts Southcoast. The cold, blustery conditions on the day of the view were in character for the area.

A: Fiberglass needs to be in a warm environment. Fiberglass pipe is what it is. And we certainly don't have that warm environment to properly do the piping. Heaters need to be installed. Now, you need the electricity for the heaters. There's never enough electricity to begin with, and everything cascades from there.

Welding, when you're doing a TIG processes -- it's an inert gas, a soft purge flow -- you need to stop the wind. The wind has to stop. You need no wind. If you blow the argon out, you explode the weld. It become a short-circuit -- argon is an inert gas, not allowing anything to burn. So it's just molten metal.

But if you remove that and put oxygen in, then you've contaminated the weld, you've contaminated the tungsten, and you need to stop and grind everything all out. And you need to go back and hopefully gut it all out for a proper processes and off you go again. So you need to stop the wind. Cold temperatures preheat the steel piping.

Q: Does the cold affect the regular welding if you're working with steel pipes?

A: You need minimum preheats to be able to weld material just to be able to get started, which is once again why the weed burners were always onsite, because the weed burners you would use to heat the pipe to a minimum temperature before you could begin the process of welding. That's just welding.

Tr. 3:67-69 (Walker).

Penna of Dominion acknowledged the impact that the lack of siding in the stair tower had on productivity. CPS had to install nine (9) vertical pipe-runs up the stair tower. On March 19, 2008, Penna wrote Cole:

> N&H/Atlantic needs to focus on installation of the siding and roofs for the various buildings. The lack of siding and roofing continues to impact work due to the weather conditions and there are buildings with live electrical. There is impact to productivity as well as a potential safety impact.

Ex.178.

The Court credits CPS's expert, Andrew Engelhart's, conclusion that CPS's performance of a substantial portion of its work in cold weather months

resulted in a substantial loss of productivity and additional costs associated with temporary measures to mitigate the winter conditions. Ex 151 (Engelhart), p. 61.

***IMPACT OF EXTENDED PERIODS OF OVERTIME***

The parties do not dispute that in the construction industry it is accepted that workers' productivity declines when substantial overtime is required. It is referred to as a loss of "efficiency", and when (as Nicholson & Hall did in connection with its GTRP and extended conditions claim—see Ex. 219) a cost submission is developed for a project involving significant overtime, there is customarily an "efficiency" item included in the forecast. Overtime is one of a number of factors that affects efficiency.[20]

As noted earlier, CPS bid on the Project according to the understanding (and the bid documents confirm) that the piping subcontract was to be performed on a 40 hour per week/5 working days/Monday-Friday basis.

There were two periods during the Project when CPS worked almost continuously on an overtime basis. The first was from mid-July 2007 through mid-October 2007; the second was from mid-January 2008 through mid-June 2008. This was most clearly presented in Figure 3 in Dominion's expert, Fredlund's, report and testimony. Ex. 230 (Fredlund). Tr. 13:154-156

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[20] The Court asked Dominion's expert, Fredlund, to clarify the concept for the Court:

> Q: [W]hen you use the word, "inefficiency", what do you mean?
> A: That more man-hours is spent to perform some unit of work. Let's say CPS—this is just an arbitrary number—it took 10 man-hours to install one foot of pipe, of some type of pipe. That was their plan; that was their budget, right. Their actual is 20 man-hours to install one foot of pipe. So they spent an extra 10 man-hours to install one foot of pipe. That 10 man-hours is inefficiency. There could be lots of reasons for that."

Tr.13:155.

(Fredlund). It was confirmed by CPS's expert's calculations and graphic representation. Ex. 151, Tab S (Engelhart).

On each occasion, Dominion agreed to pay CPS for the premium portion of the overtime hours ("PPOT")—the 0.5 portion of each 1.5 per overtime hour paid to an employee. Tr. 1:125 and Tr. 2:62 (Wright).

CPS's PPOT billings on the Project, not including loss of productivity, total $851,325.00. Ex. 151 (Engelhart), Tab S.

On July 17, 2007, Dominion and Nicholson & Hall directed CPS to work "5 - 10 hour days and 1 - 8 hour day (Saturday)." Ex. 75A.8, Bates p. CPS 005140. This work schedule is also referred to as the "58 Hour Work Week."

In connection with its extra compensation for the GTRP, Nicholson & Hall submitted data to Dominion demonstrating the impact on its labor productivity from extended periods of overtime. The following chart represents Nicholson & Hall's data from mid-July 2007 to October 1, 2007, a time period in which CPS also performed overtime:

| Date | % Efficiency |
|---|---|
| **58 Hour Work Week** | |
| 7/23/2007 | 164% |
| 7/30/2007 | 41% |
| 8/6/2007 | 45% |
| 8/13/2007 | 57% |
| 8/20/2007 | 41% |
| 8/27/2007 | 41% |
| 9/3/2007 | 39% |
| 9/10/2007 | 39% |
| 9/17/2007 | 46% |
| 9/24/2007 | 44% |
| 10/1/2007 | 30% |

Ex. 219, p. 5.

In late January 2008, CPS was again directed to work an extended schedule by Nicholson & Hall, with Dominion's approval. CPS requested reimbursement for the supervision hours required by the extended schedule. Dominion rejected the request to pay for supervision but offered, once again, to pay the PPOT. CPS commenced overtime on January 26, 2008. CPS's overtime schedule was 9 hours (Monday through Friday) and 8 hours (on Saturday) -- "53 Hour Work Week." Ex. 29, p. 2-4.

The decision to require substantial overtime was made in the context of Dominion's continuing alarm over the Project schedule, notwithstanding the GTRP. In an email, Wright warned that:

> [Nicholson & Hall] and CPS should be aware that the execution of the piping installation is currently impacting their potential future consideration of work for Dominion.

Ex. 29, p 4.

In making its decision to require the additional overtime, Dominion balanced the PPOT costs for hours worked by CPS against the benefits for Dominion (e.g. recovery of capitalized interest) of having the scrubber system operational. Tr. 14:75-77 (O'Toole).

On April 2, 2008, Wright recommended to his boss, Wood, that Dominion " . . . hold the current course and continue on 53hrs . . . ." Ex. 235, p. 1.

In March 2008, the cost of CPS's PPOT hours of $371,184 exceeded Dominion's internal budget ($300,000) by $71,184. However, as Wright explained to Wood, " . . . with the overrun on this line item the net savings to the

project is [worth] ~$150k in case one [53hrs per week scenario] and [worth] ~$170k in case two [47 hrs. per week scenario]." Ex. 235, p. 1.

Because of Nicholson & Hall's decision in early May 2008 to suspend any further payments to CPS on its invoices, CPS has not been paid for any PPOT hours worked in March-June 2008. Tr. 7:206 (Giarve).[21]

***CPS FAILS TO CAPTURE ITS COSTS IN ITS INVOICES***

CPS submits that as the Project unfolded, it was not practicable for it to track and allocate its costs to particular RFIs or other root causes such as winter conditions, continuous overtime and the impact of extended conditions. Ex. 270 (Engelhart), p. 72. Tr. 7:76-78 (Engelhart).

For reasons that will be stated later, the Court is not persuaded that it was impractical to do so. However, the Court finds that beginning in the Fall of 2007 and continuing to the conclusion of the Project, CPS did not capture a significant portion of the costs that it was reasonably incurring. Furthermore, CPS timely notified Nicholson & Hall and Dominion of the circumstance and of its intention to submit a change order to be compensated. It did so, first, in October 2007, Ex. 13[22] and, again, in January 2008. Ex. 29.

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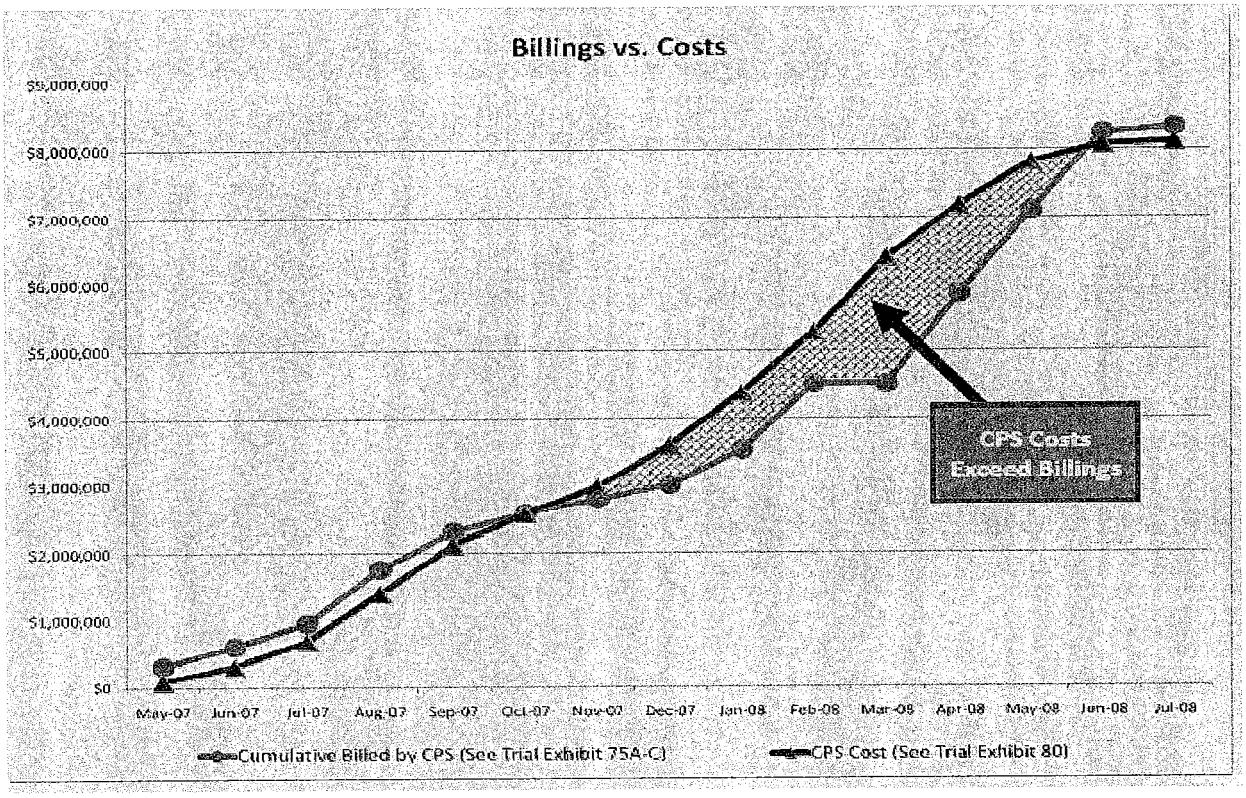
[21] Beyond the adverse impact of overtime on CPS's efficiency, Dominion's pressure to add extra pipefitters had its own repercussions. Because of union rules, some of the pipefitters that Dominion ordered CPS to bring to the Project were previously laid off by because of poor performance. Tr. 4:205 (Bravo). This weakened CPS's control of its work force and its ability to manage its costs.

[22] After consulting with Dominion, Cole rejected CPS's October 11, 2007 notice of intention to seek further compensation in connection with the increased work crews and hours. He did so on the basis that payment for overtime in addition to the compensation schedule for the base scope of work adequately compensated CPS. Cole continued: "All work additional to the base work scope including the supervision will be a change to the contract price. If a change in scope is requires a schedule extension we must be notified when said change is addressed." Flynn reasonably interpreted Cole's point to be that were it to become manifest at some point in the

The following chart represents a comparison between CPS's direct costs incurred against CPS's invoices to Nicholson & Hall from May 2007 to June 2008. It was compiled from data of CPS's cumulative costs attributed to the Project (not including home office expenses), Ex. 80, and the amounts billed in its invoices. Tr. 3:238-242 (Flynn).

The Court has some reservations about the precision of the cost data, but the Court is convinced that there was a significant distance between costs and invoiced amounts. Thus, the chart is reliable and valid for the larger point, without being accepted as a definitive representation as to precise dollar amounts.




Ex. 75A-C and Ex. 80.

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future that the base scope was being exceeded by changed conditions, CPS could seek compensation for such changed conditions.

As reflected in the above chart, CPS's costs began to intersect unfavorably with its billings in October 2007. That coincided with a communication from Robertson of CPS to Cole on October 11, 2007 informing Cole of CPS's intention to seek further compensation. Ex. 13, p. 2. Tr. 6:164-165 (Rotunno). Robertson wrote to Cole as follows:

> The purpose of this letter is to document our discussion on the remaining scope of work for CPS at Brayton Point. In order to complete the remaining scope of work in the time frame requested from N&H and Dominion, CPS will be required to utilize a larger work force and supervision than the job was bid. Per my understanding with you, N&H does not feel they are bound to subsidize the cost of additional foreman, area foreman, or superintendent. CPS plans to pursue the additional supervision costs at a later date.
>
> We also discussed my concern of CPS being delayed by:
>
> Design problems
> Scope changes
> Work that precedes CPS work not being complete that would impede CPS production. Preceding work should not cause delays by utilizing the schedule and interfacing at the daily production meeting.
> Items that are out of CPS control with the exception of weather
>
> In the event of work delays, CPS will bill for all personnel that are affected by the work delays including the supporting supervision. Note: Design problems, scope changes and work delays were agreed on being justifiable billing for both of us.

Ex. 13, p. 2.

Cole responded 11 days later, challenging CPS's conclusions and reminding CPS that any claim for additional compensation be submitted in compliance with the procedures provided for in the Subcontract.

Flynn credibly testified that he followed up on this exchange with a conversation with Cole in which Flynn challenged the reasonableness of

Dominion's refusal to include compensation for overhead if, as then expected, the project would extend beyond December. Cole responded that in that circumstance, he expected (according to Flynn) that Dominion "will have to pay your overhead then." Tr. 3:156 (Flynn). Flynn concluded that on the basis of his entirely favorable prior experience with Dominion, he would "try to resolve the issues for compensation at the end of the project." Tr. 3:159 (Flynn). See also Tr. 3:160 (Flynn). In the meantime, Flynn placed first priority on getting the Project to completion. Tr. 3:159 (Flynn).

The gap between CPS's costs and billings began to widen between October 2007 and December 2007. It was during this period of time that the field "busts" and FRP issues became more prevalent. On December 20, 2007, CPS and Nicholson & Hall agreed that CPS would provide Nicholson & Hall "delay slips" documenting lost time encountered by CPS. Ex. 22, p. 3.

CPS's foremen, general foreman, and superintendent prepared delay sheets after the December 20, 2007 meeting, which were delivered to Nicholson & Hall, but they do not appear to have been acted upon. Because the delay sheets were disregarded and the frequency and seriousness of the field issues persisted, CPS stopped completing them. Tr. 5:125-127 (Poole).

On January 26, 2008, in the context of Dominion's and Nicholson & Hall's requirement of extended overtime in order to try to recapture the recent further slippage in the schedule, Robertson agreed to the new program but repeated CPS's concern with regard to CPS's uncompensated costs. And he repeated CPS's intention to seek relief. Ex. 29, p. 1.

Wright immediately responded, demanding to know its basis. Ex. 29, p. 2. Flynn interceded by affirming that CPS would "complete the work scope on time so Dominion can start the unit as scheduled". However, Flynn reinforced the point that CPS "was reviewing its costs due to schedule, engineering and other factors that have caused CPS to expend monies above the original bid and contract." Ex. 29, p. 2. Flynn concluded that "CPS will meet with N&H and Dominion to discuss [its] findings." *Id.*

Flynn testified to a contemporaneous meeting with Housel in which he told Housel that CPS was "going to put a plan together...with a calculation to figure out loss of productivity and time on the project. But being in the middle of the project, it's very difficult to try to figure out—because we're still in the middle of a battle." Housel's response, according to Flynn, was, "Well, we don't really want to wait until the end of the job to hit Dominion for a few million bucks." Tr. 3:195.[23]

The Court finds that CPS made the tactical judgment to not press for further compensation at that moment of stress for the Project. Instead, CPS deferred its claim, relying on Cole's statement as to post-December charges and on Dominion's and Nicholson & Hall's good faith in light of CPS's prior dealings

[23] The setting of this exchange between Flynn and Housel was at the time the of the blunt warning, noted earlier, from Wright to both Nicholson & Hall and CPS that the recent erosion of the schedule was "impacting their potential future consideration of work for Dominion." Ex. 29, p. 4.

with Dominion and of what CPS viewed as conventional practice in the construction industry to accommodate materially changed conditions.[24]

### *BACKCHARGES, RESERVES AND OTHER MEASURES TAKEN BY DOMINION IN RESPONSE TO ISSUES WITH SIEMENS*

As noted earlier, problems and concerns arising from Siemens' design and fabrication work that impacted CPS's piping subcontract was only part of Dominion's near-global dissatisfaction with Siemens' performance on the SDRS/MRS Project. In late May 2008, Dominion prepared a comprehensive chronological summary of those issues. Ex. 258.

Interim agreements with Siemens were made and defensive measures taken by Dominion to protect Dominion's interests. For example, in July 2007 (two months after CPS mobilized), Dominion and Siemens entered into a settlement agreement, which resulted in a Siemens payment of $4 million to Dominion. *Id.* at Bates p. DOM0068642. Tr. 1:145 (Wright). And Dominion suspended payments to Siemens altogether in the fall of 2007. Tr. 2:105 (Wright). Dominion also withheld the Siemens contract balance as a reserve from which it could recoup money that Dominion expected to have to pay to Nicholson & Hall and its subcontractors for charges attributable to design and fabrication errors. *Id.* Where an RFI was generated because of a Siemens-related issue, such as a misfabrication, Dominion routinely issued backcharge notifications ("BCNs") to Siemens. The amount of the BCNs was subtracted from what Dominion otherwise owed to Siemens. Tr. 2:88-89 (Wright).

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[24] Walker, the pipefitter union foreman, described a conversation with Richards of Dominion: Richards said "yes" to Walker when asked if extra monies are being allocated for CPS ". . . to make up for the obvious loss that's just bleeding into the sand of lost productivity." Tr. 3:34-35 (Walker).

On January 29, 2008, senior management and Project-level participants of Dominion and Siemens met regarding the outstanding issues affecting the Project. These included the impact of the extension of the Unit 1 tie-in to March 2008. Ex.258 at Bates pp. DOM0068638-68642 and Exhs. 34 and 255. As a result of the meeting, Dominion and Siemens decided temporarily to "table commercial issues", including "Backcharges for Nicholson & Hall." Ex. 258 at Bates p. DOM0068642. Tr. 14:144 (Wright). The latter would have included backcharges for design and fabrication issues that impacted CPS. Those issues were still "tabled" at the time of trial. Tr. 1:90 (Wright).

