

MEMORANDUM

TO: Hon. Chair and Members of the Orange County Sanitation District Board of Directors

FROM: Bradley R. Hogin, Esq.
General Counsel

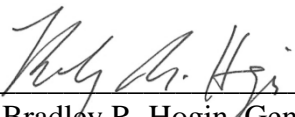
DATE: January 17, 2023

RE: Closed Session Items

The Board of Directors desires to hold a closed session on January 25, 2023 for the purpose of conferring with its legal counsel regarding anticipated litigation. Existing facts and circumstances reflect a significant exposure to litigation against the District. The closed session will be held pursuant to the authority of California Government Code Section 54956.9(d)(2).

The facts and circumstances are as follows. On December 15, 2022 OC San received a claim from Thomas Nguyen. A copy of the claim is attached. The claim arises out of a contract between OC San and Thomas Solar Energy for construction of Project No. FR1-0007 "Control Center Offices and Day Training Room Remodeling at Plant No. 1."

Respectfully submitted,

By 
Bradley R. Hogin, General Counsel

December 15, 2022

RE: Contractual Dispute, Thomas Nguyen of Thomas Solar Energy v. OCSD; Project No. FR1-0007; Control Center Offices & Day Training Room Remodeling at Plant No.1

To Whom this may concern,

This firm has been engaged to represent Thomas Nguyen (“Client”) in the above referenced matter. Our client was awarded a contract with the Orange County Sanitation Department (“OCSD”) after bidding on a project. The Contract Agreement (“Contract”) was entered into by our client and OCSD on May 26, 2021. Identified as Project No. FR1-0007, (“Project”) the Project was for the remodeling of control center offices and the day training room at a location described as Plant No. 1. During the course of the Contract, Covid-19 increased shipment times for supplies, increased costs generally, and also hospitalized the safety officer. This led to minor delays in the Project.

The OCSD Project Manager, Matthew Perry, became dissatisfied with the work being done, leading to minor conflicts. On February 15, 2022, Mr. Perry wrote to our Client claiming our Client was behind schedule and expressed concerns with Mr. Nguyen’s performance. Mr. Perry later recommended termination of the contract to the OCSD Board, claiming our Client did not respond to the letter and that our Client walked out on the job. Mr. Perry’s claim is false. Client did respond on February 22, 2022, explaining the complexity of the project and provided justifications for the delays. Our Client received no response to this. Moreover, on November 11, 2022, our Client provided a Notice of Claim for Time Extension to Finish Contract along with a new performance schedule to finish the Project. Our Client believes that other claims may exist against OCSD that are unknown at this time and reserves the right to assert future claims as discovered.

1. OCSD UNLAWFULLY BREACHED THE CONTRACT BY UNILATERALLY TERMINATING IT DURING THE COURSE OF PERFORMANCE

The General Conditions provides in section GC-21 that “If it is later determined by OCSD that **the Contractor had an excusable reason for not performing**, such as fire, flood, or **other event which was not the fault of or was beyond the control of the Contractor**, OCSD, after setting up a new performance schedule, **may allow the Contractor to continue Work**, or treat the termination as a termination for convenience, and the rights and obligation of the parties

shall be the same as if the termination had been issued for the convenience of OCSD,” attached herein as Exhibit 1.

The few delays that occurred on the Project all fell outside the control of our Client and he provided reasonable justifications to OCSD in requesting a new work schedule. The first delay out of our Client’s control occurred when the City of Fountain Valley took over three months in issuing a construction permit. The Notice to Proceed Date began on August 3, 2021 but our Client was not issued the permit until November 18, 2021. OCSD knew of this delay because they would not allow our Client to work on the Project without the permit from the City.

Additionally, a second delay outside of our Client’s control occurred when our Client’s on-site safety officer suffered from Covid-19 complications and was unable to work from December 22, 2021 to March 30, 2022. A final delay outside of our Client’s control took place when he ordered supplies in January of 2022 with the expectation they would arrive in February or March. Supply chain delays caused the required supplies to arrive in July 2022, and our Client was unable to perform work without the requisite supplies. Our Client wrote Mr. Perry on March 15, 2022, explaining the delays and requested a time extension. Mr. Perry failed to respond to our Client’s request.

The Covid-19 pandemic, supply chain problems, and permitting issues all caused delays outside the control of our Client, and thus our Client had a justifiable excuse. Moreover, once the delays ceased, our Client desired to resume work before OCSD breached the contract with three months remaining. As the above delays were outside both the control and fault of our Client, they should be found excusable under this Contract.

