

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon Street Colorado Springs, CO 80903 Telephone: (719) 452-5000	DATE FILED: March 8, 2023 1:04 PM FILING ID: 6AB0FE6780264 CASE NUMBER: 2023CV30438
Plaintiff: G.E. JOHNSON CONSTRUCTION COMPANY, INC. v. Defendant: CITY OF COLORADO SPRINGS, COLORADO	
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<div style="text-align: center;"> ↑ COURT USE ONLY ↑ </div> <hr/> <div style="text-align: center;"> Case Number: Div.: Ctrm.: 23CV30438 </div>	
<div style="text-align: center;"> COMPLAINT AND JURY DEMAND </div>	

Plaintiff G.E. Johnson Construction Company, Inc. ("GEJ"), by and through its counsel, Hogan Lovells US LLP, for its Complaint and Jury Demand ("Complaint") against Defendant City of Colorado Springs, Colorado ("COS"), states, avers, and alleges as follows.

NATURE OF THE CASE

1. This is a breach of contract action arising from the "Pikes Peak Americas Mountain Summit Complex Construction Project" ("Project") atop Pikes Peak. Pursuant to a written contract between GEJ and COS, GEJ served as the Construction Manager/General Contractor for COS as Owner. The Project involved the construction of a new visitor center on Pikes Peak. GEJ's claims against COS in this action arise from COS's refusal to pay GEJ for work GEJ properly performed under the contract and delays GEJ encountered and damages GEJ incurred in performing its work for COS on the Project. Although the original Substantial Completion date for the Project was October 30, 2020, compensable delays outside of GEJ's responsibility or control prevented GEJ from achieving Substantial Completion until June 23, 2021. In this action, GEJ seeks to recover from COS all damages, fees, costs, interest, and other losses to which it is entitled.

GENERAL AVERMENTS

Parties, Jurisdiction, and Venue

2. GEJ is a Colorado corporation in good standing with the Colorado Secretary of State with its principal address at 25 N. Cascade Avenue, Suite 400, Colorado Springs, Colorado 80903. GEJ is a commercial general contractor with offices throughout Colorado and elsewhere.

3. COS is a Colorado municipal corporation with its principal address at 30 S. Nevada Avenue, Colorado Springs, Colorado 80903.

4. This Court has subject-matter jurisdiction over this action and personal jurisdiction over all parties. Venue for this action is proper in El Paso County. In their contract, GEJ and COS agreed that venue and jurisdiction shall exclusively be in “Colorado District Court of El Paso County, Colorado.”

Factual Background

5. On or about December 31, 2015, GEJ and COS entered into a “Contract Manager/General Contractor Contract, Contract No. C008016, Pikes Peak Americas Mountain Summit Complex Construction Project” (collectively, with all appendices/exhibits, amendments, change orders, and modifications thereto, the “Contract”) for the construction of the Project. Including approved change orders, the current Contract Sum was adjusted to \$60,040,888.

6. From the outset, the Project was both important for COS and challenging from an execution standpoint, particularly due to the Project being constructed over 14,000 feet above sea level and subject to extreme winter conditions more than half the year.

7. GEJ commenced work on the Project site on or about August 3, 2018.

8. GEJ’s original baseline schedule for the Project was delayed in the critical beginning stages of the Project by at least nine weeks due to the delayed execution of a certain “Memorandum of Understanding” between COS and the United States Forest Service (“MOA Delay”). Because the Project is situated within the Pikes Peak National Forest, COS was required to secure timely the Memorandum of Understanding, including certain permits regarding same, before the Project could get started. GEJ properly and timely notified COS in writing of the MOA Delay.

9. The MOA Delay constitutes a compensable delay under the Contract. In this regard, Section 7.2.1 of the Contract provides, in relevant part, that “[f]or delays in the Project not the responsibility of [GEJ] documented in accordance with the requirements of this Contract, there will be an equitable adjustment to compensate [GEJ] for [GEJ’s] increased expenses.” In addition, the General Conditions of the Contract, Section 9.01.A., states, as relevant here, that “[COS] shall provide as indicated the lands upon which the work under this contract is to be done, right-of-way for access to same, and such other lands which are designated on the drawings for the use of

[GEJ],” and “any delay in the furnishing of these lands by [COS] shall be deemed proper cause for an equitable adjustment in both contract price or time of completion, or both.”