Dominion was well aware of the prospect that productivity and efficiency claims would be made on account of the delays incident to what Dominion saw as Siemens' failures. In January 2008, Dominion internally budgeted $1 million for Siemens backcharges. Tr. 2:104-105 (Wright). Ex. 30, p. 2. A significant portion of this reserve was for design and supply issues that CPS would likely encounter in performing the process piping work. In fact, Wood, Dominion's Director of Environmental Projects, told Wright on January 31, 2008:

> One thing we need to think about is the potential productivity claim [from] N&H for Siemens impacts to CPS. There is more to the equation than just the backcharge to fix the issues - my gut is that we are going to get hit with a significant productivity claim which we need to push back on [S]iemens - unless you think the numbers below reflect the total potential impacts?

Ex. 30, p. 1.

Dominion is presently retaining $3.6 million from Siemens relating to the Project. Tr. 1:90 (Wright); Tr. 14:7 (O'Toole). And Dominion's total actual or anticipated claims against Siemens arising from the Project exceeds $22 million

of out of pocket costs. Tr. 14:122 (O'Toole). Dominion has placed Siemens on notice that it expects to be indemnified for any damages it incurs in connection with CPS's claims in this trial. Ex. 35.

### *CPS PROGRESS PAYMENT REQUESTS*

Under the Subcontract, CPS was to submit to Nicholson & Hall its progress payment applications no later than the 25th day of each month, projected through the 30th day of that month. Ex. 87 at Art. 2.A. Tr. 7:194-95 (Giarve). Nicholson & Hall was to make progress payments, less retainage of ten percent (10%), of approved amounts not later than seven (7) days after Nicholson & Hall received payment from Dominion for the CPS Work. Ex. 87 at Art. 2.A. Tr. 7:195 (Giarve). The contract provided that unless and until Nicholson & Hall actually received payment from Dominion for CPS Work, Nicholson & Hall had no obligation to pay CPS. Ex. 87 at Art. 2.B. Tr. 7:195 (Giarve).[25]

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[25] The pertinent provisions from the Subcontract are as follows:

> B. CONDITIONS PRECEDENT TO PAYMENT
>
> (1) Progress Payments
>
> Progress Payments due under the Subcontract will not be released until *all* of the following conditions have been met: . . . .
>
> (2) Contractor's receipt in current funds from the Owner for the progress payments due the Subcontractor. It shall be a condition precedent to any liability of the Contractor to the Subcontractor for any payment to the Subcontractor, that the Contractor be in receipt of payment from the Owner for the Subcontractor's work. If the Owner has not paid the Contractor for any reason whatsoever, including the Owner's financial inability to pay or other reasons not related to this Subcontractor [sic], the Subcontractor agrees that the Contractor shall not be liable for payment, nor be indebted to the Subcontractor. The Subcontractor assumes the credit risk of the Owner and agrees that he has relief [sic] on the Owner's credit and not that of the Contractor....
>
> (5) Anything to the contrary not withstanding Contractor shall not be required to make periodic or final payments to Subcontractor in the event Contractor reasonably determines that a sufficient balance would not remain after said payment so as to enable Subcontractor to discharge all of its obligations for labor, materials and equipment remaining to be furnished under the Subcontract

Nicholson & Hall submitted monthly progress payment applications to Dominion, including those that included CPS work from May 2007 through March 2008. Ex. 153. Tr. 7:181-186 (Giarve). Upon its approval of those applications, Dominion paid Nicholson & Hall by wire transfer. Ex. 154. Tr. 7:186-88 (Giarve). In accordance with the Prime Contract, Dominion made progress payments to Nicholson & Hall on the following dates for the following monthly invoices: (i) May 2007 on June 29, 2007; (ii) June 2007 on August 2, 2007; (iii) July 2007 on August 31, 2007; (iv) August 2007 on October 4, 2007; (v) September 2007 on October 31, 2007; (vi) October 2007 on November 30, 2007; (vii) November 2007 on January 3, 2008; (viii) December 2007 in part on February 1, 2008, and in part on February 20, 2008; (ix) January 2008 on February 29, 2008; (x) February 2008 on April 2, 2008; and (xi) March 2008 on May 8, 2008. Exhs. 153 and 154. Tr. 7:188-92 (Giarve).

Nicholson & Hall paid CPS payment applications for both base scope CPS work and additional approved work through February 29, 2008 as follows:

| CPS Invoice No. | Invoice Date | Amount | NH Payment Amount | Payment Date |
|---|---|---|---|---|
| 3831 | May 23, 2007 | $289,583.23 | $289,583.23 | July 9, 2007 |
| 3860 | June 22, 2007 | $163,404.23 | $163,404.23 | August 13, 2007 |
| 3861 | June 22, 2007 | $12,505.90 | $12,505.90 | August 13, 2007 |
| 3862 | June 22, 2007 | $74,104.78 | $74,104.78 | August 13, 2007 |
| 3888 | July 20, 2007 | $294,290.37 | $294,290.37 | September 4, 2007 |

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Agreement [sic] or if Subcontractor has failed to fulfill any covenant or condition required by the Contract Documents.

Ex. 87 at Art. 2.

| | | | | |
|---|---|---|---|---|
| 3925 | August 23, 2007 | $724,311.40 | $717,270.13 | October 5, 2007 |
| 3965 | September 20, 2007 | $582,653.25 | $472,813.07 | November 2, 2007 |
| 4023 | October 24, 2007 | $267,769.39 | $382,674.88 | December 10, 2007 |
| 4071 | November 21, 2007 | $195,725.50 | $195,725.50 | January 3, 2008 |
| 4106 | December 28, 2007 | $235,421.83 | $235,421.83 | February 6, 2008 |
| 4162 | January 31, 2008 | $486,599.94 | $486,599.94 | March 4, 2008 |
| 4193 | February 29, 2008 | $907,761.18 | $250,000.00 | March 7, 2008 |
| 4193 | | | $120,000.00 | March 18, 2008 |
| 4193 | | | $535,430.55 | April 4, 2008 |

Exhs. 155, 164, 79 and 149. Tr. 7:199-206 (Giarve) and Tr. 6:217 (Rotunno).

***NICHOLSON & HALL AND DOMINION AGREE TO A PRODUCTIVITY AND OVERHEAD CHANGE ORDER TO COMPENSATE NICHOLSON & HALL FOR THE IMPACT OF THE GTRP AND THE SCHEDULE EXTENSION***

As noted earlier, Nicholson & Hall, purportedly on behalf of itself and Dominion, rejected CPS's early October 2007 notice as to the likelihood that CPS would be seeking additional compensation on account of CPS's expanded work and the prospect of the Project being extended beyond the December deadline. Also as noted, Nicholson & Hall and Dominion were unreceptive when in January 2008, Robertson and Flynn again gave notice of the intention to then seek further compensation. At that juncture, the extension of the project schedule was no longer a hypothetical but a reality on account of the Unit 1 outage having been postponed to March.

It is particularly significant to the Court that during the same timeframe, Nicholson & Hall and Dominion negotiated, and ultimately agreed to, a substantial increase in Nicholson & Hall's compensation. The increase was

predicated in substantial part on the same considerations that CPS had articulated in justification of its prospective claim. Because of the importance of these events to the Court's decision on the merits of the case, detailed findings are made.

As of the end of October 2007, Dominion had decided to move the Unit 1 tie-in outage to March. Ex. 21.10. Anticipating an extended conditions claim from Nicholson & Hall, Wright informed Nicholson & Hall that "Dominion would like to entertain discussions regarding efficiency impacts and support and supervision costs" so that resolution could be achieved during calendar year 2007." Ex. 12.

Nicholson & Hall through Housel responded with a submission to Dominion for losses in productivity due to overtime and additional costs in delaying the Project completion to March 2008. Ex. 219, p. 1. Nicholson & Hall sought over $4.7 million for working continuous overtime (58-hour work week) in connection with the GTRP. This amount was in addition to PPOT reimbursements. Nicholson & Hall supported its request with data showing average worker productivity of 59% from March 26, 2007 to October 1, 2007. *Id.* at p. 5.

Included in Housel's submission was also a $2.8 million claim for the impact of the extension of the Unit 1 outage. This included expenses for project management personnel (e.g. superintendent and quality control), supervisory support personnel (e.g. foreman) and rental expenses. To that sum, Nicholson & Hall added 10% for overhead expenses and 10% markup for profit. *Id.* at p. 7-9.

The Nicholson & Hall claims were comprised of the following categories:

> [1.] [GTRP]Schedule Recovery Cost due to Siemens [] late deliveries $7,681,287.02.
>
> [2.] Lost craft productivity incurred working extended hours for [GTRP] schedule recovery $4,527,561.36.
>
> [3.] Additional support and supervision cost due to schedule recovery and delaying Unit 1 outage [to March 2008] $2,870,542.61.
>
> [4.] Extra scope of work and backcharges . . . $4,074,016.67.
>
> Total: $19,153,407.66.

Ex. 19, p. 1; Ex. 241, pp. 1-2.

On December 3, 2007, Dominion and Nicholson & Hall reached agreement for Dominion to pay Nicholson & Hall's schedule recovery cost claim ($7.68 million) and extra scope claim ($4 million), leaving open the question of the remaining two claims. Ex. 241, pp. 1-2.

Dominion and Nicholson & Hall continued negotiations regarding the productivity and the extended conditions claims, which totaled $7,398,103.97. Responding to issues and questions raised by Wright, Housel, on December 5, 2007, explained Nicholson & Hall's position:

> [Nicholson & Hall] had to totally abandon its original job and crane plan. Because of this departure from our job plan, which was directly caused by lack of and late deliveries, [Nicholson & Hall] changed the original erection sequence and instituted a sequence that was driven by material deliveries. By following this sequence [Nicholson & Hall] was forced to be innovative in its planning in an effort to enable the project to move forward to try to regain and meet project schedules that were affected by material delivery issues. [Nicholson & Hall] did not work the project in the sequence that was conducive to labor and equipment cost as was originally planned.
>
> [Nicholson & Hall] agrees that the productivity loss was not due solely to extended overtime shift duration. Another contributing factor was

> the issue surrounding the late deliveries and lack of supply of materials and equipment that did not allow the project to move forward in a sequence that was conducive to optimal labor and equipment usage. We had originally planned on working straight time only with smaller crew sizes but had to depart from this job plan as you are aware of which had a direct impact on the original erection sequence. The new adapted sequence was driven by material deliveries and this approach was not as productive as the original plan. We did make supervision changes as the project progressed and new issues and goals were planned in relationship to job schedule and the ever-changing construction issues brought on by the material delivery issues previously described.

Ex. 220, p. 3.

On December 11, 2007, Wright offered to settle the productivity and extended duration claims for $6.4 million "... in the hopes of avoiding a long drawing out process of claims and rebuttals." Ex. 23, p. 2. This proposal was roughly $1 million less than Nicholson & Hall was seeking.

Three days later, Housel responded that Nicholson & Hall had incurred "a total cost of $6,643,450." Ex. 23, p. 2. Housel then stated that "[Nicholson & Hall believe[s] a 5% mark up above cost would be fair and reasonable . . . [making Nicholson & Hall's] total request $6,975,600." *Id.*

On December 15, 2007, Wright responded that a condition of any settlement would be that it would "preclude[ ] future delay/loss claims due to material delivery, engineering, productivity and changes in construction plan". Wright also asked that Nicholson & Hall "provid[e] a schedule guaranty." Ex. 23, p. 1.[26]

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[26] In the same email, Wright expressed his acute concern about the continuing erosion of the schedule: "The schedule has continued to slip over the last two weeks. The [inability] to operate Unit 2 SDA will have additional financial impacts to Dominion starting on January 1, 2008. Based on the schedule recovery planning, we had planned on U2 SDA being operation[al] by mid December 2007, it is now forecast for February 2008. We cannot afford any additional delays

On December 28, 2007, Wright sent an e-mail to Brayton Point's Plant Manager, Barry Ketschke, copying various other senior Dominion personnel. Wright expressed the environmental team's "... regrets having missed various milestones throughout 2007 and understands the operational ramifications of these deficiencies." Even though his team "has executed *all contractual leverage* in an attempt to maintain and improve the schedule", Wright noted that "[o]verall the MRS/SDA projects continues to suffer schedule delays due primarily to [Siemens] contract scope deficiencies and partially due to construction productivity." Ex. 24, p. 1 (emphasis added). Wright predicted that the Project would be substantially completed in April 2008. He did not provide specific dates "[g]iven the current volatility in our weekly schedule updates." *Id.* at 1.

On December 28, 2007, Dominion accepted Nicholson & Hall's counteroffer of $6,975,600. Wright cautioned Housel:

> As we discussed, we all would be in a very precarious position having agreed to an additional $6.9M in cost and not meeting future dates. Not meeting schedule going forward will have negative implication to both my project team and N&H's future with Dominion. I can not stress the importance of meeting future commitments enough.

Ex. 23, p. 1.

In the corporate environment in which Wright was operating, the Court infers that Wright felt in professional jeopardy because, on his watch, the Project was so seriously delayed and so substantially over budget. For more than anyone else at Dominion, the Scrubber Project was *Wright's* project. He was the point person at Dominion. Robertson, the CPS project manager who was

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and Unit 1 SDA/FF must be fully functional at the end of the tie-in outage. Therefore, it must be mechanically complete well before that to provide adequate time for start-up and commissioning." *Id.*

replaced by Bravo, described a conversation in which Wright told him that "if [the Project] wasn't in fact installed [on time], 'I'm going. I'm history.'" Exhibit 259 (Robertson deposition designations at p. 138).

On December 31, 2007, Nicholson & Hall invoiced Dominion $6,975,600. The line item was denominated "Loss of Efficiency." Ex. 153.5, Bates p. DE000758.

On January 7, 2008, Wright e-mailed Nicholson & Hall the draft settlement. The draft provided:

> The Parties agree that payment of the Settlement Value by [Dominion] to N&H will constitute full, final and complete compensation to N&H for all and any claims by N&H for Recovery Plan Costs and Compensation, and N&H shall not be entitled to any further adjustment in compensation or the Performance Schedule in connection with the Recovery Plan.

Ex 27, p. 3.

On January 11, 2008, Housel responded to Wright's email:

> Our sub-contract agreements state that we pay on claims only if we get paid. However, if we sign this agreement as is we are signing the subs right to submit a claim. By doing that we would be liable for any of their claims. Nicholson & Hall will not submit any claim on behalf of Nicholson & Hall but we would have to submit sub-contractor claims for your consideration.
>
> Any ideas?

Ex. 28, pp. 2-3.

One week later, on Friday, January 18, 2008, Wright got back to Housel, suggesting a partial accommodation: "If we can come to some settlement with [subcontractor] Atlantic, will N&H be agreeable to signing the agreement?" Ex. 28, p. 1.

On Monday, January 21, 2008, Housel informed Wright that he did not "want to ask if [CPS or State Electric] have a claim." In doing so, however, he acknowledged Nicholson & Hall's exposure if such claims were later presented:

> We can not sign off on State or CPS as we discussed if we did ***we would be liable for any claim due to signing off their right to present a claim that we by contract have to present to Dominion***. As we discussed we only pay them if Dominion pays us.

Ex 28, p. 1 (emphasis added).

Even while this exchange between Wright and Nicholson & Hall was unfolding, Wright continued to be alarmed at the ongoing compromise of the schedule.

On Friday, January 25, 2008, understanding that he was in the process of securing a schedule guarantee from Nicholson & Hall, Wright demanded that Nicholson & Hall institute another "recovery plan." Ex. 29, p. 3. And this was when Wright, in a communication quoted earlier, further warned "[Nicholson & Hall] and CPS . . . that the execution of the piping installation is currently impacting their potential future consideration of work for Dominion." Ex. 29, p. 4.

Cole—aware that Dominion would not approve efficiency and extended conditions claims from subcontractors other than Atlantic—forwarded Wright's January 25th email to CPS and stated that CPS's notice of its expectation of full payment of overtime and all supervision is "out of line". Ex. 29, p. 3.

Wright's threat as to the adverse impact on CPS's "potential future consideration of work" for Dominion had particular resonance with CPS because Dominion was CPS's largest customer. Tr. 3:87 (Flynn).

CPS (through Robertson) immediately responded to Wright's veiled threat by assuring Cole (with cc's to Housel, Wood and Giarve—among others) that it would commence overtime the next day, stating, however, that CPS "reserves the right to seek additional compensation for hours worked in the future." Ex. 29, p. 2.

Wright responded directly to CPS's project manager, Robertson: "Bob, Please clarify your statement reserving the right for additional compensation." Ex. 29, pp. 1-2.

On Saturday, January 26, 2008, CPS, Flynn responded for Robertson. In so doing, he gave Dominion and Nicholson & Hall notice of CPS's intent to submit a claim for efficiency impacts and for support and supervision costs because of the extended conditions:

> CPS is currently reviewing costs incurred due to schedule, engineering and other factors that have caused CPS to expend monies above the original bid and contract. When all information is reviewed, CPS will meet N&H and Dominion to discuss our findings. It is the priority of CPS to complete the work scope on time so Dominion can start the unit as scheduled....CPS appreciates your input and we look forward to completing this project on time with quality and safety as our number one priority.

Ex. 29, p.1.

The next business day after receiving CPS's notice, Wright sent an e-mail to Housel which stated in part:

> Regarding the settlement agreement for productivity and extended duration, Dominion counsel has advised that the settlement must encompass all parties ***and to not pay the agreement amount until we can resolve the N&H subcontractor issue***. In order to not impact payment of base scope work, I have approved the December 2007 Invoice less the amount of the settlement.

Ex. 31 (emphasis added).

Later on the same day (January 28, 2008), Housel responded to Wright that the settlement amount "did not include any dollar amounts for any subcontractor requests." Housel concluded his email as follows:

> To this date we have not received [a] request [from] CPS which we would pass on for your consideration. They indicated last week in an e-mail that they are reviewing their costs. However, ***we need to receive payment on the $6,975,600 as we continue to incur additional cost on the $6,643,450 already spent months ago***. I would ask that you review this request and let me know your decision as soon as possible.

Ex. 166, p. 1 (emphasis added).

Although there was no evidence presented at the trial as to Nicholson & Hall's financial circumstances at the time, the tone (and larger context) of Housel's communication suggests that Nicholson & Hall was itself financially at risk at the time.