2. OSCD BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BY NOT DETERMINING WHETHER THE DELAY WAS EXCUSABLE AND NOT ALLOWING OUR CLIENT THE OPPORTUNITY TO REQUEST AN EXTENSION OF TIME FOR DELAY

The covenant of good faith and fair dealing is implied in each contract to be performed. This covenant prevents one party from unfairly frustrating the other party’s rights to enjoy the benefits of the agreement that was actually made. See *Avidity Partners, LLC v. State of Cal.*, 221 Cal. App. 4th 1180, 1204, 165 Cal. Rptr. 3d 299, 320 (2013).

Section GC-42 states that “**If the Work should be delayed** at any time...for **any other unforeseeable cause beyond the control and without the fault or negligence of the Contractor**, then the **Contractor may be entitled to an extension of time for completion of the Work** equivalent to the time actually lost by such delay,” attached herein as Exhibit 2. Our Client provided reasonable justifications for unforeseeable Project delays outside of his control. Our Client was unable to enjoy one of the few benefits contractually provided to him within the General Conditions: entitlement of an extension of time equal to the amount lost from delays.

OCSD at no time worked in good faith with our Client to determine whether the delays were objectively excusable and thus never allowed our Client an opportunity to enjoy his right of requesting a time extension. ***OCSD acted in bad faith when OCSD failed to determine whether the delays were excusable AND when OCSD failed to respond to our Client's request for an extension of time for delays pursuant to Section GC-42.*** For these reasons, our Client was unable to enjoy the benefit of the agreement and OCSD breached the implied covenant of good faith and fair dealing.

3. OCSD'S RIGHTS TO TERMINATE UNDER THE CONTRACT ARE ILLUSORY, UNCONSCIONABLE, AND INVALID

A contract is unenforceable as illusory when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder. See *Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373, 385, 203 Cal. Rptr. 3d 522, 531 (2016). Moreover, a provision is substantively unconscionable if it involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms. See *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647, 114 Cal. Rptr. 3d 449, 459 (2010).

The sixty-nine page General Conditions essentially allows OCSD to terminate the contract at will. There are two large and relevant termination sections: (1) GC-21 Termination for Default and (2) GC-22 Termination for Convenience. Regarding both, OCSD is provided with a large number of vague provisions for situations that constitute default or convenience and would allow them to terminate the Contract. This includes OCSD holding the right that "***upon a determination that such termination is in the best interest and convenience of OCSD, or whenever OCSD is prohibited from completing the Work for any reason,***" attached herein as Exhibit 3. Such language is inherently vague and shockingly one-sided. Neither of these two sections, that span some three-and-a-half pages, provide contractors with any similar rights or protection.

Because the above contract language allows OCSD to unilaterally terminate the contract in a manner without providing our Client similar rights to terminate the contract, the termination provisions are illusory, unconscionable, and invalid, and thus such termination by OCSD was unlawful and a breach of contract on OCSD's part.

4. OCSD UNLAWFULLY TERMINATED THE AGREEMENT AND THUS HAD NO RIGHT TO THE SURETY BOND

Client furnished Surety Bonds in accordance with section GC-3 of the Contract. The contract permits OCSD to essentially make a demand for the release of such bond "in the event of [default] termination" where the contractor defaults on the contract. However, per Section 1 of this letter above, where a contractor has an excuse for performance, the Contractor shall not have been deemed to be in Default. Rather, when a Contractor has an excuse for performance and

OCSD chooses to terminate the contract, “the rights and obligation of the parties shall be the same as if the termination had been issued for the convenience of OCSD”

OCSD made a claim to Liberty Mutual Surety for the bond issued on behalf of our Client. On December 5, 2022, Liberty Mutual Surety wrote to OCSD stating that The Ohio Casualty Insurance Company released its request to hold the contract funds belonging to Thomas Solar Energy, attached herein as Exhibit 4.

Because our Client had an excuse for performance, as articulated in Section 1 in this letter above, OCSD was not entitled to any compensation from Client’s Surety Bond.

Therefore, we demand that all monies received from Client’s Surety Bond be returned.

5. EVEN IF OCSD’S TERMINATION WAS WARRANTED, OCSD APPROVED AN INVOICE FOR \$63K THAT IS PAYABLE TO MR. NGUYEN

Section GC-21 regards Termination for Default and provides “in the event of such termination, the **Contractor will be paid the actual amount due based on unit prices or lump sums Bid and the quantity of Work completed at the time of Termination...**,” herein attached as Exhibit 5. Section GC-22 addresses Termination for Convenience and provides that “**Final Payment to the Contractor after termination for convenience shall be limited to amounts due and owing under the Contract at the time of termination...**,” herein attached as Exhibit 6.