10. GEJ, in response to the MOA Delay, worked in good faith with COS and reasonably attempted to mitigate the impacts of the delay by, among other things, working weekends and overtime and into the winter of 2018/2019. GEJ ultimately was unable to overcome COS’s MOA Delay without incurring significant additional costs and requiring additional time to achieve Substantial Completion of the Project.

11. Under the Contract, GEJ and COS recognized, understood, and explicitly agreed that the available build season on Pikes Peak could be reliable and productive only from approximately May 31 to September 30. In this regard, pursuant to GEJ’s Proposal which was attached to the Contract and specifically incorporated therein, GEJ and COS recognized and agreed that there was a “Limited Work Season” for the Project and that “on average, one can expect a working construction season of 3-4 months at the summit” which “must be utilized to its full potential if the Summit Complex project is to be completed in the schedule duration that has been established.” Thus, COS contractually agreed that the construction season for the Project would be 3-4 months, and COS also knew that GEJ would be unable to perform most of its work during any winter seasons.

12. Primarily because of COS’s initial nine week MOA Delay, the reliable build season during calendar year 2018 was more than cut in half from approximately 120 calendar days to approximately 56 calendar days, making it virtually impossible for GEJ to finish the work it originally anticipated completing during the 2018 calendar year and before winter conditions set in. While GEJ reasonably attempted to mitigate these delays by continuing to work into the harsh conditions of the 2018/2019 winter season, GEJ was unable to work productively during that timeframe due to the adverse winter conditions at the summit, which—in addition to making the construction difficult—also posed serious safety hazards to the Project team. Consequently, COS’s MOA Delay caused the overall Project duration to be extended by at least nine months. And, with this extended duration, GEJ also incurred significant additional costs for which COS is now required to pay GEJ.

13. On or about September 25, 2020, and as revised on or about January 31, 2021 and supplemented on or about September 10, 2021, GEJ timely and properly submitted to COS a “Request for Equitable Adjustment” (“REA”), pursuant to which GEJ requested an increase to the Contract Sum as a result of delays, disruptions, and other adverse impacts to GEJ’s work on the Project outside of GEJ’s responsibility or control for which COS is liable to GEJ, including the MOA Delay, adverse winter conditions, and other issues allged in this Complaint.

14. More specifically, GEJ’s REA included four Change Order Requests (individually, a “COR,” and collectively, the “CORs”). Each COR within the REA is described below.

Item 1. Differing Site Conditions (COR-96 R1)

15. GEJ had engaged a subcontractor to perform the blasting scope of work for the Project foundations. Based on information provided by COS, including the Geotechnical Report prepared by COS’s soils engineer dated as of June 13, 2016, and the Project Specifications, GEJ

and its blasting subcontractor initially anticipated that this work would take approximately 20 working days to complete. After the late commencement of this critical path work on August 7, 2018 (due to the MOA Delay), GEJ discovered differing site conditions, including, for example and without limitation, fissured granite, permafrost, and ground water. These differing site conditions made the blasting work much more time-consuming to complete than originally anticipated. The blasting work actually took 79 days to complete, not 20 as originally anticipated. Because GEJ was not able to commence the blasting work until August 7, 2018 (42 days late due to COS' MOA Delay), GEJ did not complete the blasting work for the foundations until the Spring of 2019. As set forth in GEJ's REA, these impacts ultimately extended the construction schedule by at least nine months, caused GEJ to miss critical milestones in order to achieve the original anticipated Substantial Completion date of October 30, 2020, and forced GEJ to work an unanticipated fourth season.

16. Had GEJ been able to perform all of the blasting work during the 2018 construction season (as GEJ originally planned) but for the MOA Delay, GEJ could have completed all such blasting work during the 2018 construction season and, consequently, achieved critical milestones.

17. With respect to this portion of GEJ's REA, GEJ requested an extension of time of nine months, up to and including May 27, 2021 (for the Summit House Complex) and September 3, 2021 (for the Project Site), and additional costs pursuant to the Contract. GEJ is entitled to these additional amounts against COS under GEJ's COR-97 R1 contained in the REA.

