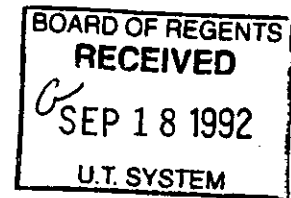


GEORGE W. OVERSHINER  
ATTORNEY AT LAW  
6200 FRANWOOD TERRACE  
FORT WORTH, TEXAS 76112



September 15, 1992

Board of Regents of  
The University of Texas System  
201 W. 7th Street  
Austin, TX 78701

Attention:  
Mr. Arthur H. Dilly, Executive Secretary  
Box N  
Austin, TX 78713-7328

RE: Appeal of Indiana Lumbermens Mutual Insurance Co. (the  
Surety) under the Disputes Clause

Gentlemen:

In accordance with your letter of March 27, 1991, I have  
conducted a hearing of the subject claim, and enclose my Findings  
and Recommendation.

I appreciate the opportunity to serve you and hope that my action  
pleases you. If I can be of further service, please advise.

Sincerely yours,

George W. Overshiner

GWO:dh

Enclosure: Findings and Recommendation  
Stipulation of Facts by the Parties

xc: Mr. Mike Pipkin

**APPEAL OF**

**Indiana Lumbermens Mutual Insurance Co. (the Surety under  
Disputes clause of construction contract)**

**with**

**THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS  
(the Owner)**

**Project: A. W. Harris Faculty Club  
Project No.: FC9-2231  
Bond No.: SBP12061654**

**Contract Dated: September 21, 1989  
Date of Hearing: June 12, 1992**

**APPEARANCE FOR CONTRACTOR:**

**Mike F. Pipkin  
Dallas, Texas**

**APPEARANCE FOR THE UNIVERSITY OF  
TEXAS SOUTHWESTERN MEDICAL CENTER:**

**Peter S. Hanke  
Austin, Texas**

**HEARING OFFICER FOR THIS APPEAL:**

**George W. Overshiner  
Fort Worth, Texas**

## FINDINGS AND RECOMMENDATION

A construction contract dated September 21, 1989 in the amount of \$113,777.40 was entered into by and between the Board of Regents of the University of Texas System (the owner) and Multi-National Investments, Inc. d/b/a Texas Metro Planners and Co. (TMP, Multi-National or the contractor) for alteration to the A.W. Harris Faculty Club at the University of Texas Southwestern Medical Center at Dallas. The starting date as stated in the contract was September 27, 1989 and completion date was November 26, 1989. The contract provided for liquidated damages of \$200 per day for late completion.

Indiana Lumbermens Mutual Insurance Company (Indiana Lumbermen, the Surety) issued a Performance Bond in the contract amount.

Because of change order work the initial contract completion date was extended to December 17, 1989, and the amount was increased to \$122,906.40.

The contractor failed to complete the work on time and was terminated by letter on January 15, 1990. A second contractor, Kenneth McNeal Construction Co., Inc, was hired by the Surety that issued the Performance Bond to complete the work. This contractor began work on February 26, 1990, reaching substantial completion on April 4, 1990 and final completion on July 15, 1990.

The owner charged the Surety liquidated damages of \$200/day for the period from December 17, 1989 to April 4, 1989 (108 days), a total

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of \$21,600. Surety disputed the amount of liquidated damages charged, taking the position that the contract completion date should have been extended 69 days, thus reducing the damages of \$21,600 to \$13,800.

On August 10, 1990, a request was made by Surety to Mr. R. S. Kristoferson for a decision under the Disputes clause. The request was turned down and an appeal was made to UTS Chancellor, Hans Mark. On October 30, 1990, the appeal was denied by Mr. Mark, and Surety then appealed to the UTS Board of Regents. By letter dated March 27, 1991, the UTS Board of Regents appointed me (George W. Overshiner) Hearing Officer for the appeal.

A hearing was conducted on June 12, 1992 at the Medical Center's Department of Physical Plant, Dallas, Texas. The attorneys for the parties (i.e. Surety and the University of Texas System) entered into a 25 paragraph stipulation of facts and documents.

I have reviewed the Stipulation of Facts and Documents and the arguments presented by the participating attorneys at the hearing and find no facts or principles of law that support the request by Surety for a 69 day extension of time to the contract.