On January 31, 2008, Wright received an email from his superior, Wood, regarding the prospect of a CPS claim. Wood noted that Dominion (via Nicholson & Hall) is ". . . going to get hit with a significant [CPS] productivity claim which we need to push back on Siemens...." Ex. 30, p. 1.

However, by that juncture, Dominion had tabled resolution of "commercial issues" with Siemens.

With actual knowledge that Nicholson & Hall had not allocated any part of the settlement proceeds to the prospect of a CPS claim, Wright pressed Nicholson & Hall to settle. He knew that the settlement would protect Dominion from any productivity and extended conditions claims by CPS through March

(and by any other subcontractors not carved out of the settlement, as Atlantic had been). In substance, Dominion—at the time burdened with a project that was substantially over budget and behind schedule—set a sum of additional money that it was willing to spend on account of the cost repercussions of the extended schedule. It would then let the chips fall where they may between Nicholson & Hall and its subcontractors as to any claims thereafter brought by the subcontractors on account of those same conditions.

On Sunday, February 3, 2008, Wright "re-evaluated" the one then-pending subcontractor claim (from Atlantic). Wright offered to include in the settlement $93,830.00 for payment to Atlantic. Wright expressed that "[t]his is Dominion's best an[d] final offer on this issue." He bluntly informed Nicholson & Hall:

> Dominion must insist that the settlement agreement between Dominion and [Nicholson & Hall] is inclusive of all claims due to extended duration and productivity.
>
> The above stated best and final offer is contingent upon an executed settlement agreement between N&H and Dominion on or before February 8, 2008.

Ex. 222.

Housel reasonably believed that if Nicholson & Hall did not sign the settlement agreement as drafted, Dominion's offer would be withdrawn. *Id.* Housel relented, and the agreement was executed on February 7, 2008. Ex. 32. The agreement was subsequently referred to at various times (and during the trial) as the "Global Settlement".

The Global Settlement included the amount for Atlantic's extended duration claim.

The total settlement amount was $7,069,430. Paragraph 2 of the settlement agreement was amended in the final agreement to read as follows:

> The Parties agree that payment of the Settlement Value by [Dominion] to N&H will constitute full, final and complete compensation to N&H for all and any claims by N&H ***or its subcontractors*** for Recovery Plan Costs and Compensation, and N&H shall not be entitled to any further adjustment in compensation or the Performance Schedule in connection with the Recovery Plan.

Ex. 32, p. 2 (emphasis added).

The phrase "or its subcontractors" was inserted into and accepted as part of the settlement agreement notwithstanding Housel's recognition that Nicholson & Hall could not sign away its subcontractors' claims and knowing that a productivity and extended conditions claim from CPS was likely. With that in mind, Nicholson & Hall made the "calculated" risk to sign the settlement agreement. Tr. 12:14-15 (Housel).

Housel was the central Nicholson & Hall figure in the negotiation and consummation of the Global Settlement. His trial testimony on the subject was inconsistent and not credible.

In response to a question from Nicholson & Hall's own counsel, Housel described that before he agreed to the settlement, he had had a conversation in January 2008 with Brian Flynn in response to Housel's having become aware of Flynn's stated intention to submit a claim for the impact of overtime and the extended schedule. That Housel and Flynn should have had a conversation at that point on the subject is not surprising and was confirmed in substance by Flynn. Tr. 3:194-195 (Flynn).

However, the thrust of Housel's account of the conversation was that he urged Flynn to assemble the documentation for such a claim before the end of the project. Tr. 11:219-221. Nevertheless, on January 21st Housel wrote to Wright: "We have not received anything from State Electric or CPS. ***We don't want to ask if they have a claim.***" Ex. 28 (emphasis added). Housel's statement to that effect made sense because at that point, a CPS claim would have materially altered the prospects of Nicholson & Hall securing the money it stood to gain through the settlement.

Furthermore, even though Housel's testimony veered at times 180 degrees, he ultimately maintained that the Global Settlement was intended to capture *only* costs relating to the GTRP that had concluded in September 2007. In doing so, Housel denied that the settlement's purpose was to compensate Nicholson & Hall (and the sole subcontractor, Atlantic) for extended conditions through March 2008. Tr. 12:12, 70, 77, 85 and 142-152.

Housel's position is untenable in light of the communications referenced above. Those communications are unambiguous as to the Global Settlement's purpose to cover extra costs incurred and to be incurred on the Project through the March outage. The attachment to the email string that comprises Exhibit 219 is titled, "Overtime Productivity Claim; Outage delay extension costs". Furthermore, Housel's account and interpretation is directly contrary to Dominion's.[27]

[27] Although the Court does not consider Dominion's expert, Fredlund's, report and testimony on the issue as affirmative evidence, the Court agrees with his conclusion as to the purpose and effect of the settlement:

The practical effect of Nicholson & Hall's decision to sign the settlement agreement was to exclude CPS's and other subcontractors' access to additional compensation from Dominion for productivity and extended duration impacts. In answer to his own counsel's questions, Housel characterized the nature of the decision made by Nicholson & Hall to accept the settlement as a "calculated risk". Housel's exchange with his counsel is instructive:

> Q: [D]id you believe that [in executing the settlement] you were negotiating away the possibility of subcontractors asserting claims on account of gas tight recovery?
>
> A: [B]ased on the fact that the recovery plan had ended in September, four months had passed, we had received no specific claims or requests for change concerning the gas-tight recovery, so it was determined that we didn't feel there was a significant risk to signing the agreement.
>
> In the end, Nicholson & Hall cannot sign away CPS's rights to assert a claim, should we receive one from CPS. We might not be able to assert that claim to Dominion or present it to Dominion. So that was a risk we were taking.
>
> Q: But it was a calculated risk?
>
> A: Yes.
>
> Q: Essentially Nicholson & Hall was assuming the risk it would no longer be able to pass through a claim to Dominion?
>
> A: That's correct.

Tr. 12:14-15 (Housel).

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> This Settlement Agreement was a global settlement of any and all claims for which Dominion was responsible under its Contract with N&H for any additional compensation related to all work performed or to be performed on the Project up to March 27, 2008 -- including any impacts incurred up to the time of the negotiations and foreseeable or projected impacts from that point in time through late March 2008.

Ex. 231 (Fredlund), p. 17.

Notwithstanding the Global Settlement, Nicholson & Hall knew that it had a duty to address in good faith a subsequent claim of CPS for compensation on account of extended conditions that CPS could not have reasonably foreseen at the time of the Subcontract's execution.

In material part, the present trial is a consequence of Nicholson & Hall having taken that risk. The Court finds that the "risk" that Housel in fact was referring to was not just the prospect of a CPS GTRP-related claim but a much broader claim for the financial impacts upon CPS of the Project having been extended at least through the end of March 2008.

CPS did not know that Dominion and Nicholson & Hall were negotiating the Global Settlement change order. No disclosures were made in that regard by Nicholson & Hall or by Dominion.

On February 20, 2008, Dominion wired the settlement payment of $7,069,430 to Nicholson & Hall. Ex 154, Bates p. NHC077770.

Despite the issuance of invoices and follow-up demands for payment, Nicholson & Hall has not paid CPS any portion of the $7,069,430 to compensate CPS for productivity losses or impacts from the Project's extended duration. Tr. 3:214-215 (Flynn). Nicholson & Hall did not submit CPS's productivity and extended duration RFI for consideration to Dominion. Tr. 14:43-44 (O'Toole).

### *CPS BECOMES DELINQUENT WITH ITS SUBCONTRACTORS AND WITH UNION BENEFIT FUNDS*

The full impact of the circumstance, noted earlier, of CPS not recovering its costs on the Project began to be acutely felt in the first months of 2008.[28] CPS had been deferring certain payables extending back to May 2007, including payments to the benefits fund of the union Local 51 laborers; however, by April 2008, CPS was in serious arrears to its vendors, most significantly, its subcontractors on the Project.[29] A number of the subcontractors threatened to file liens, and in late April, Nicholson & Hall and Dominion became aware for the first time of the claims. Once they did become aware, a cascade of events ensued that led eventually to CPS being removed from the Project.

### *CPS LIEN WAIVERS AND REPRESENTATIONS AS TO PAYMENT OF ALL SUB-SUBCONTRACTOR CLAIMS*

The record and extent of CPS's delinquency to its subcontractors had more significance than the fact of the amounts owed. As the Scrubber Project neared completion, Nicholson & Hall began to require CPS and other subcontractors to execute waivers and releases ("Lien Waivers") in exchange for progress payments. Tr. 7:210-11 (Giarve).[30]

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[28] Prior to the Project, CPS had a stable financial history. Tr. 5:59-65 and 87 (Gould); Tr. 5:10-21 and 58 (Joyce); Tr. 6:149-151 (Rotunno). In May 2007 it had an available line of credit at S Bank of $1.1 million. Tr. 5:87 (Gould). The credit line was customarily drawn on to even out the financial impact of the seasonal nature of CPS's business. Tr. 5:15-20 (Joyce).

[29] As of May 7, 2008 CPS had accumulated payables of approximately $1.2 million, with (in round numbers) $252K past due for greater than 90 days, $405K for greater than 60 days and $415K for greater than 30 days. Ex. 104, p. 3. Tr. 5:71-72 (Gould).

[30] The contractual framework of the Lien Waivers blended provisions of Nicholson & Hall's contract with CPS and of the general contract between Dominion and Nicholson & Hall. In Article 2B(1)(a)(1) of the subcontract, progress payments are conditioned on "[Nicholson & Hall's] receipt of such Partial and Final Lien Waivers and Warranties as *may* be required by the Owner, Contractor and the Contract documents." "Contract Documents" include the Owner-General Contractor Agreement. Ex. 87. Article 1. The Dominion/Nicholson & Hall contract (Ex. 239)

The first Lien Waiver Rotunno executed for CPS was on February 29, 2008 in exchange for receipt of a $486,599.94 payment to CPS on its earlier monthly invoice. Ex. 118. Tr. 7:210-11 (Giarve); Tr. 6:174-75 (Rotunno). On March 7, 2008, Rotunno executed and delivered another Lien Waiver to Nicholson & Hall to obtain an advance payment to CPS of $250,000.00. Ex. 118. Tr. 7:211 (Giarve); Tr. 6:174-75 (Rotunno). On March 17, 2008, Rotunno executed and delivered a third Lien Waiver for CPS to receive another advance payment of $120,000.00. Ex. 118. Tr. 7:211-12 (Giarve); Tr. 6:174-75 (Rotunno). Rotunno executed and delivered a fourth Lien Waiver to Nicholson & Hall on March 28, 2008 on CPS's request for payment of $535,430.55. Ex. 118. Tr. 7:212 (Giarve); Tr. 6:174-75 (Rotunno). In total, Nicholson & Hall paid CPS $1,394,336.12 subject to the Lien Waivers.

The text of the Lien Waivers provided that CPS acknowledged that, in exchange for the present payment "to the extent of said amount and the cumulative amount of all prior invoices", that it:

> (a) . . . waive[d] and release[d] all actions, claims, and demands against [Nicholson & Hall] and [Dominion] on account of all work, services, equipment, material, and supplies performed by [CPS] at the [Project];

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provides at Article 24B ("Lien Waivers") that "[w]ith each invoice submitted under this Agreement, [Nicholson & Hall] shall complete and execute and deliver to [Dominion] (i) a lien waiver in form and substance reasonably acceptable to [Dominion].... Prior to making *final* payment to any subcontractor or supplier, [Nicholson & Hall] shall require every subcontractor and supplier to execute a lien waiver in form and substance reasonably acceptable to [Dominion]. [Nicholson & Hall] may not receive payments hereunder unless [Nicholson & Hall] shall have provided to [Dominion]: (i) for each invoice an executed [Nicholson & Hall] lien waiver and certificate of performance as provided above and (ii) with respect to the *final* payment, an executed lien waiver *from each and every subcontractor* and supplier." (Emphasis added.) This contractual regime required CPS to submit a lien waiver only if required of Nicholson & Hall by Dominion. Further, Nicholson & Hall, in turn, was required by its contract with Dominion to secure a lien waiver from CPS only in connection with Nicholson & Hall's *final* payment to CPS and upon submission of Nicholson & Hall's *final* invoice to Dominion. (Emphasis added.)

(b) waive[d] all rights to file any mechanic's materials men's, or similar liens against [Nicholson & Hall] and [Dominion] in respect of work, services, equipment, material, and supplies performed or provided or supplied prior to 3/17/08 [or other applicable date];

(c) [would] promptly and [sic] release all mechanic's materials men's, or similar liens filed by any of [CPS's] subcontractors, suppliers, or material men against [Nicholson & Hall] and [Dominion]; and

(d) [would] defend, indemnify and hold harmless [Nicholson & Hall] and [Dominion] from and against all liability, cost or expense (including reasonable attorney's fees) related to any such liens.

Ex. 118.

In each of the CPS Releases, CPS covenanted and warranted that:

it has paid all of its subcontractors, suppliers, and material men for work, services, equipment, and materials performed or furnished other than work, services, equipment, and material, the cost of which is included in the Invoice (such unpaid amounts being hereafter referred to as the "Included Sums"), and [CPS] represents and covenants that is shall first pay all Included Sums from the amounts received in respect of such Invoice.

*Id.*

CPS further covenanted and warranted in the CPS Releases that:

in consideration of payment of all amounts invoiced or due in connection with the performance of the work or the provisions or materials or services other than amounts included in the Invoice of which this Lien Waiver forms a part and covenants and warrants the [Project] is free from all liens and claims for payment of such amounts whether by reason of work performed, services rendered and materials furnished by [CPS] and by any subcontractor, material man, employee or agent working for or under [CPS].

*Id.*

In his trial testimony, Rotunno acknowledged (a) that when he signed the Lien Waivers in exchange for payments, all of which he read before signing, they were false, (b) that he signed them for the purpose of obtaining payments from

Nicholson & Hall, and (c) that he understood Nicholson & Hall would not have made payments without the CPS Releases. Tr. 6:181 and 214-17 (Rotunno).

Giarve relied upon the Lien Waivers in making the $1,394,336.12 of payments to CPS, which payments Nicholson & Hall would not have made if he had known the true circumstances of CPS's indebtedness to its subcontractors and vendors. Tr: 7:209-12 and 229 (Giarve).

***AFTERMATH OF THE DISCOVERY OF CPS'S DELINQUENCY WITH ITS SUBCONTRACTORS***

Nicholson & Hall and Dominion were justifiably alarmed by the information as to CPS's arrears to its subcontractors and to the Local 51 union benefit funds. The arrears presented the near-term risk of mechanics liens being filed on the Brayton Point plant. By its contract with Dominion, Nicholson & Hall, as general contractor, would be obligated to remove them. Further, at least at first, there was good faith concern by Dominion and Nicholson & Hall as to whether, under the circumstances, CPS would be able to complete the Subcontract. (At that juncture, the Project was on the cusp of substantial completion, but significant work remained to be done in May and early June, including the final punch list process.[31])

On May 1, 2008, Roger Huffman of Dominion, Penna's predecessor, informed Penna that he had heard that CPS had filed for bankruptcy. Ex. 46. Penna responded: "Things are interesting out here—the CPS default was inevitable." *Id.* On the same day, Dale Smith, Dominion's Manager of

[31] "A punch list is an itemized list of finish work, corrections, repairs, and services to be performed in order to complete a construction contract." *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 790 (1986).

Construction Contracts emailed a colleague, informing her of his having just heard of CPS's alleged bankruptcy filing. He then added: "They [CPS] were the ones that we were expecting a productivity claim from as a result of Siemens sloppy design work. I guess now we may not see the claim." Ex. 44.

In fact, CPS had not (and has not to date) filed for bankruptcy protection. However, events swirled rapidly and ominously between CPS and Nicholson & Hall after May 1st.

As of early May, CPS's most pressing concern was the payment of its March invoice in the amount of $553,858.77. It had been approved by Nicholson & Hall and incorporated into Nicholson & Hall's March payment application to Dominion. Nicholson & Hall expected Dominion to pay it on the March application on or about May 1, 2008. Ex. 172.[32] The suspension by Nicholson & Hall of what would otherwise have been its routine payment to CPS of what CPS was owed from that payment application posed a dire threat to CPS.

On May 2, 2008, counsel for Nicholson & Hall sent a demand letter to CPS's attorney. After reciting various provisions of the contract and alleged violations of the same by CPS's failure to pay its vendors and the union benefit funds, counsel stated:

> Subcontractor [CPS] has repeatedly advised Contractor [Nicholson & Hall] it is unable to fund its payroll to provide the manpower necessary to complete its Work at the Project. Accordingly, Contractor has

[32] As of May 1st, CPS had issued four payment applications to N&H seeking payment in the total amount of $1,333,192.98 (not including retainage). The billings were for (a) work performed in March 2008, Ex. 75A, Tabs 29 and 30, (b) an extra crew directed by Dominion, Ex. 75B, Tab 30, (c) additional supervision and equipment on change order work performed in 2007, Ex. 75B, Tab 31, and (d) extended general conditions for work performed after January 1, 2008, Ex 75B, Tab 32.

> ample reason to believe Subcontractor is or will soon become insolvent, and to anticipate Subcontractor is, or will become unable to fulfill its obligations under the Subcontract. Therefore, formal demand is hereby made that Subcontractor immediately provide Contractor with adequate assurance of its willingness and ability to complete its performance under the Subcontract. Until such time as Contractor has been provided with such assurances, all payments due, or to become due to Subcontractor are hereby suspended.

Ex. 211.

The same day, Flynn responded to Cole, with copies to Housel and Wright, among others:

> Please confirm that Nicholson & Hall will continue to support the project by releasing monies due to support payroll so we can continue to maintain 5-10s and 8 hrs on Saturday and allow CPS to make payments to vendors as requested. Nicholson & Hall's stand on not releasing any monies and their unwillingness to discuss any options is jeopardizing this project. N&H has stated that they will not release monies without the advice of their legal [counsel]. CPS's legal counsel has made several attempts to make contact with your legal [counsel] without success. CPS is willing to work with N&H, Dominion and all parties to successfully complete this project.

Exhibit 82, p. 2.

Housel then further responded to Flynn. He stated that Nicholson & Hall was "**current**" (bold in original) in its payments to CPS.[33] He continued: "[W]e will make every attempt to move the project forward with CPS but due to circumstances CPS has created Nicholson & Hall in moving forward will follow our counsel's advice in regard to this matter." *Id.* at p. 2.