OCSD terminated the Contract in approximately April of 2022. OCSD approved an invoice dated April 23, 2022 in the amount of \$63,154.87, payable to our Client, herein attached as Exhibit 7. Whether or not the contract was terminated for Default or for Convenience, OCSD’s approval of the invoice obligates OCSD for payment. OCSD has failed to pay our Client for this outstanding invoice. Therefore, we demand OCSD pay our Client the obligated amount plus applicable interest.

6. MR. NGUYEN’S DAMAGES FROM OCSD’S BREACH OF CONTRACT

Contractual damages are categorized in two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages). General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. See *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 344, 102 P.3d 257, 261 (2004).

The total value of the Contract was approximately \$256,790. OCSD has paid our Client approximately \$40,000 to date. OCSD owes our client \$63,154.87 for the above mentioned outstanding invoice. The remaining balance on the contract owed is approximately \$154,000. We believe the remaining balance fully represents our Client’s expectation, consequential, and

incidental damages. Therefore, our total demand that OCSD must pay our Client is approximately \$218,000.

7. IN THE ALTERNATIVE, RESUME THE CONTRACT

The outstanding invoice in the amount of \$63,154.87 must be paid to our Client, as well as a return of the bond amount of approximately \$256,790.00 . However, in the alternative, our Client desires to reach a compromise in which the Contract can be resumed under a new schedule and payment plan.

Sincerely,

Matt Cortez, Esq.
Attorney At Law
Matt Cortez Law, PC

EXHIBIT 1

If it is later determined by OCSD that the CONTRACTOR had an excusable reason for not performing, such as a fire, flood, or other event which was not the fault of or was beyond the control of the CONTRACTOR, OCSD, after setting up a new performance schedule, may allow the CONTRACTOR to continue Work, or treat the termination as a termination for convenience, and the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of OCSD.

EXHIBIT 2

GC-42 EXTENSION OF TIME FOR DELAY

If the Work should be delayed at any time by Extra Work or by reason of a suspension ordered by OCSD or because of any other act of OCSD or its officers or employees without contributory fault or neglect on the part of the CONTRACTOR or its agents or employees or its Subcontractors and/or Suppliers or if the Work should be delayed by reason of strikes or abnormal force or violence of the elements or for any other unforeseeable cause beyond the control and without the fault or negligence of the CONTRACTOR, then the CONTRACTOR may be entitled to an extension of time for completion of the Work equivalent to the time actually lost by such delay. Requests to extend the Construction Schedule due to inclement weather shall be justified and evaluated consistent with Special Provisions – “Delays Caused by Inclement Weather.”

EXHIBIT 3

GC-22 TERMINATION FOR CONVENIENCE

OCSD may terminate the CONTRACTOR's performance under the Contract, either in whole or in part, at its own discretion or when conditions encountered during the Work make it impossible or impracticable to proceed, or when OCSD is prevented from proceeding with the Contract by act of God, by law, or by official action of a public authority, or upon a determination that such termination is in the best interest and convenience of OCSD, or whenever OCSD is prohibited from completing the Work for any reason. OCSD shall

EXHIBIT 4



December 5, 2022

Email and US Mail
ndubrovski@ocsan.gov

Ms. Natasha Dubrovski, Contracts Supervisor
Orange County Sanitation District
10844 Ellis Avenue
Fountain Valley, California 92708

Sonia Linnaus
Surety Claims Counsel

P.O. Box 34670
Seattle, WA 98124
Sonia.Linnaus@libertymutual.com
Phone: (949) 316-1833
Fax: (866) 442-4060

Re: Principal: Thomas Solar Energy
Obligee: Orange County Sanitation District
Bond No.: 024253623
Project: Project No. FR1-0007; Control Center Offices and Day Training Room
Remodeling at Plant No. 1
Claimant: Orange County Sanitation District
Claim No.: 024253623.0
Surety: The Ohio Casualty Insurance Company

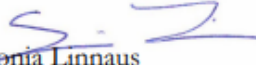
Dear Ms. Dubrovski:

On June 9, 2022 we issued a letter requesting that Orange County Sanitation District ("OCSAN") not release any funds to Thomas Solar Energy in connection with the above-referenced project. A copy of our June 9, 2022 letter is enclosed for your reference.