I agree with the counsel for The University of Texas System that this appeal can be decided by application of judgment and common sense to the contract provisions and the facts. (See Paragraph 1, page 4, Argument for owner).

I concur with the University's position that the owner was entitled to make a business decision as to when to terminate the

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contractor and that Surety was not denied opportunity to mitigate its' damages. I find that it is not unusual for an owner to work along with a contractor, delaying his termination, hoping that the contractor will go ahead and get the construction job finished. It appears to me that the University mitigated the damages by (1) extending the contract date from November 26, 1989 to December 17, 1989, a total of 22 days, and (2) when they chose not to assess damages for the period from partial completion to final completion (108 days)! This is a total of 130 days. Whereas Surety's performance of taking 42 days to get a second contractor on the project who took 210 days to complete the job that was originally scheduled for 60 days can hardly be called mitigation of damages!! It appears that Surety's greatest effort to mitigate the damages was in its making this appeal.

Furthermore, I support the reasons given by the owner in its decision to delay the removal of the wall between the Faculty Club and the expansion area and find that no further extension of time should be given to the contract.

I find no contractual agreement allowing Surety an extension of time and consequential reduction of liquidated damages, during which time the owner called upon Surety to respond to the notice of termination of the contract. Therefore I recommend that this 15 day request for extension of time be denied.

For all of the above reasons I concur with the October 30, 1990

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decision of Chancellor Hans Mark and recommend that the request by Surety for a 69 day extension of time to the contract, or with a reduction of liquidated damages to the same extent (\$13,800) be entirely denied.

George W. Overshiner

George W. Overshiner

Hearing Officer

## STIPULATION OF FACTS BY THE PARTIES

1. A construction contract dated September 21, 1989, in the amount of One-Hundred-Thirteen-Thousand One-Hundred-Seventy-Seven and 40/100 Dollars (\$113,177.40) was entered into by and between the Board of Regents of the University of Texas System (the "Owner") and Multi-National Investments, Inc., d/b/a T.M.P. & Company ("Multi-National") for alterations to the A.W. Harris Faculty Club, Project No. FC9-2231. A copy of the contract is enclosed as Exhibit "A".

2. Indiana Lumbermens Mutual Insurance Company ("Indiana Lumbermens") issued a Performance Bond in the contract amount. A copy of the Performance Bond is attached as Exhibit "B".

3. Kirby Vahle, Director of Physical Plant for the Owner, sent a letter dated September 22, 1989, to V. O. Shynkar, president of Multi-National, informing him that the starting date for the project was September 27, 1989, and the completion date was November 26, 1989. A copy of the September 22, 1989, letter is attached as Exhibit "C".

4. Thomas W. Hainze, Assistant Director Design for the Owner, sent a letter dated September 29, 1989, to Multi-National requesting substitutions and/or corrections to the bonds and insurance documents submitted by Multi-National. A copy of the September 29, 1989, letter, is attached hereto as Exhibit "D".

5. Vern Moss, Project Coordinator of the Owner, sent a memorandum dated October 26, 1989, to Alan Rogers, Assistant Director of Buildings and Grounds of the Owner, concerning the status of the Project. A copy of the October 26, 1989, memorandum is attached hereto as Exhibit "E".

6. Mr. Shynkar of Multi-National sent a letter dated November 6, 1989, to Mr. Moss of the Owner concerning carpet tiles and wallcovering. A copy of the November 6, 1989, letter is attached hereto as Exhibit "F". Mr. Rogers of the Owner responded to Mr. Shynkar of Multi-National with a letter dated November 9, 1989. A copy of the November 9, 1989, letter is attached hereto as Exhibit "G".

7. Mr. Rogers of the Owner sent a letter dated November 13, 1989, to Mr. Shynkar of Multi-National regarding the status of the project. A copy of the November 13, 1989, letter is attached hereto as Exhibit "H".

8. The contract required Multi-National to build an expansion area outside the existing solid wall of the dining room of the faculty club and to remove the existing wall and replace it with a folding partition between the dining room and the expansion area being built. Construction of the partition wall and related areas required Multi-National to obtain and install various materials such as a steel beam, fabric wall covering, folding doors, vent wood ceiling

and carpet. As of November 13, 1989, Multi-National had not yet obtained any of these materials.