On May 5, 2008, in response to a request by Nicholson & Hall's counsel for information as to the status of CPS's Project payables, CPS's counsel

[33] Nicholson & Hall was "current" as of that particular day but was required by the Subcontract to pay CPS within not later than seven (7) days after Nicholson & Hall received payment from Dominion. Ex. 87, Art. 2.A. Nicholson & Hall received payment on its March requisition on May 5th. Ex. 224, see reference 026972. Thus, at the latest, CPS would have been due its payment on May 12th.

informed Nicholson & Hall that it owed approximately $1,133,000. Ex. 156. Tr. 11:233-34 (Housel).

The same day, Nicholson & Hall received a wire transfer from Dominion of $1,589,091.72 for work performed in March 2008. Ex. 224, see reference 026972. These funds included the amount due CPS on its March invoice.

On May 6th, Nicholson & Hall's counsel gave notice to CPS that Nicholson & Hall would exercise its authority pursuant to Article 18 of the Subcontract to terminate CPS within the next 48 hours unless CPS timely completed the FRP hydro testing and "staff[ed] the project with a minimum of 35 craftsmen daily (Monday through Saturday), which craftsmen shall work a minimum of eight per day on Saturdays for as long as Contractor deems, in its sole judgment, such schedule is necessary to timely complete the Work." Ex 83, p. 2.

Following discussions with counsel, Tr. 7:228 (Giarve), and after discussing the matter internally at the project management and executive management levels, Tr. 7:223-24 (Giarve), Nicholson & Hall invoked what it asserted was its right under the Subcontract to suspend all payments to CPS. Tr. 11:232 (Housel).[34]

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[34] The Subcontract states, in relevant part, that:

> (3) Independently of any other right hereunder, Contractor may deduct from any amount due or to become due Subcontractor amounts equal to any claims asserted against Subcontractor in connection with Subcontractor's work hereunder including, but not limited to, unpaid bills, defective work, incomplete work and/or damage to the work of Contractor. Further, Contractor may offset against any sum otherwise due Subcontractor the amount of any other obligation of Subcontractor to Contractor whether or not said obligation arises out of this Subcontract and whether or not such obligation is liquidated or un-liquidated.

Ex. 87 at Art. 2.B.

From the time that the crisis struck, CPS insisted that if it were paid what it was owed, CPS would satisfy its subcontractor and vendor claims and bring the Project to substantial completion within the month. In the interim, CPS proposed that Nicholson & Hall issue checks from the proceeds due or to be due CPS jointly to CPS and to its Project creditors as a means of assuring Nicholson & Hall and Dominion that the funds would not be diverted to non-Project purposes. Ex. 156. (The joint check procedure is provided for in the Subcontract to the option of Nicholson & Hall. Ex. 87, Art. 2C.) Nicholson & Hall refused the joint check proposal (and continued to do so thereafter when CPS renewed the proposal).

In response to Nicholson & Hall's counsel's letter of May 2d in which counsel demanded proof of CPS's solvency, on May 7, 2008, Rotunno, his accountant (Gould), bookkeeper (Connor), and project manager (Bravo) met with Cole and Anthony DiSano ("DiSano") at the Project site. The purpose was to demonstrate to Nicholson & Hall that CPS had the ready capacity to pay its creditors and complete the Project, provided it received the funds that were then, or would soon be, due it. Tr. 6:184 (Rotunno).

Gould presented schedules to Cole and DiSano that listed CPS's current assets, payables and receivables, including the anticipated receipts from the final billing on the project. After the meeting, DiSano forwarded the schedules to Housel and Giarve and to Nicholson & Hall's attorneys. Ex. 104.

Gould's cash flow analysis purported to demonstrate that upon the anticipated conclusion of the Project in July and payment on its final invoices,

CPS would have $1.830 million in "cash on hand", with all its subcontractor and other creditor accounts having been paid off. Tr. 5:67-68 (Gould). Neither Cole nor DiSano took issue with any of the figures in the presentation.

Cole was cordial. He said that he would follow up by reviewing the data with Giarve.

Rotunno spoke with Giarve thereafter and, again, requested the issuance of joint checks to the creditors. Giarve informed Rotunno, "it is in legal, his hands are tied, nothing he could do." Tr. 6:184-185 (Rotunno).

Nicholson & Hall did not credibly challenge Gould's cash flow projections,. Nicholson & Hall did not inquire further about the information contained in the projections.

Nicholson & Hall was unmoved by Gould's presentation and thereafter reaffirmed (through the conclusion of the trial) its attorney-advised decision to withhold any further payments to CPS. Tr. 6:173 (Rotunno); Tr. 3:230-231 (Flynn); Tr. 7:207 (Giarve).

The Court finds that the Gould's cash flow analysis was based on reliable data and reasonable assumptions. The Court further finds that it was a reasoned and fact-based response to Nicholson & Hall's counsel's demand letter of May 2d for "adequate assurance of [CPS's] willingness and ability to complete its performance under the Subcontract." Ex. 211. If CPS had been timely paid for the work it performed after February 2008 on the Project, its creditors would have been paid, and there would have been no reasonable risk of liens being filed against Brayton Point by any of them.

On May 15, 2008, CPS recorded and served its Mechanic's Lien Notice of Contract on Dominion. Exhs. 76 and 119.

On May 16, 2008, Housel rejected CPS's claim for extended general conditions for work performed after January 1, 2008. Ex. 84.

***CONTINUED PRESSURE ON CPS TO MAN THE PROJECT AS THE PROJECT WOUND DOWN***

Notwithstanding Nicholson & Hall's decision to freeze any further payments to CPS, Nicholson & Hall and Dominion insisted that CPS continue to staff the project with the extra crews on the then-existing overtime schedule.

In mid-May, Bravo believed that the piping work that remained to be done could be accomplished with a reduced crew. On May 15th, he notified Cole that CPS would reduce its work force to four crews comprised of 35 pipefitters. Bravo included backup information detailing the FRP work plan. Ex. 74. Cole, copying Nicholson & Hall's attorney and Penna, rejected the proposal. *Id.*

Later in the month, Bravo again recommended a reduction of force. When informed of it, Penna bluntly told Cole: "Dominion does not agree with the proposed layoff and will view a layoff as CPS defaulting on its agreement to support the project per the N&H's 5/6/08 Notice of Intent letter." Ex. 50. Tr. 4:143-144 (Bravo).

Thus, the circumstance faced by CPS in June was that Nicholson & Hall was withholding the money CPS was owed for work performed since February and simultaneously demanding that it maintain a full work crew on extended hours. Nicholson & Hall and Dominion did so with full knowledge of CPS's acute cash flow circumstance.

CPS's standing with its bank, however, was sufficiently favorable for the bank to authorize CPS to borrow an additional $500,000 to assist its completion of the Project. Tr. 5:24-27 (Joyce); Tr. 3:199 (Flynn). Exhs. 99-100.

Also, as a means to fund its Brayton Point payroll, CPS drew on the proceeds from other projects it was then undertaking. Tr. 3:200-201 (Flynn); Tr. 6:168-169 and Tr. 7:9-10 (Rotunno).

CPS continued to press Nicholson & Hall to issue joint checks to its creditors. Nicholson & Hall continued to refuse or chose not to respond. Ex. 217, p. 2. In an effort to ensure that the Local 51 workers would continue on the Project, CPS negotiated an interim agreement with Local 51's business agent where the union agreed to remain on the job provided CPS paid $150,000 to reduce the debt owed to the benefit funds. Tr. 3:198-199 (Flynn). CPS proposed that a joint check issue. Ex. 73. Nicholson & Hall did not respond. Ex. 126, p. 2.

Once it determined that CPS was unable to perform on the interim agreement, Local 51 recorded its Mechanic's Lien Notice of Contract on the Brayton Point plant on May 28, 2008. Ex. 157.03. The amount of lien was $522,048.30. Ex. 157.03, p. 2.

The CPS work crew schedule was returned to a normal five-day week at the beginning of June. Ex. 96. Thereafter, the Project wound down, with Dominion issuing its first punch list in mid-June. CPS protested as to certain of the items as being outside its scope of work, but the items were addressed. Tr. 3:205-206 and 208-209 (Flynn); Tr. 4:155 (Bravo).

By the end of June, Nicholson & Hall considered CPS's piping subcontract to be complete. In a testy email exchange on June 26th in which Penna protested Cole's having moved back to Buffalo, Cole responded: "As stated in numerous e-mails and conversations; and as notified in writing to Dominion via the daily/weekly/monthly reports; The piping scope of work is complete, and care and custody of the system has been assumed by Dominion as evidenced by Dominion's operation of the system." Ex. 51. Cole characterized the nature of the remaining problems as "due to the design and/or operation of the system and are Dominion's issues to resolve." *Id.*

Local 51 pulled the remaining union pipefitters from the Project on account of its payment issues with CPS effective July 7th. At the time, CPS was doing exclusively punch list work. Ex. 95.

In furtherance of its perceived obligations to Dominion, and in an apparent effort to assist CPS in completing the Project in mitigation, in late August 2008 Nicholson & Hall negotiated an arrangement with Local 51 that permitted its members to return to the Project for CPS. Ex. 171. Under that arrangement, Nicholson & Hall made a $218,948.70 payment to Local 51 for CPS, Ex. 161, and provided its guarantee of certain of CPS's obligations to Local 51. Ex. 171.

Nicholson & Hall claims to have completed CPS's work on the Project at a cost of $207,027.00. Tr. 9:161-62 (Cole); Tr. 11:192 (Housel).

CPS continued to work at a much reduced level on punch list and related items at Brayton Point until mid-September. However, upon CPS filing and

recording its Statement of Account on its mechanics lien for $5,389,500.33 (Exhs. 77 and 120, p 2), CPS was ordered off the site. Ex. 55.

***DOMINION'S CONTINUED PROGRESS PAYMENTS TO NICHOLSON & HALL***

On June 4, 2008, Dominion wired $462,369.02 to Nicholson & Hall for non-base scope work. Compensation for work performed by CPS was included in the sum. Ex. 224, Ref: 027202. Nicholson & Hall did not pay any of the proceeds to CPS.

On July 8, 2008, Dominion wired $323,959.46 to Nicholson & Hall for non-base scope work. Compensation for work performed by CPS was included in the sum. Ex. 224, Ref: 027075. Nicholson & Hall paid none of the proceeds to CPS.

On August 18, 2008, Dominion wired $434,472.98 to Nicholson & Hall for non-base scope work. Compensation for work performed by CPS was included in the sum. Ex. 224, Ref: 027141. Nicholson & Hall paid none of the proceeds to CPS.

Nicholson & Hall did not pay for 34,037 CPS man-hours in connection with the Project after March 1, 2008. Exhs. 21.15 - 21.19.

The Notice of Substantial Completion for the Project was recorded in the Registry of Deeds on September 12, 2008. Ex. 123.

This action was filed on September 16, 2008.

***NICHOLSON & HALL'S PAYMENT OF CPS'S LIEN CREDITORS***

As noted, on May 28, 2008, Local 51 recorded its lien for $522,048.30 for CPS's unpaid union benefit fund obligations. Ex. 157. Other CPS creditors filed similar liens thereafter. On June 17, 2008, NES Rentals recorded a lien in the

amount of $83,165.15. *Id.* On July 10, 2008, L.F. Clavin & Co., Inc. recorded its lien for $51,637.23 on account of CPS's failure to pay it for its services. *Id.* On or about July 30, 2008, the laborers' union recorded a $245,495.59 lien for CPS's unpaid union obligations. *Id.* On September 28, 2008, Powerhouse Supply, Inc. recorded a lien for $22,029.28 for materials sold to CPS. *Id.* On October 15, 2008, Marr Scaffolding Company recorded a lien for $100,309.54 in equipment charges to CPS. *Id.* All, or substantially all of the amounts asserted in those liens were for labor or materials provided to CPS on or prior to February 29, 2008. Exhs. 156 and 104. Tr. 5:106-7 (Gould).

Pursuant to its contractual obligation to Dominion, in August and December 2008, Nicholson & Hall issued joint checks to CPS and its lien creditors to obtain discharges of the liens on Brayton Point. Tr. 7:231-33 (Giarve). Exhs. 79, 162 and 163. In total, Nicholson & Hall paid $488,536.82 to discharge liens of CPS creditors for labor and materials provided to CPS on or prior to February 29, 2008. Nicholson & Hall had already paid CPS for these vendors' goods and services. Exhs. 79, 149, 155, 162 and 164. Tr. 6:217 (Rotunno); Tr. 7:199-206 and 231-33 (Giarve).

***ROTUNNO TRANSACTIONS WITH CPS FUNDS***

During 2007 at a time when CPS was on the Project and while some CPS lien creditors debts had accrued, Exhs. 104 and 156 and Tr. 5:106-7 (Gould), Rotunno transferred approximately $35,000.00 of CPS funds to his personal investment account. Ex. 34; Tr. 6:232-34 (Rotunno). In the same time period, he also drew $14,000.00 of CPS's funds to pay the fees for investment education

seminars he attended. Ex. 135; Tr. 6:235-37 (Rotunno). During 2007 and 2008 Rotunno further used CPS funds to pay monthly auto lease payments for his and his wife's personal vehicles. Exhs. 131, 132 and 133. Tr. 6:225-32 (Rotunno).

As a result of these draws, the funds were not available to pay CPS's Project creditors. Tr. 7:15-16 (Rotunno).

The Court finds that these draws by Rotunno were done in good faith and without the intent to prejudice the interests of CPS's creditors. At the end of CPS's fiscal year, it was the practice of CPS's accountant, Gould, to reconcile such payments by allocating them as income. Tr. 7:12-13 (Rotunno). In the Court's experience, principals, which are subsequently reconciled as income to the principals, is a common contemporary business practice.

In mid-to late-June 2008, Rotunno transferred $450,000.00 that CPS had received as an advance on a project that CPS was about to undertake in the Virgin Islands to his personal bank account. He did so out of a concern that Project creditors would attach the funds and thereby prevent CPS from being able to perform on that project. Exhs. 130A and 130B. Tr. 6:223-225 (Rotunno). Rotunno returned the funds to CPS's operating account over the next two months, where they were used to meet the expenses of the Virgin Islands project. Tr. 7:9-10 (Rotunno).

***DOMINION'S CONDUCT ALLEGEDLY TO DIRECT CPS***

CPS alleges that Dominion, acting through Penna and Richards, gradually took over the management, coordination, and scheduling of the construction work on the Project from March 2008 through July 2008 and that Nicholson &

Hall affirmatively acquiesced in Dominion directly managing the subcontractors. CPS submits that the direction of the Project assumed by Dominion caused the breach of Nicholson & Hall's contract with CPS.

The Court finds that Dominion did take a significantly more active role in the day to day management of the Project during its final months.

A number of significant changes in Project management personnel at Dominion, Nicholson & Hall and Siemens occurred in March 2008 that set the stage for Dominion's more prominent role.

First, as noted earlier, Penna replaced Huffman as Dominion's Project Manager effective April 1, 2008. Tr. 8:104 and 107-108 (Penna). Penna had begun the transition process in February 2008.

At Nicholson & Hall, Burt Marker, who had been the subcontracts administrator for the Project, left at the end of March 2008. Marker wrote, submitted, and processed the RFI paperwork for subcontractors. He was also in charge of obtaining the written response from Dominion with regard to change orders and delivery of the same to the subcontractors. After Marker was laid off by Nicholson & Hall in late March 2008, no one assumed his role with regard to the RFI paperwork. Instead, Cole requested that CPS begin preparing its own RFIs. Tr. 5:142-143 (Poole).

Starting in April 2008, Cole spent increasing amounts of time in Buffalo at Nicholson & Hall's headquarters. While Cole remained available by phone, Cole's absences created problems on site because the remaining Nicholson &

Hall personnel lacked knowledge of the Project history and did not have on-site authority to resolve issues. Tr. 5:228-231 (Poole).

In Wright's April 8th project status update to his superior, Wood, Wright expressed his "Concern with N&H" and listed the following bullet points:

- Concern that N&H is lacking in supervision
- No N&H superintendents on site (boilermaker and ironworker)
- No subcontract manager on site
- Bill Cole is wearing both of these hats and he is here only part time
- Bill [Cole] has indicated he will be on site the week of 4-14 and 4-21
- the[n] gone for the balance of the month
- I think we need to remind N&H this job is not done!

Ex. 42.

At Siemens, Bell left the Project in March. Tr. 10:10 (Bell). Barry Neal, an intern engineer in training, replaced him. Tr. 10:42 (Bell); Tr. 3:25 (Walker).

Bravo testified that the arrival of Penna, tied together with the departure of Marker and Bell, resulted in a situation where Dominion (through Penna and Richards) effectively controlled management and coordination of CPS's work on the Project. Tr: 4:228-31 (Bravo). They "ran" it. *Id.* at 229.

Poole testified at length about his interactions with Dominion personnel. He explained that he worked collaboratively with Richards, who provided input that was instructive, rather than suggestive. Tr. 5:201 and Tr. 6:40 (Poole). Poole felt he had the ability to say "no" when Richards suggested a task be performed. Tr. 6:57-58 (Poole).

Poole also testified that he had good working relationships with other Dominion personnel, including Paul O'Mara and Roger Hoffman, and that they never specifically ordered him to perform any work. *Id.* Poole believed that

Penna overstepped his bounds when he informed them "that CPS couldn't lay people off"; however, this communication came through Nicholson & Hall. Tr. 6:41-42 (Poole).

Penna had a markedly different style than Huffman. Tr. 10:130 (Cole). Furthermore, the Court infers that Penna was brought in for the very specific purpose of getting the over-budget and seriously behind-schedule project completed.[35] Tr. 8:163-164 (Penna). It was reasonable under the circumstances for Dominion to have done so.

Penna threatened to declare CPS in "default" if CPS laid off workers. Ex 50.

Bravo was told to report every day the size of CPS's work force to Johnston (Dominion's scheduler). Ex.96, at Bates p. CPS26286.

On April 8, 2008, Wright reported to Wood that Dominion "[c]ontinue[s] daily direction meeting with CPS." Ex. 42.

Penna refused to consider certain RFI paperwork " ... until all work is successfully completed by the milestone dates." Ex. 49. Without the return of RFI paperwork, Dominion would not pay Nicholson & Hall, thus precluding any chance of CPS being paid. Penna acknowledged that the outstanding RFIs, which had been generated under his predecessor, were not his priority. Tr.

[35] In mid-March 2008 Dominion required Nicholson & Hall to add an additional 8-man pipefitter crew. Wood, Dominion's Director of Environmental Projects, told Nicholson & Hall that he "cannot emphasize enough the importance to Dominion of meeting the March 25th date and fully expect N&H to focus on its responsibility to actively manage its subcontractors to ensure operation per the March 25, 2008 date." Ex. 40.