Item 2. Winter Work – 11/18 to 5/19 (COR-097)

18. As a further result of COS' MOA Delay, GEJ also was not able to complete other critical path work it anticipated completing prior to the 2018/2019 winter shutdown, including foundation, precast structural, and blasting of building footprint work. While GEJ attempted to work into the winter months of 2018 to attempt to mitigate COS' delays (notwithstanding the fact that both parties initially agreed that GEJ would perform no winter work during this Project), GEJ ultimately was only able to work up to December 21, 2018, at which point it had to shut down due to extreme winter weather. GEJ incurred additional costs performing this work from October 25, 2018 (the date on which GEJ originally anticipated completing the above-referenced activities) through December 21, 2018, as well as GEJ's earlier-than-planned mobilization in 2019 on April 8, 2019, to get an early start on work it could not complete during 2018.

19. While GEJ had no explicit obligation under the Contract to continue with these critical activities during the winter of 2018/2019, GEJ did so in connection with COS' request, demand, and approval and in order to mitigate the delays resulting from COS' initial MOA Delay.

20. Accordingly, GEJ is further entitled to additional amounts under COR-097.

Item 3. Undulation Impact to Critical Path 7/22/19 to 8/22/19 (COR-098)

21. After completing the blasting and foundation excavation work, GEJ encountered severe undulation (in excess of 6" and up to several feet) throughout the subsurface solid rock upon which the structure's spread footing foundations were to bear. GEJ and COS agreed that the hammering and additional excavation work to remove the severe high points of these undulations

constituted extra work as a result of unforeseen site conditions that entitled GEJ to an increase in the contract sum for its direct material, labor and equipment costs. Accordingly, the parties executed Modification #07 to the Contract that incorporated GEJ's corresponding change order requests for those direct costs. That extra work made necessary by this unforeseen site condition, however, also forced a delay to the completion of GEJ's foundation work by twenty-four (24) more days in 2019, in addition to the delays discussed in Item 1, above. GEJ incurred extended overhead costs associated with the undulation delay which are included above in Item 1 (COR-096 R1).

**Items 4A and 4B. Winter Work 11/19 to 5/20, Production Inefficiencies
& Ground Thaw Impact (COR-099 R1)**

22. In a further effort to recover from COS' MOA Delay and the other delays, disruptions, and impacts caused thereby, GEJ also was forced to work into the winter months of 2019/2020. During this time, GEJ attempted to complete its slab-on-grade ("SOG") and slab-on-deck ("SOD") activities where possible as the weather allowed. GEJ planned to complete these exterior and temperature sensitive activities during the summer months to avoid winter cost impacts. While GEJ agreed to work into the 2019/2020 winter in an effort to further mitigate or minimize delays caused by COS, GEJ could not determine accurately, evaluate, or predict any schedule gains, especially working at 14,115 feet, during the winter.

23. During the winter months of 2019/2020, GEJ completed an additional 20% of its SOG/SOD scope, bringing GEJ to 80% complete. Item 4A in COR-099 R1 of the REA includes the general requirements costs associated with working during the winter of 2019/2020, along with the production inefficiencies GEJ encountered performing this work during winter.

24. In May 2020, GEJ encountered frozen ground and ice and snow buildup within the main level slab on grade (P13, P15 and P16) subgrades, which was yet another delay that impacted the progress of GEJ's work. COS' design team determined that, due to the risks associated with having any ice and snow in those areas, GEJ had to perform a significant thaw effort, which included the removal and replacement of backfill and thawing of backfill until acceptable unfrozen backfill and moisture levels had been achieved as reviewed and approved by CTL. This work began at the end of May 2020, and GEJ did not receive full and final approval until July 13, 2020, further impacting GEJ's ability to complete its SOG work and complete the backfill around the building. This condition also impacted the critical path and caused GEJ to incur additional costs.

25. Accordingly, GEJ is further entitled to additional amounts for Items 4A and 4B in COR-099 R1.

COVID-19 Delays (COR 160)

26. On or about March 25, 2020, GEJ timely and properly notified COS of the potential for effects of the COVID-19 pandemic ("COVID") to result in delays and impacts to its work that were beyond GEJ's control. In that notice, COS was advised that the pandemic's effects could include reductions in the availability and productivity of Project staff and tradespeople and unavailability and delays in the manufacture, supply, and delivery of materials, among other potential impacts.

27. Work on the Project was allowed to continue and COVID remained a health emergency pursuant to State executive orders until July 2021 after the Project was certified as substantially complete.