9. Mr. Rogers of the Owner wrote to Mr. Shynkar of Multi-National, a letter dated November 16, 1989, regarding the status of the project. A copy of the November 16, 1989, letter is attached hereto as "I".

10. Mr. Shynkar of Multi-National sent a letter dated November 22, 1989, to Mr. Rogers of the Owner, requesting an extension of the contract completion date to January 31, 1990. A copy of the November 22, 1989, letter is attached hereto as Exhibit "J".

11. Multi-National failed to complete the project by November 26, 1989, the date specified in the contract.

12. Mr. Hainze of the Owner sent a letter dated November 27, 1989, to Mr. Shynkar of Multi-National, with a copy to Indiana Lumbermens and others, concerning the status of the contract and the subject of liquidated damages. A copy of the November 27, 1989, letter to Multi-National is attached hereto as Exhibit "K".

13. Mr. Hainze of the Owner sent a letter dated November 27, 1989, to Indiana Lumbermens, with a copy to Multi-National and others, concerning the status of the contract and liquidated damages. A copy of the November 27, 1989, letter to Indiana Lumbermens is attached hereto as Exhibit "L". In response, Larry Rice, Assistant Claims Manager of Indiana Lumbermens sent a letter dated December 7, 1989, to the Owner referring to Midwest Indemnity as its Agent for Claims against the Performance Bond. A copy of the December 7, 1989, letter is attached hereto as Exhibit "M".

14. As of December 7, 1989, the facts described above in Paragraph 8 (regarding the status of required materials on November 13, 1989) had not changed.

15. Roger J. Biggus, Claims Manager of Midwest Indemnity, sent a letter dated December 14, 1989, to Mr. Haynes of the Owner regarding the referral to it of the Owner's concern regarding the status of the contract and the subject of liquidated damages. A copy of the December 14, 1989, letter is attached hereto as Exhibit "N".

16. Mr. Vahle of the Owner sent a letter dated January 15, 1990, with copy to Indiana Lumbermens and others, to Mr. Shynkar of Multi-National, terminating Multi-National's employment under the contract and calling upon Indiana Lumbermens to take action under the Performance Bond. A copy of the January 15, 1990, letter is enclosed as Exhibit "O". After discussions between Kirby Vahle, Hal Lange, consultant for Indiana Lumbermens, and Clayton E. Devin, counsel for Indiana Lumbermens, on February 21, 1990, Kirby Vahle was notified that Surety had obtained competitive quotes and had elected to arrange for the completion of the Project, and Surety tendered Kenneth McNeil Construction Co., Inc., as completion sub-contractor to complete the Project. At that time, Indiana Lumbermens emphasized that it

reserved its rights and defenses. On February 26, 1990, Kenneth McNeil Construction Co., Inc., began work on the Project. The following letters between the Owner and Indiana Lumbermens or its agents, in connection with the above-referenced facts are attached hereto as Exhibits "P" - "X".

- (a) Letter dated January 25, 1990 from Mr. Vahle to Mr. Rice of Indiana Lumbermens - Exhibit "P".
- (b) Undated draft of a "construction contract takeover agreement" proposed by CMA Consulting Group, an agent of Indiana Lumbermens, to the Owner on or about February 2, 1990 - Exhibit "Q".
- (c) Letter dated February 6, 1990, from Mr. Vahle of the Owner to Mr. H. L. Lange, an agent of Indiana Lumbermens - Exhibit "R".
- (d) Letter dated February 13, 1990, from Mr. Vahle of the Owner to Mr. Rice of Indiana Lumbermens - Exhibit "S".
- (e) Letter dated February 16, 1990, from Clayton E. Devin, counsel for Indiana Lumbermens, to Mr. Vahle of the Owner - Exhibit "T".
- (f) Letter dated February 20, 1990, from Mr. Vahle of the Owner to Mr. Devin, counsel for Indiana Lumbermens - Exhibit "U".
- (g) Letter dated February 21, 1990, from Mr. Devin and Mr. Mike F. Pipkin, counsel for Indiana Lumbermens, to Mr. Vahle of the Owner - Exhibit "V".
- (h) Letter dated March 27, 1990, from Mr. Rogers of the Owner to Mr. Lange of CMA Consulting Group - Exhibit "W".
- (i) Letter dated April 2, 1990, from Mr. Lange of CMA Consulting Group, to Mr. Rogers of the Owner - Exhibit "X".