8:166-167 (Penna). Poole's perception was that "Mr. Penna was pretty unilaterally rejecting [the RFIs]." Tr. 5:144 (Poole).

Thirty-two RFIs were not responded to between February and July 2008. This coincided with Penna's presence at the Project. Ex. 176.

Penna reversed Dominion's earlier position (articulated by Wright) that allowed verbal authorization of extra work and the payment of PPOT. He did not think RFI work should proceed based upon "verbals" or that Dominion should pay PPOT. Tr. 8:121-122 (Penna). Nicholson & Hall (through Cole) attempted to push back. They requested that Dominion be "... fair in their response to all open issues regarding compensation for work already performed on this project... [and]... [Nicholson & Hall] wants to make sure that [Nicholson & Hall is] not at a disadvantage during the consideration process due to unfamiliarity with the history of some of the work that was completed at Dominion's request." Ex. 21.18.[36]

Penna increased Dominion's direct oversight of CPS to make sure CPS was working on Dominion's highest-priority items. On March 17, 2008, Penna circulated Dominion's first "incomplete work list." His e-mail stated in part: "[A]ttached is a list of work items that is required to be completed by March 25, 2008, to allow injection of liquid lime for the Unit 2 SDA. The incomplete work list will be reviewed daily at 8:15 am to document progress." Ex. 228.

[36] Earlier in the Project, Wright was careful to maintain the prescribed lines of authority and supervision. In a December 26, 2007 e-mail to Cole, he wrote: "Item 3 in the attached [minutes of CPS/N&H meeting] implies CPS might have been taking direction from someone other than N&H. I have told my guys to be very careful not to direct CPS. If this is not the case please let me know." Ex. 22. Penna exhibited no such deference.

Richards became more proactive with CPS, as well; in one instance hand-carrying a list of FRP piping leaks "to CPS and walked it down with them." Ex. 181.

As part of its more aggressive oversight of CPS, Dominion (through Penna and Richards) generated, updated, and managed work lists specially prepared for CPS at the daily meetings. For example, Penna issued and updated the work lists for seven separately identified systems for Unit 1 (Ex. 107) and Unit 2 (Ex. 108). As items on the work lists were addressed, progress on them was tracked daily by Penna and Richards. Tr. 5:130-137 and 6:27-28 (Poole). Tr. 13:112-117 and 125 (Richards).

The majority of the items on the work lists were identified as priority 1 ("PR.1"), which meant, according to Poole, that they were to be done "yesterday." Tr. 5:132-133 and Tr. 6:28-29 (Poole).

The daily 8 a.m. meetings were almost always presided over by Penna and Richards. Nicholson & Hall was passive. Tr. 4:87-88 (Bravo) and Tr. 5:129-130 (Poole). The work priorities for the day identified by Penna occasionally conflicted with the work assignments made by Bravo and Poole at CPS's daily 6:30 a.m. (project management) and 7 a.m. (superintendents and foremen) meetings. In those instances, the CPS work crews' instructions were cancelled, and the crews had to be redirected. The interruption compromised CPS's efficiency. Tr. 4:88-91 (Bravo) and Tr. 5:122-123 and 137-137 (Poole).

Bravo's diary contemporaneously recorded Penna's and Richard's more active role in directing work. For example, Bravo recorded the following from the 8 a.m. meeting on April 24th:

- Bruce Richards - Dom[inion] - gaskets are going in on the Clarkson valves.
- Tom Penna - Dom[inion] - wants to see the torque sheets, wrenches & certs as well as the red line drawings - was ripping on CPS Q.C.
- Bruce & Tom - Dom[inion] - want CPS to take the SDA crew when done and then do the silo piping. Want U-2 functional ASAP.

Ex. 96, Bates p. CPS26310.

And after the 8:00 a.m. meeting on May 1st, 2008, Bravo recorded the following:

- Dom[inion] Tom Penna – U[nit]-2 is going online in May no matter what.
- Dom[inion] Bruce Richards - Wants a marked up P&ID showing the hydro boundaries
- Dom[inion] Don & Dave - Want a schedule of times durations of hydros and work left, if we stop indicate for how long
- Dom[inion] Bruce - Told us that CPS did good on the 4 items that Bruce requested
- N&H - Bill - Said that the crane would be up and operational today.

Ex.96, Bates p. CPS26314.

In light of the new regime, at one point in April, Nicholson & Hall offered Dominion the option "to go direct" with CPS. Ex. 172, p. 2.

The Court finds that while Dominion, on the ground, took a significantly more active role in directly supervising CPS's work after Penna's arrival, Dominion did not fundamentally alter the owner-general contractor-subcontractor relationship as the Project came to conclusion. CPS did not contemporaneously object to the altered roles. CPS did, on occasion, however, object to the content of the direction it was given. From the evidence, it appears that, as a matter of

construction industry practice, it is not unusual for an owner to become more directly involved in project execution as completion nears.[37] An owner is, understandably, more likely to become proactive if a project is significantly behind schedule or is otherwise one that has been marked by problems. Brayton Point was both.

### *CPS'S PROJECT INVOICES AND PAYMENTS RECEIVED (AND NOT RECEIVED) FROM NICHOLSON & HALL*

In its Statement of Account filed in connection with its mechanics lien on the Project, CPS stated as to the amounts due from Nicholson & Hall and Dominion:

| | | |
|---|---|---|
| 1. | Contract price | $3,193,983.00 |
| 2. | Agreed change orders | $1,808,560.80 (in addition) |
| 3. | Agreed overtime charges and consumables | $961,853.27 (in addition) |
| 4. | Pending change orders | $911,714.45 (in addition) |
| 5. | Loss of Labor Productivity Claim | $1,821,162.00 (in addition) |
| 6. | Site Supervision Overhead Claim for labor provided in 2007 | $159,373.14 (in addition) |
| 7. | Extended General Conditions Claim for labor provided in 2008 | $985,989.58 (in addition) |
| 8. | Total Amount Claimed | $9,842,636.24 |
| 9. | Payments received | $4,453,135.91 |
| 10. | Amount Due | $5,389,500.33 |

Exhs. 77 and 120, p. 2.

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[37] *Inter alia*, the Court credits the expert testimony of Donald Fredlund as it relates to this issue: "For the timeframe we are talking about, which is in the 2008 timeframe, and the start-up and commissioning, that whole process that Mr. Richards was speaking to, as it relates to those lists, not only is it not uncommon, it's part of the process, it's how it happens . . . Pick your job, oil and gas, any job that requires start-up and commissioning and a hand-over from the general contractor and his subs to the owner to do start-up and commissioning, that's how it's done." Tr. 13:161-163 (Fredlund).

The sources and documentation of the above entries were testified to by Flynn. The Court found Flynn to be credible and the entries based on reliable data. Tr. 3:216-224 (Flynn).

CPS substantially completed its base scope work by June 2008 for which it was due payment of the $3.2 million contract price.

Dominion paid Nicholson & Hall for the entire base scope work on the Project, including the piping scope. Tr. 14:104 (O'Toole).

Dominion paid Nicholson & Hall $3.7 million for non-base scope work performed by CPS, which included overtime expenses (PPOT) and change order work. Tr. 14:106-107 (O'Toole).

Nicholson & Hall received $6.9 million for CPS's work, representing $3.2 million for the base contract and $3.7 million for extra work.

Nicholson & Hall withheld payment for CPS's base scope that was invoiced in April 2008 and May 2008. During this period, CPS billed $756,011.31 in base contract work and retainage. Exhs. 75A, Tab 29; 75B, Tab 33; 75B, Tab 35, and 75C, Tab 36. As described above, despite having received payment from Dominion, Nicholson & Hall released no monies to CPS after April 4, 2008. Ex. 79.

On April 4, 2008, CPS billed Nicholson & Hall $159,373.14 for additional general conditions costs incurred in 2007. Ex. 75B, Tab 31. These are charges which CPS intended to bill in October 2007 but which, as noted earlier, were not because of Nicholson & Hall's and Dominion's position that they were included in CPS's base scope work provided for in the Subcontract. Tr. 3:219-221 (Flynn).

On April 4, 2008, CPS invoiced for extended general conditions for working beyond December 31, 2007. Ex. 75B, Tab 32. CPS's invoice stated:

> Contract was based on project completion by December 31, 2007. Due to engineering, material problems and construction schedule changes, CPS is seeking reimbursement for all overhead and supervision and equipment charges after December 31, 2007.

The billings issued by CPS for extended supervision and equipment costs totaled $985,989.58:

| Month | Extended General Conditions Billed | Trial Exhibit |
|---|---|---|
| January 2008 | $209,731.63 | 75B, Tab 32 |
| February 2008 | $203,073.13 | 75B, Tab 32 |
| March 2008 | $207,156.31 | 75B, Tab 32 |
| April 2008 | $160,108.93 | 75B, Tab 34 |
| May 2008 | $118,955.99 | 75C, Tab 37 |
| June 2008 | $81,739.25 | 75C, Tab 40 |
| August 2008 | $5,224.34 | 75C, Tab 69 |
| TOTAL | $985,989.58 | |

Nicholson & Hall did not present these claims to Dominion. Tr. 14:45-50 (O'Toole); Tr. 14:244-245 (Wright).

On August 26, 2008, CPS billed Nicholson & Hall $1,821,162 for productivity impacts. Ex. 75C, Tab 85. CPS applied recognized industry factors of labor inefficiencies resulting from conditions such as excessive overtime, trade stacking, reassignment of manpower, and logistics against man-hours incurred to arrive at the claimed amount. Tr. 3:223-224 (Flynn).

Fredlund, Dominion's expert, analyzed Dominion's potential exposure to claims based on work performed and costs incurred after March 27, 2008 (the end-date per the Global Settlement). He noted that such claims could be based on non-base contract work performed on extended general conditions and on inefficiencies resulting from continuous overtime. Ex. 230 (Fredlund), pp. 18-33; Tr. 13:164-174 (Fredlund).

In so doing, Fredlund cited data that overtime efficiency estimates (which were incorporated into the PPOT rates) came out very close to actuals. Ex 230 (Fredlund), p. 20. For that reason, he concluded that no productivity adjustment because of overtime called for. Fredlund further noted, however, that there were inefficiencies/impact on productivity in connection with the change orders issued to deal with fabrication and design defects. He was of the opinion, however, that CPS's record keeping was so poor that a claim cannot be substantiated. *Id.* at 21.[38]

CPS received $4,221,074.21 in payments from N&H for work performed on the Project. Ex. 79, #1-14.

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[38] Fredlund calculated potential exposures for these categories of charges without stating an opinion that any of them are in fact due. (He specifically declined to offer such an opinion on account of the limitations of his engagement as an expert. Tr. 13:167.) As to the disputed change orders item for the post-Global Settlement period, Fredlund "split the baby" 50/50 between Nicholson & Hall's and CPS's positions and concluded with a figure of $300,000. Tr. 13:168-170. As to CPS's extended general conditions claim, Fredlund did not use CPS's actual cost information, and instead applied a $1,000 per day figure based upon his consulting company's internal data and experience in the industry. Tr. 13:186-188. Finally, Fredlund assigned $60,000 for CPS's loss of efficiency due to extended overtime. Tr. 13:171. From Fredlund's report and testimony and other evidence at the trial, the Court concludes is that it is conventional in the construction industry for these *types* of costs to be charged and paid; in other words, that sophisticated owners and contractors would accept such costs as part of normal business practice, subject to agreements to the contrary in a particular project's contractual documents. The Court, however, did not find Fredlund's conclusions credible. They substantially understated the financial impact of the Project's extended conditions on CPS.

### *HOW CPS RECORDED ITS PROJECT COSTS*

At the time of its work on the Project at Brayton Point, CPS had other projects on which it was working. CPS tracked each project separately by assigning a job number. When a cost record was generated, e.g., a labor timesheet or invoice for materials, equipment, rentals or tools, CPS's bookkeeper assigned the cost to the detail job cost report for the particular project. Tr. 3:238-239 (Flynn); Tr. 5:64-65 (Gould).

CPS utilized the QuickBooks accounting software for its financials. Tr. 5:91-92 (Gould). Gould had been CPS's accountant for over 20 years and was competent to set up and over the implementation of the Quick Books financial and job cost-tracking program at CPS. Tr. 5:61 and 64-65 (Gould). The Court finds that Gould had the requisite professional training and experience to do so. The Court further finds that the QuickBooks software was suitable for the accurate and reliable recording of job costs according to particular projects.

CPS's direct costs incurred on the Project were $8,159,782.65. Ex. 80, p. 153. The Court accepts the opinion of Engelhart, CPS's expert that "the cost entries that were included in [CPS's cost accounting records] reflect the cost that CPS actually incurred for the transaction or resource." Ex. 151 (Engelhart), p. 76.

Certain costs incurred after November 1, 2007 (payroll taxes, worker's compensation costs, and liability insurance) were not contemporaneously allocated to the job cost report because Gould typically and routinely performed such allocation at the end of CPS's fiscal year (October 31). Tr. 5:62 and 78

(Gould). With such allocations having been made, CPS's total direct job costs from the Project were $8,935,043.16. Ex. 105.

CPS's job cost report, Ex. 80, does not include any amount for overhead and profit. Tr. 3:241 (Flynn).

The labor-related expenses, payroll, payroll taxes, worker's compensation, union expenses, incurred by CPS totaled $7,375,158.31, or 82% of CPS's costs. *Id.*

The defendants do not dispute that the labor hours as recorded were in fact incurred.

CPS bid the project assuming a 10% markup for overhead and a 15% markup for profit. Tr. 3:109 (Flynn). Ex. 151, p. 77. The Court finds both to have been reasonable.

The total amount of CPS's costs with the addition of 10% overhead and 15% profit, compounded, total $11,302,829.60. Ex. 105. Tr. 5:78-82 (Gould). Tr. 7:113 (Engelhart).

***CPS'S FINANCIAL CONDITION BEFORE AND AFTER THE PROJECT***

Nicholson & Hall's suspension of payments to CPS in May 2008 directly threatened CPS's solvency. Tr. 5:28-29 (Joyce); Tr. 6:153 (Rotunno).

Before the Subcontract was signed in the late spring of 2007, CPS was (and had been for years) a stable, profitable company. It was sufficiently capitalized to perform lump sum contracts the size of the Project. Tr. 5:84-89 (Gould). Ex. 106. From 2004 to 2007, CPS had annual revenues of approximately $10 million per year. Tr. 6:149-150 (Rotunno).

As of May 1, 2007, CPS had $876,210 in working capital available to fund the Project and CPS's other engagements. Ex. 106. Tr. 5:14-20 (Gould).

In the spring of 2008, CPS's other jobs were profitable. Ex 97, p. 1.

As noted earlier, due to the seasonal nature of CPS's business, CPS routinely accessed a flexible line of credit in the spring and fall. Tr. 3:97-98 (Flynn); Tr. 5:16 (Joyce).

In March 2007, CPS was provided a temporary extension of credit of $400,000. It was paid off by June of that year. Tr. 5:16 and 29 (Joyce).

Gould performed a review audit for CPS as of October 31, 2007, which was the end of CPS's fiscal year. Tr. 5:62 (Gould). At that time, CPS had a positive net worth and working capital available of $949,771. Ex. 98, p. 2 and Ex. 106.

In 2007, CPS was current on all loan obligations with S Bank. Tr. 5:15-16 (Joyce).

As noted earlier, in May 2008, CPS requested an increase in its working capital line of credit with S Bank. Ex. 99, p. 2. The purpose was to deal with the acute cash flow situation occasioned by the staffing demands of the extended Project period and by Nicholson & Hall's decision to suspend payments to CPS. CPS requested an additional $500,000 " . . . to allow [it] to continue to finance and finish the Brayton Point Power Facility project as well as finance [its] routine seasonal maintenance and repair." Ex. 99, p. 2.

After conducting its normal due diligence review, S Bank approved CPS's request for a $500,000 temporary increase of its line of credit on May 12, 2008.

Tr. 5:24-25 (Joyce). Ex. 99. The credit was extended on the expectation that CPS would be timely paid for its work on the Project. Ex. 104.

The Court finds that S Bank was a prudent lender, that it reasonably deemed CPS to be credit-worthy and that but for Nicholson & Hall's suspension of payments otherwise due CPS, CPS would have remained a solvent and financially secure concern.

Once, however, Nicholson & Hall suspended such payments, CPS was denied access to its accounts receivable as a source of working capital. Tr. 5:87 (Gould).

As of the end of CPS's 2009 fiscal year (October 31, 2008), CPS had a working capital deficiency of nearly $4 million. Ex. 106. S Bank refused to extend further credit. Tr. 5:28-29 (Joyce). For all practical purposes, CPS at that juncture was crippled as a going concern. Tr. 6:149-150 (Rotunno).

In 2009, CPS's billings were under $1 million. Tr. 6:152 (Rotunno). In 2010, it was less, and the largest job that CPS could perform was approximately $100,000 due to the lack of working capital and access to financing. *Id.* at 152-153.

Rotunno and his wife have invested their personal assets and retirement savings into CPS to keep it afloat. *Id.* at 153.

***N&H'S CLAIMS ARISING OUT OF THE LIEN WAIVERS***

Under the Subcontract, if partial waivers of lien are "required by the Owner," then N&H could condition the release of progress payments based upon CPS providing partial lien releases. Ex. 71, art. 2.B(1)(a).

Nicholson & Hall did not require that CPS execute lien waivers on its payment applications prior to January 2008. Tr. 6:175 (Rotunno); Tr. 7:209 (Giarve). On its own initiative, it began doing so then with all its subcontractors. *Id.* at 210-211 (Giarve). The Court finds that it was not requested or required to do so by Dominion.

Nicholson & Hall's lien waivers applied ". . . to the extent of said amount and the cumulative amount of all prior invoices." Ex. 118.

The lien waivers also contained language that CPS warranted that it had paid all of its subcontractors and suppliers for amounts owed prior to the period covered by the then-current payment application. By its terms, the lien waivers required CPS to pay its subcontractors and suppliers the cost of whose work or goods were incorporated in the current payment application "first" upon receipt of payment on the application by Nicholson & Hall. Ex. 118.

When Rotunno signed the lien waivers, he falsely represented that CPS was current with its subcontractors up to the date covered by the respective lien waivers. However, in doing so, he intended in fact to pay the sub-contractors and suppliers with whom CPS was delinquent with the proceeds of the payment applications submitted with the lien waivers once the more immediate need to fund current payroll was met.[39]

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[39] The Court found Rotunno credible in the following exchange with his counsel:

> Q: Why did you sign the waivers?
>
> A: We were increasing in manpower at the Brayton Point in these time periods. And Dominion wasn't allowing us to lay anybody off. Their payrolls were becoming increasingly harder to fund. And frankly, we needed the money to pay the guys to keep going towards substantial completion. Dominion owed us several million dollars. And we thought it would eventually be worked out and these would become a non-issue.