28. GEJ reasonably attempted to mitigate COVID impacts upon the work, while also abiding by State and local health orders and protocols to protect the health and safety of Project personnel. Among other measures, GEJ utilized additional vehicles to shuttle personnel to and from the Project site and regularly sanitized vehicles, workspaces, tools, and equipment. GEJ required on-site workers to work independently when feasible. Personnel, whether stationed on or off-site, were screened for COVID symptoms and were required to quarantine or isolate as a result of illness or exposure. As a result, the progress and sequence of the work was disrupted and GEJ experienced at least a 10% loss in labor productivity, resulting in further delays that impacted the progress of GEJ's work ("COVID Delays").

29. On or about July 23, 2021, GEJ timely and properly submitted to COS a request for reimbursement as a result of the COVID Delays.

30. The COVID Delays were beyond GEJ's control and are a compensable delay under the Contract. Section 7.2.1 of the Contract provides, in relevant part, that "[f]or delays in the Project not the responsibility of [GEJ] documented in accordance with the requirements of this Contract, there will be an equitable adjustment to compensate [GEJ] for [GEJ's] increased expenses."

31. Accordingly, GEJ is further entitled to payment of amounts in COR-160.

Non-Payment of GEJ Payment Applications and Unpaid Other Change Order Requests

32. COS has wrongfully withheld payment of GEJ's final two payment applications that properly requested the remaining Contract amount. GEJ's work on the Project was certified as substantially complete on June 30, 2021 excluding the Project's site work which received a similar certification on November 1, 2021. COS received payment application #52 on August 30, 2022. Payment application #53 followed on November 16, 2022, accompanied by GEJ's notice of final completion of all work on the Project.

33. Section 12.01 of the General Conditions of the Contract requires COS to make payment "at the end of each calendar month (net 30 days), on statements prepared by the contractor and submitted to, and approved by the a/e."

34. GEJ also has presented COS with additional change order requests including (without limitation) COR's 63-66, 167, 170-172, 178-179, and 181-184 that COS has wrongfully failed to pay.

COS' Wrongful Denial of GEJ's REA, Wrongful Failure to Approve COR 160, and Wrongful Failure to Pay Applications Nos. 52 and 53 and Other COR's

35. COS has wrongfully denied GEJ's REA, wrongfully failed to approve COR 160 and has refused to pay GEJ additional amounts that are past due and owing.

CONDITIONS PRECEDENT

36. In sum, GEJ is entitled to and seeks to recover from COS all damages, costs, expenses, and other relief to which GEJ is entitled. All conditions precedent to bringing this action have been performed, have occurred, and/or have been waived by COS, including, without limitation, any conditions precedent under the Contract.

FIRST CLAIM FOR RELIEF **(Breach of Contract)**

37. GEJ restates and incorporates by reference each and every averment set forth at Paragraphs 1 through 36, above, as if fully set forth herein.

38. GEJ and COS entered into a valid, binding, and enforceable Contract.

39. GEJ substantially performed all of its obligations of the Contract.

40. COS materially breached the Contract, as set forth above.

41. GEJ has been damaged as a result of COS's material breaches in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF **(Unjust Enrichment/Quantum Meruit – Plead in the Alternative Under C.R.C.P. 8)**

42. GEJ restates and incorporates by reference each and every averment set forth at Paragraphs 1 through 41, above, as if fully set forth herein.

43. At GEJ's expense, COS received certain benefits, including, without limitation, the benefit of GEJ's labor, equipment, and materials on the Project.

44. Under the circumstances, it would be unjust for COS to retain these benefits without full and proper payment to GEJ regarding same.

45. To the extent it is determined that GEJ provided any such labor, equipment, or materials on the Project outside of the Contract, then, in the alternative, GEJ is entitled to recover all damages from COS as a result thereof under an unjust enrichment/*quantum meruit* theory.

PRAYER FOR RELIEF

WHEREFORE, GEJ prays that the Court:

1. Enter judgment in GEJ's favor and against COS for any and all damages resulting from COS' breaches of the Contract and/or unjust enrichment/*quantum meruit*, plus all applicable pre- and post-judgment interest and costs; and

2. Enter an award for such other and further relief to which GEJ is justly entitled.

JURY DEMAND

GEJ hereby demands trial by jury on all issues so triable. Pursuant to C.R.C.P. Rules 38 and 121 § 1-3, GEJ hereby tenders all jury fees required by law.

Respectfully submitted this 8th day of March, 2023.

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s/ Jeffrey S. George

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