17. A Certificate of Substantial Completion signed by the parties established April 4, 1990, as the date of substantial completion of the work under the contract. This date was one-hundred-eight (108) days after the stated contract completion date. A copy of the Certificate, including the attachment to it, is enclosed as Exhibit "Y". All work was completed and accepted by the Owner on July 15, 1990.

18. On April 9, 1990, Mr. Lange, on behalf of Indiana Lumbermens, submitted Pay Application No. 2 to the Owner for work completed on the project in the amount of Fifty-Two-Thousand Eight-Hundred-Twenty-Four and 08/100 Dollars (\$52,824.08). On April 17, 1990, Mr. Hainze of the Owner approved payment in the amount of Thirty-One-Thousand Two-Hundred-Twenty-Four and 08/100 Dollars (\$31,224.08), the amount applied for being reduced

by the assessment of liquidated damages in the amount of Twenty-One-Thousand Six-Hundred and No/100 Dollars (\$21,600.00), signifying liquidated damages assessed at Two-Hundred and No/100 Dollars (\$200.00) per day for one-hundred-eight (108) days. The reduction was placed in Unilateral Change Order No. 2, which Mr. Lange received on April 24, 1990.

19. Mr. Devin, counsel for Indiana Lumbermens, sent a letter dated August 10, 1990, to R. S. Kristoferson, Director of the Office of Facilities Planning & Construction, the University of Texas System, requesting a decision under Paragraph 5.2.1 of the General Conditions of the contract. The letter took the position that the contract should be extended by sixty-nine (69) days, with a consequent reduction of Two-Hundred and No/100 Dollars (\$200.00) per day or Thirteen-Thousand Eight-Hundred and No/100 Dollars (\$13,800.00) in the amount of liquidated damages charged. A copy of this letter is attached hereto as Exhibit "Z".

20. Mr. Kristoferson, by his letter of September 20, 1990, to Mr. Devin, responded with a decision that no extension was due. A copy of this September 20, 1990, letter, is enclosed as Exhibit "AA".

21. Mr. Devin, on behalf of Indiana Lumbermens, appealed from Mr. Kristoferson's decision by a letter dated October 25, 1990, to Chancellor Hans Mark, the University of Texas System. A copy of Mr. Devin's letter dated October 25, 1990, is attached hereto as Exhibit "BB". Chancellor Mark denied the appeal by his letter dated October 30, 1990, to Mr. Devin. A copy of Chancellor Mark's letter, dated October 30, 1990, is attached hereto as Exhibit "CC".

22. Mr. Devin, on behalf of Indiana Lumbermens, appealed by a letter dated December 5, 1990, to the Board of Regents, the University of Texas System. A copy of the December 5, 1990, letter is attached hereto as Exhibit "DD".

23. Indiana Lumbermens' appeal to the Board of Regents is acknowledged by Arthur H. Dilly, executive secretary of the Board, by his letter dated January 7, 1991, to Mr. Devin. A copy of the January 7, 1991, letter is attached hereto as Exhibit "EE".

24. By a letter March 27, 1991, from Mr. Dilly, the Board of Regents appointed George W. Overshiner as hearing officer to hear the appeal on behalf of the Board of Regents. A copy of the March 27, 1991, letter is attached hereto as Exhibit "FF".

25. The original contract amount of One-Hundred-Thirteen-Thousand One-Hundred-Seventy-Seven and 40/100 Dollars (\$113,177.40) was revised by an Agreed Change Order No. 1 for Nine-Thousand Seven-Hundred-Eighty-Nine and No/100 Dollars (\$9,789.00) to a new total of One-Hundred-Twenty-Two-Thousand Nine-Hundred-Sixty-Six and 40/100 Dollars (\$122,966.40). Of this total, the Owner has paid Indiana Lumbermens One-Hundred-One-Thousand Three-Hundred-Sixty-Six and 40/100 Dollars (\$101,366.00) and has withheld payment of Twenty-One-Thousand Six-Hundred and No/100 Dollars (\$21,600.00) as liquidated damages.