## *SUPPLEMENTARY FINDINGS WITH REGARD TO EXTENDED CONDITION CLAIMS*

As noted earlier, in late January 2008, CPS had placed Nicholson & Hall and Dominion on notice that it was incurring substantial additional supervision and equipment costs beyond that which it was being compensated for by the Subcontract. CPS further informed them that it intended to submit to Nicholson & Hall and Dominion a claim to cover such extra costs once the impacts could be reliably determined. Exhs. 13, 22 and 29.

Flynn believed that "there was no way to quantify where [CPS was] losing time" because of the design issues, problems with the piping systems, problems with engineering, growing crew size requirements, and lack of RFI responses. Tr. 3:158 (Flynn) ("[So]me RFIs were sent in, and it took days, weeks and months to get responses back from Dominion.").

CPS was willing to carry temporarily the burden of the extra costs because it "had a very good relationship with Dominion, and [CPS] felt we needed to do to get this project done." Tr. 3:159-160 (Flynn). Consistent with its notices and expectation of payment, CPS planned to submit the supplementary claims when they could be determined:

> Once we could sit back and calculate out what actually took place would be at the end of the project. Once the impacts were over with, the changes were over with, then we could try to figure out where we stood. It actually got worse in January, February and March.

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Q: When did you intend to pay the bills of the vendors on this project?

A: Immediately, as soon as we got paid.

Tr. 6:181.

Tr. 3:160 (Flynn).

The burden of carrying the impact costs grew. CPS invoices during January 2008 and February 2008 were substantial:

| TE # | Inv. Date | Inv. # | Base | CO/Extra | Retainage | Net Due | Total |
|---|---|---|---|---|---|---|---|
| 75.A.26 | 1/31/08 | 4162 | 362,302.33 | 160,527.84 | 36,230.23 | 486,599.94 | 522,830.17 |
| 75.B.28 | 2/29/09 | 4193 | 784,708.85 | 201,523.22 | 78,470.89 | 907,761.18 | 986,232.07 |
| | | | 1,147,011.18 | 362,051.06 | 114,701.12 | 1,394,361.12 | 1,509,062.24 |

CPS was paying $600,000 per month in payroll obligations. Tr. 6:167-168 (Rotunno).

In keeping with his experience and with industry practice, Flynn reasonably believed that CPS would be compensated by Nicholson & Hall and Dominion for the impact of extended conditions and the unforeseen burdens arising primarily from Siemens defective products and delays.

Because CPS's invoices did not cover its costs, CPS drew on receivables from other jobs to complete its work at Brayton Point. Tr. 6:168 (Rotunno).

Regarding its payables, Rotunno explained:

> Q: Did you defer payment on some of your payables?
>
> A: Yes. I mean, we basically had to look and prioritize the payable list on what was necessary to pay, so we could use the funds that -- we were in a critical situation. It was a business decision to get this project completed, all along thinking that the issues we were having were going to be resolved somewhat readily. We weren't looking at this long, drawn-out solutions to get these problems resolved.
>
> Q: What led you to believe the issues were going to be worked out?
>
> A: Well, Dominion had stated a few times to my project manager, 'Just keep working. We're going to take care of the bills. We're going to get you paid.' That was stated at least two or three times to me from my project manager.

Tr. 6:168-169 (Rotunno).

As noted earlier, Nicholson & Hall knew that it had an ongoing duty to address in good faith an extended conditions claim presented by CPS that was based on impacts that could not have been reasonably foreseen.

***SEPTEMBER 2010: CLOSE-OUT OF THE DOMINION/NICHOLSON & HALL CONTRACT***

In late September 2010, Dominion and N&H negotiated a contract closeout. Tr. 2:140-142 (Wright).

As part of the contract close out, Dominion:

- Paid $1,732,472.50 to the electrical subcontractor, State Electric by joint check.
- Paid $4,181,827.50 to Nicholson & Hall.
- Held back $450,000 for attorney's fees for this action,
- Provided Nicholson & Hall with a guaranty of payment in exchange Nicholson & Hall's release of its mechanic's lien, and
- Required Nicholson & Hall to record a bond to dissolve CPS's mechanics lien on the Brayton Point property.

Ex. 56, p. 2.

Pursuant to the close-out, Dominion paid Nicholson & Hall $3.7 million for out of scope work performed by CPS. Tr. 14:109 (O'Toole).

N&H has had possession and use of approximately $2.2 million in cash ($6.9M [$3.2M (Base) + $3.7 (Extras)] - $3.7M = $2.2.M) for work performed by CPS that it has not paid to CPS.

Dominion did not release any monies, by joint check or otherwise, to CPS in connection with the September 2010 contract close-out with Nicholson & Hall.

In closing out the Project, Dominion and Nicholson & Hall decided to "split the baby" as to disputed items and waived reliance on a strict application of otherwise applicable contract provisions as to documentation, etc. Tr. 14:130-131 (O'Toole); Tr. 5:114-116 (Housel); Tr. 13:170 (Fredlund).

## RULINGS OF LAW

### *CPS'S CLAIMS AGAINST DOMINION*

CPS's claims that Dominion was complicit with Nicholson & Hall in misrepresenting the state of the Project in April-May 2007 and in its condoning Nicholson & Hall's signing away of CPS's right to be compensated for the impact of inefficiencies and extended conditions. CPS further alleges that Dominion caused it damage by preemptively assuming direction and control of the Project as of February 2008.

The claims are contained in four counts of the Third Amended Complaint: Count 6 ("Breach of Implied-In-Fact Contract, Implied-In-Law Contract and/or Quasi-Contract"), Count 7 ("Unjust Enrichment"), Count 8 ("Negligent Misrepresentation") and Count 9 as co-defendant with Nicholson & Hall ("Violation of G.L. Chapter 93A"). The Court considers them in turn.

#### *Contract and Related Equitable Claims: Counts 6 and 7*

The essence of a contract, whether express or implied, is a promise or set of promises, between two or more parties to do or not do a certain thing. In order for there to be a contract, the parties must by their words or by their conduct express their mutual agreement to exchange promises. Restatement (Second) of Contracts § 1 (1981). "[O]rdinarily a written contract, before breach, may be

varied by a subsequent oral agreement made on sufficient consideration. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other term of the contract, or may discharge it altogether." *Costonis v. Medford Housing Auth.,* 343 Mass. 108, 113 (1961).

CPS has an insurmountable problem at the threshold with regard to its contract based claims: "In the absence of a lien perfected under G. L. c. 254, an owner who enters into a general contract for improvements on real property is not ordinarily liable to subcontractors whose sole contractual arrangements are with the general contractor." *Brick Constr. Corp v. CEI Dev. Corp.*, 46 Mass. App. Ct. 837, 840 (1999); *Evans v. Multicon Constr. Corp.*, 30 Mass. App. Ct. 728, 740 (1991).[40]

The phrase, "not ordinarily liable", as used in *Evans* and *Brick, supra,* has not been further defined other than by the *Evans* court's illustrative hypothetical which posited a situation where "the owner agreed to pay to subcontractors all claims in connection with the owner's job against the contractor which were reduced to judgment." *Evans,* 30 Mass. App. at 740.

In a well-reasoned decision, the District Court Appellate Division, however, addressed a subcontractor's quasi-contract and quantum meruit claims against an owner. The court aptly rejected an expansive reading of the qualifying phrase in the *Evans* court's opinion in the following terms:

> Allowing a subcontractor to recover damages in a quasi-contract action against a property owner with whom that subcontractor was not in contractual privity would in essence eliminate the reason the long-

[40] CPS perfected a statutory mechanics lien on the Brayton Point property, and Count 10 of its complaint seeks enforcement of the mechanics lien bond issued by the defendant Hanover in the penal sum of $5,389,500.33.

> lived mechanic's-lien statute exists, and would render its strictly construed provisions superfluous in their entirety. The statute exists to provide security to subcontractors and others for the value of their goods and services provided to improve the owner's real property, and it affords the protections it does likely because of the long-standing bar preventing a subcontractor's recovery against a landowner when the general contractor fails to pay the subcontractor.

*Rosano-Davis Inc. v. Sastre*, 2004 Mass. App. Div. 55 (2004) (citing, *inter alia*, *Tremont Tower Condo., LLC v. George B. H. Macomber Co.*, 436 Mass. 677, 679 (2002).

The thrust of CPS's claims in Counts 6 ("Breach of Implied-In-Fact Contract, Implied-In-Law Contract and/or Quasi-Contract") and Count 7 ("Unjust Enrichment") are essentially similar. In substantial part, they sound in equity. Equitable remedies are available only in the absence of an adequate remedy at law. *Santagate v. Tower,* 64 Mass.App.Ct. 324, 329 (2005).[41] Here, CPS has an adequate remedy via the mechanics lien statute, G.L. c. 254, and pursuant to G.L. c. 93A.

To the extent that CPS's contract claims rest on the proposition that through its words and actions Dominion affirmatively agreed ("promised") that CPS would be compensated accordingly with the damage specifications in the amended complaint, the Court finds no factual basis for such a claim.

The Court rules for Dominion on Counts 6 and 7 of the Third Amended Complaint.

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[41] Unjust enrichment requires proof of (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge on the part of the defendant of the benefit; and (3) acceptance or retention of the benefit by the defendant under circumstances that would make acceptance or retention inequitable. See, e.g., *Foster v. Hurley*, 61 Mass.App.Ct. 414, 420-422, 810 N.E.2d 1266 (2004).

***Negligent Misrepresentation: Count 8***

In a commercial context where there is no privity between the parties, "[i]n order to recover for negligent misrepresentation, a plaintiff must prove that the defendant (1) in the course of his business, (2) supplied false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance on the information, and that he (6) failed to exercise reasonable care or competence in obtaining or communicating the information." *Gossels v. Fleet National Bank*, 453 Mass. 366, 371-372 (2009). See also *Nycal Corp. v. KPMG Peat Marwick LLP,* 426 Mass. 491, 495-496, (1998), quoting Restatement (Second) of Torts § 552 (1977).

CPS failed to prove that Dominion provided false information to it. The misinformation of which CPS complains is primarily that contained in the bid documents and statements made to it on site before the Subcontract was signed. The latter allegedly failed to disclose the material delays the Project was experiencing and the measures that Dominion and Nicholson & Hall were undertaking at the time to recover the schedule through the Gas Tight Recovery Plan.

As noted earlier, CPS was a *subcontractor* and had no direct contractual relationship with Dominion. The contract documents were explicit that it was to Nicholson & Hall to which CPS was reporting. Further, while Dominion was not immune from consequences for false statements to CPS, there were no material false statements by *Dominion* on which CPS justifiably relied which could not have been remedied with the exercise of reasonable diligence.

That the Project was substantially behind schedule as of April-May 2007 could not reasonably have been a surprise to CPS in light of the visible evidence of the same on the Project site when CPS inspected it prior to executing the Subcontract.

The Court rules for Dominion on Count 8.

***General Laws Chapter 93A: Count 9***

In evaluating whether a practice is unfair in a G.L. c. 93A, §11 claim, a court assesses "(1) whether the practice...is at least within the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; [and] (3) whether [the conduct] caused substantial injury...." *PMP Associates, Inc.* v. *Globe Newspaper Co.*, 366 Mass. 593, 596 (1975).

In deciding whether a certain practice is "unfair" under G.L. 93A, "the nature of [the] challenged conduct and the purpose and effect of that conduct [are] the crucial factors...." *Massachusetts Employers Insurance Exchange* v. *Propac-Mass., Inc.*, 420 Mass. 39, 42-43 (1995). "While it is correct that a breach of contract alone does not amount to an unfair act or practice under G.L. c. 93A, § 2, conduct undertaken as leverage to destroy the rights of another party...has a coercive quality that, with the other facts, warranted a finding of unfair acts or practices." *Propac-Mass., supra* at 43.

"[C]onduct in disregard 'of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice for

c. 93A purposes." *Anthony's Pier Four, Inc.*, v. *HBC Associates, et al*, 411 Mass. 451, 474 (1991).

> Legality of underlying conduct is not necessarily a defense to a claim under c. 93A. Chapter 93A does not define what constitutes an "unfair or deceptive act or practice." Such a definition would be impossible, because, as the Appeals Court aptly noted, "[t]here is no limit to human inventiveness in this field." *Levings v. Forbes & Wallace, Inc.*, 8 Mass.App.Ct. 498, 503 (1979). Although G.L. c. 93A, § 2 (b), states that courts are to be guided by the Federal Trade Commission and Federal court interpretations of the Federal Trade Commission Act, unfair or deceptive conduct is best discerned "from the circumstances of each case." "[I]t is not the definition of an unfair act which controls but the context--the circumstances to which that single definition is applied". Cf. *Anthony's Pier Four, Inc. v. HBC Assocs.*, [*supra,* at] 476 (use of discretionary contract right to "forc[e] financial concessions" was unfair or deceptive act violating c. 93A).

*Kattar v. Demoulas*, 433 Mass. 1, 13-14 (2000) (some internal citations and punctuation omitted).

The multiple damages provision of c. 93A is reserved for particularly egregious conduct. "[The statute] 'ties liability for multiple damages to the degree of the defendant's culpability by creating two classes of defendants.' Those defendants who have committed 'relatively innocent violations' of the statute are not liable for multiple damages, while a second class of defendants who have committed 'willful or knowing' violations are." *DataComm Interface* v. *ComputerWorld, Inc., et al*, 396 Mass. 760, 779 (1986).

A "willful or knowing" violation is one where either the defendant affirmatively knew that a material representation was false or that the defendant made the representation with reckless disregard of its truth or falsity. See *Shaw* v. *Rodman Ford Truck Center, Inc.*, 19 Mass. App. Ct. 709, 711-12 (1985). See also *Anthony's Pier Four, supra,* 411 Mass. at 475.

The discussion above at to CPS's contractual, equitable and negligent misrepresentation claims against Dominion largely disposes of the 93A-based claims, as well. However, in the 93A context, additional comment is required with regard to the conduct of Dominion's project supervisor, Thomas Penna, in substantially taking over the on-site direction of the Project and with regard to the conduct of Brian Wright in closing the Global Settlement with Nicholson & Hall on terms that he knew did not include an allocation of funds for a CPS efficiency and extended conditions claim.

Penna's proactive supervision of the Project job site and his strictly "by the book" policy with regard to RFIs and change orders was a departure from his predecessor's conduct. Nevertheless, as noted in its findings of fact, the Court views both as within the boundaries of reasonable construction industry practice. Stated differently, Penna's actions were neither unfair, immoral, unethical, oppressive nor unscrupulous, and they did not violate any contractual or other legal duty incumbent upon Dominion.

A closer question is presented by Dominion's conduct with regard to the Global Settlement. For reasons stated in the Court's findings of fact, both Nicholson & Hall and Dominion were on notice that CPS would, in all likelihood, submit a substantial efficiency and extended conditions claim before the end of the Project. However, as Nicholson & Hall's subcontractor, it would be Nicholson & Hall to whom such a claim would be presented.

In the negotiations leading up to the Global Settlement, Dominion made a business judgment as to a set figure of additional money it was willing to pay its

general contractor to bring the troubled Project to conclusion. Nicholson & Hall was on explicit notice from Dominion that Nicholson & Hall would be on its own as to any subsequent subcontractor extended condition claims, other than the one from the subcontractor, Atlantic.

While Dominion's posture vis-à-vis Nicholson & Hall could be reasonably characterized as "hardball", both companies were veteran players in the power and construction industries. Each was capable of rationally calculating their risks. Nicholson & Hall knowingly assumed the risks posed by its acceptance of Dominion's final offer. And no cognizable 93A duty to CPS was violated by Dominion's actions that exposed Nicholson & Hall to have to address future subcontractor extended conditions claims without recourse to further compensation by Dominion.[42]

The Court rules for Dominion on Count 9.

***CPS'S CLAIMS AGAINST NICHOLSON & HALL***

Six causes of action are alleged against Nicholson & Hall: Count 1 ("Misrepresentation and Rescission"), Count 2 ("Contract Repudiation/Material Breach"), Count 3 ("Breach of Implied-In-Fact Contract, Implied-In-Law Contract, and/or Quasi-Contract"), Count 4 ("Breach of Contract"), Count 5 ("Breach of Contract...Abandonment/Cardinal Change") and Count 9 as co-defendant with Dominion ("Violation of G.L. Chapter 93A").

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[42] Although the SJC has expressed its reservations with regard to the Appeals Court's classic formulation in *Levings* v. *Forbes & Wallace, Inc., supra,* 8 Mass. App. Ct. at 504, as to the substance of a Section 11 93A violation, *Propac-Mass., supra,* 420 Mass. at 42, there is continuing resonance to the *Levings* phraseology, namely, that a 93A violation embodies a "level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Dominion's conduct with CPS does not reasonably raise such an eyebrow.

***Misrepresentation: Intentional and Negligent—Count 1***

To recover for an intentional misrepresentation, CPS must show that Nicholson & Hall (1) made a false statement of material fact; (2) with knowledge of its falsity or with disregard for its truth; (3) to induce action, and (4) that CPS reasonably relied on the misrepresentation to its detriment. See *Danca v. Taunton Savings Bank,* 385 Mass. 1, 8 (1982). Where there has been a partial disclosure, a party has an affirmative duty to disclose additional facts if the failure to do so would render the partially disclosed facts materially misleading. *Kannavos v. Annino*, 356 Mass. 42, 48 (1969).

"The plaintiff's reliance on the defendant's false statement must be reasonable and justifiable under the circumstances. Restatement (Second) of Torts § 537 (1977) ('The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, [a] he relies on the misrepresentation in acting or refraining from action, and [b] his reliance is justifiable'). The person claiming justifiable reliance is 'required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he utilized his opportunity to make a cursory examination or investigation.' Restatement (Second) of Torts, supra at § 541 comment a." *Collins v. Huculak*, 57 Mass.App.Ct. 387, 391-392 (2003) (case citations omitted).

CPS did not meet its burden to prove that Nicholson & Hall either intentionally or negligently misled it by failing to disclose during the bid process the erosion in the Project Schedule and the evidence of Siemens' design and

fabrication failures. Both were conditions potentially material to the subcontract. However, from Flynn's and Rotunno's visits to the job site, it should have been obvious to CPS that the Project was significantly behind schedule. As such, they could have made further inquiries. The Court infers that, at least Flynn did, and the Court further infers that Flynn was comfortable that there was adequate work to be done in the near-term and that the December schedule could be recovered.