In light of the settlement of OCSAN's performance bond claim and OCSAN's release of the Performance Bond, The Ohio Casualty Insurance Company hereby releases its request to hold the contract funds.

If you have any questions regarding this letter, please contact the undersigned.

Sincerely,


Sonia Linnaus
Surety Claims Counsel

SL

Enclosure: June 9, 2022 hold funds letter

cc: Thomas Solar Energy (via email)

EXHIBIT 5

In the event of such termination, the CONTRACTOR will be paid the actual amount due based on unit prices or lump sums Bid and the quantity of Work completed at the time of termination, less damages caused to OCSD by acts of the CONTRACTOR causing the termination, including but not limited to, all costs to OCSD arising from professional services and attorneys' fees and all costs generated to insure or bond the Work of substituted CONTRACTORS or Subcontractors utilized to complete the Work, such excess shall be paid to the CONTRACTOR. If such costs exceed the unpaid balance, the CONTRACTOR shall pay the difference to OCSD promptly upon demand. On failure of the CONTRACTOR to pay, the Surety shall pay on demand by OCSD. Any portion of such difference not paid by the CONTRACTOR or Surety within thirty (30) days following the mailing of a demand for such costs shall earn interest at the maximum rate authorized by California law.

EXHIBIT 6

- C. The Final Payment to the CONTRACTOR after termination for convenience shall be limited to amounts due and owing under the Contract at time of termination, including the following:
1. Any actual costs incurred by the CONTRACTOR for restocking charges;
 2. The agreed upon price of protecting the Work in any manner, if any, as directed by OCSD;
 3. The cost of settling and paying claims arising out of the termination of the Work under subcontract agreements or orders with OCSD's approval, as specified above, exclusive of the of the amounts paid or payable on account of goods delivered or Work furnished by Subcontractor prior to the effective date of the termination; and
 4. The Contract Price allocable to the portion of the Work properly performed or goods supplied by the CONTRACTOR as of the date of termination, as determined in accordance with the within Sections herein entitled Payment – General and Contract Price Adjustments And Payments, reduced by any sums previously paid to the CONTRACTOR.

EXHIBIT 7



107398-OB - FR1-0007 Control Cente

CREATE NEXT

SUBMIT Need Help?

FORMS

MAIN

CLAUSES (5)

ATTACHMENTS (6)

WORKFLOW (2/9)

COSTS

HOME

RECENT

EXIT

Guided Help

Project* FR1-0007 - FR1-0007 Control Center

Commitment* 107398-OB - May 26, 2021 Item 11(B)

Company Thomas Solar Energy

Reference

Invoice # 3

Record #* 003

Status Submitted 0

Revision Date 04-23-2022

ONLINE INVOICE

Invoice Date 04-23-2022

Invoice Type* Progress

Print Lien Waiver Signed Waiver Attached

Paid In Full

-RECAP

Original Value	\$256,790.00
Approved Changes	\$0.00
Revised Value	\$256,790.00
Invoiced	\$109,074.87
Retained	\$5,453.74
Earned Less Retainage	\$103,621.13
Less Prior Invoices	\$43,632.55
Current Payment Due	\$59,988.58
Unapplied Payments Available	\$0.00
Payments Applied	\$0.00
Open Balance	\$59,988.58
Bal. To Finish(incl. Retainage)	\$153,168.87



USER DEFINED FIELDS

Period From 12-22-2021

Period To 04-18-2022

LINE #	DESCRIPTION	PRIOR INVOICES	CURRENT INVOICE	% COMPLETE	TOTAL INVOICED	BALANCE TO INVOICE	TOTAL THIS INVOICE	SERVICES RETAIN %	PRIOR SERVICES RETAIN AMOUNT	CURRENT SERVICES RETAIN AMOUNT
Cost Type:										
1	MOBILIZATION	\$22,500.00	\$0.00	100.00%	\$22,500.00	\$0.00	\$0.00	5.00%	\$1,125.00	\$0.00
2	ALL OTHER WORK	\$23,429.00	\$63,145.87	36.95%	\$86,574.87	\$147,715.13	\$63,145.87	5.00%	\$1,171.45	\$3,157.29
		\$45,929.00	\$63,145.87		\$109,074.87	\$147,715.13	\$63,145.87		\$2,296.45	\$3,157.29
		\$45,929.00	\$63,145.87		\$109,074.87	\$147,715.13	\$63,145.87		\$2,296.45	\$3,157.29

1 PAGE SIZE 40