While Siemens problems had become manifest in other aspects of the Project, as of April-May 2007, they had not as to the piping component.[43] Furthermore, Nicholson & Hall was not negligent in failing to disclose because of the Court's affirmative finding of fact, noted above, that it was Cole's intention for Nicholson & Hall to address in good faith the changed conditions of the schedule and related Siemens issues through the change order process.

The Court rules for Nicholson & Hall on Count 1.

***Contract Claims: Counts 2-5***

CPS submits that due to misrepresentations and, independently, due to the fundamentally different conditions that it eventually faced on the ground that a "cardinal change" to the contract had occurred. Such a cardinal change, CPS argues, allowed rescission of the Subcontract and the substitution of a contract implied in law. The terms of the implied contract, CPS submits, are those inferred from the conduct of the parties, namely, that it is entitled to the reasonable value of its services based on the "total cost" of such services.

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[43] Because of the Court's conclusion as to the timing of Nicholson & Hall's knowledge as to piping design and fabrication issues, it is unnecessary to address the *Spearin-Alpert* issues raised in CPS's post-trial brief. See *U.S. v. Spearin*, 248 U.S. 132 (1918) and *Alpert v. Commonwealth*, 357 Mass. 306 320 (1970) (party supplying plans to construction contractor impliedly warrants the plans sufficiency for their intended use).

The Court will address the total cost measure of damages issue later.

The Court was unable to find a Massachusetts case that referred directly to the cardinal change doctrine. However, it is referred to by commentators on Massachusetts law, and the concept embodies familiar contract principles.

A cardinal change is a change outside the general scope of the contract which constitutes such a substantial deviation that it alters the nature of the bargain and constitutes a material breach. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law § 4:13, at 526 (2002). See also Joel Lewin & Charles Schaub, Construction Law § 6:5, at 377 (2009-2010 ed.) (cardinal change occurs when change goes so far beyond scope of contract in terms of quantities, costs, duration, or type of work as to constitute a materially different undertaking); *In re Boston Shipyard Corp.*, 886 F.2d 451, 456 (1st Cir. 1989) (cardinal change is drastic and fundamental modification in the work which requires contractor to perform duties materially different from those originally bargained for).

Although a cardinal change generally represents a large increase in one party's contract burdens, there is no precise formula for determining whether a change is within the scope of the contract or a cardinal change. *General Dynamics Corp. v. United States*, 585 F.2d 457, 462 (U.S. Ct. Cl. 1978). Each case must be analyzed on its own facts and circumstances, giving fair consideration to the magnitude and quality of the changes ordered and their cumulative effect on the project as a whole. *Id.* Cf. *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190, 206 (1945) (noting that ordered changes are

within scope of contract if when viewed against background of work described in specifications as a whole, they are directed to furthering the original design and are not destructive of that design or disproportionate in size or amount). Relevant considerations include the individual and cumulative impact of the changes; the degree of added complexity and difficulty of the work; the disruption caused to the contractor's performance; the overall impact upon the contract cost and time of performance; and the effect of the change on compensation or risk allocation. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law § 4:15, at 531-532 (2002).

Numerous changes, none of which individually may be deemed cardinal, may create a cardinal change when considered as a whole:

> [W]hen a project has required many clarifications, Requests for Information (RFIs) and change orders, it may give rise to a claim by the contractor for a cardinal change due to the cumulative impact of the many RFIs, clarifications and change orders. While each change, standing alone, may be within the allowable limits of the contract's change provisions, the sheer volume of the changes and disruptions can give rise to a claim for a cardinal change due to the cumulative impact of the totality of the changes. Determining when cumulative changes constitute a cardinal change is a factual question and must be viewed in relation to the size and complexity of the project.

Joel Lewin & Charles Schaub, Construction Law § 6:5, at 379 (2009-2010 ed.).

Here, CPS argues that the cumulative impact of the many changes (the increased work crews, overtime and other consequences of the extended schedule and the chronic Siemens design issues) for which Nicholson & Hall was responsible constituted a cardinal change, amounting to a material breach of the Subcontract.

Applying the above principles, the Court concludes that CPS did not

confront such a drastic and fundamental modification of the work as to comprise a cardinal change. The single largest addition to CPS's scope of work was its voluntary assumption of the Fly Ash project. (The value of the change order was approximately $1 million.) The succession of Siemens-caused "busts", the enlarged work crews, the insistence on substantial overtime as a means to recover schedule and the winter conditions together presented a markedly different contract environment from what CPS had reasonably anticipated. However, the essence of the work required by the Subcontract remained the same. Further, the change order procedure of the Subcontract provided a structure for the orderly accommodation of the altered conditions without undue disruption.[44]

***Oral Modification of Contractual Provisions as to the Change Order Process***

Notwithstanding CPS's failure to prove that a cardinal change had relieved it of its obligations under the Subcontract, certain of the terms of the Subcontract were orally modified in a manner that entitles CPS to relief.

As noted in the findings of fact, Dominion, Nicholson & Hall and CPS frequently departed from the formal RFI/change order process a provided for in the Subcontract. In so doing, they were mutually making practical adjustments in good faith in response to the changed conditions that the parties faced in the field. By their conduct they modified the contract. Accordingly, CPS's non-compliance with Articles 10, 24 and 25 of the Subcontract is not—for that reason—a bar to recovery.

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[44] The evidence, as well, is insufficient to prove that Nicholson & Hall repudiated or abandoned the Subcontract.

In general, parties to a contract may waive compliance with a provision in a written construction contract requiring a written order form for additional work, and may orally agree for work to be performed outside the written contract. *J.P. Smith Co. Inc. v. Wexler Constr. Co., Inc.*, 353 Mass. 551, 555 (1968) (finding waiver of unspecified provisions for "prior notice and written order"); *M.L. Shalloo, Inc. v. Ricciardi & Sons Constr., Inc.*, 348 Mass. 682, 684-685 (1965) (finding waiver of provision that "No extra work . . . under this contact will be recognized or paid for, unless agreed to in writing before the work is done."); *Zarthar v. Saliba*, 282 Mass. 558, 560 (1933) (finding waiver of provision that "no charge for extra work will be honored and paid unless owner shall order same by a writing directed to the contractor stating the nature of the work to be performed and the sum to be paid therefor."). See also *General Elec. Co. v. Brady Elec. Co. Inc.*, 2 Mass. App. Ct. 522, 528 (1974) (noting that formalities of written authorization for change order may be waived); James J. Myers, Massachusetts Construction Law §3-4[e], at 3-12 (2004) (noting that because formal change order procedures are for owner or general contractor's benefit, owner or general contractor "must comply with the requirements or risk liability for oral changes."); Joel Lewin & Charles Schaub, Construction Law §7.15, at 481 (2009-2010 ed.) (noting that oral agreements to proceed with extra work, despite contract provisions requiring changes to be in writing, may be enforced based upon conduct of the parties).

The Subcontract states that written notice requirements may not be waived and that no term or provision of the Subcontract may be waived by the Contractor except in writing. Under general Massachusetts contract law, the

parties to a written contract may modify it by a subsequent oral agreement, even when the contract requires any modification to be in writing. See *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 439 (1992); *First Pennsylvania Mortgage Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625 (1985). Similarly, a contract clause requiring a waiver of any provision to be in writing may be modified orally. *Clifford Shoe Co. v. United Shoe Mach. Corp.*, 297 Mass. 94, 106 (1937).

These principles apply in the construction context, as well. As noted by a leading construction law treatise:

> In an effort to shore up the effectiveness of the "written order" requirement, contracts routinely include an "anti-waiver" clause that purportedly invalidates a waiver of any contract provision, unless expressly in writing. The mistaken assumption is that an express "anti-waiver" clause can legally negate the doctrine of implied waiver. Such "anti-waiver" clauses are of little effect because of the overriding principle that any contract clause may be modified or waived expressly or impliedly by persons with requisite contracting authority.

Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law § 4:40, at 592 (2002).

The Court rules that Nicholson & Hall and CPS orally modified the Subcontract to eliminate the requirement that any waiver be in writing and/or to eliminate the written change order requirement. Accordingly, CPS is due reasonable compensation for work completed pursuant to oral authorizations.

Furthermore, the Court rules that CPS (through Flynn) reasonably understood on the basis of industry practice, prior experience with Dominion and statements by Cole that Nicholson & Hall impliedly agreed to present and pay an extended conditions and efficiency claim at such time as CPS was reasonably able to assemble the documentation for such a claim. It was not practicable to

assemble such a claim until April 2008, and the claim was not waived by the Rotunno's execution of the lien waivers.

Nicholson & Hall knew that it was obligated to address in good faith a claim based on extended conditions that were not reasonably foreseen by CPS when CPS executed the Subcontract.

Nicholson & Hall breached the implied terms of the Subcontract by failing to pay CPS for work performed and reasonable expenses incurred pursuant to orally authorized change orders and payment applications for efficiency and other impacts from reasonably unforeseen extended conditions.

***Covenant of Good Faith and Fair Dealing***

Nicholson & Hall materially breached the Subcontract by violating the implied covenant of good faith and fair dealing.

"Every contract is subject to an implied covenant of good faith and fair dealing. The purpose of the covenant 'is to guarantee that the parties remain faithful to the intended and agreed expectations' of the contract, and to ensure that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' The covenant 'may not . . . be invoked to create rights and duties not otherwise provided for in the existing contractual relationship.' 'The scope of the covenant is only as broad as the contract that governs the particular relationship.'" *Liss v Studeny*, 450 Mass. 473, 477 (2008) (citations omitted).

Nicholson & Hall breached the covenant in two instances. First, it did so by entering into the Global Settlement, which by its terms excluded from

Dominion's consideration CPS's expected efficiency and extended conditions claims. Second (and decisively), Nicholson & Hall breached the covenant by its suspension and thereafter withholding (to the present) of payments due CPS for work performed from March through September 2008. The Court will not repeat here its detailed findings of fact as to both instances. Nicholson & Hall's conduct had the effect of "destroy[ing] CPS's "right to receive the fruits of the subcontact." *Id.*[45]

The Court rules for CPS on Counts 3 and 4. The Court rules for Nicholson & Hall on Counts 2 and 5.

***General Laws Chapter 93A: Count 9***

Nicholson & Hall's actions to suspend and thereafter withhold payments due CPS were unfair and deceptive acts in violation of G.L. c. 93A, § 11. However, the Court further concludes that such conduct was not knowing and willful so as to entitle CPS to multiple damages.

Again, the Court will not repeat its detailed findings of fact. However, the features that converted what would otherwise have been a mere breach of

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[45] Although the Court prefers to rest its decision as to CPS's contract claims on the above construct, the Court notes that even if it were determined that CPS was not entitled to recover on the contract, it would be entitled to substantially the same scope of relief under the principles of *quantum meruit*. Quantum meruit requires proof (1) that the plaintiff conferred a measurable benefit upon the defendant; (2) that the benefit was accepted with an expectation that the plaintiff would be compensated; and (3) that the plaintiff provided the benefit with the reasonable expectation of being compensated. See *Green v. Richmond*, 369 Mass. 47, 48-50 (1975). "The law in this Commonwealth is clear that one who in good faith substantially performs a contract may recover in quantum meruit." *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 796 (1986). "The amount of recovery on a claim based in quantum meruit is the fair and reasonable value of material and labor supplied to the benefiting party." *Id.* at 797. See also *PDM Mechanical Contractors, Inc.* v. *Suffolk Construction Co.*, 35 Mass. App. Ct. 228, 231 (1993). CPS substantially performed under the Subcontract. Notwithstanding its non-material breach, with CPS having proceeded in good faith with the expectation of being compensated and with Nicholson & Hall having been conferred a measurable benefit, CPS is due the fair and reasonable value of its services on the grounds of *quantum meruit*.

contract into a 93A violation were the elements of coercion and unscrupulous leverage that Nicholson & Hall employed to destroy CPS's entitlement to fair compensation for its work. Nicholson & Hall, as an experienced construction contractor, was well aware of how financially exposed CPS was at the time it suspended payments to CPS.

The merits of Nicholson & Hall's counterclaim, based in substantial part on CPS's acknowledged false lien waivers, will be addressed more fully later, but at this juncture it is sufficient to say that shortly after Nicholson & Hall discovered the false waivers, it was on notice that, despite CPS's arrears, CPS had a credible capacity to address them if CPS were to receive payment on its requisitions. Nicholson & Hall acknowledged owing CPS for the remainder of what it had billed for the completion of the Subcontract's base scope of work and for approved change order extras.

Further, through the joint check procedure provided for in the Subcontract, Nicholson & Hall had the ready ability to dispose of any risk that CPS would divert the proceeds of such payments for non-Project purposes.

Any violation of the Subcontract or misrepresentation occasioned by the false lien waivers were not material to the contract and did not excuse Nicholson & Hall from its duty to pay timely CPS for the fair value of its requisitions. By indefinitely withholding payments to CPS in May-September 2008, Nicholson & Hall virtually destroyed CPS as a viable enterprise.[46]

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[46] The adverb, "virtually", is used advisedly. As the record reflects, for reasons that are a testament to the diligence of CPS's principals, the patient forbearance of its principal lender and the decision of the U.S. Bankruptcy Court to stay a ruling on an involuntary bankruptcy petition pending the outcome of this case, CPS has remained solvent, albeit marginally.

The circumstance that Nicholson & Hall's principals were acting pursuant to advice of counsel does not excuse its primary 93A violation. However, in the Court's judgment, the fact that Nicholson & Hall relied on counsel in responding to CPS bars its culpability from being held to have been "willful or knowing". As a result, Nicholson & Hall is not subject to multiple damages. *DataComm Interface* v. *ComputerWorld, Inc., et al, supra*, 396 Mass. at 779.

***Enforcement of Mechanic's Lien Bond Against Hanover: Count 10***

The Court finds for CPS against Hanover because CPS is owed for labor, materials and services that were provided in connection with the erection, alteration and repair of structures or other improvements at Brayton Point, all as covered in the mechanics lien statute, G.L. c. 254.

***NICHOLSON & HALL'S CLAIMS AGAINST CPS***

Nicholson & Hall seeks relief against CPS on the following causes of action:

Count I (Chapter 93A)

Count II (Breach of Contract)

Count III (Breach of Express Covenants and Warranties)

Count IV (Fraud, Misrepresentation and False Pretenses)

Count V (Breach of Implied Covenant of Good Faith and Fair Dealing)

Count VI (Indemnity)

Count VII (Discharge of Subcontractor Lien)

The substance of Nicholson & Hall's claims rest on the assertion that CPS incompetently performed the piping subcontract, especially with regard to the

FRP installation, and then, and most acutely, breached the contract, intentionally misrepresented material facts and violated its duty to refrain from unfair and deceptive practices by Rotunno's false certification of the lien waivers.

***Contract and Fraud Based Claims: Counts II, III, IV and V***

As recorded in the Court's findings of fact, CPS's piping installation did not fall below industry standards. Thus, the Court rules that Nicholson & Hall failed to meet its burden of proof as to that theory of its claim for breach of contract.

The false lien waiver based claims, however, require more detailed treatment.

The falsity of the waivers is not disputed, and Rotunno acknowledged that they were executed intentionally, with the expectation that Nicholson & Hall would reasonably rely upon them. Nicholson & Hall did so to its detriment. Thus, the elements essential to the misrepresentation cause of action were established. *Kannavos v. Annino*, *supra,* 356 Mass. at 48 and *Collins v. Huculak*, *supra*, 57 Mass.App.Ct. at 391-392.

The Court concludes, however, that while Rotunno's execution of the false waivers breached the Subcontract, the breach was not material. Thus, Nicholson & Hall's relief is limited to the damages caused by the breach.[47]

A material breach occurs when there is a breach of an essential and

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[47] A material breach by one party excuses the other party from further performance under the contract and entitles him to recover contract damages with no set-off awarded to the breaching party for damages caused by the non-breaching party's failure to complete performance. *Center Garment Co., Inc. v. United Refrigerator Co.*, 369 Mass. 633, 638 (1976); *Lease-It, Inc. v. Massachusetts Port Auth.*, 33 Mass. App. Ct. at 397. In contrast, a party's non-material breach entitles the other party to bring an immediate action for damages, but does not relieve it of its obligations under the agreement, including liability for a subsequent breach. *Lease-It, Inc.*, 33 Mass. App. Ct. at 396.

inducing feature of the contract, i.e., an act that goes to the root of the agreement. *Petrangelo v. Pollard*, 356 Mass. 696, 701 (1970). A breach is material where it is so serious and so intimately connected with the substance of the contract as to justify the other party in refusing to perform further. *Bucholz v. Green Bros. Co.*, 272 Mass. 49, 52 (1930). See also Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law § 18:4, at 869 (2002) (the proper focus is whether breach materially impairs non-breaching party's interest in future contractual performance and mitigation of damages).

In the construction contract context, the nonpayment of a substantial sum of money owed under the contract has been held to constitute a material breach warranting termination of the contract. See *Petrangelo v. Pollard*, 356 Mass. at 701 (owner's failure to pay contractor monthly payments for work performed was material breach); *Drinkwater v. D. Guschov Co. Inc.*, 347 Mass. 136, 141 (1964) (contractor's nonpayment of $25,000 owed to subcontractor was material breach of subcontract where contractor had been paid by owner for the work). Cf. *Quintin Vespa Co. Inc. v. Construction Serv. Co.*, 343 Mass. 547, 554 (1962) (contractor's two week failure to put job site in condition for subcontractor's immediate and continuous work was material breach of subcontract).

The Court was unable to find authority for the proposition that a contractor's submission of false certifications or failure to timely pay subcontractors and suppliers is *per se* a material breach of contract. Indeed, whether a breach is material or immaterial is normally a question for the fact finder to decide based on the circumstances of each case. *Cetrone v. Paul Livoli,*

*Inc.*, 337 Mass. 607, 610 (1958); *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 609 (2010).

In determining materiality, the fact finder may consider the factors set forth in the Restatement: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the benefit of which he was deprived; (c) the extent to which the breaching party will suffer forfeiture; (d) the likelihood that the breaching party will cure his failure; and (e) the extent to which the breaching party's failure to perform comports with standards of good faith and fair dealing. *O'Connell Mgt. Co. v. Carlyle-XIII Managers*, 765 F. Supp. 779, 783 (D. Mass. 1991), citing Restatement (Second) of Contracts § 241 (1981). See also *DiBella v. Fiumara*, 63 Mass. App. Ct. 640, 646-647 n. 7, *rev. den.*, 444 Mass. 1107 (2005) (referencing detailed factors for determining materiality set forth in § 241).[48]

CPS's breach by falsely subscribing the lien waivers was not material because the conduct did not go to the essence of the Subcontract.

When Nicholson & Hall discovered the breach, the Project was within weeks of substantial completion. For reasons stated before, the Court finds that

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[48] One construction law commentator suggests the following guideposts: an unexcused breach is not material unless it reasonably compels a clear inference of unwillingness or inability of one party to substantially meet the other party's contractual expectations of future performance and need to mitigate damages; a breach is not material if the contract has been substantially performed; a breach is not material if it is redressable by compensatory damages and raises no justifiable insecurity as to future performance; a breach is not material if waived; and even if material, a breach may be excused for legally recognized reasons such as impracticability, fraud, and mistake. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law § 18:4, at 873 (2002).

CPS competently performed the Subcontract under challenging circumstances. Thus, Nicholson & Hall (and Dominion) had received the essential value of the Subcontract. Further, Nicholson & Hall *insisted* that CPS remain on site to complete what work remained on the contract (and to maintain extra crews on extended overtime). It is ironic that Nicholson & Hall, on the one hand, argues that CPS's breach was material and, on the other, that Nicholson & Hall continued to rely on the contract to leverage further work from CPS.

Further, it is significant that CPS timely offered to cure its breach. It did so through its proposal that Nicholson & Hall issue joint checks to CPS's creditors and through its demonstration that, in fact, it would remain a solvent going concern if it were only to be paid for its past and its reasonably anticipated future requisitions.

Finally, as recounted in the Court's findings of fact, the Court concludes that in the particular context in which the false certifications occurred, Rotunno's conduct did not violate standards of good faith and fair dealing. Any damage of substance that Nicholson & Hall sustained on account of the false lien waivers was self-inflicted.[49]

Subject to the above, the Court rules for Nicholson & Hall as to Counts II,

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[49] While the Court does not so rule, it notes the plausible argument that the false certifications did not comprise a breach at all. The argument would rest on the proposition that because Nicholson & Hall was not obligated by its general contract with Dominion to require its subcontractors to execute lien waivers until the "final" payment to the subcontractor and, further, because the Subcontract required CPS to execute only such waivers as required conjunctively by Nicholson & Hall and Dominion, Nicholson & Hall's insistence on the lien waivers was gratuitous and unsupported by consideration. See *Peerless Unit Ventilation Co. v. D'Amore Construction Co.*, 283 Mass. 121, 125 (1933). Nevertheless, construing the contract as a whole and considering the timing of the lien waivers being required, i.e., in the late period of the Project, the Court is satisfied that their honest execution was, at a minimum, an implied term of the Subcontract. Moreover, as noted above their execution comprised an actionable misrepresentation.

III and IV.

The Court rules for CPS on Count V.

***Indemnity: Count VI***

The Court rules for Nicholson & Hall on Counts VI, but only as it relates to the cost by Nicholson & Hall to discharge the Laborers Fund lien on the Brayton Point plant and the amounts paid to clear CPS's delinquencies to its subcontractors and suppliers.

***Discharge of Subcontractor Lien: Count VII***

The Court rules for CPS on Hanover's claim for discharge on account of the Court's central finding that Nicholson & Hall breached its contractual and statutory duty to CPS and that CPS is entitled to damages on the account of the work it performed at Brayton Point and the benefit of the enforcement of its mechanics lien rights pursuant to G.L. c. 254.

***Chapter 93A Claim: Count I***

CPS struggled with the conditions that it unexpectedly faced at Brayton Point, and the quality of its work was not always up to standard, but it substantially performed on the Subcontract. Its breach of the Subcontract by execution of the false lien waivers was not material. Neither was its misrepresentation aggravated. CPS's conduct cannot fairly be characterized as unfair and deceptive under the standards of G.L. c. 93A. Thus, the Court rules for CPS on Nicholson & Hall's Count 1.

***DOMINION'S THIRD PARTY CLAIMS AGAINST CPS***

Dominion filed contractual and common law indemnification claims against

CPS in connection with the Laborers Union Benefit Funds' (the "Funds'" or the "Laborers' Funds'") liens on Brayton Point arising from CPS's failure to have remained current with its contributions to the Funds.[50] CPS has acknowledged its failure to have done so and that its failure was a violation of ERISA. Dominion also has contract claims arising from the same incidents.

With Dominion's specific performance count having been mooted, its remaining claims are for indemnification and breach of contract.

The Court rules that CPS breached its contractual obligation to Dominion by failing to pay the Funds, by failing to remove the Funds' lien from the property and by failing to defend and indemnify Dominion in connection with the Funds' lawsuit against Dominion. In so ruling, the Court attaches significance to the fact that CPS's delinquency with the Funds began in May 2007, long before it became cash squeezed on account of the Project. Nevertheless, the Court finds and rules that Dominion failed to mitigate substantially its damages from CPS's breach.

A right to indemnification may arise (1) where there is an express contract for indemnification; (2) where a right to indemnification is implied from the contractual relationship between the parties; and (3) under the common law, where a party is exposed to liability because of the negligent act of another. *Rathburn v. Western Massachusetts Electric,* 395 Mass. 361, 363-65 (1985);

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[50] Dominion's third party claims stem from the mechanics lien action brought by the trustees of the Laborers Benefit Funds, styled, *Paul McNally, et al v. Dominion Energy Brayton Point, LLC*, BRCV2008-1198 ("*McNally*"). *McNally* was consolidated with the instant CPS, Nicholson & Hall and Dominion actions, and the undersigned justice was specially assigned to *McNally*, as well.

*Decker v. Black and Decker Manuf. Co.,* 389 Mass. 35, 37-41 (1983); *Araujo v. Woods Hole,* 693 F.2d 1, 2 (1st Cir. 1982)).

CPS breached its contractual obligations to Dominion by failing to pay the Funds, by failing to remove mechanics lien from the property, and by failing to defend and indemnify Dominion in connection with the Funds' lawsuit.

However, Dominion failed to mitigate its damages reasonably. "[A] plaintiff may not recover for damages that were avoidable by the use of reasonable precautions on his part." *Global Inv. Agent Corp. v. National Fire Ins. Co.*, 76 Mass. App. Ct. 812, 825 (2010), rev. denied, 457 Mass. 1108 (2010) (quoting *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 586, 441 N.E.2d 1027, 1034 (1982). A plaintiff in a contract action is "under an obligation to use all reasonable efforts to minimize and lessen [its] damages. [It] must use the care that a person or entity of ordinary prudence would have exercised in seeing that the amount of damages were minimized." *Global Inv.*, 76 Mass. App. Ct. at 825–26.

Dominion's settlement of the Funds' mechanics lien action for $225,000 was reasonable in view of the magnitude and complexity of the claims, as well as the likelihood of recovery by the Funds.

Dominion incurred legal fees in defending against the Funds' claims, including by successfully resisting the Funds' motion for summary judgment brought in 2009.

Nevertheless, the duration and cost of the litigation could have been significantly reduced if Dominion had exercised its rights and its practical

leverage to have payments otherwise due CPS released to address the Funds' lien.

The Court rules for Dominion on Counts I, II and IV of Dominion's third party claims.

## DAMAGES

### *CPS Damages*

On September 5, 2008, CPS filed in the Registry of Deeds its "statement of account" pursuant to the Mechanics Lien statute, G.L. c. 254, § 8. Ex. 77. The claim included items for lost productivity ($1,821,162.00), site supervision overhead for 2007 ($159,373.14) and extended general conditions. The net amount due after subtracting $4,453,135.91 for payments received was $5,389,500.33. Tr. 3:216-224 (Flynn).

At the trial, however, CPS submitted its damages calculation according to a "fair value" method by which it totaled its direct costs of $8,935,043.16 and then added a home office overhead charge of 10% ($893,504.31) and a charge for 15% profit ($1,474,282.13). So calculated, the total fair value of CPS's services was said to be $11,302,829.60. Exhs. 80 and 105. Tr. 5:78-82 (Gould). From that was subtracted payments received from Nicholson & Hall and payments made by Nicholson & Hall to CPS's creditors (sub-subcontractors and the Local 51 union) of $4,709,611.23. Ex. 79. The net fair value CPS alleges that it is due

is $6,593,218.37.[51]

CPS's rationale for employing the fair value methodology, as opposed to one based on discrete contract cost data, was explained by its expert, Engelhart: "[I]t's the only practicable way to arrive at the fair value of the work, given all the changed circumstances and the fundamentally different nature of the project." Tr: 7:76-77. See also Tr. 7:137-142 (Engelhart). The substance of the approach was addressed on cross-examination of Engelhart by Dominion's counsel:

> Q: Your bottom-line number is to take every cent that CPS spent and then to multiply that, adding 10 percent for overhead, right?
>
> A: Yes.
>
> Q: And then to multiply that resultant number, to compound it, add another 15 percent for profit, correct?
>
> A: That's my calculation of the fair value of the work.

Tr. 7:113 (Engelhart).

Engelhart took issue with the proposition that his fair value methodology was the same as what is referred to in the industry as a "total cost" damages methodology. Tr. 7:147-148 (Engelhart). However, the distinction was lost on the Court, and the Court concludes that the method employed by Engelhart was, in substance, a total cost approach as characterized by Dominion and Nicholson & Hall. In Engelhart's words: "[The fair value method is] akin to, had the project been conducted on a cost-plus basis because of the uncertainties on the project,

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[51] In a post-trial submission, received by the Court at final argument, CPS calculated its damages according to what it styled, "Billings Under the Contract". The calculation therein is in substance an amendment to the Statement of Account (Ex. 77). The total amount billed was revised to $9,823,136.96; payments to or on behalf of CPS was revised to $4,709,611.23 and the resulting net amount due was submitted to be $5,113,525.73.

that's what it's akin to." Tr. 7:147.[52]

The Court was unable to find a case in Massachusetts that addressed the use of the total cost methodology. However, it is discussed in construction law treatises, and there is pertinent case authority on it from other jurisdictions.

As a general matter, the total cost method is employed to calculate damages for contract breaches or authorized changes resulting in extra work, time impacts, and disruptions when it is impossible for the contractor to segregate its costs and calculate actual damages. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law §19:93, at 295 (2002). The total cost method awards a contractor the total cost incurred in the performance of the contract, minus the contractor's bid or the contract price. *Id.* § 19:94, at 296.

The predicate for use of this measure of damages is a showing that given the nature of the contractor's losses, it is impossible or highly impracticable to determine damages on a segregated basis under the circumstances of the case. *Id.* The contractor must demonstrate that the costs incurred in performing the original work and the extra work became so inextricably intertwined that segregating damages is impracticable. *Id.* at 297. The contractor must persuade the court that there is no other practical means for measuring its damages flowing from the impacts on the project. Joel Lewin & Charles Schaub, Construction Law § 6:29, at 414-415 (2009-2010 ed.). "This condition usually

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[52] Engelhart noted with considerable force that the compensation structure of the Gas Tight Recovery Plan between Dominion and Nicholson & Hall was on a cost-plus basis due to uncertainty of the costs to be incurred. Tr. 11:59 (Engelhart). Ex. 151 (Engelhart) at pages 68-72.

occurs when there have been ongoing continuous, large scale changes. For example, if there have been a number of sequence changes, stop and go work, and differing site conditions, then the contractor may find it impracticable to measure damages for each individual event." *Id.* at 415.

Courts have viewed the total cost method with skepticism, given the existence of sophisticated job cost accounting and scheduling systems. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law §19:93, at 296-297 (2002). See, e.g., *Servidone Const. Corp. v. U.S.*, 931 F.2d 860, 861 (Fed. Cir. 1991) (noting that court must use total cost method with caution and only as last resort in rare case); *Anchorage v. Frank Coluccio Constr. Co.,* 826 P.2d 316, 325 (Alaska 1992) (noting that total cost method is universally disfavored); *John F. Harkins Co., Inc. v. School Dist. Of Philadelphia*, 460 A.2d 260, 262-263 (Pa. Super. 1983) ("because the total cost method of measuring damages is imprecise it is fraught with danger and must be applied with caution.").

Once the contractor proves the necessity of using the total cost method to calculate damages, it must further demonstrate that its bid was realistic and without material mistake; its incurred costs were reasonable; and it is not responsible for any additional costs. Philip L. Bruner & Patrick J. O'Connor, Bruner & O'Connor on Construction Law §19:94, at 297-298 (2002).

The Court concludes that CPS has not met its burden of proof that a discreet project cost-based methodology is impracticable. In that regard, the Court found Nicholson & Hall's expert on the subject, Stephen Collins,

persuasive. Tr. 11:50-57. Ex. 208 (pages 1-3 of the incorporated "Disclosure"). The court also found Dominion's expert, Fredlund, credible on the point. Tr. 13:144-145 (Fredlund). Accordingly, the Court assesses CPS's damages on the contract.

There is imprecision in the calculation of damages on account of (at once) the limitations and the complexity of the record. However, the Court finds that CPS's statement of account (Ex. 77), as revised by CPS's June 24, 2011 submission ("Billings Under the Contract"), provides a reasonable framework for the determination of damages.[53]

The Court finds and rules that CPS was damaged by Nicholson & Hall's breach of contract and unfair and deceptive practices in the amount of $5,036,462. This is the sum that results from its total amount claim on the Statement of Account, less the "Site Supervision Overhead Claim for labor provided in 2007", which the Court finds Nicholson & Hall had rejected with

[53] The general rule is that the plaintiff must prove its damages for breach of contract with reasonable certainty. *Don v. Soo Hoo*, 75 Mass. App. Ct. 80, 85 (2009). The essential requirement is that the plaintiff have some basis in the evidence for permitting the fact finder to make a reasoned judgment that it incurred damages in a specified amount. *Id.* Although an award of damages cannot be based on speculation, proof of damages does not require mathematical precision. *Air Technology Corp. v. General Elec. Co.*, 347 Mass. 613, 627 (1964). The fact that there is an element of uncertainty in the assessment of damages is not a bar to recovery. *Carlo Bianci & Co., Inc. v. Builders' Equipment & Supplies Co.*, 347 Mass. 636, 646 (1964). A reasonable approximation will suffice. *Air Technology*, 347 Mass. at 646. The fact finder may proceed to some extent on estimate and judgment, sometimes upon meager evidence. *Carlo Bianci & Co., supra*, 347 Mass. at 646 (defects in equipment causing delay in buyer's performance of certain contracts). See also *Graustein v. H.P. Hood & Sons, Inc.*, 293 Mass. 207, 220-221 (1936) (damages for breach may be measured by reasonable estimate).

justification and less a 2% deduction from the overall claim on account of the occasionally substandard quality of the work performed by CPS's craft labor.[54]

CPS is entitled to its reasonable and necessary costs and legal fees on account of Nicholson & Hall's 93A violation.

***Nicholson & Hall's Damages***

Nicholson & Hall is entitled to set-off damages in the amount of $488,536.82 which it incurred to discharge liens of CPS's creditors for labor and material provided prior to February 29, 2008. Exhs. 79, 149,155, 162 and 164. Tr. 7: 199-206 and 231-233 (Giarve).

Otherwise, Nicholson & Hall is not entitled to other than nominal damages. That is because it either failed to prove its entitlement by a preponderance of the evidence (the alleged $209,317.00 damages for tools and equipment and $207,027.00 for pipefitter labor to complete CPS's work) or because the losses were caused by its own breach and/or failure to mitigate (its bond premium, interest on payments due Nicholson & Hall impounded by Dominion until 2010 and payments in connection with the lien releases).

***Dominion's Damages***

Reduced because of its failure to mitigate, Dominion was damaged in the amount of $100,000 due to CPS's breach of its obligation to discharge the Funds' lien. Pursuant to the contract, Dominion is entitled to its reasonable costs and attorney's fees in connection with CPS's breach. The award for reasonable and necessary costs and fees, however, shall be reduced by a similar percentage,

[54] Applying *quantum meruit* as an alternative theory of Nicholson & Hall's liability, CPS's damages for the fair and reasonable value of labor and material it provided to Nicholson & Hall was $5,036,462.

i.e., 55%.

**ORDER**

1. Judgment shall enter for CPS against Nicholson & Hall on Counts 3, 4 and 9 of CPS's Third Amended Complaint.
2. Judgment shall enter for Nicholson & Hall on Counts 1, 2 and 5 of CPS's Third Amended Complaint.
3. Nicholson and Hall shall pay damages to CPS in the amount of $5,036,462.
4. Judgment shall enter for CPS against Hanover Insurance Company on Count 10 of CPS's Third Amended Complaint in the amount of $5,036,462.
5. Within 20 days of the entry of this order, counsel for CPS shall file an affidavit of the reasonable and necessary fees and expenses incurred by CPS in connection the instant litigation as relates to Nicholson & Hall. Within ten days of receipt of CPS's counsel's affidavit Nicholson & Hall may file a response to it.
6. Judgment shall enter for Dominion on Counts 6,7, 8 and 9 of CPS's Third Amended Complaint.
7. Judgment shall enter for Nicholson & Hall on Counts II, III and IV of its complaint against CPS for nominal damages of $1.
8. Judgment shall enter for Nicholson & Hall on Court VI (Indemnity) against CPS in the amount of $488,536.82. Such amount has been

set off of the damages due CPS from Nicholson & Hall as provided in numbered paragraph 3 of this Order.

9. Judgment shall enter for CPS on Counts I, V and VII of Nicholson & Hall's complaint.

10. Judgment shall enter for Dominion on Counts I, II and IV of its Third Party Claim against CPS.

11. CPS shall pay damages to Dominion in the amount of $100,000.

12. Within 20 days of the entry of this order, counsel for Dominion shall file an affidavit of the reasonable and necessary fees and expenses incurred by Dominion solely in connection the discharge of the Laborers Funds' mechanics lien. Within 10 days of receipt of Dominion's counsel's affidavit, CPS may file a response to it.

13. Within 20 days of the entry of this order, counsel for CPS shall file with the court a proposed form of judgment. Within ten days of receipt of such proposed form of judgment, counsel for Nicholson & Hall and counsel for Dominion may separately file a response to such proposed form of judgment and may, respectively, submit their own proposed alternative forms of judgment. Within 5 days of receipt of any such proposed alternative form of judgment, counsel for CPS may file a reply to such.

**D. Lloyd Macdonald**
**Justice of the Superior Court**

December 30, 2011